FEDERAL COURT OF JUSTICE

JUDGEMENT IN THE NAME OF

THE PEOPLE

IV ZR 110/21Announced on:
29 June 2022
Heinekamp Inspector
of Justice as clerk of
the court registry

in the legal dispute

Reference work: y

es BGHZ: y

es

BGHR: yes

BGB § 2314 para. 1; EuErbVO Art. 35; AdoptG Art. 12 § 2 para. 2

The application of the English law of succession chosen in accordance with Art. 22 para. 1 of the EU Succession Regulation is in any case contrary to German public policy within the meaning of Art. 35 of the EU Succession Regulation if it leads to the fact that, in a situation with a sufficiently strong domestic connection, a child is not entitled to a compulsory portion regardless of need.

BGH, judgement of 29 June 2022 - IV ZR 110/21 - OLG Cologne

LG Cologne

ECLI:DE:BGH:2022:290622UIVZR110.21.0

The IV. Civil Senate of the Federal Court of Justice, composed of Prof. Dr Karczewski, Dr Brockmöller, Dr Bußmann, J u d g e Rust and Judge Piontek, at the hearing on 29 June 2022

recognised as correct:

The appeal of defendant 1 against the judgement of the 24th Civil Senate of the Higher Regional Court of Cologne of 22 April 2021 is dismissed.

The defendant 1. shall bear the costs of the appeal proceedings.

The amount in dispute for the appeal proceedings is set at up to 8,000 was set.

By right

Facts:

1 The plaintiff is claiming - to the extent still relevant for the appeal instance - against the defendant 1 (hereinafter: defendant) as the testamentary heir for information on the existence and value of the estate of the deceased John Keith L., who died on 26 April 2018.

2 The testator, born in 1936, was a British citizen. He had lived in Germany since the age of 29, where he also had his last place of residence. With a notarised child adoption agreement dated 30 October 1975, which the Cologne Local Court confirmed by order of 20 May 1976 in accordance with Section 1741 BGB in the version valid at the time, the testator adopted the plaintiff, who was born on 9 September 1974. The contract contains the following provision, among others:

> "The inheritance and compulsory portion rights for the child and its future descendants after the first death of the deceased spouses are excluded."

3 In a notarised will dated 13 March 2015, the testator appointed the defendant as his sole heir and revoked all dispositions of property upon death that he had previously made. For the succession upon death, he chose English law as the partial law of his home country. The estate consists of a property located in Germany and various other items. The plaintiff is a German national and has his habitual residence in Germany.

4 The Regional Court dismissed the action. On the plaintiff's appeal, the Higher Regional Court, rejecting the further appeal, amended the judgement at first instance and ordered the defendant to provide the plaintiff with information about the deceased's estate by submitting a notarised inventory of the estate, which includes in detail all property and receivables of the deceased existing at the time of the inheritance as well as all claims against the deceased and all gifts subject to supplementation made by the deceased in the last ten years prior to the inheritance, and the values of various items of the estate by means of expert opinions for the key date

26 April 2018 and to provide information about this, as well as dismissing the remainder of the action. With the appeal allowed by the Court of Appeal, the defendant is pursuing its application for the claim to be dismissed in full.

Reasons for the decision:

5 The appeal is unsuccessful.

6 I. In the opinion of the Court of Appeal, whose decision is published in ZEV 2021, 698, among others, the plaintiff is entitled to a claim for information and valuation against the defendant pursuant to Section 2314 (1) BGB, as he is entitled to a compulsory portion as the adopted son of the deceased pursuant to Sections 2303 (1), 1754 (1), 1755 (1) BGB in conjunction with Section 2314 (1) BGB.
Art. 12 § 2 para. 2, para. 3, § 3 para. 1 AdoptG and excluded from succession. The fact that the testator had chosen English law as part of the law of his home country for the legal succession upon death to his entire estate in the will of 13 March 2015 did not preclude a claim. It is true that the testator was free to choose the law of the state to which he belonged at the time of the choice of law for the succession upon death in accordance with Art. 22 para. 1, 83 para. 4 of the EU Succession Regulation. However, the application of English law was ruled out because it was clearly incompatible with German ordre public in the specific case, Art. 35 EuErbVO. English law does not recognise a compulsory portion. Children of the deceased could only apply to the court for an "appropriate financial settlement" under the Inheritance (Provision for Family and Dependants) Act 1975 in the event that they were not adequately provided for. According to this, adult children are generally not entitled to a share of the estate. However, this is contrary to

against the guarantee of inheritance rights in Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG. Art. 6 para. 1 GG, according to which the children's participation in their parents' estate may not be made dependent on their neediness. English law places the law of succession close to the law of maintenance and links it to the fact that the testator was resident in England or Wales at the time of death. According to the German legal understanding, the fundamentally indissoluble relationship between parents and children and the resulting family solidarity are much more decisive for the children's participation in their parents' estate. The place of residence plays no role in this. Finally, English law leaves the decision on a financial contribution and its amount to the discretion of the court. This also contradicts the guarantee of a minimum economic participation of the children in the estate of their parents regardless of need, as required by German law and enshrined in Art. 14 para. 1 sentence 1 GG. In order to guarantee a regulation in accordance with German public policy, the provisions of German law on compulsory portions must be used.

7 II This stands up to legal scrutiny.

8 The plaintiff has a claim against the defendant pursuant to § 2314 para. 1 sentence 1, sentence 2 half-sentence 2, sentence 3 BGB for information on the status of the deceased's estate and for a valuation to the extent specified by the Court of Appeal.

9 1) The Court of Appeal rightly assumed that the fact that the testator had chosen English law as the law of his home country for the legal succession upon death to his entire estate did not preclude the plaintiff's claim for information and valuation.

10 a) Pursuant to Article 22 (1) of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ EU 2012 No. L 201 p. 107; hereinafter: EU Succession Regulation), the testator was free to choose the law of the state to which he was subject at the time of death. EU 2012 No. L 201 p. 107; hereinafter: European Succession Regulation), the testator was free to choose the law of the state to which he or she belonged at the time of the choice of law for the legal succession to English law. The choice of English inheritance law was also effective. The will was dated 13 March 2015, while the EU Succession Regulation has only been in force since 17 August 2015. However, as the testator died in 2018, the law that applies is the law that the testator ordered to be applied before the cut-off date in the context of a disposition of property upon death in accordance with the law that can be chosen under Art. 22 of the EU Succession Regulation.

11 b) Contrary to the opinion of the appeal, the application of English law is clearly incompatible with German public policy (Art. 35 EU Succession Regulation), at least in the case at hand. This is because English law is in such serious conflict with the constitutionally guaranteed distribution of estates under German law that its application in the present case is unacceptable. As a result, it does not apply here.

12 aa) Article 35 of the EU Succession Regulation provides that the application of a provision of the law of a State designated by the Regulation may only be refused if its application is manifestly incompatible with public policy (ordre public) in the State of the court seised. The provision enables the forum state to uphold essential principles and values of its own substantive law in individual cases in exceptional cases and to enforce them despite a conflicting provision of the lex causae (see Köhler in Gierl/Köhler/Kroiß/Wilsch, Internati- onales Erbrecht 3rd ed. § 4 para. 172; NK-BGB/Looschelders 3rd ed. Art. 35 EuErbVO para. 1; Pintens in Löhnig/Schwab ua (eds.), Erbfälle unter Gel- tung der Europäischen Erbrechtsverordnung, 2014, p. 1, 27; Schwartze in Deixler-Hübner/Schauer, Kommentar zur EU-Erbrechtsverordnung (EuErbVO) 2nd ed. Art. 35 para. 3, 11). A mere deviation of foreign law from domestic legal principles is not s u f f i c i e n t for the assumption of a violation of public policy. It only exists if the result of the application of the foreign law in the specific individual case is so strongly at odds with the basic ideas of the national provisions and the concepts of justice contained therein that it appears simply unacceptable according to domestic concepts (cf. recital 58 sentence 1 EU Succession Regulation; ECJ, judgement of 28 March 2000 - C-7/98, EU: C: 2000:164 para. 37; BGH, decision
of 14 November 2018 - XII ZB 292/15, NJW-RR 2019, 321 para. 30; judgement of 8 May 2014 - III ZR 371/12, SchiedsVZ 2014, 151 para. 29; established case law; see also Bauer/Fornasier in Dutta/Weber, Internationales Erbrecht
2nd ed. Art. 35 EU Succession Regulation para. 5; Grüneberg/Thorn, BGB 81st ed. Art. 6 EGBGB para. 5; Lagarde in Bergquist/Damascelli et al (eds.), EU Succession Regulation 2015 Art. 35 para. 2; NK-BGB/Looschelders 3rd ed. Art. 35 EU Succession Regulation para. 14; Soutier, Die Geltung deutscher Rechtsgrundsätze im Anwendungsbereich der Europäischen Erbrechtsverordnung, 2015,
p. 198 ff.; cf. on Art. 6 EGBGB BT-Drs. 10/504, p. 42 ff.).

13 bb) According to this standard, there is an obvious violation of German public policy here.

14 (1) As an institutional guarantee, the right to a compulsory portion is part of the German ordre public. In its landmark decision of 19 April 2005 (BVerfGE 112, 332 et seq.), the Federal Constitutional Court clarified that the right to a compulsory portion of the deceased's children, with reference to the guarantee of inheritance rights under Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG, has the character of a fundamental right in the sense of a right that is fundamentally inalienable and independent of need. Art. 6 para. 1 of the German Basic Law (Grundgesetz - GG) has the character of a fundamental right in the sense of a fundamentally inalienable and needs-independent minimum economic participation of the deceased's children in the deceased's estate. This follows from family solidarity and the family-protecting function of the right to a compulsory portion derived from this (see BVerfGE loc. cit. [juris para. 64 et seq.]). Art. 6 para. 1 GG protects the relationship between the testator and his or her children as a lifelong community within which parents and children are not only entitled but also obliged to assume material and personal responsibility for each other. The testator's freedom to make a will is therefore constitutionally subject to the family law ties established by descent. The right to a compulsory portion has the function of enabling the continuation of the ideal and economic connection between assets and family - irrespective of a specific need of the child - beyond the death of the owner of the assets (see BVerfGE loc. cit. [juris para. 72]). The Federal Constitutional Court has also expressly upheld this categorisation of children's right to a compulsory portion as a legal position protected by fundamental rights in its more recent case law (see BVerfG ZEV 2019, 79 para. 13, on the constitutionality of Section 2325
para. 3 sentence 3 BGB).

15 (2) English law, on the other hand, does not recognise a claim of a descendant after the death of the testator that is independent of need and calculated according to fixed quotas. A right to a compulsory portion, as it corresponds to the German legal system, is alien to English law.

16 (a) The appeal is unsuccessful in its procedural complaint that the Court of Appeal merely stated in general terms and without further justification that it was aware that the English legal system does not grant any rights to a compulsory portion or notarised inheritance to close relatives and on this basis alone made the decision that English law is essentially different from German law. At the same time, it had failed to determine the specific structure of the law of foreign practice, in particular foreign case law.

17 (aa) The German trial judge must determine the foreign law ex officio (Section 293 ZPO). In doing so, he must apply it as the judge of the country concerned interprets and applies it. How he obtains this knowledge is at his dutiful discretion. In this respect, the court of appeal only reviews whether the trial judge has exercised his discretion without error of law, in particular whether he has sufficiently exhausted available sources of knowledge, taking into account the circumstances of the individual case (see Senate judgement of 18 March 2020
- IV ZR 62/19, VersR 2020, 614 para. 23 et seq.; BGH, judgement of 25 January 2022 - II ZR 215/20, WM 2022, 670 [juris para. 15]; decisions of
30 March 2021 - XI ZB 3/18, NJW-RR 2021, 916 para. 59; of 17 May 2018
- IX ZB 26/17, WM 2018, 1316 para. 12 with further references; established case law). The limits of the judge's discretion are determined by the respective circumstances of the individual case. The more complex or the stranger the circumstances, the higher the requirements to be placed on the duty of investigation.

The law to be applied is the law of the place of residence. The parties' submissions and other contributions can also have an influence on the judge's discretionary powers. If the parties present a certain foreign legal practice in detail and controversially, the judge will regularly have to make more comprehensive statements on the legal situation - if necessary, exhaust all means of knowledge available to him - than if the parties' submission on the content of the foreign law is the same or they do not comment on the content of this law, although they are aware of its applicability or expect it. However, this also always depends on the specifics of the individual case (see Senate judgement of 18 March 2020 loc. cit. para. 24 with further references).

18 (bb) In accordance with these requirements, the Court of Appeal exercised its discretion in the case in dispute without error of law. In the absence of any other rules on the distribution of the estate in the case of descendants who have not been considered, the Court of Appeal was right to refer to the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 (hereinafter: Inheritance Act 1975). This alone fulfils the requirements of Section 293 ZPO. In view of the parties' submissions, no further examination was necessary. As the parties have unanimously argued, English law does not recognise a right to a compulsory share or right of inheritance on a pro rata basis and the Inheritance Act 1975 only provides for an appropriate financial participation in the estate for descendants according to need at the discretion of the court. This discretionary decision to be made under English law - depending, among other things, on the neediness of the descendant and the last place of residence of the testator - was sufficient for the Court of Appeal to find that English law is contrary to the guarantee of a minimum economic participation of the children in the estate of their parents, irrespective of need, as enshrined in Article 14 (1) sentence 1 of the Basic Law. Against this background, it was sufficient

A comparative legal analysis, as undertaken by the Court of Appeal, is required here.

19 The Court of Appeal did not have to make any findings as to whether the English case law - which the appeal assumes - should have the tendency, after an overall consideration of all circumstances of the individual case, to also grant children of full age a share in the estate (see Hördt, Pflichtteilsrecht und EU-ErbVO, 2019, p. 362 et seq.; Röthel in FS v. Hoffmann 2011, p. 348 et seq.; Wolff, Pflichtteilsrecht - Forced Heirship - Family Provision, 2011, p. 176 et seq.). This is not r e l e v a n t to the case in dispute. A claim for maintenance by the plaintiff to compensate for the absence of his right to a compulsory portion would in any case already fail because the testator did not have his last domicile in England or Wales, as required by Section 1 (1) Inheritance Act 1975 for the assertion of a claim for compensation. The term "domicile" is not identical to the German term "Wohnsitz", but is understood more narrowly (see KG IPRspr. 2007 No. 163 [juris para. 13]; Staudinger/Man- kowski, (2010) Vorbem. zu Art. 13 - 17b EGBGB para. 20 f.). In this respect, a distinction is made between the original "domicile of origin" and a later voluntarily chosen "domicile of choice". The latter can be established if the person concerned settles in a place with the intention of remaining there permanently or indefinitely and not returning to the country of previous domicile. Strict requirements must be met to prove such a "domicile of choice" (see KG loc. cit.; Staudinger/Mankowski loc. cit. para. 21). In view of the circumstances of the testator, who had lived in Germany for several decades without any recognisable intention of returning to England, there is no doubt that he had his "domicile" in Germany.

20 (b) The findings of the Court of Appeal regarding English law are also correct. English law does not restrict the testator's power of disposition through a right to a compulsory portion or a right of emergency inheritance. The Inheritance Act 1975 contains medium-term restrictions, according to which children of the testator may be entitled to a maintenance claim against the estate upon application if the deceased has failed to make reasonable financial provisions ("reasonable financial provision"; see Cornelius in Flick/Piltz, Der Internationale Erbfall 2nd ed. para. 579; Henrich in FS Yamauchi, 2006, p. 133, 136; Hördt, Pflichtteilsrecht und EU-ErbVO, 2019, p. 363 f.; Kristic in Schlitt/Müller, Handbuch Pflichtteilsrecht 2nd ed.
§ 15 para. 224 ff; Odersky, Die Abwicklung deutsch-englischer Erbfälle, 2001, p. 38; Röthel in FS v. Hoffmann 2011 p. 348, 351 ff; Süß in Mayer/ Süß/Tanck/Bittler, Handbuch Pflichtteilsrecht 4th ed. § 19 para. 147 f., 156 ff; Werkmüller, Rechtspolitische und rechtsvergleichende Aspekte des geltenden Pflichtteilsrechts, 2002, p. 42 ff; Wolff, Pflichtteilsrecht
- Forced Marriage - Family Provision, 2011, p. 180 f.). Section 1 (2) (b) of the Inheritance Act 1975 determines what maintenance is appropriate in the circumstances. The English courts are responsible for making a discretionary decision in individual cases if - unlike here - the testator had his "domicile" in England or Wales at the time of his death. Under English law, the claimant remains uninvolved in the estate of the deceased for this reason alone.

21 (3) The relevant question here is whether the absence of a claim to a compulsory portion without the intervention of compensatory claims of the claimant under English law violates German public policy. One view assumes that the application of Art. 35 of the EU Succession Regulation prohibits the German law on compulsory portions from affecting other legal systems (see Ayazi, NJOZ 2018, 1041, 1045 et seq.; leaving the result open Herzog, ErbR 2013,

2, 5; cautious Simon/Buschbaum, NJW 2012, 2393, 2395). Another view does not consider a violation of German public policy in the case of a deprivation of a compulsory portion which - as in the present case - is limited to descendants who have reached the age of majority and are economically independent (Ludwig/A. Baetge in jurisPK-BGB, 9th ed. Art. 35 EuErbVO para. 9, 17, 21 [Status: 2 March 2022]; Röthel in FS v. Hoffmann 2011, p. 348, 361 f.; Staudinger/Dörner, (2007) EGBGB Art. 25 para. 726; Staudinger/Beiderwieden, juris PR-IWR 6/2021 note 2) or only if the person concerned is therefore a burden on German social welfare (MünchKomm- BGB/Dutta, 8th ed. EuErbVO Art. 35 para. 8 with further references). In contrast, the prevailing opinion assumes - as did the Court of Appeal - that it is the duty under Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG. Art. 6 para. 1 GG, if a descendant is not entitled to a share in the estate under the chosen law, so that in these cases there is an obvious violation of German public policy (see Bauer/Fornasier in Dutta/Weber/Bauer, 2nd ed. Art. 35 EuErbVO para. 11; BeckOGK/J. Schmidt, EuErbVO Art. 35 para. 22.2 [as of 1 February 2022]; Grüneberg/Thorn, BGB 81st ed. Art. 35 EuErbVO para. 2; Hohloch in FS Leipold, 2009 p. 997, 1005; Köhler in Kroiß/Horn/Solomon, Nachfolgerecht 2nd ed. Art. 35 EuErbVO para. 8; Lehmann in Schlitt/Müller, Handbuch Pflichtteilsrecht 2nd ed. § 14 para. 371 - 373; Looschelders in FS v. Hoffmann, 2011, 266, 280; Lorenz in Dutta/Herrler, Die Europäische Erbrechtsverordnung, 2014, para. 28; NK-BGB/Looschelders 3rd ed. Art. 35 EuErbVO para. 25; Pintens in Löhnig/Schwab ua (Hrsg), Erbfälle unter Geltung der Europäischen Erbrechtsverordnung, 2014, p. 1, 29; J. Schmidt in Bamberger/Roth/Hau/Po- sek, 4th ed. Art. 35 EuErbVO para. 22.2; Soutier, Die Geltung deutscher

Rechtsgrundsätze im Anwendungsbereich der Europäischen Erbrechtsverordnung, 2015, p. 223 et seq.; Voltz in Staudinger, BGB (2013), Art. 6 EGBGB para. 190 [as of 31 May 2021]; Walther, GPR 2016, 128, 131).

22 (4) The latter view applies in any case to the facts to be assessed here due to its sufficiently strong domestic connection.

23 (a) This alone fulfils the requirements established by the Federal Constitutional Court for a needs-independent minimum economic participation of the children in the estate of their parents (BVerfGE 112, 332 under C I 2 [juris para. 64 et seq.]). Both the former and the latter view do not fulfil these requirements. A protection of children that only intervenes in the case of a corresponding (social welfare) need and thus depending on discretionary considerations in the individual case contradicts this in Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG. Art. 6 para. 1 GG. The will of the testator and testamentary freedom also do not justify an exclusion of the right to a compulsory portion. The children's right to a compulsory portion sets limits to the testator's testamentary capacity (BVerfGE loc. cit. under C I 3 c [juris para. 73]). It is true that the structure and the amount of the right to a compulsory portion is not prescribed by constitutional law (BVerfGE loc. cit. under C I 4 [juris para. 76]). However, the children must be guaranteed an irrevocable, appropriate share in the deceased's estate (BVerfGE 112 loc. cit. [juris para. 76]). If - as here - a child of the testator is denied a compulsory portion under foreign law without compensation due to the testator's lack of "domicile" in England or if this depends on criteria that have not been defined in advance and are not independent of need and is left to the discretion of the court, the core of the compulsory portion is affected. This is clearly incompatible with German public policy.

24 (b) A different understanding does not follow from the recitals of the EU Succession Regulation. Recital 38, second sentence, of the EU Succession Regulation clarifies that the choice of law should be limited to the law of the state to which the deceased belongs in order to avoid a law being chosen with the intention of frustrating the legitimate expectations of the beneficiaries of the compulsory portion and thus ensuring that there is a connection between the deceased and the chosen law. Contrary to the opinion of the revision, this assessment is not undermined if, when choosing a foreign legal system in accordance with Art. 22 of the EU Succession Regulation, it must be decided on a case-by-case basis whether there is a violation of public policy. The existence of Art. 35 of the EU Succession Regulation alongside Art. 22 of the EU Succession Regulation suggests that the European legislator considers it necessary to protect the beneficiary of the compulsory portion in individual cases. According to the second sentence of Recital 58 of the EU Succession Regulation, the courts of a Member State may not exclude the application of the law of another Member State on grounds of public policy if this would violate the Charter of Fundamental Rights of the European Union. However, it cannot be assumed that a relevant violation of the Charter of Fundamental Rights would result from the non-application of English law - irrespective of the question of the effect of the fact that England has not become a contracting state to the Regulation.

25 (c) Nothing to the contrary emerges from the legislative history of Art. 35 of the EU Succession Regulation either. The Commission proposal still provided in Art. 27 para. 2 of the EU Succession Regulation (COM 2009/0154 final - COD 2009/0157) that a deviating regulation of the right to a compulsory portion could not per se be qualified as a violation of public policy. The elimination of the provision in the course of the legislative procedure suggests that different compulsory portion regulations can be invoked under strict conditions.

on public policy (see BeckOGK/J. Schmidt, EuErbVO Art. 35 para. 22 (as of 1 February 2022); Burandt/Schmuck in ders./Rojahn, 3rd ed. EuErbVO Art. 35 para. 2 with further references).

26 (d) The argument used by the appeal that it is not correct that German inheritance law and thus a claim to a compulsory portion prevails precisely and only in cases in which the chosen target legal system does not provide for a right to a compulsory portion, whereas in cases in which the chosen law does provide for a claim to a compulsory portion but this falls short of the German standard, the application of the law of the target state does not justify a different result. It overlooks the fact that the yardstick for a breach of public policy is the question of whether the specific result of the application of the foreign law is to be disapproved of (see BGH, judgment of 4 June 1992 - IX ZR 149/91, BGHZ 118, 312 under III 4 a [juris para. 38]). In this respect, a generalised approach is prohibited.

27 (e) Contrary to the opinion of the appeal, this understanding is not contradicted by the fact that previous decisions have not counted the existence of a right to a compulsory portion and a right of noter inheritance as part of German public policy and have not objected to the absence of a compulsory portion in foreign law (see RG JW 1912, 22; BGH, judgment of 21 April 1993 - XII ZR 248/91, NJW 1993, 1920 [juris para. 14]; OLG Hamm ZEV 2005, 436 [juris para. 48 et seq.]; OLG Cologne FamRZ 1976, 170, 172). Based on the Federal Constitutional Court's (BVerfGE 112, 332 et seq.; BVerfG ZEV 2019, 79 para. 13) understanding of the value of a fair estate distribution in favour of children, the Senate considers this view to be outdated.

28 (f) To the extent that some writers take the view that there is no violation of public policy if the absence of a descendant' s claim to a compulsory portion is compensated for by substitute mechanisms such as the English "family provision" (cf. Andrae in FS v. Hoffmann 2011 p . 3 , 15; BeckOGK/J. Schmidt, EuErbVO Art. 35 para. 22.2 [as at 1 February 2022]; MünchKommBGB/Dutta, 8th ed. EuErbVO Art. 35 para. 8 with further references; Obergfell in Hager, Vorweggenommene Vermögensübertragung unter Ausschluss von Pflichtteilsansprüchen, 2013, p. 9, 28 f.), the Senate is not able to follow this. Apart from the fact that such a compensation claim cannot be considered here due to the lack of a "domicile" of the testator in England or Wales at the time of death, English law differs fundamentally from the German legal system in that it does not provide for a needs-independent proportionate participation of descendants in the estate, but rather the court must examine the extent to which the provision made by the testator contains reasonable financial compensation for the claimant. If such a "reasonable financial provision" is not guaranteed by the testamentary provision, the competent court can make appropriate orders and, if necessary, also determine payments to be made by the deceased to the relative. However, this provision in Section 2 (1) Inheritance Act is a purely discretionary rule ("the court may"). Furthermore, the awarding of such a claim for compensation d e p e n d s on numerous factors in the individual case, as listed in Section 3 (1) Inheritance Act, such as the financial resources and needs of the claimant, other claimants and the heir, the type and size of the estate, physical or mental impairments of the claimant and the heir (see Kristic in Schlitt/Müller, Handbuch Pflichtteilsrecht, 2nd ed. § 15 para. 224 ff.). Particularly in the case of adult children with their own income, English courts tend to be reluctant to grant a claim (cf.

Kristic loc. cit. para. 234). In its statutory and concrete form, English law thus falls short of the constitutionally guaranteed right to a compulsory portion of children under German law in a way that is incompatible with German public policy.

29 (5) The non-application of the foreign law invoked as a result of obvious incompatibility with the public policy of the state of the court seised also requires that the facts of the case to be judged have a sufficiently strong domestic connection (cf. BGH, judgment of 11 October 2006 - XII ZR 79/04, BGHZ 169, 240, under III 4 c [juris para. 50]; also BVerfG, NJW 1971, 1509 under C III 3 [juris para. 43]; Andrae in FS v. Hoffmann p. 3, 15; Köhler in Kroiß/Horn/Solomon, Nachfolgerecht, 2nd ed. Art. 35 EuErbVO para. 5 with further references). The Court of Appeal did not err in law in assuming this in this case. The deceased's family relationships to be protected had their centre of gravity in Germany. Both the plaintiff and the testator have or had their habitual residence in Germany at the time of the inheritance, the testator for more than 50 years. The deceased's assets were also located there. The plaintiff also has German citizenship.

30 cc) A violation of public policy has the consequence that the foreign legal norm does not apply in the specific case. In order to ensure that there is as little interference as possible with the foreign law that would otherwise continue to apply, gaps must first be closed with the help of the lex causae. The lex fori is only to be applied as a substitute law (BGH, judgement of 11 October 2006
- XII ZR 79/04, BGHZ 169, 240, under III 4 c [juris para. 50]; decision of
14 October 1992 - XII ZB 18/92, BGHZ 120, 29, under II 6 [juris para. 21];

Pfundstein, Pflichtteil und ordre public, 2010, para. 531; Soutier, Die Gel- tung deutscher Rechtsgrundsätze im Anwendungsbereich der Europäi- schen Erbrechtsverordnung, 2015, p. 225 ff; Stürner, GPR 2014, 317, 324). According to the findings of the Court of Appeal, which cannot be criticised on legal grounds, this is the case here. Since English law does not provide the plaintiff with a claim to participation in the labour market that satisfies the requirements of Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG. Art. 6 para. 1 GG, English law does not provide for a claim by the plaintiff to a share in the estate that satisfies the requirements of Art. 14 para. 1 sentence 1 in conjunction with Art. 6 para. 1 GG. Accordingly, recourse to the German law on compulsory portions is required.

31 dd) Furthermore, no preliminary ruling procedure to the Court of Justice of the European Union is required. This is precisely not a question of interpreting a provision of the European Succession Regulation in the context of European law. The special feature of Art. 35 of the European Succession Regulation lies precisely in the fact that the application of the law that is in itself applicable under the European Succession Regulation is ruled out because its application would be manifestly incompatible with the public policy of the state of the court seised. This question can only be answered by the national court for the respective national law.

32 2. the Court of Appeal also rightly assumed that the plaintiff, as the person entitled to a compulsory portion pursuant to § 2314 para. 1 sentence 1, sentence 3 BGB, is entitled to information about the deceased's estate at the time of the inheritance by means of a notarised estate register, which, pursuant to § 2325 BGB, also includes gifts within the last ten years prior to the inheritance that must be supplemented.

recorded. Pursuant to Section 2314 para. 1 sentence 2 clause 2 BGB, he or she is also entitled to a valuation of the estate items specified in detail.

33 According to the will, the defendant has become the sole heir. As the adopted son of the testator, the plaintiff is entitled to a compulsory portion in accordance with

§§ 2303 Para. 1, 1754 Para. 1, 1755 Para. 1 BGB in conjunction with Art. 12 § 2 para. 2,

para. 3, § 3 para. 1 AdoptG and excluded from succession. The defendant is unable to prevail with its complaint pursuant to Section 286 ZPO that the Court of Appeal did not make any findings as to whether the plaintiff is entitled to a compulsory portion according to the content of the adoption contract. It is true that the notarial deed of 30 October 1975 contains the provision that the plaintiff's inheritance and compulsory portion rights are excluded after the first death of the adopting spouses. Contrary to the opinion of the appeal, however, this provision does not preclude the plaintiff's right to a compulsory portion. As the plaintiff was still a minor when the Adoption Act came into force on 1 January 1977, the adoption relationship was fundamentally converted into one pursuant to §§ 1741 et seq. of the German Civil Code (BGB) from 1 January 1978 in accordance with Art. 12 § 2 Para. 1, Para. 2 AdoptG (cf. on its constitutionality BVerfG NJW 2003, 2600). BGB from 1 January 1978. The consequence of this was that the exclusion of inheritance rights and compulsory portions, which had taken place in the adoption contract in accordance with § 1767 Para. 1 BGB in the version valid at the time, lost its effectiveness with the transfer, provided that no objection had been expressly declared in accordance with Art. 12 § 2 Para. 2 Sentence 2 AdoptG (Müller-Engels in Münch, Fami- lienrecht in der Notar- und Gestaltungspraxis 3rd ed. § 14 marginal no. 56).

34 The objection to be expressly declared is a legally invalid circumstance for which the defendant has the burden of proof according to general principles (see BGH, judgement of 13 November 1998 - V ZR 386/97, NJW 1999, 352, under II 3 b aa [juris para. 13]; Musielak/Voit/Foerste, ZPO 18th ed. § 286 para. 35). In this respect, the appeal does not show that the Court of Appeal disregarded the defendant's substantiated submission regarding an objection pursuant to Art. 12 § 2 Para. 2 Sentence 2 AdoptG in breach of procedure. At first instance, the defendant merely denied with ignorance that the plaintiff was an adopted son of the deceased and denied his legitimisation. The defendant did not make any factual submissions on Art. 12 § 2 Para. 2 Sentence 2 AdoptG in the instances. The Court of Appeal also did not - as the defendant believes - violate Section 139 of the German Code of Civil Procedure (ZPO) by not referring to the plaintiff's secondary burden of proof prior to its decision, contrary to the right to be heard. The secondary burden of proof only arises when the party with the primary burden of presentation and proof has conclusively presented connecting facts and a certain probability of the correctness of its presentation arises from this (cf. sec.

natsurteil of 17 December para. 2014 - IV ZR 90/13, VersR 2015, 271 21). This i s not the case.

Prof Dr Karczewski Dr Brockmöller Dr Bußmann

Rust Piontek

Lower instances:
Cologne Regional Court, decision of 10/07/2020 - 20 O 246/19 - Cologne Higher Regional Court, decision of 22/04/2021 - 24 U 77/20 -