

Inheritance law revision – Should I adapt an existing will or inheritance contract?

The currently applicable Swiss inheritance law is no longer able to do justice to today's social conditions and lifestyles in essential points. This has prompted the legislator to revise the inheritance law. The envisaged adjustments extend over several stages.

1. New inheritance law as of 1st January 2023

The **first stage** of the inheritance law revision will come into force on 1st January 2023. Essentially, this is about the reduction of the compulsory portions. This allows the testator¹ to freely dispose of a larger part of his estate under the new law.

This article highlights the **most important changes** as of 1st January 2023 and what these changes mean for you and your **existing wills and inheritance contracts**. Finally, there is an outlook on the next inheritance law revision stage.

2. Most important changes

2.1 Reduction of the compulsory portions of the descendants and abolition of the compulsory portions of the parents

The compulsory portion is that part of the statutory share of the inheritance over which the testator may not freely dispose. If he does so anyway, the heirs who are protected by the compulsory portion may sue for a reduction against the beneficiaries who exceed the statutory limit.

¹ Although the masculine form has been chosen in the text for reasons of readability, the information refers to members of both sexes.

Under current law, spouses and descendants as well as – if the testator has no descendants – parents are also entitled to a compulsory portion. With the **new law**, the compulsory portion of the descendants is reduced and the compulsory portion of the parents is eliminated altogether. The compulsory portion of the surviving spouse remains unchanged.

The reduction (or, in the case of the parents, the abolition) of the compulsory portions **increases the testator's room for manoeuvre**, because under the new law he can freely dispose of a larger share of his estate. In this way, he can specifically favour persons of his choice more strongly, be they selected persons entitled to inherit or third parties (e.g. cohabiting partners, stepchildren, foundations, etc.).

The **new compulsory portions** apply if the testator **dies after 1st January 2023**. I.e. they are applied without further ado to all wills and inheritance contracts existing at the time of death – **regardless of when the wills and inheritance contracts were drawn up**.

Illustration of the new compulsory portions in relation to the current ones, depending on which legal heirs the testator leaves behind:

The testator leaves:	Statutory share of the inheritance (unchanged today and new)	Com-pulsory portion today	Com-pulsory portion new	Disposable quota today	Disposable quota new
Spouse and descendants	1/2 and 1/2	1/4 and 3/8	1/4 and 1/4	3/8	1/2
Only spouse	Whole inheritance	1/2	1/2	1/2	1/2
Only descendants	Whole inheritance	3/4	1/2	1/4	1/2
Spouse and parents	3/4 and 1/4	3/8 and 1/8	3/8 and 0	1/2	5/8
Only parents	Whole inheritance	1/2	0	1/2	Whole inheritance

2.2 No protection of the compulsory portion in pending divorce proceedings

According to current law, the spouses have a legal claim to inheritance and compulsory portion until the divorce decree becomes final. Under the new law, the surviving spouse's **entitlement to the compulsory portion can already be withdrawn by testamentary disposition when the divorce proceedings are initiated**. It is a prerequisite that (i) the divorce proceedings have been initiated on joint request or continued according to the rules on divorce on joint request; or (ii) the spouses have lived separately for at least two years.

It should be noted, however, that the surviving spouse retains his statutory right of the inheritance unchanged until the divorce proceedings have become final. Thus, if the testator dies during pending divorce proceedings and does not leave a will or inheritance contract with different provisions, the still-spouse receives the statutory share of the inheritance.

2.3 Higher inheritance quota for spouse as most-favoured party under inheritance law

If the testator wishes to favour the surviving spouse as much as possible in terms of inheritance law towards the joint descendants, he may give the surviving spouse under the new law **half of the estate** as

a share of the inheritance in property and the other half **in usufruct**. Currently, the surviving spouse could receive a maximum of 1/4 of the estate as a share of the inheritance in property and 3/4 of the estate (which goes to the joint children) in usufruct.

2.4 Prohibition of gifts in inheritance contracts

Another important change in inheritance law concerns existing and future inheritance contracts. Under the new law, a testator may **no longer make gifts during his lifetime after concluding an inheritance contract (fundamental prohibition of gifts)**. This is in contrast to the current law, according to which the testator remained free to dispose of his assets by means of gifts during his lifetime even after concluding an inheritance contract (fundamental freedom to make gifts).

The **beneficiary of the inheritance contract** can therefore under the new law **challenge all lifetime gifts** (regardless of to whom) that go beyond occasional gifts if (i) their inheritance contract beneficiaries are **thereby diminished** and (ii) the lifetime gifts **were not reserved in the inheritance contract**.

2.5 Analogous application for couples in a registered partnership

All provisions of the revision that affect spouses **also apply to same-sex couples** in a registered partnership. When "marriage for all" comes into force on 1st July 2022, however, the importance of the registered partnership will probably diminish, as same-sex couples will also be able to marry from that date and will be subject to marriage law, and existing registered partnerships can be converted into marriage.

2.6 Cohabiting couples

Unmarried cohabiting partners are entitled **neither to a statutory right of inheritance nor to a compulsory portion** even after the revision of the law of succession has come into force. The beneficiary of the cohabiting partner under inheritance law must continue to be made by means of a disposition of property upon death (will or contract of inheritance).

However, the increased freedom of disposal resulting from the new law gives the testator the **opportunity** to benefit his cohabiting partner **more generously than before** by means of a will or a contract of inheritance.

3. Practical advice

The new law applies **without a transitional period**. It **applies if the testator dies after the new law comes into force, i.e. after 1st January 2023**. Thus, it will also apply without exception to wills and inheritance contracts that were drawn up under the current law.

With regard to your **already existing wills and inheritance contracts**, there are the **following points to note** in particular in view of the new regulations:

- It is to be expected that after the new law comes into force, delicate questions of interpretation regarding the testator's will will arise in individual cases. This is particularly the case if, due to the wording in an existing will or inheritance contract, it is **unclear** whether the testator **would have disposed differently under revised law**.

It is therefore advisable to review **already existing wills and inheritance contracts** to see whether their contents **also correspond to the will of the testator under the new law, are up-to-date and sufficiently clear** and, if necessary, adapt them - still during the testator's lifetime. This can considerably reduce later difficulties of interpretation and conflicts among the heirs.

- In particular, there may be a need to adapt those wills and inheritance contracts that **specify certain (inheritance) quotas that could be structured differently** due to the **changes in the compulsory portions** under the new law (cf. supra Para 2.1).

For example, if a will drawn up under the current law quantifies an inheritance share of a descendant or third party, which is calculated differently under the new law and in particular due to the reduced compulsory portions under the new law, or names the parents as compulsory heirs. The question then arises as to whether the testator nevertheless intended to benefit these persons with the corresponding quota, irrespective of the new law, or whether it was rather the testator's will to benefit the persons maximally or minimally in accordance with the applicable law and he had simply failed to adapt his last will to the new legal situation.

- If a person wishes to ensure that the surviving spouse does not receive anything from the estate of the testator of the still-spouse **while the divorce proceedings are still pending, he may under the new law, with a corresponding provision in the will or contract of inheritance**, assign the share attributable to the still-spouse to **someone else** as early as **this point in time** (cf. supra Para 2.2).
- Anyone who has intended and provided for a **maximum inheritance-law benefit for the spouse** with existing wills or inheritance contracts should check whether the existing wording is also covered by the higher maximum inheritance-law benefit for the spouse under the new law. A will or contract of inheritance should be adapted in particular if it specifies **certain quotas** (applicable under the current law but changed under the new law) (cf. supra Para 2.3).
- Anyone who concludes or has concluded an **inheritance contract** and still wishes to reserve the right to dispose freely of his assets during his lifetime must clearly provide for this in an inheritance contract under the new law. Existing inheritance contracts should therefore be carefully reviewed with regard to the **prohibition of gifts** that will apply under the new law and, if necessary, supplemented accordingly with such a **clear reservation** (cf. supra Para 2.4). Of course, a reservation is also required in the inheritance contract if the testator wishes to make **additional dispositions upon death** that are incompatible with the obligations under the inheritance contract (e.g. legacies by means of a separate will).
- **Those who have made their cohabiting partner** a beneficiary under an existing will or inheritance contract should check whether this beneficiary status needs to be adjusted due to the testator's **increased freedom of disposal** under the new law (cf. supra Para 2.6).

4. Outlook: Facilitating business succession in family businesses

4.1 Relevance of business succession

The reduction of the compulsory portions as of 1st January 2023 and the new freedoms of disposal grant the testator more flexibility in the settlement of the estate, which can also facilitate business succession. However, the crux of the matter **when handing over the family business to the next generation** is often that the business is by far the largest component of the estate and this is often only to be transferred to one of several (compulsory) heirs. In the case of inheritance disputes, **the compulsory portions and payment claims** of the other compulsory heirs **often massively complicate** the family business succession, which occasionally leads to a dismemberment or even closure of the business.

Statistics show that every year thousands of family businesses in Switzerland are faced with a business succession and encounter practical difficulties, among other things, within the framework of the inheritance law restraints. The practical and economic relevance of improving the legal situation is therefore great.

Therefore, the **next stage** of the inheritance law revision **focuses on facilitating the transfer of family businesses under inheritance law**. The consultations are currently underway. The draft law and the Federal Council's dispatch are expected in the course of this year. The **Federal Council's preliminary draft law** essentially provides for the following **four central measures** to facilitate business succession:

4.2 Right of an heir to integral assignment of the company

In the context of the division of the estate and at the request of an heir, the judge should in future be able to assign the family business as a whole to **one of the heirs** if the testator has not made a disposition to this effect. This is to prevent a fragmentation or closure of the company. This would be a departure from the principle of equal treatment and from the "10% rule", according to which an integral assignment of an inheritance matter is only possible if the assignment does not result in excessive equalisation payments within the community of heirs.

4.3 Possibility of deferred payment for the business successor

In the case of integral assignment, the successor remains **fully liable to compensate** his co-heirs. Under the current law, the compulsory portions and compensation claims of the other heirs are in principle due immediately, which can bring the business successor into **liquidity problems** if neither further funds from the estate nor own funds are available for settlement. The successor to the business should in future be given the opportunity to request the judge to grant a **deferment of payment vis-à-vis the other heirs**. The deferred amounts shall bear interest and be secured in accordance with this proposed new regulation.

4.4 Specific rules for the imputation value of the company

Specific rules for the imputation value of the business should be introduced if it has already been transferred to a successor during his lifetime and a valuation must take place as part of the equalisation. Under certain conditions, the value of the business at the **time of the bequest** should in future be decisive and no longer per se the value at the time of the inheritance (departure from the death date principle).

4.5 No minority share in the company against the will of heirs entitled to a compulsory portion

An heir entitled to a compulsory portion **should in future not have to accept** in the context of the division of the estate that a **minority share** in the family business is allocated to him to be set off against the compulsory portion if another heir exercises control over this business. The aim is to prevent heirs from having to take over shares that regularly have only a reduced value and often cannot be sold at all.

If you have any further questions or suggestions on the subject of inheritance law revision or more generally on the subject of inheritance law, please do not hesitate to contact us. We will be happy to advise you on your estate planning and assist you in drawing up or amending your will or marriage and inheritance contract.

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