Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top-ranked lawyers

Private Wealth

Switzerland: Law & Practice
Kinga M Weiss, Philippe Pulfer,
Fouad Sayegh and Robert Desax
Walder Wyss Ltd

Switzerland: Trends & Developments
Kinga M Weiss, Robert Desax and
Andrea Tina Weber
Walder Wyss Ltd

chambers.com

2020

SWITZERLAND

Law and Practice

Contributed by:
Kinga M Weiss, Philippe Pulfer, Fouad Sayegh and Robert Desax
***Walder Wyss Ltd** see p.15*

Contents

1. Tax p.3
- 1.1 Tax Regimes p.3
- 1.2 Stability of the Estate and Transfer Tax Laws p.3
- 1.3 Transparency and Increased Global Reporting p.3

2. Succession p.3
- 2.1 Cultural Considerations in Succession Planning p.3
- 2.2 International Planning p.3
- 2.3 Forced Heirship Laws p.4
- 2.4 Marital Property p.4
- 2.5 Transfer of Property p.5
- 2.6 Transfer of Assets: Vehicle and Planning Mechanisms p.5
- 2.7 Transfer of Assets: Digital Assets p.6

3. Trusts, Foundations and Similar Entities p.6
- 3.1 Types of Trusts, Foundations or Similar Entities p.6
- 3.2 Recognition of Trusts p.7
- 3.3 Tax Considerations: Fiduciary or Beneficiary Designation p.7
- 3.4 Exercising Control over Irrevocable Planning Vehicles p.7

4. Family Business Planning p.7
- 4.1 Asset Protection p.7
- 4.2 Succession Planning p.8
- 4.3 Transfer of Partial Interest p.8

5. Wealth Disputes p.8
- 5.1 Trends Driving Disputes p.8
- 5.2 Mechanism for Compensation p.9

6. Roles and Responsibilities of Fiduciaries p.9
- 6.1 Prevalence of Corporate Fiduciaries p.9
- 6.2 Fiduciary Liabilities p.10
- 6.3 Fiduciary Regulation p.10
- 6.4 Fiduciary Investment p.10

7. Citizenship p.10
- 7.1 Requirements for Domicile, Residency and Citizenship p.10
- 7.2 Expeditious Citizenship p.11

8. Planning for Minors, Adults with Disabilities and Elders p.12
- 8.1 Special Planning Mechanisms p.12
- 8.2 Appointment of Guardian p.12
- 8.3 Elder Law p.12

9. Planning for Non-traditional Families p.13
- 9.1 Children p.13
- 9.2 Same-Sex Marriage p.13

10. Charitable Planning p.13
- 10.1 Charitable Giving p.13
- 10.2 Common Charitable Structures p.13

Contributed by: Kinga M Weiss, Philippe Pulfer, Fouad Sayegh and Robert Desax, ***Walder Wyss Ltd***

1. Tax

1.1 Tax Regimes

In addition to income taxes, all Swiss cantons levy an annual net wealth tax on worldwide assets (directly held foreign real estate is tax exempt). The wealth tax is independent from an effective return on the assets.

Furthermore, almost all cantons levy inheritance taxes and gift taxes. The exceptions are the cantons of Schwyz and Obwalden which do not levy any gift and inheritance taxes, and Lucerne, that does not levy a gift tax. There are no federal gift and inheritance taxes.

Transfers between spouses are always tax exempt, and transfers to direct descendants are either exempt or taxed at rather low rates (exceptions may apply to persons subject to preferential lump sum taxation). Transfers to other persons are subject to tax rates that vary in function of the degree of kinship (ie, the highest rates are applied towards unrelated persons). Gift and inheritance taxes must especially be considered in cases of wealth and succession planning, for example when certain structures are used, such as trusts of foundations (obtaining advance tax rulings is highly recommended).

Lump Sum Taxation

Resident taxpayers who are not Swiss nationals may benefit from lump sum taxation. Lump sum taxation is an alternative and simplified method for determining the taxable income and wealth of foreign nationals who are tax domiciled in Switzerland and who are not exercising any professional activity in the country. The tax is levied on a deemed income (the "lump sum") that derives from the annual cost of living.

As a result, the effective tax burden can be extremely attractive. The base for wealth tax is also determined on a lump sum basis. It should be noted that persons benefitting from lump sum taxation remain potentially subject to gift and inheritance taxes.

1.2 Stability of the Estate and Transfer Tax Laws

There are no specific current proposals to amend the rules on gift and inheritance taxes. It may be expected that these rules will hardly change in the foreseeable future.

1.3 Transparency and Increased Global Reporting

Switzerland implements the automatic exchange of information on financial accounts (AEOI) according to the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA). Bilateral treaties on the AEOI have been concluded with the EU, Hong Kong and Singapore. Under FATCA, the Swiss banks report information on US accounts directly to the IRS. Group requests from foreign tax authorities are possible. Generally, Swiss authorities adopt a rather liberal approach to exchange of information.

2. Succession

2.1 Cultural Considerations in Succession Planning

Based on a study by the University of Lausanne the inherited sum in the year 2020 reaches almost CHF95 billion. The age of the deceased is, on average, 85. Only 5% of the inheritances benefit people under the age of 40 and almost over 60% of the inheritances are transferred to heirs over the age of 60.

As a result of the high life expectancy, the inheritance process leads to a concentration of assets in the pensioner generation and the younger generation cannot count on inheritances to provide the necessary financial basis for the development of their life plan. The wealth transfer secures the standard of living or even only serves of capital accumulation.

Wealthy people usually plan their estates very carefully and draw up wills or inheritance contracts with the help of professionals. However, the majority of the population dies intestate.

Families

Marriage is still the predominant form of relationship for heterosexual partners. Per woman, the birth rate amounts to 1.5 children. Hence, traditionally Swiss families are small. Typically, only little wealth is transferred to the next generation during lifetime as in most cantons there are no inheritance taxes in the direct line (see **1.1 Tax Regimes**).

In particular with regard to business successions, the control factor of the elderly generation is immanent. In average the patron is 70 years old when the business is passed on to the next generation. In most cases, power, responsibility and control is kept beyond the transfer.

2.2 International Planning

Switzerland is located in the middle of Europe and is a migration country. 25,3% of the population in Switzerland (at the end of 2019: 8.6 million people) are foreigners. Around 770,000 Swiss citizens are living abroad. Hence, almost in every estate planning in Switzerland there is a cross-border element due to the residence of the involved persons or the situs of the assets, which shall be transferred upon death.

Chapter 6 of the Swiss Private International Law has specific rules on succession which set out the rules on jurisdiction, governing law and recognition as well as enforcement of foreign judgements, documents and measures. Switzerland has

concluded a few bilateral conventions containing provisions on succession (eg, with the USA, the United Kingdom and Italy). The EU Succession Regulation is not directly applicable in Switzerland, however, it needs to be considered in almost every estate planning as we are living in a global world and people are mobile. Whether COVID-19 will on the long run change that development is open.

Cross-border cases are often highly complex due to the various jurisdictions, which need to be taken into account during the planning process and due to the conceptional differences on the subject matters involved. For example, the matrimonial property regime is from a Swiss perspective an integrated component and a highly important estate planning tool. Other countries such as the UK are, however, not familiar with such concept at all.

Vice versa, in Anglo-Saxon countries the trust is regularly used as a planning instrument. Swiss law does not know the trust instrument, however, recognises it (see **3.2 Recognition of Trusts**). Planning with trusts in Switzerland usually fails because of the strict forced-heirship rules of Switzerland (see **2.3 Forced Heirship Laws**).

Collaboration with Foreign Counsels

There are numerous discrepancies between the various laws which might be applicable in a cross-border setting and therefore it is crucial to try to avoid conflicts by careful planning and drafting of the relevant documents such as pre-/postnuptial agreements, last wills and inheritance contracts in a close collaboration with foreign counsels. As set out above in **1.1 Tax Regimes**, there might be tax consequences on the transfer of the wealth (during lifetime or upon death). Hence, the tax laws in Switzerland and in the foreign countries (including possible double tax treaties) involved must be included in the planning process.

2.3 Forced Heirship Laws

Switzerland knows forced heirship-laws. Basically, the testator can freely dispose of their estate, however, there are statutory limitations protecting certain categories of statutory heirs, who have a right to a compulsory portion of the estate (forced heirship right). Pursuant Article 471 seq Civil Code, the spouse and registered partner, the descendants and the parents are entitled to a compulsory share. A testator's disposition violating forced heirship rights may give grounds for an action of abatement (Article 522, paragraph 1 Civil Code). The compulsory portions are inheritance portions which are expressed in quotas (fractions) of the whole. Therefore, a testator may only dispose by testamentary dispositions of the freely disposable portion of his estate.

Compulsory and Freely Disposable Portions

The compulsory portion amounts for the spouse to half of their statutory share (share which would apply pursuant to the intestacy rules), for descendants to three quarters of their statutory share and for the parents to half of their statutory share.

These rules result in the following freely disposable portions:

- if there is a spouse but no descendants or surviving parent, the freely disposable portion is a half;
- if there is a spouse and descendants, the freely disposable portion is three eighths;
- if there is a spouse and parents, the freely disposable portion is a half;
- if there is no spouse but descendants, the freely disposable portion is a quarter;
- if only parents survive, the freely disposable portion is a half.

The compulsory portion is calculated by considering certain inter vivos gifts made by the deceased, in particular the net value of all the assets held by the deceased at the time of his death plus the Inheritance advances, lifetime gifts of the deceased if revocable or made within five years prior to the deceased's death and any lifetime gifts with no time limit with the evident purpose of evading the forced heirship rules.

An heir entitled to a compulsory share has the right to receive the full amount of such share outright and the testator may not impose a charge on the compulsory portion by, eg, means of a trust or by attaching conditions on the inheritance. However, an heir can renounce their inheritance rights in advance, in full or in part (including the compulsory share quota), by signing an inheritance contract before a Swiss notary.

Modernising Swiss Inheritance Law

Swiss inheritance law shall be modernised as the current law dates back to 1907. Among others the compulsory share quotas shall be reduced. The Federal Council suggests reducing the compulsory portion of the children from three quarters to a half of the statutory share. Where the deceased is not survived by any issue, the parent's current statutory entitlement shall be abolished. The Federal Council and parliament are currently discussing the reform of the inheritance law including the introduction of specific provisions regarding business successions to facilitate the transfer of businesses to the next generation.

2.4 Marital Property

Swiss matrimonial property law deals with the effects of marriage on the spouse's rights to its assets in the event of divorce or one spouse's death. A consequence of the dissolution

of the marriage by divorce, judicial separation, nullity or death is that the marital assets must be divided between the spouses as it has an impact on the calculation of each spouse's share in the other spouse's asset in case of liquidation of the matrimonial property. In case of death, depending on the regime in place, a spouse is entitled to a specified share of the deceased's assets prior to the partition of the estate among the heirs.

Swiss law provides for three matrimonial property law regimes, namely:

- the ordinary matrimonial property regime of participation in acquired property;
- the community of property; and
- separation of property.

Ordinary Regime of Participation in Acquired Property
Under the ordinary regime, each spouse retains and manages their own assets and acquisitions during the marriage. Hence, no consent is needed of the other spouse, except with regard to the family home (Article 169 CC). A distinction is made between a spouse's own property (*Eigengut*) and the acquired property (*Errungenschaft*) when the liquidation of the marital property takes place.

A spouse's own property comprises the assets, which were brought into the marriage or were received through gifts or inheritance during the marriage. Acquired property includes in particular assets, which resulted through employment or self-employment or derive as income from own property during the marriage.

Separation of Goods or Community of Property
By way of marital agreement (pre- or postnuptial agreement) the spouses can opt for another regime such as separation of goods or community of goods. Under the regime of community of property each spouse holds their personal property (eg, cloth, jewellery) while the other assets of the marriage are jointly owned and managed. Spouses either need to act jointly or with the consent of the other spouse to validly dispose over common property as far as extraordinary affairs are concerned. If the community of property regime is dissolved by death of a spouse, each party is entitled to an equal share in the common property.

Marital agreements regarding the marital property regimes between the spouses have to be authenticated before a notary and are binding for the spouses.

Side-Effects of a Divorce
Certain side-effects of a divorce, such as the children's interest and entitlement in the retirement savings cannot be stipulated by the spouses with a binding effect. However, the Federal Supreme Court recently (BGE 5A_778/2018) decided that spouses can agree with binding effect on post-marital allowance payments. To avoid that a spouse can successfully contest the binding effect it is recommended to make sure that:

- the spouses had enough time to study the marital agreement and make up their mind;
- each spouse had an independent advisor;
- that a translator is involved in case one of the spouses is not fluent in the contract language; and
- that the financial situations at the time of the conclusion of the contract are set out.

In an international setup it is recommended to provide for legal certainty and to stipulate for each legal area the jurisdiction and the governing law by making respective choices of law, if permitted by the law.

2.5 Transfer of Property

The value of the property transferred during lifetime to descendants will be revalued at the time of death of the deceased. Unless the deceased expressly instructed otherwise, anything gifted or granted to their issue by way of dowry, endowment or assignment of assets, debt remission and the like is subject to hotchpot (Article 626, paragraph 2 CC). Although the testator is in general free to determine whether the recipient must provide compensation in the partitioning of the estate for lifetime gifts, or whether they are to be exempted from this, the value of the property at the time of the death of the testator is taken to calculate the estate for determining whether the compulsory share is violated.

Transfers during lifetime or upon death to direct descendants or spouses are in almost all cantons exempt from gift or inheritance taxes (see **1.1 Tax Regime**). If taxes are levied (eg, because the recipient is a third party), the taxes are calculated in general on the fair market value of the asset. The accrued value is not of relevance and no adjustment is made for income tax purposes.

Contrary to other countries Switzerland does not levy taxes on capital gains generated on private assets.

2.6 Transfer of Assets: Vehicle and Planning Mechanisms

In general, there are no specific tax planning schemes in place to facilitate the transfer of assets to the younger generation. To minimise the tax exposure, if any, the donor may however change their residence and move to another canton with a lower tax rate or the donor may withhold the right of usufruct (or the right or residence if real property is transferred) on the asset transferred.

In certain cantons the tax (gift or inheritance tax) is then only calculated on the fair market value less the capital value of the right of usufruct or the right of residence (bare ownership). Depending on the canton even at the time of the death of the donor the value of the capitalised right of usufruct or right of residence will not be taxed retrospectively.

2.7 Transfer of Assets: Digital Assets

The treatment of digital assets for purpose of succession depends on the data concerned and its legal qualification. There is currently no public court case in Switzerland that has dealt with the inheritance of digital assets.

According to Article 560 Civil Code, the entire estate of the deceased, subject to legal exceptions, is transferred by law due to the principle of universal succession to the heirs. The heirs are the legal successors of the deceased with respect to claims, ownership and limited real property rights. The physical disk of the deceased as well as any data stored on it goes through universal succession into the ownership of the heirs.

Data

The legal situation is less clear regarding data which are stored in a cloud. To this online data, which are saved in a data centre, the heirs have without a password no immediate access. The inheritance of such data depends on their legal classification. According to Swiss Civil Code the protection of the personality ends with death, therefore personal rights of the deceased cannot be claimed by the heirs. Exempted is namely the case where for example a picture of the deceased is uploaded on the internet, if thereby the own personal rights of the heirs are violated.

Copyrights are inheritable and are thus covered by the universal succession. However, it must be noted that the testator during his lifetime, or in the event of death may renounce copyrights. Such a renunciation is binding on the heirs of the deceased. Copyrights can only be claimed for a limited period of time after the death of the copyright owner, namely 50 years for computer programs and 70 years for all other works.

In cases where data is saved in an external data centre, there are usually contracts involved. Users of internet network accounts conclude contracts with the platform providers. The same applies for persons who operate a homepage. Due to universal succession, the heirs step into the contract of the testator. Some market providers have inserted in the general terms of business how the provider will treat the user account after the death of the user (such as Apple, Google and Facebook). Hence, these terms are usually binding for the heirs.

Cryptocurrencies

Cryptocurrencies such as Bitcoins or tokens are saved in so-called “wallets”. Payment token like Bitcoin are stored decentralised on a block chain. The payment token falls as part of the holder’s estate by universal succession to the heirs.

The wallets can be “custodian wallets”, where a third party keeps the tokens as well as the access key. In this case the heirs inherit the legal position of the testator depending on the content of the contract. A “non-custodian wallet”, however stores the tokens on the user account itself and only the testator has via a key (code comprising of numbers and letters) access to the tokens. therefore, the heirs must have this key to gain access to the tokens. If the key not known to the heirs, they cannot dispose of the assets, and it is inevitable that the testator must disclose the code to the heirs or the executor.

The challenge is that every person who has the key may dispose of the tokens immediately by hardly leaving any trace. This can lead to an untraceable loss of the crypto assets. The transcript of the key in a last will is therefore not recommendable. A system with two key should be chosen. One access key can be handed over to the heirs and the second to the executor.

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations or Similar Entities

There is no Swiss substantial law on trusts and (for the time being) no such thing as a Swiss domestic trust. The introduction of a Swiss trust law is currently under review.

Family Foundations

Swiss law provides for specific legal provisions regarding foundations, including private foundations, which are called family foundations.

A family foundation is characterised as a foundation established for the benefit of beneficiaries who are members of the founder’s family. According to Article 335 of the Swiss Civil Code and based on the legal practice of the Swiss Supreme Court, there is an exhaustive list of purposes for which a family foundation may be set up: education, welfare and health. The family members who belong to the class of beneficiaries should only be supported in certain circumstances, namely at a young age, when settling down or establishing a livelihood as well as in cases of hardship.

According to Swiss law, it is not permitted that family members unconditionally benefit from a foundation’s assets to make a

living or to improve their economic situation. Swiss law family foundations which do not comply with the foregoing rules and have a broader purpose are illegal and void.

Foreign Law Foundations
According to Swiss private international law, private foundations governed by the laws of another jurisdiction are recognised in Switzerland provided that they fulfil the publicity or registration provisions of such laws or, in the absence of such provision, provided that they are organised in accordance with the laws of that state, regardless of the fact that they might support, even entirely, the living costs of their beneficiaries.

The Swiss Supreme Court has confirmed on several occasions that family foundations created under a foreign law which allows such foundations are valid. Both foreign law foundations and foreign law trusts are widely used for estate planning purposes in Switzerland, although the benefits they bring to purely domestic situations are limited.

3.2 Recognition of Trusts
Switzerland is a party to the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition (the Hague Trust Convention) which it ratified in 2007.

According to Swiss private international law, the law applicable to a trust is designated by the Hague Trust Convention. Consequently, Swiss courts and authorities must recognise a trust established in accordance with the law designated by the Hague Trust Convention, provided that it meets the minimum standards prescribed by the Hague Trust Convention.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation
The Swiss tax authorities distinguish between revocable and irrevocable trusts. The deciding factor as to whether a trust is considered to be either revocable or irrevocable is not necessarily the trust deed itself. Using an economic approach, it must be determined whether the settlor has irrevocably given up his or her control over the trust assets or not.

The taxation of a trust in Switzerland depends on its qualification based on a circular published by the Swiss tax conference, a group comprised of the heads of the cantonal tax administrations. According to this circular, the trust assets and income therefrom may, in certain cases, be attributed for tax purposes to the beneficiary or the settlor (as a rule, the trust itself cannot be regarded as a taxpayer even if the trustee is located in Switzerland):

- a revocable trust's assets and income are attributed to the settlor for income and wealth tax purposes;
- the trust assets of an irrevocable fixed-interest trust as well as the income thereof are attributed to the beneficiaries in proportion to their interest;
- a Swiss resident settlor is generally not considered to have disposed of their assets when forming an irrevocable discretionary trust; the assets as well as the income thereof will in principle remain taxable in their hands; and
- a foreign resident settlor forming an irrevocable discretionary trust is normally considered to have disposed of their assets.

If a foreign resident settlor later moves to Switzerland, the trust assets will, consequently, not be attributed to him or her unless they have remained a beneficiary, however, it is strongly recommended to confirm the position by seeking a tax ruling.

It must be noted that the foregoing applies to the tax qualification of trusts only.

3.4 Exercising Control over Irrevocable Planning Vehicles
Since there is no Swiss substantive law on trusts, no steps have been taken in these areas. However, Swiss tax authorities have developed an economic approach according to which it must be determined whether the settlor has irrevocably given up their control over the trust assets or not.

If an irrevocable trust has been drafted in a way that it grants too much power to the settlor, the Swiss tax authorities would consider that the trust is revocable (see **3.3 Tax Considerations: Fiduciary or Beneficiary Designation**).

The situation regarding foundations differs to the extent that they have a separate legal personality (personne morale), just like a corporation, which cannot be disregarded. There is a risk, however, that they might be regarded as a Swiss taxpayer if they are effectively managed out of Switzerland.

4. Family Business Planning

4.1 Asset Protection
Assets protection tools used in Switzerland include lifetime gifts, trusts, foundations and life insurance policies. These techniques are potentially subject to the limitations imposed by Swiss law in relation to matrimonial and succession law, meaning that depending on the situation, assets placed into such structures might be either nominally accounted for in the transferor's wealth or subject to claw-back claims. Generally speaking, the transfer of assets taking place shortly before a claim arises and specifically aimed at placing assets beyond the creditor's reach is

likely to be ineffective. Careful attention should also be given to the actual location of the assets following the transfer.

4.2 Succession Planning

While there is nothing such as a Swiss trust, the institution of trust is becoming growingly popular and is very well apprehended by Swiss authorities, including the tax administration. Switzerland is now even exploring the possibility of enacting its own trust law.

Family business leaders often strive to keep their enterprise within the family and avoid division of ownership. Main sources of division include divorce, death, liquidity needs, and even quarrels among the members of the next generation. Swiss law provides few tools to prevent such events, therefore sophisticated business owners increasingly resort to foreign solutions, most frequently the trust.

The Hague Trust Convention

Switzerland ratified the Hague Trust Convention in 2007 and has adapted its legislation to better grasp the specificities of the trust, which reinforces confidence of potential settlors. Yet, one must carefully plan any estate planning involving trusts. A trust would typically be settled during the settlor's lifetime, rather than upon demise, as this could otherwise infringe Swiss inheritance law.

The characteristics of the trust (eg, revocability, powers retained by the settlor, discretion of the trustees) will also affect its tax treatment and the tax impact on the settlor and the beneficiaries. The way the class of beneficiaries is designated could also trigger very diverse, and possibly adverse, tax consequences. Fortunately, it is possible to request from the tax authorities a confirmation of the tax qualification of the trust before it is settled, which provides some valued legal security to taxpayers.

4.3 Transfer of Partial Interest

Due to the peculiarities of the Swiss fiscal framework, transfer tax is often not a major issue in family business planning, since most cantons do not levy any significant gift or inheritance tax on transfers to spouses and lineal descendants. That being said, the valuation of a partial interest can have a significant impact on wealth tax over the years. The valuation of private companies is often a focus point for entrepreneurs, especially during difficult economic times.

Valuations of non-listed companies are carried out by the cantonal tax authorities and there are various ways to reduce them. Among others, a minority stake generally justifies a 30% discount. Such a discount does however not apply when substantial dividends are paid.

5. Wealth Disputes

5.1 Trends Driving Disputes

A frequent topic in wealth disputes regards what can be considered as an individual's estate when this individual is married or has children.

During the marriage, within the limits of the law, each spouse administers and enjoys the benefits of their individual property (ie, their own individual property and share of the jointly acquired property) and has power of disposal over it. If an asset is in the co-ownership of both spouses, neither spouse may dispose of their share in it without the other spouse's consent, unless otherwise agreed.

Upon dissolution of the matrimonial property regime (either through death, divorce or in the event of a change of matrimonial property regime), accrued gains are divided between the spouses into two equal shares. The following are added to the property acquired during marriage (sort of clawback):

- the value of assets disposed of by one spouse, without consideration and without the other spouse's consent, during the five years preceding the dissolution of the matrimonial regime, except for the usual occasional gifts; and
- the value of assets disposed of by one spouse during the matrimonial regime with the intention of diminishing the other spouse's share.

The property acquired during marriage and the individual property of each spouse are divided according to their value at the time of the dissolution of the matrimonial regime.

Swiss Substantive Succession Law

In addition, Swiss substantive succession law provides that the heirs are the deceased's issue. Children inherit in equal shares. Predeceased children are replaced by their own issue at all degrees per stirpes. The surviving spouse or civil partner is entitled to one-half of the estate when in competition with the deceased's issue.

If there are no descendants, the surviving spouse or civil partner inherits three-quarters of the estate and the deceased's parents one-quarter. If the deceased's parents are predeceased, the surviving spouse or civil partner inherits the entire estate. If there are no descendants and no surviving spouse or civil partner, the deceased's parents inherit the entire estate. Moreover, the predeceased parents are replaced by their issue at all degrees per stirpes.

Switzerland has a forced heirship regime, meaning that there are protected heirs. The free estate depends on the compulsory portions of the protected heirs. The protected heirs and their respective compulsory portions are as follows:

- for the descendants of a deceased: three-quarters of their statutory share;
- for the parents of a deceased: half of their statutory share (this only applies when the deceased has no issue); and
- for the surviving spouse or the civil partner of a deceased: half of their statutory share.

Nevertheless, such compulsory portions may be derogated by way of an inheritance contract to be entered into between the testator and the renouncing forced heirship heir.

Clawback

Swiss succession law allows the protected heirs to claw back the gifts or legacies that are in breach of their compulsory portion, under certain conditions. Consequently, a protected heir receiving less than his or her compulsory share in the estate may file a clawback claim in order to receive the balance of the compulsory portion. In the absence of such claim, a will drawn up in breach of forced heirship rights is not automatically invalid for this reason.

A change of law is foreseen whereby the compulsory portions (including a cancellation of the compulsory portion of the parents of the deceased) will be reduced in order to provide the testator with greater flexibility. It is not expected that this change will enter into force before 2021.

Trusts and Foundations

Trusts and foundations are frequently challenged in the context of estate disputes. In most cases, such disputes are initiated by heirs claiming that a trust or a foundation has been created with a view to breaching their forced heirship rights. The same kind of claims can made in divorce proceedings, when one spouse claims that assets have unduly transferred into a trust or a foundation by the other spouse, without consent, to such an extent that the assets have to be accounted for in the liquidation of the regime.

5.2 Mechanism for Compensation

As mentioned (see **5.1 Trends Driving Disputes**), protected heirs are entitled to a mandatory share of the estate. As a result, transfers of assets in favour of a trust or a foundation resulting in a breach of forced heirship rights may be subject to claw back claims enabling protected heirs to receive the balance of their compulsory portion. The claim is a money claim and has to be filed against the trustee or the foundation.

In the context of divorce proceedings, matrimonial assets transferred into a trust or a foundation by one spouse without the other spouse's consent may be notionally reintegrated into the matrimonial regime, thereby increasing the amount to be divided between the spouses in the liquidation of the matrimonial assets.

In any event, both in succession and family disputes, the effectiveness of the transfer of assets will be under scrutiny, and there might be cases in which an invalid transfer will result in the relevant assets still forming part of the estate of matrimonial assets. It must be noted, in that context, that the Hague Trust Convention does not deal with the transfer of assets into trust which will therefore remain subject to the relevant law applicable to the assets in question, having regard to the nature and location of such assets, the acquisition of title, and the legal obligations of the transferor.

6. Roles and Responsibilities of Fiduciaries

6.1 Prevalence of Corporate Fiduciaries

The use of corporate fiduciaries is common and prevalent in Switzerland.

Since 1 January 2020, trustees are required to seek an authorisation from the Swiss Financial Market Supervisory Authority (the FINMA) as trustee pursuant to the Swiss Federal Act on Financial Institutions (Financial Institutions Act, FinIA) and its implementation ordinance (FinIO). Exemption may apply for trustees who manage solely the assets of persons with whom they have business or family ties.

Trustees that are subject to the FinIA are, in particular, Swiss trustees, whether professionals or corporate trustees, or those trustees acting on an ad hoc basis (eg, attorneys), and foreign trustees of trust which are effectively managed in or from Switzerland.

AMLA

In addition to the FinIA obligations, trustees which fall within the scope of the FinIA are considered as financial intermediaries pursuant to the Swiss Anti-Money Laundering Act (AMLA). The consequence is, amongst other, that for every relevant mandate the identity of the contracting party and of the beneficial owner has to be established with appropriate documents, that every relevant transaction (ie, above CHF100,000) and every relevant change during the relationship have to be explained and documented. In addition, all the information has to be kept in a file since all the information has to be provided to the authority in case of suspect money laundering activity.

6.2 Fiduciary Liabilities

As a matter of principle, legal entities will be recognised to the extent that they comply with the incorporation rules in the jurisdiction of their governing law. In relation to trusts, the recognition will be strictly governed by the relevant foreign trust law in accordance with the Hague Trust Convention to which Switzerland is a party, leaving no room to piercing the veil.

Interim Measures

In the context of interim measures, however, there is a risk that Swiss courts might apply the Durchgriff principle in order to consider that assets settled into trust have remained in the ownership of the settlor.

The Swiss Supreme Court and some Swiss scholars consider that in interim measures, Swiss courts may apply Swiss law, including the Durchgriff principle, instead of the foreign law applicable to the trust, in an apparent breach of the Hague Trust Convention.

According to scholars, this is justified by the urgency of taking a decision and by the fact that these are only interim measures and not a final decision on the merits.

Extenuating Circumstances

According to Swiss case law, courts and/or authorities can, under certain circumstances, disregard the formal independence of a legal entity when such entity is owned by someone who has full control over it. By application of the Durchgriff principle, courts and/or authorities would disregard the entity when it is an instrument in the hand of the owner used to circumvent the law or to violate third party rights in an abusive manner.

In proceeding on the merits, with the benefit of a full review of the facts and legal arguments, Swiss courts will apply the provisions of the Hague Trust Convention which exclusively refer to the law designated in the trust instrument.

6.3 Fiduciary Regulation

There is no such law in Switzerland. The fiduciary's investment policy should be in accordance with provisions included in the trust instrument of foundation's charter, or subject to the terms contractually agreed between the principal and the fiduciary.

6.4 Fiduciary Investment

Under Swiss law, there is no specific investment theory or standard which applies to trustees, and the authors are not aware that the modern portfolio theory should apply. The management of assets by charitable foundations should be prudent and subject to a certain degree of diversification as a matter of good practice. Foundation board members are typically prudent in the investment of assets so as to avoid criticism by the supervisory authority for having exposed a charitable foundation's assets to high risks. It is, however, perfectly acceptable for Swiss foundations to own active businesses and there are several examples of large Swiss companies held in such structures.

7. Citizenship

7.1 Requirements for Domicile, Residency and Citizenship

Switzerland has country-specific requirements for immigration as well as residence and work permits. The main differences exist for EU/EFTA-members and third-country states (all non-EU-28/EFTA states). Different immigration rules apply according to the nationality of the immigrant and the purpose of the immigration (tourist, residence, employment/labour).

The most important types of the residence permits are:

- short term residence permit (permit L);
- resident foreign national permit (permit B);
- settled foreign national permit (permit C); and
- cross-border commuter permit (permit G).

No permit for a stay up to three months is needed if no gainful activity is intended.

Freedom of Movement

Nationals from the E-27/EFTA states profit from the freedom of movement. The residence permits are issued to them upon presenting a current passport/valid identity card and a lease contract for a premise. In addition, they need to show that they have sufficient financial means to maintain the livelihood and a sufficient health and accident insurance coverage.

EU-2 States (Bulgaria, Romania and Croatia) and third-country nationals must submit a full formal application. Third-country nationals may apply for a permit B for education, retirement, medical treatment, important public interest, extremely grave cases of hardship and adoption.

Third-Country Nationals

EU/EFTA state nationals receive a work permit upon producing an employment contract or confirmation of employment as well as a residence permit. Third-country nationals wishing to take up gainful employment require a work permit. Third-country nationals may take up employment if:

- a macroeconomic interest exists;
- the employer has requested it;

- any applicable quotas have not yet been filled, permits for a term not exceeding four months within a 12-month period are not subject to any quotas;
- no priority exists for suitable residents (Swiss nationals, settled foreign nationals and resident foreign nationals) or EU/EFTA citizens, who may rely on the freedom of movement agreement;
- the salary and work conditions customary in that region and for that business are kept;
- the personal requirements are fulfilled (management official, specialist/expert or qualified employee); and
- the third-country national has premises sufficient for their need.

In certain cases (eg, internships and education, transfer of specialists and economic reasons) the Migration Office may depart from the usual requirements.

Naturalisation

Naturalisation may be obtained in Switzerland through birth, adoption, regular or simplified naturalisation or re-naturalisation. After ten continuous years of residence in Switzerland and having a permit C, foreigners may apply for Swiss citizenship through regular naturalisation. Years between the ages 8 and 18 count double. The naturalisation takes on three levels, namely on federal, cantonal and communal level. The cantonal and communal requirements may vary. The federal requirements are:

- knowledge of a Swiss national language;
- integration into Swiss life and familiarity with Swiss customs;
- compliance with Swiss law, no danger for Swiss security; and
- no benefits received from Swiss social welfare.

COVID-19

As part of the COVID-19 Regulation 2 the Federal Council has enacted in March 2020 extraordinary entry restrictions. For all foreigners who come from a risk country in accordance with Appendix 1 of the COVID-19 Regulation 2 and want to enter Switzerland the entry is in general to be refused. Hardship cases or cases in the public interest are reserved. Switzerland opened the border with all countries within the EU/EFTA area on 15 June 2020.

From this point on, freedom of travel with all states within the Schengen area and full freedom of movement for all EU/EFTA citizens apply again without restriction. This also applies to citizens from the non-Schengen states of the United Kingdom, Ireland, Romania, Bulgaria, Croatia and Cyprus who are entitled to free movement.

Travellers

For travellers, who, due to the current COVID-19 situation, enter the Schengen area after the expiry of their visa, with respect to the maximum possible stay abroad (overstay) no corresponding sanctions are ordered.

Work permit applications

Work permit applications by EU/EFTA nationals are, as of 8 June 2020, subject to the usual regulations. Applications of third-county nationals which were submitted or approved before 19 March 2020 will continue to be processed. On July 6th all COVID-19-related restrictions on the admission of workers from third countries were lifted. Workers from third countries can therefore again be recruited normally via the quota system, just as before the crisis.

Residence applications

Residence applications from third-country nationals who do not intend to work in Switzerland, such as people who have retired will be processed again; the normal criteria apply. However, third-country nationals are still not permitted to travel to Switzerland on holiday: entry for a stay of less than 90 days, that does not normally require a permit, will only be authorised in cases of special necessity.

Since 20 July, about 20 countries, have been removed from the relevant list. For the nationals of these countries, the entry restrictions have been lifted. The Federal Department of Justice and Police removed Algeria, Andorra, Australia, Canada, Georgia, Vatican/Holy See, Japan, Morocco, Monaco, New Zealand, Rwanda, San Marino, South Korea, Thailand, Tunisia and Uruguay, as well as the EU states outside the Schengen area (Bulgaria, Ireland, Croatia, Romania and Cyprus) from the list of high-risk countries. China is also expected to be removed from the list in line with the EU recommendations, provided it guarantees reciprocal rights of entry to persons arriving from Switzerland.

From 6 July 2020, people who have stayed in a state or area with an increased risk of infection and are entering Switzerland are required to go into quarantine. The country list is regularly updated; last update 23 July, midnight (0:00 hours).

7.2 Expeditious Citizenship

A simplified process takes place in case a foreigner is married to a Swiss national for at least three years and was living in Switzerland for a total of five years, including 12 months prior to the application. Registered partners do not profit from the facilitated procedure.

8. Planning for Minors, Adults with Disabilities and Elders

8.1 Special Planning Mechanisms

Minors or adults with disabilities are in general equally treated as persons without disabilities with regard to their rights in the estate of the testator. Usually, a testator wants to consider the disability of his child. Whether the estate planning is in favour for the disabled child or just conversely, with a favour by its siblings, depends on the situation.

The most important obstacle to planning the estate is the forced-heirship quota for children. Currently the forced-heirship quota for a child amounts to three quarters of the statutory inheritance quota. This shall however change due to the current revision of the Swiss inheritance law (see **2.3 Forced Heirship Laws**). Not only is the quota relatively high but also there exists a strict case law to it. Namely, the allocation of usufruct, the appointment of a reversionary heir or the appointment of an executor for a long time are incompatible with the forced-heirship right of an heir.

If the disabled person is a minor or is mentally incapable to act, then the renouncement of the compulsory share quota is not permitted. For reasons of social security law, a waiver of the compulsory share may also be problematic. Is the disabled child mentally incapable, planning is also difficult due to the principle of personality, meaning that neither parents nor other persons can make a last will for the disabled child. Statutory wills are not permitted.

Establishing a Trust

To cover the needs of a disabled person (eg, the financing of regular vacation accompaniment or a certain therapy) a family foundation or a trust (see **3. Trusts, Foundations and Similar Entities**) can be established and the foundation board (or the trustee) may adapt the distributions to the current needs of the beneficiaries. A pure maintenance foundation is under Swiss law inadmissible. However, the establishment of a Swiss foundation for the satisfaction of the special needs of a disabled child is an allowed purpose of a foundation. It is recommended to request a ruling for the tax treatment of such distributions to avoid unpleasant surprises.

Since 2013 there is a new provision in the law which enables testators to appoint a reversionary heir if an heir is mentally incapable of judgement, is entitled to a compulsory share quota and has no spouse or children. Therewith a testator may avoid that the wealth passes on to then living legal heirs.

It is in any case recommended to have a person appointed as guardian or executor who qualifies as a person of trust to ensure that the estate planning measures may be executed. Since 2013 it is furthermore permissible to establish an advance care directive and living will to plan for the situation where someone becomes mentally incapable.

8.2 Appointment of Guardian

In Switzerland guardians are appointed by the Children and Adult Protection Authority, which are organised by the cantons. In some cantons the courts act as the competent authority and in others such as in the canton of Zurich it is an administrative body. The guardians are under an ongoing supervision of such authority.

An exception applies if the guardian was appointed based on an advance care directive. In such case, there is no ongoing supervision. Only in cases where a charge has been filed the authorities will interfere.

8.3 Elder Law

The Swiss pension provisions are based on the three-pillar system. The old-age and survivors' insurance (AHV) and the disability insurance (IV) form the first pillar in conjunction with supplementary benefits, which is mandatory. Persons who work must contribute starting from the age of 17 until the legal retirement age (currently 65 for men and 64 for women) and persons not gainfully employed must contribute as of the age of 20 until the legal retirement age. If a person is employed, the employer pays half of the contribution, whereas the other half is directly deducted from the salary.

The occupational pension plan forms the second pillar. This has the purpose to enable the insured persons to continue their previous lifestyle in a reasonable way. The employers pay at least half of the contribution and the rest is deducted from the salary. Person who are not gainfully employed and self-employed person are not obliged to pay contributions, but they can insure themselves voluntarily.

The third pillar are the voluntary retirement plans to cover additional personal needs. Most of Swiss people provide for such additional plans not least because one can benefit from tax advantages.

Every person living in Switzerland is obliged to have health care insurance and bears its premiums. Employed persons, all self-employed and persons without gainful employment with a modest income are in general entitled to family allowances.

9. Planning for Non-traditional Families

9.1 Children

Traditional family forms and household structures are still dominant in Switzerland. Switzerland clearly has, compared to other countries, a low number of extra-marital births and the number of divorces is also comparatively low. The proportion of households with children under 25 years of age who are not married or have one parent living alone, is accordingly low.

Reproductive Medicine

Swiss law in the field of reproductive medicine is very restrictive and prohibits procedures which lead to a split in maternity (such as oocyte and embryo donation as well as surrogate motherhood). Agreements for example between surrogate mother and intended parents are void. There is no possibility of challenging the maternity of the woman who gave birth to the child to be able to establish a legal relationship to the germ cell donor.

The Federal Supreme Court confirmed in such cases the refusal to register the children in the register of civil status of the germ cell donor and referred the intended parents to the adoption procedure. That the refusal of the recognition of the child's circumstances may lead to parentless children, the Federal Court accepted. With the revision of the adoption law as of 1 January 2018, a first step towards the recognition of same-sex parenthood has been made. The stepchild adoption by the same-sex partner was made possible. However, same-sex couples and cohabiting partners may still not adopt together "foreign" children.

Nevertheless, the possibility of receiving abroad reproductive medical treatment prohibited in Switzerland makes the traditional rules of descent under Swiss law no longer enforceable. The Federal Supreme Court pointed out in several recent cases the need to revise the law of descent (BGE 141 III 328 f.). Single persons and same-sex couples have currently no access to reproductive medicine. This ban is under review by the parliament in the context of the "Marriage for All" initiative.

Swiss Prevailing Principles

In Switzerland, the prevailing principle is that the woman giving birth is the mother of the child. The child relationship with the father arises by law by virtue of marriage to the mother. The paternity of the husband is presumed if the child has been conceived by artificial insemination. It is irrelevant whether the sperm of the spouse or that of another man has been used.

If the mother is not married or the presumption of paternity of the husband was successfully challenged, paternity is established by means of recognition or legal action. This means that Swiss law differs between the paternity of the husband and the paternity of the person not married to the mother. A child relationship can also be established through adoption if the conditions are met.

Since the revision of the adoption law in 2018, stepchild adoption is possible after three years of de facto cohabitation, ie, one cohabiting partner can adopt the (natural or adopted) child of the other partner. Once a legal child relationship has been established, the child (also children born out of wedlock and adopted children) is treated as a child of such legal parents (even if not biological parents) and are entitled towards such parents' estate as an ordinary heir.

9.2 Same-Sex Marriage

Same-sex marriages are not permitted under current Swiss law. Same-sex couples can only be registered at the Civil Registry Office pursuant to the Partnership Act. However, the Federal Council supports the bill which the Legal Commission of the National Council has drawn up on the basis of the parliamentary initiative "Marriage for All". Disputed is still the question whether same-sex couples shall have access to reproductive medicine. The respective legal questions are currently being examined by an interdisciplinary group of experts which shall formulate recommendations until summer 2021.

10. Charitable Planning

10.1 Charitable Giving

Swiss charitable entities (eg, foundations, associations) are very well-regarded institutions internationally. While their independence grants them sustainability, their possible supervision by the authorities can provide for a much sought-after level of security to potential donors.

From a tax angle, Swiss charities most importantly qualify for tax exemption. As for Swiss resident supporters, both individuals and companies, gifts to a Swiss charitable entity are tax deductible (generally up to 20% of their taxable income). Gifts or bequests to charities located in other cantons or other countries, however, require some verifications beforehand, as gift and inheritance tax exemption can depend on reciprocity rules. Failing that, adverse consequences may arise, as gift and inheritance tax rates may reach 50% or more in some cantons.

10.2 Common Charitable Structures

The Swiss charitable foundation is certainly the preferred choice when it comes to incorporating a Swiss charity.

In essence, the founder dedicates assets for a specific purpose, usually by deed, and designates a circle of beneficiaries. A foundation board manages the foundation and decides on the foundation's distributions, but cannot change the nature or purpose of the foundation. Swiss law does not allow founders or their heirs to claim back any of the amounts contributed to charitable foundations.

The foundation is under the supervision of the cantonal authorities or, when it has an international scope, of the Federal Supervisory Authority on Foundations. Although this may seem as a burden, it undoubtedly shows a very positive sign to potential donors and provides some precious comfort to founders.

If it exclusively and actually pursues goals of public interest and if its assets are irrevocably affected to the pursuit of such goals, the foundation should be eligible for tax exemption.

Walder Wyss Ltd is one of the leading and largest Swiss law firms, with more than 250 lawyers in offices in Zurich, Geneva, Basel, Berne, Lausanne and Lugano. It offers a full range of legal services to Swiss and international clients. Its practice teams handle private client matters, business transactions, banking and finance matters, taxes, arbitration and litigation, as well as IP/IT and competition matters. The private client team consists of seven partners and 14 qualified lawyers, predominantly located in Zurich and Geneva. The firm's wide-ranging expertise and experience in cross-border matters allow its lawyers to assist private clients in complex cases involving different jurisdictions. Walder Wyss advises private clients on their estate planning, including issues of succession and family law, tax and corporate law, and wealthy individuals on their relocation or the purchase of Swiss real property. The firm also advises trustees and other fiduciaries. Members of the private client team represent private clients, executors and trustees in succession, family and trusts disputes.

Authors

Kinga M Weiss is a partner and co-chair of the firm's private client team. She devotes her time to domestic and foreign private clients relating matters (also contentious) on inheritance law, marital property law, trusts, endowment and relocation. Recognised as an expert on international law, she was invited to the Law Commission regarding the legislative amendment of the Swiss International Private Law Act on succession law. She is a member of the Swiss and International Bar Association, the Society of Trust and Estate Practitioners and the International Academy of Estate and Trust Law. Among others, she recently commented on the EU Succession and Property Regulations and published articles on digital estates and the legislative proposal for a Swiss business succession law.

Philippe Pulfer is a partner of Walder Wyss and heads the firm's Geneva private client practice. He is widely recognised as one of Switzerland's leading private client lawyers, both domestically and abroad, and is a frequent speaker at international conferences. Philippe specialises in wealth structuring and estate planning with an international focus and acts in complex, often multi-jurisdictional, succession and trust disputes. He advises charities and charity donors in all areas of philanthropy. Philippe is a committee member of STEP Geneva, a former STEP Worldwide Council member and a member of The International Academy of Estate and Trust Law.

Fouad Sayegh is a partner of the tax team. His expertise covers most aspects of domestic and international taxation, and he particularly advises on matters relating to high net worth families, trusts, M&A transactions, double tax treaty applications, tax litigation, and criminal tax proceedings. His expertise is recognised by rankings publications. Fouad has a broad international exposure, including work experience in Geneva, New York and Hong Kong, and also served as a judge (Administrative Tribunal of First Instance of Geneva, tax section).

Robert Desax is a partner in the tax team. He works in the fields of national and international taxation. He regularly represents clients in controversial tax matters and assists private clients regarding the tax aspects of estate and wealth planning. He advises on cross-border implications of international taxation, especially on the application of double tax treaties, on issues in connection with the refund of Swiss withholding taxes in international structures, on the Swiss tax treatment of trusts as well as on the redomiciliation of individuals and businesses to Switzerland.

Walder Wyss Ltd

Seefeldstrasse 123
P.O. Box
8034 Zurich
Switzerland

Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
Email: Kinga.weiss@walderwyss.com
Web: www.walderwyss.com

walderwyss

Trends and Developments

Contributed by:
Kinga M Weiss, Robert Desax and Andrea Tina Weber
Walder Wyss Ltd ***see p.22***

Current Trends

Family businesses and family offices

With its modern but at the same time solid legal framework, Switzerland is well known as one of the world's prime hubs for wealth management services to Ultra High Net Worth Individuals (UHNWIs). The services provided in Switzerland have a long tradition and proven to be reliable, especially during challenging times. COVID-19 and the current international developments have led to an increased level of uncertainty in society, the full impact of which will probably only become apparent in the coming years. These developments have had a direct impact on everyone and led to reflection on both values and behaviour and the allocation of financial resources. All this has reinforced the already existing trend towards a more long-term and secure structuring of family wealth and an increased sense of social and moral responsibility with respect to potential investments.

Family businesses

In Switzerland, 75% of the small and medium-sized enterprises (SMEs) are family businesses. Every fifth SME (around 75,000 businesses in total) is facing issues of succession to the next generation within the next few years.

The scope of advisory services that are being sought today in connection with long-term safeguarding and intergenerational transfer of a family business has significantly expanded. Whereas in the past it often happened that lawyers were retained for specific matters such as drafting an inheritance contract or a shareholder agreement, the need for comprehensive advice in succession planning is now recognised and addressed at an earlier stage. This permits advisors to assist in implementing a comprehensive framework summarised under the term "Family Governance".

For family businesses, the family members are simultaneously their greatest resource and their greatest weakness. Due to the different interests of the family members, family businesses are exposed to a constant field of tension. Furthermore, the growing complexity of the globalised economy, technological developments and innovations as well as the increasing individualisation of the younger generation accentuate such aspects and call for mechanisms that facilitate the handling of corporate cultural aspects, communication and decision-making. Family Governance involves measures that strengthen the owner family's sense of belonging and their identification with the family businesses.

All these aspects thus should be co-ordinated with the legal framework of the family business, in particular those aspects linked to corporate law and estate planning measures. From a corporate law perspective, a well thought through shareholder agreement that provides both a clear structure and decision-making processes on different levels preventing deadlocks, is crucial.

Company succession

Another demanding but essential aspect for the long-term prosperity of a family business is the planning of the company succession. To find the best succession arrangement, it is important to take into account both the relevant legal provisions such as martial property law regimes, and applicable inheritance and corporate laws as well as family politics, business related and emotional aspects.

Legal provisions may obstruct the design of a succession plan suitable to all members of a family (eg, rights to a forced heirship quota, compensation claims, and similar provision). Typically, different succession scenarios give rise to various intra-family agreements (including shareholder agreements, gift deeds, purchase agreements or inheritance agreements) both from a corporate law and inheritance law perspective to avoid future conflicts.

The structure and design of family governance is to be tailormade in line with the needs of the family business. Each entrepreneurial family should initially determine its requirements, possibly with assistance of professional advisors such as coaches and lawyers be it in workshops, through coaching sessions or other methods. In Switzerland, the need for advice in this respect has been recognised and there is a wide range of advisory services being offered on the market. Interdisciplinary cooperation has been established and is in particularly encouraged by the major law firms.

Family philanthropy and impact investing

In Switzerland many UHNWIs and family business owners are about to transfer their wealth to the next generation. With this shift of wealth, the focus on the use and structuring of family

wealth is changing, indicating a trend towards sustainable investments and expansion of charitable use of funds.

Switzerland has a long tradition and over the last decades has even developed into an international hub for charitable foundations. According to the Swiss Foundation Report 2019, Switzerland had 13,293 charitable foundations, almost 70% of which were founded within the last 30 years. The majority of the foundations in Switzerland is charitable foundations.

However, family as well as clerical foundations exist as well. The scope of application of family foundations though is limited under current law. The assets of a family foundation may be used to cover the costs of education, equipment or support of family members. However, regular distributions of alimony payments are not permitted.

Legislative amendment to the law of foundations

The Swiss foundation market is experiencing constant and solid growth. The generational shift in wealth as well as the forthcoming amendments in the law on foundations are leading to an even more pronounced trend in this regard. In line with these developments and to strengthen this position in the future, the parliament proposed amendments to the law on foundations that intend to further liberalise the law and thus creating incentives for UHNWIs to finance charitable expenditure.

The proposed amendments include an extension of statistical surveys with respect to the activities of foundations, clearer and stronger regulation of the supervisory appeals on the activities of foundations, the extension of the reservation of change in the foundation deed to organisational changes, facilitation for making minor changes to the foundation deed, a limitation of liability for voluntary board members, a tax privilege for heirs by granting one-time increased donations deductions for inherited benefits being donated to charitable organisation and no refusal or withdrawal of tax exemption if non-profit organisations adequately compensate their strategic management bodies.

Requirement to register family foundations in the commercial registry

Based on a recent amendment of Article 52 of the Swiss Civil Code, as of 1 January 2016, all foundations (ie, family foundations and clerical foundations) must be registered with the commercial registry. The deadline for existing family foundations to file for registration ends on 31 December 2020. Family foundations that miss this deadline shall continue to exist as legal entities. However, the board to the respective foundation is subject to fines and potentially liability risks.

Potential introduction of a Swiss trust law

Switzerland which recognises foreign trusts but for historical reasons has never had a trust law on its own, is currently assessing the introduction of a Swiss trust law with the intention to further promote the Swiss financial and private wealth market. A group of experts appointed by Federal Office of Justice has been working on a corresponding proposal since 2018.

However, the discussions of the expert commission have shown that the implementation of a Swiss trust law proves to be more complex than initially expected. In many respects, the trust as a common-law vehicle is difficult to bring in line with the Swiss legal system. Furthermore, the acceptance of the idea of a Swiss trust law varies widely by region.

Whereas the mostly French speaking part of Switzerland strongly supports the introduction of a Swiss trust law, the German speaking parts of Switzerland rather tend to favour the expansion of the law on foundations, in particular the liberalisation of the family foundation to extend the scope of structuring the estate and wealth planning.

Further Legal Developments in the Area of Wealth Management

Legislative amendment to the law on succession

Swiss inheritance law, most of which has been in force for more than 100 years, does in many respects no longer meet the requirements of today's society. The Federal Council therefore initiated major amendments to the Swiss Civil Code regarding provisions on inheritance law. The proposed adoptions are now subject to parliamentary deliberations. It is not yet determined when the revised inheritance law will come into force. The proposed amendment to the law mainly affects the following topics in particular:

Reduction of the forced heirship quota

Contrary to many other countries, Swiss law requires that forced heirship quotas be considered when drawing up testamentary dispositions. Such quotas exist for parents, descendants and the surviving spouse or registered partner and are expressed as quotas of their actual statutory share that would apply if a testator did not dispose of his or her estate (see Switzerland L&P **2.3 Forced Heirship Laws**).

Under current law, the forced heirship quota for descendants amounts to 75% and the statutory heirship quota of each parent as well as for the surviving spouse or registered partner amounts to 50% of the respective statutory portion of the inheritance.

According to the proposed new provisions this quota shall be eliminated with respect to parents and shall be reduced to 50%

of the statutory portion of the inheritance for descendants. As a result, the testator has a larger quota available which she or he can freely dispose of.

Loss of forced heirship quota in divorce proceedings

Under current law, in the event of divorce, the right to a forced heirship quota only expires with a legally binding divorce decree. In the past, this has frequently resulted in divorce proceedings being delayed by all possible means so that the often financially weaker spouse did not lose his or her entitlement to the forced heirship quota.

The proposed provisions now state that the surviving spouse already loses their forced heirship quota once the divorce proceedings are pending and they are either filed on mutual request or the spouses have been separated for at least two years. The same shall apply for registered partners.

Marital property contributions upon death

The legislative proposal furthermore contains a number of clarifications on legal controversial matters. The most significant clarification and a substantial amendment at the same time is the handling of contributions between the spouses under martial property law provisions and their impact on the calculation of the heirship quota.

In Switzerland, most married couples are subject to the ordinary matrimonial property regime of participation in acquired property. In case of one spouse's death, the statutory provisions stipulate that a distribution of the matrimonial property must be carried out before the estate can be wound up, whereas the assets of both spouses acquired during the marriage are divided equally (see Switzerland L&P **2.4 Marital Property**). It is possible to agree by means of a martial agreement (pre- or postnuptial agreement) that the surviving spouse shall be entitled to the entire acquired property during the marriage.

In this case the estate is reduced accordingly in favour of the surviving spouse. The proposed amendments of the Swiss Civil Code now clarify that such contributions to the surviving spouse are to be treated as contributions inter vivos and shall therefore be considered when calculating the forced heirship quota of the descendants.

This proposed provision has led to some criticism by practitioners and scholars because it contradicts the principles pursued, namely that the testator's disposable quota should be increased and enable the testator to dispose of a higher free quota.

Legislative amendment of the law to facilitate business successions

In April 2019 the Federal Council presented a further draft revision of the Swiss Civil Code regarding the provisions on inheritance law to facilitate the transfer of (family) businesses to the next generation. It mainly contains four measures.

First, it creates a right for the heirs to claim an entire business being part of an estate if the testator has not made any disposition in this respect. Upon request, the courts shall therefore be able to allocate the entire business to one heir and therefore prevent the fragmentation or winding up of companies.

Second, the draft intends to establish, for the benefit of the company's successor, the possibility of agreeing on a deferment of payments with the other heirs, in particular to avoid liquidity shortages.

Third, the draft contains specific rules for the valuation of the business, taking into account the entrepreneurial risk assumed by the successor to the company. Under current law, the date of death is decisive for determining the value of a company even if the business was transferred during lifetime of the deceased. This implies that the successor of a family business bears the risk of a change in value between the time of the transfer of the family business and the time of demise of the testator. The proposed amendments aim at valuation of shares and associated membership rights to be recognised upon their transfer. Furthermore, with respect to business assets that are not essential to the company's going concern and that may be subject to an effortless carve out, the other heirs shall not face any discrimination. Therefore, for the valuation of these assets, the time of the passing of the testator will continue to be decisive.

Forth, a stronger protection of heirs entitled to a forced heirship quota shall be established by excluding the option of their statutory portion being allocated to them in form of a minority share in a company in case another heir obtains control over that company.

The bill was largely appreciated in the consultation procedure. Taking into account these results, the Federal Council will present a revised draft early 2021 based on which the parliamentary deliberations will then start. Entry into force is likely to be expected not earlier than three to five years from now.

Legislative amendment of the Swiss Private International Law Act on the law of succession

In the context of international inheritance law matters, practitioners frequently encounter conflicts of jurisdiction with

other states and contradictory decisions. The European Union has therefore established common rules in the EU Succession Regulation, No 650/2012 by regulating questions of jurisdiction, the law applicable and the recognition of foreign legal acts in a cross-border succession.

As a non-EU-state, Switzerland intends to bring its International Private Law Act in line with the EU Succession Regulation. The amendments furthermore take account of various needs for modification and clarification that have arisen in practice and doctrine since the provisions came into force 30 years ago and moderately extends the testator's freedom to structure their estate. Among the most important changes is the possibility for testators of foreign nationality to subordinate their estates to the authorities of their home country. By this, conflicts over jurisdiction may be avoided. Furthermore, the proposed amendments provide all nationals (including Swiss dual citizens and multiple nationals) the right to subject the estate to the law of one of their nationalities.

Today only foreigners (not being Swiss nationals) may make such a choice of law. Hence, the estate of a Swiss or a dual citizen is always governed by Swiss substantive law. The amendments proposed by the Federal Council were assessed as largely positive. The final version must now be approved by parliament. It is not yet known when the amendments to the law will enter into force.

Marriage for same-sex couples

Since 2007 same-sex couples have been entitled to enter into a registered partnership. However, in many respects, the legal implications of a registered partnership cannot be compared to those of a marriage. In line with the claim for equal treatment of same-sex couples compared to heterosexual couples, on 10 June 2020 the National Council approved a parliamentary initiative to enable same-sex couples to be entitled to marriage.

Furthermore, the National Council approved that lesbian couples shall be allowed to make use of sperm donation for reproductive purposes. Switzerland having restrictive reproductive medicine laws, especially in case it leads to a split of parenthood, until now has prohibited measures such as oocyte and sperm donation. Same-sex couples therefore often take advantage of such services abroad. Since 2018 stepchild adoption is possible, however same-sex couples and cohabiting partners may not adopt together "foreign" children.

The amendments to the law adopted by the National Council now are subject to approval by the Council of States where opposition is likely to be stronger. Whether or not there will be a public vote on this subject and (if at all) when the amendments will come into force is not known yet.

Regulation of the activity of financial institutions

On 1 January 2020 the adopted Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) that comprehensively regulate the activity of financial institutions entered into force. In addition to numerous other newly established rules and regulations it is particularly of importance that Swiss trustees – like asset managers – will now be subject to supervision and must obtain an authorisation.

According to Article 74, paragraph 2 FinIA current Swiss trustees must report to the Financial Market Supervisory Authority and apply for authorisation within three years of FinIA coming into force. Until an approval on the authorisation is made, they may continue their activities provided they are affiliated to a self-regulatory organisation (SRO) pursuant to Article 24 of the Anti-Money Laundering Act (AMLA) and supervised regarding compliance with the corresponding requirements under AMLA.

Whether protectors are subject to the provisions of the AMALA or not depends on the specific powers conferred on them. If a protector is only entitled to replace or supervise the trustee and has the sole right of veto regarding the investment of trust assets or distributions to beneficiaries, the protector does not qualify as a financial intermediary and therefore is not subject to the provisions of the FinIA.

Proposed amendments of the Anti Money Laundering Law Act to extend its application to advisory services

Based on the results of the FATF (Financial Action Task Force) country review, the Federal Council presented a draft amendment to the Anti Money Laundering Act (AMLA). Among other aspects, the proposed amendments provided for an extension of the scope of application with regard to advisory services provided by lawyers, notaries and fiduciaries. Going forward such advisors may be required to maintain proper due diligence on clients once they provide pure advisory services in a very general sense with regard to the establishment or the administration of a trust and/or an underlying company of a trust even if no actual financial transaction related to such structure takes place.

Given that such advice may be purely theoretical, advisors may face the complex situation to establish beneficial ownership of a trust even if such trust may never come into existence. It does not come as a surprise that such regulations are heavily opposed both by practitioners in the public consultation process and thereafter in the parliamentary deliberations of the National Council. The National Council therefore declared that it would refrain from further consultations. Whether the proposed draft still has a chance depends on the vote of the Council of States on whether to enter the deliberations or not.

Contributed by: *Kinga M Weiss, Robert Desax and Andrea Tina Weber,* ***Walder Wyss Ltd***

Trends and Developments in the Tax Law

As regards tax matters, the ongoing trend towards transparency and automatic exchange of information (AEOI) continues and appears now to be of a rather permanent nature. Following international pressure, the Federal Council proposed extending the automatic exchange of information to foundations and associations. However, this proposal was dropped after having faced broad objection in the consultation process.

The number of countries with which Switzerland exchanges financial data is constantly increasing. Among others the Bahamas, Israel, Panama and the United Arab Emirates are new countries that will start to share financial data with Switzerland as from the year 2019.

On a more general level, Swiss tax authorities have started to take a harder stance against cross-border structures that result in (potential) tax benefits. Especially where Swiss resident taxpayers use foreign passive structures, then increased scrutiny from the authorities and/or tax audits must be expected. In such cases, Swiss corporate tax rules may have to be taken into account: a foreign passive corporation could become a Swiss resident taxpayer subject to corporate taxes, if its place of effective management is situated in Switzerland.

In recent years, one could observe the clear tendency of Swiss authorities and courts to presume a Swiss corporate tax residence in the case of Swiss resident individuals controlling foreign passive corporations. The consequences can be bitter: such companies could not only become liable to Swiss corporate income and capital taxes, but their (effective and even deemed) dividends could also become subject to withholding tax at 35%. In the case of persons benefiting from lump sum taxation, such dividends could qualify as Swiss-sourced and therefore be subject to ordinary, full income taxation (ie, no protection under the lump-sum tax regime). It goes without saying that in such situations there would also be an obvious risk of international double taxation on the level of the company.

Furthermore, for example in the case of tax adjustments (eg, “hidden profit distributions”) or of non-observation of procedural rules, then the tax authorities have started to become prone to open criminal investigations against taxpayers which often result in fines and penalties being imposed. As a consequence, and more than ever, the emphasis is on prudent and sustainable tax planning.

Walder Wyss Ltd is one of the leading and largest Swiss law firms, with more than 250 lawyers in offices in Zurich, Geneva, Basel, Berne, Lausanne and Lugano. It offers a full range of legal services to Swiss and international clients. Its practice teams handle private client matters, business transactions, banking and finance matters, taxes, arbitration and litigation, as well as IP/IT and competition matters. The private client team consists of seven partners and 14 qualified lawyers, predominantly located in Zurich and Geneva. The firm's wide-ranging expertise and experience in cross-border matters allow its lawyers to assist private clients in complex cases involving different jurisdictions. Walder Wyss advises private clients on their estate planning, including issues of succession and family law, tax and corporate law, and wealthy individuals on their relocation or the purchase of Swiss real property. The firm also advises trustees and other fiduciaries. Members of the private client team represent private clients, executors and trustees in succession, family and trusts disputes.

Authors

Kinga M Weiss is a partner and co-chair of the firm's private client team. She devotes her time to domestic and foreign private clients relating matters (also contentious) on inheritance law, marital property law, trusts, endowment and relocation. Recognised as an expert on international law, she was invited to the Law Commission regarding the legislative amendment of the Swiss International Private Law Act on succession law. She is a member of the Swiss and International Bar Association, the Society of Trust and Estate Practitioners and the International Academy of Estate and Trust Law. Among others, she recently commented on the EU Succession and Property Regulations and published articles on digital estates and the legislative proposal for a Swiss business succession law.

Robert Desax is a partner in the tax team. He works in the fields of national and international taxation. He regularly represents clients in controversial tax matters and assists private clients regarding the tax aspects of estate and wealth planning. He advises on cross-border implications of international taxation, especially on the application of double tax treaties, on issues in connection with the refund of Swiss withholding taxes in international structures, on the Swiss tax treatment of trusts as well as on the redomiciliation of individuals and businesses to Switzerland.

Andrea Tina Weber is a member of the litigation and arbitration team. She specialises in private client-related dispute resolution, in particular in domestic and international estate and trust litigation. She advises and represents parties in international arbitrations, before state courts and authorities as well as in enforcement and legal assistance matters.

Walder Wyss Ltd

Seefeldstrasse 123
P.O. Box
8034 Zurich
Switzerland

Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
Email: Kinga.weiss@walderwyss.com
Web: www.walderwyss.com

walderwyss