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LA RESERVE HEREDITAIRE

French succession law is renowned for its forced heirship, known as *réserve héréditaire*, which (until recently) prevented parents from disinheriting their children. For French nationals, the *réserve héréditaire* is in our blood, and we have managed it for the past two centuries: several options have been introduced in the past century to mitigate its power, including tontine and company structures.

However, for nationals of common law legal systems, which are found in England, the United States, Australia and many other countries, this concept is alien. Under common law, the deceased is free to dispose of their estate as they wish, and children are not automatically granted protection.

A major change to forced heirship was the European succession law 650/2012, which came into force on 17 August 2015 for all EU countries other than Ireland, the United Kingdom and Denmark, who opted out.

This change allowed people to choose their national legislation to settle their estate (article 22) rather than the legislation of the country in which they resided. For instance, a Japanese resident of France could choose Japanese law to settle their estate rather than French law, or an English citizen resident in France could choose English law to settle their estate. A key implication, however, is that their worldwide assets would also be governed by one unique law.

Many thought that this marked the end of complicated estate planning to determine who to exclude from an estate, as a choice of law would resolve this problem in most cases: a person, resident of France or not, who wished to disinherit a child could use article 22 of the regulation, called *Professio juris,* to choose a different law.

In 2020, there was an important reform, made by the French Government, to this regulation

Six years later, one of Mr Macron's Government members was fighting to recognise women's legal rights, and one of the issues addressed was the discrimination suffered by women under Sharia law (Islamic succession law), which prescribes that women inherit only half of what their brothers do from parents.

France has a history of immigration from North African countries, so it emerged that Sharia law could be used within the scope of the EU regulation to give an advantage to sons over daughters. Therefore, this member of the Government introduced a bill in November 2020 to reinforce women's legal rights and prevent them from suffering discrimination due to the application of Sharia legislation.

However, in considering and approving this bill, the Government did not think about any other legislation – i.e. common law - and introduced a bill to reinforce children's legal rights in France and protect the *réserve héréditaire.* As such, by fighting discrimination against women, the Government inadvertently created a bombshell by overruling any other legislation that does not observe the *réserve héréditaire.*

In my entire career, I cannot recall anyone from the UK, the USA or any other country of the common law requesting advice to leave more inheritance to their son than their daughter, based solely upon on the sex of their children.

This is purely my personal opinion, but I believe that French Government should have limited their bill to overruling legislation that discriminates against women, rather than implementing a genuine law that relinquishes any legislation that fails to observe the *réserve héréditaire.*

How does the reform work?

The bill, introduced in November 2020, provides a mechanism to compensate children, under two conditions, when the settlement of an estate in France could be governed by a different law.

A new subsection to the article 913 of the Civil Code was created, with the following provision: *"When the deceased, or at least one his children, is, at the time of death, a national of a Member state of the European Union or has his/her habitual residence there, and when the foreign succession law does not know a mechanism with a reserved portion protecting the children, each child (or his/her heirs, or those who benefit from his/her rights) can use the assets which are located in France to obtain a compensation at the time of death, in order to benefit from the forced heirship rights which they have under French law, within the limits of these rights."*

Under this legislation, a child can challenge the provisions of their parent's will, should it disinherit or provide them less than their legal rights under French law, if both conditions are fulfilled. *The compensation mechanism only applies to assets located in France, and the compensation only applies to French assets.*

What are the two conditions?

1. **Geographic criteria: The reform applies if:**

    - The deceased has his habitual residence in a member state of the EU (France for example), or has the nationality of a member state of the EU, or
    - One of his children has his habitual residence in a member state of the EU (France for example), or has the nationality of a member state of the EU

2. **Absence of forced heirship in the foreign law:**

    - The chosen law by the deceased does not know the concept of forced heirship, such as common law.

If the criteria are fulfilled, the children, who may have been disinherited, can use the compensation mechanism to recover their *réserve héréditaire* from French assets.

When will the reform apply?

The bill was introduced in November 2020 and passed with the French National assembly (*Assemblée Nationale*) on 23 July 2021. Several Senators challenged it before the Constitutional Council. Unfortunately, the challenge did not specifically address the provision of the article 13, i.e. forced heirship rights.

The reform was approved on 13 August 2021 by the Constitutional Council. It will come into force on the first day of the third month following the publication of the present reform, so we expect it to be in force by the end of 2021, or early 2022.

Please note that the reform will only apply to any new succession that is opened from the day that it is in force. Any current succession remains governed by the present EU regulation 650/2012 and children would not be able to claim any right over their parent's estate.

Examples of the impact of the reform in practice

1. ***Mr and Mrs Smith, UK nationals and French residents, have children from previous marriages who all live in the UK. They made a will electing UK law, in order to disinherit some of the children.***

Mr Smith died in France after the reform came into force. As such, his children will be able to claim their forced heirship on the French assets because he died in France, his habitual residence.

Some of you may deduce that the solution would be to go abroad to die, in order to avoid the legislation. Considering the concept of residence in France, I doubt that moving abroad temporarily would resolve the problem; the children would probably be able to evoke a fraud.

2. **Mr and Mrs Trump, US citizens who reside in Florida with children from previous marriages (all US residents) own a second home in France. They both made a will to disinherit some of the children.**

Mr Trump died in Florida, after the reform came into force. As such, Mr Trump will be able to disinherit his children and the reform will not apply because he did not reside in France and was not an EU national .

3. **Mr and Mrs Auckland, Australian citizens, reside in Australia. They have children with dual nationalities (Australian/Italian) and own a property in France.**

They made a will disinheriting one particular child. Mr Auckland died in Australia. In this case I believe that the child who was disinherited could claim his share over the French assets because he has the nationality of a member state of the EU (Italy).

Q&As

Here are some questions that I have received from clients, which I think may be useful to share with my readers.

I am an English citizen who has lived in France for the past 10 years. I made a will, under English law, disinheriting my children who lost contact with me several decades ago. Can they claim any rights over my French estate?

I believe so, because both criteria apply: you live in France and you chose English law as the law applicable. Your children should be able to use the new article 913 of the civil code to claim their *réserve héréditaire* over your French assets only.

I am a British citizen, born and raised in Scotland until I moved to France 5 years ago. I made a Scottish will disinheriting my children. Will I be affected by the new reform?

You should not be affected by the reform because there is a forced heirship in Scotland of 1/3 over the movable assets. Therefore, your children should only be liable to their reserve, in France, over your movable assets only. <u>This is an interpretation of the reform and we may need to wait for further clarification</u>. In theory, it is likely that you will be able to transfer your property to whomever you wish.

I am a US citizen, living in California with children from a previous marriage. I own a property in France and made a French will electing US law of the State of California to transfer it to my spouse only. Will the reform apply to me?

No, it will not apply to you because you are a resident of the United States and none of your children live in a member state of the EU or have EU nationality. Your will can be executed and your property transferred to your spouse under the EU regulation 650/2012.

I made a will in 2019 electing UK law. Will the reform affect my will?

Unfortunately, yes, because the reform will take into consideration the time of death, regardless of any will made prior to the reform.

I purchased a property with my partner with a tontine. I heard that the reform will revoke the tontine clause and that my children will be able to claim their share of the estate.

I do not think that the tontine will be revoked by the reform. Tontine enables a property to be transferred to a partner without any known claim from children, unless a child can prove that the conditions of the tontine have not been met.

Conclusion

From a purely legal perspective, the imminent reform raises several questions of compatibility with the recent legislation and court cases. France ratified EU regulation 650/2012, which enables a person to choose a different legislation to settle their estate, so how will the reform be accommodated within this context?

The *réserve héréditaire* has already been challenged. After two famous court cases (27.09.2017), it was confirmed that a foreign law which ignores forced heirship is not in itself contrary to French international public order and can only be ruled out if its concrete application in a specific case leads to a situation that is incompatible with the principles of French law. By principles, the Court pointed out the fact that a child, who was disinherited, would be in a precarious situation.

From a practical aspect, the reform will redefine our estate planning advice, and may push some of our clients to leave France if there is no option to protect their estate from unwanted heirs.

However, we are optimistic that a specific question of constitutionality may be raised in the future regarding article 13, or a ’fresh refurbishment’ of our succession law may be implemented by a new President in 2022. Some EU countries, such as Belgium, have already changed their legal system to provide more flexibility for a testator to distribute their estate without completely removing the *réserve héréditaire*. Ideally, France will follow this example and evolve with modern times, as the 19th century legislation it currently adheres to is no longer appropriate or relevant.

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