



U.D.P. 1961 - Etudes: XLIII
Forme du testament - Doc. 2

U n i d r o i t

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ

E T U D E

sur la forme du testament dans le droit comparé

"E x t r a i t

of the Inheritance Code containing

the dispositions regarding Wills"

(12th December 1958)

Octobre 1961

Chapter 9

Regarding The Right to Execute a Will Or to Receive Benefit Under a Will.

Art. 1. A person, who has reached 21 years of age may, by a Will, make disposition +) of his estate. A Will may also be executed by a minor who is either married or has been married or who after reaching the age of 16 years wishes to make disposition of property over which he himself has control.

Art. 2. Disposition to a person other than one, who is born at the time of the testator's death or is then conceived and subsequently born alive, shall be without effect.

Irrespective of what is now stated, disposition is valid, according to which the future issue entitled to inherit, of anyone who according to the first section has the right to benefit under a Will, shall receive property in full ownership latest at the testator's death or when another who shall enjoy some limited right to the property, dies or his right otherwise becomes extinguished. In such a disposition no difference shall be made between brothers and sisters who are not born or conceived at the testator's death.

Art. 3. Regarding the right of foreign nationals to benefit under a Will in the Realm the provisions laid down regarding foreigners' right to inherit are applicable.++)

Chapter 10

Regarding the Execution and Revocation of Wills.

Art. 1. A Will shall be drawn up in writing with two witnesses. In their presence at the same time the testator shall

+) "Disposition" means hereinafter in this Code bequest as well as devise.

++) See Chapter 1 art. 3 of this Code.

sign the testamentary instrument or acknowledge his signature thereto. The witnesses shall attest and subscribe the instrument with their names. They shall have knowledge of the instrument being a Will, but the testator is free either to disclose or not the contents thereof to them.

Art. 2. Witnesses to a Will should beside their names give their occupation and place of residence. They should also attest the instrument regarding the time of witnessing together with other circumstances which may be of importance with regard to the validity of the Will.

Should the witnesses have attested on the testamentary instrument that the execution of the Will has been effected in accordance with what is stated in article 1, the attestation clause shall, in case of dispute, be given credence, provided circumstances do not occur which detract from the authenticity of the certificate.

Art. 3. Where anyone on account of illness or other emergency is prevented from executing the Will in accordance with the provisions of article 1, he may dispose of his estate by word of mouth before two witnesses or alternatively without witnesses through the medium of a document written and signed in his hand.

Such a Will shall be null and void if the testator subsequently during a period of three months has had an opportunity to dispose of his estate in accordance with the provisions of article 1.

Art. 4. A person under 15 years of age or one who is insane or feeble-minded or on account of any other disturbance of the mental capacity lacks the insight of the meaning of the attestation by witnesses, may not be taken as witness to a Will, neither may the testator's spouse nor one who is a direct and lineal ascendant or descendant of consanguinity or affinity or is the testator's brother or sister or who on account of an adoption stands in a corresponding relationship to the testator.

A person may not be admitted a witness when a Will disposes in his favour, in favour of his spouse, or of anyone who is related to him by consanguinity or affinity or adoption of a degree just mentioned. Appointment as executor of a Will does not constitute incompetency to be admitted a witness.

Where a witness to a Will is cited as testimony in legal proceedings that which is stated regarding such testimony in the Act of Court Procedure is applicable.

Art. 5. Where a testator has, in the manner prescribed for the execution of a Will, revoked his dispositions or destroyed the testamentary instrument or otherwise plainly announced that the disposition is no longer the expression of his last Will, the disposition is without effect.

An engagement not to cancel a Will is not binding.

Art. 6. Where anyone wishes to make a codicil to his Will in connection with the revocation of a particular disposition or otherwise, that which is stated with regard to the execution of a Will shall apply.

Art. 7. Where anyone has, through a unilateral revocation or alteration of a mutual Will, fundamentally infringed the postulations for the mutual disposition, he loses his right on the basis of the Will.

Chapter 11

Regarding the Construing of a Will.

Art. 1. Such construing shall be given to a Will which can be considered as being consistent with the wishes of the testator; and the rules laid down in articles 2 - 9 below shall accordingly be applicable only in so far as, with regard to the purpose of the disposition and other circumstances, nothing else shall be considered to be inferred from the disposition.

Where a Will through error in writing or otherwise as a result of a mistake has acquired other contents than intended by the testator, it will nevertheless be put into effect, in case the correct meaning can be established.

Art. 2. A legacy shall proceed from the residuary estate and not be counted from a specific share of the estate.

Art. 3. If all legacies can not be effected, legacies which concern particular property shall have the preference over others, but otherwise abatement shall be made in proportion to the value of the legacies.

Art. 4. Where a disposition concerns a particular property and it is not found in the estate, the disposition shall be without effect.

Art. 5. Where particular property regarding which disposition has been made, on account of mortgage or otherwise is encumbered by the right of pledge or other right, the legatee shall not enjoy compensation as a result thereof.

Art. 6. If the testamentary beneficiary⁺⁾ dies before his right materializes, or the Will can not otherwise be effected as far as he is concerned, his descendants shall take his place, where they should have been entitled thereto if it had been a question of inheritance from the testator.

Art. 7. Where disposition is made regarding the entire estate or of everything which does not constitute the legal share of the issue (legitim) and the Will can not be effected with regard to a particular testamentary beneficiary

⁺⁾ By "a testamentary beneficiary" means hereinafter in this Act a person who is a legatee or a residuary legatee, or who else receives any other benefit under a Will.

and where nothing else follows from article 6, the portions of the residuary legatees shall be increased to a corresponding extent.

Art. 8. Where anyone has made a Will in favour of his betrothed or his spouse and the betrothal or marriage is afterwards dissolved otherwise than by the death of the testator, the disposition shall be null and void. The same law applies where anyone has made a Will in favour of his spouse and such a case arises as is provided for in Chapter 3, article 8 (of this Act).

Art. 9. Where a specific purpose is stipulated concerning property, which is allotted to a particular heir or testamentary beneficiary, he is duty bound to give effect to the disposition. In other cases the specific stipulation shall be effected from the residuary estate.

Art. 10. With the word legacy shall be understood a special favour given in a Will, such as a particular thing, or a certain amount of money or a right of enjoying the use of property (usufruct) or the right to enjoy interest or yield therefrom.

A residuary legatee is one, whom the testator has placed in the position of an heir, by awarding to him the estate in its entirety, a certain share in the estate or the excess thereof.

Chapter 12

Regarding the Testamentary Beneficiary's Right in Certain Cases.

Art. 1. Where a disposition is made by Will to the effect that property due to a surviving spouse as heir or as residuary legatee shall, after the cessation of the right of the spouse, pass to another, the provisions laid down in Chapter 3 of this Act shall have corresponding application, provided nothing different follows from the Will.

Art. 2. Where anyone has through a Will received the right of usufruct to property +), to which the right of ownership at the death of the testator or later shall devolve to another, the provisions of articles 3 - 9 below are applicable, provided nothing different follows from the Will.

Art. 3. The one having the right of usufruct administrates the property and enjoys the yield thereof. In the administration he shall also observe the owner's right and best interest. The property may not be mixed together with other property, unless the expedient application thereof occasions it.

The one having the right of usufruct shall bear all necessary expenses for the property, which ought to be paid from the yield during his time of possession.

Art. 4. Chattels, which are of no special value to the owner, may be disposed of by the person enjoying the right of usufruct. In case there are special reasons for the disposal or pledging of other chattels and the owner's co-operation thereto can not be obtained, the Court can, on application, authorize the person enjoying the right of usufruct to take the steps. The person enjoying the right of usufruct may give notice of claims, and he may also receive payment for them.

The right of usufruct may not be assigned to anybody else.

Art. 5. Capital sums shall be made interest bearing by the person enjoying the right of usufruct in such manner as is prescribed for the means of persons under age, unless the owner, or where his consent can not be obtained, the Court has conceded otherwise. Without such permission that which has been placed in farming or other trade or business may again be made use of for the same purpose, and smaller amounts which otherwise have been received for sold chattels may be used for the purchase of property of the same kind.

+) A right that includes the use and the enjoying of the property.

Art. 6. The owner may not without the consent of the person having the right of usufruct alienate or otherwise dispose of the property. Concerning real estate of the right to a building site, the consent shall be given in writing and be attested by two witnesses.

Where consent can not be obtained, the Court may on application permit the measure where reason therefor exists.

Where the owner without the necessary consent has alienated or else disposed of property, the measure is null and void if the person having the right of usufruct so demands.

Art. 7. Property which is subject to the right of usufruct may not be taken in distraint for the owner's debt, unless, on account of mortgaging or otherwise, there is a lien therefore on it or there is a question of the debt of the testator, for which the owner is liable according to the provisions of Chapter 21.

Art. 8. That which has taken the place of property which was subject to the right of usufruct, shall belong to the owner.

Art. 9. If the person enjoying the right of usufruct through neglect of the property or through other improper act obviously jeopardizes the owner's interest, the Court may on application direct him to give security for the property or order that it shall be placed under the care and administration of a trustee, referred to in Chapter 18 of the Code of Parentage.

For damage, caused deliberately or through carelessness to the owner by the person enjoying the right of usufruct, compensation shall be paid when the right of usufruct ceases or the property is placed under the custody and administration of a trustee.

Art. 10. Where it has been provided through a Will that a legacy shall go to two or more in succession and provided nothing else follows from the Will, the provisions of article 9 shall have a corresponding application if any of them, as is stated therein, jeopardizes the interest of the successive testamentary beneficiary, or causes him damage.

Art. 11. Where anyone according to the provisions of a Will shall enjoy yield from the property belonging to the estate, and the property shall be placed under special custody for the protection of his rights, it shall, where nothing different follows from the Will, be placed in the hands of an administrator as provided for in Chapter 18 of the Code of Parentage.

Chapter 13

Regarding the Nullity of a Will.

Art. 1. Where a testator was not competent to dispose of his estate by bequest or devise or if the Will is not executed in legal form, it shall be null and void. In cases stated in Chapter 10, article 4, section 2, the Will will; however, be invalid only so far as that part provided for therein is concerned.

Art. 2. A Will shall not be valid, which has been executed under the influence of insanity or feeble-mindedness or other disturbance of the mental capacity.

Art. 3. Where anyone has compelled the testator to execute a Will or prevailed upon him thereto through the abuse of his want of judgement, weak-willedness or position of dependence, the Will shall be null and void.

The same law applies if the testator has been fraudulently inveigled to execute the Will or if he has otherwise been in error and this has provoked his decision to execute the Will.

Chapter 14

Regarding Probate, Certification and Contesting of a Will.

Art. 1. A Will shall be offered for probate in Court within six months from the time when the testamentary beneficiary gained knowledge of the testator's death and of the disposition made in his favour.

Where anyone on the basis of a Will shall enjoy the right after another person and the Will has not been offered for probate in accordance with what is stated in the first section of this article, presentation for probate with legal effect may take place within the time there stated, after he gained knowledge of the fact that the right of the previous testamentary beneficiary ceased.

Offering a Will for probate is valid for the benefit of any testamentary beneficiary, for whom the time has not run out.

Art. 2. The presentation for probate is made in the Court having jurisdiction in the place where the testator would have had to plead a case regarding his person, or, if a competent Court does not exist, before the Magistrates' Court of Stockholm.

When offered for probate the Will should be produced in the original and be included in the court records. Where the person who wishes to offer a Will for probate does not have the Will in his possession or it is made by word of mouth, the presentation of it for probate is made through notification of the disposition.

Art. 3. A testamentary beneficiary on whose behalf the Will has not been offered for probate according to the rules contained in articles 1 and 2, shall lose his right against an heir, who has not relinquished his plea to contest it.

Art. 4. After a Will has been offered for probate in Court, the Will shall be served upon an heir by the handing over of a court certificate showing the Will having been offered for probate as well as a certified copy of the testamentary instrument or, with regard to a Will executed by word of mouth, of the court record of the hearing of the witnesses to the Will or by other written statement regarding the contents of the Will.

Where a testator as nearest heirs leaves, besides a spouse, next-of-kin referred to in Chapter 3, article 1, the Will may so far as the next-of-kin is concerned, be served upon those who at the time of notification are the nearest heirs of the testator.

Where there is more than one testamentary beneficiary a serving on the heir that is arranged by one of them, shall hold good even for the others.

Art. 5. Where an heir wishes to pretend that a Will is null and void according to Chapter 13, he shall institute proceedings in a Court for the contest thereof within six months after the instrument was served upon him in the manner prescribed in article 4. If this time has run out, the right to take action in Court is forfeited.

How to obtain a modification of a Will for claiming a portion-in-law (legitim) is dealt with in Chapter 7.

Chapter 15

Regarding the Forfeiture of Right to Inherit or to Benefit under a Will.

Art. 1. No one can be an heir, or benefit under a Will, of a person, whose life he has deliberately taken through a criminal act.

Where anyone thus takes the life of one, who is the heir or testamentary beneficiary of another, he shall not have a better right to inherit from the latter or to benefit under his Will than if the murdered party had lived.

Art. 2. Where anyone, through force, inveiglement or abuse of the want of judgement, weak-willedness or the position of dependence of the testator has caused the testator to execute or revoke a Will, or to desist from so doing, he forfeits the right to inherit from this person or to benefit under his Will, unless special reasons exist to the contrary. The law is the same where anyone has deliberately destroyed or withheld a Will.

Art. 3. What is stated in articles 1 and 2 regarding the committing of a criminal offence is also valid for the person, who has taken part in the crime in the manner referred to in Chapter 3, articles 4 and 5 of the Criminal Code.

Art. 4. Where anyone has forfeited his right to inherit, a succession shall be distributed as if he has died before the decedent.

Chapter 16

Regarding Limitations of Action in respect of the Right to Inherit or to Benefit under a Will.

Art. 1. If, at the taking of the inventory, the decedent's heir whose name is known resides at a place unknown, the person in charge of the estate shall notify the Court. Upon such notification or at the time when this fact otherwise becomes known, the Court shall immediately cause a notice to appear in the Official Gazette stating that a share in the decedent's estate has devolved upon the missing heir and urging him to claim his share in the estate within five years from the date of the notice in the Gazette. The name of the missing heir shall appear in the notice.

When applying the provisions of the preceeding paragraph in cases referred to in article 1 of Chapter 3, the right due the heirs of the predeceased spouse in the estate of the surviving spouse shall be treated as a right to inherit from the surviving spouse.

Art. 2. If, at the taking of the inventory, it cannot be established whether the decedent has been survived by an heir who is entitled to the estate to the exclusion of the Public Estate Trust or another heir or who is co-heir with another heir whose name and address is known, the Court, upon being notified by the person in charge of the estate or at the time when this fact otherwise becomes known, shall immediately cause a notice to appear in the Official Gazette giving details of the estate and urging the heirs unknown to claim their share in the estate within five years from the date of the notice in the Gazette. These provisions shall also apply where at the taking of the inventory the existence of an heir is known but his name and place of residence are unknown.

Art. 3. If a testamentary beneficiary is unknown or his place of residence is not known, what is laid down in art. 1 regarding notification and publication of a notice on the estate shall have corresponding application in so far as the testamentary disposition is concerned.

If a testamentary beneficiary's right shall take effect at any other time than at the death of the testator, notice may not be published in the Official Gazette before that time comes.

Art. 4. An heir or a testamentary beneficiary who is not obliged to claim his right according to the provisions of articles 1, 2 or 3, shall do so within ten years from the decedent's death or from the date his right materializes, if later.

Art. 5. In case an heir or a testamentary beneficiary evades to state whether he intends to claim his share in the estate or his right under the Will, the Court may order him to establish his right within six months from the date on which the Court order, or a copy thereof, was served upon him.

Such a Court order shall be issued exclusively upon the application of anyone who is entitled to the share of the heir or the testamentary beneficiary, should this latter fail to safeguard his right.

Art. 6. If an heir or a testamentary beneficiary does not want to take possession of the estate, or his share therein, but nevertheless is desirous of claiming his right, he shall lodge his claim with a trustee, if a trustee has been appointed to safeguard his right, or with an heir who has taken possession of the estate, or part thereof, or, if distribution of the estate has not yet taken place, with the administrator of the estate or anyone else who is in charge of the same. The claim may also be brought to the notice of the Court. If a trustee has received such claim, he shall inform the Court. Where the claim has been presented to the Court, the Court shall mail a notification to the other heirs or residuary legatees, whose name and place of residence are mentioned in the inventory of the estate or otherwise known to the Court.

Art. 7. Where the heir or the testamentary beneficiary has failed to take possession of the estate, or his share therein, or set forth his claim thereto in conformity with what is stated in art. 6, within the time limit specified in articles 1 - 5 for the separate contingencies, he shall forfeit his right.

Art. 8. The share of an estate that an heir has forfeited by virtue of article 7 shall devolve upon the one who would have been entitled thereto, should the heir have predeceased the decedent, or, in cases referred to in article 1 of Chapter 3, should he have predeceased the surviving spouse.

Art. 9. Further regulations regarding the notice mentioned in articles 1 - 3 shall be given by the King-in-Council.