The Principle „ SEMEL HERES, SEMPER HERES“ and Its Reflection in the Civil Law in the Territory of the Czech Republic from 19th to 21st Century

JUDr. Pavel Salák jr., Ph.D
Masaryk univerzity , Brno
Faculty of Law, Department of the History of the State and Law

Contents

Overview of the development of civil law in territory of the Czech Republic

Roman law and legal regulation of the law of succession in civil codes from 19th-21st century in general – influences and differences

Semel heres, semper heres

-Origins and importence of this principle

-Legal regulation in ABGB and Proposal of Civil Code 1937

-Legal regulation after 1948

Fideicommisary substitution /sucession

- Roman Law regulation of substitution
- Fideicommissum Hereditatis

-New Civil Code 89/2012 Coll. and remainders of roman law influence

Overview of the development of civil law in the territory of the Czech Republic

19th Century – **ABGB** 1811/in force 1812 until 1949, 1950, 1965/
1918 Czechoslowakia – Act 11/1918 Coll. „The Reception Rule“, art. *2 “All existing laws and regulations are still remaining in force.”*
Bohemia, Moravia and Silesia – ABGB
Territory of Hlučín – BGB, until 1920, then ABGB
Slowakia, Subcarpathian Ruthenia – Hungarian custom law

Proposition of Civil Code 1937 – being prepared for all territory from 20^{s} , 1937 text ready for initiating the legislative procedure, the legislative procedure was stoped in 1938 / *the Munich Dictate/*

Act No 141/1950 Coll., „Middle Civil Code“

Act No. 40/1964 Coll. „Socialist Civil Code“
- this act was more „socialistic“ then the exemplary civil code for states of USSR, abandoned traditional terminology /e. g. locatio operis/ and traditional institutes /e. g. possessio, usucapion/
Large novelization in 1982 and 1991 x in force until 31.12. 2013

New Civil Code – in force from 1. 1. 2014 (**Act No. 89/2012 Coll.**)

Correspondences and differences of Roman law and czechoslowak civil codes I. ABGB, Proposition 1937

Characteristics of the Law of Succession – cumulation of property, testator’s will preferred, fundamental institutes of the law of succession: testament, legacy, etc.

X

The law of succession has only proprietary features, new ground for succession – pact of succession, combination of grounds for succession possible /the principle Nemo pro parte testatus, pro parte intestatus decedere potest abandoned/, autonomy of testator’s will preferred /no Falcidian Portion concerning legacies/

Correspondences and differences of Roman law and czechoslowak civil codes II.

Act No 141/1950 Coll. Middle Civil Code

Two grounds for succession /intestate and testamentary succession/, legacy, falcidian portion vs. in adversary position /legacies can not represent more than. ¼ of the decedent's estate/, substitution of heir possible

X

preference of family relationship – the law of succession is in the legal regulation separated from real rights and placed behind the law of obligation, preference of intestate sucession over the testamentary one, no privileged testaments, no possibility of condictions in testament /apart from collation and creating a servitude/, position of forced heirs strenghtened

Act No. 40/1964 Coll.

Two grounds for succession – intestate and testamentary succession, posibility of collation

X

legacy and substitution of heir are no more possible, testament is de facto not binding – the treaty of all heirs is essential for the the probate proceedings, even more formal /date required for validity of testament/

SEMEL HERES, SEMPER HERES

- connotation with religious dimension of roman heirship /sacra privata/
- heirship is not only the question of asset /changed by Pretor s edict/

Consequences

- heir can not change the decision of acceptance or non-acceptance of the estate
- resolutive condictions in testament not possible

-heir fully responsible for the debts of decedent

D 28,5,89 Gaius l.S. de Cas.

...Titius, antequam stichus ex testamento heres exstiterit, heres esse non potest, cum autem semel heres exstiterit servus, non potest adiectus efficere, ut qui semel heres exstitit desinat heres esse.

....for Titius cannot be the heir before Stichus becomes such under the will, and as the slave has at once become the heir, he who was added cannot share in the estate; so that where the slave becomes the heir, the other ceases to be one. **(Scott)**

ABGB and Proposition of 1937 and principle „SEMEL HERES, SEMPER HERES“

- resolutive conditions in testament possible / 696, 608 ABGB/

696 ABGB: *“Condition“ is called an event on which a right depends. Condition is securing or… Is suspensive if the right comes into force after its fulfillment;* ***is resolutive if the right by its fulfillment ceases to exist.*** *Such arrangment is called*

608 ABGB „fideicommissary substitution“ /svěřenecké náhradnictví/ /substitution in trust/,
The testator can order the heir to transfer the decedent's estate after his death ***or in other cases to another appointed heir****. This arrangement is called a fideicommissary substitution. Fideicommissary substitution implicitly contains general substitution.*

570 Proposal Civil Code 1937
The testator may order, that the decedent's estate shall after the death of the heir or in other cases /e. g. five years/ pass to other person.

Civil Code 1950 a Civil Code 1964 and principle „SEMEL HERES, SEMPER HERES“

Civil code 1950 – Act No. 141/1950 Coll.

550 **:** *Condition, restricting appointmet of an heir is void. Testamentary provision, stating that the heir shall acquire the decedent's estate only temporarily or later than at the day of the testator's death, as well as testamentary provision about person on whom the decedent's estate shall pass after the death of the heir… is void.*

Civil Code 1964 Act. No. 40/1964 Coll.

478**:** *„Any condition attached to the testament have no legal consequences; it does not apply to the provision of 484 sec. 1 sentence 2.“* (collation)

Resolutive condition in Roman Law

Military testament was exemption of nearly all rules of roman law of succession

Dig. 29.1.15.4
Ulpianus 45 ad ed.
Miles ad tempus heredem facere potest et alium post tempus vel ex condicione vel in condicionem.

A soldier can appoint an heir for a certain time, and another after that time, or he can appoint one on the fulfillment of a certain condition, or another after the condition has been complied with. (**P. C. Scott**)

Military testament as inspiration:
Justinian
 - beneficium inventarii

Modern law
-…Miles enim pro parte testatus, pro parte intestatus decedere potest (D 29, 1, 6 Ulpianus 5 ad Sabinum)
-Possibility of combination of more testaments (Dig. 29. 1. 19. pr. Ulpianus 4 disp.)
-No existing of Falcidian portion by legacy

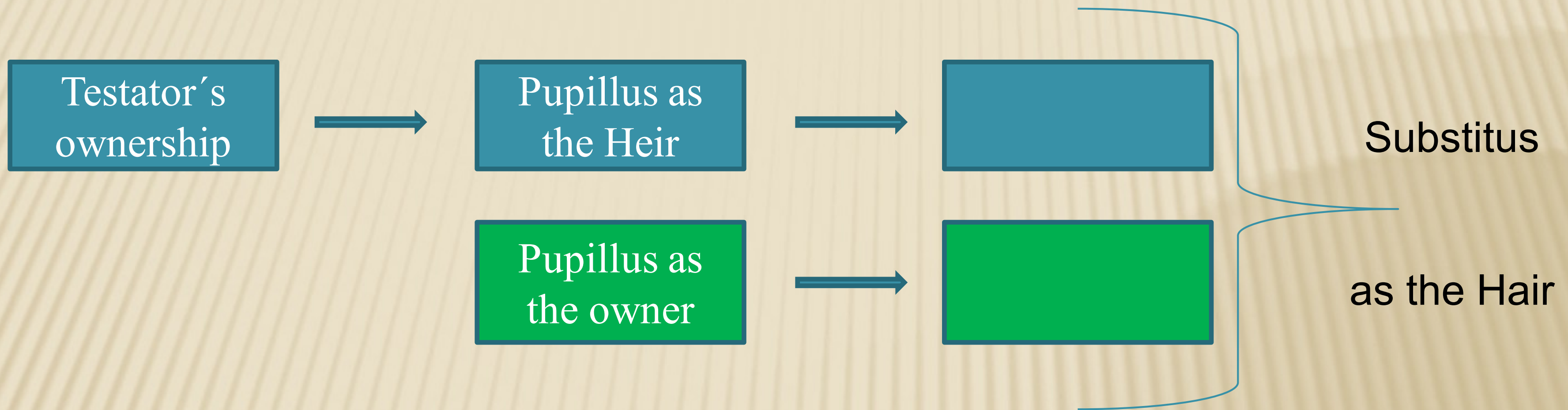
Fideiccommissary substitution (substitution in trust) I.

Substitution – appointment of an substitute for case that the appointed heir will not accept the decedent’s estate.

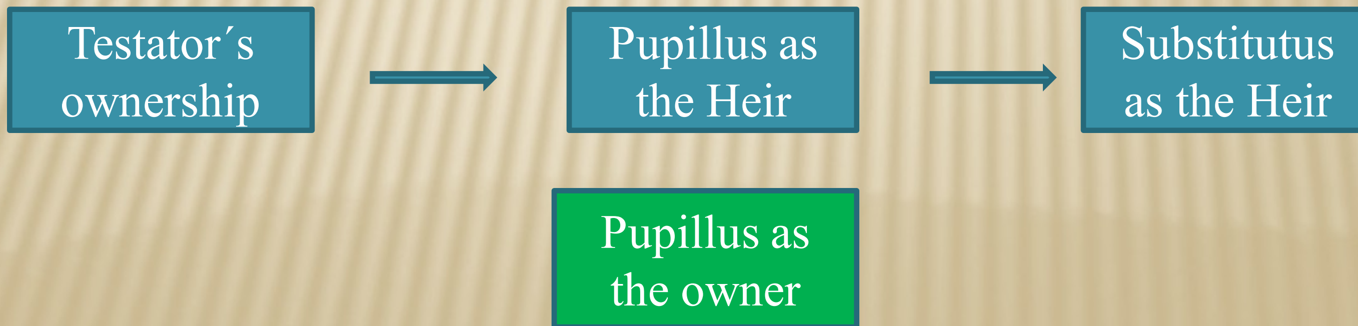
Roman law distinguishes
substitutio vulgaris *– general substitution*
pupilary substitution *– on behalf of minors*
quasi pupilary substitution *– on behalf of insanes*

fideicommissary substitution –origins in pupilary or quasi pupilary substitution?
609 – how the parents can established the substituts for their children
616 - the fideicommissary substitution to the insane loses its power, if it is proved that he was of sound mind in the time of his last mortis causa disposition
608 in the end - Fideicommissary substitution implicitly contains general substitution.

Substitutio pupillaris in Roman Law



„Substitutio pupillaris“ in 609 ABGB



Fideiccommissary substitution (substitution in trust) II.

608 ABGB „fideicommissary substitution“ /svěřenecké náhradnictví/ /substitution in trust/,
The testator can order the heir to transfer the decedent’s estate after his death ***or in other cases to another appointed heir****. This arrangement is called a fideicommissary substitution…*

German denomination of 608 is „Fideikommissarische.“ Where does it come from?

Fideicommissum hereditatis – universal trust

Gai Inst. II, 252:

Olim autem nec heredis loco erat nec legatarii, sed potius emptoris. tunc enim in usu erat ei, cui restituebatur hereditas, nummo uno eam hereditatem dicis causa uenire; et quae stipulationes inter uenditorem hereditatis et emptorem interponi solent, eaedem interponebantur inter heredem et eum, cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo, cui restituebatur hereditas, ut quidquid hereditario nomine condemnatus fuisset siue quid alias bona fide dedisset, eo nomine indemnis esset, et omnino si quis cum eo hereditario nomine ageret, ut recte defenderetur; ille uero, qui recipiebat hereditatem, inuicem stipulabatur, ut si quid ex hereditate ad heredem peruenisset, id sibi restitueretur, ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi.

Formerly, however, he did not occupy the position of either heir or legatee, but rather that of a purchaser; for in those days it was customary for the party to whom the estate was transferred to give a coin as an evidence of the purchase of the same; and the stipulations usually entered into between the vendor and the purchaser of an estate were accustomed to take place between the heir and the party to whom the estate was conveyed, that is to say, as follows: The heir stipulated with the party to whom the estate was transferred that he would be indemnified for anything which he might be compelled to pay on account of the estate, or might otherwise pay in good faith; and if anyone were to bring an action against him on account of the estate, that it would be properly defended; and, on the other hand, the party who received the estate stipulated that if anything should come into the hands of the heir which belonged to the estate it should be delivered to him, and also that he should be permitted, either as the agent or attorney of the heir, to bring any actions which the latter was entitled to bring in his own name. (**S. P. Scott, *The Civil Law*, I, Cincinnati, 1932**)

The heir is in position of the heir – i. e. responsible for the debts X this responsability is transferd on the person entitled to receive the decedent's estate according to a universal trust (hereinafter referred to as „legatee") by mutual stipulations.

Trebellian Decree of Senate /56 AD/ – actions available to and against the heir are passing on the legatee in case the property was transfered to the legatee. Pretor's utile actions passed on the legatee as well – it was universal succession de facto, therefore universal trust.

Pegasian Decree of Senate /75 AD/ – because the heirs were hesitant to accept the decedent's estate if there was a large legacy, the rule of Falcidian portion applies to the universal trust as well.
If the legacy exceeds ¾ of the decedent's estate – Trebellian Decree of Senate does not apply, is necessary to use mutual stipulations.
If the legacy does not exceed ¾ of the decedent's estate – Trebellian Decree of Senate applies and the legatee is in position of co-heir.
If the heir is hesitant to accept the decedent's estate – can be compelled to do so by the legatee vs. The heir can neither profit of it nor sustain damage by it – the legatee will receive the whole decedent's estate.

Codification of Justinian – simplification, return to the Trebellian Decree of Senate, but the heir has claim to Falcidian portion and he can be compelled to accept the decedent's estate by the legatee.

Legatee is not an heir – therefore is possible to order the transfer of decedent's estate in any moment, not only if the heir dies, it is possible to attach resolutive condition.

The principle Semel heres, semper heres does not apply to the legatee.

The action were related only to proprietary rights (assets and debts) vs. The heir was always the heir – private ceremonies, religious duties, etc. still belonged to him.

X

ABGB 531 – decedent's estate is proprietary entity only

608 ABGB „fideicommissary substitution“ /svěřenecké náhradnictví/ /substitution in trust/,
The testator can order the heir to ***transfer*** the decedent’s estate after his death or in other cases to another appointed heir…

Proposal 1937 570
The testator can order, that decedent’s estate shall the after his death or in other cases ***pass*** to another person.

Civil Code 2012 in 1512 - the same as the Proposal Civil Code 1937

ABGB: fideicommissary substitution“ /svěřenecké náhradnictví/ substitution in trust/,
x
Osnova + Civil Code 2012 : fideicommissary succession/ svěřenské nástupnictví / succession in trust

Last remainder of roman law in the Proposal 1937 and the New Proposal:
Fideicommissary succession implicitly contains substitution.

Thank you for your attention.

Pavel Salák jr.