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# paragraph

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## issue

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01 Possibilities and limits of estate planning  
06 Tailored Succession Solutions within the family  
09 Measures to avoid conflicts in connection

*Possibilities and limits of estate planning, taking into account forced heirship rules and other aspects*

Individual wishes concerning estate planning are subject to legal restraints. The law poses certain obstacles in this regard. However, by means of early and careful estate planning, it is feasible to achieve the desired solution, preserve family peace and minimize inheritance taxes.

### MARITAL PROPERTY LAW AND ESTATE PLANNING

Upon someone's death, the first step is to define the property belonging to the decedent's estate, then to be divided up according to inheritance law. In the case of married persons, a *marital property division* must be carried out, i.e. it must be determined which property is to be attributed to which spouse *based on the marital property law*. Thus, setting the course as to the property falling into the estate to be divided under inheritance law can largely be achieved through a *marital contract*:

- In the absence of provisions specifying otherwise, spouses are subject to the ordinary *community of accrued gains regime*. In the course of the marital property division the deceased spouse's "own assets" (put simply, the assets brought into the marriage and those received as a gift, bequest or inheritance) as well as half of the "acquests" (savings of both spouses during the marriage) fall into the estate. However, the spouses may declare in their marital contract that in the case of death all acquests shall be allocated to the surviving spouse and consequently shall not fall into the estate. Conversely, acquests that are used for the operation of one spouse's business can be declared being his or her own assets, and hence fall into that spouse's estate. This facilitates

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passing on companies to children.

-In the case of the *community of property regime*, all property apart from a few own assets (objects for personal use) constitutes joint marital property of both spouses. However, this default allocation can be modified in a marital contract. Upon the division, half of the joint marital property and the decedent's own assets fall into the estate.

Through a marital contract, spouses can decisively determine what shall belong to the surviving spouse at the outset and what shall fall into the estate.

-Under the *separation of assets regime*, each spouse owns whatever assets he or she brought into the marriage and he or she acquired and/or saved during the marriage. All assets of the decedent fall into his or her estate.

#### INHERITANCE LAW AND ESTATE PLANNING

Once it has been determined what property falls into the decedent's estate, the *division* of the estate *according to inheritance law* follows in a second step. If the decedent did not make any directives, the division follows the

rules of the *statutory succession* (spouses and children, or, in the absence of the latter, parents and siblings).

The succession and each heir's portion in the estate can be changed, but not unlimited: statutory heirs that are close relatives enjoy forced heirship rights, i.e. the decedent cannot deprive such persons against their will of a certain share in the estate. The part of the estate that is not subject to *forced heirship* rights is the *freely disposable portion*, which can be disposed over by means of a will.

The possibilities and tools for estate planning offered by inheritance law are extremely diverse – however, forced heirship rules must be considered

A *will* or an *inheritance contract* offers various possibilities for individual and tailor-made solutions. In particular, essentially all goals can be achieved by entering into an *inheritance contract* incorporating heirs who, for example, waive their right to a compulsory portion or accept certain obligations with respect to their inheritance. It must be noted that a later amendment or the revocation of the inheritance contract is subject to the consent of all parties involved. Also a *will* offers innumerable structuring possibilities. For example, the testator can determine each individual heir's



*A comprehensive approach to your needs and an analysis of the factual and legal situation enable us to optimally advise you and implement the appropriate estate planning tools.*

Florian Schneider, Attorney-at-Law, lic. iur.

portion in the estate or allocate certain assets to certain heirs. Restricting directives are possible only within the limits of the freely disposable portion. As an exemption, the surviving spouse can be favored at the cost of the joint children to such extent that he or she is granted a usufruct of the entire estate.

#### INTERNATIONAL CONTEXT

On an ever-increasing basis, Swiss citizens are emigrating abroad and foreigners are taking up residence in Switzerland. The various legal systems that are impacted may deviate greatly from one another (marital property law, inheritance law and forced heirship rules, institutions and structures such as foundations and trusts, etc.). Therefore, the applicable laws and the possibilities available must be analyzed on a case-by-case basis in order to determine which of them serve the intended result best.

In the case of an emigration out of or a move to Switzerland, every directive which affects the marital property law and/or inheritance law must be carefully reviewed in order to verify that they are valid and executable in the new country of residence. Due to the new European Inheritance Law Ordinance, as per 2015 the same applies for all arrangements made by persons with an international background.

#### FURTHER ASPECTS

##### Cohabitation

Two partners living together without being married are not deemed to be relatives, and hence not statutory heirs. However, the partner can be granted the status as an heir in a will, while, at the same time, statutory heirs are deprived of their status as heirs. The latter will receive a bequest to the extent of their compulsory portion. The surviving spouse will therefore enjoy the status as sole heir and does not need to deal with the relatives of the decedent in a community of heirs, which can only act unanimously. Possible tax consequences must be considered separately.

##### Same-sex registered partnership

Unlike spouses, same-sex registered partners are not subject to the community of accrued gains regime, but are instead subject to the separation of assets regime. However, it is possible to agree by way of contract that the marital property division shall follow the rules of the community of accrued gains regime. From an inheritance law perspective, same-sex registered partners are granted the same status as spouses.

##### Divorce

The statutory right to an inheritance of the spouse ends upon a divorce. Nevertheless, un-



*Balanced estate planning lessens the burden on the heirs and is conducive to family peace.*

Michael Hamm, Attorney-at-Law, Dr. iur., TEP

less otherwise stipulated, will remain valid after a divorce. Consequently, such wills must be revoked if an ex-spouse appointed therein as heir shall cease to be heir. In the case of an inheritance contract, unless otherwise provided, it should be noted that a revocation of the same is subject to the consent of the ex-spouse.

#### Remarriage after Death

In the event that the surviving spouse remarries, the new spouse is his or her statutory heir. In the absence of a special set-up, the new spouse therefore indirectly succeeds the former spouse.

#### Patchwork Family

If the decedent leaves biological children and a spouse, they are his heirs. If these children are born out of wedlock or from the first marriage, they will – unless otherwise stated – not be heirs upon the death of the second-deceased spouse. On the contrary, the second-deceased spouse will leave what he or she inherited from the first-deceased spouse to his or her own biological children and/or new spouse.

#### Childless Marriages

In the case of a spouse passing away without children, the parents of the decedent are statutory heirs. Their portion can be reduced to the compulsory portion in a will. By means of an

appropriate marital property law arrangement, the interest of the parents could even be eliminated entirely.

*In most cases, unwelcome successions and inheritance taxes of up to 40% can be counteracted by means of tailored estate planning.*

#### Foundations and Trusts

Especially in the case of substantial wealth, the establishment of a foundation and/or trust ensures that the intent of the decedent is also respected in the future. These vehicles provide protection against excessive asset depletion and ensure that the descendants enjoy a structured subsistence for a long time to come. Such structuring may be limited by forced heirship rules.

#### Lifetime Gifts

In some cases it is favorable to gift assets during the lifetime as an advance on inheritance. The transferring person is entitled to retain the usufruct or right to residency until his or her death. In any case, it should be clearly recorded how lifetime gifts are to be treated upon the distribution of the estate.

#### Power of Attorney in Case of Incapacity | Advance Medical Directive | Instructions in Case of Death

We recommend to any person issuing a *Power of Attorney* in case of incapacity due to accident, illness or old age in order to govern matters relating to care and custody, the management of assets and legal representation. Further, the questions of life-prolonging measures and organ donations, as well as who shall be permitted to take medical decisions in case of emergencies, can be dealt with by means of an *Advance Medical Directive*. Finally, *Instructions in Case of Death* provide information concerning the type of burial that is desired, etc.

#### Inheritance Taxes

Currently, all except one Canton impose inheritance taxes. The tax rate is progressive and depends on the relationship to the decedent. It varies considerably from Canton to Canton. While spouses and descendants are exempted from inheritance taxes in most Cantons, individuals who are not relatives and co-habiting partners are charged with taxes up to 40%. In this sense, even a change in residence can be considered for estate planning purposes. Depending on the situation, considerable taxes could result in the event of remarriage, in patchwork families or among unmarried partners. Taxes can be minimized in most cases by means of a suitable arrangement. The estab-

lishment of and donations to a charitable foundation are always tax-exempt. Finally, reference is made to the inheritance tax initiative that is currently pending, the outcome of which is uncertain.

#### CONCLUDING REMARKS

Marital property law and inheritance law provide for statutory default rules in case of death. These rules can be modified by means of individual estate planning in order to achieve the desired result. In this regard, mandatory provisions such as forced heirship rules must be observed. In order to be valid, the respective directives must meet strict *formal requirements*. If the estate turns out to be somewhat complicated or if problems within the community of heirs are likely in view of the family structure, an *executor* ensures the safeguarding of the directives of the decedent and provides relief to the heirs with regard to the tasks incurred after death (inventory, tax declaration, administration of the estate, division of the estate, etc.) and helps to preserve family peace. §

Florian Schneider



*Through a combination of preferred shares and voting right shares, an optimal succession concept can be developed for you, your company and your heirs."*

Peter Lutz, Attorney-at-Law, Dr. iur., LL.M.

## *Tailored Succession Solutions within the Family due to Corporate Law Instruments*

In the event that a company is transferred by its owner to a family member, it is crucial to implement, on the one hand, an adequate ownership and management strategy and, on the other hand, a fair arrangement for all heirs. It is often imperative to the success of the company that the entire company or at least a clear majority thereof is transferred to a single heir, which however might be difficult, depending on the overall composition of the estate in question. The following article describes options to achieve the envisaged goals.

### THE NECESSITY OF SPECIAL SUCCESSION ARRANGEMENTS

Most entrepreneurs basically intend to treat all of their heirs equally and at the same time would like to ensure that one of the heirs takes over the management of the company and continues to successfully operate the same. In connection with this initial situation, it is often the case that insufficient unencumbered

assets are available to pay out the other heirs because a major portion of the assets generated by operations are bound up in the company.

Since the succession frequently requires, in terms of entrepreneurial responsibility, a concentrated voting power on the part of an individual family member, a complete equal treatment of all affected parties through the equal allotment of the shares is merely possible in limited cases. If heirs with a compulsory portion subsequently enforce their rights by claiming an unequal distribution of the assets, a liquidation of the company might result, which certainly contradicts the intention of the current owner.

In connection with the company succession, the well-being of the company itself must also be taken into consideration.

Thanks to the instruments provided for by law, such a development can be averted by means of an adequate planning. However, in order to take advantage of said instruments, a convincing and fair concept must be drawn up that appropriately takes into consideration the interests of all family members, without disregarding the interests of the owner.

### CORPORATE LAW INSTRUMENTS FOR TAILORED SOLUTIONS

Corporate law provides in the form of preferred shares and voting right shares (and potentially participation certificates and dividend rights certificates) various structuring instruments. Accordingly, a company owner could bequeath to a potential successor upon his death a portion of voting right shares sufficient to ensure control over the company. The preferred shares on the other hand could be used to safeguard the lawful compulsory portion of the heirs of the company owner.

*Voting right shares and preferred shares facilitate a fair succession concept for all heirs without thereby endangering the ability of the company to act in the future.*

#### Preferred Shares

The preferred shares pursuant to Article 654 of the Swiss Code of Obligations (CO) can be equipped with disproportionate pecuniary rights. The preferred rights in this regard can relate to or can be combined with various pecuniary rights, such as dividends, liquidation proceeds or subscription rights.

Various structuring possibilities, which must be implemented in the respective articles of incorporation, are available for purposes of determining the preferential dividend right of

preferred shares.

In respect with the fixed preferred dividend model, the preferential dividend right can be limited to a specific percentage, for example 6% or even 90%. The net profit remaining after distribution of the preferred dividend will be divided between all shareholders or to the holders of the ordinary shares. The holders of preferred shares therefore benefit from a profit distribution that is considerably in excess of the normal dividend.

The preferential dividend right can also be structured in the sense that an entitlement to subsequent payment of suspended dividend amounts arises in later years. In connection with the limited cumulative dividend entitlement, the accrual entitlement is limited, e.g. to the last five business years.

#### Voting Right Shares

The so-called voting right shares pursuant to Article 693 CO constitute an additional instrument under corporate law. In principle, the voting power of the shareholders is measured based on the participation in capital, i.e. the larger the capital investment of a shareholder, the greater the voting power. This corporate law principle is contravened through the issue of corresponding voting right shares. Voting right shares are shares to which the voting right is tied to the individual share independen-



dently of its nominal value. By creating shares with greater and smaller nominal values, a disproportionate voting right can be acquired through the same investment of capital. This option is however, limited to the extent that a maximum of ten percent (10%) of the entire share capital nominal value can be structured as voting right shares (cf. Article 693 para. 2 CO). In other words, the voting right shares are privileged in terms of voting rights vis-à-vis the other shares.

#### Participation Certificates and Dividend Rights Certificates

As an alternative to or by way of supplement to voting right shares and preferred shares, it is possible to issue participation certificates. Under Swiss law, participation certificates do not confer any voting rights but, based on prevailing legal scholars, can confer a financially better position vis-à-vis the ordinary shares / preferred shares. If there is a need to place some or all of the heirs in a better position vis-à-vis the ordinary shares / preferred shares with respect to certain selected financial rights and to place them in a worse or possibly subordinated position with respect to other financial rights (e.g., dividends), participation certificates are not an option due to the statutory prohibition on a worsening of position laid down in Article 656f para. 1 CO. Instead, dividend rights certificates can potentially be used for this purpose.

#### CONCLUDING REMARKS

Sooner or later, every entrepreneur must deal with the succession in his company. The most appropriate moment for the initiation of this process depends on the individual assessment and the general situation of the company as well as the question of whether or not a potential successor is available. Since the circumstances may vary considerably with regards to company successions, no generally valid rules or one-size-fits-all solutions exist in terms of the structuring and implementation of a succession arrangement. Instead, a solution that is tailored to each case at hand must be striven for whereby the corporate law instruments are valuable tools and permit tailored succession concepts from the perspective of both the company and the successors. Simultaneously, the overall family situation as well as the corresponding dynamics must also be taken into consideration.

Preferred shares and voting right shares allow concentrating the voting rights in the hands of one person on the one hand and, on the other hand, irrespective of this, to redirect the dividend streams in a disproportionate manner in order to safeguard the financial interests of the other heirs. Hence, the two main topics relating to a succession within a family with more than one heir can be addressed in a target oriented approach. §

Peter Lutz



*The conflict potential of an inheritance can be reduced to a minimum if known points of conflict are avoided from the very outset and a careful and transparent estate planning is carried out on a timely basis. In this manner, the heirs can be spared expensive litigation relating to the distribution of the estate.*

Cyrill Süess, Attorney-at-Law, lic. iur. HSG

#### *Measures to avoid conflicts in connection with the division of the estate*

Irrespective of the estate's size, the settlement of an estate generally harbors a great deal of potential for conflict. This potential can be reduced by avoiding certain sources of conflict and taking provisional measures to defuse other conflicts.

#### AVOIDABLE CONFLICTS IN CONNECTION WITH THE DIVISION OF MARITAL PROPERTY

As has already been noted in the main article of this "Paragraph issue", the handling of the estate of married persons basically requires, as an initial step, a division of the marital property. Particularly in the case of the ordinary community of accrued gains regime, this division can entail considerable effort and conflicts that could often have been avoided through adherence to simple rules of conduct.

#### Documentation of the Individual Own Assets

If the spouses have considerable pre-marital assets, or if they receive substantive gifts during the marriage, it is recommended that the value and composition of the same be laid down in writing. This facilitates the definition of the individual own assets and the allocation of the same to the corresponding spouse.

#### Documentation of the Funds Used to Finance and Maintain Major Assets

In order to be able to allocate major assets, for example real property, to the different categories of property (own assets and acquets), the source of the funds used to finance these assets must be determined in order to conduct the division of the marital property. This reconstruction generally entails considerable effort and can lead to conflicts. Both can be avoided if the financing sources are laid down in writing at the time of the acquisition.

This applies not only to the acquisition of assets, but also to investments in existing assets such as a renovation of a house. If such a renovation is, for example, carried out on a voluntary basis by one spouse, the spouses should agree whether this work corresponds to a pecuniary contribution and, if so, in what amount.

### Review of the Marital Property Law Situation

The daily life or the value shared by the spouses does often not correspond to the legal consequences of the applicable marital property regime. Due to this reason alone, a review of the legal situation is advisable once the marriage has lasted for a longer period of time or in the case of major financial changes. Upon this occasion, the initial situation can also be simplified in the event of a later division of the marital property, whereby a future conflict can be avoided. It should be reviewed for example, whether potential marital property law claims can be set off against each other and whether individual claims should be waived because the spouses deem them to be unreasonable or otherwise fulfilled.

Careful documentation prevents evidentiary difficulties and ensures clear relationships, which means that litigation becomes pointless.

### THE TESTAMENTARY EXECUTOR AS CONFLICT MANAGER

In the case of a comprehensive estate or complicated family relationships, the appointment of a testamentary executor also serves to ensure a smooth, conflict-free handling of the division of the estate. The task of the testa-

mentary executor is to administer the estate up through its division, distribute potential legacies, mediate among the heirs and carry out the division of the estate. The appointment of the executor can be made only by the testator, by means of a last will, whereby the testator can revoke the appointment at any time.

### Choice of the Proper Executor

A good executor assumes a neutral position with respect to the heirs and has the necessary expertise in order to carry out his or her mandate in an efficient and proper manner. Accordingly, it is not advisable to appoint an heir, who may run into a conflict with his own interests or fails to be accepted by other heirs. The same applies with respect to an individual who has difficulties to cope with such a task or can be easily influenced.

### Mediation among the Heirs

The testamentary executor ensures in a first step that the estate is safeguarded and that the scope of the estate is defined.

The executor is then authorized to handle and administer the estate even contrary to the will of individual heirs. Thus, the executor can ensure that the value of the estate is preserved and that existing contracts are properly processed.

*There are good reasons for an early estate planning. In particular, it is important to find a reasonable solution during the testator's lifetime, including the wishes of all parties involved. Our specialists have many years of experience and profound legal knowledge in order to assist you in drafting the necessary documents or a last will.*

In a second step, the executor submits to the heirs proposals for the division of the inheritance, explains the legal situation as needed and mediates in the event of conflicts. The executor is under an obligation to treat the heirs equally in connection with all of his or her activities. The executor cannot carry out any estate division contrary to the wishes of the heirs.

*A last will that is drawn up behind closed doors often arouses suspicion and may easily be in contradiction to provisions of law or existing dispositions of property upon death.*

### Transparency in Connection with Estate Planning

The testator's last wishes should be known not only to the executor but also, in principle, to the future heirs. A decision taken by the testator is significantly better accepted if the motives that led to this decision have been disclosed and potentially explained.

Open conflicts are often the consequence of smoldering family tensions, which the heirs and the executor have to settle.

### Supervision and Rendering of Accounts

The executor is subject to regulatory supervision. The supervisory authority can issue rec-

ommendations, instructions and prohibitions to the executor and decide on disciplinary measures up to the executor's dismissal. The executor is required to provide an account to the heirs.

### CONCLUDING REMARKS

Knowledge of one's own marital property regime and the legal consequences of the dissolution of the same – albeit through death or divorce – is the first prerequisite in order to avoid disagreeable surprises and unnecessary conflicts. A conscious mode of dealing with the marital assets, which includes a reasonable documentation of the same, can prevent uncertainties and evidentiary difficulties in connection with the division of the marital property. On an individual basis, this can be enhanced by an estate planning taking marital property law and inheritance law into account and the occasional review of the dispositions that have been made. §

Cyrrill Süess