

## The Will of “La Calaca”

To those not from these parts, to celebrate death strikes many as quaint, even strange. While the Day of the Dead in Mexico is cause to both celebrate and poke fun at death (*la calaca, la pelona, la parca, la huesuda, la pálida*), this event is foremost a day of remembrance. So let us sail forth these days remembering our own dead, lest we forget that we too one day will meet Charion at the shores of the River Styx. And while we reflect on our own mortality, let us also consider, or reconsider, our Mexican estate plan.

There are four sets of documents that we suggest as basic for any estate plan in Mexico: Mexican Wills, Mexican revocable powers-of-attorney, healthcare directives and Living Wills.

The most important instrument of your Mexican estate plan is a validly executed Mexican Will (a possible alternative is that your property be held in a Mexican trust, known in Mexico as *fideicomisos*). There are several different types of Mexican Wills, and while not a legal requirement, it makes sense to have your Mexican Will drafted by a qualified attorney and then certified by a *Notario*.

A Mexican Will can be drafted to exclusively apply to property located within Mexico. In addition, many of us have already drafted Wills in our respective countries of origin. As far as Mexico is concerned, these prior Wills may remain valid as long as the Mexican Will specifically states that this particular instrument **does not** revoke any prior Wills. If, as is common, there is language revoking prior Wills, or if the Mexican Will is mute on this point, the Mexican Will revokes any prior Wills. In the event of conflict settling an estate, an improperly drafted Mexican Will could be a mayor headache.

An alternative would be to let your current foreign Wills control the disposition of property in Mexico. This is an option, but we recommend against it. Our reasoning is that the process to have foreign Wills validated in Mexico is cumbersome, time consuming and expensive. This is especially true where the Will needing validation has been drafted in a country that has not ratified the Hague Convention of 5 October 1961, abolishing the Requirement of Legalization for Foreign Public Documents. A good example of a country that has not ratified the above-mentioned convention is Canada. Both Mexico and the US have ratified the Convention which makes the process of having a Mexican Will accepted in the US, and visa-versa, much less difficult.

What happens if you die without any valid Will and you own property in Mexico? In this case your Mexican property is usually divided according to the intestate laws contained in the Civil Code of each state. Intestate laws seldom distribute property as the original owners would have liked. For example, most civil codes in Mexico will divide property between surviving children and the surviving spouse, in equal shares. If the surviving spouse has property in his or her own right that is equal to or exceeds the equal shares, the spouse is in effect disinherited and the estate is divided equally between the surviving children. Another common example in intestate laws in Mexico is that if there are no

children, the surviving spouse may possibly be required to share the estate with his or her in-laws!

In addition to a valid Will, we suggest that people grant a Mexican “springing” power-of-attorney to their partners. We call these powers “springing” because they only become valid when certain conditions are met. Typically, these documents become valid and are used when a partner is not able to make decisions due to poor health or incapacity. Unless this document exists, it is possible that a spouse would be unable to dispose of property or access accounts belonging to his or her partner. Access might be convenient in order to meet financial obligations or implement important planning strategies.

Finally, we advise that people draft healthcare directives and Living Wills. If you already have these documents as part of your US or Canadian estate plan, these need only be translated into Spanish. It is important to note that neither instrument is legally binding in Mexico. However, they can prove invaluable for caregivers (often not a spouse), providing important information regarding what a person’s wishes are vis-à-vis healthcare and after death wishes.

Don’t tempt the Fates. Take care to look after your Mexican estate plan today. Do it for your own peace of mind. Do it for those who will one day hold a match to the candle on the *ofrenda* table, the *ofrenda* table with your picture.

.....

Raoul Rodríguez Walters is a cross-border financial planner with offices in San Miguel de Allende. He can be reached at [raoul.rodriguez@mexadv.com](mailto:raoul.rodriguez@mexadv.com).