THE PROCEDURE OF MENTIONING THE TRUST RELATIONSHIP ON REAL ESTATE IN A CANTONAL LAND REGISTER IN SWITZERLAND IN THE CONTEXT OF REAL AND INHERITANCE RIGHTS FROM THE PERSPECTIVE OF THE TICINESE NOTARY PUBLIC

(WITH INFORMATIVE CHARTS)

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translated into English language, revised, amended and presented in occasion of the Euro American Lawyers Group (EALG) meeting October 27, 2023, held in Istanbul, Republic of Turkey
*Avv. Niccolò Salvioni, Notary, Locarno, researcher - 27/10/2023 – **v2***

Index:

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a) Foreword

1. Introduction

a) The Swiss trust: shipwrecked?

The Swiss trust had a one-year life expectancy: after the draft-project of September 2022, last month the federal government threw in the towel: there Will be no specific Swiss trust legislation integrated into the Swiss Obligations Code. However, this exercise had the merit of taking stock of the degree of integration of the institution of trust in Switzerland. In the massive explanatory report, as well as from the summary of the consultation's results, the considered consolidated or critical elements by the various stakeholders emerged, which drew attention to existing institutions that, with some adjustment, could play similar roles.
The epilogue is to be found not so much in the Swiss Trusts Project, but in the corollary change in tax treatment proposed by the Federal Council, which distanced itself from the situation generated by the March 27, 2008, entry into force of the Swiss Tax Conference (SFC) Circular No. 20 on Taxation of Trusts, as well as the practice that has been established in the meantime.
The final chapter of the bibliographic sources on "Swiss trusts" provides coordinates for finding more information on the recent project to include trusts among the domestic legal institutions of Swiss civil law.

b) Trusts and notarization in Switzerland

To expose, from a notarial perspective, the Swiss procedure for "registration" of the trust relationship provided for in Art. 12 of the Hague Convention on Trusts of 1985 (HC Trusts), referred to as a form of "publicity" by the Swiss Private International Law Act (PILA) and "mention" by the Federal Ordinance on Land Registry (OLR), is actually a pretext to try to expose, in an organic, non-detailed way, a line of connection between different regulatory "universes." that of the trust of Anglo-Saxon common law origin and the civil law institutions of real and inheritance rights of Roman/Germanic/Napoleonic Helvetic origin, curiously little explored -in their practical implementation- not only by the Canton of Ticino but also Swiss legal literature.

This, although, since July 2007, date of the transposition of the Hague Convention on Trusts into Switzerland, with its implementing rules, came into force, the institution of trusts has often peeped out -particularly- in Canton Ticino as well, and a certain practice has been established by notaries, courts and at Land Registry Offices. The reason for such frequency is actually not surprising.

c) Receptions of trusts by Swiss and Ticino nationals who have emigrated since the 1900s and “silent lands”

The Swiss canton of Ticino, to the 1900s found the highest percentage of Swiss emigration, with tens of thousands of citizens emigrating, particularly, but not only, to nations governed by common law of Anglo-Saxon origin.

So, probably, Ticino is the Helvetic canton with the highest incidence of property ownership relationships, of inheritance derivation, governed by trusts.

It is precisely in Canton Ticino that, because of the strong emigration of past centuries, succession case histories often arise where, in addition to a Will, there is also a living trust transformed into a postmortem trust or a testamentary trust, which concerns one or more real estate assets in Ticino, in a rural or valley area. Particularly affected by these international cases are the praetorships (*Pretura* or *District Court*) and land registry offices (*Ufficio del registro fondiario*) in the cantonal valley districts. These were in fact the areas with the highest incidence of emigration, brought about by enduring economic crises.

In 2007, in the *Land Registry Ordinance* (LRO), Switzerland gave to the notary the key role of ascertaining, for the *Land registry offices*, the existence of a trust. The instructional ascertainment of real and inheritance rights in relation to a trust of a trustee and an asset dedicated to it as property has been delegated to the notary public.
This activity of the notary also takes the form of pre-investigatory work in close interaction with the civil court, particularly in the inheritance context:

A) either that of the decuius's foreign domicile, or primary or so-called or ***state of succession*** (*stato successorio* or *Erbstatut*), i.e., of a U.S.A. State, if called upon to issue a *probate* designation of an inheritance executor (*esecutore*) or administrator (*amministratore*) or similar declaration,

B) be that of the ***opening state*** or (*stato di apertura* or *Eröffnungsstatut*, ancillary (or *Ancillary Probate*) i.e., in the Canton of Ticino, if recognition of the foreign Will is sought through the issuance of a Swiss-limited probate (called an *inheritance certificate* or *certificato ereditario*) under Art. 556 SCC with extension limited to Switzerland, often based on subsidiary jurisdiction derived from the fact that:

   1) the foreign judge (of the *status of the succession or stato successorio* or *Erbstatut*) has not been seized of the request to issue a *probate* in favor of an heir, trustee, executor, administrator or other; and

2) the foreign-domiciled decuius was the owner of real property within the jurisdiction of the Ticino court (thus susceptible to founding ancillary Helvetic jurisdiction as an *opening state*, *strato dell'apertura* or *Eröffnungsstatut*); and/or

3) the decuius domiciled abroad had -or also had- Swiss citizenship.

In the inheritance context, the situation in relation to a trust, is complicated as a result of the fact that the property can either be transferred directly to a trustee, or this transfer must take place, if required in the Will, through the intermediation of ***temporary rights holders*** such as either a designated *executor* of the Will (executor) or *administrator* (administrator).

This makes the interaction between the existing organs of the trust (trustee/s) with the *temporary rights holders* (*executors* or *administrators*), the Court (of the "*state of the succession*" or the "*state of the opening of the succession*"?), the notary and the Land Registry Office even more complex. All it takes is for one link to fail, whether abroad or in Ticino, and the mechanism of ownership transmission crashes, generating "*silent lands*," without owners or with "*unknown owners*." Regarding the cases of *unknown owners*, *derelict* land and the prerequisites for *relinquishing ownership*, see the interesting reflections set forth by Simone Albisetti in "*An illusory return to the state of nature: notes on dereliction* (translation)" Weblaw, 2023, (work mentioned at the end).

It should be noted that the new amendments proposed with the revision of the PILA, initiated by the March 13, 2020 message concerning the amendment of the *Federal Private International Law Act* (Succession Law), in addition to harmonizing the practice of recognizing decisions and Wills on the basis of the 2015 *European Succession Regulation*, also plan to clarify the powers of *temporary rights holders*, such also as certain forms of trusts.

To date, the latest changes being reconciled between the parliament chambers are those that can be compared in the table of September 23, 2023, attached at the end of this text.

Indeed, the new second paragraph of Art. 92 para. 2 PILA is intended to clarify the legal issues that are subject to the law designated under Art. 90 et seq. PILA (the so-called "***state of succession***" or "*Erbstatut*") and those that are subject to the law of the place of settlement of the estate governed by the jurisdiction at the location of the assets – "*Forum of the place of situation*" (the so-called ***opening state of the succession*** or *Eröffnungsstatut*); in the case of proceedings in Switzerland: Swiss law.

For example, in the case of decujus domiciled and deceased in California, the state of the opening for succession initiated in California will be of California law and court

(such as *primary* or *domiciliatory probate court*), while in the case of the *state of the opening of succession* relating to real estate located in Switzerland, the *ancillary probate Court* will be the District court possibly having jurisdiction as *opening state of the succession*.

> *"The proposed rewording of Article 92 para. 2 PILA eliminates the current legal uncertainty. It is intended to clarify that subjecting testamentary execution to the state of opening means first of all contemplating its "procedural aspects" (supervision by authorities, legal remedies of heirs, etc.). As for the material aspects, the design follows the solution outlined in the message on the PILA (based on the specialized literature at the time). The rights and obligations of the executor (duties, faculties, duties of care, indemnification, etc.) are in principle subject to the inheritance status. In contrast, the question of the executor's position in relation to the succession, i.e. whether he is the owner of the succession ("rights over the succession") and his power to dispose of it, is judged according to the state of the opening.*
>
> *The current Article 92 PILA deals exclusively with the execution of a Will. Instead, for the sake of clarity, the new wording will also mention administration of the estate, by which the liquidation of the estate ordered by the authorities, such as liquidation by an administrator according to common law or "administrator of the estate" according to Article 29 of the European Regulations. By contrast, a mere administrator of the estate according to Article 554 SCC, whose task is limited to conservative measures, is not contemplated. The mere administration of the estate will continue to be subject to the opening state." (See Message 20.034 regarding the amendment of the Federal Act on Private International Law (Succession Law) of March 13, 2020, FF 2020 3011 -3012).*

d) Commitments made in 2007 post incorporation of the 1985 Hague Convention on Trusts (HC Trusts)

In his commentary on the HC trust, which came into effect in Switzerland in July 2007, Dr. Iur. Peter Max Gutzwiller, reflecting on the future function of judges in the context of transportation trusts in Swiss law, noted that:

1) courts applying civil law will have to acquire sufficient knowledge to handle the law of trusts by developing a related practice,
2) cantons will have to adjust their judicial organization by establishing a single court with jurisdiction over trusts matters, and that, lastly,
3) universities and professional organizations, such as lawyers, notaries and judges, will have to offer their members and other interested parties extensive

> and repeated learning opportunities in order to develop and deepen their knowledge of trusts law and practice.

In fact, curiously enough, for reasons I am unable to explain, these "galaxies" and interrelationships among legal institutions have remained out of the spotlight. In particular, there has not yet been a systematic analysis in the literature of the practice in the courts regarding the treatment of foreign-originated trusts against real estate in Switzerland and Canton Ticino. Or, perhaps, I have missed something.

There has been much debate about trusts particularly in the tax field, while there has rarely been a detailed examination of civil case law concerning trusts established abroad for estate planning purposes, about Swiss real rights and their relationship to foreign succession, whose property has been-or must be-segregated, in favor of a trust.

The issue is multifaceted and complex, not least because not all trusts are the same, and because, depending on the foreign jurisdiction of origin of the trusts and the relevant regulatory provisions in force, including international bilateral provisions with Switzerland, the situation may be different, case to case.

Today's reflection will be limited to expounding on a number of concepts revolving around real estate ownership in Switzerland-Ticino by trustee/s, for a trust. I will therefore be able to focus on the concepts revolving around the notary, particularly in relation to the "mention" of the fact that a property is part of a trust, as an act of publicity, resulting from public notarial acts. I will probably raise more doubts than certainties.

e) <u>Trusts during life and postmortem trusts: real rights, inheritance rights and trust rights and related procedural mechanisms</u>

While the establishment of the living trust poses no particular problems with regard to the segregation of assets, including real estate, in favor of the trust, the problems begin at the moment when inheritance rights interact with the trust, following -for example- a Will that stipulates that all assets of settlor X go to trustee Y, for the benefit of settlor X's trust.

In fact, Article 4 HC Trusts reads:

> *The Convention does not apply to preliminary issues relating to the validity of* ***Wills*** *or of other acts by virtue of which assets are transferred to the trustee.*

and Art. 15 HC Trusts specifies:

> *The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters –*
> *a) the protection of minors and incapable parties;*
> *b) the personal and proprietary effects of marriage;*
> *c) **succession rights, testate and intestate**, especially the indefeasible shares of spouses and relatives;*
> *(…)*

This means that, the interfacing of the state law of succession generates interactions that are sometimes difficult to predict vis-à-vis the law of trusts. In particular, when the property subject to succession is real estate located in a third state, the real rights component also takes over, which, in turn, like the preceding institutions, is governed by both domestic and international conflict provisions.

By way of illustration, it can thus be said that if a transfer to a living trust of real estate in Switzerland represents, on the notarial level, a difficulty to the "second power" (trust rights and real rights being involved), a transfer to a "mortis causa" or "post mortem" trust as a result of succession, involving a foreign succession, a foreign trust and domestic Swiss real estate, represents a degree of complication to the "third power" (being involved at the same time as trust rights, real rights and inheritance rights).

In the context of living trusts, the role of the Swiss notary seems to be relatively clearer and simpler. In fact, in this case we are moving mainly in the context of real rights, which, even in Switzerland, are rather refractory to foreign interference, in relation to foreign trust law.

The federal lawmaker in Art. 67 para. 1 of the Land Registry Ordinance (ORF) has given notaries the responsibility to certify, by notarial deeds or public deeds, that the land property in question is in relation to a trust. In fact, it is the responsibility of the notary, in the context of his or her public notarial act, to ascertain that:

- the trust has been validly established under foreign law;
- the person receiving the property to be transferred has been entered as trustee;
- the property to be transferred to the trustee has been allocated to the assets of a trust (see Instructions on the Handling of Business Concerning a Trust, Federal Office for Land Registry and Land Law, June 28, 2007).

The establishment, designation of the trustee(s), and dedication of the property to the trust could also be the subject of an **affidavit**, or an additional affidavit by a local attorney or notary public with expertise in trust matters, as external support for the deed.

As seen above, however, the situation is also different for the Helvetic notary when it comes to trusts set up by deed of death (a *Will*), once the settlor has died, or when Helvetic real estate is transferred to the trustee -for the trust-, or to an executor, administrator or trustee understood as a *personal representative* having *temporary rights*, by deed of death.

In such a case, in addition to the elements relating to Swiss real rights and trust rights, elements of inheritance law, foreign as well as Swiss, come into play, with the relevant competent judicial authorities to be identified and defined. The situation, therefore, becomes quite complicated.

Indeed, aspects of real rights, and inheritance rights, as well as trust law arise, the interrelationships of which are sometimes mediated by the HC Trust, any specific international treaties in relation to successions, provisions contained in the *Federal Act on Private International Law* (PILA), the indications inferable from the Swiss *Ordinance on the Land Registry (ORF)*, the *Instructions on the Treatment of Trusts Affairs and the Instructions on Foreign Certificates of Succession as Evidence for Entries in the Swiss Land Registry* of this year, issued by the federal government (see bibliography at the end). The latter instructions regarding foreign succession certificates can serve -particularly- when only the possibility of a recognition of competence of the (foreign) *state of the succession* remains open. If, on the other hand, the state of succession has not opened probate proceedings due to the absence of the relevant domestic prerequisites, e.g., when there is only the presence of "*nonprobate assets*" in the *forum of the of succession*, in such a case the possibility remains open to consider initiating a court proceeding for the issuance of the Swiss ancillary (limited to Switzerland) probate (inheritance certificate) in the *Jurisdiction at the location of assets* ex art. 88 PILA, since precisely the foreign authority does not deal with it.

Thus, there are a number of normative connecting factors that make it possible to determine the jurisdiction of a succession, and thus possible connections between real estate and trusts, in the temporal evolution of the latter institution.

In the event that real estate has already been transferred during life into the ownership of the trust's segregated assets, that property is no longer part of the deceased's estate. If there are two or more trustees, the asset held in ***common ownership*** is concentrated in the surviving trustee(s) by ***accretion***. For this reason, it is always recommended to have at least two trustees in place: in the event of the vacancy of a trustee (death or resignation), the procedure should be facilitated, without the need to

proceed with demanding judicial interventions at the state of the trust's seat or jurisdiction, to appoint the missing trustee according to the instructions contained in the *deed of trust*.

In the event, on the other hand, the trust is established at the time of the settlor's death (testamentary trust or postmortem trust), it is likely that probate intervention is required in the state of probate, what would make it unnecessary to initiate an ancillary one in the state of the opening, of the *Jurisdiction at the location of assets*. Precisely because of the inevitability of the probate procedure in the State of succession in the case of testamentary trusts or postmortem trusts, this probate strategy seems to be much less common, compared to the technique of a gradual transfer of assets to a *living trust*, with transfer of the remainder by means of a *pour-over trust disposition* in favor of the trustee, for the trust.

f) Choice of trust as estate planning and probate procedure of the Will

The aspect, which is often locally overlooked in the treatment of successions with the coexistence of a trust, is that the choice, in the context of the preparation of the foreign succession, to structure it by means of the trust mechanism, stems precisely from the desire to regulate it without having to proceed to a judicial recognition of the -parallel- Will through a probate procedure. As seen, assets that are formally conferred, dedicated, and segregated to the trust (so also the real property) are no longer part of the Will and thus escape, the succession probate procedure.

This foreign *probate* court procedure is in fact often very costly and time-consuming, hence, the choice to set up a trust, designate normally two or more active trustees and sub-trustees in the *Deed of Trust* (*Atto costitutivo del trust*) as well as dedicate a property -which for example is located in Switzerland- to trustees -for the trust-, through notary intervention, thus segregating the property from that of the settlor (settlor), in favor of the trustee(s) (often initially the settlor(s) are at the same time the co-trustees of the trust), for the trust, is intended to avoid initiating the *probate* court procedure defining who are the heirs, trustee(s) or *temporary beneficiaries* (such as executors or administrators), after the death of the settlor (*disponente*).

In fact, assets allocated to the living trust, such as real estate and transcribed in *common ownership* (*proprietà comune*) under Art. 652 SCC of trustees, acting as a *simple partnership* (*società semplice*) under Art. 530 CO, perhaps with mention that the property belongs to a trust, represent a segregated mass not subject to probate later. Insofar as Switzerland is concerned, however, all provisions regarding legitimacy and other inheritance matters remain reserved (see Art. 15 para. 1 lit c) HC trusts).

The assets held by the co-trustees (in more than one) are thus so as *common property* under art. 652 SCC by virtue of a *simple partnership* relationship under art. 530 SCO.

The disappearance of a **co-trustee**, by virtue of the principle of ***accretion***, concentrates the relationship of ownership on the surviving trustee, so this does not in principle necessitate succession allocation by court procedure, thus simplifying the property transfer procedure.

For this reason, to avoid having the management of the trust shifted from internal authority to the judicial, it is recommended that there be always at least two or more trustees of a living trust. Upon the death of one, the property is distributed according to the terms of the trust, without the need for a will. Living trusts are a good solution for some people, but they almost always require the assistance of an attorney to be set up and funded properly. Living trusts also require separate deeds to be filed after the settlor's death to transfer property from the trust to his or her family members or other heirs specified by the deed of trust.

As for the U.S.A., the same **Convention of Friendship, Commerce and Extradition Between the United States and Switzerland**; November 25, 1850, provides in Article V:

> *The citizens of each one of the contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, by sale, testament, donation or in any other manner, and their heirs, whether by testament or ab intestato, or their successors, being citizens of the other party, shall succeed to the said property or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities, for the preservation of the property, that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.*
>
> *The foregoing provisions shall be applicable to real estate, situated within the States of the American Union or within the Cantons of the Swiss Confederation in which foreigners shall be entitled to hold or inherit real estate.*
>
> *(…)*

And art. VI states:

> *Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the Judges of the country in which the property is situated.*

The principle of the *state of opening* sanctioned in 1850, thus the jurisdiction of the forum of the place of situation (Jurisdiction at the location of assets), set forth in Art. VI, makes sense if one considers that in that period it would have been impossible to coordinate successions 9,000 km apart with message travel times or decisions of months. So, the existing bilateral agreement between the U.S. and CH favors the settlement of inheritance differences with respect to assets where they are located and thus-for real estate in Switzerland-in the state of the opening of the succession.

Article 7 lit. d) of the HC Trust for its part also stipulates that if no law has been chosen, the trust shall be governed by the law with which it has the closest connection, and that in determining the law with which the trust has the closest connection, reference shall be made in particular to: b) *the situs of the assets of the trust*.

Some States also provide for the issuance of a ***Certificate of Trust***, often by means of a declaration, before a notary public, by the trustee(s) in office, with: indication of the name of the trust; date and who formed it; names of the trustees; elements of trust property; indications as to whether the trust is revocable; powers of the trustee; tax coordinates as the trust's taxable entity; manner of transfer of property to the trustee(s); indications as to any changes or corrections; indications that can be used to prove the existence of a trust, with notarization of the declarant trustee(s)' signature by a public notary.

g) <u>Can the coexistence of a trust with an estate be incompatible with the issuance of a probate of the Will?</u>

Notwithstanding the peculiarities of trusts, in relation to a succession with real estate in Switzerland, often, authorities (or even banks if there are bank accounts in parallel), although a succession is in co-presence with a trust, require in principle a *probate*, or a *letter testamentary* (for an executor), or a *Letter of administration* (for an administrator) issued on the basis of the status of the foreign succession. This, without considering the possibility that -with regard to immovable property- Article 67 OLR itself requires "*a certificate of inheritance or a declaration of the competent inheritance authorities*" thus not requiring the existence of a foreign Inheritance certificate or *probate* according to the state of succession (or *Erbstatut*), but <u>also</u> considers the possibility that the certificate comes from the *state of the openin*g as place of settlement of the succession as *opening state of the succession* (or *Eröffnungsstatut*), for example

in the forum of the place of situation (*Jurisdiction at the location of assets*), as also provided for in the CH/USA Treaty of 1850.

With regard to a *living trust* (*trust in vita*), if at the time of the settlor's (*disponente*) death the *principal of the trust* (*asse del trust*) has already received most of the living assets, the probate of the estate in favor of the settlor is usually minimal and therefore sometimes it is not even possible to initiate the probate procedure, which is reserved for larger estates (in California exceeding $166,250). Assets that are not subject to probate proceedings are also called "***nonprobate assets***".

The situation seems to be different in the case of ***testamentary trusts*** (*trust testamentari*), where the trust relationship arises with the death of the settlor (*disponente*). In fact, in such a case -more rare- usually the testator designates an executor (*esecutore*) who has the task of procedures to transfer the assets in favor on behalf of the trustees, for the trust. This executor normally is designated by the court in the state of probate. If he or she had the power to act abroad, he or she could apply to be recognized and proceed with transfers abroad as well. Otherwise, it would be necessary to proceed to ask the state of the opening for the designation of an ancillary executor at the *state of the opening* of the succession.

So, basically, for the transfer of real property located in Switzerland by inheritance, a simple Swiss certificate of inheritance (*Swiss probate*), limited to Switzerland, based on the Swiss jurisdiction determined by the absence of action by the authority of domicile of the succession or primary authority would also suffice, on jurisdiction derived from real rights on Swiss territory (cantonal and district) and/or -if applicable- Swiss citizenship -or co-citizenship- of the foreign decujus, all particularly in the case where there are only nonprobate assets in the *state of the succession* and therefore the relevant court does not deal with them, perhaps also due to lack of jurisdiction over real estate located abroad.

In the case of the coexistence of a trust with an inheritance assignment, by Will, to the trustee, for the trust, of real estate located in Switzerland, a Swiss *ancillary certificate of inheritance* (Swiss probate) could establish that: on the basis of the existence of the trust, its deed of trust and the trustee in office or established successor, the foreign Will determined universal postmortem transfer for the benefit of an executor (*esecutore testamentario*), administrator (*amministratore*) or trustee, as *temporary rights holder*, with the task of transferring the real estate to the beneficiaries, according to the instructions contained of the *deed of trust*, based on the applicable trust law.

In this case, rather than an *ancillary Helvetic certificate of inheritance*, as also highlighted in point (h) below, in the context of the foreign Will it would seem more appropriate and sufficient to issue a *certificate of designation as executor (esecutore testamentario)*. In fact, the role of the trustee -except in special cases- appears closer

to a *temporary rights holder*, with the mandate to transfer the assets of the estate to the ultimate beneficiaries (*beneficiari*), the latter having a value more akin to heirs than the trustee himself. Since the executor (*esecutore testamentario*) is usually also a trustee, representing these functions, the dual appointee (*trustee* at the same time *executor*) can then, through the intervention of the Swiss public notary, with these credentials, proceed to transfer the succession assets to the trust, sell them or divide them pursuant to Art. 67 a ORF, depending on what is prescribed in the Will, *deed of trust* and permitted by the applicable trust law.
Given that the function of the administrator can only be considered in the case of *intestacy succession* (*successione ab intestat*) i.e., without the presence of a Will, and that normally the regulatory provisions do not designate a universal heir to any trust established during his lifetime, in the absence of a Will, the ***judicial certificate of designation as administrator*** should hardly play a role in the context of the successional allocation of real estate in favor of a trust.

Or, it may also be the case that, in the presence of a trust, the settlor (*disponente*) in his Will leaves real estate abroad to heirs (not the trust). Even then, a Swiss ancillary certificate of inheritance can directly establish that, based on the existence of the Will and the heirs, the latter are the heirs to the decujus and thus of the real estate placed in Switzerland. Precisely, since these real estates were not dedicated by the decuius, in his Will, to the trust.

In the case of the establishment of *Deed of trust* in relation to the *Last Will* and Testament, usually the same, in the California case, are established sequentially according to the following structure, with signatures notarized by a local notary public. I enclose a possible example of the interaction between California trusts and Wills and subsequent deeds:

1. Last Will and testament of X	***X Revocable living trust (Deed of trust)***
2. -	***First amendment of the X revocable trust***
3. -	***Second amendment of the X living trust - description of assets transferred to the X living trust***
4. First Codicil to Will of X	***Third amendment of the X living trust***
5. Morte / Death (Death Certificate of X)	***(transforms itself as "X irrevocable trust")***

In order to be able to understand the interaction between the *trust deed* and the Will, it is therefore necessary to have all the documents of the relevant amendments, both of the trust and the Will, so to have a complete overall picture of the relationship between trust and succession. It is necessary to determine the settlor's decisions, if any, to allocate his or her own, specific, estate assets to the trust. It is by examining these documents that one is able to determine whether a real property was attributed

by the settlor to a trust during his lifetime on the basis of trust law, or whether it was attributed to an heir by testamentary disposition on the basis of the applicable inheritance law.

So, it is only by examining these documents that one can determine the procedure to be implemented to obtain the transfer of ownership of the property, that means:

- To the *temporary rights holders* (*executor* / *esecutore* or *administrator* / *amministratore*) or to the person designated as trustee or to the *beneficiary beneficiario* in the case of involvement and **transfer of ownership through the mechanism provided by the of trust institution** and the relevant applicable right; or
- to the *temporary rights holders* (*executor* / *esecutore* or *administrator* / *amministratore*) or the ***heir / erede***, in the case of no trust involvement, through the **mechanism of property transfer by succession** prescribed of the relevant applicable right.

It should be noted, that according to the *guidelines of the Federal Office for Land Registry and Land Law* of June 28, 2007, assets must be transferred to the trust individually (**no *universal succession***).

This indication can only be interpreted as a limitation on the transfer, segregation, of the settlor's real estate in life, to the trust: the assets must be transferred individually: it is not possible to transfer them -in life- all ***universally***, to the trust.

On the other hand, this indication cannot be interpreted as prohibiting the transfer of real estate in favor of a trust by means of a *pour-over disposition* by **inheritance**, even a universal one, or in the case of a universal succession in favor of the trust by means of a testamentary trust (as long as this is possible in relation to the nationality and *professio iuris* of the settlor). Such an interpretation, if it were extended to transfers of inheritance origin in favor of a trust, would be detrimental to Art. 4 and 15(c) HC Trusts relating to reservations of inheritance law in relation to trusts.

The requirement that the real estate must be transferred to the trust individually (no *universal succession*) must therefore be understood in the context of the transfer of the real estate during the *inter- vivos* phase of the trust, i.e., at the time of formation or thereafter, by way of attribution from the settlor during his lifetime. By contrast, it cannot extend in the context of *inheritances mortis causa* in favor of the previously established *trust inter vivos* nor in favor of a *testamentary trust* that arose *post-mortem*. Indeed, in such cases, universal succession in favor of the trust, if provided for by the applicable inheritance law, must be allowed. This is also because of the reservations in favor of the law of succession provided by the HC Trusts.

The federal directive of June 28, 2007 -for the case of creation of the trust by death disposition- also indicates that:

> *"In the case of formation of the trust by death disposition, the applicable inheritance law comes to determine whether the trust is to be transferred directly to the trustee, or whether it is preemptively transferred to an -having right intermediary (person/ representative), e.g., an administrator of inheritance (administrator); or an executor (executor), (with the obligation to deliver the trust property to the trustee).*
> *The foreign certificate of inheritance (certificate of inheritance, probate certificate) is sufficient as proof of legal title if it shows (also) the transfer in favor of the trustee.*
> *If the certificate of inheritance does not show the transfer in favor of the trustee (which should correspond to the normal case), the land registry will also have to be provided with the documents enumerated in the guidelines of the Federal Office of Justice."*

A similar reflection should be made in the case of pour-over disposition of succession in favor of a trust already established during life. In such a case, particularly when the foreign authority does not deal with the succession, if it is structured well, if it is in the group of nonprobate successions according to the parameters of the state of succession, as such -just - not susceptible to initiate and judicially obtain a probate in the state of succession, it will then be necessary to obtain an inheritance-probate certificate, or rather an ***executor certificate*** (***certificato erediario***) not in the state of succession, but in the state of opening, that is, in the place of situation of the estate abroad.

On the other hand, depending on the deed of trust -and except in special cases- the trustee often performs his or her duties as a *temporary rights holder*. So, the trustee has a function more akin to that of an executor (*esecutore testamentario*) or administrator (*amministratore*) than an heir. Indeed, normally, the deed of trust specifies who the ultimate beneficiaries (*beneficiari*) are, who are ultimately the heirs of the estate, albeit mediated by the work of the trustee ruled by *deed of trust*.

So, in the case where the beneficiary of the universal succession is the trust, and for it the trustee(s), in order to be able to proceed with the transfer of the decedent's real estate to the place of situation of the real estate, it is probably sufficient to apply to the Swiss court of the state of the opening of the succession for the issuance of a ***certificate as the executor*** (*esecutore testamentario*) designated in the *Will (testamento)*. The *executor* designated in the Will is normally at the same time the *trustee* of the trust benefited by the inheritance, previously designated as *temporary rights holder* by the settlor.

Ultimately, since the executor (*esecutore testamentario*) also has the right to transfer or divide real property even without the concurrence of the co-heirs, often deriving this right from the provisions contained in the deed of trust or from the applicable trust law, by virtue of the ***certificate as executor*** limited to Switzerland, the executor (*esecutore testamentario*), who at the same time is -normally- also trustee of the trust, may afterwards present himself to a Swiss notary public to make the transfers of property prescribed in Art. 67 LRO: from the deceased to the trustee(s), from the trustee(s) to the beneficiary/ies or to a third party to liquidate the value thereof and distribute it among the beneficiaries as permitted in the deed of trust.

h) The ongoing revision of Article 92 para. 2 PILA in the context of the law of succession tends to strengthen the possibility of recognizing the state of the opening of the succession and thus, in the context of the forum of jurisdiction of the place where the assets are located, obtaining a certificate of inheritance and/or as executor and administrator of the succession, in the event of inoperability of the state of domicile of the succession: effect on trusts

In the context of the revision of the PILA under way in the federal chambers (see what is indicated in the bibliography and the document attached at the end), the possibility of Swiss alternative action by the court of the opening state is stimulated, considering that it is planned to amend Article 88 para. 1 concerning the jurisdiction of the forum of the place of situation as follows:

1. *If the deceased was a foreign citizen domiciled abroad, the Swiss judicial or administrative authorities have jurisdiction to deal with those parts of the estate that are located in Switzerland to the extent that the foreign authorities do not deal with them. To avoid conflicts of jurisdiction, Swiss courts or authorities may also make their jurisdiction subject to the inaction of the authorities of a foreign state of origin of the inheritor or the state of his or her last habitual residence.* (Proposal by the Federal Council, as of 09/14/2023 not yet consolidated by the federal chambers).

Currently, the paragraph reads as follows:

1. *If the deceased was a foreign citizen domiciled abroad, the Swiss judicial or administrative authorities have jurisdiction to deal with those parts of the estate that are located in Switzerland to the extent that the foreign authorities do not deal with them.*

It is likely that if there is increased federal attention to the status of the opening of probate, the regulation of assets attributed to trusts from probate will also benefit.

It should also be noted that there are different procedures for obtaining a probate in the United States.
For example, in California, in addition to the ordinary procedure, for a probate whose estate has a value of less than US$166,250, the route of a "*Small Estate affidavit*" is open, or, if necessary, in the case of real estate in the state of probate having a value of less than US$ 100'000.- a "*Petition to determine succession of real property*." For real estate located out of state jurisdiction, California courts do not have jurisdiction.

As a result of the principle of *dualism* of succession, since the California courts do not have jurisdiction over real estate located abroad, it is often not possible to proceed with a probate proceeding when there are no assets there that would make it possible to reach the threshold value of the estate indicated above, or when the assets, including real estate, have already all been attributed to the trust thus removing them from the succession. When calculating the value of the estate's estate, in California they also consider the value of real estate located abroad, although the California court does not have jurisdiction over the transfer of the same.

As stated above in point g), in the case of the transfer by succession of real estate in Switzerland to a trust, there is the possibility, in the event of inoperability of the authorities of the state of succession, that, in the place of situation of the real estate, that the Swiss court of the state of the opening of the succession may issue ***certificate of executor*** (*certificato di esecutore testamentario*) limited to Switzerland aimed at permitting -in application of Art. 67 para. 1 (a) ORF- the transfer of the property from the executor as temporary rights holder -and at the same time trustee-, to himself as trustee who will then dispose of it as prescribed by the *deed of trust* and the applicable trust law.
A **certificate as administrator of the estate** limited to Switzerland, since this is limited to cases of succession ab intestat, without a will, and foreign inheritance law usually does not provide for inheritance shares in favor of trusts, in normal cases should not have relevance in the context of the successional transfer of assets from the deceased to a trust.

i) In Switzerland, domestic trusts (in application of foreign trusts but with local organs) are permissible inter vivos, domestic mortis causa trusts are problematic for Swiss citizens

It should be considered that in Switzerland, establishing a **living trust** (*trust in vita*) based on the foreign law that allows and regulates it is conceivable, whether the settlor (*disponente*) and related organs are domiciled in Switzerland or abroad. When a trust is based on a settlor and organs located within Switzerland it is also called an ***inland trust*** *(trust interno)*.

As for **testamentary trust** (*trust testamentario*) mortis causa, the situation is somewhat more complex. In fact, it must be assumed that Swiss inheritance law makes available a limited set of inheritance institutions, considered as *numerus clausus*, thus not extendable with new inheritance institutions. Although the trust abroad has value as a pre-succession planning tool, in Switzerland it has connotation as an autonomous institution, so much so that the HC Trust itself makes reservations in favor of the succession arrangements of signatory countries.
As a result of these considerations, part of Swiss doctrine rules out the possibility of a Swiss citizen proceeding to establish a mortis causa trust in the context of his or her Will. On the other hand, I believe that the current legal framework does not prevent a person in Switzerland from establishing a living trust based on foreign law, and later, in the context of his or her will based on Swiss law, dedicating certain assets, including perhaps real estate, to one or more trustees of an *inland trust*.

To this should be added that, in the context of Article 90 PILA concerning applicable law, the foreigner may by Will or inheritance contract subject the succession to one of his or her domestic rights. This means that it is not ruled out that a foreigner domiciled in Switzerland (or a Swiss citizen with dual nationality?) who is a native of a State familiar with trusts and whose domestic law permits the establishment of a trust mortis causa, by means of a Will based on the testator's domestic law of origin, albeit drafted in Switzerland where he or she is domiciled, may establish a testamentary trust in such a way.
I would like to note that in the context of the of the PILA revision currently pending before the federal chambers, with reference to Article 91 PILA concerning the *choice of applicable law*, the following versions are being discussed (compare the appendix at the end of the document):

> *1 A person may submit estate, by Will or contract of succession, to the law of one of his or her home states. He must be a citizen at the time of disposition or at the time of death. (= Federal Council)*

> *1 A person may submit estate, by Will or contract of succession, to the law of one of his home states. He must have citizenship at the time of disposition or at the time of death.* ***A Swiss citizen may choose only Swiss law.*** *(Council of States).*

While the version currently in force is as follows:

> *1 The estate of a person who had their last domicile abroad is governed by the law referred to by the private international law rules of the state of domicile.*

If the Council of States' version were to prevail, Swiss people with dual citizenship would no longer be able to opt for the succession law of the second state. This would

restrict their ability to possibly decide for the jurisdiction familiar with the trust institution and thus to be able to establish a testamentary trust.

j) Anglo-Saxon dualism principle

Another aspect to be considered, indirectly pertaining to and akin to the subject of trusts, as far as the structuring of a foreign Will is concerned, is to consider whether, on the basis of the principle of dualism of succession, which generally permeates Anglo-Saxon-derived successions, it is not sometimes hypothesizable, instead of attributing an asset to trusts during life, or, instead of attributing a real estate in Switzerland in the context of a Will written abroad on the basis of foreign law, whether it might not rather be possible to proceed with the technique of a *separate Will* (*testamento separato*) also known as an *international Will* (*testamento internazionale*) or *foreign Will (testamento straniero),* parallel to the local principal Will, which, from abroad and according to its forms, merely regulates the ownership of the real estate located in Switzerland, in the Canton of Ticino, on the basis of Swiss real and inheritance law.

This possibility has not been provided for in the *European Succession Regulation*, nor does the planned amendment of the PILA aimed at partially complying with the same explicitly refer to it, although such a solution could sometimes be effective in resolving problems otherwise difficult to solve precisely as a result of the absence of jurisdiction of the court of the state of succession with respect to real estate located abroad. Both Germany ex att. 25 para. 2 EGBGB and Switzerland ex art. 87 para. 2 PILA provide for the possibility that Swiss citizens domiciled abroad can make a partial Swiss law choice in favor of assets located in their home countries (see The European Succession Regulation, 2015, Giuffrè, at art. 7, no. 37).

The drafting of a separate Will to regulate the fate of property abroad could be helpful in facilitating the procedure for the transfer of real property abroad in a future succession opened in an Anglo-Saxon country on the basis of the *state of succession*, proceeding with the state of opening on the basis of the jurisdiction of the forum of the place of situation of the state of opening.
This type of Will, precisely known as a *foreign Will* or *international Will*, is specifically designed to deal with issues relating to assets located in countries other than the testator's country of residence. Rather than proceeding to recognize the Will of the state of succession that governs matters in that jurisdiction (often a lengthy and complicated procedure), the procedure for recognizing the Will in the state of the opening could be simplified by a succinct Will that governs the succession of assets abroad, as it might be in the canton of Ticino, in application of Swiss real rights,

including with reference to the devolution of assets to a trust, already established or to be established *post mortem*.

Although Switzerland has not ratified the Washington *Convention providing a Uniform Law on the form of a international Will*, which established the 1973 international Will, this should not prevent the recognition of separate Wills, aimed at regulating the inheritance destiny of real estate located in Switzerland, by intervention, instead of the court of the deceased foreign domicile, of the ancillary forum of the place where the real estate is located, in Switzerland.

Italy ratified the Washington Convention in 1991 along with nineteen states. The U.S.A. signed it in 1973 but did not ratify; the U.K. signed it 1974 but did not ratify; Australia ratified it in 2014, and Canada in 1977. I am not aware why the -international- Switzerland has not yet acceded to this convention.

The Washington Convention is not to be confused with the *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* of October 5, 1961; it has not been signed or ratified by Italy, Canada, or the US. Instead, Switzerland ratified it in 1971, the UK in 1964/1965 and Australia in 1986.

k) *Coexistence of separate Wills for real estate jurisdictions extra state of succession*?

The dualism of succession in the Anglo-Saxon system and the usefulness of preparing separate (or international) Wills to regulate the inheritance destiny of real estate located in Switzerland, working on the concept of domiciliary or primary probate respectively ancillary probate, depending on the jurisdiction of the court, is crucial in determining which court is best suited to regulate the succession.

As seen above, the federal legislature in the upcoming revision of the PILA is moving toward greater enforceability of the status of the opening of the succession in case of "*inoperability of the authorities of a foreign state of origin*."

Therefore, it is up to the judicial authority of the place of situation of the property, in case, of Canton Ticino, to decide, after simultaneous application of the heir beneficiary according to the Will, be it the *temporary rights holders* as *executor* (recognized as executor limited to real estate) or *adminstrator* (administrator always limited to real estate outside the jurisdiction of the state of the succession), the established *trustee* or the established *heir*, to decide on the fate of real estate outside the jurisdiction of the *state of succession*, as bodies of the *state of the opening*, considering the *inoperability of the authorities of a foreign state of origin*.

With reference to the Swiss-American Convention of 1850 on Succession, based on the rule of *comity*, the principle should prevail between Switzerland and the U.S. that when the *state of domicile* assumes jurisdiction, the *state of non-domicile* does not interfere (see Alfred von Overbeck, American-Swiss Successions - the meaning of art. VI of the 1850 Treaty, The American Journal of comparative law, 1970 [vol 18], p. 603). Conversely, if the state of domicile of the succession does not assume jurisdiction, then the ancillary jurisdiction of the place where the real property is located should remain open.
The problem of duality of succession in the U.S.A. also arises internally, when the deceased owned real property in more than one state of the U.S.A., before even internationally, outside the U.S. A fortiori, in the event of inoperative foreign judicial authorities, a solution determined by the *state of the opening of the succession* is required, precisely when there is property in that state whose ownership must be settled. This, even if this property is pertaining to a foreign trustee -or trustees-.

A greater openness aimed at covering jurisdictional holes in foreign successions is apt to reduce the risk of land becoming part of the large ranks of *silent lands* or whose *owners are unknown*, because they are ungoverned, because the owners are unable to assume ownership because of the complexity of international ownership and succession relations, perhaps heightened by the existence of one or more trusts. Legal nodes, whose cost of resolution, often, is likely to exceed the modest value of the land involved.

In California, in the case of the death of a trustee, the procedure is to prepare an ***Affidavit of Death of Trustee***: where the successor trustee must declare that the parent/trustee is deceased, and that the successor trustee appointed in the parent's trust is the new trustee. The affidavit must also state that the deceased parent/trustee owned the real property. An original death certificate must be submitted in support of the affidavit. Thus, there are also affidavits or notarized asseverations of the status of the succession that contribute to forming the evidentiary substrate on which the Swiss notary public then rests for the preparation of the public deed necessary to determine -for example- the transfer of real property in Switzerland pursuant to Art. 67 para. 1 lit b no. 3 OLR.

The possibility of regulation in states of Anglo-Saxon tradition of the post-mortem fate of real estate located abroad, in Switzerland, by means of a *separate Will* intended for the state of the opening in the place the situation the real estate, must be carefully evaluated on a case-by-case basis. There is not much literature on the subject.

l) The current revision of Art. 92 para. 2 PILA in the area of inheritance with regard to the extent of inheritance status and liquidation of succession, and the possible effects also with regard to successions involving trust organs

The current Art. 92 para. 2 PILA reads as follows:

> *2 The implementation of the measures is governed by the law of the state whose authority has jurisdiction. Such law governs inter alia conservatory measures and the administration of the estate, including the administration by an executor.*

The Federal Council proposed the following addition, which was not amended by the federal chambers; therefore, it will come into effect at the end of the revision process:

> *2 ... This right applies particularly to conservatorship measures and the settlement of the estate, including procedural aspects of the execution of the will or the administration of the estate, as well as to the question of the rights to the estate of the executor or administrator of the estate and his or her power to dispose of it.* (translation by the author).

In the context of Message 20.034 concerning the amendment of the *Federal Act on Private International Law* (PILA) (Succession Law) of March 13, 2020 (FF 2020 2987ff), the Federal Council argued the proposed addition as follows:

> *"The rewording of Article 92 Paragraph 2 PILA eliminates an existing legal uncertainty. It is intended to clarify that subjecting the execution of a will to the state of opening means first of all contemplating its "procedural aspects" (supervision by the authorities, legal remedies of the heirs, etc.). As for the material aspects, the design follows the solution outlined in the message on the PILA (based on the specialized literature at the time). The rights and obligations of the executor (duties, faculties, duties of care, indemnification, etc.) are in principle subject to the inheritance status. In contrast, the question of the executor's position in relation to the succession, i.e., whether he is the owner of the estate ("rights to the succession") and his power to dispose of it, is judged according to the state of the opening.*
> *The current Article 92 deals exclusively with will execution. Instead, for the sake of clarity, the new wording now also mentions administration of the estate, by which the liquidation of the estate ordered by the authorities, such as liquidation by an administrator under common law or an "administrator of the estate" under Article 29 of the European Rules. By contrast, a mere administrator of the estate under Article 554 SCC, whose task is limited to conservatory measures, is not contemplated. The mere administration of the estate will continue to be subject to the opening state.*

In order to simplify the application of the regulation, the state of the opening has been given a broad scope with reference to the execution of the will and the administration of the estate. The advantage of the proposed solution is that in the case of the application of the law of succession of a common law state to a Swiss succession procedure, an executor is in principle treated as an executor under the SCC, and the appointment of an administrator provided for in the absence of an executor can be implemented through the order of compulsory liquidation under Article 593 SCC. In this way, an executor or administrator can easily be integrated into the system of Swiss civil law.

As for the declaration recognizing the heirs and the executor, entry in the land register and so on, one can refer to the rules of Swiss law applicable to domestic cases. This also has the advantage that Swiss authorities do not have to check whether the inheritance status that provides for an executor or administrator confers on the person concerned the status of owner of the estate - a question that is not always easy to answer. In all this, sufficient account is taken of inheritance status. The solution proposed here corresponds to the prevailing doctrine regarding the current Article 92 PILA.

The fact that the power of disposition of the executor or administrator of the estate is judged according to the state of the opening also greatly relieves the treatment of succession in Switzerland. The corresponding rules in the legal systems of common law states, under which the executor and administrator usually hold the position of a trustee, are hardly applicable in the Swiss context. Subjecting the power of disposition to the state of the opening also serves to protect legal relations. Third parties who come into professional contact with an executor or administrator of the estate involved in a Swiss probate proceeding will be able to rely on the validity of Swiss rules regarding capacity to dispose. The LDIP also protects corresponding interests in other provisions.

The term "ability to dispose" is to be understood in a broad sense: it refers not only to the alienation or encumbrance of succession property, but also to the contracting of commitments to the succession. The expression "rights to succession" should also be understood in a broad sense: it includes the issue of ownership and the right to property.

If an executor or administrator of the estate is appointed within the framework of a succession proceeding and if the corresponding decision of the authorities can be recognized in Switzerland according to Article 96 of the PILA, the rights over the succession and the power to dispose are governed by the law on which the aforementioned decision of the authorities is based.

According to the European Regulation (Art. 29 para. 2 (3)), in the context of the administration of a succession, the "transfer of ownership of the property of the estate" is governed by the succession status. However, this does not result in a risk of conflict with Swiss law. Article 29 of the European Regulation affects the appointment of a succession administrator in the context of a succession proceeding that takes place in a state party to the Regulation. From the Swiss

point of view, what is explained in the previous paragraph applies to the appointed person."

This regulatory clarification, in the past episodically already implemented by the practice of the courts to untangle otherwise inextricable bundles, should in the future also facilitate the development of those steps that in Article 67 of the Federal Land Registry Ordinance (LRO) are set out in an admittedly somewhat cryptic manner, regarding the acquisition in connection with a trust.

Art. 67 LRO, which is fundamental with regard to the conveyance of the relationship of trust du a property in Switzerland, reads as follows:

Art. 67 ORF - Acquisition in relation to a trust

1 If the transfer of ownership is in connection with a trust, proof of legal title is provided by the following supporting documents:

a. a contract concluded by public deed:
1. in the case of transfer of a real estate from the settlor to the trustee upon the establishment of the trust by an act between living persons,
2. in the case of further transfer of a real estate from the temporary rightful claimants (administrator of the estate, executor of the estate) or the founder's heirs to a trustee,
3. in case of transfer between two trustees of a wholly owned real estate belonging to a trust,
4. in case of further transfer of a trust from the temporary rights holders or heirs of the deceased trustee to the successor trustee,
5. in case of transfer of a fund that is part of a trust from the trustee to the beneficiary;

b. the certificate of inheritance or a statement from the competent inheritance authorities:
1. in the case of establishment of a trust by disposition upon death and direct transfer of a fund from the settlor to the trustee,
2. in case of direct transfer of funds belonging to a trust from the deceased trustee to the successor trustee,
3. in case of purchase by the temporary having rights or the heirs of the settlor or trustees, who are required to make the further transfer;
c. in the case of acquisition of a real estate by the founder's heirs by legacy: a notarized copy of the disposition at death and a written statement by the trustee certifying acceptance;
d. in the case of a transfer of ownership as a result of a change in the composition of a trust with several trustees: a written deed signed by all trustees attesting to the exclusion of old trustees or the inclusion of new trustees.

2 Upon the purchase of a trust from a third party who is not part of the trust or the purchase of a fund belonging to a trust by such a person, Articles 64 and 65 shall apply.

3 The attestation that a fund belongs to a trust shall be provided by means of a mention, the trust deed, the transfer contract or the decision of a judicial authority. If such attestation is lacking, the land registry office shall not verify ex officio that a fund belongs to a trust (translation by the author)

This article in fact divides two broad categories for proceeding with a transfer of ownership: a) by means of a contract concluded by ***public notarial deed*** or b) by means of a ***certificate or declaration from the competent inheritance authority***.

It is necessary to consider that in the two broad categories, namely, the transfer mediated by the notary by public deed and the transfer determined by a certificate of inheritance or a declaration of the competent inheritance authority, we have a category of protagonists, referred to as: ***temporary rights holders*** (*aventi diritto temporanei*) who are also referred to as ***administrators*** (*amministratori*) of the estate or ***executors*** (*esecutori testamentari*). The formalization of these functions, in the procedure of the acquisition of the property by a trust, in the context of a succession, are essential to be able to then interact, later with the notary, in the context of the contract concluded by public deed. In fact, the further transfer of a property from the temporary rights holders or by the heirs of the settlor to a trustee, through a contract concluded by public deed by a notary public, presupposes -as a prerequisite- the formal judicial recognition of the temporary rights holders by the competent probate authority. Often precisely the authority of the *opening of the succession*, where the property to be transferred is located, in the future consolidated, through the confirmation provided by the federal legislature.

So, in the context of Art. 67 LRO it can be seen that, as a prerequisite for the notarization of certain notarial acts aimed at obtaining property transfers with inheritance origin, described in no. 1 para. (b) of the same article concerning the *certificate or a declaration of the competent inheritance authority*, the obtaining of such certificates (in the state of the succession or in the state of the ancillary opening of the succession) is a prerequisite for the notary public to act in the preparation of the contract of property transfer, particularly in the envisaged cases described in no. 1 lit. a) paras. 2 and 4 LRO, which provide:

> Art. 67 para. 1 lit a 2 LRO
> *"in case of further transfer of a real property from the temporary rights holders (administrator of the estate, executor) or the founder's heirs to a trustee," (translation by the author)*
>
> Art. 67 para. 1 lit a 4 LRO
> *"in case of further transfer of a fund from the temporary rights holders or heirs of the deceased trustee to the successor trustee," (translation by the author)*

The notary, before notarizing these types of deeds, will therefore normally have to obtain, either from the state of the succession or from the state of the opening of the succession, a certificate enabling him to formalize what is necessary at the land registry.

As expressed in points g) and h) above, the certificate that can enable the notary to notarize the transfer of real assets of a deceased in favor of a trust, and for it to the trustee, is the ***certificate of executor*** of the deceased's estate (*certificato di esecutore testamentario*) limited to Switzerland. This, together with a decision that the relevant authority is not subject to the *Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents* (ANRA- LAFE) as an exception, allows the trustee to proceed with the requests of transfer of the property through a Swiss notary public in accordance with the requirements of Art. Art. 67, para. 1 lit a) 2 and 4 LRO.

The confirmation contained in Art. 92 para. 2 PILA proposed at the federal level will thus be likely, in the future, to facilitate the recognition of foreign executors (*esecutori testamentari*) or administrators (*amministratori*), and, consequently, their interaction with notaries, also for the purpose of proceeding to implement what the deceased envisaged in his or her Will, either -as indicated above- in the case of a devise of property to an existing trust, or in the context of the deed of establishment of a testamentary trust. This is in addition to the normal designation of executor or administrator -also with respect to a property in Switzerland- in the context of a simple external succession, unrelated to a trust.

> *In Anglo-Saxon law, the acquisition of the estate is affected by interposition of a "personal representative" as "trustee" between the decedent and the heir: in the case of a will by an "executor," and in the case of legal succession by an "administrator."*
> *These "personal representatives" distribute after payment of debts the remainder to the "beneficiaries," namely the heirs. The "executor" can be likened to an executor of a will, and the "administrator" has the similar functions as an administrator under Article 595 SSC (...). Both the executor and the administrator are issued a certificate of legitimacy by the court: the letters-testamentary for the executor and the letters of administration for the administrator. These documents can be recognized in Switzerland under Article 96 PILA. The registrar will register by adaptation the beneficiaries as owners of the real estate in Switzerland. (...).* (Domenico Acocella, FORM AND VALIDITY OF WILLS IN SWITZERLAND AND ABROAD, in Selected Topics in Inheritance Law, CFPG, 2000, pp. 217-218 ff).

In the OLR in Article 67, concerning the "*acquisition of real estate in connection with a trust*" the *temporary rights holders* are mentioned three times: presumably these are precisely the *executors* and *administrators* also mentioned above.

In the context of the Guidelines "***Foreign Succession Certificates as a Supporting Document for Entry in the Swiss Land Register***," State May 2023, regarding the "***Principle of Succession Administration in Common Law States***," of the Federal Office for Land Registry and Land Law indicates the following:

> *"Under common law inheritance law, the inheritance of movable property is not transferred to the heirs ipso jure with the death of the decedent, but is acquired by a temporary rights holder (personal representative). In England/Wales and other various legal systems of common law states, this rule has been extended to real estate.*
> *The personal representative is called executor (or executrix) if he or she has been designated by the deceased or administrator if, in the absence of a person established by will, the probate court has designated an administrator of the estate. It is the responsibility of the temporary successor to liquidate the estate by proceeding to the collection and liquidation of assets and the payment of liabilities. He or she will pay the surplus to the ultimate beneficiaries (beneficiaries) only at the closing of the liquidation.*
> *Funds are usually transferred by "deed of assent". The whole procedure is called "administration." The right to succession of the personal representative largely corresponds to that of a trustee.*
> *These principles also apply to England/Wales, Scotland, Ireland, Northern Ireland, English Canada, India, Malaysia, Myanmar, Hong-Kong, South Africa, Nigeria, Kenya, Ghana, Australia and New Zealand. Other common-law jurisdictions, many of which belong to U.S. federal states, have retained the old regulation, under which ownership of the estate passes directly to the heirs. Several other federal states have begun to transfer formal ownership of probate directly to heirs. It is safe to assume that these states include those that have fully taken over the Uniform Probate Code (UPC) [should be Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota and Utah, note of the author]. As a rule, however, succession is still subject to the administration. The legal position of the personal representative, however, is no longer that of a formal owner; rather, it is comparable to that of an executor under the UPC.*
> *The UPC provides for the possibility of applying for universal succession. If the request is approved, the power to dispose of the succession passes directly to the heirs and a personal representative is not appointed.*
> *In this context, "heirs" means heirs in the common law sense.*
> *They also include legacies according to Article 483 et seq. SCC. For the purposes of the Swiss land registry, if the estate is assigned to a person as a legatee in a common-law state, it should be treated as a legatee per vindicationem."*

The paragraph above describing the role of "*personal representatives*" or personal representatives in Anglo-Saxon successions is reminiscent of the role described in Art. 67 LRO concerning *temporary rights holders* and their function as executors or administrators of a succession, vested with that role by a court, whether that of the state of the succession (and it is this procedure that the above partially reproduced guideline describes) or of the state of the opening of the succession, as it might to be -for real estate forming part of a succession in the canton of Ticino- forum of the place of situation ex art. 88 LDIP.

The reference in the Federal Guidelines on "*Foreign Succession Certificates as a supporting document for entry in the Swiss Land Register*" to the forum of the opening of the succession does not imply the exclusion that documents of similar effect, may be issued by a judicial authority of ancillary probate of the will, at of the state of the opening of the succession, at the place of situation of the property whose ownership is to be transferred. This, even with reference to a possible transfer of property from the deceased to one or more trustees, for a trust, including through the intermediation of temporary rights holders such as executors of wills or administrators.

m) Trusts and other regulatory "micro-galaxies"

After this fairly comprehensive overview of the relationship between real, trust, inheritance and notarial rights, domestic, foreign and private international law, in this review I will refrain from discussing, with rare exceptions, the following: anti-money laundering obligations of trustees; data protection obligations of trustees; restrictions on the purchase of real estate with respect to persons residing abroad; trustee obligations in tax matters; trustee obligations in the automatic exchange of tax information; legal remedies in case of violations committed by the trustee to the detriment of the trust; provisional measures under civil law and possible criminal sanctions against the trustee. I refer to the related, copious literature on this subject.
As the only cantonal tax curiosity of notarial interest, I note that Art. 20 para. 1 lit o) of the ***Cantonal Stamp Tax Law*** of October 20, 1986, provides that the copy intended for the Notarial Archives of "*instroments having as their object the transfer of property connected with a* ***trust***" is exempt from the cantonal stamp duty tax.

As you will see during this paper in points 2 through 9, I have supplemented certain descriptions, aimed at framing the institution of trust and its use, by means of artificial intelligence-generated responses, elaborated by yours truly, as an experiment aimed at framing the institution of trust in the context of the transposition of this institution to the Swiss legal establishment.

At the end, I also set out the theme of the paper, relating to the annotation of the trust, and to finish, I added a track relating to normative and bibliographical sources and chronological issues and more.

2. Geographical spread of the trust institution

The institution of trust is widely used in Anglo-Saxon and common law legal systems. The main countries in which it is used include:

- **United Kingdom**: is the cradle of the trust and has a long tradition of using this legal structure. The trust is widely used in the United Kingdom for estate planning, probate, and asset administration purposes.
- **United States**: The trust is commonly used in the United States for purposes similar to those in the United Kingdom, such as estate planning, asset management, and protection of beneficiaries interests.
- **Canada**: Canada, particularly common law provinces such as Ontario and British Columbia, recognizes and uses trusts extensively in the areas of estate planning and asset management.
- **Australia and New Zealand**: These countries also use trusts as an integral part of their legal systems, particularly for estate planning and asset management purposes.
- **South Africa**: Even in South Africa, a country with a legal system based on common law, trusts are commonly used for inheritance and estate purposes.

Philip Wood, in his book "*Law and Practice of international finance*" (see at the end), estimated which world populations subjected to distinct legal groups: 5 percent to American common law / 30 percent to English common law / 25 percent to a mixture of civil and common law / 34 percent Napoleonic / 18 percent Roman / Germanic. So, perhaps between 30 percent and 50 percent of the world's population has the option as a “state of the succession" to transfer assets of their succession, during life and/or death, to a trust, or otherwise use that institution for other purposes.

It is important to note that laws and regulations regarding trusts may vary from country to country.

3. States with their own trust institution

The institution of trust is recognized in many countries around the world, although the laws and regulations concerning it can vary greatly from one jurisdiction to another. Below I provide an overview of certain countries that have their own trust institution and those that recognize foreign trusts:

- **United States**: has a robust trust system, with trust laws varying from state to state. Some states, such as Delaware, Nevada and South Dakota, are known for their trust-friendly laws.
- **United Kingdom**: has a long tradition of using trusts and has specific trust legislation. The Trustee Act 2000 is an important law on trusts.
- **Canada**: has trust laws based on provinces and territories. Trust laws can vary widely among jurisdictions.
- **Australia**: trust laws are established at the state and territorial level. Again, there are significant differences between jurisdictions.
- **New Zealand**: has specific legislation on trusts, including the Trustee Act 1956.
- **China, Hong Kong and Singapore**: These Asian jurisdictions recognize trusts and have specific trust laws.

4. Economic significance of the trust, some considerations

The institution of trust is a legal and financial concept that has significant importance worldwide. It is based on an arrangement in which a person (settlor) transfers ownership of property or assets to a trustee who holds and manages them for the benefit of one or more beneficiaries, in accordance with the instructions set out in the trust. This results in a **segregation** of the assets allocated to the trust from those of the settlor. Such segregated assets, in principle, are no longer likely to enter the estate or matrimonial estate of the settlor.

Here is some information on the overall economic importance of the trust and its applications:

- **Family Succession Planning**: This is one of the most common applications of trusts, where people create trusts to protect and manage their assets from future generations. It allows for tax- and legally efficient estate succession planning in advance.

- **Asset protection**: A trust can be used to protect assets from potential creditors or legal action. This application is often used by high net worth individuals and entrepreneurs.

- **Charitable giving**: Charitable remainder trusts are set up for charitable purposes. Assets are managed by the trustee to support specific charitable causes or organizations.

- **International Tax Planning**: Trusts can be used to optimize international tax planning, allowing them to take advantage of jurisdictions with more favorable taxes.

- **Protection of Minor or Incapacitated Heirs**: Trusts can be created to ensure that minor or incapacitated heirs have access to needed assets and resources without the risk of these being dissipated or mismanaged.

- **Investment Tools**: Some investors establish trusts to manage investment portfolios or to participate in pooled investments.

- **Management of International Assets**: Trusts are widely used to manage international assets, allowing efficient distribution of assets across different jurisdictions.

- **Estate Planning**: In addition to estate planning, trusts can be used for the management and distribution of real estate such as land, buildings or commercial properties.

- **Management of Natural Resources or Family Assets**: Trusts can be established for the management of natural resources, family businesses, or any type of asset that requires professional management.

The economic importance of the trust worldwide stems from its versatility and its ability to adapt to a wide range of purposes and financial situations. Jurisdictions offering trust services can attract international capital and investors, contributing to the creation of offshore financial centers and the growth of the trust services industry. However, it is important to note that the use of trusts can raise ethical and tax issues and may be subject to complex regulations in different jurisdictions. Therefore, it is essential to seek the advice of qualified legal professionals and financial experts before creating or using a trust.

5. States that recognize trusts under the 1985 Hague Convention on the Law Applicable to Trusts (HC Trusts)

The ***Hague Convention on the Law Applicable to Trusts and on their Recognition*** (HC Trusts) was adopted by the Hague Agency for Private International Law (HCCH) on July 1, 1985, and entered into force on January 1, 1992. However, it is important to note that the number of countries that have ratified or acceded to this convention may vary over time.

As of September 2021, many countries have acceded to or ratified the HC Trusts, but the list may be subject to change: Italy, Switzerland, the United Kingdom, Australia, Canada, France, Germany, Japan, New Zealand, the Netherlands, South Africa, Spain, Sweden, China (Hong Kong and Macau) and Singapore.

It is advisable to consult the official sources of the Hague Agency for Private International Law (HCCH) or the website of the government of the country of interest for the most up-to-date information on ratification or accession to the HC Trusts.
https://www.hcch.net/en/instruments/conventions/status-table/?cid=59

The HC Trusts is an international agreement that aims to establish uniform rules for determining the law applicable to trusts and for the recognition of trusts among the jurisdictions of signatory countries. This convention was adopted at the Hague Conference on Private International Law on July 1, 1985.

Switzerland ratified the HC Trusts on April 26, 2007, while it entered into force on July 1, 2007.
Ratification of the convention enabled Switzerland to adhere to international trust standards and facilitate the recognition of Swiss trusts in other jurisdictions that are signatories to the convention.

Italy signed ratified the HC Trusts and on their recognition Feb. 21, 1990, where it entered into force Jan. 1, 1992.

The implications of the HC Trusts for countries that have ratified it include:

- **Determination of applicable law**: The convention establishes clear rules for determining the law applicable to a trust. This is important because the trust may involve parties from different jurisdictions and may be subject to different national laws.

- **Recognition of trusts**: The convention promotes the recognition of trusts among signatory jurisdictions. This means that a trust recognized in one country that has ratified the convention should also be generally recognized in other signatory countries.

- **Uniform Rules**: The convention aims to establish uniform rules for the interpretation and application of trusts, thereby helping to provide greater legal certainty in international transactions involving trusts.

- **Facilitation of international business**: The convention facilitates international estate planning, cross-border investments and other international business involving trusts.

It is important to note that not all countries have ratified the HC Trusts, and even among those that have, specific provisions may vary. In addition, application of the convention may involve interpretation and adaptation to each country's domestic laws.

The HC Trusts is an international instrument that promotes the recognition of trusts among the jurisdictions of signatory countries.

Article 11 of the HC Trusts states:

> *A trust created in accordance with the law specified by the preceding Chapter shall be **recognized** as a trust.*
> *Such recognition shall imply, as a minimum, that the trust property constitutes a **separate** fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a **notary** or any person acting in an **official capacity**.*
> *(…)*

The trust in Switzerland is not granted an independent legal personality. The assets dedicated to the trust are separated, segregated from those of the settlor from those of the trust. So much so that with the entry into force of the HC Trusts, the new special provisions Art. 284a - 284b of the *Swiss Debt Enforcement and Bankruptcy Law* (SDEBL) concerning trusts also came into force in 2007.

The recognition of a trust under this convention implies a direct impact on the functions or responsibilities of notaries and other public authorities in the states that have ratified it. Here are some important considerations:

- **Role of Notaries**: Notaries, as legal professionals, play an essential role in the creation and administration of trusts in the states of trust establishment. The recognition of a trust is more related to the laws and courts of the jurisdictions involved than to the specific functions of notaries. The recognition of trusts granted by the HC Trusts results in an indirect duty on the part of the notary to recognize this institution when it exists and is operational. To deny such recognition would be to deny the commitment made by the Swiss Confederation when the HC Trusts were adopted.
- **Public Authorities**: Public authorities, such as Courts and government agencies, may be involved in the registration or approval of trusts under national laws. In Switzerland, courts, land registry offices and tax authorities. The convention may simplify the process of recognizing foreign trusts, but the specific procedure may vary from country to country.
- **Effect on the Convention**: The convention is primarily geared toward establishing uniform rules for the recognition of trusts among signatory

jurisdictions. It promotes legal certainty and harmonization of laws applicable to trusts. The direct effects will be most evident in international legal disputes concerning trusts and in international transactions involving trusts.

- **Legal Consultation**: When dealing with international trusts and recognition issues, it is always advisable to consult a lawyer experienced in international law and trusts in the state relative to the governing law. These professionals can advise on the best strategy to follow, including the specific laws and procedures of the country involved.

In summary, the HC Trusts aims to facilitate the recognition of trusts between jurisdictions, and the functions of notaries and public authorities in signatory states remain governed by national laws and local procedures. Therefore, for any specific issue related to a trust, it is essential to consult competent legal professionals in the relevant jurisdiction, including through relevant affidavits or sworn statements (affidavits).

6. Emigration and subsequent interaction of foreign trusts on Swiss, Ticino and Italian jurisdictions - effects on territory and related property

> *"In the prospectuses the first place for emigration belongs to Ticino, which in relation to the total number of the population gives the highest ratio which reached up to 122 per 10,000 in 1869. Then come the cantons of Glaris, Grisons, Bernese, Schaffhausen, Zurich, St. Gallen, and Aargau, which -vary from 85 to 18 per 10,000 population.*
> *After Ticino come the German cantons, emigration to the French cantons being almost nil in at least the two most important ones, those of Geneva and Vaud.*
> *In 1869, setting aside the exceptional 1870 for the war, it is noted that above the total number of 5206 emigrants went to America as many as 4984, of which to the Northern States 3627, to Central America 86 and to South America 1271 while to Australia went only 65 to Asia 11 and to Africa." (Excerpt from "Le emigrazioni svizzere", notes by Giovanni Tomasoni 1873, Padua)*

Historians estimate that between 1880 and 1890 nearly 9,000 people packed their bags, registering a new peak; the following decade, the one that closed the 19th century, saw "only" 4,000 people leave Ticino. The phenomenon remained alive in the first two decades of the 20th century with about 600 expatriates a year but faded over the years due to the two world wars and the Great Depression of the 1930s.

In total, an estimated 50’000 left between 1850 and World War II. Among them, 30’000 living over the Ceneri Mount (Monte Ceneri or *soprecenerini*) embarked with a destination of **California** while at least 12,000 living under the Ceneri Mount (Monte

Ceneri – or *sottocenerini*) bought a ticket to **South America**. To these, those who chose Australia should be added.
https://www4.ti.ch/can/oltreconfiniti/dalle-origini-al-1900/storia-dellemigrazione-ticinese/questione-di-numeri

Of these emigrating Ticinese, predominantly from rural regions and valleys, many therefore came to a country of common law jurisdiction, American or English in character.

Many of them completely lost contact and connections with their parents and later grandparents, great-grandparents and ancestors. Many of those who maintained -or did not maintain- contact transferred their assets by applying the law in force in the jurisdiction in which they were located, thus of the common law, and thus also -sometimes- by resorting to the trust institution.

Since Canton Ticino has been the Swiss region with the highest incidence of emigration, including to London, California and Australia (Argentina does not have a common law legal system), it is not out of place to argue that, probably, Canton Ticino is the one in Switzerland with the highest incidence of successor connections with countries with Anglo-Saxon traditions, and therefore also -possibly- with trusts.

If we consider that recently the Cantonal Land Use Plan for Landscapes with Protected Buildings and Installations and its implementing regulations of June 28, 2012 involved nearly **60,000 rural buildings** located outside of building zones, it is very likely that several thousand of these are in turn connected in some way with descendants of emigrants in countries with the common law system, whether or not aware of the inheritance ownership relationships that still exist. Of these, it is possible that a number have been subjected-or are still subjected-to a trust regime.

Since these are often properties located in rural and suburban, remote, also impervious territory of difficult access, of (current) low if not insignificant commercial value, the ownership relations on them are ignored, or unknown, remaining the actual current owners unknown. This contributes to a certain an impairment of the valleys' housing stock and to a certain planning disorder, considering that the absence of ownership exercise results in an absence of the administratively permissible use of such properties.

Probably several cases concern land that, because of failure to identify or formalize the owners, is defined as "***silent***" or with unknown owners due to the absence of definition of the successional relations of the last registered as owner. It is also conceivable that a number of cases concern successions of heirs identified in the past by means of *public notice procedure* (*pubblicazioni di grida*) to search for unknown heirs (*ricerca di eredi sconosciuti*) ex art. 86a para. 1 of the -cantonal- *Application and*

Complement Code to SSC (*conservative measures for the devolution of the estate - provvedimenti conservativi per la devoluzione dell'eredità*), 248 CPC (*summary procedure - procedura sommaria*) and 555 CCS (*appointment of an administrator in case of unknown heirs - nomina di un amministratore in caso di eredi ignoti*).

Procedures that made it possible sometimes to remedy situations in which there were no known heirs of real estates, but which later, as a result of subsequent foreign successions with devolutions to trusts, as a result of the little-known procedure of transfer in favor of the trust, could not be perfected by the transfer of ownership of the properties in favor of the heirs or, if a trust was involved, in favor of the trusts/trustees or beneficiaries.

In the event that, following the transfer of real property by succession to the designated heir (or by trust to the trustee and then to the beneficiaries) the new owner does not wish to retain the real property because he or she has no interest in it, the procedure of dereliction of ownership by waiver by all the beneficiaries (*procedura della derelizione della proprietà mediante rinuncia da parte di tutti gli aventi diritto*) remains open (cf. Art. 666 and 729 SCC and Art. 131 LRO) (see also An illusory return to the state of nature: notes on dereliction (translation), Simone Albisetti, p. 338 ff Weblaw, 2023, cited at the end).

The question remains as to whether even a trustee or executor or administrator, in the context of the trust mechanism, can already themselves relinquish ownership of property without having to carry out the transfer to the beneficiaries as the ultimate owners. Probably the answer is positive if, to the unilateral demand of the trustee or executor, is added the consent of the beneficiaries who are beneficiaries of the trust. Determinant in this regard is to examine what the settlor has stipulated in the deed of trust, respectively what the applicable trust law provides.

Considering that neighboring Italy has also had large emigration flows to common law countries in history, the hypothesis of the existence several trust-related successions in relation to real estate in Italy I speculate may be plausible.

7. The use of trusts in family estate planning, the example of California

A trust is managed by one or more trustees, who may be the settlor or another individual or institution designated by the settlor.

Trust assets are distributed to beneficiaries according to the instructions of the settlor after the settlor's death.

When an inter vivos trust (or revocable living person's trust) reaches the term specified by the settlor or when another event occurs that causes its termination, such as the death of the settlor, the fate of the trust and its assets will depend on the provisions set forth within the trust formation document.

Here are some common possibilities:

- **Distribution to beneficiaries**: Most often, an inter vivos trust will stipulate that upon termination of the trust, the assets will be distributed to the beneficiaries designated by the donor, according to the terms contained in the trust formation document (deed of trust). The provisions may be detailed, specifying how the assets should be divided among the beneficiaries. For example, it could be provided that the assets be divided equally among the donor's children.

- **Age of beneficiaries**: The trust could provide that beneficiaries receive their assets only when they reach a certain age. For example, it could stipulate that assets are distributed when a beneficiary turns 21, 25, or another specific age.

- **Alternative choices**: The donor could establish alternative choices in the event that a beneficiary dies before the assets are distributed. In such a case, the assets could be directed to other beneficiaries or earmarked for charitable purposes, such as charity or education.

- **Continuing trust**: In some cases, the trust could provide for continuation of the trust even after the death of the donor. For example, if the trust was created to provide ongoing support for the education or welfare of a beneficiary, it might be stipulated that the trust continue to exist and be administered by a trustee until certain conditions specified in the document are met.

- **Other charitable purpose**: In some cases, the trust could be established for a specific charitable purpose, such as funding a charity or a particular cause. In such a case, the assets of the trust would be used to accomplish this charitable purpose.

It is important to note that the provisions of an ***inter vivos trust*** are completely customizable and can vary according to the donor's intentions. The trust document should clearly detail the conditions and instructions for the distribution of assets upon its termination. In addition, the trust will be subject to local laws and may be subject to federal or state taxes if assets are distributed; therefore, it is critical to consult with an experienced trusts attorney to ensure that everything follows applicable laws and the donor's intentions and to try to predict the tax liability.

A Will, commonly known as a ***Last Will***, is a legal document that provides instructions for the distribution of a person's assets after his or her death. Unlike a trust, a Will becomes effective only after the death of the person who created it and must go through the probate process, which in some jurisdictions can also be a lengthy and expensive procedure (court of probate).

Usually, when an inter vivos trust is created, a Will (Last Will and Testament) is also created in parallel. In this, assets that have not previously been explicitly vested in the inter vivos trust are determined how to be distributed by succession.

Although a *revocable inter vivos trust* and a Will both allow people to distribute their assets after their death, there are some key differences between the two.

One of the most significant differences is that assets held in a *revocable inter vivos living trust* can avoid court succession (probate), while assets distributed through a will must generally go through probate. This means that a trust can often save the trust beneficiaries time and money. Therefore, in countries where the trust is a recognized domestic legal institution, ownership of assets is often transferred to a trust during their lifetime, in parallel with a Will, the latter limited to assets that have not previously already been transferred to the trust. In this, the remaining assets are eventually transferred to the trustee(s), for the trust.

A revocable living person trust (living trust) can also provide more privacy than a Will, since the trust document does not become part of a public court proceeding, whereas a Will becomes a public document once filed with the court.

Trusts can be used effectively to protect and administer the assets of minors or individuals in need of special protection. Below are some pointers on how trusts can be used in such cases:

- **Trusts for minors**: When it comes to protecting the assets of minors, trusts can be a very useful tool. Here is how they work:

    - **Trust inter vivos** (revocable living person trust or revocable living trust): This type of trust can be created during the donor's lifetime. Assets are transferred to the trust and administered by a trustee until the child reaches the age set by the donor (e.g., 18 or 21). The trustee may distribute the funds for the minor's needs in accordance with the donor's instructions.

    - **Testamentary trust**: A testamentary trust may be established in a will to administer and protect the minor's assets after the death of the parent or legal guardian. The trust can specify the conditions under which the

assets can be used to support the child, such as for education, health and welfare.

- **Trusts for individuals with disabilities**: For individuals with disabilities, special trusts can be an essential tool to ensure that they receive ongoing financial support without compromising access to government programs such as in the case of disability. Here are some options:

    - **Special Needs Trust (SNT)**: This type of trust is designed to provide additional resources for a person with a disability without affecting their eligibility for public assistance. Funds in the trust can be used to improve the person's quality of life, such as for medical care, education, and recreation.

    - **Pooled Trust**: In a pooled trust, the funds of many people with disabilities are "pooled" into a single trust administered by a nonprofit entity. This reduces the costs of administering the trust. The funds are separate for each beneficiary but administered jointly.

- **Trusts for protection from creditors and divorce**: Trusts can also be used to protect assets from creditors or from a division of assets in the event of divorce. For example, an irrevocable trust can be used to legally separate assets from personal assets so that they are not subject to claims by creditors or former spouses.

8. The making of a Will (Last Will) parallel to the making of a living trust (deed of living trust) - California - Australia - United Kingdom

In **California**, the institution of trust is often used as an important part of estate planning. A trust, or trust, is a legal vehicle through which a person (the grantor or settlor) can transfer his or her assets to a trustee, who acts in the best interests of the beneficiaries specified in the trust. Here is how the trust can be integrated into the probate context, for example in California:

1. **Avoid probate**: By creating a trust, assets can be transferred into the trust so that they do not have to go through the probate process, which can be lengthy and costly. This allows assets to be distributed more efficiently to designated beneficiaries.

2. **Succession control**: The settlor can clearly establish provisions for the distribution of assets within the trust. This provides greater control over succession and ensures that assets are managed according to the settlor's wishes.

3. **Privacy**: Unlike a Will, which becomes public knowledge during the probate process, the details of a trust remain private. This can be advantageous for those who wish to keep their estate planning confidential.

4. **Avoid estate taxation**: In California, trusts can be used to reduce estate tax. Some types of trusts, such as spousal trusts to avoid estate taxation, make it possible to maximize the inheritance passed on without having to pay excessive taxes.

5. **Management during life**: A trust can be structured to allow the settlor to retain control and use of assets during his or her lifetime while planning for succession for beneficiaries after his or her death.

It is important to note that estate planning and the use of trusts can be complex, and laws may vary. It is advisable to consult an estate law attorney in California for personalized advice on creating and incorporating a trust into your specific estate plan.

In **Australia**, trusts are often used as a tool in estate planning. This can be done through various types of trusts, including testamentary trusts and family discretionary trusts.

- **Testamentary Trust**: A testamentary trust is a trust created under the provisions of a Will and becomes operative after the death of the testator. This type of trust can be used to distribute assets specifically among designated beneficiaries, protecting the assets from inheritance problems.
- **Family Discretionary Trust**: This type of trust is created during the person's lifetime and offers greater flexibility in distributing assets among beneficiaries. The assets are managed by a trustee who has the power to decide how to distribute the income and principal of the trust among family members.

The use of trusts in estate planning in Australia can offer tax advantages, asset protection and flexibility in managing inherited assets. However, it is important to obtain expert legal advice to fully understand how to integrate a trust into one's inheritance context, as laws and regulations can vary and affect taxes and asset distribution.

In the **United Kingdom**, the institution of trust is widely used in the inheritance context to manage the distribution of assets and estates after a person's death. Successor trusts, also known as "testamentary trusts" or "living trusts," are very common legal instruments to achieve various succession objectives, including:

- Beneficiary protection: A trust can be created to protect beneficiaries, for example, minors or individuals with special needs, by ensuring that they receive financial support in a managed manner.

- Inheritance tax reduction: Trusts can be structured to reduce the impact of inheritance taxes, enabling more efficient tax planning.
- Asset management: A trustee is appointed to manage the trust assets and distribute them in accordance with the provisions of the trust or applicable laws.
- Preservation of family wealth: Trusts can be used to maintain family wealth, ensuring that assets remain within the family for generations.
- Flexibility: Trusts can be extremely flexible in their provisions and instructions, allowing individuals to tailor them to the specific needs of their inheritance situation.

In general, trusts are a very versatile option for estate planning in the United Kingdom, as they offer many opportunities to customize the approach to wealth distribution and beneficiary protection. However, it is important to obtain qualified legal advice to create and manage a trust appropriately and in accordance with the law.

9. The mode of transfer of assets belonging to the trust: by Will, by succession, by a trust pour-over disposition

A ***trust pour-over trust disposition*** for its part is used in the estate planning and management of a person's assets after his or her death. This type of instrument is used in conjunction with a Will and is designed to ensure that all assets that were not transferred directly into the trust during the life of the donor (the person establishing the trust) are "poured over," "vested" in the trust established during his or her lifetime after the donor's death.

Here is how a pour-over disposition generally works:

- **Trust creation**: The donor creates a trust during his or her lifetime and transfers some or all of his or her assets into this trust. This trust may be revocable or irrevocable, depending on the donor's needs and preferences.

- **Will**: The donor also drafts a will designating the trust as the primary beneficiary by pour-over. In the Will, the donor may specify how he or she wishes the assets to be distributed once he or she dies.

- **Post-death distribution**: After the donor’s death, assets that were not transferred directly into the trust during his or her lifetime are “poured” or “contributed” into the trust according to the provisions of the Will. The trustee (the person in charge of the trust) will be responsible for administering the trust and distributing the assets in accordance with the instructions of the Will.

In essence, the pour-over disposition serves as a mechanism to ensure that all of the donor's assets are included in his or her estate planning, even though some assets may have been overlooked or acquired after the trust was created. This type of trust can be useful to simplify the distribution of assets after the donor's death and to ensure that assets are managed and distributed in a manner consistent with the donor's intentions.

b) The mention of the trust relationship at land registry

10. Regulatory basis, effects and structure of deed aimed at mentioning the relationship with a trust

In its June 28, 2007 "*Instructions on the Handling of Business Concerning a Trust*," the Federal Office for Land Registry and Land Law in Bern noted the following:

"Mention of the relationship to a trust.

At the time the trust is established, the settlor may require mention of the relationship of the trust, or it may defer to the will of the trustee to require it at a later date.
Where the trust statute so provides, mention may be requested either by the beneficiaries or by other persons, but only with the consent of the trustee, or based on a decision of a court.
Mention does not cause a limitation of the trustee's power of disposition (the trustee being fully the trust owner) but is intended to destroy the good faith of third-party purchasers and to protect the beneficiaries (enforcing the right of claim, i.e., restitution against bona fide third parties, mandatorily requires mention). The mention makes persistent the carve-out of the assets in trust, provided for in Anglo-Saxon law in the case of forced execution directed against the trustee, against those creditors who are unaware that the trust belongs to a trust.
The mention is made with the following key expression, "is part of the assets of a trust, justifying no .... "." (translated by the author)

For its part, such mention is derived from Article 12 CA trusts, which states:

> *Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.*

In the context of the integration of the CA Trust, in the Swiss body of law, Article 149d par. 1 and 3 PILA concerning "*Special Provisions Concerning Publicity*" reads:

1 - Where the assets of the trust are registered in the name of the trustee in the land register, the ships register or the aircraft register, reference to the trust relationship can be made by adding a note.
(…)
3 - A trust relationship that is not noted or recorded is not enforceable against third parties acting in good faith.

Lastly, in the Land Registry Ordinance (LRO), guidance on the mention of a trust can be found in the following articles:

Art. 58 ORF - Trust relationship
The mention of a trust relationship (Art. 149d of the Law of Dec. 18, 1987, on Private International Law) is entered on the basis of:
a. a notification of the settlor entered in the land register related to the contribution of the fund into the trust;
b. a notification of trustees registered in the land register;
c. a judgment of a Swiss court.

Art. 128 ORF - Mention of a trust relationship.
The mention of a trust relationship reports that the trust is part of a trust and the short designation of the trust.

While from a Swiss perspective the mentioned trust relationship results in the effects indicated above regarding the good faith of third-party purchasers, it also has clarifying effects regarding the position of the real estate that is the subject of mention in the case of succession of the settlor/institution.

The absence of formal transfer of the real property to the trustees and the trust to Land registry -constitutive- , after the deed of dedication according to the provisions of the state of the (future) succession, is likely not to transfer the property out of the ownership of the settlor of the trust who decided to dedicate the property to the same, and thus leave the property in the estate.

So, although it is conceivable that real estate may pose to be transferred by public deed to trustees even without mentioning that ownership relationship publicly, the mention facilitates the consideration of the real estate at the time of the settlor's succession as segregated from the estate.

A notary who were to notarize a sale of real estate belonging to a trust, the ownership of which is public by virtue of the mention, will likely have to take care, for the protection of the purchaser and the organs of the trust (trustees and beneficiaries), that the sale price remains at the disposal of the trust or is paid into a bank account belonging to the trust, and, if not, that any reverse decision to the initial dedication of the property to the trust, which is in

principle easier as long as the trust is in existence (and therefore revocable), is compatible with the trust deed, the trust law applicable to the case and accepted by all trustee(s) in charge, who, as joint owners, must act unanimously.

In the case of a public deed aimed at formalizing the purchase of real estate for the benefit of a trust by the two co-trustees who are members of the trust, aimed at annotating the trust relationship (Art. 67 para. 1 lit a cfr. 1 LRO), the steps to be considered, in summary form, are as follows:

i. *Presence of/of the trustee/s*
ii. *Ascertainment of the existence of a trust*
iii. *Ascertainment that the parties are trustee/s of the trust*
iv. *Finding that one or both settlors by a deed of disposition have decided to allocate the real property identified in Switzerland, Ticino, to the trust*
v. *Finding that the transaction is approved by the LAFE authority*
vi. *Contract of incorporation of simple partnership ex 530 CO between the two trustees (if the trustees ate more than one)*
vii. *Application for registration of the two trustees as joint owners in common of a defined parcel of land in Ticino ex art. 652 CCS (if the trustees ate more than one)*
viii. *Request for mention of the trust ex art. 149d PILA and 58 LRO (optional)*

***

c) Conclusions

11. As the topic, even for notaries, is highly articulated and complex, particularly as a result of the inherent multi-layered relationships of international law of trusts, real rights and inheritance rights, the indications developed in this research, rather than "granitic" conclusions are meant to be starting points for reflection that, I hope, may lead to a better understanding, development and recognition of the institution of trust in relation to Swiss private- and procedural- law institutes, also in the hope that more and more "silent lands" or with unknown owner may recover the past links and, with that, resume revival.

    In order to try to clarify the multiple terminological and procedural "mirror games" I have collected part of them in a brief English/Italian glossary at the end of this text, as well in the attached flux diagrams in A3 format.

    Niccolò Salvioni, v1 Locarno/Lugano October 13, 2023 // v2 Locarno/Istanbul October 27, 2023.

A) Sources and applicable regulations:

With respect to trusts

Convention on the Law Applicable to Trusts and on their Recognition *(HC trusts), Concluded at The Hague July 1, 1985, RS 0.221.371, in force in: Australia, Canada, China, Hong Kong, Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Panama, United Kingdom, San Marino, Switzerland, especially Art. 12(2) "the trustee shall have the capacity to act and be sued or to appear, as trustee, before* ***notaries*** *or other persons representing a public authority."*

Federal Act on Private International Law *(PILA - LDIP) of Dec. 18, 1987, SR 291, esp.*

Art. 16 PILA regarding ex officio ascertainment of applicable foreign law;
Art. 21 PILA seat of the trust;
Art. 29 PILA concerning the procedure for recognition or enforcement (principal para. 1 or incidental para. 3) of a foreign judgment;
Art. 86 - 96 PILA relating to inheritance law, especially Art. 96 relating to recognition of foreign decisions, orders and documents;
Art. 97 - 108 PILA relating to rights in rem: particularly Art. 97 relating to exclusive jurisdiction over rights in rem over land in Switzerland; Art. 99 and 100 PILA relating to the law in rem applicable to land and movable property; and Art. 108 PILA relating to foreign decisions concerning rights in rem over land,
Art. 149a - 149e PILA concerning Trusts: art. 149a PILA Definition; art.149b PILA Jurisdiction art. 149c PILA Applicable law; art. 149d PILA Special provisions concerning publicity - mention; art. 149e foreign decisions.

Lugano Convention *(CLug) of October 30, 2007 (RS - 0.275.12).*

Art. 5 para. 6 CLug concerning special powers for trusts.
Art. 60 para. 3 CLug concerning the domicile of trusts

Treaty between the Swiss Confederation and the United States of North America. (Convention of Friendship, Commerce and Extradition Between the United States and Switzerland) *of November 25, 1850, RS 0.142.113.362*

Art. V - freedom to dispose of personal property located in the other party's jurisdiction.
Art. VI - Jurisdiction of the courts and laws where the property lies.

Ordinance (Swiss Federal) on the Land Register *(OLR-ORF) of September 23, 2022, RS 211.432.1*

Art. 58 OLR concerning the mention of the trust relationship;
Art. 64 OLR concerning the acquisition of property by registration (by public deed, inheritance division or by legacy),
art. 65 OLR relating to acquisition prior to registration (by inheritance);

Art. 67 OLR concerning the acquisition of property in connection with a trust;
Art. 128 OLR concerning the mention of a trust relationship;
Art. 137 OLR relating to the cancellation of the mention of a trust relationship, specifically, with regard to the cancellation of the mention of a trust relationship: "The land registry office may require a notarized deed of verification from a ***Swiss public official*** *certifying that the proof has been produced."*

Regulations (Ticino Cantonal) concerning the Land Register Law *(RLRF), (dated April 1, 1998)*

Art. 28 RLRF relating to inheritance and
Art. 30 RLRF concerning enforceability of judgments of Swiss courts and decisions of foreign authorities, with reference to Art. 335 ff of the Swiss Code of Civil Procedure Law.

With relation to successions

Federal Act on Private International Law *(LDIP-PILA) of December 18, 1987, SR 291*

Art. 16 PILA concerning the ex officio ascertainment of the applicable foreign law;
art. 21 PILA seat of the trust;
Art. 29 PILA relating to the procedure for recognition or enforcement (principal para. 1 or incidental para. 3) of a foreign judgment; and
Art. 86 - 96 PILA relating to inheritance law, especially Art. 96 relating to recognition of foreign decisions, orders and documents;
art. 97 - 108 PILA relating to rights in rem: in particular art. 97 relating to exclusive jurisdiction over rights in rem over land in Switzerland; art. 99 and 100 LDIP relating to the law in rem applicable to land and movable property; and art. 108 LDIP relating to foreign decisions concerning rights in rem over land,
Art. 149a - 149e PILA concerning Trusts: art. 149a LDIP Definition; art.149b LDIP Jurisdiction art. 149c LDIP Applicable law; art. 149d LDIP Special provisions concerning publicity - mention; art. 149e foreign decisions.

Relating to the ***partial amendment of the PILA*** *currently underway in the federal chambers with the aim of harmonizing it with the European Regulation on Succession, also affecting trusts with particular regard to competence in the area of succession see:*
- January 22, 2020: Änderung des Bundesgesetzes über das Internationale Privatrecht (Erbrecht) - Bericht über das Ergebnis des - Vernehmlassungsverfahren, by the Federal Department of Justice (only in German or French)
- 20.034, Message Concerning the Amendment of the Federal Act on International Private Law (Succession Law), dated March 13, 2020, with related bill. (Relevant operations to reconcile differences are currently in progress at the parliament-state October 1, 2023).
https://www.parlament.ch/it/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20200034

Ordinance (Swiss Federal) on the Land Register *(ORF-OLR) of September 23, 2022, SR 211.432.1*

Art. 64 OLR concerning the acquisition of property by registration (by public deed, inheritance division or by bequest),
Art. 65 OLR relating to acquisition prior to registration (by inheritance);

Swiss Civil Code (CCS-SCC)*, (RS 210).*

Art. 555 SCC Appointment of an administrator in case of unknown heirs
Art. 559 SCC concerning the delivery of the inheritance (by inheritance certificate).

Swiss Code of Civil Procedure *(Code of Civil Procedure, CCP - CPC) SR 772, Dec. 19, 2008 (Status Jan. 1, 2023)*

Art. 248 lit e CCP, provided for cases of voluntary jurisdiction, summary procedure.
Art. 335 CCP, relating to enforceability of decisions.

Law (of Canton Ticino) implementing and supplementing the Swiss Civil Code (LAC*), April 18, 1911, RL - 211.100*

Art. 86a lit c LAC concerning the powers of the praetor (District Judge), issuance of the certificate of inheritance.
Art. 30 RLRF concerning enforceability of judgments of Swiss courts and decisions of foreign authorities, with reference to Art. 335 ff of the Swiss Code of Civil Procedure.

European Regulation on Succession (Succession Regulation)*, Aug. 15, 2015 (not yet transposed by Switzerland, message of partial integration into the LDIP under discussion in the federal chambers, see above in LDIP)*

Art. 1 lit. j non-applicability of the regulation to the establishment, operation and dissolution of trusts;
Art. 22 para. 2 choice of applicable law;
art. 31 adaptation to rights in rem

<u>With relation to real rights</u>

Swiss Civil Code *(CCS-SCC), (SR 210).*

Art. 664 - 666 CCS - ***Things without master*** *and dominion - Loss of right*

Ordinance (Swiss Federal) on the Land Register *(OLR-ORF) of September 23, 2022, RS 211.432.1*

131 LRO - Amendment and ***deletion*** *– conditions*

With relation to the law on execution and bankruptcy

***Swiss Debt Enforcement and Bankruptcy law** (SDEBL -LEF) of April 11, 1889*

Art. 284a and 284b LEF relating to special provisions on Trust relationships (trust property separated from the trustee's private property)

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- *Le Trust en droit Suisse, Guillaume Grisel, Schulthess, 2020.*
- *Property and Trust Law in Switzerland, 2 Ed. Georg von Segesser and Josef Caleff, Stämpfli - Wolters Kluwer.*
- *Der Common law Trust, Roman Cincellli, Schulthess, 2017.*
- *Il Regolamento Europeo sulle successioni, Andrea Bonomi and Wautelet, Giuffré, 2015.*
- *Law and Practice of international finance, Chapter 2 - Jurisdictions of the world and criteria page 17 statistics (% legal groups based on the population: % 5 American common law / 30% English common law / 25% mixed civil/common law / 34% Napoleonic / 18% Roman Germanic), Philip Wood, Sweet & Maxwell, 2008.*
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- *Message concerning the federal decree approving and implementing the Hague Convention on the law applicable to trusts and their recognition (05.088), Swiss Federal Council, December 2, 2005 (58 pages)*
- *The Hague Trusts Convention Scope, Application and Preliminary Issues, Johnatan Haris, Hart Publishing, 2002 (578 pages)*

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- *Incompatibilité du trust avec le droit suisse ? Un mythe s'effrite, Florence Guillaume, Swiss Journal of International and European Law (RSDIE), Schulthess, 2000, pp. 1 – 36*
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- *Trusts (149a - 149e LDIP), Thomas M. Mayer, Zürcher Kommentar zum IPRG, Band II., 3 Auflage, Schulthess, Zürich, 2018 (881 - 1043).*
- *Trusts (149a - 149e LDIP), Florence Guillaume, in, Loi sur le droit international Privé, Convention de Lugano, Commentaire Romand, Helbing Lichtenhahn, Basel, 2011 (1207 - 1269).*

***Lugano Convention** (CLug)*

- *Lugano Übereinkommen (Art. 5 para. 6 and 60 para. 3 CLug), Oetiker - Weibel, Helbing und Lichtenhahn Basel, 2011*

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- *Handbuch für den Verkehr mit den Grundbuchämtern und die Grundbuchführung, Bearbeitungsdatum 1. April 2022, Grundbuchämter der Kanton Bern*
- *Grundbuchverordnung (GBV), Urs Fasel, 2e Auflage, Helbing Lichtenhahn, Basel, 2013*
- *Die Anmerkung des Trustverhaltnisses und die Pflichten des Notars, Dr. iur. Delphine Pannatier Kessler, (SZBG), Schweizerische Zeitschrift für Beurkundungs und Grundbuchrecht, 2011, pp. 75 - 107.*
- *Fragen rund um die Eintragung eines im Trustvermögen befindlichen Grundstücks ins Grundbuch, Prof. Dr. iur. Florence Guillaume, SZGB, 2009, pp. 2 - 18.*
- *La mention du trust au registre foncier, Dr. en droit, Benedict Foex, SZGB, 2009, pp. 81 - 90.*
- *Trust und schweizerisches Zivilrecht - insbesondere Ehegüter-, Erb- und Immobiliarsachenrecht Stephan Wolf / Nadine Jordi, in "Der Trust - Einfuhrung und*

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- *Wegleitung zur grundbuchlichen Behandlung von Trustgeschäften, Eidgenössisches Justiz- und Polizeidepartement EJPD, Bundesamt für Justiz BJ, Direktionsbereich Privatrecht, Eidgenössisches Amt für Grundbuch- und Bodenrecht, June 28, 2007 (6 pages); (also in SZBG 2007, pp. 377 - 382).*
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With relation to successions :

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C) ***Glossary re trust etc. / English - Italian***

A - Glossary re trust etc v1 - 10.2023

English	Italian
Accretion of property	Accrescimento della proprietà
administrator (of the estate)	amministratore (della successione)
administrator, public	amministratore giudiziario (art. 555 CCS)
affidavit	dichiarazione giurata o asseverazione

amendment and restatement of trust x	modifica e rideterminazione o riformulazione of trust x
ancillary probate court	corte di omologazione ancillare
Application and Complement law to SSC (Cantonal) (ACL)	Legge (cantonale) di applicazione e complemento al CCS (LAC)
beneficiary	beneficiario
bequest mortis causa / Legacy mortis causa	lascito mortis causa / Legato mortis causa
Cantonal district judge	Giudice distrettuale cantonale
Certificate of inheritance art. 556 SCC)	Certificato erediario (art. 556 CCS)
Certificate of trust	Certificato di trust
Civil Procedure Code (Swiss) CPC	Codice di diritto procedurale civile CPC
Convention on Trusts (CA trusts), 1985 Hague (HC Trust)	Convenzione dell'Aia sui Trusts (CA trusts), 1985 Hague
co-trustee	co-trustee
deceased	decuius
Deed of death / Disposition upon death	Atto di morte
deed of transfer of property to the trust	negozio di destinazione della proprietà al trust
deed or instrument of trust	atto costitutivo o istromento di trust
District Preatorship or Court	Pretura o Corte Distrettuale
executor/trix (testamentary of the estate)	esecutore/trice (testamentario/a della successione)
Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents (ANRA)	Legge federale sull'acquisto di fondi da parte di persone all'estero (LAFE)
Federal Act on Private International Law (Act) (PILA)	Legge federale sul diritto internazionale privato (LDIP)
Federal Land Registry Ordinance (LRO)	Ordinanza federale sul registro fondiario (ORF)
grantor or settlor	disponente o fondatore
irrevocable trust	trust irrevocabile
land register office (district)	ufficio del registro fondiario (distretto)
loss of right (real)	perdita del diritto (reale)
notarial public deed	atto pubblico notarile
notary public	Pubblico notaio
notary public / Swiss - Cantonal	Notaio pubblico / svizzero - cantonale
opening state of succession	stato dell'apertura della successione

Ordinance on Land Registry (OLR)	Ordinanza federale sul registro fondiario (ORF)
Ordinance on the land register (federal) (OLR)	Ordinanza sul registro fondiario (ORF)
personal property	
principal of the trust	asse del trust
probate (a will)	probazione o omologazione o pubblicazione (di un testamento)
probate assets / nonprobate assets	beni soggetti alla procedura di omologazione della successione / beni non soggetti alla procedura di omologazione della successione
Probate court / ancillary (cantonal district judge)	Corte di omologazione della successione / ancillare (giudice cantonale distrettuale) dello stato dell'apertura della successione
Probate court / domiciliary primary	Corte di omologazione della successione / domiciliare o primaria (o dello stato della successione)
Probate proceeding (art. 556 SCC)	Pubblicazione delle disposizioni di ultima volontà (art. 556 CCS)
protector	protettore
public act of transfer (of property)	Atto pubblico di trasferimento (della proprietà)
public notarial act	atto pubblico notarile
Public notarial deed (Public deed)	Atto pubblico notarile (Atto pubblico)
public notice procedure	pubblicazioni di grida
rappresentante personale	personal representative
real estate/real property	immobile/proprietà immobiliare/fondo
revocable trust	trust revocabile
separate fund	proprietà separata o proprietà scorporata o massa distinta
settlor or grantor	disponente
simple company	società semplice
State of the succession	stato della successione
state trust law	diritto del trust statale
succession, intestate (without a Will)	successione ab intestat o ab intestato (successione senza testamento)
succession, testamentary (with a will)	Successione testamentaria (con un testamento)
Swiss Civile Code SCC	Codici Civile Svizzero (CCS)
Swiss Debt Enforcement and Bankruptcy law (SDEBL)	Legge federale sulla esecuzione e il fallimento (LEF)

Swiss Obligations Code (SOC)	Codice delle obbligazioni svizzero (CO)
temporarly entitled	avente diritto temporaneo
temporary rights holders (art.67 LRO)	aventi diritto temporanei (Art. 67 ORF)
testamentary succession (with a Will)	successione testamentaria (con testamento)
things without master and dominion	Cose senza padrone e dominio
trust	trust

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Decisioni del Consiglio nazionale del 13.1.2023
Decisioni del Consiglio degli Stati del 12.9.2023

Legge federale sul diritto internazionale privato (LDIP)

Modifica del ...

L'Assemblea federale della Confederazione Svizzera,

visto il messaggio del Consiglio federale del 13 marzo 2020[1],

decreta:

I

La legge federale del 18 dicembre 1987[2] sul diritto internazionale privato è modificata come segue:

Art. 51 lett. a

Per le azioni o i provvedimenti concernenti i rapporti patrimoniali tra i coniugi sono competenti:

a. per la liquidazione del regime dei beni in caso di morte di un coniuge, i tribunali o le autorità svizzeri competenti a liquidare la successione (art. 86-89), salvo nei casi di cui all'articolo 88*b*;

Art. 58 cpv. 2

2 Per le decisioni in materia di rapporti patrimoniali pronunciate in connessione con provvedimenti a tutela dell'unione coniugale o in seguito a morte, dichiarazione di nullità del matrimonio, divorzio o separazione, il riconoscimento è retto dalle disposizioni della presente legge concernenti gli effetti del matrimonio in generale, il divorzio o le successioni (art. 50, 65 e 96), salvo nel caso di cui all'articolo 96 capoverso 1 lettera c.

Art. 86 cpv. 1

1 *Concerne soltanto il testo tedesco*

1 FF **2020** 2987
2 RS **291**

Art. 87 cpv. 1 e 2, primo periodo

[1] Se l'ereditando era un cittadino svizzero con ultimo domicilio all'estero, sono competenti i tribunali o le autorità svizzeri del luogo di origine, sempreché le autorità dello Stato di domicilio non si occupino della successione. Per evitare conflitti di competenza, i tribunali o le autorità svizzeri possono subordinare la loro competenza anche all'inoperosità delle autorità di uno Stato di origine estero dell'ereditando, dello Stato della sua ultima dimora abituale o, nel caso di singoli beni successori, dello Stato di situazione dei medesimi. (= *CF*)

[1] Se l'ereditando era un cittadino svizzero con ultimo domicilio all'estero, sono competenti i tribunali o le autorità svizzeri del luogo di origine, sempreché le autorità dello Stato di domicilio non si occupino della successione. Per evitare conflitti di competenza, i tribunali o le autorità svizzeri possono declinare la propria competenza sempreché le autorità di uno Stato di origine estero dell'ereditando, dello Stato della sua ultima dimora abituale o, nel caso di singoli beni successori, dello Stato di situazione dei medesimi si occupino della successione.

[2] I tribunali o le autorità svizzeri del luogo di origine sono sempre competenti se un cittadino svizzero con ultimo domicilio all'estero ha, per testamento o contratto successorio, sottoposto alla competenza svizzera o, senza riserva in merito a tale competenza, al diritto svizzero beni situati in Svizzera o l'intera successione. ...

Art. 88 cpv. 1

[1] Se l'ereditando era uno straniero con ultimo domicilio all'estero, per i beni situati in Svizzera sono competenti i tribunali o le autorità svizzeri del luogo di situazione, sempreché le autorità dello Stato di domicilio non se ne occupino. Per evitare conflitti di competenza, i tribunali o le autorità svizzeri possono subordinare la loro competenza anche all'inoperosità delle autorità di uno Stato di origine estero dell'ereditando o dello Stato della sua ultima dimora abituale. (= *CF*)

[1] Se l'ereditando era uno straniero con ultimo domicilio all'estero, per i beni situati in Svizzera sono competenti i tribunali o le autorità svizzeri del luogo di situazione, sempreché le autorità dello Stato di domicilio non se ne occupino. Per evitare conflitti di competenza, i tribunali o le autorità svizzeri possono declinare la propria competenza sempreché le autorità di uno Stato di origine estero dell'ereditando o dello Stato della sua ultima dimora abituale si occupino della successione.

Art. 88a

3a. Litispendenza

L'articolo 9 si applica per analogia al procedimento successorio nel suo insieme.

Art. 88b

3b. Deroga alla competenza svizzera

1 La competenza di cui agli articoli 86–88 è esclusa, se l'ereditando ha, per testamento o contratto successorio, sottoposto l'intera successione o parte di essa alla competenza di uno Stato di origine estero e le autorità di tale Stato se ne occupano. Il disponente deve averne la cittadinanza al momento in cui dispone o al momento della morte.

2 La competenza di cui agli articoli 86–88 è inoltre esclusa se l'ereditando ha, per testamento o contratto successorio, sottoposto un fondo situato all'estero alla competenza dello Stato di situazione e le autorità di tale Stato se ne occupano.

Art. 89

4. Provvedimenti conservativi

Se l'ereditando lascia beni in Svizzera e non sussiste una competenza secondo gli articoli 86–88, le autorità svizzere del luogo di situazione ordinano i necessari provvedimenti d'urgenza a loro tutela.

Art. 90 titolo marginale, nonché cpv. 2 e 3

II. Diritto applicabile
1. Principio

2 La successione di una persona con ultimo domicilio all'estero è regolata dal diritto richiamato dalle norme di diritto internazionale privato dello Stato di domicilio. Se queste norme richiamano le norme di diritto internazionale privato svizzero, si applica il diritto successorio materiale dello Stato di domicilio.

3 In quanto i tribunali o le autorità svizzeri del luogo di origine siano competenti secondo l'articolo 87 capoverso 1, la successione è regolata dal diritto svizzero.

Art. 91

2. Scelta

1 Una persona può sottoporre la successione, per testamento o contratto successorio, al diritto di uno dei suoi Stati di origine. Deve averne la cittadinanza al momento in cui dispone o al momento della morte. (= *CF*)

1 Una persona può sottoporre la successione, per testamento o contratto successorio, al diritto di uno dei suoi Stati di origine. Deve averne la cittadinanza al momento in cui dispone o al momento della morte. Il cittadino svizzero può scegliere unicamente il diritto svizzero.

2 Se un cittadino svizzero sottopone l'intera successione o parte di essa alla competenza svizzera (art. 87 cpv. 2), la successione è considerata sottoposta al diritto svizzero salvo disposizione contraria.

3 La scelta del diritto svizzero per parte della successione è ammessa soltanto se è effettuata per beni situati in Svizzera e se prevede anche l'assoggettamento degli stessi alla competenza svizzera o ha tale assoggettamento come conseguenza (art. 87 cpv. 2).

Art. 92 cpv. 2, secondo periodo

2 ... Questo diritto si applica in particolare ai provvedimenti conservativi e alla liquidazione della successione, inclusi gli aspetti procedurali dell'esecuzione testamentaria o dell'amministrazione della successione, nonché alla questione dei diritti sulla successione dell'esecutore testamentario o dell'amministratore della successione e della sua facoltà di disporne.

Art. 94

5. Testamento

1 La validità materiale, la revocabilità e l'interpretazione di un testamento nonché gli effetti delle disposizioni ivi contenute sono retti dal diritto dello Stato in cui il disponente è domiciliato al momento della confezione del testamento.

2 Se, nel testamento in questione o in una disposizione precedente, il disponente ha sottoposto l'intera successione al diritto di uno dei suoi Stati di origine (art. 91 cpv. 1), quest'ultimo surroga quello designato nel capoverso 1.

3 Il disponente può sottoporre il testamento al diritto di uno dei suoi Stati di origine. Deve averne la cittadinanza al momento della confezione del testamento o al momento della morte.

Art. 95

6. Contratto successorio

1 La validità materiale, gli effetti vincolanti tra le parti e l'interpretazione di un contratto successorio nonché gli effetti delle disposizioni ivi contenute sono retti dal diritto dello Stato in cui il disponente è domiciliato al momento della stipulazione del contratto.

2 Se, nel contratto successorio o in una disposizione precedente, il disponente sottopone l'intera successione al diritto di uno dei suoi Stati di origine (art. 91 cpv. 1), quest'ultimo surroga quello designato nel capoverso 1.

3 Ove il contratto successorio conti due o più disponenti, le disposizioni sulla successione di ogni disponente sono sottoposte al diritto applicabile secondo i capoversi 1 o 2. Sono considerati contratti successori anche i testamenti che si fondano su un patto congiunto che lega i disponenti.

4 I contraenti possono sottoporre il contratto successorio al diritto di uno degli Stati di origine del disponente o di uno dei disponenti oppure al diritto del domicilio di uno dei disponenti al momento della stipulazione del contratto. Il disponente interessato deve averne la cittadinanza al momento della stipulazione del contratto o al momento della morte del primo disponente.

Art. 95a

7. Altre disposizioni contrattuali a causa di morte

L'articolo 95 si applica per analogia alle altre disposizioni contrattuali a causa di morte.

Art. 95b

8. Definizione di validità materiale

1 La validità materiale secondo gli articoli 94–95*a* comprende:

a. l'ammissibilità in sé del testamento, del contratto successorio o di altre disposizioni contrattuali a causa di morte;

b. la confezione del testamento, del contratto successorio o di altre disposizioni contrattuali a causa di morte;

c. la capacità di disporre del disponente;

d. l'impugnabilità del testamento, del contratto successorio o di altre disposizioni contrattuali a causa di morte;

e. l'ammissibilità delle disposizioni contenutevi.

2 La porzione disponibile è retta dal diritto designato negli articoli 90 e 91.

Art. 96 cpv. 1 frase introduttiva, nonché lett. a, c e d

1 Le decisioni, i provvedimenti e i documenti stranieri concernenti la successione, come anche i diritti derivanti da una successione aperta all'estero sono riconosciuti in Svizzera, fatto salvo l'articolo 87 capoverso 2, se:

a. sono stati pronunciati, stilati o accertati oppure sono riconosciuti nello Stato dell'ultimo domicilio dell'ereditando;

c. sono stati pronunciati, stilati o accertati in uno Stato di origine dell'ereditando e quest'ultimo ha sottoposto la sua successione alla competenza o al diritto di uno di tali Stati; o

d. sono stati pronunciati, stilati o accertati nello Stato dell'ultima dimora abituale o in uno Stato di origine dell'ereditando oppure, nel caso di singoli beni successori mobili, nello Stato di situazione dei medesimi, sempreché l'ultimo domicilio dell'ereditando sia stato all'estero e lo Stato interessato non si occupi della successione.

Art. 199a

III. Modifiche della presente legge
1. Principio

Gli articoli 196–199 si applicano per analogia alle modifiche della presente legge.

Art. 199b

2. Diritto successorio

Le modifiche delle disposizioni del capitolo 6 sul diritto applicabile si applicano alle successioni aperte dopo la loro entrata in vigore. Le disposizioni a causa di morte confezionate prima dell'entrata in vigore della modifica che sarebbero nulle secondo le disposizioni designate nel nuovo diritto sottostanno alle disposizioni designate nel diritto previgente. La porzione disponibile è tuttavia sempre retta dalle disposizioni designate nel nuovo diritto.

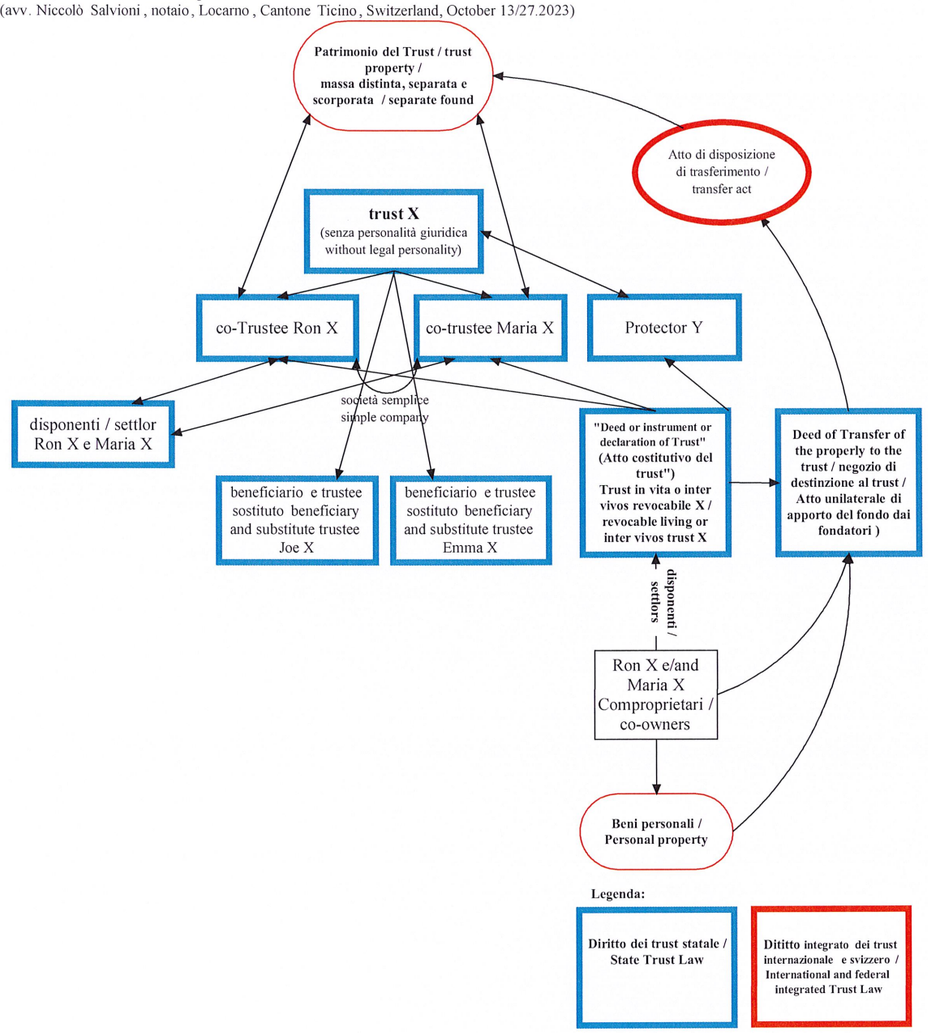
II

1 La presente legge sottostà a referendum facoltativo.

2 Il Consiglio federale ne determina l'entrata in vigore.

THE PROCEDURE OF MENTIONING THE TRUST RELATIONSHIP ON REAL ESTATE IN A CANTONAL LAND REGISTER IN SWITZERLAND
IN THE CONTEXT OF REAL AND INHERITANCE RIGHTS FROM THE PERSPECTIVE OF THE TICINESE NOTARY PUBLIC (with informative charts) (v2a - October 27 - Istanbul EALG Meeting 2023)

1.1 - Trust - a structure exemple :
(avv. Niccolò Salvioni , notaio , Locarno , Cantone Ticino , Switzerland, October 13/27.2023)



1.2 - Trust - Swiss Law Bases:

Convenzione relativa alla legge applicabile ai trust ed al loro riconoscimento / CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION
Conclusa all'Aia il 1° luglio 1985
RS 0.221.371

Stati - Entrata in vigore
Australia - 1° January 1992
Canada - 1° January 1993
Cina Hong Kong - 1° July 1997
Cipro - 1° June 2017
Italia - 1° January 1992
Liechtenstein - 1° April 2006
Lussemburgo - 1° January 2004
Malta - 1° March 1996
Monaco - 1° September 2008
Paesi Bassi - 1° February 1996
Panama - 1° dicembre 2018
Regno Unito - 1° January 1992
San Marino - 1° August 2006
Svizzera - 1° July 2007

Cap 1 Scope
art. 1 - 5

Cap. II Applicable law
art. 6 - 10

"The Convention does not apply to preliminary issues relating to the validity of **wills** or of other acts by virtue of which assets are transferred to the trustee." Art. 4

Cap. III Recognition
art- 11 - 14

"Where the trustee desires to register (...) immovable, (...), he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed."
art. 12

Cap. IV - General Clauses
art. 15 - 25

Cap. V Final Clauses

Legge federale sul diritto internazionale privato (LDIP)/
Federal Act on Private International Law
(PILA)
del 18 dicembre 1987
RS 291

Sezione 4: Domicile Seat and Citizenship
II. Seat and estabilishement of Companies and truststart. 21 LDIP

Chapter 9a Trust
art. 149a - 149e
I. Definition
art. 149a LDIP

Chapter 9a Trust
art. 149a - 149e
II. Jurisdiction
Art. 149b LDIP

Chapter 9a Trust
art. 149a - 149e
III. Applicable law
Art. 149c LDIP

Chapter 9a Trust
art. 149a - 149e
IV. Special rules pertainig publicity
(mentioon/menzione)
Art. 149d LDIP

Chapter 9a Trust
art. 149a - 149e
V. Foreign Decisions
Art. 189e

Legge federale sulla esecuzione e il fallimento
(LEF) SBEDL
Swiss Debt Enforcement and Bankruptcy Law

Chapter 9 bis
Special dispositions related to trust relations
Art. 284a

Ordinanza sul registro fondiario
(ORF-LRO) /
Land registry Ordinance
del 23 settembre 2011
RS 211.543.1

Section 3: Notification of **mentions**
Trust relationship
Art. 58 ORF

The **mention** of a trust relationship (Art. 149d of the Laws of Dec. 18, 1987 on Private International Law) is entered on the basis of:
a. a notification of the settlor entered in the land register related to the contribution of the fund into the trust;
b. a notification of trustees registered in the land register;
c. a judgment of a Swiss court

Section 2: Property **Purchase** in connection with a trust
Art. 67 ORF

1 - transfer of ownership is in connection with a trust:
a - a contract concluded by **public deed**
b - certificate of inheritance or a declaration of the competent inheritance authorities
c- acquisition of a trust by bequest
d - transfer of ownership as a result of a change in the composition of a trust
2 - Purchase of a fund from a third party who is not part of the trust
3 - Certification that a fund belongs to a trust is provided by means of a **mention**, the deed of trust, the transfer contract, or the decision of a judicial authority.

Section 5: Notations, **mentions** and remarks
Mention of a trust relationship
Art.128 ORF

Mention of a trust relationship reports that the trust is part of a trust and the short designation of the trust

Chapter 5: Amendment and **deletion**
Deletion of the mention of a trust relationship Art. 137 ORF

2 - The land registry office may require a notary act from a Swiss public official certifying that the evidence has been produced.

2 - Caso di trust californiano / Californian trust case:
Proprietà immobiliare in Svizzera / Real estate in Switzerland:
- Trasferimento a trust in vita (1a) e a nuovo co-trustee (1b) / transfer in property to a living trust (1a) and to an new co-trustee (2)
- Trasferimento a trust post mortem e a nuovi co-trustees (2) / Transfer in property to a trust post mortem to a new co-trustee (2)

(avv. Niccolò Salvioni, Notaio in Locarno, Cantone Ticino, Svizzera, 13 ottobre 2023)

A1 Trust in vita / Living trust or inter vivos trust

tempo

A2 Lasciti a trust *mortis causa* / donations *mortis causa* to the the trust

B Trust testamentario / Testamentary trust o trust by will or trust post mortem

co-trustee Ron X

co-trustee Maria X

co-trustee Maria X

co-trustee Joe X

Proprietà comune / Ownership in common art. 652 CCS
società Semplice / simple company art. 530 CO/SCO

Proprietà comune / Ownership in common art. 652 CCS
società Semplice / simple company art. 530 CO/SCO

Patrimonio del Trust / trust property / massa distinta e segregata / separate found

Proprietà immobiliare (real estate) part. X ad/in Ascona , CH.

Annotazione: "fa parte di un trust DG no xxx, xx.xx.2023"

Proprietà immobiliare (real estate) part. X ad/in Ascona , CH

Annotazione: "fa parte di un trust DG no xxx, xx.xx.2023"

co-trustee Maria X

co-trustee Joe X

Proprietà comune / Ownership in common art. 652 CCS
società Semplice / simple company art. 530 CO/SCO

Proprietà immobiliare (real estate) part. X ad/in Ascona , CH

Annotazione: "fa parte di un trust DG no xxx, xx.xx.2023"

2 - Trasferimento proprietà immobiliare in CH a trust post mortem / Transfer of CH real estate to a post mortem trust

Corte di omolagazione del testamento primaria o di domicilio/ Domiciliary or primary Probate Court

Giudice cantonale Distrettuale
Cantonal District Judge
Corte di omologazione del testamento ancillare /ancillary probate Court
art. 67.b.1 ORC

1a - Trasferimento di proprietà immobiliare CH a un trust in vita / Transfer of real estate in CH to a living trust:

1b - Cancellazione di co-trustee deceduto e iscrizione un nuovo co-trustee / Cancel of a deceased co-trustee and inscription a of new co-trustee:

Ufficio del registro fondairio / Land Register Office

Ufficio del registro fondairio / Land Register Office

Ufficio del registro fondairio / Land Register Office

Land Registry Official of the Cantonal District (Ufficiale del Registro fondiario distretiuale Cantonale)

Richiesta di iscrizione (costitutiva) / Inscription Request (constitutive)

Richiesta di iscrizione (costitutiva) / Inscription Request (constitutive)

Corte di omolagazione del testamento primaria o di domicilio / Domiciliary or primary Probate Court

Giudice cantonale Distrettuale
Cantonal District Judge
Corte di omologazione del testamento ancillare / ancillary probate Court
art. 67.b.1 ORC

Richiesta di iscrizione (costitutiva) / Inscription Request (constitutive)

Swiss Cantonal Notary public (Notaio Pubblico cantonale)

Atto pubblico di trasferimento/ Public Act of transfer
art. 67.1.a.1 ORF
con menzione rapporto trust / with mention of the trust relationship
ex art. 58 e 128 ORF

Atto pubblico di trasferimento/ Public Act of transfer
art. 67.1.a.2 ORF
con menzione rapporto trust / with mention of the trust relationship
ex art. 58 and 128 ORF

art. 67.1.a.2 ORC
art. 67.1.a.4 ORC

Rappresentante personale / personal representative / avente diritto temporaneo / Esecutore testamentario o amministratore / Executor or Administrator

Rappresentante personale / personal representative / avente diritto temporaneo / Esecutore testamentario "straniero" / Foreign Executor o Amministratore / Administrator

art. 67.1.a.2 ORC
art. 67.1.a.4 ORC

Amministratore giudiziario / Public Administrator

Amministratore giudiziario / Public Administrator
art. 554 CCS/SCC

Trust X
(senza personalità giuridica without legal personality)

co-trustee Ron X

co-trustee Maria X

co-trustee † Ron X passes away (il trustee Ron X decede)

co-trustee Joe X

Ron X e / and Maria X Comproprietari / (co-owners art. 646 CCS/SCC)

disponenti o fondatori/ settlors or disposers

Atto costitutivo del trust / Deed or instrument or declaration of Trust / Trust in vita o inter vivos revocabile X / revocable living or inter vivos trust X

Atto unilaterale di destinazione o apporto o disposizione del terreno dai fondatori mediante atto tra vivi / Deed of transfer of the property to the trust

Dichiarazione giurata, decesso di un trustee / Affidavit, death of a trustee

Modifica e riformulazione del trust X con designazione del trustee Joe X / Amendment and Restatement of X Trust with appointment of co-trustee Joe X (accrescimento a favore della superstite Maria)

il trust X diventa irrevocabile / Trust X become an irrevocable trust

il trust X diventa irrevocabile / Trust X become irrevocable trust

Ultima volontà e testamento - con disposizione di versamento al trust" di Maria X / Last Will and Testament (with testamentary pour-over provision to the trust) of Maria x

Ultima volontà e testamento - con disposizione di versamento al trust di Ron X / Last Will and Testament (with testametnary pour-over provision to the trust) of Ron X

il trustee Ron X decede / co-trustee † Ron X passes away

art. 86.1 LDIP - in caso di cittadino svizzero o / case of swiss citizen or
art. 88 LDIP - foro del luogo di situazione dell'immobile- place of situation of the real property
art. 98.2 LDIP - L'autorità straniera non si occupa - the foreign authority does not deal with the case

Transfer of:

Nonprobate assets:
Small estates Affidavit, with real property of value < 166'250 US$
Petition to determine succession to real property (estates 100'000 US$ or less)

Probate assets:
Grant of Probate o
Ancillary probate process

Beni personali / Personal property

Proprietà immobiliare (real estate) part. X ad/in Ascona , CH

Proprietà immobiliare (real estate) part. X ad/in Ascona , CH

Legenda:

***Diritto** dei Trust USA e statale California/ U.S.A and State California Trust Law*

***Diritto** integrato dei trust internazionale e svizzero / International and federal integrated trust law*