WORLD LAND TRUST™
www.carbonbalancedprint.com
CBP2250

FSC
www.fsc.org
MIX
Board | Supporting responsible forestry
FSC® C020438

43386224

PRIVATE CLIENT BUSINESS

2025 Number 1

Sweet & Maxwell

2025

FOUNDER
BARRY MCCUTCHEON
B.A. (TRINITY, U.S.A.), LL.M. (LOND.)
F.T.I.I.,
Barrister

GENERAL EDITOR
RICHARD DEW
10 OLD SQUARE

CORRESPONDENTS

INHERITANCE TAX
OLIVER MARRE
Barrister
5 Stone Buildings
Lincoln's Inn
London WC2A 3XT
Tel: 020 7242 6201
Email: omarre@5sblaw.com

CAPITAL GAINS TAX
OLIVER MARRE
Barrister
5 Stone Buildings
Lincoln's Inn
London WC2A 3XT
Tel: 020 7242 6201
Email: omarre@5sblaw.com

EU MATTERS
NICOLA SACCARDO
CHARLES RUSSELL SPEECHLYS
5 Fleet Place
London EC4M 7RD
Tel: 020 7427 6548
Email: Nicola.Saccardo@crsblaw.com

TRUSTS
RICHARD DEW
Barrister
10 Old Square
Lincoln's Inn
London WC2A 3SU
Tel: 020 7405 0758
Email: richarddew@tenoldsquare.com

SUCCESSION
RICHARD DEW
Barrister
10 Old Square
Lincoln's Inn
London WC2A 3SU
Tel: 020 7405 0758
Email: richarddew@tenoldsquare.com

FAMILY PROPERTY
HELEN BRANDER
PUMP COURT CHAMBERS
3 PUMP COURT
TEMPLE
LONDON EC4Y 7AJ
TEL: 020 7353 0711
Email: H.Brander@pumpcourtchambers.co.uk

CHARITIES
JOSH LEWISON
Barrister
RADCLIFFE CHAMBERS
11 NEW SQUARE
LINCOLN'S INN
LONDON WC2A 3QB
Tel: 020 7831 0081
Email: JLEWISON@RADCLIFFECHAMBERS.COM

ELDER LAW
BARBARA RICH
Barrister
5 STONE BUILDINGS
Lincoln's Inn
London WC2A 3XT
Tel: 020 7242 6201
Email: brich@5sblaw.com

INTERNATIONAL MATTERS
GILLY KENNEDY-SMITH
Advocate
Mourant Ozannes (Guernsey) LLP
Royal Chambers
St Julian's Avenue
St Peter Port
Guernsey GY1 4HP
Direct line: 01481 739 397
Cellphone: 07839 191 397

RESIDUE
RICHARD DEW
Barrister
10 Old Square
Lincoln's Inn
London WC2A 3SU
Tel: 020 7405 0758
Email: richarddew@tenoldsquare.com

Sweet & Maxwell

Thomson Reuters™

Private Client Business

Issue 1 2025

Table of Contents

Correspondents

Inheritance Tax
Oliver Marre: 5 Stone Buildings.

Capital Gains Tax
Oliver Marre: 5 Stone Buildings.

Trusts
Richard Dew: Ten Old Sqaure.

Succession
Richard Dew: Ten Old Sqaure.

Family Property
Helen Brander: Pump Court Chambers.

Charities
Josh Lewison: Barrister, Radcliffe Chambers.

Elder Law
Barbara Rich: 5 Stone Buildings.

International Matters
Gilly Kennedy-Smith: Mourant Ozannes.

EU Matters
Nicola Saccardo: Charles Russell Speechlys.

Residue
Richard Dew: Ten Old Sqaure.

ISSN: 0967-229X

Private Client Business is published by Thomson Reuters, trading as Sweet & Maxwell. Thomson Reuters is registered in England & Wales, Company No.1679046. Registered Office and address for service: 5 Canada Square, Canary Wharf, London, E14 5AQ. For further information on our products and services, visit http://www.sweetandmaxwell.co.uk.

Computerset by Sweet & Maxwell. Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire.

Each article and case commentary in this issue has been allocated keywords from the Legal Taxonomy utilised by Sweet & Maxwell to provide a standardised way of describing legal concepts. These keywords are identical to those used in Westlaw UK and have been used for many years in other publications such as Legal Journals Index. The keywords provide a means of identifying similar concepts in other Sweet & Maxwell publications and online services to which keywords from the Legal Taxonomy have been applied. Keywords follow the taxonomy logo at the beginning of each item. The index has also been prepared using Sweet & Maxwell's Legal Taxonomy. Main index entries conform to keywords provided by the Legal Taxonomy except where references to specific documents or non-standard terms (denoted by quotation marks) have been included. Readers may find some minor differences between terms used in the text and those which appear in the index. Please send any suggestions to sweetandmaxwell.taxonomy@tr.com.

For orders and enquiries, go to: http://www.tr.com/uki-legal-contact; Tel: 0345 600 9355.

The purpose of this journal is to draw the attention of all those advising private clients to possible tax planning strategies, tactics, opportunities, traps and relevant legal developments generally. The views offered are intended only to stimulate readers, who will need to evaluate them independently.

We welcome the submission of material for publication. Contributions, which may be of any length, should be double spaced and in electronic format. Reference should be made to existing issues for guidance on house style. Submission of material will be held to imply that it contains original unpublished work and is not being submitted for publication elsewhere, unless the contrary is stated. Logos/stationery headings: contributors who wish to have a logo and/or stationery heading appear with their contribution should submit an electronic file of the logo when they submit their contribution. Please include brief biographical details with all contributions, case notes and correspondence.

Correspondence relating to editorial matters should be addressed to:

Richard dew
Barrister
10 Old Square
Lincoln's Inn
London WC2A 3SU
Tel: 020 7405 0758
Email: richarddew@tenoldsquare.com

Please note that preference is to be contacted by email.

Contributions, case notes and other correspondence should, where possible, be sent to the relevant Correspondent at the address indicated on the Correspondents' page, failing which it should be sent to the General Editor.

Editorial

Law journals; Private clients

I am very pleased to write this first editorial as the new editor of this excellent journal.

In his last editorial, my predecessor took the opportunity of only briefly blowing his own trumpet. Let me blow it a little louder on his behalf. Mark has edited the journal for eight years. I know, from working with him, the struggles involved in commissioning articles from busy practitioners and academics and the resulting panics as to whether there will be any content, too much content or something in between. So it is hugely to his credit that he has during his time expanded sections of the journal, introduced others and produced a very wide range of high-quality articles. Around fifty separate authors have produced articles in the last two years alone and the consequence is a very diverse range of excellent articles. Mark is also retiring from practice and so I take this opportunity to congratulate him on a marvellous career and to wish him well on this next stage of his life.

These are big shoes to fill. I hope to maintain both the quality and diversity of content and to continue to ensure that contributions reflect and consider the important developments in the private client sphere. I hope to commission articles from all parts of the profession, both senior and junior, solicitors and barristers and from academics at all levels (and anyone else with something interesting to say). From time to time, I may pen my own thoughts on some topics.

The biggest news in the private client world in 2024 was the budget of the new Labour Government. The changes to the non-domiciled regime, dispensing with domicile altogether, will take some considerable time to bed in but were at least heavily trailed and expected whichever government had been in power. In contrast, the huge impact of reducing agricultural and business property relief was not really anticipated and the effects are not yet, in the author's view, sufficiently appreciated. Whilst the NFU has campaigned hard for its members, it does not seem to have yet fully dawned on business owners, particularly those smaller family businesses, quite how damaging the loss of such an extensive relief will be. We await draft legislation and expect to cover the topic in more detail in forthcoming editions.

In this edition, we carry two articles on tax, one devoted to the changes in the budget and the other to an arrangement disclosed under DOTAs which actually survived challenge. There is also an important article on the changes to the Swiss Private International law. Finally, I have penned a case note on the appointment of representatives to represent estates in litigation.

Richard Dew

International

The New Rules of Swiss Private International Law for Foreign and Swiss Dual Nationals Domiciled in Switzerland

Jutta Gangsted

Justine Wadhera*

Applicable law; Domicile; Dual nationality; Family provision; Foreign nationals; Jurisdiction; Switzerland; Wills

On 22 December 2023, the Swiss Parliament approved the revised version of the Private International Law Act (the revPILA) following nearly a decade of extensive debate focused on the harmonisation and modernisation of Swiss succession law.

The changes were particularly called for to:

i) prevent conflicting decisions on international successions by partially aligning Swiss law with the European regulation on succession (EU Regulation 650/2012, which came into effect in 2015) and

ii) clarify recent developments in case law and legal doctrine.

The date of entry into force of the new provisions has been set for 1 January 2025.

These changes to the revPILA grant individuals will increase the importance of international estate planning for individuals. As such, the following article serves to outline the current estate planning opportunities available to: (i) foreign nationals; and (ii) Swiss dual nationals domiciled in Switzerland whilst setting out the key amendments made to the revPILA in respect of applicable law and jurisdiction.

Foreign nationals resident in Switzerland

Swiss forced heirship regime, a reminder

Swiss inheritance law provides statutory limitations protecting certain categories of statutory heirs, that is spouse and descendants (or parents, if there are no descendants). These heirs are protected under the forced heirship regime and have a mandatory entitlement to a fixed portion (the "compulsory portion") of a deceased's assets. Therefore, under Swiss law, a testator can only dispose by Will of the freely disposable portion of his/her estate (that is, his/her entire estate less the compulsory portions).

* Jutta Gangsted and Justine Wadhera are senior associates at the firm of Lenz and Staehelin, Route de Chene 30 CH-1208 Geneva.

Whilst the changes to Swiss inheritance law that came into force on 1 January 2023 sought to provide more flexibility in how a testator can dispose of his/her assets in Switzerland, by reducing the percentage of the compulsory portion of a deceased's assets, the forced heirship regime remains embedded in Swiss inheritance law. Currently, the forced heirship rights are:

- half of the succession right in the case of a direct descendant; and
- half of the succession right in the case of a surviving spouse or registered partner.

In a situation where there is a surviving spouse and a child/children, the compulsory portion of the deceased's estate will amount to half of the estate. As such, under Swiss law, in such a case, only up to half of the estate can be divided freely without any restrictions, which is far from the testamentary freedom enjoyed in other countries such as, for example, the UK.

Applicable law

Pursuant to Swiss law, the law of the jurisdiction in which the deceased had his/her last place of residence, will generally determine which law applies to his/her succession. Indeed, art.90(1) of the Swiss Private International Law Act (PILA) states that "*the estate of a person who had their last domicile in Switzerland is governed by Swiss law*". Under the PILA, a person "*has their domicile in the state where they reside with the intent of establishing permanent residence*" (art.20(a) PILA).

Consequently, if a person of Swiss nationality dies with his/her last domicile in Switzerland, his/her estate, whether movable or immovable and whether situated in Switzerland or abroad, will, by application of the PILA, be governed by Swiss succession law.

Furthermore, the estate of a foreign national who dies with his/her last domicile in Switzerland will also be, in principle, governed by Swiss law, regardless of where they may have lived previously or their nationality.

Professio juris

Such foreign national whose last domicile was in Switzerland may, however, choose by way of a Will or inheritance agreement to submit his/her estate to the law of the State of which he/she is a national (or should he/she have several nationalities, to the law of one of them), thereby overriding the application of Swiss succession law (*professio juris*) (art.90(2) PILA). It is worth noting that a foreign national cannot decide to subject only certain assets of his/her estate to the law of the State of which he/she is a national. Indeed, a *professio juris* will apply to the deceased's entire estate.

Further, such election only applies to civil law and not to tax law. This means that a testator cannot freely choose the tax law to which he/she wishes to subject his/her estate, and that making a *professio juris* should have no influence on the tax law applicable to his/her estate.

Jurisdiction

Currently, irrespective of any *professio juris*, Swiss private international law provides that the administration of the estate (in particular, the administration and enforcement measures) is governed by the law of forum (*lex fori*), which is in principle Swiss law when the deceased's last domicile was Switzerland. Indeed, a *professio juris* has no effect on the authorities and courts competent to open the succession and rule on any legal proceedings, or on the enforcement procedures (art.92(2) PILA). Under the PILA, the Swiss authorities automatically consider themselves as competent when the deceased died having his/her last domicile in Switzerland, irrespective from any *professio juris*.

However, once in force, the revPILA will enable foreign nationals and Swiss nationals with one or more other nationalities to submit: (i) the assets located in their national State; or (ii) their entire estate to the jurisdiction of the authorities of their national State when they are electing their foreign national law as applicable to their estate.

Careful consideration should be given to this election for married couples as it does not apply to the liquidation of matrimonial property (art.51 revPILA), which could lead to a situation where one authority (i.e. Swiss) handles the liquidation of the matrimonial regime upon death, while another authority deals with the liquidation of the estate itself (i.e. one's national State). Indeed, a spouse who made a choice of jurisdiction for the estate is not allowed to also unilaterally derogate Swiss jurisdiction regarding the liquidation of the matrimonial property regime. As such, the Swiss rules dealing with the distribution of assets which form part of the applicable matrimonial property regime, will bite before the application of Swiss succession law.

Case Study

Let us take the example of Mr Jones, a French and British national residing in Switzerland. The following facts are relevant to Mr Jones' planning opportunities:

- Mr Jones is married to Mrs Jones, with whom he has two children
- Mr Jones' assets comprise Swiss real estate as well as portfolios held in bank accounts in Switzerland and the UK
- Mr Jones wishes for all of his estate to pass to Mrs Jones on his death, should she survive him
- Whilst Mr Jones retains ties with the UK, he has no ties with France

Should Mr Jones make a Will providing for his entire estate to pass to Mrs Jones' on his death without making a choice of law submitting his estate to the laws of England and Wales, Swiss inheritance law will apply to his estate. Thus, Mr Jones' children, as legal heirs, will be able to claim their compulsory portion—equal to 25% of Mr Jones' estate by way of a specific judicial action. The limitations to Mr Jones' testamentary freedom could be waived by his children by way of them entering into an inheritance contract.

Article 90(2) PILA, however, enables Mr Jones, as a foreign national domiciled in Switzerland, to subject his succession to the law of his nationality. As a dual national, Mr Jones is free to submit his estate to the law of the State of which he is a national (i.e. French or English law), and case law has confirmed that it does not matter whether or not he had ties with the chosen State.

In this case, as France also applies a forced heirship regime giving a mandatory right to Mr Jones' children, Mr Jones should make an election in his Will to submit his estate to the laws of England and Wales to achieve his estate planning objectives. Indeed, as English law applies testamentary freedom, such a *professio juris* would increase Mr Jones' freedom of disposal, as he would be able to organise his estate without having to comply with the Swiss forced heirship rules.

As Mr Jones holds bank accounts in England, the revPILA would allow him to make an election to submit those specific assets to the English authorities, or even his entire estate should he wish to do so (art.87(1) revPILA). In practice, Swiss banks and authorities that are familiar with international estates regularly accept foreign certificates of inheritance (e.g. an English grant of probate) if there is no reason to doubt their authenticity and/or accuracy. In case of uncertainties, the foreign certificate of inheritance (or similar document) can be recognised by way of Swiss recognition proceedings pursuant to the PILA.

It is worth noting that under the current PILA, a *professio juris* lapses if, at the time of death, the deceased no longer has such citizenship, or has acquired Swiss citizenship (the case of a Swiss dual national resident in Switzerland will be discussed below). However, the amendments made to the revPILA provide

that, going forward, a *professio juris* will continue to be valid if the deceased was no longer a foreign national upon his/her passing, provided he/she was a foreign national at the time the *professio juris* was made. As such, even if Mr Jones' was to renounce his UK citizenship after making his Will, such an election will still be valid.

Swiss dual nationals resident in Switzerland

Under the current PILA, a Swiss dual national domiciled in Switzerland cannot elect the foreign law of their other nationality to govern their estate if they are also of Swiss nationality at the time of their death. Indeed, a professio juris is only possible for foreign nationals, to the exclusion of Swiss dual nationals (art.90(2) PILA). Had Mr Jones held Swiss nationality, in addition to his French and English nationality as set out above, he would not have been able to subject his estate to English law under the current PILA.

Under art.91(1) revPILA, however, Swiss dual nationals will now also have the option to select one of their other national laws but they must hold the relevant nationality at the time of either signing their Will or upon their death.

This amendment sparked significant debate in Swiss Parliament and led to disagreements between the National Council and Council of States. The approved text offers only limited flexibility for Swiss dual nationals in that the agreement reached by the Chambers on art.91(1) revPILA maintains the principle of forced heirship and the corresponding compulsory portion. As a result, the estate of Swiss dual nationals will still be subject to the Swiss forced heirship rules, regardless of whether they choose to submit their estate to the laws of the State of their other nationality. Had Mr Jones held Swiss nationality, in addition to his French and English nationality as set out above, the revPILA would allow him to subject his estate to English law but he would not be able to deviate from the Swiss forced heirship rules.

It may still be advisable for Swiss dual nationals to submit their estate to a foreign law for example in order to make use of certain foreign planning tools such as Will trusts (although they still remain controversial under Swiss law) or to ensure consistency between the governing matrimonial and succession laws.

The legislation in neighbouring countries, which are most relevant dual nationality situations involving Swiss nationals, typically grant stronger forced heirship rights to legal heirs, than those provided for under Swiss inheritance law. Consequently, the provision in art.91(1) of the revPILA is unlikely to significantly affect the testamentary dispositions of Swiss nationals with multiple nationalities, except in the case of countries that have a system of testamentary freedom (e.g. the US, the UK, Australia…).

"The Importance of Montoring"

Whilst the amendments made to the revPILA offer greater opportunities to testators, it is important to emphasise that once a *professio juris* and/or choice of jurisdiction is made, any changes in the law of the jurisdictions concerned (i.e. residence, nationality, situs of assets etc.) should carefully be monitored. Indeed, in principle the legal framework in effect at the time of the testator's death, rather than when such choice is made, will ultimately govern the devolution of his/her estate.

Cumulative Index

This index has been prepared using Sweet & Maxwell's Legal Taxonomy.