

Bain Event

Laura Falabella

Alejandro Breit

PROBATE LAW
LAST WILL AND TESTAMENT
AFTER-DEATH ARRANGEMENTS
LIVING WILLS

Introduction

- As a general rule, Argentine law is particularly restrictive in terms of succession planning. There are rigorous limitations for the potential testator to dispose of the estate upon his death, and therefore, any provision violating those restrictions can be voided or otherwise challenged.
- It is for that reason that succession planning in Argentina is far from ordinary.
- However, for those of us having some concerns on that subject, there is still room for planning. But special consideration must be given to this all applicable rules, so as to ensure that your testamentary dispositions will be fulfilled.
- Having said this, let's see what it is all about.



- There are basically two different kinds of probate proceedings in Argentine: intestate successions, meaning successions in absence of a will (*sucesiones ab intestato*), and testamentary successions.
- If a person dies leaving no will (intestate succession) Argentine law determines who will inherit the estate, and how it will be distributed, in case of plurality of heirs.
- If you do not wish your relatives to inherit you (see limitations concerning forced heirs), or if you don't have any heir, you can make a will in favor of a close individual or a public welfare organization (Testamentary successions), as a way to contribute to the community.
- If the person has no heirs, the estate is considered vacant and, as such, all assets will be transferred to the Provincial State, which is the worst scenario (these proceedings are cumbersome and generally the estate is mostly consumed by expenses).

What Types of Inheritances are there in Argentine Law?

Under Argentine inheritance regulations there are three types of heirs:

- (i) Forced heirs (*herederos legítimos o forzosos*): They are those heirs that cannot be deprived of their (forced share of the) estate even by will: descendants, spouses and parents of the decedent.
- (ii) Non-forced heirs: they are those heirs who inherit if there are no forced heirs or will. They are the relatives until the fourth degree as: brothers, nephews, uncles and cousins.
- (iii) Testamentary heirs: they are those heirs appointed by a will.

Different types of inheritors.

How to determine the protected share of the estate

- All forced heirs have a right to “**reserved portions**” (*legítima*) of the estate.
- To such purpose, the net value of the estate left shall be added to the value of the donations the testator might have made (all assets existing at the time of the testator’s death and of those donated by the testator during his life).

The reserved portions are as follows:

- Children: 2/3

Grandchildren and other lineal descendants take the same proportion, within the limits of the share of their immediate ascendant.

- Ascendants: 1/2
- Spouse, when there are neither descendants nor ascendants of the testator: 1/2.

- **Decedent survived only by children:** The children take the entire estate, divided into equal parts for each heir. If pre-deceased, the share of that child passes to his issue, who take by representation the share that their parent would have inherited if living.
- **Decedent survived by ascendants** (i.e., lineal relatives in the ascending line): The ascendants take only if the decedent is not survived by issue. Each generation excludes the further one (e.g., if the decedent is survived by one or both of his parents, no share in the estate passes to the decedent's grandparents).
- **Decedent survived by a spouse and children:** The spouse and children all take the estate per capita, except for the marital property corresponding to the decedent, which passes only to the children (please see below for the definition of marital and non-marital property under Argentine law).
- **Decedent survived by a spouse and ascendants:** The surviving spouse takes one half of the decedent's non-marital property and one half of the decedent's marital property. The remainder of the estate passes to the ascendants.
- **Decedent survived by a spouse only and no issue or ascendants:** The spouse takes the entire estate.
- **Decedent not survived by issue, ascendants or a spouse:** The estate passes to relatives within the fourth degree of collaterality (i.e., (i) siblings of the decedent and their issue until grand-nephews/nieces, and (ii) cousins of the decedent). The next of kin prevails. Between siblings of whole and half blood, the latter receive half of the share of the whole-blooded siblings.

What happens in Argentina if you die without a will? Who succeeds?

- The worldwide estate of a person who dies with last domicile in Argentina is subject to Argentine law, regardless of the decedent's or the inheritors' nationality.

The only exception is real estate located abroad which may be subject to local inheritance rules, although the effect of any gratuitous dispositions thereof should be considered for the purpose of Argentinean inheritance proceedings.

- Otherwise, pursuant to Argentine conflict of laws rules, the law of the decedent's domicile governs inheritance. However, there is an important exception: Title to real property located in Argentina may only be passed according to Argentine law. This exception is especially relevant because of the statutory reserved portions, as commented below.

- **Jurisdiction:** The courts corresponding to the last domicile are the ones having venue to hear the inheritance proceeding. Exceptionally, when the decedent did not have domicile in Argentina, but left real estate in the country, courts sitting where the real estate is located are competent for the transmission thereof.

Applicable law to a succession

Principle: Law of the decedent's last domicile

Jurisdiction

What wills are valid?

Argentine inheritance regulations provide for a wide range of forced heirship rules. Such rules cannot be waived, modified or otherwise disposed of by any contractual or testamentary arrangement.

These restrictions are deemed to affect any foreign instrument or court decision providing otherwise (including alternative planning tools, such as trusts), which shall not be acknowledged by a local court for this reason.

What wills are valid?

- The reserved share or *legítima* is a portion of the estate of a deceased which the heirs cannot be deprived of, except *in case of dishonor (indignidad)*, e.g., attempted murder of the testator (among other very exceptional cases).

What that the testator may freely dispose of:

If there are no forced heirs, an individual is free to testate at will. In this case, the testamentary arrangements shall supersede all hereditary rights that regular (i.e., not forced) heirs may have.

- If there are forced heirs, the *capacity of individuals to make testamentary dispositions with respect to their estate extends only to a statutorily established portion of such estate, which cannot affect the reserved portion of the estate that the law assigns to forced heirs*. This means that the testator cannot impose any charges or conditions whatsoever upon the protected share referred to, the *legítima*. If a testator does so, such charges and/or conditions shall be considered as not written.
- The estate of a deceased individual with no forced heirs who dies intestate, shall pass to regular heirs as a matter of law.



Does a will from any other country have jurisdiction here?

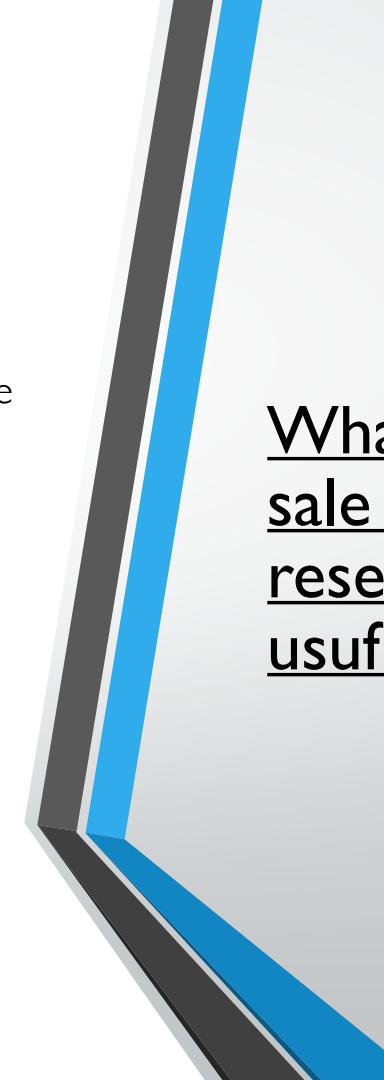
Technically, it would not be “jurisdiction”, but yes, a valid testament **would be acknowledged by any Argentine court on the condition that it is not contrary to any public policy (forced heirs’ protection is deemed of public order).**

- A testament will be deemed formally valid in Argentina if it is valid either
 - Under the law of the place where the testament is granted, or
 - Under the law of the testator’s domicile or habitual residence, or
 - Under the law of the country of the testator’s nationality.
- Legal capacity to grant and revoke wills will be governed by the law of the testator’s domicile at the time of granting the act.

What about a donation with reservation of usufruct?

- A donation with a reservation of usufruct was a very popular means of succession planning, particularly in the case of the transmission from parents to children.
- When the donor dies, **the usufruct ceases to exist and is reunited with bare ownership again**, avoiding an inheritance proceeding.
- However, since 08/1/2015 (with the new Civil and Commercial Code) this continues to exist, but **it is no longer advisable**, as the donation can be challenged, even from parents to children (which was not an issue before), for 10 years since the donation or 5 years since the death, what occurs earlier.
- Thus, donation is no longer a convenient means for succession planning.

- This is a succession planning instrument not so ordinary in Argentina (on the contrary, it is commonly used in France, under the name of “viager”).
- It consists of the sale of the bare ownership, while retaining the usufruct.
- This transaction allows the seller to enjoy the property while he/she is alive, and at the same time, get paid the current value thereof (that the purchaser shall get upon death of the seller), typically as a monthly payment similar to a rent.
Also, this is a valid means to enjoy your property while you are alive, instead of leaving it to heirs that perhaps don't deserve it
- And the purchaser gets the chance to buy an asset for a portion of its value. As it is contingent on the seller's life expectancy, it is normally not viable for persons under 75/80 years old.



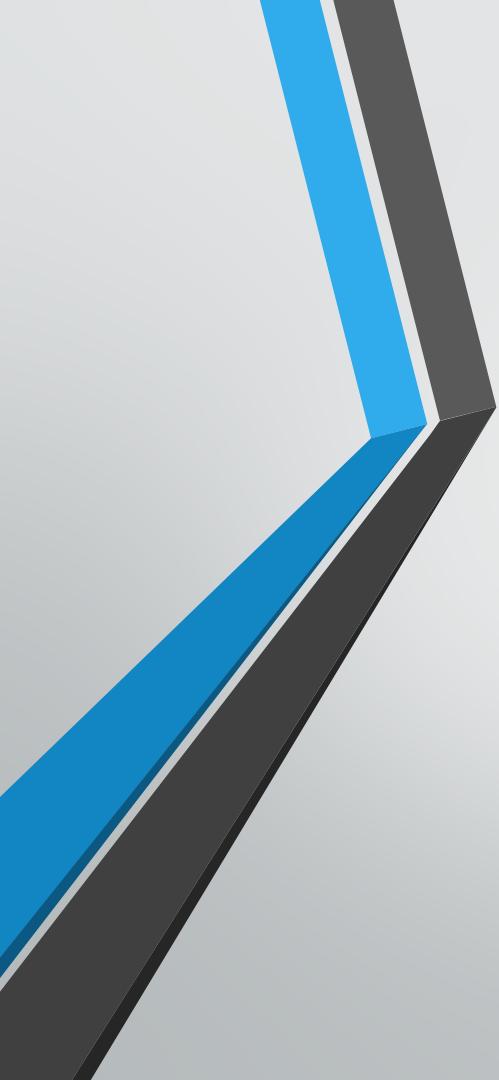
**What about a
sale with
reservation of
usufruct?**

- A testament would be the suitable instrument for that purpose.

How do I leave
my apartment
and possessions
to a foundation?

How can I ensure the correct people are notified upon my death?

- The best way to do that would be to appoint a last will **executor (Albaceas)**
- An executor has the power to act as determined by the testator, and in the absence of any specification, the power to act as necessary to fulfill the testator's last will.
- The appointment is made by testament, but it can be in a separate testament (referring to another one, with which execution the executor is charged).
- Who can be executor: Typically, *lawyers and notary publics* are appointed as executors, but actually any person capable at the time of serving as executor can act as such. Legal entities and government organisms can also act as executors (when a public servant is appointed, the appointment is deemed referred to its function, whoever turns out to be the public servant at the time of the decease).
- The executorship cannot be delegated or transmitted by inheritance, but appointment of proxies is allowed (at the executor's expense).
- Duties: The executor must provide for the preservation of the estate, and make an inventory, prior summoning the interested parties. And accounts must be rendered.
- The executor will comply with all the testamentary dispositions, and will be held liable for any breach thereof, and may also be removed for failure to fulfill its purpose, or incapacity.



Do we need to register with our embassy to have people contacted upon death?

- There are Registries holding records of the testaments granted locally.
- The consular section of an embassy usually provides notarial services, and although we are not familiar with each State's diplomatic services, perhaps the last will can be granted directly there.
- Focus should be made where the testament will produce its main effects: i.e., if most of the assets are located in your home country, then perhaps the consular testament makes more sense. Conversely, if your center of business is in Argentina, then the testament should be local.
- It is advisable, in any case, that the testament is registered with any available service of registration, so that a court hearing a probate proceeding would get from the Registry all the information needed to fulfill the testator's last will.

- The following **documents** are needed to bring an inheritance proceeding: the death certificate of the deceased, marriage and birth certificates, as the case may be. Also, deeds and titles to prove the existence of the assets. All documentation must be exhibited in original.
- The **costs** of successions are locally determined, so this varies in each province.
- **Fees:** Local regulations contemplate a scale between 6 and 20% of the estate, for each transmission. But this is the legal rule for the court to award fees, in the absence of any contractual stipulation between the parties
- Thus, the fee is negotiable, and depends on the magnitude of the estate: **the larger it is, the lesser the percentage that can be agreed upon.**
- **Expenses** also depend on the value of the assets. But on this topic, **no contractual stipulation may provide otherwise.** And **expenses** can also be sometimes significant (some jurisdictions also have inheritance tax; so far, this is not the case of Buenos Aires city).
- **Timeframe:** Successions technically take about 6/12 months to be approved. However, the most important factor to have a probate proceeding finished soon is the heirs' cooperation.

What documents are required to begin the Process of a Succession

Costs of an inheritance proceeding

How long does this proceeding last.

Is a living will a legal document in Argentina?

- Local law in deed contemplates a form of living will (Directivas médicas anticipadas):
A capable person can anticipate directives and give instructions regarding its health and foreseeing its own potential incapacity.
- A person, or more than one, can also be appointed to express the consent to medical acts and to act as curator. Directives implying *euthanasia* are not valid.
- Medical directives can be revoked freely.

- This depends on the funeral house, but can cost from \$150 to \$700 US, approximately.
- In each case it varies because of not only the funeral house but of the place one may choose to be buried: The costs of being buried in a municipal cemetery varies from a private cemetery.

How much does a funeral cost with burial, and with cremation.

Repatriation of remains

It can be arranged, provided that some formal requirements are met. This should be approached individually by each one with his/her embassy or consular department.

Final Instructions



- In the event of emergency requiring long term hospitalization, repatriation to US hospital.
 - Also, it is possible, but it depends on the medical conditions and associated costs.
- How do I leave instructions for my cremation?
 - Any capable person may dispose by any means and circumstances the instructions for its own exequies (wake, funeral, cremation, burial, etc.), as well as the donation of the body for scientific purposes.
 - If the will of the decedent has not been expressed, the decision is made by the spouse, cohabiting partner, or the next of kin.
- Can I pre-pay for cremation?
 - It is not usual here, but it can be arranged.

Thanks for participating

Should you have any queries or concerns, you are welcome to contact us at the following emails and / or telephone numbers:

Laura Falabella:

laufalafalabella@gmail.com

+54 9 11 3207-2217

Alejandro Breit:

ajp.breit@gmail.com

+54 9 11 64398433