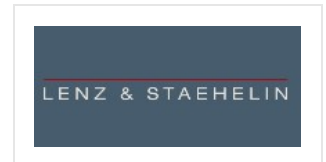


# Modernisation of Swiss succession law under way



11 October 2018

Private Client & Offshore Services, Switzerland

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## Introduction

Swiss succession law, as set out in Articles 457 to 640 of the Swiss Civil Code, dates back to 1 January 1912 and has remained virtually unchanged since then. However, on 29 August 2018 the government published a proposal to modernise the current succession regime. Although the proposal is less ambitious than initially hoped for, if adopted, it will have a significant impact on Swiss and foreign individuals residing in Switzerland. The proposal's main change is the reduction of the compulsory share of certain heirs and, as a result, an increase in the freely disposable share of a testator's estate.

## Forced heirship rules

Forced heirship rules are often a source of debate. Testators generally see them as a nuisance, unnecessarily limiting their right to dispose freely of their estates. On the other hand, the legislature considers them essential to ensure that the surviving family members continue to have sufficient financial resources following the testator's death. The rules also ensure that members of the same class of heirs (eg, children) are treated equally. Lastly, the rules intend to protect the relationship between the family members by reducing the risk that the testator, during their lifetime, uses testamentary freedom to put pressure on family members. The Federal Council now holds that due to social and economic changes, heirs need less protection than they did 100 years ago and thus the current forced heirship regime should be relaxed.

Swiss law currently grants a compulsory share to the descendants, the spouse or registered partner and the parents, but the latter only in the absence of any descendants (statutory heirs). The entitlement reserved to a statutory heir (compulsory share) is a fixed proportion of their intestate entitlement under Swiss law (statutory succession rights).

The new proposal affects the compulsory share of the statutory heirs as follows:

- Parents – the compulsory share of the parents amounts at present to half of their intestate entitlement. Under the proposal, the parents are no longer entitled to any compulsory share.
- Descendants – the compulsory share of the descendants will be reduced from three-quarters to half of their intestate entitlement.
- Surviving spouse or registered partner – the compulsory share of the spouse or registered partner remains unchanged (ie, half).

The schedule below summarises the current situation and the changes set out under the proposal.

| <b>Current situation</b>   |                              |                         |                                | <b>Proposal</b>              |                         |                                |
|--|------------------------------|-------------------------|--------------------------------|------------------------------|-------------------------|--------------------------------|
| <b>Surviving family members</b>                                      | <b>Intestate entitlement</b> | <b>Compulsory share</b> | <b>Freely disposable share</b> | <b>Intestate entitlement</b> | <b>Compulsory share</b> | <b>Freely disposable share</b> |
| <b>Descendant</b>  | 100%                         | 75%                     | 25%                            | 100%                         | 50%                     | 50%                            |
| <b>Spouse or registered partner</b>                                  | 100%                         | 50%                     | 50%                            | 100%                         | 50%                     | 50%                            |
| <b>Parent</b>  | 100%                         | 50%                     | 50%                            | 100%                         | 0                       | 100%                           |
| <b>Brother or sister</b>   | 100%                         | 0                       | 100%                           | 100%                         | 0                       | 100%                           |
| <b>Descendant; and a spouse or registered partner</b>                | 50%; and 50%                 | 37.5%; and 25%          | 37.5%                          | 50%; and 50%                 | 25%; and 25%            | 50%                            |
| <b>Parent; and a spouse or registered partner</b>                    | 25%; and 75%                 | 12.5%; and 37.5%        | 50%                            | 25%; and 75%                 | 0; and 37.5%            | 62.5%                          |
| <b>Brother or sister; and a spouse or registered partner</b>         | 25%; and 75%                 | 0; and 37.5%            | 62.5%                          | 25%; and 75%                 | 0; and 37.5%            | 62.5%                          |
| <b>Parent; and brother or sister</b>                                 | 50%; and 50%                 | 25%; and 0              | 75%                            | 50% and 50%                  | 0; and 0                | 100%                           |
| <b>Parent; brother or sister; and a spouse or registered partner</b> | 12.5%; 12.5%; and 75%        | 6.25%; 0; and 37.5%     | 56.25%                         | 12.5%; 12.5%; and 75%        | 0; 0; and 37.5%         | 62.5%                          |

The proposal also provides that in the event that the spouses either jointly request divorce or they have been living apart for more than two years and filed a divorce petition, the surviving spouse will (contrary to current practice) no longer be able to make any claims based on testamentary dispositions made by the testator, unless otherwise stipulated in the will.

However, until the divorce decree is issued, the surviving spouse continues to be a statutory heir. Therefore, if the testator dies in the absence of a will, the surviving spouse, even if a divorce proceeding is pending, will remain entitled to receive their share of the deceased estate.

### **Claim for support**

The proposal also introduces a 'claim for support' for the life partner of the deceased. Swiss law currently does not offer any protection to life partners that live as a couple, but who are unmarried and have not entered into a registered partnership.

To avoid a deceased person's life partner facing any financial hardship, the proposal seeks to grant the life partner a claim for support equal to an amount that would ensure such life partner's minimum subsistence needs. The claim could be exercised against the statutory heirs and even to the detriment of their compulsory share.

However, in order to be able to make such a claim, the surviving life partner must demonstrate that:

- they lived together with the deceased for at least five years;
- they are in a state of need following the death of their life partner; and
- the claim does not exceed 25% of the value of the deceased's estate.

### **Benefits granted under the matrimonial agreement**

Through the proposal, the Swiss legislature has further tried to settle various legal controversies. One concerns the legal qualification of benefits granted by the testator to the surviving spouse in a matrimonial agreement.

In Switzerland, the matrimonial property regime of participation in acquired property is the regime which applies by default to married couples. 'Acquired property' comprises those assets which a spouse has acquired for valuable consideration during the marriage (eg, salary and income derived from any property owned). At the time of the dissolution of the marriage due to divorce or death, the acquired property is divided in equal shares between (the estates of) the spouses.

Spouses can depart from the rules regarding participation in acquired property regime by matrimonial agreement. They can (for example) agree that all benefits realised during the marriage are allocated to one of the spouses. However, the consequences for the spouses' successions of such deviation from the default rules were unclear.

The proposal seeks to qualify such allocation provision in a matrimonial agreement as a 'living gift' between spouses, which is taken into account only for the calculation of the compulsory share of the non-common descendants of the testator and the surviving spouse. Common descendants will therefore be unable to reduce the share of the surviving spouse, even if such common descendants have, due to the terms of the matrimonial contract, received less than their compulsory share.

### **Pension payments**

Another much-debated issue in relation to Swiss successions concerned the treatment of payments made into the so-called 'third pillar', which is a form of voluntary individual pension plan which any person earning an income can set up with their bank or insurer. Third-pillar contributions are tax deductible up to a set amount and because it is a restricted pension fund, the savings cannot be withdrawn at any time.

The individual pension plan of the third pillar is in addition to the first pillar (the mandatory old age and survivors insurance) and the second pillar (the mandatory occupational pension system). Clearly, benefits from the first and second pillars do not fall into the testator's estate. The only beneficiaries of the first and second pillars are those set out in the relevant laws and regulations. However, the qualification of benefits relating to the third pillar is controversial: do such benefits fall in the estate of the deceased or outside? In practice, banks and insurers are reluctant to pay out third-pillar benefits without the consent of the statutory heirs because they are concerned that such heirs could otherwise file a claim against the financial institution in case of a violation of their compulsory share.

The proposal clarifies that third-pillar benefits do not form part of the deceased's estate and can therefore be distributed to the designated beneficiaries, without the heirs having a claim against the bank or insurer. However, the amount of the benefits does not need to be taken into account for the calculation of the compulsory share of the heirs. In other words, if statutory heirs have not received the full value of their statutory entitlement, they may have a claim against the beneficiary of the third-pillar benefits – but not the bank or insurer – to compensate the shortfall.

Parliament will now review the proposal and may suggest further changes before its adoption.

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