

# Reserved rights for European citizens under French law

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## Subject

Succession

## Other related subjects

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## Keywords

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***\*P.C.B. 4** This article explores the effect of a recent decision of the Conseil constitutionnel in France, potentially expanding the reserved rights of a deceased person's children. It is capable of affecting the succession to any property in France whenever any of the relevant members of the family has the required connection with the EU, not just France. Anecdotal, it is said that several British citizens have taken Irish nationality in the wake of Brexit, and other Member States may have entertained similar applications as well. A family that includes any such person is in danger of being affected by the decision. Or is this irrelevant because of the [Succession Regulation](#) ?*

## Introduction

Under French domestic law a deceased person's children (but not a surviving spouse) are entitled to equal reserved rights in a specified share of a deceased person's estate: one-half if there is one child; two-thirds if there are two; three-quarters if there are more. In general, this applies to all property situated in France at the date of death, and there is an "anti-avoidance" provision by which lifetime gifts are restored on death for calculation of the *réserve*.

This right to a compensatory claim (in French, *prélèvement*) dates back to a much earlier decision of the *Conseil constitutionnel* (CC) made on 14 July 1819. That was expressed only to benefit French nationals who were otherwise excluded by the operation of a foreign law of succession. But in 2011 the *prélèvement* of 1819 was the subject of a *Question Préable de Constitutionnalité* (QPC)<sup>1</sup> as a result of which the CC ruled that it included an unjustifiable inequality between heirs and was therefore contrary to the constitution.<sup>2</sup>

## The recent decision of the *Conseil constitutionnel*

By decision 2021-823 of 13 August 2021 the CC has approved the "Law reinforcing respect for the principles of the Republic" (also known as "against separatism") of 23 July 2021.

This includes the controversial art.24.<sup>3</sup>

## Article 24

I. — Chapter III of Title II of Book III of the Civil Code is thus amended: **\*P.C.B. 5**

1° Article 913 is supplemented by a paragraph worded as follows: — "Where the deceased or at least one of his children is, at the time of death, a national of a Member State of the European Union or habitually resides there and where the foreign law applicable to the succession does not allow any reservation mechanism protecting the children, each child or their heirs or beneficiaries may claim compensation on property situated in France as at the date of death, so as to be re-established in the reserved rights under French law, within the limits of those."

2° Article 921 is supplemented by a paragraph worded as follows: — "Where the notary finds out, during the administration of the succession, that the reserved rights of an heir are likely to be affected by the gifts made by the deceased, he informs each heir concerned and known, individually and, where applicable, before any distribution, of his right to request the reduction of the gifts which exceed the disposable portion."

II. — This article will come into force on the first day of the third month following the publication of this law and will apply to successions opened from its entry into force, including to gifts granted by the deceased before this entry into force.

Article 24 forms part of Ch.III, entitled "Provisions relating to respect for the rights of individuals and equality between women and men." It was reintroduced by the National Assembly on its final bill after having been rejected by the Senate.

The CC therefore seems to have reversed its 1819 decision. As already mentioned, that previous decision benefited only French nationals who were otherwise excluded, but that discriminated between heirs according to their nationality and was ruled unconstitutional.

### **The effect of the decision**

Under the new art.913 it is sufficient for any one of the deceased's heirs to be an EU national or habitual resident for the provision to apply; if so, all heirs will then be treated equally. The provision intends to remain "EU compliant" by making reference to the nationality of a Member State or habitual residence in a Member State.

Article 913 should therefore not apply to the typical British national habitually resident in England and Wales leaving his French property to his surviving spouse as long as none of his children is habitually resident in an EU country (or has an EU passport). But if he, or any of his children, has nationality in any Member State, or if any of his children is a national of, or is habitually resident in, a Member State, then the new decision is capable of applying. In such a case all his children, wherever resident, will have equal compensatory claims against his property situated in France.

### **Example**

Paul dies in April 2022. He was habitually resident in the UK and domiciled in England and Wales. He was a British citizen. By his will he has left his cottage in the Dordogne and a large block of rented apartments in Bordeaux to his wife Frances. His will states that he has made sufficient provision for his three children with a substantial lifetime settlement in their favour, but these do not amount to three-quarters of the property taken into account for the *réserve*. His two sons live in London but his daughter has moved to Dublin and has taken Irish citizenship.

All three children may claim a share of the French property. *\*P.C.B. 6*

If the children decide to rectify the position in some way, or if they want to leave Frances with ownership of the French property, they should do so by means of an instrument of variation within two years after the death, otherwise they (or those who are domiciled or deemed to be domiciled in the UK) may be treated as making chargeable dispositions for the purposes of inheritance tax. This may also have repercussions with French taxation.

A similar result could apply to a US citizen with property in France and a child with the required connecting factor to an EU Member State.

The proposed arts 913 and 921 have been highly criticised by academics and practitioners alike. They anticipate practical difficulties in its implementation.<sup>4</sup>

Surprisingly, the provision was not even raised in the referral to the *Conseil constitutionnel* by the members of the National Assembly and the Senate.

Therefore, it may technically still be subject to appeal to the *Conseil constitutionnel* in the form of a "Priority Constitutional Question" (QPC), which may be raised by any individual through a civil court.

### The Succession Regulation

Indeed, under the [EU Succession Regulation](#),<sup>5</sup> unless renvoi applies, the succession as a whole is governed by the law of the state of the deceased's habitual residence,<sup>6</sup> which also has jurisdiction.<sup>7</sup>

Therefore, should French law be the applicable law under the [Succession Regulation](#), art.913 is not needed.

And if French law is not the applicable law, art.913 should not apply either unless by reference to *ordre public*.<sup>8</sup> And for those who wonder what the point of the new wording of art.913 was, it is thought to have been aimed more at Shari'a successions than those governed by Anglo-Saxon jurisdictions. But it could additionally apply to a British testator whose will does not, either expressly or by implication, apply a non-French system of law to govern it.

In *Colombier & Jarre* the *Cour de cassation* ruled that the children's rights may be set aside by reference to a foreign law provided their exclusion does not:

- (1) constitute discrimination on the basis of sex, religion or the nature of parentage or
- (2) result in a situation of economic precariousness or of need for the excluded child.<sup>9</sup>

However, raising a QPC or a claim before the CJEU may take some time, as would any further appeal to the *Cour de cassation*. But one way or another the resolution of this issue is likely to require litigation.

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### Footnotes

- 1 In English, Priority Constitutional Question.
- 2 *Décision* no.2011–159 QPC, 5 August 2011.
- 3 <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070721/> [Accessed 8 December 2021].
- 4 See D. Boulanger, "La réserve héréditaire: un principe républicain?" (2020) 52 JCP N 1039.
- 5 [Succession Regulation \(EU\) 650–2012](#).
- 6 [Succession Regulation art.21](#).
- 7 [Succession Regulation art.4](#).

- 8                    [Succession Regulation](#)  
                      [art.35.](#)
- 9                    *Colombier v Jarre,*  
                      *Cass 27 September*  
                      *2017.*