GOT MILCH?: THE EFFECT OF EUROPEAN CITIZENSHIP ON AGRICULTURAL ESTATE PLANNING

Jennifer Ann Gumbel[*]

Areas of the Midwest are experiencing a modern wave of European agricultural immigration. In recent years, dairy farmers from Europe have taken advantage of the EB5 investor visa to establish farms in the United States.[1] Companies from civil-law nations,[2] such as Germany and the Netherlands, are recruiting local farmers to come to the United States to establish dairy farms.[3] Because

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* B.A., University of Minnesota, 2004; J.D. Candidate, Drake University Law School, 2007. The author wishes to thank Notar Jochen Schwartner and Wolfgang Decker for introducing the author to the differences between American and German probate law. The author also wishes to thank Professor Martin Begleiter, Professor Eugene Scoles, and Sebastian Kocks for their assistance with this Note. However, any errors remain the sole responsibility of the author.

1. *See* Jerry Perkins, *Iowa Goes Dutch*, DES MOINES REGISTER, Feb. 27, 2005, at 1M; Jessica Miller, *European Farmers Seek Opportunities in America*, WATERLOO-CEDAR FALLS COURIER, Mar. 18, 2005; Kirsti Marohn, *Law Allows Foreign Farmers*, ST. CLOUD TIMES, June 2, 2004, at 1B; James Hannah, *Nation's Dairy Herds Growing Climate and Location Help Draw Large Farms to Ohio*, GRAND FORKS HERALD, Oct. 18, 2004, at A24.

2. "One of the two prominent legal systems in the Western World, originally administered in the Roman Empire and still influential in continental Europe, Latin America, Scotland, and Louisiana, among other parts of the world." BLACK'S LAW DICTIONARY 263 (8th ed. 2004).

3. *See* Agrarberatung Ratio GmbH-VrebaHoff-Koncept, http://www.melken-in-amerika.de/VrebaHoff%20Konzept.htm, *translated in* WorldLingo, http://www.worldlingo.com/

these farmers are not required to become U.S. citizens or, at the very least, may not become citizens for many years,[4] rural attorneys will deal with issues of international law when these farmers seek estate planning assistance.

This Note will discuss conflicts of local and international estate planning law and local restrictions on agricultural land ownership that rural attorneys may face when assisting these clients. In considering issues regarding the conflict of laws, this Note will examine German law as an example of differences in estate planning in civil-law jurisdictions. In considering restrictions on land ownership, this Note will consider Iowa law as an example of how state agricultural land ownership laws may or may not restrict the options available in estate planning.

I. EUROPEAN DAIRY IMMIGRATION

European dairy farmers, like many immigrants, come to the United States looking for opportunities not found back home.[5] These farmers enter the United States on the EB5 Investor Visa.[6] In order to obtain the visa, the immigrant is required to invest a minimum amount of capital in a new business enterprise.[7] Before coming to the United States, many of these immigrants find financial assistance through companies which help the farmers in obtaining the EB5 visas, buying land, and applying for necessary permits.[8]

A. *The EB5 Investor Visa*

In 1990, the Immigration and Naturalization Act created a new immigrant investor category, called EB5.[9] One of the motivating factors behind this

(under Translation Products, follow "Website Translator" hyperlink; then follow "URL Translator" hyperlink, then under Product Info follow "Demo", enter website and enter German to English) (last visited April 13, 2007); Vreba-Hoff Dairy Development, http://www.vrebahoff.com/ (last visited April 13, 2007).

4. *See* 8 U.S.C. §1427(a) (2006) (requiring five years of continual residence in the United States before permanent residents are eligible to apply for citizenship).

5. *See* James Dao, *Dutch 'Factory Farms' Stir Resentment in U.S.*, INT'L HERALD TRIB., Mar. 28, 2005, at 2 (explaining the reasons why European dairy farmers immigrate to the United States).

6. Miller, *supra* note 1.

7. *See* 8 U.S.C. § 1153(b)(5)(i) (2006). *See* Beth MacDonald, Note, *The Immigrant Investor Program: Proposed Solutions to Particular Problems*, 31 LAW & POL'Y INT'L BUS. 403, 403 (2000); Gary Endelman & Jeffrey Hardy, *Uncle Sam Wants You: Foreign Investment and The Immigration Act of 1990*, 28 SAN DIEGO L. REV. 671, 671-72 (1991); Margaret C. Makar, *Foreign Entrepreneurship in the United States*, 23 COLO. LAW. 35, 37 (1994); 2 IMMIGR. L.SERV. 2d § 8.87 (2006) (describing the requirements of an EB5 visa).

8. Dao, *supra* note 5.

9. MacDonald, *supra* note 7, at 403; 2 IMMIGR. L.SERV. 2d . §8.87 (2006)

new category was to stimulate foreign investment.[10] Initially, this visa was established to stimulate foreign investment from Hong Kong[11] and compete with similar immigration programs in Canada and Australia.[12] Additionally, this program includes an initiative to bring investment to rural areas through the designation of targeted employment regions.[13] The creation of these regions is meant to attract dairy farms to rural counties in order to revitalize the areas.[14]

Foreign investors who wish to invest in a targeted employment area must, at a minimum, commit $500,000 to qualify for the visa.[15] These funds must be placed at risk before the visa is granted and the investor must be actively involved in the business that has received the investment.[16] Active involvement does not include passive investment in either stock or real estate.[17] Active involvement also does not include "intangible property, leases, and loans, or other forms of indebtedness."[18] Rather, active involvement requires either daily management or policy-making activity in the business.[19] This business must also be a new business enterprise.[20] Additionally, this business must produce economic development by eventually creating at least ten jobs.[21]

Immigrants who are granted an EB5 visa enter the United States as a resident alien.[22] However, EB5 visas are conditional.[23] During the first two years, the visa is based on a conditional residency.[24] Before the two years have expired, the investors have ninety days to prove that a viable business has been established and that this business created jobs.[25] The visa will be extended as long as the statutory requirements, especially concerning job creation, are met.[26]

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10. Endelman & Hardy, *supra* note 7, at 671.
11. *Id.*
12. MacDonald, *supra* note 7, at 405.
13. *See* 8 C.F.R. § 204.6(f)(2) (2006).
14. Perkins, *supra* note 1.
15. *See* 8 C.F.R. § 204.6(f)(2) (2006).
16. *See* MacDonald, *supra* note 7, at 403.
17. 8 C.F.R. § 204.6(j)(5) (2006); Makar, *supra* note 7, at 37.
18. Endelman & Hardy, *supra* note 7, at 673 (quoting a letter from the American Immigration Lawyers Association to the Director, Policy Directives and Instruction Branch, INS, Washington, D.C. (Aug. 6, 1991)).
19. Makar, *supra* note 7, at 37.
20. 8 U.S.C. § 1153(b)(5)(A)(ii) (2006); MacDonald, *supra* note 7, at 403.
21. 8 U.S.C. § 1153(b)(5)(A); MacDonald, *supra* note 7, at 403.
22. 8 C.F.R. § 1235.11(a)(2) (2006).
23. *Id.*
24. *Id.*
25. *Id.*; *see also* U.S. CITIZENSHIP & IMMIGR. SERVICES, OMB No. 1615-0045, FORM 1-829: PETITION BY ENTREPRENEUR TO REMOVE CONDITIONS
26. 8 C.F.R. §1235.11(c) (2006).

Investing immigrants will be required to provide documentation relating to the business when requesting an extension.[27]

B. *The Increase of Immigrant Dairy Farms*

European dairy farmers are recognizing the benefits of immigrating to the United States on the EB5 visa.[28] These farmers have mainly settled in the Northern Plains and Great Lakes Region.[29] They come to the United States because of expensive milk quotas, intense competition, strict environmental regulation, and high prices of agricultural land in Europe.[30] Communities where these farmers settle have mixed reactions. Some are concerned about water pollution, odor, and increasing land values that could prevent local farmers from buying land.[31] Others welcome the immigration as a signal of economic development and bringing additional tax dollars, as well as students, to local schools.[32]

Regardless of whether communities welcome the immigrants or not, venture capitalists are betting that these farms will become booming businesses and European dairy immigration has spurred the creation of boutique companies that serve the needs of these farmers. Companies such as Vreba-Hoff Dairy Development, L.L.C., and Agrarberatung Ratio GmbH assist Canadian, Dutch, and German dairy farmers in immigrating to the United States.[33] These companies set up trips to the United States for interested farmers[34] and also provide information, training, and financial assistance to immigrating dairy farmers.[35]

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27. Makar, *supra* note 7, at 38.

28. *See* Miller*, supra* note 1.

29. *See, e.g.,* Dao, *supra* note 5 (discussing the large Dutch dairy farming population setting into Ohio, Minnesota, Indiana); Perkins, *supra* note 1 (noting migration to Iowa, South Dakota); Joe Mahon, *Minnesota: Say Cheese – In Several Languages*, FEDGAZETTE, July 1, 2004 (documenting various dairy operations in Minnesota).

30. Dao, *supra* note 5.

31. *Id.*; Marohn, *supra* note 1. This paper will not discuss the controversial topic of the economic or environmental impacts of these new immigrants on the local communities, rather this paper is limited to the topic of estate planning issues for the individual immigrants.

32. Miller, *supra* note 1.

33. *Agrarberatung Ratio GmbH-VrebaHoff-Konzept, supra* note 3; Vreba-Hoff Dairy Development, *supra* note 3.

34. Agrarbetratung Ratio GmbH – Farmreisen, http://www.melken-in-amerika.de/Farmreisen.htm (*translated in* WorldLingo, http://www.worldlingo.com (under Translation Products, follow "Website Translator" hyperlink; then follow "URL Translator" hyperlink, then under Product Info follow "Demo", enter website and enter German to English) (last visited April 13, 2007) (outlining the schedule for an October 2005 trip to Michigan, Ohio, and Indiana).

35. Vreba-Hoff Dairy Development, Our Service Package, http://www.vrebahoff.com/HTML/servicepackage.htm (last visited April 14, 2007).

States have recognized the revitalizations these farms can bring to depressed rural areas. Some of these revitalizations include strengthening a struggling dairy industry[36] and creating markets for local grain producers.[37] Because of these revitalizations, some states, including Minnesota, have relaxed limitations on foreign ownership of agricultural property.[38] Other states are assisting immigrant farmers. For example, the Iowa State University Extension Office, recognizing the positive aspects of the EB5 immigration, has set up programs to facilitate the settlement of immigrant dairy farmers in rural Iowa communities.[39] Through the EB5 visa and the response of agricultural states, European dairy farmers are becoming an integral part of rural communities throughout the Midwest.

II. LIMITATIONS ON AGRICULTURAL LAND OWNERSHIP IN IOWA

While many states have prohibitions on foreign ownership of agricultural land, investors immigrating under the EB5 visa are still able to own and acquire agricultural land. For example, Iowa has some of the strictest agricultural land ownership laws in the country.[40] Iowa law provides that non-resident aliens, foreign businesses, and foreign governments are prohibited from purchasing or otherwise acquiring agricultural land.[41]

However, this section does not apply to resident aliens.[42] The Iowa Constitution specifically provides that resident aliens are afforded the same property rights as U.S. citizens.[43] Article 1, section 22 of the Iowa Constitution states that "[f]oreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens."[44] Iowa defines a non-resident alien as "an individual who is not a citizen of the United States and who has not been classified as a

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36. *Dairy Farmers Debate New Ownership Law Legislation Allows Immigrants to Own Farms in Minnesota*, GRAND FORKS HERALD, Jun. 7, 2004, at A29.

37. Miller, *supra* note 1.

38. Marohn, *supra* note 1.

39. *See Iowa New Farm Family Project to Grow Dairy Industry,* EXTENSION CONNECTION (Iowa State Univ./Univ. Extension, Ames, Iowa), July 18, 2005, http://www.extension.iastate.edu/ag/staff/info/ianewfarmfamily.pdf.

40. ROGER A. MCEOWEN & NEIL E. HARL, LAW OF THE LAND: FUNDAMENTALS OF AGRICULTURAL LAW 270 (2002).

41. IOWA CODE § 9I.3(1) (2006).

42. *Id*.

43. *See* IOWA CONST. art. 1, § 22.

44. *Id*.

permanent resident alien by the United States Immigration and Naturalization Service." [45]

Because immigrants who come to the United States on the EB5 visa are granted conditional permanent residency, these investors are not subject to the limitations on agricultural land ownership that prohibits non-resident aliens from owning agricultural land. Because the restriction on agricultural land ownership will prevent a purchase until the individual is granted residency status, there is an obvious problem in buying agricultural land as part of the required investment. One possible solution is to put the amount of the purchase price of the property in an escrow account to be released when the visa is granted.[46] In any event, it must be kept in mind that the limitation on agricultural land ownership may later limit the individuals who can inherit and continue to own the dairy farm.

III. CIVIL LAW TESTAMENTARY DISPOSITION IN GERMANY

The wave of European immigrants, who are establishing dairy farms in rural areas, presents particular challenges to the rural legal practitioner in respect to estate planning. Because these immigrants cannot immediately become citizens,[47] questions arise as to what laws govern the estate: the law of place of residence, the law of the location of the property, or the law of the nation where the decedent held citizenship. A look at the particularities of civil testamentary law illustrates some issues that may arise if the laws of the nation of citizenship were to govern the disposal of the estate.

Civil-law jurisdictions, such as the Netherlands and Germany, have a system of protecting the inheritance rights of the testator's[48] descendants.[49] The German Civil Code protects inheritance rights through two legal tools: rights of children under intestate succession[50] and compulsory portion, also known as

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45. MCEOWEN & HARL, *supra* note 40, at 270.

46. Interview with Lori Torgerson Chesser, Partner, Davis, Brown, Koehn, Shors & Roberts, P.C., in Des Moines, Iowa (Oct. 4, 2006).

47. *See* 8 U.S.C. § 1427(a) (2006) (requiring five years of continual residence in the United States before permanent residents are eligible to apply for citizenship).

48. "A person who has made a will; esp[ecially], a person who dies leaving a will." BLACK'S LAW DICTIONARY, *supra* note 2, at 1514.

49. *See* Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and A Proposal for Chance to A System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1205-1206 (1990) (tracing the historical split of British law from Roman Civil Code in the area of inheritance).

50. Intestate succession means the order of inheritance when one dies without a valid will. BLACK'S LAW DICTIONARY, *supra* note 2, at 840 (referring reader to page 1472, under the word *succession*).

forced shares or *Pflichtteil*.[51] *Pflichtteil* refers to the right for those who would have inherited property under intestate succession to demand the monetary amount equal to half of what the descendant would have inherited in the estate.[52]

A. *Laws of Succession*

In the event there is no valid will, civil-law jurisdictions consider multiple interests when considering the division of the estate.[53] German testamentary law recognizes five classes of relatives with valid intestate succession interests.[54] The first class consists of children of the decedent and those children's descendents (issue), with the children inheriting before their issue.[55] The inheritance of issue is split *per stirpes* (an equal share going to each line of descendents).[56] The second class of relatives consists of parents of the deceased and their descendants, siblings of the deceased and their issue.[57] The third class consists of grandparents and their issue, aunts and uncles of the deceased.[58] The fourth class includes great-grandparents and their issue, great-aunts and great-uncles of the deceased.[59] Finally, the fifth class includes all other relatives.[60] If there are no relatives, the estate will escheat to the state.[61]

Unlike the common law system in the United States, German intestate succession emphasizes blood relatives as opposed to the spouse. However, the interests of the spouse are protected on a limited scale.[62] A surviving spouse will receive one quarter of the estate if there are any relatives of the first class, versus one half of the estate if the closest surviving relatives are in the second class.[63] In determining how to split the estate between the spouse and relatives, objects be-

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51. *See* Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, as amended § 2303, ¶ 1, sentence 1, *translated in* SIMON L. GOREN, THE GERMAN CIVIL CODE; AND THE INTRODUCTORY ACT TO THE CIVIL CODE OF AUGUST 15, 1896 AND THE ACT ON LIABILITY FOR DEFECTIVE PRODUCTS OF DECEMBER 15, 1989 412 (1994) (stating the right, under the *Pflichtteil* regime, of a disinherited heir) [hereinafter THE GERMAN CIVIL CODE].

52. *See id.* at §2303, ¶ 1, sentence 2.

53. *See generally* NORBERT HORN, HEIN KÖTZ & HANS G. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 198 (Tony Weir trans., 1982) (describing the system of intestate succession in Germany).

54. *Id.*

55. THE GERMAN CIVIL CODE, *supra* note 51, at 349 (citing to § 1924, ¶ 1).

56. *Id*. at §1924, ¶ 3.

57. *Id*. (citing to § 1925, ¶ 1).

58. *Id.* at 350 (citing to § 1926, ¶ 1).

59. *Id.* (citing to § 1928, ¶ 1).

60. *Id.* (citing to § 1929, ¶ 1).

61. HORN, KÖTZ & LESER, *supra* note 53, AT 198.

62. *See generally id.* at 198–99 (describing the German intestate inheritance scheme).

63. THE GERMAN CIVIL CODE, *supra* note 51, at 350 (citing to § 1931, ¶1).

longing to the matrimonial household if "they are not accessories of the land" and wedding presents are given entirely to the spouse.[64] Even if the deceased dies without issue, the spouse will still have to split the estate of the deceased with the in-laws.

The German default rule for marital property is called the "community of acquisitions."[65] Unless the couple has contracted otherwise, property acquired during the marriage will remain separate, i.e. owned individually, not as a married couple, until divorce or death, at which time the property will be split equally.[66] The purpose of this scheme "is to divide equally between the spouses any property that has accrued to either of them during the subsistence of the marriage."[67] If the end of the marriage is due to death, the surviving spouse loses half of her marital property to the deceased spouse's estate, to be distributed among his relatives, but is reimbursed by automatically receiving half of the deceased spouse's marital property and one-fourth of his estate in return.[68] The remainder of the deceased spouse's estate, however, is accessible to the deceased's blood relatives according to intestate succession.[69]

When splitting the estate between the surviving spouse and any children, no consideration is given to the age of the children.[70] This creates a potential problem for a spouse and a minor child both inheriting property: the rights of the minor child in the property can raise control issues if the surviving spouse wants to sell or otherwise dispose of the property.[71] Also, problems may arise if the child receives a portion of the estate, and for whatever reason, desires to receive the amount of his portion in cash, forcing a monetary right to a compulsory portion.[72]

Further, the surviving spouse is also limited in inheritance rights if the status of the marriage is in question.[73] Not only will a spouse be prohibited from claiming a portion of the estate if there is an invalid marriage or if a divorce proceeding was initiated before the death, but also if there are any grounds for di-

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64. *Id.* at 351 (citing to § 1932, ¶1).

65. HORN, KÖTZ & LESER, *supra* note 53, at 191.

66. *See* THE GERMAN CIVIL CODE, *supra* note 51, at 238 (citing to § 1363, ¶2).

67. HORN, KÖTZ & LESER, *supra* note 53, at 191.

68. THE GERMAN CIVIL CODE, *supra* note 51, at 239 (citing to § 1371, ¶ 1). *See also* HORN, KÖTZ & LESER, *supra* note 53, at 191 (giving an example of how an estate would be divided under this system).

69. HORN, KÖTZ & LESER, *supra* note 53, at 198.

70. *See* Dr. Thomas Ammelburger, *Das Erbrecht und die Instrumente der Testamentsgestaltung* (Inheritance Rights and the Instruments of Testamentary Form) § 3 (stating the possibility of juvenile children inheriting with the mother) (on file with author).

71. *See id.*

72. *See id.*

73. HORN, KÖTZ & LESER, *supra* note 53, at 198.

vorce present in the relationship between the deceased and the spouse.[74] Grounds for divorce in Germany are defined as when "the spouses are no longer on living terms and it is not to be expected that they can re-establish the society that they have lost."[75]

However, it should be noted that the testator does not have complete freedom in distributing the assets even with a legally valid will.[76] In Germany, relatives who are excluded from the will still have legal rights to a portion of the estate.[77] For example, a legally valid will would not prohibit issue from claiming portions of the estate.[78] The issue can demand half of what they would have received under intestate succession.[79] Additionally, the claim of the disinherited issue not only includes a general right to the estate but also a monetary right, *Pflichtteil*, allowing the disinherited issue to make a monetary claim against the heirs who received the decedent's property.[80] The *Pflichtteil* consists of the amount the children would have received under intestate succession.[81]

This limitation on the testator's distribution scheme is in opposition to the U.S.-based common law tradition of allowing the testator free reign to devise or not devise portions of his estate to his issue. All jurisdictions in the United States allow a parent to disinherit a child for any reason.[82] Even the civil-law state of Louisiana abandoned compulsory portions in 1989 and allows a parent to disinherit a child.[83]

If, for example, a German citizen owns and operates a dairy farm in Iowa, a conflict German and Iowa laws would arise if the farmer desired to disinherit a child. Iowa, like the rest of the United States, only protects spousal rights to the estate, not children's rights.[84] The civil-law scheme of compulsory portions comes in direct conflict with Iowa's probate law. If the German farmer

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74. THE GERMAN CIVIL CODE, *supra* note 51, at 266 (citing to § 1565).

75. *Id*. at 266-7 (citing to §§ 1566-67).

76. *See id*., at 412 (citing to § 2303, ¶ 1, sentence 1) (stating the right, under the *Pflichtteil* regime, of a disinherited heir).

77. *Id.* at 412 (stating that descendants, parents, and spouses have a right to demand a portion of the estate in the event that the testator excludes them from the will).

78. *Id*.

79. *Id.*

80. M. Read Moore, *Practical Estate Planning for Noncitizens Who Reside in the United States*, SK093 A.L.I.-ABA 493, 540 (2005).

81. *Id.*

82. Batts, *supra* note 49, at 1198.

83. *Id.*

84. IOWA CODE § 633.236 (2006). Iowa does allow for children, not included in the will, to inherit. However, this protection only extends to children born or adopted after the making of the will, and only if allowing the children to inherit appears to be the intent of the testator. *See id.* at §§ 633.267 & 633A.3106 (2006).

relied on Iowa law, he runs the risk that the disinherited child would file a claim in a German court to receive a compulsory portion. The lawyer who prepares a will for a farmer in this situation would have to take caution in drafting a will that considers the possibility that a disinherited child could bring suit to demand half of what he would have received under German intestate succession.[85]

In addition to the intestate succession and *Pflichtteil*, German succession law also includes important differences in regards to trusts and the heirs liability for the debts of the estate.[86] German succession law does not recognize trusts (*Treuhand*) as a valid tool of estate planning because the trust must be created while the testator is alive,[87] and any amount placed in the trust will be included in determining the value of the estate.[88] Additionally, trusts are not consistently enforced by courts and if the fiduciary is insolvent, his or her creditors may access the trust in order to fulfill any claims.[89] This prevents the use of a trust to avoid a *Pflichtteil* regime.[90] Additionally, with respect to estate debt, the heir is held liable.[91] The heir does have the option to limit his liability by either disclaiming the inheritance entirely under section 1942 of the German Civil Code,[92] or beginning bankruptcy proceedings on the estate under Germany bankruptcy law.[93]

B. *Form of the Will*

German laws regarding the form of the will (*Testament*) are stricter than the laws U.S. jurisdictions generally impose. Sections 2229 through 2273 of the German Civil Code address laws concerning wills.[94] The only valid will, under normal conditions, is either a holographic will (*Privattestament*) or a public will (*öffentliches Testament*).[95] A holographic will is a strict version in that it not

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85. *See generally* THE GERMAN CIVIL CODE, *supra* note 51, at 419 (citing to § 2303, ¶ 1, sentence 1) (stating the rights of disinherited children).

86. *See* Moore, *supra* note 80, at 541.

87. Henry Christensen III, *Foreign Trusts and Alternative Vehicles*, SH032 A.L.I.-A.B.A. 81, 95 (2002).

88. Moore, *supra* note 80, at 542.

89. Christensen, *supra* note 87, at 95.

90. *See* Moore, *supra* note 80, at 542.

91. HORN, KÖTZ & LESER, *supra* note 53, at 196-97.

92. E. J. COHN & W. ZDZIEBLO, MANUAL OF GERMAN LAW, VOL. 1 262-63 (2d ed. 1968) (quoting the Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, as amended, § 1942) [hereinafter COHN VOL. I].

93. HORN, KÖTZ & LESER, *supra* note 53, at 196-97.

94. THE GERMAN CIVIL CODE, *supra* note 51, at 401-07 (citing to §§ 2229-73) (stating the laws concerning the construction and annulment of wills).

95. COHN VOL. I, *supra* note 92, at 273.

only requires a signature, but also requires that the entire document be handwritten.[96] "[A]nything not written in hand . . . [i.e.] typewritten . . .is ineffective."[97] Public wills are "drawn up in an official document by a [German] notary."[98] The document is then registered with the local court and officially opened upon the death of the testator.[99] However, in one respect, the requirements are less strict than the American counterparts in that witnesses are not needed for a public or holographic will to be valid.[100]

IV. DETERMINATION OF APPLICABLE LAW

In order to weigh the risk of a client's relative bringing a claim in German court in an attempt to receive a compulsory portion or apply other succession laws, it is important to consider how German choice-of-law rules resolve the issues regarding both the form of the will and the law of succession.[101] Additionally, international treaties may override traditional domestic conflicts law and either create, relieve, or fail to adequately address the particular concerns of the practitioner.[102] When issues arise as to the rights of the relatives, it is also important to consider whether a U.S. court would enforce a German judgment concerning property located within its jurisdiction.[103]

German law has gone through a transition concerning which law would apply in conflicts issues involving wills and succession. In Francis Wharton's 1872 treatise on the conflict of laws in private international law, he indicates that German legal jurists, such as Friedrich Karl von Savigny, promoted that the law of succession generally be governed by the law of voluntary domicile.[104] However, only a few of Savigny's views have been adopted in contemporary Germany[105] and this is one that did not prevail.[106]

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96. *See id.* at 274.
97. *Id.*
98. HORN, KÖTZ & LESER, *supra* note 53, at 197.
99. *Id.*
100. THE GERMAN CIVIL CODE, *supra* note 51, at 401-02 (citing to §§ 2232 & 2247).
101. *See* E. J. COHN & W. ZDZIEBLO, MANUAL OF GERMAN LAW, VOL. II 121 (2d ed. 1971) (stating that German Courts would apply the principle of nationality in a conflicts issue regarding succession) [hereinafter COHN VOL. II].
102. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 222 (4th ed. 2004).
103. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481-82 (1987) (indicating the duty of a domestic state court to enforce foreign judgments).
104. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW 422-23 (1872).
105. COHN VOL. II, *supra* note 101, at 94.
106. *See id.* at 121 (stating the law of succession is governed by nationality).

The prevailing view concerning the law of succession rests, generally, on the law of the nationality of the testator at the time of death.[107] When there is a question as to which law applies in respect to succession, Germany will generally apply the "principle of nationality", that is the law of the nation in which the individual holds citizenship governs.[108]

For example, if a suit was brought in a German court concerning a forced share of an agricultural estate located in Iowa and owned by a German dairy farmer, who at the time of death, was a U.S. citizen, then the German court would apply Iowa law since in the U.S, courts look to the states to govern succession law.[109] However, in the case of a farmer who has retained German citizenship, the German court would apply German law, based on his nationality.[110]

Generally, both movable and immovable properties are subject to the law of where the property is located (*lex rei sitae*).[111] However, Germany does not initially distinguish between movable and immovable property in an issue of succession and both would be subject to the law of the citizenship of the deceased.[112] Nevertheless, farmland located in the United States will be subject to the law of the state where the property is located because Article 3(3) to the Introductory Act to the German Code creates an exception to the basic principle.[113] This Article applies the law of the location if that law has special rules concerning immovable property.[114] So while the land would be exempt from issues arising from German law, especially a *Pflichtteil* claim, movables, such as equipment, would still be subject to such issues. The problem is further complicated by the fact that German law does not affirmatively allow a German national a choice of law dealing with succession.[115] The Introductory Act to the German Civil Code, which gives guidance in the area of conflicts of law and private

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107. Einführunggesetz zum Bürgerliches Gesetzbuch [EGBGB] [Introductory Act to the Civil Code] Aug. 18, 1896, as amended Art 25, *translated in* SIMON L. GOREN, THE GERMAN CIVIL CODE AND THE INTRODUCTORY ACT TO THE CIVIL CODE OF AUGUST 15, 1896 AND THE ACT ON LIABILITY FOR DEFECTIVE PRODUCTS OF DECEMBER 15, 1989 441 (1994) [hereinafter THE INTRODUCTORY ACT].

108. COHN VOL. II, *supra* note 105, AT 121.

109. *See id.* at 119-20.

110. *See id.* at 121 (stating that German Courts would apply the principle of nationality in a conflicts issue regarding succession).

111. *Id.* at 139.

112. *See id.* at 140.

113. THE INTRODUCTORY ACT, *supra* note 107, at 434 (citing to Art. 3, ¶ 3); *see also* email from Sebastian Kocks, Trainee, Legal and Consular Section, German Consulate General Chicago to author (Nov. 20, 2006, 1:32 pm CST) [hereinafter Kocks email] (on file with author).

114. THE INTRODUCTORY ACT, *supra* note 107, at 434 (citing to Art. 3, ¶ 3); *see also* Kocks email, *supra* note 113.

115. *See* COHN VOL. II., *supra* note 101, at 155.

law,[116] only allows for a non-German national to choose German law to apply to immovable property within Germany.[117]

Many countries recognized the need to allow mobile persons the freedom to choose between applicable laws regarding their estates.[118] In 1988, the delegates of thirty-one nations endorsed the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons.[119] The goal of the nations "was to address the need, of almost crisis proportions, for practical predictable rules for determining the applicable law to avoid the costly confusion and delay incident to settling estates of decedents who die leaving assets in different countries."[120]

Under the Convention, an individual may choose either the law of the state of nationality of the deceased or the state of habitual residency to apply to the estate "if he had been resident there for a period of no less than five years immediately preceding his death."[121] While this provision may not protect foreign residents before the required five years of residency, the Convention also allows a person to "designate the law of a particular State to govern the succession to the whole of his estate."[122] The available law includes the law of habitual residence.[123]

While the Convention seems a fix-all to the estate planning issues facing a permanent resident, one major exception is made to the freedom of choice of law. The Convention does not allow a choice of law in the matter of a forced share system.[124] While the testator's intent in other areas of estate planning is generally protected under this Convention, a testator cannot use a choice of law clause to prevent a forced share claim by a disinherited family member.[125]

A possible protection to U.S. permanent residents is the reluctance of U.S. courts to enforce a foreign system of forced shares. However, jurisdictions across the United States may balance the desires to enforce the intent of the testator and the differing views of other nations in protecting children. Therefore, it is far from clear how an American court would rule in a forced share claim. In *In*

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116. *See id.* at 94.

117. THE INTRODUCTORY ACT, *supra* note 107, at 441 (citing to Art. 25, ¶ 2).

118. *See* Eugene F. Scoles, *The Hague Convention on Succession*, 42 AM. J. COMP. L. 85, 86 (1994).

119. *Id.*

120. *Id.*

121. Hague Conference on Private International Law: Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 3, Oct. 20, 1988, 28 I.L.M. 146, 150 [hereinafter Hague Conference].

122. *Id*.

123. *Id.*

124. Scoles, *supra* note 118, at 95.

125. *Id.*

re Estate of Renard, the Surrogate's Court in New York did not apply the French system of compulsory portion to the estate of a French national.[126] In that case, the decedent died residing in France.[127] On the other hand, she had resided in New York for over thirty years prior to residing in France and included a choice of law clause invoking New York law in her will.[128] The majority of her assets were located in New York.[129] The court ruled that the domestic policy of allowing "testamentary freedom from forced heirship claims" should prevail over the application of forced heirship.[130] Additionally, the Court pointed to New York statute EPTL 3-5.1(h) which, in the Court's view, permitted "a decedent, in a case like this one before the court, to avoid the application of the French law of forced heirship to her personalty by invoking New York law in her will."[131] The Court emphasized the legislature's intent to prevent a forced heirship in instances like the one in the Renard case.[132] Additionally, in balancing the factors in order to determine applicable law, the court noted that,

> [T]raditional conflict of laws rules often fail to take cognizance of the policies of other jurisdictions, and of the interests which those jurisdictions have in the application of their laws. [Prior decisions] make it clear that the [New York] Court of Appeals has moved away from mechanical choice of law rules to a balancing approach which requires the identification of the underlying policies in the conflicting laws of the relevant jurisdictions, and the examination of the contacts of those jurisdictions to see which has a superior connection with the occurrence and thus a superior interest in having its policy of law followed.
>
> . . . . The factor of decedent's domicile at death need not be decisive.[133]

However, it should be noted that U.S. courts might not be so reluctant to enforce judgments from other countries, which may base their rulings on the forced heirship system. Generally, under the Restatement of Foreign Relations Law, "a final judgment of a court in a foreign state . . . is entitled to recognition

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126. *In re* Estate of Renard, 437 N.Y.S.2d 860, 867 (N.Y. Sur. 1981) (aff'd by Matter of Renard's Estate, 439 N.E.2d. 341 (N.Y. 1982)).

127. *Id.* at 861.

128. *Id.* at 861-62.

129. *Id.* at 862.

130. *Id.* at 867.

131. *Id.* at 864.

132. *Id*.

133. *Id.* at 866.

in courts in the United States."[134] The comments note that "[a] foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another State."[135]

Additionally, under the Restatement, U.S. courts would only be allowed to not recognize a foreign judgment based on forced heirship, if the court finds that the "cause of action . . . or the judgment itself, is repugnant to the public policy of the United States or of the State in which it is sought."[136] This portion of the Restatement uses "need not recognize" language, illustrating the lack of a mandatory provision.[137] Additionally, under the comments, merely because the state does not recognize a cause of action, such as the monetary claim under the German *Pflichtteil* system, this would not be grounds for a court to determine that a "judgment … [is] contrary to public policy of the recognizing [s]tate."[138] Applying the principles of res judicata (issue definitively settled by judicial decision),[139] a state court may recognize a foreign judgment enforcing a monetary forced heirship of property located in the United States.[140] The differing results stemming from whether the matter was initially decided in a domestic or foreign court is a major consideration for the estate planning practitioner.

An example of a court enforcing a foreign judgment based on a compulsory portion claim can be seen in a 1995 Florida appellate case.[141] In *Nahar v. Nahar*, the appellate court upheld the decision of the trial court to enforce a Dutch ruling concerning a compulsory portion claim.[142] The court stated that, since both parties had "notice and opportunity to be heard" and the Dutch court "has satisfied Florida's jurisdictional and due process requirements," the ruling was entitled to be enforced.[143] However, the Florida Court did not include a Totten trust, created in the United States, to be considered in the judgment, only because it was not "the subject of any order by the Dutch court."[144] The court remanded the issue of whether the American real property should be included in the judgment enforcing the forced share to the trial court.[145] The court in *Nahar*

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134. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987).
135. *Id.* at cmt. c.
136. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (1987).
137. *Id.* at § 482(2).
138. *Id.* at cmt. f.
139. BLACK'S LAW DICTIONARY, *supra* note 2, at 1336-37.
140. Moore, *supra* note 80, at 541-43.
141. Nahar v. Nahar, 656 So. 2d 225 (Fla. Dist. Ct. App. 1995).
142. *Id.* at 229.
143. *Id.* at 230.
144. *Id.*
145. *Id.*

put the estate planning community on notice that foreign judgments based on forced share claims may be enforced.

The result in *Nahar* should raise particular concern for a foreign farmer living in the United States. If a forced share judgment is made by a foreign court, an American court may enforce that judgment. If the decedent farmer had all of his assets tied in the farming operation, a forced share claim could drain needed assets and close the operation. If the court also enforces the right for a child to receive a monetary right to this property, which is allowed under German law, needed assets may have to be sold. A decision by a state court as to whether to enforce a forced share claim, or a foreign judgment based on this claim, may make all the difference in whether the farm continues its operation after the death of the owner.

German laws concerning the validity of wills are less problematic for the U.S. practitioner.[146] "German law is also fairly liberal in recogni[z]ing … wills made abroad."[147] Under Article 11 of the Introductory Law to the Civil Code, legal documents are recognized by German courts as valid if the documents are considered legally valid in the jurisdiction in which it was created.[148] This protection of foreign legal documents extends to wills made abroad.[149]

The international community has created another protection for will recognition. The 1973 Diplomatic Conference on Wills proposed a uniform will that would be recognized by all signatories.[150] The benefits of having a single, internationally recognized will includes alleviating the court's burden of interpreting foreign law in respect to the form, interpretation, and conflicts laws of the jurisdiction in which the will was drafted as well as alleviating the estate of the burden of time and cost associated with a complicated legal issue.[151]

The United States was a signatory to the Convention in 1973.[152] Even so, the Convention is not self-executing in the United States, meaning that the Convention is not automatically a part of state probate law.[153] Because probate law is traditionally a role of state law, the federal government left a portion of the

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146. *See* COHN VOL. I, *supra* note 92, at 274.

147. *Id.*

148. THE INTRODUCTORY ACT, *supra* note 107, at 436 (citing to Art. 11, ¶¶ 1, 5).

149. *Id.* at 441 (citing to Art. 25, ¶ 1); s*ee also* COHN VOL I, *supra* note 92, at 274.

150. *See* Diplomatic Conference on Wills: Convention Providing a Uniform Law on the Form of an International Will annex art. 1(1), Oct. 26. 1973, 12 I.L.M. 1298.

151. Peter Chase, Note, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT'L L.J. 317, 331-32 (1988).

152. UNIDROIT, Convention Providing a Uniform Law on the Form of an International Will, http://www.unidroit.org/english/implement/i-73.pdf (last visited Apr. 15, 2007).

153. Chase, *supra* note 151, at 329.

implementation process to the states.[154] Therefore, a state legislature has to pass specific legislation in order for state courts to recognize the uniform will.[155] The Convention has become part of the Uniform Probate Code, but Iowa has not yet implemented this portion as part of its own probate law.[156] The convenience afforded by the Convention does not extend to individuals who would require their wills to be considered valid by Iowa courts.

V. EFFECTS OF AGRICULTURAL LAND LAWS ON ESTATE PLANNING

While the issues facing a practitioner who is dealing with estate planning for a resident alien are complex, the added consideration of agricultural property brings the issue to an even higher level of complexity. The laws of Iowa pertaining to agricultural property add additional considerations, including whether the individuals inheriting the property will be able to retain control over the property, requirements to register foreign ownership of land, and whether estate planning tools available to citizens are closed to aliens.

Under the Iowa statutes pertaining to ownership of agricultural property, the prohibition of ownership by a non-resident alien does not apply to "[a]gricultural land acquired by devise or descent."[157] However, a non-resident alien who acquires land by devise or descent "shall divest itself of all right, title and interest in the land within two years from the date of acquiring the land or interest."[158] This means that a non-resident alien who either inherits a portion of the farm, or who would be given an interest in the farm through a forced share judgment would not be able to keep the land beyond two years of receiving the interest.

These statutes also require foreign-owned business to adhere to the same requirements as non-resident aliens.[159] Particularly of note, a foreign-owned business, like the non-resident alien, is required to divest itself of the agricultural property within two years.[160] The inclusion of foreign-owned businesses in the divestment requirement limits incorporation of the farm as a viable option to an estate planning practitioner who desires to find a way to allow an Iowa dairy farm to be inherited by a non-resident alien. These limitations on agricultural ownership in Iowa create further issues for the estate planner dealing with a non-resident alien.

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154. *Id*.
155. *Id*.
156. UNIF. PROBATE CODE § 2-1001 (1997).
157. IOWA CODE § 9I.3(3)(a) (2006).
158. *Id.* at § 9I.5.
159. *Id.* at §§ 9I.3(3)(a), 9I.5 & 9I.7.
160. *Id.* at § 9I.5.

VI. ADVICE FOR THE PRACTITIONER

The first step for the practitioner who encounters a non-resident alien, particularly a German national who owns agricultural land, is to become familiar with the law of nationality concerning succession, the form of wills, debt liability, and conflicts of law.[161] This can be accomplished through legal materials published in English or consultation with a foreign attorney.[162] Another additional resource available to clear up questions concerning foreign law is contacting the legal section of the nation's consulate.[163]

The next step is to assess the likelihood that any eligible relatives of the alien would attempt to enforce a monetary right.[164] Seeking consultation of a foreign attorney can be especially helpful in this area.[165] If litigation is likely, alternatives to disposing of property through a will should be considered such as non-probate transfers.[166] Another reason that having assistance from both a local and foreign attorney would be especially helpful for the German national is the need to address German statutes concerning a valid form of a will.[167] Since Germany recognizes the validity of a will drafted in accordance with local rules, the attorneys can work together.[168] The German attorney can assist in creating provisions, as well as pools of assets, to limit the effect of a *Pflichtteil* claim, while the local attorney can correctly draft a will according to local rules. Additionally, the local attorney can assist in making sure local laws concerning ownership of agricultural property are considered when dealing with planning succession of the ownership of the farm, and whether a certain estate planning tool, specifically incorporation, is an available device in planning the agricultural estate.[169]

The practitioner may help the cause of a client who desires to disinherit a descendant by adding a choice of law clause to the will which specifically invokes "the 'internal' laws of [the] state [of residence], not just the laws of [the] state."[170] The "reference only to the laws of [the] state will incorporate its conflict of law rules, which could result in the application of the foreign law if for some reason it turns out the client is not in fact domiciled in [the] state."[171] In

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161. *See* Moore, *supra* note 80, at 544.
162. *Id.*
163. *See* Kocks email, *supra* note 113.
164. Moore, *supra* note 80, at 544.
165. *Id*. at 545.
166. *Id*.
167. *See* THE INTRODUCTORY ACT, *supra* note 107, at 441 (citing Art. 26).
168. *Id.* (citing Art. 26, ¶ 1(1)).
169. *See* IOWA CODE §§ 9I.3, 9I.5 & 9I.7.
170. Moore, *supra* note 80, at 545.
171. *Id.*

this way, it will be clear to a U.S. court that the intent of the client was to invoke the probate law of the state, not merely laws concerning conflicts.[172] A choice of law clause may also achieve the result reached in *Renard*. If a state legislature has passed a similar statute to the New York statute referenced in that case, the U.S. court may view the intent of the legislature as permitting the court to deny a descendant's claim based on a foreign compulsory portion system.[173]

VII. CONCLUSION

A practitioner finding himself planning an estate for a farmer who still holds citizenship in a civil-law country faces multiple issues based on the citizenship of the client and the ownership of agricultural land. The attorney will have to consider what rights relatives could enforce in the country of citizenship and take care to ensure that the will would be recognized in that country. Additionally, certain tools generally open to the estate planning practitioner may not be available when dealing with a resident alien farmer, such as incorporation. Further, a consideration of whether certain family members will not be desirable devisees, in regards as to whether the state where the land sits will allow the relative to retain the property, should be made.

With all of these concerns, states, including Iowa, can go beyond merely just trying to attract these farmers to the area by enacting legislation to further protect the estates of these farmers. Doing so would ensure that, in the event of a farmer's death, the investment made in rural communities can continue to bring economic renewal to these areas. One way that state legislation can help the farmer is to make clear to the courts that the intent of the legislature is both that the a civil-law, forced heirship system, and foreign judgments, based on forced heirship systems, should not be enforced in Iowa courts. This would help to ensure the result in the *Renard* case, especially in light of the state's policy of promoting the continued operation of family owned farms. Additionally, the state can pass the section of the Uniform Probate Code which recognizes the validity of the Uniform International Will, to simplify the will drafting process for resident aliens of Iowa. While the issues facing the practitioner are complicated, state legislatures can do more to bring some reliability and simplicity to the process.

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172. *Id.*
173. *See In re* Renard, 437 N.Y.S. 2d at 864.