

13.09.2016

Dr. iur. Bernhard Madörin

Tax and Fiduciary Expert
Licensed Audit Expert RAB
Licensed Insurance Intermediary FINMA

Death creates heirs

Dear Sir or Madam,

Have you ever contemplated who might benefit from being able to receive your savings at a given stage? Very often, after a bereavement, inheritance disputes occur, especially in cases where a last will, which would clearly and indisputably document the wishes of the deceased, does not exist.

In this article you will receive information about intestate succession, the various forms of testament, about statutory entitlement and bequests, inheritance law and inheritance tax, and about the setting up of a last will and testament.

Community of heirs

The opportunities to act within a community of heirs have dramatically changed over the last few years. While in previous years, banks would still have accepted powers of attorney beyond death and thus would have allowed movements of assets beyond the firm foundations of inheritance law, this has now become restricted – but existing powers of attorney over the joint assets of a married couple, or family assets, are still possible. Today, these are suspended in the event of death. For example, this means that a widow needs sufficient income and assets for living costs, whilst the estate distribution only enables availability of other assets. This could actually lead to a situation where joint assets of a married couple may be blocked if they are part of the estate of a deceased husband. For this reason, certain precautions need to be taken to avoid such a blockage.

In a recent case attended by the author, a previously unknown half-sister turned up suddenly. This meant that she could effectively block the entire estate and thus excessively assert her claims for her entitlements under inheritance law. In the end this meant for other family members that they had to buy themselves out to achieve legal capacity. It can take many years before a court reaches a verdict about estate distribution. During that time, all assets are blocked. Among the precautions to avoid this are family agreement, during life-time, to an inheritance contract to settle the estate distribution. At the same time, contractual penalties are agreed upon in such a contract, to provide for opposition to asset allocations contrary to agreement by counterparties.

Another effective instrument is appointing an executor. This person ensures legal capacities of the estate distribution remain in force, from date of death until estate distribution.

With large assets, there is the option of a contract to endorse parts of the assets to the descendants at an earlier stage. This comes with the caveat that a council with co-determination supervises the assets. Thus an uncontrolled collapse of assets can be prevented.

Prenuptial agreement

With a prenuptial agreement, both partners can agree upon provisions for matrimonial assets by virtue of matrimonial property law, which governs the allocation of assets. This can be in favour of either of the spouses or in favour of the surviving spouse. Such a contract can even include the provision that any acquired property shall belong to the surviving spouse by virtue of matrimonial property law. In marriages where a substantial part of the assets has the character of acquired property such a provision will ensure that the surviving spouse will receive the greatest part of the assets. However, such a provision still does not ensure that, in the event of death, the surviving spouse will retain his or her legal capacity. Determining what falls under a matrimonial property system and what is estate remains an exclusive matter for the heirs and cannot be unilaterally determined by the surviving spouse.

Inheritance contract

With an inheritance contract, both partners can name each other as heirs. However, they can also determine that in the event of death of the surviving partner the children of both spouses should be the legal heirs. This will calm the waves of an estate distribution as the heirs of the succeeding generation receive an assurance that one day it will be their turn to benefit. The question remains whether securities should be created for the heirs or not. Generally the surviving spouse can dispose of assets any way he or she likes and in a subsequent marriage bequeath all assets to his or her second spouse. Have more than five years passed between endowment and the death of the surviving spouse the children from a first marriage receive nothing.

Both spouses and their descendants can jointly come to an agreement whereby an inheritance contract which contains, above all, an amicable, consensual and calculable settlement. The disadvantage of such a solution lies in the fact that this is a binding agreement which, a few years after the contract having been signed, can no longer be changed without the approval of all parties that had signed the contract.

Last will and testament

Finally, everyone is free to write down a last will and testament and thus determine testamentary dispositions beyond the event of death. Provided these do not contravene prenuptial agreements or provisions of an inheritance contract, or limit statutory entitlement, then these testamentary dispositions are valid. Such a last will is best deposited at the local inheritance office. There it is kept safe and will be opened. A testament that is kept at home can be destroyed by anybody who finds it and is not happy with its provisions. However, it is also possible that such a testament will either not be found at all or far too late, after all has been settled and distributed.

Any order regarding cremation and funeral are to be avoided, these matters should be dealt with somewhere else (e.g. cemetery office). Generally a funeral has already taken place by the time a testament is officially opened and read.

Inheritance tax

Apart from legal heirs and any other named heir, the state benefits as additional heir. In Switzerland, bequests to spouses and direct descendants, and also partly to parents, are tax free. Inheritance tax increases in direct proportion to the amount inherited and the distance of relation. For those not related, this can go up to 50%. It is reasonable to plan ahead, especially when the assets are located in different cantons and countries.

Kind regards

artax Fide Consult AG

Member of Morison KSi

Gartenstrasse 95, Postfach, 4002 Basel

Tel: +41 61 225 66 66, Fax: +41 61 225 66 67

info@artax.ch, www.artax.ch