

Newsletter No.

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Upcoming changes in Swiss inheritance law and consequences on estate planning:

To adapt inheritance provisions to the evolution of society and to the current family models, the Federal council was asked to propose the necessary changes. The text of law was approved by the Federal assembly on 18th December 2020 and in the absence of a referendum against it, its entry into force was set by the Federal council for 1st January 2023

New Swiss Inheritance Law as of 1st January 2023



By **Caroline L. Goette**
lic.iur., TEP, Attorney at Law, Associate
Judge
Counsel
Direct phone: +41 58 658 58 58
caroline.goette@walderwyss.com

The main objective of the reform is to favour the decision-making power of the testator by modifying the protected shares, by increasing the available share in case of usufruct and by making certain clarifications concerning the current provisions of law.

1.1 Protected shares

Under current law, in the absence of testamentary dispositions, Swiss law establishes an order by which the legal heirs inherit according to kinships, the closest kinship excluding the following ones.

Thus, the direct descendants of the deceased and their own descendants if they are predeceased are those who inherit first excluding other family members. If there is a surviving spouse, he/she inherits in competition with the direct descendants.

In the absence of issue, the parents of the deceased inherit, if they are predeceased, their own issue concurring with the surviving spouse.

In the absence of issue and parents, the grandparents inherit, if they are predeceased their own issue and so on.

However, the testator has the possibility of modifying these distributions rules, but not completely, because certain relatives are obliged to receive a minimum share of the estate, and this is known as the protected shares.

Under current law, the heirs with the right to protected shares are the descendants ($\frac{3}{4}$ of their legal share), the parents of the deceased ($\frac{1}{2}$ of their legal share) and the surviving spouse ($\frac{1}{2}$ of their legal share).

The revised law changes this by reducing the protected share of descendants from $\frac{3}{4}$ of their legal share to $\frac{1}{2}$ of their legal share and by abolishing the protected shares of the parents. The status of the

surviving spouse nevertheless is maintained.

Thus, the new inheritance regime increases the disposable portion of the testator to $\frac{1}{2}$ of the estate instead of a $\frac{1}{4}$ under current law.

The amended legislation hasn't gone as far as enabling partners neither married nor registered to inherit from their partner. The increase of the disposable portion of the estate may remedy this to some extent by anticipating the devolution of the estate to have each other inheriting by using the disposable portion.

1.2. Loss of the spouse's protected share in divorce proceedings

Under current law, as long as the divorce has not come into force, the spouse remains a legal heir and has the right to his/her protected share. This can be a problem in lengthy divorce proceedings which can last for many years.

However, once the divorce becomes final, the ex-spouse loses all expectations.

The revised law modifies this in that the surviving spouse loses his/her protected share in the event of the death of his/her spouse when the divorce proceedings are pending if i) the proceedings were initiated or continued at the joint request of the spouses or ii) if the couple's separation lasted at least two years.

The same principles apply during proceedings for dissolution of a registered partnership.

However, the surviving spouse or registered partner remains a legal heir until the divorce comes into effect.

1.3. Increase of the available share in case of usufruct (art. 473CCS)

Pursuant to art. 473CCS, one of the spouses may leave by will the usufruct of the entire share devolving to their common children to his/her surviving spouse.

In this case, the freely disposable portion is $\frac{1}{4}$ (art. 473 para. 2 CCS).

With the new law, the disposable portion will increase to $\frac{1}{2}$ of the estate. In such a case, the surviving spouse or the surviving registered partner who is maximally favoured by his or her spouse will benefit from $\frac{1}{2}$ in full ownership of the estate and the remaining $\frac{1}{2}$ in usufruct.

1.4. Clarification of the treatment of the allocation of an additional share of the profit by marriage contract

Under the standard marital regime of participation in acquired property, each spouse is entitled to $\frac{1}{2}$ of the acquets when the matrimonial property regime is liquidated (Art. 215 CCS). The other $\frac{1}{2}$ becomes part of the estate together with the deceased's own property. However, it is possible by marriage contract to allocate the entire profit to the surviving spouse (216 CCS). In the event of death, only the deceased's own property is considered in the estate.

It remains uncertain under current law whether the allocation of an additional share of the profits to the surviving spouse is a gift inter vivos or a gift mortis causa.

The new law settles this question and qualifies the allocation of the entire profit to the surviving spouse or registered partner as a gift inter vivos. This is important since it has an impact when calculating the protected share and the order of abatement (see infra 1.6).

However, the profit share allocated in addition to the legal share is not considered for the calculation of the protected shares of the surviving spouse and the common descendants, in the sense that only the non-common children will be able to claim the abatement, as is already the case.

1.5. Treatment of life insurance

Under the revised new law, pillar 3a pension assets continue to be excluded from the estate and apply to assets held in insurance policies and bank foundations.

However, claims from pillar 3a related to redemption value shall be incorporated into the estate to calculate the protected shares. Thus, heirs with the right to protected shares could take action against the beneficiaries of pillar 3a should their protected shares be damaged.

With regards to pillar 2, there is no impact since it does not fall into the estate and is not subject to abatement.

1.6. Additional Clarification

The heirs who do not receive the full value of their protected share have a claim in abatement. The new provisions give the order in which assets should be abated.

1.7. Prohibition of donations following the conclusion of an inheritance agreement

According to current case law, a testator may make gifts after entering into an inheritance agreement if it does not provide otherwise or if the gift is made with a clear intention to harm.

The revised law prohibits giving after the conclusion of an inheritance agreement beyond the customary gifts, unless provided for in the agreement.

Thus, dispositions upon death and inter vivos gifts which exceed the customary gifts may be challenged if they are contrary to the agreement.

1.8. Conclusion

The new provisions will apply to all successions after 1st January 2023 and to wills and inheritance agreements already drawn up.

It will therefore have to be clarified whether the reduction to an heir's protected share contained in a will drawn up before 1st January 2023 is to be interpreted according to the old or the new law.

The same applies to the question of the parents' protected share.

Thus, if descendants have been reduced to their protected share, it will be necessary to determine whether they should retain $\frac{3}{4}$ or $\frac{1}{2}$ of their protected share after the entry into force of the revised law. Similarly, it must be specified whether the parents will retain their (protected) share after 1st January 2023.

It must also be stipulated in the will whether the testator wishes to disinherit his/her spouse or registered partner in the event of divorce proceedings pending after 1st January 2023.

Finally, it will also be necessary to check the inheritance agreements in connection with the question of donations to be made after their conclusion.

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Walder Wyss Ltd.
Attorneys at Law

Phone + 41 58 658 58 58
Fax + 41 58 658 59 59
reception@walderwyss.com

www.walderwyss.com