

International

Probate

BY GRAF LEGAL

German Probate

Intestacy Rules

Wills & Alternatives

Forced Share

Inheritance & Gift Tax



Intestacy Rules in Germany

The distribution of an estate in Germany is quite complex and depends on whether the deceased was married, whether he/she had entered into a pre-nuptial or marriage agreement, whether he/she had any children, and whether there are any surviving relatives.

Surviving Spouse

The surviving spouse (or surviving registered same-sex partner) is entitled to a statutory share (gesetzlicher Erbteil, Section 1931 German Civil Code) of the estate. The actual share they receive depends on the following:

1. Which matrimonial property regime (Güterstand) the spouses have chosen upon marriage (Section 1363 GCC).
2. Which and how many relatives the deceased has left behind.

This statutory share (not to be confused with the forced share, i.e. Pflichtteil) can range from 25% to 100%. The most common distributions are shown in the table below.

Additionally, the surviving spouse is also entitled to certain statutory legacies (see Sections 1932, 563 and 1969 GCC).

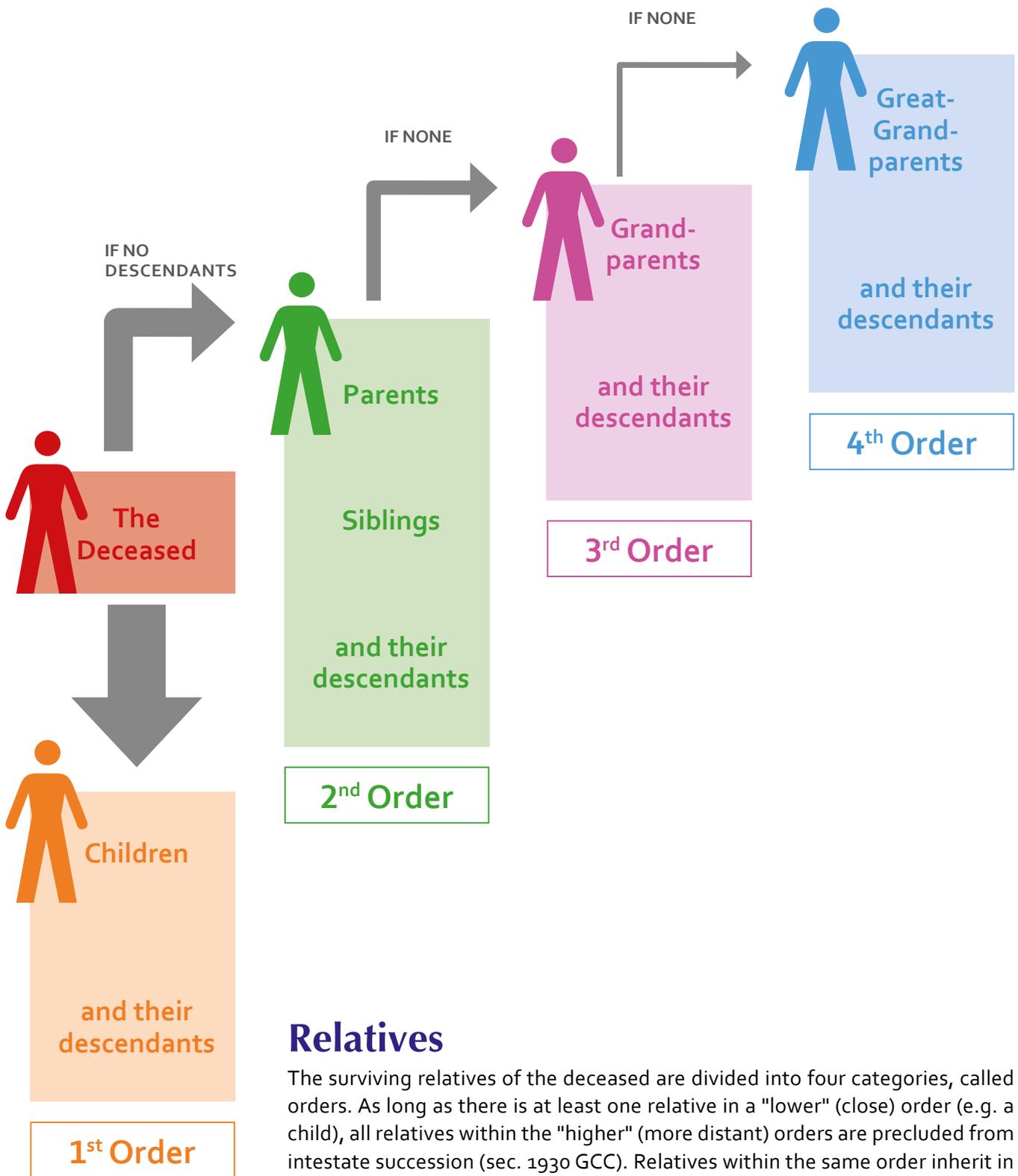


Distribution of the Estate under German Intestacy Rules:

Matrimonial property regime	Spouse and 1 child(*) survives	Spouse and 2 children(*) survive	Spouse and 3 children(*) survive
Community of accrued gain = default regime (Zugewinn-gemeinschaft)	Spouse: 1/4 + 1/4	Spouse: 1/4 + 1/4	Spouse: 1/4 + 1/4
	Child: 1/2	Children: 1/4 each	Children: 1/6 each
Separate estate (Gütertrennung)	Spouse: 1/2	Spouse: 1/3	Spouse: 1/4
	Child: 1/2	Children: 1/3 each	Children: 1/4 each
Community of property (Gütergemein-schaft)	Spouse: 1/4	Spouse: 1/4	Spouse: 1/4
		Children: 3/8 each	Children: 1/4 each

(*) Or descendants of predeceased children who then take their parent's share.

If the deceased has not left any descendants and if either relatives of the 2nd order or grandparents are still alive, the surviving spouse receives one-half of the estate. In contrast, if the deceased has no children and only distant surviving relatives, then the surviving spouse is entitled to the whole estate.



Relatives

The surviving relatives of the deceased are divided into four categories, called orders. As long as there is at least one relative in a "lower" (close) order (e.g. a child), all relatives within the "higher" (more distant) orders are precluded from intestate succession (sec. 1930 GCC). Relatives within the same order inherit in equal shares per stirpes (gleichberechtigt nach Stämmen). In other words, each branch of the family is to receive an equal share of the estate (sec. 1924 GCC). This rule, however, does not apply if there are no surviving relatives within the first three orders. If the surviving relatives falls into the 4th order, it is the closest relative that receives the whole estate under German intestacy rules.

German Wills

German law provides for two types of Wills, neither of which requires the presence of a witness.

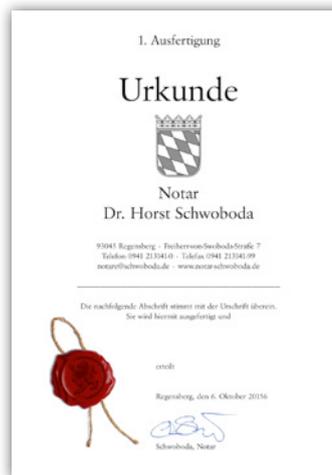
Holographic Will

This type of Will is entirely handwritten in the testator's own writing and signed by him/her (Sec. 2247 GCC).



Public Will

This type of Will must be recorded in the presence of a German notary or consular officer (Sec. 2232 GCC).



Public Wills have one practical advantage: When the testator passes away, the beneficiaries do not have to obtain a German Grant of Probate (Erbschein or Testamentsvollstreckerzeugnis) because a Public Will is accepted in lieu of an Erbschein. This saves the German inheritors (beneficiaries) time and money. However, in 2016 the German Supreme Court (Bundesgerichtshof) held that even in the case of a Holographic Will, a beneficiary does not need to obtain a German Grant of Probate provided the wording of the Will is very clear and there is no dispute as to who the beneficiary is.

Are Foreign Wills accepted in Germany?

In most cases, the answer is yes. According to Article 27 of the EU Succession Regulation (which applies if the deceased has died on or after August 17th, 2015), a disposition of property upon death made in writing shall be valid if its form complies with the law of the State:

- A. in which the disposition was made; or
 - B. whose nationality the testator possessed; (*) or
 - C. in which the testator resided or had habitual residence; (*) or
 - D. in so far as immovable property is concerned, of the State in which that property is located
- (*) either at the time when the disposition was made or at the time of death

In effect, the EU S.R. also applies to Non-EU countries in accordance with German law under Article 25 of the Introductory Act to the Civil Code (EGBGB), which stipulates: "Insofar as the succession doesn't fall within the scope of application of EU S.R. chapter III of this Regulation shall apply mutatis mutandis."

For deaths prior to August 17th, 2015, the same result can be achieved by applying the prior version of article 26 EGBGB and the Hague Convention of October 5th, 1961, on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

English Law, of course, applies very similar principles (Sec. 1 Wills Act 1837).

Practical Alternatives to German Wills

German law provides for a number of legal tools which enable a testator to transfer some or all of his/her assets outside of the German probate rules so the transfer will happen automatically upon the testator's death without the need for a Will, grant of probate, or a waiting period. NOTE: These transfers – even if outside of probate – are still subject to an inheritance tax, however.

These tools are called "conditional transfers in contemplation of death" (lebzeitige Verfügungen von Todes wegen) and are neither testamentary dispositions nor lifetime gifts. They are an ideal means for British citizens to transfer assets they may hold in Germany since their beneficiaries are not subject to German probate rules. Some of the options available are as follows:

- **Vertrag zugunsten Dritter auf den Todesfall**
Provision for the benefit of a third party conditional upon the event of death
- **Transmortale Vollmacht**
Power of attorney valid beyond death
- **Aufschiebend bedingte Verfügungen / Übertragungen**
Transfer of title conditional upon the event of death

Forced Share (Pflichtteil)

German law contains strict forced share rules. In cases where the surviving spouse and/or close relatives, namely descendants or parents, have been disinherited, they are entitled to bring a monetary claim against the testamentary heirs. The forced share consists of 50% of the cash value of the portion of the estate the disinherited person would have received had the deceased died intestate, i.e. the share he or she would have been entitled to by statute. Such claims even extend to gifts made by the deceased during the last 10 years of his or her lifetime. Again: it is a purely monetary claim that may be brought against the testamentary heirs and not a claim to a share of the actual property belonging to the estate.

Important Facts

- Under German probate law, the estate of the deceased is not administered by a personal representative, as it is in America. Instead, the estate passes directly to the heirs due to the principles of automatic inheritance (Vonselbsterwerb) and universal succession (Gesamtrechtsnachfolge). If there are several heirs, they form a community of heirs (Erbengemeinschaft) and must act unanimously.
- German heirs are personally liable for all debts of the deceased! In order to avoid personal liability they need to actively renounce their inheritance within 6 weeks of notification (6 months in international cases).
- Unlike English law, testamentary trusts are rarely used in Germany since they do not offer any advantages.
- Post-death variations are not accepted by the German Tax Authorities. In fact, a deed of variation is most likely to be counterproductive as it may trigger additional taxes.
- Payment of inheritance tax is independent of the application for a German Grant of Probate. However, banks will not release funds to foreign beneficiaries unless the German Tax Authorities have issued a clearance certificate (Unbedenklichkeitsbescheinigung).
- Joint wills by spouses in one single document (Ehegattentestamente) and mutually binding testamentary agreements (Erbverträge) are allowed under German probate law and are commonly used.
- The appointment of an executor in a Will is possible but not very common.

German Inheritance & Gift Tax

Germany has a unified inheritance and gift tax regime regulated by the federal IHT & Gift Tax Act (Erbschaftsteuer und Schenkungssteuergesetz (ErbStG)). The Act came into effect on January 1st, 2009, after undergoing major reform (and has been amended further since). An inheritance or gift tax is imposed on any transfer of assets at death or by gift. IHT & Gift Tax is assessed and based on the objective value of the benefit accrued to the individual transferee (beneficiary / donee).

Tax Classes

Tax Classes Sec. 15 ErbStG	Relationship of Beneficiary with Decedent / Donor
I	<ul style="list-style-type: none"> › Spouse or registered same-sex partner › Child / stepchild and their issue › Parents / grand-parents (if inheritance, not lifetime gift)
II	<ul style="list-style-type: none"> › Parents and grandparents (if lifetime gift, not inheritance) siblings and their children (i.e. nieces / nephews etc) step-parents › parents-in-law / children-in-law › divorced spouse / registered same-sex partner
III	› All other

Individual Tax Rates of Beneficiaries

(Net) value of personal inheritance (exceeding the individual personal allowance, see p. 7)	Personal Inheritance Tax Rate in % Sec. 19 ErbStG		
	Class I	Class II	Class III
up to (amounts in EUR)			
75,000	7	15	30
300,000	11	20	30
600,000	15	25	30
6 million	19	30	30
13 million	23	35	50
26 million	27	40	50
more than 26 million	30	43	50

Personal Allowances / Nil-Rate Bands

Beneficiaries' Individual Tax Exempt Amounts

All amounts in €

Beneficiary / Donee (Empfänger)	Tax Class (Steuer- klasse)	Personal Allowance Persönlicher Freibetrag (in €)	Chattels Allowance ² Hausrats- freibetrag (in €)	Maintenance Allowance ³ Versorgungs- freibetrag (in €)
Spouse or registered same-sex partner ¹	I	500,000	41,000 plus 12,000	256,000
Children of transferor (incl. stepchildren and adopted children) ¹	I	400,000	41,000 plus 12,000	from 10,300 up to 52,000
Descendants of predeceased children ¹	I	400,000	41,000 plus 12,000	
Descendants of living children	I	200,000	41,000 plus 12,000	-
Parents, grandparents etc in case of inheritance	I	100,000	41,000 plus 12,000	-
Parents, grandparents etc in case of lifetime gift	II	20,000	12,000	-
Siblings and their children (1st degree only)	II	20,000	12,000	-
Step-parents, children-in-law, parents-in-law	II	20,000	12,000	-
Divorced spouses	II	20,000	12,000	-
All other	III	20,000	12,000	-

Notes and explanations:

- ¹ **Family home privilege** (Sec. 13 I Nr. 4b and 4c ErbStG): the acquisition of the family home for the owner's use is tax free as long as certain requirements are fulfilled; exemption requires personal use for at least 10 years.
- ² **Chattels allowance** (Sec. 13 I ErbStG): household and personal items up to a value of € 41,000 are exempt if acquired by a person in tax class I.
- ³ **Maintenance allowance** (Sec. 17 ErbStG): surviving spouse and children may be entitled to an additional allowance. The exact amount of allowance children are entitled to depends on their age at the time of death. The allowance is reduced by the net present value of existing pension claims.

Special tax privileges apply to the transfer of certain operating assets, as well as assets of agricultural and forestry businesses (Sec. 13a ErbStG). Additionally, there are tax privileges on transfers to charities, churches, political parties etc.

Important note: For the above allowances to apply, the transferor or transferee needs to be subject to unlimited German inheritance tax (unbeschränkt steuerpflichtig), i.e. German inheritance tax is due on all worldwide assets of the transferor. However, please note that for any transfer that is subject to limited tax liability, a reduced personal allowance is available! In such a case, the transferee (if an EU citizen) may opt to be treated as someone who is subject to unlimited taxation. However, the potential disadvantage of this option is that it results in an unlimited taxation of all assets worldwide, including any transfers within 10 years before AND after the transfer for which the option has been used. Making use of this option must therefore be well considered.

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