Articles

Estates with a French aspect

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Introduction

To suggest we live in an increasingly mobile world would be an example of classic British understatement, and France has always been a popular destination for people migrating from the UK. Statistics from the Office of National Statistics show that in 2011 alone, 20,000 people emigrated to France from the UK. If we add to this number all those who have purchased property of one kind or another in France in recent years, the result is a significantly large number of people owning assets in both France and England.

While advice is often taken when a property in another jurisdiction is purchased, sometimes, planning for what will happen to that property on the death of the owner(s) is overlooked. In particular, consideration may not have been given as to whether there are any limits on disposing of property on death, whether a local will is required, or what inheritance tax consequences there will be.

Certainly as regards France, a failure to consider the differences between the common law tradition of England and the civil law tradition of France can result in unintended consequences on death. This is particularly so where property is owned jointly by two people, one or both of whom have children from a previous relationship.

The legal issues affecting ownership of overseas assets in the estate planning / administration of estates context are varied and complex; it is therefore not possible to deal with the topic in exhaustive detail here. Likewise, there are numerous tax considerations to be borne in mind which are also beyond the scope of this article.

However, we do hope to provide an overview of some of the issues which arise in estate planning and after death, where people own assets in France as well as England, and to highlight some of the steps which might be taken to mitigate any unintended consequences.

The focus is on English estates where there is a French element to consider; however some of the issues discussed may arise in other cross-border contexts where assets are owned in civil law jurisdictions. The aim of the article is to raise awareness of potential issues in order that appropriate advice can be sought at an early stage. Specifically, we will consider which law or laws will apply to the estate of an individual, the issue of substantive validity of French wills, and the requirement for a will in French form in respect of assets located in France. We shall then consider how French law may affect the devolution of a person's estate, including forced heirship and claw back provisions. Finally we will consider some of the steps that can be taken to mitigate the consequences of the application of French law to assets in that jurisdiction.

Applicable law to estates

In order to consider issues which may arise in estates with assets in France and England, it will be necessary to consider which law or laws will apply to the assets in question. This can be a complex area, with different jurisdictions applying differing concepts when determining the applicable law to a succession. For example, whilst the private international rules of England and Wales and France both apply the law of the deceased's domicile in respect of moveable assets and the lex situs in respect of immoveable assets, 'domicile' under French law is different from the English concept, in that for the French, it is more akin to habitual residence.

From the point of view of English private international law, where a person dies domiciled in England, then English law will apply to that person's moveable estate, whether it is situated in England or in France. Accordingly, any moveable estate can pass according to the deceased's will (if he or she has one) or according to the English rules of intestacy. As regards immoveable assets, French law will apply to the succession of any such assets situated in France.

Equally, from the point of view of English law, the assets located in England of a person domiciled in France will devolve according to French law if they are moveable but English law if they are immoveable.

Ignorance of the fact that a different system of law may apply to one's estate on death may lead to difficulties later on. We consider the difficulties which arise where French law applies to the succession of assets below.

It should also be borne in mind that from 17 August 2015, Regulation (EU) 650/2012 will come into force relating to the jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Brussels IV). The UK has opted out of Brussels IV, principally because of claw back provisions in relation to lifetime gifts (which we discuss further in the context of France below).

However, the UK has retained the option to opt in to Brussels IV should it choose to do so in the future. Furthermore, reference will need to be made to the regulation in any event, in the context of an English estate with a European element, as this may have a bearing on the law to be applied to a succession of foreign assets, or to the validity of the testamentary disposition.

Requirement for a will in French form and requirements for validity

Strictly speaking, a testator making an English will in English form who has assets in France with which he or she also wishes to deal, does not necessarily need a will in French form. Provided the will is valid in this jurisdiction, it will be recognised in France. However, it should be remembered that French law may apply to the assets passing under that document.

This notwithstanding, it is always advisable where there are immoveable assets located in France, to take advice and prepare a French will.

French wills may take one of three forms:

(1) A holographic will is the most common form and must be entirely handwritten, dated and signed by the testator. It does not, however need to be witnessed.
(2) An 'authentic' will which is made either before two notaries or one notary and two witnesses. It is dictated by the testator and written out by the notary and then read back to the testator who signs it. It is then signed by the notary and witnesses and registered on the French National Will Register.
(3) Much more rarely used is a 'testament mystique' (literally a mystical will) which involves the signed will being given to a notary in a sealed envelope in the presence of witnesses. A report is made of the fact and again the document recorded on the French National Will Register.

By taking advice, proper account can be taken regarding the limits on testamentary freedom discussed below, but also an adviser can make sure that the French will is compatible with the English will. For example, care needs to be taken that one will does not revoke the other.

Issues in relation to devolution of French assets

Forced heirship

At its most basic level, the concept of forced heirship in France means that under French law, only a certain proportion of a person's estate may be given away freely. This portion is known as the *quotité disponible*. The remainder of the estate is subject to a *réserve* in favour of the person's heirs (the *réserve héréditaire*).

The amount of a person's estate which can be given away freely depends on the number of legal heirs. Children take priority. If a person has one child, he or she may dispose of up to half of his or her

estate; if the person has two children, then 1/3 of their estate may be disposed of freely and if there are three or more children, then only one quarter of the estate may be disposed of freely. Where a person dies leaving issue and a spouse, and provided that the person has indicated a wish to leave assets to the spouse (either by way of lifetime gift or by will) then the spouse has the option on the deceased's death of taking the freely disposable portion of the estate (eg 1/4, 1/3 or 1/2 as the case maybe) or a usufruct (a right to enjoy a property during one's lifetime, similar to the English life interest) in 3/4 of the estate and 1/4 outright, or a usufruct in 100% of the estate. If a person dies without children, but leaves a surviving spouse, then a testator is obliged to leave 1/4 of his estate to the spouse.

Only if a person dies without spouse or issue is he entitled to leave his estate to whomsoever he chooses.

If a testator attempts to give away more than his freely disposable estate, then the testator's heirs whose forced heirship rights are affected may bring a claim against the beneficiaries (known as an *action en réduction*).

Claw back

A further sting in the tail of forced heirship is that lifetime gifts made by a deceased can also be clawed back into the estate for the purpose of calculating the portion of the estate reserved to the heirs.

Take for example an estate consisting of a property in France worth €200,000 which the deceased purports to leave to his partner to whom he is not married. The deceased had made a gift of another property worth €50,000 to his partner during his lifetime. The deceased dies and is survived by his partner and his only child from a previous relationship. The child would be entitled to €125,000 from the estate.

There is no limitation period in relation to a claim in respect of the reserved portion, so that this can be made in respect of gifts made many years previously. However, any action must be made within 5 years of the opening of the succession, or two years of discovering the gift which encroaches on the reserved portion of the estate. There is however a 'longstop date' for any claim of 10 years from the date of death.

Examples of unintended consequences

A recent example of a testator's estate producing unintended results is the case of *Scarfe v Matthews* [2012] EWHC 3071 (Ch) which centred on the estate of the well-known turkey farmer who died in November 2010. Bernard Matthews died leaving four children (three of whom were adopted) and his partner, a lady called Odile Marteyn, with whom he had been in a relationship for a considerable number of years.

By a French will dealing with his French immoveable property, Mr Matthews purported to leave his villa in the south of France to his partner, in defiance of the rules of forced heirship. The deceased made no provision for his adopted children either in France or in England (although they had been provided for in Mr Matthews' lifetime). Mr Matthews also left a letter setting out his reasoning and asking his children to respect his wishes.

However, Mr Matthews' three adopted children chose to claim their reserved portion of the French estate (ie the villa in the south of France) to the detriment of Ms Marteyn and against their father's wishes. They also sought to rely on a clause in the deceased's English will which provided for the payment of worldwide inheritance tax. The case before the court related to the question of whether the adopted children could benefit from the inheritance tax provision in the English will (from which they had been excluded) as well as the rules of forced heirship in France. The court ruled they could not so benefit. However the adopted children still stand to gain from the French property against the wishes of the testator and in this respect the case neatly demonstrates what can go wrong where there has been inadequate estate planning.

A further example of unintended consequences arises in the context of a case which one of the authors is dealing with at present. A French national with his habitual residence in England made a simple English will dealing with both his English and French estates. He purported to leave a property he owned in France to his sister

who had provided care to him during his lifetime when he was living with terminal cancer. However, the deceased left a daughter, who while being provided for in the will, is still seeking to enforce rights of forced heirship to the detriment of the intended beneficiary.

Mitigating the effects of forced heirship

Under French law, the rules of forced heirship are a matter of public policy and it is not possible to avoid them. However, there are various methods of mitigating the consequences of forced heirship, although these can have downsides in terms of practicality or tax.

We explore some options below. In France one might consider the following:

Marriage contract

If assets are held under the French marriage regime of universal community of assets (*communauté universelle*) whereby all assets acquired by the spouses before and during the marriage are held jointly, they will be excluded from the succession. However, if either spouse has a child from a preceding marriage, his or her rights to the reserve will still be preserved.

Tontine clause

A clause may be put into a transfer of property deed (*Acte de Vente*) whereby both owners agree that on the first death the survivor of them will be considered to be, and to have always been, the sole owner of the property. Advice would need to be taken on the downsides of this approach, which should not be overlooked.

Succession Agreement (Pacte Successoral)

It is possible for reserved heirs to renounce all or part of their reserved rights during the lifetime of a testator. The agreement must however set out the specific beneficiary or beneficiaries who will benefit from the agreement and the renunciation must be accepted by the testator. The agreement must be made before two notaries and set out the legal effects of the renunciation.

Such agreements can be useful for example where parents wish to benefit a disabled child over and above their other children. However, in contentious cases, such as that of the Bernard Matthews case referred to above, a succession agreement is not likely to be practicable, unless the renouncing beneficiaries are compensated in some other way.

Property companies and off shore trusts

Another option which might be considered is to place assets into a French property company (a *Société Civile Immobilière* or *SCI*). However, again, specialist advice would need to be taken because there may be unfavourable tax treatment of the transfer of property to the company, and also the possibility of a claw back claim if the sole purpose of the transfer to the company is to defeat the claims of reserved heirs. It is also sometimes suggested that assets might be placed into an offshore trust in a jurisdiction which does not have forced heirship rights and which will not recognise an order of the French court. However, there are numerous disadvantages with this approach, which is likely to be appropriate in only very limited circumstances. Furthermore, given recent changes to the French disclosure requirements in respect of assets in trust, the benefit of offshore trusts may become more limited generally in the future.

'Compensating' out of the English or French estate

In respect of successions opened since 1 January 2007, the principle has been established that the rights of reserved heirs are to be paid in cash rather than out of the specific assets. This is relevant where for example a property exists which the testator wishes to leave to a non-reserved heir.

As stated above, the focus in this article is on English estates with a French element. This being the case, there will be many situations where there is only one asset in France, or where the moveable estate will be subject to English law (whether it is in England or France).

In these circumstances, it may be possible to provide a legacy in the English will, to the value of the reserved heirs' rights, to a third party non-reserved heir. At the same time, the testator can provide in his French will for a specific legacy of the French property to that same third

party non-reserved heir, who would have the obligation of compensating the reserved heirs.

This can be of interest in situations where a testator wishes to leave specific immoveable assets to a third party. However it should be approached with great care and only after obtaining full advice on the tax and other consequences that will ensue in each country.

If a testator leaves a legacy to his reserved heirs in his English will, and at the same time attempts to give away an asset subject to forced heirship in France to a third party, then as the heirs' rights still exist under French law, this could result in a reserved heir receiving considerably more than their intended entitlement if this is not structured appropriately and correct advice is not taken.

It is possible that the English equitable concept of the doctrine of election might come into play in these circumstances, although this is likely to involve lengthy and expensive court proceedings.

This doctrine (which was also argued before the Court in the Bernard Matthews case referred to above) arises where a testator purports to make a gift of property which is not his to gift (for example property subject to the *réserve héréditaire*) to a third person. At the same time, the testator makes another gift (for example, a cash legacy) to the true owner of the property he has attempted to give away to the third party (in this example, the reserved heir).

Equity states that the reserved heir in these circumstances cannot 'have his cake and eat it', ie he cannot benefit from the rules of forced heirship in France and from the gift under the English will. He has to choose:

(1) to accept the English will in its entirety by taking the benefit due to him under the English will and giving up his own property (his reserved portion of the assets in France) in accordance with the terms of English will, and taking the benefit due to him under the English will; or
(2) to take against the wishes set out in English will by keeping his own property (the reserved portion of French assets) and compensating the disappointed beneficiary for his loss by paying out of the legacy to him in the English will, a sum equal to the lesser of the value of the true owner's property (the reserved portion in France), or the value of the benefit they have received under the will; or
(3) to disclaim.

The doctrine of election is a complex area and will usually arise only in limited circumstances; however it does demonstrate the need to take appropriate advice at an early stage.

In the absence of beneficiaries who are likely to be willing to renounce their rights in a succession, the most practical course of action may be to structure one's affairs so that at least certain assets go to specific people. This does, however, mean compensating the reserved heirs in one way or another and, as it requires the reserved heir to accept a cash alternative, it goes without saying that there has to be enough cash in the estate to provide the required compensation.

Conclusion

As noted at the outset, the number of people dying domiciled in France or with assets located in France and further afield is on the increase; however, it is also clear from the cases passing across our desks that sometimes little thought is given to what will happen on the death of the owner(s) of property – and the forced heirship regime in place makes no allowance for the more complex family structures which characterise modern society. Nor does French law distinguish between those who are domiciled in France or abroad in its application of French forced heirship rules.

Those moving to France may however wish to give some thought to their domicile as, if they die domiciled in France, forced heirship rules may apply to a larger proportion of their estate. The effect of the new Succession Regulation should also not be overlooked.

As we have seen, there are ways in which a person can mitigate the effects of the forced heirship regime. However, it is very difficult to avoid the regime altogether. Any action that is to be taken needs to be taken while the owner is alive.

Untangling matters after death can be drawn out and expensive, not to mention

emotionally draining. While it may not be possible or practicable to avoid the effects of the French forced heirship regime; early advice on the options available may save a great deal of expense later on.