LOZANO SCHINDHELM
law. tax. clarity.

LAST WILLS IN THE TIME OF COVID-19

This could have been the title of Gabriel García Marquez's novel if he had been a lawyer and the historical context of his work had been the present. The common element is that in both cases we are in times of an epidemic. The legal regulation of wills in the event of an epidemic in the Spanish Civil Code dates back to 1889, a provision that was introduced as a result of the experience of the repeated outbreaks of cholera in Spain in the 19th century. In the following we will analyse what possibilities our legislation offers us in this exceptional situation, wherever we are.

The **will in the event of an epidemic** is not, legally speaking, a special form of will, but is an open will that enjoys an exception: The intervention of an official notary is not necessary for its validity. However, our Civil Code requires two types of conditions for its valid constitution: formal and factual. Let us start with the latter: article 701 of the Spanish Civil Code (*Código civil*, hereinafter "CC") first of all states that there must be an epidemic. The declaration of a state of alert in Spain (Royal Decree 463/2020 of 14 March and Royal Decree 476/2020 of 27 March) leaves no doubt that this condition is currently met, so that wills made in Spanish territory in accordance with the ad hoc formalities of the *Código civil* will be valid.

The cause of death of the deceased does not necessarily have to be linked to the epidemic itself, nor does he or she have to have been infected in order for this type of will to be valid. However, the will becomes invalid two months after the end of the epidemic if the testator has not died during this period. In this sense, in the event of an epidemic, the will has an expiry date that is automatically effective if the testator does not die, as it is designed as an instrument of urgency and exceptionality. The legal consequence of its ineffectiveness is that it is considered that such a will never existed (ineffectiveness is therefore *ex tunc*). It should be noted that the consequences are the same even in the event of the death of the testator, if the will is not authenticated by an official notary within three months of his or her death (articles 703 and 704 CC, articles 64 and 65 of the Notaries Act –*Ley del Notariado*, hereinafter "LN").

One of the formal requirements of the will in the event of an epidemic is the participation of three (ideal) witnesses who are at least 16 years old and who, in turn, meet the requirements of art. 681 and 682 CC. This means that all of them must understand the language in which the testator expresses himself, and they must have the necessary judgement to be able to carry out the testimony (i.e. they must understand the meaning of the act they are witnessing). Under no circumstances may the heirs and legatees appointed in the will, as well as their spouses or relatives, act as witnesses up to the fourth degree of consanguinity or up to the second degree of affinity. Legatees and their spouses or relatives are not covered by this prohibition if the legacy is a movable object or an amount of minor importance in relation to the entire estate.

Article 685 CC also requires that witnesses, who must know the testator, satisfy themselves as to his or her legal capacity. These days, many people wonder how this can be done in view of the lockdown or even hospitalisation and the resulting isolation of the testator. It is difficult for health care professionals to claim to "know" the testator. It should also be noted that there is a practical lack of case law in this area. Nevertheless, arts. 685 and 686 CC offer a solution: If the notary public, in this case the witnesses, does not know the testator, recourse is made to officially issued identification documents that are expressly foreseen for the purpose of identifying the person. If this is also not possible, the documents presented by the testator for this purpose and his personal details must be recorded.

Compliance with these formal requirements is of fundamental importance, as their disregard invalidates the will (art. 687 CC).

Two other topics are also being discussed. One of them is whether witnesses, e.g. neighbours, can virtually "intervene" (via tele- or video-conference, through instant messaging groups, etc.). The answer is no, although it should be examined whether later in practice (especially in notarial practice) the general legal principles –*favor contractus* and *favor testamenti*– could be taken into account, since these give priority to the execution of the testator's testamentary dispositions, i.e. in case of doubt, the validity of the will is preferred to the rigid formalities that limit the validity of the will, even if this is at the expense of legal certainty. In practice, this preference could be applied above all because digital means that can be reproduced before the notary are permitted for recording the testator's oral will (art. 64.3.2 LN).

The other aspect is whether participation should take place in a unit of action, i.e. whether the witnesses must all be present at the same time. Here the question according to art. 65.3.3 LN would have to be answered in the affirmative, especially if the will cannot be recorded in written form due to the current circumstances, since otherwise there is a risk that the statements of the three witnesses may not correspond.

In any case, art. 702 CC stipulates that the will must be recorded in writing, although this is not a prerequisite for its validity, as the testator must at least express himself or herself orally. If the last will can be written, the testator does not have to do this himself, but then it must be signed by him and the three witnesses in person.

In both cases, it is strongly recommended that the date of the will be recorded in some form, as latter wills revoke those made earlier, unless otherwise declared.

The two other alternatives of non-notarial wills that could be considered in the present circumstances are the hand-written will (art. 688 et seq. CC) and the will made in peril of death (art. 700 CC). Although the **hand-written will**, which must be written by the testator himself and signed and dated by him, may be less useful in truly urgent situations, as it must be written entirely in the testator's own handwriting. The law also requires that the testator is of age and can read and write. On the other hand, the validity of a handwritten will is guaranteed for longer (the period for notarisation is 5 years from the death of the testator) than a will in the event of an epidemic and in the event of danger of death. In the case of a **will in imminent danger of death**, as in the case of an "epidemic" will, it is sufficient for the testator to express himself or herself orally, although for it to be valid it requires the participation of five (instead of three) witnesses. The witnesses must meet the same requirements as those explained above. The expiry date is also two or three months, depending on whether the testator dies or not and whether the will is notarised or not. One question that might be asked is whether it must be proven that the testator was in a life-threatening situation when he or she made the will. In the case of notorious danger, life-threatening accidents, wars, natural disasters and also coronavirus infection, the danger of death is presumed.

In the particular law, or "Foral law", which applies in certain regions of Spain, two nuances must be taken into account. While "Navarrese law" refers to the general law of the *Código civil*, Basque law provides that a will in peril of death ("*hilburuko*") is made before only three witnesses, and the Catalan Civil Code directly prohibits wills made exclusively before witnesses. For these reasons, testators from certain civil districts and also witnesses who are subject to these special regulations (see, for example, art. 415 of the Aragon Foral Law or art. 421-11 of the Catalan Civil Code for the incapacity or suitability of witnesses) must take these particularities into account.

Finally, art. 732 CC provides that Spanish nationals may draw up a will outside Spanish territory, subject to the forms laid down by the laws of the country in which they are located. This includes the handwritten will (art. 688 CC), even if foreign laws do not allow it. Although, on the other hand, art. 734 CC states that Spaniards residing abroad must give their will, whether open or closed, before the Spanish diplomatic or consular official who exercises notarial functions at the place where the will is drawn up, it will be difficult to comply with this requirement if the movement of persons abroad has also been restricted by COVID-19. However, by stating that all the formalities listed in Chapter 1, Title III, Book 3, Sections 5 and 6 of the *Código civil* are also complied with in foreign cases, one could include the variant of the will in the event of an epidemic and in danger of death, as explained above, also abroad.

However, considering that the subsequent notarisation would have to be carried out according to Spanish law, i.e. it could only be carried out by an authority whose competence is recognised by our legal system, this could pose a problem, since abroad only diplomatic or consular officials in the exercise of notarial functions have this competence. Therefore, for practical reasons, it would probably be more appropriate to draw up a will according to the laws of the foreign country.