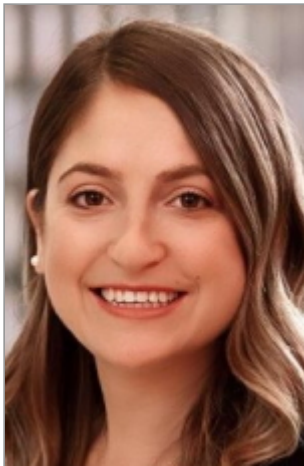


Wills, Trusts & Estates

European 'forced heirship' in estate planning: A case study

By **Marly Peikes and Stephanie Battista**



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(February 5, 2021, 2:09 PM EST) -- Canadians who own real estate, art and other personal property, investments and business interests, or any other type of asset in certain European countries need to be aware of what happens to those assets upon death.

While testamentary freedom — the autonomy to pass property on death as a person pleases — is a long-standing principle in Canada, most civil law jurisdictions in the European Union (EU) operate under a forced heirship regime.

Forced heirship laws often provide a mandatory distribution scheme among a person's spouse and children and other family members. However, the *European Succession Regulation* (the Regulation), which came into effect on Aug. 17, 2015, allows you to opt out of these forced heirship rules in certain situations by making a choice of law of a Canadian jurisdiction through proper estate planning. The Regulation applies to all EU member states except Denmark and Ireland, which decided to opt out.



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The Regulation provides rules to determine which country's law will apply to a deceased person's estate.

Generally, the law of the deceased's "last habitual residence" will govern succession on death, with a few exceptions allowed. If a person has a nationality different from their place of habitual residence, they can choose the law of their nationality to apply to their succession.

The Regulation can have a significant impact on Canadians with ties to EU states, including for a Canadian citizen resident in a participating EU member state, a Canadian citizen with assets in a participating EU member state and a Canadian citizen resident in a non-participating EU member state with assets in a participating EU member state.

The case study below was adapted from O'Sullivan Estate Lawyer LLP's webinar on Sept. 23, 2020: "It's Complicated: Solutions for Planning and Administering an Estate with Foreign Connections." This short case study illustrates how the Regulation can affect Canadians and their estate planning:

Meet Alessandro who was born and raised in Italy. He moved to Alberta for an employment opportunity and became a Canadian citizen. Alessandro is happily married and is settled in Alberta.

All of Alessandro's assets are located in Alberta, except for a quaint vacation home in Southern Italy that he and his wife visit every summer. Sadly, Alessandro's now adult child from a previous relationship is estranged from him.

Alessandro is considering his estate planning and wishes to leave everything to his wife.

Italy is a civil law jurisdiction with a forced heirship regime and Alessandro is concerned that

Italian law will require that his estranged child receive a share of his estate, particularly part of his vacation home in Italy.

To see if Alessandro's estranged child may have a claim on his estate, we must first consider what law governs the succession of Alessandro's property on death.

Under the Regulation, Alessandro can choose the laws of Canada, and specifically the laws of Alberta as the jurisdiction in which he has the closest connection to govern succession to his property under his will, and thereby avoid Italian forced heirship rules.

Under his will, after having chosen the law of Alberta to govern, Alessandro is free to choose to leave all of his assets, including his vacation property, to his wife.

Alessandro may consider having one will to govern all of his property or preferably an Alberta will and a separate situs Italian will in Italian form and language, to govern the property in Italy in order to minimize legal fees overall and allow for a more efficient administration of the estate.

Careful attention would need to be paid to ensure that these wills operate concurrently and don't accidentally revoke each other.

Alessandro is able to make this choice of law because Italy has adopted the Regulation, and because he is both an Italian and a Canadian citizen. The choice of law would not be available if Alessandro was a Canadian resident (as opposed to a Canadian citizen).

The result would be very different if Alessandro does not choose the law of Alberta to govern the succession of his property. To determine which law would govern succession to the vacation home, it would be necessary to first refer to the law of situs of the real property, which is Italy. Italian law would refer back to Alberta law as the law of habitual residence. Alberta law would then refer back to Italy as the law of situs of the real property.

Without making a choice of law, Italian law and Italy's forced heirship rules would govern the succession of Alessandro's vacation home in Italy and Alessandro's wife and estranged child would each receive a share, which is not Alessandro's intention.

This case study illustrates how the Regulation can be helpful for Canadian citizens with ties to EU member states. It is important to understand how the Regulation operates and how it can be applied for Canadians in the scope of their estate planning.

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