
Austria

International Estate Planning Guide

Private Client Tax Committee

Contact:

Niklas Schmidt
Wolf Theiss, Vienna
niklas.schmidt@wolftheiss.com

Stefan Pacher
Wolf Theiss, Vienna
stefan.pacher@wolftheiss.com

Updated 12/2023

I. Wills and disability planning documents

A. Will formalities and enforceability of foreign wills

A will must meet certain requirements that 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 without the necessity of witnesses. This is the most uncomplicated type of will. Although it is not necessary to add the place and date of establishment to the will, it is advisable to do so.

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/her own hand, confirm that this is his/her will. The three witnesses have to 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 (*nuncupatio*) and that they are acting as witnesses (*Zeugenzusatz*). Close relatives (eg, spouses, children, parents and siblings), cohabitants, 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 Notaries (*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. Moreover, the Central Register of Wills can be used to access other European registers of wills as well.

Pursuant to Article 27 of the European Union 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 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 a 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 him/herself who he/she wants to be represented by in the case of loss of legal capacity. The special power of attorney must specify the affairs for which the special power of attorney is granted, for example, representation before public authorities. General authorisations are inadmissible. The special power of attorney only becomes effective on the person's loss of capacity. It must be signed in person before a notary public, an attorney-at-law or an adult protection agency (*Erwachsenenschutzverein*) and must be registered in a central register. The special power of attorney can be revoked at any time, that is, even after the loss of decision-making capacity.

II. **Estate administration**

A. *Overview of administration procedures*

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 a 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 has to 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 the 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 because the heirs are not bound by such an appointment and may consequently dismiss the executor at any time. It is only possible for a testator to force his/her heirs to accept an executor by specifying in the will that the heirs 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 that 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) – also adopted descendants; 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 of the deceased, but without their descendants.

The spouse (or registered partner) of the deceased receives: (1) in addition to members of the first group, one-third of the estate; (2) in addition to the parents of the deceased, two-thirds of the estate; (3) in addition to 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. Additionally, a cohabitee may, for one year after the death of the deceased, use the marital home and the moveable property contained therein (*Vorausvermächtnis*).

Under the Austrian forced heirship regime, the testator has to 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 (ie, 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 (ie, one-sixth) and each child would receive one-half of two-ninths (ie, one-ninth) of the value of the estate from such an heir.

The forced heirship rules are mandatory and certain rules exist limiting the possibility to reduce the forced heirship portion through gifts during a person's 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 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 a gift is to be included 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 the gifts received. Additionally, when transferring assets to private foundations, it should be noted that if the founder had revocation rights or comprehensive amendment rights up to two years prior to his/her death, these assets will be added to the estate and thus increase the value for persons who are entitled to a compulsory portion (*Vermögensopfertheorie*).

C. *Marital property*

The statutory matrimonial property regime in Austria is the separation of property: spouses stay the sole owners of 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 a spouse's 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*

On 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, cohabitee and children of the lessee automatically enter the agreement as the new lessees (thereby excluding any heirs), provided that 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 account holder. This does not apply to so-called 'and/or' accounts, which were established for more than one person.

III. **Trusts, foundations and other planning structures**

A. *Legal concept*

As already mentioned above, Austria does not have 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 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 a case, the beneficiaries of the private foundation are typically the founder and/or family members of the founder. A 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. 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 no supervisory board exist, both the court and the other members of the board of directors have to approve such a transaction. The board of directors has to 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 have to sign a deed of foundation in the form of a notarial deed. This has to contain: (1) the assets to be endowed to the private foundation (at least €70,000); (2) the purpose of the private foundation; (3) the body that 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 the case of individuals) or registration numbers (in the 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 have to be contained in the deed of foundation in order to be valid, such as the right to amend the deed of foundation and 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. Because the latter does not need to be disclosed to the commercial register, details of a more private nature are usually contained therein. Typically, it contains: (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 €70,000. The supplementary deed also has to be set up in the form of a notarial deed.

As mentioned above, assets with a value amounting to at least €70,000 must be endowed by the founder to the private foundation. In the case in which 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, €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 €5m. Assets endowed may consist of cash or be 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. Additionally, it is possible for non-founders to make endowments; however, this does not 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 the 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 the foundation; (2) initiation of insolvency proceedings; (3) 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 has to unanimously resolve on the dissolution of the private foundation in the following cases: (1) the founder has validly revoked the private foundation; (2) the purpose of the foundation has been achieved (or is not achievable any more); (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 the 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 have to be transferred to the last beneficiary. After the private foundation has been deregistered from the commercial register, its books and records have to be securely stored in a place determined by the court for a period of seven years.

E. *Treatment of foreign trusts and foundations*

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

IV. **Tax issues**

A. *Inheritance and gift tax*

Austria currently does not levy inheritance and gift tax. Such taxes were repealed by the Austrian Constitutional Court (Verfassungsgerichtshof) as of 1 August 2008 due to inconsistent tax bases for various assets. There have been ongoing political discussions regarding the reintroduction of these taxes, but these have led nowhere.

B. *Real estate transfer tax*

Gratuitous transfers of Austrian real estate, whether through inheritance or through a gift, trigger real estate transfer tax (*Grunderwerbsteuer*). The tax basis of real estate transfer tax is the so-called property value (*Grundstückswert*). The property value can be calculated using one of two methods:

- lump-sum value method (*Pauschalwert-Modell*): The property value is calculated as the sum of the land value (*Grundwert*; this is based on historical assessments) and the building value (*Gebäudewert*; this is based on the number of square metres times a construction cost coefficient); or
- real estate price index method (*Immobilienpreisspiegel-Modell*): The property value is calculated based on the real estate price index as annually published by *Statistik Austria*, using a discount of 28.75 per cent.

The taxpayer can freely choose the method, and this also per economic unit.

Alternatively, instead of using the property value, if proof is given that the fair market value of the real estate is lower than the property value, then the lower fair market value may be used.

The following rate rates apply:

Property value	Tax rate (%)
€0 up to and including €250,000	0.5
From €250,000 up to and including €400,000	2
Over €400,000	3.5

Real estate transfer tax is triggered not only on the direct transfer of Austrian real estate but also in the case of certain indirect transfers, namely if: (1) at least 95 per cent of the shares/interest in a company/partnership holding Austrian real estate are transferred to one acquirer or unified in the hands of one acquirer; or (2) at least 95 per cent of the interest in a partnership is transferred to new partners within a time period of five years. In such cases, the tax basis is the property value, with the tax rate being a flat 0.5 per cent.

In the case that real estate is transferred to (Austrian or foreign) private law foundations and comparable legal estates, such as trusts, the tax rate is increased by 2.5 per cent of the property value (*Stiftungseingangssteueräquivalent*).

C. Land register fees

The registration of ownership of real estate in the Austrian land register (*Grundbuch*) triggers a 1.1 per cent land register fee (*Eintragungsgebühr*). Generally, the basis of this fee is the purchase price that would be attained in the case of the disposal in the normal course of business. All circumstances that influence the price are to be taken into account. Unusual or personal circumstances are, however, not to be taken into account. The applicant before the land register has to mention the fee basis in the application.

Notwithstanding the aforementioned, a preferential fee basis applies to real estate transfers to the following parties:

- spouses or registered partners during an existing marriage or registered partnership;
- cohabitants, provided that they have or had a common primary residence (*Hauptwohnsitz*);
- relatives or in-laws in the direct line;
- stepchildren, adopted children, foster children or their children, spouses or registered partners; or
- siblings, nieces or nephews of the transferor.

In all these cases, the basis of the land register fee is equal to three times the tax value (*Einheitswert*), capped at a maximum of 30 per cent of the purchase price that would be attained in the case of the disposal in the normal course of business. The tax value is in no relation to the fair market value because it is, in general, artificially low (in most cases, somewhere between 0.1 per cent and ten per cent of the fair market value).

D. Foundation transfer tax

Gratuitous transfers of assets (*inter vivos* and *mortis causa*) to (Austrian or foreign) private law foundations and comparable legal estates, such as trusts, are subject to a foundation transfer tax. Not only are transfers in the course of the establishment of such an entity covered but also any later transfers, both by the founder/settler or a third person. In this context, the civil law point of view is not decisive, but rather the attribution of assets for tax purposes. Therefore, the scope of application is limited to transfers to non-transparent entities. Transfers to tax transparent entities, on the other hand, do not lead to a change in the attribution of the assets so that no foundation transfer tax is triggered.

Foundation transfer tax is only triggered if there is a certain territorial nexus to Austria. This is the case if the transferor and/or transferee, at the point in time of the transfer, have a domicile

(*Wohnsitz*), their habitual abode (*gewöhnlicher Aufenthalt*), their legal seat (*Sitz*) and/or their place of management (*Ort der Geschäftsleitung*) in Austria. Thus, no tax falls due in the case that neither the transferor nor transferee has a nexus to Austria. The four terms just mentioned are defined as follows:

- a domicile is maintained where the taxpayer has a dwelling place under circumstances that permit the conclusion that the taxpayer intends to keep and use it. A special regime applies to secondary residences. In the case that taxpayers whose centre of vital interests is outside of Austria for more than five calendar years, an Austrian dwelling place qualifies as a domicile only in the years in which the dwelling place is used (alone or together with other Austrian dwelling places) for more than 70 calendar days;
- a habitual abode is maintained where a taxpayer stays under circumstances that permit the conclusion that the taxpayer intends to dwell there not only temporarily. Staying in Austria for more than six months irrefutably leads to a habitual abode retroactively for the first six months;
- the legal seat is the place designated as such in the constitutional documents (eg, articles of association, memorandum and trust deed) of an entity or in the applicable statute. If no legal seat is defined, then the place of effective management (see immediately below) is deemed to be the legal seat; and
- the place of effective management is the place where the management decisions of an entity are passed.

The tax basis under the Foundation Transfer Tax Act is the fair market value of the assets transferred minus any debts (eg, mortgages or consideration), calculated at the time of transfer.

The tax rate generally is 2.5 per cent. A higher rate of 25 per cent applies if one (or more) of the following alternatives is fulfilled:

- the private law foundation or comparable legal estate is not comparable to an Austrian private foundation (*Privatstiftung*; note that trusts are not seen as comparable to an Austrian private foundation);
- the documents, as amended, concerning the internal organisation, the administration of assets and the usage of assets have not (entirely) been disclosed to the competent Austrian tax office, at the latest, at the point in time when Austrian foundation transfer tax falls due;
- there exists no comprehensive treaty concerning administrative assistance and the enforcement of foreign judgments between Austria and the state of residence of the private law foundation or comparable legal estate;
- there exists no obligation to disclose the identities of beneficiaries to the tax authorities in the state of residence of the private law foundation or comparable legal estate; or
- there exists no register in the state of residence of the private law foundation or comparable legal estate in which it is registered.

Deviating from this, in the case of transfers of assets (by persons having a territorial nexus to Austria) to Liechtenstein foundations, rates between five per cent and ten per cent apply.

The law provides for certain exemptions, in particular for:

- transfers *mortis causa* of certain financial assets, for example, bank deposits and publicly placed bonds; and
- transfers of real estate (regarding real estate transfer tax, see above).

The tax liability occurs at the point in time of the transfer. The debtor of the foundation transfer tax is, in general, the transferee; notwithstanding, in the case of transfers *inter vivos* where the transferee has neither its legal seat nor place of management in Austria, the transferor is liable to tax. In both cases, the respective other party can be held secondarily liable for the non-payment of foundation transfer tax. The debtor of foundation transfer tax has to file a tax return (in principle, electronically), has to self-assess the tax and has to pay it until the 15th day of the second month following the triggering of foundation transfer tax.

E. *Gift notification obligation*

There is a special notification obligation for gifts of money, receivables, shares in corporations, participations in partnerships, businesses, movable tangible assets and intangibles. The notification obligation only applies if the decedent (donor) and/or the heir (donee) have a domicile, their habitual abode, their legal seat and/or their place of effective management in Austria. Both the decedent (donor) and the heir (donee) are obliged to electronically effect the gift notification within three months from the donation. The intentional violation of the notification obligation may trigger fines of up to ten per cent of the fair market value of the gifts. Impunity is only attainable in the case in which voluntary self-disclosure is filed, at the latest, within one year after the gift notification period has expired.

Not all gifts are covered by the notification obligation: In the case of gifts to related parties, a threshold of €50,000 per year applies; in all other cases, notification is obligatory if the value of the gifts exceeds €15,000 during a period of five years. Related parties are:

- spouses (even after the marriage has ended);
- relatives in the direct line and relatives in the second, third and fourth degree in the collateral line;
- in-laws in the direct line and in-laws in the second degree in the collateral line (this applies *mutatis mutandis* to registered partners);
- foster parents and foster children;
- cohabitants, as well as children and grandchildren of one of these persons in relation to the other person; and
- registered partners (even after the registered partnership has ended).

Another exemption from the notification obligation applies to gratuitous transfers subject to foundation transfer tax (see above).

F. *Double taxation treaties*

Although there is currently no inheritance and gift tax in Austria, double taxation treaties covering inheritance, and partly also gift tax, are in force with nine countries and may be used to reduce taxation. Treaties with the Czech Republic, France, the Netherlands and the United States cover both inheritance and gift tax, while treaties with Hungary, Liechtenstein, Poland, Sweden and Switzerland cover only inheritance tax. For the substantive scope of double taxation treaties, it should be noted that not only does inheritance and gift tax (which has in the meantime been repealed) fall within the substantive scope but also any identical or substantially similar taxes imposed by Austria after the date of signature, in addition to, or in place of, such previously existing tax. The Austrian Ministry of Finance (Bundesministerium für Finanzen) has published several public letter rulings

regarding specific issues related to double taxation treaties concerning inheritance and gift tax. In these, it has repeatedly been stated that the (current) foundation transfer tax and (previous) inheritance tax are to be seen as substantially similar taxes so that a double taxation treaty may apply.