

FOR THE SAKE OF RESTITUTION: AN ANALYSIS OF  
CORNELIUS GURLITT'S WILL, ITS COURT  
CHALLENGE, AND WHY PUBLIC POLICY SHOULD  
DRIVE THE COURT'S DECISION

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I. INTRODUCTION

On September 22, 2010, on a high-speed train from Zurich, Switzerland to Munich, Germany, Bavarian customs officers came upon Cornelius Gurlitt ["Gurlitt"], "a frail, well-dressed, white-haired man traveling alone and asked for his papers."<sup>1</sup> Gurlitt, acting nervously, produced an Austrian passport that identified him as Rolf Nikolaus Cornelius Gurlitt, born in Hamburg, Germany in 1932.<sup>2</sup> Gurlitt informed the customs officers that his trip was for business at an art gallery in Bern, Switzerland; nonetheless, because Gurlitt was acting so nervously, customs officers took him into the bathroom and searched him.<sup>3</sup> Upon searching his person, customs officers discovered that Gurlitt was in possession of €9,000.00<sup>4</sup> in cash, just under the €10,000.00<sup>5</sup> threshold that travelers are required to declare.<sup>6</sup> Because of Gurlitt's nervous behavior, customs officers flagged him for further investigation, despite compliance with the customs' regulation.<sup>7</sup> In February 2012, customs investigators and officials with the

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<sup>1</sup> Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Apr. 2014), <http://www.vanityfair.com/culture/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> At that time in 2010, the equivalent amount in American currency was about \$12,000. *Id.*

<sup>5</sup> At that time in 2010, the equivalent amount in American currency was about \$13,000. See *Currency Converter*, OANDA, <http://www.oanda.com/currency/converter/>.

<sup>6</sup> Mary M. Lane & Harriet Torry, *Cache of Nazi-Seized Art Discovered in Munich Apartment*, WALL ST. J. (Nov. 4, 2013), <http://www.wsj.com/articles/SB10001424052702303482504579177171094005740>.

<sup>7</sup> Shoumatoff, *supra* note 1.

Augsburg public prosecutor's office<sup>8</sup> seized over 1,000 pieces of alleged Nazi-confiscated artwork in Gurlitt's Munich apartment.<sup>9</sup>

The trove of artwork was estimated to be worth about \$1.35 billion in United States currency and included works by famous artists such as Picasso, Matisse, and Chagall.<sup>10</sup> In an interview with the German newsmagazine *Der Spiegel*, Gurlitt was extremely upset about the actions taken by German customs investigators and officials in seizing the art collection and stated that he had no plans to voluntarily give any of the artwork back.<sup>11</sup> Of more importance was his statement that he would not give the art collection to any museum in the world, stating: "[t]hey have enough other things they can exhibit."<sup>12</sup> Gurlitt passed away on May 6, 2014, at his Munich apartment while recuperating from recent heart surgery.<sup>13</sup> Shortly thereafter, it was revealed that Gurlitt had an apparent change of heart before his death, executing a last-minute will naming a Swiss museum, the Kunstmuseum Bern ("Kunstmuseum"), as his unrestricted and unfettered sole heir.<sup>14</sup> After months of deliberation, the Kunstmuseum decided to accept Gurlitt's bequest of the art collection, ensuring that any looted art would be returned to its rightful owner.<sup>15</sup>

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<sup>8</sup> Özlem Gezer, *Interview With a Phantom: Cornelius Gurlitt Shares His Secrets* (pt. 1), DER SPIEGEL (Nov. 17, 2013), <http://www.spiegel.de/international/germany/spiegel-interview-with-cornelius-gurlitt-about-munich-art-find-a-933953.html>.

<sup>9</sup> Melissa Eddy & Alison Smale, *Cornelius Gurlitt, Scrutinized Son of Nazi-Era Art Dealer, Dies at 81*, N.Y. TIMES (May 6, 2014), [http://www.nytimes.com/2014/05/07/arts/design/cornelius-gurlitt-son-of-nazi-era-art-dealer-has-died.html?\\_r=0](http://www.nytimes.com/2014/05/07/arts/design/cornelius-gurlitt-son-of-nazi-era-art-dealer-has-died.html?_r=0).

<sup>10</sup> *Id.*

<sup>11</sup> Özlem Gezer, *Interview With a Phantom: Cornelius Gurlitt Shares His Secrets* (pt. 3), DER SPIEGEL (Nov. 17, 2013), <http://www.spiegel.de/international/germany/spiegel-interview-with-cornelius-gurlitt-about-munich-art-find-a-933953-3.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Matt Schudel, *Cornelius Gurlitt, Hoarder of Valuable Art Collection, Dies*, WASH. POST (May 6, 2014), [http://www.washingtonpost.com/world/europe/cornelius-gurlitt-hoarder-of-valuable-art-collection-dies/2014/05/06/d2cb4e66-d542-11e3-95d3-3bcd77cd4e11\\_story.html](http://www.washingtonpost.com/world/europe/cornelius-gurlitt-hoarder-of-valuable-art-collection-dies/2014/05/06/d2cb4e66-d542-11e3-95d3-3bcd77cd4e11_story.html).

<sup>14</sup> Philip Oltermann, *Swiss Museum Sole Heir in Will of Art Collector Cornelius Gurlitt*, THE GUARDIAN (May 7, 2014), <http://www.theguardian.com/world/2014/may/07/swiss-museum-heir-will-art-collector-cornelius-gurlitt>.

<sup>15</sup> Melissa Eddy, *Swiss Museum Accepts Art Trove Amassed Under Nazis*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/arts/design/swiss-museum-kunstmuseum-bern-cornelius-gurlitt-nazi-era-art.html>.

This note will examine the potential inheritance issues surrounding Gurlitt's bequest to the Kunstmuseum, specifically focusing on what potential challenges, if any, may be brought by family members in contesting Gurlitt's will. Part II of this note will discuss Cornelius Gurlitt and how he came to be in possession of over 1,000 pieces of alleged Nazi-confiscated artwork. First, it will discuss Gurlitt's father, Hildebrand Gurlitt, and his role within the Nazi regime, which ultimately allowed him to amass a vast collection of Nazi-era art. Second, it will examine the reclusive lifestyle of Cornelius Gurlitt and how he was able to keep the trove of artwork hidden for such a long period of time. Finally, it will examine the circumstances surrounding Gurlitt's final will, which bequeathed the art collection to the Kunstmuseum, and discuss other potential heirs to Gurlitt's estate.

Part III of this note will examine German succession/inheritance law and discuss potential challenges to Gurlitt's last-minute will and testament that may be made by other potential heirs. First, it will discuss the principles of German succession law, including a discussion on German intestacy succession and testamentary succession. Second, it will examine what potential court challenges may be brought by Gurlitt's family in contesting his will, specifically focusing on issues of capacity and undue influence. Finally, it will discuss the efficacy of these potential challenges by drawing upon the previous section's discussion on the circumstances surrounding the creation and execution of Gurlitt's final will before he passed away.

Part IV of this note will discuss the Kunstmuseum's recent acceptance of Gurlitt's bequest and will argue that even if Gurlitt's family members are successful in a potential court challenge of his will, the Kunstmuseum should still be allowed to retain the art collection. First, it will describe the Washington Principles on Nazi-Confiscated Art and the Kunstmuseum's plans on returning pieces of the art collection to their rightful heirs. It will also examine the potential legal and moral consequences if Gurlitt's will is revoked and his family members receive the collection of artwork.

## II. THE GURLITT FAMILY

*A. Hildebrand Gurlitt*

On April 14, 1945, American soldiers moved into the town of Aschbach<sup>16</sup> and arrested Baron Gerhard von Pölnitz (“Pölnitz”), the local Nazi Party leader.<sup>17</sup> Pölnitz, a baron who joined the Nazis, had served in the war in Paris and had worked with art dealers who were known for their dubious reputations, some of whom he had harbored in his castle towards the fall of the Third Reich, including Hildebrand Gurlitt and his family.<sup>18</sup> Following Pölnitz’s arrest, the American Army sent a specialized unit known as the Monuments, Fine Arts and Archives Section (“Monuments Men”) to inspect Pölnitz’s castle for Nazi-stolen art.<sup>19</sup> Thereafter, Captain Robert K. Posey and his assistant, Private Lincoln Kirstein, (members of the Monuments Men) discovered an enormous art warehouse inside Pölnitz’s castle.<sup>20</sup>

The Monuments Men determined that the vast art trove stored within the castle were collections amassed by two individuals: Karl Haberstock, a registered resident of the castle who was also on a wanted list of the Office of Strategic Services (a precursor to the modern day Central Intelligence Agency), and Hildebrand Gurlitt, who had also lived in the castle with his family since their house in Dresden burned down.<sup>21</sup> In the following months and years, the Monuments Men gathered information on both Karl Haberstock and Hildebrand Gurlitt.<sup>22</sup> The Monuments Men concluded that Hildebrand Gurlitt was “an art collector from Hamburg [Germany] with connections within high-level Nazi circles . . .”<sup>23</sup> who acted on behalf of other Nazi officials and made trips to France where he brought home art

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<sup>16</sup> A village in the Upper Franconia region of Bavaria. Felix Bohr et al., *Art Dealer to the Führer: Hildebrand Gurlitt’s Deep Nazi Ties* (pt. 1), DER SPIEGEL (Dec. 23, 2013), <http://www.spiegel.de/international/germany/hildebrand-gurlitt-and-his-dubious-dealings-with-nazi-looted-art-a-940625.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* In fact, the entire castle could have been considered an art warehouse itself due to the discovery of various rooms, crates, boxes, and suitcases which all contained numerous paintings, sculptures, tapestries, statues, and valuable furniture. *Id.*

<sup>21</sup> Bohr et al., *supra* note 16.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

collections.<sup>24</sup> The Monuments Men determined there was reason to believe that the private art collections within Pölnitz's castle consisted of looted art from other countries and labeled Gurlitt the "art dealer to the Führer."<sup>25</sup>

In 1930, Hildebrand Gurlitt, an art historian, was removed as director of the museum in the eastern city of Zwickau because he was viewed as a champion of modern art.<sup>26</sup> Thereafter, he went to Hamburg and ran the city's Kunstverein art museum until he was fired over his preference for the avant-garde, as well as his Jewish familial ties.<sup>27</sup> Hildebrand Gurlitt remained in Hamburg where he became an art dealer and opened a gallery.<sup>28</sup> Over the course of his private art dealing, Hildebrand Gurlitt bought pieces of art from people who were being persecuted – mainly Jews – who sold their art because they were being forced to flee Germany.<sup>29</sup> Additionally, Hildebrand Gurlitt used middlemen to purchase pieces of art, which had been seized by the Gestapo.<sup>30</sup> Hildebrand Gurlitt eventually became the official dealer in "degenerate art" (modern art works that were no longer deemed acceptable under the Third Reich).<sup>31</sup> In that capacity, he was expected to sell "degenerate art" abroad to bring in hard currency.<sup>32</sup> Hildebrand Gurlitt remained in Hamburg until 1942, where he continued to amass his private art collection.<sup>33</sup>

By 1941, one year after the German invasion of France, Hildebrand Gurlitt made his first purchase of artwork for his private collection.<sup>34</sup> Recognizing paintings from France had increased in value, Hildebrand Gurlitt began making regular trips to Paris and surrounded himself with "shady members of the art world, including agents, informers and other dealers."<sup>35</sup> As a result of his numerous trips to Paris, Hildebrand Gurlitt "acquired

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Bohr et al., *supra* note 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Felix Bohr et al., *Art Dealer to the Führer: Hildebrand Gurlitt's Deep Nazi Ties* (pt. 2), DER SPIEGEL (Dec. 23, 2013), <http://www.spiegel.de/international/germany/hildebrand-gurlitt-and-his-dubious-dealings-with-nazi-looted-art-a-940625-2.html>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

works worth a total of 400 to 500 million francs” for both German museums and his private collection.<sup>36</sup> It was not until June 1945, the end of the Second World War, that the Monuments Men questioned Hildebrand Gurlitt regarding his role within the Third Reich and his dealings in “degenerate art.”<sup>37</sup>

The Americans interrogated Hildebrand Gurlitt for three days.<sup>38</sup> During the interrogation, Hildebrand Gurlitt worked hard to paint himself not as the “art dealer to the Führer,” but victim of the Nazis, “a man who saved precious artworks from destruction and someone who had never done anything malicious.”<sup>39</sup> The Americans appeared to mostly believe Hildebrand Gurlitt’s story as he was able to remain under house arrest in Aschbach.<sup>40</sup> Eventually, Hildebrand Gurlitt’s house arrest was lifted in January 1948 and he moved to Düsseldorf, where he once again worked for the Kunstverein museum.<sup>41</sup>

By 1950, Hildebrand Gurlitt had been acquitted of all charges related to his dealings in “degenerate art” and his 140 pieces of private artwork, which were initially seized by the Monuments Men, were restored to him from the archive of seized property known as the Wiesbaden Central Collecting Point.<sup>42</sup> Unbeknownst to the Americans, Hildebrand Gurlitt had also hidden a separate portion of his collection from the Monuments Men in an old water mill, which he promptly recovered.<sup>43</sup> Hildebrand Gurlitt eventually became a respected member of the art society, being appointed to an honorary committee overseeing an exhibition of German art in Lucerne, Switzerland, where he publicly displayed several paintings from his private collection.<sup>44</sup> In 1956, the year Hildebrand Gurlitt died, he sent pictures from his private collection to New York, along with a short biographical sketch of himself for the catalogue.<sup>45</sup> In the biographical sketch,

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<sup>36</sup> Bohr et al., *supra* note 31.

<sup>37</sup> Bohr, et al., *supra* note 16.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Bohr et al., *supra* note 31.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* It is believed that part of Hildebrand Gurlitt’s purpose in showing the paintings “was probably to assess whether there would be any objections or claims from the true owners.” *Id.*

<sup>45</sup> Felix Bohr et al., *Art Dealer to the Führer: Hildebrand Gurlitt’s Deep Nazi Ties* (pt. 3), DER SPIEGEL (Dec. 23, 2013), <http://www.spiegel.de/>

Hildebrand Gurlitt labeled himself as “courageous and bold, a hero whose dealings during the war were a dangerous balancing act . . . .”<sup>46</sup> Hildebrand Gurlitt died after a car accident in 1956 and his wife, Helene, inherited his art collection,<sup>47</sup> which eventually was passed down to his son, Cornelius Gurlitt.

### *B. Cornelius Gurlitt*

After spending four days with Gurlitt, I had the feeling that it wasn’t just the paintings he kept locked up in the walls of his apartment to insulate them from the world. He locked up himself along with them.<sup>48</sup>

When Bavarian customs officers searched and questioned Gurlitt on the train from Zurich, Switzerland to Munich, Germany, he informed them that he had an apartment in Munich.<sup>49</sup> However, a later investigation by customs and tax investigators revealed that there were little to no records of Gurlitt’s existence in Munich or anywhere in Germany.<sup>50</sup> To Gurlitt, his apartment was his world.<sup>51</sup> Gurlitt lived a very reclusive lifestyle, guarding his privacy zealously, refusing even to open his door to meter readers from the gas company.<sup>52</sup> Gurlitt’s only true companions were the pieces of art within the collection;<sup>53</sup> “[h]e spoke to his paintings [and] [t]hey were his friends, the loyal

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international/germany/hildebrand-gurlitt-and-his-dubious-dealings-with-nazi-looted-art-a-940625-3.html.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Özlem Gezer, *Time Machine: Munich Art Collector Lives in the Past*, DER SPIEGEL (Nov. 21 2013), <http://www.spiegel.de/international/germany/art-collector-cornelius-gurlitt-a-man-at-odds-with-modern-world-a-934841.html>.

<sup>49</sup> Shoumatoff, *supra* note 1.

<sup>50</sup> *Id.* For example, customs and tax investigators, acting upon the customs officers’ recommendation, discovered that Gurlitt had no state pension, no health insurance, no tax records, no employment records, and no bank accounts; Gurlitt was not even listed in the Munich phonebook. *Id.*

<sup>51</sup> Gezer, *supra* note 8.

<sup>52</sup> Andrew Higgins & Katrin Bennhold, *For Son of a Nazi-Era Dealer, a Private Life Amid a Tainted Trove of Art*, N.Y. TIMES (Nov. 17, 2013), <http://www.nytimes.com/2013/11/18/world/europe/a-private-life-amid-a-tainted-trove-of-art.html?pagewanted=all/>.

<sup>53</sup> *Id.*

companions that didn't exist in real life."<sup>54</sup> He had grown up with the paintings as a child and, at the time, had grieved for their loss, stating "[t]here is nothing I have loved more in my life than my pictures."<sup>55</sup>

According to the German newsmagazine *Der Spiegel*, Gurlitt appeared to be trapped in another time.<sup>56</sup> Gurlitt had stopped watching television in 1963, when Germany's second public television network was launched.<sup>57</sup> He booked his hotel rooms months in advance through mail, with a letter written on a typewriter and signed by fountain pen.<sup>58</sup> He did not use the Internet and was fascinated by how telephones show numbers on display screens.<sup>59</sup> He was a man who trusted no one, especially not the German government.<sup>60</sup>

Gurlitt considered it his life's mission to protect his father's legacy and spent his life doing just that.<sup>61</sup> For Gurlitt, his father was a hero,<sup>62</sup> claiming that his father never bought anything from a private individual and that his father only cooperated with the Nazis because "he wanted to save the paintings from being burned."<sup>63</sup> Gurlitt had hoped that the public would quickly lose interest in his story and he did not understand "why the public prosecutor's office [was] making such a fuss about an old issue."<sup>64</sup> Gurlitt maintained that the paintings were rightfully his and had hoped for their return.<sup>65</sup> Gurlitt had expressed concern about public exposure of him and his paintings, stating that he would not "give [the paintings] to any museum in the world . . . [t]hey have enough other things that they can exhibit."<sup>66</sup> However, after Gurlitt passed away, it was revealed that he made a last-minute

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<sup>54</sup> Gezer, *supra* note 8.

<sup>55</sup> Higgins & Bennhold, *supra* note 52.

<sup>56</sup> Gezer, *supra* note 8.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Gezer, *supra* note 48.

<sup>60</sup> *Id.*

<sup>61</sup> Gezer, *supra* note 8.

<sup>62</sup> *Id.*

<sup>63</sup> Özlem Gezer, *Interview with a Phantom: Cornelius Gurlitt Shares His Secrets* (pt. 2), DER SPIEGEL (Nov. 17, 2013), <http://www.spiegel.de/international/germany/spiegel-interview-with-cornelius-gurlitt-about-munich-art-find-a-933953-2.html>.

<sup>64</sup> *Id.*

<sup>65</sup> Gezer, *supra* note 11.

<sup>66</sup> *Id.*



will which bequeathed his entire art collection to a Swiss museum, the Kunstmuseum.<sup>67</sup>

### III. THE GERMAN CIVIL CODE: SUCCESSION/INHERITANCE LAW

#### A. General Principles of German Succession Law

German succession law is governed by the fifth volume of the German Civil Code,<sup>68</sup> known as Bürgerliches Gesetzbuch ["BGB"],<sup>69</sup> and in particular, Sections 1922-2385 BGB.<sup>70</sup> In addition to Sections 1922-2385 of the BGB, other volumes within the German Civil Code contain sections partly relating to the law of succession.<sup>71</sup> In addition to its substantive law component, the German Civil Code also contains a procedural law component, such as its regulation of the competence of the Probate Courts.<sup>72</sup>

The principle of universal succession is the starting point of the German law of succession.<sup>73</sup> Section 1922 I BGB sets forth the basic principle of universal succession, stating that "[a]ll proprietary rights of the deceased go directly on his death to one or several successors,"<sup>74</sup> resulting in the heirs gaining possession by law.<sup>75</sup> If several heirs are in existence at the time of the decedent's death, then those heirs will inherit jointly, with few exceptions.<sup>76</sup> An inheritance encompasses the entirety of the decedent's estate, including its encumbrances, i.e. assets and liabilities; therefore,

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<sup>67</sup> Andrea Thomas, *Swiss Museum Accepts Art From Late Dealer Cornelius Gurlitt*, WALL ST. J. (Nov. 24, 2014), <http://www.wsj.com/articles/swiss-museum-accepts-art-from-gurlitt-1416826077>.

<sup>68</sup> DIETER SCHWAB ET AL., *Germany Part IV. Law of Succession Ch.1 Introduction*, in INT'L ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW (2014).

<sup>69</sup> DIETER SCHWAB ET AL., *National Monographs Germany General Introduction*, in INT'L ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW (2014).

<sup>70</sup> SCHWAB ET AL., *supra* note 68.

<sup>71</sup> *Id.* For example, "Proceedings of an insolvent estate are regulated in §§315ff InsO. The Law of Succession also appears in the Law of Hereditary Farms (as amended of 26.7.1976) and in International Private Law (Art. 25, 26 EGBGB)." *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> SCHWAB ET AL., *supra* note 68.

<sup>75</sup> *Id.* (citing §857 of the BGB).

<sup>76</sup> *Id.* (citing §2032ff and listing the exceptions as: (1) shares in a partnership and (2) inheritances of farms).

making the heir(s) liable for the decedent's debts, with few exceptions.<sup>77</sup>

### *B. Testamentary Succession & Intestate Succession*

Testamentary freedom of disposition is not only an essential principle of the German law of succession,<sup>78</sup> it is also constitutionally guaranteed through the general freedom principle<sup>79</sup> and through the guaranteed right of succession.<sup>80</sup> Under the principle of testamentary freedom, the testator may make dispositions of his or her property in order to replace or alter (intestate) legal succession.<sup>81</sup> In the absence of testamentary provisions made by the deceased, his or her estate will be disposed of through the operation of intestate succession law.<sup>82</sup>

Under German intestate succession, the decedent's estate goes to his or her family by operation of law.<sup>83</sup> The decedent's family includes the surviving spouse and relatives of the first order, including the decedent's parents if necessary, who are considered joint heirs.<sup>84</sup> The term "relative" is determined by Section 1589 BGB, and Section 1924ff BGB determines the order in which relatives have a right to succeed.<sup>85</sup> Relatives, for intestate succession purposes, are broken down into four categories: primary heirs, secondary heirs, tertiary heirs, and further heirs.<sup>86</sup> Primary heirs are the issue of the decedent and their issue (the decedent's children and grandchildren).<sup>87</sup> Secondary heirs are the parents of the decedent and their issues (the decedent's brothers, sisters, nephews, and nieces).<sup>88</sup> Tertiary heirs consist of the grandparents

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<sup>77</sup> *Id.* The few exceptions include §§1942ff, which provides an heir or heirs the opportunity for disclaiming the inheritance while §§1975ff and §§315ff InsO provide an opportunity to limit an heir's or heirs' liability. *Id.*

<sup>78</sup> DIETER SCHWAB ET AL., *Germany Part IV. Law of Succession Ch. 2 Provisions Made and Succession in the Event of Death*, in INT'L ENCYCLOPEDIA OF LAWS: FAMILY AND SUCCESSION LAW (2014).

<sup>79</sup> *Id.* (citing Article 2 I GG).

<sup>80</sup> *Id.* (citing Article 14 I GG).

<sup>81</sup> *Id.* at §2(I)(A) 350.

<sup>82</sup> *Id.* at §1(I) 337 (citing §§1924ff BGB).

<sup>83</sup> SCHWAB ET AL., *supra* note 78 at § 1(I) 337.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at §1(I)(A) 338.

<sup>86</sup> *Id.* at §1(I)(A) 338(1).

<sup>87</sup> *Id.* (citing §1924 BGB).

<sup>88</sup> SCHWAB ET AL., *supra* note 78 at §1(I)(A) 338 (1) (citing §1925 BGB).

of the decedent and their issues,<sup>89</sup> while further heirs constitute more distant relatives.<sup>90</sup>

### *C. Capacity and Undue Influence: The Challenge of Gurlitt's Will*

Just hours before the Kunstmuseum made its formal acceptance of the testamentary bequest of Cornelius Gurlitt's art collection, Uta Werner, a cousin of Cornelius Gurlitt, made a formal challenge to Gurlitt's will.<sup>91</sup> The decision to challenge Gurlitt's will came after the release of a report commissioned by psychiatrist Helmut Hausner, which raised doubts over whether Gurlitt was of sound mind when he made his bequest to the Kunstmuseum.<sup>92</sup> It is now up to a Munich Probate Court to review Gurlitt's will and decide its validity,<sup>93</sup> specifically whether Gurlitt had the proper testamentary capacity to make the last-minute will.

Unlike the United States law, the German law requirement for testamentary capacity is equivalent to the standard necessary to contract, "at least in terms of mental quality."<sup>94</sup> Section 1903 II of the BGB sets forth the general principle that a person who has come of age (being sixteen or older) is deemed to have full testamentary capacity.<sup>95</sup> Although this principle reflects a presumption of testamentary capacity, a qualitative standard exists, which requires more than just the mere knowledge of the existence of the will and its contents.<sup>96</sup> However, the BGB does not

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<sup>89</sup> *Id.* (citing §1926 BGB).

<sup>90</sup> *Id.* (citing §1930 BGB).

<sup>91</sup> Melissa Eddy, *Cousin of Cornelius Gurlitt Challenges Will That Leaves Collection to Swiss Museum*, N.Y. TIMES (Nov. 21, 2014), <http://artsbeat.blogs.nytimes.com/2014/11/21/cousin-of-cornelius-gurlitt-challenges-will-that-leaves-collection-to-swiss-museum/>.

<sup>92</sup> *Id.* See, e.g., Stefan Dege, *Examiner Explains Invalidity of Gurlitt's Will*, DEUTSCHE WELLE (Nov. 18, 2014), <http://www.dw.de/examiner-explains-invalidity-of-gurlitts-will/a-18070811> ("[T]here is a special group of factors that don't necessarily lead to overall incapacity but instead simply exclude particular provisions [and] [t]hese include delusional disorders . . . . [Gurlitt's] idea of being pursued by Nazis, especially Nazis from Munich . . . was central to his motivation to select a museum in Switzerland for his art collection . . . [and] this one fear made it impossible for him to make a free decision.").

<sup>93</sup> Eddy, *supra* note 91.

<sup>94</sup> Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 79 (2008).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 80.

provide an affirmative definition of what constitutes qualitative capacity. Therefore, “it must be inferred from the articles that provide for the absence of capacity.”<sup>97</sup>

Section 2229(4) BGB provides that an individual cannot make a will if “because of diseased defect of mental capacity, due to imbecility or impaired consciousness, [he] is incapable of realizing the significance of a declaration of intention made by him and of acting with this understanding.”<sup>98</sup> This section requires that the testator understand the scope of the will and the effect of his or her will on the economic and personal circumstances of those individuals receiving under it.<sup>99</sup> This is similar to the standard for contractual capacity, which deems an individual incompetent to enter into a contract if he or she suffers from “a diseased disturbance of mental capacity preventing the free exercise of his [or her] will, unless the condition by its nature is a temporary one.”<sup>100</sup> Ultimately, the principle of *Geschäftsfähigkeit*, meaning, “those who lack contractual legal capacity are also incapable of making a will,”<sup>101</sup> is the standard for both contractual and testamentary capacity.<sup>102</sup>

Unlike the high statutory standard for testamentary capacity, German law contains no concept of undue influence.<sup>103</sup> Instead, the BGB addresses undue influence—albeit *sub silentio*—by refusing to enforce legal instruments, such as wills, that “contravene the sense of decency of every person who possesses understanding for what is just and equitable.”<sup>104</sup> For example, Section 138(1) of the BGB prohibits a legal transaction, which is in opposition to public policy.<sup>105</sup> Nonetheless, Section 138(1) BGB cannot be used to challenge a will simply because it deviates from the intestate order of succession. However, it has been used to invalidate testamentary dispositions that have excluded those who are entitled to a compulsory share.<sup>106</sup> Here, German law considers

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Scalise Jr., *supra* note 94, at 80.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 42.

<sup>104</sup> Scalise Jr., *supra* note 94, at 65-66.

<sup>105</sup> *Id.* at 66.

<sup>106</sup> *Id.*

the motive of the testator and invalidates the dispositions of a will only if the purpose is a meretricious one.<sup>107</sup>

In addition to invalidating a disposition due to a testator's meretricious purpose, German law also protects against exploitation of the testator.<sup>108</sup> Section 138(2) of the BGB provides that a "legal transaction is void in which someone by exploiting the plight, inexperience, lack of discernment or significant weakness of will of another, causes to be promised or granted disproportionate pecuniary advantages to himself or to a third party in exchange for a performance."<sup>109</sup>

#### IV. PUBLIC POLICY VS. SUBSTANTIVE LAW: THE CASE FOR RESTITUTION

In late 2014, the Kunstmuseum accepted the last-minute bequest of Gurlitt's Nazi-era art trove,<sup>110</sup> which he kept hidden away in his Munich apartment and was subject to seizure from German customs and tax officials. In accepting Gurlitt's bequest, the Kunstmuseum—through its Foundation Board—signed an agreement with the Federal Republic of Germany and the Free State of Bavaria to ensure that any looted art contained within the collection is returned to its rightful owner.<sup>111</sup> Acting in accordance with The Washington Conference Principles on Nazi-Confiscated Art of 1998 ["Washington Principles"], which has been adopted by Switzerland, the Kunstmuseum declared that it will only receive pieces of art from Gurlitt's collection, which are not *suspected* of having been looted.<sup>112</sup> However, if no owner of suspected looted artworks can be identified, the artworks will remain in Germany on public display so that potential claimants can come forward.<sup>113</sup> Christoph Schäublin, President of the Kunstmuseum's board of trustees, has publicly avowed that the museum would adhere to the Washington Principles<sup>114</sup> and his statements, coupled with the agreement reached between the museum and German officials,

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 67.

<sup>109</sup> Scalise Jr., *supra* note 94, at 67.

<sup>110</sup> Eddy, *supra* note 15.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

has been touted as “a game changer for the way cultural institutions handle this in the future.”<sup>115</sup>

Nonetheless, this signed agreement and cooperation of the Kunstmuseum can only proceed if the Munich Probate Court dealing with Gurlitt’s estate upholds his last-minute will. As discussed in the previous section, a cousin of Gurlitt, Uta Werner, submitted a certificate of inheritance to a Munich Probate Court, contesting Gurlitt’s last-minute will to the Kunstmuseum. This challenge relied on the report of psychiatrist Helmut Hausner, who “seriously questioned” the testamentary capacity of Gurlitt at the time of his last-minute bequest.<sup>116</sup> Should the Munich Probate Court find that Gurlitt lacked the appropriate testamentary capacity, the art trove would then pass to his heirs, Uta Werner and Dietrich Gurlitt, via intestate succession.<sup>117</sup> Thereafter, Gurlitt’s heirs would likely not be bound to an additional agreement Gurlitt had with German officials (discussed below). Furthermore, although Uta Werner has stated—as legal heir—that she would work to reconstitute the entire collection of stolen art to its rightful Jewish owners and heirs,<sup>118</sup> at this time her words can only be considered speculative in the light of the enormous public scrutiny surrounding Gurlitt’s art collection.

#### *A. Why the Munich Probate Court Should Favor Restitution Over Substantive Legal Challenges*

Despite the legal challenge to Gurlitt’s will, the board members of the Kunstmuseum have resolved to establish a task force/research body that will look into the challenged origins of many pieces of art within the Gurlitt collection.<sup>119</sup> Once this legal challenge has been resolved, and only if the Kunstmuseum is permitted to retain its bequest, will the task force begin its

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<sup>115</sup> Eddy, *supra* note 15.

<sup>116</sup> Stefan Dege, *Cornelius Gurlitt’s Overlooked Heirs Want Control of his Nazi-era “Degenerate Art” Estate*, DEUTSCHE WELLE (Nov. 24, 2014), <http://www.dw.de/cornelius-gurlitts-overlooked-heirs-want-control-of-his-nazi-era-degenerate-art-estate/a-18082078>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Cait Munro, *Dispute Over the Will Delays Gurlitt Acquisition by Kunstmuseum Bern*, ARTNET NEWS (Feb. 18, 2015), <http://news.artnet.com/art-world/dispute-over-the-will-delays-gurlitt-acquisition-by-kunstmuseum-bern-258852>.

investigation into every piece of art within the Gurlitt collection.<sup>120</sup> As previously discussed, the Kunstmuseum has avowed to return any piece of suspected Nazi-looted art to its rightful heirs. Even more encouraging is the fact that Switzerland, according to the International Council of Museums' September 2014 report, is one of the eleven countries that have made substantial progress towards implementing the Washington Principles and the Terezin Declaration.<sup>121</sup>

Against the backdrop of the Kunstmuseum's commitment and Switzerland's substantial progress in Nazi-era art restitution, are the mere words of a cousin of Gurlitt, Uta Werner. As previously discussed, Uta Werner has made statements that the family of Gurlitt will also pursue restitution. In fact, there has reportedly been an agreement between Uta Werner and an heir of the Rosenberg family (an American heir who claims that a Matisse in the Gurlitt collection belongs to his family) that the Matisse would be returned to the Rosenberg family.<sup>122</sup> While this purported agreement is encouraging, it should still be considered only words from an heir whose potential inheritance is in the national spotlight.

In addition to Gurlitt's last-minute will, he also signed an agreement with the German Federal Government and the Bavarian Ministry of Justice, which expressed his cooperation in the continued research and potential restitution of Nazi-looted art within his collection.<sup>123</sup> According to Walter Schön, from the Bavarian Justice Department, the agreement extends beyond the death of Gurlitt; therefore, under German law, Gurlitt's heirs would also be bound by this agreement.<sup>124</sup> However, one is left to question the veracity of Walter Schön's statement, if the Munich Probate Court finds that Gurlitt lacked the testamentary capacity

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<sup>120</sup> *Id.*

<sup>121</sup> Dr. Wesley A. Fisher & Dr. Ruth Weinberger, *Holocaust-Era Looted Art: A Current World-Wide Overview*, ICOM MUSEUM & POLITICS CONFERENCE (Sept. 10, 2014), <http://www.artlawreport.com/files/2014/09/Worldwide-Overview.pdf>.

<sup>122</sup> Munro, *supra* note 119.

<sup>123</sup> Nicholas O'Donnell, *Breakthrough? Gurlitt Signs Agreement with Germany for Continued Research and Commits to Return of Art*, ART LAW REPORT (Apr. 7, 2014), <http://www.artlawreport.com/2014/04/07/breakthrough-gurlitt-signs-agreement-with-germany-for-continued-research-and-commits-to-return-of-art/>.

<sup>124</sup> Heike Mund, *Gurlitt Case: 'Nazi-Looted Art to Remain in Administrative Trust'*, DEUTSCHE WELLE (May 8, 2014), <http://www.dw.de/gurlitt-case-nazi-looted-art-to-remain-in-administrative-trust/a-17619751>.

to make his last-minute will. Since the German law standard for testamentary capacity is equivalent to the standard that is necessary to contract, “at least in terms of mental quality,”<sup>125</sup> a decision by the Munich Probate Court that Gurlitt lacked the appropriate testamentary capacity would appear to be an implicit assertion that Gurlitt did not have the capacity to enter into or sign the agreement. Therefore, if Gurlitt lacked testamentary capacity and contractual capacity (for the agreement), Uta Werner and her family may not necessarily be bound by Gurlitt’s agreement. A legal consequence of this magnitude would not only impede the progress already made in researching the various pieces within the collection to determine their rightful origins, but may also result in moral implications surrounding the strong public policy; thereby, ensuring that Gurlitt’s life mission of protecting his father’s art collection is accomplished.

#### V. CONCLUSION

Admittedly, there is a strong possibility that Uta Werner’s challenge of Gurlitt’s last-minute bequest to the Kunstmuseum will succeed. As previously discussed, there appears to be ample evidence that the reclusive Gurlitt was living in another time, had believed he was the rightful owner of the art collection, and adamantly resisted the idea that any piece within his collection should be given to a museum. In addition, the report by Helmut Hausner, which posed serious questions as to Gurlitt’s testamentary capacity, amounts to a considerable hurdle for the Kunstmuseum in its legal endeavor to keep Gurlitt’s bequest.

Allowing Uta Werner and the other legal heir or heirs to inherit Gurlitt’s art trove would be consistent with substantive German succession law, but would have a moral consequence toward restitution. Juxtaposed with substantive German succession law, there is a strong public policy counter-balance favoring restitution of Nazi-looted art which should not be overlooked. The Nazis and their affiliates committed atrocious war crimes, including actions taken against “degenerate art.” In particular, many Jewish families were forced to sell their pieces of art well below their value in order to pay the “flight tax” from Germany, while some families simply had their art collections seized/confiscated by the Nazis. A ruling by the Munich Probate

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<sup>125</sup> Scalise Jr., *supra* note 94.



Court that Gurlitt lacked testamentary capacity would devastate the progress already made by Germany and the Kunstmuseum in researching Gurlitt's art collection. It would leave Gurlitt's art collection in the hands of his family, who may not be as willing as the Kunstmuseum is in restituting all pieces within the collection that meet the low threshold of suspected Nazi-looted art.