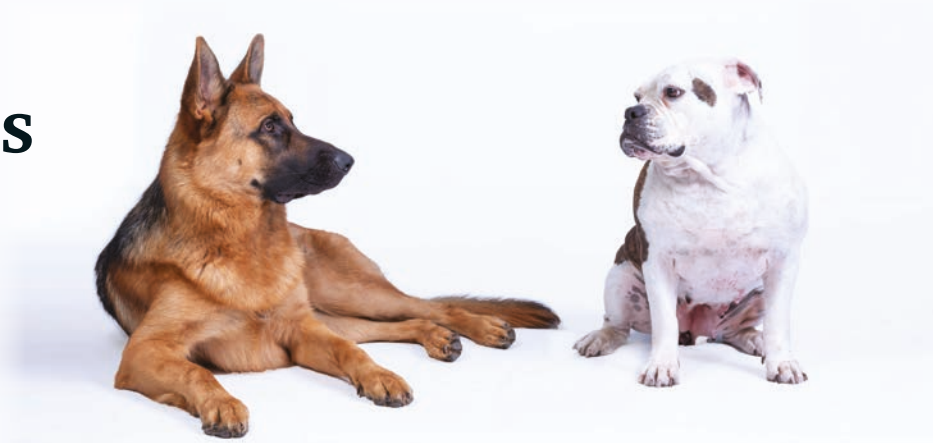
UK-German probate: process & pitfalls

Bernhard Schmeilzl runs through some typical problems & costly mistakes when dealing with probate cases involving the UK & Germany



IN BRIEF

▶ 11 common issues when drafting a will or applying for probate when the estate in question involves both UK and German considerations.

If an English testator owns assets in Germany, or if they decide to gift all or part of their estate to someone resident in Germany, a 'standard' English will does not adequately cover all the client's needs. Foreign inheritance tax (IHT) consequences, for example, are often completely ignored, as is the fact that German law neither knows the concept of 'personal representative' nor recognises trusts. Standard common law estate planning techniques are thus likely to cause uncertainties, higher costs, longer probate proceedings, and may even produce unintended results with regards to the distribution of the estate.

The typical advice given by English solicitors is to set up a separate independent will for the German assets. This is, however, rarely the best solution, because the existence of various wills may increase the risk of conflicting interpretation by (competing) executors, probate judges and the respective national tax authorities. Having more than one will also creates higher costs and usually slows down probate, because German probate judges, as well as the German tax office, usually request to see (and have translated) all existing wills.

The best solution is often to amend the English will with specific wording that deals with the German estate. Some English solicitors refuse this for fear of liability. In that case, the 'two separate wills' approach is the second-best solution. These two wills must, however, be carefully reconciled in order to avoid contradictions, eg with regard to UK and German IHT, or the respective powers of the executors in the UK and in Germany.

Either way, solicitors who advise an international family or an English testator with German assets should be aware of the typical pitfalls. Graf & Partners has specialised in German-British estate planning and international estate administration for more than 20 years. Here are the 11 problems we come across most frequently:

Does the English will even cover Germany?

Many English wills are silent on the question of whether they shall only deal with the UK estate, or also with assets outside of the UK. The German law perspective is that when in doubt, the will shall be applied to the global estate. However, if there are any persons who are not mentioned in the will but would inherit under intestacy rules, they may challenge the scope of the will and argue that the testator wanted the will only to apply to the UK estate. Wills should thus be absolutely clear on this matter.

A separate German grant is required

Many executors, and even some solicitors, assume that an English grant can be used in Germany to access the assets. This is not the case, just as a German certificate of inheritance is not accepted in the UK. The option of an EU Certificate is not available, nor can a UK grant simply be resealed. Instead, the executor or administrator must go through the full German probate process, which includes swearing an oath in Germany (more on this below).

Shall the executor(s) deal with the German estate?

This may sound like a stupid question, but keep in mind that German law does not apply the concept of a personal representative. Instead, in Germany the heirs (*Erben*) inherit the estate directly and immediately upon the death of the testator. There is no administration period. The typical German grant of probate is thus the *Erbschein* (certificate of inheritance) which names not a personal representative but the heir(s).

While German law permits the testator to appoint an executor, called *Testamentsvollstrecker* (TV), this is very rarely done. A German testator would appoint a TV only if they fear that the heirs cannot be trusted to adhere to the stipulations in the will, or if the heirs are still underage or lack legal capacity.

Therefore, a German probate court will carefully assess and interpret the English will as to whether by naming an executor in their will, the testator really intended this executor to also have the position of TV. If the judge decides that this is not the case, then the executor has no power to administer the German estate, and the heirs (*Erben*) themselves are permitted (and obligated) to deal with the German assets. The German judge will simply refuse to issue a certificate of executorship (*Testamentsvollstreckerzeugnis*) and will only be willing to issue the standard grant under German law, the certificate of inheritance (*Erbschein*). Which raises the next question…

Who are the *Erben* (heirs)?

If a will is meant to (also) deal with assets in Germany, the most dangerous drafting error to make is to be silent or vague on the question of who shall have the position of an heir. Yet, it happens all the time. From a German law perspective, many English wills are very unclear on this question, especially if the residuary estate goes into a testamentary trust for many years, or—and this is the worst-case scenario—if another person than the testator is permitted to decide who shall receive the residuary estate (discretionary trust). Under German law, it is forbidden to delegate the decision of who is an heir to someone else. Thus, a discretionary trust clause can make the entire will void as far as Germany is concerned. In that case, the German assets will be distributed under intestacy rules.

A separate executor for Germany? Or none at all?

A simple solution is to let the heirs deal with the German estate directly, ie restrict the executor's responsibilities to the UK estate. If that is not viable, the testator needs to decide whether the English executor(s) shall also deal with the German side or whether it is better to appoint a German-speaking person who is resident in Germany and can

easily correspond with German banks, tax authorities etc. This is especially relevant with regard to German taxes, because if the court interprets the will as meaning that the executor is also to be considered a German TV, then that person is responsible (and liable) for all German taxes being paid.

Where & how to apply for German probate

Probate proceedings in Germany are quite different from the UK. There are no standard forms to fill in. Instead, the individual application is drafted by a German lawyer, notary or—outside of Germany—a German consular officer. The bottleneck of proceedings is that the applicant must swear an oath, as was the case in England up until 2018. This means that the applicant (executor and/or heir) must appear in person, the entire application will be read aloud (in German) and the applicant must then swear that the content is correct and complete In England and Wales. This oath can only be sworn at the German Embassy in London and they have an appointment lead time of up to six months. Which German court to send the application to depends on whether the deceased has ever been resident there. The details are complicated, and the entire probate proceeding is explained on our blog: *bit.ly/3ryVXyy*.

Next of kin must always be notified

Under German probate procedure rules, in case of an existing will, the German probate court must notify the next of kin of the probate application, ie those persons who would inherit if the will were found to be void. To avoid queries and significant delays, the applicant must include in the application the names and addresses of these (potential) statutory heirs. The rationale is that the court must officially notify these persons to give them the opportunity to:

i) enter a formal caveat (stop notice) in case they believe that the will could be void; or
ii) claim their forced share (*Pflichtteil*).

Until the probate court is satisfied that every potential statutory heir has been properly notified, they will not issue the grant. If the applicant does not know the current addresses of the next of kin, things get really complicated, and sometimes even an expensive heir-hunter must be instructed.

If there is property, both kinds of German grants may be required

If the English will appoints an executor and the German probate court has found this to also mean executorship for Germany, this poses an especially tricky issue if there is German property involved. In these situations, there is the need for both kinds of German grants, the *Erbschein* and the *Testamentsvollstreckerzeugnis*. This is because only the executor can sell the property, but the German land registry will still want an *Erbschein* in order to enter the new proprietors, even if the property is immediately sold. This causes significantly higher probate fees.

German IHT is often due in addition to UK IHT

Many testators are ignorant of the fact that German IHT may apply independently of whether there is UK IHT to pay or not. This is because Germany taxes each individual beneficiary, not the estate as such. Each donee may claim their personal allowance, which differs vastly depending on the degree of kinship to the testator (from €500,000 for spouses to only €20,000 for distant relatives and non-related donees). Things are made worse by the absence of an IHT double taxation agreement between UK and Germany, so there can be cumulative IHT. The details are explained here: *bit.ly/34r227t*.

Dangerous 'free of tax' clauses

In many English wills, gifts are made 'free of inheritance tax' or even 'free of inheritance tax and any other death duties'. If the recipient of such testamentary gift is also subject to German IHT, the question arises whether the testator meant that the estate must also pay these German taxes. Over the last 20 years, we have had hundreds of disputes about this issue.

Renounce the inheritance if estate is over-indebted

Finally, in cases where the deceased was resident in Germany or if German property exists, and thus German succession laws apply, it is extremely important to check at a very early stage whether the estate may be over-indebted (überschuldet). Because—and this appears a very strange concept for English lawyers—under German law, the heirs are personally liable for the debts of the deceased unless the heirs actively renounce the inheritance within a certain deadline (six weeks for persons who live in Germany; six months for heirs who live outside of Germany). German creditors automatically assume that the heirs are liable for the debts, and they will thus chase those heirs until there is official proof that the heirs have renounced (*ausgeschlagen*) in time.

The practical problem is that a simple letter to the court is not sufficient. Instead, the heirs who wish to renounce must have their signature certified by a notary public and then get the document apostilled by the Foreign, Commonwealth & Development Office. This legalised document must then reach the German probate court before the statutory deadline has expired. NLJ

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