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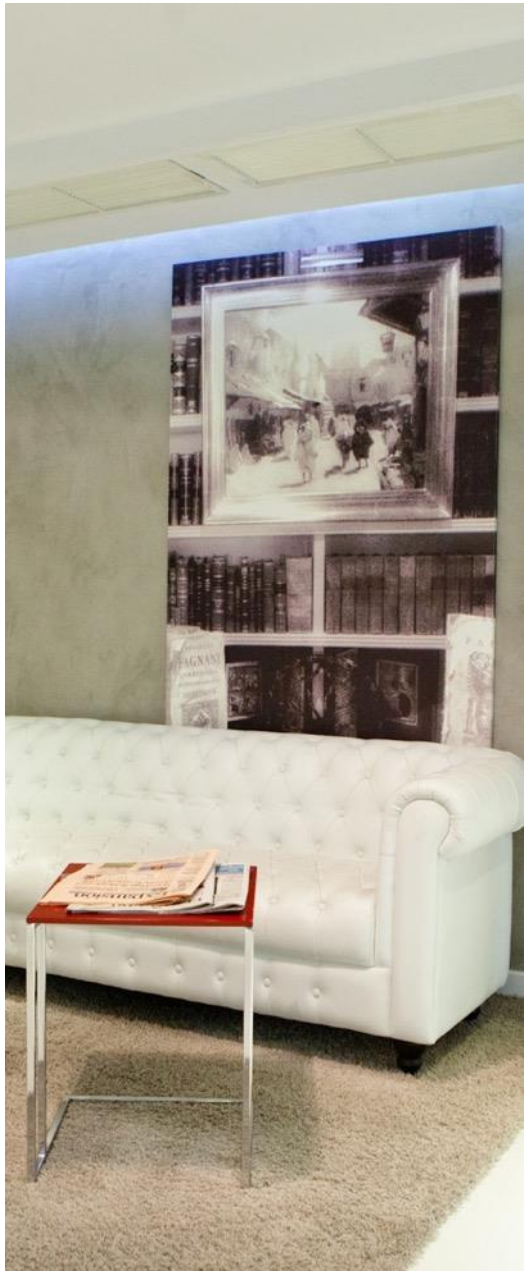
# INHERITANCE AND GIFTS FOR U.S. CITIZENS LIVING IN SPAIN



In Madrid, September 23, 2019

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# REGULATION (EU) N0 650/2012 IN MATTERS OF INTERNATIONAL SUCCESSSION

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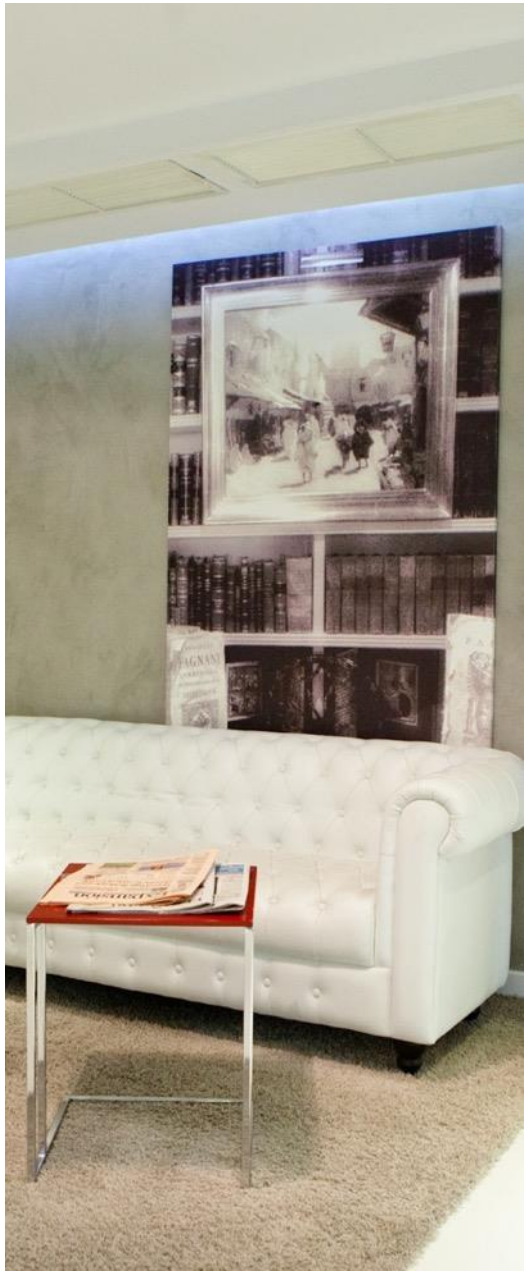
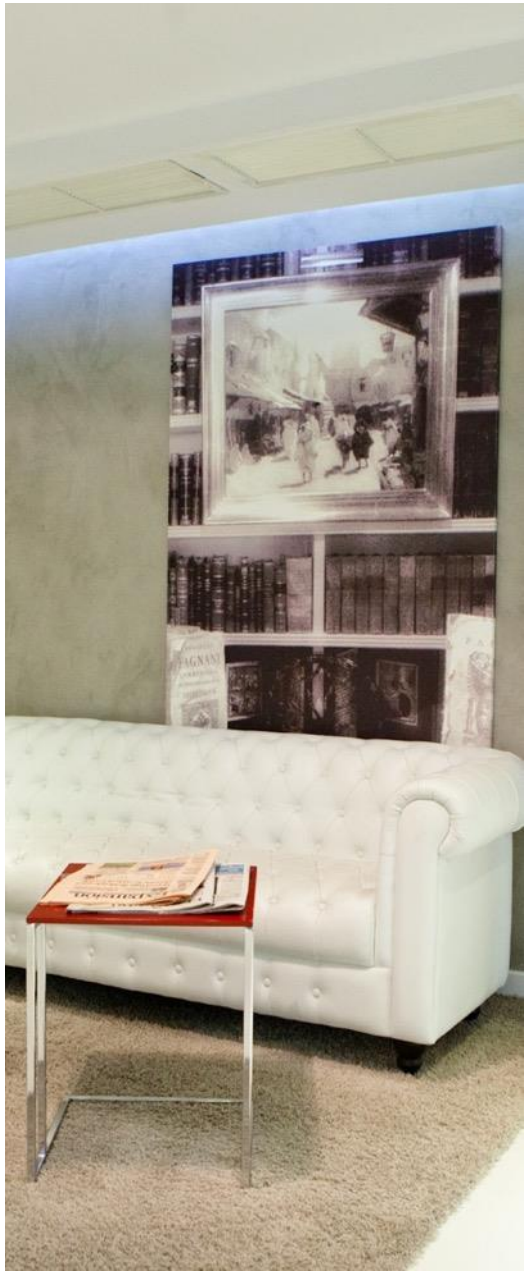


# Regulation content

The Regulation **comprises all civil-law aspects of succession by reason of death, whether by way of a *mortis causa disposition*** – that is to say, a voluntary transfer under a *disposition of property upon death,* as a will –, or a transfer through *intestate* succession. **It is not applicable in Denmark, Ireland or the UK**, although it affects citizens of the referred Member States who hold an habitual residence in other EU Member States, and therefore fall under such scope.

This Regulation shall apply to all aspects of succession to the estate of a deceased person, being explicitly excluded all revenue matters or administrative matters.

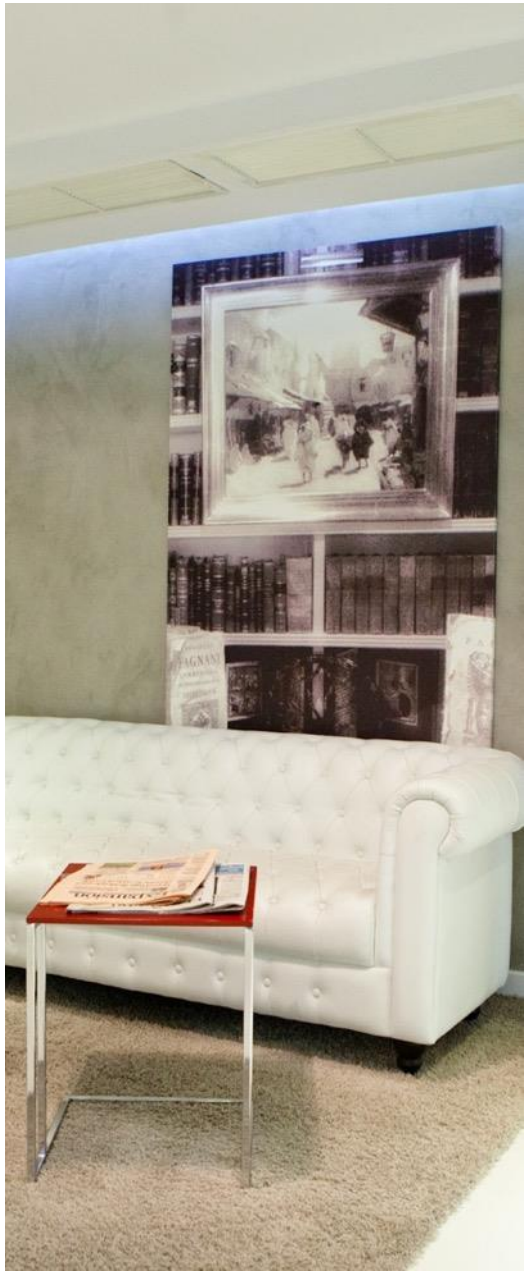
**It shall not apply to civil-law questions relating to marital status, legal capacity, matrimonial property regimes, donations, company-law, rights *in-rem* or the recording in a register of a right in immovable or movable property**.



# Jurisdiction and aplicable Law

- The criterion with regard to the determination of whether or not the Regulation is applicable **is that of the criterion of the Competent Court** *–id est*, if the Prerogative Court or authorities of an EU Member State (with the exception of the UK, Denmark and Ireland) deals with the succession, given the deceased passes away in such Member State, or due to the fact that the deceased had granted a will in the referred Member State prior to passing away, the Regulation shall be applicable. Otherwise, it shall not be applicable.

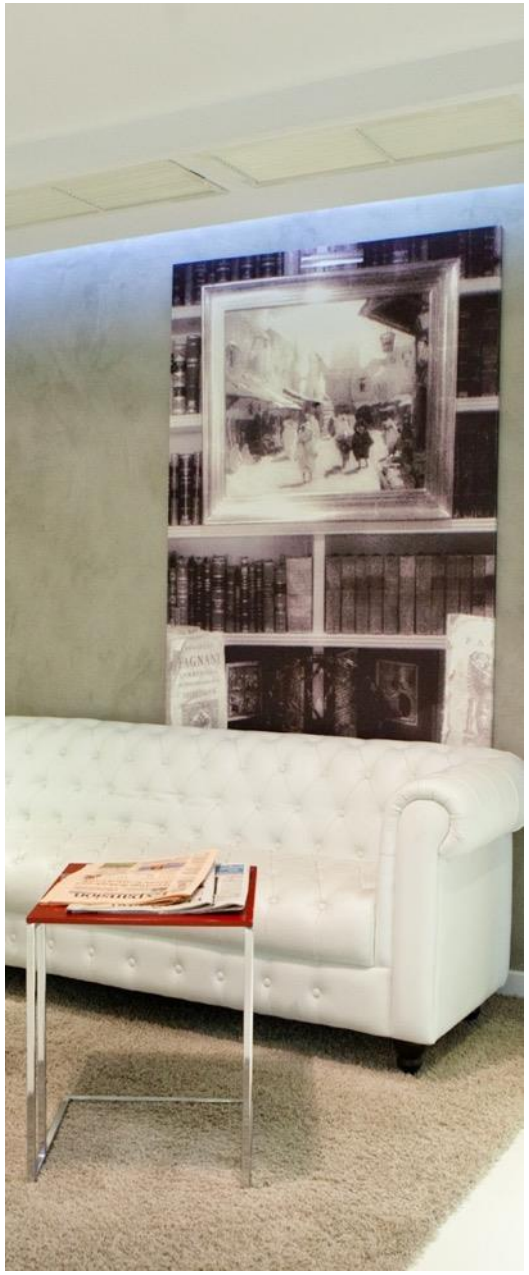
- **The applicable law is that of "the Law of the Member State regulating a specific legal matter which portrays an international aspect".** Hence, in regards to a succession that holds an international aspect, the applicable law will be the Act (of Congress or Parliament) or Law of the Member State governing such succession.



# Jurisdiction and aplicable Law (2)

- The Regulation establishes that the **main criterion when determining the applicable law is that of "habitual residence"**. This means that the succession shall fall under the scope of the applicable law of the Member State where the deceased had an established habitual residence preceding death.

- **There is an exception:** "when one can prove that the deceased was manifestly more closely connected to another State, the law of such Member State shall be applicable".



If I do not want my succession to fall under the scope of the legal framework of the law of the Member State where I hold my habitual residence, **Article 22 of the Regulation establishes the "*professio juris*", or the possibility to choose the applicable law that will govern my succession.**

Such establishes the following: "***Anybody can designate the law of the Member State which citizenship one holds at the time of determining such choice or at the moment of dying*". The only requirements I need to comply with are:**

- That the choice of the law will be done **via a mortis causa disposition** – a disposition of property upon death -i.e., a will. The choice has to be done in an express manner or at least in a tacit manner, so one may infer unequivocally the terms to the document.
- **That the chosen law pertains to the Member State which citizenship I hold,** whether that may be at the time I grant my will or whether that may be at my death.

Most noteworthy to mention is the fact that the said Regulation 650/2012 was conferred with a universal scope.

As mentioned, the Regulation covers succession law, provided the Prerogative Court is that of an EU Member State – with the exception of the UK, Ireland and Denmark.

- **Thanks to the universal scope of the Regulation, if you are a foreigner, citizen of the U.S., and are currently living in Spain or in any other EU Member State, your succession can be governed by the law of your country of origin, provided you expressly request that in your will.**

# TESTATE SUCCESION

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## PERSON'S ENTITLED TO A RESERVED SHARE AND HEIR-AT-LAW

## COMPULSORY HEIRS:

1st.- Offspring and descendants in regards to parents and ascendants.

2nd.- In their absence, parents and ascendants in regards to offspring and descendants

3rd.- The widow or widower as prescribed by the Spanish Civil Code.

In conclusion, the testator cannot deprive the compulsory heirs of their legitimate inheritance, except in cases expressly provided for by law, and hence, cannot impose any such levy, which in turn, entails that the protection of the legitimate is such that:

– Even in the event that a compulsory heir has not been included in the will – and that being, with or without the intention of the testator- such circumstance shall not harm the legitimate (except in the situations of prohibition expressly provided for by law).

– The compulsory heir who the testator has granted less than its share provided for by law shall request such complement via the corresponding legal actions.

– The testamentary dispositions the decrease the legitimate of compulsory heir, shall be reduced, upon request of the above, via the corresponding legal actions.

– The amounts donated to a compulsory heir during the life of the testator will be included in the inheritance in order to take into account such amounts or to add them to the hereditary assets, to avoid any harm to other compulsory heirs, as they could result harmed from such donations done to one or more compulsory heirs by collation. Collation is a type of donation.

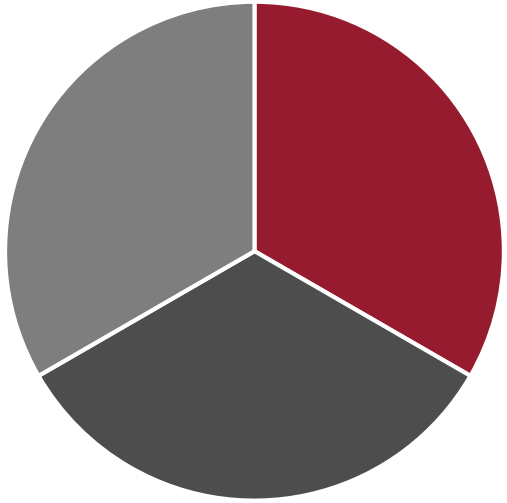
**In order to determine the legitimate, the value of the assets have to be taken into account upon death of the testator – that is, after deducing debts and burdens, without including the ones imposed in the testament.**

# THE LEGITIMATE

The first share is named ***Legitimate "estricta or corta" – which is one third of total value, divided equally among lawful heirs*** – that is always reserved for compulsory heirs and hence, is divided in so many shares as compulsory heirs are brought forth to the inheritance

The second share **is the *third for betterment* -as the part of an inheritance used to benefit any or all of the rightful heirs more than anyone else**. Parents can use it to improve the allowance granted to one or more offspring or descendants, and which along with the other parts comprises the *legitimate "larga"*, that is to say, the sum comprised of the first share of the legitimate and the second share of the legitimate, as mentioned above,

The third share is the ***legitimate of free-disposition*** **(and hence, the testator can decide to grant it to whomever such deems, even though the heir is not a compulsory heir.**




Hence, the legitimate part which, corresponding to the offspring and descendants, is comprised of the first two thirds of shares of the inheritance (*legitimate larga*). And that, even though parents may improve the inheritance of one or more of their offspring or descendants by also granting one of the two shares which comprise the *legitima larga*, namely with the *third for betterment*- apportionable at will to any or all of the lawful heirs.

**The legitimate of the parents and ascendants consists of half of the inheritance assets of their offspring or descendants causers, except in the event that they may compete against the widowed spouse of the deceased, and hence, in such case, the legitimate of the parents will be one third of the inheritance.**

Pertaining to the legitimate part of the widowed spouse- and, taking into consideration the special life in common of a matrimony between two spouses- such part is characterized by being variable in relation to the heirs with whom the widowed spouse competes for the testament, as it is understood to be an usufruct.

## So, what is an usufruct?

It is the right by which a person can use someone else´s assets and benefit from them -with the obligation to preserve and take care of them as if they were one´s own, yet without entitling the person to ownership.

## Law of Matrimonial Property

Of utmost importance and as previously expounded, the inheritance of the causer consists of all assets, rights and obligations, hence, upon bringing to effect the succession, the assets belonging to the joint matrimonial property need to be liquidated and divided in the event that the deceased had been married pursuant to a joint marital property basis.

That is to say, all assets and rights which derive from such matrimonial property basis are deemed to be split evenly between both spouses, and shall only be subject to the succession the halve which corresponds to the deceased, as the widowed spouse had previously acquired the other halve of the referred property.

Albeit, in the event the matrimony were celebrated under an asset or constant separation regime, and a prenuptial agreement had been granted in order to divide assets and rights generated under such matrimony, all deceased assets are subject to the succession.


## Will

The oral will is almost the only testament performed nowadays as it offers great advantages over other type of wills.  It consists of a will drafted by a notary in a public deed, made by the spoken declaration of the testator, i.e., an oral will made in contemplation of imminent death. Hence, the testator benefits from the counsel and legal advice of the notary whilst being ensured that such legal clauses are drafted in accordance with the law.

It is not obligatory to determine which assets comprise each heir´s inheritance. What generally happens is that if the testator has offspring, **assets are divided up equally among heirs, not mentioning at all the assets, yet applying an equal percentage among all heirs**. Upon the  testator´s death, the mentioned heirs in the testament have to determine an inventory of the assets and debts of the deceased and thus, proceed with dividing up the inheritance.

It may be the case that the testator wished to grant a person or persons a specific asset, whether that may be real estate, jewels or money in a bank account, or any other thing. **In such case, it will be called a legacy. The testator has bequeathed this specific asset.**

# Legacy

The legacy can benefit compulsory heirs –whether that may be descendants or ascendants- or any other person or institution. In any event, it shall respect the limits pursuant to the legitimate provisions determined by law, which we have previously explained.

Legatees -benefiting from the legacy- will only receive what the testator has indicated, and the remaining assets will be distributed among the heirs, who are entitled to acquire all testator´s assets that are not those of the legacy, and hence, debts shall also be included -which they are obliged to pay in the event they accept the inheritance formally (or even tacitly).

**It is most convenient to designate one or more executors who will take care of the inheritance and protect the assets upon testator´s death**, so they can determine the distribution of assets in the event heirs may enter into conflict or difficulties: that is, **the executor and the so-called partitioner.**

**Legal guardians can be designated where children are involved, forseeing a future absence of parents.** Testamentary provisions, are required (children´s age, will to not allow certain assets to be sold during a period of time, or that such assets may pass on to someone else in the absence of the designated or after such have passed away, limitations, requirements, etc…) and are a myriad of possibilities. Hence, legal counsel is highly recommended prior to granting such legacy.

The purpose of this presentation is to offer you a general overview, but, being such an important and personal matter – which in many occasions turns out being a delicate issue- it is important to obtain legal counsel in regards to all possibilities given your personal circumstances.

To conclude, **a testament is always revocable**, that is, **it is always changeable;** whomever grants it can make another will in the future at any given moment. Conversely, it is a personal document, which does not need to be turned-in at any registry or public office, and does not forbid the testator to use the assets to the will, that is, the situation is the same as if the will hadn´t entered into existence. By all means, it is the will of a person regarding how the partition of the assets shall be executed upon death, but it does not affect the person´s life.

**The most common will: "A will between spouses, and afterwards, granted for offspring".** This will ensure, that **while one of the spouses lives, such spouse has the right to live in the family house, and use the estate, and in absence of both spouses, such will pass on to the offspring – being equally divided, even if the widowed spouse marries again, as the use is an usufruct, not an ownership.**

The way to do this is by **both spouses bequeathing respectively the universal usufruct** of all the deceased´s assets to the surviving spouse, and designating the offspring heirs in equal parts.

Hence, the husband or wife who are a widow or widower can use and be entitled to the income and estate´s benefits of both spouses, in such a manner that, the living spouse can remain in the family house, even if the offspring want to deny the widow or widower such right. If there are incomes, such person is entitled to them, and in general terms, will benefit from all profits of such income that previously belonged to both spouses.

In the event of there being leases, the remaining spouse will benefit from the incomes and, in general, will benefit from all benefits deriving from the assets which they both held in their estate, albeit, under no circumstance can the widow or widower sell anything belonging to the deceased, that is , without the consent of the offspring. Whenever the widow or widower passes away, the offspring will receive the parents´ inheritance with no limitations whatsoever.

In this type of will, **the "Cautela Socini**" is included in order to avoid any possible harm to offspring´s legitima. If one of the offspring does not accept that the widowed parent receives a usufruct of all assets- the offspring is entitled to request the legitima estricta free of usufruct- then such offspring would lose all that is not legitima estricta that, in turn, will benefit the other offspring who do accept it. This way, there are more guarantees offspring will respect parents´ will.


Such formula is frequently complemented by offering the widow or widower the alternative to receive, instead of the assets´ usufruct, a portion of an estate disposable at will, i.e., the maximum possible attribution of property. The widower or widow will assess, given age and circumstances, if it is preferable to accept usufruct or determine the inheritance portion in terms of assets that can be sold without taking into account offspring´s opinion.

# INTESTACY

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## What happens if one does not make a will?

The foremost problem one may address upon someone´s death, and hence, not having made- out a will, is what happens with the inheritance?

Unlike what most people believe, **the inheritance is not lost, nor does the State completely take it over.** What happens is that, in such case, as the deceased has not determined who are heirs, the law will do so on the deceased´s behalf, following a degree of kinship.


## Who are the heirs in absence of a will?

**If the deceased has offspring**, the inheritance will be partitioned amongst them equally

**If one of the offspring has passed away prior to the parent**, one must distinguish:

- If such offspring had, in turn, descendants, they are entitled to equal parts of what their parents were entitled to.
- If such offspring had no descendants, the inheritance is divided only between the offspring who were alive when the parents passed away.
- If the deceased was married, the spouse is only entitled to the usufruct of one third of the inheritance. Furthermore, naturally, this person is entitled to half of the matrimonial assets, given such assets were when both were living owned by both spouses equally.

**If there is no offspring, the order is the following:**

- The parents are entitled to them, equally if both still live, or in the event that only one lives, such is entitled to all. If there are no parents, but there are grandparents or ascendants farther down the kinship line, such are entitled. In such case, the widow or widower is entitled to the usufruct of half of the inheritance.
- In the event that the parents passed away, and there are no ascendants whatsoever, the widow or widower is the only heir.
- If the parents passed away and they do not have a spouse at the time of passing away: to siblings and siblings´ children, and in absence of such, to the aunts and uncles, and if there are no siblings or aunts and uncles, to cousins, great grand niece and nephews and great grand uncle´s and great-grand-aunts if they still live. Only in the event the deceased has none of the above relatives, if the deceased passes away without a will or relatives, then the State or the Autonomous Community inherits the person´s estate.

## Measures to compensate a lack of Will

If a will hasn´t been made, one must draw up a declaration of heirs, which is a public document which defines who are the relatives who are entitled to the inheritance pursuant to the regulation previously expounded and such shall be done in the presence of a Notary public.

One must take to the Notary the following documents (ID number of the deceased, death certificate, certificate from the Register of Wills, family register, at least) and 2 witnesses, in principal, who know the deceased´s family. If they are relatives, they cannot hold a direct interest in relation to the declaration.

# Accepting  or Refusing a Will

When a person passes away, the heirs – whomever they may be- whether they have been designated by will or by a legal provision- have to decide if they are going to accept the inheritance or refuse it (which is called repudiation).

**Acceptance can be express or tacit**. It is tacit when the heir does business transactions which such person is not entitled to do if the heir had no inheritance. To set an example, signing a lease contract of a flat which the deceased owned. **It is express, the most common form of inheritance, if such is done "expressly" before a public notary**.

**The refusal, however, is never tacit, as it has to be expressed in a notary deed (before a public notary) or it has to be authentic**.

Both, **acceptance and refusal, are irrevocable**, once they are granted and may not be changed upon a change of opinion. One is a heir or no longer is a heir accepting all the consequences, and that´s for life.

**Acceptance can be done in two manners: pure and simple, or by benefit of inventory.**

- In the first  case, the heir commits to paying all debts and assuming deceased´s compromises, covering such debts and compromises not only with the estate of the deceased, but with one´s own estate unlimitedly.

- Acceptance upon benefit of inventory entails covering such debts only with the deceased´s estate one has inherited, and never with one´s own assets.

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# Thank You


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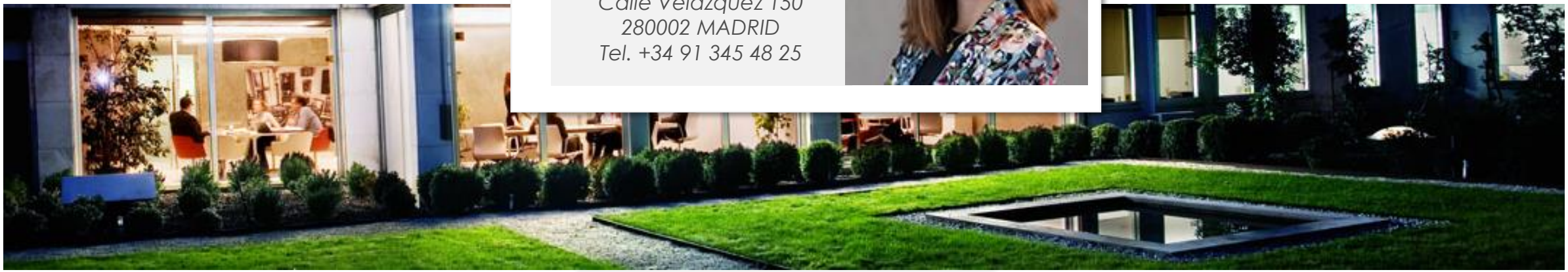

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