



Succession Planning Simplified in 2015 for European Assets

European Union Regulation 650 will simplify estate planning and administration of property located in any of 25 countries that adopted the regulation.

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Every year, over 450,000 cross-border successions (i.e., successions to the estate of a deceased person) occur in the European Union (EU), the estimated value of which is more than EUR 120 billion.¹ The large number of cross-border successions is due in part to the free movement of people within the EU. Succession laws vary considerably from one EU country to another,² which complicates multi-jurisdictional planning and estate administration for persons living in the EU and for U.S. citizens owning property located in the EU. Some of those complications include multiple succession proceedings that apply to different succession laws.

EU Regulation 650

To simplify estate planning and administration in the EU, the EU adopted Regulation 650 on 7/4/2012 (“Regulation”).³ The Regulation becomes effective on

8/17/2015 and applies to individuals dying after 8/16/2015.

Twenty-five EU countries adopted the Regulation and are referred to in this article as Member States or individually as Member State. The 25 adopting countries are:

1. Austria.
2. Belgium.
3. Bulgaria.
4. Croatia.
5. Cyprus.
6. Czech Republic.
7. Estonia.
8. Finland.
9. France.
10. Germany.
11. Greece.
12. Hungary.
13. Italy.
14. Latvia.
15. Lithuania.
16. Luxembourg.

17. Malta.
18. Netherlands.
19. Poland.
20. Portugal.
21. Romania.
22. Slovakia.
23. Slovenia.
24. Spain.
25. Sweden.

Three EU countries did not adopt the Regulation, namely the United Kingdom, Ireland, and Denmark.⁴

The Preamble to the Regulation consists of enumerated “whereas clauses” that provide guidance with respect to the Regulation. According to the Preamble, the purpose of the Regulation is to remove obstacles to the free movement of persons who currently face difficulties in asserting their rights in successions having cross-border implications by enabling those persons to organize their succession in advance while protecting the rights of heirs, legatees, and creditors.⁵ That pur-

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pose is reflected in the broad scope of the Regulation, which implements procedures to achieve the following goals:

- Limit jurisdiction over a succession to the courts of a single Member State.
- Apply the law of one country to a succession.
- Allow enforcement of a decision on succession by one Member State in another Member State.
- Establish a European Certificate of Succession to implement a decision on succession by a Member State in another Member State, which should be less complicated than trying to enforce a decision in another Member State.

The Regulation's goal of reducing the complexity of successions in the EU is accomplished by having one jurisdiction apply one law to all aspects of a succession at death.

The Regulation's goal of reducing the complexity of successions in the EU is therefore accomplished by having one jurisdiction apply one law to all aspects of a succession at death. This procedure should reduce the time and expense of post-death administration of an estate.

The Regulation, however, excludes and does not contain procedures regarding the following matters:

- Death taxes.
- Status of natural persons (e.g., as a minor or adult) or of family relationships and deemed family relations.
- Legal capacity of a person.

- Questions relating to disappearance of a person.
- Questions relating to marital property rights.⁶
- Maintenance obligations.
- Validity of oral dispositions of property upon death.
- Property rights created other than by succession (e.g., gifts and retirement plans).
- Questions regarding the law of businesses entities that determines what will happen to ownership interests in those entities upon the death of an owner.
- The creation, administration, and dissolution of trusts.
- Property rights referred to as rights *in rem* that are applicable irrespective of the law applicable to a succession.
- Any recording in a register of rights in immovable or movable property, and the effects of recording or failure to record.⁷

Matters covered or excluded by the Regulation are further discussed below, particularly in connection with U.S. citizens who own property located in one or more Member States. Before those matters are discussed, one needs to understand the meaning of the term "succession" under the Regulation:

'[S]uccession' means succession to the estate of a deceased person and

covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.⁸

By including all forms of transfer of assets, rights, and obligations, the Regulation covers the transfer of property at death that would otherwise be subject to forced heirship or other succession laws.

Jurisdiction over succession

To achieve its goal of reducing the complexity of succession in the EU, the Regulation begins by discussing the procedure for selecting one jurisdiction that will rule on succession matters. Specifically, the Regulation states that "courts" of a Member State in which the decedent had a "habitual residence" at death will have jurisdiction over the succession as a whole.⁹

Definition of courts. Out of respect for the differences in Member States, the Regulation defines the term "court" broadly.¹⁰ The term refers not only to courts in the traditional sense but also to legal professionals with competence in matters of succession who exercise judicial functions, act under a delegation of power by a judicial authority, or act under the control of a judicial authority.

¹ See http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm, where this information is provided just below the picture there.

² See www.successions-europe.eu for a general summary of the succession laws of 27 European countries.

³ Specifically, the Regulation is entitled *Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*. A copy of the Regulation (document number 32012R0650) can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF> or <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32012R0650&rid=1>.

⁴ The EU's official website is europa.eu. See http://europa.eu/abouteuropa/index_en.htm.

The countries forming the EU are listed at http://europa.eu/about-eu/countries/index_en.htm.

⁵ Preamble ¶ 7.

⁶ Although questions regarding marital property regimes are excluded from the Regulation, the Regulation promotes agreements as to succession. Article 25. An agreement as to succession means an agreement created with or without consideration that creates, modifies, or terminates rights in the future estate or estates of one or more parties to the agreement. Article 3.1.(b). Agreements between spouses that divide property between them at death should qualify as agreements as to succession and should be enforced under the Regulation.

⁷ Article 1.

⁸ Article 3.1.(a).

⁹ Article 4.

¹⁰ Preamble ¶ 20.

However, those legal professionals must act impartially and allow all parties to be heard, and their decisions must have the force and effect of a decision of a judicial authority and must be subject to appeal or review by a judicial authority.¹¹

The Preamble sheds additional light by stating that the term “courts” includes notaries, legal professionals, or registry offices in some Member States who or which exercise judicial functions in certain succession matters or with respect to a particular succession by delegation of a court. On the other hand, notaries in some Member States who are not exercising judicial functions are not included within the term “court.”¹²

Definition of habitual residence. The term “habitual residence” is not defined in the Regulation, but the Preamble provides guidance as to its meaning:

[T]he general connecting factor for the purposes of determining both *jurisdiction* and the *applicable law* should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death *and* at the time of his death, taking account of *all relevant factual elements*, in particular the *duration* and *regularity* of the deceased’s presence in the State concerned and the *conditions* and *reasons* for that presence. The habitual residence thus determined should reveal a *close and stable* connection with the State con-

cerned *taking into account the specific aims of this Regulation.*¹³

Thus, the term habitual residence will take into account all relevant facts in determining whether there is a close and stable connection with a Member State. Although the specific aims of the Regulation might skew a court to rule in favor of the existence of a habitual residence in a Member State, the rules below regarding complex situations could prevent that result.

For example, the Regulation acknowledges that determining a decedent’s habitual residence may be complex, such as when a U.S. citizen moves to Europe for work or lives like a transient by going from one Member State to another.¹⁴ When the citizen moves to Europe for work, a court determining habitual residence at death is authorized to treat the citizen’s state of origin as his or her habitual residence if his or her “centre of interests” are there. On the other hand, when a citizen migrates from one Member State to another without settling down, a court may treat the state of nationality or the location of the deceased’s main assets as his or her habitual residence.¹⁵

The use of centre of interests, state of nationality, or location of main assets in the Regulation are “all relevant factual elements” in determining habitual residence. When all of those relevant factual elements are taken into account, they could produce a result different from one’s domicile. Under the concept of domicile, a U.S. citizen could move to a Member State to work for years without having a definite date for returning to the U.S. In that instance, the citizen’s domicile might be treated as having changed to that Member State. However, for succession purposes under the Regulation, if the citizen retains a stable and close relationship to the U.S. (e.g., the U.S. remains the centre of interests for

the citizen’s family and social life), the citizen’s habitual residence at death could still be treated as being in the U.S.

A U.S. citizen who does not want the courts of that Member State to rule on succession matters with respect to property in the U.S. should consider having two wills.

Prevention of simultaneous succession proceedings. To prevent the commencement of simultaneous succession proceedings in Member States and thereby promote the goal of having one jurisdiction handle all succession matters at death, the Regulation contains a *lis pendens* rule that applies when the same succession case involving the same parties is brought before courts in different Member States. In that event, the courts other than the court where the succession proceeding was originally commenced must stay their proceedings until such time as the jurisdiction of the court where the proceeding was originally commenced is established.¹⁶ When the jurisdiction of the court where the proceeding was originally commenced is established, all other courts must decline jurisdiction.¹⁷

Planning for U.S. citizens. If a deceased U.S. citizen had a habitual residence in a Member State at death, the courts of that Member State will be entitled to rule on the deceased’s succession as a whole regardless of whether the deceased’s assets were located in one or more Member States or in a third state, such as the U.S.¹⁸ A U.S.

¹¹ Article 3.2.

¹² Preamble ¶ 20.

¹³ Preamble ¶ 23 (italics added).

¹⁴ Preamble ¶ 24.

¹⁵ *Id.*

¹⁶ Article 17.1 and Preamble ¶ 35. See Article 14 for guidance as to when a court is initially “seized” with jurisdiction over a succession proceeding.

¹⁷ Article 17.2.

¹⁸ Preamble ¶ 37.

citizen who does not, however, want the courts of that Member State to rule on succession matters with respect to the citizen's property located in the U.S. should consider having two wills—a U.S. will to dispose of property located in the U.S. and a European will to dispose of property located in one or more Member States.

The European will should be drafted to pertain only to property located in one or more Member States and should state that any property located outside those Member States (e.g., property located in the U.S.) will be disposed of under another will executed by the U.S. citizen. If the European will is drafted in that manner, a court of the Member State having jurisdiction over the succession can decide *not* to rule on assets located in the U.S. provided its decision regarding those assets is not expected to be recognized and declared enforceable in the U.S.¹⁹ To obtain such a ruling, the estate of the deceased citizen should consider commencing a probate proceeding in the U.S. to admit the U.S. will that disposes of property located in the U.S.

If the U.S. court admits the U.S. will to probate and its decision on admitting the will becomes binding and is no longer appealable, a court of the Member State having jurisdiction may decide not to rule on the succession of assets located in the U.S. because its decision is not likely to be recognized and declared enforceable in the U.S. due to applicable procedural rules such as *res judicata* or collateral estoppel.

An alternative and possibly less costly procedure exists under the Regulation to prevent the court of a Member State having jurisdiction over the succession of a deceased U.S. citizen from ruling on the citizen's assets located in the U.S. If the parties to the succession have a right under the law of that Mem-

ber State to limit the scope of the succession, the Regulation authorizes the parties to assert that right.²⁰ By asserting that right and limiting the scope of the succession to assets located only in one or more Member States, the parties will be spared from asking the court not to rule on assets located in the U.S. and from contending that the court's decision regarding U.S. assets will not be recognized or declared unenforceable in the U.S.

The Regulation's goal of having one jurisdiction apply one law to a succession proceeding will *not* apply when a deceased U.S. citizen owns assets located in two or more Member States *and* the citizen's habitual residence at death is not located in a Member State (e.g., the habitual residence is determined to be in the U.S.). In that event, the Member State in which the citizen's assets are located will have jurisdiction to rule only on the assets located in that Member State at death.²¹ Consequently, a decision of a Member State regarding the succession of the citizen's assets located in that Member State should not be enforceable in another Member State where other assets of the citizen are located because each Member State in that instance has jurisdiction over only the assets located in that Member State. Thus, a succession proceeding will have to be commenced in each Member State in which the deceased U.S. citizen had assets at death if the deceased citizen did not have a habitual residence in any Member State at death.

In summary, succession planning under the Regulation for a U.S. citizen owning assets located in only one Member State should be easy from a jurisdictional perspective because that Member State will have jurisdiction either because the citizen has a habitual residence there²² or because the citizen's assets are located there.²³ However, succession

planning for a U.S. citizen owning assets located in two or more Member States could be more difficult from a jurisdictional perspective. If the citizen does *not* have a habitual residence in any Member State at death (e.g., because the citizen's centre of interests, nationality, or main assets causes his or her habitual residence to be in the U.S.), the possibility of having multiple succession proceedings will have to be considered. In that event, the citizen and his advisors should consider whether it is feasible to cause the citizen to have a habitual residence in a Member State for succession purposes to the extent habitual residence does not increase death taxes or cause some other adverse result for estate planning purposes.

Law governing succession

As previously noted, the Regulation's goal of reducing the complexity of succession in the EU includes having one jurisdiction apply one law on all matters pertaining to succession at death. This portion of the article focuses on what law applies to the succession.

General rule—law of habitual residence applies. The Regulation provides that the law of the Member

¹⁹ Article 12.1.

²⁰ Article 12.2.

²¹ Article 10.2.

²² Article 4.

²³ Article 10.2.

²⁴ Article 21.1. This means that the law governing the succession applies to "all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State." Preamble ¶ 37.

²⁵ Preamble ¶ 23.

²⁶ Article 23 and Preamble ¶ 42.

²⁷ Preamble ¶ 42.

²⁸ Article 21.2.

²⁹ Preamble ¶ 25.

³⁰ *Id.*

³¹ Preamble ¶¶ 24 and 25.

³² Article 22.1.

³³ Article 22.2.

³⁴ Article 3.1.(d).

³⁵ See the discussion above under the heading "Planning for U.S. Citizens."

State in which the decedent had a habitual residence at the time of death will govern succession as a whole.²⁴ Thus, the general connecting factor for determining both *jurisdiction* and *applicable law* is the habitual residence of the deceased at the time of death.²⁵

When an individual selects the law of his or her nationality to govern the succession, the law will also apply to the admissibility and substantive validity of the will.

The law governing the succession will apply to all aspects of the succession, including the following:

- Opening of the succession.
- Determination of beneficiaries and shares.
- Capacity to inherit.
- Disinheritance and disqualification by conduct.
- Transfer of assets and waiver of legacies.
- Power of certain persons to sell property and pay creditors.
- Liability for debts under the succession.
- Property available for disposition, reserved shares, and other restrictions on disposal of property.
- Any obligation to restore or account for gifts, advancements, or legacies when determining shares.
- Sharing-out of the estate.²⁶

Regarding liability for debts under the succession, the Preamble advises that any ranking of creditors under applicable law will apply in the payment of those creditors.²⁷

Exception to general rule. While applicable law for a succession is

generally the law of the deceased's habitual residence, the Regulation provides an exception that applies when all the circumstances at the time of death show that the deceased was "manifestly more closely connected" with a Member State other than the Member State of habitual residence. In that event, the law of the other Member State with which the deceased citizen was "manifestly more closely connected" will govern the succession.²⁸

The Preamble provides that the exception could apply when the deceased had moved to the country of his or her habitual residence fairly recently before his death and all the circumstances indicate that the deceased was manifestly more closely connected with another country at death.²⁹ The Preamble, however, states that this exception should *not* be used whenever the determination of the habitual residence of the deceased at death proves complex.³⁰ As discussed above, a complex habitual residence case could arise when a U.S. citizen moves to Europe for work but maintains a close and stable connection with the U.S.

When the determination of habitual residence is complex, the Preamble allows certain factors such as the decedent's centre of

interests, nationality, and location of his or her main assets to be given weight when considering "all relevant factual elements" for habitual residence purposes.³¹ The exclusion of complex habitual residence cases from the exception appears to be based on the fact that the complex cases already focus on factors showing that the deceased was "manifestly more closely connected" to a Member State.

Selecting governing law. In addition to using the law of one's habitual residence to govern all matters pertaining to a succession, the Regulation authorizes a deceased to choose the law of his nationality to govern the succession as a whole.³² The choice must be made "in the form of a disposition of property upon death."³³ A "disposition of property upon death" is defined in the Regulation as "a will, joint will or an agreement as to succession."³⁴ For a U.S. citizen then, the primary form of a disposition of property upon death under the Regulation is a will, and if the citizen selects U.S. law in the will, that law will govern the succession as a whole unless, as previously discussed, the citizen limits the scope of the succession proceeding in the manner discussed above.³⁵

Morse Genealogical Search

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The law of one's nationality must be selected at the time of making the choice or at the time of death.³⁶ The choice of law will be respected if the selection was made expressly or is demonstrated by the terms of the disposition, such as by general mention of that law.³⁷

Choice of law under the Regulation is limited to the law of one's nationality in order to ensure, among other things, a connection between the deceased and the law chosen.³⁸ A person who possesses multiple nationalities may choose the law of any nationality he or she possesses at the time of making the choice or at the time of death.³⁹ Choosing the law of one's nationality is valid even if that law does not provide for a choice of law in matters of succession.⁴⁰

To ensure that the selected law will govern a succession, the Regulation prevents that law from applying its conflict-of-laws rules that may call for another country's law to govern the succession. The Regulation accomplishes this by providing that no *renvoi* (which refers to the process by which a court adopts the rules of a foreign jurisdiction with respect to a conflict of laws) applies when the law governing succession is the selected law of one's nationality.⁴¹ Consequently, the chosen law will govern the succession as a whole irrespective

of whether the assets are located in one or more Member States or in a third state such as the U.S.

When an individual selects the law of his or her nationality to govern the succession, the law will also apply to the admissibility and substantive validity of the will⁴² and to the act of modifying or revoking a choice of law.⁴³ The substantive validity of a will includes the following:

- The individual's capacity to make a disposition of property at death.
- Whether the individual is barred from disposing of property to certain persons or from receiving succession property from another person.
- The admissibility of representations for making a disposition.
- The interpretation of a disposition.
- Fraud, duress, mistake, and other questions relating to the consent or intention of the person making a disposition.⁴⁴

Two exceptions to selecting governing law. There are two notable exceptions in the Regulation to the general rule that one law will govern the succession as a whole. First, the Regulation provides that certain property referred to as "immovable property, certain enterprises or other special cate-

gories of assets" that is located in a Member State, which is subject to special rules (based on economic, family, or social considerations) that affect the succession of such property and that apply irrespective of the law applicable to the succession, will still be subject to those special rules.⁴⁵ Second, the Regulation provides that property rights referred to as rights *in rem* under the national law of some Member States will be governed by that law rather than by the law applicable to the succession.⁴⁶ If the law governing the succession does not normally recognize a right *in rem*, that right must be adapted to the closest equivalent right *in rem* under that law.⁴⁷

Unfortunately, neither the Regulation nor the Preamble shed additional light on the meaning of these two exceptions. Thus, counsel needs to be retained in Member States where property of a U.S. citizen is located to determine if any property of a U.S. citizen located there is subject to these exceptions.

Special planning for wills selecting U.S. law. If a U.S. citizen desires to select the law of his or her nationality to govern the disposition of property under a will, a question arises as to whether U.S. law or the law of a state within the U.S. will govern the disposition.

³⁶ Article 22.1. For example, an agreement as to succession would select the law of the state of nationality at the time of making the choice (e.g., at the time the agreement was executed), while a will would select the law of the state of nationality at the time of death, which is when the will becomes effective. However, an agreement as to succession is not discussed further in this article, although it is briefly discussed in footnote 6 above with respect to the exclusion of marital property from the Regulation.

³⁷ Article 22.2 and Preamble ¶ 39.

³⁸ Preamble ¶ 38.

³⁹ Article 22.1.

⁴⁰ Preamble ¶ 40.

⁴¹ Article 34.2. However, *renvoi* can apply when the law governing succession is the law of a deceased's habitual residence (Article 34.1), but no *renvoi* will apply when the law of the

deceased's habitual residence is replaced by the law of the state with respect to which the deceased was manifestly more closely connected at death. Article 34.2 (citing Article 21.2).

⁴² Articles 22.3 and 24.2.

⁴³ Article 22.4 and Preamble ¶ ¶ 40 and 51.

⁴⁴ Article 26.1.

⁴⁵ Article 30. Preamble ¶ 54 provides examples as to how the special rules will be strictly construed so that they remain compatible with the general objective of the Regulation.

⁴⁶ Article 1.2(k) and Preamble ¶ 15.

⁴⁷ Article 31 and Preamble ¶ 16.

⁴⁸ Article 36.1. For this purpose, the capitalized term "State" means a country or nation.

⁴⁹ *Marshall v. Marshall*, 547 U.S. 293 (2006).

⁵⁰ The U.S. Supreme Court stated in *Marshall v. Marshall*, *supra* note 49, that when a state

court has issued a final judgment regarding *its own* jurisdiction, the judgment qualifies for full faith and credit in the U.S. so long as the jurisdictional issue was fully and fairly litigated in the court that rendered the judgment.

⁵¹ Restatement (Second) of Conflict of Laws § 316 (1971) (Comment a there also provides that "[s]uch questions are all determined by the local law of appointment even though it is not the state of domiciliary administration and the local law of the state of domiciliary administration is different.")

⁵² Restatement (Second) of Conflict of Laws §§ 260 and 264 (1971)

⁵³ *Id.*

⁵⁴ See note 41, *supra*.

⁵⁵ Article 36.1.

⁵⁶ Article 36.2.

The Regulation attempts to resolve this question through a two-prong conflict-of-laws analysis. As to the first prong, the Regulation states:

Where the law specified ... [in the will] is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules are to apply.⁴⁸

The first prong arguably does not apply here because (1) the U.S. does not have any federal conflict-of-laws statutes that resolve the question above, and (2) the U.S. Supreme Court has determined that the probate exception to federal court jurisdiction “reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate ... [and] also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.”⁴⁹ In other words, the probate of a will and the administration of a decedent’s estate are within the exclusive province of state probate courts, which authority presumably includes questions about jurisdiction and applicable law in those proceedings.⁵⁰

Nevertheless, applicable U.S. conflicts rules summarized in the Restatement (Second) of Conflict of Laws (“Restatement”) are a blend of both federal and state common law, so the estate of a deceased U.S. citizen could contend that the federal common law cited there (which presumably ruled on matters outside of the probate exception to jurisdiction) constitutes the internal conflict-of-laws rules of the U.S. for purposes of the Regulation. If that argument were to prevail under the Regulation, then

applicable conflict-of-laws rules in the Restatement provide as follows with respect to a testate estate:

- The law governing the duties of the executor or administrator regarding estate administration is determined by the law of the state of appointment of the executor or administrator.⁵¹
- When a will designates the law of a particular state to govern its construction, bequests of personal property (movables) and real property will be construed in accordance with the law of that state.⁵²
- Otherwise, bequests of personal property in a will are construed in accordance with the rules of construction of the testator’s domicile at the time of his or her death, and bequests of real property in a will are construed in accordance with the rules of construction of the state of situs of that property.⁵³

A decision issued in a Member State will be enforceable in another Member State when, on application of an interested party, it has been declared enforceable.

Thus, if the Restatement is treated as constituting the internal conflict-of-laws rules of the U.S. for purposes of the Regulation and if the will of a U.S. citizen selects the law of a particular state within the U.S. to govern the will, then, under the first prong of the conflicts analysis in the Regulation, the law selected in the will should govern construction of the will, but that law may not govern adminis-

trative matters if there is no probate proceeding pending in that state, because no executor or administrator would be appointed in that state. Until an executor or administrator is appointed in that state (e.g., via an ancillary probate proceeding), no law would arguably govern administrative matters in a succession proceeding in a Member State because the rule against *renvoi*, which applies when the citizen’s will selects governing law, would prevent that Member State from using its administrative law.⁵⁴

Consequently, trying to satisfy the first prong of the conflicts analysis in the Regulation may prove more difficult than one might expect, and the first prong could frustrate the Regulation’s goal of having only one law apply to all aspects of the succession. Therefore, focusing on the second prong of the conflict-of-laws analysis in the Regulation may prove to be the better approach as it will cause one law to apply to all aspects of a succession.

The second prong of the conflicts analysis in the Regulation generally provides that if a State has no internal conflict of laws rules, the law of a territorial unit within the State is selected as follows:

1. If the State law selected under the Regulation is the law of the decedent’s *habitual residence*, the State’s law will be construed as referring to the law of the territorial unit in which the decedent had his *habitual residence* at the time of death.⁵⁵
2. If the State law selected by the decedent under the Regulation is the law of the deceased’s *nationality*, the State’s law will be construed as referring to the law of the territorial unit with which the deceased had the *closest connection*.⁵⁶

When the second prong of the conflicts analysis in the Regulation applies to a will that selects the law of the U.S. to govern succession, the law of the state in the U.S. with which the deceased had the “closest connection” will govern the succession.⁵⁷ Thus, an estate planner should consider inserting language into a U.S. citizen’s will stating that the citizen desires to have the law of a particular state in the U.S. govern succession in a Member State because that is the state with which the citizen has the closest connection.

An estate planner, however, should keep in mind that the state or territorial unit in the U.S. in which the U.S. citizen had the closest connection is determined at the citizen’s death because that is when the will becomes effective. This may present a problem because the citizen may have had a closest connection with a particular state in the U.S. at the time a will was executed, but may have a closest connection with a different state in the U.S. at death. In other words, while the nationality of the citizen may not have changed after the will was executed, the state in the U.S. with which the citizen had the closest connection may have changed between the time the will was executed and the time of death. Thus, when a U.S. citizen executes a will and chooses to apply the law of the U.S. to govern a succession in a Member State, the citizen should update the will if the citizen moves to another state in the U.S. so that the will refers to the current state in the U.S. with which the citizen has the closest connection.

Overall, the benefit of using the second prong of the conflicts analysis in the Regulation is that it will apply one law to all construction and administration matters pertaining to the succession (e.g., the law of the state in the U.S. with which the U.S. citizen had the closest

connection). A possible detriment of using the second prong of the conflicts analysis is that the estate may incur expense proving to a court in a Member State the state in the U.S. with which the deceased had the closest connection at death.

Court decisions regarding succession

When a court of a Member State renders a decision in a succession proceeding setting forth the rights of persons in the estate or the plan of distribution of property subject to the succession, a question arises as to how the decision will be enforced in another Member State where the deceased’s property is located. The Regulation answers this question by providing two alternatives.

Enforcing court decisions in other Member States. The first alternative is discussed in Chapter IV of the Regulation,⁵⁸ which governs the recognition and enforcement of a decision of one Member State in another Member State. Chapter IV provides that a decision on succession by a Member must be recognized in other Member States without any special procedure being required,⁵⁹ and the decision cannot be reviewed as to substance in the other Member State.⁶⁰

A decision issued in a Member State will be enforceable in another Member State when, on application of an interested party, it has been declared enforceable.⁶¹ As soon as the formalities have been completed, the decision must be declared enforceable immediately.⁶²

The Regulation provides, however, that a Member State does *not* recognize a decision of another Member State in certain circumstances, including when the decision of the other Member State is irreconcilable with a decision in a proceeding between the same individuals in the Member State in which

recognition is sought.⁶³ The possibility of potential irreconcilable decisions between Member States regarding a succession should be substantially reduced because of the *lis pendens* procedure discussed above.

Issuance of European certificate of succession. In addition to the process described in Chapter IV of the Regulation to enforce a decision, Chapter VI of the Regulation provides for the creation of a uniform European Certificate of Succession (“Certificate”) that will have the same effect as enforcing a decision of one Member State in another Member State.⁶⁴ According to the Preamble to the Regulation, the use of a Certificate is optional:

The use of the Certificate should not be mandatory. This means that persons entitled to apply for a Certificate should be under no obligation to do so but should be free to use the other instruments available under this Regulation (decisions, authentic instruments and court settlements). However, no authority or person presented with a Certificate issued in another Member State should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the Certificate.⁶⁵

⁵⁷ The term “closest connection” is not defined in the Regulation or Preamble. Because the Regulation uses the concept of “domicile” for purposes of enforcing a decision under Chapter IV of the Regulation, it is safe to say that the term “closest connection” means something other than “domicile.”

⁵⁸ Articles 39 through 58.

⁵⁹ Article 39.1.

⁶⁰ Article 41.

⁶¹ Article 43.

⁶² Article 48.

⁶³ Article 40(c). Other circumstances under Article 40 where a decision will not be recognized is when (1) the decision of the other Member State is manifestly contrary to public policy; (2) the decision was a default judgment and the defendant was not properly served and did not fail to challenge the decision when it was possible to do so; and (3) the decision is irreconcilable with an earlier decision given in another Member State or in a third state in proceedings involving the same cause of action and between the same parties, provided the earlier decision satisfies requirements for recognition in the Member State in which recognition is sought. Article 40.

⁶⁴ Articles 62 through 73.

The Certificate is for use by heirs, legatees, executors, and administrators who, in another Member State, need to invoke their status, rights, or powers.⁶⁶ The Certificate can also be used to attribute specific estate assets to certain heirs or legatees mentioned in the Certificate.⁶⁷ While the Certificate should produce the same effect in all Member States, it is *not* an enforceable title in its own right but is presumed to demonstrate accurately the elements that have been established under the law applicable to the succession, such as the substantive validity of dispositions of property upon death.⁶⁸

Both the Regulation and the Preamble provide that any person relying on the Certificate is afforded protection if he or she relies in good faith on the accuracy of the information certified in the Certificate. For instance, protection is to be afforded in either of the following circumstances:

- When succession property is transferred *to* a person indicated on the Certificate.
- When succession property is transferred or sold *by* a person designated on the Certificate to a third person.⁶⁹

A Member State whose courts have jurisdiction over a succession under the Regulation can issue the Certificate.⁷⁰ The Certificate must be issued without delay in accordance with the procedure set forth in the Regulation once elements to be certified have been established under the law applicable to the succession or under any

other law applicable to specific elements of the succession.⁷¹ Under certain circumstances, a Certificate can be rectified, modified, withdrawn, or suspended.⁷²

Overall, a Certificate recognized by all of the Member States should facilitate administration of a succession in all Member States. As the Certificate gains acceptance in all Member States, persons relying on it will also know where to look on the Certificate for the information they need for administration and asset disposition purposes in a Member State. The same level of recognition and understanding may not apply to an enforceable order of a court.

Matters excluded from the Regulation

As noted at the beginning of this article, certain matters are excluded from the Regulation. Some of the excluded matters are further discussed below.

Revenue matters. Each Member State is left to determine whether any estate or succession-related tax will be paid by a deceased's estate or the beneficiaries.⁷³ More importantly, each Member State can determine whether the release of succession property to a beneficiary, or the recording of succession property in a register, may be made subject to the payment of taxes.⁷⁴ Thus, for U.S. citizens, gift and

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⁶⁵ Preamble ¶ 69.

⁶⁶ Article 63.1.

⁶⁷ Article 63.2.(b).

⁶⁸ Preamble ¶ 71.

⁶⁹ Article 69 and Preamble ¶ 71.

⁷⁰ Article 64.

⁷¹ Article 67.

⁷² Articles 71 and 73.

⁷³ Article 1.1 and Preamble ¶ 10.

⁷⁴ *Id.*

estate tax treaties between the U.S. and a Member State will continue to apply in determining tax liabilities to the U.S. and the applicable Member State.

Creation, administration, and dissolution of trusts. The Regulation also does not apply to questions regarding the creation, administration, and dissolution of trusts. The exclusion of trusts from succession proceedings under the Regulation is important because U.S. citizens use trusts frequently as part of their estate plan.

However, while a court of a Member State will not issue a decision under the Regulation pertaining to the creation, administration, and dissolution of a trust, the law selected in a will should determine whether assets will pass under the will to a trust. According to the Preamble:

Questions relating to the creation, administration and dissolution of trusts should also be excluded from the scope of this Regulation. This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under a statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.⁷⁵

Thus, if the law applicable to the succession recognizes trusts, such law should enforce testamentary provisions that create trusts or transfer assets to a trust. Accordingly, a U.S. citizen who wants property located in a Member State to be transferred, administered, and disposed of under a trust should consider executing a will that selects the law of the U.S. as the law

governing succession because U.S. law recognizes trusts and enforces bequests to trusts. The will of a U.S. citizen governed by U.S. law could bequeath property to a testamentary trust under the will, and the bequest should not fail even though the law of the Member State in which the deceased citizen's property is located does not recognize trusts. The will could also contain provisions permitting the testamentary trust to merge or combine with a substantially similar trust, which would allow the trustee of the testamentary trust to ultimately merge or combine that trust with a trust established by the deceased citizen under a revocable or irrevocable trust created by the deceased citizen in the U.S.

Conclusion

The Regulation's goal of reducing complexity of successions in the EU by having one jurisdiction apply one law in administering a succession should have a substantial impact in the 25 EU countries that adopted the Regulation. Estate planners who have U.S. citizen clients with property located in one or more Member States will need to consult the Regulation in connection with the disposition of property in Member States after 8/16/2015.

A U.S. citizen can execute a will that selects U.S. law to govern the succession of property located in one or more Member States. Consequently, the succession law of those Member States, including any forced heirship rules, will not govern the disposition of that property *unless* that property is either rights *in rem* or "immovable prop-

erty, certain enterprises or other special categories of assets" that are subject to special distribution rules irrespective of the law applicable to the succession.

If a U.S. citizen has a habitual residence in a Member State, then the Member State will have jurisdiction over the entire succession. As discussed above, however, if the citizen's habitual residence at death is determined to be in the U.S. rather than in a Member State and the citizen has property located in two or more Member States at death, the citizen's estate may have to commence separate succession proceedings in each Member State in which such property was located at death, even though the citizen's will selects U.S. law to govern the succession of such property. Thus, the one forum goal of the Regulation may not apply in those circumstances.

Although the Regulation should make it easier to transfer a deceased citizen's property located in a Member State, the death tax consequences of that transfer will still be governed by other applicable law such as treaties between the U.S. and a Member State. Furthermore, the creation, administration, and dissolution of trusts are not covered by the Regulation, so when a U.S. citizen wants to bequeath property located in a Member State to a trust, the citizen should consider selecting the law of the U.S. as the law governing the succession, especially if the law of the Member State having jurisdiction over such property does not recognize trusts. ■

⁷⁵ Preamble ¶ 13.