

# Benefits in Switzerland to the Surviving Spouse: Lawmakers Provide Clarity



When spouses have common descendants, often the surviving spouse is left the usufruct over the entire estate in accordance with the Swiss Civil Code, meaning also over the entire portion of the inheritance falling to the children. In practice this leads to the situation that the children inherit from their parents only after the second spouse dies.

In order that the surviving spouse also enjoys the position of heir and therefore is allowed to participate in the proceedings distributing the estate, he or she will also be left a portion of the estate to own in addition to the usufruct. Often the entire available share will be allocated for ownership to the surviving spouse. This is allowable because the usufruct is considered to be in satisfaction of the right of inheritance conferred by law.

The marital law effective on January 1, 1988, in many ways strengthened the position of the surviving spouse. At this time, a difference was created between the inheritance portion conferred by law and the compulsory portion (which were identical until 1988). Suddenly there was the question (not noticed by lawmakers) of how Art. 473 par. 2 Civil Code was to be interpreted

when it states “The usufruct is considered to be in satisfaction of the right of inheritance conferred by law on the surviving spouse where these descendants are co-heirs with the spouse”.

When the “right of inheritance conferred by law” is understood as the inheritance portion of the spouse conferred by law (1/2), the available share remaining is 1/8 because the compulsory portion of the children equals 3/8 (3/4 of the half due to the children). In contrast, if one understands the “right of inheritance conferred by law” as the compulsory portion of the spouse (1/4), the available share remaining (together with the compulsory portion of the children of 3/8) is an additional 3/8.

There are many good arguments for both interpretations. Unfortunately, the Federal Court has never had the opportunity to create clarity based on a decision. This unclear situation is particularly unpleasant for estate planning because one cannot give a clear answer to the testator and he or she must for safety reasons calculate with 1/8.

On December 18, 1997, National Councilor Marc Suter submitted a parliamentary initiative in which he demanded clarification of the legal situation. The Commission for Legal Questions of the National Council expressed its opinion favoring the 3/8 solution because for the purposes of the modification of the marital law in 1984, the surviving spouse should hold as much as possible.

The Federal Council entertained concerns against this interpretation because it allowed that third parties also profited from the large, freely available share and therefore made the recommendation that preferential treatment of the surviving spouse should only apply in relationship to the descendants and that a special rule should apply for non-common descendants.

A political tug of war was therefore started which ended where most Swiss problem solutions end, namely with a

good federal compromise: Both the National Council and the Senate (Ständerat) voted for a middle solution of 2/8, therefore 1/4, on October 5, 2001, and accepted the suggestions of the Federal Council. The new text of Art. 473 par. 1 and 2 Civil Code now states: “The testator can by testamentary disposition leave to his or her surviving spouse the usufruct in the whole of the share of the inheritance devolving on the common descendants. Such usufruct is taken to be in satisfaction of the right of inheritance conferred by law on the surviving spouse where these descendants are co-heirs with the spouse. In addition to this usufruct, the available share shall be a quarter of the estate.”

After the unused expiration of the referendum period, the new regulation became effective on March 1, 2002. The solution solved a dogmatic dispute without any actual losers and avoided tension between the German-speaking part of Switzerland (which leaned more heavily towards the 1/8 solution) and the French-speaking part (which favored the 3/8 solution).

Advisors for estate matters are pleased because there are now clear ratios to use for future planning. Furthermore advisors will be busy during the next months because the wills set up during the last years must be checked to see if they conform to the new legal situation.

Dr. Rudolf Roth  
Managing Partner, KPMG private

See also: “Das Ende des ‘Achtelskrieges’”, by PD Dr. Hans Rainer Künzle, in: *Chancen und Risiken rechtlicher Neuerungen 2001/2002*, published by KPMG, Schweiz