September 2017

THE HEIR WHO IS (COMPLETELY) EXCLUDED FROM SUCCESSION

Oliver Arter | Daisy Vacher

By judgment of 28 June 2017, the Swiss Federal Supreme Court re-examined the rights and obligations of an heir who was completely excluded from succession in a disposition of property upon death. Persons who have been completely excluded from succession are referred to as so-called "virtual heirs".

What does a virtual heir have to do in order to get to his or her legacy, and what rights does a virtual heir have until the time that heir status is recognised? And who actually is a virtual heir in the first place?

1. Who is a virtual heir according to Swiss law?

Virtual heirs are persons who are subject to a right of inheritance, be it as a statutory heir, an heir with a statutory inheritance entitlement or a legacy in a prior disposition of property upon death, but who have been excluded from their right of inheritance by means of a (subsequent) disposition of property upon death.

2. According to Swiss law, who is an heir with a statutory inheritance entitlement?

Compared to certain foreign legal systems, Swiss inheritance law provides that a minimum portion of the testator's legacy belong to selected persons who benefit from the so-called statutory inheritance entitlement.

The heirs with a statutory inheritance entitlement are, on the one hand, the **spouses** or **registered partners**, and on the other the **descendants**.

If there are no descendants, the **parents** of the deceased are also beneficiaries of a statutory inheritance entitlement.

3. How high is the statutory inheritance entitlement in Switzerland?

The statutory inheritance entitlement amounts to:

- for a descendant, three-quarters of their statutory succession rights;
- for each parent, one-half of their statutory succession rights;
- for the surviving spouse or registered partner, one-half of their statutory succession rights.

4. And how high are the statutory succession rights in Switzerland?

Statutory heirs are the persons who receive the inheritance by law when a deceased has not made a valid testamentary disposition or a valid inheritance contract. The statutory heirs are the relatives of the testator according to their degree of affinity, the surviving spouse or registered partners and – if need be – the state.

The statutory heirs are determined according to a hierarchy that depends on their degree of relationship with the testator. If close relatives are present, the more distant relatives do not inherit. Within a category of heirs who are equally close to the testator, these inherit equally per stirpes.

The spouse or registered partner does not belong to the category of relatives, because they are not related by blood. The spouse or registered partner of the testator inherits, however, as an additional entitled person apart from the relatives.

Shutterstock/ArbyDarby

The direct descendants of the testator, i.e. his or her children, inherit first and foremost. Children who have already died will be replaced by their descendants, i. e. the grandchildren, or at most the great-grandchildren of the testator. Adoptive and extramarital children inherit in the same way as legitimate descendants.

In the second place, if there are no direct descendants, the parents of the testator inherit equally. After predeceased parents come their descendants, that is, the siblings, and to the nieces and nephews of the testator.

In the third line, when neither the descendants nor the relatives of the parents are present, the grandparents inherit, and, if they have died, their descendants share proportionately.

If there are no surviving grandparents or their descendants, more distant relatives do not inherit as statutory heirs. They are, however, considered if this was provided for by means of a testamentary disposition or a contract of inheritance. If the testator leaves no heirs, the inheritance falls to the canton where the testator had his or her last place of residence, or to the municipality that is designated by the legislation of the canton.

The surviving spouse or surviving registered partner occupies as an heir a special position alongside the relatives of the testator because he or she is not blood-related. The spouse or registered partner inherits, in addition to the testator's relatives, or, if only members of the grandparent's family line are present, then they inherit in their place. The legal inheritance right of the spouse or registered partner is defined as follows:

- If direct descendants of the testator are present, the surviving spouse or the surviving registered partner inherits half the inheritance.
- If the testator's parents or their descendants exist, the surviving spouse or surviving registered partner inherits three-quarters of the inheritance.
- If there are grandparents of the testator or their descendants, or if no descendants entitled to inherit are present, the surviving spouse or the surviving registered partner inherit the entire inheritance.

Statutory succession rights are shown in the following table:

Degree of relationship	**Legal share of inheritance**
Testator with spouse/registered partner, without descendants and without parents	Spouse/registered partner: 100%
Testator without spouse/registered partner and with descendants	Descendants: 100%
Testator with spouse/registered partner and with descendants	Spouse/registered partner: 50% Descendants: 50%
Testator without spouse/registered partner and without descendants, but with parents	Parents: 100%
Testator with spouse/registered partner and with parents, but without descendants	Spouse/registered partner: 75% Parents: 25%

5. So what is the statutory inheritance entitlement?

The statutory inheritance entitlement can be represented as follows:

Degree of relationship	Legal share of inheritance	Statutory inheritance entitlement
Testator with spouse/registered partner, without descendants and without parents	Spouse/registered partner: 100%	Spouse/registered partner: 50%
Testator without spouse/registered partner and with descendants	Descendants: 100%	Descendants: 75%
Testator with spouse/registered partner and with descendants	Spouse/registered partner: 50% Descendants: 50%	Spouse/registered partner: 25% Descendants: 37.5%
Testator without spouse/registered partner and without descendants, but with parents	Parents: 100%	Parents: 50%
Testator with spouse/registered partner and with parents, but without descendants	Spouse/registered partner: 75% Parents: 25%	Spouse/registered partner: 37.5% Parents: 12.5%
Testator without spouse/registered partner, without descendants, and without parents/descendants	Grandparents: 100%	-

6. I was excluded from inheritance in a disposition of property upon death. What do I need to do?

Anyone who has been completely excluded as an heir in a disposition of property upon death obtains his or her heir status by **an abatement or invalidity judgment** in his or her favour.

It is therefore appropriate, unless an agreement can be reached with the other heirs, to take legal action.

7. How much time do I have to claim for infringement of statutory share or to claim grounds for invalidity?

An abatement action shall expire at the end of **one year** from the date on which the heirs became aware of the infringement of their rights and, in any case, after ten years have passed from the date of the opening of the testamentary disposition.

The invalidity action shall also expire **one year** from the date on which the claimant became aware of the testamentary disposition and the ground for invalidity and, in any case, ten years from the date on which the testamentary disposition was opened.

In order to avoid any legal disadvantage, it is always advisable to bring an action for abatement or invalidity no later than **one year** after the testator's death. If a person finds that he or she has been excluded from succession, action should therefore be taken without delay, as the preparation of an action for reduction or invalidity takes time and, if necessary, prior information must be obtained from third parties in order to ascertain how high the testator's assets were and to assess whether it is worthwhile to take legal action at all.

8. What can be claimed with an invalidity action?

The invalidity action may be brought for various reasons.

On the one hand, a disposition of property upon death is annulled when an invalidity action is brought if:

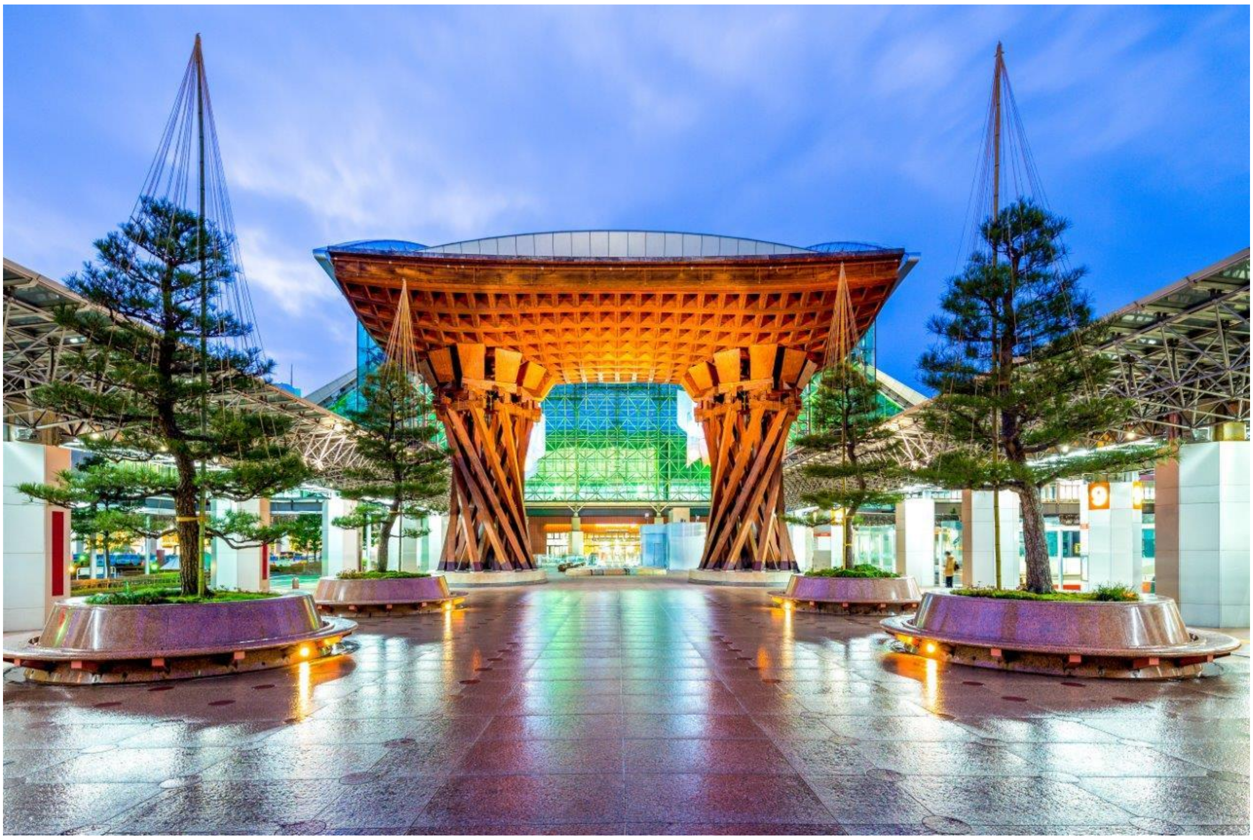
- It was established by the testator at a time when he or she was **not capable of making a disposition**;
- It arose from a **defective will**;
- Its content or any condition attached to it is **immoral** or **illegal**.

On the other hand, a disposition of property upon death is declared null and void when an invalidity action is brought if it suffers from a **formal deficiency**.

9. And what can be claimed with an abatement action?

Heirs protected by the statutory inheritance entitlement may sue to have the disposition abated to the permitted amount if the testator has exceeded his or her *power of disposition by virtue of a disposition of property upon death* and the heirs do not receive the value of their statutory inheritance entitlement (Art. 522 para. 1 ZGB) if the testator paid contributions to credit the inheritance portion *during his lifetime*, such as wedding gifts, settlements or assignments of assets, if they are not subject to hotchpot (Art. 527 para. 1 ZGB), compensation payments in settlement of future rights of inheritance (Art. 527 para. 2 ZGB), freely revocable gifts – with the exception of the usual occasional gifts – which he or she made during the last five years prior to death (Art. 527 para. 3 ZGB), has alienated assets with the intention of circumventing the limitations on his or her testamentary freedom (Art. 527 para. 4 ZGB), if the testator has established *insurance claims based on his death* in favour of a third party or transferred them to a third party without valuable consideration during his lifetime (Art. 529 ZGB), if the testator has so burdened his estate with *usufructuary rights and annuities* that their capital value according to the obligation to perform exceeds the disposable part of the estate (Art. 530 ZGB), or if the testator has established a *replacement of the heir* in relation to an heir entitled to a statutory inheritance entitlement (Art. 531 ZGB).

Similarly, the abatement action applies to the action in the case of the challenge of a disinheritance (Art. 477 ZGB in connection with Art. 479 ZGB), to the action for challenge of a testamentary disposition not agreed upon with an earlier contract of inheritance (Art. 494 para. 3 ZGB), to the action for the abatement of a legacy or sublegacy (Art. 486 para. 1 ZGB; Art. 525 para. 2 ZGB), to the action for a reduction of consideration among living persons in the case of a positive, remunerated inheritance contract (Art. 528 para. 2 ZGB) and the action for enforcement of protection of the statutory inheritance entitlement of descendants according to marital property rights (Art. 216 para. 2 ZGB; Art. 241 para. 3 ZGB).



Shutterstock/Richie Chan

In order to calculate the statutory inheritance entitlements, the amount of abatement on the day of death must be assessed (Art. 474 para. 1 ZGB; Art. 537 para. 2 ZGB; Art. 630 para. 1 ZGB). The assets of the abatement include (I) *assets of the estate in the actual sense of the word*, (II) *contributions during lifetime that are subject to hotchpot*, (III) *lifetime contributions that are not subject to hotchpot*, for example (III. A) because the recipient of the contribution does not become an heir as a result of a waiver or disinheritance and no third party takes his place to which the duty of hotchpot passes (Art. 627 ZGB), (III. B) the recipient of the contribution according to the statutory provision of Art. 626 ZGB or testamentary order does not have to adjust for the benefit (Art. 527 para. 1 ZGB), (III. C) in the case of heirship compensation or amounts to be bought out (Art. 527 para. 2 ZGB), (III. D) in the case of certain objects of donation (Art. 527 para. 3 ZGB), (III. E) in the case of circumvention transactions (Art. 527 (4) ZGB) or (III. F) in the case of life-time contributions, which are on the basis of the consent of the surviving spouse (Art. 208 para. 1 ZGB) not taken into account in the lawful adding back and (IV) the redemption value of the insurance claims established by the testator in favour of third parties (Art. 529 ZGB).

The liabilities of the abatement amount include both the *deceased's debt* and the *inheritance debt*.

10. I am a virtual heir, the one-year period for filing a claim has not yet expired and I would like to know which estate values the testator has left with banks. Do I have the right to information?

In spite of the fact that some banks have made statements to the contrary, heirs with statutory inheritance entitlement have the right to obtain information on the testator's assets, even if they have been completely excluded from succession by the testator.

Since some banks wrongly refuse to provide information to a virtual heir, it may be necessary for practical reasons to obtain a certificate of information from the competent court. If necessary, the right to information must also be enforced in court.

11. I missed the one-year period for filing the action for abatement, but I would still like to know who has received which assets and what the estate actually amounts to. Do I have the right to information?

If it is proven that an heir has lost his or her heir status because a claim has not been lodged in due time, the right to be informed under inheritance law ceases to apply because the requested information is no longer required for examining infringement of any rights under inheritance law. Correspondingly, no information can be obtained from co-heirs and third parties if the deadline for the filing of a claim has been missed.

12. Can I, as a virtual heir, demand that a public inventory be recorded?

According to a new judgment of the Federal Supreme Court of 28 June 2017, 5A_246/2017, E.3.1., any heir who has the power to reject the inheritance is entitled to demand a public inventory.

Since a virtual heir has not yet acquired his or her heir status, an inheritance cannot be rejected by one. Accordingly, an heir who has been completely excluded from the succession in the disposition of property upon death can only require a public inventory if the heir's status has been obtained by an invalidity or abatement judgment in his favour.

WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with offices in Zurich, Geneva and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.

Many of our lawyers are recognised as leaders in their practice areas, and our clients benefit from our in-depth knowledge and the rich diversity of talents, languages and cultures that makes our lawyers particularly versatile and adaptive.

ZURICH
Bellerivestrasse 201
CH-8034 Zurich
Tel. +41 44 386 60 00
Fax +41 44 383 60 50
zurich@froriep.ch

GENEVA
4 Rue Charles-Bonnet
CH-1211 Geneva 12
Tel. +41 22 839 63 00
Fax +41 22 347 71 59
geneva@froriep.ch

ZUG
Grafenaustrasse 5
CH-6302 Zug
Tel. +41 41 710 60 00
Fax +41 41 710 60 01
zug@froriep.ch

LONDON
17 Godliman Street
GB-London EC4V 5BD
Tel. +44 20 7236 6000
Fax +44 20 7248 0209
london@froriep.ch

MADRID
Antonio Maura 10
ES-28014 Madrid
Tel. +34 91 523 77 90
Fax +34 91 531 36 62
madrid@froriep.ch

.