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ESTATE LAW REFORM:
WHAT TO DO BEFORE 1 SEPTEMBER 2018?

The Act of 31 July 2017, published in the Belgian Official Gazette, introduced profound changes in our civil code. The parliament intends to simplify and modernise the current rules while allowing greater freedom to dispose of one's assets. Thus, most notable feature of this reform, the available quota will in the future be equivalent to 50% of the estate, regardless of the number of children. The parliament wanted to take into account the societal development of (i) people living longer and (ii) often having many lives. This law will apply to all successions starting from 1 September 2018. All acts of donation made even earlier will be, in principle, subject to the new rules except in certain cases (automatically or by means of a notarised confirmation taking place before 1 September 2018).

I. THE PRIMARY CHANGES

1. The reserve and the reduction of donations

Today, the rightful heirs are the descendants, the spouse and, in the absence of descendants, ascendants. The available quota is equal to 50% (if a child), 1/3 (if two children) and ¼ (if three or more children).

From 1 September 2018, the reserve for the descendants will be understood as a global reserve equal to half of the succession. The other half will be allocated to the freely disposable portion.

The reserve of the surviving spouse has not been modified (except as regards the actual reserve which has been extended to a leasehold on the dwelling house). However, when assessing this reserve, it was stipulated that the surviving spouse will no longer be able to assert their right to the reduction on gifts made before marriage to the donor.

The reserve of ascendants has been removed and replaced by a maintenance claim in the event of need (limited to one quarter of the succession).

The deceased will be able to freely dispose of half of his/her estate. From 1 September 2018, the reduction of a donation will accomplished with less effort. The recipient of the donation will therefore keep the property and will have to provide, primarily, monetary compensation. The recipient may, however, agree to a reduction in kind. Important new feature of the law: the valuation of goods. As part of the reduction, the indexed value of the donated assets on the day of the donation will be taken into account. However, if the donor has not been able to freely dispose of the donated property due to, for

example, an unavailability or usufruct encumbrance, the valuation of the asset will be made on the day when the encumbrance ceases or the usufruct ceases.

2. The donation report

The donation report aims to maintain equality between the different rightful heirs. In the absence of precision, the permissible variations with regard to the spouse and the descendants are now presumed reportable.

Three important changes are worth noting:

- Only donations made to descendants will still be presumed to be reportable.
  The report will no longer exist for or against the surviving spouse. However, for donations made before 1 September 2018, the parliament has nevertheless allowed the maintenance of the rules relating to the mode of the report as provided at the time of the donation.
- The donation report will be made easier and take into account the indexed value of such donations on the day of donation (harmonisation with the rules applicable to reduction; distinction based on whether the recipient of the donation was able to freely dispose of the donated goods or not.
- If it is now possible to transform a reportable donation into a non-reportable donation, the opposite, however, is not possible. The new law will enable, subject to the agreement of the recipient of the donation, change in both directions.

3. Future succession pacts

The principle of the prohibition of pacts on future succession remains applicable but has been relaxed. The law has, in fact, provided for global succession pacts (imperative that it be concluded with *all* of the heirs in a descending line) and specific (being able to take place among some of them). In both cases, these inheritance pacts will have to be done in notarial form and comply with a significant formalism.

These pacts enable the setting of the donations made to avoid any dispute between the heirs on the opening date of the succession of the donor's estate. Such donor will have to detail and prioritise them in order to demonstrate that, according to the donor, a balance, as subjective as it is, has been maintained among the different descendants. If all of the parties sign this pact, they definitively waive their right to ask for the reduction of a donation or contest its value.

In addition to the heavy formalism attached to the establishment of these pacts, certain tax uncertainties may also limit the excitement: the act prior to being notarised, would the registration rights be due on the donations already made and specifically inventoried in the pact? The question remains open.

4. The conversion of the usufruct of the surviving spouse

The conversion of the usufruct of the surviving spouse remains possible, except as concerns the family dwelling (the agreement of the surviving spouse must and will always be necessary). However, if the judge currently has the power of discretion, such discretion will not remain the

same tomorrow. The new law no longer requires the involvement of the magistrate in the event of children from another union. In addition, this conversion cannot be discussed and only legal mortality tables will be applicable.

II. IMPACTS ON ESTATE PLANNING IMPLEMENTATIONS

We have examined some frequently encountered situations in practice in order to analyse them in the light of the new law.

1. Between spouses

The donation between spouses, married in a separation of property regime, is often privileged when the children are still young. It is very flexible (revocability of donations between spouses) and if it is reportable in kind, retains the 'natural' effects status in the event of the death of the donor: the children are instructed to report the donated property in bare ownership and the surviving spouse retains the usufruct. From a tax point of view, however, inheritance taxes are avoided.

Given the removal of the report by the surviving spouse of the donations received from the deceased, this procedure will have to be reviewed. In fact, the assets given to the spouse will no longer be reported to the estate but will be allocated primarily to the freely disposable share. On the death of the second of the spouses, if the donated assets are still in the estate of such spouse, the children of the donor will pay inheritance tax on these assets (in the absence prior estate planning by said second spouse). It would therefore be interesting, in the frequent scenario where the donor does not wish to benefit, as such, his/her spouse in relation to their children, to plan a donation to the spouse, reportable in kind with respect to the succession and to do it before 1 September 2018.

The application of the transitional rules provided for by law allows that all of the donations already made (as of 1 September 2018) on the basis of this scheme will remain applicable, on the day of the donor's death, as provided for and originally desired by such donor.

2. To the descendants

In the context of donations, when a donor possessed assets of different values and nature (cash, securities and real estate), it was common to resort to the "double act" technique. This method consisted in giving the same goods on the same day to all the descendants in joint ownership in order to avoid, on the opening date of the succession of the donor's estate, that the application of the reporting rules not give rise to undesired inequalities among the children. It was then up to the children to circumvent the joint ownership and divide the donated assets between them, according to their affinities. This method could lose its *raison d'être* given the harmonisation of valuation rules in this area. It will be enough for the value of the donated goods, on the day of the donation (in full ownership) to be the same for each of the donation recipients.

However, it will be necessary to think about (i) the spouse to whom these donations will no longer be reportable and (ii) the equality of the valuation rules which will be wiped out in the event of a gift with a usufruct reserve.

With regard to the spouse, if the donation occurs after the marriage, and it is done with a usufruct reserve, the parliament in this case has provided for a "continued" usufruct for the surviving spouse. Since this usufruct is a new right of inheritance, we assume that it will not be taxed under inheritance tax law. This provision will ultimately allow, as before, the surviving spouse to benefit from a non-taxable estate usufruct on the property donated by the deceased spouse to the children.

On the other hand, as far as the report is concerned, the value of the property must be based on the day of death (if the deceased had not given up his/her usufruct beforehand) and, consequently, inequities related solely to the report could reappear. Thus, the double act technique will not necessarily be over.

3. To third parties

While it is true that the increase in the disposable portion will in the vast majority of cases make it possible to more broadly benefit third parties, it should be noted that, in certain particular cases, the situation will be different particularly when the deceased wanted to reduce his/her spouse to his/her reserve. In this case, the parliament provided that the reserve of that descendants (namely, children) should be free of usufruct. As a result, the surviving spouse's reserve will be charged for its usufruct on the freely disposable portion. Thus, the liberality in full ownership that the deceased would have made to third parties (and who necessarily count on the freely disposable portion) will be systematically reduced to bare ownership. On the other hand, if the rights of the surviving spouse are not reduced by will, the usufruct/bare ownership separation will take place as before, between the children and the spouse.

One of the major axes of the reform was precisely the following: a principle of increased autonomy demonstrated by the quantitative expansion of the freely disposable portion in order to allow larger legacies to third parties, such as stepchildren (taking into account favourable rates in different regions) or for philanthropic work.

Everyone is concerned, even those who do not think about it: It will indeed be necessary to be very attentive and verify the formulation of the current testamentary dispositions: a person who has three children and bequeaths to a friend/foundation the largest freely disposable portion, currently bequeaths a quarter of his/her estate, whereas from 1 September 2018, the donor would leave half of his/her estate.

III. CONCLUSION

This reform brings us back to our past practices to ensure that the initial volition of the donor or testator will be respected in light of the new legal provisions.

Balances within the family have in fact been modified and it is important to use the next ten months to check whether acts of donation or testamentary dispositions contain statements that need to be corrected or whether it is necessary to confirm their retention in an express declaration before a notary.

For the future, the new rules will provide more freedom to the donor/testator and more legal certainty to the donation recipient/legatee.

Finally, it will be absolutely necessary to follow the evolution of the current reform on matrimonial regimes because the links between the two subjects are inseparable and will also have impacts on the patrimonial organisation of families.

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