



MIL-OSI USA: Germany: Federal Court of Justice Rules Digital Social Media Accounts Inheritable

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(Sept. 7, 2018) On July 12, 2018, the German Federal Court of Justice (Bundesgerichtshof, BGH) held that user agreements for digital social media accounts are inheritable. Upon the death of the account holder, the user agreement passes to the heirs by operation of law, and the heirs are subrogated to the rights of the deceased, in accordance with § 1922 of the Civil Code. Access to the account is precluded neither by the postmortem personality rights of the deceased, nor by the confidentiality of telecommunications, nor by data protection law. (BGH, July 12, 2018, [Docket No. III ZR 183/17](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=763e32ddfeac8a10c62fbc1bd813c35&nr=86602&pos=0&anz=1) (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=763e32ddfeac8a10c62fbc1bd813c35&nr=86602&pos=0&anz=1>), ECLI:DE:BGH:2018:120718UIIIZR183.17.0, BGH website; [BÜRGERLICHES GESETZBUCH](http://www.gesetze-im-internet.de/bgb/BGB.pdf) (<http://www.gesetze-im-internet.de/bgb/BGB.pdf>) [BGB] [[CIVIL CODE](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf) (http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf)], Jan. 2, 2002, [BUNDESGESETZBLATT \[BGBl.\] \[FEDERAL LAW GAZETTE\]](http://www.gesetze-im-internet.de/bgbl1/bgbl1_2003_01_01.html) I at 42, 2909; 2003 BGBl. I at 738, as amended, § 1922.)

Facts of the Case

The plaintiffs are the parents of a deceased 15-year old daughter. The defendant is the social media platform Facebook. On January 4, 2011, the deceased registered a user account with the defendant with the permission of her parents. On December 3, 2012, she was fatally injured when she was hit by an incoming train under circumstances that are still unclear. (BGH, III ZR 183/17, para. 3.) The plaintiffs unsuccessfully tried to get access to her user account with her login details, but the defendant had turned their daughter's profile into a so-called "memorial page." When an account is turned into a memorial page, access to the user data is not possible even with the login details. However, the content remains on the servers and is visible to the selected audience. Depending on the privacy settings, friends may share memories on the page. The general terms and conditions of the defendant do not mention the rules on "memorial pages." (*Id.* at 4.)

The plaintiffs allege that access to their daughter's Facebook account is necessary to determine whether she was harboring suicidal thoughts before her death and to defend against claims for damages from the train driver. (*Id.* at 5.) The court of first instance ruled in favor of the plaintiffs, whereas the court of appeals ruled against them, holding that the confidentiality of telecommunications prevented the defendant from transmitting telecommunication content to heirs. (*Id.* at 6 & 12.) The Federal Court of Justice set aside the decision of the court of appeals and held in favor of the plaintiffs. (*Id.* at 8.)

Decision

The Federal Court of Justice stated that the user agreement between Facebook and the deceased is a contract that passed to the heirs by operation of law according to section 1922, para. 1 of the German Civil Code. It held that the parents therefore have a right to access the account and its digital content. (*Id.* at 19 & 21.) Neither the contractual terms nor the type of contract excludes the hereditability, in the opinion of the Court. (*Id.* at 23.) The rules on “memorial pages” are not part of the general terms and conditions. (*Id.* at 27.) Furthermore, the Court held that even if they were part of the general terms and conditions, they would not be valid, because they unreasonably disadvantage the other party to the contract. The rules do not explicitly prohibit the hereditability, but they undermine it by preventing access to the account by the heirs. (*Id.* at 30.) Furthermore, the Court stated that they also prevent the heirs from exercising their essential contractual rights, meaning accessing the account and its content and disposing of it. (*Id.* at 31.)

The Federal Court of Justice ruled that hereditability is also not barred by the type of contract. (*Id.* at 33.) It explained that the contractual obligations are not strictly personal in nature. Only the user-created content has relevance with regard to personality rights. The services of the defendant, however, do not differ from user to user and there is therefore no protected interest of the defendant to refuse to perform those services for the heirs. (*Id.* at 35 & 36.) Furthermore, the Court held that the situation is comparable to analog communications such as letters and diaries that have strictly personal content. (*Id.* at 49.) Such analog documents are inheritable as can be inferred from section 2047, para. 2 and section 2373, sentence 2 of the Civil Code, and there seems to be no reason to treat digital content differently, in the opinion of the Court. It is not the way the information is stored that is strictly personal but the content of the information. (*Id.* at 49 & 50.)

In addition, the Court held that the confidentiality of telecommunications does not bar the heirs from accessing the account. The defendant is not forced to transfer personal data to a third party, because the heirs became a party to the user agreement upon the death of their daughter. (*Id.* at 56 & 60.)

Finally, the Federal Court of Justice held that honoring the plaintiffs’ request would not violate data protection laws, because the EU General Data Protection Regulation (GDPR) does not apply to the personal data of deceased persons. (*Id.* at 64 & 67; [Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN) (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>) (General Data Protection Regulation) (GDPR), recital 27, 2016 O.J. (L 119) 1). In addition, the GDPR does not bar the defendant from providing the heirs access to the content, because the processing is necessary for (1) the performance of a contract and (2) the purposes of the legitimate interests pursued by plaintiffs. (BGH, III ZR 183/17, at 70; GDPR, art. 6, para. 1(b) & (f).) In this case, the Court concluded that defending themselves against the claim for damages by the train driver and finding out whether their daughter committed suicide constitute legitimate interests to pursue. (BGH, III ZR 183/17, at 74, 80, 81.)

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