

Newsletter No.

152

Entry into force of the revised inheritance law: At its meeting on 19 May 2021, the Federal Council decided for the revised inheritance law to enter into force on 1 January 2023. The modernization of inheritance law entails a significant increase in the testator's freedom of disposition, which must be taken into consideration in estate planning.

New inheritance law effective as of 1 January 2023



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After the period for referendum for the bill on the new Swiss inheritance law, which was passed by the National Council and Council of States on 18 December 2020, expired unused, the revised inheritance law is to enter into force on 1 January 2023 according to the Federal Council's decision. The reform focuses on modernizing Swiss inheritance law, which is over a hundred years old and has undergone only a few changes since it came into force. Among other things, the testator will be granted more freedom of disposition by adapting the right of the statutory entitlement, which takes into account the new diverse forms of family cohabitation and in particular also facilitates the transfer of family businesses.

Reduction of the statutory entitlement of the descendants and cancellation of the statutory entitlement of the parents

Under the current law, testators in Switzerland can only dispose of their estate to a limited extent due to the statutory entitlements to which children, spouses and, in some cases, parents are entitled by law. The current law is amended insofar that the statutory entitlement of the descendants will only amount to $\frac{1}{2}$ of the statutory succession rights instead of $\frac{3}{4}$ as before and the statutory entitlement of the parents will even be completely abolished (art. 470 para. 1 and 471 nCC), although the statutory succession right of the parents remains. Overall, the testator's freely available quota is thus increased. The statutory entitlement of the surviving spouse or registered partner, however, is left unchanged (i.e. $\frac{1}{2}$ of the statutory succession right), which results in a statutory entitlement of half of the statutory succession right applying to all statutory entitlement heirs under the new law (cf. art. 471 nCC).

The following overview compares the statutory succession rights, the statutory entitlements and the available quotas of the current law with the law coming into force as of 1 January 2023.

Statutory entitlements and available quota according to current law and according to revised law¹

The deceased person leaves behind	According to current law			According to the revised law		
	Statutory share of the estate	Statutory entitlement	Available quota	Statutory share of the estate	Statutory entitlement	Available quota
Descendants	entire estate	$\frac{3}{4}$	$\frac{1}{4}$ (25%)	entire estate	$\frac{1}{2}$	$\frac{1}{2}$ (50%)
Spouse or registered partner	entire estate	$\frac{1}{2}$	$\frac{1}{2}$ (50%)	entire estate	$\frac{1}{2}$	$\frac{1}{2}$ (50%)
Mother and/or father	entire estate	$\frac{1}{2}$	$\frac{1}{2}$ (50%)	entire estate	0	entire estate
One/several siblings or their descendants	entire estate	0	entire estate	entire estate	0	entire estate
Descendants and spouse or registered partner	$\frac{1}{2}$ and $\frac{1}{2}$	$\frac{3}{8}$ and $\frac{2}{8}$	$\frac{3}{8}$ (37,5%)	$\frac{1}{2}$ and $\frac{1}{2}$	$\frac{1}{4}$ and $\frac{1}{4}$	$\frac{1}{2}$ (50%)
Mother and/or father and spouse or registered partner	$\frac{1}{4}$ and $\frac{3}{4}$	$\frac{1}{8}$ and $\frac{3}{8}$	$\frac{1}{2}$ (50%)	$\frac{1}{4}$ and $\frac{3}{4}$	0 and $\frac{3}{8}$	$\frac{5}{8}$ (62,5%)
One/several siblings and spouse or registered partner	$\frac{1}{4}$ and $\frac{3}{4}$	0 and $\frac{3}{8}$	$\frac{5}{8}$ (62,5%)	$\frac{1}{4}$ and $\frac{3}{4}$	0 and $\frac{3}{8}$	$\frac{5}{8}$ (62,5%)
Father or mother and one/several siblings	$\frac{1}{2}$ and $\frac{1}{2}$	$\frac{1}{4}$ and 0	$\frac{3}{4}$ (75%)	$\frac{1}{2}$ and $\frac{1}{2}$	0 and 0	entire estate
Father or mother and one/several siblings and spouse or registered partner	$\frac{1}{8}$ and $\frac{1}{8}$ and $\frac{3}{4}$	$\frac{1}{16}$ and 0 and $\frac{3}{8}$	$\frac{9}{16}$ (56,25%)	$\frac{1}{8}$ and $\frac{1}{8}$ and $\frac{3}{4}$	0 and 0 and $\frac{3}{8}$	$\frac{5}{8}$ (62,5%)

Loss of the right to statutory entitlement during pending divorce or dissolution proceedings

Another change within the scope of the revision of the inheritance law concerns the right to statutory entitlement of spouses or registered partners if one of the spouses or partners dies during divorce or dissolution proceedings. Under current law, the right to statutory entitlement between spouses or partners only ceases to exist when the divorce or dissolution decree becomes final, which could possibly give rise to tactical delaying of the divorce or dissolution proceedings. In the future, a spouse or registered partner may, under certain conditions and subject to deviating orders, no longer claim his or her statutory entitlement already during the divorce or dissolution proceedings. Specifically, according to art. 472 para. 1 nCC, the surviving spouse or surviving partner loses his or her right to statutory entitlement if divorce or dissolution proceedings are pending at the time of the deceased's death and i) the proceedings were initiated at a joint request or continued at a joint request in accordance with the provisions on divorce (cf. art. 111 f. CC; art. 29 SSPA); or ii) the spouses have lived separately for at least two years. In such a case, the statutory entitlements apply as if the deceased had not been married (art. 472 para. 2 nCC).

It must be taken into account that this legal reform only applies to the right to statutory entitlement, whereas the statutory succession right of the surviving spouse or registered partner is not affected by it, even during initiated divorce or dissolution proceedings. If no testamentary disposition has been made, the surviving spouse or registered partner will benefit according to his or her statutory succession right as long as no legally binding divorce or dissolution judgment has been passed.

Available quota in the usufruct solution

Under the current law, the surviving spouse may be granted a usufruct over

the entire share of the inheritance to be allocated to the joint children pursuant to art. 473 para. 1 CC. The usufruct replaces the statutory succession right to which the spouse is entitled in addition to these descendants. The quota available in addition to this usufruct is currently one quarter of the estate (art. 473 para. 2 CC). According to the revised law, this available quota will be increased to half of the estate in connection with the reduction of the descendants' statutory entitlement (art. 473 para. 2 nCC). Under the new law, registered partners can benefit in the same way as spouses by means of usufruct of the entire statutory succession right of the joint descendants (as a result of stepchild adoption; art. 264c para. 1 item 2 CC), including their statutory entitlements.

Tied pension plan (bank foundation for pillar 3a)

The new art. 476 para. 2 nCC clarifies that assets of the tied pension plan with a bank foundation (pillar 3a) are not included in the estate, but are added to the deceased's assets for the calculation of the statutory entitlement. In the case of pillar 3a insurance solutions, the surrender value is currently already included in the statutory entitlement calculation (art. 476 CC).

In addition to the adaptation of the provisions of inheritance law, art. 82 of the Federal Law on Occupational Retirement, Survivors' and Disability Pension Plans (BVG) will also be systematically adapted. The revised art. 82 para. 3 nBVG states that orders concerning the change of the order of beneficiaries of the tied pension plan must be made in writing as of the entry into force of the provision. The amendment in art. 82 para. 4 nBVG is further significant for beneficiaries of tied pension plans, as well as for the community of heirs. Therein it is stipulated that beneficiaries have an independent claim to the benefit from tied pension plans and can enforce this against the insurance institution or bank foundation in question, so that the benefit in question is in no

way attributable to the estate. With regard to tied pension plans with insurance institutions, this entitlement already exists today by virtue of art. 78 of the Insurance Contract Act (VVG), but is now being extended to tied pension plans with bank foundations and formally regulated in the BVG.

Prohibition of gifts in case of incompatibility with inheritance contract

Under the current law, art. 494 para. 3 CC only provides for the possibility for the beneficiary of the inheritance contract to challenge dispositions upon death and inter vivos gifts or gifts that are incompatible with the testator's obligations under the inheritance contract. According to the new wording of the provision, dispositions upon death and gratuitous inter vivos gifts of the testator (after his or her death) may be contested if cumulatively i) the dispositions and gifts are not compatible with the obligations arising from the inheritance contract, i.e. reduce benefits agreed in the inheritance contract, and ii) they have not been reserved in the inheritance contract (art. 494 para. 3 nCC). This is intended to make gifts that go beyond occasional gifts contestable in principle.

Clear order of reduction

The newly formulated art. 532 nCC provides clarity with regard to the order of reduction of the individual testamentary donations that are incompatible with the statutory entitlements. Thus, according to art. 532 para. 1 nCC, first of all acquisitions as a result of legal successes are subject to reduction, then bequests from dispositions upon death and, if the statutory entitlements cannot be established by then, inter vivos gifts. These inter vivos gifts are then further subdivided in their order of reduction in art. 532 para. 2 nCC. The first inter vivos gifts to be reduced are those gifts from marriage and property contracts that are subject to addition. Secondly, freely revocable benefits and benefits from tied pension plans may be reduced in the same proportion for all

beneficiaries of this category of benefits. Finally, all other inter vivos gifts are reduced, whereby – as under current law – the gift closer to the time of death is reduced first.

Excessive surplus participation

In the event of the death of one spouse or registered partner, the spouses or registered partners may agree on an excessive surplus participation up to the entire acquired property of the other spouse or registered partner in the context of marriage or property contracts. The planned provision according to which a contractually agreed excessive surplus in favor of the surviving spouse is to be taken into account in the calculation of the statutory entitlements has not been considered in the new wording of the law, so that the share which is allocated to the other spouse or partner by agreement on an excessive basis is not taken into account for the calculation of the statutory entitlements (art. 216 para. 2 nCC). The legal clarity thus created is to be welcomed.

No right to support in favor of de facto life partners

Contrary to the Federal Council's original draft, the envisaged statutory support claim in favor of the de facto life partner was not acceptable to the majority and has therefore not been incorporated in the current inheritance law revision.

Transitional provisions and recommendations for action

No actual transitional law is provided for the current inheritance law revision. Instead, the principle of the day of death applies (cf. art. 15 and 16 Final Title CC), which means that the law applicable at the time of the testator's death is applicable. The new inheritance law will thus be applicable to inheritance cases from 1 January 2023.

In view of the imminent entry into force of the revised inheritance law, it is advisable to review existing wills and marriage

contracts already today and, if necessary, adapt them to the new law in order to avoid undesirable results. For entrepreneurs in particular, it may make sense to make dispositions of their assets by means of testamentary dispositions as part of the greater freedom of disposition under the new law. If a testator has placed his or her descendants (or a descendant) on the statutory entitlement without specifying the exact quota, it must be made clear in the interests of legal certainty whether, according to the testator's will, the quota of the statutory entitlement is calculated according to the old law or according to the new law (lower quota). Without such an addendum, an heir to the statutory entitlement could argue on the basis of the rules of interpretation that the testator did not intend a further reduction of the quota and that the quota of the statutory entitlement is therefore not determined according to the new law. The same applies if the testator has assigned the usufruct (art. 473 CC) to the spouse and has disposed of the free quota ($\frac{1}{4}$). The free quota will be $\frac{1}{2}$ in the future. It should also be noted that the testator will be prohibited from making inter vivos gifts if they are incompatible with the inheritance contract. Here, too, it is important to create clarity and, if necessary, to adapt the inheritance contracts in such a way that the testator is granted the right, at least to a certain extent, to make inter vivos gifts. When drafting marriage and inheritance contracts, it is particularly important to carefully examine the extent to which the loss of the right to a statutory entitlement and/or statutory succession right during the divorce proceedings is to be taken into account. In any case, testamentary dispositions and marriage contracts must be drafted in such a way that they achieve the desired objective in the best possible way both in the event of death before and after the date of entry into force.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Endnotes

- ^{1,2} Dispatch on the Amendment of the Swiss Civil Code (Inheritance Law), BBl 2018 5813, p. 5833 ff.