



An Introduction to Forced (Protected) Heirship

In many Common Law jurisdictions, testators enjoy full freedom to leave their assets to whomever they wish. However, in other countries, this is not the case. Succession laws define given rights for the heirs. Despite the provisions made in a testament, a will can easily be overturned by these protected heirs. This is called *Forced Heirship*.

Forced Heirship rules restrict the ability of testator to decide how their assets should be distributed after death. The exact rules will differ from country to country. Some jurisdictions may legislate that, upon death, all the property of an individual must be inherited by the protected heirs, other countries may permit a testator to give away a proportion of the estate, provided the balance still passes to protected heirs. The latter is the case in Portugal.

Why Forced Heirship?

In some jurisdictions, succession is viewed as a right of the heir, not a choice of the testator. For the most part, these expectations are part of the prevailing way of thinking and reflect deep-seated cultural roots and assumptions. Several factors come into play:

- a) there is a requirement to protect immediate family members - spouse and children of that marriage - by assuring they receive a minimum percentage of the estate, called the "*legítima*".
- b) Second, and almost equally important, is the intention to preserve family wealth. "*Blood is thicker than water.*"
- c) Legislation regarding succession often dates back to historical periods where the prevailing mentality was quite different from today.

Why is Forced Heirship not used everywhere?

Critics of Forced Heirship contend that testators should be permitted to bequeath their estate or a proportion thereof as they please. Prohibiting them from doing so on death could be seen as the same as doing so during their lifetime. Also, most countries in the world allow wills to be changed if satisfactory conditions are not made for dependants.

Where are Forced Heirship rules most common?

Forced Heirship prevails in Civil Law jurisdictions and Islamic countries.

How are the rules applied?

It is up to each country to decide how to apply its rules for Forced Heirship. In countries such as Belgium, Cyprus, France, Germany, Italy, the Netherlands, Portugal, Spain and Sweden, there are several categories of protected heirs. With a few exceptions, the hierarchical nature of relationships means that only the closest relatives inherit. In Common Law jurisdictions, heirs are not entitled to a fixed proportion of the estate. Dependants may also ask for financial provisions from the deceased's estate if needed.

Different Rules

Forced Heirship rules applied in countries such as Portugal provide certainty, and so often may avoid unnecessary probate and legal expenses in their application. This rigidity does not take into account personal circumstance. Either a percentage of the estate or a set amount is allocated despite any provisions a Will. Other Forced Heirship rules may lack certainty, as their application depends on the facts of the particular case. This can result in legal challenges.

The application of Forced Heirship rules depends on the laws of each jurisdiction. Some techniques may alleviate the impact of Forced Heirship. Professional advice should be taken before any strategy is put into place.

1) Using Trusts

Sometimes a trust can be used to mitigate the impact of Forced Heirship rules. For example, in Cyprus, one can nominate beneficiaries of a trust. The property is then gifted to legal owners (the trustees) and Forced Heirship rules no longer apply. However, in Belgium, the law blocks the use of trusts to circumvent Forced Heirship rules.

2) Lifetime transfers

Lifetime transfers may be used to sidestep Forced Heirship rules. In Germany, gifts to third parties are ignored upon death if predefined period has passed since making the gift. However, in France, protected heirs are still entitled to challenge lifetime gifts.

3) **Company Ownership**

If assets - either real estate (immovable property) or investments (movable assets) - are held by a company, it is the ownership of the shares and not the ownership of the assets that is in question. Rules for share ownership can be quite different from those applying to real property.

4) **Territoriality**

Portugal applies the principle of territoriality to succession. The law only predetermines succession for assets held within Portugal, not those domiciled abroad. Therefore, holdings owned overseas are not subject to assessment nor restrictions in Portugal.

5) **Gift and Inheritance Tax**

Immediate family members (spouse, children, grandchildren, parents and grandparents) are exempt from tax on gratuitous transfers due to Gift and/or Inheritance in Portugal. All other gratuitous transfers are assessed Stamp Duty at a flat rate of 10%. Stamp Duty is also territorial in nature and is levied only on Portuguese based assets.

6) **Brussels IV and Succession within the EU**

Brussels IV marks a significant advance in EU succession rules which should result in faster, easier and less expensive procedures. Some of the most important advantages are:

- Being able to choose the law that will govern your estate reduces uncertainty for those who have connections with more than one country;
- The ability to opt out of ‘forced heirship’ rules. Before *Brussels IV*, a Maltese national with a property in France would have been obliged to leave it to his wife and children due to French ‘forced heirship’ rules. Under *Brussels IV*, he can choose the law which applies to the succession of the property – so he can even leave it to someone else in his Will.
- A *European Certificate of Succession* has been created to allow heirs, executors and administrators to prove their status and facilitate the exercise of their rights/powers in other member states throughout the EU.

Three European Union countries – Denmark, Ireland and the UK – have opted out of *Brussels IV* in order to apply their own rules.