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LAWYERS & NOTARIES

Inheritance Law in Germany and Australia (NSW)

1. Introduction

This article gives an overview of inheritance law in Germany and Australia. The article also highlights aspects of inheritance laws in both countries and indicates how these laws may affect, for example, German citizens or expatriates living in Australia as well as Australian residents with assets in both Germany and Australia and people living in Australia with relatives in Germany.

This article also provides a general comparison of German and Australian inheritance laws. It does not deal with specific issues, but outlines some of the basic principles of both systems. The following areas are dealt with:

1.1. Statutory Inheritance;
1.2. Forms of Wills and Making Wills;
1.3. Executors;
1.4. Statutory or Compulsory Portions;
1.5. Taxes; and
1.6. International Aspects.

Inheritance or succession law is not uniform throughout Australia because different legislation applies in each state and territory. Nevertheless, succession law regimes throughout Australia are largely similar, and the law in New South Wales ("NSW") and in the other states and territories in Australia is generally uniform. Accordingly, any reference in this article to Australian inheritance law means the law in NSW unless stated otherwise. The specific character of the Australian legal system, which is based on common law rather than civil law, confers a range of discretions and powers in the Court and in judges, which under German law, would be mainly dealt with by legislation.

In Australia, reference is often made to trusts. A trust is a common law concept which is largely unknown to the German legal system, and should not be confused with the German concept of *Treuhandverhältnis*. Under Australian law, a trust exists where a party (a trustee) who, despite being registered or recorded as the proprietor or owner of the relevant property (trust property), holds that property on behalf of another person or entity (beneficiary) or other legally recognised purpose (object). The trustee accordingly has a duty to administer the trust property for the benefit of the beneficiary or for the specific purpose.

By comparison, the *Treuhandverhältnis* under German law is a two party relationship, similar to a principal-agent relationship. In a Treuhandverhältnis, the owner appoints a so-called "*Treuhänder*" who acts in favour of, and only as representative for the owner. The owner remains at all times the beneficial and legal owner of the relevant asset. There are no beneficiaries.

2. Statutory Inheritance

In this article, statutory inheritance law refers to the legal rules applying under German and Australian law respectively if a person dies intestate (i.e. wholly or partly without a legally effective Will or Testamentary Contract under German law).

Note:
The term "the intestate" is used in this article to mean a person who dies intestate. If a person has made a legally effective Will or a Testamentory Contract under German law then he or she is referred to in this article as the "testator".

2.1. Germany

2.1.1. Fundamental aspects

German inheritance law is specifically regulated by the German Civil Code (*Bürgerliches Gesetzbuch*). A system of orders is used for determining the order of inheritance under German law:

2.1.1.1. the first order constitutes the offspring (children, grandchildren, great-grandchildren etc) of the deceased;
2.1.1.2. parents of the deceased and their issue (deceased's siblings) constitute the second order; and
2.1.1.3. grandparents, uncles, aunts, cousins of the deceased and their issue form the third order.

The deceased's surviving spouse does not belong to the beneficiaries of the first or any other order, and is not part of the system of orders. However, he or she is a statutory beneficiary. A surviving spouse's entitlement to receive a share in an estate only flows from the fact of marriage.

2.1.2. Time limits

As a fundamental principle, it should be noted that statutory (i.e. by law) or testamentary (i.e. by Will or other testamentary instrument) beneficiaries directly and automatically obtain full joint ownership of the estate at the time of death of the deceased, whether or not he or she is an intestate or a testator. The beneficiaries "inherit" all rights and obligations of the deceased.

A beneficiary can waive his or her claim to an estate within a period of six weeks after he or she becomes aware of the inheritance. This period is extended to six months if the deceased's last place of residence was, or the beneficiary's residence is outside Germany.

2.1.3. Statutory inheritance and shares in estates

Under German law, the statutory order of inheritance follows the scheme described below:

2.1.3.1. the issue of the deceased. The biological and adopted children as well as children born out of wedlock of the deceased, are the first in line to inherit. Children always inherit in equal shares;

2.1.3.2. if the deceased has no issue, the estate passes to the beneficiaries who fall within the second order i.e. the parents of the deceased. The deceased's father and mother are each entitled to half of the estate. If they are no longer alive, the estate falls equally to their issue, namely the deceased's siblings;

2.1.3.3. the beneficiaries of the third order are the grandparents of the deceased. They inherit in equal shares. If one grandparent has already died, his or her issue will take his or her place; and

2.1.3.4. as mentioned above, the spouse of the deceased as legal beneficiary inherits outside the system of orders. The spouse is entitled to one-half of the estate and the relatives of the first order are entitled to the other half. If there are relatives of the first order, the surviving spouse would inherit one quarter or one half of the estate depending on the matrimonial property regime which applied to the spouse and the deceased. If there are no relatives of the first order then the spouse inherits three-quarters of the estate, and the relatives of the second order or the deceased's grandparents inherit the other quarter. If there are no living relatives of the first or second order and no living grandparents of the deceased then the spouse's interest overrides the interests of the grandparents' issue, so that the spouse is entitled to the whole estate.

A diagrammatic overview of the respective entitlements in various situations appears at the end of this article.

2.2. Australia

2.2.1. Fundamental aspects

Statutory inheritance in NSW also follows a system of orders in a similar manner to Germany. As a result, the NSW statutory rules in case of intestacy and the system of orders which apply in codified civil law countries are similar. Since March 2010, the basic principles of statutory inheritance have been found in the *Succession Act 2006* (NSW) ("Succession Act") which has replaced the intestacy provisions of the *Probate and Administration Act 1898* (NSW) ("PAA").

2.2.2. Time limits for claims against the estate

The application of time limits for beneficiaries' claims on estates, whether pursuant to a Will or in the case of intestacy, is treated fundamentally differently under the Australian and German legal systems. As indicated in section 2.1.2 above, a beneficiary of an estate in Germany has a certain time limit within which to waive or renounce his or her claim on the estate.

However, in Australia, beneficiaries have a certain time after publication of a particular notice in which to notify the executor or administrator of their claim. Moreover, beneficiaries, creditors and other persons having a claim on the estate are all treated in the same way in relation to giving notification of their claims. The obligation to notify the executor or administrator about a claim is, however, moderated by two factors: firstly, the executor's or administrator's obligation to inform himself about likely beneficiaries of, and other claimants on the estate, and secondly, the need to only give notification if the executor or administrator is not otherwise aware of the claim or did not have previous notice of the claim.

In Australia, if an executor or administrator publishes a notice giving beneficiaries (as well as creditors or other persons having a claim on an estate) at least thirty (30) days in which to notify the executor or administrator about the claim and then distributes the estate at least six (6) months after the death of the deceased, the executor or administrator will not be liable for failing to make distributions to beneficiaries (or creditors or other persons having a claim on the estate) of which he did not have notice. If a person believes that he or she is a rightful beneficiary of an estate (whether pursuant to a Will or on intestacy) and the executor or administrator is not otherwise already aware of the person's claim or has not previously had notice of the person's claim then the person must give notice of the claim within thirty (30) days after publication of a Notice of Intention to Distribute the estate by the executor or administrator. If the person claiming an interest in the estate does not give notice to the executor or administrator within that time limit and the estate is distributed more than six (6) months after the death of the deceased without regard to the person's claim then the executor or administrator will not be liable to the claimant (section 92 PAA). The Notice of Intention to Distribute must be published in a newspaper circulating in the district where the deceased resided or, if the deceased was not resident in NSW at the date of his death, in a Sydney daily newspaper.

The position overall is, in Germany, a person who *does not want* to become a beneficiary must act within a certain time limit while, in Australia, a person who *wants* to claim on an estate must act within a certain time limit if the executor or administrator of the estate does not otherwise have notice of the claim.

2.2.3. Statutory inheritance and shares in estates

A distinction should be made between estates that are wholly regulated by Will on the one hand, and estates that are partly regulated by Will (partial intestacy) or wholly unregulated by Will (total intestacy) on the other.

Generally, Australian law allow for absolute freedom of disposition by Will. If no Will exists, or if a Will exists but it only disposes of part of the real and personal property of the deceased then the statutory provisions applicable on intestacy will govern that portion of the estate which is not regulated by Will.

In the case of full intestacy (i.e. where the deceased did not leave a valid Will), the entire estate passes under the rules of intestacy. In the case of partial intestacy (i.e. where the deceased left a valid Will but which did not dispose of the entire estate), the undisposed part of the estate passes under the rules of intestacy.

Different alternatives for the distribution of an estate are presented by the Succession Act depending on who the deceased was survived by. The order in which the intestate's relatives will take, and the amount of portion of the estate which they will respectively be entitled to depends on where those relatives rank in the order of priority set out in the Succession Act. The order of priority generally is:

2.2.3.1. spouse;

2.2.3.2. children (or the issue of children if a child predeceases the intestate);

2.2.3.3. parents;

2.2.3.4. siblings;

2.2.3.5. nieces and nephews;

2.2.3.6. grandparents; and

2.2.3.7. aunts and uncles (or their children if an aunt or uncle predeceases the intestate).

Under the intestacy rules, a spouse has priority. Accordingly:

2.2.3.1. if the deceased is survived by a spouse, the surviving spouse inherits the entire estate. This remains the case even if the intestate left a spouse and issue. Accordingly, the intestate's children would receive no share of the intestate's estate, irrespective of the size of the estate, if there is a surviving spouse;

2.2.3.2. if the deceased is survived by children from a prior relationship, the surviving spouse will be entitled to the intestate's personal effects, a legacy of $350,000.00 (increased in proportion to increases in the CPI) (the "statutory legacy") and a half share of the balance of the estate. The children from the prior relationship or relationships will be entitled to the remaining half share of the estate in equal shares; and

2.2.3.3. if the deceased is survived by more than one spouse (e.g. by both someone to whom the deceased was legally married as well as another person with whom the deceased was in a domestic partnership at the time of his or her death), the estate will be divided between the spouses in accordance with the mechanism for determining priority between competing spousal interests set

out in Division 3 of the Succession Act. Surviving children from a prior relationship will also be entitled to a share of the estate if the value of the estate (excluding the deceased's personal effects) exceeds the statutory legacy amount.

3. Forms of Wills

3.1. Germany

3.1.1. Forms and formal requirements

A Will is the most fundamental means of making provision for the distribution of property in the event of a person's death. The other way of making provision in the event of a person's death is a Testamentory Contract. On the basis of the principle of freedom of contract, the testator can make provision in relation to his or her estate without regard to the rules of statutory inheritance. This freedom is only limited by statutory restrictions in respect of shares in the estate to be left to certain family members (*Pflichtteilsrecht*) and also by certain moral considerations.

A person who has testamentary capacity and is over 18 years of age, is entitled to make provision for the distribution of property in the event of his or her death. This is subject to possible statutory entitlements of the spouse, the parents and children of the testator. The testator is also free to make provision concerning all or some of his or her assets.

3.1.2. Will (Testament)

German law recognizes four different forms of testamentary dispositions, namely:

3.1.2.1. simple Will;

3.1.2.2. Mutual Will;

3.1.2.3. emergency Will; and

3.1.2.4. Testamentory Contract.

For a simple Will to be valid, it must either be prepared and signed in the presence of a notary, or the entire text of the Will must be handwritten and signed by the testator. All other forms of writing (such as printing, photography etc.) would not satisfy the formal requirements. If the Will is entirely written by the testator, no witnesses are necessary. If the Will is made in the presence of a notary, the notary must witness the execution of the document. The formal requirement for a valid signature will be satisfied once the testator's authorship can be established without objection. Thus, for example, the inscription "Your father" is enough to establish the identity of the writer. However, careful checks must be made to ensure that the testator can be identified without ambiguity. The date and place of making

the Will are not legal requirements for a simple Will to be valid, but nevertheless it is recommended that these details be inserted into the Will.

A Mutual Will is reserved for married couples. It can incorporate the special feature of making "reciprocal provisions". This means that the consideration for one spouse making a testamentary provision is the making of a testamentary provision by the other spouse. The same formal requirements apply to a Mutual Will as to a simple Will except that it is sufficient if only one spouse writes out the Will in his or her own hand and both spouses sign it.

An emergency testament is very rare and only applies in exceptional situations such as natural disasters, deadly peril etc.

A Testamentory Contract makes provisions on a contractual basis in the event of death. The person making the contract can make any unilateral provision in the contract that can also be made by a Will. For a Testamentory Contract to be valid, it must be prepared by a public notary. Both parties to the contract must sign the contract in the presence of the notary. No further witnesses are necessary.

3.2. Australia

3.2.1. Wills

3.2.1.1. Wills

The most common method of dealing with assets after death is to make a Will. The Will itself may be simple or complex, depending on many factors.

3.2.1.2. Mutual Wills

An essential aspect of the agreement or contract accompanying Mutual Wills is that there is an agreement between both testators to the effect that one party will not revoke or alter his or her Will without the consent of the other. However, if one party nevertheless revokes the Mutual Will, the later Will would be valid. In that case, in accordance with the principles of equity, the executor of the later Will would nevertheless be obliged to administer the estate on trust for the beneficiaries under the Mutual Will.

3.2.2. Formal requirements

The following minimum requirements are necessary in order to ensure that a Will is validly made under Australian law (section 6 Succession Act):

3.2.2.1. the Will must be in writing; and

3.2.2.2. the testator must sign the document in the presence of two witnesses who are both present at the same time and in the presence of the testator.

The Will need not, but is usually signed by the testator at the foot of each page of the document.

It is important to ensure that no witness is a beneficiary under the Will otherwise any gift to that witness will generally fail (section 10 Succession Act).

4. **Executors**

4.1. Germany

A testator may in his or her Will, nominate an executor of the Will (called *Testamentsvollstrecker*). The main duty of such an executor is to carry out the provisions of the deceased's Will. An executor of a Will must declare whether he or she accepts the appointment. This declaration need not take place within a certain period of time unless the Probate Court notifies the person named in the Will as executor to declare his or her acceptance within a certain time.

The duties of an executor are (depending on the Will) to:

4.1.1. represent the beneficiaries;

4.1.2. administer the estate;

4.1.3. pay the debts of the estate;

4.1.4. distribute the bequests; and

4.1.5. distribute the residuary estate.

If the Will does not appoint an executor, the German Probate Court having jurisdiction in the matter may nominate an administrator (*Nachlasspfleger*) if the Court considers it is necessary to do so in order to protect the estate's assets and the beneficiaries of the estate are unknown or cannot be found.

In Germany, the appointment of an executor for the administration of the estate is not a legal requirement. However, the appointment of an executor may accelerate and simplify the administration and distribution of the estate.

4.2. Australia

In Australia, almost every Will does or should nominate an executor. Indeed, if an executor is not named or has died or is not willing to accept the appointment then another person or institution (e.g. a relative or the NSW Trustee and Guardian) must seek to be appointed either as executor of the Will or as administrator of the estate, and apply for a grant of administration in order to deal with the assets in the estate.

An executor has a far more important and powerful position in Australia than in Germany. In fact, the choice of executor is a critical estate planning issue. The role of an executor entails considerable responsibilities. An executor is able to do all that is legally necessary in order to achieve the due and proper administration of the estate. In particular, an executor is required to attend to the following matters in the administration of the estate:

4.2.1. organise any funeral or related service;

4.2.2. collect, maintain and protect assets pending the final distribution of the estate;

4.2.3. apply for probate of the Will;

4.2.4. invest estate assets pending distribution of the estate;

4.2.5. pay all debts, funeral and testamentary expenses of the deceased and the estate;

4.2.6. if the estate has earned income, obtain a tax file number and lodge any tax returns;

4.2.7. establish and administer any trusts created by the Will for minors; and

4.2.8. distribute the estate in accordance with the provisions of the Will.

Note:

In Australia, on the death of the testator, all the deceased's assets pass to or vest in the executor (section 44 PAA) who is responsible to deal with them and distribute them in accordance with the Will. The transfer of ownership is, in effect, only confirmed by the grant of probate or administration.

However, in Germany, the community of beneficiaries inherits all the deceased's assets automatically at the time of death, and not the executor. As a result, all the beneficiaries need to mutually agree on the distribution of the various assets between themselves if no executor is nominated in the testamentary instrument or by the Court.

5. Statutory or Compulsory Portions

The term statutory or compulsory portion (*Pflichtteil*) refers to the share of the estate that must be left to certain members of the deceased's family under German law.

5.1. Germany

As a classic civil law country with codified civil and inheritance laws, in Germany the testator's relatives can claim a fixed statutory portion of the estate against a beneficiary. The compulsory portion is an amount equivalent to one-half of the person's entitlement under statutory succession. The claim to a statutory share arises at the time of inheritance. The claim is binding on the estate, and attaches to

the estate as a whole. The claim is assignable and can be transmitted to another person or a specified succession of heirs. The period of limitation is three years from the time the person becomes aware of the inheritance and the testator's Will.

The people entitled to a statutory share are the deceased's issue, his or her parents and his or her spouse. The attached diagrammatic overview also shows the respective compulsory portions and free quotas in certain circumstances.

5.2. Australia

Australian inheritance law does not recognize fixed statutory shares as provided for under German law. As Australian law is founded on the English common law system, "family provision" (similar in some respects to statutory share) claims by "eligible persons" are dealt with by the Supreme Court under the Succession Act, but only if a claim is in fact made. It remains within the Court's discretion whether, to what extent and on what basis, family provision claims are to be provided for out of the estate.

6. **Taxes**

6.1. Germany

6.1.1. Inheritance tax

Inheritance tax is a federal tax in Germany. The tax applies throughout Germany if at the time the tax liability arises, either the deceased or the beneficiary:

6.1.1.1. had his or her abode in Germany; or

6.1.1.2. was a German citizen with a continuous abode outside Germany of no longer than five years.

The rate of tax payable depends on the net value of the estate and the tax class which the beneficiary belongs to.

The net value of an estate is calculated by deducting the estate liabilities from the gross value of the estate.

There are three tax classes under German law. The applicable tax class is determined by the relationship between the deceased and the beneficiary. That relationship also determines the amount of allowable deductions under the legislation.

The first tax class comprises:

6.1.1.1. spouse;

6.1.1.2. children and stepchildren;

6.1.1.3. grandchildren; and

6.1.1.4. parents and grandparents, if they are testamentary beneficiaries.

The second tax class comprises:

6.1.1.1. parents and grandparents, in so far as they do not belong to the first tax class;

6.1.1.2. siblings and their issue;

6.1.1.3. step-parents;

6.1.1.4. children-in-law;

6.1.1.5. parents-in-law; and

6.1.1.6. former spouses.

All other beneficiaries belong to the third tax class.

The lowest tax rate and the highest level of allowable deductions apply to members of the first tax class. For example, if the net value of the estate amounts to €512,000.00, the deceased's spouse would currently receive an allowable deduction of €306,000.00. Overall in a case like this, a tax rate of 15% would apply.

6.1.2. Capital gains tax

Germany does not have capital gains tax. Therefore, unlike Australia, no further "delayed death duty" is payable.

6.2. Australia

6.2.1. Inheritance tax and death duties

There is no inheritance tax or death or estate duty payable in Australia or in any state or territory of Australia. This means that all estate assets in Australia may be transferred to beneficiaries without incurring any duties or taxes. Australia does, however, impose capital gains tax in case of many dispositions. In some instances, capital gains tax can operate as a de facto or delayed death duty (see 6.2.2 below).

6.2.2. Capital gains tax

Capital Gains Tax (CGT) is a federal tax and accordingly applies throughout Australia. The rate of CGT is generally dependent on the taxpayer's marginal income tax rate for the financial year during which the capital gains tax event (CGT event) occurs. CGT is not, however, payable on the transfer of assets under a Will. Accordingly, estate assets may be transferred to beneficiaries (at least those resident in Australia) without either the estate or the beneficiaries becoming liable to CGT. If beneficiaries resident overseas are

involved then gifts to them are deemed to be a CGT event which occurred immediately before the deceased's death and, as a result, CGT may be imposed on the estate in respect of the gift.

CGT is generally payable on the disposal of an asset. There are numerous technical rules relating to when CGT arises and what constitutes a disposal or deemed disposal of an asset. As a result, the subsequent disposal of estate assets by beneficiaries who have inherited the assets may give rise to a CGT liability. The liability would, however, only be payable on the disposal of the asset.

Liability for, and the amount of CGT payable depends on a number of factors including the nature of the asset concerned, when the asset was originally acquired by the testator, when the testator died, when the asset is subsequently disposed of by the beneficiary, whether the beneficiary is a natural person or, for example, a corporate entity or a trust, and the marginal tax rate of the beneficiary at the time of disposal. Certain assets, such as the testator's family home, may remain permanently CGT exempt in the hands of the estate and the beneficiary provided that certain residence rules are met or the home is disposed of within a particular period after the testator's death (generally 3 years).

If an executor or administrator disposes of an estate asset in the course of administration of the estate (e.g. because the executor or administrator is directed to do so under the Will or in order to distribute proceeds to or among beneficiaries), CGT may also be payable on the disposal of the asset. Liability for the CGT (i.e. whether it is payable by the estate or the beneficiary(ies)) depends on the wording of the Will.

6.2.3. Tax on assets

Generally there is no tax on assets in Australia, except for land tax payable on certain classes of real property in certain states.

Because of the different taxes levied and not levied in Germany and Australia, estate planning for people whose estates are affected by both systems involves careful thought being given to arranging one's financial affairs and estate matters in a tax effective way.

7. International Aspects

7.1. Germany

The EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) is the relevant German law that regulates whether a courst has jurisdiction in a matter as well as the applicable law in international cases.

7.2. Australia

Australia does not have a single federal law regulating international conflict of laws or private international law as it is also called in common law countries; every state and territory has its own common law rules.

8. Glossary

Bürgerliches Gesetzbuch	German Civil Code
Einführungsgesetz zum Bürgerlichen Gesetzbuch	Introduction Code to the German Civil Code
Nachlasspfleger	administrator
Pflichtteil	statutory or compulsory portion
Testament	Will
Testamentsvollstrecker	executor
Treuhänder	a person who acts in favour of and as representative for the legal owner
Treuhandverhältnis	German trust concept

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Disclaimer

Further Information

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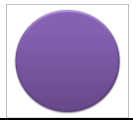
Statutory Shares under German Succession Law

Succession Law Aspects/Personal Circumstances (Relatives)	Statutory Share (deceased died intestate and without Testamentary Contract)	Statutory Share/Free Quota (to be considered when drafting a Will /Testamentary Contract)
Spouse* and issue	 Spouse 1/2 Issue 1/2	 Spouse 1/4 Issue 1/4 Free quota 1/2
Spouse* and both parents (no issue)	 Spouse 3/4 Father 1/8 Mother 1/8	 Spouse 3/8 Father 1/16 Mother 1/16 Free quota 1/2
Spouse* and one parent (no siblings)	 Spouse 3/4 Parent 1/4	 Spouse 3/8 Parent 1/8 Free quota 1/2
Spouse* and one parent and siblings	 Spouse 3/4 Parent 1/8 Siblings 1/8	 Spouse 3/8 Parent 1/16 Siblings 0 Free quota 9/16
Issue only	 Issue 1	 Issue 1/2 Free quota 1/2
Both parents only	 Father 1/2 Mother 1/2	 Father 1/4 Mother 1/4 Free quota 1/2
One parent only (no siblings)	 Parent 1	 Parent 1/2 Free quota 1/2
Siblings only	 Siblings 1	 Siblings 0 Free quota 1
Parents and registered partner**	 Father 1/8 Mother 1/8 Reg. partner 3/4	 Father 1/16 Mother 1/16 Reg. Partner 3/8 Free quota 1/2
Siblings and registered partner**	 Siblings 1/4 Reg. partner 3/4	 Siblings 0 Reg. Partner 3/8 Free quota 5/8
Parents and non-marital partner	 Father 1/2 Mother 1/2 Non-marital Partner 0	 Father 1/4 Mother 1/4 Non-marital Partner 0 Free quota 1/2

Siblings and non-marital partner		Siblings Non-marital Partner	1 0		Siblings Non-marital Partner Free quota	0 0 1

* if the spouses were married under the default matrimonial property regime of accrual. The entitlement would be different if the spouses were married under the matrimonial property regime of community of property.
** if the spouses lived in a "Civil Union" (civil partnership registered under the Civil Partnership Code "Lebenspartnerschaftsgesetz").