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LIQUIDATION OF SHARES IN A SIMPLE COMPANY DUE TO THE DEATH OF A PARTNER: IS IT NECESSARY TO INVENTORY AND SHARE OUT THE SHARES OR IS IT ENOUGH TO AMEND THE ARTICLES OF ASSOCIATION?

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Abstract: The purpose of this article is to demonstrate the need to inventory and share out the shares of a deceased partner in a simple company, and that merely amending the articles of association is not enough. Through doctrinal, jurisprudential and administrative research, it seeks to substantiate the indispensability of carrying out the formal act of succession mentioned above. The aim is to contribute to the doctrinal, jurisprudential and practical advancement of the subject in question, in order to dispel any remaining doubts.
Keywords: Succession, Inventory and distribution, Company shares, Simple company, Notary public

INITIAL CONSIDERATIONS

The purpose of this article is to resolve an issue that has been little dealt with by doctrine and case law, which concerns the liquidation of company shares in the event of the death of a partner in a partnership. Is it enough to amend the articles of association or is it necessary to carry out an inventory and share out the company shares?

Before proposing a solution to the problem in question, it is necessary to make a few comments about companies. In fact, for legal purposes, companies can be conceptualized as legal entities[1] under private law resulting from the union of people to carry out economic activities, with the aim of making a profit and sharing the results[2]. This concept is in line with the etymology of the word company, whose Latin origin ("*societas*") means friendly association with others.

However, under Brazilian law, one-person companies are allowed, i.e. those made up of just one partner. There are three possibilities for sole proprietorships: i) the wholly-owned subsidiary corporation, provided for in Article 251 of Law No. 6,404/76; ii) the sole proprietorship law firm (Articles 15 to 17 of Law No. 8,906/94); iii) the sole proprietorship limited liability company created by Law No. 13,874/2019, which introduced the first and second paragraphs in Article 1,052 of the Civil Code.[3]

There are also two more legal exceptions to the rule of a plurality of company members, namely: i) the possibility provided for in item IV of article 1.033 of the Civil Code (a company shall not be dissolved for lack of a plurality of members if such absence does not exceed 180 (one hundred and eighty) days; ii) in the case of a joint stock company, the existence of a single shareholder is admissible for the period of time between two (2) Ordinary General Meetings, i.e. if the minimum plurality of shareholders is reconstituted by the time of the meeting).

Ordinary General Meeting of the year following the one in which the company became a sole proprietorship, there will be no dissolution of the legal entity (art. 206, I, "d", Law 6.404/76). It is worth remembering that these are exceptional and temporary situations.

Furthermore, it should be remembered that the main purpose of creating companies, which are a type of legal entity, is to limit assets and encourage economic activity, since this

1. Fábio Ulhoa Coelho (2017, p. 137) explains that: «Legal person is an expedient of law intended to simplify the discipline of certain relationships between men in society. It has no existence outside the law, that is, beyond the concepts shared by the members of the legal community. Such an expedient has the rather precise meaning of authorizing certain subjects of law to perform legal acts in general.»

2. Civil Code, Art. 981, "caput": "Persons who reciprocally undertake to contribute, with goods or services, to the exercise of an economic activity and to share the results among themselves, enter into a partnership agreement".

3. The Individual Limited Liability Company - EIRELI, provided for in Article 980-A of the Civil Code, according to the majority understanding in doctrine and case law, is not a sole proprietorship, but a new personified legal entity, distinct from the person of the entrepreneur and the entrepreneurial company (Statements No. 469 of the 5th Civil Law Conference and Statement No. 3 of the 1st Commercial Law Conference, both promoted by the Study Center of the Federal Justice Council). However, it is worth noting here that Fábio Ulhoa Coelho believes that the EIRELI is a sole proprietorship (COELHO, 2017, p. 146).

generates wealth, jobs and is a source of taxes. It is therefore a socially relevant institute.

Indeed, the rule that the company is liable for its debts with its assets, and not with the assets of its partners, is a measure designed to encourage the exercise of economic activity and mitigate its inherent risks. To this end, there needs to be a clear legal and asset separation between the company and its partners, as they are different people with different rights and obligations. As a rule, the company will be liable with its assets for the obligations it incurs[4]. The partners' assets will not be affected by company debts. The partner has the duty to pay in what he has subscribed. After this payment, as a rule, there will be a complete distinction in assets between partners and the company.[5]

The disregard of legal personality must be exceptional and motivated, otherwise such an important legal institute could be put at risk. The Civil Code, in its article 50, "caput", was right to restrict the effects of disregard to "certain and determined relationships of obligations" in cases where there is "abuse of the legal personality, characterized by misuse of purpose or confusion of assets". It therefore accepted the so-called "Greater Theory of Disregard of Legal Personality", which means that in order for the partners to be liable for the company's obligations, it is essential to prove the existence of an abuse of law, and mere financial incapacity of the moral entity is not enough. This is protection not for the legal entity or its partners, but for society, because if the partner is liable with all their assets for acts of the legal entity, there will be a disincentive to entrepreneurship, which generates so much good social fruit (employment, taxes, production/circulation of products and services, etc). Unfortunately, other legislation has not followed this path and allows partners to be held personally liable for acts of the legal entity.

This is the case with the Consumer Protection Code (art. 28, "caput" and § 5) and the National Tax Code (art. 135), among others. These rules adopt the so-called "Minor Theory of Disregarding Legal Personality", i.e. it is enough for the legal entity's economic insufficiency to affect the partners' assets.

With regard to the doctrinal classifications of companies, the most important for this study is the one that refers to the conditions for disposing of the shareholding or the form of composition. In this case, companies are divided into partnerships (*intuitu personae)* and capital companies (*intuito pecuniae)*. In the former, the union between the partners is based on their personal characteristics, i.e. the personal attributes of each partner are decisive for achieving the corporate purpose. For this reason, the partners can prevent outsiders from joining the company. In capital companies, the partner's financial contribution to the company is paramount. Therefore, there is no restriction on outsiders joining the company. In the latter, the subjective qualities of its members do not influence the performance of the corporate activity.

In this sense, Fábio Ulhoa Coelho (2017, p. 143-144) states that:

> There are companies in which the individual attributes of the partner interfere with the realization of the corporate purpose, and there are companies in which there is no such interference. In some, the fact that the partner is competent, honest or diligent is relevant to the success or failure of the company, while in others, such subjective characteristics have no influence on the realization of the corporate purpose [...].

4. In this sense, Fábio Ulhoa Coelho (2017, p. 138-139) recalls that "The personalization of *business* companies generates three quite precise consequences, namely: a) *Business ownership* [...]. b) *Procedural ownership* [...]. c) *Asset liability* [...]." These characteristics apply to all legal entities, not just companies.

5. There is express provision in the Civil Code for companies in which the partners are liable on an unlimited basis, i.e. once the company's assets have been forfeited, the partners' private assets will be liable for the debts of the legal entity, as is the case with a general partnership (art. 1.039) and a limited partnership (art. 1.045). These companies have little impact on practical life.

In companies where the subjective characteristics of the partners could jeopardize the success of the business carried out by the company, the right to veto the entry of a third party from outside the partnership is guaranteed. In this way, the sale of the shareholding is subject to the consent of the others, when it is a non-member purchaser. On the other hand, in companies where the subjective attributes of each partner do not influence the realization of the corporate purpose, the circulation of the shareholding is free, unconditional on the agreement of the other partners.

Partnerships are simple companies, partnerships, limited partnerships and cooperatives. Capital companies are the anonymous company, the limited partnership by shares and the participation account company. A limited liability company may or may not be a partnership, depending on the provisions of its articles of association.

Among the various legal entities that are registered by the Civil Registry Officers of Legal Entities[6], simple companies stand out in the subject proposed here, as they are the only ones that have their share capital divided into quotas. Therefore, this article will only deal with the procedure for liquidating shares in a simple company.

THE CONTINUITY (OR NOT) OF THE LEGAL ENTITY IN THE EVENT OF THE DEATH OF ANY OF THE PARTNERS

The Brazilian legal system establishes as a requirement for the incorporation of a company the plurality of partners[7]. Thus, when one of the partners leaves (whether due to death; sale of their shareholding; exercising the right to withdraw; exclusion; bankruptcy of a partner; or liquidation of a share at the request of a partner's creditor) there is a debate in the legal profession as to whether there is dissolution[8] (extinction, for some) of the legal entity.

6. Norms of Service of the São Paulo State Office of the Inspector General of Justice, Chapter XVIII, item 1: "It is the responsibility of the Officers of the Civil Registry of Legal Entities to: a) register the articles of incorporation, articles of association and bylaws of simple companies; associations; religious organizations; private law foundations; individual limited liability companies of a simple nature; and trade unions. 3 b) register simple companies in the form of businesses, as established in the Civil Code, with the exception of joint stock companies and limited liability companies"; Art. 114, items I, II and III of Law no. 6.015/73: "The following will be registered in the civil registry of legal entities: I - the contracts, articles of incorporation, bylaws or commitments of civil, religious, pious, moral, scientific or literary societies, as well as foundations and associations of public utility; II - civil societies that take the forms established in commercial laws, with the exception of joint stock companies; III - the articles of incorporation and bylaws of political parties".

7. Only in exceptional cases is it permissible for only one partner to set up a company, as is the case with the sole proprietorship of a lawyer (art. 15 of Law no. 8.906/94), the wholly-owned subsidiary (art. 251 of Law no. 6.404/76), the sole proprietorship limited liability company (art. 1052, §§ 1 and 2, of the Civil Code) and the "temporary companies" (art. 1.033, IV, of the Civil Code and art. 206, I,"d", of Law no. 6.404/76). It is worth noting that the Individual Limited Liability Company (EIRELI) is not a company, but an entity with legal personality (arts. 980-A c/c 44, VI, of the Civil Code and Statement No. 469 of the Civil Law Sessions of the Federal Justice Council).

8. A recent decision by the Corregidor Geral da Justiça do Estado de São Paulo, Des. Geraldo Francisco Pinheiro Franco, dealt with the distinction between dissolution and extinction of the legal entity: "It can be seen, therefore, that dissolution, liquidation and partition are distinct phases of the procedure, judicial or extrajudicial, which leads to the extinction of the legal entity (article 51 of the Civil Code), and that each phase must be promoted according to its purpose, respecting the rules that are specific to them. Fábio Ulhoa Coelho, on the extinction of the legal personality of business companies, explains that: "The dissolved business company (by act of the partners or judicial decision) does not immediately lose its legal personality completely. On the contrary, it retains it, but only in order to settle existing outstanding obligations (LSA, art. 207; CC/2002, art. 51, with, art. 335, in fine). In other words, it suffers a considerable restriction on its personality, to the extent that it can only carry out the acts necessary to meet the purposes of the liquidation. Any legal transaction carried out in the name of the dissolved company that is not aimed at resolving outstanding obligations cannot be attributed to the legal entity. The legal entity is no longer a person capable of holding rights or contracting obligations, except for those that are indispensable to the smooth running of the liquidation. The consequences of the act are therefore attributed exclusively to the individual who carried it

Marcelo Fortes Barbosa Filho, commenting on art. 1.028 of the Civil Code, explains that:

> The death of one of the partners was once considered an inexorable cause for the dissolution of a company, considering that the aggregation of partners was completely subordinated to the identity and individual qualities of the contracting parties (art. 1.399, IV, of the CC/16 and art. 335, item 4 - repealed - of the Commercial Code). As the text of this article shows, this rigid conception has been removed, even in the non-business sphere of simple companies. The aim is therefore to preserve the company and, even more so, for the benefit of the community, to enable the continuity of the activity undertaken and the corresponding generation of wealth. Thus, when a partner dies, it is proposed, as a general rule, to carry out a partial resolution of the contract entered into, causing, in accordance with the provisions of article 1031, the isolated and singular liquidation of their share. By reducing the share capital, the heirs are awarded the amount corresponding to the *deceased*'s share, while the remainder is preserved (PELUSO, 2012, p. 1025).

Except in cases where the company is made up of only two partners, the Civil Statute is clear that the company will be preserved and only in exceptional cases will it be dissolved.

This solution is in line with the Principles of the Preservation of the Company and its social function. In fact, no one is interested in the closure of a socially relevant activity. The economic activity carried out by society creates jobs, pays taxes and produces services and products of collective interest[9]. It is only in cases where there is economic/financial unfeasibility of the activity or abuse of rights that the extinction of the legal entity becomes necessary.

With regard to the death of a partner, articles 1.028 and 1.031 of the Civil Code[10] state that, as a rule, in the event of the death of one of the partners, their share will be liquidated based on the equity value of the company on the date of the partial resolution (date of death).

The aforementioned situation may not occur in three cases: 1) if the articles of association provide otherwise; 2) if the remaining partners no longer wish to maintain the company; 3) if the deceased partner is replaced by his heirs or by one of them, provided there is an agreement between the heirs and the remaining partners.

It can therefore be seen that, in the event of the death of one of the partners, there will, as a rule, be continuity of the legal entity and resolution of the company with regard to the partner (or partial dissolution of the company).

However, in order for this to happen, it will be necessary to amend the articles of association, either to reduce the share capital due to the liquidation of the deceased's shares, or to maintain the share capital through the acquisition of the deceased's shareholding by the other partners, by a third party or by his heirs.

out on behalf of the dissolved company" (COELHO, 2003, p. 460). Once the dissolution has been carried out, the first step is to register the respective instrument with the Civil Registry of Legal Entities, so that it has the necessary publicity (article 51, paragraph 1, of the Civil Code)". (CGJ-SP, Administrative Appeal No. 1011485-78.2017.8.26.0100; DJ: 03/21/2018).

9. Law 11.101/05, art. 47: "The purpose of judicial reorganization is to make it possible to overcome the debtor's economic and financial crisis, in order to maintain the source of production, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and stimulating economic activity."

10. Civil Code, Art. 1.028. "In the event of the death of a partner, his or her share shall be liquidated, except: I - if the agreement II - if the remaining partners opt for the dissolution of the company; III - if, by agreement with the heirs, the replacement of the deceased partner is regulated". "Art. 1.031. In cases where the company is dissolved in relation to a partner, the value of his share, considered in terms of the amount actually paid in, shall be settled, unless otherwise provided by contract, on the basis of the company's assets at the date of the dissolution, verified in a specially drawn up balance sheet. § 1º The share capital shall be reduced accordingly, unless the other shareholders supply the value of the share. § 2º The liquidated quota shall be paid in cash within ninety days of the liquidation, unless otherwise agreed or stipulated in the contract".

At this point, a second question arises: how should the articles of association be amended? Is it enough to merely record the exclusion of the deceased partner and the consequent liquidation of his shares, or is it essential to proceed with the inventory and sharing of such shares?

THE NEED TO INVENTORY AND SHARE OUT THE COMPANY SHARES IN ORDER TO FILE THE CORPORATE AMENDMENT WITH THE CIVIL REGISTRY OF LEGAL ENTITIES

According to the provisions of article 1.784 of the Civil Code[11], at the exact moment of the partner's death, by legal fiction, the inheritance is passed on to his heirs. This is what is known as *saisine* law.

In this sense, José Fernando Simão (2019, p. 1411) asserts that the principle of *saisine*:

> [...] It comes from the phrase *le mort saisit le vif*, i.e. the dead bind the living, the inheritance is transmitted immediately to the successors regardless of any act by the heir. This is a legal fiction that is very useful to the system, as the assets of the estate are never left in the lurch, without ownership. This would be detrimental to the system, since it does not meet the idea of the social function of property, damage can arise as a result of the assets (imagine an animal that escapes causing deaths) and there are the fruits to be received.

Thus, the deceased's estate (assets and liabilities) is deferred as a unitary whole and indivisible to his heirs, whose relations with each other shall be governed by the rules governing to the condominium. Only with the sharing of the author's estate will each asset be assigned and individualized to each successor.[12]

It can be seen that the inventory and division of the deceased partner's assets is a prior and essential act to the drawing up of the instrument amending the articles of association. Only once it has been ascertained who will own the company shares can the amendment to the articles of association be formalized.

It is worth noting that partition is a declaratory act, not a constitutive act, as ownership is acquired by death. However, without it there will be no availability, publicity or "*erga omnes*" effects, i.e. in order for the heirs to be able to freely exercise their rights over the inherited assets, a public instrument must be drawn up, judicial or extrajudicial, in which each successor's share of the "*de cujus*" estate is specialized and imputed to them.

Confirming the above-mentioned understanding, the Superior Council of the Judiciary of São Paulo maintains that:

> It so happens that the heirs of the deceased became owners of the property by virtue of the death of the previous owner. This transfer, therefore, took place 'mortis causa' and, as the Public Prosecutor's Office rightly pointed out in both instances, independently of real estate registration.
>
> Thus, the transfer that took place in this case is different from the one prohibited by the blocking measure, which is limited, as we have seen, to the sale of the asset by a voluntary *'inter vivos'* act.
>
> In addition, it must also be considered that the division, as an act of extinction of communion, is merely declaratory in nature and does not attribute a right in rem, implying a simple division and individualization of the property hitherto held in common by the owners. In this sense, with the registration of the corresponding formal, there is no transfer of real property rights, but a simple

11. Civil Code, art. 1.784: "When succession is opened, the inheritance is immediately transmitted to the legitimate and testamentary heirs".

12. Civil Code, art. 1.791: "The inheritance is granted as a unitary whole, even if there are several heirs. Sole paragraph. Until the division, the right of the heirs to the ownership and possession of the inheritance shall be indivisible and shall be governed by the rules relating to condominiums."

> documentation, for publicity purposes, of the transfer that has already taken place, plus the individualization of the property (BRASIL, 2006).

Afrânio de Carvalho (1997, p. 143) does not disagree with this assertion:

> Registration is the means of acquiring rights in rem in inter vivos transactions, which are the most numerous, but acquisition does not only take place in these transactions, by agreement of wills. When it takes place outside of them, by force of law, as in inheritance, registration is also required in order to maintain the chain of owners unbroken. Depending on whether the inscription is intended to "bring about" the acquisition of the right in rem or merely to "reveal" the existence of that right or a threat to it, it is divided into: a) constitutive, as it constitutes the right or its encumbrance, i.e. it gives rise to the right or its encumbrance; b) declarative, as it declares its prior constitution or the threat to it.
>
> weighs on its existence, that is to say, by consigning the preceding, consummated and perfect legal fact or act.
>
> These effects of registration are linked to the acts in different ways. The constitutive effect is inseparably attached to the acts by virtue of a legal provision, while the declaratory effect is inferred by exclusion.

With the advent of Law No. 11.441/07, there was a substantial change in the legal scenario regarding inventories and partitions. Until then, these procedures were jurisdictional. Even if all the heirs were of legal age and agreed to the division of the estate, it would not have been possible to draw up an inventory and partition by public deed. In compliance with the Principles of Celerity, Adequate Provision of Jurisdiction and De-Judicialization, the aforementioned legislation allowed, in certain cases[13], the interested party to opt for the extrajudicial route, which reduced the time and costs arising from this procedure of transmitting and publicizing the estate of the deceased to his heirs.

A recent decision by the Fourth Panel of the Superior Court of Justice, in Special Appeal No. 1.808.767 - RJ (2019/0114609 - 4), allowed out-of-court inventory and partition to be drawn up, even if there is a valid will, provided that all the heirs are capable and in agreement, assisted by a lawyer and there is express authorization from the competent court or that the will has been previously registered in court. As this is a relevant legal innovation, I would like to transcribe the summary of the aforementioned ruling:

> SPECIAL APPEAL. CIVIL AND CIVIL PROCEDURE. SUCCESSIONS. EXISTENCE OF A WILL. EXTRAJUDICIAL INVENTORY. POSSIBILITY, PROVIDED THAT THE INTERESTED PARTIES ARE OF LEGAL AGE, CAPABLE AND CONCURRING, DULY ACCOMPANIED BY THEIR LAWYERS. UNDERSTANDING OF STATEMENTS 600 OF THE VII CIVIL LAW DAY OF THE CJF; 77 OF THE I DAY ON PREVENTION AND EXTRAJUDICIAL SOLUTION OF DISPUTES; 51 OF THE I DAY OF CIVIL PROCEDURAL LAW OF THE CJF; AND 16 OF IBDFAM.
>
> 1. According to art. 610 of the CPC/2015 (art. 982 of the CPC/73), if there is a will or an incapacitated party, a judicial inventory will be carried out. As an exception to the caput, the

13. Code of Civil Procedure, art. 610, § 1: "If all are capable and in agreement, the inventory and partition may be made by public deed, which will constitute a valid document for any act of registration, as well as for the withdrawal of amounts deposited in financial institutions." Federal Justice Council - 1st Civil Procedural Law Conference - Statement 51: "If the will is registered in court or expressly authorized by the competent succession court, in the records of the procedure for opening, registering and complying with the will, and all the interested parties are capable and in agreement, the inventory and partition may be made by public deed" and 7th Civil Procedural Law Conference - Statement 600: "After the will has been registered in court and all the interested parties are capable and in agreement with its terms, and there is no conflict of interest, it is possible for the inventory to be made out of court".

§ Paragraph 1 establishes, without restriction, that if all the interested parties are capable and in agreement, the inventory and partition may be made by public deed, which will constitute a valid document for any act of registration, as well as for the withdrawal of amounts deposited in financial institutions.

2. The Civil Code, on the other hand, expressly authorizes, regardless of the existence of a will, that "if the heirs are capable, they may make a partition

This is done amicably, by public deed, a term in the records of the inventory, or a private writing, approved by the judge" (art. 2.015). On the other hand, it stipulates that "the division shall always be judicial, if the heirs differ, as well as if any of them is incapable" (art. 2.016) - in these cases, subsequent judicial ratification of the agreement will suffice, under the terms of art. 659 of the CPC.

3. Thus, from a systematic reading of the heading and § 1 of art. 610 of the CPC/2015, with arts. 2.015 and 2.016 of the CC/2002, an out-of-court inventory is possible, even if there is a will, if the interested parties are capable and agree and are assisted by a lawyer, provided that the will has been previously registered in court or there is express authorization from the competent court.

4. The *mens legis* that authorized the out-of-court inventory was precisely to challenge the Judiciary, removing the judicial process from processes in which the seal of the court is not required, ensuring a faster and more effective solution in relation to the interests of the parties. Indeed, the process should be a means, not an obstacle, to the realization of the right. If the judicial process is not necessary, it is unreasonable to prohibit, in the absence of a conflict of interest, heirs who are of age and capable from using the administrative process to give effect to a will that has already been deemed valid by the courts.

5. In this case, with regard to the available part of the inheritance, it can be seen that all the heirs are of age, with harmonious and agreed interests, duly represented by a lawyer. Furthermore, there are no major complexities arising from the will. Both the state treasury and the public prosecutor's office at the local court agreed with the measure. In addition, the public will, granted on 2/3/2010 and drawn up at the 18th Notary Office of the Capital District, was duly opened, processed and concluded before the 2nd Orphans and Succession Court.

6. Special appeal granted.

We should also make a small digression: although most of the doctrine and jurisprudence attribute an innovative character to Law 11.441/07, in reality, it only reinvigorated a provision contained in the Philippine Ordinances, which was revoked by the Civil Code of 1916[14]. Narciso Orlandi Neto (2009, p. XI) points out that:

> After losses and more losses, determined by laws made under pressure, notaries **have seen their activity enriched with the possibility of formalizing partitions, separations and consensual divorces. In other words, they regained the role they had at the time of the Philippine Ordinances (First Book, LXXVIII, 7)**. It would be useful to go back in time to investigate how and why notaries lost this power to formalize partitions in the Civil Code of 1916.

14. Ordenações Filipinas, Primeiro Livro, Título LXXVIII, 7: "**And they shall make** all the wills, cédulas, codicils, and any other last wills, **and all the inventories**, which the heirs and executors of the deceased and other persons wish to order them to make, in any way whatsoever: except for the inventories of Minors, Orphans, Prodigals, or the Unascertained, where there is **a** Registrar of Orphans, because then he will make them; **and where there is no such Registrar, the Notaries of the Judicial Court will make them**. And since inventories are to be made between Major and Minor, Prodigal and Destitute, we order that the Orphans' Registrar should always make them. Nor will they do the same for inventories, which the Judges of their Office order to be made, of the property of people who are absent, or who die without heirs: because such inventories must be made by the Clerks of the hearings, who write before them." (sic) (bold).

> Anyone who doubts the voluntary jurisdiction that exists in notarial activity should review their concepts. The notary is the agent of the Public Power in the administration of some very relevant private interests. Now more than ever. Could it be that, because the agent has changed, consensual separation is no longer a voluntary jurisdiction procedure, as it was and is considered in procedural legislation (art. 1.120 of the Code of Civil Procedure)? (bold).

Thus, whether by judicial or extrajudicial means, the inventory and division of the deceased partner's shares must take place.

Furthermore, it is not necessary for the shares to be shared among all the heirs. It may be left to just one or a few of the successors. This is because, as the inheritance is considered a universality of law, its division can be of each asset for each heir in equal parts or one or more assets for each heir as payment of their hereditary right.[15]

It is interesting to note that what will be taken to inventory and distribution are the shares, and not their value. Therefore, it is not possible to change the articles of association without first defining who will own the shares in question.

The Superior Council of the Judiciary of the State of São Paulo, in a judgment dated 1986, whose rapporteur was Judge Sylvio do Amaral, already made it clear that:

> 9. All of the deceased's assets, as we know, must be inventoried. Consequently, the shares of the limited liability company of which he was the owner will also be taken to him. As Egberto Lacerda Teixeira says (quoted above), "the quota will remain undivided or will be shared between the heirs in the inventory court" [...].
>
> 13. Perhaps in order to eliminate inconveniences of this kind, the heirs immediately decided to amend the articles of association. They did so without judicial authorization or anything else, before the division to be carried out in the inventory records. **This, however, is not legal.**
>
> 14. Before partition, as is well known, there is a state of indivision, with the estate of the executor being presented as a universality of law. [...]
>
> 15. This is indeed the case. If there are other assets making up the estate under inventory, there is nothing to prevent the shares from going to one of the heirs and the other assets to the rest. It is in the division of assets that all this will be broken down. Or, as Carlos Fulgêncio da Cunha Peixoto ("A Sociedade por Cotas de Responsabilidade Limitada", 2. ed., v. 2, p. 29) **puts it, "once the inventory and division have been carried out, the holder or holders of the quota are identified and then the company, through the manager, will communicate their names to the Board of Trade, so that the competent registration and publication of their names can be carried out**" [...].
>
> 16. [...] The contractual amendment, as far as we can see, was not even worthy of registration. For all the above reasons, I opine that the appeal should be dismissed (sic) (bold) (BRASIL, 1986).

The Superior Court of Justice (2000) corroborates the above position exposed:

> Marriage. Communion of property. Under the universal community of property regime, all the spouses' present and future assets are shared, except in the cases provided for in article 263 of the Civil Code. The shares in a limited company, insofar as they represent the right to share in the profits and in the distribution of the net settlement in the event of dissolution, are, in principle, part of the community of property**,** regardless of whether they are in the name of one of the spouses**. What is not communicated is the status of partner.**

15. The ideal is, whenever possible, to avoid co-ownership because, as the Romans said, *condominiums* are the mother of disagreements (*condominium mater rixarum est).*

> **If the husband dies, the shares in his wife's name must be taken into inventory, and the exclusion will only be made if it is shown that any of the causes justifying it are present** (bold).

There is just one caveat: if the successors opt for the judicial route, it is not necessary to wait for the inventory and partition to be completed. It will suffice to present a court order expressly and specifically ordering the drawing up of the corporate amendment[16]. Armed with this document, the executor of the estate can represent the "de cujus" in the instrument and it will be registered with the Civil Registry of Legal Entities.

VALUE OF THE SHARES IN THE RESOLUTION IN RELATION TO THE DECEASED SHAREHOLDER

An important and always controversial topic concerns the real value of the estate's assets. The value of assets has repercussions in various branches of law, especially civil law, business law, criminal law and tax law. However, this analysis will be restricted to the civil and tax fields.

Article 1.031 of the Civil Code establishes that it is up to the contract to determine the value of the quota to be liquidated, as well as how it is to be paid. If the contract is silent, the law stipulates that the payment will be made in cash, within ninety days, at the value of the company's assets on the date of the resolution. This amount will be calculated in a specific balance sheet.

Therefore, if the partners wish to provide differently from what is required by law, they must regulate in detail in the articles of association what will be done in the event of the death of one of the partners. Thus, it is possible for the amount and form of payment to be pre-established, in order to allow for accounting and financial planning, preventing unexpected expenses from affecting the simple company's activity. Obviously, this previously stipulated amount cannot be used as a form of tax evasion and must correspond, to a certain extent, to the actual market value of the share, otherwise it will be disregarded by the tax authority for the purposes of characterizing and quantifying the taxable event, as provided for in the sole paragraph of article 116 of the National Tax Code.

São Paulo's tax legislation (Law No. 10.705/00) moves in the same direction as the Civil Statute and, with regard to simple companies, states that,

> In cases where the share, quota, participation or any security representing the share capital is not traded or has not been traded in the last 180 (one hundred and eighty) days, the respective asset value will be admitted (SÃO PAULO, 2000, p. 6).

Eduardo Moreira Peres and Jefferson Valentin (2017, p. 188) define the equity value of the quota as:

> [...] the quotient between the company's net worth and the number of shares or quotas that make up its share capital, i.e. to obtain this value we have to divide the total net worth indicated in the company's balance sheet by the number of shares or quotas that make up its share capital. The basis for calculating a shareholding will be the equity value of the security (share or quota) multiplied by the number of shares or quotas transferred (sic).

Fábio Ulhoa Coelho (2017, p. 195-196) also warns that "[...] the partner must receive, in partial dissolution, the same as he would receive in total dissolution, by way of reimbursement".

16. "In other words, for the termination sought, the interested party must carry an identical permit, but issued in the records of the inventory of Manoel Guerreiro Sanches, since the termination cannot be considered an act of mere administration and therefore requires the regular issuance of a specific permit, in the form of art. 992 of the Code of Civil Procedure" (SÃO PAULO, 2010).

It should therefore be noted that the amount to be paid in the liquidation of a share resulting from the death of a shareholder must reflect, unless otherwise provided by contract, the net assets of the company at the time of the resolution. For this reason, the law rightly requires a special balance sheet for the act. Declarations by the partners or a previously drawn up annual balance sheet are not enough. As a rule, it is necessary to present a balance sheet stating the value of the partner's share on the date of his death.

CONCLUSION

In these few words, we have tried to shed a little more light on the liquidation of a share due to the death of one of the partners, as well as to justify, based on doctrine and case law, why the inventory and sharing of shares are necessary procedures and precede the corporate change.

The absence of an inventory and division of the shares in a simple company makes it impossible to know who owns them and prevents their availability. Therefore, despite the fact that the transfer of such assets takes place at the exact moment of the death of the author of the inheritance (*saisine* principle), in order to proceed with the subsequent act of amending the articles of association, it will be necessary to carrying out the inventory and distribution in question, not least to make it possible for third parties to know the destination of the share.

Of course, there are extreme cases in which the inventory and partition can be dispensed with. However, under the scope of the registry qualification of the Civil Registry Officer for Legal Entities, since this public agent is subject to the Principle of Strict Legality and his actions take place in the administrative field, refusal to register will not be an option, but an obligation. It is only for the Judiciary, in a court of law, to rule out legal obstacles in specific situations.

With regard to the value of the shares to be inventoried and shared, the law requires that a specific balance sheet be drawn up to indicate the amount at the date of the partner's death. Exceptionally, the partners may stipulate otherwise in the articles of association, which is advisable from the point of view of the financial planning that must take place in any economic activity. Thus, as long as it is expressly provided for in the contract, both the amount and the form of payment of the share in the event of death can be pre-established.

Finally, it is important to reiterate that the inventory and division of shares can take place in or out of court. Notaries and registrars act in a field prior to litigation, in order to generate social peace through preventive and consensual action and always under the dictates of strict legality[17]. In cases of litigation or where it is necessary to mitigate normative provisions due to issues peculiar to a specific case, judicial intervention will be essential.

17. Mónica Jardim (2017, p. 7) states that: «The legal system has as one of its specific missions to combat uncertainty and legal insecurity, a duty it fulfills in two ways: *a posteriori*, through the process, resolving current uncertainty; and *a priori* or preventively, avoiding future uncertainty, seeking to provide certainty and security to situations and concrete intersubjective relations, creating means and instruments capable of producing such certainty and security, making them available to individuals. Notarial activity is situated on the second of these levels: once the certainty of objective law is assumed, notarial activity tends to preventively achieve the certainty of its application to legal relationships and situations and to rights. **Preventing and avoiding conflicts is the normal consequence or result of notarial intervention**".

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