

Case C-187/23

Request for a preliminary ruling

Date lodged:

23 March 2023

Referring court:

Amtsgericht Lörrach (Germany)

Date of the decision to refer:

21 March 2023

Interested parties:

E. V. G.-T., P. T., F. T. and G. T.

[...]

Amtsgericht Lörrach (Local Court, Lörrach, Germany)

Order

In the probate proceedings

P. M. J. T., born on 12 December 1931, deceased 15 September 2021,
French national, last address: S-straße
- Testator -

Interested parties:

E. V. G.-T. [...] – interested party No 1 –

[...]

P. T. [...] – interested party No 2 –

F. T. [...] – interested party No 3 –

G. T. [...]

– interested party No 4 –

the Local Court, Lörrach, [...] decided on 21 March 2023:

1. The proceedings are stayed pending the decision of the Court of Justice of the European Union on the following questions referred for a preliminary ruling.
2. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to point (b) of the first paragraph and the second paragraph of Article 267 TFEU on the interpretation of point (a) of the second subparagraph of Article 67(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 ('the Succession Regulation'):
 - (a) Must point (a) of the second subparagraph of Article 67(1) of the Succession Regulation be interpreted as meaning that it also refers to challenges raised in the procedure for issuing the European Certificate of Succession itself, which the court is not permitted to examine, and that it does not refer only to challenges raised in other proceedings?
 - (b) If the answer to Question (a) is in the affirmative: Must point (a) of the second subparagraph of Article 67(1) of the Succession Regulation be interpreted as meaning that a European Certificate of Succession may not be issued even if challenges have been raised in the procedure for issuing the European Certificate of Succession, but they have already been examined in the proceedings for the issuance of a certificate of inheritance under German law?
 - (c) If the answer to Question (a) is in the affirmative: Must point (a) of the second subparagraph of Article 67(1) of the Succession Regulation be interpreted as covering any challenges, even if they have not been substantiated and no formal evidence is to be taken of that fact?
 - (d) If the answer to Question (a) is in the negative: In what form must the court state the reasons that led it to reject the challenges and to issue the European Certificate of Succession?

Grounds

I. Presentation of the subject matter of the dispute and the relevant facts

The testator, a French national, was last resident in R. (Germany) and died on 15 September 2021. On 23 November 2021, interested party No 1, the deceased's former wife, represented by her legal representative, applied for a European Certificate of Succession showing her as the sole heir. A testament exists that states as follows:

Joint testament

We, the spouses E. G.-T., born on 29 December 1937, and P. T., born on 12 December 1931, both residing on S-Straße, declare as follows:

(1) We are not bound by previous dispositions under inheritance law and have not made any dispositions under inheritance law. As a precautionary measure, we revoke all dispositions previously made by us, whether unilaterally or jointly.

(2) We mutually appoint each other as our sole heirs. This appointment as an heir is made reciprocally and with binding effect. The heir that survives the other is not otherwise bound by any restrictions under this provision. He or she is free to make his or her own provisions *mortis causa*, even before the death of the first deceased, but only in so far as this relates to surviving the other heir.

(3) We both reside in Germany and wish the German law of succession to apply, which we choose as the applicable law in the exercise of our choice of law as far as this is permissible. This provision applies reciprocally.

Done in R., 23 July 2020

E. G.-T.

This is also my will

P. T.

That testament is handwritten and signed by the interested party G.-T. Moreover, the testament is signed by the testator.

There is also an older testament that states as follows (translation from French):

I, P. M. J. T., born on 12 December 1931 in A., residing in T. L. R., SPAIN, revoke all previous dispositions *mortis causa*.

I bequeath the disposable share of my estate to my two grandchildren, the sons of P.,

N. A. J. T., born on 12 October 1988 in A., and

J. N. J. T., born on 25 June 1993 in A.

They will share in equal parts in the disposable share of my estate.

I appoint my son P., and him alone, to arrange my funeral service with a Gregorian Mass and my burial in D. in Spain.

Done in A., 31 May 2001

This is my testament.

P. T.

That testament is handwritten and signed by the testator.

Interested party No 1 considers herself to be the sole heir on the basis of the testament dated 23 July 2020. The interested parties No 2 to No 4 consider that testament to be invalid. They contend that the testator was no longer capable of making a testament when it was drawn up and that the signature was not his own.

However, the testator was still capable of making a testament. The interested parties No 2 to No 4 only submitted that the testator was occasionally confused. That is, however, not sufficient to assume testamentary incapacity or to follow up on that challenge by further investigation. In order to assume testamentary incapacity, substantiated submissions would need to be made stating the deficiencies that impaired the testator's will to such an extent that he no longer understood the meaning and consequences of a testament [...].

Furthermore, the signature is that of the testator. Several signatures of the testator were submitted to the court. The only signature that differs is the one from 1956. All subsequent signatures correspond to the signature on the testament.

II. Wording of provisions of national law and case-law relied on

Paragraph 2267 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'):

1To make a joint will in accordance with Paragraph 2247, it suffices if one of the spouses makes a will in the form prescribed therein, and the other spouse co-signs the joint declaration in his or her own hand. 2In doing so, the co-signing spouse shall state the time (day, month and year) and the place at which his or her signature was affixed.

Paragraph 26 of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Law on proceedings in family matters and matters subject to non-contentious proceedings, 'the FamFG'):

The court shall of its own motion conduct the inquiries necessary to establish the facts relevant to the decision.

Paragraph 352e of the FamFG:

(1) 1The certificate of inheritance shall be issued only if the probate court considers the facts necessary to substantiate the application to be established. 2The decision shall be made by way of an order. 3The order shall become effective upon its issuance. 4There is no requirement for notification of the order.

(2) If the order is contrary to the declared wishes of an interested party, the interested parties shall be notified of the order. 2In that case the court shall suspend the immediate effectiveness of the order and postpone the issuance of the certificate of inheritance until the order becomes final and binding.

(3) If the certificate of inheritance has already been issued, an appeal against the order shall only be admissible in so far as the withdrawal of the certificate of inheritance is requested.

Paragraph 35 of the Internationales Erbrechtsverfahrensgesetz (Law on international succession proceedings):

(1) Unless otherwise provided by Regulation (EU) No 650/2012 and the provisions of this section, the Law on proceedings in family matters and matters subject to non-contentious proceedings shall apply.

Paragraph 39 of the Law on international succession proceedings:

(1) 1If the requirements for the issuance of a European Certificate of Succession are met, the court shall make its decision by issuing the original European Certificate of Succession. 2If the requirements for the issuance of a certified copy or for the extension of the period of validity of a certified copy are met, the court shall make its decision by issuing a certified copy or by extending the period of validity of a certified copy. 3The court shall decide on any other issues by way of an order.

(2) The form referred to in the second sentence of Article 67(1) in conjunction with Article 81(2) of Regulation (EU) No 650/2012 shall be used to issue a European Certificate of Succession and a certified copy thereof.

German case-law on point (a) of the second subparagraph of Article 67(1) of the Succession Regulation:

Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart, Germany ('OLG Stuttgart'), order of 15 December 2020 – 8 W 342/20, [...] DE:OLGSTUT:2020:1215.8W342.20.00

Prior proceedings thereof: Amtsgericht Stuttgart (Local Court, Stuttgart), order of 10 August 2020 – 30 VI 665/19 –, DE:AGSTUTT:2020:0810.30VI665.19.00

III. Grounds for the request

1. Question (a) referred for a preliminary ruling

The proceedings depend on the interpretation of point (a) of the second subparagraph of Article 67(1) of the Succession Regulation. The interested parties No 2 to No 4 have challenged the application made by interested party No 1. Those challenges were examined and the matter is ready for decision, such that the court has arrived at the conclusion that interested party No 1 is deemed to be the sole heir of the deceased. Thus, the requirements of the first subparagraph of Article 67(1) of the Succession Regulation for the issuance of a European Certificate of Succession are met. However, such a certificate cannot be issued if point (a) of the second subparagraph of Article 67(1) of the Succession Regulation is to be interpreted as also referring to challenges raised in the procedure for issuing the Certificate of Succession.

Such an interpretation would prevent the issuance of the European Certificate of Succession because challenges have been raised in that procedure.

2. Question (b) referred for a preliminary ruling

The legal representative of interested party No 1 has announced that he would apply for a certificate of inheritance if the proceedings were stayed. In that case, the challenges would have to be examined under national law. Once the challenges have been examined in the proceedings for the issuance of a certificate of inheritance, the question arises whether any challenges under point (a) of the second subparagraph of Article 67(1) of the Succession Regulation remain at all, or whether those challenges have already been adjudicated on and the European Certificate of Succession must be issued.

3. Question (c) referred for a preliminary ruling

Moreover, the challenges raised by interested parties No 2 to No 4 were not substantiated, so that the court considers the matter to be ready for decision even without any formal taking of evidence. The issuance of the European Certificate of Succession therefore depends on whether such challenges are also covered by point (a) of the second subparagraph of Article 67(1) of the Succession Regulation.

4. Question (d) referred for a preliminary ruling

If the court is required to examine the challenges from the outset, the question arises as to where that must be shown. For the issuance of the European Certificate of Succession, the form pursuant to the second sentence of

Article 67(1) in conjunction with Article 81(2) of the Succession Regulation must be used. That form contains the clause:

The authority confirms that it has taken all necessary steps to inform the entitled parties of the application for a certificate and that, at the time of preparing the certificate, none of the details contained therein were contested by the entitled parties.

That raises the question of where it must be shown that challenges have been brought but are rejected. That question arises in the light of the fact that procedural law does not provide for an attendant decision regarding the issuance of the European Certificate of Succession.

IV. Reasons why the referring court has doubts with regard to the interpretation of point (a) of the second subparagraph of Article 67(1) of the Succession Regulation

The interpretation of point (a) of the second subparagraph of Article 67(1) of the Succession Regulation is contentious in Germany. On the one hand, the opinion is expressed that the Succession Regulation provides for a consensual procedure and that point (a) of the second subparagraph of Article 67(1) of the Succession Regulation therefore relates to challenges raised in the procedure for issuing the Certificate of Succession itself [...] [references to legal literature]. The main reasons for that opinion are that the procedural law of the Succession Regulation does not allow for contentious proceedings. According to that opinion, the proceedings under the Succession Regulation are designed as a consensual procedure which does not provide for a contentious decision.

The other opinion holds that the court can examine any challenges itself [...] and that the Succession Regulation relates only to challenges raised in other proceedings. That would also be in keeping with point (a) of the second subparagraph of Article 67(1) of the Succession Regulation. That opinion also holds that the second sentence of Article 66(1) of the Succession Regulation provides for the court to act of its own motion where this is provided for by its own law, as is the case in Germany in Paragraph 26 of the FamFG.

In its decision OLG Stuttgart, order of 15 December 2020 – 8 W 342/20, [...] DE:OLGSTUT:2020:1215.8W342.20.00, the OLG Stuttgart ruled that contentious proceedings had to be conducted. The court allowed an appeal on a point of law because the court considered this question to be of fundamental importance and that it had not yet been decided by the highest courts. Legal commentators criticised that decision in so far as the OLG Stuttgart did not refer that question of interpretation to the CJEU [...]. No appeal on a point of law was lodged. For that reason, the case did not proceed to the Bundesgerichtshof (Federal Court of Justice, Germany), which would have been under an obligation pursuant to the third paragraph of Article 267 TFEU to refer the matter to the CJEU.

The legal representative of interested party No 1 has submitted that if Question (a) is to be answered in the affirmative, a situation could arise in which no European Certificate of Succession may be issued to the true heir. Legal commentators, on the other hand, envisage that at least the court of appeal could examine challenges, which would result in differing standards of review applying to the issuing authority and the court of appeal (Article 72 of the Succession Regulation). [...]. Furthermore, it is contemplated that a European Certificate of Succession would need to be issued if the challenges had already been examined in other proceedings [...]. That could be the proceedings for the issuance of a certificate of inheritance under German law, to which Question (b) relates, because, in the German proceedings for the issuance of a certificate of inheritance, challenges are examined and ascertained of the court's own motion.

In order to avoid unacceptable consequences, legal commentators suggest that challenges raised in an abusive manner be disregarded [...]. That is the aim of Question (c). In the present dispute, the challenges have not been raised in an abusive manner, but in such an unsubstantiated manner that no formal taking of evidence is necessary in that regard.

Information with respect to the legal remedies available:

[...]