The unbearable lightness of forced heirship: the Czech perspective

Kateřina Ronovská* and Vlastimil Pihera†

Abstract

The law of forced heirship establishes the specific and essentially unlimited right of persons who are in a close family relationship to the settlor to an indefeasible share of a deceased person's estate, or for monetary performance amounting to the value of such a share. This limitation of one's freedom to dispose of one's own estate, however, has raised many doubts at the beginning of the 21st century. It also appears that current national succession laws in many European countries often do not react adequately to the development of new forms of inter-generational family estate planning. The aim of this article is to illustrate the ambivalent nature of the concept of forced heirship in the context of foundation and trust structures in the Czech Republic.

Introduction

Civil law jurisdictions are gradually opening up to the possibilities of using private foundations, trusts, and trust-like instruments for the purposes of estate planning. Their usability, however, comes into conflict with traditional concepts of succession law, mainly the institute of forced heirship.[1]

The law of forced heirship establishes the specific and essentially unlimited right of persons who are in a close family relationship to the settlor to an indefeasible share of a deceased person's estate, or for monetary performance amounting to the value of such a share. This limitation of one's freedom to dispose of one's own estate (traditional in Continental Europe), however, has raised many doubts at the beginning of 21st century. It also appears that current national succession laws in many European countries often do not react adequately to the development of new forms of inter-generational family estate planning. The aim of this article is to illustrate the ambivalent nature of the concept of forced heirship in the context of foundation and trust structures in the Czech Republic.

On the way from public policy to testamentary freedom

The socialist regime, which ruled in former Czechoslovakia between 1948 and 1989, was based on a collectivist communist ideology that was not inclined towards freedom of disposing of one's assets. The Czechoslovak socialist legislatures as regards the law on succession followed the Soviet model. After 1950 the range of persons subject to forced heirship became extended as was the amount of their obligatory shares. Furthermore, the stipulation of any conditions in a testament was forbidden and the possibility of donating or disposing of one's estate by means of testamentary agreements was ruled out. The limitation of the dispositive freedom went hand in hand with the expropriation of private

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1. Cf M Cumyn, 'Reflections Regarding the Diversity of Ways in Which the Trust Has Been Received or Adopted in Civil Law Countries' in L Smith (ed) *Re-imagining the Trust* (CUP 2012) 6ff.

 doi:10.1093/tandt/tty102

property, a ban on entrepreneurial activities, and the limitation of other economic and political freedoms.

Perhaps because the actual reduction of succession law was understood as a side effect of fundamental social changes, it did not cause any particular controversies. During socialism, after all, there was not much left that could be inherited, taking into account the confiscation and nationalization of private property. Consequently, the practical importance of the succession law was dramatically reduced.

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After the fall of the socialist regime in 1989, Czech legislators made only slight corrections in the area of succession law. A major breakthrough came as late as 2014 in relation to the recodification of Czech private law.

The New Civil Code[2] (NCC) finally made a clean break with the socialist past. It introduced, among others, the possibility of establishing foundations with a private purpose and the trust-like vehicle of a 'trust fund'. In the area of succession, it essentially returned (with some modifications) to the original legal regulation of the Austrian General Civil Code (ABGB).

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During the recodification process, it was discussed whether the concept of forced heirship is compatible at all with the liberal spirit of the new code.[3] The debates eventually resulted in a compromise in the form of a substantial reduction of the obligatory share and a change in the position of forced heirs.[4]

According to the current regulation, forced heirship thus only applies to the deceased person's children. The amount of their obligatory shares is: three-fourth in the case of minors and a mere one-fourth of the statutory inheritance share in the case of adult persons.

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Their protection is also (compared to the legal regulation before 2014) relatively weak. They may only request that their obligatory shares be recovered from the heirs (or legatees) but not from third persons to whom assets were donated by the deceased person before or upon his death.

Better the devil you know . . .

However, things are more complex in actual practice than they might appear at first sight. The concept of forced heirship was so well-suited for the egalitarian socialist law that many Czech lawyers still, until today, find it somewhat confusing that it can be found in essentially all traditional civil law jurisdictions. If it were not there, forced heirship would probably be abolished without much discussion in the Czech Republic. It appears that such a 'radical solution'

2. Act No 89/2012 Coll, Czech Civil Code
3. V Bednář, Dědické právo v novém občanském zákoníku. Obchodní právo, 2012, roč 21, č 5, 162–71.
4. They are not heirs in the true sense of the word but, similar to Austrian law, merely beneficiaries having a claim against the heirs/legatees.

might be a better choice for legal practice than the existing 'embarrassing compromise'.

Since 1 January 2014 more or less two parallel worlds exist in Czech law: forced heirship with heirs having their claims on the one hand and alternative tools for estate planning (the so-called will-substitutes[5]) on the other, such as the trust fund or the *donatio mortis causa*.

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Such instruments may be used by a testator until the last day of his life, passing assets to third persons without the obligation arising for such persons to recover the obligatory share of forced heirs. Most people see it as embodying an internal value conflict. It gives rise to considerations whether such will-substitutes ultimately reduce the obligatory share, or represent an abuse of the law, or whether they contradict morality, thus constituting void or voidable legal acts. However, such an interpretation would mean a catastrophe for the existence of trust funds, private foundations, and similar means of family estate planning.

A standard claw-back mechanism would oblige trust or foundation administrators to recover the value by which the obligatory share was reduced or, at worst, to return a partial performance, and in case of void legal acts the transfer of the contested assets would imply the obligation for the administrator to return the entire performance received. That would indeed mean the destruction of the entire structure.

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The majority of settlors are ready to accept the necessity to make financial payments to forced heirs or to provide some other performance (eg placing them in the position of a beneficiary with a legal title). However, it is entirely unacceptable to risk that a transfer of assets or the creation of a foundation or trust fund could later possibly be declared void.

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Though will-substitutes are undoubtedly better suited for cases of full testamentary freedom, they may (and in some countries do) operate even where such freedom is reasonably limited. The limits, however, must be clear and stable. Since Czech succession law does not yet provide for such a luxury, it appears necessary to reconsider the regulation of forced heirship.

Claw-back and will-substitutes—the puzzler

The most frequent model of family estate planning in the Czech Republic is the trust fund and the private foundation established *inter vivos*, whose beneficiaries are the settlor's children and wife. These structures have relatively complicated rules for the distribution of benefits. Moreover, they are mostly conceived as

5. cf A Braun and A Röthel, *Passing Wealth on Death: Will Substitutes in Comparative Perspective* (Hart Publishing 2016).

discretionary, ie the trustee may, at his own discretion, appoint beneficiaries from a delimited group of individuals on a case-by-case basis for each performance, ie payment.

Succession law should reflect the existence of such structures. As long as forced heirs are protected by means of the claw-back mechanism, such a mechanism must be able to take into account the rights of forced heirs that arise to them by virtue of their position as beneficiaries. A number of questions arise in this connection: how can the value of such rights be determined? Considering the idea, that the obligatory shares shall be free of all encumbrances, how should we treat different conditions for performance under will-substitute structures? What consequences has listing the forced heirs among the persons who may be appointed as beneficiaries of discretionary trusts? Under what conditions can forced heirs seek the right to recovery directly from the trustee, and if, under what conditions from the beneficiaries?

The protection of forced heirs must be reasonable, taking into account the legitimate interests of other persons. It should be possible to split the recovery payment of the obligatory share in time, particularly when a running business is concerned. The existence of such a business should not be put under risk by claims for immediate cash-flow. How should we deal with situations where the obliged person and the forced heirs fail to agree on the manner of the recovery?

The existence of will-substitutes places high demands on succession law. In that respect, inspiration can be sought in many countries, particularly in neighbouring Austria, where the succession law was substantially amended last year, partly also in order to respond to the above-mentioned problems.

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With a view to the Austrian changes, it is evident that an independent legislative action is not the only task. The modern concept of forced heirship must assess the position of heirs individually, with a view to specific conditions. Thus, it inevitably leads to the strengthening of the role of courts because it is up to them to eventually determine the conditions for the recovery of the obligatory share.

However, is such a power of the courts to interfere in private family affairs suitable? And do the courts have the necessary prerequisites to play such role successfully? That issue is particularly acute as long as courts not have any experience with such issues, as is the case in the Czech Republic.

Back to the public policy?

Many ideas about forced heirship in the Czech legal environment are probably affected by the 2005 decision of the German constitutional court.[6] The court ruled that the German constitution guarantees to the settlor's children the right to a minimal material (economic) share of the deceased person's estate as essentially inalienable and independent of one's own needs.

The Czech Charter of Fundamental Rights and Freedoms (which forms a part of the Constitution) contains provisions that are essentially identical to those that the German Constitutional court relied on, namely the provision under which the 'right of inheritance shall be guaranteed', and the provision specifying that the 'family shall enjoy the special protection of the state'.[7] However, the reasoning of the German constitutional court also refers to the specific historical heritage of German (Prussian) law. The question remains whether the court's conclusions are transferrable to the Czech context, which is culturally somewhat different.

6. Decision of the German Constitutional Court from 19 April 2005 (BVerfGE 112, 332–63).

7. cf čl 14(1) a art 6 Grundgesetz für die Bundesrepublik Deutschland a art 11(1) a art 32 of Czech Act No 2/1993 Coll, Charter of Funadamental Rights and Freedoms.

The ideas about the constitutional law relevance of the institute of forced heirship give rise to the uncertainty to which extent the regulation on forced heirs can be amended or entirely removed from Czech law.

The position of forced heirs is complicated also from the point of view of international private law. The European regulation on cross-border succession in the European Union[8] enables (though in a limited way) the choice of the applicable law to govern the succession as a whole, ie including the issue of forced heirship and the potential claw-back.

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It may probably be stated, also with view to experience from abroad,[9] that such a procedure is possible. It is not clear, though, what its limits are. May some cases of passing over forced heirs be in line with public policy while others are not? If the very right to an obligatory share were a constitutional right, then it would most likely be necessary to insist on acknowledging it in all cases. European law does not give any clear answer here. Because of the lack of any relevant judicial decisions and of no clear positions in doctrinal literature, Czech law is similarly unclear in this respect.

Where are we now?

The extent to which foundation and trust structures can be used for inter-generational estate planning is significantly affected by succession law, mainly by the existence and extent of the protection of heirs. Many quite complex questions arise regarding both the values that should be upheld and the specific 'technical' solutions.

If the regulation is applied rigorously, the field of estate planning may be significantly negatively affected, and assets may be diverted to off-shore jurisdictions that do not know forced heirship rules. At present, the Czech Republic faces the task of restructuring its succession law. However, it is not the only such country in Europe.

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8. European Parliament and Council Regulation (EC) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, [2012].

9. eg R Süß, *Erbrecht in Europa* (2nd edn, ZErb-Verlag 2015)151.