

German Federal Court of Justice (Bundesgerichtshof)

Opting out of the German compulsory portion (Pflichtteil) by choosing the law of a foreign succession - in this case of England & Wales - may violate German "ordre public"



BGH, Judgment of July 29, 2022, Case No. IV ZR 110/21

Facts: A British man living in Germany made a choice of law (Rechtswahl) in favor of English inheritance law in his will executed in 2015, in which he completely excluded his adopted son from succession.

The son filed a lawsuit and demanded information from the sole heir regarding the inventory of the estate in order to quantify his compulsory portion (§§ 2303 et seq. of the BGB, the German Civil Code).

The central question of the decision concerned whether the absence of a claim to a compulsory portion independent of need in the inheritance law of England and Wales was contrary to German public policy ("ordre public").

This provision, embodied in Art. 6 EGBGB and Art. 35 EU Succession Regulation No. 650/2012 ("EuErbVO"), enables the jurisdiction to preserve essential principles and values of its own substantive law in individual cases and to enforce them against the foreign law ("lex causae") invoked by choice of law.

Decision: The Federal Court of Justice found for the individual case that the German law on compulsory portions may not be "de-selected". The facts of the case had a "sufficiently strong domestic connection", so that the requirements of the German Constitution ("Grundgesetz") had to be respected. Article 14 and Article 6 Grundgesetz protect the compulsory portion ("Pflichtteil").

The plaintiff was thus entitled to the full compulsory portion. Therefore, he also had a right to information, § 2314 German Civil Code.

Pursuant to Article 35 EUErbVO, the application of foreign law must be refused to the extent that there would otherwise be a strong contradiction between the result of this law and essential fundamental ideas of national law.

This was the case in the present case for the following reasons:

The law of succession of England & Wales is not familiar with a compulsory portion that is independent of need. Rather, the decision on the existence and the amount of a benefit under the "Provision for Family and Dependants Act 1975" is entirely at the discretion of the foreign court.

The choice of law thus collided with the German guarantee of the right of inheritance embodied in Article 14 and Article 6 of the German Grundgesetz, of which the right to a compulsory portion was an integral part. According to the case law of the Federal Constitutional Court (BVerfGE 112, 332 = decision of April 19, 2005, published at NJW 2005, 1561), the German Constitution guarantees that the participation of children in the estate of their parents may not be made dependent on their neediness and that a minimum economic participation must exist in any event.

According to the Federal Constitutional Court, German law is based on an "indissoluble relationship between parents and child" in the form of "family solidarity" and derives from this a "family-protecting function of the right to a compulsory portion". The right to a compulsory portion serves as a "continuation of the ideal and economic connection between property and family", irrespective of a concrete need of the child beyond the death of the owner of the property.

The consequence: Existing wills and inheritance contracts with an explicit, conclusive or implied choice of law in favor of the inheritance law of legal systems that do not provide for a compulsory portion, e.g. England & Wales, Ireland, Sweden, Israel, require review.

The Federal Court of Justice emphasized that the concrete form and amount of a minimum share or the exact quotas are not prescribed by constitutional law (compare also, for example, the reform of the law on compulsory shares in Switzerland).

The current structure of the right to a compulsory portion, which goes back to the Civil Code of January 1, 1900, and is historically linked to maintenance (= compulsory portion corresponds in value to half of the inheritance, § 2303 German Civil Code), is therefore not to be equated with a minimum share.

If there is a "sufficiently strong domestic connection" to Germany and the German Constitution must therefore be adhered to, a minimum share can therefore also be established by provisions in the will.

We will be happy to advise you on this.

Incidentally, the other provisions of the law of succession of England & Wales could be effectively chosen in the case of the British man who died in Germany.

In addition to a reduction of claims to a compulsory portion, there may be several other reasons for choosing foreign law.

Rechtsanwalt Torben Swane