



TAGLaw/TIAG Conference - Tax Specialty Group
Wealth planning in Switzerland

Julie Wynne



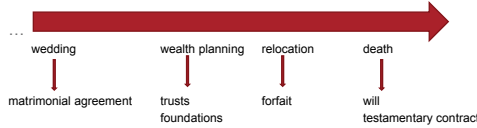
Why international private clients use Switzerland for their wealth planning?

1. Liberal and flexible system across all aspects of wealth planning (from matrimonial aspects to inheritance matters)
2. Most wealth planning tools are available: from pre-nuptial agreements to trusts and private foundations
3. Tax efficiency
4. Strong reputation and capabilities for off- and on-shore wealth planning




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The lifetime of a HNWI and wealth planning opportunities in Switzerland

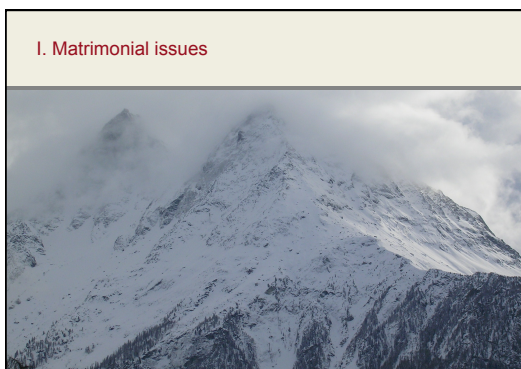


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I. Matrimonial issues

I. Matrimonial issues	
a) Governing law	
> Matrimonial property regime is governed by the law chosen by the spouses (with or without retroactive effect), failing which the law of their common place of residence applies.	
> They may choose between the law of the State in which they both have their domicile or will have their domicile after the marriage, and the law of one of their States of citizenship (art. 52 of the Swiss Private International Law Act, SPILA)	
> Absent a choice of law, the matrimonial property regime is subject to:	
> the laws of the State in which both spouses have their domicile, or	
> if they do not have their domicile in the same State, to the laws of the State in which they both had their last common domicile.	
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I. Matrimonial issues

b) Rules

- > Choice of Swiss matrimonial regimes (separation of property; participation in accrued gains; community of property).
- > Ordinary matrimonial property regime: participation in accrued gains
 - > Each spouse retains and manages his/her own assets and acquisitions during the marriage. On dissolution of the marriage by death or divorce, subject to contractual modifications by the spouses, each spouse retains (a) his/her own assets brought into the marriage, (b) his/her assets acquired during the marriage by gift or inheritance and (c) one-half of all acquisitions made by each of the spouses during the marriage.
- > Spouses can freely adopt/amend any regime by marital agreements (pre-/post-nuptial), which are legally binding and fully enforceable.

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II. The Swiss Landscape for Trusts



II. Trusts

a) Open Door for Trusts

- > Among the 10 global financial centres, Switzerland is the only one without its own trust law (Global Financial Centres Index 7)
- > No "Swiss trusts", but absolute freedom to select whatever trust law the settlor wishes.
- > Since 1st July 2007, the Hague Trust Convention (HTC) ensures the full and complete recognition of trusts in Switzerland.

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II. Trusts

b) Trust Industry in Switzerland

- > STEP Switzerland was founded in 1992, 1 year after STEP's creation
- > Today, Switzerland holds 6 STEP centres: Geneva, Zurich, Lugano, Basel, Lucerne/Zug and Lausanne.
- > Over 1400 STEP members, accounting for +10% of STEP world
- > The fastest-growing STEP student-base (500)
- > Launched the comprehensive Swiss Advanced Certificate in Trust Management (SACTM) in 2007



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II. Trusts

c) Swiss Association of Trust Companies

- > Founded in July 2007, with the ratification of the Hague Trust Convention.
- > Representative of independent and bank-owned trust companies.
- > SATC's purpose is "to engage in the furtherance and development of trustee activities in Switzerland, to ensure a high level of quality and integrity and the adherence to professional and ethical standards in the trust business in Switzerland."
- > Issued a Code of Ethics and Business Conduct in April 2008, that requires professionalism, competence, diligence, integrity, fairness and confidentiality.



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II. Trusts

d) Swiss Taxation of Trusts (I)

- > Circular n°30 on the taxation of trusts of 22 August 2007 by the Swiss Tax Conference (made up of directors from all the cantonal tax administrations as well as representatives from the federal tax authorities)
- > Confirmed by the Federal Circular n°20 of 27 March 2008 by the Federal Tax Administration
- > A trust is *per se* not subject to any Swiss taxation – it is not a taxable entity.

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II. Trusts

d) Swiss Taxation of Trusts (II)

- > Swiss-based trustees and/or protectors are not liable for any Swiss taxation on the trust assets.
- > Revocable trusts are always treated as transparent. Irrevocable trusts may also be treated as revocable trusts if they have certain features.
- > Trust assets of an irrevocable fixed interest trust as well as the income thereof are attributed to the beneficiary(ies) as with a usufruct.

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II. Trusts

d) Swiss Taxation of Trusts (III)

- > A Swiss resident who settles an irrevocable discretionary trust is considered not to have disposed of his assets (*principle of non-recognition*). Even if he is not a beneficiary or has not retained any interest or powers, the assets as well as the income of the trust fund will remain taxable in his hands.
- > A foreign resident who settles an irrevocable discretionary trust is considered to have disposed of his assets. Should he later move to Switzerland the trust assets should not be attributed to him if he has truly alienated himself from the assets.
 - ➡ Complete tax neutrality of a pre-immigration trust for settlors and beneficiaries, who enjoy the lump-sum taxation (*forfait*).

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II. Trusts

d) Swiss Taxation of Trusts: *Distributions*

- > Distributions by foreign trusts to Swiss-resident beneficiaries may be subject to Swiss taxes:
 - > distribution out of a **revocable trust** -> characterised as a gift from the settlor and is potentially subject to cantonal gift tax, if the settlor is domiciled in Switzerland at the time of the distribution.
 - > distribution out of an **irrevocable fixed trust** -> the Swiss-resident beneficiaries are regarded as holders of a life interest (usufruct) in the trust assets -> for income tax purposes, trust income is attributed to the beneficiaries as and when it arises.
 - > distribution out of an **irrevocable discretionary trust** -> income tax is levied only once the trustee exercises his discretion to make a distribution -> a distribution of trust income is therefore taxed as income, whereas a distribution of trust capital is not taxed.

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II. Trusts: Advantages to use a Swiss resident trustee

a) *Dealing with Swiss banks and asset managers*

> More specifically, a Swiss resident trustee operates within the same legal system as Swiss banks and asset managers, which already hold or manage substantial trust assets.

➔ The trustee is thus in a better position to supervise their activities and can safeguard the trust assets by seeking local judicial relief more promptly than a foreign-based trustee.

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II. Trusts - Advantages to use a Swiss resident trustee:

b) *Tax consequences*

> In any case, whether there are any further tax advantages in using a Swiss resident trustee will naturally depend on the Swiss tax treatment of the trust and its actors - settlor, trustee, protector and/or beneficiaries, especially if any of them are resident in Switzerland.

> More specifically, the circular issued by the Swiss Tax Conference provides that Swiss resident trustees will not be personally liable for wealth tax or income tax on the trust assets.

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II. Trusts - Risks of using a Swiss resident trustee:

a) *Lack of specific supervisory regulation (I)*

> Professional trustees have no duty to register with a specific supervisory authority in order to operate in Switzerland, unlike, for example, in Singapore, the Cayman Islands, Bermuda, Guernsey, Jersey or the BVI.

> As a rule, such trustees are subject to Swiss anti-money laundering legislation and/or securities dealing regulations.

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II. Trusts - Risks of using a Swiss resident trustee

a) Lack of specific supervisory regulation (II)

- > The current lack of specific supervisory regulation means that anyone can act as a trustee in Switzerland and that there are no requirements in terms of capital funding or professional insurance coverage for protecting the trustee's clients.
- > Some key Swiss trust companies founded the Swiss Association of Trust Companies ('SATC'), the purpose of which is furthering and developing trustees' activities in Switzerland as well as promoting the adherence to certain professional and ethical standards.

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II. Trusts - Risks of using a Swiss resident trustee:

b) Risk of trust litigation in Switzerland (I)

- > Liberal approach with respect to forum selection clauses (art. 149b §1 SPILA) whereby the trust's forum selection clause is conclusive for all matters related to the law of trusts.
- > Jurisdiction shall fall upon the Swiss court at the defendant's domicile or at the trust's seat:
 - > In the absence of a forum selection clause or where such selection is not exclusive (article 149b §3 SPILA); or
 - > despite the forum selection clause, if a party is abusively deprived of protection at a place of jurisdiction provided by Swiss law (article 5 §2 SPILA, article 149b §1 in fine SPILA).

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II. Trusts - Risks of using a Swiss resident trustee:

b) Risk of trust litigation in Switzerland (II)

- > The presence of a Swiss resident trustee may result in giving Swiss courts jurisdiction over a foreign trust in the absence of a forum selection clause.
- > The following cases of Swiss court jurisdiction might arise:
 - > the designated Swiss court must accept jurisdiction over a foreign trust if the trustee is domiciled, or has his habitual residence or establishment in the canton where that court is located (article 149b §2 SPILA).
 - > the designated Swiss court must accept jurisdiction over a foreign trust if a substantial part of the trust's assets are located in Switzerland (article 149b §2 SPILA).

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II. Trusts - Risks of using a Swiss resident trustee:

b) Risk of trust litigation in Switzerland (III)

- > When the trustee and the trust assets are located in Switzerland, disgruntled heirs will often be inclined to file claims in Switzerland (even though foreign estate legislation will often govern the remedies available), to the extent that
 - > they can simultaneously join a Swiss depository of trust assets as party or
 - > obtain interim relief against such depository, with a view to securing enforcement of the Swiss court's decision over the trust assets.

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II. Trusts - Risks of using a Swiss resident trustee:

c) Lack of knowledge of foreign trust law

- > As Switzerland has not introduced a trust law of its own, Swiss resident trustees will administer trusts governed by various foreign trust laws.
 - ➔ certain Swiss resident trustees may be less knowledgeable with respect to the relevant trust law applicable.
 - ➔ could potentially affect whether the trust is properly settled, whether the assets are transferred into trust according to the foreign legal requirements, or whether the trustee administers the trust in full compliance with the relevant trust law.

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II. Trusts - Acquiring Swiss Property (in Trust)

- > Since 2002, EU nationals residing in Switzerland can freely acquire Swiss property. They no longer require a "*lex Koller*" authorisation, contrary to non-resident foreigners.
- > Incidentally, EU nationals are entitled to obtain a Swiss residence permit without gainful activity, provided they have health insurance coverage and sufficient financial means.
- > Since 2007, it is possible to hold Swiss property in trust.
 - > 2007 and 2009 federal guidelines
 - > In the case of trusts, to decide whether the acquisition is subject of the Lex Koller, one must focus on whether trustee and beneficiaries are resident abroad.

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III. Private foundations



III. Private foundations (I)

- > The nearest equivalent in Swiss law to a trust is a foundation (i.e. a legal entity to which assets are contributed for a specified purpose).
- > Under Swiss law, only foundations set up for family members whose sole purpose is to provide for the education, professional establishment or financial aid of family members are allowed (Article 335 §1 Swiss Civil Code).
- > Swiss law prohibits maintenance foundations (Article 335 §2 Civil Code) that makes distributions and grants other economic benefits to certain members of a specifically designated family in order to support them outside the narrow scope permitted by Swiss law.

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III. Private foundations (II)

- > Article 335 SCC does not prevent however the recognition of foreign family foundations established by Swiss residents, as this recognition has not been considered by the Federal Supreme Court as contrary to Switzerland's public policy (ATF 135 III 614).
- > Such maintenance foundations may be established in various other civil and common law jurisdictions, such as Austria, Jersey, Liechtenstein, Malta, Panama, the Netherlands Antilles or the Bahamas.

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IV. Inheritance



IV. Inheritance

a) Rules on Cross Border Estates

- > Principle: unity of succession
- > Connecting factor: Domicile in the civil sense
- > *Lex successionis*: Apply conflict rules of the country of deceased's last domicile
- > Recognition of foreign wills: Switzerland is party to the 1961 Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions

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IV. Inheritance

b) Matrimonial regime and inheritance

- > Matrimonial regimes have no direct relevance to a spouse's inheritance rights.
 - > However, they have an important impact on the calculation of a deceased's estate
 - ➔ Depending on the regime in place, a spouse is entitled to a specified share of the deceased's assets prior to the opening of the succession.
- This share is not part of the estate for succession purposes.

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IV. Inheritance

c) Forced heirship rules in Switzerland

- > Switzerland has an internal forced heirship regime, BUT
- > Forced heirship is not part of Swiss public policy.
- > It can be excluded unilaterally:
 - > Testator can opt out of Swiss law and have his national law govern his estate (*professio juris*).
- > It can be limited:
 - > Testamentary contracts with/among heirs which are legally binding and fully enforceable.

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IV. Inheritance

d) Inheritance and gift taxes (I)

- > No federal inheritance tax (IHT) or gift tax.
- > Inheritance tax levied at cantonal level if either:
 - > The deceased person or donor had his last residence in that canton.
 - > The transferred real estate is located in that canton.
- > The tax rates are progressive and vary between the cantons.
- > The IHT and gift tax rates depend on:
 - > The amount transferred.
 - > The relationship between the deceased person or donor and the beneficiary.

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IV. Inheritance

d) Inheritance and gift taxes (II)

- > Tax-free allowances vary between the cantons:
 - > Transfers on the death of the deceased or during his lifetime to descendants, a spouse, or a registered same-sex partner are generally exempt from taxation or are taxed at a very low rate (0-15%).
 - > Transfers on the death of the deceased or during his lifetime to unrelated persons are taxed at between 20% and 50%.

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IV. Inheritance e) Trusts, Private Foundations, etc.

- > Avoid probate procedure and death duties
- > Recognised in Switzerland
 - > Especially trusts, through the 1985 Hague Trust Convention
- > But subject to the usual limitations:
 - > Proprietary effects of marriage
 - > Inheritance rights, especially claw-back claims if the governing inheritance law applies forced heirship regime
 - > Public policy (*ordre public*)

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V. Conclusions



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Thank you for your attention.

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