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The case of a succession governed by US law

Succession to property in France[*]

Caroline DENEUVILLE
Notary in Paris

TOPIC

Pursuant to EU Regulation no. 650/2012 (Successions Regulation*),* the notary in charge of an international succession applies the foreign law to both movable and immovable property located in France. When the foreign law is akin to French law, inspired by the Napoleonic Code, no great difficulty arises in dealing with the succession as the directions provided by the European Regulation are completely effective.

When the succession is governed by Anglo-American law, inspired by common law*,* the notary deals with "a succession to property", in which administration prevails over devolution. The administrator is the key figure and acts both for the heirs and the creditors, to whom he is liable.

This was how the succession of Mrs Crawley, which was governed by the law of the State of Maryland, was dealt with.

After presenting the case, we will examine the main questions, and the documents drawn up to deal with this American succession, before addressing the tax aspects.

Case Presentation

Mrs Crawley, who was a native of France, had obtained American nationality by naturalisation in 1949. She had lived for decades in the USA and lastly in the State of Maryland, where she died at the end of 2016, at the age of 90.

She left her two children, Henry and Matthew, who she had had with her predeceased husband. They were both single, also lived in Maryland, and both suffered from a mental illness.

She owned an apartment in Paris which she had inherited from her French family.

Document Analysis

Mrs Crawley had organised her succession for the benefit of her two sons, by making the following dispositions, on different dates during 2001:

- a will in which she appointed her accountant as executor, with the mission of liquidating the assets in her estate. The proceeds were to be paid to her attorney*,* in his capacity as trustee of the trust below;
- a revocable trust of which she was the beneficiary during her lifetime, "*The Mrs Crawley revocable trust*". She set up the trust by contributing her property located in Maryland to it. A trust of this kind becomes irrevocable on the settlor's death. This trust contained the following disposition of property upon death: Mrs Crawley decides that after her death, her trustee shall

[*] A distinction is made between « succession aux biens » of common law countries and « succession à la personne » of civil law countries

divide the assets remaining after payment of liabilities, taxes and fees, in two equal shares for her two sons, i.e. by giving half to each of the two trusts created for this purpose, below;
- two trusts drafted in identical terms: "*The Matthew special needs trust"* and "*The Henry special needs trust".* The assets of these trusts were to be used to pay for their treatment and their needs throughout their lifetime. The trustee of these trusts is a non-profit entity that provides services to ill people. In these trusts, Mrs Crawley adopted the plan prepared by said entity to take care of her children and to administer the property *(Plan Life Trust, Master discretionary trust agreement).* Finally, pursuant to these Special needs trusts, Mrs Crawley decided that upon the death of the predeceasing son, the remainder of his own trust would go to his children, or if there were no children, to his brother's trust. Upon the brother's death, the remainder of his trust would go to his children, or if there were none, to Mrs Crawley's sister, and if the latter had predeceased him, to her children or their descendants.

According to all these related dispositions, the testamentary executor therefore had to liquidate the assets in Mrs Crawley's estate; the proceeds from this liquidation were to be placed in her revocable trust; the trustee of this trust was then to pay half to the trust created for Henry and the other half to the one created for Matthew, the latter being the exclusive beneficiaries of the assets put in their trust, both in income and capital, for their entire lifetime.

SOLUTION

I. Administration of the succession: the main questions

After determining the law applicable to the succession, the administrator's powers were implemented.

A. Law applicable to the succession pursuant to Article 83-4 of the Successions Regulation no. 650/2012

First, we checked the scope of application of the will, i.e. whether it also applied to the immovable property located in France. Mrs Crawley specified that she bequeathed *all her movable and immovable assets, of whatever nature, and wherever they were located,* to her revocable trust[1]. The will did not contain any restriction on its scope of application, and her attorney confirmed that no external factor contradicted this assertion.

Once the scope of application had been checked, Article 83-4 of the Successions Regulation was applied: "If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession."

As the will had been made prior to that date, the first condition was met. As for the second, there was no doubt that the dispositions were drafted in accordance with US law, the law of Mrs Crawley's nationality (appointment of an executor having extensive powers of administration and distribution, bequest to a trust, etc.).

As both conditions were met, US law was deemed to have been chosen[2]. The French language contains two words: "*présumé*" (presumed) and "*reputé*" (deemed). For anything presumed, proof to the contrary is, in principle, accepted, whereas for anything deemed, it should not be. This would appear to be confirmed by the wording of Article 28-2 of the Matrimonial Property Regimes Regulation which also contains this word "*reputé*".

The succession was therefore governed by US law, in this case the law of Maryland, the law of the territorial unit with which the deceased had the closest connection (Successions Regulation, Art. 36-2-b).

By applying US law, we were dealing with a "succession to property" rather than "a succession to the person"[3].

1. Calligan M. and Deneuville C, "Présentation des trusts les plus courants en droit américain", Solution Notaire Hebdo, 21 March 2019, no. 10.

2. Wautelet P., comm. on Art. 83, spec. no. 32 *in* Bonomi A. and Wautelet P., *Le droit européen des successions. Commentaire du Règlement UE, no. 250/2012 of 4 July 2012,* 2nd ed., 2016, Bruylant.

3. In France, a distinction is made between « succession aux biens » of common law countries and « succession à la personne » of civil law countries. Sauvage F., "L'option et la transmission du passif dans les successions internationales au regard du règlement européen du 4 juillet 2012", *in* Khairallah G. and Revillard M. (dir.), *Droit européen des successions internationales,* 2013, Defrénois.

An American succession or a succession of common law system can be likened to a French succession accepted to the extent of the net assets. In both cases, there is a person responsible for the administration of the assets, for both the heirs and the creditors; an inventory and public notice procedures; and a judge informed of the various stages in the administration of the succession, etc.[4]

In this case, the law of Maryland governed the entire succession, including the executor's powers of administration, particularly for the sale of the assets (Successions Regulation, Art. 23, 1 and 2 f).

B. Powers of the executor of the will according to the law of Maryland

1. Applicable rules

In both US and French law, the executor derives his powers from the testator, as set forth in the will. However, he may not exercise such powers (except for conservatory acts) until letters of administration have been obtained.

These letters of administration are issued by the judge of the Court in the place where the succession is opened, in an order handed down after the will has been granted Probate. In general, the judge grants Probate and issues the letters of administration in the same order, but this is not always the case. In fact, they do not serve the same purpose, as Probate establishes that the will has been approved, whereas letters of administration enable the administrator to take the assets in order to exercise his powers.

To deal with the estate in Maryland, no Probate was required as Mrs Crawley had transferred all the property she owned in this State to her revocable trust[5]. To deal with the estate in France, however, we had to establish that the executor of the will could exercise his powers. The American attorney therefore applied to the Office of the Register of Wills (which is part of the Court) for Probate and letters of administration. The letters of administration were issued the day after Probate. This gave us proof, in accordance with the US law applicable to the succession, that the executor was entitled to exercise his powers.

According to Article 3, g, of the Successions Regulation, the order granting letters of administration could be considered equivalent to a decision.

We therefore had an American decision enabling the executor to take the assets in order to exercise the powers granted by the testator.

2. Could the executor sell the apartment in Paris with the American letters of administration?

Findings. To answer this question, we established the following:

1. The EU Regulation provides for the recognition of decisions between member States only.

2. In the USA, it emerged that recognition between States was not total or systematic. If letters of administration are granted in the State in which the deceased resided, for example in Maryland, and if the estate includes a property in New York for example, the executor must obtain ancillary letters of administration in New York[6].

Conversely, where a property located in the State of Maryland is part of a succession opened in another State, it is not necessary to obtain ancillary letters of administration in Maryland. In this State, the letters of administration issued by the court in the State of residence are honored, but a file must nonetheless be submitted to the Court in the place where the property is situated, containing a certified copy of the letters of administration and the will, as well as an inventory of the assets and a list of beneficiaries. Furthermore, a person must be appointed to act in Maryland in the event of any dispute and public notice must be given for any creditors, etc.[7].

Therefore, recognition of letters of administration varies from one American State to another. And the ancillary letters of administration, when they are required, as in New York (and in a number of other US States), are only granted in the light of the letters of administration issued by the court in the State in which the deceased resided.

3. In England, the situation is more straightforward: when an English court grants Probate and entrusts administration to the executor[8], this Probate only applies in England and Wales.

4. See the highly informative site of the Office of the Register of Wills, https://www.maryland.gov/Pages/default.aspx.
5. Michael Calligan, aforementioned, note 1.
6. New York Surrogate's Court, SCPA, Surrogate's Court Procedure Act, art. 16.
7. Maryland Code annotated, Estates and Trusts, art. 5-503 and 5-504.
8. "*The last will of X was proved and registered before this Court. The administration of X's estate is granted by this Court to the following executor: Y...*".

Conversely, when a succession opened in another State includes a property located in England, an application for letters of administration is made to the English judge to be able to administer and dispose of this property[9].

When he issues the letters of administration, the judge agrees to be a sort of management controller, i.e. the person to whom the executor of the will, the heirs and the creditors can refer in the event of any difficulty.

4. In Anglo-American countries, the administration is governed by the law of the locality of the property. It is therefore understandable why, when issuing the letters of administration, the judge considers that his role cannot extend beyond the borders of his jurisdiction. In short, if the letters of administration are considered to be a decision within the meaning of the European Regulation, it was difficult to extend their scope of application beyond the scope anticipated by the issuing judge.

Deductions from the findings. In light of all these factors, we considered that the executor of the will could not take and sell the apartment in France solely with the American letters of administration.

We looked for the closest French equivalent to American letters of administration, as permitted by the Regulation, in whereas clause no. 17.

According to the US law applicable to the succession, the beneficiary children do not have seisin; they cannot take the assets, which are administered by the executor. And the executor needs letters of administration to take the assets. This situation can be likened to a French estate administered by an executor empowered to dispose of the assets in the absence of any forced heir. In this case, the executor must be "*envoyé en possession*" (sent into possession) by an order of the judge to carry out his mission (unless such powers were conferred by an authenticate will, i.e. a will made and signed with a civil law notary).

Therefore, an application for "*envoi en possession*" of the executor was made to the *Tribunal de Grande Instance* in Paris which had jurisdiction pursuant to Article 10 of the Regulation.

A decision granting "*envoi en possession*" was handed down by this court pursuant, in particular, to Article 1030-1 of the French Civil Code[10].

Lastly, it shall be noted that the executor is responsible for paying the debts. It may be advisable, or even mandatory if the law applicable to the succession so provides, to give public notice in France in order to inform any creditors. In any event, this measure must be proposed to him.

9. In England, there is no public notice to creditors, but the executor is nonetheless responsible for settling claims to the extent of the value of the estate.
10. Several decisions have been handed down since in other cases.

C. Sale of the property by the executor of the will for the estate

Once the decision granting "*envoi en possession*" was obtained, the executor of the will sold the property which was part of the estate. The only particular feature here was that no prior certificate of ownership was drawn up. As the children did not have seisin to sell the property, no certificate was issued in their name. And we did not draw up a certificate in the executor's name either, since he is not the owner within the French meaning of the term, particularly as the testator had no *animus donandi* as far as he was concerned.

The executor therefore proceeded with the sale, on behalf of the estate, without registering any certificate of ownership with the land registry.

This is also the case when a property is sold by a curator in a vacant succession, or by an executor empowered by the testator in the absence of any forced heir. In these cases, the sale is made by the administrator of the estate in view of the title deed of the deceased[11].

II. Administration of the succession: documents and tax

A. Documents

To settle this succession, the following documents were prepared:

1. A copy (certified true to the original by a competent person under local law whose signature was legalised) of the wills and trusts mentioned above (§ "Document Analysis") was filed in the notary's original records to establish the chain of dispositions made by Mrs Crawley and to show that they were made for the exclusive benefit of her two children.

This document records the admissibility and validity of the dispositions in substantive terms and as regards form, in accordance with Article 83-3 of the Successions Regulation.

The letters of administration issued by the foreign court were appended to it to show that the executor could, according to the foreign law applicable to the administration of the succession, exercise the powers conferred by the testator[12].

11. Art. 1939 of the AMC Bulletin, Association mutuelle des conservateurs des hypothèques, reproduced in the *Guide de la publicité foncière,* no. 804; JCl. Notarial Formulaire, V° Attestation notariée, fasc. 10.
12. The death certificate, the statement from the attorney concerning the scope of application of the will and the receipt of letters of administration between American States, the certificate of naturalisation of the deceased and a certified translation of the documents required to apply for "*envoi en possession*" were also filed.

2. An application was made to the French Court (Tribunal de Grande Instance) in the locality of the property for the "*envoi en possession*" of the executor of the will.

3. The decision granting "*envoi en possession*" issued by the Court was filed in the notary's records.

4. The property was sold by the executor. In the paragraph on acquisition of ownership, mention was made of the registration of the deceased's title of acquisition, specifying that no certificate of ownership had been drawn up by reference to the aforementioned *Guide de la publicité foncière*[13].

After obtaining the document certifying registration of the inheritance tax return and payment of duties, the proceeds from the sale were sent to Mrs Crawley's attorney in his capacity as trustee, in accordance with the will.

B. Tax

1. For the succession

Pursuant to the Franco-American convention for the avoidance of double taxation with respect to taxes on estate of 24 January 1978, as amended on 8 December 2004, and particularly Article 5 thereof, the property, which was the only asset located in France, was taxable in France.

In the inheritance tax return, we recounted the chain of dispositions of property upon death contained in the will and the trusts, in order to show that the two children were indeed the only beneficiaries of the succession. Accordingly, and pursuant to Article 792-0 bis of the French Tax Code, the inheritance duties were calculated at the direct line rate provided for by Article 777 of the same code. The certificates drawn up by the doctors of Matthew and Henry concerning their mental illness which prevents them from working in normal economic conditions were appended to the declaration of succession. Therefore, and in accordance with Article 12 of the convention, they benefitted from the ordinary law abatement and the abatement for disabled people (Tax Code, Art. 779). The declaration was registered with the tax centre for non-residents.

2. For the sale

The capital gains tax payable by the children, who received the proceeds from the sale of the property, was calculated by comparing the sale price of the apartment with the value of the same property entered in the declaration of succession and increased by the inheritance duties. An accredited representative was appointed to guarantee payment of this tax.

13. See note 11