VI. Conclusion

his chapter has explored cases where there is a claim by a family member or rer which is defeated or reduced as a result of a will-substitute. It has explored e case for testamentary freedom and accepted that it is a sound starting point, least given the kind of property regimes most Western democracies use. The guments used in favour of testamentary freedom would also support the use of ll-substitutes. However, the chapter has explored the use of forced heirship law legislation such as the English I(PFD) Act to amend the provision made by a ll or the intestacy laws. It has been argued that the strongest justifications for ch intervention in testamentary freedom occur where the claimant is arguing at they have a property claim or quasi-property claim over the estate or where ey have provided unpaid (or underpaid) care for the deceased. These claims em as effective against a will-substitute as they are against the will itself. Indeed nas been argued that the use of legislation such as the I(PFD) Act is an effective ol to encourage the care of older people and the best way of ensuring compensa-on for the costs of that care. It also pursues important state goods in ensuring at the care is provided and valued. In so far as will-substitutes defeat those goals ey should be liable to be set aside in the same way wills can be.

15

Will-Substitutes and the Family: A Continental Perspective

ANNE RÖTHEL

I. Introduction

Will-substitutes can be seen as simply another type of gratuitous transfer, situated somewhere between lifetime gifts and wills. Just as lifetime gifts and wills, they express the freedom to transfer property as desired by the transferor. But will-substitutes can also be seen as specific devices, which are, so to speak, hidden in a blind spot and used with the intention to circumvent provisions otherwise applicable to 'proper' gifts or 'proper' wills. Hence, will-substitutes become an issue where the law attempts to make a clear distinction between transfers made during lifetime and transfers governed by succession law. This chapter deals with one of the instances in which such a 'distinctive line' is drawn: the rights of family members in continental jurisdictions. It is no surprise that continental civil law jurisdictions with their long-rooted tradition of family-based statutory rights take a formalistic approach to wills and that they define any instrument which can be used for the same purposes as a will, ie, for organising a revocable, gratuitous transfer of wealth upon death.[1]

The purpose of this chapter is to provide an assessment of how continental jurisdictions, and in particular German law, deal with will-substitutes in the context of family rights. On the one hand, this chapter analyses how will-substitutes are dealt with in the context of *compulsory* family rights. On the other hand, it

[1] It has been suggested that there is a distinction between 'pure' or 'perfect' will-substitutes, which do not have any legal effect during lifetime, and 'impure' or 'imperfect' will-substitutes such as joint tenancies, which also lead to lifetime consequences; see JH Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1984) 97 *Harvard Law Review* 1108, 1114 ff and ch 7 above, pp 163 ff and pp 167 ff. Esp with regard to the rights of the family 'impure' or 'imperfect' will-substitutes are of importance. From a broader perspective, any will has lifetime effects, whether or not they are of immediate legal relevance (expectations, motives etc). More importantly, however, a coherent approach to wills and alternative devices should also include alternative devices irrespective of their lifetime effects.

assesses how they are tackled in the context of *default* family rights. It will show that—in contrast to the findings John Langbein[2] and Thomas P Gallanis[3] have made for current US law—default provisions of succession law aimed at protecting the family, such as the automatic revocation of a will in the event of divorce ('divorce rule'), are not applied to will-substitutes. This is true at least for German law, where will-substitutes, though being efficiently subjected to compulsory shares (section III), are expressly exempted from the rules governing the interpretation of wills (section IV). However, these findings are not as contradictory as they might seem at first (section V).

The aims of this chapter are restricted. It cannot explore the legal status of each will-substitute, and the way it relates to each and every family right in every continental jurisdiction, nor can it cover all jurisdictions. Its purpose is to provide an impression of the common strands and the central ideas prevailing in continental jurisdictions. Compulsory shares and default interpretation rules were chosen as the most significant and relevant examples due to the fact that German courts have dealt with both of them. Although an exploration of the hotchpot rules is possible, their importance for will-substitutes seems of little practical significance.[4]

II. The Role of the Family in Continental Succession Laws

Before taking a closer look at will-substitutes, the role of the family in continental succession laws requires clarification. Continental succession laws share the deeply rooted principle that family members enjoy specific, pre-defined imperative rights to the estate. These laws rely on both testamentary freedom and the family, but in contrast to common law jurisdictions, family members generally enjoy fixed statutory rights in the form of the Romanic forced heirship (property rights to the estate)[5] or the Germanic compulsory share (financial claims).[6,7] For the purpose of this chapter, the term 'compulsory share' is used in a broad and

[2] Langbein, above n 1, 1149 ff; see also GMP McCouch, 'Will Substitutes under the Revised Uniform Probate Code' (1993) 58 *Brook Law Review* 1123, 1149 ff.

[3] See ch 1 above V.

[4] But see ch 6 above, p 135 and ch 7 above, pp 163 and 166.

[5] See Italy (Arts 536 ff C Civ), Spain (Arts 806 ff C Civ) and Switzerland (Arts 470 ff ZGB).

[6] See Austria (§§ 762 ff ABGB), the Netherlands (Arts 4:63 ff BW) and Germany (§§ 2303 ff BGB).

[7] For comparative studies see C Castelein, R Foqué and A Verbeke (eds), *Imperative Inheritance Law in a Late-Modern Society* (Antwerp, Intersentia, 2009); A Röthel (ed), *Reformfragen des Pflichtteilsrechts* (Cologne, Heymann, 2007); I Kroppenberg, 'Compulsory Portion' in J Basedow, K Hopt and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, vol 1 (Oxford, OUP, 2012) 337–41; A Dutta, 'Entwicklungen des Pflichtteilsrechts in Europa' (2011) *Zeitschrift für das Gesamte Familienrecht* 1829–40.

functional sense, including any legal institution that guarantees family members formalised statutory rights to the estate of the deceased, irrespective of the legal nature of these rights. Unlike under English law, these rights have in common that they are neither discretionary nor dependent on individual needs or other specific reasons.[8]

Even though these imperative family rights to compulsory shares represent the most substantial limitation to private autonomy in succession law, and thus give rise to vivid debates, they remain essentially uncontested. The idea that family members enjoy a statutory entitlement to a minimum part of the estate meets with broad societal acceptance, and the corresponding legal rules are intended to be 'long lasting'.[9] Notwithstanding the fact that recent reforms of succession law in many continental jurisdictions[10] have adapted the statutory position of family members, the family's established position was never at any fundamental risk. Imperative family rights have undoubtedly achieved the status of an *institution* within succession law. This has historical reasons. The historical trajectory of compulsory family rights as a shared continental law tradition can be traced back to its beginnings in Roman law (*querela inofficiosi testamenti*)[11] and, in a second step, to the development of succession law from family law in the Middle Ages.[12] Ultimately, this historical foundation has entailed that the rules governing forced heirship and compulsory shares have taken the position of fundamental rights, as is for example the case in Germany.[13] Additionally, academics increasingly emphasise the symbolic and psychological importance of inheritance for the family members' identities and the course of their lives.[14] Others reveal

[8] See ch 14 above II.

[9] J Beckert, 'The *Longue Durée* of Inheritance Law' (2007) 1 *Archives Européennes de Sociologie* 79 ff; R Foqué and A Verbeke, 'Towards an Open and Flexible Imperative Inheritance Law' in C Castelein, R Foqué and A Verbeke (eds), *Imperative Inheritance Law in a Late-Modern Society* (Antwerp, Intersentia, 2009) 203 ff.

[10] Recent law reforms concerning succession law have been undertaken in many continental jurisdictions, see in particular, the Netherlands (2003), Italy (2006), France (2007), Denmark (2008), Catalonia (2008) and Germany (2010).

[11] R Zimmermann, 'Die Erbfolge gegen das Testament im Römischen Recht' in A Röthel (ed), *Reformfragen des Pflichtteilsrechts* (Cologne, Heymann, 2007) 97–115.

[12] J Beckert, *Inherited Wealth* (Princeton, Princeton University Press, 2007); K Gottschalk, 'Erbe und Recht. Die Übertragung von Eigentum in der frühen Neuzeit' in S Willer, S Weigel and B Jussen (eds), *Erbe. Übertragungskonzepte zwischen Natur und Kultur* (Berlin, Suhrkamp Verlag, 2013) 85 ff; B Willenbacher, 'Individualism and Traditionalism in Inheritance Law in Germany, France, England, and the United States' (2004) 28 *Journal of Family History* 208 ff.

[13] For Germany, see BVerfG 19 April 2005, BVerfGE 112, 332.

[14] F Lettke (ed), *Erben und Vererben. Gestaltung und Regulation von Generationenbeziehungen* (Konstanz, UVK, 2003); U Langbein, *Geerbte Dinge. Soziale Praxis und symbolische Bedeutung des Erbens* (Cologne, Böhlau, 2002).

the anthropological and socio-biological link between family and property.[15] Moreover, the rules on compulsory shares reflect the perception of a strong need within civilian jurisdictions for clearly defined rules to govern legal relations in a reliable manner. Without such objective, clear and stereotyping rules on compulsory shares, the courts would be overburdened with litigation claiming that the testator was lacking capacity, or that he or she was mistaken or had become a victim of undue influence, or that a will without inclusion of the family is to be declared void for violating the *bona mores*. Therefore, from a civil law perspective, statutory family rights correspond fully with the overall preference of general and practical rules facilitating foreseeable outcomes. Once again, 'rationality' of law prevails over individual justice. And finally but no less significant, the rules on compulsory shares reflect a strong emphasis on the idea of equality, where the position of children is concerned.[16]

III. Will-Substitutes and the Rights to Compulsory Shares

A. Continental Characteristics

Continental jurisdictions such as France, Austria, Switzerland, the Netherlands, Italy, Spain and Germany that acknowledge compulsory shares conceive these rights in many ways as the 'extension' or 'prolongation' of obligations and expectations of *solidarity* that had already arisen during lifetime. Family law imposes several limitations on private autonomy. These limitations become limitations to testamentary freedom imposed by succession law. However, given that the structure and the nature of family rights undergo fundamental changes, this turn from family law to succession law, and from private autonomy of the living to freedom of testation, is more complex than simply turning the page in a book. Rights that were previously based on specific conditions, in particular needs, and mainly fulfilled by monthly payments (maintenance), now change into claims for lump sums; matrimonial property rights that were deferred to the moment of death, or

[15] D Clark (ed), *The Sociology of Death: Theory, Culture, Practice* (Oxford, Blackwell, 1993); J Carrier, 'Gifts, Commodities, and Social Relations: A Maussian View of Exchange' (1991) 6 *Sociological Forum* 119 ff; U Schönpflug (ed), *Cultural Transmission. Psychological, Developmental, Social, and Methodological Aspects* (Cambridge, CUP, 2008); S Willer, S Weigel and B Jussen (eds), *Erbe. Übertragungskonzepte zwischen Natur und Kultur* (Berlin, Suhrkamp Verlag, 2013).

[16] P Steiner, 'L'heritage égalitaire comme dispositif social' (2005) 46 *Archives Européennes de Sociologie* 127 ff; for a different reasoning, see ch 14 above, pp 290 f: testamentary freedom as an instrument to counterbalance discriminatory provisions in intestate rules, eg in order to promote the equality of same-sex partners.

property rights that only existed as limitations to the power to dispose of one's property, eventually acquired the status of actual rights. Thus, from the family members' perspective, the death of a member of the family not only represents a dramatic emotional experience and a personal loss, but also *the* fundamental *turning point* concerning the legal nature of their rights over the deceased's estate.

i. Anti-Evasion Provisions

Continental laws governing compulsory shares—as much as they may differ in detail—all stipulate specific anti-evasion provisions. The fact that they all draw a distinctive line between the living family member's obligations and the deceased family member's obligations shows that they are aware of the necessity to prevent potential loopholes. In this respect, the drafters of the *Bürgerliches Gesetzbuch* (hereafter BGB) were under no illusion: the absence of such anti-evasion rules would mean that the rights to compulsory shares 'would hardly have any practical impact'.[17]

ii. Structure

Given the many differences in nature and structure of the continental rules on compulsory shares, their anti-evasion provisions operate with surprising similarity. First, they share the fact that they address *lifetime gifts* made by the deceased.[18]

A second characteristic is that they do not generally require a wrongful intent.[19] In contrast to English law,[20] the continental version of the anti-evasion provision is *formal* and *objective*. Any lifetime gift can be challenged without having to prove that the deceased intentionally wished to harm family members and to infringe their rights to compulsory shares. As such, the anti-evasion provisions aimed at protecting the compulsory shares are constructed in quite the same way as the provisions aimed at creditor protection.[21]

Third, the anti-evasion rules operate mainly by extending compulsory shares to lifetime gifts. Gifts falling under the scope of the anti-evasion rules are treated as if they were part of the succession, and family members entitled to a compulsory share

[17] *Motive zu dem Entwurf eines BGB*, vol 5 (Goldbach, Keip, 1888, reprint 2000) 452: 'Ohne eine solche Schranke würde das Institut des Pflichttheiles kaum eine materielle Bedeutung haben'.

[18] See § 2325(1) BGB, Art 922 French C Civ, Art 556(2) Italian C Civ, Arts 4:67 ff BW, § 785(1) AGBG, Art 475 Swiss ZGB as well as chs 6 and 7 above, pp 135 f and p 160.

[19] But see ch 9 above, p 201 regarding Swiss law (Art 527 no 3 ZGB).

[20] See s 10 Family (Provisions for Dependants) Act as well as chs 3 and 14 above III.B. and V.

[21] See ch 13 above IV. But for Italy and the protection of creditors with a view to life insurance contracts see the findings of ch 6 above, p 139.

are entitled to either complementary compulsory shares (*Pflichtteilsergänzung*)[22] or claw-back claims against the beneficiary, if the beneficiary is still enriched.[23]

However, continental anti-evasion provisions differ in one point, namely the issue of whether any lifetime gift or only recent lifetime gifts should be taken into account. Many jurisdictions have decided in favour of a limitation period. In Germany, the rights to compulsory shares are only extended to gifts made in the last 10 years prior to death (§ 2325(3) BGB). Swiss law takes account of any gift that has been made in the five years prior to death and also grants the right to challenge any 'assets alienated by the deceased with the obvious intention of circumventing the limitations on his or her testamentary freedom' as well as any 'advances … to the extent these are not subject to hotchpot'.[24] In Austria, Liechtenstein and the Netherlands, the time limit depends on the person of the beneficiary. Gifts in favour of 'third parties' are only taken into account if they have been effected in the last two years prior to the death (§ 783(3)2 *Allgemeines Bürgerliches Gesetzbuch* (ABGB)), whereas gifts to persons who belong to those entitled to a compulsory share are to be taken into account without consideration of any time limit (§ 785(2) ABGB).[25] Finally, the Romanic jurisdictions entitle the heir to challenge any 'exceeding' lifetime gift, however long ago it was made.

[22] See § 2325(1) BGB: '(1) Where the testator made a gift to a third party, a person entitled to a compulsory share may claim, as an augmentation of his compulsory share, the amount by which the compulsory share is increased if the object given is added to the estate' (this as well as all subsequent translations of German provisions are, unless indicated otherwise, taken from www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html). Further, see § 785(1)1 ABGB: 'On demand of a child entitled to a compulsory share or a spouse entitled to a compulsory share, gifts by the testator are to be taken into account in the calculation of the estate'; Art 475 ZGB: 'Inter vivos gifts are added to the estate insofar as they are subject to an action in abatement' (trans by the Swiss Federal Council, www.admin.ch/opc/en/classified-compilation/19070042/201407010000/210.pdf); or Art 922(2)1 French C Civ: 'The assets that were disposed of by inter vivos are added to this mass fictitiously, according to their state at the time of the donation and their value at the opening of the succession, after deducting from them the debts or the charges that encumber them' (trans Légifrance, www.admin.ch/opc/en/classified-compilation/19070042/201407010000/210.pdf).

[23] See for the German Law the dispositions of §§ 2328, 2329 BGB. § 2328 BGB states: 'If an heir is entitled to a compulsory share himself, he may refuse the augmentation of his compulsory share to the extent that he would retain his own compulsory share, including what would be due to him as an augmentation of his own compulsory share'. § 2329 BGB states: '(1) To the extent that an heir is not obliged to augment a compulsory share, the person entitled to a compulsory share may, in accordance with the provisions concerning the return of unjust enrichment, demand from the recipient of a gift that he return it for the purpose of making up the shortfall. If the person entitled to a compulsory share is the sole heir, he has the same right. (2) The recipient may avoid the return of the gift through the payment of the shortfall'.

[24] See Art 527 ZGB and ch 9 above, p 201.

[25] For Austria and Liechtenstein, see ch 9 above, p 203. The same is true for Dutch law, see Art 4:67 lit e BW. These seemingly 'odd' rules rely on two ideas: The first is of an 'emotional' nature and is based on the fact that gifts to family members may be perceived as being more hurtful than gifts to third parties. The second is of a 'systematic' nature and based on the idea that the anti-evasion provisions are not only meant to protect the family against gifts to third parties, but also to ensure a balanced attribution of shares among family members; see further A Röthel, 'Umgehung des Pflichtteilrechts' (2012) 212 *Archiv für die civilistische Praxis* 157, 170 ff.

The only time limits applicable are normal prescription periods of claims.[26] In the context of will-substitutes, however, these differences can be set aside. As will-substitutes come into effect upon death, they generally fall within the scope of the anti-evasion provisions.

iii. Relevance

There are very few English cases turning on the anti-evasion provision of section 10 Family (Provisions for Dependants) Act. Cases dealing with other aspects of the family provision legislation are equally scarce.[27] This situation is in stark contrast to the great practical importance of the rules on compulsory shares and anti-evasion provisions in continental jurisdictions.

Thanks to their broad scope as well as their formalistic and non-discretional nature, claims for compulsory shares, including complementary compulsory shares for lifetime gifts, have become standard in continental law and are brought to court in great quantities and with predictable outcomes. Thus, compulsory shares, and in particular anti-evasion rules, operate efficiently and form the core of succession law.

An empirical analysis of the sheer number of judgments rendered in Germany on matters of succession law in the last 25 years proves that cases involving the set of provisions governing compulsory shares (§§ 2303 ff BGB) are clearly above average in quantity, and count amongst the most litigated issues. The same is true of cases concerning the complementary compulsory share (*Pflichtteilsergänzung*) pursuant to the anti-evasion provision stipulated under § 2325 BGB.[28]

iv. Will-Substitutes: A Pseudo Problem?

This brief outline offers many reasons why will-substitutes should represent no major challenge for the continental succession laws governing the rights to compulsory shares, as they are protected by effective anti-evasion provisions. These work even more efficiently with regard to will-substitutes than with regard to 'pure' lifetime gifts. As will-substitutes take effect only upon death, they will always fall within the scope of application of the anti-evasion provisions. In theory, will-substitutes represent the least controversial issue in the context of family rights to succession.

[26] See Art 921 French C Civ and A-M Leroyer, *Droit des successions*, 3th edn (Paris, Dalloz, 2014) para 593.

[27] See ch 14 above, p 285.

[28] See the 'quantitative analysis of case law' undertaken by D Leipold in 2010, www.jura.uni-freiburg.de/institute/izpr2/downloads/dateienleipold/quantitativerechtsprechungsanalyse. The study reveals that out of the 5,628 chosen decisions on succession law of various German courts published between 1985 and 2010, nearly a quarter were decisions by the Bundesgerichtshof (BGH) (180 out of 834) and concerned the compulsory share, and that § 2325 BGB ranks among the five most important provisions of the BGB, only outnumbered by § 1922 BGB (universal succession), § 1967 BGB (transfer of debts), § 2084 BGB (interpretation in favour of validity) and § 2247 BGB (formalities on wills).

B. Remaining Uncertainties

However, this is not entirely true or at least not always that evident. Focusing in particular on German law, will-substitutes remain a challenge to compulsory shares and their respective anti-evasion provisions.

Since the inception of the BGB, there has been an awareness of the potential problem raised by will-substitutes and the need for effective anti-evasion provisions to protect the rights to compulsory shares. On these matters, German law is by no means stagnant. The German experience clearly shows that the only way to extricate will-substitutes from the regime of anti-evasion provisions is either to challenge their gratuitous nature—with the consequence that they would neither be subject to compulsory shares nor to complementary compulsory shares—or to argue that they are not at all, or not entirely, a gift made by the deceased. This is an issue which has recently been the subject of debate and court review in Germany in particular regarding transfers to charitable foundations (subsection III.B.i). Life insurance constitutes an additional challenge, which has yet to be resolved in Germany, as well as in various other continental jurisdictions. Very often, the insurance sum paid to the beneficiary is not wholly considered a gift made by the deceased, and is therefore not entirely included when calculating the complementary compulsory share (subsection III.B.ii).

i. Charitable Transfers: Merely 'Fiduciary Benefits'?

As Anatol Dutta has already pointed out, gratuitous transfers in favour of existing foundations, or for the creation of a foundation, can function as will-substitutes under German law, which thus leads to a potential problem for those entitled to a complementary compulsory share (*Pflichtteilsergänzung*, § 2325 BGB).[29] The legal nature of such transfers has been the subject of recurrent court scrutiny, first by the Reichsgericht and then by the Bundesgerichtshof. In a decision of 2003, the Bundesgerichtshof had to render a judgment on the legal nature of such transfers to charitable foundations.

a. Bundesgerichtshof 10 December 2003: Dresdner Frauenkirche

The following case was presented to the Bundesgerichtshof. A widowed father of an only daughter supported the Stiftung Dresdner Frauenkirche, a private charitable foundation with the purpose of reconstructing the Dresdner Frauenkirche, by making a lifetime transfer in the amount of 4.4 mio DM (€2.2 mio) to the foundation. He therefore received a *Stifterbrief*, a document in testimony of his generosity. As the donor had disinherited his only daughter and had additionally installed the foundation as his sole heir, the disappointed daughter sued the foundation for her compulsory share. She based her claim on the estate left via

[29] Ch 8 above, pp 187 f.

will to the foundation, and on the lifetime transfers previously made by her father. Even though the central issue of this case is actually that of lifetime transfers made some years before death and not that of transfers taking effect upon death, the Bundesgerichtshof had to arrive at a general decision concerning the legal nature of transfers to charitable foundations, which means that the judgment in this case is equally important for the assessment of will-substitutes.

The Oberlandesgericht Dresden had supported the view that these transfers were not gratuitous. Therefore, they were not gifts and consequently did not entail an entitlement to a complementary compulsory share (§ 2325 BGB). The principal argument was that transfers in favour of charitable foundations would not enrich the foundation as it was bound to invest the means according to its charitable purpose. Instead, these transfers were merely transitory items,[30] which was in keeping with the view that had been previously taken by the Reichsgericht.[31]

However, the Bundesgerichtshof took a different position, thus approximating German law with Swiss and Austrian law, where the legislature had expressly acknowledged the gratuitous nature of transfers for charitable purposes and in particular of those to charitable foundations.[32] The Bundesgerictshof deemed the transfer to the foundation 'Dresdner Frauenkirche' to be gratuitous, and thus qualified it as a gift entitling the compulsory heir to a complementary compulsory share.[33] The Court focused on a 'technical' line of reasoning and explained that ownership had been transferred to the foundation.[34] It rejected the argument of the Oberlandesgericht Dresden that the foundation had acquired the means only 'on trust' (*Treuhand*).[35] Instead, it held that the foundation had acquired definitive ownership without any remaining discretional rights of revocation. The mere fact that the foundation had an obligation to invest the means according to its purposes did not mean that it held the means 'only' on trust.[36]

Despite the fact that the judgment of the Bundesgerichtshof primarily revolved around the technical issue concerning the legal nature of such transfers, the Court

[30] OLG Dresden 2 May 2002, (2002) *Neue Juristische Wochenschrift* 3181 f.

[31] RG 6 February 1905, RGZ 62, 386, 390 f.

[32] See Art 82 Swiss ZGB: 'A foundation may be challenged by the founder's heirs or creditors in the same manner as a gift', and § 785(3) Austrian ABGB: 'Gifts which the deceased has made from his revenues without affecting the core of the assets (*Stammvermögen*) and for charitable purposes are not taken into account'; for the Law of Liechtenstein see the decision FL OGH 9 February 2006, 6 CH.2004.23, LES 2006, 468 as well as ch 9 above IV.

[33] See BGH 10 December 2003, BGHZ 157, 178, 182 ff.

[34] BGH 10 December 2003, BGHZ 157, 178, 182 f: 'Gegen eine Schenkung … spräche allerdings eine Zuwendung allein zu dem Zweck, es zugunsten anderer zu verwenden. … Die Beklagte verwandte die Mittel nach dem Willen des Geldgebers ausschließlich für sich selbst, so wie es in ihrer Satzung festgelegt ist … Es besteht kein Anhalt, dass die Geldzuwendungen des Erblassers nicht im Sinne eines endgültigen Vermögenstransfers erfolgen sollten'.

[35] OLG Dresden 2 May 2002, (2002) *Neue Juristische Wochenschrift* 3181 f.

[36] BGH 10 Dez 2003, BGHZ 157, 178, 182: 'Zwar war die Beklagte gehalten, die Gelder zu Stiftungszwecken … zu verwenden. Das verlieh dem Erblasser aber keine weitergehenden Rechte im Sinne eines Treuhandverhältnisses. Die für Treuhandverhältnisse typischen Merkmale … treffen auf Spenden der vorliegenden Art nicht zu'.

was indeed aware of the obvious political question underpinning the trial and made the following statement:

> Even if the reason to support charitable purposes might seem honourable and in the public interest, this does not alter the fact that such transfers actually affect the rights to a compulsory share. If such restrictions to the rights to compulsory shares appear politically justified, it remains the exclusive competence of the legislature to implement such restrictions.[37]

b. The Academic Aftermath

This judgment gave rise to an animated academic debate. Though the technical argument that lifetime transfers to charitable foundations are gifts, and not merely fiduciary contributions, was widely supported by legal scholars, many of them used a political line of reasoning to argue in favour of a general privilege of charitable transfers. Donations in favour of charitable foundations should be at least partially exempted from claims of those entitled to complementary compulsory shares. In particular, this was proposed for cases where claims invoking family rights degenerated into 'luxurious' claims, as was for example the case in the decision concerning the Dresdner Frauenkirche, where a 'greedy' daughter sued for the total sum of 3.1 million DM. Some authors suggested that charitable foundations should be treated as an additional 'fictive' child of the deceased so as to reduce the (complementary) compulsory shares of the 'real' family members.[38] Others referred to Austrian law, where the ABGB exempts transfers for charitable purposes from the compulsory share, provided that the transferred wealth derives exclusively from the revenues, and does not affect the core of the assets (*Vermögensstamm*), see § 785(3)1 ABGB.[39]

c. The Reform of 2010

However, the German legislature decided otherwise. In fact, the German anti-evasion provision, which entitles the compulsory heir to a complementary

[37] BGH 10 Dez 2003, BGHZ 157, 178, 187: 'Dass im Einzelfall die Motive durchaus anerkennenswert sein mögen und die als gemeinnützig gedachte Vermögensverschiebung im allgemeinen Interesse liegen kann, ist für die damit einhergehende Pflichtteilsverkürzung ohne Belang. Solche Eingriffe in das Pflichtteilsrecht, so sie denn rechtspolitisch gerechtfertigt erscheinen, sind dem Gesetzgeber vorbehalten'.

[38] R Hüttemann and P Rawert, 'Pflichtteil und Gemeinwohl—Privilegien für gute Zwecke?' in A Röthel (ed), *Reformfragen des Pflichtteilsrechts* (Cologne, Heymann, 2007) 73–91. Others have suggested that charitable transfers should be exempted from complementary compulsory shares as being merely gifts made out of decency (*Anstandsschenkungen*, § 2330 BGB), see W Matschke, 'Gemeinnützige Stiftung und Pflichtteilsergänzungsanspruch' in HP Westermann and K Mock (eds), *FS Bezzenberger* (Berlin, De Gruyter, 2000) 521–28.

[39] See § 785(3)1 ABGB: 'Gifts which the deceased has made from his revenues without affecting the core of the assets (*Stammvermögen*) and for charitable purposes are not taken into account'. See Hüttemann and Rawert, above n 38, 77 ff; A Röthel, 'Generationengerechtigkeit versus Gemeinwohl' (2006) *Zeitschrift für Erbrecht und Vermögensnachfolge* 8, 12.

compulsory share (§ 2325 BGB) was finally reformed in 2010, but not in the proposed direction of a specific exemption for charitable purposes. Instead, the legislature only changed the time limit applicable to claims. The ten-years rule, which had been consistently applied, was changed into a *pro-rata-temporis*-rule (*Abschmelzungsregel*).[40] The legislature expressly hoped that this reform would address the needs of charitable foundations insofar as it would be conducive to a reduction of subsequent claw-back claims.[41] Doubts remain as to whether this step was of any great consequence. The rule quite clearly failed to implement any changes regarding will-substitutes, which operate upon death. The state of affairs, as it had been described by the Bundesgerichtshof in 2003, remained unaltered by the reform. Therefore, 'charitable' will-substitutes still do not enjoy any exemption or alleviation.

ii. Providential Transfers via Life Insurance: Premiums, Last Redemption Value or Revenues?

The legal assessment of life insurance has given rise to a similar discussion. Life insurance contracts represent a typical and frequently used will-substitute on the continent—in Germany,[42] as well as in many other civil law jurisdictions, for example, France,[43] Switzerland,[44] Austria and Italy.[45] One might expect that the great practical impact would lead to clear, stable and similar evaluations across the different jurisdictions, yet the contrary is true. Life insurance is still the subject of many heated debates and recurring jurisprudential interpretation. This is not only true of France and Italy, as Cecile Pérès and Gregor Christandl have shown,[46] but also for Germany. German courts have had several opportunities to assess the extent to which life insurance is to be included in the calculation of complementary compulsory shares (*Pflichtteilsergänzung*, § 2325 BGB).

a. Reichsgericht 25 March 1930: Premiums

In contrast to the issue of charitable transfers (see subsection III.B.i above), there were no doubts, as far as life insurance is concerned, that the beneficiary of a life insurance contract had received a gift. In fact, the Reichsgericht stated as

[40] § 2325(3) BGB: 'The gift is fully taken into account within the first year prior to the devolution of the inheritance, and is taken into account by one-tenth less within each further year prior to the devolution of the inheritance. If ten years have passed since the gift was made, the gift is not taken into account'.

[41] BT-Drs. 16/13543, 7.

[42] Ch 8 above, p 183. The Association of German Insurers (Gesamtverband der Deutschen Versicherungswirtschaft) reported that in 2014, €2,500 mio were held in insurance funds, governed by some 92.5 mio contracts, www.gdv.de/wp-content/uploads/2015/07/GDV-Lebensversicherung-in-Zahlen-2015.pdf.

[43] Ch 7 above, pp 167 ff.

[44] Ch 9 above, pp 209 f.

[45] Ch 6 above, pp 137 f.

[46] See chs 6 and 7 above, p 139 and pp 153 ff and pp 169 ff.

early as 1930 that life insurance contracts enrich the beneficiary and are therefore gifts within the meaning of the anti-evasion provision.[47] But it is still contested whether the gift is equivalent in amount to the insurance sum that is finally paid to the beneficiary.[48] The Reichsgericht pointed out that a gift not only requires the enrichment of the beneficiary, but that the enrichment also has to originate from a designation by the donor. The Reichsgericht held that this was only the case for premiums paid by the contracting party, but not for the insurance sum, which in general is substantially higher.[49] Thus, the Reichsgericht had developed a position which is quite similar to current English law (section 10(7) Inheritance (Provision for Family and Dependants) Act 1975).[50]

b. Bundesgerichtshof 28 April 2010: The Last Redemption Value

Recently, in 2010, the Bundesgerichtshof expressly departed from this long line of case law. Interestingly, the Bundesgerichtshof developed a third evaluation method for the value of the complementary compulsory share with regard to life insurance. It found that any payment resulting from life insurance does not constitute a gift from the contracting party to the beneficiary, unless the value is equivalent to the fictional last redemption value that the contracting party would personally have been entitled to (*letzter fiktiver Rückkaufswert*).[51] This position had already been established by Swiss law, as the Swiss Civil Code states in Article 529 that:

> Where a life assurance claim maturing on the death of the deceased was established in favour of a third party by a disposition inter vivos or by a testamentary disposition or was transferred by the deceased during his or her lifetime to a third party without valuable consideration, such claim is subject to abatement at its redemption value.[52]

c. And the Remaining Revenues?

Hence, the insurance sum is not entirely subject to the complementary compulsory share (§ 2325 BGB), as the revenues (*Überschüsse*) cannot be challenged. Once more, the Bundesgerichtshof argued 'technically' and relied on the legal nature of gifts. The Court emphasised that the anti-evasion rule is exclusively applicable to assets that had once been at the disposal of the deceased. Therefore, a previously unattained right (by the deceased) can never be treated as a gift in the context of compulsory shares.[53]

[47] RG 25 March 1930, RGZ 128, 187, 188 f.

[48] But see for Austrian law, OGH 10 June 1997, (1997) *Österreichische Notariatszeitung* 394 ff; OGH 24 April 2003, (2003) *Österreichische Notariatszeitung* 340, 341. In both cases, the Austrian OGH held that the compulsory share has to be calculated on the basis of the insurance sum.

[49] RG 25 March 1930, RGZ 128, 187, 190.

[50] See chs 3 above III.E. and 14 above V.

[51] BGH 28 April 2010, BGHZ 185, 252, 254 ff.

[52] See further ch 9 above VI.B.

[53] However, the BGH decided otherwise with regard to § 134 InsO, the equivalent anti-evasion provision aiming at the protection of creditors. The BGH explains this difference with the fact that the insolvency rules aim at restoring the assets in nature ('real'), whereas the rules on forced heirship only offer a monetary claim and thus aim at only fictionally restoring the *status quo ante*; see BGH 28 April 2010, BGHZ 185, 252, 264 and ch 14 above, p 299 f.

This time, the Bundesgerichtshof remained silent on the obvious political dimension of its decision. Whereas the Court did not move one iota to alleviate the burden of compulsory shares in favour of charitable purposes, it found room for some alleviation in favour of 'provisional' purposes. The subtle 'technical' distinction between direct and indirect gifts, between the deceased's contribution and the extent of the beneficiary's enrichment, has finally promoted a profoundly 'political' issue. The partial exemption of revenues generated by a life insurance contract from the entitlement to a complementary compulsory share (§ 2325 BGB) is in full accordance with a general and well-established position under German law that the accumulation of wealth destined to provide for others (*Versorgungsvermögen*) should enjoy statutory support.[54] Since their introduction in the late-nineteenth century, life insurance contracts have been perceived as 'special' and have contributed to multifaceted conceptual changes in both contract law and succession law.[55] Even though the Bundesgerichtshof did not expressly refer to this tradition of 'leniency' on life insurance contracts, it is suggested that these political reasons genuinely explain why the Court—contrary to its otherwise 'adamant' support of the compulsory share[56]—explored options and finally found a way for at least creating a partial privilege for life insurance contracts with regard to compulsory shares.

One might add another argument explaining why 'providential purposes' should be different from 'charitable purposes' with regard to compulsory shares: the typical beneficiary of a life insurance contract is not a third party, but someone related to the deceased. In many cases, life insurance contracts do not conflict with compulsory shares, in particular if the beneficiary is the spouse or civil partner. Conflicts often arise when the deceased names his cohabitant or another companion as the beneficiary. In such cases, the Bundesgerichtshof makes a minimal correction to the fact that cohabitants enjoy no legal succession rights under German law,[57] by granting life insurance contracts a partial exemption from compulsory

[54] G Hager, 'Neuere Tendenzen beim Vertrag zugunsten Dritter auf den Todesfall' in H Ficker (ed), *FS E von Caemmerer* (Tübingen, Mohr, 1978) 128–31; A Röthel, *Ist unser Erbrecht noch zeitgemäß?* (Munich, Beck, 2010) A 44.

[55] In fact, the early recognition of contracts in favour of third parties (§§ 328, 331 BGB) with the inception of the BGB in 1900 is partially due to the emergence of insurance and insurance contracts in the 19th century; see further R Zimmermann, *The Law of Obligations* (Oxford, OUP, 1996) 34 ff. German law not only recognised contracts in favour of third parties *upon death* (§ 331 BGB), but also later confirmed that these contracts can be transferred 'other than by succession law', BGH 19 October 1983, (1984) *Neue Juristische Wochenschrift* 480, 481 and ch 8 above III.C.

[56] See BGH 10 December 2003, BGHZ 157, 182 and BGH 23 May 2012, BGHZ 193, 260.

[57] Cohabitants enjoy neither intestate rights, nor are they entitled to compulsory shares (see §§ 1924 ff, § 2303 BGB); but see for a comparative overview KGC Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law, volume 2. Intestate Succession* (Oxford, OUP 2015) 442, 504 ff.

shares. Nevertheless, this exemption to legal rights to compulsory shares is yet to be operated in a coherent way. As of now, the exception applies only to contracts in favour of third parties, that is to say when a contracting party designates a third person as a beneficiary in his or her insurance contract. However, it is inapplicable to gifts, which the contracting party donates *directly* to another person with the same intent.[58]

C. Interim Findings

As the short overview clearly demonstrates, the continental imperative of family rights remains under threat of circumvention, but continental jurisdictions have established effective anti-avoidance provisions that by and large successfully reintegrate some functionally equivalent instruments into the regime of compulsory shares. In general, family rights are more or less equally protected against wills, will-substitutes and lifetime gifts.[59] Notwithstanding the brief existence of an exemption for charitable transfers, and a partial exemption for revenues when transferred via life insurance contracts, it must be remembered that continental jurisdictions enforce family rights against will-substitutes in an effective as well as a largely coherent manner. They are all equipped with well-functioning anti-evasion provisions, and respective claims are continuously and successfully brought to court. As the anti-evasion provisions mainly target lifetime gifts made before death, will-substitutes do not represent a genuine challenge to them.

However, it seems remarkable that one kind of will-substitute—the life insurance contract—challenges the otherwise precisely defined and neatly 'closed' system of family rights as provided for by succession laws of almost all continental jurisdictions. Germany, Switzerland, Austria and France offer a range of legal responses, grounded in statutory as well as case law, ranging from a large or at least 'unclear' exemption (France) up to no exemption at all (Austria). The fact that life insurance is dealt with so differently, despite the fact that the anti-evasion provisions generally follow a similar structure, once again underlines the degree of influence exercised by policy—irrespective of the fact that these political reasons are not expressly stated but concealed in dogmatic arguments, as is the case in Germany.

[58] See Röthel, *Ist unser Erbrecht noch zeitgemäß?*, above n 54, A 46; Röthel, 'Umgehung des Pflichtteilrechts', above n 25, 174 f; P Windel, *Über die Modi der Nachfolge in das Vermögen einer natürlichen Person beim Todesfall* (Heidelberg, von Decker, 1998) 171; K Muscheler, *Universalsukzession und Vonselbsterwerb* (Tübingen, Mohr Siebeck, 2002) 119 ff.

[59] Under German law, a 'regular' claim for a compulsory share is directed against the heir. Conversely, the right to the 'complementary compulsory share' (*Pflichtteilsergänzung*) can result in a claim against the beneficiary of the transfer (§ 2329(1) BGB). It can also result in the claim being reduced or turned down where the beneficiary is no longer enriched (§§ 2329(1), 818(3) BGB). However, the 'complementary' claims are more likely to fail due to practical reasons. Whereas the existence of testamentary dispositions and their beneficiaries can easily be identified, transfers via lifetime gifts or will-substitutes may often remain unknown or at least require closer scrutiny, see ch 6 above, pp 151 f.

IV. Will-Substitutes and Default Rules on Interpretation

A. Default 'Divorce Rules' for Wills

From the family's perspective, another important and crucial issue of succession law is whether wills favouring spouses or civil partners remain valid in the event of divorce or annulment of the partnership. Generally, continental jurisdictions are reluctant to allow the remaining family members, for instance the deceased's children, to challenge the will on grounds of error (*Irrtum*) or misconception of an implied condition (*Fehlvorstellung über die Geschäftsgrundlage*). In particular, this is true of Austrian and Italian law.[60] Germany provides the counter-example, expressly granting statutory protection to the interests of the family by way of a statutory default rule. § 2077 BGB states as follows:

> (1) A testamentary provision in which the testator has made provisions in favour of his spouse becomes ineffective if the marriage is dissolved before the testator's death …
> (2) A testamentary disposition in which the testator has made provision for the person to whom he is engaged is ineffective if the engagement was dissolved before the testator's death.
> (3) The disposition is not ineffective if it is to be presumed that the testator would have made it even in such a case.[61]

By doing so, the German legislature has placed a 'special' emphasis on the position of children and of surviving parents, as they do not have to prove the relevance of the marriage or partnership for the deceased's decision-making process. Instead, they can simply rely on the statutory rule of § 2077(1) BGB, with the result that they are—unless the contrary is proven—entitled to the estate under the rules of intestacy.[62]

B. Non-Applicability to Will-Substitutes

Thomas P Gallanis has identified within US law a 'major trend' of extending default rules concerning wills to will-substitutes. In particular, he has pointed to

[60] Austrian, Italian and Swiss law know no express statutory provision, and the courts only seldomly rule in favour of the family. In Austria, this may change in the future (see the proposal for reform of § 726 AGBG). Concerning Italian law, I have to rely on the observations by G Christandl. Interestingly, the Italian C Civ acknowledges a default rule concerning children born after the will (§ 687 C Civ), but not in the event of a subsequent divorce.

[61] The same applies to registered partners, § 10(5) *Lebenspartnerschaftsgesetz* (LPartG).

[62] §§ 1924 ff BGB; see further W Schlüter and A Röthel, *Erbrecht*, 17th edn (Munich, Beck, 2015) §§ 7 ff.

the reformed Uniform Probate Code, which expressly extends the 'divorce rule' to will-substitutes.[63] This question only arises in jurisdictions with comparable default rules such as the divorce rule concerning wills under German law. However, the position of German law is quite clear on this point and takes the opposite view on the applicability of the divorce rule to will-substitutes. In their decisions, German courts were especially concerned to underline the differences between wills and will-substitutes.

i. Bundesgerichtshof 30 November 1994: The Contractual Nature of Will-Substitutes

The Bundesgerichtshof had several opportunities to rule on the applicability of regulations governing the validity of wills or will-substitutes.[64] All the cases brought to the Bundesgerichtshof concerned life insurance, and the Court consistently denied the application of the divorce rule to the designation of the life insurance's beneficiary—with sometimes 'tragic' effects, as the following case illustrates. A husband had concluded a life insurance and named his 'wife' ('*die Ehefrau*'), as the primary beneficiary. He had also written a will and named his wife, as well as any subsequently born children as his testamentary heirs. They separated only two years later. During the divorce procedure, the husband died at the age of 33 of a brain tumor and—one is tempted to add 'of course'—without having altered the designation of the beneficiary of his life insurance contract. The insurance company thus paid the insurance sum to the widow, and the deceased's father claimed the sum back, mainly relying on an analogy to the divorce rule, which is also applicable if death occurs during the divorce proceedings.[65]

Once again, and perfectly in line with its earlier judgments, the Bundesgerichtshof expressly rejected the analogy,[66] and thus upheld its general rule that the provisions on wills are not to be applied to will-substitutes, such as transfers upon death via a life insurance.[67] The Court mainly invoked the legal nature of wills as

[63] § 2-804(b)(1)(A) of the Uniform Probate Code, ch 1 above V.A.

[64] BGH 17 September 1975, (1976) *Neue Juristische Wochenschrift* 290; BGH 1 April 1987, (1987) *Neue Juristische Wochenschrift* 3131; BGH 14 February 2007, (2007) *Neue Juristische Wochenschrift–Rechtsprechungs-Report Zivilrecht* 976, 977; see also BGH 29 January 1981, (1981) *Neue Juristische Wochenschrift* 984 and BGH 30 November 1994, BGHZ 128, 125.

[65] Following § 2077(1) 2, 3 BGB: 'It is equivalent to dissolution of marriage if at the time of death of the testator the requirements for divorce were satisfied and the testator had petitioned for divorce or consented to it. The same applies if the deceased at the time of his death was entitled to petition for the annulment of the marriage and had filed the petition'.

[66] BGH 30 November 1994, BGHZ 128, 125, 132.

[67] See earlier concerning the 'divorce rule' (§ 2077 BGB) BGH 17 September 1975, (1976) *Neue Juristische Wochenschrift* 290; BGH 1 April 1987, (1987) *Neue Juristische Wochenschrift* 3131; see later BGH 14 February 2007, (2007) *Neue Juristische Wochenschrift–Rechtsprechungs-Report Zivilrecht* 976, 977 and recently OLG Düsseldorf 16 October 2014, (2015) *Zeitschrift für Erbrecht und Vermögensnachfolge* 274, 275 as well as OLG Bremen 11 November 1958, (1959) *Versicherungsrecht* 689; OLG Düsseldorf 13 May 1975, (1975) *Der Betrieb* 1503; OLG Hamm 29 January 1975, (1976) *Versicherungsrecht* 142; LG Saarbrücken 16 April 1982, (1983) *Neue Juristische Wochenschrift* 180. See as well the rules concerning the revocation in cases of misrepresentation (*Anfechtung*, §§ 2078 ff BGB) BGH 10 December 2003, BGHZ 157, 79, 85 f.

unilateral dispositions in contrast to the contractual nature of transfers via a life insurance. Rules such as the divorce rule only represented assumptions on the hypothetical will of the deceased, without taking into account how third parties would have reasonably interpreted the disposition. Therefore, the application of such a unilateral interpretation rule would run contrary to the 'legal nature of the designation of the beneficiary' since it would fail to take into account the perspective of the contractual party and his or her understanding of the declaration.[68] Eventually, the Bundesgerichtshof added a practical argument. The application of the 'divorce rule' might lead to laborious litigation and would thus impair the effective and prompt handling of the insurance case.[69] Another argument for not applying the divorce rule to designations of beneficiaries in life insurance contracts is that the fate of the marriage or the civil partnership is merely an 'external' fact, which does not belong to the sphere of the insurance company and should therefore not affect its contract with the deceased.[70]

Though German courts have consistently denied the application of the divorce rule (§ 2077 BGB) to the designation of a beneficiary in a life insurance contract, they have pointed out that intestate heirs can still prove that the divorce had affected the basis (*Geschäftsgrundlage*, § 313 BGB) of the transfer and was therefore revocable.[71] However, there remains an important difference as to the burden of proof. Concerning wills, the assumption is in favour of the intestate heirs, and it falls upon the named beneficiary to prove the contrary—whereas as far as life insurance is concerned, the assumption is in favour of the designated beneficiary, and it is upon the intestate heirs to challenge the transfer.[72]

[68] BGH 14 February 2007, (2007) *Neue Juristische Wochenschrift–Rechtsprechungs-Report Zivilrecht* 976, 977: 'Denn die für die Auslegung einer letztwilligen Verfügung gebotene Prüfung des hypothetischen Erblasserwillens nach § 2077(3) BGB widerspricht der Rechtsnatur der Bezugsrechtsbenennung als einseitiger, empfangsbedürftiger Willenserklärung … Bei einer Erklärung im Rahmen einer vertraglichen Vereinbarung ist im Interesse des Vertragspartners, hier des Versicherers, weitgehend auf deren Wortlaut und darauf abzustellen, wie die Erklärung aus dessen Sicht zu verstehen ist'. ['This is due to the fact that the legal assessment of the testator's hypothetical will, as required for the interpretation of a testamentary disposition pursuant to § 2077(3) BGB, contradicts the legal nature of the designation as a unilateral declaration of intent requiring acknowledgment … In the interest of the contractual partner, ie, the insurer, a declaration through a contractual agreement is to be interpreted on the basis of its exact wording and on the basis of how it is to be understood from the contractual partner's perspective'].

[69] BGH 14 February 2007, (2007) *Neue Juristische Wochenschrift–Rechtsprechungs-Report Zivilrecht* 976, 977; see also BGH 1 April 1987, (1987) *Neue Juristische Wochenschrift* 3131: 'Außerdem soll der Versicherer im Interesse einer schnellen und reibungslosen Abwicklung des Versicherungsfalls nicht—mitunter schwierige—Auslegungsfragen entscheiden müssen, die sich aus einer entsprechenden Anwendung von § 2077 BGB ergeben können'. ['Moreover, in the interest of the prompt and smooth processing of the insurance case, the insurer should not be required to decide on—sometimes difficult—interpretation issues, which may arise because of the corresponding application of § 2077 BGB'].

[70] See G Otte in *von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Berlin, De Gruyter, 2012) § 2077 para 31.

[71] BGH 1 April 1987, (1987) *Neue Juristische Wochenschrift* 3131 f; BGH 30 November 1994, BGHZ 128, 125, 132.

[72] See Otte, above n 70, § 2077 para 31.

ii. And What About Succession Contracts?

Considering the strong emphasis that the Bundesgerichtshof placed on the contractual nature of the life insurance contract, and the non-contractual nature of wills, it might seem contradictory that the BGB expressly expanded the applicability of the divorce rule to binding dispositions (*vertragsmäßige Verfügungen*) made by way of a succession contract (*Erbvertrag*, see §§ 2274 ff BGB). § 2279(2) BGB states that '[t]he provision of section 2077 also applies to a contract of inheritance between spouses, civil partners or engaged persons … to the extent that a third party is provided for'.[73] However, the applicability of the divorce rule (§ 2077 BGB) to inheritance contracts between spouses (§ 2279(2) BGB) can be realigned with the non-applicability of § 2077 BGB to life insurance contracts: a transfer via life insurance contract and a transfer via inheritance contract differ insofar as the life insurance contract is a contract between the contracting party and a third party different from the beneficiary, whereas the inheritance contract between the contracting party and his or her spouse is not. Thus, it is not the contractual nature of the will-substitute alone that explains the non-applicability of the divorce rule to will-substitutes, such as life insurance contracts, but it is also the fact that life insurance contracts are contracts with a third party.

iii. Will-Substitutes as Functional Equivalents?

Even though there is no reasonable doubt about the *status quo* of German law concerning the non-applicability of the testamentary default rules to will-substitutes, legal scholars increasingly plead otherwise. Their main argument is that the designation of a beneficiary in a life insurance contract is the 'functional equivalent' of a testamentary disposition and should therefore be treated in the same way.[74] However, it still needs to be established to what degree wills and will-substitutes are indeed 'functional equivalents'. As far as the application of the divorce rule is concerned, it would seem that the functional similarity is mainly based on the assumption that designations in life insurance contracts in favour of a spouse or civil partner are generally motivated by the same reasons as a testamentary disposition.[75] However, legal scholars such as Dieter Leipold acknowledge that, unlike with 'pure' testamentary provisions, in the case of life insurance contracts,

[73] See further Schlüter and Röthel, above n 62, § 23 para 11.

[74] See D Leipold in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 6th edn (Munich, Beck, 2013) § 2077 para 38: 'Funktional kommt jedoch die Benennung des Ehegatten als Bezugsberechtigten durchaus einer letztwilligen Verfügung gleich, und sie beruht im Regelfall im selben Maße auf der familienrechtlichen Bindung'. ['However, the designation of a spouse as a beneficiary is indeed functionally equivalent to a testamentary disposition and, as a rule, relies to the same extent on relations defined by family law'.] See also R Stürner in *Jauernigs Kommentar zum BGB*, 15th edn (Munich, Beck, 2014) § 2077 para 8; J Petersen, 'Die Lebensversicherung im Bürgerlichen Recht' (2004) 204 *Archiv für die civilistische Praxis* 832, 852 ff.

[75] Leipold, above n 74, § 2077 para 38.

the interests of third parties (insurance companies) should be taken into account, as well as practical issues such as the prompt and effective handling of the insurance case.

V. Conclusions: Will-Substitutes from the Perspective of the Family

If there was one single conclusion and one way to tie up the loose ends, I would feel tempted to summarise that, from the perspective of the family, and as far as continental jurisdictions are concerned, will-substitutes do not present a major 'danger'. Quite the contrary. The statutory rules on compulsory shares not only protect the family members against wills, but also quite similarly and effectively against 'pure' lifetime gifts, even if such gifts, as well as will-substitutes, have been made many years before death. And will-substitutes are treated as lifetime gifts and therefore share their fate, as they are all subject to claims for additional compulsory shares, redemption or claw-back (see section III above). This is very telling of the position of the family in continental succession laws. The high value that continental jurisdictions assign to the family within succession law is reflected in the decision to grant the family members rights against wills, but also against lifetime gifts and will-substitutes. The protection of the family appears a central idea of succession laws and is therefore extended to other, similar, transactions that affect the family rights in a comparable way. This observation underlines both the central position that the family occupies within continental succession laws, and the strong link between succession law, the law of lifetime gifts and family law. Or, vice versa, the civilian jurisdictions generally aspire to enforce family rights notwithstanding the legal nature of a gratuitous transfer and the time at which it is effected, be it via will, will-substitute or lifetime gift.

This is at least true regarding *compulsory* family rights. Compulsory family rights such as the right to compulsory shares are more or less likewise exercised on wills and on will-substitutes. Civil law jurisdictions show a strong concern for anti-evasion strategies and have developed effective anti-evasion provisions that ensure the reintegration of transferred wealth into the calculation of compulsory shares.

But the image changes if one looks at *default* rules aimed at the protection of the family. At least as far as the German divorce rule is concerned, we have seen that the general wish to exercise family rights against will-substitutes does not lead to the corresponding application of default rules to will-substitutes. This might seem contradictory, given the strong support of family interests in the context of compulsory shares. However, this is based on a coherent view of will-substitutes. In both cases, will-substitutes are viewed as lifetime gifts and not as wills. As for compulsory shares, will-substitutes are taken into account in their calculation.

With regard to default rules on the interpretation of wills, these norms are not applicable to will-substitutes. What remains to be resolved and what does not fit in this picture is the incoherent assessment of life insurance. Interestingly, the most used will-substitute in civil law jurisdictions is also the will-substitute that is most likely to benefit from exemptions. If there are policy reasons that support a privilege for providential transfers, then this privilege should be applied to any transfer aiming to provide maintenance for the beneficiary.