Swiss instruments

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The will and the forced heirship rules

A Swiss will may be made by public deed, in holographic form (handwritten, dated and signed) or orally in emergency.[1] Since the revision in force on 1 January 2023, descendants are entitled to one half of their statutory share as a compulsory portion and the surviving spouse to one half, while parents receive nothing. A testator with a spouse and children therefore has a free quota of one half of the estate.[2] Digital assets are part of the estate and count towards the compulsory portions at their value at death. For a volatile asset that creates a practical problem. The value on the date of death may differ sharply from the value when the estate is distributed, so the heirs who receive tokens bear the movement while the heirs who receive cash do not.[3] A will that allocates digital assets in kind to specific heirs should say whether the allocation is a legacy at a fixed value or a share of the residue, and should give the executor power to sell tokens to equalise.

The will is also the place for the instructions that make the key-management arrangement work. These are the appointment of the executor, the authorisation to engage technical assistance at the estate's expense, the direction to the depositary or

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co-signer to cooperate with the executor and the authority to sell or to transfer in kind. Swiss law gives the executor the powers of administration and the duty to carry out the testator's instructions, so the instructions bind.[4]

Practice note

A Swiss will clause for digital assets should do five things. It should define the assets by reference to the inventory held by the executor, without listing addresses in the will itself, because the will becomes a public document on opening. It should appoint an executor with power to engage a technical adviser and a custodian. It should direct every person holding a key share, seed record or co-signing right to deliver or exercise it at the executor's request and release them from confidentiality towards the executor. It should state whether the digital assets pass as specific legacies in kind, at the value on the date of death, or as part of the residue. It should authorise the executor to sell tokens to pay taxes, debts and equalisation payments. Part Q, Chapter III, contains a model clause.

The executor's problem in Switzerland

The Swiss executor obtains a certificate of appointment from the cantonal authority and deals with banks, custodians and registries on its strength.[5] Swiss banks and custodians release digital assets to the executor on the certificate and the usual identification. Foreign exchanges are the obstacle. Most require a grant from their own jurisdiction or a lengthy process of document legalisation. Some have no process at all. An executor who finds exchange accounts in the inventory should expect months of correspondence and should budget for local counsel in the exchange's jurisdiction. For that reason the plan should move material balances off exchanges and into custody or self-custody with a transmission arrangement during the owner's life.

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Inheritance tax in Switzerland is cantonal. Zug levies none on spouses and descendants and a graduated tax on other heirs, and Zürich likewise exempts spouses and descendants.[6] The executor must nonetheless file an inventory and value the tokens at the date of death for the cantonal authority, which uses the FTA price list where available.

Marital property and the advance care directive

Under the default Swiss regime of participation in acquired property, each spouse's acquisitions during the marriage are divided equally on divorce or death. That includes digital assets bought with income earned during the marriage. Assets owned before the marriage or received by gift or inheritance remain individual property.[7] The appreciation of tokens bought before marriage is individual property, but tokens bought during the marriage with employment income are acquired property. A founder who marries during the vesting of a token allocation should expect the released tranches to be acquired property. The remedy is a marital agreement by public deed adopting separation of property or modifying the participation regime, which spouses may conclude before or during the marriage.[8] The agreement should list the digital assets as individual property and allocate the burden of proof, because Art. 200 CC presumes acquired property where the character of an asset cannot be shown.[9]

Incapacity is addressed by an advance care directive (Vorsorgeauftrag). In it a person of full capacity appoints another to manage their assets and represent them in legal matters if they become incapable. The directive is drawn up in holographic form or by public deed and validated by the adult protection authority on incapacity.[10] The directive should extend expressly to digital assets and authorise the appointee to obtain key shares and instruct co-signers, because the default powers of an appointee are read by reference to the assets the authority can see.

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Notes

1. CC, SR 210, Arts 498 to 506 (forms of testamentary disposition; holographic will under Art. 505). ↩
2. CC, SR 210, Art. 471 (compulsory portions of one half of the statutory entitlement for descendants and the surviving spouse or registered partner), as amended by the Federal Act of 18 December 2020, in force 1 January 2023; Art. 457 and Art. 462 (statutory shares of descendants and spouse). Part D, Chapter VIII. ↩
3. CC, SR 210, Art. 474 (the estate is valued as at the date of death for the purposes of calculating the disposable portion); Art. 617 (valuation at market value at the time of division). ↩
4. CC, SR 210, Art. 517 (appointment of an executor by testamentary disposition) and Art. 518 (executor's rights and duties: administration of the estate, payment of debts and legacies, division according to the testator's instructions or the law). ↩
5. CC, SR 210, Art. 517 para. 3 (the authority confirms the executor's appointment); cantonal practice (certificate of executor, Willensvollstreckerzeugnis). ↩
6. Canton of Zug, Gesetz über die Erbschafts- und Schenkungssteuer (BGS 634.1), § 5 (exemption of spouses and descendants); Canton of Zürich, Erbschafts- und Schenkungssteuergesetz (LS 632.1), § 11 (exemption of spouses and descendants). Part G, Chapter I. ↩
7. CC, SR 210, Arts 196 to 198 (acquired property and individual property), Art. 204 (dissolution of the regime) and Art. 215 (each spouse entitled to one half of the other's surplus). ↩
8. CC, SR 210, Art. 182 (marital agreement by public deed before or after the marriage) and Arts 247 to 251 (separation of property). ↩
9. CC, SR 210, Art. 200 para. 3 (presumption of acquired property). ↩

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10. CC, SR 210, Arts 360 to 369 (advance care directive: appointment, form under Art. 361, validation by the adult protection authority under Art. 363). Part D, Chapter VIII. ↩

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