

Briefing January 2021

Modernisation of Swiss Inheritance Law

On 18 December 2020, the Swiss Parliament adopted the draft bill which aims at modernising Swiss inheritance law by increasing the testator's freedom of disposition.

Overview

Swiss inheritance law is over 100 years old and its main features have remained unchanged ever since its adoption in 1907. While the traditional family model – consisting of a father, a mother and common children – was practically the only form of family known at the time, new forms of life such as patchwork families, cohabitation or same-sex partnerships have emerged in recent years. Against this background, the current revision aims to modernise Swiss inheritance law and adapt it to these new ways of living.

The revision therefore focuses on increasing the testator's freedom of disposition by reducing the minimum share in the estate guaranteed by law to certain persons close to the deceased, the so-called forced heirship share. The revision notably provides that in cases where a spouse predeceases during ongoing divorce proceedings, the surviving spouse is no longer entitled to her or his forced heirship share. The revision is also intended to clarify certain questions regarding the calculation of the forced heirship share. However, the Federal Council's proposal to introduce an inheritance entitlement for unmarried and cohabiting partners was not supported by the Parliament. These amendments will be addressed in more detail below.

The revision was also taken as an opportunity to clarify a number of technical issues. The Federal Council,

however, took the decision to treat these issues separately. Likewise, it decided to use a separate revision to address the reform of Swiss inheritance law regarding succession pertaining to family businesses. These two legislative projects are currently in progress and will not enter into force until after the modernisation of Swiss inheritance law discussed here.

Reduction of the Forced Heirship Share

Under the current law, descendants, the surviving spouse and – in certain cases – the parents of the deceased are entitled to a forced heirship share.

The forced heirship share of a descendant amounts to three quarters of her or his statutory share, defined as the share of the estate provided by law in the absence of a last will or an inheritance contract. The statutory share of a descendant depends on whether the deceased was married and also on the number of descendants.

The forced heirship share of the surviving spouse amounts to one half of the statutory share, which depends on whether the deceased left surviving children or parents. The parents of the deceased are entitled to a forced heirship share of one half of the statutory share, which exists only if there are no descendants.

According to the draft bill, the descendants' forced heirship share shall be reduced to one half (instead of 3/4 as it currently stands) of their statutory share, while that of the parents shall be abolished completely. The spouse's forced heirship share, however, shall remain unchanged.

In view of the testator's increased freedom of disposition, there may well be a need to reconsider current estate planning. For instance, the testator may wish to dispose of a larger portion of her or his assets in favour of her or his unmarried partner, a stepchild or a successor to the family business.

Example: Testator leaves two descendants and her spouse. In accordance with the current law, the forced heirship share of each descendant amounts to 3/16 ($3/4 \times 1/4$) while that of her spouse amounts to 1/4 ($1/2 \times 1/2$) of the estate. In comparison, under the revised Swiss inheritance law, the forced heirship share of each descendant amounts to 1/8 ($1/2 \times 1/4$) while the forced heirship share of the spouse remains at 1/4. Under the new law, the testator can therefore freely dispose of half of her estate, whereas under the previous law it is only 3/8.

No statutory entitlement for unmarried, cohabiting partners

Unless the deceased has made dispositions in a will or concluded an inheritance contract, unmarried partners have no inheritance rights whatsoever under the current law.

The revision is aimed at improving the protection of unmarried, cohabiting partners and so at adapting the current law to today's social reality. In its draft bill, the Federal Council proposed an entitlement of financial support for the said partners, provided that they have cohabited for at least five years. However, the Parliament rejected the proposed entitlement of financial support for unmarried, cohabiting partners altogether. A majority in Parliament feared that such an entitlement would be difficult to implement and would potentially lead to complex inheritance disputes.

Against this background, unmarried partners are advised to make dispositions in a will or inheritance contract to provide adequate financial support for their life partner. In addition to the allocation of assets and decisions by the testator regarding her or his estate distribution, tax issues should also be carefully considered, as unmarried partners are subject to particularly high inheritance tax rates in many cantons, while spouses benefit from a zero-tax rate in all cantons.

Example: Testator and his partner are parents of a common descendant and have lived together for six years. While the common descendant will inherit from the Testator, his partner will only do so if the Testator appoints him in a will or they agree so in an inheritance contract.

No Forced Heirship Share during ongoing Divorce Proceedings

If a spouse dies during ongoing divorce proceedings, the surviving spouse is still entitled to claim a forced heirship share under the current law. The said entitlement only ceases upon the issuance of a final divorce decree by the court.

The draft bill foresees that the entitlement of the spouse to a forced heirship share ceases immediately once divorce proceedings are initiated. The Parliament specified that in such cases, the forced heirship shares shall apply as if the predeceased spouse had not been married.

Example: Testator, who has two descendants, dies during ongoing divorce proceedings. In his will, Testator may give his entire estate to his descendants given that his – not yet divorced – spouse is no longer entitled to a forced heirship share.

Treatment of Marital Benefits

In the case of the death of a married person, the division of the matrimonial property must be carried out before the estate can be distributed among the heirs. Under the default matrimonial property regime of participation in acquired property – which in principle applies whenever the spouses have not opted for the separation of property regime or community property regime by means of a marital agreement – each spouse participates in half of the other spouse's so-called acquisitions accrued during marriage, *i.e.* mainly income from work and revenues from a spouse's own property.

By marital agreement, the spouses may alter the said level of participation. For example, the spouses may agree that the surviving spouse receives the entirety of the predeceased spouse's acquisitions. However, such an agreement must not negatively affect the statutory inheritance entitlements of spouses' non-common descendants. This restriction does not apply to common descendants given that they will in principle inherit the whole estate at the time the surviving spouse dies.

The amendment of the default 50/50 split by marital agreement has given rise to various legal controversies such as whether the marital benefit in favour of the surviving spouse shall be included when calculating the forced heirship share of the common descendants of the spouses. The controversy around this issue was the subject of various debates during the legislative process. The Parliament finally decided not to include the marital benefits in the calculation of the forced heirship share of the common descendants of the spouses.

Example: Testator leaves behind his spouse and two common descendants as well as a non-common descendant. The spouses agreed that the surviving spouse will receive the entirety of any acquisitions accrued during marriage. The marital benefit in favour of the surviving spouse will be included in the calculation of the forced heirship share of the non-common but not of the common descendants.

Reviewing Existing Succession Planning

In light of the above, we recommend reviewing existing succession plans to ensure that these are up to date not only with regard to the testator's specific circumstances, but also in relation to the new inheritance law. If, for example, a last will states that child A should receive her or his forced heirship share and child B should inherit the remaining estate, it may be worth clarifying whether child A should receive the forced heirship share in accordance with the current law or the smaller forced heirship share provided for by the new law once it becomes effective.

Outlook

As a next step, the adopted draft bill is subject to an optional referendum. The date of entry into force of the revised inheritance law has therefore not yet been officially announced, but is expected to be on 1 January 2023. Nonetheless, the proposed amendments should already be considered in current estate planning by taking the necessary steps to draft last wills accordingly.

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