

PROTECTION OF THE SURVIVING SPOUSE IN FRENCH  
LAW

*PROTECCIÓN DEL CÓNYUGE SUPÉRSTITE EN LA LEGISLACIÓN  
FRANCESA*

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**ABSTRACT:** While French inheritance law has recently sought to give everyone more freedom to anticipate the transmission of their estate, it still guarantees to the children a reserved portion in his estate. This guarantees the deceased's children a minimum share in his/her estate. However, the mechanisms protecting this reserve are subject to legal adjustments when spouses wish to organize the protection of the couple's survivor, either by submitting to a conventional matrimonial regime or by giving themselves gifts that improve the legal succession of the spouse. This ensures a balance between the protection of the spouse and that of the compulsory heirs. Not seeming to be satisfied, several famous French people living abroad have recently sought to escape French law in order to be able to give their surviving spouses an advantage beyond these limits, at the expense of children of first French marriage. Thus, the protection of the spouse may be both a reason to submit to French law as well as a motivation to try to escape it.

**KEY WORDS:** Conventional matrimonial regime; surviving spouse; reserve; gift.

**RESUMEN:** *La ley francesa de sucesiones ha buscado recientemente dar a todos más libertad para anticipar la transmisión de su patrimonio, sin embargo, todavía garantiza a los hijos una parte reservada. Esto asegura a los hijos del fallecido una participación mínima en su patrimonio. No obstante, los mecanismos de protección de esta reserva están sujetos a ajustes legales cuando los cónyuges desean organizar la protección del cónyuge sobreviviente, ya sea sometiéndose a un régimen matrimonial convencional o entregándose obsequios que mejoren la sucesión legal de éste. Esto asegura un equilibrio entre la protección del cónyuge y la de los herederos obligatorios. Sin parecer satisfechos, varios franceses famosos que viven en el extranjero, han intentado recientemente escapar de la ley francesa para poder dar a sus cónyuges supérstites una ventaja más allá de estos límites, a expensas de los hijos del primer matrimonio. Por tanto, la protección del cónyuge puede ser tanto un motivo para someterse a la ley francesa como una motivación para intentar escapar de ella.*

**PALABRAS CLAVE:** Régimen matrimonial convencional; cónyuge supérstite; reserva; obsequio.

**TABLE OF CONTENTS.- I. INTRODUCTION.- II. SOLUTIONS FOR TRANSMITTING ALL THE DECEASED'S ASSETS TO THE SURVIVING SPOUSE.- 1. By gifts or will.- 2. By matrimonial regimes.- III. ESCAPE THE FRENCH LAW.- 1. Jurisprudence.- 2. Prospective law.**

## **I. INTRODUCTION.**

In French law, among the three models of couples - the marriage<sup>1</sup>, the civil pact of solidarity<sup>2</sup> and the *concubinage*<sup>3</sup> - only the latter provides legal protection for the surviving companion. The rights granted to the surviving spouse depend on the family composition of the deceased at the time of death.

If the deceased leaves children and a surviving spouse, they must share the estate. But, sometimes, couples want the surviving spouse to receive the entire estate, without sharing it with the children, although French inheritance law guarantees them a reserved portion of the deceased's estate. Something which isn't always well accepted by both French and foreign couples.

However, there are several ways for a person to transfer all of his/her assets to his/her spouse. These solutions may encourage foreign couples living in France to choose to comply with French law. Conversely, it seems that these solutions sometimes seem insufficient to other couples who will try to escape French law to escape the reserved portion of the succession.

## **II. SOLUTIONS FOR TRANSMITTING ALL THE DECEASED'S ASSETS TO THE SURVIVING SPOUSE.**

In 2006<sup>4</sup>, French inheritance law sought to give everyone more freedom to anticipate the transmission of their estate. Thereby, the mechanisms protecting the reserved portion were subject to legal adjustments. It became possible to transmit all the deceased's assets to the surviving spouse, by gift or will or by submitting to a conventional matrimonial regime.

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1 Art. 143 to 226 of the Civil code.

2 Art. 515-1 to 515-7-1 of the Civil code.

3 Art. 515-8 of the Civil code.

4 Law of 23 June 2006 entered into force on the 1<sup>st</sup> January of 2007.

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## 1. By gifts or will.

When a disposing party has children, he/she can only freely dispose of the part of his/her estate, which isn't reserved by legislation: the disposable portion<sup>5</sup>. However, his/her spouse can be gratified more than any other person, because there is a special disposable portion between spouses. This allows the spouse to benefit of lifetime use on the reserved portion<sup>6</sup>. But sometimes, the disposing party, by a will or donation<sup>7</sup>, decides to transmit to his/her spouse all his/her succession. The sanction of the impingement on the reserved portion is the reduction of the excessive part<sup>8</sup>. But, since 2006, this reduction is only in value<sup>9</sup>. The spouse will receive all the estate of the deceased and, if the children claim it<sup>10</sup>, they will be entitled to a financial compensation. This will not always be the case if the couple decides instead to resort to matrimonial regimes.

## 2. By matrimonial regimes.

In French law, couples can, by contract, opt for a conventional matrimonial regime called universal community<sup>11</sup> which allows all the property of the spouses to be common. Often, it also stipulates the allocation of the entire community assets for the case of survival, for the benefit of whichever one survives.<sup>12</sup> The children of the first spouse deceased don't inherit any property, because his/her estate is empty.

If the children are all common to the couple, they can't reclaim anything<sup>13</sup>, they will have to wait for the death of the second spouse to inherit from him/her. On the contrary, if there are children from a first bed, they will be able to exert a specific action. It will allow them to treat the matrimonial advantage as a gift and to

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5 Art. 912 of the Civil code.

6 Art. 1094-1 of the Civil code: "If a spouse leaves children or descendants, born of the marriage or otherwise, he /she may dispose in favour of the surviving spouse, either in ownership what he/she may leave to an outsider, or one-fourth of his/her assets in ownership and the other three-fourths in usufruct, or else the totality of his/her assets in usufruct only".

7 In order to transmit all his/her patrimony to his/her spouse, the disposing party can either use a will or grant him/her a donation between spouses, which is considered an inheritance pact. The latter, granting him/her rights in his/her future succession, is considered an inheritance pact. To ensure recognition of the validity of the latter, foreign couples may choose French law as an inheritance law. Failure of doing this, will make the validity assessed in the light of the law which was intended to apply to the succession of each disposing party on the date of the act.

8 Art. 920 of the Civil code.

9 Art. 924 of the Civil code.

10 Art. 921 of the Civil code.

11 Articles 1526 and 1527 of the Civil code.

12 Art. 1524 of the Civil code.

13 Art. 1527 of the Civil code.

ask for the reduction of its excessive portion<sup>14</sup>. As in the previous case, they won't recover any property of the deceased, but will get a compensation.

This matrimonial regime was very often adopted before 2019 by English couples coming to France to buy a house. At the time, the rules of private international law concerning matrimonial property regimes were established by the Hague Convention of 1978<sup>15</sup>. It allowed couples to choose to apply the law of the country in which that immovable property was situated.<sup>16</sup> Furthermore, the French Civil Code allowed spouses which decided to submit their matrimonial regime to French law to opt for a conventional regime. Choosing the universal community, these English couples were ensured that their home in France would be considered as a common good attributed out of succession to the survivor. In addition, any children of a first survivor's bed could not exercise the action of reduction, the latter being attached to the applicable law of succession, generally the English law of succession<sup>17</sup>.

Thus, these English couples benefited from the possibilities of transmission offered by the French law of matrimonial regimes, while escaping the limits resulting from the French succession law.

On the other hand, some French couples now seem to want to escape French law in order to no longer be required to respect the reserved portion of the succession.

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14 Art. 1527 of the Civil code: "The advantages which either spouse may draw from the clauses of a conventional community, as well as those which may result from a mingling of movables or of debts, are not deemed donations. However, if there are children not born of both spouses, any agreement which has as a consequence of donating to one of the spouses beyond the portion regulated by article 1094-1, in the Title 'Donations Inter Vivos and of Testaments' is ineffective as to the whole excess; but mere profits resulting from common work and from savings made from the respective although unequal incomes, of both spouses, are not considered as an advantage made to the prejudice of the children of another bed".

15 Hague Convention of the 14 march 1978 on the law applicable to matrimonial property regimes.

16 The Hague Convention provided for a principle of the uniqueness of the applicable law, but with one exception: the spouses could choose their location for the immovable goods. For spouses married from January 29, 2019, the applicable law is determined on the basis of Regulation (EU) 2016/1103 of 24 June 2016 - known as the Matrimonial Property Regimes Regulation - which enshrines the principle of the uniqueness of the applicable law.

17 Seized of an action for reduction concerning an inheritance opened in 2013, (before the regulation of July 4 2012 n° 650/2012 came into force on August 17, 2015), the Court of Cassation considered that, since this action only allowed compensation, and not recovery in kind of the property transferred, it was of a movable nature and, therefore, fell within the jurisdiction of the courts of the country where the deceased had his/her last domicile: Cass. 1<sup>st</sup> civ., 14 April 2021, n° 19-24.773, FS-P: JurisData n° 2021-005372. For estates opened after August 17, 2015, the competent court to examine the action for reduction will be that of the State in which the deceased had his/her habitual residence at the time of death (except *professio juris* under certain conditions).

### III. ESCAPE THE FRENCH LAW.

This intention to escape the reserved portion by submitting to a foreign succession law has been especially proven through the situation of two famous French artists. They all had children in France from a first union. Then they went to live, at least partially, in California with a new wife to whom they transmitted all their inheritance, as well as to their common children. They deprived their first children, adults, who remained in France, of all rights. Two of these cases have already been submitted to the Court of Cassation.

#### I. Jurisprudence.

The Court of Cassation ruled in 2017<sup>18</sup> on the successions of two artists, the best known of which was Maurice Jarre. He was a composer and, at the end of his life, lived in California. His succession was therefore subject to Californian succession law, which doesn't know the reserved portion of the succession. The French children of this artist asked the Court of Cassation to rule out the application of this law with regard to the infringement of the French international public policy<sup>19</sup>. But the Court of Cassation considered that the fact that the application of a foreign law to an estate infringes the reserved portion doesn't constitute a sufficient reason to exclude the application of this law.

The scope of these decisions is discussed. According to some authors, the reserve reserved portion, basis of internal public policy of succession, is not, except under certain conditions, a rule of French international public policy<sup>20</sup>. But the Court of cassation was not so categorical and specified in the two decisions that a foreign law ignoring the reserved portion « can be excluded only if its concrete application, in the present case, leads to a situation incompatible with the principles of the French law considered as essential » and verified that the French heirs were of legal age and weren't in need.

More recently, a very famous singer, Johnny Halliday, passed away and made the same arrangements as the two composers. This case, whose parties seem to have found a settlement, was the occasion of a public debate on this affair between those who took the defence of the young widow – and the singer's

18 Cass. 1<sup>re</sup> civ., 27 September 2017, n°16-17.198 et 16-13.151, D. 2017, p. 2185, note GUILLAUME J.; D. 2018, p. 966, obs. CLAVEL S.; D. 2018, p. 2384, obs. GODECHOT-PATRIS S. and GRARE-DIDIER C.; AJ fam. 2017, p. 595, 510, obs. BOICHÉ A.; AJ fam. 2017, p. 598, obs. LAGARDE P.; Rev. crit. DIP 2018, p. 87, note ANCEL, B.; RTD civ. 2017, p. 833, obs. USUNIER L.; RTD civ. 2018, p. 189, obs. GRIMALDI M.; JCP 2017. 1236, note NOURISSAT, C. and REVILLARD, M.; JCP N 2017. 1305, note FONGARO, E.; RTD com. 2018, p. 110, obs. POLLAUD-DULIAN, F.

19 "The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum" Regl. (UE) n° 650/2012, 4 July 2012, art. 35.

20 USUNIER, L.: "La réserve héréditaire n'est pas d'ordre public international", RTD civ., 2017, p. 833 ; LEGRAND, V.: "La réserve héréditaire exclue de l'ordre public international", Petites aff. 2017, n° 249, p. 15.

freedom to dispose of his assets - and those who supported the two famous disinherited oldest children - and defended the reserved portion.

Since then, two reforms to enhance the protection of the reserve have been considered.

## 2. Prospective law.

First of all, a working group has been appointed by the Minister of Justice to discuss the future of the reserved portion. The latter has presented its report on December 13, 2019<sup>21</sup>. This report recommends maintaining the hereditary reserve of descendants and strengthening its protection in international estates. Two proposals are made for this purpose: on the one hand, the reserved portion should be recognized as being of international public policy in so far as it belongs to the principles attached to the political, family and social foundations of society<sup>22</sup>. On the other hand, the foreign law whose application would lead to the deprivation of any right a successive descendant when the deceased or the heir is French or would reside in France at the time of the death of the deceased should be considered contrary to international public policy<sup>23</sup>.

Secondly, a draft law<sup>24</sup> envisages the reintroduction of the right to levy. The latter allowed that a French heir who might have received less under a foreign law than what he/she could have claimed under French law, to levy on the property situated in France the equivalent of what he/she had not received under foreign law<sup>25</sup>. Reserved only for French heirs, the right to levy was deemed unconstitutional in that it violated the principle of equality facing the law between French and foreign heirs<sup>26</sup>. The reintroduction of this right is criticized in doctrine<sup>27</sup> and, if it was adopted by the National Assembly in first reading, it was instead deleted by the Senate<sup>28</sup>.

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21 Reserved portion working group report under the direction of Philippe Potentier and Cécile Pérès, presented on December 13, 2019 to Nicole Belloubet, Minister of Justice. More informations (and report downloadable) in: <http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/la-reserve-hereditaire-32881.html>.

22 2<sup>nd</sup> proposal of the report.

23 3<sup>rd</sup> proposal of the report. The report also envisages in its proposal 3 bis to extend these attachments to all nationals of a Member State or having their residence in a Member State.

24 Draft law confirming the respect of the principles of the Republic and the fight against separatism adopted at first reading by the National Assembly the 16 February 2021, amended then adopted at second reading by the Senate the 12 April 2021. The text must be examined again by both Houses of Parliament.

25 This right was established by a law of 14 July 1819.

26 This decision was made by the Constitutional council seized of a priority constitutional issue: Cons. const., 5 August 2011, n° 2011-159 QPC, Mme Elke, B. et a.: JO, 6 August 2011; JCP N 2011, 1236, note FONGARO, E. et 1256, § 7, note PÉROZ, H.; JCP G 2011, 1139, note ATTAL, M.; Defrénois 2011, p. 1351, note REVILLARD, M.; D. 2012, p. 1228, obs. GAUDEMET-TALLON, H.; Rev. crit. DIP 2013, p. 457, note ANCEL, B.

27 PÉROZ, H.: "Le droit de prélèvement: tel un phœnix?", Gaz. Pal. 2021, n° 12, p. 48 ; BOULANGER, D. : La réserve héréditaire: un principe républicain?, JCP N 2021, act. 1039.

28 Article 13 of the Draft law.

Therefore, at least in the current state of French positive law, it remains that the French can, by submitting to a foreign law, escape the limits of the reserve<sup>29</sup>.

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<sup>29</sup> Provided that the reserved heirs are not in a situation of economic precarity or need.



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