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## Reform of the Law of Succession in Germany

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### Act Reforming the German Law of Succession and Statute of Limitation

On July 2, 2009, the German Bundestag (*German parliament*) adopted the Act Reforming the German Law of Succession and Statute of Limitation (BT-Drs. (*Bundestag paper*) 16/8954) which will take effect on January 1, 2010. With this Act, the legislator intends to account for the social developments and modified moral concepts with respect to the law of succession and, in particular, the forced share in an estate.

Below, the most important amendments in the areas of **forced heirship** (Chapter I.), the **other areas of the law of succession** (Chapter II.), the **statute of limitation** (Chapter III.) as well as the **entry into force** of the new law (Chapter IV.) will be presented in an overview.

#### I. Modifications to the Law on Forced Heirship

##### 1. Introduction

In Germany, the children, the surviving spouse and, in the event that no children exist, also the parents of the decedent are entitled to a statutory forced share in the estate (*pflichtteilsberechtigigt*). The statutory forced share (*Pflichtteil*) provides a minimum participation by the relatives in the decedent's estate in the event that the latter has made provisions for other persons in his/her will, e.g. distant relatives, friends, foundations etc.

The claim to a statutory forced share is a mere monetary claim and amounts to **half of the statutory share in the inheritance** (*gesetzliche Erbquote*). For example, if there are two children and is the spouse predeceased they are entitled each to a pro-

portional share in the estate of 1/2 (statutory forced share = 1/4 each)

It is a precondition for the claim to a statutory forced share that the forced heir (*Pflichtteilsberechtigter*) is not provided for in the will. However, in the event that the forced heir does inherit but disclaims the inheritance he is, as a rule, not entitled to claim the statutory forced share. Only in exceptional cases provided for by statutory law he will still be entitled to claim the statutory forced share even after a renunciation of the inheritance.

**Important note:** The claim to a statutory forced share is directed at a payment of money and is due immediately. Thus, the claim to the statutory forced share does not provide the legal position of an inheritor (as is the case, for example, under Swiss law). This, in particular, is the special risk inherent in the statutory forced share, because those inheritors who are obligated to satisfy the claim to the statutory forced share are frequently forced to dispose of illiquid assets (real property, art, enterprises etc.) in a relatively short period of time in order to settle the claim to the statutory forced share.

##### 2. Amended Provisions

#### Simplification of the renunciation of an inheritance by forced heirs

A so far very complicated **protective provision** (Section 2306 BGB (*German Civil Code*)) **for the benefit of the forced heir** has been reformed by the legislator. This concerns the following issue:

If the decedent in his will has provided for the forced heir under the law of succession, but has also imposed on him a legacy (= grant of an individual asset out of the decedent's estate) or a testamentary burden or a restriction by the appointment of a rever-

sionary heir or an execution of the will or by a direction as to the partitioning of the decedent's estate, then **to date** all these **restrictions did not apply** in the event that the share in the decedent's estate left to the inheritor did not exceed half of the statutory share in the decedent's estate.

If the share in the decedent's estate exceeded half of the statutory estate then the forced heir was entitled to **choose** either to accept the **higher** share in the decedent's estate **with all restrictions and burdens** or to **disclaim the granted benefit** and instead to claim the "regular" **pecuniary statutory forced share**.

Until now, this right of choice involved a risk. Because in practice it is **difficult to determine** whether the value of the share in the decedent's estate actually left is below or above that of the statutory forced share and what the value of the restrictions and burdens is. In certain cases, namely for donations in the past which have to be taken into account in calculating the claim for the statutory forced share of the forced heir, the **valuation of the decedent's estate** is necessary on a regular basis, which can be difficult in cases of real property, enterprises or art. As a general rule, the inheritor may **only disclaim the inheritance and claim the statutory forced share within a period of 6 weeks** from obtaining knowledge of the death and his appointment as inheritor. While the period is held not to commence prior to the forced heir obtaining clarity on the value of the estate, in practice this is still a frequent matter of dispute.

To date, if the forced heir **miscalculated** and **disclaimed the share in the decedent's** even though the share in the decedent's estate **left** to him **did not exceed the statutory forced share**, the forced heir took the risk of receiving neither the share in the decedent's estate nor the statutory forced share.

With the reform Act, the legislator intends to eliminate this risk and to **facilitate the decision** of the forced heir. If the forced heir was appointed as inheritor, but restrictions and burdens were imposed on him/her, he/she can choose to **either** accept the **share in the decedent's estate with all restrictions and burdens** or to **disclaim the share in the decedent's estate** and to claim the **statutory forced share**. Thus, now every forced heir is entitled to disclaim the inheritance if restrictions and burdens have been imposed, independent of the amount of his/her proportional share in the decedent's estate. The new provision eliminates the risk for the forced

heir of miscalculating within the short period for filing the disclaimer and of receiving, eventually, neither the inheritance nor his/her statutory forced share.

**Caution:** Under the new law, the opportunity presently existing for the forced heir to choose the share in the decedent's estate without the restrictions and burdens applying does no longer exist.

### Addition of donations

Where the decedent has **made a donation out of his assets within the last ten years** prior to his death, these **donations are added** (fictitiously) **to the decedent's estate** as of the time of death. This is intended to prevent the decedent from undermining the rights of the forced heir. The present provision resulted in even a donation made nine years and eleven months prior to the death of the decedent being fully taken into account for the calculation of the so-called claim to a supplement to the statutory forced share (*Pflichtteilsergänzungsanspruch*).

The legislator now introduced the so-called **ablation** (*Abschmelzung*). Under the relevant provisions, the value of the donation is reduced by 1/10 of the value of the donation for each expired year between the donation and the death. Thus, now the donation will only be added to the decedent's estate with its value after the aforementioned deduction.

### Example:

If the decedent makes a donation to a third party in the amount of € 100,000 in January 2004 and dies in February 2010, under the new regime the decedent's estate will no longer be increased by € 100,000, but only by € 40,000. However, the value changes owing to the influence of inflation between the time of the donation and the death have to be taken into account for the increase.

**Caution:** Even after the reform, firstly, the ten-year period **does not apply to donations to spouses** (or: to same-sex partners (*gleichgeschlechtliche Lebenspartner*)). In these cases, the ten-year period only **commences upon the dissolution of the marriage** or of the **civil partnership** (*eingetragene Lebenspartnerschaft*). Secondly, even in the future the ten-year period will not commence where the donator **substantially reserves the economic utilization** of the gift, so that, for example, with regard to real property he/she retains the residential right or the right to lease.

### Deferment of the statutory forced share

Under the **present law**, the inheritor was entitled to request the **deferment** of the claim to the statutory forced share only **within very strict limits**. In practice, this regulation has to date been scarcely applied, because in addition to the strict objective conditions there were also personal limitations. For example, **only an heir who is eligible to claim a statutory forced share** is entitled to deferment. If, for example, the nephew inherited his uncle's enterprise he did, from the outset, not meet the personal conditions and was not entitled to deferment for this reason alone.

Under the **reform Act**, now **every inheritor** is entitled to claim deferment if the other conditions are met. Furthermore, to date it was a precondition for the deferment of the claim to a statutory forced share that the deferment was **reasonably acceptable** to the forced heir, taking into consideration the interests of both sides. In the future, the interests of the forced heir are to be **adequately** taken into account. With this change in the wording, the legislator **also** intends to reduce the requirements for a permission for deferment **with regard to the content** for the benefit of the inheritor. It remains to be seen whether the courts will allow the deferment of payments for the settlement of claims to the statutory forced share more frequently following the change from **reasonableness** to **adequacy**.

### Deprivation of the statutory forced share

To date, the decedent was entitled to deprive a forced heir of his/her statutory forced share if the forced heir made, for example, an attempt on the life of the decedent, his wife or his siblings or committed another major criminal offence against the aforementioned persons. The legislator considered these very strict provisions regarding the deprivation of a statutory forced share no longer suitable. Besides, the German Federal Constitutional Court (*Bundesverfassungsgericht*) had criticized that the individual elements of the offences were to closely oriented towards criminal law. Finally, the reasons justifying a deprivation of the statutory forced share were not the same for all forced heirs.

The **reform Act** has **harmonized** the reasons justifying a deprivation of the statutory forced share **for all forced heirs**. The testator is entitled to deprive his/her child or grandchild of its statutory forced share provided that the latter, for example, makes an attempt on the life of the testator, is guilty of a crime

or a major intentional offence against the testator, maliciously violates the statutory obligation vis-à-vis the testator incumbent upon it to maintain the testator or is convicted, in a final and binding manner, of an intentional criminal offence and sentenced to imprisonment for at least one year without probation and, therefore, the participation in the testator's estate of this descendant cannot reasonably be expected from the decedent. Under the new law, **these reasons also apply** to the deprivation of the statutory forced share of the testator's parents or spouse.

Furthermore, the group of persons affected by the misconduct of the forced heir has been widened. Thereby, the legislator intends to react to the change in family structures. **Not only** the aforementioned misconduct **against the decedent, his spouse or children and grandchildren** (as is the case under the present regime) will entitle the testator to the deprivation of a statutory forced share, but also misconduct against **persons equally closely related** to the testator. Therefore, under the new provision also misdemeanors against non-marital permanent partners (*Lebenspartner*), stepchildren or foster children are relevant. In other words, the circle of the family is substantially widened.

While it was the intention of the legislator to reform the concept of forced heirship, even in the future the deprivation of a statutory forced share will only be possible within very strict limits and be restricted to few exceptional cases.

### Renunciation of benefits

Under the present law, a beneficiary who was appointed as inheritor or provided with a legacy in the will was entitled to disclaim this benefit by means of an agreement with the decedent. This provision is suitable if the decedent is no longer able to revoke these commitments easily, due to possible commitments such as a joint will (*gemeinschaftliches Ehegattentestament*). In contrast to the case of a renunciation of an inheritance, to date the renunciation of a benefit did not affect the children or grandchildren of the disclaimer.

With the **reform Act**, the legislator clarifies that the **renunciation of a benefit** by the beneficiary also represents a renunciation by his/her entire family branch (*Familienstamm*), with the consequence that possible alternate heirs (*Ersatzerben*) will also be excluded from the benefit due to the renunciation by the beneficiary. In the past, this provision led to unjust results if the beneficiary – as is often the case in

practice – received a compensation for the renunciation of the benefit. The potential **double benefit for one family branch** is abolished by the new regime.

## II. Other Amendments to the Law of Succession

The legislative reform concerns a number of minor amendments to the law of succession out of which the collation obligation among children (*Ausgleichspflicht unter Kindern*) for nursing care provided (*Pflegeleistungen*) will be highlighted in the following.

If more than one child was left behind by the decedent and he transferred assets to them during his lifetime, the descendants were obliged in certain cases under the present law to bring those benefits into account among themselves. Thereby, it was intended that upon the accrual of the inheritance a fair participation in the decedent's estate was achieved. Under the present law, a descendant may also claim to have the benefits brought into account (*Ausgleichsanspruch*) if he/she, as a result of working in the household, occupation or the business of the decedent over a prolonged period of time or of substantial financial contributions or in any other way, has contributed to the preservation or increase of the assets of the decedent.

So far, this provision was intended to apply also in the case of a descendant who **provided nursing care** to the decedent for a prolonged period of time, **giving up occupational income** for this purpose. In this case, the other children were under an obligation to bring into account the value of the nursing care in the course of an adjustment and, therefore, received less out of the decedent's estate.

The reform Act reduced the obstacles to a claim to have the benefits brought into account in the case of the provision of nursing care to the decedent. **In the future, it will no longer be necessary** for the descendant **to give up occupational income** during the period of providing nursing care to the decedent. Therefore, only the provision of care itself will be relevant.

### Miscellaneous

Shortly prior to the adoption of the reform Act, the legislator refrained from a number of planned amendments. In particular, this concerns the opportunity for the decedent to have a donation brought

into account between several children **only after the implementation** of such donation.

Under the present law, the donor has to direct already at the time of a donation whether after the death of the donor the donee is obligated to have this donation brought into account in the course of an adjustment among several children. Whereas endowments by the parents at the marriage of the child, contributions to the income of the child and financial contributions to professional education are always subject to a collation obligation (provided the other conditions are met), this only applies to any other benefits – i.e. all other donations – if at the time of the donation the donor has already directed that this donation should be brought into account.

Therefore, in the draft bill for the reform Act, the legislator provided that the testator would also be entitled to direct the collation obligation with regard to the donation later by will. A similar provision was **also** intended to apply **to the bringing into account** of donations in the area of **forced heirships**, with the consequence that the testator would have been entitled to retroactively direct by will in respect of a disinherited forced heir that the donation be brought into account in calculating the statutory forced share.

However, the legislator refrained from including these rules shortly before the adoption of the Act.

Caution: As before, **any donor** should consider **already at the time of a donation** whether he wishes a bringing into account by the donee upon the accrual of the inheritance or in case of an assertion of a claim to a statutory forced share. If no such direction was included in the donation agreement or if the testator later intends a revision of this, he/she has to rely on one of the common substitution structures in the will. Another possibility would be for the testator to direct in the donation agreement in any event an obligation to conduct an adjustment or a bringing into account in respect of the statutory forced share. He/she may then decide later whether to refrain from this collation obligation.

## III. Amendments to the Provisions Regarding the Statute of Limitations

Since 2002, in Germany the limitation period for claims is, **as a general rule, three years**. However, in the areas of family law and the law of succession, the limitation period was **to date**, as a general rule, **30 years**. The legislator had the intention to avoid disputes as to whether a claim under the law of suc-

cession exists or not or whether each claim which is provided for in the law of succession does also constitute a claim under the law of succession eligible for the long limitation period.

Under the **new regime**, only the claim for delivery under the law of succession against a third party who wrongfully pretends to be an inheritor, the claim for delivery against a preliminary heir (*Vorerbe*) and the claim for delivery of an incorrect certificate of inheritance will still become time-barred after 30 years.

**In the future**, the limitation period for **all other claims under the law of succession** will be **three years**. However, this three-year limitation period will only commence if the person entitled to the claim has obtained knowledge of the accrual of the inheritance or of the will or of an agreement of inheritance. In the absence of such knowledge, claims become time-barred no later than 30 years from the coming into existence of the claim.

#### IV. Entry Into Force of the Amendments

The reform Act will enter into force on **January 1, 2010**. The new limitation provisions are to be applied to claims existing on that date which have not yet become time-barred.

If the limitation period for claims under the former statutory regime expires earlier than the new limitation period, then the former provisions prevail.

Other than that, the former provisions apply to all cases of succession prior to January 1, 2010, whereas the new law applies to all cases of succession from January 1, 2010. For example, if a decedent dies on January 2, 2010, the new ablation model applies to the fictitious addition of a donation within the last 10 years prior to the death. However, if the decedent were to die on December 31, 2009, the present rule stipulating an addition in full of the donation would apply, irrespective of whether the latter occurred 1 or 9 years prior to the death.

This publication merely serves as a basis for discussion and is no substitute for legal advice. We would be pleased to provide you with additional information or to render advice with regard to a specific situation.

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