



## PRIVATE CLIENTS

# CHANGES TO PORTUGUESE INHERITANCE LAW

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### THE SURVIVING SPOUSE AS LEGITIMATE HEIR: A RIGHT OR A CHOICE?

Under the current Portuguese law, the surviving spouse is the heir of the deceased spouse, except if they are legally or administratively separated.

In order to change this «mandatory capacity» of the spouse, the Socialist Party presented a Draft Law (no. 781/XII) on 20 February 2018 which would allow couples planning to marry to determine whether or not they want the other person to be their heir.

Arguing that the current inheritance rules place excessive conditions on the freedom of choice of engaged couples, especially those who already have children from another relationship, this Draft Law would make it possible – by means of a prenuptial agreement choosing the marital regime of separation of property – for engaged couples to (reciprocally) renounce the capacity of being the legitimate heir. This renunciation does not have to be absolute and can be made on condition that certain people survive the deceased spouse.

This Draft Law is a different political choice to the one currently in force and it is based on the understanding that – in view of the numerous forms that families take today – it is desirable to give individuals greater freedom to determine who their heirs will be.

We note that there are many differences in succession (inheritance) law across Europe. There are legal systems in which there are no legitimate heirs and the testator is free to dispose of their property as they see fit (as happens, for example, in England), and systems in which there are legitimate heirs, with no possibility for them to renounce this position. There are also systems in which renunciation is possible, for example, the German system in which all the heirs (and not only the spouse), may renounce their right to an inheritance in advance.

The Socialist Party's Draft Law does not remove all protection from the spouse, because it allows amounts to be given to them by the other spouse, by way of gifts or legacies, up to the share of the inheritance that would correspond to their legitimate share if they had not renounced it. The Draft Law does not make any specific provision, but one can safely assume that amounts can be given up to the limit of the legitimate share, plus any available share, because the testator always has complete freedom to leave the available share to whoever he or she sees fit, without limitations.

Under the terms of the draft law, any spouse who renounces their legitimate share will still have a right to maintenance from the estate, if they require it.

It remains to be seen whether this Draft Law will actually be passed into legislation in Portugal.

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**CHANGES TO THE POWERS TO CARRY OUT THE INVENTORY PROCESS**

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Following this analysis, the Bar Association made a set of «suggestions» to the Minister of Justice, to make urgent changes to the rules currently in force. These suggestions were accepted in full, and we are now waiting for them to be implemented.

Highlights among these suggestions include making changes to who has power to deal with inventory processes. In fact, the Bar Association suggested that exclusive powers should be granted to the courts in inventory processes where any minor or person lacking capacity has an interest. It is also suggested that courts should have powers to deal with the process in cases where there is no notarial office in the municipality that has territorial jurisdiction. In other cases, it is proposed that it should be possible for the applicant in the inventory process to choose between the court and the notarial office (dual powers).

This «turnaround» has arisen more or less directly from the nature of inventory processes themselves. It is because it is not uncommon for them to involve the consideration of evidence and the resolution of disputes between the parties. Furthermore, the applicant is given the freedom to choose the notary that is most convenient as long as that notary is based in the municipality of the opening of the succession, which could compromise the impartiality of the decision.

In addition, giving powers exclusively to notaries to deal with these processes has not reduced the number of cases pending before the courts, as had been expected when the reform was introduced in 2013. As a result, this change should be made as soon as possible and, as mentioned above, this should happen very soon.

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