

Estate Planning in Families

Report on a research project in comparative law
Familiäre Vermögensplanung
Majetkové plánování v rámci rodiny

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Overview

- I. Estate planning – what it is and why we do it
- II. How it all started
- III. How we worked
- IV. Results (examples)

I. Estate planning – what it is and why we do it

Estate planning as a starting point:

- strategies for the management of the assets (wealth) of an individual
- estate planning in families put a special focus on
 - marriage (entering into long-term partnership)
 - divorce (end of a partnership)
 - incapacity (loss of mental abilities, especially in the old age)
 - death
- legal system provides for solutions for most of these situations

I. Estate planning – what it is and why we do it

Estate planning deals with the question:

- how can the short-term and long-term management of assets be organised by private autonomy of the persons involved, especially by
 - contracts (such as pre-nuptial contracts)
 - power of attorney (health care proxy)
 - wills (in the case of death)
 - foundations or equivalents for the long-terms management of assets
 - articles of association, statutes of a company (corporation)

I. Estate planning – what it is and why we do it

Purposes of estate planning

- management of assets, asset protection
- providing for maintenance of family members
- intergenerational transfer of wealth (passing on the estate to the next and future generations)
- safeguarding the existence of a company (family business)
 - generation change in a family business may create severe risks!
 - Successor is not really fit to run a company
 - Division of shares may weaken influence of shareholders
 - conflicts between family member may affect the company

I. Estate planning – what it is and why we do it

Stakeholders (interests involved)

- owner of assets: interested in most extensive autonomy to organise the assets
 - both for his lifetime and for the time after his death
- family members: interested in participating in the financial situation and the standard of living of the owner of the assets
 - maintenance
 - participation in the assets in the case of divorce
 - participation in the assets in the case of death

I. Estate planning – what it is and why we do it

– (other) shareholders of a company

- control over succession in the shares (incompetent successors, competitors etc are not welcome)
- acquisition of the shares of deceased shareholder

– general public

- businesses should not be put at risk due to a divorce or the death of the owner
- loss of economic power or bankruptcy weakens the economy
- loss of jobs is to be avoided

I. Estate planning – what it is and why we do it

Conflicting interests

- Owner of assets: far reaching autonomy
- Family member: participation
- (other) shareholders of family business: control in succession, acquisition
- general public: protection of economy and jobs

(Partial) protection of interests of other stakeholders by mandatory law

- owner's private autonomy is not unrestricted
- limited e.g. by legal right to maintenance of family members, compulsory shares in the case of death etc.

II. How it all started

2013: Formation of a trinational project team

– Austrian team

- Prof. Astrid Deixler-Hübner (University of Linz)
- Prof. Susanne Kalss (University of Economics, Vienna)
- Prof. Martin Schauer (University of Vienna)

– German team

- Prof. Barbara Dauner-Lieb (University of Cologne)

– Swiss team

- Prof. Margareta Baddeley (University of Geneva)
- Prof. Rita Trigo de Trindade (University of Geneva)

II. How it all started

- Preparation of the project design and definition of the objectives of the project
 - Research on whether and in how far the individual person may constitute binding rules which have to be respected by others on the disposition of his or her assets for a shorter or an extended period of time
 - on where there are restrictions to the autonomy of the individual person for such setting up such rules and why such restrictions may exist (for instance: testamentary freedom versus compulsory shares)
- based on a comparative analysis
 - focusing on Austrian, German and Swiss law
 - sharing (more or less) „common ground“

II. How it all started

- Project language: German
- Time range: three years

2015: Application for financial support at the Austrian Science Fund and the German Research Foundation

- application was approved
 - one research assistant for each Austrian and German applicant for three years
 - additional funds for travel costs

III. How we worked

2016-2019: work on the project

Defining „stages of life“ (Lebensphasen) as a core element of the projects

- which stages of life may create a specific need for estate planning?
 - marriage or entering into a partnership
 - parenthood (younger family with minors)
 - divorce or ending of a partnership
 - passing on assets to the next generation *inter vivos*
 - passing on assets to the next generation upon death

III. How we worked

Preparation of a questionnaire

- commonly used in the field of comparative law
- questions addressed to national reporters on the legal framework in their domestic law
 - questionnaire has to be standardized to make results comparable
- questionnaire had five chapters (based on the stages of life)
- examples:
 - Stage 1: In your legal system, does entering into a partnership have any consequences regarding the patrimonial relations between the partners? Which possibilities are there for contractual arrangements?

III. How we worked

- Stage 3: What is the legal framework for a divorce? Is there a divorce by mutual consent? What are the principles for dividing the assets of the divorced partners? Are pre-nuptial agreements binding in case of a divorce?
- Stage 4: What are the legal instruments for the representation of a person in the case of illness or due to age? What is the legal framework in the transfer of assets *inter vivos*? What is the effect of a gift on the compulsory shares of family members? In how far can the succession into shares of a company be regulated in the articles of an association (statutes of company)? Can transfer of assets be organized by special legal entity, such as a foundation or a trust?
- Stage 5: How is the estate of a deceased person acquired by the heirs? What is the legal position of an executor of a will? What are the effects of the death of a person on his position as a shareholder of a family business?

III. How we worked

Answers to the questions were worked out by each national team

Results were discussed in about three conferences among the team members every year (Vienna, Linz, Cologne, Geneva)

Legal practitioners (lawyers specialized in estate planning) were invited to participate in some of the conferences

Additional presentations by invited guests (sociological aspects, fundamental rights aspects)

III. How we worked

In addition to the national reports based on the questionnaire for each stage of life a typical case was presented

- solutions based on the national legal system were provided

Based on the national reports and on the cases general reports for each stage of life were elaborated

- general reports display accordences and differences between legal systems

Theses to each stage of life as conclusion of the project

Feb 28, 2019: final conference with presentation of the results

2020: publication of the book „Familiäre Vermögensplanung“

IV. Results (examples)

Legal framework for divorce

– German and Swiss law

- based on the principle of breakdown of a marriage (Zerrüttungsprinzip), fault of misconduct of a spouse leading to divorce is not relevant
- maintenance between former spouses based on the principle „clean break“: every former spouse is responsible for his or her maintenance. Right to maintenance only in case of age, illness, joblessness, childcare

– Austrian law

- based on the principle of fault (Verschuldensprinzip): divorce if one spouse violated obligation from the marriage (adultery, violence, disrespectful conduct, etc)
- Maintenance between former spouses based on fault

IV. Results (examples)

Asset distribution after divorce

- assets acquired during marriage are to be distributed among former spouses
- German and Swiss law:
 - Distribution 50:50 for each of the former spouses
 - Businesses not excluded: (Pre-)nuptial agreements to be recommended!
- Austrian law:
 - Distribution based on fairness (court decisions mostly 50:50)
 - Businesses excluded

IV. Results (examples)

Compulsory shares

- spouses and children entitled to compulsory shares
 - German and Swiss law: parents may be entitled as well
- Compulsory share half of the statutory share
 - Swiss law: three quarters
- German and Swiss law:
 - person entitled to a compulsory does not have to accept any grant provided by the testator
 - legacies may be rejected in general (German law) or if they do not consist of liquid assets (Swiss law) in favour of a claim for money

IV. Results (examples)

– Austrian law:

- person entitled to a compulsory share has to accept any kind of grant provided by the testator
- cannot „switch“ to a claim for money
- value of legacy must reach the amount of the compulsory share
- if so, compulsory share may be covered by a right to usufruct, right to life-time income, position as a beneficiary of a foundation, shares of a company (even if not transferable) etc
- testator (and in some cases courts) may postpone the time when the compulsory has to be delivered up to five years after the death of the testator
- Austrian law provides for better protection of family businesses against outflow of liquidity in case of death of a (major) shareholder

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Wir stellen die Fragen.



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