CONFLICT OF LAWS

Jerry Frank Jones
Laurie Ratliff
Ikard Golden Jones, P.C.
Austin, Texas

Advanced Estate Planning and Probate Course
State Bar of Texas
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JERRY FRANK JONES
Ikard Golden Jones
400 West 15th Street, Suite 975
Austin, TX 78701
Phone: (512) 476-2929
Fax: (512) 472-3669
jerry@jerryfrankjones.com
jerry@ikardgoldenjones.com

Education: Williams College, Williamstown, Mass., B.A. 1967
University of Texas-Austin, J.D, 1971
Certification: Board Certified Estate Planning and Probate by the State Bar o Texas.
Bicycle Assembly and Maintenance, Barnett's Bicycle Institute 2004
Fellow: American College of Trust and Estate Counsel
Instructor: University of Texas, Legal Assistant Program,
Estate Planning & Probate (1989-1995)
Honors **Super Lawyer, Texas Monthly** 2003--2013
The Best Lawyers in America, 2006--2013

Author:

- "Conflict of Laws" Advanced Estate Planning & Probate Course 2013.
- "Pattern Jury Charges for Fiduciary Litigation," Fiduciary Litigation: Beyond the Basics, State Bar of Texas, December 1, 2011
- Presented: "Wills and Revocable Trusts—What's Best for the Client," by Prof. Thomas Featherston, Intermediate Estate Planning, Guardianship and Elder Law Conference, UT, Galveston, August 11, 2011.
- "Pattern Jury Charges: Probate: Where Are We Now?" Advanced Estate Planning & Probate Course 2011.
- "Limitations & Laches," State Bar of Texas, Advanced Estate Planning & Probate Course 2010.
- Presented: Exculpatory Clauses, by Frank N. Ikard, Fiduciary Litigation Course, State Bar of Texas (December 2009)
- LIMITATIONS IN FIDUCIARY LITIGATION, Advocate, Litigation Section, State Bar of Texas 2009.
- HE'S DEAD? Suing and Defending When There is A Dead Body, Car Crash Seminar 2005-2006, University of Texas, School of Law
- HE'S INCAPACITATED? Powers of Attorney. Advanced Real Estate Drafting Course, State Bar of Texas 2005.
- STATE BAR OF TEXAS & THE LEGISLATIVE PROCESS, State Bar of Texas Council of Chairs, September 11, 2004
- MYTHS AND FACTS: TEXAS PROBATE, National College of Probate Judges, Spring 2003 Conference, Galveston, Texas.

- TEXAS LEGISLATIVE REPORT 2003 State Bar of Texas, 26th Annual Advanced Estate Planning and Probate Course 2003.
- HE'S DEAD? Real Estate in a Decedent's Estate, Advanced Real Estate Drafting Course 2002
- TEXAS LEGISLATIVE REPORT 2001, Starting Over Again, State Bar of Texas, 24th Annual Advanced Estate Planning and Probate Course 2001.
- Probate and Trusts, Statutory Update, 53 SMU Law Review 1273 (Summer 2000)
- "A TOPICAL GUIDE: Advanced Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Estate Planning and Probate Course (Originally prepared in 1992; updated each year through 2013)
- "A TOPICAL GUIDE: Advanced Drafting: Estate Planning and Probate Course Articles" State Bar of Texas, Annual Advanced Drafting: Estate Planning and Probate Course (Originally in 1999; updated each year through 2006).
- COMMUNITY PROPERTY FOR ACCOUNTANTS, Travis County CPAs Annual Conference. 1999.
- TEXAS LEGISLATIVE REPORT 1999, Laws for The Millennium, State Bar of Texas, 23rd Annual Advanced Estate Planning and Probate Course 1999.
- TEXAS LEGISLATIVE REPORT 1997, Next to Last Stop Before The Millennium, State Bar of Texas, 21st Annual Advanced Estate Planning and Probate Course 1997.
- TEXAS LEGISLATIVE REPORT 1997, Next to Last Stop Before The Millennium, State Bar of Texas Annual Convention, 1997 and 1998.
- Probate Practice in Travis and Surrounding Counties, Travis County Probate and Trust Law Section, 1996.
- What's Hot: GRATS, GRUTS, PRTS, QPRTS & FLPS, ANNUAL TAX CONFERENCE, Travis County CPA Association. 1995.
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning The Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Estate Planning for PWAs (Persons With AIDS)," State Bar of Texas, 16th Annual Advanced Estate Planning and Probate Course 1992.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, Magazine of the Real Property, Probate and Trust Section, American Bar Association.
- "Non - Probate Assets and Miscellaneous Items; The Difference Between Writing a Will and Planning an Estate," Travis County Probate and Estate Planning Conference - 1986.

Bar Associations and Activities:

- American College of Trust and Estate Counsel: Elected 1989, State Laws Committee, Fiduciary Litigation Committee
- American Bar Association: Co-Chair: Committee on Administration and

Distribution of Estates and Trusts (I-3) (1996-98); Chairman: Committee on Planning and Administering Small Estates and Trust of the Real Estate, Probate & Trust Law Section (1995-1996); Vice-Chairman, Committee on Planning and Administering Small Estates (1988-1995);

- State Bar of Texas:
  - -- Pattern Jury Charges: Probate Subcommittee Chair, Family & Probate Law Volume; (2009B2012)
  - -- Pattern Jury Charges: Family & Probate Co-Vice Chair (2009Bpresent)
  - -- Chair, Real Estate, Probate and Trust Law Section, State Bar of Texas (2001-2002)
  - -- Solutions 2012 Committee, Special Committee Appointed by President of the State Bar of Texas (2012); dissenting report.
  - -- Legislative Liaison, Real Estate, Probate and Trust Law Section, State Bar of Texas (1997B2003)
  - -- Council: Real Estate, Probate & Trust Law Section (1994-1998)
  - -- Chair: Real Estate, Probate & Trust Law Section (2001-2002)
  - -- Probate Code Committee, Section on Real Estate, Probate and Trust, State Bar of Texas (1989)
  - -- Member of the Real Estate, Probate and Trust Law Section, State Bar of Texas
- Texas Academy of Probate Lawyers: Legislative Liaison (1997-present)
- Travis County Bar Association: Board of Directors - 1986 – 1988; Past Chairman, Probate Section

TEXAS LEGISLATURE: Legislative Liaison, Real Estate, Probate and Trust Law Section, State Bar of Texas (1997-2003); Legislative Liaison, Texas Academy of Probate Lawyers (1997-2003); Member, Texas Legislative Interim Study Committee on Community Property Laws (1999-2000); Member, Uniform Trust Code Study Committee, Texas Real Estate Probate and Trust Law Section, State Bar of Texas.

ADMITTED TO PRACTICE LAW: All Courts in the State of Texas, United States District Court for the Western District of Texas, United States District Court for the Eastern District of Texas, U. S. Court of Appeals 5th Circuit, United States Tax Court.

Certified Bicycle Mechanic: Barnett's Bicycle Institute, December 2004
Alp d'Huez Club: October 2005.

Laurie Ratliff

Shareholder, IKARD GOLDEN JONES, P.C.
400 West 15th St., Suite 975, Austin, Texas 78701
512 472 4601
Laurieratliff@igjlaw.com

BOARD CERTIFICATION

Civil Appellate Law - Texas Board of Legal Specialization

JUDICIAL CLERKSHIP and COURT EXPERIENCE

Briefing Attorney - Seventh Court of Appeals, Amarillo (Justice John T. Boyd)
Staff Attorney - Third Court of Appeals, Austin

EDUCATION

Texas Tech University School of Law - J.D. 1992
Research Editor, *Texas Tech Law Review*
University of Texas at Austin - B.B.A. 1989

SELECTED COMMUNITY SERVICE, ACTIVITIES and HONORS

Board of Directors – The Settlement Club (non-profit supporting The Settlement Home for Children)
AV Peer Review Rating by LexisNexis Martindale-Hubbell
Selected as a Super Lawyer by *Law & Politics* and *Texas Monthly* magazine (2005-12)
Member – State Bar Appellate Section Pro Bono Committee
Life Fellow, Texas Bar Foundation
Past Chair, Travis County Bar Association Civil Appellate Section

SELECTED RECENT PRESENTATIONS and PAPERS

- "Winding down the trial gearing up for appeal" SBOT 26th Annual Advanced Appellate Practice Course (Sept. 2012)
- "Administrative Case Law Update," State Bar 24th Annual Advanced Administrative Law Course (June 2012)
- "Fiduciary Duty to Disclose: Informal demand or formal discovery," State Bar Fiduciary Litigation (Dec. 2011)
- "Post Trial Preservation of Error: Practice, Procedure, & Strategy" State Bar Appellate Practice 101 (September 2011)
- "Winding down the trial, gearing up for appeal: Tips to get your case from the trial court to the court of appeals," Austin Bar Association Fourth Friday CLE Series (June 24, 2011)
- "Property in transit: Implications of recent cases and strategy considerations" Texas Oil & Gas Association 2011 Property Tax Representatives Annual Conference (February 2011) (co-presenter)
- "Appealing Bench Trials" State Bar Appellate Practice 101 (September 2010)
- "Appealing Bench Trials" State Bar Nuts and Bolts of Appellate Practice (September 2009)
- "Oil Tank Farm and Gas Storage Cases on Appeal" Texas Oil & Gas Association 2009 Property Tax Representatives Annual Conference (February 2009) (co-presenter)
- "Case Law Update" Austin Bar Association Nuts & Bolts of Administrative Law Seminar (February 2009)
- "Practice Before the Courts of Appeals" State Bar Appellate Boot Camp (September 2008)
- "Jury Charge Issues" State Bar 31st Annual Advanced Civil Trial Course (August/September/November 2008)
- "Midland Tank Farm Appeal Update" Texas Oil & Gas Association 2008 Property Tax Representatives Annual Conference (February 2008) (co-presenter)
- "Not Just for Toxic Tort Cases: Strategic Use of Multidistrict Litigation Consolidation" 71 TEX. BAR J. 98 (2008) (co-author with Lynne Liberato)
- "Preserving Issues in Post-Trial Motions" Austin Bar Association Civil Litigation Section Ultimate Trial Notebook Seminar (June 2007)
- "Appellate Practice Tips Every Lawyer Needs to Know" Austin Bar Association First Friday CLE (December 2006)
- "Multidistrict Litigation" 20th Annual Advanced Civil Appellate Practice Course (September 2006)
- "Case Law Update" 7 TEX. TECH. ADMIN. L.J. 1 (Spring 2006) (co-author)
- "Appeals Involving the Government" 19th Annual Advanced Civil Appellate Practice Course (September 2005)

- "Case Law Update" Austin Bar Association Annual Advanced Administrative Law Seminar (2005, 2004, 2002)
- "Supreme Court Update" College of the State Bar Summer School (co-presenter) (July 2005)
- *Austin Lawyer*: "Third Court of Appeals Update" - monthly article (2001-present)
- *The Appellate Advocate*: "Texas Supreme Court Update" - annual article (co-author)

Table of Contents

1) **Introduction.** 11
2) **Not included** 11
3) **Restatement.** 11
  a) **Section 1. Reason for the Rules of Conflict of Laws.** 11
  b) **Section 2. Subject Matter of Conflict of Laws** 11
  c) **Section 6. Choice of Law Principles.** 2
4) **Limiter: Constitutional** 2
5) **Limiter: Texas Public Policy.** 2
6) **Domicile** 2
  a) **Defined.** 2
  b) **Determining Domicile.** 3
7) **Jurisdiction.** 5
  a) ***In rem* Jurisdiction of the Texas Court.** 5
  b) **Personal Jurisdiction over Executor.** 6
  c) **Personal Jurisdiction over Daughter Individually.** 6
  d) **Subject Matter Jurisdiction.** 7
8) **Jurisdiction: General and Specific** 7
9) **Intestacy.** 7
  a) **Immovables (Land)** 8
    i) **Law of Situs.** 8
    ii) **Marriage.** 8
    iii) **Adoption.** 8
  b) **Movables (Personalty).** 8
    i) **Law of the Domicile.** 8
    ii) **Marriage and Adoption.** 8
    iii) **Contracts.** 8
  c) **Real or Personal.** 8
10) **Wills: Probate** 9
  a) **General: Texas Will for A Texan.** 9
  b) **Foreign Wills for Texas Residents** 9
    i) **Complies with Texas Law of Wills.** 9
    ii) **Not Comply with Texas Law** 9
  c) **Foreign Wills for Non Texas Domiciliary.** 10
    i) **Will Probated in the Domiciliary State.** 10
    (1) **Muniment of title: Deed Records.** 10
    (2) **Muniment of title: Probate Records** 10
    ii) **Will Probated in a Non Domiciliary State.** 11
  d) **Wills Not Probated in Another Sate: Non Texas Domiciliary** 11
  e) **Copy of Will in Original Texas Probate Proceeding.** 11
  f) **Attested and Authenticated.** 11
11) **Contest of Foreign Wills** 11
  a) **Will probated in the Decedent's Domicile.** 11
    i) **Statutory Grounds.** 12

ii) **Denied Probate** ... 12
iii) **Other Grounds.** ... 12
(1) **Domicile.** ... 12
(2) **Existence of Assets.** ... 12
(3) **Statute of Limitations.** ... 13
(4) **Formalities, Fraud, Undue Influence & Capacity.** ... 13
b) **Will Probated in a non Domiciliary State.** ... 13
c) **Procedures of Contest** ... 13
i) **Time to Contest.** ... 13
ii) **Time to File.** ... 14
iii) **Notice of Contest.** ... 14
iv) **Rejection in the Domiciliary State.** ... 14
12) **Appointment of Ancillary Executor** ... 14
a) **Procedure.** ... 14
b) **Requirement of Asset: Jurisdictional.** ... 14
c) **Notice.** ... 15
d) **Foreign Corporate Fiduciary.** ... 15
13) **Wills: Construction** ... 15
a) **Law Stated in Will** ... 15
b) **Movables** ... 15
c) **Real Estate** ... 15
i) **Validity and Effect of Will on Land.** ... 15
ii) **Construction Related to Land** ... 15
14) **Foreign Executors** ... 17
a) **Generally.** ... 17
b) **No Force and Effect.** ... 17
c) **The Exceptions.** ... 17
i) **Deed of Trust.** ... 17
ii) **Transfer of Notes and Chooses in Action.** ... 17
iii) **Sell Real Estate.** ... 17
iv) **Collect a Debt.** ... 17
v) **Plaintiff: Wrongful Death and Survival Actions** ... 19
vi) **Action for Accounting.** ... 19
d) **Statute of Limitations.** ... 19
15) **Foreign Judgments.** ... 19
16) **Non Probate Assets (Contracts)** ... 20
a) **ERISA and preemption.** ... 20
b) **Law of Domicile or Choice of law Provisions.** ... 20
c) **Contracts** ... 21
i) **Choice of Forum Clauses** ... 21
ii) **Choice of Law Clauses.** ... 21
iii) **Adopted by Texas Supreme Court.** ... 22
d) **McKeehan.** ... 22
xi) **Respect for Choice of Law.** ... 24
xii) **Criticism of *McKeehan*.** ... 24
xiii) **New Legislation.** ... 24

CONFLICT OF LAWS

1) **Introduction**.

"'The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors, who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.' William L. Prosser in Interstate Publications, part of the Cook lectures at the University of Michigan." *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1961)

This paper addresses conflicts of law questions that arise in probate proceedings. Whenever the decedent was domiciled outside of the State of Texas, or his will was executed while he was domiciled outside of the State or Texas, or some of his property is outside of the State of Texas, or one or more of the beneficiaries are not residents of the State of Texas, a conflict question may arise. In intestacy the issue is which states' intestacy laws apply and who is entitled to serve as administrator.

2) **Not included**

This outline does not address trusts, guardianships or powers of attorney. Nor does it directly address full faith and credit, res judicata, comity or collateral estoppel. It is limited to conflicts between states of the United States and not conflicts involving other countries. All worthy related topics but beyond this outline.

3) **Restatement.**

Restatement, Second, Conflict of Laws addresses conflict of laws for persons, things and status. When there is a reference to "Restatement," "Restatement, Second," or "Restatement, 2nd" it means Restatement Second, Conflict of Laws.

To the extent there is not Texas law on a point, the Restatement is a very helpful guide. And one that has been adopted by Texas courts in many contexts.

a) **Section 1. Reason for the Rules of Conflict of Laws.**

"The world is composed of territorial states having separate and differing system of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one sate, making necessary a special body of rules and methods for their ordering and resolution."

b) **Section 2. Subject Matter of Conflict of Laws**

"Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."

i) Comment a says that conflicts include three aspects

(1) Judicial jurisdiction and competence. The extent to which courts exercise jurisdiction over persons who are not physically present or events that occurred elsewhere

(2) Foreign Judgments. The effect each state will give to the judgments of another state.

(3) Choice of law. Whether a state applies its local laws or the laws of another state.

ii) Comment b acknowledges that there are certain constitutional overlays. It identifies

(1) Full faith and credit;
(2) Due process;
(3) Privileges and immunities;
(4) Equal protection; and,
(5) Supremacy clause.

c) **Section 6. Choice of Law Principles**.

i) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

ii) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(1) The needs of the interstate and international systems,

(2) The relevant policies of the forum,

(3) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(4) The protection of justified expectations,

(5) The basic policies underlying the particular field of law,

(6) Certainty, predictability and uniformity of result, and

(7) Ease in the determination and application of the law to be applied.

4) Limiter: Constitutional

As outlined above, there are certain constitutional rules that limit the states conflict rules.

5) **Limiter: Texas Public Policy**.

a) In addition to the constitutional restrictions, Texas courts will not enforce the laws of other states if they are contrary to the public policy of the State of Texas.

i) This has been most recently addressed by the Texas Supreme Court in *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990); *Larchmont Farms, Inc. v. Parra*, 941 S.W.2d 93 (Tex. 1997) and *Lawrence v CDB Services, Inc.*, 44 S.W.3d 544 (Tex. 2001).

ii) In an action by an executor of the wife's estate against the husband's estate seeking damages for wrongful death of the wife due to the husband's negligence in piloting an aircraft, New Mexico law rather than Texas law applied notwithstanding that Texas law provided for interspousal immunity and New Mexico law did not, the court stating that the rule which permits spouses to recover from each other for negligently inflicted injuries does not violate good morals or natural justice. *Robertson v. Estate of McKnight*, 609 S.W.2d 534 (Tex. 1980).

iii) In *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. denied) the court did not apply any public policy limiter. This is discussed in more detail below.

6) **Domicile**

a) **Defined**.

In *Holt v. Drake*, 505 S.W.2d 650 (Tex. Civ. App.—Eastland 1974,

no writ), the following definition of domicile was approved.

> 'Domicile' is the legal conception of home, and the relation created by law between an individual and a particular locality or country. 'Domicile' is a place where a person has his true, fixed and permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning.
>
> "While 'Domicile' and 'Residence' are synonymous, they do not have the same legal meaning. 'Domicile' is a larger term, of more extensive signification, while 'Residence' is of a more temporary character. One may have a residence in one place while being domiciled in another, and may have more than one residence at the same time, but only one domicile. Residence simply requires bodily presence, as an inhabitant in a given place; while domicile requires, in addition, the intention to make it one's domicile.'"

b) **Determining Domicile**.

Domicile generally arises in will contests but also with issues of status (marriage and adoption for example) and when applying the law of the domicile to personal property.

i) The Uniform Probate Code (1969, last amended 2010) Section 3-202 says,

"If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state."

The Comment goes on to say.

"This section adds very little to existing law. If a previous estate proceeding in State A has determined the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of *res judicata* or collateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably it would not matter in this setting that domicile was a jurisdictional fact. Stoll v. Gottlieb, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed 04 (1938). Even if the parties to a present proceeding were not personally before the court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to the property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. Riley v. New York Trust Co., 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885 (12942); Mullane v. Central Hanover Bank and Trust Co., 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 (1950)."

Several observations about this uniform code section and its comments.

(1) First, it says first filed governs, not first judgment.

(2) Second, it says in the comment that it probably does not matter that domicile is a jurisdictional fact.

(3) Third, it says a judgment regarding property subject to the power of that court would be binding on persons with "due notice" even though not parties.

ii) In Texas

(1) It is not clear that first filed, versus first judgment, is the controlling rule.

(2) In *Mayhew v. Caprito*, 794 S.W.2d 1 (Tex. 1990), the Texas Supreme Court held that the Louisiana judgment that the domicile of the decedent was Louisiana controlled.

Mr. Caprito lived in Ft. Worth for 20 years. In 1977 he was placed under a guardianship in Texas and in 1981 he was moved to a nursing home in Louisiana. He died in 1982. He had a Texas will from 1977 and a Louisiana will written in 1982. The Texas will left his estate to his niece and nephew and the Louisiana will left his estate to his children. Over objection of the Texas will proponents (niece and nephew), the 1982 will was probated in Louisiana and the decedent's domicile was determined to be Louisiana. The ruling was affirmed by the Louisiana appellate court.

The Texas will was offered for probate in Texas. Exactly when is not clear in the opinion. The children said the matter had been fully litigated in Louisiana.

The Texas Supreme Court, citing *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed 2d 186 (1963), says that "'a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.' *Id.* at 375 U.S. at 111, 84 S.Ct. at 245.

It goes on to quote the U.S. Supreme Court "'…a collateral attack upon the decision as to jurisdiction…merely retries the issue previously determined. There is no reason to expect that a second decision will be more satisfactory than the first.'"

(3) Subsequently the Dallas Court of Appeals went even further in *Maxfield v. Terry*, 885 S.W.2d 216 (Tex. App.—Dallas 1994, writ denied). Terry offered the decedent's will for probate in Florida stating that the decedent's domicile and residence was Pinellas County, Florida. The decedent again was a life long resident of the State of Texas until she was moved to a Florida nursing home in August 1991. Two weeks before she died she wrote the will at issue.

Maxfield contested the Florida proceeding to probate the will. Terry filed the will for probate in Texas. Maxfield notifies the court that he is contesting the will in Florida and asks that the Texas court stay its proceedings. The Texas court agreed to stay its proceedings pending the outcome of the Florida proceeding.

Maxfield prepared to try the case in Florida but the day before the matter was set for trial he non suited and the

Florida court admitted to the will to probate. Four days later Maxfield asked the Texas court to declare that Texas was the decedent's domicile. Terry moved for summary judgment on res judicata, estoppel by judgment and full faith and credit. The trial court agreed and granted the summary judgment.

The Dallas Court of Appeals affirmed, holding that Maxfield had an opportunity to fully and fairly litigate the questions including domicile and his non suit does not protect him from the binding effect of the Florida judgment. The court also brushed aside Maxfield's argument that domicile could be re litigated under *Barney v. Huff*, 326 S.W.2d 617, 621 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.). The court says that case was before *Durfee, supra*, and *Mayhew, supra*.

7) Jurisdiction.

In *Smith v. Lanier*, 998 S.W.2d 324 (Tex. App. —Austin 1999, pet. denied), husband and wife lived in Texas during their entire marriage. The wife died, husband and the assets in his name were moved to South Carolina by his daughter (not wife's child). She used the Texas power of attorney that her father gave her to transfer the assets. Husband died 52 days after his wife (and 19 days after being put into a nursing home). Wife's will said that Texas law would apply.

Before husband died wife's executor filed an application to probate wife's will in Texas. Daughter submitted husband's will for probate in South Carolina. Wife's executor also filed an action to declare the community nature of the assets and had daughter served both personally and as executor of dad's estate.

There were four issues before the court.

a) ***In rem* Jurisdiction of the Texas Court**.

i) In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) the United States Supreme Court held that the minimum contacts analysis set out in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) applies to *in rem* proceedings.

ii) For an in rem proceeding all that was needed were such minimum contacts that "traditional notions of fair play and substantial justice" are not offended.

iii) In *Shaffer* the Court held that Delaware did not have sufficient contacts.

iv) The *Smith* court while adopting *Shaffer* quickly distinguished *Shaffer* because in Shaffer the *res*, the property itself, was not the source of the dispute.

(1) Shaffer was a shareholder derivative suit where the shareholder was trying to get jurisdiction in Delaware over out of state corporate officers by seeking to sequester of the Delaware stock. Delaware had a statute that said all stock in Delaware corporations are deemed in Delaware without regard to their physical location.

(2) Here the issue is the community nature of the assets.

v) *Shaffer* recognized that a state court maintains in rem jurisdiction over property located within the state that gives rise to the cause of action.

vi) In *Smith* the issue is the community nature of the assets that were in Texas at the time of the wife's death.

(1) Daughter says no, she had removed the assets in her father's name; and that they were his separate property.

(2) The court says, it is the province of the jury to decide if the assets were separate or community and it is definitely not to be decided by the person who benefits from the characterization.

(3) Until the character is determined the "property must remain encumbered with the Texas probate court's authority to determine its character."

vii) *Shaffer* says that jurisdiction depends "upon the quality and nature of the activity in relation to the fair and orderly administration…"

viii) "The core issue of an inquiry into jurisdiction is the relationship among the property, the forum and the litigation."

ix) The daughter next argues that when the property was removed to South Carolina that the Texas courts lost jurisdiction and cited two forfeiture cases in support. The Court said that does not apply if the property was removed "accidentally, fraudulently or improperly…"

> "…the Texas court did not lose its *in rem* jurisdiction because Smith (daughter) unilaterally transferred the property to another state; Texas jurisdiction is not so easily defeated."

b) Personal Jurisdiction over Executor.

The court took only a paragraph to hold that once they had in rem jurisdiction that it had personal jurisdiction over the husband's executor.

c) **Personal Jurisdiction over Daughter Individually**.

i) First daughter invokes the long arm statute (Tex.C.P.R.C. Section 17.041 *et seq*.)

(1) She says that to get jurisdiction over her that

(a) The long arm statute must apply, and

(b) It cannot violate state and federal guarantees of due process.

(2) In particular that the long arm statute required her to do business in Texas.

ii) The court looked to daughter's purposeful conduct and cited the involvement with the will preparation, her accepting and acting under a Texas power of attorney and her removing assets from the state.

iii) The court also observed that after wife's death, husband was a trustee of the community property and she as dad's agent was subject to those fiduciary duties.

iv) The court says, "The statute expressly identifies several acts that constitute 'doing business' and states that the list is not exhaustive. The 'broad language' of the long-arm statute permits an expansive reach, limited only by federal constitutional requirements of due process."

v) The court said that declaring that the Texas courts had personal jurisdiction over her did not offend notions of fair play and substantial justice.

d) **Subject Matter Jurisdiction**.

i) Finally daughter makes several arguments that the court did not have subject matter jurisdiction.

ii) She says that the assets are now physically within the *in rem* jurisdiction of the South Carolina courts. The court's answer as stated above was that the assets, as of wife's death and the filing of her application for probate, were subject to the jurisdiction of the Texas probate court.

iii) That since the Texas probate was filed first that it had dominant jurisdiction.

iv) That it was not an abuse of the rule of comity for the court not to defer to the South Carolina court.

8) Jurisdiction: General and Specific

In *In re Estate of Davis*, 216 S.W.3d 537 (Tex.App.—Texarkana 2007, pet. denied) the court also addressed personal jurisdiction over an executor individually including a discussion of general and specific jurisdiction.

(1) For a Texas court to exercise personal jurisdiction over a nonresident two conditions must be met:

(a) The long arm statute must authorize it, and

(b) It must be consistent with due process guarantees of federal and state constitutions.

(2) The *Davis* court goes on to discuss the two types of personal jurisdiction.

(a) General. General personal jurisdiction exists when the defendant's contacts with the State "are continuous and systematic." If the Texas courts have general jurisdiction, "'…the courts have jurisdiction even if the cause of action did not arise from or related to the activities conducted within the forum state.'" The defendant is treated as a resident of the State.

(b) Specific. Specific personal jurisdiction arises from or is related to specific conduct within the state. To have specific jurisdiction

(i) The defendant's contacts within the forum must be purposeful, and,

(ii) The cause of action must arise from or related to those contacts.

(iii) Examples cited by the court are

--Invoking the authority of Texas to act as executor,

--Making trips to Texas to carry out those duties,

--Naming a resident for purposes of service of process, and,

--Filing a lawsuit in the State of Texas

9) **Intestacy.**

Generally it is held that the intestacy laws of the domicile controls the disposition of personal property. But it may require looking at the laws of the location of a marriage or an adoption. The primary issues in intestacy are status. Was the decedent married? What children did he have? Were there any adopted descendants? Formal adoption or adoption by estoppel? Was the decedent adopted? Did the decedent have any children that were adopted by someone else?

a) **Immovables (Land)**

i) **Law of Situs**.

(1) The real estate of an intestate decedent is invariably controlled by laws of the situs of the land. See, Restatement §236.

(2) However, the courts may look to the law of the domicile for the answers to particular questions. For example:

ii) **Marriage**.

The court of the situs of the land may look to the laws of the state where the marriage was contracted to determine if there was a valid marriage. Restatement § 283.

iii) **Adoption**.

(i) The courts of the situs would use their own local laws to determine if adopted children inherit.

(ii) In *Northwestern Nat'l Casualty Co. v. Doucette*, 817 S.W.2d 396 (Tex. App. —Forth Worth 1991, writ denied) a man had a son who was adopted in Arizona by his step father. When the man died, his wife and other child contended that the Arizona adoption eliminated the son as an heir of the father. Arizona law says that an adoption "completely severed" all rights including to inherit. Texas law is different and the Texas court held that the son inherits from the father. The court said this is not a full faith and credit case nor a comity case. It is a conflict of laws case.

(iii) In addition, according to Restatement § 289, courts should determine the validity of the adoption according to the law of the state where the adoption occurred.

b) **Movables (Personalty)**.

i) **Law of the Domicile**.

(1) Generally the devolution of personal property is governed by the law of the domicile. Restatement § 260.

ii) **Marriage and Adoption**.

As with real estate, the courts tend to look to the law of the marriage or the adoption to determine whether or not there was a valid marriage or a valid adoption. But then they tend to apply their own local law to determine the impact of a marriage or an adoption.

iii) **Contracts**.

As compared to real estate, personal property may be controlled by a contract that impacts how property passes. For example, corporations and limited partnerships may have buy sell agreements controlled not by the domicile but by the state where the entity was created. Or those contracts may have specific provisions as to which states' laws control.

c) **Real or Personal**.

Likewise, the law of domicile will determine whether a particular interest is real property or personal property, such as a leasehold or a mortgage interest. Restatement § 236, Comment a.

d) **Foreign Heirship Determination.**

In *Hungate v. Hungate*, 531 S.W.2d 650, 653 (Tex. Civ. App.—El Paso 1975, no writ) a Nebraska court held in an heirship proceeding that a

minor was not an heir. In a Texas proceeding the minor contended that he was not represented by an ad litem and the judgment was not enforceable. The El Paso Court said that the judgment was presumed to be valid and binding.

10) **Wills: Probate**

a) **General: Texas Will for A Texan**.

Most probated wills are for residents of the State of Texas for wills which were executed in Texas. While Texas wills for Texas residents has its own host of issues, they are not addressed here.

b) **Foreign Wills for Texas Residents**.

Another common category are wills signed by a person domiciled in another state who subsequently moves to Texas, does not change his will and then dies domiciled in Texas.

i) **Complies with Texas Law of Wills**.

If that foreign will meets the Texas requirements for a will, Tex. Prob. C. Sec 58 and 59, it is treated like a will executed in Texas by a person who was a domiciliary at the time.

(1) The most common problems with these wills are the lack of a satisfactory self-proving affidavit, language insufficient to appoint an independent executor and the lack of waiver of bond.

(2) In 2011 the legislature substantially relaxed the requirements for a satisfactory self proving affidavit with amendments to Section 84(a).

ii) **Not Comply with Texas Law**.

If this foreign will for a Texas domiciliary does not comply with Texas will requirements, it apparently cannot be probated in Texas.

(1) Many states have a "savings" statute that says a will can be admitted to probate if it complies with that state's laws or complies with the laws of the decedent's domicile at the time of execution. See the Uniform Probate Code Section 2.506.

(2) Texas has no such statute.

(3) No Texas authority was found addressing this issue. It is believed that the lack of reported cases stems from our liberal will requirements.

(4) It is worth noting that in 2011 the Texas Legislature amended Section 84 to broaden the scope of acceptable self-proving affidavits.

(a) First it says, Section 84(a)(1), that even if a self-proving affidavit did not comply with Section 59 it would still be treated as self-proved if it complied with the testator's domicile at the time of execution.

(b) Then in Section 84(a)(2) it sets out that a will is considered self-proved (under Subsection 1 *supra*) if the will or an affidavit makes certain provisions. This section deserves careful study. First, it may be providing an alternative method of self proving a will. Second, notice that this subsection applies if the necessary language is in the will or the affidavit. Suggesting that even if there is no affidavit or if the affidavit is defective that it will still be treated as self proved. That is a fair read of the amendment but it certainly gives foreign wills a leg up on Texas wills.

(c) It may be that if there is a foreign will that does not comply with Texas requirements for a will but complies with these 2011 amendments that it can be probated in Texas. The statute says, as it always has, that if self proved "…no further proof of its execution …to make it a valid will shall be necessary." (Section 84(a)(1).

c) **Foreign Wills for Non Texas Domiciliary**.

i) **Will Probated in the Domiciliary State**.

When a will has already been probated in the state in which the decedent was domiciled at his death, there are simple procedures for probating the will.

(1) **Muniment of title: Deed Records**.

(a) If the will has been probated in the decedent's domiciliary state, Tex. Prob. C. Sec 96 allows probate as a muniment of title, if the will "in any manner" disposes of land by filing in the deed records.

(b) The will and order admitting it to probate which "bears the attestation, seal and certificate required by the preceding Section" may be filed in the deed records.

(c) Section 96 says the attestation, seal and certificate shall be as set out in the preceding section, Section 95. See the discussion below for the requirements for proper filing.

(d) Once they are filed it shall be "…valid and effectual as a deed of conveyance…" Section 98.

(e) With one exception, mere filing in the deed records does not allow the foreign executor to act in Texas. If the will gives an executor the authority to sell, Section 107 says that the foreign executor may convey the property without becoming a Texas executor.

(f) If there is no land in Texas, then this procedure is not available.

(2) **Muniment of title: Probate Records**

(a) An application may be filed with the probate clerk and need only state that the will was probated in the decedent's domiciliary state and probate is requested based on an "authenticated copy of the "foreign proceeding" Section 95(b)(1).

(b) No citation or notice is necessary Section 95(b)(1).

(c) Section 95(c) sets out the filing requirements.

(d) It is the clerk's ministerial duty to record the will and order in the minutes of the court. Section 95(d)(1).

(e) No order of the Texas court is necessary. Section 95(d)(1)

(f) Once filed it is effective to "dispose" of real and personal property in Texas. Section 95(e)

(g) A strict reading of Section 107 suggests that filing in the probate records does not give the foreign executor any authority to sell as is allowed if the will and order were recorded in the deed records.

ii) **Will Probated in a Non Domiciliary State**.

(1) If a will has been probated in a state that was not the domicile of the decedent, Section 95(b)(2) applies and there are additional requirements.

(a) The application to the probate court shall include all of the information required under Section 95(b)(1) for a will probated in a domiciliary state.

(b) But in addition,

(i) The application shall set out the name and address for each devisee under the will and each heir who would take in the absence of a will.

(ii) Citation shall be issued to each such devisee and heir.

(2) The will can be contested the same as the will of a Texas domiciliary. Section 95(d)(2).

(3) If no contest is filed the clerk shall record the will and order and no order of the Texas court is necessary. Section 95(d)(2).

d) **Wills Not Probated in Another Sate: Non Texas Domiciliary**

i) If the will of a non Texas domiciliary has never been probated anywhere it can be probated under Section 103.

ii) In the same fashion as the probate of other wills.

iii) Except if the will has been rejected in the state of the decedent's domicile.

iv) But even then it can be probated in Texas if it can be shown that it was denied probate for a reason that is not a grounds for rejection to probate in Texas, a holographic will is a good example. Section 103.

v) If the probate is pending in the domicile state, then the Texas court may delay in passing on the application. The statute does not mention a pending probate in a non domiciliary state.

e) **Copy of Will in Original Texas Probate Proceeding**.

i) Section 104 allows a Texas court, in an original probate proceeding for a decedent domiciled outside of the State of Texas, to use an authenticated copy of the will.

ii) Presumably this is if the original will has been filed in another state but no order admitting it to probate has been entered.

f) **Attested and Authenticated**.

i) Attested or authenticated documents are different from certified documents.

ii) Authenticated means documents that are attested by the clerk and certified by the judge.

iii) Section 95(c) calls for a will and order that are

(1) "attested by and with the original signature of the clerk,"

(2) with the seal of the court affixed," and,

(3) a certificate with "the original signature of the judge…that the attestation is in due form."

iv) Section 95 goes on to say, "Original signatures shall not be required when filing in the deed records under Sections 96, 99 and 107.

v) Section 96 says has the same requirements for an authenticated copy of the will and order.

11) **Contest of Foreign Wills**

a) **Will probated in the Decedent's Domicile**.

i) **Statutory Grounds**. According to Section 100 a will probated in the decedent's domicile may only be contested in Texas:

(1) If the foreign proceedings were not authenticated in the manner required under the Texas Probate Code;

(2) If the will has been finally rejected in Texas in another proceeding; or,

(3) If the will has been set aside in the domiciliary jurisdiction.

ii) Denied Probate Section 102 says that if a will was denied probate in the domiciliary jurisdiction for a reason that would not bar the probate in Texas, the will may still be admitted to probate in Texas. For example a state in which holographic wills are not recognized.

iii) **Other Grounds**.

(1) **Domicile**.

(a) Section 100 does not mention domicile as a grounds for a contest, but it but implicit in the section that the Texas contestant can raise the issue of domicile.

(b) Unless, that issue has been fairly resolved ion the domiciliary state.

(c) As mentioned above, in *Mayhew v. Caprito*, 794 S.W.2d 1 (Tex. 1990), the Texas Supreme Court gave full faith and credit to the Louisiana Supreme Court's determination that a decedent was a domiciliary of Louisiana. The Louisiana courts including the Louisiana Supreme Court determined that the decedent was domiciled in Louisiana. Those same contestants filed suit in Texas contending that the decedent was domiciled in Texas. The Texas Supreme Court said the Louisiana judgment was entitled to full faith and credit.

(d) In addition we have *Maxfield v. Terry, supra,* that says notice is sufficient.

(e) This is also the position of the Uniform Probate Code, see Section 3-202. The comment says that this section "…adds very little to existing law." This position is based on full faith and credit and res judicata. It even says "Probably, it would not matter in this setting that domicile was a jurisdictional fact." The comment says that the finding of domicile would even be binding, as to the property subject to the power of that court, on persons who were given due notice of the proceeding. It cites *Riley v. New York Trust Co.*, 315 U.S. 343 (1942) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

(f) If the foreign judgment probating the will does not make a finding as to domicile, the issue probably is ripe for litigation in the Texas court.

(2) **Existence of Assets**.

(a) Texas law is clear that assets within the state are necessary to confer jurisdiction on the probate courts. See Woodward and Smith, *Probate and Decedents' Estates*, 17 *Texas Practice Series* Section 411 (hereinafter *Woodward and Smith*).

(b) *Woodward and Smith* say the asset could be a claim that has to be asserted in Texas.

(c) Stock in a corporation domiciled in Texas gives Texas jurisdiction, *Albuquerque Nat'l*

Bank v Citizen Nat'l Bank of Abilene, 212 F.2d 943 (5th Cir. 1954). The decedent was domiciled in New Mexico and the stock certificates were in New Mexico. The decedent named as New Mexico bank as executor and named as Texas bank ancillary executor for any Texas assets. There was a dispute between the two banks about who had the right to administer the stock. The court held in favor of Texas bank because the stock was in a corporation domiciled in Texas. It also noted that the corporation held Texas oil producing properties.

(d) Also see *Ayala v. Brittingham*, 131 S.W.3d 3 (Tex. App.—San Antonio 2003), reversed on other grounds, *De Ayala v. Mackie*, 193 S.W.3d 575 (Tex. 2006).

(3) **Statute of Limitations**.

Again, not mentioned in Section 100 but there is clear authority that a will probated in the domiciliary state may not be admitted to probate in Texas if it was not filed within the prescribed time.

(a) In *Nelson v. Bridge*, 98 Tex. 523, 86 S.W. 7 (1905) the Texas Supreme Court held that the four year statute for offering a will for probate applied to a foreign will.

(b) While deciding that the foreign executor provided good cause for not filing within four years, the court in *Hodge v. Taylor*, 87 S.W.2d 533 (Tex. Civ. App.—Fort Worth 1935, writ dism'd) confirmed that the four year statute applied to foreign wills.

(c) The argument is even more forceful when the Texas resident was not given notice of the foreign probate and especially if the time for contesting the will in the domiciliary jurisdiction has expired.

(d) For cases in other jurisdictions, see 87 A.L.R. 2nd 721.

(4) **Formalities, Fraud, Undue Influence & Capacity.**

Woodward and Smith Section 417 says there is "no good reason why questions about formalities of execution, fraud, undue influence, and testamentary capacity should be re-litigated in this state." (pp page 280).

b) **Will Probated in a non Domiciliary State**.

i) Section 100(b) states that a will probated in a non domiciliary state can be contested in Texas on all grounds that a Texas will could be contested.

ii) Upon proof that the will was not probated in a domiciliary state, and the notice required for the probate of a non domiciliary state was not given, then it can be set aside.

iii) If notice was given this statutes suggests that the second chance available under Section 93 for Texas wills would not be available. See *In re Estate of Blevins*, 202 S.W.3d 326 (Tex. App.—Tyler 2006, no pet.).

iv) The better reading should be that any contest does not immediately set the will aside, but it is like any contest under Section 93 where the will and administrator continue in effect until the will is set aside.

c) **Procedures of Contest**

i) **Time to Contest**.

Section 100(c) says that a will filed in the probate records or recorded in the deed records may be contested within the same time limits as wills admitted to probate in original Texas

probates. Section 93 (subject to exceptions for fraud, forgery and incapacity) says the contest must be brought within two years of the order admitting it to probate. There is no case to tell us if Section 100(c) means within two years of filing in Texas or within two years of the order in the foreign jurisdiction.

ii) **Time to File**.

Section 100(c) is silent on the time for filing a foreign will in Texas, but see the cases cited *supra*.

iii) **Notice of Contest**.

(1) Within the time for contest of a foreign will in Texas a verified notice may be filed (in the probate or deed records) showing that there is a contest of the will in the foreign jurisdiction. Section 101.

(2) Such a filing negates the "force and effect" of the will until it has been proved

(a) That the foreign contest was resolved in favor of probating the will; or,

(b) That there were not any such proceedings pending.

iv) **Rejection in the Domiciliary State**.

If the will is denied probate in the domiciliary state, it will not be admissible to probate in Texas except as provided in Section 102. Section 102 says the ruling of the domiciliary state is binding unless the will has been denied probate solely for a reason that would not prevent probate under Texas laws for a Texas domiciliary (for example a hand written will in a state that does not recognize holographic wills). In such a case the will may still be admitted to probate in Texas.

12) **Appointment of Ancillary Executor**.

All of the above just addresses the Texas recognition of the foreign will as a muniment of title. There are separate procedures for the appointment of a Texas ancillary executor.

a) **Procedure**.

i) Section 105 sets out the procedure for appointment of a Texas ancillary executor

(1) The will has been admitted to probate by filing in the probate records pursuant to Section 95.

(2) The authenticated will and order have to be filed in the probate records as set out above, filing in the deed records under Section 96 is not sufficient,

(3) There has to be an application to appoint an ancillary executor,

(4) There must be proof that he was duly appointed executor in the other state, and

(5) That he is qualified and not disqualified to serve as executor in Texas.

ii) If letters of administration have already been issued by the Texas courts to someone else, those letters are to be revoked upon personal service on that previously appointed Texas administrator.

b) **Requirement of Asset: Jurisdictional**.

The existence of assets subject to the laws of the State of Texas are a

jurisdictional requirement for probating a foreign will in Texas, *supra*.

c) **Notice**.

There is nothing in the statute regarding notice or citation being issued before the appointment. However, it is reasonable to assume that the clerks and courts will require at least a posting as with other Texas administrators

d) **Foreign Corporate Fiduciary**.

A foreign corporate fiduciary may serve as executor to the same extent its home state allows a Texas corporate fiduciary to serve as a fiduciary. Section 105A(a)

i) Before qualifying it must under Section 105A(b) file with the Texas Secretary of State

(1) its charter and amendments,

(2) an appointment of the Texas Secretary of State as its agent for all process and notices,

(3) a designation of to whom the Secretary of State should forward all such citations and notices.

ii) A foreign executor is not required to file bond if the will waives it. All rules regarding bonding of domestic personal representatives shall apply. Section 106.

13) **Wills: Construction**

a) **Law Stated in Will**.

The Restatement § 240 and 264 say that a bequest shall be construed in accordance with the laws of the state designated in the will. Comment e to Section 264 says "It is not necessary that this state have a substantial relationship to the testator or his estate."

b) Movables

i) **Law of the State Designated Controls**.

According to Restatement § 264 bequests of movables are controlled by the law of the state designated in the will.

ii) **Law of the Domicile**.

If there is no designation in the will, the rules of construction of the state of the domicile of the testator at the time of death controls. Restatement § 264(2).

c) **Real Estate**

i) Validity and Effect of Will on Land.

(1) Restatement § 239 says whether or not a will transfers an interest in land and the nature of the interest is determined by the law applied by the courts of the situs of the land.

(2) And that courts tend to apply their own laws.

(3) Examples of these issues are violation of the rule against perpetuities, a prohibition on a gift of land to a charity or the effectiveness of a gift on after acquired real estate.

ii) Construction Related to Land

(1) Restatement § 240 says that the law of the state designated in the will governs construction.

(2) Then goes on to say, if the will is silent, the will is construed by the rules applied by the courts of the situs.

(a) Typically the courts of the situs will apply their own laws.

(b) However, it may be the courts of the domicile that are deciding what law the situs courts would apply.

(c) Whether the court of the domicile or the court of the situs, they could reach two different conclusions.

(i) That the laws of the situs should be used because those are the rules that are familiar to the lawyers, judges and title examiners (see Comment f.)

(ii) But the court might conclude that the law of the domicile at the time the will was written best tells us what the testator intended.

(iii) Comment f. also says that the law of the domicile at death would not be relevant if the decedent had changed domiciles since writing the will.

(d) *Woodward and Smith*, Section 419 set out and discusses the few Texas cases on Texas law controlling dispositions of Texas real estate.

(3) Two cases from other jurisdictions illustrate the issues.

(a) *In re Estate of Hannan*, 523 N.W.2d 672 (Neb. 1994) the testator was domiciled in Virginia but ancillary litigation arose In Nebraska regarding Nebraska land. The will left decedent's property to his "issue." His son, who predeceased the testator, was survived by an adopted child. Under Nebraska law construction of the will would leave the property to the child. But Virginia law excludes adopteds from the meaning of "issue." The Nebraska court applied the law of the domicile on the theory that issue conveyed her intent to exclude adopted grandchildren.

(b) In *Mazza v. Mazza*, 475 F.2d 385 (D.C. Cir. 1973), the court dealt with the allocation of estate taxes of real estate in the District of Columbia that passed by joint tenancy to the decedent's sister. Under DC law all taxes are payable out of the residuary. Under Maryland law, the domicile of the decedent, the taxes are apportioned. The court pointed out that they were dealing not just with real estate but also allocation of taxes and administration of the estate. While stating that the question did not fit neatly into conflict terms, the court applied Maryland law to require apportionment on the theory that that was decedent's intent.

(4) On the effect of a foreign probate order on Texas real estate consider.

(a) The holding in *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1961). An Oklahoma court granted a divorce to a husband and wife, both of whom resided in Oklahoma. That decree in dividing the property of the spouses ordered husband to convey to wife Texas real estate. Wife sought to enforce that decree in Texas. The Texas Supreme Court said as a matter of comity that the Oklahoma court had in personam jurisdiction and the obligation was enforceable against husband.

(b) And the 1971 case of *Welch v. Trustees of the Robert A. Welch Found.*, 465 S.W.2d 195 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.). Here the Decedent a resident of South Carolina had her will probated and construed in South Carolina. That construction held that the clause in her will attempting to make a charitable gift was invalid and that her estate passed by intestacy. The Texas court held that Texas law controlled not a South Carolina statute and not the South Carolina order.

On rehearing the court went on to say

"We affirm our conclusion that the law of this state controls and governs the transmission by will of real estate located therein and the construction and effect of all instruments intended to convey such real estate." (200)

14) Foreign Executors

a) **Generally**.

Generally, a foreign executor has no authority to act on behalf of the estate in Texas. This includes Texas real estate, lawsuits in Texas and any personal property in Texas over which a Texas executor is needed. Filing the will and order probating does not give the foreign executor any general authority. The exceptions are set out below.

b) **No Force and Effect**.

Any action taken by or against a foreign executor is of no force and effect. See *Woodward and Smith*, Sections 435 and 436. The court in *McAdams v. Capitol Products Corp*., 810 S.W.2d 290, 293 (Tex. App.—Ft. Worth 1991, writ denied) said, "An administrator, appointed by the courts of another state, may not be sued in the courts of Texas nor act as the legal representative of the estate in Texas."

c) **The Exceptions**.

Without appointment as a Texas ancillary executor, a foreign executor without qualifying in Texas can take some actions.

i) **Deed of Trust**.

A foreign executor may authorize a trustee under a deed of trust to foreclose on Texas real estate. *American Nat'l Ins. Co. v. Savage*, 112 S.W.2d 240 (Tex. Civ. App. —San Antonio 1937, writ dism'd).

ii) **Transfer of Notes and Chooses in Action.**

(1) See *Woodward and Smith*, Section 434 for a discussion of the right of a foreign executor to transfer a note or choose in action to a third party to permit pursuit of a claim without becoming a Texas executor. This includes a discussion of the situs of non negotiable notes for purpose of enforcement is the situs of the debtor but the rights to ownership and transfer are the situs of the executor/owner.

(2) This discussion came before the passage of Section 107A. It may be superseded by that section, which is discussed below.

iii) **Sell Real Estate**.

Under Section 107, once a foreign will and the order of its admittance has been filed in the probate or deed records in this state, the foreign executor, without qualifying, may sell Texas real estate if so authorized by the will. No order of a court it necessary. Also see *Adams v. Duncan,* 147 Tex. 332, 215 S.W.2d. 599 (1948).

iv) **Collect a Debt**.

A foreign executor or administrator without qualifying may bring an action to collect a debt under Section 107A. This section does not specifically authorize him to defend a debt or take any other type of court action, but because this gives Texas

creditors the right to make claims, implicitly this must be the case.

(1) It is important to note that this may be the only provision of Sections 95 through 107A that applies to foreign administrators of an intestate estate. Every other section refers to executors and wills." In Section 107A it refers to "foreign executor or administrator (subsections (a) (c) and (d)) and to "letters testamentary or letters of administration…" (subsection (b))

(2) The statute also says he subjects himself "personally" to the jurisdiction of the court for claims equal to the money or the value of any personal property he may recover.

(3) This procedure is available only if

(a) The decedent was a non resident.

(b) The foreign executor has sent certified mail notice to all creditors in Texas who have filed a claim against the estate.

(c) The foreign executor files his properly authenticated foreign letters with the suit.

(d) And, there is no administrator appointed in the State of Texas, nor any pending application to appoint an ancillary administrator in this state.

(4) Again note that this does not explicitly authorize the foreign executor to act as a defendant.

(5) However, once the foreign executor files suit, he has submitted "personally" to the jurisdiction of this state for a lawsuit brought to recover debts owed by the decedent to Texas residents. The statute does not limit such a suit to a counter claim in this same action. Since the right is open to any Texas creditor ("who has filed a claim"), it reasonably allows a creditor to bring a separate action.

(6) And, implicitly the foreign executor would have the right, and duty, to defend that action.

(7) "Personally" is in parenthesis because it does not appear that the statute means the foreign executor individually but rather the as the personal representative of the foreign estate.

(8) This jurisdiction is only to the extent of the money or "the value of personal property" recovered in this state. If the claim is for more than the amount of the Texas property, it is assumed that the creditor will have to pursue a separate action in the foreign state. And there may be faced with arguments that he made an election of remedies.

(9) This section does give any authority to non Texas creditors to pursue claims. They would be forced to follow the procedures for an ancillary proceeding.

(10) This section does not cover an action regarding any real property that the decedent might own in Texas.

(11) Nor is the statute clear if the money and property limitation is that recovered in a suit or from any Texas source. For example if there was a Texas bank account or stock in a Texas corporation, could the creditor collect from those sources?

(12) This does not cover debts incurred by the foreign administrator.

(13) This section refers to Texas creditors who have filed claims

against the estate. Since there is no Texas administration, this must mean Texas creditors who have filed claims in the foreign probate proceeding. ‘

v) **Plaintiff: Wrongful Death and Survival Actions**.

A foreign executor may act as plaintiff for a dead non resident in a wrongful death or a survival action, Sections 71.012 and 71.022, Texas C.P.R.C.

(1) The foreign executor need only comply with Section 95 and not with Section 105.

(2) This is only as plaintiff and not as a defendant or a third party.

vi) **Action for Accounting**.

According to *Chamberlain v. Witts*, 696 S.W.2d 204 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) a foreign executor of a will that has been probated as a muniment of title may bring a suit for an accounting. Mother died survived by two daughters; her will was probated as a muniment of title. It left her home to her daughter Jean and assets of a similar value to her daughter Amy Lee. Amy Lee died domiciled in Michigan. Her husband probated her will and was appointed administrator in Michigan. He then filed Amy Lee's will and order in Texas under Section 95 and brought an action for an accounting from Jean. The court, without citing any authority said that he was entitled to bring that action. The focus of the case was whether or not this demand for accounting and a similar one brought in the mother's estate were incident to an estate.

d) **Statute of Limitations**.

i) Texas C.P.R.C. Section 16.062 tolls the statutes of limitation when there is a death for one year or until an administrator is appointed.

ii) According to the court in *Pirkle v. Cassity*, 104 F.Supp. 318 (E.D. Tex. 1952), the appointment of a foreign executor in another state does not cause the statutes of limitations to begin to run. The court reasoned that a foreign executor cannot sue or be sued in Texas, thus the tolling would continue until a year after the decedent's death or a Texas ancillary administrator is appointed. The result might be different if the foreign executor was authorized to act without appointment by a Texas court under one of the exceptions set out above.

15) **Foreign Judgments**.

A foreign judgment can be filed as a new action or pursuant to the Uniform Act discussed below.

a) Uniform Statute. Under Section 35.001*et seq* of the Tex. C.P.R.C. a foreign judgment can be domesticated and collection can be initiated without having to reprove the case.

i) This statute is based on the U.S. Constitution's Full Faith and Credit Clause Article IV, Section 1. And is compatible with the federal statute 28 U.S.C. 1738.

ii) Filing. The filing of a foreign judgment "…comprises both a plaintiff's original petition and final judgment." *Walnut Equip. Leasing Co. v. WU*, 920 S.W.2d 285, 286 (Tex. 1996).

iii) Default. A foreign judgment is enforceable "…even if the foreign judgment is by default." *Cash Register Sales and Services of Houston, Inc. v Copelco Capital, Inc.* 62 S.W.3d 278 (Tex. App.--Houston [1st Dist.] 2001, no pet.); *Hill Country Spring*

Water v. Krug, 773 S.W.2d 637, 639 (Tex. App.—San Antonio 1989, writ denied).

iv) Grounds for Challenge. *Brown v. Lanier Worldwide*, Inc., 124 S.W.3d 883 (Tex. App. —Houston [14th Dist.] 2004, no pet.) set out the basics

(1) "It is well established that the final judgment of sister state must be given the same force and effect it would be given in the rendering state." (902)

(2) "Once the party seeking enforcement of a foreign judgment has presented an authenticated judgment that appears to be a final and valid judgment, the burden then shifts to the party resisting the judgment to establish an exception to full faith and credit" (902)

(3) Then the Court goes on to say, "Recognized exceptions to full faith and credit requirements are (indentations added)

(a) the judgment is interlocutory;

(b) the judgment is subject to modification under the law of the rendering state;

(c) the rendering state lacked jurisdiction;

(d) the judgment was procured by extrinsic fraud; and

(e) limitations had expired" (903)

b) There are no cases stating if the domestication or collection can be initiated by a foreign executor without first being appointed an ancillary administrator. It can be argued that such a judgment is the collection of a debt under Tex. Prob C Section 107A.

c) It is assumed this statute applies not only to money judgments but also equitable relief. On the other hand, it probably does not trump the specific provisions of the Texas Probate Code Sections 95 *et seq*.

d) There is a case saying that a foreign judgment obtained against a foreign executor cannot be enforced against a Texas administrator. It has to be proved as an original matter. *Carrigan v. Semple*, 72 Tex. 306, 12 S.W. 178 (1888).

i) One case even said the foreign judgment cannot be introduced into evidence. *Reily v. Hare*, 280 S.W. 543 (Tex. Com. App. 1926).

ii) These cases justify their decision on the basis of avoiding fraudulent collusion between the creditor and the foreign administrator.

e) Generally foreign *in rem* judgments do not apply to Texas real estate. See *Durfee v. Duke, supra* and *Welch, supra*. At the same time *McElreath v. McElreath, supra*, allows for a different result under the rules of comity.

16) Non Probate Assets (Contracts)

a) **ERISA and preemption**.
Any matter involving ERISA is subject to the federal preemption rules. Those issues are beyond the scope of this paper.

b) **Law of Domicile or Choice of law Provisions**.

i) As discussed above, the general rule is that the law of the domicile controls the disposition of the decedent's personal property.

ii) This general rule is complicated by non probate assets being creatures of contract.

c) **Contracts**

i) **Choice of Forum Clauses**

(1) We frequently see choice of law clauses, which are discussed below. Not so frequent are choice of forum clauses.

(2) While the analysis is different it appears clear that choice of forum clauses are enforceable. See *Holeman v. Nat'l Bus. Inst., Inc.*, 94 S.W.3d 91 (Houston [14th Dist.] 2002 pet. denied), *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Texas Practice Guide Financial Transactions* Section 7:196.

ii) **Choice of Law Clauses**.

(1) Conflicts for contract matters are addressed in Restatement § 187-188.

(2) §187. Law of the State Chosen by the Parties

(a) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(b) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(i) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(ii) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) §188 Law Governing in Absence of Effective Choice by the Parties

(a) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles in §6.

(b) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account in applying the principals of §6 to determine the law applicable to an issue include:

(i) The place of contracting,

(ii) The place of negotiation of the contract,

(iii) The place of performance,

(iv) The location of the subject matter of the contract, and

(v) The domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(c) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§189-199 and 203.

iii) **Adopted by Texas Supreme Court**.

(1) In *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) the Texas Supreme Court adopted the Restatement 2nd "most significant relationship test" (421). Then in 1990 the Texas Supreme Court in *DeSantis v. Wackenhut Corp*., 793 S.W.2d 670 (Tex. 1990), approved of choice of law clauses or agreements and cited to the Restatement 2nd with approval.

(2) The test is nicely analyzed in "Conflict of laws," 65 SMU L. Rev. 391 (2012) beginning at page 405

(a) There are three initial principles

(i) Choice of law is a question of state law.

(ii) Next is a question of the law of the forum state.

(iii) The forum state has broad power to make choice-of-law decisions. Within this the courts have a hierarchy of rules.

First the court will consider any legislative direction. There are two limits to any legislation

The first is the legislation itself.

The second are constitutional restrictions. The article catalogues the following

--Due process

--Full faith and credit

--Equal protection

--Privileges and immunities,

--and the Contract clause (*Id*, 406)

Next the court will consider any choice of law clauses.

Finally the court will look to the common la w "…now controlled in Texas by the most significant relationship test…" of the Restatement 2nd Sec. 6 (*Id*, 406).

d) **McKeehan**.

i) Mr. McKeehan lived in Michigan and worked for Ford Motor Company. He and his wife moved to Texas where he died. Shortly before his death he added his wife to a Ford investment account.

ii) After his death a dispute broke out between his wife and his kids. His wife contended that this was a right of survivorship account and belonged to her. That the Ford account was subject to a terms and condition document that said the account was "governed by and construed in accordance with" Michigan law. That this was a valid choice of law provision that Mr. and Ms. McKeehan entered into.

iii) Under Michigan law accounts held by a husband and wife as joint tenants (even though not stated in the agreement) enjoyed right of survivorship.

iv) The account card did not state that it was a survivorship account. The terms and conditions document did not state that it was a survivorship account. Only by reading the Michigan statute (Mich. Comp. L. Sec. 557.151

(2010)) does one learn about the survivorship rights.

v) The kids said the law of the domicile controls and the Ford account did not comply with Texas law on right of survivorship.

vi) The trial court agreed with the kids but the court of appeals, *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. denied) sided with the widow. The Texas Supreme Court declined the petition for review.

vii) There are two competing issues.

(1) If the Texas rule is in favor of such choice of law provisions, then estate planners, executors, widows and beneficiaries have to study all non probate assets very carefully for choice of law provisions and the laws of any such selected state.

(2) If the Texas rule is in favor of the law of domicile, financial institutions of other states will have to be very careful in distributing accounts to right of survivorship account holders after death.

(3) The Austin court did not discuss any of this.

viii) The Austin Court of Appeals went through the following steps.

(1) First they determined if the laws of Texas and Michigan were different.

(2) Next, the court said it must determine if the choice of law provision was enforceable under Restatement § 187.

(3) Citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990) the court said that choice of law provisions, with certain limitations, are valid.

(4) Restatement § 187 says

(a) (1)The state law chosen will be applied if the particular issue is one is one they could have explicitly included in their agreement.

(b) (2) And, even if (1) does not apply, their selected state laws will be respected unless

(i) (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(ii) (b) The particular law is contrary to a fundamental policy of Texas.

(5) The court said examples of issues that cannot be resolved by choice of law are (Restatement § 187, cmt.d)

(a) Capacity,

(b) Enforceability,

(c) Formalities, and

(d) Validity

ix) Examples where parties can select the law are (Restatement § 187, cmt.c)

(a) Construction,

(b) Conditions precedent and subsequent, and

(c) Performance.

(2) The Court found that the right of survivorship could be resolved by explicit agreement between the parties. "…Texas law allows parties to create a joint tenancy with right of survivorship. See Tex.Prob.Code Ann Sec 46(a), 439(a)." (292)

(3) The kids argued that Texas public policy prevents application of this Michigan law.

(a) The court says that public policy arguments only come up if the parties could not make the agreement under Restatement § 187(1). And since the court approved under (1), public policy is not an issue.

(b) The court also observes that even if they considered public policy that would only apply to a state that had "a materially greater interest" than the chosen state, Michigan.

(c) If the choice of law provision was to be disregarded the court still believed Michigan law controlled using the factors under Restatement § 188

(i) Place of contracting.

(ii) Place of negotiation of the contract.

(iii) Part performance of the contract.

(iv) Location of the subject matter.

(v) Ford's place of business.

x) Based on all of this the court adopted Michigan law, and reversed the trial court and rendered in favor of Ms. McKeehan.

xi) **Respect for Choice of Law**.

(1) More than anything else, this case reflects the inclination of Texas courts to respect choice of law agreements.

(2) See "All Hail, King v. Bruce: The Rule of Domicile Prevails, Despite *McKeehan v. McKeehan* and the Second Restatement of Conflicts" 64 Baylor L. Rev. 943 (2012) (964).

(3) In "Conflict of laws," 65 SMU L. Rev. 391 (2012) the authors note

> "One aberration—we hope not a trend--is the number of Texas courts accepting choice-of-law clauses without consideration of whether the chosen law contradicts the public policy of a state with a stronger relationship to the claim." (422)

(4) Or this may just be another case of the courts protecting widows as we saw in *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009). Which result was overridden by an amendment to Probate Code Section 452 by the 2011 Texas Legislature.

xii) **Criticism of *McKeehan***.

(1) The Baylor Law Review article lays out a very detailed analysis of the *McKeehan* opinion. The primary criticism is that the court was wrong in not applying public policy to its use of Restatement § 187 (1).

(2) This article also compares *McKeehan* to *King v. Bruce*, 201 S.W.2d 803 (Tex. 1947). While *King v. Bruce* was decided before the Second Restatement, this law review believes the exception it carved out for the law of the spouses' domicile still controls.

xiii) New Legislation.

The 2013 Texas legislature passed HB 2912. At this time it has gone to the Governor but he has not signed or vetoed it. A part of that bill if enacted would change the result in *McKeehan*.

SECTION 9. Section 111.051, Estates Code, as e
January 1, 2014, is amended by amending S
Subdivision (1-a) to read as follows:

(1) "Contracting third party" means a
institution, insurance company, plan custodia
administrator, or other person who is a party t

agreement, insurance contract, annuity contract, retirement account, beneficiary designation, or other similar contract the terms of which control whether a nontestamentary transfer has occurred or to whom property passes as a result of a possible nontestamentary transfer. The term does not include a person who is:

(A) an owner of the property subject to a possible nontestamentary transfer; or

(B) a possible recipient of the property subject to a possible nontestamentary transfer.

(1-a) "Employees' trust" means:

(A) a trust that forms a part of a stock-bonus, pension, or profit-sharing plan under Section 401, Internal Revenue Code of 1954 (26 U.S.C. Section 401 (1986));

(B) a pension trust under Chapter 111, Property Code; and

(C) an employer-sponsored benefit plan or program, or any other retirement savings arrangement, including a pension plan created under Section 3, Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1002 (1988)), regardless of whether the plan, program, or arrangement is funded through a trust.

SECTION 10. Subchapter B, Chapter 111, Estates Code, is amended by adding Section 111.054 to read as follows:

Sec. 111.054. APPLICATION OF STATE LAW TO CERTAIN NONTESTAMENTARY TRANSFERS. (a) This section applies if more than 50 percent of the:

(1) assets in an account at a financial institution, in a retirement account, or in another similar arrangement are owned, immediately before a possible nontestamentary transfer of the assets, by one or more persons domiciled in this state; or

(2) interests under an insurance contract, annuity contract, beneficiary designation, or other similar arrangement are owned, immediately before a possible nontestamentary transfer of the interests, by one or more persons domiciled in this state.

(b) Notwithstanding a choice of law or other contractual provision in an agreement prepared or provided by a contracting third party, Texas law applies to determine:

(1) whether a nontestamentary transfer of assets or interests described by Subsection (a) has occurred; and

(2) the ownership of the assets or interests following a possible nontestamentary transfer.

(c) Notwithstanding a choice of law or other contractual provision in an agreement prepared or provided by a contracting third party, any person, including a personal representative, who is asserting an ownership interest in assets or interests described by Subsection (a) subject to a possible nonte
shall have access to the courts of this state fo
determination of:

(1) whether a nontestamentary trans
interests has occurred; or

(2) the ownership of the assets or int
a possible nontestamentary transfer.

(d) Subsections (a), (b), and (c) do not a
obligation:

(1) owed by a party to the contractin

(2) owed by the contracting third par

(e) This section applies to a community
survivorship agreement governed by Chapter
account governed by Chapter 113.

SECTION 11. (a) The changes in law made by Sec
Estates Code, as amended by this Act, and S
Code, as added by this Act, ***represent the fu***
state for the protection of its residents and
prevail over the laws of another state or ju
extent those laws are in conflict with Texa

(b) The changes in law made by Section
Code, as amended by this Act, and Section 1
added by this Act, apply to an account at a fi
insurance contract, an annuity contract, a
beneficiary designation, or another similar arr
which becomes [illegible] on or after the effective date of this