A Survey
of Canadian and German Succession Law

by

Eric P. Polten, Lawyer and Notary Public, Toronto, Ontario

and

Florian Pötzlberger, Referendar*, 2008

Dr. Sebastian Zander, Referendar*, 2011

Polten & Associates

Lawyers and Notaries

Adelaide Place, DBRS Tower

181 University Avenue, Suite 2200

Toronto, Ontario

Canada M5H 3M7

Telefon: +1 416 601-6811

Fax: +1 416 947-0909

E - Mail: epolten@poltenassociates.com

Web-Site: http://www.poltenassociates.com

Updated: March 2011

Disclaimer

The information provided in this article is for general information purposes only and does not constitute professional legal advice. The information presented has been compiled by Polten & Associates and, while we do endeavor to keep the information up-to-date and correct, we make no representations or warranties of any kind, express or implied, about its completeness, accuracy, or reliability. Nor are we to be held responsible for any omissions from this article.

Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

* A *Referendar* is a German trainee lawyer receiving practical training in judicial and other legal work having completed at least five years of formal legal studies at university and having passed the first of two state examinations for admission to the legal profession (as a judge, lawyer, state attorney, etc.).

Table of Contents

I. Scope of the Essay

This essay is concerned solely with issues regarding succession law cases in relation to Canada where Canadian law applies to the proceedings before German or Canadian courts or authorities. On the one hand, one can think of cases where, despite the relationship to Canada, only substantive German law or the substantive law of a third country applies under the conflict of laws provisions of the applicable private international law. On the other hand, substantive Canadian law has to be considered even in third countries if the legal action is brought to court in such a country and the conflict of laws provisions of that country declare Canadian law to be applicable. German private international law is grounded in sections 1-49 of the Introductory Act to the German Civil Code (EGBGB).

Substantive Canadian succession law can be applicable to German citizens if they have assets located in Canada, they are Canadian residents, or their last will and testament (hereinafter referred to as "will") was made in Canada. This depends particularly on the content of the relevant conflict of laws provisions, and has to be judged differently depending on whether German or Canadian conflict of laws provisions apply. The following essay is confined to a brief introduction to German and Canadian conflict of laws provisions as they pertain to the respective substantive law of both legal systems.

Canada is a federal country and consists of 10 provinces and 3 territories. Although the territories have their own legislative assembly, they are ultimately more controlled by and dependent on the actions of the federal government than are the provinces. The Canadian provinces have more legislative power than the *Bundesländer* – the 16 partly sovereign constituent states of the Federal Republic of Germany. This power derives from the exclusive jurisdiction over "property and civil rights" accorded to the provinces by section 92(13) of the Canadian *Constitution Act* (1982). Succession law in particular, to the extent that it does not overlap with federal matrimonial law, falls under the exclusive jurisdiction of the provinces. Both the substantive law and the conflict of laws provisions are provincially based.

In the paragraphs that follow, the law of the largest Canadian province by population, i.e. Ontario, will be referenced for the sake of discussion, although the law of the other eight common law provinces is similar in content. However, the essay will not allude to the succession law of the province of Quebec, which is grounded in a French and Continental Civil Law tradition quite distinct from the British Common Law tradition of the rest of Canada.

When this essay refers to "Canadian law," it is implicitly referring to Canadian federal law or the law of the province of Ontario, which in general does not differ significantly from that of the other common law provinces.

This essay can only deal with the main principles governing succession law issues. Legal advice should be obtained for any detailed information since the legal terms used do not always correspond to those employed in the German legal tradition. For instance, under Canadian law, income derived from Real property is considered a form of Real property in itself. Also, what constitutes an accessory to immovable property under Canadian law differs from its equivalent under German law.

II. Sources and Literature

The official version of an Act arises out of its first publication as well as the amendments published subsequently. An unofficial but almost daily updated version of all statutes of Canada and its provinces can be found on the Internet (also see the attached list below). In Ontario, a consolidated official update of all statutes is published at regular intervals (*Revised Statutes of Ontario, R.S.O.*). However, the most recently updated traditionally printed version dates back to 1990.

The substantive succession law of Ontario is grounded in the *Succession Law Reform Act* of 1990 and its later amendments. Matrimonial property rights are also important. With regard to Ontario, they are mainly codified in the *Family Law Act, R.S.O. 1990, Chapter F. 3*. Provisions regarding the *administration* of an estate are to be found in the *Estates Act*, in the *Estates Administration Act* and in the *Trustee Act.* The civil procedural law of the province of Ontario is governed by the *Courts of Justice Act* as well as the *Rules of Civil Procedure.* Canadian laws are structured in *sections*, abbreviated *s.,* and *subsections*. In the paragraphs that follow, quotations from statutes for which the name of the relevant Act is not mentioned explicitly are derived from the *Succession Law Reform Act.*

Although quotations of the later amendments to the R.S.O. are not provided, the sources of the applicable statutes are shown immediately below: (The Internet links should be used to access an updated version.)

– **Succession Law Reform Act, R.S.O 1990 Chapter S. 26**

  http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s26_e.htm

– **Family Law Act, R.S.O. 1990, Chapter F. 3**

  http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90f03_e.htm

– **Estates Act, R.S.O. 1990, Chapter E. 21**

  http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90e21_e.htm

– **Estates Administration Act, R.S.O. 1990, Chapter E. 22**

http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90e22_e.htm

– **Trustee Act, R.S.O. Chapter T. 23**

http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90t23_e.htm

– **Courts of Justice Act, R.S.O. 1990, Chapter C. 43**

http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c43_e.htm

– **Rules of Civil Procedure, R.S.O. 1990, Regulation 194**

http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a_e.htm

III. International jurisdiction, place of jurisdiction

1. Succession law issues as preliminary questions in other legal relationships

Succession law issues can appear in all kinds of legal disputes. The procedural law and especially international jurisdiction arise out of general jurisdiction rules independent from succession law and the corresponding conflict of laws provisions. In general, succession law follows the rules of local jurisdictions in so far as international agreements or bilateral treaties do not provide for any exclusive jurisdiction. Moreover, the rule of *forum (non) conveniens*, which is widespread in the Anglo-Saxon legal tradition, applies in Canada. According to this rule, a court can (*inter alia*) refuse its jurisdiction if it considers another court to be more competent to take a decision.

2. Succession law jurisdiction according to German conflict of laws provisions

Apart from issues of disputed jurisdiction, the nature of international jurisdiction is debated vigorously in Germany. According to the *doctrine of constant velocity (Gleichlaufgrundsatz)*, the courts assume jurisdiction only if German succession law is applicable. If such an approach would in the case at issue lead to a denial of any jurisdiction, local jurisdiction according to §§ 343 ff. FamFG (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) is sufficient.

In order to protect international legal relations, the probate court can order a foreign law certificate of inheritance according to § 2369 BGB (German Civil Code) which is limited to a

certain subject, if the assets are located in Germany, even if German succession law is not applicable.

> **Example:** Canadian citizen X, resident of Toronto, Ontario, dies there and leaves movable and immovable property in Germany and Ontario. Regarding the property located in Germany, the German probate court can order a foreign law certificate of inheritance according to § 2369 BGB.

3. Succession law jurisdiction according to Canadian conflict of laws provisions

According to Canadian law the court has international jurisdiction if it has already decided about appointing an *estate trustee with a will* (also known as *"executor")* or an *estate trustee without a will* (also known as *"administrator"*), (Castel, Chapter 26.1.a). The *estate trustee* is an executor who is to be appointed mandatorily under Canadian law (see further details below under IV.2). Depending on whether the deceased made a will or not, he is either called *estate trustee with a will* or *estate trustee without a will.* The local court where the deceased died has competent authority to appoint the executor. Since the authority of the executor ends at the border of the province, an executor has to be appointed by the competent court for every province in which assets are allocated. It is also possible for a court to formally acknowledge an *estate trustee* from another province.

> Regarding the **example** mentioned above, the court in Ontario would appoint an *estate* trustee who would have to carry out the decedent's estate allocated in Ontario. Whether the *estate* trustee has to consider the assets allocated in Germany depends on the scope of his or her appointment. Whether his or her position is acknowledged by the German authorities is a question of German private international law.

IV. Particular legal issues

1. Formal Validity of the Will

a) Applicable law

(1) German Conflict of Laws Provisions

The *Hague Convention on the Conflict of Laws relating to the Form of Testament* Law, which

came into effect in Germany on January 1 1966, was incorporated into German Private International Law. Notwithstanding the principle that the applicable succession law depends on the decedent's citizenship (Art. 25 of the Introductory Act to the German Civil Code, EGBGB), the will is formally valid if it is effective under one of the legal bases named in Art. 26 Abs. 1 Nr. 1-5 EGBGB. As far as applicable, this can be the law of the country of citizenship (Nr. 1) which is not to be interpreted in terms of a formal citizenship according to Art. 5 EGBGB. It can further be the law of the location where the will has been signed (Nr. 2), the law of the decedent's place of residence or of permanent dwelling on the date of the signing of the will (Nr. 3), the law of the country where the immovable property affected by the will is located (Nr. 4) or, finally, the law which would be applicable with regard to succession law (Nr. 5). This broad provision reflects the Convention's intention to provide efficacy for testamentary dispositions.

(2) Canadian Conflict of Laws Provisions

Unlike Germany, Canada has not set out its conflict of succession laws provisions in a general Private International Law Act but has embedded them in the Succession Law Reform Act under sections 36 ff. According to Canadian conflict of laws provisions, the formal validity of a will with regard to immovable property is subject to the jurisdiction of the country where the property is located (s. 36 subsection 1); with regard to the rest, the law of the country of the deceased's last residency is applicable (s. 36 subsection 2). The provision of validity in subsection 37 is consistent with that in the German EGBGB and the *Hague Convention.*

b) Formal validity of wills according to Canadian Succession Law

As mentioned above, Canadian succession law can be applicable according to either German or Canadian conflict of laws provisions. With regard to the formal validity of the signing of the will Canadian law differs on various points. This essay does not deal with the formal German procedure for signing a will.

The testament has to be signed in writing but not necessarily handwritten (s. 3) in the presence of two witnesses (s. 4 subsection 1). The signature has to be positioned under or next to the text in order to clarify the last will of the testator (s. 7 subsection 1). Instead of the testator's personal signature, the signature of a third person at the testator's disposition is acceptable. If the testator is attending, publication of the will his or her signature is not required (s. 10).

The witnesses also have to sign in presence of the testator (s. 4 subsection 1). They and their spouses shall not benefit from the will, otherwise the will is void as far as the witness or his or her spouse is concerned (s. 12 subsection 1). The very same stipulations apply when another

person signs the will for the testator (s. 12 subsection 2). In both cases the court is, nevertheless, entitled to declare the testamentary dispositions valid if it is convinced that the testator has not been influenced improperly (s. 12 subsection 3). One of the witnesses has to swear an affidavit that the will has been signed in accordance with the said provisions. This can be done at the time of signing or at the time of the opening of the will (Rules of Civil Procedure, s. 74.02 subsection 2).

If the testator has made and signed the whole will holographically (*holograph wills*, s. 6), an affidavit has to be sworn by a relative or by another person of comparable relation confirming that the signature belongs to the testator. Such an affidavit is not required if the will is made by members of the Canadian forces or if it is made at sea (s. 5).

Minors cannot testate unless they are married or members of the Canadian forces or sailors at sea (s. 8 subsection 1). They are entitled to revoke their will (s. 8 subsection 3).

As under German law, a will is revoked – in whole or in part – if a new will is made, if a revocation is made or if the will is destroyed either by the testator himself or herself or by another person in accordance with the testator's intention of revoking it (s. 15). Beyond that, in case of the testator's marriage, a will normally becomes void (s. 16). Since this is a legal consequence of the marriage, it requires that the marriage has been carried out according to Canadian matrimonial law (*Castel*, Chapter 27.4.i). The interpretation of the will can lead to a different conclusion if it refers to a later marriage or if the spouse declares within one year that he or she subscribes to the said will.

Divorce or annulment of the marriage normally leads to the ineffectiveness of the will as far as the spouse is concerned (s. 17 subsection 2). Beyond that, a change in circumstances does not affect the validity of the will (s. 17 subsection 1).

> **Example:** Given the example mentioned above, the deceased X is German and has made his notarized will in Germany. When the certificate of inheritance is issued, the will becomes formally valid according to Art. 25, 26 Abs. 1 Nr. 5 EGBGB in conjunction with German Succession Law. If the "opening of the will" takes place in Canada (*administration*, in contrast to German law the formal and substantial validity of the will has to be examined and the *estate trustee of the will* has to be appointed), the will is valid according to s. 36 subsection 1 as far as the dispositions about immovable property allocated in Germany are concerned. With regard to the movable property the will would be invalid under Canadian law (s. 36 subsection 2) since it lacks the signatures of two witnesses. Because of the provision in s. 37 corresponding to *The Hague Convention on the Conflict of Laws relating to the Form of Testament* the will is, nevertheless, valid because X was German citizen at the time of the making of the will and the will is valid under German law. This does not affect the question of which substantial law applies to the content of the will.

2. Estate Administration

While under German law execution of the will of a private person is rare, in Canadian Law *administration* is mandatory according to the *Estates Act.* The estate has no legal personality but is treated independently as an "in-between succession." The *estate trustee* has to administer and distribute it as a *trust.* The heirs do not become universal successors entering in all legal relationships of the testator, as in German law, but the *estate trustee* transfers only the positive assets to them.

Estate administration constitutes only a specific part of the administration procedure for a trust estate, which seriously complicates the estate succession. What follows deals only with basic principles. A German lawyer dealing with an estate only partly allocated in Canada, should as far as possible manage the issues in a manner that avoids the Canadian *estate administration* regulations.

a) Applicable law

The *administration* is governed by the law of the country where the *estate trustee* has been appointed. This concerns primarily his or her legal status, general powers, accountability and claim for expenses. The final distribution of the estate to the heirs has to comply with the succession law statute (*Castel*, Chapter 26.1.a).

It is ambiguous whether an *administration* is mandatory at all. Generally, any movable or immovable property allocated in Ontario is governed by the *administration* regulations of the province of Ontario (*Castel*, Chapter 26.1.a). Nevertheless, the *estate trustee* under foreign law is entitled, once accepted in Ontario, to add the property in Ontario to the estate he or she is administering (*Castel*, Chapter 26.1.a.). In addition, a judgment of a foreign court will be approved in Canada if the court has international jurisdiction according to Canadian law. (*Castel*, Chapter 27.1.b). If according to a judgment of a foreign court the legal succession of the heir had already taken place, *administration* under Canadian law would be "procedurally obsolete" and therefore unnecessary. An example of such a judgment would be the issuing of a certificate of inheritance that covers foreign assets by a German court.

b) Appointment and competence of the *estate trustee*

The appointment of the *estate trustee* requires an application (*application for a certificate of appointment of an estate trustee with a will / without a will*) by the person appointed in the will or, if the deceased did not appoint anyone, by any other person with a legitimate interest in the estate. The Ontario *Superior Court of Justice* has jurisdiction with respect to assets allocated in

Ontario (as already seen under III.3 regarding international jurisdiction). If no *estate trustee with a will* has been appointed, the court will appoint one of the following persons in the said order: the surviving spouse or the *common law partner*, the next of kin, a trustee and, finally, if no other possibility is available, a creditor. The appointment requires the approval of the *estate trustee* which can be implied if the person begins to perform his or her assigned duties. It is also possible to appoint various persons with different fields of duty. For procedural issues see also *Rules of Civil Procedure*, s. 74 und 75.

The *certificate of appointment of estate trustee with a will (*formerly called *Letters of Probate)* or *without a will (*formerly called *Letters of Administration)* serves a similar purpose and can be compared to a certificate of inheritance. It constitutes the presumption that the *administrator* is entitled to perform his or her duties within the scope of the *certificate* and to dispose of the deceased's estate. The powers of the *estate trustee* appointed within the will derive directly from the will, whereas the powers of the *estate trustee* are granted by the *certificate of appointment* (C.E.D., Title 59 Executors and Administrators, §§ 72 f.).

The powers of the *estate trustee* are broad. In addition to merely administrative tasks like organizing the funeral he or she has to follow the deceased's instructions regarding the positive assets to the best of his or her knowledge and belief. He or she is obliged to clear all debts and pay the taxes out of the estate. If the debts exceed the liquid assets he or she is also entitled to dispose of the immovable property. He or she is supposed to adhere to the instructions of the deceased and to maintain the property that ought to be maintained according to the will. Finally, he or she has to distribute the remaining objects and other assets according to the instructions in the will or the intestate succession. If there are not sufficient assets left, he or she is supposed to allocate the claims proportionally.

During the *administration*, all legal relationships of the deceased ought to be carried out with the *estate trustee*. This can lead to problems especially when continuing obligations are involved. These obligations have to be terminated unless the former contract partner and one of the heirs have a legitimate interest in establishing a new contract. Pending proceedings and proceedings to be commenced shall be conducted by and against the *estate trustee* as a party *ex officio* on behalf of the estate and lead to a title only against the *estate trustee* in his or her official role.

The liability of the *estate trustee* corresponds roughly with the diligence one usually employs in one's own affairs (*diligentia quam in suis rebus*) under § 277 BGB, C.E.D., Title 59, § 93. The *estate trustee* can claim his or her expenses and compensation in accordance with the amount of the administered assets and the scope of his or her action. Nevertheless, the court has broad discretion with respect to the exact amount and is not limited by any general principle (C.E.D., Title 59, § 296).

3. Contents of the Will

a) Applicable law, choice of law

(1) German conflict of laws provisions

The applicable law to determine the content of a will does not always correspond to the law that applies with respect to the declaration of its validity in form. Art. 25 Abs. 1 EGBGB refers strictly to the law of the deceased's citizenship. According to German Private International Law this is a standard reference to foreign conflict of laws provisions and substantial law (Art. 4 Abs. 1 S. 1 EGBGB). The substantial law of the referring country is therefore only applicable if its conflict of laws provisions allow for acceptance/adoption of the referral. In any other case, the so-called *renvoi* applies, i.e., either remission to the law of the forum or transmission to the law of a third country. In order to avoid an endless transmission in circles, German conflict of laws provisions always accept such a remission so that the chain of referral ends (Art. 4 Abs. 1 S. 2 EGBGB).

As an exception, it is possible to split the estate (Art. 25 Abs. 1 EGBGB) if a non-German deceased has declared German substantial succession law to be applicable with regard to the immovable property allocated in Germany.

(2) Canadian conflict of laws provisions

Generally and according to the *Succession Law Reform Act* of the province of Ontario, the law of the country of the testator's residency at the time of testation applies with respect to the construction of the content of the will as far as movable and immovable property are concerned, s. 39. In contrast to German law, a choice of law is permitted, i e., the testator can declare the law of a third country to be applicable by means of an expressed disposition or by a disposition interpreted by reference to the circumstances (*Castel*, Chapter 27.4.e.).

> **Example:** The deceased - German citizen X from the example mentioned above - who was a Canadian resident for a long time, made his will on a trip to Germany with the support of a German notary who was well known to him. He died later in Canada.
> According to German Private International Law, German law is applicable since X is a German citizen. Under Canadian conflict of laws provisions, it has to be determined whether the will says something about a choice of law.
> Indications for this are the location where the will has been made, the language used and compliance with German formal requirements. The issue whether the will has a further connection with Germany due to assets allocated in Germany or because of relatives being German residents is also of importance. Canadian Private International Law (s. 39),

therefore, also declares German law to be applicable.

b) Legal capacity to inherit

Under Ontario law as under German law, unborn children (*nascituri*) are capable of inheriting if they are born alive after the testator has passed away (s. 1 subsection 1). Children who were born outside of marriage are treated as equal to legitimate children if the deceased did not expressly determine something different.

If two persons die at the same time or in circumstances rendering it uncertain which of them survived the other s. 55 subsection 1 rules that administration of the estate shall proceed as if the testator had survived the other. Thereby the same legal consequence as under German law applies, notwithstanding § 11 Verschollenheitsgesetz (Missing People Act) = "it shall be presumed that they died simultaneously," namely that the heirs of the other deceased person inherit directly.

c) Estate

The estate to be administered by the *estate trustee* covers the complete assets and the other legal relationships of the deceased. However, common law knows two forms of joint proprietorship. The *tenancy in common for real property* is the equivalent of the German legal terms *joint property* and *joint ownership of debts*. (These rights may be bequeathed through a will.)

In contrast, the *joint tenancy for real property* constitutes a special form of joint proprietorship of rights which is well known in the *common law*. All proprietors share a uniform and indivisible title. Typical cases are the legal partnership of spouses regarding their joint real estate or the rights of joint heirs with respect to the estate. When a joint proprietor dies, his legal shares devolve to the surviving proprietor and are therefore detracted from the estate. Although the provinces try to repel the instrument of *joint tenancy for real property* by legislative action, in cases of doubt the courts tend not to follow the corresponding statutory presumptions. Therefore, every case requires a thorough analysis of legal precedents to determine whether *joint tenancy for real property* or other forms of legal partnership are applicable.

Further specific provisions apply to entitlements to pensions and life insurances which are only partly hereditary (see also ss. 50 ff.).

The purpose of the estate *administration* is to relieve the estate from debts, according to the testator's instructions as far as this is indicated. Only positive assets belong to the estate which is to be distributed by the *estate trustee.* Therefore, the heirs cannot inherit negative assets.

d) Appointment of an heir and other dispositions by will

Since *administration,* which is mandatory under Canadian law, ensures that only positive assets can be distributed to the heirs, no distinction between heirs as legal successors and beneficiaries of a legacy – as in German law – is required. Every person benefitting from the estate is therefore considered to be an heir, no matter if the assets are granted as legacy, gift, bequest or *devise* (giving freehold property to someone in a will).

d) Right to a compulsory portion

There is no right to a compulsory portion in Canada. Only the surviving spouse can choose between testamentary or statutory succession and equalization of the accrued gains (see also s. 6 *Family Law Act*; and further below IV.5); technically speaking, this is not part of succession law but of family law.

e) Interpretation of the will

Similar to German law, Canadian succession law in the Ontario *Succession Law Reform Act* contains comprehensive statutory presumptions with regard to the interpretation of the will (ss. 20 ff.). In addition to that, courts have set out various rules on how to interpret a will. This takes into account the fact that wills are usually made by people without any legal background. Furthermore, compared to reciprocal contracts, wills generally lack external circumstances upon which an interpretation could be based. It is also a peculiarity of the law that, in contrast to the Common law tradition in other legal areas, *precedents* referring to former comparable court decisions cannot be used for interpretation of a will (C.E.D. Title 150, Wills, § 242).

Under Canadian law, as under German law, the most important issue of an interpretation of a will is to follow the real intention of the testator as closely as possible (C.E.D. Title 150, § 246). If the deceased did not have any legal background, great importance has to be attached to the colloquial meaning of the words (C.E.D. Title 150, § 248). If the meaning remains unclear, the circumstances of the making of the will can be considered on a limited scale (C.E.D. Title 150, § 252). There is a statutory presumption that the deceased wanted to dispose of his or her whole estate and that he did not intend to bequeath a part of it according to statutory succession (C.E.D. Title 150, § 256). In cases of doubt, the courts tend to assume an appointment of persons who could reasonably expect to inherit (C.E.D. Title 150, § 259).

An enumeration of only the most important rules of interpretation would go beyond the scope of this essay. A will ought to be made as precise as possible in order to avoid requiring any further interpretation. If an existing will has to be interpreted, the relevant legal literature and court

decisions are supposed to be taken into account.

4. Statutory Succession

a) Applicable law

If the deceased left the whole estate or particular assets *intestate,* i.e., died without a will, this would be governed by the same law as that which applies to the interpretation of the particular will or to the case of an existing will (see above IV.3.a). There are no further specifics concerning this matter.

b) Statutory succession under Canadian law

Statutory succession in Ontario is governed by the ss. 44 ff. of the *Succession Law Reform Act.* According to the Act, the surviving spouse at first receives the *preferential share* which is an absolute figure whose amount usually has to be determined by the *Lieutenant Governor* (200.000 CAN $ since 1995 O.Reg. 54/95). In the case of one descendent, the spouse can claim one half of the estate; in the case of two or more descendents one third. In particular situations where the complete estate is not covered by the will, the spouse can claim one third of the remaining assets. Alternatively, the spouse can choose equalization of the accrued gains (s. 6 subsection 2 *Family Law Act*; see below IV.5). If one of the heirs dies prior to the death of the testator, the succession *per stirpes* (division of a legacy among representatives of the respective original legatees) applies so that the testator's descendents receive their share (s. 47 subsection 1 und 2; see the following for exceptions).

The parents of the deceased only inherit if neither a spouse nor descendants in direct line exist (s. 47 subsection 3). Further subordinated are the siblings (s. 47 subsection 4), and finally the nephews and niece (s. 47 subsection 5). If none of the persons mentioned above is still alive, the closest relatives of the same degree inherit equally without representation. That means that the succession *per stirpes* does not apply in this regard (s. 47 subsection 6). As in German law, the degrees of kinship are computed by counting upward from the deceased to the nearest common ancestor and then forward through time towards the relative (s. 47 subsection 8).

If no heirs are at hand at all, the whole estate flows into the treasury (*escheats to the crown*, s. 47 subsection 8).

5. Equalization of Accrued Gains

a) Applicable law

(1) According to German conflict of laws provisions

According to German conflict of laws provisions, the equalization of the accrued gains (§ 1371 BGB) is governed by the matrimonial property regime (Palandt-*Heldrich*, EGBGB Art. 15 marginal number 26). Thus the jurisdiction which was applicable on the date of the marriage is relevant, (Art. 14 EGBGB), in so far as no other jurisdiction applies which the parties agreed upon (Art. 15 Abs. 2 EGBGB). In contrast to the general matrimonial regime, it is irrevocable, hence it does not change with the nationality or the habitual residence of the spouses. According to Art. 3 Abs. 3 EGBGB, the matrimonial regime generally governs the complete assets unless parts of the affected assets are subject to differing provisions of the law of the country where they are located.

(2) According to Canadian conflict of laws provisions

According to Canadian conflict of laws provisions, the principle of choice of law also applies with respect to matrimonial property law (*Castel*, Chapter 25.1) which covers furthermore the equalization of the accrued gains in case of death (*Castel*, Chapter 25.1.a). If a corresponding agreement is not available, the applicable property regime has to be determined according to the general principles, i.e., depending on the location where the marriage took place, the permanent residence, the nationality and other connections of the spouses and the estate with the law of a country. Generally, the matrimonial law which can thereby be determined is also unalterable unless the interpretation of the surrounding circumstances leads to a different conclusion.

b) Equalization under Canadian family law

The equalization of the accrued gains as a family law issue shall only be illustrated cursorily in this essay. In case of both testamentary and statutory succession, according to s. 6 subsection 1 and 2 *Family Law Act*, the surviving spouse is entitled to choose equalization of the accrued gains instead of his or her share of the estate. Assets which are expressly provided for that result in separate legacies can be claimed in addition to the equalization, s. 6 subsection 5 *Family Law Act*. The calculation of the equalization is roughly comparable to the procedure under German law, except that the Ontario court has broader discretion with regard to equity adjustments, see especially s. 5 subsection 6 *Family Law Act.*

6. Support and Maintenance

All support claims under family law expire when the testator deceases. Instead, the persons entitled to claim support can make a claim against the estate. A very short limitation takes effect, beginning half a year after the opening of the will; however whereas the court can grant exceptions on a big scale (s. 61). In particular, spouses and partners as well as children and siblings are entitled to make a claim (s. 57). Furthermore, the application can be made by state authorities as far as they grant benefit, assistance or income support to the persons who are entitled to claim. With regard to the amount that has to be granted, the court has to consider various points expressly mentioned in the Act (see. s. 62). The court can also make preliminary provisions (s. 64). The *estate trustee* has to pay the alimony and is at this time obliged to realize property which is part of the estate if this appears to be necessary. If he or she distributes prematurely he or she can be held accountable personally with respect to the alimony (s. 67 subsection 3).

V. Conclusion

The information outlined above provides only a basic overview. It cannot replace individualized legal advice. Private international law issues, in particular, are difficult to explain abstractly in the absence of reference to specific fact situations, and legal practice in that regard is not always consistent. Sound legal advice regarding the making of a will and the permissible choice of law can help preempt many succession law problems.

Bibliographic References

– The Canadian Encyclopedic Digest (Ontario), 3rd Edition, loose-leaf-collection, in several volumes; quoted: *C.E.D*, title, section

– J.-G. Castel, Canadian Conflict of Laws, 6th Edition, LexisNexis Canada 2005; quoted: *Castel*, chapter;

– Palandt, Bürgerliches Gesetzbuch (German Civil Code), Commentary, 70th edition 2011; quoted: Palandt-*editor*, paragraph, marginal note