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Adapting rights in rem



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European Judicial Network
(in civil and commercial
matters)

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

Rights in rem are transferred upon death if the holder is the deceased and these rights are not extinguished by death. They include property rights, easements (along with dominant tenement rights) and securities (mortgages, along with secured credit). However, usufruct rights are extinguished by the death of the usufructuary (Article 513(1) of the Spanish Civil Code [*Código Civil*]).

The succession may give rise to new rights in rem, due to either the wishes of the deceased (e.g. bequests of usufruct, use or habitation rights, creation of an easement) or the law (legal usufruct which the law confers on a spouse in testate or intestate succession).

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

Registration is not obligatory, i.e. the law does not require this in order to obtain the right (except in the case of mortgages). However, as being entered in the Property Register does offer protection to the party whose right is registered, in practice the holder of a right usually applies for registration.

Succession instruments may take the form of a will, testamentary contract, declaration of intestate successors or European Certificate of Succession (Article 14 of the Spanish Mortgage Law [*Ley Hipotecaria*]). However, in general, even if such an instrument confers the status of heir or legatee to a person, it is not possible to immediately re-register rights formerly registered in the name of the deceased. The allocation of rights to a specific item of property from the division of the estate must be carried with the agreement of all other heirs (and before a notary for registration to be possible). If no agreement is reached between all the heirs, the matter will have to be settled in court.

Before the division of an inheritance has been carried out, an heir can only request that a note be made in the Register that they have a right to a specific registered item in the inheritance, so that third parties are aware of this right.

The law allocates the right to a specific item of property in an inheritance to a legatee at the moment of death of the holder (Article 882 of the Civil Code), but the legatee cannot take possession of it on their own authority (Article 885 of the Civil Code) unless the deceased has authorised them to do so. The law gives the legatee the right to demand that the heir transfer a specific item to him/her and it is this notarial deed that may be registered. If the heir refuses to transfer a specific item, the legatee will have to take the matter to court.

There are exceptions to the division of an inheritance after death, i.e. if the division by the testator was an

anticipated inheritance or the will only has one heir.

Before an item can be registered, it is also necessary to make the relevant declaration to the tax authorities so that the transfer taxes can be paid.

3 Which effects are linked to the registration of the rights in rem?

The effect of registration is that the heir to a property right is considered the legal holder of it, he/she is able to dispose of it and he/she enjoys the same protection as the original holder from any other possible heirs that have not registered their rights.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

Law 29/2015 on international legal cooperation states in Article 61:

'1. If a decision or a foreign authentic instrument orders measures or transposes rights which are not recognised by Spanish law, the registrar will, as far as is possible, adapt them to a measure or right laid down in, or recognised by, Spanish law which has similar effects or a similar purpose or interests, as long as the effects of adapting them does not go beyond the effects they would have had in the law of the country of origin. Before registering a right, the registrar will inform the holder of the right or measure that needs to be adapted.

'2. Any interested party may challenge the adaptation of a right or measure in court.'

■ Last update: 16/10/2024

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