

LITIGATING ESTATE DISPUTES WITH MULTI-JURISDICTIONAL ASSETS

by Angela Casey¹

In today's increasingly cosmopolitan world, it is not unusual for someone to own property in more than one jurisdiction. When a dispute arises with respect to the estate of a deceased with assets in multiple jurisdictions, there are several distinct but related issues that the estate litigator must consider. First, one must consider which jurisdiction's laws will govern the dispute. Second, an Ontario litigator will need to determine whether Ontario has jurisdiction to determine the dispute. If there is more than one possible jurisdiction, thought should be given to whether the chosen forum is could withstand a *forum non conveniens* challenge, (ie a jurisdictional challenge based on an assertion that there is another clearly more appropriate forum for the dispute.) The third and final issue is whether a judgment in one jurisdiction will be enforceable in another jurisdiction.

Conflict of law questions in regards to wills and estates are not a recent phenomenon - the United Kingdom's *Wills Act* of 1861 first introduced laws dealing with this issue. Ontario's *Succession Law Reform Act*² ("SLRA") provides the modern rules that deal with conflict of laws issues in estates law. The conflict of laws rules in sections 25 through 41 of the SLRA are applicable irrespective of whether the will was made inside or outside of Ontario.³

¹ Partner, de VRIES LITIGATION. The author gratefully acknowledges the research assistance provided by articling student Michael Rosen.

² *Succession Law Reform Act*, R.S.O. 1990, c. S. 26

³ SLRA, s. 35

GOVERNING LAW

Movables versus Immovables

The SLRA conflict rules distinguish between movables (personal property such as bank accounts) and immovables (land, or an interest in land). With respect to the “manner and formalities of making a will, and its essential validity and effect”, the governing law depends on the type of asset. For immovable assets such as a house or a cottage, the governing law is the law of the jurisdiction where the land is situated (*the lex situs*). For worldwide movable assets, the governing law is that of the jurisdiction where the deceased was domiciled as of the date of death. Consequently, if the deceased died domiciled in Ontario, the Ontario court would have jurisdiction over all of the deceased’s worldwide movables.⁴This basic principle has been repeatedly applied by Canadian courts.⁵

A foreign-made will is valid and admissible to probate if it complies with the internal laws of the place where (a) the will was made, (b) the testator was domiciled or made a habitual residence when (s)he made the will, or (c) the testator was then a national if there was in that place one body of law governing the wills of nationals⁶. For example, a will drafted by a Florida lawyer and executed in Florida may be admitted to probate so long as the will complied with the laws respecting validity in Florida.

If the deceased died domiciled in Ontario, the disposition of the deceased’s worldwide *movable* assets will be governed by Ontario law. However, even if domiciled in Ontario, the

⁴ Margaret O’Sullivan, “Jurisdiction and Choice of Forum in Succession Matters: Re: Foote (Estate of)” OBA 2009 Institute, p. 2.

⁵ E.g., *Jewish National Fund v. Royal Trust Co.* (1966), 53 D.L.R. (2d) 577 (S.C.C.); *Senkiw v. Muzyka* (1967), 65 D.L.R. (2d) 622 (Sask. Q.B.); affirmed (1969), 68 W.W.R. 515 (Sask. C.A.); affirmed (1970), 72 W.W.R. 314 (S.C.C.)

⁶ SLRA, s.37

deceased's *immovable* property will be governed by the law of the jurisdiction where the property is located. In other words, if an Ontario testator's gift of land is impermissible under the laws of the jurisdiction where the land is situated, the testamentary disposition may not be effective.

A stark example of such a failed testamentary gift occurred in *Granot v. Hersen*.⁷ The deceased, Henry Hersen, had executed a will in Ontario, and remained domiciled in Ontario at his death. He was a dual citizen of Canada and Switzerland. His entire estate, valued at approximately \$4.5 million (according to the Court of Appeal decision), was located in Ontario, except for a condominium property in Geneva, Switzerland, worth approximately \$600,000 Canadian. Henry was survived by his daughter Lillian, his son, Roland, and two grandchildren from a third son, Norbert (who had predeceased Henry).

Henry made specific gifts to Lillian and Roland, and directed that Lillian receive the residue of the estate. However, under Swiss law, a testator is only free to dispose of one quarter of his estate; the remaining three quarters must be distributed according to a forced-heirship system.

The question therefore arose as to whether the Swiss condominium was to be distributed in accordance with Henry's will, or, alternatively, whether the Swiss condominium devolved pursuant to the Swiss forced heirship laws.

If Swiss law governed the disposition of the condominium, the one-quarter interest capable of being gifted would go to Lillian in accordance with the deceased's will. However, the other three quarters would be divided as follows: one quarter to Roland, one quarter to the

⁷ *Ibid*, rev'd in part on other grounds *Granot v. Hersen*, 1999 CarswellOnt 1011, 26 E.T.R. (2d) 221 [ntd: **check cite**]

children of Norbert, and one quarter to Lillian. Thus, instead of receiving the entire value of the condo under the residual clause of the deceased's will, Lillian would only receive a half interest in the Swiss condo.

Lillian argued that the condominium should pass under the residuary clause and go entirely to her. Her counsel argued that the issue before the court was one of construction of the will, and that Ontario law should apply to determine a question of construction as set out in section 39 of the SLRA.

The court held otherwise. While the court found that there was no doubt regarding the testator's intention to gift the condominium to his daughter, the law was clear that real property passes under the law of the jurisdiction it is located in. The court then applied the doctrine of election to compel Roland to choose between his legacy in the will or his interest in the condominium pursuant to the laws of Switzerland. However, the finding that Roland was required to elect was reversed by the Ontario Court of Appeal.⁸

Some have suggested that this distinction between movables and immovable is archaic and that both types of assets should be governed by the law of the testator's domicile.⁹ Such a law would presumably provide clarity in the distribution of the estate and may better reflect the testator's intentions, particularly where the competing jurisdiction has significantly different succession laws.

Determining governing law based on whether assets are movable/immovable can also lead to unintended consequences when there are overlapping jurisdictions. Take, for example,

⁸ *Granot v. Hersen*, 1999 CarswellOnt 1011, 26 E.T.R. (2d) 221 (Ont. C.A.)

⁹ *Granot v. Hersen*, 1998 CarswellOnt 964 (O.C.J. [G.D.]) at para 11

the application of intestacy laws. If a deceased dies intestate with assets in more than one jurisdiction, then it is possible for more than one set of intestacy laws to govern.

This was the situation in *Re: Estate of Sally Vak*¹⁰. The deceased died intestate in Manitoba. She was survived by her husband, from whom she was separated, and her son. At the time of her death, she had movable assets valued at \$131,000 in Manitoba and real property worth \$42,000 in Ontario. Strictly applying the SLRA conflict of law provisions, Manitoba law governed the movable assets, and Ontario law governed the real estate in Ontario. That would mean that the entire value of the property in Ontario would go to the separated spouse pursuant to Ontario's intestacy laws. As for the Manitoba assets, the first \$50,000 would go to the spouse, with the remaining Manitoba assets to be split equally between the spouse and the son. The Ontario judge seemed to perceive this result as unduly generous to the spouse (calling it "inequitable double dipping") and unduly harsh to the son.

Citing the earlier decision in *Thom Estate v Thom* as authority, the Ontario Court (Gen. Div.) read the word "estate" in the Manitoba statute to include the worldwide assets of the deceased. The judge then found that the "assets, irrespective of whether they are movables or immovable, should be assembled under the administrator's umbrella and after setting aside the highest preferential share permitted under the respective jurisdictions where the assets are located, the residue of the estate be divided by the applicable law of the deceased's usual or habitual place of residence."¹¹ In other words, using the Court's approach in *Vak*, the spouse would get only one preferential share, rather than a preferential share in each jurisdiction, but would take whichever preferential share was larger.

¹⁰ 117 D.R.R. (4th) 122, 20 O.R. (3d) 378, 4 E.T.R. (2d) 1 (Ont. C.J. (Gen Div)

¹¹ Re estate of Sally Matilda Vak, 117 D.L.R. (4th) 122, 20 O.R. (3d) 378, 4 E.T.R. (2d) 1, at paragraph 42.

Domicile

Because the law governing immovable assets depends on where the deceased was domiciled as of the date of death, the issue of domicile can be a critical one. In some cases, there are clear strategic reasons for a litigant to prefer one jurisdiction over another. An adult child of a testator for example, may prefer a British Columbia domicile due to the more generous provisions of the *Wills Variation Act* in British Columbia as compared to similar legislation elsewhere in Canada. It is not uncommon to have a trial of an issue or advice and direction application to determine domicile prior to a hearing on the merits. In *Re: Foote Estate*, there was a preliminary trial to determine which court could determine the deceased's domicile.

"Domicile" means the place where a person permanently has his or her home.¹² Domicile does not mean the same thing as residence or citizenship. While a person can have more than one residence or citizenship, a person can have only one domicile. A domicile is primarily determined by personal intent, which must be supported by clear evidence.

At birth, a person acquires a domicile of origin. This domicile does not change until a person acquires a new domicile, either by law or by choice.¹³ A domicile of choice may be acquired by a person by residing in a new jurisdiction with the intention to reside there indefinitely.¹⁴ To establish that there has been a change in domicile, a person must establish that there was a permanent move to a new, specific domicile, and the move is not temporary or for a specific purpose. The new domicile is then acquired, and is kept until the person leaves

¹² *Crosby v. Thomson* (1926), [1926] 4 D.L.R. 56 (N.B. C.A.)

¹³ *White v. White* (1958), [1958] O.W.N. 15 (Ont. C.A.)

¹⁴ *Wadsworth v. McCord* (1886), 12 S.C.R. 466 (S.C.C.)

with the intention of abandoning it forever.¹⁵ A variety of evidence may be offered to establish an intention to change domiciles.¹⁶

Governing Law re: Construction of Wills

Questions about the construction of wills are governed by the law of the domicile of the testator *at the date of making the will*, (rather than date of death) in regards to both movables and immovables.¹⁷

There may be some difficulty in determining the domicile of the testator at the time of the drafting of the will. In *Hammill Estate v. McDonell*,¹⁸ the testatrix was born in Ontario, but later moved to New York where she became an American citizen. She later drafted a will which divided the residue of her estate into four shares, one each to her two brothers, one to her nephew, and another to her nephew in trust for all of his surviving children and those of his sister, provided that the children had reached the age of 21. The testatrix's two brothers predeceased her. Her nephew survived her, but later died.

The estate trustee applied for directions. At issue was whether the remainder of the residue should be shared equally between the testatrix's nephew's estate and the grand-nieces and grand-nephews or unequally, with three quarters of the residue to the testatrix's nephew's estate. The answer depended on whether the will was to be construed in accordance with the laws of New York or the laws of Ontario.

While section 39 of the SLRA seems to state that governing law is to be determined simply based on the deceased's domicile at the time that the will was made, the court in

¹⁵ *Vien, Re* (1988), 1988 CarswellOnt 202 (Ont. C.A.)

¹⁶ CED Conflict of Laws IV.3.(c)

¹⁷ SLRA, s. 39

¹⁸ 1994 CarswellOnt 657, 3 E.T.R. (2d) 300 (Ont. C.J. [G.D.])

Hammill took a more expansive and purposive approach suggesting that the law of the deceased's domicile is a rebuttable presumption only. The Court in *Hammill* sought to determine which law the testatrix intended to apply to the construction of her will on the basis that it was the law that the testatrix had in mind when she drafted her will that should govern. As part of that process, the domicile of the testatrix at the date of the will had to be determined. The will itself had strong indications that she intended New York to be her permanent residence – for example, she directed that her funeral be arranged in New York. Ultimately, the court found that the law of New York applied to the construction of her will, which meant that the nephew's estate, the grand-niece and grand-nephews shared equally in the residue.

Similarly, in *Re: Barna Estate*,¹⁹ the B.C. Supreme Court determined that a will is to be interpreted in accordance with the law intended by the testator. There is a presumption that a testator intends the governing law to be the law of the jurisdiction of the testator's domicile as of the date of the will. This presumption can be rebutted by evidence that a different governing law is intended. In this case, the terms of the will itself revealed an intention that the will be interpreted in accordance with the laws of British Columbia,²⁰ rather than the laws of the deceased's domicile as of the date of the will.

Governing Law re: Effect of Marriage on a Will

Another twist on the conflict of laws rules is the effect of marriage on the validity of a will. In *Re: Covone*²¹, the question was whether the deceased's marriage revoked a will made a few months earlier. Under Quebec law, where the deceased and her husband resided, marriage does not revoke a will. In B.C., where the deceased later acquired a real property, the law holds

¹⁹ 1990 CarswellBC 558, [1990] B.C.W.L.D. 041, [1990] B.C.J. No. 2513.

²⁰ *Barna Estate* at paragraph 8.

²¹ *Re: Covone* 1989 CarswellBC 504, [1989] B.C.J. No 2338, 18 A.C.W.S. (3d) 1199, 36 E.T.R. 114.

that marriage revokes a will. The question for the court was whether the laws of Quebec or the laws of B.C. governed. There was authority to suggest that B.C. law, as the *lex situs*, governed²². However, this would have resulted²² in an intestacy, which the law abhors. The Court held that the law relating to the effect of marriage upon a will must go the law of the matrimonial domicile, rather than the law of the place where the deceased's real property is situated.²³

Governing Law: Dependant Support

The law governing dependant support is determined based on the deceased's domicile at the time of death. In *McCallum v. Ryan Estate*²⁴, a Superior Court of Justice decision, the deceased's ex-wife brought an application for dependant support on behalf of their daughter, Meghan. Meghan had been living with her mother in Ottawa since the parents' divorce. Meghan's father, Frederick, then married his second wife, Susan, and moved with Susan first to Florida and then to Georgia. Susan and Frederick later separated and divorce proceedings were commenced in Georgia. Frederick returned to Ontario following the separation and made it clear to his parents that he planned to stay permanently in Ontario. Before the divorce was finalized, Frederick was killed in a car accident.

Meghan sought dependant support in Ontario pursuant to the SLRA. Meanwhile, Susan petitioned the Probate Court of Fulton County, Georgia, for support pursuant to the laws of Georgia.

²² The court cited Castel, in the *Canadian Conflict of Laws*, 2nd ed, which stated that "the question of whether marriage revokes a previous will of immovables is governed by the *lex situs*. This, the court found "is seemingly supported by the plain wording of s. 41(2) of the Wills Act.

²³ Re: Covone at paragraph 10-11.

²⁴ 2002 CarswellOnt 1211, 45 E.T.R. (2d) 113 (Ont. S.C.J.)

The court in Ontario held that a dependant support application engages the Ontario conflict of law rules, and in this case the rule governing movable property. Frederick had abandoned his domicile in Georgia and his domicile of origin was revived on his return to Ontario. Therefore, the RRSPs were governed by Ontario's dependant relief law, and Ontario had jurisdiction to determine the daughter's claim. What was not made explicitly clear in the decision, however, was the extent to which the deceased's assets in Georgia would be included in the calculation of his assets for the purpose of determining support, or the extent to which his Georgian assets would be available to satisfy any order for support.

In another dependant support case, *Taylor v. Dolisie*,²⁵ the Divisional Court upheld a lower court ruling that an order under section 59 of the SLRA (to freeze assets) could not be made in respect of an insurance policy. The wording of section 59 allowed a court to make an order freezing in whole or in part the operation of the deceased's "estate". The court reasoned that the deceased was not the owner of the policy and therefore the policy was not an estate asset. In its reasons, the court held that the insurance proceeds were not subject to the jurisdiction of Ontario courts, and that it had no power to enjoin payment of the insurance proceeds in the U.S. to satisfy any support order.

However, the court left open the question of whether the insurance policy should nevertheless be included for the purposes of calculating support:

Whether or not the proceeds may be deemed to be included for the purposes of calculating whatever charge may be made by the defendant upon the estate, is not expressly before us. I would make no order or finding in that connection.²⁶

²⁵ 1991 CarswellOnt 537, 3 O.R. (3d) 699

²⁶ Urquhart Estate at para. 18.

Governing Law re: Limitation Period

The applicable limitation period will, of course, depend on which law governs. It is possible that there could be different limitation periods for different assets. For example, a claim against an immovable asset in a foreign jurisdiction will be subject to the limitation period of that jurisdiction. An Ontario litigator would be wise to consult with a lawyer in the jurisdiction where the immovable asset is held to ascertain available remedies in the foreign jurisdiction and applicable limitation periods.

JURISDICTION

It is possible that more than one court may have jurisdiction over the dispute. Where jurisdiction is non-exclusive, it is a matter of judicial discretion whether to assume jurisdiction.

The 2007 decision in *Re: Foote Estate*²⁷ is instructive on this point. Several different courts had jurisdiction as of right over the deceased's estate. In a preliminary application brought in Alberta, the court considered a challenge to its jurisdiction on the basis that it was not the most convenient forum.

The deceased had an estate worth well over \$130 million (in addition to assets already vested in a charitable corporation and assets passing outside of his estate). He had assets in several jurisdictions, including Australia, B.C., and Alberta, with the bulk of his assets held in the British Virgin Islands. The testator chose to leave the vast majority of his extensive estate to charity. Perhaps unsurprisingly, his wife and 5 of his 6 children sought to challenge this disposition of his estate. It appears from the 2007 decision that the family intended to bring some type of family support application against the estate. Before doing so, the family brought

²⁷ 2007 ABQB 654.

an application in Alberta to determine (a) whether an anti-litigation (*in terrorem*) clause could be enforced against them and (b) the deceased's domicile.

The judge presiding over the initial jurisdictional challenge by the charities held:

“In my view, this is a situation where a number of jurisdictions have jurisdiction over Mr. Bentley [the executor] as a matter of right: (a) Alberta, because of Mr. Bentley's residence here and because of his representative capacity as executor of Mr. Foote's Canadian estate; (b) Norfolk Island, because of Mr. Bentley's capacity as executor of Mr. Foote's Norfolk Island estate; and (c) the British Virgin Islands, because of Mr. Bentley's representative capacity as executor of Mr. Foote's worldwide estate.

As a result, I find that Mrs. Foote and the children's choice of Alberta is in a forum which possesses jurisdiction over Mr. Bentley as of right.

Therefore, the Fund must show that there is another available forum which is clearly or distinctly more suitable.

In other words, the tie goes to the “first past the post”, or the first litigant to commence proceedings in a court with jurisdiction to determine the dispute. Once jurisdiction is assumed by the court, the applicant/plaintiff's choice of jurisdiction will only be interfered with if the defendant/respondent can prove that there is clearly and distinctly a more suitable forum.

The Supreme Court in *Club Resorts Ltd. v Van Breda*,²⁸ provided guidance on how to determine whether there is clearly a more suitable forum or jurisdiction. The inquiry looks to the claim as a whole:

The purpose of the conflicts rule is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a

²⁸ *Club Resorts Ltd. v Van Breda*, 2012 SCC 717, [2012] 1 S.C.R. 572.

related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.²⁹

A recent Ontario case applied the *Van Breda* analysis to determine the Ontario court's jurisdiction to determine the validity of a will made in Italy. Antonina's father died during his vacation to Italy. She and her two siblings then received a purported handwritten will made just before his death which named their cousin Anna as a beneficiary. In *Re Estate of Domenico Grillo*,³⁰ Justice Newbould found Ontario had jurisdiction over Antonina's application to set aside this holograph will. His Honour did so and declared her father's previous will to be valid.

Despite being ill, the father had decided to travel to Italy. Before his death, Antonina and her two siblings had received several "very suspicious" calls from Anna. The siblings went to Italy to check on their father and discovered his house had been looted and over 13,000 euros had been withdrawn from his bank account. After the funeral they received a purported handwritten will of their father which added Anna as an equal beneficiary to them. This will did not appear to contain the father's handwriting or his signature and indicated the wrong date of his birth. An Italian handwriting expert concluded that the holograph will was not made in the father's handwriting. Anna and members of her family were criminally charged in Italy for theft and for registering a forged will.

Antonina applied to set aside the holograph will, as the bank required a declaration of the validity of the father's previous will in order for it to act under same. Justice Newbould considered whether Ontario had jurisdiction to hear the application. His Honour applied the test set out in *Van Breda*, where the Supreme Court held that a case with an international aspect must have a real and substantial connection to the jurisdiction in question such that it would be

²⁹ *Van Breda*, at paragraph 99.

³⁰ *Re: Estate of Domenico Grillo*, 2015 ONSC 1352. This summary of the *Grillo* decision is reproduced from my colleague Jacob Kauffman's blog on Allaboutestates. I thank him for allowing me to reproduce it here.

reasonable to expect that the defendant would be called to answer legal proceedings in that forum. There are presumptive connecting factors, the starting point for which is rule 17.02 of the *Rules of Civil Procedure*. Clause 17.02(b) permits service without a court order in respect of the administration of a deceased's estate in respect of personal property where the deceased was a resident of Ontario at the time of death. Clause 17.02(c) allows such service with respect to setting aside a will in respect of personal property in Ontario. Here, the father was resident in Ontario (even though he died in Italy) and some of his assets were located in Ontario.

Justice Newbould held that Anna could expect that the determination of the validity of the handwritten will would take place in Ontario as that was where the father's children lived, where the father was domiciled, and where some of the father's bank accounts were located. These factors, together with clauses 17.02(b) and (c) are presumptive connecting factors giving Ontario jurisdiction to deal with the handwritten will.

Under subsection 36(2) of the SLRA, the formalities and validity of both wills were governed by the law of the domicile of a deceased, here Ontario. Justice Newbould found that the evidence demonstrated that the handwritten will was not written by the father and declared it to be invalid.

This case appears to be the first that applies the Supreme Court's decision in *Van Breda* to proceedings involving the determination of the validity of a will. It appears that none of the express presumptive connecting factors set out by the Supreme Court were met in this case. However, the Supreme Court acknowledged that the list of presumptive connecting factors set out in *Van Breda* related to claims in tort and did not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to law. As such, examining clauses 17.02(b) and (c) should be the starting point when considering whether to bring a proceeding in Ontario with respect to a will made in a foreign jurisdiction.

In *Gillespie v. Grant*³¹, the Alberta Surrogate Court considered the proper forum for a will challenge. The deceased had significant assets, including immovable assets worth millions in both Alberta and B.C., and just one immovable, namely, a cottage located in Alberta. Upon learning of the deceased's will, which left his assets to two of his four children, the other two children started will challenge proceedings by filing caveats in both Alberta and B.C. The parties all conceded that there was jurisdiction in both Alberta and in B.C. They disagreed as to which jurisdiction was the more appropriate forum. The court cited *United Oilseed Products Ltd. v. Royal Bank*³² for the applicable test:

1. The test to be applied in all cases where there is an issue of determining the appropriate forum, is that of forum conveniens, the forum which is more suitable for the ends of justice.

2. Where a forum possesses jurisdiction over a defendant as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable.

Where the jurisdiction does not exist as of right, the same burden rests on the party seeking to establish jurisdiction (typically service ex juris).

4. While the overall burden is as stated, the party alleging an advantage or disadvantage must establish it.³³

If a litigant delays in challenging the court's jurisdiction or attorns to the jurisdiction of the court selected by the plaintiff/applicant, then (s)he risks being precluded from challenging jurisdiction later.³⁴ A litigant may be found to have attorned to the jurisdiction by filing a defence/ responding materials, attending discoveries or dispositions, and/or appearing before the court on interlocutory matters.

³¹ *Gillespie v. Grant* 1992 Carswell Alta 110, [1992] 6 W.W.R. 599, [1992] A.W.L.D. 712, 46 E.T.R. 68

³² *United Oilseed Products Ltd. v. Royal Bank* 60 Alta L.R. 92d) 73, [1988] 5 W.W.R. 181, 29 C.P.C. (2d) 28 (Alta. C.A.)

³³ *Gillespie* at paragraph 60, quoting the Alberta Court of Appeal in *United Oilseed*.

³⁴ *Frey v. Heintzl Estate* 1988 CarswellBC 75, 24 B.C.L.R. (2d) 25, 9 A.C.W.S. (3d) 57.

Importantly, the governing law is not dispositive of where the dispute must be litigated. A court may assume jurisdiction over a dispute governed by foreign law.³⁵ In doing so, a court in Ontario will typically apply the laws of a foreign jurisdiction by using expert evidence to prove the applicable foreign law.

Trusts

The law governing the administration of the trust or estate is *lex rei sitate* – where the trustee is administering the trusts.³⁶ For a comprehensive analysis of the conflict of laws and trusts, see Thomas Grozinger’s paper, entitled “Conflict of Laws and Trusts of Movables In Canada: Determining the Applicable Law for Essential Validity and Administration”.³⁷

ENFORCEMENT OF FOREIGN ORDERS

A final question for the Ontario litigator is whether an order or judgment obtained in Ontario will be enforceable in another jurisdiction. As a practical matter, an Ontario litigant may obtain an Ontario judgment which should be binding in the U.S., for example, but may still require additional proceedings in the U.S. to enforce it.

In determining this question, the starting point is whether the jurisdiction is a signatory to the *Reciprocal Enforcement of Judgments Act*. Currently all provinces and territories are reciprocating jurisdictions, except Quebec.

In *McCallum*, the dependant in Ontario (a minor child of the deceased, who was in arrears of his child support obligations at the time of his death) faced an argument that the

³⁵ see, for example, *Vien Estate v. Vien Estate*, where the Ontario court decided the issues, based on expert evidence as to the applicable law, of Quebec.

³⁶ Widdifield at 5.9.1

³⁷ Thomas Grozinger, *Estates, Trusts and Pensions Journal*, Vol. 23, 301

doctrine of *res judicata* precluded her support claim in Ontario. The deceased and his second spouse, Susan, lived in the State of Georgia until their separation. At the time of his death, Susan had commenced divorce proceedings, but they were still legally married. Following the separation, the deceased had moved back home to his parents' house in Sault Ste. Marie. Susan commenced an application in Georgia for spousal support. The Georgia court appointed a guardian *ad litem* for Meghan, the deceased's child in Ontario. The court in Georgia, apparently on its own motion, considered and rejected Meghan's eligibility for an award of support under Georgia law.

At the hearing of Meghan's dependant support application in Ontario, Susan argued (a) that the deceased was domiciled in Georgia and therefore Georgia law governed his worldwide movable assets and (b) the doctrine of *res judicata* applied to preclude Meghan's application, as the Georgia court had already determined that Meghan was ineligible for support.

The Ontario Court found that the SLRA conflict of laws rules relating to succession are applicable to a dependant support claim. Applying those rules, the Court found that the applicable law governing Meghan's right to receive support was determined by the domicile of the deceased as of the date of his death. The Court determined that domicile to be Ontario. Consequently, the governing law was Ontario, particularly, s.58 of the SLRA.

The Court went on to consider whether Meghan's dependant support claim was barred by the doctrine of *res judicata*:

The other preliminary objection raised by counsel for the spouse, that the applicant mother should not be allowed to relitigate the issue under the SRLA in Ontario because it has already been litigated in the support proceedings in Georgia, the "res judicata" argument, may best be tested by considering whether an Ontario court would recognize and enforce in Ontario the order made by the George court on September 26, 2001.

In order to recognize and enforce a judgment or order of a foreign court in Ontario (apart from the *Reciprocal Enforcement of Judgments Act*, which does not apply), it is essential that the foreign court had jurisdiction in the eyes of the Ontario court. J. G. Collier, *op cit.*, p. 113. In order for such foreign judgment to be recognized and enforced in Ontario, the foreign court must have had jurisdiction according to Ontario conflict of law rules. J-G Castel, /Janet Walker *op cit* 14.5. The Georgia court has made an order *in personam* against the estate of a deceased resident of Ontario for payment of a sum of money. One of the grounds upon which a foreign court may acquire jurisdiction to make such an order is that the defendants (the mother and Meghan) consented or submitted to the resolution of the dispute by the foreign court. Submission is clear where a defendant voluntarily appears and pleads to the merits of the case. Applying these rules to the facts before me...I am satisfied that these jurisdictional requirements were not met. There is no evidence before me that the merits of the support petition were pleaded or argued by them or on their behalf before the Georgia court. In my view, there are insufficient grounds to found an argument based on "*res judicata*"³⁸.

In *Ravida v. Ravida Estate*³⁹, the ex-wife of the deceased was being sued in Florida by the deceased's estate. At the "eleventh hour"⁴⁰, the ex-wife brought an application in Ontario for injunctive relief to prevent the trial in Florida from proceeding. In Ontario, the ex-wife had been engaged in protracted divorce litigation with her ex-husband. The action in Florida was based on Mrs. Ravida's attempt to enforce an Ontario judgment against her husband in Florida. Her ex-husband alleged that during the course of trying to enforce the Ontario judgment, Mrs. Ravida made certain comments to various individuals in the state of Florida which had the effect of diminishing the value of his estate and certain of his companies.

In her application, Mrs. Ravida sought injunctive relief to prevent the Florida trial from proceeding on the basis that Ontario was the *forum conveniens*. Her request was denied for several reasons. First, the court held:

if the basis of the Florida claim is simply that Mrs. Ravida sought to enforce the Ontario judgment of Justice John Van Duzer, which was not

³⁸ *McCallum*, at paragraphs 27 and 28.

³⁹ *Ravida v Ravida Estate* 1995 CarswellOnt 1390, 11 E.T.R. (2d) 45.

⁴⁰ *Ravida*, at paragraph 3.

recognized as valid in Florida, it is doubtful that an Ontario court would entertain it, since in doing so, it would be impugning a judgment of its own court. At the time that the order was sought to be enforced, it was valid in Ontario and therefore enforceable. Under the law of Florida, however applying the principles of private international law, it may be that the judgment in Ontario was one that would not be recognized in Florida, bearing in mind that Mr. Ravida was not given an opportunity to present his defence at the hearing. Therefore to require the Florida case to be dealt with in Ontario would be effectively to deprive the estate of Mr. Ravida of its remedies available in Florida.⁴¹

Second, the facts of the Florida action seemed to be based on statements made by Mrs. Ravida to various people in Florida. That, too, militated in favour of Florida as the *forum conveniens*.

Third, applying the principles in *Amchem Products v. British Columbia (Workers Compensation Board)*⁴², Mrs. Ravida was precluded from the relief she now sought because of her delay in raising the jurisdictional issue (the case had been before the Florida court for three and a half years) and because of evidence that she had attorned to the Florida jurisdiction by, *inter alia*, exchanging interrogatories in Florida and preparing for the trial there. Justice Steinberg commented, "I should think that, where a case is actually being heard by a foreign court, an anti-suit injunction would almost never be granted."⁴³

However, Justice Steinberg seemed anxious to ensure that the ex-husband's bad litigant behaviour in Ontario did not escape the notice of the Florida judge:

The question of whether to proceed with the action in Florida, or to defer it, is solely in the discretion of Judge Hausser (the Florida judge). I trust, however, that he has been made aware of the lengthy and difficult history of the Ontario litigation...it is my view that that the root cause of the delay leading up to the hearing before Justice Mendes da Costa was the extreme unwillingness of Mr. Ravida to provide particulars to his assets.

⁴¹ *Ravida*, at paragraph 5.

⁴² *Amchem Products v British Columbia (Worker's Compensation Board)* [1993] 1 S.C.R. 897.

⁴³ *Ravida*, at paragraph 6.

The judge went on:

It may very well be that Mrs. Ravida is impecunious, through no fault of her own, in pursuing a proper defence to the action against her in Florida. It may also very well be that, as a result of the expected judgment from Justice Mendes da Costa, she may obtain a vesting of all or some of the properties owned by the respondent in Florida. That might obviate the need for proceeding with the present case before the court in Florida.

I would hope that these last comments of mine could be put before the learned judge in Florida.⁴⁴

The frequently-cited decision in *Salter Estate*⁴⁵ also dealt with enforcement issues. At the time of the deceased's death, Brett Salter was being pursued by his ex-wife in Texas to enforce a divorce judgment obtained against him in Florida. The 2006 Florida order required Mr. Salter to pay Mrs. Salter \$1.45 million. Following Mr. Salter's death, Mrs. Salter brought an application in Ontario for a declaration that she enjoyed a sole beneficial interest in certain of Mr. Salter's property as a result of prior orders made in Texas and Florida. Alternatively, she sought a declaration that she held a constructive trust over assets held by the estate trustee of Mr. Salter's estate.

It appeared that the estate trustee and Mrs. Salter reached a settlement, with Mrs. Salter agreeing to take \$1.325 million in full satisfaction of her claims against the estate. The evidence filed on the application indicated that Mr. Salter's estate was insolvent. The issue was therefore whether Mrs. Salter had an interest in any of the deceased's assets by virtue of the orders she had previously obtained against him in Florida and Texas.

Justice Brown found that Mrs. Salter had not proved, on a balance of probabilities, that the orders in Texas and Florida gave her a trust or security interest in the impugned assets such

⁴⁴ *Ravida*, at paragraphs 9 – 11.

⁴⁵ *Salter Estate* 2009 CanLII 9762 (ONSC).

that she would be paid in priority to other creditors of Mr. Salter's estate. Justice Brown found that she had failed to adduce proper evidence about the legal effect of the final judgment under Florida law or the effect of a writ of possession or order for sale pursuant to a Texas writ. Although she had included a paragraph in her affidavit describing the legal advice she had been given with respect to the effect of the prior orders in Texas and Florida, Justice Brown gave no weight to her evidence because it was hearsay. He held that the onus was on Mrs. Salter to prove that the order in Texas gave her a trust or secured interest in assets of her husband. In the absence of proper evidence about Texas law, she failed to discharge that burden.⁴⁶

SECURITY FOR COSTS

Another issue that parties must be aware of when dealing with cross-jurisdictional issues is the potential that a non-resident litigant may be required to post security for costs when bringing an application in Ontario.

For example, In *Uribe v. Sanchez*,⁴⁷ the plaintiff was a Columbian national living in Florida. The plaintiff claimed that the defendants had induced him to invest in a company that became insolvent, and claimed a loss of over \$12.8 million. The various defendants sought either substantial, partial or no security for costs. Master Dash considered the law under Rule 56.01(1)(a). The court was required to consider a number of factors and make a just order. The plaintiff argued that he had sufficient assets to satisfy a costs award in Florida, a reciprocating jurisdiction, which meant that the defendants could enforce foreign money judgments, including security for costs awards made in Ontario. However, the court rejected the argument, saying

⁴⁶ *Salter*, at paragraph 30.

⁴⁷ 2006 CarswellOnt 3553, 33 C.P.C. (6th) 94 (Ont. Master)

that he had failed to disclose that his home was owned jointly with his wife and that he had two additional mortgages on the property, and that Florida law exempted a primary place of residence from such an order. It therefore appeared that the home was not an exigible asset which the defendants could enforce a judgment against. Furthermore, while the plaintiff alleged he was a developer with two condominium projects, the lack of detailed information on the property led Master Dash to conclude that they did not “meet the test as to sufficiency and quality of assets in the reciprocating jurisdiction.”⁴⁸

The plaintiff also argued that he would suffer from financial hardship, and gave substantial evidence as to the merits of his case. The Court agreed that there was a good chance of success against one of the defendants, who was described as the “mastermind” of the scheme, although did not agree that the case against the other defendants had a “good chance of success,” which is the test under Rule 56.01. The Court held that the plaintiff had not established that he was unable to post security or that he would be unable to continue if security was ordered. The plaintiff was ordered to pay or post an irrevocable stand-by letter of credit from a Canadian chartered bank for security for costs up to the completion of discoveries. The defendants were also entitled to apply for further security after the action was set down for trial.

Role of the Office of the Children’s Lawyer in Multi-Jurisdictional Matters

The Office of the Children’s Lawyer (the “OCL”) acts on behalf of children under the age of 18 and the unborn and unascertained in certain cases where a child may have a right to receive money or property. A child may be entitled to property where he or she is named as a beneficiary in a will, trust, or life insurance policy, pursuant to intestacy laws, or as the

⁴⁸ *Ibid* at para 8

registered owner of real or personal property. The OCL must be served with a court application where there is:

- 1) An application for guardianship of a child's property⁴⁹
- 2) An application to appoint an estate trustee (where a child's interests are affected)⁵⁰
- 3) An application to vary a trust (where a child's interests are affected)⁵¹
- 4) An application to pass estate accounts (where a child's interests are affected)⁵²
- 5) An application to sell or mortgage a child's real property⁵³
- 6) An application against a child regarding the child's interest in an estate or trust, including a will challenge, an application to interpret a will, the removal of an estate trustee, the administration of an estate or trust, or the sale of estate property to an estate trustee⁵⁴

The OCL should also be served where there is a claim for support under the SLRA if the child is a beneficiary of the estate, the child does not have a litigation guardian, or there is an issue regarding the suitability of the litigation guardian.

The OCL will represent minors who may be entitled to an interest in Ontario property. This is true irrespective of whether the child lives in Ontario or abroad. Thus, even in cases where minors with a potential interest live outside of Ontario, the OCL must be served with court applications regarding Ontario property.

CONCLUSION

Conflict of law questions in estate matters can be complicated. The SLRA conflict of law provisions have not been frequently litigated and their effect is not always obvious. When dealing with assets in different jurisdictions, it will be important to consult from the outset with a

⁴⁹ *Children's Law Reform Act*, R.S.O. 1990, c. 12 ("CLRA"), s. 47

⁵⁰ *Rules of Civil Procedure*, Rule 74.04(4) and 74.05(3)

⁵¹ *Variation of Trusts Act* and *Rules of Civil Procedure*, rule 7.03(2)

⁵² *Rules of Civil Procedure*, Rule 74.18(3)

⁵³ CLRA, s. 59

⁵⁴ *Rules of Civil Procedure*, Rule 7.03(2)

lawyer in the jurisdiction where assets are held. It will be important to understand not just the value of the estate in question, but also the types of assets held within the deceased's worldwide estate, as the governing law will depend on whether assets are movable or immovable. Early on in the retainer, Ontario litigators should ascertain the facts relevant to determining the deceased's domicile. It will also be important to consider what remedies might be available in other jurisdictions in order to develop a comprehensive litigation strategy regarding what relief to seek where. In doing so, consideration should be given not just to the governing law of the dispute, but to the choice of jurisdiction and ultimately, what path may be available to enforce a successful judgment both inside and outside Ontario.