



# THE JOURNAL

ESSENTIAL ANALYSIS AND COMMENTARY FOR TRUST AND ESTATE PROFESSIONALS AND THEIR ADVISORS

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# INSIDE

## 15 OFCs and Crown Dependencies



05 EDITORIAL  
On the bright side

06 NEWS  
Lobbying success

13 MARTYN GOWAR  
The right solution

18 GLOBAL TAXATION  
The OECD annual review

21 SOCIAL INVESTING  
A new asset class

25 CANADIAN TRUSTS  
Where does your trust live?

28 HMRC  
Changing gear in CAR

31 UK REGULATION  
Treating customers fairly

35 ASSET MANAGEMENT  
Tactical asset allocation

36 INTERVIEW  
With Mike de Figueiredo

39 CHINA  
Private wealth succession

43 BOOK REVIEW  
*Parker's Modern Will Precedents*

45 BRANCH MEETINGS  
Global events round-up

46 INTERNATIONAL EVENTS

**About the cover**

This month's *STEP Journal* cover shows an abstract depiction of the 'fleur de lis' in the style of the Rockefeller Center's relief sculptures. The 'fleur de lis' symbol has been adopted by Scouting organisations around the globe and represents their motto of 'be prepared' – a theme that is reflected in this month's lead feature on OFCs and Crown Dependencies. The Art Deco style can be seen in the various sculptures at the Rockefeller Center in New York – a lasting testament to John D Rockefeller, who defined the structure of modern philanthropy, another subject that features in this issue.

Mark Friday



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# Wealth and succession

*Austin X D Zhang* considers Chinese private wealth succession

China has adopted various laws to protect private wealth, although wealth planning and management is still quite new to the People's Republic of China (PRC). The laws governing private wealth are *The Civil Law*, *The Property Law*, *The Company Law*, *The Marriage Law*, *The Succession Law* and *The Foreign Investment Enterprise Law*.

## How people leave their assets to a successor

There are three forms of succession in China: statutory succession, will and legacy. *The Succession Law* of the PRC states that the estate will be inherited in the following order: primary successors: spouse, children or parents; secondary successors: brothers and sisters, paternal and maternal grandparents.

If there is a will or legacy, it has priority in succession. If a successor is under six years old or is without civil capacity, the estate is delivered by a legal agent; for a successor under 18 years old but older than six years old, without full civil capacity, the estate is delivered by a legal agent or can ask for permission from the legal agent for delivery.

The court may decide that the successor loses their right to succession in the following situations: intentional killing of the decedent; killing any other successor in a fight over the estate; a serious act of abandonment or maltreatment of the decedent; killing other heirs in order to receive assets; and a serious act of forging, tampering with or destroying the will.

The time limit for the institution of legal proceedings pertaining to disputes over the right to inheritance is two years from the day the successor became, or should have become, aware of the violation of his right to inheritance. No legal proceedings, however, may be instituted after the expiration of a period of 20 years from the day succession began. Succession begins at the death of the decedent.

## Property succession

Property succession is a means of transferring personal lawful property before the death of the property owner. It happens in the following situations: a legacy-support agreement; testamentary succession and legacy; statutory successor(s); and disposing of an estate that is left with neither a successor nor a legatee.

Not all the assets may be part of the estate for succession, Article 3 of *The Succession Law* of the PRC identifies the following assets that can be included in the estate: income, house or apartment, deposit, cash, securities or stock and articles of everyday use, trees, livestock and poultry, antique collections, books and information, other productive materials, copyright and patent and other legal assets.

The law identifies clearly assets not for succession:

- personal rights that are closely related to the decedent himself are not heritable, such as the right of personal name, the right of reputation, the right of honour and the right of portrait;
- the debt and credit related to a citizen

himself: this type of credit and debt confirms a given person acts as object which concerns the creditor's and debtor's personal rights, thus this credit and debt is not heritable.



- The right of use of state-owned resources: such as mining right, hunting right, fishing right, right of use of water resource, marine, and space. All the users are designated to enjoy the right of use by a given procedure, so these rights cannot be regarded as the estate that can be inherited. If the successor(s) wishes to use these rights, he must re-apply for them.
- Management right of collective ownership
- Article 4 in *The Succession Law* of the PRC stipulates: 'Personal benefits accruing from a contract entered into by an individual are heritable in accordance with the provisions of this Law. Contracting by an individual, if permitted by law to be continued by the successor, shall be treated in accordance with the terms of the contract.' However, the capital invested by the decedent during the validity of the contract and the personal benefit from the investment shall be regarded as the estate that is heritable; the right of management of collective ownership is not the estate and will not be heritable.



- The right of use of residential land: a citizen's residential land is not heritable but it can be transferred with the right of use of the building on it. The right of use of residential land can be obtained when inheriting the ownership to the building on this land.

### Chinese succession outside of China

Article 36 in the *Law of Succession* of the PRC stipulates: 'For inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreigner within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply.' This provision is applied in cases of foreign succession. Foreign succession cases are those where the successor and the decedent are both foreigners or where one of them is a foreigner, or the decedent died in a foreign country and the whole or part of the estate is in a foreign country.

According to the above, when a Chinese citizen inherits an estate outside the PRC, or an estate in the PRC from a non-Chinese decedent, PRC's *Succession Law* and the related foreign succession laws will apply in accordance with the nature of the estate – that is, movable property or immovable property. Immovable property refers to property that cannot be moved without changing the original nature and shape, such as land and buildings; movable property refers to property that can be moved with no need to change the original nature and shape, such as cash, gold and silver and jewellery. If the estate inherited is movable property, the law of the decedent's country of domicile is applied. But it does not specify which domicile of the decedent will be. In the international communication, a person's residence may always change or one person may have

several places of residence. In this case, article 149 in Chapter VIII 'Application of Law in Civil Relations with Foreigners in General Principles of the Civil Law of the People's Republic of China' stipulates: 'In the statutory succession of an estate, or movable property shall be bound by the law of the decedent's last place of residence.' Thus, the residence of the decedent refers to the residence where the decedent's death occurs, 'and immovable property shall be bound by the law of the place where the property is situated.'

### Foreign succession in China and foreign succession of Chinese assets outside of China

Article 36 of the *Law of Succession* of the PRC stipulates: 'For inheritance by a foreigner of an estate within the People's Republic of China or of an estate of a Chinese citizen outside the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply.' This is another 'governing law' by China on foreign succession cases. With this provision, PRC laws shall apply for the inheritance by a foreigner of an estate within the PRC whether the decedent is a Chinese or not.

If the decedent is a Chinese citizen but his last place of domicile is not inside PRC, the laws of PRC shall not apply, and the laws of the last place of domicile of the decedent shall apply, in the case of movable property inside PRC. The laws in PRC shall only apply in the case of the immovable property.

This provision is equal to the provision for a Chinese citizen who inherits the estate outside PRC and a foreigner's estate inside PRC. This is the governing law made according to the principle of territory and the principle of nationality.

However, according to the provision that special law derogates general law, where

treaties or agreements exist between the PRC and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements, which shall not apply in the case of special rules concerning foreign succession cases in *Law of Succession* of the PRC.

### The application of law

The Chinese law of succession has made specific provisions with regards to foreign succession cases because such cases always involve two or more different laws from different countries. The application of the law can lead to the conflict of those laws concerned. Adjustments on governing law will be a must and will ensure which country's succession law will be applicable.

The governing law is practiced internationally as 'Principle of Territory' and 'Principle of Nationality'. The first is that an estate shall be bound by the law of the place where the estate is situated; the second is that the application shall be bound by the law of the last place of the decedent's domicile.

The law applied in foreign succession cases is called 'governing law'. On the one hand, the countries concerned now have jurisdiction over some foreign succession cases, and countries without the jurisdiction will not be involved in such cases. The court decisions in cases where the country does not have jurisdiction will not be recognised internationally.

On the other hand, these principles have offered the countries with jurisdiction a clear law reference when dealing with foreign succession cases, and the court decision from these countries with the jurisdiction has enforced the law concerned in cases concerning foreign countries.

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