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International estate planning easier with new EU rules

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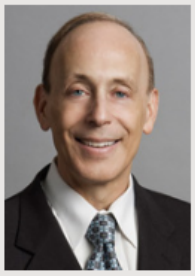

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In the past it has been quite complex to handle an estate plan in which the client had property both in the United States and Europe. That was due to the fact that the laws about who inherits property vary considerably from one European country to another. In 2012, the European Union adopted rules to make it easier to address the legal aspects of international estate planning (referred to as "cross-border successions") in 24 of the EU states. The uniform rule (Regulation No. 650/2012 (July 4, 2012)) became effective for people who die on or after Aug. 17, 2015. Neither the substantive inheritance laws nor the fiscal aspects of international successions are affected.

As with so many aspects of EU law, there are exceptions. In this case Denmark, Ireland, the United Kingdom and Switzerland, do not participate in the new regime. Therefore, estate planning procedures will continue to be handled by their national rules.

The regulation's main purpose is to ensure that a decedent's assets are passed by applying the law of a single jurisdiction to the entire estate. That is true even if, for example, the decedent owned real property in three different countries. Every year, an estimated 450,000 cases worth over $100 million occur in which property passes from a U.S. or EU resident to a resident of another EU jurisdiction. These transfers have resulted in expensive ancillary proceedings and inconsistent court rulings. Those proceedings and rulings should now be a thing of the past.

Only one criterion remains for determining the jurisdiction and law applicable to cross-border successions: the decedent's last habitual residence. Criteria such as nationality or the location of the decedent's real property will no longer be primary factors. Unfortunately, the regulation fails to define "last habitual residence." According to the legislative history, an overall assessment of the circumstances of the decedent's life during the years preceding death, and at the time of death, should be made by considering all relevant factual elements such as the duration and regularity of the decedent's presence in the state concerned and the conditions and reasons for that presence.

California and EU residents are now able to choose which law governs the disposition of property upon death: the law of habitual residence or the law of the deceased's nationality. EU courts may now issue a European certificate of succession (an "ECS") that must be respected in all 24 signatory countries.

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This is especially good news for California residents with property in the EU for another reason: Californians do not generally come into contact with forced heirship rules. These are rules designed to prevent a person from disinheriting certain family members. Forced heirship rules are uncommon in common law countries like the U.S. (save Louisiana, where laws are not based on the common law). Canada, the U.K. and Australia do not have such rules. But they are common throughout the rest of the world. In Germany, this rule (called the Pflichtteil) provides the decedent's descendants, parents and spouse/civil partner with a compulsory share of the estate.

Thus, when a U.S. citizen owns property in Europe, he or she is often shocked to find out that his or her European will cannot freely dispose of that real property and, instead, the disposition of the property may be dictated, at least in part, by the country's forced heirship rules. For example, if a German widow leaves two children, each child's forced share is 25 percent of the estate. So even if her will leaves her entire estate to her boyfriend, her boyfriend will not actually get 100 percent of the estate.

Assume a California widow with children resident in California has a California will, but dies in her German ancestral home in her boyfriend's arms. Which law governs the disposition of her German residence? Her California will? Or the German forced heirship rules? Before Aug. 17, the U.S. children could claim that the German forced heirship rules protected them (to some extent) from the boyfriend. If she dies after Aug. 17, the new rules apply. Was the widow's "habitual residence" in Germany at her ancestral home? If so, the German succession law would ordinarily apply. However, if she clearly states that she wants her California will to govern the transfer of her worldwide property, the German court will respect the California succession plan. If the widow wants her California will to protect her boyfriend, she can get a German court to issue an ECS to protect the boyfriend from the children.

Even though the new regulation does not apply in the U.K., if a U.K. national owned a holiday residence in the south of France, the U.K. national may choose which law should apply: English or French law. If the U.K. national asked that U.K. law govern the succession of the French holiday residence, an ECS could be issued in France to apply U.K. law irrespective of the French forced heirship law.

In summary, if a California resident lives or owns property in the EU or is moving to or from the EU, the resident or the resident's children should obtain advice on how the new regulation may impact a California estate plan. Although the regulation does not apply to the division of marital property, and there are still some open issues, there is greater certainty now for those who want to pass property without regard to the forced heirship laws prevalent in the EU.

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