

# Law of succession INTRODUCTI ON

Speaking in rough general terms, the **Law of Successions** is that branch of law which governs the manner in which, and, of course, to whom, **the rights and duties of a dead person, technically referred to as the deceased, should pass.**

The Law of Successions belongs to the civil/private law category in the family tree of laws.

## *General Course Objective*

- Discuss the meaning, time, place, and manner of opening of a succession;
- Identify those things that make up the inheritance of a dead person and those that do not;
- Enumerate the kinds of successions recognized by law;
- Elaborate the meaning of capacity to succeed and the conditions required therefor;
- Identify those persons who have the capacity to succeed a dead person and those that do not;
- Discuss the meaning of intestate succession, and enumerate, in order of their preference, the persons called to the succession of a person who had died intestate;
- Dissertate about the power of a person to dispose of his property after his death;
- Name the kinds of wills recognized by the Law, and discuss the validity requirements attached to each;
- State the available legal methods to prove the

- existence and contents of a will;
- elaborate the possible grounds for the partial or full invalidation of a will;
  - Internalize the meaning of liquidation of a succession;
  - Explain the modes of appointment, duties, liabilities, and scope of power of a liquidator;
  - Identify the types, modes of payment, and the of the recipients of the debts of a succession;
  - Discuss the meaning of partition and the manner it is lawfully conducted;
  - Understand the nature of conventions relating to an inheritance and explain the rationale for the prohibition of pacts on future successions; and
  - Fully appreciate and help enforce the rights of women and children with respect to succession.

## CHAPTER ONE

# DEVOLUTION OF SUCCESSIONS

## *1.1. General considerations of THE devolution of A succession*

### *• The Concept of Patrimony*

The literal meaning of patrimony is the estate that descended from the father to his descendants. However, this does not exclude the estate that descends from the mother to her descendants and/or from other ancestors in the paternal as well as in the maternal line.

There is a link between a person and patrimony. This link can be expressed in the following four ways:

- A) Only persons have patrimony with the

exclusion of other beings. Persons are beings that are capable of having rights or owing obligations.

B) Every person necessarily has a patrimony, irrespective of the fact that the person has no property at all. Patrimony is linked to the personality of the person.

C) Patrimony is a unit. All the property and all the charges of a person form a single mass. However, this principle of unity of patrimony is subject to exceptions. One example of the exceptions is — an heir seems to have two patrimonies.

D) Patrimony is inseparable from the person. Therefore, there can't be a total

transfer of property of the person while he/she is still alive. A person can dispose only part of the constituent elements of his/her patrimony, one after the other. His/her patrimony, considered as universality, is the consequence of his/her own personality and necessarily remains attached to his/her personality.

Transmission of patrimony in its totality takes place only after the person's death. At that moment, the deceased's patrimony is attributed to his/her successors.

### **1.1.2. Opening of Succession**

As it is expressed in Article 826 of the Civil Code, the succession of the person opens at the place he/she had his/her principal residence at the time of his/her death.

The succession of the deceased shall open just at the time of his/her death.

### **1.1.3 Things making up a Succession**

Generally speaking, what transfer from the deceased to his/her heirs and legatees are those rights and duties of the deceased which arise from various relations which the deceased had with third parties during his/her lifetime. It is possible to indicate some of the principal relations between the deceased and third parties which can serve as source of rights and duties of the deceased like: contractual relations the deceased had with third parties; contract of insurance between the deceased; rights which arise from court proceedings between the deceased and third parties; and those rights generally referred to as property

rights – those rights we create and exercise against things, corporeal (movable or immovable) or incorporeal.

All the inheritable property left by the deceased at the time of his/her death are called the hereditary estate.

The hereditary estates are not limited to corporeal (tangible) things. They also include incorporeal (intangible) things such as the works of the mind or literary rights.

#### ***Art. 827. — Things making up inheritance. — Life insurance***

- (1) Monies due in performance of a contract of life insurance to which the deceased was a party, shall form part of the inheritance where the deceased has not determined the beneficiary or the insurance is made to the benefit of the heirs of the deceased without any

other indication.

(2) In other cases, they shall not form part of the inheritance.

**Art 691. — (Definition of life insurance)**

Life insurance is a contract.

The contract is made between the insurer (insurance company e.g. the Ethiopian Insurance Corporation) and the subscriber (a person who buys the life insurance policy and makes a periodical payment of premiums to the insurer).

The insurer undertakes or commits itself to pay the agreed amount of money to the beneficiary upon death of the subscriber.

**Art. 701. (comm.. code) — Beneficiary of insurance policy**

An insurance policy for the event of death may be made to the benefit of specified beneficiaries.

**A. Pensions and Indemnities**

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A person's succession may be conducted in one of the two types of successions. As it is prescribed in Art. 829, succession could be either testate or intestate. It could also be the combination of the two types. Testate succession is a succession in which the estate of the deceased person shall pass to his heirs and/or legatees according to the order of the deceased in the will he/she made. If the deceased made a valid will, his/her succession would be conducted in accordance with the will. A person who left a will is called a testator. The testator shall regulate as to what should happen to his property after his death. If the testator had no will at all, or his/her will is not valid, the succession of such person shall be conducted by the operation of the law. That is, in the case where there is no will, or where the will is invalid, the law shall distribute his estate among his heirs.

Sometimes it may happen that the succession is a combination of both intestate and testate. Many circumstances could lead to such a situation. For instance, property which was not included in the will may be discovered later; the will may be partially invalidated; the testator may appoint a universal legatee who is not a legal heir to take only some portion of the hereditary estate and with respect to the rest of the estate he/she may keep silent; etc.

#### **1.1.4 Capacity to Succeed**

The law requires someone who alleges to have a right in the succession of the deceased to fulfill some requirements. One is expected to have capacity to succeed. This is one of the most important requirements to succeed the deceased. The capacity to succeed depends mainly on two conditions. The first one is; the heir and/or legatee must survive the deceased person. The second requirement is such heir and/or legatee must not be unworthy.

The first condition is an objective condition and the heir and/or legatee shall lose his right to succeed the deceased for reasons outside his volition. The second condition is a subjective condition which occurs with a willful act of the heir and/or legatee. (Read Articles 830 & 831 of the Civil Code).

- **The Condition of Survivorship** (Art. 830 of cc).
- **Commorients**

Persons who die at the same time.

When several persons die by the same accident, and there is no evidence as to who survived, the presumption of law is, they all died at the same time.

When persons who have reciprocal rights to succeed each other die together, we could know by a post-mortem examination who survived whom. However, this examination is not always successful.

**Art. 832. — Persons dying simultaneously**

Where two or more persons are dead and it is not possible to prove which of such persons survived the other, the succession of each one of such persons shall be regulated as if he had been the last survivor without, however, receiving anything from the succession of the other persons.

### **C) Death of Heir**

If the heir is alive at the time of the death of the deceased (i.e., at the time of opening of his succession), then such an heir is said to have survived the deceased. If the heir survives the deceased, he/she fulfills the requirement of survivorship. Therefore, an heir who dies even after a short period from the death of the deceased will not lose his capacity to succeed. However, a problem arises if the heir himself/herself dies. What will happen to his/her share from the succession of the deceased? According to Art. 833, all the rights of the heir in the succession of the deceased shall pass to the heirs of the heir.

### **E) Unworthiness(Art. 838-840 of cc)**

The second condition to succeed the deceased is related with unworthiness. That is, in order to succeed the deceased, the heir and/or the legatee must not be an unworthy person. An heir and/or a legatee can become unworthy because of his criminal actions. The rationale behind this rule is that a person may not profit from his/her own crime.

It is the law that imposes a liability of unworthiness upon an offensive heir. The imposition of unworthiness has an exception. Although the heir has committed the offences prescribed under Arts. 838 and 840, he/she would not lose his/her capacity as unworthy, if the deceased had given such heir an amnesty, or if he had forgiven him/her. The pardon may be either an expressed or an implied one. A very common way of pardoning an heir is expressing the pardon in a will.

### **F) Unborn child**

“A child shall be deemed to be viable where he lives for forty-eight hours after his birth...” (Article 4(1) of the Civil Code)

When the father of a merely conceived child dies, the law considers that the interest of the child requires his consideration as a person. Such a child shall not be treated as a non-existent being. In such a case, his/her interest requires that he/she is a person subject to rights. Hence, although he/she is an unborn child, the law allows him/her to participate in the succession. However, his rights in the succession shall be realized after his/her viability is proved.

### **G) Children born in marriage, outside marriage and adopted children**

The Ethiopian law of succession makes no distinction based on the status of a child whether such child is born in marriage, outside a wedlock marriage or he/she is an adopted child. Nevertheless, you should note here that the establishment of the paternity of an illegitimate child is duly

obligatory before he claims to succeed the deceased, if the deceased is putative father.

An adopted child, for all intents and purposes, is assimilated to a natural child. The only exception for this rule is, as prescribed under Art. 182 of the Revised Family Law of 2000, (or the corresponding provisions in the Regional Revised Family Codes) adoption cannot be effective against the ascendants and collaterals of the adopter who opposed the adoption. Therefore, the Ethiopian law does not make any distinction among children of the deceased based on the fact that they are legitimate or otherwise.

### **H) Sex, age and nationality of heir (Art. 837)**

## **1.2 INTESTATE SUCCESSIONS**

In Ethiopia, most of the successions are intestate. When the deceased leaves no will at all or a court for various reasons invalidates the will made by him, it

is said that the succession is intestate. In such a case, the distribution of the estate will be in accordance with the operation of the law rather than the volition of the deceased. In the intestate succession, the law follows “the presumed will of the deceased.” This type of succession is older and more historic than succession by will. (Read Articles 842 — 848 of the Civil Code).

### **1.2.1 Devolution according to the degree of relativity**

#### **A) First relationship**

Children or other descendants are number one candidates to succeed a person (See Art. 842(1)). All children of the person who died intestate have equal rights in the succession irrespective of their age, sex, etc. differences.

Although a predeceased heir lost his/her capacity to succeed the deceased, his/her own descendants will represent him. Therefore, representation could be taken as

an exception to the rule of survivorship.

#### **B) Second relationship**

If the deceased is not survived by his/her children or other descendants, the father and the mother of the deceased will be called to his/her succession. In the case where his/her descendants survive him/her, all other heirs of the deceased will be excluded from the succession according to the rules of the interstate succession. His/her father and his/her mother are in the second order in the queue of the relatives of the deceased. The father and mother of the deceased will take equal share of the whole estate of the deceased.

In the case where one of the parents has died before the deceased, such parent shall be represented by his/her children (or other descendants). Note that the children (first degree descendants) of the parents of the deceased are his/her brothers and sisters, of full or of half blood.

In the case where both parents have survived the deceased, half of the hereditary estate of the deceased goes to the father and the other half goes to the mother. This is based on the principle that heirs of the paternal line the maternal line shall have equal shares in the inheritance of the deceased, so long as they are at equal distance from the deceased. In the paternal line, we find the father of the deceased and his (the father's) descendants. In the maternal line, we get the mother of the deceased and her descendants.

In a situation where the father predeceased the deceased and where descendants do not survive him, there is nobody to take the estate of the deceased in the paternal line at that level. In this case, the heirs of the maternal line take the whole estate of the deceased.

### **C) Third relationship**

A person has four grandparents, two on the paternal line and two

on the maternal line. If the deceased is survived by all of the four grandparents, half of the hereditary estate shall be devolved on the paternal grandparents and the rest half will go to the maternal grandparents. Each of them shall be entitled to one-fourth of the hereditary estate. If one of them predeceased the deceased and is survived by descendants, he/she will be represented by such descendants.

### **D) Fourth relationship**

A person has eight great-grandparents, four on the paternal line and the other four on the maternal line. The distribution of the estate follows the same pattern as that of the case of parents and grandparents.

#### **1.2.2 Paterna paternis-materna maternis (Art. 849 and 852)**

Articles 842 to 848 describe the rule in which intestate succession is governed. That is, the closest relative of the deceased would succeed him/her. This rule has an

exception. The exception is — although there are closer relatives of the deceased, a certain property may devolve upon far distant relatives. The law calls this exception as *paterna paternis materna maternis*.

The exceptional rule of *paterna paternis materna maternis* is designed to allocate an immovable property that is obtained by the deceased from one of the lines by way of donation or succession to the heirs of the line from which the property is obtained.

### **Example**

Ato Tezera acquired a house from his paternal grandfather by way of succession. Tezera is a young unmarried man and he has no descendants. Tezera's father, Ato Todano, died on Tahsas 30, 1998 E. C. Ato Todano's only child was Tezera. Nearl a year after death of his father, Tezera Died on Tir 7, 1999 E. C. Wro. Haymi, Tezera's mother, has survived her son. As Tezera was not survived by

descendants, his parents will be called to his succession. But, his father predeceased him and the predeceased heir (Tezera's father died without leaving other descendants. Therefore, the mother will be called to the succession. However, there immovable property which is originated from the paternal line. With respect to the chattels, Wro. Haymi can succeed her son. But she cannot succeed the house. Although Wro Haymi is a closer relative of her deceased son, the house will go to the heirs of the third relationship of the paternal line. Because the deceased obtained the house from the paternal line by way of succession.

But w/ro Haymi can have usufruct right on the house. /Art. 850 of cc/.

According to Art 851, to apply the rule *paterna paternis materna maternis*, there has to be an heir in the line from which the immovable property is obtained, if the immovable property is obtained. If the immovable property is

acquired from the paternal line, there has to be an heir in that line. In case of absence of any heir in the paternal line, the immovable property shall devolve upon the maternal line. The converse is also true.

To apply the rule *paterna paternis materna maternis*, the following five conditions must all exist together. If one of them is missing, it cannot be applicable. The five conditions are:

1. The deceased must die intestate. (The exceptional rule cannot be applied if there is a will)
2. His/her own descendants must not survive the deceased. (If there are descendants, Art. 842 shall apply)
3. The property must be an immovable one. (Art. 849 (1) & (2))
4. The property must be acquired by the deceased from either paternal or maternal lines by way of

succession or donation. (Art. 849 (1) & (2))

5. There must be an heir in the line from which the property has originated. (Art. 851)

### **1.2.2 Escheat (Art. 852 of cc)**

When there are no heirs of the deceased up to the 4th relationship, the property shall devolve on the State. This condition is usually said to be Escheat. Escheat is reversion of property to the state in the absence of legal heirs or claimants. The State takes the property of the deceased not by way of succession, but because such property has no one to claim it.

### **1.2.3 Representation and renunciation**

#### **A. Representation (Art. 853 of cc)**

##### **Example**

Ayantu died intestate and she left 90,000 Birr as a hereditary estate. She had three children, Brook, Ezana and Metti. Brook

predeceased Ayantu. Brook himself was survived by three children; Meron, Akalu and Mike. As Brook is survived by descendants, he shall be represented by them. Brook's children would receive what would have been taken by Brook. That is, they shall be entitled to 30,000 Birr and each of them has an equal share in the succession. Ayantu's grandchildren will only take proportionately among themselves the share that their deceased parent (Brook) would have taken if he were alive. This is a per stripes representation.

## **B) Renunciation (Art. 854)**

An heir who is a successor may not necessarily be willing to participate in the succession. In such a case, he could renounce the succession. Renunciation is a refusal to accept the succession. A person may renounce the succession for various reasons. If he/she is relatively in a better economic position, he may renounce the succession to the

benefit of his co-heirs. The heir who has renounced the succession shall never be seen as the heir of the deceased. He/she has forfeited his/her right in the succession and hence he/she will not be represented by his/her descendants. The reason is the one who has no right in the succession shall not transfer to his/her descendants what he/she does not have. However, as it is prescribed in Art. 854(2), the person whose succession has been renounced may be represented.

## **1.3 WILLS**

A will is the most satisfactory means of arranging for the devolution of a person's property after death.

While making a will, the testator makes a disposition of his/her property through a unilateral declaration of intention which does not require receipt by another party to become complete. The valid execution of a will requires

that the testator possessed testamentary capacity at the time of execution and that the formal legal requirements were observed. For the most part, the testator is free to make his/her own arrangements. The only requirement is that the instructions in the will not contravene legal prohibitions or public policy. A will is a juridical act that shall have a legal effect after the death of the testator or the will maker. It is an instrument by which a person makes a disposition of his/her property to take effect after his/her deceased, and which in its nature is ambulatory and revocable during his/her lifetime. A will is the instrument, which expresses the last wish of the testator.

Will is different from donation in that donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee (Art. 2427 of cc). Will is a unilateral juridical act which is

different from contract, in which the latter needs at least two parties. Since donation is a contract, it needs the acceptance by the donee (Art. 2436 of cc). The most significant difference, however, between donation and will is the time in which they are effected. Donation shall take place while both the donor and the donee are alive. As it has been discussed above, will is ambulatory and hence becomes effective after death of the testator. Some similarities also exist between will and donation (Art. 2427 of cc).

### **1.3.1 Conditions for the validity of wills**

#### **A) Personal nature of a will (Art. 857)**

The testator should seek the assistance of no one else. He/she should make the will by himself/herself. No any other person may take part in the making of a will on behalf of the testator or by way of assisting him/her.

A person may not bind himself/herself to make, to modify

or to revoke a will to the advantage or disadvantage of any other person. That is, he/she cannot promise to make a will to the benefit of a relative, a friend or any other person. In addition, he/she cannot promise to make, modify or revoke a will to the disadvantage of any person. When it is said that the will maker cannot promise, it should not be taken in a sense that if he/she promises to make, modify or revoke a will, the testator may not be bound by such a promise. That is, notwithstanding the promise made, the testator can revoke the will at any time. See Art 859(2).

### **B) Capacity to make a will**

Testamentary capacity is a special form of legal capacity. According to the Revised Family Code, testamentary capacity commences upon the completion of the 16th year. Prior to this, the minor cannot make a will even with the consent of his/her legal representative. After the age of testamentary capacity has been reached, the minor does not

require the consent of his/her legal representative. Persons lacking testamentary capacity are those who, due to a state of mental disturbance, mental deficiency or unsound mind, are unable to understand the meaning of the declaration of intention they have made or to act in accordance with this understanding in the execution of a will.

## **1. Minors**

### ***Art. 295 – Will.***

1. The tutor may not make a will on behalf of the minor.
2. A minor may not make a will before he attains the age of sixteen years.
3. The will made before he has attained such age shall be of no effect, notwithstanding that the minor has not revoked it after having attained the age of sixteen years.

## **2. Judicially interdicted persons**

Judicially interdicted persons are those who are declared by a court of law not to perform juridical acts, such as making a will. One of the reasons for a judicial interdiction is a mental illness. Arts 861, 368 and 862.

1. An interdicted person may not make a will after his interdiction.
2. A will made by the interdicted person before his interdiction is valid.
3. Although the will made by an interdicted person before his interdiction is valid, the court has the power to invalidate such will either totally or partially.
4. Although the will made by an interdicted person after his interdiction, is invalid, the court has the power to maintain such will either totally or partially.

5. When the court maintains a will made by the interdicted person after he/she is being interdicted, it shall consider the following points:

- i. A legacy (money or property given to somebody through a will) must not exceed five thousands Birr and;
- ii. The heirs-at-law of the interdicted person (the heirs-at-law could be descendants or other relatives) should get a minimum of three-fourths of the succession. That is, the outsiders (non-relatives) can take a maximum of only one-fourth of the succession.

## **3) Insanity**

As indicated in Art. 863, a will made by an insane person is valid

unless it is proved that the person was a notoriously insane person at the time of making the will.

When a testator makes a will, he/she must be careful not to include provisions that are contrary to law or morality. Moreover, the provisions of the will must not be difficult or impossible to execute.

### **C) Provisions Difficult or Impossible to Execute**

Article 865 (1) tells us that a testamentary provision which fails to specify in a sufficiently clear manner its beneficiary or its object shall be of no effect.

### **D) Illicit Provisions**

In Art 866 the word “object” is to mean the aim, purpose or goal of the will. If the purpose of the will is unlawful, its provision shall be of no legal effect. Moreover, the provisions of a will shall be of no effect if their purpose or aim is immoral. However, there is no standardized immorality.

Something immoral in a certain area may not necessarily be immoral at another area. Hence, the judgment on immorality could be left to local conditions.

### **E) Violence (Art. 867)**

The testator has to make a will only by his/her free volition. That is, the testator should not make a will under a threat or under any condition that could affect his/her freedom in the making of a will.

It may happen against one of the testator's descendants, ascendants or against the testator's spouse. In this case, the violence or the duress may put under threat the life, honor or property of the testator or one of the above persons.

### **F) Undue influence (Art. 875)**

According to the Ethiopian law of succession, undue influence is not a ground to invalidate a will. This is the rule. Undue influence is more of psychological than

physical. Someone may exert an excessive influence on the testator to have a will made, modified or revoked to the benefit of oneself. Although such influence affects the mind of the testator, it is not considered as a serious threat. However, there are exceptional circumstances in which undue influence could be a ground to invalidate a will or reduce the amount indicated in the will. Especially, the exceptional circumstance is relevant when the one who exerts the undue influence has a special opportunity to exert pressure on the testator. Generally, the exceptional situations depend on two circumstances:

- a) On the conditions of the testator; and,
- b) On the identity of the person who exerts the undue influence on the testator.

The conditions of the testator put him in a weak position in that he/she needs the help or

assistance of other persons. The conditions that force him to seek the assistance of other persons could be his being a minor, sick, etc.

The identity of the person who is exerting the undue influence is the one who, by taking the advantage of the conditions of the testator, gets benefit from the will of the testator. This person could be the guardian or tutor of a minor testator, or he/she could be a physician who prescribes or applies a medical treatment to the testator or he/she could be a clergyman who prays for the testator or gives him a spiritual assistance. A person, who takes part in the making of the will as a witness, interpreter, etc., can effectively exert undue influence on the testator and this situation is an exceptional one. Read Arts 870 and also 871—876)

### **A) Fraud (Art. 876)**

Fraud is a deceitful act. However, it is not a ground to invalidate a will, if the will benefits the

fraudster (the person who commits fraud). Here you should distinguish between fraud and undue influence. In the case of undue influence, the testator seeks others' help. In the case of fraud, the testator may not necessarily be in a weak position. For instance, the fraudster may promise to do something to the testator, if the testator makes a will to the benefit of such a fraudster.

## **H) Error (Art. 877)**

When a will is made as a result of error, the provisions of the Civil Code relating to invalidation of contracts shall apply. (Refer to the Civil Code provisions (Arts 1697 — 1705 and 1808 — 1818)) Generally, the mistake which led the testator to make the will in such a manner must be fundamental.

Moreover, the mistake must be clear from the wording of the will itself or from another document to which the will refers.

Only one or two of provisions of a will might have been affected by error and others may be good. The court may invalidate only such defective provisions by leaving others to be effective. The nullity of a certain defective provision cannot cause the nullity of other provisions of the will, unless there is a necessary connection between the execution of the provision, which has to be nullified, and the execution of another provision. (Art 878).

There are three types of wills (See Art 880). All of them are required to be made by following the formal requirements prescribed by the law. Failure to fulfill these formal requirements may cause the invalidation of the will as a whole. The law is so strict as far as fulfillment of the formal requirements is concerned.

## **A. *Form of wills***

### **I) Public wills (Art. 881- 883 of cc)**

A public will is a will that is read in the presence of the testator and of four witnesses. The testator can write the will in the presence of the witnesses. He/she can also write the will in the absence any person. That is, the testator may write the will by himself/herself or he/she may get it written by another person under his/her dictation in the presence of witnesses or even in the absence of the latter. The most important thing, as far as a public will is concerned, is the will has to be read in the presence of the testator and of four witnesses.

*The law prescribes the fulfillment of very stringent formalities when one makes a will. The reason is: a will becomes effective after the death of the testator. The testator is not in a position to defend his/her positions if someone makes some fraudulent act against the will. To narrow the possibility of making any fraudulent act against the will, the law lays down very strict formalities. In many instances the courts are so serious*

*in executing the provisions of the law and they rarely validate a will when it fails to fulfill one of the important formal requirements.*

## **II) Holograph will (Art. 884 886)**

Holograph will is a will that is totally made by the testator himself/herself in the absence of witnesses. Only literate persons may make a holograph will. It is the testator that writes a holograph will totally and if there is an additional word (even if it is a single word) written by the hand of another person, that is a sufficient cause to invalidate the will wholly.

Art 886 of the Civil Code advises the testator not to simply reproduce graphic symbols without understanding their meaning.

With respect to Art 888, the will refers to another document. You cannot understand the provisions of the will without referring to another document. When the will refers to another document or

when it is impossible or difficult to understand the will without referring to another document, such a document must have been written and signed by the testator.

In such cases, we cannot understand the will, unless we supplement it with the acknowledgement document or letter. The law under Art 888 requires that such a document or letter should be written and signed by the testator.

### **III) Oral wills (Art. 892-894)**

Oral will is a will made verbally to two witnesses. As you might have understood from Art 892 of the Civil Code, the testator does not make an oral will under normal circumstances. He/she makes such a will when he/she feels that he/she is going to die within short period of time, particularly after accidents, shocks or similar situations. It can be said that oral will is not a proper will. The testator can make only restricted

testamentary dispositions through an oral will. That is, the testator cannot make any order of his wish by way of an oral will. The law has listed down the contents of an oral will. The testator cannot add other testamentary dispositions, which are not included in Art 893.

If the provisions of various wills contradict each other and cannot be enforced together the latest will shall prevail. (See Art 895).

#### **B) Proof of will**

The one who claims a right in a will has to prove one or both of the following two things. First, he/she has to prove the existence of the will. That is, he/she has to show a will made by the testator. Second, he/she has to prove the contents of a will.

From Art 897, one can see the following important points:

- a) The existence and contents of a will (whether a public or holograph will) shall be proved only by producing

the original will itself or the copy of the original will, certified to be true by the court registrar. The court registrar could issue the copy of the original will, if he/she had received the original will to be deposited in his/her archives. Otherwise, the claimant shall only present the original will.

- b) To benefit from the will, approval by presenting the will itself is obligatory and no any other means of evidence can be possible. For example, witnesses cannot prove the contents of a public will.

If someone destroys or causes the destruction of a will by his/her fault or negligence, such a person may be obliged to pay compensation to the beneficiary of the will. To get compensation from the person who has destroyed or caused the destruction of the will by his/her fault or negligence, the beneficiary can prove the fact

that he/she is a beneficiary by any means of evidence. For instance, he/she can prove that he/she is beneficiary of the will by producing witnesses.

### **1.3.3 Revocation and lapse of wills**

#### **A) Revocation of wills (Art. 898-901)**

A will is always revocable, until the death of the testator. A testator may make an agreement with a beneficiary not to revoke the will. However, sometimes elderly people who have no descendants of their own may promise to leave some property to a person, on condition that the latter nurses the former.

There are various ways in which a will may be voluntarily revoked:

- a. By another will.
- b. By an express intention to revoke, made in the same manner as a will, i.e., this must comply with the formalities set out by the law.
- c. By destruction.

- d. By alienation of the thing bequeathed

### **1. Another will**

The testator may, in his will include words like: 'I hereby revoke all former wills and testaments made by me'. The testator may revoke specific clauses of a will, while leaving the rest of it intact.

### **2. An intention to revoke**

A will may be revoked by any other written instrument, provided it is executed with the same formalities as are required for a will. For instance, the testator may revoke wholly or some of the provisions of a previously made will not by a new will but by a document made by following similar formalities.

### **3. Destruction**

A will may be revoked 'by the burning, tearing or otherwise destroying . . . with the intention of revoking the same'.

### **4. Alienation of the thing bequeathed**

By alienating the thing bequeathed, the testator can

revoke the will he/she has made. For instance, in his/her will made last year, assume he/she gave a mule to his/her friend. Now, if the testator sells or donates the mule to some other person, it means that he/she has revoked his/her will. /Art. 900/

## **B) Lapse of wills (Art. 902-908)**

Lapse of will takes place by the operation of the law. There are a number of reasons for the revocation of a will by the operation of the law. The reasons depend on the type of the will.

### **a) Failure to deposit a holograph will**

According to Art 903 of the Civil Code, a holograph will shall lapse where it is not deposited with a notary or in a court registry within seven years since it has been made. No such imposition exists for a public will.

## **B) Birth of child**

Another reason for the lapse of a will is birth of a child. If a child is

born after a will is made (whether a public or a holograph will) such a will, shall lapse if the newly born child accepts the succession. /Art. 905/

### **C) Dissolution of marriage**

According to Article 906 of the Civil Code, legacies made in favor of a spouse of the testator shall lapse where the marriage of the testator with that spouse is dissolved through divorce or court order when the marriage is concluded without observing the conditions for the validity of marriage. However, such a legacy cannot lapse where the marriage is dissolved by death.

When a husband or a wife makes a will to the benefit of his/her spouse, it is believed that the testator has made the will with the expectation that the marriage would continue until his/her death.

### **D) Death, unworthiness, or renunciation by a legatee**

Art 907 lays down the rule of lapse of legacies. According to Art 907,

three factors cause the lapse of legacies.

- i. When the legatee dies before the testator. In this case, the legatee has no capacity to succeed the testator since he does not fulfill the requirement of survivorship.
- ii. When the legatee cannot succeed the testator. This has a relation with unworthiness. When a legatee is condemned as unworthy, anything destined to his benefit shall lapse.
- iii. When the legatee does not want to take the legacy. This has something to do with the renunciation of the legatee to the succession of the testator. The law passes the legacy when anyone renounces the succession of the

testator, as it does not consider him as the legatee of the testator.

However, according to Art 908(a), the legatee who died before the testator would be represented if he/she is a legatee by universal title (or a universal legatee).

There is a very narrow chance for the existence of representation in the case where the legatee is a legatee by singular title (or a singular legatee). According to Art 908 (b), where the singular legatee dies before the testator, the descendants of the singular legatee shall represent him only when the legacy destined to such singular legatee devolves upon the state as a result of failure of the singular legatee to receive the legacy. According to the rules of intestate succession, the hereditary estate shall devolve upon the state when relatives up to fourth relationship do not survive the deceased. In the above situation, the rules of the intestate succession shall regulate the singular legacy, because of the

prior death of the singular legatee. If a relative survived the testator (from the nearest relative — a child — up to a far apart relative at the fourth relationship), such a relative would receive the legacy. In the absence of any relative up to the fourth relationship, the legacy shall devolve upon the state. Instead of devolving the property upon the state, the law favors the representatives of the predeceased legatee to inherit the deceased by way of representation.

### **1.3.4 Contents and interpretation of wills**

#### ***A. Contents of wills***

The testator can determine the contents of a will he/she makes freely so long as the contents of his/her will do not violate the law or so long as they are not contrary to public moral. Art 909 lists down the contents of a will. But this should not be seen as an exhaustive list. It only gives us illustration.

The only limitation with respect to the contents of a will is, the testator cannot declare in his will anything illegal and/or immoral.

***B.Interpretation of wills (Art. 910 and 911)***

**I) Legacies by universal title**

Sometimes it is difficult to distinguish between universal legacies and singular legacies. The law itself does not clearly give the meaning these terms.

Art 912 (1) the following four aspects of universal legacies.

- When the testator gives his/her whole estate to one person, the property given to the beneficiary is a universal legacy and the beneficiary is a universal legatee.
- When the testator gives his/her whole estate to two or more persons, the whole estate given to these persons is a universal legacy and

such persons are universal legatees.

- When the testator gives a portion of his/her estate to one person, such a portion of the hereditary estate is a universal legacy and the beneficiary of the portion of the hereditary estate is a universal legatee.
- When the testator gives a portion of his/her estate to two or more persons, such portion of the hereditary estate is a universal legacy and the persons appointed to receive such a portion are said to be universal legatees.

A universal legatee is the one who is called to the succession to receive a certain portion of the hereditary estate, not a particular thing from the succession. Therefore, a universal legatee does not know what thing he/she is going to receive from the succession.

**II) Legacies by singular title**

What is a singular legacy and who is a singular legatee? According to Art 912(2), any other disposition (that is, outside the ones discussed above) is a singular legacy. The general tendency of the law toward singular legacies is that, singular legacies are minor testamentary dispositions usually given to non-relatives. When a single item, such as a bicycle, a television, an overcoat, a watch, a radio, etc., is given to someone, the property is a singular legacy and the one who is in a position to receive such a property in kind is a singular legatee. A universal legatee, in majority of the cases, does not know what thing he is going to receive before partition of the succession.

### ***III) Legacies and rules of partition (Art. 913)***

#### **Example**

Assume that Ato Habtamu made the following will by fulfilling all the legal requirements:

*"My elder daughter*

*Ayantu shall take the ISUZU pickup car."*

Assume also that this is the whole content of the will of Ato Habtamu. Let us consider that Ato Habtamu has other two children (other than Ayantu). This will does not give to Ayantu the pickup car, in addition to what she partakes with her siblings. Rather, the will shall be interpreted that the pickup car shall fall in the portion allocated to Ayantu. The children of Ato Habtamu have equal portions in the successions as there are no other dispositions in the will. Other children, since they are universal legatees, do not know what a specific property they are going to receive. Only Ayantu knows that the car falls in her portion.

A problem may arise here. That is, the value of the ISUZU car may be greater than other portion of the

inheritance. If Ayantu is in need of the pickup car, she can set off the excess amount by paying sums of money to the co-heirs. For instance, if the total hereditary estate is about Birr 600, 000, including the pickup car, each of the co-heirs is entitled to receive Birr 200,000. If the value of the car is Birr 225,000, Ayantu should equalize her share with others by paying them back Birr 25,000.

You should note here that the testator could give an exclusive right to one of his/her heirs, on a certain property, in addition to what such an heir shares with other co-heirs. However, if this is the intention of the testator, he/she should express it clearly.

## **I. Effects of universal legacies**

When a person is in a position to receive a universal legacy, he/she becomes a universal legatee. The appointment of a universal legatee does not follow any special formality. That is, a public or holograph will that normally fulfills the formal requirements could appoint a universal legatee. No special will with special formalities is required to appoint a universal legatee (Art. 914).

When someone is appointed as a universal legatee, he/she is assimilated to an heir-at-law. When it is said that a universal legatee is assimilated to an heir-at-law, it means that a universal legatee who is a non-heir (such as a friend, a servant, a spiritual father, a spouse, etc.) shall be treated in all respects in relation to the succession in the same manner as the legal heirs of the testator. The rights and responsibilities of such universal legatees will be similar to that of the legal heir to the testator.

### **1.3.5 Conditional Legacies (Art. 916- 919)**

The testator may make his succession to depend on certain conditions. The conditions are of two types. In the words of the Code, they are suspensive and resolutive conditions. We also call suspensive conditions as condition precedent and resolutive conditions as condition subsequent.

**Suspensive condition** — In the case of suspensive condition or condition precedent, the legatee shall wait until a certain time lapses or until a certain circumstance occurs. Therefore, the legatee will not be entitled to receive the bequest until the fulfillment of the specified condition.

**Resolutive condition** — Resolutive condition or condition subsequent is a situation where the legatee brings back what he received from the succession when a certain condition is fulfilled.

That is, in the case of resolutive condition, the legatee is automatically entitled to receive the bequest, unlike the case of suspensive condition.

### **1.3.6 Charges**

Charge is the order of a testator against his/her heirs and/or legatees in which he/she binds them to take some responsibility or take care of one or more persons. However, the testator cannot bind the heirs and/or legatees to give or to do something to specified persons more than the value of the legacy. /Art. 920- 923/.

### **1.3.8 Substitutio vulgaris**

*Substitutio vulgaris* was very common in Roman wills. An alternative heir was appointed in the event that the person instituted as the primary heir failed to become the heir (e.g. because he/she died before the testator or refused the inheritance). According to the Ethiopian Civil Code, *Substitutio vulgaris* is the situation where the testator orders another person to

take the legacy in cases where the appointed universal or singular legatee fails to appear and receive what the testator allocates to him/her. The causes for the disappearance of the appointed legatee could vary from case to case. (See Article 928).

### **1.3.8 Entails**

The concept similar to entail existed in Roman law. It was also common in many parts of Europe. It is a restriction of inheritance to a limited class of descendants for at least several generations. It is mainly linked with real estate. The object of entail is to preserve large estates in land from the disintegration that is caused by equal inheritance by all the heirs and by the ordinary right of free alienation (disposal) of property interests.

In Ethiopia, the testator has the power to order that his/her heir and/or his/her legatee shall hand over the legacy to one or more persons after such heir and/or legatee has benefited with the

legacy. The testator may order the heir and/or legatee to transfer the legacy (or even portion of it) to the specified person(s) upon the following conditions:

- On the expiry of a certain period, for example, after 5 years from the opening of the succession;
- Upon the death of the heir or the legatee; and,

On the accomplishment of a certain condition, for instance, when the testator's little daughter gets married.

### **1.3.9 Disherison (Art. 937- 940)**

In the Ethiopian law of successions, the testator has wider rights to disinherit one or more of his/her heirs by the will he/she makes. His/her rights may even go to the extent of disinheriting all of his/her children. Disherison is an order passed by the testator to exclude his/her heirs from the succession. It usually serves as a

means of punishment for the misbehavior of his/her heirs.

# CHAPTER TWO

## LIQUIDATION OF SUCCESSION AND DETERMINATION OF RIGHTFUL SUCCESSORS

2.1

Preliminary

Considerations

### ***2. 1. 1. The Essence of "Liquidation"***

It goes without saying that before any right over things making up the inheritance passes to heirs-at-law/ Art. 1060/ and/or legatees by universal title /Art. 915/, some kind of screening must be made. That means, before any property or

right of the inheritance is delivered to properly identified heirs, there should be a winding up of the deceased's affairs. In particular, assets and claims the deceased owned should be identified and collected, debts and taxes ascertained and paid, maintenance claims entertained, and singular legacies ordered by the deceased, if any, paid.

"Liquidation" is the technical term we use in the law of successions to refer to that winding up process. Liquidation is legally important for a host of reasons. For instance, the property forming part of the inheritance merges with the other property of the heir only after the closure of the liquidation of the succession /Art. 1053/.

Partition does not take place unless and until the succession has been fully liquidated /Art. 1062/. It is not even an indispensable part of the process of devolution of a succession. There will be no partition where, all the property in the inheritance having been

disposed of in the course of liquidation, there remains nothing to partition. Nor will there be any partition where there is just one properly identified heir.

The Ethiopian Law of Successions takes a somewhat similar stance with respect to liquidation. Article 944 of the Civil Code provides for what the liquidation of a succession consists of. It states that liquidation means the process of determination of the rightful recipients and constituents of the succession; the recovery of debts due to and the payment of debts due to it; the payment of the legacies by singular title and the taking of such other steps as are required to carry into effect the provisions made by the deceased.

Liquidation is a tough task, especially when the testator has left lots of property. It demands the liquidator to do a series of toiling activities. The first thing the liquidator is required to do immediately after assuming office is making a search to find out

whether the deceased has left a will /Art. 956/a/. He should then go on to receive, preserve, and administer the properties left by the deceased. The liquidator should also perform such other important functions as establishing the identity of the persons that are eligible to receive the inheritance, determining what property makes up the estate, recovering debts for which the deceased was a creditor, and paying debts owed by the succession, etc. /Art. 944/.

## ***2. 1. 2. The Guiding Principles of Liquidation***

Art. 942 of the Civil Code sets forth a very important principle. This principle serves as a guideline for the entire process of liquidation. Here is the content of the Article in full:

### ***Art. 942. — Guiding principle.***

So long as a succession has not been liquidated, it shall constitute a distinct estate.

But, what does “a distinct estate” mean? Literally, a distinct estate means some property set aside for a special purpose. Art. 942 obliges that the succession will constitute a distinct estate pending liquidation. And one of the most important purposes of the device of liquidation is the satisfaction of debts claimed from the succession in favor of persons with rightful claims.

The law considers the succession a distinct estate. The primary reason behind this move seems to be the protection of the interests of rightful persons. The succession is specially kept for the benefit of lawful claimants pending liquidation.

So long as it has not been fully liquidated, heirs, legatees, and creditors (both creditors of the succession and the personal creditors of the heirs) will have an undivided interest over the succession. Article 943 provides for a specific instance of the practical application of the principle set forth under Article 942. It states that the creditors of

the succession shall have the property of the inheritance as their exclusive security. Since the creditors have right to satisfy their claims from the property of the inheritance, the implication is that the law prescribes the setting aside of the succession as a distinct estate for their protection. The creditors may require the attachment of the property of the inheritance in order to satisfy their claims. To protect this right of the creditors, the property forming part of the inheritance may not merge with the personal properties of the heirs pending liquidation. That means, heirs have no distinct right over the property of the inheritance before the end of the liquidation process. By the same token, personal creditors of the heirs shall have no right on the properties of the inheritance while the liquidation is still going on.

### ***2. 1. 3. General Objectives of the Chapter***

- Internalize the whatness of the liquidation of a succession;
- Understand the meaning and constituents of a distinct estate in the context of the Law of Successions;
- Discuss the significance of the device of distinct estate in the real societal life especially in relation to the rights of persons who have legitimate claims over the succession;
- Discuss the modes of appointment of a liquidator;
- Analyze the duties, liabilities, and the scope of power of the liquidator;
- Outline the options available for heirs and legatees by universal title after they are called to the succession;
- Identify the modes of payment and the identity of the recipients of the debts of a succession;
- Discuss such issues as the grounds for the closure of liquidation, and the legal effects of closure; and

- Dissertate about the right of creditors who appear after closure and the duty, if any, of the heirs.

## **2.2The Liquidator of a Succession**

### **2. 2. 1. Who is the "Liquidator"?**

Liquidation is a process that involves a series of tasks and activities.

Article 946 of the Civil Code establishes that executing institution designated with the task of carrying out the liquidation of a succession. The Article in question reads:

“A succession, whether intestate or testate, shall be liquidated by one or more persons...referred to as ‘the liquidators’”.

The functions of the liquidator are numerous and painstaking, and may even entail personal liability. As a matter of principle, the liquidator must be a diligent

person capable of administering the property of the deceased as a bonus paterfamilias. He should also be a person of integrity and thick patience.

It is important to note that a liquidator is expected to discharge his duties faithfully, diligently, and vigilantly, whatever the mechanism through which he has come to hold the function. Moreover, no distinction whatsoever is made between liquidators with respect to powers, rights, and duties on the basis of the manner of appointment.

### **2.2.2 Mechanisms of Appointment of a Liquidator**

#### **2. 2. 2. 1. Designation by Law**

One of the mechanisms of appointment of a liquidator is designation by the law. /Art. 947/.

One of the mechanisms of appointment of a liquidator is designation by the law. The law designates the capacity of

liquidator to the heirs-at-law of the deceased. Heirs-at-law assume the office of liquidator solely by the operation of the law. Where a person dies wholly intestate; or where the deceased dies without leaving a will at all; or where he dies leaving a will, but the will is either subsequently declared invalid by a competent court of law or fails to appoint a liquidator, the function of liquidator will devolve to his heirs-at-law.

#### **2. 2. 2. 2. Appointment by Will**

A person has a right to specify, by a legally valid will, the manner in which his estate should be disposed of after his death. He has also the power to name a person or persons whom he wants to oversee the disposition. That in other words means, he can appoint the liquidator of his succession by his will.

Where the deceased has left a valid will, and where he has validly named a person as a liquidator, the person so named shall be the

sole liquidator of the succession/ Art. 948/. No other person may take the position – not even those designated by law. Testamentary appointment prevails over all other modes of appointment.

That, therefore, means that failing any express disposition by the testator, the law assigns legatees by universal title to the office of the liquidator/ Art. 948(2)/. Legatees by universal title are persons whom the testator has called to receive one whole or a portion of his inheritance/ Art. 912 (1)/. It seems, the law took this position presuming the fact that the testator would have preferred those persons whom he has appointed legatees by universal title also to be the liquidators of his succession.

### **2. 2. 2. 3. Incapable Liquidator**

A person may be the heir-at-law of the deceased or might have been appointed a legatee by universal title by the deceased in his will. As discussed shortly earlier, an heir-

at-law has the right to claim the office of the liquidator by the operation of Articles 947 and 948(3). A legatee by universal title is also eligible to the same office thanks to Article 948(2).

But as a matter of fact, a minor or an interdicted person lacks the capacity to act as a liquidator. However, the law assigns the tutor of the incapable person to represent the latter for the performance of the functions of liquidator/ Art. 940/.

### **2. 2. 2. 4. Appointment by Court**

It may happen that a succession remains without a liquidator even after the application of Articles 947, 948, and 949 of the Civil Code. Such a scenario could happen where all the heirs-at-law and legatees by universal title decline inheritance. Ditto for a vacant succession where the succession is taken by the state.

In such an event, the court intervenes. It appoints a liquidator

upon the application of any interested person. In the present context, a legatee by singular title or the public prosecutor could be regarded as interested person. In particular, the court appoints a liquidator in either of the following to cases:

- When the succession is a vacant one. That is, when no person appears claiming that he is an heir, or when all of the heirs renounce the succession, or when all of the heirs do not want to liquidate the succession/ Art. 950/.
- When the succession goes to the state. That is, where there is no person legally entitled to receive the succession/ Art. 950(2)/.

### ***2. 2. 3. Nature of the Functions of the Liquidator***

The function of liquidator is voluntary. No person is bound to

take the office of the liquidator without his consent. In other words, no one is compelled to become a liquidator, even if he has been appointed in terms of the provisions of the pertinent Articles.

By the same token, the liquidator may resign after starting his functions. According to Article 954(1), the liquidator may resign at any time. This is saving where he has expressly committed himself to perform his functions up to the conclusion of the liquidation process or for a definite period of time.

However, an untimely resignation may entail personal liability. The liquidator may not resign at a time “which is not convenient”. For instance, the liquidator may not resign while there are perishable goods out there that seek his immediate attention. If he resigns at this particular time, he will personally bear the loss. (See Article 954(2) cum. Article 961).

The functions of a liquidator will terminate where he is replaced by a new liquidator. A liquidator may

be validly replaced in conformity with the law, the will, or a decision of the court. They may also terminate where the liquidator has fully accomplished his functions and rendered an account of his management/ Art. 955/.

## ***2.2. 4. Powers and Duties of the Liquidator***

The liquidator's functions are enormous. Article 944 and 956.

- Search for a will of the deceased,
- Determination of persons who are called to the succession,
- Determination of the property that constitutes the succession,
- Administration of the succession,
- Payment of debts of the succession

The liquidator has several powers and duties. However, the deceased or the court may limit the powers

of the liquidator or give him instructions regarding the manner how he should perform his functions/ Art. 957(1)/. Nonetheless, the court may, for good reason, modify such instructions/ Art. 957(2)/.

The liquidator is duty bound to render the accounts of his management when he has accomplished his functions to their conclusions/ Art. 960(1)/. He may also be required to render such accounts before that date at the time agreed upon with the heirs or fixed by the court/Art. 960(2)/. Failure to do so has the liability of the liquidator as its sanction/ Art. 957(3)/.

In addition, several other reasons may entail the personal liability of the liquidator. In particular, the liquidator shall be liable for any damage he causes through his fault or negligence/ Art. 961(1)/. He shall be deemed to be at fault where he acts contrary to the provisions of the law, to the provisions of the will or to the

instructions given to him by the deceased or by the court/ Art. 961(2)/. Nevertheless, the court may relieve him in whole or in part of such liability in his relation with the heirs or legatees where it appears that he has acted in good faith with the intention of performing his functions/ Art. 961(3)/.

## **2. 3. Identifying Legitimate Successors**

### **2. 3. 1Provisional Determination**

The rightful recipients of a succession – be it testate or intestate – must be identified with the utmost care. This is important for a number of obvious reasons. To mention but one reason, if the recipients of a succession are not correctly identified, then there will be a risk of violating the intent of the deceased and the law by denying the persons who are lawfully entitled and by entitling those that are not entitled.

The liquidator does most of the identification activity. The first and

the foremost task of the liquidator is to make a search for a will. The cumulative reading of Articles 962(1) and 956(a) of the Civil Code.

Once a will has been discovered, it shall be opened. Opening means to formally publicize the will and its contents. According to Article 965 of the Civil Code, the liquidator opens the will.

Article 965 prescribes also that the liquidator is expected to open the will forty days after the death of the deceased/ Art. 965(1)/. There is nothing special with the fortieth day. It is simply the reflection of the religious or customary practice of “*tezkar*” or “*arba*”, i.e., commemorating the dead on the fortieth day of his death.

However, the above rule is not hard and fast. A will may be opened after the fortieth day of the deceased’s death. Article 965 (2) of the Civil Code provides for an instance where a will may be opened after such date.

Article 967 of the Code stipulates the place where the liquidator should open the will. Sub-Article (1) of this Article specifies that the will shall be opened at the notary or in the registry of the court where it has been deposited during the deceased's lifetime or after his death. Sub-Article (2) of the same Article purports to fill the gap that may be created in the event where the will is not deposited for any reason. This Sub-Article states that in default of such deposit, the will shall be opened at the place where the deceased had his principal residence at the time of his death.

Akin to the liquidator of a testate succession, the liquidator of an intestate succession must establish an order of partition at the time it appears certain that the deceased has not left a will/ Art. 972(1)/. He must also inform interested persons of his proposed order of partition without delay. The liquidator must give such information as soon as it appears certain that there is no will and, at

the latest, forty days after the death of the deceased/ Art. 972(2)/.

### ***2. 3. 2. Option of Heirs and Universal Legatees***

An individual right generally is optional. The holder of a certain individual right has two options as far as that particular right he holds is concerned. He is at liberty to opt to exercise the right or, if he so wishes, to renounce it single-handedly so long as his act does not directly harm any right of others recognized by law as valid and enforceable.

"No heir is bound to accept the succession to which he is called/ Art. 976/".

The "no necessary heirs" rule applies not only to heirs-at-law, but also to both legatees by universal and singular titles. That is because the law, via Article 915 (1) of the Civil Code, assimilates legatees by universal title to heirs-at-law. And

as for legatees by singular title, Article 1038 of the same Code provides that the provisions relating to the option of heirs-at-law and legatees by universal title shall apply also to legatees by singular title, save for a handful of differences.

Akin to making, altering and revoking a will, the right to opt to accept or to renounce the succession is strictly personal to the heir/ Art. 977(1)/. No other person may make the option on behalf of the heir as long as he is alive and capable. Likewise, where several heirs are called to the succession, it is up to each individual heir to make the choice. Some heirs may accept the succession, while others renounce it/ Art. 986/.

Even the personal creditors of an heir may not exercise the right of election notwithstanding the likelihood that the heir will opt to renounce the succession at their peril/ Art. 977(2)/. But the rights of such creditors shall not be affected

by the heir renouncing the succession in fraud of their interests/ Art. 977(3)/. Once the heir has opted to renounce the succession, the creditors may, where it is prejudicial to them, apply to the court to annul the renunciation by invoking the device of “**Actio Pauliana**” / Art. 993(1)/.

Acceptance or renunciation may not be partial/ Art. 989(1)/. An heir may not, for instance, accept to take the benefits of a succession and decline its debts. A valid election is said to be made only where the heir accepts or renounces the succession in total.

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| <p>Under the Ethiopian Law of Successions, the liability of an heir to the debts of the inheritance does not in any case exceed the value of the benefit he gains by accepting the succession. If all the property of the inheritance is disposed of during the process of liquidation, creditors of the inheritance will not have any legal recourse against the heir as nothing has gone to the heir from</p> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

the succession. If, on the other hand, some property remains after the liquidation process is wound up and the heir takes the property so remaining, he will be liable only to the extent of the value of the property he has taken/ Art. 1054(3)/.

Apparently, the Ethiopian Law promotes acceptance more than renunciation of succession. That is because the law prescribes stricter time limit and formality requirements for valid renunciation than acceptance. For example, renunciation not made in conformity with the specified time limit or form amounts to acceptance/ Art. 982(2)/.

An heir will be legally considered to have renounced a succession only where he makes the renunciation in strict compliance with the following requirements; otherwise he is deemed to have accepted the succession. The renunciation will be valid only where the heir makes it:

- I. Within one month from the day on which the liquidator has informed him that he is called to the succession/ Art. 978(1)/; or
- II. Where the court, upon his application, grants extension, within three months from the day on which the liquidator has informed him that he is called to the succession/ Art. 978(2) /; and
- III. In writing/ Art. 979(1)/; or
- IV. If he has to make it orally, in the presence of four witnesses; and
- V. Known to the liquidator before the expiry of the period stated under (I) or (II) above as the case may be.

Unlike renunciation, acceptance is totally irrevocable/ Art. 990/. In no case may acceptance be revoked. The decision of an heir to accept the succession to which he is called is final and conclusive. He may not seek the invalidation or annulment of his acceptance even by going to court.

### **2. 3. 3. Certificate of Heir**

An heir /Art. 915 and 1002/ does not start to exercise his inheritance right as soon as he is informed that he is called to the succession. He must wait until the property of the inheritance merges with his personal property in accordance with the pertinent provision of the law. However, he can before that apply to the court and obtain a “certificate of heir”.

A “certificate of heir” is thus a written assurance or official representation issued by the competent court to confirm the inheritance right of an heir who meets the all the legal requirements to succeed a deceased person/ Art. 996(1)/.

### **2. 3. 4. Petitio Haereditatis**

The danger of issuing a certificate of heir before the liquidation process is wound up and rightful recipients of the succession are correctly identified is that someone without a valid title or with a

lesser title may obtain one. For example, a person who, while he is not entitled to the succession at all, obtains a certificate of heir through fraud or any other means is said to be without a valid title. If, on the other hand, a brother or a sister of a person who died intestate controls the estate upon the deceased’s death, obtains a certificate of heir, and takes possession of the property of the inheritance while the deceased is survived by a child whom he fathered out of wedlock, such brother or sister is said to have a lesser title as compared to the child.

The person without a valid title or with a lesser title will, once he has a certificate of heir in his hand, have the status which the certificate attributes to him/ Art. 997(1)/. That happens regardless of the defectiveness of his title so long as his certificate has not been annulled. He might enter into juridical acts in the capacity he derives from the certificate. He might even manage to take

possession of all or a portion of the property forming part of the inheritance/ Art. 999/.

That naturally takes place at the expense of the rightful recipients of the succession who have valid title. Fortunately, the law has devised a mechanism through which the persons who are lawfully entitled to the succession may redeem their rights. It may be impossible to undo the damage completely, but this mechanism is better than nothing.

A lawful heir may sue the person who has obtained a certificate of heir without a valid title with a view to redeeming his right. The suit such an heir institutes is technically called the action of ***“petitio haereditatis”***. Article 999 of the Civil Code, which sets forth the principle of ***“petitio haereditatis”***

A person can institute such action within a period specified under Art. 1000 of cc. if it not within this period, it may be barred by period of limitation.

An heir might not be able to institute a ***“petitio haereditatis”*** action within the three years period specified under Article 1000 (1) for one reason or another. If the reason is legally acceptable, the heir may institute the action within fifteen years from the death of the deceased or the day when the plaintiff can enforce his right over the succession/ Art. 1000(2)/. An action of ***“petitio haereditatis”*** may in no case be instituted after such period, save for those suits that relate to family immovables.

The heir who is the plaintiff in a ***“petitio haereditatis”*** action may, in his statement of claim, request the court to:

- Annul the status and certificate of heir of the defendant/ Art. 998(1)/;
- Order the defendant to return his certificate of heir; and where he alleges that he has lost the certificate or that he cannot return it for any

- other reason, order the defendant to give all appropriate securities to ensure that he will not make use of the certificate in the future;
- Acknowledge his own status of heir/ Art. 999/; and
  - Order the defendant to return to him all the property of the inheritance which he had come to possess.

### **3. 4. Administration of the Succession**

#### **Article 1003 of the Civil Code provides that:**

“The liquidator shall administer the estate of the deceased from the day when he is appointed until the persons having a right to the succession have received the shares or the property to which they are entitled”.

In the ordinary course of events, persons who may have right to the succession are persons who have

covered the expenses of the funeral of the deceased and of the administration and liquidation of the succession from their personal pocket, where this is the case; heirs-at-law; legatees by universal title; creditors of the deceased; maintenance claimants; and legatees by singular title. That means that the liquidator must administer the estate until that time at which properly identified debts of the inheritance, i.e., expenses of the funeral of the deceased, expenses of the administration and liquidation of the succession, debts of the deceased, maintenance claims, and legacies by singular title, if any, have been paid to properly identified creditors and the net rights of the deceased have been delivered to the deceased's rightful heirs and/or legatees by universal title.

The liquidator is expected to administer the properties of the succession with the prudence and zeal of a ***bonus pater familia/ Art. 1010(1)/***.

## **2. 5. Payment of Debts Claimed from the Succession**

### **2. 5. 1.            *Introductory Remarks***

Generally, debts that may be claimed from the succession can be classified into two categories: The first category consists in debts which are imputable to the deceased, whereas the second those that are attributable to the succession.

The debts which are imputable to the deceased include the expense of the deceased's funeral, debts he assumed during his lifetime, claims of maintenance by his rightful, and properties he bequeathed to legatees by singular title. These debts are said to be imputable to the deceased because they are linked to him in one way or another.

The second category is composed of debts that are attributable to the succession. These debts, which generally arise after the death of

the deceased, have more affinity to the succession than the deceased. These include the expenses of administration, liquidation, and partition of the succession such as those incurred for affixing of seals, drawing up of inventory, preservation of property, partition and delivery of the inheritance to the heirs, etc.

### **2. 5. 2.            *Order to be followed***

Not all the debts of the inheritance have equal legal importance. The law has devised a hierarchy of debts in which each type of debt is placed on a different rank depending on its perceived precedence. Some must be paid before others. Accordingly, for purposes of payment, creditors are treated differently on the basis of the priority attached to the debts they claim. The liquidator is thus expected to stick to the order specified by the law while effecting payment.

### **2. 5. 3. Funeral Expenses**

Funeral expenses are expenditures required for the disposal of the body of the deceased.

Funeral expenses are legally considered as one of the most important debts of the inheritance. The cumulative reading of Articles 1014 (a) and 1015 (1) of the Civil Code suggests that funeral expenses are payable before any other debt provided that they are justified. This is apparently the case even where the estate is insolvent.

### **2.5.4 Expenses of Administration and Liquidation**

The administration and liquidation of the succession involve a number of various activities that may require expenditure. Expenses incurred for purposes of administration and liquidation should be paid next to the funeral expenses/ Art. 1014(b)/.

### **2. 8. 5. Debts of the Deceased**

These are debts which the deceased actually incurred during his lifetime. These debts could be contractual, non-contractual, or penal by nature. Contractual debts are liabilities emanating from the deceased's contractual undertakings. Non-contractual debts originate in torts imputable to the deceased. And penal debts, such as fines, arise as a result of sentence imposed on the deceased for his criminal acts.

Creditors of the deceased do not have any right over the personal property of the heirs and legatees. They, however, have the estate of the deceased as their "exclusive security". As long as their claim is based on a legally valid and enforceable obligation of the deceased, they can enforce it against the estate./ Art. 1017, 1018, 1022, 1024, 1023/.

But, what if the property left by the deceased is not sufficient to

pay off all his debts? Here is what the liquidator should do. Creditors of the deceased may be of either of the following types:

- Secured creditors;
- Creditors with special privilege under the law; and,
- Ordinary creditors.

Secured creditors are those whose claims have been guaranteed by a personal guarantor or who possess what is known as “real security” by way of a mortgage or a pledge. Secured creditors are always with advantages in comparison with other creditors. They have the right to follow the guarantor or the property which constitutes their security for the satisfaction of their claims.

In the case of a real security, secured creditors have a priority right over the property under pledge or mortgage. Other creditors may make recourse against such property only after the claims of secured creditors

have been satisfied. Banks are usually secured creditors.

Creditors with special privilege are such creditors as workers claiming payment under employment contracts. The debts could be salaries or unpaid occupational safety claims, etc. For instance, if the deceased was a factory owner, workers of the factory may demand payment of any unpaid wage. The workers have a right of preference on the property forming part of the inheritance next to secured creditors. Tax authorities are also creditors with special privilege under the law, where there is any tax due.

Ordinary creditors are creditors who do not have any security or who are not conferred with a special privilege by the law. There are two classes of ordinary creditors: Those whose debts are exigible and those that are not.

Ordinary creditors whose debts are exigible are creditors with liquidated and mature claims. These debts have priority over

debts that are not exigible, i.e., debts that are not yet liquidated and mature. Creditors whose debts are not exigible and those who have conditional claims over the estate may require deposit of securities from the liquidator to ensure that he will later pay their claims when they fall due or when the conditions attached to the claims materialize.

## **2. 5. 6. Debts Relating to Maintenance**

The obligation to supply maintenance is not just moral. It is also a legal obligation sanctioned by the law. Family law governs maintenance provision obligations that may exist as between persons who are alive. According to the pertinent provisions of this law, a person is under certain circumstances obliged to supply maintenance to his spouse, descendants, ascendants, parents-in-law, siblings and stepchildren.

This obligation apparently continues even after death. / Art.1025/

According to Article 1026 of the Civil Code, the following three groups of persons may claim for maintenance from the succession. These are:

- The spouse of the deceased;
- The relatives of the deceased, namely, his descendants, ascendants, and brothers and sisters; and
- Other persons who lived with deceased or were maintained by him at the time of his death.

Notice that the right of those groups of persons is not unqualified. They are not entitled to claim for maintenance against the estate unless they are in need/ Art. 1027/. That is, they must not have any own means to support themselves. They will not also have such right if they are in a position to earn their living by their work.

The spouse of the deceased may claim maintenance irrespective of whether the succession is testate or intestate. S/he may claim regardless of the fact that the

deceased has ordered a legacy in her/his favor, unless it is shown that the claimant can live on such legacy. The spouse may get the maintenance by way of a life annuity in accordance with the rules laid down in the applicable family code concerning maintenance obligations/ Art.1030/. However, where the maintenance is payable by way of annuity, the annuity will no longer be due in case the spouse remarries/ Art. 1034(3)/.

In contrast, the relatives of the deceased, i.e., his descendants, ascendants, and brothers and sisters may claim only where the succession is testate and the deceased has left a valid will to their prejudice. That in other words means that they must be persons who could have been called by the law to take the inheritance or a part thereof had the succession been intestate/ Art. 1028(1)/. Accordingly, any descendant, ascendant, brother or sister of the deceased who does not have the capacity to succeed

because he has been excluded from the succession as unworthy will not have a claim for maintenance/ Art. 1028(2)/.

## ***2. 5. 7. Payment of Legacies by Singular Title***

A legacy by singular title is not an indispensable element of a succession. There will be a legacy by singular title only where the succession is testate. That is, the deceased must have left a valid will. Moreover, the testator must have made a disposition to that effect.

A legacy by singular title is a disposition whereby the testator calls a person, otherwise called a legatee by singular title, to receive a specific property which forms part of the inheritance/ Art. 912/. Legatees by singular title are, as a rule, assimilated to creditors of the inheritance. As such, like the other creditors of the inheritance, viz., the creditors of the expenses of the funeral of the deceased, the expenses of the administration of

the succession, and the debts of the deceased, legatees by singular title are paid during the liquidation phase/ Art. 1014(4)/.

However, unlike the creditors of the expenses of the funeral of the deceased, the expenses of the administration of the succession, and the debts of the deceased, the title of legatees by singular title is not generally onerous. So long as the law is concerned, legatees by singular title are not presumed to have got their right for consideration. That is, they are not considered to have obtained their claim in return for something they have paid or performed for the benefit of the deceased or the succession. The legacy was presumably ordered in favor of them by the deceased without quid pro quo. In other words, their claim is not based on an obligation recognized by the law as valid and enforceable as against the deceased. What is more, unlike persons legally entitled to claim for maintenance against the succession, legatees by singular title might not be in need or might be in a position to earn their living by their work.

The implication of all that is legatees by singular title will be paid only after all other creditors of the inheritance are paid. After paying off all the debts having precedence, the liquidator is expected to pay the legacies by singular title ordered by the deceased out of the estate/ Art. 1037 cum 1041/. Once legatees by singular title have been paid, the liquidation process will end and be closed.

As mentioned earlier, the provisions relating to the option of the heirs or legatees by universal title also apply to legatees by singular title/ Art 1038/. That is, however, without prejudice to the following two rules. First, the doctrine of total acceptance or refusal is not applicable to legatees by singular title. A person to whom more than one legacy by singular title has been bequeathed may freely accept one of such legacies and refuse the other/ Art. 1039/. Second, refusal of a legacy does not result in the return of the property bequeathed to the

succession. If a legatee by singular title refuses the legacy, his refusal benefits either the liquidator or the heir – whoever has the charge of paying the legacy under the will/ Art. 1040/.

Nonetheless, the testator is at liberty to provide otherwise in his will. Instead of the liquidator, the testator may order one of the heirs to pay a legacy by singular title/ Art. 1037/. The law is silent as to whether such an heir should pay the legacy out of his share of the succession or out of his personal property. But the testator does not have any power to order an heir to pay a legacy out of his pocket. Nor is any heir obliged to pay anything unless he has accepted the succession and has received all the property of the inheritance or a portion thereof. It can, therefore, safely be said that an heir on whom payment of a legacy may be imposed is an heir who, having accepted the succession, has received some inheritance property.

Such an heir can be analogized with a legatee whose legacy has been encumbered by a certain condition. A conditional legatee will receive the legacy ordered in his favor only upon the accomplishment of the condition imposed by the testator/ Art. 916/. Likewise, the heir will receive his share of the succession only if he pays the legacy he is ordered to and vice versa. That is, the heir receives the inheritance property to which he is entitled only if he pays the legacy, and is liable to pay the legacy, of course out of his share of the succession, only if he has received some inheritance property.

In the normal course of events, a legatee by singular title may not get his legacy at all if the entire property of the inheritance is spent early serving the debts with precedence. A legatee whose legacy has been ordered to be paid by an heir may also experience a similar fate. Where all the property of the inheritance has been disposed of in the course of the

liquidation process, a legatee the payment of whose legacy has been imposed on an heir will have no right of recourse against the heir as it is clear that nothing has gone to the heir from the succession.

The position of legatees by singular title is precarious even under normal circumstances. Where the testator has not imposed payment on an heir or has not made any disposition as to the manner of payment at all, the liquidator normally pays singular legacies out of the estate. However, such legacies may be paid only where it appears that the succession has sufficient means for paying them/ Art. 1041/. No means, no payment.

## **2.6 Closure of liquidation**

Liquidation is not a process which goes on indefinitely. It will come to an end be closed upon the fulfillment of certain conditions. The law recognizes two alternative grounds that may lead to the closure of liquidation.

Article 1052 (1) of the Civil Code provides for the first ground for the closure of liquidation. It states that “the liquidation of a succession will be closed where the creditors of the succession who made themselves known and the legatees by singular title have been paid their claim or legacy”.

Therefore, the liquidation process will be closed at the time when singular legatees have received what is due to them.

The liquidation process may go up to the stage where legatees by singular title are paid their legacies only when the succession has sufficient means to do that. All the property of the inheritance could be depleted at some earlier stage. Article 1052 (2), which sets forth the other ground entailing closure, states that liquidation will be closed when all the property of the succession is disposed of. That in other words means that liquidation could be closed before legatees by singular title are paid and even at any earlier stage at

which the inheritance is left with no more resources.

In particular, when the liquidation is closed all the creditors of the inheritance having been paid their claims, it is no more necessary to keep and administer the succession as a distinct estate. Therefore, pursuant to Article 1053 (1), any property which remains from the inheritance after such closure will merge with the personal property of the heir. That seems to be the case where the succession has just one sole heir. In the event of multiplicity of heirs, such property will stay jointly owned by the heirs as per the provision of Article 1053 (2) until it is partitioned.

As for a legatee by singular title, Article 1058 provides that he will be liable to the post-liquidation creditors of the inheritance only in default of the heir and only to the extent of the value of the legacy which he has received. Such a legatee is assimilated to a simple guarantor in the law of contracts

(Articles 1920-1951, the Civil Code) in his relation with a post-liquidation creditor who has sued him. Thus, he may avail himself of any defense available to a guarantor as soon as he is proceeded against. He may invoke the defense of benefit of discussion and demand the suing creditor to discuss the assets of the deceased that have gone to the heirs.

It can be argued that legatees by singular title will be liable to the late coming creditors of the inheritance under two circumstances. First, if the property of the inheritance is fully depleted immediately after such legatees are paid, the heirs would receive nothing. As a result, the heirs will not be liable to pay anything.

Second, after the property of the inheritance has merged with his personal property, the heir may change his address, or become insolvent, or may not, for any other reason, be in a position to pay. In such an event, the legatee by

singular title might be compelled to pay the claim of the latecomer creditors. But Article 1059 (2) authorizes the paying legatee to make a recourse against the heir as if he himself were the personal creditor of the heir.

If the singular legatee pays the debt of the succession to the latecomer creditor, he shall substitute himself for the creditors of the heir and can demand from the heir what he has paid to the latecomer creditor (Art. 1059).

## **Chapter three**

# **Partition of succession**

### **3.1 Introduction**

After the liquidation process comes to an end, the following phase is partition of the remaining hereditary estate among the heirs and universal legatees. This phase shall exist only if some property is left from the liquidation phase. That is, if the estate of the deceased is depleted in the

liquidation phase, nothing shall remain for partition and hence there will be no partition.

### **Objectives**

- Prepare a design in which you conduct partition of succession;
- Compare and contrast the rights of latecomer creditors of the succession during liquidation and partition;
- Explain how and why the estate is jointly owned by the heirs;
- Discuss the importance and the difficulties in implementing the theoretical shortcomings of the principle of collation by coheirs;
- Workout the relations that exist between the coheirs after partition, in relation to themselves and in relation to latecomer creditors of the inheritance;
- Reason out the rules that prohibit conventions relating to a future inheritance.

### **3.2 Community of Hereditary Estates**

Partition may not necessarily follow when liquidation comes to an end. The coheirs may jointly own the property that they acquired from the succession. The joint ownership of property by the coheirs is different from the community of property of spouses.

**What are the differences between the community of property of spouses and that of coheirs? Discuss.**

The community of property of spouses is different from the common ownership of coheirs in that:

- (a) In the case of spouses, every property in the hands of the spouses is presumed to be a common property, while only the property obtained from the succession is the common or joint property of the coheirs.

- (b) The common property of the spouses remains their common property so long as their marriage exists, but the joint ownership of coheirs stays only for a limited time, unless the co-heirs agree to jointly own for longer time.

- (c) The spouses have an equal right over their common property, but the coheirs may have a different proportion, especially in the case of testate success

**Read Art. 1061 and explain its content**

Article 1061 gives two rules to the coheirs. Firstly, the coheirs may not demand the sale by auction of a particular thing forming the property obtained from the succession. For example, one of the heirs cannot demand, while the estate is still owned jointly, the sale of a car or a table or any other specific property, which is part of

the inheritance. As a rule partition has to be made in kind/ Art. 1086/. Hence, the law favors the coheirs to receive a particular property from the succession instead of cash. Secondly, the coheirs cannot demand partition of a particular property from the succession, while the hereditary estate is still held in common. Since they are either heirs or universal legatees all of them have a right over the whole hereditary estate. Unless their condition is regulated by the rule of Article 913, they cannot know which specific property is going to fall in their portion. Moreover, when partition is made, the law requires that care shall be taken to give to each heir the things, which are most important to him/ Art. 1087(2)/. Therefore, partition should involve the whole hereditary estate and partition of a specific or a particular thing that forms portion of the succession should not be made.

The partition of the total hereditary estate (but not only part of it) can be required by any of the coheirs at any

time once the liquidation is completed/ Art. 1061/. But this is not always true. That is because Art. 1063 provides for possible exceptions to the rule laid down under Art. 1062. (Exceptions Art. 1063 1064).

### **3.3 collation by coheirs**

Collation is the bringing back of properties that were given by donation to a descendant by the ascendant during the lifetime of the latter into the succession. Collation is devised to bring equality among the coheirs.

A descendant who has received some property by way of donation (liberality) shall bring back such a property into the inheritance. But it is only descendant that has accepted the succession who should be obliged to bring back the donations he/she has received from his/her ascendant or parent. That is, renunciation would relieve a descendant from collation. The testator may also exempt his descendant from collation/ Art. 1065/.

As prescribed under Article 1066, the following donations or liberalities are subject to collation.

- Any money that is given to establish the heir;
- Money paid to settle the debts of the heir;
- Property or money given to the heir during his marriage in the form of dowry.

An heir who has benefited from such donations shall be obliged to pay back the values of the properties he received into the succession. However, any payment incurred for the education of the heir is not subject to collation. The property or money incurred for education may be by far greater than the ones listed above. Still tuition fee is not subject to collation.

Only those descendants who accept the succession shall be

obliged to collate. It is also possible that the testator can exempt his/her child from collation in his/her valid will. For example, the testator can express in his/her testamentary disposition that his/her child shall participate in the succession without the need to bring the properties he/she took in the form of donation. Moreover, the testator could exempt the heir from collation in the act of donation.

The law provides that only descendant heirs of the deceased are obliged to collate. Other heirs, who have been benefited from donation are not obliged to collate, even if they are beneficiaries of the succession. But this is not a mandatory rule. The testator, in his/her will, can effectively impose these heirs to collate what they have received in the form of donation.

A person who was not an heir of the deceased but later becomes an heir is also bound to collate. This could happen, for instance, if the

donor adopts the donee after making the donation.

As provided for in Art. 1074, the value to be collated shall be added to the estate left by the deceased. It is this mass that is ready to be partitioned among the heirs. But here you must note that the co-heir who is obliged to collate need not bring the value in real terms. That is, he/she is not required to bring the value of the donation in liquid cash nor is required to bring in kind.

The purpose of collation is to ensure justice by distributing the estate left by the deceased fairly among his/her children. Therefore, any value brought into the succession by collation can only be distributed or partitioned among the coheirs. Collation is made only to the benefit of coheirs. Even latecomer creditors of the deceased have no right to claim payment from what is collated.

An heir who is bound to collate is considered to have already

received his/her portion from the succession to the extent of the value he/she is bound to collate. Therefore, collation is made by taking less. (Read Arts. 1074 (2) cum. 1076(1)).

### **3.4 The Modalities of Partition**

The law prescribes that partition shall, first and foremost, be made as per the terms of the agreement to be made as between the coheirs/ Art. 1079(1)/. But this may not always be possible. Where the coheirs fail to agree on how partition should be made, it shall be made in accordance with the provisions of the law.

The law respects any agreement among the heirs with respect to partition of the succession. In default of an agreement, one of the coheirs may draw up a plan, which could serve as a blueprint for partition/ Art. 1079(2)/. This, however, is on condition that such plan is approved by the court. If partition were to be single-handedly made by one of the

coheirs, such heir may make the partition to the prejudice of other coheirs or of the creditors of one of the coheirs. This could particularly be true when partition is made in the absence of the coheir, or in the absence of the creditor of the coheir. That is why the law requires court approval of the agreement by the court/ Art. 1080 and 1081/.

As a rule, partition must be made in kind/ Art 1086(1). That is, instead of selling the property and dividing the liquid cash or the money, the law considers it good to divide the property as it is. However, sometimes it could be very difficult or even impossible to partition the property equally among the coheirs in accordance with the rule of partition in kind. In such a case, the inequality of the shares in kind shall be setoff by payment of sums of money/ Art. 1086(2)/. What is more, the law stipulates that an heir should be given the property which is most useful to him, so long as that is possible/ Art. 1087(2)/.

### **3. 5. The Relation between the Co-heirs after Partition**

The entire process of the devolution of a succession comes to an end with partition. With partition also ends the relation between the co-heirs in regard to the succession. Basically, there will be no binding relation, whether contractual or legal, as between the co-heirs once the succession has been fully partitioned.

However, with a view to protecting the interests of the co-partitioners, or of one or some of them, the law has put in place provisions that extend the relation between the co-heirs even after partition with respect to two issues. The first is the issue of warranty. The co-partitioners owe to each other warranty in respect of their shares in the succession/ Art. 1097/. The other is the issue of the annulment or correction of the partition/ Art. 1102 & 1109/. Partition may be annulled or corrected for the

benefit of all, some, or one of the co-partitioners in certain circumstances.

### **3. 5. 1. Warranty due by Co-heirs**

“Warranty” basically means the security a person provides for the benefit of another person to ensure that something is done safely in favor of that other person. Often, warranty is associated with sales, wherein the seller is duty bound to warrant the buyer as to the transfer of the ownership of the thing sold as per the terms of the contract/ Art. 2273 % 2287/. There also exists a warranty obligation as between the co-heirs in the Law of Successions. This obligation is meant to serve as a sort of risk distribution mechanism among the co-heirs.

The fundamental idea pertaining to the warranty obligation in the Law of Successions is that the co-heirs, who are the co-partitioners so to

say, are bound to provide warranty to each other to ensure the safe delivery of their shares in the succession after partition.

**(Art. 1098 and 1099, 1101)**

### **3. 5. 2. Annulment and Correction of Partition**

Partition is made by an agreement that is concluded between the co-heirs. As such, a partition agreement is expected to meet all the validity requirements of a contract as to consent, capacity, object, and form. Otherwise, it may be annulled in the same circumstances as other contracts/ Art. 1102/.

Partition will not be annulled for the sole reason that a property forming part of the succession is discovered subsequent to it/ Art. 1103/. Article 1103 prescribes that without affecting the partition previously made, a supplementary partition will be made in relation to such property. It may, nonetheless, happen that the newly discovered property was in

the possession of one of the co-heirs who had concealed its existence from his co-heirs in bad faith with the intention of owning it exclusively. In such an event, the concealing heir will, by way of punishment, be deprived of any share in the property he concealed/ Art. 1104/.

Article 1105 (1) provides that a person who has received in all less than three-fourth parts of what he had a right to because of an erroneous valuation of a certain property may apply to the court to order the correction of the partition. Pursuant to Sub-Article (2) of the same Article, an application for the correction of a partition may also be filed where a donation subject to collation has not been declared by the person who was bound to collate it in favour of his co-heirs. Such application must be filed within three years after the partition has been made/ Art. 1106/. The right to apply for correction will be barred after the expiry of this period.

**(Art. 1107, 1108)**

### **3. 5. 3. The Right of Creditors coming after Partition**

Creditors of the inheritance may sometimes appear after partition has been made. Such creditors do not lose their rights simply because the succession has already been partitioned. However, they will have a lesser or, at least, no better right than the personal creditors of the co-partitioners in as much as the property of the succession is concerned.

**(Article 1110)**

### **3. 6. Conventions Relating to an Inheritance**

Succession is a strictly *mortis causa* process. Any act relating to a succession will be of no legal effect unless it occurs after the death of the person being succeeded. That, of course, is with the exception of will, which is naturally made while the person to be succeeded is alive.

**(Art. 1114, 1117 & 1123)**

### **3. 6. 1. Pacts on Future Successions**

A “pact” is an agreement made between two or more people. The law does not allow people to make agreements on a succession that has not yet opened. Such agreements are believed to affect the powers of a person with respect to making, modifying, or revoking a will. The law is always interested in ensuring that the testator makes his will with his free volition.

In short, in the words of Article 1114, any contract or unilateral undertaking relating to the succession of a person alive that is not expressly authorized by law is void ***ab initio***. The provision at hand renders void a pact that may be entered into by the person whose succession is concerned. This assertion is corroborated by Article 1116, which provides that

“no person may bind himself by contract to leave his succession or to bequeath a legacy to a person contracting with him or to a third person”.

### **3. 6. 2. Partitions made by Donations**

The practice of parents in Ethiopia whereby they distribute their property among their children while alive is apparently recognized by the country’s Law of Successions. Article 1117 of the Civil Code sets forth the following rule:

“The father and the mother and the other ascendants may make a distribution and partition of their property among their children and descendants”.

According to this provision, not only parents, but also grandparents or other ascendants may validly distribute their properties to their descendants during their lifetime. Note that the

disposition of property by way of such type of partition is legally allowed only as between a specific group of persons.

The other point that should be noted is that the law recognizes and gives effect only to unidirectional distributions. Only ascendants may, while alive, validly partition their properties, and only among their descendants. Such partition could not validly be conducted the other way round, i.e., by descendants to ascendants. Nor could it be effectuated as between persons other than ascendants and descendants. Apparently, the rationale for this restriction has got to do with right to inheritance. Descendants are the likely heirs of their ascendants anyway.

Furthermore, such partition should be made in compliance with the formality requirements prescribed by the law for donations ***inter vivos***. / Art. 1118/. Articles 2427 through 2470 of the Civil Code, which specifically govern

donations, provide for those requirements.

Donation ***inter vivos*** is one of the two legally recognized types of donations, the other being donation ***mortis causa***. It is a donation made while the donor is alive. The donee receives the donated property during the lifetime of the donor.

In contrast, donation ***mortis causa*** is a donation given effect after the death of the donor. This type of donation is similar with a bequest left by a will. As such, it is subject to the provisions governing wills. /Art. 2428/.

As a rule, a donation ***inter vivos***, the subject matter of which is an immovable property or a right thereon, must, should it be valid, be made in the form of a public will. / Art. 2443/. In other words, a donation ***inter vivos*** of an immovable or a right on such property will be of no effect unless it fulfills the formality requirements stipulated for a

public will by Articles 881 through 883 of the Civil Code.

Other rights may, however, be donated ***inter vivos*** in the form governing their transfer for consideration. / Art. 2444 & 2445/. Alternatively, they may be validly donated in the form governing the donation of immovables./ Art. 2444(2)/. That means, the donation of a movable property may be made by mere delivery of the property to the donee, or in the form governing the making of a public will.

Article 1119 makes restriction to the subject matter of the distribution that may be made by an ascendant. This Article specifies that an ascendant may distribute among his descendants only the property which belongs to him at the time of the distribution. In other words, he may not distribute a property which belongs to others or one he will acquire in the future.

The other worth examining scenario is the partition, by an

ascendant, of only part his property. Article 1120 provides that where part only of the property which the ascendant leaves on the day of his death has been included in the partition made by donation, the property that has not been included shall be distributed in conformity with the law. That means that if the deceased has left a valid will pertaining to the property that was not donated, then such property will be disposed of in accordance with the terms of his will. Otherwise, it will be distributed pursuant to the rules of the intestate succession.

If, on the other hand, the donor-ascendant has omitted one of his children in the partition of his property, or where a child is born to him after the day of such partition, the omitted child may impugn the partition./ Art. 1121/. Such a child or his representative may apply to the court to nullify the partition made to his prejudice at the time of the death of the

donor availing himself of the provisions of Article 1121.

However, the right of recourse of a child omitted from partition is not absolute. Article 1122 (1) qualifies his right by providing that such child may not apply for nullification where he has been validly disinherited by the disposition the deceased has made to that effect in a valid will. Moreover, the partition may not be annulled if the donor has left sufficient property to the benefit of the omitted child. / Art. 1122(3)/.

### ***3. 6. 3. Assignment of Rights to a Succession***

As discussed in the preceding Sub-Sections, it is not lawful for a potential heir or legatee to enter into a juridical act in relation to a future succession. In particular, an heir or a legatee may not accept, renounce, or assign any right

pertaining to a succession in advance./ Art, 1115(2). Such an act is void regardless of the fact that the person whose succession is concerned has agreed to it.

An heir may validly assign his rights to a succession in whole or in part after the opening of the succession. / Art. 1124/. However, an heir may assign his rights on a determinate or a specific thing pertaining to the succession only after the thing has been allotted to him as his own.