

**ESTATE PLANNING FOR U.S. CITIZENS RESIDING  
IN CIVIL LAW JURISDICTIONS**

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The increase of multinational businesses, the number of Americans who travel widely and of multicultural personal relationships has led to a significant rise in the number of U.S. citizens who become tax residents in foreign jurisdictions while retaining investment interests and family ties in the U.S. This type of client poses a fascinating diversity of problems and opportunities to the U.S. estate planner, especially when the client has established his or her residency in a civil law jurisdiction.

Although I am an American attorney (Rhode Island Bar '82) I have practiced in Rome, Italy, assisting Americans residing in Italy and other European countries with U.S. estate and tax related matters, for twenty years. It is from this vantage point I have come to appreciate some key principles that I believe are basic to approaching estate planning for all such clients. It is these principles that I will discuss in this paper in the context of the following client scenario.

Scenario: The client is an American citizen who works and resides in the Netherlands for a U.S. multinational company and who travels extensively. He is currently going through a complicated and protracted divorce from his U.S. citizen wife (there has as yet been no legal separation) and has three grown children from that marriage, all U.S. citizens. Client has also entered into a partnership, recognized under Dutch law, with a Dutch citizen, pregnant with client's child. Client and his Dutch partner have purchased a home in the Netherlands in their joint names. Client has significant investments both in and outside the U.S. Those in the U.S. are divided among three states. He currently plans on permanently residing in The Netherlands, although he leaves open the possibility of returning to live in New York, his home state. Client calls and says he needs *real* help with his estate plan.

Goals: Client would like to disinherit his wife and his four grown children to the extent legally allowed. He wishes to provide as much as possible for his partner and the child they are expecting, as well as to minimize estate taxes in the U.S. and The Netherlands.

Although this particular matter involves U.S. and Dutch law, there are some universal civil law aspects that I will highlight, referring to aspects of other civil law jurisdictions, particularly Italy. In doing so, I will address the following issues:

- A. Differences between the U.S. and civil law jurisdictions, relating to:
- Descent and distribution rules, and in particular the statutory forced share and its planning implications;
  - Estate and gift taxation; and
  - Estate administration, including the importance of the notarial system in civil law jurisdictions.

- B. Whether it is advisable to use documents, e.g. Wills and powers of attorney, etc. drafted in accordance with a state jurisdiction in the U.S. in preference to those drafted as per local country law.

## **I. LOCAL COUNSEL**

One of the most difficult prejudices that I had to overcome in my early years in practice in Europe was the naïve belief that all solutions for American clients should be American in nature; or, alternatively, that non-U.S. law should be considered to a lesser extent when it came to providing legal solutions for American clients residing abroad. Both of these views are shortsighted. While a U.S. solution may in the end prove to be the best strategy, local law must be given equal weight and consideration, as it is only through an understanding of all possibilities that a successful and effective estate plan can be devised.

Studying local law is essential. However, this in of itself is not enough. While it is certainly possible to become well versed in the laws of a new jurisdiction, including those based on the civil law, working with local counsel is a necessity. In this I am quite fortunate. Our firm, which is an independent legal and accounting firm, is the Italian representative of the international tax network of PricewaterhouseCoopers. Having worked in Italy for many years, I have developed contacts with trusted tax practitioners in that network and other independent legal counsel in many jurisdictions. No matter which way you locate local counsel, this is a step you must take at the outset of the matter to properly serve this type of client.

## **II. DESCENT AND DISTRIBUTION**

Client's first goals are to disinherit, to the extent allowed by law, his three grown children and his wife should he pass away prior to his divorce being finalized. Before we can learn whether either of these, or indeed client's other goals, are possible and to what extent, we must initially determine which law will apply to client's estate. This is a two-step process. First, we must look to the internal domestic laws of the jurisdictions where client has his assets and is domiciled and/or resident. Secondly, we must look at the private international laws of those jurisdictions, which may very well refer the issue to laws of another jurisdiction.

### Domestic Laws

The surviving spouse is commonly protected from disinheritance in U.S. jurisdictions through a forced share or the right to elect against the Will and claim a statutory share. Client has investments in several states in the U.S. and each of those states does in fact have provisions protecting the share of the surviving spouse.

Surprisingly, Dutch law does permit the surviving spouse to be completely excluded from taking any share of the estate under the provisions of a Will. This however, is more of an exception than the rule. In most civil law jurisdictions the surviving spouse is well protected.

In Italy, for instance, the surviving spouse as well as the children are considered "favored beneficiaries", otherwise known as heirs or *lègitime* whose shares may not be eliminated or reduced even by express provision in the decedent's Will. The total portion of a deceased's patrimony to which the favored beneficiaries are entitled is called the "reserve" quota and the remaining portion

is the “disposable” quota. The Netherlands has similar protections for children. Selected descent and distribution rules of The Netherlands and Italy are shown in Chart A.

U.S. jurisdictions generally do allow for the exclusion of children by Will. As noted above, civil law jurisdictions on the other hand have a well-developed system for protecting the inheritance of the *lègitime*, which include children. Under the Dutch system, the childrens’ reserve quota depends on the testator’s marital status at the time of death. Under both Italian and Dutch laws, the quotas change depending on the number of children.

The amount of each quota varies depending which member(s) of the testator’s family survive him/her. In Italy, where there is a surviving spouse, the portion reserved to children that may not be disposed of by Will, is 33% of the estate if there is one child and 50%, to be divided equally, if there are two or more children. Where there is no surviving spouse (and no other relatives – testator’s parents, siblings, etc.), these shares to the children are increased to 50% and 66% respectively.

Applying Dutch law to client’s situation, each of his three children would receive 12.5% of the estate if he were to be married at the time of his death and 16.5% if legally separated or unmarried.

Therefore, between the internal law provisions of the U.S. and The Netherlands there are various options for client to disinherit either his wife or children. However, what still need to be understood are the private international law and choice of law rules of these jurisdictions as those often provide the overriding rules upon which one must base a final strategy.

### International Private Law

American jurisdictions tend to apply the laws of the situs when it comes to immovables and the law of the domicile for moveables. Many civil law jurisdictions, including those of Italy and The Netherlands consider the distribution of the decedent’s assets, whether moveable or immovable, as personal in nature and therefore apply the same laws to both categories of property.

In Italy, the national law of the deceased governs succession due to death at the moment of death. Further, the deceased may choose to apply the law of the country where he resides, but this would only be effective if he actually lives in that country at the moment of death. Lastly, it is also possible for the heirs to agree to have applied the law of the country where probate is opened or where one or more parts of the inheritance are located. Therefore, if our client’s assets were in Italy, the law of a U.S. jurisdiction would automatically apply to the succession, unless he choose to apply the law of his residence. Dutch law contains a provision allowing a non-Dutch citizen to actively choose to apply the law of his nationality to his succession.

The practical effect of these provisions is to allow a U.S. citizen, with property located in Italy or The Netherlands, the possibility of avoiding their respective systems of *lègitime*. Further, as state rather than U.S. federal law applies to the distribution of estates in the U.S., the other effect of these provisions is that they allow client to apply the law of whichever U.S. state in which he has assets located or of which he could claim to be a domiciliary that would be most advantageous. Since in Italy the application of national law occurs by force of law, the selection of a particular state law would need to be made by Will or left to those who administer the estate.

With the flexibility provided by the international private law and choice of law provisions in The Netherlands, client could disinherit his wife by actively choosing by Will to have Dutch law apply to his estate. This would not only effect the distribution of client’s property located in The Netherlands,

but also of that moveable property that he has in the U.S. where the law of the domicile is accepted. Alternatively, he could disinherit his children altogether by actively choosing to apply the laws of a state in the U.S. Which strategy is finally chosen will have much to do with events, such as how long it may be until client's divorce will be finalized and his real priorities.

### **III. ESTATE AND GIFT TAXES**

An effective estate plan must of course also consider the fiscal impact of potential strategies. On a federal level, both The Netherlands and the U.S. would tax client's worldwide estate, the former basing its taxing authority on his being a resident there and the latter on his citizenship. However, while the U.S. taxes assets of an estate, The Netherlands taxes the shares received by each of the beneficiaries. In September 2002, Italy abolished estate and gift taxes for assets passing to spouses, children and parents.

In the Netherlands as well, a non-married couple may have their relationships recognized legally and choose a tax regime of "fiscal partnership" that has significant tax benefits. The tax in The Netherlands where fiscal partnership is not elected would actually be higher than that of the U.S. On the other hand, should fiscal partnership be elected, Dutch tax drops significantly, leaving the U.S. tax higher.

Client's fiscal partnership is not recognized for tax purposes in the U.S. and client is also unable to utilize the unlimited marital deduction for estate planning purposes. Although he could begin making gifts to his partner, his pending divorce requires him to postpone that kind of decision. Therefore, while he has some choices as to whom he may disinherit, he currently remains exposed to high estate taxes in the U.S.

### **IV. ESTATE ADMINISTRATION**

Many Europeans choose not to have a Will at all, preferring to allow their estates to devolve according to the statutory scheme, which protects spouses and children. They also do not consider naming an Executor as being an important issue, as in most jurisdictions the heirs are responsible for administering the estate.

#### No Probate Court

In both The Netherlands and Italy for instance, unlike in the states of the U.S., there is no probate court or other governmental authority responsible for the administration of estates, and no formal court procedure for the approval of Wills or the appointment of an estate representative. Rather, it is the responsibility of the heirs of a deceased person to carry out the administrative functions having fiduciary liability to all heirs, legatees, creditors, etc.

In practice in Italy, the heirs of a deceased go before an Italian notary to make a formal declaration, known as an "Atto Notorio" (notarial deed), stating under oath whether or not the deceased left a Will and who are the rightful heirs. They also declare that they accept the burden of full responsibility, under penal laws, should any statement in the declaration itself prove to be false.

Title to estate property passes immediately upon death to the heirs, although procedures must be followed in order to perfect the recording of the title transfer. This is different from procedure under the common law system where there is a period between death and title passing to the heirs, during

which time the executor or administrator acquires title to estate assets and carries out the administration pursuant to the authority and under the supervision of the appointing court.

While the heirs in Italy remain responsible for the estate administration, an estate representative can be appointed by Will. The representative would then act as fiduciary to assist the heirs in the administration. Importantly, the representative, if not an heir, does not acquire title per se. Further, the functions carried out by the representative are carried out without remuneration, unless otherwise specifically provided for under the Will.

Testamentary documents are valid whether they have been dictated to and drawn up by a notary, in which case they may well be easier to interpret and follow the instructions contained therein, or whether they be a simple holographic Will, handwritten by the testator.

Should a Will be left, in any form, upon death it is “published” by the notary, after which it then becomes executable.

### Apostille

It is often necessary in administering an estate in a civil law jurisdiction to record original or certified copies of notarized documents from other countries. The Apostille is the form recognized by the Hague Convention of 5 October 1961 by which the office responsible for notaries in a particular jurisdiction (often located at the Office of the Secretary of State) certifies that the notary signing an original document is in fact a notary in good standing within that jurisdiction. Once completed, the office responsible for notaries attaches the Apostille to the original notarized document and that document is then valid in the signatory countries to the convention. The U.S., The Netherlands and Italy are all signatories to this convention. A model of the form is attached (Chart B).

## **V. DOCUMENTS – WHICH JURISDICTION**

In our scenario, client would prefer to have a Will drafted in accordance with the laws of a U.S. jurisdiction and this is certainly the norm. However, when a client has most of their assets outside of the U.S. and professes a real intent in continuing to reside abroad, having a U.S. Will can actually prove inconvenient.

When a U.S. citizen with a U.S. Will dies in Italy, for example, his/her Will must be proven according to U.S. rules before it will be executable in Italy. This means first finding a U.S. state that will take jurisdiction over the matter, a process that can be difficult should there be no assets in the U.S. or if the individual no longer maintains a residence or domicile in the U.S. Trying to accomplish this can be confusing, time consuming and expensive for non-U.S. citizen heirs charged with estate administration.

## **VI. CONCLUSION**

Estate planning for the U.S. client residing abroad requires careful study of applicable laws and procedures as well as a very good understanding of the client. It requires working carefully with local counsel and the client to investigate all available options for planning and to devise a plan that will not only carry out client’s wishes as to the distribution of his estate and minimization of taxes,

but also to soften the complications involved with administering a estate with international implications.

## CHART A

### DESCENT AND DISTRIBUTION

Chart showing the intestate and testate descent distribution rules in The Netherlands and Italy applicable to U.S. client's situation.

	<b>Dutch Law</b>	
<b>Statutory Share</b>	<b>No Will</b>	<b>Will</b>
Spouse	25% 0 – if legally separated	Can be disinherited
3 children	25% each if deceased was married 33% each if deceased was legally separated or divorced	12.5% min. each if testator was married 16.5% min. each if testator was legally separated, divorced or unmarried
De facto Partner	No share	Can receive any amount after distribution reserved to children
Applicable law	Dutch	Dutch unless chooses U.S. state law

	<b>Italian Law</b>	
<b>Statutory Share</b>	<b>No Will</b>	<b>Will</b>
Spouse	33% - where two or more children 0% – if divorced	25% - where two or more children 0% – if legally divorced
3 children	66% divided equally	50% divided equally
De facto Partner	No share	Can receive any amount after distribution reserved to spouse and children
Applicable law	Law of nationality	May chose to apply law of nationality or country/state of residency

