

ACA Town Hall

Estate Planning for Overseas Americans in Switzerland

May 10, 2012

Webster University Geneva

Jonathan Lachowitz

Certified Financial Planner™ – Investment Advisor

This presentation is not meant as legal, tax or financial advice to any individual. This is a general explanation of cross border issues between the US and Switzerland. You are strongly recommended to seek the advice of a professional who understands your specific circumstances before relying on any of the information in this presentation. There may be mistakes and regulations may change or not apply in some circumstances. The presentation may be circulated but should be appropriately cited if used in a professional setting.

IRS Circular 230 Disclosure: Any tax advice in this communication is not intended or written by the author to be used, and cannot be used, by a client or any other person or entity for the purpose of avoiding penalties that may be imposed on any taxpayer.



Jonathan Lachowitz – CFP®

- Certified Financial Planner™ & Investment Advisor – Switzerland and US
- MBA 1996 – Finance & Marketing – New York University’s Stern School of Business
- Specialized in cross-border financial planning, especially with overseas US citizens in Switzerland
- US & Swiss National
- Founded White Lighthouse Investment Management – 2006 – Lausanne
- Owner JJK Investment Management (Registered Investment Advisor) in US
- Serving ~100 clients in personal financial planning and asset management
- Develop & teach personal finance courses at IMD
- Board Member of ACA – American Citizen’s Abroad (Geneva)
- Board Member of SFPO (Swiss Financial Planning Organization – Bern)
- Email: lachowitz@white-lighthouse.com / www.white-lighthouse.com

Outline

1. Estate Planning Checklist
2. Government Forms – Starting Estate Settlement
3. Financial Accounts
4. Estates & Gifts – US Taxes
5. US – Swiss Estate Tax Treaty / EU Regulations
6. Government & Employer Benefits
7. US Expatriation & Giving Up a Green Card – Estate Planning
8. Tips for American Expats
9. Being a Smart Consumer & Choosing a Professional Advisor
10. Conclusion

1. Estate Planning - Checklist

- Do you have a will? Has it been updated? Is it valid where you are living?
- Have you prepared an estate planning letter?
- Do you know what will happen if you or your spouse die overseas?
- Do you have enough life insurance?
- Who will take care of minor children (raising them and finances)?
- Do you have a listing of location of all valuable papers, assets, accounts, passwords?
- If you have a business – continuity plan?
- Insurance documents – updated including beneficiaries?
- Do you have durable health care power of attorney, general power of attorney?
- Do you have a living will?
- Have you made your wishes known: heirlooms, location of burial, type of service, donations to charity etc?
- Do you need a trust arrangement: for sizable estates, to take care of minor children, to avoid probate, other reasons?

2. Government Forms – Starting Estate Settlement

- Consular Report of Death of American Abroad – DS 2060
- IRS Transfer Certificate 5173
- US Estate Tax Return
- Settling an overseas estate can easily take 6 months, a year, or longer

Requesting Consular Report of Death of US Citizen Abroad

- Contact US Citizen Services at the closest Embassy or Consulate
- Based on foreign death certificate, which must be received first
- http://travel.state.gov/travel/tips/emergencies/death/death_3878.html
- <http://bern.usembassy.gov/service/death-of-an-american-citizen-abroad.html>
- http://travel.state.gov/travel/tips/emergencies/death/death_1204.html
- Call the Embassy at 031-357 7011 for the latest requirements to request this form
- More info can also be obtained from email to citizeninfo@state.gov
- Generally 20 certified copies of Consular Report of Death (DS 2060) are given “free of charge” upon the initial request.

Sample DS 2060 Overseas Death Certificate

U.S. Department of State
REPORT OF THE DEATH OF AN AMERICAN CITIZEN ABROAD

Post _____ Date of Issue (mm-dd-yyyy) _____
SSA No. _____

Name in full _____ Age _____ (Last name)
Date (mm-dd-yyyy) and Place of Birth _____
Evidence of U.S. Citizenship _____
Address in U.S.A. _____
Permanent or Temporary Address Abroad _____
Date of death _____ (First name)
Month _____ Day _____ Hour _____ Minute _____ Year _____
Place of death _____
Number and street, or Hospital/Institution _____ City _____ Country _____
Cause of death _____
(Including authority for statement - if physician, include full name and official title, if any)

Disposition of the remains _____
Local law governing disinterment of remains provides that _____
Disposition of the effects _____
Person or official responsible for custody of effects and accounting therefore _____

Traveling/residing abroad with relatives or friends as follows:
NAME _____ ADDRESS _____ (Middle name)

Informed by telegram or telephone
NAME _____ ADDRESS _____ DATE (mm-dd-yyyy) NOTIFIED _____
NAME _____ ADDRESS _____ DATE (mm-dd-yyyy) NOTIFIED _____

Copy of this report sent to:
NAME _____ ADDRESS _____ DATE (mm-dd-yyyy) SENT _____
NAME _____ ADDRESS _____ DATE (mm-dd-yyyy) SENT _____

Notification or copy sent to Federal Agencies: SSA _____ VA _____ CSC _____ Other _____
State Agency

The original copy of this document and information concerning the effects are being placed in the permanent files of the U.S. Department of State, Washington, DC 20520

Remarks: _____

(Continue on reverse if necessary)

[SEAL] _____ Signature on all copies
_____ of the United States of America.

For Additional Certified Copies, see <http://travel.state.gov/passport/faq/017>

DS-2060 (Formerly DF-100)
12-2011

US Estate Tax Return

- IRS Form 706 – Only 28 pages
- US Estate (and Generation Skipping Transfer) Tax Return
- <http://www.irs.gov/pub/irs-pdf/f706.pdf>
- Generally the responsibility of your executor
- Many CPAs do not have experience filing this return
- IRS Form 706 Instructions:
<http://www.irs.gov/instructions/i706/index.html>
- File within 9 months of death of decedent
- 2012 Required filing if Gross Estate is over \$5.12 million estate tax 35%
- Drops to \$1 million in 2013 & 55% estate tax unless Congress acts.

IRS Transfer Certificate: Form 5173

- Written request to:
IRS SB/SE Estate Tax Group 1205
820 First St NE, Suite 730
Washington DC 20002
- Include:
 - DS-2060 Report of Death of American Citizen Abroad
 - Signed affidavit listing worldwide assets at time of death and any taxable gifts after 1976
 - Copy of decedent's last will and testament: In English (may need to be a notarized copy)
 - Filing of local country estate tax return if required in local country
- Expect 3 months for a response
- Check with IRS to see if requirements have changed at time of request, especially with respect to documents that may need to be notarized

Misc. Info

- NRA owning over \$60,000 in “us situs” assets will owe estate taxes at highest federal rate.
- NRA gifting US assets, no gift taxes
- One US Spouse can inherit unlimited assets with no estate tax due, from another US citizen spouse
- Non-Citizen Spouse inheriting from US Citizen subject to exemption limits and estate tax, can defer with a QDOT

3. Financial Accounts

- What happens to Financial Accounts when someone dies?
- How does a financial institution find out about the death of an account holder?
- Pitfalls to plan for:
 - Joint accounts
 - First named on account is often important
 - Credit card

US IRA Accounts

- Are your beneficiaries up-to-date?
- 401 K Plans
- Inherited IRA rules are different than “regular” IRAs in terms of distribution schedules and amounts; depends on who inherits; age of decedent and age of beneficiary
- Rollover IRA
- Special rules for Roth IRA and inherited Roth IRA. Generally 5-year-rule must be met to keep these “tax free”; heirs must withdraw within 5 years or distribute over their lifetime.
- Swiss lump sum taxation available for Swiss Resident; though generally only advisable for non-US persons.

Beneficiaries on IRA Accounts

- Are your beneficiaries up-to-date and in proportion to your desires? Don't disinherit recently born children or grandchildren.
- What if a non-American inherits an IRA?
- Spousal IRAs and Inherited IRAs have different distribution requirements. [Generally driven by account value, age of decedent, and age of beneficiary.]

Transfer on Death Forms

- Many US Brokerages allow this election; it will be executed upon death and avoids probate and overrides any election in a will.
- US Brokerages will generally follow US State laws and will not allow this election if you live outside the US (so they don't conflict with local laws)
- Can be an effective planning tool before leaving the US

Life Insurance - Review

- Are your beneficiaries up-to-date?
- Do you have enough coverage for the right event?
Income replacement versus Estate planning
- Is your plan a US-qualified insurance plan?
- Who owns the policy and will it be in the decedent's estate?
- Could you benefit from a life insurance trust?

US Accounts Owned by Non-US People

- Investment accounts or real estate
- Possibly inherited from US person
- Planning for US Estate Tax for non-US persons
- Generally Personal Investment Company inside a structure (Trust or Company)

Could you benefit from a trust or other structure?

- In many cases, yes
- Best to discuss with a qualified attorney

4. Estates & Gifts – US Taxes

- What happens to your assets when you or your spouse dies?
- What limitations do I have on gifts?
- Chart on next pages – Credit to Prudential Financial
Part of the Prudential Insurance Company of America and is not considered legal, accounting or tax advice

General Gift Tax Situs Guidelines for Non-Resident Aliens by Family or Property

Type of Property	Subject to Gift Tax	Not Subject to Gift Tax
General Rule	Real and tangible personal property situs in US at time of transfer	Real property outside the US
Real Property	Real property, i.e., land, building, fixtures, and improvements located in the US	Real property outside the US
Tangible Personal Property	Property physically in the US Note: Cash/currency whether in US dollars or foreign currency, is treated as tangible property and will incur gift tax on gifts made within the US	Property outside the US
Intangible Person Property	None Note: This is in contrast with estate tax where such property located in the US is subject to estate tax	Intangible personal property, i.e., stocks, mutual funds, bank, brokerage and fiduciary accounts even if located in the US
Life Insurance	Gifts of cash by non-resident alien to make premium payments are gifts of cash and subject to gift tax (unless limited to annual gift tax exclusion).	Policy insuring non-resident alien or another can be transferred without a gift tax and does not need to worry about 3-year pullback rule.

General Gift Tax Situs Guidelines for Non-Resident Aliens by Form of Property

Type of Property	Included in the Taxable Estate	Non-Included in the Taxable Estate (or exceptions to the rule)
General Rule	Assets situated within the US or titled therein must be fully disclosed on Form 706 NA,	Assets not situated within the US generally do not have to be disclosed.
Real Property	Real property, i.e., land, buildings fixtures, and improvements, located in the US.	Real property outside the US.
Tangible Personal Property	Property physically in the US cash/currency is considered tangible property (although most forms of monetary instruments are not) and is taxable if in US.	Tangible property in the possession of the foreign national if only temporarily visiting the US.
Bank, Brokerage & Fiduciary Accounts	Funds held by US banks or other financial institutions, if used in conjunction with a US trade or business; funds held in brokerage accounts; deposits with domestic branches of foreign banks are also subject to this trade or business requirement.	Savings accounts, checking accounts or certificates of deposit issued by a US bank if not used in conjunction with a US trade or business; funds held in a US bank custody account; funds deposited in a foreign branch of a US bank.

General Gift Tax Situs Guidelines for Non-Resident Aliens by Form of Property - continued

Type of Property	Included in the Taxable Estate	Non-Included in the Taxable Estate (or exceptions to the rule)
Qualified Retirement Plan	Assets held by Plan Administrators representing work for a US company.	
Stock	Shares issued by a US corporation regardless of situs.	Shares issued by a foreign corporation regardless of situs.
Life Insurance	The value of a policy on the life of another person (i.e., the interpolated terminal reserve), issued by a US licensed insurance company and owned by the decedent.	The proceeds from an insurance policy on the life of the non-resident regardless of the insurance company's country of origin.
Annuities	The value of any annuity issued by a US insurance company on the life of another.	Annuities where issued by foreign insurance companies.

Summary of Estate & Gift Tax

Decedent / Surviving Spouse	Decedent's Estate Tax Applicable Exemption Equivalent ¹	Estate Tax Marital Deduction	Decedent's Interest in Property Held Jointly With Spouse ²	Annual Marital Gift Tax Exclusion ³	Availability of Gift-Splitting to a Third Party	Availability of Gift Tax Annual Exclusion ⁴
US Citizen/ US Citizen	\$5m	Unlimited	50%	Unlimited	Available	Available
US Citizen/ Resident Alien	\$5m	Only with QDOT	100%	\$136,000	Available	Available
US Citizen/ Non-Resident Alien	\$5m	Only with QDOT	100%	\$136,000	Not Available	Available
Resident Alien/ US Citizen	\$5m	Unlimited	50%	Unlimited	Available	Available
Resident Alien/ Resident Alien	\$5m	Only with QDOT	100%	\$136,000	Available	Available
Resident Alien/ Non-Resident Alien	\$5m	Only with QDOT	100%	\$136,000	Not Available	Available
Non-Resident Alien/ US Citizen	\$60,000	Unlimited	50%	Unlimited	Not Available	Available
Non-Resident Alien/ Resident Alien	\$60,000	Only with QDOT	100%	\$136,000	Not Available	Available
Non-Resident Alien/ Non-Resident Alien	\$60,000	Only with QDOT	100%	\$136,000	Not Available	Available

¹Applicable for 2011-2012

³Rates for 2011

²Unless considerations can be substantiated for the non-citizen surviving spouse's portion

⁴\$13,000 – 3&4 Indexed for inflation

Situs Rules

Type of Property	US Citizen	US Resident	Non-Resident Alien
Gift Tax	Worldwide gifts subject to US gift tax.	Worldwide gifts subject to US gift tax.	Gifts of real and tangible personal US situs property subject to US gift tax. Gifts of intangible US situs property (e.g. stock, certain deposits and life insurance) and gifts of non-US situs property not subject to US gift tax.
Estate Tax	Worldwide property owned by decedent subject to US estate tax.	Worldwide property owned by decedent subject to US estate tax.	US situs property owned by decedent subject to US estate tax.

US Federal Estate Tax – US Citizens

- 2012 - \$5.1 million exemption, 35% estate tax.
- Married couple (both US citizens) can get full exemption \$10.2 million on 2nd to die as long as Estate Tax return is filed. (Historically a trust set-up was often used to accomplish this.)
- 2013 - \$1 million exemption, 55% estate tax unless Congress acts to change it (they probably will but it will probably be late)

Income Tax Rules – Year of Death

- Surviving spouse or personal representative should file final tax return.
- DECEASED with date of death should be written at the top of the return.
- Full year standard deduction applies, but only itemized expenses and income up until date of death.
- Medical expenses received and paid up to 1 year after date of death can be treated as having been paid by the decedent for income tax purposes.
- Income (over \$600) after death (in respect of decedent) requires Form 1041.
- Can create some confusion on 1099 forms and other income statements received from banks and brokerage accounts.
- Form 1030 must be filed if the final tax return is claiming a refund.
- State Tax returns may need to be filed too (e.g. if Real Property is owned in the US).
- In the year of death of one spouse, surviving spouse can use same filing status that year.
- Surviving spouse may use \$500,000 credit against sale of home (instead of \$250,000 for an individual) if the home is sold within 2 years of the spouse's death.
- Inherited Assets receive a step up in basis (gifted assets retain their original cost basis)
- Gifts to non-citizen spouse \$139,000 limit per year – estate tax treated like “non spouse” if surviving spouse is a non-American
- Non-American owning US assets still only \$60,000 exemption

Estate Planning for Non-Citizen Spouse

- Non-citizen surviving spouse subject to US Estate taxes above exemption amount.
- Non-citizen spouse owning US assets only has a \$60,000 exemption from US Estate tax.
- US Citizen can gift non-citizen spouse \$139,000 per year (2012 limit) + \$13,000 annual gift limit.
- QDOT can be formed to defer US estate taxes until time of death of non-citizen spouse.

Estate Planning for Non-Citizen Spouse

QDOT information

- Can be formed post mortem (within 9 months of death, extension can be filed for)
- At least one US Trustee who is US citizen or US corporation
- Executor must make an irrevocable QDOT election for qualify for marital deduction on Federal Estate tax return (form 709)
- If QDOT has equal to or less than \$2 million, only 35% can be real property outside the US or else:
 - Trustee must be a US bank
 - Individual US Trustee must furnish a bond for 65% of the QDOT assets at the transferors demise **or**
 - The individual US Trustee must furnish an irrevocable letter of credit to the US Government for 65% of the value
- If QDOT has over \$2 million in Assets then one of the items 1, 2, or 3 above need to be met.
- Any property that the deceased spouse transfers to the surviving spouse outside of the QDOT (e.g. beneficiary election, joint tenancy, etc) may be transferred to the QDOT without estate tax before the estate tax return is due [9 months after date of death with a possibility to apply for a 6-month extension].
- Primary requirement for a QDOT is that the surviving spouse can not be the only Trustee
- Distributions of QDOT income are not subject to estate tax when made; distributions of principal are subject to federal estate tax.

5. US-Swiss Estate Tax Treaty

- Went into force in 1951 – not updated since
- Aims to prevent double taxation of estates

Switzerland - United States Inheritance Tax Treaty (1951)

<p>Status: In Force Conclusion Date: 9 July 1951. Entry into Force: 17 September 1952. Effective Date: 17 September 1952 (see Article 8).</p>
<p>Related Cases:</p> <p>- United States - Louis M. Mudry v. United States (Internal Revenue Service), 8 December 1986 (Summary)</p>

CONVENTION BETWEEN THE SWISS CONFEDERATION AND THE UNITED STATES OF AMERICA FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INHERITANCES

Article 1

1. The taxes referred to in this Convention are the following taxes asserted upon death:
 - (a) In the case of the United States of America: The Federal estate tax, and
 - (b) In the case of The Swiss Confederation: Estate and inheritance taxes imposed by the cantons and any political subdivision thereof.
2. The present Convention shall also apply to any other estate or inheritance taxes of a substantially similar character imposed by the United States or the Swiss cantons or any political subdivision thereof subsequently to the date of signature of the present Convention.

5. Misc Item – Online Assets¹

- How to bequeath on-line assets?
- Gmail will provide e-mails to an executor upon death.
- Facebook will allow relatives to close an account or turn it into a memorial page.
- iTunes license for music can be revoked upon death; all iCloud data is deleted upon death of an owner.
- 5 American states have enacted laws giving an executor rights over a deceased persons social networking sites.
- Some cases already litigated in the US.
- Securesafe, a Swiss company, recently acquired Entrustet and allows users to store passwords and set-up who can access what information when they die.

¹Economist article April 21, 2012, page 76, “Deathless Data”

5. EU Succession Laws¹

- From 2015, expatriates in all EU countries will have the right to have their country of nationality's succession laws apply – similar to Switzerland today.
- An elective statement can be made through a will or European Certificate of Succession.
- Country of residence estate tax law will still apply.
- Variable tax rates on estate planning by country and based on “type” of beneficiary.
- UK, Ireland, and Denmark have opted out of this Brussels IV regulation.

¹Credit to Blevinsfranks Article 11, April 2012; <http://www.blevinsfranks.com>

6. Government Benefits & Employee Benefits

- Read the fine print – know your rights
- US Social Security: <http://www.ssa.gov/>
- Swiss AVS: <http://www.bsv.admin.ch/>
- US Embassy in Bern is a great resource for Swiss/US social security rules

US Social Security & AVS - Highlights

- US Swiss Totalization Agreement
- http://www.ssa.gov/international/Agreement_Pamphlets/switzrld.html
- US Social Security – More generous to non-working spouse
- US - WEP

What happens to US & Social Security when a decedent passes away?

- US – Surviving Spouse receives the higher of their own or their spouse's SS.
- US – Dependents may also be eligible (e.g. younger children or disabled dependents)
- Swiss AVS – Less generous for surviving spouse

Swiss Taxation of US Social Security

US Social Security – Gross Benefit	100	
US tax, limited to 15% under article 19(4)	-15	
Net Received from US Sources	85	85
Exempt amount under Article 23(2)(d)	28.33	
Swiss taxable benefit	56.67	
Swiss tax rate: Assume Maximum rate of 40%	-22.67	-22.67
Net after all US and Swiss Income Taxes	62.33	62.33

7. US Expatriation – Estate Planning

- Applies to US Nationals
- Applies to long-term green card holders – 8 of the past 15 years.
- Expatriation not necessarily beneficial for US Estate Tax purposes.

US Expatriation & Relinquishing Green Card

- New rules in affect since June 17, 2008
- If
 - A) Net worth above \$2 million
 - B) Average US tax burden for last 5 years is above \$147,000 (2011 limit, indexed) or
 - C) Fails to certify that they have complied with all US tax obligations from last 5 years.

The 3-year look back has been eliminated which can be an effective planning tool.

- Long-term green card holder (8 of the last 15 years)
- All property deemed sold at date of expatriation. If gain is above \$600,000, then expatriation will be a taxable event.

US Expatriation & Relinquishing Green Card

- Some people can escape the rules (dual nationals/accidental Americans)
 - The exceptions are dual nationals from birth, who have not lived in the US for more than 10 years from the last 15, and persons younger than 18 ½ who have not lived in the US for more than 10 years.
- Estate type tax on any US person who receives a gift (directly or via trust) from a “covered” expat. 35% in 2011
- Certain deferred tax items not subject to mark-to-market: (Stock options, pension rights, restricted stock units and other deferred compensation, certain tax deferred accounts and non-grantor trusts), but still subject to US taxes.
- 30% tax imposed on all post-expatriation trust distributions received by covered expat. Could result in 51% next tax on distributions from certain pension plans and retirement accounts.

Procedure to Expatriate

- Get a second citizenship in another country.
- Leave the US.
- Appear before the US Consul in that country to renounce your US citizenship.
- File the form 8854, Expatriation Information Statement.
- Pay the exit tax due, if any.

As a covered expatriate, you will be able to visit and stay for certain time in the United States, and the mere fact of being an expatriate does not make you a US tax resident. You still can become taxable in the US under the normal US tax rules.

8. Tips for Americans Overseas

1. Get a regular copy of your free annual credit report: +1 877 322 8228
2. Consider implementing a security freeze to prevent ID theft: <http://redtape.msnbc.com/2007/11/now-a-way-to-st.html#posts>
3. Get a regular copy of your US Social Security Statement: <http://www.ssa.gov/>
4. File your annual US tax returns – **It can now be checked upon passport renewal!**
5. Keep a US credit card with a US address.
6. Keep a US address (for investing, credit cards & possible insurance).
7. Know what happens if you return to your previous state of residence, especially on state income tax for years you were away.
8. Get a US phone number (Skype, call 800 number for free).
9. Review life insurance and long-term care insurance in the US.
10. Review a US-based will.
11. Investigate what happens if you were to die while living overseas. (Swiss Law different than US)
12. If you plan to return to the US, work with advisors who are experienced with the US “system”: financial, tax, legal, etc.
13. Travel to the US only on your US passport.
14. Vote in the Presidential elections (federal ok, local elections not advised from overseas)
15. New voting form, Department of Defense – Federal Post Card application – Will affect which elections you can vote in and may affect taxation at the state level, especially upon return. Some states very aggressive: eg Virginia, Maryland, & Mass.
 1. I am a US citizen residing outside of the US and I intend to return.
 2. I am a US citizen residing outside of the US and I do not intend to return.
16. Check out previous residence: “unclaimed property”
17. If you are married to a non-American, make sure you know the estate planning and gift tax implications! There are advantages and disadvantages...

9. Being a Smart Financial Consumer

- Investment of your time – even if the subject is not interesting
- Together with your spouse or partner
- Together with your advisor(s) –
- Educate yourself
- Hiring a professional(s) where specialists are needed
- You will need to pay for most professional advice
- Being a good client – Advisors choose you as much as you choose them. Be respectful, honest, and timely.
 - e.g. If you have had 5 new tax advisors in 5 years, the problem may not be the tax advisors.
 - The expat community & advisor community is small
- Know your costs
- Know your rights and obligations
- Advice is not always “right” trust, but verify.
- Comparison shopping

Choosing a Professional Advisor

1. Do you need a professional advisor(s)? Why?
2. What are the advisor's services and do they match your needs? Different titles...
3. Whose interests do they put first? Are they fiduciary, employee, sales person?
4. What are you looking for and what do you think you need?
 - A financial plan?
 - An estate plan?
 - Legal advice? Documents?
5. Get references from people you trust. Ask the one thing your reference does not like.
6. What licenses, education, registrations do they hold?
7. What experience do they have? Would you be a typical client?
8. How does the advisor get paid?
9. Is their advice objective? How do you know? Are they paid more to sell their company's products?
10. Have they been involved in any lawsuits or other disciplinary action?
11. Do you know how to be a "valued" client?
12. Gut feel

10. Concluding Thoughts

- Time and education are your best assets
- Find professional help when you need it. Hire people who are more qualified than you and expect to pay for personalized advice.
- Don't expect government, employer, family or children to take care of informing you. If they do, that's a bonus. You are in the driver's seat.
- Ask good questions.
- Things change (frequently) stay prepared & educated!

Questions after the presentation?

- Email: lachowitz@white-lighthouse.com
- www.white-lighthouse.com
- Office phone: +41 22 548 1431

Swiss Estate Laws and PLanning

Yves Bonnard – American Citizens abroad – May 10, 2012

Swiss Estate Laws and Planning

Introduction

A U.S person dies in Switzerland

- Legal questions (planning):

- Which law apply? Swiss or U.S. law?
 - In case he is married, which law applies to his matrimonial regime?
 - Which law applies to his estate?
- How much tax will be due in Switzerland and/or in the U.S.? Who is liable for the estate tax?

- Various practical questions

Swiss Estate Laws and Planning

If no will and no marital agreement : Swiss private international law

- Swiss private international law (PIL) provides:
 - In case a foreigner dies while residing in Switzerland without a will:
Swiss inheritance law will apply (art. 90 PIL)
 - In case a **married** foreigner dies while residing in Switzerland without a marital agreement:
Swiss marital law will apply (art. 54 al.1 litt.b PIL)
- In any event Swiss tax law will apply!

Swiss Estate Laws and Planning

Swiss marital law and inheritance law

- In case the U.S. decedant was married at time of death, two sets of Swiss laws will apply subsequently:

- First, one must segregate between all the family wealth:
what belongs to the decedant (= the estate) and
what belongs to the surviving spouse;

This first step is governed by Swiss matrimonial law (Swiss Civil Code, art. 181-251)

- Second, one must share the estate among all the heirs (among which you usually find again the surviving spouse)

This second step is governed by Swiss inheritance law (Swiss Civil Code, art. 457-640)

Swiss Estate Laws and Planning

Sharing of the marital property

- **First step: sharing the marital property**
- Unless otherwise provided in a marital agreement, Swiss law provides for the U.S. equivalent of a «community property» so called: **«participation aux acquêts»**

(in the U.S. nine States apply the «community property»: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin).

- The portion of the wealth earned during the marriage («acquêts») by the spouses is shared by two.
- The portion of the wealth already owned by a spouse before the marriage or inherited during the marriage is NOT shared.

Swiss Estate Laws and Planning

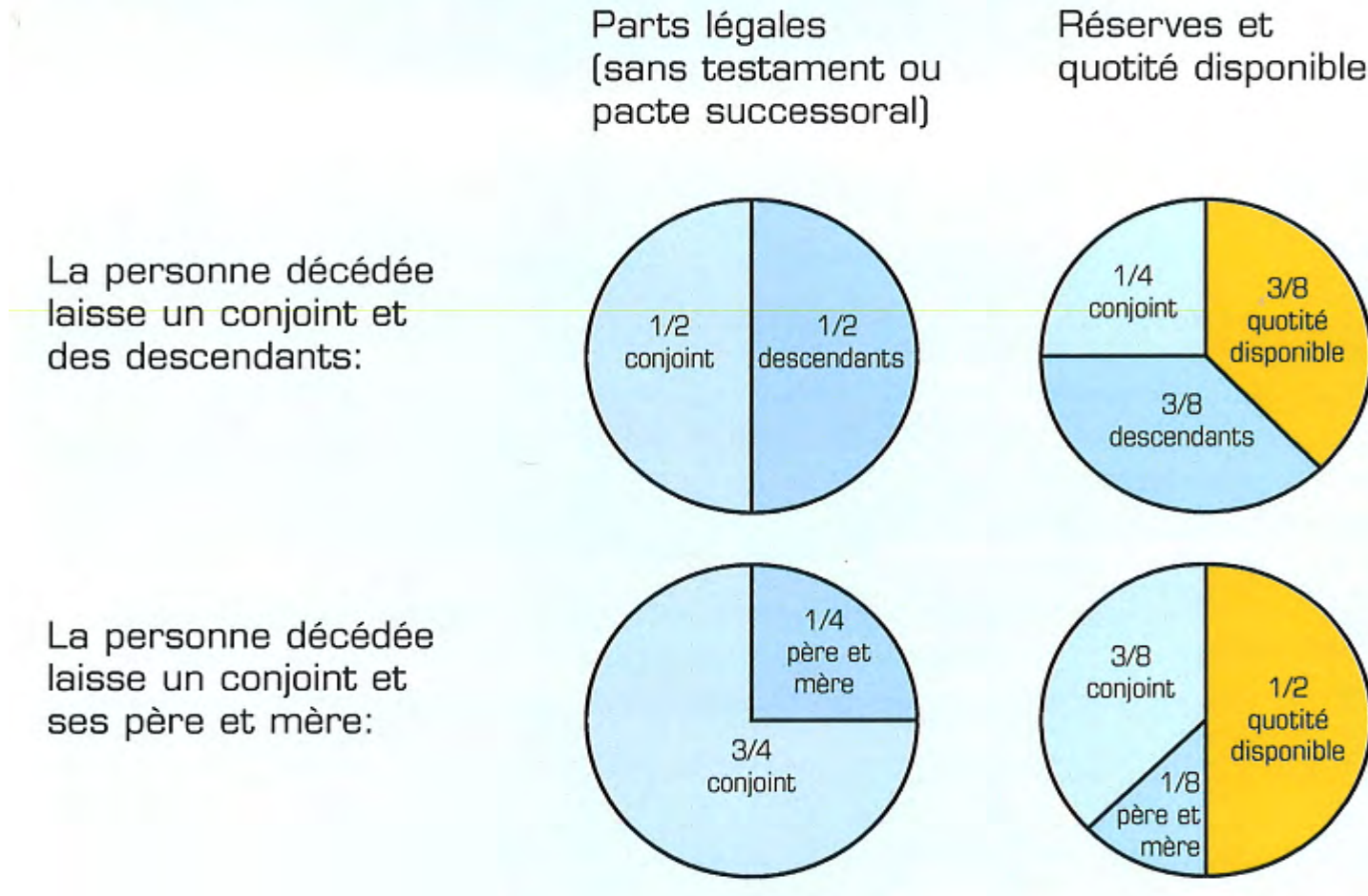
Sharing of the estate without a will

- **Second step: sharing the estate**
- Unless otherwise provided in a will, Swiss law provides for specific sharing rules:
- Among all the heirs, the surviving spouse has a special status: his/her share varies depending the family relationship between the other heirs and the decedant: the more remote the other heirs are, the larger the share allocated to the surviving spouse is

Swiss Estate Laws and Planning

Sharing of the estate

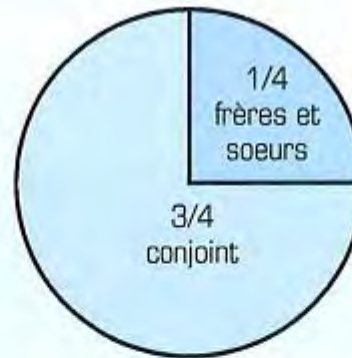
Parts légales, réserves et quotités disponibles



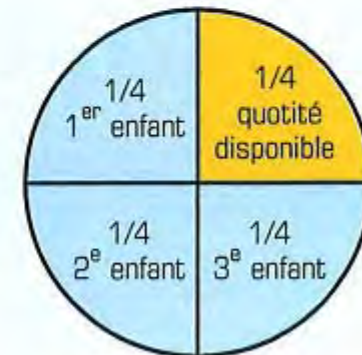
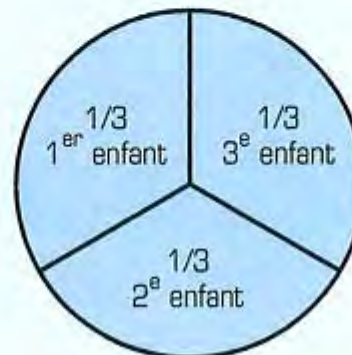
Swiss Estate Laws and Planning

Sharing of the estate

La personne décédée
laisse un conjoint et
des frères et soeurs:



La personne décédée
était veuve ou divorcée
et laisse trois enfants:



Swiss Estate Laws and Planning

How to modify the sharing rules

- **For the first step: Signing a marital agreement**

With a proper marital agreement you can change the sharing rules of the marital property: e.g. with a «separation of wealth» agreement, you avoid the sharing of the marital wealth between the spouses.

- **For the second step: Writing a will**

- The Swiss Civil Code provides that you can slightly change, **in writing a will**, the portion of the estate that is otherwise allocated to your heirs.

- However, some heirs (surviving spouse and children) benefit from a minimum portion of your estate: this is the so-called «**forced heirship rules**»

- Under those rules:

- The surviving spouse is entitled to a minimum share of $\frac{1}{2}$ of the share she would have been entitled to without a will

- The children are entitled to a minimum share of $\frac{3}{4}$ of the share they would have been entitled to without a will

Swiss Estate Laws and Planning

How to change the applicable law

- In case the regular sharing rules do not satisfy you **and**
- In case you cannot achieve what you want in modifying those sharing rules with a marital agreement / a will :

- Then may be you should **elect the law of your country of origin** as the applicable law to your marital regime and to your estate
- Swiss PIL allows you to do so (provided you are not a double national, e.g. Swiss and U.S. citizen).

- For example, this is usually the case when the spouses want that all the family wealth goes to the surviving spouse:
Not to the children at all. They have to wait until the death of the surviving spouse.

In such a case, you would breach the “forced heirship rule” as the children would not get their minimum share of the estate;

- Two notes:
- Under Swiss law, adult the children only may accept to renounce to their minimum share of the estate
- Under Swiss law, even though not all the estate can go to the surviving spouse “in full ownership” he/she can inherit of the “**usufruct**” on the entire estate. It is similar to a life interest on the estate. He/she cannot sell the assets, but he/she can freely benefit from them (e.g. the family house, the proceeds of the bank portfolio, etc.).

Swiss Estate Laws and Planning

Some practical questions

- **Notary vs. lawyer**
- In some Swiss cantons such as of Geneva and Vaud, lawyers and notaries have two different professions, but both in private practices;
- Both have a full legal education in law school, but there after, they go through a two or three years different training program;
- Notaries have, by law, the monopoly for “authentic” contracts, such as:
 - Sale of real property;
 - Marital agreements;
 - Authentic wills, etc.
- So, at first sight you may want to go to a notary for the drafting of a will and of a marital agreement.
- This may be true for the standard Swiss citizen and resident.
- However, a foreigner residing in Switzerland may want to go first to a lawyer with international law experience.
- Then the international lawyer will liaise with the notary to instruct him on the proper drafting of the authentic documents, taking into account, for example, international legal/tax implications.
- Note: according to the Swiss Civil Code, a will can be either “authentic” or fully handwritten. In other words, you do not need to go to a notary if you only need a will: your lawyer can draft it and you copy it by hand. If you not only need a will but also a marital agreement, then it is easier to do both with a notary.

Swiss Estate Laws and Planning

Swiss estate and gift taxes

- There is no federal gift or estate tax
- Each canton has its own legislation on gift and estate tax: in Vaud and Geneva, there is also a municipal estate tax that is computed as a % of the cantonal tax.
- Estate tax is a tax due on the share of the estate and not on the estate itself (except in the cantons of GR and SO)
- Consequences:
 - The tax is due by each heir (and not by the estate)
 - The tax rate varies depending the degree of family relationship between the decedent and the heir:
 - In all Swiss cantons, no estate tax between spouses
 - In most Swiss cantons (except VD and NE), there is no estate tax between parents and children.
 - As an example, if the estate is shared between the surviving spouse, a cousin and an exempt charity, only the cousin will be liable for Swiss estate tax on his share of the estate.
- Tax base: The estate is composed of all movable property and real estate located in Switzerland. Foreign real estate is not subject to estate tax.
- Double estate tax issues between Switzerland and the U.S. will be discussed in the other conferences.

Swiss Estate Laws and Planning

Contact

Yves Bonnard

Avocat - Attorney-at-Law

LL.M. in Taxation

Avocat au Barreau, Lausanne, Paris

Tel: +41 21 348 11 88

Dir: +41 21 348 11 94 (assistante)

Fax: +41 21 348 11 89

Bonnard Lawson

International Law Firm - www.ilf.ch

Lausanne: Grand-Chêne 8, 1002 Lausanne, Switzerland

Genève: Général-Dufour 11, 1204 Genève, Switzerland

Other offices: Shanghai - Paris - Luxemburg – Dubai

The logo for Duane Morris, featuring the name in a white serif font on a dark blue rectangular background. The background of the slide is a light green with a subtle, abstract pattern of curved lines.

US Estate Planning for Americans in Switzerland

Presentation for American Citizens Abroad

May 10, 2012

presented by

Anthony D. Martin, Esq.

©2012 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.

Duane Morris – Firm and Affiliate Offices | New York | London | Singapore | Los Angeles | Chicago | Houston | Hanoi | Philadelphia | San Diego | San Francisco | Baltimore | Boston | Washington, D.C.
Las Vegas | Atlanta | Miami | Pittsburgh | Newark | Boca Raton | Wilmington | Cherry Hill | Lake Tahoe | Ho Chi Minh City | Duane Morris LLP – A Delaware limited liability partnership

DM3/2174912v1

www.duanemorris.com

Disclaimer

- *In compliance with U.S. Treasury Regulations, please be advised that any tax advice given herein (or in any attachment) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax penalties or (ii) promoting, marketing or recommending to another person any transaction or matter addressed herein.*

The Swiss Family Robinson – 2012 edition

**Hubert – known as H, a
U.S. citizen, age 50**



**Wilma – known as W, a
Swiss citizen and U.S.
green card holder, age 48**



Their Assets

H's + Joint

- **Apartment in NYC** in H's name, inherited from H's mother - \$2M
- **Bank and Investment accounts** – held jointly with W - \$2M (all from H)
- **Retirement accounts** with W as beneficiary - \$2.12M
- **Term insurance** on H's life, with W as beneficiary - \$2M

W's + Joint

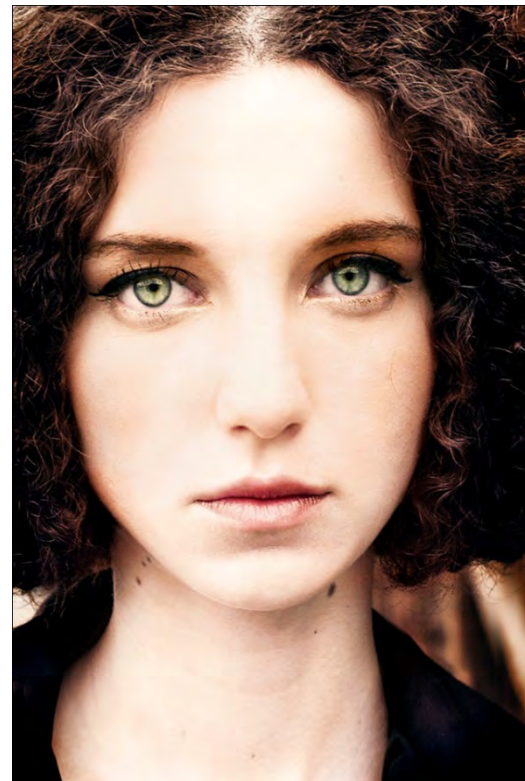
- **Chalet in Switzerland** – gift of W's Swiss mother (known as "Mutti") - \$1M
- **Investment accounts in Swiss** (\$1M) and **German** (\$1M) mutual funds - (50% from H), deemed to be joint property under Swiss law
- **Term insurance** on H's life with W as beneficiary - \$1M

Their Two Children – dual U.S. and Swiss Citizens, age 21, both are in school in the U.S.

Sonny



Dotty

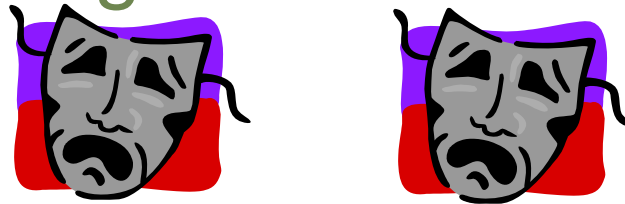


H dies in 2012 with Simple Wills and No Estate Planning



- Total taxable estate is: \$9.12 M
- W inherits all – **NO MARITAL DEDUCTION**
- Federal Estate Tax on \$4 M after \$5.12M exemption @ 35% = **\$1.4 M**
- Q. If NY will claim H as domiciled in NY? Add NY estate tax
- Q. If IRS will claim additional gift tax for annual gifts by H to W in excess of the annual \$100,000+ exclusion for establishing joint investment accounts? (Exclusion in 2012 is \$139,000.)

H dies in 2013 with Simple Wills and No Estate Planning – and No Tax Reform

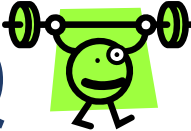


- Federal Estate Tax on \$8.12 M after \$1M exemption @ 55% = **\$4.7 M**
- Q. Swiss Inheritance Tax?
- No Estate Tax Treaty Relief for Double Estate Tax on \$1 M of German Mutual Funds (but maybe a credit for taxes paid or deduction for the debt?)
- Q. IRS Penalties if H & W failed to report PFIC income from Swiss and German Mutual Funds?

The CHALLENGE





The FIX #1

- H and W establish Revocable Trusts to avoid probate of U.S. assets
- H includes a **QDOT** [Q ] in his Trust
[QDOT = Qualified Domestic Trust]
- The QDOT defers estate tax on what W inherits from H

The FIX #2



- H AND W CONSULT THEIR SWISS TAX ADVISOR. IF POSSIBLE, THEY PUT THEIR LIFE INSURANCE INTO IRREVOCABLE LIFE INSURANCE TRUSTS (  = ILITs)

Smart Move



- H and W talk to their investment advisor about swapping H's \$2 M **term insurance** for a policy that has a cash value.
- W can be a beneficiary of the   and can withdraw funds from the cash value.
- Watch out for the 3 year rule [buy new policies] and the special rule for non-U.S. citizens owning policies on others [make W the beneficiary of her own policy.]


The FIX #3 (in 2012)

- H and W consult their investment advisor to see if they can use some of their \$5.12 M lifetime exemptions to make gifts to Sonny & Dotty
- H and W again consult their Swiss tax advisor to see if they can make these gifts in the form of **Grantor Trusts**


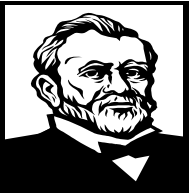


- Trusts are trusts in which H and W pay trusts' income taxes. [They can be used to buy assets from H and W tax-free].

The Gift of the NYC Apartment

- After consulting their Swiss tax advisor, H creates a Marital Trust for W with a **Q**  and splits the ownership of the **NYC apartment** into equal tenancies in common (TIC).
- After a qualified appraisal, each TIC is valued at \$750,000 [the appraiser applies a discount of 25% to the \$2M].
- The TICs form a **QPRT** (Qualified Personal Residence Trust) with a short, 2 year term.

The Gift of the NYC Apartment

- The gifts to the Children (using May 2012 rates) use up approx. \$1,454,000 of H and W's total \$10.24M exemption from gift tax.
- The **QPRT** includes  or Trusts for Sonny & Dotty.
- After 2 years, the  or Trusts own the NYC apartment. H and W pay fair market rent to the Trusts – without paying income tax on the rental income.

Smart Move




- H and W talk to their investment advisor about establishing Grantor Retained Annuity Trusts (**GRATs**) for their children.
- If the investment return in the **GRAT** exceeds the current IRS low interest rate, the children's



or Trusts receive the excess tax free.

U.S. Estate Savings if H dies in 2013



- There is no federal estate tax to pay
- H and W have removed \$3M of life insurance from estate taxes on both their estates
- The Q  has deferred Estate Tax on W's inheritance from H
- However, H and W have used up \$726K each of their \$1M federal estate tax exemption with the QPRT

What happens if W dies in 2014 – and no Tax Reform?

- Assume no change in asset values
- The QPRT has removed the \$2M **NYC apartment** from their estates, but left them with an exemption of only about \$550K.
- W's taxable estate is approx. \$6.6M
- Tax is approx. **\$3.6M**
- **Total tax savings are approx. \$2M.** [Without the Fixes, the estate tax on both deaths would be approx. \$5.6M.]

Mutti Wants to Make Gifts



- After Swiss gift tax, she has \$5M to give to her children and grandchildren
- What is the best way for her to do it?

Mutti Gifts the \$5M outright to W

- What happens?





- W reports receipt of the gift on IRS Form 3520 and pays no income tax, but





- If W dies, her estate pays 55% tax on the \$5M and grandchildren receive only \$2.25M




Mutti Contributes the \$5M to an Offshore Trust

- Mutti first consults her Swiss tax advisor
- If permitted, Mutti establishes a Foreign Trust f/b/o W and the grandchildren. To comply with US rules, she can revoke the Trust  or
- Mutti needs to decide if the Trustee makes mandatory or discretionary distributions
-  She chooses discretionary distributions, for creditor protection for W (in case W gets divorced from H)

Foreign or Trust f/b/o W and the Grandchildren

- While Mutti lives, the Trustees distribute 50% of the income to W and retain the rest
-  W reports her receipt of distributions on IRS Form 3520 and pays no income tax, but
-  When Mutti dies, the Trust becomes a Foreign Non-Grantor Trust

Foreign Non- or Trust

-  W now receives distributions from the Trust and must report them as income taxable to her; and
-   now subject to the nasty “**Throwback Rule**” when she receives the accumulated “Undistributed Net Income” (**UNI**) of the Trust.
- She pays ordinary income even on capital gains and on top of that a compounded interest for all years of the accumulation.

The Fix (Partial)

- Mutti's Trust consults a wealth advisor and buys Life Insurance on W's life with a policies that have cash value.
- Withdrawals from the policies and the death proceeds are **not UNI** and can be distributed to W and the grandchildren tax free.
- [**UNI** accumulated after Mutti died will still be subject to the **Throwback Rule.**]



The logo for Duane Morris, featuring the company name in a white serif font on a dark blue rectangular background. The background of the slide is a light green gradient with a white dotted horizontal line.

Tony Martin can be reached in the
Boston office of Duane Morris:
001-857-488-4224
admartin@duanemorris.com

©2012 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm and Affiliate Offices | New York | London | Singapore | Los Angeles | Chicago | Houston | Hanoi | Philadelphia | San Diego | San Francisco | Baltimore | Boston | Washington, D.C.
Las Vegas | Atlanta | Miami | Pittsburgh | Newark | Boca Raton | Wilmington | Cherry Hill | Lake Tahoe | Ho Chi Minh City | Duane Morris LLP – A Delaware limited liability partnership

www.duanemorris.com