

## Fictions in Belgian inheritance duties

Belgian inheritance duties contain a number of 'fictions'. These are legal provisions stating that certain transactions 'under living' are to be considered as a transfer after death. Certain assets are considered to be part of the estate, even if they are transferred by the testator to the successors before his death. Consequently a higher amount of inheritance duties has to be paid. We explain some of these fictions more in detail.

Based on these fictions assets which no longer are part of the estate of the testator (e.g. because they were given away during his lifetime) are considered by the tax authorities as being part of the estate, so inheritance duties have to be paid. These rules have tax consequences. This means that these assets do not belong to the estate from a civil right perspective, since they already are part of the property of the successor (the person who received the assets during the lifetime of the deceased).

In fact these fictions are specific anti-abuse provisions on the basis of which 'suspicious' transactions can be challenged. A person could minimize his estate by giving away assets without paying any taxes on these transfers (whether registration or inheritance duties). Such transactions are off course extra suspicious when they are made shortly before the passing away. In such case it seems clear that it was the intention to transfer the assets to the later successors free of inheritance duties.

### A confession of debt in a will

The confession of debt which is only made in a will, is to be considered as a legacy. The legislator wants to avoid that the testator for the first time in his will confesses that he has debts with (some of) the successors. Often there is no debt, but the testator wants to transfer part of his estate tax free to its successors. On the payment of a private debt no taxes are due. Even if the testator has debts with one of the successors, the ultimate confession is for tax purposes deemed to be a legacy. From a civil perspective, the debt keeps its character of a debt. If the successor can demonstrate that there is another reason for the debt (e.g. a contract), the provision is not applied.

#### Example

*Marc borrows 20.000€ from his friend Johan. Shortly before his death he makes a will in which he confesses this debt. If there is no other written contract, the 20.000€ is to be considered as a legacy. Johan will consequently have to pay inheritance duties on this amount. Imagine that Marc and Johan have put everything concerning this loan on paper. This loan agreement can serve as evidence. The debt is after all not 'only' confessed in the will, but also in a contract drafted under the living. The fiction does no longer apply and the debt remains a debt, which will even be deducted from the estate.*

### Unequal division of the marriage estate

Spouses can through their marriage contract change the division of their marriage estate. So can spouses married under the community of goods scheme agree that the whole marriage estate will go the longest living spouse. This implies that the longest living spouse does not 'inherit' anything, since he/she is the owner of the full estate.

COMPTAFID-Benelux NV SA  
Brussels

Bld. Edmond Machtensl. 180/100  
B-1080 Brussels  
Tel: +32 (0)2 410 75 75  
[www.comptafid.be](http://www.comptafid.be)

COMPTAFID-Benelux NV SA  
Antwerp

Schijnparklaan 45  
B-2900 Antwerp (Schooten)  
Tel: +32 (0)3 658 89 02  
[www.comptafid.be](http://www.comptafid.be)

COMPTAFID (Schweiz) AG  
Zürich

Seefeldstrasse 19 – Postfach  
CH-8032 Zürich  
Tel.: +41 44 250 2929  
[www.comptafid.ch](http://www.comptafid.ch)

The tax authorities do not like this. Therefore such clause in a marriage contract is declared null and void. Without this specific attribution, the longest living spouse is solely owner of half of the estate. From a tax perspective he/she should 'inherit' half of the common estate. The longest living spouse should pay taxes on all he/she obtains on top of half of the common estate. This is again an inheritance duties fiction: if not, the excess of the half of the common estate would not be taxed since the longest living spouse obtained the assets on the basis of the marriage contract (a contract under the living).

### Gifts less than three years before death

The three years before the death of a person are considered by the tax authorities as a 'suspicious period'. Assets which are given away by the testator during this period are considered to be part of the estate. No proof to the contrary is possible. Successors can however prove who was the beneficiary of this gift. The latter is then to be considered as a special legatee. If the beneficiary has already paid registration duties at the time of the gift, the transaction is taxed. In this case, no inheritance duties are levied.

#### Example

*Fred gives 25.000€ to his only daughter Sophie. He does this through an authentic deed before a Belgian notary public. At that time, Sophie pays registration duties (3% on 25.000€ = 750€). Nine month afterwards Fred suddenly dies. This 25.000€ is no part of his estate, even if the gift is made during the suspicious period. After all taxes (registration duties) were paid, so no second payment is required.*

COMPTAFID-Benelux NV SA  
Brussels

Bld. Edmond Machtensl. 180/100  
B-1080 Brussels  
Tel: +32 (0)2 410 75 75  
[www.comptafid.be](http://www.comptafid.be)

COMPTAFID-Benelux NV SA  
Antwerp

Schijnparklaan 45  
B-2900 Antwerp (Schooten)  
Tel: +32 (0)3 658 89 02  
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Zürich

Seefeldstrasse 19 – Postfach  
CH-8032 Zürich  
Tel.: +41 44 250 2929  
[www.comptafid.ch](http://www.comptafid.ch)