

Characterization and the Law Applicable to Foreign Living Trusts

*Rong-Chwan Chen**

Abstract

The law applicable to a foreign living trust is significant in private international law. Based on the Supreme Court's Judgment No. Tai-Zai 23 of 2018, this Article develops its discussion and argument. The living trust at issue was created in California, US and was funded with properties located there. The courts of all instances unanimously ruled against the assertion that hiding a living trust agreement is legally equal to hiding a last will by which an heir's right to succession is deprived. Their basis is that the living trust in question is a will under California's law and its governing law shall be ascertained according to the conflicts rule on wills in Taiwan's Choice-of-law Act. Substantively, they ruled that the living trust at issue is not a valid last will since the formal requirements of Taiwan's Civil Code were not satisfied. This Article argues that characterization is an important process in applying the conflicts rules of the forum and attention shall be paid to its details. However, the courts of all instances did neither explain why it was characterized under California's law nor investigate into the evidence to prove that California's law treats a living trust as a last will. The reasoning is deficient and erroneous because a living trust is not a last will and is not required to be probated under California's law. This Article further argues that the living trust in question shall be characterized as a trust relationship that is not provided for in Taiwan's Choice-of-law Act. The specific question that is disputed over shall

* University Distinguished Professor, National Taipei University College of Law.
E-mail: ronchen@gm.ntpu.edu.tw

be furtherly characterized as a legal relationship arising from an obligatory act or a proprietary act. The living trust in this case shall be characterized as a trust and governed by California's law. It is therefore substantively not a last will. The right conclusion was coincidentally reached unanimously by the courts of all instances on this case. Yet, sufficient attention shall be paid to the fallacies and errors in the reasonings of their judgments. It is hoped that the reflections and comments on such judgments call on stressful learning and research in private international law and promote the quality of decisions in Taiwan's international judicial practice.

Keywords: foreign element, private international law, characterization, conflicts rule, applicable law, living trust (inter vivos trust), revocable trust, testament (last will), California's trust law.