THE WILL

DIPUTACIÓN
DE ALICANTE

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1. WHAT IS A WILL?

As a general concept, a will is the declaration made by a person of their final wishes regarding their assets and other matters to take effect after their death. In other words, it is the document in which, in a legally valid manner, a person's will is recorded; this person will hereinafter be referred to as the testator (*testador*).

The legal definition of a will is found in Article 667 of the Civil Code (hereinafter CC), which states: "The act by which a person disposes, for after their death, of all or part of their assets is called a will."

2. CHARACTERISTICS OF A WILL

A will, according to its definition, is characterized as an act that is:

Individual, as two or more people cannot make a will jointly or in the same notarized document.

Strictly personal, meaning that its creation cannot be entrusted, in whole or in part, to the discretion of a third party, nor can it be made through a representative.

Voluntary, since a will granted by means of violence, deceit or fraud will be null and void.

Formalistic, being subject to safeguards that confer legal certainty on it, given its important significance, so that the absence of any required element will render the will null and without effect.

Revocable. Until the testator's death, the will may be modified, in whole or in part, as many times as desired. That is, all testamentary provisions are inherently revocable, even if the testator states in the will their intention or decision not to revoke them.

3. WHAT CAN A WILL INCLUDE?

A will must specify to whom we wish to leave our assets and how we want to distribute them, within the limits established by law. At the time the will is made, it is not necessary to specify which assets will be given to each heir. The most common approach is to allocate a percentage of the estate to the heirs, for example: *I leave my estate to my children in equal shares.*

It is also possible for the testator to leave a specific asset to a particular person, such as a vehicle, a piece of jewellery, a painting, etc. In this case, that person is referred to as a **legatee** (*legatario*). Whilst this figure is accepted, the limits imposed by the legally mandated reserved portions (*legítimas*) must always be respected.

In addition to specifying the distribution of the testator's estate, a will may also include other provisions as determined by the testator, such as:

- The appointment of guardians or asset administrators in the event that, at the time of death, the testator has minor or legally incapacitated children.
- The designation of an e**xecutor** (*albacea*) or estate partitioner (*contador partidor*). These individuals will be responsible for the division and distribution of the inheritance. It is common for the executor or partitioner to be someone the testator fully trusts.
- The express revocation of a previous will.
- Decisions regarding the funeral.
- Provisions regarding limitations on the date or age at which a particular asset may be transferred to an heir.

Given all these considerations, it is advisable to consult a **notary** to formally express one's last wishes. This ensures proper legal guidance and results in a legally valid will, helping to prevent future disputes among heirs, between heirs and legatees, and among other involved parties, such as executors.

4. WHO CAN MAKE A WILL?

All persons for whom it is not expressly prohibited by law.

The following individuals **CANNOT** make a will:

- Minors under the age of 14.
- Any person who, at the time of making the will, is unable to form or express their will, even with the assistance of means or support to do so.

What about persons with disabilities?

Persons with disabilities may make a will if, in the notary’s judgment, they are capable of understanding and expressing the scope of their provisions. The testator’s capacity will be assessed solely based on their condition at the time the will is made.

Therefore, it is the **notary** who evaluates whether the testator is of sound mind, conducting what is known as a "**judgement of the testator's capacity"** (*juicio de capacidad del testador*). This assessment is recorded in the will itself and serves as a presumption—unless proven otherwise—that the testator was of sound mind at the time of making the will. If the notary has doubts regarding the testator's capacity, two doctors will be appointed to determine the capacity of the testator.

What about foreign citizens?

Foreign citizens, whether from EU member states or not, may also make a will in Spain. When visiting the notary, they must simply choose which law will govern their succession—that is, the law of their nationality or the law of their habitual residence, which in this case would be Spanish law. This choice must be expressly and necessarily stated in the will.

If the testator holds more than one nationality and opts to apply the law of their nationality instead of the law of their habitual residence, they must also specify which of their nationalities' laws they wish to apply.

If a foreign testator does not make a will or, having done so, fails to specify the applicable law, the law of their **habitual residence at the time of death** will apply, regardless of the country where their assets are located or their nationality.

5. TYPES OF WILLS

In Spain, there are two types of wills, as established in the Civil Code: **ordinary** and **special**. Each of these categories is further subdivided into several types.

5.1. ORDINARY WILLS

Ordinary wills are classified into:

1. **Holographic will** (*Testamento ológrafo*): A will is called a holographic will when the testator writes it by himself, not being imperative to do it before a notary, although it is recommended that he be duly advised given the importance of this document.
2. **Open will** (*Testamento abierto*): A will is considered open when the testator declares their final wishes in the presence of the persons who must authorize the act, who thus become aware of its contents. This is the most common type of will in Spain and one of the safest ways to carry out the process.

3. **Closed will** (*Testamento cerrado*): A will is considered closed when the testator, without revealing their final wishes, declares that they are contained in the sealed document presented to the persons authorized to validate the act. The closed will is also formalized before a notary; however, it is delivered in a sealed document or envelope so that the notary does not know its contents and acts solely as its custodian.

5.2. SPECIAL WILLS

Special wills are classified into:

1. **Military will** (*Testamento militar*): A type of will intended for military personnel in active service, including volunteers, hostages, prisoners, and other individuals employed in or accompanying the army during wartime.
2. **Maritime will** (*Testamento marítimo*): A will made by individuals on board a vessel during a sea voyage. It may be either open or closed. If the vessel is a warship, the will must be executed before the accountant (c*ontador*) or the person fulfilling that role, in the presence of two witnesses, and must be approved by the Commander. If the vessel is a merchant ship, the will must be executed before the Captain or the person fulfilling that role, in the presence of two witnesses.
3. **Will made in a foreign country** (*Testamento hecho en país extranjero*): Spanish nationals may make a will outside Spain in accordance with the laws of the country where it is executed. They may also make a will before a Spanish diplomatic or consular official with notarial functions in that location. Additionally, they may execute a holographic will, even in those countries where this type of will is not legally recognized.

6. WHERE TO GO TO MAKE A WILL

A will can be made at any notary office of the testator's choosing, whether for reasons of proximity or personal trust in a particular notary. The choice of notary is irrelevant, as any notary office will be legally valid for this purpose. Once a notary has been selected, the testator must visit the notary's office with valid identification documents. The testator will then inform the notary of how they wish to distribute their estate—without the need to provide an inventory of assets or present any related documentation. The notary will then draft the will, ensuring compliance with current legal requirements, and proceed with its formal authorization.

Where can I find out whether or not a person has made a will?

Once wills have been formalized by notaries, they are registered in the **Register of Last Wills** (*Registro de Actos de Última Voluntad*), in order to guarantee that their existence is known.

Therefore, to initiate inheritance proceedings, a **Certificate of Last Wills** (*Certificado de Actos de Última Voluntad*), issued by the aforementioned register, must be obtained along with the **Death Certificate** (*Certificado de Defunción*). This certificate confirms whether the deceased left a will.

The request for this certificate may be made by any person with inheritance rights over the deceased, upon submission of the corresponding Death Certificate, and may be obtained through the following methods:

- **Online**: By accessing the website of the Spanish Ministry of Justice (https://www.mjusticia.gob.es/es/ciudadania/tramites/certificado-actos-ultima) with a digital certificate.
- **In person or by postal mail**: By visiting or sending the request to the Registro de Actos de Última Voluntad, located at **Plaza de Jacinto Benavente, 3, First Floor, 28012 Madrid.**
- **Through a notary**: This being the most common method given its ease, since it is the notary's office itself that requests the certificate through the platforms with which it is connected to the Register.

7. CONTESTING A WILL

Even if the will has been granted before a notary and filed in the Register of Last Wills, it can still be contested, either because of an error in the form or in the content.

In the case of open wills, granted before a notary, there is less room for contestation, given that the notary will have given advice to the testator, but the will can still be contested on the grounds that the testator was not of sound mind to consider it legal, that no forced heir is included or that there has been coercion.

The holographic will is the most likely to be contested, as it is written and guarded by the deceased himself, and there is the possibility that, not having received legal advice, he has not respected the legitimate rights or has not complied with the necessary formalities for the will to be valid.

In the case of a closed will, although it is drawn up by the interested party and delivered to the notary in an envelope, the notary only acts as a custodian. Therefore, once the will has been opened, it may be subject to challenge due to errors of form, failure to respect the testator's legitimate or incapacity.

This will give rise to a legal process by the heir who wants to contest the will against the rest of beneficiaries according to the will. It is a long process, so in these cases it is necessary to have the advice of a lawyer to guide you and analyse whether the contestation is viable.

The time limit for contesting a will is 15 years from the testator's death. In the case of a holographic will, it is valid for 5 years from the testator's death.

Who can contest a will?

A will can be contested by the forced heirs: children or their descendants, ascendants and widows/widowers.

8. BENEFITS OF MAKING A WILL

In addition to the possible tax advantages, making a will facilitates the inheritance process for our heirs. The existence of a will offers peace of mind and legal security in terms of the procedures that have to be undertaken for the allocation of the inheritance, with a significant saving of formalities, as well as avoiding possible problems of disagreement between the heirs after death. The main benefit is to ensure that the distribution of the testator's estate is carried out in accordance with his or her will, as long as the legally reserved portions (*legítimas*) are respected.

Making a will allows the testator to appoint an executor to carry out the wishes of the deceased, to look after their assets and to hand them over to the heirs, to improve (*mejorar*) the distribution to some of his children, to establish legacies (*legados*), usufruct for life and other wishes or rights, and the testator even has the possibility to disinherit some of his children.

If the testator has no children or other heirs, if they do not make a will, their inheritance would become the property of the State, whereas in fact they can decide what their wishes are through a will and their assets will be awarded to whomever they decide.

In the event that no will is granted, intestate or ab intestato inheritance will apply, and in this case it will be the law that determines how the deceased's assets will

be distributed, without taking into account the preferences or wishes that the deceased may have had.

Although it is not compulsory, making a will is highly recommended.

What happens if no will is made?

If the deceased died without leaving a will, the inheritance would not be lost, nor could it be distributed among whomever the deceased wanted. Instead, in the absence of the testator's express will, the heirs would inherit according to the applicable law, following the order of kinship. In the event that the Civil Code is applicable, the order would be as follows:

In case the deceased was married with children:

- The inheritance would be divided between the children in equal shares. If any of the testator's children had predeceased him, that child's share would be divided equally among his descendants (the testator's grandchildren), and if he had no children, the inheritance would be divided among his siblings (the testator's other children).

- The spouse would be entitled to the usufruct of 1/3 of the inheritance.

In the event that the deceased has no descendants:

- First his parents would inherit in equal shares or whoever of them survives if one of them is deceased. In the absence of the parents, the other ascendants could inherit. If the deceased was married, the widow or widower would receive the usufruct of half of the inheritance.

- If his parents are not living and he has no other ascendants, the widow or widower is the sole heir.

- If he had neither parents nor spouse at the time of death, the following would inherit, in this order: his siblings, their children and, in the absence of these, his uncles, cousins and other collateral relatives up to the fourth degree.

- Only if he has none of the above-mentioned relatives shall the State inherit.

Persons who consider themselves to be heirs must go to a competent notary to make the declaration of intestate succession (*declaración de herederos ab intestato*). Competent notaries for this are the notaries of the place where the deceased had his habitual residence, or where he had most of his estate, or where he died, or of a district adjoining all of these.

8.1. TAX ADVANTAGES

As to whether or not there are tax advantages to making a will, first of all, it is cheaper to leave a will than to make the compulsory declaration of heirs when having to go to intestate or ab intestato inheritance.

The tax advantages will depend on how the will is drawn up, because although taxes cannot be avoided, at the time of drawing up the will, it is possible to study the most favourable tax alternatives for the heirs, in order to minimise taxes and expenses associated with the inheritance. Inheritance tax (*Impuesto sobre Sucesiones*) will be considerably reduced, which is important in the event that donations have been made during life, because if this fact is not left in writing in the will, the donee would be obliged to declare it in the inheritance tax, as long as there is no record of such donations. In addition, the testator can determine in the will the specific economic value of the assets, and thus determine how they are to be distributed, thus avoiding the heirs having to make donations to each other in order to balance each other out, which implies paying gift tax (*Impuesto sobre Donaciones*) as well.

Inheritance tax varies between the different Spanish regions (*Comunidades Autónomas*), and its amount will also depend on other factors, such as the value of the assets received, the family relationship to the deceased and the net worth of the person inheriting. The more wealth, the more expensive it is to inherit.

Who pays taxes and how much is paid for inheritance?

All beneficiaries of an inheritance have to pay Inheritance Tax (*Impuesto sobre Sucesiones y Donaciones*), which is a tax under regional jurisdiction (hence there can be considerable differences). The amount depends on:

- The value of the assets received: the greater the value of the inherited property, the higher the amount to be paid and vice versa.
- The family relationship with the deceased: the more distant the relationship, the higher the percentage of the payment and vice versa.

- The inheritor's previous wealth: if the inheritor has considerable wealth prior to the inheritance, it is also more expensive to inherit. The inheritance of the main residence or of the business or entrepreneurial activity of the deceased usually entails a reduction of the tax.

9. WHO HAS THE STATUS OF HEIR

Whatever the type of will drawn up, in doing so the testator is ordering and determining which persons will succeed to all his/her assets, rights and obligations, by establishing one or more heirs, who will receive the whole of his inheritance, either as a single heir, in equal shares or in different proportions as determined in the will itself, or as universal co-heirs.

Most commonly, the will does not specify which of the testator's assets will be awarded to each of the heirs, a question that must be resolved by the heirs after the testator's death. Once the inventory of assets and debts has been completed, they will be distributed according to the allocation percentages set out in the will.

On the other hand, the distribution of the specific assets of the testator's estate that have been left to a person, even without the status of heir, is carried out through legacies (*legados*). The legatees do not partake of the entirety of the testator's estate, but will simply receive the legacy stated in the will without being liable for the debts or burdens of the inheritance. The legatee is the owner of the property bequeathed to him/her from the moment of the death of the deceased, but possession of the property must be expressly handed over by the heir or, if applicable, the executor appointed in the will.

10. WHAT IS THE SYSTEM OF LEGITIMATE SHARES?

According to our legislation, even if you decide to make a will and determine the destiny of your estate, you are not completely free to dispose of your assets, as in certain cases, there is an obligation to leave a certain percentage of the assets, known as the legitimate share or *legítima*, to certain relatives. This legitimate share varies depending on the presence or absence of certain relatives: children, grandchildren, parents, spouse, etc… They are also different depending on the deceased's place of residence (general civil law or chartered territories with their own civil law regulations).

In the case of general civil law (*derecho común*), where the person making the will has a spouse and children, the inheritance is divided into three thirds:

- The **first third is the strict forced share (*legítima estricta*)**. A third of the assets must be left to the children in equal shares between all of them, unless they have incurred in some cause for disinheritance, which must be accredited by the heirs and which is not always easy.

- The **second third is the improvement third (*tercio de mejora*):** This third of the inheritance must necessarily be left to children or descendants, but this time it is not required that the distribution is made in equal parts, as in the case of the first third. It can be distributed in different percentages depending on the need of the heir, the greater or lesser emotional bond, or the simple desire. The strict forced share that corresponds to the widowed spouse is the usufruct of this improvement third.

- **The third portion is the free disposal third (*tercio de libre disposición*).** It can be left to whomever one wishes, even if he or she bears no family relationship to the person making the will. Most often, this free disposal third is used to increase the spouse's share in the inheritance, which would otherwise be limited to the usufruct of the improvement third. This can be arranged in two ways: either in the usufruct of all the assets of the estate or in the full ownership (*pleno dominio*) of one-third of the estate. One of the two options must be chosen, it being possible to establish that the choice is made by the spouse after the death of the person who has made the testament.

11. IS IT POSSIBLE TO DISINHERIT A FORCED HEIR?

The answer to this question is affirmative. That is to say, the law includes several cases in which it is possible to deprive an heir of his/her share of the inheritance. However, if the heir has descendants, his/her share of the inheritance will pass directly to them in equal shares.

11.1. *CAUSES* OF *DISINHERITANCE*

Regarding parents disinheriting their children, the most common grounds are having been denied maintenance and/or having suffered psychological or physical abuse by them.

Regarding children disinheriting their parents, they may do so for having abandoned, prostituted, or corrupted them, for having lost parental authority over them by court ruling, for having denied them maintenance, or if one parent has attempted against the life of the other.

Lastly, it is also possible for one spouse to disinherit the other for breach of marital duties, for the causes leading to the loss of parental authority, for refusal of maintenance or for having made an attempt on the testator's life

Sí, una vez llamada a heredar, el heredero podrá formalizar su renuncia ante Notario, en escritura pública. Dicha renuncia tendrá distintas consecuencias fiscales en función de si se hace en favor de otra persona (por ejemplo, cuando el hijo del testador renuncia para que hereden directamente los nietos), o si pura y simplemente se renuncia a ella (siendo irreversible dicha renuncia), así como si es antes o después de que haya prescrito el Impuesto de Sucesiones.

Suele ser habitual que el motivo de la renuncia sean las deudas del testador, por lo que, en ese caso, se puede aceptar la herencia a beneficio de inventario (recordemos que le renuncia pura y simplemente es irrevocable, por lo que esta alternativa podría ser la solución). En este caso, el heredero sólo responderá de las deudas con el patrimonio que herede, y nunca con el suyo propio, es decir, los bienes previos del heredero no quedarán afectos al pago de las deudas del fallecido.

12. CAN AN INHERITANCE BE RENOUNCED?

Yes, once called upon to inherit, the heir may formalize their renunciation before a notary in a public deed. This renunciation will have different tax consequences depending on whether it is made in favour of another person (for example, when the testator’s child renounces so that the grandchildren inherit directly) or if the inheritance is purely and simply renounced (this being irreversible), as well as whether it is done before or after the Inheritance Tax has expired.

It is common that the reason for the renunciation is the testator's debts, so that, in this case, the inheritance can be accepted under benefit of inventory (*beneficio de inventario*). Bearing in mind that a pure and simple renunciation is irrevocable, this alternative may be the solution. In this case, the heir will only be liable for the debts with the inherited assets and never with their own property, meaning the heir’s pre-existing assets will not be affected by the payment of the deceased’s debts.

13. REFERENCE LEGISLATION

Book III, '*De los diferentes modos de adquirir la propiedad*', Title III, '*De las Sucesiones*', Chapter I, '*De los testamentos*', Articles 662 to 743 of the Civil Code.

14. GLOSSARY

- **Deceased** (*causante/finado*): the person who has died.

- **Testator** (*testador*): the person who makes the will.

- **Executor** (*albacea*)**:** the person who is responsible for ensuring that the testator's will is carried out.

- **Universal co-heirs** (*coherederos universales*)**:** group of heirs who receive all or part of the entire estate.

- **Legatee** (legatario): successor to the testator with regard to specific assets, i.e. who, out of the entire estate, only receives a specific asset, e.g. a vehicle, a coin collection, shares in a telecommunications company, etc.