# TAB 19

# The Role and Meaning of Domicile and Situs



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# The Role and Meaning of Domicile and Situs

*Corina S. Weigl**

## Introduction

It is trite to say that the growing mobility of persons and their assets across borders means that more and more clients will face a conflict of laws issue whether they are the testator/testatrix, executor/executrix, a beneficiary of property or a dependant in need of support. The purpose of this paper is to focus on the concepts of domicile and situs in order to provide a review of their respective roles and meaning in the context of a matter that raises a conflict of laws. Given the complexity of conflict of laws, this paper can only be of a summary nature. Suffice it to say that there are far more accomplished authors who have written treatises on the subject.[1]

This paper is divided into four parts. Part I will provide a summary of the manner in which one approaches a matter that involves more than one legally relevant foreign fact connecting it with more than one jurisdiction thereby raising a conflict of laws. Part II will give an overview of the choice of law principles in the context of succession law. Part III will focus on the concept of domicile. Finally, the concept of situs will be considered in Part IV.

## Part I – Overview of Conflict of Laws Analysis

*General*

Castel & Walker provide the following definition:

> "The conflict of laws is that branch of the law of each province or territory, including federal law, which, in a case containing at least one legally relevant foreign element connecting it with more than one legal unit, determines before the courts of which unit this case should be heard and by the law of which unit each pertinent issue should be decided."[2]

The authors go on to summarize the questions that arise in conflict of laws disputes as follows:

> "Does the Canadian court have jurisdiction to hear the dispute?; and, if so, What system of law, domestic or foreign, should the court apply to decide it?; and, Will the Canadian court recognize or enforce a foreign judgment purporting to settle the dispute between the parties?"[3]

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1 See Janet Walker and Founding Author Jean-Gabriel Castel *Castel & Walker Canadian Conflict of Laws,* 6th ed., (Toronto: LexisNexis, 2005) vol. 1 and 2 ("Castel & Walker"); and Sir Lawrence Collins (General editor) *Dicey, Morris and Collins on Conflict of Laws* 14th ed., (London: Sweet & Maxwell, 2006) vol 1, 2 and Supplements..

2 *Ibid*, at 1-4.

3 *Ibid*.

The concepts of domicile and situs, as relevant connecting factors, will be seen to have a role to play in the analysis required to address each of these questions.

*Does the Canadian Court Have Jurisdiction?*

The threshold issue which must be addressed in a matter involving succession is where can the proceedings be brought. In general the following principles emerge from the jurisprudence:

* If an Ontario court issues a Certificate of Appointment of Estate Trustee, it has jurisdiction to determine succession to the property to be administered thereunder. Under the *Estates Act*, an Ontario court has jurisdiction to issue a Certificate in respect of any deceased person.[4] Notwithstanding this broad jurisdiction, Ontario courts exercise discretion in determining which succession matters to hear relying upon the following principles when exercising their discretion.

* If property is situate in Ontario e.g. real property, an Ontario court has jurisdiction.

* If the deceased died domiciled in Ontario, an Ontario court has jurisdiction over all of the deceased's worldwide movables. It is important to note though, that the jurisdiction of the court of the deceased's domicile to decide the succession to movables may not be exclusive; the court of the jurisdiction where the movables are situate may also have jurisdiction. As a result, the stating of this rule should not lead one to assume that another jurisdiction would necessarily enforce the judgment of the Ontario court, for example, as it relates to movables that are situate in that other jurisdiction. Whether this is the case will depend upon the rules related to the recognition and enforcement of judgments in that other jurisdiction. It is beyond the scope of this paper to address this issue. The point to note is that the law of the deceased's domicile may be ineffective and further conflicts may arise where the rules with respect to the recognition and enforcement of foreign judgments in that other jurisdiction differ from the rules relied upon by the Ontario court to assume jurisdiction or to ultimately decide the issue.

*What is the Appropriate Forum?*

At one point in the development of conflict of laws principles, it was considered the right of a plaintiff/applicant to be able to access the jurisdiction of the English courts. The premise for this was the view that the English system of law was considered to be superior to that available in other jurisdictions.[5] Eventually the ability of a plaintiff/applicant to forum shop for a jurisdiction providing unfair advantages, without necessarily any connection to the chosen forum, became restrained. In *Amchem Products*

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[4] See *Estates Act*, R.S.O. 1990, c. E.21, s. 7 (*"Estates Act"*).

[5] Castel and Walker, at 13-1.

*Inc. v. British Columbia (Worker's Compensation Board)*, the Supreme Court of Canada articulated its view that forum shopping is not to be encouraged as follows:[6]

> "If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides.
>
> ...
>
> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others."[7]

*What Factors Will a Court Consider in Deciding the Appropriate Forum?*

The Ontario Court of Appeal in *Muscutt v. Courcelles* recently listed the following factors as being relevant to determining the appropriate forum:[8]

* the location of the majority of the parties,
* the location of key witnesses and evidence,
* contractual provisions that specify applicable law or accord jurisdiction,
* the avoidance of a multiplicity of proceedings,
* the applicable law and its weight in comparison to the factual questions to be decided,
* geographical factors suggesting the natural forum, and
* whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

The list is not exhaustive and the weight to be accorded to the various factors differs depending upon the facts of the case.

The case of *Re Foote*[9] is a recent example of the Alberta court having to first determine whether it was the appropriate forum to determine the issue of where was the deceased

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6 *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)* [1993] S.C.J. No. 34, 102 D.L.R. (4th) 96.

7 *Ibid* at 920 (S.C.R.).

8 [2002] O.J. No. 2128, 213 D.L.R. (4th) 577 (Ont.C.A.) at para 41.

9 2007 ABQB 654. For a summary of this case see Margaret O'Sullivan, *Jurisdiction and Choice of Forum in Succession Matters: Re Foote (Estate of)*, Ontario Bar Association, 2009 Annual Institute

domiciled at the date of his death in the context of a potential dependant's relief application. Without going into the facts, the court considered a variety of factors to determine which of Norfolk Island or Alberta, being the competing forums, was a more appropriate forum:

* the location of the majority of the parties – Alberta favoured;

* the location of key witnesses and evidence – neutral;

* avoidance of a multiplicity of proceedings – Alberta favoured as this was the only proceeding;

* applicable law and its weight – neutral. While there was a substantive difference in the relevant rules related to domicile, the court concluded that those differences were not factors that tipped the balance in favour of one jurisdiction over the other as the matter was balanced;

* geographical factors that would suggest the "natural" forum – Alberta favoured; most relevant parties would be inconvenienced by having to go to Norfolk Island; and

* where the cause of action arose – Alberta favoured. All three Wills were made in Alberta and a claim for dependant's relief would also arise in Alberta.

**Part II – Summary of the Identification of the Legal Issue to be Resolved**

*General*

Once the hurdle of determining the appropriate forum is overcome, it is necessary for a determination of what is the appropriate choice of law rule to apply. In addressing this issue, the forum will apply its own choice of law rules. The goal of this exercise is to determine whose jurisdiction's laws are to apply; the exercise does not have regard to the particulars of the relevant law.

In order to determine the relevant choice of law rule, it is necessary to first ascertain the legal nature of the question or issue that requires consideration. Once the legal nature of the issue is characterized, the court will then consider what is the relevant connecting factor - that is "a fact or element connecting a legal question or issue with a particular legal system."[10] The concepts of domicile and situs are two of the connecting factors used in many of the choice of law rules[11]. As summarized by Castel and Walker:

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February 3, 2009 and Margaret O'Sullivan, *Estate Administration Issues Involving Multi-Jurisdictional Wills* STEP (Toronto Branch) March 11, 2009.

[10] Castel and Walker, at 3-1.

[11] Other connecting factors include the place of making of a contract and the intention of the testator.

> "In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue."[12]

The result is a set of rules that are stated as fundamental propositions. This can be seen by the conflict of laws provisions codified in sections 36 to 41 of the *Succession Law Reform Act*[13]. These sections provide as follows:

> Subsection 36(1) - the essential validity and effect of a will as it relates to immovables (realty) is governed by the internal law of the place where the realty is located.
>
> Subsection 36(2) - the validity and effect of a will as it relates to movables (personalty) is governed by the internal law of the place where the testator was domiciled at the date of his or her death.

It should be apparent that the characterization of the legal issue is a crucial component of the analysis. How the issue is characterized leads to the governing law. Generally the characterization of the legal issue proceeds with little controversy. However, further conflicts can arise where the legal issue at hand can have multiple characterizations, each with their own relevant connecting factor leading to differing governing laws. Castel and Walker provide the following list of those questions or issues that might lead to characterization difficulties and therefore difficulties in determining the governing law:

> "(a) the administration of estates of deceased persons and succession on death respectively;
>
> (b) the capacity to marry, to make a marriage or domestic contract or settlement, to make a commercial contract, to convey property inter vivos, and o succeed to property on death;
>
> (c) the existence of a status distinguished from some incident of that status of the capacity of a person having that status for any of the purposes mentioned in (b);
>
> (d) the formal validity, distinguished from intrinsic validity, of a marriage, a contract, a conveyance or a will;
>
> (e) succession on death distinguished from contract or conveyance inter vivos, or matrimonial property or marriage law;
>
> (f) succession to land, movables or intangibles;
>
> (g) contractual or equitable rights relating to land and interest or property in land;
>
> (h) the distinction between matrimonial property rights and property rights;
>
> (i) the rights and duties of parties to transaction inter vivos as between themselves and as regards third parties;
>
> (j) delictual or contractual liability;

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[12] Castel and Walker, at 3-1.

[13] R.S.O. 1990, c. S.26 (the "*SLRA*").

(k) the distinction between movables and immovables:

(l) substantive law and procedural law."[14]

In addition to characterizing the legal issue, it is necessary to also interpret or characterize the particular connecting factor of the relevant choice of law rule, be it domicile, situs or the place where the contract was signed or the tort committed. Even if the forum and the competing jurisdiction(s) use the same connecting factor eg. both provide that the succession to movables is governed by the domicile of the deceased, each may interpret domicile differently. This is particularly common where the competing jurisdictions are respectively a common law and a civil law jurisdiction.

*What are the Relevant Choice of Law Principles?*

The following is intended to be a general listing of the relevant choice of law principles in the context of succession to property:[15]

(1) In general, succession to movables of a deceased person is governed by the law of his or her last domicile; whereas, succession to immovables of a deceased person is governed by the *lex situs*.

(2) All questions of succession to an intestate's movables are governed by the law of his or her domicile at the time of death and to his or her immovables by the *lex situs*.

(3) The capacity of a testator/ix to make a will of movables is governed by the law of his or her domicile at the time of making the will.

(4) A beneficiary under a will has capacity to receive a legacy if s/he has capacity either by the law of his or her domicile or by the law of the testator/ix's domicile.

(5) With respect to immovables, the *lex situs* governs the capacity to make a will and to take under such a will.

(6) A will of movables is formally valid at common law if its execution complied with the formalities prescribed by the law of the testator/ix's domicile at the time of his or her death. A will of immovables is formally valid at common law if its execution

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[14] Castel and Walker, at 3-6 to 3-12 where numerous examples are given such as:

*Beaudoin v. Trudel* [1937] 1 D.L.R. 216 (Ont.C.A.) where the issue could be characterized as being related to matrimonial property (then Quebec law would apply) or a question of succession (then Ontario law would apply). The choice had significant implications to the extent of the surviving husband's property rights vis a vis his wife who died intestate domiciled in Ontario at the time of her death. Similarly, in *Pouliot v. Cloutier* [1944] 3 D.L.R. 737 (S.C.C.) the relevant connecting factor was either the domicile of the deceased at death because the issue was one of succession to property or the matrimonial domicile because the question related to matrimonial property rights. Again the choice had a significant impact on the surviving spouse's property rights – either limited to $1000 or taking all movables situate in New Hampshire. In *Seifert v. Seifert* (1914), 23 D.L.R. 440 (Ont.S.C.) the statutory provision providing that marriage revokes a will was determined to fall with matrimonial property law and not of testamentary law.

[15] The following summary is taken from Castel and Walker, chapter 27.

complied with the formal requirements of the laws of the *lex situs*. However, reference must be had to the statutory provisions of the SLRA.

(7) The construction of a will is governed by the law intended by the testator.[16] In the absence of an expressed intention or if the intention is ambiguous, in the case of a will of movables, this is the law of the testator's domicile at the time of execution of the will. A will of immovables must be construed according to the law of the testator/ix's domicile at the time of execution of the will, unless there is an indication s/he intended a different law.

(8) The essential validity of a will of movables is governed by the law of the testator's domicile at the time of his or her death. The types of questions governed by essential validity are: is the testator bound to leave something to his spouse or children, whether a give of movables to an attesting witness is valid, whether a gift of movables infringes the rule against perpetuity. The essential validity of a will of immovables is governed by the law of the *lex situs*.

(9) The question of whether marriage revokes a previous will of movables is governed by the law of the testator's domicile at the time of the marriage. A subsequent change of domicile is not relevant. Note this is a question of matrimonial property law and not one of succession.

**Part III – The Role and Meaning of Domicile**

*General*

It should be apparent from the listing of choice of law principles that many rely upon an the concept of domicile, being the personal law applicable to an individual regardless of his or her physical location,[17] as the relevant connecting factor to a particular legal regime. It is to be noted that an individual's domicile within a forum may be the basis for the forum assuming jurisdiction. While it is beyond the scope of this paper to address the following point, domicile of an individual may also be the basis upon which the forum recognizes and enforces the exercise of jurisdiction by a foreign court.

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[16] The reader is cautioned that this is not the case in most civil law jurisdictions where the testator/ix is generally unable to alter the law applicable to their will, with respect both to formal matters and to matters of interpretation. As Jeffrey Talpis notes, "[t]here is no civil law system, other than Switzerland, in which the testator may designate the law applicable to his succession.." see Jeffrey Talpis, "International and Transnational Marital and Estate Planning: A View From the Civil Law (and in Particular Quebec Law)", 10 *Estates and Trusts Journal* (No. 2) (1990-91) pages 89-133 at 108.

[17] This is the case for most common law jurisdictions. It is worth noting that in many countries, an individual's personal law is the law of his or her nationality. Castel and Walker note that this is the case with those mostly of Continental Europe (see p. 4-1).

A preliminary point worth noting is that the common law and civil law concepts of domicile differ. Accordingly, difficulties can arise where a deceased had connections to both common law and civil law jurisdictions. This can have significant implications given the forced heirship principles common to civil law regimes and testators or testatrices who intentionally attempt to avoid the import of those principles. It is beyond the scope of this paper to consider these issues

*What is "Domicile"?*[18]

Domicile refers to an individual's personal law being the individual's fixed place of habitation based upon an intention to make that place their permanent home[19]. As a result, every individual must have a domicile. This differs from an individual's residence which refers to a transient place of dwelling to which the individual may have connections[20]. Although an individual can have more than one place of residence, he/she can only have one domicile at a given point in time[21]. Whether a place is an individual's domicile is therefore a question of mixed fact and law.

The concept of an individual's domicile divides into two types: a person's "domicile of origin", which is received at birth[22], and a person's "domicile of choice", which refers to the place that the person has moved to, with the requisite intention to make that place their permanent home, and is, by definition, acquired after birth. Thus, the domicile of origin arises at birth and continues until a new domicile is acquired, referred to as a domicile of choice.

Domicile of origin is more robust than domicile of change. It is always retained by an individual until a domicile of choice is proven to have been acquired. If a domicile of choice is assumed, the domicile of origin still remains - "behind the scenes" so to speak, waiting to be revived. If a domicile of choice is abandoned, the domicile of origin is revived unless another domicile of choice is assumed.

The following quote from *Crosby v. Thomson*[23] summarizes the principles relating to the determination of a person's domicile:

> "A man may have several residences but he can have only one domicile, and it is clear and beyond controversy that to constitute an acquired domicile two things are requisite, viz., act and intention, factum et animus. These two things cover, first, residence, and

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[18] The following sections on Domicile are taken, in large part, from the chapter on Dependants Support co-authored by Corina S. Weigl and Jon Lancaster in B. Croll and Melanie Yach eds, *Key Developments in Estates and Trusts Law in Ontario 2009* (Canada Law Book, 2009).

[19] See *Re Urquhart Estate* [1990] I.L.R. 1-2637, 74 O.R (2d) 42 at para 12.

[20] Schnurr, Brian A., *The Annotated Estate Statutes,* 2d ed., looseleaf (Toronto: Carswell, 2003) at 5-96.

[21] See *Cartwright v. Hinds* (1883), 3 O.R. 384 (Ont. C.A.).

[22] Domicile of origin of a child will be the domicile of the parent or person with whom the child habitually resides or who has lawful custody of the child upon birth. If this does not result in a clear outcome, then reference will be had to the jurisdiction with which the child is most closely connected which generally leads to the place of the child's birth.

[23] (1926), 53 N.B.R. 135, [1926] 4 D.L.R. 56, 1926 CarswellNB 18 (C.A.).

> then the intention of making it home, which must concur to make the domicile legal. Domicile of choice is the relation which the law creates between an individual and a particular locality or country. It is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. A choice of domicile continues until it is abandoned. It is divested only when the country of domicile has been actually abandoned with the intention of abandoning it forever."

From this quote we can articulate the relevant principles.

First, acquiring a domicile of choice involves two facts: (i) residence in a new country, and (ii) an intention to permanently reside there.[24] Note, "if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile".[25]

A domicile of choice can be abandoned. To abandon a domicile of choice requires the opposite of acquiring a domicile of choice – the individual must cease to reside in the place of his domicile and also no longer have the intention to return to it as his or her permanent home. As Castel and Walker state: "Absence without intention of abandonment is of no effect; nor is intention without any actual change of residence."[26]

Given the principle that an individual must always have a domicile, thereby ensuring they always have a personal law applicable to them, some jurisdictions rely upon the doctrine of revival. This doctrine provides that where a domicile of choice is abandoned, the domicile of origin revives unless some other third domicile of choice is acquired.[27] This principle, however, is not universally accepted. Rather, some jurisdictions direct that a domicile of choice cannot be abandoned until a new domicile of choice is acquired.

In order for an individual to have abandoned his/her domicile of choice, he/she must have both physically left their domicile of choice and no longer have the intention to reside there permanently or, put another way, with the intention not to return there. There is a presumption against a change of domicile. The burden of proving a change of domicile is on the party alleging it and the evidence must be clear and unambiguous. If it is domicile of origin that is suggested to have changed, the burden is more onerous.[28] However, evidence necessary to establish abandonment is less than that required to establish acquisition of a domicile of choice.[29]

According to Castel and Walker, an Ontario court is required to determine the domicile of a person in accordance with its own laws, including its conflict of laws rules.[30] There

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[24] See also *Magurn v. Magurn,* (1883), 3 O.R. 570 (Ont. H.C.) at 579, affirmed in *Haut v. Haut* (1978), 86 D.L.R. (3d) 757 (Ont. H.C.).

[25] See *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307 (U.K. H.L.) at pg. 319.

[26] Castel and Walker, at 4-7.

[27] See *McCallum v. Ryan Estate,* [2002] O.J. No. 1088, 45 E.T.R. (2d) 113, at para. 23.

[28] Castel and Walker, at 4-9 to 4-10.

[29] See *Re Flynn,* [1968] 1 ALL E.R. 49 (Eng. Ch. Div.)

[30] Castel and Walker at p. 4-3.

is a presumption against a change of domicile. The burden of proving any change in domicile is on the person alleging it.[31] The burden is more difficult to discharge where the domicile alleged to be displaced is one of origin as opposed to one of choice.

Based upon the foregoing, some of the issues that a court may have to determine are: Did the deceased person abandon his domicile of origin? Did he/she acquire a domicile of choice? If so, are there any indications that the deceased domicile of choice was abandoned with either the acquisition of a new domicile of choice or the revival of domicile of origin?

As noted, the common law principle of domicile differs from the civil law concept. It is the authors' understanding that according to many civil law jurisdictions, a person's domicile is determined solely by their nationality or citizenship.

*Factors Considered to Determine Domicile*

With respect to showing the requisite intention, it is important to note that direct evidence is often not available. Rather, the court will look at acts, events and circumstances of an individual's life to infer intention. Where there are direct expressions of intention, written or oral, the court will weigh the circumstances in which the expressions occurred (see *Re Foote (Estate of)*). If direct expressions are inconsistent with a course of conduct, they may be given little weight. The ultimate focus of the court is on "the conduct of the individual rather than his or her expression of intention."[32]

Some of the factors considered by common law courts to determine the domicile of an individual or whether there has been a change of domicile include:

(i) the individual's length of presence in a jurisdiction, as compared to length of presence in other jurisdictions;

(ii) location of the individual's family and friends;

(iii) location of items of value "financial or sentimental" to the individual;

(iv) location of business interests;

(v) location of social and business ties of the individual (such as churches, clubs, business associations;

(vi) type of value of the individual's residence in a jurisdiction, especially compared to other jurisdictions;

(vii) whether the individual's residences are owned or rented (owning a residence may indicate more permanence than renting);

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[31] Ibid.

[32] Castel and Walker at p. 4-12.

(viii) the type of area in which the individual's residence is located (a resort area may suggest transitory purposes);

(ix) declarations of residence made by the individual on legal documents such as Wills and deeds;

(x) country of voter registration, driver registration, etc.;

(xi) change of nationality, religion or name;

(xii) marriage to a person who is a native of the country of residence;

(xiii) the education, marriage or settlement in life of children;

(xiv) the purchase, sale or ownership of land or graves; and

(xv) the form and contents of wills or other documents.[33]

*Some Jurisprudence Determining Domicile*

The following are examples of the application of the foregoing principles.

In *Re Urquhart Estate*[34], there were five possible choices for the deceased's domicile: New Zealand, Ontario, Quebec, Florida and New York. The court confirmed that a person's domicile involves both the fact of residence and the intention to stay permanently or indefinitely. To reach a conclusion, the court considered all of the facts presented to them in the form of documentary evidence and the testimony of the deceased's friends and family.

Based upon the evidence, the court found that the deceased did not live nor did he have an intention to stay in either New York or Quebec on a permanent basis at the time of his death. While the deceased resided in Florida when he died, there was no clear evidence that he intended to reside there permanently. The court therefore had to decide between New Zealand, the deceased's domicile of origin and Ottawa, the deceased's potential domicile of choice. On the evidence, the court concluded that Ottawa became the domicile of choice of the deceased and throughout his periods of residency in other places in Canada and the United States, he did not acquire the requisite intention to live in any of those other places indefinitely. Accordingly, the deceased never abandoned his intention to return to Ontario.

In *McCallum v. Ryan Estate*[35] the applicant for support under Part V was the deceased's former spouse on behalf of her daughter. Since their divorce, the deceased had re-married

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[33] Taken from Castel and Walker, at 4-14 to 4-16; and from a list of factors the IRS publishes as being relevant to the determination of whether an individual is subject to the U.S. Estate and Gift tax regime which is based upon domicile within the U.S.

[34] Supra, footnote 18.

[35] 2002 Carswell Ont 1211.

and moved from Ontario, where he was born, to various places in the United States, including Georgia, where he had purchased a home and had held a valid resident visa. However, immediately prior to his death, the deceased divorced his second wife and returned to the home of his parents in Ontario.

The Ontario court concluded that while the deceased had acquired a domicile of choice in Georgia, he abandoned his domicile of choice, thereby reviving his domicile of origin being Ontario. The court was persuaded by the evidence presented of his parents. In particular, that (i) the deceased had stated he had no intention of returning to the United States, (ii) the deceased had opened up an account at a local bank branch in Ontario, and (iii) he had applied for an Ontario health card and for financial assistance from the province pending employment.

## Part IV – The Role and Meaning of Situs

*General*

As can be seen, the relevant choice of law rules applicable to succession law rely upon characterizing property as either movable or immovable. Whether property falls within one category or the other is determined by the laws of the place where the property is situated. The rules apply equally to choses in action and choses in possession. Accordingly, understanding how the situs of property is determined is an important part of the analysis in a matter that raises a conflict of laws.

*What are Immovables?*

As described in Castel and Walker:

> "All estates, interests and charges in or over Canadian land are classified as immovables. This applies to freehold and leasehold interests, to freehold land subject to a trust for sale by remaining unsold, to rent charges, mineral rights and to the interest of a mortgagee."[36]

*What are Movables?*

Castel and Walker continue with the following:

> "Unless classified under the rules stated previously as immovable property, all interests in chattels situated in the common law provinces and territories are classified as movable property; this applies to choses in action as well as choses in possession."[37]

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[36] Castel and Walker at 22-1.

[37] Ibid.

*How is the Situs Determined?*

With respect to choses in possession – corporeal property – the general rule is that its situs is where it is physically located. The rules become somewhat more complex with respect to choses in action. The following is a summary of the relevant principles:[38]

Simple Contract Debts – situate in the place in which the debt is property recoverable by action which is typically the debtor's residence; if this is ambiguous, then the situs is the place where payment would be made in the ordinary course eg. the branch where the account is kept in the case of a debt owed to a bank. It is important to note that while an action on the personal covenant in a mortgage may be a simple action in debt, because the security is land, the most appropriate jurisdiction to bring a claim is where the land is situate.

Specialty Debts (i.e. a sealed instrument) – situate in the place where the instrument is located.

Negotiable Instruments, Bonds and Securities Transferable by Delivery – situate in the place where the instrument or document is located or found at the material time.

Securities Not Transferable by Delivery – "In the context of the modern global securities marketplace, it is often difficult to determine the situs of equity securities held in "no-certificate issued" form as well as "strip bonds" created electronically which are "dematerialized" in the sense that there is no certificate available representing the precise interest of the security or strip bond. More generally, where is the situs of securities held through accounts with Canadian financial investment intermediaries? It is suggested that the place where the central securities depository control account is located could be considered the situs of "dematerialized" securities. In a multi-tiered holding system, the account would be situated at the financial investment intermediary on whose books the interest of the debtor appears. This is the place where the record that determines title is to be found. The place of the intermediary provides a certain, predictable and practical answer to the conflict of laws questions in cross-border collateral transactions. [Emphasis added]"

The foregoing quote was relied upon in the decision in *Re: The Estate of Bessie Bloom, Bernstein v. British Columbia*[39] which is an example of how the historical principles no longer apply in the world of modern investments.

The issue the British Columbia Supreme Court had to address was what is the test to be applied in determining the situs of shares, bonds and debentures for the purpose of assessing probate fees under the *Probate Fee Act* in effect in B.C.

The charging language of sub-section 2(3) provides that a fee at the prescribed rates is payable on the "value of the estate". Section 1 defines "value of the estate" to mean the

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[38] Castel and Walker at 22-3 to 22-5

[39] [2004] B.C.J. No.154, 2004 B.C.S.C. 70.

gross value of the real and personal property of a deceased person ***situated in British Columbia*** that passes to the personal representative.

It is the highlighted text that squarely raised an issue for the Court in applying the traditional conflict of laws rules in respect of the particular assets at issue.

On the facts Bessie Bloom, whose affairs were being managed by the Bank of Nova Scotia Trust Company in Toronto as her Committee, died owning *inter alia* stocks, bonds and debentures that had been purchased by the Trust Company as her Committee and effected through the book entry system maintained by the Canadian Depository for Securities Limited ("CDS") located in Toronto which were held in her committeeship account. No physical certificates for the stocks, bonds and debentures in the name of the deceased were ever registered. The ownership by the deceased was evidenced by electronic entries in the books of the Securities department of the Trust Company and the electronic entries in the books of CDS and any transmission or transfer could only be effected by entries made in those records. Lastly, the transfer agents for all securities but one were located outside of B.C.

Given these facts, are these securities "situated in B.C."? The Crown's position was that the phrase must be interpreted in accordance with the common law in relation to the situs of securities, which must take into account the current industry practices including the indirect, multi-tiered holding system. In this system, you cannot look to physical location of securities certificates. As a result, the common law test should not depend upon the physical location of the certificates. Rather, the situs should be "where the deceased most likely would have gone to conduct the securities transaction."

The Court reviewed in detail the legislative history as well as the provincial taxing jurisdiction and the relevant conflict of law principles. The Court articulated the existing common law test for situs of company shares as being the place where the shares can be dealt with as between the shareholder and the company. This, however, is not possible in the indirect, multi-tiered system as there is no clear place where the shares can be dealt with as between the "owner" and the company.

The Court determined it ought to apply the rules by analogy to this context. Unfortunately the Court could not find a concensus on what the result would be. In the end, the Court was persuaded that the test proposed by Castel and Walker quoted above, was the closest analogy. The result was that the situs of the deceased's securities was in Toronto, being the location of the institution on whose books her interest was recorded and where her personal representative must go to effect the transmission.

As can be seen, the B.C. statutory regime squarely raises the issue of "situs" by the language of its statutory provisions. We do not have a similar problem within the context of the charging sections applicable to determining the quantum of the estate administration tax owing by a deceased person's estate.

Section 1 of the *Estate Administration Tax Act*, 1998[40] defines "value of the estate" to mean:

> "the value which is required to be disclosed under section 32 of the Estates Act (or a predecessor thereof) of all of the property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person."

Section 2 then imposes the tax based upon the "value of the estate".

Section 32 of the *Estates Act*[41] imposes an obligation on the person applying for a grant of probate or administration to "make or cause to be mae and delivered to the registrar a true statement of the total value, verified by the oath or affirmation of the applicant, of all the property that belonged to the deceased at the time of his or her death.

Property For Which Title Depends on Registration – If title to a chose in action (e.g. a share or government stock) depends upon registration then the situs is determined by the place where the register is kept.

**Conclusion**

In summary, the concepts of domicile and situs have such a fundamental role to play in a matter raising a conflict of laws that it is imperative we have an understanding of the general principles applicable thereto. Difficulties may arise when the matter touches both a civil and a common law jurisdiction, or where the matter can be characterized both as relating to succession to property and as relating to matrimonial property, where the relevant connecting factor of domicile at death may differ from the matrimonial domicile thereby leading to differing outcomes. With the connecting factor of situs and the new modes of ownership of property in today's modern investment world, the relevant rules for determining situs have had to develop to continue be relevant.

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[40] S.O. 1998, c. 34, Sched, as amended 2001, c. 23, ss. 86, 87.

[41] R.S.O. 1990, c. E.21, as amended.