

---

# Chile

## International Estate Planning Guide

Individual Tax and Private Client Committee

### Contact:

Sebastián Guerrero

*Guerrero Garces, Santiago*

sguerrero@gvg.cl

*Updated 5/2021*

## I. Wills and disability planning documents

Succession rules are governed under the Chilean Civil Code (CC), where succession is only by means of the law or by will and testament.

'Wills' are defined as a semi-formal act, essentially revocable, pursuant to which a testator determines how his or her wealth is to be inherited after his or her death. Wills govern if the inheritance is granted to one or more heirs, in what ratios or percentages the inheritance is to be distributed, or if specific assets are granted to one or more individuals known as legatees.

In Chile, there is no absolute freedom to dispose of wealth. If there is a will, the law allows only a quarter of the wealth to be disposed of freely and another quarter can improve the share of one or more heirs. The remaining part of the wealth must necessarily be transferred to direct relatives, according to the basic order of inheritance.

If the will does not comply with fulfilling the legal requirements, including formalities and forced heirs, the will is considered without force or void.

Chilean succession only admits succession by law ('intestate succession') or by will ('testamentary'). Also, the inheritance could have a testamentary part and an intestate part.

Chilean law prohibits joint wills and succession agreements.

### A. Types of wills and enforceability of foreign wills

In general terms, Chilean legislation established two types of wills: solemn wills and less solemn wills or privileged wills.

#### 1. SOLEMN WILLS

Solemn wills are granted in normal circumstances. They have an indefinite term and are enforceable until and unless they are revoked. There are two types of solemn wills.

##### a. Solemn open will (*testamento solemne abierto*)

The testator makes his or her will known to a public notary officer and three witnesses. If it is not possible to grant it before the aforementioned official, it could be granted in front of a judge or five witnesses, without the need for a public notary.

##### b. Solemn closed will (*testamento solemne cerrado*)

The testator does not reveal the content of his or her will to anyone and seals it in an envelope in front of a public notary officer and three witnesses. Then the testator has to deliver the sealed envelope with the will inside to the officer.

According to the CC, when the testator cannot understand or be understood by voice, he or she can only grant a closed will. An example of this situation is the case of a foreigner who does not speak Spanish.

#### 2. PRIVILEGED WILLS

Privilege wills are granted under extraordinary circumstances and have the peculiarity that their effectiveness is temporary. There are three types of less solemn wills: verbal, military and maritime. The latter two are only allowed at time of war. These types of wills lose their effectiveness automatically once the circumstances that justified them have ceased. Thus, a verbal will does not have any value if the testator dies after 30 days following the grant; or if, having died before, the will has not been put in writing, with the formalities to be expressed, within 30 days following death. A military will expires due to the fact that the testator survives the danger if the testator dies after 90 days, counting from the time the circumstances that

enable him or her to testify militarily have ceased, and if, being able to testify militarily, he or she grants a verbal will because he or she is in imminent danger.

A maritime will made while sailing expires if the author dies after 90 days from landing, but if he or she testifies verbally, in the case of imminent danger, the will expires if the testator survives the danger.

Privileged wills expire without the need for revocation, in the cases provided by law.

### 3. FOREIGN WILLS

A will granted in a foreign country is valid in Chile, provided that the following requirements are met:

- only a Chilean or a foreigner residing in Chile can testify this way;
- the will may only be authorised by a Minister Plenipotentiary, a Legation Secretary who has such a title, issued by the President of the Republic, or a Consul who has a patent for it, but not a Vice Consul; express mention is made of the position, and of the aforementioned title and patent;
- the witnesses will be Chilean, or foreigners domiciled in the city where the will is executed;
- the rest of the formalities of the solemn testament granted in Chile are observed; and
- the instrument bears the stamp of the Legation or Consulate.

A will that has not been granted before a head of Legation bears the approval of this head; if the will is open, the approval is at the bottom, and if it is closed, on the cover. An open will must always be initialled by the same head at the top and bottom of each page.

The head of Legation sends a copy of the open will, or the cover of the closed will, to the Minister of Foreign Relations of Chile; who sends a copy to the judge of the last domicile of the deceased in Chile so that it can be incorporated into the protocols of a notary of the same domicile.

If the testator has no known domicile in Chile, the document is sent by the Minister of Foreign Affairs to a judge of letters of Santiago for its incorporation in the protocols of a designated public notary.

#### *B. Will formalities*

As mentioned above, wills are classified as: (1) solemn wills and (2) least solemn wills or privileged wills.

The least solemn or privileged will is that in which some of these solemnities can be omitted due to the consideration of particular circumstances, expressly determined by law. This type of will is generally applied in cases where the testator's life is in imminent danger.

A solemn will is used the most. It must be written and granted before witnesses over 18 years of age. A solemn will can be open or closed. In the former, the testator informs a notary and witnesses of his or her will. In the latter, the testator presents a closed deed to the notary and three witnesses, declaring out loud that it contains his or her last will.

The following are ordinary formalities of a solemn will:

- *It must be in writing.*

- *It is a single person act and not delegable*: all provisions made by two or more people at the same time, whether for the mutual benefit of the grantors, or of a third person, are void.
- *Continuity of the act*: the will shall be granted in one uninterrupted act. The writing of the will itself may be done by the testator in a series of acts, but the reading of the will by a notary public or the deposit in the Will National Registry (*Registro Nacional de Testamentos*).
- *Witnesses*: witnesses must comply with the following requirements:
  - be at least 18 years old;
  - be mentally sane and not be deprived of reason;
  - know the language of the testator, unless is a closed will;
  - not be blind, mute or deaf;
  - not be the employees of the notary public who wrote the will; and
  - not be foreigners without being domiciled in Chile.

Some of the witnesses must be able to read and write. If the will is made before three witnesses, at least one of them must read and write, and if it is granted before five witnesses, at least two of them must read and write. Finally, at least two witnesses must be domiciled in the department where the will is made.

- *Capacity to grant a will*: in order to grant a will, a testator must:
  - be at least 12 years old if the testator is female, and 14 years old if the testator is male;
  - be mentally sane, and his or her judgement is not affected by drunkenness or other similar causes;
  - not be deprived of the administration of his or her assets; and
  - be capable of clearly expressing his or her will.
- *Register of the will*: the will must be registered in the National Register of Wills at the Civil Registry. The notary public must file the will with the Registry of Wills and Testament, which is under the supervision of the Ministry of Justice.

## **II. Estate distribution and administration**

### *A. Overview of procedures*

The estate of the deceased passes to the heirs after a legal procedure. The heirs must accept or repudiate the heritage. No one can acquire rights against their will. The place of death determines the jurisdiction and regulation of the succession. The moment of death determines the assets and heirs.

If there is an intestate death, one of the heirs has to request an Affidavit of Heirship (*Certificado de Posesión Efectiva*) at the Chilean Registry Office (*Servicio de Registro Civil e Identificación*). An application should be filed with the individualisation of the heirs and an estate inventory. The Registry Office checks the information with its records and issues the Affidavit of Heirship.

On the other hand, if there is a will or the descendant dies abroad, one of the heirs has to request an Affidavit of Heirship at the civil court corresponding to the last domicile of the testator. The solicitude has to be accompanied with a notarial estate inventory, Registry Office and Internal Revenue Service records, and publications in the Official Journal.

Where an estate inventory includes real estate, the heirs can dispose of them only when the Affidavit of Heirship is registered in the Real State Registry.

Finally, the heirs distribute the estate in accordance with the will and succession laws.

#### B. *Forced heirship*

In the case of testate inheritance, the deceased may only freely dispose of 25 per cent of his or her assets; the rest must be distributed among the heirs: 50 per cent according to the rules of intestate succession and the remaining 25 per cent to increase the quota of certain heirs (spouse or civil partner, descendants or ascendants).

Intestate succession has the following characteristics:

- they are universal, namely they involve all the assets of the deceased;
- they only occur in the event that a valid will may not be enforced;
- the rules that define who may be a legitimate heir are the same rules that apply in testamentary succession; therefore, heirs in intestate and testamentary succession share the same characteristics;
- heirs are not subject to conditions and there are no legatees; and
- heirs are responsible for the appointment of an executor, and, if appropriate, an intervenor.

The general rules for distributing inheritance in an intestate succession are as follows:

- *First-order heirs*: the direct descendants and surviving spouse. In the case where these descendants are also deceased, the rightful heirs are their direct descendants; in other words, the testator's grandchildren.
- *Second-order heirs*: If there are no direct descendants, the rightful heirs are the parents or the closest related ascendants and the surviving spouse. In the case where the father, mother and surviving spouse are deceased, the rightful heirs are the testator's living grandparents. In the case that they are not alive, then it becomes the testator's living great grandparents.
- *Third-order heirs*: If any of the above are deceased, the rightful heirs are the testator's brothers and sisters, either from the same mother and father or as half-siblings. In the case where they are deceased, the rightful heirs are the brother's or sister's children; in other words, the testator's nieces and nephews.
- *Fourth-order heirs*: If any of the above are deceased or do not exist, the rightful heirs correspond to the closest blood relatives descended from the same origin without being direct ascendants or descendants of the testator. These are uncles and aunts, and if they are deceased, cousins.
- *Fifth-order*: The Chilean State.

The following rules apply for every succession:

- when there are no descendants or ascendants of the deceased, the surviving spouse is the sole heir;
- if there are two or more children, the widower or the surviving civil partner receives, as a general rule, twice the share of each child. If there is only one child, the quota of the surviving spouse or the surviving civil partner is equal to the quota of the son or daughter;

- in no case will the portion that corresponds to the spouse or civil partner be lower than a quarter of the inheritance; and
- if there is a surviving spouse or surviving civil partner and ascendants, the inheritance is divided into three parts: one for the ascendants and two for the surviving spouse or surviving civil partner. If there are no ascendants, the inheritance is for the surviving spouse or surviving civil partner.

### C. *Marital property regimes and inheritance*

If spouses were married under a marital partnership regime, the surviving spouse owns half the assets that the deceased and surviving spouse acquired after marrying. Therefore, the deceased would only have owned 50 per cent of the property or assets acquired during the marriage; therefore, only this percentage should be considered for inheritance.

In the separation of property regime, instead, there is no confusion of assets, so each spouse is the owner of his or her assets.

Finally, there are two rights that the surviving spouse or the surviving civil partner may exercise in a partition:

- *Right of preferential adjudication*: they have preference in the adjudication of the real estate, including furniture, in which they lived and has been the main home of the family (they are copulative requirements).
- *Right of use or habitation*: if the value of the real estate, including furniture, in which they lived and has been the main home of the family exceeds the hereditary quota of the surviving spouse or civil partner, he or she may request rights of use and habitation over them.

### D. *Estate distribution*

Under Chilean succession law, the heir is considered to hold the legal position of the deceased, and therefore is responsible for administering and settling the inheritance and rendering the testamentary provisions, unless there is a provision to the contrary from the testator.

The testator may entrust one or more faculties of the execution of the inheritance to one or more people. In these cases, the administration of an estate is carried out by one or more executors (*albaceas*).

The position of executor is voluntary and the nominated executor may accept or reject the commission; such a position must be performed directly by the individual appointed. Executors may grant powers of attorney to third parties being responsible for the actions of the third parties holding powers of attorney.

Executors are entitled to receive compensation for the performance of their duties, as follows: (1) the amount that a testator fixes in the will; or (2) In the absence of a determination by the testator, the judge is granted the power to set the remuneration of executors, taking into consideration two aspects: the estate and the work that demands the performance of their duties.

In general terms, executors have the following duties.

#### 1. DUTY TO ENSURE THE SECURITY OF THE ASSETS OF THE SUCCESSION

Executors must ensure the security of the assets, especially furniture, money and documents. In compliance with this obligation, executors can request the conservative measure of storage and apposition of seals (*medida conservativa de guarda y aposición de sellos*).

Executors must prepare the estate inventory within 60 days following their appointment. Such an inventory must list the assets and debts of the estate. The inventory must be solemn, unless all the heirs agree to carry out a simple inventory, a valued list of the assets, which must be notarised before a notary, but without the formalities to do it.

In the event that the heirs do not agree to a simple inventory, the solemn inventory must meet the following requirements:

- it must be done before a public notary and two witnesses over 18 years of age, who can read and write and are known to the notary;
- all known interested parties must be summoned to the diligence, leaving a record in the inventory;
- this summons is made personally to those who are joint owners of the assets to be inventoried, if they reside in the same jurisdictional territory; and
- the other co-owners and other interested parties are summoned by three publications in a newspaper of the community, the capital of the province or, if there is none there, the capital of the region.

Before closing, executors must declare under oath that they have nothing other to manifest and that they must appear in the inventory. It must be signed by the executors and witnesses.

## 2. DUTY TO PAY DEBTS AND LEGACIES

Chilean law establishes the following procedures where executors must be in charge:

- to ensure that the assets will pay the debts;
- to notify the public – and especially the creditors – of the opening of the succession, by means of three notices published in a regional or state circulation newspaper; if executors fail to carry out the above two procedures, the creditors could demand compensation for any damage caused; and
- executors must also be in charge of the payment of the legacies, unless the testator has imposed the payment on one of the heirs. If the money available is not enough to pay the inheritance debts and legacies, the executor may sell the assets with the consent of the heirs. The law prevents personal goods being sold before real estate.

## 3. EXERCISE JUDICIAL ACTIONS

Executors must exercise limited judicial actions related to the will.

## 4. RENDER AN ACCOUNT OF THE EXECUTOR'S MANAGEMENT AT THE END OF HIS OR HER COMMISSION

The duties of an executor end pursuant to the following:

- the fulfilment of the executor's obligations;
- the death of the executor;
- a formal declaration of legal inability to perform the duties of an executor issued by a competent judge with jurisdiction;
- a good reason to be excused from acting as an executor;
- the expiration of the term determined by the testator or, if the testator has not set a fixed time, the term lasts one year from the day the executor began to exercise his or her position; or

- the removal of the executor by a competent judge with jurisdiction.

### III. Taxation

#### A. Domicile and residency

Income tax in Chile is based on two factors: the taxpayer's place of residence and the source of income.

Any resident or person domiciled in Chile, whether an individual or corporation, is taxed on its total income, on any domestic or foreign source income. However, non-residents are only taxed on income generated in Chile.

Residence, for tax purposes, is an objective concept. Pursuant to Chilean law, any person who remains in Chile, whether continuously or not, for a period or periods exceeding 183 days in total within any 12-month period is classed as a tax resident in Chile.

The domicile consists of the residence, accompanied, actually or presumptively, by the intention to remain in it. Indeed, the domicile requires residence and the desire to remain there. Once the domicile has been established, the CC and the Income Tax Law establish that the loss of residence does not necessarily entail the loss of domicile. Indeed, the civil domicile does not change if the person had his or her family and the main seat of his or her business in the previous domicile. One of the decisive factors that would determine the loss of domicile in the country is the circumstance of the place where the person exercises the activity from which the person obtains most of his or her income and where his or her main interests are located.

#### B. Inheritance taxation

Chilean law applies to inheritance opened in Chile, which depends on the last domicile of the deceased, but the hereditary rights of the spouse and relatives in Chile are governed by Chilean law even if the succession opened abroad.

Inheritance tax is a progressive tax on the net value of each assignment. The tax rates depend on the proximity of the relationship between the deceased and the value of the inheritance as follows:

Heirs and beneficiaries are classified into the following categories:

- Category I: spouse, direct descendants, direct ascendants, adoptive descendants and adoptive ascendants.
- Category II: siblings, nephews and nieces, aunts and uncles, and first cousins.
- Category III: any other person.

<b>Inheritance tax</b>			
<i>Tax rate on different categories (approx.)</i>			
<i>Tax base (US\$)</i>	<b>I (%)</b>	<b>II (%)</b>	<b>III (%)</b>
Up to 70,000	1	1.2	1.4
70,001–141,000	2.5	3	7
141,001–282,000	5	6	7
282,001–424,000	7.5	9	10
424,000–565,000	10	12	14

565,001–706,000	15	18	21
706,001–1,060,000	20	24	28
Over 1,060	25	30	35

Assets located abroad must be included in the valuation of Chilean succession; in foreign succession, these assets must be collated in the inventory only when they have been acquired with resources from Chile. The tax paid abroad for the goods collated in the inventory serve as credit against the total tax in Chile. In this case, the tax cannot be less than that which would have corresponded considering only the goods located in Chile.