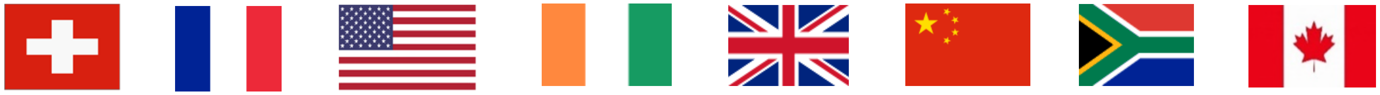
THOUVENIN rechtsanwälte

Do’s and don’ts when planning your estate in Switzerland



ZIWA event on 8 November 2018

Kirchgemeindehaus Neumünster, 8008 Zürich

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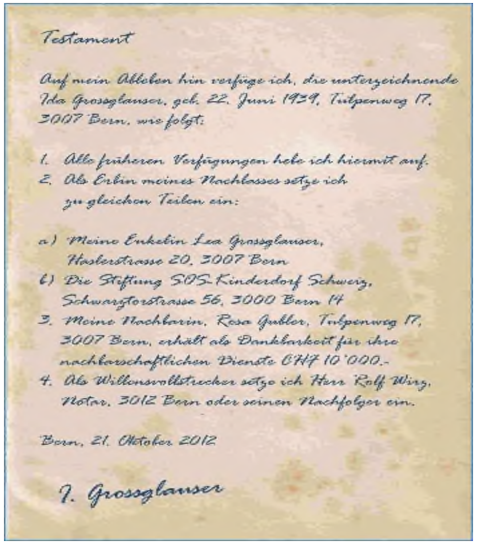
Overview

I. What is «Estate Planning»?

- «To dispose over your property upon death».
- Granting of rights and entitlements to persons in relation to your estate.
- Will and inheritance agreement as instruments to implement your «last wishes».



Testament

Auf mein Ableben hin verfüge ich, die unterzeichnende Ida Grossglauser, geb. 22. Juni 1939, Tulpenweg 17, 3007 Bern, wie folgt:

1. Alle früheren Verfügungen hebe ich hiermit auf.
2. Als Erbin meines Nachlasses setze ich zu gleichen Teilen ein:

a) Meine Enkelin Lea Grossglauser, Haslerstrasse 20, 3007 Bern
b) Die Stiftung SOS-Kinderdorf Schweiz, Schwarztorstrasse 56, 3000 Bern 14

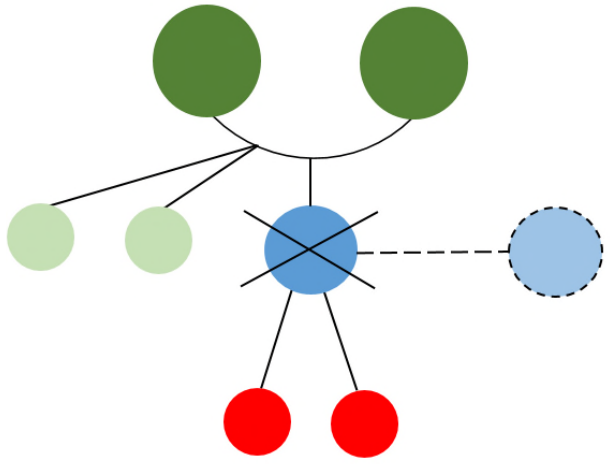
3. Meine Nachbarin, Rosa Gubler, Tulpenweg 17, 3007 Bern, erhält als Dankbarkeit für ihre nachbarschaftlichen Dienste CHF 10'000.-
4. Als Willensvollstrecker setze ich Herr Rolf Wirz, Notar, 3012 Bern oder seinen Nachfolger ein.

Bern, 21. Oktober 2012

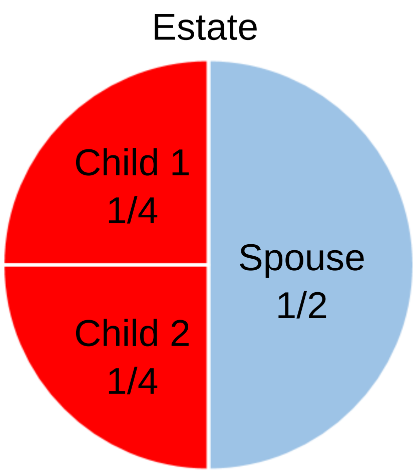
I. Grossglauser

II. What happens if you do <u>not</u> plan your estate?

- Last domicile in Switzerland: Swiss law applies on your estate (art. 90 para. 1 Swiss International Private Law, PIL).
  - Exception: Real estate abroad; foreign state applies its own law («lex rei sitae»).
- Estate passes over to statutory heirs according to Swiss law:
  - First line: Children («issue»)
  - Parental line: Parents
    - Siblings (if one parent or both are predeceased).
  - Additionally: Surviving spouse.

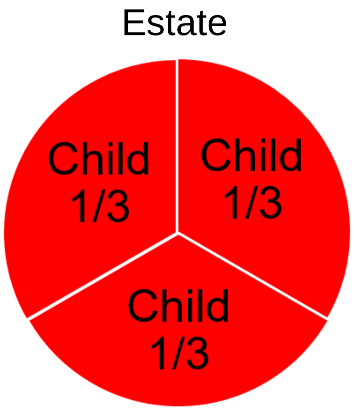


(II. What happens if you do not plan your estate?)



Statutory shares:

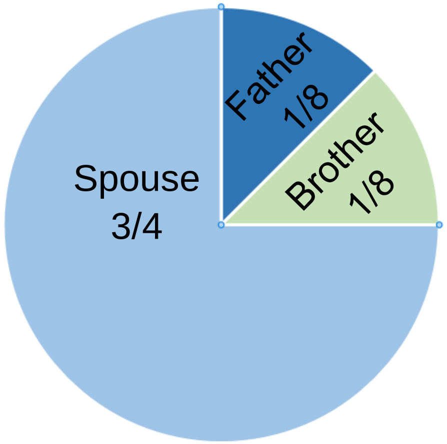
- Decedent leaves a spouse and two children:
  - Spouse: Marital property claims
    ½ of the estate
  - Children: ½ in equal shares (= ¼ each)



- Decedent leaves three children, no spouse, parents:
  - Each child: $^1/_3$

(II. What happens if you do not plan your estate?)

- Decedent leaves a spouse, father and a brother (mother predeceased):
  - Spouse: - marital property claims
    - ¾ of estate
  - Father: $^1/_8$
  - Brother: $^1/_8$



- No executor.
- No partition rules.

III. Reasons for planning your estate

- Maybe statutory distribution of estate is not what you want:
  - Wish to appoint other persons or charities as heirs or legatees.
  - Wish to favour one person over another.
- Wish to provide directions on the division of the estate.
- Wish to appoint an executor who takes care of the estate.
- Depending on content and how skilfully drafted, wills or inheritance agreements can help prevent the heirs from incurring unpleasant, long-term disputes.

IV. Planning your estate

1. What are your goals?

Maybe:

- Equal treatment of children.
- Exclusion of a (difficult) child / soon to be ex-spouse.
- Preferential treatment of:
  - a child (to the disadvantage of another child), or
  - the surviving spouse / partner.
- Making sure that son X. / daughter Y. gets the family business, etc.
- Making sure that unused inheritance of surviving spouse will pass, upon his or her death, to your children from a previous marriage.

(IV. Planning your estate)

2. Possibility to choose your foreign national law

- Choice of law for foreigners in favour of their foreign national law (art. 90 para. 2 Swiss PIL).
  - Not possible for Swiss double citizens.
  - Invalid, if decedent has become later a Swiss citizen.
- Examples:
  - Swiss-French citizen wants to subject his estate to his French national law: Not possible.
  - Norwegian-French citizen wants to subject his estate to his Norwegian national law: Possible.

(IV. Planning your estate)

- Swiss International Private Law is currently revised:
  - Also Swiss double or Swiss multiple citizen shall have the option to declare their foreign national law as applicable law.
  - Corresponding with the rules in most other European countries (European Succession Regulation).
  - To enter into force in approx. 4-5 years.

(IV. Planning your estate)

3. When does the choice of a foreign national law make sense?

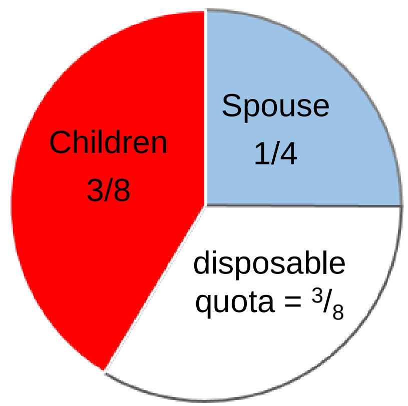
- Some foreign national laws are less strict than Swiss law:
  - In many countries: No forced heirship rules for surviving spouses or children (United Kingdom, some US common law States, South Africa, the Netherlands, France [only children], etc.).
  - Whereas under Swiss succession law:
    - Compulsory shares for children, surving spouses and even for parents (if no children).
    - Swiss forced heirship rules: Restricted freedom of testation.
    - Depending on family situation, testator may have a small disposable quota.

(IV. Planning your estate)

a) Swiss forced heirship rules (compulsory shares)

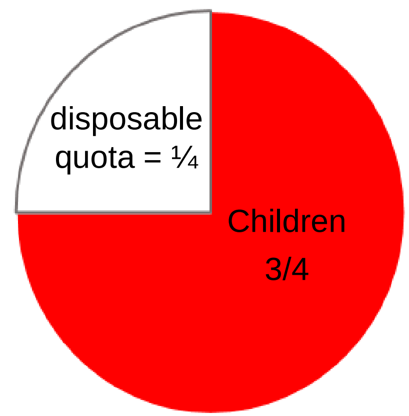
- Decedent leaves spouse and two children:
    - spouse: ¼
    - children: $^3/_8$ ($^3/_{16}$ each)

Estate



- Decedent leaves three children, no spouse, parents
    - children: ¾ (¼ each)
    - parents: none.

Estate



- Current revision of Swiss succession law:
    - Abolition of parents’ compulsory share.
    - Reduction of children’s compulsory share.

(IV. Planning your estate)

- Choice of foreign national law is recommended if:
  - Swiss succession law (in particular forced heirship rules) is too strict to satisfy your estate planning goals; and
  - your foreign national law provides better opportunities.

- Swiss succession law:
  - established, fair and flexible;
  - but rather conservative with regard to compulsory shares;
  - will fit most of you.

- Recommendation, if testator wants to choose his foreign national law:
  - Consult with a succession lawyer from that jurisdiction.

(IV. Planning your estate)

<u>b) Examples:</u>

- US citizen domiciled in Zurich is living separated from his wife, two children; divorce proceedings are pending.
  - Goal: Wife shall not inherit, in case husband should unexpectedly die before divorce has become effective.
  - Choice of husband’s national law (Californian state law): No compulsory share for spouses.
  - Appointment of his children as his sole heirs -> Not contestable.

- Citizen from the UK, domiciled in Zürich:
  - Wants to devise his entire estate to his second wife and exclude his children from a previous marriage.
  - Establishment of a will under his UK national law.
  - Appointment of his wife as his sole heir.
  - Will is not contestable: No compulsory shares for children under UK law.

(IV. Planning your estate)

4. <u>What can you arrange for in a Swiss will or inheritance agreement?</u>

- Appointment of heirs (including quotas):

  «I herewith appoint my dear wife Elena and my two daughters as my sole heirs in equal shares».

- Bequeathing of legacies to other persons (legatees):

  «I herewith bequest an amount of CHF 50’000 to Spitex Meilen.»

- Providing partition rules and fixing the values:

  «My daughter Claudia shall get the appartment in Flims at its tax value at the time of my demise».

- Attachment of burdens and conditions:

  «My three grandchildren shall receive a bequest of CHF 25’000 each if and when they successfully accomplish apprenticeship or gymnasium.»

(IV. Planning your estate / 4. What can you arrange for in a Swiss will)

- Appointment of a provisional heir and remainderman («Vor- und Nacherbeneinsetzung»):

  «I herewith appoint my wife Claire as my sole heir and designate my nephews, Alex and Tim, as remaindermen with respect to the residue.»

- Rules regarding equalization or non-equalization of lifetime donations:

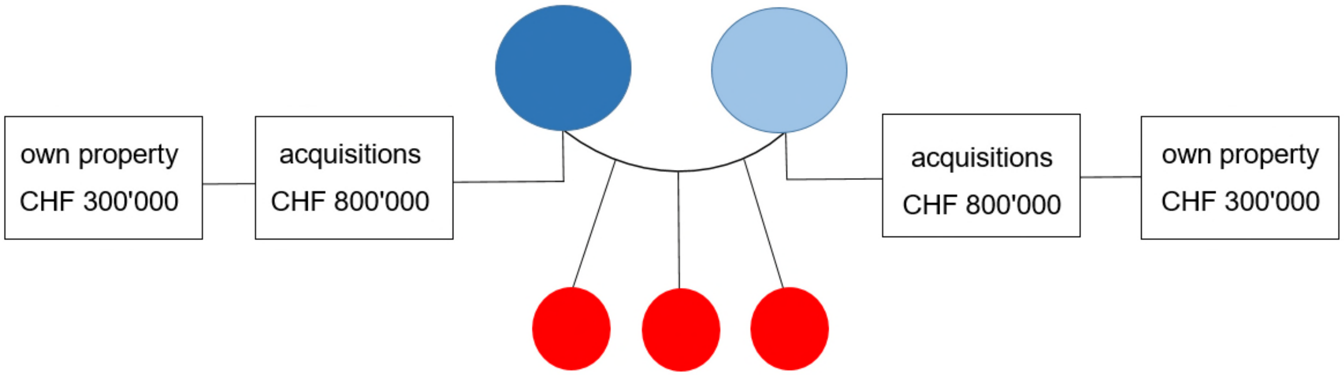
  «My daugther Claudia is not obliged to equalize the amount of CHF 400’000 I gave her in 2012 when she purchased a house.»

- Appointment of an executor.

V. Case Studies

1. Estate Planning in favour of surviving spouse (common children)

- Facts: Husband and wife, three adult children, long marriage (30 years), joint acquisitions made by spouses of CHF 1’600’000, each spouse has own property.



- Swiss law allows advantaging a surviving spouse to a great extent and to the disadvantage of common children.

(V. **Case Studies /** Estate Planning in favour of surviving spouse)

- Instruments:
  - Conclusion of a matrimonial property agreement:
    - Marital property regime of participation in acquisitions.
    - Transfer of both acquisitions to surviving spouse upon death of first spouse (art. 216 para. 2 Swiss CC).
  - Conclusion of an inheritance agreement:
    - Surviving spouse receives usufruct of entire estate.
    - Children are heirs with respect to the entire estate («bare owners»).

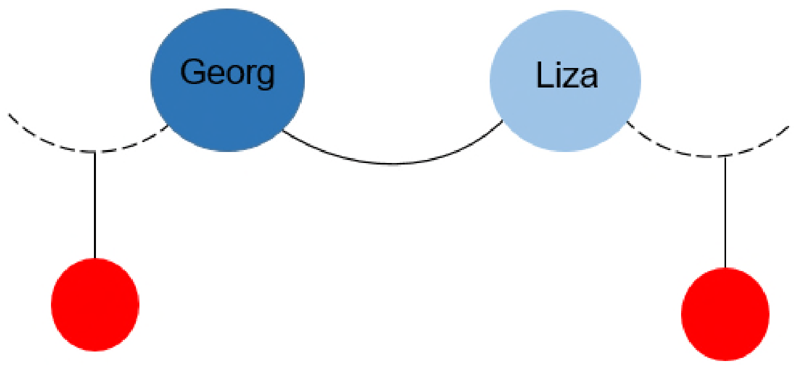
  -> Should surviving spouse remarry: Usufruct will be lifted on compulsory share of children.

2. Estate planning in patchwork situations

See hand-out at the door when leaving.

3. Estate planning for unmarried couples

- Facts: Georg and Liza (both in their fifties); unmarried, each has a child from a previous relationship.



- Goal: Surviving partner shall be considered adequately.
- Legal situation: Surviving partner has, under Swiss Law, neither a marital property claim nor any statutory inheritance entitlements.

(**V. Case studies** / 3. Estate planning for unmarried couples)

- Recommendation:
  - Establishment of two wills or conclusion of inheritance agreement.
  - If choice of foreign, more liberal national law possible: Choice of foreign national law, appointment of partner and child as sole heirs in equal shares.
  - If choice of more liberal foreign national law not possible: Swiss law applies:
    - Assignement of disposable quota to surviving partner ($^1/_4$).
    - Child receives his or her compulsory share ($^3/_4$).
  - Possibility: Donations to partner during lifetime (no impact on compulsory share of child, if made early enough).
  - Beneficiary declarations regarding occupational pension fund and pillar 3a retirement savings account in favour of surviving partner.

(**V. Case studies** / 3. Estate planning for unmarried couples)

- <u>Warning:</u>
  - High inheritance & gift tax on donations and inheritances to unmarried partners in the Canton of Zürich (tax rate up to 36%).
    - Canton St. Gallen: tax rate of 30%.
  - Canton of Zug, Schwyz and Graubünden:
    - Tax-exemption also for partners.
    - Canton Aargau: tax rate of 4%-9%.

VI. Instruments

- Will
  - Unilateral / not binding / unilaterally revocable at any time.
  - Form:
    - Holographic will (handwritten, signed, dated); or
    - Public deed (before a notary, two witnesses).

- Inheritance agreement:
  - To be concluded between two or more parties.
  - Binding effect:
    - Can be revoked only with consent of all parties.
  - Typically: Between spouses / between parents and children.
  - Form: Public deed, to be signed before a notary, two witnesses.
  - Inheritance waiver agreement.

(VI. Instruments)

- Where to keep your will or inheritance agreement?
  - Where it can be found:
    - in a safe (at home, no bank safes);
    - with a trusted person;
    - with the notary (at the place of your domicile).
- Can I write my will in English?
  - Handwritten will: Any language
    - Estate authority will order a translation after will has been handed in.
  - Public deed:
    - Any language, notaries additionally require a German translation.

VII. Summary

1. Do’s when planning your estate

- Make sure you know your goals when planning your estate.
- Make sure you know your options when planning your estate (or go and see a counselor).
- If you want to subject your estate to your foreign national law: Consult (also) with a succession lawyer from that jurisdiction.
- Conclude a marital property agreement if you want to favour your spouse.
- Foresee partition rules if you want to make sure that an heir receives a specific asset.
- Provide clear instructions as to whether donations to heirs shall be equalized or not.

- Appoint an executor if you deem this as helpful.
- Make sure you establish your will / inheritance agreement in the right form.
- Make sure you keep your will/inheritance agreement in a place where it can be found.
- If you want to favour your partner: Sign a beneficiary declaration in relation to your pension fund and pillar 3a retirement savings account.
- Check your will regularly and update it when needed.

2. Don’ts when planning your estate

- Don’t violate forced heirship rights.
- Explain the reasons why you favour one person over the other (in particular among children).

Thank you for your attention.

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