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WILL IN PORTUGAL

1. Notion

The will is an act of last will by which the person disposes of all of his/her assets or parts of them. May contain the nomination of a guardian, the confession of a debt or the acknowledgment of a child.

<u>The testamentary act characterizes for being:</u>

a) ***Revocable**, because the testator has the power to revoke his will, in whole or in part, because the will is a project that can be altered or destroyed at any time.*

The revocation shall be:

- *expressed when emerges a declaration of will in that sense;*
- *real, when it becomes unpractical to fulfill the will of the testator, by virtue of not having left any goods;*
- *tacit, when the tester makes a new will, without any allusion to the previous and the new provisions are inconsistent with the foregoing.*

b) ***Personal***, *because it can not be done through a representative. However, substitutions ward and almost ward, are two exceptions to this rule. These substitutions is permitted in case of children's death before them reaching eighteen years of age or suffer disability as a result of the test ban for a mental disorder.*
The expression of the will of the testator can not be dependent on the discretion of others.

c) ***Singular***, *because it does not admit the combination of people. The will of common hand is forbidden. Two or more persons can not test in the same document, unless they are wedded.*

d) ***Non recipient, because the validity of testamentary dispositions do not depend on knowledge or acceptance of the contemplated.***

For a testamentary disposition to be considered valid, notary's intervention is essential, he is responsible for registration of the public will in the notebook or for an approval of closed will in terms of governing notary laws.

Exceptions to this rule: will of militaries and of persons treated, will made on board ship or aircraft and will made in case of public calamity.
Verbal or nuncupative will, written by the testator without the approval of notary, are not valid.

Only singular persons of legal age and interdicts may make a will.

The freedom of testamentary disposition is not absolute. There are situations where an individual cannot test for the benefit of certain persons. Thus, testamentary dispositions are invalid:

a) For prohibited or incompetent in favour of his tutor, custodian or legal administrator of properties.

b) In favor of the doctor or nurse that deals with the tester, or the priest who will provide spiritual care, if the will is made during the illness and its author was to die of it, unless these people are descendants, ascendants, collateral to the third degree or

spouse of the testator or that the made dispositions contemplate legacies remunerative services received by the patient;

c) In favor of the person with whom the married testator committed adultery, unless, the date of opening of the succession, the marriage was dissolved, or the spouses and their goods were legally separated or de facto separated for over six years, the date of opening of the succession, or whether the provision merely provide food to the beneficiary.

d) In favor of the people who took part in grant of the will or in its approval.

The will also will be invalid, in following cases:

a) when establishing conditions / obligations of a kind: celebrate or forget to celebrate marriage, residing or not residing in a certain place, live with a certain person, make any disposition in the will that is in favour of the testator or another.

b) When the will disposition depends on instructions or recommendations given to others secretly or refers to unauthentic documents. It is prohibited the will "per relationem".

c) A disposition through which the testator bequeaths to someone the values that he relates in a particular document. But will be valid the disposition that disposes of identified goods in determined document or in a document written and signed by him, dated prior to the date of the will or the date hereof.

d) A will disposition that goes as follows: " Institute as a heir the person I indicated in my will"

Therefore, a declaration of the testator must be unmistaken, spontaneous and clear.

2. Forms of Will

In Portugal, the law predicts two types of will:

⇨ *<u>Public</u> – It is a will written or typed by the notary in his notebook.*

⇨ *Closed – will written and signed by the testator or by another person at his request, or written by another person by testator's request and signed by him.*

Despite the confidential nature of the public will, the testator, which would not wish to reveal to the notary the content of his dispositions, can opt for the form of the closed will.
However, by not being obligatory the deposit of closed will, it always subsist a threat of its disappearance or concealment.
The closed will must be handwritten by the testator or by another person at the testator's request. Only for request of the testator the will can be read by the notary who will draw up the instrument of approval, as for it being obligatory, under penalty of nullity.
The notary function is intended to give a legal form and to verify public faith to the act.

3. Notaries Act

Currently, in Portugal, only notaries (public e privates) have the ability to seal the wills and to file them.
The will is obligatory celebrated in Portuguese language.

To seal the will, necessary are the identification documents of the testator and of two witnesses, such as: ID cards or citizen equivalent document, if issued by the competent authority of the European Union, or a driving licence, if issued by the competent authority of one of the countries of the European Union, or passport.

In case the testator does not understand the Portuguese language, then, in addition to the testator and to two mentioned witnesses, will have to be present, during the act of celebration of the will, an interpreter, which will provide oath before the notary, for the purposes of translation of the will into the language of the testator.

The original will be filed in the Notary Office, where was celebrated and the same should be recorded in the Central Registry. The testator is given a certificate of the will.

The notary's fees, with the celebration of the will, vary between 150€ and 200€.

4. Tax Framework

The will, considered individually, or its celebration, has no tax consequences.
However, the tax effects of will's dispositions will feel at the death of the testator. Thus, the inheritance, in which children and husband/wife are beneficiaries, will be exempt from stamp tax. In the case of the beneficiary, of will's succession, is a cousin, an uncle, for instance, will succession will be subjected to payment of Stamp Duty at a rate of 10% on the value of goods in the estate.

It is necessary to attend AT (Tax Department), the free transfers subject to Stamp Duty (IS), resulting of donations, of the death of the author of succession, of declaration of presumed death or judicial justification of death, of judicial justification, notary or unofficial of acquisition, by usurpation or any act or contract that involves the free transmission of goods.

The participation must be presented in the Tax Department by the end of 3rd month following the birth of the tax, upon delivery of the Model 1 and its annexes in which is included a list of relation of transferred goods.
Participation must be submitted for each act and for each author of the transmission. For instance, if a couple, by deed of gift, pass property to the children, there must be submitted two participations, one by each author of succession.

5. Proof of Heirs

Proof of heirs consists in declaration, made in public deed or equivalent document, by "lider" of the couple or by three persons, that the notary considers credible, that the qualified ones are heirs of the deceased and there is no one to prefer in the succession or who competes with them.

The declaration must include a statement of the full name, status, place of birth and last residence of the deceased and of qualified, and if any of these are smaller, and indication of this circumstance.

The deed of authorisation should be accompanied with the following documents:
a) Certificate narrative of death of the deceased;
b) Documentary evidence of legal succession, when this is based the quality of the heir of any of any qualified (birth certificate and marriage certificate);
c) Certificate contents of the will or the deed of donation by death.

In case of the decease would celebrate the will, this will serve to instruct the content of qualification, corresponding to the testator's intentions now deceased. For this purpose, should be presented to the Notary, where the will was signed, the death certificate, with a view to its endorsement.

Entitlement of heirs, along with The Participation of Stamp Duty, registration will allow the transmission of goods subjected to registration in favour of the heirs and now new owners (e.g. urban building).

6. *Importance of celebration of a Will in Portugal for Foreigners*

For foreign citizens, residents or not residents, it is recommended to celebrate the will in Portugal, namely, when having goods here.
Although Portuguese law, unlike other European jurisdictions (e.g. Italy, France), have applied the law of succession for the nationality of parents (natural law) of the deceased ("de cujus"), celebration of a will in Portugal has an extreme importance, in practical terms.

The conclusion of a Portuguese will, by foreigners, has the following advantages:

a) *Identification of the heirs, before the Portuguese officials. In the absence of this identification, will be necessary to search in the country of origin, family heirs.*
b) *Application and implementation of the will of the testator, without having to undergo a lengthy, bureaucratic and in most cases, far more expensive, translation of the will, signed in another country, a foreign language and where*

it will be necessary to affix the Apostils adopted in the Hague Convention, so that the will is considered valid in Portugal.

c) *And even if they pass, by the process mentioned in the previous paragraph, although there is a risky part of it or certain dispositions will not be considered. This is because the Portuguese law, while maintaining the law succession of the testator, does not allow the application of dispositions that hurt the mandatory rules, even if they are admitted by that law (e.g. testamentary disposition, in which the product or part thereof is left to an animal).*
d) *No confusion of succession of the testator, between jurisdictions. A will signed in Portugal, should only regulate the assets held in this territory, and the will celebrated in the country of origin, should only regulate the goods held in that country.*
e) *Benefiting from a tax treatment more favourable in Portugal.*

In terms of disadvantages, the will celebrated in Portugal cannot suffer from amendments or alterations in the contrary to other European Countries (e.g. United Kingdom). Wherefore, in the case of the will being changed at the will of the testator, the will celebrated must be revoked and another one must be celebrated in the same manner in which the first one was.

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