

**Retirement – What's next?**  
**Pensions, Powers of Attorney and Last Wills**

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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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## I. Introduction

Retirement for many pensioners means that they can finally relax and live life to the fullest.

This is also a time to make provisions for future situations when one may be in need of care or mentally incapable of making decisions. Such provisions ensure that the person affected knows that he or she will be in good hands. Additionally, such provisions make it easier for family members and authorities to act in the interests of the person affected.

This essay provides a short summary of the topics of pension payments in Canada and in Germany as well as the different powers of attorney that can be drafted to make provisions for medical emergencies or situations in which someone is incapable of making decisions. The final paragraph of the essay deals with last wills and testaments.

It is never too early to make provisions for unpleasant circumstances, but as soon as provisional measures have been taken, retirement can be enjoyed to the fullest.

## II. Retirement & Pensions

### 1. Germany

*Deutsche Rentenversicherung* (public pension insurance) is the competent authority for all pension related matters, such as applications and payments. It also has the authority for pensions for reduced earning capacity and widow's and orphan's pensions. Some professional groups, such as lawyers and public servants, do not pay into the public pension insurance. They receive payments from occupational pension funds or directly from the government.

#### a. Statutory Pension in Germany

Some preconditions have to be met in order to receive a pension from the German *Rentenversicherung*; in particular, the recipient has to contribute to the pension insurance for a certain period of time.

To receive the old age pension the recipient must have reached the statutory retirement age and must have completed a minimum 5-year period of insurance.

The statutory retirement age for persons born after 1964 is 67 years.<sup>1</sup> The pension will be permanently reduced for all those who retire before achieving the statutory retirement age of 67 years. The pension will be reduced by 0.3 % for every month that the pension is claimed before the age of 67.

On July 1, 2014, according to the statistics of *Deutsche Rentenversicherung*, the average retirement pension after 45 years of contribution was in the Old Länder of Germany € 1,287.45

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<sup>1</sup> For age groups born before 1964 different rules apply.

(CAD \$ 1,815.66) and in the New Länder € 1,187.55 (CAD \$ 1,674.78).<sup>2</sup> Contributions over an average of 27 years are necessary in order to receive a basic pension.

### **b. Survivor Pension**

*Deutsche Rentenversicherung* is also responsible for survivor pension payments. To receive a survivor pension the deceased has to have received a retirement pension until his or her death or to have fulfilled the minimum 5-year period of insurance. Furthermore, the spouses have to have been married for at least one year.<sup>3</sup>

To receive a survivor pension the surviving spouse must be at least 47 years old or be engaged in raising a child of the marriage or a child of the deceased spouse who is under 18 years of age, or the surviving spouse has to have a reduced capacity to earn income.

If these preconditions are met, the surviving spouse receives a so called *große Witwen-, Witwerrente* (large widow's or widower's pension) in the amount of 55 % of the deceased's retirement pension. If the provisions are not met, the surviving spouse receives a so called *kleine Witwen-, Witwerrente* (small widow's or widower's pension) in the amount of 25% of the deceased's retirement pension for a period of 2 years. Re-marriage leads to the forfeiture of any entitlements to survivor pension.

Registered civil partners are considered to have the same status as spouses in this regard.

### **c. Taxation of Retirement Pension in Germany**

On January 1, 2005, the *Alterseinkünftegesetz* (Retirement Income Act) came into effect. Thereby, retirement pensions are gradually phased into being completely taxable. The transition period extends from 2005, with a taxable portion of 50% of the retirement pension, to 2040, with a taxable portion of 100%. This new law affects pensioners in Germany and those living abroad. A restricted tax liability arises from receiving retirement pension payments from Germany and, therefore, every recipient is obligated to complete a tax return for the German authorities. However, the German pension has to be declared also on the Canadian tax return. In order to avoid double taxation in cases in which the recipient is residing in Canada, the tax agreement between Germany and Canada provides for measures whereby the German income taxes can be taken into account for Canadian tax purposes.

### **d. Refund of Contributions to Pension Insurance**

Someone who worked in Germany and contributed to the pension insurance only for a short period of time can apply to get a refund of the contributions. Compulsory contributions can be refunded in the amount that they have been paid; the employer's contribution to the pension

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<sup>2</sup> Statistics *Deutschen Rentenversicherung*, Rentenversicherung in Zahlen 2014: [http://www.deutsche-rentenversicherung.de/cae/servlet/contentblob/238692/publicationFile/57922/rv\\_in\\_zahlen\\_2013.pdf](http://www.deutsche-rentenversicherung.de/cae/servlet/contentblob/238692/publicationFile/57922/rv_in_zahlen_2013.pdf)

<sup>3</sup> The minimum period of one year is not applicable in cases in which the spouses were married before January 1, 2012.

insurance cannot be refunded.

The preconditions are:

- Being no longer obligated to contribute to the German pension insurance;
- Not being entitled to voluntarily contribute to the German pension insurance (residing outside of the European Union and less than 60 months of contribution to the pension insurance);
- 24 months having elapsed since dropping out of the compulsory insurance.

Please be advised that after the refund of the contributions has been received all entitlements to services from the pension insurance expire. The German pension insurance provides access to a helpful brochure in the German language on their website.<sup>4</sup>

## **2. Canada**

The Canadian pension system is based upon duality; the Old Age Security (OAS) and the Canada Pension Plan (CPP). The pension system in the Province of Quebec, *the Québec System Régime de rentes du Québec/Québec Pension Plan* which is similar to the Canada Pension Plan, will not be discussed separately in this essay.

### **a. Old Age Security Pension**

The Old Age Security Pension is a monthly security payment available to most Canadians 65 years of age or older. This federal pension is financed through taxes. The maximum amount for the time period starting on July 1, 2013 is CAD \$ 549.89 (EUR 398.92).

The maximum amount is available to persons from the age of 65 who have lived since their 18<sup>th</sup> birthday for at least 40 years in Canada or who were born on, or before July 1, 1952 and who have lived in Canada for some time between their 18<sup>th</sup> birthday and July 1, 1977, and who, in addition, have lived in Canada for the 10 years prior to submitting the application.

Partial payments are available to persons at the age of 65 and older who are Canadian citizens or permanent residents and who have lived for the last 10 years in Canada.

Someone who receives the Old Age Security Pension but has an income over CAD \$ 70,954.00 (income tax year 2013), has to pay 15% taxes retroactively on the income that is over the maximum amount. For persons who have an income over CAD \$ 114,815.00 and who receive payments from the Old Age Security Pension, the monthly payments have to be paid back.

Within the scope of the social security agreement between Canada and Germany or the USA, periods of residence can be recognized, in order to qualify for the Old Age Security Pension. The social security agreement between Canada and Germany is further discussed under II.3.

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<sup>4</sup> <http://www.deutsche-rentenversicherung.de/cae/servlet/contentblob/232658/publicationFile/50114/beitragserstattung.pdf>

## **b. Canada Pension Plan**

Payments from the Canada Pension Plan are available to people from the age of 65 or over who have worked for a period of time in Canada since 1965<sup>5</sup> and who have contributed to the Plan.

Benefits can be taken from the age of 60. However, for each month short of the retirement age of 65, 0.6 % of the benefit amount is deducted up to a maximum amount of 30% in total. The reduced pension continues after the age of 65.

For every month after the age of 65 up to the age of 70 that the payments are postponed, the pension increases to 0.7 % to a maximum 30%.

The estimated pension payments at the age of 65 amount to 25 % of the average insured monthly wages during the entire period of insurance under the Canada Pension Plan. In March 2013, the average payout was CAD \$596.66 (approximately: EUR 421) and the maximum amount was CAD \$1.012.50 (approximately: EUR 715).

It is possible to earn unlimited additional income which does not trigger contributions to the Canada Pension Plan.

The Plan also administers disability benefits, survivor benefits for spouses and children and death benefits. Even after re-marriage survivor benefit payments continue to be paid out, contrary to the German system.

## **c. Taxation of Pensions in Canada**

Pension payments from the Canada Pension Plan as well as the Old Age Security are subject to income taxes. In both cases, taxes are either withheld directly from the monthly payments or, upon application, may be paid every three months.

## **3. Social Security Agreement between Germany and Canada<sup>6</sup>**

On November 14, 1985, Germany and Canada entered into a Social Security Agreement.<sup>7</sup> This agreement affects all persons who have contributed to either the German or the Canadian pension insurance system, as well as persons receiving survivor benefits. In Germany the statutory pension insurance and in Canada the Old Age Security and the Canada Pension Plan, and for the Province of Québec the *System Régime de rentes du Québec/Québec Pension Plan*, are covered by the agreement.

By allowing the combining of periods of contribution or periods of residency in Canada with periods of contribution or periods of residency in Germany, the Social Security Agreement can enable persons to meet the minimum eligibility criteria to qualify for benefits. The permitted

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<sup>5</sup> The year in which the Canada Pension Plan was introduced.

<sup>6</sup> Similar agreements exist between Austria and Canada and Switzerland and Canada.

<sup>7</sup> [http://www.dvka.de/oeffentlicheseiten/pdf-Dateien/SVAbkommen/Kanada/Kanada\\_SVA.pdf](http://www.dvka.de/oeffentlicheseiten/pdf-Dateien/SVAbkommen/Kanada/Kanada_SVA.pdf)

combination does not lead to one total pension. The German pension is calculated by the period of insurance in Germany and the Canadian pension is calculated by the period of insurance in Canada.

### III. Powers of Attorney

In case people are, due to their age or any kind of illness, not capable to make decisions anymore, other persons are required to make the decisions on their behalf. A new challenge is the global mobility which makes individuals and families often residing in more than just one country.

When moving to another country, it is strongly recommended, especially when real estate is involved, to seek legal advice and make Powers of Attorney according to the law of the particular country in which the real estate is located and that of the country to which one is relocating.

Existing Powers of Attorney should be revised periodically. If they are still in accordance with the current ideas and wishes of the principal, he or she should confirm them or otherwise change them, so that, in the event that the Powers of Attorney have to be used, the attorney knows that the documents reflect the actual wishes of the donor.

#### 1. Germany

In Germany, three different types of Powers of Attorney exist: *Vorsorgevollmacht*, *Betreuungsverfügung* and *Patientenverfügung*. The *Vorsorgevollmacht* designates a person who is allowed to act on behalf of an incapacitated person. A *Betreuungsverfügung* determines to whom a court is supposed to grant a Power of Attorney, and a *Patientenverfügung* determines what is supposed to be arranged in case of a medical emergency.

For a small fee individuals as well as notaries can deposit all documents with the Central Register run by the National Association of Notaries (*Zentrales Vorsorgeregister*)<sup>8</sup>. The deposit guarantees that in the case of an emergency the documents can be found and arrangements can be made according to the wishes of the donor.

##### a. *Vorsorgevollmacht*

By means of a *Vorsorgevollmacht* the donor can authorize a person of trust to act on his or her behalf when he himself or she herself is no longer able to look after his or her own affairs.

Spouses, parents or children do not automatically have a Power of Attorney in case of an emergency. If no *Vorsorgevollmacht* has been made, a court has to decide on and appoint a Power of Attorney within a guardianship proceeding.

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<sup>8</sup> More information here: <http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Zentrales-Vorsorgeregister-ZVR.php>

The *Vorsorgevollmacht* can provide for specific concerns, e.g. financial matters, or can entitle the attorney to act in all general matters.

The Power of Attorney should be drafted in as much detail as possible. It need not be in any particular form. The Power of Attorney should be in writing in order for the attorney to provide proof of authority to act for the incapacitated person. The Power of Attorney has to be notarized for representation purposes regarding the transfer of property or consumer loans.

At any time the donor can revoke, including orally, a *Vorsorgevollmacht*. Especially in such a case the donor has to demand the return of the documents in order to prevent the misuse of the Power of Attorney.

Of course the grantor has to be mentally capable when granting the Power of Attorney.

### **b. *Betreuungsverfügung***

The *Betreuungsverfügung* does not avert the appointment of an attorney by court. It rather determines who should be appointed as attorney. The donor can give instructions as to what he or she envisions for his or her life after incapacitation. The court and the attorney are bound by these provisions. In contrast to a *Vorsorgevollmacht*, the attorney in this situation is under supervision of the court who appointed him or her.

### **c. *Patientenverfügung***

By means of a *Patientenverfügung*, the donor can express which medical treatments he or she wants to receive in the event of an emergency. The *Patientenverfügung* addresses doctors and attorneys in order to act upon the wishes of the donor.

The legal definition in Sec. 1901a (1) German Civil Code (BGB) reads as follows:

*“If a person of full age who is able to consent has determined in writing, for the event of his becoming unable to consent, whether he consents to or prohibits specific tests of his state of health, treatment or medical interventions not yet directly immanent at the time of determination (living will)...”*

A *Patientenverfügung* must be given in writing. It has to be signed personally or by notarized hand sign. The donor must be 18 years or older.

The *Patientenverfügung* may be revoked at any time without a specific form, Sec. 1901a (1) (3) BGB.

The donor should provide specific information regarding beliefs or values.

If no *Patientenverfügung* has been made, a decision has to be based on expressly stated wishes or on a presumed will. The presumed will is a result of the values, beliefs and decisions the patient expressed to relatives and friends before the emergency occurred. If no unambiguous will can be determined, the doctors can start with the assumption that the patient would consent to the medical treatment recommended by the doctors.

## 2. Canada

In Canada powers of attorney are subject to provincial legislation. All provinces, including Québec, whose legal system is civil and not common law, have enacted similar regulations in this respect. Hereafter, the essay concentrates exclusively on the law of the Province of Ontario.

In Ontario, the *Substitute Decisions Act, 1992* (SDA) regulates representation in the case of legal incapacity. In general, a legally incompetent person is not automatically represented by family members. This only applies to medical emergencies. Regardless of a court appointing a representative by court order, everyone who is 18 years of age or older and of sound mind can appoint a representative by means of a Power of Attorney. According to the law of the Province of Ontario two different powers of attorney can be made: a Continuing Power of Attorney for Property and a Power of Attorney for Personal Care.

### a. Continuing Power of Attorney for Property

A Continuing Power of Attorney authorizes a person to dispose of the property of the donor. The term property includes real estate, furnishings, shares, bonds, promissory notes, vehicles and pensions.

The Power of Attorney is called “continuing” because it can continuously be used after the person who granted it is no longer mentally capable.

In general, a continuing Power of Attorney becomes effective immediately. The donor can also specify that it will not take effect until he or she becomes mentally incapable of making decisions. However, this requires provision within the Power of Attorney of a detailed definition of incapacity and delineation of criteria for determining the actual incapacity of the donor.

In order to make a continuing Power of Attorney for property the donor has to be 18 years or older and must be mentally capable of understanding the legal consequences of such a document. The attorney must be 18 years of age or older and should live in the same Canadian province as the donor. To give a Power of Attorney to a person who is living abroad, including a family member is not recommended, since in most cases decisions have to be made that require the attorney to be present in the place of residence of the donor.

A number of people may be named as the attorney and others as alternative or backups in case the attorney resigns or becomes mentally incapacitated. To name more than one person as attorney for property might cause conflicts which could lead to disadvantages for the donor. But, it could also prevent misuse of a Power of Attorney. The pros and cons should be discussed during a meeting with a lawyer in order to find an optimal solution for each particular situation.

The signing of the Power of Attorney must be witnessed by at least two persons. A person to whom the Power of Attorney is given or the spouse or partner of the donor cannot be witnesses. Furthermore, an attorney should be a respectable person who can make reasonable decisions. The Continuing Power of Attorney need not follow any particular form. A database similar to the German Central Register does not exist in Canada and, therefore, a Power of Attorney should be deposited with a lawyer or a reliable and trustworthy person.

A Power of Attorney can be revoked. This must be done in writing, either in the presence of two

witnesses - who witness the signing of the document - or by making a new Continuing Power of Attorney for Property.

**b. Power of Attorney for Personal Care**

Personal Care includes health care, food, living arrangements, housing, clothing, hygiene and/or safety.

To give a Power of Attorney for personal care, a person must be at least 16 years of age. The attorney must also be at least 16. More than one person may share the responsibility of attorney and the grantor may name alternatives or backups. There must be two witnesses to the signature of the person granting the Power of Attorney.

The Power of Attorney may include instructions to the attorney which must be followed by the attorney, with regard to medical treatment, for example. The record of such wishes is called a “living will”. It can be part of the Power of Attorney or can be set down in a separate document.

If the donor did not express specific wishes, the attorney must make a decision according to otherwise written or orally expressed wishes or, as a last resort, must make a decision which is in the best interest of the donor. In deciding what those best interests are, the attorney must consider the donor’s values and current beliefs, whether the decision is likely to improve the incapacitated person’s quality of life, and the advantages and disadvantages of the decision.

**c. No Power of Attorney available**

Insofar as the affected person did not make a Power of Attorney, family members are entitled to make decisions in medical emergencies.

For cases that involve financial matters, relatives and close friends can apply to the Office of the Public Guardian and Trustee to be able to represent the incapacitated person. When no relatives or friends are available, the Office of the Public Guardian and Trustee represents the incapacitated person. Only under specific circumstances, when the incapacitated person refuses any form of cooperation, will a court be used to appoint a guardian.

If no Power of Attorney for personal care has been made, the court will appoint a guardian of the person. The court will then examine the person’s capacity to make decisions regarding at least one aspect of personal care and, additionally, whether such a decision has to be made. In some cases, the Office of the Public Guardian and Trustee will be appointed to represent the person and to take care of the outstanding issues.

**IV. Disposition of Property upon Death**

This section presents an overview of the different options for dispositions of property upon death in Germany and in Canada. For a more detailed presentation, also with regard to intestate succession, please see our essay “Estate Planning in Canada and Germany and the Conflict of

Laws<sup>9</sup>.

## **1. Germany**

In Germany the law provides for last wills, last wills made by spouses and for testamentary contracts as provisions in case of death.

### **a. Last Will**

There are two different ways to make a last will. The first option is a handwritten and signed testament; witnesses are not necessary. The second option is a notarized last will.

### **b. Last Will made by Spouses**

Spouses and registered civil partners can make a joint will with simplified formal requirements. One spouse/partner has to prepare and sign a handwritten will. The other spouse/partner then has to sign the joint declaration.

### **c. Testamentary Contract**

A testamentary contract legally binds the testator when he or she is still alive. The testator and the contractual partner have to be personally present when the contract is notarized. The agreement gives the contractual partner a secured position which cannot simply be revoked. In order to revoke the agreement wholly or only partially another contract has to be made before a notary.

## **2. Canada**

Succession law in Canada is subject to provincial legislation. This presentation solely concentrates on inheritance law in the Province of Ontario.

### **a. Typed Will**

A typed will is the most common way to make a testament. A written, not necessarily handwritten, testament is signed by the testator in the presence of two witnesses. The witnesses themselves have to sign the document as well. Neither the spouse of the testator nor beneficiaries of the will can be witnesses.

### **b. Holograph Will**

The testator can furthermore draft a handwritten and signed will which is called a 'holograph will'. It does not require the presence and signature of witnesses.

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<sup>9</sup> <http://www.poltenassociates.com/Resource-Links/EstatePlanning-English.pdf>

**c. Mutual Will**

A mutual will is a joint testament of two people, in most cases spouses or common-law-spouses, who name each other heir of the predeceasing spouse/partner. The parties also name a beneficiary who inherits the estate at the death of the surviving spouse. A mutual will cannot be changed after the death of the first spouse because it is considered to be a binding contract, dispositions of which cannot be changed or cancelled by drafting a new last will or by a revocation of the will.

**d. Mirror Wills**

Mirror wills are, in contrast to a mutual will, not made in one document, but two independent, reciprocal testaments. The testators appoint each other as heirs. The advantage of a mirror will is that it can be changed or revoked after the death of the first spouse/partner.