Cross-Border Estate Planning for US Citizens Living in Switzerland

September 21, 2016 – ACA Zurich Town Hall

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Case Study

JOHN
- Nationality → US
- Residency → CH

married to

HEIDI
- Nationality → CH
- Residency → CH

- 2014: John and Heidi meet and marry in NYC
- 2016: They move to Zurich, Switzerland with two children
Estate planning begins with matrimonial property planning
Matrimonial property regimes in the US

Community property

Separate property
Matrimonial property regimes in Switzerland

Matrimonial property regimes:

- Participation in acquired property (default set of rules)
- Separation of property
- Community property regime
Matrimonial Property rules may change with relocation to Switzerland

“If the spouses transfer their domicile from one state to another, the law of the new domicile shall be applicable with retroactive effect from the date of the marriage.”

PILA 55
International matrimonial property law (Swiss view)

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But:

– Retroactive effect may be waived or precluded by written agreement

– No retroactive effect if the spouses have agreed in writing to continue the application of the former law or if they are bound by a marriage agreement (prenup / postnup)

– Choice of law is possible
Rule of thumb # 1: Consider matrimonial property laws when planning the estate
Lifetime contingency planning and crisis management
Main US planning instruments for incapacity

- Joint-Accounts
- Durable powers of attorney
- Living wills / Advance directives / Health care proxies
Main Swiss planning instruments for incapacity

Advance power of attorney (Vorsorgeauftrag)
- Designed to govern personal & medical representation, financial representation and proxy in all other legal matters
- Needs to be validated by guardianship authority
- Handwritten or notarized (typically the latter)

Patient's directive (Patientenverfügung)
- Instructions on medical treatment
- Designation of representatives (who shall decide if I am no longer able to do so?)
- Waiver of medical secrecy
Rule of thumb # 2: Consider lifetime contingency planning and crisis management tools in order to make sure that they are recognized and enforceable in Switzerland
Jurisdiction and applicable law in cross-border succession cases
Main US succession planning tools

- Last Will and Testament
- Trusts (revocable living trusts / inter vivos trusts)
- Joint tenancy

Note: no forced heirship, in some states spousal right of election probate versus non-probate assets
Inheritance Law Switzerland / Jurisdiction

Contentious and non-contentious proceedings:

- Domicile: **last domicile** of the deceased in Switzerland
- Domicile: reservation with regard to foreign real property
- Origin: Swiss citizen with last domicile in a foreign country, inactivity of the foreign authorities
- Origin: Swiss citizen with last domicile in a foreign country: choice of law and/or jurisdiction
- Situs: foreign citizen with last domicile in a foreign country, property in Switzerland, inactivity of the foreign authorities
- In Swiss / US cases: ramifications of the Swiss-American treaty of 1850
- Need for ancillary probate in the US possible
Main Swiss succession planning tools

**Wills**
- Handwritten or notarized
- Heirship, legacies and bequests

**Inheritance agreements**
- Notarized agreement between two or more parties
- Often used in combination with matrimonial property agreement in order to maximize or minimize share of surviving spouse

**Important:**
- Forced heirship rules in Switzerland!
- Principle of universal succession
Inheritance Law Switzerland / Applicable law

Domicile of the deceased

Choice of law
Advice on choice of law

- Shares in the estate, forced heirship claims (if any)
- Treatment of inter vivos dispositions
- Claw-back claims, abatement, augmentation
- Hotchpot (Ausgleichung / Rapports)
- Statute of limitations for inheritance claims
- Executorship / Trusteeship
- Disinheritance
- Responsibility for debts, renunciation
- Rights in rem vs. personal rights in the estate
- Acceptance of foundations, trusts and insurances as estate planning means
- Devolution of the estate
Advice on choice of law: Acceptance of trusts as estate planning means?

**Foreign Trust**

- Switzerland is not a trust jurisdiction
- Recognition of foreign trusts thanks to Hague Trust Convention and Swiss conflict of laws rules
- Diligent tax analysis imperative, need for tax ruling in Switzerland
- If Swiss real estate is involved: possibly need for Lex F Ruling
Rules of thumb # 3:

1. Remember rule of thumb # 1 (consider matrimonial property law);
2. Review existing wills in order to make sure that they are recognized and enforceable in Switzerland;
3. Review existing joint tenancy arrangements;
4. Review existing trust arrangements in order to make sure that they are recognized and enforceable in Switzerland;
5. Consider the use of Swiss estate planning tools if main assets and/or majority of heirs are located in Switzerland;
6. Swiss and US gift, estate, income and wealth taxes have to be considered. Also consider double-taxation treaty.
7. Early planning is essential.
Salient rules on US Estate Tax

What if John dies first?
- Worldwide assets
- Estate tax exemption currently USD 5,450,000 Mio (indexed annually for inflation)
- Highest graduated estate tax rate of 40%
- No martial deduction generally unless QDOT
- No portability generally, but some potential relief under US-Swiss Estate and Gift Tax Treaty using QDOT

What if Heidi dies?
- Swiss (non-US) situs assets
- US situs assets
- $60,000 exemption generally, although some potential relief under US–Swiss Estate and Gift Tax Treaty
Other considerations

- Patch-work families (forced heirship rights and taxes)
- Guardianship for minors
- Renunciation of citizenship
- Recognition of charities
  - Additional estate tax planning issues
  - Reorganization of assets
    - Lifetime donations
    - U.S. annual exclusion $14,000 (indexed for inflation in $1,000 increments)
    - U.S. annual exclusion to non-US spouses $148,000 (indexed for inflation)
  - Family limited partnerships and LLCs
  - Joint property → Swiss matrimonial property agreement?
  - Change of domicile
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