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Inheritability of Digital Content under Austrian Law

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Abstract: The German Supreme Court (Bundesgerichtshof) recently decided that a Facebook account is inheritable. This article examines how Austrian law would deal with this issue and concludes that the result would be identical. According to Section 531 Civil Code (ABGB), only rights and obligations are non-inheritable when the replacement of an obligee or obligor by an heir would change the performance of the obligation. This does not apply to social media or email accounts since an heir can take the deceased's place without changing the performance that Facebook has to provide to each user. Telecommunications and data protection law does not prevent the heirs' access eisther because they replace the deceased. Even if digital content is non-inheritable, courts may grant access to an heir who has a compelling reason (e.g., to use digital content as evidence in a lawsuit) that overrides the deceased's privacy interests. Prior agreements between service providers and the deceased may also limit access and should be carefully scrutinized, but not hastily dismissed as void.

Résumé: La Cour fédérale allemande (Bundesgerichtshof) a décidé qu'un compte Facebook peut être transmet par succession. Cet article examine comment ce problème serait résolu par le droit autrichien. Le résultat est essentiellement identique. En vertu de l'article 531 du Code civil autrichien (ABGB), seulement les droits et obligations ne peuvent pas être transmis par succession dont le contenu de la prestation se changerait si on remplaçait le bénéficiaire par l'héritier. Cela ne s'applique pas aux médias sociaux ni aux comptes de messagerie. Cependant, il faut aussi prendre en compte le point de vue des prestataires qui sont principalement concernés par la protection de la sphère privée des utilisateurs. C'est pourquoi les accords qui interdisent la transmission des comptes sur les médias sociaux par succession ne doivent pas être hâtivement jugés comme des stipulations irrecevables.

Zusammenfassung: Der BGH hat kürzlich entschieden, dass ein Facebook-Konto vererblich ist. Der Beitrag untersucht, wie der Fall nach österreichischem Recht zu lösen wäre und kommt zum selben Ergebnis. Gemäß § 531 ABGB sind nur Rechte und Verbindlichkeiten unvererblich, bei denen der Austausch des Berechtigten durch einen Erben dazu führt, dass sich der Leistungsinhalt verändert. Das ist bei Social-Media- oder auch E-Mail-Konten nicht der Fall, weil die Leistungserbringung durch den Anbieter idR von der Person des Nutzers unabhängig ist. Telekommunikations- und Datenschutzrecht stehen diesem Ergebnis ebenfalls nicht im Weg, weil die Erben als Rechtsnachfolger die Position des Verstorbenen einnehmen. Selbst wenn manche Inhalte unvererblich sind, ist den Rechtsnachfolgern des Verstorbenen bei Vorliegen überwiegender berechtigter Interessen Einsicht zu gewähren. Vereinbarungen zwischen Diensteanbietern wie Facebook und deren Nutzer können den Zugang der

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Erben oder die Vererblichkeit einschränken, sollten aber nicht vorschnell als unzulässig abgetan werden.

Keywords: Digital Content, Digital Estate, Facebook, Social Media, Strictly Personal Rights, Privacy, Inheritabilty, Heirs, Data Protection, Austria, Civil Code, ABGB.

Schlüsselwörter: Digitale Inhalte, digitaler Nachlass, Facebook, soziale Medien, höchstpersönliche Rechte, Privatsphäre, Vererblichkeit, Datenschutz, ABGB.

Mots clés: Contenu digital, droit successoral, droits strictement, personnels vie privée, protection des données.

1. Introduction

Austrian inheritance law, covered by Sections 531 to 824 Civil Code (Allgemeines bürgerliches Gesetzbuch ABGB), was fundamentally reformed in 2015.[1] The new rules are applicable to persons who died after 31 December 2016.[2] One important issue following death is the legal fate of the deceased's so-called digital estate.[3] Millions or even billions of users buy and store their music or e-books online, use an email or Facebook account, store data in the cloud, write blogs and operate homepages, or even earn money on the internet. As these users die, these questions arise: what happens to their digital content and accounts? Is it accessible by heirs?

A German case[4] recently grappled with this question.[5] It was triggered by the tragic death of a 15-year-old girl whose parents wanted to access her Facebook

1 Erbrechts-Änderungsgesetz 2015, BGBl I 87/2015. The Federal Law Gazette (BGBl), https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_87/BGBLA_2015_I_87.pdfsig.27 November 2018

2 S. 1503 para. 7 subpara. 2 ABGB.

3 W. Zankl, 'Rechts- und Beratungsfragen des digitalen Nachlasses', in W. Zankl & C. Spruzina (eds), *Der digitale Nachlass* (Wien: Manz 2018), p (1) at 3.

4 BGH 12 July 2018, III ZR 183/17, *NJW (Neue Juristische Wochenschrift)* 2018, p 3178.

5 In Austria, the digital estate has been addressed by the following authors: P. Apathy & M. Neumayr, 'Section 531 ABGB', in H. Koziol, P. Bydlinski & R. Bollenberger (eds), *Kurzkommentar zum ABGB* (Wien: Verlag Österreich, 5th edn 2017), no. 1; N. Böhsner, 'Digitale Verlassenschaft – Tod im "Social Network"', *Zak (Zivilrecht Aktuell)* 2010, p 368; S. Brehm, 'Verlassenschaft 2.0. Ausgewählte Fragen zum Umgang mit dem digitalen Nachlass', *JEV (Journal für Erbrecht und Vermögensnachfolge)* 2016, p 159; B. Eccher, 'Section 531 ABGB', in M. Schwimann & G. E. Kodek (eds), *ABGB Praxiskommentar vol. 3* (Wien: LexisNexis, 4th edn 2012), no. 4; J. Gebauer, 'Digitale Verlassenschaft – Was passiert mit Facebook-Accounts & Co?', *ZIIR (Zeitschrift für Informationsrecht)* 2015, p 382; T. Höhne, 'Der Tod im Internet', *ZIIR (Zeitschrift für Informationsrecht)* 2015, p 238; C. Kölbl, 'Zum Anspruch des Erben auf Zugang zum vollständigen Benutzerkonto des Erblassers und den darin enthaltenen Kommunikationsinhalten gegenüber einem Sozialen Netzwerk', *jusIT* 2017, p 172; F-S. Meissel, 'Section 16 ABGB', in A. Fenyves, F. Kerschner & A. Vonkilch (eds), *Großkommentar zum ABGB – §§ 1 bis 43* (Wien: Verlag Österreich, 3rd edn 2014), no. 198; S. Perner, 'Datenschutz in den sozialen Medien aus

account, hoping to learn more about the circumstances that led to her death. Since a subway train entering the station fatally injured the girl, there was some suspicion that the accident was actually a suicide. Beyond providing emotional closure, the question was also financially important for the parents. By rebutting the suicide-theory, they wanted to fight a lawsuit brought by the subway driver who alleged that he was traumatized by the incident.

2. The Term Digital Estate

Pursuant to Section 531 ABGB, the rights and obligations of a deceased person constitute their estate, unless they are of a strictly personal nature.[6] This definition of estate does not make a distinction between digital or non-digital (analog) content.[7] However, nearly every article dealing with the topic offers a definition of the so-called digital estate. Some propose this term to mean 'the entirety of the testator's legal relationships concerning information technology systems, including the complete electronic data of the deceased'[8] or, succinctly, 'the sum of inheritable digital content'[9].

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privatrechtlicher Perspektive', *ALJ (Austrian Law Journal)* 2017, p 105; J. Pierer, *Postmortaler Schutz von Persönlichkeitsrechten* (Wien: Verlag Österreich 2018), pp 89 et seq.; M. Schauer, 'Section 531 ABGB', in A. Fenyves, F. Kerschner & A. Vonkilch (eds), *Großkommentar zum ABGB – §§ 531 bis 551* (Wien: Verlag Österreich, 3rd edn 2016), no. 31; M. Schauer, '§ 16: Verlassenschaft und vererbliche Rechtsverhältnisse', in M. Gruber, S. Kalss, K. Müller & M. Schauer (eds), *Erbrecht und Vermögensnachfolge* (Wien: Verlag Österreich, 2nd edn 2018), no. 12; H. Sprohar-Heimlich, 'Section 547 ABGB', in A. Fenyves, F. Kerschner & A. Vonkilch (eds), *Großkommentar zum ABGB – §§ 531 bis 551* (Wien: Verlag Österreich, 3rd edn 2016), no. 22; C. Thiele, 'Der digitale Nachlass – Erbrechtliches zum Internet und seinen Diensten', *jusIT* 2010, p 167; C. Thiele, 'Social Media Accounts post mortem – Ein Beitrag zu Erbrecht, Telekommunikationsgeheimnis und Datenschutz', *ZIIR (Zeitschrift für Informationsrecht)* 2018, p 269; R. Welser, 'Section 531 ABGB', in P. Rummel & M. Lukas (eds), *Kommentar zum ABGB – §§ 531-824* (Wien: Manz, 4th edn 2014), no. 1; C. Werkusch-Christ, 'Section 531 ABGB', in A. Kletecka & M. Schauer (eds), *ABGB-ON – Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Manz, online-version 1.05), no. 2; W. Zankl, *Erbrecht* (Wien: Facultas, 8th edn 2017), nos. 2f et seq.; W. Zankl, in *Der digitale Nachlass*, p 1.

6 A decision of the probate court is required before heirs are allowed to take possession of the deceased's estate (ss 797, 546, 547 ABGB), see C. Fischer-Czermak & K. Windisch, 'Law of Succession', in C. Grabenwarter & M. Schauer (eds), *Introduction to the Law of Austria* (Kluwer Law International 2015), p (167) at 168. The translations of the Austrian Civil Code (ABGB) are based on P. Eschig & E. Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code* (Wien: LexisNexis 2013).

7 C. Thiele, *jusIT* 2010, p (167) at 168; C. Kölbl, *jusIT* 2017, p (172) at 173.

8 S. Brehm, *JEV* 2016, p (159) at 159 with reference to the definition proposed by F. Deutsch, 'Digitales Sterben: Das Erbe im Web 2.0', *ZEV (Zeitschrift für Erbrecht und Vermögensnachfolge)* 2014, p (2) at 2.

9 W. Zankl, *Erbrecht*, no. 2f; W. Zankl, in *Der digitale Nachlass*, p (1) at 10.

The digital estate does not pose any particular problems when digital content is directly accessible to the deceased's heirs.[10] This is the case, for example, when computers, hard disks or USB sticks directly belonged to the deceased and her estate and are simply provided to the deceased's heirs by the probate court. Problems only arise when third parties provide access to digital content linked to the deceased and refuse to grant access to the deceased's heirs. However, this is not a novel problem; anything that belongs to the estate may be in the hands of a third party without heirs having immediate access to it. This could be the case, for instance, when the deceased has lent a thing or kept it in a safe deposit box. The only difference is that digital content or data is not physically tangible. Again, from a legal point of view, this is not a new problem; claims or rights, i.e. intangible items as defined in Section 292 ABGB,[11] are inheritable without causing any problems.[12]

It is questionable whether this concept is necessary, since there is no distinction between movable and immovable estate or tangible and intangible estate either. The physical nature of a thing has no direct impact on questions of inheritance. On the contrary, the term digital estate could contribute to confusion by falsely suggesting that the estate is split into digital and non-digital content, which are to be treated separately. The only benefit of the term digital estate could be to draw attention to the existence of things, legal relationships and the like, which could otherwise be forgotten in the course of dealing with inheritance law. For instance, correspondence important to the heirs or significant assets may exist in digital form only on email accounts or other third-party servers (e.g. online poker credit). Thus, the important question is not how to precisely define the term digital estate, but whether there is any reason to treat digital content stored or accessibly by third parties differently.

3. Inheritability of Digital Content

3.1. The Legal Relationships Behind Facebook & Co.

From a legal perspective, it is not the Facebook profile as such that can be inherited, but the underlying legal relationship between the user and provider of the platform.[13] Again, the problem lies in the heirs' lack of accessibility. Because property is inheritable, a computer or a storage medium (USB stick, hard disk or

10 W. Zankl, *Erbrecht*, no. 2g; W. Zankl, in *Der digitale Nachlass*, p (1) at 10.

11 G. Iro, *Sachenrecht* (Wien: Verlag Österreich, 6th edn 2016), no. 1/10; H. Koziol & R. Welser/A. Kletečka, *Grundriss des bürgerlichen Rechts vol. I* (Wien: Manz, 14th edn 2014), no. 303.

12 See the wording of s. 531 ABGB: 'rights and obligations'. Also, s. 285 ABGB has a wide understanding of what is to be understood as an asset (thing) in the legal sense.

13 OGH (Oberster Gerichtshof [Austrian Supreme Court]) 25 March 2009, 3 Ob 287/08i, ECLI:AT:OGH0002:2009:0030OB00287.08I.0325.000; T. Höhne, *ZIIR* 2015, p (238) at 240; S. Brehm, *JEV* 2016, pp (159) at 162 et seq.; J. Pierer, *Postmortaler Schutz*, p 90. Decisions of the OGH (Austrian Supreme Court) can be accessed via http://ris.bka.gv.at/Jus/by checking the box Entscheidungstexte and entering the case number in the field Geschäftszahl.

the like) that was owned by the deceased belongs to the estate and ultimately to the heirs so that they can access the data directly. Here, there is no third party providing or controlling access and no problem at all, even though we are dealing with digital content. On the other hand, anyone registering a domain contracts with the domain registrant,[14] or the provider of the social media platform by accepting the terms of service. These contractual relationships (usually a continuing obligation)[15] are to be judged from the viewpoint of inheritance law.

3.2. No Difference Between Testate and Intestate Succession

Admonishing calls not to forget digital content when advising clients on estate planning have been on the rise lately. From the perspective of inheritance law, however, it makes no difference whether the deceased has left a will or not. Non-inheritable rights and obligations cannot become inheritable by order of the deceased. Conversely, intestate succession covers precisely those rights and obligations, which the deceased could have transmitted by will. Therefore, the following remarks apply equally to testate and intestate succession.

3.3. Inheritability as General Principle

Pursuant to Section 531 ABGB, the rights and obligations of a deceased person constitute their estate, i.e. are inheritable, unless[16] they are of a strictly personal nature. Rights and obligations are to be understood in a broad sense, in that they include all legal positions of the deceased that could lead to the acquirement, change or loss of any rights and legal obligations in the future.[17]

The question of whether digital content is inheritable (i.e. whether parents can access the Facebook account of their deceased daughter or not) depends on whether the underlying rights or legal relationships are classified as strictly personal under the exception in Section 531 ABGB.

Readers should note that Section 531 ABGB does not require the rights and obligations to be of monetary value in order to be inheritable.[18] This restriction is

14 OGH 25 March 2009, 3 Ob 287/08i, ECLI:AT:OGH0002:2009:0030OB00287.08I.0325.000.

15 S. Brehm, *JEV* 2016, pp (159) at 162 et seq.

16 According to s. 531 ABGB, inheritability is the general rule while non-inheritability is only an exception, R. Welser & B. Zöchling-Jud, *Grundriss des bürgerlichen Rechts vol. II* (Wien: Manz, 14th edn 2015), nos. 1821, 2413; J. Pierer, *Postmortaler Schutz*, p 92.

17 OGH 27 August 1996, 5 Ob 543/95, ECLI:AT:OGH0002:1996:0050OB00543.95.0827.000; W. Kralik, *Das Erbrecht* (Wien: Manz, 3rd edn 1983), p 10; R. Welser, in *Kommentar zum ABGB*, no. 1.

18 W. Kralik, *Erbrecht*, p 12; M. Schauer, in *Großkommentar zum ABGB*, no. 5; W. Zankl, *Erbrecht*, no. 2i; W. Zankl, in *Der digitale Nachlass*, p (1) at 11; J. Pierer, *Postmortaler Schutz*, p 92.

often used,[19] probably due to the wording of Section 1922 paragraph 1 of the German Civil Code (Bürgerliches Gesetzbuch BGB), which states that upon the death of a person that person's property and assets pass to the heirs.[20] Section 531 ABGB does not equate strictly personal rights with non-monetary rights and obligations.[21] Whether a thing, a right or an obligation is valuable or worthless is therefore irrelevant to the question of inheritability. The fact that an average social media profile (e.g. a Facebook account) does not have any significant value does not rule out that the legal relationship between user and provider of the platform (e.g. Facebook) could belong to the estate.[22] On the contrary, the decisive factor is whether such legal relationships are of a strictly personal nature.

3.4. Exceptions from the General Principle of Inheritability

Although Section 531 ABGB does not contain a list of inheritable and non-inheritable rights and obligations,[23] it does specify the decisive criterion: strictly personal nature. Section 1448 ABGB is of similar nature when stating that death only terminates those rights and obligations that are limited to a person or relate to individual acts of the deceased. Section 1393 sentence 2 ABGB also refers to the strictly personal nature of rights, providing that rights which relate to a person and hence terminate with him or her, cannot be assigned. Furthermore, Section 1171 ABGB provides that a contract for services relating to works, for which the specific individual qualities of the contractor are essential, expires upon his death.

In some cases, the law itself expressly states the inheritable[24] or non-inheritable[25] nature of rights and obligations. Some of these provisions are mandatory, others may be modified by contract (e.g. personal easements pursuant to Section 529

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19 See e.g. N. Böhsner, *Zak* 2010, p (368) at 368; C. Thiele, *jusIT* 2010, p (167) at 168; J. Gebauer, *ZIIR* 2015, pp (382) at 384 et seq.; S. Brehm, *JEV* 2016, p (159) at 163; C. Werkusch-Christ, in *ABGB-ON*, no. 2; also OGH 5 April 1984, 7 Ob 18/84, ECLI:AT:OGH0002:1984:0070OB00018.840.0405.000; 29 January 2004, 6 Ob 263/03z, ECLI:AT:OGH0002:2004:0060OB00263.03Z.0129.000.

20 W. Kralik, *Erbrecht*, p 12; M. Schauer, in *Großkommentar zum ABGB*, no. 5.

21 W. Kralik, *Erbrecht*, p 12.

22 The view of N. Böhsner, *Zak* 2010, p (368) at 369 followed by J. Gebauer, *ZIIR* 2015, p (382) at 385 et seq., that a common user profile does not have any monetary value and is non-inheritable should therefore be rejected. Also, S. Brehm, *JEV* 2016, pp (159) at 162 et seq. suggests that because users consent to the platform's use of their data, user profiles actually have monetary value.

23 A binding list of inheritable rights and obligations is impossible to compile, R. Welser, in *Kommentar zum ABGB*, no. 1.

24 For example ss 142, 537 paras 1, 1116a, 1337, 1403, para. 1 subpara. 2 ABGB; s. 78 para. 1 EheG (Marriage Act); s. 52 para. 3 UGB (Commercial Code).

25 For example, s. 364c sentence 1, 529 ABGB; s. 77 para. 1 EheG (Marriage Act); s. 100 para. 1 ASVG (General Social Security Act).

sentence 2 ABGB). In the absence of such provisions, the question of inheritability must be clarified through construction and interpretation of the law itself.[26]

Strictly personal means 'self', 'in person'.[27] Thus, a strictly personal right or obligation depends on the personality of the deceased so that an exchange of that person by an heir would change the performance itself.[28] Therefore, rights and obligations are strictly personal if they tied to the personality of the deceased; and transferring the right or obligation to an heir would change the performance of the obligation or the nature of the right. A strictly personal right or obligation can therefore be executed or demanded 1) only by the person of the oblige (deceased), but not by her heirs; or conversely 2) only from a specific obligor (deceased) and not the heirs.[29]

Classic examples are employment contracts[30] or maintenance claims[31]. Basis of an employment contract are education, skills, knowledge, experience and personality of the employee, so that an heir would not be able to simply take the deceased's position. Also, and heir would not have any desire to accept an additional job. Maintenance claims are of strictly personal nature because they are closely tied to only one person. A father wants to support his daughter only, not her heirs. Comparable, a divorced husband is only obliged to support his ex-wife, but not her heirs since the legal ground for his payments is their divorced marriage. *Franz von Zeiller*, who significantly contributed to the making of the ABGB, understood strictly personal rights, among other things, to be rights that stick to the person or 'highly personal rights and duties associated with the family'.[32] For example, neither the status of a spouse nor a parent is inheritable.[33] Other examples are a patient's contract with a surgeon – no one would ask the doctor's heirs to perform the surgery; or the commissioner's contract with a portrait artist since the artist was commissioned because of his skills, too.[34] To crosscheck the

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26 W. Kralik, *Erbrecht*, p 15; M. Schauer, in *Großkommentar zum ABGB*, no. 25.

27 Duden, *Die deutsche Rechtschreibung vol 1* (Berlin: Bibliographisches Institut, 24th edn 2006), p 508.

28 OGH 14 December 1983, 1 Ob 675/83, ECLI:AT:OGH0002:1983:RS0032673; 9 September 1997, 4 Ob 199/97m, ECLI:AT:OGH0002:1997:0040OB00199.97M.0909.000 with reference to K. Wolff, 'Section 1393 ABGB', in H. Klang (ed.), *Kommentar zum ABGB vol. 6* (Wien: Österreichische Staatsdruckerei, 2nd edn 1951), p (292) at 293; 11 September 2003, 6 Ob 106/03m, ECLI:AT:OGH0002:2003:0060OB00106.03M.0911.000; 25 November 2009, 3 Ob 232/09b, ECLI:AT:OGH0002:2009:0030OB00232.09B.1125.000; 17 December 2009, 6 Ob 247/08d, ECLI:AT:OGH0002:2009:0060OB00247.08D.1217.000.

29 OGH 24 September 1968, 4 Ob 47/68, ECLI:AT:OGH0002:1968:0040OB00047.68.0924.000.

30 C. Weiß & S. Ferrari, 'Der Nachlass', in S. Ferrari & M. Likar-Peer (eds), *Erbrecht* (Wien: Manz 2007), p (5) at 15; B. Eccher, in *ABGB Praxiskommentar vol. 3*, no. 27.

31 S. 77 para. 1 EheG (Marriage Act).

32 F. Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch vol. IV* (Wien: Geistinger 1813), p 84.

33 M. Schauer, in *Großkommentar zum ABGB*, no. 62.

34 R. Welser & B. Zöchling-Jud, *Grundriss vol. II*, no. 1141.

strictly personal nature of rights and obligations, one has to ask: Can the deceased bequeath his or her legal position to an heir and can the performance be provided to, or by, the heir without distinction from the deceased? I.e. can the deceased transfer her Facebook account to an heir and can Facebook provide the same services to the heir as to the deceased?

When applying these principles to contracts relating to digital content, one comes to the conclusion – like the Bundesgerichtshof – that the performance does not change even when an heir replaces the deceased. Facebook provides a platform and technical services equally to each user and does not tailor its services to a specific person.[35] Contracts regarding the use of social media platforms are therefore not strictly personal and are inheritable pursuant to Section 531 ABGB.[36] The same applies to email accounts, an Amazon account, an Instagram profile, Netflix accounts, iTunes[37] or online gambling sites.

Yet, this argument (providing only technical services not tailored to a specific person) will not always lead to the right result, because even strictly personal contracts can be executed automatically on a technical-abstract level without any difference to the contracting party. For instance, a contract with an online dating agency that proposes users as potential partners based on a personality analysis is strictly personal and therefore non-inheritable since the suggestions are tailored to the user who created the account.[38] However, the underlying technical service is not tailored to a specific person, but provided equally to each user. The platform provider does not care who logges into the account either, what is different is the final performance, i.e. the partner suggestions. Assessing the

35 S. Brehm, *JEV* 2016, p (159) at 163 also points to the possible use of pseudonyms and the absence of mutual trust between the contracting parties. See also A. Kutscher, *Der digitale Nachlass* (Göttingen: V&R unipress, 2015), pp 156 et seq., confirmed by BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 35.

36 Affirming inheritability for Austrian law of succession already P. Apathy & M. Neumayr, in *Kurzkommentar zum ABGB*, no. 1; S. Brehm, *JEV* 2016, p (159) at 163; B. Eccher, in *ABGB Praxiskommentar vol. 3*, no. 4; T. Höhne, *ZIIR* 2015, p (238) at 240; J. Pierer, *Postmortaler Schutz*, p 92; H. Sprohar-Heimlich, in *Großkommentar zum ABGB*, no. 22; C. Thiele, *jusIT* 2010, p (167) at 170; C. Thiele, *ZIIR* 2018, p (269) at 272; R. Welser, in *Kommentar zum ABGB*, no. 5; W. Zankl, *Erbrecht*, no. 2j; W. Zankl, in *Der digitale Nachlass*, p (1) at 11. C. Werkusch-Christ, in *ABGB-ON*, no. 2 argues in favour of inheritability, too, but also refers to rights and obligations of monetary value. C. Kölbl, *jusIT* 2017, p (172) at 177 concludes than a Facebook account is inheritable but that the heirs cannot access the account due to the post-mortem protection of personality rights. The view of N. Böhsner, *Zak* 2010, p (368) at 369 followed by J. Gebauer, *ZIIR* 2015, p (382) at 386, that a common user profile does not have any monetary value and is non-inheritable, has already been disproven *supra* at 3.3 (fn. 22).

37 It is worth noting that digital content is usually licensed and not bought, thus inheritability is questionable.

38 A. Kutscher, *Der digitale Nachlass*, p 156 citing a decision by the Amtsgericht Dortmund 18 September 1990, 128 C 413/89, *NJW-RR (Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht)* 1991, p 689.

Facebook-case from this perspective, it turns into a borderline case due to the personalized features like the newsfeed, friendship suggestions etc. However, in my opinion, these elements are not yet sufficient for classifying the contract as strictly personal and thus non-inheritable, because they only play a minor role. What they do show is the importance of looking at each case individually.

The conclusion that a Facebook account is inheritable is further supported when one compares non-digital (analog) and digital content. Diaries, and especially letters, which are comparable to emails or messages exchanged on social media platforms,[39] are inheritable.[40] It is impossible to protect letters or diaries with passwords like an email account. However, the deceased could have kept her letters in a safe deposit box, so that during her lifetime no one had access to it, just like with the password-protected email account. After her death, both the contract for the safe deposit box and the letters belong to the estate and are thus subject to the heirs' access. The only difference between this situation and digital content (i.e., passwords on Facebook accounts etc.) is that restrictions to access for digital content are standard practice.

3.5 The Legal Nature of Strictly Personal Rights and Obligations

One reason why the question of the inheritability of a Facebook account is controversial, may be that the concept of strictly personal nature is used differently in the legal sense than in everyday language. From a legal perspective, not everything that is private can also be considered as strictly personal.[41] A love letter sent via Facebook or email is strictly personal in the sense that the content is intended only for the recipient and that publication would violate legitimate interests[42] in privacy. However, the everyday and colloquial meaning of strictly personal nature or highly personal sphere of life differs from the understanding of strictly personal nature in the legal sense under Section 531 ABGB. From a legal point of view, the nature of a legal relationship with a third party is of importance (e.g. a service contract or the exercise of a right), while the everyday and colloquial assessment depends on the nature of the content (e.g. a love letter).

The aim of preserving privacy and secrecy after death, which is desirable in terms of legal policy, may be achieved in the context of post-mortem protection of personality rights,[43] but not under inheritance law. For example, even after the

39 S. Perner, *ALJ* 2017, p (105) at 108.

40 OGH 10 December 1985, 4 Ob 387/85, ECLI:AT:OGH0002:1985:0040OB00387.85.1210.000; C. Thiele, *ZIIR* 2018, p (269) at 272.

41 W. Zankl, in *Der digitale Nachlass*, p (1) at 12 (fn. 24).

42 S. 77 UrhG (Copyright Act) prevents the unauthorized publication of confidential notes, especially letters and diaries.

43 Since the free development of personality requires a certain degree of protection after death, doctrine and jurisprudence affirm the so-called post-mortem protection of personality rights. The

death of a well-known politician, a newspaper may not report on his alleged homosexual orientation and relationships[44] or it risks being sued by the deceased's heirs or close relatives. In inheritance law, however, the heirs invade the privacy of the deceased. They could discover the most intimate secrets just by entering the inherited house.[45] On bank statements, for example, they could find alimony payments to an unknown illegitimate child and thus discover that the deceased had lived a double life or kept certain things a secret from the outside world. These examples show that privacy concerns and the understanding of the strictly personal nature of rights and obligations in the legal sense is a problem for both analog and digital content.

In addition, strictly personal rights or obligations of the deceased may be mingled with the financial interests of the heirs. Then, even claims arising from strictly personal rights pass to the heirs if they have any monetary value.[46]

The fact that heirs have access to personal correspondence admittedly causes discomfort. The question of protecting the privacy of the deceased also arises in the non-digital (analogue) context, but is in fact unsatisfactory to solve. If it is technically possible to protect the deceased's privacy in the digital age, however, the law should not completely ignore it. Perhaps the deceased has chosen certain electronic means of communication in order not to leave behind any records that could fall into the hands of the heirs or third parties. It is technically possible for digital content, for example, to encrypt or delete the entire existing or stored data when conditions defined in advance occur. Whether this difference to the analog reality of life can also have legal effects requires a closer examination to be carried out elsewhere.

3.6. Restrictions on Heirs' Use of Digital Content

Being legal successors, the heirs take the place of the deceased from a legal point of view. An heir could use the name of the deceased to continue the Facebook account or continue to send messages under the deceased's email address. This is, of course, an undesirable result. Thus, the heirs may only continue using accounts where they can adopt its settings to the new circumstances and change its name or

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close relatives or persons commissioned by the deceased can, e.g. protect the deceased's honor, image and privacy and take legal action against third parties that interfere with these rights, OGH 23 May 1984, 1 Ob 550/84, ECLI:AT:OGH0002:1984:0010OB00550.84.0523.000; 29 August 2002, 6 Ob 283/01p, ECLI:AT:OGH0002:2002:0060OB00283.01P.0829.000; 17 February 2014, 4 Ob 203/13a, ECLI:AT:OGH0002:2014:0040OB00203.13A.0217.000; H. Koziol & R. Welser/A. Kletečka, *Grundriss vol. I*, no. 300; F-S. Meissel, in *Großkommentar zum ABGB*, nos. 171 et seq.; J. Pierer, *Postmortaler Schutz*, pp 33 et seq.

44 OGH 13 July 2010, 4 Ob 112/10i, ECLI:AT:OGH0002:2010:0040OB00112.10I.0713.000.

45 T. Höhne, *ZIIR* 2015, p (238) at 238.

46 W. Kralik, *Erbrecht*, p 13; OGH 25 October 2000, 2 Ob 281/00p, ECLI:AT:OGH0002:2000:0020OB00281.00P.1025.000. For instance, unpaid salary while the employment agreement itself was terminated by death (*supra* 3.4).

other settings since the heirs are not the deceased's proxy but her legal successors.[47] In all other cases, piety requires the heirs to ensure the dignified memory of the deceased,[48] as the memorialize-account-feature on Facebook, for example, allows. However, the heirs are also free to terminate[49] the inherited contracts and delete the accounts.[50]

4. Privacy Legislation

4.1. Telecommunications Law

The secrecy of communication as established in Section 93 TKG[51] protects any user who uses a public communication service for private or business purposes from the unauthorized transmission of the communicated content and the traffic and location data associated with the communication.[52] If the heirs demand access to an email[53] or Facebook account of the deceased, the provider could oppose the heirs' request by pointing at the secrecy of communication because the deceased user has not consented to handing over the data. However, assuming the applicability of the TKG,[54] communication secrecy does not bar the heirs' access. Since they take the place of the deceased, the heirs are users[55] under telecommunications law and not

47 W. Zankl, in *Der digitale Nachlass*, p (1) at 16.

48 J. Pierer, *Postmortaler Schutz*, pp 92 et seq.

49 Heirs may terminate contracts stipulating continuing obligations for cause as shown for instance in ss 1116a, 1205 para. 2 ABGB or s. 139 para. 2 UGB (Commercial Code). See A. Fenyves, *Erbenhaftung und Dauerschuldverhältnis* (Wien: Orac 1982), pp 279 et seq.

50 However, assuming non-inheritability, it is questionable whether deleting is possible only by relying on the post-mortem protection of personality rights of the deceased, since the mere display of profiles after a user's death (e.g. memorialized profiles on Facebook) does not violate any rights, see J. Pierer, *Postmortaler Schutz*, p 93. T. Höhne, *ZIIR* 2015, p (238) at 242 points out that there is no legal basis for the heirs to control and correct the life image of their deceased relative at will.

51 Telekommunikationsgesetz (Telecommunications Act) 2003.

52 S. 92 para. 3 subpara. 2 and s. 93 para. 3 TKG; W. Wessely, 'Section 93 TKG', in T. Riesz & M. Schilchegger (eds), *Telekommunikationsgesetz* (Wien: Verlag Österreich 2016), no. 12.

53 On the scope of application of the TKG with regard to email-services see P. Lust, 'Section 3 TKG', in T. Riesz & M. Schilchegger (eds), *Telekommunikationsgesetz* (Wien: Verlag Österreich 2016), nos. 99 et seq.

54 The Bundesgerichtshof, too, did not rule on this issue (BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 56), since it would have had no impact on the result – even if the TKG were applicable, it does not hinder the heir's access. On the scope of application of the TKG see C. Kölbl, *jusIT* 2017, p (172) at 175.

55 A user is any natural person using a publicly available communications service, for private or business purposes, without necessarily having subscribed to this service. The TKG does not require an upright contractual relationship (s. 92 para. 3 subpara. 2; C. Thiele, *ZIIR* 2018, p (269) at 271), on the other hand, the heirs as legal successors continue the deceased´s legal relationship with the provider anyway.

a third party.[56] If the user requests information himself, the provider cannot rely on Section 93 TKG because the request only concerns the user's data and information.

4.2. Data Protection Law

The GDPR[57] – applicable since May 25, 2018 – does not apply to the personal data of deceased persons according to recital 27.[58] Privacy regulations for the living – persons the deceased communicated with – do not preclude the access of the heirs either.

Personal data must be processed lawfully in accordance with Article 5 paragraph 1 subpara a GDPR. Pursuant to Article 4 para 1 GDPR, personal data means any information relating to an identified or identifiable natural person (the data subject). This includes messages sent or received by the deceased or published content or photos.[59] Assuming the applicability of the GDPR,[60] the processing[61] is lawful in accordance with Article 6 para 1 subpara b GDPR because the processing is necessary for the performance of a contract of which the data subject is a party. According to the terms of service, the operators of social networks or email providers are obliged to deliver the messages from the sender's account to the recipient's account and keep them available. To fulfil their contractual obligation, the providers or operators have to process data.[62]

Granting access to heirs is also lawful in accordance with Article 6 para 1 subparagraph f GDPR. Accordingly, processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. The Bundesgerichtshof identified

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56 C. Thiele, *ZIIR* 2018, p (269) at 271; for Germany see BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 56. According to S. Brehm, *JEV* 2016, p (159) at 166 communications secrecy terminates with death and thus heirs are granted access. C. Kölbl, *jusIT* 2017, pp (172) at174 et seq. assumes inheritability of social media accounts and argues that heirs must not be granted access due to communications secrecy, but does not deal with the question of whether heirs take over the deceased´ status as user.

57 General Data Protection Regulation, Regulation (EU) 2016/679 OJ L 2016/119, p 1.

58 Given the wide scope of application of the GDPR, it is unfortunate that the regulation does not apply to the personal data of deceased persons. See *infra* 4.3 and fn. 66. However, the second sentence of recital 27 authorizes the Member States to provide regarding the processing of personal data of deceased persons.

59 BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 72; C. Thiele, *ZIIR* 2018, p (269) at 271.

60 The Bundesgerichtshof did not rule on the applicability of the GDPR when the platform provider grants access to the heirs of a deceased user.

61 Pursuant to Art. 4 para. 2 GDPR, processing means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, organization, storage, adaptation or alteration, retrieval, disclosure by transmission, dissemination or otherwise making available.

62 BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 69.

several legitimate interests of the heirs:[63] 1) Ensuring the performance of contract; 2) The search for aspects that might be of general financial relevance to their rights and obligations; 3) The assertion, exercise and defense of rights (with regard to the claim for damages of the traumatized subway driver); and 4) Clarification of the circumstances of their daughter's death. These arguments are convincing,[64] because otherwise, performance of contract would be rendered impossible once the heirs of a deceased party are involved. Anyone communicating with the deceased must have been aware that they no longer have control over their messages once they have been sent.[65]

4.3. Access by the Heirs Despite Non-Inheritability

The assumption that the right to privacy ends at death is worth criticizing.[66] However, special duties of confidentiality arising from laws or contracts generally continue to apply after the death of a person, otherwise the purpose of confidentiality would be undermined.[67] For example, doctor-patient confidentiality applies after death, although data protection laws are no longer applicable.

If rights and obligations are non-inheritable due to their strictly personal nature, privacy and secrecy of the deceased must also be maintained against the heirs. Then, the heirs – who did not inherit these rights and obligations – are only granted disclosure if: 1) Laid down by law; 2) The deceased presumable would have consented; or 3) Disclosure is necessary for the purposes of the legitimate interests pursued by the heirs which override the deceased's interest in post-mortem privacy.[68]

In the German case, the heirs would have been granted access even if the Facebook account had not been inheritable. The parents were able to demonstrate an interest that overrode the deceased daughter's interests of confidentiality, namely to obtain certainty about their circumstances of death and to fight related claims for damages.[69]

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63 BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, nos. 74 et seq.

64 C. Thiele, *ZIIR* 2018, p (269) at 271; see also ECJ 4 May 2017, C-13/16, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v. Rīgas pašvaldības SIA 'Rīgas satiksme'*, ECLI:EU:C:2017:336 with regard to Art. 7 subpara. f of Directive 95/46/EC that was superseded by Art. 6 para. 1 subpara. f GDPR while being identical in content.

65 BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, nos. 78 et seq., 91; see also recital 47 sentence 3 GDPR.

66 J. Pierer, *Postmortaler Schutz*, pp 79 et seq.; see C. Thiele, *jusIT* 2010, p (167) at 170: 'painful regulatory gap in data protection law'; C. Thiele, 'Datenschutz post mortem – eine Europäische Perspektive de lege ferenda', *ZIIR (Zeitschrift für Informationsrecht)* 2017, p 13.

67 OGH 23 May 1984, 1 Ob 550/84, ECLI:AT:OGH0002:1984:0010OB00550.84.0523.000; K. Prietl, 'Die ärztliche Schweigepflicht nach dem Tod des Patienten', *RdM (Recht der Medizin)* 1995, p (6) at 7; J. Pierer, *Postmortaler Schutz*, p 82. See *supra* fn. 43 on the post-mortem protection of personality rights.

68 F. Bydlinski, 'Paradoxer Geheimnisschutz post mortem?', *JBl (Juristische Blätter)* 1999, p (553) at 557; J. Pierer, *Postmortaler Schutz*, pp 79 et seq.

69 Number (3) of the reasons mentioned in the paragraph above.

5. The Impact of Standard Terms of Business

In the case, Facebook also insisted on the applicability of their rules on memorializing accounts, i.e. that no one can get access to any messages once the account has been memorialized after Facebook was informed about the user's death. The Bundesgerichtshof declared those rules inapplicable since the provisions were not part of the Facebook terms of service itself. Instead, they were only to be found in the help area of the Facebook site. The Court argued that the user only agreed to the terms of service, thus the provisions on memorializing accounts did not become part of the contract governing the relationship between Facebook and user.[70] Under Austrian – contract – law, the result is the same.[71]

Meanwhile, Facebook has included the provisions on memorializing accounts in their terms of service, so that they become part of the contract between user and platform. However, standard terms of business (terms and conditions) are subject to special scrutiny under European Union law, which is why they can still be void.[72] The new clause[73] stipulates that only a legacy contact chosen by the user or a person whom the user identified in a valid will or similar document expressing clear consent to disclosure upon death or incapacity is able to seek disclosure from the account after it is memorialized. Since the clause has been newly drafted, the Bundesgerichtshof has not ruled on it in the case. On the one hand, one could argue that the clause is void since it does not allow heirs to seek disclosure or demand performance of the contract (i.e. transfer of the account to the heirs). On the other hand, the clause requires a deliberate, informed decision of the user for granting disclosure of her account, speaking in favour of validity.

Such clauses should not be hastily dismissed as void. The deceased must be able to protect her data and privacy from access by the heirs or third parties, if she wants to do so.[74] In addition, one must also consider the perspective of service providers. Granting unjustified disclosure or access would constitute a breach of contract since the providers are committed to the protection of their users' privacy. The question of whether parties may agree that certain rights and obligations are non-inheritable or whether standard terms of business can provide for the deletion of content in the event of death requires – as mentioned above – a closer examination.[75]

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70 BGH 12 July 2018, III ZR 183/17, *NJW* 2018, p 3178, no. 27.

71 OGH 16 April 2004, 1 Ob 30/04z (no. 2.1.), ECLI:AT:OGH0002:2004:0010OB00030.04Z.0416.000; H. Koziol & R. Welser/A. Kletečka, *Grundriss vol. I*, no. 431.

72 S. 879 para. 3 ABGB; s. 6 KSchG (Consumer Protection Act). These provisions implemented the respective Directives of the European Union.

73 As of 27 November 2018.

74 *Supra* 3.5.

75 The Bundesgerichtshof did not deal with this question either, since the Facebook terms of service did not contain provisions regulating this issue, see BGH 12 July 2018, III ZR 183/17, *NJW* 2018,

6. Conclusion

Contracts with providers of digital content or digital services are inheritable according to the general rule laid down in Section 531 ABGB. However, rights and obligations are non-inheritable when the replacement of an obligee or obligor by an heir would change the performance of the obligation; then they are of strictly personal nature. One has to look at each case individually, but in general, contracts with providers of digital content or digital services are not strictly personal and thus inheritable. Telecommunications and data protection law does not prevent the heirs' access either. Even if content is non-inheritable, heirs would get access if they have a compelling reason that overrides the deceased's interest in privacy.

Digitalization provides the deceased with a means of maintaining her privacy even after death. She could instruct someone to delete user data or accounts in the event of death, thereby preventing her heirs from having access to it. Furthermore, the question of whether parties may agree that certain rights and obligations are non-inheritable in the first place or whether standard terms of business can provide for the deletion of content in the event of death requires closer examination. Such clauses should not be hastily dismissed as void – one must also take the perspective of the providers of such services. Granting unjustified disclosure or access would constitute a breach of contract since providers are committed to the protection of their users' privacy.

The digital estate has to be treated in the same way as analogous rights and obligations of the deceased. Lawyers, who work with abstract legal norms on a daily basis, should be able to recognize legal structures behind new technologies and thus demystify problems that seem to be completely new.

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p 3178, no. 25. An initial analysis has been conducted by W. Zankl, in *Der digitale Nachlass*, pp (1) at 16 et seq.