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Estate planning – an evolving process

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Personal estate planning is a constantly evolving process. It is essential to review and adjust existing arrangements regularly to reflect any changes in your personal circumstances and financial situation. Current need for action may in particular be identified with regard to the dealing with digital data, gifts and loans as well as occupational benefits schemes.

Dynamic estate planning

- **Your estate planning should be regularly updated to reflect your personal circumstances and financial situation.**
- **Changes in case law and legislation will often necessitate adjustment.**

Estate planning – an evolving process

As well as reiterating some well-established principles, we focus here on four key aspects that have become increasingly relevant in practice. We will consider (i) instructions for digital data in case of succession, (ii) the potential implications of gifts made in haste in anticipation of an inheritance tax reform, (iii) specific categories of inter vivos gifts to descendants and (iv) the treatment of occupational and tied pension assets.

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Digital data in case of succession

Smartphones, laptops and tablets have become ubiquitous in our everyday lives. We use these devices on a daily basis, send messages from our email accounts or, for example, WhatsApp and back up data to the cloud. We view websites, make online payments, use social networking sites, such as Facebook, or participate in auctions on eBay. We leave many traces of ourselves online, including images, credit card data and Cumulus points. What will happen to all this data when we die?

When someone dies, family members are often unsure of how to access devices, personal logins or ongoing, prepaid services. Accessing electronic bills or cancelling online newspaper subscriptions, for example, may present particular challenges.

It is therefore advisable to make arrangements for handling such data. Drawing up an inventory of devices, personal logins and ongoing online services is a key step in this process. It is also advisable to record login data and passwords and store these in a secure location that can be accessed by family members. The terms and conditions of the relevant provider, e.g. credit card company, may provide other pointers on how to prepare for the eventuality of one own´s incapacity or death.

It is also advisable to designate a trusted person, e.g. the executor of your will, who will be responsible for deleting accounts, backing up digital assets and ensuring that your heirs have access, for example, to digital photos and music. An added advantage of appointing an executor, apart from easing the burden on heirs, is that you can also authorise this one trusted individual to access all your digital data.

As a precaution, instructions relating to digital data should be set down in the form prescribed by law (notarised or hand-written will or notarised contract of succession).

Gifts made prior to rejection of the inheritance tax initiative and the civil and tax law implications

In 2011, parents transferred significant assets to their children in response to the threatened introduction of a national inheritance tax. In some cases, these gifts were made in haste without investigating the implications in sufficient detail. Provided it is still practicable to do so, any shortcomings should now be addressed by entering into supplementary agreements and any future disadvantages identified and eliminated.

For example, where a contract of succession did not extend to all children and the transferor´s spouse, this may be in breach of the statutory entitlements and give rise to disputes with respect to division of the future estate.

Principles for effective estate planning

1. Consideration of any international dimension (testator resident abroad, assets located abroad, foreign nationality etc.)

2. Determining the affordability of any loan-financed assets (e.g. mortgaged property) for the transferee, allowing for the settlement of any inheritance claims and/or statutory entitlements

3. Making property arrangements between spouses (matrimonial property regimes/marital agreements), registered partners (property agreements) and cohabiting partners (partnership agreements)

4. Drawing up an inventory of all assets, including establishing titles, ownership of rights and any allocation of assets under a matrimonial property regime

5. Inclusion of all assets:

- Assets included in tax return taken as a basis
- Lump-sum settlements under Pillar 2 including assets held at vested benefits institutions
- Sums insured and surrender values
- Tied pension fund assets (Pillar 3a) including sums insured and conversion values
- Intellectual property rights (e.g. copyright)
- Inter vivos gifts

6. Appointment of an executor of will

7. Appointment of a deputy for heirs who are minors on division of the estate and a legal guardian for orphans

In transferring property, many donors opted not to assign mortgage debt to their descendants in order to keep the gift portion as high as possible and thus benefit from a deferral of property gains tax. This type of arrangement carries the risk that the donor's future estate is burdened by excessive debt or that the surviving partner will not be able to afford the interest payments and potentially face foreclosure on the property.

Where several children acquired a property by way of a simple partnership, they will benefit from a deferral of property gains tax upon subsequent distribution in the same way as on division of an estate. However, this benefit may be forfeited if a building is constructed on jointly held land or substantial structural alterations are made to an existing property. Any subsequent sale or internal distribution may have significant adverse tax implications, depending on the length of time the property was held.

It is essential that anyone contemplating a retransfer of gifted assets should carefully consider the civil and tax law implications in advance.

Treatment of gifts and loans to offspring

Offspring are obliged to deduct inter vivos gifts made by the testator without valuable consideration from their shares in the estate. This general rule does not apply to occasional gifts or where the testator has provided for an exemption from the obligation to deduct.

The effects of dispositions inter vivos to offspring, without consideration, will vary depending on the type of legal arrangement, even though the end result is the same from a purely financial perspective. If the gift consists in a tangible asset, the value of the gift upon succession or the proceeds realised from any earlier sale will be relevant. The face value principle applies to gifts of money.

The differences can best be illustrated by the following example: a father makes a gift of his house, worth CHF 800,000, to his daughter and, at the same time, gives his son CHF 800,000 in cash. The market value of the house at the time of the father's death is CHF 1 million. The daughter is therefore required to deduct CHF 1 million from her share in the estate and the son CHF 800,000. Provided that the father intended to treat his children equally, a possible solution would be to sell the house to the daughter at market value by simultaneously granting an interest-free loan. If the loan were subsequently written off, which amounts to a monetary gift, it would only be necessary to offset the face value. The fact that interest was not charged on the loan does not constitute a deductible benefit for these purposes. Alternatively, a stipulation could be made exempting the daughter from the obligation to deduct any appreciation in the value of the property.

If a testator allowed his offspring to live in his property without valuable consideration, this would also be deemed to constitute a deductible gift.

As a result, the method of dispositions should always be aligned with the desired outcome, having due regard to the tax implications.

Entitlement to survivors' benefits under occupational pension and Pillar 3a schemes

Upon the death of an insured person, the occupational benefits scheme institution (bank or insurance company) is required to pay lump-sum death benefits to the beneficiary or beneficiaries in the order of precedence prescribed by law ("order of beneficiaries"). Although the intention behind this policy is to achieve harmonisation, different orders of beneficiaries apply to the various forms of pension provision (mandatory and non-mandatory occupational pension

If the occupational benefits scheme is not known, this information may be obtained from the 2nd Pillar Central Office.

Link to 2nd Pillar Central Office.

components, vested benefits and Pillar 3a). Also, different stipulations as to the order of beneficiaries are possible. In a recently published decision, the Federal Supreme Court held that it could not be inferred from a will, in which the insured person appointed his partner as heir, that the beneficial interests prescribed under occupational pensions legislation were intended, i.e. that the will did not include a nomination of beneficiary to this effect. The same would apply even if the partner were appointed as sole heir.
Instead, an express reference to the provisions of the applicable rules or at least to the occupational pension scheme would be required. In view of the above, it is essential to consider with regard to the specific form of pension scheme which dispositions may be made in favour of which individuals. In considering these issues, it is important to bear in mind that the legislative provisions have been amended several times in the past, including changes to the order of beneficiaries, and it has not been conclusively established whether the law in effect at the time of entering into the contract or the law currently in effect would apply. Clarification on this issue should also be obtained from the occupational benefits scheme institution.

Outlook and practical recommendations

Estate plans should be adjusted at regular intervals in line with changes in case law and legislation as well as changes in personal and financial circumstances.

Efforts are currently underway to reform the Swiss law of succession. The consultation process relating to the draft legislation has already been completed. The preliminary draft proposes, inter alia, a reduction in the statutory entitlements for offspring and surviving spouses or registered partners as well as the abolition of statutory entitlements for parents. This gives testators a wider margin of manoeuvre, which is intended to facilitate small and medium-sized enterprises (SME) transfers and address the different types of family setup now in existence.

Existing wills and contracts of succession should be reviewed no later than the date on which the revised provisions come into effect and amended where necessary.

In an international context, due consideration should be given to the EU Succession Regulation which came into force on 17 August 2015 and its application in practice. Finally, it is important to take account of the pending revision of the provisions governing succession under Swiss private international law.

Alongside estate planning, arrangements in relation to loss of capability of judgment (advance care directive / patient decree) should be made.

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