Switzerland

International Estate Planning Guide

Individual Tax and Private Client Committee

Contact:

Gian Andri Töndury
Umbricht Attorneys at Law, Zurich
toendury@umbricht.ch

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A. *Will formalities and enforceability of foreign wills*

1. THREE FORMS OF WILL UNDER SWISS LAW

The Swiss succession law forms part of the Swiss Civil Code (CC) and is regulated in Articles 457 et seq of the CC. It provides for three different forms of will, that is, the public will, holographic will and oral will, as well as an inheritance contract. The testator can, at any time, wholly or partially revoke a last will. This can be done by a clause in a new last will or implied by the content of any subsequent last will. It is also possible to destroy the previous last will. An inheritance contract may be revoked under limited circumstances.

a. Public will

A public will is made in the presence of two witnesses before a notary or any other official qualified for this purpose under the applicable cantonal law. When authenticating a public will, the testator can either read the will or have it read by the official. If the testator reads the will, the witnesses confirm the declaration of the testator that he or she read the will and that it represents his or her last will. Where the testator neither reads nor signs the will, the official must read it in the presence of the two witnesses, whereupon the testator declares that it represents his or her last will. The witnesses, in this case, certify by signing that the testator made this declaration, appeared to have testamentary capacity and that the will has been read to the testator in their presence (CC, Article 499 et seq).

b. Holographic will

The most common will in practice is the holographic will. The testator must write the document from beginning to end by hand, include the year, month and date it was made, and include his or her signature (CC, Article 505). Under certain conditions, the will remains valid, even though the date of execution was omitted (CC, Article 520a).

c. Oral will

The oral will is rarely used and of limited practical importance. This third form of a will can only be used when the testator – because of exceptional circumstances – can no longer execute a public or holographic will. For this purpose, the testator must declare his or her last will to two witnesses, whereupon the witnesses must immediately notify the court. The oral will loses its validity 14 days after the testator's inability to make his or her last will in another form has ceased to exist (CC, Article 506 et seq).

d. Inheritance contract as a special form of a will

Besides the three forms of last will, Swiss law provides for an inheritance contract (CC, Article 512 et seq). The formalities to execute such a contract are the same as those with a public will. As opposed to the unilateral nature of a will, an inheritance contract is concluded with an heir or legatee as a party and therefore limits the possibilities of the testator to unilaterally revoke it. Consistent with its character as a bilateral agreement, the amendment or annulment of an inheritance requires the mutual consent of the parties. Only if grounds for disinheritance are given can the testator unilaterally revoke an inheritance contract.

e. What can be regulated in a will or inheritance contract

Within the limitations of statutory entitlements, the testator is generally free to dispose of his or her entire wealth or any portion of it with a last will or inheritance contract (CC, Article 481). The part of his or her estate that is not disposed of passes on to the statutory heirs of the testator (CC, Article 481 al 2). The following dispositions are possible. The testator can:

- appoint an heir;
- leave legacies;

- endow funds to a foundation to be set up at the date of his or her death;
- decree that an appointed heir has to pass on the inheritance after his or her demise to another heir; and/or
- appoint a substitute heir or legatee in case the heir or legatee predeceases the testator or disclaims the inheritance or legacy.

Furthermore, it is possible to attach obligations or conditions to the testator's dispositions, which all interested parties can enforce as soon as the disposition itself takes effect. A testamentary disposition in favour of an animal is deemed to impose an obligation to care for this animal according to its species (CC, Article 482).

The estate of a foreign national who dies with last domicile in Switzerland will, in principle, be governed by Swiss law, including its forced heirship provisions. However, such a testator might choose by way of a will or inheritance contract to submit the future estate to the law of his or her nationality. Such submission is called the *professio iuris* and is void if, at the time of death, the decedent no longer had such nationality or had acquired Swiss nationality. The *professio iuris* is an interesting estate planning tool that enables foreign nationals living in Switzerland to have their national law applied to their estate (Swiss Private International Law Act (SPILA), Article 90, paragraph 2).

In addition to these dispositions, the inheritance contract allows for and is often used to vary the Swiss forced heirship provisions (CC, Article 495).

f. Voiding a testamentary disposition

If one of the following listed grounds is given, any interested heir or legatee may file an action of declaration of invalidity at the competent court (CC, Article 519 et seq.):

- if the disposition was made by the testator at a time when he or she lacked testamentary capacity;
- if it is the product of a lack of free will;
- if its content or a condition attached to it is immoral or unlawful; or
- if the testamentary disposition lacks the required form.

Dispositions made in error or under the influence of malicious deception, threats or coercion are voidable due to a lack of free will. However, they become valid if not revoked by the testator within one year of his or her discovering the error or deception or of his or her release from the threat or coercion (CC, Article 469).

2. ENFORCEABILITY OF FOREIGN WILLS

When Switzerland has jurisdiction over proceedings and disputes concerning an estate and a will that is executed abroad, such a will is recognised in Switzerland if the form conforms with the Hague Convention of 5 October 1961 on the Conflict of Laws Relating to the Form of Testamentary Dispositions. This convention provides for a broad range of possibilities to ensure that testamentary dispositions are upheld, especially when a will is executed abroad and corresponds to the applicable laws of the place where the testator made it or of a nationality possessed by the testator.

Alternatively, the estate partition may be dealt with in another jurisdiction, but foreign decisions, measures and documents relating to the estate, as well as rights in an estate administered abroad, can be given recognition in Switzerland. Such legal acts are recognised in Switzerland if they were rendered in the state of the decedent's last residence or in the state of the law chosen, or if they are recognised in one of these states (SPILA, Article 96).

B. *Will substitutes (revocable trusts or entities)*

All assets directly owned by the deceased at the time of his or her death form part of the estate, including the shares of an entity. Accordingly, entities do not serve as a will substitute per se.

Switzerland, as a civil law jurisdiction, does not have its own history of trust law, but it acknowledges foreign trusts. A properly established trust can serve as a will substitute as assets properly transferred to an acknowledged trust do not form part of a deceased estate and hence pass on in accordance with the trust deed to its beneficiaries rather than in accordance with a last will.

Within the limits of the forced heirship rights and the applicable marital property regime, a person may structure his or her future estate by taking legal acts, such as donations made during the testator's lifetime. Such anticipated regulations affect the net worth of a testator, as the transferred assets no longer belong to the testator. It must be noted that transfers made during lifetime might be subject to a claw-back claim of a protected heir who did not agree to a transfer that infringes his or her forced heirship rights.

It is possible under Swiss law to split ownership from beneficial rights in the usufruct. With a usufruct, movable and immovable assets can be transferred to a new owner during lifetime whilst the transferor keeps the beneficial rights of the assets. The beneficiary of such usufruct is entitled to possess, enjoy and use the property during his or her lifetime or for a maximum period of 100 years for legal entities. At the death of the beneficiary, the owner is relieved from the charge (the usufruct) and receives full ownership rights. It is a very common planning tool in Switzerland, in particular, in the case of Swiss real estate.

C. *Powers of attorney, directives and similar disability documents*

In dealing with Swiss bank accounts, many account holders execute a power of attorney that survives the account holder's demise in favour of a trusted person. As opposed to a power of attorney that becomes effective at the death of the principal, the power of attorney that ought to survive the death of the principal is commonly used and does not require the form of a testamentary disposition. The agent is obligated to use the power of attorney after the death of the principal in the principal's best interest. With the automatic devolution of the testator's assets and liabilities to his or her heirs, the heirs also inherit the rights and obligations deriving from agreements between principal and agent (power of attorney) as successor(s) of the principal. If there are several heirs, they form a community of heirs. Contrary to almost all other resolutions of the community of heirs that need unanimous consent, each heir individually has the power to revoke such a power of attorney. In consequence, the banks are cautious to execute instructions based on such a power of attorney, in particular in case of unusual transactions. Therefore, if uninterrupted disposition over a deceased person's accounts is of importance, one should consider other legal arrangements.

Directives that do not affect the transfer of assets and financial affairs but are of a mere administrative nature, such as directives in regard to a funeral, are legally valid and need no special form.

Sometimes used in practice are fiduciary set-ups, where a fiduciary holds assets of the testator in its own name for the benefit of the testator. Assets held by a fiduciary for a person are part of this person's estate. Therefore, directives from the testator to a fiduciary to pass on assets held under this nominee relationship to a specific beneficiary bear the risk of being void, especially when protected heirs are in the community of heirs and when the required form of a testamentary provision is not respected. Also, such a directive would be delivered to the probate authority so that the heirs could challenge it.

Swiss law also enables a person with capacity to act to instruct a natural person or legal entity to take responsibility for his or her personal care or the management of his or her assets, or to act as his or her legal agent in the event that he or she is no longer capable of judgement (CC, Article 360). This advance care directive needs a decision of the adult protection authority to come into force and is often drawn up together with a last will and living will.

A person who is capable of judgement may specify in a patient decree (living will) which medical procedures he or she agrees or does not agree to in the event that he or she is no longer capable of judgement (CC, Article 370).

II. Estate administration

A. *Overview of administration procedures*

1. General considerations

In Switzerland, the devolution of the decedent's assets to the heirs does not follow the common law concept of probate proceedings. Instead, the entire estate vests in the heirs by force of law as universal succession. All assets and liabilities automatically pass *eo ipso* directly to the heirs and it does not matter whether or not the heirs have knowledge of the estate (CC, Article 560). Where there are several heirs, they form a community of heirs, giving them joint ownership in the estate. In order to avoid the universal succession, an heir has the possibility to waive his or her right of succession (see below).

Contrary to many other countries, in Switzerland the devolution of the estate is the business of the persons involved (heirs, executors, creditors etc) and not the authorities. The authorities only interfere on demand, when the deceased leaves minor children (CC, Article 318) or in exceptional cases, for example, in the time from the testator's demise until the community of heirs or the executor are ready to take over the administration (see below).

2. Administration procedures

Anyone who is in possession of a will at the death of the decedent has the duty to deliver it without delay to the probate authority at the decedent's last Swiss domicile, even if the will appears to be invalid (CC, Article 556). The probate authority must open the will within one month after its delivery, summon the heirs and the executor to the opening ceremony (in practice, often replaced by a written procedure) and send interested parties a copy of an extract of the will that concerns them (CC, Articles 557 and 558). If, one month after the notice was sent to the interested parties, none of the statutory heirs or appointed heirs of an earlier will has filed an objection, the probate authority can issue a certificate of inheritance in favour of the appointed heirs. The inheritance certificate confirms that they are recognised as heirs subject to a suit for invalidity of the will or a suit for inheritance (CC, Article 559).

The competent probate authority is then required to take all necessary measures to secure the devolution of the inheritance until the community of heirs or the executor step in (CC, Article 551). The competent authority can order protective measures such as: (1) the sealing of the estate (if provided for by the cantonal law); (2) the production of an inventory of the estate where an heir is under guardianship or is to be made a ward of court, where an heir is permanently absent and without representation, at the request of one of the heirs or where an adult heir is, or is to be made, subject to a general deputyship (CC, Article 553); and (3) the appointment of an estate administrator of the estate where such an appointment is in the best interests of an heir who is permanently absent and without representation, where none of the claimants may adequately establish his or her succession rights or the existence of an heir is uncertain, where not all heirs are known or in special cases provided for by law (CC, Article 554). Where the deceased had named an executor, administration of the estate is entrusted to him or her.

Irrespective of whether the authority has ordered protective measures, the probate authority must make a decision in regard to the possession of the estate. It can give possession to the statutory heirs or instead order estate administration of the estate (CC, Article 556, paragraph 3).

If neither a testamentary executor nor an estate administrator has been appointed, the heirs form a community of heirs and administer the estate jointly. However, the heirs still have the opportunity to punctually involve the probate authority, for example, the heirs can ask the probate authority to appoint a common representative for all heirs who will act until the partition has taken place (CC, Article 602, paragraph 3). This option is necessary, because a community of heirs need unanimous approval of all heirs for almost all actions taken, occasionally resulting in deadlock situations.

3. WAIVING THE INHERITANCE

As discussed above, in Switzerland, all assets and liabilities pass automatically to the heirs by force of law as universal succession (CC, Article 560). However, an heir has the right to waive his or her right of succession, which is particularly relevant when an estate is indebted. To waive his or her right of succession, a statutory heir must make a declaration to the competent authority within three months of learning about the demise of the testator, and an appointed heir must file a declaration within three months from the notification of the will (CC, Article 566 et seq).

Another means provided by law is the public inventory. This is commonly used when an heir fears the indebtedness of the estate but would otherwise accept the inheritance. In this case, he or she can request a public inventory within one month of the demise of the testator (CC, Article 580 et seq). Finally, every heir can request an official liquidation of the estate (CC, Article 593 et seq).

4. TESTAMENTARY EXECUTORS IN PARTICULAR

It is common in Switzerland for a testator to appoint one or more persons as executor(s) in the last will or inheritance contract, even though there is no legal requirement to do so, and the heirs could administer and divide the estate themselves. Where the testator has not provided for any limitations, the executor has the sole power to administer the estate, pay the debts of the testator, distribute the legacies and prepare the partition of the estate in accordance with the directions of the testator and the provisions of the law (CC, Article 518).

5. ESTATE PARTITION

Irrespective of administrator appointment, the heirs constitute a community of heirs owning all assets and liabilities jointly (CC, Article 602) until the estate is partially or wholly divided into the separate property of each heir. As there is no legal obligation to divide the estate, it is, in practice, often the case that assets (eg, real estate) is held jointly by the community of heirs for many years after the demise of the testator. However, no heir has the duty to remain in the community of heirs and can – in most cases – request the partition of the estate (CC, Article 604) and ultimately enforce this right to divide the estate in court.

Absent any provision of the testator, the heirs can freely agree on the mode of the partition (CC, Article 607, paragraph 2). It is commonly understood that the heirs can – by unanimous decision – overrule directions made by the testator in regard to the partition of the estate. If the testator made no provisions, the heirs form as many portions or lots as there are heirs or stirpes. If the heirs are unable to reach agreement, at the request of one heir, the competent authority must form the lots with due regard to local custom, and the personal circumstances and wishes of the majority of the heirs (CC, Article 611). The goal is that the probate authority – as a neutral person – shall facilitate an agreement among the heirs with respect to the building of lots. However, the authority has no standing to enforce its suggestions. If the heirs still cannot agree on the mode of the partition, a request to divide the estate must be filed in court.

The goal of the estate partition is to divide the estate and dissolve the community of heirs. As discussed above, the heirs own all assets and liabilities of the estate from the date of the death of the testator as a community of heirs. By mutual agreement in an estate partition agreement signed by all heirs, or by a court ruling to this effect, the assets and liabilities of the community of heirs are allotted to an individual heir, terminating the community of heirs. Even after the division of the estate, the heirs remain jointly and severally liable with their entire property for the debts of the testator to his or her creditors, provided the latter have not expressly or impliedly agreed to a division or transfer of such debts. The joint and several liability of the co-heirs terminates five years after the division or the subsequent date on which the debt claim fell due (CC, Article 639). No heir is forced to accept the division of the estate with outstanding debt triggering this potential joint and several liability of co-heirs, because each heir may request that the debts of the deceased be redeemed or secured prior to division of the estate (CC, Article 610, paragraph 3).

B. *Intestate succession and forced heirship*

Swiss law provides for exact rules determining the division of an estate if a testator dies without leaving a last will. The heirs determined under these rules are called statutory heirs. Some of the statutory heirs – the closest relatives – are protected by forced heirship rights, leaving the testator a reduced quota of his or her estate of which the testator can freely dispose. Within this quota, the testator can by last will or inheritance contract make testamentary dispositions that overrule the rights of statutory heirs.

1. REQUIREMENTS TO BECOME AN HEIR

There are not only rights of future heirs but also requirements under Swiss law to become an eligible heir. First, no authenticating officer, witness, or his or her lineal relatives, siblings or spouse can benefit from a public will (CC, Article 503, paragraph 2). Second, in order to inherit, an heir must be alive and capable of inheriting at the time of succession. If an heir dies after commencement of succession, his or her rights of inheritance in respect of the estate pass to his or her own heirs (CC, Article 542). A child is capable of inheriting from the moment of conception onwards, providing he or she is subsequently born alive (CC, Article 544). Finally, an heir is considered unworthy to inherit by law (CC, Article 540) if the heir:

- wilfully and unlawfully caused or attempted to cause the death of the person now deceased;
- wilfully and unlawfully rendered the person now deceased permanently incapable of making a testamentary disposition;
- by malice, coercion or threat induced the person now deceased to make or revoke a testamentary disposition, or prevented him or her from doing so; or
- wilfully and unlawfully eliminated or invalidated a testamentary disposition in such a manner as to prevent the person now deceased from drawing up a new one.

Unworthiness to inherit does not apply if the person now deceased has forgiven the person concerned. The effect of such unworthiness applies only to the concerned person and not to his or her issue. If the concerned person had descendants, such descendants inherit from the deceased as if the person unworthy to inherit were predeceased (CC, Article 541).

2. STATUTORY HEIRS

In Switzerland, three statutory heirs are distinguished: the relatives; the surviving spouse or registered partner; and the community.

a. Relatives

The Swiss rules follow a parenthetic system starting with the first parentela that includes the issue of the deceased and their respective descendants, such as children and grandchildren (CC, Article 457). If the deceased leaves no issue, the estate passes to the parental line (second parentela). The father and mother each inherit half the estate. A predeceased parent is replaced by his or her issue *per stirpes*. Where there are no descendants on one side, the entire estate passes to the heirs on the other (CC, Article 458). Third parentela: Where the deceased is survived by neither issue nor heirs in the parental line, the estate passes to the line of the grandparents. Where the grandparents of the paternal and maternal lines survive the deceased, they inherit in equal parts on both sides. A predeceased grandparent is replaced by his or her issue *per stirpes*. If a grandparent on the paternal or maternal side has predeceased without issue, that entire half of the estate is inherited by the heirs on that side. If there are no heirs in either the paternal or the maternal side, the entire estate passes to the heirs on the other side (CC, Article 459). The succession rights of relatives end with the line of the grandparents (CC, Article 460).

b. Surviving spouse and registered partners

Surviving spouses and registered partners receive: half the estate, where they are obliged to share with the deceased's issue; three-quarters of the estate, where they are obliged to share with heirs in the parental line (second parentela) and the entire estate, where no heirs exist in the first and second parentela.

In Switzerland, it is possible for homosexual partners to register their partnership under certain circumstances with the local authorities. Such a registration gives the registered partner rights close to a spouse, for example, in regards to statutory inheritance rights. Non-married heterosexual couples, on the other hand, do not enjoy statutory inheritance rights, but the Swiss legislator plans to introduce a statutory legacy to certain partners who lived in cohabitation for a long period.

c. Community

Where the deceased leaves no heirs in the first, second or third parentela, as well as no surviving spouse or registered partner, his or her estate passes to the canton in which he or she was last resident or to the commune designated by the law of that canton (CC, Article 466).

3. EQUALISATION AMONG THE HEIRS

The statutory heirs are under a mutual obligation to place into hotchpot any property received from the deceased during his or her lifetime as advancements against their share of the estate. Unless the deceased expressly instructed otherwise, anything gifted or granted to his or her issue by way of dowry, endowment or assignment of assets, debt remission and the like is subject to hotchpot (CC, Article 626). Costs for the upbringing and education of individual children are subject to hotchpot only insofar as they exceed the normal amounts (CC, Article 631).

The hotchpot is calculated according to the value of the advancements on succession or, where the advanced property has previously been sold, the sale proceeds obtained. Any expenditure on, and damage to, the property and the natural produce derived therefrom must be allowed for among the heirs according to the rules governing possession (CC, Article 630).

Where advancements to an heir exceed the value of his or her share of the estate, subject to claims in abatement, the surplus is exempt from hotchpot if it may be shown that the deceased intended to favour said heir by such advancements (CC, Article 629).

4. FORCED HEIRSHIP RIGHTS

a. Protected portion and the free quota

A person who is survived by issue, parents, a spouse or a registered partner may make a testamentary disposition of that part of his or her estate that exceeds the forced heirship rights of the survivor or survivors. A person who is not survived by any such heirs may dispose of his or her entire property by testamentary disposition (CC, Article 470). The forced heirship protected portion cannot be encumbered – with the exception under (b) below – with rights of usufruct, burdens, conditions and annuities. The forced heirship portion amounts to three-quarters of the statutory succession for each child, half for each parent and half for the surviving spouse or registered partner (CC, Article 471). Therefore, only a fraction of the intestate share is protected by the forced heirship provisions, leaving a free quota to the testator that varies depending on the heirs he or she leaves. This can best be illustrated by the following table:

Heirs	*Statutory portion*	*Forced heirship protected*	*Free quota*
Spouse/registered partner and issue(s)	1/2 1/2	1/4 3/8	3/4

Issue(s)	1/1	3/4	1/4
Spouse/registered partner	1/1	1/2	1/2
Parent(s)	1/1	1/2	1/2
Spouse/registered partner and parent(s)	3/4 1/4	3/8 1/8	1/2

Within the free quota, the testator can freely dispose of his or her assets. If the dispositions exceed the free quota, they are not automatically void, but give the protected heir grounds to challenge the excessive dispositions (see below).

Note that, at the time of writing, the Swiss legislator is in the process of revising the inheritance law and plans, among other changes, to reduce substantially forced heirship protection. According to the latest draft legislation, the forced heirship portion of the parents will be abolished, and the portion of the issues and surviving spouses or registered partners reduced to half and one-quarter, respectively.

b. The surviving spouse in particular

It is possible – and, in practice, quite common – that the testator would like to favour the surviving spouse over common issue during the lifetime of the surviving spouse. By a testamentary disposition, the testator may grant the surviving spouse a usufruct of the entire part of the estate passing to their common issue. This usufruct replaces the statutory succession right due to the spouse where the common issue are co-heirs with the spouse. In addition to this usufruct, the free quota is one-quarter of the estate. By making this disposition, the forced heirship rights of the issue are infringed because they receive the assets of the estate charged with the usufruct. Common issue of the testator must accept this, as long as the surviving spouse does not remarry (CC, Article 473).

In order to favour the surviving spouse the most, the usufruct on three-quarters of the estate can be endowed and the remaining one-quarter of the estate passed on to the surviving spouse as his or her own property.

c. Calculation of the free quota and the forced heirship protected portion respectively – treatment of lifetime gifts

The calculation is based on the net value of the deceased's assets at the time of his or her demise. Added to this is the value of gifts made in the five years prior to death or freely revocable gifts. Also included are assets alienated by the deceased with the obvious intention of circumventing the limitations on his or her testamentary freedom (CC, Article 527).

Where a life insurance claim maturing on the death of the deceased was established in favour of a third party by an *inter vivos*, testamentary or *mortis causa* disposition, or was transferred by the deceased during his or her lifetime to a third party without valuable consideration, the redemption value of such an insurance claim at the time of death is added to the estate (CC, Article 476).

d. Enforcing the forced heirship rights – claims in abatement

Where the testator has exceeded his or her testamentary freedom, those heirs who do not receive the full value of their forced heirship protected portion may sue to have the disposition abated to the permitted amount (CC, Article 522). Testamentary provisions that infringe on the rights of protected heirs are therefore not automatically void. The right to receive the forced heirship protected portion needs to be actively claimed at court within one year after the date on which the heirs learned of the infringement of their rights and in any event no later than ten years after the succession, in the case of testamentary disposition, or after the testator's death, in the case of other dispositions. As long as the community of heirs still exists, and hence the estate is not yet entirely divided, the entitlement to abatement may be invoked as a defence at any time without statutes of limitations (CC, Article 533).

If the court – after calculating the forced heirship portion of the claimant – determines that the claimant did not receive this portion either as a lifetime gift or as a testamentary disposition, such an heir has the right to request the proportionate reduction of the testamentary dispositions made in favour of others. Abatement applies first to testamentary dispositions and thereafter to *inter vivos* dispositions in reverse chronological order until the entitlement has been reconstituted, giving the heir even the right to claw back lifetime gifts (CC, Article 532). However, a beneficiary of such gift acting in good faith has a duty of restitution only to the extent that he or she is still enriched by the relevant transactions with the deceased at the time of succession (CC, Article 528).

e. Depriving an heir of the forced heirship protected portion – disinheritance

By means of a testamentary disposition, the testator has the power to deprive an heir of his or her statutory entitlement in the following cases (CC, Article 477):

- if the heir has committed a serious crime against the testator or a person close to him or her; or
- if the heir has seriously breached his or her duties under family law towards the testator or the testator's dependants.

As discussed above, the forced heirship provisions are intended to protect the family wealth by forcing the testator to pass substantial wealth to his or her relatives. If a child of the testator is seriously indebted, the goal of the forced heirship provisions would fall short as such an heir's creditors would benefit from the forced heirship provisions. In these circumstances, another ground for disinheritance is provided for in CC, Article 480, enabling the testator to reduce an indebted heir's forced heirship portion by half if this heir passes on the other half to his or her issue(s).

The disinherited person may neither participate in the estate nor bring an action in abatement. Unless disposed of otherwise by the testator, the disinherited person's portion passes to the testator's statutory heirs as if the disinherited person had predeceased. Accordingly, the disinherited person's issue retain their statutory entitlements as if he or she had predeceased (CC, Article 478).

Any testator wishing to disinherit an heir must indicate the reason for the disinheritance in the testamentary disposition. If the disinherited person challenges the disinheritance on the grounds that the indicated reason is incorrect, any heir or legatee wishing to benefit from the disinheritance must prove that the reason is correct. Where no proof is presented or no reason for the disinheritance is indicated, the disposition shall be upheld insofar as it does not deprive the disinherited person of his or her forced heirship portion, unless it was made by the testator in obvious error regarding the reason for the disinheritance (CC, Article 479).

C. *Marital property*

It is important to note that when a decedent leaves a surviving spouse, the division of the marital property regime precedes the calculation and partition of the estate. Accordingly, the total estate and the calculation of the portions of each heir can only be established after the matrimonial property is divided in accordance with the applicable law.

A married couple residing in Switzerland can choose in a marital contract that the law of one of their states of origin shall apply on the marital property regime (SPILA, Article 52). Absent such a choice, the applicable law will be determined in the following order: (1) the law of the state in which both had their last contemporaneous domicile; (2) the common national law if they never had a common domicile, or if this is also not the case; (3) the Swiss marital property regime of separation of property (SPILA, Article 54). When spouses transfer their domicile from one state to another, the law of the new domicile shall govern retroactively until the termination of the marriage unless the spouses opted out by written agreement (SPILA, Article 55).

Under Swiss law, there are three different marital property regimes: (1) the participation in acquired property; (2) the separation of property; and (3) the community of property.

1. PARTICIPATION IN ACQUIRED PROPERTY

This is the default marital property regime that applies whenever spouses did not agree on a different regime and provided no extraordinary property regime has come into effect. An extraordinary property regime can be imposed by the court at the request of one spouse or in the event of bankruptcy of one spouse or seizure in execution proceedings over one spouse's assets.

This marital property regime comprises four categories of property, namely the individual property and the acquired property of each spouse. Acquired property includes assets that a spouse has acquired for valuable consideration during the marital property regime. Specifically, such assets could include the proceeds from his or her employment, income derived from his or her own property, and property acquired to replace acquired property (CC, Article 197). Individual property comprises personal effects used exclusively by a spouse and assets belonging to one spouse at the beginning of the marital property regime or acquired later at no cost by inheritance or otherwise, as well as any property that is declared individual property in a marital contract by the spouses.

At the death of one spouse, the marital property regime is dissolved. First, the surviving spouse takes back his or her property that is in the other's possession, and debts between the spouses are settled. Second, the individual property of each spouse is separated. Next, the value of each spouse's acquired property, and the compensation between acquired and individual property are calculated (CC, Article 207 et seq). Absent any different participation agreed in a marital contract, the surviving spouse is entitled to half the surplus of the other spouse after the claims are set off, if any (CC, Article 215).

2. SEPARATION OF PROPERTY

Under the marital property regime of separation of property, only two categories of property exist, namely each spouse's own property. No division of the marital property is necessary as each spouse takes back his or her own property. Any spouse who asserts that a specific object or asset is owned by one or other spouse bears the burden of proof. If no such proof may be adduced, there is a presumption of co-ownership (CC, Article 247 et seq).

3. COMMUNITY OF PROPERTY

Even though the community of property regime provides for interesting planning opportunities, it is rarely used in practice. It comprises three different categories of property, namely, each spouse's individual property and the common property. Individual property may be created by marital contract, dispositions by third parties, or by law (eg, items for the exclusive personal use of a spouse). The remaining property is considered common property with joint ownership by the spouses. The division of this marital property requires a three-step process. First, the individual property is separated, then the amount of the common property is established as the surviving spouse is entitled to half the common property, if the spouses have not agreed otherwise in a marital agreement. Such agreements must not adversely affect the statutory inheritance entitlements of the spouse's issue. Finally, the division takes place and the surviving spouse receives assets to cover the marital property claim.

D. TENANCIES, SURVIVORSHIP ACCOUNTS AND PAYABLE ON DEATH ACCOUNTS

In Switzerland, two types of joint ownership exist: co-ownership and joint tenancy (eg, the assets of a community of heirs). Neither provides for a right of survivorship by default, and more importantly, if a joint owner dies, his or her heirs acquire his or her share of the property or its value rather than the other joint owner.

An example of joint ownership that is often used is a joint account with a Swiss bank. Here, the aforementioned principles also apply. The relationship between the account holders and the bank is distinguished from the relationship among the account holders themselves. A bank is generally entitled to perform instructions received from either of the account holders. By contrast, the assets in a joint account do not necessarily automatically belong to the surviving account holder. The question of which co-owner has what entitlement in the jointly owned assets is governed by the applicable law on the relationship between the account holders, and Swiss banks will provide the heirs of the deceased joint account holder with information about the account (especially its value at the date of the demise of one account holder), so that they can regulate their internal claims.

III. Trusts, foundations and other planning structures

A. *Common techniques*

Switzerland, as a civil law jurisdiction, does not provide for a trust established under Swiss law. However, the recognition of foreign trusts in Switzerland has led to increased popularity of this flexible estate planning tool.

Foundations are provided by Swiss law. Foundations are legal entities independent of their founder and generally exist in the form of charitable or benevolent foundations or family foundations. Charitable and benevolent foundations are often used and can apply for a tax exemption. A Swiss family foundation can only serve the purpose of paying the cost of raising, endowing or supporting family members, or for similar purposes. A family member must have a special need, and family foundations are not permitted to use their funds to pay for the general maintenance and or enjoyment of its beneficiaries. Due to these restrictions, the establishment of a merely family foundation is not common.

B. *Fiduciary duties (trustees, board members, directors etc)*

Not applicable.

C. *Treatment of foreign trusts and foundations*

Even though Switzerland does not provide for substantive trust law, courts have recognised foreign trusts for a long period of time. Switzerland ratified the Hague Convention on the law applicable to trusts and on their recognition (Trust Convention), amended the SPILA and the Swiss Federal Debt Enforcement and Bankruptcy Act. Even though a trust is still not a legal institution under Swiss law, the Trust Convention and the amendments in the federal law, inter alia, enacted predictable rules governing the administration of trusts, the registration of trust property in Switzerland, and rules that allow for the recognition of foreign court orders relating to trusts. The Trust Convention and the amendments further clarified that trust property is segregated from the personal assets of a trustee and therefore generally do not form part of a person's wealth for inheritance and marital property purposes.

Taxation of a trust: In Switzerland, the trust itself is not a taxpayer; rather, income and assets of the trust assets are attributed to the person who has vested rights in the trust assets. It is crucial for tax purposes to determine whether the settlor fully divested him or herself of his or her assets or whether the settlor retained (legally or economically) the right to withdraw the trust assets. Even though the Federal Tax Administration and the Swiss Tax Conference issued guidelines in regard to the tax treatment of a foreign trust, it remains advisable to ask for a binding ruling on the tax treatment of a trust at issue. The mentioned guidelines provide for three categories of trusts in determining the taxation of such structures.

- *Revocable trust:* Depending on the degree of control over the trust retained by a Swiss resident settlor, the Swiss tax authorities ignore a revocable trust for tax purposes and any transfer in such trust is not taxed. Consequently, the income and net wealth of the trust are imputed to the settlor's income and wealth for income and wealth tax purposes. Distributions out of the trust to the beneficiaries are subject to gift taxes and upon the death of the settlor, the trust assets are subject to estate taxes.

- *Irrevocable fixed interest trust:* The tax authorities are likely to accept that the settlor fully disposed of his assets upon formation of such a trust. Consequently, taxes on income and net wealth of the trust's assets cannot be levied on a Swiss resident settlor. Transfers to the trust will be treated as gifts from the settlor to the beneficiaries. The rate of this gift tax depends on the relationship between the settlor and the beneficiary, and it is advisable to discuss the treatment of such settlement with the tax authorities in advance. The trust assets, as well as the income thereof are attributed to the beneficiaries.

- *Irrevocable discretionary trust:* The beneficiary of an irrevocable discretionary trust has no enforceable claim on the trust assets but only expectancy, and it would therefore be inequitable to tax the beneficiary. The solution found by the Swiss Tax Authorities is pragmat-

ic: assets and income of a trust settled by a Swiss resident settlor continue to be attributed to the settlor and the rules of the revocable trust apply; a Swiss resident beneficiary will not be liable for taxes on trust assets and the income thereof; distributions to a Swiss resident beneficiary are, on receipt, subject to income tax unless the beneficiary proves that the payment is actually sourced from the original capital of the trust.

Foreign foundations are generally recognised in Switzerland if they conform to the internal laws of the place of their situs. For tax purposes, Switzerland might take a different view depending on the facts and circumstances.

IV. Taxation

A. *Domicile and residency*

Tax liability arises in the canton where the deceased had his or her last domicile and where a donor has his or her domicile. The domicile of a person is determined in accordance with the civil law rules and hence, usually is the place where the person resides with the intention of settling (CC, Article 23). This means that a person with a foreign domicile will not be considered a Swiss resident for tax purposes merely because he or she passed away in Switzerland, for example, in a Swiss hospital or care home. Unlike other jurisdictions, Swiss tax liability does not depend on the nationality of the deceased or donor.

The federal constitution of Switzerland prohibits intercantonal double taxation. Accordingly, movable property is subject to tax only in the canton of the deceased's last domicile and immovable property in the canton of its situs. Also, a canton of last domicile is not permitted to tax immovable property situated in another canton, even if the situs canton does not levy taxes at all.

Switzerland concluded inheritance tax treaties with countries such as Austria, Denmark, Finland, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. None of these agreements apply to gift taxes, but some treaties do provide for a procedure to bilaterally solve issues concerning gift taxes. These inheritance tax treaties allocate taxation rights between the treaty countries. In most treaties, the country of the last domicile of the decedent is entitled to exclusively levy inheritance tax on movable property while immovable property and respective rights in rem over such property give the country where such property is located (*lex rei situs*) taxation rights. Similar rules exist for assets belonging to a permanent establishment in a treaty state. Several Swiss cantons have concluded bilateral agreements with foreign countries to obtain reciprocity for tax exemptions of donations or legacies in favour of charitable institutions.

If no bilateral treaty exists, Switzerland will generally tax all worldwide assets of a deceased person with last domicile in Switzerland except for real estate situated abroad. If a deceased person had his or her last domicile abroad but leaves Swiss real property, such property and the respective rights in rem are subject to the cantonal tax where the real estate is located. Special provisions also exist in some cantons in regards to assets belonging to a permanent establishment in Switzerland.

B. *Gift, estate and inheritance taxes*

There are no federal inheritance and gift taxes, as the fiscal sovereignty for inheritance and gift taxes remains at the cantonal level and sometimes even at the municipal level.

At present, only the cantons, and sometimes municipalities, have the right to levy inheritance and gift taxes. That leads to a wide variety of applicable taxation principles within Switzerland and only a few considerations are generally applicable. The majority of cantons apply an inheritance tax levied on each recipient's individual share of the estate; a minority applies an estate tax and hence levies the tax on the estate. Most cantons tax lifetime gifts with similar criteria as the taxes on transfers at death.

The most important difference between the cantons is the applicable tax rate for each recipient. In certain cantons, transfers to the surviving spouse, descendants or even other relatives are exempt from any inheritance tax; in addition, different personal allowances may be available. The rate of the tax is generally progressive and fixed in relation to the kinship between the decedent and the heir, as well as in relation to the value of the assets transferred. Currently, most cantons have abolished in-

heritance and gift taxes for transfers between spouses, and between parents and their children. The tax rate for unrelated parties, on the other hand, can be very high, amounting in some cantons to 50 per cent or more. Generally, transfer to recognised charities having their registered office in the same canton are tax exempt. If a charity in another canton is endowed, the exemption is subject to reciprocal agreement with such canton. Taxes are usually calculated on the basis of the net market value of the asset transferred.

The procedures also vary from canton to canton, but in general, each beneficiary of a transfer is liable for the inheritance tax jointly with his or her co-heirs. In some cantons, if a donor transfers a gift during his or her lifetime, the donor is jointly liable with the beneficiary to pay the gift taxes.

C. *Taxes on income and capital*

The duty to pay income and wealth taxes terminates at death. After death, generally an inventory will be established and all heirs and their representatives, as well as the executor, are obliged to assist in drawing up the inventory. As a consequence of the fact that all assets and liabilities of the deceased pass to the heirs, the heirs are also jointly and severally liable for all unpaid taxes of the deceased, only limited to each heir's respective inheritance portion or lifetime advancement received.

During the time when the estate is still owned by the community of heirs, the income generated by the estate's assets, as well as the value of the estate remain subject to taxes. In such an undivided estate, the community of heirs is – with some exceptions – not liable for the taxes, rather each heir is liable for his or her portion, even though such a portion has not yet been allocated to the heir.

If an heir or executor discovers income or assets in the estate that have not been declared by the deceased person, each heir or executor individually can make a voluntary disclosure and profit from a reduced supplementary tax. With full cooperation of the heirs, especially in the preparation of an amended inventory, the supplementary taxes are only due for the unpaid taxes plus interest of the last three tax years preceding death rather than ten years.