Austria

International Estate Planning Guide

Private Client Tax Committee

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I. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

A will must meet certain requirements which are set out in the Austrian General Civil Code (Allgemeines bürgerliches Gesetzbuch). If it does not meet these requirements (or if no will has been made), then the intestacy rules apply. Austrian law distinguishes between several types of wills:

Holographic wills (*eigenhändige Testamente*) must be handwritten and signed by the testator. This is the most uncomplicated type of will.

Non-holographic wills (*fremdhändige Testamente*) are normally written or typed by a third person and must be signed by the testator and three witnesses. The testator must, by his own hand, confirm that this is his/her will. The three witnesses must be present at the same time, their identity must be mentioned in the will and they, by their own hand, must confirm that the testator declared that the signed document represents his/her will and that they are acting as witnesses (*Zeugenzusatz*). Close relatives (eg, spouses, children, parents and siblings), cohabitees, heirs mentioned in the will and minors are prohibited by law from acting as witnesses.

Apart from these two types of private wills, there exist also public forms of wills. These are drawn up in court or before a notary public.

A will can optionally be registered in the Central Register of Wills of the Austrian Chamber of Notataries (Zentrales Testamentsregister der österreichischen Notariatskammer) or in the Register of Wills of Austrian Lawyers (Testamentsregister der österreichischen Rechtsanwälte) to ensure that it will be found at the time of death; such registration is, however, not a requirement for validity.

Pursuant to art. 27 of the EU Succession Regulation, a foreign will is valid as regards form if its form complies with the law: 1. of the state in which the disposition was made; 2. of a state whose nationality the testator possessed either at the time when the disposition was made or at the time of death; 3. of a state in which the testator had his/her domicile either at the time when the disposition was made or at the time of death; 4. of the state in which the testator had his/her habitual residence either at the time when the disposition was made or at the time of death; or 5. insofar as immovable property is concerned, of the state in which that property is located. These rules essentially implement the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

B. Will Substitutes (Revocable Trusts or Entities)

Austrian law does not provide for trusts. Instead, so-called private foundations (*Privatstiftungen*) exist, which serve similar purposes, but have an entirely different legal structure. Private foundations are sometimes used as will substitutes; they are explained in more detail below. The use of other legal entities is not at all common.

C. Powers of Attorney, Directives, and Similar Disability Documents

If a person loses legal capacity, the competent court must appoint a custodian, who has the legal authority (and the corresponding duty) to take care of such person's interests. The custodian is subject to supervision by the court.

In order to prevent the appointment by the court of any third person as a custodian, Austrian law offers the possibility to grant a special power of attorney (*Vorsorgevollmacht*) whereby a person can decide for himself by whom he wants to be represented in case of loss of legal capacity. This special power of attorney only becomes effective on the person's loss of capacity. It must be signed in front of a notary public or an attorney-at-law and must be registered in a central register.

II. **Estate Administration**

A. Overview of Administration Procedures

The probate proceedings are initiated *ex officio* by the competent court as soon as the death of an individual becomes known, provided that Austria has jurisdiction to conduct the probate proceedings. The competent court is the court in whose district the deceased had his/her habitual residency. If such place cannot be established in Austria, the competent court is the court in whose district the major part of the deceased's inherited property is located, otherwise the district court competent for the Inner City of Vienna.

After a person dies, the estate does not pass directly to his/her heirs; rather, the assets as well as the liabilities of the deceased transfer by law to the estate (*Verlassenschaft*), this being a legal entity. Only upon formal resolution of the probate court (Einantwortungsbeschluss), will the assets then transfer to the heirs.

During the probate proceedings, a notary public is appointed as a representative of the court (Gerichtskommissär). The notary public must invite the heirs to make declarations of acceptance of the inheritance. An heir can make: 1. an unconditional declaration of inheritance, in which case the heir assumes all assets and liabilities of the deceased (even if the value of the debts exceeds the value of the assets); or 2. a conditional declaration of inheritance (in which case an inventory is drawn up and the heir becomes liable for the deceased's debts only up to the value of assets he/she has received).

During probate, the heirs named in the will are entitled to a joint administration of the estate. This means that the heirs must normally decide unanimously on a proposed course of action. For extraordinary transactions, the heirs additionally need the consent of the probate court. The deceased may also appoint an executor (*Testamentsvollstrecker*) to supervise the carrying out of the will's provisions, but this is of little practical relevance, since the heirs are not bound by such appointment and may consequently dismiss the executor at any time. The only possibility for a testator to force his/her heirs to accept an executor would be to specify in the will that they will lose all rights to the inheritance if they do not accept the appointed executor.

B. Intestate Succession and Forced Heirship

If an individual dies: 1. without having set up a valid will; 2. having set up a will which only disposes over part of the estate; or 3. having set up a will but the designated heirs do not, or cannot,

accept the inheritance, then the intestacy rules of the Austrian General Civil Code apply. Pursuant to these provisions, the closest relatives of the deceased are to inherit the estate. A system of succession *per stirpes* applies. Four such groups of heirs exist, and they are applied in the following order: first, the descendants of the deceased (children, grandchildren etc); second, the parents of the deceased and their descendants (siblings, nephew, nieces etc); third, the grandparents of the deceased and their descendants (uncles, aunts, cousins etc); and fourth, the great-grandparents, but without their descendants.

The spouse (or registered partner) of the deceased receives: 1. beside members of the first group: one third of the estate; 2. beside the parents of the deceased: two thirds of the estate; 3. beside one parent of the deceased: five sixths of the estate; and 4. in all other cases: the whole estate. In addition, the spouse (or registered partner) receives the right to live in the marital home and to take possession of the moveable property within it.

Cohabitees do not have the same legal status as spouses (or registered partners). For example, they have no statutory right of intestate succession; however, if a deceased person has not set up a will and there is no heir under intestate succession law, then a cohabitee of the deceased may exceptionally inherit. Also, a cohabitee may for one year after the death of the deceased use the marital home and the moveable property contained therein.

Under the Austrian forced heirship regime, the testator must leave his/her spouse (or registered partner) and his/her descendants a certain part of the estate, namely one half of the amount that they would have received under the intestacy rules. If the testator does not provide for these persons in his/her will, they can demand the respective payment in cash from the heirs. For example, if a husband dies leaving a wife and three children, under the intestacy rules the widow would receive one third of the estate and each of the three children would receive one third of the remaining two thirds (that is, two ninths each) of the estate. Should the deceased have drawn up a will leaving his entire estate to a third person, then the widow would receive one half of one third (that is, one sixth) and each child would receive one half of two ninths (that is, one ninth) of the value of the estate from such heir.

The forced heirship rules are mandatory and certain rules exist limiting the possibility of reducing the forced heirship portion through gifts during lifetime: The value of all gifts made by the deceased in the two years before his/her death needs to be taken into account for the purposes of calculating the forced heirship portion. If a gift was made to an individual who is also entitled to a forced heirship portion, the value of such gift is to be included even without any time limit applying. If the assets of the net estate are not sufficient to cover the forced heirship portion, the recipients of gifts must pay compensation (in equal parts) or return gifts received.

C. Marital Property

The statutory matrimonial property regime in Austria is the separation of property: spouses remain the sole owners of those assets that they bring into the marriage and that they acquire during the marriage. A married couple is, however, free to agree on any other matrimonial property regime, such as: 1. community of property during lifetime (the spouses acquire co-ownership in the community property); 2. community of property on death only (property remains separated until the death of one spouse); and 3. community of surplus (property remains separated but gains on property are shared between the spouses equally). Any such matrimonial property agreement must be notarised.

D. Tenancies, Survivorship Accounts and Payable-on-Death Accounts

Upon a person's death, due to universal succession (*Gesamtrechtsnachfolge*), all assets, liabilities, rights, and obligations of the deceased pass on to the heirs. Thus, also tenancies pass on to the heirs. Special rules apply to tenancies subject to the Austrian Tenancy Act (Mietrechtgesetz): provided they do not object within two weeks following the lessee's death, a spouse, a cohabitee, and children of the lessee automatically enter the agreement as the new lessees (thereby excluding any heirs), if they have already used the home together with the deceased and provided further that they urgently need such accommodation.

Banks typically freeze bank accounts as soon as they become aware of the death of the accountholder. This does not apply to so-called 'and/or' accounts, which have been established for more than one person.

III. Trusts, Foundations, and Other Planning Structures

A. Legal Concept

As already mentioned above, Austria does not know the concept of a common-law trust. Rather, private foundations are used. A private foundation is a body corporate, similar to a limited liability company, but it does not have any shareholders or members. It is set up by one or more founders through a deed of foundation, and is endowed by the founder with assets, which are managed by a board of directors consisting of three individuals. The deed of foundation defines the purpose of the foundation, which may be charitable or non-charitable. In practice, most private foundations are non-charitable and are used as private wealth vehicles for holding liquid assets, real estate, or the shares in a family business; in such case, the beneficiaries of the private foundation are typically the founder and/or family members of the founder. The private foundation has full legal ownership over its assets; the beneficiaries of a legal foundation have no ownership or other *in rem* rights over these assets. The Austrian private foundations can be established *inter vivos* or upon the founder's death.

B. Fiduciary Duties

As a rule, the board of directors represents the private foundation. However, in legal transactions between the private foundation and a member of the board of directors, the private foundation is represented by the supervisory board, if any; should there exist no supervisory board, both the court and the other members of the board of directors must approve such transaction. The board of directors must perform its duties in an economical manner, in accordance with the deed of foundation and in line with the purpose of the private foundation. The members of the board of directors are liable for fault vis-à-vis the private foundation, including cases of slight negligence.

C. Establishment and Incorporation

The founders of a private foundation can be individuals or legal entities. They must sign a deed of foundation in the form of a notarial deed and this must contain: 1. the assets to be endowed to the private foundation (at least EUR 70,000); 2. the purpose of the private foundation; 3. the body which determines the beneficiaries (eg, the board of directors); 4. the name of the private foundation (which must contain the wording '*Privatstiftung*'); 5. the legal seat of the private foundation

(which must be in Austria); 6. the names, postal addresses and dates of birth (in case of individuals) or registration numbers (in case of legal entities) of the founders; and 7. the term of the private foundation (which may be limited or unlimited). Certain rights of the founder must be contained in the deed of foundation in order to be valid, such as the right to amend the deed of foundation, the right to revoke the private foundation as well as the admissibility of setting up a supplementary deed of foundation.

In practice, the founder of a private foundation will always reserve the right to set up a supplementary deed of foundation. Since the latter does not need to be disclosed to the commercial register, details of a more private nature are usually contained therein. Typically, it will contain: 1. detailed provisions regarding the determination of the beneficiaries and the distributions to them; and 2. further endowments to be made by the founder to the private foundation exceeding the minimum endowment of EUR 70,000. The supplementary deed also has to be set up in the form of a notarial deed.

As mentioned above, assets in a value amounting at least to EUR 70,000 must be endowed by the founder to the private foundation. In cases where there are several founders, it is not necessary that every founder contributes the same amount. Often, when a private foundation is set up, minors contribute a nominal amount (eg, EUR 1,000), in order for them to acquire the status as a founder, which enables them to exercise the rights associated therewith. In practice, it does not make sense to set up a private foundation with assets of less than EUR 5m. Assets endowed may consist in cash or in kind. In the latter case, an audit will be necessary to determine the value. After the establishment of a private foundation, subsequent endowments by the founder are still possible. Also, it is possible for non-founders to make endowments; however, this does not therefore result in these persons becoming founders.

Once the deed of foundation and the supplementary deed of foundation, if any, have been signed, the first board of directors must apply for registration of the private foundation in the commercial register.

D. Dissolution

A private foundation is dissolved in the following cases: 1. expiry of the term of the private foundation pursuant to the declaration of foundation; 2. initiation of insolvency proceedings; 3. a dissolution order of the court; and 4. unanimous resolution on the dissolution of the private foundation by the board of directors. The board of directors unanimously has to resolve on the dissolution of the private foundation in event of the following: 1. the founder has validly revoked the private foundation; 2. the purpose of the foundation has been achieved (or is no longer achievable); 3. a non-charitable private foundation the main purpose of which is the financial support of individuals has been in existence for 100 years (after expiry of the first 100-year term, all ultimate beneficiaries can unanimously resolve on the continuation of the private foundation for another specified term, at most 100 years); and 4. other reasons for dissolution as mentioned in the declaration of foundation have occurred.

All assets of the dissolved private foundation remaining after the settlement of creditors' claims must be transferred to the last beneficiary. After the private foundation has been deregistered from the commercial register, its books and records must be securely stored in a place determined by the court for a period of seven years.

E. Treatment of Foreign Trusts and Foundations

Granting the status as a beneficiary in a foreign trust or foundation may discharge a forced heirship obligation.