EDUARDO SERRA JORGE
& ASSOCIADOS
Sociedade de Advogados SP, RL

Power of Attorney
&
Wills
in Portugal

AFPOP, April 28 2026

POWER OF ATTORNEY in Portugal

- The power of attorney is a formal and legal instrument through which one person (grantor) authorizes another (proxy) to act on their behalf.

- It is the most usual way to give such a mandate (a business entered into specifically when one receives powers from another to perform acts in the latter's interest).

- The power of attorney must be written and can be granted through a private instrument, or by public instrument or authenticated private instrument. A public instrument or authenticated private instrument is the power of attorney which is done with the intervention of entities such as lawyers, Notary Offices and solicitors who have legal powers to confer public faith to documents.

- For some specific situations, the power of attorney must be performed by public instrument or authenticated private instrument. In such cases, it is a legal determination normally established for the purpose of avoiding fraud.

- For power of attorney granted by private instrument (which are those that do not need to be done by public instrument or authenticated private instrument; for instance, a proxy vote in an AGM), the essential thing is the signature of the person who confers the powers.

- Proxies granted by private instrument can be handwritten and because they are a unilateral document they do not require the signature of the person to whom powers are granted.

- Whether in powers of attorney granted by a private instrument or in those granted by a public instrument or authenticated private instrument, the grantor must specify in detail the powers granted to the proxy/attorney and for what purpose. It should also contain the indication of the place where it is issued, the date of use of the powers and the qualification of the grantor and the proxy/attorney, for example, Nationality, marital status, domicile, taxpayer number and the civil identification number.

- For the constitution of a lawyer, it is necessary that the client grants powers of forensic representation to the lawyer. The power of attorney, in this case, can be made by private instrument and must contain the number of the professional card of the lawyer.

- Please note that for any public document to be valid in a State other than that in which it was drawn up, it must be legalised with the Hague Apostille (in respect of contracting States of the Hague Convention of 1961) or equivalent procedure.

- The validity of a **power of attorney** may end in several ways, depending on what is stated in the document and on the specific situation: it may cease by the will of the grantor, by fulfilment of its purpose, or for other reasons provided by law.

- The most common situation is when the person who granted the power of attorney (the grantor) decides to cancel it, that is, to revoke the power of attorney. Revocation may be made in writing, and, in some cases, it must be done in the same place where the power of attorney was executed (lawyer, notary, or registry office).

- The power of attorney ends if the grantor dies, if the proxy dies, or if the grantor loses legal capacity.

- If the power of attorney is irrevocable, it cannot be freely cancelled, unless there is agreement between the parties, a legal ground allowing it, or a court decision determining its termination.

Mandate for “acompanhamento”

Since 2019, it has also been possible to create a power of attorney/mandate for assisted living/”acompanhamento”.

- A person is considered an assisted adult/”maior acompanhado” when, due to health reasons, disability, or their behaviour, they are unable to fully, personally, and consciously exercise their rights and fulfil their duties. Those declared assisted adults benefit from measures that provide support in daily life.

Anticipating a potential need for assistance, a person can establish a mandate to manage their interests, with or without powers of representation.

At the moment assistance is decreed, the court approves the mandate, in whole or in part, and takes it into account when defining the scope of protection and appointing the assistant.

WILLS

- The will is the legal revocable document that validly allows an individual (the testator) to personally dispose of his assets for the time after his death. According to the Portuguese Law there are two different types of wills: the Public Written Will and the so-called Closed Will («testamento cerrado»).

- Please note that those are the only legal ways to formalise a will in Portugal. The validity of its content, namely of the dispositions that refer to the sharing between the heirs, depends on which is the applicable law to the succession and inheritance of a foreign person living in Portugal.

Foreign Wills which include Portuguese assets

Portuguese assets can only be freed locally for disbursal on presentation of an officially notarized Portuguese translation of the original document. This should also include a notarized translation of the Home Country's probate instructions if there are any.

Similarly, if the testator were to die outside of Portugal, an official Portuguese translation and notarization of the death certificate must be presented. Without these, no transfer of title of Portuguese registered Real Estate, Vehicles, Boats, Bank Accounts, etc. can be affected. Nor could any expenses be drawn against the estate by the administrator.

Portuguese Wills for Portuguese assets

The advantage of having a Portuguese will for assets in Portugal is one of convenience and expediency: the probate process will be easier and except for a “Foreign Language Closed Will”, the whole process will be faster.

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A. Public Written Will:

- The Public Written Will is made at a Public Notary who will be responsible for keeping it as a secret file until the testator's death.

- Once the decision of making a will is taken, you should provide the Notary with information about the «legitimários» heirs (the spouse, the descendants and the ancestors), to whom the Portuguese Law states that will always receive part of the testators assets (there is an unavailable quota from which the testator cannot dispose as he wishes), as well as details of the assets.

At the Notary, two witnesses must be present, but you should keep in mind that they can't act under any of the following conditions:

- Anyone that doesn't understand the Portuguese language;
- Under 18 years of age.
- Any deaf, mute or blind people;
- Employees, salary earners and apprentices of the Notary Office;
- The spouse, the relatives and similar, in the direct line or in 2nd degree of the collateral line, as well as the Notary that intervenes in the act, any of the grantors or their representatives;
- Husband and wife jointly;
- Any person that will acquire any patrimonial advantage in the will;
- Any one that doesn't know how to sign or can't sign.

Two records of the will are prepared by the Notary: one of them remains at the Notary Office and the other one is sent to the Central Register Services («Conservatória dos Registos Centrais») allowing for its research at the time the testator death even by those who don't know of the Will's existence.

B. Closed Will:

- The Closed Will is a written and signed Will by the testator or by any other person at the testator's request and signed by him.

- The will should then be approved by the Notary and must contain the following:

  - A declaration that the presented writing contains the testator's last dispositions of will;
  - That it is written and signed by him, or written by somebody else, at his request, either because he cannot or does not know how to sign;
  - The will mustn't contain amended words, abbreviations, deletions or implications, blots or marginal notes, or where they do occur, they must be properly explained;
  - That all the pages, except the signed one, are initialled by whoever signed the will.

- It is also mandatory that two witnesses must be present at the Notary, and if no problem exists, the Notary solemnly approves the will by an Act signed by the testator, witnesses and Notary.

- That Act is attached to the will and remains with it until the day it will be opened.

- The testator can keep the will in his possession or commit its safe-keeping to a third entrusted person or even deposit it at the Notary Office.

- In this case, the testator will have to inform someone that a will was made and deposited and when the testator dies, the third party goes to the Notary, together with two witnesses and the Death Certificate, allowing the Notary to solemnly open the will by an Act, and then it is able to be used.

C. Documents and estimated costs:

- To make any kind of Portuguese Will, you will have to provide the complete identification of the testator, witnesses and «legitimários» heirs, as well as the assets to be shared, and it has an estimated cost of aproximately € 250,00, due only to notary fees.

LIVING WILLS

- The Anticipated Directive of Wills (ADWs) are written documents unilaterally signed before a Notary or a clerk of the NRLW (RENTEV “Registo Nacional do Testamento Vital”) by which someone of legal age and capable of its acts expresses, in advance, a free, enlightened and conscientious will with regard to the health care it agrees or not agrees to be subjected to if, for any reason, it becomes unable to express its will on a personal and autonomous way.

- These ADWs may take the form of a Living Will.

- By signing an ADW, it is possible to express a clear and unequivocal will about:

  - - Not being subjected to artificial life support's treatments;
  - - Not being subjected to futile, useless or disproportionate treatments given a specific clinical condition and a good professional practise;
  - - Having access to palliative care;
  - - Not being subjected to treatments still in an experimental stage;
  - - Authorising or refusing the participation on scientific research programmes or clinical trials.

- The ADWs are valid for five years from the day they are signed, but they can always be renewed, revoked or modified at any time, totally or only partially.
- The grantor may always revoke or modify the ADW by a simple oral declaration before the one responsible for providing health care.
- When done at the Notary the living will may cost between €6,00 (if is only to certify the signature) and € 90,00 (if including the redaction of text, registry, archive and certifications).
- When done at the NRLW the living will has no costs.

- One of the points most discussed on this new law is to know if it is mandatory for the health care providers to respect the will of an ADW's grantor. Some opinions are that it must be clarified what is meant by "express will of the author" since the redaction of the text such as it is allows each one to interpret the ADW as one wishes, giving it, or not, a mandatory character.
- When it is referred in the law that the health professional providers shall "respect" the express opinion of the grantor, that is clearly insufficient since some persons are going to interpret it as mandatory and some are not.
- The health care providers are also provided with the right of conscientious objection, but then they remain responsible to search for the cooperation of other health care provider that shall ensure the full accomplishment of the ADW's content.

- It is also stated in the new law that nobody shall be discriminated when accessing to health care or taking insurance due to the fact that there is an ADW or not.

- Also, the law introduces the new legal concept of «power of attorney for health care». The attorney will act on the grantor's behalf if and when he/she is unable to personally and autonomously express his/her will about which health care he/she agrees or not agrees to be subjected to.

- Neither the clerks of the NRLW/Notaries nor the owners or managers of health care providers can be nominee as health care attorneys.
- The attorney's decision shall be also respected as the grantor's ones.
- However, if there is a conflict between the attorney's decision and the ADW then it will prevail the ADW.
- The grantor of a health care power of attorney may freely revoke it, as well as the attorney may also renounce to it.

- Although the law creates a NRLW, which is meant to register, organize and keep updated all the documents concerning to ADW and health care powers of attorney issued not only by Portuguese nationals but also by citizens from abroad and stateless persons living in Portugal, the truth is that the Government still needs to implement that National Record.

- However, there is the possibility already to sign an ADW and grant a health care power of attorney at the Notary.

EU SUCCESSION REGULATION

Brussels IV (EU Regulation 650/2012) is a crucial EU regulation, active since 2015, that simplifies cross-border inheritance by allowing individuals to choose their national law to govern their entire estate in participating EU states, rather than the law of their habitual residence.

- It applies to Wills and intestacy.
- Applies to all EU Member States but does not apply in Denmark or Ireland.

Brussels IV aims to ensure that only one law determines how an estate is dealt with across the Brussels IV zone:

- The default position is that the law of the state in which the deceased was “habitually resident” applies to succession
- The state of habitual residence need not itself be a Brussels IV state;
- If, however, the deceased was “manifestly more closely connected” with another state the law of that other state governs succession;
- The deceased may choose the law of his nationality to apply to succession to all of his/her assets across the Brussels IV zone;
- Where a person has more than one nationality, he/she may choose the law of any one of them;
- The selection of the law of nationality must be made expressly in a will or analogous document;
- Generally, the selection of the law of nationality means applying the domestic succession laws of that state to succession to assets in the Brussels IV zone.

In our view anyone who:

- lives in;
- owns property in; or
- is moving to or from a Brussels IV state

Should obtain advice on how Brussels IV and the laws of the relevant states may impact upon his or her succession planning.

- **Cross-border succession and inheritances involving countries outside the European Union** are governed by Private International Law rules that differ from those applied within the EU, since Brussels IV does not automatically apply to third countries.

The key aspects for managing an inheritance outside the EU are:

- **General Rule in Portugal:** Unlike in the EU, where habitual residence applies, in an international context, the rules of the Portuguese Civil Code apply to immovable property located in Portugal.
- It is possible for a situation to arise in which Portugal applies its law to immovable property located in Portugal, while the third country applies its own law (based on the deceased's nationality) to immovable property located abroad.
- **Choice of Law (Professio Juris):** In many cases, it is possible to choose the law of the deceased's nationality to determine the rules of succession, but the validity of this choice depends on recognition by the third country.

Recommended Steps:

- **Identify all assets:** Locate immovable and movable assets in each country.
- **Determine the applicable law:** Consult a lawyer specialized in Private International Law.
- **Legalize documents:** Apostille foreign documents (if the country is a member of the Hague Convention) or legalize them via the consulate.
- **Initiate the heirs' certification:** In Portugal, through a notary or at the Inheritance Desk (Balcão Heranças).

For answers to any questions regarding the information above please contact:

Dr. Eduardo Serra Jorge

esjorge@esjaadvogados.com

Tel: 00351 289 82 93 26 (Faro)

00351 21 384 53 90 (Lisboa)

www.esjaadvogados.com

EDUARDO SERRA JORGE
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Sociedade de Advogados SP, RL

Thank You for Your attention.