



SWISS LAW

INHERITANCE LAW IN SWITZERLAND AND AUSTRALIA

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I. INTRODUCTION

This article gives an overview of inheritance law in Switzerland and Australia. It points out many of the aspects of inheritance laws in both countries that one should be aware of and indicates how these laws may affect, for example, Swiss citizens or expatriates living in Australia, people with assets in Switzerland and/or Australia or with relatives in Switzerland and so on.

The article also gives a comparison of Swiss and Australian inheritance laws. It does not deal with specific issues, but outlines some of the basic principles of both systems. The following six areas are dealt with:

1. Statutory Inheritance;
2. Forms of Wills and Making Wills;
3. Executors;
4. Statutory Shares;
5. Taxes; and
6. International Aspects.

Inheritance law is not uniform throughout Australia because different legislation applies in each state and territory. Accordingly any reference to Australian inheritance laws contained in this overview is a reference to the law in New South Wales as at November 2004. However, there are many basic similarities among inheritance laws through Australia. The specific character of the Australian legal system which is based on the common law, vests a number of discretions and powers in the Courts and their judges, which under Swiss law, would be mainly dealt with by legislation.

In Australia, reference is often made to trusts. A trust is a common law concept which is unknown to the Swiss legal system, and should not be confused with the Swiss trust concept (Treuhänderverhältnis). Under Australian law, a trust exists where a party (a trustee), who despite generally being registered as the proprietor of the property (trust property), holds that property on behalf of another person or entity and accordingly has a duty to administer the trust property for the benefit of that other person or entity (beneficiary) or for another legally recognised purpose (object).

On the other hand, the Treuhänderverhältnis under Swiss law is a two-party-relationship. The legal owner appoints a so-called “Treuhänder” who acts in favour of and only as representative for the legal owner. At all times the owner remains the legal and beneficial owner of the asset. There are no beneficiaries.

II. STATUTORY INHERITANCE

In this article, statutory inheritance law refers to the legal rules applying under Swiss and Australian law if a person dies intestate (i.e. wholly or partly without a will or testamentary contract).

Note: The term “the deceased” is used in this article only where a person dies intestate. If a person has made a will or a testamentary contract, then he or she is referred to in this article as “the testator”.

A. SWITZERLAND

1. Fundamental aspects

Swiss inheritance law is expressly regulated by the Swiss Civil Code (Schweizerisches Zivilgesetzbuch). A system of family relationships to the deceased (called “Parentele” in the Code) is used to determine the order of inheritance under Swiss law. These relationships are called “orders” in this article.

The first order is constituted by the offspring (children, grandchildren, great-grandchildren etc) of the deceased.

Parents of the deceased and their issue constitute the second order.

Grandparents, uncles, aunts, cousins and their issue form the third order.

A spouse inherits outside the order system and stands in a special position to the deceased.

2. Time limits

As a fundamental principle, it should be noted that statutory or testamentary beneficiaries directly and automatically obtain full joint ownership of the entire estate at the date of death of the deceased or testator. The beneficiaries inherit all rights and obligations of the deceased.

A beneficiary can waive his or her claim to the estate within a period of twelve weeks after he or she becomes aware of the inheritance. This period only commences after the conclusion of the estate inventory by a notary if one of the beneficiaries resides outside Switzerland.

3. Statutory inheritance and shares in estates

Under Swiss law, the statutory order of inheritance follows the scheme below:

- a. issue of the deceased, that is, the biological and adopted children of the deceased, are the first in line to inherit. Children always inherit in equal shares;
- b. if the deceased has no issue, then the estate passes to the beneficiaries who fall within the second order; that is, the parents of the deceased. The deceased’ father and mother are entitled to half of the inheritance each. If they are no longer alive, the estate falls to their issue, who would be the deceased’s siblings;
- c. the beneficiaries of the third order are the grandparents of the deceased. They inherit in equal shares. If a grandparent has already died, his or her issue will take his or her place; and
- d. as mentioned above, the spouse of the deceased as legal beneficiary inherits outside the order system. The spouse is entitled to one-half of the estate and the other half of the estate goes to the relatives from the first order. If there are no relatives from the first order, then the spouse inherits three-quarters of the estate and the relatives of the second order inherit the other quarter. The spouse’s hereditary interest overrides those of the grandparents and the grandparents’ issue, so if there are no relatives of the second order, shares of the estate that would otherwise devolve to the grandparents and the issue of the grandparents, are instead added to the spouse’s share.

B. AUSTRALIA

1. Fundamental aspects

Statutory inheritance in New South Wales (“NSW”) also follows a system of orders in a similar manner to Switzerland. As a result, the NSW statutory rules and the system of orders which apply in codified civil law countries are similar. The basic principles are found in the Wills, Probate and Administration Act 1898 (NSW) [“WPAA”].

2. Time limits

The administrator of an intestate estate sets a time limit for making a claim on the estate by publication in a daily newspaper of a notice to creditors and those having a rightful claim on the estate, to assert their rights before the given deadline (at least 14 days after the date of publication).

3. Statutory inheritance and shares in estates

A distinction should be made between estates that are wholly regulated by will on the one hand, and estates that are partly regulated by will (partial intestacy) or wholly unregulated by will (total intestacy) on the other.

Generally, Australian law allows for absolute freedom of disposition by will. If no will exists or if a will exists which disposes of only part of the real and personal property of the deceased, the statutory provisions concerning statutory inheritance will apply only to that portion of the estate which is not covered by will (s 61F WPAA).

Different alternatives are presented by the WPAA for distribution of the estate; e.g.:

a. Spouse and no issue

In this situation, the surviving spouse inherits everything. A de facto partner will be treated in the same way as a spouse and will also inherit everything, but only if there is no surviving spouse or children.

b. Spouse and issue

In this situation, the value of the estate determines how the estate is distributed. If the value of the estate minus the household items amounts to less than \$200,000.00, the spouse inherits everything. If the value of the estate exceeds \$200,000.00, the spouse receives:

- all household items;
- \$200,000.00;
- interest on this amount at 6% per annum from the date of death to payment; and
- one-half of the remaining estate.

The rest goes to the issue of the deceased.

The WPAA also regulates who inherits the estate (or the intestate part of the estate) if there is no spouse or issue but other relatives survive, and also if there are no relatives.

III. FORMS OF WILLS AND MAKING WILLS

A. SWITZERLAND

1. Possible forms and formal requirements

The will is the most fundamental means of making provision for the distribution of property in the event of a person's death. The other form of making provision in the event of one's death is a testamentary contract. On the basis of the principle of freedom of contract, the testator can make provision regarding his or her estate without consideration of the rules of statutory inheritance. This freedom is limited only by statutory restrictions regarding shares in the estate to be left to certain family members (Pflichtteilsrecht) and also by certain moral considerations.

A person who has testamentary capacity and is over 18 years of age, is entitled to make provision for distribution of property in the event of his or her death. The deceased is free - within the statutory restrictions - to make provision concerning all or some of his or her assets. The balance of his or her assets must be left to the statutory beneficiaries.

2. Will (Testament)

Swiss law recognises three different forms of testamentary dispositions:

1. certified testament;
2. autographed testament; and
3. emergency testament.

A certified testament needs to be prepared and certified by a notary or another official person listed in the applicable laws of the canton where the document is to be executed. It must then be executed by the testator before two witnesses and signed by these witnesses next to the testator's signature.

An autographed testament must be handwritten in its entirety and signed by the testator. No witnesses or notary are necessary. The formal requirement for a valid signature will be satisfied once the testator's authorship can be established without objection. Thus the inscription "Your Father" is enough to establish the identity of the writer. However, very careful checks must be made to ensure that the testator can be identified without ambiguity. The date and place of making the will are also necessary to establish its formal validity.

An emergency testament is very rare and only applies in exceptional situations such as war, epidemic, deadly peril, etc.

3. Testamentary contract

A testamentary contract makes contractual provisions in the event of death. The person making the contract can make any unilateral provision that can also be made by will. For a testamentary contract to be valid, it must be prepared by a notary. Both parties to the contract must be present at the time of its creation and certification. Furthermore, two witnesses who are not related to the testators must sign the contract confirming that the testators were capable and aware of what they were doing.

B. AUSTRALIA

1. Wills

a. Wills

The most common method of dealing with assets after death is to make a will. The will itself may be simple or complex, depending on many factors.

b. Mutual wills

An essential aspect of the agreement or contract accompanying these types of wills is that there is an agreement between both testators to the effect that one party will not revoke or alter his or her will without the consent of the other. However, if one party nevertheless revokes the mutual will, the later will would be valid. The executor under the later will would be obliged in accordance with the rules of equity to administer the estate on trust for the beneficiaries under the mutual will.

2. Formal requirements

The following minimum requirements are necessary to ensure that a will is validly made under Australian law (s 7 WPAA):

- a. the will must be in writing;
- b. the will must be signed by the testator at the foot of the document;
- c. the testator must sign the document in the presence of two witnesses; and
- d. it is important to ensure that the witnesses are not beneficiaries under the will, and preferably, are not related to any of the beneficiaries.

IV. EXECUTORS

A. SWITZERLAND

A testator may nominate an executor of his will (called Willensvollstrecker). The main duty of such an executor is to execute the deceased's will. An executor of a will must declare, within 14 days of notification, whether he or she consents to be executor. His or her duties are (depending on the will) to:

- represent the beneficiaries;
- administer the estate;
- pay the debts of the estate;
- distribute the bequests; and
- distribute the residuary estate.

If a testator has not nominated an executor of his will or if the nominated executor does not accept his nomination, the Swiss authority having jurisdiction in the matter may nominate an administrator (called Erbschaftsverwalter) who has similar duties to a nominated executor. An administrator will be nominated in the following cases:

- the beneficiary lives in another country and has no legal representative;

- if he or she is unsure whether there are any beneficiaries; and/or
- where the applicable Swiss law requires the nomination of an administrator.

In Switzerland, the appointment of an executor is not a necessity. However, it has become more popular to appoint an executor because the appointment of an executor generally accelerates and simplifies the execution and distribution of the estate.

B. AUSTRALIA

In Australia, almost every will does or should nominate an executor. Indeed, if an executor is not named, has died or is unwilling to accept the role, and assets are to be disposed of, then another person or institution (eg. a relative or the Public Trustee) must apply for appointment as administrator of the will and for a grant of administration of the will, in order to deal with the assets in the estate.

An executor has a far more important and powerful position in Australia than in Switzerland. In fact, the choice of executor is a critical estate planning issue. The role of an executor carries considerable responsibilities. An executor is able to do all that is legally necessary to achieve the due and proper administration of the estate. In particular, an executor is required to attend to the following matters in the administration of the estate:

- disposal of the deceased's body;
- proof of the will (application for probate) or application for administration;
- collection of the assets of the deceased and ensuring their security;
- payment of the estate's debts;
- preparation of any outstanding tax returns and ensuring that all outstanding tax is paid; and
- distribution of the estate.

Note: In Australia, on the death of the testator, all assets pass to the executor who is required to deal with them and distribute them in accordance with the will. The transfer of ownership is, in effect, only confirmed by the grant of probate or administration.

However, in Switzerland, the community of heirs inherits all assets, and not the executor. The community of heirs must mutually agree on the distribution of the various assets between themselves if no executor is nominated.

V. **STATUTORY SHARES**

The term statutory or obligatory share (Pflichtteil) refers to the share of the estate that must be left to certain members of the deceased's family under Swiss law.

A. SWITZERLAND

As a classic civil law country with codified civil and inheritance laws, in Switzerland the testator's relatives can claim a fixed statutory share of the estate against a beneficiary. The claim to a statutory share arises at the time of inheritance. The claim is binding on the estate, and attaches to the estate as a whole. It is assignable and can be bequeathed to another person.

Those persons entitled to a statutory share are the deceased's issue, his or her parents and his or her current spouse.

B. AUSTRALIA

Australian inheritance law does not recognise fixed statutory shares as provided for in Swiss law. As Australian law is founded on the English common law system, family provision (similar to statutory share) claims are dealt with by the Equity Division of the relevant Supreme Court, but only if a claim is asserted. It remains within the Court's discretion to determine whether, to what extent and on what basis, these statutory claims are to be provided for out of the estate.

VI. TAXES

A. SWITZERLAND

1. General Introduction

Like Australia, Switzerland consists of a federation of states (cantons). Traditionally, taxes are levied and collected by the cantons. Federal taxes are only imposed in exceptional circumstances.

2. Inheritance Tax (Death Duty)

Inheritance tax is regulated on a cantonal and not on a federal basis. Cantons are accordingly free to determine whether to impose inheritance taxes. At present, all cantons except the central canton of Schwyz impose inheritance tax. Most cantons do not impose inheritance tax on close family members such as spouses and, in some cases, children. Tax rates are based on the degree of family connection, i.e. the closer the relationship to the deceased, the lower the tax rate. In some cantons, a threshold for children applies, i.e. inheritance tax is only payable by the children on the amount above a nominated threshold.

Most cantons also impose gift duty, i.e. a tax which applies on gifts made to a beneficiary during a person's lifetime. This duty was introduced to prevent persons giving away their assets shortly before death in order to avoid death duties. The cantons of Lucerne and Schwyz, however, do not have gift duty.

3. Capital Gains Tax

Switzerland does not have a federally regulated capital gains tax regime. Like the inheritance tax system, capital gains tax is a cantonal matter. Although Switzerland does not have a general capital gains tax, all 26 cantons impose a capital gains tax on the sale of real estate. Half of the cantons collect this tax on all capital gains on real estate transactions, while the other half only impose the tax on real estate transactions of privately owned assets so that, if capital gains occur in a corporate context, no capital gains tax is incurred. The criteria which apply in determining the relevant tax rate include the selling price and how long the seller owned the property. The maximum ordinary capital gains tax rate is between 30-40% of the gain on real estate.

4. Wealth Tax

All cantons levy a wealth tax on the assets of natural persons. The federal government does not impose a wealth tax. The subject of this tax is, in principle, the aggregate of the net assets of a taxpayer. In certain cases, mainly based on social policy grounds, deductions are allowable. Furthermore, most cantons have introduced tax exempt amounts for people with

little capital. The rates of taxation vary from canton to canton, but never exceed 1% of the net assets per year. Usually, amounts below CHF 100,000.00 are not subject to wealth tax.

B. AUSTRALIA

1. Inheritance Tax and Death Duties

There is no inheritance tax or death duty payable in Australia or in any state or territory of Australia. This means that all estate assets in Australia may be transferred to beneficiaries without incurring any duties or taxes. Australia does, however, have capital gains tax (CGT), and in some instances, CGT can operate as a de facto or delayed death duty (see below).

2. Capital Gains Tax

Capital Gains Tax (CGT) is a federal tax and accordingly applies throughout Australia. The rate of CGT is generally dependent on the taxpayer's marginal income tax rate for the financial year during which the capital gains tax event occurs. CGT is not, however, payable on the transfer of assets under a Will. Accordingly, estate assets may be transferred to beneficiaries without either the estate or the beneficiaries thereby incurring liability for CGT.

CGT is generally payable on the disposal of an asset. There are numerous technical rules governing when CGT may arise and what constitutes a disposal or deemed disposal of an asset. As a result, the subsequent disposal of estate assets by beneficiaries who have inherited the assets, may give rise to CGT liability. The liability would, however, only be payable on the disposal of the asset.

Liability for, and the amount of CGT payable depends on a number of factors including the nature of the asset concerned, when the asset was originally acquired by the testator, when the testator died, when the asset is subsequently disposed of by the beneficiary, whether the beneficiary is a natural person or, for example, a corporate entity or a trust, and the marginal taxation rate of the beneficiary at the time of disposal. Certain assets, such as the testator's family home, may remain permanently CGT exempt in the hands of the estate and the beneficiary, provided certain residence rules are met or the home is disposed of within a particular period after the testator's death.

3. Tax on Assets

There is generally no tax on assets in Australia, except for land tax payable on certain classes of real property in certain states.

Because of the different taxes levied and not levied in Switzerland and Australia, careful thought should be given to arranging one's affairs and estate matters in the most tax effective way.

VII. **INTERNATIONAL ASPECTS**

A. SWITZERLAND

The IPRG (Gesetz über das Internationale Privatrecht) is the relevant Swiss law that governs whether a court has jurisdiction in a matter as well as the applicable law in international cases.

B. AUSTRALIA

Australia does not have a single federal law regulating international conflicts of laws. Every state has its own common law rules.

VIII. GLOSSARY

Erbschaftsverwalter	administrator (of the inheritance)
Parentele	order
Pflichtteil	statutory share
Pflichtteilsrecht	law governing statutory share / obligatory share
Schweizerisches Zivilgesetzbuch	Swiss Civil Code
Testament	will
Treuhänder	acts in favour of and as representative of the legal owner
Treuhandverhältnis	Swiss trust concept
Willensvollstrecker	executor

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