Audrey Leuba
Jean-Blaise Eckert
Editors

Estate Planning

The Swiss Perspective

Helbing Lichtenhahn

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Preface

This book is the result of a meeting between the worlds of academia and estate planning. We felt there was a common need in both worlds to publish a work that every reader or student could use as a "toolbox". This is a perilous exercise, as it involves constantly balancing the needs of a work that is intended to be scientific, yet easily accessible and usable in practice. In other words, as scientific as possible, but as practical as necessary!

We would like to take this opportunity to thank all the contributors for their invaluable contributions to the success of this book. Each author has spent an enormous amount of time writing his or her contribution. The contents of this book speak for themselves.

We see this book as a work in progress. Not only Swiss inheritance law, but the entire regulatory and legal landscape in the rest of the world is in a constant state of flux. Subsequent editions will take this into account.

We would like to thank Mrs Julie Udry for all the time and efforts she spent coordinating the various aspects of this book, Mr. Axel Gubler for all his precious help and Mr. Miguel Buencamino for his always careful work of translation in and review of the English language.

Our warmest thanks also go to the Helbing Lichtenhahn publishing house, which was kind enough to accompany us on this adventure, and in particular to Mr. Jérôme Voumard and Mrs. Lara Tang for their endless patience and understanding, as well as their professional and crucial contribution.

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Summary

§ 1 Instruments of Inheritance Law

Audrey Leuba/Tobias Somary*

I. Introduction

A. Traditional Objectives in Estate Planning

Swiss inheritance law is based on the concept of family and the preservation of wealth as well as freedom of disposition reflecting liberal values. The statutory rules of Swiss inheritance law were promulgated in the early twentieth century. Apart from few and minor amendments, the salient rules of statutory inheritance law have not changed much over the past century. This stability of the law also had and has a stabilizing effect, as an easily implementable and widely accepted legal order has a conflict-minimizing force. 1

The rules of inheritance law were created at a time in which the prevailing family model was that of a traditional marriage and children raised in wedlock. Thus, securing the financial needs of the surviving dependents after the death of a family member had a high priority. The default inheritance rules aim at distributing the assets to the bereaved family members in a needs-oriented and equitable manner, resulting in a dynastic succession of property from one generation to the next **(family succession)**. If a person dies intestate, all the financial interests and liabilities automatically pass to the surviving family members, first to the direct descendants and the surviving spouse, in the absence of such to the more distant relatives, whereby the **principle of equality** applies among the heirs (in particular among relatives of the same degree; cf. *infra* N 39). 2

However, in accordance with the **guarantee of ownership** embedded in the Swiss Federal Constitution, Swiss inheritance law also embraces the concept that a testator may have estate-planning objectives deviating from the principle of family succession and/or the principle of equality among the heirs. The testator may wish to dedicate wealth to charity, to favor third-party beneficiaries (legatees, donees) or to make disproportionate allocations between family members. Accordingly, under Swiss inheritance law, testators may avail themselves of a variety of instruments and types of dispositions allowing the **regulation of the succession** of wealth through dispositions effective during the testator's lifetime (*inter vivos,* cf. *infra* N 107 ff.) or with effect upon death (*mortis causa*, cf. *infra* N 51 ff. and N 68 ff.). 3

The individual estate planning objectives may deviate significantly from the statutory default principles of family succession and equality among the heirs. In the sense of a compromise solution, the law thus restricts the **principle of testamentary freedom** (art. 470 CC) in cases in which a deceased leaves behind close family members. Accordingly, if there are no immediate relatives and no spouse, the principle of testamentary freedom applies without restriction. However, if a deceased person leaves behind spouse, issue or parents, the principle of testamentary freedom is limited by relatively 4 far-reaching **statutory entitlements** (also called the forced heirship quotas) in the form of certain quotas of the estate (cf. *infra* N 68 ff.). The testator's **testamentary freedom is thus limited to the freely disposable part** of the respective property respectively of the estate. The statutory entitlement of a descendant amounts to half of the statutory succession rights, the latter being defined as the share of the estate provided by the default provisions of the law in the absence of a last will or a contract of succession. The statutory quota of a descendant depends on whether the deceased was married and on the number of descendants. The statutory entitlement of the surviving spouse amounts to one half of the statutory quota, which depends on whether the deceased left surviving children or parents. Until the end of 2022, the parents of the deceased were entitled to a statutory entitlement of one half of the statutory share, which existed only if there were no descendants (the statutory entitlement of issue and parents were, however, subject to the revision of the Swiss succession law, cf. *infra* N 25).

5 The interplay between individualism (freedom of disposition) and schematism (statutory entitlement) is rooted in Roman law and has evolved ever since. The balance between the two is also susceptible to change over time. The past decades brought a wide range of socio-economic developments, an increased importance of self-determination and self-responsibility, a rise in general health and life expectancy, a better matrimonial property law, new family models with changing roles, a vast increase of possibilities for part-time employment, alternative job models and continuous education, the development of mandatory and voluntary old age and pension schemes, a reliable social security as well as a substantially increased financial and personal mobility, all of which might contribute to the call for a reduction of high statutory entitlements as intra-family succession slightly lost its importance.[1] As of 2023, the statutory entitlement of the descendants was substantially reduced and the parental statutory entitlement abolished under the provisions of the revised law (cf. *infra* N 25).

6 Successful estate planning is not managed by scientifically exact principles and certainly not by off-the-shelf standard agreements and model formulas. Rather, reliable planning requires a careful analysis of the specific circumstances, needs and possibilities and a circumspect drafting of the relevant instruments. In order to best meet the individual planning objectives, the appropriate estate planning instruments and types of disposition must be selected depending on the particular case. There are innumerable individual testamentary wishes and **possible estate planning objectives**, which not only differ from testator to testator, but can, and indeed should, also change and develop over the course of a testator's life.

7 A married couple with common young children, for example, is likely to view their estate planning as mere contingency planning aiming at providing maximal **financial security for the surviving spouse** following the untimely demise of one of the spouses. In such constellations, the spouses often have the additional wish to keep the wealth of minor children and young adults at a reasonably low level for educational reasons, as spendthrift protection and to keep the children and adult protection authority at bay.

1 Cf. Breitschmid, 10 ff.

Maximizing – or even better: optimizing[2] – each other's share in the estate of the pre-deceasing spouse usually entails that the other heirs, in particular the mutual children, shall receive as little as possible upon the death of the first parent and the main part of their patrimony upon the death of the second parent. For families with a traditional structure, *i.e.* married spouses (of the same or opposite sex) with mutual children, the law provides for several options to easily facilitate said objectives. In these constellations, matrimonial property law assumes an important supportive estate planning function as the marital property rules determine which of the conjugal assets form part of the estate of a deceased spouse and which assets pass to the surviving spouse. The appropriate matrimonial property instruments can, therefore, be used to minimize or to maximize the estate of the predeceasing spouse, depending on the planning goals (cf. *infra* N 68). Where a couple plans to maximize each other's economic benefit in case of the demise of one of the spouses, they will typically conclude a combined matrimonial property and inheritance agreement electing full allocation of acquired property (art. 216 CC) and maximum apportionment of the remaining estate (art. 470 CC) to the surviving spouse, paired with a subjective right of choice (art. 608 CC) in favor of the latter. The law offers additional instruments aimed at providing financial security for the surviving spouse. These instruments include a statutory preferred allocation right of the surviving spouse regarding the marital home and household effects (cf. art. 612*a* CC) as well as the right of usufruct of the surviving spouse pursuant to art. 473 CC, the latter even permits a quite far-reaching encroachment of the descendant's statutory entitlement (cf. *infra* N 74).

When dealing with **patchwork or recombination families**, the legal situation is very different and technically more challenging, mainly because the children, who are not the common issue of the spouses, are not designated statutory beneficiaries in the estate of their stepparent and overriding testamentary dispositions are likely to be limited by the statutory entitlements of other heirs and unfavorable inheritance tax laws (stepchildren tend to be treated much less favorably than biological descendants in the inheritance tax laws of many cantons). The set of estate planning instruments applied in patchwork situations is, therefore, rather different as compared to those applied in traditional family settings. In such cases, the diligent estate planner is likely to work with a marital agreement (possibly applying the rules of community of property with asymmetrical splitting of assets, art. 241 CC, or separation of assets, art. 247 CC) combined with an inheritance agreement (possibly applying instruments such as the designation of remaindermen (also referred to as reversionary inheritance), art. 488 CC, cf. *infra* N 51 ff.). Extra diligence is required here in order to not infringe the issue's statutory entitlements and thereby render the estate planning vulnerable to appeal. If, within a patchwork family, the testator wishes to provide financial benefits to the stepchildren or to other unrelated household members, this may be done individually within the freely disposable part of the property/estate. If this part is not enough to meet the needs of the beneficiaries, the restrictions imposed by the statutory entitlement can be overcome by means of concluding a contract of succession or a renunciation contract with the children and the spouse (cf. *infra* N 62 f., 84 ff. and 8

2 Aebi-Müller provides an excellent overview in her book over the beneficiary options which can be tailored by classical instruments of matrimonial property and inheritance law, but also by utilizing the law of obligations, insurance law and social security law (Aebi-Müller).

165 ff.). In some cases, unfavorable inheritance tax consequences can be addressed by means of appointing provisional heirs and remaindermen (cf. *infra* N 56 f.). The testator may also financially support the non-related members of a recombination family by taking out a life insurance in their favor or by appointing them as beneficiaries regarding the pension funds (cf. *infra* § 3 N 18 ff.).

9 Where a couple married or re-married in an advanced phase of their lives, the estate planning objectives will typically be very different to those described above. In these cases, the spouses often wish to pass the wealth to their descendants upon their demise and limit the benefits of the surviving spouse. If the **descendants are to be prioritized over the surviving spouse**, typical planning instruments are marital and inheritance agreements. Here too, the choice of the applicable marital property regime (participation in acquired property or separation of property) and an inheritance agreement can be used to shape the future estate and to tailor the inheritance shares of the future heirs and beneficiaries. Furthermore, the testamentary allocation of usufruct to the surviving spouse (art 473 CC) may be attractive, in that the issue immediately becomes the owners of the estate, partly encumbered with the usufruct in favor of the spouse (cf. *infra* N 65 and 73 ff.).

The statutory inheritance rules of family succession and equal treatment may also not be suitable in cases where a testator wishes to protect the family wealth or specific assets thereof from certain heirs or relatives. Possible motives might lie in the **spendthrift** behavior of a potential heir, **incapacity** or incompetence in the management of large fortunes, a severely **impaired or estranged personal relationship** between the testator and an heir or the goal to protect the estate from further **fragmentation** within the extended family.

10 The unilateral infringement of an heir's statutory entitlement is only possible in a few exceptional cases and under very narrowly defined conditions (art. 477 CC; cf. *infra* N 97 ff.).

11 In all other cases, the testator may limit the inheritance rights of successors protected with statutory entitlement only by restricting their general rights within the community of heirs or with regard to the estate division, while still complying with the quota of their statutory entitlement. The testator may exclude heirs from formally participating in the estate as heirs by **satisfying their statutory entitlement already *inter vivos*** or, alternatively, by appointing them as mere **legatees** instead of heirs to the estate by last will. This concept of the "virtual heir"[3] bases on the idea that heirs protected by statutory entitlements only have the right to claim formal instatement as heirs if they have not received the financial value of the protected quota (cf. art. 522 CC). Once the heirs have been financially satisfied through lifetime *inter vivos* dispositions and/or testamentary legacies, they have no more claim to be considered as heirs. In the estate planning practice, certain statutory heirs may be designated as virtual heirs (and thus legally as mere legatees) where their participation in the community of heirs is undesirable, but their financial statutory claims are, nevertheless, to be met without reservation. This may apply to persons prone to querulant or unruly behavior or heirs who are simply non-compatible with the community of heirs. The instrument is sometimes

3 Strazzer, 147 ff.; Strazzer/Zeiter, 142 ff.; Lötscher, 174 ff.; Jakob/Dardel, 462 ff.; Steinauer, Droit des successions, N 787.

also used when maximizing the share of the surviving spouse. The surviving spouse can be appointed as sole heir and the other beneficiaries (*e.g.* minor children) can be designated as legatees in which case the inheritance certificate can be issued to the surviving spouse only. This can, in some cases, simplify the devolution of the estate.

Furthermore, if there are certain assets in the estate which are to devolve to a particular heir or which a particular heir is not to receive under any circumstances, the testator may expressly allocate such estate assets to one or more preferred successors (**testamentary instruction regarding the division of the estate** according to art. 608 CC, cf. *infra* N 60). The testator may even grant one or more preferred heirs the general right to freely choose which assets and liabilities they wish to take from the estate in satisfaction of their inheritance claims, and if necessary, to compensate the others in cash or otherwise liquid assets. In case the asset in question is too valuable in relation to the total estate and thus mere compensation of the other heirs in order to satisfy their statutory entitlement is not an option, the estate planning may require the cooperation of all heirs by way of a **contract of succession** (cf. *infra N* 62 ff. and 166 ff.). 12

Regardless of the specific estate planning objectives, the overarching goal of the diligent estate planner will always be to provide for a smooth, conflict-free transition of the estate to the heirs/legatees by **minimizing potential sources of conflict**. Already during one's lifetime, it is thus advisable to document all substantial *inter vivos* dispositions and to expressly clarify their effect on the recipient's subsequent inheritance claim *vis-à-vis* the other heirs (cf. *infra* N 48 and 118). With regard to the *mortis causa* dispositions, it is furthermore essential to formulate the testator's last wishes as clearly as possible and in a way that is binding for all heirs. The less room for ambiguity and questions an estate planning provides, the more effectively it can be executed. 13

Where an estate is expected to be complex due to the nature of assets, international aspects or foreseeable tensions among heirs, the **appointment of a suitable executor** (cf. *infra* N 66 ff.) is advisable. Although Swiss inheritance law does not authorize the executor to divide the estate without the unanimous consent of all heirs, he or she at least takes over the administration of the estate until its division, without being bound by the approval of the heirs. An ideal executor should have the talent to be a facilitator, moderator, and mediator. 14

Finally, **international aspects** require, and indeed deserve, special attention. Many estate planning scenarios have relevant cross-border elements, the potential of which is often overlooked in the planning practice. Home bias and familiarity of the estate planner with local laws are likely to limit the attention to Swiss law only, even in matters which clearly call for a cross-border examination. Depending on the viewpoint, the international angle can be **a risk or a benefit**: it is a risk in cases where mandatory application of foreign law and/or competing foreign jurisdictions are ignored, exposing the future estate to potential jurisdictional conflicts, forum running and estate splitting. The internationality, however, is a benefit, where the testator can be guided to make use of a suitable choice of law, thereby subjecting the estate to the most favorable jurisdiction (typically: Swiss law or law of nationality) and ensuring unity of the estate. Swiss rules on international planning, both in the area of matrimonial property 15 and inheritance law,[4] are pleasantly adaptable and practical (the planned revision of the conflict of laws rules in inheritance matters[5] is expected to lead to even more flexibility and international adaptability). Moreover, with the recent promulgation of harmonized euro-international conflict of laws rules, namely the enactment of the EU Succession Regulation[6] and the EU Matrimonial Property Regulation,[7] the possibilities for an appropriate choice of law in Swiss-European cross-border settings have become greater. Under the realm of the aforementioned regulations, there has been a shift from the widespread principle of nationality to the law at the place of habitual residence with the new option of choice of law in favor of the law of nationality (art. 21 EU Succession Regulation and art. 21 EU Matrimonial Property Regulation). The concept – law at the center of living interests, optional choice of law in favor of home country – is comparable to that of the Swiss PILA, the details however differ. If a testator or the testator's spouse is a foreign national or has multiple nationalities, if either of the two have foreign residence or have recently moved to Switzerland, if the testator holds assets abroad, the applicable matrimonial property regime and the applicable inheritance law deserve closer examination. In many cases, a given cross-border setting opens the door for a wider range of planning options and necessitates active planning steps to reduce unnecessary risks and uncertainties. It is advisable, and in many cases indeed necessary, to guide the testator on how to avoid possible conflicts of competing laws and to harmonize the applicable laws. In doing so, unity and freedom of choice should be the guiding principles. Unity means that an estate shall be governed by *one* substantive law and *one* jurisdiction as far as possible (thus avoiding overlaps and competition). Freedom of choice means that the testator may, within the limits of the law, elect the most suitable substantive law and legislation to apply to the estate. The diligent estate planner, therefore, will assist the testator in evaluating the available planning jurisdictions (law of residence v. law of nationality). He/she will want to adopt a pendulum view[8] considering the options under domestic laws and the laws which could be elected in a given scenario.

4 Art. 51 ff. PILA and art. 86 ff. PILA whereby it is to be noted that any international treaties precede the dispositions of the PILA.

5 In order to prevent contradictory decisions in Switzerland and EU Succession Regulation states and to improve coordination of the jurisdictions, a revision of chapter 6 (international succession law) of the PILA is in process.

6 Regulation No 650/2012 of the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic interments in matters of succession and on the creation of a European Certificate of Succession (referred to as EU Succession Regulation); cf. Dutta *et al.*; note that pursuant to art. 20 EU Succession Regulation the Regulation the law designated as applicable by the Regulation shall be applied universally whether or not it is the law of a member state.

7 Regulation No 2016/1103 of the Council of the European Union of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (referred to as EU Matrimonial Property Regulation); cf. Bergquist *et al.*; note that pursuant to art. 20 EU Matrimonial Property Regulation should be replaced by the law designated as applicable by the Regulation shall be applied universally whether or not it is the law of a member state.

8 An excellent treaty on choice of laws and the importance of a pendulum view in the international context has been written by Lehmann, 665 ff.

§ 5 Business Transfers upon Death

Balz Hösly/Jean-Blaise Eckert

Bibliography

Credit Suisse, Unternehmensnachfolge in der Praxis, Nachfolgestudie 2022, September 2022 (cited: September 2022); Federal Council, Message of the 10 June 2022 amending the Civil Code on business transfer by succession, BBl 2022 1637 ff. (cited: Message business transfer); Henniger J., Unternehmensnachfolge im Erbrecht – Vorgesehene Gesetzesänderungen, Anwaltsrevue 25 (2022) 471 ff. (cited: Unternehmensnachfolge).

This article was drafted on the basis of parliamentary discussions as of 31 December 2023. In the meantime, the Swiss Parliament has definitively rejected the amendments proposed by the government. However, new proposals are expected in the medium term, taking into account the needs expressed by the business community and the criticisms made by Parliament. The comments below (cf. infra N 116 ff.) on the draft amendments to the Civil Code are therefore no longer directly relevant, but will nonetheless help the reader to understand the future legislative challenges in this area.

I. Introduction

There are almost 600'000 small and medium-sized enterprises (SMEs) in Switzerland. About 540'000 of these are micro-businesses with up to 9 employees, 50'000 are small businesses with 10 to 49 employees and some 9'000 are medium-sized businesses with 50 to 249 employees.[1] **1**

Around 20% of all SMEs are invariably confronted with business succession.[2] In the last five years, for example, more than 74'000 businesses with a total workforce of 406'000 full-time equivalents were affected by a transfer of ownership. This number is equivalent to around 10% of all employees in Switzerland.[3] **2**

In every succession plan, two issues are of particular importance: the transfer of the ownership, and the transfer of the management. There are generally three types of business successions:[4] **3**

– **Family Buy-Out (FBO):** Transfer of the business to a successor within the family. 41% of SME entrepreneurs wish to pass on their business to a member of the family. In fact, 18% of all business transfers through FBO are made as gifts – *i.e.* with-

1 The figures are based on the year 2019; Federal Statistical Office, Marktwirtschaftliche Unternehmen und Beschäftigte nach Grössenklassen im 2018 ‹https://www.bfs.admin.ch/bfs/de/home/statistiken/industrie-dienstleistungen/unternehmen-beschaeftigte/wirtschaftsstruktur-unternehmen/kmu.html› (30.04.2021).

2 Andric *et al.*, 11.

3 *Ibid.*

4 Andric *et al.*, 18; Hösly/Ferhat, N 8.

out consideration.[5] Generally these types of transfers have consequences with respect to inheritance matters.[6]

- **Management Buy-Out (MBO):** Takeover of the business by the existing (non-family) management. 23% of all business owners transfer their business by means of an MBO.[7] An MBO is often chosen when none of the heirs have the appropriate skills to run the business. Often, an MBO – similar to an FBO – is also facilitated by a "special price", *i.e.* a discount on the market value of the business, which, again, can have consequences with regard to the estate planning of the selling entrepreneur.[8]
- **Management Buy-In (MBI):** Takeover of the business by external persons as managers and owners. 17% of SME owners plan to transfer their business in the form of an MBI. Inheritance law and regulations are not of great relevance in these cases – if the business is sold at the relevant market price. However, there is an increasing number of businesses that are sold with a discount (or, in legal terms, as mixed donations), which can have consequences under inheritance law (and tax law).[9]

4 **Family businesses** are particularly exposed when it comes to a business succession. On one hand, the family ties and emotions play a more prominent role in family business configurations, and, on the other hand, these successions have an impact on the whole estate planning or on the division of the estate of a late entrepreneur who transferred his/her business upon death or even during his/her lifetime. In 2016, some 75% or 440'000 of all Swiss SMEs were family businesses. They employed about 1.6 million people – roughly 41% of all employees in Switzerland. However, 12 years before, in 2004, 88% of all Swiss SMEs were family businesses.[10] These figures show that the proportion of family businesses has declined significantly over the last years – most probably for various reasons. Moreover, estimations presume that annually 10–15'000 jobs are lost because of unsuccessful and failed business successions projects. There is at least a strong likelihood that some of the main reasons for these findings appear to be the **stumbling blocks or obstacles** that Switzerland's inheritance law imposes on the succession of family businesses.[11]

5 In a national economy, successful business succession processes have a high economic impact. A failed family business succession can not only be adverse for the business, its owner and its employees, but can also impact family members, other stakeholders and business partners (customers, suppliers, etc.). Generally, a failed business succession destroys economic value and jobs and creates a loss for the national economy. It is, therefore, in the interest of a national economy that the inheritance laws protect businesses during succession processes and preserve them from unnecessary failures, particularly because of inheritance disputes.[12]

5 Credit Suisse, September 2022, 25.
6 *Ibid.*
7 Credit Suisse, September 2022, 12.
8 *Ibid.*
9 *Ibid.*
10 Andric *et al.*, 14.
11 Cf. Hösly/Ferhat, N 1 ff.
12 Andric *et al.*, 5 and 11.

For the time being, in Switzerland, despite the high economic value of SME businesses, the current law on inheritance does not have specific regulations for business successions. Therefore, the aforementioned obstacles to the smooth succession of a business have generally been of considerable interest to the legal doctrine and case law. For a successful business succession in the current legal framework, a business owner planning a succession would be well advised to observe a certain number of measures and provisions during his/her lifetime as well as in his/her testamentary dispositions. Part II hereafter gives a concise overview of these obstacles and their possible countermeasures (cf. *infra* N 8 ff.). 6

Switzerland's inheritance law is currently under reform. An important step of the reform is to facilitate business successions. Part VI hereafter explains the most prominent of these potential amendments and illustrates how they could affect future business succession planning procedures in Switzerland (cf. *infra* N 116 ff.). 7

II. The Main Obstacles for Family Business Succession under Current Swiss Inheritance Law

A. General Remarks

Switzerland's current inheritance law imposes several legal obstacles on a family business succession planning. This section provides an overview of the most important obstacles and highlights the potential legal means and tools to circumnavigate these hurdles. 8

As already mentioned, Switzerland's inheritance law is currently under reform. The **first part of the reform** concerns the reduction of the **statutory entitlements** of the issue (children) and the waiver of the statutory entitlements of the parents (in cases with no issue). It entered into force on January 1, 2023. This reform increases the testator's freedom to plan his/her estate by increasing the share he/she can dispose of. Naturally, this additional leeway is also one of the most important measures to facilitate and increase the flexibility for the transfer of a family business to the next generation.[13] 9

The **second part of the reform** concerns the **succession of family businesses** in particular. The Swiss Government submitted a dispatch on this topic to the Parliament in June 2022.[14] Part VI below outlines the content of this dispatch and how the potential new provisions could facilitate transfers of family businesses to the next generation in the future, at least from the perspective of inheritance regulation. 10

13 Media Release of 19 May 2021, ‹https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-83570.html#:~:text=Berne%2C%2019.05.2021%20%2D%20Lors,grande%20part%20de%20leurs%20biens› (30.04.2021); Media Release of 29 August 2018, ‹https://www.bj.admin.ch/ejpd/fr/home/actualite/news/2018/2018-08-29.html› (30.04.2022), BBl 2020 9923 ff.

14 Media Release of 10 June 22 ‹https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-89219.html› (23.06.2022). At the time of submission of this manuscript (23.06.2022), the dispatch has not yet been adopted by the Parliament.

B. The Main Obstacles for Family Business Succession

1. Obstacle 1: The Marital Property Law and the Ordinary Matrimonial Regime

a. *The Challenge*

11 The ordinary matrimonial regime in Switzerland is the "**Participation in Acquired Property**" (art. 181 CC). In a nutshell, under this regime, each spouse has two baskets of matrimonial goods: the **individual property** and the **acquired property**. The acquired property consists of the assets that a spouse acquires for consideration during the marriage (cf. art. 197 CC).[15] The individual property includes, among other things, all personal belongings, the property brought into the marriage or received gratuitous gifts such as donations and inheritances (art. 198 CC). Upon termination of the marriage (notably by divorce or by death of one of the spouses), the individual property remains with the respective owner or falls into his or her estate.[16] The acquired properties of the two spouses are added together after compensation of the respective claims and the balance is split into two equal parts (in value). If one of the spouses dies, the surviving spouse's claim is equivalent to half of the balance, *i.e.* half of the combined acquired property that was accumulated during marriage, (cf. art. 210 and 215 CC) under the title of matrimonial regime.[17] The other half of the acquired property becomes part of the deceased's estate. In the absence of a marital agreement, the outlined matrimonial regime automatically applies for a married couple living in Switzerland as it is considered as the ordinary matrimonial regime (cf. art. 181 CC).[18]

12 The family business of a spouse which he or she brought into the marriage belongs to the spouse's individual property.[19] Often, however, a family business is initially acquired property, in particular when the two spouses marry early in their lives and create and develop the business during the time of their marriage – regardless of whether they work together or only one of them is operationally involved in the business. Upon the death of one of the spouses, the value of the business must be split in half under the ordinary matrimonial regime (cf. art. 210 and art. 215 CC).[20] As a family business is, in many cases, the most important asset of the family's wealth, the split of the business' value into two is a severe drawback in transferring the business to a member of the next generation.

b. *A Potential Solution*

13 Spouses in Switzerland are entitled to enter into a (**prenuptial or postnuptial) marital agreement** (art. 182 CC). In such an agreement, the spouses have the possibility to choose a different matrimonial regime (*e.g.* the regime of Separation of Property

15 CR CC I-Steinauer, art. 197 N 1; Hausheer/Geiser/Aebi-Müller, N 12.05.
16 Hausheer/Geiser/Aebi-Müller, N 12.26.
17 Hausheer/Geiser/Aebi-Müller, N 12.164. Compare: Praz, N 25.
18 CR CC I-Mooser, art. 181 N 4; Wolf/Hrubesch-Millauer, N 81; for an overview of the marital property division, cf. also N 78 ff.
19 Cf. *infra* N 17.
20 Praz, N 25. Cf. for an example of use Henninger, successio, N 21 ff.

§ 7 Artwork and Art Collections

David W. Wilson/Jean-Frédéric Maraia

I. Introduction

A. Succession Planning Objectives in Relation to an Art Collection

Succession planning objectives in relation to an art collection depend on the collector's intentions, that are generally the following: (i) avoid dismembering the collection due to conflict, divorce or death or its devolution to the State, (ii) delegating its administration to a qualified third party, (iii) benefiting from the art collection, (iv) maintaining and developing it as an income-generating investment, (v) making the collection public. **1**

B. Overview of Legal Structures Available

The following sections present the different possibilities one enjoys to hold one's art collection, whether directly (cf. *infra* II.) or indirectly through a company (cf. *infra* III.), a trust (cf. *infra* IV.) or a foundation or association (cf. *infra* V.). Each section will present the benefits, disadvantages and tax considerations that should guide each art collector or investor towards the most appropriate structure. That said, given the wide cantonal disparities existing on the taxation of artworks and various holding options, a full comparison is beyond the present scope.[1] **2**

Regardless of the ownership structure, several Swiss regulatory requirements apply to artworks, especially anti-money laundering legislation.[2] The Transfer of Cultural Property Act[3] further imposes specific due diligence duties and provides for restitution guarantees, which prevent the seizure of State-owned artworks exhibited in Switzerland (*e.g.* the attempted seizure of the Pouchkine museum's artworks displayed at the Gianadda Foundation).[4] This is an increasingly regulated field that brings its load of high-profile cases (such as the confiscation of a sarcophagus from Phoenix Ancient Art SA).[5] In parallel, self-regulation has also developed in the form of various private initiatives, especially the Responsible Art Market (RAM) Initiative.[6] **3**

1 Cf. SFTA, Impôt sur le capital pour les associations, fondations et les autres personnes morales.
2 Cochard/Nahmad.
3 Federal Act of 20 June 2003 on the International Transfer of Cultural Property (SR 444.1).
4 Candrian; Nicolet; Arsever.
5 Lugon, 2016; Lugon 2017; Lugon, 2018; Favre.
6 ‹http://responsibleartmarket.org› (28.06.2021), in particular the Art Transaction Due Diligence Toolkit. Cf. also the Basel Institute on Governance, Art Basel Trade Guidelines.

II. Direct Ownership by the Collector

A. Benefits

4 Direct holding has the merit of simplicity. From a civil perspective, one retains control during one's lifetime and one can freely dispose of the artworks (*e.g.* exhibit, sell, gift or even attach peculiar conditions to gifts such as Mr. Turner did with the National Gallery).[7] From an economic standpoint, direct ownership has the advantage of cost-control over setting up any kind of structure. From a tax perspective, direct holding can be exonerated from wealth tax, one-off sales do not generally generate capital gains tax, and devolution to one's direct heirs is usually exempt from estate/inheritance tax.

B. Disadvantages

5 One has no guarantee of perenniality: the risk of dismemberment occurs upon one's passing, which was the reason behind the partial sale of the Zuellig collection in St Gallen.[8] This is especially due to (Swiss) statutory entitlements. Please refer to § 1 – Instruments of Inheritance Law, N 68 ff. – on this point. The dismantling risk is even greater because Swiss scholars debate whether an art collection forms one whole for the purpose of dividing an estate or not (art. 613 para. 1 CC).[9]

6 On the tax level, direct holding is ill-suited for commercial activities, which are much more tax-efficient when using a corporate structure. Moreover, artworks are generally considered as taxable assets, in contrast with household furnishings and personal items that are not taxable (cf. below).

C. Tax Considerations

1. Wealth Tax and Available Exonerations

7 Wealth tax is only levied by the cantons. The DTHA contains some framework provisions on the tax object. According to art. 13 para. 1 DTHA, the total net assets are subject to wealth tax, but household goods and personal items (art. 13 para. 4 DTHA) are excluded.[10] This is a definitive list.[11] In the case of usufruct, the life tenant is taxable (art. 13 para. 2 DTHA).

8 The question of what constitutes household goods or personal items arises when artworks are held in the taxpayer's direct patrimony. In general, this has to be decided on a case-by-case basis.

9 In a Zurich decision,[12] the cantonal appeals commission ruled that paintings and artworks valued at around CHF 2.2 million (out of total assets of CHF 7 million) could no longer be considered as household goods and were therefore not tax-free. It focused

7 Studer.
8 Cossy.
9 Items which by their nature belong together must not be separated if one of the heirs objects to such separation.
10 On the difference between household goods and personal items: StE 1997 B 53.1 no 3, § c and b.
11 KSS-Dzamko-Locher/Teuscher, art. 13 StHG N 35.
12 StE 1997 B 53.1 no 3.

on the purpose of the provision providing for the exemption of household goods, *i.e.* it was intended on the one hand to circumvent the problems of valuing such assets and, on the other, to avoid excessive intrusion into the taxpayer's private life. The commission took the view that it was not justified to exempt assets which, although probably located at the taxpayer's residence, were primarily used as an investment, because this would go beyond the provision's purpose.

A recent decision by the Zurich Administrative Court[13] took an even stricter approach **10** against a taxpayer who had inherited a Giacometti painting from her father 30 years prior. At the time of the inheritance, it had been valued at CHF 45'000 and taxed. The taxpayer was not a collector, but she loved this painting very much and had it hanging in her kitchen. She argued that a single oil painting could not be classified as an artwork, but rather only as non-taxable household good. The picture had been hanging in her kitchen for decades until it was finally sold at auction for CHF 2 million in 2008. The tax office then initiated a supplementary wealth tax procedure. The Court upheld the supplementary tax decision on the grounds that the painting was part of "alternative property", *i.e.* items that can be both household goods and a capital investment. If their market value exceeded a certain amount, they were included in taxable assets, regardless of their specific use. As to its value, the Administrative Court partially allowed the taxpayer's appeal by holding that the tax authority should not have satisfied itself with a linear increase, but ought rather to have estimated the painting's value for each tax period for which supplementary tax was levied. Scholars strongly criticized this decision, arguing that value should not be retained as the decisive criterion.[14] In Geneva,[15] the law expressly exempts art and scientific collections, which may be considered as "*meubles meublants*" (art. 55 let. a LIPP/GE[16]). Thus, only collections held solely for speculative purposes are excluded from this tax exemption.[17] The purpose and use of the asset are therefore decisive,[18] as an American art broker learned regarding an art collection he had inherited.[19]

In our view, a painting's high value is not, in itself, a reason to refuse tax exemption.[20] **11** However, collections stored in bank safes or in duty-free warehouses can generally be taxed, as one cannot really speak of household goods.[21] In principle, the taxpayer must prove that the artwork is tax-exempt.[22]

Artworks included in the individual's business assets are taxable. If they are taxable, **12** they must first be valued. The market value is decisive for assets included in private assets (art. 14 para. 1 and 3 DTHA). Items included in the business assets are valued at the value that is decisive for income tax, *i.e.* generally at their book value.

13 VGer ZH, 09.05.2012, SR-ZH 2011.00019; cf. also Duss, ST 2012, 1002 ff.
14 Duss, 1005 ff.; Metz, 656. In any case, we believe that art. 13 para. 4 DTHA leaves the cantons sufficient room for manoeuvre such that they can also allow collectors to hold artworks tax-free.
15 Concerning the cantons of Basel, Luzern and Zurich: Metz, 658 ff.
16 Geneva Act on Personal Income Tax of 27 October 2022 (Loi sur l'imposition des personnes physiques) (SR-GE D 3 08).
17 Oberson, Droit fiscal suisse, § 8 N 13.
18 KSS-Dzamko-Locher/Teuscher, art. 13 StHG N 38; Jolles/Simonek/Waldburger, 77.
19 CJ GE, 20.12.2019, ATA/1851/2019.
20 Subject to tax evasion.
21 Oberson, SJ 2001 II 19.
22 StE 1997 B 52.1 N 3; cf. also Jolles/Simonek/Waldburger, 78.

13 In practice, it is very difficult to determine an artwork's market value: they are often unique objects and it is difficult to find anything comparable. In addition, it is seldom purchased and sold several times in a relatively short period of time. As such, there really is no market. And, even if there was a market, there are in reality several markets: the primary market (direct transactions with the artist or the gallery) and the secondary market (transactions among collectors). Scholars recommend relying on the secondary market.[23] The tax authorities therefore sometimes rely on the insurance value, but the taxpayer is free to evidence a lower market value.[24] If the insurance value does not correspond to a market value, other methods must be sought.[25]

2. Capital Gains Treatment

14 Under Swiss law, capital gains on private assets are tax-free (art. 16 para. 3 DFTA; art. 7 para. 4 let. b DTHA)[26], but they can be taxed if they are realized through the sale of parts of the business assets (art. 18 DFTA; art. 8 DTHA). This distinction also has significant social insurance consequences, because in principle income from self-employment is subject to social contributions. One must therefore determine whether one is self-employed or not, irrespective of what one's main activity is, because this explains how profits or losses will be treated for tax purposes.

15 The Federal Supreme Court has ruled that profits are subject to income tax, when they stem from a main or secondary acquisition activity, when they are earned by a taxpayer subject to trade accounting, but also when they stem from an activity that is to be regarded as profitable overall.[27] In order to distinguish taxable self-employment from the management of private assets, the Federal Supreme Court relies on the following criteria:[28]

- systematic or planned nature of the activity;
- frequency of transactions and short term of ownership;
- connection with the taxpayer's professional activities, use of specific expertise, activity in a partnership;
- using borrowed funds;
- the use of revenue or reinvestment thereof.

16 These criteria need not be cumulative, as a Vaud collector of vintage posters learned.[29] The existence of a single criterion may be sufficient for the activity to be classified as commercial.[30]

23 De Le Court/Axelroud Buchmann, 905.
24 Jolles/Simonek/Waldburger, 78; cf. also Metz, 658.
25 According to Jolles/Simonek/Waldburger, 78, one can consult databanks on the internet.
26 Capital gains on real estate are taxable at the cantonal level (art. 12 DTHA).
27 ASA 59 709 = RDAF 1993 4; 9C_606/2022, 06.06.2023.
28 RDAF 2010 II 600; RDAF 2003 II 599; ASA 73 305 = RDAF 2003 II 611; ATF 125 II 113 = RDAF 1999 II 385; ASA 69 788 = RDAF 2001 II 233.
29 RDAF 2009 II 76.
30 ATF 125 II 113, RDAF 1999 II 385; RDAF 1999 II 391.

§ 10 International Estate Litigation

Philippe Pulfer

All happy families resemble one another, each unhappy family is unhappy in its own way.

Leo Tolstoy

I. Introduction[1]

Successions are a frequent matter of litigation. The conduct of succession disputes is particularly challenging in an international context, for instance when the deceased was a foreign national, when several countries may claim jurisdiction over the estate, or when assets are located in multiple countries. **1**

This contribution focuses on several aspects which must be considered in the conduct of international succession proceedings. We will start by setting out the principles regarding jurisdiction (II.) and applicable law (III.). **2**

We will then focus on various challenges which parties to such disputes have to face: the clarification of the scope of the estate (IV.), the relations with the executors (V.), the rights to information (VI.) and the possibilities to obtain interim measures in Switzerland (VII.). After summarizing in a table the most frequent succession actions (VIII.), we will address conduct of litigation and funding (IX.) as well as settlement discussions (X.) **3**

Finally, we will set out the principles regarding recognition and enforcement of foreign decisions in Switzerland (XI.). **4**

The Swiss private international law in succession matters is currently going through a revision, in order to harmonize the legislation with the EU Regulation no. 650/2012.[2] This process is still ongoing. The Swiss Federal Assembly published a preliminary project on 5 June 2020.[3] Furthermore, a revision of Swiss substantive succession law has entered into force on 1 January 2023. The present contribution will focus on the currently applicable provisions, while mentioning how the new regulation could bring changes. **5**

1 I would like to express my gratitude to Alain von Wattenwyl whose unparalleled knowledge of the law and enthusiastic taste for legal research have been invaluable. Any credit for this article has to be shared with him.

2 Regulation (EU) no. 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

3 BBl 2020 3257.

II. Jurisdiction

6 The first assessment in a (potentially) litigious international estate is the determination of the jurisdiction in which a claim could be brought. After some general considerations on the issue (A.), we will set out the provisions to consider in this regard (B.)

A. General Considerations

7 In an international context, uncertainty on jurisdiction is likely to trigger the need to seek advice from foreign counsel in order to determine which State courts could consider the merits of claims related to the estate. If various jurisdictions may be considered, the aim will be to determine which one should be prioritized.

8 In this assessment, the analysis will focus not only on the merits of the claim – to wit, where is the claim more likely to succeed? – but also the expected duration and costs of the proceedings, the chances for recognition of the foreign decision as well as the possibility to obtain interim measures. Further, when a favourable jurisdiction has been identified, the international *lis pendens* effect of a claim brought in that jurisdiction should be confirmed.

B. Applicable Provisions

9 To determine jurisdiction, one has to look at the relevant conflict laws. In Switzerland, these include the PILA and various international conventions.

1. International Conventions

10 International conventions have priority over the provisions of the PILA (art. 1 para. 2 PILA). While Switzerland has concluded a number of bilateral agreements affecting estate matters,[4] in particular with the United States[5] and Italy[6], the LC is not applicable to successions (art. 1 para. 2 let. a LC). Thus, in the absence of any bilateral agreement, the applicable conflict rules are found in the PILA.

2. Swiss Private International Law

11 Art. 86 ff. PILA set forth the jurisdiction rules applicable to contentious and non-contentious succession matters.

a. The Principle: art. 86 para. 1 PILA

12 According to art. 86 para. 1 PILA, the Swiss authorities of the last domicile of the deceased shall have jurisdiction. Although EU Regulation no. 650/2012 relies on the criterion of "habitual residence", this criterion of domicile will remain decisive under the proposed new legislation on international successions in the PILA (art. 86 para. 1 P-PILA).[7]

4 Bucher/Bonomi, N 869 ff.; Message from the Federal Office of Justice of 21 April 2020 on the amendment of the Federal Act on Private International Law (PILA), BBl 2020 3215, 3252.
5 SR 0.142.113.361.
6 SR 0.142.114.541.
7 BBl 2020 3227.

Art. 158 CPC also provides for the possibility to request the taking of evidence by the court before the introduction of an action, for instance to hear a witness who might pass away shortly.[92] **69**

Finally, in cases in which interested parties have a direct monetary claim against the estate (*e.g.* a legatee), they may request the freezing of estate assets or even individual assets of each heir (art. 271 ff. DEBA).[93] **70**

VIII. Summary Review of the Most Frequent Actions

Without claiming to be exhaustive, the present chapter aims at providing a brief overview, in the form of a summary table, of the main actions available under Swiss succession law, their legal bases and conditions. As regards the jurisdiction of Swiss courts over these actions, we refer to the developments in chapter II. above. **71**

As a general requirement, it shall be noted that under Swiss procedural law, the introduction of most claims on the merits – including the most frequent actions in succession matters – requires previous reconciliation proceedings. These proceedings are initiated by a reconciliatory request, which has the effect to create the *lis pendens* between the parties, even in an international context. **72**

For further information on the respective actions, reference is made to the relevant publications.[94] **73**

Action	Requirements on the merits	Legal capacity	Legal capacity to defend	Deadline
Action to rectify a will (art. 469 para. 3 CC)	– Death of the author of the will; – Provision containing a manifest error in the designation of people or assets.	Any heir or legatee interested in the rectification of the erroneous provisions.	Any person advantaged by the erroneous provision.	N/A
Action for declaration of invalidity of a testamentary disposition (art. 519–521 CC)	– Testamentary disposition; – Death of the author of the disposition; – Defectiveness of the disposition (art. 519–520a CC), namely: (i) lack of capacity (ii) lack of intent; (iii) illegality; (iv) violation of public morals; or (v) formal invalidity.	Any heir or legatee with an interest in the invalidity of the challenged disposition; the executor if designated therein.	Any person advantaged by the (alleged) invalid disposition.	– 1 year since the knowledge of the disposition and of the invalidity cause; – In any case, 10 years since the date of opening of the disposition or 30 years if the defendant acts in bad faith.

92 CR CPC-Schweizer, art. 158 N 2.
93 Pestalozzi-Früh, 606.
94 Bohnet, 351 ff.; Eigenmann/Landert; Brückner/Weibel; Fischer/Theus/Gessler.

Action	Requirements on the merits	Legal capacity	Legal capacity to defend	Deadline
Action in recognition of status as heir	– Death of the *de cujus*; – Claimant's (alleged) status as heir; – Interest in the recognition (art. 88 CPC).	Anyone claiming to be an heir.	All other heirs (art. 70 CPC).	– N/A
Action in abatement (art. 522–528 CC; art. 532–533 CC)	– Death of the *de cujus*; – Statutory entitlement; – Value of the estate including all hotchpots and additions; – Value of the statutory entitlement; – Violation of the statutory entitlement; – Provisions subject to abatement (testamentary disposition or lifetime gift) exceeding the freely disposable part; – If applicable, proportion and order of abatements.	Heirs with a statutory entitlement who did not receive the full value thereof; bankrupt estate of the heir with a statutory entitlement and his or her creditors: legatee or person gratified by contract of succession whose allowance has been reduced.[95]	Any beneficiary of a disposition or a gift in violation of the claimant's statutory entitlement.	Art. 533 CC: – 1 year since the knowledge by the claimant of the violation of his or her statutory entitlement. – In any case, 10 years since the opening of the will and, for other dispositions, since the death of the *de cujus*.
Action against dispositions incompatible with a contract of succession (art. 494 para. 3 CC)	– Death of the *de cujus*; – Contract of succession; – Testamentary dispositions or lifetime gifts incompatible with bilateral clauses in the contract of succession; – Dispositions or (mixed) gifts made after the contract of succession; – If applicable, proportion and order of abatements.	Anyone deriving rights from a contract of succession.	Any beneficiary of a disposition or a gift in violation of the claimant's rights under a contract of succession.	The provisions of the action in abatement (one- and ten-year deadlines) are applicable by analogy.[96]
Action in recognition of an heir's unworthiness to inherit (art. 540–541 CC)	– Death of the *de cujus*; – Unworthiness of the defendant; – No forgiveness by the *de cujus* (art. 540 para. 2 CC); – Interest in the recognition (art. 88 CPC).	Anyone challenging the defendant's status as heir.	The person whose status as heir is being challenged.	N/A

95 Art. 525 para. 2 and 528 para. 2 CC; for the specific conditions applicable to such claims see Bohnet, actions civiles, § 33 N 37-38.

96 Brückner/Weibel, 57.

Action	Requirements on the merits	Legal capacity	Legal capacity to defend	Deadline
Action for recovery of inheritance (art. 598–600 CC)	– Death of the *de cujus*; – Possession by a third party of the estate assets; – Undivided succession; – Loss of the claimant(s), when the estate assets have been lost, destroyed or disposed of.	All heirs acting together (art. 70 CPC); the official administrator; the executor; the estate representative; the bankrupt estate of an heir.	Any third party in possession of estate assets.	Art. 600 CC: – 1 year since knowledge by the claimant of (i) his or her preferential right and (ii) of the possession of the defendant. – In any case, 10 years since the date of opening of the deed or 30 years if the defendant acts in bad faith.
Action for the delivery of a legacy (art. 562 and 601 CC)	– Death of the *de cujus*; – Provision constituting a legacy; – Due legacy; – Debtor of the legacy; – If the legacy consists in a specific performance: loss of the claimant (art. 563 para. 3 CC).	Anyone gratified with a legacy; surviving spouse benefitting from a usufruct according to art. 473 CC.	Debtors of the legacy or, when no debtor is specified, the heirs; the executor of an undivided estate (individually or in addition to the heirs).	Art. 601 CC: 10 years as from the date the legacy becomes due.
Action for hotchpot (art. 626–632 CC)	– Death of the *de cujus*; – Gift by the *de cujus* to a future heir (legal or established); – Hotchpot duty: (i) endowment to a descendant with no specific waiver of the hotchpot duty; or (ii) gift to another heir with a specific hotchpot order.	Each legal heir; each established heir to whom the *de cujus* granted a right to hotchpot.	Each legal heir having received gifts during the lifetime of the *de cujus*; established heirs if the *de cujus* subjected them to the hotchpot duty.	As long as the succession has not been divided.

Action	Requirements on the merits	Legal capacity	Legal capacity to defend	Deadline
Action to divide (art. 604, 607 and 610–612 CC)	– Death of the *de cujus*; – Persistence of the community of heirs; – If applicable, refusal of the other heirs to divide the estate; – Lack of reasons to postpone the division.	Each heir; the authority asked to concur in the division in the specific case of art. 609 para. 1 CC.	All other heirs (art. 70 CPC).	N/A

IX. Conduct of Litigation and Funding

74 Experience shows that in many cases, succession disputes are predictable. Pre-existing disagreements within a family, multiplicity of marriages (or extra-marital relationships), children born out of different marriages or relationships, quarrelling or simply estranged relatives are factors which increase the risks of a dispute.

75 How the litigants approach the dispute, from an early stage which sometimes predates the death of the *de cujus*, will be key to their prevailing in court or in settlement discussions.

76 In an international context, the identification of the jurisdiction or jurisdictions in which proceedings can be initiated will be the first step. In addition to the Swiss courts having jurisdiction because of a connecting factor (art. 86-89 PILA), other jurisdictions may have to be considered as a result of the location of assets or relevant documentation, and also because of the possible incorporation or place of administration of asset-holding structures.

77 In such cases, a multi-jurisdictional team of lawyers will have to be assembled. It would be advisable to secure foreign counsel as early as possible, in particular in jurisdictions in which law firms with the required expertise and experience are scarce and likely to be conflicted when many parties are involved or might potentially be involved. Steps taken as well as facts or legal arguments presented in one jurisdiction are likely to have an impact in another one,[97] hence the need for a wide consultation with, and the involvement of, foreign counsel at all major stages of the dispute.

78 We have already mentioned interim measures (cf. *supra* N 59–70). These will be crucial at the beginning of a dispute in order to prevent the disappearance of assets or relevant documents.

79 Succession disputes typically last for many years, and those which play out in several jurisdictions last even longer. They are likely to require substantial financial means which are not always available to the litigants: assets of the estate are usually beyond the reach of the heirs, as one of the first steps taken in a contentious succession is an application to freeze the assets and prevent the delivery of a certificate of heirship.[98]

97 In Anglo-Saxon jurisdictions in particular, the estoppel principle will have to be carefully considered.

98 Cf. *supra* N 59–70.

The book deals with most of the issues concerning the transfer of assets within the context of a succession; it covers not only the general question of *mortis causa* dispositions under Swiss law, and questions of the advance care directive but also situations such as business transfers upon death, transfers of art collections, and the devolution of assets for philanthropic purposes. In addition, it addresses the specific problems faced by families with international exposure and the management of proceedings in multiple jurisdictions.

As practitioners, the authors identify in a pragmatic fashion the common problems, the potential solutions, and the appropriate legal instruments available under Swiss as well as under foreign law.

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