MAKING A WILL IN PORTUGAL

Cross Border Estate Planning

If you are a Foreign Resident in Portugal, married to a foreigner, have foreign source income, or assets in a foreign jurisdiction, Cross Border Planning is a must. Anytime foreign laws are introduced into a plan or dispute, complexity is introduced. Because legislation is so different in the international arena, planning in advance becomes essential in order to meet one's goals, take advantage of opportunities and avoid nasty surprises along the way.

International Estate Planning is quite different from domestic estate planning and involves diverse analysis.

1. Domicile Planning
2. Last Will and Testament
3. Planning for One or More "Situs" Wills for foreign property
4. Conflict of Law Analysis
5. Tax Treaty Analysis
6. Redomiciling Assets:
   - "Portuguese Nominee Company for Property (immovables)
   - "Portuguese Nominee Company for Portfolios (movables)

Your Will in Portugal

Estate Planning can be a complex process, specially for Foreign Nationals in Portugal, due to the laws of different jurisdictions that need to be reconciled. As a key part of the process, it is always advisable for property owners to make a Will in Portugal that deals exclusively with the assets located in Portugal. Making a Portuguese Will reduces expenses and avoids needless delays in the execution of the estate.

This instrument does not replace but rather supplements your existing Will in your home jurisdiction. Otherwise, if someone dies intestate (without a Will), there are no guidelines as to how the assets are to be distributed. A properly thought out Will can save a family from much confusion and discomfort at what is already a difficult moment.

In Portugal, a Will is read in accordance with the Personal Law (*lei pessoal)* of the individual, a concept in Civil Law roughly equivalent to *Domicile* in Common Law jurisdictions. Under the Portuguese Civil Code, an individual's Personal Law is determined by nationality. For those who have not established a *Domicile of Choice* in Portugal, their Will must be read under the legal rules of the country of origin. For the Will to be recognised as valid, it must be reviewed by a "competent authority" (usually an attorney in the respective jurisdiction) who issues a declaration stating that the terms of the documents are in harmony with the law of origin.

Portuguese legislation recognizes several types:

1) *"Testamento Público"*: The most common is the *Public Will* which is dictated to the notary by the individual who then drafts the document in the presence of the author and two witnesses. The Will is signed by the individual and then recorded by the Notary.

2) *"Testamento Cerrado"*: The *Closed Will* is drafted by the individual or by his/her solicitor and subsequently notarized. The Notary only recognizes the document and does not keep a copy, the safekeeping of which is entrusted to the individual.

3) *"Testamento Internacional"*: Pursuant to the Washington Convention of 1973, any country which adopts the Convention agrees to recognize as valid in its jurisdiction a will prepared in accordance with the provisions of the Act. Portugal is a party to this Convention. While quite simple and straightforward for the testator (the person registering the Will), the other forms of Wills are usually preferable in terms of simplicity and economy when the estate is executed.

Forced Heirship

If and when one's *personal law* becomes that of Portugal, there are a number of important consequences. First, Portugal applies the principal of Territoriality to the execution of the estate. This means that the scope of the deceased' estate is limited to assets held within Portugal. Portuguese law does not attempt to regulate or tax any assets outside of its borders. Next, Portugal abolished inheritance Tax in 2004. Bequests to immediate family members (spouse, children, grandchildren, grandparents & parents) are tax exempt. Transfers to others are assessed 10% Stamp Duty.

Finally, there are restrictions to the discretion of the testator. Legislation requires forced inheritance ("*a legitima*") in many instances and only permits limited leeway to an individual in the Will.

The following summarises the part of the estate that the testator is at liberty to apportion:

Living Relatives at the Time of Death	Part of Inheritance Free to Allocate
Spouse	½
Spouse and Children (a)	⅓
Two or more Children	⅓
One Child	½
Spouse and Parents/Grandparents	⅓
Father and/or Mother	½
Grandparents/ Great grandparents	⅔
No immediate Living Relatives	ALL

(a) The spouse receives ¼, if there are more than 3 children. The remaining ¾ is to be divided equally amongst the children.

Who can make a Will?

Anyone — resident or non-resident, national or foreign citizen — can make a Will except minors and those who are judicially deemed unfit.

***Who cannot be an Heir*?**

In order to avoid conflicts of interests, certain people cannot be named beneficiaries. This is the case with Doctors, Nurses or Priests who assist an individual at the time of death. The same applies to a tutor, legal administrator, or guardian (unless a family member), an accomplice in the event of adultery of the deceased or anyone intervening in the preparation of the Will.

Which country's legislation should be followed?

It is not uncommon for the principle of *Renvoi* (from the French, meaning "send back") to be applied. In order to determine which legislation has jurisdiction, the legal considerations may go back and forth between the two (or more) before a final determination is achieved.

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