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Splitting Heirs - Civil Law Column of on Fordced Heirship Rules

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SPLITTING HEIRS

Jacqueline Burckhardt Bertossa on forced heirship rules

In the last civil-law column, Daniel Lehmann wrote about mousetraps. One of these traps, which often surprises clients and lawyers with a common-law background, is forced heirship, which is an important characteristic of civil-law succession statutes.

Under forced heirship, certain heirs are entitled to an indivisible portion: the forced estate. In Switzerland, for example, the issue, the spouse and – in certain cases – the parents of a decedent qualify as forced heirs. When the *Swiss Civil Code* was drafted in the late 19th century, it was seen to be the decedent's fiduciary duty to secure the financial future of these heirs. At the time, patchwork families (comprising the remnants of divorced families) were unknown, at least from a legal viewpoint, and it was everybody's duty to financially support other family members. Also at the time, there were no welfare systems in most European countries. There were neither public social security systems, nor mandatory pension schemes, nor healthcare plans, so the forced estate made sense.

However, even today, forced heirship forms part of the civil-law tradition and is widely accepted. Some people claim forced heirship

rules have prevented many disputes because close relatives can be certain how much they are entitled to. But forced heirship rules may be a serious obstacle for planning an estate, particularly for large estates or when there is one main asset that is difficult to divide, such as real estate or a company. In Switzerland, there is no ceiling for the forced estate, no matter how large the estate is; Switzerland is also known as the country with one of the highest forced estates (i.e. the quota to which

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certain heirs have a statutory right is one of the highest compared to other countries).

The following scenario illustrates some of the issues. An unmarried couple, Heidi and Peter, have one son, Max, and they are domiciled in Switzerland. Peter dies leaving an estate consisting of the family home, his tangible property and some savings. In the father's succession, the son is the only statutory heir and he has a forced heirship claim of three-quarters of the estate. Heidi is not a legal heir because Peter and Heidi were not married and therefore she has no statutory claim to the estate.

This is certainly not the result Peter and Heidi would have wanted. Furthermore, by law, all gifts Peter has made to Heidi or any parties during the five years before his death, or even earlier if a gift was made with the intention to diminish Max's forced estate, will be taken into account when calculating Max's

forced estate. This includes the settlement of trusts, even if Max is one of the beneficiaries.

What options does Peter have to bequeath a decent share of his estate to Heidi?

- a) If Peter had married Heidi she would have been entitled to half of his estate and her own forced estate would have been a quarter, whereas Max's forced estate next to Peter's wife would only have been three-eighths (equalling three-quarters of a half – his statutory quota).
- b) Peter could have drawn up a last will according to which his partner, Heidi, would receive the entire free estate of a quarter.
- c) The entire family could have entered into an inheritance agreement, provided Max had full legal capacity. By this agreement, Max would have waived his claim to the forced estate of the parent who passes away first in favour of the surviving parent.

Swiss succession law applies to every estate of a decedent whose last domicile was in Switzerland. The Swiss international private law is, however, quite liberal; a person who is not a Swiss citizen may choose the law of the state of their citizenship as the law applicable to their estate. Under these rules, many international clients domiciled in Switzerland who don't have a Swiss passport may choose the law of their home country when planning their estate. By doing so, they may avoid the forced heirship rules, which are sometimes seen as constraining.

This column will run every issue, written by authors from different civil-law jurisdictions. Interested contributors should email editor@step.org

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