

SPANISH WILLS AND INHERITANCE TAX

WHY IS HAVING A SPANISH WILL A MUST?

WHAT CAN HAPPEN IF YOU PASS AWAY WITHOUT LEAVING A SPANISH WILL IN PLACE?

HOW CAN THIS AFFECT THE INHERITANCE TAXES TO BE PAID BY YOUR BENEFICIARIES?

We have repeatedly stated in many of our published articles that *“any person owner of a property, land or other assets in Spain should draft a Spanish Will as soon as possible”* this could be seen by some of you as a business strategy for our firm but unfortunately it is not. We kindly ask you to please take a few minutes of your time to read the below information to surely realize how important this could be for you and your loved ones and the huge repercussion that this could have over your inheritance taxes.

Unlike England and some other European countries, in Spain the Inheritance Tax **is paid by each beneficiary and does not depend only on the amount of the estate to be inherited.** The tax amount to be paid will be determined by some of the below listed facts, **therefore in order to avoid unpleasant surprises it is firstly important to keep in mind that the Inheritance Tax in Spain cannot and will not be managed similarly to Inheritance in your home country.**

Now, some lawyers will advice you to set up a company in the UK to avoid or minimize IHT payments in Spain; some other will say that becoming Tax Resident in Spain is the perfect solution while others will suggest transferring the property to your descendants while you are still alive. Are all these answers incorrect? Of course not!! but **the key of the question is not if they are correct or not, but knowing which one should be applied in each case.**

Unfortunately taking other people’s word will not help you to know what is best in your case, as some friends, relatives etc. will just startle you talking about the extremely high tax bill they paid while others on the contrary, will tell you that you have nothing to worry about.

You should know that **there are NO magical solutions** and all possible alternatives must be thoroughly examined with the indispensable assistance of a Spanish lawyer with wide experience in Inheritance in Spain.

No standard advice can be given since depending on the individual circumstances of each beneficiary the amount to be paid can dramatically change from one heir to the other:

We often see in our office how one heir pays less (or more) than another only because one of them was Tax Resident in Spain. So the following details need to be closely reviewed:

- 1.) Are heir and testator both Tax Residents in Spain?
- 2.) Are heir and testator both Non Tax Residents in Spain?
- 3.) What is the relationship between testator and heir: ascendant, descendant spouse?
- 4.) Do you, as heir have the intention to sell the property?
- 5.) What is the value of the estate?
- 6.) What is the estate composed of; properties, money?
- 7.) Age of the heir and testator etc.

You might be clearly aware by now that none of the above mentioned details would make much sense when managing a UK inheritance but they must **all** be considered in Spanish Law.

In some countries when both spouses own a property and **one of them passes away there is no IHT to be paid for transferring the deceased's share to the other spouse**; but in Spain this type of transfer is taxed. Therefore it is essential to plan the succession ahead of time with the purpose of minimizing the amount to be paid for Spanish Inheritance tax, which in some cases can be very high.

**** (Please note that some Non Residents in Spain have already submitted claims at Spanish Courts in order to have the IHT paid returned to them as they considered this payment discriminatory when compared to Tax Residents).**

What are some of the advantages of having a Spanish Will?

1.) **It is a cost effective means of simplifying the handling of your affairs.** Unfortunately without a Spanish Will no action can be taken in Spain until the Probate of your English estate (or other country) has been finalised. If you only have a Will out of Spain, it would be expenses for official translations of your foreign Will, its legalisation, etc, which together will cost significantly more than preparing a Spanish Will in the first place.

2.) **On your Will you can expressly appoint your national Law to apply to your succession and Will.** Without a Will choosing the law of your country of origin, it would be understood if you live and have your assets in Spain, that Spanish inheritance Law applies to your succession, so at least 2/3 of the estate must go to your children.

3.) **For tax purposes a Spanish Will** can be drawn in such a way that it will minimize the Inheritance Tax (IHT), needless to say you have to know how the Spanish IHT works to make your Will really tax efficient.

What could happen if I do not have a Spanish Will?

1.- **The Spanish authorities only allow six months** from the date of death to pay the inheritance taxes. Failing to comply will result in surcharges and late payment interest will start to accrue. **As previously stated it is very rare for an English Probate to be ready within time to allow this deadline to be met.**

2.- **Unless you expressly state in your Spanish Will your wish to have your Spanish Estate (Succession) managed according to your National Law, Spanish Law could apply**, which means that at least 2/3 of your Estate will go to your children as forced heirs in Spanish Law since you did not leave a Spanish Will **expressly stating your wish to have your national Law applied to your succession and Will**. This could also mean **(for those couples with no other property or second / third time marriages)** leaving your spouse with no assets or place to live in.

In this respect **Regulation No. 650 / 2012 of the European Union** has been recently approved with the intention to avoid legal disputes and simplify inheritance matters when dealing with cross border issues /Successions.

The most remarkable fact of this new legislation is the **criteria adopted to determine the law that should apply to the Succession**, mentioned by us in many previous articles

The applicable Law for the succession will be the Law of the deceased's habitual residence at the time of death; therefore the inheritance will depend on the Succession Laws of the that country; however **you can opt, in your Spanish Will** either for the Law of the country of habitual residence (which is likely to be the applicable Law) **or for your national Law or country of origin.**

How can this affect you?

Let's take a common case of a British citizen permanently living in Spain **with no Will** or with a **Will drafted in order to leave all his assets to his wife**, substituted by the children. With the recent approval of the referred regulation and also as per the last High Court of Spain precedents, this could mean that unless the Will specifically states that this inheritance should be dealt with according to the deceased's national Law, the Law of England and Wales (different from Scottish Law) the applicable Law could be the law of habitual residence that is Spanish Law. Thus your wife may not be able to inherit since according to this Law at least 2/3 of the deceased's assets must go to his legitimate forced heirs (children) and not to his wife.

Should this be your case then please review your Spanish Will to make sure you specifically stated your wish to have your inheritance dealt with according to your national Law and thus have the freedom to leave your assets as you wish. If this is not stated in your Will we understand that it could be contested or revoked, or questioned by the notary if on the Will there is not enough provision for the forced heirs as per the Spanish Law.

Present and future of Inheritance Tax in Spain and the Valencian Autonomous Community:

It is quite common to find press articles especially in newspaper and magazines for foreigners living in Spain (expats), mostly British, referring to the Spanish Inheritance and Gift Tax IHT (*Impuesto Sucesiones y Donaciones: ISD*). The reason is obvious, since this tax can be very high or not, depending on some of the above mentioned factors:

In Spain when the applicable Inheritance Tax is that of the Autonomous Community (*Comunidad Autonoma*) where the deceased lived, it is considerably lower than when the applicable Inheritance Tax is the National or State Tax.

So now the question really is how can we know if the Autonomous Community Inheritance Tax is applicable and when should the national /State Inheritance Tax be applied?

The answer is quite simple; if the testator (deceased) is resident in one Autonomous Community (which is normally proven by the Tax Office records of his Income Tax Return as Resident) for the majority of time of the last 5 years prior to his death, the Inheritance Tax Law of that Community will apply, with the conditions of being the heirs also tax resident. However if he lived in the same community for X amount of years but never submitted an Income Tax Return he could be considered Not Tax Resident and National / State Tax will apply.

Also you we would like to share with you some **IMPORTANT AND REALLY GOOD NEWS:** the European Commission has formally requested from Spain a change in the regulation of the IHT and already presented an appeal against Spain in front of the European Court of Justice for considering that the Spanish IHT Laws are discriminatory in practice.

We really understand that the Spanish regulation are incompatible with the free movement of workers and capital as provided by the European Union Treaty and constitutes an obstacle to free movement of persons and capital in breach of the Treaty on the Functioning of the European Union (Articles 45 and 63 respectively).

A similar case previously happened in Spain in relation to the Capital Gain Tax (CGT) Law as Non Tax Residents had to pay more CGT than Tax Resident however this was changed after several Spanish Courts issued favourable Court Orders in this respect and also by the pressure received from the European Union, therefore now CGT is the same for everyone.

Few final recommendations:

- 1.) Make sure you receive the appropriate legal advice from a lawyer with knowledge of English and Spanish Law.
- 2.) Verify your spouse's and your own Spanish Will to make sure it is drafted according to your wishes and your **National Law** failure to do so could result in the administration of your Estate according to Spanish Law (if you still do not have a Spanish Will then we recommend to have it done as soon as possible.
- 3.) Submit a yearly Income Tax Return in Spain as Resident or as Non Resident as failure to do so will affect the Succession Taxes to be paid by your loved ones.

Should you need additional advice or information please do not hesitate to contact us at:

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