Impact of the envisaged revision of the Swiss inheritance law on estate planning via foundations and trusts

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Agenda

I. Overview: The envisaged revision of the Swiss inheritance law

II. Example: Impact on estate planning via foundations and trusts

III. Conclusion
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I. Overview: Facts

- 17.6.2010: Legislative initiative “Motion Gutzwiler: Towards a contemporary inheritance law”
- 25.8.2010: Acceptance of the initiative by the Federal Council (Bundesrat)
- 23.9.2010: Acceptance of the initiative by the Council of States (Ständerat)
- 2.3.2011: Acceptance by the National Council (Nationalrat) with a claim for amendments requesting that unmarried couples are not equal before the law compared to married couples
- 7.6.2011: Acceptance of the amendments by the Council of States
- 4.3.2016: Publication of the preliminary draft and explanatory statement

Critique: neither expert opinions nor the results of the consultation were taken into account, lowest common denominator, 2-step enactment
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I. Overview: Relevant content for the present planning situation

- Reduction of the compulsory shares: Children: ½ instead of ¾, Spouses: ¼ instead of ½, Parents: 0 instead of ½
- No compulsory share for the unmarried partner: Compromise is a claim for a legacy of maintenance under certain conditions
- Claim for reduction/“clawback” (Herabsetzung): amount of claims is expected to be reduced, clarification regarding the qualification of inter vivos trusts
- Information rights: Customary complementary information right against certain involved third parties is now regulated by the law
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II. Example: Compulsory shares

Current situation (art. 471 ZGB)

- Children
- Spouses
- Parents
- Unmarried Partner

Envisaged situation art. 471 ZGB

- Children
- Spouses
- Parents
- Unmarried Partner

Estate in the hands of a foundation or trust

- Deceased
  - transfer by will or *inter vivos*-transaction

New: legacy of maintenance

Compulsory share  Legal share

Fewer and smaller claims for reduction

New: art. 527 no. 3 ZGB: "gift" to "free grants"
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II. Example: Legacy of maintenance (*Unterhaltsvermächtnis*), art. 484a ZGB

- **Entitlement:** Persons, that have *factly cohabited* with the deceased for *3 years* *and* have provided *substantial performances* in the interest of the deceased *or minors* that have lived in a *common household* with the deceased and have received *financial support* that would have continued

- **Against:** The “*estate*”, i.e. also a foundation or trust that has received such assets

- **Amount:** *Not defined*, i.e. in the discretion of the court (adequate standard of living)

- **Restriction:** Only if *tolerable* for the heirs regarding their financial situation and the amount of the estate

- **Procedural requirement:** Mandatory *court action within 3 months* after knowledge of the death

→ No legal claim or compulsory share, but hardship clause subject to various controversial criteria
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II. Example: Information rights

Current situation

- Judically introduced information rights of contractual nature that are passed from the deceased to the heir by way of universal succession
- Information rights acc to arts. 607 para 3 and 610 para 2 ZGB

Envisaged situation

- New: Art. 601a ZGB Information rights towards persons that have “managed, possessed or received any assets of the deceased”
- Art. 601a ZGB
  - Extends to all persons that can assert an inheritance claim and need information to determine the extent of the claim
  - The information right cannot be withdrawn by testamentary disposition
  - Professional confidentiality duty cannot be held against
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III. Conclusion

The “light side”:
- Greater freedom of disposition for the testator/settlor

The “dark side”:
- Far-reaching information rights against foundations/trusts
- Unpredictable new claim for unmarried partners
- In general: badly drafted provisions and 2-step enactment will cause insecurity
Thank you for your attention

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