

Postmortal succession on the example of Polish law in a comparative perspective

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**Postmortal succession
on the example of Polish law
in a comparative perspective**

Between inheritance law and nonprobate transfers

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*To my beloved wife, Alicja, daughter, Nina,
and parents, Elżbieta and Bernard*

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Abbreviations

ABGB	Allgemeines bürgerliches Gesetzbuch, 1811
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, 9.08.1886
BGB	Bürgerliches Gesetzbuch, 18.08.1896
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgerichtshof
CA	Court of Appeals
CC	Code Civil, 1804
CCI	Codice Civile, 16.03.1942
ch.	chapter
Constitution	Konstytucja Rzeczypospolitej Polskiej, 2.04.1997
D.	Digesta Iustiniani
DPostS	Dekret o postępowaniu spadkowym, 8.11.1964
DPS	dekret Prawo spadkowe, 8.10.1946
ECHR	European Court of Human Rights
ERISA	Employee Retirement Income Security Program, 1974
GG	Grundgesetz, 23.05.1948
GUS	Główny Urząd Statystyczny
I.	Institutiones Iustiniani
KC	ustawa Kodeks cywilny, 23.04.1964
KH	Rozporządzenie Prezydenta Rzeczypospolitej Kodeks handlowy, 27.06.1934
KP	ustawa Kodeks pracy, 26.06.1974
KPC	ustawa Kodeks postępowania cywilnego, 17.11.1964
KPK	ustawa Kodeks postępowania karnego, 6.06.1997
KPP	Kwartalnik Prawa Prywatnego
KPSW	ustawa Kodeks postępowania w sprawach o wykroczenia, 24.08.2001
KRO	ustawa Kodeks rodzinny i opiekuńczy, 25.02.1964
KSH	ustawa Kodeks spółek handlowych, 15.09.2000
KZ	rozporządzenie Prezydenta Rzeczypospolitej Kodeks zobowiązań, 27.10.1933
MRG	Mietrechtsgesetz, 12.11.1981

No	side number
NP	Nowe Prawo
NSA	Naczelny Sąd Administracyjny
OG	Oberste Gerichtshof
OLG	Oberlandsgerichtshof
PA	ustawa o prawie autorskim i prawach pokrewnych, 4.02.1994
para	paragraph
PB	ustawa Prawo bankowe 29.08.1997
PiP	Państwo i Prawo
PN	ustawa Prawo o notariacie, 14.02.1991
pos.	position
PPH	Przegląd Prawa Handlowego
PS	Przegląd Sądowy
PS	ustawa 16.09.1982 Prawo spółdzielcze
PSG	Privatstiftungsgesetz, 22.09.1993
RCL	Rządowe Centrum Legislacji
RPEiS	Ruch Prawniczy, Ekonomiczny i Socjologiczny
SA	Sąd Apelacyjny
SC	Supreme Court
SGB	Sozialgesetzbuch, 11.12.1975
SN	Sąd Najwyższy
Regulation No 650/2012	Regulation No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 4.07.2012
TK	Trybunał Konstytucyjny
UCCZ	ustawa o cmentarzach i chowaniu zmarłych, 31.01.1959
UEK	ustawa o emeryturach kapitałowych, 21.11.2008
UEPPBW	ustawa o ekwiwalencie pieniężnym z tytułu prawa do bezpłatnego węgla dla osób uprawnionych z przedsiębiorstw robót górniczych, 6.07.2007
UERFUS	ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych, 17.12.1998
UF	ustawa o fundacjach, 6.04.1984
UFBS	ustawa o funkcjonowaniu banków spółdzielczych, ich zrzeszaniu się i bankach zrzeszających, 7.12.2000
UFI	ustawa o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi, 27.05.2004
UFR	ustawa o fundacjach rodzinnych, 26.01.2023
UIKE	ustawa o indywidualnych kontach emerytalnych oraz indywidualnych kontach zabezpieczenia emerytalnego, 20.04.2004
ULN	ustawa o leczeniu niepłodności, 25.06.2015
UMDA	Uniform Marriage and Divorce Act, 1974
UNŚK	ustawa o nauczycielskich świadczeniach kompensacyjnych, 22.05.2009
UOFFE	ustawa o organizacji i funkcjonowaniu funduszy emerytalnych 28.08.1997
UOKH	ustawa o odwróconym kredycie hipotecznym, 23.10.2014

UPC	Uniform Probate Code, 2019
UPGR	ustawa o przekazywaniu gospodarstw rolnych na własność państwa za rentę i spłaty pieniężne, 29.05.1974
UPPE	ustawa o pracowniczych programach emerytalnych, 20.04.2004
UPPK	ustawa o pracowniczych planach kapitałowych, 4.10.2018
UPPP	ustawa o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów, 1.07.2005
UPZ	ustawa o promocji zatrudnienia i instytucjach rynku pracy, 20.04.2004
UROD	ustawa o rodzinnych ogrodach działkowych, 13.12.2013
USKOK	ustawa o spółdzielczych kasach oszczędnościowo-kredytowych, 5.11.2009
USM	ustawa o spółdzielniach mieszkaniowych, 15.12.2000
USRI	ustawa o ubezpieczeniu społecznym rolników indywidualnych i członków ich rodzin, 14.12.1982
UUN	ustawa o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego, 23.02.1991
UUSR	ustawa o ubezpieczeniu społecznym rolników, 20.12.1990
UUSWP	ustawa o ubezpieczeniu społecznym z tytułu wypadków przy pracy i chorób zawodowych, 30.10.2002
UZER	ustawa o zaopatrzeniu emerytalnym oraz innych świadczeniach dla rolników i ich rodzin, 27.10.1977
UZER	ustawa o zaopatrzeniu emerytalnym oraz innych świadczeniach dla rolników i ich rodzin, 27.10.1977
UZS	ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej, 5.07.2018
WEG	Wohnungseigentumsgesetz, 26.04.2002

Introduction

The pandectistic system adopted by Polish law (following the approach in German law, for example) leaves no doubt that the effects of death of an individual should be left to inheritance law. The underlying assumption of this branch of law (which often forms a separate unit in codified legal acts) is that it fully regulates the complex transfer of the decedent's rights and duties onto the successors. One may therefore draw the idealistic picture that inheritance law deals with all after-death consequences of civil law relations of an individual as a participant of the market exchange: namely within property law, the law of obligations, as well as family law, as remaining units of civil law as understood by the pandectistic system, or even of the entire private law.

However, it is unlikely that this picture is an accurate reflection of the reality of any legal system. This is especially true for Polish law in which it has never been solely inheritance law that regulates postmortal succession as there are numerous other legal instruments that can achieve this aim, too¹.

The significance of the transfer of rights and duties by means of varied instruments of inheritance law should not be undermined. The inheritance of pecuniary rights and duties is thus a principle of civil law expressed, for example, in Art. 922§1, the opening provision of the Book 4 of the KC (entitled: 'Inheritance'). The appointment of an heir or of a successor of single property items mostly by means of testation alongside with statutory (nontestamentary) inheritance and mandatory family protection system (usually in form of the legitim protecting against the dispositions of the decedent) mark the important balance between individual autonomy, the protection of family and interests of the exchange: this balance is fundamental for inheritance law. In addition, inheritance law is typically associated with creation of postmortal succession and is often utilised within estate planning. The foundation of inheritance law is therefore described in Chapter 2.1.

1 Wójcik/Zoll in: *System*, 333.

At the same time, there are numerous primarily contractual arrangements beyond inheritance law that affect postmortal succession in different ways, both directly and indirectly. In general, one can observe a two-fold approach.

Firstly, a contractual arrangement may modify the inheritance model, but remain within the scope of inheritance law. Within this category one may distinguish modification of the default heritability (or non-heritability) of rights effectuated by the parties to the legal relations from which those rights derive as presented in Chapter 2.2. Ultimately, legal acts undertaken by parties' will may declare heritability (or non-heritability) of resulting rights and duties, affecting the estate. This category also includes specific inheritance (namely demanding from the beneficiary that yet another premise than just being an heir is met) depicted in Chapter 2.3. In many cases such specific succession is influenced by the parties, but it may also be determined by the legislator. Both those examples show that individual autonomy to create inheritance succession goes far beyond instruments typically associated therewith, such as testaments, contracts of renunciation of inheritance, inheritance contracts, contracts regarding future estate, even though one still operates within inheritance law.

Secondly, a transfer of rights may take place other than by inheritance (nonprobate). Those surprisingly many varied examples are fully named in Chapter 3. They share a common characteristic that they disregard the inheritance model, effectuating fully autonomous premises regarding the transfer of the decedent's right onto the beneficiary. More significantly, they broaden the individual autonomy to create postmortal succession, although the system sets some specific boundaries.

Despite the similarity within the category of postmortal succession other than by inheritance, its examples are significantly varied, but may be divided into two main subcategories.

Due to further-reaching similarity to the inheritance law solutions, transfers *mortis causa* are the most significant. They take either the form of non-testamentary dispositions (will-substitutes) depending on parties' will (Chapter 3.1.) or of specific succession whose beneficiaries are mandatorily determined by law (Chapter 3.2). This category also includes a more complex set of examples of postmortal succession of nonpecuniary rights as depicted in Chapter 3.3.

In contrast, *inter vivos* transfers affect postmortal succession, often substituting it or, otherwise, anticipating it in form of *successio anticipata* or *vorweggenommene Erbfolge*. They may be divided into those effectuated *post mortem*, namely *inter vivos*, but with a condition of survival or a certain-time of death (e.g. *Zuwendungen auf den Todesfall*); these are presented in Chapter 3.4. There are also transfers that are fully performed *inter vivos*, but with an aim of creating postmortal succession; these are depicted in Chapter 3.5. The category of own rights of persons close to the decedent which benefit such persons as a result of

death of the decedent, which, however, are not succeeded is often misleading and does not fall into any category of postmortal succession (Chapter 3.6).

In some limited instances inheritance law rules may apply to postmortal succession other than by inheritance; this issue is briefly described in Chapter 4. It considers both model of transfer by means of inheritance and otherwise, application of inheritance law that directly refers to all dispositions irrespective of their subordination to inheritance law only, as well as application of other detailed rules of inheritance law. This is a complex issue, and Chapter 4 only presents basic remarks on it.

This work presents the whole panorama of postmortal succession under Polish law and accordingly focuses on all possibilities to effectuate individual autonomy in creation of postmortal succession both by means of inheritance and other than by inheritance, both as models and as their detailed form. It also analyses the borderline of such individual autonomy justified with varied socio-economic rationale.

The example of Polish law is meaningful from the perspective of postmortal succession model. Its system of inheritance law is very simple, and deprived, for instance, of numerous arrangements available in many inheritance laws across the jurisdictions that allow for complex effectuation of decedent's autonomy and for reaching numerous aims often expected by the decedent. Polish law lacks, for example, joint testaments, inheritance contracts, contracts regarding future inheritance, conditional appointment of an heir, fideicommissary substitution or testamentary division of estate². Legacy by vindication or enterprise management after death³ were regulated only recently.

This results in part from the ideological assumption of the current Polish inheritance law drafted in the 1964 KC. Its simple solutions were applicable to a relatively poor society⁴, in which no valuable rights and duties were transferred after death. In particular, the approach led the legislator to provide only limited scope of possible testamentary dispositions which at first glance affected the personal autonomy of the decedent. With the rise of entrepreneurship and of general wealth of the society after the fall of communism in 1989, as well as inevitable death of the first rich generation, inheritance law gained importance only relatively recently, and this justifies some novelisations⁵.

Until 1946 there was no Polish inheritance law and laws of states that used to govern Polish territories until 1918 applied⁶. This referred to the law of Germany

2 See in this book, 44, 66, 69, 49, 50, 55.

3 See in this book, 51, 75.

4 Wójcik/Zoll in: *System*, 335; Załucki, *Współczesne*, 23; Zoll, *Das polnische*, 33.

5 Osajda, *The New*, 488.

6 Generally, on foreign laws applicable in Poland after regaining independence in 1918, Guzik-Makaruk/Fiedorczyk, *The Achievements*, 18, 22.

(BGB), Austria (ABGB), France (CC, introduced on some territories under the Napoleonic governance), Russia and Hungary. The current prohibition of joint testaments or inheritance contracts known in German law (§§2265–2300 BGB) as well as long-term opposition (until 2011) to legacy by vindication known in French law (Art. 1014 CC) should therefore be viewed differently, if each instrument was valid on the territory of Poland and in Poland under the rule of foreign inheritance laws. Since all those legal systems (mostly German and French law) were directly a part of Polish legal heritage, the simplifications of Polish inheritance law made firstly in the 1946 DPS issued shortly after World War II mostly based on pre-war drafts and then in the 1964 KC more affected by the ideology of communism should not be seen as the final development of Polish law, but merely as a step therein.

In addition, the simplistic vision of inheritance law from 1964 is to a certain extent artificially maintained by extensive decodification of this branch of law. For example, management of an enterprise after the death of the entrepreneur was implemented outside of the KC in a specific statute (UZS), and to a great extent irrespective of the KC provisions involving management of the estate under inheritance law. At the same time, the aims of this specific statute could have been better (and, in particular, more coherently) reached by novelisation of the KC rules on testamentary executor.

However, most importantly, such simple inheritance law system is supplemented by a very broad scope of instruments creating postmortal succession other than by inheritance, both *mortis causa* and *inter vivos*, and altogether of very different legal character. Comparable instruments often exist in the other jurisdictions analysed in this work, but never as many as in Polish law. Also, this number still increases. Thus, already in 2023 the family (private) foundation⁷ was introduced to the Polish legal system.

In fact, many of the instruments of postmortal succession other than by inheritance date back to the communist era. It seems that they at least in part may have sought to omit inheritance law and its underlying principle of freedom of testation. The latter particularly contradicted communist ideals whereas at least in theory it must have been maintained in a system of inheritance law. Thus, the voices that called for testation only in favour of a narrow group of potential beneficiaries, e.g. statutory heirs⁸, were not accepted in the final wording of KC. Most significant rights in the communist era were anyway transferred other than by inheritance and those specific rules included desired limitations as to the scope of potential beneficiaries (see e.g. rules on agricultural farms, flat leases,

7 See in this book, 161.

8 Szer, *Z zagadnień*, 922.

cooperative rights or bank account balances⁹). The ideological aim of limiting transfers of wealth especially outside family relationships was therefore fulfilled without visibly undermining the freedom of testation underpinning inheritance law.

This rationale is now no longer vital. Despite the loss of political meaning of succession other than by inheritance, its instruments still affect individual autonomy and are continued or even developed. One possible reason is that inheritance law constantly does not meet societal expectations, especially regarding increasingly complex relations, both of social (ties created outside the traditional family unit) and economic (growing wealth and entrepreneurship) character. It may then be easier to provide a specific statute answering a single problem than to rethink the entire branch of law. Additionally, based on well-established instruments allowing for succession other than by inheritance, new instruments are regulated accordingly for similar legal instruments evolving in the market economy (e.g. investment fund disposition based on bank account disposition¹⁰) even without particular rationale. The use of an ever-increasing number of such instruments may therefore to a greater extent continue to reduce the use of inheritance law dispositions.

This book reflects on all the various ways and limitations to create postmortal succession under Polish law. On the one hand, it presents a general model of inheritance, including different ways of its creation by acts of the decedent and other persons, also by contractual decision on inheritability or non-inheritability of rights or with involvement of specific succession by inheritance. On the other hand, it presents numerous specific possibilities other than by inheritance, including by means of legal acts *mortis causa* and *inter vivos*, both those which depend upon decedent's will, and which take place regardless of it. The observation of said instruments is made through the perspective of monopoly of inheritance law – whether it is exempted by numerous examples of succession other than by inheritance, or rather retains this monopoly since it could apply to transfers other than by inheritance, too, by means of analogy.

This book is undeniably influenced by the research undertaken to prepare my Ph.D. thesis: *Pozasпадkowe sposoby kształtowania następstwa na wypadek śmierci – o przełamaniu monopolu prawa spadkowego* (Non-inheritance ways to create post-mortal succession – about the questioned monopoly of inheritance law) submitted on 27.10.2021 and defended on 27.06.2022 at the Jagiellonian University in Kraków.

It is to be noted that this book is neither a translation nor an abridged version of the thesis. The subject is indeed similar, but this book, despite being much

⁹ See in this book, 97, 122, 125, 104.

¹⁰ See in this book, 117.

shorter, offers a significantly broadened scope of analysis. Whereas the primary aim of the Ph.D. thesis was to juxtapose succession other than by inheritance and inheritance succession, this book, otherwise, describes all model possibilities to create postmortal succession.

* * *

The Ph.D. thesis as well as this book were drafted with the kind tutorship of Professor Fryderyk Zoll and thoughtful reviews of Professor Wojciech Klyta and Professor Konrad Osajda. I appreciate sincere support from the Faculty of Law and Administration of the Jagiellonian University in Kraków, in particular from its Dean, Professor Jerzy Pisuliński. Furthermore, I value language consultations by Jonathon Watson. The research stays at the University of Osnabrück and the University of Edinburgh were undeniably helpful as serving to consult and develop my research.

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1. Framework of postmortal succession

It is common for postmortal succession to be specifically framed within a legal system. This occurs not only via specific, formalised legislative provisions but such provisions are also usually organised into a coherent juridical framework which at least supposedly deals with all complexities of effects of death of an individual: inheritance law.

This coherency is challenged by legislative provisions creating postmortal succession that falls outside of this framework. Still, the character of such framework – i.e. rules subordinate to inheritance law – requires a thorough analysis to properly assess the exceptions, especially as the rule of inheritance law and exception in postmortal transfers other than by inheritance are true in various jurisdictions (though to a great extent differing in many other significant elements).

1.1. Notions and scope of work

Comparative law makes it particularly challenging to describe notions used, especially in the area of inheritance law, which typically is greatly interconnected with the national identity¹¹. Nonetheless, many basic legal concepts in inheritance law are at least comparable¹² across jurisdictions, even in diverse systems such as the common law and civil law. Additionally, the assistance of the EU Succession Regulation (No. 650/2012) should not remain underestimated, especially since it was drafted at the time in which the United Kingdom was an EU Member State, with its common law inheritance law being juxtaposed with civil law solutions. The Regulation No. 650/2012 not only served to unify inheritance law terminology but also consolidated the varied concepts of numerous inheritance law systems in legislation, albeit legislation regarding conflicts of laws.

11 See e.g. examples by Leipold, *Europa*, 648.

12 Bańczyk, *The Efficiency*, 721; Erp, *New Developments*, 2.

In addition, this book just as Regulation No. 650/2012 focuses on distinguishing inheritance and non-inheritance transfers. Although such distinction is present across various jurisdictions, its form depends greatly on the terminology (and categorisation) used by the legislator and the courts.

1.1.1. 'Inheritance law' and 'beyond inheritance law'

It is necessary to begin by defining 'inheritance law' (*Erbrecht, prawo spadkowe*). This allows first for a distinction to be drawn between inheritance law transfers from those regulated by other set of rules. Secondly, since inheritance law is a complex set of rules, it supposedly delineates the overall scope of law applicable to a particular succession. If inheritance succession (even of specific character¹³) is involved, there are no doubts as to the application of the detailed provisions of inheritance law. However, where succession is not regulated by inheritance law mechanisms, other rules of a given type (mostly contractual) apply, and inheritance law may at most apply only by analogy, which is a subject of vigorous debate¹⁴.

Inheritance law may be defined as a branch of law that deals with the transfer of all rights and duties of the decedent (estate) onto the heir¹⁵. The notion should therefore be narrow, regarding only such transfers that involve an entire estate (or, by means of exception, also its elements) devolving following the complex set of rules.

A broader definition can also apply to inheritance law, namely as all rules that refer to postmortal succession¹⁶. This refers to all differently regulated transfers, not just inheritance. Other definitions, such as of 'estate law of generational shift'¹⁷, also follow the same direction, though this particular definition appears to disregard such transfers that serve multi-generational estate planning extended for a longer time after the decedent's death that too falls within the scope of postmortal succession¹⁸.

Each of the above definitions appear correct, but it needs to be underlined that they refer to varied and *distinct* phenomena. Whereas legislators indeed distinguish inheritance transfers and apply a complex set of rules, the notion of inheritance law suits only this model. Other (alternative) models of postmortal

13 See in this book, 95.

14 See in this book, 167–168.

15 Piątowski/Witczak/Kawałko in: *System*, 4; *Explanatory Memorandum*, No 3.1.

16 Borysiak, *Art. 922*, No 1; Brox/Walker, *Erbrecht*, 1; Księżak, *Prawo*, 19.

17 Dutta, *Warum*, 5.

18 Bańczyk, *Pozaspadkowe*, 123.

succession are admissible, but fall beyond inheritance law, and as such inheritance law should be understood narrowly¹⁹.

Inheritance law should therefore be understood as the full regulation of the complex set of rules distinguished by the legislator²⁰. It serves, *inter alia*, to establish the identity of the successors following the will of the decedent, to provide proof of the succession and to afford the possibility to waive such succession. At the same time, it also provides care of the other persons involved (e.g., closest persons to the decedent, claimants of the decedent). After all, the balance of the decedent's will and protection of other values is at the heart of inheritance law. Nonetheless, it is to be underlined in this context that, irrespective of the varied mechanisms of inheritance transfer as well as different legislative techniques (e.g. between civil law and common law jurisdictions), it is vital to distinguish inheritance law, which can be seen in Book 4 of the KC, Book 5 of the BGB, as well as American probate codes, including the UPC.

At the same time, postmortal transfers take place 'beyond' inheritance law in the sense that they are outside²¹ or alongside²² inheritance law and are based on other²³ (or independent²⁴ or autonomous²⁵) rules in comparison with those within inheritance law. Rules regulating postmortal transfers are sometimes described as prioritised²⁶ against inheritance law (by which we should understand that only they, and not inheritance law, refer to the transfer), or that inheritance law rules are modified²⁷ or even infringed²⁸. The conceptual framework that juxtaposes inheritance law and other set of rules regulating postmortal transfers is, however, visible by the notion of *ersatz* inheritance law²⁹.

19 Bańczyk, *Pozaspadkowe*, 45.

20 Bańczyk, *Pozaspadkowe*, 16.

21 Justyński, *Glosa do wyroku*, 70; Müller-Christmann, §1922, No 23; Skibbe, *Gesamtrechtsnachfolge*, 247.

22 Kroppenberg, *Privatautonomie*, 3; Marotzke, §1922, No 54.

23 Dyoniak, *Ochrona*, 129; Jędrasik-Jankowska, *Art. 136*, No 4; Panowicz-Lipska, *Art. 691*, No 1; Pyziół, *O potrzebie*, 70; Wąż, *Art. 63¹*, No 4.

24 OG judgment, 21.04.2005, 6 Ob 68/05a; Baier, §56, No 4; Justyński, *Glosa do wyroku*, 70; Koppenfels-Spies, *Die Sonderrechtsnachfolge*, 1031; Kroppenberg, *Privatautonomie*, 3; Muscheler, *Universalsukzession*, 61.

25 Jakowlew, *Art. 38*, No 18; Gajewski, *Art. 136*, No 2.

26 OLG Karlsruhe judgment, 18.10.1989, 3 REMiet 1/89; Siefert, §56, No 3.

27 SN resolution, 26.07.1972, III CZP 50/72.

28 Gersdorf, *Art. 63¹*, No 3.

29 Puelinckx-Coene, *General*, 54.

1.1.2. 'Estate' and 'outside the estate'

From a Polish perspective, the estate (*Erbschaft, Nachlass, spadek*) encompasses all the decedent's rights and duties of civil law and pecuniary character³⁰ that devolve on the heirs upon the moment of death of the decedent (Art. 922§1 KC). At times this notion is extended to encompass also the entire legal situation of the decedent³¹.

The provisions that follow the KC in some instances narrow but also broaden the scope of estate as in Art. 922§1³². On the one hand, the KC regulates that not all such rights and duties belong to the estate: rights and duties closely connected with the person of the decedent do not (Art. 922§2 *ab initio*) nor do rights and duties that devolve onto designated persons independently of their status of an heir (Art. 922§2 *in fine*), which are mostly dealt with in this book. On the other hand, it is not just the decedent's rights and duties that belong to the inheritance but also those which arose at the moment of death, or even thereafter (such as funeral costs, costs of the inheritance proceeding, legitim claims, as per Art. 922§3 KC).

The postmortal transfers that take place beyond inheritance law are also increasingly often referred to as transfers 'outside' (*pozaspadkowy, Nachlass vorbei*) the estate³³, or by means of exclusion from the estate (*die Erbschaft ausschlagen*)³⁴.

1.1.3. 'By inheritance' and 'other than by inheritance'

It is commonly emphasised that the transfer of rights and duties (of an estate) is the core of inheritance law, and this transfer is referred to as inheritance (*Erbfolge, dziedziczenie*). In English, the term 'succession' is occasionally used (e.g. recital 4 sentence 2 of the Regulation No. 650/2012), but in this book the term will be used more generally³⁵ as more equal to postmortal transfers of varied characters, therefore, both involving the transfer of the estate by means of inheritance law as well as beyond inheritance law.

30 Ciszewski/Knabe, *Art. 922*, No 4; Załucki, *Art. 922*, No 1.

31 Skowrońska-Bocian/Wierciński, *Art. 922*, No 1.

32 Borysiak, *Art. 922*, No 98; Kremis, *Wpływ*, 139–140.

33 Dutta, *Will-Substitutes*, 184; Księżak, *Prawo*, 52; Księżak, *Przejsie*, 240; Kroppenber, *Pri-vatautonomie*, 3; Kuźmicka-Sulikowska, *Sytuacja*, 441–442; Matthews, *Will-Substitutes*, 250; Mrozowska-Bartkiewicz/Serwach, *Problematyka*, 18; Niedośpią, *Glosa do wyroku Sądu Apela-cyjnego w Szczecinie*, 92.

34 Koppenfels-Spies, *Die Sonderrechtsnachfolge*, 1031.

35 See in this book, e.g. 152.

The inheritance is commonly framed around the process of transferring the rights and duties of the decedent onto heirs³⁶ or – following the broader definition of estate – even transferring the legal situation of the decedent³⁷. It is nonetheless this process that allows for the continuation³⁸ of rights and duties (or even of the legal situation) of the decedent.

Art. 1(2)6 of Regulation No. 650/2012 excluding certain matters from its scope of application refers to rights ‘created or transferred otherwise’ than by inheritance³⁹, but having a link with it (cf. the second sentence of recital 12). The fact of such a statutory differentiation proves the utility of conceptual categorisation of ways of transferring rights after death. In addition, legal doctrine refers to the concept of exclusion from inheritance (*Ausschluß der allgemeinen Erbfolge*)⁴⁰, the transfer otherwise⁴¹ than by inheritance, exceptional transfer in comparison to the general rule of inheritance⁴², transfers independently from inheritance⁴³, as well as *sui generis* inheritance⁴⁴ or a surrogacy⁴⁵ of inheritance. As regards donative transfers *inter vivos* made in contemplation of future inheritance, the notion of anticipated inheritance (*vorweggenommene Erbfolge, successio anticipata*) is used⁴⁶.

1.1.4. ‘Probate’ and ‘nonprobate’

Due to its significance in common law jurisdictions, the term probate appears to be of the most significance when describing postmortal succession outside inheritance law. In this regard, both N.F. Dacey’s *How to Avoid Probate*⁴⁷ and J.H. Langbein’s *Nonprobate Revolution [...]*⁴⁸ marked the popularity of the probate

36 Borysiak, *Dziedziczenie*, 26–27; Niezbecka, *Art. 922*, No 2.

37 Ciszewski/Knabe, *Art. 922*, No 2.

38 Waal, *Comparative*, 1072.

39 The Regulation No 650/2012 uses term ‘succession’ which is understood differently in this book, see, 24.

40 OG judgment, 20.11.1991, 1 Ob 592/91; Antonów, *Sytuacja*, 74; Mrozynski, §56, No 2.

41 TK judgment, 16.06.2009, SK 42/08, No 45; SA Warszawa judgment, 11.09.2019, II AKa 114/19; Antonów, *Sytuacja*, 74; Bulsiewicz, *Glosa*, 385; Czekaj, *Sukcesja*, 7; Dyoniak, *Ochrona*, 136; Koszel, *Prawa*, 321; Kucia, *Art. 931*, No 30; Macierzyńska-Franaszczyk, *Odpowiedzialność*, 332; Sokołowski, *Roszczenia*, 60; Tollík, *Art. 57*, 155; Witczak, *Wylączenie*, 84.

42 TK judgment, 12.12.2017, P 13/16, No 89; Kędzierski, *Polemika*, 79; Piszczek/Rzewuska/Rzewuski, *Konsekwencje*, 24; Robaczyński, *Glosa*, 99.

43 Salamonowicz, *Art. 691*, No 1.

44 Kędzierski, *Polemika*, 81.

45 Ignatowicz, *Spółdzielnie*, 771.

46 BGH judgment, 27.01.2010, IV ZR 91/09; Dutta, *Warum*, 10; Olzen, *Die vorweggenommene*, 14.

47 Dacey, *How to Avoid*, 1.

48 Langbein, *The Nonprobate*, 1109.