

## **The importance of writing a will in Portugal, specially now!**

I think that almost of you know the importance of writing a Portuguese Will.

What many of you don't know is that come in force a new European Rule (Regulation (EU) No 650/2012), from 17 August 2015 onwards, which will apply to the estates of individuals dying after that date.

The new rules aim to ease succession across the EU by giving individuals the chance to opt either for the law of the country of their nationality or their last habitual residence to be applicable to their inheritance across Europe.

The default position will mean the law of the country where someone is a habitual resident when they die governs succession to their estate as a whole (worldwide estate).

Article 21 provides that "unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death."

According with Article 22 "[a] person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death".

The choice of law must be made expressly in the will.

As Denmark, Ireland and the United Kingdom do not participate in the Regulation succession procedures handled by the authorities of these three EU countries will continue to be governed by their national rules. So, these countries are not bound by the Regulation or subject to their application. However, it still applies to the citizens of these countries living in the EU countries who adopted the regulation.

Therefore and for example, where a UK national who is habitually resident in France has chosen UK law to apply to his estate it may still be necessary to obtain a UK grant of probate to administer any UK assets.

The Regulation also creates a **European Certificate of Succession** (from now on ECS) to enable heirs, legatees, executors of wills and administrators of the estate to prove their status and exercise their rights or powers in other EU countries. This document is similar to a Grant of Probate.

Once issued, the ECS will be recognised in all EU countries without any special procedure being required.

The ECS will be issued by the authorities of the participating Member State in which the deceased was habitually resident and will be recognized by all of the participating Member States.

The **European Certificate of Succession** will make sure that:

- a given succession is treated coherently, by one single court applying one single law;
- citizens are able to choose whether the law applicable to their succession should be that of their last habitual residence or that of their nationality;
- parallel proceedings and conflicting judicial decisions are avoided;
- decisions relating to successions given in one EU country are recognised and enforced in other EU countries.

However, the European regulation doesn't alter the substantive national rules on successions.

The following issues continue to be governed by national rules:

- who is to inherit and what share of the estate goes to children and spouse;
- property law and family law in an EU country;
- tax issues related to the succession assets.

So, national law will continue to determine how inheritance tax is calculated and whether it is the estate or the beneficiary who is liable for the payment of the tax.

Those who do not want their national law to apply to assets which are held in a country where they live and that has opted into the regulation will need to alter their will to make that clear.

It can be of extreme importance, as for example, for English people living in Portugal to sign a will expressing which law they want to see applicable to their estate, because under Portuguese law (which has a system of obligatory heirs similar to the ones in Spain, France and Italy) you cannot leave everything to your wife, as 2/3 of the estate of the deceased have to be left to children.

So, if you are resident of Portugal, have children and do not establish on your will that you wish English Law (your national law ) to rule your inheritance your Spouse will not be allowed to receive his/her inheritance as it would contradict Portuguese rules of obligatory heirs, which would be applicable automatically because of the new directive.

The Regulations also state that the law chosen does not need to be the law of another EU Member State. This would therefore allow, for example, an American national who is habitually resident in Portugal to choose American law to apply to his estate.

Some wills made in the past can already comply, in our opinion, with the new Directive and therefore do not have to be redone. These wills are those that mention that the testator/testatrix considered national law should apply to their estate.

The intended effect of the new European Succession Regulations (Regulations) is to make things less complicated so that instead of different laws of different countries applying to different assets, just one country's laws will govern the succession of all the assets in the deceased's estate.

So let see if it is what is really going to happen!

Please feel free to call or e-mail us and we will tell you if we consider your existing complies or not. If you need assistance with making a Will doesn't hesitate in contacting us, for a quote.

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