

# Draft revision of Swiss inheritance law: impact on estate planning via foundations and trusts

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## Abstract

Estate planning by way of foundations and trusts is crucially influenced by inheritance law. The changes envisaged by the draft revision of Swiss inheritance law are far-reaching and might have a great impact on foundations and trusts, if the settlor had his last domicile in Switzerland. As a positive shift, the scope of the freedom of disposition for the settlor shall be enhanced by the reduction of the compulsory shares. As a rather negative shift, one has to deal with a number of poorly drafted provisions that will result in legal insecurity, as well as conflicting legislation. However, the legislative proceedings have not yet been concluded, so improvements are still possible.

contemporary inheritance law<sup>7</sup>. In the course of the legislative procedure the initiative was modified by the National Council (*Nationalrat*) and thereupon accepted in March 2011 by the Council of States (*Ständerat*).<sup>3</sup> Thereafter, the Federal Office of Justice took five years to create and publish the first preliminary draft in March 2016<sup>4</sup> which is the basis of discussion for this article.

*These efforts began in 2010 with motion no 10.3524 submitted by Ständerat Felix Gutzwiller, which is entitled 'Towards a contemporary inheritance law'*

## Introduction

After the international frenzy of new regulations regarding compliance, transparency, and tax, the Swiss legislator<sup>1</sup> is currently—and after more than 100 years—preparing a reform of the substantive Swiss succession law.<sup>2</sup> These efforts began in 2010 with motion no 10.3524 submitted by Ständerat Felix Gutzwiller, which is entitled 'Towards a

The draft for the new succession law was perceived with quite some disappointment by most experts who had expected a more thorough effort of the legislator. Most of the expert opinions that were rendered during the elaboration process had been disregarded. Taking into account the impression that was conveyed at a talk in November 2016 given by the responsible person at the Federal Office of Justice, it now seems that the consultation statements rendered during the Consultation Process (*Vernehmlassungsverfahren*)<sup>5</sup> will be treated with indifference again. On that occasion

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1. Parallel to the revision of the substantive law there are endeavours for the revision of the corresponding provisions in private international law aiming at a harmonization with the European Succession Law Regulation; cf P Picht and G Studen, 'Die Schweiz will ihre Rechtsregeln für grenzüberschreitende Erbfälle reformieren - Anpassung an die EU-Rechtslage' (2016) *Successio* (4/2016), 318ff.

2. The article is based on the talk given by the author at the Inaugural Step Alpine Conference of the Swiss and Liechtenstein STEP Federation on 20 January 2017 in Interlaken, Switzerland.

3. cf <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20103524>> accessed 23 February 2017.

4. cf <[https://www.bj.admin.ch/bj/de/home/aktuell/news/2016/ref\\_2016-03-041.html](https://www.bj.admin.ch/bj/de/home/aktuell/news/2016/ref_2016-03-041.html)> accessed 23 February 2017.

5. cf <<https://www.bj.admin.ch/dam/data/bj/gesellschaft/gesetzgebung/erbrecht/ve-organisationen.pdf>> accessed 23 February 2017.

the representative of the Federal Office of Justice also explained that the draft had been driven by the idea of a '2-step enactment'; this implies that a number of clear and important provisions should and also would be amended and introduced as soon as possible, whereas the 'difficult details' would remain to be solved at a later stage. It goes without saying that such a legislative approach in the complex and intertwined subject of inheritance law puts at risk the consistency of the reform project.

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## Overview: relevant content for the present planning situation

For the purpose of this article the described revision project is directly applied to estate planning via foundations and trusts. In this context, a number of relevant features and characteristics of the reform have to be scrutinized, namely:

- the reduction of the compulsory or forced shares;
- the position of the unmarried partner;
- the possibility of claims for reduction or 'clawback'-claims (*Herabsetzungsklagen*); and
- information rights, especially against third persons, eg asset managers, foundations, or trustees.

## Reduction of the compulsory shares

For the purpose of an easy example we assume that upon death of the settlor the entire estate is bequeathed into the hands of a foundation or trust, either by way of a will or by an *inter vivos* transaction. Under the current legislation, such a situation entails quite a heavy burdening of the estate with compulsory shares (Article 471 ZGB<sup>6</sup>). The compulsory shares are

determined as a fraction of the respective statutory share of the relevant party: three-quarters of the statutory share for the children and half the statutory share for the spouse and the parents (in case that the latter have a statutory share at all). The unmarried partner, however, is neither entitled to a statutory, nor a compulsory share, a situation that is often regarded as no longer adequate for a contemporary inheritance law. As a result of the above, under the current legislation, if the settlor only has one daughter, three-quarters of the estate are bound by a compulsory share and are subject to a clawback-claim.

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According to the preliminary draft, the current situation is supposed to be adjusted by way of a substantial reduction of the compulsory shares: the compulsory shares shall be reduced to one-half of the statutory share for the children and one-quarter for the spouse, while the compulsory share of the parents shall be abolished in its entirety. As a result, fewer and smaller claims for reduction are to be expected in the future, thus enhancing the freedom of disposition for the settlor.

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Further, a small but important change of wording is proposed in the provision regarding the scope of the clawback-claim. According to Article 527 No 3 ZGB, 'gifts' that are made within five years before the death of the deceased, are under present law subject to clawback. In this context it is discussed controversially

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6. Civil Code of the Swiss Confederation of 10 December 1907, as amended, AS 24 233, 27 207 and BS 2 3.

whether a disposition to a trust qualifies as such a 'gift' in the technical legal sense under Swiss law. Accordingly, the preliminary proposal suggests that the wording is adjusted from 'gifts' to 'free dispositions', thereby clarifying that the establishment of a trust is included in the relevant clawback-provision.

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### **Legacy of maintenance (Unterhaltsvermächtnis)**

So what happens to the position of the unmarried partner? As a compromise following a controversial discussion the idea of a compulsory share for the unmarried partner was denied in favour of a so-called 'legacy of maintenance' (*Unterhaltsvermächtnis*). The resulting provision (a new Article 484a ZGB), however, is subject to a lot of discussion and criticism.

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The current form of the legacy of maintenance aims at entitling persons that have factually cohabited with the deceased for at least three years. 'Factual cohabitation' shall most probably be interpreted as cohabitation in a somewhat affectionate or non-platonic relationship (in contrast to the cohabitation as *eg* sisters or roommates). Furthermore, these cohabitants must have provided 'substantial performances in the interest of the deceased'. It is left to the imagination of the reader what the term 'substantial performance' within cohabitation could mean. Such legacy of maintenance shall also be granted to minors that shared a household with the deceased for at least five years and had in the past and would have also received ongoing financial support by

the deceased in the future, if he had not died (*eg* stepchildren). The claim for the legacy of maintenance is directed against the estate while the amount of the legacy is not defined. Naturally, the claim should aim at an adequate standard of living; yet, no limit, threshold, or quota was introduced; thus, leaving the decision totally in the discretion of the court.

As an interesting restriction, the legacy should only be granted if it is tolerable for the heirs taking into account their financial situation and the amount of the estate. How such 'tolerability test' should be applied in practice, is not specified. Further, as a procedural restriction the draft requires a mandatory court action within a time limit of three months after the death of the settlor has become known. The period of three months is ridiculously short compared to the common 12 months' minimum period applied in other compulsory court actions under Swiss inheritance law. This time limitation will raise a number of difficulties in practice, *eg* only to discover the right opposing party. Also, friendly settlements seem quite unlikely under these circumstances.

Conclusively, the provision does not grant 'a compulsory share light' but constitutes a hardship clause subject to various unclear and controversial criteria. It is not foreseeable how courts should or would even be able to apply this provision with a certain consistency.

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### **Information rights**

In the context of successful litigation in inheritance matters, information rights can be crucial. Under the current legislation the Civil Code provides for information rights only for the heirs among each other. Information rights against third persons, however, are a rather difficult subject. The first possibility is to inherit an information right of the settlor by

universal succession. That applies eg in case the deceased himself had a contractual claim implying an information right against that person (eg a bank).<sup>7</sup> The second possibility is to prove that the third person is in the possession of an object of the estate. Also for such instances jurisprudence has developed certain information rights.<sup>8</sup> Yet, as this remains an unclear and unsatisfying situation, the draft law provides for a new provision granting information rights towards ‘persons that have managed, possessed or received any assets of the deceased’ (Article 601a ZGB). This wording clearly aims to cover asset managers, trustees, and foundations. The right should entitle *all* persons that can assert *any* inheritance claim and require information to determine the extent of such claim. It is thus very (if not too) extensive. The information right cannot be excluded by testamentary disposition and professional confidentiality obligations cannot (at all) be held against it. Hence, the current shape of the information right will raise a number of problems regarding the rights of personality and the confidentiality obligations of professionals. In any case, the envisaged information right will effect a change of the situation especially for trustees and foundation board members and might lead to a new wave of court action.

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## Conclusion

To sum up the above, there certainly is a ‘light side of the force’ that lies in a greater freedom of disposition for the testator or settlor. Such is achieved by the simple but substantial reduction of the compulsory shares.

However, the ‘dark side of the force’ seems to prevail. It includes far, probably too far-reaching information rights against third persons, eg foundations or trusts, and a claim for maintenance for the unmarried partners that is completely unpredictable for all sides involved. In addition, one has to deal with rather badly drafted provisions that need some re-engineering, and the envisaged 2-step enactment will cause insecurity and definitely not contribute to the consistency of the reform project.

*One has to deal with rather badly drafted provisions and the envisaged 2-step enactment will not contribute to the consistency of the reform project*

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7. M Häuptli in D Abt and T Weibel, *Praxiskommentar Erbrecht*, Art 560 Rn 13ff (3rd edn, Helbing Lichtenhahn Verlag 2015).

8. Decision of the Federal Supreme Court of Switzerland, BGE 132 III 677, E.4.