

# **ROYAUME-UNI**

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## EU study on the international law of succession

This is a study of the international law of succession in the law of England and Wales. It does not cover the laws of Scotland, Northern Ireland, the Isle of Man, Jersey and Guernsey, each of which has its own separate legal system and substantive law. It is, however, fair to say that the law applied in Northern Ireland is likely to be very close, if not identical, to the law of England and Wales, whereas that applied in Scotland is likely to be closer to that of the civilian European systems. (However, the Scots usually describe their system as ‘mixed’ rather than civilian.) The laws of the Isle of Man and the two Channel Island jurisdictions occupy a middle ground, the Isle of Man being closer to Northern Ireland and the Channel Islands being closer to Scotland. Although these six legal systems are all independent of each other, there is a single point of unity. The Appellate Committee of the House of Lords is the ultimate (third degree) court of appeal for England and Wales, Scotland (civil matters only) and Northern Ireland. The same judges also sit (with occasional members from other Commonwealth jurisdictions) in the Judicial Committee of the Privy Council, which is the ultimate (third degree) court of appeal for Jersey, Guernsey and the Isle of Man, as well as the ultimate court of appeal for points of law relating to so-called “devolution” issues (ie the constitutional competence of the devolved governments of Scotland, Wales and Northern Ireland). References in this study to ‘Dicey & Morris’ are to the leading practitioner work on English private international law, ie *Dicey & Morris on the Conflict of Laws*, 13<sup>th</sup> ed 2000.

### 1<sup>st</sup> part

#### International Jurisdiction

**Preliminary Note:** the word ‘jurisdiction’, when used in the context of the jurisdiction of the English Court, is used in two different senses in English law. First, there is ‘territorial’ jurisdiction, ie answering the international question *which* persons are (or are claimed by English law to be) within the reach of the English Courts. In English law this extends beyond persons within the physical territory of England and Wales to a few (discretionary) cases where the potential defendant is elsewhere (what the Americans call ‘long arm’ jurisdiction). The second sense of jurisdiction is ‘power’ jurisdiction, ie the circumstances in which the English courts will *in fact* deal with a particular matter, in relation to a defendant who is undoubtedly within the jurisdiction of the court in the first (‘territorial’) sense. On these two kinds of jurisdiction, see the case of *Mercedes Benz v Leiduck* [1996] AC 284, which was not, however, about succession law.

In most European systems, there are two sets of rules relating to jurisdiction. They are (i) the rules that give the courts of one particular state jurisdiction *rather* than the courts of another state, and (ii) the rules that allocate jurisdiction amongst the courts *within* that particular state. We must here record that that distinction – which does not correspond to the distinction between ‘territorial’ and ‘power’ jurisdiction - has no place in English law. The High Court is a single first instance court with universal competence throughout England and Wales. It sits mainly in London, but can and does sit elsewhere. (The county courts are first instance courts with similar competence, though limited in practice by value. They sit in different locations throughout the country. Matters may be – and are – transferred from one such court to another for matters of practical convenience, rather

than lack of jurisdiction. But international succession cases, being matters of greater value and complexity, are almost always dealt with in the High Court.) Accordingly, there are no relevant English rules for the *allocation of jurisdiction* between domestic courts.

### A. Sources

- I. The UK is not party to any international treaties specifically dealing with international jurisdiction in succession matters.
- II. As for national sources of rules relating to international jurisdiction in succession cases, these are very few. In English law the basic rule for jurisdiction in the first sense – in all cases - is purely territorial, ie whether the defendant is physically within England and Wales at the time that the originating process (the ‘claim form’, formerly ‘writ of summons’) is served upon him: see the Civil Procedure Rules 1998, Part 6. In addition to this, under the Civil Procedure Rules 1998, Rule 6.20, the English Court has a *discretionary* jurisdiction in a number of cases which may arise in the context of a succession. These include the following sub-paragraphs of Rule 6.20:
  - “(10) The whole subject matter of the claim relates to property located within the jurisdiction.
  - (11) A claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written document where –
    - (a) the trusts ought to be executed according to English law; and
    - (b) the person on whom the claim form is to be served is a trustee of the trusts.
  - (12) A claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction.
  - (13) A claim is made in probate proceedings which includes a claim for the rectification of a will.
  - (14) A claim is made for a remedy against the defendant as constructive trustee where the defendant’s alleged liability arises out of acts committed within the jurisdiction.
  - (15) A claim is made for restitution where the defendant’s alleged liability arises out of acts committed within the jurisdiction.”

There are no statutory rules on the circumstances in which a *foreign* court has jurisdiction in matters relating to succession. The rules which apply in this area are derived from decided cases: see Dicey & Morris, Rules 130 (deceased’s domicile) and 131 (situs of property).

### B. Jurisdiction Requirements

The basic requirements for “territorial” jurisdiction are set out above in section A(II). But ‘territorial’ jurisdiction, whilst necessary, is not sufficient. The court must have ‘power’ jurisdiction as well. The primary rule for the English Court to have jurisdiction in the second sense (‘power’ jurisdiction) in relation to succession matters is a simple and practical one. It is the presence, before

the English Court, of a properly constituted ‘personal representative’ of the deceased (see Dicey & Morris, Rule 129). Unless there is such a representative of the deceased’s estate before the English Court, the English Court will not have jurisdiction to deal with succession matters relating to the estate of that deceased person, even though (a) the deceased person died domiciled in England, or (b) was a British national, or (c) wished his succession to be governed by English law, or (d) the heirs are physically in England, or indeed any other of the categories set out under this paragraph in the questionnaire, *except* no 6 (property of the deceased’s estate being situated in England and Wales: this is explained further below).

As is well known, in English law, and unlike the civilian systems derived from Roman law, there is no automatic transmission of the ownership of assets from the deceased person to the heirs of the deceased (“*le mort saisit le vif*”). Instead, the substantive law of succession vests the ownership of the deceased’s assets *temporarily* in a ‘personal representative’. This is either the executor of the deceased’s valid will, or, if there is no will, or no such executor, an administrator appointed by the Court. This person becomes the legal owner of the deceased’s assets, and carries out an administration of the affairs of the deceased, rather similar to the winding up of the affairs of a company prior to its liquidation. Only once the administration is complete does the representative transmit such assets as may be left to those who are, under the substantive succession law, entitled to them. The period of administration may last only a short time, or may indeed last many years. This is dealt with in more detail in Part 4.

The English rule requires a *properly constituted* personal representative of the deceased’s estate to be present before the Court. By ‘properly constituted’, the rule is referring to a grant of ‘probate’ (ie to an executor) or of ‘letters of administration’ (ie to an administrator) made by the English Court to that person. (In most cases the grant of probate or letters of administration is an administrative rather than judicial function. Only where there is a dispute - eg as to the validity of the will - is there a real judicial function involved.) Exceptionally, a similar grant made by the Scottish or Northern Irish Courts, or by the courts of certain colonies of the United Kingdom, will be recognised for the purpose of regarding a person as a properly constituted personal representative. It follows that a person who claims to be a personal representative under some foreign law (other than Scots, Northern Irish or the laws of those colonies referred to), or who claims to be the heir of a deceased person under some foreign law, is *not* a properly constituted personal representative for this purpose until he has obtained a grant from the English Court.

Accordingly, everything turns on the question of obtaining an English grant of probate or letters of administration. Generally speaking, the English Court will only make a grant of probate or administration where there are demonstrated to be assets in England and Wales. Strictly, however, there is no *absolute* bar to a grant being made in other cases, where a good reason can be shown: cf Dicey & Morris, Rule 121. But in effect, therefore, the ‘power’ jurisdiction of the English Court in succession matters is nearly always based *on the presence of some property of the deceased within the jurisdiction*. It does not matter whether the assets concerned are moveable or immovable: once the grant is made, and a duly constituted personal representative of the deceased appears before the English Court, the English Court has ‘power’ jurisdiction to deal with the *whole* of the estate left by the deceased, moveable and immovable. See also Part 4.

Finally, it should be noted that the English rule requiring a properly constituted personal representative of the deceased as the basis for taking ‘power’ jurisdiction in a succession matter does not in any way depend on the inaction of the authorities in any other country.

### C. Scope of Application of English Jurisdiction

- I. Once the English Court has ‘power’ jurisdiction to deal with a succession matter, it has jurisdiction to deal with the whole of the estate, moveable and immovable, wherever situate: see *Re Ross* [1930] 1 Ch 377.
- II. The jurisdictional base referred to above (ie presence of a personal representative before the Court) applies to:
  1. disputes between heirs and beneficiaries;
  3. disputes relating to the validity and execution of wills;
  4. legal proceedings against someone who claims to be an heir or has possession of part of the estate;
  5. Oclaims to the possession of the estate.

Claims made by creditors of the estate are *administration* questions, and such claims are brought against the personal representative duly constituted, on the basis that such personal representative is within the “territorial” jurisdiction of the English Court. So far as concerns the *certificat d’héritier*, there is no such concept in English law. The nearest functional equivalent may be (i) the grant of probate or letters of administration (in relation to proving that the personal representative has the title vis-à-vis third parties to deal with the assets), or (ii) the accounts prepared by the personal representative at the point when the administration is complete. However, there is no function to be performed in the English system by any such document as the *certificat d’héritier* in the civilian system.

### D. Proof of Jurisdiction

There are no rules in England and Wales concerning the question set out in relation *specifically* to succession law. There are however *general* rules relating to jurisdiction covering all of the matters referred to: see Dicey & Morris, Rule 31. The specific answers to the questions put (in the context of the general rules) are as follows:

1. The court may declare that it has no jurisdiction in the matter.
2. The court, even though it has jurisdiction, may declare that it is *forum non conveniens*, on the basis that there is another court with jurisdiction which is clearly more appropriate, and that it is not unjust to deprive the claimant of the right to trial in England: (see Dicey & Morris, Rule 31(2)). In considering whether to exercise any of the discretionary extensions to “territorial” jurisdiction in Civil Procedure Rules 1998, r.6.20, the Court will consider whether England is the most appropriate forum for trial: see Dicey & Morris, Rule 31(3).
3. The question of influence on the jurisdiction of the English Court by reason of a claim of exclusive jurisdiction from another court is simply an aspect of the doctrine of *forum non conveniens*.
4. Provided that the court has established that it has jurisdiction, the court may go on to decide the matter even if the defendant does not appear before the court. However, it must be borne in mind that in some cases the jurisdiction (either ‘territorial’ or ‘power’) of the court will actually depend on the defendant’s submission to and appearance before the court. In such cases, the court is not able to decide the matter if the defendant does not appear, because the

court will have no jurisdiction. It should also be noted that the court may grant an anti suit injunction against the party who is litigating elsewhere, where the appropriate conditions are satisfied.

### **E. Litis Pendens and Connectivity**

- I.** As a general rule the English Courts may decide a case even though litigation on the same matter is already pending in another country; it may also grant an anti-suit injunction to stop the litigation elsewhere, if this is appropriate: see Dicey & Morris, Rule 31(5). Modern treaties and conventions such as the Brussels and Lugano Conventions are exceptions, but they do not apply to succession matters. However, where a case is already pending in another state, this is a relevant factor for the English Court to take into account in deciding whether to declare itself *forum non conveniens*.
- II.** This is not applicable.
- III.** We do not understand this question.

## 2<sup>nd</sup> part

### Recognition and enforcement of judgments

#### A. Sources

- I. The United Kingdom is party to the Brussels Convention of 1968 and the Lugano Convention of 1988, and is also bound by Council Regulation (EC) No 44 of 2001, dated 22 December 2000. However, all of these exclude from their scope rights in property arising out of wills and succession, and hence are outside the scope of this study. The United Kingdom is also party to a number of bilateral conventions with other states. These conventions are general in scope, but at least in theory there may be some cases of judgments rendered in the area of wills and succession that could fall within their provisions and hence be recognised or enforced in the United Kingdom. In this study we shall concentrate on the conventions with other EU states. These conventions are as follows:

*Convention with Belgium (scheduled to SR&O 1936 No 1169)*

*Convention with Germany (scheduled to SI 1961 No 1199)*

*Convention with Austria (scheduled to SI 1962 No 1339)*

*Convention with Italy (scheduled to SI 1973 No 1894).*

(There are also bilateral conventions with France, scheduled to SR&O 1936 No 609, and with The Netherlands, scheduled to SI 1969 No 1063, but these expressly do not apply “to judgments in matters of succession or administration of estates of deceased persons”, and hence fall outside the scope of this study.)

These bilateral conventions are all superseded by the Brussels and Lugano Conventions to the extent that those latter conventions have effect, but, as we have seen, those conventions do not have any effect in the area of rights to property arising out of wills and successions. It is not clear whether the convention relating to Germany now extends to the former East Germany, as Article 1 of the Convention describes the Convention as applying to the ‘Territory of the Federal Republic of Germany’. (We note that the German Report does not refer to this Convention at all; perhaps it has been abrogated and our sources are out of date.)

The conventions were not designed to apply to decisions rendered in relation to wills and successions, and in most cases there are provisions contained in them disapplying certain provisions (relating to the question whether the original court had jurisdiction) in relation to matters of succession or the administration of estates of deceased persons. In practice, we are not aware that these conventions have ever been used for the purpose of enforcing directly in the United Kingdom judgements of the convention states in matters of succession law.

- II. There are no UK national laws concerned specifically with the enforcement of foreign judgments in succession cases. There are, however, UK national laws concerning the enforcement of foreign judgements generally, which in some cases may be relevant. These are the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933. The bilateral conventions referred to above are all given effect to under the 1933 Act.



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The 1920 Act is confined to Commonwealth jurisdictions. Copies of the relevant provisions of the 1933 Act are attached.

## B. Foreign judgments and other decisions concerning succession

- I. There are no special rules in English law for the recognition or enforcement of foreign judgments concerning succession. There are general rules concerning the recognition or enforcement of foreign judgments, which may or may not (depending on the facts) cover some succession cases. If judgments rendered in succession cases fulfil the criteria laid down in these general rules, then they will be enforced or recognised (as the case may be) in England and Wales.

Insofar as English law will accordingly recognise foreign judgments concerning succession, there are three methods by which this happens. The first of these is that the foreign judgment creditor (ie the person seeking to enforce the foreign judgment) simply brings an action in the English court against the judgment debtor (ie the person against whom the judgment is being enforced) on the basis that the foreign judgment has created an obligation binding on the defendant. The second method is for the judgment to be registered under the provisions of the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. (Where a judgment is capable of being registered under the 1933 Act, no fresh action may be brought on it at common law.) It follows that in either of these two cases the enforcement of a foreign judgment concerning succession is not automatic, but requires a further procedure to be followed, namely *either* a fresh action being brought in England *or* the registration of the judgment under the appropriate statute. The third method is that the foreign judgment to be recognised in England may be simply relied on in existing legal proceedings in the English courts, whether as a defence to a claim, or as constituting an issue estoppel (*res judicata*). See Dicey & Morris, rule 34.

### II.1. Recognition requirements: common law

#### (i) The jurisdiction of the foreign court

It is necessary to distinguish two quite different cases.

- (a) First, a foreign judgment *in personam* may be enforced in England by a claim made in a fresh action here, if the judgment is for a debt or definite sum of money, is final and conclusive, *and the foreign court had jurisdiction according to the English conflicts rules* (Dicey & Morris, rule 35).
- (b) The second situation is that the English court will recognise (or, in some cases, enforce) the effect of a judgment *in rem* if the subject matter of the proceedings in relation to which the foreign judgment was given was property (moveable or immoveable) which at the time of the proceedings was in that foreign country. In this second case, English law does not require the foreign court to pass any jurisdiction test according to *English conflicts rules* (Dicey & Morris, rule 40).

In relation to the first situation (the *in personam* judgement) the English courts will recognise the courts of the foreign country concerned as having jurisdiction to give that judgment in the following four cases (Dicey & Morris, rule 36):

- (a) if the judgment debtor was, at the time the proceedings were instituted, present in the foreign country;

- (b) if the judgment debtor was claimant (or counterclaimant) in the foreign proceedings;
- (c) if the judgment debtor (being defendant) voluntarily appeared in the proceedings;
- (d) if the judgment debtor (being defendant) had before the commencement of the proceedings agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of that court (or the courts of that country).

These propositions are derived from, and supported by, numerous cases. In substance, they come down to two propositions: either the defendant in the foreign court was present there when the proceedings were brought (and thus was within the ‘territorial’ jurisdiction of the court) or the defendant submitted to the jurisdiction of the foreign court. As stated above, there are no “domestic rules of jurisdiction” which can be applied at international level, and (for the avoidance of doubt) we add that the notion of a “sufficient contact” between the subject matter of the action and the foreign court is not part of English law.

There is, however, one rule of exclusive jurisdiction which is relevant. The English courts hold that the courts of a particular country have no jurisdiction to adjudicate on the title to, or right to possession of, any immovable property situated outside that country. This is a rule which applies (with limited exceptions) to English courts as it applies to foreign courts (see Dicey and Morris, Rule 114).

It should also be made clear that the English courts will not regard a foreign court as having had jurisdiction over the defendant if the bringing of proceedings was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country, and the defendant did nothing to submit to the jurisdiction of that court (see Dicey and Morris, Rule 37). Nor will the foreign court be regarded as having jurisdiction against a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of that country and that immunity was not waived. (Dicey & Morris, rule 38)

**(ii) The law applied by the foreign court**

In considering the recognition or enforcement of the foreign judgment in England, the English court will not be concerned with how the foreign court dealt with the matter, or which law it applied (see Dicey and Morris, Rule 41), in the absence of fraud (either on the part of one of the parties, or on the part of the court: see Dicey and Morris, Rule 43 or breach of natural justice (see Dicey and Morris, Rule 45). In particular, a foreign judgment cannot be impeached in the English courts on the grounds that the court which gave it was not competent to do so according to the law of that foreign country (see Dicey and Morris, Rule 42(2)).

**(iii) Public policy**

So far as concerns public policy (see Dicey and Morris, Rule 44), some of the main heads which are applicable have already been set out. They are reflected in the rules requiring that a foreign court should have jurisdiction according to the rules set out above, that the foreign court has no jurisdiction in certain cases (notably land outside the jurisdiction, diplomatic or other immunity, non-jurisdiction agreements) and also where the judgment has been obtained by fraud, in breach of natural justice, or its enforcement would be contrary to public policy. An example of the last of these is the rule that the English courts will not enforce foreign tax or criminal liabilities: (Dicey & Morris, Rule 3).

**2. Recognition requirements: 1933 Act and bilateral conventions**

Where a foreign judgment is to be registered under the 1933 Act, there is a similar set of rules relating to the jurisdiction of the original court, and a similar set of limitations and exclusions. But they are not identical to the common law rules. In brief, a judgment of a recognised foreign court for a money sum (not in respect of taxes, fines or penalties) which is *either* final and conclusive *or* requires an interim payment, is registrable under the Act if it could be enforced by execution in the original country and has not been wholly satisfied: Dicey & Morris, Rule 47. For the purposes of execution, registration renders the foreign judgment of the same force and effect as an English High Court judgment. Registration will be set aside if the foreign court had no jurisdiction (the rules for determining which are the same as (b), (c) and (d) above, at common law, plus (e) residence or incorporation in the foreign country, and (f) office or place of business there *and* the proceedings were in respect of a transaction done there). Registration may also be set aside on grounds (inter alia) that the defendant did not receive sufficient notice of the original proceedings and did not appear, or the judgment was obtained by fraud, or enforcement would be contrary to public policy.

**III. 'Voluntary jurisdiction' and administrative decisions**

First of all, it is necessary to point out that, with very limited exceptions, there is no equivalent in English law of so-called 'voluntary jurisdiction'. One example may be the grant of probate or letters of administration in common form. But, where the foreign court makes a decision, whether in 'voluntary jurisdiction' or not, it can be enforced to the extent that any ordinary judgment can be so enforced or recognised. So far as concerns the decisions of administrative bodies, a distinction must be drawn between bodies which exercise the judicial power of the state and those which are part of the executive. Decisions of the former will be enforced to the same extent and under the same conditions as decisions of any foreign court. Decisions of the latter will not.

**C. Other Documents**

**I. Wills executed abroad**

1. The general rule as to the recognition of wills executed abroad is that the will of a person dying domiciled outside England and Wales is admissible to proof in this country if it has been accepted by the country of domicile as a valid testamentary document, or if it is executed in accordance with the law of the place of domicile of the deceased at the time of his death, or at the time when it was made. For persons dying on or after 1 January 1964 the Wills Act 1963 provides various alternative tests any one of which, if satisfied, renders the will admissible to proof in this country.

To be admissible to proof in England and Wales it will normally be necessary that a will should dispose a property in this country or contain a valid appointment of an Executor, but it is now accepted that the Court has power to admit a will and notwithstanding that it does not dispose of property in this country;

The validity and construction of a will, and the capacity of the Testator, as pronounced for by the Court of domicile, are followed by the Courts of England and Wales.

If the papers produced contain no clear evidence that the will has been recognised as valid by the Court of domicile of the deceased, an affidavit of law or a certificate of law by a Notary practising in the country or territory concerned must be filed.

A will in English form is normally accepted as validly executed without further inquiry if the deceased was domiciled in Northern Ireland, the Republic of Ireland, Australia, Canada or New Zealand. A domicile in any other British Commonwealth country, colony or protectorate (including the Isle of Man) necessitates the validity of the will being established (unless it has been proved in the Court of the domicile) by other evidence.

2. The general rule is that a person who wishes to be able to deal with assets of a deceased in England must obtain a grant of representation here. No person will be recognised by the English courts as personal representative of a deceased unless and until he has obtained an English grant of probate or letters of administration.

Non-Contentious Probate Rule 30(3)(a)(i) (see statutory sources in 4<sup>th</sup> Part) provides that where a will is admissible to proof (as to which see above), and is in the English or Welsh language, irrespective of the deceased's domicile, any Executor named therein is accepted as having the full rights of executorship and no order will be required for him to obtain the Grant.

Regardless of the language in which the will is written, provided it is admissible to proof in England and Wales, and sets out the duties of a person named therein sufficiently to constitute him an Executor according to the tenor of the will, that person may apply for Probate without first obtaining an Order. Where doubt arises as to the sufficiency of the duties to constitute an Executor, preliminary applications should be made to the Registrar for directions.

Where an Executor is appointed, or a person's duties imposed in the will are sufficient for him to be constituted an Executor according to the tenor of will, he may apply for and obtain a grant in England and Wales notwithstanding that he has renounced Probate or refused to take a Grant in the country in which the deceased died domiciled. Where there is more than one Executor appointed, those who do not apply must renounce their right to the Grant or have power reserved to them.

An Executor appointed in the will may himself apply for a Grant of Probate, or act through an attorney, notwithstanding that another person has been entrusted with the administration of the deceased's estate by the Court of the country where the deceased died domiciled. However, the person entrusted with administration by the Court of the deceased's domicile, and entitled to apply for an order under Non-Contentious Probate Rule 30(1)(a) may apply for such an order and obtain the Grant without clearing off any Executor appointed in the will. If the person entrusted with administration by the foreign court is an Executor it would be preferable for him to apply (if possible) in his capacity as Executor.

## **II. Official documents concerning the position as an heir (e.g. certificate of inheritance or probate).**

The procedure to be followed for the recognition of foreign documentation will differ depending upon whether or not there is a person entrusted with the administration of the estate of the deceased by the Court whose jurisdiction covers the place where the deceased died domiciled. Where there is such a person he may apply for a Grant in England and Wales under Non-Contentious Probate Rule 30(1)(a). Where there is no such person entrusted with the administration an application may be made for a Grant to be issued to the person beneficially entitled to the estate of the deceased by the law of the place in which the deceased died domiciled under Non-Contentious Probate Rule 30(1)(b) and if there is more than one person beneficially entitled to the estate the Grant may issue to such of them as the Registrar may direct. To establish those who are entitled to the estate and thus to the Grant an affidavit

of foreign law will be required (as to which see above). This affidavit evidence must clearly show who is beneficially entitled to the deceased's estate by the law of the place of domicile.

There are special provisions relating to the re-sealing of Grants of Probate or Letters of Administration made by a Court in a country or territory to which the Colonial Probates Act 1982 and 1927 apply. Under Non-Contentious Probate Rule 39 application can be made to the Probate Registry for such a Grant to be resealed and once resealed that Grant has the same power in effect to administer estate in England and Wales as if the Grant had been made by the Courts in England and Wales.

**III. Other official documents concerning successions (if applicable)**

There are no other official documents concerning successions.

**D. Questions concerning judgements and other official documents equally**

- (a) It is unlikely that the Land Registry or any other public registry dealing with land would alter the Register on the basis of any of the following: a foreign judgment, a will executed abroad, a certificate of inheritance or a certificate about the partition of an estate executed abroad or given by a foreign authority. It is usually necessary to apply for an English Grant to deal with the succession of legal interests in registered land. (As is well known, in England it is possible to separate the legal interest from the beneficial interest and reference is often made to legal owner and beneficial owner).
- (b) It is normally a requirement to obtain an English Grant to deal with bank accounts or other assets held by other depositaries. There is a limited exception, however, where the amount held in the bank account is small, the bank may be willing to release the funds without the requirement for a formal Grant, although they will require some form of evidence of the death of the holder of the account and the entitlement of the person seeking the release of funds. Typically, the bank may ask for a legal opinion or sworn statement as to entitlement.

Property held as joint tenants in England passes automatically to the surviving joint owner, outside the estate of the deceased, and is not governed by the will of the deceased. It is only necessary, therefore, to provide evidence of the joint ownership and of the death of the deceased owner. There may be similar joint ownership arrangements in other jurisdictions which would be recognised by the English courts (for example, *tontine* in France).

## 3<sup>rd</sup> part

### Conflict of Laws/International Private Law

#### A. Literature

There are no leading cases which are indispensable for the understanding of the conflict of laws rules in England and Wales. There are cases dealing with particular aspects of conflicts of laws but no case which deals with all the principal aspects.

The leading authority in this area is *The Conflict of Laws* by Dicey & Morris (currently 13<sup>th</sup> edition) published by Sweet & Maxwell. There are other useful text books, for example Cheshire & North's *Private International Law* (currently 13<sup>th</sup> edition) which contains a useful summary of the peculiarities of the English conflict of law rules). Reference is made to this work in this 3<sup>rd</sup> part by referring to 'Dicey & Morris'.

#### B. Treaties

##### I. Multilateral treaties

1. The Hague Convention of 1.8.1989 on the law applicable to successions to estates of deceased persons has not been signed or ratified by the UK and we are not aware of any English cases which have made references to this Convention.
2. The Hague Convention of 5.10.1961 on the conflicts of laws relating to form of testamentary dispositions was signed (on 13 February 1962) and ratified (on 6 November 1963) in the UK by the implementation of the Wills Act 1963 and came into force on 5 January 1964.
3. The Hague Convention of 2.10.1973 on the international administration of estates of deceased persons was signed by the UK (on 2 October 1973) but has not been ratified by the UK. and we are not aware of any English cases which have made references to this Convention.
4. The Hague Convention of 1.7.1985 on the Law applicable to Trusts and on the recognition of Trusts has been signed (on 10 January 1986) and ratified (on 17 November 1989) by the UK. It was implemented in UK domestic law by the Recognition of Trusts Act 1987 which came into force on 1 August 1987 which was extended to a number of UK colonies by an Order in Council. In addition, further ratifications have been made by the UK in relation to UK territories including the Channel Islands and the Isle of Man. The effect of this has recently been considered in the case of *Re Barton Deceased Tod v Barton* [2002] EWHC 24 (Ch)
5. The Washington Convention of 26.10.1973 on a uniform form of international testament was signed by the UK (10 October 1974) and has been followed to the extent that the Administration of Justice Act 1982 (the 'AJA 1982') makes provision for such wills (see section 27 and 28) but the relevant sections are not yet in force in the UK.
6. The Basle Convention of 16.5.1972 on the registration of wills has been signed by the UK and is reflected in sections 23 to 25 of the AJA 1982. However, these provisions have not yet come into force.

7. The Hague Convention of 14.3.1978 on matrimonial property has not been signed or ratified by the UK and we are not aware of any English cases which have made references to this Convention.

## **II. Bilateral treaties with other European states**

According to the Treaty Section of the Foreign and Commonwealth Office the UK has entered into over 400 bilateral treaties but none of these govern the rules relating to the conflict of laws in relation to succession.

## **C. National rules on conflict of laws**

### **I. Which rules govern the national law on conflicts of laws (civil code, state, non-qualified rules)?**

There is no one single source of rules that govern the national law on conflicts of laws. A fundamental difference to some continental European countries, is that under English Law, as far as the rights of individuals are concerned, the ratification of an international treaty or convention has no legal effect until such time as implementing legislation has been passed by parliament and come into force. Therefore, England has a number of statutes that provides rules as to the conflict of laws that have as their genesis an international treaty or convention on the conflict of laws. There is not a singular form of implementing statute, nor are such statutes the subject of a uniform interpretation, and these two factors can result in the object of achieving harmonisation through the use of international treaties and conventions being hampered as far as the English jurisdiction is concerned.

A large majority of the statutes on the conflicts of laws are derived from international conventions and treaties, however before the conflict of laws became the subject of such international agreements, it was the common law which provided the rules governing the conflict of laws and many of these rules still form the basis of the conflict of laws system in England. This body of jurisprudence has been supplemented by the opinions of jurists and leading texts. Statutes, jurisprudence and the work of scholars – in that order of importance - form the basis of the rules that govern the national law on conflicts of laws.

### **II Applicable law absent the choice of law (intestate and testamentary succession – excluding the form of testamentary dispositions – compare VII)**

1. Under English common law, the succession to the movables of a person who dies intestate will be governed by the law of his domicile at the date of his death. This rule would not apply where the Crown or a foreign government claims ownerless property where the intestate dies without heirs. In such a case, the law of the state in which the property is situated will govern.

The succession to the immovables of a person who dies intestate will be governed by the law of the state in which the immovables are situated.

Under the Wills Act 1963, a will made by a testator dying on or after 1 January 1964 will be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times he was a national. This rule applies to Wills of both movables and immovables. Under English common law, the formal validity of a will of movables is governed by the domicile of the testator (possibly at the date the will is executed or at the date

of his death). Under section 2(1)(b) of the Wills Act 1963, a will dealing with immovable property will be treated as properly executed if its execution conformed to the internal law in force in the territory where the property was situated.

The validity of a gift of movables in a will (which is properly executed as discussed above) will, under English common law, be governed by the law of the domicile of the deceased at his death. That law will govern, for example, the extent to which the testator is bound to leave a proportion of his estate to his wife or children.

The validity of a gift of immovables in a will (which is properly executed as discussed in paragraph (3) above) will, under English common law, be governed by the law of the state in which the immovables are situated.

2. There is no single rule (see above) which applies to the whole estate.
3. (a) Succession to immovables of an intestate person is governed by the *lex rei sitae* and, assuming that the will dealing with immovables is properly executed, succession to immovables is again governed by the *lex rei sitae*.
- (b) The *lex rei sitae* governs whether something is to be classed as a movable or immovable object and if there is a conflict between the *lex fori* and the *lex rei sitae*, the latter always prevails.
4. (a) Under the common law, the question of whether a person has capacity to make a will dealing with movables is governed by the law of his domicile (possibly either at the date of making the will or at the date of death) and a will dealing with immovables is probably governed by the law applicable in the state in which the immovables are situated. Under section 1 of the Wills Act 1963, a will is properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times he was a national. Under section 2(1)(b) of the Wills Act 1963, a will dealing with immovable property will be treated as properly executed if its execution conformed to the internal law in force in the territory where the property was situated.
- (b) Under English law, testamentary dispositions are not made by more than one person but two people may agree on the disposition of property under the mutual wills doctrine (discussed below).
- (c) There are no special conflict of law rules in England and Wales dealing with contracts relating to testamentary dispositions or the renunciation of an inheritance (with or without payment). In English law such contracts or renunciations are valid. The doctrine of election may apply for example to require a beneficiary to elect whether to take under the will or the inheritance rights of another jurisdiction.

Election – the question of whether a beneficiary under a will must irrevocably choose whether he wants to take under the will or whether he wishes to take under community of property rules in another jurisdiction is governed by the law of the domicile of the testator at the date of his death. If, however, the question would depend on the construction of the will as to whether the beneficiary must make an election, then the question will be determined by the law chosen by the testator to govern the will. Where a testator bequeaths foreign property away from a foreign heir (who is entitled to the foreign immovable property under the law of the *lex rei sitae*), and also gives English



situs immovable property to the foreign heir or, being domiciled in England, gives movables whether situate, the foreign heir has to ensure that the transfer of the foreign immovable property is carried out according to the wishes of the testator before an English court will allow him to take the English immovable property (if any) and the movables given to him under the will. It has been established by case law that if the foreign heir decides to keep the land, he must compensate the beneficiary who the testator intended the foreign land to be bequeathed to out of any legacy which the testator had given to the foreign heir, the value of the compensation being the value of the land.

- (d) There are special rules concerning the material validity of a will (i.e. the validity of the gifts under the will according to the applicable law rather than the ‘formal validity’). The rules are different depending on whether the property being dealt with under the terms of the will is immovable or movable. If the terms of the will relate to movables, the governing law is the law of the domicile of the testator as at the time of death. However, Dicey & Morris suggests that where a gift into trust is void because of the rule against perpetuities according to the law of the domicile of the testator, but is valid according to the laws of the place of administration of the trust, the trust should be treated as being valid and the laws of the place of administration should apply.

For gifts of immovables, whether or not such gifts are valid depends on the law applicable in the territory in which the property is situated.

- (e) The law applicable to the revocation of a testament is dependent on the form of revocation. Under English law there are various ways by which a testament can be revoked, including physical destruction, by subsequent marriage and by a new testament or codicil.

As far as revocation by subsequent marriage is concerned, case law has determined that the *lex domicilii* of the testator at the time of marriage is relevant whether the revocation applies to the revocation of a testament concerning movables or immovables.

However, in relation to the question of whether physical destruction by either burning, tearing or destroying is sufficient to revoke a will, the only decided cases relate to movables and these determined that the *lex domicilii* of the testator at the time of the revoking act would apply to decide this question. Where the will applies to immovable property it is not clear whether the *lex domicilii* or the *lex rei sitae* would apply.

Where revocation takes the form of a new testament or codicil, revocation depends on the validity of the revoking document and therefore the conflict of laws relating to capacity to make a will and the formal validity of the will are applicable. It is a question of construction whether a second will which does not contain an express revocation clause revokes the first will.

- (f) The method by which property is to be transferred from the deceased to the beneficiaries will generally be determined by the *lex rei sitae* in the case of immovables or the *lex domicilii* in the case of movables. In England and Wales the legal requirement, except in the case of *donationes mortis causa* and joint tenancies, it is unusual for the property of the deceased to be transferred directly to the beneficiaries. The property is normally administered by the executors or personal representatives of the deceased and they will effect the transfer of the property.

Exceptions include, as discussed above, property held as joint tenants in England passes outside the estate of the deceased automatically to the surviving joint owner and is not governed by the will of the deceased. In addition, in the case of property transferred under the doctrine of *donationes mortis causa* passes outside the will directly to the donee.

- (g) There are specific rules relating to the choice of law regarding the administration of the estate, although pursuant to English rules of conflict of laws, ‘administration’ means the rules relating to the collection of assets by the administrator or personal representative, the payment of debts, fiscal duties and expenses and it “does not include the distribution to beneficiaries of that portion of the assets which remains in the hands of the personal representative after the estate has been [administered]” (Dicey & Morris).

The governing law applicable to the administration of the estate is dependent on which system of law has provided authority to the administrator or the personal representative to collect in the assets of the estate. Authority to collect in the assets of the deceased situated in England can only be provided by the English courts and therefore, it is English law which will govern the administration of English assets. Where there are assets situated in a foreign jurisdiction, the law of that jurisdiction will govern the administration of the foreign assets.

- (h) Under English law, how a claim by the state or crown is to be treated is dependent on how its claim is characterised under the foreign laws. Generally, if the foreign state’s claim is as *ultimus heres* under the foreign law, the English courts will regard the matter as being one of true succession and therefore, in the case of movables, the governing law will be that of the testator’s domicile.

Where, however, the foreign state is not claiming as the *ultimus heres* but instead claiming the property as ownerless property belonging to the state as *bona vacantia* or *jus regale*, the question is not one of succession and it has been established that under these circumstances, the *lex rei sitae* will determine which state is entitled to the property.

- (i) Unlike many civil law systems, English law allows an individual (‘the Donor’) to confer upon a person (‘the Donee’) the power to dispose of the property of the Donor (the power is known as a ‘power of appointment’). For example, a testator may in his will give a power of appointment to X and after the testator’s death X can decide how the property passing under the will is to be distributed. There are separate conflict of law rules for powers. The Donor may provide that the power can be exercised during the Donee’s lifetime and/or by his will or codicil.

The question of the Donee’s capacity to exercise the power is governed by the *lex domicilii* where the power is exercised over movables (there is no authority on which law will govern this question in relation to immovables). The question of whether the power has been validly exercised is governed by the *lex domicilii* in the case of movables and the *lex rei sitae* for immovables.

Where the Donee’s power is not general (i.e. not capable of exercise to benefit any one in the world) and is limited in some way, then the law governing the exercise of the power will be that which governs the will of the Donor. Where the Donee could exercise the power in his own favour and is treated as if he owned the property (i.e. he has a

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‘general’ power under English law) then the law governing the exercise of the power will be that which governs the will of the Donee.

**III. Choice of law regarding intestate or testate succession (excluding questions of form, compare VII)**

1. English rules on the conflicts of law do allow a limited choice of law regarding succession. This choice of law, however, is limited to the interpretation or construction of the will. If a testator provides that his will is to be interpreted under English law, legal terminology which appears in the will, will be interpreted according to English law principles. This choice of law, however, is subject always to the rules governing the material validity of the will, i.e. the law of the testator’s domicile in the case of movables and the law of the territory in which the property is situated in the case of immovables.
2.
  - (a) As highlighted above, the choice of law only governs the interpretation of the will, it does not govern whether any gifts made in the will are materially valid. Given that the testator is free to choose the governing law, arguably he could decide for the parts of his will dealing with his immovables to be interpreted under a different law to that of the part dealing with movables, although there is no authority on this point. As stated above, it is clear that the principle that the testator is free to choose an applicable law for interpretation purposes is limited in relation to immovables if the interpretation given by the chosen law would be illegal or impossible under the law of the territory in which the property is situated.
  - (b) Subject to what has been said above, the testator is free to choose the national law or any foreign law to govern the interpretation of his will.
  - (c) The choice of law may be express or implied. If there is no express choice of law it will be necessary to look at all the circumstances to determine whether there has been an implied choice. For example, a choice of law may be implied if the will refers to a particular provision in a statute.
  - (d) In the absence of an express or implied choice of law, the *lex domicilii* of the testator at the time of executing the will applies (whether or not the testator subsequently changes his will). However, this is a rebuttable presumption and the testator’s intention can be inferred from all the surrounding circumstances.
  - (e) As stated above, the principle that the testator is free to choose an applicable law for interpretation purposes is limited in relation to immovables if the interpretation given by the chosen law would be illegal or impossible under the law of the *lex rei sitae*. If the choice of law is invalid the normal rules will apply for determining the governing of law.
  - (f) Assuming it is possible to revoke the will, it will be possible to revoke the choice of law. If no new law is chosen, the normal rules will apply for determining the governing law.
  - (g) Under English conflicts of rules, choice of law only governs the construction of wills, and since section 4 of the Wills Act 1963 provides that “[t]he construction of a will shall not be altered by reason of any change in the testator’s domicile after execution of the will”, the *lex domicilii* of the testator at the time of executing the will (which expresses or, as the case may be, fails to express a choice) must apply.

#### **IV. Simultaneous application of more than one law**

Under English law there is no single rule governing succession to movables and immovables. Succession to immovables of an intestate person is governed by the *lex rei sitae* and to movables, by the *lex domicilii*. Assuming that the will dealing with immovables is properly executed, succession to immovables is again governed by the *lex rei sitae*. The *lex rei sitae* governs whether something is to be classed as a movable or immovable object and if there is a conflict between the *lex fori* and the *lex rei sitae*, the latter always prevails.

The testator may choose the applicable law under this will but this may be subject to the laws of the jurisdiction in which the property is situated. In practice, therefore, more than one law may govern the dispositions under a will. It is usual practice, where this is foreseen, to draft more than one will dealing with property situated in different jurisdictions.

A beneficiary under a will may be required to make an election to determine whether he will benefit under the will or under other statutory or other rights (for example, where the beneficiary could claim both under the will and under community of property or forced heirship rules). This question, under English law, will be governed by the domicile of the testator at his death. It will also be necessary to consider the governing law of the particular gift under the will for this purpose.

#### **V. Compensation for different distribution by the State where the property is situated**

Where a testator bequeaths foreign property away from a foreign heir (who is entitled to the immovables under the law of the *lex rei sitae*), and also gives English situs immovable property to the foreign heir or, being domiciled in England, gives movables wherever situate, the foreign heir has to ensure that the transfer of the foreign immovable property is carried out according to the wishes of the testator before an English court will allow him to take the English immovable property (if any) and the movables given to him under the will. It has been established by case law that if the foreign heir decides to keep the land, he must compensate the beneficiary who the testator intended the foreign land to be bequeathed to out of any legacy which the testator had given to the foreign heir, the value of the compensation being the value of the land.

These rules would apply to all beneficiaries.

#### **VI. Succession and marital property**

1. Prior to the Matrimonial Causes Act 1973, in the absence of a contract or settlement, the rights which each party to the marriage would acquire in relation to each other's property was governed by the domicile of the husband. This was the case because prior to the Act, a wife took as her domicile her husband's domicile on marriage.

The rules regarding the domicile status of a wife were changed with effect from 1 January 1974 so a woman marrying after that date will retain her own domicile separate from that of her husband. It has been suggested (see Dicey & Morris p 1071) that the parties to a marriage after this date should be able to choose the law which will govern the ownership of property either expressly or by way of implication. If they do not do so, the matrimonial domicile should determine this question and this should be determined by reference to the law of the country with which the parties and the marriage have their closest connection at the date the marriage is entered into (although subsequent events may be evidence of the parties' intentions). The leading case *Re De Nicols (No.2)* [1900] 2 Ch 410 determines that the law which will govern the ownership of immovable property as between spouses will be that of

the matrimonial domicile. There is a House of Lords case (which is only of persuasive authority as it was an appeal from a Scottish court) which held that the law of the country in which the immovable property is situated would govern this question (see *Welch v Tennent* [1891] AC 639).

The validity of a marriage contract governing the ownership of matrimonial property between husband and wife is generally governed by the proper law of the contract. The parties to the contract are normally permitted to choose the proper law, at least where there is some substantial connection to the proper law chosen. If no express choice of law is made and there is no choice of law implied by the terms of the contract, the courts would look at all the circumstances and the matrimonial domicile (see above) may determine this.

The formalities to be complied with in executing such a contract will be governed by the proper law of the contract or the place where the contract is executed. The question of which law would govern whether someone is competent to enter into such a contract is unclear. This may be governed by the domicile of the party entering into the contract whose competency is in question (*Re Cooke's Trusts* (1887) 56 LT 737) or by the proper law of the contract (*Viditz v O'Hagan* [1900] 2 Ch 87).

2. There is no matrimonial property regime or forced heirship regime under English law which is intended to prevent (or limit) the transfer of property out of the family. The Inheritance (Provisions for Family and Dependents) Act 1975 provides for limited succession rights but this is largely based on fairness (at least in the case of a surviving spouse) and financial need. (See 4<sup>th</sup> Part for further discussion).

Succession laws and marital property rules on the conflict of laws are not coordinated and it is possible for one system of law to apply to determine the marital property regime and another the succession. However, in order to reduce the inequalities that can arise as a result of two different systems of law applying, a mechanism known as the doctrine of election is used.

Where for example, a husband and wife have married in Italy with no marriage contract and the husband is considered domiciled in Italy at the time of marriage (and it is assumed that in these circumstances community of property applies), but at the time of death he has acquired a domicile in England leaving an English will, it may be that applying matrimonial property conflict of law rules the wife is entitled to a greater share of the property which she has been purportedly left in the will. However, applying the material or essential validity conflict of law rules in relation to his will, as far as movables and English situs immovable property is concerned, the gifts in the husband's will would not abate as a result of the matrimonial property regime as English domestic law has no fixed share requirement. In these circumstances, the wife would have to elect whether to receive her share of the property under the matrimonial property regime or under the will.

3. See answers to VI 2 above.

## **VII. Law applicable to the form of Wills and other testamentary dispositions**

1. The English conflicts of laws on formal validity of wills is governed by the Wills Act 1963 and, in more limited circumstances, by common law rules. The Wills Act 1963 ('the Act') is intended to give effect to the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions. The general position is provided by section 1 of the Act which states that:

*“A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator’s death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.”*

Section 1 applies to Wills of movables and immovables, and provides maximum flexibility in relation to the formal validity of Wills by providing that a will can be valid according to the law of the place where the will was executed, or according to the law of the testator’s domicile, habitual residence or nationality whether at the time of death or execution of the will. If a testator’s will relating to movables is invalid under the Act, since the Act does not abolish the common law rule that the last domicile of the testator governs the formal validity of wills of movables, and given that the doctrine of *renvoi* is not abolished by the Act (although it does not apply when examining the formal validity of a will by reference to the Act, since reference in the Act to ‘internal law’ has been interpreted to mean domestic law only), an individual may be able to rely on the old common law rule to validate his will.

2. There are no special rules for the formal validity of testamentary dispositions executed by more than one person in one document. Joint wills are unknown in practice because they are inconvenient when an application for a grant is made. Joint wills however are possible and may be appropriate to exercise a joint power of appointment or where there is an intention to make mutual wills.
3. The following are examples of which legal questions would be considered questions of form rather than questions of substance.
  - (a) Has the will been properly executed? For example, under English law (the Wills Act 1837) it is necessary for the testator (except in limited circumstances) to sign the will in the presence of two independent witnesses who also sign the will in his presence and in the presence of each other. Special rules apply where the testator is illiterate, blind or incapable of signing.
  - (b) The form of the will is a question of form. For example, under English law, a will must (except in very limited circumstances) be in writing.
  - (c) The document must be intended only to take effect on death i.e. it must be intended to be a will.

There are no prohibitions on the form of the will due to age or personal disabilities although this may be relevant to questions of substance.

### **VIII. Ordre public regarding successions**

1. There is no specific public policy rule in relation to succession. For conflict of law purposes generally, the English courts are reluctant to invoke the doctrine of public policy:

*“the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”*

*Loucks v Standard Oil Co.*, 224 N.Y 99,111,120 N.E. 198,202 [1918] as cited in Dicey & Morris, page 81

There appears to be no authority on the application of public policy to succession cases involving a foreign element.

2. It is likely that the court would refuse to accept foreign succession rules (for example intestate succession of a non-married partner) where to do so would be against public policy or relevant law. For example, the English courts would not accept a rule which sought to discriminate on the grounds of sex (e.g. a higher share in intestate succession for male rather than female heirs) or legitimacy (e.g. the exclusion of children born out of wedlock) as such rules would be in breach of the European Convention on Human Rights (see *Evanturel v Evanturel* (1874) 23 WR 32). The English courts would recognise rules which reflected those in England, for example, the absence of forced heirship or similar protection in a foreign law and the validity of contracts relating to inheritance (although it is not possible to make a voluntary renunciation of an entitlement to a share of a person's estate this could probably be done by way of contract – see *Re Smith* [2001] 23 All ER 552).

#### IX. Renvoi and applicable law in states with more than one legal system

1. The English courts do apply the doctrine of renvoi, although the doctrine has been interpreted by the English courts in a number of different ways.

The cases of *Re Annesley* [1926] Ch 692 and *Re Askew* [1930] 2 Ch 259 provide authority for the application of the 'double renvoi' doctrine. Double or total renvoi involves the English courts standing in the shoes of the foreign court whose law is said to be the applicable law as a result of the application of the connecting factor, such as *lex rei sitae* or *lex domicilii*, and deciding the choice of law in exactly the same way the foreign court would do. Therefore, the doctrine involves the English judge applying the domestic law of the foreign court and the conflict of law rules of that foreign court. If applying the conflict of law rules of the foreign court, this would mean the foreign court would make a reference to the English law which would result in English law referring the case back to the foreign law, the applicable law is determined by whether the foreign law accepts such a renvoi (known as single renvoi): if the foreign law would accept the single renvoi, then the English court would apply the foreign law as the applicable law as this is what the foreign court would do, but if the single renvoi was rejected, this would mean that the foreign court would apply English law and this is what the English court will therefore do. This full circle effect is known as double renvoi.

The English court may also apply the doctrine of envoi (onward transmission) – where the foreign court would apply the domestic laws of a second foreign jurisdiction.

Dicey & Morris suggest that as a practical matter unless the situation is an exceptional one and the advantages of doing so clearly outweigh the disadvantages the English courts would apply the domestic law of the foreign jurisdiction (single renvoi) rather than the conflict laws of the foreign jurisdiction (double renvoi).

2. The doctrine of renvoi has been applied in many situations, for example, in looking at the formal and intrinsic validity of wills and to cases of intestate succession. It does not apply to the formal validity of wills falling within the Wills Act 1963. The English court would determine the question of ownership of interest in immovables abroad by applying the *lex situs* (as applying any other law would probably be of no effect as it could not be enforced in the jurisdiction). A similar argument may apply in relation to movables although these could be taken out of the jurisdiction.
3. Under section 1 of the Wills Act 1963 a will will be properly executed if it conforms to the internal rule in the territory where it is executed or where at the time of its execution or of the testator's death he was domiciled or had his habitual residence, or a state at which either of those times he was a national. It is possible that he could be a national of the UK which has

three legal systems: that of England and Wales and those of Scotland and Northern Ireland. In such a case, it would not be possible to look at the law of his nationality to determine whether the will is properly executed.

4. In the UK there are three separate legal systems not just to determine succession but for all purposes: the law of England and Wales, the law of Scotland, and the law of Northern Ireland.

The Wills Act will determine whether a will governed by either Scottish law or the law of England and Wales or a will dealing with property situated in either jurisdiction is properly executed and will look at the internal rule in the territory where it is executed or where at the time of its execution or of the testator's death he was domiciled or had his habitual residence.

If a person dies intestate the English courts would look to the law of his domicile at the date of his death to determine the succession to movable property and the law of the state in which the property is situated in relation to immovable property. For example, if the individual died domiciled in England and Wales but owned movable and immovable property in Scotland, the succession to the movable property would be governed by the law of England and Wales whereas the succession to the immovable property would be governed by the law of Scotland.

### **X. Applicable law concerning preliminary questions (question préalable)**

Where the English conflict of law rules for both the preliminary or subsidiary question and the main question would lead to the same law being applied this is the law which would be applied to both. Problems arise, however, where in applying the English conflict of law rules to both the preliminary question and the main question, different rules apply. Dicey & Morris argue that this problem will only arise if three conditions are satisfied. First, the main question must, under English law, be governed by a foreign law. Secondly there is a preliminary question which involves foreign elements and which has a special conflict rule which would apply to determine it. Thirdly, the English conflict rules applicable to the preliminary question lead to a different result from the conflict rules adopted by the country whose law governs the main question. Dicey & Morris suggest that each such case should be looked at separately in order to find a solution which produces the best results rather than applying a general rule to all such cases.

### **XI. Scope of rules on the law applicable to successions**

1. The legal questions covered by the conflict of law rules concerning the law applicable to successions relate predominantly to the distribution of assets to the beneficiaries - whether statutory beneficiaries according to the rules of intestacy or testamentary beneficiaries - of the 'net' estate. The net estate is comprised of the property available for distribution to the beneficiaries after the assets belonging to the testator have been collected in, and the administrator or executor has paid all duties, debts and testamentary expenses. Therefore, all matters relating to the 'gross estate' are normally matters of administration, and for conflict of law purposes are not dealt with under the conflict of law rules for succession.
- 2(a) The transfer of property to beneficiaries by the personal representative or administrator is normally governed by the *lex successionis*, which in turn depends on whether the property being transferred is movable or immovable (see Section C Part II 4(f)).

The transfer of property from the deceased to the personal representative or administrator is governed by the law governing the administration of the estate. The law governing the administration of the estate will be the law of the country where the personal representative or administrator is given the power by the courts to collect in the assets of the deceased.



- (b) As far as debts are concerned, the *lex successionis* is applicable in determining whether such debts should be paid out of realty or personalty, specific assets or residue (see Dicey & Morris, page 1017). Questions relating to the order in which debts should be paid are not governed by the *lex successionis* but instead are dealt with under the law governing administration.
- (c) The *lex successionis* does not apply to powers relating to the administration of the estate rather than the distribution of the assets once debts, legacies and expenses have been paid. To the extent that the powers in question are regarded as relating the administration of the estate, whether or not such powers apply to assets situated abroad will depend on the law of the country governing the administration of the estate. Where the administrator has received letters of administration in England, assets of the deceased situated abroad are not automatically transferred to the administrator. It would appear that, “[w]hether or not he is entitled to recover them is a matter for the law of the country in which they are situate (per Dicey & Morris pg. 1014) (i.e. the *lex rei sitae*).

However, where the powers to be exercised by the administrator relate to the distributions of the assets to beneficiaries after the payment of debts, legacies and expenses, the *lex successionis* will apply to such powers.

## 4<sup>th</sup> part

### Substantive law on successions

#### A. Sources and literature

##### I. Statutory sources

Administration of Estates Act 1925 ('AEA 1925')

Administration of Justice Act 1982 ('AJA 1982')

Adoption Act 1976

Family Law Reform Act 1969

Family Law Reform Act 1987

Family Provision Act 1966

Inheritance (Provision for Family and Dependents) Act 1975 ('I(PFD)A 1975')

Inheritance Tax Act 1984

Intestates' Estates Act 1952

Law of Property Act 1925

Law Reform Succession Act 1995

Legitimacy Act 1976

Married Women's Property Act 1882

Non-Contentious Probate Rules 1987

Supreme Court Act 1981

Supreme Court of Judicature (Consolidation) Act 1925

Taxation of Chargeable Gains Act 1992

Trustee Act 1925

Trustee Act 2000

Wills Act 1837

Wills (Deposit for Safe Custody) Regulations 1978

##### II. Literature and judgements

Williams on Wills: Law of Wills Volume 1 – CH Sherrin, RFD Barlow, RA Wallington (2002)

Tristram and Coote's Probate Practice – RR D'Costa, JI Winegarten, T Synak (2002)

*Re Smith deceased, Frank Smith v Raymond John Smith and Others* [2001] 3 All ER 552, Ch.D

*Re Oldham, Hadwen v Myles* [1925] Ch 75

*In Re Estate of Monica Dale Deceased: Proctor v Dale* [1993] 4 All ER 129

*Re Goodchild (Deceased)* [1996] 1 All ER 670

*Tinsley v Milligan* [1993] 2 All ER 65

*Pettitt v Pettitt* [1970] AC 777

## B. Intestate succession

By way of introduction it may be worth pointing out that the intestacy rules applicable in England and Wales prior to 1926 (when the major reforms enacted in 1925 to property legislation generally came into force) made a distinction between real and personal property. This distinction was abolished by AEA 1925 when the pre-existing rules in relation to personal property were, in large measure, adopted for property of all types. It is also worth noting that the specific rules as to the manner in which the estate of an intestate is split (contained in AEA 1925, s46) were the result of a survey of the provision commonly made in wills by testators dying in the preceding 25 years ie they were intended to reflect public opinion at the time. There have been no major changes (other than to increase the financial limits) since then and it is open to question whether the rules reflect public opinion in the twenty-first century.

- I. Where the intestate leaves a surviving spouse and issue then, subject to the spouse's entitlement (see section III below), one half of the estate will pass to issue after the termination of the spouse's life interest; the other half will pass to them immediately on the death of the intestate (AEA 1925, s46(1)(i), (2)). Where the intestate leaves issue but no spouse, the whole of the residuary estate is held immediately for issue. (AEA 1925, s46(1)(ii)). "Issue" includes children and grandchildren and more remote descendants and includes legitimated, adopted and illegitimate persons and children *en ventre sa mère* at the death.

In each case, the issue take on the 'statutory trusts' which are defined in AEA 1925, s47. Property held for issue subject to the statutory trusts is held by the personal representatives (see section D II below) as trustees upon trust for the children of the intestate who take absolute interests in equal shares at the age of 18 or on marrying under that age. If any child dies before the intestate or after him but under the age of 18 leaving issue who were alive at the death of the intestate, the issue take *per stirpes*, through all degrees, the share which their parent would have taken if living at the death of the intestate, so that no issue take whose parent is alive at the death of the intestate and is capable of taking.

As regards other relatives, the position (which is set out in AEA 1925, s46(1)) is different depending on whether or not the intestate leaves a surviving spouse. Where he leaves a surviving spouse and no issue but either a parent or parents or one or more brothers or sisters of the whole blood or issue of a brother or sister of the whole blood, the surviving spouse takes the personal chattels absolutely, a fixed sum of £200,000 and subject thereto the residuary estate is held as to one half in trust for the surviving spouse absolutely and as to the other half, where the intestate leaves one or both parents, in trust for the parent or parents absolutely, and if both in equal shares, or where the intestate leaves no parent, on the statutory trusts for the brothers and sisters of the whole blood.

If the intestate leaves no spouse and no issue but both parents, then the residuary estate is held in trust for the parents in equal shares absolutely. If the intestate leaves no spouse and no issue but one parent, then the surviving parent takes outright.

If the intestate leaves no spouse and no issue and no parents, his estate is held:

1. on the statutory trusts for brothers and sisters of the whole blood and their issue, but if no person takes an absolute interest then
  2. on the statutory trusts for the brothers and sisters of the half blood and their issue, but if no person takes an absolute interest then
  3. for the grandparents of the intestate, and if more than one survive, in equal shares, but if there is no member of this class then
  4. on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate) but if no person takes an absolutely vested interest then
  5. on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate).
- II.** Following Legitimacy Act 1976, Adoption Act 1976 and Family Law Reform Act 1987, there are no special rules for children born out of wedlock or for adopted children. Both categories fall within the definition of children and issue.
- III.** The surviving spouse's entitlement under AEA 1925, s46 is dependent on the spouse surviving the intestate by 28 days.

The surviving spouse's entitlement depends on whether, in addition to the spouse, the intestate leaves issue and/or parents and/or brothers or sisters of the whole blood or their issue (see section I above). If the intestate leaves none of these then the residuary estate is held in trust for the surviving spouse absolutely.

Where the intestate leaves a spouse and issue, then the surviving spouse takes personal chattels absolutely (this expression is defined in AEA 1925, s55(1)(x)) and a fixed net sum (currently £125,000) absolutely. Subject thereto, the residuary estate is held as to one half upon trust for the surviving spouse during his or her life, and thereafter on the statutory trusts for the issue of the intestate, and as to the other half, on the statutory trusts for the issue of the intestate.

Where the intestate leaves a surviving spouse, no issue, but either a parent or brother or sister of the whole blood or their issue, then the surviving spouse takes the personal chattels absolutely and a fixed net sum (currently £200,000) absolutely and, subject thereto, the residuary estate is held as to one half for the surviving spouse absolutely and as to the other half for the parents, brothers or sisters or their issue (see section I above).

Where the surviving spouse is entitled to a life interest in part of the residuary estate, he or she may elect to have the life interest capitalised (AEA 1925, s47A). Intestates' Estates Act 1952 conferred a right on the surviving spouse to require the personal representatives to appropriate the matrimonial home in or towards satisfaction of any absolute interest in the intestacy.

English law has no concept of marital property nor of couples marrying in accordance with a particular matrimonial regime. Historically, it was not possible for married women to own property in their own right, though this rule came to be of limited effect as a result of the

intervention of the courts of equity i.e. by the use of trusts and it was ultimately abolished by Married Women's Property Act 1882. Each party to a marriage now retains his or her own property following the marriage and any assets acquired during the course of the marriage are normally treated as owned by the person who paid for them.

It should however be noted that it was common practice in the 19<sup>th</sup> and early 20<sup>th</sup> centuries for marriage settlements to be set up on the marriage of wealthy individuals. The parties' parents (or the parties themselves) transferred property to the settlement at the time of the marriage and, in addition, the parties frequently covenanted to settle after acquired property (eg future inheritances) on the terms of the settlement. This therefore operated in a sense as a type of community property regime.

Though marriage settlements are now unusual, it is common practice in the UK for a married couple to acquire their main residence in joint names on terms that, regardless of the identity of the person who provided the funds to effect the purchase, the surviving spouse will take the entirety of it on the death of the first to die.

Gifts from husbands to wives are also subject to special rules. Where property is transferred without any consideration, it is usual for a resulting trust to be presumed in favour of the transferor (ie for the property to be treated as continuing to belong beneficially to the transferor). It is normally for the transferee to prove that the transfer was a gift or a loan. However, there is a reversal of the burden of proof in the case of transfers between husbands and wives. In this case, the 'presumption of advancement' applies so that, where a husband transfers something into his wife's name, it is assumed that this was intended to be by way of gift. The husband has to rebut the presumption. This presumption has been held not to apply to transfers from wife to husband (*Pettitt v Pettitt* [1970] AC 777) and today the scope of the presumption is unclear due to social and economic change, particularly the change in the position of women.

#### **IV. English law currently provides no share for unmarried co-habitants or for homosexual co-habitants.**

However, the Civil Partnerships Bill was introduced into the House of Lords in January 2002 as a Private Members' Bill to make provision for civil partnerships and their rights and obligations. The bill provides for the registration of civil partnerships if certain conditions are satisfied. To be eligible, each of the persons must be over 18, unmarried and not a partner in another civil partnership. At least one of the partners must be domiciled in England and Wales on the date of applying for registration or must have been habitually resident in England and Wales for one year before that date. The partners must have lived together for at least 6 months before the date of application but not merely because one of them is an employee, tenant, lodger or boarder of the other.

Clause 22 of the Bill provides for the distribution of the residuary estate where one of the partners dies intestate domiciled in England and Wales and the other partner survives by 28 days or more. If the deceased has no issue, the residuary estate is to be held on trust for the surviving partner absolutely. If the deceased leaves issue, the personal chattels and a net sum of £125,000 are due to the surviving partner. Half the residuary estate is held on trust for the surviving partner for life and, subject to this life interest, on the statutory trusts for issue, and the other half is held on the statutory trusts for issue. "Statutory trusts" is to be construed in accordance with AEA, s47(1)(i).

Clause 23 provides for a right of action under I(PFD)A 1975. This clause extends the right to apply for an order to the surviving partner. The court must make an order if it feels that the disposition to the surviving partner (whether under intestacy law or a will) does not make “such provision as it would be reasonable in all the circumstances” for the surviving partner to receive for his maintenance (clause 23(2)(c)).

The factors that the court should consider are the age of the surviving partner, the length of their civil partnership and the contribution made by the survivor to the welfare of the deceased’s family (including care of the home or family).

The Bill received its second reading in the House of Lords on 25 January 2002 and was committed to a Committee of the whole house. It is relatively unlikely that the bill will be enacted in the short term but its approval by the House of Lords is indicative of possible developments in this area in the future.

At present, I(PFD)A 1975 allows unmarried cohabitants to apply for reasonable provision from the deceased’s estate (see section G, II). Anyone living in the same household as the deceased for two full years before the death of the deceased as the husband or wife of the deceased is a dependant under the Act and can therefore make a claim for reasonable provision.

- V. The estate goes to the Crown by way of “bona vacantia” in default of the spouse, issue or other relatives as outlined above taking an absolute interest. If a person is resident in Lancashire or Cornwall (applying historical boundaries) the devolution is strictly speaking to the Duchy of Lancaster or to the Duke of Cornwall (ie the Prince of Wales), as the case may be, rather than to the Crown per se. The Crown or the Duchy can make *ex gratia* payments out of the estate for dependants and other persons for whom the intestate might reasonably have been expected to make provision.
- VI.1. Where the deceased leaves a surviving spouse, two children and both parents still alive, the surviving spouse will take the personal chattels and £125,000 absolutely, together with a life interest in one half of the remainder. Subject thereto, this half will be held on the statutory trusts for the two children in equal shares and the remaining half share will be held for them immediately on the statutory trusts in equal shares.

There is no marital property regime (though it should be noted that any assets held by the intestate and his spouse as joint tenants on terms where the surviving spouse has a right of survivorship will pass outright to the surviving spouse).

2. Where the deceased has a surviving spouse and one living child and the child of a deceased child, but no parents, the surviving spouse will take the personal chattels and £125,000 absolutely and a life interest in one half of the residuary estate (as above). The surviving child and the child of the deceased child will share equally, on the statutory trusts, the one half share which is subject to the surviving spouse’s life interest and the half share which is not so subject.
3. Where the deceased is survived by a spouse but no issue, his mother, a brother and the daughter of a deceased sister, the spouse will take the personal chattels and £200,000, together with half of the remainder absolutely – the other half will be held for his mother absolutely.
4. Where the deceased is survived by neither a spouse nor issue but by his mother, brother and the daughter of a deceased sister, the mother will take the entire estate outright.

### **C. Execution of a will/testamentary disposition**

- I.** With effect from 1 January 1970, the minimum age for making a will is 18 (Family Law Reform Act 1969, s1(7)). The only exception to this is that soldiers in actual military service and mariners or seaman at sea may make wills at a younger age (there are also special more relaxed formalities for people in such circumstances - see Wills Act 1837, s7).
- II. Formal Requirements for wills or other testamentary dispositions**
  1. The normal form used in England and Wales is a will attested by two witnesses. The will must be in writing and signed by the testator (in a manner which makes it clear that the deceased intended his signature to give effect to the will) in the presence of two witnesses present at the same time (Wills Act 1837, s9 as amended by AJA 1982, s17). The signature and witnessing requirements are modified in the case of testators who are blind or illiterate. As mentioned above, the rules are also relaxed in the case of people on active military service and seaman at sea.
  2. International wills are extremely unusual.
  3. Anecdotal evidence is that two-thirds of people die intestate.
  4. Not applicable.
- III.1.** Wills are not normally deposited centrally. Many testators lodge their original wills with their solicitors or with their bank. However, Supreme Court Act 1981, s126 provides for safe and convenient depositories for the custody of wills under the control and direction of the High Court. The Wills (Deposit for Safe Custody) Regulations 1978 (SI 1978/1724) contain the procedure for depositing wills. However, this section is prospectively repealed by AJA 1982, s75 and is to be replaced by AJA 1982, ss23-26 which are not yet in force.

Sections 23-26 will replace the domestic provisions for the deposit of wills contained in the Supreme Court Act 1981 by introducing the legislation necessary to ratify the Council of Europe Convention of the Establishment of a Scheme of Registration of Wills 1972 (the 'Registration Convention'). Any will that has already been deposited in a depository under the Supreme Court Act 1981, s126 or Supreme Court of Judicature (Consolidation) Act 1925, s172 will be treated as though it was deposited under AJA 1982, s23.

2. Section 23(4) provides that any will whose registration is requested under Article 6 of the Registration Convention must be registered by the registering authority. Article 6 provides that, at the testator's request, an authorised person (such as a notary) may request that the will is registered in other Contracting States as well as in the state in which the will was made. The Principal Registry of the Family Division of the High Court is the designated national body for the international aspects of the registration scheme (AJA 1982, s 24).

### **D. Wills and Testaments**

- I.** English law distinguishes in a number of respects between a residuary beneficiary (English law does not use the term "heir" in the context of a person who takes, or shares in, the bulk of the deceased's assets subject only to bequests or legacies but instead uses the term 'residuary beneficiary' or 'beneficiary of residue') and the beneficiary of a bequest (normally described as a legatee). It may be worth noting that 'heir' was a 'term of art' for the purposes of the pre-1925 legislation, and is still relevant in the case of arrangements established before that dated

(eg hereditary titles). For example, the interests of a legatee take precedence over those of a residuary beneficiary if there are insufficient assets to satisfy legatees and to leave assets in the residuary estate for the benefit of the residuary beneficiary. Special rules also apply to legacies – for example, the rules which determine whether a legacy which is not payable immediately on the death of the deceased carries income.

- II.** The ownership of the property of a person who dies leaving a will under which executors are appointed who go on to prove the will passes on his death to his executors whose authority is confirmed by a grant of probate. The beneficiaries (whether they are legatees or residuary beneficiaries) have rights against the executors for the due administration of the estate and the transfer of their entitlements to them. In the case of an intestacy or a will which does not validly appoint executors who are willing and able to prove it, the ownership passes on the grant of letters of administration to administrators the identity of whom is determined in accordance with provisions of the AEA 1925 and it is the administrators against whom the beneficiaries have rights. Executors and administrators are known collectively as ‘personal representatives’, and are so called because, prior to 1898, it was only personalty which passed to them, and not because they represent the person of the deceased. Accordingly neither a legatee nor a residuary beneficiary is the owner of the property and the legatee has no rights against the residuary beneficiary.
- III.1.** As indicated above, the appointment of personal representatives (either executors or administrators) is necessary for the administration of all estates.
  2. In the case of a testator who dies with a will, he may nominate the executors in his will. There is no mechanism for a third party to nominate executors. Where the will does not appoint executors (or where the executors appointed have predeceased the testator or are unwilling to act) the persons who have standing to apply for a grant of letters of administration are as set out in the Non-Contentious Probate Rules 1987, Rules 20 and 22. Rule 20 gives a list of those entitled to a grant in order of priority; these include the executor, any residuary beneficiary who holds assets in trust for any other person, any other residuary beneficiary (subject to certain provisos), the personal representative of any residuary beneficiary, any other legatee or devisee, and any creditor of the deceased. As there is an order of priority, an applicant can only apply for the grant if there is nobody in a higher category who is willing and able to apply. This process is known as “clearing off”. Rule 22 provides that, where there is no will, the people entitled to the grant are the surviving spouse, the children and their issue, the parents, the brothers and sisters, any half brothers and sisters, grandparents, uncles and aunts and half-uncles and aunts, the Treasury Solicitor and creditors. There is a clearing off process similar to that in Rule 20 and any applicant must potentially have a beneficial interest in the estate under the intestacy rules.
  3. The personal representatives are the legal owners of the estate and have the right to dispose of the assets comprised in it. The powers and duties of the personal representatives are conferred by statute (and where the deceased makes a will additional powers may also be conferred by the will). There is no maximum period for the administration of an estate and personal representatives are not bound to distribute the estate within a year of the testator’s/intestate’s death (AEA 1925, s44). However, the entitlements of legatees may be increased if legacies are not paid within a year of the grant of representation being obtained as the personal representatives must pay interest to the legatee at 6% per annum (unless a different provision is made by the will). If the will requires that a legacy is paid either immediately after death or that it is paid on a specific date, interest will be payable from the relevant date.



4. The court does have ultimate control over the personal representative in the sense that his co-executors/administrators and/or the beneficiaries may apply to the court if they are dissatisfied with his conduct. However, once the grant of probate or letters of administration has been issued, there is no need for the permission of the court for the alienation of particular property or other contracts.
- IV. It is very common for testators to leave property on trust rather than by way of absolute gift. It should be noted that the intestacy rules similarly provide for the property of the deceased to be held on trust where there is a surviving spouse and/or young beneficiaries. Express trusts created by wills are typically of a more complex type and are designed to take account of changes in family circumstances and the UK tax regime.

### **E. Special rules concerning certain types of property**

There are no special statutory rules for the succession to certain types of property, though, as mentioned above, the rules for the succession to realty and personalty were different prior to 1926.

### **F. Limits to the revocation of a will (joint and mutual wills)**

It is possible (though most unusual) for testators to make mutual wills. In principle, following the death of the first to die, the survivor is prohibited from changing his or her will. However, the extent of the doctrine is extremely uncertain (for example, it is not clear how it applies where the revocation is automatic rather than voluntary, as is the case where a testator marries) and the making of mutual wills is not normally recommended. Mutual wills are analysed as implying a contract not to revoke the will and it is similarly possible (though most unusual) for a testator to contract not to revoke a will in circumstances not involving a mutual will.

In *Re Estate of Monica Dale Deceased: Proctor v Dale* [1993] 4 All ER 129 the executor, whose parents had made mutual wills, made an application to determine whether, subsequent to her father's death, her mother could change her will. It was held that, although the mother could technically change her will, the agreement made with her husband when they made their mutual wills imposed a trust on her estate, and her executors would therefore take her property subject to a duty to dispose of the property in accordance with the provisions agreed between the mother and the father which were reflected in the original mutual will.

There is no special form for a contract not to revoke a will but the existence of such an agreement must be proved if mutual wills are to be established (*Re Goodchild (Deceased)* [1996] 1 All ER 670). The agreement not to revoke may be incorporated in the will by a recital or can be proved by extrinsic evidence. It is essential that the precise terms of the agreement can be established, as proof of an agreement to make mutual wills is not sufficient to prevent revocation: there must also be proof that it was agreed that the wills would be irrevocable and remain unaltered (*Re Oldham, Hadwen v Myles* [1925] Ch 75).

The transfer of property under a valid *donatio mortis causa* cannot be revoked by will. The requirements of this doctrine are that the gift is both made in contemplation of, and is conditional on, death. The donor must have effected some transfer of the subject matter of or of some essential 'indicia' of title to the gift to the donee. When the donor dies, the donee becomes the absolute owner of the property.

### **G. Limits on the testamentary power of disposition (forced share)**

- I. English law now contains no forced heirship rules, though forced heirship rules in relation to personalty and in relation to certain categories of testator did survive in certain parts of England until the 1720s. As a consequence no family members or dependants have any entitlement to a fixed share in the estate of the deceased. However, it should be noted that certain classes of beneficiaries may apply to the court under I(PFD)A 1975 if reasonable provision has not been made for them.
- II. These classes include the deceased's spouse, unmarried former spouse, children and those treated as children, such as step-children. In addition to family members, dependants may also make a claim. Under I(PFD)A 1975, a dependant is a person who was being maintained by the deceased immediately before death. Section 1(3) defines being maintained as when 'the deceased, otherwise than for full valuable consideration was making a substantial contribution in money or money's worth towards the reasonable needs of that person'. Finally, any person who was living, throughout the two years up until the date of death in the same house as the deceased and as the husband or wife of the deceased can also make a claim (Law Reform (Succession) Act 1995).

There is only one ground for a claim: the applicant must prove that neither the will, nor intestacy law nor a combination of the two 'make reasonable financial provision for the applicant.' The court considers factors such as the applicant's financial resources and needs (both present and future), the size of the estate, the moral obligations of the deceased to the applicant and any physical or mental disability of the applicant (I(PFD)A 1975, s3(1)).

- III. I(PFD)A 1975 confers on the court a discretionary power to make awards out of the estate in favour of the claimants. The court can make orders for lump sum payments, periodical payments, transfers or settlements of property and variations of marriage settlements. Interim orders may be made. Awards are made against the deceased's 'net estate'. This includes property that the deceased had the power to dispose of by will or nomination, less his funeral, testamentary and administration expenses, debts and liabilities (including any taxes payable on death) (I(PFD)A 1975, s25(1)). The net estate also includes any share of joint property passing by survivorship (as long as the application was made within 6 months of the grant) and any property that was the subject of an overriding power of appointment which he had not exercised.

There are two different standards for judging 'reasonable financial provision'; one for the surviving spouse and one for all other applicants:

1. A surviving spouse is allowed such financial provision as is reasonable in all the circumstances whether or not this provision is necessary for his/her maintenance (I(PFD)A 1975, s1(2)(a)); and
2. Other applicants are allowed such financial provision as is reasonable in all the circumstances for the applicant's maintenance (I(PFD)A 1975, s1(2)(b)).

Where the applicant is the surviving spouse, special guidelines, in addition to the factors mentioned above (see section G II), are considered by the court. These include the spouse's age and contribution to the welfare of the family, the duration of the marriage and the likely financial settlement if the marriage had ended in divorce as opposed to death.

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- IV. Any claim must be made within 6 months of the date of issue of the grant of representation. However, the court has a discretion to extend this time limit (I(PFD)A 1975, s4).
- V. As this is a discretionary regime, the court looks at various factors when deciding the amount of the award.

Gifts made by the testator are considered by the court, not so much when calculating the amount awarded but if the court is satisfied that less than six years before his death, the deceased made a gift “with the intention of defeating an application for financial provision under the Act” and the donee did not give full valuable consideration (I(PFD)A 1975, s10(2)). The court can then make an order that the donee should provide a certain sum of money in order to provide for a member of the family or a dependant.

If the deceased had made an inter vivos contract to leave property by will which was not made for full valuable consideration, the court can order that the donee makes provision for a member of the family or a dependant. “Full valuable consideration” does not include marriage or a promise of marriage.

## H. Waiver or renunciation of the inheritance of forced share

As mentioned above (see section G, I), English law contains no forced heirship rules.

A beneficiary of a will is not able unilaterally to renounce or disclaim a gift before the testator’s death though he may contract to do so and the contract will be enforced by the Court. In *Re Smith, deceased, Frank Smith v Raymond John Smith and Others* [2001] All ER 552, ChD it was held that, before the testator’s death, a beneficiary of the will is an intended donee with no proprietary right in the testator’s estate. The beneficiary has a mere expectancy which is not capable of being disclaimed and any inter vivos disclaimer is ineffective.

Disclaimers can be made after the death of the testator (IHTA 1984, s142) providing that the beneficiary has not received yet any benefit from the gift. Disclaimers are normally made by deed. However, disclaimers can be made by informal acts and may be presumed where acceptance of the gift would be manifestly disadvantageous to the beneficiary (*Harris v Watkins* (1856) 2 K & J 473). Disclaimers of legacies normally operate in favour of the residuary beneficiaries: a disclaimer by a residuary beneficiary will normally result in an intestacy. Disclaimers made within two years of the death of the deceased receive the same favourable tax treatment as deeds of variation (see section M below).

## I. Transfer of property on death

- I. Executors must apply for a grant of probate which is evidence of their authority to deal with the property of the deceased. The grant of probate can be obtained in two forms:**
1. common form – where a will is not questioned, a grant of representation in common form is made. The personal representative is able to obtain the grant from the registry in the absence of any other interested parties. A grant in common form can be revoked for a number of reasons.
  2. solemn form – to prove a will in solemn form, the executor or an interested party must offer the will to the court for consideration in a claim to which all other interested persons have been made parties. The court hears evidence and orders the grant in solemn form if the will is

pronounced to be valid. If proper notice has been given to all interested persons, this type of grant is irrevocable unless the existence of a more recent will is subsequently discovered or the judgment was obtained by fraud. Where a grant of probate in common form has been obtained, it is possible for persons whose interests are prejudiced by the grant to issue a writ for a claim that the will is invalid with the executor as the defendant.

Where the deceased died wholly intestate a grant of letters of administration is issued. In this case there is no distinction between common form and solemn form as there is normally no question of a will being propounded. Letters of administration with the will annexed may however be granted in solemn form where the deceased died with a will but with no executors to prove it.

- II. Law of Property Act 1925, s184 provides that if the deceased and a beneficiary die closely together and the order of deaths cannot be proved, the elder of the two is deemed to have died first for succession law purposes. Therefore if the testator is older than the beneficiary and they die in circumstances where it is impossible to tell which survived, the gift to the beneficiary will be valid and the property will pass to the beneficiary's estate. This rule does not apply where the deceased is intestate and he and his spouse die together, in circumstances where it cannot be determined which has survived. In this instance, both estates are distributed as though the other spouse had predeceased.

It is very common for a testator to include a survivorship clause in a will providing that beneficiaries must survive the testator by a specified period such as two months. This prevents property passing through the estate of a beneficiary who does not live long enough to enjoy it and ensures that it devolves on that beneficiary's premature death in accordance with the wishes of the testator.

- III. The property vests in the executors on the death of the testator. Although the executor's title comes from the will, he needs a grant of probate as evidence of this authority in order to carry out dealings in respect of the property. Once the grant has been obtained, the executors collect the assets, pay any debts and distribute the legacies and residue amongst the beneficiaries.
- IV. The beneficiary has the right to renounce or disclaim a gift, whether it is made under a will or under the laws of intestacy. If the beneficiary accepts the gift or part of the gift, he loses his right to disclaim. A disclaimer prevents the property from vesting in the beneficiary and the rejected gift then becomes part of the residue and is transferred to the residuary beneficiary. Although, there is no fixed form for making a disclaimer, the person disclaiming must be an adult and of sound mind (*sui juris*) and it is normal for the disclaimer to be by way of deed. There is no deadline for making a disclaimer, although (as mentioned above) it must be made before the beneficiary receives any benefit from the gift.
- V. There are no limits on the acquisition of property by foreigners.

### **K. Payment of claims against the estate – responsibilities of the heirs and beneficiaries**

- I. The personal representatives are, if they take up their appointment, liable for the debts of the deceased up to the extent only of the assets of the deceased. (English law does not have the Roman law concept of the personal representatives or heirs of the deceased standing in his shoes for all purposes and accordingly there is no need for a concept similar to 'benefit of inventory'.) Liabilities include debts, funeral expenses, expenses incurred during the

administration of the estate and any inheritance tax payable on death. People who interfere in the administration (even if not appointed as executors or administrators) can also be so liable. However the residuary beneficiaries/legatees do not take on debts, unless assets are given to them subject to charges secured against them.

- II.** Not applicable.
- III.** The executors'/administrators' liability can extend to their own assets in certain exceptional circumstances. These circumstances include distributing the deceased's assets to people other than those entitled to them who may, for example, be creditors or untraced beneficiaries (e.g. where the gift is 'to my grandchildren equally' and the personal representatives divide the property between four grandchildren in ignorance of the fact that a fifth grandchild exists). However, there is statutory protection in some circumstances (eg under Trustee Act 1925, s23, where personal representatives are relieved of liability if they advertise for missing beneficiaries and creditors and none come forward). Personal representatives may also apply to court for an order permitting them to distribute in a certain way where beneficiaries cannot be traced, or may take out insurance against the risk of a missing beneficiary making a claim for wrongful distribution.

### **L. Plurality of heirs**

- I.** If there is more than one residuary beneficiary, the residuary beneficiaries will normally take as tenants in common in undivided shares (unless the will specifically provides for them to take as joint tenants with right of survivorship). It is up to the personal representatives to deal with the assets in such a way that the beneficiaries' entitlement as outright owners of proportionate parts of the estate is satisfied. In cases of difficulty, this may result in the personal representatives disposing of all of the assets and providing the beneficiaries with cash sums. The personal representatives have a statutory power to appropriate assets in satisfaction of a particular beneficiary's share with the consent of the beneficiary concerned (the requirement for the consent of the beneficiary to any appropriation is often dispensed with in wills by express wording to this effect).
- II.** See section I above.

### **M. Alienation of a share in the inheritance**

- I.** A beneficiary may redirect a share in the inheritance by way of a lifetime gift. Such lifetime gifts may (if made within 2 years of the death of the deceased and if an election to this effect is made) be read back to the death of the deceased for tax purposes, with the result that inheritance tax is charged as if the deceased had left the property in question to the new beneficiary rather than to the original beneficiary. An election may also be made so that no capital gains tax charge arises on the redirection (see Inheritance Tax Act 1984, s142 and Taxation of Chargeable Gains Act 1992, s 62).
- II.** Lifetime redirections are normally effected by deed of variation.
- III.** There is no entitlement for other heirs to buy the share of a beneficiary or to sell it to a third party.

## **N. Proof of the position as an heir (or an administrator etc)**

- I.** The personal representatives require a grant of representation (probate or letters of administration (with or without will annexed) for executors and administrators respectively) in order to evidence their right to manage the property of the deceased.
- II.** The application for a grant of probate must be supported by an oath for executors. At the time of the application for grant, the applicant's capacity to act as an executor is judged. Although there is no limit as to the number of executors appointed by a will, probate is granted to a maximum of four executors.

The grant of probate has two functions; it is proof of the authority of the executor and of the executor's title and confirmation that the will is valid.

Where there is a valid will but the executors are either unwilling or unable to act, an application for a grant of letters of administration is made, supported by an oath for administrators with will annexed. If the deceased dies intestate, the people listed in the Non-Contentious Probate Rules 1987, Rule 22 are entitled apply for the grant of letters of administration. The applicant must have a beneficial interest in the estate under the intestacy rules. In this case, an oath for administrators is required.

Both types of grant of administration bestow authority on and vest the deceased's property in the administrator. Unlike an executor, an administrator cannot act until he has received the grant.

Grants of probate and letters of administration are accepted in all courts in England and Wales. There is no limit on their applicability in other jurisdictions, though obviously the domestic rules in other jurisdictions may require additional formalities to be complied with.

- III.** In order to obtain a grant of representation an application should be made to the Principal Registry of the Family Division of the High Court or a district probate registry (Supreme Court Act 1981, s105), which is the body which issues the grant. There is no requirement that the application be made in the locality where the deceased lived or died.

The personal representatives of the estates of foreigners with property in England and Wales require an English grant to enable them to deal with property in this country. Where succession to the English estate of a foreign person is governed by the law of another jurisdiction (eg in the case of movables situate in England of a deceased who was not domiciled in England) the probate registry will require evidence of the applicable foreign law so as to enable it to issue the grant to those entitled to the assets in accordance with that law (see section C of Part 2 above). There is no territorial limit on the grant.

## **O. Reform**

- I.** There are currently no significant proposals for reform which are likely to succeed.
- II.** There are no major recent reforms, save that Trustee Act 2000 conferred additional statutory powers on personal representatives and trustees in connection with the management of estates and trusts (a topic not covered in detail in this study).