

# CHOICE-OF-LAW AND PROPERTY

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## I. INTRODUCTION

One means through which the legal system imposes order on inchoate human experience is by giving that experience a name. Business entities reach an understanding about some aspect of their future relationship, and the law characterizes this understanding as a “contract.” A driver accidentally steers her automobile into that of another driver, and the law characterizes her actions as a “tort.” These legal classifications entail practical consequences for the parties, as the legal system may coerce them to act or to pay damages based on the name affixed to their behavior.

Attaching a name to an experience is as important in conflicts doctrine as in other areas of the law — perhaps more so. This name-fixing, which is formally styled “characterization”<sup>1</sup> in conflicts parlance, often dictates which state's substantive law will be applied to behavior that crosses state boundaries. At a time when American law attaches less and less significance to form and legalism, characterization remains an important fixture of conflicts' doctrine and has proven far more resistant to change than one might expect.<sup>2</sup>

The importance of characterization can be illustrated by a relatively straightforward probate problem. Assume that a woman dies intestate in Florida, leaving behind her husband, two children and a valuable trust account located in New York. Under Florida law, the husband ostensibly has a right to force the estate to give him a share in this trust account. The wife, however, decided long ago that

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1. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (1969) [hereinafter RESTATEMENT SECOND] (“The classification and interpretation of legal concepts and terms involve questions of characterization . . .”).

2. The RESTATEMENT SECOND illustrates this phenomenon. See RESTATEMENT SECOND, *supra* note 1. Even though the RESTATEMENT SECOND requires that courts consider various policies and principles when determining which jurisdiction's law to apply, most important issues are governed by a specific rule, which is identified by characterizing the issue in dispute. See generally Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the RESTATEMENT (SECOND)*, 24 STETSON L. REV. 653 (1995).

she wanted a marriage where love and affection — but not property — were shared. Thus, the couple entered into the marriage after executing an antenuptial agreement, whereby the marriage would have no effect on their various property interests such as the wife's trust. This agreement, as well as the trust, is fully enforceable under the laws of New York where it was executed. On the other hand, the antenuptial agreement does not satisfy the requirements of Florida law, and as a result, the husband can insist upon a share of the trust res under Florida intestacy law.

Whose law governs the estate's disposition of the trust property?

The resolution of this choice-of-law problem requires first and foremost that a name be attached to the problem. Is this problem characterized as an “intestate succession” issue, a “trust” issue, a “contract” issue, a “marital property” issue, a “personal property” issue — or some combination of these? Each of these characterizations is plausible under conflicts doctrine; and, as will be demonstrated in later discussion, the characterization chosen leads to discrete, and sometimes differing, choices of law.

This Article addresses choice-of-law issues that arise in the area of *property*, where the process of characterization assumes special importance. The focus of this Article will be on the decisional law of Florida courts, and the manner in which those courts have characterized and resolved conflicts issues pertaining to the various forms of property and property transactions.

As will be seen, there are numerous choice-of-law rules pertaining to the general subject of “property,” and much is dependent on the legal classification emphasized by the courts. The diverse conflict rules reflect the various types of property involved in a transaction, the types of parties engaged in the transaction, and the nature of the transaction itself.

This Article will suggest that, amid the confusing array of property rules, there is often an operative hierarchy whereby “conflicts” in choice-of-law rules may be resolved. All rules are not equal, and both statutory and decisional law dictate sensible solutions for most of the conflicts in property rules that occur. Where such solutions are lacking, it is important that legal characterizations be scrutinized, and if necessary set aside, so that situational justice and good sense apply to a property transaction.

## II. THE "SITUS" RULES

### A. Real Property

No choice-of-law rule has earlier vintage, or greater longevity, than the rule that issues directly pertaining to real property are governed by the law of the *situs* of the property.<sup>3</sup> The situs rule as applied in Florida dates back to the nineteenth century<sup>4</sup> and has been reaffirmed by courts throughout the twentieth century.<sup>5</sup>

As stated by the Florida Supreme Court, the law of the situs governs all issues pertaining to realty, including issues generated by the conveyance, encumbrance, or inheritance of realty.<sup>6</sup> Provided a legal issue is characterized as a "real property" issue, the law of the state where that property is situated governs, be it the law of Florida or some other state.<sup>7</sup>

The situs rule has been justified on several grounds. The situs state has a strong interest in regulating the manner in which real estate is used and developed.<sup>8</sup> There is also a compelling interest in insuring that title and ownership interests in situs land be regular and predictable. Further, the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land.<sup>9</sup> Finally, the situs state is best situated to resolve disputes and enforce legal decisions pertaining to local property, and can best do so when it implements local legal policy.<sup>10</sup>

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3. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 19.1, at 743 (2d ed. 1992).

4. See, e.g., *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899) ("[I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.").

5. See *infra* text and accompanying notes 25–50.

6. See *Walling*, 27 So. at 48; *Thomson v. Kyle*, 23 So. 12, 16 (Fla. 1897).

7. See, e.g., *Denison v. Denison*, 658 So. 2d 581, 582 (Fla. 4th Dist. Ct. App. 1995) (holding that in a Florida divorce proceeding, Michigan law determines rights in Michigan real property).

8. SCOLES & HAY, *supra* note 3, § 19.1, at 744.

9. RESTATEMENT SECOND, *supra* note 1, § 222, at 8.

10. See RESTATEMENT SECOND, *supra* note 1, § 222, topic 2, at 7; SCOLES & HAY, *supra* note 3, § 19.1, at 744.

Although these policies are not always implicated in conflicts issues characterized as “real property,” the situs rule occupies a wide field and has seldom been modified by the legislature or the courts.<sup>11</sup> As much as any choice-of-law rule, the situs rule provides an unequivocal answer to problems involving real estate whatever the transactional setting.

Application of the situs rule does merit further elaboration. First, one must consider what, precisely, is encompassed by the “law” of the situs. Many decisions appear to proceed on the assumption that the situs rule mandates application of the *substantive* law of the situs to any issue directly affecting realty within the situs. As a result, Florida law has been applied to determine such issues as the capacity of a married woman to convey or encumber real property located in Florida;<sup>12</sup> the formal execution requirements for conveying an interest in Florida realty;<sup>13</sup> and the interest acquired by one spouse in Florida realty upon the death of the other spouse intestate.<sup>14</sup> Consistent with this approach, the law of a non-Florida situs has been applied in a Florida divorce proceeding to determine the relative interest of a family member who made improvements on that realty.<sup>15</sup>

Even when courts apply the “law” of the situs, that law need not inevitably refer to the situs' particular rule regarding issues like the formal requirements for transferring realty within the forum. In conflicts doctrine, such law is termed the “internal” law of a state, in comparison to the “whole” law of a state — which includes both the internal law of the state *and* its choice-of-law rule.<sup>16</sup>

It is entirely consistent with the philosophy of the situs rule to

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11. The principal exception is found in state statutes that validate wills disposing of local real estate even though such wills do not satisfy will-execution requirements of the situs state. See *infra* text and accompanying notes 187–89.

12. See, e.g., *Thomson*, 23 So. at 12.

13. See, e.g., *Kyle v. Kyle*, 128 So. 2d 427, 429 (Fla. 2d Dist. Ct. App. 1961).

14. See, e.g., *In re Silverman*, 15 B.R. 843 (Bankr. S.D.N.Y. 1981).

15. See, e.g., *Denison v. Denison*, 658 So. 2d 581, 582–83 (Fla. 4th Dist. Ct. App. 1995).

16. See generally *SCOLES & HAY*, *supra* note 3, § 19.2, at 746. The RESTATEMENT SECOND makes this distinction clear in its particular rules governing real property, although the Restatement uses the terms “law” and “local law,” rather than “whole law” and “internal law.” See RESTATEMENT SECOND, *supra* note 1, § 222, at topic 2. “The reference is to the ‘law’ of the situs, namely to the totality of its law including its choice-of-law rules. The reference is not to the ‘local law’ of the situs, by which is meant its purely domestic rules.” *Id.* (cross references omitted).

permit the situs state to defer to the internal law of a non-situs state, when such deference does no appreciable harm to situs policy and otherwise provides a sound resolution of a conflicts issue. In essence, the situs state retains ultimate control over legal issues protecting local property but chooses to defer to non-situs law so as to achieve a more sound or just outcome. Such deference is most often justified when real estate is affected by the provisions of a contract or estate plan that attempts to dispose of properties located in different states or nations.

The best illustration is estate planning where the testator may have properties located in states other than the state where the will is to be executed, or where the testator cannot accurately predict what properties might be acquired subsequent to the will's execution. When properties are located outside the state of the will's execution, application of the situs rule can undermine the need for a single reference in determining the manner of executing a will. And where properties are acquired after execution of a will, the law of the new situs state can jeopardize an estate plan that was valid and enforceable at the time of execution.<sup>17</sup>

The Florida Legislature, like that of most states, has responded to the above-described problem by enacting "validating" statutes.<sup>18</sup> Such statutes tacitly acknowledge the situs state's power to govern the requirements for devising local realty but defer to the will execution requirements of another state in specified circumstances. Thus, Florida Statutes, sections 732.502 and 734.104 provide that a will purporting to devise real property located in Florida, but failing to satisfy the execution requirements of Florida (the situs), may nonetheless be admitted to probate provided it has been executed by a non-resident and complies with the law of the state where the will was executed.<sup>19</sup> This legislation provides a sensible modification of

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17. The historical problems posed by wills executed outside Florida that purported to transfer Florida real property are discussed in Henry A. Fenn & Edward F. Koren, *The 1974 Florida Probate Code — A Marriage of Convenience*, 27 U. FLA. L. REV. 1, 18–19 (1974). As noted by the authors, most of these problems have been remedied by the Florida Legislature's enactment of laws patterned after the Uniform Probate Code. *Id.*

18. See *infra* text and accompanying notes 187–89.

19. See FLA. STAT. §§ 732.502, 734.104 (1995); Fenn & Koren, *supra* note 17, at 18–19. As noted in later discussion, these statutes do not adopt every will executed by a non-resident, and when a will falls outside coverage of the statutes, the disposition of local real estate reverts back to situs law. See *infra* text accompanying note 188.

the situs rule so as to facilitate estate planning in the multi-state context.

Another context where the situs might wish to decline exercise of its power to regulate a transaction involving local realty is that of antenuptial and postnuptial agreements. These agreements, like wills, attempt to regulate “wholesale” the properties of spouses by limiting, *inter alia*, the claim that each may make against the properties of the other upon termination of the marriage by divorce or death.<sup>20</sup> And like wills, these agreements are usually intended to cover a person's properties generically — both existing properties and properties yet to be acquired — no matter where they are located and no matter when they are acquired.

An example of the mischief that indiscriminating application of the situs rule may produce is found in *Kyle v. Kyle*.<sup>21</sup> In *Kyle*, the Second District Court of Appeal refused to enforce an antenuptial agreement and quiet title to realty in Florida, even though the agreement was valid in the state where the spouses were domiciled and where the agreement was executed. Relying on the situs rule, the court determined that the agreement failed to comply with Florida requirements for transferring a real property interest in dower (which called for two witnesses to the agreement).<sup>22</sup> Yet, in *Kyle* the Florida realty had been acquired twenty-four years *after* execution of the antenuptial agreement.

One must question whether the parties to the agreement even conceived of their transaction as a “real property” conveyance subject to the situs rule. Indeed, the purpose of their agreement was to *preclude* any property conveyancing that might otherwise result from their entering into marriage. Accordingly, even if one generously views the antenuptial agreement as an anticipatory “property” transaction, it is both unrealistic and unfair to require that parties clairvoy the possible situs of properties to be acquired in the distant future so as to satisfy the situs-to-be's legal requirements for conveyancing.

In cases like *Kyle*, there may sometimes be other grounds for refusing to enforce nuptial agreements. It may be, for example, that one spouse has been misled into signing the agreement or that the

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20. See *infra* text accompanying notes 148–75.

21. 128 So. 2d 427 (Fla. 2d Dist. Ct. App. 1961).

22. *Id.* at 430–31.

terms of the agreement are fundamentally unfair. As will be discussed later, a situs court might be justified in applying local law to deny enforcement of an agreement that truly offends public policy, particularly when Florida residents are harmed by the agreement.<sup>23</sup> But that is altogether different from invoking the situs law *solely* because of the realty's location, without regard to whether situs law serves an important policy concern. *Kyle* is one such case.<sup>24</sup>

Another issue that arises when applying the situs rule concerns the proper characterization of a problem as one in "real property." Most transactions involving the transfer or encumbrancing of real estate are founded in contract. When such transactions result in litigation, courts must sometimes distinguish those parts of the transaction characterized as "real property" issues from those characterized as "contract" issues. Lending agreements secured by mortgages on real property provide the most common illustration.

Under conventional conflicts doctrine, a promissory note is deemed a contract whose validity is governed by the law of the state where the note is executed or is to be repaid.<sup>25</sup> Provided the parties comply with the law of the place of execution, their obligation will generally be enforceable elsewhere. When security for payment of the note consists of an encumbrance on real estate, however, the choice-of-law issue is complicated. The giving of a mortgage is, effectively, the transfer of a real property interest, and thus would appear to be governed by the situs rule.<sup>26</sup> Consequently, there is a "divisible" transaction — part "contract" and part "real property." When the place of the note's execution differs from the situs of the mortgaged property, different state laws may apply to the contract and property issues.

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23. See *infra* text accompanying notes 156–75.

24. One district court has interpreted *Kyle* in more limited fashion. In *In re Estate of Santos*, 648 So. 2d 277, 280–81 n.4 (Fla. 4th Dist. Ct. App. 1995), the court opined that the husband in *Kyle* could have enforced the prenuptial agreement to quiet title to Florida realty by seeking an order compelling the wife to transfer the realty in accordance with the conveyancing requirements of Florida. The *Santos* court thus interpreted *Kyle* as a case where the husband sought an improper remedy directly against Florida real estate. Although the *Santos* court's rationalization of *Kyle* is consistent with Florida precedent, nothing in the *Kyle* decision indicates that the court extended this remedial option to the plaintiff. See *infra* notes 171–73 and accompanying text. Rather, taken at face value, *Kyle* appears to be a reflexive application of the situs rule.

25. See, e.g., *Connor v. Elliott*, 85 So. 164 (Fla. 1920); *Thomson v. Kyle*, 23 So. 12 (Fla. 1897).

26. See, e.g., *Connor*, 85 So. at 164; *Thomson*, 23 So. at 12.

Illustrative is the case of *Thomson v. Kyle*.<sup>27</sup> In *Thomson*, the Florida Supreme Court considered whether the Florida realty owned by a married woman, who had co-signed a promissory note with her husband in Alabama and who had given as security a mortgage on her Florida property, would be subject to foreclosure to secure payment of the debt.<sup>28</sup> The court first recognized that, under the law of Alabama (where the note was executed), the wife lacked capacity to incur the contractual debt. Since the validity of the wife's note was governed by the law of the state of execution, the wife could not be held personally liable under the note.<sup>29</sup>

That was not, however, an end to the dispute. The husband had validly indebted himself by executing the note in Alabama,<sup>30</sup> and the wife's mortgage covered his debt as well as hers. Thus, the determinative question was whether the mortgage on Florida real estate was valid as security for the husband's admittedly valid debt.<sup>31</sup> According to the Florida Supreme Court, the mortgage's validity was a "real property" issue governed by the law of the situs — Florida. And under Florida law, the wife could validly encumber her real property to secure payment of her husband's debt, even though the mortgage, like the note, was executed and delivered in Alabama!<sup>32</sup>

The *Thomson* decision was reaffirmed by the Florida Supreme Court in a subsequent decision, and its recognition of mixed contract/realty transactions remains good law.<sup>33</sup> In conflicts language,

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27. 23 So. 12 (Fla. 1897).

28. *Id.* at 13–14.

29. *See id.* at 16.

30. The validity of his debt obligation would be independent of the debt obligation of his wife.

31. *Thomson*, 23 So. at 16–17. The contractual obligation of the husband was also at issue in *Thomson*. In particular, the husband argued that the interest rate established by the note was in violation of Alabama's usury laws. *Id.* at 13. The court concluded that the legality of the interest rate would be determined by Alabama law, since the note was executed and payable in that state. *Id.* at 16–17. Thus, Florida law governed the wife's obligation under the mortgage (the "real property" issue), while Alabama law governed her husband's contractual obligation under the note secured by the mortgage. *Id.*

32. *See id.*

33. *See Connor v. Elliott*, 85 So. 164 (Fla. 1920), *cert. dismissed*, 254 U.S. 665 (1920). The federal court decision in *Van Wyck v. Read*, 43 F. 716 (C.C.N.D. Fla. 1890), which predates *Thomson*, appears inconsistent with the rule cited in the text. In *Van Wyck*, the court stated that "[a] mortgagee of land in Florida has no legal estate in the land." *Id.* at 718. Although this statement was not pivotal to the court's holding, it does appear to contradict the Florida Supreme Court's view that a mortgage is a "real proper-

such decisions illustrate the phenomenon of “dépeçage,” by which the different issues in a single legal dispute may be governed by the laws of different states.<sup>34</sup>

Unfortunately, subsequent case law is somewhat unclear about what transactional issues will be characterized as “real property” issues governed by the situs rule. In *In re Estate of Siegel*,<sup>35</sup> for example, the lower appellate court was asked to determine whether a note and related mortgage of real estate located in New York were “immovable” property (i.e., real property) governed by situs law, or “movable” property governed by the law of the decedent’s domicile (Florida). The court concluded that both the note and mortgage were “movables” and consequently applied Florida law to determine the relative interests of the deceased’s heirs.<sup>36</sup> Although the *Siegel* court properly characterized the most critical piece of property — the note — as non-realty,<sup>37</sup> it is difficult to reconcile the court’s characterization of the mortgage with prior precedent like *Thomson*.<sup>38</sup>

A similar issue arose in *Bethell v. Peace*, where the court was asked to enforce a contract for the sale of real estate located in the Bahamas.<sup>39</sup> Although the plaintiff argued that the enforceability of the contract was properly characterized as a “real property” issue governed by situs law, the defendants contended that the enforceability of the contract, per se, presented a “contract” issue governed by the place of execution and domicile of the parties — Florida.<sup>40</sup> The court in *Bethell* suggested that it found the contractual characterization persuasive, while acknowledging support for the real property characterization.<sup>41</sup> The court ultimately avoided a resolu-

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ty” transaction governed by the situs rule. See *supra* text accompanying note 31–32.

34. See generally ROBERT A. SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE* 16-18 (1989). “All modern approaches to choice of law recognize that the laws of different states may be applied on different issues arising in the same case. *Dépeçage* is the French term for this phenomenon.” *Id.* at 16.

35. 350 So. 2d 89 (Fla. 4th Dist. Ct. App. 1977).

36. *Id.* at 91.

37. *Id.* at 90–91.

38. The court made no attempt to reconcile its decision with *Connor* or *Kyle* and, in fact, did not cite those decisions in its opinion.

39. *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971).

40. *Id.* at 497.

41. *Id.* The court observed that “[w]hen dealing with contracts to sell land, rather than actual conveyances, courts have sometimes applied the substantive law that would be applied under the conflicts rule dealing with contracts in general.” *Id.* The court did not cite any Florida precedent on this point, however. In fact, its sole reference to

tion of the characterization issue based on the plaintiff's failure to prove the content of situs law.<sup>42</sup>

By comparison, one federal court applying Florida conflicts doctrine has specifically ruled that a contract to convey Florida realty is governed by the situs rule. In *Xanadu of Cocoa Beach, Inc. v. Zetley*, the court applied Florida law to determine the validity of a contract to convey Florida realty that was executed in Wisconsin.<sup>43</sup> In so ruling, the court failed to acknowledge any distinction between a contract *personally obligating* a party to convey real estate, and a contract purporting to actually *convey* the real estate.

Although a contract obligating an owner to transfer real estate might be treated as a "contractual" matter — since the contract does not directly convey realty, but only promises to convey<sup>44</sup> — the *Restatement Second of Conflicts of Laws* tends to support the "real property" characterization.<sup>45</sup> Certainly parties should *plan* their transactions relating to real estate as if the situs rule will govern their rights and obligations so as to avoid surprise. This is particularly the case when transactional documents purport to actually convey, by their operation, interests in real estate. For example, in *Girard v. Tremblay*, the lower appellate court applied situs law (Florida) in refusing to enforce the terms of a trust agreement executed in Canada that attempted to place Florida real estate into the trust.<sup>46</sup> Because the trust agreement failed to satisfy Florida's conveyancing requirements for real property, the court refused to recognize the plaintiff's claimed interest under the trust.<sup>47</sup>

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Florida law was to the contrary rule in *Kyle v. Kyle. Id.*

42. *Id.* Under conventional conflicts doctrine, when a party relying on non-forum law fails to prove the content of such law, the forum will usually presume that non-forum law is identical to forum law. See *Bethell*, 441 F.2d at 495; *Gustafson v. Jensen*, 515 So. 2d 1298, 1300 (Fla. 3d Dist. Ct. App. 1987).

43. *Xanadu of Cocoa Beach, Inc. v. Zetley*, 822 F.2d 982, 985 (11th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

44. See generally *SCOLES & HAY*, *supra* note 3, § 19.3, at 747–51.

45. See *RESTATEMENT SECOND*, *supra* note 1, § 189 (stating that law of situs state presumptively governs contracts to convey real estate). This view also seems to be supported by dictum in *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899), where the court states that situs law governs both "contracts and conveyances" pertaining to real estate.

46. *Girard v. Tremblay*, 384 So. 2d 39, 40 (Fla. 3d Dist. Ct. App. 1980).

47. *Id.* See also *Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1121 (11th Cir. 1990) (stating that Florida law governs insurance contracts executed in California which insure real property in Florida).

The characterization process can sometimes lead to odd, circuitous conclusions. In *In re Estate of Binkow*, the widow of a deceased Floridian sued to obtain a dower interest in a partnership consisting largely of real property in Michigan and Maryland.<sup>48</sup> The critical issue was whether the wife was entitled to such a dower interest, which in turn depended on whether the partnership was “real property,” and thus governed by the laws of Michigan and Maryland (which recognized no dower), or “personal property,” and thus governed by the laws of Florida.<sup>49</sup>

The court concluded that the law of the situs of the partnership property (Michigan and Maryland) would be applied to determine the characterization of the partnership. These states, the court found, characterized a partnership interest as “personal” property.<sup>50</sup> As a result of this characterization under non-Florida law, the partnership property *would* pass under Florida probate law since Florida was the decedent's domicile!<sup>51</sup>

*Binkow* is somewhat unusual, since the forum court (in *Binkow*, a Florida court) normally characterizes in accordance with forum law.<sup>52</sup> However, the court's preliminary deference to situs law in characterizing the property seems appropriate, for if the states of Michigan and Maryland had viewed the partnership interest as real estate, and the Florida court had nonetheless disposed of the partnership interest as personal property, the widow might have encountered subsequent difficulties if and when she attempted to enforce her rights against the partnership properties.<sup>53</sup>

A question arises: If parties are planning a transaction that might affect real property interests located in other states, can they avoid the situs rule by including a *choice-of-law* provision that selects the law of a non-situs state? There is no direct Florida precedent addressing this issue. In other transactional contexts, however,

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48. *In re Estate of Binkow*, 120 So. 2d 15 (Fla. 3d Dist. Ct. App. 1960).

49. *See id.* at 16–19.

50. *Id.* at 17.

51. This succession rule is discussed later in the text. *See infra* text accompanying notes 184–85.

52. *See* RESTATEMENT SECOND, *supra* note 1, § 7(2) (“The classification . . . of Conflict of Laws concepts and terms [is] determined in accordance with the law of the forum . . .”).

53. *See infra* text accompanying notes 57–58 for a discussion of a situs court's power to refuse to recognize a judgment from another court that affects realty in the situs.

the Supreme Court of Florida has given strong endorsement to choice-of-law clauses in commercial transactions.<sup>54</sup> Provided the law chosen by the parties does not offend "fundamental" public policy of the State of Florida, such clauses are typically enforced. This is consistent with the approach taken by the *Restatement Second of Conflict of Laws*, which generally recognizes choice-of-law provisions even in contracts to transfer real estate.<sup>55</sup>

It is best, of course, to anticipate situs law and attempt to comply with it. However, where this is not plausible (for example, when the transaction addresses after-acquired properties whose locale cannot be known), the parties would be wise to include a choice-of-law provision. If the chosen law does not seriously undermine a situs policy pertaining to transactions in local real estate, the parties might be able to persuade a situs court to defer to the chosen state's law. In attempting to persuade situs courts, however, the parties should "mind their manners" by making clear to the situs court that they are not attempting to displace the situs' regulatory authority, but instead are asking that the situs employ the "whole" law approach<sup>56</sup> and voluntarily defer to the parties' choice.

The situs rule has a historical counterpart in jurisdictional doctrine. The traditional rule, which has been approved by the United States Supreme Court, is that situs courts have exclusive jurisdiction to render orders affecting local land and that the orders of non-situs courts are *not* entitled to full faith and credit insofar as they purport to directly affect situs real estate.<sup>57</sup> This jurisdictional doctrine is manifest most often in probate court decisions, where situs courts have jealously exercised their authority to make independent

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54. See, e.g., *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).

55. See generally *RESTATEMENT SECOND*, *supra* note 1, §§ 188, 189. A different issue may be presented when the relief sought in litigation necessitates that a court involve itself with situs property. In *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111, 112 (Fla. 5th Dist. Ct. App. 1988), the Fifth District Court of Appeal affirmed the jurisdiction of the courts in Florida to adjudicate a dispute concerning construction bonds and mechanic lien waivers pertaining to a construction project in Florida, even though the parties had stipulated that New York law would apply to the bonds and that all litigation would occur in New York. The court observed that Florida, as the situs, was an appropriate forum even though the proceeding was not, technically, an *in rem* proceeding. *Id.*

56. See *supra* text accompanying note 16.

57. See *Fall v. Eastin*, 215 U.S. 1 (1909). See generally *SCOLES & HAY*, *supra* note 3, § 24.10, at 965-67.

determinations about the disposition of local realty notwithstanding the orders of other state's courts.<sup>58</sup> For this reason, all states have enacted statutes providing for ancillary proceedings to dispose of local realty owned by non-residents whose estates are being principally probated in the state of residence.<sup>59</sup>

The rule that non-situs courts lack jurisdiction to directly affect land located elsewhere is not so monolithic as it may sound. While it is true that a non-situs court may not transfer or quiet title to foreign real estate, that does not render the non-situs court powerless to indirectly affect foreign land by issuing orders directed to persons subject to the court's *personal* jurisdiction. There is extensive case support for the power of courts to compel persons to take action that will, effectively, result in the transfer of lands located outside the court's jurisdiction.<sup>60</sup>

As observed by the Florida Supreme Court in *Le Mire v. Galloway*, a court may exercise its *in personam* power over litigants before it so as to require that they convey property outside the forum.<sup>61</sup> A non-situs court may exercise its contempt power, for example, to compel litigants to execute deeds transferring property located outside the forum.<sup>62</sup> Such orders may be issued even though the law applicable to the order is that of the situs state, and even though the transferring party must comply with conveyancing requirements of the situs state.

The recent case of *Denison v. Denison* affirms this jurisdictional power, even though a casual view of the case facts appears initially to suggest otherwise.<sup>63</sup> In *Denison*, the son of parents involved in a divorce proceeding in Florida asked for a declaratory judgment recognizing his interest in certain real estate located in Michigan, upon which the son had made substantial improvements.<sup>64</sup> The original trial court had ordered the father to either pay the son for the value

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58. See, e.g., *Trotter v. Van Pelt*, 198 So. 215 (Fla. 1940); see also *Colburn v. Highland Realty Co.*, 153 So. 2d 731, 735 (Fla. 2d Dist. Ct. App. 1963) (delineating that a Michigan court could not preclude a party from litigating claims in real property located in Florida).

59. See *infra* text accompanying notes 182–83.

60. See, e.g., *Denison v. Denison*, 658 So. 2d 581 (Fla. 4th Dist. Ct. App. 1995), *rev. denied*, 670 So. 2d 937 (Fla. 1996).

61. *Le Mire v. Galloway*, 177 So. 283, 286 (Fla. 1937).

62. See generally *SCOLES & HAY*, *supra* note 3, § 24.10, at 965–66.

63. *Denison*, 658 So. 2d at 581.

64. *Id.* at 581–82.

of the improvements, or convey a portion of the realty to the son — both remedies that fell within the court's *in personam* authority over the father.<sup>65</sup> The appellate court reversed the trial court, however, and declined to exercise jurisdiction over the declaratory action.<sup>66</sup>

The court first observed (correctly) that Michigan law, that of the situs, controlled as to the rights acquired by the son based on his improvements to Michigan realty.<sup>67</sup> According to that law, the son could not acquire title by estoppel as a result of his improvements to the land. Instead, the son was required to file a claim against his father and, if the claim went unpaid, title would transfer to the son based on a theory of abandonment. Alternatively, the father could elect to abandon the realty by filing an election with the proper Michigan court and could lien the abandoned property to the extent of its unimproved value.<sup>68</sup>

The Florida appellate court found the enforcement of situs law resulted in direct consequences for the Michigan realty — either abandonment or lien. Because the Florida court could not apply situs law without directly affecting situs real estate, the court declined to exercise jurisdiction over the son's claim. Contrary to the son's allegation, the court concluded that under Michigan law it could not simply order the father to convey the land to the son, and thereby avoid issuing an order directly affecting title to the Michigan property.

The decision in *Denison* may or may not correctly summarize the court's enforcement options under Michigan law. But at least as interpreted by the court, the situs law precluded the court from giving purely “personal” relief against the father.<sup>69</sup> Thus, *Denison* does not contradict the view that courts may issue *in personam* relief that indirectly affects non-forum real estate; rather, *Denison* presents a somewhat anomalous case where the rights acquired under situs law necessitated that relief be directed against situs property. Had situs law recognized the son's right to simply compel transfer of the realty by his father, the outcome in *Denison* would probably have been different.

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65. *Id.* at 582.

66. *Id.* at 583.

67. *Id.* at 582.

68. *Denison*, 658 So. 2d at 582–83.

69. *See id.*

In summary, the situs rule pervades conflicts doctrine. Most issues regarding real property will be governed by the law of the property's location, and the principal exception to this will occur when the situs state chooses, on occasion, to defer to the law of another state. To date, there is insufficient precedent to indicate whether parties to a transaction affecting real estate can displace the situs rule by including a choice-of-law provision. Consequently, the only prudent strategy for attorneys and clients is to inform themselves of the law of any state where affected realty may be located and attempt to satisfy that state's legal requirements. And where realty is subsequently acquired in a state beyond the contemplation of the original transactional plan, the client must consider whether situs law may undo part of the plan and, if so, what, if anything, can be done to rehabilitate the plan.

### B. Personal Property

The situs rule is not limited to real property.<sup>70</sup> Traditionally, it is also applicable to personal property, which is variously described by synonyms like personalty, movables and chattels.

As applied to personalty, the situs rule generates more issues and greater confusion than when it is applied to realty. This results from many factors. First, the situs of personalty may change in time (thus the synonym "movables") resulting in several situs and several potentially applicable laws. Second, the situs of certain forms of personalty cannot be so easily located as real estate — debts and other intangibles being a classic example. Third, the situs rule for personal property is often trumped by other choice-of-law rules. In this regard, the situs rule for personalty is distinctly inferior to the situs rule for realty, which most always takes precedence over competing conflicts rules.

The first point concerns the temporal dimension of the situs rule as applied to personalty. When courts are asked to apply the situs rule to personal property that has crossed state lines, they must answer the important question: situs at *what time*? The answer is usually the situs at the time of the act that gives rise to the legal

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70. See, e.g., *Van Wyck v. Read*, 43 F. 716, 718 (C.C.N.D. Fla. 1890); *In re Jacksonville Gas Co.*, 46 F. Supp. 852, 858 (S.D. Fla. 1942); *Walters & Walker v. Whitlock*, 9 Fla. 86, 96 (1860).

claim. For example, assume that a valuable musical instrument is stolen in a burglary occurring in New Jersey. Assume further that the thief pawns the instrument at a pawn shop in New York, and the pawnshop owner subsequently sells the instrument to a purchaser in Florida. Whose law determines whether the innocent pawnshop owner in New York or the innocent purchaser in Florida acquires good title if the original owner in New Jersey traces the purloined instrument through its course of commerce? Applying the situs rule, the interest acquired by the pawnshop owner would be governed by the situs of the instrument at the time of its transfer to him (New York). The interest of the Floridian, by comparison, would be governed by the law of the situs of the instrument when transfer was effected to him (which may be New York or Florida, depending on how "transfer" is defined).<sup>71</sup>

Thus, there may be multiple situs and different laws applicable to the various transactions affecting the musical instrument. It may be necessary in a complex problem involving personal property to disentangle the transactions so as to identify the time at which the "situs" is to be determined. A related concept that is applicable to movable property is that of "tracing," a doctrine that will be explored in later discussion.<sup>72</sup> The tracing doctrine recognizes that, even when property is moved into a new state and subjected to new dealings, the situs court may choose to "trace" the property to an earlier source (e.g., a transaction in another state) and recognize the rights of person previously acquired under another state's law.<sup>73</sup> The point to be made for purposes of present discussion is that, under the situs rule, the most recent situs state will not inevitably apply its law to the exclusion of interests acquired in an earlier situs state.<sup>74</sup>

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71. Case analogies to this factual hypothetical are found in *Brown & Root, Inc. v. Ring Power Corp.*, 450 So. 2d 1245 (Fla. 5th Dist. Ct. App. 1984), and *Anderson Contracting Co. v. Zurich Ins. Co.*, 448 So. 2d 37 (Fla. 1st Dist. Ct. App. 1984).

72. See *infra* notes 143–45 and accompanying text.

73. For example, in *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899), the court took care to point out that the case did not involve the rights of a married woman in property that had been acquired in Alabama and brought into the State of Florida. Although the court did not use contemporary terminology, its reference was to the concept now termed "tracing."

74. This concept is akin to the principle that the situs of real property need not always apply its law and ignore the legal policies of other states. See *supra* text accompanying notes 16–24. In the case of personal property and tracing, the situs court will

A second point to be made about situs law as applied to personal property is that the “situs” of property has traditionally been located in defiance of common sense and experience. A classic example is the medieval precept of “*mobilia sequuntur personam*,” that is, personal property follows the location of the person, or his “domicile.” Although this precept has been cited by Florida courts on occasion,<sup>75</sup> there is no contemporary precedent where it has actually been applied to tangible property or chattels. The notion that tangible property can be located at the situs of the owner, or his domicile, is clearly archaic.<sup>76</sup> Moreover, if taken seriously, this precept would undermine the more salutary use of the situs rule, whereby personal property is governed by its *physical* location at the time of a transaction. A truly physical situs rule permits parties to rely on the law of the market where they actually transfer property, which is both a convenient reference and the more likely reference of the parties, assuming some constructive intent can be imputed to them. The precept of “*mobilia sequuntur personam*” lives on in form, however, and must be considered when addressing conflicts issues involving personal property.

A more significant problem in applying the situs rule occurs when personal property is “intangible.” Such intangible property interests might include debts, contract rights, stock, or security interests in tangible property. Obviously, intangible property lacks a physical “situs” and thus offers no intuitively clear reference point.

There is little conflicts law in Florida concerning the situs of intangible property. Nineteenth century precedent relies on the “property follows the owner” maxim,<sup>77</sup> which may retain some sense in the context of intangibles.<sup>78</sup> As applied to debts, however, this

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often defer to the law of an earlier situs state so as to render justice to the parties. *See, e.g., Brown & Root*, 450 So. 2d at 1245.

75. *See, e.g., State ex rel. United States Sugar Corp. v. Gay*, 46 So. 2d 165, 167 (Fla. 1950); *In re Estate of Siegel*, 350 So. 2d 89, 91 (Fla. 4th Dist. Ct. App. 1977); *see also Walters & Walker*, 9 Fla. at 95.

76. *See* SCOLES & HAY, *supra* note 3, § 19.11, at 763–74. The United States Supreme Court has reigned in the domicile rule in the jurisdictional context and expressed misgivings about the rule's continued utility. For instance, in *Hanson v. Denckla*, the Court refused to uphold a Florida court's assertion of *in rem* jurisdiction over a trust simply because the settlor had relocated to Florida, when the trust res (consisting of securities) was located in another state. 357 U.S. 235, 248–49 (1958).

77. *See, e.g., Walters & Walker*, 9 Fla. at 95–96.

78. *See, e.g., Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 611 (Fla. 1953), *cert. denied*, 348 U.S. 816 (1954).

maxim seems inconsistent with the equally-fictitious maxim that a debt remains with the debtor and may be attached by proceeding against the debtor through exercise of quasi-in-rem jurisdiction.<sup>79</sup> Which is it: Does the property interest in a debt follow the owner, or can it be seized judicially in the person of the debtor?

Fortunately, such intractable issues seem largely to have disappeared from the scene of conflicts litigation. This disappearance may be explained by examining a third aspect of the situs rule as applied to personal property.

Many of the issues that might theoretically arise in disputes over personal property have been mooted by other developments within the conflicts of law. For one thing, issues pertaining to personal property are often addressed by contracts (oral, written or implied), which transmute “property” issues into contractual ones governed by a separate body of choice-of-law principles or by the law chosen by the parties in their agreement.<sup>80</sup> When parties have ex-

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79. See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980); *Harris v. Balk*, 198 U.S. 215 (1905). The problem of inconsistent choice-of-law references is illustrated by *Walters & Walker*, 9 Fla. 86 (1860). In that case, the court attempted to reconcile the law of South Carolina, where the creditor was domiciled and hence his personal property was “located,” with Florida law, where the debtor was domiciled. *Id.* at 96–97. In an action in Florida based on attachment of the debt owed the creditor (who had attempted to assign his debt to a third party), the plaintiff argued that Florida law should govern the validity of the debt and its assignment. *Id.* at 95. The court was ultimately able to resolve the problem based on its conclusion that the law of both Florida and South Carolina permitted the debt assignment. *Id.* at 101–02. But the court's citation of multiple choice-of-law rules, and the apparent inconsistency in those rules as applied to the case facts, illustrates the confusion inherent in the law of intangible personal property.

80. See generally Michael Finch & Lora Smeltzly, *The Restatement Second and Conflict of Laws: Extending the Bishop Approach to Problems in Contract*, 16 STETSON L. REV. 261 (1987). The decision of *Walters & Walker*, see *supra* note 79, exemplifies the interaction of contract and property rules. That case involved the assignment (a “contract”) of personal property and debts (“property” transactions), and the court cited both contract and property rules in attempting to reach its conclusion. See *Walters & Walker*, 9 Fla. at 95–105.

A questionable characterization occurred in *Brown & Root*, 450 So. 2d at 1249. In that case, the court had to determine ownership in stolen property that had been purloined in Texas and resold to an innocent purchaser in Louisiana. *Id.* at 1246. In initially determining the applicable law, the court looked to Louisiana based on the execution of a contract of sale in that state. *Id.* Since the dispute concerned the relative rights of the original innocent owner and the subsequent innocent purchaser — who had no business dealings — it seems the issue should have been resolved as a “property” issue, not a contract one. However, since Louisiana was both the place of the contract and the situs of the transfer of property, the result would not have been affected by a change in characterization. *Id.* at 1247–48.

pressly or constructively addressed their relative rights and interests in property by contract, true “property” issues are seldom presented. Thus, the contemporary domain of personal property issues is often located in disputes where there is no agreement — express or implied — governing the rights of litigants.<sup>81</sup>

Second, many potential conflicts issues pertaining to personal property have been addressed by uniform legislation, in particular Article 9 of the Uniform Commercial Code (hereinafter UCC). The UCC governs a large number of potential conflicts in law by either creating “uniform” property law among jurisdictions (thus eliminating the potential conflict) or by imposing uniform choice-of-law rules to regulate interstate transactions in property. Interestingly, most of the choice-of-law issues addressed by the UCC refer to the situs of property<sup>82</sup> or, in the case of accounts and general intangibles, the location of the debtor (not that of the owner of the debt, as called for by the traditional choice-of-law rule).<sup>83</sup> In any event, UCC provisions have greatly reduced the incidence of traditional choice-of-law disputes in transactions regulated by the UCC.<sup>84</sup>

Finally, there are a variety of conflicts rules addressed to special categories of legal problems that effectively preempt more general “personal property” rules. These rules, which will be addressed in subsequent discussion, govern special problems such as those pertaining to marital property<sup>85</sup> and estate property.<sup>86</sup> In operation, these specialty rules reduce the importance of the generic situs rule insofar as it applies to most forms of personal property.<sup>87</sup>

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81. As discussed later, the two primary settings, where there is dispute over personal property and where there is frequently no contract governing the dispute, are divorce and probate proceedings. *See infra* text accompanying notes 126–47. As will be seen, however, in the context of divorce and probate there are still other conflicts rules that supersede the application of the situs rule.

82. *See, e.g.*, FLA. STAT. § 679.102(1)(a) (1995) (stating that situs law generally governs security interests in collateral). Although the UCC recognizes the rights of secured parties that vest in the situs state of collateral, such parties must act expeditiously to preserve their rights when the situs changes. *See, e.g.*, FLA. STAT. § 679.103(3) (1995); *In re Unger*, 4 B.R. 224 (Bankr. S.D. Fla. 1980).

83. *See, e.g.*, FLA. STAT. § 679.103(3) (1995).

84. One significant Code provision is its recognition and enforcement of choice-of-law clauses. *See* FLA. STAT. § 671.105(1) (1995). The Florida Supreme Court has demonstrated a consistent willingness to enforce such clauses, both within and without the context of the UCC. *See generally* Finch & Smeltzly, *supra* note 80.

85. *See infra* notes 114–35 and accompanying text.

86. *See infra* notes 136–47 and accompanying text.

87. Even where the property situs rule might seem applicable, Florida courts can

Before leaving discussion of the situs rule and personal property, a special comment is appropriate concerning *trust* arrangements for the control and disposition of property. There is no unequivocal pronouncement by the Florida Supreme Court as to which state's law governs a trust. Several possible references for resolving choice-of-law issues exist: courts could apply the law of the *situs* of the trust res; the law of the state where the trust documents were *executed* (a version of the rule of "lex loci contractus"); the law of the state where the settlor is *domiciled*; the law of the state where the *trustee* is domiciled; or the law of that state which the parties to the trust agreement expressly, or impliedly, *chose*.

As a general matter, it is widely agreed that courts should, and will, apply a "rule of validity" whereby they will select as governing law any law that will sustain the validity of a trust.<sup>88</sup> This typically results in the enforcement of choice-of-law provisions in the trust agreement, which a conscientious attorney should always include in a trust that has multi-state connections. Courts of other jurisdictions have strongly endorsed such choice-of-law provisions.<sup>89</sup> Although Florida case law addressing choice-of-law provisions in trusts is sparse,<sup>90</sup> the Florida Supreme Court's consistent validation of choice-of-law provisions in business contracts bodes well for such provisions in trusts.<sup>91</sup>

In the event that a trust agreement improvidently omits a choice-of-law provision, matters become less clear. There is appreciable federal court precedent (purporting to apply Florida choice-of-law doctrine) for the proposition that *situs* law governs the validity of a trust,<sup>92</sup> as well as one nineteenth century precedent of the Flor-

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always refuse to enforce another state's law based on Florida "public policy." This has occurred, for example, where situs law is anomalous and contrary to both Florida law and the law of most other states. *See, e.g.,* Brown & Root, Inc. v. Ring Power Corp., 450 So. 2d 1245 (Fla. 5th Dist. Ct. App. 1984); Anderson Contracting Co. v. Zurich Ins. Co., 448 So. 2d 37 (Fla. 1st Dist. Ct. App. 1984). In both cited cases, the courts refused to apply Louisiana (*situs*) law to determine rights in stolen property subsequently acquired by an innocent purchaser, based on the fact that Louisiana was the sole state denying the rights of the original owner.

88. *See* SCOLES & HAY, *supra* note 3, § 21.1, at 831; SEDLER, *supra* note 34, at 93.

89. *See id.*

90. *See* Florida First Nat'l Bank of Jacksonville v. Bagley, 5 Fla. Supp. 2d 89 (Fla. Cir. Ct. 1982) (upholding choice-of-law provision in trust agreement).

91. *See supra* note 80 and accompanying text.

92. *See, e.g.,* Sax v. Sax, 294 F.2d 133, 137 (5th Cir. 1961); Warner v. Florida Bank & Trust Co., 160 F.2d 766, 771 (5th Cir. 1947).

ida Supreme Court.<sup>93</sup> The problem, however, is that the situs of the trust property usually overlaps with other choice-of-law references like the place of execution and the settlor's domicile. These multiple references preclude one from reaching any firm conclusion concerning the importance of the situs of trust property, or any other reference for that matter.<sup>94</sup>

One famous Florida court precedent concerning trusts merits mention. In *Hanson v. Denckla*,<sup>95</sup> a classic civil procedure case, the Florida Supreme Court concluded that Florida law should apply to determine the validity of the republication of a trust agreement, based on the fact that the settlor effected that republication while domiciled in Florida. The court applied Florida law even though the situs of the trust res and trustee had remained in Delaware since the trust's inception. On review, the United States Supreme Court declined to consider whether this choice-of-law analysis was constitutionally sound, but it did reject the exercise of jurisdiction by a Florida court based solely on the settlor's domicile.<sup>96</sup> Thus, *Hanson* does not ultimately shed much light on the issue of which law governs a trust.

Accordingly, one is left with uncertainty concerning choice-of-law and trust agreements.<sup>97</sup> Again, the best advice is to foreclose an uncertain judicial analysis of the choice-of-law issue by selecting the applicable law in the trust agreement. In the absence of such a contractual provision, the next best strategy may be to argue that the parties "constructively" expressed their intent by referring to factors such as the situs of the trust res or the place of administration.

Some indication of the proper resolution of the trust issue may

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93. See *Maiben v. Bobe*, 6 Fla. 381 (1855).

94. One conflicts scholar recommends a dual strategy for the attorney seeking to create a trust in another jurisdiction — including a choice-of-law provision referring to the desired state — as well as transferring the trust res to that state. See SEDLER, *supra* note 34, at 93.

95. 100 So. 2d 378 (Fla. 1956), *rev'd*, 357 U.S. 235 (1958).

96. See *Hanson*, 357 U.S. at 254 n.27. The Court also cast aspersions on the common-law doctrine, previously referred to in this Article, see *supra* text accompanying note 75, whereby the situs of personal property is said to follow the domicile of the owner. *Hanson*, 357 U.S. at 248–49.

97. The multiplicity of trust rules is exacerbated by the generic defense of "public policy," whereby a Florida court could displace choice-of-law rules altogether and apply Florida law based on its inconsistency with the laws of other states. See, e.g., *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766, 772 (5th Cir. 1947) (considering but rejecting the public policy argument).

be gleaned from Florida Statutes governing joint bank accounts and “Totten” trusts. For decades, Florida courts grappled with legal issues generated by such arrangements, primarily legal issues pertaining to ownership interests.<sup>98</sup> These banking transactions raised questions as to whether they should be treated as inter vivos or testamentary gifts and, depending on the classification of the transaction, what legal formalities were required to properly consummate the transaction. In the choice-of-law context, these issues were exacerbated by the fact that the account custodian — quite often a savings and loan association or bank in Florida — was subject not only to inconsistent claims but was also potentially subject to differing state laws. A common setting for this problem was estate litigation, where traditional rules call for application of the law of the “decendent's domicile” to determine disposition of personal property,<sup>99</sup> rather than the law of the situs.<sup>100</sup>

Such problems eventually prompted the Florida Legislature to codify a choice-of-law rule — something legislatures seldom do. Currently, Florida Statutes, section 655.55(1) provides:

The law of this state, excluding its law regarding comity and conflict of laws, [shall govern] all aspects, including without limitation the validity and effect, of any deposit account in a branch or office in this state of a [financial] institution . . . regardless of the citizenship, residence, location, or domicile of any other party to the contract or agreement governing such deposit account, and regardless of any provision of any law of the jurisdiction of the residence, location, or domicile of such other party, whether or not such deposit account bears any other relation to this state . . . .<sup>101</sup>

This codification of a “situs” rule is the most forceful statement on conflicts doctrine that one can find in the Florida Statutes.<sup>102</sup>

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98. A brief history of case and statutory law on this subject is found in *In re Estate of Combee*, 601 So. 2d 1165 (Fla. 1992).

99. See *infra* text accompanying note 178.

100. See, e.g., *Seng v. Corns*, 58 So. 2d 686 (Fla. 1952) (applying law of Illinois — the situs — to determine estate's interest in joint-bank account, rather than law of Florida, the decedent's domicile).

101. FLA. STAT. § 655.55(1) (1995).

102. Even before enactment of this statute, most Florida courts applied the situs rule in determining ownership interests in joint bank accounts. See, e.g., *Sanchez v. Sanchez De Davila*, 547 So. 2d 943, 945 (Fla. 3d Dist. Ct. App. 1989) (stating that this statute merely affirms prior Florida case law); *Lieberman v. Silverstein*, 393 So. 2d 565,

Section 655.55(1) effectively preempts other choice-of-law rules that might create uncertainty in the administration of joint accounts.<sup>103</sup> By its express language, the statute forestalls application of traditional rules governing probate, contract, and personal property. The statute also precludes a court from *engaging* in a choice-of-law exercise that might displace the situs rule. The principal exception to the statute is its recognition that the depositor may choose to exempt himself from the statute's coverage,<sup>104</sup> and the parties may contractually agree to the application of another state's law.<sup>105</sup>

The force of the statute is backed up by the implicit power of situs courts to control the disposition of property within their borders.<sup>106</sup> Thus, if property has been deposited into a Florida bank account, Florida courts can enforce their statutory directive by asserting jurisdiction over disputed accounts even though divorce or probate proceedings will occur primarily in the state or nation of the depositor's domicile.

That is not to say that Florida law provides a refuge for persons seeking to evade the legal claims of persons in property moved into the state. As recently stated by the appellate court in *Cardenas v. Solis*,<sup>107</sup> Florida law is primarily intended to regulate local banks and, while such law may create a presumptive right of ownership in accounts located in Florida, it is not necessarily conclusive as to such ownership.<sup>108</sup> This statement is consistent with the spirit of the "tracing" rule previously discussed, by which situs courts will occasionally defer to the law of another state so as to prevent an injus-

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566 (Fla. 3d Dist. Ct. App. 1981) (stating that the situs law — New York — governs rights in joint bank accounts).

103. See, e.g., *Sanchez*, 547 So. 2d at 945.

104. FLA. STAT. § 655.55(6) (1995); see also *Nahar v. Nahar*, 656 So. 2d 225, 228 n.8 (Fla. 3d Dist. Ct. App. 1995).

105. See FLA. STAT. § 655.55(2) (1995); see also FLA. STAT. § 670.507 (1995) (stating that parties may select law applicable to a transfer of funds).

106. See *supra* notes 57–58 and accompanying text.

107. 570 So. 2d 996 (Fla. 3d Dist. Ct. App. 1990).

108. See *Cardenas*, 570 So. 2d at 1000. The *Cardenas* court distinguished joint bank accounts from Totten trusts, suggesting that ownership in Totten trusts was determined solely by reference to Florida law (the situs) and was not subject to equitable modification. *Id.* However, one wonders if a Florida court would adopt such a view if actually confronted with inequity in the creation of a Totten trust. See also *Nahar*, 656 So. 2d at 225 (stating that there is a divided opinion concerning disposition of bank accounts located in Florida where deceased died domiciled in foreign nation).

tice.<sup>109</sup>

Florida's statutory law governing joint bank accounts may be the best indication that, put to the test, Florida courts would generally affirm the situs rule for trusts. The law governing joint bank accounts reflects the need for an unequivocal choice-of-law rule to govern custodians of property doing business in Florida. That law also reflects a certain commercial orientation that makes sense when one considers that trust arrangements are an important part of the state's commerce.

The situs rule for personal property, like that for real property, has its counterpart in jurisdictional doctrine. Thus, the courts of the situs state will normally have jurisdiction to dispose of personal property,<sup>110</sup> subject to the typically modest restrictions imposed by the due process clause.<sup>111</sup>

The jurisdictional situs rule concerning personal property does differ in one notable respect from its real property counterpart. Although the decrees of non-situs states purporting to affect real property need not be given full faith and credit by the situs state, such an exception has not been recognized for personal property.<sup>112</sup> Thus, a non-situs state may exercise jurisdiction to resolve disputes in personal property, provided there is personal jurisdiction over concerned parties. Florida courts have asserted such authority on nu-

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109. See *infra* text accompanying notes 143–47.

110. See, e.g., *Walters & Walker v. Whitlock*, 9 Fla. 86, 96 (1860) (“There is no doubt that each State has jurisdiction over all property within its limits . . . .”); *In re Estate of Siegel*, 350 So. 2d 89, 90–91 (Fla. 4th Dist. Ct. App. 1977) (stating that the situs state has authority to adjudicate rights in personal property). The situs state's control over personal property also entails that its courts will apply local remedial law in disposing of property. See, e.g., *Fincher Motors, Inc. v. Northwestern Bank & Trust Co.*, 166 So. 2d 717, 719 (Fla. 3d Dist. Ct. App. 1964) (applying Florida law in an action to repossess automobile acquired in Missouri under Missouri contract).

111. The leading precedent regarding jurisdiction over personal property is *Shaffer v. Heitner*, 433 U.S. 186 (1977), where the Court required that the litigants have sufficient contacts with the forum prior to adjudication of their interests in situs property. Except for situations where personal property enters the forum fortuitously or temporarily, contacts should normally exist. The “minimum contacts” requirement does not appear to have had appreciable impact in property disputes that have generated choice-of-law issues, such as trust, estate, or divorce proceedings.

112. As previously noted, this restriction on judicial decrees affecting real property is often a matter of form. The real property exception can typically be circumvented, provided a court casts its decree as an *in personam* order. See *supra* text accompanying notes 60–62.

merous occasions.<sup>113</sup>

### III. MARITAL PROPERTY

#### A. Property Implications of Marriage

Although marriage is a contractual relationship principally intended to alter the parties' personal status,<sup>114</sup> in many respects marriage is a property transaction — a legal fact that many newlyweds do not appreciate until the marriage “celebration” has long since ended. Marriage can affect the spouses' property interests in several ways. In community property states, marriage signifies that the acquisitions of either spouse during the marriage may become “community” property of both spouses regardless of which spouse has formal legal title to those acquisitions.<sup>115</sup> By comparison, in contemporary “common law” property jurisdictions like Florida, marriage *per se* does not result in joint ownership of subsequently-acquired assets.

However, even in common law jurisdictions like Florida, marriage may result in property consequences similar to those that arise in community property states. Thus, upon dissolution of the marriage, properties acquired as the result of the expenditure of a spouse's work efforts, services, or earnings during the marriage are usually deemed “marital assets” that will be “equitably distributed” between the divorcing parties.<sup>116</sup> Furthermore, even non-marital assets may be summoned by a court when needed to fund alimony for a less advantaged party to the divorce.<sup>117</sup>

The other principal context in which the property effects of marriage become apparent is when one of the spouses dies. In common law jurisdictions like Florida, a spouse is entitled to a “forced share” of the deceased's estate, regardless of whether the deceased has

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113. See, e.g., *Le Mire v. Galloway*, 177 So. 283 (Fla. 1937); *Belsky v. Belsky*, 324 So. 2d 111 (Fla. 3d Dist. Ct. App. 1975).

114. See generally *SCOLES & HAY*, *supra* note 3, § 13.1, at 430.

115. See generally *id.* § 14.3, at 466–67.

116. See, e.g., *Gardner v. Gardner*, 452 So. 2d 981, 983 (Fla. 5th Dist. Ct. App. 1984). Equitable distribution accomplishes goals similar to those served by community property systems. For that reason, equitable distribution is found solely in common law property jurisdictions. See generally Stephen W. Sessums, *Equitable Distribution and Its Effect on Property Acquired by Gift or Inheritance*, FLA. B.J., Apr. 1983, at 262.

117. See, e.g., *Gardner*, 452 So. 2d at 983; *Zaborowski v. Zaborowski*, 547 So. 2d 1296, 1297 (Fla. 5th Dist. Ct. App. 1989).

provided for the surviving spouse in his will.<sup>118</sup> Thus, not even in death can the spouse escape the property implications of the decision to marry.

Accordingly, celebration of the marriage contract typically insures that, at a minimum, each spouse has a potential claim against the other's property when the marriage ends by divorce or death. The question arises, *which* state determines the relative property interests of spouses resulting from marriage?

At the outset, it is helpful to dispose of the regulatory power of one potentially concerned state — the state where the marriage is celebrated. With some exceptions, persons can freely choose the state in which to consummate their marriage contract, and the chosen state will apply its law to determine the validity of the marriage. This choice will generally be recognized by other states.<sup>119</sup> However, the state of celebration *per se* will not determine the property implications of the marriage. The effects of marriage on property interests will generally be determined by either the state where property is located (in the case of real property) or the state where the spouses are domiciled.

The traditional choice-of-law rule provides that, at the time the marriage is *celebrated*, each spouse acquires an interest in the other's property as follows: the interest acquired in real property is governed by the *situs* of the realty,<sup>120</sup> and the interest acquired in personal property is governed by the state of the *marital domicile*.<sup>121</sup> These rules need not occupy our attention for long, as they seldom give rise to conflicts litigation today. First, neither community property nor common law property jurisdictions transfer an interest in personal property solely because of the celebration of marriage.<sup>122</sup> Second, the principal impact of the marriage ceremony for real property arises from “homestead” laws, which protect the new marital home from creditors and place restrictions on the home's alien-

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118. See FLA. STAT. §§ 732.102, 732.201 (1995).

119. See, e.g., RESTATEMENT SECOND, *supra* note 1, § 283 (stating a marriage will be valid where celebrated and will be recognized in other states unless it violates the “strong public policy” of another state that has a more “significant relationship” to the spouses).

120. See SCOLES & HAY, *supra* note 3, § 14.5, at 470–71.

121. See Arthur L. Harding, *Matrimonial Domicil and Marital Rights in Movables*, 30 MICH. L. REV. 859 (1932).

122. See SCOLES & HAY, *supra* note 3, § 14.8, at 475.

ation.<sup>123</sup> Given the widespread deference to situs law when addressing issues pertaining to real property,<sup>124</sup> true conflicts in law seldom occur.

Property transactions occurring after the marriage ceremony *are* affected by the marital status of the parties and may generate conflicts issues. After marrying, a spouse may acquire, retain, or transfer property both in the state of the “marital domicile” as well as in other states. Formal legal title to property may not reflect the spouses' interests *inter se* (i.e., their relative property interests vis-a-vis each other), since the individual spouses may buy, sell, and encumber property without reference to their marital status or the other spouse's legal interest in the subject property.<sup>125</sup> In addition, transactions in some forms of property produce no formal title at all, as when common chattels (e.g., furniture or jewelry) are bought or sold or when cash is acquired.

Quite commonly, a final determination of legal interests in marital property results only upon termination of the marriage, when attorneys or judges are asked to sort out the spouses' relative property rights. As mentioned, the two primary settings for this determination are (1) divorce proceedings, and (2) estate proceedings. These will be addressed in turn.

### 1. Divorce Proceedings

In Florida, divorce proceedings have generated few reported decisions in which choice-of-law issues concerning marital property are presented.<sup>126</sup> At first, this finding is surprising, given the highly increased frequency of divorce in recent decades, the disputatious nature of divorce proceedings, and the likelihood that many divorcing couples have lived and acquired property in other states. One would speculate that the traditional conflicts rules — whereby marital property rights in personalty are determined by the law of the

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123. See generally Andrew Krause & Richard Franklin, *The Homestead Devise Trap*, FLA. B.J., Nov. 1990, at 17.

124. See *supra* text accompanying notes 3–7.

125. See, e.g., Sessums, *supra* note 116, at 263–64 (discussing the problems arising when assets acquired during marriage are intermingled or not clearly traceable to the appropriate spouse).

126. See *Camara v. Camara*, 330 So. 2d 818 (Fla. 3d Dist. Ct. App. 1976) (holding that the division of property upon divorce requires determination of property assets acquired in Cuba, the previous marital domicile).

marital domicile at the time of acquisition, while rights in real property are regulated by situs law<sup>127</sup> — would generate issues during the quarreling over property division.

The infrequency of conflicts issues about property in divorce proceedings may result from a combination of factors. First, the majority of states follow the common law doctrine of marital property (albeit a modernized version), and thus the incidence of “conflict” is greatly reduced.<sup>128</sup> Second, equitable distribution rules generally “pierce” the formalities of legal title<sup>129</sup> and focus instead on critical factual issues, such as the time at which properties were acquired (e.g., before or after marriage), the source of funds used to generate property (e.g., inheritance, gift or income earned during marriage), and the extent to which “marital” labor or services contributed to the development of property.<sup>130</sup> Such factual questions assume determinative importance,<sup>131</sup> and genuine choice-of-law disputes are rare. In essence, the divorce court applies forum law and legal arguments based on property interests vested under the law of other states are uncommon.

Thus, traditional marital property rules are often minimized or ignored during divorce proceedings, as the forum's policies of fairness and equity take precedence. Forum control is emphasized by another, somewhat anomalous feature of divorce jurisdiction: the forum typically exercises control over the spouses' properties *regardless* of the property's location.<sup>132</sup> As noted earlier, courts hav

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127. See *supra* text accompanying notes 120–22.

128. More than 80% of states have some form of common law property laws. See SCOLES & HAY, *supra* note 3, § 14.3, at 466 & n.1.

129. The major exception is property held jointly by the spouses. Under Florida law, such legal title creates a presumption that such property is marital property, subject to the opposing spouse's proving the opposite. See FLA. STAT. § 61.075(5)(a) (1995); see also *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991) (quashing the appellate court's decision and holding that the former husband failed to meet his statutory burden of proving a special equity).

130. See, e.g., *Stevens v. Stevens*, 651 So. 2d 1306 (Fla. 1st Dist. Ct. App. 1995); *Thomas v. Thomas*, 571 So. 2d 499, 503–04 (Fla. 1st Dist. Ct. App. 1990). See generally Susan L. Steffey & Caroline A. Kapusta, *Equitable Distribution*, in FLORIDA DISSOLUTION OF MARRIAGE §§ 15-1, 15-27, 15-28 (2d ed. 1991).

131. See, e.g., *Gregg v. Gregg*, 474 So. 2d 262, 264 (Fla. 3d Dist. Ct. App. 1985) (“In the process of sorting out separate property . . . from marital property . . . the trial court must look to the substance, that is, the source of the funds used to acquire the asset, rather than the form in which legal title was taken and held.”).

132. See, e.g., *Duncan v. Duncan*, 379 So. 2d 949, 952–53 (Fla. 1980) (upholding divorce decree which awarded Alabama residence to former husband even though he had

ing *in personam* jurisdiction over parties (a prerequisite if a divorce court is to render decisions affecting the spouses' property interests)<sup>133</sup> can issue orders that effectively dispose of property located outside the forum, provided those orders are directed to the person and not directly against the property.<sup>134</sup> In divorce proceedings, courts routinely exercise the power to allocate properties, including real property, outside the forum.<sup>135</sup> In this sense, divorce proceedings illustrate the high-water mark of a court's power to apply the law of the forum.

## 2. Probate Proceedings

Probate proceedings present an entirely different matter. In contrast to divorce proceedings, probate courts show greater deference both to the property laws of other states and to their jurisdictional control over situs properties. This has resulted in an increase in the number of conflicts issues pertaining to marital property in probate proceedings, although it bears emphasis that even in the probate context such issues are uncommon.

The decision in *Quintana v. Ordonez*<sup>136</sup> comes closest to a demonstration of how traditional marital property rules operate in probate proceedings. In *Quintana*, the probate litigation pitted the widow of the deceased against the deceased's children from an earlier marriage. The property at issue consisted of a promissory note and a contract for monies owed the decedent. According to the widow, the personal property was "community property" under the laws of Cuba, the former marital domicile. According to the children, the property was acquired in the state of Florida and was thus governed by "situs" law under which title in the personal property arguably vested in the deceased alone. If the children's contention was correct, the wife was entitled only to such portion of the decedent's estate as provided by Florida laws of intestacy (where the husband and wife had resided at the time of his death and where conse-

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no special equity in the residence).

133. See, e.g., *Estin v. Estin*, 334 U.S. 541 (1948).

134. See *supra* text accompanying notes 60-69.

135. Florida divorce decrees encompassing non-Florida realty are widely enforced by other states. See, e.g., *Higginbotham v. Higginbotham*, 222 A.2d 120 (N.J. Super. Ct. App. Div. 1966).

136. 195 So. 2d 577 (Fla. 3d Dist. Ct. App. 1967).

quently the estate was being probated).<sup>137</sup>

The court provided the legal framework for its decision by reciting the “almost unanimous” rule in America, that marital property interests are determined by the law of the marital *domicile* at the *time* when the movables are acquired.<sup>138</sup> As noted by the court, this rule differs from the more generic rule that personal property is governed by the law of the situs of that property. As a consequence, the key question was the determination of the marital domicile at the time that the husband acquired the promissory note and contract rights.<sup>139</sup>

The applicable conflicts rule required the court to reconstruct the facts pertinent to the property's history. Evidence showed that between 1936 and 1960, the spouses maintained their marital domicile in Cuba. During that time, the husband worked as supervisor of a sugar refinery in Florida. While in Florida, the husband purchased shares of stock in the refinery, although it was disputed as to whether the purchase price was funded by assets in Cuba or by the husband's labor in Florida. The married couple subsequently moved to Florida and established a new marital domicile. Thereafter, the husband sold the shares of stock and received in exchange the promissory note and contract that were at issue. Acquisition of the note and contract occurred in Florida when, as mentioned, the couple were domiciled there.<sup>140</sup>

Applying the conflicts rule to the facts, the court observed that the wife's interest in the original stock purchased in Florida was determined by Cuba's community property laws, as Cuba was the marital domicile at the time of the transaction.<sup>141</sup> But upon change in the marital domicile from Cuba to Florida, subsequent property transactions of the husband were governed by the new domicile of Florida. Thus, Florida law governed marital property rights when the stock was sold in exchange for the note and contract.<sup>142</sup>

At that time, it was arguable that Florida property law would deem the note and contract to be individual property of the husband — at least the children so contended. However, the court concluded

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137. *Id.* at 578–80.

138. *Id.* at 579.

139. *Id.* at 580.

140. *Id.* at 579–80.

141. *Quintana*, 195 So. 2d at 580.

142. *Id.*

that, while Florida law would apply based on its domiciliary status, Florida law did not divest the wife of her property interest acquired under Cuban law. Instead, Florida law would consider the note and contract to be in “constructive trust” based on the fact that it was acquired through the exchange of marital assets vested under Cuban law, the former marital domicile.<sup>143</sup>

The *Quintana* decision demonstrates operation of the “marital domicile” rule pertaining to personal property, but it also illustrates an additional conflicts doctrine followed by all courts — the doctrine of *tracing*. The doctrine of tracing (or “constructive trust” as it was termed by the Florida court) serves the equitable goal of preserving marital assets when they are subject to a new transaction in a new marital domicile. Thus, while the new marital domicile applies its law to personal property transactions occurring after the change in domicile, it “traces” back the source of new property acquisitions to the legal regime of the prior marital domicile.<sup>144</sup> Tracing is, in essence, a variation on the conflicts doctrine of marital domicile and obviates choice-of-law problems that might otherwise arise when married couples move from one system of marital property to another.<sup>145</sup>

As illustrated by the *Quintana* decision, the marital property issue takes a different form in probate than in dissolution proceedings. In dissolution, as has been noted, legal concepts like “equitable distribution” guide the courts' decisions when determining the allocation of property, and courts routinely assume control over all property, notwithstanding its situs in another jurisdiction, in order to render the fairest and most comprehensive resolution of the property dispute. By comparison, the probate proceeding appears more constrained by notions of property law and jurisdiction. A spouse's claim against the estate, as in *Quintana*, may require a more exacting definition of what property belongs to the deceased spouse, as

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143. *Id.* Similarly, in *Camara v. Camara*, 330 So. 2d 818, 820 (Fla. 3d Dist. Ct. App. 1976), the court found it necessary to identify assets acquired while the couple maintained a marital domicile in Cuba and to trace the use of those assets in Florida, the couple's last marital domicile.

144. Such tracing is used more often when a Florida court is asked to apply its own “equitable distribution” rule. Under this domestic rule of tracing, a court must sometimes determine whether an asset that appears to be “marital” property subject to equal division can be traced back historically to the separate property of either spouse. *See, e.g., Greenberg v. Greenberg*, 602 So. 2d 626 (Fla. 4th Dist. Ct. App. 1992).

145. *See* SEDLER, *supra* note 34, at 95–96.

there are additional parties or claimants to the proceeding. Malleable concepts like "equitable distribution" have no place.

*Quintana* involved a dispute over personal property. When the alleged marital asset consists of real property, a different choice-of-law rule will apply in the probate setting. Consistent with the long-lived "situs" rule, probate courts will apply the law of the situs to determine a surviving spouse's interest in real property.<sup>146</sup> However, the situs rule must be understood in the context of the "tracing" doctrine which operates to prevent application of situs law so as to defraud an innocent spouse.<sup>147</sup>

In summary, choice-of-law problems involving marital property are relatively uncommon, but when they do arise the more likely context is probate. In the probate context, a court may be called on to identify the various marital domiciles of the deceased and his or her spouse and the appropriate domicile at the time a property transaction occurred. Such identification, in conjunction with the doctrine of tracing, will be necessary to disentangle the various property interests retained by each spouse.

## B. Antenuptial and Postnuptial Agreements

Although marital property rights are affirmed by statute as a means of protecting spouses, virtually all states recognize that such rights are waivable by contract. Contracts to waive marital property rights may be entered into prior to celebration of the marriage (antenuptial or prenuptial contracts) or after celebration (postnuptial contracts).<sup>148</sup>

Florida, like most states, recognizes the validity of nuptial agreements subject to certain safeguards to protect the spouse who stands to lose from the agreement. The criteria for assessing the

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146. See, e.g., Eugene F. Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U. FLA. L. REV. 151, 165, 180-81 (1955) (discussing application of situs rule to homestead property and to surviving spouse's forced share in real estate).

147. See SCOLES & HAY, *supra* note 3, § 14.6, at 471-73. "The marital interest which attaches to movable assets acquired by the spouses according to the law of their domicile at the time of acquisition is recognized and traceable into real property located in another state in which those assets are invested." *Id.* at 472.

148. The following discussion will use the term "nuptial" agreements to refer to antenuptial and postnuptial agreements collectively, except where more specific reference is required.

validity of nuptial agreements is a blend of statutory law and common law. In *Del Vecchio v. Del Vecchio*,<sup>149</sup> the Florida Supreme Court announced that antenuptial agreements would be enforceable only when either (a) the agreement made a “fair and reasonable” provision for the poorer spouse, or (b) that spouse received full, fair and open disclosure of the wealthier's spouse's assets.<sup>150</sup> Subsequently, the Florida Legislature modified this rule in the context of probate proceedings by expressly eliminating any requirement of fair disclosure (and tacitly eliminating any requirement that “fair and reasonable” provision be made for a surviving spouse) when the contract was entered into *before* marriage.<sup>151</sup> Following this enactment, the supreme court upheld the statute against constitutional challenge but made it clear that the statute had no effect on prior common law doctrine pertaining to nuptial agreements relied on in divorce proceedings.<sup>152</sup>

As mentioned previously, disputes over marital property rights are most likely to arise in either divorce or probate proceedings.<sup>153</sup> These proceedings will usually occur in the state of the spouses' domicile with the exception of ancillary probate proceedings that are commenced in a state where the deceased owned property. Thus, the most common setting for introduction of nuptial agreements is in the spouses' domicile — which is significant because the forum state will have a clear interest in applying its law to determine whether its domiciliary will contractually forfeit property rights otherwise recognized under forum law.

The most frequent conflicts problem pertaining to the enforceability of nuptial agreements occur when there is a Florida divorce or probate proceeding involving an agreement entered within some other state or country.<sup>154</sup> The party relying on the agreement will typically argue that, under settled choice-of-law principles, the state where the contract was *executed* should govern its validity. Presum-

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149. 143 So. 2d 17 (Fla. 1962).

150. *Id.* at 20. A third ground for challenging a nuptial agreement is also recognized: a spouse must enter into the agreement voluntarily, without coercion or duress. *Id.* See generally Jennifer A. West, *The Do's and Don'ts of Antenuptial Agreements*, FLA. B.J., Feb. 1987, at 47–48.

151. See FLA. STAT. § 732.702(2) (1995).

152. See *Weintraub v. Weintraub*, 417 So. 2d 629, 630–31 (Fla. 1982).

153. See *supra* text accompanying notes 126–47.

154. See, e.g., *In re Estate of Santos*, 648 So. 2d 277 (Fla. 4th Dist. Ct. App. 1995); *Gordon v. Russell*, 561 So. 2d 603 (Fla. 3d Dist. Ct. App. 1990).

ably, parties entering into a nuptial agreement will have consulted the law of the state of execution and complied with its requirements (although this is not inevitably the case).<sup>155</sup> Thus, the conflicts rule of “lex loci contractus” is commonly asserted to uphold a nuptial agreement that might not otherwise satisfy the requirements of Florida law.

The defense to the enforcement of nuptial agreements will be based on an equally well-recognized exception to the rule of *lex loci contractus*, an exception which permits a court to deny enforcement of a contract in order to effectuate forum *public policy* for the benefit of a forum resident. Since the disfavored spouse under the contract will typically be a resident of Florida (the place of the marital domicile or the deceased spouse's residence), the public policy contention is well suited to this factual setting.<sup>156</sup>

Another defense that appears in the reported decisions is to avoid the rule of *lex loci contractus* by arguing that the issue should be governed by conflicts' rules applicable to “property” rather than “contract.” Almost always, the party relying on the “property” characterization asks that the court apply *situs* law to govern the disposition of property located in Florida with the resulting consequence that the otherwise valid contract will not be enforced as it pertains to Florida property.<sup>157</sup> The *situs* rule has potential to upset an appreciable number of out-of-state nuptial agreements, since property will often be located in Florida when that state is either the marital domicile or the decedent's last residence.

It is difficult to make highly reliable generalizations about Florida precedent. Overall, there does seem to be frequent recitation of and reliance on the “place of contracting” rule.<sup>158</sup> At the same time, the public policy defense is also invoked with some frequency, as is the *situs* rule.<sup>159</sup> The accommodation of these conflicts rules

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155. See, e.g., *Gordon*, 561 So. 2d at 603 (upholding an agreement that allegedly failed to satisfy the disclosure requirements for the state in which the contract was entered) (dictum).

156. See, e.g., *Santos*, 648 So. 2d at 281–82; *Gustafson v. Jensen*, 515 So. 2d 1298 (Fla. 3d Dist. Ct. App. 1987).

157. See, e.g., *Santos*, 648 So. 2d at 280–81; *Kyle v. Kyle*, 128 So. 2d 427, 430 (Fla. 2d Dist. Ct. App. 1961).

158. See, e.g., *Robbat v. Robbat*, 643 So. 2d 1153 (Fla. 4th Dist. Ct. App. 1994); *Kolflat v. Kolflat*, 636 So. 2d 87 (Fla. 2d Dist. Ct. App. 1994); *Baker v. Baker*, 622 So. 2d 541 (Fla. 5th Dist. Ct. App. 1993).

159. See *infra* text accompanying notes 160–75.

varies, as can be seen from a brief review of reported decisions.

For example, in *In re Estate of Santos*,<sup>160</sup> the court was generally willing to enforce an antenuptial agreement entered into in Puerto Rico which contained a Puerto Rican choice-of-law selection. The wife disadvantaged by the agreement relied, in considerable part, on an earlier court precedent in which it was determined that the situs of property governs the validity of antenuptial agreements insofar as they affect situs property. She also contended that, according to Florida public policy codified in homestead protection, she should at least be protected from divestment of her interest in the couple's Florida homestead.<sup>161</sup> *Santos*, it should be noted, was a probate proceeding.

The *Santos* court generally sided with the position that the conflicts issue was governed by the "law of contracting" rule and so upheld the agreement under Puerto Rican law.<sup>162</sup> The court did, however, conclude that the wife's interest in the Florida homestead should be protected under Florida public policy.<sup>163</sup> Accordingly, the prenuptial agreement was only partially enforced, with personal property being governed by the law of the place of contracting, while the Florida homestead passed under situs law.

Insofar as the *Santos* court protected the homestead based on the public policy rationale, its reasoning is persuasive. Homestead protection enjoys constitutional stature in Florida and can be waived by contract only under specified conditions.<sup>164</sup> The intent is to provide special protection to Floridians and their spouses, presenting a quintessential example of "public policy." Significantly, the *Santos* court did *not* invoke the situs rule to undo the agreement, as it could have. The court characterized the controlling issue as one in "contract" and not "property,"<sup>165</sup> and so the situs rule had no bearing on the outcome.

The logic of *Santos* is also found in the decision of *Gustafson v. Jensen*.<sup>166</sup> In *Gustafson*, the court refused to apply Denmark law

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160. 648 So. 2d 277, 280–81 (Fla. 4th Dist. Ct. App. 1995).

161. *Id.* at 281–82.

162. *Id.* at 280–81.

163. *Id.* at 282.

164. See FLA. STAT. § 732.702(1) (1995) (stating that a spouse may waive homestead property).

165. *Santos*, 648 So. 2d at 280–81.

166. 515 So. 2d 1298 (Fla. 3d Dist. Ct. App. 1987).

(which allegedly upheld the antenuptial agreement) to divest a spouse of assets and real property located in the couple's Florida marital domicile. The court did *not* attempt to displace the antenuptial agreement by applying "situs" law as such but instead invoked Florida public policy to protect the spouse (a Floridian) from enforcement of an agreement that failed to provide a "fair" distribution of assets and that lacked a foundation in adequate disclosure of the husband's assets.<sup>167</sup>

A somewhat anomalous decision is that in *Gordon v. Russell*.<sup>168</sup> In *Gordon*, the court invoked Florida public policy to *uphold* an antenuptial agreement that was presented during the course of a probate proceeding.<sup>169</sup> As noted, Florida statutory law validates an antenuptial agreement, notwithstanding a lack of disclosure, when that agreement is asserted in a probate proceeding.<sup>170</sup> It is unusual to see forum public policy invoked to uphold an agreement that is invalid in the place of execution, even though the benefitted spouse in *Gordon* was a Floridian.

On at least one occasion, a Florida appellate court has invoked the "property" characterization and "situs" rule in refusing to enforce an antenuptial agreement executed outside Florida. Thus, in *Kyle v. Kyle*,<sup>171</sup> the court refused to quiet title in Florida real estate based on an antenuptial agreement executed in Quebec, Canada. The dispute in *Kyle* did not involve a Florida homestead; the parties to the agreement were Canadians both at the time of the agreement's execution and at the time of the litigation, and the Florida property was not the parties' residence. As a consequence, the public policy defense was not really applicable and was not cited by the court.

Instead, the *Kyle* court noted that real estate was traditionally governed by situs law, and since the antenuptial agreement failed to satisfy Florida requirements for conveying realty (two witnesses were lacking), it did not affect situs land.<sup>172</sup> Disturbing in *Kyle* is the court's seeming requirement that parties execute an antenuptial agreement in accordance with Florida law even though the Florida

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167. *Id.* at 1300.

168. 561 So. 2d 603 (Fla. 3d Dist. Ct. App. 1990).

169. *Id.* at 604.

170. *See supra* text accompanying notes 149–52.

171. 128 So. 2d 427 (Fla. 2d Dist. Ct. App. 1961).

172. *Id.* at 430–31.

real estate was acquired *twenty-four years* after the agreement's execution.<sup>173</sup> It is one thing to require that spouses relocating to Florida accept the state's legal restrictions and protections pertaining to the family residence; it is quite another to insist that a significant planning document like an antenuptial agreement perceive the technical conveyancing requirements for yet unacquired and unknown investment properties. Fortunately, *Kyle* does not appear to have been followed by other courts.

The potential application of the public policy defense must be considered by those entering into nuptial agreements that are otherwise valid under the law of the state of execution. Because of the impact of such agreements on the economically weaker spouse and because those spouses will typically be situated to invoke the "public policy" of a divorce or probate court,<sup>174</sup> reliance on the law of the place of contracting is risky. The better strategy for counsel is to advise full disclosure which will be adequate to satisfy the requirements of most states.<sup>175</sup> Otherwise, counsel should make clear to contracting parties that their agreement may be scrutinized under a different law, should they change marital domiciles.

#### IV. PROPERTY SUCCESSION

Conflicts issues involving succession to property, whether by will or by law, continue to arise, but their number is considerably smaller since most states have adopted some form of the Uniform Probate Code.<sup>176</sup> This Code succeeds in reducing conflicts issues in

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173. *Id.* at 428.

174. In the large majority of cases, divorce and probate proceedings will occur in the state of the spouses' domicile. Consequently, the spouse challenging a nuptial agreement is well-situated to argue that, as a domiciliary, he or she is entitled to protection under forum law. *See generally* Finch, *supra* note 2, at 714-17 (stating that a public policy defense is usually invoked to protect forum domiciliaries).

175. Similar advice is offered by family-law practitioners, even outside the context of choice-of-law problems. *See, e.g.*, West, *supra* note 150, at 50. Note that this advice is recommended for lawyers advising clients concerning nuptial agreements executed in Florida. That is, the nuptial agreement may ultimately be asserted in the courts of another jurisdiction, as when the spouses establish a new domicile outside Florida. A spouse relying on the "no disclosure" policy of Florida probate law for example may find the nuptial agreement invalidated by another state's court based on the public policy rationale.

176. *See generally* 1 LESLIE A. JEFFRIES, WILLS AND ADMINISTRATION IN FLORIDA (6th ed. 1986) (discussing the evolution of Florida probate laws); Fenn & Koren, *supra* note 17 (discussing Florida's partial adoption of the Uniform Probate Code in 1974).

probate by both proposing uniform laws and by simplifying probate administration so as to lessen the number of proceedings occurring when the deceased owns properties located in several states.<sup>177</sup> Certain conflicts issues persist, however, and those planning or administering the estates of persons with multi-state affiliations must consider choice-of-law doctrine.

#### A. Succession by Will

Succession to property through probate raises interrelated issues of jurisdiction and choice-of-law. To begin with, virtually all American jurisdictions follow the practice by which an estate is probated principally in the state of the decedent's domicile.<sup>178</sup> Thus, the "domicile" of the decedent presents a preliminary jurisdictional issue.

Although the decedent's domicile is not usually in dispute, on occasion it may be.<sup>179</sup> In such situations, two different states may be called upon to probate the deceased's estate, leading to the possibility of conflicting results. Determination of the "domicile" issue, like other issues resolved by American courts, has consequences under the "full faith and credit" clause of the United States Constitution. Generally, when a court has determined the domicile of the decedent, all persons who are *parties* to the court proceeding will be bound by its finding.<sup>180</sup> However, the issue of domicile is open to relitigation in another state's court by persons who were not parties to the prior judicial proceeding. Thus, conflicts in probate jurisdiction may occur.

Assuming the typical case where the decedent's domicile is clear, probate proceedings can occur both (1) where the decedent died domiciled, and (2) where estate property is located (a "situs" state).<sup>181</sup> All state laws make provision for "ancillary" administra-

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177. See Fenn & Koren, *supra* note 17, at 3-4.

178. See, e.g., *Biederman v. Cheatham*, 161 So. 2d 538, 542 (Fla. 2d Dist. Ct. App. 1964).

179. See, e.g., *Loewenthal v. Mandell*, 170 So. 169 (Fla. 1936); *Biederman*, 161 So. 2d at 538.

180. See, e.g., *Loewenthal*, 170 So. at 174; *Torrey v. Bruner*, 53 So. 337, 339 (Fla. 1910).

181. See, e.g., *Biederman*, 161 So. 2d at 541. An ancillary probate proceeding is generally viewed as affecting only property with the situs' jurisdiction. See *Murphy v. Murphy*, 170 So. 856 (Fla. 1936). In addition, where Florida is not the state of the dece-

tion of estate properties located within the state but owned by a non-resident decedent, particularly when real property is involved.<sup>182</sup> Most states, like Florida, require that such ancillary proceedings take place following probate proceedings in the state of principal administration (e.g., the domicile state).<sup>183</sup>

The classic conflicts issue that arises in the probating of wills is: Whose law governs the will's validity? The traditional answer is: It depends on the type of property involved. Again, one encounters the importance of characterization.

Regarding the testate disposition of personal property, the widely recognized rule is that the law of the decedent's *domicile* governs the validity and effect of a will.<sup>184</sup> This rule is founded in several policies; the law of the decedent's domicile is, presumably, the law to which the decedent would have referred in devising his estate plan; and reference to the domicile state provides a single reference for disposing of the decedent's properties no matter what their situs.<sup>185</sup>

The domicile rule operates best when the decedent's domicile remains unchanged from the time of the will's execution until death. But what of the situation where there is an intervening change in domicile? The testator might execute a will based on the formal requirements of the domicile state at the time of execution — a reliance long-sanctioned by choice-of-law principles — only to find that a later domicile has differing execution requirements. Testators who die domiciled in Florida might run afoul of this problem, given the

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dent's domicile, state courts lack probate jurisdiction when no assets of the deceased remain in the state. *See In re Estate of Purnell*, 482 So. 2d 438 (Fla. 5th Dist. Ct. App. 1986).

Statutes governing probate venue reaffirm the requirement that probate proceedings occur either where the decedent was domiciled or where property is located. Thus, Florida Statutes § 733.101 confers venue in any county where the decedent had his domicile, where he was "possessed of property," or where his debtor resides. FLA. STAT. § 733.101 (1995).

182. *See, e.g.*, FLA. STAT. §§ 734.102, 734.104 (1995); FLA. PROBATE R. 5.475. *See generally* JEFFRIES, *supra* note 176. In the case of personal property, most states recognize that the estate administrator may take possession of property outside the state of the primary probate proceeding. Such extra-territorial control facilitates economical administration of an estate by avoiding the necessity of an ancillary proceeding. *See* RESTATEMENT SECOND, *supra* note 1, § 321 cmt. b.

183. *See generally* FLA. STAT. §§ 734.102, 734.104 (1995).

184. *See, e.g.*, *Biederman*, 161 So. 2d at 542.

185. *See, e.g.*, SCOLES & HAY, *supra* note 3, § 20.3, at 800.

more fastidious will execution requirements set forth in the Florida Statutes.<sup>186</sup>

The Florida Legislature has, for the most part, eliminated this problem by its enactment of a “validating” statute, Florida Statutes, section 732.502.<sup>187</sup> This statute generally validates wills executed by non-residents, provided the will is not oral or holographic, *and* provided the will was executed in accordance with the law of the state where the non-resident was at the time of execution.<sup>188</sup>

Several observations are appropriate concerning section 732.502. First, section 732.502 is used to *validate* wills that otherwise fail to satisfy Florida's will-execution requirements. If the will independently meets Florida requirements, there is no need to refer to the law of the place of execution to validate the will. Second, this validating statute only applies to wills executed by *non-residents* (residency being determined at the time of execution). Thus, section 732.502 is addressed to persons who acquire a Florida residence after execution of their wills in another state or to non-residents whose wills are the subject of ancillary proceedings in the State of Florida. Third, section 732.502 validates wills by referring to the law of the state of execution, *not* to the state of domicile at the time of execution (which would seem the logical reference state based on traditional probate practice and choice-of-law principles).<sup>189</sup>

Traditional choice-of-law rules vary when real property is at stake. As previously mentioned, the “situs” rule operates with a vengeance when realty is concerned. Thus, the validity and effect of a will disposing of real property is governed by the law of the situs

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186. See generally Fenn & Koren, *supra* note 17, at 16–20. As noted by Fenn and Koren, the Florida Probate Code rejects several of the proposals of the Uniform Probate Code, such as the location of the testator's signature and the procedures for witnessing a will which would have simplified the formalities for executing a will. *Id.*

187. FLA. STAT. § 732.502 (1995).

188. Until 1974, Florida law did not recognize the validity of wills of new Florida residents that had been previously executed in other states, nor did it recognize the wills of non-residents disposing of Florida realty unless those wills complied with Florida law. See Fenn & Koren, *supra* note 17, at 18.

It has been observed that § 732.502(2) validates only the procedural formalities of the state of execution, and the parties may challenge a foreign will on “substantive” grounds like duress and lack of capacity. See *In re Estate of Hatcher*, 439 So. 2d 977, 980 (Fla. 3d Dist. Ct. App. 1983).

189. See generally *In re Estate of Swanson*, 397 So. 2d 465, 467 (Fla. 2d Dist. Ct. App. 1981) (criticizing § 732.502(2)'s failure to also validate wills per the law of the executor's domicile).

state,<sup>190</sup> leading to a phenomenon known as “split succession.” As explained by the Florida Supreme Court, when a single will disposes of situs realty together with non-situs property, it is “as if” there were separate wills.<sup>191</sup> Accordingly, while the law of the decedent's domicile may govern the testate disposition of personal property (and real property located in the domicile state), the law of the situs of real property will govern its testate disposition.<sup>192</sup> Situs law similarly applies in determining the right of a surviving spouse to take an “elective share” contrary to the provisions of a will.<sup>193</sup>

The situs rule is an important one to consider in estate planning. Both counsel and the testator must be aware of the impact of the situs rule on real estate owned, or later acquired, outside the testator's domicile. Fortunately, most “validating” statutes — like Florida Statutes, section 732.502 — apply equally to wills disposing of personal and real property.<sup>194</sup> But one cannot assume that a validating statute will salvage a testamentary disposition of real estate, and thus situs law should always be consulted.

## B. Intestate Succession

The conflicts rules governing intestacy largely mirror those governing testate succession. That is, intestate inheritance of personal property will be governed by the law of the decedent's domicile,<sup>195</sup> while intestate inheritance of real property will be governed by the law of the situs.<sup>196</sup> Since “validating” statutes have no rele-

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190. See, e.g., *Frazier v. Boggs*, 20 So. 245 (Fla. 1896).

191. See *Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940).

192. See *In re Estate of Roberg*, 396 So. 2d 235 (Fla. 2d Dist. Ct. App. 1981) (stating that in an ancillary proceeding of a non-domiciliary, Florida law governs the validity of the will insofar as it disposes of Florida realty).

193. See, e.g., FLA. STAT. § 732.206 (1995) (stating that the elective share does not include real estate outside Florida). See generally *Scoles*, *supra* note 146, at 165. It should be noted that several generalizations about property law, like that just cited in the text, are not specifically supported by local precedent. This may result from the fact that such general rules are seldom contested in litigation and so do not provide occasion for the establishment of local precedent.

194. See FLA. STAT. § 734.104 (1995) (adopting the validation rule of § 732.502 when a foreign will devises Florida realty).

195. See, e.g., *In re Estate of Binkow*, 120 So. 2d 15 (Fla. 3d Dist. Ct. App. 1960).

196. See, e.g., *id.*; *Williams v. Kimball*, 16 So. 783 (Fla. 1895), *rev'd on other grounds*, *Adams v. Sneed*, 25 So. 893 (Fla. 1899). See generally *SCOLES & HAY*, *supra* note 3, §§ 20.2–20.4, at 796–803. There appears to be no explicit, contemporary judicial statement of these conflicts principles by a Florida court in the context of intestacy, al-

vance to intestate succession, the disposition of intestate estates can be fragmented as different laws apply to different properties, particularly real property. As always, estate planning is the surest method to insure that disparate state laws and choice-of-law rules do not produce an undesirable distribution of property.

### V. CONCLUSION

In comparison to choice-of-law rules applicable to tort,<sup>197</sup> property rules occupy an area of calm and familiarity. Property rules trace their origins to nineteenth-century precedent and throughout the twentieth century have been reaffirmed more often than reformed. There is little that is modern or original about Florida choice-of-law doctrine, an observation that is meant to be more complimentary than it may sound.

The principal problem presented by property doctrine is the seeming thicket of rules that must be reconciled in resolving a conflicts issue. There are rules for types of property — real, personal, and intangible — as well as for different types of transactions — probate, marriage, and inter vivos transfers. These rules, in turn, can be overwhelmed by still other choice-of-law principles, such as those governing contracts. And always, the forum may resort to “public policy” to displace choice-of-law doctrine altogether.

The problems generated by the multiplicity of rules appear to be waning, however, as attorneys appear to largely avoid conflicts by invoking their considerable authority to choose the applicable law. Given the planned nature of most property transactions, the choice-of-law clause may be the most important tool available to parties and their counsel regardless of whether they understand the obscurities of the conflicts doctrine.

Where genuine choice-of-law problems have emerged, the solution has often been legislative. These legislative solutions are evidenced by enactments like the Uniform Commercial Code, the Uni-

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though one Florida statute indirectly affirms the rule that the decedent's domicile governs intestate succession of personal property. Thus, Florida Statutes § 731.106(2) provides that, in the absence of a will provision, the property of a foreign nation domiciliary will be distributed in accordance with the law of the decedent's domicile. See *In re Estate of Fajardo*, 597 So. 2d 362, 363 (Fla. 3d Dist. Ct. App. 1992).

197. The problems generated by current tort rules are discussed in Finch, *supra* note 2.

form Probate Code, and statutes regulating bank accounts and fund transfers.

Thus, there does not appear to be a strong case for broad-ranging judicial reform in the area of property. Perhaps property doctrine could be somewhat improved by adopting the provisions of the *Restatement Second of Conflicts of Law*, but experience with reform in the area of torts has been singularly disappointing. More importantly, the Florida Supreme Court has refused to experiment with the *Restatement Second of Conflicts of Laws* in the area of contracts even though there is arguably greater need for revisiting the allegedly stable and predictable dogmas of contract law.<sup>198</sup> It appears, then, that Florida's blend of nineteenth-century common law and contemporary legislative intercession will continue to characterize the conflicts doctrine governing property matters.

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198. See *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988).