

German-American Probate Law

The Administration of a U.S. Domiciled Decedent's German Assets

This article provides a brief introduction to the administration of a U.S. domiciled decedent's German Assets

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As globalization flattens the world, practitioners and individuals are increasingly confronted with estates that include assets in multiple jurisdictions. The situs of such assets can lead to the application of differing and, at times, conflicting legal domestic and international legal systems. This article examines the hypothetical example of an U.S. domiciled decedent who dies leaving assets in Germany. In doing so, this article provides a general introduction to basic principles of German probate law and describes the process of administering German estate assets of a U.S. domiciled decedent.

Applicable Inheritance Law from a German Perspective

German private international law holds that, succession, administration and distribution are governed by the law of the nationality of the decedent at the time of his/her death.

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Generally, the situs of the Estate is not relevant. As an exception to this rule, German courts apply U.S. state or federal law with respect to immovable property situated in the U.S. irrespective of the nationality of the decedent. Additionally, German private international law allows for the courts to relate back. Thus, German courts will apply German law with respect to German immovable property if the decedent was an U.S. citizen domiciled in the U.S.. Under the rule of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012, which applies from 17 August 2015, German courts must apply, even with respect to immovable, the law of the last habitual residence of the decedent.

However, under the regulation, the testator can choose the application of the laws of the country of his citizenship (at date of death). As the U.S. is not a member state of the regulation, there is a lack of certainty as to whether U.S. courts will recognize this choice-of-law provision.

Basic Principles of German Inheritance Law

Under German law, the heir (Erbe), unlike the legatee (Vermächtnisnehmer), takes on all the rights and liabilities of the decedent (the principle of universal succession) upon the death of the decedent by operation of law and without any declaration of acceptance of inheritance (the principle of direct acquisition).

The heir can repudiate the inheritance within six weeks after he has received notice that he is to receive an inheritance. If the place of residence of either the decedent or the heirs is outside Germany, the repudiation period is increased to six months. If the decedent died testate, the period does not start to run until the heir receives a court certified copy of the will from the probate court. If the heir does not repudiate the inheritance, he is personally liable for the estate's debts. However, the heir can limit his liability by initiating estate insolvency proceedings.

Generally, the estate is administered by the heir individually and not by a personal representative or fiduciary. However, the testator may appoint an executor in his will and give him the right to administer and distribute the estate. He may also appoint an executor to administer the Estate for up to 30 years as in the case of a minor heir. If the decedent leaves more than one heir, the estate will become joint property of the community of co-heirs and the heirs will be called to jointly administer the estate. Generally speaking, any act of administration requires a unanimous decision of the community of co-heirs. However, certain exceptions apply to this general rule.

A testator is free to make a will and make all dispositions allowed under the German Civil Code. However, the spouse, descendants and, if the decedent left no descendants, parents are entitled to a statutory forced share. The forced share amounts to half of the net value of the share the forced heir would receive in case of intestacy.

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Other acquisitions upon death (e.g. accrual of joint tenant or claim against banks out of payable upon death accounts), will be added to estate in order to compute the statutory forced share. Lifetime gifts of the decedent in the last 10 years prior to his death or if the gift was made to the spouse prior to death, may be added to the estate in order to calculate the statutory forced share (“claw-back”). Of special interest to U.S. decedents, is that transfers to trusts may be characterized as lifetime gifts. Regardless, many trust assets are deemed to form part of the estate under German law.

The forced share must be claimed within 3 years and otherwise becomes barred by time.

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The testator can either make a public will or a holographic will. A public will is usually written and notarized by a German notary pursuant to the instructions of the testator. A holographic will must be entirely hand written by the testator and the testator must sign the will at the end of the text. The date and place of signature should be added, although failure to comply with this requirement does not necessarily invalidate the will.

No attestation or signature of a witness is necessary and there is no tradition in Germany that wills are witnessed. As Germany is a member state of the Hague Convention on the formal validity of wills, Germany recognizes a will as properly executed if: 1) it complies with the internal law of the country of nationality of the deceased, 2) or of the place where the deceased made it, 3) or of a place in which the deceased had his domicile or habitual residence, 4) or, as far as immovable property is concerned, the place where the property is situated.

„Germany is a member state of the Hague Convention on the formal validity of wills and recognizes most foreign wills.”

In case of intestacy, the relatives of the deceased, especially his issue, and the surviving spouse are the first entitled to claim inheritance rights. The share of the surviving spouse depends on the matrimonial property regime. The children of the deceased share the remainder in equal parts. If the decedent made lifetime gifts to a child, the other children may claim equalization.

Administration of German Estate Assets by US-Administrators or Executors

Generally, German banks, land registries or other institutions do not recognize U.S. grants of probate or U.S. letters of administration. Instead, German institutions generally require a German certificate of inheritance (Erbschein), which names the heirs and proves their full or limited legitimacy to administer the estate. However, if the decedent named an executor in his will, the executor should (additionally) apply for a German certificate of executorship (Testamentsvollstreckerzeugnis). An U.S. administrator generally cannot obtain a Testamentsvollstreckerzeugnis and, thus, cannot effectively administer the estate unless the heirs provide him with power of attorney.

A Testamentsvollstreckerzeugnis application can be made via a German notary or a German Consulate. Generally, the German notary or German Consulate drafts the application document and there is generally no need to seek assistance from a German lawyer. However, in more complex or high value estates, it is advisable to seek additional assistance from a German probate lawyer.

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The application must be affirmed by at least one heir or, in cases where the testator named an executor, the executor in front of the German notary or German Consulate. Additionally, the applicant must provide documents that support his application. Supporting documents may include a court certified copy of the will or the grant of probate. The German notary or the German Consulate sends, upon the request of the applicant, the application document to the competent German probate court, which generally is a court situated in the jurisdiction of the last residence of the decedent. The probate court will send a copy of the application document and all supporting documents to all interested persons (e.g. intestate heirs). If no interested parties object in due course and the court is convinced that the applicant has the right to receive the requested certificate, the court issues the certificate after payment of the court fees. There is no further supervision by the court without the formal application of an interested person.

The distribution is made on the basis of the unanimous consent of the heirs, or if the testator named an executor with the power to divide the estate, on the basis of his unchallenged distribution plan.

Within 3 months after the death, the heirs or the executor must inform the competent tax office of all relevant facts as far as already known (e.g. names of heirs and their residence, value of the estate). Failure to comply can lead to prosecution.

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The tax office will receive additional information from German banks, insurance companies, German notaries and the probate court. The tax office will, on the basis of all received information, decide whether the executor or the heirs will have to file an inheritance tax return. If the tax office does not require that an inheritance tax return be filed, there is no obligation to do so. However, it may become necessary to obtain a tax clearance certificate

(Unbedenklichkeitsbescheinigung) as German banks generally refuse to make any payments to an heir or executor residing outside of Germany before obtaining confirmation that no German inheritance tax is outstanding. The Unbedenklichkeitsbescheinigung is directly sent to the bank and the executor and/or heirs are not generally informed.

In many cases, estate assets situated in Germany are not taxable if neither the decedent nor the beneficiaries had a home or habitual abode in Germany at the time of death (e.g. bank accounts). Additionally, if the tax free amounts, which depend on the familial relationship to the decedent, are not exceeded, then no German inheritance tax is due. However, even in this case an inheritance tax return must be filed if the competent local tax authority has demanded that a tax return be filed.

Key Facts:

- German probate courts apply the law of the nationality of the decedent.
- U.S. grants of probate or U.S. letters of administration are not recognized.
- Germany recognizes most foreign wills.
- An executor should apply for a German certificate of executorship.
- German tax authorities must be informed within 3 months after the death.



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