



BANQUE
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**WEALTH PLANNING NEWSLETTER:
LEGAL INCAPACITY AND DEATH
HOW TO GET PREPARED?**

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LEGAL INCAPACITY AND DEATH

HOW TO GET PREPARED

Personalised services have always been at the heart of Eric Sturdza Bank's proposition. In order to deal with increasingly complex situations, the Bank relies on its expertise in Wealth Planning to meet the ever more specific expectations of its clients. Wealth Planning is an essential part of our holistic approach. In this new issue, we asked our wealth planning expert to shed light on the process related to bank assets in the event of legal incapacity, or death.

When a person loses his or her faculties and becomes legally incompetent and no steps have been taken in advance, protection of the person is generally organised through a judicial procedure with the appointment of a guardian or curator.

When a person dies without any estate plan, the applicable law of succession establishes who the heirs are and what share each one gets.

In both cases, the default mechanisms are limited in scope and not well adapted to the particular situation. It is therefore in everyone's interest to anticipate and organise the way in which they wish to settle their affairs in the event of future incapacity, or death. But in reality, which approach is most effective in addressing this?

ANTICIPATING INCAPACITY

Most countries allow their citizens to organize, in a conventional (extra-judicial) way, the measures they wish to take in the event of a future incapacity.

These arrangements allow the person, when still capable of doing so, to choose an individual, or a group of trusted persons, thus avoiding having someone imposed by the

competent judicial authority. Additionally, with these arrangements, the person decides the extent of the powers he/she wishes to entrust.

The form and scope of these agreements differ from country to country. They are private, or notarial acts, sometimes limited to management, sometimes extended to disposal of assets.

These arrangements are known as “mandat pour cause d’incapacité” (mandates for incapacity) in Switzerland, “mandat de protection future” (mandates for future protection) in France or “lasting power of attorney” in the United Kingdom.

PLANNING YOUR SUCCESSION

Depending on the countries concerned and the objectives pursued, organising one's succession may involve drawing up a last will, or an inheritance pact, underwriting a life insurance policy, or even setting up a trust, or a family foundation.

These various instruments make it possible to designate who the heirs are of the deceased and the share that each is to receive in the estate. Trusts and foundations differ from other arrangements in that they allow for the planning of the transmission of an estate over several generations.

In recent years, many countries have reformed their inheritance laws to take better account of new family situations and to give testators greater freedom for distribution.

In spite of this flexibility, civil and “sharia” law countries apply forced heirship rules,

under which, a part of the estate must go to certain heirs. Thus parents cannot disinherit their children according to laws applicable in Switzerland, France, Belgium, Italy, Spain, etc.

Common law countries such as the United Kingdom are more liberal and allow testators greater freedom for distribution.

The breach of forced heirship rules may lead to the (partial) invalidation of the estate plan put in place by the deceased. It is therefore important to respect the rights of heirs.

CROSS-BORDER SITUATIONS

In a globalised world, exposure to foreign laws is frequent, for example, when the national of a country resides in a third country, or when part of his assets are located outside his country of residence.

This makes it necessary to determine which of the applicable laws of succession applies. Conflicts of laws are not uncommon in these cross-border situations. For example, two countries may claim that their respective laws apply to a situation or, conversely, neither country may apply its national law to the situation.

IN CASE OF INCAPACITY

The Hague Convention of 13/01/2000 on the International Protection of Adults regulates conflicts of laws by assuring the recognition of arrangements made in one signatory state by another signatory state.

According to the Convention, the law of the country of habitual residence applies if the person has not expressly opted for another law (for example, his or her national law or the law of the place where his, or her assets are located).

The Convention has been signed by some twenty states and is in force in particular in

Austria, Belgium, Finland, France, Germany, Portugal, Switzerland and the United Kingdom.

When a person is exposed to a jurisdiction that is not a signatory to the Convention, it is advisable to draft and register a local incapacity mandate.

IN CASE OF INHERITANCE

In Europe, successions subsequent to 17/08/2015, are governed by the European Regulation EU 650/2012, better known as "Brussels IV". It facilitates the treatment of cross-border successions from a civil standpoint.

The Regulation applies to the entire estate (movable and immovable), the law of the last habitual residence, unless the deceased has expressly opted, for example in his will, for the law of his nationality.

This EU Regulation applies to nationals and residents of the signatory countries (EU member countries except, Denmark & Ireland), as well as to any person holding assets there, except when a third country applies its own conflict of laws rules.

SWISS BANK ACCOUNT IN NAME OF A FOREIGN INDIVIDUAL

As far as incapacity is concerned, we have already seen that Switzerland recognises the provisions made by a signatory country of the Hague Convention but what is the situation in case of succession?

Switzerland does not apply the European Regulation. When a non-resident foreigner dies with a bank account in Switzerland, Switzerland does not apply its law of succession. The law of the last domicile, or the national law of the deceased determines in this case the heirs of the bank account.

Thus, for example, assets deposited in a Swiss account by an Italian national residing in Italy will revert to the heirs of the deceased, designated by the Italian law. The Italian forced heirship rules will therefore apply.

In practice, the Swiss bank will transfer the bank assets to the community of the heirs, upon presentation of a death certificate and a document establishing the heirs (heirship certificate).

To facilitate the transfer of assets in the event of death, Swiss banks sometimes offered their clients a joint account with individual signature rights and a clause for exclusion of heirs. This set up allowed the surviving joint account-holders to continue to operate the account, without impediment, after the death of a joint account-holder.

This arrangement does not prevent a disappointed heir from asserting his rights in accordance with the applicable law in front of a court in his home country.

Moreover, notwithstanding bank secrecy, the heirs remain entitled to obtain from the bank information on the deceased's bank account in order to assert their rights before the competent courts.

Thus, a joint account opened in the name of the parent and only one of the children does not allow the rest of the siblings to be excluded from the estate.

Today estates can no longer be settled through joint account arrangements. Our Wealth Planners are at your disposal to explore possible avenues in light of your situation.

TAXES APPLICABLE UPON DEATH

The inheritance process generally triggers a tax event.

It should be noted in passing that, the law applicable to the succession and the place where the inheritance tax is due are two independent matters. Thus, in the case of an Italian national living in Switzerland, the succession may be governed by Italian law, while inheritance tax will be paid in the Swiss canton of residence.

Some countries do not levy taxes upon death (e.g. Austria, Sweden or some Swiss cantons), whereas other countries apply taxes whose nature, criteria and calculation methods vary widely.

Depending on the country and the type of assets, taxes are due at the last domicile of the deceased, at the domicile of the heirs and/or at the place where the assets (i.e. in particular real estate properties) are located.

It should be noted that in some countries, notably the USA and the United Kingdom, the so called "situs" assets are subject to tax, regardless of the residence of the holder. Thus, an individual resident in an European country exposes his heirs to U.S. estate taxes (up to 40% at the current rate) on the U.S. shares he may hold in his portfolio (in addition to any taxes that may be applicable in his place of residence).

The number of double tax treaties covering inheritance tax is limited, so that cross-border situations require particular attention.

Finally, it should be noted that assets deposited by a non-resident individual in a Swiss account are not subject to taxation in Switzerland upon death.

Various strategies are available to mitigate taxes applicable upon death. Anticipating the inheritance by making gifts and/or by placing assets in life insurance policies are among the strategies that often pay off.

LIQUIDITY PLANNING

It is important to ensure that your loved ones have the cash needed to face hardships of life such as incapacity, or death.

The continuity of the family business is at stake when it constitutes the main asset of the estate. It is critical to ensure that the heir taking over the business gets the financial means to buy out the shares of his brothers and sisters, or that of a minority shareholder. Similarly, when the family wealth is mainly invested in illiquid assets such as real estate, sufficient liquidity is critical to prevent the hasty sale of some properties to pay the inheritance tax.

Identifying the need for cash, when it should be available, and redressing any shortfalls by increasing the share of liquid assets or triggering the necessary liquidity through life insurance is the basis for liquidity planning.

IN CONCLUSION

The issues of incapacity and death are unfortunately inevitable. Preparing for them through adequate planning will help relieve your loved ones when these events occur.

We are at your disposal to discuss this topic, to share our experiences with you, or to review with your advisors, if necessary, the strategy that you have implemented or that you are planning to implement.

Do not hesitate to contact us.

Your questions or suggestions for future newsletters should be sent to :

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