Wills and Estates: Cross-Border Situations between Common Law and Civilian Jurisdictions as Exemplified by the Laws of Ontario and Germany

by

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

and

Luise Hauschild, Trainee at Law/Referendar, Bonn, 2014

Gerhard M. Schertzer, Lawyer and Notary Public, Toronto, 2014

Julia Koenen, Ass. Jur., Legal and Administrative Assistant, Toronto, 2014

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

Homepage: http://www.poltenassociates.com

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I. Introduction

As technology evolves, people become more mobile; travelling or immigrating to different countries has become a common occurrence. These social changes lead to new challenges for lawmakers as conflicts of laws are bound to arise. Despite ongoing efforts to harmonize private international law, particularly throughout the European Union, cross-border cases can still present significant challenges to the parties involved. Many questions have to be asked prior to the settlement of a cross-border estate: Which law has to be applied to a German citizen's estate when he or she has lived and died in Ontario? Is there a guarantee that a will that is valid under Ontario law will be recognized as such in Germany? What happens if a Canadian citizen who has been living in Germany for the past few decades dies without a will?

Civil law systems differ considerably from common law systems in many respects. Beyond that, German and Canadian inheritance laws are structured very differently. According to German law, for example, the heir is responsible for the administration and settlement of the estate. Appointment of an estate trustee by the testator is possible, but by no means mandatory. Moreover, legacy liabilities are transferred to the heir who is obligated to settle the testator's debts even if they surpass the value of the estate. Also, if a descendant or the spouse of the testator is excluded by disposition *mortis causa* from succession, he or she may demand his or her compulsory share from the heir, which may be as much as one-half of the value of the share of the inheritance on intestacy. These examples demonstrate how very important it is to consider the specific provisions of both legal systems involved when making testamentary dispositions.

The safest way to avoid problems upon the death of the testator is compilation of a will that takes into consideration the basic differences between the laws involved as well as the potential conflicts of law. In order to rise to the challenge of drafting such a will, legal practitioners must be aware of the current legislation as well as the specific risks involved. Choice of law or forum can be an important tool to allow the testator to match the contents of his or her will to the law he or she wishes to see applied to the division or settlement of his or her estate.

The following paper provides a brief overview of the current legislation as well as recently implemented changes that will become effective in the summer of 2015 when a new, comprehensive regulation will enter into force in the member states of the European Union (EU). While for the purposes of this paper, Germany, as a civil law jurisdiction, is used as an example, the information provided also applies to other European countries.

II. Jurisdiction and Applicable Law

There are two key questions to be addressed when one is faced with a case that has ties to two different legal systems. Firstly: Which court has jurisdiction over the matter? And secondly: Whose national law must be applied to the estate? These questions must be answered on the basis of on one's own law as well as the law of the other jurisdiction(s) involved. In what follows, considerations to be taken into account are outlined using the laws of Ontario and of

Germany as examples.

1. Jurisdiction

(a) Ontario

In Ontario, jurisdiction in contentious matters follows jurisdiction in non-contentious matters. Consequently, the court that is competent to issue the documents related to the succession and the administration of the estate also has jurisdiction to decide in contentious matters[1]. Jurisdiction in non-contentious matters is subject to provincial law. In Ontario, as in all other provinces, the local court of the place in which the testator died is competent to appoint the administrator[2].

(b) Germany

In Germany, jurisdiction depends on whether the matter at hand involves contentious or non-contentious proceedings, such as the granting of a certificate of inheritance.

(i) Contentious Proceedings

International jurisdiction of German courts in contentious procedures relating to succession is determined by the general rules of local jurisdiction that apply to all civil procedures. According to sec. 12 of the *Code of Civil Procedure*, the court within the jurisdiction in which a person has his or her general venue is competent for all actions that may be brought against that person, unless an exclusive venue has been established for court actions. A person's general venue is determined by his or her place of residence[3].

In relation to estate matters, ss. 27 and 28 of the *Code of Civil Procedure* may also become relevant. Complaints brought in order to have the court determine certain matters related to the estate may be brought to the court at which the testator had his or her general venue at the time of death. A special provision applies if the testator is a German citizen who had no general venue in Germany at the time of his or her death. In that case, the matters specified in s. 27 (1) can be brought to the court of the jurisdiction within which the testator had his or her last place of residence in Germany; where he did not have such a place of residence, the *Amtsgericht Berlin - Schöneberg* is competent[4]. Moreover, in the jurisdiction where an inheritance is situated,

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[1] *Castel & Walker*, 27. 1. a.

[2] *Castel & Walker*, 26. 2. a.

[3] Code of Civil Procedure *(ZPO)*, sec. 13.

[4] Code of Civil Procedure *(ZPO)*, sec. 27.

claims may also be filed concerning other liabilities of the estate, provided certain criteria are met[5].

A choice of forum can be made by way of written agreement between the parties whenever at least one of the parties to the agreement has no general venue in Germany.

(ii) Non-contentious Matters

In non-contentious matters related to succession, a court has international jurisdiction whenever it is locally competent[6]. Local jurisdiction is held by the probate court at the place of the testator's last habitual residence, or, failing that, inside Germany at the place of his or her residence at the time of death[7]. If the testator is a German citizen who did not have either habitual residence or residence inside Germany at the time of his or her death, the local court of Berlin - Schöneberg is locally competent[8]. If the testator is not a German citizen and did not have residence in Germany but assets to the estate are located in Germany, the court at the location of the asset has local jurisdiction[9].

2. Applicable Law

(a) Ontario

(i) Succession

The conflict of laws rules in Canada distinguish between movables and immovables. With respect to the former, the law at the place of the testator's domicile is applicable[10]. Where immovables are concerned, the law of the jurisdiction in which the property is located has to be applied[11]. This means that an Ontario court will apply Ontario law to the movables of a German citizen with domicile in Ontario, while immovables that are located in Germany will be subject to German law with regard to succession. It is therefore possible that the laws of two different countries apply to the same estate.

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[5] Code of Civil Procedure *(ZPO)*, sec. 28.

[6] Family Procedural Act *(FamFG)*, sec. 105.

[7] Family Procedural Act *(FamFG)*, sec. 343 (1).

[8] Family Procedural Act *(FamFG)*, sec. 343 (1).

[9] Family Procedural Act *(FamFG)*, sec. 343 (1).

[10] *Castel & Walker*, 27. 2. a.

[11] *Castel & Walker*, 27. 2. a.

(ii) Validity of Wills

A. Formal Validity

According to the *Succession Law Reform Act* of Ontario, in general, the formal validity of a will is governed by the law of the place where the property is situated when it comes to interest in real estate, and by the law of the place where the testator was domiciled at the time of his or her death insofar as movables are involved[12]. Moreover, regardless of whether an interest in movables or in real estate is concerned, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where (a) the will was made, (b) the testator was then domiciled, (c) the testator then had his or her habitual residence, or (d) the testator then was a national, if there was in that place one body of law governing the wills of nationals[13].

B. Construction and Material Validity

The construction of a will, meaning all issues concerning its meaning and interpretation[14], is subject to the law of the jurisdiction in which the testator was resident at the time of making the will, with no distinction made between movables and immovables[15]. The material validity, however, is governed by the law of the testator's domicile at the time of his or her death where movables are concerned, and the *lex situs* where immovables are affected[16]. With regard to construction alone, the testator may choose the law applicable either by way of an expressed disposition or one that can be interpreted by reference to the circumstances[17].

(b) Germany

(i) Succession

From a German perspective, succession is governed by the law of the country of which the deceased was a national at the time of his or her death[18]. If referral is made to the law of a country having several partial legal systems, without indicating the applicable one, then the law of that country will determine which partial legal system shall be applicable. If no such rules are in place, the partial legal system to which the connection of the subject matter is closest will be applied[19]. In cases involving Canada and Germany, this means that conflict of laws rules

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[12] Succession Law Reform Act, sec. 36.

[13] Succession Law Reform Act, sec. 37 (1).

[14] *Castel & Walker*, 27. 4. i. footnote 23.

[15] Succession Law Reform Act, sec. 39.

[16] Castel & Walker, 27. 4. f.

[17] *Castel & Walker*, 27. 4. e.

[18] Introductory Act to the Civil Code (*EGBGB*), article 25 (1).

determine the law of which province is applicable to the case at hand.

German law relies on the uniformity of the estate as a basic principle. This means that the law of the testator's home state is applied to the entire estate; generally, a distinction between movables and immovables is not made. However, as to immovables located within Germany, the testator may, in the form of a testamentary disposition, choose German law[20]. This reinforces the fact that under current German law, the possibility to choose the law applicable is limited to immovables situated in Germany, while a choice of the law applicable to the complete estate or to movables is not permitted.

Another basic principle of German conflict of laws rules stipulates that if referral is made to the law of another country, its private international law is also applied, insofar as this is not incompatible with the meaning of the referral (*renvoi*). As a consequence, if the law of another country refers back to German law, the German substantive provisions apply[21] and German courts will accept the referral. This is an important issue where German/Canadian cross-border cases are concerned, as lack of knowledge of this principle can lead to fatally erroneous assessments.

According to the provisions set out above, if a Canadian citizen lives in Germany at the time of his or her death, succession will be governed by the law of the province that is applicable according to Canadian conflict of laws rules. If the designated law is that of Ontario, in light of its conflict of laws rules, the law of the testator's domicile – which is in Germany – is applicable. German law accepts this designation so that, as a consequence, German courts would apply German law to the complete estate, with the exception of property located in Canada. Conversely, when a German citizen dies with domicile in Canada, German courts would apply German law only, irrespective of whether the assets in question are movables or immovables. Currently, German law does not allow for a choice of law.

(ii) Validity of Wills

German international law contains specific provisions regarding the law that determines the formal validity of a will[22]. A will is valid if its form complies with the formal requirements:

- of the law of the country of which the testator was a national at the time when he or she made the testamentary disposition or at the time of his or her death;
- of the law of the place where the testator made the testamentary disposition;

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[19] Introductory Act to the Civil Code (*EGBGB*), article 4 (3).

[20] Introductory Act to the Civil Code (*EGBGB*), article 25 (2).

[21] Introductory Act to the Civil Code (*EGBGB*), article 4 (1).

[22] Introductory Act to the Civil Code (*EGBGB*), article 26.

- of the law of the place where the testator had his or her domicile or habitual residence either at the time when he or she made the testamentary disposition, or at the time of his or her death;
- so far as immovables are concerned, of the law of the place where they are situated; or
- of the law which governs the succession or governed at the time when the disposition was made.

Matters of form include any provisions of law that limit the permitted forms of testamentary dispositions by reference to the age, nationality or other personal attributes of the testator, or qualifications that must be possessed by witnesses for the validity of a testamentary disposition[23]. Other than that, the validity of a will and its binding force are governed by the law which would have been applicable to the succession at the time the disposition was made[24]. The provisions made in article 26 of the *Introductory Act to the Civil Code* accord with the *Hague Convention of October 5 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, to which Germany is a party.

3. European Union Regulation on Matters of Succession

In recent years, the European Union (EU) has been engaged in efforts to harmonize the conflict of laws rules throughout its member states. As a result, *Regulation No. 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession* was introduced. This body of legislation, hereinafter "the regulation", entered into force in 2012, but will be applied only to cases of succession arising on or after August 17, 2015. It has to be noted, however, that not all member states of the European Union are parties to the regulation; Denmark, Ireland and the United Kingdom will continue to determine the applicable law as well as jurisdiction according to their national conflict of laws rules.

(a) Scope

The regulation applies to succession to the estates of deceased persons, but does not govern revenue, customs or administrative matters. From a German perspective, the new statutes bring a multitude of changes, most prominently the general possibility for the testator to choose the law applicable to his or her estate.

(b) Jurisdiction

General jurisdiction to rule on the succession as a whole – including contentious and non-

[23] Introductory Act to the Civil Code (EGBGB), article 26 (3).

[24] Introductory Act to the Civil Code (EGBGB), article 26 (5).

contentious proceedings – belongs to the courts of the member state in which the deceased had his or her habitual residence at the time of death[25]. However, this does not apply to matters in which an application for a Certificate of Inheritance is sought; jurisdiction will still be determined according to sec. 373 of the *Act on the Procedure in Family Matters*, as outlined above. For the proceedings involving a Canadian citizen's estate, German courts would therefore have jurisdiction if the testator died with habitual residence in Germany.

Where the habitual residence of the deceased at the time of death is not located in an EU member state, such as Canada, the courts of a member state in which assets of the estate are located nevertheless have jurisdiction to rule on the succession as a whole in so far as the deceased had the nationality of that member state at the time of death or, failing that, the deceased had his or her previous habitual residence in that member state, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed[26]. Therefore, if a German citizen dies with habitual residence in Canada, German courts still have jurisdiction according to the regulation. This also holds true in respect of assets located in Germany[27]. However, jurisdiction is limited to those assets and does not encompass the complete estate.

Where the estate of the deceased comprises assets located in a third state, such as Canada, the court seized to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets, if it is expected that the decision of the court seized in respect of those assets will not be recognized, or declared enforceable in that third state. This does not affect the right of the parties to limit the scope of the proceedings under the law of the EU member state of the court seized[28]. In the event of court proceedings in an EU member state, the aforementioned has to be kept in mind if there are any concerns as to whether a decision would be recognized in Ontario.

(c) Applicable Law

(i) Succession

As a general rule, the law applicable to the succession as a whole is the law of the state in which the deceased had his or her habitual residence at the time of death[29]. However, an exception applies: Where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected to a state other than the state whose law would be applicable according to the general rule stated above, the law of the other state will be applied to the succession. Any law specified by the regulation will be applied by the court of the EU member state, whether or not the law specified by the regulation is the law of a member state or a

[25] Regulation No. 650/2012, article 4.

[26] Regulation No. 650/2012, article 10 (1).

[27] Regulation No. 650/2012, article 10 (2).

[28] Regulation No. 650/2012, article 12.

[29] Regulation No. 650/2012, article 21.

third country such as Canada[30].

It has to be noted that the definition of the term *habitual residence* does not necessarily dovetail with that of the term *domicile* used in common law states. The regulation does not contain a clear definition; however, the following is stated in the preamble to the regulation:

> *"in order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation."*

If a German citizen dies with habitual residence in Ontario, but owns property in Germany, German courts would apply Ontario law to his complete estate according to the regulation. However, according to article 34, the application of the law of any third state specified by the regulation includes the rules of private international law of that third state, in so far as those rules make a *renvoi* to the law of an EU member state, or to the law of another third state which itself would apply its own law. Since according to Canadian conflict of laws rules German law is applicable to immovables located in Germany, the *renvoi* to the EU member state will be accepted. The only way to ensure that Canadian law is applied to the complete estate, including immovables, is to choose Canadian law, as article 34 (2) of the regulation excludes choice of law from the *renvoi*.

(ii) Validity of Wills

A. Formal Validity

Member states that have ratified the previously mentioned *Hague Convention* will continue to apply its provisions[31]. All other non-contracting parties will apply article 27 of the EU regulation, the content of which is virtually identical to the provisions made in *The Hague Convention* and the German national law.

B. Admissibility and Substantive Validity

Article 26 of the regulation specifies the scope of substantive validity of a disposition of property upon death. According to this provision, the applicable law governs the testamentary capacity of the person making the will, the particular causes which bar a person from disposing in favor of certain persons, or which bar a person from receiving succession property from the

[30] Regulation No. 650/2012, article 20.

[31] Regulation No. 650/2012, article 75 (1).

person making the disposition, the admissibility of representation for the purposes of making a disposition of property upon death, the interpretation of the disposition, and fraud, duress, mistake and any other questions relating to the consent or intention of the person making the will.

Article 24 governs the law applicable to the admissibility and substantive validity of dispositions of property upon death, other than agreements as to succession, and article 25 governs the law applicable regarding admissibility and substantive validity of agreements as to succession. According to article 24, a will is governed by the law which would have been applicable to the succession according to the regulation if the testator had died on the day on which the disposition was made. However, a choice of law can be made in regard to the disposition: the testator may choose to govern the substantive validity of his or her will by the law of the jurisdiction of which he or she is a citizen at the time of the choice or at the time of his or her death. The same holds true for revocation of a disposition of property upon death[32]. Hence, if a Canadian citizen dies with habitual residence in Germany, the admissibility and validity of the will is subject to German law as the law applicable to succession according to the regulation. However, a testator is free to choose the law of Ontario in this regard.

(d) Choice of Law and Jurisdiction

From a German perspective, the new regulation introduces a comprehensive choice of law for the first time. It is an important instrument for practitioners and should be considered whenever a cross-border estate is being planned.

(i) Applicable law

According to article 22 of the regulation on inheritance, a person may choose the law of the state of which he or she is a national at the time of making the choice or at the time of death as the law to govern his or her succession as a whole. This means that it is now possible under German law for a Canadian citizen to choose the relevant Canadian law to be applied to his or her complete estate, regardless of where movables or immovables are located, and also regardless of where he or she has had habitual residence at the time of death. This allows for more flexibility and planning security when planning cross-border estates. A person possessing multiple nationalities – as is permitted according to German and Canadian law – may choose the law of any of the states whose nationality he or she holds at the time of making the choice or at the time of death[33].

There are certain stipulations that have to be met in order for the choice to be valid: it has to be made expressly in a declaration in the form of a disposition of property upon death or has to be demonstrated by the terms of such a disposition. The substantive validity of the act where-

[32] Regulation No. 650/2012, article 24 (3).

[33] Regulation No. 650/2012, article 22 (1).

by the choice of law was made is itself subject to the law chosen[34].

It should be noted that the regulation's choice of law rules can already be relevant to estate planning prior to August 17, 2015. According to the regulation's transitional rules, a choice of law made before that date is valid if it is in accordance with the requirements listed above or with the rules of private international law which were in force at the time the choice was made, in the state in which the deceased had his or her habitual residence or in any of the states whose nationality he or she held[35]. Consequently, a Canadian citizen with habitual residence in Germany can already make a choice in favor of Ontario law that will be recognized as valid by a German court if he or she dies after August 17, 2015.

If a disposition of property upon death is made prior to August 17, 2015 in accordance with the law which the deceased could have chosen on the basis of the regulation, that law will be deemed to have been chosen as the law applicable to the succession. A Canadian citizen of Ontario with habitual residence in Germany who makes a will in accordance with Ontario law and dies after August 17, 2015, will be deemed to have chosen Ontario law to govern his or her estate[36].

(ii) Jurisdiction

The testator cannot make a choice of forum, so the courts at the place of his or her habitual residence will still be competent. However, the courts of an EU member state whose law has been chosen by the deceased do have jurisdiction in the matter if a court previously seized has declined jurisdiction in the same case, if the parties to the proceedings have agreed to confer jurisdiction on a court or the courts of that member state, or if the parties to the proceedings have expressly accepted the jurisdiction of the court seized[37]. However, this cannot be a Canadian court, as the regulation in this specific regard refers to EU member states only. Hence, whenever a Canadian citizen chooses the law of Canada but has his or her last habitual residence in an EU member state, the court of the last habitual residence will assume jurisdiction.

III. Multiple Wills and International Wills

It may be advisable for the testator to have an original will made for each jurisdiction in which assets exist. This would enable the wills to be prepared in the proper form and language of the respective jurisdictions involved. Proceeding in such a manner could reduce potential

[34] Regulation No. 650/2012, article 22 (2), (3).

[35] Regulation No. 650/2012, article 83 (2).

[36] Regulation No. 650/2012, article 83 (4).

[37] Regulation No. 650/2012, article 7; see article 5 for further information on the requirements for the agreement made by the parties.

difficulties in meeting the formal requirements of multiple jurisdictions in a single document.

Most Canadian jurisdictions do not commonly employ multiple wills. Ontario is the primary exception, and its probate forms have been amended to accommodate multiple wills, Justice Brown of the Ontario Superior Court of Justice having noted in *Re Kaptyn Estate* 2010 ONSC 4293, 2010 CarswellOnt 5804 (S.C.J.) that "[m]ultiple wills have enjoyed a long history where a testator owned assets located in different jurisdictions". The validity of multiple wills in Ontario has been reinforced by two recent rulings of the Ontario Superior Court of Justice in *Re Silver Estate* (1999), 31 E.T.R. (2d) 256 (Ont. S.C.J.) and *Carmichael v. Carmichael Estate* (2000), 31 E.T.R. (2d) 33 (Ont. S.C.J.). On March 1, 2001, a regulation came into force in Ontario that specifically allows an application for a Certificate of Estate Trustee to be limited to the assets contained in the will filed in the application.

Other jurisdictions may have enacted probate provisions that make multiple wills ineffective, while still others may have no clear rules on the matter. In Quebec, for example, multiple wills are commonly used although for limited purposes, with *situs* wills sometimes being employed when property is located in another (especially common law) jurisdiction. In Alberta, the multiple wills strategy is employed where the testator has assets in more than one jurisdiction, not necessarily to avoid probate fees as that province has one of the lowest probate fees in Canada. In Manitoba, there have been no cases to test whether the multiple wills strategy would be valid there; however, the Ontario position on the issue was based on legislation that is very similar to that in force in Manitoba. Courts in Atlantic Canada also have not yet had to face the issue of the validity of the will of an individual who has maintained more than one will.

Attached to s. 42 of Ontario's *Succession Law Reform Act* is the *Convention Providing a Uniform Law on the Form of an International Will*, which makes an international will a further possible option for the testator who has assets in more than one jurisdiction.[38] The formalities of execution are set out in the Convention and should be followed. In Canada, Quebec and the territories have not ratified the Convention, unlike the United States and the United Kingdom, both signatories since the 1970s. While it is in force in Belgium, France, Italy, Portugal, the list of those states which have ratified the Convention remains relatively small in number, thus accordingly restricting the applicability of the Convention.

Germany, like Ontario, does not prohibit a multiple wills strategy. From a German perspective it is advisable either to make separate wills for each jurisdiction in which assets are owned, or to make one international last will according to the aforementioned *Convention*.

Care must of course be taken to ensure that each will does not revoke the other wills that are intended to remain in force.

IV. Conclusion

[38] Link to the status of Convention: http://www.state.gov/documents/organization/209142.pdf

All things considered, the new regulation both allows for greater flexibility in the planning of cross-border estates and leads to a certain degree of harmonization between German and Canadian conflict of law rules.

While the terms *habitual residence* and *domicile* cannot be used synonymously, it is clear from both perspectives, that the law of the place to which the testator has made commitment and developed ties for a certain period of time is applicable to his or her succession. Still, Germany as well as all other EU member states that will apply the regulation in future will not make a distinction between movables and immovables. However, due to the provisions on *renvoi* and to those of Canadian private international law, two different sets of law may be applied to a single estate.

In accordance with the new regulation, German courts will accept in future a choice of law governing an estate as a whole. Therefore, it is possible for a Canadian citizen with habitual residence in Germany to choose as the law applicable to his or her estate the law of the province of his or her origin; this choice has not been feasible until now. This affords the testator a greater degree of security and foreseeability. It also allows Canadian testators to avoid inconvenient German provisions, such as the aforementioned statutory legal share that considerably limits freedom to determine how to dispose of one's property upon death.