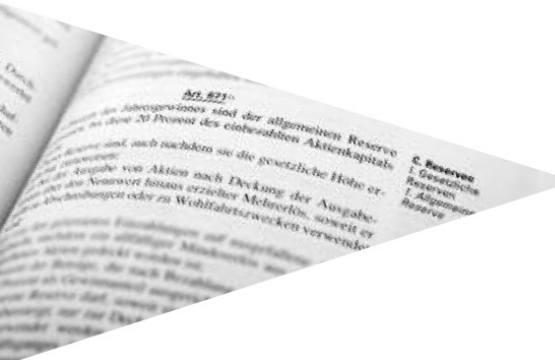


Legal News



Avoiding disputes in estate distribution

Dr. René Schwarzenbach Attorney-at-law, Managing Partner, Legal Services,
rene.schwarzenbach@ch.ey.com

Dear clients and business friends

With reference to the factual or presumed last will of a person who has died, there is always the possibility - if not indeed likelihood - of heated argument between the heirs if the deceased has failed to regulate his or her estate clearly and comprehensively. It is particularly important to make the necessary arrangements in good time when substantial assets are going to be left behind.

The arrangements that need to be made can, as a rule, only be determined after analysis of the specific asset situation and the family circumstances (particularly the existence of spouses and/or other heirs entitled to what is known under Swiss law as a "statutory share"). A lot - thought not everything - can be done if arrangements are made in good time and the solutions found are reviewed at regular intervals to ensure that they still match the current situation and the intentions of the involved parties.

With this issue of Legal News we want to provide a brief summary in general terms of ways to approach possible solutions and encourage our readers to think about the theme.

Daniel Bachmann
Partner, Legal
daniel.bachmann@ch.ey.com

1. Sharing a common destiny

If disputes arise between the heirs, experience shows that distribution of the estate can become a lengthy, expensive affair. Apart from the costs for external consultants, there is also the threat that disputes will lead to a diminution of the assets involved because management of the estate is blocked. Securities cannot be sold, even if their price is under threat, and real estate cannot be professionally managed. If the disputed estate includes a major participation in a company, customers and employees are likely to feel insecure, often with catastrophic consequences for the company.

The effect of the principle under inheritance law of "universal succession" is that the heirs become legal successors of the deceased person. They take over all the rights and obligations of the deceased as co-owners and can only jointly and unanimously decide on what happens to the estate. Until the formal distribution takes place, they form a community of heirs with a common destiny. Every heir can, of course, demand that the estate is distributed by the court. However, in view of the long durations of court cases like that, the right to call upon the court is of little help to the heirs who want the distribution to be executed as quickly as possible.

2. Example constellations

If, for example, the direct descendants are already arguing among themselves before the death or if there is a poor relationship between a step-parent and children from the first marriage,

arguments about the inheritance are virtually pre-programmed. How much leeway does a person have to prevent disputes and reduce the associated risks after he or she has died?

2.1 The virtual heir

It is generally known that in Switzerland the closest relatives of the deceased (children, spouses and parents) are legally entitled to a share of the estate (the so-called "statutory share"). If a person with that status is excluded from his or her entitlement by means of a last will and testament, he or she becomes a so-called "virtual heir", without the legal status of an heir and without being mentioned in the official certificate of inheritance. If agreement cannot be reached with the other heirs, he or she will have to battle for official status as an heir by means of a law-suit (in the form of an invalidity or mitigation claim). That would block the estate. This risk can be reduced if the testator pays to the excluded person a legacy equal to the statutory share to which he or she is legally entitled. The law states that the share in such a case is of a purely mathematical nature, i.e. "in value" (Article 522 ZGB). This means that it is hardly worthwhile for the entitled person to enter into legal proceedings simply because he or she is formally excluded from the status of an heir. The testator can therefore use this opportunity to exclude a quarrelsome person from the community of heirs.

2.2 Gifts paid out during the lifetime

As long as he or she is still alive, the testator can dispose freely of his or her wealth. If he or she pays gifts to statu-

tory heirs during his or her lifetime, those amounts have to be compensated and added to the estate. Decisive is the value of the gift at the point in time at which the inheritance is opened. If the available ratio is exceeded through the gifts paid out during the lifetime of the testator, they can be reduced. This means that gifts paid out during the testator's lifetime can therefore lead, when the inheritance is opened, to claims for compensation or reduction. However, the only matter under discussion in this case is the value of the gifts made during the lifetime. The assets themselves are deemed to have been validly transferred by the testator during his or her lifetime and no longer form part of the estate. The testator can therefore pre-empt physical division of individual assets (e.g. real estate properties, works of art, etc.). The statutory heir receives his or her share of the value of the estate during the lifetime of the testator and has no further claims when the estate is later distributed.

2.3 The surviving spouse

In the case of a married testator, distribution of the estate is always preceded by determining the ownership of matrimonial property. It might therefore be necessary to make arrangements in advance by means of a matrimonial or a combined matrimonial and inheritance agreement. Matters with the potential to cause argument regarding the allocation of assets to individual groups of property (e.g. wealth achieved during the marriage or own property) including the determination of claims can be bindingly regulated in this manner. Particularly for a business owner who lives under the normal matrimonial property status of participation in wealth brought into the marriage, there could be argument as to whether the value which has been added to a business brought into the marriage is deemed to be an achievement subject to participation by both spouses or the sole property of the deceased. (Please refer in this respect to Legal News May 2006 "Business owner's salary and matrimonial property law").

2.4 Inheritance buy-out

In order to pre-empt any arguments with a difficult member of the circle of heirs, the testator can conclude an inheritance agreement with that presumptive heir.

That heir draws his or her share in advance and, in return, waives his or her participation in the inheritance process (inheritance buy-out).

2.5 Distribution stipulations by the testator

In his or her last will and testament, the testator can issue instructions on allocation of individual objects within the estate. With stipulations of this kind, the testator can avoid arguments and secure the particular needs of individual heirs. The instructions are basically binding in the distribution process.

2.6 Determination of values

In order to avoid arguments about the values of individual assets in the estate (real estate properties, investments, etc.), the testator can issue instructions regarding valuation. In cases in which the value of an object can fluctuate sharply prior to the opening of the inheritance (e.g. shares in an unlisted company), it can be worthwhile to at least define the method of valuation as well as the person designated to carry it out.

2.7 Executor of the will

The testator can designate the executor of the will either by means of the last will and testament or an inheritance agreement. The executor executes administration of the last will and testament and can help in asserting the specific instructions of the testator. Designation of an executor also makes sense if merely the legal distribution rules are to be applied; he can submit suggestions to the heirs for the allocation and prevent arguments among the heirs as an independent third party.

3. Transparency

Experience shows that it is advisable to discuss as transparently as possible the last will and testament with the heirs while the testator is still alive (in the case of inheritance agreements, the heirs are in any case included). This enables avoidance of unpleasant surprises, false expectations or arguments on the part of the heirs when the last will and testament is opened. It is a demanding task, and it is advisable to include an external consultant and/or the future executor in the discussion.

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Contacts Legal

Basel: **Thomas Bauer**
thomas.bauer@ch.ey.com

Berne: **Daniel Bachmann**
daniel.bachmann@ch.ey.com

Geneva: **Olivier Dunant**
olivier.dunant@ch.ey.com

Zurich: **René Schwarzenbach**
rene.schwarzenbach@ch.ey.com