

Some Reasons to have both a German and a Canadian Last Will and Testament

Many Germans have resettled permanently in Canada. At the same time, they regularly visit their relatives and hometowns in Germany. Sometimes, they have bank accounts and real estate or other assets in Germany, including pension funds. German law treats estate matters very differently from Canadian law.

In Germany, if a German citizen dies, the German probate court will issue a so-called “Erbschein” (Certificate of Inheritance) based on the last will and a death certificate. The heirs can take the Erbschein to the banks in which the deceased had accounts or present it to an insurance company and have the funds or premiums transferred to them immediately. By the same token, an Erbschein can be used to transfer title to real estate to the heirs listed in the Certificate immediately. In Germany, it is the heirs who will be taxed on the value of the assets transferred to them. Bequests to spouses and children are given preferential tax treatment.

In Canada, not the heirs but the deceased will be taxed on death. There is no equivalent to an Erbschein in Canada. Instead, if the deceased had a will, this must first be probated and an executor must be appointed. If a deceased died without a will, the court will appoint an administrator and determine the legal heirs by application of law. The assets of a deceased cannot be dealt with by simply transferring them to the heirs. Instead, the executor will obtain the power to deal with these before any transfers can take place. An executor or administrator is entitled to receive remuneration for services provided to wind up an estate. In Canada, not the heirs are taxed on an inheritance but the deceased will be taxed as though he or she had sold or transferred all assets in the moment before death.

Probate can take a long time in Canada. For every year that the estate is being wound up, income tax filings must be made. Obtaining an Erbschein is a relatively quick and uncomplicated procedure in Germany. Since the heirs are taxed, the administrative issues are relatively simple.

The difference in treatment between the two countries is important. It should affect estate planning but very few people take the trouble to inform themselves about these issues before actually preparing a will. And then, they generally prepare only one will, a will that is valid in their country of residence. Neither they nor the lawyers who consult them take into account the effect of the laws of their home country.

For German citizens, the laws of Germany continue to apply to them even though they have been resident in Canada for most of their lives. So, if a German citizen makes a valid Canadian will, this may not be recognized in Germany if the individual has assets in Germany and a spouse or child cut out of the will attacks the will. By the same token, a German will may not be recognized in Canada, for example, if it does not comply with the formal requirements of the Canadian province in which the deceased had assets.

All of this is to say that, as a German citizen living abroad, you should keep in mind the differing legal treatment that applies to your assets and that, without proper planning and legal advice, your affairs may not be arranged as you had planned.

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