

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ  
(LRC 36-1991)

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REPORT  
ON  
THE HAGUE CONVENTION  
ON THE LAW APPLICABLE TO  
SUCCESSION TO THE  
ESTATES OF DECEASED PERSONS (1989)

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IRELAND  
The Law Reform Commission  
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## THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;  
John F. Buckley, Esq., B.A., LL.B., Solicitor;  
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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-five Reports containing proposals for the reform of the law. It has also published eleven Working Papers, three Consultation Papers and Annual Reports. Details will be found in Appendix 2.

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## CHAPTER 1: INTRODUCTION

In this Report, we examine the question whether Ireland should ratify the 1988 *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, and recommend that it should do so. The subject is one falling within the scope of the Commission's First Programme. In February of this year we circulated a Consultation Paper on the subject among interested persons and groups. We are most grateful to them for their helpful comments. In particular we wish to express our appreciation for their detailed observations to Mr Hans van Loon, First Secretary of the Hague Conference on Private International Law; Mr W Westbroek, Professor David Hayton, Mr GDM Collett and Mr Eamonn G Mongey, B.L. Needless to say, they are not responsible for the recommendations contained in this Report, which represents our final conclusions on the subject.

The law of succession involves a blend of individual, family and social values. The goals of freedom of testation, discharging responsibilities to family members, and serving the broader social interest in relation to property transmission and taxation<sup>1</sup> must all be served. What precisely these goals should be and how they should be harmonised are questions requiring moral and political resolution in every political community. Inevitably wide differences in policies have been recorded among different societies at different times.<sup>2</sup>

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1 It is a feature of inheritance and gift taxes internationally that the revenues they generate tend to be small: *Van Loon*, p6, Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 Yale L J 259, at 269-270 (1983); Dobris, *Marshalling the Arguments in Favour of Abolishing the Capital Transfer Tax*, [1984] Br Tax Rev 363, at 364, 376. As to the merits of an inheritance tax, see Maloney, *Distributive Justice: That Is the Wealth Tax Issue*, 20 Ottawa L Rev 601, at 619-620 (1988).

2 Cf *Brady*, ch 7, *In re Urquardt deceased*, [1974] IR 197, at 208-209 (Sup Ct, Walsh, J's judgment).

It is perhaps rash to speak of international socio-legal trends at a time such as today, when certain social and political orthodoxies are in the process of very rapid transformation<sup>3</sup>: nevertheless legislative developments in States of both the civil law and common law traditions are sufficiently consistent to warrant the statement that the movement is towards increasing the range of protection for the surviving spouse of the deceased at the time of his or her death:

"The universality of this development towards strengthening of the position of the surviving spouse is striking and contrasts sharply with the position of the previous spouse who is generally excluded from the succession and in respect of whom the trend is generally to reduce the period during which she, or he, can claim maintenance from the ex-spouse."<sup>4</sup>

Another characteristic of modern succession law internationally is the improvement in the position of children whose parents are not married:

"Complete equality now exists in particular in Denmark, France as a result of ... reforms of 1972, the Federal Republic of Germany since 1969, Italy as a result of ... reforms of 1975 ... and the Netherlands as a result of a 1982 reform."<sup>5</sup>

To this list may be added Ireland, which equalised the rights of succession, regardless of the marital status of the parents, in the *Status of Children Act 1987*.<sup>6</sup>

The trend in relation to adopted children is somewhat more ambiguous: after a gradual extension of their succession rights over several decades,<sup>7</sup> there is some indication of a desire in a number of jurisdictions to encourage adoption by making it a less permanent, and less final, transfer of rights and obligations, including succession rights.<sup>8</sup>

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3 It is interesting to note that, following the Russian Revolution, the right of inheritance was totally abolished in 1918 but restored a few years later. Freedom of testation was restored in 1962. See *van Loon*, p12, Harwood, *Comment, Soviet Inheritance Law: Ideological Consistency or a Retreat to the West?*, 23 *Gonzaga L. Rev* 593 (1988).

4 *van Loon*, p20 (footnote citation omitted).

5 *van Loon*, p22. The decisions of the European Court of Human Rights in *Marckx*, 2 EHRR 330 (1979), and *Johnston*, 9 EHRR 203 (1986), should be noted in this context.

6 See *infra*, p10, R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 178-193 (1988), and Woulfe, *Annotation*, [1987] ICLSA. In Britain, the same result was achieved by the *Family Law Reform Act 1987*: see Miller, *The Family Law Reform Act 1987 and the Law of Succession*, [1988] *Conv* 410.

7 Cf Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 *Vand L. Rev* 711 (1984), Chica, *Comment*, 23 *Gonzaga L. Rev* 413, at 418 ff (1988), French, *Comment*, 53 *Brooklyn L. Rev* 1007 (1988).

8 See Deutsch, *Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives*, 22 *J of Family L* 59 (1983).



The removal of legal and economic barriers between many countries, and in particular the States of the European Communities, has resulted in an increasing international dimension to the law of succession. In 1986, the latest year for which statistics are available, there were in Ireland 8,991 residents who had been born abroad. The movement of workers between States is a feature of contemporary European life: over a million and a half Turkish nationals are now working in the Federal Republic of Germany.<sup>9</sup> This migration leads to new issues in the private international law of succession.

At present, under Irish rules of private international law,<sup>10</sup> succession to immovable property is determined by the *lex situs*; the *lex domicilii* generally governs succession to movable property. This approach is in harmony with other common law jurisdictions,<sup>11</sup> though it is fair to say that many scholars have made a potent case against an indiscriminate application of these black-letter rules.<sup>12</sup>

The Hague Convention favours an entirely novel approach. The applicable law which it prescribes is a combination of the connecting factors of nationality and habitual residence. It also provides for a *professio juris*, again limited by the elements of nationality and habitual residence. Its third innovation is to prescribe rules dealing with *pactes successoraux*, which are a feature of civil law States.

In Chapter 2, we summarise briefly the existing domestic law as to succession. In Chapter 3, we consider the existing Irish private international law rules. In Chapter 4, we examine the provisions of the Convention and what they seek to achieve. In Chapter 5, we address the questions whether Ireland should ratify the Convention and, if so, what reservations (if any) should be availed of under Article 24 of the Convention.

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9 See *van Loon*, p24. The problem of refugees is of considerable international significance: see *id.*, pp28-29.

10 See *Binchy*, ch 23, *Brady*, paras 2.10, 5.18-5.19.

11 See *Dicey & Morris*, ch 27, *Cheshire & North*, ch 33.

12 See, e.g., *Weintraub*, 311 ff.

## CHAPTER 2: THE PRESENT LAW OF SUCCESSION

In this chapter we set out briefly the present domestic law relating to succession. Our analysis concentrates on aspects of particular relevance to the Convention.

Our treatment of the subject law is necessarily of a summary nature: detailed accounts are available in a number of excellent treatises on the subject.<sup>1</sup>

In Irish domestic law, the process of succession may be either testamentary (where the testator has made a valid will disposing of his or her property on death) or intestate (where either there is no will or the will is invalid or it fails to dispose of all the testator's property, in which latter case there is a partial intestacy).<sup>2</sup>

As regards testate succession, the testator must have reached the age of eighteen years or be or have been married and must be of sound disposing mind.<sup>3</sup> The will must be in writing,<sup>4</sup> and executed in accordance with the following rules:

1. It must be signed at the foot or the end of it by the testator, or by some person in his presence and by his direction;
2. The signature must be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness must attest by his signature the signature of the

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<sup>1</sup> See generally *Brady, passim*, *McGuire, passim*, *Wylie*, chs 14-15, *Shatter*, 518-529.

<sup>2</sup> See *Wylie*, para 14.01.

<sup>3</sup> *Succession Act 1965*, section 77(1). See *Brady*, paras 2.12.1 ff, *Wylie*, para 14.04.

<sup>4</sup> *Succession Act 1965*, section 78.

testator in the presence of the testator; no form of attestation is necessary nor is it necessary for the witnesses to sign in the presence of each other;

3. As regards the position of the signature of the testator (or person signing for him under rule 1), it is sufficient if the signature is so placed at or after, or following, or under, or beside, or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will;
4. A will is not to be affected by any of the following five circumstances -
  - (a) that the signature does not follow or is not immediately after the foot or end of the will; or
  - (b) that a blank space intervenes between the concluding word of the will and the signature; or
  - (c) that the signature is placed among the words of the *testimonium* clause or the clause of attestation, or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, or under, or beside the names or one of the names of the attesting witnesses; or
  - (d) that the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or
  - (e) that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

(The enumeration of these five circumstances is not to restrict the generality of rule 1).
5. A signature is not to be operative to give effect to any disposition or direction inserted after the signature is made.<sup>5</sup>

Publication of the will is not necessary;<sup>6</sup> nor does the incompetency of a witness render the will void.<sup>7</sup> Gifts to an attesting witness or to the spouse

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* section 81.

<sup>7</sup> *Id.* section 81.

of the witness are void.<sup>8</sup> Creditors attesting wills charging the estate with debts are admissible as witnesses;<sup>9</sup> executors who attest wills are also admissible as witnesses.<sup>10</sup>

A will is revoked by the subsequent marriage of the testator, except a will made in contemplation of that marriage, whether so expressed in the will or not.<sup>11</sup> Otherwise, no will, or any part of a will, is revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by burning, tearing, or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it.<sup>12</sup> A will that has been revoked will not be revived otherwise than by re-execution or by a codicil duly executed and showing an intention to revive it.<sup>13</sup>

Section 5 of the *Succession Act 1965* preserves the common law presumption of simultaneous deaths in cases of uncertainty of survivorship.<sup>14</sup> It provides that:

"[w]here, after the commencement of the Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall be deemed to have died simultaneously."

As regards construction of wills, "[t]he function of the court ... is to give effect to the testator's intention, as it is ascertained from the written terms of the will".<sup>15</sup> The will is to be read as a whole and thus a general intention overrides a particular one.<sup>16</sup> The courts have drawn a distinction between rewriting a testator's will - a task they decline to undertake - and "making alterations in [it] which ... [they] may do to ensure that the written document is consistent with the testator's intention".<sup>17</sup>

This "overriding principle"<sup>18</sup> had led the courts to develop several rules of construction.<sup>19</sup> Of particular importance is the common law rule that, as a general principle, subject to limited exceptions, only the words of the will should be considered in determining the testator's intention, and evidence

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8 *Id.*, section 82.

9 *Id.*, section 83.

10 *Id.*, section 84.

11 *Id.*, section 85(1).

12 *Id.*, section 85(2).

13 *Id.*, section 87.

14 *Wylie*, para 14.33.

15 *Brady*, para 5.2.1.

16 *Id.*, *Wylie*, para 14.36.

17 *Brady*, para 5.3.3.

18 *Wylie*, para 14.36.

19 See *Brady*, paras 5.4 ff, *Wylie*, paras 14.37 ff.

gathered from outside the will should not be admissible. This rule has been modified by section 90 of the *Succession Act 1965*, which provides that extrinsic evidence is admissible "to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will". In *Rowe v Law*,<sup>20</sup> the Supreme Court, by a majority,<sup>21</sup> took the view that extrinsic evidence was admissible under section 90 only where it met the *double* requirement of (a) showing the intention of the testator and (b) assisting in the construction of, or explaining any contradiction in, a will.

Section 99 of the *Succession Act 1965*, provides that:

"[I]f the purport of a devise or bequest admits of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative shall be preferred."

Professor Brady has commented that:

"Section 99, together with section 90, was intended to incorporate into Irish Law the principle of *favor testamenti* which is to be found in Civil Law jurisdictions and which, particularly in Germany, allows the court to adopt supplementary interpretations to resolve the difficult problems which may arise in the construction of wills. In adopting the principle of *favor testamenti* the Irish legislature clearly wanted to make it easier for the court to 'get at' the intention of the testator, but ... the courts have held,<sup>22</sup> that an unbridled power to look outside the will would subvert the formal requirements for the execution of wills set out in section 78 of the Succession Act. Be that as it may, the principle of *favor testamenti* is now, arguably, part of Irish law and, applied within acceptable parameters, subsumes more traditional rules of construction."<sup>23</sup>

The principle of freedom of testation is significantly qualified by Part IX of the *Succession Act 1965*. This gives the surviving spouse a *fixed* share in the estate of the deceased and a surviving child a *right to apply to the court* for provision to be made out of the estate on the ground that the deceased failed in his or her moral duty to make proper provision for the child.

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20 [1978] IR 55. See Brady, paras 5.6.1 ff, Brady, The '*Favor Testamenti*' in *Irish Law*, 15 Ir Jur (NS) 1 (1980), Wylie para 14.42 for critical analysis of the decision. See further Keane, para 26.14.

21 Henchy and Griffin, JJ; O'Higgins, CJ dissenting.

22 See *Rowe v Law*, *supra*.

23 Brady, para 5.8.1 (footnote references omitted).

### ***Rights of Surviving Spouse***

If a testator leaves a spouse and no children, the surviving spouse has a right to a half of the estate.<sup>24</sup> If the testator leaves a spouse and children, the surviving spouse has a right to a third of the estate.<sup>25</sup> This legal right of the surviving spouse has priority over devises, bequests and shares on intestacy.<sup>26</sup> A spouse's legal right may be renounced in an ante-nuptial contract made in writing between the parties to an intended marriage or may be renounced in writing by the spouse after marriage and during the lifetime of the testator.<sup>27</sup>

The surviving spouse must elect between the legal right share and rights arising under a will; in default of election, the spouse is entitled to take under the will and not by way of legal right.<sup>28</sup> Where the deceased died partly testate and partly intestate, the surviving spouse may elect to take either (i) the legal right share or (ii) the share under the intestacy, together with any devise or bequest to the surviving spouse under the will, but no legal right share.<sup>29</sup>

The position regarding provision made *before* the commencement of the Act (on 1 January 1967) is dealt with by section 116. Where a testator, during his lifetime, has made permanent provision for his spouse, whether under contract or otherwise, all property which is the subject of such provision (other than periodical payments made for her maintenance during her lifetime) are to be taken as given in or towards satisfaction of the share as a legal right of the surviving spouse.<sup>30</sup> The value of the property is reckoned as at the date of the making of the provision.<sup>31</sup> If the value of the property is *equal to or greater than* the share of the spouse as a legal right, the spouse is not entitled to take any share as a legal right.<sup>32</sup>

If the value of the property is *less* than the share of the spouse as a legal right, the spouse is entitled to receive in satisfaction of that share so much only of the estate as, when added to the value of the property, is sufficient, as nearly as can be estimated to make up the full amount of that share.<sup>33</sup>

Section 116 is designed to avoid hardship where testators, many of them in innocence of the forthcoming changes brought about by Part IX of the Act, made permanent provision for their spouses. The section does not define what amounts to permanent provision other than to exclude periodical

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24 *Succession Act 1965*, section 111(1).

25 *Id.*, section 111(2).

26 *Id.*, section 112.

27 *Id.*, section 113.

28 *Id.*, section 115(1).

29 *Id.*, section 115(2).

30 *Id.*, section 116(1).

31 *Id.*, section 116(2).

32 *Id.*, section 116(3).

33 *Id.*, section 116(4).

maintenance payments<sup>34</sup>. It has been suggested that "it would no doubt be intended to have substantially the same meaning as that given to 'advancement' in section 63(6)",<sup>35</sup> in respect of children.<sup>36</sup>

Section 117 of the Act, as has been indicated, enables a child of a testator to apply to the court for an order, for provision out of the testator's estate where the court is of opinion that the testator failed in his or her moral duty to make proper provision for the child in accordance with his or her means. It merits quotation in full:

- "(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
- (2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.
- (3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.
- (4) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.
- (5) The costs in the proceedings shall be at the discretion of the court.
- (6) An order under this section shall not be made except on an application made within twelve months from the first taking out

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34 At the time the Act came into force, the only orders for maintenance which a court could make were of a periodical nature; alimony in favour of the wife in proceedings for divorce *a mensa et thoro* (cf *MB v RB*, Sup Ct 5 March 1989) and small periodical payments under section 1 of the *Married Women (Maintenance in cases of Desertion) Act 1936*; see further Duncan, *Desertion and Cruelty in Irish Matrimonial Law*, 7 Ir Jur (NS) 213, at (1972).

35 McGuire, 259.

36 Cf *infra*, p65.

of representation of the deceased's estate."<sup>37</sup>

Section 117 has given rise to a substantial volume of litigation,<sup>38</sup> which can only be touched on here. Until 1989 the *locus classicus* was *Re GM; FM v TAM*,<sup>39</sup> where Kenny J considered that:

"the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon

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37 Prior to the coming into force of Part V of the *Status of Children Act 1987* on 14 June 1988, the rights under this section of children whose parents had not married one another were not clear: at best they were restricted, at worst non-existent: see *Brady*, para 7.7.1, *Shatter*, 623-625, the Law Reform Commission's *Report on Illegitimacy*, pp45-46 (LRC 4-1982), *O'B v S*, [1985] IR 316 (Sup Ct), *L v L*, [1978] IR 288 (High Ct, Costello, J, 1977). Section 3 of the 1987 Act introduces the principle (subject to the appearance of a contrary intent) that the marital status of parents is to have no effect in deducing relationships for the purposes of the 1987 Act or any Act of the Oireachtas passed after the commencement of section 3 (on 14 January 1988). Section 29 of the 1987 Act inserts a new section 4A into the *Succession Act 1965*, which provides in part (and subject to a qualification not of present relevance) that in deducing any relationships for the purposes of the 1965 Act, the relationship between every person and his father and mother is to be determined in accordance with section 3 of the 1987 Act. Section 31 of the 1987 Act inserts a new subsection (1A) into section 117 of the 1965 Act, which provides as follows:

"(a) An application made under this section by virtue of Part V of the *Status of Children Act, 1987*, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of the said Part V.

(b) Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V."

It is clear that children whose parents have not married one another now have a right to apply to the court under section 117. As regards the date on which this right accrued, it seems that this was 14 June 1988, when Part V came into operation. It might be argued that the language of section 3 of the 1987 Act, which came into effect on 14 January 1988, is sufficiently broad to confer such a right on these children. The language indeed seems broad enough to have this effect but the inclusion of the proviso, "... unless the contrary intention appears", seems to require that the accrual of this right should be deferred until Part V came into effect, in order to give a harmonious interpretation to the separate provisions of the Act. For consideration of the effect of the 1987 Act in relation to succession entitlements see *Brady*, para 7.7.2, *Woulfe, Annotation to the Act*, [1987] ICLSA, *Lehane, The Law relating to the Status of Children Born outside Marriage and Their Property Rights*, 83 *Incorp L Soc of Ireland Gazette* 402, 443 (1989) (esp at 405), *R Byrne & W Binchy, Annual Review of Irish Law 1987*, 185 (1988).

38 See *Brady*, paras 7.1.1-7.1.5, 7.6.1 ff, *Wylie*, paras 14.61-14.62, *McGuire*, 261-288, *Shatter*, 520-524, *Binchy*, 389-399, *Cooney, Succession and Judicial Discretion in Ireland: The Section 117 Cases*, 15 *Ir Jur* (NS) 62 (1980), *Fitzpatrick, The Succession Act 1965, Section 117*, 110 *Ir LT & Sol J* 77 (1976) *Bacon, The Rights of Children and the Discretion of the Courts under Section 117 of the Succession Act 1965*, 77 *Incorp L Soc of Ireland Gazette* 223 (1983), *R Byrne & W Binchy, Annual Review of Irish Law 1988*, 245-246 (1989).

39 106 *ILTR* 82 (High Ct, Kenny, J, 1972).



- (a) the amount left to the surviving spouse or the value of the legal right if the survivor elects to take this,
- (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death,
- (c) the means of the testator,
- (d) the age of the child whose case is being considered and his or her financial position and prospects in life,
- (e) whether the testator has already in his lifetime made proper provision for the child.

The existence of the duty must be decided by objective considerations. The court must decide whether the duty exists and the view of the testator that she did not owe any is not decisive."

In the Supreme Court decision of *In the Estate of IAC deceased; C and F v WC and TC*<sup>40</sup> in 1989, Finlay, CJ quoted this general statement of the applicable principles, but added further principles which, he admitted, might to an extent be considered a qualification of it. He was satisfied that the phrase "failed in his moral duty to make proper provision for the child in accordance with his means" placed a relatively high onus of proof on an applicant for relief under section 117:

"It is not apparently sufficient from these terms in the Section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The Court should not, I consider, make an Order under the Section merely because it would on the facts proved have formed different testamentary dispositions.

A positive failure in moral duty must be established.

In a case such as is the instant case where evidence has been given of the Testatrix's financial support of her children during her lifetime indicative of a concerned assistance to all the members of her family, and where, as was established to the satisfaction of the learned trial Judge in this case, the relationship between the Testatrix and her children, and in particular, between the Testatrix and her daughters, was one of caring and kindness, the Court should, it seems to me, entertain some significant reluctance to vary the Testatrix's disposition by will. Quite different considerations may apply, as have been established in some of the decided cases under this Section, where a marked hostility

between a testator and one particular child is established to the satisfaction of the Court."

Commenting on this decision, Professor Brady has observed that:

"Finlay CJ's emphasis on the heavy burden which lies on an applicant child under s117 may well stem the growing tide of s117 applications, but, it is to be hoped that it will deter only the avaricious and frivolous and not the child who is genuinely 'hard done by'."<sup>41</sup>

Part IV of the *Succession Act 1965* prescribes the rules for intestate succession. All estate to which a deceased person was beneficially entitled or an estate or interest not ceasing on her death and as to which he dies intestate after the commencement of the Act is to be distributed in accordance with Part VI, after payment of all expenses, debts and liabilities and any legal right properly payable thereout.<sup>42</sup>

If an intestate dies leaving a spouse and *no* issue,<sup>43</sup> the spouse takes the whole estate.<sup>44</sup> If there is a spouse *and* issue, the spouse takes two-thirds, the issue one-third.<sup>45</sup> If there are issue but no surviving spouse, the issue are entitled to the estate.<sup>46</sup> If an intestate leaves neither issue nor surviving spouse, his or her parents take equal shares<sup>47</sup>; if only one parent survives, he or she takes all the estate.<sup>48</sup> If both parents are dead, the brothers and sisters and their children inherit.<sup>49</sup> Failing them, the estate is distributed in equal shares among the next-of-kin.<sup>50</sup>

In default of any person taking the estate of an intestate, whether under Part VI or otherwise, the State takes as ultimate intestate successor.<sup>51</sup> This change, which replaces the old law of escheat and *bona vacantia*,<sup>52</sup> was made in part out of concern that foreign courts "might treat *bona vacantia* as being a matter of public law and so might not enforce a claim to it".<sup>53</sup> As we shall see, the provision is of some relevance to the Convention.

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41 *Brady*, para 7.6.7.

42 Section 66.

43 Children whose parents have not married one another are now within the meaning of the term "issue": *Status of Children Act 1987*, section 29. As to the former law, see *O'B v S*, *supra*. The section applies to deaths intestate on or after 14 June 1988.

44 Section 67(1).

45 Section 67(2).

46 Section 67(3).

47 Section 68.

48 *Id.*

49 Section 69.

50 Section 70.

51 Section 73(1). The Minister for Finance may waive this right if he considers it proper to do so: section 73(2).

52 Cf *In re Doherty*, [1961] IR 219 (High Ct, Kenny, J).

53 *Wylie*, para 15.27. See also *Brady*, para 8.13.1, *McGuire*, 184, *Binchy*, 429-430, *Wolff*, 146, 151-152, 157, 166, 579-580.

Finally in relation to intestacy, it should be noted that, where the will of a testator effectively disposes of part only of his estate, the remainder is distributed as if he had died intestate and left no estate.<sup>54</sup> Mr Pearce notes that "[t]here is no express provision that the will shall prevail, although clearly dispositions by will take effect before the intestacy rules apply".<sup>55</sup>

Section 56 of the 1965 Act confers on a surviving spouse the right to require the personal representatives to appropriate the dwelling<sup>56</sup> and household chattels<sup>57</sup> in or towards satisfaction of any share of that spouse.<sup>58</sup> We need not here describe the full scope of the section, which contains fourteen subsections. Suffice it to note that this right to require appropriation may be exercised in relation to the share of an infant for whom the surviving spouse is a trustee if the share of the surviving spouse is insufficient to enable an appropriation to be made.<sup>59</sup>

Moreover, the rights conferred by the section on the surviving spouse include a right to require appropriation partly in satisfaction of a share in the deceased's estate and partly in return for a payment of money by the surviving spouse on the own spouse's behalf and also on behalf of any infant for whom the spouse is a trustee.<sup>60</sup> In addition, in an application to the court by the surviving spouse,<sup>61</sup> the court, if of opinion that, in the special circumstances of the case, hardship would be caused to the surviving spouse (or to the surviving spouse and any infant for whom the surviving spouse is a trustee), may order that an appropriation to the spouse be made without this payment of money or subject to the payment of such amount as the court considers reasonable.<sup>62</sup>

The court may make such further order in relation to the administration of the deceased's estate as may appear to it just and equitable having regard to the provisions of the Act and to all the circumstances.<sup>63</sup>

A limitation on the right to appropriation of the dwelling<sup>64</sup> should be noted. It arises in the following cases:

- (a) where the dwelling forms part of a building, and an estate or interest in the whole building forms part of the estate;

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54 Section 74. See *Brady*, para 8.14.1.

55 *McGuire*, 186.

56 Defined in subsection (14).

57 Also defined in that subsection.

58 Subsection (1).

59 Subsection (3).

60 Subsection (9).

61 Subsection 10(a).

62 Subsection 10(b).

63 Subsection 10(c).

64 But not the household chattels.

- (b) where the dwelling is held with agricultural land on estate or interest in which forms part of the estate.
- (c) where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house;
- (d) where a part of the dwelling was, at the time of the death, used for purposes other than domestic purposes.<sup>65</sup>

If, however, the court, on application by the personal representatives or the surviving spouse, is satisfied that the exercise of the right of appropriation of the dwelling is unlikely to diminish the value of the assets of the deceased, other than the dwelling, or to make it more difficult to dispose of them in due course of administration, it may authorise the exercise of this right of appropriation.<sup>66</sup>

Part X of the *Succession Act 1965* (as amended) deals with unworthiness to succeed<sup>67</sup> and disinheritance.<sup>68</sup>

As regards the former, a sane person who has been guilty of the murder, attempted murder or manslaughter of the deceased is precluded from taking any share in his or her estate save such as arises under a will made after the act constituting the offence,<sup>69</sup> and is not entitled to make an application under section 117.<sup>70</sup>

A spouse guilty of desertion which has continued up to the death for two years or more is also precluded from taking any share in the estate of the

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65 *Id.*, subsection (6).

66 *Id.*, subsection (5)(b).

67 See generally *Brady*, paras 7.10.1 ff; and paras 67 ff, for a stimulating policy analysis. The Irish approach is modelled on that favoured in civil law jurisdictions: see the Scottish Law Commission's Consultative Memorandum No. 71, *Some Miscellaneous Topics in the Law of Succession*, paras 2.4-2.6 (1986). More generally see the South African Law Commission's Working Paper 19, *Review of the Law of Succession: Disqualification from Inheriting, Substitution, Succession Rights of Adopted Children* (1987).

68 See generally *Brady*, paras 7.10.8 ff.

69 Section 120(1). The courts have yet to address the scope of the expression "the act constituting the offence" in the context of the making of a will subsequent to that act. If a man poisons his wife, and, before the poison kills her, the wife, in ignorance of his conduct, makes a will in his favour, is he to be precluded? The courts would without question be disposed to hold that he should be precluded. One approach would be to interpret "the act constituting the offence" as ending only on the death of the wife. Another approach would be to read into the statutory provisions a requirement that the will be made in knowledge of the guilt of the beneficiary. A third possibility is that subsection (4) would be called in aid, though whether it could carry such a distinct load is debatable.

70 Section 120(1).

deceased as a legal right or on intestacy.<sup>71</sup> A spouse who has been found guilty of an offence against the deceased, or against the spouse or any child of the deceased (including an adopted child or a person to whom the deceased was *in loco parentis* at the time of the offence) is precluded from taking any share in the estate as a legal right or from making an application under section 117, where the offence was one punishable by a maximum period of at least two years' imprisonment or by a more severe penalty.<sup>72</sup>

Section 121 deals with dispositions<sup>73</sup> made for the purpose of defeating or substantially diminishing the share of the disposer's spouse, whether as a legal right or on intestacy, or the intestate share of any of his children, or of leaving any of his children insufficiently provided for.<sup>74</sup> The section applies only where the disposition is one other than a testamentary disposition or a disposition to a purchaser; moreover the beneficial ownership of the property must vest in possession in the donee within three years before the death of the person who made it.<sup>75</sup>

If the court is satisfied that the disposition was one for the purpose of disinheriting the spouse or children of the deceased, it is decreed for the purposes of Parts VI and IX of the Act, to be a devise or bequest made by the deceased's will and to have had no other effect.<sup>76</sup> To the extent that the court so orders, the disposition is deemed never to have had effect as such and the donee of the property (or other person deriving title under him) will be a debtor of the estate for such amount as the court may direct accordingly.<sup>77</sup> The court may make such further order in relation to the matter as may appear to it just and equitable having regard to the provisions and the spirit of the Act and to all the circumstances.<sup>78</sup>

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71 Section 120(2), as amended by the *Judicial Separation and Family Law Reform Act 1989*, section 42(1). The notion of desertion here embraces constructive desertion: section 120(3). See further *Duncan & Scully*, paras 7.032ff. Section 17(2) of the 1989 Act enables the Court to extinguish such a share of either spouse on granting a decree of judicial separation or at any time thereafter, on application of either spouse. See *Duncan & Scully*, paras 13.044 - 13.045, R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 237-238 (1989).

72 Section 120(4).

73 Including *donationes mortis causa*: section 121(10).

74 *Id.*, subsection (2).

75 *Id.*, subsection 3.

76 *Id.*, subsection (2).

77 *Id.*, subsection (3).

78 *Id.*, subsection (4).

### CHAPTER 3: IRISH PRIVATE INTERNATIONAL LAW ON SUCCESSION<sup>1</sup>

As a general principle,<sup>2</sup> as we have mentioned, the *lex situs* governs succession to immovables and the *lex domicilii* at the time of death determines succession to movables. These rules are subject to some fairly important qualifications, especially in relation to testate succession and powers of appointment.

Let us first consider intestate succession before going on to examine the position relating to testate succession.

#### *Intestate Succession*

##### *(a) Movables*

It is a long-established rule that succession to moveable property in the case of intestacy is determined by the *lex domicilii* of the testator at the time of

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1 See generally *Binchy*, ch 23, *Brady*, paras 2.10, 5.18-5.19, *Rabel*, vol 4, part 13, *Wolff*, chs 38-41, W Breslauer, *The Private International Law of Succession in England, America and Germany* (1937), F Boulanger, *Les successions internationales: problemes contemporains* (1981), N Bentwich, *The Law of Domicile in its Relation to Succession* (1911), von Overbeck, *Divers aspects de l'unification du droit international prive, specialement en matiere de succession*, [1961] - III Recueil des cours 529, Hickey, *Irish Private International Law*, 42 *Rabels Zeitschrift* 268, at 286-291 (1978). Lewald, *Questions de droit international des successions*, [1925] - IV Recueil des cours 1, Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U Fla L Rev 151 (1955). Plimpton, *Conflicts of Laws and the Disposition of Decedants' Movables*, 24 Me L Rev 43 (1972), Carteaux, *Comment, Conflicts of Law and Successions: Comprehensive Interest Analysis As a Viable Alternative to the Traditional Approach*, 59 Tul L Rev 389 (1984), Miller, *Family Provision on Death - The International Dimension*, 39 Int & Comp L Q 261 (1990).

2 *In bonis GM Deceased; FM v TAM*, 106 ILTR 82, at 86 (High Ct, Kenny, J, 1970).

death.<sup>3</sup> This rule applies only to succession "in the strict sense of that term".<sup>4</sup> It does not apply to the right of a State to take ownerless property as *bona vacantia* or *jus regale*.

The issue was analysed by the English Court of Appeal in *In the Estate of Maldonado, Deceased, State of Spain v Treasury Solicitor*,<sup>5</sup> in 1953. There, the Court held that the Spanish State, as *ultimus heres*, should succeed to the estate of a woman domiciled in Spain. Against this view, it has been argued that the distinction between succession by a sovereign state as *ultimus heres*<sup>6</sup> and the appropriation of *bona vacantia* by a foreign state was "a mere matter of words".<sup>7</sup> Jenkins, LJ responded:

"This argument is not without persuasive force, but I do not think that the question can truly be said to be one of distinction without difference. The foreign state can only succeed under its own law of succession where the succession is governed by that law. On the other hand, where the case is not one of succession, but of appropriation of ownerless property, the right applies to any ownerless property which may be reached by the law of the foreign state concerned, irrespective of the law by which its devolution is governed, provided only that by the relevant law it is in fact ownerless."<sup>8</sup>

#### (b) *Immovables*

It is well established that where a person with an interest in immovables dies intestate, the *lex situs* determines the question of descent or distribution. This is so, regardless of the domicile of the intestate person.<sup>9</sup>

This rule can present particular difficulties where legislation in more than one state confers on a surviving spouse or a member of the family of the deceased intestate person, a specific entitlement to a portion of the estate. This matter

3 See *In bonis Gentili, Deceased*, 1R 9 Eq 541 (Prob, Warren, J, 1875), *Miller, Pipon v Pipon*, Amb 25, 27 ER 14 (1744), *Thorne v Watkins*, 2 Ves Sen 35, 28 ER 24 (1750), *Bruce v Bruce*, 6 Bro PC 566, 2 ER 1271 (1790), *Balfour v Scott*, 6 Bro PC 550, 2 ER 1259 (1793), *Somerville v Somerville*, 5 Ves Jun 750, 31 ER 839 (1793).

4 *Dicey & Morris*, 1005.

5 [1954] P 223 (CA, 1953, aff'g Barnard, J).

6 Which, as we have seen, is also the position under Irish Law: Succession Act 1965, section 73(1). See further *supra*, p12.

7 [1954] P, at 248. Cf *Anton*, 517 Lipstein, [1954] Camb LJ 22, at 25-26, LCB G[ower], 17 Modern L Rev 167 (1954); Ehrenzweig, *Characterisation in the Conflict of Laws: An Unwelcome Addition to American Doctrine*, in *XXth Century Comparative and Conflict Law: Legal Essays in Honor of Hessel Yntema*, 395, at 403 (1961). See, however, Cohn, 17 Modern L Rev 381 (1954).

8 [1954] P, at 248.

9 *In bonis Gentili*, 1R 9 Eq 541 (Warren, J, 1875), *De Fogassieras v Dupont*, 11 LR Ir 123 (Warren, J, 1881), *In re Rea deceased; Rea v Rea*, [1902] 1 IR 451 (Porter, MR). See also *Murray v Campemowme*, [1901] 2 IR 232, at 236 (QB Div, Prob, Andrews, J, 1900), *In re Stoughton, Deceased*, [1941] IR 166, at 178 (High Ct, per Hanna, J, 1940).

is considered in detail below.<sup>10</sup>

#### *Testamentary Succession*

The general rule in Ireland<sup>11</sup> and other common law jurisdictions is that the *lex domicilii* of the testator at the time of his death exclusively determines testamentary succession to his movable property,<sup>12</sup> and that the *lex situs* governs testamentary succession to his immovable property. The fact that Irish assets must be administered in accordance with Irish law does not detract from this principle, since the duty of the Irish executor will be to distribute the moveable property to the persons entitled under the *lex domicilii*.

#### *The Scope for Renvoi*

The private international law of succession in a number of common law jurisdictions has generated a degree of interest in *renvoi*.<sup>13</sup> Ireland is no exception, though it is fair to say that the subject has received only minimal attention by Irish courts. The essence of this doctrine is that, where the law of a particular foreign country is the *lex causae*, that law should be considered to embrace the private international law rules of the foreign country as well as its domestic law. Thus, if, under those rules, the succession to a deceased's estate should be determined by the law of another country, the *renvoi* doctrine would require the application of the latter law.

In *Re Adams Deceased; Bank of Ireland Trustee Co v Adams*,<sup>14</sup> Budd J, applied the *renvoi* doctrine in holding that no conflict of laws arose because French law, the testator's *lex domicilii* under Irish private international law rules, referred the issue of formalities as to the succession to his estate to the law of the testator's domicile.

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<sup>10</sup> *Infra*, pp 24ff.

<sup>11</sup> See *Re Adams, Deceased. Bank of Ireland Trustee Co v Adams*, [1967] IR 424 (High Ct, Budd, J, 1966).

<sup>12</sup> *Cheshire & North*, 834; *Re Adams, Deceased. Bank of Ireland Trustee Co v Adams, supra*, at 454, quoting from *Whicker v Hume*, 7 HL Cas 124, at 156, 11 ER 50, at 63 (*per* Lord Cranworth, 1858).

<sup>13</sup> See *Binchy*, 38-44, Falconbridge, *Renvoi and Succession to Movables*, 46 LQ Rev 465 (1930), 47 LQ Rev 271 (1931, Sewall, *Observations on Renvoi in the Case of the Movable Succession of British Subjects Dying Intestate in France*, 27 Int Law Assn 334 (1912), Bentwich, *The Development of the Doctrine of Renvoi in England in Cases of Succession*, 4 Zeitschrift für Ausländisches und Int. Privatrecht 433 (1930), Brown, *In re Johnson*, 25 LQ Rev 145 (1909), Mann, Note: *Succession to Immovables Abroad*, 11 Modern L Rev 232 (1948).

<sup>14</sup> [1967] IR 424. See further *Binchy*, 43.



## Capacity

### (a) *Movables*

The capacity of a testator is determined by the law of his or her domicile.<sup>15</sup> In the English decision of *In the Estate of Fuld (No. 3)*; *Hartley v Fuld*,<sup>16</sup> Scarman, J said that he knew of no distinction drawn between "lack of capacity due to immaturity or status and incapacity arising from ill health."

There is no problem where the testator has the same domicile at the time of making the will and at his death; but a difficulty arises where the testator has changed his domicile between making the will and the time of his death. The commentators are divided on the question whether capacity should be tested by the testator's *lex domicilii* at the time of the making of the will or at the time of his death. In favour of referring to the time of the testator's death, it may be said that the will, confers no rights prior to his death.<sup>17</sup> Moreover, other conflicts aspects of succession, such as the essential validity of wills of movables, and intestate succession to movables, take the time of death as their reference point.<sup>18</sup>

In favour of making the time of the will control the outcome, it has been pointed out that certain types of incapacity, such as unsoundness of mind or minority, may not be validated by subsequent events: "[n]o will can be valid unless it is valid when made. On principle it makes no difference that the subsequent event consists in a change of domicile to a new country where the law has a more favourable rule for capacity".<sup>19</sup> This point is a strong one, but should perhaps be restricted to cases of personal, rather than proprietary,<sup>20</sup> capacity,<sup>21</sup> which should better be regarded as involving the question of essential validity.<sup>22</sup>

Rather than making one of these two times the *sole* controlling factor in determining matters of capacity, it would, of course, be possible for our law to require that the testator have capacity at both<sup>23</sup> or, far more generously, either,<sup>24</sup> of these times.

This latter solution gains some support from a similarly "liberal"<sup>25</sup> approach prevailing in relation to the capacity of a legatee to receive a legacy of

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15 *Cheshire & North*, 835.

16 [1968] P 675, at 696.

17 *Cf Wolff*, 581, who mentions, but does not accept, this argument.

18 *Graveson*, 485.

19 *Cheshire & North*, 835.

20 As, for example, the power to disinherit one's spouse.

21 *Cf Dicey & Morris*, Rule 139.

22 *Cf id.*, and *infra*, pp 24ff. See also *Re Adams Deceased*; *Bank of Ireland Trustee Co v Adams* [1967] Ir 424 (High Ct, Budd, J).

23 As suggested by *Thomas*, 130-131 (surely too severe a solution).

24 *Cf Graveson*, 486.

25 *Cf Dicey & Morris*, 1001, *Graveson*, 520.

movables: it will suffice if the legatee acquires capacity either by the law of his own domicile or by the law of the testator's domicile, whichever first occurs. Thus, if a testator, domiciled in England gives a legacy to his nephew, domiciled in Ireland, and the boy is aged sixteen, the boy may receive the legacy on reaching full age in Ireland by marrying under the age of eighteen,<sup>26</sup> even though in England eighteen is the age of majority in all cases.<sup>27</sup> The converse case arose in *Donohue v Donohue*<sup>28</sup> in 1887, where funds in Ireland, placed to the separate credit of a minor domiciled in Missouri, were paid out on her reaching the age of eighteen, the age of majority in Missouri though not in Ireland.

**(b) Immovables**

So far as capacity is concerned there is general agreement<sup>29</sup> that the *lex situs* should govern, though clear judicial authority is hard to come by.<sup>30</sup>

**Formal Requirements<sup>31</sup>**

At common law, after some uncertainty,<sup>32</sup> it was accepted in 1830<sup>33</sup> that the law of the domicile exclusively governed the formal validity of a will of movables.<sup>34</sup> This could lead to hardship where a person resident or domiciled abroad made his will in accordance with the formal requirements of the land of his birth. Such a will, if it failed to comply with his place of domicile was invalid, in spite of the testator's best efforts to ensure that the will would be formally valid.<sup>35</sup> As a result of the decision to this effect in *Bremer v*

<sup>26</sup> Age of Majority Act 1985, section 2(1).

<sup>27</sup> See *Hellman's Will*, LR 2 Eq 363 (Lord Romilly, MR, 1866), *Re Schnapper*, [1928] Ch 420 (Clauson, J); cf, however *Leslie v Baillie*, 2 Y & CCC 91, 63 ER 40 (1843) and *Re Will of John Lee Hing*, 1 SRNSW (Eq) 199 (Simpson, CJ in Eq, 1901), both of which appear to look exclusively to the *lex domicilii* of the legatee. See also *Re Pemberton; Fisher v Barclays Bank Ltd*, 59 DLR (2d) 44 (BC Sup Ct, Smith Co Ct J, 1966), *Graham v Canadaigna Lodge No. 236 of the Independent Order of Oddfellows of the State of New York*, 24 OR 255, esp at 260-261 (Chy Div, Meredith, J, 1893).

<sup>28</sup> 19 LR Ir 349 (Chatterton, V-C, 1887).

<sup>29</sup> Cf *Cheshire & North*, 850, *Dicey & Morris*, 1010, *Morris*, 392, *McLeod*, 416, *Castel*, vol 2, 450.

<sup>30</sup> Cf *Bank of Africa v Cohen*, [1909] 2 Ch 129, a case dealing with capacity to mortgage land; see also *Re Hernado; Hernado v Sawtell*, 27 Ch D 284 (1884). It may be argued that dicta in *In the Goods of Gentili, Deceased*, IR 9 Eq 541 (Prob, Warren, J, 1875), are broad enough to embrace the question of capacity.

<sup>31</sup> See Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws*, 20 Yale LJ 427 (1911), Bale, *The Demise of Lord Kingsdown's Act*, 29 Sask Bar Rev 179 (1964), Rabel, *The Form of Wills*, 6 Vand L Rev 535 (1953), *Morris Note*, 13 Int & Comp LQ 684 (1964), Cohn, *Note*, 22 Modern L Rev 413 (1959).

<sup>32</sup> Cf Lorenzen, *supra*, at 434.

<sup>33</sup> *Stanley v Barnes*, 3 Hagg Ecc 447, 162 ER 1190 (1830). See also *Moore v Darell*, 4 Hagg Ecc 346, 162 ER 1472 (1832), *Craigie v Lewin*, 3 Curt Ecc 435, 163 ER 782 (1842), *Croker v Hertford*, 4 Moo PC 339, 13 ER 334 (1844).

<sup>34</sup> *Cheshire & North*, 836.

<sup>35</sup> Cf *Bremer v Freeman*, 10 Moo PC 306, 14 ER 508 (1857).

Freeman<sup>36</sup> in 1857, the Wills Act 1861 was passed.

This Act (Lord Kingsdown's Act) improved the position somewhat. Section 1 of that Act provided that every will made outside the United Kingdom by a British subject (whatever his or her domicile at the time of making the will or at his or her death) should be admissible to probate, as regards personal estate, if made in accordance with the formal<sup>37</sup> requirements of the law of the place where it was made or of the law of the place where the person was domiciled when making the will or of the law of his or her domicile or origin if this was in "part of Her Majesty's Dominions."

The Act was, however, "marred by indefensible distinctions".<sup>38</sup> The limitations to British subjects was "embarrassing and insular".<sup>39</sup> Moreover, the reference to personal, rather than movable, property was out of harmony with the general conflicts classification.<sup>40</sup> Finally, invoking the testator's domicile of origin in this context could result in a will being formally valid by reason of compliance with the law of a country with which the testator had no social links.<sup>41</sup>

So far as immovables were concerned, the position at common law was that the *lex situs* provided the exclusive test for formal validity.<sup>42</sup> A decision involving the application of the *lex situs* is *De Fogassieras v Dupont*,<sup>43</sup> in 1881. A French subject, domiciled and resident in France, made a will executed and attested as required by the Irish legislation but not in conformity with the formal requirements of French law. Warren, J held that the will was effective in relation to the testator's real estate and leaseholds in Ireland. The will, he said, was "unquestionably valid as a disposition of the testator's real estate in Ireland, for such testamentary dispositions are governed by the *lex loci rei sitae* ...".<sup>44</sup> He held that the leaseholds should also be characterised as immovable property, and that thus the will was equally valid in regard to them.<sup>45</sup>

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<sup>36</sup> *Supra*.

<sup>37</sup> Accordingly, the 1861 Act did "not affect the material validity of a will. Its effect [was] to render formally valid, and thus admissible to probate, a will which might otherwise be defective in form". *Re Adams Deceased; Bank of Ireland Trustee Co Ltd v Adams*, [1967] IR 424, at 455 (High Ct, Budd, J).

<sup>38</sup> Bale, *The Demise of Lord Kingsdown's Act*, 29 Sask Bar Rev 179, at 181 (1964). See also Morris, *The Choice of Law Clause in Statutes*, 62 LQ Rev 170, at 173-176 (1946), Thomas, 131-132, Breslauer, *The Scope of Section 3 of the Wills Act, 1861*, 3 Int LQ 343 (1950).

<sup>39</sup> *Cheshire & North*, 836. See also Morris, *supra*, at 174. Cf Breslauer, *supra*, at 344-350.

<sup>40</sup> Morris, *supra*, at 175. Cf *M'Ginn v Delbeke*, 61 ILTR 117 (NICA 1926).

<sup>41</sup> *Cheshire & North*, 836. See also Bentwich, *Recent Application of the Renvoi in Matters of Personal Status*, 5 Can Bar Rev 379, at 387 (1936).

<sup>42</sup> *Murray v Champemowne*, [1901] 2 IR 232 (QB Div, Prob, Andrews, J, 1900), *De Fogassieras v Dupont*, 11 LR Ir 123 (Prob, Warren, J, 1881) (described by Dicey 6th ed, 1949, 539, fn 64 as "undoubtedly sound in principle"); see also *In the goods of Gentili, Deceased*, IR 9 Eq 541, at 544-545 (Prob, Warren, J, 1875). Cf *M'Ginn v Delbeke*, *supra*.

<sup>43</sup> 11 LR Ir 123 (1881).

<sup>44</sup> *Id.*, at 125.

<sup>45</sup> *Id.*, at 126.

The matter was the subject of a Hague Convention in 1961: *The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*.<sup>46</sup>

The philosophy of the Convention is very much in favour of upholding the formal validity of testamentary dispositions whenever it is reasonably possible to do so.

Giving effect to this Convention, Part VIII of the Succession Act 1965<sup>47</sup> provides (in section 102(1)) that a testamentary disposition is valid as regards form if its form complies with the internal law of any of a number of possible countries, that is, the internal law:

- (a) of the place where the testator made the testamentary disposition;
- (b) of a nationality possessed by the testator either at the time when he made the disposition or at the time of his death;
- (c) of a place in which the testator had his domicile either at the time when he made the disposition or at the time of his death;
- (d) of the place in which the testator had his habitual residence either at the time when he made the disposition or at the time of his death; *or*
- (e) so far as immoveables are concerned, of the place where they are situated.

As a supplement to ground (a), section 103 provides that a testamentary disposition made on board a vessel or aircraft is also valid as regards form if its form complies with the internal law of the place with which, having regard to its registration (if any) and any other relevant circumstances, the vessel or aircraft may be taken to have had the most real connection.<sup>48</sup>

Ground (b) brings our law into line with civil law jurisdictions,<sup>49</sup> where the *lex patriae*, even today, plays an important role. In countries whose national law consists of a non-unified system, ground (b) would present difficulties of interpretation. Section 102(3) accordingly provides that in such a case the law to be applied is to be interpreted by the rules in force in that system and, failing any such rules, by the most real connection which the testator had with

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46 For analysis of the Convention, see Droz, *Les nouvelles règles de conflits française en matière de forme des testaments*, [1968] Rev crit de dr internat priv 1, Graveson, *The Ninth Hague Conference of Private International Law*, 10 Int & Comp LQ 18, at 21-25 (1961).

47 See Wylie, paras 14.51-14.54.

48 This provision is modelled on section 2(1)(a) of Britain's Wills Act 1963.

49 Cf Cohn, *Note*, 22 Modern L Rev 413, at 413 (1959). It is interesting to note that Dr Morris had considered "startling" a proposal by an English Committee to this effect: *Note* 22 Modern L Rev 65, at 66 (1959). His doubts were not dispelled by Dr Cohn's note: see Morris, *Note* 13 Int & Comp 684, at 686-687 (1964).

any one of the various laws within that system.

So far as ground (c) is concerned, there is an important change to the general rule<sup>50</sup> that the *lex fori* determines the meaning of domicile. Section 102(4) provides that the determination of whether or not the testator had his domicile in a particular place is to be governed by the law of that place.<sup>51</sup> The possibility of a testator's being domiciled in more than one country by virtue of this provision should be noted.

Ground (d), which refers to the testator's habitual residence, contains no definition of that concept.<sup>52</sup> The liberal policy of Part VIII of the Act towards upholding the formal validity of testamentary dispositions may well affect the judicial interpretation of the concept.<sup>53</sup>

Ground (e), in referring to the *lex situs*, where immovables are concerned, preserves the common law rule. The important difference, of course, is that, at common law, the *lex situs* constituted the *sole* test for immovables whereas, under section 102(1), ground (e) offers merely one of five options for immovable property. Perhaps it would have been advisable to make this option available for movable, as well as immovable, property.<sup>54</sup>

Some other provisions in the Act regarding formalities should be noted. Section 106(1) provides that, for the purposes of Part VIII, any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator is to be deemed to pertain to matters of form.<sup>55</sup> What appears to be envisaged here is not the question of capacity in the general sense to make a will but rather merely particular *formal* requirements applying to the making of testamentary dispositions by persons of defined age, nationality or other personal condition.

Section 107(2) of the Act provides that, in determining whether or not a testamentary disposition complies with a particular law, regard is to be had to the requirements of that law at the time of making the disposition, but that this is not to prevent account being taken of an alteration of law affecting testamentary dispositions made at that time if the alteration enables the disposition to be treated as valid. Thus, retrospective legislation making

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50 See *Binchy*, 50.

51 This provision derives from Article 1, final paragraph, of the Convention.

52 In contrast to the approach favoured by the Law Reform Commission, in its recommendations on the subject of habitual residence as a general connecting factor in private international law; see *Binchy*, 99-100.

53 Cf *Graveson*, 490:

"If, as is possible, a testator, like a cat, has two or more habitual residences, he should be allowed to resort to the law of either or any one of them."

54 Cf *Morris*, 394.

55 The same rule applies to the qualifications of witnesses necessary for the validity of a testamentary disposition and to the provisions of section 82 concerning gifts to an attesting witness or spouse of an attesting witness: section 106(2).

formal requirements easier than previously would be recognised, but retrospective legislation invalidating a testamentary disposition for non-compliance with formal requirements would not.

### ***Essential Validity***

The grant of probate "is conclusive evidence that the instrument proved was testamentary"<sup>56</sup> according to Irish law, but it is not conclusive as to the validity of the disposition to which the will is designed to give effect. This aspect - the essential validity of the will - is determined by the *lex domicilii* at death, so far as movables are concerned, and the *lex situs*, so far as immovables are concerned.<sup>57</sup> In *In Re Adams Deceased; Bank of Ireland Trustee Co v Adams*,<sup>58</sup> Budd, J said:

"The position in this case is that, according to English and Irish law, on which there is no difference on this point, the law of the place of a deceased person's domicile governs the succession to his movables and therefore the material validity of his will."

Accordingly, he applied French law,<sup>59</sup> as the *lex domicilii*, to determine this question. Since the testator's codicil contravened an imperative requirement of French law in that it did not take into account the *reserve legale* to which the testator's daughter was entitled under French law, Budd J held that the will and codicil applied only up to the quota which French law permitted the testator to dispose of, having regard to his daughter's claim.

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56 *Re Adams Deceased; Bank of Ireland Trustee Co v Adams*, [1967] IR 424 at 454 (High Ct, Budd, J) quoting from *Whicker v Hume*, 7 HL. Cas 124, at 156, 11 ER 50, at 63 (*per* Lord Cranworth, 1858).

57 In this context, it is necessary to distinguish between rules of substance, which are determined by the *lex domicilii* (for movables) or *lex situs* (for immovables), and rules of procedure, which will be governed by the *lex fori*. Rules of substance include the presumption of simultaneous death in cases of uncertainty: cf *Succession Act 1965*, section 5, *Wylie*, paras 7.06, 14.32-14.33, *Re Cohn*, [1945] Ch 5 (Uthwatt, J, 1944), analyzed by 61 LQ Rev 340 (1945), and see *infra*, p628. An example of a rule of procedure in this context is the burden of proof of testamentary capacity: see *In the Estate of Fuld (Deceased) (No. 3) Hartley v Fuld*, [1968] P 675, at 698-699 (Scarman, J, 1965).

58 [1967] IR 424, at 457 (High Ct, Budd, J). Budd, J could find "no case ... where it has been held that the expressions used in a will can override the law of domicile as to material validity": *id*, at 459. He quoted *Dicey*, 7th ed, Rule 119: "The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death". This passage appears unaltered in *Dicey & Morris*, 11th ed, as Rule 142.

59 Budd, J's consideration of the *renvoi* issue is dealt with by *Binchy*, pp43-44.

An example of the reverse case arose in the English decision of *Re Groos, Groos v Groos*,<sup>60</sup> where a will made in the Netherlands by a woman domiciled in England was held to operate under English law, which permitted her to leave all her property to her husband, rather than the law of the Netherlands, which would have required three-quarters of her estate to be given to her children.

### **Statutory Entitlements<sup>61</sup>**

This may be a useful point at which to examine in some detail the important question of compulsory statutory entitlements in the estates of deceased persons, since it is generally treated as a matter affecting essential validity.

In most countries, legislative provisions confer specific entitlements on intestacy as well as restricting the freedom of a testator to dispose of the whole of his estate as he wishes. Normally the members of his family will have the right to some specific or discretionary share in his estate. There is a wide divergence in the types of legislation in different countries. In Ireland, where a spouse dies intestate<sup>62</sup> leaving a surviving spouse and no issue, the surviving spouse is entitled to the entire estate.<sup>63</sup> Where there are issue the surviving spouse is entitled to two-thirds and the issue to the remaining third of the estate.<sup>64</sup> Where a spouse dies leaving a will, the surviving spouse has a "legal right" to a half of the estate of the deceased spouse if there are no issue,<sup>65</sup> and to a third of the estate if there are issue.<sup>66</sup>

The children have no right to any specific proportion of the estate but they may apply to the court, under section 117 of the Succession Act 1965, claiming that their parent has failed in his or her moral duty to make proper provision for them as a prudent and just parent would have done. The court may make an order for such provision out of the estate as it thinks just.

In other countries, the general trend is to permit applications at least to the

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60 See Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U Fla L rev 151 (1955), Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 Ind LJ 293 (1955), Heilman, *Interpretation and Construction of Wills of Immoveables in Conflict of Laws Cases Involving "Election"*, 25 U Ill L Rev 778 (1931), Graue, *The Rights of Surviving Spouses Under Private International Law*, 15 Amer J of Comp L 164 (1967), Scoles & Rheinstein, *Conflict Avoidance in Succession Planning*, 21 L & Contemp Prob 499, at 506-512 (1956), Breslauer, *Conflict of Laws in Restrictions on Freedom and Testation*, 27 Iowa L Rev 425, (1942), Ester & Scoles, *Estate Planning and Conflict of Laws*, 24 Ohio St LJ 270, at 279-281 (1963), Carteaux, *Comment, Conflicts of Law and Successions: Comprehensive Interest Analysis As a Viable Alternative to the Traditional Approach*, 59 Tul L Rev 389, at 400ff (1984).

61 [1915] 1 Ch 572 (Sargant, J).

62 For clarity of discussion, it is easier to include the intestacy provisions in the present discussion, rather than treat them separately earlier in the chapter.

63 Succession Act 1965, section 67(1).

64 *Id.*, section 67(2).

65 *Id.*, section 111(1).

66 *Id.*, section 111(2).

extent that the claimants may obtain *maintenance* out of the estate. Some countries go further and permit either specific proportions or discretionary entitlements extending beyond the entitlement to maintenance.<sup>67</sup>

It is worthwhile to consider the policy goals served by this type of legislation. Where, as is often the case, the legislation limits the entitlements of the surviving members of the deceased's family to a *maintenance* claim, it can be argued that the purpose is to prevent destitute families from becoming a charge on the community.<sup>68</sup> Where, however, the legislation provides for a fixed share, as is the case in Ireland in relation to the surviving share, this factor fades in significance. Similarly, a discretionary entitlement not limited to maintenance enables the Court to make a substantial order in favour of an applicant,<sup>69</sup> which goes well beyond the protection of the State purse.

When we come to examine the legislation in most countries, including Ireland, we find a surprising lack of concern on the part of the legislators for the conflicts dimensions. The result is doubly unfortunate. Firstly, the legislation tends to treat the deceased person's estate as a unit, rather than making any distinction between movable and immovable property. Secondly, in the light of a wide divergence between the laws of different countries and in the absence of any significant international agreement harmonising practice between the legislation of different countries, there can often be a significant risk of surviving members of the deceased's family receiving undue or inadequate shares from two or more countries.

Having mentioned these difficulties, let us now consider how the conflicts principles have developed on this subject.

Firstly, as has already been mentioned,<sup>70</sup> it is agreed that a claim for a statutory share, where there is a will, relates to the essential validity of the will,<sup>71</sup> rather than being a matter to be dealt with by the *lex fori* in the administration of the estate.<sup>72</sup>

Secondly, there is widespread support among common law jurisdictions for the view that the domicile or residence of the *claimants* is irrelevant to a claim that is otherwise sustainable. Thus, a child of a testator will not be excluded from making a claim under section 117 of the Succession Act 1965 merely

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67 See Graue, *supra*, at 164-172.

68 Cf *Re Perkins, Deceased*, [1958] SR (NSW) 1, at 9 (Eq, McLelland, J, 1957) (accepting that this was "part of the purpose" of the New South Wales legislation).

69 See, e.g. *In bonis GM Deceased: FM v TAM*, 106 ILTR 82 (High Ct, Kenny, J, 1970).

70 *Supra*, p24.

71 See *Re Adams Deceased; Bank of Ireland Trustee Co v Adams*, [1967] IR 424 (High Ct, Budd, J), *McGuire*, 34, *In re Paulin*, [1950] VLR 462, at 464 (Sholl, J).

72 See *Pain v Holt*, 19 SR (NSW) 105 (Harvey, J, 1919), *In re Butchart (Deceased): Butchart v Butchart*, [1932] NZLR 125 (CA, 1931), *Krzus v Crow's Nest Pass Coal Co Ltd*, [1912] AC 590, *In re Paulin*, [1950] VLR 462 (Sholl, J); cf *In re Found. Found v Seemans*, [1924] SASR 237 (Sup Ct, Murray, CJ 1924).



because he was born in Australia and has lived there all of his life. Where, conversely, a testator has abandoned his family and dies domiciled in a foreign country which permits total, or virtually total, testamentary freedom, the fact that the *lex domicilii* of the abandoned family confers substantial rights on the surviving spouse and children is a matter which should surely be given weight.<sup>73</sup> When we are dealing with legislation designed primarily to perform the goal of protecting family members or other dependants of the deceased spouse, reference to their *lex domicilii* would be far from fanciful.<sup>74</sup>

The approach generally favoured by the courts in this context is that the deceased's *lex domicilii* at the time of death governs movables<sup>75</sup> and the *lex situs* governs immovables.<sup>76</sup>

Some important Irish decisions on this subject have been reported. In *In bonis GM Deceased; FM v TAM*,<sup>77</sup> a testator, domiciled in Ireland, left, among other property, a farm in England. An adopted child of the testator took proceedings under section 117 of the *Succession Act 1965*, claiming that the testator had not provided for him as a prudent and just parent should. A question arose as to whether the farm should be included in the testator's estate for the purpose of Part IX of the *Succession Act 1965*, and in particular section 109(2), which provides as follows:

"In this Part references to the estate of the testator are to all estate to which he was beneficially entitled for an estate or interest not ceasing on his death and remaining after payment of all expenses, debts, and liabilities (other than estate duty) properly payable thereout."

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73 *In re Roper (Deceased)*, [1927] NZLR 731 (Sup Ct Skerrett, CJ), *Re Donnelly*, 28 SR (NSW) 34 (Harvey, CJ in Eq, 1927), *In re Butchart (Deceased): Butchart v Butchart*, [1932] NZLR 125 (CA, 1931).

74 Of course, a rule that simply referred to the respective *leges domicilii* of the family members at the time of death would be quite unsatisfactory, in view of its contingent results and complexity in application. But this difficulty, of itself, scarcely justifies an unqualified reference to the *lex domicilii* of the deceased spouse.

75 *In bonis GM Deceased; FM v TAM*, 106 ILTR 82 (High Ct, Kenny, J, 1970), *Re Adams Deceased; Bank of Ireland Trustee Co v Adams*, [1967] IR 424 (High Ct, Budd, J), *Higgins v Byrne*, 42 ILTR, 252 (Ch, Meredith, MR, 1908), McGuire, 34, *In re Roper (Deceased)*, [1927] NZLR 731 (Sup Ct, Skerrett, CJ), *Re Donnelly*, 28 SR (NSW) 34 (Harvey, CJ in Eq, 1927), *In re Paulin*, [1950] VLR 462 (Sholl, J), in *In re Butchart (Deceased): Butchart v Butchart*, [1932] NZLR 125 (CA, 1931), it was acknowledged that the statute, in its express terms extended to testators not domiciled in New Zealand but it was held that the statute should be read subject to the rule, already established, that the material validity of a will of movables is to be determined by the *lex domicilii* of the testator at the time of death. In *Pain v Holt*, 19 SR (NSW) 105 (1919), Harvey, J took the view that the "presumption" that the *lex domicilii* should apply might be displaced "if the legislature has clearly indicated such an intention". Since no deliberate intention was indicated one way or the other in the New South Wales Act, the *lex domicilii* was applied.

76 *In bonis GM Deceased; FM v TAM*, *supra*. See also *In re Rea Deceased; Rea v Rea*, [1902] 1 IR 451 (Porter, MR), *In re Roper (Deceased)*, *supra* *Re Donnelly*, *supra*, *In re Paulin*, *supra*.

77 106 ILTR 82 (High Ct, Kenny, J, 1970). Cf *supra*, pp 10-11.

By the time the issue had to be determined by Kenny, J. it had been conceded that the estate, for the purposes of Part IX of the Act, did not include the farm. Kenny, J. said:

"Section 109(2) of the Act has not changed the judge-made rule that the succession to immovables is governed by the law of the place where they are situate, and that to movables is regulated by the law of the domicile of the deceased."

Turning to the adopted child's claim under section 117, Kenny, J. said:

"The duty is not to make adequate provision but to make proper provision in accordance with the testator's means and in deciding whether this has been done, the court may have regard to immovable property outside the Republic of Ireland owned by the testator. The court, therefore, when deciding whether the moral duty has been fulfilled, must take all the testator's property (including immovable property outside the Republic of Ireland) into account, but if it decides that the duty has not been discharged, the provision for this child is to be made out of the estate excluding that immovable property."<sup>78</sup>

After a review of the evidence, Kenny, J. came to the conclusion that a prudent and just parent would have given one half of the estate, excluding the immovable property in England, to the adopted son.

The implications of this case are interesting. Kenny, J. took into account the immovable property in determining how much the testator should have given his adopted son. Kenny, J. came to this conclusion without regard to the content of the legislation in England or to the conflict rules of that country. If the Irish court chooses to be blind to those considerations in other cases there is a danger that the claimant may receive undue compensation. If we assume that the immovable property is in Ruritania, whose laws contain a provision exactly the same as section 117 of our Succession Act 1965, how is a court in Ruritania to determine a claim made there? If it adopts a similar approach to that of Kenny, J., and includes the *movable* property within the total estate against which the testator's duty is to be measured, and compensates the claimant accordingly, the claimant will finish up with unduly extensive compensation. Of course, if the court in Ruritania has regard to the earlier order made by the Irish court and to the basis on which that award was made, the problem of undue compensation may be mitigated or removed.

We must also consider the position where the court of the *situs* of the immovable property has *already* made an order in respect of the claimant under its equivalent legislation, *before* the claimant's application under section

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78 *Id.*, at 87.

117 is determined here. *In bonis G.M. Deceased: F.M. v. T.A.M.*<sup>79</sup> is itself authority for the view that, in determining the question of moral duty in applications under section 117, the court must consider the facts existing at the time of the testator's death rather than of the hearing. This might at first sight seem to foreclose the possibility of the court's taking into account the outcome of the foreign proceedings. In fact it does not do so. Having addressed the question of the testator's duty, the court is perfectly entitled (if not required) to have regard to present realities when making its order under section 117.

Next, it seems that Kenny, J.'s reference in the *G.M.*<sup>80</sup> case to the *lex domicilii*, so far as movables are concerned, suggests that he might not have countenanced a claim brought against a testator not domiciled within the State and having no immovable property here.<sup>81</sup> If the testator had immovable property here but was not domiciled within the jurisdiction, it seems clear that the Irish court could make an order under section 117, so far as the immovable property is concerned, and, on Kenny, J.'s approach, in doing so, it would have regard to the value of the movable property elsewhere. What is not so clear is whether the Irish court could in this case go further and attempt to determine the statutory entitlements, akin to section 117, of claimants under the *lex domicilii* so far as the movables are concerned. The inhibition which affected Kenny, J. against trespassing on the jurisdiction of the *lex situs*, so far as immovables are concerned, would not arise in this case. Moreover, the general rule that the essential validity of a will of movables is determined by the *lex domicilii* would appear to permit our courts to attempt to determine statutory claims arising under that law.

If this approach is favoured, the risk of overcompensation by the laws of two separate countries would obviously be reduced. But it may be considered too much to ask of an Irish court to attempt to exercise discretion in the same manner as required of courts in the country of the domicile by the *lex domicilii*.<sup>82</sup>

It may be argued that questions relating to moral duties to family members raise value judgments best resolved in the context of the culture in which they arise. This last observation brings to the surface yet again the inadequacy of a blind adherence to the *lex situs* in relation to immovables; for why should the contingent location of immovable property in a particular country result in the application of the mores of that country on an issue which is not its primary concern? If a German domiciled and resident in the Federal

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79 *Supra*. See further Cooney, *Succession and Judicial Discretion in Ireland: The Section 117 Cases*, 15 Ir. Jur. (n.s.) 62, at 66 ff (1980), Fitzpatrick, *The Succession Act 1965, Section 117*, 110 Ir. L.T. & Sol. J. 77, at 90 (1976), Binchy, 393.

80 *Supra*.

81 It is useful in this regard to contrast *In re Found. Found v. Seemans*, [1924] S.A.S.R. 237 (Sup. Ct., Murray, C.J., 1924) with *In re Butchart (Deceased): Butchart v. Butchart*, [1932] N.Z.L.R. 125 (C.A., 1931) and *In re Paulin*, [1950] V.L.R. 462 (Sholl, J.).

82 Cf. *In re Paulin*, [1950] V.L.R. 462, at 467 (Sholl, J.).

Republic of Germany buys a site in County Cork for a holiday home, Irish law should have little interest in imposing on him the mores of our Succession Act 1965, so far as the compulsory entitlements of his wife and children are concerned. The doctrine of total *renvoi* could mitigate the dangers of a "culture clash" here.<sup>83</sup> Under this doctrine the Irish court would apply whatever law the German courts would apply if they were dealing with the case.

It would be unfortunate if the traditional deference afforded to the *lex situs* were allowed to get in the way of basic justice to surviving family members. In the *F.A.M.* case, no difficulty arose, since the assets within the reach of the Irish court were capable of satisfying the claim of the testator's adopted child. But it is possible to think of cases where all the testator's roots and life experiences were in Ireland but the large part of his property at the time of his death consisted of an immovable, perhaps recently purchased in a foreign country whose domestic law had no equivalent of section 117, and whose conflicts rules did not refer the question back to Irish law. In cases such as this, the risk of injustice would be high.

When we come to consider the "legal right" of the surviving spouse, more difficulties arise. If Ireland is the country of the testator's domicile, and the portion of the estate consisting of immovable property is situated abroad, it would appear from the *F.A.M.* case that the "legal right" would be measured against the *whole* of the estate, but that only that amount of the estate comprising movables would be available to satisfy this claim. The surviving spouse, regardless of whether the "legal right" claim had been fully satisfied against the movable property, would appear free to proceed independently under the *lex situs* of the immovable property for such further claim as that law might support.<sup>84</sup> It is hoped that the foreign court would have regard to the claim already made before the Irish court, but with the present lack of international harmony on this general question, there is no guarantee that this will be so.

Finally, it is worth noting a further complexity. In some countries, the law relating to matrimonial property may give substantial entitlements to a

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83 Cf. Scoles & Rheinstein, *Conflict Avoidance in Succession Planning* 21 L. & Contemp. Prob. 499, at 510-511 (1956).

84 A further complication may arise where the surviving spouse, having taken the benefits under the will so far as the movables (or immovables) are concerned, seeks to assert his or her legal right *against* the will so far as immovables (or movables) are concerned. The possibility of excessive entitlements is a real one. The best solution may be to put the surviving spouse to his or her election: cf. Wolff, 575, Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 Ind. L.J. 293, at 297 (1955); see further Scoles & Hay, 793-795. Where the doctrine of election occurs in a situation where the testator leaves some of his own property to A but purports to give some of A's property to B, the courts generally look to the testator's *lex domicilii*: see *Cheshire & North*, 516-519, Wolff, 573-574, *In re Ogilvie* [1918] 1 Ch. 492. Cf. *In re Allen*, [1945] 2 All E.R. 264 (Cohen, J.), criticised by Morris, 24 Can. Bar Rev. 528 (1946). For detailed analysis of the doctrine of election, see *Keane*, ch 25.

surviving spouse which have accrued during the lifetime of the deceased spouse. It is possible to envisage cases where a surviving spouse may have a combination of rights under the rules governing succession and matrimonial property. If, for example, the surviving spouse has, by virtue of a family property regime, a joint share in the family home, over and above his or her entitlements under the law of succession, this can amount to a larger claim than in a case where the surviving spouse's entitlement to the family home rests exclusively on the law of succession.<sup>85</sup>

The easiest response might seem to be that the testator "must be considered as disposing only of that which was properly his, and ... the disposition did not include what would be the wife's under the ... law of community of goods",<sup>86</sup> but, where the surviving spouse, having thus (let us say) obtained half the deceased spouses's movable property, proceeds against both immovable and the remaining movable property in separate countries, under the "forced share" provisions of each, the possibility of overgenerous entitlements is a real one.

In *In re Rea Deceased; Rea v. Rea*,<sup>87</sup> in 1902, the facts were as follows. A domiciled Irishman died in Ireland, intestate without issue, leaving a widow surviving him. He had immovables and movables in Ireland, as well as lands in Victoria, Australia which by the law of Victoria were regarded and distributed as personal estate. Administration was taken out in Ireland by the widow, and in Victoria by an appointed person who sold the lands and sent the proceeds to the widow.

By Victoria's legislation a widow was entitled, in the circumstances of the case, to a charge of £1,000 on the estate, the residue to be divided between the widow and next of kin. The widow claimed £1,000 out of the proceeds of sale of the lands in Victoria, as well as £500 out of the real and personal estate in Ireland, under the Intestates' Estates Act 1890. She also claimed dower out of the Irish freeholds and a moiety of the residue of the proceeds of sale of the lands in Victoria and of the Irish personal estate.

The widow's claim was successful. The Master of the Rolls held that the land in Victoria "must in the present case descend in the mode prescribed by the law of that colony, and ... when in fact sold the net proceeds in our Court must be treated as pure personalty".<sup>88</sup>

The Master of the Rolls stated:

"The question then arises, is the plaintiff entitled to both these sums

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85 See Graue, *The Rights of Surviving Spouses under Private International Law*, 15 Amer. J. of Comp. L. 164, at 180ff (1967).

86 *In re Nicols, De Nicols v. Curlier*, [1898] 1 Ch. 403, at 418. Cf. Morris, *Note*, 24 Can. Bar Rev. 528 (1946), criticising *In re Allen*, [1945] 2 All E.R. 264, Breslaurer, *Conflicts of Laws in Restrictions on Freedom of Testation*, 27 Iowa L. Rev. 425, at 438-439 (1942).

87 [1902] 1 I.R. 451 (Porter, M.R.).

88 *Id.*, at 463, following *Beaumont v. Oliveira*, L.R. 6 Eq. 534 (Stuart, V.C., 1868).

of £1000 and £500, or only to one, and if one, to which? I can find no reason to say that either must be surrendered. The £500 under the Act of 1890 is, of course, absolutely secure if there are assets. Then why should the £1000 under the Colonial Act, charged upon colonial assets, be lost? Or why, if the £1000 is legally provided, should it be held to include the £500 under our Act? The latter is a provision out of net assets; but there are no assets till the £1000 charge is first paid. It would, of course, be a different question if the Australian assets had been movable, and, therefore, subject to the law of the country of the domicile. In that case the colonial statute would be of no avail against our law. But that is not so.

If £1000 has been secured to the wife by settlement, or in any other manner (the settlement not being in bar of her rights under the Statute of Distributions) she would have had both. It seems to me even clearer that she must have both, when both are secured as charges by independent Acts of different Legislatures, each having full jurisdiction over the respective subject matter".<sup>89</sup>

The widow thus was entitled to two statutory legacies, a result that might perhaps be defended on the principle of generosity to widows,<sup>90</sup> but which could not be so easily supported where the shares were higher and the interests of other competing claimants stronger. Morris has roundly criticised the case for its lack of understanding of how conflicts of law operates and, more fundamentally, for its blind application of traditional conflicts rules, so as to reach a result "which seems absurd, because it could not have been contemplated by either of the legislatures concerned."<sup>91</sup> In defence of Porter, M.R., it could be argued that he was rightly conscious of the fact that conflicts rules in relation to succession can operate effectively only where there is a close degree of international co-operation.

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<sup>89</sup> *Id.*, at 465.

<sup>90</sup> See Morris, *Intestate Succession to Land in the Conflict of Laws*, 85 L.Q. Rev. 339, at 350 (1969). Cf. Binchy 389. See also *Re Collens (deceased); Royal Bank of Canada (London) Ltd. v. Krogh*, [1986] Ch 505 (Chy. Div., Browne-Wilkinson, V.C., 1985). Noted by Collier, *Conflict of Laws*, All ER Review 1986, 69-70 (1987).

<sup>91</sup> Morris, *supra*, at 349, fn. 44, 45:

"The reader will observe [in the passage from *Re Rea* quoted *supra*] the assumption that there is some mysterious super-law known as conflict of laws which would in the case supposed deprive the Victorian Act of all efficacy, irrespective apparently of its content and policy [as well as] the assumption that under the conflict of laws each legislature has a separate 'jurisdiction' assigned to it within which it can operate and outside which it cannot."

In *Higgins v. Byrne*,<sup>92</sup> a married man, with no children, who was apparently domiciled in Ireland,<sup>93</sup> died intestate, possessed of immovable property in Kansas, having failed to exercise a power to dispose of the reversion of settled property in Ireland, subject to a life estate for his widow. The value of the reversion, after deducting the value of the life estate, was less than £500. Section 1 of the Intestates' Estates Act 1890, provided that, where the value of an estate did not exceed £500, it was to belong to the widow absolutely.

Meredith, M.R. considered himself bound by *Rea v. Rea*. He noted that "according to law",<sup>94</sup> the land in Kansas passed to the widow, and that neither the land nor the proceeds of the land were assets for distribution. He went on to hold that the widow was entitled to the Irish estate. He said:

"It so happens that the life estate to which the property of [the deceased] was subject was the life estate of his wife, but as against a creditor it would make no difference if it were the life estate of somebody else of equal age and bodily health. All that any creditor could get at for the payment of debts would be the reversionary interest that [the deceased] was given power to dispose of by the settlement. The wife is entitled to her life estate as property under the settlement and no person claiming under the husband can get anything as regards the assets, except subject to the life estate of the wife, and after full provision has been made for it. Every line of the Intestates Estates Act demonstrates that the wife having a charge of £500 on the assets<sup>95</sup> is in the position of a statutory creditor, and is a chargeant on the estate by Act of Parliament. In this case the net value of the assets at the date of the death of the intestate does not exceed £500, and every sixpence that is not absorbed in payment of costs and debts goes to the widow".<sup>96</sup>

Clearly, Meredith, M.R. was not disturbed at the prospect of the widow receiving the statutory benefit in addition, not only to her life interest, but also to her entitlement to the land in Kansas.

#### *Other Limitations on the Disposition of Property*

We now enter a somewhat less certain area of the law. If we look at the laws of different countries, we find a wide range of limitations on how property

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92 42 I.L.T.R. 252 (Ch. Meredith, M.R. 1908).

93 The report does not state so expressly, though the headnote refers, without elaboration, to the *lex domicilii*. It is not even certain from the report that the man and his wife were living in Ireland, although this seems likely.

94 42 I.L.T.R., at 252. The law referred to here is the law of Kansas, on which evidence was given, to the effect that the widow became absolutely entitled to the property in Kansas.

95 In fact, where (as in the case) the net value of the estate did not exceed £500, the estate belonged to the widow "absolutely and exclusively", under section 1. It was only where the net value exceeded £500 that the widow was given a charge on the property, under section 2.

96 42 I.L.T.R., at 252-253.

may be disposed of. Thus, we note that in Ireland our rule against perpetuities<sup>97</sup> is more stringent than in many other countries;<sup>98</sup> our rules as to charities<sup>99</sup> more liberal than some<sup>100</sup> but more restrictive than others.<sup>101</sup>

From one standpoint it could be argued that these various limitations are controls on the *testator*, but in at least some respects it is surely more realistic to view them as limitations on the *intended recipients*.<sup>102</sup>

There may well be cases where Irish law as the *lex domicilii* of the testator regards a particular bequest as inconsistent with the rule against perpetuities or our law as to charitable trusts, but where the law of the intended recipient's domicile or the country where the trust is to be administered sees nothing wrong with the bequest. Whose law should prevail? There is now general agreement that in such a case, unless the public policy of our law would regard the limitation as so fundamental as to override the foreign entitlement, the foreign entitlement should prevail. There is, moreover, much support for the view that the rule against perpetuities does not have public policy implications.<sup>103</sup> Equally, charitable trusts are not generally seen as giving rise to public policy difficulties.<sup>104</sup>

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97 Cf. *Wylie*, paras. 5032 ff.

98 Cf. *Bogert & Bogert*, 186-187.

99 Cf. V.T.H. Delany, *Law Relating to Charities in Ireland* (1962), Brady, *Religion and the Law of Charities in Ireland* (1976).

100 Cf. *Honore*, 115-123.

101 Cf. *Bogert & Bogert*, 215.

102 For example, the policy of preventing the accumulation of wealth in the hands of charitable institutions within the jurisdiction where they are situated. But factors such as the protection of a testator against undue influence and deathbed "soul-saving" gifts (cf. Joslin, *Conflict of Laws Problems Raised by "Modern Mortmain Acts"*, 60 Dick. L.Rev.7 at 11 (1955)), Scoles & Rheinstein, *Conflict Avoidance in Succession Planning*, 21 L. & Contemp. Prob. 499, at 511 (1956) and the protection of the interests of members of the testator's family (cf. *Dannert v. Osborn* 140 N.Y. 30, at 40, 35 N.E. 407, at 410 (1893)) may more properly be regarded as being concerned with the capacity of the testator than of the intended recipient.

103 Cf. *Cheshire & North*, 843:

"The object of the perpetuity rule is to restrict the withdrawal of property from the channels of commerce, a purpose which is clearly local, and which, therefore, cannot justifiably be invoked to destroy a bequest of money that is to be enjoyed and administered in a foreign country."

See also *Hopc v Brewer*, 136 N.Y. 126, 32 N.E. 558 (1892); Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule"*, Calif.L.Rev. 185, at 215-216 (1958).

104 See *Cheshire & North*, 609. See, however, fn.102 *supra*, See generally *Annotation*, 91 A.L.R. 491 (1934), Joslin, *supra*, Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule"*, 46 Calif.L.Rev. 185, at 212-215 (1958). It seems that, in the United States, courts are inclined to uphold the validity of gifts to charities if they are valid under the law of *either* the testator's or the recipients's domicile: Yiannopoulos, *supra*, at 213.



### CONSTRUCTION

The purpose of construction is "to ascertain the expressed intentions of the testator, i.e. the meaning which the words of the will, when properly interpreted, convey",<sup>105</sup> Sometimes, of course, the words are so abundantly plain in their meaning that no doubts as to construction arise; but often testators use ambiguous expressions which call for interpretation. In these latter cases, a question arises as to which system of law should be applied in interpreting the expressions.

#### (a) *Movables*

In *Re Adams deceased; Bank of Ireland Trustee Co. Ltd. v. Adams*,<sup>106</sup> Budd J., construing a codicil containing a bequest of moneys and securities, said:

"Dealing as it does with movables,<sup>107</sup> it is accepted as a general proposition (in accordance with the well-established law on the matter) that the codicil is to be interpreted and to receive effect in accordance with the law intended by the testator. This will *prima facie* be presumed to be the law of his domicile at the time when the codicil was made, but this is a mere canon of construction which will not be adhered to when there is any reason, from the nature of the will or otherwise, to suppose that the testator wrote it with reference to the laws of another country."

This passage offers an excellent summary of the relevant legal principles regarding construction in relation to movables. The *lex domicilii*'s claim is based on the fact that in many cases it represents the law with which the testator was most familiar;<sup>108</sup> but clearly there are instances where the testator has some other legal system in mind.

It should be noted that the time at which the *lex domicilii* (or other law, for that matter) applies will normally be when the testamentary disposition was

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<sup>105</sup> *Cheshire & North*, 844.

<sup>106</sup> [1967] I.R. 424, at 458 (High Ct., Budd, J.).

<sup>107</sup> As to immovables, cf. *infra*, pp 37-39.

<sup>108</sup> *Cheshire & North*, 845. See further Anon., *Note, Choice-of-law Rules for the Construction and Interpretation of Written Instruments*, 72 Harv. L.Rev. 1154, at 1163 (1959).

made rather than when the testator died.<sup>109</sup> Obviously, a testator when making a will or codicil can have no certain knowledge of where he is going to die. Common sense requires us to look to his position at the time of the making of the testamentary disposition, if construction is truly concerned with giving effect to the testator's intention.<sup>110</sup> Statutory support for this approach is afforded by section 107(1) of the Succession Act 1965, which provides that the construction of a testamentary disposition is not to be altered by reason of any change in the testator's domicile after the making of the disposition.

In *Re Adams Deceased; Bank of Ireland Trustee Co. Ltd v. Adams*,<sup>111</sup> the testator's domicile at the time he made a codicil was French. Nonetheless, Budd, J. held that the codicil should be construed in accordance with Irish law. Budd, J. pointed to the fact that the codicil was in the English language and "in the form appropriate to an Irish will or codicil, in that executors [were] appointed and it [was] attested in the Irish form."<sup>112</sup> Moreover, the executors were Irish companies, and the codicil was not in holograph form as required by French law. There were thus sufficient indications contained in the will itself for the Judge to come to the conclusion that the terms of the will should be construed in accordance with Irish law.

In *In re Sillar; Hurley v. Wimbush*,<sup>113</sup> in 1955, a decision that has been discussed in detail in relation to domicile, Budd, J. was called on to determine whether the will of an English national domiciled and long resident in Ireland should be construed according to Irish or English Law. The testator made the will at the age of 92, and two codicils between then and his death a few years later. Budd, J., having stated the general rule somewhat differently than he

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109 Although Budd, J. correctly stated the law on this point in the passage quoted above from *Re Adams deceased*, in the earlier case of *In re Sillar; Hurley v. Wimbush*, [1956] I.R. 344, at 361 (High Ct., 1955), he has said: "Since the testator died domiciled here his will should *prima facie* be construed according to Irish law." These words appear to make death rather than the time of making the will the relevant point for referring to the *lex domicilii*. But, immediately before making this statement, Budd, J. made the express finding that, both at the date of making the will and at the time of death, the testator had been domiciled in Ireland. It would seem, therefore, that Budd, J. was guilty of no more than infelicitous expression, rather than of misstatement of the rule of law. See further *In re Bonnet deceased; Johnston v. Langheld*, [1983] I.L.R.M. 359 (High Ct., O'Hanlon, J., 1982), *Philipson-Stow v. Inland Revenue Commissioners* [1961] A.C. 727, at 761 (*per* Lord Denning).

110 Cf., however, the objective approach intention favoured in *Hamilton v. Carroll*, 1 Ir. Eq. Rep. 175 (Lord Plunkett, L.C., 1839) where a will was executed before a change in the value of Irish currency and a codicil was executed afterwards; Lord Plunkett, L.C. held that the codicil had the effect of republishing the will and that bequests in the will should be interpreted as referring to the new value of the currency. The Lord Chancellor considered that the question he had to decide was "not whether [the testator] intended to alter the distribution of his property, but whether he has, in fact, done an act, the effect of which is to make the whole will as if published at the date of the codicil. I think the codicil had that effect, and, consequently, that these legacies must be paid in [the new value]": *id.*, at 178-179.

111 *Supra*.

112 [1967] I.R., at 459.

113 [1956] I.R. 344 (High Ct., Budd, J., 1955).

had in *Adams*,<sup>114</sup> observed that:

"[i]t is a question of the testator's intentions and the court is bound to give effect to the testator's intentions."<sup>115</sup>

Budd, J. held that the will should be construed in accordance with Irish law:

"The background is that the deceased had lived for approximately half his life in a settled home and there are indications in the will ... that he intended to end his days here. His will was apparently drawn up by Irish solicitors and he appointed Irish solicitors as his executors. It is, perhaps, a small point but I notice that in both codicils the testator directs his will to be construed in a certain fashion which at least shows that the matter of construction was not absent from his mind, and it would have been simple for him to add a direction that his will should be construed according to English law, but he did not do so despite the fact that he apparently wished to stress his nationality."<sup>116</sup>

The testator had described himself in his will as "a British subject and domiciled in England" who was "at present residing at ... Dublin." Accepting that this description was ineffective in establishing that the testator was in fact domiciled in England rather than Ireland, did it nonetheless have the effect of indicating a sufficient intent to have the will construed in accordance with English law? Budd, J. considered not. He accepted that the testators' description of himself was a feature that "should not be lightly disregarded."<sup>117</sup> But he regarded this statement as not involving "anything similar"<sup>118</sup> to one in the English decision of *In re Price, Tomlin v. Latter*,<sup>119</sup> where Stirling, J. had held that an expression in the will of a domiciled French subject that it should "be construed in England the same as in France" referred to English law the question whether the document operated as the execution of a power. Moreover (as Budd, J. pointed out), in *In re Annesley, Davidson v. Annesley*,<sup>120</sup> Russell J. had construed the will in accordance with French law although the

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114 Cf. fn. 109, *supra*.

115 *Id.*, citing *Bradford v. Young*, 29 Ch. D. 617 (1885). Budd, J. also referred to *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442 at 452, where Stirling J., having stated that in general a will is to be construed in accordance with the law of the domicile of the testator, had proceeded to quote from *Dicey*, 1st ed., 1896, p.695:

"But this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country."

See now *Dicey & Morris*, 11th ed., 1987, pp1023-1024.

116 [1956] I.R., at 362.

117 *Id.*

118 *Id.*, at 361.

119 [1900] 1 Ch. 442.

120 [1926] 1 Ch. 692.

testatrix had "said in so many words that her domicile was English."<sup>121</sup> Budd, J. referred to two earlier English decisions, where wills had been construed according to the law of the domicile. In one<sup>122</sup> the testator, an Englishman domiciled in France had described himself as a British subject, the will being in English form and containing benefactions mainly to English people; moreover, the property comprising the residue was in England. In the other decision,<sup>123</sup> the testatrix, who died domiciled in England, was a Scottish woman who had made a will in Scottish form in Scotland. It contained many expressions peculiar to Scots law. Budd, J. commented:

"These two cases show that some very strong combination of circumstances is required to exclude the rule in the absence of a direct declaration of intention."<sup>124</sup>

Budd, J. in coming to his conclusion that "the rule" had not been excluded, accepted that a large part of the testator's estate consisted of English assets, and that there were many English legatees. The will was in a form suitable in both Ireland and England. The central question was whether the testator's statement that he was domiciled in England indicated an intention that he wished the will to be construed according to the law of England, and Budd, J. confessed<sup>125</sup> to being unable in the circumstances to persuade himself that it did; he added<sup>126</sup> that the remaining facts relied on to establish this intention did not convince him in this either.

#### (b) *Immovables*

There is some degree of uncertainty as to the best approach to the question of construction of testamentary dispositions of immovable property. There is much to be said for generally applying the *lex domicilii*,<sup>127</sup> and indeed many courts have supported this approach, though, of course, if the testator's disposition evinces his intention that some other law, such as the *lex situs*,<sup>128</sup> should determine questions of construction, that law will be applied. But one difficulty results from the fact that, so far as such questions as capacity and material validity are concerned, the *lex situs* must prevail.<sup>129</sup> The courts "will endeavour to see that the dispositions will operate under the *lex situs*,"<sup>130</sup> but if, in spite of these exertions, the dispositions cannot be upheld under the *lex*

121 [1956] I.R., at 362.

122 *In re Cunningham, Healing v. Webb*, [1924] 1 Ch. 68.

123 *Anstruther v. Chalmers*, 2 Sim. 1 (1826).

124 [1956] I.R. at 362.

125 *Id.*, at 362-363.

126 *Id.*, at 363.

127 Cf. Section 107 (1) of the *Succession Act 1965*, which extends to immovables as well as movable property.

128 Cf. *Bradford v. Young*, 29 Ch.D.617, at 623 (1885).

129 See *Re Miller. Bailie v. Miller*, [1914] 1 Ch. 511, *Nelson v. Bridport*, 8 Beav. 547 (1846), *Philpston-Stow v. Inland Revenue Commissioners*, [1961] A.C. 727.

130 *Morris*, 399.

*situs*, it will not be effective.

In *In re Bonnet Deceased; Roche Johnston v. Langheld*,<sup>131</sup> O'Hanlon, J. addressed the general question of what law should be applied to the construction of provisions of a will relating to immovables. The testatrix, a German national who was at her death and "at all other material times"<sup>132</sup> domiciled in Germany, made a will in the German language in which she purported to dispose of a farm in Ireland in favour of "der Evangelischen Kirche in Ireland". Problems of interpretation arose as to which Church she meant to benefit, and as to what exact interest in the farm she intended to dispose of.

If the *lex domicilii* were to govern interpretation, German law would be applied; on the other hand, if the *lex situs* were to govern, Irish law would<sup>133</sup> be applied. After a brief review of some of the differing views on the question which had been expressed judicially and in the textbooks, O'Hanlon, J. came to the conclusion that he was not obliged to choose between German and Irish law on this issue since he was:

"satisfied from the evidence given by experts in German law that the German legal code incorporates the primary principle of construction which is applicable in our law also, namely, that whether or not the case contains a foreign element, a will is to be construed in accordance with the intention of the testator to be gathered from the will. In the circumstances of the present case it appears to me that the application of that primary principle is sufficient to enable me to answer the questions of construction which have been raised ...."<sup>134</sup>

As to the first question of interpretation, all parties agreed that the testatrix had intended to benefit the Lutheran Church, of which she was a member and that the expression used by her "should not be construed as referring to Protestant Churches in general".<sup>135</sup> The second question of interpretation was more complicated. The testatrix had not in fact been the owner, in her personal capacity, of a farm in Ireland, but she or her nominees held the entire shareholding in a limited company which owned three parcels of land in Co. Laois, comprising 175 acres, together with buildings, livestock and farm machinery. The company also had a small holding of bank stock and a small amount of cash in the bank.

O'Hanlon, J. considered that "[t]here was clearly an intention on the part of the testatrix to give her lands in Ireland to the beneficiary named in the

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131 [1983] I.L.R.M. 359 (High Ct., O'Hanlon, J., 1982).

132 *Id.*, at 360.

133 Cf. *id.*, where O'Hanlon, J. described the disposition as "at first sight [one] of immovables."

134 *Id.*, at 361.

135 *Id.*

will,"<sup>136</sup> but the will had "all the appearance of having been prepared in haste",<sup>137</sup> although the testatrix survived for some months after making it, during which period she added a codicil. In the Judge's view, the notary who drafted the will must not have discussed with the testatrix the nature of her beneficial interest in the lands in Ireland and thus remained unaware of the fact that the legal owner was a company.

He concluded:

"In all these circumstances, having regard to the fact that the expression 'farm' is used in the German text of the will, which the experts in German law who gave evidence in the case agreed was one generally used in Germany only when referring to lands held abroad. I consider that the text of the will was loosely drawn and loosely expressed by the testatrix, and should be construed as referring to her property in Ireland.

The testatrix and her husband formed or acquired a small private company - whose whole *raison d'être* thereafter appears to have been the acquisition, holding and running of the farm in question, and whose liquid assets at the date of the testatrix's death comprised only a very limited amount of bank stock and cash. My impression is that the testatrix intended to hand over the entire enterprise, lock, stock and barrel, with its assets and liabilities as they then stood, to the beneficiary named in the will."<sup>138</sup>

On this construction, the gift of the farm in Ireland was regarded as capturing the entire shareholding of the testatrix in the company, with all its assets and liabilities.

The decision is an interesting one. We must consider the statement that under Irish law, "whether or not the case contains a foreign element, a will is to be construed in accordance with the intention of the testator to be gathered from the will".<sup>139</sup> Of course, finding the testator's intention is the purpose of the exercise, but that represents the goal rather than the means; and we have seen that, where the means are involved, the question may arise as to which legal system's rules of construction are to be applied in determining that intention. Moreover, from the fact that, according to the German experts, German law also seeks to discern a testator's intention, it would not be proper to conclude that Irish and German law adopt the same principles of construction. Sharing the goal does not necessarily involve sharing the means.

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136 *Id.*, at 362.

137 *Id.*

138 *Id.*

139 *Id.*, at 361.

### REVOCATION

Just as conflicts questions may arise relating to the *making* of a will, so also conflicts questions may reflect *revocation*. Rules relating to revocation vary from country to country. Under Irish domestic law, as we have seen, a will may be revoked by the testator's making a new will or codicil,<sup>140</sup> by his<sup>141</sup> destroying it *animo revocandi*,<sup>142</sup> or by his subsequent marriage.<sup>143</sup>

Let us take each of these aspects in turn.

#### *Revocation by later will or codicil*

A will may be revoked, expressly or impliedly,<sup>144</sup> by a later will or codicil.<sup>145</sup> Whether the revocation is effective depends on whether the later will or codicil is essentially valid, whether the testator had the requisite capacity and whether the formal requirements were satisfied. In this latter regard we must consider a special provision in the Succession Act 1965. Section 102, having set out in subsection (1) the five grounds for formal validity of testamentary dispositions, provides in subsection (2) as follows:

"Without prejudice to subsection (1), a testamentary disposition revoking an earlier testamentary disposition shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under that subsection, the testamentary disposition that has been revoked was valid."

The effect of this provision is as follows. A new will, revoking a former will, is formally valid in either of two cases. First it will be formally valid if it complies with any of the five grounds for formal validity under subsection (1). Thus, for example, if an Irish woman, domiciled in France, makes her first will complying with the law there, that will is formally valid under ground (c) of the subsection. If that woman later becomes domiciled in Switzerland where she then makes a second will, revoking the first, and that will complies with the formal requirements of Swiss law, though not French law, then that will is also formally valid.

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140 *Succession Act 1965*, section 85(2). This subsection also permits a will to be revoked by "some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed."

141 Or by a person who is authorised by him to do so destroying it in his presence: *id.*

142 *Id.*

143 *Id.*, section 85(1). A will made in contemplation of marriage is not revoked by the subsequent marriage; *id.*

144 The question whether a will or codicil revokes an earlier will by implication is one of construction, governed (as with testamentary dispositions generally) "*prima facie* by the law of the testator's domicile at the time of making the later will": *Morris*, 401.

145 *Succession Act 1965*, section 85(2). As to earlier law, cf. *In bonis Kalling, Deceased*, 32 Ir. L.T.R. 131 (Prob., Andrews, J., 1897).

The second case covered by subsection (2) is where a person makes a new will revoking a former will and the *new* will is not formally valid under subsection (1). All is not necessarily lost: if the new will complies with the requirements of any one of the laws qualified to govern the formal validity of the *former* will, then the *new* will is formally valid.<sup>146</sup>

Thus, to vary the example we have already given, if the woman who becomes domiciled in Switzerland makes a will which does *not* comply with the formal requirements of Swiss law but which *does* comply with the formal requirements of French law, the will is formally valid.

### *Revocation by Destruction of a Will*

#### *(a) Movables*

A problem may arise when a testator possesses one domicile at the time of the act of destruction of a will and another domicile at the time of death. It is possible that the act of destruction may constitute an effective revocation by the law of the testator's domicile at the time of the act but may be ineffective by the law of his domicile at the time of his death.<sup>147</sup>

The better view is surely that the putative revocation by so final an act should be given effect by the law, and that, in cases where the intended revocation was effective under the testator's *lex domicilii* at the time of the revocation, it should not be rendered ineffective merely because the testator, who believed that the will no longer was effective, changed his domicile to a country under whose laws the revocation would be effective. From the standpoint of the overwhelming majority of testators, the more sensible solution would be to give effect to their intention and uphold the revocation of the will.<sup>148</sup>

The converse is more troublesome. Let us imagine a testator who destroyed his will in the mistaken belief that this revoked the will according to his *lex domicilii* at the time of the destruction. If that testator later dies domiciled in a country by whose law the destruction is efficacious as a revocation, should the will be regarded as having been revoked? *Cheshire & North*<sup>149</sup> think not: "A chance change of domicil could scarcely infuse life into an act that was legally abortive at birth." Now admittedly it is a matter of chance that a particular rule of the testator's *lex domicilii* at death agrees with his misconceived view as to the rule of his *lex domicilii* at the time of the destruction of the will. But as against this, our conflicts rules should surely give effect as far as possible, to the reasonable expectations of testators. It

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146 Cf. *Cheshire & North*, 846.

147 For consideration of the wide variety of rules among jurisdictions in the United States on the question of revocation by physical act, see Reese, *American Wills Statutes - Part II*, 46 Va. L. Rev. 856, at 875-880 (1960).

148 See *Cheshire & North*, 847.

149 *Id.*



is not unreasonable for a testator to believe that setting fire to his will revokes it. If his *lex domicilii* at that time of his death provides otherwise, that is his misfortune but, if his *lex domicilii* at the time of his death coincides with his reasonable expectations, it seems unwise for the law to stand idly by and witness the frustration of the testator's understandable wishes on such an important matter.

(b) *Immovables*

There has been little discussion about the question of revocation by destruction of a will, so far as immovables are concerned. It has been suggested that "no doubt" the *lex situs* governs.<sup>150</sup>

*Revocation by Marriage*

Under Irish law a will is revoked by the subsequent marriage of the testator, except where the will is made in contemplation of marriage.<sup>151</sup> This is not the position in some other jurisdictions. The divergence of approach can give rise to difficulties, as, for example, where, in the case of a will disposing of immovable property, the testator's *lex domicilii* at the time of the marriage differs from the *lex situs* of the property at the time of his death.<sup>152</sup>

A question of characterisation arises: are we dealing with a rule of testamentary, or of matrimonial, law? The commentators generally<sup>153</sup> favour the latter view, which has the support of some judicial authority.<sup>154</sup> Thus, the *lex domicilii* at the time of marriage would be determinative. But there is much to be said for the opposite view that the rule relates more to testamentary law.<sup>155</sup>

150 *Morris*, 401. *Morris* refers to the Iowa case of *Re Barrie's Estate*, 240 Iowa 431, 35 N.W. 2d 658 (1949), where the majority applied the *lex situs* rule. From the standpoint of policy, there is in this instance, as in so many others relating to the *lex situs* rule, a considerable doubt as to the utility and fairness of referring to that law, since the testator almost certainly paid no attention to it and the community living within that territory presumably had little concern as to what law regarding revocation was applied to persons whose only connection with them was that they owned land there: see further Hancock's criticism of the majority approach, in *Conceptual Devices for Avoiding the Land Taboo in Conflict of Law: The Disadvantages of Disingenuousness*, 20 Stan. L. Rev. 1 (1967).

151 *Succession Act* 1965, section 85(1). See *Wylie*, para. 12.20.

152 See *Cheshire & North*, 847, *Falconbridge*, 112-117. In *re Fleming, deceased*, [1987] ILRM 638, Gannon, J applied section 85(1) where it appeared that the testator was not domiciled in Ireland at any relevant time.

153 *Cheshire & North*, 847-848, *Dicey & Morris*, 1035.

154 *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, at 240 (C.A., per Vaughan Williams, J.), *Seifert v Seifert*, 32 O.L.R. 433, 23 D.L.R. 440 (Ont. Sup. Ct., Middleton, J., 1914); cf. *Davies v Davies*, 8 W.W.R. 803, 24 D.L.R. 737 (Alta. Sup. Ct., Stuart, J., 1915).

155 See *Rabel*, vol. 1, 403, *Falconbridge*, 112-117, *Wolff*, 595. Our courts have yet to address the problem created where the testator has been divorced and, under his *lex domicilii* at the time of the divorce, the divorce operated to revoke his will: cf. *Scoles & Hay*, 787-788, *Scoles & Rheinstein, Conflict Avoidance in Succession Planning*, 21 L. & Contemp. Prob. 499, at 505-506 (1956).

### POWERS OF APPOINTMENT EXERCISED BY WILL<sup>156</sup>

Under Irish law, one person (the donor) may by will or *inter vivos* settlement give another (the appointor) the power of appointment - that is, power to select which persons are to be entitled to the donor's property. We are here concerned with cases where the appointor exercises the power of appointment by will. The power may be *special*, where the appointor must make his selection from a specified class of persons (objects of the power) or *general*, where he may select without any such limitation. This means, of course, that the appointor of a general power may, if he wishes, select himself as beneficiary.

Conflicts of law problems relating to a power of appointment in regard to movables may arise where the donor, the appointor and the donees of the power are not all domiciled in the same country. Which law should control? One approach would refer to the *lex domicilii* of the appointor on the basis that the validity of all wills of movables should be governed by a consistent rule.<sup>157</sup> But certainly in the case of a special power (where he is not an object of the power) and theoretically even in the case of a general power, the appointor is not bequeathing his *own* property but rather is acting as agent for the donor in disposing of the donor's property.<sup>158</sup> This would suggest that we should look instead to the law governing the instrument creating the power of appointment.

Let us consider the subject of powers of appointment under the same headings as we dealt with wills, namely: (1) capacity; (2) formal requirements; (3) essential validity; (4) construction; and (5) revocation.

#### Capacity

There is English authority<sup>159</sup> in favour of recognising the exercise of a power of appointment over movables by will where the appointor has capacity under his *lex domicilii* but not by the law governing the instrument creating the power. There is no judicial authority dealing with the position where matters are reversed. It has been suggested<sup>160</sup> that the exercise of a special, but not

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156 See *Morris*, 402-408, *Scoles & Hay*, 812-821, *Fridman, Choice of Law Governing the Testamentary Exercise of Powers of Appointment Over Movables*, 9 *Int. & Comp. L.Q.* 1 (1960), *Durand & Herterich, Conflict of Laws and the Exercise of Powers of Appointments*, 42 *Cornell L.Q.* 185 (1957), *Mulford, The Conflict of Laws and Power of Appointment*, 87 *U. Pa. L. Rev.* 403 (1939), *Ester & Scoles, Estate Planning and Conflict of Laws*, 24 *Ohio St. L.J.* 270 (1963), *Casner, Estate Planning - Powers of Appointment*, 64 *Harv. L. Rev.* 185, at 208-210 (1950), *Anon, Note: Choice of Law Governing Personality and the Conflict of Laws*, 89 *U. Pa. L. Rev.* 360 (1941), *Halbach, The use of Powers of Appointment in Estate Planning*, 45 *Iowa L. Rev.* 691, at 715-717 (1960), *Anon, Note*, 38 *Harv. L. Rev.* 661 (1925).

157 Cf. *Morris*, 403, *Castel*, vol. 2, 469.

158 *Id.*

159 *Re Lewal's Settlement*, [1918] 2 Ch. 391. See also *Guarantee Trust Co. of New York v. Stevens* 28 N.J. 243, 146 A. 2d 97 (1958).

160 *Cheshire & North*, 859. See also *Morris*, 404, *Dicey & Morris*, Rule 148, *Scoles & Hay*, 816.

a general, power should be valid in such a case. This distinction gives effective recognition to the practical distinction between special and general powers.<sup>161</sup> As against this, it may be debated whether a power of appointment is in fact exercised "by will" when the will is not valid by the law governing testamentary capacity.<sup>162</sup> Where the power of appointment is over immovables, it could appear that the *lex situs* should govern.<sup>163</sup>

#### **Formal Requirements**

Where a person, under an Irish settlement or will, is given a power of appointment exercisable by will, and he later dies abroad, having made a will in the foreign country, the question will arise as to whether the power of appointment is formally valid. Whose laws should determine this question? The position has been made far easier by the *Succession Act 1965*. We have already noted that section 102(1), which upholds the formal validity of a will if it complies with any one of five specific laws, also applies to powers of appointment by will.<sup>164</sup> Thus a power of appointment by will is formally valid if it complies with the formal requirements of the *locus actus* or the nationality, domicile or habitual residence of the testator, or, in the case of immovables, of the *lex situs*.

Furthermore, section 104(1) of the *Succession Act 1965* provides as follows:

"Without prejudice to section 102, a testamentary disposition shall also be valid as regards form so far as it exercises a power of appointment, if its form complies with the law governing the essential validity of the power."

The subsection is in harmony with a number of earlier authorities, including *Murphy v. Deichler*,<sup>165</sup> where the House of Lords affirmed the Irish Court of Appeal. Section 104(2) of the *Succession Act 1965* provides that:

"A testamentary disposition so far as it exercises a power of appointment shall not be treated as invalid as regards form by reason only that its form is not in accordance with any formal requirement contained in the instrument creating the power."

Formerly, compliance with these formalities was necessary where the testamentary disposition derived its formal validity from foreign law.<sup>166</sup>

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161 See *Castel*, vol. 2, 469-470.

162 *Goodrich*, 530. See also Fridman, *Choice of Law Governing the Testamentary Exercise of Powers of Appointment Over Movables*, 9 Int. & Comp. L.Q. 1, at 4 (1960).

163 Cf. *Castel*, vol. 2 470, *Restatement 2d* 281, *Dicey & Morris*, 1041.

164 Section 102(1) refers to a "testamentary disposition", which is defined, for the purpose of Part VIII of the Act, as meaning any will or other testamentary instrument or act.

165 [1909] A.C. 446, 43 I.L.T.R. 235 (H.L.(Ir), aff'g 42 I.L.T.R. 113 (C.A., 1908). See further *Benwich*, 123-124.

166 *Dicey & Morris*, 1042, *Barretto v Young* [1900] 2 Ch. 339.

### *Essential Validity*

When we consider the question of the essential validity of a will exercising a power of appointment over movables, we have to bear in mind the distinction between special and general powers. Where the power is special, the *lex domicilii* of the donor rather than of the appointor controls, since the appointor is acting merely as the agent of the donor.<sup>167</sup> Where the power is general, and the appointor deals with the appointed property and his own property "as one mass",<sup>168</sup> this is regarded as so clearly a matter under the appointor's control and concerned with his interests, rather than those of the donor, that the *lex domicilii* of the appointor should control.<sup>169</sup> But where the power is general and the appointor in making an appointment keeps the property subject to the power separate from his own property, the appointor is again regarded as acting as the agent of the donor, whose *lex domicilii* accordingly controls.<sup>170</sup>

So far as immovables are concerned, judicial authority is sparse but the clear rule appears to be that the *lex situs* governs.<sup>171</sup>

### *Construction*

The construction of wills exercising a power of appointment proceeds on the same basis as the construction of wills generally.<sup>172</sup> The courts seek to interpret the will in accordance with the law intended by the testator; in the absence of contrary indications, this is presumed to be the *lex domicilii* at the time the will was made.<sup>173</sup>

In *Murray v. Champemowne*,<sup>174</sup> a testator domiciled in Scotland made a will in execution of a general power of appointment, in which he disposed of land in Ireland subject to a trust of sale as yet unsold. The will was invalid under Scots law but valid under Irish and English law.<sup>175</sup> The original deed creating the power of appointment was either Irish or English.

Andrews, J. upheld the disposition, on the basis that the property should be categorised as immovable, and thus, the will was governed by Irish law.<sup>176</sup> But the Judge was willing to hold that, even if the property should be categorised as movable, the will was still valid. The question was one of construction, and

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<sup>167</sup> *Pouey v. Hordern*, [1900] 1 Ch. 492. See *Morris*, 406-407.

<sup>168</sup> *Re Pryce*, [1911] 2 Ch. 286, (C.A., per Cozens-Hardy, M.R.), See also *In re Khan's Settlement*, [1966] Ch. 567, disapproving *In re Waite's Settlement Trusts*, [1958] Ch. 100, criticised by *Morris*, 73 L.Q. Rev. 459 (1957). See further *Dicey & Morris*, Rule 151. As to Irish internal law, cf. *Re De Lusi's Settlement*, 3 L.R. Ir. 232 (Chatterton, V.C., 1879).

<sup>169</sup> *Castel* vol. 2, 472.

<sup>170</sup> *In re Megret* [1901] 1 Ch. 547.

<sup>171</sup> *Re Hernando*, 27 Ch. D. 284 (1884).

<sup>172</sup> See *Dicey & Morris*, Rule 150, *Cheshire & North*, 618.

<sup>173</sup> *Dicey & Morris*, 1044, *Re McMorrah*, [1958] Ch. 624 (Harman, J., 1957).

<sup>174</sup> [1901] 2 I.R. 232 (Q.B. Div., Prob., Andrews, J., 1900).

<sup>175</sup> *Wills Act 1837*, section 27. See now the *Succession Act 1965*, section 93.

<sup>176</sup> See further *Binchy*, 397-398.

Warren, J. construed the intention of the original deed as being to give the testator "power to appoint by a will made in accordance with Irish or English law, and to be construed in accordance with such law."<sup>177</sup> The words specifying the power, in conjunction with an earlier provision, suggested to the Judge that this construction was correct.<sup>178</sup> The testator "must be taken to have intended"<sup>179</sup> that it should be construed in accordance with the rules of Irish and English law.

#### **Revocation**

A power of appointment over movables exercisable by will may be revoked in any of three circumstances:<sup>180</sup>

- (a) if the will is properly revoked under the law of the donee's domicile,<sup>181</sup>
- (b) if it is revoked by a later will properly executed under the *Succession Act 1965*,<sup>182</sup> or
- (c) if it is revoked by the subsequent marriage of the testator according to the law of his or her domicile at the time of his or her marriage, rather than of his or her death.<sup>183</sup>

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<sup>177</sup> [1901] 2 I.R., at 237.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*, at 862.

<sup>180</sup> Cf *Cheshire & North*, 862.

<sup>181</sup> *Velasco v. Coney*, [1934] P. 143 (Langton, J.). See further Mumford, *The Conflict of Laws and Powers of Appointment*, 87 U. Pa. L. Rev. 403, at 421, fn. 101 (1939).

<sup>182</sup> Succession Act 1965, section 85.

<sup>183</sup> Cf *Cheshire & North*, 862, *Dicey & Morris*, Rule 152.

## CHAPTER 4: ANALYSIS OF THE HAGUE CONVENTION ON SUCCESSION

In this Chapter, we analyse the Hague Convention on an article-by-article basis. We defer to Chapter 5 consideration of whether Ireland should ratify the Convention and, if so, what reservation, if any, it should make. Our analysis of the Convention was greatly assisted by the Explanatory Report prepared by Professor DWM Waters, which clarifies for the common law reader many of the relatively unfamiliar civil law doctrines, as well as offering several insights into the meaning and practical implications of the Convention's provisions.

### CHAPTER I: SCOPE OF THE CONVENTION

Article 1, paragraph 1, provides that the Convention determines the law applicable to the estates of deceased persons. Paragraph 2 sets out the limits of the Convention's scope. It does not apply to:

- (a) the *form* of dispositions of property upon death;
- (b) *capacity* to dispose of property upon death;
- (c) issues pertaining to *matrimonial property*;
- (d) *property rights, interests or assets created or transferred otherwise than by succession*, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.

Several points about Article 1 may be noted. Firstly, as regards the four matters excluded from the scope of the Convention, it is, of course, possible for a Contracting State to apply the rules of the Convention as part of its own

conflict rules,<sup>1</sup> on any matter it thinks fit that it is not within the scope of the Convention without any necessary expectation of reciprocity from other Contracting States. Secondly, as well as specifically excluding four matters from its scope, the Convention is silent on certain other matters, notably the question of construing testamentary documents.<sup>2</sup> The differences of approach to this subject among the several civil law and common law jurisdictions were so substantial that Commission II decided it was better to leave it to be dealt with by each jurisdiction's existing solution.

Thirdly, it should be noted that Article 1 of the Convention does not define "succession": its meaning and scope are determined by Article 7(2). It is clear that the term embraces both testate and intestate succession (and thus cases of partial testacy) as well as succession claims based on agreements as to succession. Also included are cases where succession occurs to the estate of a person who is judicially declared to be dead, as, for example, in cases of those missing presumed dead.<sup>3</sup>

As regards the four exclusions, the first, relating to formal validity, springs from the existence of the *Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* of 1961, the provisions of which, as we have noted, have been incorporated into Part VIII of the *Succession Act 1965*. The forum decides, by way of characterisation,<sup>4</sup> whether the issue is one of formal or material validity.

The second exception, relating to capacity to dispose of property upon death, embraces questions of *general* capacity and incapacity, such as where a person has been declared a ward of court on account of his or her mental incapacity, and the age of majority,<sup>5</sup> but not to defects in consent (*vices de consentement*), such as may arise in respect of fraud, duress or undue influence, which "are not matters of capacity in the strict sense".<sup>6</sup> This distinction may be difficult to draw in certain cases, and lends itself to philosophical and linguistic debate. It is for the forum to determine the question in this context. If it characterises the issue to be one of capacity, it falls outside the Convention by virtue of Article 1(2)(b); if it characterises it as involving a question of consent it falls within the scope of Article 7. Professor Waters notes that:

"[t]he same task of characterisation arises with regard to persons who are suffering from illness, such as senile dementia or Alzheimer's disease, from the effects of alcohol or drugs, or from other mentally impairing factors, a condition which may be temporary or permanent, but who have not been declared mentally incompetent by judicial

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1 Cf the *Explanatory Report*, para 36, and Article 7(3) of the Convention.

2 Cf *Binchy*, 442-447.

3 *Explanatory Report*, para 39.

4 See *Binchy*, ch 3.

5 Cf *Donohue v Donohue*, 19 LR IR 349 (Challerton, VC, 1887).

6 *Explanatory Report*, para 43.

decree. Generally such mental impairment, short of judicially decreed mental incompetence, would be characterised as issues of consent."<sup>7</sup>

The third exclusion, relating to issues pertaining to matrimonial property, is clearcut but caused the delegates very considerable difficulty since such a clearcut exclusion may not work out justly, especially in cases where spouses move between States with differing matrimonial property regimes. It is necessary to record what Professor Waters has to say on the delegates' deliberations:

"The question was whether the Convention should provide either a conflicts rule or a substantive rule to deal with the imbalance of benefits that may befall the surviving spouse and children of the deceased spouse as the result in any jurisdiction of the ill-matched substance of the matrimonial property law and the succession law. This is a problem evidently experienced in many jurisdictions, and a number of proposals were put before Commission II. No one denied that injustices can thereby come about, not only to those married couples who move from one jurisdiction to another (the matrimonial property laws of each being different), but to those who remain within the same jurisdiction all their married lives. At the conflicts of law level the *depeçage* between the matrimonial property law and succession law may itself produce injustices of result.

However, delegations were divided as to whether the Convention should attempt to deal with this undoubted problem. Some delegations were decidedly of the view that the Convention should confer a discretion upon the court of the Contracting State, enabling the judge to adjust the property distribution produced by his matrimonial property and succession laws where and to the extent that equitable adjustment is needed to produce fairness. Others would have gone further and given the judge such a discretion, however the injustice results. For example, gifts by the deceased in his lifetime and the impact of *inter vivos* trusts were cited. On the other hand, the majority of delegations appeared persuaded by the arguments that among the countries and jurisdictions there is a very large amount of diversity in matrimonial property laws, and that, given this diversity, the interrelationship of those laws with succession laws was not something which the Convention could usefully assist. Indeed, the Convention might give rise to added difficulties, were it to contain provisions on the subject. In any event, it was felt, this is a problem which jurisdictions can and do deal with in their own way. For instance, the French delegation gave a most interesting presentation to the Commission describing the adjustment, compensation, and other techniques employed in France, and the United Kingdom delegation reported that England as a common law country gives its courts extensive powers to look into *inter vivos* gifts and the effects of actual

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7 *Id.*, para 43.



or potential marital property distributions when making provisions for the surviving spouse and family on the death of the deceased.

It was noted that the Commission could (1) exclude matrimonial property laws from the Convention, (2) give priority to the applicable succession law or to the matrimonial property law, or (3) devise a rule of its own. It was also a reflection made by one delegation that, if the unity principle behind the Convention was to be effective, solutions should not be left to each individual State. The impact of Articles 6 and 15 of the Convention in possibly producing unjust imbalances among heirs was also canvassed. However, while deciding not expressly to exclude the co-ordination of matrimonial property laws and succession laws from the Convention, the Sixteenth Session rejected a number of written proposals bringing the relationship of the two into the Convention, and decided to leave the exclusion as it is now worded.<sup>8</sup>

The effect of the fourth exception, in relation to property rights, interests or assets created or transferred otherwise than by succession, makes it clear that the wide range of "will-substitutes" in common law jurisdictions, which involve *inter vivos* dispositions of assets, are excluded from the scope of the Convention, even though death "triggers" an accrual or augmentation of a particular property interest. Thus the Convention does not extend to such matters as joint tenancies, *inter vivos* trusts, joint bank accounts where the survivor takes the balance, life assurance with a designation of a beneficiary to take the benefits of the policy on the death of the insured (and payor of the premiums), and pension provision accounts where the designated beneficiary takes the benefit of the account proceeds, by way of a joint lives and survivor annuity, in the event of the prior death of the pensioner.<sup>9</sup> One may here note O'Hanlon J's reluctance in *Lynch v. Burke*,<sup>10</sup> to adhere to the ratio of the former Supreme Court in *Owens v. Greene*.<sup>11</sup>

Article 2 provides that the Convention applies even if the applicable law is that of a non-Contracting State. It is the Convention itself, not the law governing the succession, which determines that the law of a non-Contracting State, if designated by Article 3, may be the applicable law.<sup>12</sup> Since the Convention brings the laws of non-Contracting States within its scope, the maker of a will, declaration or *pacte successoral* may designate the law of a non-Contracting State as the applicable law under Article 5(1).<sup>13</sup>

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8 *Id.*, para 45.

9 *Id.*, para 46.

10 High Ct, 16 January 1990.

11 [1932] IR 225.

12 *Id.*, para 47.

13 *Id.*

## CHAPTER II: APPLICABLE LAW

This chapter sets out the means by which the applicable law is to be determined, and the consequences of that determination.<sup>14</sup> It also specifies the matters required to be governed by the applicable law. The chapter prescribes two tests for determining the applicable law, one involving objective criteria,<sup>15</sup> the other subjective in the sense that they are a matter for the testator's choice.<sup>16</sup>

Article 3 provides as follows:

- "(1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
- (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
- (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies."

Article 3 is "a very delicate fabric resulting from a compromise".<sup>17</sup> It employs three connecting factors: the law of the nationality, the law of the habitual residence and the law of "more close connection". The Convention leaves to the forum the task of defining nationality, as well as dealing with such matters as dual nationality<sup>18</sup> and statelessness.<sup>19</sup> This is in harmony with the traditional approach of Hague Conventions.<sup>20</sup> The use of habitual residence in preference to domicile as a connecting factor has become a feature of Hague Conventions. It is useful to capture what Professor Waters has to say on the matter in view of the long tradition in Irish private international law of applying the *lex domicilii* to questions of succession:

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14 *Id.*, para 48.

15 Article 3.

16 Articles 5, 6.

17 *Explanatory Report*, para 49.

18 See de Winter, *Nationality or Domicile? The Present State of Affairs*, [1969] - III Recueil des cours 347, at 384-386; Baty, *The Interconnection of Nationality and Domicile*, 13 Ill L Rev 363, at 365 (1919). Cf *Davies v Lynch*, IR 4 CL 570 (QBD, 1868).

19 See de Winter, *supra*, 381-382; *Rabel*, vol 1, 132-133.

20 Cf *Explanatory Report*, para 51.

"While 'domicile' is predominantly a question of the intent of the *de cuius*, habitual residence is determined by a more equal weighting of a range of elements. Essentially it is the place of belonging of the *de cuius*. A person can have only one habitual residence, because it is the centre of his living, the place with which he is most closely associated in his pattern of life. For the purpose of determining this place, his family and personal ties are particularly important elements. Intention appears to play a more muted role as an element in habitual residence than it traditionally has done in domicile, and this is why lawyers who are accustomed to working with domicile as a connecting factor hesitate before accepting the term, habitual residence, as an equivalent, but finally accept it as a possible alternative. It is a regular physical presence, enduring for some time, and a clearly stronger association than 'ordinary' or 'simple' residence, of which the *de cuius* may have had two or more. However, the manifest hopes and plans of the *de cuius* are also elements that may be legitimately considered by the person who would have to know which State is the habitual residence."<sup>21</sup>

The latter sentence is worth noting in particular in relation to a spouse who might be disposed to acquire an ostensible habitual residence in order to defeat the statutory entitlements of his or her family in respect of his or her estate.

Professor Waters explains that "more close connection" of a law is discovered by examining the same elements as for habitual residence with a view to discovering whether the centre of the personal and family life of the *de cuius* was in one place more than another:

"Once again the considerations are his nationality, the location of his immediate family, his personal ties, the nature and location of his employment or business, the permanence of his place of residence (his apparent home), the principal *situs* of his personal assets, and his journeying and the reasons for the same."<sup>22</sup>

As regards the scope of paragraph 1 of Article 3, two matters are worth noting. Firstly, that the paragraph requires merely that the habitual residence and nationality of the *de cuius* coincide *at the time of his death*: thus, an Irishman who lived all his life in the United States but came to Ireland and established an habitual residence here as an old man, which he retained until his death would have fulfilled the requirements of the paragraph. Secondly, the paragraph offers a solution to many cases of dual nationality, since a substantial proportion of dual nationals will be likely to die in the State of their habitual residence which will coincide with one of those nationalities.

Paragraphs 2 and 3 deal with cases where the States of nationality and

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<sup>21</sup> *Id.*, para 51.

<sup>22</sup> *Id.*

habitual residence of the *de cuius* do not coincide at the date of his or her death. It should be noted that the first sentence of paragraph 2 requires, not that the *de cuius* has been *habitually* resident in the particular State for five years preceding his or her death but that he or she has been (i) *resident* there for this minimum period and (ii) *habitually resident* there at the time of his or her death. The forum has the function of determining this question.

The second sentence of the second paragraph contains the important proviso that, in *exceptional circumstances*, if at the time of his or her death the *de cuius* was "manifestly more connected" with the State of which he or she was then a national, the law of that state applies. In its discussions Commission II "conceived of this exception as an 'escape clause' to be used in genuinely unusual circumstances".<sup>23</sup> It is worth recording the following examples proffered by Professor Waters:

"... the deceased at his death was a national of State D, but he had been resident continuously for six years in State E prior to his death. Though the first five years of that residence were markedly equivocal as to whether the deceased was or was not habitually resident in State E, there is no doubt at his death that that place was then his habitual residence. The law of State E is the applicable law. However, let it now be imagined instead that there are other circumstances to be considered. Though the deceased lived in State E during that period of time, nevertheless it was his business in State E which led to his being there in the first place and in remaining there. He has no cultural links with State E and cannot in any way be said to be integrated in that State. He has business ties with his first homeland, State F, the country of his nationality, his children go to school in State F, and upon completion of his contract will return to that State. A court might very well conclude in this case that the application of the solution prescribed by the first sentence of Article 2 is inappropriate, that the law of his national State, was 'more closely connected' with him than the law of State E.

It should be noticed that, if State F were not the State of the deceased's nationality but nevertheless the place with which he had had the same associations, the law of State E is the applicable law. No 'escape clause' is available. Commission II considered this situation very carefully, and made its decision deliberately in order to maintain the balance of nationality and habitual residence within the article."<sup>24</sup>

Paragraph 3 of Article 3 deals with cases *other than* where the *de cuius* died (i) in the State of his or her nationality and habitual residence or; (ii) habitually resident at the time of his or her death in a State in which he or she had resided for the previous five years. In cases falling under paragraph

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23 . *Id.*, para 53.

24 *Id.*

3, the applicable law will be that of the State of which the *de cuius* at the time of his or her death was a national, unless at that time he or she was more closely connected with another State, in which case the law of the latter State applies.

Professor Waters deals with a case, not capable of easy resolution in accordance with the express language of the paragraph, where there is *more than one* State with which the *de cuius* was more closely connected than that of his or her nationality:

"For instance, the *de cuius* leaves his national State, State I, in Northern Europe to live in the gentle climate of the Mediterranean. He sets up his home in State J, where he is joined by his wife and youngest child who is still living at home. Here he becomes part of the community and builds himself the home of his dreams. However, he is an author, and his publisher carries on business in State K in North America. He often visits his publisher in State K, and has a *pied a terre* there where he spends long periods of time and he and his wife have many friends in authorship and the arts. He has no family in State I at his death, and never goes there. It would seem there is a 'more close connection' with either State J or State K. The Convention does not employ the term, the closest connection, but that is what it must be interpreted to mean in the example just given. That was Commission II's intention."<sup>25</sup>

What of a case where the *de cuius* has dual nationality? In such circumstances the laws of *two* countries could claim to be the applicable law as being "the law of the State of which at the time of his death the deceased was a national". The simple solution would be to look to the proviso in the paragraph and to apply the law of whichever of the two States of nationality was that with which the deceased was more closely connected (unless of course the deceased was even more closely connected with another State of which he or she was not a national).

Article 4 provides that, if the law applicable according to Article 3, is that of a non-Contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of succession, the law of another non-Contracting State which would apply its own law, the law of the latter State applies. This is a particular, somewhat limited, application of the *renvoi* doctrine.<sup>26</sup> The parameters should be noted. The Article applies only where the law applicable according to Article 3 is that of a *non*-Contracting State. Where the applicable law is that of a *Contracting* State, *renvoi* has no application.<sup>27</sup> Secondly Article 4 does not apply to cases where the conflicts rules of the non-Contracting State designate a Contracting State. Thirdly, the Article has no application where a designated non-Contracting State either

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<sup>25</sup> *Id.*, para 54.

<sup>26</sup> See *Binchy*, ch 5.

<sup>27</sup> See Article 17 of the Convention.

remits the question to the first non-Contracting State or transmits it onwards to a third non-Contracting State, even if that third State would apply its own law.

It may be seen, however, that Article 4 does apply even where the applicable law under the Convention is that of a non-Contracting State which would refer the matter on to another non-Contracting State *so far only as part of the estate or its assets is concerned*:

"For example, the likely most common example, State L as the non-Contracting State whose law in the applicable law under Article 3 follows the principle of scission. Scission is also the law adopted by State M, to which State L refers. Since the immovables in question in the deceased's estate are situated in State M, the law of State L refers the matter of those assets to State M which accepts the reference and applies its own law to the immovables. However, State L would apply its own law to the movables in the estate. The forum will therefore apply the law of State L to the movables in the estate".<sup>28</sup>

Professor Waters notes that it would seem that the approach taken by Article 4 prevailed because most delegations recognised it as an attempt not to destroy unity where it already exists:

"If two non-Contracting States are able to reach a point where there is unity between them as to which law shall apply, why destroy that unity in the name of the Convention which proclaims unity as its object? It was also felt that, as more States become Contracting States, the use of the article will decline; meanwhile States will be attracted by the 'out-reach' of the Convention as here demonstrated. Good relations will be created".<sup>29</sup>

Finally it is worth noting in relation to Article 4 that support for the idea of extending its principle from *objective* connecting factor circumstances involving the non-Contracting State to embrace the *subjective* connecting factors encapsulated in Article 5 was not forthcoming from the delegations. There was a quite understandable fear that to take this step might actually defeat the testator's expectations since no testator could exercise a choice of the law of a non-Contracting State under Article 5 save after receiving sophisticated legal advice as to the private international law rules of the chosen non-Contracting State.

Article 5 provides as follows:

1. "A person may designate the law of a particular State to govern the succession of the whole of his estate. The designation will

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<sup>28</sup> *Explanatory Report*, para. 58.

<sup>29</sup> *Id.*, para. 59.

be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.

2. This designation shall be expressed in a statement made in accordance with the formal requirements for depositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If under that law the designation is invalid, the law governing the succession is determined under Article 3.
3. The revocation of such a designation by its maker shall comply with the rules as to form applicable to the revocation of dispositions of property upon death.
4. For the purposes of this Article, a designation of the applicable law, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the whole of the estate of the deceased whether he died intestate or wholly or partially testate".

Article 5, as may be seen, allows a person some freedom of choice as to the law that is to govern his succession. The person is not entitled to designate *any* law he wishes: his choice is restricted to the law of his nationality or habitual residence:

"These two connecting factors were agreed by the Conference to be those which today to the exclusion of others (save for domicile) are employed for succession purposes, and, since the principle of a *professio juris* for wills is a novel proposition for almost all jurisdictions (Switzerland is a notable exception), it was felt that the limitations of testators to the choice of one or the other was both wise and practicable. Both factors stress a 'belonging' of the *de cujus*, which is appropriate for the personal and family nature of succession. It is also a central aim of the Convention that family protection laws against disinheritance of the surviving spouse or children be honoured, and to allow the testator to depart from both of those laws which reflect his natural association would be to encourage such disinheritance."<sup>30</sup>

Paragraph 1 of Article 5 enables a person to designate one of *four* laws: the law of his nationality at the time of his death or at the time of designation or the law of his habitual residence at either of these times. It is of no importance that the habitual residence at either of these times should have lasted any particular period beyond that which in the circumstances was sufficient to make the residence habitual.

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30 *Id.* para 26.

The Special Commission had permitted only *two* choices: the law of the person's nationality or habitual residence *at the time of his death*. Commission II "was persuaded by the argument that the testator should be able to know when he makes his will what law will govern it, and that he can only be assured of this if he may also choose the law of his nationality or of his habitual residence as that nationality or habitual residence is at the time of the execution of his will".<sup>31</sup> One reason for this shift of view was that it would more conveniently accommodate *pactes successoraux*, in respect of which the designation adopted in the Convention was the law as at the date of the agreement; another reason was that changes in habitual residence (and, to a considerably lesser extent, nationality) might occur without the *de cuius* appreciating this fact.<sup>32</sup> But

"the primary cause for this shift of opinion seems to have been the realisation that, if the date of designation were permitted, the *de cuius* might plan his matrimonial property arrangements and his provisions for succession to his estate freely, knowing which law will apply to each and able to have the same law apply to both. In the nature of things a designation of the law that will be the nationality law or the habitual residence law (particularly the latter) on his eventual date of death is not conducive to the best estate planning for the *de cuius*. This is one reason why *inter vivos* dispositions, with perhaps the reservation of life interests to the disposer, are so very popular and increasingly used in lieu of will disposition in the common law jurisdictions. When taxation considerations are also taken into account, the preference for *inter vivos* transfer becomes even more marked."<sup>33</sup>

Article 5(1) offers an opportunity to a person with more than one nationality to eliminate any question as to which is to be taken into account: the applicable law will be that of the nationality so designated by him.

Article 5(1) lays down no specific requirements as to how designation should be expressed:

"However, the wording of the paragraph seems to ensure that, as long as the *de cuius* makes it clear whether it is the nationality law or the habitual residence law he is choosing, and whether it is the chosen law at the time of the designation or at the time of his death, that designation will be effective. Though it is preferable that he designate the law of the chosen State by the name of that State, because this makes the designation paramountly clear, paragraph 1 does not make that requirement. Provided it is clear which law he is designating, that is enough."<sup>34</sup>

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31 *Id.*

32 *Id.*, para 61.

33 *Id.*

34 *Id.*, para 62.



It appears sufficient if the *de cuius* designates the law of a State by reference to the name of the State, without any averment that this is the law of his habitual residence or nationality:

"For example, he writes, 'I designate the law of Arcady to govern my succession'. The State of Arcady is not [that of] his nationality or his habitual residence at the time of the designation, but at his death it is [that of] his habitual residence. Provided the designation can be found by the forum to be 'express', paragraph 1 gives the benefit of any ambiguity as between the times of designation and death to the *de cuius*."<sup>35</sup>

The choice exercised under paragraph 1 is of a State rather than of the particular law of that State at the time of designation. Thus, if the *de cuius* designates the law of a particular State, and, under the law at the time of the designation, the will is invalid but, under that law at the time of his death, it no longer is invalid, the will may be upheld.<sup>36</sup>

Paragraph 2 of Article 5 deals with issues concerning the form of the designation and the existence of the real consent of the *de cuius* to the making of a designation.<sup>37</sup> The designation must be "expressed in a statement" made in accordance with the formal requirements for disposition of property upon death. Thus implied designations are excluded. It appears that an oral statement will suffice, provided the law governing the formal validity permits this.<sup>38</sup> As we have already noted, the meaning of "formal validity" is for the forum to determine.

Apart from formal requirements, paragraph 2 is also concerned with "[t]he existence and material validity of the act of designation". This relates to issues such as mistake, fraud, duress and undue influence: in essence the question is whether the designation was a voluntary act on the part of the *de cuius*.<sup>39</sup> This question is to be answered by the law designated.

Paragraph 3, as we have seen, provides that the revocation by its maker of a disposition made under paragraph 1 must comply with the rules as to form applicable to the revocation of dispositions of property upon death. Paragraph 3 is capable of embracing differing types of revocation, whether by act of the maker (such as by execution of a later, wholly incompatible, testamentary instrument or by burning or tearing up the will) or by operation of law (such as subsequent marriage). The conflicts rules of the forum as to the requirements for form will lead to a determination as to whether a revocation may take the character of an act by the maker or by operation of

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35 *Id.*

36 *Id.*, para 64.

37 *Id.*, para 65.

38 *Id.*

39 *Id.*, para 66.

law.<sup>40</sup> Professor Waters notes that:

"[I]f the revocation may be of either character, the forum will also have an answer as to whether such an act or operation has occurred in any particular instance. It is clearly arguable that marriage and divorce are each acts of the *de cujus* in a particular setting having legal connotations. In some jurisdictions<sup>41</sup> marriage revokes a will, and in some jurisdictions divorce also revokes a will. Commission II discussed the matter of revocation *ex lege*, and a proposal was initially put forward, later to be withdrawn, that the material validity of the revocation *ex lege* should be subject to the chosen law. However, it appeared that there is no known instance where revocation *ex lege* has affected a *professio juris* in a will, and the Convention has therefore remained silent on the matter. In these circumstances, were questions to arise, the forum will decide how they shall be answered. As to whether there is a revocation of the choice of law clause, experience may show that reference is made to the *lex successionis*, or perhaps to the matrimonial law or the personal law of the *de cujus*. There is a variety of ways in which the jurisdictions might handle this matter."<sup>42</sup>

Paragraph 4, as we have seen, provides that a designation of the applicable law under paragraph 1, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the *whole* of the estate of the deceased, whether he died intestate or wholly or partially testate:

"For instance, if a testator in his will designates the law of State P to govern his succession, and disposes of all his assets in that will, but later one of his legatees predeceases him leaving a situation where no other legatee takes by way of substitution, so that there is partial intestacy on the testator's death, the law of State P will continue to govern the whole succession. It is not the case that a designation in a testamentary form extends to that part of the estate only which is testate. By way of another example a *de cujus* may originate a statement making a choice of law to govern his succession, never make a dispositive act to take effect upon death, and die, of course, intestate as to his entire estate. The chosen law will govern that whole intestate succession."<sup>43</sup>

The qualification, "in the absence of an express contrary provision by the deceased", is a reference to Article 6, which permits the deceased to incorporate into his succession the laws of one or more other States or jurisdictions to govern the succession to particular (or specified) assets in his

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40 *Id.*, para 67.

41 Including **Ireland**, save where the will is made in contemplation of that marriage: *Succession Act 1965*, section 85(1). See *supra*, p5.

42 *Explanatory Report*, para 67.

43 *Id.*, para 68.

estate, subject to mandatory provisions of the law applicable under Article 5(1):<sup>44</sup>

"For example, a testator makes a will and later enters into a *pacte successoral* with another in which he designates the law of State Q, his habitual residence, to govern his entire succession. This designation will not only govern the *pacte successoral*, but constitute the *lex successionis* to the earlier drawn will. At a yet later date the testator executes another will - his third will - in which he revokes part of his second will, leaves the property in question (immovables in State R) to another person, and designates the law of State R to govern the succession to the immovables devised by the second will. The authority to make this incorporation of the law of State R is Article 6 (in the context of this Convention; otherwise it might be said to be implied), and this paragraph (4 of Article 5), the interpretational rule, is acknowledging this existence of Article 6 in its 'absence of' clause."<sup>45</sup>

Article 6 may be quoted in full:

"A person may designate the law of one or more States to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1."

Article 6 "was the outcome of a protracted effort of a significant number of delegations to secure recognition of the *lex situs* as a third possible applicable law, in addition to the laws of the nationality and of the habitual residence".<sup>46</sup> These delegations argued that testators with assets in more than one jurisdiction want to invoke the local law for local assets, because lawyers know best their local law, and the whole process of administration is consequently quicker, more reliable and less expensive. Multiple wills are popular in common law jurisdictions for this reason".<sup>47</sup> Opponents of this approach argued that it would result in scission, contrary to a central object of the Convention<sup>48</sup>; they argued, moreover, that "it meant that the protection of the family, another object of the Convention, would in fact suffer, because the unscrupulous could site their assets in States with no family protection laws".<sup>49</sup>

The notion at the base of Article 6 is "substantive law reference", or incorporation.<sup>50</sup> Professor Waters describes the breadth of what is here

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44 *Id.*, para 60.

45 *Id.*, para 69.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Cf *Binchy*, 523-524, *Griffin v Royal Liver Friendly Society*, [1942] Ir Jur Rep 29 (High Ct, Murnaghan, J, 1941).

envisaged:

"The substantive law reference is not restricted in any way to *situs* references. The provisions of any law foreign to the dominant law may be introduced (or incorporated), subject, of course, to the mandatory rules of the dominant law, and any number of foreign laws may be incorporated subject to the same qualifications. Nor is there any kind of quantum limit. The incorporated law or laws may in fact govern ninety-nine per cent of the acts contemplated by the particular institution or legal concept invoked, but that is no valid objection, provided the mandatory rules of the dominant law prevail."<sup>51</sup>

The following brief summary of the implications of Article 6, published in Britain by the Lord Chancellor's Department and Scottish Courts Administration, is instructive:

"Only one law - the dominant law - can govern the mandatory family protection rules applicable to D's estate. Thus, if D, a UK national and habitually resident in England, dies intestate except for a Spanish will disposing of his Spanish property and designating Spanish law as governing succession to such property, then English law and the Inheritance (Provision for Family Dependents) Act 1975 applies to D's whole estate to protect his family, though, subject thereto, the Spanish property passes under the Spanish will. If D, a UK national, died wholly testate and habitually resident in France, having made a Spanish will disposing of his Spanish property and designating Spanish law as governing succession to such property and having made a will disposing of the rest of his property and designating English law as governing succession thereto, then English law and the 1975 Act apply to D's whole estate though, subject thereto, the Spanish property passes under the Spanish will."<sup>52</sup>

Article 7 of the Convention provides as follows:

- "1. Subject to Article 6, the applicable law under Articles 3 and 5, paragraph 1, governs the whole of the estate of the deceased wherever the assets are located.
2. This law governs -
  - a) the determination of the heirs, devisees and legatees, the respective shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favour of

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<sup>51</sup> *Explanatory Report*, para 70.

<sup>52</sup> *Consultation Paper*, para 1.16.

persons close to the deceased;

- b) disinheritance and disqualification by conduct;
  - c) any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees.
  - d) the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death;
  - e) the material validity of testamentary dispositions.
3. Paragraph 2 does not preclude the application in a Contracting State of the law applicable under this Convention to other matters which are considered by that State to be governed by the law of succession."

It may be seen, this Article serves three separate goals: *first*, to confirm that, subject to Article 6, a single dominant law governs all assets of the *de cuius*, wherever situate: *second*, to spell out the substantive legal topics that a Contracting State must regard as falling within the scope of the Convention, and, *third*, to make it clear that, *for the purpose of its own conflicts rules*, a Contracting State may bring any topic not mentioned in Article 4(2) within the scope of "succession".

Article 5(1) is the only provision in the Convention which refers to the unity principle. Its effect, of course, in conjunction with the other provisions of the Convention, is that a Contracting State will not be permitted invariably to apply its own law to immovables within its jurisdiction. In cases where it has to apply a foreign law to these immovables, how is that foreign law to be proved? Professor Waters addresses this very relevant practical question as follows:

"Proof of foreign law is left implicitly to the forum, and the forum will draw on its own rules for that purpose. This is particularly important for immovables that are subject for article 7(2) purposes to an applicable law under Article 3 or 5(1). The Convention makes no provision regarding the proof that, for example, public offices and title insurers within the *situs* are to require in order that they may be sure the substantive Article 7(2) law of the applicable law has been correctly established in evidence. Of course, a *bona fide* transferee is often already protected under generally accepted law in all jurisdictions. Nothing in the Convention interferes with the power of the *situs* to protect the third party transferee. The purchaser in good faith without notice will always acquire a good title to immovables. However, States already applying the unity principle usually require and are satisfied with a notarial certificate as to the provisions of the foreign law. The notary certifies the heirship rights in his jurisdiction. The *situs* could require

also that the certificate be notarized before a consul of the *situs* State resident in the foreign State, and this would surely render the certificate recordable plus giving protection under the recording statutes of the *situs*. A court order in the foreign law State, declaring the heirship law of that State, is likely to be more costly and creative of delays than notarial certification, but would be available as a last resort in a different case."<sup>53</sup>

The need for a provision on the lines of Article 7(2) springs from the wide diversity of understanding between civil law and common law countries as to the meaning of "succession":

"Within that concept civil law countries (and units within a State, like Quebec) include devolution, transmission and administration (to the extent that the latter is not governed by the procedural law of the forum). Common law countries (and units within a State, like England and Wales) include devolution only; they assign transmission and administration to the law of the forum. There are also significant differences between jurisdictions as to classifications; a topic may be classified as substantive in some jurisdictions, and procedural in others. The distinction between matrimonial property law and succession has no agreed line, and the same is true of the distinction between the marriage contract and succession".<sup>54</sup>

Paragraph (2) represents the lowest common denominator of matters that all jurisdictions would regard an succession; paragraph (3) deals with the "grey area", of matters which only some jurisdictions regard as succession. As Professor Waters notes,

"[t]he Special Commission recognized that for civil law jurisdictions a large terrain of what in their classification constitutes succession is omitted from Article 7(2), and that this is a severe limitation upon the harmonization that the Convention is able to produce, in particular as between civil law Contracting States. Nevertheless, it was felt to be a considerable advantage to have harmony in the area of devolution, and Article 7(2) mandates the itemized topics with harmonization in view".<sup>55</sup>

Sub-paragraph *a* of paragraph 2 "is concerned with the ascertainment of the *persons* who are entitled to inherit, what it is they inherit, and on what terms, if any."<sup>56</sup> The reference to "share" appears to include the *reserve*, *legitime* and forced share entitlement, to the extent that that entitlement does not relate to specific assets.<sup>57</sup> Thus it seems that the shares arising on an intestacy or

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53 *Explanatory Report*, para. 75.

54 *Id.* para. 74.

55 *Id.*

56 *Id.* para. 76.

57 *Id.*

by way of legal right under the *Succession Act 1965* fall within the scope of the sub-paragraph.

If they do not, they fall within the description of "other succession rights arising by reason of death ..." This latter expression, incidentally, appears to capture the right of the surviving spouse to have the dwelling and household chattels appropriated to him or her under section 56 of that Act. The expression "obligations imposed on [the heirs etc] by the deceased" appears to refer to conditions or personal duties imposed on the beneficiary which the deceased attaches to the particular right of inheritance.<sup>58</sup>

Applications by children of a deceased testator under section 117 of the 1965 Act seem plainly to fall within the scope of the expression "other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased". A technical argument could perhaps be made that no child has any *right to provision* "arising by reason of the death" of his or her parent, but rather has merely a right to apply to the court for an order making such provision; on this view, the court's exercise of its discretion to make a grant of provision is the source of the right, rather than the death of the parent. Applications under section 117 may be contrasted with statutory schemes in some other jurisdictions which, although they envisage application to the court to determine the quantum of a particular share, are premised on the automatic entitlement to some share or, if not going quite so far, are at all events not conditional on the exercise of judicial discretion to make proper provision for the applicant. It seems clear from the structure of the Convention and from its entire corpus of deliberations that applications under section 117 do indeed fall within the scope of the sub-paragraph. Reinforcement for this interpretation comes from the statement by Professor Waters that:

"The provision by a court or other authority refers to the power of the court in common law jurisdictions, or of an administrative tribunal in some other jurisdictions, to make inheritance awards at the discretion of the court or tribunal."<sup>59</sup>

Sub-paragraph *b* deals with disinheritance and disqualification by conduct. In our law, we are now familiar with this notion but it is worth recalling that Part X of the *Succession Act 1965*<sup>60</sup> involved a radical change from the former common law approach by the adoption of what is essentially a civil law principle.<sup>61</sup>

It should be noted that disinheritance by *choice* - such as by disclaimer,

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58 *Id.*

59 *Id.*

60 See *supra*, pp. 14-15.

61 Cf. the *Explanatory Report*, para. 77.

renunciation or election against the will (save in favour of a "legal right" such as arises under Part X of the *Succession Act 1965*) - is not included within the sub-paragraph.<sup>62</sup> It seems, however, that since in cases where a member of a class of testate beneficiaries or intestate heirs disclaims, an increase in the shares of the other members of that class will result, a dispute about the efficacy of an alleged disclaimer would fall within the scope of sub-paragraph *a*, because it relates to "shares", which are specifically mentioned there.<sup>63</sup>

Sub-paragraph *c* renders subject to the applicable law all questions concerning obligations to restore an account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees. In Irish law, such matters as are dealt with by sections 63 and 116 of the *Succession Act 1965* fall within the scope of the sub-paragraph.

Sub-section *d* is concerned with freedom of testation and its limits. It relates to the questions of inalienability of a portion (or the entirety) of the estate, and is not intended to cover creditors' rights.<sup>64</sup> In addressing the question of inalienability, the sub-paragraph covers issues as to what part of the estate the deceased was free to distribute to whom he wished and extends to:

"attempts by the deceased - in his lifetime or by his will or agreements as to succession - to avoid *reserve*, *legitime*, forced shares, or judicial discretionary allocation of assets to immediate family members. This would include a situation where the deceased in his lifetime responds to an advertisement from a tax haven (a non-Contracting State) that he deposit assets in an investment device in the haven, and thereby avoid family protection legislation in his home jurisdiction. It is here supposed, of course, that other assets of the deceased remain subject to the control of the forum in a Contracting State."<sup>65</sup>

We confront here a troubled boundary-line between succession and matrimonial property. Professor Waters states that:

"[i]t is clear that questions concerning matrimonial property would be determined by the appropriate law governing such questions, and only thereafter would the questions of the testator's disposable estate be known. The Convention concerns that disposable estate. It is also clear that whether dower rights, homestead rights, and other rights of this kind, pertain to succession or matrimonial property law is for the forum (a Contracting State) to determine, and the same holds true for divorce and separation agreements that allocate assets of one spouse at the death of that spouse to the other".<sup>66</sup>

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62 Cf. *id.*

63 *Id.*

64 *Id.* para. 79.

65 *Id.*

66 *Id.*



Sub-paragraph *e* is included on account of Chapter III, which deals with the material validity of *pactes successoraux*.<sup>67</sup> The expression, "testamentary dispositions" was used on purpose here instead of "dispositions of property upon death" because the latter also includes agreements of succession, the material validity of which is dealt with in Chapter III; Article 7, paragraph 2, sub-paragraph *e* deals solely with the material validity of testamentary dispositions. The forum defines material validity.<sup>68</sup>

As regards paragraph 3 the delegations reluctantly decided that the question of interpretation of wills should fall within its scope rather than that of paragraph 2, because of the diversity of approaches among the several jurisdictions as to how to deal with interpretation.<sup>69</sup>

### CHAPTER III: AGREEMENTS AS TO SUCCESSION

Chapter III (Articles 8-12) deals with agreements as to succession. What are in question here are not unilateral revocable wills, but (1) agreements between parties as to a future succession (*pactes successoraux*) and (2) wills of different parties which are reciprocal.<sup>70</sup>

The notion of reciprocal wills is, of course, already well established in common law jurisdictions. Reciprocity in these jurisdictions takes the form that each will confers a succession benefit on the other testator, where the conferment of benefit by each testator is in expectation that a third person will benefit from both wills; in some civil law jurisdictions, however, there is no requirement for that expectation.

The concept of a *pacte successoral*, so far as it relates to the establishment rather than extinction of succession rights, is an exclusively civil law creation. The essence of the notion is that of a contractual agreement, whether for consideration or otherwise,<sup>71</sup> involving the disposition of future property at the time of the death of the transferor.<sup>72</sup> Article 1(2)*d* specifically excludes from the Convention all dispositions of property save those upon death; thus, where, as often occurs in common law jurisdictions, a dispositive act *inter vivos* generates immediate full property rights, possession rights only vesting in the transferee on the transferor's death, this will be outside the terms of the Convention.

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67 See *infra*, pp 67-72.

68 *Explanatory Report*, para. 80.

69 *Id.*, para. 81.

70 *Id.*, paras 82, 91.

71 Common law jurisdictions have already come to terms with this difference in a private international law context: cf *Re Bonacina*, [1912] 2 Ch 394, *Binchy*, 537.

72 Cf the *Explanatory Report*, paras 28, 84, 92. It may be seen that the requirements for a *pacte successoral* differ from those for reciprocal wills in that an actual agreement is necessary; reciprocal wills need not necessarily be the outcome of an agreement, though it is usually necessary that they further an agreement *previously* concluded: *id.*, para 84.

Professor Waters comments that:

"[t]o tackle the inclusion within the Convention of *pactes successoraux* was a courageous act, if to some delegations it seemed a time-consuming venture and one which justified treatment in a separate Convention. On the other hand the majority of delegates agreed with the argument that a Convention on choice of law for succession transmissions could not ignore *pactes successoraux*, even if in many civil law jurisdictions they are totally or partly prohibited. By bringing them within the Convention a more complete unity of law in matters of succession was achieved, and the practitioner could more effectively assist his property disposing client. In particular it could be ensured that those who gain by reason of *pactes successoraux* do not also take again unfairly on the death of the agreement transferor."<sup>73</sup>

The precise definition of an agreement as to succession contained in Article 8 is of some considerable importance. This is:

"an agreement created in writing or resulting from mutual wills which, with or without consideration, creates, varies or terminates rights in the future estate or estates of one or more persons parties to such agreement."

It will be recalled that section 113 of the *Succession Act 1965* provides that a spouse's legal right may be renounced by an antenuptial contract made in writing between the parties to an intended marriage or may be renounced by a spouse after the marriage and during the lifetime of the testator, if the renunciation is in writing. Such a renunciation would seem properly capable of falling within the scope of Article 8.

It should be noted that Article 8 is limited to agreements *created in writing*. Commission II "was aware that oral agreements are recognized by a few jurisdictions, but was of the opinion that the agreement 'created in writing' because of evidentiary considerations is as far as the Convention should go. However, this is merely a restriction on the scope of Chapter III. The applicable law may indeed choose to accept the validity of an oral *pacte*; the oral *pacte* (or agreement) is simply not included in the Convention."<sup>74</sup> The requirement that the agreement should have been *created* in writing means that it will not suffice to establish an oral agreement, however convincingly it may be *evidenced* in writing.<sup>75</sup> The Convention says nothing on the question of the form of the agreement; it is for the forum to decide which law determines the form the 'writing' must or may take.<sup>76</sup>

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73 *Id.*, para 28.

74 *Id.*, para 84.

75 *Id.*, para 90.

76 *Id.*

A possible practical limitation of the scope of Article 8 results from Article 1, 2, c: as Professor Waters notes, "any gift of, or agreement as to, future property, though classifiable as a *pacte successoral*, will nevertheless fall outside the Convention if it is characterised by the forum Contracting State as matrimonial property".<sup>77</sup>

The following passage from Professor Water's *Explanatory Report* is of central relevance:

"On the common law side, given the absence of exceptions to the rule that there can be no disposition of future property other than indirectly through a contract for value between the would-be disposer and the would-be donee, it seems likely that common law jurisdictions will rarely find that a non-testamentary disposition nevertheless constitutes a 'disposition of property upon death'. The question that will be asked, however, is whether the following is a 'disposition of property upon death': the *de cuius*, X, contracts with Y for value that X will leave an asset that he then owns ('my house called "Greengables" at Stow-in-the Wold') by will to Y. X dies intestate, and Y is a stranger in blood who survives X, having given the promised value. It is the opinion of the Reporter that Y claims as a creditor against the estate of X .... Y seeks specific performance of a contract, and in registration jurisdictions that right as of the date of the contract will be registered against the house. This conclusion has the useful side result that no distinction need be drawn or attempted between property existing at the time of the contract and property that may exist at some future date. The distinction is merely that between testamentary and non-testamentary dispositions, something which has been familiar in common law jurisdictions since the seventeenth century. If H in his separation agreement with W purports to 'give' W 'three-quarters of my net estate at death', he has breached the rule that he may make no disposition of property upon death other than in testamentary form. The so-called 'gift' is invalid."<sup>78</sup>

A question may arise as to how to characterise a case of estoppel *a la Webb*.<sup>79</sup> If a husband purports to give his wife three-quarters of his net estate at death and, let us assume, the wife acts to her detriment in reliance on that assurance, would a court addressing and (let us further assume) applying the *Webb* principle to these facts characterise the matter as involving a "disposition of property on death"? Perhaps the answer depends on the nature of the court's holding and order. If it were to hold that the husband's estate "must not be permitted to resile from the promise made by the deceased and accordingly must not frustrate the effectuation of that disposition", the case

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77 *Id.*, para 93.

78 *Id.*

79 *Webb v Ireland* [1988] IR 353 (Sup Ct, 1987). Cf *McMahon & Binchy*, 155-157, *Pesca Valentia v Minister for Fisheries*, High Ct, Keane, J, 6 June 1989.

in favour of such a characterisation would, of course, be stronger than if it were merely to award the widow a sum in the nature of damages.<sup>80</sup>

Article 9, paragraph 1, provides that, where the agreement as to succession involves the estate of *one* person only, its material validity, the effects of the agreement, and circumstances resulting in the extinction of the effects are determined by the law which, under Article 3 or 5, paragraph 1, would have been applicable to the succession to the estate of that person if he or she had died on the date of the agreement. Thus, the objectively applicable law under Article 3 at the time of the agreement is to be applied unless an express choice of law has been made under Article 5, paragraph 1. Article 9, paragraph 2, provides that if, by the law at the date of the agreement the agreement is invalid the agreement will nonetheless be valid if so under the law which at the time of death actually applies to his or her estate according to Article 3 or 5, paragraph 1, as the case may be.

Article 10 deals with agreements involving the estates of *more than one person*. Such an agreement is materially valid only if so under *all the laws* which, according to Article 3 or 5, paragraph 1, would have governed the succession to the estates of *all* those persons if each of them had died on the date of the agreement.<sup>81</sup> A similar cumulative requirement applies to the effects of the agreement and the circumstances resulting in the extinction of the effects.<sup>82</sup>

Article 11 enables the parties to exercise a *professio juris* for *pactes successoraux* and reciprocal wills. They may agree by express designation to subject the agreement (again so far as its material validity, effects and circumstances resulting in the extinction of the effects are concerned) to the law of a State in which the person or any one of the persons whose future estate is involved has his habitual residence or of which he is a national *at the time of the conclusion of the agreement*. In contrast to Articles 5, paragraph 1 and 9, paragraph 2, Article 11 does not permit the parties to designate in the alternative the law of the nationality or habitual residence of the *de cujus* *at the date of his or her death*. Professor Waters explains that:

"[t]he reason for this is clear. When under Article 11 the parties choose a law to govern their agreement, they make their own arrangements, and there is no case or need for the agreement to remain in suspense as to its validity until a later date. If they have been ill-advised or taken no advice, the parties have an independent remedy against their advisors or they have only themselves to blame. Suspended contingent validation is not a policy which commends itself in these circumstances where the parties have chosen a law to govern the agreement, even when only one party's estate is involved. A significant majority of voting delegates came to this opinion, while

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80 Cf R Byrne & W Binchy, *Annual Review of Irish Law* 1987, 164 (1988).

81 Article 10, paragraph 1.

82 *Id.*, paragraph 2.

continuing to uphold the policy decision of Article 9(2).<sup>83</sup>

Article 12 is of some considerable importance, in seeking first to *prevent abuse* by persons with a compulsory entitlement and secondly to *protect* persons with a compulsory entitlement who are not parties to an Article 8 agreement from losing their rights.

Paragraph 1 provides that the material validity of an agreement valid under the law applicable according to Articles 9, 10 or 11 may not be contested on the ground that the agreement would be invalid under the law applicable according to Article 3 or 5, paragraph 1. As Professor Waters observes, this:

"ensures that no person with *reserve*, *legitime*, forced share, or judicially determined share rights under the Article 3 or Article 5(1) law *at the death* of the person or persons whose estates are involved should be able to benefit from the Article 3 or Article 5(1) law or laws of that person or those persons *at the date of the agreement*, and then claim that under the law at death or one of those laws the agreement is invalid so that this right to the *reserve* or *legitime*, etc, can still be asserted."<sup>84</sup>

Paragraph 2 of Article 12 provides that the application of the law applicable according to Articles 9, 10 or 11 is not to affect the rights of anyone *not party to the agreement* who, under the law applicable to the succession by virtue of Article 3 or 5, paragraph 1, has an "indefeasible interest" in the estate or another right of which he cannot be deprived by the person whose estate is in question. Professor Waters explains that the Convention:

"makes it binding on Contracting States that, whatever the substantive provisions of the applicable law at the date of the agreement (the law which validates the agreement) as to the rights of persons who were not party to the agreement, those rights - if they are rights to a *reserve*, *legitime*, forced share, etc, under the *lex successionis* at the time of the death of the person or a person whose estate was affected by the agreement - remain enforceable."<sup>85</sup>

An important question in relation to Irish law is whether paragraph 2 extends to section 117 applications. It will do so only if a child asserting a claim under that section has "an indefeasible interest" in his or her parent's estate or another right of which he or she cannot be deprived by his or her parent.

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83 *Explanatory Report*, para 102.

84 *Id.*, para 103. Of course it is not only persons with an indefeasible right of their own who are prevented by paragraph 1 from asserting the actual *lex successionis* at the death to invalidate the agreement: everyone is. As a matter of likelihood, persons with indefeasible rights would be most inclined to do so, but, as Professor Waters points out (in para 104), it might also be in the interests of a general legatee to take the same course.

85 *Id.*, para 105.

It seems that the child's right falls within the scope of this terminology: it would be hard to describe it as other than a right of which he or she cannot be deprived by his or her parent.<sup>86</sup>

Finally in relation to Chapter III, it is worth noting that Article 24, paragraph 1 *a*, permits a Contracting State to make a reservation that it will not apply the Convention to agreements as to succession as defined by Article 8. We examine below<sup>87</sup> the question whether Ireland should make such a reservation.

#### CHAPTER IV: GENERAL PROVISIONS

##### *Commorientes*<sup>88</sup>

Article 13 provides that, where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for this situation or make no provision at all, none of the deceased persons are to have any succession rights to the other or others.

This Article is likely to have limited application since it is premised on two contingencies: the existence of different applicable laws as to the succession to the respective estates of the decedents and the existence of laws providing differently (or not at all) for the situation. Professor Waters explains:

"It was agreed that what was wanted was a provision that prevented either or any one of the simultaneously dying persons from inheriting from the other or any other among their number. But how to express that most effectively for all legal systems without upsetting substitution (or 'anti-lapse') provisions was the challenge. At first the Commission favoured, 'each of the deceased persons shall be understood to have predeceased the other or others', because it clearly set the scene for the substitution of another person for the heir or legatee who has simultaneously died. However, delegations came to feel on a later reading of the text that this language was insufficiently explicit; it did not say that no simultaneously dying person may inherit from another such person. Consequently, the present language of Article 13 was adopted."<sup>89</sup>

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86 In this context it is worth noting that, in Britain, the Consultation Paper published by the Lord Chancellor's Department and Scottish Courts Administration characterises as such a right one arising under the *Inheritance (Provision for Family and Dependents) Act 1975*: para 2.24.

87 *Infra*, p101.

88 Cf *Brady*, para 65, *Binchy*, 434, 628-629, *McGuire*, 25-26, *Wylie*, paras 7.06, 14.32-14.33, the *Succession Act 1965*, section 5, *Re Cohn*, [1945] Ch 5 (Uthwatt, J, 1944), analysed in 61 LQ Rev 340 (1945).

89 *Explanatory Report*, para 106.

### *Trusts*

Article 14, paragraph 1, may best be understood against the background of the *Hague Convention of 1985 on the Law Applicable to Trusts and their Recognition*.<sup>90</sup> The Trusts Convention is concerned with express trusts, whether private or charitable, as well as resulting trusts arising by implied intent: constructive trusts are excluded from its scope.

Under the Trusts Convention, trusts and wills are distinct legal phenomena, though of course they can be closely related: thus a will often is the instrument for the creation of certain trusts.<sup>91</sup>

It is clear that the private international law rules governing the formal and material validity of a will are not necessarily the same as those governing the formal and material validity of the trusts contained in the wills.<sup>92</sup>

Article 14, paragraph 1, provides that, where a trust is created in a disposition of property upon death, the application to the succession of the law determined by the Convention does not preclude the application of another law to the trust. Conversely, the application to a trust of its governing law does not preclude the application to the succession of the law governing succession by virtue of the Convention.

The Consultation Paper published in Britain by the Lord Chancellor's Department and Scottish Courts Administration summarises the effect of this provision graphically:

"This emphasises that while State X's law may govern succession (for example, a will regarded as the 'rocket-launcher') State Y's law may govern a trust or foundation (the 'rocket') created by a testamentary disposition governed by State X's law."<sup>93</sup>

Paragraph 2 of Article 14 applies the same rules, by analogy, as those set out in paragraph 1 to "foundations and corresponding institutions" created by dispositions of property on death. Professor Waters states that:

"[t]he Convention recognises with this paragraph that a trust in the common law tradition does not have a legal *persona*. On the other hand, where the same effect is achieved by incorporation or a statutory grant of *persona*, whether in civil law or common law States, the Convention with this paragraph permits the Contracting States to apply another law than the applicable law of the *de cuius* under this Convention to that *persona*. It was not the intent of the Sixteenth Session with the words, 'by analogy', to require the Contracting State

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<sup>90</sup> See Williams, *Trusts and the Hague Convention*, 1 Company L 95 (1986).

<sup>91</sup> *Explanatory Report*, para 108.

<sup>92</sup> *Id.* See Binchy, ch 30.

<sup>93</sup> Para 2.26 of the Consultation Paper.

to commence an enquiry on each occasion as to whether the *persona* in question does achieve the same effect as a trust. It is merely saying that an *institution* in the French sense may be treated in the same way as a trust. The foundation is singled out among other *institutions* because some delegations to the Special Commission considered that this particularisation would make it easier for their States to comprehend the intended application of this paragraph."<sup>94</sup>

#### *The lex situs*

Article 15 provides that the law applicable under the Convention is not to affect the application of any rules of the law of the State where certain immovables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of these assets because of economic, family or social considerations. The reference *certain* immovables, enterprises or *other special* categories of assets should be emphasised: the Article does not apply to rules which apply to *all* immovables, even where those rules are based on economic, family or social considerations.

Professor Waters outlines the type of rules that fall within the purview of the article:

"For instance, the *situs* may legislate that with regard to family-owned farms at or under a given size the farm is to devolve as one unit or by way of the male line of proprietor. In another case the concern may be not so much a particular line of descent, but that however the farm is held in ownership, whether by an individual, a company, or a partnership, it shall not be divided whether as an immovable or as shares or interests as a consequence of two or more persons being entitled to inherit the whole, or a part each, but devolve as a whole. The policy of the article may also extend to other movables."<sup>95</sup>

The Article does not cover provisions of the *situs* concerning such matters as the ability of foreigners under the law of the *situs* to own such property as waterfront land, land on State borders or interests in operations of great concern to the State, such as utility supply units and nuclear power stations.<sup>96</sup> The Special Commission, after much debate, took the view that these should more appropriately be left to fall under the *ordre public* provision,<sup>97</sup> "and the forum, if it is not the *situs*, would consider whether the ownership, use or control restrictions of the *situs* constitute an *ordre public* exception to the application of the succession law".<sup>98</sup> The matter was re-opened at the

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<sup>94</sup> *Explanatory Report*, para 109.

<sup>95</sup> *Id.*, para 110.

<sup>96</sup> *Id.*, para 111.

<sup>97</sup> Then Article 11, now Article 18.

<sup>98</sup> *Report on the Special Commission*, para 61.



Sixteenth Session but the delegates came to the same conclusion.<sup>99</sup>

It is necessary to examine the range of reference of "enterprises, immovables or special categories of assets". Professor Waters explains that:

"Enterprises' is intended to refer to large operations like the artisan, industrial or commercial operations conducted as enterprises or corporations to be found, for instance, in Poland, the Federal Republic of Germany and Belgium where a community of persons enjoy property by membership of the group, so to speak, rather than by individuals. Were individual inheritance to be permitted the conception of an enterprise would be destroyed. 'Immovables' would refer clearly to such assets as family farms, or interests in family farms less than full proprietorship, where the duration of the interest or the nature and quantum of rights attached to the interest reflect a particular inheritance scheme. 'Special categories of assets' would refer for example to historic articles, such as sculptures, paintings and jewellery within the family which are required by the original act of disposition to pass from generation to generation down the lineal line."<sup>100</sup>

As to the terms "economic, family or social considerations", it "was not the Commission's intention that they should imply a wide span of potential meaning which the courts might freely construe as a means of giving effect to what are conceived in the *situs* as desirable local policies".<sup>101</sup> On the contrary,

"[i]t was the intention of the Commission that the phrase ... should be strictly construed, and not be regarded as an invitation to States or courts to bring within *situs* control any subject having broad economic, family or social connotations. To understand this phrase one has to return to the fundamental concerns of the Convention itself. The Convention is concerned with the protection of the family's indefeasible inheritance rights, with economic wealth that affects people when that wealth passes from generation to generation, such as in the form of small family businesses, and with social concerns such as the well-being of groups of peoples within society. Social concerns would also be reflected in the attempt of the estate to maintain the standards and values of society as those elements are reflected in laws concerning

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99 The Mexican delegation pressed strongly for the addition of the words "national security" to the words "economic, family or social" considerations. In taking the view that this goal really had to find expression as a matter of public policy, the majority were of opinion that Article 15 "was only justifiable as a succession law rule concerned with the conflict of laws and that the Commission could not stray from these criteria without losing all control over the manner in which the article might be applied in years to come by courts around the world": *Explanatory Report*, para 111.

100 *Id.* para 112. It was not the intention, however, that the Article (or the Convention) should apply to the devolution of titles of nobility where land is attached to the title and devolves with the title itself.

101 *Id.*

inheritance and the family. Economic concerns ... are intended to embrace the enterprises to which reference was earlier made, but there again the concern of the Convention was with groups of persons in the context of inheritance."<sup>102</sup>

Without doubt the Article as drafted retains a potentially staggering breadth. One solution would have been to qualify the type of rules to which it refers, by requiring that they be mandatory, in that they would have to be applied in the State of the *situs*, whatever the law applicable to succession. The delegates, however, ultimately eschewed such a specific description, preferring to leave matters "deliberately ... somewhat vague".<sup>103</sup>

How does Article 15 impinge on our domestic and private international law? As we have noted earlier, at present, when our courts apply conflicts rules to immovables situated within the State, they apply Irish law as the *lex situs*. Article 15 is clearly of far narrower scope. It is only in cases where the rules of Irish law institute a *particular* inheritance regime in respect of *certain* immovables, enterprises or other special categories of assets situated within the State, and the institution of that particular regime is because of economic, family or social considerations, that the Irish courts could contemplate applying Irish law in a case where the law applicable under the Convention is the law of some other State.

Thus it seems clear that a surviving spouse's legal right (or claim based on intestacy) and a child's claim under section 117 (or on intestacy) do *not* come within the scope of Article 15 and so would not override a foreign law applicable under the Convention.<sup>104</sup> Whether or not section 56 of the *Succession Act 1965* falls within the scope of the Article is less certain. This enables the surviving spouse to require the personal representatives of the estate of the deceased spouse to appropriate the dwelling in which at the time of the deceased's death the surviving spouse was ordinarily resident in satisfaction of his or her share in the estate. Two doubts arise as to its relevance to Article 15: the first concerns the characterisation of the legal

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, para 113. Professor Waters explains that the majority view was that:

"it would be deleterious to the interests of the Convention that these rules be characterised as mandatory in so many words. Mandatory rules of the *situs* inevitably result in a setting aside of the main provisions of the Convention, and it was felt that State authorities should not be encouraged to discern mandatory rules more than where it is absolutely essential. Th[e majority approach] therefore, hewed to the line that, while Article 15 gives scope to the courts and authorities for the recognition of compelling concerns in the *situs* touching particular inheritance regimes, by not describing them as mandatory it suggests to the *situs* that time and circumstances change and the compelling nature of a rule may change with them. These are simply special situations where there are overriding interests at stake": *id.*

<sup>104</sup> Cf para 2.27 of the Consultation Paper published in Britain by the Lord Chancellor's Department and Scottish Courts Administration.

right and spousal share on intestacy - a matter just mentioned<sup>105</sup>; the second concerns the question whether the right of appropriation amounts to "a particular inheritance regime" in respect of the family home because of economic, family or social considerations.

In both these contexts it is worth noting the following passage from the Report on the Special Commission's deliberations:

"A particular inheritance regime' should ... be interpreted as a mode of devolution of immovables or movables. Unless that right were to be characterised as 'matrimonial property' under article 1(2)(c), it should be noted that it would appear to include the right of the surviving spouse to remain in the family home for his or her lifetime, taking precedence thereby over the testamentary or intestate heirs."<sup>106</sup>

This passage suggests that a statutory life-interest, or right of residence, in the family home is capable of falling within the scope of Article 15. Whether the right to appropriate the family home should be similarly characterised is not entirely clear in view of the fact that it is secondary to, and entirely dependent on, the existence of a specific inheritance right (whether by way of intestacy or legal right) inhering in the claimant spouse. In the absence of such a specific inheritance right, no right to appropriate accrues. Our courts have not addressed the question whether the policy reflected in section 56(1) represents such a strong social policy that it should be applied even where the applicable law of succession is not Irish. One reason for this is no doubt that under our private international law rules the dwelling which is the subject of appropriation will, invariably<sup>107</sup>, it seems, be an immovable and thus subject to the provisions of the *Succession Act 1965*, including section 56(1), as the *lex situs*.

There thus remains a doubt as to whether the right of appropriation of the family dwelling falls within Article 15.

#### ***Bona Vacantia and Regalian Right***

In cases where there is no designated beneficiary under a will and no physical heir to take on intestacy, different legal systems adopt differing strategies.

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<sup>105</sup> *Supra*.

<sup>106</sup> *Report on the Special Commission*, para 62.

<sup>107</sup> Cf. the definition of "dwelling" in sections 56(14) of the 1965 Act and contrast it to the definition of "family home" in section 2(2) of the *Family Home Protection Act 1965* and section of the *Judicial Separation and Family Law Reform Act 1989*. *Quaere* whether Travellers could challenge the constitutionality of the definition in section 56(14). No doubt the protection of third party interests is more difficult in respect of movable than immovable property, but would that justify the complete exclusion of a surviving spouse from the right to appropriate the dwelling where it comprises a caravan? Articles 40.1, 40.3, and 41 would appear to be of central relevance; also, possibly, Articles 42 and 43. It should be noted that the caravan would not easily fit within the definition of 'household chattels' in section 56(14).

Some, following the theory of the regalian right, hold that the State takes as *bona vacantia* all estate assets whose *situs* is in that State. Others, including Ireland,<sup>108</sup> as well as a number of civil law jurisdictions, provide that the State takes as *ultimus heres*. The effect of these differing strategies is that both positive and negative conflicts may arise:

"A positive conflict occurs when the State upholding *situs* and the State upholding *ultimus heres* both claim to be entitled; a negative conflict will exist when State X (*ultimus heres*) is the *situs* of the assets, but X designates State Y (the regalian right) as the ultimate heir. So neither claims entitlement."<sup>109</sup>

Article 16 deals with the difficulty by providing that, where, by the law applicable by virtue of the Convention, there is no heir, devisee or legatee under a disposition of property upon death, and no physical person is an heir by operation of law, the application of law so determined does not preclude a State (or an entity appointed thereto by that State) from appropriating the assets of the estate that are situated in its territory. The effect of the Article is that, if the State of the applicable law under the Convention differs from the State of the *situs*, and the *situs* State regards itself as the appropriate party to take the assets on its soil, whether as *bona vacantia* or in its capacity as *ultimus heres*, the *situs* State may do so. If, however, the *situs* State, on the basis of the *ultimus heres* theory, is prepared to let the fate of the assets be determined by the applicable law, then it can look to the applicable law for the answer.<sup>110</sup>

#### **Renvoi**

Article 17 provides that in the Convention, and subject to Article 4, "law" means the law in force in a State other than its choice of law rules. This is in substantive harmony with the general policy of successive Hague

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108 *Succession Act 1965*, section 73(1). See further *Brady*, para 8.13, *Binchy*, 429-430. Cf *In the Estate of Maldonado, Deceased, State of Spain v Treasury Solicitor*, [1954] P223 (CA, aff'g *Barnard, J*), *Lipstein*, [1954] *Camb L J* 22, at 25-26, *LCB G[ower]*, 17 *Modern L Rev* 167 (1954), *Ehrenzweig, Characterisation in the Conflict of Laws: An Unwelcome Addition to American Doctrine*, in *XXth Century Comparative and Conflict Law: Legal Essays in Honour of Hessel Yntema*, 395, at 403 (1961). See, however *Cohn*, 17 *Modern L Rev* 381 (1954).

109 *Explanatory Report*, para 114.

110 *Id.*, para 116. A drafting imperfection, identified at an advanced stage of the Commission II's deliberations, is that Article 16 applies, in express terms, only where there is no physical heir, devisee or legatee. It was underlined at the Plenary Session that the article should apply, not merely in these circumstances but also in other cases where there are some assets for which there is no such heir, devisee or legatee: *id.*

Conventions to exclude the application of the *renvoi* doctrine.<sup>111</sup>

#### ***Ordre public***

Article 18 provides that the application of any of the laws determined by the Convention may be refused only where the application "would be manifestly incompatible with public policy (*ordre public*)". A provision on these lines is customary in Hague Conventions. It serves the useful advantage of encouraging States to ratify Conventions which contain many good provisions but also some which, on a pessimistic interpretation, might interfere with an important public policy, such as a fundamental constitutional right.

Article 18, as we have seen<sup>112</sup>, contemplates that Contracting States might wish to invoke *ordre public* on grounds of national security or in respect of foreign ownership of waterfront property, border lands and utilities and other enterprises of great economic significance.<sup>113</sup> It was because of the inclusion of Article 18 that Article 15 could be drafted more narrowly than some delegations would have wished.

Professor Waters counsels that:

"[s]o many exceptions in Hague Conventions look to the restraint of Contracting States in the manner in which they invoke these exceptions, and it is to encourage restraint that Article 18, once again, expressly refers to 'manifest incompatibility'. Clearly any excessive use of Article 18 by the forum could ultimately frustrate the achievement of the basic aims of the Convention".<sup>114</sup>

As to the precise scope of Article 18, it is worth noting that the reference to "any of the laws" determined by the Convention makes it clear that the public policy exception may be invoked, not merely where the law in question is that determined by Articles 3, 5 or 6, but also where Articles 9, 10 and 11 are concerned.<sup>115</sup>

#### ***Multi-Jurisdictional States***

Article 19 deals with the problem of identifying the applicable law where a State comprises two or more territorial units, each of which has its own system of law or its own rules of law in respect of succession. This may of

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<sup>111</sup> See Binchy, ch. 5, Bentwich, *The Development of the Doctrine of Renvoi in England in Cases of Succession*, 4 *Zeitschrift für Ausländisches und Int. Privatrecht* 433 (1930), Falconbridge, *Renvoi and Succession to Movables*, 46 *L.Q.Rev.* 465 (1930), 47 *L.Q.Rev.* 271 (1931), Mann, *Note: Succession to Immovables Abroad*, 11 *Modern L. Rev.* 232 (1948).

<sup>112</sup> *Supra*, pp 75-76.

<sup>113</sup> Cf. the *Explanatory Report*, para. 121.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

course be a federal State, such as the United States of America or Canada; but the description also includes unitary States, such as Spain and Britain, which have distinct geographic areas each with its own system of rules pertaining to succession.

Paragraph 2 of Article 19 gives to the multi-jurisdictional State power to prescribe rules to identify which unit is to be taken as the unit of reference in any of the situations for which the Convention provides.<sup>116</sup> The remaining paragraphs deal with the position where the State has not exercised this option.

Paragraph 3 deals with the meaning of "habitual residence" and "nationality" in this context. "Habitual residence" means the law of the unit in which the *de cuius* had his or her habitual residence at the relevant time.<sup>117</sup> "Nationality" also means the law of the unit in which the *de cuius* had his or her habitual residence at the relevant time; if he or she had no such habitual residence, the law of the unit with which he or she had his or her closest connection is to apply.

Paragraph 5 is designed to ensure that persons who are nationals or habitual residents of multi-jurisdictional States will not abuse the powers of designation conferred on them by the Convention so as to restrict or completely defeat the inheritance rights of their family in relation to their estate. Paragraph 5(a) provides that (subject to Article 6), if the deceased was a national of the State of which he has designated a unit, the designation is valid only if, at the relevant time, he had his habitual residence in that unit, or in the absence of such an habitual residence, he had a close connection with that unit. Paragraph 5(b) provides that, (again subject to Article 6), where the deceased was not a national of the State, one of whose units he has designated, the designation is valid only if, at the relevant time, he was habitually resident in that unit. If he was not then habitually resident in that unit but was at the time resident in the State, the designation will still be valid provided that at some time he had had an habitual residence in that unit.<sup>118</sup>

These rules are fairly stringent but were considered necessary by the majority

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116 *Id.*, para 122. The exercise of this power presents no difficulty in respect of unitary States (such as Britain): in a federal State, however, it may be exercised only by the organ (if any) that has constitutional authority to make rules competent to bind all the units of the State: *id.*, para. 124.

117 A small *lacuna* arises from the drafting of paragraph 3 a. The *de cuius* may have an habitual residence in a multi-jurisdictional State but *no* habitual residence in any of its units, as, for example, where he or she is an itinerant salesman of no fixed abode. Paragraph 7, as we shall see, reduces the extent of the problem, but, as Professor Waters notes (*Explanatory Report*, para 125), no provision appears to have been made for an Article 5(1) designation of the State as the State of habitual residence. A person without an habitual residence in any of the units of the State whose law he or she has thus designated "can only be said surely to have made no valid choice, and therefore the objectively determined law under Article 3 applies".

118 See further the *Explanatory Report*, para 127.

of the delegates in order to prevent a testator from "shopping around" for the law most to his (as opposed to his family's) taste in terms of family inheritance rights.<sup>119</sup>

Paragraph 6 provides that, for the purposes of any designation under Article 6 with regard to particular assets whereby the deceased designates the law of a State, it is presumed that, subject to evidence of contrary intent, the designation means the law of each unit in which the assets are situated. The paragraph does not specify the weight of evidence necessary to rebut the presumption; there is no reason to imagine why it should be other than on the balance of probabilities.

Paragraph 7 is concerned with the application of Article 3(2) to multi-jurisdictional States. It will be recalled that, under Article 3(2), the applicable law is determined, in the absence of a valid choice, by the State in which the deceased was habitually resident at his death, having had five years of continual residence in that State prior to his death. Paragraph 7 first provides that, in a multi-jurisdictional State, this period of residence may be acquired even though the *de cujus* resided in more than one of its units during the five years. If he had no habitual residence in any of the units, though having an habitual residence in the State at the time of his death and having resided in the State for five years, the applicable law is the law of that unit in which he *last* resided, unless at that time he had a closer connection with another unit of the State, in which case the law of the latter unit applies.

#### ***Differing Personal Laws***

Article 20 provides that, for purposes of identifying the law applicable under the Convention, where a State has two or more legal systems applicable to the succession of deceased persons for different categories of persons, any reference to the law of that State is to be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the reference is to be construed as referring to the legal system with which the deceased had the closest connection.

This Article is familiar in modern conventions. Some States include persons who are subject to, or acknowledge, differing personal law systems, such as Islamic, Christian or Hindu law, and the State recognises these laws, and their adherents. The Article enables the State to prescribe rules dealing with the position relative to the applicable law under the Convention and, in default, to adopt a "closest connection" test which normally should be easy to determine.<sup>120</sup>

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119 See *id.*

120 *Id.* para 130.

### ***Internal Conflicts***

Article 21 provides that a Contracting State in which different systems of law or sets of rules of law apply to succession is not bound to apply the rules of the Convention to conflicts solely between the laws of these different systems or sets of rules of law. A provision such as this is a necessity in Conventions of this type<sup>121</sup> since there frequently will be no compelling reason why a multi-jurisdictional State should contemplate applying the rules of the Convention to its several units, or why a State with differing personal laws should similarly apply the rules of the Convention to different groups.

### ***Transitional Arrangements***

Article 22 provides that the Convention is not retrospective: it applies in a Contracting State to the succession of any person whose death occurs after the Convention has entered into force for that State.<sup>122</sup> If the deceased, before such entry into force, has designated the law applicable to his succession, the designation will be valid if it complies with Article 5.<sup>123</sup> Moreover, where parties to an agreement as to succession,<sup>124</sup> before such entry into force, have designated the law applicable to their agreement, their designation will be valid if it complies with Article 11.11<sup>125</sup>

### ***Relationship with Other Conventions***

Article 23 is in harmony with the policy of several previous Hague Conventions,<sup>126</sup> in accepting that Contracting States may be parties to other Conventions on the same subject, even if there is a conflict between the Hague Convention and other conventions. Unusually, however, this conclusion was reached only after very considerable debate.<sup>127</sup>

Paragraph 1 of Article 23 provides that the Convention does not affect any other international instrument to which Contracting States are or become parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States party to the instrument. Paragraph 2 provides that paragraph 1 also applies to uniform laws based on special ties of a regional or other nature between the States concerned. This applies most obviously to the Scandinavian countries which are parties to the Helsinki Agreement on Nordic Co-operation of 1962.<sup>128</sup>

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121 Cf. Article 18 of the *Matrimonial Property Convention* and Article 24 of the *Trusts Convention*. See further the *Explanatory Report*, para 131.

122 Paragraph 1 of Article 22. It should be noted that the fact that the will was executed before the entry into force will not place it outside the scope of the Convention.

123 Cf Article 8.

124 Paragraph 2 of Article 22.

125 *Id.*, paragraph 3.

126 E.g. Article 19 of the *Matrimonial Obligations Convention* 1973, Article 20 of the *Matrimonial Regimes Convention* 1978, Article 21 of the *Validity of Marriages Convention* 1978 and Article 22 of the *Agency Convention* 1978: see the *Explanatory Report*, para 137.

127 See the *Explanatory Report*, paras 137-138.

128 *Id.*



### ***Reservations***

Article 24 of the Convention is of very considerable importance in providing for the possibility of up to four reservations:

- "(1) Any State may, at the time of signature, ratification, acceptance, approval or accession, make any of the following reservations -
  - (a) that it will not apply the Convention to agreements as to succession as defined in Article 8, and therefore that it will not recognise a designation made under Article 5 if the designation is not expressed in a statement made in accordance with the requirements for a testamentary disposition;
  - (b) that it will not apply Article 4;
  - (c) that it will not recognise a designation made under Article 5 by a person who, at the time of his death, was not or was no longer either a national of, or habitually resident in, the State whose law he had designated, but at the time was a national of and habitually resident in the reserving State;
  - (d) that it will not recognise a designation made under Article 5, if all of the following conditions are met:
    - the law of the State making the reservation would have been the applicable law under Article 3 if there had been no valid designation made under Article 5,
    - the application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the State making this reservation,
    - that spouse or child is habitually resident in or a national of that State.
- (2) No other reservation shall be permitted.
- (3) Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the month following the expiration of three months after notification of the withdrawal."

*Sub-paragraph (a)*

With regard to sub-paragraph (a), Professor Waters explains the underlying thought of the delegations:

"Oral succession agreements are valid in some jurisdictions, but ... are not included in the Convention. A Contracting State which makes this reserve as to Article 8 succession agreements will not, of course, recognise oral agreements as dispositions of property upon death, because its overall policy is to recognise only those dispositions on death which take the form of testamentary dispositions. It is for the reason of this policy that such a Contracting State will probably feel the need to protect itself against having to recognise designations under Article 5(1). This leads to the second aspect of Article 24(1)(a). By authority of Article 5(1) these designations are effective designations of the chosen law, but are contained in a form other than that which is testamentary because of the existence in the Convention of Chapter III. The language of paragraph 1(a) does not obligate the reserving State to refuse to recognise Article 5(1) designations, but the State is free to make clear in its reserve that neither will it recognise a designation of a chosen law to govern the whole of the estate when the designation is in the form of a succession agreement. Such agreement may or may not be in the form of a testamentary disposition, and it is testamentary dispositions alone which the reserving State intends to recognise. That this second aspect of the reserve is necessary can be seen from the fact that, while the wording of the first aspect refers to succession agreements 'as defined in Article 8', Article 8 commences with the words, 'For the purposes of this Chapter'. Article 5(2), however, provides that a designation of an Article 5 law is to be made in accordance with the formal requirements for 'dispositions of property upon death'. If a State recognises the validity of oral succession pacts, it follows that in that State a 'statement' designating the chosen law may be in oral form, which under the Convention is a valid disposition of property upon death in that State. Therefore, to prevent the difficulty arising of a Contracting State which has reserved as to Chapter III from being faced with either a written or oral designation in succession agreement form but not in testamentary form, the second aspect of Article 24(1)(a) permits the reserving State to make it clear that it will not recognise these non-testamentary forms of Article 5 designation."<sup>129</sup>

It is clear that, in a case where a Contracting State makes a reservation under sub-paragraph (a) declining recognition of Chapter III succession agreements, it is free, at its option, to continue to accept any Article 5 designation even though it be in the form which is not acceptable for a testamentary disposition.<sup>130</sup> It is worth quoting the words of advice of Professor Waters for

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<sup>129</sup> *Id.*, para 141.

<sup>130</sup> *Id.*, para 141.

States contemplating making a reservation under sub-paragraph (a):

"In view of the fact that this Convention will create greater international awareness and probable use of succession agreements, and that Chapter III constitutes an orderly international modus for the recognition of these mostly civil law estate planning devices, common law jurisdictions may be well advised not to make this reservation. It may be preferable to come to terms in this way with the succession agreement, as civilians accept through the Trusts Convention to come to terms with the trust. And for those States who wish later to resile from their decision, Article 30(1) ... provides an exit."<sup>131</sup>

*Sub-paragraph (b)*

Sub-paragraph (b) enables a Contracting State to make a reservation that it will not apply Article 4 of the Convention, which deals with a specific case of *renvoi* as between non-Contracting States.<sup>132</sup> The reservation would have some attraction for States, such as Denmark, which are strongly opposed to the *renvoi* doctrine.<sup>133</sup> The hostility of some scholars to this "bête noire" of the conflict of laws<sup>134</sup> is deeply rooted. *Rabel* has described the doctrine as "the most famous dispute in conflicts law, a classical example of violently prejudicial literature confronting naively consistent practice".<sup>135</sup> Whatever may be said about the demerits of *renvoi*, it should be noted that, in its applications under Article 4, it works to support a *harmony* existing between the conflicts rules of the two non-Contracting States. Moreover, to decline to apply Article 4 on principle may result in causing practical difficulties for individuals. Professor Waters argues against the merits of the reservation in blunt terms:

"It would ... seem that the significance of this reserve in practice terms is simply the inconvenience it causes to those whose estate affairs are likely to be determined in the reserving State. This is assuming, of course, that they are informed of the reserve and its consequences in the first place. The intestate and those lacking professional advice will be the ones who will bear the brunt of this reserve. States will have to determine whether this distaste for *renvoi* is worth this price."<sup>136</sup>

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131 *Id.* See also the *Consultation Paper* published in Britain by the Lord Chancellor's Department and Scottish Court Administration, which states in para 2.20:

"When UK Courts come to be faced with foreign *pactes successoraux* it should simplify matters if they merely have to apply rules in the Convention (acceptable to Civil Law and Scandinavian States) rather than create their own special rules. For this reason alone it may be worthwhile not to make the reservation allowed by Article 24, paragraph 1(a) against *pactes successoraux*."

132 See *supra*, pp 54-56.

133 See the *Explanatory Memorandum*, para 142.

134 Forsyth, *Renvoi - Is There an Answer?*, 1 *Natal UL Rev* 321, at 323 (1976).

135 *Rabel*, vol 1, 75-76.

136 *Explanatory Report*, para 142.

*Sub-paragraph (c)*

Sub-paragraph (c) enables a Contracting State, by reservation, not to recognise a designation made under Article 5 by a person who, at the time of his death, was not or was no longer either a national of, or habitually resident in, the State whose law he had designated, but at that time was a national of and habitually resident in the reserving State. The French and Italian delegations originally proposed a wider reservation, without the limitation to cases where the deceased died habitually resident and with his nationality in the reserving State.<sup>137</sup> Sub-paragraph (c) was proposed by way of compromise by the British delegation and accepted by the French and Italian delegations.

The following example clarifies how the reservation operates:

"Suppose the deceased in his will designates State A's law, his then habitual residence, to govern his estate. He dies with the nationality of State B, the reserving State, a nationality which he had at the time of designation, but at death he has changed his habitual residence to State B. State B will not recognise the designated law, and will apply the Article 3 law. Had the deceased died with his habitual residence in State C, possessing State B's nationality at all times, State B as a Contracting State, must recognise the designation in the will of State A because the reserve does not extend to the situation where nationality alone (or habitual residence alone) exists at death in the reserving State. Had the deceased died with his habitual residence in State B, but have changed his nationality and have had the nationality of State D at the time of designation, State B (the reserving State) as a Contracting State must still apply the designated law, the law of State A."<sup>138</sup>

Professor Waters evinces little enthusiasm for the reservation. He observes that:

"[t]here is no doubt ... that for the very large number of people who die habitually resident in and a national of the same one State, this reservation, if made by that State, has serious consequences. Suppose a will or succession agreement made by the *de cujus* earlier in life when he was an habitual resident in another State, and in which will or agreement he designated the law of that State as his applicable law, that designation will not at his death be recognised in the reserving State. For instance, if France or Italy were to reserve, a Frenchman or Italian working abroad, acquiring habitual residence and assets there (in State X), and designating the law of State X as his habitual residence to govern his estate, must take care if he wishes in older years to die in the land of his birth, and so returns to France or Italy, as the case may be. He leaves significant funds behind him in State X, and he does this perhaps because exchange control in State X prevents him from taking

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<sup>137</sup> *Id.*, para 143.

<sup>138</sup> *Id.*

capital out of the country. If he survives five years in his homeland, he will no doubt under Article 3 have acquired an habitual residence there, and if he dies under five years following his return no doubt the law of his homeland as his nationality law will apply to his estate. The difficulty is that because he has retained throughout his life the nationality of his place of birth, France or Italy, as the case may be, at his death he has neither the nationality of, nor is he habitually resident in, State X. At the same time he has at death the nationality and habitual residence of the reserving State (France or Italy). Ironically enough, had the deceased in these circumstances have been an Irishman or a Belgian, for instance, who had decided to spend his declining years away from the searing summers or the bitter winters of State X in the delights of the South of France or the Isle of Capri, the courts of France or Italy - as the case might be - would be required to accord him recognition of his designation of the law of State X.

It is much to be hoped that States intending to adopt the Convention, in order that their populations have the advantages conferred by the Convention, will hesitate before exercising this reserve. It may well produce more confusion and disappointment for those citizens who at death are habitually resident in and nationals of the reserving State than the reserve is worth. It may be a better course for States to give the Convention a chance, and see how it works out in practice.<sup>139</sup>

It may be useful, however, to consider the issue from the standpoint of the testator's family. If he dies a national of, and habitually resident in, State A, the fact that many years previously he has made a designation under Article 5 when habitually resident abroad (or when a national of another State) might not seem a sufficient reason to override the claims of his family.

*Sub-paragraph (d)*

Sub-paragraph (d) permits a reservation not to recognise a designation made under Article 5, if three conditions are fulfilled: (1) the law of the reserving State would have been the applicable law under Article 3 if there had been no valid designation made under Article 5, (2) the application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the reserving State, and (3) that spouse or child is habitually resident in or a national of that State.

This reservation derived from the concern of the Australian delegation that the family provision laws of the Australian states should be enforceable by those family members who are habitual residents or nationals of Australia.<sup>140</sup>

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139 *Id.*

140 *Id.*, para 144.

It catches the testator who is habitually resident in Australia but who retains the nationality of the State whence he emigrated to Australia. (Over a hundred nationalities are represented among Australia's immigrants).<sup>141</sup>

To the argument that the situation envisaged in this sub-paragraph might better be dealt with, if at all, by resort to *ordre public* under Article 18, it was replied that common law jurisdictions give a much more limited scope to public policy invocation than to other jurisdictions.<sup>142</sup> It was also noted that the reservation is relatively narrowly drafted: it applies only where the application of the designated law "would totally or very substantially deprive" the family of an inheritance or family provision.

It may be noted here that this reservation would not be likely to have great relevance to Ireland, where immigration, though increasing, is not a significant phenomenon. The reservation would of course apply to Irish nationals who, after a period abroad, in which they acquired a foreign habitual residence, return here, possibly to retire. The number of these who will have made a designation, assuming optimum ratification of the Convention, is difficult to forecast.

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

## CHAPTER 5: RECOMMENDATIONS

We must now consider the question whether Ireland should ratify the Convention. The case in favour of doing so depends in part on the inadequacy of our existing rules of private international law on the subject and in part on the particular merits of the approach favoured in the Convention.

Our existing rules of private international law may be criticised on two main grounds: their preference for scission rather than a unitary approach, and their central reliance on the concept of domicile.

The scission approach has been criticised over the years by a number of courts<sup>1</sup> and commentators.<sup>2</sup>

*Wolff's* comparison of the advantages and disadvantages in both the scission and unitary systems is worth recording:

"The advantage of the unitary rule is its greater simplicity. Where the deceased leaves several immovables in different countries, these together with his movable property form a single mass, all parts of which are treated alike. All co-heirs are co-owners of any asset belonging to the estate, and the whole estate is liable for the debts of the deceased in the same way as during his lifetime. If, while the testator was alive, one of the co-heirs had received certain gifts, for example, as an advance or on marriage, for which, according to the personal law of the deceased, he is accountable on division of the property, such 'hotchpot liability'

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1 See, e.g., *Re Collens deceased; Royal Bank of Canada (London) Ltd v Krogh* [1986] Ch 505 (Browne-Wilkinson VC, 1985).

2 Cf. e.g., *Dicey & Morris*, 1008.

is easy to fulfil where there is a single mass into which the gifts are to be brought. Complications are thus avoided which arise when several groups of property in one estate are to be distributed under different rules. Under the unitary system a will is either valid or invalid; under the scission system the same court may regard the same will as valid in respect of land situated in country X and as void in respect of land in country Y or of movables situated anywhere.

The simplicity of the unitary solution is, however, counterbalanced by a considerable disadvantage. If the succession law of state X is to be applied to the whole estate, including land situate in state Y, and if the succession law of Y is at variance with the law of X, the rights acquired under the law of X with regard to the foreign land are merely nominal; the courts of X have in fact no power to enforce them. Is it consistent with justice to establish rules which are necessarily ineffective? In the case of movables situate abroad no such inconsistency exists. True, the law of the domicile may be temporarily inoperative so long as the *situs* of the movables is outside the territory in which the domicile lies. But as the *situs* may be changed at any time, there is a chance that the domiciliary law will at some period become operative.<sup>3</sup>

The advantage of the Convention is that it removes the problem of the *de facto* dominance of courts of the *situs*, so far as Contracting States are concerned.

A weakness of the present law, to which we have adverted, is its reliance on the notion of domicile. The case against domicile is a well-known one. The concept is complex, and capable of yielding arbitrary attributions of domicile, especially where the domicile of dependency<sup>4</sup> or of origin<sup>5</sup> is concerned. Moreover, the emphasis on the intention of the *de cuius* opens up his entire life for scrutiny, in order to determine his mental disposition: this can be a time-consuming and expensive process, involving the expenditure of much

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3 Wolff, 568-569.

4 See *Binchy*, 77 ff. The domicile of dependency of married women was abolished prospectively by section 1 of the *Domicile and Recognition of Foreign Divorces Act 1986*. In *M(C) v M(T)*, [1988] ILRM 456 (High Ct), Barr J held that the domicile of dependency of married women had been "swept away by principles of equality before the law and equal rights in marriage as between man and woman which are enshrined in the Constitution", in particular in Articles 40.1, 40.3 and 41. See further R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 73-77, 111-113 (1989).

5 See *Binchy*, 74-77; see also the Law Reform Commission's Working Paper No. 10-1981, *Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*, p.79, acknowledging that the Irish decisions in relation to the domicile of origin do not manifest the "exaggerated emphasis" on national sentiments towards one's own country (*Graveson*, 199) which characterise certain English decisions: see, e.g., *In re Joyce, Corbett v Fagan*, [1946], *Munster & Leinster Bank Ltd v O'Connor*, [1937] I.R. 962 (High Ct., Meredith, J.).



judicial energy.<sup>6</sup>

The Convention offers what may be considered to be an improvement in respect of both these deficiencies. In place of scission, it proposes unity and in place of domicile it offers habitual residence. The latter change is perhaps worth examining in some detail. The concept of habitual residence<sup>7</sup> has several virtues, but it also has what some may consider to be significant vices. Its principal virtue is its simplicity (though its application may not be easy in a case where the *de cujus* has strong and competing connections with more than one State).

Its principal vice, at all events in comparison to domicile, is that it may fail to give sufficient weight to long-term intentions in some cases. For example, an Irishman, born in County Cavan, goes to work in London at the age of twenty-two with the intention of spending four years there and to return to Cavan "to build a house and buy a few acres" with the money earned in London. After three years he is killed in a traffic accident there. A court may hold that he had sufficient connections with England to make it the State of his habitual residence; but his longer-term connections were with Ireland - his Irish domicile would not have been abandoned - and some may consider that Irish rather than English law should more appropriately determine the question of succession to his estate.

As it happens, if the Convention were to apply to this case, the applicable law could well be Irish (in the absence of a *professio juris*) even if the man were considered to have been habitually resident in England at the time of the death. This conclusion, which many may consider the most satisfactory, springs, however, not from the simple fact that habitual residence is a more appropriate connecting factor than domicile in respect of succession, but from the delicate compromise between habitual residence and nationality which is

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6 The decision of Budd, J., in *In re Sillar; Hurley v Wimbush* [1956] I.R. 344 (High Ct., 1955), and *Re Adams Deceased*, [1967] I.R. 424 (High Ct.) immediately come to mind. Just how difficult it can be to determine the question of intention is evidenced by *In re Joyce, Corbet v Fagan*, [1946] I.R. 277 (Sup. Ct., 1945) and *T v T*, [1983] I.R. 29 (Sup. Ct., 1982).

7 See generally the Law Reform Commission's *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (LRC 7 - 1983) and its earlier Working Paper No. 10-1981, *supra*, Binchy, 98-100, de Winter, *Nationality or Domicile? The Present State of Affairs*, [1969] - III Rec. des cours 347, esp. chs. 4-6, Hall, *Cruse v Chittum: Habitual Residence Judicially Explored*, 24 Int. & Comp. L.Q. 1 (1975), Cavers, "Habitual Residence: A Useful Concept?", 21 Am. U.L. Rev. 475 (1972), Nadelmann, *Habitual Residence and Nationality as Tests at the Hague: The 1968 Convention on Recognition of Divorces*, 47 Tex. L. Rev. 766 (1969).

effected by Article 3.<sup>8</sup> Perhaps this delicate balance shows the strength of the Convention.

Before embarking on a detailed consideration of the merits and drawbacks of the Convention, we should note that the existing law has not occasioned any volume of protest by lawyers or those whom they represent. Its uncertainty and potential for arbitrariness in relation to the operation of law relating to forced shares has not led to a chorus for change. It is, moreover, worth noting the greater mobility of people in the past couple of decades; emigration has become a less final step in some cases than it used to be. This development may be considered to be a factor arguing in favour of adherence to the Convention.

Let us now turn to examine what the Convention offers. Several advantages may be considered. In place of the present complicated position where a

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<sup>8</sup> Paragraph 1 of Article 3 would not apply because the deceased was not, at the time of his death, habitually resident in the State of which he was a national. Paragraph 2 would not apply because he had not been resident in England for at least five years immediately preceding his death. Paragraph 3 would thus apply. It would seem that this would yield a holding that the applicable law was Irish since, on the somewhat bare facts stated above, the court would very probably conclude that the deceased's connection with England was not "more close" than with Ireland, the State of his nationality, upbringing and long-term aspirations. We will return later to an examination of the precise relationship between the concept of habitual residence and the requirements of paragraph 3 of Article 3.

deceased leaves property spread between civil law and common law countries,<sup>9</sup> the Convention as we have seen, offers a unitary approach.<sup>10</sup>

The second principal change proposed by the Convention is in relation to the applicable law in cases<sup>11</sup> where the deceased has not made a *professio juris*. Here there is a significant compromise between the civil and common law approaches. Article 3 involves a three-step process, which exhausts the universe of cases with which it has to deal. Under paragraph 1, succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State. Under paragraph 2, succession is also governed by the law of the State in which the deceased, at the time of his death, was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was "manifestly more closely connected" with the State of which he was then a national, the law of that State applies. Finally, under paragraph 3, in other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter

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9 Cf. the *Explanatory Report*, paras. 17-18:

"Some countries will use one connecting factor, and other countries another, in order to determine which is the applicable law to apply to the succession to the deceased's estate. That is, some countries use the nationality of the deceased as a connecting factor, others the domicile, and very different results can flow from this. For example, suppose a Mexican national who leaves and makes his home in London, England, has at his death assets in the Netherlands and Denmark. To the Netherlands assets the Netherlands will apply Mexican law as his national law, and to his Danish assets Denmark will apply English law as his domiciliary law. Now suppose that the assets include a house in Amsterdam. The Netherlands, being a 'unitarist' State, would apply Mexican law to this asset, but the United Kingdom is a 'scissionist' State (i.e., it applies one law to movables and another law - the *sius* - to immovables) and therefore for English succession purposes the law of the Netherlands applies. At this point the lawyer needs to know whether the United Kingdom applies *renvoi* in matters of succession, and consequently would apply Mexican law as the law which the *sius* would apply. In addition to these conflict problems the lawyer must recall that the concept of 'succession' in the Netherlands and Denmark means the devolution, the transmission and - to the extent that this is not dealt with by the law of the last domicile, as is the case in the Netherlands - also the administration of assets; in England it means only the devolution of assets, administration and transmission being subject to the *lex fori*.

It is clear, therefore, that, while nothing could be done at the conflict of laws level to deal with the differing concepts of 'succession' between the civil law and common law countries, something could be done about the diversity of connecting factors and also the existence of both unitary and scissionist States. A single approach in both these areas would both simplify the winding-up of deceased persons' estates and also reduce costs and the chances of error".

10 We address the partial exception prescribed by Article 6 presently.

11 Other than involving *pactes successoraux*, which are dealt with in Chapter III of the Convention.

State applies.

Let us examine how these rules would be likely to work out in relation to Irish nationals, domiciliaries and habitual residents and foreign nationals and domiciliaries habitually resident, or resident, here. The first point worth noting is that, by virtue of paragraph 1, Irish law will be the applicable law in certain cases where it would not<sup>12</sup> under present law.

For example, an Irish national, of Irish domicile of origin, resident in Ireland all his youth, emigrates to Massachusetts when he is twenty two. He there acquires a domicile of choice, marrying, buying a house and starting a business in Boston. Four years later he comes home with his American wife, to manage the family business while his father is dying. The son's genuine intention is to return to Boston shortly after his father has died. Six months later, while his father is still alive, the son dies in a traffic accident. If a court holds that the son was habitually resident in Ireland, Irish law will determine his succession, whereas at present the law of Massachusetts, as the *lex domicilii*, would determine succession to his movable estate.

Would this change be retrogressive? Our view is that it would not. Crucial to the assessment of the adequacy of the change is the meaning to be ascribed to the concept of habitual residence. To the extent to which it gives weight to the intentions of the *de cuius*, obviously the potential distance between habitual residence and domicile is abridged.<sup>13</sup>

It is also worth recalling that, in our *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*<sup>14</sup> we proposed that legislation introducing the concept of habitual residence should define "habitual residence" in such a way that a person could have only one habitual residence,<sup>15</sup> which should be "the centre of his personal, social and economic interests".<sup>16</sup> In determining this question, account should be taken of the duration of these interests "and of the intentions of the person relative thereto".<sup>17</sup> We are satisfied that the adoption of this definition would be likely to ensure that sufficient, but not undue, attention is given to the question of the intention of the *de cuius*.

We do not, therefore, perceive paragraph 1 of Article 3 of the Convention as

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12 Clearly, in all cases where under present law a foreign *lex situs* is prescribed in respect of immovables and Irish law is not applied by virtue of the application of the *renvoi* doctrine, paragraph 1 of Article 3, so far as its application will involve Irish law as the governing law, involves a change such as is mentioned in the text. It is, however, to the succession to movables, where the *lex domicilii* applies under present law, that discussion in the text is primarily addressed.

13 Cf. the *Explanatory Report*, para 51.

14 LRC 7 - 1983.

15 Section 6 of the General Scheme of a Bill, contained in the Appendix to the Report.

16 *Id.*, section 3(1).

17 *Id.*, section 3(2).

yielding an outcome that is unsatisfactory from the standpoint of policy.

Paragraph 2, as a general rule, applies the law of the State of the *habitual residence* of the deceased if he had been *resident* there for at least five years immediately before his death. However, in exceptional circumstances it will apply the law of another State if at the time of his death he was manifestly more closely connected with the State of which he was then a national. Is this a satisfactory approach in the Irish context? Let us take the case of a testator, born in Ireland and of Irish domicile of origin, who emigrates to London with his family as a teenager and who acquires a domicile of choice and habitual residence there on reaching full age. If he dies there at the age of twenty-two, seven years after emigrating, it seems perfectly reasonable that the succession to his estate should be determined by English law. That would already be the solution under existing law, so far as his movables are concerned. If we change the facts somewhat and attribute to the testator only an English habitual residence, and not a domicile, then, of course, the position would be different under the present law (unless the final sentence of paragraph 2 were to apply); but we do not see that the change in policy envisaged by paragraph 2 is a source of concern.

A converse case is worth addressing. An Englishman, of English domicile of origin, comes to Ireland, where he acquires an Irish domicile of choice and habitual residence. He marries an Irishwoman, and they live here for four years, whereupon he dies. Even though he was habitually resident here, paragraph 2 will not apply to his case because his residence did not amount to five years. Thus, the succession to his estate will be determined, not by the *Succession Act 1965* but by the similar, but by no means equivalent, English legislation, unless the deceased could be considered to be "more closely connected" with Ireland, and thus, by virtue of paragraph 3, the succession to his estate would be determined in accordance with Irish law.

It may be worth considering the range of the word "manifestly". On one view it addresses the *clarity* with which the court may discern that a connection with another State is closer than that of the State of habitual residence. On this view, the question is one of evidential patency rather than of the degree of closeness of connection. Of course it may well be that a very close connection will be more manifest than one that is only quite close, but, on this view, it may be said to be wrong to identify relative lack of evidential opacity with relative strength of connection. In some cases, the evidence as to the connection of the *de cuius* with any particular State may be quite unclear. In other cases it may be extremely clear but its very clarity may reveal what appears to be a "tie" between two States as to proximity of connection with the *de cuius*. We consider, however, that a proper interpretation of "manifestly" in paragraph 2 is such that "manifestly" imports a degree of weight of closeness of connection. We take this view because of

the inclusion of the reference to "exceptional circumstances",<sup>18</sup> as well as the fact that this is how the word "manifestly" tends to be understood in the context of the *ordre public* provision, in Article 18.

We take the view that, in the circumstances of its formulation, the Convention strikes a reasonable balance in requiring five years' residence as a supplement to habitual residence in a State other than that of nationality. In a case where this might seem to yield an entirely unconvincing result, paragraph 3 may well offer the answer.

We now must consider the type of case that falls within the scope of the second sentence of paragraph 2. This is one where (i) the deceased died habitually resident in a State of which he was not a national, (ii) he had been resident in the State of his habitual residence for a period of no less than five years immediately preceding his death, and (iii) he was manifestly more closely connected with the State of which he was a national at the time of his death. An example might be that of an Englishman who comes to Ireland, lives here for ten years, and dies here having acquired an habitual residence here. He may, nonetheless, have remained manifestly more closely connected with England, perhaps on account of his lack of integration with Irish Society and the absence of his cultural links with Ireland.<sup>19</sup> In such circumstances, English rather than Irish law should determine his succession.

We see no objection to this outcome but it reveals a difficulty, inherent in paragraphs 2 and 3 of Article 3, concerning the precise relationship between habitual residence, as that concept is envisaged under the Convention, and the factual circumstances amounting to a "closer connection" (or "manifestly closer connection"). If the concept of habitual residence merely embraced residence of a certain minimum degree of duration and intensity, then we would have no difficulty in accepting the notion that a person could have a closer connection with a particular State than with the State in which he is habitually resident. But if, as seems clear from the *Explanatory Report*, habitual residence is to be characterised as "the centre of [one's] living, the place with which he is most closely associated in his pattern of life",<sup>20</sup> and if in determining this place the person's family and personal ties are "equally important elements",<sup>21</sup> we do perceive a difficulty in seeing how a person could ever be more closely connected with a State other than that of his habitual residence. Nevertheless, the *Explanatory Report* appears to accept that this is possible.<sup>22</sup>

Paragraph 3 of Article 3 deals with a category of cases where the deceased was not at the time of his death habitually resident in a State of which he was

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18 Cf the *Explanatory Report*, para 53.

19 *Id.*

20 *Explanatory Report*, para 51.

21 *Id.*

22 Cf *id.*, para 53, quoted *supra*, p53.

then a national, nor was habitually resident in a State in which he had been resident for at least five years immediately prior to his death. This category embraces many different types of fact situations. It would apply, for example to a man of Irish nationality and domicile of origin, who had acquired an habitual residence in France at the time of his death but who had resided there for less than five years immediately before his death or who had resided there for more than five years but who had lost his residence there for a period, before re-acquiring it less than five years before his death. Another case falling within paragraph 3 is that of a much-travelled man or woman whose habitual residence keeps changing within periods that do not involve many years' residence. A third type of case falling within the scope of the paragraph is one where, for example, a person emigrated from State A to State B, where he remained for forty years, habitually resident there, and then emigrated to State C to live out his retirement there, but died before he had acquired five years' residence there, though he had acquired an habitual residence there at the time of his death.

What paragraph 3 prescribes in all these cases is that the law of the nationality at the time of death should apply, unless at that time the deceased was "more closely connected" with another State, in which case the law of the latter State applies. We consider that this policy introduces sufficient flexibility to ensure a workable and just solution to these cases. It should be noted that the problem of the exact relationship between habitual residence and a more close connection does not cause the difficulty in relation to paragraph 3 that it does in relation to paragraph 2, since in paragraph 2 (but not paragraph 3) the two concepts are counterpoised.

It may be useful to examine a particular narrow problem which troubled us when examining the subject of habitual residence eight years ago. This concerns the position where a person abandons an habitual residence in one State in order to take up residence in another State but dies before he has acquired such a new habitual residence. The parallel problem in relation to domicile is well known, involving a controversial revival of the domicile of origin.<sup>23</sup>

In our *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*<sup>24</sup> we proposed that a person should be deemed to have his habitual residence in one State until such time as he acquires an habitual residence in another State. Paragraph 3 of Article 3, as we have seen, deals with this case in terms of close connection rather than by a hard-and-fast rule.

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23 See *Binchy*, 76-77, *Leflar*, 18, *Weintraub*, *An Enquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 Mich L Rev 961, at 965-968 (1965), *Revenue Commissioners v Mathews*, 92 ILTR 44 (Sup Ct, 1954, rev'g High Ct, Maguire J, 1953).

24 LRC -1983, section 6 of the General Scheme of a Bill, contained in the Appendix to the Report. This solution bears a close parallel to that favoured (in relation to the equivalent issue domicile) in the United States (cf *In Re Estate of Jones*, 192 Iowa 78, 182 NW 226 (1921), Australia (*Domicile Act 1982*, section 7 (also New South Wales's *Domicile Act 1979*, section 6) and New Zealand (*Domicile Act 1976*, section 11)).

This does not of course obliterate the problem, which can be especially acute in situations where the deceased died when on his way to the State of his intended habitual residence. The discretionary approach to the problem envisaged by paragraph 3 seems to us to be perfectly satisfactory.

Having considered the totality of Article 3, we are satisfied that on balance it represents a workable compromise between habitual residence and nationality. The main problem with nationality as a connecting factor in private international law is that it can work unconvincingly in cases where a national has emigrated<sup>25</sup>; Article 3 is drafted in such a way as to remove this difficulty in a most satisfactory manner, since nationality is not permitted to "trump" a more close connection with another State<sup>26</sup> and can defeat habitual residence backed by five years' residence immediately prior to death only where the deceased was manifestly more closely connected with the State of nationality.<sup>27</sup>

It is necessary to consider Article 3 in relation to family protection and forced share provisions. The choice of law rules set out in Article 3 are very much designed to facilitate the testator/rix by providing greater certainty, as well as unity, in the rules applicable to the essential validity of the will which he/she makes. The choice of law rules are, therefore, centred on the movements (residence) and contacts (nationality) of the testator/rix. In other words the choice of law rules are determined by connecting factors relating to the individual rather than his or her family situation. However, as we have seen many modern systems of succession law have as one of their objectives the protection of, or the giving of rights to, relations (who may or may not be dependents) of the testator/rix. It could, therefore, be argued that a fair choice of law system ought to be based on connecting factors which reflect the situation of the family as a whole (or at least the nuclear family), not just the situation of the individual. The following case illustrates the point.

H, a national of Arcadia, marries W who is an Irish national. They have their matrimonial home in the Republic of Ireland for 25 years. The spouses later separate. An Irish court grants a judicial separation, and makes an order giving W occupation of the matrimonial home which is wholly owned by H. H returns to live in Arcadia as a habitual resident. He makes a will leaving all his property, including the family home, to a young woman who has recently become his companion. This disposition is perfectly valid under Arcadian law, which favours the principle of testamentary freedom. Soon afterwards H dies. Under Article 3.1 succession is governed by Arcadian law because H was a national and habitual resident of Arcadia at the time of his death. W would therefore lose the protection which she enjoys under the

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25 See Binchy, 97-98, *Rabel*, vol 1, 163-166, de Winter, *Nationality or Domicile? The Present State of Affairs*, [1969] - III Rec des cours 347, at 401, 407, Baty, *The Interconnection of Nationality and Domicile*, 13 III L Rev 363, at 367 (1919).

26 Article 3, paragraph 3 of the Convention.

27 *Id.*, paragraph 2.



Irish Succession Act, even though the sole matrimonial home for many years was Ireland, and an important element in the deceased's estate was a family home situated in Ireland. Article 15 would probably not apply.<sup>28</sup> If the Irish court wished to protect W, it would have to rely on the Article 18 "public policy" exception.<sup>29</sup> Arguably, it would be preferable to achieve this result through a choice of law rule which reflected the interests of a dependent surviving spouse than on the discretionary application of the unpopular "public policy" exception. As against this criticism, practical realities suggest that there is no immediate prospect of such an approach finding favour internationally. The Convention in its totality may perhaps be considered to offer the best practical means of protecting the dependent surviving spouse. Moreover, it is rare indeed to find a state permitting complete testamentary freedom. The overwhelming trend internationally is for states to contain some family protection provisions in their succession law.

On the narrower question of the risk that the Convention might encourage attempts to disinherit the surviving spouse, the phenomenon of husbands seeking to defeat their wives' inheritance rights by emigrating, while remaining married to them, is not one that has come to our attention. It is to be noted

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<sup>28</sup> See further *infra*, pp. 101-102.

<sup>29</sup> Our courts have yet to examine, the full constitutional parameters of succession law in relation to the Family. During the Second Reading of the Bill in the Dail, the Minister for Justice, Mr Lenihan, said:

"In a country such as ours which recognises the very special position of the family 'as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law', so-called freedom of testation is a paradox which cannot be defended on any ground. Article 41 of the Constitution pledges the State 'to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to, the welfare of the Nation and the State'. Under the same Article, the State recognises that, by her life within the home, woman gives to the State a support without which the common good cannot be achieved; and the State undertakes to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. These principles cannot be reconciled with a system of law which allows a man to ignore the mother of his family and to leave his property to strangers." 215 Dail Debs, cols 2017-2018 (25 May 1965).

See also the Minister's statement, to similar effect, during the Seanad Debates: 59 Seanad Debs, col 414 (14 July 1965).

In *O'B v S*, [1984] IR 316, the Supreme Court held that, in the light of the State's guarantee under Article 41 to protect the Family in its constitution and authority, it could not find the differences created by the *Succession Act 1965* as between children characterised as legitimate and those characterised as illegitimate were necessarily unreasonable, unjust or arbitrary. Walsh, J, delivering the judgment of the Court, noted that it could:

"scarcely be doubted that the Succession Act was designed to strengthen the protection of the family as required by the Constitution and for that purpose to place members of the family based upon marriage in a more favourable position than other persons in relation to succession to property whether by testamentary disposition or intestate succession."

that section 29 of the *Judicial Separation and Law Reform Act 1989* contains provisions, similar to those contained in section 121 of the *Succession Act 1965*,<sup>30</sup> enabling the court to set aside "reviewable dispositions", *inter vivos*, intended (or deemed to be intended) to defeat the claim of the applicant.<sup>31</sup> This is the most usual context in which the neglect of family responsibilities will be addressed. Finally, it is worth noting that a testator intent on disinheriting his or her spouse through the medium of private international law rules would be unlikely to rely on Article 3 of the Convention.<sup>32</sup> There would be no absolute guarantee that a court, possibly moved by humane considerations, would not apply the proviso in paragraph 2 or the "closer connection" test in paragraph 3 in such a way as to protect the interests of the Irish surviving spouse, habitually resident here. We should refer briefly to Article 4, as it is an adjunct to Article 3. It will be recalled that this applies a limited *renvoi* exception as between two non-Contracting States. We see no difficulty with this provision and are in fact impressed by its strategy (though its limited scope is perhaps a matter for regret).

We must now turn to the radically new rules, concerning the *professio juris*, introduced by Article 5. The benefits of this facility, from the standpoint of the testator, are significant. He or she may choose the law of his or her nationality or habitual residence at the time either of his or her death or of the designation. This freedom increases the degree of certainty in estate planning, to the advantage of the testator. By limiting the choice of applicable law to that of the nationality or the habitual residence at either death or designation, the formulators of the Convention sensibly reduced the possibility of a fraudulent or arbitrary choice of applicable law, especially in relation to family protection legislation.<sup>33</sup>

As in the case of Article 3, it is possible to envisage cases where a choice of law under Article 5 could result in a reduction of protection to surviving spouses from that available under the present law, but we do not consider that Article 5 would easily lend itself to abuse in this context.

It is in this context that we approach Article 6. It will be recalled<sup>34</sup> that this Article enables a person to designate the law of one or more States to govern the succession to particular assets in his estate, such designation being without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1. We are satisfied that this Article operates as a useful supplement to Article 5 and that it would not

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30 Cf *supra*, pp 14-15.

31 See R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 239 (1989). The section is not retrospective in its effect: *O'H v O'H*, [1991] ILRM 108 (High Ct, Barron, J, 1990), noted by Woulfe, 9 ILT (ns) 28 (1991).

32 Unless he or she were able to acquire the nationality of the State in which he or she acquired an habitual residence and this came within the scope of paragraph 1 of Article 3.

33 Cf the *Explanatory Report*, para 26.

34 *Supra*, pp 60-61.

work injustice. The proviso that the mandatory rules of law applicable according to Article 3 or Article 5, paragraph 1 cannot be shaken off by resort to Article 6 ensures that it cannot be put to fraudulent or irresponsible use, especially in relation to family inheritance claims. Here again, Article 18 acts as a deterrent to creativity in using the Convention to defeat family claims.

The next most important feature of the Convention is Chapter III, concerning agreements as to succession. We have earlier described its main characteristics. As we have noted, it is possible, under Article 24, paragraph 1 *a*, to make a reservation not to apply the Convention to agreements as to succession. We do not consider that, if Ireland gives effect to the Convention, it should avail itself of this option. The arguments<sup>35</sup> for not doing so, based on easing the task of Irish courts when they confront a *pacte successoral*, as well as encouraging the widespread ratification of the Convention, make it imperative that Ireland should not make such a reservation. Chapter III is sensitively drafted so as to ensure that it will not be utilised to the abuse of family responsibilities.

We consider that it would be useful for the legislation implementing the Convention to confirm expressly that section 117 applications under the *Succession Act 1965* fall within the scope of Article 12, paragraph 2.

We now must consider whether the General Provisions, contained in Chapter IV of the Convention, would enhance or detract from the rules applying under present law.

Article 13 presents no difficulty. It will be recalled<sup>36</sup> that it addresses the problem arising where different laws yield differing solutions to the situation arising where the order of deaths among *commorientes* is uncertain. Its solution, that none of the deceased persons should have any succession rights to the others, seems to us to be just and workable. Similarly, Article 14, dealing with the relationship between succession, trusts and foundations, involves a necessary clarification of respective areas of operation.<sup>37</sup>

We have already discussed Article 15 in some detail.<sup>38</sup> We have noted that there is a doubt as to whether the right of appropriation of the family dwelling under section 56 of the *Succession Act 1965* falls within the scope of the Article. Undoubtedly it reflects a strong social policy of Irish family law; whether this policy is sufficiently strong to override the applicable law of succession is a matter for debate. If, for example, a German couple have a home in County Cork in which they ordinarily reside, while retaining a reasonably close, ongoing connection with Germany, should the surviving

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35 Cf the *Explanatory Report*, para 141, and the *Consultation Paper* published in Britain by the Lord Chancellor's Department and Scottish Court Administration, para 2.20 (1990).

36 Cf *supra*, p73.

37 Cf *id.*, pp. 73-74.

38 Cf *id.*, pp. 75-78.

spouse have an entitlement to appropriate the dwelling under section 56(1)? Our preliminary view is that he or she should not, but we would greatly welcome views. If we were ultimately to conclude that section 56 should have such a wide reach, the question would arise as to whether, in the legislation implementing the Convention, it would be appropriate so to prescribe. The fact that it is not entirely clear that such a rule would fall within the scope of Article 15 is not determinative, since the Convention is sufficiently flexible to embrace such a rule under the head of public policy.

Article 16, dealing with the position where no physical person is an heir by operation of law,<sup>39</sup> removes the potential for positive and negative conflicts in a manner that appears to us to be satisfactory.

Article 17, excluding the application of *renvoi*,<sup>40</sup> subject to a limited role under Article 4, is in harmony with earlier Hague Conventions and raises no difficulty.

Article 18, the *ordre public* provision,<sup>41</sup> is essential to any Convention with a potential for raising important issues of public policy. This is particularly so in relation to Ireland, where the range of constitutional protection of the Family relation to succession has yet to be fully articulated by our courts. Article 18 represents the guarantee that the Convention will be capable of harmonising with the fundamental policies of our law.

Article 19, concerned with identifying the applicable law where a State comprises two or more territorial units, each with its own system of law or rules as to succession,<sup>42</sup> prescribes rules which appear to us to be sensible and fair. Similarly Articles 20, concerned with States with differing personal laws,<sup>43</sup> and 21, concerned with internal conflicts.<sup>44</sup>

The transitional arrangements<sup>45</sup> prescribed by Article 22 appear to us satisfactory, as do the provisions<sup>46</sup> in Article 23 concerning the relationship of the Convention with other Conventions.

We must now consider whether, if Ireland gives effect to the Convention, it should avail itself of any of the four reservations permitted by Article 24. We have already<sup>47</sup> addressed the first of these, which enables a Contracting State not to apply the Convention to agreements as to succession as defined by Article 8. We have indicated our view that Ireland should not make this

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39 Cf *supra*, pp 78-79.

40 Cf *id.*, p79.

41 Cf *id.*, p80.

42 Cf *id.*, pp 80-82.

43 Cf *id.*, p82.

44 Cf *id.*, p83.

45 Cf *id.*

46 Cf *id.*, pp 83-84.

47 Cf *id.*, pp. 100-101.

reservation.

The second reservation permits a Contracting State not to apply Article 4, which prescribes a limited *renvoi* rule with respect to cases where the applicable law is that of a non-Contracting State and that State would refer to another non-Contracting State, which accepts the reference.<sup>48</sup> We are firmly of opinion that Ireland should not make this reservation. To do so would be to sacrifice a harmonious outcome in the interests of making a doctrinal point<sup>49</sup> on which, incidentally, our law has yet to show a particular sensitivity.<sup>50</sup>

The third reservation is perhaps of greater relevance. It permits a Contracting State not to recognise a designation made under Article 5 by a person who, at the time of his death, was not or was no longer either a national of, or habitually resident in, the State whose law he had designated, but at that time was a national of and habitually resident in the reserving State.<sup>51</sup> This reservation can cater (in part) for an immigrant State, where a designation prior to migrating made by an immigrant could result in his surviving family becoming public charges on the State where they reside at his death. In order for the reservation to apply, it is necessary for the immigrant to have acquired not only the nationality but also the habitual residence of the State to which he has migrated.<sup>52</sup>

This reservation would also catch the case of a person who, having emigrated from the State of his nationality, for example, Ireland, - and having made a designation under Article 5 when habitually resident abroad, returns to Ireland in his old age and dies here without having changed the designation.

We consider that Ireland should not make this reservation, and we so recommend. In spite of its merits, we consider that on balance its potential to create a trap for the unwary<sup>53</sup> makes it unacceptable.

The fourth, and final, reservation, as we have seen,<sup>54</sup> permits a State not to recognise a designation made under Article 5 if all the following three conditions are met:

1. the law of the State making the reservation would have been the applicable law under Article 3 if there had been no valid designation made under Article 5;

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48 Cf *id.*, p100.

49 Cf the *Explanatory Report*, para 142.

50 Cf *Kutchera v Buckingham International Holdings Ltd* [1988] IR 61 (Sup Ct) and See R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 72-73(1989).

51 Cf *supra*, pp 87-89.

52 The fourth reservation deals with cases where the immigrant has not acquired such new nationality.

53 Cf the *Explanatory Report*, para 143.

54 Cf *supra*, p89.

2. the application of the law designated under Article 5 would "totally or very substantially" deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the State making the reservation;

and

3. that spouse or child is habitually resident in or a national of the State making the reservation.

We consider that Ireland should avail itself of this reservation. A designation which would have the effect of totally or very substantially depriving one spouse or child of the deceased of an inheritance or family provision to which he or she would have been entitled under the mandatory rules of Irish law, as the applicable law under Article 3, is one that appears fundamentally out of harmony with our Constitution. Even if the reservation were not available, we are of the view that Article 18 would probably reach such a designation, but it is beneficial that the policy can be spelt out plainly through making this reservation. It would be wrong to overstress the importance of the reservation: it will apply only to cases where the deprivation is total or very substantial.<sup>55</sup>

Finally, we must refer to Articles 1, 2 and 7 of the Convention which prescribe the parameters of its remit. We see no difficulty with these provisions. Perhaps the most important of them is the exclusion from the Convention of issues pertaining to matrimonial property.<sup>56</sup> This was an inevitable limitation. In the context of Irish Law it may be noted that, whereas our legislation distinguishes clearly between matrimonial property and succession, our courts have yet to address this matter in the context of constitutional entitlements deriving from Article 41.<sup>57</sup> This fact should, however, in no way discourage Ireland from incorporating the Convention's provisions into our law.

#### *Our conclusions*

As our analysis of the provisions of the Convention has shown, *we are satisfied that on balance it would be desirable for Ireland to introduce legislation giving effect to its provisions, and we so recommend.*

As regards the specific matters on which each state has to decide when giving

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<sup>55</sup> Cf the *Explanatory Report*, para 144.

<sup>56</sup> Article 1 2 c.

<sup>57</sup> Cf. *L v L* [1989] ILRM 528 (High Ct., Barr J. 1988 analysed by R Byrne & W Binchy, *Annual Review of Irish law 1988*, 213-221 (1989), not followed in *N(E) v N(R)*, High Ct., Barron, J, 27 June 1989, analysed by R Byrne & W Binchy, *Annual Review of Irish Law 1989*, 240-244 (1990). For detailed consideration of these and other relevant decisions, see *Duncan & Scully*, paras. 10. 042ff.

effect to the Convention's provisions, we have already indicated our views. *We recommend that Ireland should not avail itself of the option (under Article 24, paragraph 1a) to make a reservation not to apply the Convention to agreements as to succession. We also recommend that the legislation implementing the Convention should confirm expressly that applications under section 117 of the Succession Act 1965 fall within the scope of Article 12, paragraph 2.*

*We recommend that Ireland should not make a reservation (under Article 24, paragraph 1b) not to apply Article 4 nor make a reservation (under Article 24, paragraph 1c) not to recognise a designation made under Article 5 in the circumstances specified in Article 24, paragraph 1c. We recommend, however, that Ireland should avail itself of the option (under Article 24 1d) not to recognise a designation made under Article 5 if the three conditions specified in Article 24 1d are met.*

## CHAPTER 6: SUMMARY OF RECOMMENDATIONS

1. Legislation should be introduced giving effect to the provisions of the Convention: p104.
2. Ireland should not avail itself of the option (under Article 24, paragraph 1a) to make a reservation not to apply the Convention to agreements as to succession: p105.
3. The legislation implementing the Convention should confirm expressly that applications under section 117 of the *Succession Act 1965* fall within the scope of Article 12, paragraph 2: p105.
4. Ireland should not avail itself of the option (under Article 24, paragraph 1b) not to apply Article 4: p105.
5. Ireland should not avail itself of the option (under Article 24 paragraph 1c) not to recognise a designation made under Article 5 in the circumstances specified in Article 24, paragraph 1c: p105.
6. Ireland should avail itself of the option (under Article 24d) not to recognise a designation made under Article 5 if the three conditions specified in Article 24 1d are met: p105.