SUCCESSION AND THE CONFLICT OF LAWS

Blue Mountains Law Society

Succession Law Conference

7 September 2024

The Hon. A S Bell[*]

Chief Justice of New South Wales

Introduction

1 Thank you to the Blue Mountains Law Society for inviting me to speak at this year's succession conference, bringing life to the law of death.

2 My topic for this morning concerns succession and its interaction with the body of rules known as the "conflict of laws" or "private international law", an area of practice in which I specialised during my time at the Bar and in the course of post-graduate work.

3 Last year, 120,000 millionaires across the world moved overseas to live in a new country – representing a 50% uptick in the migration of wealthy individuals from 2022.[1] The top destination for high net-worth individuals, according to a

[*] The Chief Justice warmly acknowledges the research assistance of Mr John Lidbetter in the preparation of this paper.

[1] Millionaires Are Moving to These Countries in Droves (Penta, 20 December 2023), available at https://www.barrons.com/articles/millionaires-are-moving-to-these-countries-in-droves-65698dfb.

recent study, was Australia – beating out the UAE, Singapore, US and the UK.[2] In fact, the UK was in the top five destinations *from which* to emigrate!

4 With the advent of electronic funds transfer and the growth of crypto currencies, the world's financial markets are becoming increasingly borderless. Money can be transferred at the click of a button or a top on a phone. Very wealthy people often also have multiple properties in different countries, and bank and company accounts in various tax havens. Second and third marriages often also go with the territory. This global phenomenon has particular relevance for my topic this morning, being conflict of laws issues that arise in the context of the law of succession.

5 The principles of the conflict of laws are typically engaged where two or more jurisdictions have the capacity to provide the forum for the resolution of a legal dispute, and different outcomes might result according to the venue that is engaged. In this context, and with the twin phenomena of lifestyle and capital mobility, instances of cross-border succession disputes are on the rise.

6 To whet your appetite, consider the following scenario. A Russian billionaire moves with his ex-wife and kids to Singapore to conduct business. There he made two wills – one covering Russian properties, the other his world-wide assets. After a series of events, they move to Greece – obtaining citizenship there until authorities learn they've arrived with forged papers. They flee to Belgium, and eventually get citizenship, but upon gaining Belgian citizenship, they immediately move to Switzerland. The billionaire leaves his ex-wife and kids to live with his now-fiancé, a Swiss watch maker. They split their time across various properties in England and Switzerland. A google search will tell you that their Surrey home was previously owned by Ringo Starr.

7 The Russian billionaire operates various companies registered in the British Virgin Islands (**BVI**); he deposits millions into French bank accounts; and decides to treat himself, and buys a Belgian castle. It's been a few years now,

[2] Millionaires Are Moving to These Countries in Droves (Penta, 20 December 2023), available at https://www.barrons.com/articles/millionaires-are-moving-to-these-countries-in-droves-65698dfb.

and the Russian billionaire is enjoying his time in England – his fiancé's kids go to school there, he frequents expensive social clubs in London – and he even watches rugby and drinks beer! He's also created a new will in London, which cuts out his kids from the previous marriage, and gives almost all of his assets to his new fiancé and more recent set of kids. This new will supersedes his old wills, made in Singapore, which contemplated an even split between all the kids.

8 All is well, until he's called in the middle of the night by his lawyer: the Russian authorities are investigating him for corruption, and Interpol have issued a red notice against him. He flees in the middle of the night by himself to Belgium, to escape extradition. A year later, he's told that the Russian investigation has ended, but he remains paranoid. Then, he dies.

9 The fiancé seeks probate of the English will in the Royal Courts of Justice. Problem is, it's missing. The fiancé suspects that the ex-wife's kids have stolen the will. The ex-wife is by now in a Russian prison for attempted fraud in relation to the deceased's Russian assets.

10 Imagine the fiancé retains you as her lawyer, and asks you: which courts can determine this controversy? Which law applies to decide the validity of the will? Does the answer change if we are talking about moveable assets, such as shares in a BVI company and French bank deposits, or immoveable assets, such as the deceased's Belgian castle, the Swiss chalet or Ringo's former manor? Even if the fiancé wins the case, will the judgment have effect and be recognised overseas – in Russia, England, Belgium and Switzerland? Can freezing orders be obtained in those jurisdictions?

11 The scenario is not hypothetical. It is derived from a recent English case called *Morina v Scherbakova*.[3] I'll return to it later. Although the facts are perhaps on the exceptional and exotic side, the legal questions illuminated by that case

[3] Morina v Scherbakova [2023] EWHC 3253 (Ch).

highlight the importance of being aware of the conflict of laws in the context of the law of succession. One commentator has said:[4]

> "From a practical perspective, with the number of people choosing to relocate to other countries ever increasing and the consequent number of people owning and investing in property in multiple countries rising accordingly, the possibility of complex and, by connection, costly, cross-border succession cases is a cause for concern."

I am not so sure that it is a cause for concern so much as a reality to be dealt with.

12 Complexity in this area is compounded because the private international law principles of different countries may characterise aspects of succession disputes differently, whether as an aspect of family law, property law or an independent source of rights and obligations – and engage different choice of law rules.[5] This in turn feeds incentives for forum shopping.

13 Conflict of laws issues are not confined to transnational disputes: they also arise within our federal system.

14 *O'Donnell v O'Donnell* [2022] NSWSC 1742 involved the question of whether the deceased died domiciled in the ACT or NSW, and the availability of the notional estate regime under Part 3.3 of the *Succession Act 2006* (NSW) in circumstances where the deceased was found to have been domiciled outside of New South Wales as at the date of death. There is a key difference between the family provision legislation in NSW and the ACT with the latter only allowing for provision to be made out of the deceased's actual estate.[6]

[4] Jayne Holliday, *Clawback Law in the Context of Succession* (Hart Publishing, 2019) at 1-2.
[5] Jayne Holliday, *Clawback Law in the Context of Succession* (Hart Publishing, 2019) at 1.
[6] See also *Gardner v Selby* [2022] NSWSC 298.

Jurisdiction

15 In any legal dispute, one must start with questions of jurisdiction. Jurisdiction in this context refers to the authority of a court to decide a legal matter.[7] Questions of jurisdiction arise in cross-border disputes where it is possible for two or more different courts to determine a dispute. Take for instance, the *Morina v Scherbakova* case: the English court had jurisdiction in the sense of authority to decide the validity of the will, but so too did the courts of Belgium, where the testator died, and the Swiss courts, as the deceased owned real property there. Indeed, proceedings in that case were commenced in England, Belgium, Russia and the BVI.

16 Parties may fight over the venue of litigation for various reasons invariably driven by the self-interested desire to obtain the most valuable result.[8] The operation of procedural, substantive law or choice of law rules in a particular jurisdiction may be advantageous to one party; or, conducting litigation in an overseas forum may simply be a source of inconvenience to one's counterparty, and in turn an inducement to settlement.

17 The basic rule in succession cases in Australia is that the courts have jurisdiction to grant probate or letters of administration where the deceased has left real or personal property within the jurisdiction.[9] Exceptions to this basic rule exist in the ACT, Northern Territory and Queensland – where legislation confers jurisdiction more broadly – where it is "necessary" – despite no property having been left in the jurisdiction.[10]

---

[7] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) at [1.6].

[8] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [1.31]-[1.43].

[9] In New South Wales, see Probate and Administration Act 1898 (NSW) s 40. For discussion, see M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [37.1] ff.

[10] Administration and Probate Act 1929 (ACT) s 9(2); Administration and Probate Act 1969 (NT) s 14(2); Succession Act 1981 (Qld) s 6.

18 It is trite law that Australian courts cannot hear matters concerning title to or possession of foreign land – a limitation known as the *Moçambique* rule.[11] This had significant ramifications for family provision claims, as the *Moçambique* rule, precluded local Australian courts from accounting for foreign property when making family provision claims.[12] However, this jurisdictional limitation has been eroded in three ways.[13]

19 First, legislation in NSW has abolished the *Moçambique* rule, enabling NSW courts to determine questions involving foreign immoveable property.[14] This solves the issue for NSW courts, but obviously not for other jurisdictions. Secondly, state courts can circumvent the *Moçambique* rule through use of Australia's cross-vesting scheme.[15] For example, whilst a Queensland court may be inhibited by the *Moçambique* rule from making determinations as to immoveable land in Victoria, the Victorian cross-vesting legislation can invest the Queensland Supreme Court with jurisdiction to make provision from land in Victoria.[16]

20 Thirdly, courts have taken a pragmatic approach: they acknowledge that immoveable foreign property is unavailable to courts when making orders for provision, but simultaneously consider its value when calculating the value of the estate for the purposes of provision.[17] Consequently, the *Moçambique* limit on family provision has in fact been significantly reduced.

---

[11] British South Africa Co v Companhia de Moçambique [1893] AC 602 at 629 (Lord Herschell LC).
[12] *Re Paulin* [1950] VLR 462 at 465 (Sholl J); Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 47.
[13] See Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 47.
[14] Jurisdiction of Courts (Foreign Land) Act 1989 (NSW) s 3.
[15] Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 47.
[16] Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 47.
[17] Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 42. See, eg, Chen v Lu [2014] NSWSC 1053 at [74]-[75] (Brereton J).

Stay of proceedings

21 In many cases where there are two or more potential forums capable of hearing the dispute, parties will frequently jostle jurisdictionally to drive the litigation into that forum in which a particular party perceives its interests will best be served.

22 One commonly used forum shopping technique is to apply for a stay of local proceedings. An example of such a case was *Murakami v Wiryadi*,[18] which involved a tussle between Meek J and me when we were both at the Bar. The case concerned the estate of Takashi Murakami, who died in Indonesia. Murakami was survived by his four children – two from a former marriage, and two from his de facto partner. His worldwide estate spanned Indonesia, Singapore, Japan, the USA, and relevantly for this case – New South Wales. Murakami had purchased seven properties across Sydney, and also held substantial sums in a Westpac bank account.[19] Under Indonesian succession law, each of the four children was entitled to a quarter of their father's estate. The issue was that, under Indonesian law, all property that was acquired during a marriage was required to be divided into equal shares with the wife upon divorce.

23 One of the children from the de facto relationship was granted probate over the father's estate in New South Wales. Declarations were also sought that certain properties in New South Wales were held on trust. The ex-wife and her children applied for a stay of the proceedings – arguing that the issues should be determined in Indonesia. Indonesian law was likely to provide them with a more favourable outcome. They succeeded at first instance in obtaining a stay of proceedings.

24 In the event, the Court of Appeal allowed the appeal and dissolved the stay. The test for a stay of proceedings in Australia is different from the test for a stay of proceedings in England and most other common law jurisdictions. In Australia, one can only get a stay if the applicant for a stay can show that the

[18] Murakami v Wiryadi (2010) 109 NSWLR 39.
[19] Murakami v Wiryadi (2010) 109 NSWLR 39 at [72]-[73].

local forum is a clearly inappropriate forum (the *Voth* test)[20] whereas, elsewhere, a stay will be granted if there is a clearly more appropriate forum.[21] Let me give a recent example of the latter test in operation in the context of transnational probate litigation.

25 2019 saw two notable victories for Pakistan over England. The first involved an exhilarating 14 run victory over the Poms at Trent Bridge in the One Day International Cricket World Cup. The second victory arose in *Rehman v Hamid*, a case involving the validity of a will made in Pakistan, and where the parties were fighting over which venue should hear the dispute.[22] The High Court of England and Wales ultimately determined that the English proceedings should be stayed in favour of the proceedings in Pakistan.[23]

26 The deceased, Ms Ali, had made a will in Pakistan, in 2017 – where she provided her entire estate to her great-nephew, the plaintiff in the proceedings. The 2017 will superseded her earlier will, made in 1993, which contemplated a distribution of her estate across 14 beneficiaries – who were the defendants in the English proceedings.

27 The deceased was born in Pakistan, but lived in England from her early 20s until her 70s, when her husband died. She returned to Pakistan in 2015, and passed in 2017. Her one substantial asset was a house in England.

28 The plaintiff sought probate of the Pakistani will in the English courts in 2019. The defendants alleged that the 2017 will was forged, or that the deceased lacked testamentary capacity. Parallel proceedings were on foot in Pakistan concerning the same issues. The defendants sought a stay of the English proceedings.

---

[20] Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 552-561; [1990] HCA 55. See also Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 248; [1988] HCA 32 (Deane J).
[21] Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 at 478; [1986] UKHL 10; The Abidin Daver [1984] AC 398 at 415.
[22] Rehman v Hamid [2019] EWHC 3692 (Ch).
[23] Rehman v Hamid [2019] EWHC 3692 (Ch).

29 It was determined that the English proceedings should be stayed in favour of those commenced in Pakistan because:

- 12 of the 15 living beneficiaries lived in Pakistan;[24]
- The material witnesses including her medical professionals who treated the deceased, and the attesting witnesses, were in Pakistan;[25] and
- The proceedings were first commenced in Pakistan – six months before the English proceedings.[26]

30 The plaintiff and his lawyer were strongly criticised by the English court for seeking to "denigrate the Pakistani legal system" by making the "astonishing" and unsubstantiated claim that justice could not be provided under Pakistan's legal system.[27] The Court granted the stay of English proceedings, finding that Pakistan was the "more appropriate forum".[28]

31 In the context of stays of proceedings, reference can also be made to the case of *Martynova v Brozalevskaia*, a 2023 decision concerning a successful stay application in the Northern Territory Supreme Court due to the existence of parallel proceedings in Panama.[29] The dispute centred upon the deceased estate of Semen Brozalevskiy, another wealthy Russian businessman who died in 2020. The deceased's estate comprised various international assets, the most valuable of which were shares in a Panamanian company named Rhombus Developments Inc (**Rhombus**). Rhombus was suspected to own significant sums of cash in Swiss bank accounts.

32 The deceased made a will, leaving his entire estate to his daughter from a previous marriage. The daughter lived in the Northern Territory and was the

[24] Rehman v Hamid [2019] EWHC 3692 (Ch) at [48].
[25] Rehman v Hamid [2019] EWHC 3692 (Ch) at [48].
[26] Rehman v Hamid [2019] EWHC 3692 (Ch) at [51].
[27] Rehman v Hamid [2019] EWHC 3692 (Ch) at [55].
[28] Rehman v Hamid [2019] EWHC 3692 (Ch) at [64].
[29] Martynova v Brozalevskaia (No 2) [2023] NTSC 45.

defendant in the proceedings. The dispute arose because, despite the daughter being entitled to the full estate under the will, it was claimed that mandatory Russian forced heirship rules applied. First, it was said that a "Spouse's Share" rule applied, whereby spouses were entitled to half the property acquired by the deceased during the marriage.[30] This would have entitled the deceased's second wife, the plaintiff in the Northern Territory proceedings, to half of the Rhombus shares. Secondly, it was said that a "Compulsory Share" rule applied, which provided that spouses receive one quarter of the deceased's estate over and above the Spouse's share.[31] As such, it was claimed that Russian law entitled the wife to 62.5% of the Rhombus shares, and left the daughter with a 37.5% shareholding.

33 The issue for the wife was that, despite under Russian law being entitled to a 62.5% shareholding, the Rhombus shares had gone missing. The wife suspected that the daughter had illegally transferred the shares to herself, and commenced proceedings in the Northern Territory seeking preliminary discovery orders against the daughter, and against the Rhombus company.[32]

34 The daughter contended that the preliminary discovery proceedings in the Northern Territory should be stayed, as the wife had commenced three sets of parallel proceedings in the Panamanian courts.[33] The proceedings in Panama involved challenges to the validity of the deceased's will, applications to enforce intestacy rules, and to void any transfer of the Rhombus shares to the daughter. Ancillary to these proceedings were applications for preliminary discovery against the daughter and Rhombus, in similar terms to that sought in the Northern Territory proceedings.

35 The Associate Judge in the Northern Territory refused to order preliminary discovery largely because the plaintiff failed to provide proper disclosure concerning the circumstances in which she sought such discovery.[34] Whilst

[30] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [9].
[31] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [10].
[32] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [19].
[33] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [13].
[34] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [69].

strictly not necessary to decide, his Honour also turned to the question of whether the plaintiff's application for preliminary discovery should be stayed,[35] holding that, applying the *Voth* test, the Northern Territory was a clearly inappropriate forum, taking account of six factors, the most significant of which was the existence of the proceedings in Panama.

36 First, the only connection between the Northern Territory and the subject matter of the action was that the defendant resided in the Northern Territory – a factor which bears "little weight".[36] Rather, the locus of the dispute was in Panama – where the Rhombus company was incorporated, where the directors resided, and where the events underlying the proceedings (being the transfer of Rhombus shares) occurred. Furthermore, the documents which Rhombus possessed were situated in Panama.[37]

37 Secondly, the primary judge considered whether there was a legitimate juridical advantage to the plaintiff commencing proceedings in the Northern Territory. The primary judge considered as "important" the fact that the Panamanian court cannot order interim injunctions with respect to Rhombus shares, whereas the Northern Territory court could.[38] Thirdly, the plaintiff's application was most closely connected to the laws of Russia and Panama.

38 Fourthly, and relatedly, his Honour noted that the discovery processes and remedies available in the Northern Territory are "very similar to Panama".[39] Furthermore, the plaintiff could seek the same documents in the Panamanian proceedings. His Honour noted that this fell "squarely within the description of vexation and oppression" under the clearly inappropriate forum test.[40]

39 Fifthly, and in a similar vein, his Honour noted that there were simultaneous proceedings against the same parties and with respect to the same issues in

[35] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [70].
[36] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [84], citing Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 at 571.
[37] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [85].
[38] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [88].
[39] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [90].
[40] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [90].

Panama.[41] In this sense, his Honour echoed Osborn J's dicta in *Talacko v Talacko*, where his Honour held:[42]

> "… it will not be prima facie vexatious to institute proceedings in both a foreign country and Australia, but it will be so if the Plaintiff has the same chance in each country and equal facility to obtain effective remedies."

40 Sixthly, the primary judge considered that a permanent stay as against the preliminary discovery application did not prevent the plaintiff from commencing proceedings in the Northern Territory Supreme Court with respect to final relief (subject to further stay applications).[43]

41 Having regard to each of these factors, the primary judge determined that the Northern Territory Supreme Court was a "clearly inappropriate" forum in the circumstances, and that a stay should be granted.[44]

Anti-suit injunctions

42 An anti-suit injunction is an injunction issued by domestic courts to restrain the institution or continuance of foreign proceedings.[45] An anti-suit injunction operates *in personam*, meaning that it restrains the individual affected from commencing or continuing foreign proceedings, rather than imposing any direct restraint on the foreign court.[46] Such injunctions are typically ordered on three bases, being: first, to protect the local court's jurisdiction; secondly, to enforce legal rights not to be sued abroad (such as might be conferred by an exclusive

[41] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [91]; Talacko v Talacko [2008] VSC 246 at [44].
[42] Talacko v Talacko [2008] VSC 246 at [44].
[43] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [92].
[44] Martynova v Brozalevskaia (No 2) [2023] NTSC 45 at [94].
[45] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.82].
[46] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.82].

jurisdiction clause or a settlement deed); and thirdly, to restrain vexatious and oppressive foreign proceedings.[47]

43 *Kong v Yan* concerned an anti-suit injunction application made in the South Australian Supreme Court, seeking to restrain the respondent, the mother of the deceased, from continuing parallel proceedings in China.[48]

44 The deceased, Mr Hongtao Liu, was a Chinese national who moved to South Australia and gained Australian citizenship. His estate comprised assets in Australia, China and Hong Kong valued at approximately $50 million, with $10 million of that estate being situated in Australia.[49] These assets included shareholdings in what appeared to be a Chinese power supply company.[50]

45 The deceased was survived by his widow, the applicant in the proceedings, who was granted letters of administration over the deceased's estate, and brought proceedings in the South Australian Supreme Court seeking the court's determination of the proper law applicable to succession to the deceased's moveable property.

46 The deceased's mother, the respondent, had commenced four separate sets of proceedings in China, relating to the deceased's assets.[51] The first Chinese proceeding was commenced in 2019, in which the mother sought orders enforcing Chinese intestacy laws over the deceased's estate.[52] The motivation for applying Chinese law was that, if successful, the mother would receive a compulsory 25% share in the deceased's estate.[53] The applicant sought an

[47] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at [4.124]. See also A S Bell and J Gleeson, "The Anti-Suit Injunction" (1997) 71 *Australian Law Journal* 955.
[48] Kong v Yan [2021] SASC 82.
[49] Kong v Yan [2021] SASC 82 at [1].
[50] Kong v Yan [2021] SASC 82 at [7].
[51] Kong v Yan [2021] SASC 82 at [4].
[52] Kong v Yan [2021] SASC 82 at [4].
[53] Kong v Yan [2021] SASC 82 at [143].

anti-suit injunction in respect of only the first of the four sets of Chinese proceedings.

47 The primary judge noted that one category of case in which an anti-suit injunction may be made is where an "estate is being administered in one country and an injunction is sought in that country to restrain a person from seeking by foreign proceedings to obtain the sole benefit of certain foreign assets of the estate".[54] The purpose of such an injunction is to protect the Court's jurisdiction – an established basis for anti-suit injunctions.[55]

48 For instance, in *Weinstock v Sarnat*, Justice White in the Supreme Court of New South Wales ordered an anti-suit injunction in similar circumstances, relying on the fact that New South Wales was the place of the deceased's domicile, residence and situs of the relevant assets.[56] The injunction restrained the pursuit of proceedings in Israel.

49 Returning to *Kong v Yan*, the respondent contended that the injunction should not be granted for three main reasons. First, that there had been excessive delay on the applicant's part in bringing the anti-suit injunction application, and that the first Chinese proceeding was significantly advanced,[57] having been commenced six months prior to the anti-suit application.[58] Whilst Stanley J noted that applications for anti-suit injunctions must be promptly advanced,[59] he held that there was no unreasonable delay, as the hearing had not yet occurred.[60]

50 Secondly, the respondent relied upon the "attitude of the Chinese courts to an Australian judgment". That is, the respondent claimed that an anti-suit injunction

---

[54] Kong v Yan [2021] SASC 82 at [124], citing CSR Ltd v Cigna Australia (1997) 189 CLR 345 at 391; Societe Nationale Industrielle Aerospatiale v Lee Kui Jak (1987) 1 AC 871.
[55] Kong v Yan [2021] SASC 82 at [124], citing Bunbury v Bunbury (1839) 1 Beav 318; 48 ER 963; Weinstock v Sarnat [2005] NSWSC 744.
[56] Weinstock v Sarnat [2005] NSWSC 744 at [33], [36].
[57] Kong v Yan [2021] SASC 82 at [121].
[58] Kong v Yan [2021] SASC 82 at [135].
[59] Kong v Yan [2021] SASC 82 at [133], citing Ecobank Transnational v Tanoh [2015] EWCA (Civ) 1309 at [133].
[60] Kong v Yan [2021] SASC 82 at [135]-[137].

to restrain the respondent from continuing the first Chinese proceeding could not prevent the Chinese courts from hearing the matter.[61] Stanley J held that this argument misunderstood the *in personam* nature of an anti-suit injunction.[62] As noted earlier, anti-suit injunctions do not interfere with foreign courts directly, but rather restrain the moving party in the foreign proceedings on pain of that party being in contempt of the court ordering the anti-suit injunction. Such an indirect operation did not render an anti-suit injunction futile, and did not undermine judicial comity.[63]

51 Thirdly, the respondent argued that she would be prejudiced in the prosecution of the remaining Chinese proceedings if she was prevented from prosecuting the first proceeding. Stanley J rejected this argument, and relied upon the fact that the claims were not relevantly connected as a positive reason to order the anti-suit injunction.[64] Consequently, his Honour granted the anti-suit injunction in relation to the first Chinese proceeding, restraining the mother from bringing parallel proceedings concerning what was the law to be applied to the deceased's moveable estate.

52 I now move to *Pescatore v Valentino*,[65] another relatively recent English decision which involved a successful application for an anti-suit injunction made by the deceased's second wife as against the deceased's two children from a separate marriage. The deceased, Vincenzo Pescatore, was born in Avellino near Naples, but moved to England aged 20 – where he raised his children and remained until his death aged 78 in 2018. His working life and almost all his assets were in England, including ownership of a house in Chelsea. However, he maintained some connection to Italy, through owning property, visiting family and voting in local and national Italian elections.[66]

[61] Kong v Yan [2021] SASC 82 at [131].
[62] Kong v Yan [2021] SASC 82 at [131].
[63] Kong v Yan [2021] SASC 82 at [131].
[64] Kong v Yan [2021] SASC 82 at [140]-[141].
[65] Pescatore v Valentino [2021] EWHC 1953 (Ch).
[66] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [9].

53 The dispute centred around a will that he made in 2017, which provided £50,000 to his children, and the residue to his second wife. She was granted probate of the will by an English court in 2019. However, shortly before the grant, the children filed proceedings in Italy – arguing that the second wife should be disqualified from inheriting due to "unworthy conduct".[67] The children also disputed the validity of the 2017 will, and sought to rely upon Italian compulsory rules of succession, which would have entitled them to various properties.

54 The second wife applied to the English courts for an anti-suit injunction to restrain the continuation of the Italian proceedings. The primary judge noted that England had the closest connection to the dispute as the deceased spent most of his life in England, he raised his children there, and the bulk of his estate was there.[68]

55 Just pausing there, in cross-border cases such as these, translators are often required to report back to the forum court about the status of the overseas proceedings. In this case, the translation was incomprehensible, making the job of understanding the status of the Italian proceedings uncertain… or at least for most judges. In this case, the primary judge helpfully, if not proudly, remarked:[69]

> "As it happens, I speak Italian reasonably fluently, sufficiently at least to be able to give lectures on English law to Italian lawyers. I have also acted in the past as a (part- time) judge of… San Marino, where of course the official language is Italian… I am not aware of any authority on the point, but I should say that I do not regard it as giving expert evidence to myself to say here what I as an Italian speaker understand the words… to mean."

56 The judge decided the status of the Italian proceedings based upon his own reading of the transcript. This is not a luxury you can expect in the NSW Supreme Court!

---

[67] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [25].
[68] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [70]-[71].
[69] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [32].

57 Returning to the case, the court determined that the children would not be deprived of a legitimate personal advantage if an anti-suit injunction were granted – as none of the parties' first language was Italian, and they did not live in Italy.[70] Furthermore, no juridical advantage would be lost due to the grant of an anti-suit injunction. The main reason was that any Italian judgment which sought to interfere with the devolution of immoveable property in England would not be recognised or enforced by an English court.[71] Given that the largest assets were immoveable property in England, the parties would have to litigate in England even if the Italian proceedings were continued.[72]

58 In turn, given that Italian proceedings would not "obviate" the need for an English trial,[73] the bringing of Italian proceedings was described by the primary judge as an oppressive form of "forum shopping".[74] As a result, an anti-suit injunction was granted, restraining the children from continuing proceedings in Italy.[75]

Choice of law

59 We now move to choice of law rules. Choice of law rules decide which country's law applies to determine the substantive legal issue(s) before the court.

60 For example, the same testamentary freedom enjoyed in New South Wales is not always enjoyed in other jurisdictions.[76] For instance, the Russian forced heirship rules in *Martynova v Brozalevskaia* would, if engaged, allow a spouse to receive 62.5% of the deceased's estate, contrary to the testator's intent.[77] In *Kong v Yan*,[78] the mother was fighting in China for Chinese intestacy rules to apply, so that she could get a compulsory 25% share of her son's estate.

---

[70] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [72].
[71] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [78].
[72] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [79].
[73] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [37].
[74] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [89].
[75] Pescatore v Valentino [2021] EWHC 1953 (Ch) at [104].
[76] Gardner v Selby [2022] NSWSC 298.
[77] Martynova v Brozalevskaia (No 2) [2023] NTSC 45
[78] Kong v Yan [2021] SASC 82.

61 A key concept for the purposes of choice of law in succession is "scission" – the concept that there is one set of rules that apply to immoveable property, and another set of rules that apply to moveable property.[79] For immoveable property, the general premise is that the applicable law is the law of the place where the property is situated – known as the "lex situs". If the law of that place requires, for example, that the matrimonial property must go to a spouse on the death of the husband or wife, an Australian court would need to give effect to that law. For moveable property, the general rule is that the applicable law is the law of the deceased's *domicile* at the date of his or her death.

62 Scission can create complexities because two different legal systems may apply to the same estate if it covers moveable and immoveable property – a so-called *depeçage*.[80] Whilst law reform bodies have suggested abandoning scission, and applying a unitary approach to succession choice of law rules, minimal legislative progress has been made in Australia.[81] I will spare you any discourse on the related topic of renvoi – that would be too much on a Saturday morning.

Examining domicile

63 It is worth briefly making some points about domicile. Every individual has one and only one domicile at any given point in time.[82] Every individual is born with a domicile, known as a "domicile of origin". The domicile of origin can be displaced by what is called a "domicile of choice". The domicile of choice is acquired where a person voluntarily decides to reside in a country with the

[79] Lewis v Balshaw (1935) 54 CLR 188 at 195; [1935] HCA 80; Atle Grahl-Madsen, 'Conflict between the Principle of Unitary Succession and the System of Scission' (1979) 28(4) International and Comparative Law Quarterly 598.

[80] Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 31.

[81] With the exception of determining the formal validity of wills: see Succession Act 2006 (NSW) s 48(1). For attempts to remove scission generally, see Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, opened for signature 1 August 1989 (not yet in force) art 7(2)(a); Australian Law Reform Commission, *Choice of Law* (Report No 58, March 1992) at 110-111. For discussion of reform options, see Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27.

[82] Radich v Bank of New Zealand (1993) 45 FCR 101 at 108 per Einfeld J. See M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [13.5].

intention of remaining there indefinitely.[83] This involves two elements, being physical presence in the country, and an intention to make that country their home indefinitely.[84] A "country" in this context means any geographical area within a common legal system – so NSW and Victoria are, for purposes of domicile, distinct countries.[85] The concept of domicile has been criticised as difficult to apply, as it involves "distasteful problems of … the uncertainties of meaning and proof of subjective intent".[86]

64 Such difficulties are illustrated by the recent decision of the NSW Supreme Court in *Re Legler*.[87] *Re Legler* concerned a contest to administer the deceased estate of Daniele Claudio Legler, who died intestate in 2022 in Lagos, Portugal.[88] The deceased left assets in various jurisdictions – including New South Wales, Portugal, Lichtenstein and Malta. The NSW estate was "essentially insolvent", with $59,000 in bank deposits, but a $68,000 debt for private school fees.[89] The deceased's international asset holdings, however, were substantial, comprising:

- Over €2,000,000 in a Lichtenstein bank;
- €2,500,000 in shares in a Maltese corporation which owned one of his family properties in Portugal – known as "La Punta";
- €733,000 in shares in a crypto company, located in the UK; and
- A small personal loan to a New Zealander.

[83] Domicile Act 1982 (Cth) s 10.
[84] Domicile Act 1982 (Cth) s 10; Domicile Act 1979 (NSW) s 9.
[85] Domicile Act 1982 (Cth) s 4(1); Domicile Act 1979 (NSW) s 3.
[86] LK v Director-General, Department of Community Services (2009) 237 CLR 582 at 593. See also O'Donnell v O'Donnell [2022] NSWSC 1742 at [145], [553]-[555] (Robb J).
[87] Re Legler [2024] NSWSC 726.
[88] Re Legler [2024] NSWSC 726 at [1].
[89] Re Legler [2024] NSWSC 726 at [2].

65 The plaintiff was the deceased's de facto partner at the time of death, named Zhenya, who sought the grant of letters of administration in her name.[90] This was contested by the deceased's children, the defendants in the case.

66 Given that the deceased had property in NSW, the Court had jurisdiction to grant administration over the deceased's estate.[91] The main issue for our purposes was where the deceased was domiciled at his death. The deceased was born in Italy in 1950, attended boarding school and university in Switzerland, and then pursued an acting career – travelling the world. During his second marriage, he lived in Italy for a number of years until 2000 – when he moved to Melbourne.

67 In 2001, the deceased obtained a right to live and work in Australia. Six years later, in 2007, the deceased moved to New Zealand, where two of his children were born. He purchased properties in Byron Bay and Queensland in 2010 and 2013.

68 In 2015, the deceased separated from his second wife. After his separation, he decided to move to his villa in Lagos, Portugal. According to one of his children, he had said "La Punta is my new home".[92]

69 While planning to move to Portugal and seeking to obtain a bridging visa, he fell in love with his migration agent, the plaintiff in this matter. In the visa application, the deceased stated that since 2002, he travelled around the world, but that Australia was his home, and that he hadn't resided elsewhere on a permanent basis. In 2017, the deceased sent an email to one of his lawyers:[93]

> "I suggest a telephone call for you to Zhenya…, my Russian visa agent in Melbourne who is taking care of my visa …She is very good …on Google you see that she is beautiful and has been awarded for body sculpture…"

[90] Re Legler [2024] NSWSC 726 at [3].
[91] *Probate and Administration Act 1898* (NSW) s 40; At [13].
[92] Re Legler [2024] NSWSC 726 at [73].
[93] Re Legler [2024] NSWSC 726 at [78].

70 The deceased remained living in his Portuguese villa, with some international travel interspersed, until his death in April 2022.[94] The following month, Zhenya initiated court proceedings in Portugal, seeking rights to reside at La Punta.[95]

71 Then, she brought proceedings in NSW – just a week before the deceased's children won an inheritance claim in Portugal, which named the eldest daughter the administrator of the deceased's estate, and the five children as being the "only legitimate heirs".[96]

72 Pike J determined the issue of domicile of choice as follows:[97]

> "…at the time of his death, the Deceased was domiciled in Portugal. He was living there with the intention of making it his home indefinitely. I reject Zhenya's contention that he still called Australia home. No matter how far or wide he roamed, he called Portugal home."

73 His Honour reached the conclusion that the deceased was domiciled in Portugal due to the following factors:

- He purchased property in Portugal, following his longstanding desire to buy it;[98]
- When he left Australia, he made statements that he never desired to return full-time;[99]
- He was settled at La Punta and regarded it as his home;[100] and

[94] Re Legler [2024] NSWSC 726 at [207].
[95] Re Legler [2024] NSWSC 726 at [216].
[96] Re Legler [2024] NSWSC 726 at [220].
[97] Re Legler [2024] NSWSC 726 at [239].
[98] Re Legler [2024] NSWSC 726 at [241].
[99] Re Legler [2024] NSWSC 726 at [242].
[100] Re Legler [2024] NSWSC 726 at [243].

- He became a tax resident of Portugal, consistent with him being resident there.[101]

74 Furthermore, Pike J noted that the fact the deceased spent 200 days in Australia in 2021 – the year before his death – was not suggestive of an intention to live indefinitely in Australia.[102] This was because the period could be explained by his desire to see his children during COVID-19.

75 Pike J explained the significance of the question before him as follows:

> "[15] Determining whether or not the Deceased was domiciled in Australia at the time of his death will assist in determining what happens to the Deceased's assets, including the NSW assets.
>
> [16] The position in relation to the assets other than the NSW assets is far from straightforward and will potentially be affected by the laws applicable in the jurisdiction where the assets are located and potentially further proceedings in those overseas jurisdictions."

Choice of law: Wills

76 Now we move to the choice of law rules for wills. To determine the capacity of the testator in respect of moveable property, the court applies the law of the deceased's domicile at the time of death – although there is some academic disagreement about whether it should instead be the point at which the will is made.[103] For immoveables, capacity is decided by the law of the situs of the asset.[104]

77 The construction of wills follows different rules: for moveable property, the will is construed according to either the law intended to be applied under the will, or if no intention can be ascertained, the law of the testator's domicile when the will was executed applies. For immoveables, the will falls to be construed according to the law of the testator's domicile when the will was made.

---

[101] Re Legler [2024] NSWSC 726 at [245].
[102] Re Legler [2024] NSWSC 726 at [249].
[103] See Dicey, Morris & Collins, 2012, above n 4, [27R-023]–[27-026], pp 1418–20.
[104] See M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [38.10].

78 Whether a will has been effectively revoked, such as through the creation of a new will, or by destroying the will, follows the traditional scission path: moveables are governed by the law of the domicile and immoveables by the law of the situs of the assets. For moveables, no Australian or English case has decided whether the relevant time to determine domicile is the time of the revocation or the time of death.[105]

79 To determine the formal validity of wills, legislation has removed the scission distinction, and provides that a will is valid if it conforms with the law of the:[106]

- place the will was executed; or
- testator's domicile when will made, or at death; or
- testator's residence when will made, or at death.

80 In this context, lets jump into a recent example, being the case of *Anderson v Yongpairojwong*.[107] This case concerned whether a testatrix had capacity to make a will in Thailand in 2020, which superseded an earlier will made in NSW in 2017. The plaintiff, being the daughter of the testatrix, sought to uphold the validity of the earlier NSW will on the basis that the mother did not have testamentary capacity when executing the Thai will. The respondent was the son of the testatrix and brother of the plaintiff.

81 The deceased was the matriarch of a popular restaurant chain in Sydney, known as "Chat Thai". She owned various properties in both Thailand and NSW, and had majority shareholdings in the companies which she used to operate her Chat Thai business. The earlier NSW will provided for a roughly even split of the Chat Thai shares between the plaintiff and respondent.

[105] M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [38.32].
[106] Succession Act 2006 (NSW) s 48(1).
[107] Anderson v Yongpairojwong [2023] NSWSC 1359.

However, the later Thai will transferred all Chat Thai shares to the son. The parties agreed that the deceased was domiciled in NSW.[108]

82 The primary judge noted that the NSW Supreme Court had jurisdiction to grant probate or letters of administration because the deceased had left real and personal property within NSW.[109]

83 Next, his Honour determined the validity of the Thai will. As I mentioned earlier, s 48 of the NSW *Succession Act* provides that a will is properly executed if it conforms with the internal law of the place it is executed (here, Thailand) or where the testator was domiciled (here, NSW). Therefore, if the Thai will was made in accordance with either Thai or NSW law, it would be valid.[110] There was a contention that the Thai will was not made consistently with NSW law because, instead of a signature, a thumbprint was used by the deceased.[111] Nonetheless, such an approach was compatible with Thai law, and so the will was considered valid.

84 The next issue concerned the proper law to determine the deceased's capacity to make a will. The proper law in respect of determining her testamentary capacity was NSW law in relation to the shares in her companies.[112] Despite the deceased undergoing various cancer treatments around the time of executing the Thai will, Griffiths AJA considered that she had capacity – having regard to eyewitness accounts, videos and regard to contemporaneous communications made with her employees. Consequently, the 2020 Thai will was upheld as valid, and probate was granted.

85 We can now return to the English case of *Morina v Scherbakova*, which concerned whether a will which had gone missing had been revoked. It has been said that cases are not like Agatha Christie novels, and that the ratio and

---

[108] Anderson v Yongpairojwong [2023] NSWSC 1359 at [201].
[109] Anderson v Yongpairojwong [2023] NSWSC 1359 at [202], citing *Probate and Administration Act 1898* (NSW) s 40.
[110] Anderson v Yongpairojwong [2023] NSWSC 1359 at [203].
[111] Anderson v Yongpairojwong [2023] NSWSC 1359 at [207].
[112] Anderson v Yongpairojwong [2023] NSWSC 1359 at [208].

legal result should be told upfront, rather than kept from the audience. However, the facts of this case are so bizarre that it merits an exception!

86 The *Scherbakova* case revolved around the deceased estate of Vladimir Scherbakov, a Russian billionaire who owned assets across the world.

87 He had made two wills in Singapore in 2014 – one covering his Russian properties, and the other covering all of his other worldwide assets: think back to the BVI companies, French bank deposits, Belgian castles and numerous houses littered across the globe. Under this Singapore will, he planned to share his entire estate evenly with all his children – being his children with his ex-wife and fiancé. However, the following year, whilst living with his fiancé, he changed his mind, and made a new will in London covering his worldwide assets, which cut out his ex-wife's children. Two years after making the updated will, he died.

88 Immediately, the ex-wife brought legal proceedings in Russia, seeking a finding that the updated will was invalid. In the process, she overplayed her hand, and was found to have forged the fiancé's signature, and was sent to a Russian prison. The ex-wife's children continued the fight however, and commenced claims in the BVI courts seeking administration over their father's assets.

89 While the BVI proceedings were ongoing, the fiancé sought probate of the updated will in the English courts. The hitch was that the updated will had gone missing, and whilst an anonymous third-party claimed to have found the will, they were refusing to return it.[113] This raised the twin questions: first, where was the deceased domiciled at his death; and secondly, which law applied to determine whether the will was revoked?

90 There were three possible places the deceased was domiciled at the time of his death: in Russia, Belgium or England. Notably, if he was domiciled in Russia or Belgium, forced heirship rules would apply, significantly altering the effect of the updated will. The deceased's domicile of origin was Russia.[114] The question

[113] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [266].
[114] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [208].

was whether he had acquired a domicile of choice which displaced this domicile of origin.

91 The judge rejected the respondents' argument that the deceased had acquired a domicile of choice in Belgium upon attaining Belgian citizenship. This was because the deceased had left Belgium almost immediately upon attaining Belgian citizenship to live in Switzerland, which the judge found to be "entirely inconsistent with any suggestion that his intention was to make Belgium his permanent home".[115]

92 The judge then turned his consideration towards England, holding that through 2013-2015, "England had become the centre of Vladimir's family and social life".[116] The primary judge considered the evidence of the family's butler, chef and nanny, which confirmed that the family had settled in England with a view to permanently staying there.[117] The judge also had regard to the deceased's social engagements and integration into English culture – including going to the Royal Opera House, Ascot races, watching rugby and playing golf. Regard was also had to the deceased's membership of English clubs, including the famous "Arts Club".[118] Such factors, according to the judge, resulted in the deceased obtaining a domicile of choice in England.[119]

93 The next issue was whether the deceased abandoned his English domicile when he fled to Belgium after Interpol's red notice was released. The judge held that he did not – for the reason that the deceased was only living in Belgium to escape extradition to Russia.[120] Such inferences were strengthened by the fact that the deceased lived in hotels, rather than a permanent home.[121] As such, the judge held that the deceased was domiciled in England at his death.[122]

---

[115] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [214].
[116] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [217].
[117] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [217]-[218].
[118] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [220].
[119] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [225].
[120] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [228].
[121] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [229].
[122] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [244].

94 The outstanding issue was whether the updated worldwide will had been revoked on the basis that the original copy was missing, albeit a PDF copy was available. The judge first determined that the will was valid under English law, as it was signed by the deceased in the presence of two witnesses, who then signed the will themselves.[123]

95 In terms of revocation, the next question was: in respect of immoveable property located in England, which law governs the question of the *revocation* of the will?[124] For moveables, the law of the domicile, being England, applied. Old authority suggested that the *lex situs* governed the question of revocation of wills in respect of English immoveable property.[125] However, the judge acknowledged that *Dicey, Morris and Collins's Conflict of Laws* suggested the opposite position – that the governing law should be the law of the testator's *domicile* at the time of the alleged revocation.[126] The judge refrained from determining the issue because the relevant immoveable property in question was in England, and the deceased was domiciled in England.

96 Under English law, a will can be revoked where it is burnt, torn or destroyed.[127] A presumption of revocation arises at English law where the will cannot be found after the testator's lifetime.[128] The judge held that the updated will existed both before and after the deceased's death.[129] Further, the judge found that the ex-wife and her children were likely involved in the suppression of the updated will.[130] In turn, it could not be said that the deceased revoked the will.[131] Consequently, the judge determined that the updated will remained valid, and could be enforced.

---

[123] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [250].
[124] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [255].
[125] *Re Caithness* (1890) 7 TLR 354, 355 (Chitty J).
[126] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [255].
[127] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [262], *Wills Act 1837* (UK) s 20.
[128] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [264].
[129] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [271].
[130] Morina v Scherbakova [2023] EWHC 3253 (Ch) at At [312].
[131] Morina v Scherbakova [2023] EWHC 3253 (Ch) at [323].

97 A further transnational will revocation case to note is *Sangha v Sangha*.[132] Here, the deceased created two wills. The first will was made in 2007, and covered the deceased's Indian and English assets. This will provided the whole of his Indian and English assets to his second wife. In 2016, he created a new will which covered only his Indian assets, and which distributed the Indian assets equally between his first and second wife. The 2016 will contained a revocation clause, providing that the will was his "last and final will and all such previous documents stand cancelled".

98 The question was: can a will which covered Indian and English assets be revoked in its entirety by a subsequent will which covers only Indian assets? The High Court of England and Wales said no, deciding that the revocation clause could only be interpreted having regard to the nature of the dispositions in the particular will, and here the will was dealing with Indian assets, and therefore only the part of the will concerning Indian dispositions could be revoked. This meant that part of the 2007 will remained on foot in relation to the English property. The Court of Appeal disagreed.

99 The result was that the Indian assets were disposed according to the 2016 will's terms, and the English assets were subject to English intestacy rules. The fact that intestacy rules were now engaged was relevant only for reasons made clear in an article written on the case by the appellant's barrister, which explained that the deceased was apparently bigamous, and there was a dispute as to which wife he was lawfully married.[133]

100 On the 23rd of September 2020, Norway beat Wales 1-0 in the qualification round of the UEFA European Women's Football Championship. A few months later, Wales got its revenge – not on the Football pitch (they actually lost to Norway again the following month), but on the hard-fought choice of law battleground in the High Court of England and Wales.

---

[132] Sangha v Sangha [2023] EWCA Civ 660.

[133] Alexander Learmonth, "Attestation and revocation: the curious world of Sangha v Sangha [2023] EWCA Civ 660" (2024) 30(2) *Trusts & Trustees* 80.

101 The case was *Rokkan v Rokkan*.[134] It concerned the estate of Elizabeth Rokkan, the deceased, who grew up in Wales, but married a Norwegian and moved to Norway. She lived in Norway for almost the rest of her life, until her husband passed away. She moved back to Wales where she lived the remaining years of her life.

102 At the time of the husband's death, they were both domiciled in Norway, enlivening Norway's Inheritance Act which provided that the offspring of a deceased person inherited the estate in equal proportions. That is, the children had rights to an equal share in their father's estate. However, the same Act provided for "deferred probate", whereby the surviving spouse could retain possession of their partner's estate until they died – at which point the full estate would pass to the children.[135] This is what occurred.

103 After the wife's return to Wales, she had written a will which differed from the deferred probate rules, and which envisaged an equal split of both her and the husband's joint estate. Upon her death, when determining how to distribute the deceased's estate, the children claimed that their mother was obliged to pass the assets to them equally, as was required by Norwegian law. But this begged the question: which country's law determined the children's succession to the mother's assets?

104 The judge found that, at her death, the deceased was domiciled in Wales. In turn, the succession rules governing the deceased's moveable assets was to be determined by the law of England and Wales. This meant that the Norwegian legislation, although binding on her whilst she was domiciled in Norway, no longer applied to her estate because, at her death, she was domiciled in Wales.[136] As a result, the court granted probate of the will, which envisaged an alternative split of the assets. The case is interesting because it highlights the

[134] Rokkan v Rokkan [2021] EWHC 481 (Ch).
[135] Rokkan v Rokkan [2021] EWHC 481 (Ch) at [2].
[136] Rokkan v Rokkan [2021] EWHC 481 (Ch) at [30].

temporal element of choice of law considerations where an individual's domicile changes over time.

Choice of law: Intestate succession

105 The choice of law rules for intestate succession are clear: for moveable assets, the applicable rules of intestacy are governed by the law of the deceased's domicile at death;[137] and for immoveable property, the proper law is determined by the law of the place that the property is located.[138]

106 These rules were applied in *Kong v Yan*, the South Australian case mentioned earlier.[139] Here, the wife argued that South Australian intestacy rules applied, whereas the mother wanted Chinese intestacy rules to apply, so that she'd get a compulsory 25% share of the estate. Given that the key assets were moveable property in the form of shares, the Court was tasked with determining the deceased's domicile as at the date of his death. The judge decided that the deceased was domiciled in South Australia because:

- The children were settled in schools in South Australia;
- The deceased moved to Australia to provide a "healthier climate and environment";
- They gained Australian citizenship, revoking their Chinese citizenship;
- They brought their furniture from China to South Australia; and
- Disinterested witnesses provided evidence that the deceased remarked that he intended to remain in South Australia.

[137] Pipon v Pipon (1744) Amb 25; 27 ER 14. See M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [38.4]-[38.6].
[138] Re Ralston [1906] VLR 689. See M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) at [38.7].
[139] Kong v Yan [2021] SASC 82.

107 As such, the judge held that the intestacy rules of South Australia applied to the deceased's moveable assets worldwide. It is interesting to contrast the high value placed on citizenship in determining domicile in *Kong v Yan* as compared with the minimal weight attributed to the deceased obtaining citizenship in Belgium in *Morina v Scherbakova*. The main reason was that, unlike *Kong*, where the deceased remained in South Australia, and developed roots there, in *Scherbakova*, the deceased used Belgium citizenship as a means to obtain property in Switzerland almost immediately. The difference between the two cases highlights the court's approach to substance over form when determining domicile and choice of law.

Choice of law: Family provision

108 Family provision attracts significant choice of law disputes because, as Mortensen and McKibbin explain:[140]

> "It takes little for family provision claims to cross borders, whether state or national. The property may be located in different places — other states or countries; the personal representatives, claimants or beneficiaries under the will may be from different places; or the deceased may have had a strong personal connection with another place. Any one of those cross-border considerations raises questions of a court's jurisdiction to deal with a family provision application, or of the law that will apply to it."

109 The applicable law to moveable property in family provision claims is the deceased's domicile at the date of his or her death.[141] And, consistent with the scission principle, the law governing family provision claims from immoveable property is the *lex situs*.

---

[140] Reid Mortensen and Sarah McKibbin, "Family Provision Across Borders" (2024) 46(1) *Sydney Law Review* 27 at 29.

[141] See Pain v Holt (1919) 19 SR (NSW) 105 at 107 (Harvey J) (the first cross-border family provision claim, involving Fiji and NSW jurisdictions); *Taylor v Farrugia* [2009] NSWSC 801 at [26]; *Re Paulin* [1950] VLR 462 at 465 (Sholl J).

110 Reference has already been made to the case of *O'Donnell v O'Donnell*.[142] Here, the issue was whether the law of NSW or ACT applied in a family provision dispute. The difference between NSW and ACT law was significant in *O'Donnell*, because in NSW a "notional estate order" was possible, but in the ACT it was not.

111 The deceased had married four times, the last of which was to the plaintiff, Kalpana – from 2012 until his death in 2018.[143] The deceased's will made no provision for her, leading the wife to make a $9.4 million provision claim.[144] She commenced proceedings in both NSW and the ACT, but quickly cross-vested her ACT claim to NSW.

112 The deceased owned various companies, collectively described as the "O'Donnell group", valued at $32 million. In contrast, the value of O'Donnell's "actual estate" was $2 million. To get provision over the $32 million, the wife needed to apply the "notional estate" concept, which was only available in NSW.[145] In contrast, if ACT law applied, she could only get provision from the $2 million estate. To make matters worse, the legal costs of the parties were, in aggregate, over $3 million.[146]

113 In essence, Justice Robb noted that, if the deceased was domiciled in the ACT, then ACT law would apply to the moveables for family provision purposes, and therefore no "notional estate" could be relied upon by the wife.[147] His Honour found that the deceased was domiciled in the ACT, precluding the possibility for a notional estate.[148]

114 His Honour awarded the plaintiff the whole of the actual estate, being $2 million, and held that legal costs should not be paid out of the estate.[149] His Honour

[142] O'Donnell v O'Donnell [2022] NSWSC 1742.
[143] O'Donnell v O'Donnell [2022] NSWSC 1742 at [1], [4]-[12].
[144] O'Donnell v O'Donnell [2022] NSWSC 1742 at [24].
[145] O'Donnell v O'Donnell [2022] NSWSC 1742 at [61].
[146] O'Donnell v O'Donnell [2022] NSWSC 1742 at [34].
[147] O'Donnell v O'Donnell [2022] NSWSC 1742 at [75]-[76].
[148] O'Donnell v O'Donnell [2022] NSWSC 1742 at [313]-[319].
[149] O'Donnell v O'Donnell [2022] NSWSC 1742 at [541].

noted that, had a notional estate been possible, he would have awarded the plaintiff $5 million.[150]

115 His Honour ended his judgment with the heading "Need for law reform".[151] Under this heading, his Honour stated that each of the Australian jurisdictions should empower courts to designate notional estates of deceased persons – and to make such provision uniform across the states.[152]

116 As *O'Donnell* shows, the inconsistency of substantive laws across different jurisdictions makes a working knowledge of the conflict of laws critical in succession matters with a cross-border element.

****

[150] O'Donnell v O'Donnell [2022] NSWSC 1742 at [544].
[151] O'Donnell v O'Donnell [2022] NSWSC 1742 at [549]-[560].
[152] O'Donnell v O'Donnell [2022] NSWSC 1742 at [549].