Coronavirus Information Hub: FAQ Private Clients

Patient Decree

What is a patient decree?

With a patient decree, you provide for situations in which you lack capacity of judgement and can no longer take decisions regarding your medical treatment. In the patient decree, you may specify which medical procedures you agree to and which you reject, so that doctors can act according to the patient's will.

The Foederatio Medicorum Helveticorum (FMH) offers templates for a short and a detailed version of a patient decree.

What does lack of capacity of judgement mean?

A person is not capable of judgement if he/she cannot, regarding a specific situation, form a will and/or act according to this will. This may occur temporarily or permanently, totally or partially, e.g. due to unconsciousness, mental disability or illness, dementia or intoxication (art. 16 CC).

I cannot decide now. Can I instruct someone to decide on a case by case basis?

Yes, you may appoint a person who shall discuss the medical procedures with the responsible doctor and decide on your behalf if you are no longer capable of judgement. You may set out specific instructions to the appointee (art. 370 CC).

What happens if I become incapable of judgement without having a patient decree?

If you become incapable of judgement without having a patient decree, the doctor will plan the required treatment in consultation with the person representing you in relation to medical procedures. Art. 378 CC states who may decide on your behalf.

The representative is determined in the following order:

i. a guardian with the right to act as representative in relation to medical procedures;

ii. your spouse or registered partner if you live in the same household or if he/she regularly and personally provides you with support;

iii. any person who lives in the same household as you or who regularly and personally provides you with support;

iv. your children or other descendants who regularly and personally provide you with support;

v. your parents, if they regularly and personally provide you with support;

vi. your siblings, if they regularly and personally provide you with support.

What personal requirements need to be met?

Any person who is capable of judgement may execute a patient decree (art. 370 sect. 1 CC).

What form requirements need to be met?

The patient decree must be executed in writing, it must indicate the date and be signed. Only the signature must be added in handwriting.

I already have a patient decree, however, I would like to revoke/amend it. How can I do this?

A patient decree can be revoked unilaterally and at any time by destroying it or by explicitly revoking it in the form required for a patient decree (in writing, dated and signed holographically). If you execute a new patient decree without explicitly revoking a previous one, it is assumed that the later replaces the previous patient decree, unless it is clearly a mere supplement to the previous one. If you only wish to amend your patient decree, it is therefore advisable to explicitly emphasize this (art. 371 sect. 3 in connection with art. 362 CC).

Where shall I store my patient decree and how do I make sure that the doctors can access it?

You should keep your patient decree at a safe place with the person designated as your representative or other persons close to you who can easily access it. It is advisable that you carry a card (English, German, French, Italian) in your wallet indicating the place of deposit.

Moreover, you may contact your health insurance and instruct them to enter the fact that you have a patient decree and its location on your insurance card.

Advance Care Directive

What is an advance care directive?

In an advance care directive, you appoint someone to take responsibility for your personal care and/or your asset management as your legal representative in the event that you are no longer capable of judgement. You may also give specific instructions to such appointee(s).

What happens if I become incapable of judgement after executing an advance care directive?

If you become (partially) incapable, the adult protection authority (APA / *Erwachsenenschutzbehörde*) shall be notified, and it will verify (i) if the directive has been validly executed, (ii) if the requirements for its effectiveness are met, (iii) if the appointee is fit for his/her duties, and (iv) if further adult protection measures are required. If the conditions are met and if the appointee accepts his mandate, the adult protection authority will issue him/her a formal document stating his/her powers (art. 363 CC). The APA has no other function and it will not interfere unless a complaint is filed upon misuse of mandate by the appointee.

What happens if I regain my capacity of judgement?

As a principle set forth by the law, the advance care directive becomes ineffective in the moment that you permanently regain your capacity of judgement.

What happens if I become incapable of judgement without having an advance care directive?

If you become incapable of judgement without having an advance care directive and if no guardian has been appointed, your spouse or registered partner may act as your representative provided that you live in the same household or that your spouse or registered partner regularly and personally provides you with support (art. 374 CC).

The right of representation only includes legal acts that are usually required to cover maintenance needs and ordinary management of assets. For any extraordinary asset management, the approval of the APA is required.

In addition, if the APA considers the support provided by the representative insufficient, the APA may appoint one or several guardians to fill the gap.

What personal requirements need to be met?

In order to execute an advance care directive, you must be at least 18 years old and capable of judgement (art. 360 sect. 1 in connection with art. 12 seqq. CC).

What form requirements need to be met?

An advance care directive may either be executed by means of public authentication or holographically, i.e. by entirely writing it by hand, dating and signing it (art. 361 sect. 1 and 2 CC).

I already have an advance care directive, however, I would like to revoke/amend it. How can I do this?

An advance care directive can be revoked unilaterally and at any time by destroying it or by explicitly revoking it in the form required for an advance care directive (by public authentication or holographically). If you execute a new advance care directive without explicitly revoking a previous one, it is assumed that the later replaces the previous advance care directive, unless it is clearly a mere supplement to the previous one. If you only wish to amend your advance care directive, it is therefore advisable to explicitly emphasize this (art. 362 CC).

Where shall I store my advance care directive and how can I make sure that the APA can access it?

You should keep your advance care directive at a safe place with the appointee or other persons close to you who can easily access it.

Moreover, you may request the civil register office (*Zivilstandsamt*) to record the fact that you have executed an advance care directive and its location in the central database (art. 361 sect. 3 CC). The APA will check this database before taking further measures (art. 363 sect. 1 CC).

Last Will and Inheritance Contract

What is the difference between a last will and an inheritance contract, and which one is more suitable for my purposes?

A last will is established unilaterally, and the testator can therefore revoke or amend it at any time.

An inheritance contract is concluded between two or more parties. The succession set forth in such inheritance contract is binding and can only be revoked or amended if all parties agree by written agreement. In particular, changes are in general not permissible after the death of one party or if one party becomes mentally incapable (except if such unilateral amendments were explicitly reserved in the inheritance contract).

Whether an inheritance contract or a last will is more suitable needs to be examined on a case by case basis. As a general rule, the inheritance contract is the instrument of choice if the estate planning is made jointly or depends on more than one person. In addition, if a party wishes to waive his/her inheritance rights (including the forced heirship rights), then an inheritance contract is mandatory. If there is only one testator involved or if the testator wishes to keep his/her full rights to amend the estate planning, then the last will is the suitable instrument.

What personal requirements need to be met?

Only individuals who are at least 18 years old and who have the capacity of judgement can validly execute a last will or an inheritance contract. For the execution of an inheritance contract, the consent of a legal representative may be necessary if the testator is subject to a guardianship (art. 467 seq. CC).

What form requirements need to be met?

A last will can either be executed by means of public authentication and in the presence of two witnesses or holographically, i.e. by entirely writing it by hand, dating and signing it (art. 499 seqq. and 505 sect. 1 CC).

In case of emergency and if the use of the other means of execution is not possible, a last will can be established orally in the presence of two witnesses who then need to convert it into a deed according to the requirements of art. 507 CC. The oral last will loses its validity 14 days after the regain of the ability to execute a last will by public deed or holographically (art. 506 seqq. CC).

An inheritance contract needs to be executed by means of public authentication and in the presence of two witnesses (art. 512 in connection with art. 499 seqq. CC).

If a testator is not able to see the notary public in his office, then the notary will come to the testator's home or even to the hospital.

I am not a Swiss citizen, and/or my residence is abroad. Which rule of law will govern my succession?

In an international setting, the applicable law must be determined on a case by case basis, since it does not only depend on the Swiss private international law but also on foreign ones. As a general rule, most jurisdictions consider the laws of the testator's last place of (habitual) residence applicable. Many jurisdictions explicitly allow the testator to choose the law of nationality as the governing law. This is for example the case pursuant the EU Succession Regulation (art. 20 EUSR) which applies in all countries within the EU except in Ireland and Demark and the UK.

Switzerland currently only respects such choice of law in favor of a foreign nationality if the testator has no Swiss citizenship (art. 90 sect. 2 SPILA). However, the government currently considers adapting a more liberal approach (see here).

Do I need to respect any compulsory inheritance shares?

If Swiss law is applicable, the testator has to respect the following statutory inheritance shares depending on his/her family structure:

Family Members left behind[1]	Statutory Share	Compulsory Share	Disposable Quota
Children or their Descendants[2]	1/1	3/4	1/4
Spouse or Registered Partner	1/1	1/2	1/2
One or Two Parents	1/1	1/2	1/2
Sibling(s) or their Descendants[2]	1/1	-	1/1
One Parent *and* Sibling(s) or their Descendants[2]	1/2 1/2	1/4 -	3/4
Children or their Descendants[2] *and* Spouse or Registered Partner	1/2 1/2	3/8 1/4	3/8
One or Two Parents *and* Spouse or Registered Partner	1/4 3/4	1/8 3/8	1/2
One Parent *and* Sibling(s) or their Descendants[2] *and* Spouse or Registered Partner	1/8 1/8 3/4	1/16 3/8	9/16
Sibling(s) or their Descendants[2] *and* Spouse or Registered Partner	1/4 3/4	- 3/8	5/8

The Swiss parliament currently considers changing the compulsory share of children (or their descendants) to 1/2 of their statutory share and completely abolishing the compulsory share of parents (see here). Moreover, further modifications are envisaged including the introduction of company succession regulations (see here). This new regime has not yet entered into force. However, if you intend to reduce the inheritance share of a compulsory heir to the greatest extent possible, it is recommended to point out that the compulsory share is determined in accordance with the law applicable at the time of death.

1 If not mentioned explicitly, the following are deemed not to be left behind: children or their descendants; spouse or registered partner; parent(s); sibling(s) or their descendants.

2 The descendants are only entitled to a compulsory share if they are statutory heirs, i.e. if any other descendent of a preceding parentela of the stem have predeceased.

Who are my successors if I die without a last will or inheritance contract?

If you die without a last will or inheritance contract, the intestate succession will take place and the statutory heirs will receive their statutory shares (cf. the table above).

I have a spouse and children. How can I make sure that my spouse will participate in my estate to the greatest possible extent?

If you and your spouse live under the property matrimonial regime of participation in acquired property (*Errungenschaftsbeteiligung*), you may agree by means of marital agreement that the surviving spouse shall receive the entire surplus when dividing the marital property upon the death of a spouse (art. 216 sect. 1 CC). Such marital agreement must be executed in the form of a public deed by a notary public and it may not adversely affect the compulsory shares of children who are not common issues of the spouses (art. 216 sect. 2 CC).

In addition, you may state in your last will or inheritance contract that your children shall only receive their compulsory share whereas your spouse shall receive the entire rest of the estate (incl. the free disposable quota, currently a share of 5/8). If your children agree, you may even conclude an inheritance contract with your spouse and your children in which the children waive their inheritance rights and agree to become heirs only in the estate of the secondly deceased spouse.

You may also grant your surviving spouse the usufruct of the entire part of the estate passing to your common children. The disposable quota then amounts to 1/4 of the estate and it can be left to the surviving spouse as well (art. 473 CC).

I already have a last will or an inheritance contract, however, I would like to revoke/amend it. How can I do this?

An inheritance contract can be revoked if all parties agree so in mere written form (art. 513 sect. 1 CC). However, it can only be amended if all parties agree and sign the addendum before the notary public.

A last will can be revoked unilaterally and at any time by destroying it or by explicitly revoking it in the form required for a last will (by public authentication or holographically). If you execute a new last will without explicitly revoking a previous one, it is assumed that the later replaces the previous last will, unless it is clearly a mere supplement to the previous one. If you only wish to amend your last will, it is therefore advisable to explicitly emphasize this (art. 511 sect. 1 CC).

Is it recommendable to appoint an executor?

Yes, appointing an executor brings many advantages: The executor takes care of the management of the estate's assets as well as of any tax or legal matters arising. By doing so, he/she may free the heirs from administrative tasks during the period of mourning. Moreover, the executor may manage the estate's assets at his best without the prior consent of the co-heirs. By appointing an executor, you therefore assure a sufficient asset management even in case of your heirs not being in agreement. In addition, the executor only needs a certificate of executorship in order to access the estate's assets. Such a certificate of executorship may be received faster than the inheritance certificate.

Where shall I store my last will or inheritance contract?

You should keep your last will or inheritance contract at a safe place which can easily be accessed. This may be at your home or with an entrusted person. A bank safe is usually not a suitable place, since it can only be accessed by your heirs with the inheritance certificate. The inheritance certificate will, in general, only be issued after the last will/inheritance contract has been filed.

In addition, you may ask the authorities at the place of your residence to store your last will/inheritance contract and file it with the competent authority upon your demise.

Partition of the estate

I am co-heir of an estate. What rights do I have with regard to the assets of the estate?

Until the partition of the estate, you and your co-heirs have joint ownership of the entire assets of the estate. Therefore any decision has to be taken unanimously.

All of the co-heirs are in agreement with regard to the partition of the estate. How shall we proceed?

The partition can be executed by mere written agreement between all of the heirs or by factual division. It is recommended to sign an agreement in writing. If the estate includes real estate, a written agreement is necessary in order to instruct the land register to change ownership.

Due to the Corona situation, one or several co-heirs need liquidity, however, we are not yet in agreement regarding the entire estate's partition. Is it possible to receive an advance payment out of the estate?

If all of the co-heirs agree, you may conclude a partial partition agreement and distribute a certain amount or assets (such as shares) to all or some of the co-heirs on account of their inheritance shares.

However, you have no claim to demand such a partial partition. If one of the co-heirs or even the executor are opposed to the idea, you may file a claim and request the full partition of the estate.

The testator appointed an executor who has accepted his mandate. Does the executor need to approve our partition?

No, if you have found an agreement among all co-heirs covering the partition of the estate, you can advise the executor to divide the estate accordingly and request him to, afterwards, resign his office.

What can we do if we cannot manage the estate due to disagreement?

Should for example only one co-heir hinder you to act, then you can request the court to appoint a representative. If you have an executor, then the executor manages the estate for the heirs.

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Coronavirus Information Hub
Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

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