Property rights, freedom of testation and protection of family members under the EU Succession Regulation

Patrick Wautelet
I. Once upon a time...

• Michael, a Luxemburg citizen, lives in Belgium with his wife Anja, a German citizen
• Michael has 2 children from a previous marriage
• Michael would like to guarantee that major part of his assets passes to his children
• Michael draws up a will choice for the law of Luxembourg – no reserved portion for surviving spouse under law of Luxemburg - and provides that 90% of his assets will benefit his children
• Can Anja challenge the will?
I. Once upon a time...

- Moran, Dutch citizen whose family lives in Israel, happily married with Anita, Spanish citizen
- Spouses live in Spain
- Moran has son from previous relationship, but lost all contact with him since 25 y.
- Moran would like to ensure that Anita obtains all his assets
- Under Spanish law, son entitled to reserved portion ('tercio de legítima')
- Moran moves to Israel with Anita - no reserved portion under Israeli law
- May son challenge the application of Israeli law?
I. Once upon a time...

- Pieter-Jan, Dutch citizen, lives in Belgium with his partner, Jean-Michel, a French citizen.
- They are not married, nor bound by partnership.
- Pieter-Jan's parents wholly disapprove of this relationship.
- Pieter-Jan would like to ensure that Jean-Michel becomes his sole heir.
- Under Belgian law, Pieter-Jan's parents are entitled to a reserved portion (art. 915 Civil Code).
- May Pieter-Jan avoid application of reserved portion by renting a small flat in England and spending enough time there to establish his habitual residence?
II. Succession Regulation: toolbox to deprive family members of protection?

- Regulation → 2 fundamental principles:
  - Habitual residence (of the deceased) (art 21)
  - Choice of law (art. 22)
II. Succession Regulation: toolbox to deprive family members of protection?

- Law designated by these 2 rules → applies to 'reserved share' (art. 23 (2)(h)): applicable law governs “the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death ...”

- This law applies even if other succession issues governed by 'hypothetical succession law' (under artt. 24/25: wills and succession agreements) → hypothetical law not applicable to reserved share
II. Succession Regulation: toolbox to deprive family members of protection?

- 2 basic principles of Regulation = 2 techniques to impact applicable law
  
  - Habitual residence (art 21) → emigration – 'walking out' of reserved share
  
  - Choice of law (art. 22) → contract out of reserved share
II. Succession Regulation: toolbox to deprive family members of protection?

- Caveat
  - Habitual residence: *simulated* habitual residence will not be taken into account → need for a real 'expatriation'
  - Choice of law restricted to law of nationality – no choice for law of habitual residence (out of fear for attack on reserved share)
II. Succession Regulation: toolbox to deprive family members of protection?

- Habitual residence and choice of law already used in national PIL rules → nothing new under the sun?
- Novelty: European level playing field → these two rules in force in all MS → guarantees that result expected by deceased respected
II. Succession Regulation: toolbox to deprive family members of protection?

• Possibility to influence outcome even greater since
  – Succession law also governs obligation to restore or account for gifts when determining shares of beneficiaries (‘Anrechnungen / Ausgleichung’ / ‘rapport et réduction’)
    – art. 23 (2)(i)
  – Succession law also possibly governs claims by beneficiaries against 3rd parties following clawbacks (controversial)
II. Succession Regulation: toolbox to deprive family members of protection?

- No express protection for family members in Regulation
  - Habitual residence: no minimum length of residence
  - Choice of law:
    - No limitation – if 2 or more nationalities, free choice for any of them
    - No caveat for children - compare
      - Italian law Art 46-2 Act Nr 218
      - Belgian Law: art. 79 WIPR
III. You've got to fight for your rights...

• Fighting for your rights – how?
  – Art. 30
  – Public policy
  – *Fraus legis*
III. You've got to fight for your rights...

• (1) Art. 30
• Application of “special rules imposing restrictions” for “economic, family or social considerations” in respect of certain assets
III. You've got to fight for your rights...

- Art. 30 useful to protect heirs?
  - Not a back door for State to apply its mandatory rules
  - No general protection of reserved share - recital 54: “… nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may be regarded as constituting special rules [meant by art. 30]”
III. You've got to fight for your rights...

• Art. 30 possibly relevant for certain rules protection surviving spouse
• *e.g.* French law - rules granting surviving spouse temporary right to remain in family home (artt. 763 / 764 French Civil Code)
III. You've got to fight for your rights...

• (2) Public policy

Possibility to refuse application of foreign law if “such application is manifestly incompatible with the public policy (ordre public) of the forum”

• Can public policy help family members against deprivation?

• Intense debate – sharply contrasting opinions

• No case law yet under Regulation (but case law in MS under national rules)
III. You've got to fight for your rights...

- A. Use of public policy in relation to rights of family members: allowed in principle
- Public policy of MS, not of EU
- MS could argue that protection of family members is fundamental principle worth being protected because →
  - Protect family members in order to foster intra-family solidarity
  - Protect States (by avoiding that family members fall dependent on the State)

→ MS could pass 'Wittgenstein-test'

ERA - Family Law
III. You've got to fight for your rights...

- MS's choice to protect family members conforted by
  - Art. 33 EU Charter Fundamental Rights: “The family shall enjoy legal, economic and social protection”
  - Succession Reg.:
    - Recital 38: Choice of law “should be limited to the law of a State of their nationality in order ... to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share”
    - Recital 50: “without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share ... of which he cannot be deprived by the person whose estate is involved”

ERA - Family Law
• B. If MS decides to use public policy to protect family members, *guidelines*?
  – Public policy = never abstract mechanism, always facts-centered
    → general application of public policy mechanism based on mere difference local/foreign law not acceptable
  – No special consideration given to origin of applicable law – public policy works the same whether applicable law is that of MS or not
  – Restrictive application of public policy → use of public policy must not contravene spirit of Regulation (liberal application of public policy undermines Regulation's principles)

ERA - Family Law
III. You've got to fight for your rights...

- C. Scenarios
- (i) Applicable law affords family members some protection, even if different from local protection → no room for public policy
- *Eg* relation Belgium / Netherlands: children and surviving spouse protected but differently
  - Protection *in rem* / *in personam*
  - Size of reserved share (NL: 50% of claim on intestacy; BE: 50%, 66%, 75% estate)
  - Statute of limitation to claim reserved share (NL: 5 years; BE: 30 y.)
  - Claim against third parties?
III. You've got to fight for your rights...

• → Method used to protect family members: not relevant

  – Allocation of property ('Noterbrecht')
  – Claim against assets ('Schuldechtlichten Anspruch')
  – Usufruct ('Fruchtgenussrecht')
Ill. You've got to fight for your rights...

- (ii) Applicable law protects family members, but protection is not automatic, upon request and at discretion of court.

- *Eg* English law – family provisions – post-factum protection, on a need based approach - *Inheritance (Provision for Family and Dependants) Act 1975*

- Room for public policy? Depends on test used by court:
  - Surviving spouse test → fine
  - Children → more difficult, because if children can provide for themselves, no claim under 1975 Act

ERA - Family Law
III. You've got to fight for your rights...

- (iii) Applicable law protects family members but only in respect of assets included in estate at death, no claw backs
  - No reason to trigger automatically public policy
  - Could be taken into account in case deceased has given away substantial portion of his assets
III. You've got to fight for your rights...

• (iv) If applicable law does not include minimum protection of family members → look at facts of the case
  – Family members are well off: no reason to allow public policy (argument: protection of family members on a need basis)
  – If family members need support: possibility to accept public policy
III. You've got to fight for your rights...

- (v) Application of public policy probably easier to justify if
  - Family members are minors? See BundesVerfassungsG 2005
  - Deceased's will leads to inequality among heirs? *E.g.* one of the children receives everything; other children whose lifestyle not to taste of deceased receive nothing → public policy as instrument of equality among heirs?
III. You've got to fight for your rights...

• Final note: if public policy applied: application of *lex fori*?
III. You've got to fight for your rights...

• (3) *Fraus legis*
• No provision – recital 26: “Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law”
III. You've got to fight for your rights...

- (3) Fraus legis
- Questions:
  - Application of 'national' mechanisms or EU fraus legis?
  - Fraus legis only when applicable law determined on basis of habitual residence or also if choice of law?
  - When is there fraus legis?
III. You've got to fight for your rights...

• When is there *fraus legis*?
  – No need to use *fraus legis* if fictitious situation – letterbox domiciliation → no habitual residence
  – What about acquisition of foreign nationality? Exceptionnally difficult to call in question
  – Expatriation – habitual residence moved → only questionable if only rationale for the move is desire to work around reserved share

ERA - Family Law
To sum up

- European Succession Regulation: toolbox for estate planner whose relationship with family is strained
- Protection mechanisms build in Regulation: only *minimum protection* of family members