WILLING and ABLE

Do you need a separate will to cover your French assets and if so who should draft it? **Daniel Harris** has the answers

Your wills are arguably the single most powerful contracts you will ever sign in your life. A will should look like a simple contract, but in reality it is an extremely complex document that is easy to get wrong. Most people believe their circumstances are straightforward, but even an unmarried British owner of French assets, without children, is faced with myriad options concerning the succession (who gets what when you die) and taxation of their French and UK estates.

Factor into the equation spouses with different nationalities and/or domiciles, children from previous relationships, French ownership structures, forced heirship, taxation considerations, matrimonial property regimes, trusts, adoptions, family conflicts, and many other modern lifestyle variables and the scope to get it wrong increases exponentially.

Not only is the drafting of wills to cover French assets best avoided by the enthusiastic DIYer, it is a specialist job, requiring training beyond that of the standard French *notaire* or UK lawyer.

Before I look at who should be drafting your French will, I should mention that there is no such thing as 'UK law' and so when I refer to UK law I mean the laws of England and Wales, or Scotland, or Northern Ireland, as appropriate to the individual.

What about Brexit?

Succession is probably the only area of law that will be unaffected by Brexit. The UK opted out of the 2015 EU succession regulation 650/2012, Brussels IV, which means it is already treated as a state outside the EU so there will be no change to the application of the rules after the UK leaves. As for inheritance tax, this is governed by the 1963 double taxation convention between France and the UK, which predates the EU, so there is no reason to believe this will change either.

Common myths

One of the most common misconceptions is that for a will to be valid in France it must be drafted by a French *notaire*. This is categorically untrue. Because France signed the Hague Convention on Testamentary Dispositions in 1967, a UK will drafted for a UK national is as valid in France as a French will. It does not have to follow the French formal validity rules (of either being handwritten or drafted by a *notaire*), it does not need to be in French and it does not need to be stored at the French will registry.

The other misconception is that the most qualified person to draft a will covering French assets is a French *notaire*.

So who should draft my French will?

Since the introduction of the Brussels IV Regulation it has been possible for a UK solicitor to make an election, if appropriate, for the laws of the client's nationality to apply to the devolution of their property. So a UK solicitor has the power to make UK law apply to French property.

In which case, who is best placed to draft the will? I would suggest a UK lawyer would be preferable to a French *notaire* who has no training in UK law. Language and cultural barriers are also bypassed this way and, importantly, UK solicitors are required to have a minimum £2m insurance per claim to cover mistakes, whereas a French *notaire* may not carry any more than token public liability insurance. So if a UK solicitor makes a mistake, his or her insurance pays, whereas if a lawyer with little or no insurance makes a mistake, your loved ones may pay. By way of balance, a specialist French lawyer may be better placed to advise on complex French legal structures.

One will or two?

Essentially there are three options:

1) A single will covering your worldwide estate
2) Separate wills for your UK and French assets drafted by two different lawyers
3) Separate wills drafted by the same UK specialist.

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If you conclude that a UK lawyer is best qualified to draft your will according to relevant UK law, this leaves a choice between one will or two, drafted by the same UK specialist. There are benefits to both. Single wills have certain advantages. For example, because there is only one will, there is no danger of one of the wills accidentally revoking (cancelling) the other, or one will having a revocation clause which is only partially effective, potentially leaving two conflicting wills covering the same assets. A single will may also be less expensive and it is easier and faster to change, although single wills are very restrictive.

An advantage of having two wills is that you can tailor the language of the 'French' will to be easier to translate and it is easier to incorporate compatible French legal structures into the planning when there are two wills. Above all, having two wills provides for greater flexibility, allowing the draftsman to make tax-efficient provisions to appropriate beneficiaries in one will, which can be balanced to other beneficiaries in the second will.

Finally, with two wills the administration is faster because it is possible to progress both administrations at the same time, instead of finishing one jurisdiction before starting the other. This can be important, as in both the UK and France it is necessary to pay the tax within six months and failure to do so can lead to penalties and/or interest payable on late tax.

To summarise, if you are a UK national hoping to avoid French succession law by electing for UK law to apply to your French assets, our advice is to have separate UK and French wills drafted by a UK cross-border specialist. ■

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