

HEIRS ON THE FOUNDATION BOARD - PERMISSIBILITY, VOTING TERMS, POSSIBILITIES OF ORGANISATION

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Anyone who establishes a foundation and leads it as the chairman of the board, together with other trusted board members, should consider how it will proceed after the potential occurrence of resignation, incapacity to act, or death. Should one's own family, especially the heirs, continue to operate the foundation in influential positions? Or should the remaining foundation board decide themselves on the selection of suitable board members, even if this means that the influence of the family in the established foundation is marginalised? And what happens if the family and the other board members cannot reach an agreement?

On the basis of a recent federal decision (Federal Supreme Court, judgment of 5 January 2016, 5A_676/2015), the most important topics relating to the influence of the family on a foundation and the election of family members to the foundation board are presented in a question and answer format, and possibilities of organisation are likewise indicated.

I. Heirs on the Foundation Board – what to consider

A. What rights can a founder reserve in the creation of a foundation to himself or to third parties?

Swiss foundation law recognises a large number of permissible so-called rights of influence. For example, the founder may reserve the following rights for himself or for third parties, such as family members:

- Election and dismissal right of board members or other foundation bodies;
- Right of instruction towards the foundation board;
- Right to impose an authorisation requirement upon foundation board decisions;
- Right to enact rules;
- Right to reserve a seat on the foundation board for oneself or for a third party.

B. Is it possible to reserve a seat for oneself on the foundation board for one's entire lifetime?

Yes, according to Swiss foundation law, there is the possibility of arranging the foundation deed accordingly, and for the founder to have a seat reserved on the foundation board for a lifetime.



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C. Is it also possible for the founder to provide that after his death, his heirs or his spouse will be permanently on the foundation board?

Yes, according to Swiss foundation law it is also possible to stipulate in the foundation deed that a seat in the foundation board is assigned to one or more descendants, a spouse, a domestic partner, a registered partner or a third party.

D. How many members are on the board of a Swiss foundation?

The size of the foundation board is not stipulated by law. The founder can therefore determine the size of the foundation board himself in the foundation deed or in one of the foundation regulations.

E. Can the foundation board of a Swiss foundation consist of only one person?

Yes, this is permitted under Swiss law, but not recommended.

F. Is there a common practice in Switzerland with regard to the size of the foundation board?

In determining the size of the foundation board, the founder should consider the size, purpose, and tasks of the foundation, the composition and complexity of the foundation's assets, and the abilities of the other board members. Depending on these various factors, a larger or smaller foundation board could be required.

The practice of the Swiss Federal Foundation Supervisory Authority recommends that a foundation board consist of at least 3 people. Certain associations in Switzerland recommend or require that the foundation board consist of at least 5 people for membership or management of the logo of their association. However, none of these requirements are legally binding.

G. Does the board member of an international foundation need to be Swiss or a resident of Switzerland?

According to consistent practice, internationally active foundations require at least one authorised signatory member of the foundation board to be an EU or EFTA citizen who is resident in Switzerland.

H. Does a person need to have special skills in order to be elected as a board member?

No, Swiss law does not set forth any specific requirements for the personal or professional qualifications of a member of the foundation board.

It is, however, permissible for the founder himself to decide that only persons who have certain personal or professional abilities may be elected to the foundation board.

I. When does a foundation board mandate begin and end?

Swiss legislation does not address the question of when a foundation board starts nor of when it ends. Accordingly, it is recommended that this be established by the founder.

J. Who elects the foundation board?

It is best if this is determined in the foundation deed.

The first foundation board is usually designated by the founder himself. However, it is also permissible for the founder to waive this designation. In this case, the foundation deed should provide for the procedure under which the first foundation board is to be appointed.

At the end of the first term of office of the board or during the establishment of the foundation, the following two options exist in practice for the selection of board members:

- A special **electoral body** is created, which elects the foundation board members. This electoral body may, for example, be:
 - a. the founder himself;
 - b. the entire foundation board;
 - c. a committee of certain board members;
 - d. certain specific family members;
 - e. a certain group of family members, for example, the heirs;
 - f. the body of another legal entity;
 - g. any other third party;
 - h. another otherwise specified electoral body;
- The **foundation board augments itself** (so-called **co-optation**)



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K. How is the foundation board elected when the foundation deed does not provide for an electoral procedure?

If the foundation deed or the foundation regulations do not provide for an election procedure for the appointment of the foundation board, then the foundation board will be designated by the supervisory authority.

L. When does the office of the foundation board begin?

There is no legal regulation of this. There are two situations that must be distinguished from one another.

- First and foremost, the beginning of the office of the foundation board is defined primarily on the basis of specific provisions in the foundation deed or the foundation regulations.
- Secondary, if the corresponding provisions of the foundation deed or the foundation regulations are missing, the office of the foundation board begins with the date of the election, if the election was adopted by the foundation board on that date.

M. How long is the term of office of a board member?

Here, too, there is no legal requirement. The term of office can, therefore, be arbitrarily fixed by the founder in the foundation deed or the foundation regulations.

If the foundation deed or the foundation regulations do not contain a term of office, the appointed board members are elected indefinitely. In this case, the term of office ends for a member of the foundation board by rescission, by dismissal for important reasons, by incapacity to act or by death.

N. Can a member of the foundation board be re-elected?

Yes, re-election can be provided for by the founder in the foundation deed or in the foundation regulations. The following, for example, can be regulated:

- The number of allowed re-elections;
- Maximum term limits;
- Age limits.

O. What happens when a board member has a conflict of interest?

In this case, the affected board member must abstain from the proceedings.

P. Is it necessary to elect the founder or a member of the family in the foundation board by a decision of the board, even if the right to become a member of the board exists in the foundation deed?

Yes, in this case as well, the usual electoral procedures for the foundation must be followed.

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