THE ADVICE OF THE NOTARY BEFORE THE SUCCESSION IN THE AGRICULTURAL HOLDING/FARM

I. THE NOTARY IN RURAL AREAS

The important work carried out by notaries in rural areas is a reality that is often little known. The impartiality of the notary together with his legal qualifications make him an ideal instrument to obtain free legal advice with guaranteed privacy, especially important in matters of family importance, such as the destination of the agricultural family business at the death of its owner.

To begin with, it should be remembered that there are almost three thousand notaries in Spain. Their creation or suppression corresponds to the Government, which every ten years with obligatory character, must approve the "notarial demarcation". The criteria for demarcation of notaries is to ensure the nearby public service, so that there are notaries in localities that do not even reach the two thousand inhabitants. It can be said that all the towns in Spain either have a notary's office or have close ones. It has been said that this "notarial demarcation" is, without a doubt, one of the great successes of the Spanish system of preventive legal security for more than 125 years. And it is something that has made the notarial service "recognised and recognisable", bringing it closer to any area, avoiding long journeys and, above all, giving the security and trust of what is known, of what is close.

It is therefore a luxury to have in the most isolated rural areas, highly qualified professionals, chosen through a very demanding selection system, with a requirement of preparation of several years, which ensure the provision of a public service of homogeneous quality to that of larger populations or provincial capitals.

In fact, the notary usually begins his professional life in very small towns, where he treasures his first professional experiences, receiving with the notarial protocol, the inheritance of social prestige of those who preceded him. These first years of practice are usually linked to the best professional memories of the notary. The village notaries, and I have been so for twenty-five years, have direct access to the social and economic reality of the populations in which they carry out their function and are made aware of the most intimate family and personal problems that interweave daily life. Notaries know the rural milieu in which they operate and come to dominate, through their profession, the legal questions that are posed to them on a daily basis in this environment: minimum cultivation units, CAP aid regime, limitations and prohibitions affecting the division of land and building into rustic land, regime of agricultural cooperatives and specific agrarian societal forms such as the Agrarian Transformation

Societies, not to mention the files of immatriculation or rectification of accommodation or boundaries or boundaries, so frequent in the rural milieu.

This professional dedication has historically determined the involvement of notaries in Agrarian Law studies, based on the needs of the lived Law. It would be necessary to bring here the memory of the outstanding figure of Alberto Ballarín Marcial, that of Víctor Garrido de Palma and, among Sevillian notaries, that of Francisco Cuenca Anaya.

II. NOTARIAL ADVICE

The Spanish Notary's Office, framed in the Latin-German Notary's Office model, provides, as an essential part of the public faith and free of charge, its legal advice in the preparation of public documents that give shape to legal acts and transactions. The advice is part of its function of informing the will of individuals, within the law, and may reach, in relation to those with less legal knowledge, the level of advice or recommendation. Notarial advice should lead to the drafting of perfect documents, avoiding or minimising the possibility of future litigation, thereby guaranteeing preventive legal certainty in legal transactions.

Notarial advice is, therefore, a public service that can be very useful for making decisions with legal content and that on the other hand is easily accessible to citizens in any town in Spain, being able to be advised free of charge and with guaranteed privacy, notarial advice when choosing the most suitable legal means to achieve the licit aims they pursue. The freedom of choice of the notary and the system of tariff remuneration make the possibility of personal consultation with the notary one of the determining elements of professional competence among rural notaries, being in this direct treatment the one that builds customer loyalty with a notarial office. The rural notary, to a greater extent than that of the cities, is an open door notary, a close and known professional, whose opinion is respected.

III. ADVICE IN MATTERS OF SUCCESSION

In rural areas, one of the issues that can and usually do concern farm owners is how to order succession on farms after their death. Since the farm is the family's main (or only) source of income, there is a family interest in avoiding the division of the farm to prevent it from leaving the family environment. It is a question of making this aim of maintaining the farm indivisible compatible with the fact that there are several children, perhaps not all of them farmers, with the right to receive their forced share assets (*pars bonorum*) and it is also a question of preserving the economic position of the widowed spouse and his family status.

In family farms governed by the Spanish Agrarian Reform and Development Act of 12 January 1973, during the administrative concession stage and until the granting of the public deed (*escritura pública*) of transfer of ownership by the competent administrative body, the law allowed the owner (or the owner and his spouse, if married) to agree on the appointment of a successor in the entitlement from among the forced heirs who had the status of collaborator in the crop, and failing that, from the person who, without being a forced heir, had the status of collaborator. This was an exception to the rule in article 1271.2 CC which prohibits the conclusion of contracts on future inheritance. This regulation was abolished by Law 19/1995 on the Modernisation of Agricultural Holdings.

This Law establishes the concept of "priority farms" (*explotaciones agrarias prioritarias*), which may be family farms (when the owner is a natural person -a professional farmer of 18/65 years of age- or a hereditary community with an indivisional agreement for a minimum of six years) or associative farms (when the owner is a cooperative society of community exploitation of the land or associated work within the agricultural activity, an agrarian society of transformation, a civil, labor or mercantile society).

The inclusion in the Catalogue of Priority Holdings or the Certification issued by the competent autonomous body, allows to prove the status of such, providing tax advantages in the Transfer Tax and Documented Legal Acts, VAT and notarial and registration fees. In addition to preferential treatment in the allocation of agricultural land, contracting subsidised agricultural insurance, access to training activities, granting aid to improve production structures or aid for the first installation of young farmers as owners, co-owners or associates of an agricultural holding. Also the right of withdrawal in the event of transfer of adjacent rustic land with a surface area less than the minimum cultivation unit.

The mortis causa transfer of such holdings is referred to the general inheritance regulations.

Notarial advice has its most important moment in the drafting of the wills of the owner of the family farm, or of the social shares in the case of a priority associative farm, and his spouse. The will may include provisions on individual estates or on the farm as a whole, however, tax incentives are provided for the block transfer of the holding, so that obtaining these significant tax benefits may be decisive in the choice of keeping the enterprise as a holding unit.

(A) CIVIL INSTRUMENTS

The prohibition of contractual succession in the Spanish civil code and the limitations imposed by the system of forced shares, make it necessary to explore, in an

appropriate notarial advice, the possibilities offered by articles 1056 and 831 of the Civil Code to avoid the division of the agricultural exploitation.

Article 1056.2 CC (in the wording given by Law 7/2003) establishes that the testator who, in view of the conservation of the company or in the interest of his family, wishes to preserve an economic exploitation undivided or to maintain control of a capital company or its group, may order that his forced share be paid in cash to the other interested parties, even if there is no such thing in the inheritance, it being possible to pay in extra inheritance cash and establish (the testator or the *partidor accountant*) a postponement not exceeding five years, counting from the death of the testator, without prejudice to any other means of extinction of the obligations. The disposition of the testator is binding for the heirs, excluding the application of articles 843 CC (approval of payment in cash by the Judicial Secretary or notary) and 844.1 CC (on deadlines for communicating the decision to pay in cash and to make the payment).

In the current wording of 1056.2 CC, we no longer speak of parents and children, but of testator and interested parties, which introduces the possibility of disposition in favour of strangers outside the family relationship, although normally the one favoured by the disposition will be forced heir, and the concept of tacit improvement can be imputed to the free disposition force share, although it is convenient to order it expressly. According to the majority doctrine, the power of 1056.2 CC could also be used to attribute the exploitation to several owners, which is not incompatible with keeping it undivided.

As a novelty, reference is also made not to the indivisibility of the estate, but also to the exploitation in associative form, including as indivisible the control package of the society that holds the ownership.

It must be taken into account that, generally, the agricultural exploitation/farm will have a matrimonial joint character, with which the problem arises when it comes to having a testamentary disposition of non-existence of quotas on matrimonial joint property, while the joint matrimonial economic regime is still in force, and therefore the need to liquidate the joint matrimonial society beforehand. In this point we have to take into account the possibility of article 1.406.2 of the CC to include in its credit each spouse the economic exploitation that manages effectively. Notwithstanding this, it would be advisable to issue a deed of matrimonial capitulations (*escritura de capitulaciones matrimoniales*) prior to the will, in which, in the event of dissolution, this provision is contained or the marital property company is effectively liquidated, assigning the shares or holdings in the family business to the entrepreneurial spouse.

Another possibility to explore is the succession trust (*fiducia sucesoria*) of article 831 CC. This provision allows the spouse to be empowered, once the testator has died, to order improvements and attributions of specific assets by any title or concept of

succession or divisions, in favour of children or common descendants, including assets of the dissolved and unliquidated joint matrimonial society. That is to say, the spouse could not only depart but also be unequal and can operate with joint matrimonial property without the company being liquidated. He can also pay the forced share one with his own goods and is not subject to the rule of homogeneity of lots of 1061 CC.

This provision allows the spouses to protect each other, favouring the position of the survivor who will be able to decide how to distribute their assets and that of the pre-deceased, including the agrarian company. However, with regard to the latter, the power of 1056.2 CC could only be used to award it in its entirety with payment of legitimate cash, even outside inheritance where this is done in favour of common descendants, since this is the sense that results from the joint interpretation of said precept with 831 CC. Bearing in mind the family interest underlying the trust, the powers of the widower shall be extinguished in the event of remarriage or an analogous de facto relationship or the birth of a new child of the widower. These causes of extinction could be excluded or qualified by the testator, for example, requiring for the extinction of faculties the conformity of a majority, reinforced or not, of the heirs (who would assess the convenience for them of extinction).

Among the common descendants, therefore, it will be able to designate the continuing widower in the company, valuing the qualities of the possible successor. This faculty, together with the universal usufruct of the inheritance, allows to delay the payment of the forced share during the whole life of the widower (although with the obligation to respect them), being able the widower to make use of the faculty granted not only by *inter vivos* acts, but also in his own will, if the testator so establishes, which seems the most convenient thing. In another case, a period of time would have to be established in the will to carry out adjudications or attributions (in one or several acts, simultaneous or successive) and in the absence of such provision, the period would be two years from the opening of the succession or the emancipation of the last of the communal children. It must be borne in mind, in any case, that the period of six months for the settlement of the Inheritance Tax from the death of the deceased will not be affected by the trust, initially settled in equal installments. However, at the time the division is made, there could be a complementary settlement due to over-allotment. On the other hand, inter vivos adjudications in the exercise of the widower's powers are not donations but rather partitional acts of an inheritance that has already been liquidated.

Article 831 CC therefore offers greater scope than Article 841 et seq., which would allow the awarding of the agricultural holding/farm to a child or a descendant who is obliged to pay the others his credit in cash. Article 841 limits the possibility of attributing the holding/farm to children and descendants, on the one hand, but above

all it establishes a power in favour of the successful tenderer and not an obligation on his part (article 842 CC), which could frustrate the purpose pursued by the testator.

Article 821 CC, which refers to the case of indivisibility, although not of a holding but of a land, may also be of interest for the purposes of succession on the agricultural holding/farm, in the case of an unofficious legacy (the one damaging forced shares), in which case it orders that it remain for the legatee if the reduction does not absorb more than half of its value, and otherwise for the forced heirs. In both cases, the respective assets must be paid in cash. If the legatee has the right to the forced share, he may retain the totality of the legacy as long as its value does not exceed the amount of the forced share one and the third for free disposition.

The testator could also use the faculty to improve on something determined, in which case according to article 829 CC, if its value exceeds one third of the *mejora* third of the estate and the part of the forced share part corresponding to the improved one, the testator would have to pay the difference in cash to the other interested parties.

Finally, the possibility of imposing the indivisibility of the inheritance should be considered. Faced with the principle of 1051 CC, according to which any member of the hereditary community has the right to request division, the testator could expressly prohibit division during the life of his spouse, for example, always as a compensatory option clause of the forced share, that is, offering to those who accept the desire of the testator more than what is rightfully theirs and sanctioning the one who requests the division with being reduced to his forced share.

(B) CORPORATE INSTRUMENTS

When the agricultural holding/farm takes the form of a company, it may be advisable to incorporate a series of statutory clauses to coordinate aspects relating to ownership with those relating to the management of the holding and family relations. From this perspective, it is necessary to take into account the different corporate forms, being the limited liability company the one that provides a more simplified and flexible legal regime.

If it is a question of transferring company shares to children or descendants, the system of inter vivos transfer of company shares, in the limited liability regime, the transfer between partners, spouse, ascendant or descendant (in principle free) may be restricted, either directly or by recognising a right of preferential acquisition to all or some partners or to a third party or to the shareholders holding shares in a group (family or professional) and the statutory prohibition is admitted in the first five years of company life or the total prohibition, provided that in this case the partner is recognised the right of separation at any time. The partner may also be obliged to pass on to others or to specific third parties (e.g. employees) for specific reasons or under

specific circumstances (Article 188.3 Spanish Commercial Registry Regulation -*Reglamento del Registro Mercantil*-).

With regard to the transfer mortis causa of shares in the company, the establishment of a preferential right of acquisition over the heir or specific legatee in favour of the other partners or the company is permitted (thus preventing the controlling shares from leaving the family or professional sphere). Although not legally provided for, the possibility of establishing the same preference in relation to the spouse of the partner who is awarded the shares in the liquidation of the matrimonial joint properties is admitted (assumption that the 188. 4 RRM collects by referring to the 110 Spanish Capital Companies Act -*Ley de Sociedades de Capital*-).

The dedication of some of the partners to the management of the company may find different ways of recognition in the limited liability company. Thus, the possibility that the accessory benefits include the contribution of work or services. Accessory benefits that may consist of the obligation to be a director or to comply with the Family Protocol. These benefits may or may not be remunerated and may be personally linked to the members or to specific shareholdings, with a particular transfer regime.

This justifies the practice of using statutory clauses in the event of the death of a particular shareholder, for example, or even of establishing an improper right of separation, by means of the obligation to buy the shareholder's shares in specific cases. Also, the limited recognition of the right of exclusion (350 et seq. LSC) for non-compliance with obligations, which would allow the loss of the status of partner for failure to perform the accessory services even for involuntary reasons, 89.2 LSC, with the possibility of establishing ad hoc causes in family companies.

Management and ownership can also be dissociated through the legal possibility of creating unequal shareholdings, in terms of certain rights (particularly important political rights, but also economic rights). And the possibility of attributing individual rights to the partners, in which case their modification will require the consent of the affected partners (article 292 LSC). Thus, a greater right to vote could be granted to a certain partner, as long as he is a partner or, failing that, to his spouse, child, etc. As in the case of ancillary services, the obligation may be imposed directly on the partner or propter rem, due to the ownership of specific shares.

The flexibility of the legal regime of the limited liability company may also make it advisable for a company or branch of activity to contribute or for a particular agricultural holding/farm to become a limited liability company.

IV. CONCLUSION

All in all, there are a series of civil and corporate instruments at the disposal of agricultural entrepreneurs to minimise the risk that the death of the owner can pose to the continuity of the business. The presence of the Notary's Office in rural areas, widely spread throughout Spain, offers personal, impartial and quality advice when it comes to ordering the succession in the agricultural holdings/farms, accessible and free of charge, to the businessman, which is especially important when drawing up his will, avoiding future conflicts and thus obtaining the preventive legal security that the Notary's Office serves.

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