

## **The Mexican Will – Is it Necessary?** ***protecting your assets through proper planning***

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US and Canadian citizens living in Mexico frequently ask:

“Do I need a Mexican Will?”

While there is no legal requirement to have a Testament, or Will, executed in Mexico, it often makes sense for people whose only Mexican asset is a home or condominium, to be proactive and draft a Mexican Will.

The main reason is that the laws governing transfer of properties to heirs are not always favorable to surviving spouses and property is not always distributed in a manner that the deceased would have wanted.

Laws of succession in Mexico are governed by the Civil Code of the state in which the property is located. While many state laws are based upon the Civil Code of the Federal District, (Mexico City) it is important to investigate the law in the state where property is held to determine precisely how property will be distributed when the owner, or one of the owners, dies without a will (intestate)

### **WILLS FOR PROPERTIES HELD IN A FEE SIMPLE DEED:**

If the property is located in the interior of the country, outside of the “restricted zone”, the strip of land 50 miles wide along the coastlines and 100 miles wide along the borders, then more than likely the property is held outright in a fee simple deed.

In Mexico, there is no such thing as right of survivorship permitting the property to automatically transfer to the surviving spouse. At the first death, assuming the husband and wife own the property 50/50, an undivided half will be transferred pursuant to the deceased’s will or pursuant to the state’s civil code.

In the event the deceased does not have a will and there are surviving children, it is possible that, even in states with revised Civil Codes such as Guanajuato and Baja California Sur, the surviving spouse will have no more than an equal share with the children. In other words, if Mr. Jones has a wife and four children who survive him, Mrs. Jones will receive only a one-fifth undivided interest in Mr. Jones’s 50% interest in the property.

Mrs. Jones will then have to obtain the permission of her four children in order to mortgage or sell the property her 50% interest and the portion she inherited from her husband.

However, in the Federal District (Mexico City) if the surviving spouse has an estate that is equal to or greater than the shares of the children, then the spouse gets nothing.

This can be avoided on fee simple properties by a carefully prepared Will made by each party on title. The Will, in Mexico, is made before a Notary Public and may be handwritten with an official translation made, or the Notary may insist upon having an official translator present if the party making the will does not speak fluent Spanish.

In the last few years many more Mexican states have added provisions to their Civil Code introducing what is known generally as a simplified will, or “Testamento Simplificado”. Basically, the person(s) purchasing a home for personal use are allowed to set up a bequest in the deed to the real property acquired, which functions for all intents and purposes, as a beneficiary designation. As such there will be no need to initiate a probate process as regards that property. However, please note that a clause such as this a deed to a home in Mexico will only apply to that specific property. Depending on your particular situation, a separate will might still be advisable for other property that you may own.

#### **WILLS AND DESIGNATIONS IN *FIDEICOMISO* PROPERTIES:**

Per Article 27 of the Mexican constitution, any property located within the “restricted zone” (see above), acquired by a foreign person, must be held in a Mexican bank trust (*fideicomiso*). Essentially, the *fideicomiso* is a contract with a Mexican bank for it to hold title on behalf of the foreign person. Thus, with bank as the titleholder, beneficiaries and substitute beneficiaries can be designated within the trust (*fideicomiso*) contract and no will is required, nor is probate required for disposition of this property.

Upon the death of a trust beneficiary, the substitute beneficiary must contact the trustee bank, provide it with a certified copy of the death certificate and request that the substitute be acknowledged as full beneficiary. Certain costs are involved but no probate is necessary.

Great care must be taken, however, in the designation of the beneficiary (ies) to insure that husband will succeed to wife’s interest in the event of wife’s death and vice versa.

If the *fideicomiso*, trust contract, shows the beneficiaries as Jonathan Smith and Geraldine Smith, without specifically stating that the surviving spouse inherits the entire property upon the death of the other, the law will assume that each party owns a 50 % interest in the party and the deceased’s 50% will transfer to his heirs upon his death which may, or may not be to his wife and children depending upon the terms of the civil law in the state where the property is located.

While the property held in *fideicomiso*, the Mexican bank trust, can properly designate successors upon the death of the original beneficiary, personal property such as automobiles, furniture, art work, and so forth are left unprotected if no Mexican Will is made.

This is a very important reason for those living in the “restricted zone” to have a will, even if real properties are held in a Mexican bank trust.

## **ESTATE TAXES IN MEXICO.**

Mexico currently has no estate tax imposed on residents. However the settlement of any estate will have certain expenses such as legal and notary fees, appraisal fees, transfer taxes, bonds, etc.

Under certain circumstances, however, non-resident heirs may need to pay a 25% estate tax.

## **ESTATE PLANNING WHEN PROPERTIES ARE HELD IN TWO OR MORE COUNTRIES**

Estate planning, as it is understood in the United States and Canada, is not generally available in Mexico. In most states, when a foreigner is not fluent in Spanish and that person goes to the Mexican Notary Public to prepare a Will, he or she will be told to handwrite their “*testamento*”, which is then translated, word for word. If you do speak Spanish you will tell the Notary Public what you want and your wishes will be given legal form. Unfortunately, however, when it is done in this manner little thought is given to the complexities of any estate plan, especially international estates: family relationships, ancillary probate processes, US or Canadian estate taxes, survivorship issues, special planning situations and so forth.

In preparing a Mexican Will, the following should be considered:

1. Be sure you know exactly what the Will says. If you did not write it and do not understand Spanish, have it translated. Review your Will every few years to be sure it expresses your intentions.
2. Mexican Wills often revoke any prior Wills, either explicitly or implicitly. If there are prior Wills and the Mexican Will does not mention them, the Mexican Will revokes all prior Wills by operation of law. Often this is not the testator’s intention. It is essential that revocation, or non-revocation, be specified in the Will.
3. Coordination of the estate plan so that all Wills, on both sides of the border, work to achieve your goals. A Mexican Will should cross-reference any US or Canadian Will, and vice versa.

4. Review your estate plan with a competent attorney, experienced in international tax and estate issues.

5. If your only Will is a Mexican one, and you own property in the US or Canada, you may wish to consider including a residuary clause. While not applicable in Mexico, it may help avoid having US or Canadian asset distributed pursuant to intestate laws. In addition, taxes will be paid in the US from the residuary, unless specifically directed otherwise.

6. Other clauses to consider in your Mexican testament:

a. Simultaneous Death Clause, Used in the event both spouses die together.

b. Testamentary Trust Clause. Used to direct the executor to create Mexican, US or Canadian trusts.

c. No Contest Clause. Used to discourage heirs from contesting a Will.

d. Letter of intent. Because the codicil in Mexico does not exist, provision for a Letter of Intent can be included in the Will making it simpler to change your bequests at a later date.

The cost for making a Mexican Will is generally less than \$500. USD. Also, the month of September is known as the “month of the wills” and most Notarios provide their services for drafting wills at a deep discount, often 50%. In most cases, it is probably money well spent for the peace of mind gained from knowing your wishes will be carried out upon your death.

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