ILLINOIS STATE BAR ASSOCIATION

SEPTEMBER 2022 VOL 60 NO 1

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Estate Planning and Probate in Illinois and France

BY LYNNE R. OSTFELD

Estate planning and probate in other countries has some similarity but is not at all the same thing with a different vocabulary. Both the guiding philosophy and procedure can vary. In fact, the testamentary possibilities in France are becoming more permissive as the traditional family structure changes.

Wills

In Illinois there are formalities which must be adhered to with a will: it must be in writing, signed by the testator, or by some person in his presence, and by his direction and attested in the presence of the testator by two or more credible witnesses. 755 ILCS 5/4-3. A will which qualifies as an international will under the Uniform International Wills Act is considered to meet all the requirements. *Id.*

In Illinois, a decedent can exclude family members from inheriting her estate, although a spouse can renounce the will. 755 ILCS 5/2-8. If the spouse renounces the will, he takes one third if there is a descendant and half if there are no descendants.

If there is no will, the statutory rules of descent and distribution apply. 755 ILCS 5/2-1. They dictate how an estate is divided among family members. If the decedent has a spouse and descendant(s), it is split 50/50. If there is a spouse and no descendants, the spouse receives the enitre estate. Likewise, if there are descendants but no surviving spouse, the descendants receive the entire estate. If there is no surviving spouse or descendants, the law looks to the parents and their descendants. When no known kindred are found, the real estate escheats to the county in which it is located and personal property to the county in which the decedent was a resident. *Id.*

In France, there are three types of wills, all of which must be written:

- A holographic will ("*testament olographique*") must be dated, signed and written by hand by the testator. Without this, it may be invalid. The will is to be kept in a safe place or left with a notary[1] who has an obligation to record it, as well as any she has prepared, on a central registry ("*Fichier central des dispositions de dernières volontés* - FCDDV"). On the death of the testator, and with a copy of the death certificate, a notary can consult the registry to learn of the existence of a will.
- An "authentic" will ("*testament authentique*") is one dictated to the notary, in the presence of two witnesses or of another notary. It is read aloud and then signed by the testator, and the witnesses. It is kept in the notary's office and recorded with the FCDDV. A will "*authentique*" is mandatory if the testator wishes to deprive his spouse of the right to remain for the rest of her life in their residence or if the testator wishes to acknowledge a previously hidden child.
- A mystic will ("*testament mystique*") is not common but is used for a person who can read but not write. She dictates her wishes to someone and gives it in a sealed envelope to a notary, in the presence of two witnesses. The notary prepares a report confirming the receipt and registers the will with the FCDDV.

Article 912 of the French Civil Code addresses a testator's options and the restrictions on how he can leave his estate. Article 913 of the French Civil Code dictates that a portion of the estate, called "*La reserve héréditaire*", has to be reserved for some protected heirs, i.e., the children and the surviving spouse. This is called "forced heirship" ("*doit de prélèvement compensatoire*"). The amount varies according to the number of the children.:

- If there is one child: decedent has to reserve 50 percent of the estate for her;
- If there are two children: decedent has to reserve 66.6 percent of the estate for them;
- If there are three or more children: decedent has to reserve 75 percent

of the estate for them.

However, a law issued by the Parliament of the European Union, effective in 2015, allows testators living elsewhere than their countries of birth or nationality the option to chose the jurisdiction whose laws control their wills. Thus, an Englishman residing in France could chose English law to govern his will, which would change the mandatory schedule of bequests. It must be specifically requested.

The French government modified Article 913 in 2021 to ensure that forced heirship cannot be ignored if a different jurisdiction is chosen to govern the will's provisions. Some legal scholars opine that this was done to ensure that daughters would receive the same benefits as sons. Forced heirship now continues to exist in France. A child not inheriting the amount dictated by French forced heirship can request compensation to be made from French assets.

Legal scholars believe that the issue is not yet settled because it contradicts the provisions of European Succession Regulation 650/2012.

Article 914-1 of the French Civil Code holds that if the deceased has no children, the surviving spouse will receive 25 percent of the estate. The surviving spouse also retains the right ("*l'attribution préférentielle*") to continue to occupy the family residence and to use the contents for the rest of her life. This is if the property was in the name of the decedent or couple only.

What remains of the estate is called the "disposable portion" ("*quotité disponible*») and can be left as the decedent wishes.

A single person without descendants may leave her assets to someone called a "*légataire universel*."

Joint wills, by which two people give to the survivor of the two of them their assets, are illegal. Art. 968, French Civil Code. They can be attacked by family members who have a greater entitlement. If the two people wish to include the other in estate planning, there must be separate wills. Further, the wills must take into account mandatory bequests.

Trusts

Illinois, being a common law state, allows people to transfer property through a trust. 760 ILCS 3/1 *et seq.* They are an instrument whereby one party, the trustee, holds legal title to property at the request of another (the settlor) for the benefit of a third party (the beneficiary. The beneficiary has equitable title. There are as many different types of trusts as reasons to create them: to delay payment of taxes until the family spends the money down to a degree; to care for a handicapped child; to make periodic contributions to favored charities; to care for a pet; to provide for a spendthrift or addicted family member. The list continues.

Trusts do not exist in civil code countries, like France. They are looked upon with suspicion, as a means to avoid paying taxes. They are referenced only in the tax code. (29th of July 2011, Article 792-0 bis). French law has slowly begun to recognize Trusts set up abroad, but they have to be in accordance with French laws, which involve forced heirship.

However, since 2016 and the case of the renowned French composer Maurice Jarre (Lawrence of Arabia, Ryan's Daughter, Topaz, and Doctor Zhivago, among many others), French courts will recognize foreign trusts holding French real property. *(CA Paris, 11 Mai 2016, no. 14/26247).* Forced heirship to pass French real property according to French laws of inheritance would not be implemented where a trust valid where it was created was the owner of the property. Further, Jarre was then an American citizen, a permanent resident of California, and spent most of his time there. Jarre's real property in France would go to his (second) wife and children in the U.S., according to the terms of his trust, and the French children from his first marriage would not receive a share, though they were otherwise provided for.

This did not hold for the case of the famous French singer, Johnny Hallyday. The same arrangement was made and fought over. The trust did not work against the French children fighting for the real property in France because the court determined that Johnny was not a resident of the U.S. but a resident of France. Further, the trust documents may have been defective on their own.

It is unknown how a court would now decide an inheritance dispute over real property in France held by a foreign trust which would exclude children, wherever located.

Governing Law

The law in Illinois fixes the jurisdiction in the State where the decedent resides, even if property is located elsewhere or the testator passes some months each year elsewhere. Real property is governed by the law of the state where it is located.

In France it is similar but important for a testator to take into account the European Succession Regulation 650/2012. This allows testators to choose the law of their nationality to apply even if residing in France, or French law if residing elsewhere. A choice of jurisdiction other than France also changes the applicable laws so that what is illegal in France, such as joint wills, would be legal if the joint will was governed by German law, where it is legal.

Procedure

In Illinois, whoever has the decedent's will must file it in the county of the decedent's residence immediately after his death. 755 ILCS 5/6-1. The named executor must file the petition to open a probate case in the county of the decedent's residence within 30 days of learning that he has been named in the will to act, or he must declare his refusal to act. 755 ILCS 5/6-3. This must be done in the court of the proper county. 755 ILCS 5/6-2.

Ancillary probate needs to be opened in every state where real estate owned by the decedent is located. Inheritance of real estate is subject to the law of the situs.

A disappointed heir or legatee can contest the will but must do this within six months of it being submitted to probate. 755 ILCS 5/8-1. The reasons are numerous but generally go to the competency of the testator and whether the will sets forth his true intents.

Small estates worth less than $100,000 do not need to be submitted to a probate court but can be handled by heirs or legatees through a "Small Estate Affidavit." These seem to be disfavored by banks.

Whether there is a will or not, the person petitioning to open an estate submits to the court an Affidavit of Heirship, made

under oath. This is accepted unless attacked and it can be later revised. The court appointed executor must notify the heirs and legatees of the decedent's passing and the opening of a probate estate. He publishes information about the opening of the estate, in a newspaper of general circulation. This gives notice to creditors of the opening of the estate, but can also be used to notify unknown heirs or heirs with unknown addresses.

She then collects the decedent's assets, determines his debts, and pays his bills, including all tax liabilities, both personal and for the estate. After a six-month period during which creditors can make claims against the estate and disgruntled heirs and legatees can contest the will, she is free to distribute his assets, according to the provisions in the will or in the statute.

In France, heirs only need to go to a notary when there is real property to be transferred. They can otherwise handle the distribution of the decedent's assets by family agreement. However, declarations of taxes due on the inheritance must be made to the taxing body within six months of death (one year for heirs not in France) and paid, or third parties will not release the funds they hold.

Although a notary is often employed to handle what is called "probate" in Illinois, disputes are handled in a civil court by an attorney. This happened in a case in France in which the author was involved with one of her French colleagues.[2] There, a man's mistress had gotten him to make out a new will leaving all that was possible to her, and this only three months before he was declared incompetent due to Alzheimer's. The French attorney was able to get a court to void the will by presenting evidence of medical certificates and written testimony that the man was mentally incompetent well before the new will was drafted. Because of the restrictions on inheritance in France, lawsuits are not common.

An heir or legatee in Illinois must approve the handling of the probate estate and must submit a receipt for what she receives. She can disclaim her inheritance. 755 ILCS 5/2-7. This must be done in writing and state what she is disclaiming. It must be carefully done or the disclaimer may lead to a legal conclusion that she predeceased the decedent and her children will not inherit her share.

In France, an heir or legatee must accept the inheritance or renounce it. Acceptance also means accepting the decedent's debts, at least to the extent of the inheritance. Renunciation is a formal undertaking requiring the heir/legatee to make a formal declaration with local court authorities. Renunciation does not block an heir from putting his children in his place to receive his inheritance.

In both Illinois and in France the heirs need to gather the decedent's financial records, including debts. Both jurisdictions will need to know who the decedent is/was and who is to inherit, with or without a will.

To work with a French notary, the family will have to provide a number of documents, in addition to the death certificate: birth and marriage certificates; the original of his national identity card or passport; the original of a family record book ("*livret de famille*") which lists children; information for the notary to complete his civil status document ("*état civil*"); the original of the will if the notary does not have it; copies of documents evidencing gifts to his spouse and children. When heirs are unknown professional genealogists are hired to find them.

In Illinois the executor has to pay, from the estate, the decedent's tax liabilities as well as the estate tax, depending on the value of the estate.

In France, declarations must be made to the tax authority within six months of death and the estate tax is based on the degree of kinship or relationship of the beneficiary to the decedent. Taxes are paid by the heir/legatee generally through a deduction from their inheritance.

Unclaimed Assets

In Illinois, property presumed abandoned for a period of time must be turned over to the Treasurer of the State of Illinois. The amount of time before this happens and what is then done with the property is set forth in great detail in the Revised Uniform Unclaimed Property Act, 765 ILCS 1026/15-101.

In France, inactive accounts are subject to the Eckert Law, or Eckert Act, Loi No. 2014-617 of June 13, 2014, with an effective date of January 1, 2016. What is considered to be an inactive account depends on what it is, e.g., a bank account, an investment account, or a life insurance policy. A bank account is inactive if there is no activity or contact by the holder during a period of 12 consecutive months. It is five years for certain investment accounts and 10 years for life insurance. The financial institution must do a yearly determination that the owner exists. The owner must respond to the request for proof of existence within six months, or 24 months after the death of a person in title. The money must then be deposited with the Caisse des Dépôts et Consignations ("Deposit and Consignment Fund"). If not claimed by those having a legal right to the money, they go to the French Republic after a delay of 30 years from the date of deposit.■

Lynne Ostfeld is a solo practitioner with her primary office in Chicago. She has a second office on a family farm in Peoria County, Illinois, and is associated with the law firm DMALEX Avocats in Paris, France. Ostfeld has a general civil practice and concentrates on legal assistance to small and medium sized companies and individuals, in the U.S. and in France. In 2017, Ostfeld was awarded the Medal of Knight of the French National Order of Merit for her work for the French in the Midwest, as legal advisor to the Consulate of France in Chicago.

1. A notaire, or notary, in France is not at all the same as a notary public in Illinois. She has an education similar to that of a lawyer but is a public officer appointed by the Minister of Justice, receiving government authority to authenticate acts. In France, the use of a notary is mandatory for certain documents such as a marriage contract, gifts between spouses, inter vivos distributions, and the transfer of real estate. Notaries must keep documents for 75 years. The number of notaries eligible to apply a "seal" to a document is limited by the government. A notary buying a seal from a retiring notary must adhere to that obligation.
2. http://leparticulier.lefigaro.fr/article/testament-annule-pour-cause-de-maladie-d-azheimer/.