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## What about your still valid testamentary contract with your ex-spouse?

Dear Sir or Madam,

In our newsletter about [Inheritance and Bestowal](#) (17 June 2015) we have already dealt with the issue of inheritance law. In this newsletter we shall be introducing you to additional aspects of this topic.

### **Prenuptial agreement and inheritance contract, maximum favouring**

Many couples and entrepreneurs address the ideal design of their marital property rights. According to matrimonial law, this is best settled by a prenuptial agreement, and a good solution regarding inheritance aspects is chosen in a testamentary contract. Very often these two contracts are merged into one, covering both marriage agreement and inheritance. A proper legal assessment is part of an entrepreneur's comprehensive asset strategy. Here, we look at this issue in detail.

### **What happens to such agreements if the marriage is terminated?**

These contracts are chosen to help find the best possible solution if a marriage ends through the death of one spouse. Usually there are provisions in the contract that the surviving partner can profit from the chosen solution as best as possible, or there are provisions that a company can survive such a critical issue in a sustainable way.

However, a marriage can end in two ways. As mentioned before, with the death of one of the partners a marriage can end. In this situation, the contractual elements of such a combined marriage/inheritance contract apply. A second reason for the end of a marriage is a divorce. In such a situation any legal dispute is settled via a divorce decree. As is often the case, any marriage contract is not explicitly revoked. Even without an explicit dissolution, such a marriage contract is now null and void. As the marriage has ended, any provisions of the marriage contract no longer apply.

A completely different matter is the inheritance contract. In most cases spouses agree on an inheritance contract together with the marriage contract. After the end of a marriage through divorce, often an inheritance contract is not explicitly revoked. The inheritance contract requires a particular format, i. e. a notarized deed. This is, among other things, one of the reason why after a divorce an inheritance contract is not always revoked as more often than not a notary is not consulted. Very often a divorce decree is just a simple written contract which has been sanctioned via the divorce courts. As a consequence the formal rule which, is required to revoke the inheritance contract is not

adhered to (Civil Code art. 513). Thus arises the fundamental issue of whether an inheritance contract, which had been agreed upon between two people formerly married but now divorced, is still valid after the divorce.

The Civil Code determines:

*Art. 120*

*B. Material rights and inheritance law*

*1 For matrimonial property law disputes, the provisions of the matrimonial property law apply.*

*2 Divorced spouses have no inheritance claims under inheritance law and cannot make any claim based on dispositions mortis causa made before opening divorce procedures.*

Thus any inheritance provisions agreed upon are null and void.

However, under the freedom of contract provisions (and under the right to a compulsory portion) divorced spouses may enter inheritance provisions (FSC 122 III 308).

### **Questionable regulation of the substitutional inheritance**

The second specific issue under inheritance law which we want to look at is substitutional inheritance. This also is a matter that has been provided for in many inheritance contracts and wills. Somebody is an heir, but only provisional heir; thereafter an additional person (a substitutional heir) can inherit. This particular legal issue has not been addressed satisfactorily in practice either. The inheritance office deals with issues concerning provisional heirs, and more often than not neglects the reversionary heirs, nor officially informs them. In other words, if the provisional heir dies, it is often not known that 20 or 30 years ago, provisions had been made for a substitutional heir. In many cases this means that provisional heirs – unmindful of their position – benefit from the inheritance without regard to substitutional heirs. This often leads to substitutional heirs ending up empty-handed and none the wiser. This also often means that the will of the bequeather has not been respected.

With the two examples in this newsletter, we wished to show you that inheritance law contains a few tough nuts that are hard to crack, and that essential issues have neither been answered nor legally solved.

Should you have any questions regarding inheritance law, the artax team is at your disposal.

Kind regards

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