Solving The Multijurisdictional Jigsaw Puzzle: Which Law Applies?



Increasingly, people and their assets have connections to several jurisdictions, rather than just one as in times past. Over the course of a lifetime, many of us will leave a trail behind us of real estate, bank accounts, investment accounts, retirement savings plans and pensions, as well as beneficiaries and other ties spread out in many different places.

But what happens on death to determine which law will apply? The body of law called the "conflict of laws" creates rules to determine the applicable law to govern succession on death. The rules are complex, sometimes vague, and as well, vary significantly between common law jurisdictions, such as the Canadian provinces and territories (except Quebec), the United States, England and Wales, Australia and New Zealand, and civil law jurisdictions such as Quebec, France, Italy, Japan and most Latin America countries, and many more.

Common law countries resolve succession matters based on a two-pronged approach: a deceased person's "domicile", or the location of the asset, in legal terms called the "situs".

Domicile is an intriguing concept, and in short, it means where a person's permanent home is. Everyone must have a domicile, and we are each born with one by operation of law, which is called a "domicile of origin".

Your domicile of origin never changes, but it can be suspended by acquiring a "domicile of choice", for which two elements must be present: the acquisition of a residence in a new place, and the intention to remain permanently there. Determining intention requires a detailed examination of the facts, and there is no precise formula. So, you can see how this can lead to disputes later on if it is unclear whether a person has changed their domicile or not.

In the two-pronged approach that common law jurisdictions use, the other important concept is location of the asset or "situs". Real estate is straightforward – it is located where the land itself is. For tangible property, like jewelry, furniture and vehicles, the general rule is that it is located where it is found.

For several other categories of assets, including intangible property, such as debts and corporate shares, the rules for situs are more complex.

Under common law rules, the applicable law to determine a succession matter will depend on whether the property is a "movable" or an "immovable". Immovables comprise land and interests in land, such as a lease or life estate. Movables comprise the rest of a deceased's estate, other than real estate, including intangible assets in most cases.

For most succession matters, if the property is a movable, wherever it may be located, its succession will be governed by the deceased's domicile. But if the asset is an immovable, succession will be governed by the place where it is located, or in estate terminology, situate.

For example, if a person dies without a will, who is entitled to their assets on an intestacy will depend on the application of possibly two rules: the deceased's domicile for their movable property and the law of the place where their immovable property is located for their immovable property.

An example based on an actual 2014 case, *Vanston v. Scott ,* is helpful to understand how these rules may apply in practice.

The issue in dispute was which law should apply to determine succession to the deceased's movable property on death. The plaintiff spouse argued it was Saskatchewan, and the defendant's children took the position it was British Columbia.

The children wanted to challenge the will, as the deceased left most of his estate to his second spouse and excluded the children of his first marriage. British Columbia has liberal legislation that can allow a court to vary the terms of a will, including where adult children have not been adequately provided for. The deceased was born in Alberta (his domicile of origin) and died in Kelowna, British Columbia. He practiced medicine in British Columbia for many years and then moved to Saskatchewan for work. He met his second wife soon after his move, who resided in British Columbia. After several years, she moved to Saskatchewan. The deceased lost his job, and spent several months looking for employment throughout Canada. Without locating a new job, he and his wife moved back to British Columbia, sold their condominium in Saskatchewan, placed furniture in storage and moved a large number of personal belongings to a short-term rental property in British Columbia, and registered their car in British Columbia. After arriving in British Columbia, the deceased and his spouse traveled internationally in search of employment, with a view to working outside of Canada. The deceased died soon after their return from his international job search.

The court held that the deceased had abandoned Saskatchewan as his domicile of choice upon leaving the province, but that although he had acquired a residence in British Columbia, he did not have an indefinite intention to live there. Although the deceased had not lived in Alberta for over 25 years, the court we expected—to the surprise of the parties—found his domicile of origin of Alberta had revived, and that he had abandoned his former domicile of choice (Saskatchewan), without yet acquiring a new one.

Civil law jurisdictions have different rules to determine the applicable law, often based on the nationality of the deceased. On August 17, 2015, the European Union passed the *EU Succession Regulation* which applies to all EU member states, except Denmark and Ireland, which opted out. In most cases, a deceased person's "last habitual residence" will determine which country's laws will apply. Again, this is a factual determination that can also certainly give rise to disputes.

When it comes to conflict of laws, and estates and deceased persons which cross borders or have multijurisdictional connections, there is significant complexity and

a lot of uncertainty.

Solving the multijurisdictional jigsaw puzzle is no easy task, and as we see in the above case, can sometimes lead to surprising results.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

by Margaret R. O'Sullivan
O'Sullivan Estate Lawyers LLP