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**“POWER TO THE CHILDREN:
CHILDREN & PROPERTY – the
Franco/British Perspective ”**

Franco-British Lawyers Society
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PRIVATE INTERNATIONAL LAW

- Definition from L.B Curzon Dictionary of Law:
That part of law that which deals with cases involving a foreign element and seeks to determine which courts has jurisdiction over the case, if so, what system must be applied.

PRIVATE INTERNATIONAL LAW

- Private International Law, does not exist as such.
- Each country applies its own PIL and will determine if it has jurisdiction by reference to a **CONNECTING FACTOR**.

CONNECTING FACTORS

- The individual (estate, capacity, marriage/divorce)
 - Domicile
 - Is used as a connecting factor in England, most commonwealth countries and the USA. Its precise definition may be different but refers to the territory where the individual is connected as a result of his birth (domicile of origin) or his long term habitual residence with the intention to abandon his previous domicile (domicile of choice).
 - Habitual residence
 - France, Belgium, Denmark, Luxembourg. Usually corresponds to a more than 6 month residence in anyone year also as to the individual's centre of economic interest. France calls it 'Domicile'.
 - Nationality
 - Replaced domicile in most European countries in the XIX Century: Austria, Germany, Greece, Italy, the Netherlands, Portugal, Spain.

THE ASSET (ESTATE)

- Is there to be a distinction between Movable (personal) or immovable (real) property?
 - Unity
 - Some jurisdictions will treat movables and immovables the same way: Denmark, Germany, Hungary, Italy, NL, Poland
 - Division
 - Other jurisdictions are regarded as 'schismatic' and will treat movables and immovables separately: France, England & Wales
 - Immovables: governed by the laws of *situs*
 - Movables: governed by the law of the deceased's domicile

CONFLICTS

- Connecting factors varied from one country to another and **CONFLICTS OF LAWS** can arise.

EXAMPLE n°1: Minority of a Frenchman domiciled in England

- From a French perspective: French national = minority governed by French law
- From an English perspective: English domiciled = minority governed by English law
- = POSITIVE CONFLICT

EXAMPLE n°2: Minority of an Englishman domiciled in France

- From a French perspective: English national = minority governed by English law
- From an English perspective: French domiciled = minority governed by French law
- = **NEGATIVE CONFLICT** or **RENVOI** (reference back)

EXAMPLE n°2: Minority of an Englishman domiciled in France

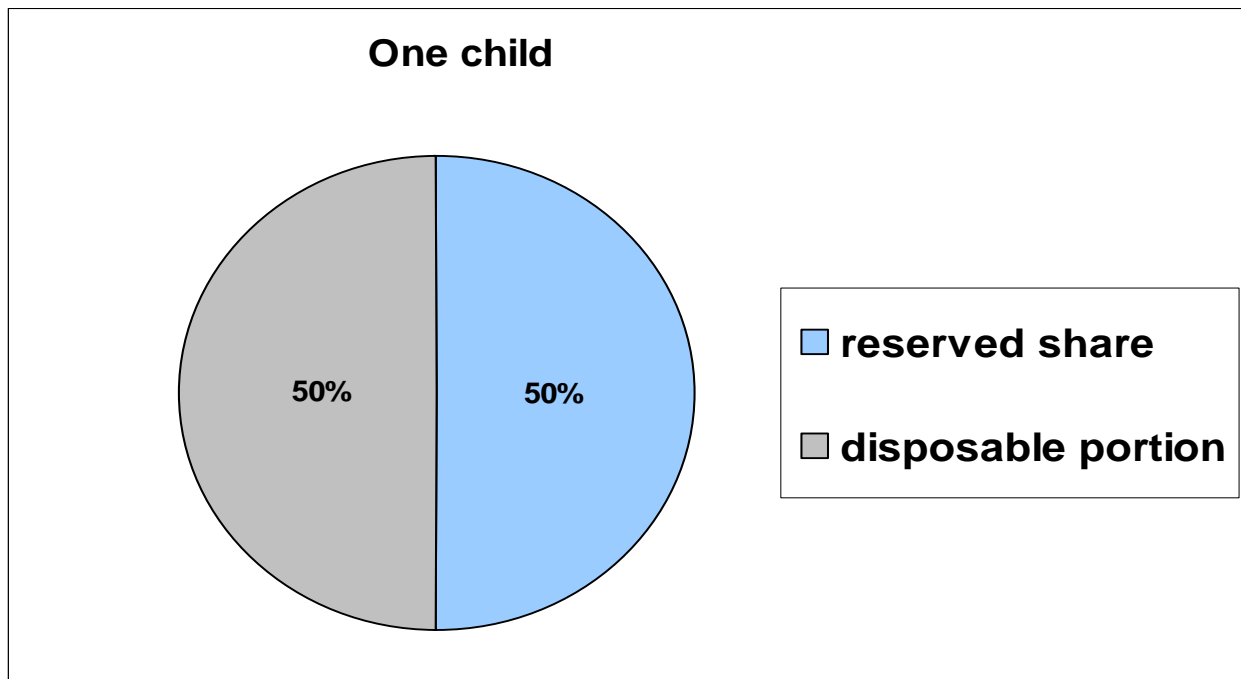
- Will the French judge accept the RENVOI?
- YES since [Cass. civ. 24 juin 1878 *Forgo*].
The French judge will regard himself competent by reference from the foreign law.

FRENCH INHERITANCE LAW

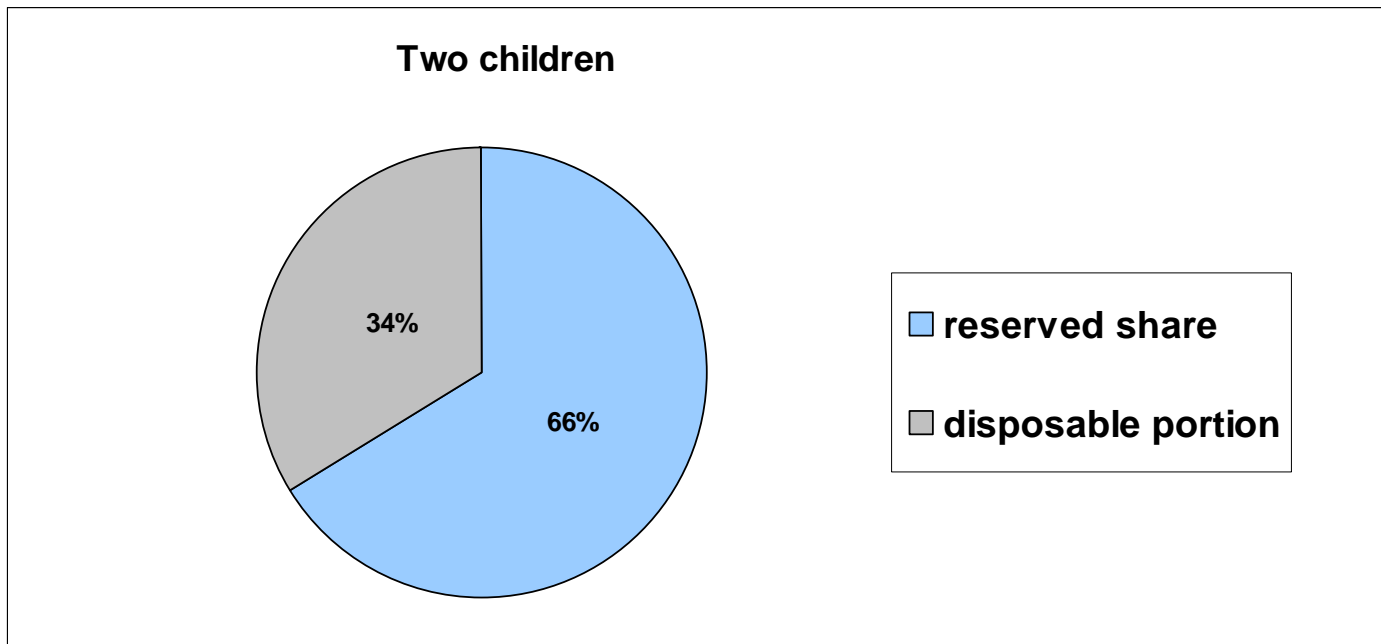
- French inheritance law differs greatly from English inheritance law,
- There has recently been some significant changes regarding Franco-British estate planning.

FRENCH LEGAL RESERVE OR *PORTIO LEGITIMA*

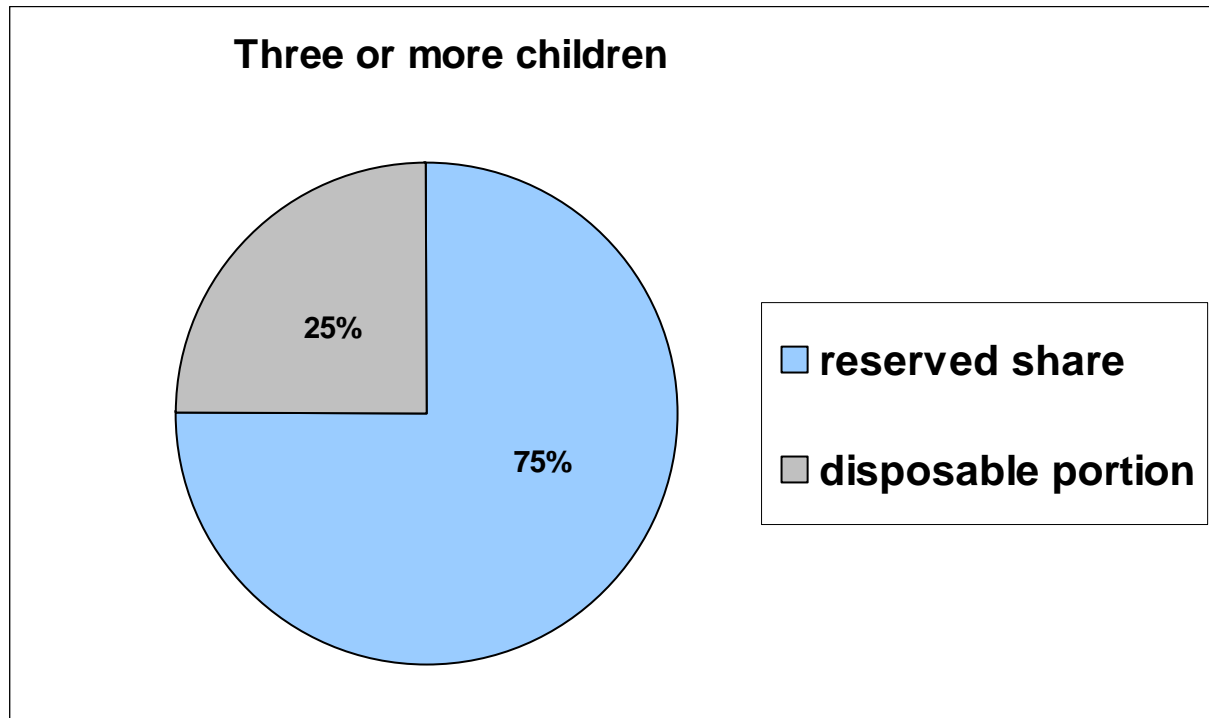
- Reserved heirs: Children



FRENCH LEGAL RESERVE OR *PORTIO LEGITIMA*



FRENCH LEGAL RESERVE OR *PORTIO LEGITIMA*



FRENCH LEGAL RESERVE OR *PORTIO LEGITIMA*

- Rights of the spouse in case of intestacy
 - In presence of common children:
 - Option 1. All life interest
 - Option 2. $\frac{1}{4}$ in full ownership
 - In presence of children from a previous relationship:
 - $\frac{1}{4}$ in full ownership

FRENCH LEGAL RESERVE OR *PORTIO LEGITIMA*

- Rights of spouse with a will - Civil Code - Art 1094-1:
 - Option 1. All life interest
 - Option 2. $\frac{1}{4}$ full ownership + $\frac{3}{4}$ in life interest
 - Option 3. Full ownership of disposable portion

CHILDREN AND INHERITANCE LAW

- Possible unwanted joint ownership
 - Forced inheritance divides property between the heirs
 - Can lead to a joint ownership between the surviving spouse and children from a previous relationship
- Asset Management
 - In the presence of minor children, the autorisation of a relevant judge can be mandatory to manage or alienate the assets.

INHERITANCE TAX

- Inheriting the property: Inheritance Tax
- Double tax treaty of 21 June 1963. Main features:
 - Only applies on death
 - Connecting factors: situs (immovables) and domicile (movables)
 - Each state applies its own law determining domicile and immovables (shares of French SCI regarded as immovables by French Revenue)
 - Tie- breaker provisions in case of 2 domiciles (Art 2 3 b)
 - Credit principle (Art 7)

INHERITANCE TAX

- In case of a French property inherited by a UK domiciled
- Taxation in France (*droits de succession*) = *situs*
- Taxation in the UK (IHT) = domicile
- Credit of French duties against UK IHT

FRENCH PROPERTY INHERITED BY A UK DOMICILED

- Taxation in France (droits de succession) = situs
- Taxation in the UK (IHT) = domicile
- Credit of French duties against UK IHT

PAYMENT

- FRANCE: payment by the BENEFICIARY depending on kinship
- Direct bloodline (parents to children)
- Each beneficiary has a 156,359 Euros nil-rate band, then:

Estate	%
Not exceeding 7,922	5
Between 7,922 and 11,883	10
Between 11,883 and 15,636	15
Between 15,636 and 542,043	20
Between 542,043 and 886,032	30
Between 886,032 and 1,772,064	35

SIBLINGS

- Each beneficiary has a nil rate band of 15,636 Euros, then:

Estate	%
Not exceeding 23,975	35
Above 23,975	45

- Others
- Nephews and nieces have a nil-rate band of 7,818 Euro.
- All others have a nil rate band of 1,564 Euros, then:

Relatives to 4 th degree	55%
Others	60%

SIBLINGS

- UK: payment by the ESTATE
- NRB: £325,000, then 40%
- Selling the property: CAPITAL GAINS TAX
- Double tax treaty of 22 May 1968
- Same features as IHT treaty
- Taxation in France (*situs*). Rate 16%
- Taxation in the UK (domicile). Rate 18%
- Credit in the UK $18 - 16 = 2\%$ actually due

FRANCO-BRITISH ESTATE PLANNING TOOLS

- At acquisition time:
 - Creating special vehicle
 - Use of accrual clause = tontine clause
 - Adoption of a French matrimonial community regime with a right of survivorship.

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Once the property is held:
 - *Inter vivos* gifts to the children
Civil Code- Art 893 *et seq*
 - Two-step gift (*donation graduelle*)
Civil Code- Art 1048 *et seq*
 - Residual two-step gift (*donation résiduelle*)
Civil Code- Art 1057 *et seq*
 - Transgenerational gift
Civil Code- Art 1078-4 *et seq*

FRANCO-BRITISH ESTATE PLANNING TOOLS

- *Mandat de protection future* – Civil Code – Article 477 *et seq.*
 - Scope is determined in the Power of Attorney
 - Comes into effect when the signee becomes physically or mentally diminished
 - Designated representative
 - Notarial deed can be mandatory
 - The validity of the Power of Attorney comes to an end:
 - When the signee returns to his previous physical or mental state
 - Upon the death of the protected person or the representative
 - When a guardian is designated for the protected person

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Post mortem power of attorney – Civil Code – Article 812 *et seq*
 - Scope is determined in the Power of Attorney
 - Only comes into effect upon the death of the signee.
 - Notarial deed is mandatory – Civil Code – Art 812-1-1
 - Duration of 2 years renewable by a judge
 - Duration of 5 years renewable by a judge
 - Due to the unsuitability of the heirs
 - Due to the age of the heirs
 - The need to manage a professional asset

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Must be accepted by the representative prior to the signee's death.
- The representative can either be paid or unpaid
- The validity of the Power of Attorney comes to an end – Civil Code - Art 812-4:
 - At the end of the 2 or 5 year duration
 - On repeal of the POA due to the unsuitability of the heirs
 - Upon the sale of the designated assets
 - Upon the death of the representative or of the heirs

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Advanced waiver of the action of reduction – Code Civil – Art 929 *et seq*
 - One of the main innovations of the 23rd June 2006 law
 - Children can now renounce in advance their right to their reserved share

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Scope – Civil Code – Art 929:
 - Moveable and immovable assets subject to French inheritance law
 - Can be made in favour of a specific person, assets or *inter vivos* gifts or legacies
 - Can affect the whole of the reserved share or just a part.
 - Takes effect against the signee and binds his descendants – Civil Code – Art 930-5.

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Effects – Civil Code – Art 930-2:
 - The waiver is ineffective if the reserved share is not reduced by *inter vivos* gifts or legacies
 - The gift or legacy cannot go beyond the scope of the waiver

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Validity of the waiver – Civil Code- Art 930-3:
 - Once agreed the waiver is definitive however can be rescinded or annulled in 3 situations:
 - The testator does not comply with his alimentary obligations regarding the signees
 - The signee is in a situation of need, which would be improved by accepting the reserved share of the estate.
 - The testator is convicted of a crime or offence against the signee.

FRANCO-BRITISH ESTATE PLANNING TOOLS

- **Minority implications - Civil Code – Art 930-1:**
 - A minor does not have the legal capacity to agree a waiver
 - This restriction cannot be overruled
 - The presence of a minor does not prevent any older children from signing a waiver.

FRANCO-BRITISH ESTATE PLANNING TOOLS

- The signing process – Civil Code – Art 930:
 - The waiver contains the exact future legal implications for each signee.
 - French notarial deed is mandatory
 - Must be recorded in front of 2 French notaries.
 - One of the French notaries must be appointed by the '*Président de la Chambre des Notaires*'
 - The use of POAs is prohibited
 - To become effective the waiver needs to be accepted by the testator- Civil Code- Art 929
 - Once agreed the waiver is registered at the French Wills Registry.

FRANCO-BRITISH ESTATE PLANNING TOOLS

- Conclusion on the waiver:
 - We suggest combining a waiver with a will as a unique 'twin-pack' to ensure they coincide
 - The waiver is a brand new tool with very little case law
 - Therefore it is difficult to determine its effectiveness at this stage particularly regarding Franco-British estate planning.

EXAMPLE N° 3

- French David born in Marseille aged 12 whose parents and grandmother were killed in a car crash inherits a house from his grandmother – can he hold the land directly? What is the position re inheritance tax? David now has a valuable asset and so needs to make a will.

EXAMPLE N° 3

- David can directly hold the house
- House management through the juge des tutelles
- Possibility to anticipate the issue with the *Mandat à effet posthume*
- No legal capacity to sell the house
- No legal capacity to make a will

EXAMPLE n° 4

- David Age 17, British passport, domiciled in England & Wales, wants to sell French the property inherited from his late parents to read at University.
- From a French perspective: the regime of protection of a minor is governed by his national law. English law is competent.
- From an English perspective: the regime of protection of a minor is governed by his domicile. English law is also competent (NO CONFLICT).

EXAMPLE n° 4

- Legal position under English law
- Law of property act 1925 (article 1(6)): the legal estate in a property may not be held by a minor child.
- Children act 1989 article 3 an estate involving a minor may be administered by the surviving parent but this right does not extend to the disposal of the asset.

EXAMPLE n° 4

- Practical position

- Petition with the Chancery Division of the High Court of Justice before a Judge or Chancery Master
- By reference to Article 53 Trustee Act 1925:
- *“Where an infant is beneficially entitled to any property the court may with a view to the application of the capital or income thereof for maintenance, education or benefit of the infant make an order a / appointing a person to convey such property...”*
- Appointment of a “litigation friend” to represent the minor with the claim
- The litigation friend will produce a witness statement indicating:
 - . That the minor child has been vested in the property under French law
 - . That the sale is in the minor’s interest
 - . That a contract for the sale must be signed
 - . That a valuation has confirmed that the price is reasonable
- A Chancery barrister must appear before the Court
- Note: a draft order can be produced to facilitate comprehension
- The order will have to be translated into French for the Notaire (certified translation) + legalised (*Apostille*)

EXAMPLE n° 4

- **CONCLUSION:** a long and costly procedure. David should be advised to wait for his 18th birthday!

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