



Estates Involving the United States and Switzerland

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by

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Please note:

- The following is only a summary. Various exceptions may apply. This survey is not and should not be used as a substitute for legal advice. A person with specific questions should consult the detailed provisions of the applicable laws and/or obtain assistance from legal experts where appropriate.
- The legal terminology in inheritance matters with respect to Switzerland and the United States, and even within the United States, is very diverse and may lead to confusion. For instance, the definition of the term "heir" varies significantly under Swiss and U.S. laws or from state to state. The same holds true for many other terms used in this context. Therefore, while reading the following, please keep these



differences in mind and consult a legal expert when drafting a will or dealing with other international estate matters.



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The Foundations of International Estate Law

The death of a person who was a resident of country A involves international legal issues if, for instance, the deceased was not a citizen of country A where he or she died, or if the deceased had assets located in other countries.

International estate law can be divided into three broad categories: jurisdiction, applicable law, and recognition of foreign judicial acts. These issues may be the subject of a bilateral or multilateral treaty to which the countries involved are parties. For instance, in 1850, the United States of America and Switzerland concluded a treaty, commonly known in the United States as the treaty on "Friendship, Commerce and Navigation," that is still in force today ("the FCN treaty"). Arts. V and VI of the FCN treaty contain rules on inheritance matters. Beyond the scope of the FCN treaty, the domestic conflict of laws rules of the countries involved apply.

Below is a brief summary of the basic rules with respect to jurisdiction, applicable law, and recognition of foreign judicial acts.

I. Jurisdiction

When dealing with international inheritance matters, the first question to ask is what country has jurisdiction over the estate, i.e., which country's authorities are competent. Today it is accepted in a majority of countries that, as a rule, the country in which the deceased had his or her last domicile has jurisdiction over such person's estate (This is also the case under the FCN treaty).

It may be, however, that the decedent's country of citizenship will claim jurisdiction over the estate or a part thereof. In some instances, the country in which real property is located will claim authority to administer that part of the estate. In such cases, the proceedings usually become more complicated and more time-consuming.

II. Applicable Law

Once the question of jurisdiction has been settled, the next issue in an international inheritance matter is that of applicable law. Even if country A has jurisdiction over a person's estate, the authorities of country A do not necessarily apply the laws of country A. For instance, it is widely recognized today that a foreigner residing in country A, through a will, is entitled to subject his or her estate to the laws of his or her citizenship. Some countries provide for the mandatory application of their domestic laws with respect to real property located in those countries. Therefore, it is possible that the laws of more than one country will be applied to the estate of a deceased person.

III. Recognition and Enforcement of Foreign Judicial Acts

Foreign judicial acts do not automatically become effective in another country. International treaties and domestic conflict of laws rules provide for the requirements that have to be met to render foreign judicial acts effective. These rules also provide for the mechanisms to enforce such foreign judicial acts.



Frequently Asked Questions

I. Under Swiss law, what are the basic estate planning Opportunities for a Swiss citizen residing in the United States?

Under the Swiss conflict of laws rules, a Swiss citizen residing in the United States has two main options with regard to his or her estate (it is assumed that the Swiss citizen will have his or her last domicile in the United States):

- The Swiss citizen may, by virtue of his or her will or testamentary agreement, subject his or her assets located in Switzerland or the entire estate to Swiss jurisdiction and/or Swiss law. Such provision in the will or testamentary agreement is, however, subject to the condition that the U.S. (federal or state) laws do not claim exclusive jurisdiction over the estate or a part thereof.
- The Swiss citizen may choose not to explicitly subject his or her estate to Swiss jurisdiction or Swiss law. In that case, Swiss authorities will generally yield jurisdiction over the entire estate to U.S. authorities even if real property located in Switzerland is involved. However, Swiss authorities may nevertheless have jurisdiction if, and to the extent that, U.S. authorities refuse jurisdiction, for instance, with regard to real property located in Switzerland.

II. If a person dies with last domicile in Switzerland, what are the basic proceedings and rights of legal successors under Swiss law?

A. Jurisdiction and Applicable Law

If a person dies with last domicile in Switzerland, Switzerland, as a rule, claims jurisdiction for that person's estate and Swiss law will apply. However, if the deceased owned real property located in the U.S., Swiss authorities will yield jurisdiction to the competent U.S. authorities claiming exclusive jurisdiction with respect to such real property.

If the deceased was a U.S. citizen, under Swiss law, he or she is entitled to subject the entire estate to the law of one of his or her countries of citizenship. For example, a U.S. citizen with last domicile in Switzerland may subject his or her entire estate to the laws of Maryland. If, on the date of death, he or she was no longer a U.S. citizen or if he or she had become a Swiss citizen, the choice of the applicable law becomes void.



B. Summary of the Proceedings for the Settlement of Estates under Swiss Law

If a person dies with last domicile in Switzerland, the competent Swiss authorities will first take the appropriate steps to protect the estate in accordance with Swiss law. Such steps include making an inventory and sealing certain assets. If the deceased left a will, such will has to be immediately presented to the probate court even if the will appears to be invalid. The probate judge then opens the will and it is communicated to all known heirs and legatees. The heirs and legatees whose current address is not known are informed by public notice. Such notice is made in official Swiss newspapers and, for instance, in the Swiss Review, the Magazine for the Swiss Abroad.

If the will provides for the appointment of an executor of the estate, such executor will, after confirmation by the probate court, take care of the administration and the distribution of the estate. The administration of the estate includes the payment of debts, the collection of money owed to the estate, and the sale of assets when necessary.

If no executor is appointed by will, the heirs will have to administer and divide the estate by themselves. In this case, Swiss law provides for certain legal remedies to protect heirs and other legal successors to the estate.

C. Overview of the Substantive Rights of Legal Successors under Swiss Law

Under Swiss jurisdiction and Swiss law, as a rule, the rights of legal successors residing abroad do not differ from the rights of those residing in Switzerland. If they do differ, they usually favor the legal successors residing abroad by extending certain deadlines that have to be met under Swiss law.

It is important to note that, under Swiss law, the heirs of the deceased constitute a community by law. This community is presumed to be formed by law at the moment of death of the deceased. All heirs are joint owners of the estate's assets and they are jointly and severally liable for all the debts of the deceased.

Under Swiss law, the rights of an heir include:

- The right to file a complaint that the testator has violated certain heirs' rights under Swiss law to their mandatory portion of the estate (deadline: one year from the time when the heirs had knowledge of the infringement of their rights and in any case no later than ten years from the date of opening of the will)
- The right to bring a suit to declare the will void for reasons of lack of testamentary capacity, undue influence at the time of drafting the will, and illegality or immorality (deadline: one year from the time when the heirs had knowledge of the will and in any case no later than ten years from the date of opening of the will)
- The right to disclaim the inheritance (deadline: three months from the date the heirs had knowledge of the death of the deceased or from the date on which they were officially notified of the testamentary disposition in their favor)



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- The right to claim a public inventory or the official liquidation of the estate
 - The right to institute an action to recover the inheritance (deadlines vary)
 - The right to bring an action for partition and distribution of the estate

By will, a testator is not only entitled to designate heirs, but can also bequeath to a beneficiary some portion of the estate without designating such person as an heir. Under Swiss law, these persons are called legatees. The rights and obligations of legatees differ from those of heirs. Perhaps the most important difference is that the legatees are not liable for the debts of the estate.

III. If a person dies with last domicile in the United States, what are the basic proceedings under the U.S. laws and how are assets located in Switzerland treated?

A. Jurisdiction and Applicable Law

If a person dies with last domicile in the U.S., the state of the last domicile usually claims jurisdiction for that person's estate and the laws of the decedent's last domicile will apply. Complexities may arise if the decedent left property in more than one state within the U.S. or abroad.

If the deceased owned real property located in Switzerland, the Swiss authorities, under the FCN treaty and the Swiss conflict of laws rules, will be competent to handle the estate under Swiss law with respect to real property located in Switzerland. If, however, the state of the decedent's last domicile also claims jurisdiction over real property located in Switzerland, the Swiss authorities will yield to the jurisdiction of the U.S. authorities.

With respect to movable property located in Switzerland (e.g., an account with a Swiss bank), the Swiss conflict of laws rules generally provide for jurisdiction and applicable law of the last domicile of the decedent, i.e., in the U.S. For certain cases that are the subject of litigation, however, the FCN treaty provides for jurisdiction and applicable law of the country where the assets in litigation are located, i.e., in Switzerland.

B. Summary of the Proceedings for the Probate of Wills and the Administration of Estates under the Uniform Probate Code (UPC)

In the United States, estates are administered under state law. These state laws vary significantly even though there is a uniform model law, The Uniform Probate Code ("UPC") of 1990, which has been adopted by a number of states and is growing in influence. The following is based on the UPC (as amended) and can therefore provide only general information. It is important to determine the applicable state law in each case.



1. Preliminary Remarks About Terminology

Under the laws of many U.S. states, the proceedings for the opening of estates may vary depending on whether or not the deceased died with a valid will. If the deceased did not leave a valid will, he or she died intestate and is referred to as the intestate. If there is a valid will, the deceased died testate and is called the testator or testatrix.

Modern state laws tend to eliminate differences between testate and intestate succession as well as between succession of real and personal property. The laws of some states, however, still differentiate between a devisee (recipient of real property by will), a legatee (recipient of personal property by will), an heir (recipient of real property by intestate succession), and a distributee (recipient of personal property by intestate succession). Hereinafter, these recipients are collectively referred to as legal successor(s) and this term does not reflect the differences that may exist under the different state laws.

The term probate refers in a technical sense only to the process of proving and deciding the validity of a will before a court which has competent jurisdiction, usually at the last domicile of the decedent. In a more general sense, however, the term refers to all matters appropriately brought before the probate courts. These matters include the entire process of the administration of a decedent's estate including initiation, the collection of assets, the settlement of debts, and closing and distribution. The term probate is hereinafter used in the latter sense.

2. Probate of Wills and Administration of Estates

a. The Flexible System under the UPC Rules

The UPC provides for a flexible system of estate administration. This system is in contrast to the law in many states where formalistic procedures still prevail. There are three conceptually different proceedings under the rules of the UPC: the informal procedure, the formal procedure, and the supervised procedure. The choice of the appropriate proceeding depends on various factors, such as the value of the estate, the degree of trust, cooperation and agreement among those interested in the estate, the explicit testamentary wishes of the testator, and the complexity of the administration.

The UPC procedures are based on the policy decision that those affected by the decedent's estate should have control of the proceedings. For the protection of the interests of the persons concerned, the UPC provides appropriate legal remedies when necessary. It is important to know, however, that the interested persons ordinarily must take positive steps in order to obtain legal protection. The UPC reflects the view that self-interest is a more effective guardian than the court.

b. Appointment and Duties of a Personal Representative (Executor or Administrator)

The testator may, by virtue of a will, name a personal representative who, in these cases, is called executor. If no personal representative is named in the will of the testator or if there is no will at all, the probate court will appoint a personal representative. In this case, the personal representative is called administrator. The probate court issues a letter of administration (to an administrator) or a letter testamentary (to an executor) after the personal representative has filed with the appointing court any bond required and a statement of acceptance of the duties of



the office of personal representative. As a rule, administration of the estate does not begin until the letters are issued.

If the probate order holds that the will is valid, in many states title to movable property is transferred to the personal representative, whereas title to real property automatically passes to the legal successors. However, based on the statutory or common law of many states, the personal representative nevertheless has a right of possession with respect to such real property for purposes of properly administering the estate.

Depending on the state, the personal representative administers the estate more or less under supervision of the probate court. He or she is responsible for the collection (marshaling) of assets, the payment of the debts (including taxes) of the estate, and, finally, the distribution and closing of the estate. Today, more and more states entitle the testators to direct that their executors be independent of probate court control after the opening of the estate.

C. What are the basic rules with respect to assets located in Switzerland?

1. Real Property

If real property located in Switzerland is part of the estate of a person last domiciled in the U.S., the competent authorities in the U.S. will usually yield jurisdiction to Switzerland and Swiss law will apply to the real property.

2. Bank Account in Switzerland

If the deceased had a bank account in Switzerland, the Swiss banks normally require the executor or administrator to provide a certified copy of the letter testamentary or the letter of administration. The banks will then usually provide the account information to the executor or administrator. Since, under the laws of many states in the U.S., legal successors are not entitled to the movable property before the estate has been distributed, the Swiss bank will usually not give account information to the heirs directly but will only communicate with the personal representative of the estate confirmed by the probate court.

IV. Taxation of the Estate

A. Estate Taxation in Switzerland

In Switzerland, estate taxation is a matter of cantonal and municipal laws. These tax laws vary. Municipalities are entitled to levy taxes only to the extent authorized by the cantons. In some cantons, the municipalities have their own tax legislation, while in other cantons the authority to levy taxes is based on cantonal law. With the exception of the Canton of Schwyz, all cantons levy taxes on estates. The right to tax is vested in the canton of last domicile of the decedent, except for real property where the situs canton has the right to tax.



Usually, the tax is based on the net value of the estate (real property is usually assessed by market value) and the tax rates are progressive, depending on both the inherited amount and the degree of relationship of the legal successor to the decedent. The recipients of the estate are liable for the tax.

B. Estate and Gift Taxation in the United States

1. The U.S. government imposes a gift and estate tax on all U.S. citizens and domiciliaries (again, domiciliaries are those noncitizens who intend to remain indefinitely in the United States). The tax is imposed on all of the taxpayer's assets, wherever located.
 - a) However every United States taxpayer is allowed an "applicable credit amount" against the estate tax which allows them to transfer \$1.5 million free of tax in 2003 and 2004, \$2 million from 2005 through 2008, and \$3.5 million in 2009, with no estate tax in 2010. Absent further action from the U.S. government, the estate tax is scheduled to return in 2011 with a \$1 million applicable credit against estate tax (the status of the federal estate tax remains a significant political topic, and future changes are anticipated). In addition, every U.S. citizen or domiciliary may give away \$11,000 of property per donee per year without any gift tax consequences and without reducing the applicable credit amount.
 - b) Also, there is an unlimited marital deduction from the U.S. gift and estate tax for all transfers to a U.S. citizen spouse. Therefore, all gifts to a U.S. citizen spouse during lifetime and all property passing to a U.S. citizen spouse at death is not subject to gift and estate tax.
 - i. If the spouse is not a U.S. citizen, a qualified domestic trust („QDOT“) may be created for the benefit of the surviving spouse for purposes of the estate tax. No estate tax will be due on property passing to the QDOT until principal is distributed from the trust to the surviving spouse. Distributions of income from the QDOT would not be subject to the estate tax. To qualify as a QDOT, a trust must meet a significant number of technical requirements imposed by federal tax law.
 - ii. A QDOT cannot be used to qualify lifetime gifts for the gift tax marital deduction. If a taxpayer makes gifts directly to his or her non-U.S. citizen spouse, the gifts will be taxable to the extent the aggregate value exceeds \$100,000 per year.
 - c) When property in excess of the applicable credit amount passes to someone other than a U.S. citizen spouse or a QDOT, such transfers are taxed at rates up to 48% (for tax year 2004), although the maximum rate is decreased to 45% for tax years 2007, 2008, and 2009. No estate tax will be assessed in 2010, and the estate tax is scheduled to return in 2011 with a maximum rate of 55% (the status of the federal estate tax remains a significant political topic, and future changes are anticipated). As described below, the U.S.-Switzerland tax treaty also provides a tax credit if a person's property is subject to taxation in both nations.



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2. The U.S. government also imposes gift and estate tax on a Swiss citizen who is domiciled in Switzerland, if he or she owns certain property deemed to be situated in the United States (such as U.S. real estate). The gift or estate tax would apply only to those U.S. assets.
- a) The U.S.-Switzerland estate tax treaty provides that the applicable credit against U.S. estate tax applies in part to such Swiss persons. A Swiss citizen and resident receives the proportion of the exemption that his or her U.S. estate bears to his or her worldwide estate. For example, if a Swiss person died in 2004 owning \$3,500,000 of property, \$1,500,000 of which was located in the U.S., he or she would receive an exemption of \$750,000 (i.e., 50% of the \$1,500,000 exemption), leaving a U.S. taxable estate of \$750,000. The unlimited marital deduction would also be available for property passing to a U.S. citizen spouse or a QDOT.
 - b) The applicable credit amount does not apply to lifetime gifts made by Swiss persons. However, like a U.S. taxpayer, a Swiss citizen and resident may make tax-free gifts of \$11,000 per donee per year. A Swiss person would also be able to deduct from a taxable gift any amounts passing to a U.S. citizen spouse. The special \$100,000 annual exemption from gift tax for direct gifts to a non-U.S. citizen spouse is also available to Swiss citizens and residents.

C. Protection from Double Taxation

Estate taxation is not covered by the Revised 1996 Convention between the United States of America and Switzerland for the Avoidance of Double Taxation With Respect to Taxes on Income. There is, however, a specific treaty of 1951 between the United States and Switzerland for the avoidance of double taxation with respect to taxes on estates (hereinafter "estate taxation treaty"). The estate taxation treaty covers U.S. federal taxes on estates and Swiss taxes on estates levied by the cantons and their political subdivisions. As a general rule, the estate taxation treaty provides that both the U.S. and Switzerland shall allow a partial tax exemption or a deduction on their own tax (usually in the form of a tax credit) to the extent of the tax paid to the other country with respect to certain assets of the estate.

Requests for a tax credit or reimbursement must be filed within five years computed from the date of death of the deceased.