A Road Increasingly Traveled: Multistate Probate Issues

The Estate Planning, Trust & Probate Law Section of the San Diego County Bar Association

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ESTATE PLANNING AND PROBATE LAW

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived in South Carolina, North Carolina, Hawaii, and California he returned to North Texas and attended Eastfield Community College before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts in 2005. He entered private practice as a litigator in a boutique probate and trust firm, representing executors, guardians, and beneficiaries in complex estate and trust litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical, reasonable, and cost-effective manner. Mark is passionate about holding those who exploit others for personal gain accountable.

Mark is married and has three children. He enjoys spending time with his family, living an active life-style and traveling.

Representative Experience

- Obtained favorable jury verdict for lack of testamentary capacity and undue influence in hotly contested will contest and favorable jury verdict for lack of contractual capacity and breach of fiduciary duty in same lawsuit regarding certain non-probate beneficiary designations.
- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.

- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Routinely obtains temporary injunctions and temporary guardianships to halt rogue agents from abusing their powers of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty involving the failure to account.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.
- Routinely serves as attorney ad litem and guardian ad litem in guardianship cases.
- Routinely serves as temporary guardian in contested guardianship cases and as temporary administrator and administrator in decedents' estates.
- Successfully obtained ancillary estate administration in California to collect and administer assets and claims due and owing to Texas estate.
- Successfully transferred guardianships to and from California.

Public Speaking & Publications

- Co-Author: "Ensure Powers of Attorney Fulfill Intended Purposes" – Estate Planning, Thompson Reuters Checkpoint, (January 2018).
- Co-Author: National College of Probate Judges: "Constitutional Considerations When Restricting Access to the Proposed Ward in Contested Guardianship Proceedings" – Spring Journal (2017).
- Co-Author / Speaker: State Bar of Texas: "Litigation Involving Powers of Attorney & Bank Accounts" – Advanced Estate Planning & Probate (2017).
- Co-Author / Speaker: State Bar of Texas: "What's New in Guardianship" – Advanced Guardianship Law Course (2017).
- Co-Author / Speaker: State Bar of Texas: "The Shortest Route to Victory: Summary Judgment Practice in Probate and Trust Litigation" – 40th Annual Advanced Estate Planning and Probate Course (2016).
- Co-Author / Speaker: Dallas County Bar Association, Probate, Trust and Estates Section: "Trends in Litigating and Administering Guardianships" (2016).
- Author / Speaker: State Bar of Texas: "Injunctive Relief–The Lethal Preemptive Strike in Probate, Trust and Guardianship Litigation" – 39th Annual Advanced Estate Planning and Probate Course (2015).
- Co-Author / Speaker: State Bar of Texas: "Elder Exploitation" – Advanced Guardianship Law (2015).
- Co-Author / Speaker: Travis County Bar Association: "Winning the Battle & the War: A Remedies–Centered Approach to Litigation Involving Durable Powers of Attorney" (2015).
- Co-Author: "Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent" – Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).
- Served as Moderator for the Guardianship and Ad litem Attorney Certification Course, sponsored by the Dallas Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and responsibilities of the Attorney ad litem (2014).
- Co-Author: "Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney" – 64 Bay. L. Rev. 435 (Spring 2012).
- Author / Speaker: "An Introduction to Guardianships" – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).

- Co-Author / Speaker: “Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings,” at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).
- Author, A Good Deed Repaid: “Awarding Attorney’s Fees in Contested Guardianship Proceedings” – 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- State Bar of Texas; Real Estate, Probate and Trust Law Section, Guardianship Committee; Member (2015-2018)
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Bar Association; Probate and Trust Section; Council Member (2015-2016)
- Dallas Association of Young Lawyers; Elder Law Section Member
- Member, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse, Texas (2012-2013)
- Organized and leads an ongoing monthly probate study group featuring prominent guest speakers and court staff

Certifications, Awards and Recognition

- Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization
- Named Rising Star by Texas Super Lawyers (2014, 2015, 2016 and 2017)
- Selected Rising Stars Top 100 Up & Coming Attorneys in Texas
- Selected to D Magazine Best Lawyers in Dallas (2018)

Education

- General Course, The London School of Economics, London, England (2001-2002)
- B.A., *magna cum laude*, Southern Methodist University, Dallas, Texas (2002)
- J.D., New England Law | Boston, Boston, Massachusetts (2005)

Sarah V. Toraason

Shareholder

An experienced litigation attorney, Sarah Toraason has ten years' experience representing clients in complex commercial disputes involving securities, contract, business tort, insurance coverage, ERISA, and intellectual property claims in state and federal courts as well as arbitration. Sarah now applies her extensive business litigation background to representing clients in estate, trust, and guardianship disputes. She strives to be a strong advocate for her clients and approaches every matter with the goal of producing a successful and efficient resolution of their case.

Sarah graduated from the University of Richmond with a B.A. in Music and Leadership Studies and received her M.B.A. and M.A. from the University of Cincinnati. She earned her J.D. from William & Mary School of Law. After graduating from law school, Sarah served as a law clerk to the Honorable Henry Coke Morgan, Jr., of the United States District Court for the Eastern District of Virginia. She then clerked for the Honorable Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit in Austin, Texas.

Prior to entering the legal profession, Sarah studied music and worked in arts administration for the Honolulu Symphony in Honolulu, Hawaii. Sarah was born and raised in Cincinnati, Ohio. She is married to an attorney and has two children.

Sarah is admitted to practice in California (2003) and Texas (2004).

Representative Experience

- Obtained favorable jury verdict for lack of testamentary capacity and undue influence in hotly contested will contest and favorable jury verdict for lack of contractual capacity and breach of fiduciary duty in same lawsuit regarding certain non-probate beneficiary designations.
- Obtained favorable settlement in case involving secret trust and wrongful death claims.
- Successfully defended former CFO of a national homebuilding company in a securities fraud class action in the Southern District of Florida and on appeal to the Eleventh Circuit.
- Obtained denial of class certification on behalf of Fortune 500 media company and certain officers and directors in a securities class action in the Northern District of Texas and on appeal to the Fifth Circuit.
- Represented for-profit educational institution in the Southern District of Texas and on appeal to the Fifth Circuit in a suit seeking to enforce a confidentiality provision in an arbitration agreement. The Fifth Circuit upheld award of preliminary and permanent injunction based on the confidentiality clause.
- Won dismissal of claims challenging design and administration of ERISA-governed severance plan and secured award of costs in favor of defendants. Defended judgment on appeal to the Fifth Circuit.

- Defended CEO of oil and natural gas company in a series of ten shareholder and derivative suits filed in state and federal court seeking to challenge potential acquisition of the company.
- Defended oil and gas company in a hydraulic fracking case.
- Represented Fortune 500 company in a significant trademark suit.
- Represented large pharmaceutical manufacturer in putative nationwide antitrust class actions brought by direct and indirect purchaser plaintiffs in the Eastern District of Pennsylvania.
- Obtained dismissal of claims brought against insurance company and former claims adjuster in Texas state court.

Community and Bar Association Involvement

- Dallas Bar Association; Probate, Trust & Estates Section Member
- State Bar of Texas
- The William 'Mac' Taylor Inn of Court, Barrister
- Attorneys Serving the Community

Education

- B.A., *magna cum laude*, University of Richmond, Richmond, Virginia (1996)
- M.B.A./ M.A. (Arts Administration), University of Cincinnati, Cincinnati, Ohio (1998)
- J.D., *magna cum laude*, William & Mary School of Law, Williamsburg, Virginia (2002)

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I. INTRODUCTION[1]

According to a recent report by Merrill Lynch and Age Wave, more than 60 percent of U.S. retirees have moved or plan to move during their retirement.[2] As another article points out, "With over a quarter of a million Americans turning 65 every month and half of all second-home buyers over 46 (according to the National Association of Realtors), the idea of buying a second home now for future retirement is a certifiable trend."[3] As many legal commenters note, "In today's increasingly transient society, it is quite common for a decedent to own property in a state other than his domicile at the time of death."[4]

These realities present complex multi-state probate issues. As Professor Jeffrey Schoenblum points out, "While a state controls the allocation of probate jurisdiction among counties within its borders, no overriding authority exists to regulate the exercise of jurisdiction when estate assets are found in several states."[5] Indeed, each state in which a decedent's property is located may assert jurisdiction over that property. This dynamic can and does result in inconsistent independent and inconsistent determinations in state court.[6] These trends and legal realities signal an increase in multistate probate issues for the probate practitioner.

Unfortunately, multistate probate issues also present significantly complex legal issues. This outline barely touches the surface of the myriad of issues that can arise in multistate probate administration. Each issue along could easily be its own paper. Additionally, the multistate probate issues are interrelated. For example, a decedent's domicile plays a significant role in choice of law issues, as well as determining the situs of intangible assets. Real property, on the other hand, has its situs in the state in which it is located. These situs determinations usually affect a probate court's in rem jurisdiction. In turn, the concept of in rem jurisdiction plays a significant role in analyzing full faith and credit issues.

The number of considerations, rules, and potential outcomes in this area make it very difficult for the legal practitioner to give advice with certainty. The purpose of this paper to highlight some of the key fundamental principles every practitioner should be aware of when analyzing a multi-state probate issues.

II. THE HISTORICAL BASIS FOR PROBATE COURTS

More than a century ago, the United States Supreme Court explained the vital function our nation's probate courts play in the transfer of property rights from one generation to the next:

> It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate, or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the succession.[7]

Our nation's highest court has traditionally given significant deference to the states with respect to its probate laws. In a society where inheritance is an

[1] This paper and accompanying presentation is intended for informational and educational purposes only and cannot be relied upon for legal advice. Any assumptions used in this paper are for illustrative purposes only. This paper and accompanying presentation creates no attorney-client relationship.

[2] Marisa Sanfilippo, Most Retirees Desire a Post-Retirement Move, Study reveals, available at: https://www.goodcall.com/news/post-retirement-move-010152.

[3] Craig Venezia, Buying a Second Home You Will Live In At Retirement (2104), available at: https://www.forbes.com/sites/nextavenue/2014/08/04/buying-a-second-home-youll-live-in-at-retirement/#7213827c76aa.

[4] George Wilson, Ancillary Administration, 2 Est. Tax & Pers. Fin. Plan. § 20:24 (April 2018 Update).

[5] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.01 (2009 ed.).

[6] *Id.*

[7] *Tilt v. Kelsey*, 207 U.S. 43, 55–56 (1907).

important social concept, the managing of decedents' property is a sovereign right which may not be readily frustrated.[8] A state has an interest "[in] provid[ing] for the just and orderly disposition of property at death" and "[w]e long have recognized that this is an area with which the States have an interest of considerable magnitude."[9] As discussed herein, sometimes courts in two or more states make conflicting and irreconcilable determinations, but this alone does not support throwing the conflict into a federal court for its resolution.[10]

III. PROBATE JURISDICTION GENERALLY

A. Jurisdictional Basics

The purpose of civil litigation is to dispose of controversies through a formal, authoritative process that results in binding judgments.[11] Our nation's courts, however, are restrained by limitations on their territorial jurisdiction.[12] The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property, without due process of law.[13] A cause of action or claim is a protected property interest within the meaning of the Due Process Clause.[14]

"Jurisdiction is the right to hear and decide, and it must be exercised, speaking in a broad sense, in one of two modes—either in rem or in personam."[15] The U.S. Supreme Court noted the distinctions between in personam and in rem jurisdiction in *Shaffer*:

- If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff.

- If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.[16]

There are two key concepts which are fundamental to due process and which act to limit the exercise of a court's jurisdiction:

- Minimum contacts;[17]and

- Notice and opportunity to be heard.[18]

[8] *Riley v. New York Tr. Co.*, 315 U.S. 343, 355 (1942).

[9] *Lalli v. Lalli*, 439 U.S. 259, 268 (1978).

[10] *Nelson v. Miller*, 201 F.2d 277, 280 (9th Cir. 1952).

[11] Gene R. Shreve & Peter Raven-Hansen, UNDERSTANDING CIVIL PROCEDURE, § 3.01 (3rd ed. 2002).

[12] *Id.* citing Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 Cornell L. Rev. 411, 412 n. 5 (1981)("Other names for this or similar concepts include judicial jurisdiction, adjudicatory jurisdiction, adjudicatory authority, amenability, nexus, and substantive due process."); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982).

[13] U.S. Const. amend. XIV; *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion) ("[T]he Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights.").

[14] *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) ("In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.").

[15] *Overby v. Gordon*, 177 U.S. 214, 221 (1900).

[16] *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

[17] *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316, (1945)(". . . [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

[18] *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

B. Pennoyer and the Rule of Physical Presence

The evolution of modern theories on state court jurisdiction can be traced back to the 1877 landmark U.S. Supreme Court case of *Pennoyer v. Neff.* [19] Traditionally, to exercise in personam or in rem jurisdiction, a court had to have "power" over the defendant and/or property, which was predicated on the physical presence of the defendant or the property within the court's territory.[20]

As *Pennoyer* mentioned, there are "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property:"

- Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory;[21] and
- No state can exercise direct jurisdiction and authority over persons or property outside its territory.[22]

Normally, the application of these rules are fairly straightforward. Analyzing whether property is within a court's territorial reach for the purpose of establishing jurisdiction is simple in the case of real or tangible property since there are clear situs rules for such property.[23] But when jurisdiction is predicated on intangible property, the analysis becomes more complicated because property of that character only has a legal situs; it does not have an actual or physical situs.[24] The rules regarding the situs of intangible property play a major role in resolving multi-state probate jurisdictional issues.

C. Along Come International Shoe and Shaffer

International Shoe Co. v. Washington[25] shifted the focus of in personam jurisdiction from a state's physical power over the defendant to the defendant's minimum contacts with the forum state.[26] The U.S. Supreme Court announced a new standard for determining personal jurisdiction over non-residents:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[27]

The legal fictions created by *Pennoyer* continued to apply to in rem cases until 1977, when the U.S. Supreme Court decided the landmark in rem case of *Shaffer v. Heitner.* Prior to *Shaffer*, the rules relating to in personam and in rem jurisdiction had developed separately.[28] As one scholar notes, *Shaffer* consolidated the illogically bifurcated system of in rem and in personam jurisdiction, which emphasized due process for some but ignored due process for others, into a single theory designed to provide due process for all.[29]

In *Shaffer*, the Supreme Court famously concluded jurisdiction over property, like jurisdiction over persons, must be based on minimum, purposeful contacts and must not offend traditional notions of fair play and substantial justice:[30]

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern

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[19] Rita Miller, *Shaffer v. Heitner: Reshaping the Contours of State Court Jurisdiction*, 11 Loy. L.A. L. Rev. 87, 91 (1977).

[20] 4A Fed. Prac. & Proc. Civ. § 1070 (4th ed.); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

[21] *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

[22] *Id.*

[23] 4A Fed. Prac. & Proc. Civ. § 1070 (4th ed.).

[24] *Id.*; *see also Hanson v. Denckla*, 357 U.S. 235, 247, (1958).

[25] 326 U.S. 310 (1945).

[26] Friedenthal, Kane, & Miller, CIVIL PROCEDURE, § 3.9 (4th ed. 2005).

[27] *Id.* at 316.

[28] Miller, *supra*, n. 18 at 93.

[29] *Id.* at 91.

[30] *HMS Aviation v. Layale Enterprises, S.A.*, 149 S.W.3d 182, 196 (Tex. App.—Fort Worth 2004, no pet.).

> justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.[31]

The *Shaffer* Court indicated, however, that *International Shoe's* minimum contact test could be satisfied in in rem cases:

> [W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.[32]

Despite *Shaffer*, the distinction between in personam and in rem jurisdiction retains some practical significance.[33]

D. Probate Proceedings are In Rem Proceedings

As the U.S. Supreme Court has long recognized, probate proceedings are actions *in rem*.[34] It may be difficult, however, to globally characterize every type of commonly encountered probate-related proceeding, especially contested proceedings, as pure proceedings in rem.[35] For example, as one treatise notes, will contests are examples of in rem or quasi in rem jurisdiction.[36] Indispensable parties may be joined in in rem actions as long as the judgment is limited to adjudicating the degree of their interest in the property.[37] "If will contests are characterized as something other than in rem actions, then these considerations of joinder will be much more important."[38] If a will contest or other contested probate proceeding (for example, one involving a claim for personal damages) is characterized as a personal action, then a good rule of thumb is that all parties necessary to the fair determination of the contest must be joined and these parties must have minimum contacts with the jurisdiction in which the will contest or other contested proceeding has been filed to be joined.[39]

E. What's So Special About In Rem Jurisdiction Anyway?

In rem jurisdiction, or jurisdiction based on property, is most typically invoked when one or more of the defendants or persons with potential claims to the property are nonresidents of the forum state or jurisdiction over their person cannot be secured in the

[31] *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

[32] *Id.* at 207–08.

[33] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 5.2 (3rd ed. 2000).

[34] *See e..g., Gelston v. Hoyt*, 16 U.S. 246, 315 (1818); *Case of Broderick's Will*, 88 U.S. 503, 509 (1874); *Overby v. Gordon*, 177 U.S. 214 (1900) ("To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration.").

[35] *See e.g. Steger v. Shofner*, 54 S.W.2d 1013, 1016 (Tex. Civ. App.—Beaumont 1932, no writ) (action to cancel written contract between Texas resident and non-resident was personal in nature and could only be supported by proper personal service on non-resident); *Socony Mobil Oil Corp. v. Belveal*, 430 S.W.2d 529, 533 (Tex. Civ. App.–El Paso 1968, writ ref'd n.r.e.) (dealing with suit to set aside certain deeds and to recover possession and title to certain property which was taken by fraud and noting that an action to cancel a voidable deed is characterized as an in personam action).

[36] Eunice L. Ross and Thomas J. Reed, Will Contests § 4.12 (2d. ed. 2017 update).

[37] *Id.* (citing 3 Page on *The Law of Wills* § 26.51: "For those states that continue to treat will contests as in rem actions, this is a convenient way out. On the other hand, a number of states no longer characterize will contests as in rem actions, or qualify that characterization by requiring that all necessary parties be joined by the contestant.")

[38] *Id.*

[39] *Id.*

forum state.[40] In rem jurisdiction is an alternative to in personam jurisdiction.[41] "The essential function of an action in rem is the determination of title to or the status of property located—physically or legally—within the court's jurisdiction."[42]

1. Key In Rem Principles

As stated above, most probate proceedings are proceedings in rem, which result in judgments affecting the rem at issue. To understand how an in rem judgment affects concepts like full faith and credit, res judicata and collateral estoppel, it is important to understand a few key in rem jurisdiction principles:

- A judgment in rem affects the interests of all persons in designated property.[43] Judgments in rem are typically binding "on the whole world."[44]

- "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."[45]

- In rem judgments bind persons to the extent of their interest in the property whether or not they were parties to the proceedings.[46]

- Service on the property owner relates only to notice and opportunity to be heard, not to the court's jurisdiction.[47]

- Personal jurisdiction is irrelevant and not required in an in rem proceeding.[48] However, the effect of a judgment in rem action is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner.[49]

- Consequently, a judgment rendered in rem or quasi-in-rem will exhaust itself in the forum state and cannot be enforced against the defendant or his property in other jurisdictions under the Full Faith and Credit Clause.[50]

Thus, these rules make it clear that the careful practitioner should consider obtaining in personam jurisdiction on every defendant for which personal liability is sought.

[40] 4A Fed. Prac. & Poc. Civ. § 1070 (4th ed.); *Pulaski Choice, L.L.C. v. 2735 Villa Creek, L.P.*, 376 S.W.3d 500, 503 (2010).

[41] *See Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.Com*, 128 F. Supp. 2d 340, 345 (E.D. Va. 2001).

[42] 4A Fed. Prac. & Proc. Civ. § 1070 (4th ed.).

[43] *Shaffer v. Heitner*, 433 U.S. 186, 199 n. 17 (1977).

[44] RESTATEMENT, JUDGMENTS § 32, comment a (1942).

[45] *In re Broderick's Will*, 88 U.S. 503, 519 (1874).

[46] 50 C.J.S., Judgments, sec. 1054 (2005).

[47] 21 C.J.S., Courts, sec. 37; (citing *Miccosukee Tribe of Indians of Florida v. Dep't of Envtl. Prot. ex rel. Bd. of Trustees of Internal Imp. Tr. Fund*, 78 So. 3d 31, 33 (Fla. Dist. Ct. App. 2011) ("Because a proceeding in rem is an action against the property itself, the court is not required to acquire in personam jurisdiction over the landowner as a prerequisite to a valid court action. Instead, "the purpose of service of the summons and complaint upon the landowner is only to provide notice and an opportunity to be heard.") (internal citations omitted)).

[48] *Id. Pulaski Choice, L.L.C. v. 2735 Villa Creek, L.P.*, 376 S.W.3d 500, 503 (2010); *see also Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Tp.*, 643 N.W.2d 685, 689 (2002)("A proceeding in rem is an action against the property itself, and in personam jurisdiction is not required.")(citing *Catlin v. Catlin*, 494 N.W.2d 581, 588 (N.D.1992); *Smith v. Smith*, 459 N.W.2d 785, 787–88 (N.D.1990); *Freeman v. Alderson*, 119 U.S. 185, 187 (1886); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 132 (5th Cir.1990); *Farley*, 350 S.E.2d at 264; *In re Petition of Seattle*, 353 P.2d at 957–58; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 59 (1988).

[49] *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977)("The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.").

[50] 4A Fed. Prac. & Proc. Civ. § 1070 (4th ed.).

2. Notice

Historically, the classification of an action as in rem or in personam was considered important with regard to the citation required to establish jurisdiction.[51] Today, however, the historical differences for the types of notice required in in personam and in rem proceedings are being whittled down by modern technology and corresponding fundamental notions of fairness.

Prior to the landmark 1950 U.S. Supreme Court case of *Mullane v. Cent. Hanover Bank & Trust Co.*,[52] determining what type of notice would satisfy due process largely depended on whether the proceeding in question could be classified as one in rem or in personam.[53]

Traditionally, in rem jurisprudence seemed to imply that notice by publication alone was sufficient "to all defendants, whether residents or non-residents, whose identities and addresses were unknown."[54] Even where the name and whereabouts of a non-resident defendant was known, notice by publication was sufficient.[55] In fact, many of these concepts have significantly affected modern day probate jurisdiction over decedent's estates.[56]

After *Pennoyer*, however, the U.S. Supreme Court became more concerned with achieving substantial justice:

> [T]here occurred a gradual expansion and strengthening of notice requirements–a move toward notice reasonably calculated to give actual notice. The Court began to take an interest in the probability of a party

[51] Note, *Jurisdiction–Status*, 10 Tex. L. Rev. 513 (1932).

[52] In *Mullane v. Central Hanover Bank & Trust Co.* the United States Supreme Court addressed the constitutional sufficiency of whether citation by publication was sufficient notice under the requirements of the Fourteenth Amendment. 339 U.S. 306, 320 (1950). *Mullane* involved the judicial settlement of a common trust fund account. Ultimately, the court held that published notice was insufficient as to the present known beneficiaries whose whereabouts were known. *Id.* at 320. The court examined the sufficiency of the notice without regard to whether the underlying proceeding was *in personal* or *in rem*. In examining the sufficiency of the notice, the Court seemed to suggest that the classification of a proceeding does not always prove dispositive of the type of notice required:

> Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.' . . . But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. *Id.* at 312-13.

[53] Note, *Due Process of Law and Notice by Publication*, 32 Ind. L.J. 469, 470 (1957); *see also* Jerry L. Malone, *Property–Meeting the Due Process Requirements of Notice to Mortgagees in Tax Sales*, 7 U. Ark. Little Rock L. Rev. 437, 438 (1984), (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

[54] Malone, *supra* note 48 at 439 (citing *Goodrich v. Ferris*, 214 U.S. 71 (1909) for the proposition that notice by posting and publication held sufficient as to non-residents).

[55] *Id.* (citing *Huling v. Kaw Valley Ry. & Improvement Co.*, 130 U.S. 559 (1889) for the proposition that state's interest was too important to allow the absence of owner to keep it from adjudicating on property within its territorial limits).

[56] *See Estate of Whittenburg*, 07-15-00443-CV, 2016 WL 4158032, at *1 (Tex. App.—Amarillo Aug. 4, 2016, pet. filed) ("It has long been the law in Texas that probate proceedings are in rem, and 'rules applicable to cases in which jurisdiction over the person [*i.e.* in personam] must be acquired before a personal judgment can be rendered, have no application to such proceedings.'")(quoting *Thomas v. Bonnie*, 66 Tex. 635, 2 S.W. 724, 726 (Tex. 1886)); *Soto v. Ledezma*, 529 S.W.2d 847, 850 (Tex. Civ. App.–Corpus Christi 1975, no writ). The Court in *Estate of Whittenburg* when on to add, "In other words, personal service normally is not required in in rem proceedings, unless, of course, statute or other law dictates otherwise." *Id.* (citing *Soto v. Ledezma*, 529 S.W.2d at 850).

actually receiving the notice it was provided.[57]

Thus in certain circumstances, published notice is insufficient since "process which is a mere gesture is not due process."[58] In fact, some scholars believe that *Mullane* was emphasizing that merely labeling a proceeding as in personam or in rem does not fully answer the question when a party can resort to constructive notice (e.g., published or posted notice).[59] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . the notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance."[60]

IV. THREE FUNDAMENTAL JURISDICTIONAL ISSUES CONCERNING MULTISTATE PROBATE CASES

Generally, probate jurisdiction only extends to assets within the particular state probating the will.[61] As Professor Schoenblum points out, there are three distinct, complex and often-intertwined issues when it comes to analyzing multi-state probate court jurisdiction issues:

- ***Issue 1:*** Whether one state can exercise jurisdiction on basis that the *estate* is domiciled there.
    - ***Corollary:*** If so, then the need to gain jurisdiction over the *interested persons* and provide adequate notice to them is avoided.
- ***Issue 2:*** Under evolving standards of personal jurisdiction, what is required to for obtaining binding authority over potential claimants, if the first approach fails.
    - ***Corollary:*** Even if another state has in rem jurisdiction over the assets, a court with personal jurisdiction over the parties can order them to take certain actions with respect to the assets.
- ***Issue 3:*** Even if jurisdiction over potential claimants was obtained, whether one state can be compelled to give full faith and credit to another state's order with respect to assets situated in the first state.[62]

A. Issue 1: In Rem Jurisdiction

1. Historical Development of In Rem Jurisdiction

There are several very significant United States Supreme Court cases that highlight the historical development of key in rem jurisdiction principles. These principles are routinely relied on by courts throughout the country when analyzing multi-state probate issues and so a brief discussion of these cases is warranted.

a. *Rose v. Himely, 8 U.S. (4 Cranch) 241, (1808):*

> "**It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds."**

b. *Pennoyer v. Neff, 95 U.S. 714 (1877):*

> '**Except as restrained and limited by . . . [the Constitution, the several states of the Union] possess and exercise the authority of independent states, and . . . [two well-established] principles of public law . . . [respecting the jurisdiction of an independent state over persons and property] are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and**

[57] Malone, *supra* note ____ at 440.

[58] *Mullane*, 339 U.S. at 315.

[59] Note, *Due Process of Law and Notice by Publication*, 32 Ind. L.J. 469, 472 (1957).

[60] *Mullane*, 339 U.S. at 314.

[61] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 (2009 ed.).

[62] *Id.*

> **sovereignty over persons and property within its territory. . . .**[63]

c. *Overby v. Gordon, 177 U.S. 214 (1900).*

In *Overby*, the Court considered whether letters of administration granted in Georgia could prevent further litigation in the District of Columbia concerning whether the decedent was domiciled there and entitled to have the will offered for probate.[64] Ultimately, the *Overby* Court held that the adjudication of a Georgia probate court that the decedent was a resident of that state was a proceeding in rem and did not bind the courts of the District of Columbia in a suit to re-determine the decedent's domicile. The opinion contains a good discussion on fundamental in rem principles:

> **An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the court is to exercise its jurisdiction.**[65]
>
> **The sovereignty of the state of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the state**.[66]
>
> **It is undeniable that the sovereignty of the state of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb county court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding *in rem* relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the state of Georgia.**[67]
>
> **We are of the opinion that the De Kalb county court possessed the power to determine the question of domicil of the decedent for the purpose of conclusively adjudicating the validity within the state of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicil, by a mere finding of such fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest**.[68]

d. *Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917).*

Baker involved a dispute between a decedent's surviving spouse and the decedent's mother about the decedent's domicile on death. This dispute affected how certain stock in a Kentucky company which was owned by the decedent would pass by intestacy. If the stock was distributable according to the laws of Tennessee, it would go entirely to the widow; if it was distributable according to the laws of Kentucky, it

[63] *Id.* at 722.

[64] *Id.* at 219; 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 (2009 ed.).

[65] *Id.* at 221.

[66] *Id.* at 222.

[67] *Id.* at 223.

[68] *Id.* at 227. ("Our conclusion being that the adjudication of the fact of domicil in Georgia made in the grant of letters by the De Kalb county court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicil in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the supreme court of the District did not err in excluding the transcript in question whether tendered as evidence conducing to establish or as conclusively fixing the domicil of the deceased."); *see also In re Nye's Estate*, 157 Ind. App. 236, 244, 299 N.E.2d 854, 859 (1973)("[B]ecause those interests were not represented in the Florida court we must find against appellant's contention that the Florida judgment is conclusive as to decedent's domicile.")

would go one half to the widow, the other half to the mother.[69]

The widow applied for letters of administration in Tennessee. The proceedings were ex-parte. The widow's application was granted and the order of the court appointing her as administratrix recited that at the time of his death, the Decedent's residence was in Tennessee.[70] The widow later obtained an order in the Tennessee estate administration finding that she was entitled to the decedent's residuary personal property and ordering the widow to transfer the stock in the Kentucky company to herself. The widow then sued the Decedent's mother (a nonresident of Tennessee) in Tennessee seeking to determine, among things, that she was the sole distribute of the decedent's personal estate.[71] As a non-resident of Tennessee, the Decedent's mother was served by publication, but she defaulted, and an unfavorable judgment resulted against her in Tennessee.

Meanwhile, the mother obtained letters of administration in Kentucky and filed suit seeking to establish her right to the stock by establishing the decedent was a resident of Kentucky. Although a favorable judgment was rendered for the mother, it was later vacated because of insufficient notice to the widow.[72]

Eventually, the widow filed suit in Kentucky, essentially seeking to enforce her Tennessee judgment against the Kentucky company. That suit was dismissed. The window appealed to the Kentucky court of appeals. The court determined that the judgments of both Tennessee courts were invalid as against the mother because they were entered without process of law as against her and found that the decedent was domiciled in the state of Kentucky and his personalty was distributable according to the laws of that state, *i.e.*, that his mother and his widow were each entitled to one half of his personal estate situated in Kentucky at the time of his death.[73]

The sole question on appeal to the U.S. Supreme Court was whether the Tennessee proceedings were entitled to recognition in the courts of Kentucky as adversely adjudicating the mother's asserted right to share in the personal property situated in Kentucky, or as conclusively determining the decedent's domicile as affecting that right, in view of the failure of the Tennessee courts to acquire jurisdiction over the mother's person or over the Kentucky corporation, Baker, Eccles, & Company.[74] The Court answered both questions in the negative.

The U.S. Supreme Court began its analysis by noting that the determination of a decedent's domicile (which impacts what law governs distribution) must be made according to fundamental principles of justice and due process: "that is, either by a proceeding in rem in a court having control of the estate, or by a proceeding in personam after service of process upon the parties to be affected by the judgment."[75] The Court further implicitly recognized the situs of the stock was Kentucky.[76] The Court then highlighted the need for an ancillary administration for purposes of probating the stock:

> **The rule generally adopted throughout the states is that an administrator appointed in one state has no power virtute officii over property in another. No state need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a state from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts . . .**
>
> **. . . the Tennessee judgments had no effect in rem upon the Kentucky assets now in controversy. [The widow] invokes the aid of those judgments as judgments in personam. But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not**

[69] *Id.* at 395.

[70] *Id.* at 396.

[71] *Id.*

[72] *Id.* at 398.

[73] *Id.* at 399.

[74] *Id.* at 399-400.

[75] *Id.* at 400.

[76] *Id.*

> **entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.[77]**

The widow framed two fundamental questions:

1. How is it possible to judicially determine that domicile under the theory of the Kentucky court of appeals in the case of an intestate heir entitled to personalty in several states having different laws of distribution, and with parties claiming to be distributees residing in different jurisdictions?

2. Assuming a lawful grant of administration in each state where part of the personalty is located and some of the possible distributees reside, how is any one of these administrators, or any one of the claimants of a share in the whole estate, to have the place of the intestate's domicile settled authoritatively and the lawful distributees ascertained?[78]

For the *Baker* Court, the answer was clear:

> **Unless all possible distributees can be brought within the jurisdiction of a single court having authority to pass upon the subject matter, either by service of process or by their voluntary appearance . . . whatever inconvenience may result is a necessary incident of the operation of the fundamental rule that a court of justice may not determine the personal rights of parties without giving them an opportunity to be heard.[79]**

e. *State of Iowa v. Slimmer, 248 U.S. 115 (1918).*

In *Slimmer*, the Supreme Court rejected Iowa's attempt to enjoin Minnesota probate proceedings so that Iowa could collect certain taxes it claimed were owed by a domiciliary decedent.

> **Furthermore, so far as concerns the property of the decedent, located at his death in Minnesota, the probate courts of that state had jurisdiction to determine the domicile.[80]**
>
> **But even if decedent was not domiciled in Minnesota, its court had the power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicile to be disposed of by him.[81]**

f. *Riley v. New York Tr. Co., 315 U.S. 343, (1942).*

As Professor Schoenblum notes, *Riley* is the seminal case concerning a court's in rem jurisdiction over an estate located within its territory. In *Riley*, the U.S. Supreme Court affirmed the Delaware Supreme Court's holding that a Delaware court could determine a testatrix's domicile anew, notwithstanding a Georgia court's prior adjudication that the testatrix was domiciled in Georgia.[82] The controversy started when Coca Cola filed an interpleader suit in the state of Delaware to determine whether a New York-appointed administrator or two Georgia-appointed executors were entitled to possess the certificates of stock.[83] The parties agreed that the situs of the stock was Delaware. The Delaware court ordered the stock to be delivered to the New York administrator.[84]

Before the U.S. Supreme Court, the Georgia executors contended that Georgia's prior "judgment on domicile conclusively establishe[d] the right of the Georgia executors to demand delivery" of the stock certificates and was entitled to full faith and credit.[85] In contrast, the New York administrator denied that the

[77] *Id.* at 401.

[78] *Id.* at 404.

[79] *Id.* at 404-405.

[80] *Slimmer*, 248 U.S. at 120-121 (citing *Overby v. Gordon*, 177 U. S. 214 (1900)).

[81] *Id.*

[82] *Riley*, 315 U.S. at 355.

[83] *Id.* at 345-47; Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [A](2009 ed.).

[84] *Id.* 347-48.

[85] *Id.* at 347-48.

decedent was domiciled in Georgia, claiming instead that the decedent was domiciled in New York when she died, and denied that the Georgia judgment on domicile and probate was binding on it.

The issue before the U.S. Supreme Court was whether the Georgia judgment on domicile conclusively established the right of the Georgia executors to demand delivery of personal assets of their testatrix which another state is willing to surrender to the domiciliary personal representative when another representative, appointed by a third state, asserts a similar domiciliary right.[86]

The Court announced that:

> **"[t]he full faith and credit clause allows [one state] in disposing of local assets to determine the question of domicile anew for any interested party who is not bound by participation in [another state's] proceeding."[87]**

The Court went on to note, in very broad terms that:

> **While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is in rem; so far as it affects personalty beyond the state, it is in personam and can bind only parties thereto or their privies. This is the result of the ruling in *Baker v. Baker, Eccles & Co*., 242 U.S. 394, 400, 37 S.Ct. 152, 154, 61 L.Ed. 386. Phrased somewhat differently, if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process**.[88]

Ultimately, the Court concluded that "Georgia and New York might each assert its right to administer the estates of its domiciliaries to protect its sovereign interests and Delaware was free to decide for itself which claimant [was] entitled to receive the portion of [the decedent's] personalty within Delaware's borders."[89]

g. *Hanson v. Denckla, 357 U.S. 235 (1958).*

In *Hanson*, one of the cornerstones of modern jurisdictional theory, the U.S. Supreme Court endorsed and applied the approach taken by these earlier cases.[90] There, a settlor established a trust in Delaware, naming the Wilmington Trust Co. as trustee. She later became domiciled in Florida. Following the settlor's death, a family dispute arose over whether Florida or Delaware courts had jurisdiction over the trust assets. Two of the settlor's daughters claimed that a portion of certain trust property passed under the residuary clause of the settlor's will. In contrast, a third daughter of the settlor contended that the trust property in dispute passed pursuant to an inter vivos power of appointment that directed the property to two trusts established for the benefit of that daughter's two children.[91] The trustee of those two trusts was the Delaware Trust Co.

A declaratory judgment was initiated in Florida to determine to whom the property should pass.[92] About a dozen defendants, including the two trustees, could not be personally served and were instead served by ordinary mail and by published notice.[93] The third daughter moved to dismiss the suit on the basis the Florida court lacked jurisdiction over certain indispensable parties. The Florida court agreed because certain nonresident defendants were not personally served and because the trust assets were located outside the territorial jurisdiction of the court.[94] In connection with the remaining parties, the Florida court proceeded with the case and ruled the assets in dispute passed under the residuary clause of the settlor's will.[95] Before the Florida court's ruling,

[86] *Id.* at 348.

[87] *Id.* at 349–50.

[88] *Id.* 354-55.

[89] *Id.* at 355.

[90] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [B](2009 ed.).

[91] *Hanson*, 357 U.S. at 239-240.

[92] *Id.* at 241.

[93] *Id.* at 241.

[94] *Id.* at 242.

[95] *Id.*

however, the executrix had instituted a declaratory judgment in Delaware to determine who was entitled to the participate in the trust assets in held in Deleware.

In response to the Delaware lawsuit, the legatees unsuccessfully argued that the Florida decree was res judicata. The Delaware court ruled that the trust and power of appointment were valid under the applicable Delaware law, and that the trust corpus had properly been paid to the Delaware Trust Co. and the other appointees.[96]

Trying to validate its state's judgment, the Florida Supreme Court ruled that "jurisdiction to construe the will carried with it 'substantive' jurisdiction 'over the persons of the absent defendants' even though the trust assets were not 'physically in this state.'"[97] After the Florida Supreme Court decision, the Delaware Supreme Court affirmed its lower court's ruling in all respects, including holding that the Florida decree was not binding for purposes of full faith and credit because the Florida court had no personal jurisdiction over the trust companies and no jurisdiction over the trust res.[98]

There were two main issues before the U.S. Supreme Court: first, whether Florida erred in holding that it had jurisdiction over the nonresident defendants, and second, whether Delaware erred in refusing full faith and credit to the Florida decree.[99]

In starting its analysis on jurisdiction, the *Hanson* Court noted that Florida law mandated that a trustee was an indispensable party to litigation involving the validity of the trust and in the absence of such a party a Florida court may not proceed to adjudicate the controversy.[100] The Court then proceeded to examine whether there were sufficient circumstances to establish in rem and in person jurisdiction over the non-resident defendants. Starting with examining in rem jurisdiction, the *Hanson* Court cited *Rose v. Himely*, and noted:

> **Founded on physical power . . . the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States.[14] The basis of the jurisdicton is the presence of the subject property within the territorial jurisdiction of the forum State.[101]**

Importantly, nothing in the record showed that the trust assets subject to dispute were located or had a situs in Florida.[102] The Court then proceeded to immediately identify the fatal flaw of the Florida court's reasoning:

> **The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called 'in rem' jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation.[103]**

Citing *Riley, Baker, and Overby,* the *Hanson* Court stated:

> **In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled has an in rem effect on personalty outside the forum State that could render it conclusive on the**

[96] *Id.* at 242.

[97] *Id.* at 243.

[98] *Id.* at 243.

[99] *Id.* at 243.

[100] *Id.* at 245.

[101] *Id.* at 247.

[102] *Id.*

[103] *Id.* at 247-248.

> **interests of nonresidents over whom there was no personal jurisdiction.[104]**

Additionally, "the fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction in rem."[105] The Court further noted an fundamental jurisdictional principle:

> **Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.[106]**

The Court ultimately concluded that Florida had no in rem jurisdiction, which begged the question of whether a judgment purporting to rest on that basis was invalid in Florida and warranted reversal.

The Court then soundly rejected the argument that the Florida court had in personam jurisdiction over the Delaware trustee. The Court warned, while "the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe Co. v. State of Washington*, it [would be] a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[107] In the *Hanson* Court's view, there were insufficient minimum contacts to establish jurisdiction over the non-resident Delaware trustee:

- The cause of action in this case did not arise out of an act done or transaction consummated in the forum state.
- The action involved the validity of an agreement that was entered without any connection with the forum state.
- The agreement was executed in Delaware by a trust company incorporated in that state and a settlor domiciled in Pennsylvania.
- The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State.
- The record disclosed no instance in which the trustee performed any substantial acts in Florida.[108]

The Court was not persuaded by the common argument that many plaintiffs make in personal jurisdiction cases, which is to try and highlight *a non-defendant's* conduct to establish the substantial connection with the forum state – i.e., here, the fact that power of appointment was executed in Florida:

> **The execution in Florida of the powers of appointment under which the beneficiaries and appointees claim does not give Florida a substantial connection with the contract on which this suit is based. It is the validity of the trust agreement, not the appointment, that is at issue here. . . we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[109]**

The Court further shot down the "normative argument" the because settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise

[104] *Id.* at 248. Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [B](2009 ed.).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 251.

[108] *Id.* at 251.

[109] *Id.*

personal jurisdiction over the nonresident trustees. This is a nonsequitur. The trustee was an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust.[110] The Courted noted these policy arguments were insufficient and irrelevant:

> **[Florida] did not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[111]**

The Court affirmed the Delaware court's ruling because "Delaware was under no obligation to give full faith and credit to a[n] [invalid] Florida judgment which offended the Due Process Clause of the Fourteenth Amendment.[112] Even before passage of the Fourteenth Amendment, *Hanson* noted the Supreme Court had sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over nonresident defendants.[113]

2. Key Lessons Learned

As Professor Schoenblum points out, there are numerous lessons to be learned from the foregoing U.S. Supreme Court case law:

- **The mere contention that a decedent died in a domiciliary state or that the state's control over its affairs give it jurisdiction to adjudicate foreign situated property will not suffice.[114]**
- **The status of a proceeding as in rem or in personam can have important consequences.[115]**
- **If the proceeding is in rem, only the property itself within the jurisdiction is under the control of the court.[116]**
- **An order of the court does not have effect with regard to extraterritorial property or with respect to the rights and obligations of persons *inter partes* not subject to the personal jurisdiction of the court.[117]**
- **An in rem proceeding affords an important benefit in that service of process is not required for a binding judgment with respect to property.[118]**
- **Consequently, the definition of what is an in rem proceeding is crucial.[119]**

B. Issue 2: In Personam Jurisdiction

1. Personal Jurisdiction Generally

The Due Process Clause of the Fourteenth Amendment operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant.[120] Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[121]

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[110] *Id.* at 254.

[111] *Id.*

[112] *Id.* at 255.

[113] *Id.* (citing *Baker v. Baker, Eccles & Co*., 242 U.S. 394; *Riley v. New York Trust Co*., 315 U.S. 343).

[114] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [B](2009 ed.) (citing *In re Nye's Estate*, 249, 299 N.E.2d 854, 862 (1973)).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14 (1984)(citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

[121] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)(quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)).

2. Minimum Contacts

a. *Purposeful Availment*

Before a forum state can exercise personal jurisdiction over a non-resident, the Due Process Clause requires that the non-resident purposefully avail itself of the benefits and protections of the forum state's laws by establishing "minimum contacts" with the state.[122] A defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there.[123]

b. *Minimum Contacts Must Give Rise to Specific or General Jurisdiction*

Personal jurisdiction exists if the nonresident defendant's minimum contacts give rise to either general or specific jurisdiction.[124] Since *International Shoe*, the Supreme Court has recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction.[125]

When a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state has been said to be exercising "general jurisdiction" over the defendant.[126] A court has general jurisdiction when the defendant's contacts with the forum state or so continuous and systematic as to render it essentially "at home" in the forum state.[127] "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."[128] For general jurisdiction purposes, an individual is "at home" in the state of his or her domicile.[129]

The inquiry of whether a forum state may assert specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation.'"[130] In order for a state court to exercise specific jurisdiction, "the suit" must "aris[e] out of or relat[e] to the defendant's contacts with the forum."[131] In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulation."[132] For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."[133] Since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role."[134]

3. Traditional Notions of Fair Play and Substantial Justice

With respect to traditional notions of fair play and substantial justice, the U.S. Supreme Court has declared that "the relationship between the defendant

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[122] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880, 131 S. Ct. 2780, 2787, 180 L. Ed. 2d 765 (2011)("As a general rule, the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'")(quoting *Hanson*, 357 U.S. at 253).

[123] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[124] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14 (1984).

[125] *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1779–80 (2017)(citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

[126] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n. 8 (1984).

[127] *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014)

[128] *Id.*

[129] *Meyer v. Bd. of Regents of Univ. of Oklahoma*, 13 CIV. 3128 CM, 2014 WL 2039654, at *2 (S.D.N.Y. May 14, 2014)(citing *Daimler*, 134 S.Ct. at 760).

[130] *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)(quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)).

[131] *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1780 (2017)(quoting *Daimler AG v. Bauman*, 571 U.S. 117 (2014)); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

[132] *Id.* quoting *Goodyear*, 564 U.S., at 919, (internal quotation marks and brackets omitted).

[133] *Id.*

[134] *Goodyear*, 131 S.Ct., at 2854 (quoting Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 628 (1988)).

and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'"[135]

The burden on the defendant will be considered in light of other relevant factors, including the forumstate's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.[136]

C. Issue 3: Full Faith and Credit

As one scholar notes, "Even if jurisdiction [can] be obtained so as to effect the rights of nonresident parties, there is no assurance that full faith and credit [will] have to be given to any probate judgment of one state by another state."[137] Indeed, "Constitutional jurisprudence does not appear to require any state to abide by a judgment or order of another state with respect to property within the first state's territorial boundaries."[138]

When courts with jurisdiction over property located within their territorial boundaries decide to recognize foreign judgments affecting such property, they usually do so on comity principles, not constitutional imperative.[139] Federal courts have explained the limits of the full faith and credit clause in the context of multi-state probate proceedings:

> Full faith and credit means that a judgment in one state must in the other state be given the full effect it is given by the law and usage in the state of its origin. And, too, the judgments of a state must be given the same full faith and credit in federal courts. Such meaning obviously presupposes that the judgment is within the subject matter jurisdiction of the court pronouncing it. . . It is the accepted theory to which both Florida and California adhere, that a probate court of the state of a decedent's domicile at the time of death has jurisdiction over and takes possession of property within the state, and none other . . . In the circumstance of property belonging to the estate but situated out of the domiciliary state, administration is had through ancillary proceedings in the state in which the property rests . . . There is, however, no authority for the claim . . . that property of a decedent situated in one state can be required by any court to be administered by a court of another state, or that a federal court can interfere in a conflict resulting from irreconcilable findings of the two jurisdictions . . . **Each state court can stand upon its findings as to domicile and apply its probate laws to the estate property situated within it. Having no jurisdiction over property outside its borders, its orders as to such property imposed no duty upon another state to recognize them on the doctrine of full faith and credit**.[140]

D. Potential Solutions

Commonly, a party will want to enforce a probate decree in a domiciliary state with respect to persons and assets *outside the jurisdiction* of the domiciliary state.[141] If a judgment or decree was entered in the first state without notice to all indispensable parties, then there is a risk that res judicata and collateral estoppel will not bar an action in another state by parties over which the first state did not obtain personal jurisdiction.[142]

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[135] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)(quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945)).

[136] *Id.*

[137] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [D](2009 ed.); *see Fall v. Eastin*, 215 U.S. 1 (1907).

[138] *Id.*

[139] *Id.*; *see also In re Harriman's Estate*, 208 N.Y.S. 672 (Sur. Ct. N.Y. 68 1924), *aff'd*, 217 A.D. 733 (1926)(full faith and credit clause did not prevent court from ignoring another state's judgment as to property located in first state); *Blount v. Walker*, 134 U. S. 607 (1890).

[140] *Nelson v. Miller*, 201 F.2d 277, 280 (9th Cir. 1952).

[141] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [E](2009 ed.).

[142] *Id.*

The key issue is usually whether the first state obtained jurisdiction over all indispensable parties, including takers in default. The first state could lack jurisdiction to determine such persons' rights if they were not made parties.[143] As Professor Schoenblum points out, "without jurisdiction, any order would not be entitled to full faith and credit vis-à-vis these persons."[144] For example, a Florida probate court erred in finding that it had jurisdiction over the persons of cotrustees and over the trust res itself where a dispute arose between Florida executor and Minnesota trustee over terms of trust that was established by a Minnesota resident and that held assets located in Minnesota.[145] There, the Florida probate court lacked jurisdiction over the cotrsutees personally due to their Minnesota residency and due to the fact that the probate court lacked jurisdiction over the trust res itself, which was also located in Minnesota.[146] The appellate court stated that the probate court was required to have personal jurisdiction over the co-trustees of a trust to enter a ruling affecting the corpus of the trust.[147] This court must not have read *Hanson v. Denckla*!

Professor Schoenblum offers a few potential solutions, none of which offer certainty, and which include, but are not limited to:

- **Personally serve all non-residents and see if they appear.**[148]
- **Personally serve all non-residents any time they can be located in state.**[149]
- **Attempt to establish personal jurisdiction based on purposeful availment.**[150]
- **Assert jurisdiction based on the situs of the property in dispute.**[151]

V. DOMICILE

Domicile is a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes and its meaning is generally uncontroverted.[152] As the United States Supreme Court declared, "The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."[153]

The functions served by domicile in conflict of laws fall into three broad categories: (1) judicial jurisdiction; (2) choice of law, particularly in matters where continuity of application of the same law is

[143] *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 245, (1958)).

[144] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [E](2009 ed.).

[145] *In re Estate of Stisser*, 932 So. 2d 400, 401 (Fla. Dist. Ct. App. 2006)

[146] *Id.*

[147] *Id.*

[148] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [E][2](2009 ed.)("Having been notified as to an in rem proceeding, they may be concerned that they will be bound by the outcome of this in rem proceeding with respect to property under control of the forum. They may also be concerned that any determination as to the validity of the will or the status of persons as heirs may be used in other jurisdictions and be persuasive, especially since they had a notice and could have challenged any determination.")

[149] *Id.* § 16.02[E][3] (citing *Burnham v. Superior Court*, 495 U.S. 604 (1990)).

[150] *Id.* § 16.02 [E][4](explaining it is idea to have regular contact initiated by the non-resident).

[151] *Id.* § 16.02 [E][5]; *see Shaffer v. Heitner*, 433 U.S. 186, 187 (1977)("The presence of property in a State may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation, as for example, when claims to the property itself are the source of the underlying controversy between the plaintiff and defendant, where it would be unusual for the State where the property is located not to have jurisdiction."). *Id.* at 207-208 ("For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.").

[152] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

[153] *Williamson v. Osenton*, 232 U.S. 619, 625 (1914).

important, as family law and decedents' estates; and (3) governmental benefits and burdens.[154]

As the Restatement (Second) of Conflicts of Laws notes, domicile plays a significant role in the area of decedent's estates:

> In the area of choice of law, the law of a person's domicil may determine such matters relating to his personal status as the validity of his marriage (see § 283) and his legitimacy (see § 287). The same law governs the transfer of his movable property upon death; it determines the validity of his will with respect to such property (see § 263) or its distribution in the event of intestacy (see § 260).[155]

A. Domicile Defined

Texas v. Florida is the landmark domicile/residence case in American jurisprudence and is frequently cited by other courts.

> **Domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there**.[156]

Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile.[157] "Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time."[158]

B. Domicile of Origin

"The law assigns to every child at its birth a domicile of origin. The domicile of origin which the law attributes to an individual is the domicile of his parents. It continues until another domicile is lawfully acquired."[159]

C. Residence Distinguished from Domicile

Domicile is not necessarily synonymous with residence; one can reside in one place but be domiciled in another.[160] Residence is a lesser-included element within the technical definition of domicile.[161] The Restatement (Second) of Conflicts of Laws notes the vague use of the term residence:

> Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case. Frequently it is used in a sense equivalent to domicil. On occasion it means something more than domicil, namely, a domicil at which a person actually dwells. On the other hand, it may mean something else than domicil, namely, a place where the individual has an abode or where he has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicil. The phrase "legal residence" is sometimes used as the equivalent of domicil.[162]

Residence, in contrast to domicile, may refer to living in a particular locality without the intent to make it a fixed and permanent home.[163] Residence requires both physical presence and an intention to remain some indefinite period of time, but not necessarily permanently.[164] "Domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is

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[154] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

[155] *Id.*

[156] *Texas v. Florida*, 306 U.S. 398, 424 (1939); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, (1989).

[157] *Id.*; *see also Mitchell v. United States*, 88 U.S. 350, 352 (1874)("Domicile has been thus defined: 'A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. . . By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home. The place where a person lives is taken to be his domicile until facts adduced establish the contrary.").

[158] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971).

[159] *Gates v. C.I.R.*, 199 F.2d 291, 294 (10th Cir. 1952).

[160] *Id.*

[161] *Snyder v. Pitts*, 241 S.W.2d 136, 139 (1951).

[162] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971), cmt. k.

[163] Black's Law Dictionary 1176 (6th ed.1990).

[164] *Eastman v. Univ. of Michigan*, 30 F.3d 670, 673 (6th Cir. 1994).

physically present much of the time."[165] An individual consequently may have several residences, but only one domicile.

D. Presumption of Domicile

As Professor Schoenblum points out, "no factor is likely to be accorded as great a weight in determining an individual's domicile than where he lives."[166] In 1852, the United States Supreme Court announced that "[w]here a person lives, is taken *prima facie* to be his domcil, until other facts establish the contrary."[167] Since *Ennis*, courts have noted that the rule of thumb on residency and domicile has remained fixed: "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary."[168] "The fact that a person's family lives with him in a dwelling is strong evidence that the dwelling place is his home. If, in addition, the person concerned has his clothing, furniture, pictures, books and other personal belongings in the place, the evidence that it is his home is strengthened...." [169]

For a dwelling place to be a person's domicile, he or she need not intend to stay there permanently. The only duration that is necessary is the intent "to make that place [a] home for the time at least."[170] It is also "not essential that the place be the one where he would prefer to live or which he is sentimentally most attached."[171]

[165] *Id.*

[166] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 8.02 (2009 ed.).

[167] *Ennis v. Smith*, 55 U.S. 400, 423 (1852)("The presumption of law is, that the domicil of origin is retained, until residence elsewhere has been shown by him who alleges a change of it. But residence elsewhere repels the presumption, and casts upon him who denies it to be a domicil of choice, the burden of disproving it. The place of residence must be taken to be a domicil of choice, unless it is proved that it was not meant to be a principal and permanent residence.").

[168] *D.C. v. Murphy*, 314 U.S. 441, 455 (1941).

[169] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12, cmt. g.

[170] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18.

[171] *Id.* cmt. b (emphases added).

E. Continuation of Domicile

A domicile once established continues until it is superseded by a new domicile.[172] The Restatement (Second) of Conflict of Laws § 19 gives the following examples of this principle:

> 1. A, having a domicile in state X, ceases to live there. A does not acquire another home. A's domicile is in X.
>
> 2. A, having a domicile in state X, goes to live in state Y. A has not yet decided to make his home in Y. A's domicile is in X.
>
> 3. A, having a domicile in state X, decides to make his home in state Y. A has not yet gone to Y. A's domicile is in X.
>
> 4. A, having a domicile in state X, decides to make his home in state Y. He leaves X and is on his way to Y but has not yet reached Y. His domicile is in X.[173]

F. Determining Domicile

The determination of domicile presents a mixed question of law and fact.[174] Courts have noted that in the probate context, a determination of domicile involves a jurisdictional fact.[175]

Among the circumstances usually relied upon to establish the intent to remain necessary to establish domicile are: the declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business.[176] Declarations in a will as to the decedent's domicile are evidence of domicile.[177]

[172] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971).

[173] *Id.*

[174] *Garcia Perez v. Santaella*, 364 F.3d 348, 350 (1st Cir. 2004)(citing *Bank One, Texas, N.A. v. Montle*, 964 F.2d 48, 51 (1st Cir.1992)).

[175] *In re Estate of Tolson*, 947 P.2d 1242, 1248 (1997).

[176] *Mitchell v. United States*, 88 U.S. 350, 353 (1874).

[177] *Ennis v. Smith*, 55 U.S. 400, 401 (1852).

"Domicile must be determined from the totality of the circumstances, and courts generally focus on such indicia as residence, voting practices, location of personal and real property, bank and brokerage accounts, membership in associations, place of employment, driver's license, auto registration, and payment of taxes."[178]

G. Domicile of Mentally Incapacitated Persons

Two legal principles cannot be ignored when it comes to ascertaining the intent of an elderly person to make a residence permanent. First, the level of intent when it comes to permanency appears to be very low. In the context of domicile – which requires a significantly heightened intent analysis – the U.S. Fifth Circuit recently noted that "only minimal competency is required to choose a new domicile; even if the person in question has been adjudged incompetent by a court and is incapable of managing his own affairs, he can change his domicile so long as 'he understands the nature and effect of his act.'"[179] Second, elderly persons are not presumptively incompetent.[180]

H. Conflicting Decisions on Domicile

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 explains why conflicting decisions on domicile can be made:

> "The issue as to the location of a person's domicil may arise in independent proceedings with different parties in two or more states. In such instances, conflicting conclusions are sometimes reached either because (1) the states involved have different rules on the subject of domicil or (2) even though the rules of domicil are the same, different inferences are drawn by the courts from the facts presented. Unless there is a common reviewing tribunal, each decision stands."[181]

The case of *In re Dorrance's Estate* provides a well-known illustration of this principle.[182] There, a New Jersey and a Pennsylvania court each held that the decedent was domiciled in their respective states. The Pennsylvania court's ruling that the decedent was domiciled in that state was ultimately not binding on New Jersey under the Full Faith and Credit Clause of the Federal Constitution.[183]

VI. CONFLICTS OF LAWS

A. Restatement Second, Conflicts of Laws

1. Reason for Conflicts of Laws

"The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution."[184]

2. Subject Matter of Conflicts of Laws

"Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state."[185] The comment notes the important matters falling within the scope of a state's Conflict of Laws rules, which include:

- **Judicial jurisdiction and competence**. The rules each state has as to the types of cases involving foreign elements which its courts and other tribunals shall hear which determine the extent to which the courts may, or do, exercise jurisdiction over persons who are not

[178] *Cassens v. Cassens*, 430 F. Supp. 2d 830, 834 (S.D. Ill. 2006).

[179] *Acridge v. Evangelical Lutheran Good Samaritan Soc*., 334 F.3d 444, 448 (5th Cir. 2003)(holding wife had the authority to change the domicile of husband so long as she was acting in his best interests).

[180] *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998) ("Unlike minors, the elderly are not presumptively incompetent, nor, we believe, should they be."); *Turner v. Hendon*, 269 S.W.3d 243, 248 (Tex. App.–El Paso 2008, pet. denied).

[181] The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, cmt. n.

[182] *In re Dorrance's Estate*, 115 N.J. Eq. 268, 170 A. 601 (1934), aff'd 116 N.J.L. 362, 184 A. 743 (1936), cert. denied 298 U.S. 678 (1936).

[183] *Id.*

[184] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

[185] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

physically present in the state and over occurrences which take place elsewhere.

- **Foreign judgments.** The rules each state has as to the effect its courts will give to judgments rendered in other states.

- **Choice of law.** The rules each state has to determine which law (its own local law or the local law of another state) shall be applied by it to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements.[186]

3. Choice of Law Principles

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 sets forth the hierarchy in terms of applying choice of law principles:

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

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

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

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

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

B. Situs Rules for Jurisdiction Purposes

Situs is a legal concept that relates to the location or position (of something) for legal purposes, as in *lex situs*, the law of the place where the thing in issue is situated.[187] When analyzing situs issues, it is important to understand the purpose for which one is trying determine situs, for example, for jurisdiction or choice of law purposes.

The basis of in rem jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state.[188] As the U.S. Supreme Court has noted, "One of the essentials of jurisdiction in rem is that the thing shall be 'actually or constructively within the reach of the Court.'"[189] One of the principal questions in a multistate estate is to identify the state that has jurisdiction for administration purposes.[190]

1. Real Property

Generally, courts have "ultimate power over lands situated within [their] state."[191] Moreover, "the Legislature of one state has no power to confer jurisdiction over property situated in another state."[192] In rem proceedings may only be affected in the jurisdiction where the real property is located.[193]

[186] *Id.* cmt.

[187] Black's Law Dictionary (10th ed. 2014), Situs.

[188] *Hanson v. Denckla*, 357 U.S. 235, 246 (1958).

[189] *United States v. Mack*, 295 U.S. 480, 484 (1935).

[190] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 22.6 (3rd ed. 2000).

[191] *Haga v. Thomas*, 409 S.W.3d 731, 736 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)(citing *De Tray v. Hardgrove*, 52 S.W.2d 239, 240 (Tex.Com.App.1932)); *In re Bills' Estate*, 542 S.W.2d 943, 946 (Tex. Civ. App.–Texarkana 1976, writ ref'd n.r.e.) ("The law is settled that the Arkansas judgment of probate is in rem but has no extra-territorial effect upon assets of the decedent's estate in Texas.").

[192] *Haga v. Thomas*, 409 S.W.3d 731, 736–37 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see also* 32 A.L.R.3d 1330 (Originally published in 1970)("Res judicata or collateral estoppel effect, in state where real property is located, of foreign decree dealing with such property.").

[193] *Gansereit v. Gansereit*, 463 S.E.2d 65, 66 (1995); *see also In re Elamex, S.A. de C.V.*, 367 S.W.3d 891, 897–98 (Tex. App.—El Paso 2012, no pet.)(noting that courts have subject matter jurisdiction over lawsuits relating to real property outside of Texas if the nature of the suit and the remedy sought directly affect and operate upon the defendant, and not upon the out-of-state property; the

2. Intangible Property

Although each state has the power to administer assets within its borders, it can be difficult to fix the precise situs of assets when they are intangible in nature.[194] When courts reference the "situs" of an intangible asset, they are identifying a place at which it is reasonable to collect and administer the intangible.[195]

Pinpointing the exact location of an intangible asset for jurisdictional purposes is sometimes a cumbersome task. Justice Cardozo famously said:

> The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common-sense appraisal of the requirements of justice and convenience in particular conditions.[196]

a. *Choses in Action*

An ordinary chose in action, not evidenced by a document, represents a claim which constitutes an asset where the debtor resides.[197] It is not altogether uncommon for an estate administration in one state to be founded upon a tort committed by a wrongdoer against a decedent. In the context of probate proceedings, such a potential claim (properly asserted by the decedent's personal representative) is a "chose in action."[198] A chose in action does not, by its nature, neatly fit within the identifiable confines of real property, tangible personal property or intangible personal property. The law of the situs of a chose in action recognizes that such a cause of action assumes the form of a debt, "resting upon an obligation which the law imposes upon a wrongdoer to pay adequate compensation to an injured party, or his representative."[199] Such debts follow the person of the debtor, and their payment – when liquidated to judgment – may be enforced where the debtor may be found.[200]

The Uniform Probate Code states: "For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office."[201]

b. *Negotiable Instruments*

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 326 declares:

> (1) A claim owned by the decedent which is represented by a negotiable instrument that is not in the lawful possession of a foreign executor or administrator or of one holding under him can be administered in the state where the instrument is located.
>
> (2) The executor or administrator in possession of a negotiable instrument owned by his decedent is entitled to payment thereof, and only such executor or administrator or his transferee is so entitled.

determining issue is whether the nature of the lawsuit in question involves a naked question of title; if it does, the suit is *in rem,* if it does not, the suit is *in personam.*").

[194] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.07 (2009 ed.); *see also* Hopkins, *Conflicts of Laws in Administration of Decedent's Intangibles*, 28 Iowa L. Rev. 422 and 613 (pts. 1 & 2 1943).

[195] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 22.10 (3rd ed. 2000).

[196] *Dickstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 685 A.2d 943, 947–48 (App. Div. 1996)(quoting *Severnoe Securities Corp. v. London & Lancashire Inc. Co.*, 255 *N.Y.* 120, 123–124, 174 *N.E.* 299, 300 (1931) (citations omitted)).

[197] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 22.10 (3rd ed. 2000).

[198] *Lancaster & Wallace v. Sexton*, 245 S.W.958 (Tex. Civ. App. 1922, writ ref'd.).

[199] *Id.*

[200] *Id.*

[201] U.P.C. § 3-201(d)("Venue for First and Subsequent Estate").

(3) Payment of a claim represented by a negotiable instrument to any executor or administrator of the decedent, or his transferee, who presents and surrenders such negotiable instrument operates as a quittance to the debtor making such payment.

Comment c states that "a claim represented by a negotiable instrument may be administered in the state where the instrument is located at the time of the death of the decedent. The claim may also be administered in any state to which the instrument may thereafter be taken under the circumstances stated in § 320 (entitled "When Chattel Brought into State After Death of Owner May Be Administered")." Comment d states that "An executor or administrator may maintain an action within the state of his appointment and in the case of a claim represented by a negotiable instrument may maintain an action in any state where he can get jurisdiction over the person or property of the defendant."[202]

The Uniform Probate Code follows this approach: "Commercial paper, investment paper and other instruments are located where the instrument is."[203]

c. *Corporate Stock*

There are at least three possibilities when it comes to determining where shares of stock are located for purposes of administration: (1) domicile of the owner of the stock; (2) place of incorporation; (3) place where the certificates are kept at the time of the owner's death, which will normally be his domicile.[204]
The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 324 states in part that "corporate shares owned by the decedent which are represented by a share certificate which is not in the lawful possession of a foreign executor or administrator or of one holding under him may be administered in the state where the certificate is located."[205]

d. *Life Insurance*

It is unclear whether a life insurance claim payable to the personal representative or the estate of the insured is to be treated like a simple contract debt or like one represented by a certificate.[206] Life insurance policies have been found to have a situs at any one of the following locations: (1) the location of the policy document;[207] (2) the place where the insurer does business;[208] or (3) any state in which the insurer can be made subject to the court's jurisdiction.[209]

e. *Bank Deposits*

It is well-settled that the situs of an intangible asset (like a bank account) is the domicile of the asset's owner.[210] Probate courts have declined to assert in rem jurisdiction over financial accounts owned by decedents who were not residents. For example, in *In re Howard Marshall Charitable Remainder Annuity Tr.*,[211] the Louisiana Supreme Court applied the longstanding concept of *mobilia sequuntur personam, immobilia situa* ("movables follow the person, immovables their locality") in determining the situs of a "right to undisbursed trust income" held by a non-resident decedent domiciled in Texas at death. The Court held that the decedent had no property, movable or immovable, which was situated in Louisiana when he died and, consequently, establishing an estate administration in Louisiana was improper because the court lacked jurisdiction.[212] The Court acknowledged

[202] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 326 (1971), cmt. d.

[203] U.P.C. § 3-201(d)("Venue for First and Subsequent Estate").

[204] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 22.12 (3rd ed. 2000).

[205] *See also* Situs of corporate stock for purposes of probate jurisdiction and administration, 72 A.L.R. 179 (Originally published in 1931).

[206] Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, § 22.13 (3rd ed. 2000).

[207] Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.07[C] (2009 ed.)(citing *Johnston v. Smith*, 25 Hun. 171 (N.Y. 1881).

[208] *Id.* (citing *Rice v. Metropolitan Life Ins. Co.* 238 S.W. 772 (1922)).

[209] *Id.* (citing *Furst v. Brady*, 31 N. E. 2d 606 (1941)).

[210] *Appraisal Review Bd. v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 533 (Tex. 1998); *Davis v. City of Austin*, 632 S.W.2d 331, 332-33 (Tex. 1982); *Great S. Life Ins. Co. v. City of Austin*, 243 S.W. 778, 781 (Tex. 1922); *In re Estate of Baer*, 46 A.D.3d 1368, 1370, 849 N.Y.S.2d 143, 146 (2007)(noting the usual rule [with respect to bank accounts] is that for administrative purposes they have their situs at the domicile of the owner").

[211] 709 So.2d 662, 668 (La. 1998).

[212] *Id.* at 670.

that although *mobilia sequuntur personam* is merely a legal fiction, the concept is particularly applicable to incorporeal movables, whose very nature makes the determination of their location problematic.[213]

Similarly, in the *In Re Estate of Coleman*,[214] the Court recognized that, under North Dakota statutes the will of a nonresident leaving property in North Dakota could be probated in that state, but held that a certificate of deposit in a loan company, which was the only property claimed to be located in North Dakota, was an intangible and had its situs at the domicile of the testatrix, which in this case was Montana, and that therefore the will of that testatrix could not be probated in North Dakota since she did not leave property within that state sufficient to give the court jurisdiction.

C. Situs Rules for Choice of Law Purposes

1. Intestate Succession on Death of Immovable Property

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 states:

> (1) The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs.
>
> (2) These courts would usually apply their own local law in determining such questions.

2. Intestate Succession on Death of Movable Property

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 states:

> The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.

The comment explains the policy behind the rule: "It is desirable that insofar as possible an estate should be treated as a unit and, to this end, that questions of intestate succession to movables should be governed by a single law. This is the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death. This state would usually have the dominant interest in the decedent at the time."[215]

3. Testate Succession on Death of Immovable Property

a. *Validity and Effect of Will Devising Land*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 states:

> (3) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.
>
> (4) These courts would usually apply their own local law in determining such questions.

b. *Construction of Will Devising Land*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 240 states:

> (1) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.

[213] *Id*. at 668 (citing *In Blodgett v. Silberman*, 277 U.S. 1, 9-10 (1928)), for the proposition that:

> At common law the maxim "mobilia sequuntur personam" applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not. *Blodgett*, 277 U.S. at 9–10.

[214] 98 NW2d 784 (N.D. 1959).

[215] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (1971), cmt. b.

(2) These courts would usually apply their own local law in determining such questions.

4. Testate Succession on Death of Movable Property

a. *Validity and Effect of Will*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 states:

(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.

(2) These courts would usually apply their own local law in determining such questions.

b. *Construction of Will*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 264 states:

(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.

(2) These courts would usually apply their own local law in determining such questions.

D. Trusts

1. Immovable Property

a. *Court Supervision of Administration*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 276 states:

The administration of a trust of an interest in land is supervised by the courts of the situs as long as the land remains subject to the trust.

b. *Construction of Trust*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 277 states:

(1) A will or other instrument creating a trust of an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the instrument.

(2) In the absence of such a designation, the instrument is construed in accordance with the rules of construction that would be applied by the courts of the situs**.**

c. *Validity of Trust of Land*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 277 states:

The validity of a trust of an interest in land is determined by the law that would be applied by the courts of the situs.

The comments to that section make it clear that that the rule applies to trusts of interests in land, whether created by will or inter vivos.[216]

d. *Administration of Trust of Land*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 279 states:

The administration of a trust of an interest in land is determined by the law that would be applied by the courts of the situs as long as the land remains subject to the trust.

2. Movable Property

a. *Court Supervision of Administration*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 267 states:

The administration of a trust of interests in movables is usually supervised by the court, if any, in which the trustee has qualified as trustee or by the courts of the state in which the trust is to be administered.

[216] THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 278, cmt. a.

b. *Construction of Trust*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268 states:

> (1) A will or other instrument creating a trust of interests in movables is construed in accordance with the rules of construction of the state designated for this purpose in the instrument.
>
> (2) In the absence of such a designation, the instrument is construed
>
> (a) as to matters pertaining to administration, in accordance with the rules of construction of the state whose local law governs the administration of the trust, and
>
> (b) as to matters not pertaining to administration, in accordance with the rules of construction of the state which the testator or settlor would probably have desired to be applicable.

c. *Validity of Trust of Movables Created by Will*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 states:

> The validity of a trust of interests in movables created by will is determined
>
> (a) as to matters that affect the validity of the will as a testamentary disposition, by the law that would be applied by the courts of the state of the testator's domicil at death, and
>
> (b) as to matters that affect only the validity of the trust provisions, except when the provision is invalid under the strong public policy of the state of the testator's domicil at death,
>
> (i) by the local law of the state designated by the testator to govern the validity of the trust, provided that this state has a substantial relation to the trust, or
>
> (ii) if there is no such effective designation, by the local law of the state of the testator's domicil at death, except that the local law of the state where the trust is to be administered will be applied if application of this law is necessary to sustain the validity of the trust.

d. *Validity of Trust of Movables Created Inter Vivos*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 states:

> An inter vivos trust of interests in movables is valid if valid
>
> (a) under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6, or
>
> (b) if there is no such effective designation, under the local law of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6.

e. *Administration of Trust of Movables Created by Will*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 271 states:

> The administration of a trust of interests in movables created by will is governed as to matters which can be controlled by the terms of the trust
>
> (a) by the local law of the state designated by the testator to govern the administration of the trust, or
>
> (b) if there is no such designation, by the local law of the state of the testator's domicil at death, unless the trust is to be administered in some other state, in which case the local law of the latter state will govern.

f. *Administration of Trust of Movables Created Inter Vivos*

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 states:

> The administration of an inter vivos trust of interests in movables is governed as to matters which can be controlled by the terms of the trust
>
> (a) by the local law of the state designated by the settlor to govern the administration of the trust, or
>
> (b) if there is no such designation, by the local law of the state to which the administration of the trust is most substantially related.

VII. FOREIGN JUDGMENTS

A. Effect Given in Other States to Judgments in Administrative Proceedings

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317 nicely summarizes the rules deduced from the domicile and choice of law principles discussed above. Section 317(1) states that:

> A judgment in administration proceedings by a competent court in the state where the decedent was domiciled at the time of his death will usually be followed by the forum with respect to local movables *insofar as the judgment deals with questions of succession* that under the choice-of-law rules of the forum are governed by the law that would be applied by the courts of the state of the decedent's domicil.

As the comment to subsection (1) provides, the devolution of movables in both testate and intestate succession is determined by the law that would be applied by the courts of the state where the decedent was domiciled when he or she died.[217] The comment notes that "an adjudication with regard to a particular person's estate in the state of that person's domicile, if final and conclusive in that state, will usually be conclusively received in other states with respect to issues *relating to succession to interests in movables* belonging to the estate."[218] Interestingly, this rule applies although the persons participating in the litigation and the property being administered are different from those involved in the proceedings in the domiciliary state.[219] Arguably, however, such persons would at least have to have proper notice.[220]

The following illustrations of the rule are offered:

1. A dies domiciled in state X, owning movables in states Y and Z. In X, probate of A's will is resisted by his widow on grounds of mental incompetency and undue influence. The X court finds that the widow's contentions are without merit and admits the will to probate. Thereafter, ancillary probate of the will is sought in Y. This is resisted on grounds of mental incompetency and undue influence by certain of A's children who did not appear in the X proceedings. The Y court will follow the X judgment and admit the will to ancillary probate.

2. Same facts as in Illustration 1 except that the widow in state X, and the children in state Y, resist probate of the will on the ground that the will is void for lack of necessary formalities. The Y court will follow the X judgment and admit the will to ancillary probate.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317(2) further provides that:

> A judgment in administration proceedings by a competent court in the state where the decedent was domiciled at the time of his death will not of itself invalidate a prior inconsistent judgment by a court in another state in administering the estate of the same decedent in that state.

Comment f deals with Subsection (2) and the effect of a later adjudication of domicile. That comment notes: "If a will disposing of movables has already been admitted to, or refused, probate locally, a subsequent contrary judgment by a court at the decedent's domicil will be sufficient grounds, except

[217] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317, cmt. subsection (1), b. rationale.

[218] *Id.*

[219] *Id.*

[220] *Id.* (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

as stated in Comment *g* (dealing with states that have statutes overriding common law rule dealing with the devolution of movables), for the local court to revoke its prior inconsistent judgment.[221] But, as the Comment notes, "the application must be seasonably made and will not be granted if the local administration has proceeded so far that the revocation of the original judgment would produce hardship."[222]

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317(3) deals with applying principles of res judicata, and declares:

> A judgment in administration proceedings by a competent court of any state will be held conclusive in other states as to the issues determined upon all persons who were subject to the jurisdiction of the original court if the judgment is conclusive upon such persons in the state of rendition.

The rule applies to judgments in administration proceedings irrespective of whether they concern immovables or movables.[223] As between states of the United States, the comment makes it clear that the rule in the Subsection is one of constitutional law.[224]

The comment offers the following illustration:

> A dies intestate. Claiming that A died domiciled in state X, W, A's widow, applies for letters of administration in a proceeding brought in X. The X court finds that A died domiciled in X and appoints W administratrix. Thereafter, S, A's son, who at no time had been subject to the personal jurisdiction of the X court, brings a proceeding in state Y where he claims that A died domiciled. W is served with process in Y and appears in the Y proceeding as a party. The Y court finds that A died domiciled in Y and appoints S administrator. The Y court's finding of domicil is binding upon W under Y local law. Thereafter, S brings a proceeding in X seeking the revocation of the letters issued to W and the issuance of ancillary letters to him. W will not be permitted to claim in X that A died domiciled in that state. As between States of the United States, this result is required by full faith and credit.

The case of *Roberts v. Bathurst*[225] is instructive as to § 317(3). There, a decedent died in Manila leaving life insurance payable to his executors. A woman named Marjorie Bathurst probated a will executed by the decedent in 1935 in Florida, which named her as the sole executor and beneficiary. Ms. Bathurst then sued the life insurance company in Federal District Court in Florida (the "Federal Case"). The insurance company filed an interpleader, because it had received a competing claim from a woman named Theresa Moreno, the decedent's ex-wife. She had been appointed as collector in the District of Columbia. She claimed that her prior divorce was not valid and petitioned to revoke the probate of the 1935 will, asserting that she was widow and sole heir and the sole beneficiary under a will of prior date, that the probated 1935 will was void because the testator was not at its making of sound mind and acted under the undue influence of Mrs. Bathurst, and that the deceased was domiciled in the District of Columbia where she had been appointed collector of the estate.

Ms. Moreno lost in the Florida probate court and in the Federal Case. Then, things really get interesting. Meanwhile, on Oct. 27, 1937, in Massachusetts a man named Paul B. Roberts offered the decedent's 1919 Will for probate, which gave Mrs. Moreno the estate and named her executrix. She declined to serve and consented to the appointment of Mr. Roberts as administrator with the will annexed. Citation on the petition for probate was issued to Mrs. Bathurst, non-resident in Massachusetts, by publication, but she did not appear. The Massachusetts court admitted the 1919 Will to probate, finding the testator's domicile to have been in Norfolk County, Massachusetts.

Roberts then intervened in the Federal Case in Florida, and asserted the decedent's true domicile was Massachusetts, and that he was the true personal representative and entitled to the insurance money.[226]

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[221] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317, cmt. subsection (2), f. Effect of subsequent adjudication of domicil.

[222] *Id.*

[223] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317, cmt. h.

[224] *Id.*

[225] 112 F.2d 543, 544 (5th Cir. 1940).

[226] *Roberts v. Bathurst*, 112 F.2d 543, 544 (5th Cir. 1940).

The court ruled that the claim of Mrs. Bathurst as executrix under appointment of the Florida probate court was valid and the money deposited was ordered paid to her. Roberts, as administrator, appealed.

The Fifth Circuit Court of Appeals started its analysis by noting that life insurance is payable to the personal representative appointed at the true domicile at death.[227] By its analysis, the true domicile would be difficult to decide under the evidence in the record could not be decided by summary judgment. The court noted that the parties confronted one another in the Florida probate court on the issues whether that court had jurisdiction as the court of domicile, and whether the later will was the true last will. The Court noted that the probate court must have sustained its jurisdiction, and did sustain the probate of the later will as the true will. Indeed, its judgment bound Mrs. Moreno in other courts, and settled that the will giving the estate to Mrs. Bathurst was valid:

> As against the parties actually contesting it, a court may conclusively adjudicate its own jurisdiction. . . Roberts asserts that he is not party to and is not bound by the Florida court's decision, and that Mrs. Bathurst is bound as to him by the probate of the other will in Massachusetts. **The Massachusetts probate, as an in rem proceeding, would protect Roberts in his administration in Massachusetts of any assets there**. But it was made only on constructive service. **We do not think it is available in Florida to override the adjudication made there on an actual contest between the interested parties**. Roberts himself has no substantial rights. He was appointed administrator on the consent of Mrs. Moreno, and appears to have stood by awaiting the result of her contest with Mrs. Bathurst in the Florida probate court. Immediately after her defeat he entered the interpleader case. Even if Massachusetts can be held the true domicile and he the payee of the policy, still to avoid circuity of action this court of equity would not pay him the money to take to Massachusetts and compel Mrs. Bathurst to follow it, subjecting her to an unnecessary burden and her money to unnecessary costs of administration.[228]

Finally, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317(4) provides:

> If an issue as to the state in which a decedent was domiciled at the time of his death is raised by a person not precluded from raising this issue under Subsection (3), a court will not regard itself as concluded by a prior finding made in another state as to the place of the decedent's domicil.

Comment j states that "if, contrary to a previous judgment rendered in another state, the court finds that the decedent did not die domiciled in the other state, the court will not be required by the rule of Subsection (1) to follow a judgment rendered in administration proceedings in the other state unless the parties are precluded from raising the issue of domicil by the rule of Subsection (3)."[229]

B. Effect of Suit Elsewhere of Judgment For Executor or Administrator

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 352 states:

> After an executor or administrator has recovered a personal judgment on a claim due to a decedent, no other executor or administrator may recover on the claim.

As Comment (a) explains, the rule applies to all personal judgments recovered by an executor or administrator, whether for money or otherwise.[230] Only the executor or administrator who recovered the judgment may enforce it or bring suit on the

[227] *Id.* at 544-45; (citing V*ogel v. New York Life Ins. C*o., 55 F.2d 205 (Tex. 5 Cir. 1932)).

[228] *Id.* at 545 (emphasis added).

[229] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 317, cmt. j.

[230] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 352, cmt. a.

judgment.[231] Such an executor or administrator may enforce the judgment in the state of the forum or in any other state as any other judgment creditor, but the executor or administrator is required to account for any amount recovered to the court which appointed him.[232]

C. Effect on Suit Elsewhere of Judgment for Defendant in Suit by Executor or Administrator

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 353 declares:

> (1) Except as stated in Subsection (2), if an executor or administrator in one state sues a person against whom a claim of the decedent is asserted and judgment is for the defendant, such judgment does not usually constitute a bar to a suit by an executor or administrator appointed in another state to collect the claim in the absence of a statute in that other state to the contrary.
>
> (2) When the suit is brought by an executor, a judgment for the defendant bars suit in another state upon the same claim by the same person as executor.

The comment to § 353 explains that, since the individuals appointed executors or administrators in the two states derive their authority from different appointments, the parties to the two suits have been held not to be the same.[233] Consequently, there is no res judicata to bar the suit of the executor or administrator in the second state. Interestingly, the comment states that "the rule of Subsection (1) has been held to apply even though the same person is administrator in both states."[234]

Note, however, that "when judgment is rendered on the merits for the defendant in an action brought against him by an executor or administrator on a claim of the estate, this judgment will bar a further action on the claim against the defendant by the same executor or administrator in the state of his appointment and in other states."[235]

D. Effect on Suit Elsewhere of Judgment for Defendant Executor or Administrator

Occasionally, a party with a claim against a decedent will sue such decedent's executor. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 357 explains the result when the executor is successful in its defense of such a claim, as it states:

> If a person asserting a claim against a decedent sues an executor or administrator of the decedent's estate and judgment is for the defendant on the merits, such judgment will constitute a bar to a suit by the claimant against an executor or administrator of the same decedent in another state upon the same claim.

The rule is based on the premise that "a person who has had his day in court in a forum of his choice should be estopped by a judgment on the merits against him from relitigating the same claim in another state against an executor or administrator appointed in that other state."[236] Plaintiff creditors have been unsuccessful in attempting to taking claims that were filed, but not established in one forum, and relitigating them in another forum.[237]

E. Effect on Executor or Administrator of Judgment Rendered During Lifetime of Decedent

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 353 states:

> (1) Except as stated in Subsection (2), if an executor or administrator in one state sues a person against whom a

[231] *Id.* citing § 355 (When Foreign Executor or Administrator May Sue; Claims Arising Upon Transactions After Appointment).

[232] *Id.* citing § 362 (Accountability of Executor or Administrator to Court of Appointment).

[233] *Id.* cmt. a.

[234] *Id.*

[235] *Id.*

[236] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 357 (1971), cmt. a.

[237] *See Grasser v. Blakkolb*, 530 P.2d 684, 686, n.2 (1975)("It is further noted that once suit is brought upon a rejected claim in one jurisdiction and judgment entered for the defendant on the merits, such judgment will bar an action against an administrator of the same decedent's estate in another state.")(citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 357 (1971)).

claim of the decedent is asserted and judgment is for the defendant, such judgment does not usually constitute a bar to a suit by an executor or administrator appointed in another state to collect the claim in the absence of a statute in that other state to the contrary.

(2) When the suit is brought by an executor, a judgment for the defendant bars suit in another state upon the same claim by the same person as executor.

VIII. MULTI-STATE WILL CONTESTS

A. Key Principles

As previously stated, probate courts have jurisdiction over property by virtue of the probate of wills and by intestate succession.[238] This jurisdiction is founded upon ancient notions of in rem process. Personal jurisdiction over the parties who must be joined to properly try a will contest sufficient to bind each of them to the order issued by the court raises serious conflict of laws and jurisdictional issues which often must be resolved.[239]

Indeed, whenever a will is probated in the jurisdiction of the decedent's domicile, a question may arise as to its recognition in other jurisdictions.[240] There exists a potential for a will to be held valid in one state and invalid in another.

There are two key principles to take away in this area:

- When it comes to land, the situs state has never been considered bound by an extraterritorial proceeding or determination concerning that land.[241]
- When it comes to movables, the full faith and credit and res judicata effects of a probate decree are primarily determined by the nature of the court's jurisdiction."[242]
    - "In an ex-parte, in rem proceeding, any determination will only be binding elsewhere with regard to the locally situated assets."[243] In other words, the will can be contested again in each jurisdiction in which assets are situated.[244]
    - However, this will not be the case if the will was probated at the domicile with adequate notice to the relevant parties.

As Professor Schoenblum points out, when it comes to movables, there is a strong preference in favor of probate at the decedent's last domicile.[245] Courts assuming ancillary jurisdiction have refused probate until the will has first been admitted to probate in the decedent's domicile,[246] although the foreign

[238] Eunice L. Ross and Thomas J. Reed, Will Contests § 4:11 (2d ed. 2017 Update)

[239] *Id.*

[240] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.16 (2009 ed.).

[241] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.16 (2009 ed.); *see Robertson v. Pickrell*, 109 U.S. 608, 611 (1883); *Chaney v. Cooper*, 954 S.W.2d 510, 520 (Mo. Ct. App. 1997)("It is universally held that for 'a will to be of any validity as a transfer of title to land, [it] must be executed, attested, and probated in the manner prescribed by the law of the state where the land is located.'" (internal citations omitted) Following this general principal of law, a state does not have to give full faith and credit to the devise of real property as a result of an adjudication of a will by another state."); *Overby v. Gordon*, 177 U.S. 214, 223 (1900)(probate of a will in one state establishes its right to convey all property within that state in addition to establishing the validity of the will in that state; but the probate proceeding in that state does not establish the validity of a will in another state in which real property is located "except as permitted by the laws of such other state.").

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.16 (2009 ed.).

[246] *Id.* (citing *In re Estate of Nevai*, 788 N.Y.S. 2d 843 (Sur. Ct. 2005)).

court is not prohibited from admitting the foreign will when estate assets are located there.[247]

B. Full Faith and Credit of Order Admitting Will to Probate

The case of *In re Estate of Stein* provides a good example of the limitations of a probate order, issued by a state where the decedent was not domiciled on his death, admitting a will to probate. In *Stein*, a decedent died in Washington. The decedent's son (the "Father") had a 1987 will admitted to probate in Oregon. An Oregon personal representative was appointed. Thereafter, the decedent's grandchildren (the "Children") had a 1984 will admitted to probate in Washington. A different Washington personal representative was appointed. The 1987 will was more favorable to the Father while the 1984 was more favorable to the Children.[248]

Eventually, the Washington personal representative sought instructions as to which will was the decedent's last valid will. The Washington court ordered that the 1987 Will be filed of record in Washington, and the court set a time limit to file a contest. The Children contested the 1987 Will. The Father did not contest the 1984 Will previously admitted to probate in Washington. The Children moved for summary judgment that the Father was time barred from seeking to admit the 1987 Will to probate. The Father filed a cross-motion for summary judgment arguing that Oregon—through the order admitting will to probate, which was not challenged by the Children—established the 1987 will as decedent's last will. The Father further contended that the Oregon decision was binding on all parties to the Washington probate proceeding under the Full Faith and Credit Clause of the United States Constitution. The Washington probate court granted the Children's motion for summary judgment.[249]

On appeal, the Father contended: (1) that Oregon probated the 1987 will and declared it to be decedent's last will and testament; (2) that Oregon properly had jurisdiction over this matter; and (3) that Washington must therefore give full faith and credit to Oregon's determination under article 4, section 1 of the United States Constitution.[250] In contrast, the Children contended that Oregon recognized that the decedent had no real or personal property in Oregon, had died being domiciled in Washington and properly closed the probate proceeding then pending before it, and, even if the Oregon order did find the 1987 will to be the decedent's last will, Oregon lacked jurisdiction over the estate and Washington is therefore not bound by any order made by Oregon.[251]

The Court reversed and remanded the summary judgment granted in favor of the Children and started its analysis by outlining several basic tenets applicable to multi-state probate issues:

> **[Full faith and credit generally]** A judgment rendered by a court of one state, if valid, is entitled to recognition in the courts of another state by virtue of the full faith and credit clause. Generally, this concept means a foreign judgment must be given the same recognition and res judicata effect it would receive in the state which rendered it, although a decree of a sister state may be subject to collateral attack **for want of jurisdiction over the subject matter of the action or the parties to the action**.
>
> **[Law of domicile governs distribution]** However, a different set of principles applies where probate matters are concerned. Generally, primary probate of a will should be made in the place of the testator's domicile.[9] "The principle is fundamental that the law of the domicil governs the distribution of the assets of a decedent."
>
> [**Nonresident will affects only property within non-resident state]** The probate of a nonresident's will who dies leaving property within the state affects *only* the property *within the jurisdiction* and has no effect on the validity of the will itself beyond the limited purpose of the plenary power possessed by the state with respect to property within its domain; **the requirement of full faith and credit** to a

[247] *Id.*

[248] *In re Estate of Stein*, 896 P.2d 740, 745 (1995).

[249] *Id.* at 742.

[250] *Id.* at 744.

[251] *Id.* at 744-45.

> sister state's judgment admitting a will to probate **does not give such judgment extraterritorial effect on assets in other states**.
>
> [**Domiciliary probate court lacks jurisdiction over foreign real property]** The courts of a decedent's domicile do not have jurisdiction to control devolution of real property held in another state; therefore, the state in which real property is located is not required to give full faith and credit to a decision of another state regarding probate of such real property.
>
> When a testator executes a will devising lands in two or more states, the courts in each state will construe it as to the lands located therein as if devised by separate wills.[252]

Importantly, the Court noted that Oregon had found that the decedent was domiciled in Washington.[253] Moreover, under the principles outlined above, it was proper for the Washington probate court to determine which will was the decedent's last will and testament as to those assets that were not in Oregon at the time of his death because Washington was the decedent's state of domicile. Consequently, the Court noted that the Washington probate court was free to determine which will was the decedent's true will in regard to his assets in Washington at the time of his death, including his Washington real estate. Finally:

> The Oregon order, which found the 1987 will to be decedent's true will, **can apply only to the assets in Oregon at the time of his death because Oregon was not the state of domicile**. **The Oregon court's order has no force beyond Oregon's borders.** Thus, Washington is not required to give full faith and credit to Oregon's order, **except as to those assets which were in the State of Oregon at the time of the death of the decedent** and were transferred to Washington for distribution.[254]

[252] *Id.* at 745.

[253] *Id.*

[254] *Id.* at 746.

In *Marr v. Hendrix*,[255] disappointed family members challenged the validity of a will originally probated in Florida. The Decedent died in Florida after having resided there for 18 months. Her will was admitted to probate and her daughter was appointed as her executrix. When she died, the Decedent owned property in Kentucky. The will as initially admitted to ancillary probate in Kentucky but was later contested on lack of capacity and undue influence grounds.[256]

The trial court dismissed the will contest, ruling that the Full Faith and Credit Clause of the United States Constitution effectively precluded a person from contesting the validity of a nonresident decedent's will, even in ancillary proceedings regarding the decedent's property located in Kentucky, where the will was previously admitted to probate in the decedent's domiciliary state.[257] The Court of Appeals reversed, and on appeal, the Kentucky Supreme Court affirmed the Court of Appeals, holdingthat Kentucky retained residual jurisdiction to challenge the validity of a will probated without contest in Florida, in so far as it affected Kentucky real property.[258]

Where there has been no adjudication of the underlying validity of the will in a sister state, the Kentucky Supreme Court held that Kentucky courts could entertain a will contest relating to real property located in Kentucky.[259] Commentators have noted that the court's ruling is consistent with the position taken by Restatement Second Conflict of Laws § 59 (Judicial Jurisdiction over Land) and § 97 (Res Judicata as to Jurisdiction over Things or Status).[260]

Other recent decisions have affirmed that principles of res judicata and full faith and credit have no application in matters involving probate and title to realty. *In re Estate of Latek*, 960 N.E.2d 193, 200 (Ind. Ct. App. 2012)(concluding domiciliary court's denial

[255] 952 S.W.2d 693 (Ky. 1997).

[256] 952 S.W.2d at 694.

[257] *Id.*

[258] *Id.* at 695.

[259] *Id.*

[260] Eunice L. Ross and Thomas J. Reed, Will Contests § 4:11 (2d ed. 2017 Update)

of will to probate because it failed to comply with domiciliary state's statutory execution requirements had no effect on the subsequent admission and probate of will in Indiana as it concerned the disposition of real property located in Indiana).

C. Domicile and Collateral Estoppel

In Re Estate of Tolson provides a good illustration of the relationship between domicile and collateral estoppel – particularly, the effect of a judgment in a probate proceeding against one who, although a party to that proceeding, attempts to raise the question of domicile in another jurisdiction.[261] In *In Re Estate of Tolson*, a Washington State trial court found that a decedent was domiciled in Washington at the date of his death. A California court, however, had previously found the decedent was domiciled in California. Ultimately, the Washington Court of Appeals held that the Washington trial court should have given collateral estoppel effect to the California judgment.

The factual and procedural history of the case are somewhat complex. In December of 1993, a man named Jack Tolson (the "Decedent") died in his mobile home located in Vancouver, Washington.

His daughters, Sharon and Laina, filed a petition to probate the Decedent's 1993 holographic will (the "Will") in San Joaquin, California. The petition listed San Joaquin County as Decedent's residence. The Will itself indicated it was executed in Vancouver, Washington, although that fact was disputed. The Will left two percent of the Decedent's estate to his son Terrance (the "Son") and divided the remainder equally among Decedent's two daughters and his granddaughter. Among other things, the estate included the mobile home in Vancouver, Washington, and a home in Stockton, California.

In March of 1994, the California court granted the petition for probate of Decedent's Will and letters of administration were issued to Susan Patterson, as public administrator for the estate ("Patterson" and/or the "California Administrator").

In March of 1994, a Washington attorney named Charles Gallup ("Gallup" and/or the "Washington Administrator"), filed a Request for Special Notice in the California court on behalf of Terrance. Gallup requested that all documents in the proceeding that were to be sent to Terrance Tolson be delivered "to the care of his attorney, Charles E. Gallup."

In July 1994, Gallup began proceedings for intestate succession in the Clark County Superior Court, Washington. Letters of Administration were issued to Gallup as personal representative for the estate in July of 1994.[262]

About a month later, in August of 1994, the Decedent's daughter, Laina, filed an application to admit the Decedent's will to probate as a foreign will in Washington. The application listed the Decedent as a resident of Washington State and did not object to Gallup's serving as personal representative. The court entered an ex parte order admitting the will and appointing Gallup as the personal representative. The order was entered without notice to Gallup.

Meanwhile, in California, Susan Patterson filed a petition to determine the Decedent's domicile because of the conflicting evidence regarding that issue.

- In December of 1994, while the petition to recognize dual domicile was still pending in California, the Washington Administrator filed a petition to determine the validity of the Decedent's holographic will in Washington. In his petition, the Washington Administrator acknowledged that the domicile issue was pending in the California court and asked for the court's guidance in administering the estate.

- At the end of December of 1994, the California court issued a statement of intended decision rejecting dual domicile, admitting the Will to probate in California, and setting ancillary administration in Washington. The Washington Administrator did not file an objection to the California court's decision, and a final order issued in January of 1995.

On January 27, 1995, the Washington court held a hearing to determine the validity of the Will.[263] Laina and the Decedent's granddaughter, acting pro se, filed a motion to dismiss, arguing that collateral estoppel

[261] *In re Estate of Tolson*, 947 P.2d 1242, 1246 (1997).

[262] *Id.* at 1246.

[263] *Id.* at 1246.

prevented the court from relitigating the issue of the Decedent's domicile.

About three months later, in April of 1995, the Washington court declined to dismiss the Washington action, ruling that the elements for collateral estoppel had not been met because the application for admittance of a foreign will stated that the Decedent was a resident of Washington State. The Washington court also determined that the Full Faith and Credit Clause did not apply because domicile is a jurisdictional issue.

Then, in November of 1995, the Washington court determined that the Decedent was domiciled in Washington. The order revoked admission of the foreign will to probate in Washington. The Decedent's daughter and granddaughter appealed.

On appeal, the Decedent's daughter and granddaughter contended that the Washington court erred in considering the question of domicile because: (1) it was required to give full faith and credit to the California decision; and (2) the Son was estopped from attacking the validity of the will or the California decision on domicile because he did not make any objection to the California proceeding.

The opinion provides an excellent overview of the concepts of full faith and credit and collateral estoppel. First, the court began its analysis by reviewing several key full faith and credit principles:

- full faith and credit requires that "where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered."[264]

- "If the foreign court had jurisdiction of the parties and of the subject matter, and the foreign judgment is therefore valid where it was rendered, [then] a court [in Washington] must give full faith and credit to the foreign judgment and regard the issues thereby adjudged to be precluded in a Washington proceeding."[265]

Enforcing a judgment under the Full Faith and Credit Clause can be challenged by a showing that the court rendering judgment lacked jurisdiction.[266] In the probate context, a determination of domicile involves a jurisdictional fact. Thus, the Washington trial court attempted to side-step the full faith and credit analysis by focusing on the determination of domicile. For the trial court, the issue was whether to give the California court's determination of domicile collateral estoppel effect. It concluded that the elements of estoppel were not met.[267]

The Washington Court of Appeals went on to examine the relationship between domicile and the Full Faith and Credit Clause in the context of a multi-state probate proceeding. The court noted that, subject to the Full Faith and Credit Clause, a sovereign will determine personal and property rights within its territory.[268]

- A decedent's will may be admitted to probate, and an executor or administrator appointed, in any state: (a) where the decedent was domiciled at the time of death; or (b) where there are assets of the estate at the time of decedent's death.[269]

- The primary probate of a will generally lies with the court of the state and county in which the decedent was domiciled.[270]

- Ancillary probate may lie in any state in which property of the decedent has a situs.[271]

In the context of a probate action, it is fundamental that the law of the domicile governs the distribution of the assets of a decedent.[272]

[264] *Riley et al. v. *New York Trust Co.*, 315 U.S. 343, 349 (1942).

[265] *In Re Estate of Tolson*, 947 P.2d at 1246 (citing 28 U.S.C. § 1738).

[266] *Id.* at 1248 (citing 18 Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure § 4467 (1981)).

[267] *Id.* at 1246.

[268] *Id.* (citing *Riley*, 315 U.S. at 349–50)).

[269] *Id.* at 1248 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 314, 359).

[270] *Id.* (internal citations omitted).

[271] *Id.* (internal citations omitted).

[272] *Id.* (internal citations omitted).

- Although the law of the domicile determines the right to succession and distribution of the personal property that has its physical situs in a foreign jurisdiction, the existence of an estate belonging to a nonresident decedent in a foreign state may make it subject to an ancillary administration under the laws of such state.[273]

- Generally speaking, courts of ancillary jurisdiction are bound by the Full Faith and Credit Clause to accept the adjudication of courts of domiciliary jurisdiction on the question of a will's validity.[274]

Relying on *In re Estate of Stein*,[275] the Washington Administrator and Son contended that the Full Faith and Credit Clause did not apply because under Washington law, a Washington court was not bound by any foreign decision relating to the distribution of assets located in the State of Washington. The Court quickly distinguished *Stein.* In *Stein*, an Oregon court found that a decedent was domiciled in the State of Washington. One of the parties argued that Oregon's finding regarding the validity of the decedent's will was binding on Washington under the Full Faith and Credit Clause. The Court of Appeals reasoned, however, that because Oregon had determined the decedent was a Washington domiciliary, a determination regarding the validity of his will in an Oregon probate proceeding was not entitled to full faith and credit in Washington.[276] Since Oregon determined that the decedent's domicile was Washington, the *Stein* court simply applied the conflict of laws provision that the law of the domicile will determine questions regarding will validity.[277] Unlike *Stein*, the California court in the instant case found the Decedent was domiciled in California, not in Washington.[278]

Because domicile is jurisdictional, the Washington Administrator and the Son also argued that the Full Faith and Credit Clause did not prohibit them from collaterally attacking the California court's determination of domicile. The Court noted, however, that it is also well settled that if the jurisdictional question has been litigated in the rendering court, principles of res judicata attach to the jurisdictional ruling and preclude relitigation. A judgment regarding domicile cannot be attacked collaterally, except for fraud or deceit, by one who is a party to the proceeding.[279]

The Court then turned to famous U.S. Supreme Court case *Riley v. New York Trust Co.* to support the rule that "a judgment in administration proceedings by a competent court of any state will be held conclusive in other states as to the issues determined upon all persons who were subject to the jurisdiction of the original court if the judgment is conclusive upon such persons in the state of rendition":[280]

> In *Riley*, 315 U.S. 343, 62 S.Ct. 608, the Supreme Court considered the application of the Full Faith and Credit Clause in an interpleader proceeding in Delaware to determine whether stock belonging to the decedent could be claimed by the executors appointed in Georgia or by the administrator c.t.a. appointed in New York at the request of the State of New York. The Georgia courts had admitted the will to probate and made a finding that the decedent was domiciled in Georgia. **All of the**

[273] *Id.* (citing *In re Estate of Glassford,* 114 Cal.App.2d 181, 189, 249 P.2d 908, 34 A.L.R.2d 1259 (1952)).

[274] *Id.* (internal citations omitted).

[275] 78 Wash. App. at 261, 896 P.2d 740.

[276] *Id.* (internal citations omitted).

[277] *Id.* citing RESTATEMENT (SECOND) OF CONFLICT § 314 (1971); Eunice L. Ross and Thomas J. Reed, *Will Contests* § 10.1, .2 (2nd ed. 1992).

[278] *Id.*

[279] *Id.* (citing *In re Sankey's Estate*, 199 Cal. 391, 399, 249 P. 517 (1926) (determination by probate court as to residence of deceased at time of death is final in all collateral proceedings)); *Hopper v. Nicholas,* 106 Ohio St. 292, 140 N.E. 186 (1922) (finding of residency by surrogates court is binding upon parties before the court in proceeding to admit will to probate and entitled to full faith and credit); *Marin v. Augedahl,* 247 U.S. 142, 149 (1918) (where the court has jurisdiction to determine the fact, and the party is before the court, the party cannot collaterally attack the judgment whether the facts before the court warranted the judgment).

[280] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT §§ 317, 367 (1971); *see also In re Estate of Fischer,* 118 N.J.Eq. 599, 605 (1935) (if grant of letters is an adjudication of domicile, then parties to that proceeding, who had opportunity to be heard, are bound).

> **beneficiaries of the will and heirs at law were parties**. The Court held that the Constitution does not require recognition of a finding of domicile when that finding is challenged in another state **by one who was not subject to the jurisdiction of the rendering state**. However, the Court specifically noted that it was **not concerned with the constitutional effect of a judgment in a probate proceeding against one who, although a party to that proceeding, attempts to raise the question of domicile in another jurisdiction**. *Riley,* 315 U.S. at 346–48, 62 S.Ct. at 610–12. The Court pointed out that **if the objector was privy to the proceedings in state A, state B would be precluded by the Full Faith and Credit Clause from redetermining the issue of domicile**. *Id.* at 353 n. 13, 62 S.Ct. at 614 n. 13.

The Court concluded the that the Full Faith and Credit Clause of the U.S. Constitution applied to a judgment determining jurisdictional facts, such as place of domicile, where the rendering court had probate jurisdiction. Moreover, under the following circumstances presented, the Court found the California court had jurisdiction to decide the Decedent's domicile and that the California order was entitled to full faith and credit in Washington:

- In this case, the California superior court had jurisdiction to admit Decedent's will into probate since Decedent had a residence in California at the time of his death.

- The Decedent's heirs under the Will alleged the Decedent's residence to be San Joaquin County, California.

- The California court appointed a public administrator who filed an action to have the court determine domicile.

- The beneficiaries and heirs at law were notified and given the opportunity to be heard.

- Respondent Gallup, then personal representative in Washington, had notice of the proceeding and appeared specially on behalf of beneficiary, Respondent Tolson.

The Court next considered whether the California court's determination of domicile was subject to collateral attack in the Washington proceedings. Four questions must be answered in the affirmative for collateral estoppel to apply.

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Turning to the first element, the Court found that issue decided in the California judgment is identical to that raised in the Washington proceeding.

- The public administrator petitioned the California Court to find the Decedent was domiciled in both Washington and California.

- The California court declined to do so and determined the Decedent was a California domiciliary.

- Respondents' petition in Clark County Superior Court also sought a determination that the Decedent was a Washington domiciliary.

The second element is also met since the California court conclusively determined that Decedent was domiciled in California at the time of his death and entered a final order to that effect.

As to the third element, the California court held a hearing on October 7, 1994, regarding questions of dual domicile, and admitting the Decedent's holographic will in California.

- All beneficiaries and heirs at law received proper notice of the hearing.

- The personal representative of the California estate was represented, and the Appellants appeared to present their evidence.

- Gallup entered a request for Special Notice in the California proceeding after probate was begun there. In that request, he represented that the Son also requested notice, and that all notices be sent to him care of "his attorney" Charles Gallup. Although Gallup never entered an actual appearance as the Son's attorney, his failure to correct that statement, and his continued receipt of all legal notices that were directed to the Son belied his present contention that he did not nor did he ever represent the Son.

- Although neither the Son nor Gallup appeared in the California domicile hearing, each received proper notice and was afforded the fair opportunity to be heard in that adjudication.

The final element involves the question of injustice to the party against whom the doctrine is being applied. The trial court incorrectly found this element was not satisfied. The Court noted that cases discussing the injustice element focus on the question of whether there was a full and fair hearing on the issue.[281]

Ultimately, the Court found that all parties were properly noticed of the hearing regarding dual domicile in California and that the fourth element was met. Gallup received notice both as personal representative of the Washington estate, and as attorney for the Son. In addition, notice and copies of the memoranda regarding the hearing were sent directly to the Son. The individual decisions of Gallup and the Son not to attend the California domicile hearing is not a defense that a full and fair hearing was conducted. In addition, the California judge sent out a notice of intended decision to all parties three weeks before the final decision was entered. The California court had the issue of domicile directly before it and could have determined that the Decedent was a Washington domiciliary had the Son or Gallup objected to California as Decedent's domicile.

Finally, the Court noted that an individual has the right and freedom to dispose of property according to his or her private desire. The Decedent in this case wrote a will. It was not facially valid in Washington because there were not two witness signatures on the document. However, it was admitted as a valid foreign will in Washington. Thus, applying collateral estoppel to the determination of domicile carries out the Decedent's intent in this particular case.[282]

The Court concluded the Washington court erred in failing to give collateral estoppel effect to the California court's determination of domicile.

D. Formalities, Undue Influence & Testamentary Capacity

As one will contest treatise notes, historically, the law of the place of death has been applied to determine the validity of a will respecting personal property located within the jurisdiction, unless the testator's domicile is different from the place of his or her death – in that case, the orthodox theory of conflict of laws requires that the law of capacity, undue influence, fraud and formalities of the testator's domicile be applied.[283]

IX. MULTI-STATE ESTATE ADMINISTRATION

An estate administration is essentially a "procedure by which the dispositive instruments of the decedent are validated and the various rights of interested persons in the property of the decedent are ascertained and allocated."[284] In cases where a decedent owned property in multiple states, "each state in which the decedent's property is found may assert jurisdiction over that property."[285]

Indeed, each independent state considers itself competent to confer, when appropriate, probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person or lawful debts owing within reach of its own mandate and judicial process.[286] A necessary corollary from the principle

[281] *Id.* at 1250.

[282] *Id.* at 1251.

[283] Will Contests § 4:1, n. 11 (2d ed. 2017).

[284] 1 Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.01 (2009 ed.).

[285] *Id.*

[286] *Glucksberg v. Polan*, 2002 WL 31828646, at *7 (S.D.W. Va. Dec. 16, 2002)(internal citations omitted).

that an appointment of an executor or administrator only has force within the state of appointment is that an executor or administrator who qualified in another state or jurisdiction can neither sue nor be sued as such in any other state or jurisdiction.[287] As Justice Story explained, "it has become an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate."[288]

Multi-state estate administrations are generally unfavored. They often produce duplicative administration expenses and delay for the beneficiaries, who often have to wait to resolve matters in foreign jurisdictions with distinct and unfamiliar court procedures, before the estate is distributed.[289]

A. Where Will May be Probated and Representative Appointed

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 314 explains when probating a will in another state is appropriate:

> The will of a decedent will customarily be admitted to probate and an executor or administrator appointed in a state
>
> (a) where the decedent was domiciled at the time of his death; or
>
> (b) where there are assets of the estate at the time of the decedent's death or at the time of the appointment of the executor or administrator; or
>
> (c) where there is jurisdiction over the person or property of one who is alleged to have killed the decedent by his wrongful act, if the statute under which recovery is sought permits suit by an executor or administrator appointed in that state.[290]

B. Where Administrator May be Appointed in Cases of Intestacy

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 315 explains when establishing an administration in another state is appropriate for someone dying intestate:

> An administrator will customarily be appointed in the case of intestacy in any state in which a will would have been admitted to probate.[291]

C. Law Governing Administration

Generally, the local law of the state in which the estate administration is pending will govern the estate administration:

> The duties of an executor or administrator with regard to the conduct of the administration are usually determined by the local law of the state of appointment.[292]

D. Suits by and Against Executors or Administrators

1. When Executor or Administrator May Maintain Action in State of Appointment

The local law of the state of appointment determines the capacity of its executor or administrator to maintain an action in its courts.[293] As Comment b notes, an executor or administrator generally represents the decedent and can bring such actions in the state of appointment as the decedent, if living, could bring there.[294] "He is not limited to those claims which arise in the state nor to suits against defendants domiciled

[287] *Id.*

[288] *Id.* citing *Vaughan v. Northup,* 40 U.S. 1, 6 (1841).

[289] *Id.*

[290] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 314 (1971).

[291] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 315 (1971).

[292] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 316 (1971).

[293] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 351 (1971)

[294] *Id.* cmt. b.

there, unless such limitations would have been applicable had the decedent himself brought the action in his lifetime."[295]

2. When Foreign Executor or Administrator May Sue

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 354

> A foreign executor or administrator may maintain an action to enforce a claim belonging to the decedent
>
> (1) when the defendant does not make seasonable objection, or
>
> (2) when the claim is on a negotiable instrument, share certificate or negotiable document of title in the possession of the foreign executor or administrator, or
>
> (3) when maintenance of the suit is in the best interests of the estate and will not prejudice the interests of local creditors, or
>
> (4) when otherwise authorized by the local law of the forum.

An executor or administrator may not be able to maintain an action outside the state of his appointment to recover a claim belonging to his decedent because the power of an executor or administrator to maintain an action on claims belonging to the decedent is a power given him by the local law of the state of his appointment and that a power created in one state can have no force in another state.[296] However, the key policy reason underlying the rule is to protect local creditors. A foreign executor or administrator may not be allowed to sue because the executor or administrator may remove from the state assets against which local creditors of the deceased might assert claims.[297] "There is the feeling that, unless otherwise provided by statute, local creditors should as a general rule be spared insofar as possible from the inconvenience of having to present their claims against the decedent's estate before the courts of another state."[298]

3. Suit Against Foreign Executor or Administrator

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 358 states:

> An action may be maintained against a foreign executor or administrator upon a claim against the decedent when the local law of the forum authorizes suit in the state against the executor or administrator and
>
> (a) suit could have been maintained within the state against the decedent during his lifetime because of the existence of a basis of jurisdiction other than mere physical presence (see §§ 29- 39), or
>
> (b) the executor or administrator has done an act in the state in his official capacity.

As Comment b notes, the reluctance of a court to find itself authorized to entertain a suit against a foreign executor or administrator stems from the fact that an executor or administrator holds the assets of the decedent which come into his possession subject to the direction of the court which appointed him.[299]

E. Accountability of Executor or Administrator to Court of Appointment

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 362 provides:

> An executor or administrator is accountable to the court which appointed him for all assets of the decedent which have come into his possession as executor or administrator of that court and for all assets of the decedent which he should have obtained in the discharge of the duties of his office.

[295] *Id.*

[296] *Id.* cmt. a.

[297] *Id.*

[298] *Id.*

[299] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 358 (1971), cmt. b.

This duty applies regardless of whether the executor or administrator obtained the assets in the state of his appointment or elsewhere.[300]

F. Accountability of Executor or Administrator Appointed in Two States

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 363 states:

> If the same person is appointed executor or administrator in two or more states, he is accountable in each state only for such assets of the decedent as he obtained, or should have obtained, as executor or administrator appointed in that state.

As comment b notes, this section can be important to determine in which state an executor or administrator is accountable, so as to hold him or her and his or her sureties liable on the bond in that state. The sureties on an executor's or administrator's bond are responsible only to the extent to which the executor or administrator is accountable in the state in which the bond is given as security.[301]

X. FEDERAL JURISDICTION & THE PROBATE EXCEPTION

Pursuant to a so-called "probate exception," a federal court has no jurisdiction to probate a will or administer an estate.[302] The probate exception stems from the statutory grant of diversity jurisdiction by Congress to federal courts in 1789.[303] The Judiciary Act of 1789 has been interpreted to limit equity jurisdiction of federal courts sitting in diversity to that of the English Court of Chancery in 1789, which did not extend to probate matters.[304] In *Markham v. Allen*, the Supreme Court determined that the probate exception does not bar federal courts from hearing all claims related to probate proceedings.[305]

A. Markham v. Allen

Markham involved a will admitted to probate in California that named German citizens as beneficiaries.[306] Six heirs of the decedent, who lived in the United States, filed a petition for determination of heirship. The resident heirs asserted that pursuant to California law, the German legatees were ineligible as beneficiaries, and that they were entitled to inherit the decedent's estate.[307] The Petitioner, who was the Alien Property Custodian under the Trading with the Enemy Act, asserted that he possessed all right, title and interest of the German legatees in the decedent's estate pursuant to an order vesting their interests with him.[308] Petitioner had filed suit in federal court against the executor and the six California claimants, seeking a declaratory judgment that the resident claimants had no interest in the estate, and that he was entitled to the entire net estate after payment of expenses of administration, debts, and taxes.[309] The district court ruled for the Petitioner, but the Ninth Circuit, reversed, holding the district court lacked jurisdiction pursuant to the probate exception.[310] Reversing the Ninth Circuit, the Supreme Court stated:

> It is true that a federal court has no jurisdiction to probate a will or administer an estate…But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of

[300] The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 362, cmt. a.

[301] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 363, cmt. b.

[302] *Markham v. Allen*, 326 U.S. 490, 494, 66 S. Ct. 296, 298, 90 L. Ed. 256 (1946).

[303] *Id*. at 494.

[304] *Id.*

[305] 326 U.S. 490.

[306] *Id.* at 492.

[307] *Id.* at 492.

[308] *Id.* at 492.

[309] *Id.* at 492.

[310] *Id.* at 493.

> the property in the custody of the state court.'[311]

The Court further clarified the scope of jurisdiction:

> [W]hile a federal court may not exercise its jurisdiction to disturb of affect the possession of property in the custody of a state court, it may exercise jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.[312]

The Court found that the district court's judgment was to determine petitioner's right in the property to be distributed after the administration.[313] It did not disturb the orderly administration of the estate and was, therefore, not an exercise of probate jurisdiction and did not interfere with property in the possession or custody of a state court.[314]

B. Marshall v. Marshall

After *Markham*, courts struggled with applying the probate exception, which one court described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."[315] Many federal courts interpreted and applied the exception broadly. Seeking to clarify and reign in the "distinctly limited scope" of this "narrow" exception, the Supreme Court revisited the probate exception in 2006 in the case of *Marshall v. Marshall*.[316] Noting that "[l]ower federal courts have puzzled over the meaning of the words 'interfere with the probate proceedings,' and some have read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate," the Court stated:

> [W]e comprehend the 'interference' language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*…Thus, the probate exception reserves to state courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. *But is does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction*.[317]

The underlying dispute in *Marshall* involved competing claims in state and federal courts to the fortune of J. Howard Marshall II. While the decedent's estate was pending in Texas probate court, his widow, Vickie Lynn Marshall, better known as Anna Nicole Smith, filed for Chapter 11 bankruptcy in California. E. Pierce Marshall, the decedent's son and the ultimate beneficiary of his estate plan, filed a claim for defamation against Vickie in the federal bankruptcy proceeding, asserting that Vickie had accused him of forgery, fraud, and overreaching to wrest control over his father's assets.[318] Vickie asserted truth as a defense and filed counterclaims, including a claim for tortious interference with an anticipated gift.[319] The bankruptcy court granted summary judgment for Vickie on Pierce's and, following a trial on the merits, entered judgment for Vickie on her tortious interference counterclaim and awarded her hundreds of millions in damages.[320] Pierce sought district-court review of the bankruptcy court judgment, and the district court held that the probate exception did not bar Vickie's claims.[321] The Ninth Circuit reversed. Under the Ninth Circuit's view, if a claim raises questions

[311] *Id.* at 494 (quoting *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909)).

[312] *Id.* at 494

[313] *Id.* at 495.

[314] *Id.* at 495.

[315] *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).

[316] 547 U.S. 293, 310 (2006).

[317] 547 U.S. at 311-312 (emphasis added).

[318] *Id.* at 300.

[319] *Id.* at 301.

[320] *Id.* at 301.

[321] *Id.* at 302.

that would ordinarily be decided by a probate court in determining the validity of a decedent's will, it falls within the probate exception, including claims of fraud, undue influence, or tortious interference.[322] Rejecting this "sweeping expansion of the probate exception," the Supreme Court held the district court property asserted jurisdiction over Vickie's counterclaim, because it did not (1) involve the administration of an estate, the probate of a will, or "any other purely probate matter," nor (2) reach a res in the custody of a state court.[323] Rather, the single claim at issue for tortious interference sought an *in personam* judgment against the defendant and was not barred by the probate exception.[324]

C. Post-Marshall Decisions

Marshall "sharply curtailed" the scope of the probate exception.[325] After *Marshall*, the probate exception does not apply to suits merely because they impact a probate-related matter.[326] As *Marshall* made clear, though purely probate matters are beyond the scope of federal subject matter jurisdiction, federal courts can hear a wide range of actions that are closely related to probate and estate administration. Since *Marshall*, court have agreed that the probate exception is narrowly limited to two categories of cases: (1) those that require the court to probate or annul a will or to administer a decedent's estate, and (2) those that require the court to dispose of property in the custody of a state probate court.[327] So long as the claims do not interfere with probate or estate administration proceedings or exert control over property already in the custody of the state court, they are fair game.[328] Since *Marshall*, courts have recognized that causes of action for breach of fiduciary duty, fraud, and undue influence are not necessarily barred by the probate exception.[329]

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[322] *Id.* at 304.

[323] This is also known as the prior exclusive jurisdiction doctrine which prohibits federal and state courts from concurrently exercising jurisdiction over the same res. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 & n. 15 (1939) (reiterating established principle that no two courts may exercise simultaneous jurisdiction over the same res).

[324] *Marshall*, 546 U.S. at 312.

[325] *See Osborn v. Griffin*, 865 F.3d 417, 434 (6th Cir. 2017); *Lee Graham Shopping Ctr., LLC v. Estate of Kirsch*, 777 F.3d 678, 681 (4th Cir. 2015); *Curtis v. Brunsting*, 704 F.3d 406, 407 (5th Cir. 2013); *Jimenez v. Rodriguez–Pagan*, 597 F.3d 18, 24 (1st Cir. 2010); *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 227 (3d Cir. 2008); *Lefkowitz v. Bank of New York*, 528 F.3d 102, 105 (2d Cir. 2007).

[326] *See, e.g., Lee Graham Shopping Ctr., LLC v. Estate of Kirsch*, 777 F.3d 678, 680–81 (4th Cir. 2015) (holding declaratory action requiring the court to interpret terms of agreement and trust do not fall within the probate exception); *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 227 (3d Cir. 2008) ("Insofar as [prior cases] interpreted the probate exception as a jurisdictional bar to claims 'interfering' with the probate, but not seeking to probate a will, administer an estate, or assume in rem jurisdiction over property in the custody of the probate court, that interpretation was overbroad and has been superseded by *Marshall*.") (internal citation omitted).

[327] *Lee Graham Shopping Ctr., LLC v. Estate of Kirsch*, 777 F.3d 678, 680–81 (4th Cir. 2015) ("[The probate exception] applies only if a case actually requires a federal court to perform one of the acts specifically enumerated in Marshall: to probate a will, to annul a will, to administer a decedent's estate; or to dispose of property in the custody of a state probate court. A case does not fall under the probate exception if it merely impacts a state court's performance of one of these tasks."); *Curtis v. Brunsting*, 704 F.3d 406, 409 (5th Cir. 2013) ("*Marshall* requires a two-step inquiry into (1) whether the property in dispute is estate property within the custody of the probate court and (2) whether the plaintiff's claims would require the federal court to assume in rem jurisdiction over that property."); *Three Keys Ltd. v. SR Utility Holding Co.*, 540 F.3d 220, 226 (3d Cir. 2008) ("It is clear after *Marshall* that unless a federal court is endeavoring to (1) probate or annul a will, (2) administer a decedent's estate, or (3) assume *in rem* jurisdiction over property that is in the custody of the probate court, the probate exception does not apply.").

[328] *See, e.g., Lee Graham Shopping Center, LLC v. Estate or Kirsch*, 777 F.3d 678 (4th Cir. 2015) (holding declaratory judgment action seeking interpretation of terms of partnership agreement and trust agreements was not subject to probate exception); *Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144 (D.D.C. 2015) (holding breach of fiduciary claim against substitute administrator did not implicate probate exception); *Leskinen v. Halsey*, 571 Fed. Appx. 36 (2d Cir. 2014) (holding probate exception inapplicable in suit decedent's granddaughter against relatives and others in sale of reap property owned by grandmother alleging racketeering, common law fraud, negligence and negligent misrepresentation).

[329] *See e.g., Doe v. Hills*, 217 F. Supp.3d 199 (D.D.C. 2016) (holding complaint did not improperly raise probate claim where actual claims asserted were tort claims); *Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144 (D.D.C. 2015) (holding *in personam* claims against substitute administrator for breach of fiduciary duty, conversion, fraudulent misrepresentation and misappropriation did not implicate

Courts have interpreted *Marshall* to require a two-step inquiry to determine whether the probate exception deprives a federal court of jurisdiction: (1) whether the property in dispute is estate property within the custody of the probate court and (2) whether the plaintiff's claims would require the federal court to assume in rem jurisdiction over that property. Only if the answer to both inquiries is "yes" does the probate exception preclude the federal district court from exercising diversity jurisdiction.[330] Thus, a key inquiry in determining whether the probate exception applies is whether the action is in rem or in personam.[331] If an action is in rem or quasi in rem and the property is already in the custody of the state court, the federal court lacks jurisdiction.[332] Federal courts can hear suits seeking to invalidate trusts[333] and actions against trustees in their personal capacities.[334] Although a federal court lacks jurisdiction over a case challenging the validity of a will,[335] it can construe terms of an otherwise valid will.[336] Likewise, the probate exception bars a federal court from redistributing probated assets, but it does not prevent that same court from ordering disgorgement of profits obtained through wrongful conduct: "Thus, for example, if a defendant forges a will to bequeath himself a lottery ticket worth $1 dollar, and obtains the ticket through probate proceedings, a federal court can neither set

probate exception); *Lewis v. Parker*, 67 F. Supp. 3d 189 (D.D.C. 2014) (holding probate exception can no longer be used to dismiss tort claims such as breach of fiduciary duty or fraudulent misrepresentation); *Curtis v. Brunsting*, 704 F.3d 406, 407 (5th Cir. 2013) (holding plaintiff's claims for breach of fiduciary duty against co-trustees of inter vivos trust did not implicate probate exception); *Wisecarver v. Moore*, 489 F.3d 747, 751 (6th Cir. 2007); *Campi v. Chirco Trust UDT*, No. 05–55595, 2007 WL 628049, at *1 (9th Cir. Feb. 27, 2007) (cause of action alleging fraud, undue influence, and breach of fiduciary duties regarding property removed from a trust and never probated not barred by probate exception); *Jones v. Brennan*, 465 F.3d 304, 307–308 (7th Cir. 2006) (breach of fiduciary duty claim regarding guardian's mismanagement not barred by probate exception); *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 108 (2d Cir. 2007) (After *Marshall*, the "probate exception can no longer be used to dismiss widely recognized torts such as breach of fiduciary duty ... merely because the issues intertwine with claims proceeding in state court." (citation, quotation marks, and alteration omitted)).

[330] *Curtis v. Brunsting*, 704 F.3d 406, 409 (5th Cir. 2013) (declining to apply the probate exception to a trust that is outside the custody of the probate court).

[331] *See Wisecarver v. Moore*, 489 F.3d 747, 751 (6th Cir. 2007) ("[T]he principles underlying the probate exception are not implicated when federal courts exercise jurisdiction over claims seeking *in personam* jurisdiction based upon tort liability because the claims do not interfere with the *res* in the state court probate proceedings or ask a federal court to probate or annul a will."); *Carpenters' Pension Tr. Fund-Detroit & Vicinity v. Century Truss Co.*, 14-11535, 2015 WL 1439868, at *5 (E.D. Mich. Mar. 27, 2015) ("Hence, under *Marshall*, the key distinction to determining whether the probate exception applies is whether an action is *in rem*, against property, or *in personam*, against a person.").

[332] *See, e.g., Chevalier v. Estate of Barnhart*, 803 F.3d 789 (6th Cir. 2015) (holding probate exception did not apply to lender's foreclosure action against borrower where property was not in state court probate custody at the time lender filed federal suit); *Lewis v. Parker*, 67 F. Supp. 3d 189 (D.D.C. 2014).

[333] *See, e.g., Oliver v. Hines*, 943 F. Supp. 2d 634 (E.D. Va. 2013) (holding probate exception did not apply to bar suit seeking to invalidate amended inter vivos trust).

[334] *See, e.g., Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144 (D.D.C. 2015) (holding personal tort claims against administrators were not barred by the probate exception); *Curtis v. Brunsting*, 704 F.3d 406 (5th Cir. 2013) (holding claims for breach of fiduciary duty against co-trustees inter vivos trust did not implicate the probate exception); *Wisecarver v. Moore*, 489 F.3d 747 (6th Cir. 2007) (holding claims for breach of fiduciary duty, breach of confidential relationship, undue influence, and fraud against individuals for misusing power of attorney during decedent's lifetime sought in personam jurisdiction over individuals and did not fall within the probate exception); *McAninch v. Wintermute*, 478 F.3d 882 (8th Cir. 2007) (holding probate exception did not apply to administrator's in personam claims against insurer); *Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839 (6th Cir. 2006) (holding probate exception inapplicable to settlor's in personam claim against trustee for breach of revocable trust); *Wolfram v. Wolfram*, 78 F. Supp. 3d 758 (N.D. Ill. 2015) (permitting claims by beneficiary of testamentary family trust against co-trustee and executor for failure to fund and administer the trust).

[335] *See, e.g., Estate of Miller v. Miller*, 51 F. Supp.3d 861 (E.D. Ark. 2014) (holding federal courts are generally precluded from exercising jurisdiction in cases challenging the validity of a will).

[336] *See, e.g., Nat'l Audubon Society v. Marshall*, 424 F.2d 717 (5th Cir. 1970) (holding diversity jurisdiction exists where the suit does not attack the will but affirms it and seeks only a declaratory judgment for construction of its terms).

aside the will, nor order the defendant to pay a plaintiff $1 in compensatory damages. But, if the defendant wins the lottery, a federal court *can* use any equitable authority it possesses under the relevant substantive law it is applying to force the defendant to disgorge his lottery winnings."[337]

XI. NON-PROBATE ASSETS

Formal probate is losing its significance. As Professor John Langbein points out, "Probate, our court-operated system for transferring wealth at death, is declining in importance. Institutions that administer non-court modes of transfer are displacing the probate system."[338] Indeed, "the law of wills and the rules of descent no longer govern succession to most of the property of most decedents."[339] This is because "the bulk of modern wealth takes the form of contract rights rather than rights in rem – promises rather than things . . . promissory instruments – stocks, bonds, mutual funds, bank deposits, and pension and insurance rights – are the dominant component of today's wealth."[340]

These contractual arrangements are full of "fine-print" clauses which can have a significant impact in deciding typical probate disputes. For example, it might appear that an IRA or 401K or life insurance policy is payable to the "estate" because no beneficiary was designated. But, upon closer inspection of the account agreement, such agreement may contain a facilities of payment clause – effectively providing a contractual heirship scheme. It is essential to obtain the actual account agreements and never rely on an assumption or conclusion by a corporate representative.

1. Choice of Law

Whenever a contract has a connection to more than one jurisdiction, a court will generally undertake a conflict of laws analysis to determine the law that will govern the agreement.[341] A "choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship."[342]

Choice of law clauses are intended to avoid protracted fights about what law applies to a given dispute. They effectively allow the parties to address the issue preemptively by writing a choice of law clause into their contracts.[343] As one author notes, "the presence of such a clause will in most cases make a conflict-of-laws analysis unnecessary."[5] Ideally, the court simply applies the law of the chosen jurisdiction to resolve any disputes arising out of the contract.[344]

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 states:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and

[337] *Osborn v. Griffin*, 865 F.3d 417, 436 (6th Cir. 2017).

[338] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984).

[339] *Id.*

[340] *Id.* at 1119.

[341] John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 632 (2017); citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[342] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995).

[343] John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 633 (2017).

[344] *Id.*

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

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

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

Choice of law clauses are not always clear, and it is often difficult to reliably determine what the parties "intended."[345] In any event, "courts are often called upon to assign meaning to specific words and phrases contained in these clauses."[346]

Courts utilize several canons of construction that they use exclusively to construe choice of law clauses.[25] For an excellent and comprehensive taxonomy of the canons that U.S. courts use to interpret choice-of-law clauses, see John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 636–37 (2017). Mr. Coyle outlines both: (1) the lexical canons, and (2) the canons relating to scope. "The lexical canons ascribe meaning to individual words in choice-of-law clauses. The canons relating to scope ascribe meaning to the clause as a whole."[347]

The actual words of the choice of law provision are extremely important. Some choice of law provisions are limited by their own terms and narrowly construed. For example, a choice of law clause that stated, "[t]his release shall be governed and construed in accordance with the laws of the State of Delaware...."[348] was narrowly construed to mean that only the release itself was to be construed in accordance with the laws of Delaware.[349] The court noted that the clause did not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties.[350] Notably, the plaintiffs sought monetary damages rather than a form of relief that would actually affect the release, such as avoidance.[351]

As recently as 2014, a federal court in Texas considered a choice of law provision contained in a life insurance policy in the context of deciding the identity of the ultimate beneficiaries. In that case, a Decedent applied for and obtained a life insurance policy while married to man and living in Guam (the "Policy").[352] The Policy designated the husband as the beneficiary and the surviving children (the "Children") as the contingent beneficiaries.[353] The Policy included a choice of law clause stating: "This policy is subject to the laws of the state where the app[lication] was signed."[354]

In 2011, the Decedent divorced the husband in Texas. Both parties signed the final divorce decree, which included an agreement dividing property. The agreement, however, did not specifically refer to the previously issued Policy.[355]

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[345] *See id.*

[346] *Id.*

[347] *Id.* n. 28.

[348] *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300–01 (11th Cir. 2003).

[349] *Id.*

[350] *Id.*

[351] *Id.* (citing *Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409–10 (11th Cir.1998) for the proposition that a provision stating that a contract was "governed by" Illinois law did not incorporate Illinois tort law); *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996) for the proposition that a choice-of-law clause providing that the contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts" did not encompass fraud claims for damages); *Sunbelt Veterinary Supply, Inc. v. International Bus. Sys. U.S., Inc.*, 985 F.Supp. 1352, 1354 (M.D.Ala.1997) for the proposition that a clause stating that a contract would be "governed by and construed under" California law was not broad enough to prevent application of the forum state's tort law); *Burger King Corp. v. Austin*, 805 F.Supp. 1007, 1012 (S.D.Fla.1992) for the proposition that "claims arising in tort are not ordinarily controlled by a contractual choice of law provision.... Rather, they are decided according to the law of the forum state").

[352] *Lincoln Ben. Life Co. v. Manglona*, 2014 WL 3608893, at *1 (S.D. Tex. 2014).

[353] *Id.*

[354] *Id.*

[355] *Id.*

The Decedent died in April of 2013 in Houston, Texas.[356] After receiving conflicting claims to the Policy proceeds from the ex-husband and from the Children, the insurance company sued to resolve the conflict.

The Decedent's children moved for summary judgment on the basis that Texas law applied, thus resulting in the husband losing his status as a beneficiary under the Policy.

Under Texas law, if an insured designates his or her spouse as a beneficiary to a life insurance policy and they subsequently divorce, the designation of the former spouse is not effective unless one of three conditions is met. If none of the conditions is met, a final divorce automatically revokes the status of the designated spouse as a beneficiary and terminates his or her right to the life insurance proceeds of the former spouse.[357]

In the instant case, none of the conditions was met. Consequently, if Texas law applied, then the husband lost his right as a beneficiary when he and the Decedent divorced. The Decedent's children contended that Texas law applied because she obtained the divorce in Texas and the husband agreed to the property division in the decree. The Children asserted that they, not their mother's ex-husband, are entitled to the proceeds.[358]

Not surprisingly, the husband disputed that Texas law applied. The Policy contained a provision that selected the law of the place where the insured applied for the Policy as the law governing any contractual disputes.[359] The provision stated: "This policy is subject to the laws of the state where the app[lication] was signed. If any of the policy does not comply with the law, it will be treated by [Lincoln] as if it did." The application designated Martin Ada Manglona as the primary beneficiary and the surviving Children, in equal shares, as the contingent beneficiaries. The application was made in Guam. The beneficiary designation was not changed after the divorce.[360]

Guam follows the majority rule that divorce does not affect an ex-spouse's beneficiary status.[361] Under the majority rule, the insurance contract terms are upheld if the ex-spouse is still listed as the beneficiary and the policy terms do not condition the ex-spouse's beneficiary status on the continuance of the marriage.[362] The designated beneficiary remains the beneficiary after he becomes an ex-spouse. Thus, if Guam law applied, the husband is entitled to the proceeds, not the Children. Not surprisingly, the husband thus asserted that Guam law applied to the insurance contract under the choice-of-law provision.[363]

In denying the Children's motion for summary judgment seeking to dismiss the husband's claim, the Court began its analysis by noting:

> In making a choice of law determination, a federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state, here Texas."[364] Texas courts typically enforce contractual choice of law provisions.[365] Texas has adopted § 187 of the Restatement (Second) of Conflict of Laws. Texas law enforces a contractual choice-of-law provision if the issue raised is "one which the parties could have resolved by an explicit provision in their agreement."[366]

Moreover, the Court noted that, "even if the issue could not have been resolved with a provision in the agreement, Texas courts will enforce choice-of-law provisions if the law of the chosen state has a reasonable relationship with the parties and is not contrary to a fundamental policy of the forum."[367]

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[356] *Id.*

[357] *Id.*

[358] *Id.* at *2.

[359] *Id.* at *3.

[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *Id.* at *3-4 (internal citations omitted).

[365] *Id.* (internal citations omitted).

[366] *Id.* at *4.

[367] *Id.* (internal citations omitted); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

The Court concluded that the conflict between the Children and the husband could have been prevented by including an explicit provision in the insurance contract. In other words, a provision requiring re-designation of the beneficiary after a divorce between the insured and the original beneficiary would have resolved the issue. Thus, the Court held the choice of law provision is enforceable under Texas law.

Unfortunately, the Children could not identify legal authority supporting their argument that Texas law, which would invalidate the beneficiary designation because the beneficiary and insured later divorced in Texas, trumps the contract's selection of Guam law, which would uphold the contract's beneficiary designation despite the later divorce. Finally, the Court reasoned that applying Texas choice-of-law rules recognizes the insurance contract provision making Guam law apply to the dispute over whether the beneficiary designation remains valid after the beneficiary and insured divorced, regardless of whether the divorce occurred in Texas or in Guam.[368]

2. Forum Selection Clauses

United States Supreme Court case law holds that forum selection clauses are contractual arrangements whereby parties agree in advance to submit their disputes for resolution within a particular jurisdiction.[369]

The enforcement of valid forum selection clauses protects the parties' "legitimate expectations" and furthers "the vital interests of the justice system," such as sparing litigants the time and expense of pretrial motions to determine the proper forum for disputes.[370]

When construing a forum selection clause, the court's first function is to determine whether a clause is mandatory or merely permissive. A mandatory forum selection clause requires that all litigation be conducted in a specified forum.[371] For a forum selection clause to be considered mandatory or exclusive, the clause "must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive."[372] Where the agreement contains clear language showing that jurisdiction is appropriate only in a designated forum, the clause is mandatory.[373]

The second function of the court is to determine whether the claims in question fall within the scope of the mandatory forum-selection clause.[374] "The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause."[375] If the claims fall within the scope of the clause, the court must determine whether to enforce the clause.[376] "[A] litigant who sues based on a contract subjects him or herself to the contract's terms."[377]

XII. SOURCE OF LAW & RESEARCH RESOURCES

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

- Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.01 (2009 ed.).
- RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

[368] *Id.*

[369] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14 (1985).

[370] *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

[371] *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 219 (5th Cir. 2009); *LeBlanc v. C.R. England, Inc.*, 961 F.Supp.2d 819, 828 (N.D. Tex. 2013).

[372] *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004).

[373] *Von Graffenreid v. Craig*, 246 F. Supp. 2d 553, 560 (N.D. Tex. 1997).

[374] *See Deep Water Slender Wells, Ltd. v. Shell Int'l Expl. & Prod., Inc.*, 234 S.W.3d 679, 687–88 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("When a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause."); *see also Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221–22 (5th Cir. 1998).

[375] *Deep Water Slender Wells, Ltd.*, 234 S.W.3d at 688 (citing *Marinechance Shipping, Ltd.*, 143 F.3d at 221–22).

[376] *Id*. at 688.

[377] *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001) (holding that non-signatory to contract was subject to arbitration provision in contract because they brought breach of contract and breach of warranty claims arising out of the contract).

- RESTATEMENT (SECOND) OF JUDGMENTS (1982).

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

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

- John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 632 (2017).