

# How to get SA law to apply to the EU assets in your will

**T**he EU estimates that more than 450 000 cross-border estate administrations take place in the union every year. It puts the combined value of these estates at more than €120-billion (R1.8-trillion).

Estates with cross-border elements are usually characterised by their high complexity because, throughout Europe and the rest of the world, private international law rules that determine succession can vary considerably.

Many countries in the EU, such as France, Spain, Portugal, Germany and Italy, have “forced heirship” rules, which can potentially provide statutory or fixed shares to certain family members and restrict testamentary freedom. So, in some cases, a South African with assets in certain countries in Europe may be restricted as to who they can gift their assets.

However, where a South African owns assets in the EU (apart from the UK, Ireland and Denmark), the European Succession Regulation, also known as Brussels IV, presents a useful planning opportunity as you can choose for the law of your nationality to apply to the succession of your assets. This choice can, potentially, be a convenient way to avoid the forced heirship rules and, for you, as a South African, to ensure that South African law applies to the succession of your European assets.

Making a choice in accordance with the European Succession Regulation is not always straightforward, and you should consult a professional to advise you on the complex considerations.

## How does this affect South Africans?

This is best explained with an example. Charles and Mary are South African nationals and live in South Africa. They jointly own a holiday home in France.

The couple both have children from previous relationships, but would both like to leave the property to each other if one of them were to pass away.

The couple are worried that, if one of them died, children from a previous marriage would be entitled to a forced share



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in the French property.

If Charles and Mary include a “choice of South African law” clause in their South African wills (or separate French wills), France will apply South African law to the succession of the property in France. Charles and Mary could hereby avoid the French forced heirship rules.

## Choice of law

South African citizens (wherever they are resident in the world) will be able to elect for their national law to apply to the succession of their assets situated in an EU member state that has opted in to the European Succession Regulation. This can have the following advantages:

- Promote certainty as to which law is applicable to the succession; and
- Potentially avoid forced heirship rules.

## Drafting one will or two?

If we take the example of Charles and Mary, a key practical consideration is whether one worldwide will should be prepared in South Africa, or if a separate will should be prepared in France.

Academic opinion varies on whether one will or two wills should be prepared in these circumstances. After considering the arguments for and against, my view is that a second will is preferable, for the following reasons:

- In this case, the second will would be prepared in French and the French lawyer would advise on the tax implications of the proposed will; and
- The second will would contain the election for the choice of law using terminology that is accepted in that jurisdiction.

It follows that, if you are a South African with assets in an EU member state that has opted in to the European Succession Regulation, now is the time to see if you can take advantage of it.

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