

# **Estate Planning in Germany and Canada and the Conflict of Laws**

by

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

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## A. Introduction

In the course of increasing globalization there are more and more cross-border cases, especially in succession law, which need to be dealt with in different countries and therefore different legal systems. This essay deals with basic questions which have to be considered when making a last will with regard to estate succession in reference to German and Canadian law. It describes the kind of dispositions which are actually possible, as well as the problems which could occur in the case of succession. The first part of this essay will demonstrate what kind of testamentary dispositions can be made under German and under Canadian law. Secondly, it will be explained which law is applicable. This is governed by the conflict of laws of the particular state, also known as Private International Law. Finally the effect of foreign judgments will be analysed.

Both Canada and Germany are federal states. Canada is composed of 10 provinces and 3 territories, Germany of 16 *Bundesländern* ( $\approx$  provinces). The Canadian provinces are more sovereign in comparison to the German *Bundesländer*. In particular they have more authority in terms of legislation. Whereas succession law as well as the conflict of laws is federal law in Germany, in Canada both are part of the provinces' jurisdiction. Therefore Canada does not have a uniform national succession law. However, the particular rules in each province are not that different from each other, except for the province of Quebec. Unlike all the other provinces, private law in Quebec is not rooted in the Anglo-American common law legal system, but is rather derived from French legal traditions and the Code Civil.

The following observations are made on the basis of the law of the Province of Ontario, the largest Canadian province having about a third of the population of Canada. The law in the other Common Law provinces is similar, but may vary.

It is not the purpose of this essay to elaborate upon all possible issues. It is limited to basic problems in cross-border will drafting and estate administration. Furthermore it has to be considered that the rules in each Canadian province generally match those of Ontario, but may nonetheless vary in particular cases. Finally, legal terms can have different meanings in Canada and Germany. For instance, leases of immovables are part of the immovable property law in Canada (real property law), whereas in Germany they are considered to be part of the movable property law (personal property law).

Therefore it is strongly recommended to obtain legal advice from a lawyer in your particular case.

## B. Making of a Last Will

The first question which needs to be considered when drafting a will that deals with assets in

different countries is what kind of testamentary dispositions exist and how they can be properly made under German and Canadian law respectively.

## **I. Germany**

According to German law, there are two different ways of making testamentary dispositions: the last will and the *Erbvertrag* (≈ inheritance contract).

### **1. Last Will**

The testator can make a last will by himself in handwriting. He has to write and sign it in person (section 2231 No.2, section 2247 of the BGB) (German Civil Code). He can also make a will by declaration before a public notary (section 2231 No.1, section 2232 of the BGB) by either announcing his will to a notary or delivering a letter to him with the declaration that this letter contains his last will. In that case the letter does not have to be in handwriting. The notary records the last will in both cases.

In Germany, spouses can make a joint last will with simplified formal requirements (sections 2265, 2267 of the BGB). It is known as a *Gemeinschaftliches Testament* (= joint last will) which complies with the formal requirements if one of the spouses writes and signs the will in person. The other one only has to sign the will.

### **2. *Erbvertrag* (Inheritance Contract)**

The testator can also make his testamentary dispositions in the form of an *Erbvertrag* (sections 2274 ff. of the BGB). An *Erbvertrag* is a contract between the testator and another person, usually one or more of the heirs, in which the testator makes binding testamentary dispositions. The contract has to be recorded in writing by a notary with both parties being present at the same time. Since an *Erbvertrag* is not valid under Canadian law, this essay will not deal with it further.

## **II. Canada**

Canadian law directs that testamentary dispositions can only be made in the form of last wills.

### **1. Last Will with two witnesses**

The conventional way of making a will, which is recognized in every province in the country, is the last will with two witnesses (ss. 3, 4). It has to be in writing (but not necessarily in

handwriting) and has to be signed by the testator in the presence of at least two witnesses. The testator does not have to sign in person. It is sufficient if another person signs the will in the presence and by direction of the testator. Afterwards, the witnesses have to subscribe the will in the presence of the testator to certify that the testator has executed the will in their presence and that it constitutes his last will. It needs to be kept in mind that the spouse as well as any other person named in the will as a beneficiary is not qualified to be a witness or to sign the will for the testator. If the will is executed contrary to this prohibition of participation, it is generally void. It is valid nevertheless if apart from the barred person at least two other qualified witnesses can attest to the execution of the will. Furthermore, it is possible that the court could declare the will to be valid if it is satisfied that the barred person has not exercised any improper or undue influence upon the testator. The ban on participation does not apply if the fact which forms the basis upon which the person is disqualified is only manifested after the execution of the will (s.11).

## **2. Holograph wills**

In most Canadian provinces it is possible to make a holograph will (e.g. in Ontario (s.6); this is not the case in British Columbia, which requires two attesting witnesses for any last will, although a holograph will made outside of BC is recognized in BC for succession of movables). A holograph will is valid if it is made wholly by the testator's own handwriting and signature.

## **3. Gemeinschaftliches Testament [Joint Will]**

A joint will is a single will that covers two people. It determines the distribution of property in a certain way regardless of who dies first. Usually, all the assets go to the survivor but this distribution is not a requirement for it to be a joint will. A joint will can not be changed after one of the parties dies. Accordingly, a joint will can be problematic if the survivor is young and his or her circumstances change such that a change in the will would be required.

## **C. Contents of Testamentary Dispositions**

The following section describes the basics of the most common dispositions made in last wills.

## **I. Germany**

### **1. Appointment of an heir/Legacies**

Primarily, the testator can appoint an heir in his last will by allocating his entire property or a part of it to someone (sections 1937, 2087 ff., BGB). The heir is the testator's universal successor. He can also bequeath a legacy to someone by allocating selected assets to this person (sections 1939, 2147 ff., BGB).

### **2. Estate of the provisional and subsequent heir**

The testator can appoint a provisional and subsequent heir, which means the testator's estate passes to the subsequent heir on the death of the prior heir. (sections 2100 ff., BGB). This is known as *Vor- und Nacherbschaft*.

### **3. Testamentary burden**

The heir as well as a legatee can be burdened with obligations without giving a third party an entitlement to the performance of the obligations.

### **4. Directions to the distribution of the estate**

The testator can make arrangements regarding the distribution of the estate in his last will (section 2048, BGB).

### **5. Administration of the Estate**

German law allows for the possibility of making arrangements for administering the estate (sections 2197 ff., BGB). The executor's assignment is to carry out the testamentary dispositions. He has to administer the estate and arrange for its distribution between the heirs.

## **II. Canada**

### **1. Appointment of an Heir/Legacies**

In Canada, the designation of an heir as a universal successor comparable to German law does not take place. In the last will the heirs receive the benefit of the estate (s.2), which can be

compared to a German legacy. The personal representative or estate trustee distributes the assets of the estate to the estate's beneficiaries (s.1 (1); rule 74.01 Rules of Civil Procedure). In Canada, the administration of the estate is mandatory, contrary to Germany where it is only an option, and is in general at the testator's discretion. The testator can either appoint someone as a trustee in his last will, who is then called executor, or he can leave the appointment to the court. A trustee appointed by the court is called administrator.

## **2. Estate of the provisional and reversionary heir/testamentary trust**

Under Canadian law, there is no disposition comparable to the German *Vor- und Nacherbschaft*. However the possibility of a testamentary trust exists. The trust is a fiduciary relationship. The subject of the trust is the trust property, which is administered by the trustee for the benefit of a beneficiary. The trust property is a special fund which is to be kept separately from the trustee's other assets and is to be used only for certain purposes or in the beneficiary's interest<sup>1</sup>. The testator creates the testamentary trust in his last will. As part of the last will it is subject to the same formalities as described under B. II.<sup>2</sup>

## **3. Testamentary burden**

The testator can make dispositions in his last will which are to be fulfilled by the beneficiaries.

## **4. Directions regarding the partitioning of the estate**

The testator can give directions in his last will regarding the partitioning of the estate which are to be fulfilled by the personal representative.

## **5. Administration of an estate**

As already described under II.1., the administration of an estate is mandatory. See the points explained above.

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<sup>1</sup> Flick/Piltz, marginal number 1029.

<sup>2</sup> Castel/Walker, Ch. 28.2.a., 28.3.a.

## **D. Revocation of testamentary dispositions**

### **I. Germany**

The testator can revoke his last will or parts of it whenever he wishes (sections 2253 ff., BGB). The revocation can be done by modification or destruction of the last will or by making a new last will<sup>3</sup>. The revocation itself can be revoked in the same way as the last will. If in doubt, the original will is revived (section 2257, BGB). In addition, a testamentary disposition which names the spouse as a beneficiary of any kind is void if the marriage is terminated before the testator's death or the testator has filed a petition for divorce before his death (section 2077 (1), BGB). Only when an intention appears in the will that the testator would still want the disposition to the former spouse to be valid will it be upheld (section 2077 (3), BGB).

For the revocation of a joint will, certain specific rules apply: a joint revocation as well as the revocation of dispositions which are not interdependent follow the general rules. The revocation of interdependent dispositions however does not. An interdependent disposition is a disposition made by one testator that only takes effect if a certain disposition the other testator made is also effective (section 2270, BGB). As long as both spouses are alive, the will is revoked by a statement of resignation authenticated by a notary (sections 2271, 2296, BGB). As soon as one of the spouses dies, the right to revoke the will expires for the other one. To revoke his or her dispositions, he or she has to renounce his/her right to succeed (section 2271 (2), BGB).

### **II. Canada**

A last will or a part of a last will can be revoked by a written declaration, by another will or by destroying the will (s.15). It is also possible to revoke a revocation and revive the original last will in compliance with the formalities required for making a valid will (s.19). The original will is revived only if the new statement shows an intention to give effect to it. Furthermore, a will is revoked by marriage unless the testator states explicitly that it should be valid despite the marriage<sup>4</sup>. In addition, a disposition that names the former spouse as a beneficiary of any kind or appoints her/him as executor or trustee is revoked if the marriage is terminated except when a contrary intention appears in the will. The former spouse is treated as if she/he had predeceased the testator (s.17 (2)).

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<sup>3</sup> Specifics apply to wills in official custody.

<sup>4</sup> See s.16 for more exceptions.

## E. Applicable Law upon the death of the testator

### I. Introduction

Cross-border cases always raise the question as to which law is applicable in the particular case. This is governed by the conflict of laws of the country where the matter is brought before a court. The court applies its own conflict of laws to clarify which law is applicable to the particular case of succession<sup>5</sup>. It depends upon several factors, for instance on the nationality of the testator at the time of his death where he had his domicile and whether the estate consists of movables or immovables. As the testator cannot always foresee at the time of making the will in which country the heirs or the estate trustee will bring the matter before a court to apply for an *Erbschein* (= certificate of inheritance) or for letters testamentary or to start other proceedings, it is important for him that his dispositions be valid and enforceable in every country which could be concerned with the matter.

#### 1. Germany

The German conflict of laws determines which law is applicable to a case with cross-border issues. The German conflict of laws can mainly be found in the EGBGB (Introductory Law to the German Civil Code); provisions regarding inheritance are to be found in Art. 25 and 26 of the EGBGB. The general regulations, in particular Art.3 and 4 of the EGBGB, are applicable as well.

German conflict of laws is primarily geared towards citizenship. Pursuant to Art. 25 of the EGBGB, succession is generally subject to the law of the country the testator was a citizen of at the time of his death. Generally, there is the principle of *Nachlassseinheit* (= uniformity of the estate), i.e. that the law of the testator's home state is applicable to the entire estate, regardless of the single assets' nature and location.

Hence, according to the German conflict of laws, German law is generally applicable to cases of succession involving a German testator, whereas for cases involving a testator of another citizenship, Canadian for instance, the respective country's law applies.

However, in terms of immovables, the testator can determine in his last will that German law should apply (Art.25 Abs.2 of the EGBGB). This leads to the splitting of the inheritance and thus to an exception to the principle of uniformity of the estate.

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<sup>5</sup> Flick/Piltz, marginal number 60.

## 2. Canada

The Conflict of Laws in Ontario distinguishes between movables and immovables (s.36). For immovables the “*lex rei sitae*” applies, i.e. the law of the country the property is located in. For movables, however, it is the place of the testator’s domicile.

### II. Testator is German Citizen

According to the German conflict of laws, only German law applies in such a case, irrespective of whether the estate contains movables or immovables and where it is located.

Therefore German law applies to the testator’s whole property in Germany as well as in Canada.

According to the Canadian conflict of laws, Canadian law applies with regard to immovables in Canada and German law with regard to immovables in Germany. With regard to movables, the law of the country where the testator had his last domicile is applicable. If the testator had his last domicile in Canada, Canadian law is applicable with regard to all movables in Canada and in Germany. Conversely, German law applies for all movables if the testator had his last domicile in Germany.

**Example 1:** *The testator had German citizenship but resided in Toronto for the last 30 years. The estate contains land as well as movable property both in Canada and in Germany.*

According to the German conflict of laws, German law is applicable to the whole estate.  
 – According to the Canadian conflict of laws, Canadian law applies in regard to the land in Canada and to all the movables in Canada as well as in Germany. In regard to the land in Germany, German law applies.

### III. Testator is Canadian

In this case, Canadian law applies according to the German conflict of laws, irrespective of the fact if the estate contains movables or immovables and where it is located.

Therefore Canadian law applies in regard to the testator’s whole property in Germany and elsewhere. If the testator owned land as well as movables in Canada, Canadian law is applicable to them. If the testator owned land and movables in Germany beyond that, Canadian law applies to them. However, Art.25 (2) of the EGBGB provides that the testator can determine in his last will that German law shall apply with respect to the immovables in Germany. Accordingly, a

Canadian with immovable property in Germany can choose which law should be applicable to it.

According to the Canadian conflict of laws on the other hand, German law is applicable to immovables in Germany and Canadian law to immovables in Canada. The law that is applicable for movables is determined by domicile, i.e. the last permanent residence of the testator. See above at (E.II).

**Example 2:** *The testator had Canadian citizenship and resided in Toronto. The estate contains land as well as movable property both in Canada and in Germany.*

According to the German conflict of laws, Canadian law is applicable to the whole estate. – According to the Canadian conflict of laws, Canadian law applies in regard to the land in Canada and to all the movables in Canada as well as in Germany. German law applies to the land in Germany.

**Example 3:** *Same as example 2, but the testator determined in his last will that German law should apply.*

According to the German conflict of laws, German law applies in regard to the land in Germany and Canadian law to the rest of the estate. – According to the Canadian conflict of laws, again, Canadian law applies in regard to the land in Canada and to all the movables in Canada as well as in Germany. In regard to the land in Germany, German law applies.

## **F. Recognition of testamentary dispositions – Formal Validity**

Art. 26 of the EGBGB states the requirements of the German Conflict of Laws for the formal validity of a last will. It contains different alternatives for a last will to be valid as well as a revocation of former testamentary dispositions. Last wills are valid, *inter alia*, if they comply with the formalities required by the law of the testator's home state, of his last domicile or of the place where the last will was made. A last will is also valid if it complies with the formalities required by the law of the place where the immovables which the testator disposed of in his last will are located.

According to Canadian law, last wills are valid especially if they comply with the formalities required by the law of the place where the last will was made or where the testator was last domiciled or had his habitual residence (s.37).

## **G. Procedural Law**

The following section answers the question of how to proceed after the death of the testator, and in particular addresses the issues of which court has jurisdiction and to what extent certificates which are issued in one country are recognizable and enforceable in the other.

## I. Germany

### 1. Jurisdiction

#### a. Contentious Proceedings

The general international jurisdiction of German trial courts also determines if a trial regarding succession issues can be brought to a German court. Due to lack of state treaties in regard to succession law between Germany and Canada, the jurisdiction is determined by national German law<sup>6</sup>. A German court therefore has international jurisdiction whenever it has jurisdiction according to the provisions of the Code of Civil Procedure (*ZPO*). In regard to succession law, sections 27 and 28 of the *ZPO* are to be especially considered, in addition to the general jurisdictional rules in sections 12 ff. of the *ZPO*. Accordingly, succession matters can be brought to the court in the district in which the testator had his place of general jurisdiction at the time of his death, irrespective of the testator's citizenship and which country's law is applicable<sup>7</sup>. In case the testator did not have a place of general jurisdiction in Germany at the time of his death but had German citizenship, a trial can be brought to the court in the district in which he had his last domestic domicile. In case he did not have such a domicile, a trial can be brought to the *Amtsgericht* (= local court) Schöneberg in Berlin.

It is also possible to stipulate a jurisdiction in compliance with the requirements of section 38 (2) of the *ZPO*. Such a stipulation requires written form and is possible if one party or both do not have a place of general jurisdiction in Germany. It is irrelevant whether there is a place of special jurisdiction<sup>8</sup>.

#### b. Non-Contentious Matters

A German probate court has international jurisdiction whenever a foreign conflict of laws refers to German succession law<sup>9</sup>. As discussed above, a German probate court has jurisdiction whenever the testator was a German citizen or a Canadian testator leaves immovables in Germany. Furthermore, section 2369 of the BGB provides a special international jurisdiction in

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<sup>6</sup> Vgl. FA-ErbR/Rohlfing, p.1278.

<sup>7</sup> FA-ErbR/Rohlfing, p.1279.

<sup>8</sup> Zöller/Vollkommer, section 38, marginal number 26.

<sup>9</sup> Flick/Piltz, marginal number 323.

case the circumstances surrounding an estate do not establish jurisdiction for a German court even though the estate consists of property situated in Germany.

The local jurisdiction is provided for in section 343 of the FamFG (German Domestic Relations Court Proceedings and Non-Contentious Jurisdiction Act). The probate court of the district in which the testator had his last domicile has jurisdiction. In case the testator did not have a domicile in Germany at the time of his death, the court in which district the testator last resided has jurisdiction. If the testator did not have such a residence at the time of his death, the *Amtsgericht* (= local court) Schöneberg in Berlin has jurisdiction for estates of German testators, while, for the case in which the testator was not a German citizen, every court in which district estate assets are located has jurisdiction.

## 2. Procedure

### a. Granting certificate of inheritance

As long as German law applies to the succession, normally there are no specifics which need to be taken into account. Upon application, the Court grants a certificate of inheritance according to section 2353 of the BGB. It should be kept in mind that, although the estate succession complies with German law, the certificate does not extend to property in other countries in regard to which foreign law applies. In this case, a restriction is added to the certificate of inheritance.

**Example 4:** *The testator is a Canadian domiciled in Munich and leaves immovables in Canada and in Germany as well as movables in Germany.*

Because of his Canadian citizenship, Art.25 of the EGBGB refers to Canadian law. The conflict of laws provisions direct that German law applies in regard to the immovables and movables in Germany, but in regard to the immovables in Canada, Canadian law applies. The Court grants a certificate of inheritance according to section 2353, BGB, with the restriction that it only extends to the property in Germany.

Even if German law does not apply to the succession, the granting of a certificate of inheritance regarding property in Germany is still possible. Such a document is called “*Fremdrechtserbschein*” (= foreign law certificate of inheritance) pursuant to section 2369 BGB. It specifies which law applies to the succession and which restrictions the heirs are subject to that are comparable to German law.

It has to be kept in mind that the granting of a “*Fremdrechtserbschein*” is only possible if foreign substantive succession law applies<sup>10</sup>. As discussed above in relation to the applicability of

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<sup>10</sup> Palandt/Edenhofer, section 2369, marginal number 1.

Canadian and German law, a “*Fremdrechtserbschein*” can never be granted to an heir if the testator was a German citizen irrespective of the last domicile or residence of the testator. In cases in which the testator had foreign citizenship but German law nevertheless applies, for instance where a foreign conflict of laws provision refers to German law or the testator directed that German law apply, in accordance with Art.25 (2) of the EGBGB, a “*Fremdrechtserbschein*” also cannot be granted. The court grants an ordinary certificate of inheritance according to section 2353 BGB.

In cases in which German and foreign law apply in parts to the succession, an ordinary certificate of inheritance can be granted as well as a “*Fremdrechtserbschein*”. Both certificates can be combined in one document.

### **b. Granting certificate of executorship**

With regard to the granting of a certificate of executorship, section 2368 (3) of the BGB directs that the regulations regarding the certificate of inheritance apply analogously. See the points above regarding the procedure of granting a certificate of inheritance. Therefore pursuant to sections 2368 (3) and 2369 of the BGB, a certificate of execution can in principle be granted if the position as executor/trustee is based on foreign law. Such a certificate is called “*gegenständlich beschränktes Fremdrechts-Testamentsvollstreckerzeugnis*” and it needs to stipulate any special authorities granted to the executor by the foreign law. The problem in this context is that according to Canadian law, and in contrast to German law, the administration of estates is mandatory and thus the formal administration of the estate is not dependent on the intentions of the deceased. As a result, the administration of estates under Canadian law is not comparable to the carrying out of the executory duties of a will under German law. It is debatable whether the trustee appointed by a Canadian court (the so-called administrator) can be granted a certificate of executorship<sup>11</sup>. If the deceased, however, appointed a personal representative in his last will (the so-called executor), comparability can be assumed and a certificate of execution can be granted.

### **3. Recognition and Enforcement of Foreign Judgments**

The recognition of foreign succession law judgments is determined by section 328 of the ZPO. Final foreign court decisions generally are recognized as long as the exceptions stated in section 328 of the ZPO do not apply. Subject matter of the recognition are the procedural effects of the final foreign court decision, as long as they are known to German law without needing to be

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<sup>11</sup> Flick/Piltz, marginal number 670, 575.

consistent with the effects of a German judgment<sup>12</sup>. The declaratory and constitutive effects of the foreign judgment are therefore recognisable by the foreign courts<sup>13</sup>.

The recognition takes place automatically if the requirements for the recognition are fulfilled. The effects of the foreign judgment extend to Germany without the necessity of a special act of recognition. If the need emerges for a final clarification of the ability to be recognized by a German court, this need can be satisfied by an action for a declaratory judgment<sup>14</sup>.

The enforceability of foreign judgments has to be strictly separated from the recognizability of, and the associated procedural effects of, foreign judgments. A foreign decree is not in itself enforceable in Germany. According to section 722 of the ZPO, enforcement of the foreign decree is only possible if the validity of enforcing the decree is declared in a so called “*Vollstreckungsurteil*” (= enforcement judgement), which can be obtained in an additional proceeding by an action leading to a declaration of enforceability.

It has to be considered that sections 328 and 722 of the ZPO do not cover foreign certificates of inheritance or grants of probate or administration. Those are not recognisable. The heirs and the estate trustee must apply respectively for a “*(Fremdrechts-) Erbschein*” and a “*(Fremdrechts-) Testamentsvollstreckerzeugnis*” in Germany. See the discussion above at (G.I 2.).

## II. Canada

### 1. Jurisdiction, Procedure

The court’s jurisdiction in terms of contested proceedings regarding succession is determined by the jurisdiction in non-contentious estate matters according to Canadian provincial laws. Accordingly, the court which has jurisdiction in terms of granting the documents in conjunction with the succession is competent.

As already discussed above (C.II.1), there is no appointment of an heir in a manner comparable to German law. Everybody upon whom an asset is bestowed by order in the last will is known as an heir irrespective of the characterization of the bestowal as a legacy or as a gift for instance. Therefore the heirs are not granted a certificate of inheritance. After the testator’s death the personal representative/estate trustee (“*Nachlassverwalter*”, compare C. II. 1.) becomes his

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<sup>12</sup> Zöller/Geimer, section 328, marginal number 20 ff.

<sup>13</sup> Zöller/Geimer, section 328, marginal number 31.

<sup>14</sup> Zöller/Geimer, section 328, marginal number 276, 277.

successor. In the course of handling the testator's property, he distributes the assets to the heirs.

Depending upon whether the testator has appointed someone as his personal representative, he is called an executor or an estate administrator. An estate administrator is appointed by the court either because the testator did not appoint anyone or because the appointee cannot or does not want to accept the position. In order to legitimize his position in the handling of the estate, he requires the appropriate certificate from the court. Both the executor and the administrator have to apply for a so-called certificate of appointment of estate trustee<sup>15</sup>. This certificate serves as a judicial confirmation of the authenticity of the last will.

If the testator has made a will, the court grants a certificate of appointment of estate trustee with a will annexed, otherwise a certificate of appointment of estate trustee without a will. For the executor, the certificate is only a confirmation of his position and serves to legitimize his role in the distribution of the assets of the estate. He derives his rights directly from the will. If the executor resides outside of the Commonwealth, the court generally grants a certificate only if he gives a security which is determined by the court (ss. 6, 29 (3) EA) (Estates Act).

The administrator is appointed by the court and derives his rights from the granted certificate. Generally only someone who is residing in the respective province shall be appointed administrator (s.5 EA). It is in the court's discretion who is appointed as administrator. The court first considers the appointment of the person to whom the deceased was married or with whom he was living in a conjugal relationship outside marriage, and then considers the next of kin (s.29 EA). The court can as well demand that the administrator deposit a security (s.29 (3) EA).

The Superior Court of Justice has jurisdiction for granting these certificates. The application is to be filed in the Court office for the district in which the testator had a fixed place of abode at the time of his death (s.7 (1) EA). If the testator resided outside the respective province, the application shall be filed in the office for the district in which the testator had property at the time of his death (s.7 (2) EA).

## **2. Recognition and Enforcement of foreign judgments: In Canada foreign judgments are in principle recognisable and enforceable**

Recognition of such foreign judgments in Canada requires the decree-delivering court to have jurisdiction according to the rules of the applicable provincial Conflict of Laws<sup>16, 17</sup>.

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<sup>15</sup> Other Canadian provinces issue a grant of probate to the executor and a grant of administration to the administrator.

<sup>16</sup> For more details see the essay „Reciprocal Enforcement of Judgments Between Germany and Ontario“, available from Polten & Associates website: [www.poltenassociates.com](http://www.poltenassociates.com).

Accordingly, a court has jurisdiction in so far as a judgment *in personam* is concerned, which is similar to a German judgment on obligatory claims, if the defendant submits or agrees to submit to the jurisdiction of that court<sup>18</sup>, if the defendant as an individual was resident in the country, state, province or territory of the foreign court or as a corporation was carrying on business there at a permanent establishment<sup>19</sup>, or if there at least was a real and substantial connection between the matter and the foreign court<sup>20</sup>. A judgement *in rem*, which primarily consists of a judgment on a claim based upon a property right, is recognizable if the movable or immovable property is situated in the district of the ruling court<sup>21</sup>.

Like German law, Canadian law distinguishes between the recognition of a judgment and its enforcement. With reference to that judgment, one can obtain another decree in Canada, the so called action on the judgment, which is the basis for the enforcement. The judgment has to meet the basic requirements for recognition and enforcement according to the above said. But even if it does, it might still be impeached and thereby denied recognition and enforcement on the ground that it was obtained by fraud, or that the foreign proceedings were conducted in a manner contrary to natural justice, or that its recognition or enforcement would be contrary to public policy<sup>22</sup>. Finally, the judgment has to be enforceable, conclusive and directed towards a determinable sum of money<sup>23</sup>.

A German certificate of inheritance is normally not recognized, because in contrast to German law, in Canada the heir does not become the testator's successor; instead the administration of the estate is done by the personal representative (C.II.1., G.II.1.). In case the testator has not appointed an estate trustee, the heirs have to make a request that the court appoint an administrator – see above at (G.II.1.). According to s.5 of the EA, the court shall not appoint a person who does not reside in that particular province as estate administrator. However, this is not mandatory. It is still possible for instance to appoint one of the heirs residing in Germany, albeit in that case the court can order him/her to give a security (s.6, EA).

Regarding the German certificate of executorship, the situation is different. The German executor can apply for a certificate of ancillary appointment of estate trustee with a will to a

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<sup>17</sup> Castel/Walker, Ch.14.5., Ch.14.11.

<sup>18</sup> Castel/Walker, Ch.14.5.a.,b.

<sup>19</sup> Castel/Walker, Ch.14.5.c.

<sup>20</sup> *Morguard Investments Ltd. v. De Savoye*, (1990) 3 S.C.R. 1077.

<sup>21</sup> Castel/Walker, Ch.14.11.a.,b.

<sup>22</sup> *Beals v. Saldanha* (2003) 3 S.C.R. 416.

<sup>23</sup> Castel/Walker, Ch.14.3., 14.6.

Canadian court. The application has to be accompanied by certified copies of the document (i.e. the German certificate of executorship) under the seal of the court which granted it (rule 74.09 Rules of Civil Procedure). For this certificate the same requirements apply as for the above-mentioned ones (see G.II.1.). The court particularly can make the granting of the certificate dependent upon security pursuant to s.6 of the EA.

## **H. Conclusion**

As this essay demonstrates, every single case in inheritance law with cross-border issues can entail unexpected complications. In addition, every case differs in its details so that a general answer to particular questions is not possible or advisable. It is therefore crucial for a client to obtain legal advice from a lawyer to address their own particular case.

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Internet: <http://www.gesetze-im-internet.de>

#### Ontario Law

A consolidated version of all statutes should be published every ten years. However, this happened last in 1990. The official version of a statute therefore results from the first publication in the Revised Statutes of Ontario (R.S.O.) as well as the subsequent published amendments. A non-official, but almost daily up-to-date version of all federal and provincial statutes can be accessed on the internet (see the list below).

The substantive succession law is regulated in the Succession Law Reform Act, R.S.O. 1990 Chapter S. 26, and its subsequent amendments. Other statutes which deal with the administration of estates are the Estates Act, R.S.O. 1990, Chapter E. 21 (abbreviated: EA), the Estates Administration Act, R.S.O. 1990, Chapter E. 22 and the Trustee Act, R.S.O. 1990, Chapter T. 23. The procedural law of the Province of Ontario is regulated in the Courts of Justice Act, R.S.O. 1990, Chapter C. 43 as well as in the Rules of Civil Procedure, R.R.O. 1990, Regulation 194.

References to sections without referring to a specific Act are derived from the Succession Law Reform Act..

The online source for Ontario statutes and regulations is <http://www.e-laws.gov.on.ca>. This website should be visited for an up-to-date version of the legislation:

- Succession Law Reform Act, R.S.O. 1990 Chapter S. 26, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90s26\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s26_e.htm)
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Words implying the masculine gender shall be deemed and taken to include females.