

Trust or Foundation

An added value in estate planning.

When people hear "trust" or "foundation", the first thing they often think of is dubious tax optimisation. In continental Europe in particular, this false image persists and is mainly due in most cases to the fact that very few people even know what a trust or foundation is.

When it comes to estate planning, which is as complicated as it is important, both trusts and foundations can generate significant added value that few people have recognised until now. Trusts and foundations greatly expand the possibilities in estate planning and help to determine the future of an estate. However, setting up an appropriate structure can be complex.

We would like to briefly explain from a Swiss perspective, their differences and for whom these solutions are suitable.

In the case of larger estates especially, the question arises more and more frequently as to whether one should settle the estate via a foundation, a trust or, alternatively, via a corporation. However, it is not always easy to answer the question on which alternative is the more advantageous. Compared to the well-known corporations, trusts and foundations do offer some advantages in estate planning, but their structures are rather complex and require some clarification as well as professional administration. Since there are both charitable and non-charitable trusts and foundations, we will limit ourselves here to the latter.

An asset belongs to itself

Let us take the example of a corporation for comparison: A joint-stock company (AG) belongs to its shareholders. In contrast, a trust and a foundation belongs to itself. One could therefore also speak of "hived off" assets. This has a direct effect on the law of succession (if such a law exists^{1 2}), because if a shareholder of a corporation dies, these shares are part of the estate. This is not the case with trusts and foundations.

Claims against foundations and trusts

Anyone who is a beneficiary of a trust or foundation, for example as heir only has a claim against this "vehicle" - and not against the founder or the testator. This entitlement cannot be inherited automatically and is sometimes also linked to conditions, for example reaching a certain age, completing an education, entering into a marriage or similar.

Often, such claims cannot be enforced. Trusts and foundations are often free to decide within the legal framework whether, when and in what amount distributions are made.

Foundations vs. trusts: these are the differences

A foundation has a tradition in continental European civil law. It is a separate legal entity which is bound to specific purposes. As the founder, you can determine these purposes as well as the beneficiaries. The foundation council is bound by this.

¹ The law of inheritance in **England & Wales** is based on the principle of testamentary freedom and there is no compulsory portion in the sense of a proportionate, value-based interest in the estate. However, certain persons must be sufficiently considered and if they have not received due consideration, they have certain rights under the Inheritance (Provision for Family and Dependents) Act 1975.

² Inheritance law in the **USA** is governed by the jurisdiction of the individual states. There is therefore no uniform US inheritance law. In principle, a testator in the USA has very extensive freedom of disposition when settling his or her estate. A nationwide right to a compulsory portion, as in Switzerland, does not exist in the USA. However, the inheritance laws of all states contain more or less distinctive provisions for the protection of the surviving spouse and minor children.

In contrast, a trust is not a legal entity, but a legal relationship between settlor, trustee, protector and beneficiaries. A trust is therefore a legal construct from the Anglo-American world, with England having the longest experience. In Switzerland there is (still) no law on this - but foreign trusts have been recognised since 2007³. The legal owner of a trust is always the trustee.

In a foundation, the founder usually remains visible as a patron, donor or project leader despite the transfer of assets. In contrast, the settlor of a trust usually remains anonymous to the outside world.

A foundation and all the members of the foundation council achieve publicity through their activities and are recorded accordingly in the commercial register. The trust, on the other hand, depending on its domicile, is not recognisable to the outside world. Since there are no trusts under Swiss law today, they have to be set up under foreign law.

What are these solutions ideal for?

Family foundations under Swiss law are only suitable for certain cases and this was deliberately designed by the legislator in 1907. However, the interpretation of the law (especially of Art. 335 of the Swiss Civil Code) has become more flexible in recent years. In principle, however, Swiss foundations can regulate educational costs or the provision and support of family members - but not the financing of the further livelihood. Liechtenstein foundations have more options here.

Trusts, on the other hand, offer considerably more freedom than Swiss foundations. To set up and administer a trust in Switzerland, however, you need a FINMA-licensed professional trustee, which is more of an advantage because the trustee ultimately controls the trust structure and is accountable to the beneficiaries. This (corporate) trustee will be credited with the trust assets for tax purposes unless the settlor is able to revoke the trust at any time. If the settlor has this right, we speak of a revocable trust - a

³ In 2007, Switzerland ratified the Hague Trust Convention from 1985

variant which is not possible with the foundation - in this case the trust assets continue to be taxed by the settlor.

Before you transfer your assets into a trust, you should clarify all tax aspects, but also check other provisions such as inheritance or marriage law.

Benefits of foundations and trusts

When it comes to estate planning in particular, foundations and trusts offer more comprehensive options than Swiss inheritance law currently provides: to a certain extent, you can freely determine who, when and to what extent somebody is to benefit from a foundation or trust.

Trusts and foundations are particularly favourable in the following cases:

- Generally, for larger estates
- Complex asset structures
- Strained family relationships or minor heirs
- Situations where heirs may not be able to handle the assets appropriately

As an experienced commercial trustee with a FINMA trustee license we care also about the individual needs and would be happy to actively support you with these questions and together work out the best possible options for you.

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