
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 Luxembourg - and provides that 90% of his assets will benefit his children
- Can Anja challenge the will?

ERA - Family Law

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?

ERA - Family 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
- ERA - Family Law

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*'
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III. You've got to fight for your rights...

- MS's choice to protect family members conformed 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”

III. You've got to fight for your rights...

- 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)

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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 ('Schuldrechtlichen Anspruch')
 - Usufruct ('Fruchtgenussrecht')

III. 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
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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

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