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New inheritance law as of 1 January 2023

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In its report «Modernization of Family Law» of 25 March 2015, the Swiss Federal Council noted that current family law does not adequately reflect social circumstances and also that the approximately hundred-year-old inheritance law does not reflect the today's diverse ways of life. The revision of the inheritance law was thus initiated. Parliament adopted the final draft of the revised law in the 2020 winter session. The new inheritance law will enter into effect on 1 January 2023.

! The most important changes to the inheritance law

- **Increase of the testator's freedom to dispose of his assets through a reduction of the compulsory portion of descendants and abolishment of the compulsory portion of parents.**
- **Loss of the spouse's compulsory portion during any pending divorce or separation proceeding.**
- **Modification of the most favoured treatment of a spouse.**
- **Clarification of the treatment of tied pension plan (pillar 3a) assets under the inheritance law.**

New inheritance law as of 1 January 2023



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The purpose of the revision is to adapt the law to the changed social conditions. The focus is on the reduction of the compulsory portion, and the clarification of certain legal issues that are disputed under the current law. With the reduction of the compulsory portion, testators are able to dispose of their estate more freely and are thus able, for example, to more strongly favour certain heirs or third parties (in particular, de facto life partners). The reduction of the compulsory portion can facilitate business succession in the case of family-run businesses.

Reduction of compulsory portion

The statutory entitlement of spouses, descendants and, in certain cases, parents is protected under the current law. They are able to claim a certain share of the estate. A distinction must be made between this compulsory portion, and the statutory succession right in an estate that applies if the decedent did not leave a testamentary disposition (will or contract of inheritance), which means that the estate is divided in accordance with intestate succession rules. The statutory succession rights remain unchanged under the revised inheritance law. These are $\frac{1}{2}$ for the surviving spouse or registered partner and $\frac{1}{2}$ for the descendants. If the decedent does not leave any descendants, but does leave a spouse and parents, the statutory succession right is $\frac{3}{4}$ for the spouse and $\frac{1}{4}$ for the parents.

Under the current law, the compulsory portion for a spouse is $\frac{1}{2}$, for children $\frac{3}{4}$ and for parents $\frac{1}{2}$ of the respective statutory succession right.

Under the current law, parents thus only have a statutory succession right and a related claim to a compulsory portion if the deceased leaves no descendants. Under the new law, the statutory entitlement or compulsory portion of parents is completely abolished. Further, the compulsory portion of descendants is reduced from $\frac{3}{4}$ of their statutory succession right to $\frac{1}{2}$ of their statutory succession right. The compulsory portion of the surviving spouse remains unchanged and is $\frac{1}{2}$ of their statutory succession right.

No protection of compulsory portion in the event of pending divorce proceedings

Under the current law, spouses have a right to compulsory portions in each other's estate, even during any pending divorce proceeding. They lose their right to compulsory portion only once divorce or dissolution proceedings are finalised. In the future, protection of the compulsory portion of the divorcing spouse will cease to apply. If a divorce proceeding is pending at the time of the death of the deceased, the surviving spouse will, under the new law, lose their right to the compulsory portion if:

- the proceeding was initiated by joint request or continued by joint request pursuant to the provisions on divorce, or
- the spouses lived separate and apart for at least two years.

This only (but still) affects the compulsory portion. If the decedent thus dies during a pending divorce proceeding and does not leave any will or inheritance contract, the surviving spouse would retain their statutory succession right to this estate. Under the new law, as well, the surviving spouse only loses their statutory succession right once divorce or dissolution proceedings are finalised.

How much is the compulsory portion and the freely disposable share under the new law?

The compulsory portion is a share of the statutory succession right. The amount of the specific compulsory portion thus depends on whether the testator left (1) a spouse and descendants or (2) a spouse and parents, because the heirs in these scenarios have different statutory succession rights.

In the first scenario, the compulsory portion of the descendants is reduced from $\frac{3}{8}$ (old law, compulsory portion of $\frac{3}{4}$ x statutory succession right of $\frac{1}{2}$) to $\frac{1}{4}$ (new law, compulsory portion of $\frac{1}{2}$ x statutory succession right of $\frac{1}{2}$). The compulsory portion of the spouse of $\frac{1}{4}$ ($\frac{1}{2}$ x $\frac{1}{2}$) remains unchanged. The freely disposable share is increased from $\frac{3}{8}$ (old law) to $\frac{1}{2}$ (new law).

In the second scenario, the compulsory portion of parents of $\frac{1}{8}$ (compulsory portion of $\frac{1}{2}$ x statutory succession right of $\frac{1}{4}$) is abolished in the future. However, if the decedent does not leave a testamentary disposition, the parents continue to retain their statutory succession right of $\frac{1}{4}$. In the second scenario, the compulsory portion of the surviving spouse remains unchanged and is $\frac{3}{8}$ (compulsory portion of $\frac{1}{2}$ x statutory succession right of $\frac{3}{4}$). The freely disposable share in the second scenario is raised from $\frac{1}{2}$ (old law) to $\frac{5}{8}$ (new law).

Matrimonial property dispositions in favour of the spouse

In the event of the death of a spouse, the surviving spouse first receives their claims under matrimonial property law as a result of dissolution of the marriage (division of matrimonial property). The estate is divided (division of inheritance) in a second step. By means of a marriage contract, the spouses can agree that the surviving spouse, on division of the matrimonial property, does not only receive one half of the acquired property, i.e. the assets generated during the marriage, but receives instead the full amount of the property acquired (excessive surplus participation). In this case, the estate of the decedent after the division of matrimonial property will consist of their own property only, i.e. the assets that they brought into the marriage or received during the marriage by way of a gift or an inheritance. The new inheritance law clarifies the question as to how this matrimonial property disposition in favour of a spouse is to be dealt with under inheritance law. This excessive surplus participation is only possible in relation to common descendants of the spouses. Excessive surplus participation is to be taken into account when calculating the compulsory portion of the non-common descendants.

Most favoured treatment of spouses under inheritance law

Pursuant to Article 473 of the Civil Code, the testator may, by way of a testamentary disposition, favour the surviving spouse over their common issue. The testator may grant the surviving spouse a usufruct to the entire part of the estate passing to their common issue. This usufruct replaces the statutory succession right of the surviving spouse. In addition to this usufruct, the freely disposable portion under the current law is $\frac{1}{4}$, which the decedent may assign as property to the surviving spouse (or third party). In this case, the issue would receive $\frac{3}{4}$ of the estate, but encumbered by the usufruct

in favour of the surviving spouse. Under the new law, the freely disposable share will be increased to $\frac{1}{2}$. The testator could thus, in the event of the most favoured treatment under inheritance law, allocate to the surviving spouse a usufruct to $\frac{1}{2}$ of the estate and ownership to the other half. The descendants receive $\frac{1}{2}$ of the estate, which is encumbered by the usufruct.

Prohibition on making gifts in the case of inheritance contracts

Pursuant to Article 494 (1) of the Civil Code, a testator may undertake, through an inheritance contract, to appoint a specific person as heir or beneficiary. Under the law in force today, the testator may in principle freely dispose of their assets and make gifts, even after entering into such an inheritance contract. Such gifts made in the lifetime of the testator may be contested by the beneficiary under the inheritance contract only if these gifts are incompatible with the obligations under the inheritance contract or if the testator obviously intended to harm the beneficiary under the inheritance contract by making the subsequent gifts. Today, testators are thus free to make gifts in principle. The new law provides for the opposite. Gifts can be contested if they were not exempted in the inheritance contract and if they reduce the claims of the beneficiary under the inheritance contract. Thus, in principle, a prohibition on gifts will apply in the future.

If a testator enters into an inheritance contract and nevertheless wishes to reserve the right to freely dispose of their assets during their lifetime, this must be specified in the inheritance contract.

Simplified succession plan in the case of family businesses through a reduction of the compulsory portion

The transfer of a family business to the next generation can entail stumbling blocks if the estate includes primarily the family business, if this business is taken over by an heir and, at the same time, the other heirs claim for their compulsory portions. With the reduction of the compulsory portion, testators have the possibility of implementing succession solutions to a greater extent.

Clarification of disputed legal issues and uncertainties

Heirs who are entitled to a compulsory portion may enforce their claims through an action in abatement if the testator has exceeded their power of disposition. As a result, certain dispositions made by the testator may be abated to the permitted amount. The order, i.e. which dispositions should be abated first was not entirely clear in some cases. The new law of inheritance now creates clarity. Abatement applies first to statutory succession, thereafter to dispositions mortis causa and finally to gifts inter vivos. Under the latter title, the following will be abated in turn as follows: (1) any dispositions under marriage or property agreements (e.g. excess surplus participation), (2) the freely revocable gifts and the benefits under the tied private pension plan and (3) the other dispositions, whereas the later dispositions are to be abated before the earlier ones.

Clarity was also provided with respect to the treatment of assets from the tied private pension plan under pillar 3a (bank savings) under inheritance law. The new inheritance law provides that assets from tied private pension plans do not form part of an estate, which was previously in dispute. In the event of the death of the testator, the beneficiaries under these private pension plans have a direct claim against the respective pension plan institution. However, the new law states that these claims are to be taken into consideration when calculating the compulsory portion and are thus relevant to the compulsory portion. They are also subject to abatement if compulsory portions are infringed, namely at full value in the case of bank savings and at surrender value in the case of an insurance policy.

Practical recommendations

The new inheritance law enters into effect on 1 January 2023. It will apply to all previous wills and inheritance contracts, i.e. including those that were drawn up in accordance with the old law, if the testator dies after the new law has entered into effect.

Existing wills and inheritance contracts should be reviewed to see whether their content does also reflect the wishes of the person concerned under the new law. Inheritance contracts should thus be reviewed and, if necessary, adapted with regard to the prohibition on gifts that will

apply in the future. Testamentary dispositions that contain specific (inheritance) shares should be reviewed with regard to reduced compulsory portions in the future. The new inheritance law should thus already be included in estate planning today.

Aside from the reduction of the compulsory portions that will apply as of 1 January 2023, the Federal Council will deal with additional measures to facilitate business succession in a separate stage of the revision to the inheritance law. The revision of the inheritance law is thus not yet fully complete.