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SPANISH PROBATE AND SUCCESION

THE POSSIBILITY OF ANY FORCED HEIR

CONTESTING THE WILL OF AN ENGLISH NATIONAL

The concept of "forced heirs" as enshrined in Spanish legislation may be imposed upon the devolution of the Spanish estate of British nationals. The Spanish rules provide for certain portions of an estate to be compulsorily left to named beneficiaries members of the family. Failure to comply with these rules may render a will void or may give rise to a claim being made against the estate by a "forced heir". The testator's issue, parents, grand parents and spouse are forced heirs under Spanish law.

The situation has always been one of a dichotomy amongst practitioners as it has always been difficult to interpret the rules of renvoi (the reference made by a system of law to another system of law) contained in the Spanish Civil Code in conjunction with the reference made by Spanish law to the national law of the deceased in order to establish the law that is to govern the deceased's succession. This was further aggravated by the fact that there was no authority from the Supreme Court of Spain on this subject until 1996.

Three cases dealing with the law applicable to the Spanish estates of foreign nationals have in a way clarified the position although the third one seems to have gone the opposite way. These cases have given rise to the issue of a Circular/Directive by the

General Directorate of Registries and Notaries that in our opinion has a quite nonsensical effect. In fact, it seems to say that the law to govern the succession in Spain of a foreign national depends on whether the estate comprises only Spanish assets or Spanish and assets in other countries. It is difficult to accept that the persons entitled to the estate of a foreign national may be different depending on whether the deceased kept or not assets in his country or indeed in any country other than Spain.

The cases in question are the Lowenthal's case (Judgment of the Supreme Court of Spain (STS) of 15 of November 1996), the Denney's case (STS of 21 of May 1999) and the case of Francois Marie James W. (STS of 23 September 2002).

The two first cases follow a similar approach to the rules governing the renvoi in that the Court held that the application of these rules is not obligatory in succession matters and that these rules are limited by the principles of unity and universality of succession. In both cases the Court held that the application of the deceased's national law is the paramount consideration. The case of Francois Marie James W has created further doubts as to the admission of the rules of renvoi in succession matters by applying the said rules and deciding that the succession of the deceased, who was of British nationality, was to be governed by Spanish law as opposed to his national law. The decision appears to have been reached on the grounds that the deceased left only assets in Spain and that there was not possible "fragmentation" of the succession and therefore no breach of the above mentioned principles of unity and universality of the succession.

In view of the above, when giving advice and dealing with the preparation of wills, practitioners should indeed consider the possibility of any forced heir contesting the will of an English national and the necessity to make specific enquiries, in particular in cases where the testator is taking permanent residence in Spain, as to the existence of other assets outside Spanish territory and the client's intention to keep the same.

This leaflet is for guidance only