Colombia

International Estate Planning Guide

Individual Tax and Private Client Committee

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A. Will Formalities and Enforceability of Foreign Wills

In Colombia, a will is a solemn act which must comply with the formal requirements established by civil law in order to be valid and binding. A will, like any other legal act, must fulfill the essential requirements for validity, that is, that the testator has legal capacity to make the will, that his or her consent is not impaired by vices such as error, duress or fraud, and that the act has a lawful purpose and cause. Depending on the type of will involved, the law has established additional specific formalities for validity.

Under Colombian legislation, wills are classified as solemn or privileged. Solemn wills may be open or sealed and privileged wills are classified into oral, military and maritime wills. A solemn will must always be recorded in writing and executed before competent witnesses. At least two of the witnesses must be domiciled at the place where the will is granted, and must be able to read and write.

In an open will, also known as a nuncupative or public will, the testator makes his or her dispositions public before three witnesses and a notary. The witnesses must copy the words of the testator verbatim and, at the end of the proceeding, read and sign the will. In a sealed will, on the other hand, the witnesses and notary are not required to have knowledge of the dispositions contained in it. However, the sealed deed must be presented before a notary and five witnesses, declaring *viva voce* that the deed contains the will.

Privileged wills, on their part, may omit some of the formalities by reason of specific circumstances expressly determined by law.[1] Nevertheless, a privileged will must meet three requirements: i) the *viva voce* statement of the testator regarding his or her desire to make a will, must be unequivocally declared; ii) the persons whose presence is necessary in the making of the will must be before the testator, and iii) the granting must be continuous, in that it may be only interrupted exceptionally for brief intervals, when required by reason of an accident. The validity of a privileged will is provisional and, therefore, once the exceptional situation is overcome, the requirements of a solemn will must be complied with.[2]

As to the content of a will, the law provides that it must indicate the full name, place of birth, nationality, domicile and age of the testator, as well as the circumstance of being of sound mind and the names of the testator's spouse and children, together with the information of each of the witnesses and the notary, indicating the place, day, month and year of execution of the will. Errors in content do not nullify the will, provided there is no uncertainty regarding the identity of the testator, notary or witnesses.

The allocations to be made must be determined or determinable, underlining the fact that the will of the testator is limited by the forced allocations established by Colombian law. These allocations are mandatory for the testator, and therefore they will be observed when they have not been made, even if they contradict what is expressly provided in the will. Forced allocations include: i) the support due by law to certain persons; ii) the marital share, that is, the portion of the assets of the deceased which the law assigns to a surviving spouse who lacks the necessary means for a decent subsistence; iii) the legitime succesors

[1] An oral will only occurs in cases of imminent danger to the life of the testator. Likewise, in order to make a military will the testator must be in a war expedition or campaign against the enemy or at a garrison in a territory under siege. A maritime will may only be made on board a Colombian warship at sea.

[2] An oral will has no value if the testator dies after thirty days following its execution, or if having died before, the will has not been set out in writing within thirty days following the death. In the case of a military will, if the testator dies before ninety days following the date on which the circumstances of war that enable him to grant a military will have ceased, his or her will is valid, but if the testator survives this period, the will becomes invalid. A maritime will is not valid unless the testator has died before disembarking or during a period of ninety days following disembarkation.

portion that is the portion assigned to certain persons known as legatees;[3] and iv) the fourth of the estate for accretions to the inheritance of the legitimate heirs.

In accordance with the foregoing, only as of the third order of inheritance, that is, if no descendants or ascendants survive the testator, may he or she dispose freely of the entire estate. Otherwise, the testator may make allocations at discretion only on a percentage equaling 25% of his or her assets.

On the other hand, the validity of wills granted abroad is subject to them been made in compliance with the laws of the State where they were granted, leaving evidence thereof, proof of their authenticity and the legal translation, if necessary.

If the will is granted abroad in compliance with Colombian regulations, the following requirements must be met for its validity: i) that the testator is a Colombian national, or a foreigner domiciled in Colombia, ii) that the will is authorized before a Colombian consul, iii) that the witnesses are Colombians or foreigners domiciled in the city where the will is granted, iv) that the rules of a solemn will are observed**.**

B. Will Substitutes (Revocable Trusts or Entities)

It is important to point out, first of all, that Colombian law does not contemplate the common law Trust institution, but there is an institution with similar characteristics, known as a Civil Law Trust, or "fiduciae". The establishment of a civil law trust implies the imposition of an encumbrance on all or part of the estate of the Trustor. When this ownership is retained by the Trustor or is transferred to another person, it is done on condition that it will be passed on to a third party upon the occurrence of a specific event. As a will substitute, the use of a Civil Trust is useful to transfer the assets of a future *de cujus*, through the designation of the spouse and other heirs as beneficiaries of the Trust, once a condition is met, which in this case is the death of the Trustor.

Therefore, a Civil Trust involves three parties: the Trustor, the Trustee and the Beneficiary. The Trustor is the person who delivers the assets by way of a Trust to the Trustee; the Trustee is the person to whom the property is entrusted until the condition is fulfilled, with the charge of restoring it to the Beneficiary; and the Beneficiary is the person in whose favor the restitution is to be made once the condition is fulfilled.

The Trustee holds the full right of ownership and usufruct of the assets for the duration of the Trust, except as otherwise stipulated, bearing in mind that the Trust ownership may be established on the bare title, reserving the proceeds for the Beneficiaries. When the person dies, the ownership of his or her assets passes to the Beneficiaries in the proportion established in the document constituting the Trust Ownership, without the need for a probate hearing.

From the tax point of view, this mechanism may be onerous, given that if the Trust is gratuitous, at the time of occurrence of the condition it generates a taxable capital gain for the Beneficiary, and therefore each case must be studied in detail, in order to determine the appropriateness of using this scheme. On the other hand, even if they do not constitute will substitutes as such, in pursuance of minimizing the tax burden at the time of the succession and as an instrument for administration of the Estate of the deceased during his or her lifetime and after his or her death, certain corporate schemes may be used both in the country or abroad, through corporate forms contemplated in Colombian law, such as Limited partnerships and Simplified Stock Companies.

[3] The following are legatees:
1) Legitimate, adopted or illegitimate children, personally or represented by their legitimate or illegitimate descendants.
2) Ascendants.
3) Adoptive parents.
4) The blood parents of a child adopted by simple adoption.

The establishment of a Limited partnership allows the testator to have control of the company as an administrating or managing partner, and to structure the assignment of the assets with new capitalizations, through which the heirs will gradually increase their rights or shareholdings in the capital of the company.

Likewise, Simplified Stock Companies (Sociedades por Acciones Simplificadas, SAS) have a flexible and dynamic regulatory framework in which the autonomy of the shareholders prevails. This corporate form enables the establishment of types of shares that assign the control of the company to one of the shareholders, through multiple votes or fractioning of vote stipulations for the election of boards of directors or other collegiate bodies of the company. In addition, the SAS offer the possibility of establishing minimum or maximum amounts of corporate capital that may be controlled by a specific shareholder, and special restrictions for the negotiation of the shares issued by the company.

The implementation of foreign companies also allows a testator to manage his wealth in the jurisdiction he considers most favorable for tax and corporate purposes. The transfer of funds abroad to invest in assets is permitted in Colombia, provided the funds allocated for such purposes are channeled through the exchange market and reported to the Central Bank. Powers of Attorney, Directives, and Similar Disability Documents.

Under Colombian civil law, all persons have legal capacity to acquire rights and assume obligations, except for those who the Law deems incapable, namely those who, despite their status as legally capable persons, cannot govern themselves or manage their affairs.[4] These persons must act through a representative.

Incapacities have been established in order to protect the interests of certain persons who, for one reason or another, do not have full discernment or lack the necessary experience to be able to express their will, acquire rights and bind themselves in a sufficiently clear manner, and therefore are disqualified to enter legal transactions..

Incapacities may be general or specific. General incapacities refer to all types of legal transactions, while specific incapacities only refer to certain acts and are expressly stipulated by the law. In accordance with the Civil Code, said general incapacities may in turn be absolute or relative. Thus, individuals with absolute mental disability,[5] children who have not reached puberty, and deaf-mute individuals who cannot make themselves understood are considered to be absolutely incapable and their acts are subject to absolute nullity. On the other hand, adult minors and squanderers who are under judicial interdiction are considered to be relatively incapable, given that their acts may be admissible under certain circumstances and in certain cases determined by law. This incapacity results in relative nullity.

In favor of protecting the interests of incapable persons, the law has created guardianships, which include tutorships and curatorships. A tutorship is exercised over children who have not reached puberty and is always of a general nature, while a curatorship may be general or special. The latter refers to a specific act or a particular transaction. On the other hand, Law 1306 of 2009, provided that when the value of the productive assets of an individual with absolute mental disability or a minor, exceeds 500 times the legal monthly minimum wage, or is less, but the Judge deems it necessary, the administration of the assets will be turned over to a Trustee.

Likewise, Law 1306 of 2009 created the measure of disability for persons suffering from behavioral deficiencies, prodigality or business immaturity, and who, as a consequence thereof, may place their wealth at serious risk. These individuals may be disqualified to enter certain legal transactions, at the request of their spouse, relatives up to the third degree of consanguinity and even by the individual himself. This may

[4] According to article 1502 of the Civil Code, capacity may refer to enjoyment or action. The former consists of the general legal competence of every individual or legal entity to hold rights and obligations. The capacity to act consists of the ability recognized by law for a person to bind himself or herself, without the intervention or authorization of another person.

[5] Persons suffering from a severe or profound learning or behavioral condition or pathology, or mental impairment, are considered to suffer from absolute mental disability.

also be imposed as an accessory measure at the request of creditors or *ex officio* by the judge, in estate liquidation proceedings and in cases of payment through assignment of the assets of individuals.

II. Estate Administration

A. Overview of Administration Procedures

In Colombia, a succession may be testate, intestate or mixed, that is, it may be governed by testamentary dispositions and in all matters not provided for by the deceased, by Civil Law.

When the testator dies, an unsettled succession arises and its settlement may be carried out through a judicial proceeding or processed before a notary public. An unsettled succession only terminates when the judgment approving the partition or the public deed is executed, or when it is recorded, in the case of the allocation of real properties.

The following persons may take part in the probate proceedings:[6]

- The surviving spouse or domestic partner for purposes of the liquidation of the community property or community estate.
- The heirs in matters related to inheritance rights.
- Legatees for a testamentary disposition in their favor.
- Assignees of the inheritance right, either generally or specifically.
- Creditors, who may come forward until the inventory and appraisal hearing, as their legal interest to become a party is exhausted at this hearing.
- An executor, who is not entitled to a portion of the inheritance; his legitimation to intervene derives from his capacity as executor of the will by the testator.
- The National Tax and Customs' Authority (DIAN) will intervene in the proceedings when the amount of the assets exceeds 700 UVT,[7] that is COP $22.301.300 (Approx. US $ 7,433,766) for the year 2017.

Considering the existence by law of forced allocations that limit the will of the testator, both in testate and in intestate and mixed successions, the estate (determined after the liquidation of the community property, if any), is reduced by these allocations. Therefore, hereditary credits, any taxes that may be incurred, allocations for support, and the marital share are deducted from the deceased's estate. The result is the net estate available for partition, which must be made observing the compulsory successors legatees and the fourth of the estate for accretions as explained in the following chapter.

Generally speaking, the stages of the legal proceeding are the following:

i. An order is issued declaring the liquidation proceeding open and the parties interested therein are recognized. However, there may be a future recognition.[8]

[6] Whoever requests recognition as party must fully evidence such capacity, through documentary proof.
[7] A UVT is a Tax Value Unit. The value of a UVT for the year 2017 is COP$ 31.859
[8] The request for intervention may be filed until the judgment approving the partition is handed down.

ii. The request for acceptance of the inheritance is made. It seeks to generate an act of acceptance or renunciation by the heir. At this stage, the spouse may opt for the conjugal share or for the property acquired during the marriage, as explained in the chapter on Marital Property.

iii. Inventory and appraisal of assets and liabilities. This stage may be lengthy, considering that objections to appraisals by the intervening parties are permitted.

iv. Partition. Once the assets of the deceased have been cleared, a partition takes place, through which the distributions corresponding to each heir are made, in accordance with the will or the law. The executor may be designated by the parties by joint agreement, by the judge, or by the testator himself, when there is a will. The judge must validate the partition and, if appropriate, issue a judgment approving it.

In the case, there is a single heir, the inheritance will be allotted to him or her. This allotment substitutes the partition.

If after the succession proceedings have been concluded, new assets of the testator which were not included in the inventory, or new assets of the community property or estate are found, or if the executor failed to distribute certain inventoried assets, there may be an additional partition if there are several interested legatees. In this act there may be no discussion regarding the existence of persons with equal or better rights who did not come forward in the succession proceeding. In that case, they must file an action to claim their inheritance right against whoever holds it, through a proceeding known as a demand for probate of the deceased's estate.

The other procedure for the liquidation of the succession, that is, the processing of the liquidation before a Notary Public, may be carried out in all cases, provided the heirs, legatees, surviving spouse or assignees are fully capable and act by joint agreement.

B. Intestate Succession and Forced Heirship

In those cases where there is no will, or if there is an invalid will, there is an intestate succession, in which the assets of the deceased are allocated to the persons whom the law has entitled to inherit in the order prescribed by civil law. As previously mentioned, Colombian law establishes forced allocations in relation to support, the marital share, the legatees , and the fourth of the estate for accretions. The law establishes as forced heirs the legatees, that is, the descendants, or if there are none, the ascendants of the deceased.

The legatees are entitled to 50% of the deceased's estate. The fourth of the estate for accretions is exclusively for the descendants and is equal to 25% of the estate. The remaining 25% corresponds to the disposable portion of the estate which is distributed equally among the heirs of the deceased in the case of an intestate succession. The order of succession is made up by the descendants in the first place, the ascendants in second place, and thirdly the siblings followed by their children, the surviving spouse in the fifth place and finally, in the absence of all the foregoing, the State, through the Colombian Family Welfare Institute (ICBF).

C. Marital Property

In Colombia, there is a community property system. This community property exists from the date of the marriage or declaration of domestic partnership,[9] and is dissolved by reason of death, divorce and/or mutual

[9] The law presumes the existence of community property when there is a de facto marital union during a period of no less than two years. It should be highlighted that the Constitutional Court, through judgment C-029 of 2009, stated that the expressions "singular, permanent and continuous union," "domestic partner," and "domestic partnership" contained in Colombian positive law must be read and interpreted in the sense that they all refer, all conditions being equal, to same-sex couples.

agreement. However, as long as there is a legal tie, the community property is not divisible, in such a way that the civil, commercial and tax obligations of the spouses operate individually.

As provided in article 1781 of the Civil Code, the assets of the community property include the salaries and emoluments of every nature arising from office or employment obtained during the marriage by each of the spouses, as well as all proceeds, yields, pensions, interest and profits of any kind derived either from the community property or from the assets belonging to each of the spouses and which are earned during the marriage.

In addition to the foregoing, the community property includes:

- The money that either spouse or domestic partner brings to the marriage, or that is acquired during the marriage, and which must be restored in the same amount from the community property.

- The fungible goods or movable property which either spouse or domestic partner brings to the marriage, or that are acquired during the marriage, and which must be restored from the community property according to the value they had at the time of their contribution or acquisition.

- All assets which either spouse or domestic partner acquires during the marriage for valuable consideration.

The assets acquired before the marriage or domestic partnership, and those subsequently received by donation, inheritance or legacy do not make part of the community property and are deemed to belong to each of the spouses or domestic partners. However, the proceeds, income, profits or increases in value, produced by these assets during the marriage or domestic partnership, are part of the community property.

On the other hand, the liabilities of the community property include the external liabilities, consisting of the obligations chargeable to the unsettled estate and in favor of third parties, and the internal liabilities, which consist of the obligations chargeable to the unsettled estate in the benefit of the spouses.

The spouses may exclude from the community property any assets that are part of their own wealth, by establishing these provisions in the marriage articles (prenuptial agreement). Likewise, the community property may be liquidated without affecting the marital relationship or domestic partnership, by partitioning the assets as the parties decide by mutual agreement. Third parties who do not intervene in this process are protected through the establishment of a joint and several liability by the spouses and domestic partners with respect to their obligations to others.

Upon the death of one of the spouses or domestic partners, if there is community property, the surviving spouse may decide whether to participate in the succession proceedings as spouse or heir. The decision must be communicated before the inventory and appraisal stage, indicating whether the surviving spouse opts for a portion of the deceased's estate as legatee or for the marital property. If he or she opts for the marital share, the unsettled assets of the inheritance and the community property are merged into a single unit, thereby making the specific inventory and partition of the community property, unnecessary. If the surviving spouse opts for the marital property, he or she may carry on the administration of the assets of the community property, and the partition must then be made.

Within the same succession proceedings there may be a combination of liquidations, that is, the liquidation of the succession and that of the community property or community estate between domestic partners. However, the inventories and appraisals must be made separately, in order to identify the assets and liabilities corresponding to each of the estates. The assets of the community property must be distributed among the parties in equal shares, as established in Civil Legislation, or as stipulated in the prenuptial agreement, if there is one.

D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

As of the moment of the death, the assets of the deceased become part of the estate. The administration of said estate may be carried out through different procedures, depending on whether the succession is testate or intestate, or whether the assets belong to the community property.

In the first case, the administration and tenancy of the assets of the estate correspond to the executor, or if there is no executor, to the heirs who have accepted the inheritance.[10]

The executor may only refuse the designation for a justified cause. Otherwise, the person designated as executor will be disqualified as inheritor if he or she refuses the designation. This designation cannot be delegated, except where the testator has so provided, and is not transferrable to the heirs of the executor.[11] It should be pointed out that the executor must answer with respect to his administration for up to ordinary negligence, and the heirs or legatees shall likewise be entitled to demand guarantees from the executor regarding the security of the assets when the executor has possession thereof.

In an intestate succession, the heirs acquire the possession of the inheritance from the moment of its report;[12] this legal fiction is known as lawful possession of the inheritance. The purpose of the lawful possession is for the inheritance not to be considered heirless or with no apparent owner, as well as to allow the heirs to assign their option right, that is, their right to accept or renounce the inheritance or legacy and to exercise the joint administration of the estate.[13] If there is community property, the assets that compose it are managed by the surviving spouse.[14]

The administrators of the estate before the formal inventory is completed and becomes final, are required to hold the assets that form the estate, under deposit (the law indicates that any personal property must be kept under lock and key). When the inventory and appraisals become final, the administrators may dispose of the assets in order to pay the liabilities of the deceased, and if the money available is insufficient to pay the debts of the inheritance or legacy, the spouse, executor or any one of the heirs may request the authorization to sell certain assets in a public auction, or at a stock exchange, when applicable. If immovable property is included, any one of the heirs may request the judge to issue the decree of effective possession in favor of all and to order its recording in the registry of public instruments. This recording grants the heirs the power to dispose of the real estate properties.

Likewise and considering the fact that under tax law an unsettled estate is subject to income taxes from the date of the death until the execution of the judgment approving the partition or the public deed, the executor or the heirs who have accepted the inheritance must act as representatives of the succession before the State. The executor or heirs must act as representatives to comply with the formal tax obligations, such as the filing of tax returns, and making the corresponding payments at the estate´s expense.

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[10] One or several executors may be appointed, in which case the judge may divide the administrative powers corresponding to each, at the request of the executors themselves or of a party with an interest in the succession proceedings; if there are any executors with common powers, they must authorize by joint agreement all acts and contracts related to the administration of the deceased's estate. All executors are jointly and severally liable, except when the testator has divided their powers or exempted them from such joint and several liability or when the judge makes the segmentation of functions.

[11] The prohibition to delegate does not prevent the executor from entering into mandate agreements for the proper administration of the deceased's estate.

[12] The denouncement of the inheritance is the legal term used when an heir or legatee states his or her acceptance or renunciation at the time of the death of the deceased.

[13] In case of discrepancies regarding the administration of the estate, the receivership of the assets may be ordered, at the request of any interested party. If there is no request for receivership, the judge may settle any conflicts between the spouse, heirs and executors through an incidental proceeding or a simple judicial order. Once the performance of its duties have ended, the administrator of the succession must hand over the assets as appropriate according to the relevant partition judgment or public deed and submit a report on his administration by presenting the relevant accounts to the judge for approval, under penalty of commencement of a separate proceeding for the rendering of accounts.

[14] Article 595 of the Colombian Code of Civil Procedure.

There are certain regulations in Colombia that are similar to the *Tenancy* systems in other countries. Among them is that contemplated in Law 258 of 1996, known as encumbrance as family dwelling. This encumbrance applies to real estate properties acquired in full by one or both spouses, either before or after the marriage, and intended as place of abode for the family. The main consequences of the encumbrance as family dwelling are, on the one hand, the impossibility to seize and confiscate the property designated as such,[15] and on the other hand, that in order to sell the property, the encumbrance must be lifted through a public deed signed by both spouses.

However, upon the death of one of the spouses or domestic partners, the encumbrance as family dwelling is extinguished, unless the under-aged heirs that are inhabiting the property, request the judge, for justified cause, to maintain the encumbrance for as long as necessary. This term may not extend beyond the date on which the under-aged heirs reach the age of 18 or become emancipated.

Likewise, Law 70 of 1931 contemplates the concept of Unseizable Family Property, which may be established in favor of the designated beneficiaries on the full ownership of a real estate property that is not held jointly with another person, or is subject to an encumbrance by mortgage, as security for payment of an annuity or antichresis and which value at the time of establishment is not greater than 250 monthly minimum wages in force at the time, that is, COP $ 184,429,250 (US $64,476.41) for 2017.. At the death of the settlor, the family property subsists in favor of the surviving spouse. In the event of the death of both spouses, the family property subsists in favor of the children, until they reach the age of 18.

In the matter of *survivorship accounts* and *payable on death accounts,* under Colombian legislation, in order for the deceased to designate the persons he wishes as beneficiaries of his or her bank deposits, he or she must set up a collective deposit. Although it is feasible for bank deposits (checking or savings) to have multiple holders through collective or joint accounts, in the case of joint accounts (those held in the name of two or more persons acting jointly to dispose of the funds deposited in them), the concurrence of the signatures of all holders is necessary in order to make withdrawals. Therefore, upon the death of one of the holders, no withdrawals may be made and the portion of the funds corresponding to the deceased holder must there onwards be included in the inventory and appraisal stage of the succession.

In collective deposits, on the other hand, when one of the holders of a savings or checking account dies, the balance may be returned to the other holders. The same applies to Time Deposit Certificates ("Certificados de Depósito a Término") established in favor of several persons containing the clause "and/or": When the principal dies and at the time of maturity of the certificate, the financial institution may pay its amount to the other beneficiaries.

Now then, regarding the funds held by the *de cujus* in financial institutions, there is a special benefit that allows banking institutions to release the balances of funds deposited in savings accounts, checking accounts, or amounts represented in time deposits or cashier's checks, up to an specified amount, without demanding proof of the succession proceedings. The maximum amount that may be released by the banks without requiring a succession proceeding is published annually by the Financial Superintendence and is the sum of COP $55,856,915 (US $17,763.54) for the period between October 1, 2016 and September 30, 2017.

The Colombian pension system, provides for the extension of the pension of the deceased to his or her heirs. Under the pertinent legislation, the spouse or domestic partner of a deceased pensioner or affiliate to the pension system is entitled to receive the survivor's pension, until his or her own death.[16] Children

[15] The attachment is in order if the asset was mortgaged prior to the date of recording of the encumbrance as family dwelling, or after said date, if the mortgage was created in order to acquire, build or improve the dwelling subject to family encumbrance.

[16] The members of the family group of the beneficiary of an old age or disability by common risk pension who dies and the members of the family group of a person affiliated to the system (not yet pensioned) who dies are entitled to the survivors' pension, provided the deceased has contributed to the system for 50 weeks during the last three years immediately preceding the death and the following conditions are proven:

under the age of 25 who are financially dependent on the deceased at the time of his or her death are also considered beneficiaries, provided they are unable to work by reason of their studies. Disabled children of any age are considered beneficiaries if there is economic dependency, as long as their disability conditions subsist. If the pension is assigned only to the spouse, he or she will be entitled to the full amount thereof, but if there are also children entitled, the pension will be distributed, 50% for the spouse and 50% for the children.

In the absence of a spouse, domestic partner and entitled children, the parents of the deceased or any disabled siblings may be the beneficiaries, but only if they depended economically on the deceased.

III. Trusts, Foundations, and Other Planning Structures

A. Common Techniques

As mentioned in previous paragraphs, the most widely used mechanisms in our jurisdiction for Family Estate Planning consist of corporate structures in Colombia and abroad, and civil and commercial Trusts. Foreign Trusts are not commonly used by Colombian nationals, except in the case of persons who own assets and/or businesses abroad. Likewise, nationals who own assets abroad, frequently establish Private Foundations, notwithstanding that, as we shall see below, these foundations, are treated as limited liability companies for Colombian tax purposes and founders and beneficiaries as partners in commercial companies, or as Fiduciary Agreements for Equity Tax purposes and founders and the beneficiaries as as fiduciae beneficiaries.

B. Fiduciary Duties (Trustees, Board Members, Directors, etc.)

In the first place, it is important to mention that, in addition to the Civil Trust described above, the Colombian law contemplates commercial or mercantile Trusts and Fiduciae Escrows (*"Encargos fFduciarios*). The Commercial Trust Agreement implies the transfer of the assets allocated to the fulfillment of a specific purpose to a free-standing trust fund, separated from the rest of the assets of the Trustee assigned to said purpose.[17] Only banking institutions and Trust companies especially authorized by the Financial Superintendence, may act as Trustees in Commercial Trusts.

Regarding the duties of the Trustee, we point out that as long as the commercial trust agreement is in force, the Trustee may not allocate the assets to any purpose other than that provided in the act of constitution, except that the settlor so decides, when the Trust is not irrevocable Therefore, the purpose established by the settlor in the trust agreement is the basis for determining the main acts which the Trustee agrees to perform.

Article 1234 of the Commercial Code imposes on the Trustee the duty to fulfill certain non-transferable obligations, namely: i) to diligently perform all necessary acts to attain the purpose of the Trust; ii) to hold the legal capacity for the protection and defense of the assets placed in the Trust against acts of third parties, of the Beneficiary and even of the Settlor himself; iii) to invest the profits from the Trust in the manner and according to the requirements established in the act of constitution; iv) to seek the greatest profitability from the assets subject to the fiduciary business, except for a determination on the contrary in the act of constitution; v) to render verified accounts of its management every six months; and vi) to transfer the assets to the appropriate person, according to the act of constitution or the law, at the end of the trust period.

a) Death caused by illness: if the person is more than 20 years old and has contributed during 20% of the time elapsed from the time that he or she reached the age of 20 and the date of the death.
b) Death caused by accident: if the person is more than 20 years old and has contributed during 20% of the time elapsed from the time that he or she reached the age of 20 and the date of the death.

[17] Article 1227 of the Commercial Code provides*: "The assets subject to the trust are not part of the general security of the creditors of the Trustee and only secure obligations contracted in furtherance of the intended purpose."*

In this respect, the Colombian Financial Superintendence has stated[18] that a Trustee is required" to *act diligently and prudently, always seeking to fulfill the purpose established in the act of constitution, being required, in order to attain said purpose, to observe the non-assignable duties imposed both by the law and by the Trust Agreement, an action which must correspond to that required from every professional in relation to the administration of third-party affairs.*" Furthermore, in the matter of taxes on the funds of the Trust, Trustees must pay any Value-Added Tax (VAT) and withholding taxes that may be incurred as result of the transactions of the Trust, as well as any default interest, penalties and indexation, when applicable.

Regarding income taxes, Trust Companies are authorized to file a single return for all the free-standing trust funds they manage.[19] The Colombian Government will specify which individual trust should be discriminated, in which case, the Trustee will be required to file a separate tax return for the specific Trust. The Trust Company will keep a disaggregated listing in case the Tax Administration requires specific information

When it is not possible to identify the Beneficiary of a Trust because, for instance, the nomination of the Beneficiary or Beneficiaries is subject to certain conditions precedent or subsequent, earnings must be declared in the name of the free-standing trust fund. The Settlor must include in the income tax returns the earnings obtained during the same tax year in which they accrue in favor of the free-standing trust fund, retaining their nature as taxable or non-taxable, and with the same description and tax conditions they would have if they were received directly by the Beneficiary or the Settlor.

On the other hand, Article 102 of the Colombian Tax Code, modified by Law 1819 of 2016[20], regulates the assessment of taxes on the income obtained through a Trust. In accordance with the tax principles of transparency, for purpose of income tax, Trust Companies must report to the Beneficiaries the detailed items representing income, costs and expenses obtained and incurred by the Trust, and must characterize each item.

The above taking in consideration, the obligation of the Beneficiaries to include in their tax return every item reported by the Trust at the end of each taxable year

An escrow is characterized by the delivery of the assets without transfer of ownership by the Settlor to the Trustee to fulfill the purpose established for the benefit of a third party or for the benefit of the Settlor himself. In this regard, the Banking Superintendence, in the Basic Legal Circular Communication, distinguished between a Commercial Trust and an Escrow, assigning to the latter the rules of a mandate agreement.

In accordance with the foregoing, for tax purposes, the Trustee in an escrow has the functions of an agent and therefore must identify in its accounts the income received on behalf of the principal and the payments made in his or her name. The Trustee must also perform all tax withholdings derived from the transactions carried out by instruction of the trustor, but it will be the trustor in his or her capacity as principal who must declare the income and apply for the respective costs, deductions, deductible taxes, according to the information provided by the Trustee.

In the case of a civil trust, the law provides that the Trustee will have free management of the assets, given that until the condition is met, he or she is the owner of the assets making up the trust. Nevertheless, the Trustee is responsible for any impairments or deteriorations derived from the Trustee's acts or negligence. For tax purposes, bearing in mind that the Trustee holds the ownership and possession of the assets placed in the trust until the condition occurs, the obligation to declare the assets and the revenues of a civil trust

[18] Opinion No. 2003018295-1. May 23, 2003.

[19] It is provided for this purpose that the Tax Administration must assign a Tax Identification Number (NIT) different from that of the trust company which identifies all managed Trusts as a whole.

[20] New Colombian Tax Bill approved by Congress on December 29, 2016

pertains to the Trustee, unless it is provided that the proceeds of the assets belong to the Trustor. In this case, these must be declared by the latter.

C. Treatment of Foreign Trusts and Foundations

Pursuant to Colombian exchange regulations, Colombian residents may set up Trusts abroad, which shall be regarded as capital investments in the financial sector. The amounts to be contributed to said Trusts must be channeled through the exchange market, in the form of foreign currency and amounts entitled to remittance. The investment is registered upon the filing of the pertinent exchange declaration with the Banco de la República, in accordance with the regulations of said entity.[21]

Colombian tax residents holding Trusts abroad must include them in their net worth for purposes of determining their income and net worth taxes. The value of the assets in the Trust must be declared in Colombian currency, at the exchange rate (Tasa Representativa del Mercado, TRM) in force on the last day of the tax period. The Trust agreement will be governed by the rules of the country where it is entered and performed.

Foreign Non-Profit Foundations and Associations are subject to a special tax system in Colombia for Non-Profit Organization. [22] In accordance with Law 1819, a new national registry will be created for entities wishing to access to the special tax system of Non-Profit Organizations. As of January 1st. 2017, entities must seek to qualify before the Colombian Tax Authorities in order to apply the special tax system, by filing a petition to qualify before the national tax authorities (" DIAN").

The entities that at December 31st of 2016 were part of the special tax regime will remain as such if they comply with the requirements for doing so.

To comply with this system, non-profit corporations, foundations and associations must meet the following conditions:

- Incorporate as a Non-Profit Organization.
- The main corporate purpose and resources must be allocated to the meritorious activities that are consecrated by Law 1819 of 2016 as Non-Profit Activities ,such as protection of the environment, prevention of the consumption of psychoactive substances, promotion of sport activities, religious freedom, economic development, promotion of the improvement of justice administration and the execution of funds deriving from the international cooperation of foreign non-profit entities.
- Said activities must be of general interest, offering community access, and;
- Neither the contributions nor their surplus may be reimbursed or distributed to the Founders , under any modality, either directly or indirectly, during its existence, or at the moment of its dissolution and liquidation.

This system applies to foreign entities that evidence compliance with the requirements established in the regulations applying to local Non-Profit Organizations, as ruled by the Council of State in Decision 16467 of 2010 and as confirmed in Opinion No. 13735 by DIAN.

[21] The exchange registration is not necessary when the transactions are carried out abroad with foreign currency that need not be channeled through the exchange market.

[22] Entities belonging to this system are considered subject to income tax, but have the benefit of assessing the tax at the special rate of 20% on the net profit or surplus, which shall be exempt in the portion allocated to the fulfillment of their corporate purpose. Likewise, they will not be required to calculate the tax through the presumptive income system (minimum alternate income tax system), nor will they be subject to withholding at the source, except for income obtained from financial yields or industrial and marketing activities.

Under the Colombian Tax Code, foreign private-interest foundations are equated for tax purposes to Limited Liability Companies and are subject to income tax. These entities are taxed on any income from Colombian source.Under Law 1819 of 2016, foreign and national entities will be subject to the following income tax rates:

(i) for the taxable year 2017 the income tax rate will be 34%, (ii) for taxable year 2018 onwards the rate will be of 33%.

A tax surcharge of 6% and 4% was implemented for corporate taxpayers that earn taxable income exceeding COP $800.000.000 (Approx. US $ 266,666,666) during 2017 and 2018.

For income and complimentary tax purposes, any Colombian residents receiving earnings from Foreign Trusts, are taxed with capital gains taxes at 10%.

The same rates will apply to Permanent Establishments and Foreign Entities required to file the income tax return in Colombia.

On the other hand, contributions to Private-Interest Foundations are deemed to be part of the assets held by the Settlor abroad, and will be subject to the minimum alternate income tax. Any beneficiaries of the foundation are also required to declare their interest as if it was part of a share in a Limited Liability Company. Contributions and shares will be valued at commercial value for tax purposes.

Payments made in favor of founders, managers, donors, family members, among others, which own more than 30% of the entity, will be considered as indirect distributions, and in consequence, the entity will be excluded from the Special Tax Regime.

Under income tax regulations currently in force, the Trust agreement will be governed for commercial law purposes, by the rules of the country where the Trust Agreement is executed and performed. Settlors of foreign Trusts will only be required to report the investment abroad in as long as they keep their share in the Trust.

IV. Taxation

A. Domicile and Residency

As provided in articles 9,12 and 20 of the Tax Code, individuals, both national and foreign, who are not deemed to be fiscal residents in the country, are only subject to income and complementary taxes on income or capital gains of national source.

Colombian tax residents are subject to taxes on global-source income, so that Colombian residents must report earnings and assets on a world-wide basis. Foreigners residing in Colombia are only subject to taxation on their domestic and foreign income after 183 days of continuous or discontinuous permanence in Colombia including days of arrival and departure during any period of 365 consecutive calendar days

Likewise, Colombian nationals who meet one of the following conditions, are considered tax residents, even if they themselves remain abroad:

a) When the spouse or domestic partner or a minor dependent child has tax residence in Colombia; or,

b) When 50% or more of their income is from national source; or,

c) When 50% or more of their assets are managed from Colombia; or,

d) When 50% or more of their assets are deemed to be possessed in the country; or

e) When having been required by the tax authorities, the individuals do not prove their residency status abroad for tax purposes; or

f) When they have their tax residency in a country qualified by the National Government as a tax haven jurisdiction or a jurisdiction with low taxes.

Nevertheless, nationals who meet any of the afore-mentioned conditions are not considered Colombian tax residents when they meet one of the following conditions:

a) 50% or more of their annual income has its source in the jurisdiction of their domicile,

b) 50% or more of the national´s assets are located in the jurisdiction of their domicile.

B. Gift, Estate and Inheritance Taxes

(i) Gift and inheritance taxes.

As previously noted, Colombian law establishes that unsettled successions are subject to income tax, and therefore earnings, revenues and assets previously belonging to the deceased and which are part of the succession, must be declared. Likewise, unsettled successions of deceased persons who were not resident in the country at the time of their death, which do not qualify as Colombian tax resident, are only subject to income tax on earnings and capital gains of national source and with respect to the assets held in the country.

Inheritances, legacies and donations, will be considered earnings subject to the Ocassional Gains Tax, regardless of the location of the assets making part of the estate, in the case of succesors qualifying as Colombian residents.

In the case of successors that do not qualify as Colombian residents, only inheritances, legacies and donations of Colombian source will generate Colombian taxes.

Taxes accrue on the date of issuance of the partition or distribution decision. The amount of the Occasional Gains received from inheritances, is the value of the property and rights on December 31st of the year immediately preceding the date of the settlement of the estate in the case of successions.

Taxes on legacies or donations accrue upon execution of the donation or of the legal *inter vivos* act whereby assets are transferred gratuitously, as applicable. In the case of the following goods and rights, the taxable basis is determined as follows:

- The value of cash sums will be the nominal value.
- The value of gold and other precious metals will be the market value.
- The value of vehicles shall be the annual commercial assessment by the Ministry of Transport.
- The value of shares, contributions and other rights in companies will be cost value.
- The value of credits will be nominal value.
- The value of assets and loans in foreign currencies will be market value, expressed in national currency.

- The value of securities, bonds, certificates and other negotiable instruments which generate interest and financial income will be cost, plus discounts or returns accrued and not paid on the last day of the taxable period.

- The value of trust rights shall be 80% of the net worth value.

- The net worth value of the rights in the Trusts for the beneficiaries, is that corresponding to their share in the liquid assets of the Trust at the end of the year or on the date of the statement of account. For the Beneficiaries, the assets retain the condition of fixed or current assets they have in the Trust.

- The value of the real estate shall be the higher value between the acquisition cost and the fiscal cost.

- The value of installments or periodical payments from Trusts, Private Foundations and other similar vehicles, established in Colombia or abroad, to individuals residing in the country will be the total value of the respective installment or periodical payments.

- The value of a temporary usufruct must be determined in proportion to the total value of the asset given in usufruct, at a rate of 5% for each year of the usufruct without exceeding 70% of the value of the asset. The value of a life-time usufruct is 70% of the total value of the asset given in usufruct. If the assets were acquired by the deceased during the year of death, the value of the asset may not be assessed for less than cost.

Current legislation determines that the transfer of the marital property does not constitute income capable of producing a net increase in the value of the net worth, and is therefore not taxable.

. The following are the assets and amounts exempt from Tax on Occasional Gains:

1. The first 7,700 Tax Value Units (UVT), (COP$ 245.314.300-US$ 81,771.54) of the value of the house owned by the deceased.

2. The first 7,700 UVT (COP$ 245.314.300-US$ 81,771.54) of rural real-state owned by the deceased. This exemption does not apply to houses or recreational farms.

3. The first 3,490 UVT (COP$111.187.910-US$37,626.36) of the inheritance received by the surviving spouse and each of the heirs or legatees.

4. 20% of the value of the assets and rights received from donations and other gratuitously act inter vivos without exceeding 2,290 UVT (COP$72,857,110-US$ 24,285.70).

5. 20% of the value of the assets and rights received by beneficiaries different from legatees or the surviving spouse by the way of inheritances and legacies, without exceeding 2,290 UVT (COP$72,857,110-US$ 24,285.70).

C. Taxes on Income and Capital

Income, or capital gains are only taxable in as long as these represent an effective increase in the net worth of the beneficiary. Income and gains may be earned in cash or kind, in ordinary or extraordinary activities , and be of domestic or foreign source. As mentioned, individuals who are Colombian tax residents are subject to tax on earnings of both domestic and foreign source. Non-residents are subject to tax only on their income of domestic source.

Income of domestic source is deemed to include earnings derived from the exploitation of both tangible and intangible assets in the country and from the provision of services in Colombia, either permanently or

transitorily, with or without a commercial establishment. The following, among others, also constitute income of domestic source:

- The capital income obtained from real-estate properties located in the country, such as rentals or encumbrances to secure the payment of annuities.

- Earnings derived from the sale of real-estate properties located in the country.

- Those derived from the exploitation of real-estate properties within the country.

- Interest produced by credits held in the country or economically related to it. Interest derived from transitory credits originated in the import of goods and in bank overdrafts, is exempt.

The ordinary income tax assessment system consists of deducting from the sum of all ordinary and extraordinary income realized during the tax period, the costs attributable to such income and the pertinent expenses, thereby obtaining the net income which, except for specific exemptions, will be taxable income.

The possession of assets must also be reported annually in the income tax return. The determination of the net worth or the assets declared in the income tax return is relevant for purposes of establishing the alternate income tax, due to the fact that tax legislation contemplates as systems to determine the tax base of the income tax, the ordinary clearance and calculation of the minimum alternate tax on presumptive income.

The minimum alternate tax, on the other hand is assessed under the presumption that the net worth of the taxpayer, for the immediately preceding period, produces minimum earnings equaling 3.5%.

Thus, the income tax is generally calculated on the ordinary net income and, as an exception, on the presumptive income, when it exceeds the ordinary income or when the latter does not exist or a loss has been rendered.

The applicable income tax for individuals, in Law 1819 of 2016, is established progressively with different ranges and a maximum rate of 35%. Individuals, will pay income tax depending in the type of income received. The income tax assessment method includes five categories or brackets of income which are:

- Dividends and shares
- Capital gains
- Pensions
- Salaries and other employment incomes
- Non-employment incomes

The individual must determine the income received under each category during the taxable period to compute the income tax. The new system is intended to assure that nontaxable income, deductions, expenses and other tax benefits, are applied only to the same category of income .

On the other hand, Law 1819 of 2016 enforces tax withholdings on dividends distributed to tax residents or non-residents, irrespective of whether the dividends derive from profits that were taxed at the company level or not

In this sense, dividends received by Colombian tax residents from profits that paid taxes at the corporate level, will be subject to a marginal rate of 0%, 5% or 10% depending in the value of the dividends.

The dividends distributed out of profits that were not taxed at the corporate level and that are distributed to individuals who qualify as tax residents in Colombia, will be subject to a progressive income tax rate from 35% to 41.5%, depending on the value of the dividends. When distributed to Colombian companies, these dividends will be subject to the general corporate income tax.

Dividends received by nonresident individuals and foreign corporations will be taxed at a rate of 5%, if the local company has paid taxes on those profits. In the case that dividends or shares correspond to profits that where distributed without paying taxes at the corporate level, withholding taxes will be applied at a 35% tax rate on the gross value of the dividend, and the balance will be subject to a 5% rate, for a total effective tax rate of 38.25%

The new dividend tax would be applied to profits obtained from year 2017 and thereon.

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