III. Landmark Cases

1. Legacy Hunter[23]

In 2006, the Federal Supreme Court was given the (rare) opportunity to (i) shed light on the question of whether a duty to inform can be derived from the general principle of good faith according to Article 2 I and (ii) to elaborate on grounds for unworthiness to inherit pursuant to Article 540.

E ("testatrix") was a widow, born on 7 February 1907. She remained childless. In her last years, due to an accident, she lived in a nursing home where she remained until she died on 9 July 1995.

K ("plaintiff") was part of a family that belonged to the circle of friends and acquaintances of the testatrix. According to a will dated 31 August 1987, the testatrix appointed the plaintiff as her sole heir. In a supplement to that will, the testatrix confirmed the plaintiff's position as sole heir on 10 March 1991.

B ("defendant") acted as the testatrix's lawyer from 1991 until, presumably, her death. His service to the testatrix included advising her on inheritance matters. When asked about her wishes regarding her estate, the testatrix replied to the defendant with the words: "That's you." During a visit at the nursing home in April 1994, the defendant was informed by the testatrix about her will and was told that he had been appointed as her sole heir. The testatrix originally instructed him in her testament from November 1992/1993 to pay out a certain sum as legacy to the plaintiff. However, in a testament dated on 2 December 1993, she confirmed only the dispositions in favour of the defendant. Finally, in a letter to the defendant dated 25 February 1995, the testatrix expressly revoked all previous testamentary dispositions and instructions, except for those in favour of the defendant. The defendant took the testament dated on 2 December 1993 with him when he left the testatrix following his visit to the nursing home in April 1994.

In addition to being in a relationship of trust with the testatrix as her appointed lawyer, the defendant exercised great personal influence over the testatrix. The testatrix had, through constant gifts, attempted to gain and maintain the friendship and affection of the defendant. The defendant was almost the sole confidante for the testatrix. The testatrix assumed that the defendant's consideration towards her was the result of genuine friendship

23 DFC 132 III 305.

and affection, and in this context she designated him as her sole heir. The defendant, on the other hand, did not act out of friendship, but out of a wish to enrich himself. As the court found, these true intentions of the defendant remained hidden from the testatrix.

The plaintiff challenged the defendant's appointment as the sole heir and executor of the testatrix and, inter alia, brought an action seeking annulment of the testament dated 2 December 1993, stating that the defendant was unworthy to inherit and thus incapable to act as executor. The civil court of Basel-Stadt declared the last will of 2 December 1993 invalid. The appellate court of the Canton of Basel-Stadt came to the contrary conclusion, i.e. that the last will of 2 December 1993 was valid. However, the appellate court ultimately allowed the claim by finding that, although the final will was valid, the defendant was unworthy to inherit and an inappropriate executor.

In an appeal, the defendant requested to be reinstated as executor and declared sole heir of the testatrix. The appeal was dismissed by the Federal Supreme Court. As to the question of defendant's unworthiness to inherit, the Federal Supreme Court had to consider whether the defendant, as the lawyer of the testatrix, had been under the duty to inform her about his conflict of interest (as lawyer and presumed sole heir) and, as a result, had maliciously prevented the testatrix from making a new and/or revoking the existing (final) will.

Firstly, the Court held that a malicious act or omission pursuant to Article 540 I No 3 does not require a criminal act to be committed. Secondly, the Court confirmed the view that there must be a causal relationship between the malicious act or omission and the fact that the deceased did not make or revoke a will. In cases of a potential failure to provide advice and information, hypothetical causality must be established. In other words, one must consider whether–based on the ordinary course of events and the general experience of life–a testatrix would have made, amended, or revoked a testament had he/she been properly informed.

The Court then turned to the question whether the defendant was under a legal obligation to inform the testatrix about his true intentions which were not based on genuine friendship and about the conflict of interest arising from his simultaneous position as the testatrix's appointed sole heir and lawyer. The Court underlined that from 1991 until her death the defendant was the only confidante for the testatrix. From the testatrix's perspective, this was much more than a working or purely professional relationship. Against this background, the court relied on the principle of good faith (Article 2) requiring parties to a legal relationship to act in an appropriate and honest manner. By not informing the testatrix about his true–i.e. purely economic–intentions

and the conflict of interest as the testatrix's appointed heir and lawyer, the defendant caused the testatrix to believe that they were connected by a genuine friendship. Against this background, the testatrix maintained the designation of the defendant as sole heir and executor until her death. Interestingly, the Court did consider that the testatrix, from a legal point of view, could have amended or revoked her last will and/or made a new testament at any time. However, it emphasised that the testatrix had relied on the (wrong) assumption that she and the defendant shared a friendship, which made her believe there was no need to revoke her will or to make a new one. In the eyes of the court, the defendant's conduct qualified as grave misconduct, resulting in his unworthiness to inherit and to act as executor.

This jurisdiction of the Federal Supreme Court widens the notion of a "legacy hunter" through an broad interpretation of Article 540 I No. 3. This could lead to difficulties in distinguishing between affectionately meant gifts and frowned-upon flattery. It should not be the task of the courts to decide whether a client's present to his/her attorney arises from a relationship of dependence between them both or is merely a nice gesture. Not every lawyer appointed as heir should be stigmatised as a legacy hunter. The testator's freedom of disposal should still be the principal concern.

2. The Revocation of the Revocation[24]

Both court judgements referenced and discussed in this section deal with the issue of *"the revocation of the revocation",* in the case of multiple wills by the same testator.

In the case at issue, the testator drew up a will in favour of his life partner, C, that included a legacy of CHF 10 million. Two years later he drew up another testament that only provided a monthly payment to C for a certain period and included the passage: *"This will supersedes all previous testamentary dispositions and wills including all addenda thereto."* The testator destroyed this last will with undisputed intention to cancel it.

Subsequently, C brought an action against the heirs and demanded payment of her legacy of CHF 10 million. The courts rejected the claim, and the case went to the Federal Supreme Court twice before it was finally dismissed.

In the DFC 144 III 81, the Court underlines that there is a mandatory, essential right of the testator to freely revoke his testamentary dispositions at any time. Such revocation, however, presupposes that the testator actually

24 DFC 144 III 81 and Judgment of the Federal Supreme Court 5A_69/2019 of 20 July 2019.