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To whom it may concern

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The new necessity to make a declaration of succession for US nationals with a habitual residence in Europe

The following explanations shall inform you, the US nationals, who reside in a country of the European Union, about a change in the European law concerning all cases of hereditary succession - a change which requires immediate attention and action.

Under the old German law, the succession of a US decedent was regulated in Art. 25 of the Introductory Law of the Civil Code. Usually, the succession was governed by the law of the state, in which at the time of death the deceased person was a national. Thus, the succession of a US deceased person was in principle governed by the law of the home state, viz. the US, which refers for the law of succession to the state of the Union which was home of the decedent. It was without consequence where the person met his death, where he was buried, or where he was resident.

This has now changed under a regulation of European law. These regulations have immediate effect, they do not need a transposition into the national law of the member states. Now, the law is the Regulation (EU) No. 650/2012 of the European Parliament and the Council of July 4, 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 (underlining added) (source: EU-OJ 2012 L 201/107 of July 27, 2012).

The new Regulation governs all deaths in the European Union (with the exceptions of UK, Ireland and Denmark) from August 17, 2015 onwards. It also governs those cases where a will has already been prepared (see Art. 83).

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According to Art. 21 (1) of the Regulation, all questions of succession shall be governed by the law of the state, where at the time of death the deceased person has had its habitual residence. In consequence, the succession after a deceased US national will be governed by the law of his habitual residence. So neither the place of death nor the nationality nor the religious affiliation is relevant. If an American dies in the EU, all member states of the European Union will apply the law of the habitual residence. If the habitual residence is in e.g. Germany, Italy, or France, German, Italian, or, respectively, French law will be applied and will govern the succession; the law of the home state will no longer be applied.

The notion of habitual residence is quite undetermined. The considerations for the Regulation in its preamble say the following:

“(23) In view of the increasing mobility of citizens … this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction an 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 into account 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 Stated concerned taking into account the specific aims of this Regulation.
(24) In certain cases, the deceased’s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. …”

So one may accept that students and migrant or guest workers with US nationality maintain their habitual residence in the state of origin, even if they learn or work in a EU member state. But the result will be different, if in the member state, in which the decedent was living at the time of death, the decedent has acquired real estate or an unlimited residence permit, or has got married and stays on, or is living there with his spouse and maybe children. It is by no ways certain that those who will be heirs under the home state law will be able to prove substantial circumstances hindering the assumption of a habitual residence of the decedent who has settled down in the EU or who has not obviously maintained a vibrant relation into his home state.

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There are just two exception to this general rule that the habitual residence is governing the succession and its settlement.

A narrow exception is provided in Art. 21 (2): “Where, by the way of exception, it is clear from all he circumstances of the case that at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would e applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.” This is not a general exception for Americans; a US flag in the living room will not suffice. Rather, very special circumstances must be proven, like e.g. the detachment by a US authority or a US company.

Art. 22 (1) para 1, (2) allows for a choice of law: “ A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. …The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.” This opens the route for a choice of the law of succession in a will, which has to observe all requirements of the state of origin and, preferably, the state of residence. It is mandatory to make a clear and unequivocal determination of the chosen law of succession so that the authorities and the courts will be bound accordingly. It is my recommendation to all US expatriates to do so now.

However, it will be necessary to observe special restrictions and recommendations under the law of the state of origin as well as the law of the EU member state of residence, the procedural rules, and the reservation of *ordre public*, in order to have a valid choice of law and to give effect to the dispositions of the deceased. It will also be beneficial to look at the estate tax consequences of the choice.

There is some urgency to resolve these matters in a new will in view of the application of the new Regulation to all deaths occurring on August 17, 2015 or later.

As a note behind please also be reminded that it is recommendable for all US expatriates in the EU to install a living will as a matter of precaution for the case of accident or illness in order to ensure at least that the next of kin will be duly informed and may take action.

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