Inheritance in Spain based on United States' Testaments or Wills and Intestacy

This article focuses on the hurdles faced by American heirs in obtaining property rights in Spanish-based assets bequeathed in American wills or testaments (these terms are used interchangeably in this article) or, where no will has been made, by way of intestate succession. While we focus on the particular case of US heirs from US testaments and intestacy, the obstacles faced by American heirs are similar to those encountered by those coming from other common law countries such as Canada, the United Kingdom, Australia, etc. and the concepts developed below will be similarly applicable. This article does not cover testaments of American expatriates resident in Spain and prepared according to Spanish law.

1. The Spanish Civil Law System governing inheritance.

To understand the difficulties in obtaining property rights in Spanish-based assets inherited by way of American wills or intestate succession, it is important to first have a general understanding of how the Spanish system of inheritance works.

Like other civil law countries (such as France or Italy), the Spanish legal system is highly reliant on the use of public registries to ensure legal security and to establish rights against third-parties (creditors, other claimants, etc.). Public registries are used for real property, company formation, certain moveable property rights and last wills and testaments. While there are exceptions (for example, handwritten or military wills), most Spanish wills must be signed before a public notary who then informs the Spanish Testaments Registry of the testament in question. Spanish heirs to an estate must contact this registry and thereby determine before which notary the testament was signed and thereafter obtain a copy from that notary. If there is no registered will and the registry search comes up negative, then the Spanish heirs must either determine the existence of a testament falling within an exception, as mentioned above, or proceed by way of intestacy. Intestacy means that the estate of the deceased will be passed on to the heirs as determined by the Spanish Civil Code regardless of what might have been the wishes of the deceased.

In addition to the use of registries, Spain is highly reliant on the use of notary publics. While the Spanish notary has certain characteristics in common with his United States and UK counterparts, including his status as an official witness, he plays a much larger role and is a vital player in the Spanish legal system. To become a notary one must obtain a legal degree and pass a highly competitive examination. A notary is authorized not only to act as a state-authorized witness, but must also intervene in any number of operations to give them validity or greater enforceability. These operations include, but are not limited to, the execution of wills, the purchase of real property and the sale of company shares. Notaries are also responsible for maintaining original documentation

related to such operations and for issuing notarized copies to the parties for their own use.

With respect to the validation or "domestication" of foreign wills (i.e. making them enforceable in Spain), **the notary in Spain is the gatekeeper**. Unlike in the United States where testaments must be probated before the competent courts, in Spain court intervention is only required in the event of disputes. Instead, the Spanish notary acts in many ways like the US probate judge in determining the validity of the will and identifying the heirs

A third characteristic of the Spanish legal system which distinguishes it from the United States and other common law countries, is the obligatory nature of certain heirs or "mandatory heirs". Mandatory heirs are ones who inherit regardless of the wishes expressed by the deceased in his will. In particular, children of the deceased are mandatory heirs and, except for limited exceptions (for example, abandonment or abuse of a deceased parent), they can only be partially disinherited.

While all three of these critical aspects of Spanish law, as well as others, will normally be applicable to Spanish heirs inheriting Spanish assets, the same is not necessarily the case for United States citizens or residents executing their wills in America for estates which include assets located in Spain. This different treatment is due to what is referred to in legal jargon as rules of "conflict of law" pursuant to which each country's legal system determines when its laws will be applicable and when it will apply the laws of another country. In the case of testaments executed by American citizens or residents in the United States for estates which include assets located in Spain, the Spanish conflict of law rules call for the application of American law and the corresponding procedures for the execution of valid wills and determination of heirs. It is the notary's job to determine, as a first step in the domestication process, that the testament in question is valid per United States law and, once this is determined, Spanish law takes over regarding the transfer of these Spanish-based assets, related tax matters, etc.

2. Typical examples

Having explained certain basic concepts important for understanding the Spanish legal context, it is helpful to examine a typical case involving an American testament where part of the estate includes real property and bank accounts located in Spain. Subsequently, we will examine the situation where the deceased leaves no testament and the heirs take by intestate succession.

a. Testamentary heirs

In our typical case the deceased is a United States citizen or long-term resident in the State of New York and leaves her children an estate which includes, amongst other things, an apartment in Madrid, Spain and a Spanish bank account. The assets could be located anywhere in Spain and the procedures described below would be essentially the same.

In the State of New York, as in most of the other 49 states, for a will to be enforceable it must obtain probate before the relevant court, the Surrogate Court in

the case of New York. This court will also name the respective executors who will carry out the provisions of the testament. The judge in question will examine the testament and notify any named heirs and those who might otherwise reasonably be expected to be named as heirs. Any challenges to the validity of the testament will be reviewed by the court and a final determination of validity will be made resulting in a decree of probate.

As described above, for the probated US will to be domesticated in Spain it must be approved by a Notary. The notary will want to see copies of the both the US decree of probate and death certificate once these have obtained the Hague Convention Apostille and been translated by an official Spanish translator (one certified by the Spanish Ministry of Foreign Affairs). These two documents will usually be sufficient for the Spanish notary to determine that the American will is valid per American law and therefore admissible in Spain per its rules of conflict of laws.

Once the notary has reviewed the decree of probate and death certificate, each duly translated and with the Hague Convention Apostille, he will require other documents and certifications similar to those required for a Spanish testament: i) a certification from the Spanish Registry of Testaments, in this case that no conflicting testament is registered, ii) an inventory of assets and liabilities located in Spain including, in our example, a certification from the bank as to the balance of the account and an extract from the Real Property Registry where the apartment is located, iii) a valuation of the Spanish assets and liabilities and iv) a tax identification number (NIE) which can be obtained in Spain, but more easily so in the nearest Spanish consulate in the United States. Once all of the above-described documents are reviewed by the notary, he will prepare an acceptance document whereby the American heirs accept the inventoried assets and liabilities, making the inheritance of the Spanish Assets official. Thereafter, in the case of the real property, title must be transferred at the Real Property Registry by presenting, amongst other things, the notarized acceptance.

b. Intestate heirs

Contrary to Spain, in the United States many assets can be inherited without the need for a will or the undertaking of judicial probate proceedings. Such is the case, for example, with joint tenants or tenants in common of real estate. Other cases include bank accounts and particular financial assets (e.g. 401K and IRA accounts) where beneficiaries have been previously designated by the deceased. The simple presentation of a death certificate and some ancillary documentation is often sufficient to transfer these assets without the need for judicial probate. However, this type of inheritance is not possible under Spanish law and the only way for it to be applied to Spanish-based assets is by application of United States law in Spain via the above-mentioned conflict of laws rules. In other words, the Spanish notary, applying the laws of New York per our example above, would have to conclude that New York law provides for the heirs to take, for example, the Madrid Apartment based on joint tenancy or otherwise by the laws of intestate succession of New York. The notary would have to reach this conclusion based on his knowledge of New

York law (unlikely) and/or based on evidence as to New York law proffered to him by the heirs.

While this determination is exclusive to the notary, the onus of providing sufficient evidence lies with the heirs. The few notaries who have some familiarity with New York law or the common law in general, may be more flexible as to the type or amount of evidence they require. Other notaries, lacking knowledge of common law concepts, may prove more demanding in the face of such alien concepts as rights of survivorship. Consequently, it is critical for the US heirs, normally via their Spanish legal counsel, to consult with one or more notaries, in advance, to determine what type of proof they will require or whether they are even willing to take on the inheritance in question.

A determination by a US judge is clearly the preferred evidence for a notary. While probate proceedings are reserved for situations where there exists a testament, in the case of intestate successions it may also be possible to involve the US courts, for example, when it is necessary to name administrators of the estate or to make other determinations necessary for the estate's distribution. To the extent that a US judge makes clear in his decree what the applicable intestacy laws are or otherwise addresses the applicable US law, the Spanish notary will be more at ease in applying these laws in Spain. Where such US judicial intervention is not possible, the notary will inevitably require other means of proof of US law. These typically include: i) expert opinions from legal practitioners, including lawyers and law professors, ii) documentary evidence laying out the specific legal provisions of the relevant laws of intestacy and iii) opinions from Spanish consular officials based in the United States.

Tax Considerations

The US heir to Spanish assets will find that she has to contend with a variety of taxes as part of the Spanish estate's settlement and prior to taking title. These taxes include: i) the municipal inheritance tax, ii) the national inheritance tax, iii) real property taxes (IBI) not paid previously by the deceased and iv) imputed income taxes due each year by foreign owners of real property. Of these taxes, by far the costliest is the national inheritance tax. This tax is considerably higher than what American heirs are accustomed to and, depending on the value of the Spanish-based assets, can reach levels of 30% or more.

Most of these taxes, particularly the national inheritance tax, must be paid before title to Spanish assets can be transferred to the US heirs. If the US heirs can pay the relevant taxes in advance, this will speed up the process significantly. However, if the heirs wish to use the proceeds from the inherited Spanish assets to pay the taxes, a special dispensation must be obtained from the Spanish tax authorities allowing transfer subject to tax payment. This process takes some time and is best carried out, like the inheritance itself, by a competent professional who is familiar with the process.