BALANCING INTERESTS AND PURSUING PRIORITIES BETWEEN THE HEIRS AND THE SURVIVING SPOUSE

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1. Introduction

The economic situation for the surviving spouse is one of the major issues in law of succession. There has been a development during the last century – at least in my part of the world – towards strengthening the position of the surviving spouse at the expense of the legal heirs or beneficiaries. The focus has changed from protection of family succession towards protection of the common economy of a married couple. In the same period, there have been an increasing number of marriage breakdowns and divorces. It is also increasingly frequent that the legal heirs of the deceased spouse and the surviving spouse are not the same people. Both spouses may have children from former marriages or relationships. This development leads to a double negative effect for the children of former relationships of the deceased spouse – the so-called separate offspring. Firstly, their stepmother or stepfather has priority when dividing the decedent’s estate. Secondly, the children of the deceased spouse will not inherit their stepmother or stepfather when he or she passes away.

I will first give a brief overview of the regulations in the Norwegian Inheritance Act and related acts about the distribution of the decedent’s estate between the surviving spouse and the offspring of the deceased. Secondly I will comment on the rationale behind the priorities made between these groups of heirs and forward my own evaluation on the balance between these two interests worthy of protection. The focus will be on the priority between the surviving spouse and the separate offspring of the deceased. If the surviving spouse is not the mother or father of the children of the deceased, we see the conflict in which the priorities have to be made in its clearest form.

In Norway, as in many other countries with a legal system based more or less on Civil Law, we have a statutory forced-share of the children, which cannot be reduced by will. In Norway we also have a statutory forced share (elective-share) for the surviving spouse. Speaking to an audience of mainly Americans, I will emphasize the fact that intestate succession is the prevailing kind of succession in Norway. The forced share of the children is deeply rooted in
the Norwegian people and many Norwegians are quite skeptical towards wills – at lest wills made by people who have children. There has been a development towards a more frequent use of wills, but intestate succession is still dominant. As I will show you later, the statutory forced shares of respectively the surviving spouse and the children do often preclude dispositions by will totally.

2. The separate offspring of the deceased

The first ranking kinship heirs in Norway are the offspring or descendents of the deceased.\(^1\) Children born out of wedlock have been legally recognized as a part of the family of the biological father since the Children Act of 1915. As long as the paternity is established, the child has the same legal rights towards their father as children with married parents. Among these rights is the right of inheritance.

The statutory forced share of the children is fixed to 2/3 of the decedent’s estate. The statutory forced share is quite high compared to the forced share in many other countries. Our neighboring countries Sweden, Denmark and Finland have all a statutory forced share of one half.\(^2\) But when it comes to larger estates, the Norwegian regulation is more liberal than those of our neighbors. There is a quite unique limitation of the forced share in Norway. The Inheritance Act section 29 first paragraph second sentence says that the forced share shall in no case exceed NOK 1.000.000 to each child of the deceased or to each child’s line (approx. $154,000) This provision – often called “Lex Michelsen” has a very special background. The initiator of the provision was former Prime Minister Christian Michelsen, a shipping-tycoon from Bergen. The limitation of the forced share was initially, from 1918, only open to testators who bequeathed in favor of socially beneficial purposes and the will was subject to royal confirmation. These conditions were repealed in 1937. The only will we know of in Norway that actually made use of the increased freedom of will in favor of socially beneficial purposes, was Michelsen’s own will that settled Chr. Michelsen Institute for Science and Intellectual Freedom. Lex Michelsen makes it easier to prioritize one child at the expense of

\(^1\) The Inheritance Act section 1. An English translation of the Inheritance Act is available on the internet at: [http://www.ub.uio.no/ujur/ulovdata/lov-19720303-005-eng.pdf](http://www.ub.uio.no/ujur/ulovdata/lov-19720303-005-eng.pdf). The translation is however not 100 % up to date.

\(^2\) Lødrup, Nordisk arverett p. 71.
the others e.g. when a business is transferred from one generation to another. The provision does also make it easier to prioritize the surviving spouse at the expense of the children.

3. The surviving spouse

Inheritance based on marriage is regulated in chapter II of the Inheritance Act. Section six, first paragraph states that: “The spouse is entitled to one-fourth of the inheritance when the decedent has offspring.” This section was amended in 1990 in order to strengthen the position of the surviving spouse. The surviving spouse was secured a minimum inheritance of 4 times the base rate of the National Insurance system at the time of the death. The base rate today is NOK 60,699, - (approx. $ 9,340). The minimum inheritance today amounts to approx. $ 37,350 from May 2005. The elective-share of the surviving spouse has priority to the forced share of the children. This means that the surviving spouse is a sole heir if the decedent’s estate is less than four times the base rate.

The committee proposing the amendments to the Inheritance Act argued that the surviving spouse must be given priority at the expense of other heirs in smaller decedent’s estates. It was important to secure the widow or widower a reasonable standard of living and a possibility to keep the residence, without having to buy out the heirs. I might add that Norwegian law does not recognize the concepts of joint tenancy and joint account so that a surviving spouse may not be the sole owner of e.g. a residence by virtue of survivorship. The committee further argued that the economic relevance of inheritance as a source of income has decreased for all groups of heirs but one – the surviving spouse. This development is due to the economic growth and a higher standard of living, but also to the fact that the average age on heirs today is quite high. Most heirs are well established middle-aged people to whom the inheritance often plays a marginal economic role. On the contrary, the inheritance will regularly play an important role for the surviving spouse. It is often an essential means in order to keep the house and keep up the standard of living. When the proposal of the committee was discussed by the Ministry of Justice, it was admitted that the proposed regulation lead to a prioritization of surviving spouses at the expense of the statutory forced share of the separate offspring of the deceased. The consequences of this prioritization were however not analyzed.

The surviving spouse’s right to a share of four times the base rate of the National Insurance may not be reduced by will. The right to a share of one-fourth of the inheritance may however be restricted by will if the spouse is informed before the testator’s death.

In addition to the elective share, the rights of the surviving spouse were also strengthened by the amendments made in the Act relating to Insurance Contracts of 1989. If there is not appointed a beneficiary to a life insurance, the sum insured which becomes payable upon the death of the policyholder will be passed on to the spouse according to section 15-1 second paragraph of the Act relating to Insurance Contracts. The insurance sum is not included in the assets to be divided with the heirs. Neither is the insurance sum taken into consideration when calculating the forced share of the children. The insurance sum is passed on to the spouse undivided. As life insurances are quite common, and often involve large amounts of money, these provisions imply a clear priority of the surviving spouse at the expense of the heirs. The surviving spouse will regularly also be entitled to survivor pension according to chapter 17 of the National Insurance Act. Only minor children below the age of 18 are entitled to survivor pension or child’s pension according to Chapter 18 of the National Insurance Act.

In most cases the right to inherit is not the major asset of the surviving spouse. One of the cornerstones in Scandinavian law of succession is the concept of “uskifte”. “Uskifte” is a decedent’s estate which is not transmitted to the heirs because a surviving spouse has exercised his or her right to retain possession of the community property undivided. The surviving spouse has the right to retain the community property undivided as long as she lives or until she remarries. The right to “uskifte” is an unconditional right towards all kinds of heirs but one: In relation to the separate offspring of a deceased spouse the right of the remaining spouse to retain possession of the undivided estate is subject to consent of the said decedents. Consent is also necessary in order to retain the separate property of the deceased spouse as “uskifte”.

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6 The Inheritance Act section 10.
4. Reflections and evaluation

Based on the presentation above we can see that the estate will have to amount to more than twelve times the base rate of the National Insurance if both the surviving spouse and the separate offspring shall have their forced share unabridged. Twelve times the base rate is approx. $112,000. The elective-share of the surviving spouse is four times the base rate and the forced share of two thirds for the children is the remaining amount of eight times the base rate. This example shows us that the forced share of respectively the spouse and the children is an obstacle to the making of wills in small to medium sized estates. If the decedent and the surviving spouse are living in a community property marriage, the total assets of the community property must exceed 24 times the base rate before there is anything to dispose of by will. Statistics from Statistics Norway shows that the average property account for households where the main income earner is in the age 67 – 79 was NOK 719.300 (approx. $110,000) in 2002. This is less than twelve times the base rate of the National Insurance. Thus the elective-share of the surviving spouse is relevant in most estates, and there is nothing to dispose of by will in an small to medium size decedent’s estate in Norway.

The Inheritance Act is written in a context of the nuclear family. The priorities between the surviving spouse and the children do not lead to any great imbalance in these cases. What is transmitted to the surviving spouse under the distribution of the estate will sooner or later be inherited by the children (as long as the assets are intact). The situation is totally different when there are separate offspring of the deceased. The inheritance of the surviving spouse is final, and the separate offspring of the deceased are not heirs to the surviving spouse. The priority between the surviving spouse and the offspring of the deceased is thus an issue of major economic importance. A consequence of elective-share of four times the base rate of the National Insurance is that community property estates below eight times the base rate are taken over by the surviving spouses as a sole heir. Thus the separate offspring of the deceased spouse are actually disinherited.

An interesting perspective in Norway in marriage law and law of succession is that these fields of law – at least apparently - has developed in opposite directions.

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The keyword for the last two decades in marriage law has been individualism. The individual is in the centre. In marriage law legal practice and legislation has moved away from being community based towards being based on individual independence both during marriage and by divorce.

An evidence of this development can be seen in the Marriage Act section 31 first paragraph which states that: “Marriage entails no limitation of the right of a spouse to dispose of what he or she owns when the marriage is contracted or later acquires, unless it is otherwise provided” and section 40 which states that “A spouse may not contract a debt which affects the other spouse unless this is specially authorized.”\(^8\) The traditional idea of community property, that the total assets of the spouses shall be divided equally after deductions have been made for debts, is no longer the practical main rule, albeit it is the formal main rule. A new provision which entered into force in 1993 states that the value of assets that one spouse had at the time the marriage was contracted or has later acquired by inheritance or by gift from a person other than his/ her spouse may be withheld from the division, provided it can be clearly traced back to such assets. It may further be noted that maintenance after separation or divorce is as a main rule not ordered in Norway.\(^9\)

In law of succession on the other hand, the economic community between the spouses has been given an increasing weight during the same period. The elective-share, the unconditional right to retain the estate undivided and the amendments to the Act relating to Insurance Contracts are all amendments to our legislation in favor of the surviving spouse.

There is apparently a tension between marriage law and law of succession on these issues. One explanation may be found in the fact that a surviving spouses and a divorced spouses are in quite different emotional situations. By divorce, the marriage breakdown is more or less wanted, whereas the opposite regularly is the case when the termination of marriage is caused by the death of one of the spouses. The interest in supporting the surviving spouse economically is maybe stronger than the interest in supporting the divorced spouse, even if the economic needs may be the same.


\(^9\) The Marriage Act section 79 et seq.
Another, possibly deeper, explanation may be that the changes in both marriage law and law of succession are steps in the same direction – towards a more market oriented and individualized family law. It is the individual economic freedom that is in focus in both cases, at the expense of the community. In marriage law it is put to extremes as the spouses are the architects of their own fortune both during marriage and after. In law of succession we can see the same tendencies in the increased freedom of dispositions by will or insurance contracts. The elective-share of the surviving spouse is also a result of this development. The spouse – chosen by the deceased - is prioritized at the expense of the children.

From the little I know about American law of succession, I think the protection in Norwegian law of succession is moderate in comparison. The system of elective-share in the revised Uniform Probate Code of 1990 implies a higher degree of protection of the surviving spouses than the Norwegian regulations. The Norwegian elective-share may be compared to the Supplemental Elective-Share in the Uniform Probate Code. A major difference between the Norwegian system and the American system is that the Norwegian system in contrast to the revised American does not make any distinction between short term and long term marriages when it comes to the right of inheritance. I think that the duration of the marriage ought to be taken into consideration also in Norwegian law of succession. Both the needs of the surviving spouse and the prioritization between the surviving spouse and the separate offspring of the deceased could possibly be better balanced by taking the duration of the marriage into consideration.