

# Where There's a Will...

Solicitor MICHAEL BULA discusses wills and power of attorney for owners of French property.

## *How do you achieve a joint tenancy survivorship for a French property purchase?*

This is a question often raised by clients who may be married, in a de facto relationship or same-sex couple. Subject to a number of French succession rules which protect children of previous marriages and some other considerations, it can be generally stated that a married couple without children from a prior relationship can change their matrimonial regime solely for French assets to the *communauté universelle* or universal community of assets in France by a notarial deed, so that the survivor automatically inherits all French assets from the predeceasing spouse.

This presupposes the couple is married. In any other case, the *tontine* may achieve a similar result, where, in effect, the predeceasing partner is treated as if he/she never owned the property and it passes directly to the survivor. There are however a number of caveats to be investigated on a case-by-case basis.

Caveats include restitution or compensation rights for protected beneficiaries, under the statutory or forced heirship rules in France. Specialist advice must be obtained before embarking upon either process above.

## *Which country's succession rules apply if I die owning French property?*

To answer this question, it must be presumed that the party is non-resident in France and usually domiciled in Australia but owning real property in France. Generally *lex situs* or the law where the real property is located—the jurisdiction of France—will alone determine succession devolution rules if the property is owned in individual names rather than by a company (French or Australian). This is irrespective of an Australian state or

territory will, as it may be in conflict with French law. It is wise to obtain specialist wills and succession advice prior to entering into a French contract.

The European Union (EU) Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the EU 650/2012 Regulation or the EU Estate Law Regulation) is in force in most of the EU (France included) since 17 August 2015 (ESR).

The ESR operates extraterritorially with a specific methodology to allow Australians in principle to elect to apply Australian or, in context, Australian State succession laws to both real and personal property in France. This is quite a revolution in private international law and involves a procedural and drafting strategy for the Australian will or international will (available in Australia since 10 March 2015).

## *How do I execute a French power of attorney (procuration) in Australia?*

You must attend before an Australian notary for him/her to certify and authenticate your signature and identity. In my case, I prepare a notarial attestation in French, interpret verbally the contents for full comprehension and attest to this in my notarial certificate (as a NAATI accredited translator), which is acceptable to French notaires, in lieu of an expensive written translation process. I have intervened after some Australian notaries have poorly completed these notarial deeds, so you should certainly enquire of any notary you choose if he/she can competently complete the work.

You will come across a *procuration* for purchase or sale of real property and even for obtaining a French



mortgage loan. If a company purchaser is involved, a special power of attorney authorising the attorneys under power to bind the company is also necessary, and possibly a company meeting and resolution too.

I have also developed a form of e-notarisation using Skype videoconferencing and identity proofs for clients all over Australia and the world, which means I can notarise deeds through this medium.

Often, French notaries incorrectly insist that clients must attend before the French Consulate General in Sydney, creating much angst, cost and loss of time. An experienced French-speaking notary in Australia is definitely an option in the preparation of the French notarial deed, which may be an authentic (*public*) or private (*sous-seing privé*) forms. The apostille stamps from the Department of Foreign Affairs and Trade will most likely be required also.

Even if a party to a French property transaction plans to be in France at the appropriate times, a power of attorney should always be put in place as an insurance policy in case the party is not available or prevented from attending. The consequences can be disastrous in damages if delays are caused by non-presence in France.

## Whom should I appoint as my attorney under power?

It is most appropriate for the clerks of notaries to be appointed, rather than your best friend. Clerks are often as qualified in terms of university training and degrees as the notary, are covered by professional indemnity insurance and carry out this work every day of their professional lives. If one clerk is not available, there would be the choice of any other clerk of the office, all ensuring smooth and pro-active service. The drafted power of attorney and appointment of a clerk should cost no more and is included in the purchase costs (see my article in the winter 2016 issue of *Provincial Living*). If your best friend is absent or unfamiliar with the procedure, the purchase may be jeopardised and settlement delayed. ♣

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