**INHERITANCE UNDER WILL AND GUARDIANSHIP**

**UNDER THE LAWS OF VIET NAM**

* 1. **General legal issues in relation to inheritance under will**

The inheritance under will in Vietnam is governed by Civil Code, Law on Marriage and Family and Law on Notarization.

* 1. **Will and the rights to bequeath property under will and the rights to receive property under will**

Will means an expression of the wishes of an individual, made in order to bequeath his or her property to others after his or her death [1].

UnderArticle 631 of the Civil Code, the will must clarify clearly the date on which the will is made; full name and residential place of the testator; full name of person who is entitled to inherit the property; the property to be bequeathed and its location if it is real estate.

* 1. **Formalities of will**

A will must be made in writing. If it is not able to be made in writing, it may be made orally under special situations as descripted by the laws [2]. However, in facility to the expression in this legal ariticle, we will only indicate the written will.

According to the Civil Code, the written will be expressed in one of the following forms:

1. Unwitnessed written wills;
2. Witnessed written will;
3. Written will which are notarized;
4. Written will which are certified.

Thus, the will are not compulsory required to be notarized or certified; however, given the facts that the testator wishes that his/her expressions in the will shall ensure the legal effectiveness and the heirs may inherit duly under such expression, the testator often conducts the notarization or certification of the will. Furthermore, another reason of which the testator should select the formality of written will which are notarized is, under the Law on Notarization, such will shall have evidential value without any proving, if arising any dispute related to the will (except for the case where the Court decides that such will are invalid) [3].

Please note that, the procedure for notarizing the will is given under the Law on Notarization [4]. Accordingly, the notarized will shall become effective as from the date of signing by the notary officer and sealing by the notary office [5]. The procedure for conducting the notarization of the will shall be guided in detail in the later stage.

* 1. **Legal effectiveness of the will**

The will become legally effective as from the time of commencement of the inheritance which is the time of the death of the testator [6].

All or part of a will shall be legally ineffective in cases where [7] (i) an heir under the will dies prior to or at the same time as the testator dying; or (ii) there are several heirs under a will and one of them dies prior to or at the same time as the death of the testator, in this case, the part of the will related to the died individual shall no-longer having legal value.

Where all or part of a will shall be legally ineffective, parts of a property related to an ineffective part of the will shall be distributed by inheritance under laws [8].

If the property distributed to the heirs no longer exists at the time of commencement of the inheritance, a will shall not be legally effective [9].

In case where a person leaves behind more than one will with respect to certain property, only the most recent of such will shall be legally effective [10].

* 1. **Amendment, supplementation, replacement and revocation of will**

A testator may amend, add to, replace or revoke his or her will at any time. If a testator adds to his or her will, the original will and the codicil shall have equal validity. However, if a part of the original will and the codicil conflict with each other, the codicil shall be prevailing [11].

Upon being notarized, the will can be partially or wholly amended, supplemented, replaced, or revoked under the same notarization process [12].

Where a testator replaces a will by a new one, the new will shall be effective and the previous one shall be revoked.

* 1. **Joint will of the husband and the wife**
  2. **Common property of husband and wife**

Under the laws of Vietnam, the marriage was registered in foreign country under foreign laws so that it is considered as the marriage relationship having foreign element [13]. Given the fact that the local Department of Justice of Vietnam must recognize the marriage to the residential book, your marriage shall be considered as a legal marriage in Vietnam and protected and governed under the Vietnamese laws.

It is notable that in the marriage and family relationship with the foreigner which is recognized under the Vietnam laws, the foreigner shall have the rights and obligations as the same with a Vietnamese citizen [14] i.e. rights relating to the ownership of property, inheritance, marriage and family etc., especially to the common property of husband and wife (includes property created by themselves before or in the marriage period, incomes generated from labour, production and business activities of each person and other lawful incomes of husband and wife during the marriage period; property jointly inherited or given to both, and other property agreed upon by husband and wife as common property) [15]. Although the laws of Vietnam has some restrictions to foreigner on registration the ownership to number of properties which required to be registered such as residential houses, lands, land use rights, construction buildings, cars, motorbikes, etc., hence there has been only Vietnamese partner’s name in the certificates on ownership of property. Even though the foreigner has not named in the ownership certificate to number of properties, but his/her legal interests toward such properties are still recognized and protected by the laws of Vietnam.

* 1. **Right to make a joint will of husband and wife**

Under the regulation of Civil Code 2005, husband and wife may jointly make a will to bequeath the common properties. Thus, when the husband and the wife have had common properties during their marriage period (usually after obtaining the Certificate of marriage), the husband and the wife may make a joint will to dispose such common properties under their mutual expression. However, the Civil Code 2015 has abolished the provisions on joint wills between husband and wife because the process of law enforcement as well as the practice of adjudicating at the People's Courts at all levels on the issue of joint wills between husband and wife have many shortcomings. It can be mentioned that the effective date of the joint will of husband and wife has directly affected the interests of the surviving person, such as in the case of the surviving person having difficulties or illness but they cannot transfer their property in the joint property of husband and wife. In addition, there are practical questions about the case in which the surviving wife/husband has used the property in production and business activities, and if the profit are obtained, this arising profit is considered as an inheritance or owned by that surviving wife/husband? Not only that, joint will of the husband and the wife affected to the interests of the heirs of the party who died first, hence, they have to wait until the time that joint will has legal effectiveness for property distribution.

* 1. **The heirs**

**3.1 The heirs**

The heir is the persons entitled to inherit the property under a will and must be alive at the time of commencement of the inheritance or, if such person is born and alive after the commencement of inheritance, he/she must have been conceived prior to the time when the testator dies. Where the heir died prior to or at the same time as the testator’s death, the part of the property which the heir would have been entitled to inherit if he/she had been still been alive will be inherited by his/her children. If the heir’s children also died prior to or at the same time as the testator’s death, the grandchildren of the heir shall inherit the part of the property which their father/mother would have been entitled to inherit had such father or mother still been alive [16].

In addition, where a will is legally made and became effective, the testator’s property shall be distributed under such will at the time of commencement of inheritance, except for some cases are required to distribute the property under laws.

Article 621.1 of Civil Code also regulated the persons are not entitled to inherit, including: (i) persons convicted of having intentionally caused the death of or harmed the health of the deceased, of having seriously mistreated or tortured the deceased, or harmed the honour or dignity of the deceased; (ii) persons having seriously breached their duty to support the deceased; (iii) the persons convicted of having intentionally caused the death of another heir in order to obtain all or a part of the entitlement of such other heir to the property; (iv) persons deceiving, coercing or obstructing the deceased with respect to the making of the will, or forging, altering or destroying the will in order to obtain all or part of the property contrary to the wishes of the deceased. However, if the testator was aware of the violation to the mentioned provisions of the person entitled to be the heir but still allows the person to inherit the property under the will, they may still bequeath the property to that person under the will [17].

Given the above, if the heir is of Vietnamese nationality, all of his/her lawful rights shall be protected under Vietnamese laws and by the State including but not limited the rights to inherit and register his/her ownership over both moveable property and immovable property inherited from you.

**3.2 Heirs notwithstanding contents of will**

To protect the children who are minors, children who are adults but incapable of working, the elders and related persons of the testator, Civil Code regulated that the following persons shall be entitled to a portion of the property if the testator does not grant them an inheritance [18]:

* Children who are minors, father, mother, wife or husband of the testator;
* Children who are adults but incapable of working.

The property portion level of the above-listed persons shall be two-thirds of a portion that person would have received if the property had been distributed under laws.

In case where the testator grants any such person an inheritance which is less than two-thirds of a portion that a person would have received if the property had been distributed under laws, such person shall be entitled to a portion of property equivalent to two-thirds of the portion that he/she would have received if the property had been distributed in accordance with laws, unless such person has disclaimed his or her inheritance or is not entitled to inherit the property.

Where a child of a testator died prior to or at the same time as the testator, the grandchildren of the testator shall inherit that portion of the property which their father or mother would have been entitled to inherit had such father or mother still been alive. If the grandchildren also died prior to or at the same time as the testator, the great-grandchildren of the testator shall inherit that part of the property which their father or mother would have been entitled to inherit had such father or mother still been alive.

* 1. **Property**

**4.1 Property**

The property in this concept means that the deceased left to his/her heirs property solely owned by the deceased or jointly owned by the deceased with other persons [19].

The property includes legally: (i) immoveable property and (ii) moveable property. In which, immoveable property includes lands, residential houses, construction buildings attached to the lands or property attached to the houses, construction buildings and other assets attached to the lands.

* Property are required to register the ownership such as residential houses, construction buildings, cars, motorbikes;
* Cash or money deposited by the individual or husband and wife in the licensed banks and/or the licensed credit institutions;
* The land use right over the kinds of land that the laws allow an individual to bequeath property and/or receive inheritance; and
* The valuable papers such as shares, bonds and promissory notes.

**4.2 Distribution of property under the will**

In principle, under the Civil Code, the property under the will shall be distributed in the manner which is set forth by the testator therein. Hence, the bequeathing of such property in the will is generally subject to the sole discretion of the testators.

In fact, under our experiences in the same cases, there some ways to distribute the property as follows:

* For the property are not required to register the ownership such as cash, deposit, shares, bonds and promissory notes: there are 2 common options of distribution including: (i) distribution under percentage ratios, or equal distribution over the currently holding property; or (ii) specific figures under the property’s value.

Between 02 above options, the testator usually selects the distribution under percentage ratios over the currently holding property at the time of making the will, since such property’ price may increase or decrease from time to time.

* For the property are required to registered the ownership or the use right such as residential houses, construction buildings, land use right, cars, motorbikes, there are also 2 options including: (i) the testator shall decide each property to his/her heir; or (ii) the testator may decide the inheritance of the heir under the percentage ratios or equal distribution based on the value of the property.
  1. **Property administrator and property distributor**

**5.1 Property administrator**

An administrator of the property is the representative on behalf of the heir in the relationship with any third party relating to the property. An administrator is responsible to make a list of the property, collect the property belonged to the deceased which are possessed by others, take care of the property, but not allowed to sell, exchange, give, pledge, mortgage or otherwise dispose of property without the written consent of the heirs, notify the heirs the status of the property and compensate for any damage if the administrator breaches any of its obligations, thereby causing the damage. However, the most important obligation of the property administrator is to deliver back the property at the request of the heirs [20].

The testator is entitled to appoint the property administrator at the time of making a will or amending of or supplementing to such will. Currently, Civil Code has kept silence on the provision of who will be entitled or not entitled to be the property administrator. This means that the testator is entitled to appoint anyone under his/her own expression, given that the property administrator must have capacity for civil acts, i.e. a person who is 18 years old or more and has not been declared as having lost the capacity for civil acts.

However, in fact, the testator often appoints (i) the persons having his/her family relationship to ensure the specific reliability for being an property administrator for the heir who is not yet an adult (i.e. under 18 years old) or cannot establish and perform civil transactions by himself/herself as regulated by the laws as well; or (ii) a reliable person among the heirs to be an property administrator in case where there are several heirs.

If the testator does not appoint the property administrators in the will, the heirs may appoint an administrator.

If the testator did not appoint the property administrators in the will and the heirs have not successfully appointed an administrator yet, the person currently possessing, using and managing the property will keep his management over such property until a property administrator is appointed by the heirs [21].

The property administrator may be remunerated as agreed with the heirs for conducting his/her management over the property.

**5.2 Property distributor**

According to Article 657 of Civil Code, the property distributor may also be the property administrator appointed in the will or by agreement of the heirs.

The property distributor is obligated to distribute the property strictly in accordance with the will or the agreement of the heirs at laws.

As said above, the property administrator is not allowed to sell, exchange, give as gift, mortgage, pledge and dispose of the property under other forms unless having written consent of the heirs; but acting as the natural guardian of minor under 15 years old, such guardian has the right to dispose of the property due to the interests of the minor.

* 1. **Cases where the property must be distributed under laws**

In light of the above, the husband and the wife or the testator shall have the entire right to dispose of his/her lawful property under will. However, under the Article 650 of Civil Code, the inheritance must be under laws in the following cases:

1. The will is invalid;

1. The heirs under the will died prior to or at the same time with the death of the testator; and
2. The heirs under the will have no right to inherit the property as analysed above or such heirs refuse to inherit property.

Please note that if the husband and the wife die at simultaneous time but there has been no private will of each person, the property also shall be distributed under the laws [22].

In addition, the inheritance under laws is also applied for the following portion of property:

1. The portion of property which is not disposed of in the will;
2. The portion of property which is relevant to the invalid portion of the will; and
3. The portion of property which is relevant to the heirs under the will but they have no right to inherit the property or they refuse the right to inherit the property or they die prior to or at the same time with the death of the testator.

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[1]: Article 624 of the Civil Code

[2]: Article 627 of the Civil Code

[3]: Article 5.2 and Article 5.3 of Law on Notarization

[4]: Article 56.2 of Law on Notarization

[5]: Article 5.1 of Law on Notarization

[6]: Article 643.1 of Civil Code

[7]: Article 643.2.a of Civil Code

[8]: Article 650.2 of Civil Code

[9]: Article 643.3 of Civil Code

[10]: Article 643.5 of Civil Code

[11]: Article 640 of Civil Code

[12]: Article 56.3 of Law on Notarization

[13]: Article 2.25 of Law on Marriage and Family

[14]: Article 121.2 of Law on Marriage and Family

[15]: Article 33.1 of Law on Marriage and Family: Common property of husband and wife includes property created by a spouse, incomes generated from labor, production and business activities, yields and profits arising from separate property and other lawful incomes in the marriage period; property jointly inherited by or given to both, and other property agreed upon by husband and wife as common property.

[16]: Article 643 of Civil Code

[17]: Article 621.2 of Civil Code

[18]: Article 644 of Civil Code

[19]: Article 612 of Civil Code

[20]: Article 617.1 of Civil Code

[21]: Article 616.2 of Civil Code

[22]: Article 650.1 of Civil Code