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HOW FOREIGN RESIDENTS CAN AVOID LOSING CONTROL OF THEIR ESTATES

US and Canadian citizens living in Mexico frequently ask, “Do I need a Mexican Will? While there is no legal requirement to have a Will executed in Mexico, our recommendation, even for people whose only asset in Mexico is their real property held in trust, is to be proactive and draft a Mexican Will. The principal reason is that Mexican property is often caught outside of the trust arrangements: automobiles, jewelry, objects of art, shares in golf clubs, business interests, etc. The second reason is that intestate laws in Mexico are not always favorable to surviving spouses and seldom distribute property in the manner in which the decedent would have liked.

If you have property in Mexico and die without any Will, the state courts will look to the intestate provisions of their respective civil code to determine the disposition of assets and establish guardianships.

If absolutely all of your property in Mexico will pass by operation of law or contract, then a Mexican Will may not be required. For example, if you hold property in a fideicomiso (Mexican Trust), the trust document will determine who inherits the beneficial right to the property. Another good example is bank accounts that have beneficiary designations. In either case, property will avoid probate.

Here are some of the most common questions foreign nationals ask about Mexican Wills and estate planning in general:

Is my US or Canadian Will valid in Mexico?

US and Canadian Wills are valid in Mexico. However, getting the US and Canadian instruments recognized here can entail a relatively lengthy and expensive process. In the case of US documents, these need to be apostilled and notarized in the US and these documents need to be converted into Spanish by a court approved translator before the file is brought to the Notario, who will initiate probate. In the case of Canadian Wills the process is incredibly more complicated because apostils are not issued in Canada pursuant to the appropriate Hague Convention. Therefore, a Mexican Will generally provides for a quicker transfer of assets to the heirs, in a more cost efficient manner.

Mexican Wills are also valid in the US and Canada. However, for ease of administration we usually suggest that if property is owned in those jurisdictions, that an appropriately executed document be prepared in the US or Canada. As an example, Mexican Wills do not contain the signature of the testator, and this fact can cause delay in having the document accepted in common law jurisdictions.

If I own property jointly with my spouse, he or she will get the other half when I pass away, right?

Wrong! There is no such thing as rights of survivorship in Mexico. At the first death, assuming that the partners own the property 50/50, an undivided half will be transferred pursuant to either the decedents Will or pursuant to state intestate provisions.

In the event that the couple does not have a Mexican Will and that they have surviving children, it is probable that the surviving spouse will be disinherited. For obvious reasons, most couples will want to have a Will for this reason alone.

Do I need an executor?

Yes, the executor or executrix is the person in charge of locating the property, preparing an inventory, paying all debts, and is generally in charge of administering the estate and supervising the transfer of title. Some Mexican states require that the executor post a bond.

We suggest that, when possible, the executor live in Mexico or that the executor be given the power to hire a Mexican representative.

What is Probate like in Mexico?

Probate is the legal process of transferring title to those properties that do not transfer some other way, after a person dies. If there is a Will, probate in Mexico is generally carried out at a Notario's office with limited court supervision. If there is no Will, if the Will is contested, or if there are guardianship issues, the Mexican courts get heavily involved in the transfer of assets. Even in this case, court proceedings in Mexico are not part of the public record and only parties in interest would be able to consult the court files.

Does Mexico have an estate tax or deemed disposition rules?

Mexico does not have either an estate tax nor deemed disposition rules. However, the settlement of an estate still has expenses to deal with. Attorney and appraisal fees, transfer taxes, bonds, etc. may all be costs to an estate.

Is it expensive to draft a Mexican Will?

As with anything else, you get what you pay for. A simple Mexican Will can cost anywhere from \$150 to \$600 US dollars.

Do you recommend any other estate planning documents?

We suggest a Mexican springing durable power of attorney be executed. This document would come into effect upon disability of the person who holds title to the property and allows decisions to be made with the Mexican property during incapacity.

We also suggest that medical directives also be prepared to give caregivers an idea of the level of health care that is desired, also during incapacity. While the medical directive is not legally binding in Mexico, it does provide the caregiver with guidance at a critical time. This document is especially important when the person is not married and is dependant on family, doctors, friends and neighbors for care.

Any other tips?

Estate planning, as we know the concept the US and Canada is not available in Mexico. In most states, when a foreigner who does not speak Spanish goes to a Notario to prepare a Will he or she is told to handwrite their testament, which is then translated word for word. If you do happen to speak Spanish you tell the Notario what you want and your wishes are given legal form. The problem with this approach is that little thought is often given to the complexities of any estate plan, especially international estates: family relationships, ancillary probate processes, US estate taxes, survivorship issues, special planning situations, etc. Here are a few tips:

1. Make sure that you know what your Mexican Will says. If you did not write it and do not understand Spanish, have it translated. Review your Will today.
2. Mexican Wills we have reviewed often revoke any prior Wills either explicitly or implicitly. Prior Wills are explicitly revoked with a revocation clause. If there are prior Wills and the Mexican Will is silent on the matter, the Mexican Will revokes all prior Wills by operation of law. Often, this is not the testator's intention.
3. Coordinate your estate plan so that all your Wills work to achieve your goals. A Mexican Will should cross-reference any US or Canadian Will, and visa-versa.
4. Have your estate plan reviewed by a competent party, with expertise in international estate issues.
5. If your only Will is a Mexican one, and you own property abroad, we suggest that you include a residuary clause. The residuary clause that makes provisions for residuary estate income, revisionary and contingent interests, and undisposed of remainders or revisionary interests in property with respect to which a life estate has been devised or bequeathed. While residuary clauses make no legal sense in Mexico, and Notarios often do not want to include them, they are important in the US. Failure to include a residuary clause may result in having some assets, at least in the US, distributed pursuant to intestate laws. In addition, taxes will be paid, in the US, from the residuary, unless specifically directed to do otherwise.
6. Other clauses and documents that you may consider depending on the circumstances:
 - a. Simultaneous Death Clause. This clause is used in the event that both spouses die simultaneously and provides the presumption that one spouse predeceased the other.
 - b. Testamentary Clause. These are used to direct the executor to create Mexican, US or Canadian trusts.

- c. No Contest Clause. These are used to discourage heirs from contesting the Will.
- d. Letter of Intent. Often times we do not want to clutter a Will with unnecessary details. These details are better placed in a letter of intent, which will be invaluable in guiding the executor as to your wishes. Furthermore, because there is no such thing as a codicil in Mexico, every time you want to change your Mexican Will, you need to draft a new document. Much in the way of instructions and bequests of personal property can effectively be placed in a letter of intent, making it easy to change your mind at a later date.

Summing it all up, unless all of your Mexican assets are held in a Mexican Trust, the relatively small cost of having a Mexican Will is money well spent for the peace of mind gained from knowing your wishes will be carried out with nothing left to chance – or to the unique provisions of Mexican laws.

MEXICO ADVISOR

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Raoul Rodríguez-Walters, CFP ® is the founding partner of Mexico Advisor, the only company in Mexico offering financial management, legal, tax and title services sunder one roof, to English-speaking foreigners wanting to live, retire or set up a small business in Mexico.

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