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The aim of this document is to highlight the main issues related to the following "typical client situations" submitted by UIA – International Estate Planning Commission – from the Italian point of view.

- last will of a divorced person having children with his ex – spouse and living in a new relationship
- Last will of parents having one "problem child" (e.g. addicted to drugs or mentally handicapped)
- Last will and marital contract of an entrepreneur whose focus lies on the continuance of the corporation whose major shareholder he is
- Last will of a patch work family with children deriving from different relationships
- Typical provisions at life-time and mortis causa of very wealthy individuals (so-called HNWI`s)
- Typical provisions to avoid spoiling children
- Last will of registered partnerships

Priority will be given to the **Italian and EU discipline**, with a focus on **taxation** and **economic aspects**.

1. PREMISE

The Italian 1942 Civil Code, in accordance with the other *civil law* legal systems, provides a **mixed succession law system**, based both on the recognition of the deceased's will, which may freely dispose of part of its assets, according to the principles of individual freedom and private autonomy, also granted by the Italian Constitution, and on the protection of the closest relatives, mandatorily granting them the right to a portion of the assets.

1.1. FORCED HEIRSHIP

Forced heirship, or compulsory share called "legittima" is a typical institution of the Italian succession law system. It applies to all of the deceased's assets and to all of the inheritance rights. **Article 536 Civil Code** is a restriction to the principle of freedom of will, providing that spouses, children and legitimate descendants are considered forced heirs.

It derives from the fusion of the Roman Law "*portio legitima*" and the "*réserve*" of French Customary law, inspired by German law.

While the "*portio legitima*" originated in the need of a progressive restriction of the free power of dispose so that a man was obliged to leave a certain proportion of his property to his children and in some cases to ascendants and brothers and sisters, the "*réserve*" was founded on the concept of family solidarity[1].

Italian Civil code provides that a minimum statutory share of the estate is reserved/can be claimed by the main family members, before the remainder may be freely disposed of.

Some members of the family are entitled to receive a fixed portion of the estate, even if a will provides otherwise. **Disinheritance** is not allowed in the Italian legal system.

In particular, as outlined above, Italian Civil Code gives a qualified status to some family members, by granting them a forced share (**Art. 536 Civil Code)**: the surviving **spouse**, even if separated from the decedent, unless he/she was held responsible for the separation of the couple by the Court; **all the children** and **all the ascendants**, when no children (or their

1 COMPORTI Marco, *riflessioni in tema di autonomia testamentaria, tutela dei legittimari, indegnità a succesere e diseredazione*, in *Familia,* 1, 2003, page 27

descendants) are alive at the time of the death. They are entitled to a fixed portion of the deceased's net estate; the law provides them with this right, regardless of their wealth or need. Neither partners nor divorced partners have any right to a forced share.

To the spouse is reserved half of the estate, unless children survived the deceased. If only one child survives the deceased, to him/her is reserved half of the estate. If more than one child survives, the children receive 2/3 of the estate, divided equally between them; their descendants take per stirpes.

After the 2012 reform, **legitimate and natural descendants** receive the same treatment[2].
If the testator has willed property whose value exceeds the value of the disposable portion, the rights of the forced heirs are regarded as violated. Italian law therefore allows the forced heirs to reduce the dispositions (and life donations) made in favour of third parties in a sufficient amount to guarantee the value of the so called "forced heirship". Donations are reduced after legacies, and before asking for the reduction of donations, persons with a right to a reserved share must account for the value of the property given to them by the will. Donations are reduced starting with the most recent and then going back to those made previously[3].

1.2. PROHIBITION OF SUCCESSION AGREEMENTS

The institution of forced heirship must also be analyzed in combination with the **prohibition of succession agreements (Article 458 Civil Code).**
Currently, such agreements are considered null and void *ab initio*, as having been made in violation of the rule that an inheritance is transmitted by law and/or will (Article 457 c.c.).
There are three different types of agreements that are not allowed in our system:
a)**institutive succession agreements**, whereby the testator arranges his own succession while still alive;
b) **testamentary succession agreements**, whereby a person has inheritance rights arising from a succession that is not yet in probate;
c) **succession rejection agreements**, negotiated between living persons, whereby an individual renounces the rights that will arise from a future estate[4].
Today it is also forbidden to give up the right, as long as the donor or testator lives, to request a reduction of donations and bequests harmful to forced heirs.

1.3. INTESTATE SUCCESSION

Where there is no will, the following principles apply:
If the deceased was unmarried and without children, his/her parents and brothers and sisters inherit.
If the deceased was unmarried and leaves children, the latter inherit.
If the deceased leaves a spouse, but no children, ascendants, brothers or sisters, the spouse receives the full inheritance.
If the deceased leaves a spouse and children, the spouse is entitled to half of the estate if there is only one child, and a third in other cases. The rest of the estate is shared equally between

2 FUSARO Andrea, Company Succession in the Latin Law Tradition using the example of the Italian legal system, in Susanne KALSS, *Company law and the law of succession,* Springer, Swithzerland, 2015, page 289 – 304.
3 FUSARO Andrea*, Transferring Business Ownership in Italian Family Enterprises*[paper delivered at the Workshop "Der Generationenuebergang in Familienunternehmen. Ver- gleichende Perspektiven", held at the University of Zurich on 21-23 june 2009, http://www.crdc.unige.it/docs/articles/fusaro.pdf*
4 http://www.notariato.it/en/reform-succession-renunciation-agreements

the children. The portion of a child already deceased reverts to that child's descendants *per stirpes* (representation).

If the deceased has no children but leaves a spouse and ascendants, then, 2/3 of the estate devolves to the spouse and a third to the ascendants.

Italian law does not recognize *de facto* partnerships that are not registered, therefore does not grant automatic succession rights to the surviving partner. The latter can only become an heir if this is stipulated in a will.

1.4. WILL

Italian inheritance law offers any person with testamentary capacity the right to dispose of his/her property for after death by a **will**.

A will is valid when it is unilateral, individual, personal, revocable, spontaneous, of economic relevance, in writing and formal.

Italian law provides for three types of will (Art. 601 and following c.c.)[5].

Olograph will (Art. 602 c.c.): the document is personally handwritten by the testator and must be dated and signed. There is no need for witnesses and there is no attestation clause. When found after the death of the testator must be given to a public notary in order to publish it.

Solemn will (Art. 603 c.c.): it is drafted by an Italian notary following the testator's will and instructions. It is signed by the testator in the presence of witnesses and then recorded and logged by the notary.

Sealed will (Art. 604 c.c.): it is drafted by the testator and placed in a sealed envelope which is then delivered to an Italian notary with strict formalities including witnesses.

The Italian legal system does not provide probate proceedings or any other validation process of the will.

The public notary that opens a testamentary schedule must communicate the existence of the will to the heirs and beneficiaries whose address is known.

1.5. TRUST

Italy was the first Country to ratify the Hague Convention on the Law Applicable to **Trusts** and on their Recognition, through **Law no. 364, of 16 October 1989**, which came into force on January 1, 1992[6]**.**

Trusts undoubtedly are present and operate within the Italian legal framework, fulfilling the parties' needs in different areas of law, not only family relationships (both during the marriage and in case of separation and divorce) or within business and bankruptcy context, but also for succession and will purposes.

The definition of trust under the Convention does not match that pertaining to the English common law. Pursuant to article 2, paragraph 1 of the former, trust includes "t*he legal relationship created, inter vivos or on death, by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose*."

The debate mainly focused on the "**domestic trust**"; namely, a trust in which the sole foreign element is the governing law, while all the other elements call for the application of the Italian law.

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5 FUSARO Andrea, page 289 – 304, Company Succession in the Latin Law Tradition using the example of the Italian legal system, in Susanne KALSS, *Company law and the law of succession*.

6 FRANCIOSI Laura, *Trust and the Italian Legal System: Why Menu Matters*, 6 J. Civ. L. Stud. (2013) Available at: http://digitalcommons.law.lsu.edu/jcls/vol6/iss2/16

According to the prevalent doctrine, domestic trusts shall be recognized in Italy, as well as any other trust under the Convention. Italian Courts adopted heterogeneous approaches: besides judgments denying recognition of internal trust, there are several decisions allowing it. However, the judicial denial of trusts does not seem due to a rejection of trust *ex se*, but rather to **the abusive use of the trust scheme**: for example, when a substantial reason for segregation of the assets is absent and the recourse to trust and its effects is neither supported nor justified by a worthwhile purpose, or there is neither real transfer of property from the settlor to the trustee nor segregation. Taxation aspects of the trust will be analyzed in the next paragraph.

1.6. TAXATION

Law 286/2006 and Law 296/2006 have re-introduced inheritance tax and gift tax (as of 25 October 2001 were repealed)[7].

The tax is levied on the net share of the inheritance passing to the beneficiary, taking into consideration non-taxable threshold amounts that depend on the relationship between the transferor and recipient.

The law provides specific rules for the determination of the taxable base for each kind of asset (real estate, shares, bonds, investment funds and movable goods).

In addition to the inheritance taxes, if the asset includes real estate rights, registration duty (2% of the value of the property) and cadastral tax (1%) are also due in most cases.

Inheritance tax applies to the worldwide assets of Italian residence, while only assets existing in Italy are subject to tax if the deceased was not Italian resident at the moment of death.

The inheritance and gift tax rates are the same. They depend on the relationship between the deceased and the beneficiary. As a general rule, the closer the relationship, the lower the tax rate applicable. The rates vary from 4% to 8%.

The most frequent tax-exempt thresholds are € 1 million for each beneficiary in case of spouse or linear relatives and the tax is 4% on the total assets' value; between brothers or sisters the exemption threshold is € 100.000,00 and the tax rate is 6%.

The 2006 legislation on inheritance and gift tax has introduced some new rules on the scope of application of gift tax. In addition to donations, the transfer of assets made without consideration (called "*atti di trasferimento a titolo gratuito*") and the setting up of restrictions on the use of certain assets called "*vincoli di destinazione*" are now subject to gift tax.

Italian tax authorities have clarified that the setting up of a trust on certain assets would fall within the notion of "vincolo di destinazione", so that gift tax would be applicable to the trust, as well as to the creation of fiduciary obligations.

In fact, **the main issue concerning the trust in Italy is the application of gift tax**. If the taxable income has been attributed to identified beneficiaries, the distributions should not be relevant for income tax purposes, given that gift tax would have been applied on the trust itself.

Given the introduction of tax rules on trusts in 2007 and the relatively untested practice, there is a high degree of uncertainty in relation to foreign trusts, concerning the taxation on the identified beneficiaries of the trust or on the trust itself.

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7 http://www.ey.com/Publication/vwLUAssets/ey-worldwide-estate-and-inheritance-tax-guide-june-2016/$FILE/ey-worldwide-estate-and-inheritance-tax-guide-june-2016.pdf

The treatment of the typical client situations listed by UIA – International Estate Planning Commission as above in Italy's legal framework must take into account all the issues related to the main succession law institutions described in this premise, in order to pursue the best interest of the client.

2. LAST WILL OF A DIVORCED PERSON HAVING CHILDREN WITH HIS EX-SPOUSE AND LIVING IN A NEW RELATIONSHIP

2.1. MAIN ISSUES

Italian legal system provides both institutions of legal separation and divorce between spouses.

According to Italian Civil Code, the **separated partner** has the same right to succeed of the non – separated partner, provided that the judge has not declared him/her responsible for the separation (Article 548 c.c.). If the "*addebito*", or responsibility for the separation has been declared, the spouse will only receive a life annuity as a necessary bequest, if he/she was beneficiary of alimony, determined by the amount of the estate, the number and the quality of the heirs.

A **divorced** partner does not have any right to the "*legittima*" and is not heir in absence of a will (intestate succession).

Italian divorce law (**L n. 898, of 01st December 1970**), **article 9** only recognize the right to receive as a necessary bequest the **retirement pension** of the deceased, in case of prior divorce alimony and in absence of other marriage of one or both ex-spouses.

Article 9 bis Divorce Law, instead, provides that the Court can establish a life annuity as a bequest if the ex-spouse is **in state of need**, if he/se was beneficiary of alimony, considering the worth of the alimony, the state of need, the entitlement to receive the spouse's pension according to art. 9, the amount of the estate, the number and quality of the heirs, their economic condition.

Any legal advice concerning the succession of a legal separated/divorced person must therefore take into account that the heirs could be charged with a bequest provided by the law, related to the needs of the ex-spouse.

2.2. WILL STRUCTURE

If the client has already obtained divorce from the ex-spouse, the will is commonly drafted providing all the assets to the children in equal parts.

The new partner, if not married, can receive from the testator only if there is a specific provision in the will in his/her favor, taking into account that the children are necessary heirs as above described.

Please note that any will can be executed if there are no complaints from the necessary heirs (their action is prescribed after 10 years from the acceptance of the inheritance).

2.3. TAXATION

The exempt amount between parents and sons is € 1.000.000,00 and the tax is 4% on the total assets' value.

3. LAST WILL OF PARENTS HAVING ONE "PROBLEM CHILD" (e.g. addicted to drugs or mentally handicapped)

3.1. MAIN ISSUES

According to Italian law, any problem child, if not underage, would normally benefit from a **guardian** appointed by the local court, chosen between the closest relatives or by the Judge (normally, lawyers that are available or social service operators).
The Italian Guardianship Law includes three different types of adult guardianship:

1) Full Guardianship (Italian: *interdizione*) with the appointment of a guardian (*tutore*);
2) Limited Guardianship (*inabilitazione*) with the appointment of a guardian (*curatore*);
3) Caretaking (*amministrazione di sostegno*) with the appointment of a guardian (*amministratore di sostegno*)

The Italian Civil Code provided only full guardianship and limited guardianship until the 2004 reform. The new "*amministrazione di sostegno*" or caretaking (as in other European countries like Germany or Switzerland) is more flexible than full or limited guardianship. It is suitable for adults with mental or physical disabilities who need the support of a guardian only for a short time, or as an assistant of the beneficiary in the everyday administration of properties and activities (Article 404 Civil Code). In comparison to full or limited guardianship the adult keeps his/her fundamental rights:i.e. the right to vote, to marry and to make a will (if not specifically forbidden by the Judge).

The guardian or caretaker is normally one of the parents of the "problem child". In his/her will, the parent/guardian can suggest another person to be appointed, and the Judge would take it into consideration choosing the new guardian. The parents can directly provide in their will in favor of their "problem child", knowing that all the income of the beneficiary would be managed by the new guardian according to the guidelines drafted by the Judge and the local social services.

4. LAST WILL AND MARITAL CONTRACT OF AN ENTREPRENEUR WHOSE FOCUS LIES ON THE CONTINUANCE OF THE CORPORATION WHOSE MAJOR SHAREHOLDER HE IS

In 2006 our legal system introduced the "family pact" or "*patto di famiglia*" (**Article 768 bis Civil Code**).
An entrepreneur may therefore manage the generational transition of his business by transferring to one or more descendants the ownership of his holdings in the capital of the "family business", in order to avoid any dispute over the inheritance.
While significantly affecting the substance of the entrepreneur's testamentary succession, the family pact is a contract between *living persons*, which involves the immediate transfer of the family business of the assets.
The family pact must be signed before the notary in a public document on pain of nullity and there must be the participation of those who would be "forced heirs" if the entrepreneur's succession were to take place at that moment.
The agreement must provide that the beneficiaries (*grantees*) of the company "compensate" the other parties with the payment of a sum, corresponding to the value of the shares reserved for forced heirs (unless they forgo all or part of the compensation).
Please note that this rule is an important exception to the prohibition of succession agreements.
The parties may agree that the payment, in whole or in part, is made in kind, i.e. goods instead of money; in this case, the assets in kind awarded in favor of the other forced heirs (not

beneficiaries of the company) "are allocated to the reserved portions due to them" i.e. they are to be considered an advance on their future inheritance.
When the entrepreneur's succession occurs, new parties may have become forced heirs after stipulation of the family pact (for example, the new spouse of a widowed or unmarried entrepreneur, new children), in which case they may demand of the family pact's grantees the payment of a sum equal to the value of the share of the inheritance reserved for them by law.
The contract may be terminated or modified by the parties who participated:

1. with a different contract still in the form of a public deed;
2. by termination (if provided for in the family pact) exercised on the basis of a "declaration to the other contracting parties certified by a notary."

Testamentary division. The testator can determine in his will which properties or shares have to be transferred to which heir. The entrepreneur can therefore choose to leave the company to one or more of his heirs and compensate the others with other assets.
Transfer of bare ownership. According to Italian law is is possible to transfer the bare ownership of company shares with retention of usufruct (right to use and enjoy the property). Future consolidation of bare ownership with usufruct on death of the usufruct holder can lead one heir to achieve the control of a company.
Patti parasociali (para-social deeds)
The management of a Company, as well as the share distribution and the profits or the rights to vote and veto, can be determined through para-social deeds, that are binding between the shareholders/heirs.
Family Holding
A common estate planning technique is the creation of a family holding company. The testator can leave his business assets to the company, whose shareholder are the sons entitled to manage the activities, and compensate the others with bequests of comparable worth.
Fondo patrimoniale. By notary deed or will spouses or testator can also elect a *fondo patrimoniale.* (capital fund, somehow similar to a trust, by which spouses or testator can choose to submit some assets—real estates or negotiable instruments, such as securities, bonds, company shares, etc.—to special rules, in order to allocate their revenues to the family needs).
The main effect is the segregation of the assets, and their destination to the family needs.
Any other aspect of the succession of an entrepreneur is ordinarily ruled by the general principles of inheritance law.
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Marriage contracts can been concluded either before or during the marriage by notary deed (Article 162 Civil Code). However such deeds are mainly intended as instruments to chose a "marriage regime" other than the default one, which is the *comunione legale* (community property).

5. LAST WILL OF A PATCH WORK FAMILY WITH CHILDREN DERIVING FROM DIFFERENT RELATIONSHIPS

According to **law 10 December 2012 n. 219** Italian Parliament enacted an historic reform titled 'Legal Provisions on the Recognition of children born out of wedlock'.
As amendments to the civil code, labels such as 'natural' and 'legitimate' children, which suggested notions of superiority and inferiority, have been cancelled. Every child is simply a 'child' without any privilege in case of married parents.

In particular, a child born out of wedlock has the same right to his father's and mother's succession of any other member of their family, as if he had been born in wedlock.
In the current text of the civil code, children have a unique legal status and the circumstances of their birth are not relevant. These amendments mirror the profound change in family structures that leads governments in many countries, including Italy, to legislate in favor of the *interest of the child*, which has become the paramount consideration[8].

The typical will of a parent with children from different relationships provides all his assets in equal part to their children. If the testator want to provide an unequal distributions of his assets, he can leave to some of his children the disposable quote, keeping in mind the forced heirship quotes equal for all of them.

6. TYPICAL PROVISIONS AT LIFE-TIME AND MORTIS CAUSA OF VERY WEALTHY INDIVIDUALS (SO-CALLED HNWI`S)

The main interest of very wealthy individuals is to preserve their wealth, profiting from tax benefits. The following techniques are the most common life-time provisions.
Transfer of bare ownership. Inheritance and gift tax can be reduced by transferring bare ownership with retention of usufruct (right to use and enjoy the property). Under this method the taxable basis on transfer is reduced. Future consolidation of bare ownership with usufruct on death of the usufruct holder does not represent a taxable event.
Life insurance. Life insurance policies can also be used to reduce the impact of inheritance and gift tax. This is because payments received by beneficiaries of life insurance policies on the deceased of the insured person are not subject to gift and inheritance tax.

However, since 2015 (Stability Act 2015), the income of the beneficiaries is subject to taxation in case of "mixed" insurance products, granting the beneficiaries with the reimbursement of the capital plus interests and capital gains deriving from investment funds and stock market, **up to 26%**. The economic convenience of this life-time provision is therefore nowadays reduced.

Art investments. With regard to inheritance tax, **Article 9 D.Lgs. 346/90** provides a legal presumption that cash money, jewels and general furniture (including art objects) represent 10% of the net asset of the deceased.
If their worth is less than 10%, the heirs can demonstrate the lower value through inventory.
Equally, if the worth of those goods is higher, taxation will be calculated only on 10% of the other taxable assets.
Family foundations (Article 28 Civil Code). Even if it is not a common instrument, HNWI individuals can opt for a family foundation. The beneficiaries of the foundation's activities can be by statute the members of a family, but there must be a specific reason (special merits, assistance needs).
No industrial or productive activities can be transferred to a family foundation (Different from the "Anstalt").
Art foundations. The creation of an art foundation (i.e. art gallery, historical palace) can be determined by will or *inter vivos*.

8 VALONGO Alessia, *Children Born Out of Wedlock: The End of an Anachronistic Discrimination, http://www.theitalianlawjournal.it/data/uploads/pdf/1_2014/children-born.pdf*

In order not to be void, there must be a philanthropic goal and the statute must provide NO-PROFIT clauses. If the foundation's activities create richness, the revenues are considered ordinary taxable income.

Trust. According to the segregation principle, HNWIs can plan an annuity to the advantage of their heirs through trusts, both *inter vivos* or *mortis causa*.

It is important to note that the difference between trust and foundation concerns its private instead of public governance. Trust is therefore preferable in order to provide annuities in satisfaction of pure individual interests or special needs (i.e. care of pets).

7. TYPICAL PROVISIONS TO AVOID SPOILING CHILDREN

The Italian succession law system does not provide explicit instruments designed in order to avoid spoiling children.

On the contrary, **Article 549 Civil Code** prohibits conditions or burdens on the necessary heirs quote.

The testator can't therefore reduce the quantity of assets reserved to the children, but can interfere on their quality. As a matter of fact, it is possible to choose during lifetime which goods are assigned to which heir, after a quotation of their worth, through testamentary division.

It is possible to leave to the children a bequest instead of the necessary portion (**Article 551 c.c.**), even a **life annuity bequest**, but the heir can still claim his legal rights and refuse the bequest.

8. REGISTERED PARTNERSHIPS

Civil unions between same-sex couples has been recently introduced in 2016 (**Law no. 76, of 20 may 2016**): the registered partner has the same inheritance rights of the spouse.

The end of the registered partnership determines the end of the inheritance rights.

(Avv. Alberto MORIZIO)