

OLIVER ARTER, CONSULTANT, ATTORNEY AT LAW

The Swiss Family Foundation

The Swiss Family Foundation

Oliver Arter*

Introduction

Misconceptions about family foundations under Swiss law

The practical aspects of the meaning of the Swiss family foundation have been discussed for decades. The literature¹ has primarily been concerned with the boundaries separating family foundations,² which have yet to be put in place under Swiss law, and entailed family estates for which creation is no longer permitted.³ The essential thrust of the discussion was that family foundations with enhanced benefits derived from the endowment fund manifest no particular link to any requirements of special life circumstances, and simply provide a higher or more comfortable standard of living, are prohibited.⁴ It may thus be concluded that Swiss family foundations are ill-suited for asset planning and estate planning. However, substantial disbursements to a beneficiary from a Swiss family foundation are allowed.⁵

The issue of Swiss family foundations enjoying a less attractive tax environment was further touched upon.⁶ What was overlooked – especially at a time during which it is increasingly difficult to consider that the establishment of an ‘offshore’ foundation entails no tax consequences for either the foundation or for the founder/the beneficiary⁷ – is that it offers

* Consultant, Attorney at law, Fropiep Renggli, Bellerivestrasse 201, 8034 Zurich. The Author would like to thank Miriana Emanuele, lic. iur., Zurich, for her precious collaboration in drafting this article as well as Eva Wettstein, Zurich, for the final editing. As for the German version of this article see Oliver Arter, ‘Die schweizerische Familienstiftung’, in Peter V Kunz, Florian S Jörg, Oliver Arter (Eds), *Entwicklungen im Gesellschaftsrecht VII* (Bern, Stämpfli Verlag AG, 2012), p 107 et seq.

1 See Michael Hamm and Stefanie Peters, ‘Die schweizerische Familienstiftung – ein Auslaufmodell?’, *Successio* 2008, p 248 et seq; Hans Rainer Künzle (Familienstiftung), ‘Familienstiftung – Quo vadis?’, in Peter Breitschmid, Wolfgang Portmann, Heinz Rey, Dieter Zobl (Eds), *Festschrift für Hans Michael Riemer* (Bern, Stämpfli Verlag AG, 2007), p 173 et seq, and p 189 et seq; Thomas Sutter-Somm and Felix Kobel, *Familienrecht* (Zurich/Basel/Geneva, Schulthess Verlag, 2009), p 252 et seq; Alexandra Zeiter (Erbstiftung), *Die Erbstiftung (Art 493 ZGB)* (Fribourg, Schulthess Verlag, 2001), p 161 et seq; Alexandra Zeiter (Unterhaltsstiftung), ‘Neues zur Unterhaltsstiftung’, *SJZ* 2001, p 451 et seq; Parisimo Vez, ‘Thesen zu einem neuen Stiftungsverständnis’, *ZBJV* 2007, p 229 et seq; Hans Rainer Künzle (Nachlassplanung), ‘Stiftungen und Nachlassplanung’, in Hans Michael Riemer (Ed), *Die Stiftung in der juristischen und wirtschaftlichen Praxis* (Zurich, Schulthess Verlag, 2001), p 1 et seq; Sophie Moreau, ‘La prohibition en Suisse des fondations de famille à but d’entretien: un principe devenu obsolète’, *REPRAX* 2011, p 59 et seq

2 Article 335(1) CC.

3 Article 335(2) CC.

4 BGer., Judgment of 30 November 2006, 5C.68/2006, E. 5.1. See BGE 108 II 398 et seq, BGE 108 II 393 et seq, BGE 93 II 439 et seq, BGE 89 II 437 et seq, BGE 79 II 113 et seq, BGE 75 II 81 et seq, BGE 75 II 15 et seq, BGE 73 II 81 et seq as well as landmark ruling BGE 71 I 265 et seq. For dissenting opinion see Peter Max Gutzwiller, ‘Die Zulässigkeit der schweizerischen Unterhaltsstiftung’, *AJP* 2010, p 1559 et seq.

5 See in detail ‘Admissible purposes of a family foundation’ and ‘Special rights’ below.

6 See Thomas Sprecher, *Die Revision des schweizerischen Stiftungsrechts* (Zurich/Basel/Geneva, Schulthess Verlag, 2006), p 82 et seq.

7 See in particular Art 2(h) of the agreement between the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland on cooperation in tax matters:

‘(h) “natural person” denotes a natural person residing in the United Kingdom, that: as party contracting to a Swiss paying agent, is an account/deposit holder as well as a person that is authorised to use the assets; or accordingly, by a Swiss paying agency backed by the prevailing Swiss obligations of due diligence and in

some quite interesting opportunities for tax planning, at least as far as international relations are concerned.⁸

Moreover, the Swiss approach to family foundations has changed in recent years for a variety of reasons.

Ratification of the Hague Trust Convention

The ratification of the Hague Trust Convention⁹ initiated the perception at the time of its issuance that foreign trusts in Switzerland (sharing the same or similar purpose that proscribed maintenance foundations fulfil under Swiss law) must be recognised.¹⁰

The ratification of the Hague Trust Convention has therefore expanded the debate in Switzerland as to whether to create a Swiss legal institution resembling a trust, to firmly anchor the trust itself into the Swiss legal system or whether the law governing Swiss family foundations – leading to acceptance of maintenance foundations – should be modified.¹¹

cont.

consideration of all of the statements of their known circumstances validating their status as a person authorised to use assets that will be required from:

- a domiciliary company (in particular legal persons, companies, Anstalten [institutions], foundations, trusts, trust companies and similar incorporations that do not engage in any activities of a commercial, manufacturing or any other business activities); or
- a life insurance company in relation with a life insurance cover; or
- another natural person disposing of an account or deposit with a Swiss paying agency.

A domiciliary company as defined above may be exceptionally considered as a person with usage authorisation if proof is furnished that, on the basis of the law of the place where it is established or where it is actually administered of the general applicable rules for direct taxes is effectively self-taxed or pursuant to the law of the United Kingdom is considered as non-transparent with regard to its income.

A natural person residing in the United Kingdom is not considered as a natural person with regard to assets of associations of persons, asset structures, trusts or foundations, when no established beneficial ownership of such assets exists, e.g., on the basis of the discretionary character of the corresponding agreement.⁷

In the agreement between the Swiss Confederation and the Federal Republic of Germany on collaboration in the fields of taxes and financial markets, there is an analogous provision in Art 2(h) as in the agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland regarding cooperation in tax matters. Regarding domiciliary companies under German tax law, see Heiko Kubaile and Hendrik Kuhl, 'Neueste Entwicklungen im deutschen Steuerrecht', StR 2011, p 878 et seq.

8 See 'Tax treatment' below.

9 Law Applicable to Trusts and their Recognition, SR 0.221.371.

10 See Botschaft zur Genehmigung und Umsetzung des Haager Übereinkommens über das auf Trusts anzuwendende Recht und über ihre Anerkennung vom 2. Dezember 2005, BBl 2006, p 551 et seq, p 564 et seq; Heinrich Honsell, Nedim Peter Vogt, Anton K. Schnyder, Stephen V Berti (Ed) (BasK-Editor), *Basler Kommentar zum Internationalen Privatrecht* (Basel, Helbing Lichtenhahn Verlag, 2007), BasK-Vogt, N 94 et seq in Art 149a PIL; Heinrich Honsell, Nedim Peter Vogt, Thomas Geiser (Ed) (BasK-Editor), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch I (Art 1-456 ZGB)* (Basel, Helbing Lichtenhahn Verlag, 2010), BasK-Grüninger, N 16 in Art 335 CC; different, but since BGE 135 III 614 well obsolete, BasK-von Planta/Eberhard (fn 10), N 18 in Art 154 PIL.

11 See Nedim Peter Vogt, 'Privatnützige Vermögensperpetuierung in der Schweiz – Kann der Trust in seinem internationalen und schweizerischen Umfeld diese Aufgabe übernehmen?', in Dominique Jakob (Ed), *Perspektiven des Stiftungsrechts in der Schweiz und in Europa* (Basel, Helbing Lichtenhahn Verlag, 2010), p 165 et seq; Wolfgang Wiegand and Corinne Zellweger-Gutknecht, 'Privatrechtliche Probleme der Vermögensverwaltung – Grundfragen und Schnittstellen', in Wolfgang Wiegand (Ed), *Berner Bankrechtstag, Vermögensverwaltung und Nachlassplanung* (Bern, Stämpfli Verlag AG, 2005), p 27 et seq, 53, and Thomas Sprecher, 'Braucht die Schweiz ein neues Vehikel zur privatnützigen Vermögensperpetuierung?', in Dominique Jakob (Ed), *Perspektiven des Stiftungsrechts in der Schweiz und in Europa* (Basel, Helbing Lichtenhahn Verlag, 2010), p 181 et seq. See also Botschaft zur Genehmigung und Umsetzung des Haager Übereinkommens über das auf Trusts anzuwendende Recht und über ihre Anerkennung vom 2. Dezember 2005, BBl 2006, p 551 et seq, 582: 'Individual participants in the consultation raised the issue, as in the Suter/Pelli Motion mentioned prior, [...], of the ban on entailed family estates as provided in Article 335 (2) CC. It has already been explained that this provision, inasmuch as it is claimed to be valid within an international context, is also valid for trusts subject to the Hague Convention. The relationship between Article 335 (2) and the convention thus requires no express provision. One must

The ban on the formation of entailed family estates in no way constitutes a so-called 'statute of immediate effect'

The Swiss Federal Supreme Court further ruled in its judgment of 29 October 2009 that the *ban on the formation of entailed family estates in no way constitutes a so-called 'statute of immediate effect'*,¹² in that it may be able to suppress the application of a foreign law which the establishment of family maintenance foundations adjudges admissible.¹³

According to the Swiss Federal Court's judgment, under foreign law, legally established family foundations in Switzerland are to be recognised as legal persons, even when they pursue a purpose that is not covered by Art 335(1) CC, especially the distribution of benefits for the maintenance of family members.¹⁴

It also derives from this decision that persons residing in Switzerland may establish foreign foundations that are not coupled with any particular maintenance payment conditions.

Are maintenance foundations de facto forbidden under Swiss law?

Additional doubts were recently expressed as to whether the traditional Swiss legislator would truly prohibit maintenance foundations,¹⁵ whether in light of the ratification of the Hague Trust Convention as much as with regard to the recent decision by the Federal Court regarding recognition of foreign family maintenance foundations.¹⁶

Whether the Supreme Court will revise its long-standing case law concerning the prohibition of Swiss maintenance foundations in the future remains to be seen. However, it seems hardly likely in light of the views put forth here.

cont.

seriously wonder whether the provision should not be eliminated as it is represented in one of the statements. However, it is question here of a common problem that, not only because it has a bearing on the trust and therefore shall be considered on other points but, since the issue is controversial and the ratification of the convention so urgently sought by the financial centre, it should not be unduly delayed. For the implementation of the convention under the Swiss legal system, a ruling on Article 335 (2) CC is unnecessary. The issue of the relationship of foreign trusts regarding the ban on entailed family estates is already implied under the applicable law and in this sense, with the ratification of the convention under which, as mentioned, it is not a matter of an implementation of the trusts, but rather simply an enhancement of the legal certainty with respect to its treatment under civil law, it has no immediate correlation.'

12 Article 18 PIL: 'The provisions of Swiss law remain intact, which, due to its specific purpose, independent from the right referred to in this law, are to be urgently applied.' See in general Ivo Schwander, *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht* (Zurich, Schulthess Verlag, 1975), p 235 et seq, or Anton K. Schnyder and Manuel Liatowitsch, *Internationales Privat- und Zivilverfahrensrecht* (Zurich, Schulthess Verlag, 2011), N 206 et seq, N 215. Article 18 PIL finds application in particular in cases that are not only dependent upon the reconciliation of private interests, but also that are concerned with judicial policy and economic or social interests of the regulatory state in its degree of autonomy in shaping those subject to the legislation. Article 18 PIL has some effect with regard to import and export regulations, in competition law or in financial market supervision. See, especially regarding trusts, Dominique Jakob and Peter Picht, 'Das Haager Trust-Übereinkommen und seine Geltungseinschränkungen – ein Fass der Danaiden?', in Franco Lorandi and Daniel Staehelin (Ed), *Innovatives Recht, Festschrift für Ivo Schwander* (Zurich/St. Gallen, Dike Verlag AG, 2011), p 543 et seq, 549.

13 In BGE 135 III 614, a reproduction of the facts was largely abandoned. For the complete text of the decision, see BGER, judgment of 17 November 2009, 4A_339/2009. Compare somewhat with the whole of Oliver Arter, 'Ausländische Familienunterhaltstiftungen, BGE 135 III 614', succession 2011, p 125 et seq; Simon Othenin-Girard, 'Fondations d'entretien et interdiction des fidéicomis de famille en droit international privé suisse, Quelques jalons posés par l'ATF 135 III 614', AJP 2010, p 1261 et seq, and Regina E Aebi-Müller, 'Die privatrechtliche Rechtsprechung des Bundesgerichts im Jahr 2009', ZBJV 2010, p 368 et seq, 379 et seq.

14 See Arter (fn 13), p 131.

15 As with Gutzwiller (fn 4), p 1559 et seq.

16 See 'The ban on the formation of entailed family estates in no way constitutes a so-called "statute of immediate effect"' above.

The Luginbühl motion

On 20 March 2009, upper chamber member Werner Luginbühl launched a parliamentary initiative that was to instruct the Federal Council on how to ensure the attractiveness of the location of the Swiss foundation for domestic and foreign founders and foundations.¹⁷ The motion intends to petition the Federal Council to adapt to European Development and *the general conditions for non-profit charitable foundations and family foundations in order to make them as fiscally attractive as in the neighbouring countries*.¹⁸ The Council of States agreed to the motion on 11 June 2009.¹⁹ The National Council likewise voted for the motion, with only slight changes to the contents, on 10 December 2009.²⁰ The Council of States agreed on the amended contents of this motion on 1 March 2010.²¹ Results from the Luginbühl motion have yet to be presented by the Federal Council.

Whether the Luginbühl motion will serve as a prelude to a liberalisation of the rights of the Swiss family foundation and foster the enhancement of its fiscal attractiveness remains to be seen; political resistance will likely make itself felt.²²

17 Motion made by Werner Luginbühl, Steigerung der Attraktivität des Stiftungsstandortes Schweiz, 20 March 2009, 09.3344.

18 Motion made by Werner Luginbühl, Steigerung der Attraktivität des Stiftungsstandortes Schweiz, 20 March 2009, 09.3344.

19 Council of States, Summer Session 2009, 16th Session, 11 June 2009, 3:00 pm.

20 National Council, Winter Session 2009, 13th Session, 10 December 2009, 8:00 am.

21 Council of States, Spring Session 2010, First Session, 1 March 2010, 5:15 pm.

22 See for instance Hans-Jürg Fehr, National Council, Winter Session 2009, 13th Session, 10 December 2009, 8:00 am, in his dissenting vote: 'The first question that should be asked concerns the need for action. We shall let Profonds answer the question of governing bodies of non-profit Swiss foundations. Profonds describes Switzerland in particular as a foundation paradise. Naturally, it must be considered, where it is all leading when one is already in Paradise. Since one can only move out of Paradise when one changes something – probably in the direction of foundation Hell. That is not what we would like. There is no need for action in our opinion.'

We may sum up the arguments of Mr Luginbühl as well as those of the majority of our commission by saying that we need to adapt to what is happening in the European environment. So should one ask, 'Just exactly how should you align yourselves; to what should we adjust?' Yet we do not even know, for nothing in sight is perceptible, and certainly no resolutions of any European institutions. I mean that we should not go so far in our meeting the requirements of the future that we anticipate a European foundation statute before one even exists.

Yet, naturally, the crux of the matter lay elsewhere. Namely, with tax privileges. Upon closer inspection, we find that it is a question of tax privileges, and indeed not a matter of tax exemption for non-profit foundations, for non-profit foundations are already tax-exempt. It is thus a matter of something entirely different, namely, the exemption of the family foundations. Family foundations are however not non-profit *per se*, but are on the contrary rather self-serving *per se*. There may perhaps be here and there one that is non-profit, but then it is indeed tax-exempt. It can also be a question of merely those that are not non-profit, or not tax-exempt. Which is precisely the point: a new tax loophole is sought here that will allow affluent people in this country to place their assets in family foundations in order to enjoy precisely those tax privileges that only non-profit foundations were entitled to formerly. That is indeed the crux of the matter at hand, and that it why our minority is against the Luginbühl Motion.'

See further the popular initiative 'Millionen-Erbschaften besteuern für unsere AHV (Erbschaftssteuerreform)' and namely with regard to family foundations in particular for the proposed Art 197(92) (9)(2) lit to para 3:

'Art 112 (3)(a)(new)

3 The insurance is financed:

(a) from the earnings of the inheritance and gift taxes;

Art 129a (new) inheritance and gift taxes

¹ The Swiss Federation levies an inheritance and gift tax. The tax is assessed and collected by the cantons. Two-thirds of the revenue is collected by the old-age and survivors insurance compensation fund, with the other third remaining for the Cantons.

² Inheritance tax is levied on the estate of natural persons whose residence at the time of their death was in Switzerland or on those whose inheritance process has been opened in Switzerland. Gift tax is levied upon the donor or donors.

³ The tax rate is 20 per cent. The following are not taxed:

- a. a one-time tax allowance of 2 million francs from the sum of the estate and all taxable gifts;
- b. the share of the estate and gifts that are turned towards spouses, the spouse, or registered partner;

The Moret postulate

National Councillor Isabelle Moret formed a postulate on 19 March 2010 which sought to mandate the Federal Council to add two additional analyses to her report ‘Strategic Lines of Action for Financial Market Policy’ of 16 December 2009.²³ On the one hand, it must be determined whether foundation law and tax law for foundations could be optimised, while on the other hand, it must be assessed whether *trusts or similar trust schemes are to be enshrined under Swiss law*.²⁴ The Federal Council proposed on 26 May 2010 the adoption of the postulate whereupon the response within the framework of the Luginbühl Motion should take place. A debate in the Swiss National Council was postponed on 18 June 2010²⁵ and has still not taken place.

The Moret Postulate focuses particularly on the possibilities of developing Switzerland as a financial centre. Among other things, efforts will be made to ensure future growth of the financial sector, in particular in the management of large-scale assets as in the field of Swiss Maintenance foundations and family foundations.²⁶ Correspondingly, the demands of the Moret Postulate target the creation of a legal institution by the Swiss legislator that shall enable the unconditional preferential treatment of family members – such as the establishment of a Swiss Trust, the reform of Swiss (family foundation law) foundation law, the creation of a trust or another form of asset conservation.

cont.

- c. the share of the estate and gifts that are turned towards the tax-exempt legal person;
- d. Gifts not exceeding 20,000 francs per year and per person.

⁴ The Federal Council periodically adjusts the amounts for inflation.

⁵ Companies or farms comprising part of an estate or gift are to be continued by the heirs, heiresses or donees for at least ten years to qualify for special tax reductions geared to ensuring their continued existence and safeguarding jobs.

II The transitional provisions of the Federal Constitution will be modified as follows:

Art 197 (92) (new)

9. Transitional provisions pursuant to Art 112 (3) Bst abis and Art 129a (inheritance and gift taxes)

¹ Articles 112(3)(a) and 129(a) enter into force at 1 January of the second year following their adoption as a directly applicable law. At the same time, the cantonal abatement of inheritance and gift taxes shall be abolished. Gifts shall be attributed retroactively from 1 January 2012.

² The Federal Council issues performance obligations for the period prior to the coming into effect of the law on implementation. The following guidelines are taken into account:

- a. The taxable estate is comprised of:
 - 1. the market value of the assets and liabilities at the time of death;
 - 2. the taxable gifts justified by the testator or testatrix;
 - 3. the assets for avoiding tax in family foundations, insurance and similar that are invested.
- b. Gift tax is levied, as soon as the amount pursuant to Article 129a(3)(a) is exceeded. Gift taxes paid are taken into account with regard to inheritance tax.
- c. The reduction pursuant to Article 129a(5) shall be realised for companies by granting a tax allowance and reducing the tax rate on the remaining assessable value of the companies. In addition, payment by instalments can be granted for a maximum period of ten years.
- d. The reduction for farms is performed pursuant to Article 129(a)(5), while their value is not taken into consideration, insofar as they are, according to the rules of land law, cultivated by the heirs or donee themselves. Should they be abandoned or disposed of prior to the end of the ten-year period, taxes shall be assessed proportionately.³

23 The Isabelle Moret Postulate, Analysis of a possible legislative regulation of trusts in Switzerland, 19 March 2010, 10.3332.

24 In the reply to the Schwaller interpellation, the Federal Council explained on 6 May 2009 that Swiss civil law makes no provision for implementing the Trust Institute. See Interpellation Urs Schwaller, Bankgeheimnis und Vermögensverwaltung in Form von Trusts, 19 March 2009, 09.3211.

25 National Council, Summer Session 2010, 16th Session, 18 June 2010, 8:00 am.

26 Schweizerische Eidgenossenschaft, ‘Strategische Stossrichtungen für die Finanzmarktpolitik der Schweiz, Bericht in Beantwortung des Postulats Graber (09.3209)’, 16 December 2009, p 25.

Future prospects

Changes and developments in Switzerland's position as a place for finance and foundations are in their early stages. Numerous challenges will have to be faced in the coming years.²⁷ It remains to be seen whether they will also have a significant impact upon Swiss foundation law. It must be assumed in any event that at the very least, serious consideration shall be given to the establishment of a Swiss maintenance foundation, because of foreign trusts and foundations with maintenance purposes that must be homologated on the one hand,²⁸ while on the other hand, the establishment of Swiss family foundations that prohibit maintenance purposes makes less sense.

Definition of the Swiss family foundation

The Swiss family foundation – just as with an ordinary foundation – is a legally independent fund for a special purpose.²⁹ The Swiss Civil Code describes the family foundation in the following manner:

- ‘Assets can be associated to defray the costs of education, to equip or support family members or to serve similar purposes a family foundation can be established under the rules of the law concerning persons or the law of succession for assets.’³⁰

At the same time, Swiss legislation specified that setting up entailed family estates is no longer allowed.³¹

The general notion of foundation in Art 80 CC³² distinguishes itself from the notion of family foundation in such way that the excluded purposes listed in Art 335(1) CC should only serve for a specific family, *and that it must not represent the founder's family*.³³

There is nothing imperative³⁴ about the founder designating the foundation being set up as a family foundation. Rather, much more decisive is:

‘... what meaning may be ascribed to the integral contents of the foundation documents. The provisions concerning the foundation purpose and the designation of the persons it should benefit according to their purpose are of particularly significance.’³⁵

27 See Oliver Arter, ‘Sorgfalt bei der Vermögensverwaltung durch Banken’, in Daniel Staehelin and Franco Lorandi (Ed), *Innovatives Recht – Festschrift für Ivo Schwander zum 65. Geburtstag* (Zurich/St. Gallen, Dike Verlag AG, 2011), p 257 et seq.

28 See ‘Ratification of the Hague Trust Convention’ and ‘The ban on the formation of entailed family estates in no way constitutes a so-called “statute of immediate effect”’ above.

29 BasK-Grüninger (fn 10), N 1 on Art 80 CC.

30 Article 335 (1) CC.

31 Article 335 (2) CC.

32 This was, according to Art 80 CC as follows: ‘To establish a foundation, assets must be devoted to a specific purpose.’

33 Hans Michael Riemer (BK-Riemer), *Berner Kommentar zum schweizerischen Privatrecht, Band I, Einleitung und Personenrecht, Die juristischen Personen, Die Vereine, Systematischer Teil und Art. 60-79 ZGB* (Bern, Stämpfli Verlag AG, 1990), N 108 et seq on the systematic component; See also BGE 93 II 439, 445 et seq. Further details on the possible and admissible circle of beneficiaries further in ‘The beneficiaries of a family foundation’ and ‘Admissible purposes of a family foundation’.

34 BasK-Grüninger (fn 10), N 1 on Art. 87 CC.

35 BGE 93 II 439, 444.

Terms³⁶ or special rights³⁷ in favour of non-family members as well as merely occasional, ancillary and relatively insignificant disbursements from foundation capital for other purposes do not alter the character of a family foundation.³⁸

Admissible family foundation v inadmissible entailed family estate

It is inadmissible under Swiss law to provide family members with *unconditional* beneficial use of a foundation's assets or the proceeds thereof for covering *general living expenses* or for the improvement of their economic situation.³⁹ The legal purpose set forth in the family foundation is the *provision of the unfettered economic security of family members* over the coming generations (as it was distinguished between the purposes specified pursuant to an admissible family foundation and an inadmissible family foundation), serving the financial purposes of an entailed family estate.⁴⁰

The family foundation and its boundaries to other Swiss legal institutions

The entailed family estate

According to Supreme Court case law, an entailed family estate is a valid private arrangement inalienably linked to a family for the enjoyment by the family members through which, according to an established order of succession of a designated asset complex, the awareness of the family unity in its subsequent changing members may preserve and honour the family.⁴¹ Objects of the entailed family estates were lasting assets, with their substance sustainable over subsequent generations, preferably such that they yield fruit or interest, but also art collections, libraries, jewels, etc.⁴²

An entailed estate primarily consists of *special assets without a separate legal character* of the respective holder or authorised user who can unconditionally enjoy the assets concerned.⁴³ Said enjoyment is encumbered with the *requirement of protecting the assets* and upon the death of

36 Regarding terms in general, Oliver Arter, 'Auflagen und Bedingungen als Mittel der Nachlassgestaltung', ST 2011, p 745 et seq.

37 Further details found in 'Special rights' below.

38 BasK-Grüniger (fn 10), N 3 on Art 87 CC; BGer, Judgment of 30 November 2006, 5C.68/2006, E. 5.

39 Article 335 (2) CC; BGE 108 II 393, 394; BGE 108 II 398, 403; BGE 93 II 439, 448 et seq See also Hamm and Peters (fn 1), p 248 et seq.

40 BGE 71 I 265; BGE 120 Ib 474, 483. See Art 335 (2) CC: 'Setting up entailed family estates is no longer allowed.' The public policy objective was to prevent idleness. See also the ban on the repeated appointment of a reversionary heir in Swiss law of succession according to Art 488 (1) and 2 CC:

'In decreeing the designated heirs, the testator or testatrix is authorised to oblige the heirs as preliminary heirs and to surrender the inheritance of another as reversionary heir.'

2Such an obligation cannot be imposed upon the reversionary heir.'

41 BGE 9, 586. See underlying historical broadening of entailed family estates, Mareike Mayer, *Institute für eine langfristige Bindung des Privatvermögens in einer Familie durch Verfügung von Todes wegen in Deutschland, Frankreich und der Schweiz* (Baden Baden, Nomos Verlag, 2008), p 26 et seq.

42 Robert Kaufmann, *Begriff und Zweck der Familienstiftung und ihre Abgrenzung von ähnlichen Instituten*, Diss. (Bern, 1954), p 2 et seq.

43 BGer, Judgment of 4 March 2002, 2A.457/2001, E 4.5. On the nature of the rights of entailed estate holders see Hans Hoffmann, *Die Familienstiftung nach schweizerischem Recht und ihr Unterschied vom Familienfideikommiss* (Bern, Stämpfli Verlag AG, 1918), p 123 et seq.

said holder or authorised user, the assets are to be *surrendered to the legal successor* within the family.⁴⁴

Yet another distinguishing feature of the family foundation is its purpose. The entailed family estate pursues a purely economic purpose, namely, to provide respective holders or authorised users with unconditional enjoyment of the assets concerned.⁴⁵ The family foundation pursues, however, ideal purposes⁴⁶ because the capital or the proceeds of the assets are due the beneficiary solely in case of need and only for a specific purpose – and thus distinctly not unconditional.⁴⁷

Entailed family estates can no longer be established today.⁴⁸

Reversionary inheritance

Under Swiss law, a legator is authorised in a testamentary disposition to oblige the appointed heirs as preliminary heirs to surrender the succession to others as reversionary heirs.⁴⁹ Such an obligation cannot be imposed upon the reversionary heirs.⁵⁰ The same holds true for legacies.⁵¹

A subsequent act of disposal is issued when a legator bequeaths or wills their estate or even only isolated portions of it to a designated person and said person is obliged to surrender such estate at a later time to a second person.⁵² The person who is primary beneficiary acquires, together with the legacy or shares thereof, the obligation to surrender that share of the estate that was bequeathed or willed from the legator at a specific date to a second person, the revisionary beneficiary.⁵³ The value of the legator's assets will be gradually conveyed to the persons concerned.⁵⁴ An additional essential feature of a subsequent act of disposal is that not the reversionary heir but rather the prior heirs inherit from the legator, for the prior heirs and the reversionary heirs are heirs of the same legator.⁵⁵ From a tax law

44 BGer, Judgment of 4 March 2002, 2A.457/2001, E 4.5.

45 BK-Riemer (fn 33), N 133 on the systematic component; see also Andrea Opel, *Steuerliche Behandlung von Familienstiftungen, Stiftungen und Begünstigten – in nationalen und internationalen Verhältnissen unter Einbezug des liechtensteinischen Stiftungsrechts* (Basel, Helbing Lichtenhahn Verlag, 2009), p 17 et seq, fn 110.

46 On possible purposes see above, 'Admissible purposes of a family foundation'.

47 BK-Riemer (fn 33), N 133 on the systematic component.

48 Article 335 (2) CC.

49 Article 488 (1) CC. On reversionary inheritances see Rudolf Frey, *Die Nacherbeneinsetzung* (Zurich, Druck, Graphische Anstalt Schüler, 1951); Peter Schmucki, *Die Nacherbeneinsetzung auf den Überrest* (Zurich, Schulthess Polygraphischer Verlag, 1982); Paul Eitel (Anwartschaft), *Die Anwartschaft des Nacherben*, Diss. (Bern, 1991); Paul Eitel (Nacherbeneinsetzung), 'Die Nacherbeneinsetzung in Theorie und Praxis', *successio* 2007, p 82, p 82 et seq; Mischa Salathé, *Die Nacherbfolge im schweizerischen Recht, Eine Untersuchung der privat- und steuerrechtlichen Aspekte der Nacherbfolge* (Basel, Helbing Lichtenhahn Verlag, 2009).

50 Article 488 (2) CC.

51 Article 488 (3) CC.

52 Daniel Abt and Thomas Weibel (Ed) (PraxKomm Erbrecht-Editor), *Praxiskommentar Erbrecht* (Basel, Helbing Lichtenhahn Verlag, 2011), PraxKomm Erbrecht-Schürmann, N 1 on Art 488 CC; Heinrich Honsell, Nedim Peter Vogt, Thomas Geiser (Ed) (BasK-Editor), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch II (Art 457-977 und 1-61 SchlT ZGB)* (Basel, Helbing Lichtenhahn Verlag, 2011), BasK-Bessenich, N 1 prior to Art 488-492 CC; Thomas Christen, 'Nacherbfolge aus steuerrechtlicher Sicht', ASA 63 (1994), p 258; 28. Administrative Court, tax filing department, Judgment of 20 January 2004 (A 03 70 (LU)), LGVE 2004 II, 294, E 2b.

53 Christen (fn 52), p 258; BGer, Judgment of 26 September 2006, 5C.95/2006, E 2.3; Felix Richner, 'Urteil des Schweizerischen Bundesgerichts vom 26 September 1997', ASA 67 (1998), p 667.

54 BasK-Bessenich (fn 52), N 1 prior to Art 488-492 CC.

55 BasK-Bessenich (fn 52), N 1 prior to Art 488-492 CC; Peter Tuor (BK-Tuor), *Berner Kommentar zum schweizerischen Zivilrecht, Das Erbrecht, 1. Abteilung 'Die Erben' (Art 457-536 ZGB)* (Bern, Stämpfli Verlag AG, 1952), N 3 on preliminary remarks on appointment of a reversionary heir (Art. 488-493 CC); Eitel, Anwartschaft (fn 49), p 96; Christen (fn 52), p 258; Paul Eitel and Lilian Scherrer, '5C.53/2006 und 5C.54/2006

perspective this leads to both the prior as well as the reversionary heirs being subject to taxation and for tax assessment in both cases which, as a matter of principle, are set by the degree of relationship with the legator.⁵⁶

Unlike the primary beneficiary, the reversionary beneficiary may not be encumbered with the obligation to surrender what they have obtained to a third party.⁵⁷ The legator may in no event provide for more than two successors.⁵⁸ One thus avoids – as was the intention with the ban on the establishment of new entailed estates⁵⁹ – that the successions over the generations shall only be applied, yet not consumed.⁶⁰ The limitation to only two succession provisions is legally binding, and the legator must not, even though a testamentary contract, deviate therefrom.⁶¹

Standards applicable to family foundations

Overview

Apart from a few exceptions,⁶² the same provisions of civil law⁶³ apply to family foundations as to normal foundations.⁶⁴ By way of derogation from foundation law, family foundations acquire a legal character without figuring in the companies' register.⁶⁵ They are not subject

cont.

(BGE 133 III 309) vom 12.4.2007 (sowie Urteil des Obergerichts des Kantons Zürich, LB050016/U vom 9.12.2005): Testamentarische Nacherbeneinsetzung auf den Überrest (Einsetzung der Ehefrau als 'Alleinerbin' und Zuwendung des 'Überrests' je zur Hälfte an die Geschwister des Erblassers oder deren Nachkommen bzw. an die Erben der Ehefrau), successio 2009, p 69; Richner (fn 53), p 667; Paul Lanz, 'Die Besteuerung des Vor- und Nacherben in den kantonalen Steuerrechten', ASA 43 (1974), p 145.

56 See Hans Rainer Künzle, 'Business Succession Planning', in Peter Johannes Weber, Marc Weber, Ricardo Seitz, Hans Rainer Künzle (Ed), *Liber discipulorum et amicorum – Festschrift für Kurt Siehr* (Zurich, Schulthess Verlag, 2001), p 127, p 154. Detailed at large, Salathé (fn 49), p 148 et seq.

57 Article 488 (2) CC; Christen (fn 52), p 258.

58 Article 488 (2) CC; Christen (fn 52), p 258; PraxKomm Erbrecht-Schürmann (fn 52), N 11 on Art 488 CC; Eitel, Anwartschaft (fn 49), p 47; Eugen Spirig, 'Nacherbeneinsetzung und Nachvermächtnis', ZBGR 58 (1977), p 202, p 213.

59 PraxKomm Erbrecht-Schürmann (fn 52), N 11 on Art 488 CC; BasK-Bessenich (fn 52), N 4 on Art 488 CC; Eitel, Anwartschaft (fn 49), p 46 et seq; Christen (fn 52), p 258.

60 Eitel, Anwartschaft (fn 49), p 46.

61 PraxKomm Erbrecht-Schürmann (fn 52), N 11 on Art 488 CC; BasK-Bessenich (fn 52), N 4 on Art 488 CC; Spirig (fn 58), p 213.

62 From the perspective of the aforementioned special rules set forth in Art 335 CC See in particular Art 87 (1) and (1)bis CC:

¹ Under public law, family foundations and church foundations are conditionally not subordinate to a supervisory authority.

^{1bis} They are exempted from the obligation of designating an auditor.'

See Art 88 (2) CC relating to the jurisdiction of a court of law – and not as with conventional foundations of an authority – to the withdrawal of a foundation as well as Art 52 (2) CC, that family foundations need not be registered in the companies' register to obtain the right of personality.

63 Art 80 – 89 CC.

64 See BK-Riemer (fn 33), N 97 and N 161 on the systematic component; BasK-Grüninger (fn 10), N 4 on Art 335 CC; dissenting: August Egger (ZK-Egger), *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, II. Band: das Familienrecht, Zweite Abteilung: die Verwandtschaft (Art 252-359 ZGB)* (Zurich, Schulthess Verlag, 1943), N 10 on Art 335 CC; Hoffmann (fn 43), p 39, 49; Kaufmann (fn 42), p 17.

65 Article 52 (2) CC. Mixed foundations must be registered, unless the mixed foundation is the result of the combination of a family foundation and einer church foundation. See BGE 106 II 114 as well as BasK-Huguenin (fn 10), N 11 on Art 52 CC. See 'The requirement to register in the companies' register' below.

to any supervision other than public trust provisions.⁶⁶ Moreover, family foundations are not obliged to designate an auditor.⁶⁷

Deviations from individual recommendations

The requirement to register in the companies' register

In family foundations, the circle of beneficiaries is limited to family members.⁶⁸ Because of the intimate character of family foundations, there is no need for public disclosure, which is why family foundations are exempt from the obligation to register in the companies' register.⁶⁹ The founder may, on a voluntary basis, provide in the foundation charter that the family foundation must appear in the companies' register.⁷⁰ Such a provision obliges the foundation body to register in the companies' register.⁷¹ The family foundation thus has a right – but not an obligation – to register.⁷²

Registration in the companies' register has an exclusively declaratory effect for family foundations.⁷³ It enhances transparency in legal matters with third parties and serves as proof of the foundation's existence.⁷⁴

From being exempted to being obliged to figure in the companies' register, there is one exception: where the family foundation carries on a trading, manufacturing or commercial enterprise⁷⁵ in the pursuit of its purpose, it is obliged to be registered in the companies' register.⁷⁶

No need for submission to a regulatory authority

Family foundations are not subject – on the same basis upon which they are exempted from the obligation to register with the companies' register – to any governmental supervision.⁷⁷ Voluntary submission to governmental supervision is not possible.⁷⁸ Should a founder wish to subject their family foundation to a state supervisory authority, the only remaining possibility is to establish a mixed foundation.^{79,80}

Although family foundations are not subject to any supervisory authority, they can nevertheless, 'submit to supervision'. The founder may, upon forming the organisation,

66 Article 87 (1) CC. In case of doubt, the supervisory authority shall decide thereon, see BGE 40 I 261. See 'No need for submission to a regulatory authority' below.

67 Art. 87 (1)bis CC. See 'No reporting obligations' below.

68 See more specifically under 'The beneficiaries of a family foundation' below.

69 Article 52 (2) CC; See also BK-Riemer (fn 33), N 113 on the systematic component; BasK-Grüniger (fn 10), N 5 on Art 335 CC.

70 BK-Riemer (fn 33), N 89 on Art 81 CC.

71 BK-Riemer (fn 33), N 89 on Art 81 CC. See also Art 7(a) in conjunction with Art 2(a) para. 9 HRegV.

72 See BK-Riemer (fn 33), N 116 and N 166 on the systematic component and N 89 on Art 81 CC; BasK-Grüniger (fn 10), N 10 on Art 87 CC.

73 BK-Riemer (fn 33), N 89 on Art 81 CC; BasK-Grüniger (fn 10), N 10 on Art 87 CC.

74 BasK-Grüniger (fn 10), N 10 on Art 87 CC.

75 Art 934 (1) OR. On the concept of business, see Art 2(b) HRegV, by which a business is to be understood as an economic activity that is autonomous and established upon on-going acquisition.

76 Art 934 (1) OR in conjunction with Art 94 et seq HRegV.

77 Art 87 (1) CC. In case of doubt, the supervisory authority shall rule thereon, see BGE 40 I 261. That is why this provision has just been incorporated into the law, since family foundations are not subject to any supervisory authority and Art. 84 (2) CC is thus not applicable in this case; See BK-Riemer (fn 33), N 121 on the systematic component.

78 BK-Riemer (fn 33), N 116 on the systematic component; See also BasK-Grüniger (fn 10), N 8 on Art 87 CC.

79 See Oliver Arter, 'Charitable Foundations and Associations in Switzerland', (2010) TLI 24(1) 50.

80 BK-Riemer (fn 33), N 116 on the systematic component; BasK-Grüniger (fn 10), N 8 on Art. 87 CC.

provide namely for an internal supervisory body, for example an assembly of all beneficiaries of legal age, to watch over the foundation's activities.⁸¹

No reporting obligations

Family foundations are exempted from the obligation to appoint an auditor.⁸² However, designation of an auditor on a voluntary basis is also allowed.⁸³

Legal obligation to keep records

Family foundations are not exempted from the obligation to keep records.⁸⁴ Proper accounting serves the pursuit of the foundation's purpose as well as the exercise of control,⁸⁵ and may be carried out through any, 'internal supervisory body', or at the request of a beneficiary through the competent court. The legal obligation to keep records concerns the topmost foundation body, whose task is to ensure that the accounting records of the foundation comply with the rules of the Code of Obligations regarding commercial bookkeeping.⁸⁶

If the foundation carries on commercial activities for its purposes, the rules of the Code of Obligations regarding the presentation of accounts and the disclosure of the annual accounts for stock corporations shall apply.⁸⁷

Establishment of a family foundation

The establishment of a family foundation requires *dedication* of assets for the purpose of defraying the costs of *education, equipping or support* of family members.⁸⁸ The foundation shall be established based on official documents or as a result of death.⁸⁹ Registration in the companies' register is – in contrast with conventional foundations – not required,⁹⁰ unless the foundation operates a trading, manufacturing or commercial enterprise.⁹¹

A distinction must be made with regard to what is obtained by the legal character: if it is a matter of establishing a foundation on account of death,⁹² then it acquires its legal capacity immediately upon the death of the founder.⁹³ Additionally, if it is appropriately organised,⁹⁴ it will also be capable of acting.⁹⁵ When establishing a foundation among living persons, the family foundation acquires its legal character with the official registration.⁹⁶ The foundation becomes *irrevocable* at the same time.⁹⁷

81 See BK-Riemer (fn 33), N 168 on the systematic component.

82 Article 87 (1)(a) CC.

83 See Parlamentarische Initiative (Parlamentarische Initiative), 'Revision des Stiftungsrechtes, Bericht der Kommission für Wirtschaft und Abgaben des Ständerates vom 23. Oktober 2003', BBl 2003, p 8153 et seq, 8159, 8165.

84 See BK-Riemer (fn 33), N 110 on Art 81 CC.

85 Article 83a CC; BK-Riemer (fn 33), N 110 on Art 81 CC; BasK-Grüniger (fn 10), N 9d on Art 87 CC.

86 Article 83a (1) CC. On the preparation of the annual accounts see Art 957 et seq OR, that are correspondingly applicable.

87 Article 83a (2) CC. See the corporate law regulations in Art 662 et seq OR, that are correspondingly applicable.

88 Article 80 (1) CC.

89 Article 81 (1) CC.

90 Article 52 (2) CC.

91 Article 934 (1) OR. On the concept of business, see Art 2(b) HRegV, by which a business is to be understood as an economic activity that is autonomous and established upon ongoing acquisition.

92 Article 81 (1) in conjunction with Art 493 CC.

93 BK-Riemer (fn 33), N 62 on Art. 81 CC.

94 See Art 83d CC.

95 BK-Riemer (fn 33), N 62 on Art 81 CC.

96 See Art 81 (1) CC; BK-Riemer (fn 33), N 68 on Art 81 CC.

97 BK-Riemer (fn 33), N 68 on Art 81 CC.

Total assets of a family foundation

Foundation assets can be comprised of any assets, such as money, securities, property, chattel, intellectual property rights, claims⁹⁸ or entire companies.⁹⁹

The beneficiaries of a family foundation

Admissible circles of beneficiaries

A prominent feature of family foundations under Swiss law is that, for one *family*, a fund is available for defraying the costs of education, equipping or support of family members or similar purposes.¹⁰⁰

The family foundation distinguishes itself from the normal foundation by the fact that the circle of beneficiaries, according to the founder's will, is limited to the members of a single designated family of related persons to which they belong through blood relationship, marriage or adoption.^{101,102} The founder himself also belongs to the family.¹⁰³ Those children born recognised or adjudged born outside of registered marriage are also counted among the blood relatives.¹⁰⁴ Persons related by marriage who are beneficiaries of the family foundation can also be related through marriage, at least as long as they are a spouse linked by blood relation to the family concerned.¹⁰⁵ By means of the family foundation, collaterals and their descendants of two spouses can also be favoured.¹⁰⁶ According to modern understanding of the concept of the family, those persons that live in registered partnerships, such as cohabiting partners, are also to be counted, inasmuch as they are in a stable concubinage,¹⁰⁷ through which a marriage or registered partnership serves an equivalent purpose.¹⁰⁸

98 BasK-Grüninger (fn 10), N 6 on Art 80 CC.

99 BGE 127 III 337 et seq.

100 Art 335 (1) CC.

101 See RB ORK ZH 1942 No.85 = ZSGV 43 (1942) 424 = ZR 41 Nr 33 with regard to adopted children of the founder; the adopted children of the family members are also associated with the concept of family in Art 335 CC.

102 BGer., Judgment of 4 March 2002, 2A.457/2001, E. 4.5; BGE 75 II 88; BK-Riemer (fn 33), N 109 on the systematic component; Hamm and Peters (fn 1), p 248 et seq; Franz Gerhard, 'Die Familienstiftung nach ZGB', ZSR 1930, p 137 et seq, 141et seq; ZK-Egger (fn 64), N 12 on Art 335 CC.

103 BK-Riemer (fn 33), N 109 on the systematic component.

104 BK-Riemer (fn 33), N 109 on the systematic component.

105 BK-Riemer (fn 33), N 109 on the systematic component.

106 BGE 50 II 416 and 421et seq.

107 A consolidated concubinage consists of a permanent relationship bearing advantages similar to marriage, while the cohabitation is so tightly knit that a cohabiting partner is ready to provide assistance and support for the other cohabiting partner pursuant to Art 159 (3) CC. See BGE 118 II 235 et seq, 237, as well as BGE 124 III 52 et seq, 54. According to BGE 118 II 235 et seq, 238, it is considered that, 'concubinage in a strict sense consists of the cohabitation of two persons over a long period, when not permanently, comprehensively based on different sexes with basic character of exclusivity, that exhibit both an intellectual-psychological, as well as a physical and financial component and also referred to somewhat as a union of life, table and bed. Meanwhile, not all three components have the same significance. Even if the sexual union or financial component is lacking, both partners live nevertheless together in a stable and exclusive relationship, are faithful to one another and provide one another with comprehensive support such that it must be considered as a community similar to marriage. The judge must conduct in any event an appraisal of all relevant factors. All of the circumstances of the cohabitation are significant in the assessment of its quality.' Confirmed in BGer, Judgment of 2 June 2003, 5C.70/2003, E 3, BGer, Judgment of 22 July 2005, 5P.135/2005, E 2.1, BGer, Judgment of 11 June 2008, 5A_81/2008, E. 5.1.2, as well as BGer, Judgment of 3 December 2010, 5A_613/2010, E 2.

108 Markus Müller-Chen, Vito Roberto, Marc Amstutz, Peter Breitschmid, Andreas Furrer, Daniel Girsberger, Claire Huguenin, Anton K. Schnyder, Alexandra Rumo-Jungo (Ed) (HandKomm-Editor), *Handkommentar zum Schweizer Privatrecht* (Zurich, Schulthess Verlag, 2007), HandKomm-Breitschmid/Vetsch, N 3 on Art 335 CC; Opel (fn 45), p 15.

According to the prevailing opinion, housemates, foster children¹⁰⁹ and others among those persons do not belong to the family of the official household.^{110,111} They may not benefit as beneficiaries of a family foundation. Should provisions for such persons as beneficiaries be made, then it is no longer a matter of the foundation concerned of being a pure family foundation, but rather a mixed foundation.¹¹² Should certain natural third parties be the recipients of the dedicated assets of a family foundation, the foundation can also be, independently of the description of the purpose, tied to an obligation, a requirement, a bequest or a usufruct in favour of these persons.¹¹³

Legal persons cannot be beneficiaries of a family foundation, not even when the legal person is controlled by family members, and such family members themselves can be beneficiaries of the foundation.¹¹⁴

Statutory design options

Within the framework of the admissible circle of possible beneficiaries of a family foundation outlined above, the founder is free to restrict the circle of beneficiaries within the foundation being established.¹¹⁵ It is conceivable that the founder designates that only individual or all descendants are beneficiaries,¹¹⁶ that they stem from an ancestor, that individual or all of the descendants are beneficiaries,¹¹⁷ or that only the descendants of a designated collateral person (brother, sister, uncle) are to be beneficiaries.¹¹⁸ A subsidiary beneficiary of a specific branch is also permissible.¹¹⁹

Yet further restrictions are permissible in designating the circle of beneficiaries, for example the restriction to male¹²⁰ or female beneficiaries,¹²¹ to bearers of the family name,¹²² to bearers of the name,¹²³ to a specific place of origin,¹²⁴ to Swiss nationality,¹²⁵ to a specific confession,¹²⁶ to legitimate descent,¹²⁷ place of residence, blood relationship¹²⁸ and the like.¹²⁹

109 See in particular Verordnung vom 19. Oktober 1977 über die Aufnahme von Kindern zur Pflege und zur Adoption (PAVO), SR 211.222.338.

110 See Art 331 (2) CC: 'The household authority covers all related persons or related by marriage or on the basis of a contractual relationship as employee or that live in a similar position within the common household.'

111 Thus BK-Riemer (fn 33), N 109 on the systematic component; Hoffmann (fn 43), p 74et seq Left open in BasK-Grüniger (fn 10), N 2 on Art 87 CC. Other opinion, ZK-Egger (fn 64), N 12 and N 14 on Art 335 CC and N 1 on Art 87 CC; Kaufmann (fn 42), p 28, fn 107.

112 BK-Riemer (fn 33), N 109 on the systematic component.

113 BK-Riemer (fn 33), N 109 on the systematic component.

114 See BGE 75 II 88et seq; BK-Riemer (fn 33), N 109 on the systematic component.

115 BK-Riemer (fn 33), N 110 on the systematic component.

116 Ie a particular child and his/her descendants. Further, ZK-Egger (fn 64), N 12 on Art 335 CC.

117 See eg BGE v 9.11.1945 in ASA 14 (1945/46) Nr 62 p 267: all descendents of the great-grandfather of the benefactress as foundation beneficiaries.

118 BK-Riemer (fn 33), N 110 on the systematic component.

119 See BGE 71 I 266: The founder and their descendents are beneficiaries, and only in the event of extinction of their family does the family of the brother of one of the founders become beneficiary.

120 BK-Riemer (fn 33), N 110 with comments on the systematic component.

121 BGE 133 III 167 et seq

122 BGE v 9.11.1945 in ASA 14 (1945/46) No 62 p 267.

123 BGE 56 I 285.

124 BGE 54 I 301.

125 BGE 56 I 285.

126 BK-Riemer (fn 33), N 110 with comments on the systematic component.

127 BK-Riemer (fn 33), N 110 with comments on the systematic component.

128 Without adopted children, see BK-Riemer (fn 33), N 110 on the systematic component.

129 BK-Riemer (fn 33), N 110 on the systematic component.

Clear and unequivocal establishment of the beneficiary's circle in the foundation documents or in a regulation is a decisive factor in statutory restrictions.¹³⁰ In case of doubt, it may be considered that female descendants through marriage are not considered as excluded from entitlements of the foundation.¹³¹ The same applies for children born outside of a registered marriage or adopted children of family members, provided the founder has made no express provision to the contrary or that they presumably correspond to the founder's will.¹³²

Whether a restriction on the circle of beneficiaries of a family foundation to separately designated individuals may be reconciled with the essential characteristics of the family foundation is subject to dispute.¹³³ Based on the view put forth here (which does not however correspond to the prevailing theory),¹³⁴ the individual favouritism of several designated beneficiaries must be compatible with the character of the family foundation because otherwise, for the founder, for example by means of favouritism through testamentary disposition, individual family members are allowed within the scope of private autonomy, to grant individual pecuniary advantages. It is likewise permissible that a founder should favour, by means of 'special rights' certain individual family members.¹³⁵

Admissible purposes of a family foundation

Preliminary remarks

The family foundation is – as shown – a normal foundation,¹³⁶ which distinguishes itself by designating family members as beneficiaries,¹³⁷ limiting it to fulfilling statutory tasks.¹³⁸ The admissible purposes are limited by statute to the defrayal of costs for education, material needs, support or similar purposes, and understandably, a family foundation may avail itself of only the individual purposes that are admissible by statute.¹³⁹

According to established Supreme Court case law, the list contained in the law is *exhaustive*.¹⁴⁰ A common feature of the purposes pursuant to Art 335(1) CC is that the family members that belong to the circle of beneficiaries may, under certain circumstances (for example, during adolescence), for setting up their own household or livelihood or in case of emergency, require help so that their special needs in such circumstances can be satisfied.¹⁴¹ By 'similar purposes' referred to by law, it is meant only those which also arise when the family members under certain circumstances grant such material help that under the prevailing circumstances appears necessary or desirable.¹⁴²

130 BK-Riemer (fn 33), N 110 on the systematic component.

131 Kaufmann (fn 42), p 28, fn 106; BK-Riemer (fn 33), N 110 on the systematic component.

132 BK-Riemer (fn 33), N 110 on the systematic component.

133 Dissenting ZK-Egger (fn 64), N 12 and N 17 on Art 335 CC; Kaufmann (fn 42), p 28 et seq, 38 et seq; Eduard Gygax, 'Familienstiftungen und ihre Steuerprobleme', StR 1956, p 462 et seq, 463; BK-Riemer (fn 33), N 111 on the systematic component.

134 See BK-Riemer (fn 33), N 111 with comments on the systematic component.

135 BK-Riemer (fn 33), N 111 on the systematic component.

136 According to Art 80 et seq CC.

137 Primarily deals with family members of the founder.

138 Zeiter, Unterhaltsstiftung (fn 1), pp 451, 452.

139 Article 335 (1) CC.

140 BGE 108 II 393, 394; BK-Riemer (fn 33), N 142 on the systematic component; Kaufmann (fn 42), p 29 et seq; Josef Ackermann, *Der besondere Zweck der Stiftung unter spezieller Berücksichtigung des Zweckes der Familienstiftung*, Diss (Fribourg, 1950), p 23.

141 BGE 108 II 393, 394.

142 BGE 108 II 393, 394.

Costs of raising children

The costs of raising children are understood to include both costs of education for *basic education* as well as for *higher education* in universities, vocational schools and others of educational institutions.¹⁴³ These are comprised not only of the full costs for scholastic and professional *initial training*, but also costs for *continuing education and further training*.¹⁴⁴ Some costs may fall into this latter category for subsequent retraining, for career entry and professional reorientation, for general professional education or furthering artistic education, for educational leave or for carrying out research projects.¹⁴⁵ It makes no matter whether the educational or training facilities are public or private.¹⁴⁶

Costs such as *living expenses in relation to education or training*, are part of education costs, at least for non-residence placement.¹⁴⁷ Costs for visits from boarding schools or approved schools¹⁴⁸ including those that result from costs for general living expenses are readily included as well. The visits of external educational and training facilities are also further costs related to the lodging, travel and transportation that may be financed by the foundation. Correspondingly, the financing of general living expenses from the foundation's assets is permitted in the education and training phase of a beneficiary.¹⁴⁹ It is essential, however, that the financing of general living expenses during the education and training phases is *not unconditional*, but rather within the scope of a certain education, training or pursued in view of a particular professional activity.¹⁵⁰ It would thus be inadmissible to finance the general living expenses of all beneficiaries during a particular period of time during adolescence, regardless of whether they are actually in training or not.¹⁵¹

The distribution of foundation assets during the training and education phase may be independent of the pursuit of any particular situation or necessity of a beneficiary, which is why the financing of maintenance of a person pursuing education or training is thus also admissible when no consideration is given to their own financial means.¹⁵² The only decisive factor is that the foundation's assets be not unconditionally distributed for the financing of the general living expenses of a beneficiary, but rather that they serve the financing of general living expenses *in the course of education or training*.^{153,154} This also means that the financing is limited to the duration of the education, training or continuing education. In addition, the amount of the financing of general living expenses during education and training must not be excessive; in any event, well-endowed family foundations are rarely set up on a petty scale.¹⁵⁵

143 BasK-Grüninger (fn 10), N 10 on Art 335 CC.

144 BK-Riemer (fn 33), N 145 on the systematic component.

145 BK-Riemer (fn 33), N 145 on the systematic component.

146 BK-Riemer (fn 33), N 145 on the systematic component.

147 BasK-Grüninger (fn 10), N 10 on Art 335 CC.

148 BK-Riemer (fn 33), N 145 on the systematic component.

149 BasK-Grüninger (fn 10), N 10 on Art 335 CC; restrictively BK-Riemer (fn 33), N 146 on the systematic component.

150 BK-Riemer (fn 33), N 146 on the systematic component.

151 BK-Riemer (fn 33), N 146 on the systematic component.

152 BK-Riemer (fn 33), N 146 on the systematic component.

153 It must therefore – according to case law of the federal court concerning the boundaries between admissible family foundations and inadmissible entailed family estates – occur under certain circumstances. See BGE 108 II 393, 394et seq.

154 BK-Riemer (fn 33), N 146 on the systematic component.

155 BasK-Grüninger (fn 10), N 10 on Art 335 CC; BK-Riemer (fn 33), N 146 on the systematic component.

Endowment

General

The notion of endowment used to be understood as the *dowry* for daughters suitable for marriage or actually marrying.¹⁵⁶ Today, endowment refers to everything concerned with establishing, ensuring and improving one's livelihood, in particular in establishing a household, marriage or starting an independent professional life,¹⁵⁷ for male and female family members alike.¹⁵⁸ What exactly is expressed by the notion of endowment remains unclear at present.

The notion of endowment can be found not only in family foundation law, but also, with much greater practical significance, in law of succession. Seen from perspectives of succession law, endowment contributions to individual heirs in the determination of the division¹⁵⁹ and weight of the statutory share¹⁶⁰ are significant.

Endowment in law of succession

Since the family played such a preponderant role in the 19th and early 20th centuries and in order to provide children with the necessary capital for starting out in life, endowment contributions were considered as special remittances from various aspects of law of succession.¹⁶¹ Nowadays it is assumed that the state should enable equal opportunity through training opportunities and social networks to eliminate economic inequality from parental homes as much as possible.¹⁶² Endowment payments thus now represent voluntary payments, and are no longer social and economic necessities and are considered as pure amenities. This also influences the discussion concerning whether they are subject to compensation and reduction.

The provisions on compensation under law of succession set forth that, what a legator passes on to their descendants as dowry, endowment or through assignment of assets, debt forgiveness and the like, carries an obligation of compensation, provided the legator has made no express provision to the contrary.¹⁶³ According to Supreme Court case law, contributions are construed as those which serve the purpose of establishing, securing and improving a livelihood,¹⁶⁴ and their common purpose for the *family welfare*.¹⁶⁵ This includes dowry and

156 BK-Riemer (fn 33), N 147 on the systematic component. Further yet ZK-Egger (fn 64), N 13 on Art 335 CC; Kaufmann (fn 42), p 33, for further comments.

157 Following the law of succession provision of Art 626 CC with relation to the heirs' reconciliation obligation.

158 Christian Brückner, *Das Personenrecht des ZGB* (Zurich, Schulthess Verlag, 2000), N 1460; BasK-Grüniger (fn 10), N 11 on Art 335 CC; ZK-Egger (fn 64), N 13 on Art 335 CC.

159 Art 626 CC:

¹ The legal heirs are mutually obliged to reconcile everything that the testator or testatrix in their lifetime charged to their part of the inheritance.'

² Whatever the testator or testatrix has endowed to their descendents as dowry, endowment or through assignment of assets, debt forgiveness and the like remains, unless the testator or testatrix expressly provided for the contrary, subject to the reconciliation obligation.'

160 Article 522 (1) CC: 'If the testator or testatrix exceeds their power of disposal, the heirs that do not receive the legal portion of the asset value may claim the reduction of the disposal to the extent allowed.'

Article 527 para. 1 CC: 'Subjecting the reduction as well as disposals on account of death: The contributions for charges to the inheritance, as dowry, endowment or assignment of assets, when they are not subject to compensation.'

161 Christian Brückner, 'Zur Herabsetzung lebzeitiger Zuwendungen', *successio* 2008, p 194, 198.

162 Brückner (fn 161), p 194, 198.

163 Article 626 (2) CC.

164 BGE 76 II 196.

165 BGE 107 II 119, 131; Arnold Escher (ZK-Escher), *Kommentar zum Schweizerischen Zivilgesetzbuch, Das Erbrecht, Erste Abteilung: Die Erben (Art 457-536)* (Zurich, Schulthess Verlag, 1959), N 14 on Art 527 CC. See the complete Paul Eitel, 'Lebensversicherungsansprüche und erbrechtliche Ausgleichung', *ZBJV* 2003, p 325, 351 et seq.

everything that is given that serves as a basis or for easing the practice of the profession or business activities, but not payments covering room and board costs over the entire year,¹⁶⁶ since these are intended for immediate consumption with nothing remaining afterwards.¹⁶⁷ The principle of the *gift collation* stands in contrast with the so-called principle of *providing support*, whereby *larger* contributions are constantly compensated,¹⁶⁸ even when there is no correspondence with a notion of provision of care, but these are rather to be qualified merely as amenities in the sense of a gift.

Up to the present day, Swiss Federal Supreme Court has followed the theory of providing support.¹⁶⁹ In a decision of 8 November 1990, the Swiss Federal Supreme Court went one step further on gift collation and exposed that the donation of land of considerable worth must be strictly considered as a donation governed by the statutory compensation obligation.¹⁷⁰ Since it is unlikely that the Supreme Court wished to lay down a special rule for property with this decision, it is fair to assume that the remarks of the Federal Court were of a general scope and that other larger, highly-valued gifts, for example, of securities or money, are to be qualified as donations governed by the statutory compensation obligation.¹⁷¹ A similar bias was already displayed in a decision of the Swiss Federal Supreme Court on 3 July 1958, in which the donation of significant individual assets was subsumed under the legal term of assignment of assets and the legal compensation was assumed.¹⁷²

Endowment in family foundation law

It is thus already implied that the notion of endowment in foundation law nowadays is also to be understood in a broad sense, that the notion of bestowal of a dowry has basically lost any significance today. When the bride – as well the groom – marry, they rarely receive from their parents a costly dowry of porcelain, dishes, linen, bed linen or the like,¹⁷³ for such gifts are no longer necessary for newlyweds setting up house.¹⁷⁴ Correspondingly, dowries, in our region, have fallen into oblivion.¹⁷⁵

The contemporary connotation of the notion of endowment – as much in inheritance as in family foundation law – is subject to broad interpretation. From the viewpoints of both inheritance law as well as foundation law, the notion of endowment is to be understood as an allocation of assets of a *certain scope and intrinsic value*. Among the specific facts of Swiss family foundations and with regard to the ban on the general financing of living expenses, the notion of endowment for family foundations is to be restricted insofar as that endowment under foundation law is to serve for *establishing, securing or improving a household*, in particular for *establishing an individual or collective conjugal household, for taking up an independent professional occupation* or for *establishing one's own company, without that an unconditional financing of living expenses through the use of the contribution occurs therewith, but rather remains as a support*.

An admissible allocation of endowment for the establishment of a private household

166 For critical commentary Walser Flügel, 'Zu einigen Fragen aus dem ehelichen Güterrecht und dem Erbrecht', BJM 1965, p 110, 122 et seq.

167 Harold Grüniger, 'Erbvorbezug, Schenkung und Ausgleichung, Vermeintlich einfache Vorgänge kompliziert gemacht? Einige Tücken der erbrechtlichen Ausgleichung', ST 2008, pp 1044, 1045.

168 Brückner (fn 161), pp 194, 197.

169 See in particular BGE 76 II 188, 196, and recently n 131 III 49, 55.

170 BGE 116 II 667, 674 et seq.

171 Also Brückner (fn 161), pp 194, 198.

172 BGE 84 II 338, 349; ZK-Escher (fn 165), N 37 of Art 626 CC.

173 Brückner (fn 161), pp 194, 198.

174 Brückner (fn 161), pp 194, 198.

175 Brückner (fn 161), pp 194, 198.

would be, for example, granting of cash benefits to the beneficiaries who leave their parents' home and funds required for setting up their own household. The notion of endowment also covers large amounts at marriage for the purpose of the usual establishment of a household, for example, for the acquisition of a property.¹⁷⁶ Disbursements can also be made in old age, for example for the acquisition of real estate that serves for the establishment of homes for the elderly beneficiaries.¹⁷⁷ Besides making funds directly available in light of the opinion put forth here – which is in part in contradiction with prevailing case law – there is also the possibility that the foundation beneficiaries may be allowed to live rent-free in a property of the foundation, that ownership of a foundation property be transferred to the beneficiaries or that the beneficiary's rent be paid through foundation assets.

An allocation of endowment that is admissible for founding a professional livelihood would be the granting of start-up capital to family members who wish to become independent at the beginning of their professional career or at a later point in time.¹⁷⁸ Likewise, family members can, when engaging in an independent occupation and when founding an enterprise, obtain interest-free preferential rates on loans granted.¹⁷⁹

Finally, foundation assets can be distributed to serve the subsistence and preservation of a habitual standard of living¹⁸⁰ or that are provided to compensate for financial losses that threaten to render the livelihood or the existing lifestyle impossible.

As with the payments taking place under the item 'Education', disbursements under the item 'Endowment' require no particular need or emergency situation of a beneficiary.^{181,182} It largely suffices that a relationship exists between the disbursement and the purpose.¹⁸³

The amount conveyed to beneficiaries is not limited but rather dependent upon the financial resources of the foundation, the material requirements of the beneficiary as well upon the living conditions of the family members.

Support benefits

Support benefits are intended for bridging financial hardship and presume – as opposed to the benefits pursued under the items 'Education' and 'Endowment' – a *need situation* of a beneficiary.¹⁸⁴ It is debatable whether a common, objective need situation¹⁸⁵ suffices or if a subjective need situation¹⁸⁶ is required.¹⁸⁷

176 See the purpose of the Wolfgang Denzel family foundation, whereby the bride's portion of up to a maximum amount of CHF 250,000.00 may be allowed.

177 See sibling founders of a family foundation.

178 See the purpose of the Sandoz-Family foundation, available online at <http://www.sandozfoundation.ch/de/stiftung/10-fragen/index.html>

179 See family foundation Franz Liechti or family foundation Schmid-Leibundgut.

180 See Karl Epting family foundation.

181 BK-Riemer (fn 33), N 147 on the systematic component.

182 Which certainly did not prevent the founder from providing through the articles of association that a situation of need was a pre-requisite for a payment, see BK-Riemer (fn 33), N 147 on the systematic component.

183 BK-Riemer (fn 33), N 147 on the systematic component.

184 BK-Riemer (fn 33), N 148 on the systematic component; BasK-Grüninger (fn 10), N 11 on Art 335 CC.

185 Such would be the case when, eg it is purely taken into account on the basis of age or retirement, ie each beneficiary would receive payments from a specific age or upon reaching retirement age, regardless of whether they were in financial need or not; see BK-Riemer (fn 33), N 148 on the systematic component.

186 In this case, the beneficiaries would only receive payment when they are, on the basis of age or retirement, effectively in financial need; see BK-Riemer (fn 33), N 148 on the systematic component.

187 BK-Riemer (fn 33), N 148 on the systematic component, requires that a subjective need situation must exist, while BasK-Grüninger (fn 10), N 11 on Art 335 CC, considers that an objective need situation is sufficient, with the argument that purposes that may be pursued from a personal provision foundation should also be open to

The concept of ‘support benefits’ is quite restrictive.¹⁸⁸ In particular, no admissible supporting situation exists when financial resources or payment in kind flow from the foundation to the beneficiary for general living expenses constantly and independently of a concrete need situation.¹⁸⁹

Where there exists on the other hand a need situation, payments for general subsistence are permissible.¹⁹⁰ It is more or less permissible to clearly establish in a foundation charter that in a property which serves particularly as a capital investment for the family foundation, family members may consider that they are in time of need free of charge.¹⁹¹ Further financial or other benefits are permissible to family members who are sick, invalid, without a profession, living alone or mired in financial difficulties.¹⁹² Family foundation providing support to family members in need situations is a broad yet permissible interpretation of the concept of support¹⁹³ as well as any kind of assistance.

Incidentally, family members suffering hardship which is their own fault can also receive payments from a family foundation.¹⁹⁴

Similar admissible purposes

Similar purposes involve those that are expressly qualified by statute as a ‘reasonable analogy’.¹⁹⁵ They are ‘intended to be only such material assistance that other family members under certain conditions would also receive that appear necessary or desirable in the present circumstances.’¹⁹⁶

According to case law, similar purposes include maintenance of a family grave or memorial services.¹⁹⁷ The maintenance of a monument of the founder, the writing of a family chronicle,¹⁹⁸ the preservation of family writings, family libraries or the financing of regular family gatherings¹⁹⁹ are contentious though permissible, at least provided they do not constitute the sole purpose of a foundation. The preservation of collections or family jewellery exclusively in favour of family members would in contrast, however, be inadmissible.²⁰⁰

Inadmissible purposes

Inadmissible purposes are those such as the family members’ pursuit of the enjoyment of the

cont.

family foundations. BK-Riemer (fn 33), N 148 on the systematic component, departs from the requirement of the subjective need situation, when actual costs have arisen for the beneficiary in the event of illness or invalidity. In this case, the beneficiary receives payments regardless of whether they dispose of the necessary financial resources for covering said costs themselves.

188 BK-Riemer (fn 33), N 148 on the systematic component; Kaufmann (fn 42), p 33; for a broad interpretation to the contrary, see Hoffmann (fn 43), p 74.

189 Kaufmann (fn 42), p 33.

190 BK-Riemer (fn 33), N 148 on the systematic component.

191 BK-Riemer (fn 33), N 148 on the systematic component.

192 ZK-Egger (fn 64), N 13 on Art 335 CC.

193 See ZK-Egger (fn 64), N 13 on Art 335 CC.

194 BK-Riemer (fn 33), N 148 on the systematic component.

195 BGE 73 II 81, 86.

196 BGE 108 II 393, 394.

197 BGE 75 II 15, 24; see BasK-Grüniger (fn 10), N 12 on Art 335 CC.

198 BGer., Judgment of 4 March 2002, 2A.457/2001, E 3.2.

199 BasK-Grüniger (fn 10), N 12 on Art 335 CC; See also BK-Riemer (fn 33), N 150 on the systematic component, that in terms of the financing of regular family meetings, the opinion voiced, however, that this was not an admissible purpose unless the meetings were a part of the foundation’s organisation.

200 BasK-Grüniger (fn 10), N 12 on Art 335 CC.

assets or of proceeds provided by the foundation, without the existence of a designated life situation for them in the sense of the one elaborated above and without a specific purpose pursued under Art 335(1) CC.²⁰¹ The so-called maintenance foundation already mentioned is specifically forbidden.²⁰² It is therefore inadmissible to pay beneficiaries unconditional payments out of a family foundation²⁰³ and pursue purely financial purposes,²⁰⁴ because that would liken the family foundation to the entailed family estate (no longer admissible), which would amount to a circumvention of Art 335(2) CC.²⁰⁵ It is thereby of no consequence whether the unconditional payments are provided in the form of money or in kind.^{206,207}

The family foundation pursues an inadmissible purpose for example, when it merely provides the family members with a higher standard of living or exclusively seeks to enhance family prestige.²⁰⁸ Swiss jurisprudence further qualifies inadmissible maintenance foundations those family foundations that serve the acquisition or maintenance of property put at the disposal of the family members for the sake of representation²⁰⁹ or recreation.^{210,211}

Care must also be taken when establishing a family foundation to ensure that a sole person or a sole person of a generation is not the exclusive beneficiary – for these could be considered as indications of an inadmissible maintenance foundation.²¹²

The pursuit of inadmissible purposes

Inadmissible provisions of the articles of association

Should provisions of the articles of association of a family foundation contain purposes that are not compatible with Art 335(1) CC, then the foundation is pursuing a purpose that is primarily unlawful.²¹³ It is thus void and has acquired no legal character.²¹⁴ If merely isolated portions are incompatible with the purpose of Art. 335 (1) CC, there exists partial invalidity in any event.²¹⁵

201 See BGE 71 II 265, 268; BGE 108 II 393, 394.

202 BGE 71 II 265, 268; BGE 73 II 81, 86; BGE 93 II 439, 449; BGE 108 II 393, 394; ZK-Egger (fn 64), N 14 and N 19 on Art 335 CC; BK-Riemer (fn 33), N 141 on the systematic component; BasK-Grüninger (fn 10), N 9 on Art 335 CC; Hamm and Peters (fn 1), p 250 et seq para 3.1; other opinion Gutzwiller (fn 4), p 1559 et seq, esp 1561 et seq.

203 BK-Riemer (fn 33), N 140, N 142 and N 149 on the systematic component; See also ZK-Egger (fn 64), N 14 and N 19 on Art 335 CC.

204 BK-Riemer (fn 33), N 149 on the systematic component.

205 BGE 93 II 439, 449 et seq.

206 Eg the use of a vehicle or the use of a property.

207 BK-Riemer (fn 33), N 142 on the systematic component.

208 BGE 93 II 439, 449.

209 A so-called castle foundation, see BGE 93 II 439, 451.

210 A so-called holiday home foundation, see BGE 108 II 393.

211 See in its entirety BasK-Grüninger (fn 10), N 9 on Art 335 CC; Hamm and Peters (fn 1), p 249, in addition to the latest BGer, Judgment of 12 December 2010, 2C_157/2010, E. 11, 2C_163/2010, E. 11.

212 BK-Riemer (fn 33), N 111 on the systematic component; BasK-Grüninger (fn 10), N 9 on Art 335 CC; ZK-Egger (fn 64), N 12 on Art 335 CC.

213 BK-Riemer (fn 33), N 159 on the systematic component.

214 Art 52 (3) CC in conjunction with Art 20 (1) OR. BK-Riemer (fn 33), N 159 on the systematic component; BasK-Grüninger (fn 10), N 13 on Art 335 CC.

215 Article 20 (2) OR. BK-Riemer (fn 33), N 159 on the systematic component; BasK-Grüninger (fn 10), N 13 on Art 335 CC. See also BGE 73 II 81, 88 et seq. By way of exception, conversion into an admissible normal foundation is conceivable, see BGer, Judgment of 8 May 2001, 5C.9/2001.

Inadmissible practice of financial contributions

Where the purposes of the foundation charter comply with Art 335(1) CC, but the practice of financial contributions of the foundation body contradicts the provisions of the foundation charter, a distinction must be made:

- If the true, original will of the founder complied with the purposes of Art 335(1) CC, then the foundation bodies are bound by the beneficiaries to the observance of the law and the founder's will.²¹⁶
- However, should the founder's will not correspond to legally permitted purposes, there is dissimulation²¹⁷ by the founder and the foundation is invalid.²¹⁸

Inadmissible organisational rights

General

According to federal jurisprudence, the principle of freedom to form foundations applies in Swiss private law.²¹⁹ It is nevertheless not without limits:

‘On the one hand the founder's arrangements may not be illegal or immoral. On the other hand, the foundation's freedom regarding its establishment is limited. Further, after it comes into being, the founder of the foundation can no longer modify it at will.’²²⁰

‘No preferential position is granted to the founder through establishment of the foundation, in particular when he has failed to reserve such for himself, whether in the foundation charter or in the regulations.’²²¹

Correspondingly, in particular the granting of a free right of disposal over the foundation, as the abolition of the foundation,²²² modification of the foundation charter,²²³ or over the foundation assets, is inadmissible:^{224,225}

‘The foundation regulations may however be modified at any time, whereby in the process the procedures in the foundation charter or in the regulations that are compulsory in their own right must be observed.’²²⁶

216 See BK-Riemer (fn 33), N 160 on the systematic component.

217 Article 18 (1) OR.

218 See BK-Riemer (fn 33), N 160 on the systematic component.

219 See recently BGer, Judgment of 1 June 2005, 5A.37/2004. See in this interest BGE 120 II 374, 377; BK-Riemer (fn 33), N 55 et seq on the systematic component.

220 BGer, Judgment of 1 June 2005, 5A.37/2004, E 3.1, with further information, BK-Riemer (fn 33), N 69 on the systematic component; BasK-Grüniger (fn 10), N 8 prior to Art 80–89bis CC; Thomas Sprecher/Ulysses von Salis-Lütolf, *Die schweizerische Stiftung* (Zurich, Schulthess Verlag, 1999), p 27 et seq.

221 BGer, Judgment of 1 June 2005, 5A.37/2004, E. 3.1.

222 See ‘No free right of cancellation’ below.

223 See ‘No free right to modifications or additions’ below.

224 BK-Riemer (fn 33), N 24 (on the absence of a free right of abolition) and N 162 on the systematic component; See also Opel (fn 45), p 34. See on the absence of a free right of abolition also ZK-Egger (fn 64), N 18 on Art 335 CC; BasK-Grüniger (fn 10), N 2 on Art 88/89 CC; Kaufmann (fn 42), p 39 et seq.

225 See ‘No free right to withdrawal of the foundation's assets’ below.

226 BGer., Judgment of 1 June 2005, 5A.37/2004, E 3.1.

No free right of cancellation

Principle

Foundations are in principle legal persons created for the long term.²²⁷ Unlike corporate bodies,²²⁸ they have no right to voluntary liquidation.²²⁹ The liquidation of a foundation is only possible in accordance with Art 88 f CC.²³⁰ Correspondingly, it is inadmissible that the founder grant a free right of liquidation in the foundation charter to the foundation bodies, the founder himself, his legal successors, beneficiaries²³¹ or third parties.²³² Should the founder nevertheless provide such right of liquidation, there is the danger that the foundation, due to this initial illegality,²³³ will be abolished²³⁴ or that a corresponding clause in the foundation charter in compliance with the rules governing invalidity²³⁵ will be assessed.²³⁶

It is, however, permissible for the founder at the time of the establishment of the foundation *to limit the duration of the foundation's existence or predetermine its future dissolution.*²³⁷

Limitation of the existence

A foundation can in such way show a *limited existence*, providing the founder with a way of describing the scope of the contributions from the foundation assets to beneficiaries by which the foundation assets will be used up within a foreseeable period with the foundation thereby ceasing to exist.²³⁸ A limited duration of the existence of the foundation can also be the result of a corresponding modification of the purpose, and namely concerning both the foundation's mission as such²³⁹ as well as concerning the circumscription of the circle of beneficiaries.²⁴⁰ For example, the founder may specify that only one generation of beneficiaries should receive benefits from foundation assets. Once these beneficiaries have received the payments, the

227 BK-Riemer (fn 33), N 51 on Art 88/89 CC; ZK-Egger (fn 64), N 17 on Art 335 CC.

228 See, eg Art 76 CC, Art 736 (2), Art 770 (2), Art 821 (1) (2), Art 911(2) OR.

229 BasK-Grüninger (fn 10), N 2 on Art 88/89 CC.

230 Article 88 (1) CC: 'The competent federal or cantonal authorities remove the foundation by request or officially when:

1. the purpose has become unattainable and the foundation cannot be maintained due to a change in the foundation charter; or

2. their purpose has become illegal or immoral.'

Article 88 (2) CC: 'Family foundations and church foundations are abolished by the court.'

Article 89 CC: 'Any person with an interest may file an application or an action for abolition of the foundation.

² The abolition must be registered with the registrar for deletion of the record.'

231 For example, by unanimous decision of the family members entitled to vote.

232 BK-Riemer (fn 33), N 24 and N 162 on the systematic component, N 51 on Art 88/89 CC; BasK-Grüninger (fn 10), N 2 on Art 88 CC; Kaufmann (fn 42), p 41 et seq; and more at ZK-Egger (fn 64), N 18 on Art 335 CC.

233 Based on Art 52 (3) CC

234 BasK-Grüninger (fn 10), N 2 on Art 88 CC.

235 Article 20 (2) OR.

236 BK-Riemer (fn 33), N 162 on the systematic component.

237 BasK-Grüninger (fn 10), N 3 on Art 88/89 CC.

238 BK-Riemer (fn 33), N 170 on the systematic component and N 54 on Art 88/89 CC; BasK-Grüninger (fn 10), N 3 on Art 88/89 CC.

239 BK-Riemer (fn 33), N 170 on the systematic component and N 55 on Art 88/89 CC.

240 See on the possible circle of beneficiaries of a family foundation, 'Statutory design options' above. A BK-Riemer (fn 33), N 170 on the systematic component that – in contrast with normal foundations – does not allow family foundations to fix the term for the existence of the foundation by the corresponding transcription or restriction on the circle of beneficiaries. See regarding normal foundations BK-Riemer (fn 33), N 55 on Art 88/89 CC.

purpose of the foundation has been reached and the foundation must be dissolved. The founder may further determine that the foundation shall only exist for a limited time.²⁴¹

Resolutive condition

It is additionally permissible, that the founder renders the existence of the foundation dependent upon a *resolutive condition* by which he specifies in the foundation charter that the foundation shall cease to exist upon the occurrence of an uncertain future event. The admissibility of resolutive conditions²⁴² is acknowledged in doctrine and jurisprudence.²⁴³ However, the uncertain future event resulting in the abolition of the foundation must be precisely and specifically circumscribed in the foundation charter.²⁴⁴ This is required, because otherwise the foundation bodies or third parties would be granted an inadmissible free right of disposal over the foundation.²⁴⁵

In part, the doctrine further requires that the resolutive condition be objectively associated with the foundation's purpose and represents a characteristic feature of the foundation.²⁴⁶ Counter to this requirement, it must be mentioned that simple limitations of the duration of the foundation's existence are readily permitted as well, which is why, based on the views presented here on the effectiveness of the resolutive conditions, no further conditions are necessary.²⁴⁷

An objective association with the foundation concerned is likewise not required, when the grounds for abolition lie with the person of the founder himself or with third parties.²⁴⁸ A founder can, for example, provide in the foundation charter that the foundation is to be abolished when it has no more assets or when one of his descendants should be unable to work, and concurrently specify that the foundation assets following abolition of the foundation should fall directly to himself or to a person designated therefor.²⁴⁹ However, it is also to be noted here that the resolutive condition is not formulated as such and that a free right of disposal over the foundation is established.²⁵⁰

Right to abolish

Finally, the founder can specify during the period of establishment that objectively specified or objectively specifiable conditions be precisely defined in the foundation charter²⁵¹ for terminating the foundation.²⁵² The founder can thus enjoin the foundation bodies, their legal successors, beneficiaries or other third parties to a *right to abolish*. Said persons dispose of no discretionary power and cannot freely decide whether the foundation actually wishes to

241 See BK-Riemer (fn 33), N 24 and N 170 on the systematic component and N 57 et seq on Art 88/89 CC with references to case law and literature; see also ZK-Egger (fn 64), N 17 on Art 335 CC; Hoffmann (fn 43), p 114. A A Kaufmann (fn 42), p 41.

242 Article 154 OR. See on Conditions in Law of Succession Arter (fn 36), p 745 et seq.

243 See BK-Riemer (fn 33), N 24 and N 170 on the systematic component and N 60 on Art 88/89 CC with references to case law and literature. See also ZK-Egger (fn 64), N 17 on Art 335 CC; Kaufmann (fn 42), p 41.

244 BK-Riemer (fn 33), N 60 on Art 88/89 CC; Kaufmann (fn 42), p 41.

245 See BK-Riemer (fn 33), N 61 on Art 88/89 CC.

246 Kaufmann (fn 42), p 41; see the reference in BK-Riemer (fn 33), N 60 on Art 88/89 CC.

247 BK-Riemer (fn 33), N 61 on Art 88/89 CC.

248 BK-Riemer (fn 33), N 61 on Art 88/89 CC.

249 BK-Riemer (fn 33), N 61 on Art 88/89 CC.

250 BK-Riemer (fn 33), N 61 on Art 88/89 CC.

251 It is not permissible to assimilate such provisions in the foundation regulations, since in this particular case the foundation body may freely decide over the foundation existence; see BK-Riemer (fn 33), N 51 on Art 88/89 CC.

252 BK-Riemer (fn 33), N 24 on the systematic component and N 62 on Art 88/89 CC.

suspend the requirements of the conditions or not; they are in fact obliged to liquidate the foundation.

Right of abolition

It is debatable whether the founder can also simply provide for a *right of abolition*, ie whether the founder, by clearly circumscribing objectively defined or objectively definable conditions in the foundation charter, can leave the decision regarding the abolition of the foundation to the foundation bodies or to other persons.²⁵³ In such a case, the abolition conditions would be objectively specified or objectively specifiable, though the decision concerning the will in relation to the further existence of the foundation would be relinquished to third parties.²⁵⁴ According to the view presented here, the granting of a right of cancellation represents an inadmissible right of disposal over the foundation and is hence inadmissible.²⁵⁵

No free right to make modifications or additions

Principle

The foundation charter sets forth the legal basis of a foundation.²⁵⁶ The purpose of the foundation, at least in its main features,²⁵⁷ is found in the foundation charter, as well as any further provisions.²⁵⁸ Following the establishment of the foundation, modifications or amendments of the foundation charter by the foundation body or the founder themselves are as a matter of principle inadmissible.^{259,260}

Right to modification or amendment is provided for in the foundation charter

One exception, however, arises when the founder has provided for a right to modification or amendment in the foundation charter. In such case, the conditions for modification and the new provisions to be added must be objectively determined and/or circumscribed in the foundation charter itself.²⁶¹ As with the abolition of the foundation,²⁶² the decision concerning the modification or amendment of the foundation charter may not lie at the discretion of the foundation body.²⁶³

Should modifications or amendments to the provisions of the foundation charter be

253 BK-Riemer (fn 3388/89 CC with references to case law and literature; BasK-Grüniger (fn 10), N 3 on Art 88/89 CC.

254 BK-Riemer (fn 33), N 63 on Art 88/89 CC.

255 As with BK-Riemer (fn 33), N 63 on Art. 88/89 CC.

256 See BK-Riemer (fn 33), N 25 on the systematic component.

257 BK-Riemer (fn 33), N 26 on the systematic component and N 19 at the end of Art. 80 CC, whereby the particularities can be addressed according to those in the charter.

258 E.g., regarding name, seat, organisation, rules, modifications and abolition, see BasK-Grüniger (fn 10), N 4 on Art 81 CC.

259 BK-Riemer (fn 33), N 25 et seq and N 162 on the systematic component; BGer., Judgment of 1 June 2005, 5A.37/2004, E 3.1.

260 The possibility existing since the revision of the foundation law for the founder to reserve for himself the faculty of changing the purpose in the foundation charter (Art. 86a CC) is not open to family foundations; see Parlamentarische Initiative (fn 83), p 8153 et seq, 8170; see also BasK-Grüniger (fn 10), N 2 on Art. 86a CC.

261 BK-Riemer (fn 33), N 27 on the systematic component and N 88 on Art 85/86 CC.

262 See 'No free right of cancellation' above.

263 BK-Riemer (fn 33), N 27 on the systematic component and N 88 a.E. on Art 85/86 CC.

necessary for urgent reasons – they can also be carried out by the competent authority – a case of non-contentious jurisdiction exists for family foundations.²⁶⁴

Right to modification or amendment of the foundation's regulations

There is a further right to modification or amendment for provisions as well as details of the foundation purpose that the founder referred to in a foundation regulation, as permitted, when establishing the foundation.²⁶⁵ In this case the foundation bodies or other persons²⁶⁶ named in the foundation charter can make modifications or amendments to the regulations. The provisions of the foundation charter must, however, not be violated nor the fulfilment of the foundation purpose defeated by modifications or amendments to the foundation's regulations.²⁶⁷

No right to withdrawal of the foundation's assets

The foundation requires assets to fulfil its purpose. Accordingly, all acts that lead to a reduction or complete relinquishing of the foundation's assets are forbidden.²⁶⁸ The prohibition on the withdrawal of the foundation's assets completes the prohibitions regarding dissolution²⁶⁹ and change of purpose.^{270,271}

No right to a de facto derogation from the founder's intentions

Finally, the foundation bodies or third parties are not allowed to grant a right by means of which these latter may override the foundation charter without formal modification of its provisions.²⁷² It is, therefore, not allowed that the foundation bodies or third parties enlist a separate interpretation of the foundation charter that does not correspond or no longer corresponds to the founder's intentions, that they disregard these latter or otherwise pursue purposes not provided in the charter.²⁷³ Likewise, it is inadmissible that the foundation's activities not be conducted at all or abandoned.²⁷⁴

Admissible participation rights

Along with the inadmissible right to organisation, the founder may reserve the right in the

264 BK-Riemer (fn 33), N 28 on the systematic component and N 68 et seq on Art 85/86 CC. See further in 'Transformation of family foundations' below.

265 BasK-Grüninger (fn 10), N 4 on Art 81 CC; See also BK-Riemer (fn 33), N 28 on the systematic component and N 80 et seq on Art 85/86 CC; BGer., Judgment of 1 June 2005, 5A.37/ 2004, E 3.1.

266 Eg the founder himself or the beneficiaries; See BK-Riemer (fn 33), N 28 on the systematic component.

267 BK-Riemer (fn 33), N 28 on the systematic component.

268 BK-Riemer (fn 33), N 30 and N 162 on the systematic component.

269 See 'No free right of cancellation' above.

270 See 'No free right to make modifications or additions' above.

271 BK-Riemer (fn 33), N 30 on the systematic component.

272 BK-Riemer (fn 33), N 32 on the systematic component.

273 BK-Riemer (fn 33), N 32 on the systematic component.

274 BK-Riemer (fn 33), N 32 on the systematic component.

foundation charter to so-called participation rights.^{275,276} Participation rights enable the founder or third parties to take part in the administration and to exert influence in the activity of the foundation.²⁷⁷

It is readily allowed that the founder or third party as member of the foundation board exert influence upon the administrative work of the foundation.²⁷⁸ By the same token, it is permissible for the founder to appoint himself as sole foundation body and assumes the administration of the foundation,²⁷⁹ whereby he must – although the foundation was originally established by him – also adhere to the foundation charter as must any other foundation board.²⁸⁰

Additionally, a founder – without himself being a member of the foundation – can influence the administration of the foundation by the reservation of various rights. The founder can also reserve himself the right to elect or withdraw the board of trustees.²⁸¹ He may subsequently grant himself a right of approval and right of instruction in relation to the resolutions of the board of trustees or a right to exemption from regulations.²⁸²

Beneficiary rights

General

Since family foundations are not subject to any federal supervision, they are subject to the jurisdiction, in the event of disputes under private law,²⁸³ of the competent courts.²⁸⁴ As opposed to a supervisory authority, courts are not officially employed, but rather only subsequent to action from legitimised persons.²⁸⁵ Correspondingly, only ‘specific’ supervision²⁸⁶ takes place.

Textually, the ‘judicial supervision’ corresponds to that of the supervisory authority under Art 84(2) CC.²⁸⁷ Accordingly, the ‘supervision’ primarily serves to assess whether the foundation assets are applied according to its purposes.

Since the court acts as supervisory authority, it fulfils the same responsibilities and powers as the supervisory authority in the event of appeal.²⁸⁸ Interested parties concerned by a family

275 As, eg voting rights and rights to dismiss with regard to foundation bodies, rights to instruct, approval of foundation decisions, enactment of regulations, etc; see BK-Riemer (fn 33), N 29 on the systematic component. Special cases must, however, be closely monitored to assess the effects these have in particular through marriage, inheritance, debt collection and aspects of bankruptcy, tax and financial market law for the founder as well as the beneficiaries. See in detail Oliver Arter (Tätigkeit), ‘Die anwaltliche Tätigkeit bei der Errichtung und Verwaltung von Trusts’, in Commissione Ticinese per la formazione permanente dei giuristi CFPG (Ed.), *Trust e istituti particolari del diritto anglosassone* (Basel, Helbing Lichtenhahn Verlag, 2009), p 35 et seq, and Oliver Arter (Bankbeziehungen), ‘Trusts und Bankbeziehungen – Wer ist Wirtschaftlich Berechtigter?’, in AJP 3/2012.

276 BK-Riemer (fn 33), N 29 on the systematic component.

277 BK-Riemer (fn 33), N 29 on the systematic component.

278 BK-Riemer (fn 33), N 12 at Art 83 CC; See also BasK-Grüniger (fn 10), N 5 and N 5a at Art 83 CC.

279 See BGE 99 II 246, 261.

280 See above ‘Inadmissible organisational rights – General’.

281 BK-Riemer (fn 33), N 12 at Art 83 CC.

282 BK-Riemer (fn 33), N 12 at Art 83 CC.

283 BGE 76 I 39.

284 Article 87 (2) CC. This provision is mandatory, which is why the court’s appeal in the event of a dispute, cannot be excluded by statute; see ZK-Egger (fn 64), N 16 on Art 335 CC; BK-Riemer (fn 33), N 123 on the systematic component.

285 BasK-Grüniger (fn 10), N 12b on Art 87 and N 5 on Art 335 CC; BK-Riemer (fn 33), N 121 on the systematic component.

286 BasK-Grüniger (fn 10), N 5 on Art 335 CC; BK-Riemer (fn 33), N 121 on the systematic component.

287 BasK-Grüniger (fn 10), N 12 on Art 87 CC; BK-Riemer (fn 33), N 121 on the systematic component.

288 BGer., Judgment of 25 November 2008, 5A_602/2008, E. 2.3.3.

foundation can thus, in particular, claim payments allowed to the beneficiaries, disclosure of information to the beneficiaries or declaration of the (partial) nullity of the foundation.²⁸⁹ Likewise, beneficiaries of a family foundation can demand from the court the withdrawal of foundation bodies that are incapable of respecting their business obligations.²⁹⁰ Further yet, requests may be made for modification of decrees issued by the foundation bodies.²⁹¹

Rights to inspection, information and disclosure

Unlike the law on stock companies,²⁹² the foundation lays down no law on rights to inspection, information or disclosure in favour of the beneficiaries. Should the founder correspondingly specify no such rights in the foundation charter, it shall be at the discretion of the foundation board to grant such rights.²⁹³ However, the foundation board must dutifully exercise its discretion and may not unjustifiably or arbitrarily refuse rights of inspection, information or disclosure.²⁹⁴ In the event of an arbitrary or unjustifiable refusal, the beneficiaries may still rely on the court to enforce the right of inspection.²⁹⁵

Dutiful administration of the foundation

Tasks that in normal foundations fall within the general supervisory authority of the foundation,²⁹⁶ including, among other things, accounting, periodic examination of the appropriate purpose, application of the foundation's assets, asset management and investment, and monitoring of the accounting of the foundation are, as a result of the exemption from government supervision of the foundation body, under the responsibility of the family foundations itself, whereby the expression of the founder's intentions in the foundation charter must be followed.²⁹⁷ Should the foundation assets be used inappropriately or be endangered, the interested parties may, pursuant to Art 87 (2) CC, request the intervention of the court.²⁹⁸ The court thereby interprets the foundation charter according to the will of the founder – and not according to the principle of good faith.²⁹⁹

Access to justice

Should the assets or the fulfilment of the purpose of the foundation be endangered or otherwise in the presence of disputes among the interested parties, the court can be called upon to take the necessary measures.³⁰⁰ Anyone with a legal interest, especially beneficiaries but also those responsible for foundation body functions or third party creditors, has direct standing.³⁰¹ The right to involve the court in the event of dispute is of a mandatory nature

289 BasK-Grüninger (fn 10), N 12 on Art 87 CC.

290 BGE 73 II 86, E. 4 a E. See also BasK-Grüninger (fn 10), N 12 on Art 87 CC.

291 BK-Riemer (fn 33), N 121 on the systematic component.

292 Article 697 OR.

293 See BasK-Grüninger (fn 10), N 12a on Art 87 CC.

294 BasK-Grüninger (fn 10), N 12a on Art 87 CC.

295 BasK-Grüninger (fn 10), N 12a on Art 87 CC.

296 In the non-litigious cases; see BK-Riemer (fn 33), N 122 on the systematic component.

297 See BK-Riemer (fn 33), N 122 on the systematic component.

298 See BK-Riemer (fn 33), N 122 on the systematic component; See also BasK-Grüninger (fn 10), N 13 on Art 87 CC.

299 BGE 93 II 439, 444; BGE 108 II 393, 396.

300 BK-Riemer (fn 33), N 121 on the systematic component; See also BasK-Grüninger (fn 10), N 12 on Art 87 CC.

301 BK-Riemer (fn 33), N 123 on the systematic component.

and cannot be waived by any corresponding provision in the foundation charter or elsewhere.³⁰²

In case of dispute of foundation board resolutions, a one-month contestation period—analogue to Art 75 CC – shall apply.³⁰³

Special rights

Overview

When someone contributes assets to a foundation, they wish to *reserve* under circumstances *for him* or in favour of *individual specific persons* certain rights to the use or consumption of substances and/or proceeds of the foundation's assets.³⁰⁴ Such rights, over which the founder himself or individual specified third parties reserve certain property rights, are designated under Swiss foundation law as 'special rights'.³⁰⁵ By means of justification of special rights, the liabilities accompanying the assets are compensated by the relinquishing of assets in favour of the foundation.³⁰⁶

The granting of special rights does not prevent the establishment of a foundation. However, it leads to a partial or total *suspension* of the foundation purpose, as the assets and/or their proceeds subject to the special rights are not for the time being available for the fulfilment of the foundation purpose.³⁰⁷ The 'special rights beneficiaries', therefore, take the place of the foundation beneficiaries with relation to the assets subject to the special rights.³⁰⁸

Admissibility of special rights according to Supreme Court case law

The 'Harris-Foundation' decision

The admissibility of special rights is not without contention, as their very admissibility in family foundations and their demarcation from inadmissible maintenance foundations present difficulties. The Supreme Court made the following comment in a leading decision involving the 'special rights' concerning the Harris-Foundation:

'The Superior Court viewed the "constraints and obligations" set forth in Art II of the foundation charter as contributing to the maintenance of the founder and therefore indicating a draw on the capital of the foundation, as a concealed primary purpose of the foundation through the ideal purposes in accordance with Art I. It is also a question of a foundation established for pleasure or maintenance that is proscribed by standard case law (BGE 73 II 83, 75 II 22 and 81).

Meanwhile, the case law mentioned refers to family foundations that may not be established under Art 335 (1) CC, family members (or perhaps to countless subsequent generations) making available discretionary application of lifestyle benefits. Yet, the

302 BK-Riemer (fn 33), N 123 on the systematic component.

303 BGer, Judgment of 25 November 2008, 5A_602/2008, E. 2.3.3.

304 BK-Riemer (fn 33), N 368 on the systematic component.

305 BK-Riemer (fn 33), N 368 on the systematic component.

306 BK-Riemer (fn 33), N 369 on the systematic component.

307 BK-Riemer (fn 33), N 369 on the systematic component; elsewhere ZK-Egger (fn 64), N 20 on Art 335 CC.

308 BK-Riemer (fn 33), N 369 on the systematic component.

Harris Foundation is no family foundation in the proper sense, for Ms Harris had no family, and she simply secured her living expenses in Art II of the foundation charter. Therefore, the legislative basis of the restriction on the purpose set forth in Art 335 (1) CC (corresponding to the prohibition of the establishment of family entailed estates) cannot apply here.

One may certainly wonder whether a foundation established solely for its founder for generally ensuring his living expenses is to be considered as a family foundation of a special kind and if the “specific purpose” pursuant to Art 80 CC lacks [...]. Be that as it may, the defendant foundation intended to promote charitable causes pursuant to Art I of the foundation charter in the first place, wherein assets are dedicated for special (altruistic) purposes. In contrast, ensuring the founder’s own maintenance is merely a reservation in this latter’s favour. A considerable impairment of foundation assets could, however, result, perhaps under circumstances of total consumption. Considering, however, that said purposes were not totally and seriously desired, there is nothing to substantiate, although it was not at first implausible, that there would yet remain something for them (apart from the financing provided for the founder’s poetry already during her lifetime). One counted rather on considerable financial resources [...], because they were made available. [...] A truly permissible foundation purpose is present against this background for which the foundation was endowed from the very beginning, as well as during the founder’s lifetime, with the assets endowed for said purpose (although under the caveat of ensuring support).³⁰⁹

Consequences

Supreme Court case law discussed above demonstrates that the grounds for special rights are admissible at present.³¹⁰ Further, the special rights do not stand counter *per se* to the provision of Art 335 (1) CC. Finally, special rights can provide the means by which an unconditional maintenance can be granted.^{311,312}

The compatibility of the reservation of special rights under specific conditions with the intents and purposes pursuant to Art 335(1) CC is a decisive factor. Due to public policy considerations, it is namely neither proscribed for a person to make an unconditional free gift to their family members – otherwise every gift, designation of an heir, or organisation of a legacy among family members would have to be prohibited – nor inadmissible to commit assets over the long term. Otherwise, the establishment of any foundation would have to be prohibited.³¹³

Lasting asset commitments in favour of a *specific family* linked to *unconditional rights of usufruct over an indeterminate number of generations* are *inadmissible* pursuant to Art 335 (1) CC.³¹⁴ Special rights or qualifications are to be assessed from the viewpoints of Art 335 (1) CC when they do not favour *single, individually designated family members*, but rather when they are granted *for the general benefit of family members*.³¹⁵ This means that the founder of a family

309 BGE 79 II 113, 118 et seq.

310 See also BK-Riemer (fn 33), N 376 on the systematic component.

311 BK-Riemer (fn 33), N 154 on the systematic component.

312 The founder can also stipulate here that payments must be earmarked for specific purposes only, eg for training purposes; see BK-Riemer (fn 33), N 369 on the systematic component.

313 BK-Riemer (fn 33), N 154 on the systematic component.

314 BK-Riemer (fn 33), N 154 on the systematic component.

315 BK-Riemer (fn 33), N 154 on the systematic component.

foundation pursuant to Art 335 (1) CC establishes and at the same time designates that special rights may be reserved for specific family members or for the founder.³¹⁶

Duration of special rights

Special rights usually terminate with the death of the special rights beneficiary. However, provision may also be made for other grounds for termination, for example the expiry of a designated time period or specific changes in the personal relationships of the special rights beneficiary.³¹⁷

Nature of special rights

Types

There are two kinds of special rights: the rights *in rem* over property and rights to the foundation's assets as well as *obligatory* rights vis-à-vis the foundation.³¹⁸

Real rights to foundation assets

Special rights can be substantiated as real rights, such as usufructuary rights³¹⁹ or as other rights, for example as right of residence.^{320,321} Special rights can be substantiated on the one hand by the incorporation of a corresponding provision in the foundation charter to which, as a rule, the foundation is obliged to execute.³²² Yet it is also possible, when establishing a foundation under living persons, for the founder to commit thereto.³²³ When establishing a foundation upon death, the contribution takes place in the form of a legacy.³²⁴ Among other things, it is thus set forth under Art 484 (2) CC that the founder or legator may will to a concern the usufruct of the entire inheritance or to a part thereof. It is also possible that the legator burden heirs with the constraint³²⁵ of establishing a foundation upon the inheritance to be comprised of the assets for the usufruct in favour of one or several designated persons.³²⁶ On the other hand, real rights can also emerge prior to the establishment of a foundation by which the objects and rights that must be constituent parts of the foundation's assets are encumbered.³²⁷ That means that assets will be devoted upon the subsequent establishment of a foundation that are already materially encumbered, in favour of third parties or family members.³²⁸

An example for a family foundation that is subject to a right *in rem* would be when a foundation is established with the purpose of organising stipends for family members, that

316 BK-Riemer (fn 33), N 155 on the systematic component.

317 BK-Riemer (fn 33), N 369 on the systematic component.

318 BK-Riemer (fn 33), N 370 on the systematic component.

319 Article 745 et seq CC.

320 Article 776 et seq CC.

321 BK-Riemer (fn 33), N 371 on the systematic component.

322 BK-Riemer (fn 33), N 371 on the systematic component.

323 BK-Riemer (fn 33), N 371 on the systematic component.

324 BK-Riemer (fn 33), N 371 on the systematic component.

325 Article 482 CC.

326 See BK-Riemer (fn 33), N 371 on the systematic component.

327 BK-Riemer (fn 33), N 371 on the systematic component.

328 BK-Riemer (fn 33), N 371 on the systematic component.

however encumbers at the same time with the asset a lifelong usufruct in favour of the founder.^{329,330}

Obligatory rights with respect to the foundation

As with real rights, the founder can establish in the foundation charter obligatory rights of all kinds, including terms and legacies, to be established at the expense of the foundation.³³¹

As an example, a foundation can repeatedly aver that it was established with the purpose of organising family members with stipends, yet additionally encumbered with the obligation to contribute to the maintenance of the founder.³³²

Effects of a decision regarding infringement of Art 335 CC

Charter provisions

Provisions of the foundation charter may infringe upon Art 335 (1) CC where there exists an illegal purpose: the foundation thus acquires no legal character and is invalid or partially invalid.^{333,334} Conversion into a normal foundation remains however possible.³³⁵ The assets return to the founder or their heirs.³³⁶ Provided the foundation was formally established in a legally valid manner, it must first be treated as legally inexistent since the civil court, by way of declaration of a new legal status,³³⁷ will declare it invalid.³³⁸

Assignments

If the foundation charter is compatible with Art 335 (1) CC but infringes upon the statutory requirements regarding assignments to the beneficiaries, the foundation's regulations must in any event be qualified as dissimulated.³³⁹ The foundation is to be treated in such case as though there were already violation of the statutes under Art 335 CC.³⁴⁰

One must distinguish between two application cases. It must be assumed from one simulation, when the foundation's activities coincide with those of the founder's actual intentions, ie the founder aims to achieve what is simulated.³⁴¹ If, on the contrary, the

329 BGE 75 II 15, 24 et seq.

330 Further examples of special rights in rem, in particular, also with normal foundations, in BK-Riemer (fn 33), N 372 on the systematic component.

331 BK-Riemer (fn 33), N 373 on the systematic component.

332 See for further examples on obligatory special rights BK-Riemer (fn 33), N 374 on the systematic component.

333 Partial nullity exists only for a purpose that is void in part or for several partial purposes. See OGer Luzern, Judgment of 4 February 1959, published in SJZ 58 (1962), p 252.

334 Article 52 (3) CC in conjunction with Art 20 OR. See BasK-Grüninger (fn 10), N 13 on Art 335 CC; BK-Riemer (fn 33), N 159 on the systematic component.

335 BasK-Grüninger (fn 10), N 13 on Art 335 CC; BK-Riemer (fn 33), N 159 on the systematic component; see BGE 93 II 439, 452 et seq.

336 BasK-Grüninger (fn 10), N 13 on Art 335 CC; BK-Riemer (fn 33), N 107 et seq on Art 88/89 CC; ZK-Egger (fn 64), N 5 on Art 57 CC; BGE 75 II 24, 26; BGE 73 II 81, 89.

337 However, the Supreme Court speaks of a declaratory action. See BGE 90 II 376, 387; BGE 73 II 81, 83.

338 BasK-Grüninger (fn 10), N 11 on Art 88/89 CC; BK-Riemer (fn 33), N 33 et seq, N 45 on Art 88/89 CC; BGE 73 II 81, 84; BGE 93 II 439, 449; BGE 75 II 81, 86 et seq.

339 BK-Riemer (fn 33), N 160 on the systematic component.

340 BK-Riemer (fn 33), N 160 on the systematic component.

341 See Art 18 (1) OR; BK-Riemer (fn 33), N 65, N 160 and N 163 on the systematic component; ZK-Egger (fn 64), N 19 on Art 335 CC.

founder wishes to observe the statutory provisions, then the foundation, despite acting contrary to the rules of the foundation board, may not be considered illegal. Rather, the foundation bodies are held to comply with the statutes.³⁴²

Investment of the foundation's assets

As is usual with foundations, family foundations are also allowed to invest foundation assets within the framework of the administration under Art 83 CC. In the process, the investment of the foundation's assets must be primarily driven by the original composition of the foundation and the founder's will.³⁴³

If neither the foundation charter nor the foundation regulations contain regulations concerning investments regarding foundation assets, then the foundation board must set forth the principles for the investment regarding liquidity, return, security, risk distribution and maintenance of assets.³⁴⁴ However, these principles are not readily compatible with one another:³⁴⁵ a (higher) return can only be achieved when the principles of liquidity and security are weighted less heavily.³⁴⁶

The practice of the Swiss foundation supervisory authority consists of managing foundation assets in accordance with recognised commercial principles while spreading the risk.³⁴⁷ Purely speculative or overly risky investments that may endanger the foundation assets and pursuit of the foundation purpose are prohibited.³⁴⁸ 'Gilt-edged' investment of the foundation's assets³⁴⁹ is not required.

Transformation of family foundations

Preliminary remarks

Foundations are built as long-standing, solid structures.³⁵⁰ They are governed by the founder's intentions as they are put down in the foundation charter.³⁵¹ Once the foundation is established, a change in the organisation or of the purpose is fundamentally no longer possible.³⁵² Over time, however, the need may arise for the organisation or the purpose of the

342 See Art 87 (2) in conjunction with Art 84 (2) CC.

343 BasK-Grüninger (fn 10), N 13 on Art 83 CC.

344 BGE 108 II 352, 359, with references to the literature; BGE 124 III 97, 99. See for the complete version, Lydia Krauss, 'Vermögensanlagen und Anlagevorschriften von klassischen Stiftungen', in Yves-Alain Moor, Daniel Dubach, Lydia Krauss, Michael Brandenberger and Dominik Roos (Ed), *Vermögensanlagen von Pensionskassen und klassischen Stiftungen* (Bern, Stämpfli Verlag AG, 2010), p 41 et seq, in particular p 49 et seq. On investing for trusts Oliver Arter, 'Aspekte der Vermögensverwaltung für Trustvermögen', ST 2005, p 592 et seq. On investing for Pension Funds Oliver Arter and Stefan Koller, 'Vermögensanlage von Pensionskassengeldern', AJP 2007, p 620 et seq.

345 BGE 108 II 352, 359.

346 BGE 108 II 352, 359. The topic of investment of the foundation's assets will not be explored in detail at this point. For general notions, see Arter (fn 27), p 266 et seq, as well as regarding investment of the trust assets Arter (fn 344), p 592 et seq.

347 Swiss Federal Department of Home Affairs EDI, Generalsekretariat GS-EDI, Rechtsabteilung/Eidgenössische Stiftungsaufsicht, *Leitfaden für Stiftungen* (Bern 2008), p 6.

348 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 6; See also BGE 99 Ib 255, 259; BGE 108 II 352, 359.

349 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 6.

350 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 6.

351 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 6.

352 But see 'No free right of cancellation' as well as 'No free right to make modifications or additions' above.

foundation to adapt to the modified situation.³⁵³ This is allowed if good cause is demonstrated.³⁵⁴ Whether for this purpose the foundation board,³⁵⁵ and based on Art 87 (2) CC subsequently thereby the court, may be called upon in the event a beneficiary does not agree with a decision of the foundation board in relation to modification of the foundation's organisation or for the foundation purpose, or whether the court has exclusive jurisdiction thereover remains a subject of dispute.³⁵⁶

Changes in the organisation

According to Art 85 CC, the organisation of a foundation can be changed when the preservation of the assets or the safeguarding of the foundation purpose urgently requires such. The changes must thereby serve to save the otherwise endangered purpose of the foundation,³⁵⁷ and must not be too extensive.³⁵⁸ A change in the organisation may therefore be carried out 'when it is in the interest of the fulfilment of the foundation purpose and on irrefutable grounds as appears necessary.'³⁵⁹ A change in the foundation's organisation may be permissible when the foundation's prior organisation proves over time (for example, as a result of a reduction in assets) to be too complicated and too costly.³⁶⁰ However, a different organisation is not justified by a simple desire for greater convenience or optimisation.³⁶¹

The changes in the organisation can perhaps affect the composition of the foundation board, the introduction of auditors or procedural rules.³⁶²

Should the founder take issue with a regulation concerning the organisation of the foundation according to the foundation charter, the foundation board is empowered to carry out modifications.³⁶³ In this case, Art 85 CC cannot be applied.³⁶⁴

Changing the purpose

With the revision of foundation laws in 2006, opportunities were created that would allow the founder to change the foundation's purpose by providing a reservation in the foundation's charter. The responsible federal or cantonal authorities can thus change the purpose of the foundation at the founder's request or on the basis of his disposition as a result of death, when they have provided for such reservation and when at least ten years have elapsed since the establishment of the foundation or since the most recent modifications demanded by the founder.³⁶⁵ In any event, such a reservation for changing the purpose is not permitted for

353 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 7.

354 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 7.

355 BasK-Grüniger (fn 10), N 3 on Art 85/86 CC and N 13et seq on Art 87 CC, that the foundation board considers competent. BK-Riemer (fn 33), N 125 et seq on the systematic component, which the court also considers competent for these missions.

356 BasK-Grüniger (fn 10), N 13 on Art 87 CC.

357 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 7.

358 BasK-Grüniger (fn 10), N 4 on Art 85/86 CC.

359 BK-Riemer (fn 33), N 50 on Art 85/86 CC.

360 Swiss Federal Department of Home Affairs (EDI) (fn 347), p 7; See also BK-Riemer (fn 33), N 51 on Art 85/86 CC.

361 BK-Riemer (fn 33), N 50 on Art 85/86 CC.

362 BasK-Grüniger (fn 10), N 4 on Art 85/86 CC; See then the casuistics of BK-Riemer (fn 33), N 53et seq on Art 85/86 CC.

363 BasK-Grüniger (fn 10), N 6 on Art 85/86 CC.

364 BasK-Grüniger (fn 10), N 6 on Art 85/86 CC.

365 Article 86a (1) CC.

family foundations,³⁶⁶ which is why a change of purpose for family foundations can only take place under Art 86 CC.

A change of purpose is thus only admissible when the original purpose of the foundation has acquired a totally different significance or effect, such that the foundation has become manifestly alienated from the will of its founder.³⁶⁷ The conditions of a change of purpose are strict. 'A change of purpose can only be admitted on the basis of Art 86 CC where a change in the external conditions of such drastic nature has occurred that adherence to the original purpose of the foundation would run contrary to the will of the founder or would at least alienate the foundation from it.'³⁶⁸

Recently, the Swiss Federal Supreme Court had to rule upon the change in purpose of a foundation established in 1922, containing an article of which the purpose was to exclude women from the circle of its beneficiaries as soon as they married and changed their name.³⁶⁹ It was questionable whether, in light of the development of marriage law and the consolidation of the principle of equal rights between men and women in Art 8 of the Swiss Federal Constitution, the purpose of this foundation may be amended,³⁷⁰ due to the fact that it had objectively changed or because it had become illegal or immoral.^{371,372} The Swiss Federal Supreme Court concluded that the conditions of a modification under Art 86 CC, in the absence of an objective modification of the meaning and the effect of the original purpose of the foundation, are not fulfilled, as Art 335 (1) CC is not interpreted according to the guaranteed principle of equality between men and women in Art 8 BV, which is why the exclusion clauses objected to should prove neither immoral nor unlawful, for established law imparts to the founder as to the legator the freedom to limit the circle of beneficiaries to a designated group of family members.³⁷³

Abolition of family foundations

Initially illegal or immoral purpose

Should the purpose set forth by a family foundation not correspond to what is circumscribed in Art 335 (1) CC or should it be immoral, the family foundation shall acquire no legal character from the outset under Art 52 (3) CC.³⁷⁴ In this case, the foundation does not exist, which is why an abolition in the proper sense of the word is not required. The assets dedicated to it revert back to the founder or in any event, to their heirs.³⁷⁵

Article 57 (3) CC, whereby the assets upon abolition of a legal person on grounds of prosecution for immoral or illegal purposes return to the community, finds no application to family foundations in cases of initial illegality or immorality.³⁷⁶

366 See Parlamentarische Initiative (fn 83), p 8170; See also BasK-Grüninger (fn 10), N 2 on Art 86a CC.

367 Article 86 (1) CC.

368 Zurich District Court, the judge in summary proceedings, Judgment of 21. September 1983, publ. in SJZ 1984, p 147 et seq, 148.

369 BGE 133 III 167 et seq

370 Article 86 CC.

371 Article 88 (2) CC.

372 BGE 133 III 167 et seq.

373 BGE 133 III 167, 172.

374 See also ZK-Egger (fn 64), N 19 on Art 335 CC.

375 BasK-Grüninger (fn 10), N 9 on Art 88/89 CC; BK-Riemer (fn 33), N 24 on Art 88/89 CC.

376 BasK-Grüninger (fn 10), N 13 on Art 335 CC; BK-Riemer (fn 33), N 103 and N 110 on Art 88/89 CC.

Purpose having become unattainable or illegal/immoral

Article 88 f CC governs the formal and substantive conditions for the abolition of foundations. On the one hand, a foundation is abolished when its purpose has subsequently become unattainable and a subsequent modification of the foundation charter is incapable of changing it.³⁷⁷ The subsequent abolition is thus subsidiary, when a change of purpose according to Art 86 CC is excluded.³⁷⁸ For example, the purpose can become obsolete in a family foundation when the family dies out and no more beneficiaries are left.³⁷⁹ Then again, abolition can come into question if the foundation purpose has become illegal or immoral.³⁸⁰ Final grounds for abolition may be present in family foundations that are of marginal importance.

The court is empowered to abolish a family foundation³⁸¹ upon which it enacts a constitutive provision for abolition.³⁸² An action can be brought against any person with an interest in the abolition of the foundation,³⁸³ namely the beneficiaries, the foundation bodies and in any event, the creditors of the foundation.³⁸⁴

Abolition brings the foundation into a liquidation phase.³⁸⁵ The liquidation procedure is determined by the material provisions of corporate law.³⁸⁶ Should excess assets remain following the liquidation procedures, they are distributed pursuant to Art 57 (1) CC.³⁸⁷ In any event, the most decisive factor governing the distribution of excess assets is what the foundation charter sets forth in this respect. The founder may thus provide that in case of liquidation of the foundation that any remaining assets should return to his legal successor or to third parties.³⁸⁸ A provision specifying that certain assets are to be surrendered in kind and not converted to cash is, however, permissible.³⁸⁹ Provided it is expressly specified in the foundation charter, it is also permissible that the foundation bodies dispose of any remaining assets in keeping with the founder's presumed intentions.³⁹⁰ Should no provisions concerning the use of the remaining assets be found in the foundation charter, the assets are donated to the community.³⁹¹

Merger and transfer of assets

In addition to the judicial abolition of family foundations based on Art 88 CC,³⁹² an organisational suspension³⁹³ by way of merger is possible.³⁹⁴ In the process, the foundation is simply suspended as such, while the assets are not liquidated but rather pursue their previous

377 Article 88 (1) para 1 CC.

378 See BasK-Grüniger (fn 10), N 4 on Art 88/89 CC; ZK-Egger (fn 64), N 17 on Art 335 CC.

379 BGE 93 II 439, 445.

380 Article 88 (1) para 2 CC.

381 Article 88 (2) CC.

382 BasK-Grüniger (fn 10), N 6 et seq on Art 88/89 CC; Parlamentarische Initiative (fn 83), p 8171.

383 Article 89 (1) CC.

384 See BasK-Grüniger (fn 10), N 8 on Article 88/89 CC.

385 BasK-Grüniger (fn 10), N 18 on Art 88/89 CC.

386 Article 58 CC in conjunction with Art 913 (1) in conjunction with Art 739 et seq OR.

387 BK-Riemer (fn 33), N 174 on the systematic component.

388 BK-Riemer (fn 33), N 95 on Art.88/89 CC; See also BasK-Grüniger (fn 10), N 13a on Art 335 CC. Further at BGE 83 III 147, 153.

389 BK-Riemer (fn 33), N 95 on Art 88/89 CC.

390 BK-Riemer (fn 33), N 99 on Art 88/89 CC.

391 Article 57 (1) and (3) CC.

392 Where the necessary requirements are met.

393 See BK-Riemer (fn 33), N 68 on Art 88/89 CC.

394 Article 78 (1) Merger Act.

purpose, though serving under another sponsorship.³⁹⁵ According to Art 78 (2) FusG, a merger of foundations is only permitted ‘when it is objectively justified and in particular serves for the protection and development of the foundation purpose.’ It should be pointed out that any legal claims of the beneficiaries of the foundation parties concerned should be safeguarded.³⁹⁶ Should it be necessary to change the purpose due to the merger, Art 86 CC shall be applied.³⁹⁷ For family foundations, the merger agreement requires official certification.³⁹⁸ It suffices, for the merger agreement to be legally effective, that the respective highest foundation bodies of the parties to the foundations agree.³⁹⁹

Incidentally, a transfer of assets is also possible in family foundations.⁴⁰⁰ This must be recorded on the companies’ register in the event this takes place pursuant to a merger agreement.⁴⁰¹ A family foundation that has still not done this on a voluntary basis⁴⁰² must correspondingly register with the companies’ register so that the foundation assets can be transferred by means of a merger agreement and not by means of a singular succession.⁴⁰³

Tax treatment

Preliminary remarks

Family foundations are legal persons that are recognised as separate taxable entities⁴⁰⁴ and taxed independently from founders and beneficiaries.⁴⁰⁵ In contrast to foundations that pursue non-profit purposes,^{406,407} family foundations do not enjoy any tax privileges.⁴⁰⁸

Taxation associated with the establishment of a foundation and other contributions

Tax consequences for the founder

Dedicating a part or all of one’s private assets on the occasion of the establishment of a family foundation has no income tax consequences for the founder, whether from the standpoint of the canton or that of the federal level.⁴⁰⁹

395 BK-Riemer (fn 33), N 68 on Art 88/89 CC.

396 Article 78 (2) Sentence 2 Merger Act.

397 Article 78 (2) Sentence 3 Merger Act.

398 Article 79 (3) Sentence 2 Merger Act.

399 Article 84 (1) Sentence 1 Merger Act.

400 BasK-Grüninger (fn 10), N 16a on Art 88/89 CC.

401 Article 86 (1) Merger Act. See also BasK-Grüninger (fn 10), N 16a on Art 88/89 CC.

402 See above ‘The requirement to register in the companies’ register’.

403 Which is admissible and must take place in any event pursuant to the provision of Art 181 OR; see BasK-Grüninger (fn 10), N 16a on Art 88/89 CC.

404 See Opel (fn 45), p 31 et seq, who provides a detailed review in § 5 on the subject of recognition of family foundations as taxable entities. See also BGer, Judgment of 4 March 2002, 2A.457/2001, E. 2.

405 See Art 49 (1)(b) DBG and Art 20 (1) StHG; see also Hamm and Peters (fn 1), p 252 para. 3.4.

406 See Art 56(g) DBG and Art 23 (1)(g) StHG.

407 According to Art 56(g) DBG and Art 23 (1)(g) StHG, the tax exemption is effective for foundations pursuing non-profit purposes only for the gain that is exclusively and irrevocably devoted to this purpose.

408 The Solothurn canton is the only one known that, with regard to gift tax, provides a tax exemption for foundations of which the circle of beneficiaries is comprised of descendants, adopted children and their descendants, see § 236 (1) (c) StG SO.

409 Opel (fn 45), p 89 et seq. It appears quite differently, when individual assets or entire business operations are transferred to the foundation being established from business assets, see further details from Opel (fn 45), p 90 et seq.

If the founder transfers a property of their assets to the family foundation, should there be no monetary compensation involved in the transaction, no real estate gains tax is assessed, or it is suspended.⁴¹⁰

Tax consequences for the family foundation

NATIONAL RELATIONSHIPS

When establishing a family foundation, gift or inheritance tax must be paid depending on whether the foundation is to be established during the lifetime of the founder or upon their death.⁴¹¹ The same applies for endowments to a family foundation, regardless of whether they take place at the same time as the establishment of the foundation or at a later date.⁴¹² As recipient of the corresponding assets, the foundation is a taxable entity.⁴¹³

The cantons are responsible for levying inheritance and gift taxes. Inheritance and gift taxes are levied by almost all cantons and municipalities.^{414,415} The tax burden differs according to the canton in which a family foundation is established or where its seat is located. Some cantons apply the tax rate for unrelated heirs, ie the highest maximum tax rate.^{416,417} Meanwhile, other cantons suppress their rates on the family relationship between founder and beneficiaries and apply lower tax rates.^{418,419}

INTERNATIONAL RELATIONSHIPS

As a matter of principle, contributions to a tax object of a canton are gratuitous when the donor has their residence or the legator had their last residence in a canton.⁴²⁰ All the cantons attach the applicability of the gift and inheritance tax rights on the location of real estate, which is why the gratuitous transfer of property situated in the canton or rights on such are subject to the gift or inheritance tax.⁴²¹

410 See Art 12 (1) and (3) (a) tax harmonisation law (StHG); See also Opel (fn 45), p 96 et seq.

411 BK-Riemer (fn 33), N 595 on the systematic component.

412 BK-Riemer (fn 33), N 595 on the systematic component; Hamm and Peters (fn 1), p 252 para. 3.4(a).

413 Hamm and Peters (fn 1), p 252 para. 3.4(a).

414 Daniela C Fischer, Beat Walker, Clarisse Pifko, *Das schweizerische Steuersystem. Eine praxisorientierte Einführung mit zahlreichen Beispielen* (Zurich, Compendio Bildungsmedien, 2004), p 61; Peter Mäusli-Allenspach, Mathias Oertli, *Das schweizerische Steuerrecht. Ein Grundriss mit Beispielen* (Bern, Cosmos-Verlag, 2004), p 441; see also Ernst Höhn, Robert Waldburger, *Steuerrecht. Band I. Grundlagen-Grundbegriffe-Steuerarten. Interkantonales und Internationales Steuerrecht. Steuerverfahrens- und Steuerstrafrecht* (Bern/Stuttgart/Vienna, Haupt Verlag, 2001), § 27 N 6.

415 The only canton that currently levies neither inheritance nor gift taxes is Schwyz. See the brochure from the tax administration of the Canton of Schwyz, Canton of Schwyz, optimal general tax conditions, pp 2 and 7, available online at http://www.sz.ch/documents/brochure_17_deutsch.pdf. The Canton of Lucerne levies only inheritance tax. See also Opel (fn 45), p 99 et seq; Hamm and Peters (fn 1), p 252 para. 3.4(a).

416 BK-Riemer (fn 33), N 595 on the systematic component; Hamm and Peters (fn 1), p 252 para. 3.4(a).

417 To these cantons belong, eg Zurich, see § 22 and 23(f) Zurich Inheritance and Gift Tax Act [ESchG ZH]. See also Hamm and Peters (fn 1), p 252 para. 3.4(a).

418 BK-Riemer (fn 33), N 595 on the systematic component; Hamm and Peters (fn 1), p 252 para. 3.4(a).

419 As, eg the canton of Zug, which suppressed the degree of kinship between founder and respective beneficiary and hence has various graduated tax rates, see § 180 StG ZG, § 175 (1) StG ZG even provides an exemption from the obligation to pay inheritance and gift taxes for direct descendants and stepchildren as well as the parents and stepparents of the testator or testatrix and accordingly, donors. See also Hamm and Peters (fn 1), p 252 para. 3.4(a).

420 Peter Mäusli-Allenspach, 'Erbschafts- und Schenkungssteuern in der Schweiz – ein Überblick, Teil 1: Schweizerische Erbschafts- und Schenkungssteuern', *successio* 2010, p 179 et seq, 183.

421 Mäusli-Allenspach (fn 420), p 183.

It arises from this that the establishment of a Swiss family foundation through a person that does not reside in Switzerland has no tax consequences for the foundation. The same holds true for subsequent endowment contributions, provided then again that the subsequent donor has a residence abroad. Tax consequences arise, however, for the Swiss family foundation upon the transfer of property located in Switzerland or rights on such as well as – within the sense of the special provision – works of art located in the canton of Geneva.

Taxation following the establishment of a foundation

The family foundation, just like any other legal person, must pay taxes on its capital. This is incurred at the canton and municipal level.⁴²² The net assets in a foundation correspond to the taxable equity.⁴²³ *Capital taxes* differ considerably from one canton to another.⁴²⁴

Moreover, should the family foundation generate a profit, it must pay taxes at federal,⁴²⁵ cantonal as well as municipal levels.⁴²⁶ The object of the *Profits Tax* is the net profit.⁴²⁷ Contributions to the foundation assets are not calculated as taxable profit.⁴²⁸ At the cantonal level, on the other hand, taxes on foundation profits can vary widely. In some cantons taxes are levied according to the provisions and rates that apply for natural persons, in others, according to those that apply to corporate enterprises, and in yet others separate tax rates are applied.⁴²⁹

The aggregate tax burden of a family foundation is the lowest in the cantons of Schwyz (profits tax in Wollerau: 8.2 per cent; capital levy: 0.84 per cent) and Lucerne (profits tax 2012: 7.12 per cent; capital levy: 0.5 per cent).

Incidentally, a reimbursement of the withholding tax is made to family foundations inasmuch as they are independent tax entities.⁴³⁰

Taxation of disbursements to beneficiaries

Tax consequences for the beneficiaries

Disbursements to beneficiaries are treated differently according to tax law in individual cantons. Depending on the canton, foundation income for individual beneficiaries is subject to income tax or to gift or inheritance tax, or the tax obligation is totally exempted.⁴³¹

The Supreme Court's judgment in 2005 provided some clarification regarding the fiscal treatment of foundation payments to the beneficiaries.⁴³² A gift exists in the sense of tax law, according to the Supreme Court, when it is made by the donor to the donee gratuitously and pursued with the intention to make a gift.⁴³³ The contribution of assets must therefore take

422 Article 29 et seq StHG.

423 Article 29 (2) (c) StHG.

424 In the canton of Zurich, foundations are subject to a capital duty of 0.75 per cent of the taxable equity capital or of the net assets, as long as the amount of CHF 100,000 has not been exceeded, see § 82 StG ZH.

425 Here, net profit is taxed at 4.25 per cent, with profit under CHF 5,000 untaxed, see Art 71 DBG.

426 See Art 57 et seq DBG, in particular Art 71 DBG, Art 24 et seq StHG.

427 Article 57 DBG, Art 24 (1) StHG.

428 Article 66 (1) DBG.

429 Andreas Kolb, 'Besteuerung von Stiftungen in der Schweiz und in Liechtenstein', *Steuer & Wirtschaft International* 2001, p 270 et seq

430 Hamm and Peters (fn 1), p 252 para. 3.4(b).

431 Opel (fn 45), p 147 et seq.

432 BGer, Judgment of 22 April 2005, 2A.668/2004. See also Opel (fn 45), p 147.

433 See BGer, Judgment of 22 April 2005, 2A.668/2004, E. 3.3.

place without consideration on the side of the donee.⁴³⁴ Since the founder, with the establishment of a foundation, no longer has any power of disposition over the henceforth independent foundation assets, no gift can exist on the side of the founder.⁴³⁵ The foundation for its part shall make payments to the beneficiaries on the basis of its obligation in the foundation charter and thus not voluntarily, which is why, likewise, no gift exists in the sense just described.⁴³⁶ Consequently, the Supreme Court provides that foundation income of the beneficiaries is subject to income tax as a matter of principle.⁴³⁷

Tax consequences for family foundations

As shown above, a family foundation is taxed on profits earned.⁴³⁸ All legitimate business expenses may be deducted from profits earned. Legitimate business expenses also include all foundation services to beneficiaries, at least where they are in compliance with the foundation charter and pursuant to Art 335 (1) CC regarding admissible purposes of the foundation.⁴³⁹

434 BGe., Judgment of 23 December 1996, 2A.303/1994, E. 3c.

435 BGer, Judgment of 22 April 2005, 2A.668/2004, E. 3.4.3.

436 BGer, Judgment of 22 April 2005, 2A.668/2004, E. 3.4.3 for further comments.

437 According to Art 16 (1) DBG.

438 See beginning of 'Taxation following the establishment of a foundation' above.

439 BGer, Judgment of 4 March 2002, 2A.457/2001, E. 4.6. See also Hamm and Peters (fn 1), p 252 para. 3.4(c).

This publication may qualify as “Attorney Advertising” requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

This publication is for general information purposes only, and not intended to constitute legal or other professional advice, and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. Consequently, this publication should not be relied upon for specific legal and/or tax advice, only be used as a guide to potential legal and/or tax issues and you should seek additional information and advice from legal counsel.

An offer to provide a free consultation, or an actual consultation, in person or by phone, signing up for, or attending, seminars and or workshops does not create an attorney-client relationship. An attorney-client relationship is only formed by a signed written agreement.

Oliver Arter accepts no responsibility for any loss which may arise from reliance on information or materials in this publication.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise without the prior permission of Oliver Arter.

If you do not wish to receive e-mails from Oliver Arter and want to be removed from the electronic mailing list, please reply to the e-mail with “remove” in the subject heading.

**Oliver Arter, Consultant, Attorney at law, Bellerivestrasse 201, 8034 Zurich, Switzerland,
Tel.: 0041 44 386 60 00, Email: oarter@froriep.ch**