Case C-98/24

Request for a preliminary ruling

Date lodged:

6 February 2024

Referring court:

Obvodní soud pro Prahu 1 (Czech Republic)

Date of decision to refer:

29 January 2024

Parties to the proceedings:

L.P.

A. K.

R. K.

R. F. von K.-K.

Request for a preliminary ruling addressed to the Court of Justice of the European Union

Referring court:

Obvodní soud pro Prahu 1 (District Court, Prague 1, Czech Republic), […], represented by authorised court commissioner […], notary in Prague, […], Czech Republic,

Subject of the original succession proceedings:

1. The testator L. K., resident at the time of his death in P., Czech Republic, died on 24 August 2022. The court found from the testimonies of the parties to the proceedings and from documentary evidence (excerpts from a German registry) that the testator was a widower and had two children, his daughters E. D. and N. K., and grandchildren A. K., R. K., and R. F. von K.-K., who are N.K.'s children.

2. An examination in the Register of Legal Actions in case of Death maintained by the Chamber of Notaries of the Czech Republic revealed that the testator had left two dispositions of property upon death:

- a declaration of disinheritance, drawn up in the form of an authentic instrument (notarial record) by … I. S., notary in P., on 23 June 2015, under ref. no. NZ 149/2015; from the point of view of Czech law, this was (in the broad sense of the word) a type of disposition of property upon death (see Fiala, Drápal, et al. p. 62) that was drawn up before Regulation No. 650/2012 came into force (Regulation No. 650/2012 has been applicable since 17 August 2015);

- a will, drawn up in the form of an authentic instrument (notarial record) by … R. N., a notary in P., on 20 December 2017, under ref. no. NZ 563/2017; the aforementioned authentic instrument included a choice of law governing succession, within the meaning of Article 22(1) of Regulation No. 650/2012.

3. In his submission of 30 November 2022, the legal counsel of the daughter N. K. and the grandchildren A. K., R. K., and R. F. von K.-K. stated that the testator and his wife, E. K., date of birth 20 December 1927, deceased on 9 January 2007, had made a joint will on 2 November 1999 before … J. F., a notary in H. in the Federal Republic of Germany ('*gemeineschaftliches Testament*' in the original)

pursuant to the German Civil Code, also known as a '*Berlin testament*'. Subsequently, that joint will was changed in part by a joint declaration of the spouses, made on 8 February 2001 before … J. F., a notary in H. in the Federal Republic of Germany. That joint will, as amended by the subsequent declaration, hereinafter referred to as the 'joint will of the spouses', was and is, in the opinion of the legal counsel of the daughter and grandchildren, a valid expression of the joint last will of the testator and his wife, E. K., which had been drawn up in line with the applicable provisions of German law. In his submission of 30 November 2022, the legal counsel of the daughter N. K. and the grandchildren A. K., R. K., and R. F. von K.-K., also detailed the contents of the joint will of the spouses and the legal rules of the BGB (the German Civil Code), inferring that the testator and his wife had explicitly restricted the freedom of disposition of property (in German *Testierfreiheit*) upon the death of one of them. He argued that, subsequent to the death of one of the testators, the other testator was able to change the circle of his or her heirs by designating as heirs only some of the persons referred to in the joint will of the spouses, and was therefore able to choose only between their daughters, namely N. K. and E. D., and their children. The legal counsel of N. K. and the grandchildren, A. K., R. K., and R. F. von K.-K., thus justified the so-called *binding effect* that results in fixing the legal relations of testators making a joint will, which cannot be changed subsequent to the death of one of the spouses, other than as envisaged in the joint will of the spouses.

4. In its decision ref. no. 37 D 227/2022-118, which was subsequently challenged on appeal, the referring court concluded that, pursuant to Article 4 of Regulation No. 650/2012, the courts of the Czech Republic have international jurisdiction to deliberate on the succession property, while local jurisdiction was based on Paragraph 98(1)(a) of [the Zákon č. 292/2013 Sb., o zvláštních řízeních soudních (Law 292/2013 on special judicial procedures; 'the Law on special judicial procedures')]. Furthermore, it found that the law governing the succession as a whole was Czech law, pursuant to Article 22(1) of Regulation No. 650/2012.

5. The referring court terminated the involvement of the daughter N. K. in the proceedings concerning succession property left by the testator, having decided that it would continue to deal exclusively with Ms. L. P. as the sole heir to the testator under the will of 20 December 2017.

6. On appeal by the daughter N. K. and the grandchildren A. K., R. K., and R. F. von K.-K., the court of appeal upheld in part the decision of the referring court (in respect of the operative part of the decision whereby the involvement of the daughter N. K. was terminated), and

set aside the rest of the decision, returning it to the court of first instance for further consideration.

7. The court of appeal cited Article 26(2) of the regulation on succession ('Where a person has the capacity to make a disposition of property upon death under the law applicable pursuant to Article 24 or Article 25, a subsequent change of the law applicable shall not affect his capacity to modify or revoke such a disposition'). The court of appeal thus inferred the following: the capacity (legal possibility) of the testator to modify or revoke that part of the joint will in which the testator made his grandchildren his heirs (in the event that his wife predeceased him) is necessarily governed by German law and not by Czech law … according to the court of appeal, that conclusion is not contradicted by the assertions of [legal academic] Magdalena Pffeifer (Pffeifer, 173). According to the court of appeal, the opinion cited leads to no other finding for the facts of the present case than that if the testator had capacity pursuant to the 'chosen' German law (see Article 83(4) of the regulation on succession) to make a joint will, then he has capacity to modify or revoke that disposition at any time pursuant to German law, regardless of the provisions of any other law that is the applicable law (note: meaning the law applicable to the succession as a whole) at the time of modification or revocation, that is, regardless of the provisions of Czech law as chosen by the testator at a later point. The court of appeal maintains that the fact that the provisions of Czech law not only did not prevent the testator from revoking the appointment of his heirs in the joint will, but also permitted him to make the revocation without restriction (in contrast to German law) has no impact on the applicability of German law to a modification or revocation of the joint will.

8. The court of appeal directed the court of first instance to ascertain (after examining the content of German law) whether (and, as the case may be, subject to what conditions), it is possible under German law to exclude the effects of the decisive part of the joint will – appointing the heirs of the testator as the grandchildren A. K., R. K., and R. F. von K.-K. – as the testator had done in the document of disinheritance of 23 June 2015 and in the will of 20 December 2017. Only then will it be possible to resolve the dispute concerning the right of succession between L. P., the heir as based on the will of 20 December 2017, and the testator's aforementioned grandchildren … It is necessary, according to German law, to examine the effects of the appointment of L. P. as the testator's heir in the will of 20 December 2017, and the effects of the disinheritance of the grandchildren A. K., R. K., and R. F. von K.-K. in the document of 23 June 2015.

Subject matter and legal basis of the questions in the preliminary reference:

The referring court submits the following three questions. **The first question** concerns the definition of the term 'disposition of property upon death'. It asks whether Article 3(1)(d) of Regulation No. 650/2012, or Article 83(3) and (4) in conjunction with Article 3(1)(d) of Regulation No. 650/2012, should be interpreted such that the expression 'disposition of property upon death' includes a declaration of disinheritance. If the first question is answered in the affirmative, **the second question** pertains to the interpretation of the question as to which law becomes the law applicable to the succession if the testator made several dispositions of property upon death before 17 August 2015 and the person had multiple nationalities. **The third question** relates to the interpretation of Article 26(2) of Regulation No. 650/2012, namely to what extent that provision excludes the impact of a subsequent change of the law applicable on a person's capacity to modify or revoke a particular disposition of property upon death.

The questions referred:

1. Must the provisions of Article 83(3) and (4) of Regulation No. 650/2012, in conjunction with Article 3(1)(d) of Regulation No. 650/2012, be interpreted as meaning that the term disposition of property upon death includes a declaration of disinheritance[?]

2. If the first question is answered in the affirmative, must Article 83(4) of Regulation No. 650/2012 be interpreted as meaning that if, before 17 August 2015, the testator made several dispositions of property upon death that were in accordance with the law that the testator could have chosen in accordance with Regulation No. 650/2012, is the law deemed to have been chosen as the law applicable to the succession that law under which the testator last made a disposition upon death before 17 August 2015[?]

3. Must Article 26(2) of Regulation No. 650/2012 be interpreted as meaning that, if the testator's capacity to make a disposition was restricted due to the making of a disposition of property upon death before 17 August 2015 under the law that governed his or her succession as a whole, and if a subsequent change of that law has resulted in changes to the conditions for the exercise of his or her capacity to make a disposition, the testator's capacity to make a disposition continues to be restricted in accordance with the law that would have been applicable to that testator's succession if he or she had died on the day on which the agreement as to succession was concluded, regardless of the fact that, according to the law governing his or her succession as a whole at the time of death, the testator was entitled to terminate (revoke or modify) that agreement as to succession [?]

Applicable provisions of European Union legislation:

Article 19(3)(b) TEU,

Article 267, paragraph 1(b), TFEU,

Article 3(1)(d) 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 ('Regulation No. 650/2012'),

Article 26(2) of Regulation No. 650/2012,

Article 83(3) and (4) of Regulation No. 650/2012.

Applicable provisions of national law:

Zákon č. 91/2012 Sb., o mezinárodním právu soukromém (Law 91/2012 on international private law), Paragraphs 2 and 73a;

Zákon č. 89/2012 Sb., občanský zákoník (ObčZ) (Law 89/2012, the Civil Code (CC)), Paragraphs 1476, 1491–1497, 1537 and 1538, and Paragraphs 1576, 1642, 1643, and 1646;

Zákon č. 292/2013 Sb., o zvláštních řízeních soudních (ZŘS) (Law 292/2013 on special judicial procedures), Paragraphs 1, 2(f), 3(1), 98(1)(a), 100, 101, 103, 110, 113, 138, and 169;

Zákon č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád) (Law 358/1992 on notaries and their activities (the Notarial Code), Paragraphs 4, 7, 8, 13, and 35b;

Vyhláška č. 37/1992 Sb., o jednacím řádu pro okresní a krajské soudy (Decree 37/1992 on the rules of procedure for district and regional courts), Paragraph 90.

Legal literature referred to:

Pffeifer, M., *Dědický statut – právo rozhodné pro přeshraniční dědické poměry*, Praha, Wolters Kluwer ČR, a.s., 2017;

Fiala, R., Drápal, L. et al., *Občanský zákoník IV. Dědické právo (§ 1475–1720). Komentář*, 2. Vydání, Praha, C. H. Beck, 2022.

A brief statement of the grounds for the preliminary reference:

The referring court hereby submits questions for a preliminary ruling after concluding that a decision as to the interpretation or applicability of EU law is necessary to enable it to render its decision. According to the referring court, the matters concerned are not *acte clair* or *acte éclairé* in terms of the judgment of the Court of Justice in Case C-283, ECLI:EU:C:1982:335.

First question referred:

1. According to the Czech Civil Code ('the CC'), dispositions of property upon death include, in the strict sense of the term, an agreement as to succession, a will or a codicil (Paragraph 1491 CC), while joint wills are explicitly ruled out (Paragraph 1496 CC). A joint will could be deemed to be an 'agreement as to succession' within the meaning of Article 3(1)(b) Regulation No. 650/2012, the same conclusions having been reached by the Supreme Court of Austria (see *Beschluss Oberste Gerichtshof*, ref. no. 2 Ob 123/19f of 29 June 2020). However, Czech legal literature also includes, among dispositions of property upon death in the broad sense, other legal actions of the testator that are not enumerated in Paragraph 1491 CC, whereby the testator makes arrangements for his or affairs following his or her death. In addition to wills, agreements as to succession, and codicils, those include, inter alia, **declarations of disinheritance** (see Fiala, Drápal, et al., p. 62).

2. The referring court deems it meaningful, just, and in line with the generally understood principle of the disposition of property upon death – whereby a testator either makes a positive disposition of property upon death by appointing his or her heirs, or acts negatively, by depriving his or her reserved heirs (children or more remote descendants) of their right to their mandatory share and claim on the succession – for Article 83(4) in conjunction with Article 3(1)(d) of Regulation No. 650/2012 to be interpreted as meaning that dispositions of property upon death, within the meaning of the article cited, include declarations of disinheritance, and not only wills, joint wills or agreements as to succession (the same could also apply to Article 83(3)). According to the referring court, a declaration of disinheritance is a form of negative will, whereby the testator explicitly expresses his or her wish that certain persons, who would otherwise inherit by operation of law, should not do so. That situation is similar to when the testator designates certain persons as his or heirs in his or her will (a joint will or an agreement as to succession). A testator, be it in a will (a joint will or an agreement as to succession) or in a negative will (that is, including in a declaration of disinheritance), regulates his or her legal succession, in other words, he or she **makes (legal) arrangements for his or her affairs following his or her death**.

3. In agreement with the CC, Czech legal literature views the concept of disinheritance as depriving a reserved heir of his or her right of succession (complete disinheritance) or as a reduction in his or her right to a mandatory share (partial disinheritance). Pursuant to Paragraph 1643(1) CC, reserved heirs are the children of the testator or, if they do not inherit, then their descendants. From the testator's point of view, disinheritance can be understood as a type of (extreme) measure (*ultima ratio*) whereby the testator penalises his or her (errant) descendant who has committed an action that qualifies as at least one of the legal grounds for disinheritance (in that regard see Fiala, Drápal, et al., p. 388).

4. However, Article 3(1)(d) of Regulation No. 650/2012 states explicitly that a disposition of property upon death means a will, a joint will, or an agreement as to succession; that list **does not include**, for example, a *codicil* or a **declaration of disinheritance.** Article 83(3) and (4) of Regulation No. 650/2012 uses the term '*disposition of property upon death*'. The question therefore arises whether the term '*disposition of property upon death*' in the article cited must indeed be understood as including solely and exclusively the three kinds (types) of disposition of property upon death listed in Article 3(1)(d) of Regulation No. 650/2012, and that no other legal action of the testator whereby he or she arranges his or her affairs after his or her death may constitute a disposition of property upon death. The referring court deems it somewhat illogical for the term '*disposition of property upon death*' to include a will (whereby a testator designates his or her heirs and beneficiaries of a bequest, as the case may be) and, at the same time, not to include a declaration of disinheritance (as a form of a negative will) whereby the testator removes the right of succession and the right to a mandatory part from a reserved heir, even though **the testator is also thereby making a disposition of property upon his or her death**.

Second question referred:

1. If the first question is answered in the affirmative, the referring court considers that a hitherto unresolved question is that of which law will become the law applicable to the succession if a testator made several dispositions of property upon death prior to 17 August 2015 and the person possessed multiple nationalities.

2. A testator may have made several dispositions of property upon death before 17 August 2015, and if, during that time, he or she was a person with multiple nationalities, he or she was able to make dispositions under the laws of those multiple countries of which he or she was then a citizen. The question thus naturally arises as to which of those laws will become the law applicable to the succession, within the meaning

of Article 83(4) of Regulation No. 650/2012, upon his or her death. The referring court operates on the assumption that the law applicable to the succession should be the law of the state under which the testator made his or her last disposition of property upon death before 17 August 2015. Accordingly, if the testator L. K. and his wife E. K. made a joint will on 2 November 1999 pursuant to German law (before a German notary), and on 23 June 2015 he made a declaration of disinheritance before a Czech notary, pursuant to Czech law, then Czech law is to be deemed to have been chosen as the law applicable to the succession, within the meaning of Article 83(4) of Regulation No. 650/2012.

Third question referred:

1. **On the one hand,** the article cited has been interpreted in the legal literature, in particular in the Federal Republic of Germany, to the effect that the provision aims to ensure legal certainty, and, in view of that purpose, the provision must also be applied to cases where the testator has not lost his or her capacity to make a disposition by a change of the law applicable to succession, but there has (only) been a change in the conditions for its exercise. According to that interpretation, in the event of a revocation or modification of a disposition of property upon death, the applicable law at the time of the original disposition of property upon death (namely, at the time the joint will was drawn up) should apply in that case too. On the other hand, the referring court operates on the assumption that testamentary capacity for the purposes of Article 26(2) of Regulation No. 650/2012 must be interpreted as excluding the impact of a subsequent change of the applicable law on a person's capacity to modify or revoke a disposition of property upon death. Accordingly, if the testator had the capacity to make a disposition, he or she will always have the capacity to revoke or modify such a disposition at any later time.

2. In particular, the referring court states that Article 26(2) of Regulation No. 650/2012 primarily envisaged the reverse scenario to that which has arisen in the present succession case. It was intended to apply to situations where a testator who had capacity to make a disposition of property upon death, pursuant to the applicable law at the time of making that disposition, lost his or her capacity to make the disposition owing to a change of the law applicable to legal succession and thus could not revoke or modify his or her disposition. It is only in accordance with German legal literature (as referred to by the legal counsel of the surviving grandchildren) that legal certainty may (also) be a purpose of the provision, and, in view of that purpose, the provision should also be applied to cases when the testator has not lost his or her capacity to make a disposition owing to a change of law applying to succession, but there has (only) been a change in the

conditions for its exercise. According to German legal literature, the applicable law at the time of the original disposition of property upon death (namely when the joint will was made) should continue to apply, even in such cases, to a revocation or modification of the disposition upon death. Nevertheless, that view is not held universally. After all, even Pffeifer operates on the assumption that if a person had the capacity to make a disposition of property upon death under the law applicable at the time when he or she made the disposition, he or she can modify or revoke that disposition at any later time, regardless of the applicable provisions of the governing law at the time of modification or revocation. If the testator had capacity to make a disposition, he or she will always have capacity to revoke or change that disposition at any later time (Pffeifer, p. 173).

3. According to the referring court, Article 26(2) of Regulation No. 650/2012 **does not indicate** that restriction of the testator's capacity to make a disposition is to be 'preserved forever' under the law that would have applied to that testator's succession if he or she had died at the date of conclusion of the agreement as to succession, regardless of the fact that, according to the law that governs his or her succession as a whole at the time of death, the testator was entitled to terminate (revoke or modify) the agreement as to succession.

4. The referring court operates on the assumption that the capacity to make a disposition under Article 26(2) of Regulation No. 650/2012 must be interpreted as excluding the impact of a subsequent change of the applicable law on the capacity of the person to modify or revoke a disposition of property upon death made by that person.

Concerning the *locus standi* of the authorised court commissioner to make a preliminary reference on behalf of the District Court, Prague 1:

1. Paragraph 1(1) of the Law on special judicial procedures states: 'Pursuant to this law, courts deliberate and rule on matters set out in this law.' Pursuant to Paragraph 100(1) of that law: 'Unless otherwise stated below, the actions of a court of first instance in succession proceedings shall be carried out by a notary authorised by the court, acting as a court commissioner.' Paragraph 100(2) of the Law on special judicial procedures lists the exceptions to which Paragraph 100(1) thereof does not apply; the list does not include the submission of a request for a preliminary ruling to the Court of Justice of the European Union, consequently, an authorised court commissioner is entitled to take that step. Paragraph 101(2) of the Law on special judicial procedures provides that, having commenced proceedings, a court is to rule on authorisation of a notary by an order that need not be served.

2. Pursuant to Paragraph 103(4) of the SJP: '**A notary**, a notarial candidate, a notary in training, and the employee of a notary who has passed a qualification examination pursuant to another legal regulation **shall have, in succession proceedings, in acting as a court commissioner, all of the rights vested in a court as a public authority in the exercise of judicial power**.'

3. Paragraph 90(1) of Decree 37/1992 states: 'A decision on succession shall include the name and surname of the court commissioner, the address of his or her notarial office, and the information that he or she has been authorised by a court to act in the succession proceedings as a court commissioner. The statement of appeal shall set out, as the place for submission of the appeal, the address of the seat of the succession court and the address of the notarial office of the court commissioner. The written version of the decision on succession shall be signed by the court commissioner, a representative of the notary appointed pursuant to Paragraph 24(1) of the Notarial Code, the notary's partner or notarial candidate who was appointed by the Notarial Association to act on the notary's behalf in carrying out his or her activities.'

[…]