UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

STUDY PAPER ON CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

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August 2009

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

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EXECUTIVE SUMMARY

Building upon the preliminary report by Lynn Romeo (Manitoba Justice) which was presented at last year's Conference, this study paper discusses conflict of law issues in the area of succession (both testate and intestate) and in the area of division of matrimonial property upon death. It identifies a number of conflicts issues which appear to be in need of reform. Specifically, the study paper makes the following Recommendations for Consideration:

Recommendation No. 1

Those provinces and territories which have not implemented the choice of law rules contained in the 1966 revisions to the Uniform Wills Act should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada.

Recommendation No. 2

Consideration should be given to amending section 40 of the Uniform Wills Act to include the law of the testator's nationality and habitual residence at the time of death in the list of legal systems which determine the formal validity of a will in respect of moveables.

Recommendation No. 3

Should section 40 of the Uniform Wills Act be amended to include the law of the place where the property is situated in the list of legal systems which determine the formal validity of a will in respect of moveables?

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Recommendation No. 4

Consideration should be given to extending section 40 of the Uniform Wills Act to include wills relating to immoveable property.

Recommendation No. 5

Although many commentators are of the view that the doctrine of renvoi should be abolished, no change to the Uniform Act is necessary to give effect to this recommendation. What is needed is for more provinces to implement the current provisions of the Uniform Act, and in particular, the 1966 revisions.

Recommendation No. 6

Consideration should be given to amending the Uniform Wills Act to include a codification of the common law rules relating to capacity to make a will in respect of moveables, and also immoveables.

Recommendation No. 7

Consideration should be given to amending the Uniform Wills Act to include a provision that the issue of whether a will is revoked by subsequent marriage, or by divorce or separation, is a matter of matrimonial law rather than succession law, and therefore is governed by the law of the testator's domicile at the time of the marriage (or divorce), both in relation to moveable and immoveable property.

Recommendation No. 8

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Despite the fact that the 1989 Hague Convention has not been signed or ratified by any common law jurisdiction, adoption of its underlying principle of a unitary approach to choice of law rules in succession (as recommended by the Manitoba Law Reform Commission) should not be lightly dismissed, and should be part of any continued consideration by a Working Group of reform in this area.

Recommendation No. 9

A. Should legislation be introduced to prevent a surviving spouse from claiming multiple preferred shares on intestacy (i.e., "double dipping")?

B. If so, should this achieved by:

(i) limiting the spouse to the highest available preferred share; or
(ii) adopting a single choice of law rule for intestate succession (such as the deceased's domicile or habitual residence at death), thereby creating only one preferred share; or
(iii) some other approach?

C. If legislation is adopted as per (A), should it also contain provisions to deal with the possible lack of uniformity, along the lines of the New South Wales Succession Amendment (Intestacy) Bill 2009?

Recommendation No. 10

Should intestate succession legislation be amended to include choice of law provisions to determine issues of status, particularly those akin to marriage, such as who is a "common law partner"?

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Recommendation No. 11

Those provinces and territories which have not implemented the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act (1997) should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada in relation to matrimonial property.

Recommendation No. 12

Consideration should be given to including in uniform legislation, provisions which address the issue of how the division of matrimonial property upon death should be characterized for choice of law purposes, to ensure that it is characterized as a matter of matrimonial property law rather than succession law.

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I. INTRODUCTION

1. Background

[1] At last year's Conference a preliminary report was presented from Manitoba Justice entitled *Conflict of Laws in Succession Matters*.[1] It concluded that "there appears to be a patchwork across the country in terms of legislative provisions addressing conflicts", and it identified a need to explore reforms to address this lack of uniformity.

[2] The preliminary report recommended that an expert be engaged to prepare a study paper on conflict of law issues in succession law (both testate and intestate) that would:

1. Provide an overview of conflict provisions in succession legislation in Canadian jurisdictions (and in the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons).

2. Examine the conflict issues relating to different succession legislation and types of property and the effect of conflict provisions/principles on estate rights flowing from certain relationships (e.g. married vs. common-law) and options for addressing those issues.

3. Make recommendations for consideration at the 2009 conference and in time for consideration by Alberta for its legislation.

4. Examine issues that might be of specific interest to Alberta for the purposes of its review.

[3] This Study Paper is the result of that recommendation.

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2. Scope of the Study Paper

[4] In its report on the consolidation of succession statutes, the Alberta Law Reform Institute noted that "currently there are 93 provincial statutes that are entirely or partially relevant to some aspect or another of succession law".[2]

[5] The same problem of scope applies to any review of conflict of law provisions relating to succession. It is probably no exaggeration to suggest that almost every rule and principle in the conflict of laws has the potential to affect (either directly or indirectly) rights of succession, both testate and intestate. Examples include choice of law rules in the area of the validity of a marriage (determining who is a surviving "spouse" or "partner") and the legitimacy of children, as well as those affecting the size of the estate (such as choice of law rules applicable to gifts and contracts, and to tort claims by or against the estate), and also the distinction between substance and procedure (which arises, for example, in the case of the presumption of survivorship).

[6] Obviously, not every conflicts issue of potential relevance to succession laws can be canvassed in this paper. Instead the paper focuses on possible issues for reform of the choice of law rules directly relating to (1) testate succession, (2) intestate succession, and (3) matrimonial property rights upon death. An examination of Dependants' Relief legislation has not been included in the paper (for reasons of brevity).

3. Common Law Choice of Law Rules Applicable to Succession

[7] Canadian law adopts a principle of "scission" in its conflict of law rules for succession. This means that it applies different choice of law rules for moveable and immoveable property. Subject to certain exceptions, succession to moveable property is governed by the law of the deceased's domicile at the time of death, whereas succession to immoveable property is governed by the law of the place where the property is situated (*lex situs*).[3] The *lex situs* determines whether property is moveable or immoveable.[4] These rules apply to both testate and intestate succession.[5]

[8] As is discussed below, this distinction between moveable and immoveable property lies at the heart of many of the problems which are created by choice of law rules in relation to succession.

II. TESTATE SUCCESSION

1. Choice of Law Provisions in the Uniform Wills Act

[9] The Uniform Wills Act contains choice of law provisions dating back to 1929 when the Uniform Act was first adopted.[6] These were revised in 1953,[7] and again in 1966.[8] The 1966 revisions reflect the current choice of law provisions of the Uniform Act, and they are reproduced in their entirety in Appendix A hereto.

[10] All three editions of the Uniform Act share two basic concepts. The first is that they codify the common law choice of rules with respect to testate succession, namely, that the formal and intrinsic validity of a will is governed by the law of the testator's domicile at death (with respect to moveables) and by the *lex situs* (with respect to immoveables).[9]

[11] The second feature of the Uniform Wills Act is that it adopts a policy of upholding the validity of wills whenever possible, so as to give effect to the intention of the testator. This is reflected in the choice of law rules with respect to formal validity. The 1929 Act provided that a will in respect of moveables is formally valid if it complies with the law of the testator's domicile at the time the will was made, or of the place where the will was made, or of the testator's domicile of origin. These were in addition to the (now codified) common law rule of compliance with the testator's domicile at death. Thus, a will in respect of moveables was formally valid if it complied with the formalities of any one of four legal systems: domicile at death, domicile at the time of making the will, domicile of origin, and the place where the will was made.

[12] However, the 1929 version of the Uniform Act drew a distinction between wills made within and outside the province. This distinction was removed by the 1953 revisions, with the result that the four legal systems outlined above with respect to the formal validity of a will of moveables applied regardless of where the will was made.

[13] The 1966 revisions to the Uniform Act gave effect to the provisions of the 1961 Hague Convention on the Formal Validity of Wills and achieved two principal goals. The first was to expand even further the list of legal systems by which a will would be formally valid in respect of moveables (once again reflecting the underlying policy of upholding the validity of wills whenever possible, so as to give effect to the intention of the testator). To the 1953 list were added the law of the place where the testator was habitually resident, or was a national, at the time the will was made. Interestingly, however, the 1966 revisions also reduced the list by eliminating the testator's domicile of origin, because it was felt that individuals often have little or no connection with the place that was their domicile of origin (particularly by the time they make a will), and hence this is no longer an appropriate connecting factor to use for formal validity.[10]

[14] The other main feature of the 1966 revisions to the Uniform Act, once again reflecting the provisions of the 1961 Hague Convention, was that references to "foreign law" were to be interpreted as a reference only to the internal law of the foreign jurisdiction. This relates to the doctrine of "renvoi", and is discussed more fully below under that heading.

2. Choice of Law Provisions in Canadian Legislation

[15] With respect to testate succession, the choice of law provisions in legislation across Canada are remarkable for their lack of uniformity. There is, in colloquial language, a complete "mixed bag" of provisions.

[16] There are roughly four groups, reflecting the extent to which the provinces and territories have (or have not) implemented the Uniform Act, and which version. Some fall into more than one

group. The specific provisions in each province and territory are set out in Appendix B hereto.

[17] The first group comprises provinces which have adopted nothing from the Uniform Act. In this group we find P.E.I., which has no statutory choice of law rules relating to testate succession.
[18] The second (and largest) group comprises provinces and territories which have adopted some or all of the 1953 Uniform Act but have not adopted the 1966 revisions. Hence they do not include habitual residence or nationality in the list of legal systems which govern formal validity of a will in respect of moveables, nor do they refer only to the "internal law" of the foreign jurisdiction. This group comprises (with some differences) Alberta, British Columbia, New Brunswick, the Northwest Territories, Nova Scotia, Nunavut, Saskatchewan, and the Yukon.

[19] The third group comprises provinces which have enacted some or all of the 1966 revisions to the Uniform Act, namely, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Ontario. Some of these provinces have also gone further than the 1966 revisions, in applying the expanded list of legal systems which govern formal validity to wills of immoveables as well as moveables. This issue is discussed more fully below.

[20] The fourth group is comprised of Quebec, which to a large extent is *sui generis*. On the one hand its Civil Code incorporates the common law principle of "scission", whereby succession to moveable property is governed by the law of the deceased's domicile at the time of death and succession to immoveable property is governed by the *lex situs*. It also provides that formal validity is governed by the law of the place where the will was made, or by the testator's domicile when the will was made. However, alone among all Canadian provinces and territories, Quebec adopts some (but not all) of the 1989 Hague Convention on the Law Applicable to Succession (which is discussed more fully below), in allowing testators to choose which law will govern succession to their estate.

[21] Clearly, the statutory choice of law rules in Canada with respect to testate succession display a marked lack of uniformity.

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[22] The one area where there is a large degree of uniformity is in relation to the adoption of the Convention on the Form of an International Will, which has been implemented in most jurisdictions in Canada.[11]

3. The Hague Convention on the Law Applicable to Succession

[23] The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons was adopted on October 20, 1988, and concluded on August 1, 1989.[12] It has been signed by only four countries (Argentina, Luxembourg, Netherlands, and Switzerland) and ratified by only one (Netherlands).

[24] The main feature of the Convention is the adoption of a unitary principle governing succession to moveable and immoveable property. Under Article 3, succession (both testate and intestate) to the deceased's entire estate is governed by the law of the deceased's habitual residence and nationality at death. If these are not the same, then the law of the place where the deceased resided for at least five years prior to death governs, unless the deceased was manifestly more closely connected with the country of his or her nationality. If this cannot be applied (that is, if the deceased had not lived in one country for five years prior to death), then the law of the nationality applies, unless the deceased was more closely connected with another country at the time of death. Special rules apply in determining nationality in multi-state countries.

[25] Another important feature of the Convention is Article 5, which enables individuals to choose which law will govern succession (both testate and intestate) to their estate, but the choice is limited to either the law of the nationality or the habitual residence at the time of the choice or at the time of death. Quebec has adopted this aspect of the Convention, in article 3098 of its Civil Code.

[26] The Convention also contains provisions which are aimed at preventing individuals from choosing a law with a view to depriving their spouse and children from entitlements under dependants' relief legislation.[13]

[27] The Convention has been the subject of much academic criticism. For example, Dr. Peter North (a leading English conflicts scholar) refers to the "complexity and uncertainty" of the hierarchy of choice of law rules in Article 3.[14] He concludes that "as an instrument of reform of choice of law rules in common law jurisdictions the Convention is seriously flawed. Its merits of uniformity of approach to the law to govern moveables and immoveables, and its introduction of party autonomy can be achieved independently and without the major disadvantages of the Convention's complex detailed rules."[15]

[28] As noted above, no Canadian province or territory (with the limited exception of Quebec) has embraced any of the provisions of the 1989 Hague Convention. However, in 2003 the Manitoba Law Reform Commission recommended that there be a single choice of law rule to govern both testate and intestate succession, and that this should be based on the model of the 1989 Hague Convention.[16] On the other hand, the British Columbia Law Institute, in its 2006 Report,[17] did not recommend adoption of the 1989 Hague Convention, apparently because the Convention has not been signed by any common law country.[18]

4. Possible Issues for Reform

(a) Lack of Uniformity

[29] We have seen that the choice of law provisions in the Wills Acts across Canada differ significantly. This, of course, creates the potential for a will to be valid in one province or territory and invalid in another.

[30] However, we have also seen that this lack of uniformity is due primarily to the varying degrees to which Canadian provinces and territories have implemented the choice of law provisions in the Uniform Wills Act, and in particular, its most recent (1966) revisions. Therefore, it is difficult to make recommendations to address this lack of uniformity, except to urge those provinces and

territories which have not yet implemented the 1966 revisions to the Uniform Act to give active consideration to doing so.

[31] This, of course, is not to suggest that improvements could not be made to the current Uniform Act. A number of possible changes will now be discussed.

(b) Changing the List of Connecting Factors in Section 40

(i) Nationality and Habitual Residence

[32] Nationality and habitual residence as connecting factors for determining formal validity of wills with respect to moveables are already contained in the Uniform Act, but only as at the time of making the will and not at the time of the testator's death. This is also true of the legislation in provinces which have adopted one or both of these connecting factors from the Uniform Act.[19]

[33] Should this be amended to include the testator's nationality and habitual residence at the time of death? This was the recommendation of the British Columbia Law Institute,[20] and it was incorporated in British Columbia's *Wills, Estates and Succession Bill* 2008 (which did not advance beyond first reading).[21]

[34] This recommendation is also consistent with the Hague Convention on the Formal Validity of Wills (1961), as well as legislation in other countries such as the United Kingdom[22] and Australia.[23]

[35] The case in favour of this amendment seems especially strong with respect to habitual residence. The Uniform Act uses domicile as a connecting factor both at the time of the will and at the time of death (as alternatives). It is difficult to see why the same policy should not be applied to habitual residence, given the strong parallel between domicile and habitual residence.[24]

(ii) Lex Situs re. Moveables

[36] As we have seen, the Uniform Act and the legislation in almost all Canadian jurisdictions codify the common law rule that formal validity of a will in respect of immoveable property is governed by the law of the place where the property is situated. Neither the Uniform Act nor the legislation across Canada extends this to formal validity in respect of moveable property. However, in its recent report the British Columbia Law Institute recommended this change,[25] and it was included in the 2008 Bill.[26]

[37] This amendment to the Uniform Act would, of course, have the advantage of furthering of the policy of upholding the validity of wills whenever possible. However, it has one disadvantage, namely, that determining the situs of moveable property is not always straightforward, and sometimes extremely complex.[27]

(iii) Formal Validity for Immoveables

[38] The legislation in New Brunswick, Nova Scotia and Ontario applies the expanded connecting factors for formal validity in section 40 of the Uniform Act to immoveable property.[28] Likewise, in the United Kingdom the *Wills Act* draws no distinction between moveables and immoveables with respect to the choice of law provisions which govern the formal validity of a will. This is also consistent with the 1961 Hague Convention.

[39] At the 1966 Uniform Law Conference it was recommended that the expanded list of choice of law rules for formal validity in the Uniform Act be extended to immoveable property, but this was not adopted because of the objections from one province.[29]

[40] In keeping with the philosophy of upholding the validity of wills whenever possible, consideration should be given to extending section 40 of the Uniform Wills Act to include wills

relating to immoveable property.

(c) Renvoi

[41] The preliminary report presented at last year's Conference specifically mentioned the doctrine of renvoi, and referred to the British Columbia Law Institute's recommendation (in 2006)[30] that the doctrine be abolished in cases of succession by legislating that any reference to foreign law should mean a reference to that jurisdiction's internal law and not to its choice of law rules.

[42] Put briefly,[31] the doctrine of renvoi involves the meaning of the word "law" when a court determines that an issue is governed by foreign law. Does this mean only the domestic (internal) law of the foreign jurisdiction, or does it include its choice of law rules as well? If the latter, and the foreign choice of law rules would result in the issue being referred back to the law of the forum (or to a third jurisdiction), how should the local court deal with this? Should that reference back (or to a third jurisdiction) be interpreted as a reference only to domestic law ("single renvoi") or to choice of law rules as well ("double renvoi")?

[43] This brief explanation of the doctrine perhaps underscores its complexity. Although in one case it was stated that the doctrine of renvoi does not apply in Canada,[32] there is Supreme Court of Canada authority which suggests that it may indeed apply, at least in the context of succession.[33]

[44] The BCLI Report referred to the doctrine as "unsettled and confusing".[34] It also pointed out that "If the list of legal systems to which a court can look for a basis on which to uphold the formal validity of a will is simply expanded, there is no longer a need for renvoi".[35]

[45] In keeping with the view of most commentators, the BCLI Report recommended that the doctrine of renvoi be abolished, and this recommendation was implemented in British Columbia's Wills, Estates and Succession Bill 2008 (although the Bill did not advance beyond first reading).

[46] It should be noted, however, that the Uniform Wills Act has already abolished the doctrine of renvoi, by having choice of law rules which refer to the "internal" law of the jurisdiction (hence avoiding renvoi). This was part of the 1966 revisions, and gave effect to the 1961 Hague Convention.

[47] Several provinces and territories have implemented this change; in particular, Manitoba, Newfoundland and Labrador, Ontario, and Quebec.

[48] Thus, to give effect to a recommendation that renvoi be abolished, no change to the Uniform Act is necessary. What is needed is for more provinces to implement the current provisions of the Uniform Act, and in particular, the 1966 revisions.

(d) Capacity

[49] There is one important exception to the common law rule that succession to moveable property is governed by the law of the testator's domicile at the time of death, and that relates to capacity to make a will. Most authors take the view that capacity in respect of moveables is governed by the law of the testator's domicile at the time of making the will rather than at the time of death.[36] The rationale for this is that it is important to know at the time of making the will whether the testator has the capacity to do so.[37] However, capacity to make a will in respect of immoveable property is governed by the *lex situs*.

[50] The Uniform Wills Act did not codify these provisions, nor do they appear in any of the legislation across Canada. The Manitoba Law Reform Commission recommended that they be codified,[38] and there seems to be a good deal of merit to this recommendation. If one of the main purposes of the Wills Act is to codify the common law choice of law rules relating to succession, it seems odd that those relating to capacity should be omitted.

(e) Revocation by Marriage, Divorce and Separation

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[51] Common law jurisdictions uniformly provide that a will is revoked by the subsequent marriage of the testator, and an increasing number of Canadian provinces now provide that a bequest to a spouse is revoked by the subsequent divorce (or separation) of the spouses.[39]

[52] From a conflict of laws perspective, this raises the issue of "characterization". Is revocation by marriage or divorce to be characterized as a matter of succession law (and hence governed by the normal domcile/*lex situs* rules), or is it to be characterized as a matter of matrimonial law and hence governed by the law of the parties' domicile (or habitual residence) at the time of the marriage/divorce/separation?

[53] A simple example illustrates the difference. If a testator makes a will with respect to immoveables which are situated in a jurisdiction where subsequent marriage does not revoke the will, and then marries while domiciled in a jurisdiction which does revoke the will upon marriage, is the will revoked? The answer depends upon how the court characterizes the issue. If it is a succession issue (and hence governed by the *lex situs*) the will is not revoked. If it is a matrimonial rights issue (and hence governed by the law of the domicile at the time of the marriage), the will is revoked.

[54] In the case of a will with respect to moveables, it is reasonably clear that the question of whether a subsequent marriage revokes the will is properly characterized as a matter of matrimonial law (the effect of marriage upon property) and hence governed by the law of the testator's domicile at the time of the marriage.[40] The position is less clear with respect to immoveable property. On the one hand the leading Canadian textbook states that the issue is governed by the *lex situs* (that is, a matter of succession law),[41] but on the other hand there are Canadian cases to the contrary,[42] characterizing the issue as one of matrimonial law governed by the testator's domicile at the time of the marriage.

[55] Similar uncertainty surrounds the characterization of revocation by divorce or separation. The only Canadian case which addresses this issue held that it was a matter of succession law, and

hence (for immoveable property) governed by the *lex situs*.[43]

[56] In its 2003 report the Manitoba Law Reform Commission expressed the view that the law is unclear in this area, and it recommended that the rule should be that revocation by divorce is governed by the law of the testator's domicile at the time of the divorce, and that this choice of law rule (along with the equivalent one relating to revocation by marriage) be codified in the legislation.[44]

[57] There appears to be a good deal of force to the recommendation of the Manitoba Law Reform Commission on this issue.

(f) A Unitary Approach: Abandoning the Lex Situs

[58] As noted above, in 2003 the Manitoba Law Reform Commission recommended that there be a single choice of law rule to govern both testate and intestate succession,[45] and that this should be based on the model of the 1989 Hague Convention. This approach was not adopted in the later report of the British Columbia Law Institute.[46] As is discussed above, the 1989 Hague Convention has been the subject of considerable academic criticism, and has yet to be signed or ratified by any common law jurisdiction. Nonetheless, adoption of its underlying principle of a unitary approach to choice of law rules in succession should not be lightly dismissed, and should be part of any continued consideration by a Working Group of reform in this area.

5. Recommendations

[59] Based upon the above discussion, the following issues are recommended for consideration with respect to choice of law rules relating to testate succession.

Recommendation No. 1

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

Those provinces and territories which have not implemented the choice of law rules contained in the 1966 revisions to the Uniform Wills Act should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada.

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Consideration should be given to amending the Uniform Wills Act to include a codification of the common law rules relating to capacity to make a will in respect of moveables, and also immoveables.

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Consideration should be given to amending the Uniform Wills Act to include a provision that the issue of whether a will is revoked by subsequent marriage, or by divorce or separation, is a matter of matrimonial law rather than succession law, and therefore is governed by the law of the testator's domicile at the time of the marriage (or divorce), both in relation to moveable and immoveable property.

Recommendation No. 8

Despite the fact that the 1989 Hague Convention has not been signed or ratified by any common law jurisdiction, adoption of its underlying principle of a unitary approach to choice of law rules in succession (as recommended by the Manitoba Law Reform Commission) should not be lightly dismissed, and should be part of any continued consideration by a Working Group of reform in this area.

III. INTESTATE SUCCESSION

1. The Spousal Preferred Share

[60] Intestate succession legislation in Canada contains no choice of law provisions, and thus the

common law rules apply. The law of the deceased's domicile at death governs succession to the moveable estate, and the *lex situs* governs succession to the immoveable estate.

[61] This principle of scission in the choice of law rules gives rise to a particular problem with respect to the surviving spouse's preferred share on intestacy. Consider the following example. Tom dies intestate, domiciled in Nova Scotia, owning moveable property worth $200,000 and immoveable property situated in the Northwest Territories worth $50,000. He is survived by his wife (Jane) and one child from a previous marriage. Nova Scotia law provides that Jane is entitled to a preferred share of $50,000 plus one-half of the residue.[47] N.W.T. law is the same.[48] How much is Jane entitled to?

[62] The answer may seem straightforward, since the law in both jurisdictions is the same. Jane gets $50,000 plus one-half of the residue (that is, one-half of $200,000), for a total of $150,000, with Tom's child receiving the remaining $100,000. However, when choice of law rules are applied, the answer becomes much less straightforward. It is open to Jane to argue that she is entitled to two preferred shares, one out of the moveable estate (which is governed by Nova Scotia law) and the other out of the immoveable estate (which is governed by N.W.T. law). The basis of this argument is that each statute must be interpreted as conferring a spousal preferred share out of the part of the estate which is governed by the law of that jurisdiction. If the argument were to succeed, Jane would be entitled to the entire N.W.T. immoveable estate (worth $50,000) plus an additional $50,000 and one-half of the residue from the moveable estate, making a total of $175,000 instead of $150,000.

[63] Although this type of "double dipping" may seem far-fetched, it has met with success on a number of occasions. For example, in an 1898 Ontario case, the surviving spouse was held to be entitled to a preferred share from the Ontario immoveable estate, even though she had already received a preferred share in Illinois where the deceased was domiciled at the time of his death.[49] A similar result is found in an Irish case decided around the same time.[50] Likewise, in the more recent English case of *Re Collens*,[51] the Court held that the deceased's wife was entitled to a preferred share of £5,000 out of the immovable estate situated in England, even though she had already

received approximately $1 million in satisfaction of her claim in Trinidad and Tobago where the deceased was domiciled at his death.

[64] Commenting on the decision in *Re Collens*, Dr. Peter North remarked that "the injustice of the present rules is manifest".[52] This injustice was recognized (and avoided) in two Canadian cases, each of which held that the surviving spouse was not entitled to two preferred shares. In the first decision, *Re Thom Estate*,[53] the deceased died domiciled in Saskatchewan, with both moveable and immoveable property there and also immoveable property in Manitoba. His wife first applied to the Saskatchewan courts and received her preferred share under that law (which, at the time, was $40,000 plus one-third of the residue), and then she applied to the Manitoba courts for payment (out of the Manitoba land) of her preferred under that law (which, at the time, was $50,000 plus one-half of the residue). Justice Oliphant held that the $40,000 preferred share which the wife had already received under Saskatchewan law should be deducted from her $50,000 preferred share under Manitoba law. Hence she was entitled to $10,000 and one-half of the residue from the Manitoba land. In effect, she was awarded the higher of the two preferred shares, rather than both. Justice Oliphant arrived at this result more by reference to principles of fairness than by legal analysis. In his words, "If I accept the widow's position, an equitable distribution of the deceased's estate would not occur in this case. I therefore reject her position."[54]

[65] In an Annotation to the *Re Thom Estate* case Professor Vaughan Black commented that the decision "has the virtue of mitigating one of the more absurd effects of the rule that intestate succession to immoveable property is governed exclusively by the law of the place in which it is situated."[55]

[66] The solution of awarding the surviving spouse the higher of the two preferred shares rather than both was also adopted in the more recent case of *Re Vak Estate*.[56] As in *Thom*, the result was justified simply by reference to the injustice of allowing the surviving spouse to claim both preferred shares, which the trial judge described as "inequitable 'double dipping' on the part of the surviving spouse, which in smaller estates could well result in the children being disentitled to any share of

their deceased parents' estate."[57] However, unlike in *Thom*, where the residue of the Manitoba immoveables devolved in accordance with Manitoba law as the *lex situs*, in *Vak* the Court held that, after payment of the higher of the two preferred shares, the entire estate (both moveable and immoveable, wherever situated) should devolve according to the law of the place where the deceased was habitually resident at her death (Manitoba).

[67] Most commentators[58] agree with the view that it is inequitable to allow the surviving spouse to claim more than one preferred share.[59] Another reason for preventing this is that it is inconsistent with the underlying policy of intestate succession legislation, namely, to give effect to the presumed intention of the average deceased person. It cannot reasonably be presumed that the deceased would have wanted to give the surviving spouse multiple preferred shares. This is particularly true given that the spouse's potential claim is not limited to two preferred shares. For example, if the deceased died domiciled in one province with real property situated in two other provinces, the surviving spouse could potentially claim three preferred shares.

[68] Despite the consensus that claiming multiple preferred shares is inappropriate, there is no guarantee that it can safely be left to courts to deal with the problem, as in the *Thom* and *Vak* cases. As noted above, the courts in these two cases arrived at the result based on what they believed to be fair and equitable rather than on strict legal principle. It is quite possible that later Canadian courts might consider themselves constrained by legal principle and the wording of the statute to allow the claim for multiple preferred shares, even though they felt that this was inequitable, as indeed was the case in the English decision in *Re Collens*. It appears, therefore, that there is a need for legislation to deal with this issue.

[69] There are a number of possible approaches to a legislated solution. One is to adopt the approach in the *Thom* and *Vak* cases and provide that the spouse is entitled only to the highest preferred share provided by the relevant jurisdictions. That was the approach favoured by the New South Wales Law Reform Commission in its recent report on intestacy,[60] and implemented by the Succession Amendment (Intestacy) Bill 2009.[61]

[70] Another possible approach is to abandon entirely the reference to the *lex situs* in cases of intestacy, and to provide that intestate succession to the entire estate, both moveable and immoveable, is governed by the deceased's domicile (or habitual residence) at death. Hence, there would be only one preferred share. Many commentators have criticized the use of the *lex situs* in intestacy. For example, Dr. Morris, one of the pre-eminent conflicts scholars in England, was of the opinion that using the *lex situs* "makes no sense whatever and leads to absurd and anomalous results",[62] and the leading Conflicts textbook in England states that "In modern law it is a quite unnecessary complication to have different conflict rules for intestate succession to moveables and immoveables."[63] Several Canadian authors have also advocated a single choice of law rule for intestate succession,[64] and it was recommended in the recent report of the Manitoba Law Reform Commission (both for intestate and testate succession),[65] based upon the model of the 1989 Hague Convention.

[71] Uniformity on this issue is especially important, because without it the surviving spouse could easily avoid any restrictions against claiming two preferred shares. Take, for example, the situation where the spouse is entitled to a preferred share in two jurisdictions, one of which (Province A) has restrictions on "double dipping" by limiting the claim to the higher of the two preferred shares, and the other (Province B) has no restrictions. The spouse could avoid the restrictions on "double dipping" simply by first making a claim in Province A (thus receiving the full preferred share) and then making another claim in Province B, thereby receiving a second (unreduced) preferred share. Indeed, in this example, if the preferred share in Province B were higher than in Province A, the perverse effect of having restrictions in only Province A would be to place the spouse in an even more advantageous position, by enabling the spouse to claim the higher preferred share twice.

[72] One way to address this problem is seen in section 106(3) of the New South Wales Succession Amendment (Intestacy) Bill 2009, which provides that the spouse's entitlement under the law of the other jurisdiction must first be satisfied (or renounced) before any claim can be made in

New South Wales.

2. Definition of Entitlement to the Preferred Share

[73] Another potential conflict of law issue in intestacy relates to whose law determines entitlement to the preferred share. Traditionally this has been straightforward. Entitlement to a "spousal" preferred share required that there be a valid marriage, and this in turn was determined by the normal choice of law rules relating to marriage: the essential validity of the marriage would be governed by the law of the parties' domicile immediately before the marriage (or, alternatively, their intended matrimonial home), and the formal validity of the marriage would be governed by the law of the place where it was celebrated.

[74] However, many intestate succession statutes across Canada now confer a preferred share entitlement on individuals who are not "spouses",[66] so long as they meet certain criteria set out in the legislation. For example, in Manitoba the preferred share is extended to "common law partners", which is defined in the Act as being a couple who either registered their relationship under the Vital Statistics Act or cohabited in a conjugal relationship for at least three years (or one year of they had a child together).[67] This raises the issue of whose law determines whether the couple are "common law partners".

[75] Take the example of a couple who have cohabited in a conjugal relationship for two years (without children), and whose relationship is, according to the law of the place where they are domiciled and habitually resident, a "common law relationship". One of them dies, leaving immoveable property in Manitoba. Is the surviving partner entitled to a preferred share under Manitoba law? The answer is "no" if we look to Manitoba law (the *lex fori*) to determine who is a "common law partner". But as with the question of who is a spouse, there is a compelling argument that the question of "who is a common law partner" should not be characterized as a question of succession, but rather as a question of status, and hence governed by the individual's domicile (or habitual residence), in which case the deceased's partner in our example would be entitled to a

preferred share under Manitoba law.

[76] This example raises the issue of whether intestate succession legislation should be amended to include choice of law provisions to determine issues of status, particularly those akin to marriage, such as who is a "common law partner".

3. Recommendations

[77] Based upon the above discussion, the following issues are recommended for consideration with respect to choice of law rules relating to intestate succession.

Recommendation No. 9

A. Should legislation be introduced to prevent a surviving spouse from claiming multiple preferred shares on intestacy (i.e., "double dipping")?

B. If so, should this achieved by:

(i) limiting the spouse to the highest available preferred share; or

(ii) adopting a single choice of law rule for intestate succession (such as the deceased's domicile or habitual residence at death), thereby creating only one preferred share; or

(iii) some other approach?

C. If legislation is adopted as per (A), should it also contain provisions to deal with the possible lack of uniformity, along the lines of the New South Wales Succession Amendment (Intestacy) Bill 2009?

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

Recommendation No. 10

Should intestate succession legislation be amended to include choice of law provisions to determine issues of status, particularly those akin to marriage, such as who is a “common law partner”?

IV. MATRIMONIAL PROPERTY AND SUCCESSION

1. The Question of Characterization

[78] An increasing number of jurisdictions in Canada have amended their matrimonial property legislation to provide that the death of one spouse triggers a division of matrimonial property, even if the spouses were living together when one of them died.[68] The philosophy underlying this development is that, regardless of whether a marriage ends by death or divorce, the spouse should have the same rights with respect to the other spouse's property.

[79] The relationship between matrimonial property division on death and the law of succession gives rise to a number of interesting issues. For example, is the spouse entitled to claim a matrimonial property division in addition to rights of succession (testate or intestate), or must the former be set off against the latter? This has yielded a number of different answers across Canada.[69]

[80] This intersection between matrimonial property and succession also gives rise to some potentially very difficult conflicts issues. The complexity is compounded by the lack of uniformity with respect to choice of law rules in matrimonial property legislation in Canada.[70] Although there is a Uniform Act dealing with choice of law issues in matrimonial property proceedings,[71] only some provinces have enacted this. Indeed, in some provinces (such as Alberta, British Columbia, and Saskatchewan), the legislation is entirely silent as to choice of law issues. Accordingly, it is not always clear whose law governs a claim for division of matrimonial property.

[81] Even if it is clear whose law governs, the concept of matrimonial property division upon death raises another important choice of law issue, related to the concept known as "characterization". Characterization is the first step in the choice of law process, whereby the court places the issue before it into a particular juridical category (for example, intestate succession to moveable estate) so as to be able to select the applicable choice of law rule (for example, intestate succession to moveable estate is governed by the law of the deceased's domicile at death). In other

words, the court will ask itself, "what are we dealing with here; is it a succession issue (if so, is it moveables or immoveables), or should it be characterized as involving some other legal category (for example, constructive trust) that would attract a different choice of law rule?".

[82] Sometimes the characterization process requires the court to characterize a particular provision of foreign law upon which one party is relying, in order to determine whether that law is relevant. This is illustrated by the Supreme Court of Canada decision in *Pouliot v. Cloutier*.[72] In that case the deceased died domiciled in Quebec and hence succession to his moveable estate (as well as his immoveable estate, which was situated in Quebec) was governed by Quebec law. However, his widow claimed that she was entitled to the entire estate under a statute in New Hampshire, where the couple was domiciled at the time of their marriage. She argued that the statute gave her rights of community property and was applicable because it was the law of the matrimonial domicile. In rejecting this argument the Supreme Court held that the New Hampshire statute did not deal with matrimonial property rights, but rather should be characterized as dealing with rights akin to dependants' relief legislation, which the Court considered to be part of succession law (restraints on testamentary freedom) , and hence the statute did not apply because succession issues were governed by the law of Quebec and not New Hampshire.

[83] A similar issue is likely to arise with respect to matrimonial property division on death, and depending on how the issue is characterized, the result may well defeat the underlying purpose of the recent amendments to matrimonial property legislation. Take the following example. A man dies domiciled and habitually resident in Ontario, survived by his wife and three children from a previous marriage. In his will he leaves his entire estate to his children. A substantial part of the estate comprises real property situated in Alberta. The children bring proceedings in Alberta claiming entitlement to the Alberta property under the terms of the will. The surviving spouse, however, argues that half of the Alberta property does not form part of the estate, because she is entitled to it as a matrimonial property division under Ontario law which (as the law of the spouses' last common habitual residence) governs rights to matrimonial property.

[84] The outcome of this case would depend on how the court characterized the surviving spouse's entitlement under Ontario law. On the one hand the court might well characterize it as a matrimonial property right (and hence properly governed by Ontario law), and as such it would have priority over claims to the estate under the will because in essence it depletes the estate; the surviving spouse's share of the matrimonial property does not form part of the deceased's estate.

[85] On the other hand, it is possible that the court would look behind the label of "matrimonial property" in the Ontario statute and decide that the provisions of the statute which trigger a matrimonial property division upon death should more properly be characterized as dealing with division of property on death and hence more properly a matter of succession law. The fact that the provisions are found in a statute which purports to deal with matrimonial property is not determinative of its proper characterization. As Professor McLeod has noted,[73] in characterizing a foreign statute "the forum court operates not with reference to the shorthand label, but with reference to the full concept lying behind such label". Thus, it is quite possible that a court might decide that legislation which gives one spouse part of the deceased's property upon death is in substance more a matter of succession law than matrimonial property law (even though it bears the label of "matrimonial property"), because it determines who is entitled to the deceased's property on death. If that were the case, in our example the surviving spouse would have no claim to the Alberta estate, because as a matter of succession law rather than matrimonial property, it would be governed by Alberta law rather than Ontario law.

[86] Given that this issue of characterization might well defeat the underlying intention of the provisions dealing with matrimonial property division upon death, consideration should be given to including in uniform legislation choice of law provisions which would address this issue.

2. Recommendations

[87] Based upon the above discussion, the following issues are recommended for consideration

with respect to choice of law rules relating to the division of matrimonial property upon death.

Recommendation No. 11

Those provinces and territories which have not implemented the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act (1997) should give active consideration to doing so, in order to avoid the significant problem of lack of uniformity which presently exists across Canada in relation to matrimonial property.

Recommendation No. 12

Consideration should be given to including in uniform legislation, provisions which address the issue of how the division of matrimonial property upon death should be characterized for choice of law purposes, to ensure that it is characterized as a matter of matrimonial property law rather than succession law.

V. ISSUES OF SPECIFIC CONCERN TO ALBERTA

[88] As noted above, one of the recommendations of last year's preliminary report was for the study paper to identify issues of particular concern to Alberta in its review of the legislation in this area.

[89] All of the recommendations contained in this paper are relevant to Alberta.

[90] Two recommendations (numbers 1 and 11) are of particular relevance, because Alberta is one of the provinces which (a) has not implemented the 1966 revisions to the Uniform Wills Act, and (b) does not have choice of law rules in its matrimonial property legislation.

UNIFORM LAW CONFERENCE OF CANADA

APPENDIX A

UNIFORM WILLS ACT
PART II - CONFLICT OF LAWS (revised 1966)

37 In this Part,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land;

(c) "internal law" in relation to any place excludes the choice of law rules of that place.

38 This Part applies to a will made either in or out of this Province.

39(1) The manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his death.

40(1) As regards the manner and formalities of making a will of an interest in movables, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where,

(a) the will was made; or
(b) the testator was then domiciled; or
(c) the testator then had his habitual residence; or
(d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

(2) Without prejudice to subsection (1), as regards the manner and formalities of making a will of an interest in movables, the following are properly made:

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be

taken to have been most closely connected;

(b) a will so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made;

(c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

41 A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

42 Nothing in this Part precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

43 Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing under a will is governed by the law that governs succession to the interest in the land.

44(1) Where, whether in pursuance of this Part or not, a law in force outside this Province is to be applied in relation to a will, any requirement of that law that

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the making of a will are to possess certain qualifications,

shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

(2) In determining for the purposes of this Part whether or not the making of a will conforms to a particular law, regard shall be had to the formal requirements of that law at the time the will was made but this shall not prevent account being taken of an alteration of law affecting wills made at that time if the alteration enables the will to be treated as properly made.

UNIFORM LAW CONFERENCE OF CANADA

APPENDIX B

CONFLICT OF LAW PROVISIONS IN TESTATE SUCCESSION LEGISLATION IN CANADA

ALBERTA

Wills Act, R.S.A. 2000, c. W-12, ss. 39-43

39(1) In this Part,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

(2) Subject to this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is situated.

(3) Subject to this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of the testator's death.

40 As regards the manner and formalities of making a will, so far as it relates to an interest in movables, a will made either within or outside Alberta is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made,

(b) the testator was domiciled when the will was made, or

(c) the testator had the testator's domicile of origin.

41 A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

42 Nothing in this Part precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

43 When the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is situated.

BRITISH COLUMBIA

Wills Act, R.S.B.C. 1996, c. 489, SS. 39-43

39 (1) In this Part:

"an interest in land" includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

"an interest in movables" includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is located.

(3) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of his or her death.

40 In so far as the manner and formalities of making a will are concerned, a will, so far as it relates to an interest in movables, made outside British Columbia is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made,

(b) the testator was domiciled when the will was made, or

(c) the testator had his or her domicile of origin.

41 A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

42 Nothing in this Part precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an

interest in movables.

43 If the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is located.

MANITOBA

Wills Act, C.C.S.M. c. W150, ss. 39-46

39 In this Part,

"interest in land" includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property; ("intérêt foncier")

"interest in movables" includes an interest in tangible or intangible things other than land, and includes personal property other than an estate or interest in land; and ("intérêt mobilier")

"internal law" in relation to any place excludes the choice of law rules of that place. ("droit interne")

40 This Part applies to a will made either in or out of this province.

41(1) The manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of the death of the testator.

42(1) As regards the manner and formalities of making a will of an interest in movables, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place

(a) where the will was made; or

(b) where the testator was domiciled at that time; or

(c) of the testator's habitual residence at that time; or

(d) where the testator was a national at that time if there was in that place one body of law governing the wills of nationals.

(2) Without prejudice to subsection (1), as regards the manner and formality of making a will of an interest in movables, the following are properly made:

(a) A will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected.

(b) A will so far as it revokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made.

(c) A will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

43 A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

44 Nothing in this Part precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

45 Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing under a will is governed by the law that governs succession to the interest in the land.

46(1) Where, whether in pursuance of this Part or not, a law in force outside this Province is to be applied in relation to a will, any requirement of that law that

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the making of a will are to possess certain qualifications;

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shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

(2) In determining for the purposes of this Part whether or not the making of a will conforms to a particular law, regard shall be had to the formal requirements of that law at the time the will was made but this shall not prevent account being taken of an alteration of law affecting wills made at that time if the alteration enables the will to be treated as properly made.

NEW BRUNSWICK

Wills Act, R.S.N.B. 1973, c. W-9, ss. 36-40 [am. 1997, c. 7]

36(1) In this Part

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land

(2) Subject to other provisions of this Part, the intrinsic validity and effect of a will, so far it relates to an interest in land, are governed by the law of the place where the land is situated.

(3) Subject to other provisions of this Part, the intrinsic validity and effect of a will, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of the testator's death.

37 As regards the manner and formalities of making a will, a will made either within or without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made,

(b) the testator was domiciled or had his or her habitual residence when the will was made, or

(c) the testator had his or her domicile of origin.

38 A change of domicile or in the habitual residence of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

39 Nothing in this Part precludes resort to the law of the place where the testator was domiciled or had his or her habitual residence at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

40 Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is situated.

NEWFOUNDLAND AND LABRADOR

Wills Act, R.S.N.L. 1990, c. W-10, ss. 21-28 [am. 2004, c. 3.1]

21 In this Part

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and another estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land and includes personal property other than an estate or interest in land; and

(c) "internal law" in relation to a place excludes the choice of law rules of that place.

21.1 This Act shall be read and applied in conjunction with the Labrador Inuit Land Claims Agreement Act and, where a provision of this Act is inconsistent or conflicts with a provision, term or condition of the Labrador Inuit Land Claims Agreement Act, the provision, term or condition of the Labrador Inuit Land Claims Agreement Act shall have precedence over the provision of this Act.

22 This Part applies to a will made either in or out of this province.

23(1) The manner and formalities of making a will and its intrinsic validity and effect, where it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) The manner and formalities of making a will, and its intrinsic validity and effect, where it relates to an interest in movables, are governed by the internal law of the place where the testator was living at the time of death.

24(1) As regards the manner and formalities of making a will of an interest in movables, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where

(a) the will was made;

(b) the testator was then living;

(c) the testator then had his or her habitual residence; or

(d) the testator then was a national if there was in that place 1 body of law governing the wills of nationals.

(2) As regards the manner and formality of making a will of an interest in movables, the following are properly made

(a) a will made on board a vessel or aircraft, where the making of the will conformed to the internal law in force in the place with which having regard to its registration and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will where it revokes a will that under this Part would be treated as properly made or revokes a provision that under this Part would be treated as comprised in a properly made will, if the making of the later will conformed to a law by reference to which the revoked will or provision would be treated as properly made; and

(c) a will where it exercised a power of appointment, where the making of the will conforms to the law governing the essential validity of the power.

25 A change of residence of the testator occurring after a will is made does not make it invalid as regards the manner and formalities of its making or alter its construction.

26 Nothing in this Part precludes resort to the law of the place where the testator was living at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

27 Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing under a will is governed by the law that governs succession to the interest in the land.

28(1) Where a law in force outside this province is to be applied in relation to a will, a requirement of that law that

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the making of a will are to possess certain qualifications,

shall be treated, notwithstanding a rule of that law to the contrary, as a formal requirement only.

(2) In determining the purposes of this Part whether or not the making of a will conforms to a particular law, regard shall be had to the formal requirement of that law at the time the will was made but this does not prevent account being taken of an alteration of law affecting wills made at that time where the alteration enables the will to be treated as properly made.

NORTHWEST TERRITORIES

Wills Act, R.S.N.W.T. 1988, c. W-5, ss. 25-27

25 The manner of making, the validity and the effect of a will, so far as it relates to immovable property, is governed by the law of the place where the property is situate.

26(1) Subject to subsections (2) and (3), the manner of making, the validity and the effect of a will, so far as it relates to movable property, is governed by the law of the place where the testator was domiciled at the time of his or her death.

(2) A will made in the Territories, whatever was the domicile of the testator at the time of the making of the will or at the time of his or her death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate under the laws in force in the Territories if it is made in accordance with this Act or in accordance with the law, in force at the time of the making of the will,

(a) of the place where the testator was domiciled when the will was made; or

(b) of the place where the testator had his or her domicile or origin.

(3) A will made outside the Territories, whatever was the domicile of the testator at the time of making the will or at the time of his or her death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate under the laws in force in the Territories if it is made in accordance with this Act or in accordance with the law, in force at the time of the making of the will,

(a) of the place where the testator was domiciled when the will was made;

(b) of the place where the will was made; or

(c) of the place where the testator had his or her domicile or origin.

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27 A subsequent change of domicile of a person who has made a will shall not, in itself, effect revocation of a will or invalidate it or alter its construction.

NOVA SCOTIA

Wills Act, R.S.N.S. 1989, c. 505, ss. 15-16
[am. 2006, c. 49; proclaimed in force August 19, 2008]

15 As regards the manner and formalities of making a will, a will made either within or without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where

(a) the will was made;

(b) the testator was domiciled or had his or her habitual residence when the will was made; or

(c) the testator had his or her domicile of origin.

16 No will shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

NUNAVUT

Wills Act, R.S.N.W.T. 1988, c. W-5, ss. 25-27, as duplicated and deemed to be the law of Nunavut by the *Nunavut Act*, S.C. 1993, c. 28, s. 29

25 The manner of making, the validity and the effect of a will, so far as it relates to immovable property, is governed by the law of the place where the property is situate.

26(1) Subject to subsections (2) and (3), the manner of making, the validity and the effect of a will, so far as it relates to movable property, is governed by the law of the place where the testator was domiciled at the time of his or her death.

(2) A will made in the Territories, whatever was the domicile of the testator at the time of the making of the will or at the time of his or her death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate under the laws in force in the Territories if it is made in accordance with this Act or in accordance with the law, in force at the time of the making of the will,

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

(a) of the place where the testator was domiciled when the will was made; or

(b) of the place where the testator had his or her domicile or origin.

(3) A will made outside the Territories, whatever was the domicile of the testator at the time of making the will or at the time of his or her death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate under the laws in force in the Territories if it is made in accordance with this Act or in accordance with the law, in force at the time of the making of the will,

(a) of the place where the testator was domiciled when the will was made;

(b) of the place where the will was made; or

(c) of the place where the testator had his or her domicile or origin.

27 A subsequent change of domicile of a person who has made a will shall not, in itself, effect revocation of a will or invalidate it or alter its construction.

ONTARIO

Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 34-41

34 In sections 36 to 41,

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land;

(c) "internal law" in relation to any place excludes the choice of law rules of that place.

35 Sections 36 to 41 apply to a will made either in or out of Ontario.

36(1) The manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its

essential validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his or her death.

37(1) As regards the manner and formalities of making a will of an interest in movables or in land, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where,

(a) the will was made;

(b) the testator was then domiciled;

(c) the testator then had his or her habitual residence; or

(d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

(2) As regards the manner and formalities of making a will of an interest in movables or in land, the following are properly made,

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it revokes a will which under sections 34 to 42 would be treated as properly made or revokes a provision which under those sections would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made; and

(c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

38 A change of domicile of the testator occurring after a will is made does not render it invalid as regards the manner and formalities of its making or alter its construction.

39 Nothing in sections 34 to 42 precludes resort to the law of the place where the testator was domiciled at the time of making a will in aid of its construction as regards an interest in land or an interest in movables.

40 Where the value of a thing that is movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing under a will is governed by the law that governs succession to the interest in the land.

CONFLICT OF LAW ISSUES IN SUCCESSION MATTERS

41(1) Where, whether under sections 34 to 42 or not, a law in force outside Ontario is to be applied in relation to a will, any requirement of that law that,

(a) special formalities are to be observed by testators answering a particular description; or

(b) witnesses to the making of a will are to possess certain qualifications,

shall be treated, despite any rule of that law to the contrary, as a formal requirement only.

(2) In determining for the purposes of sections 34 to 40 whether or not the making of a will conforms to a particular law, regard shall be had to the formal requirements of that law at the time the will was made, but account shall be taken of an alteration of law affecting wills made at that time if the alteration enables the will to be treated as properly made.

PRINCE EDWARD ISLAND

Probate Act, R.S.P.E.I. 1988, c. P-21

No conflict of laws provisions (except with respect to implementing the Convention Providing a Uniform Law on the Form of an International Will).

QUEBEC

Civil Code of Québec, S.Q. 1991, c. 64, articles 3080, 3098-3099 [am. 2002, c. 6, s. 65], 3109

3080 Where, under the provisions of this Book, the law of a foreign country applies, the law in question is the internal law of that country, but not its rules governing conflict of laws.

3098 Succession to movable property is governed by the law of the last domicile of the deceased; succession to immovable property is governed by the law of the place where the property is situated.

However, a person may designate, in a will, the law applicable to his succession, provided it is the law of the country of his nationality or of his domicile at the time of the designation or of his death or that of the place where an immovable owned by him is situated, but only with regard to that immovable.

3099 The designation of a law applicable to the succession is without effect to the extent that the

law designated deprives the married or civil union spouse or a child of the deceased, to a large degree, of a right of succession to which, but for such designation, he or she would have been entitled.

In addition, the designation has no effect to the extent that it affects special rules of inheritance to which certain categories of property are subject under the law of the country in which they are situated because of their economic, family or social destination.

3109 The form of a juridical act is governed by the law of the place where it is made.

A juridical act is nevertheless valid if it is made in the form prescribed by the law applicable to the content of the act, by the law of the place where the property which is the object of the act is situated when it is made or by the law of the domicile of one of the parties when the act is made.

A testamentary disposition may be made in the form prescribed by the law of the domicile or nationality of the testator either at the time of the disposition or at the time of his death.

SASKATCHEWAN

Wills Act, S.S. 1996, c. W-14.1, ss. 38-40 [am. 2001, c. 51]

38(1) In this section and sections 39 and 40:

(a) "immovable property" includes real property and a leasehold or other interest in land; ("biens immeubles")

(b) "movable property" includes personal property other than a leasehold or other interest in land. ("biens meubles")

(2) The manner of making, the validity of and the effect of a will, with respect to immovable property, are governed by the law of the place where the property is situated.

(3) Subject to sections 39 and 40, the manner of making, the validity of and the effect of a will, with respect to movable property, are governed by the law of the place where the testator was domiciled at the time of his or her death.

39(1) A will made in Saskatchewan, regardless of the domicile of the testator at the time of the making of the will or at the time of his or her death, with respect to movable property, is properly made and admissible to probate if it is made in accordance with this Act or if it is made in accordance with the law in force at the time of the making of it of the place where:

(a) the testator was domiciled when the will was made; or

(b) the testator had his or her domicile of origin.

(2) A will made outside Saskatchewan, regardless of the domicile of the testator at the time of the making of the will or at the time of his or her death, with respect to movable property, is properly made and admissible to probate if it is made in accordance with this Act or if it is made in accordance with the law in force at the time of the making of it of the place where:

(a) the testator was domiciled when the will was made;

(b) the will was made; or

(c) the testator had his or her domicile of origin.

40 No will is revoked or becomes invalid and the construction of a will is not altered by reason of any subsequent change of domicile of the person making the will.

YUKON

Wills Act, R.S.Y. 2002, c. 230, ss. 24-26

24 The manner of making, the validity, and the effect of a will, so far as it relates to immovable property, is governed by the law of the place where the property is situate.

25(1) Subject to subsections (2) and (3), the manner of making, the validity, and the effect of a will, so far as it relates to movable property, is governed by the law of the place where the testator was domiciled at the time of the testator's death.

(2) A will made in the Yukon, whatever was the domicile of the testator at the time of the making of the will or at the time of the testator's death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate under the laws in force in the Yukon if it is made in accordance with this Act or in accordance with the law, in force at the time of the making thereof,

(a) of the place where the testator was domiciled when the will was made; or

(b) of the place where the testator had their domicile of origin.

(3) A will made outside the Yukon, whatever was the domicile of the testator at the time of making the will or at the time of their death, shall, so far as it relates to movable property, be

held to be well made and be admissible to probate under the laws in force in the Yukon if it is made in accordance with this Act or in accordance with the law, in force at the time of the making thereof,

(a) of the place where the testator was domiciled when the will was made;

(b) of the place where the will was made; or

(c) of the place where the testator had their domicile of origin.

26 A subsequent change of domicile of a person who has made a will shall not, in itself, effect revocation of a will or invalidate it or alter its interpretation.

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[1] Lynn Romeo, *Conflict of Laws in Succession Matters* (ULCC, August 2008).

[2] Alberta Law Reform Institute, *Report on a Succession Consolidation Statute* (Report No. 87, 2002) at para. 8.

[3] J.-G. Castel & J. Walker, *Canadian Conflict of Laws* (looseleaf 6th ed., 2005), vol. 2 at para. 27.2a.

[4] *Ibid.* at para. 22.1a.

[5] *Ibid.* at para. 27.3.

[6] Proceedings of the 12th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Quebec, 1929) at 46-47.

[7] Proceedings of the 35th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Quebec, 1953) at 51-52.

[8] Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Minaki, 1966) at 138-140.

[9] This is reflected in the current version of the Uniform Act, s. 39. See Appendix A hereto.

[10] For a discussion of the reasons for this removal see Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Minaki, 1966) at 132-133.

[11] See Report of the Department of Justice Canada, *Activities and Priorities of the Department of Justice in International Private Law* (ULCC, 2008) at paras. 185-187.

[12] For a detailed discussion of the Convention see Castel & Walker, note 3 above, para. 27.6; P.M. North, *Private International Law Problems in Common Law Jurisdictions* (1993) at 202-205.

[13] See, for example, Article 24.

[14] North, note 12 above, at 205.

[15] *Ibid*.

[16] Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report No. 108, 2003) at 43-44.

[17] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (Report No. 45, 2006).

[18] See Romeo, note 1 above, at para. 7.

[19] Manitoba Act, ss. 42(1)(c) and (d); New Brunswick Act, s. 37(b); Newfoundland Act, ss. 24(1)(c) and (d); Nova Scotia Act, s. 15(b); Ontario Act, ss. 37(1)(c) and (d). See Appendix B hereto.

[20] Note 17 above.

[21] Bill 28, paras. 80(1)(c) and (d). The Bill used the term "ordinary residence" rather than "habitual residence".

[22] *Wills Act* 1963, c. 44, s. 1.

[23] See, for example, New South Wales *Succession Act* 2006, ss. 48(1)(b) and (c).

[24] Indeed in some jurisdictions the two are equated - see, for example, *The Domicile and Habitual Residence Act*, C.C.S.M. c. D96.

[25] Note 17 above.

[26] Wills, Estates and Succession Bill 2008, Bill No. 28, para. 80(1)(f).

[27] See generally Castel & Walker, note 3 above, chpt. 22.

[28] See the discussion of this issue in the Nova Scotia Law Reform Commission Report, *Reform of the Nova Scotia Wills Act* (2003) at 35-37.

[29] Proceedings of the 48th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Minaki, 1966) at 133.

[30] Note 17 above, at 51-52.

[31] For a detailed discussion see Castel & Walker, note 3 above, chpt. 5.

[32] *Re Thom Estate* (1987), 40 D.L.R. (4th) 184 at para. 31 (Man. Q.B.).

[33] *Ross v. Ross* (1894), 25 S.C.R. 307. Renvoi does not apply in Quebec - see Quebec Civil Code, article 3080.

[34] Note 17 above, at 52.

[35] *Ibid*. However, this reasoning would not apply to essential validity.

[36] See, for example, Castel & Walker, note 3 above, at para. 27.4a; *Dicey, Morris & Collins on the Conflicts of Laws* (14th ed, 2006), Rule 142; J.G. McLeod, *The Conflict of Laws* (1983) at 415-416.

[37] See, for example, North, note 12 above, at 199.

[38] Note 16 above.

[39] See generally the discussion in Alberta Law Reform Institute, *Effect of Divorce on Wills* (Report No. 72, 1994).

[40] See, for example, *Allison Estate v. Allison*, [1999] 3 W.W.R. 438 (B.C.S.C.); *Seifert v. Seifert* (1914), 23 D.L.R. 440 (Ont. S.C.).

[41] Castel & Walker, note 3 above, at para. 27.4i.

[42] *Davies v. Davies* (1915), 24 D.L.R. 737 (Alta. S.C.); *Re Covone Estate* (1989), 36 E.T.R. 114 (B.C.S.C. Master).

[43] *Page Estate v. Sachs* (1990), 72 O.R. (2d) 409 (S.C.), *aff'd on other grounds* (1993), 12 O.R. (3d) 371 (C.A.).

[44] Note 16 above, at 46.

[45] Note 16 above.

[46] Note 17 above.

[47] *Intestate Succession Act*, R.S.N.S. 1989, c. 236, s. 4.

[48] *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 2.

[49] *Sinclair v. Brown* (1898), 29 O.R. 370 (H.C.).

[50] *Re Rea*, [1902] 1 I.R. 451.

[51] [1986] Ch. 505.

[52] North, note 12 above, at 201.

[53] (1987), 40 D.L.R. (4th) 184 (Man. Q.B.).

[54] *Ibid*., para. 30.

[55] Black, "Annotation to Re Thom" (1987) 27 E.T.R. 185 at 185.

[56] (1994), 117 D.L.R. (4th) 122 (Ont. Gen. Div.).

[57] *Ibid*., para. 43.

[58] See, for example, Baer et al., *Private International Law in Common Law Canada: Cases, Text, and*

Materials (1997) at 702; Dicey, Morris & Collins, note 36 above, vol. 2, at para. 27-020; Black, note 55 above; North, note 12 above, at 201.

[59] Some might argue that, in the example used above, it is not inequitable to give the surviving spouse $175,000 rather than $150,000, where the estate is worth only $250,000. However, this is more a question of the fairness of the size of the preferred share rather than the question of double dipping.

[60] New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No. 116, 2007).

[61] Succession Amendment (Intestacy) Bill 2009 (New South Wales), para. 106(3).

[62] Morris, "Intestate Succession to Land in the Conflict of Laws" (1969) 85 L.Q.R. 339.

[63] Dicey, Morris & Collins, note 36 above, at para. 27-016.

[64] See, for example, Black, note 55 above; McLeod, note 36 above, at 414-415.

[65] Note 16 above, at 66-69.

[66] Some also purport to regulate the definition of "spouse". See, for example, the *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 1(1) [am. 1998, c. 17, s. 16], which purports to limit the definition of "spouse" so as to exclude same sex marriage. This is probably of no effect, because the validity of a same sex marriage not a matter for the *lex fori* but rather an issue of essential validity of the marriage (who can I marry?), and thus governed by the law of the parties' domicile or intended matrimonial home. Nor can it be said that a same sex marriage offends the fundamental public policy of the forum, in light of recent Supreme Court of Canada jurisprudence.

[67] *Intestate Succession Act*, C.C.S.M. c. I85, s. 1(1).

[68] See the detailed discussion in Alberta Law Reform Institute, *Division of Matrimonial Property on Death* (Report No. 83, 2000).

[69] See *ibid*., chpt. 5.

[70] See generally Castel & Walker, note 3 above, chpt. 25.

[71] Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act (1997).

[72] [1944] S.C.R. 284.

[73] Note 36 above, at 205.