
South Korea

International Estate Planning Guide

Individual Tax and Private Client Committee

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I. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

There are five categories of valid wills under the Civil Act of Korea (“Civil Act”). The most common categories are: (1) holographic wills, (2) recorded wills, (3) notarized wills and (4) secret wills. The fifth category, wills by dictation, may also qualify as a valid will when the testator is unable to create a will due to serious illness or other urgent causes. In order to be valid, each will should be prepared in a certain format as required under the Civil Act. The following is a description of each will and the requirements to validate their authenticity.

A holographic will is a will that has been hand written and signed by the testator. In order to draft a valid holographic will under the Civil Act, the testator must write the entire content of the will, including date, address and name of the testator, and sign and seal the document.

A recorded will (or voice recording by electronic means) must be made by the testator in person, stating the purpose, name, and date of the recording in the presence of at least one witness. The witness must also state and record his/her name and the accuracy of the recording.

A notarized will requires participation of two witnesses. The testator must announce the content of the will in the presence of two witnesses and the notary. The notary must record the testator’s statements and read aloud the recorded statement in the presence of the testator to verify the accuracy of the recorded statement. The testator and the witnesses then sign and seal the document to confirm their verification, and upon such confirmation, the notarized will becomes effective.

A secret will is a will in which the testator conceals the content of the will in a sealed envelope and delivers it to witnesses to be opened only upon the testator’s death. A secret will is created when the testator creates a will document, seals the document in an envelope, and writes his name on the envelope (or the name of the writer of the document, since the creator need not be the testator himself). The sealed envelope must be delivered to two or more witnesses (each witness must receive the original executed document, not a copy) and upon such delivery, both the testator and the witness should write the date of the delivery on the envelope and sign (or seal) on the envelope. The sealed envelope should be submitted to the notary or the court clerk within five days from the delivery date recorded on the envelope and obtain a “fixed-date stamp”¹ on the envelope.

A will by dictation may only be created when serious illness or other urgent causes prevent the testator from creating a will through the four common methods mentioned above. In order to create a will by dictation, two or more witnesses must participate, and one witness should record the content of the will as stated by the testator. Then such witness should read aloud the content of the will to the testator and the other witness for their verification. The testator and the witness must sign and seal to confirm their verification. One of the witnesses or any other party having an interest in the will should submit the will to the Family Court within 7 days of the end of the illness (or other cause) which prevented the testator from creating another type of will. The Family Court will then issue a certification seal.

1. Will Probation

Upon a testator’s death, the individual who has the will or recording in possession should present the will or the recording to the Family Court to affix an authentication seal; provided, however, notarized wills or wills by dictation do not require such submission since the documents already have been verified.

¹ Under Korean law, a notary or certain other competent authority is authorized to affix a stamp showing the date on which a document is submitted to such notary or other authorized authority. Therefore, the “fixed-date stamp” system prevents any attempts to falsify the will date retroactively.

The Family Court must open a secret will or a will sealed in an envelope in presence of the inheritors or a representative of the inheritors or other interested parties. Upon opening of the envelope, the Family Court must draft a report regarding the opening of the envelope, and must notify any inheritors or other interested parties not present at the meeting of the opening of the envelope. The process of receiving an authentication seal from the Family Court and opening the sealed envelope are merely verification processes to preserve evidence, and therefore they do not influence the effectiveness of the will document itself.

There are three types of persons that may serve as executor of a will upon the testator's death. A testator, at the time of the drafting of the will, may choose a will executor and state the name in the will. When the testator does not choose an executor, then the inheritor by law becomes the will executor. When there are no executors chosen in a will document or no inheritors available, then the Family Court may appoint an executor based on a claim by interested parties, and that appointed person becomes the executor.

The executor of the will must investigate the complete inheritance and make a list of all the property that is delivered to the inheritor(s). Once the executor's duties terminate, the executor must notify the inheritor(s) of such fact.

B. Will Substitutes

Will substitutes, a method by which a person may arrange instruments to transfer property at death to a chosen beneficiary, such as revocable trusts under the American legal system, do not exist in Korea. However, the trust laws of Korea have been revised recently, and revocable trusts similar to those under the American legal system have been introduced and will be implemented in the near future. Under the revised trust laws, a settlor has the right to change the trust beneficiary during his lifetime if the original trust beneficiary is to receive the rights to the trust at the time of settlor's death, or the original beneficiary is to receive trust payments upon the death of the settlor. In the latter case, the beneficiary has no rights to the trust until the settlor's death.

In addition to trusts, there is life insurance, various insurance policies, and employee benefits such as death retirement funds. In Korea, some employers make a lump sum payment to the family members of a deceased from a fund that the deceased employee has created during his employment. The procedure for the beneficiaries to receive such benefits at the death of the policy holder is similar in effect of a trust beneficiary. The assets held through life insurance policies, various types of damage insurance policies, and death retirement benefits as part of the inheritance are governed by the inheritance and gift tax laws of Korea, and are included for purposes of calculating inheritance and gift taxes.

II. Estate Administration

In case of intestacy, the estate passes to the heirs of the deceased in proportions set forth in the civil laws. If there are no heirs, then the estate may revert to a person (or persons) with a special relationship to the deceased. If a person with a special relationship to the deceased survives the deceased, that person may make a claim in the Family Court to receive the estate, and the Family Court has discretion to award the estate to that person in whole or in part. If there are no heirs or people with a special relationship to the deceased, then the estate passes to the national government.

More specifically, the estate is passed through the heirs in the order of inheritance ranking set forth by the Civil Act, and for heirs within the same ranking of inheritance, a ratio set forth by the Civil Act will be applied to divide the amount of the bequest.

The inheritance ranking set by the Civil Act is as follows. The first tier are the direct lineal descendants (sons or daughters), the second tier is the direct ascendants (parents), the third tier is siblings (brothers or sisters), and the fourth tier is limited to first cousins. The spouse is ranked as same as the first tier direct lineal descendants, however if there are no direct lineal descendants alive then the spouse is ranked in the second tier, having the same status as the direct ascendants in the second tier, and if there are no

direct lineal descendants nor direct ascendants, then the spouse becomes the sole inheritor. In Korea, the only type of marriage recognized for spousal inheritance is legal marriage. A legal marriage occurs when a marriage is registered with the local municipality. A common law marriage is not recognized under Korean law, and a marriage registration with the local municipality is strictly enforced. Therefore, a spouse must be able to prove legal marriage in order to inherit the estate.

By operation of law, when inheritors exist, the inheritance of the deceased will automatically pass to the heirs. However, the Civil Act grants the heirs the option to either accept or reject his inheritance. In approving and accepting one's inheritance, the inheritor has the option to accept fully or partially. In case of full acceptance, the inheritor receives the inheritance as well as all the debt and liabilities of the deceased. In case of partial acceptance, the amount of debts and liabilities of the deceased that pass to the inheritor will be limited to the amount of the inheritance. When the inheritor renounces the inheritance, the rights and obligations deriving from such inheritance will cease to exist retroactively from the time of bequest.

Unlike the western legal systems, the Korean laws do not specify marital property in tenancies. Rather, historically, the Korean laws focus on the individual legal ownership of property. Thus, property obtained prior to marriage is considered non-marital property and ownership cannot be disputed. Even for property acquired during marriage, individual legal ownership is recognized and the property belongs to either the husband or wife who acquires it under his or her name with his or her account. Properties acquired during the marriage whose ownership is difficult to determine will be considered to be jointly owned by the husband and wife. Thus, for real property and other assets the ownership of which is recorded, the person having the legal record under his or her name will be in general considered a legal rightful owner; provided, however, if one can prove that the person on record did not provide the funds to purchase the relevant property, then the person who actually provided the funds will be considered a legal rightful owner. For household goods and other movable properties not requiring legal record (i.e. furniture, small household items), as they will be normally under the common possession of the husband and wife, more likely than not, they will be considered to be owned by the couple jointly.²

III. Trusts and Other Planning Structures

A. Domestic Trusts

Under the Income Tax Act of Korea ("ITA") and the Corporate Tax Act of Korea ("CTA"), a trust is treated as a conduit so that no separate income tax return is necessary for the trust. Korean tax laws do not distinguish between a grantor trust and a non-grantor trust, and income arising out of or in connection with trust property is deemed to belong to the beneficiary of the trust and taxed accordingly. Thus, the beneficiaries of the trust should recognize the profits of the trust property as its income at the time such profits were received by the trustee on behalf of the trust and the income will be treated as if the beneficiaries hold the trust property directly.

However, there is an exception for an investment fund that is established pursuant to the Financial Investment Services and Capital Markets Act and that satisfies certain requirements provided in the ITA ("Qualifying Investment Trust"). The profits of the Qualifying Investment Trusts constitute a dividend income at the level of the beneficiaries and are subject to withholding at the time such profits are distributed to the beneficiaries of such trust.

B. Foreign Trusts

For tax purposes, foreign trusts are always treated as a Qualifying Investment Trust and taxed accordingly regardless of whether they satisfy the requirements of Qualifying Investment Trust or not.

² For movable goods not requiring legal record, unless otherwise proved, the person having the possession of such property will be considered as the legal owner thereof.

IV. Taxation

A. Inheritance Tax

Individuals and non-profit legal entities that acquire property through inheritance or bequest are liable for inheritance tax. Inheritance tax is assessed on: (a) all property bequeathed by a resident; and (b) all property in Korea bequeathed by a non-resident.

1. Tax Base

The tax base of Inheritance Tax is the amount derived by subtracting certain deductions such as public imposts, funeral expenses, claims against the estate, certain charitable contributions, itemized deductions (deductions for the surviving spouse, dependents, minors, the elderly, the disabled, etc.) from the value of inherited property. In the event any of the following exists, it is added to the value of inherited property:

- The value of property donated, within 10 years prior to the commencement date of succession, by the deceased to his successor; or
- The value of property donated, within 5 years prior to the commencement date of succession, by the deceased to a person who is not his successor.

2. Tax Rates

Tax Base	Tax Rates
100 million won and less	10 percent of the tax base
Over 100 million won, but less than 500 million won	10 million won + 20 percent of amount in excess of 100 million won
Over 500 million won, but less than 1 billion won	90 million won + 30 percent of amount in excess of 500 million won
Over 1 billion won, but less than 3 billion won	240 million won + 40 percent of amount in excess of 1 billion won
Over 3 billion won	1 billion 40 million won + 50 percent of amount in excess of 3 billion won

3. Inheritance Tax for Bequests that Skip a Generation

Where one designates a direct lineal descendant who is not one's own child (e.g. a grandson) as a beneficiary of a bequest, an additional amount of inheritance tax (Y) is levied in addition to the normal amount of Inheritance Tax. The additional amount is calculated according to the following formula:

$$Y = A \times (B/C) \times 30\%$$

where A equals the amount of Inheritance Tax, B equals the value of the property bequeathed to descendants other than children of the deceased, and C equals the total value of the inherited property.

B. Gift Taxes

A resident donee (an individual or a non-profit legal entity) is obligated to pay the gift tax on any and all gifted property while a non-resident donee (an individual or a non-profit legal entity) is obligated to pay gift tax only on the gifted property located in Korea. Gift tax is not imposed on profitable companies.

The applicable tax rates are same as those of the inheritance tax, however, deductions applicable to gift taxes are slightly different from those of inheritance tax.

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