meyerlustenberger | lachenal

Last Minute Succession Planning from a Swiss Law Perspective

Patricia Guerra, LL.M., partner with Meyerlustenberger Lachenal
Barbara Stillhart-Zimmermann, lic.oec. HSG, tax expert
Silja Aebersold, MLaw

This paper is the executive summary of Meyerlustenberger Lachenal's presentation on the subject *"Oops, have I left it too late? Deathbed Tax and Succession Planning – Common Law, Civil Law and Sharia Law Perspective"* held at the IBA 18th Annual International Wealth Transfer Practice Conference in London, 4 – 5 March 2013. The first section of this paper provides an introduction to last minute Swiss succession planning. The second section focuses on the most important instruments available for succession planning in Switzerland and the last section reviews certain aspects of tax mitigation.

1. Introduction to Swiss Succession Planning

Estate planning is the process of anticipating and arranging for the disposal of the estate assets, trying to eliminate uncertainties and avoid conflicts as well as aiming at having an orderly succession, with less costs, as tax efficient as possible and in the best interest of the heirs. Proper estate planning can prevent inheritance litigation and solve problems beforehand so that the transition of the assets from one generation to the other is as smooth as possible. Inheritance can be a loaded issue and the testator who discusses its plans in advance with its heirs and obtains their consent or understanding may prevent disputes. The wise testator will not leave estate planning to the last minute. On the contrary, it will even consider to already transferring wealth to its heirs during lifetime and just leave a small estate to be distributed and dealt with upon death.

Since Swiss law regulates a succession quite in detail, the challenges of deathbed planning can be – to a certain extent – defused in most of the ordinary cases. In fact, Swiss succession law sets forth who the heirs are and to which extent they inherit as well as the rules to administrate and divide the estate. Therefore, the estate of an individual who was not able to make a disposition upon death will devolve *ab intestat* according to law. *Ab intestat* succession will, however, not be appropriate, for example, in cases of patchwork families, when a spouse has children born out of wedlock, when the testator has not married its long-time life partner, in the event that the testator wishes to reduce the protected share of its protected heirs and dispose of the freely available quota for the benefit of third persons or charitable institutions or when it wishes to give the maximum benefit of its estate to its surviving spouse by granting to it the usufruct of the portion devolving to their common children in addition to property in part of the estate. In such cases, a disposition upon death and/or the entering into agreements before death will be necessary to make sure that the testator's wishes prevail upon *ab intestat* succession.

Swiss law allows for comprehensive estate planning within the limits of forced heirship rules until the last minute of existence of an individual, provided that such individual has capacity of judgement. The extent of succession planning will depend on the time that is available to the testator. Last moment comprehensive tax planning, especially in an international context, or the entering into inheritance agreements which need negotiation with several heirs and parties will most likely not be possible any longer at a late stage.

2. Instruments of Succession Planning under Swiss Law

2.1 Wills and Inheritance Contracts

The deceased may dispose of its assets by setting up wills or concluding inheritance contracts also at a late stage, provided that it is capable of judgment. Even if the deceased leaves behind heirs protected by forced heirship rules, a will may help to organize the transfer of estate assets, indicate which assets of its estate should go to which heir, dispose of the freely disposable quota or nominate an executor. It should be noted here that the quota of the estate which is necessarily reserved for the protected heirs is calculated on the basis of the estate's value at the time of the deceased's death (art. 474 ff. of the Swiss Civil Code (**SCC**)). Wills can be made in holographic form (in writing) or in the form of a public deed before a notary public and two witnesses.

Inheritance contracts with heirs can allow buyouts of heirs from the estate during the lifetime of the testator (for example the transfer of a business to a protected heir against its renunciation to the inheritance). Wealthy spouses can agree in an inheritance contract to renounce their share in the inheritance in order to allow common descendants to inherit a larger share or the whole estate. Inheritance contracts must be done in the form of a public deed before a notary public and two witnesses.

2.2 Usufruct for the Surviving Spouse

The deceased has further the possibility, even at the last moment, to grant to the surviving spouse the usufruct for the part of the estate which would otherwise fall to the common descendants (art. 473 para. 2 SCC).[1] The usufruct may be given in form of a will or inheritance contract. It replaces the legal succession rights of the surviving spouse who then becomes legatee and is no longer heir (art. 473 para. 2 SCC).[2] The surviving spouse has the usufruct of all assets concerned and may use and administer them freely (art. 755 SCC). In addition to the usufruct, the deceased may leave the freely disposable quota of one quarter of the total estate to the surviving spouse which maximizes its benefit.[3] The usufruct to the surviving spouse leads to the result that the protected shares of the common descendants are violated. However, they may not ask for reduction but have to tolerate such restriction until the usufruct ceases to exist. For income and wealth tax purposes, the usufructuary is the tax subject and has to declare the assets and income on its tax return. The owners, i.e. the descendants, need not disclose the naked property on their own returns, except when the usufruct ceases.

2.3 Gifts

A donor may make gifts if he has legal capacity, meaning that the donor needs to be over the age of 18 and capable of judgment (art. 240 para. 1 of the Swiss Code of Obligations (**SCO**) and art. 12 ff. SCC). From a Swiss law perspective, deathbed gifts may either qualify as lifetime gifts (transactions *inter vivos*) or gifts upon death (transactions *mortis causa*).[4] Lifetime gifts can be validly made if they respect forced heirship rules and rights in inheritance contracts (art. 470 para. 1 and 494 para. 3 SCC) and the donor has the capacity of

---

[1] PETER WEIMAR, Berner Kommentar – Das Erbrecht, Bern 2009, Art. 473 No. 1. Since the usufruct may only be granted to the determinant of common children, it is not possible for registered partners to benefit the surviving partner by means of usufruct. So far, registered partners may not have children but will soon be allowed to adopt the child of their partner ("stepchild adoption").

[2] The deceased regularly grants to the surviving spouse the possibility to choose between the usufruct for the estate of the descendants and its protected share (one quarter of the total estate) (STEPHAN WOLF / GIAN GENNA, cited in footnote 4, p. 284 ff.).

[3] PETER WEIMAR, cited in footnote 1, Art. 473 No. 12.

[4] The basic criterion for the distinction between transaction *inter vivos* and transaction *mortis causa* is whether a transaction is intended to have binding effect already during lifetime or only upon death of the deceased (STEPHAN WOLF / GIAN GENNA, Schweizerisches Privatrecht IV/1 – Erbrecht, Basle 2012, p. 137 f.). However, in practice, the distinction is not always clear since many transactions *inter vivos* may also have effects on the estate. Therefore, all relevant circumstances must be taken into account.

judgment. The transfer of a gift from hand to hand is not subject to any form requirements. The promise of a gift must be done in writing. Gift taxes at cantonal level may be triggered.

If a deathbed gift qualifies as a transaction *mortis causa*, the question may arise whether the deceased was capable of judgement at the time of making the disposition (art. 467 f. SCC) and whether the disposition was made free of error, deception or coercion (art. 469 SCC). Furthermore, in order to respect the form requirements, a notary public and two witnesses must be called (art. 512 SCC). If the deathbed gift exceeds the value of an occasional gift and violates forced heirship rules, it may be subject to the action for reduction (art. 527 cif. 3 SCC). Deathbed gifts may trigger inheritance tax at cantonal level.

2.4 Nomination of an Executor

The testator can nominate one or several executors of its estate in a disposition upon death (art. 517 para. 1 SCC). The nominated executor must indicate whether it accepts the mandate within 14 days from the notification of its nomination. When the nominated executor does not react within two weeks of such date, it is assumed that he accepts his nomination (art. 517 para. 2 SCC). The executor is usually a person of trust of the testator who will be in charge of the administration of the estate, the payment of the debts of the testator, the distribution of the legacies and the preparation of the partition of the estate in accordance with the last wishes of the testator or the law (art. 518 SCC).

An executor is usually nominated to allow a prompt and reliable execution of the testator's will, to help inexperienced heirs with the administration of the estate and with the task of its partition or to reduce the risk of conflicts of interests or disagreement between heirs.[5] In this connection, the establishment of an inventory of the assets or its updating during lifetime, especially for individuals who are domiciled in Switzerland under lump sum taxation as they need not disclose their worldwide assets on their Swiss tax returns, even at the last minute, can prove very helpful for the executor or the heirs since it may ease the later settlement of the estate.

If an executor is nominated, the heirs cannot act in estate matters. The executor has an independent position and acts in its own name and in an independent manner pursuant to the will of the testator as well as in an objective manner in the interest of the heirs, the legatees and the creditors. The executor is neither representative nor fiduciary of the deceased, the heirs or the estate. Its mandate cannot be terminated neither by the heirs nor the legatees, not even with unanimity. Further, neither the heirs nor the legatees can give instructions to the executor nor are the executor's acts subject to the approval of the surveillance authority. The heirs can exclude the executor by partitioning the estate as with such final act the mandate of the executor terminates. The executor is subject to the surveillance of the authority and is liable for its activity at a disciplinary, civil and penal law level and also as a professional.[6] The authority can remove the executor who is not complying with its obligations.

2.5 Contracting of Marriage

Under Swiss law a person can contract marriage if it has reached 18 years of age and has capacity of judgment (art. 94 SCC). Swiss law allows a simplified marriage procedure in the event that a person is in danger of death and the respect of deadlines set forth for marriage would have the risk that the marriage cannot be celebrated. In such case, the competent authority can shorten the deadline or marry the couple immediately based on a medical certificate (art. 100 para. 2 SCC). Through the contracting of marriage the

[5] MARTIN KARRER / NEDIM PETER VOGT / DANIEL LEU in: Heinrich Honsell / Nedim Peter Vogt / Thomas Geiser (ed.), Basler Kommentar Zivilgesetzbuch II, 4th edition, Basle 2011, Preliminary Remarks to Art. 517/518 No. 3.
[6] MARTIN KARRER / NEDIM PETER VOGT / DANIEL LEU, cited in footnote 5, Preliminary Remarks to Art. 517/518 No. 8.

surviving spouse of the deceased becomes an heir protected by forced heirship rules and can request that any previous dispositions upon death made by the testator be reduced to respect its own protected share.

2.6 Matrimonial Property Regime

The surviving spouse / registered partner[7] may be given an advantage by the choice of a matrimonial property regime or the amendment of such a regime. Such agreements or dispositions can also be made at a late stage or just before death to the extent the parties have capacity of judgement. A matrimonial agreement can be given retroactive effect as of the contracting of marriage.

If the spouses / registered partners are subject to the ordinary matrimonial property regime of participation in the acquisitions, they may agree that, in deviation of the law, the surplus shall not be distributed equally among them, in particular that the surviving spouse shall receive the total surplus (art. 216 SCC). Such agreement is valid to the extent that it does not adversely affect the protected shares of non-common descendants or their descendants. The other protected heirs, namely the common descendants and parents may not claim a violation of their protected shares if such violation results from the different distribution of the surplus.[8]

The spouses / registered partners can also declare that acquisitions which are relevant for the profession or business of a spouse belong to the individual property (art. 199 SCC). This prevents that assets are withdrawn from the business of a spouse in case of death.[9] The spouses / registered partners may also regulate in a matrimonial agreement that the proceeds of the individual property remain with such property instead of falling into the acquisitions.

In the event that the spouses have chosen community of property, a different partition of the common property than equal distribution may be agreed upon (art. 241 SCC). If the spouses have agreed that the surviving spouse shall receive the totality of the common property upon death of the other spouse, the surviving spouse becomes automatically the sole owner of such property.[10] In such case, only the individual property of the deceased spouse falls in the estate. However, such agreement may not violate the protected shares of the descendants of the spouses, irrespective of whether they are common descendants or not (art. 241 para. 2 SCC). Descendants may ask for reduction if their protected shares are violated. However, the protected shares of the parents must not be respected and, therefore, they may not ask for reduction.[11]

2.7 Pension Fund and Insurance Solutions

There is also the possibility for the testator to name a beneficiary for its professional pension fund ("second pillar" of the Swiss social security system) and for its individual pension fund ("pillar 3a" of the Swiss social security system). The professional and, if carefully drafted, also the individual pension fund usually constitute transactions *inter vivos* and are therefore not subject to the more stringent form of dispositions upon death. Therefore, the claim of the beneficiary is outside succession law. Whether the over-obligatory part of the professional pension fund and the individual pension fund count towards the calculation of the protected

---

[7] Since 1 January 2007, same-sex unions are permitted. They are called "registered partnerships". Registered partners have in many respects the same rights and duties as pursuant to married couples. So far, they may not have children but will soon be allowed to adopt the child of their partner ("stepchild adoption"). They are subject to the property regime of separation of property, provided that they have not opted for the participation to the acquisitions by contract (art. 18 and 25 of the Law on the Registered Partnership of Couples of the Same Sex). The property regime of community of property is not available to them.

[8] HEINZ HAUSHEER / REGINA AEBI-MÜLLER in: Heinrich Honsell / Nedim Peter Vogt / Thomas Geiser (ed.), Basler Kommentar Zivilgesetzbuch I, 4th edition, Basle 2011, Art. 216 No. 36.

[9] HEINZ HAUSHEER / REGINA AEBI-MÜLLER, cited in footnote 8, Art. 199 No. 1.

[10] STEPHAN WOLF / GIAN GENNA, cited in footnote 4, p. 57.

[11] STEPHAN WOLF / GIAN GENNA, cited in footnote 4, p. 58.

shares, must be analysed on a case-by-case basis. The obligatory part of the professional pension does not. As these funds are outside the succession, they can be interesting from a tax perspective since they are not subject to inheritance tax but to income tax with the beneficiary at a reduced rate.

Free insurance solutions ("3b pillar" of the Swiss social security system) allow the testator also to name a beneficiary, for example for a life insurance outside its estate (art. 76 ff. of the Law on the Insurance Contract (**LIC**)). Such life insurances can be structured as transactions *inter vivos* and, therefore, not be subject to the form of dispositions upon death. They may be revoked at any time during lifetime of the testator, if not explicitly stated otherwise. They are subject to reduction (art. 529 SCC or art. 527 cif. 4 SCC).

2.8 The Law on the Protection of Adults

The amendment to the Swiss Civil Code on the Protection of Adults of 19 December 2008 (new art. 360 – 456 SCC) entered into force on 1 January 2013. The possibility of nominating a representative for personal and financial matters in case of absence of capacity of judgement (advance care directive; art. 360 SCC) as well as of setting forth health care directives (patient decree; art. 370 SCC) have been explicitly introduced and are now regulated in this amendment. The mandate nominating a representative must be done in handwritten form (from the beginning to the end, including date and signature) or in the form of a public deed (art. 361 SCC). The advance health care directive must be done in writing, dated and signed (art. 371 SCC). Both can be revoked at any time respecting one of the forms of establishment or by a new disposition or destruction of the document.

3. Tax Mitigation

In Switzerland, inheritance and gift taxes are levied at cantonal level. Since the effective tax burden varies considerably among the cantons, taxes may be mitigated by changing the place of residence to a more attractive location. For instance, in the Canton of Schwyz, inheritances (and also gifts) are not taxed. However, the change of domicile which is made only very shortly before death or another taxable event might be challenged under the tax avoidance rules. Relocation abroad (for example to the UK, Malta, etc.) is also an alternative.

Inheritance taxes may further be mitigated by shifting liquidity to other assets during lifetime. One possibility is the purchase of real estate in a canton with no inheritance tax or a lower tax rate compared to the canton of residence of the deceased. Alternatively, the deceased may purchase real estate in a more tax attractive jurisdiction abroad.

With regard to real estate, it may also be advantageous that the taxable basis is the tax value of the cantonal real estate estimation, which may be lower than the fair market value.

Another possibility is to make lifetime gifts to a charitable foundation or a foundation with public purpose since such gifts can be deducted from the donor's income (up to a certain percentage). The establishment of such foundations upon death and the gifting of assets of the estate to them are also tax-neutral.

A committee supported by left-wing parties and trade unions submitted to the Federal Chancellery the people's initiative on the introduction of a gift and inheritance tax at federal level. The new tax is a flat rate tax of 20% on the donation or total estate value. Exempted are estates and gifts of up to CHF 2 million. Further exempted are gifts of up to CHF 20,000 per year and per donee as well as all gifts and inheritances to the surviving spouse / registered partner and to foundations with a Swiss charitable or public purpose. Tax

reductions shall apply to companies or agricultural businesses belonging to the estate or donations of such assets if the heirs or donees take them over for a certain period of time.

If the initiative is accepted in the people's vote (the exact date is not yet known), the new gift and inheritance tax is expected to enter into force in 2016. However, gifts made after 1 January 2012 will be added to the estate and, therefore, be subject to retroactive taxation.

4. Concluding Remarks

Swiss law provides numerous possibilities of succession planning which give to the deceased the opportunity to organize the succession of its estate in accordance with its personal wishes and needs even at last minute. Particular attention should be paid to the structure of wealth, the domicile of the testator, the individual relationships and the domiciles of the future heirs. Given the fact that these circumstances may change during lifetime of the testator, succession planning should be reviewed and, if necessary, updated on an on-going basis.

To receive additional detailed advice on Swiss succession law and estate planning, please contact Meyerlustenberger Lachenal, Patricia Guerra or Barbara Stillhart-Zimmermann by telephone (+41 44 396 91 91), fax (+41 44 396 91 92) or email (patricia.guerra@mll-legal.com or barbara.stillhart@mll-legal.com).

meyerlustenberger | lachenal

IBA 18th Annual International Wealth Transfer Practice Conference

Session of the Individual Tax and Private Client Committee

London, 4 – 5 March 2013

Oops, have I left it too late?

Deathbed Tax and Succession Planning – A Swiss Law Perspective

Meyerlustenberger Lachenal
Switzerland

Patricia Guerra, lic.iur. LL.M., Partner
Barbara Stillhart-Zimmermann, lic.oec., tax expert
Silja Aebersold, MLaw

meyerlustenberger | lachenal

Table of Contents