

BRIEFING FEBRUARY 2023

NEW INHERITANCE LAW – ENACTED

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The new, modernised Swiss inheritance law came into force on 1 January 2023. The revision has important practical implications – also with regard to the existing inheritance contracts and last wills.

OVERVIEW

The Swiss inheritance law as in force until the end of 2022 was more than a century old, its main features having remained unchanged ever since its adoption in 1907. Social developments, such as the acceptance of new family models and lifestyles or the creation of social welfare schemes to provide security for the older generation, have fundamentally changed the requirements for estate planning options and prompted the Swiss legislator to adapt inheritance law provisions accordingly.

The focus of the new law is on the testator's increased freedom of disposition deriving from a reduction so-called forced heirship shares. These minimum shares in the estate, which the law guarantees to certain heirs, are reduced or eliminated under the new law, so that the testator can freely dispose of a larger portion of his or her assets. Notably, the revised law reduces the forced heirship share of descendants or it states that in cases where a spouse predeceases his or her partner during ongoing divorce proceedings, the surviving spouse is no longer entitled a forced heirship share.

The revision was also an opportunity to clarify several technical issues. The Federal Council, however, decided to treat these issues separately. Likewise, it decided to use a separate revision to address the reform of Swiss inheritance law regarding succession of family businesses. These two legislative projects are currently in progress; the Federal Council passed a draft bill focusing on the facilitation of company succession on 10 June 2022. However, the new reforms are still subject to discussions in the parliament and the resulting modifications will only become effective in the years to come.

REDUCTION OF FORCED HEIRSHIP SHARES

The statutory heirship shares, defined as the shares of the estate provided by law in the absence of a last will or inheritance contract (so-called intestate succession) are not affected by the new law. However, the statutory heirship shares form the basis for the calculation of the forced heirship share, which have been changed as follows:

Under the old law, descendants, the surviving spouse, registered partner and, in the absence of descendants, the parents of the deceased were entitled to a forced heirship share.

The forced heirship share of the **descendants** amounted to three quarters (3/4) of their statutory heirship share. Since 1 January 2023, the forced heirship share of the descendants only amounts to one half (1/2) of their statutory heirship share. The latter remained unaffected by the inheritance law revision and depends on whether the deceased was married, and on his or her number of descendants.

For the **surviving spouse** or **registered partner**, the forced heirship share according to the new inheritance law remains unchanged. The spouse's or registered partner's statutory heirship share, depends on whether the deceased leaves, in addition to the surviving spouse or registered partner, direct descendants or whether there are relatives in the parental lineage of the deceased.

Under the previously applicable law, the **parents** of the deceased were entitled to a forced heirship share of one half (1/2) of their statutory heirship share if the testator was not survived by any descendants. The inheritance law revision has completely abolished this forced heirship share for the older generation and increased the freedom of disposal of childless testators accordingly.

To sum up and put it simply, descendants, spouses and registered partners have an equal forced heirship share amounting to one half (1/2) of their statutory heirship share since 2023, resulting from the reduction of the descendants' forced heirship share from three quarters (3/4) to one half (1/2), while spouses and registered partners continue to be entitled to one half (1/2) of their statutory heirship share. The example (see box) and the illustrations below serve to further illustrate the amended legal situation.

Example: A testator is survived by two descendants (A and B) and her spouse. Her entire estate consists of liquid assets amounting to CHF 1'000'000. According to the previous forced heirship law provisions, the surviving spouse would have been entitled to CHF 250'000, A and B to CHF 375'000 (CHF 187'500 each). The testator would thus have been free to allocate the remaining CHF 375'000 to her spouse and children or to give them to a third party (e.g., a charitable organisation). Under the new law, the surviving spouse would still be entitled to a forced heirship share of CHF 250'000, whereas A and B would only be entitled to CHF 250'000 (CHF 125'000 each). While under the old law, the testator in this example could freely dispose of CHF 375'000, she would be allowed to freely dispose of CHF 500'000 according to the new law.

	Statutory/intestate shares	Forced heirship shares (until 31 December 2022)	Forced heirship shares (since 1 January 2023)
Spouse and two children			
Spouse and no children, but parents			
No spouse, two children			



ADJUSTMENT IN CASE OF USUFRUCT IN FAVOR OF THE SURVIVING SPOUSE

Under the previous inheritance law, spouses with joint descendants already had the option of favoring the surviving spouse with a usufruct of part of the estate by will or inheritance contract.

The new inheritance law retains this possibility but changes the share of the estate that the testator can give to the surviving spouse in addition to the usufruct as inheritance share to full ownership.

Under the old law, spouses were only able to allocate one quarter (1/4) of the estate as an inheritance share whereas three quarters (3/4) of the estate which passed to the descendants encumbered with a usufruct in favor of the surviving spouse.

As of 1 January 2023, the quota that the testator may allocate to the surviving spouse as inheritance share to full ownership is now one half (1/2) of the estate, while the other half (1/2) goes to the joint descendants and is encumbered with a usufruct in favor of the surviving spouse.

PROHIBITION OF GIFTS AFTER CONCLUDING AN INHERITANCE CONTRACT

An important change of the law concerns gifts made after the conclusion of an inheritance contract, which newly include matrimonial property benefits, and which will now only be possible to a limited extent unless gifts were explicitly allowed under the inheritance contract.

Gifts made by the testator after entering into an inheritance agreement and which exceed the value of normal occasional gifts can, in principle, be challenged if said inheritance contract does not contain any reservations in this respect and if they are incompatible with the testator's obligations.

NO FORCED HEIRSHIP SHARE IN ONGOING DIVORCE PROCEEDINGS

Under the old law, if a spouse died during ongoing divorce proceedings, the surviving spouse was entitled to claim a forced heirship share until the court issued a legally binding divorce judgement.

The new law provides that a spouse's right to a forced heirship share immediately ceases to exist once the divorce proceedings have been initiated, under the condition that they were initiated or continued upon joint request, or the spouses have lived separately for at least two years.

However, unlike the forced heirship share, surviving spouses do not lose their status as mutual statutory heirs until the divorce or dissolution judgement becomes final.

NO STATUTORY ENTITLEMENT FOR UNMARRIED PARTNERS

Unless the deceased has made dispositions in a will or concluded an inheritance contract, unmarried (cohabiting) partners continue to have no inheritance rights whatsoever, although the revision originally aimed to adapt the law to the modern social realities by improving the protection of unmarried partners. At least, the reduction of the forced heirship share of descendants allows for increased flexibility.

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 the distribution of his or her estate, 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: A testator and his partner are parents of a common child and have lived together for six years. While the child will inherit from the testator, his partner will only do so if the testator appoints her as an heir in a will or they agree so in an inheritance contract.

WHAT HAPPENS TO EXISTING LAST WILLS AND INHERITANCE CONTRACTS?

While the old law was in force until 31 December 2022, the new inheritance law provisions became effective on 1 January 2023.

For the application of the new provisions, the date of death is the only deciding factor, while it remains irrelevant whether an inheritance contract or last will has been executed before 1 January 2023.

Last wills and inheritance contracts that were drawn up before the entry into force of the new inheritance law remain valid and will be applied in accordance with the new legal provisions.

REVIEWING EXISTING SUCCESSION PLANNING

Considering the above, we recommend reviewing existing **last wills and inheritance contracts** to ensure that they are up to date with regard to the new inheritance law. It is advisable to verify that existing last wills or inheritance contracts comply with the new law and to ensure that the new legal provisions do not give rise to ambiguities or questions of interpretation that could cause disputes later on.

In addition, it may be desirable to specifically take into account certain adjustments by adapting an existing estate planning. In particular, the following topics are worthy of consideration:

For some testators, it might be an interesting option to benefit from the **extended freedom of disposition** under the new inheritance law and to freely dispose of a larger share of the estate, for example in favor of an unmarried partner, a stepchild, another close person or in favor of charitable organizations.

For persons who have limited certain heirs to **the forced heirship share**, it is advisable to check existing wordings and, if necessary, to adapt them either to refer to the percentages under the old law and thus retain them, or to refer to the current forced heirship law. This can avoid misunderstandings and prevent subsequent legal disputes.

***Example:** If a last will made before 1 January 2023 states that child A should receive his or her 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 new law or the larger share according to the old law.*

For spouses with joint descendants who have conferred **usufruct** of the estate on the surviving spouse by last will or inheritance contract, it may be desirable to review the ratio between usufruct share and inheritance share to full ownership and, if necessary, to adjust the quota allocated to the surviving spouse to full ownership in order to further optimize the beneficiary status of the surviving spouse.

In connection with **lifetime gifts to descendants**, it may be advisable to expressly reserve the right to make such gifts and, if necessary, to amend existing inheritance contracts accordingly. The parties are at liberty to regulate the scope of such gifts contractually, for example by specifying a maximum amount for all future lifetime gifts.

For married couples who have not made a testamentary disposition but do not want the surviving spouse to **inherit during ongoing divorce proceedings**, it is advisable to draw up a last will that excludes the spouse as heir in the event of ongoing divorce proceedings. Testators who have included a divorce clause in their testamentary disposition under the old law should review and adapt such clause to the new law if necessary.

***Example:** A testator, who has two descendants (A and B), writes a new will during ongoing divorce proceedings. In his will, he may give his entire estate to A and B since the spouse who has not yet been divorced no longer has the right to a forced heirship share.*

OUTLOOK: COMPANY SUCCESSION

Due to the increased testamentary freedom provided, the new forced heirship law provisions as enacted on 1 January 2023 are an important first step when it comes to facilitating company succession. However, the current inheritance law can still make it extremely difficult to arrange succession in family businesses if there is no consensus among the heirs and an amicable solution cannot be reached. The further revision targeting company succession will focus on family businesses and SME, i.e., all companies except listed companies and cooperatives, companies that exclusively manage their own assets as well as agricultural businesses.

There are three central measures in the planned revision: First, the right of integral assignment of a company to an heir (in the absence of testamentary dispositions), which allows judges to deviate from the principle of equal treatment of the heirs and to allocate a company to a suitable heir. Second, debt payments arising from the division of an estate can be deferred in cases where the company successor is unable to pay out the other heirs immediately. Third, the new law shall allow business owners to transfer their shares during their lifetime to a successor based on a donation agreement and thereby fix the relevant value of the gifted shares. The value of the shares at the time of the donation is to be considered for inheritance purposes following the death of the donor, provided the value of the company has been properly evaluated in accordance with the provisions of the new law.

These new provisions are, however, still subject to parliamentary discussions.

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