

IRLANDE

Rapporteur

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1st part

Competence conflicts of the Law of Successions

A. Sources

1. International treaties (multilateral and bilateral) that contain rules and judicial jurisdiction concerning successions

Please enclose a copy of bilateral treaties with your report!

2. National Law

Please enclose the text of the relevant statutory articles with your report.

B. Judicial Jurisdiction

Please indicate whether the courts of the state of your report (contentional or voluntary jurisdiction) have jurisdiction because of the following links: deceased persons domicile. How is the term domicile defined in your state?

1 General

1.1 In order to put the concept of “domicile” in context, a number of facts are set out below:

- The concept of domicile is usually linked with the notion of a person’s “permanent home”.
- In common law systems the concept is used to determine the jurisdiction whose laws a particular person should be subject to in relation to “personal law” matters eg taxation, wills, divorce etc.
- The concept of domicile is a “conflict of laws concept” used effectively to determine the system of personal law to be applied where a person has connections with more than one jurisdiction.
- There are four fundamental rules pertaining to domicile:
 - (a) a person at no time can be without a domicile;
 - (b) a person cannot have two domiciles at one point in time;
 - (c) the domicile of an individual must be that of a territory which is subject to a single system of law;
 - (d) a change to a person’s domicile is not to be presumed, ie definite intention must be present;

1.2. There are three types of domicile:

- (a) Domicile of origin;

- (b) Domicile of dependence;
- (c) Domicile of choice.

In the context of the particular situation under review the concepts of domicile of origin and domicile of choice and the acquisition of a domicile of choice to displace a domicile of origin are the most important.

2. Domicile of Origin

A legitimate child born during the life of its father has its domicile of origin in the jurisdiction in which its father was domiciled at the time of its birth (*Udny v Udny*, 1869 LR 1 Sc & Div). Such a domicile of origin remains with the person unless a domicile of choice is obtained.

3. Domicile of Choice

- 3.1. There are two elements to the acquisition of a domicile of choice, both of which must be present:
 - (i) Residence in the new jurisdiction.
 - (ii) An intention to reside there permanently.
- 3.2. Lord Westbury in the case of the *Udny v Udny* (1869 LR 1 Sc & Div) described a domicile of choice as:

“a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicil is established.”

Lord Chelmsford described the situation in *Bell v Kennedy* (1868 LR 1 Sc & Div 307) as follows:

“a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there.”

- 3.3. In reviewing whether or not a particular individual has acquired a domicile of choice, it is necessary to consider both the concept of residence in the context of domicile and also consider the issue of “intention”.

3.4. Residence

In the case of *IRC v Duchess of Portland* (1982 STC 149) it was stated that:

“Residence in a country for the purposes of the law of domicile is a physical presence in that country as an inhabitant of it... in the case where the domiciliary divides his physical presence between two countries at a time ... it is necessary to look at all the facts in order to decide in which of the two countries he inhabits”.

In effect, the concept of residence for the purposes of domicile is not the same as the concept of residence for tax purposes, ie visits for short periods will not suffice for the purposes of the residence test for domicile.

In the situation under review, consideration needs to be given to whether or not a prolonged period of residence in a particular jurisdiction (Ireland) would also serve to satisfy the “intention” requirement. In the case of *Munroe v Munroe*, (1840 7 Cl & IF 842) Cottenham LC stated that:

“residence alone has no effect, per se, though it may be most important as a ground from which to infer intention.”

In *Udny v Udny* (1869 LR1 Sc & Div) Lord Chelmsford stated:

“Time is always a material element in questions of domicile; and if there is nothing to counteract its effect, it may be conclusive on the subject”.

Two cases of note illustrate this point.

- (a) In the case of *Anderson v Laneuville* (1854 9 Moo PCC 325) Anderson, a person born with an Irish domicile subsequently acquired an English domicile of choice, emigrated to France and cohabited with a widow Madame Laneuville for 24 years until his death. Anderson had expressed some intention of returning to England should Madame Laneuville predecease him. However, it was held that this intention was insufficient to counteract the effect of Mr. Anderson’s length of residence in France and that the long period of residence was held to lead inevitably to the conclusion that Anderson was domiciled in France. (However, it should be noted that the acquisition of the French domicile was displacing another domicile of choice rather than a domicile of origin).
- (b) In *Re Furse, Furse v IRC* (1980 STC 596) William King Furse who had a Rhode Island domicile of origin settled in the UK and carried on a farming business there. In the early 1950’s Mr. Furse decided that he would not return to America unless he become incapable of leading an active life on his farm in England. It was decided that Mr. Furse was domiciled in England and Fox J K stated. “in my view, by the time of his death, the balance of probabilities is that he can have had no real intention of leaving: a fact which is emphasised by the vagueness of his expressed intentions”.

It is worth noting that in this case the individual had a home in America which was available should he wish to return there. Furthermore in considering Mr. Furse’s intention some weight was attached to the fact that he was content and happy living in England.

Therefore vague aspirations or assertions of returning to the person’s country of origin may not have the effect of displacing years of long residence in another jurisdiction, therefore inadvertently acquiring a domicile of choice in the new jurisdiction.

However the notion that long periods of residence in a particular jurisdiction can be used conclusively to infer intention should be tempered.

In the case of *Ramsay v Liverpool Royal Infirmary* (1930 AC 588) Lord McMillan said:

“Prolonged actual residence is an important element of evidence... it must be supplemented by other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test”.

This case concerned an individual (Mr. George Bowie) with a Scottish domicile of origin who re-located to Liverpool and remained there until his death. He professed he would never return to Scotland and in fact never did so even for visit purposes. However, the House of Lords maintained that he had not acquired an English domicile of choice notwithstanding his prolonged period of residence in England as in their opinion his declaration to the effect that he would never return to Scotland was mere “posturing” and had Mr. Bowie’s source of funds dried up he would have in fact gone back there. Furthermore, the fact that there was no evidence to show that Bowie had made his permanent home (he lived in rented accommodation or with relatives) in England was in their view sufficient to quash the inference of intent which Bowie’s 36 years of residence in the UK would have otherwise given. The conclusion was that the long period of residence in England was due to inertia (brought on by old age) rather than a desire to make England his permanent home. It was also noted that he had made no real linkages or attachments to England due to his rather introverted lifestyle. In essence the difficulty in establishing that Mr. Bowie had acquired an English domicile of choice lay in the lack of evidence that he had settled there (again due to his rather inactive and introverted lifestyle).

Another case on the same theme was *IRC v Bullock* (1976 STC 409) (probably the most important case on the subject). This case concerned an individual whose domicile of origin was in Nova Scotia but came to England in 1932 and joined the RAF. He intended to return to Canada on completing his service but in 1946 he married an English woman. Between then and 1960 Mr. Bullock and his wife made several trips to Canada and upon leaving the RAF in 1959 Bullock would have liked then to move there permanently. However, his wife did not wish to do so and therefore Bullock took up employment in England until 1961. Until 1966, Bullock continued to try to persuade his wife to move to Canada but thereafter resigned himself to the fact that she would never do so. In that year, however, he made a will under Nova Scotia law, in which he declared that his domicile was and would continue to be in Nova Scotia and that he would return and remain there upon his wife’s death. Mr. Bullock retained his Canadian nationality and passport, never acquired British nationality or passport, refused to vote in local or parliamentary elections, maintained close contact with Canadian relatives and friends and was a regular reader of a Toronto newspaper. On these facts, the Court of Appeal upheld the Commissioners finding that Bullock was not domiciled in England on the grounds that Bullock’s residence in England was accompanied at all times by a clear and definitive intention to return to Canada upon the substantial possibility of his wife predeceasing him and that was sufficient to counteract the effect of the element of time, ie the prolonged period of residence in England.

In summary, in any situation where an individual has a prolonged period of residence in another jurisdiction then concrete facts indicating the individual’s intent to return to his country of origin would need to be shown to avoid the presumption that a domicile of choice had displaced the person’s domicile of origin.

3.5. Intention

The acquisition of a domicile of choice is described by Scarman J in *Fulds No 3 (Goods)* ([1968] P675) in the following two propositions:

“A domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.”

“A domicile of choice is acquired only if it is affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with an intention formed independently of external pressures of residing there indefinitely.”

Lord Cairns in *Bell v Kennedy* (1968 LR I Sc & Div 307) stated that:

“The question ... is ... whether Bell had determined to make and had made Scotland his home with the intention of establishing himself and his family there and ending his days in that country.”

In the case of *CIR v Cohen* (21 TC 301) the tax payer spent a significant amount of time in Australia, married an Australian lady, established a business there, and lived there continuously for 32 years. It was held in that case that the taxpayer had never lost his domicile of origin in England. At page 315 Finlay J states that;

“the inference which I would draw is that he intended to reside and to reside for a long time in Australia but that he intended to reside there only as long as his business made that necessary and his business with Australia ceased in 1911”.

In considering this case the following should be noted:

- the individual had no fixed place of residence in England
- he had a large amount of furniture and effects stored in Australia after he ceased to live there
- he had reserved a grave plot for himself and his wife in Australia
- all of his commercial investments were in Australia and he had no investments outside that country
- it would have been better from a tax perspective and a foreign exchange perspective if he continued to reside in Australia

Finally, in considering the judgement in this case, it should be noted that the individual's domicile was being considered in respect of years subsequent to his departure from Australia. Therefore, it was immaterial whether it was concluded that he had never acquired an Australian domicile of choice or whether he had acquired such a domicile during his period of residence in Australia but had abandoned it on his departure from that country.

Buckley LJ said in the case of *IRC v Bullock* (1976 STC 409)

“I do not think that it is necessary to show that the intention to make a home in a new country is irrevocable or that the person whose intention is under consideration believes that for reasons of health or otherwise he will have no opportunity to change his mind. In my judgement the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to make him change his mind.”

In *Aikman v Aikman* (1861 4 LT 374) Camel LC said that a mere intention to return to a man's native country on a doubtful contingency would not prevent residence in a foreign country putting an end to his domicile of origin.

The position can be probably best summed up by saying that an intention to return to one's country of origin on a doubtful contingency would not suffice to prevent the ending of a

domicile of origin. It is necessary to be able to point to a definite intention to return which is not contingent on something happening.

In *Fuls (No 3) Goods* ([1968] p 675) Scarman J said:

“If a man intends to return to the land of his birth upon a clear unforeseen and reasonably anticipated contingency eg the end of his job, the intention required by law is lacking: but if he is in mind only a vague possibility, such as making a fortune (a modern day example might be his winning a football pool) or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn; the ultimate decision in each case is one of fact.”

The reference to intention here is in the context of acquiring domicile of choice rather than retaining a domicile of origin. Finally Buckley J in the case of *IRC v Bullock* (1976 STC 409) stated the question to be asked is:

“Is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so on a contingency occurring rather than a vague hope or aspiration.”

3.6. Interaction of Residence and Intention

A critical issue in the case under review is whether or not an “intention” of the individual in question to make Ireland his permanent home can be inferred from the period of residence in Ireland and the “circumstances” of his life. It should be noted that the cases discussed above appear to give conflicting pointers as to what determines intention for the purposes of acquiring a domicile of choice. This is usefully summarised in “Conflict of laws” by Dicey and Morris 12th Edition, page 132 as follows:

“Most disputes as to domicile turn on the question of whether the necessary intention accompanied the residence; and this question often involves very complex and intricate issues of fact. This is because there is no act, no circumstance in a man’s life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act may possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime. There is, furthermore no circumstance or group of circumstances which furnishes any definite criterion of the existence of the intention. A circumstance which is treated as decisive in one case may be disregarded in another, or even relied upon to support a different conclusion.”

The case *Claire Proes -v- the Revenue Commissioners* concerned Mrs Proes who had an Irish domicile of origin and was agreed to have obtained an English domicile of choice during the course of her married life there. It was contended by the Revenue Commissioners her Irish domicile of origin revived when she returned to live in Ireland for a number of years after her husband’s death, despite her stated intention to return to England when she found suitable accommodation. Mr Justice Costello stated as follows:-

“Where a person has acquired a domicile of choice in England returns to Ireland (his/her domicile of origin) the question is not whether a new domicile of choice has been acquired in this country but whether the English domicile of choice has been abandoned. If it had, then the Irish domicile of origin revives. This means that the question which should have been posed was did Mrs Proes abandon her English

domicile by (a) residing in Cork and (b) deciding not to return to live permanently in England, and not did Mrs Proes decide to live permanently in Ireland and thereby acquire a new domicile of choice?"

"The defendants say that this is a distinction without a difference and that the decision of the Circuit Court that Mrs Proes had decided "to live indefinitely" in this country and thereby acquired a new domicile of choice means that she had ceased to intend to return to live permanently in England and therefore had abandoned her English domicile. I cannot agree with the defendant's submissions"

2. nationality of the deceased;

No.

3. the domicile of the defendant

Refer to 1 above.

4. the nationality of the plaintiff or the defendant;

Refer to 2 above.

5. the application of the substantive law of your state concerning successions (*forum legis*)

The law in relation to immovable property is the *lex domicilli* (domicile) of the deceased. The law of movable property is governed by the *lex situs* of the deceased.

6. property of the estate being situated in your state (Does this jurisdiction apply only for immovables? Does this jurisdiction depend upon the inaction of the authorities at the deceased domicile?)

Refer to 5 above.

7. the choice of law made by the deceased;

The courts will look at the intention of the testator when making a will. In general, this is the law of this domicile as this is the law with which the testator was most familiar, but clearly there are instances where the testator has some other legal system in mind. If the court is satisfied that this was the intention of the testator, then the court is bound to give effect to the testator's intentions.

8. the choice of law made by the heirs or beneficiaries;

No.

9. specific jurisdiction for urgent measures to preserve the estate;

Although *mareva* injunctions may be applicable in such circumstances, the domicile of the testator and the *lex situs* for immovable property will be the deciding factors in determining how the estate shall be administered.

10. the risk that there is no other jurisdiction;

This is a function of the domicile issues, which have already been discussed.

11. other bases for jurisdiction

This is a function of the domicile issues, which have already been discussed.

C. Please indicate the scope of application for all the above mentioned judicial jurisdictions

1. **Does the jurisdiction apply for the whole estate or only for movables or immovables situated within the territory of your state? If your law distinguishes between movables and immovables, please answer, according to which law the distinction between movables and immovables is being made.**

Yes. Section 10 of the Succession Act 1965 treats the deceased's estate as a unit by constituting the personal representatives as statutory trustees for the beneficiaries, rather than making a distinction between movables and immovable property.

2. **Do the above mentioned jurisdictional bases apply**
- a) **for suits complaints among the heirs/beneficiaries?**
 - b) **for suits complaints by creditors of the estate?**
 - c) **for suits complaints concerning the validity and the execution of wills?**
 - d) **for suits complaints against somebody who claims to be an heir or has possession of part of the estate?**
 - e) **for the possession of the estate?**
 - f) **for the certificate of inheritance?**

Yes to all, for the reasons stated above.

D. Proof of jurisdiction

Please indicate whether there are any specific rules in your state concerning the following questions of the law of successions:

- I. May the court declare that it has no jurisdiction of the matter?**

Even where it has jurisdiction, the court may in its discretion decide to decline jurisdiction and state proceedings either because there is a *lis alibi pendens* or proceedings are frivolous or vexatious, or, in some cases, the balance of common sense favours a trial somewhere else.

- II. May the court, although it has jurisdiction, declare itself *forum non conveniens*?**

Even where it has jurisdiction, the court may in its discretion decide to decline jurisdiction either because there is a *lis alibi pendens* or proceedings are frivolous or vexatious, or, in some cases, the balance of common sense favours a trial somewhere else.

- III. Is there any influence in the scope of jurisdiction, if another state claims exclusive jurisdiction for its own courts (e. g. for real estate)?**

If property is in Ireland and is immovable, then Irish courts have jurisdiction. Submission to the jurisdiction of the Irish courts cannot operate so as to confer jurisdiction on Irish courts over matters which would otherwise be outside the jurisdiction of Irish courts. Nor will submission of itself give an Irish court jurisdiction over questions of title to foreign land. In general, the policy issues are addressed in the response to the previous question.

IV. May the court decide the matter, if the defendant does not appear before the court?

Yes. If it can be shown that an attempt was made to serve procedures on the defendant, then the court can issue judgement in default of appearance after taking appropriate measures to ensure that the defendant is aware of the proceedings.

E. Litispendens and connectivity

I. May the courts of your country decide, although the cases already pending, within a foreign jurisdiction?

II. If a suit already pending in a foreign jurisdiction bars an action in your state, how does the law of your state define the identity of the claim, of the subject matter and of the parties concerned?

III. Are the rules about litispendens also apply to the question of connectivity?

An Irish court may decide an issue, even though proceedings are pending elsewhere. As a general rule, the courts will consider applications for rulings in the context of such proceedings, and decide on jurisdiction as a preliminary matter.

2nd part

Recognition and Execution of Decisions

A. Sources

1. International treaties (multilateral and bilateral) that contain rules and judicial jurisdiction concerning successions

Please enclose a copy of bilateral treaties with your report

2. National Law

Please enclose the text of the relevant statutory articles with your report.

B. Foreign judgements and other decisions concerning successions

I. Does your state recognise foreign judgements concerning successions ipso iure or does the recognition require a special procedure?

Yes, Ireland does recognise foreign judgements concerning successions ipso iure but does not have any special procedure relating to enforcement. The judgement would be dealt with under common law but it would have to become a separate proceeding here with the judgement itself being a right of action. It would only be in limited circumstances that our Courts would decline to recognise such foreign judgements where:

- (1) The original proceedings had no jurisdiction;
- (2) The defendant was not properly served with the proceedings – where the defendant did not have an opportunity to defend the proceedings;
- (3) The context of the judgement is contrary to public policy in Ireland.

II. Which are the requirements for recognition:

1. the judicial jurisdiction of the foreign court? Please indicate

a) whether the law of your state defines the jurisdiction of foreign courts in this respect

No. It allows the foreign court to decide. If the foreign court accepted that it had jurisdiction over the administration of our estate, then the Irish courts will not have a difficulty in enforcing the judgement. The Irish court will look only to jurisdiction in respect of enforcement where (a) there are assets located in the State and (b) where the Defendant is located in the State.

b) or whether the same rules that govern judicial jurisdiction in the domestic context are also applied to international jurisdiction

Yes.

c) or whether sufficient contacts of the case with the foreign court state are sufficient.

No.

Please also indicate, if and in how far there is an exclusive jurisdiction of the courts of your state which is an obstacle to the recognition of foreign judgements.

None in this context.

- 2. the law applied by the foreign court, in particular the law applied for preliminary questions (questions préables)?**

We do not have questions preables in our state.

- 3. the public order (ordre public)?**

Please state the requirement for the international ordre public in your state, which might be an obstacle to the recognition of foreign judgements.

See reply to 1 above.

- III. Are there any specific rules concerning the recognition and execution of decisions of voluntary jurisdiction or of administrative authorities concerning successions? If so, please give the most important examples.**

There are no specific rules in this jurisdiction.

C. Other documents

- I. Wills executed abroad**

- 1. Is there a specific procedure for the recognition of wills executed abroad?**

Yes. Section 102 of the Succession Act deals with this issue. A will relating to land or other immovables situated in Ireland is formally valid, if executed according to Irish law, or the law of the place of execution.

- 2. Does this procedure depend upon the form of the will?**

Yes. As per Section 102 of the Succession Act 1965 a testamentary disposition shall be valid as regards form, if its form complies with the internal law – (a) of the place where the testator made it, or (b) of a nationality possessed by the testator, either at the time when he made the disposition or at the time of his death, (c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or (d) of the place in which the testator had his habitual residence, either at the time when he made the disposition, or at the time of his death, or (e) so far as immovables are concerned of the place where they are situated.

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

Are these documents recognised if they are authored by a foreign court or a foreign authority? Which are the requirements for the recognition?

Yes, when they are proved elsewhere. The requirements are that sealed and certified documents are provided for the purposes of a Probate/Administration application in Ireland. In cases where an application is made in Ireland on foot of letters of administration intestate obtained in another jurisdiction, an affidavit of law from a competent lawyer in that jurisdiction is provided which sets out the beneficiaries of the estate.

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

None.

D. Questions concerning judgements and other official documents equally

Is a foreign judgement, 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 sufficient:

a) for registration in the land register or similar public registers;

No, an Irish grant must be obtained in order to deal with Irish real property.

b) for a bank or another person with whom properties of the estator is deposited, to hand over property of the estate.

No. In general, it is not possible to act on the foot of a foreign grant in Ireland. There is no set procedure for banks and it may be possible to procure the release of certain assets depending on their value and the provision of an indemnity.

3rd part

Conflict of Laws/International Private Law

A. Literature

Please include the text of statutory rules on International Private Law/Conflict of laws of your state and also a copy of the bilateral treaties.

Are there any leading cases indispensable for the understanding of the conflicts of Law rules of your state?

Please name these leading cases and include a copy of a textbook or a commentary on the conflict of laws regarding successions in your country.

B. Treaties

I. Multilateral treaties

a) Which multilateral treaties has your state ratified, which has it signed?

In particular:

1. Hague Convention of 1.8.1989 on the law applicable to succession to the estates of deceased persons
2. Hague Convention of 5.10.1961 on the conflicts of laws relating to the form of testamentary dispositions
3. Hague Convention of 2.10.1973 concerning the international administration of the estates of deceased persons
4. Hague Convention of 1.7.1985, on the law applicable to trusts and on the recognition
5. Washington Convention of 26.10.1973, on a uniform form of international testaments
6. Basel European Convention of 16.5.1972 on the establishment of an organisation for the registration of testaments
7. Hague Convention of 14.3.1978 on the law applicable to matrimonial property regime

Ireland is a signatory to the Hague Convention of 5.10.1961 on the conflicts of laws relating to the form of testamentary dispositions and the Washington Convention of 26.10.1973, on a uniform form of international testaments.

b) Do you have any information whether and how these treaties are being followed in the legal practice of your state?

The Hague Convention of 5.10.1961

Part VIII of the Succession Act 1965 amended the rules of private international law in Ireland relating to the formal validity of wills. The purpose of the changes in the law is to enable Ireland to adhere to the Convention on the Conflict of Laws relating to the form of

Testamentary Dispositions, 1961. The provisions of Part VIII follow closely the wording of the Convention.

The 1961 Convention is also enacted in Orders 11 and 79 of the Rules of the Superior Courts 1986. Order 11 deals with service outside the jurisdiction including the situation where the action is for the administration of the personal estate of any deceased person. Order 79 deals with probate issues. Order 79 Rule 8 is applicable where the deceased died domiciled outside Ireland.

Washington Convention of 26.10.1973

Part IV of the Arbitration Act 1980 makes provision for enforcement under this Convention. The provision entails an application for leave for enforcement under the provisions of Section 16(1) of the 1980 Act.

II. Bilateral treaties with other European states

1. Which bilateral treaties with other European states has your state ratified, which other has it signed?

None.

2. Do you have any information whether and how these treaties are being followed in the legal practice of your state?

Not applicable.

C. National rules on conflicts of laws

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

The common law rules on conflicts of law govern these issues in Irish law. The leading commentary in Ireland is William Binchy's Irish Conflicts of Law.

II. Applicable law absent the choice of law (intestate And testamentary succession – excluding the form of testamentary dispositions -compare VII.

1. Does your law distinguish between the succession to immovables and to movables or is there one single conflict of laws for the whole estate?

Yes, Irish law distinguishes between the succession to immovables and to movables. As a general principle the *lex situs* governs succession to immovables and the *lex domicilii* at the time of death determines succession to movables.

Intestate Succession

(a) Movables

It is a long-established rule that succession to movable property in the case of intestacy is distributed according to *lex domicilii* of the deceased at the time of death, This issue was analysed by the English Court of Appeal in *In the Estate of Maldonado, Deceased, State of Spain v. Treasury Solicitor*, in 1953. There, the Court held that the Spanish State, as *ultimus heres*, should succeed to the estate of a woman domiciled in Spain. Against this view, it had been argued that the distinction between succession by a

sovereign state as ultimes heres and the appropriation of bona vacantia by a foreign state was “a mere matter of words”. Jenkins L.J. responded:

“This argument is not without persuasive force, but I do not think that the question can truly be said to be one of distinction without difference. The foreign state can only succeed under its own law of succession where the succession is governed by that law. On the other hand, where the case is not one of succession, but of appropriation of ownerless property, the right applies to any ownerless property which may be reached by the law of the foreign state concerned, irrespective of the law by which its devolution is governed, provided that only by the relevant law it is in fact ownerless”.

(b) Immovables

It is well established that where a person with an interest in immovable property dies intestate, the lex situs determines the question of descent or distribution. This is so, regardless of the domicile of the intestate person.

Testamentary Succession

The general rule in Ireland and other common law jurisdictions is that the lex domicilii of the testator at the time of his death exclusively determines testamentary succession to his movable property and that the lex situs governs testamentary succession to his immovable property. The fact that Irish assets must be administered in accordance with Irish law does not detract from this principle since the duty of the Irish executor will be to distribute the movable property to the persons entitled under the lex domicilii.

(a) Movables

Capacity: The capacity of the testator is determined by the law of his or her domicile.

Form: There is no problem where the testator has the same domicile at the time of making the will and at his death; but a difficulty arises where the testator has changed his domicile between making the will and the time of his death. The commentators are divided on the question whether capacity would be tested by the testator’s lex domicilii at the time of the making of the will or at the time of his death. In favour of referring to the time of the testator’s death it may be said that the will confers no rights prior to his death. Moreover, other aspects of succession, such as the essential validity of wills of movables, and intestate succession to movables, take the time of death as their reference point.

(b) Immovables

Capacity: So far as capacity is concerned there is general agreement that the lex situs should govern though clear judicial authority is hard to come by.

Form: Giving effect to the Hague Convention of 1961, Part VIII of the Succession Act 1965 provides in section 102 (1) that a testamentary disposition is valid as regards form if its form complies with the internal law of any of a number of possible countries that is the internal law:

- (a) of the place where the testator made the testamentary disposition;
- (b) of a nationality possessed by the testator either at the time when he made the disposition or at the time of his death;

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- (c) of a place in which the testator had his domicile either at the time when he made the disposition or at the time of his death;
- (d) of the place in which the testator had his habitual residence either at the time when he made the disposition or at the time of his death; or
- (e) so far as immovables are concerned, of the place where they are situated.

2. If there is a single rule for the whole estate:

a) Which is the relevant factor determining the applicable law:

- (1) nationality
- (2) residence (please state how the residence is being defined)
- (3) domicile (please state how domicile is being defined)
- (4) other factors

b) Why has this factor been chosen (please quote statutory sources, literatures or court decisions)?

c) Are there special rules for stateless persons and asylum seekers?

d) Are there any rules according to which foreign rules on conflicts of law applicable to property situated abroad (e. g. real estate, shares and cooperations) are being applied resulting in a different succession according to the law where the property is being situated (e. g. art. 3 § 3 of the German EGBGB)?

e) If in principle there is a uniform rule for movables and immovables, are there any other rules which might lead to a distinction in the rules applicable to the succession, e. g. due to a choice of law, renvoi or some special statutory rules?

Not applicable.

3. If there is a difference between succession to land and the succession to movables:

a) Which factors determine the law applicable to immovables besides the *lex rei sitae*:

- (1) nationality
- (2) residence (please state how the residence is being defined)
- (3) domicile (please state how domicile is being defined)
- (4) other factors

See reply to question 1 above.

b) Which law governs the distinction between movables and immovables (*lex fori* or *lex rei sitae*)?

The Irish courts apply the *lex rei sitae* in determining whether an asset is movable or immovable in line with the general common law rules.

4. Special rules for specific questions

Are there in your state special rules for the conflict of laws regarding special questions, such as

a) the capacity to make a will;

One has to be aged over 18 years or married if under that age and be of sound disposing mind as set out in Section 77 of the Succession Act 1965

b) testamentary dispositions being made by two or more persons in one document;

No.

c) contracts containing testamentary dispositions or the renunciation to a future inheritance (of with or without payment)?

No.

d) the validity of a testamentary disposition (e. g. if the time of the making of the will is decisive and not the time of the death);

Yes, the time of the making of the will is decisive.

e) the possibility of the testator will change or revoke the testament or a contract concerning his estate (e. g. if the time of the making of a contract is decisive and not the time of the death);

Yes, if the testator makes another will or destroys the previous one.

f) rules on how the estate is being transferred from the deceased to the beneficiaries;

Yes, the estate is transferred through the personal representatives. If there is real estate the personal representatives sign an assent in writing to register title in the beneficiaries. In the case of personal assets, these may be distributed on an informal basis appropriate to the nature of the asset.

g) the administration of the estate (partition, responsibility of the heirs);

Yes, in a testate situation, the spouse has a legal right share if there are no children to one half of the estate under section 111 of the Succession Act, 1965. Under section 111, sub-section 2, if a testator leaves a spouse and children, the spouse shall have a right to one-third of the estate. In an intestate situation, under section 67 of the Succession Act, 1965, the spouse gets the entire estate if there are no children, if there are children, the spouse will take two-thirds of the estate and the children will take one-third of the estate. In an intestacy situation, children are automatically entitled to one-third of the entire estate. However, in an intestacy situation, a child is not entitled as of right to any part of their parent's estate. However, in all instances where a testator has children, the provisions of section 117 of the Succession Act, 1965 should be taken into consideration. Under this section the court will decide whether the testator has failed in his or her moral duty to make proper provision for the child. If this is established, then the court may order whatever provision it considers just to be made out of the estate.

h) succession to the state or the crown;

Yes. The state will succeed to an estate if it is an intestate situation and there are no next of kin.

i) others

None.

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

1. Does your law allow any choice of law regarding the succession?

No.

2. If so, please state the details of the choice of law:

- a) requirements (e. g. Is it possible for all property or only for real estate? Is it possible only for a property situated in your state or also for property situated abroad? Can the choice of law being restricted to some property only, e. g. to one of several immovables situated within a given country?)
- b) consequences (e. g. Can a choice being made only in favour of the national law or also of a foreign law?)
- c) form
- d) is there an express choice of law required or can it also be made tacitly?
- e) consequences of law and invalid choice of law
- f) Is it possible to revoke a choice of law? If so: which are the consequences?
- g) which time has to be taken into consideration deciding whether or not a choice of law is valid: the time of the making of the choice or the time of the death?

Not applicable.

3. If your law does not allow any choice of law:

- a) are there any proposals in the legislature or is there at least a discussion in legal journals on whether the choice of law should be introduced?
- b) if so: which reasons are being quoted for or against the introduction of a choice of law?

There are no proposals under discussion.

IV. Simultaneous application of more than one law

If it is possible according to the International Private Law of your state that two or more laws are applied to one estate (e. g. due to a choice of law or due to renvoi – compare II 2 e) and II 3.):

Which rules are applied for the relation between the different estates? Do you apply the respective law separately for each estate or is it possible that the application of one law has also consequences for the application of another law?

(e. g. if „A“ is entitled to a forced share for the part of the estate governed by the law of the state „1“, but not part of the estate governed by the state „2“ – has this to be taken into consideration for calculating his share in state „1“ or in state „2“? Or: „A“ is responsible to the creditors claims in state „1“, but not in state „2“ – is there any compensation for this in the partition in state „1“?)

It is possible due to renvoi that two or more laws are applied to one estate. This will apply where different law applies to different assets, lex domicilli applies to movables and lex situs will apply to immovables.

V. Compensation for different distribution by the state where the property is situated

1. Does the law of your state provide any compensation (being an obligation or a droit de prélèvement), if property of the estate is situated abroad and if the foreign law gives a lower share to the beneficiary than according to your law?

In some countries the law relating to matrimonial property may give substantial entitlements to a surviving spouse. It is possible to envisage cases where a surviving spouse may have a combination of rights under the rules governing succession and matrimonial property. A surviving spouse having obtained, for example, one half the deceased spouses' movable property, may receive both immovable and the remaining movable property in different countries, under the "forced share" provision of each country. The possibility of over generous entitlements is a real one.

We attach the judgement of Kenny J in the case of FM v TAM where the judge took the view that provision could be made out of the worldwide assets of the deceased in discharge of the testator's moral obligation to the child. Having determined the entitlement of the child, the judge made an order to satisfy the entitlement by appropriation of exclusively Irish assets.

2. If so: Does this compensation apply only to beneficiaries who are nationals of your state or to all beneficiaries?

Not applicable.

VI. Succession and marital property

1. What are the rules on conflict of laws regarding marital property in your state?

Marital property is not a concept in Irish law.

2. Are the rules regarding successions and marital property co-ordinated or is it possible that one law is applicable to marital property and another law is applicable to the succession? If so: In which situations?

Not applicable.

3. What are the main problems for the practice due to non-coordinated rules on the conflicts of law (e. g. that the application of the law of succession of state „1“ and the law of marital property of state „2“ favors some heirs in intestate succession)?

Not applicable.

VII. Law applicable to the form of wills and other testamentary dispositions

1. Which law is applicable to the form of wills and other testamentary dispositions? Which are the requirements for a will executed abroad to be valid?

Section 102 of the Succession Act, 1965 refer to 2nd Part, Section C, Part I.

2. Are there special rules for the formal validity of testamentary dispositions executed by more than one person in one document?

As per section 105 of the Succession Act, 1965, the provisions of section 102 of the Succession Act, 1965 will also apply to the form of testamentary dispositions made by two or

more persons in one document. No special rules apply to the formal validity of joint testamentary dispositions. It could therefore happen, that a joint testamentary disposition might be formally valid in so far as it disposed of the property of one of the testators, but not in so far as it disposed of the property of the other.

3. Which legal questions are being considered questions of form (e. g.: capacity to make a will? Prohibition of certain forms due to age or personal disabilities of the deceased?)

Section 106, sub-section 1 of the Succession Act, 1965 provides that any provision of law which limits the permitted forms of testamentary dispositions by reference to age, nationality or other personal conditions of the testator is to be deemed to pertain to matters of form. In view of the liberal approach adopted by the Hague Convention and section 102 of the Act, towards upholding the validity of wills, the effect of this provision, of course, is greatly to enhance the prospects of the will being upheld in respect of matters which formerly would have been characterised as relating to capacity.

VIII. Ordre public regarding successions

1. Which are – generally speaking – the requirements of the international ordre public regarding successions in your state?

Any dispositions by Will which include conditions which are contrary to public policy will not be upheld. Conditions which have traditionally been found unacceptable are those relating to restrictions of benefit where persons deviate from their religion.

2. Would your law accept the following rules of a foreign law? Please quote decisions!

a) a higher share in intestate succession for male than for female heirs?

Yes, in respect of immovables only arising from private international law.

b) the exclusion of children born out of wedlock?

No. Section 4A of the Succession Act 1965 which was introduced by the Status of Children Act 1987 provides that the entitlement of children is not dependent on the relationship of their parents.

c) intestate succession of the non-married partner or of a homosexual partner?

No.

d) absence of any forced share or similar protection in a foreign law?

Yes.

e) statutory or contractual limitations of the testamentary power of disposition?

See reply to a) above.

f) revocability of a joint will or a contract regarding the inheritance?

Yes.

g) irrevocable renunciation to the intestate succession during the testators life?

Yes.

h) discriminatory testamentary dispositions?

See reply to a) above.

i) **other examples**

No further examples.

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

1. According to your rules on conflicts, do you also have to apply the foreign states rules of conflicts – in other words: does your state apply renvoi ?

Irish Conflicts law does apply renvoi. However, it has been stated by Binchy that the application of renvoi has been inconsistent in the small number of applicable Irish cases. It has been pointed out that in a number of cases, it is unclear whether the Irish courts are applying foreign conflicts law or foreign domestic law in endeavouring to resolve the complex issues before them. The academic commentary recognises the limitations which arise where foreign domestic law is applied as appears to have occurred in a number of Irish cases. The views applied by Irish courts can be summarised as follows:-

- 1) To apply foreign domestic law without regard to the relevant conflicts law.
- 2) To apply “partial renvoi”. This approach was followed in the case *In re Interview Limited* which case concerned title to goods sold to an Irish company by a German company subject to reservation of title. Kenny J appeared to view the case as one initially to be determined by German law as a proper law of the contract. He relied on German conflict rules to apply Irish law as the *lex situs*.
- 3) The approach involves reference to their relevant foreign law, but applies Irish internal law in default in circumstances where foreign law is inconsistent with Irish law.
- 4) In this approach, the Irish court would establish and apply the law that the relevant foreign court would apply to the case in question. This approach would involve many frontier crossings.

2. If there is any distinction between movables and immovables (compare II. 3.), is the renvoi applicable to both the succession to movables and to the succession to immovables?

Insofar as an immovable property is concerned, the *lex situs* will be applicable. Significant issues involving renvoi will apply to the succession of movable property.

3. Are there any special rules for intestate or testamentary succession and/or for the formal validity of testamentary dispositions, if the applicable law consists of several legal systems (such as in the U. K. or in Spain)?

Same reply to 1 above.

4. Is there more than one legal system regarding successions in your state? If so: Which are the rules to decide, which of the different domestic legal systems is applicable?

Same reply to 1 above.

X. Applicable law concerning preliminary questions (question préalable)

If successions depends on a preliminary question concerning family law (such as the validity of a marriage, the descent of a child, the validity of an adoption etc.) – how is the applicable law being determined:

- a) **by independent application (that is following the International Private Law of your state – lex fori)**

This issue has not been the subject of significant analysis in the Irish courts. It has been argued that the application of lex fori enhances the consistency and simplicity of decision making.

- b) **or by indirect application (of the law applicable to the succession itself – lex causae)?**

This approach has been commended as enhancing international harmony in the conflict of laws.

XI. Scope of rules on the law applicable to successions

1. **Please describe, which legal questions are being covered by the rules of your state concerning the law applicable in successions.**

The Succession Act is divided into twelve main parts as follows:

Part I – Preliminary and General

Part I contains the preliminary and general provisions relation to such matters as commencement, interpretation, jurisdiction and appeals.

Part II – Devolution of Real and Personal Estate on Death

This Part of the Act contains the rules relating to the devolution of property on death.

Part III – Executors and Administrators

This Part of the Act deals with executors and administrators and, in the main, provides for the re-enactment of the existing law.

Part IV – Grants of Representation

The majority of the sections in this Part of the Act refer to the High Court alone, although by section 6 the Circuit Court has concurrent jurisdiction with the High Court in certain matters. The High Court has exclusive jurisdiction to issue, revoke, cancel or recall grants of probate or administration. This jurisdiction is exercised through the Probate Office and the District Probate Registries which are both offices of the High Court.

Part V – Administration of Assets

This Part of the Act deals with the administration of assets of deceased persons and continues the process of the assimilation of the law relation to realty and personalty by providing that real and personal estate shall be administered in the same manner. All the deceased person's property is to be available for the payment of his debts, and to satisfy legal rights under Part IX of the Act.

Part VI – Distribution on Intestacy

The rules of intestate succession are laid down in this Part of the Act. They apply to all property real and personal. The method adopted by the Act is to give the surviving spouse and children (if any) no fixed sum but a fixed fraction of the total value of the estate.

Part VII – Wills

This Part of the Act contains the rules for the creation of wills containing the expression of a person's wishes normally concerning the distribution of his property which he intends to take

effect only after his death; such expression being made in the manner prescribed by law. The powers of a testator to dispose freely of his property by will are significantly restricted by Part IX of the Act, which confers on a surviving spouse a legal right share in a portion of the estate and contains provisions for children.

Part VIII – Conflicts of Laws Relating to Testamentary Dispositions

This Part of the Act amends the rules of probate international law in Ireland relating to the formal validity of wills. The purpose of the changes in the law is to enable Ireland to adhere to the Convention on the Conflict of Laws relating to the form of Testamentary Dispositions which was drawn up at the Hague in 1961. The provisions of Part VIII follow closely the wording of that Convention.

Part IX – Legal Right of Testator’s Spouse and Provision for Children

This Part of the Act contains the provisions designed to protect the spouse and children of a testator from disinheritance. A spouse is entitled to a Legal Right Share (fixed fractions) of the estate of the testator. Children although not entitled to a fixed share can make an application to Court if the deceased parent has failed in his moral duty to make proper provision for the child. These rights exist even in the absence of express provision by the testator.

Part X- Unworthiness to Succeed and Disinheritance

This Part of the Act provides that in certain circumstances the surviving spouse or children are debarred from taking any benefit from the estate of a deceased, by reason of their actions or behaviour during his lifetime. In some cases, the disqualification applies to any interest except certain gifts by will. In other cases the disqualification applies only to the legal right share, application under section 117, or right on intestacy. This Part of the Act also contains provisions under which a disposition, made by a deceased for the purpose of disinheriting his spouse and children may be set aside by the court.

Part XI – Limitation of Actions

This Part of the Act deals with limitation of actions in respect of the estates of deceased persons.

Part XII – Provisions Relating to Probate Office and District Probate Registries

This Part of the Act provides for the consolidation of miscellaneous statutory provisions relating to the Probate Office and district probate registries.

- 2. Do you apply the International Private Law on succession for the following questions:**
- a) transfer of property and the payment of debts (transfer immediate transfer to the heirs upon this, transfer to an administrator or a necessity of a decision by the courts)?**
Yes
 - b) the powers of an administrator concerning property situated abroad?**
Yes

4th part

Substantive Law on Successions

A. Sources and Literature

I. Legal Sources

II. Literature and Judgements

Which are the most important textbooks on the law of successions of your state?

Table of abbreviations (in particular courts and legal journals)

(Please note for all courts also the respective higher and the lower court)

B. Intestate succession

I. Inheritance of the relatives

Where a person dies intestate, his estate is distributed according to statute (see attached sketch). An important consequence of the right to take a share in the estate of a deceased is that it also confers on the person entitled the right to extract the grant of administration intestate. The two are inseparable and the principle that the grant follows the interest. The order of entitlement to extract a grant is as follows:

- (I) surviving spouse;
- (ii) next of kin as follows
 - (a) child or other descendant
 - (b) father or mother equally entitled,
 - (c) brother or sister,
 - (d) nephew or niece,
 - (e) grandparent,
 - (f) uncle or aunt,
 - (g) great-grandparent,
 - (h) first cousin, great uncle or great aunt, grand-nephew or grand-niece,
 - (I) great-uncle or great-aunt, grand-nephew or grand-niece,
 - (j) great-great-grandparent,
 - (j) other next of kin depending on degrees of blood relationship, with any direct lineal ancestors being postponed to other relatives in the same degree;
- (iii) parties entitled in distribution;
- (iv) personal representatives, a spouse, next of kin or persons entitled in distribution;

- (v) persons entitled under “Spes Successionis”
- (vi) creditors pursuant to a court order of probate officers;
- (vii) the state as the ultimate intestate successor where there are no known next of kin or any other person with an interest in the estate.

Please explain briefly the intestate succession of the children and other offspring, the parents, the siblings and the offspring (including a graphical sketch if possible).

II. Are there any special rules for children born out of wedlock or for adopted children?

No, children born out of wedlock have equal status under the Status of Children Act, 1987. If the child is formally adopted, he or she has equal status under the Succession Act 1965

III. The surviving spouse’s share and the influence of marital property

Please describe briefly the surviving spouses share and the influence of the partition of the marital property on the estate.

Irish law does not recognise the concept of marital property. However, in relation to a spouse’s share of the estate, under section 67 of the Succession Act, 1965, if a person [intestate] dies leaving a spouse and no children, the spouse shall take the whole estate. If an intestate dies leaving a spouse and children, the spouse shall take two-thirds of the estate.

IV. Is there any share for unmarried cohabitants or for homosexual cohabitants?

No.

V. Under which circumstances does the estate go to the state (or to the crown)?

Under section 73 of the Succession Act, 1965 in default of any person taking the estate of an intestate, the State shall take the estate as ultimate intestate successor.

VI. Examples

Please give the respective shares for intestate succession in the following cases (including the surviving spouses share of marital property, where applicable):

1. *The deceased left a surviving spouse (statutory marital property regime of your state) and 2 children (born in wedlock). (Both parents of the deceased are still alive) Please distinguish the surviving spouses share according to the marital property and according to the law of inheritance!*

The spouse will get two-thirds of the estate, the children will get one-third of the estate under the law of inheritance.

2. *The deceased has a surviving spouse (statutory marital property regime in your state) and one living child born in wedlock. Another child (of both spouses) has died before, but has left an offspring (grandchild) (both parents of the deceased are dead).*

The spouse will take two-thirds of the estate, the children will take one-third of the estate, i.e. each child will take one-sixth of the estate. The child of the deceased’s child will take the one-sixth share of the estate under section 33 of the Succession Act, 1965 (per stirpes rule).

3. *The deceased has a surviving spouse (statutory property regime) but no offspring. His next surviving relatives are: his mother, a brother and a niece (being the daughter of a deceased sister).*

Irlande

The spouse will take the full estate.

4. *The deceased has neither a surviving spouse nor offspring. His closest surviving relatives are (same as in case 3.): his mother, a brother and a niece (being the daughter of a deceased sister).*

His mother will take all of his estate.

c. Execution of a will/testamentary disposition

I. Which minimum age is required in order to make a will?

18 years or married if under that age.

II. Formal requirements for wills or other testamentary dispositions

1. **Which are the usual forms used in your state for a will or testamentary disposition (e. g. holographic will, will attested by true witnesses, will by notarial deed, joint and mutual will)?**

The usual form used for a will is a will attested by two witnesses.

2. **Are there many international testaments in your country (question only applicable if your country is a signatory state to the Washington Convention of international testaments – such as Belgium, France, Ireland and Portugal)?**

Ireland is signatory to the Washington Convention.

3. **Can you estimate, how many percent of people die intestate or leaving a will – and how many percent are holographic wills, or wills attested by witnesses etc.?**

Approximately seventy per cent of estates in Ireland are governed by Wills, the balance are cases of intestacy.

4. **Special forms of testaments – what is the maximum period of validity?**

Unknown.

III. Testament's register

1. **Is there a (central) register of testaments?**

No. A Will is confidential until admitted to proof in the Probate Office of the High Court. It is then a public document.

2. **Is it possible to register also testaments made abroad – and how may foreign persons obtain knowledge of a registered testament?**

None such.

D. Wills and testaments

- I. **Does your law distinguish between an heir (who obtains the whole estate) and the beneficiary of a bequest?**

No.

II. Bequest: Does it make the beneficiary owner of the property or does it create only an obligation against the heir?

No.

III. Administration of the estate (and similar)

1. Is the administration of all estates mandatory (as in the Anglo-Saxon law)?

Yes.

2. Who may nominate the administrator (the testator, a third party nominated by the testator, or the court)?

The testator and in the case of an intestacy according to the Succession Act, 1965.

3. May the administrator transfer property belonging to the estate? Can the administrator be given the power by the testator to distribute the estate and/or to administer the estate? Is there a maximum period for the administration of the estate?

It has been stated by the High Court that a personal representative can deal with estate property for twenty years after the date of a grant of probate letters of administration.

4. Does the court control the administrator? Does the administrator need the court's permission for alienation of a certain property or for other contracts?

The court has supervising jurisdiction in all estates but the Succession Act will give whatever powers are necessary but which are not in the will to the personal representatives to enable him to carry out his duties. An application can be made to court in such circumstances.

IV. Which other clauses are being used often in your state in a testamentary disposition or to transfer property upon the death of the testator (such as *ouderlijke boedelverdeling*, testamentary trust, *herederos de confianza*)?

In the case of a trust for sale in a Will, such clauses include powers of investment advancement appropriation and indemnity for the personal representatives.

E. Special rules concerning certain types of property

Are there any special statutory rules for the succession in certain types of property (such as for a farm, for cooperate shares, for copyright etc.)?

Section 56 of the Succession Act provides that the surviving spouse has the right to require the personal representative to appropriate the family home (i.e. the dwelling in which the spouse was ordinarily resident at the time of the deceased's death). In or towards the satisfaction of any of his or her share (i.e. the legal right share, share under a will or share on intestacy) subject to the following restrictions. Under section 56, sub-section 6 of the Succession Act, 1965, there are four important restrictions on the powers of either the personal representatives or the court to make an appropriation. The cases are where the dwelling (a) forms part of a building, the whole of which forms part of the estate, or (b) is held with agricultural land included in the estate, or (c) as to the whole or part whilst, on the deceased's death used as a hotel, guesthouse or boarding house, or (d) as to part was used, at the time of death, for other than domestic purposes. In these four cases, the personal representatives may not appropriate the dwelling to the surviving spouse unless on application the court is satisfied that the appropriation is unlikely to diminish the value of the assets of the deceased other than the dwelling or to make it more difficult to dispose of them.

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

Is it possible for the testator to be bound by a contract, e. g.

- a joint or a mutual will
- contract to revoke or not to revoke a will
- donatio mortis causa?

Please also note

- which are the conditions for such a contract (especially the form required),
- which are the consequences of the contract?

It is possible for the testator to be bound by a mutual will. It is not possible for the testator to be bound by a contract to revoke or not to revoke a will unless it is a mutual will.

Yes it is possible for the testator to be bound by a donatio mortis causa. This is a gift in contemplation of death and is confined to personal property only, no formal transfer is required. The conditions for such contracts are that they be witnessed by two witnesses.

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

I. Legal nature of limitation

Is it a forced share, is it necessary to take a legal action to enforce it, is it a mere obligation or a claim for support?

In a testacy situation, a spouse has a legal right share under section 111 of the Succession Act, 1965. Under section 111, sub-section 1, if a testator leaves a spouse and no children, the spouse shall have a legal right to one-half of the estate. Under section 111, sub-section 2 if a testator leaves a spouse and children, the spouse shall have the right to one-third of the estate. Where property is bequeathed or devised to a spouse in a will and the bequest or devise is expressed in the will to be in addition to the share as a legal right, the testator is deemed to have made by will a gift to the spouse comprising of:

- (i) a sum equal to the value of the share as a legal right of the spouse, and
- (ii) the property so devised or bequeathed.

In the case *In Re Thomas Cummins Deceased* and *In Re Kathleen Cummins Deceased* the Supreme Court ruled that where no provision is made for a surviving spouse, the legal right share vests automatically in the survivor. Where some provision is made for the surviving spouse, the spouse must elect between provision granted in the Will and their legal right share.

In any other case, the devise or bequest in a will to a spouse shall be deemed to have been intended by the testator to be in satisfaction of the share as a legal right. Unless the devise or bequest is expressed to be in addition to the legal right share, the surviving spouse will have to elect under section 115 of the Succession Act, 1965 to take either the devise or bequest or the share to which he or she is entitled as a legal right. In default of election, the spouse takes under the will. It is the duty of the personal representative to notify the spouse in writing of the right of election. The right of election must be exercised within six months from the

receipt by the spouse of such notification or one year from the first taking out of representation of the deceased's estate whichever is the later. If it is made by the testator, contracts on marital property are not taken into consideration when calculating the amount of the forced share (subject to the information outlined above). Under section 117 of the Succession Act, 1965, a child is not entitled as of right to any part of their parent's estate. However, in all instances where a testator has children, the provisions of section 117 of the Succession Act, 1965 should be taken into consideration. If a child is disinherited, they can make an application under this section and there is a possibility that the testator's wishes will be over-ruled notwithstanding the cost to the estate. Under section 117 sub-section 1, the relevant test for the court to decide was whether the testator has failed in his or her moral duty to make proper provision for the child. If this is established then the court may order whatever provision it considers just to be made out of the estate. The testator may have made provision for a child during his or her lifetime by settlement by setting a child up in a business by providing a high standard of education or otherwise. However, the court can look objectively at the circumstances of the case. An order under section 117 cannot affect the legal right of the surviving spouse or if the surviving spouse is the mother or father of the child, any devise or bequests of the spouse or any share to which the spouse is entitled on intestacy. Under section 117, sub-section 6 as amended, an order under this section shall not be made except on an application made within six months from first taking out a representation of the deceased's estate. This time limit is a strict time limit.

- II. Who is entitled to the forced share etc.?**
- III. How big amount is the forced share?**
- IV. Is there a time limit in order to take court action to claim the forced share?**
- V. Are gifts made by the testator or contracts on marital property taken into consideration for calculating the amount of the forced share?**

H. Waiver or renunciation of the inheritance or of a forced share etc.

Can the heir or the beneficiary of a forced share waive or renounce his statutory rights before the testator's death? Which are the requirements (form etc.)?

Yes. However, it is unusual to have notice of a will at that stage. A renunciation should be in writing and executed under seal to ensure that it is legally binding.

I. Transfer of property upon the testator's death

- I. Is there any special procedure where and when the inheritance is being opened?**

No.

- II. Is there any rule upon the persons dying at the same time (e. g. in an accident)?**

Yes. In order to cover the situation of simultaneous or near-in-time death of spouses and in order to avoid any ambiguity, it is usual for a commorientes clause to be inserted in the will of married persons. The usual procedure is for a testator to leave all his property to his spouse on the condition that she survives the testator for a stated period (usually 30 days). If the surviving spouse survives the testator by the stated period, the benefit will vest in the

surviving spouse. If the surviving spouse has not survived the testator by that period, alternative provisions can be made under the testator's will.

II. Is the property of the estate transferred to the heirs immediately upon death or are there any additional acts required (e. g. acceptance of the inheritance; hereditas iacens) or does the estate go first to an administrator or an executor?

No, under section 10 of the Succession Act, 1965, the estate of the testator will vest in the personal representatives. The personal representatives are responsible for the administration of the deceased's estate by way of collecting his assets and paying his debts, and on completion of the administration, for vesting the net assets of the estate in the beneficiaries entitled.

IV. Acceptance and renunciation of the inheritance

Which options has the beneficiary to accept or to renounce the inheritance (form, deadline and consequences of acceptance or renunciation)?

The beneficiary can renounce the inheritance before the benefit has been vested or handed over to him or her.

V. Are there any limitations on the equitation(?acquisition?) of the property by foreigners (especially for real estate)?

Under section 45 of the Land Act, 1965 property can only be handed over to a person whose place of residence is in a member state of the EC. Non EC members, although not prohibited from holding property in the State are restricted from doing so, and must apply for consent.

J. Payment of claims against the estate – responsibility of the heirs and beneficiaries

I. Do the heirs/beneficiaries acquire the estate as well as the debts?

No, the property vests in the personal representatives. They are obliged to discharge debts and expenses of administration before distributing the net assets in accordance with the Will of the deceased or the law of intestate succession. If the estate is insolvent the assets must be marshalled in accordance with the Succession Act.

II. If there is more than one heir/beneficiary, is there a joint responsibility or is every heir responsible only for a certain quota of the debts?

See reply to I above.

III. Is the heir's responsibility limited to the net amount of the estate or can the creditors of the estate also attach the heir's personal property? How can the heir limit his responsibility?

See reply to I above.

K. Plurality of heirs

I. Structure

- 1. If there are more than one heir, do they form a common property or which type of honourship?**

The property will be taken jointly unless otherwise specified.

- 2. Who administers the estate if there are more heirs?**

The personal representatives.

II. Partition of the estate

- 1. Is there a partition of every single property (partition in nature) or does every heir just obtain a part of equal value of the estate?**

No, it depends on the will.

- 2. Is there any form required for the partition?**

An assent is required for real property.

M. Alienation of a share in the inheritance.

- 1. Can a share of the inheritance (if there are more heirs) be alienated to a third person?**

Yes, if there is a trust for sale which is made without restriction.

If power of sale is given to the administrator but not the trustee, section 50 of the Succession Act, 1965 requires consultation.

- 2. Are there any form required for the alienation?**

The form would depend on the nature of the asset involved. There are no special rules for estate assets.

- 3. Are the other heirs entitled to buy the share first?**

Not unless there is an express direction in the Will giving such rights to the heirs or any of them.

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

- I. Is there any special form of proof for the heir or the administrator/executor (in particular letters of probate)?**

This is a matter for the personal representatives. An oath from the executor or the administrator is required.

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- II. Which is the content, the consequences and especially the probatory force of such a certificate? Is the certificate valid only in your country or is it meant to be valid also abroad?**

This oath states that the executor or administrator will administer the estate and will pay the debts of the deceased from the estate. It states the date and place of death. It also gives the gross value of the estate. The oath is not valid abroad.

- III. Which authority makes the certificate? Is it competent for foreigners as well as for nationals? Is it competent also for property situated abroad?**

The High Court. It is competent for foreigners as well as for nationals. It is not competent for property situated abroad. A foreign grant will have to be taken out in this case.

O. Reform

- I. Are there any plans to reform the law of inheritance in your state?**

(If so, please include the text of any draft law)

The Law Reform upon Committee are considering issues relating to law on capacity to make a will and unconscionable demands and undue influence.

- II. Which major reforms has been made for the law of inheritance within the last years?**

None.