

## International Implications of Article 11a Israeli Succession Law

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"Provided that where immediately before the death of the deceased the spouse had been married to the deceased for three years or more at that time and had been living with the deceased in a dwelling wholly or partly included in the estate, the spouse shall take the whole of the share of the deceased in the dwelling..." (Art. 11a/2 of the Israeli Succession Law).

While this provision grants the spouse the respective full rights of the deceased in the matrimonial dwelling - "full rights over the residence"<sup>1</sup> -, the Israeli Succession Law contains another provision stipulating only a "limited right of residence"<sup>2</sup> to be granted to the spouse (as well as to the children and parents of the deceased): "Where immediately before his death the deceased owned and lived in a dwelling, his spouse, children and parents who at that time lived there with the deceased may continue to live there as tenants of the heirs to whose share the house falls." (Art. 115a Israeli Succession Law) Apart from this regulation, which under certain conditions also applies to rented dwellings<sup>3</sup>, Israeli law also comprises the concept of a right of "provisional accommodation", which, however, other than Article 115a of the Israeli Succession Act, is not restricted to the spouse and close relatives but is granted to every person who had been living together with the deceased: "A person who immediately before the death of the deceased resides with him in his dwelling, whether the deceased was the owner or the tenant of the dwelling, is entitled to continue to reside there for three months, or if he or she is a heir, for six months after the death of

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<sup>1</sup> *Rosen-Zwi/Maoz*, Principles of Intestate Succession in Israeli Law, *Israel Law Review* 1988, 311.

<sup>2</sup> *Rosen-Zwi/Maoz*, *Israel Law Review* 1988, 311.

<sup>3</sup> For details cf. Art. 115c and 115d of the Israeli Succession Law.

the deceased, and during this period he may use the common household chattels to the extent that he had used them immediately before the death of the deceased." (Art. 108a Israeli Succession Act)

Neither of the last two provisions referred to above will be taken into consideration in the present survey as their specific nature does not permit any general statements on succession law which this survey deals with; the limited right of residence, on the one hand, is granted against consideration and can therefore not be regarded as a "typical" right of inheritance; the right to provisional accommodation, on the other hand, constitutes only an interim solution apparently meant to avoid social hardship and does therefore not exclusively reflect succession law purposes. After all, both these rights are granted also to persons other than the spouse, and the consideration of these legal provisions in connection with legal policy issues relating to the spouse's right of succession, which is the subject matter hereof, might create a somewhat distorted picture.

However, legal provisions focusing on the right to continue using the matrimonial dwelling - comparable to Article 11a of the Israeli Succession Law relevant herein - have been established by numerous legal systems world-wide<sup>4</sup>; therefore the question arises what actually are the specific international implications of the relevant Israeli laws. We will arrive at the answer to that question if we consider the time factor (i.e. the required minimum duration of a marriage), which constitutes - as do two further aspects of Article 11a of the Israeli Succession Act<sup>5</sup> - a unique feature from a

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<sup>4</sup> Cf. for instance Art. 3573 of the Argentine Civil Code, Art. 1611 § 2 of the Brazilian Civil Code, Art. 540 of the Italian Civil Code, Art. 612a of the Swiss Civil Code, § 758 of the Austrian Civil Code, the Second Schedule section 1/1 of the English Intestates' Estates Act, section 8/2 of the Scottish Succession Act, section 56/1 of the Irish Succession Act and several statutes of Australian law (for instance in New South Wales: section 61 of the Wills, Probate and Administration Act). All these provisions can be summarized into two groups: on the one hand provisions representing the "allotment system", which like Israeli law aims at transferring to the surviving spouse the rights the deceased had in respect of the matrimonial dwelling, and on the other hand provisions representing the "utilization system", to be found for instance in Italian, Austrian and South American laws, which grant the surviving spouse merely the right to use the matrimonial residence. The inherent function of both systems is the same, namely to provide that the surviving spouse may continue to reside in the matrimonial dwelling.

<sup>5</sup> On the one hand, this remark refers to the fact that the rights in respect of the matrimonial dwelling stipulated by Article 11a of the Israeli Succession Law are not granted to the spouse if in competition with close relatives of the deceased. None of the other legal systems mentioned in footnote 4, which functionally stipulate comparable residential rights of the spouse, provides for a restriction of this kind. Another remarkable feature - in an international comparison - is the relationship between Article 11a and other inheritance claims of the

comparative law perspective and plays a central part if viewed against the background of international developments in relation to the spouse's right of succession. Now, which are these developments? Firstly<sup>6</sup>, there is a world-wide tendency towards improving the legal position of the surviving spouse<sup>7</sup>. This development is clearly evidenced by the fact that many countries have not only abolished the concept of granting the spouse a mere beneficial interest as his/her share in the estate and have increased the spouse's intestate portion<sup>8</sup>, but have moreover stipulated preferential rights of the spouse regarding the matrimonial dwelling and household chattels<sup>9</sup>. However, not only does this development work to the disadvantage of the deceased's kin, but it furthermore more or less contradicts another international trend<sup>10</sup>, namely that matrimonial ties are more and more loosened by extending the possibilities for obtaining a divorce.

These developments create some tension in the relationship between succession law and family law structures: On the one hand, the spouse's position under succession law is approximated to the relatives' position, whereas in family law, on the other hand, this polarization is to some extent mitigated by the creation or extension of possibilities for breaking up the very bonds on which the family law relationship (and therefore intestate succession) is based.

As a consequence thereof the question might arise to what extent such valuations in family law will affect the interpretation of succession law, i.e. whether it is possible

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spouse. Whereas it is typical of most legal provisions which structurally correspond to Article 11a that a certain "deduction" is made if the spouse makes use of his/her special residential rights, i.e. the remaining inheritance claims are diminished (for instance in English, Irish and Australian/New South Wales law), the provision of Article 11a/2 corresponds to the exception provided by Scottish law, where the allotment of the matrimonial residence is made independently of (with priority over) that of the legal portion ("the spouse takes the whole of the share of the deceased... and two thirds of what is left of the remainder of the estate").

<sup>6</sup> The following observations are mainly based on my survey "Right of succession of the spouse and the relatives - a comparative analysis", in "Developments in Austrian and Israeli Private Law" (edited in 1999 by Hausmanninger/Koziol/Rabello/Gilead). However, whereas the observations in the said survey were kept limited to the scope of *lex lata* (currently applicable law), the present survey will continue from there and develop concepts *de lege ferenda*, i.e. in categories of reform models.

<sup>7</sup> Cf. also *Ferreira*, *Tratado de las sucesiones IV: La sucesión intestada y la herencia yacente* (1981) 58; *Neumayer*, *Einheit in der Vielfalt - Bewegung und Bewahrung im Erbrecht der Nationen*, *Ferid-Festschrift* (1978) 669.

<sup>8</sup> Cf. for instance the developments in Swiss law (for example in *Weimar*, *Zum Erbrecht des überlebenden Ehegatten*, *Zeitschrift für Schweizerisches Recht* 1980, 379).

<sup>9</sup> Cf. footnote 4.

<sup>10</sup> In this regard cf. *Ferreira*, *Sucesiones IV* 68.

to construe the provisions of succession law in a way to take into account the fact that the relevant legal system provides for particularly extensive divorce possibilities. In other words: Is it permitted in cases of doubt to interpret a provision of succession law to the detriment of the spouse (and therefore to the advantage of the deceased's kin) because owing to the extensive possibilities for divorcing, the family law bonds between the spouse and the deceased have an inherent normative instability and are therefore potentially less permanent than the (indissoluble) tie between the deceased and his/her kin?

In my opinion, the answer to this question must be no, as (apart from the exceptional case of a putative marriage provided for by Italian law<sup>11</sup>) the surviving spouse is entitled to a share in the estate only if at the time of the death of the deceased the spouse and the deceased had been living in a conjugal community. At this point in time, however, the spouse and the deceased's kin are of "equal ranking" in view of the family law tie, which is the ideological basis of hereditary succession. The normative instability of the matrimonial bonds has not been realized owing to the very fact that these bonds were dissolved "according to schedule"<sup>12</sup>, i.e. by the death of one spouse.

For similar reasons, the continuously increasing frequency of divorces must not be taken into account in the present context. It will be shown later on that succession law should *de lege ferenda* react to this development<sup>13</sup>: "Is it acceptable that the spouse becomes entitled to a large intestate share if a marriage ends after only a short duration by the death of the wealthy spouse, even though it might just as well have been possible that the marriage had broken up only few months later on?"<sup>14</sup> The interpretation of *lex lata* does not provide us with any clues as to the relevance of such considerations. It would result in an unacceptable level of legal uncertainty if the attempt was made in connection with the interpretation of the spouse's right of

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<sup>11</sup> Art. 584 of the Italian Civil Code.

<sup>12</sup> Cf. only § 44 of the Austrian Civil Code; the concept of the indissolubility of a conjugal community represented therein does, however, seem rather anachronistic in view of the wide range of possibilities for a divorce provided for by the Marriage Act. As a consequence, modern legal systems refrain from stipulating such elements of a marriage (cf. for instance Article 159 of the Swiss Civil Code: "By the marriage ceremony the spouses are joined in a conjugal community.")

<sup>13</sup> Cf. *Leipold*, *Wandlungen in den Grundlagen des Erbrechts?* Archiv für die civilistische Praxis 180, 177 et seq.

<sup>14</sup> *Leipold*, *Archiv für die civilistische Praxis* 180, 177.

inheritance to take into account the fact that "in some probability" such rights would anyway have ceased to exist as a consequence of a divorce if only the deceased had "lived long enough". Notwithstanding the undesirability of a collision between succession law and family law valuations and tendencies *de lege ferenda*, it can therefore not be permitted that the fact that the matrimonial tie "per se" (*abstractly*) and from a factual legal perspective is less stable than the relation among blood relatives has any impact on the interpretation of inheritance law.

Similarly, in the present context we must avoid any interference between the spouse's position under inheritance law and the *actual* "quality" of the spouse's family law relationship with the deceased, as most legal systems comprise the concept of a person being "unworthy of succession"<sup>15</sup>, whereby it is clearly determined that not just any odd deviation under family law but only qualified abnormalities affect the right of succession. Any different approach would in any case be irreconcilable with the relatives' statutory right of succession, as this is generally based on fixed structures<sup>16</sup> and does therefore account for the circumstances of any individual case and the actual relationship between the deceased and his/her relatives eligible as heirs only in "standardized categories" (i.e. in case of persons deemed "unworthy of succession"). Apart from these categories, the relatives' right of succession refers to the formal existence of kinship and not to the actual "closeness" of family bonds. Rather on the contrary, relatives benefiting from succession *per stirpes* or from other hierarchical systems will inherit from the deceased also if they have never in their lives met or liked the deceased. This shows clearly that the "intensity" of the family bonds is of no impact at all, and as a consequence thereof such circumstances can have no influence on the interpretation of the law. In view of legal certainty and for the purpose of ensuring a uniform legal system, no different criteria may therefore be applied to the spouse's right of succession. The actual state of the marriage must not be taken into account, and even the fact that a marriage was ripe for a divorce at the time of the death of the deceased, which would be a circumstance "relevant under family law", must be ignored for the purpose of interpreting the provisions of succession law.

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<sup>15</sup> Cf. for instance Art. 3291, 3294, 3295 and 3296 of the Argentine Civil Code, § 540 of the Austrian Civil Code and Art. 540 of the Swiss Civil Code.

Nevertheless, what does seem worthy of consideration - and this takes us back to the major issue of the present survey and the importance of Israeli law in this respect - is the question whether *de lege ferenda* the determination of the intestate portion should not at least depend on the duration of the marriage and thereby take into account the above described development, namely that both factually and normatively, matrimonial bonds continue to become weaker whereas the spouse's rights of inheritance are becoming stronger. In subjecting the spouse's special rights in respect of the matrimonial dwelling to the requirement of a minimum duration of the marriage, Israeli law suggests a possibility for introducing the element of time into succession law relating to spouses. The considerations in respect of German law already referred to above which aim at linking the amount of the spouse's intestate portion to the duration of the marriage<sup>17</sup> thereby gain international dimensions. The suggestion of a time-dependent progression of the spouse's rights of inheritance may at first sight still seem radical. On the other hand, if a marriage (as for instance under Austrian law) can be divorced (by mutual consent) only after a certain period of time has elapsed (Art. 55a Marriage Act) and if maintenance after divorce to some extent relates to the duration of marriage (Art. 68a Marriage Act), why should not also the spouse's rights of inheritance (or at least the extent of such rights) depend on the requirement that the marriage had lasted for a certain minimum period of time? It may be correct that the determination of the actual progression (e.g. only 50% of the intestate share if the marriage had lasted for less than one year) is a difficult affair<sup>18</sup> and may seem arbitrary to some extent<sup>19</sup>, however, that is inherent in the nature of each fixed period of time the lapse of which causes certain claims to arise or to expire. Nevertheless all legal systems prescribe such fixed periods. Therefore, at least against the background of basic legal structures there can be no objections to the introduction in succession law of fixed periods for determining the extent to which the surviving spouse will be entitled to an intestate share (or legitimate portion). From a legal policy perspective, such fixed periods would - as already outlined above - seem rather a worthy issue of

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<sup>16</sup> *Zankl, Erbrecht*<sup>5</sup> (1998) 21.

<sup>17</sup> *Leipold, Archiv für die civilistische Praxis* 180, 177.

<sup>18</sup> *Leipold, Archiv für die civilistische Praxis* 180, 178; ad English law cf. Great Britain Law Commission Paper, Distribution on Intestacy 21 et seq.

discussion as they could serve for mitigating the above described collision between the developments in family law on the one hand and in succession law on the other. If these ideas should ever be realized, the credit for having shown the right way by determining time-dependent restrictions in connection with the acquisition of rights of inheritance by the surviving spouse would be due to Israeli law.

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<sup>19</sup> Cf. *Rosen-Zwi/Maoz*, Israel Law Review 1988, 312 ad Israeli law.