

## German-American Estate Planning and Probate

# Determination of the Law Applicable in German- Californian Estates

**Under the European Succession Regulation, the conflict of laws rules regarding succession matters applied by Germany have changed dramatically for decedents with a date of death occurring on or after August 17, 2015. While U.S. laws regarding the determination of the laws applicable to probate estates and trusts haven't changed, the European Succession Regulation may have a significant impact on the law to be applied by U.S. courts. This article outlines the law applicable to US/German estate matters from a German and U.S. perspective with a special focus on German-Californian estates.**

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### A. Applicable Law from a German Perspective

A German court will determine the applicable law for deaths occurring on or after August 17, 2015 under the [European Succession Regulation \(EU\) No 650/2012](#) ('the Regulation').

Notably, a German court will apply the Regulation whether it is the law of a Member State of the Regulation or not.<sup>1</sup> Accordingly, German courts will also apply the Regulation in relation to estates of persons domiciled in the U.S. or estates with U.S. real estate. This broad application is consequential as it could result in the application of German law even when a Californian court would typically apply the laws of California.

### I. Application and Scope of the European Succession Regulation

The application of the Regulation is broad. The Regulation applies to all questions pertaining to "succession to the estates of deceased persons".<sup>2</sup> 'Succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason

of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. However, many questions that typically arise in US/German estate/trust matters are excluded from the scope of the Regulation. In particular, the Regulation does not apply to the "creation, administration and dissolution of trusts". However, this should not be understood as a general exclusion of trusts.<sup>3</sup> While somewhat uncommon in California, many common law jurisdictions provide for testamentary trusts (trusts created by a will) which would result in a German court applying the rules of the Succession Regulation in order to determine the "heirs" and "forced heirs".

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As Germany is not a member of the Hague Convention on the Law Applicable to Trusts and on their Recognition, a German court will determine the applicable law under domestic conflict of law rules, specifically, Art. 25 EGBG. The Regulation also does not apply to other non-probate transfers on death, e.g. joint tenancy survivorship rules. However, any obligation to restore or account for gifts (e.g. "claw back"), when determining the forced heirship right, are in the scope of the Regulation even when a non-probate instrument is utilized.

### II. General Rule and 'Last habitual Residence'

Generally, the law applicable to succession matters is governed by the law of the State in which the decedent had his 'habitual residence' at the time of death.<sup>4</sup> A threshold issue that has created uncertainty is that the term 'last habitual residence' is not defined in the Regulation. In order to determine the habitual residence, a German court will make an overall assessment of the circumstances of the life of the decedent during the years preceding his death and at the time of his death.<sup>5</sup> The court will take into account all relevant factual elements including:

- The duration and regularity of the decedent's presence in the U.S. or in Germany;

<sup>1</sup> Art. 20 of the Regulation

<sup>2</sup> Art. 1 para 1 of the Regulation

<sup>3</sup> Recital (13)

<sup>4</sup> Article 21(1) of the Regulation

<sup>5</sup> Recital (23)

- The conditions and reasons for that presence; and
- The individual's intent to remain in the country for an indefinite period or not.

**Please note:** While an individual's intent is relevant to the overall assessment, a new habitual residence does not require that the decedent intends to remain for an indefinite period with no definitive intention of returning. Therefore, the habitual residence of a person may be different from that person's "domicile".

While the duration and regularity of the decedent's presence in the U.S. or in Germany is relevant, no minimum period is required for the establishment of a new habitual residence.<sup>6</sup>

**Example:** Norbert, a German citizen, moves to Los Angeles on March 16, 2017 and abandons his home in Hamburg, Germany. On April 15, 2017, Norbert dies in a car accident. Based on the given fact, Norbert's "habitual residence" would be considered to be in California.

A decedent who maintained a close and stable connection with his home country, but was required to live abroad for professional reasons, even for a significant period of time, could still be considered to have his habitual residence in his State of origin in which the center of interests of his family and his social life was located.<sup>7</sup>

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**Continuation of Example:** If in the example above the decedent worked for a German subsidiary of Siemens, his family stayed in Germany and he visited them on occasion. Germany would apply German law as he maintained a stable connection to Germany.

In the case of a decedent who lived in several States alternately or travelled from one State to another without

settling permanently in any of them, his nationality or the location of his main assets will be a significant factor in determining his habitual residence.<sup>8</sup>

### III. Renvoi

When the law determined under article 21(1) is the law of any non-member State of the Regulation (e.g. the U.S.), article 34(1) holds that such State's rules of conflict of laws are included in so far as those rules refer back to the law of a Member State. Accordingly, referrals to German law by U.S. conflict of laws rules are to be observed and the German substantive provisions shall apply. This is particularly relevant with regard to immovable property (e.g. real estate) situated in Germany of a decedent having his/her last habitual residence (and domicile) in the U.S.

**Example:** A US citizen having his last habitual abode in the U.S. and domiciled in California dies without leaving a will. His estate includes an apartment in Berlin, Germany. Art. 21(1) of the Succession Regulation refers to U.S. law. As Californian law calls for the application of the law of the situs of immovables, German courts would apply German law with regard to the apartment in Germany by way of back reference from Californian law.

But even in the rather rare cases where habitual residence and domicile fall apart, there can be a referral to German law.

**Example:** In 2014, a German citizen moves to San Diego together with his family. He then dies in 2016. However, the family always expressed the clear intention to return to Germany after his retirement. A German court would apply German law by way of back reference from Californian law whereas a court in California would apply Californian law.

### III. Applicable Partial Legal Order

When the Regulation refers to U.S. law, a court must determine which partial legal order is applicable. According to Article 36(1) of the Regulation, the relevant jurisdiction is primarily determined by the internal conflict of laws rules of the respective State. In the U.S., the vast majority of inheritance matters are not subject to federal subject matter jurisdiction and there is no federal probate code. Instead probate and trust matters are generally

<sup>6</sup> Recital (23)

<sup>7</sup> Recital (24) of the Regulation

<sup>8</sup> Recital (24) of the Regulation

subject to state law.<sup>9</sup> Thus, the law of the U.S. state in which the decedent had his habitual residence at the time of death is applicable.<sup>10</sup>

#### IV. “Escape Clause”

Article 21(2) provides for an exception from the general rule in article 21(1). The exception applies when it is clear from all the circumstances of the case that, at the time of death, the decedent was manifestly more closely connected with a State other than the State where he had his habitual residence. In this case the law applicable to the succession shall be the law of that State.

Article 21(2) is intended to apply in exceptional cases. For example, if a decedent was to move from the State of his habitual residence just before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State.<sup>11</sup> Another example would be if an incapacitated individual whom his guardian relocates from Germany to the U.S. without his wish later dies in the U.S.

The mere fact that it is difficult to determine the habitual residence of the decedent, is not a sufficient justification for the application of article 21(2)<sup>12</sup> and there must be a compelling argument that the decedent was closely connected with the State.

#### V. Choice of Law Clauses

Pursuant to article 22(1), the testator may choose the law applicable to their “succession as a whole”. The choice of law can include the law of the State whose nationality he possesses:

- at the time of making the choice or
- at the time of death.

If an individual possesses multiple nationalities, they may choose the law of any of the States whose nationality they possess at the time the election is made or at the time of death.

The choice can be made expressly in a declaration in the form of a disposition of property upon death (e.g. a will) or it shall be demonstrated by the terms of such a disposition (implied choice of law).<sup>13</sup> For example, a choice of law can be demonstrated by a disposition of property upon death

where the decedent referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.<sup>14</sup>

**Example:** Albert, a U.S. citizen from Florida, permanently lives in Berlin, Germany. Albert makes a will attested by 2 witnesses in the U.S. Embassy in English in which he names his cousin in Miami as “personal representative” and devises his “residuary estate” to this niece in Fort Lauderdale. A will of this sort is typical for common law jurisdictions, but not for Germany. Accordingly, an implied choice of the laws of Florida can be inferred from the will.

A choice of law is only permissible if it pertains to the entire estate of the decedent. A choice of law with regard to particular assets or assets located in a particular jurisdiction will be deemed void.

**Please note:** It is common in US/German estate plans to make separate wills for assets located within each jurisdiction and the wills typically limit their applicability to assets located within the specific jurisdiction. However, when the testator limits the application of laws to specific assets, such an estate plan may result in an unacceptable partial election.

In case of a choice of law election, the substantive provisions of the chosen law are applicable. The conflict of laws rules of the appointed State are irrelevant because a *renvoi* is not applied.<sup>15</sup>

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When a U.S. citizen with a habitual residence in Germany chooses “U.S. law”, the inheritance law of the U.S. state in which the decedent had the closest connection shall apply.<sup>16</sup> If the testator chooses the law of a particular U.S. state and he is not most closely connected to this state, the choice of law is generally invalid.

<sup>9</sup> Erie R. Co. v. Tompkins, 304 US. 64, 58 S.Ct. 817 (1938); Klaxon Co. v. Stentor Electric Mfg. Co., 313 US. 487, 61 S.Ct. 1020, 85 L.Ed. 1477, 49 US.P.Q. 515 (1941); Griffin v. McCoach, 313 US. 498, 61 S.Ct. 1023, 134 A.L.R. 1462, 85 L.Ed. 1481 (1941)

<sup>10</sup> Art. 36(2)(a)

<sup>11</sup> Recital (25) of the Regulation

<sup>12</sup> Recital (25) of the Regulation

<sup>13</sup> Art. 22(2)

<sup>14</sup> Recital (39) of the Regulation

<sup>15</sup> Art. 34(2)

<sup>16</sup> Art. 36(2)(b)

## VI. Deemed Choice of Law Clauses

If a disposition of property upon death was made prior to August 17, 2015, in accordance with the decedents chosen law according to the Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

## VI. Choice of Law Clauses and German Forced Heirship Regime

For U.S. citizens with real estate or habitual residence in Germany, a choice of law clause is significant in that it provides the opportunity to avoid Germany's forced heirship regime.

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However, it should be cautioned that such a choice of law clause may be incompatible with the German public policy (*ordre public*) as the German Federal Constitutional Court (*Bundesverfassungsgericht*)<sup>17</sup> provides that the German forced Heirship regime receives constitutional status.<sup>18</sup> However, a counter argument to such an assessment is that the legislators of the Regulation recognized that the choice of law can be used to avoid the compulsory share, and they decided to only limit its applicability to the law of the decedent's nationality.

## VII. No Special Rules for Immovables

While the conflict of law rules in force until August 16, 2015 included an exception for immovables (e.g. real estate) in the U.S., there is no such exception under the European Succession Regulation and the law determined as outlined in this article also governs succession with regard to immovable assets located in the U.S. However, California courts are likely to disregard the application of German law to the disposition of immovable property in California. As a result, German and Californian courts may apply different laws.

**Example:** A German citizen purchases a vacation home in Los Angeles which he uses every summer. His family and center of interests are in Germany. He dies intestate.

Based on the situs of the real property, a California court will apply California law to disposition of the vacation home, whereas a German court will apply German law.

In such a scenario the German 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 as it may be

**Example:** A German citizen dies in 2016 with a habitual residence in California. In 2010, he had made a notarized will before a German notary and designated an "heir" without naming a "personal representative". As such a will is typical for Germany but rather uncommon in California, it is deemed that he has chosen German law to govern succession.

expected that its decision in respect of the Californian assets will not be recognized.<sup>19</sup> Arguably, this does not apply to forced heirship claims as such claims may be enforceable in assets located in Germany or other States that would recognize a German judgement.

## VIII. Other Special Rules

Special rules apply with regard to the admissibility (e.g. joint wills) and substantive validity (e.g. capacity or interpretation of a will) of dispositions of property upon death; insofar that it must be based on the date of the establishment.<sup>20</sup> In addition, there are special rules with regard to the admissibility, substantive validity and binding effects of agreements as to succession;<sup>21</sup> such rules also apply to a contract to make a will or not to make a will. Finally, there are special rules with regard to the formal validity of a will, which is governed by the *Hague Convention*.<sup>22</sup>

### B. Applicable Law from the Perspective of a Californian Court

There is no federal conflict of laws regarding the determination of law applicable to US/German estate or trust matters. California, like the majority of U.S. states, begins its conflict of laws analysis by applying a basic formula which holds that

- the law of the domicile applies to "movable" property and
- the law of the situs applies to dispositions of "immovable" property.

<sup>17</sup> BVerfGE 112, 332

<sup>18</sup> KG, ZEV 2008, 440 with annotation by Pattar and Dörner.

<sup>19</sup> Art. 12

<sup>20</sup> Art. 24(1)

<sup>21</sup> Art. 25

<sup>22</sup> Art. 75(1)

However, different rules apply with regards to the validity of a will as regards to form, and the administration of estates and trusts.

### I. Determination of the Applicable Law to Succession in Movable Property

As stated above, the law of the domicile applies to “movable” property.<sup>23</sup> The California Probate Code does not explicitly define “domicile.” However, the Elections Code is instructional as it defines a person’s domicile as “that place in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning.”<sup>24</sup> California case law reflects a similar definition of “domicile.” Domicile is typically found by California courts to be “the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively.”<sup>25</sup> In sum, a domicile includes “both the act of residence and an intention to remain.”<sup>26</sup> Pursuant to this test, a person may have only one domicile at a given time.

### II. Immovable Property

With respect to immovable property located in California, the California courts are likely to apply California law regardless of the decedent’s domicile.<sup>27</sup> The characterization of an asset as movable or immovable is governed by the law of the situs.<sup>28</sup> Pursuant to California legal authority, German law would apply to the characterization of assets located within Germany whereas California law would apply to California situs assets. For example, XY is a German individual who dies without a will leaving a home in Los Angeles. The intestate succession of his estate shall be governed by the laws of California. While California may treat partnership interests as being an interest in immovable property, Germany qualifies shares in a partnership with immovable property and real estate held by a community of heirs as movable property.<sup>29</sup>

<sup>23</sup> Estate of Nolan (1955) 135 CA2d 16, 19.

<sup>24</sup> Elec. Code, § 349(b)

<sup>25</sup> In re Marriage of Amezquita & Archuleta (2002) 101 Cal.App.4th 1415, 1419-1420, citing Smith v. Smith (1955) 45 Cal.2d 235, 239; see also Chapman v. Superior Court (1958) 162 Cal.App.2d 421, 426, quoting 16 Cal.Jur.2d, p. 649, § 4)

<sup>26</sup> Id.

<sup>27</sup> Restatement (Second) Conflict of Laws § 239 (1971)

<sup>28</sup> See Restatement Second, § 7(2) (“The classification . . . of Conflict

Accordingly, the laws of California would apply to a German decedent’s estate if he/she was domiciled in Germany.

### III. Choice of Law Clauses under the California Probate Code

Section 21103 of the CPC states: “The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6.” The language of Sec. 21103 CPC suggests that the testator is generally free to choose the applicable law. However, it should be noted that Section 21103 is based on UPC § 2-703. As one can take from the comment to UPC § 2-703, the purpose of the law was to enable the law of a particular state to be selected in the governing instrument for purposes of interpreting the instrument. This comment clearly indicates that Sec. 21103 CPC only applies to the interpretation of a will and is not applicable to other substantive questions such as forced heirship issues.

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### IV. Administration of the Estate

The administration of a decedent’s estate is governed by the local law of the state which has appointed the personal representative (*lex fori*).<sup>30</sup> It is important to consider that it is possible that multiple states have jurisdiction because jurisdiction exists both in the state in which the testator had his last domicile, as well as in a situs-state of immovable property.<sup>31</sup> When an individual dies owning real property (not subject to a trust), that real property is subject to the

of Laws concepts and terms [is] determined in accordance with the law of the forum . . . .”)

<sup>29</sup> BGHZ 146, 311, 315 f.; KG ZEV 2012, 593, 594.

<sup>30</sup> Restatement (Second) of Conflict of Laws § 316; *Felix/Whitten*, American Conflicts Law, § 166, S. 521.

<sup>31</sup> Restatement (Second) of Conflict of Laws §§ 314 f., 334, Chapter 14, Topic 1, Introductory Note (1971).

jurisdiction of the Court in the County where the property is located. As seen above, movable (or intangible) assets can be subject to ancillary proceedings out of state or even in foreign jurisdictions. Accordingly, the characterization of an asset as immovable or movable can be a threshold issue in determining jurisdiction which will govern the application of California probate administration law.<sup>32</sup>

## V. Trusts

Trust construction and administration are generally not subject to probate. However, should a conflict or question arise regarding administration, construction and/or capacity, such a dispute will be subject to the jurisdiction of the California probate courts and the CPC. There is no inherent issues with a German national creating a trust in California as they would be treated like any other individual under the CPC. However, unintended tax consequences can arise where the settlor, beneficiaries and/or trustees are not U.S. citizens/residents. The use of a trust as an estate planning instrument by German domiciled individuals can create significant issues as they are relatively unused and unrecognized in Germany and other civil law countries. Administration issues and unintended tax consequences can occur when there is a delayed distribution, German situs assets and/or German beneficiaries.

## VI. Accepting a Choice of Law Clause under the Regulation

As stated above, under German law, the testator may choose the law of his/her nationality according to Art. 22 of the Regulation. The ability to undertake this election is significant, as choice of law selection could negate the German forced share. In contrast, California law only allows for choice of law clauses with respect to the interpretation of a will. A question thus arises whether a choice of law clause that touches on substantive issues other than interpretation will be recognized in California.

If the decedent was domiciled in Germany at the time when he/she made the choice of law or at the time of his/her death, such choice of law will likely be honored as the choice of law rules of California refer not only to German internal law but to Germany's choice of law rules.<sup>33</sup> As far as a U.S. citizen has elected "U.S. law" with regard to immovables in Germany, the same holds true.<sup>34</sup>



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### At a Glance:

- Immovables located in Germany are subject to German law unless the testator has affirmatively chosen "U.S. law"
- Immovables in California are governed by California law unless the testator has affirmatively chosen German law
- Movables in Germany are governed by the law of the domicile/habitual residence of the decedent, subject to a valid choice of law clause and a *renvoi*.
- Movables in California are governed by the law of the domicile/habitual residence subject to a valid choice of law clause and *renvoi*.

<sup>32</sup> Basic Conflict of Laws Principles, Robert C. Lawrence, III and Elisa Shevlin Rizzo, 4<sup>th</sup> Edition, (2015).

<sup>33</sup> 25 Am. Jur. 2d Domicil § 1 (2012); 28 C.J.S. Domicile § 1 (2004); Conflict of Laws, Eugene Scoles and Peter Hay, 2<sup>nd</sup> Edition, (1992).

<sup>34</sup> Id.