From the Desk of the President

We hope you will have a chance to attend the upcoming Spring 2019 Conference in New Orleans, Louisiana, May 14 -17, 2019. The agenda includes presentations on a wide variety of interesting topics, including digital assets, guardianship, evidence in probate proceedings, multistate probate issues, and more. The Fall 2019 Conference will be held November 13-16, 2019, in historic and revitalized Philadelphia.

Conference registration for all of the NCPJ conferences is now streamlined using the NCPJ website, www.ncpj@ncsc.org. This journal will be posted for future use on NCPJ website, along with many past journals. Currently, the website is also highlighting Managing Someone Else’s Money, a series of guides for fiduciaries prepared by the Consumer Financial Protection Bureau to assist in avoiding financial exploitation and scams.

The administration of justice in probate cases is challenging and ever-evolving. As the national organization promoting probate excellence, NCPJ provides us all with an opportunity to discuss these challenges, to consider innovative solutions at work in other jurisdictions, and most important, to share our experiences with one another.

We appreciate your membership in the National College of Probate Judges and welcome your participation. I am honored to serve as your President this year.

Hon. Anne Meister, President of NCPJ

A Road Increasingly Traveled: Multistate Probate Issues

By Mark R. Caldwell and Sarah V. Toraason

I. Introduction

Multistate probate issues are complex. Although it is increasingly common for a decedent to own property in more than one state, there is no overriding authority to determine jurisdiction when estate assets are located in several states. Each state may assert jurisdiction over property located within its boundaries. This can and does result in inconsistent state court judgments.

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The will of a decedent will normally be admitted to probate in a state: (1) where the decedent was domiciled on death; (2) where there are assets of the estate on death. Restatement (Second) Conflicts of Laws § 314.

A. Domicile

Domicile “means the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.” Williamson v. Osenton, 232 U.S. 619, 625 (1914). Domicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there. Texas v. Florida, 306 U.S. 398, 424 (1939).

Courts have held that when a person is adjudged incompetent, his or her domicile is the last county in which he or she resided while competent. Thomas v. Price, 534 S.W.2d 730, 733 (Tex. Civ. App.—Waco 1976, no writ) (“It is undisputed that the deceased was domiciled in Ellis County in 1933 when he was adjudged insane. There is no evidence he was ever restored. Thus, his domicile continued in Ellis County.”). Other courts have held that someone can change an incompetent person’s domicile if it is done to serve the incompetent person’s best interest. Acridge v. Evangelical Lutheran Good Samaritan Soc., 334 F.3d 444, 453 (5th Cir. 2003) (wrongful death case dismissed for lack of diversity jurisdiction).

B. In Rem Jurisdiction


This case law provides key principles:

- In rem judgments bind persons to the extent of their interest in the property whether or not they were parties to the proceedings. 50 C.J.S. Judgments § 1054 (2005).
- Service on the property owner relates
only to notice and opportunity to be heard, not to the court’s jurisdiction. 21 C.J.S. Courts § 37 (citing Miccosukee Tribe of Indians of Florida v. Dep’t of Envtl. Prot. ex rel. Bd. of Trustees of Internal Imp. Tr. Fund, 78 So. 3d 31, 33 (Fla. Dist. Ct. App. 2011) (“Because a proceeding in rem is an action against the property itself, the court is not required to acquire in personam jurisdiction over the landowner as a prerequisite to a valid court action. Instead, “the purpose of service of the summons and complaint upon the landowner is only to provide notice and an opportunity to be heard.” (internal citations omitted)).

Personal jurisdiction is irrelevant and not required in an in rem proceeding. Id. However, the effect of a judgment in rem action is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner. Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

Consequently, a judgment rendered in rem or quasi-in-rem will exhaust itself in the forum state and cannot be enforced against the defendant or his property in other jurisdictions under the Full Faith and Credit Clause. 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1070 (4th ed.).

The mere contention that a decedent died in a domiciliary state or that the state’s control over its affairs give it jurisdiction to adjudicate foreign situated property will not suffice. Jeffrey Schoenblum, Multistate and Multinational Estate Planning, § 16.02 [B] (2009 ed.) (internal citations omitted).

Because will contests affect both the property and the personal rights of the beneficiaries to participate in the distribution of estate assets, they are generally viewed as examples of quasi in rem jurisdiction. In a contested probate proceeding, the careful practitioner should consider obtaining in personam jurisdiction on every interested party for which personal liability is sought or such party’s personal rights are affected.

1. Common Situs Rules Based on Physical Location

Jurisdictional situs rules are generally based on: (1) physical location; or (2) domicile. The situs of real property is the state where it is located. Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. Pennoyer v. Neff, 95 U.S. 714, 722 (1877). The situs of tangible personal property for purposes of administration is in the state where it is located. Lancaster & Wallace v. Sexton, 245 S.W. 958, 959 (Tex. Civ. App.―Texarkana 1922, writ ref’d). For example, the situs of a negotiable instrument is the place where it is located. Restatement (Second) of Conflict of Laws § 326.

When it comes to intangible property, it can be difficult to fix the precise situs of assets when they are intangible in nature. The “situs” of an intangible asset is essentially the place at which it is reasonable to collect and administer the intangible. Pinpointing the exact location of an intangible asset for jurisdictional purposes is sometimes a cumbersome task though. Justice Cardozo famously said:

Because will contests affect both the property and the personal rights of the beneficiaries to participate in the distribution of estate assets, they are generally viewed as examples of quasi in rem jurisdiction.

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a commonsense appraisal of the requirements of justice and convenience in particular conditions.

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Presentation of the Treat Award

By Mary Joy Quinn

At the NCPJ 2018 Fall Conference in Hilton Head, South Carolina, Judge Thomas A. Swift was the Treat Award recipient for 2018. Judge Swift served as a judge in Trumbull County in the State of Ohio for 30 years. In that time, Judge Swift served as President of the Ohio Association of Probate Judges as well as chair of the Ohio Judicial Conference. He also served as a member of the Board of Governors of the American Judges Association and the National Committee for the Prevention of Elder Abuse. He has been an instructor in the Ohio Judicial College and has served as a mentor for countless Probate Judges in Ohio. In addition, he served on the Ohio Attorney General’s Elder Abuse Commission and the Supreme Court of Ohio’s Subcommittee on Adult Guardianships.

As Probate Judge in Trumbull County Judge Swift instituted programs that were duplicated throughout Ohio.

- Trumbull County Senior Court Assistance Program: This voluntary diversion program seeks to provide solutions to legal issues faced by those 60 years of age and older. Eligible participants have been charged primarily with non-violent misdemeanors or civil actions. The program provides a multidisciplinary approach and strives to connect seniors with services, programs and available benefits. The majority of the charges are either dismissed or reduced.

- Guardian Angels Program: This program trains volunteers to visit adults who have guardians in their various living environments to assure that all needs are met and if not, report concerns back to the court.

- Annual Probate Seminar which provides continuing education and information for lawyers, social workers and support staff on recent developments in the Probate Field. This seminar is now in its 38th year and is expected to continue with successor probate judges.

- Veterans Assistance Program which provides help to veterans

- Senior Fair Program, an annual program, which provides seniors with a one-stop shop for senior education and services. Annually sponsored a Senior Fair to provide seniors with one-stop shopping of local senior education and services.

Judge Swift has received many honors and recognition for his work in Ohio from many community groups as well as from the Ohio Probate Judges Association and the Ohio Judicial Conference. Most recently he received the newly created Ohio Association of Probate Judges’ R.R. Denny Clunk award for service and excellence in the field of probate law.

In recognition of Judge Swift’s achievements and contributions, the National College of Probate Judges was honored to present the 2018 Treat Award for Excellence for Judge Thomas A. Swift.

Nominations for the Treat Award

The Treat Award for Excellence was established by the National College of Probate Judges (“NCPJ”) in 1978 in honor of Hon. William W. Treat, founder and President Emeritus of NCPJ. Judge Treat was appointed probate judge in Stratham, N.H., in 1958 and served until his retirement in 1983. He founded NCPJ in 1968 and served as its first President. He maintained a second residence in Naples, FL, where he died on January 10, 2010. Judge Treat was a renowned judge, author, diplomat, professor, and banker. He was a graduate of the University of Maine and Harvard Graduate School of Business Administration and received honorary doctor of law degrees from the University of Maine in 1992 and the University of New Hampshire in 2001. In 1991 he received the Silver Shingle Award, the highest alumni award presented by the Law School of Boston University.

The Treat Award for Excellence was established by the National College of Probate Judges (“NCPJ”) in 1978 to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the NCPJ. The College annually selects one individual, a resident of the United States, who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields, which contribution is of outstanding merit. The award is presented at the annual banquet during the Fall NCPJ Conference. The Award Committee consults with leading probate practitioners and judges throughout the country, including members of the American College of Trust and Estate Counsel and the Trust and Estate Division of the American Bar Association’s Real Property, Trust and Estate Law Section. Nominations usually come from probate practitioners, probate judges, and academic leaders.

Nominations for the award should be submitted no later than July 1st of each year. Nominations should be sent to:
The Treat Award
c/o National College of Probate Judges
300 Newport Avenue
Williamsburg, VA 23185
ncpj@ncsc.org
NCPJ Spring Conference in New Orleans, Louisiana

Happy New Year to all of our colleagues new and old! It was a delight to see so many of you at our fall conference in Hilton Head, South Carolina and we look forward to seeing you in New Orleans in May. Can you imagine New Orleans in the spring? Warm weather, gumbo, po-boys, muffulettas, and beignets. NCPJ has been in existence for 30 years providing knowledgeable presenters in the area of probate law. We provide two conferences a year at diverse locations giving you an opportunity to hear experts from all parts of the country. Many of our judges and speakers have developed new and innovative projects and programs in the probate arena, with many duplicated throughout the country.

We have planned a wonderful conference in New Orleans at the Omni Royal Orleans, from Tuesday, May 14 through Friday, May 17, 2019. The hotel is located in the heart of New Orleans, in walking distance to Preservation Hall and Jackson Square. This 4-star hotel is within close proximity of Bourbon Street and Café Du Monde. The City of New Orleans is known for its Mardi Gras celebration, beads and masks, French Quarter, creole food and jazz. There are a plethora of outstanding walking and swamp tours, boat cruises, cooking classes, gardens, museums and more.

Program: Hon. Anne Meister and Hon. Christine Butts have developed an outstanding educational program. Topics include, Using Technology to Monitor “Red Flags” in Probate Cases, Gary Egner presenting, as well as Uniform Guardianship, Conservatorship and other Protective Arrangements Act with Ben Orzeske and Diana Noel. Dr. Gerry Beyer addresses the topic of Digital Assets along with a timely presentation on multistate probate and guardianship issues by Mark Caldwell.

Accommodations: This elegant hotel is located in the heart of the French Quarter near the Audubon Aquarium, Bourbon Street and numerous dining and shopping options. The hotel also is located within 0.7 miles of Louis Armstrong Park and Jackson Square.

NCPJ has negotiated a guaranteed rate of $189.00 for a deluxe queen room or $199.00 for a Premier King. The rate for a double/queen (two bed) room will be $209.00 based on availability. These rates are available 3 days before and 3 days after the conference for conference attendees also based on availability. Contact the Omni Royal Orleans at 800-578-0500. This is the national Omni reservations number, so please make sure to mention the NCPJ conference. Reservations must be made no later than April 16, 2019.

Registration: The conference registration fee will be $400.00 for members if received before April 1, 2019, and $450.00 after April 1, 2019. The fee for fully retired members who do not need CLE credit is $200.00. In keeping with our recent policy, non-member Louisiana probate judges who have not previously belonged to NCPJ will be granted a one year complementary membership with their registration. The registration fee includes all conference materials, and the cost of the reception and banquet. The fee for spouses and guests will be $80.00, which includes the cost of the reception and banquet. The dress code for the conference is casual; dress code for the reception and banquet is business casual.

The Louis Armstrong New Orleans International Airport is the gateway to one of the most exciting cities in the United States and has a variety of airlines who fly in daily to that location. There is ground transportation with airport shuttles, taxicabs, buses and more. I hope you can join us for what is sure to be an informative and enjoyable gathering of probate judges and professionals from across the country in an incredible setting. Mark your calendars now to join NCPJ this spring in New Orleans, Louisiana!

Life insurance policies have been found to have a situs at any one of the following locations: (1) the location of the policy document; (2) the place where the insurer does business; or (3) any state in which the insurer can be made subject to the court’s jurisdiction. Jeffrey Schoenblum, Multistate and Multinational Estate Planning, § 16.07[C] (2009 ed.). The situs of a chose in action is the place where the debtor resides. Lancaster & Wallace v. Sexton, 245 S.W. 958, 959 (Tex. Civ. App.—Texarkana 1922, writ ref’d) (ancillary administration in Texas was proper to pursue wrongful death claim against Texas resident on behalf of Louisiana Decedent who died in Louisiana). “A valid claim for damages, based upon transactions of this character, is a chose in action; it is a debt resting upon an obligation which the law imposes on a wrongdoer to pay adequate compensation to an injured party, or to his representative. Like other debts not evidenced by some form of writing, it follows the person of the debtor, and its payment may be enforced in any forum where the debtor may be found.” Id.

2. Common Situs Rules Based on Domicile

The situs of a bank deposit is the domicile of the asset’s owner. In Re Estate of Coleman 98 N.W.2d 784 (N.D. 1959) (holding that a certificate of deposit in a loan company, which was the only property claimed to be located in North Dakota, was an intangible and had its situs at the domicile of the testatrix, which in this case was Montana, and that therefore the will of that testatrix could not be probated in North Dakota since she did not leave property within that state sufficient to give the court jurisdiction).

The situs of a claim to trust income is the domicile of the trust beneficiary. In re Howard Marshall Charitable Remainder Annuity Tr., 709 So. 2d 662, 665 (La. 1998) (situs of non-resident’s right to undistributed income from Louisiana trusts was the domicile of non-resident—not the situs of the trusts; trial court lacked jurisdiction to open estate administration). The Marshall Court relied heavily on the concept of mobilia sequuntur personam, immobilia situat (“movables follow the person, immovables their locality”).

The situs of corporate stock for purposes of administration is the: (1) domicile of the owner of the stock; (2) place of incorporation; or (3) place where the certificates are kept at the time of the owner’s death, which will normally be his domicile. Eugene F. Scoles & Peter Hay, Conflicts of Laws, §22.12 (3rd ed. 2000).

C. Common Choice of Law Rules

1. Choice of Law Rules Based on Situs

With respect to immovable property, the law of the situs: (1) determines distribution in the event of intestacy; (2) determines the validity of a will; and (3) determines the construction of a will. The Restatement (Second) Conflict of Laws §§ 236, 239, 240.

2. Choice of Law Rules Based on Domicile

With respect to movable property, the law of a person’s domicile: (1) determines distribution in the event of intestacy; (2) determines the validity of a will; and (3) determines the construction of a will. The Restatement (Second) Conflict of Laws §§ 236, 263, 264.

III. Analysis for Non-probate Assets

When it comes to multi-state probate issues, much of the historical legal analysis may be of diminishing importance due to the non-probate revolution. “The law of wills and the rules of descent no longer govern succession to most of the property of most deceased. This is because the bulk of modern wealth takes the form of contract rights rather than rights in rem — promises rather than things . . . promissory instruments — stocks, bonds, mutual funds, bank deposits, and insurance rights — are the dominant component of today’s wealth.” John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1119 (1984).

In analyzing non-probate assets, the devil is in the details. Many account agreements will contain: (1) forced heirship clauses, which may differ from the applicable state’s intestacy scheme; (2) choice of law provisions; and (3) forum selection clauses. Therefore, these account agreements must be carefully analyzed to determine the effect of any such clauses in a particular case.

A. Choice of Law

The minimum age requirements for marriage in the U.S. are woven throughout a mosaic of state laws. In most states, a couple can marry without parental consent when both parties are 18 years old or older.

The minimum age for marriage varies. In some states, if you are 16 or 17 years old parental consent is required. In some states a 14 or 15 year old can obtain a marriage license only with court approval. Some states have no minimum age set by statute, but require parental or Judicial approval. The Pew Research Center reports that the states with the highest number of child marriages are West Virginia, Texas, Nevada, Oklahoma, Arkansas, California, Tennessee and North Carolina.

State legislatures in many states are moving to raise the minimum age for marriage, in part fueled by a concern that laws allowing adolescent marriage increase the risk of sex trafficking and underage forced marriages.

According to the Tahirih Justice Center, a nonprofit advocacy group, a review of public records from 41 states found that over 200,000 minors were married between 2000 and 2015. Nationally, about 5 out of every 1000 adolescents age 15 to 17 were married as of 2014, according to U.S. Census data.

Delaware has passed legislation prohibiting marriage for anyone under 18. Virginia has passed similar laws. At least a dozen other states have passed or are considering similar legislation.

In Ohio, the marriage between a 14 year old pregnant girl and a 48 year old man sparked a media frenzy. The marriage exempted the man from prosecution for statutory rape. The result was a new law that recently went into effect that raises the minimum marriage age to 18 for both parties, but allows 17 year olds to marry if (1) they obtain juvenile court consent, (2) complete a 14 day waiting period, and, (3) the age differential is not more than four years.

Not everyone agrees with the raise the minimum marriage age movement. Some opponents of that movement argue that marriage is a fundamental right and some juveniles marry willingly and benefit from the choice. The ACLU initially opposed the legislative effort in California, asserting that it unnecessarily intruded on the right to marry.

Other opponents argue that a pregnant teen should be allowed to marry if she wants to do so. Missouri State Rep. Bill White noted “It’d be ridiculous to say they can’t get married and force children to be born out of wedlock.” Further, stricter marriage laws infringe on religious freedom and even parental rights. In 2017, Chris Christie, then governor of New Jersey, vetoed a bill that would have banned marriage for children under 18, stating that it did not “comport with the sensibilities” or “religious customs” of some residents.

The movement to raise the minimum age for marriage will continue, as will opposition to that movement. While the focus of these battles will be in various legislatures, Probate Judges should keep a wary eye on the legislative process in their state.
tained an insurance policy in Guam. The wife designated her husband as her primary beneficiary and her children as secondary beneficiaries. The policy contained a choice of law stating that the policy was “subject to the laws of the state where the application was signed.” Id. Later, the wife divorced her husband. The divorce agreement failed to mention policy. The wife died. The wife’s children argued Texas law applied and the designation in favor of husband was void. (Guam’s law was unfavorable to the children). The court ultimately upheld the choice of law clause and found that Guam, not Texas, law applied to the beneficiary designation.

B. Forum Selection

Forum selection clauses are contractual arrangements whereby parties agree in advance to submit their disputes for resolution within a particular jurisdiction. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985). The enforcement of valid forum selection clauses protects the parties’ “legitimate expectations” and furthers “the vital interests of the justice system,” such as sparing litigants the time and expense of pretrial motions to determine the proper forum for disputes. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

When construing a forum selection clause, the court’s first function is to determine whether a clause is mandatory or merely permissive. A mandatory forum selection clause requires that all litigation be conducted in a specified forum. UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 219 (5th Cir. 2009); LeBlanc v. C.R. England, Inc., 961 F.Supp.2d 819, 828 (N.D. Tex. 2013). For a forum selection clause to be considered mandatory or exclusive, the clause “must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties’ intent to make that jurisdiction exclusive.” City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004). Where the agreement contains clear language showing that jurisdiction is appropriate only in a designated forum, the clause is mandatory. Von Graffenreid v. Craig, 246 F. Supp. 2d 553, 560 (N.D. Tex. 1997).

The second function of the court is to determine whether the claims in question fall within the scope of the mandatory forum-selection clause. See Deep Water Slender Wells, Ltd. v. Shell Int’l Expl. & Prod., Inc., 234 S.W.3d 679, 687–88 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“When a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause.”). “The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.” Id. If the claims fall within the scope of the clause, the court must determine whether to enforce the clause. Id. “[A] litigant who sues

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based on a contract subjects him or herself to the contract’s terms.” In re FirstMerit Bank, 52 S.W.3d 749, 755 (Tex. 2001) (holding that non-signatory to contract was subject to arbitration provision in contract because they brought breach of contract and breach of warranty claims arising out of the contract).

IV. Full Faith and Credit

Every state must give the public acts, records, and proceedings of other states full faith and credit. U.S. Const. art. IV, § 1. Full faith and credit requires a state to give effect to another state’s judgment when the parties fully and fairly litigated the cause in the first state. See Durfee v. Duke, 375 U.S. 106, 111 (1963). However, as one scholar notes, “Even if jurisdiction [can] be obtained so as to effect the rights of nonresident parties, there is no assurance that full faith and credit [will] have to be given to any probate judgment of one state by another state.” Jeffrey Schoenblum, Multistate and Multinational Estate Planning, § 16.02 [D][2009 ed.]; see Fall v. Eastin, 215 U.S. 1 (1907). Indeed, “Constitutional jurisprudence does not appear to require any state to abide by a judgment or order of another state with respect to property within the first state’s territorial boundaries.” Id.

The United States Supreme Court has held that the full faith and credit clause does not require recognition of a finding of domicile when that finding is challenged in a second state by one who was not personally subject to the jurisdiction of the court in the state of rendition. Restatement (Second) of Conflict of Laws § 317 (1971); Riley v. New York Trust Co., 315 U.S. 343 (1942); Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Overby v. Gordon, 177 U.S. 214 (1900).

When courts with jurisdiction over property located within their territorial boundaries decide to recognize foreign judgments affecting such property, they usually do so on comity principles, not constitutional imperative. Jeffrey Schoenblum, Multistate and Multinational Estate Planning, § 16.02 [D][2009 ed.]; see Fall v. Eastin, 215 U.S. 1 (1907). Federal courts have explained the limits of the full faith and credit clause in the context of multi-state probate proceedings:

Full faith and credit means that a judgment in one state must in the other state be given the full effect it is given by the law and usage in the state of its origin . . . There is, however, no authority for the claim . . . that property of a decedent situated in one state can be required by any court to be administered by a court of another state, or that a federal court can interfere in a conflict resulting from irreconcilable findings of the two jurisdictions . . . Each state court can stand upon its findings as to domicile and apply its probate laws to the estate property situated within it. Having no jurisdiction over property outside its borders, its orders as to such property imposed no duty upon another state to recognize them on the doctrine of full faith and credit. Nelson v. Miller, 201 F.2d 277, 280 (9th Cir. 1952).

In Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917), a widow obtained letters of administration in Tennessee. The widow secured a finding that the decedent was domiciled in Tennessee. The proceeding was ex parte. The decedent owned stock in a Kentucky Corp (the stock was viewed as claim against corporation – since

(to be continued on page 10)
the situs is the domicile of the debtor). If the stock was distributable according to the laws of Tennessee, it would go entirely to the widow. If the stock was distributable according to the laws of Kentucky, it would go one half to the widow, the other half to the mother. The widow obtained an order in the Tennessee estate administration that the stock belonged to her. The widow sued the decedent’s mother (a nonresident of Tennessee) in Tennessee seeking a declaration that the widow was the sole distributee. The mother was served by publication, defaulted, and a judgment unfavorable to mother was entered. Meanwhile, the mother obtained letters of administration in Kentucky and filed suit seeking to establish her right to the stock by establishing the decedent was a resident of Kentucky. The widow responded by filing suit in Kentucky, essentially seeking to enforce her Tennessee judgment against the Kentucky company. The issues on appeal were:

1. was the Tennessee proceedings entitled to recognition in the courts of Kentucky as adversely adjudicating the mother’s asserted right to share in the personal property situated in Kentucky?
2. did the Tennessee proceedings conclusively determine the decedent’s domicile as affecting that right, when the Tennessee courts failed to acquire jurisdiction over the mother’s person or over the Kentucky corporation?

The U.S. Supreme Court said no to both questions. In their view, "... the Tennessee judgments had no effect in rem upon the Kentucky assets now in controversy. [The widow] invokes the aid of those judgments as judgments in personam. But it is now too well settled to be open to further dispute that the ‘full faith and credit’ clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.”

V. Res Judicata & Collateral Estoppel

Commonly, a party will want to enforce a probate decree in a domiciliary state with respect to persons and assets outside the jurisdiction of the domiciliary state. If a judgment or decree was entered in the first state without notice to all indispensable parties, then there is a risk that res judicata and collateral estoppel will not bar an action in another state by parties over which the first state did not obtain personal jurisdiction. Jeffrey Schoenblum, Multi-state and Multinational Estate Planning, § 16.02 [E] (2009 ed.). There are a few potential solutions, none of which offer certainty, and which include, but are not limited to:

- Personally serve all non-residents and see if they appear. Jeffrey Schoenblum, Multi-state and Multinational Estate Planning, § 16.02 [E][2] (2009 ed.) (“Having been notified as to an in rem proceeding, they may be concerned that they will be bound by the outcome of this in rem proceeding with respect to property under control of the forum. They may also be concerned that any determination as to the validity of the will or the status of persons as heirs may be used in other jurisdictions and be persuasive, especially since they had a notice and could have challenged any determination.”).

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• Personally serve all non-residents any time they can be located in state. Id. § 16.02[E][3] (citing Burnham v. Superior Court, 495 U.S. 604 (1990)).

• Attempt to establish personal jurisdiction based on purposeful availment. Id. § 16.02[E][4] (explaining it is idea to have regular contact initiated by the non-resident).

• Assert jurisdiction based on the situs of the property in dispute. Id. § 16.02[E][5]; see Shaffer v. Heitner, 433 U.S. 186, 187 (1977) (“The presence of property in a State may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation, as for example, when claims to the property itself are the source of the underlying controversy between the plaintiff and defendant, where it would be unusual for the State where the property is located not to have jurisdiction.”); Id. at 207-208 (“For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.”).

In Re Estate of Tolson provides a good illustration of the relationship between domicile and collateral estoppel – particularly, the effect of a judgment in a probate proceeding against one who, although a party to that proceeding, attempts to raise the question of domicile in another jurisdiction. In Re Tolson, 947 P.2d 1242 (1997). In that case, a Washington court found a decedent was domiciled in Washington on death. The decedent died leaving a holographic will (which was not valid under Washington law). However, a California court had already found the decedent was domiciled in California. The decedent’s son had notice and appeared through attorney. The California determination would make the decedent’s will valid in Washington as a foreign will. The will favored the decedent’s daughter and granddaughter. The daughters wanted the California determination to control over decedent’s son’s attempt to establish an intestacy in Washington.

The Washington Court of Appeals held that the son was collaterally estopped from challenging the California court’s judgment. The court found all the elements of collateral estoppel were met. The issue decided in California was identical to issue decided in Washington (domicile). There was a final judgment in first court (California). The son was represented in California proceeding and had notice and opportunity to be heard. An injustice did not arise as a result of the son’s refusal to participate in California proceeding. The Court cited Riley v. New York Trust Co., 315 U.S. 343 (1942) and recognized: “A judgment in administration proceedings by a competent court of any state will be held conclusive in other states as to the issues determined upon all persons who were subject to the jurisdiction of the original court if the judgment is conclusive upon such persons in the state of rendition.” Id. at 1249.

VI. Source of Law & Research Resources

There are several excellent authoritative treatises to consult when facing multi-state probate issues:

• Jeffrey Schoenblum, Multistate and Multinational Estate Planning, § 16.01 (2009 ed).

• RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

• RESTATEMENT (SECOND) OF JUDGMENTS (1982).

• 121 A.L.R. 1200 (Originally Published in 1939) (Diverse adjudications, actual or potential, by courts of different states, as to domicile of decedent as regards taxation, administration, or distribution of estates).

• 131 A.L.R. 1023 (Originally Published in 1941) (Decree of court of domicil respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will).
