THE AMERICAN LAW INSTITUTE

Restatement of the Law Third
Conflict of Laws

Preliminary Draft No. 7

(October 2021)

SUBJECTS COVERED

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Conflict of Laws

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Conflict of Laws

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Each portion of an Institute project is submitted initially for review to the project's Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute's position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster's Third New International Dictionary defines the verb "restate" as "to state again *or* in a new form" [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute's founders, however, the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once "analytical, critical and constructive." In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—"analytical, critical and constructive"—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute's founders envisioned a Restatement's black-letter statement of legal rules as being "made with the care and precision of a well-drawn statute." They cautioned, however, that "a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended." Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what Herbert Wechsler called "a preponderating balance of authority" but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went

the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a "law reform" organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

> We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute's founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, *which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

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Choice of Law, Topic 2, Foreign Law
(Introductory Comment, §§ 5.06–5.08) – approved at 2021 Annual Meeting

History of Material in This Draft

The Council approved the initiation of this project in October 2014.

REPORTERS' MEMORANDUM
RESTATEMENT OF THE LAW THIRD, CONFLICT OF LAWS
PRELIMINARY DRAFT NO. 7

Kermit Roosevelt, Reporter
Laura Elizabeth Little and Christopher A. Whytock, Associate Reporters
October 15, 2021

This draft comprises a projected Table of Contents, revisions of one previously submitted Chapter: Chapter 5 (Choice of Law), Topic 1 (Introduction), and a new Chapter 7, Topic 4, Succession. The draft also includes § 1.03, but as explained below, for information purposes only.

Projected Table of Contents

The Projected Table of Contents has been revised to reflect the work done for this meeting. It has not been otherwise altered.

Choice of Law

The introduction to choice of law, old §§ 5.01–5.05, was first presented to the Advisers as part of Preliminary Draft No. 1 in September 2015. It was revised in response to Adviser comments and presented and discussed again as part of Preliminary Draft No. 2 in September 2016. It was revised in response to the comments received at that meeting and presented to the Council in November 2016. Because the Council meeting did not provide sufficient time for a full discussion of those Sections, they were revised and presented to the Council again as part of Council Draft No. 2 in September 2017. At that meeting, the Council voted to approve §§ 5.01–5.05, along with the more general introductory Sections, 1.01–1.04.

Four years later, we brought portions of the project to the Membership for the first time at the Annual Meeting in May 2021. A motion was filed seeking to recommit § 1.03. During discussion of the motion, some participants suggested that some concepts in § 1.03, notably the distinction between a statutory specification of scope and a choice-of-law rule, had not been adequately discussed with the Advisers and needed a more extensive exposition in the draft. The Sections developing that distinction, §§ 5.01–5.05, had been presented and discussed twice with the Advisers and twice with the Council. They had been the subject of discussion with individual project members for four years after receiving Council approval. The delay in presenting material to the Membership is in part attributable to some project members' desire to continue discussing § 1.03.

Still, the Reporters recognize that discussions from five or six years ago may not be fresh in the mind of every Adviser. We also believe that the distinction has proved sufficiently divisive that it is worth trying to offer a more extensive explanation. In the course of offering that explanation, we have also made some changes to the process by which courts are supposed to apply the rules of this Restatement. Those changes are reflected in this draft.

These introductory Sections also include a revised Section on public policy, first presented to the Advisers last year as part of Preliminary Draft No. 6.

Specifications of scope and choice-of-law statutes; methodology in using this Restatement

The Reporters start from the premise that there is some benefit in telling courts what they are doing in resolving a choice-of-law question. Understanding what it means to identify a choice-of-law problem and then to select the law of one state rather than another is useful because it gives courts better insight into what the specific rules of the Restatement are intended to achieve. That allows courts to apply the rules in a more self-aware fashion and to be better able to perceive when the rules are not serving their intended purposes. To the extent that the draft can present choice of law in a way that makes it consistent with and intelligible in terms of ordinary legal concepts, it can also help render the field more accessible to nonspecialists.

The Introduction to Chapter Five attempts to do this. It starts from the point that all modern choice-of-law methodologies have in common: the two-step structure of first determining whether a conflict exists, and second, if necessary, selecting a governing law. The basic question is how to describe those two steps. The draft describes the first step as deciding whether the facts of the case bring an issue within the scope of more than one state's law, and the second as giving priority to one of the laws.

We have chosen these descriptions for three reasons. First, one of the main claims of modern choice-of-law theory, advanced by Brainerd Currie in the 1950s and 1960s, and developed further by Larry Kramer and others in the 1990s and later, is that deciding whether a state's law should be eligible for selection is a matter of interpreting that law to see whether it creates rights or obligations for the parties. This connection between choice of law and the content of internal law is one of the premises of interest analysis. Since most modern jurisdictions use interest analysis, either explicitly or implicitly, to perform the first-step determination of whether a conflict exists, we believe that we must capture that claim if we are to describe the caselaw accurately. Describing the first step as deciding whether an issue comes within the scope of a law captures it.

Second, the process of interpreting a law to determine its scope is clearly what courts do with statutes in multistate cases. As the Reporters' Notes demonstrate, courts consistently interpret statutes to decide whether they reach the facts of a particular multistate case, treating this as a threshold question before undertaking a choice-of-law analysis to select a particular law. This description thus allows us to treat statutes and common-law claims together, which we believe is desirable. Choice of law for statutes and for common-law claims is fundamentally the same enterprise; the difference is simply that with statutes, legislatures sometimes answer some of the questions that arise—they may specify the scope of their law, or they may assign priority to one or another of conflicting laws. We believe there is a benefit to telling courts to follow the analytical path set out by legislatures.

Third, describing choice of law as a process of determining scope and, if necessary, assigning priority, allows the Restatement to use the vocabulary and analytical toolkit of ordinary legal analysis. Presenting choice of law in a user-friendly way that is intelligible to nonspecialists strikes us as a worthy goal for the Restatement.

Operating from that perspective, §§ 5.01 and 5.02 attempt to tell courts first what they are doing in deciding a choice-of-law question and second how to do it. Section 5.01 has been expanded, but remains essentially the same. Section 5.02 has also been expanded, most notably in terms of its discussion of how to distinguish a statutory specification of scope from a statutory assignment of priority (what the Second Restatement called a choice-of-law statute). The Reporters' Notes to Comment *c* list a large number of cases in which courts either interpreted a statute as specifying scope or interpreted it as assigning priority. We believe that these cases establish that there are two different things legislatures do when writing statutes and that courts both are capable of distinguishing them and routinely do so. We believe that the Restatement must capture that distinction if it is to accurately reflect reported decisions and guide courts. We welcome comment on how to express the distinction more effectively.

Section 5.02 has also been changed. Earlier versions instructed courts, in the absence of a statutory directive, simply to consult the rules of the Restatement to identify the governing law. That left open the possibility that a rule might select a statute to govern events outside its scope. Notably, for noncontractual issues for which domicile is a more important connecting factor than the location of conduct or injury, the rules will tend to select the law of shared domicile to govern an issue. It might be, however, that the relevant statute is territorially limited, excluding a case involving two domiciliaries in which the relevant events happen outside the state. To deal with that possibility, earlier versions instructed courts to ask whether they had selected a law to govern issues outside its scope and, if so, to select a different law under the "manifestly more appropriate" exception.

Precedent for that approach exists in the caselaw, notably Elson v. Defren, 726 N.Y.S.2d 407, 412–413 (N.Y. App. Div. 2001), in which the court followed New York's *Neumeier* rules to select the law of shared domicile to govern an issue of vicarious liability, then observed that the statute it had selected was territorially limited and excluded the facts of the case from its scope. It then selected a different law.

With statutes, however, it is more common for courts first to determine their scope as part of deciding whether a choice-of-law issue exists, and then to resolve conflicts if necessary. If courts perform both steps of the two-step analysis in this way, the problem of selecting a law with a scope that excludes the issue does not arise. (It still arises with choice-of-law clauses, and in that guise is dealt with in § 8.04) Having revised and expanded the discussion of scope and priority, we believe that the simpler and clearer path, overall, is to tell courts to perform both steps: first determine scope to decide whether a conflict exists, then, if necessary, resolve the conflict either by following legislative direction (if it exists) or by following the relevant Restatement rule. This revision eliminates the need for the discussion of what to do if the Restatement selects a law with a scope that excludes the issue, so we have removed Illustrations on that from §§ 1.03 and 5.03. The revised §§ 1.03 is presented as part of this draft for informative purposes only; we do not intend to discuss it.

We understand that not everyone is enthusiastic about describing choice of law as a two-step process or about distinguishing between the scope of a law and the relative priority of overlapping laws. We think, though, that we do need to tell courts what happens in a choice-of-

law decision, and we do need to capture the very different things courts do in (1) interpreting statutes to decide whether the facts of the case bring an issue within the scope of the statute (or interpreting common-law rules to decide whether a state policy is implicated) and (2) deciding which law to select if there is a conflict of laws. There may be other ways to do that, but we do not see a superior alternative, and we think the one we have chosen is the dominant understanding, as the Reporters' Notes document. (Even in non-statutory cases, courts very commonly describe their analysis as a two-step process.) The draft is as faithful to reported decisions and mainstream scholarship as we have been able to make it.

Public Policy

Section 5.04, which discusses the public-policy exception, has been revised in an attempt to simplify it. Rather than distinguishing between the modern and traditional versions in the black letter, § 5.04 now leaves the black letter vague enough to cover both versions and discusses the distinction in the Comment.

Succession

Chapter 7 (Property), Topic 4, covers choice of law for issues about succession to and escheat of a person's property when they die. It is the first time this Topic has been presented in its entirety to the Advisers and Members Consultative Group. In order to reduce repetition in under each Section, the Introductory Note is fairly lengthy and explains the primary rationales for the approach taken by this Topic's choice-of-law rules.

Like the portions of Chapter 7 that have already been presented to the Advisors and Members Consultative Group, Topic 4 does not make a categorical distinction between personal property and real property for choice-of-law purposes. In general, this Topic's choice-of-law rules select the law of the state of the decedent's domicile at the time of death to govern issues about testate and intestate succession regardless of whether those issues are related to personal property or real property. The Introductory Note explains the reasons for this general approach, and each Section's Comment explains the reasons for this approach as to the specific succession issues covered by that Section. However, like Chapter 7 generally, this Topic leaves core real-property issues to be governed by the state where that real property is located, such as issues about the state's real-property-recording system, the required formalities for recording, and the effect of recording or failing to record a real-property document on the priorities of interests in that real property.

The Reporters will be coordinating with the Uniform Law Commission (ULC), which has launched a Uniform Act on Conflict of Laws in Trusts and Estates project. That uniform act is expected to cover choice of law for many if not most of the succession issues covered by this Topic's choice-of-law rules. As a result of this coordination, this Topic's approach may evolve significantly.

CHAPER 7

PROPERTY

TOPIC 4

SUCCESSION

Introductory Note:

a. Scope. This Topic covers choice of law for issues about succession to and escheat of a person's property when they die. Under this Topic's choice-of-law rules, the law of the state of the testator's domicile at the time of death governs issues about testate succession, the law of the state of the decedent's domicile at the time of death governs issues about intestate succession, and the law of the state where property is located at the time of death governs issues about escheat. Certain issues related to succession are not covered by this Topic. For example, issues regarding the rule against perpetuities are covered by Topic 1, Subtopic C (§ 7.09) and issues regarding a spouse's matrimonial property rights or elective share when the other spouse dies are covered by Topic 3 (§ 7.20).

b. Personal property and real property. This Topic's use of domicile at the time of death as its principal connecting factor follows the predominant approach to choice of law, which is also the approach of the Restatement of the Law Second, Conflict of Laws (AM. L. INST. 1971), for succession issues related to personal property. This Topic extends that approach to succession issues related to real property. Under the predominant approach, succession issues related to real property usually have been governed by the law of the "situs" state, that is, the state where the real property is located. The disparate treatment of personal-property-related- and real-property-related succession issues for choice-of-law purposes reflects the former substantive law of succession, which treated the two types of property differently. However, the current substantive law of succession rejects this distinction. Today, few states have different substantive laws governing succession to personal property, on the one hand, and succession to real property, on the other hand.

By applying the same choice-of-law rules to personal-property-related and real-property-related succession issues, this Topic brings those rules up to date with the today's substantive law of succession. As explained below, the application of the law of the decedent's domicile at the time of death to succession issues, regardless of whether they relate to personal property or real

property, is also reasonable in light of state interests and party expectations, and avoids the problems of a fragmented (or "scissionist") approach to choice of law for succession issues.

c. Policies and state interests. This Topic's choice-of-law rules usually should result in the application of the law of the most interested state. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property as they wish when they die. Restatement of the Law Third, Property (Wills and Other Donative Transfers) Introduction (AM. L. INST. 1999). A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to the person. Therefore, in most cases, a state is likely to have a stronger interest than other states in governing its own domiciliaries' rights to dispose of property upon death. States with weaker connections to a person are in most cases unlikely to have a stronger interest in governing those rights than the state where that person is domiciled. The policies underlying some aspects of the law of succession are about the protection of certain other persons such as spouses, partners in non-marriage domestic relationships, children, and creditors. In many cases, some or all of those other persons will be domiciled in the same state as the decedent, thus reinforcing that state's interest in having its law govern the succession.

In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern a succession solely because the succession relates to real property that happens to be located there. However, a state does have a legitimate interest in having its law govern issues about its own real-property-recording system, which real property documents are eligible for recording, the required formalities for recording, and the effect of recording or failing to record a real property document on the priorities of interests in that real property. Those issues, as well as other core real-property issues, are governed by the law of the state where the real property is located. See Chapter 7, Topic 1, Subtopic B ("Core Real-Property Issues"). Thus, the situs state's interests can be satisfied by requiring a devisee to record a deed in the situs state's land records in accordance with the situs state's law.

d. Party expectations. This Topic's choice-of-law rules are intended to be reasonable in light of the most likely expectations of the decedent and related persons. Insofar as persons have particular expectations regarding the law that would govern issues about succession to a decedent's property, they would more likely expect the law of the decedent's domicile to govern rather than the law of some other state with a weaker connection or no connection to the decedent. There is

little reason to presume that persons would expect the law of a nondomicile state to govern a succession solely because the succession relates to real property located there, and there is even less reason to presume that they would expect different items of property in the same succession to be governed by the laws of different states merely because those items of property are characterized as personal property rather than real property, or vice versa, and located in different states. Therefore, although application of the law of the state of the decedent's domicile at the time of death is unlikely to align with party expectations in all cases, in most cases it is likely to be more in line with those expectations than the law of any other state or multiple states.

e. Unitary, not fragmented ("scissionist") approach. This Topic's choice-of-law rules result in the application of one state's law—the law of the decedent's domicile at the time of death—to issues about succession to a decedent's property. This unitary approach is in contrast to the traditional common law fragmented (or "scissionist") approach, which distinguishes personal property and real property, and refers to domicile law for succession issues related to the former and situs law for succession issues related to the latter. The Restatement of the Law Second, Conflict of Laws adopted the scissionist approach.

Whenever an estate includes personal property, and also real property located in one or more states other than the state of the decedent's domicile, scission requires the application of the laws of multiple states to issues about a single decedent's succession. Scission thus requires estate planners and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and necessitates the determination and application of the law of multiple states (including law that is foreign to a court in the state of domicile in which the primary probate proceedings are taking place). For these reasons, scission creates uncertainty, adds complexity to estate planning and the probate process, and risks frustrating the intent of decedents regarding the disposition of their property at death. This Topic's unitary approach to choice of law for issues about succession avoids the problems of the scissionist approach, thus fostering simplicity, predictability, and efficiency in estate planning and probate proceedings.

f. Judicial avoidance of the traditional rule. The choice-of-law rule that the law of the state where real property is located governs succession issues related to that property reflects the currently predominant approach as stated by American courts. In practice, however, courts have used various techniques to avoid applying situs law to issues about real-property-related

succession issues. These techniques include equitable conversion, characterizing real-property issues as personal-property issues, and refusing to apply the law of the state where real property is located if the parties do not give the court information about that law, so as to apply instead the law of the decedent's domicile. This Topic's unitary state-of-domicile approach makes it unnecessary for courts (or estate planners) to use these techniques to avoid the situs rule and the problems associated with the traditional scissionist approach.

g. Statutory directives and "escape hatches." If a local statutory directive on choice of law requires the application of a law other than the law selected by one of this Topic's choice-of-law rules, the court will follow the statutory directive. See § 5.02(1). In addition, this Topic's choice-of-law rules, like this Restatement's other choice-of-law rules, are subject to two narrow "escape hatches." First, under § 5.03, the law selected by the rules of this Topic will not be applied if a case presents exceptional circumstances that make the application of a different state's law manifestly more appropriate. In such cases, the court will apply the manifestly-more-appropriate law. Moreover, under § 5.04, a court may use forum law to decide an issue if applying the law selected by one of this Topic's choice-of-law rules would be offensive to a strong forum public policy.

h. Situs-state recognition of domicile-state orders related to real property. In Fall v. Eastin, 215 U.S. 1 (1909), the U.S. Supreme Court held that a state where real property is located is not required by the U.S. Constitution to grant full faith and credit to an order of a court of another state that purports to directly transfer title to that property. This rule does not preclude the application of the law of the state of the decedent's domicile at the time of death to real-property-related succession issues. A situs-state court may recognize an order of another state's court that has applied the law of the decedent's state of domicile, even under circumstances that do not require it to do so as a matter of full faith and credit, and some states provide for such recognition as a matter of state law. The full-faith-and-credit obligation may require a situs-state court to do so if the domicile court's order requires a person to take the steps necessary under situs-state law to transfer title rather than purporting to change title directly. Issues about the recognition and enforcement of judgments are covered by Chapter 4 of this Restatement.

i. Comparative perspective. This Topic's use the decedent's domicile at the time of the death as a choice-of-law connecting favor is similar to the approach taken by other nations. Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on

jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the "EU Succession Regulation") and the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (the "Hague Form of Testamentary Dispositions Convention") both use the decedent's domicile at the time of death as a choice-of-law connecting factor for issues about the formal validity of wills. In addition, the EU Succession Regulation and the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989) (the "Hague Succession Convention") use the decedent's habitual residence at the time of death as the primary choice-of-law connecting factor for other issues about testate and intestate succession. Moreover, most other nations outside the common-law world follow a unitary approach to choice-of-law for issues about successions (usually by referring to either the habitual residence or the nationality of the decedent) rather than a scissionist approach.

By using the decedent's domicile at the time of death as the primary connecting factor for both personal-property-related and real-property-related succession issues, this Topic may modestly foster more uniformity of choice-of-law approaches to issues about successions in international contexts and, in turn, help simplify estate planning and administration of estates in international contexts.

However, domicile and habitual residence are distinct concepts and must not be confused. Regarding the similarities and differences between them, see § 2.03, Comment *h*.

REPORTERS' NOTES

1. Comment a. Scope. This Topic covers choice of law for many, but not all, of the succession issues that are substantively covered by the Uniform Probate Code and the Restatement of the Law Third, Property (Wills and Other Donative Transfers) (AM. L. INST. 1999).

2. Comment b. Personal property and real property. See Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 2.1, Comment *b* (AM. L. INST. 1999) ("Although the rules for intestate succession to real and personal property have major points of difference in a few American jurisdictions, and minor ones in some others, the trend has been to eliminate such differences. Today, in well over two-thirds of the states, there is a single system of inheritance for both real and personal property."); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, VOL. 2, para. 27-018, at 1416–1417 (Adrian Briggs, Andrew Dickinson, Jonathan Harris & J.D. McClean eds., 15th ed. 2012) (noting that the personal property/real property distinction in choice of law for succession issues "made some sense before 1926 when there were two systems of

intestate succession in English domestic law, one for realty and the other for personalty" but "[i]t makes less sense today when England and most, if not all, other countries in the world have adopted one system of intestate succession for all kinds of property"); SYMEON C. SYMEONIDES, CHOICE OF LAW 617 (2016) (noting "disappearance of many substantive-law differences" between personal-property-related and real property-related succession issues, but persistence of the distinction in choice of law for those issues). Neither the Restatement of the Law Third, Property (Wills and Other Donative Transfers) nor the Uniform Probate Code's substantive rules of succession systematically distinguish personal property and real property.

3. Comment c. Policies and state interests. See § 5.01, Comment *d* ("The rules of this Restatement are intended to "resolv[e] any conflicts between state laws in a way that is reasonable in light of . . . the relative interests of the states, but that also permits the formulation of clear and predictable rules.").

Regarding the primary policies underlying the law of succession, see Restatement of the Law Third, Property (Wills and Other Donative Transfers) Introduction (AM. L. INST. 1999) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please, either during life or at death."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 1 (10th ed. 2017) ("The American law of succession, both probate and nonprobate, is organized around the principle of freedom of disposition."). Regarding the underlying policy of protecting certain persons other than the decedent, see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.01[A], at 13-4 (2010 ed. 2009) ("[T]he fundamental interest that justifies family allowance and homestead rights is the economic protection of the family[.]"); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 519 (10th ed. 2017) ("For the most part, the American law of succession is built on the principle of freedom of disposition. But this principle is not absolute. [There are] limits on freedom of disposition for the protection of a surviving spouse and children.").

Regarding state interests, see Louisiana Civil Code, Book IV, Title IV, art. 3533, Revision Comments 1991 (b) ("[W]hile it has a legitimate interest in matters of land utilization (e.g., prohibited substitutions, perpetuities, etc.), the situs state has little interest in deciding matters of testamentary formalities, capacity, or wealth distribution among members of a family not domiciled therein. Also, while the situs has an interest in preserving the integrity of its recording system, that interest is fully satisfied by requiring recordation of the judgment at the situs and does not require application of situs substantive law on the merits."); See Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134–136 (2014):

> Despite the strength of the situs rule, there are clear cases where the situs has no legitimate interest in applying its law. When a person is domiciled in one state and owns real property in another, the domicile has strong interests in determining who owns the domiciliary's property upon divorce or death[.]
>
> …While the situs state might have a conceivable interest in fair distribution of property located there, its interest is attenuated when the owner is domiciled

> elsewhere and the situs state shares an interest with the domicile state in a coherent, fair distribution of property on divorce or death. . . . The situs state's only real interest in such cases is in clarity of title. Since it is possible to completely satisfy *that* situs interest while applying the law of the domicile to determine who owns what, these cases represent false conflicts that should deviate from situs law, all other things being equal.
>
> The situs state does have very strong interests in clarifying who owns real property within the state but any judgment about property title at the domicile can be implemented by requiring the relevant party to grant a deed of real property to the appropriate person who then can record the deed at the situs, thereby satisfying any interest the situs has in its title system. . . . [S]itus states lack any real interest in determining who owns property within their borders.

See SYMEON C. SYMEONIDES, CHOICE OF LAW 618 (2016) ("The situs state qua situs has no interest in regulating matters such as: (1) whether a non-domiciliary has the proper age or mental capacity to make a testament, or whether he was subject to undue influence; and (2) whether children or spouses should be guaranteed a certain minimum share of the decedent's estate (forced heirship, statutory share), whether illegitimate children can inherit and how much, or whether an adopted child can inherit from her biological parents. The rules that regulate these matters embody certain societal judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state."); See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW § 8.7, at 594 (6th ed. 2010) ("The situs, which has no interest in the fractions in which the interests in realty are divided among non-residents, also has no interest in deciding whether one or another non-resident shall take."); id. § 8.9, at 594 ("Can the situs ever have a legitimate interest qua situs in controlling the intestate distribution of interests in realty? Not today as between states of the United States. Their laws on intestacy are too similar in both letter and purpose, differing on details that do not concern a state that has no contact except as situs.").

See also Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017) ("The most obvious advantage to [an approach based on the law of the state of the decedent's domicile at the time of death] is that it leads to the application of the law of a country with a real and significant connection not only for the deceased but also for most other persons interested in the succession (members of the family, potential heirs, legatees, creditors etc.).").

4. Comment d. Party expectations. See § 5.01, Comment *d* ("The rules of this Restatement are intended to "resolv[e] any conflicts between state laws in a way that is reasonable in light of party expectations . . . but that also permits the formulation of clear and predictable rules."). It is often assumed that a person is most likely to expect the law of their state of domicile to govern succession issues when they die. See Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) ("Application of [law of state of decedent's domicile at time of

death] to determine such questions would presumably be in accord with the reasonable expectations of the decedent and his family."). But see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.03, at 11-8 (2010 ed. 2009) ("As for the invocation of the justified expectations of the parties, the decedent, at least, likely had none in light of his condition. It is highly improbable that the decedent would have known the differences between [state *X* and state *Y* law regarding intestate succession]. If he knew that, he probably also would have had the competency to make a will.").

5. Comment e. Unitary not fragmented ("scissionist") approach. For an overview of the distinction between unitary and scissionist approaches to choice of law for succession issues, see Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683-1684 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017):

> Under the unitary approach, one single law governs all assets belonging to an estate, wherever they are situated. Along the same lines, the applicable law also governs all different aspects of the succession, including the issues relating to the administration of the estate. The unitary approach thus avoids a scission of the succession and the complicated problems related to the simultaneous application of different laws to separate parts and distinct aspects of one single estate. . . .
>
> Dualistic (or scissionist) systems are based on the idea that the succession of immovable property should be governed by the law of the country where the property is located (lex rei sitae, lex situs). . . . As a consequence, immovable assets situated in different countries are not dealt with as part of one single, unitary estate, but as part of separate estates, each of them being governed by its own law.

Regarding the advantages of the unified approach and the disadvantages of the scissionist approach, see Rudow v. Fogel, 426 N.E.2d 155, 160 (Mass. App. Ct. 1981):

> It is desirable that the same law apply to all property involved in the same transaction wherever situated. "(A)wkward or arbitrary results" can be produced if different laws are applied to different portions of a settlor-testator's property based solely on the fortuitous physical location of his or her assets. In Keith v. Eaton, 58 Kan. 732, 738, 51 P. 271 (1897), a testator had owned parcels of land located in four different states. The possibility of applying four different rules of construction in determining whether an illegitimate son was included as an heir "furnish(ed) the reason for giving over to the law of (the) testator's domicile the interpretation of his will, unless to do so contravenes the law of the place where the will is probated."

See also Mazza v. Mazza, 475 F.2d 385, 389 (D.C. Cir. 1973) (reasoning that "[i]f a decedent leaves property in several states, and if each situs applies its own law, some of the recipients may be required to contribute to payment of the federal estate taxes while others are not" which is an "anomalous result which can be avoided if all jurisdictions refer to the law of the domicile" rather than the law of the situs); Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) ("It is desirable that insofar as possible an estate should be treated as a unit

and, to this end, that questions of intestate succession to movables should be governed by a single law."); Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683–1685 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017):

> …The unitary approach . . . avoids a scission of the succession and the complicated problems related to the simultaneous application of different laws to separate parts and distinct aspects of one single estate.
>
> . . .
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> The scission of the deceased's estate which results from the application of the lex situs and from the dualistic approach raises difficult problems and is often perceived as the most serious drawback of the scissionist approach. The shortcomings of a scission of the succession are particularly evident when the substantive rules on succession under the governing laws are based on the consideration of the estate as a whole. This is for instance the case when one of the applicable laws provides for forced heirship rights, the calculation of which requires an assessment of the value of the entire estate and all financial provisions made by the deceased in favour of his/ her close relatives. A unitary approach is also desirable when the issue at stake is the validity of a will or another mortis causa disposition by which the testator intended to dispose of the whole of the estate or assets situated in several countries. In such instances, the application of different laws to the individual assets belonging to the deceased's estate may lead to improper results and even cause injustice.

William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83, 145 (1997) (referring to "the often foolish results of scission"); WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS 300–301 (4th ed. 2013) ("The domicile rule makes good sense, because it permits a uniform disposition of assets which may be located in several jurisdictions."); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134 (2014) ("The goal of all states in inheritance and testacy cases is to promote the will of the owner who writes a will while ensuring fairness for surviving family members. . . . Mixing and matching the law of various states has great potential to undermine all these shared policies resulting in distributions no state thinks fair.").

The unitary approach also reduces the likelihood that the court overseeing the primary administration of an estate will need to determine and apply foreign law, see Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017) ("[S]ince the administration of the estate normally takes place, at least in part, at the place of the last domicile or of the last habitual residence of the deceased, these connecting factors often lead to the application of the domestic law of the state of the competent authority, thus avoiding or reducing the instances in which a foreign law is applicable.").

6. Comment f. Judicial avoidance of the traditional rule. Regarding judicial avoidance of the situs rule by applying the doctrine of equitable conversion, see, e.g., McGuire v. Andre, 65 So.2d 185, 192 (Ala. 1953) (law of Kentucky, decedent's residence at time of death, governed inheritance of real property located in Alabama, due to characterization as personal property under doctrine of equitable conversion); Duckwall v. Lease, 20 N.E.2d 204, 211 (Ind. Ct. App. 1939) (where Ohio was decedent's domicile and real property was in Indiana, court applied Ohio law to determine to whom that property should be transferred, reasoning that the will caused an equitable conversion of the real property into personal property and that the law of the decedent's domicile governs transfer of personal property by will); In re Wiley's Estate, 36 N.W. 2d 483, 489 (Neb. 1949) (using doctrine of equitable conversion, applying law of Nebraska, decedent's residence at time of death, to govern succession to real property in Wyoming). Regarding characterization as personal property, see, e.g., Cohn v. Heymann, 544 So.2d 1242, 1245 (La. Ct. App. 1989) (although Louisiana choice-of-law rule required that Louisiana law govern devise of Louisiana real property, real property was held by a Louisiana corporation; plaintiffs alleged that testator "transferred her interest in Louisiana immovable property to Louisiana corporations in order to convert her ownership interest to corporate stock (movable property), the disposition of which is controlled by the laws of the State of Pennsylvania and therefore not subject to Louisiana forced heirship laws," so as to deny them an interest; court rejected that argument and applied law of Pennsylvania, where decedent was domiciled at time of death); Craig v. Craig, 117 A. 756 (Md. 1922) (characterizing leasehold interest as personal property rather than real property, so as to apply law of decedent's domicile at the time of death, rather than situs law, to govern devise of that interest). Regarding refusal to apply situs law if parties fail to provide information about that law, see, e.g., Estate of Taylor, 391 A.2d 991, 994 n.5 (Pa. 1978) (acknowledging choice-of-law rule that law of state where real property is located governs testate succession to that property; nevertheless applying law of Pennsylvania, where testator resided at time of death, to govern devise of real property located in Ohio, because neither party informed court as to the content of applicable Ohio law).

See also Moffatt Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1, 15–19 (1967) (discussing judicial avoidance of situs rule by reclassifying real property-related issues as other types of issues and by applying doctrine of equitable conversion); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.04, at 11-9 to 11-10 (2010 ed. 2009) ("In circumventing the rigid choice-of-law rules pertaining to [intestate succession to] immovables, equitable conversion has become perhaps the leading device. . . . American courts have in many instances applied the doctrine of equitable conversion to reach the opposite outcome. . . .").

7. Comment g. Statutory directives and "escape hatches." Some states have statutes that require the application of the law of the state where real property is located to govern certain succession issues that are related to real property that a local court will follow even if one of this Topic's choice-of-law rule selects the law of a different state. See, e.g., West's F.S.A. § 731.1055 (Florida) ("The validity and effect of a disposition, whether intestate or testate, of real property in

this state shall be determined by Florida law."); Ga. Code Ann., § 53-5-38 (Georgia) ("If a nondomiciliary dies intestate owning real property located in this state, the real property shall be distributed to that decedent's heirs in accordance with the laws of intestacy of this state."); 84 Okl. St. Ann. § 20 (Oklahoma) ("Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile.").

Regarding the "escape hatches," the law of a state generally will not be manifestly more appropriate under § 5.03 for governing a succession issue than the law selected by this Topic's choice-of-law rules solely because the succession issue is real-property related. Moreover, the presence of real property in the forum state is unlikely by itself to be a basis for a conclusion that the determination of a real-property-related succession issue under foreign law would be "offensive to a strong forum public policy" under § 5.04. There must be other circumstances, too (e.g., a surviving family member is domiciled in the state where real property is located, application of the law of the state of the decedent's domicile would leave the family member without a source of economic support, but the law of the situs state would provide for the family member's protection under its ordinary laws of succession; or the intestate succession law of the decedent's domicile at the time of death would result in the fractionalization of real property located in another state to such a greater extent than would be the case under the intestate succession law of the situs state that it would offend a strong public policy of the situs state related to the marketability and productive use of real property). For a discussion of these types of situations, see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.02, at 11-4 to 11-5 (2010 ed. 2009):

> [T]he situs jurisdiction may have its own overriding interest in preventing . . . the undue parceling and fractionation of valuable land. A foreign intestate succession law that, in contrast with situs law, distributes shares to numerous relatives rather than to just one or a few inheritors, would run counter to this strong situs state policy. Likewise, the domicile law may be especially favorable to debtor landowners. This may be detrimental to the interests of the situs state's creditors. The domicile state's law may be more discriminatory, such as disallowing females to take the same share as males, barring their owning any land altogether, or requiring the land to be held in trust or similar management vehicle for them rather than outright.
>
> . . .
>
> [W]hen the decedent dies domiciled in state *X*, but land and all potential beneficiaries are located in state *Y*, . . . it is difficult to comprehend why state *X* should have a greater claim to determine the shares of the beneficiaries than state *Y*. This is particularly true where the decedent has executed a will partially invalid, but by its testamentary plan indubitably manifesting an intent not to have the intestate scheme of distribution of state *X* apply.

8. Comment g. Situs state recognition of domicile state orders related to real property. See WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, THE FULL FAITH AND CREDIT CLAUSE 84–85 (2005):

> [T]he rule [of Fall v. Eastin has a] very narrow scope. It is clear that the Supreme Court has no objection to a decree from an F-1 court that has an indirect effect on the land in F-2. In *Fall*, . . . if the Washington court had threatened the husband with contempt, and, under that duress, he had executed a deed conveying the Nebraska land to his wife, the deed would have been valid, and the Nebraska court would have recognized it. Further, if the wife had merely asked for a different remedy in Nebraska, she may have been successful. If instead of suing on the deed prepared at the order of the Washington court, she had sought recognition in Nebraska for the Washington decree ordering her husband to convey the land to her, the Nebraska court probably would have granted full faith and credit to that decree and issue its own order compelling the husband to execute the deed. The two hypothetical cases show that the *Fall* rule is very limited. It permits an F-2 court to ignore an F-1 decree only if it directly affects title to land in F-2. It does not, however, prevent an F-1 court from acting indirectly in ways that ultimately will control title to land in F-2.
>
> . . .
>
> One argument for [the *Fall*] rule relies on the need for the situs to maintain reliable land records, records that might be muddled by foreign decrees to the disadvantage of subsequent innocent purchasers. . . . The response to that argument is that the situs could easily protect its land records without discriminating against foreign judgments. It could do so by simply requiring one who claimed under a foreign decree to file that decree in the land records. Once filed, the decree would warn subsequent purchasers and mortgagees just as would any other document in the chain of title.

See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.12, at 627 (6th ed. 2010) (6th ed. 2010) ("The situs will rarely, if ever, have so substantial an interest qua situs in refusing to recognize a non-situs land decree that the situs' interest should be permitted to override the great national interest in recognition of sister-state judgments."); id. at § 8.5, at 584 ("We may dismiss at once the argument that by refusing to recognize the sister-state decree as between the original parties and their privies, the situs is simply protecting hypothetical bona fide purchases who might rely on a record title that does not note the sister-state decree. When bona fide purchasers exist, the situs is free to protect them on the same basis as it would in wholly domestic transactions that are improperly recorded. It may not, however, create imaginary bogies to mask what is simply hostility to a sister-state decree.").

Regarding statutes providing for recognition of non-situs-court judgments regarding real property-related succession issues, see, e.g., Unif. Probate Code § 3-408 (revised 2019):

> A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at death in the state where the order was made.

id. at Comment (emphasis added):

> This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court.
>
> . . .
>
> This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. *It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land.* But, choice of law rules frequently produce a similar result.

See also In re Estate of Tolson, 947 P.2d 1242, 1248 (Wash. App. 1997) ("Generally speaking, courts of ancillary jurisdiction are bound by the Full Faith and Credit Clause to accept the adjudication of courts of domiciliary jurisdiction on the question of a will's validity."); SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 13.1, at 568 (6th ed. 2021) ("Some states recognize foreign probate decrees even as to local land."; citing Uniform Probate Code states and California law as examples).

9. Comment i. Comparative perspective. For choice-of-law references to the law of the state of the testator's domicile at the time of death for issues about formal validity of wills, see EU Succession Regulation art. 27(1)(c) and Hague Form of Testamentary Dispositions Convention art. 1(c). For choice-of-law references to the law of the decedent's habitual residence at the time of death for other issues about testate and intestate succession, see EU Succession Regulation art. 21 and Hague Succession Convention art. 3. According to one comparative analysis, European Union members (as a result of the EU Succession Regulation) and many Latin American countries take a unitary approach based on habitual residence or domicile; Japan, South Korea, and most Arab countries take a unitary approach based on the decedent's nationality at the time of death; and China, Russia, Turkey, and several African countries take a scissionist approach. Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683–1684 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017).

See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.1, at 574–575 (6th ed. 2010) ("Civil law jurisdictions do not share the common law countries' fixation on the situs of realty. A survey of countries that are members of the Hague Conference on Private

International Law revealed that most civil law jurisdictions applied the same law to both personal and real property (unity principle) for testate and intestate succession. Most applied the law of the decedent's nationality, but some applied the law of the decedent's domicile at death.").

Regarding the benefits of greater uniformity of choice-of-law approaches to issues about succession in international contexts, see EU Succession Regulation recital 7 (harmonization in the EU context mitigates difficulties faced by persons "in asserting their rights in the context of a succession having cross-border implications" and helps "citizens . . . organise their succession in advance."); Donovan W. M. Waters, Explanatory Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, para. 18, at 21 (1988) ("A single approach [to choice-of-law for issues about successions] would both simplify the winding up of deceased persons' estates and also reduce costs and the chances of error.").

§ 7.25. Formal Validity of Wills

The law of the state of the testator's domicile at the time of death governs the formal validity of a will.

Comment:

a. Scope. This Section covers choice of law for issues about the formal validity of wills. These issues include, for example, issues about compliance with requirements for writing, signature, witness, attestation, and testator's handwriting. This Section covers choice of law for these issues as to personal property and real property; written and oral wills; nonelectronic and electronic wills; and revocations of wills.

b. Rationale. As to personal property, this Section follows the Restatement of the Law Second, Conflict of Laws and reflects the predominant choice-of-law rule. As to real property, this Section reflects the trend away from the traditional common-law rule that the law of the state where real property is located governs issues about the formal validity of wills as to that property. Many states have validation rules that do not distinguish between personal property and real property. According to those rules, a will is formally valid if its execution complies with the law of the testator's state of domicile at the time of death, even if the will would not be formally valid under the law of the state where the real property is located.

This Section's choice-of-law rule usually should result in the application of the law of the most interested state. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property in accordance with their intent when they die. The policies underlying the law governing the formal validity of wills in particular are about the protection of those rights by ensuring the authenticity of a decedent's purported will. A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, a state is likely to have a stronger interest than other states in governing issues about succession in general and the formal validity of wills in particular as to its own domiciliaries. In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern those issues solely because the succession relates to real property that happens to be located there. The situs state does have legitimate interests in having its law govern issues about its real-property-recording system, which real property documents are eligible for recording, the required formalities for recording, and the effect of recording or failing to record a real-property document on the priorities of interests in that real property. These issues, as well as other core real-property issues, are governed by the law of the state where the real property is located, thus satisfying those situs-state interests. See Introductory Note, Comment *c*.

This Section's choice-of-law rule also reflects the most likely expectations of the decedent and related persons regarding the applicable law. Insofar as persons have particular expectations regarding the law that would govern issues about the formal validity of wills, they would more likely expect the law of the decedent's domicile to govern rather than the law of some other state with a weaker connection or no connection to the decedent. There is little reason to presume that persons would expect the law of a nondomicile state to govern a succession solely because the succession relates to real property located there, and even less reason to presume that they would expect different items of property in the same succession to be governed by the law of different states merely because those items of property are characterized as personal property rather than real property, or vice versa, and are located in different states. See Introductory Note, Comment *d*.

Moreover, this Section's choice-of-law rule results in the application of a single state's law—the law of the decedent's domicile at the time of death—to issues about succession to a single decedent's property. In contrast, the traditional fragmented (or "scissionist") approach refers

to domicile law for personal-property-related succession issues and situs law for real-property-related succession issues. For estates that include personal property, and also real property located in states other than the state of the decedent's domicile, scission requires the application of the laws of multiple states to a single succession. It thus requires estate planners and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and requires courts to determine and apply the law of multiple states. By doing so, scission unnecessarily adds uncertainty and complexity to estate planning and the probate process and also risks frustrating the intent of testators. This Section's unitary approach avoids these problems, thereby fostering predictability, simplicity, and efficiency in estate planning and probate proceedings and furthering the policy goal of implementing the testator's intent. See Introductory Note, Comment *e*. This approach also avoids the odd result that a single will is simultaneously valid and invalid as to different items of property solely because those items of property are of different types and happen to be located in different states.

c. Validating statutes. Many states have validating statutes according to which a will is formally valid if executed in compliance with either that state's own law or the law of certain specified states, such as the state where the will was executed or the state of the decedent's domicile at the time of death. This Section is a choice-of-law rule rather than a substantive validating rule. However, by selecting the law of the state of the decedent's domicile at the time of death, this Section's choice-of-law rule will result in the application of a validating statute of the state of the decedent's domicile at the time of death, if that state has one, and the will's formal validity will be determined in accordance with that validating statute.

d. Domicile. A natural person's domicile is the place where the person's life is centered and the person is physically present. Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities. See § 2.03. The law of the forum governs determinations of domicile. See § 2.09.

e. Domestic and international contexts. This Section applies in both domestic and international contexts. This Section's reference to the law of the decedent's domicile at the time of death is also found in the EU Succession Regulation and the Hague Form of Testamentary Dispositions Convention. See Introductory Note, Comment *i*.

REPORTERS' NOTES

1. Comment a. Scope. The scope of this Section is based on Uniform Probate Code § 2-502 (revised 2019) ("Execution; Witnessed or Notarized Wills; Holographic Wills"). See also Unif. Electronic Wills Act (2019).

2. Comment b. Rationale. See In re Brace's Estate, 180 Cal.App.2d 797, 801 (Cal. Ct. App. 1960) ("Since personal property has, broadly speaking, no locus apart from the domicile of its owner, and there being no reason why the sovereign within whose jurisdiction it chances to be physically situated should interfere with the method of its devolution, it is steadily held that in regard to . . . method or execution . . . the state or country in which the testator was domiciled at the time of his death controls.") (citation omitted); Goodwin v. Colchester Probate Court, 133 A.3d 156 (Conn. App. Ct. 2016) (applying law of Pennsylvania, where testatrix was domiciled at time of death, to validate will devising real property located in Connecticut); Oehler v. Olson, 2005 WL 758038, *2 (Conn. Superior Ct. 2005) ("The validity of a will conveying personal property, including issues of testamentary capacity, is controlled by the law of the testator's domicile at the time of death."); In re Estate of Dow, __A.3d __, 2021 WL 199619, *3 (N.H. 2021) ("Our law comports with Section 263(1) of the Restatement (Second) Conflict of Laws [Validity and Effect of Will of Movables]"); Marr v. Hendrix, 952 S.W.2d 693, 693 (Ky. 1997) ("The will of a person domiciled out of this state at the time of his death shall be valid as to his personal property and his real property in this state, if it is executed according to the law of the place where he was domiciled."); In re Estate of McHugo, 237 A.3d 1239, 1241 (Vt. 2020) (stating rule that "[i]n general, the validity of a bequest or disposition of personal property by will is governed by the law of the testator's domicile at the time of death" and that "[t]he law of the domicile also applies to the question of whether [a] will validly revoked [a] prior will"). Cf. In re Estate of Janney, 446 A.2d 1265 (Pa. 1982) (applying the law of Pennsylvania, where testatrix was domiciled at time of death, to determine testatrix's intent and the capacity of an attesting witness to take real property located in New Jersey).

See also 87 POWELL ON REAL PROPERTY § 87.02 (2021) ("The traditional minority rule determines validity of a will of land under the law of the testator's domicile."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.02[B], at 14-6 (2010 ed. 2009) (noting that validation rules have the "palliative effect" that "the testamentary intent of the decedent can be effectuated despite nonobservance of a technical formality in one of several situs jurisdictions").

Regarding the revocation of wills, see In re Estate of McHugo, 237 A.3d 1239, 1241 (Vt. 2020) (stating rule that "[t]he law of the domicile also applies to the question of whether [a] will validly revoked [a] prior will"); Restatement of the Law Second, Conflict of Laws § 263, Comment *i* (AM. L. INST. 1971) ("The effect upon a will, insofar as it concerns movables, of an intentional act of revocation by the testator, such as the physical destruction of the will, is determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. The same law will be applied to determine whether the will has been entirely or partially revoked by operation of law, such as by marriage or by the birth of a child subsequent to the will's

execution. The courts of the state where the testator was domiciled at the time of his death would usually apply their own local law in deciding such questions."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.06[A], at 14-33 (2010 ed. 2009) ("In general the same choice-of-law provisions that govern the validity of wills apply to revocation. Thus, the law of the decedent's domicile at death will determine, in the case of personal property, whether a revocation, alteration, or amendment of a prior will was properly effectuated.").

Regarding the policies underlying the law governing the formal validity of wills, see MELANIE B. LESLIE & STEWART E. STERK, TRUSTS AND ESTATES 53 (4th ed. 2021):

> These statutes, often referred to as "formalities statutes", have several objectives. First, they serve a protective function. By requiring witnesses and other safeguards, the statutes attempt to protect the testator from fraud and overreaching by greedy relatives and acquaintances. Second, the statutes serve a ritual function; requiring a testator to participate in a ceremonial occasion impresses upon the testator the finality and importance of the act she is performing. The will should control distribution of testator's assets only if it is a carefully considered, formal document, not a hastily scribbled product of a momentary whim. Third, formalities statutes serve an evidentiary function: the formal document serves as conclusive evidence of the testator's wishes, and the witness requirement ensures that others will be available to testify if the will's authenticity is in doubt.

See also ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 141–142 (10th ed. 2017) ("The main purpose of these formalities is to enable a court easily and reliably to assess the authenticity of a purported act of testation. . . . [The challenge] is to prescribe a set of formalities, and a rule for the exactness with which those formalities must be complied, that balances the risk of probating an inauthentic will (a false positive) with the risk of denying probate to an authentic will (a false negative). Both kinds of error dishonor a decedent's freedom of disposition.").

Regarding the relative interests of states in having their law govern these issues, see Introductory Note, Comment *c*. See also Louisiana Civil Code, Book IV, Title IV, art. 3533, Revision Comments 1991 (b) ("[W]hile it has a legitimate interest in matters of land utilization (e.g., prohibited substitutions, perpetuities, etc.), the situs state has little interest in deciding matters of testamentary formalities. . . . Also, while the situs has an interest in preserving the integrity of its recording system, that interest is fully satisfied by requiring recordation of the judgment at the situs and does not require application of situs substantive law on the merits. For these reasons, this Title removes . . . issues of testamentary formalities [from its scope].").

Regarding validation rules that do not distinguish personal property and real property, see Unif. Probate Code § 2-506 (revised 2019) ("A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."); id., Comment:

> This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502 or 2-503. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the court of this state would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators.

According to the Uniform Law Commission, as of September 2021, 19 states had adopted the Uniform Probate Code (Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah). States that have adopted the Uniform Probate Code generally follow Section 2-506. See JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.02[B], at 14-5 (2010 ed. 2009). Other states also include validation under the law of the state of the decedent's domicile at the time of death. See id. at nn. 12, 15, and 16 (listing states including California, Indiana, Iowa, Maryland, New York, Pennsylvania, Rhode Island, Vermont, and Washington). See also ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 160, 509 (6th ed. 2011) ("These validating statutes apply equally to wills of land and of personalty. A substantial majority of the American states now have statutes of this general sort.").

See also Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 3.1, Comment *e* (AM. L. INST. 2003) ("Most probate codes, including the Original and Revised Uniform Probate Code, contain a choice-of-law provision. . . . The UPC provides that a will is validly executed if it was executed in compliance with the law at the time of execution of the place where the will was executed, or of the law where at the time of execution or at the time of death the testator was domiciled, had a place of abode, or was a national. The policy underlying such legislation is to promote the validation of wills by maximizing the number of jurisdictions with whose law an instrument may be found to comply. This policy commends itself as a principle of decisional law in a state that does not have such choice-of-law legislation."); id. § 3.1, Statutory Note (listing state statutes).

Regarding electronic wills, see Unif. Electronic Wills Act § 4 ("A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is: (1) physically located when the will is signed; or (2) domiciled or resides when the will is signed or when the testator dies.").

Regarding scission as to issues about validity of wills and its tendency to undermine the testator's intent, see Lindsay v. Wilson, 63 A. 566, 569 (Md. 1909):

> The intentions of testators have frequently failed because they executed their wills according to the forms prescribed by the laws of their respective domiciles, which were not in accordance with the laws of the states where some of their lands were situated, and in this country where we have so many states, each one of which can determine such questions for itself, it cannot be doubted that such a statute as ours is more likely to accomplish the great object of the law applicable to wills—to carry out the intention of the testator—than the common-law rule. Perhaps nothing has shaken the respect of even intelligent laymen for the wisdom of the law more than the fact that a will will pass real estate in one state and be utterly null and void as to that in an adjoining state. Most attorneys in active practice have doubtless realized the difficulties arising from so many statutes on the subject in force in this country, when called upon to hastily draw a will for a person who owned real estate in different states, and although the wisdom of such a statute as ours is a question for the Legislature rather than the courts, it is, to say the least, not so unreasonable as to cause us to record any objection to it.

3. Comment c. Validating statutes. See, e.g., Unif. Prob. Code § 2-506 (revised 2019) ("A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."); Unif. Electronic Wills Act § 4 (2019) ("A will executed electronically but not in compliance with [this act's execution requirements] is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is: (1) physically located when the will is signed; or (2) domiciled or resides when the will is signed or when the testator dies."

4. Comment d. Domicile. Regarding domicile for purposes of resolving choice-of-law issues, see Chapter 2 of this Restatement.

5. Comment e. Domestic and international contexts. See EU Succession Regulation art. 27(1):

> A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:
>
> (a) of the State in which the disposition was made or the agreement as to succession concluded;
>
> (b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;

> (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;
>
> (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or
>
> (e) in so far as immovable property is concerned, of the State in which that property is located.

Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961):

> Article 1
>
> 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, or
>
> 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.
>
> …
>
> Article 2
>
> Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition. The revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under Article 1, the testamentary disposition that has been revoked was valid.

6. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 239 (AM. L. INST. 1971) ("(1) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."); id. at § 263 ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions.").

§ 7.26. Invalidity of Will Due to Testator's Incapacity or Another's Wrongdoing

The law of the state of the testator's domicile at the time of death governs whether a will is invalid due to the testator's incapacity or another's wrongdoing.

Comment:

a. Scope. This Section covers choice of law for issues about whether a will is invalid due to the testator's incapacity or another's wrongdoing. These issues include, for example, whether a testator has the requisite age or mental competence to make a will and whether a will was a product of undue influence, duress, or fraud. This Section covers choice of law for these issues as to both personal property and real property, and as to both wills and revocations of wills.

b. Rationale. This Section's choice-of-law rule usually should result in the application of the law of the most interested state. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property in accordance with their intent when they die. The policies underlying the law governing the invalidity of a will due to the testator's incapacity or another's wrongdoing in particular are about the protection of those rights by ensuring that the will was voluntary. A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, a state is likely to have a stronger interest than other states in governing issues about succession in general and issues about the invalidity of a will due to the testator's incapacity or another's wrongdoing in particular as to its own domiciliaries. In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern these issues solely because the succession relates to real property that happens to be located there. The situs state does have legitimate interests in having its law govern issues about its real-property-recording system, which real property documents are eligible for recording, the required formalities for recording, and the effect of recording or failing to record a real property document on the priorities of interests in that real property. These issues, as well as other core real-property issues, are governed by the law of the state where the real property is located, thus satisfying those situs-state interests. See Introductory Note, Comment *c*.

This Section's choice-of-law rule also reflects the most likely expectations of the decedent and related persons regarding the applicable law. Insofar as persons have particular expectations regarding the law that would govern issues about whether a will is invalid due to the testator's

incapacity or another's wrongdoing, they would more likely expect the law of the decedent's domicile to govern rather than the law of some other state with a weaker connection or no connection to the decedent. There is little reason to presume that persons would expect the law of a nondomicile state to govern a succession solely because the succession relates to real property located there, and even less reason to presume that they would expect different items of property in the same succession to be governed by the laws of different states merely because those items of property are characterized as personal property rather than real property, or vice versa, and are located in different states. See Introductory Note, Comment *d*.

Moreover, this Section's choice-of-law rule results in the application of a single state's law—the law of the decedent's domicile at the time of death—to issues about whether a will is invalid due to the testator's incapacity or another's wrongdoing. In contrast, the traditional fragmented (or "scissionist") approach refers to domicile law for personal-property-related succession issues and situs law for real-property-related succession issues. For estates that include personal property, and also real property located in states other than the state of the decedent's domicile, scission requires the application of the laws of multiple states to a single succession. It thus requires estate administrators and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and requires estate administrators and courts to determine and apply the law of multiple states. This unnecessarily adds uncertainty and complexity to estate planning and the probate process and risks frustrating the intent of testators. This Section's unitary approach avoids these problems, thereby fostering predictability, simplicity, and efficiency in estate planning and probate proceedings and furthering the policy goal of implementing the testator's intent. See Introductory Note, Comment *e*. This approach also avoids the odd result of a testator being found to have had and lacked capacity simultaneously, or to have acted both voluntarily and involuntarily simultaneously, as to a single will, and thus that the will is both valid and invalid as to different items of property, solely because those items of property are of different types and happen to be located in different states.

c. Domicile. A natural person's domicile is the place where the person's life is centered and the person is physically present. Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional,

and civic activities. See § 2.03. The law of the forum governs determinations of domicile. See § 2.09.

d. Domestic and international contexts. This Section applies in both domestic and international contexts. This Section's reference to the law of the state of the decedent's domicile at the time of death as governing whether a will is invalid due to the testator's incapacity or another's wrongdoing is similar to, but must not be confused with, the reference in the EU Succession Regulation to the law of the state of the decedent's habitual residence at the time of death. The Hague Succession Convention, which has not entered into force, also refers to the state of the decedent's habitual residence at the time of death (but excludes issues about capacity to dispose of property upon death). Regarding the similarities and differences between domicile and habitual residence, see § 2.03, Comment *h*.

REPORTERS' NOTES

1. Comment a. Scope. The issues covered by this Section's choice-of-law rule include those covered by the substantive rules of the Restatement of the Law Third, Property (Wills and Other Donative Transfers) and the Uniform Probate Code governing these issues. See Restatement of the Law Third, Property (Wills and Other Donative Transfers) Chapter 8 (AM. L. INST. 2003) (covering invalidity due to incapacity, undue influence, duress, and fraud); Unif. Probate Code § 2-501 (revised 2019) ("An individual 18 or more years of age who is of sound mind may make a will."). Cf. SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 5.3, at 233 (6th ed. 2021) ("Claims of undue influence and mental incapacity are commonly combined. The same evidence may be relevant to both issues, because findings of undue influence are often predicated on the mental weakness of the testator/donor."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 263 (10th ed. 2017) (grouping together incapacity, undue influence, duress, and fraud because they all relate to whether a will was voluntarily made).

2. Comment b. Rationale. See In re Brace's Estate, 180 Cal.App.2d 797, 801 (Cal. Ct. App. 1960) ("Since personal property has, broadly speaking, no locus apart from the domicile of its owner, and there being no reason why the sovereign within whose jurisdiction it chances to be physically situated should interfere with the method of its devolution, it is steadily held that in regard to testamentary capacity . . . the law of the state or country in which the testator was domiciled at the time of his death controls."); Oehler v. Olson, 2005 WL 758038, *2 (Conn. Super. Ct. 2005) ("The validity of a will conveying personal property, including issues of testamentary capacity, is controlled by the law of the testator's domicile at the time of death."); In re Estate of Latek, 960 N.E.2d 193, 200 (Ind. Ct. App. 2012) ("The rule as to personal property is that the law of the place where the testator is domiciled at the time of his death governs as to the capacity of the testator to make a will . . ."); Ministers & Missionaries Ben. Bd. v. Snow, 45 N.E.3d 917, 925

(N.Y. 2015) ("The intrinsic validity [or] effect . . . of a testamentary disposition of personal property . . . [is] determined by the law of the jurisdiction in which the decedent was domiciled at death."); In re Dehn's Will, 347 N.Y.S. 2d 821, 828–829 (N.Y. Surr. Ct. 1973) ("Since the decedent left only personal property, the intrinsic validity of the instruments offered for probate is determined by the law of the jurisdiction in which decedent was domiciled which in this case is New York. Intrinsic validity necessarily includes appropriate testamentary intent in addition to testamentary capacity and freedom from fraud and undue influence.").

See also Restatement of the Law Second, Conflict of Laws § 263 (AM. L. INST. 1971) ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions."); id. § 263, Comment *a* ("[T]he law selected by application of the present rule determines the capacity of a person to make a will[.]").

Regarding the policies underlying the law governing whether a will is invalid due to the testator's incapacity or another's wrongdoing, see Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *b* (AM. L. INST. 2003) ("The law of donative transfers is premised upon implementing the donor's intent. The law requires that the donor have the mental capacity to form such an intent. . . . The law protects a person who lacks mental capacity by providing that such a person is incapable of effectively formulating the requisite donative or testamentary intent."); id. § 8.3, Comment *e* ("The doctrine of undue influence protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor's age, inexperience, dependence, physical or mental weakness, or other factor. A donative transfer is procured by undue influence if the influence exerted over the donor overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."); id. § 8.3, Comment *i* ("A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made."); id. § 8.3, Comment *j* ("A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 264 (10th ed. 2017) ("The law governing [incapacity, undue influence, duress, and fraud] attempts to balance the risk of giving effect to an involuntary act of testation with the risk of denying effect to a voluntary one.").

Regarding the relative interests of states in having their law govern these issues, see Introductory Note, Comment *c*. See also Louisiana Civil Code, Book IV, Title IV, art. 3533, Revision Comments 1991 (b) ("[W]hile it has a legitimate interest in matters of land utilization (e.g., prohibited substitutions, perpetuities, etc.), the situs state has little interest in deciding matters of testamentary . . . capacity [for a decedent] not domiciled therein[.]"); SYMEON C. SYMEONIDES, CHOICE OF LAW 618 (2016) ("The situs state qua situs has no interest in regulating matters such as

. . . whether a non-domiciliary has the proper age or mental capacity to make a testament, or whether he was subject to undue influence. . . . The rules that regulate these matters embody certain societal judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state.").

3. Comment c. Domicile. Regarding domicile for purposes of resolving choice-of-law issues, see Chapter 2 of this Restatement.

4. Comment d. Domestic and international contexts. See EU Succession Regulation art. 26(1) ("For the purposes of Article[] 24 . . . the following elements shall pertain to substantive validity: (a) the capacity of the person making the disposition of property upon death to make such a disposition; . . . [and] (e) fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition"). Article 24 indirectly refers issues about substantive validity to Article 21, which provides for the application of "the law of the State in which the deceased had his habitual residence at the time of death." See Juliana Rodríguez Rodrigo, *Article 24: Dispositions of Property upon Death Other Than Agreements as to Succession*, *in* THE EU SUCCESSION REGULATION: A COMMENTARY 351, 372, para. 7 (Algonso-Luis Calvo Caravaca, Angelo Davì & Heiz-Peter Mansel eds. 2016) ("Article 24 . . . refers, albeit tacitly, to article 21 ESR (which provides that the law of habitual residence at the time of death will apply to legal or intestate succession)"). See also Hague Succession Convention art. 3:

> (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
>
> (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

The Hague Succession Convention excludes issues about the capacity to dispose of property upon death. Id. at art. 1(2). The Explanatory Report states that "questions of mistake, fraud, duress or undue influence are not matters of capacity in a strict sense" and that the forum may either characterize one of those issues as an issue of capacity (in which case it would be excluded from the Convention) or not (in which case it would not be excluded). Donovan W. M. Waters, Explanatory Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, para. 43, at 31 (1988).

5. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 239 (AM. L. INST. 1971) ("(1) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."); id. at § 239, Comment *a* ("[T]he law selected by the present rule determines the capacity of a person to make a will. . . . "); id. at § 263 ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions."); id. at § 263, Comment *a* ("[T]he law selected by application of the present rule determines the capacity of a person to make a will. . . ."). Although the black letter of § 239 favors application of the law of the state where real property is located, Comment *c* explicitly notes that the situs state may instead apply the law of the state of the testator's domicile. See id. at § 239, Comment *c*:

> The courts of the situs would usually apply their own local law to determine the capacity of the testator to make a valid will insofar as it devises an interest in local land. These courts might hold, however, that some rule of incapacity is applicable only to local domiciliaries and hence does not affect a testator who dies domiciled in another state. These courts might also apply the local law of another state on the ground that the concern of that other state in the decision of the particular issue is so great as to outweigh the values of certainty and predictability which would be served by application of their own local law.

§ 7.27. Rights of Certain Persons to Take from Estate

The law of the state of the testator's domicile at the time of death governs the rights, if any, of a person to take from the testator's estate even if the will does not so provide.

Comment:

a. Scope. This Section covers choice of law for issues about the rights, if any, of a person to take from the testator's estate even if the will does not so provide. These issues include, for example, issues about the rights of a person with a legally recognized relationship with the testator such as a spouse, a partner in a nonmarriage domestic relationship, or a child, to take from the testator's estate even though they were omitted from the testator's will, and issues about the rights of such a person to exempt property or a family allowance.

This Section does not cover choice of law for issues about a person's community-property rights, marital-property rights, or other matrimonial-property rights upon the death of a spouse, the classification of property as a spouse's individual property or separate property, or as

community property, marital property, or some other form of matrimonial property, or a spouse's right to an elective share of the testator's estate. These issues are instead covered by § 7.20, under which they are governed by the law of the marital domicile at the time of death.[1]

b. Rationale. This Section's choice-of-law rule usually should result in the application of the law of the most interested state. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property in accordance with their intent when they die. The rights of a person to take from the testator's estate even if the will does not so provide act as limitations on the testator's freedom of disposition, animated by the policy of ensuring some degree of economic protection for persons with legally recognized relationships with the testator such as a spouse, a partner in a nonmarriage domestic relationship, or children. A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, a state is likely to have a stronger interest than other states in having its laws govern issues about the rights, if any, of a person to take from the testator's estate, even if the will does not so provide, as to its own domiciliaries. In many cases, the state of the decedent's domicile at the time of death will also be the domicile of one or more persons benefiting from these rights, in which case that state's interest will be especially strong. If persons benefiting from a right to take from the testator's estate even if the will does

[1] NOTE TO ADVISERS AND MCG: Under the current draft of § 7.20 of this Restatement, issues about the matrimonial property rights of spouses upon the death of a spouse, including community-property rights and elective-share rights, are governed by the law of the marital domicile. Section 7.16 defines "marital domicile" as the state of the spouses' common domicile, if they are domiciled in the same state, or the state with which the spouses jointly have the closest connection, taking into account all the circumstances, if the spouses do not have a common domicile. As is widely recognized, there is no single obvious line to draw between matrimonial property law and succession law when it comes to these issues, and there are advantages and disadvantages to different approaches. The current draft groups the matrimonial-property and elective-spousal-share issues together under § 7.20 because they are animated by similar policies and theories about marriage relationships, which are different from succession law's predominant policy of furthering a testator's freedom of disposition. There was general support for this approach when § 7.20 was last discussed. Issues about omitted children, family allowances, and exempt property seem more closely connected to succession law and the probate process than to the law of matrimonial property, and are therefore covered by this draft of § 7.27. However, a potential disadvantage of including issues about elective share rights of a spouse in § 7.20 rather than § 7.27 is that this would not follow the Uniform Probate Code's reference to the law of the state of the decedent's domicile at the time of death to govern elective share issues. See Unif. Prob. Code § 2-202(d) (2019 rev.) ("The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death."). As a practical matter, the choice-of-law reference will be to the same state's law regardless of whether elective share issues are covered by § 7.20 or § 7.27 if the spouses had a common domicile at the time of the decedent's death. In other cases, however, the result may be a reference to the law of different states. Advice is welcome about whether there are alternative approaches that would be preferable to the approach reflected by the current versions of §§ 7.20 and 7.27.

not so provide are domiciled in other states, those other states may also have an interest in having their laws apply. However, to avoid having to apply the law of multiple states to the determine the rights of different persons as to a single succession, this Section's choice-of-law rule refers only to the state of the testator's domicile at the time of death.

In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern issues about the rights, if any, of a person to take from the testator's estate even if the will does not so provide solely because the succession relates to real property that happens to be located there. A state does have a legitimate interest in having its law govern issues about its real-property-recording system, which real-property documents are eligible for recording, the required formalities for recording, and the effect of recording or failing to record a real-property document on the priorities of interests in that real property. These issues, as well as other core real-property issues, are governed by the law of the state where the real property is located, thus satisfying these situs-state interests. See Introductory Note, Comment *c*.

This Section's choice-of-law rule also reflects the most likely expectations of the decedent and related persons regarding the applicable law. Insofar as persons have particular expectations regarding the law that would govern issues about the rights, if any, of a person to take from the testator's estate even if the will does not so provide, they would more likely to expect the law of the decedent's domicile to govern rather than the law of some other state with a weaker connection or no connection to the decedent. There is little reason to presume that persons would expect the law of a nondomicile state to govern a succession solely because the succession relates to real property located there, and there is even less reason to presume that they would expect different items of property in the same succession to be governed by the laws of different states merely because those items are characterized as personal property rather than real property, or vice versa, and are located in different states. See Introductory Note, Comment *d*.

Moreover, this Section's choice-of-law rule results in the application of a single state's law—the law of the decedent's domicile at the time of death—to issues about the rights, if any, of a person to take from the testator's estate even if the will does not so provide. In contrast, the traditional fragmented (or "scissionist") approach refers to domicile law for personal-property-related succession issues and situs law for real-property-related succession issues. For estates

that include personal property, and also real property located in states other than the state of the decedent's domicile, scission requires the application of the laws of multiple states to a single succession. It thus requires estate planners and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and requires estate planners and courts to determine and apply the law of multiple states. This unnecessarily adds uncertainty and complexity to estate planning and the probate process and risks frustrating the intent of testators. This Section's unitary approach avoids these problems, thereby fostering predictability, simplicity, and efficiency in estate planning and probate proceedings, and furthering the policy goal of implementing the testator's intent. See Introductory Note, Comment *e*.

c. Domicile. A natural person's domicile is the place where the person's life is centered and the person is physically present. Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities. See § 2.03. The law of the forum governs determinations of domicile. See § 2.09.

d. Domestic and international contexts. This Section applies in both domestic and international contexts. This Section's reference to the law of the state of the decedent's domicile at the time of death to determine the rights, if any, of a person to take from the testator's estate even if the will does not so provide is similar to, but must not be confused with, the reference in the EU Succession Regulation to the law of the state of the decedent's habitual residence at the time of death. The Hague Succession Convention, which has not entered into force, also refers to the state of the decedent's habitual residence at the time of death. Regarding the similarities and differences between domicile and habitual residence, see § 2.03, Comment *h*.

REPORTERS' NOTES

1. Comment a. Scope. The issues covered by this Section's choice-of-law rule include those substantively covered by §§ 2-301 to 2-302 (Spouse and Children Unprovided for in Wills) and §§ 2-401 to 2-405 (Exempt Property and Allowances) of the Uniform Probate Code. The scope of this Section's choice-of-law rule excludes those issues substantively covered by §§ 2-201 to 2-214 of the Uniform Probate Code (Elective Share of Surviving Spouse). Those issues are instead covered by § 7.20, according to which the law of the state of the marital domicile governs.

2. Comment b. Rationale. See Unif. Probate Code § 2-401 (revised 2019) ("Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not

domiciled in this state are governed by the law of the decedent's domicile at death."); Reece v. Chu, 2020 WL 3053617, *4 (Ariz. Ct. App. 2020) (stating rule that "[r]ights to homestead allowance, exempt property and family allowance for a decedent who is not domiciled in this state at the time of death are governed by the law of the decedent's domicile at death" and, on that basis, rejecting claims of surviving spouse under Arizona law because testator was domiciled in New Jersey at time of death); Sarbacher v. McNamara, 564 A.2d 701 (D.C. 1989) (applying law of District of Columbia, where testator was domiciled at time of death, to govern whether it was entitled to a contribution from another estate toward satisfaction of mortgage obligation on real property located in Florida); Duckwall v. Lease, 20 N.E.2d 204, 211 (Ind. Ct. App. 1939) (where Ohio was decedent's domicile and real property was in Indiana, court applied Ohio law to determine to whom that property should be transferred, reasoning that the will caused an equitable conversion of the real property into personal property and that the law of the decedent's domicile governs transfer of personal property by will); In re Janney's Estate, 446 A.2d 1265 (Pa. 1982) (applying law of Pennsylvania, where testator was domiciled at time of death, to govern whether witness to will's execution can take New Jersey real property as a devisee under the will).

Cf. Saunders v. Saunders, 796 So. 2d 1253 (Fla. Dist. Ct. App. 2001) (applying law of Colorado, where decedent was domiciled at time of death, to govern pretermitted spouse issue even though the issue arose as to real property located in Florida) (since superseded by statute). See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 94–95 (2002) ("Saunders v. Saunders offers an example of the gradual erosion of the traditional situs rule for succession to immovable property.").

Regarding the policies underlying the rights of a person to take from the testator's estate even if the will does not so provide, see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.01[A], at 13-4 (2010 ed. 2009) ("[T]he fundamental interest that justifies family allowance and homestead rights is the economic protection of the family during the often tedious course of estate administration. . . . There are, however, countervailing considerations. Most prominent of these is the fact that the state will have little protective interest where the survivors do not reside within its borders."); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134 (2014) ("The goal of all states in inheritance and testacy cases is to promote the will of the owner who writes a will while ensuring fairness for surviving family members."; ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 519 (10th ed. 2017) ("For the most part, the American law of succession is built on the principle of freedom of disposition. But this principle is not absolute. [There are also] limits on freedom of disposition for the protection of a surviving spouse and children."). In the case of protections for omitted spouses or children, the policies are also about implementing the testator's presumed intent. See Restatement of the Law Third, Property (Wills and Other Donative Transfers) §§ 9.5–9.6 (AM. L. INST. 1999) (characterizing omitted spouse and omitted heir statutes as intended to protected against unintended disinheritance); SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 8.5, at 335 (6th ed. 2021) (noting that omitted heir statutes are "based on the

assumption that the failure to mention a child in a will was an oversight, so the omitted child should get a share of the estate in order to fulfill the testator's true intent").

A state generally will not have a stronger interest than the domicile state in having its law govern issues about the rights of a person to take from the testator's estate even if the will does not so provide, as to real property, solely because the property is located in that state. See Louisiana Civil Code, Book IV, Title IV, art. 3533, Revision Comments 1991 (b) ("[W]hile it has a legitimate interest in matters of land utilization (e.g., prohibited substitutions, perpetuities, etc.), the situs state has little interest in deciding . . . wealth distribution among members of a family not domiciled therein. . . . "); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134–136 (2014) ("Despite the strength of the situs rule, there are clear cases where the situs has no legitimate interest in applying its law. When a person is domiciled in one state and owns real property in another, the domicile has strong interests in determining who owns the domiciliary's property upon divorce or death. . . . While the situs state might have a conceivable interest in fair distribution of property located there, its interest is attenuated when the owner is domiciled elsewhere. . . . "); SYMEON C. SYMEONIDES, CHOICE OF LAW 618 (2016) ("The situs state qua situs has no interest in regulating matters such as . . . whether children or spouses should be guaranteed a certain minimum share of the decedent's estate (forced heirship, statutory share), whether illegitimate children can inherit and how much, or whether an adopted child can inherit from her biological parents. The rules that regulate these matters embody certain societal judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state.").

3. Comment c. Domicile. Regarding domicile for purposes of resolving choice-of-law issues, see Chapter 2 of this Restatement.

4. Comment d. Domestic and international contexts. See EU Succession Regulation art. 21(1) ("Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death."); id. at art. 22(b)(2) (scope of applicable law includes "the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner"). See also Hague Succession Convention art. 3:

> (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.

> (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Id. at art. 7(2)(a) (scope of applicable law includes "the determination of the heirs, devisees and legatees, the respective shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased").

5. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 241 (AM. L. INST. 1971) ("(1) The existence and extent of a common law or statutory interest of a surviving spouse in the land of a deceased spouse are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."); id. at § 242 ("(1) The forced share interest of a surviving spouse in the land of the deceased spouse is determined by the law that would be applied by the courts of the situs. (2) Whether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share or dower interest in the land of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the situs. (3) These courts would usually apply their own local law in determining such questions."); id. at § 265 ("(1) The forced share interest of a surviving spouse in the movables of the deceased spouse is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of his death. These courts would usually apply their own local law in determining such questions. (2) Whether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share interest in the movables of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of his death.").

§ 7.28. Construction of Wills

(a) The construction of a will is governed by the law of the state designated for that purpose in the will.

(b) In the absence of such a designation, the law of the state of the decedent's domicile at the time of death governs the construction of the will.

Comment:

a. Scope. This Section covers choice of law for issues about the construction of wills—that is, the attribution of an intention to the testator by applying a rule of construction. It covers, for

example, issues about the rules of construction that apply if a postexecution event has occurred that affects the will, such as an ademption, increase, or lapse; if a mistake occurred; or if there is an ambiguity in the will. This Section covers choice of law for these issues as to both personal property and real property, and as to both wills and revocations of wills.

This Section does not cover choice of law for issues about the interpretation of wills, which is distinct from construction. Interpretation is the process of determining the testator's actual intention based on the text of the will and relevant extrinsic evidence. It is necessary to construe only if the testator's intent cannot be determined by interpretation. Insofar as the process of interpretation is intertwined with rules of evidence, it is governed by the law of the forum. See § 5.26.

b. Rationale—Governing law indicated. By referring to the law designated in the will to govern construction without distinguishing personal property and real property, subsection (a) of this Section follows the Restatement of the Law Second, Conflict of Laws and the Uniform Probate Code, both of which also refer to the law designated in the will without distinguishing personal property and real property. The rule that the construction of a will is governed by the law of the state designated for that purpose in the will furthers the policy favoring the testator's intent regarding the disposition of property upon death.

c. Rationale: Governing law not designated. Under subsection (b) of this Section, when a will does not designate a particular state's law for purposes of construction, the law of the state of the decedent's domicile at the time of death governs the construction of the will. This approach reflects the predominant choice-of-law rule as to devises of personal property and the minority approach as to devises of real property. This Section does not follow the traditional scission approach, according to which a will is construed under the law of the state of the decedent's domicile at the time of death as to personal property but is construed under the law of the state where the real property is located as to such property.

The main purpose of construing a will is to carry out what was most likely the testator's actual intention, or what most likely would have been the testator's intention if they had foreseen the matter in dispute. One frequently stated rationale for construing a will according to the law of the testator's domicile at the time of death is that the rules of construction of that state are, in general, likely to coincide more closely with the testator's actual intention than another state's rules of construction. Although that will not always be true (such as when the testator executed the

will in a prior state of domicile), it is unlikely that the rules of construction of a state where a given item of property is located will coincide more closely with the testator's actual intention solely because that property happens to be located there.

Subsection (b) of this Section should usually result in the application of the law of the most interested state. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property in accordance with their intent when they die. The policies underlying the law governing the construction of wills in particular are about the protection of those rights by approximating the actual likely intent of the testator. A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, that state is likely to have a stronger interest than other states in governing issues about succession in general and issues about the construction of wills in particular, as to its own domiciliaries. In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern issues about the construction of wills solely because the succession relates to real property that happens to be located there. The situs state does have legitimate interests in having its law govern issues about its real-property-recording system, which real-property documents are eligible for recording, the required formalities for recording, and the effect of recording or failing to record a real-property document on the priorities of interests in that real property. These issues, as well as other core real-property issues, are governed by the law of the state where the real property is located, thus satisfying those situs-state interests. See Introductory Note, Comment *c*.

Subsection (b)'s choice-of-law rule also reflects the most likely expectations of the decedent and related persons regarding the applicable law. Insofar as a person has particular expectations regarding the law that would govern issues about the construction of a will they have made, it is more likely that they would expect the law of their state of domicile to govern rather than the law of some other state with a weaker connection or no connection to them. There is little reason to presume that persons would expect the law of a nondomicile state to govern the construction of their will solely because the succession relates to real property located there. There is even less reason to presume that they would expect their will to be construed (and given one meaning) under one state's law and their same will construed differently (and the same words

given a different meaning) under another state's law solely because the estate includes real property located in that state. See Introductory Note, Comment *d*.

Moreover, subsection (b)'s choice-of-law rule results in the application of a single state's law—the law of the decedent's domicile at the time of death—to issues about the construction of a single will. In contrast, the traditional fragmented (or "scissionist") approach refers to domicile law for construction of a will as to personal property and situs law for construction of the same will as to real property. For estates that include personal property, and also real property located in states other than the state of the decedent's domicile, scission requires the application of the law of multiple states to construe a single will. It thus requires estate administrators and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and requires estate administrators and courts to determine and apply the law of multiple states. This unnecessarily adds uncertainty and complexity to estate planning and the probate process, and risks frustrating the intent of testators. This Section's unitary approach avoids these problems, thereby fostering predictability, simplicity, and efficiency in estate planning and probate proceedings, and furthering the policy goal of implementing the testator's intent. See Introductory Note, Comment *e*. This approach also avoids the odd result of a will being construed to have different meanings as to different items of property solely because those items of property are characterized as personal property rather than real property, or vice versa, and happen to be located in different states.

d. Domicile. A natural person's domicile is the place where the person's life is centered and the person is physically present. Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities. See § 2.03. The law of the forum governs determinations of domicile. See § 2.09.

e. Domestic and international contexts. This Section applies in both domestic and international contexts. This Section's reference to the law of the state of the decedent's domicile at the time of death to govern construction of a will is similar to, but must not be confused with, the reference in the EU Succession Regulation to the law of the state of the decedent's habitual residence at the time of death for issues regarding the interpretation of a disposition. The Hague Succession Convention, which has not entered into force, also refers to the state of the decedent's habitual residence at the time of death but is silent as to choice of law for the construction of wills.

Regarding the similarities and differences between domicile and habitual residence, see § 2.03, Comment *h*.

REPORTERS' NOTES

1. Comment a. Scope. Regarding the distinction between interpretation and construction, see Restatement of the Law Second, Conflict of Laws § 264, Comment *a* (AM. L. INST. 1971) ("[W]ords may be given a meaning which it is believed, on the basis of the available evidence, was the meaning the testator intended the words to bear. This process, which is here referred to as interpretation, is employed in the great majority of situations. [S]ituations do arise where the court is not presented with a satisfactory basis for determining the testator's intentions and where a rule of law is employed to fill the resulting gap in the will. This . . . process is here referred to as construction."); Louisiana Civil Code, Book IV, Title IV, art. 3531, Revision Comments—1991 (a) ("The general literature on the subject distinguishes between "interpretation" and "construction". "Interpretation" is the process of defining the meaning of words and terms contained in a testament. "Construction" is the process of completing or presuming the intent of the testator as to matters on which he could have, but has not, spoken. The introductory phrase of the Article confines its scope to matters of interpretation."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08, at 14-45 to 14-51 (2010 ed. 2009) (making a similar distinction between construction and interpretation of wills).

Regarding the construction of wills, see Restatement of the Law Second, Conflict of Laws § 264, Comment *d* (AM. L. INST. 1971) ("If it is found impossible to ascertain the testator's intentions from the evidence, a rule of law is employed to fill what would otherwise be a gap in the will. This is done in order to carry out what was probably the testator's intention, or what probably would have been his intention, if he had foreseen the matter in dispute."); see Restatement of the Law Third, Property (Wills and Other Donative Transfers) Chapter 5, Introductory Note (AM. L. INST. 1999) ("Many of the issues addressed in this chapter [on post-execution events affecting wills, including ademption and lapse] could—and should—be avoided by foresight and careful drafting. The doctrines addressed in this chapter operate as default rules. They apply because, and only to the extent that, the testator and the testator's attorney failed to address the issue explicitly in a will provision."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08[C], at 14-49 (2010 ed. 2009) ("The need for construction of a will is not reached if the testator's intent is discernible from extrinsic evidence [through the process of interpretation]."). For examples of rules of construction applicable to wills, see, e.g., Uniform Probate Code, Article II, Parts 6 and 7 (revised 2019).

As to interpretation, which is governed by forum law, see Restatement of the Law Second, Conflict of Laws § 264, Comment *b* (AM. L. INST. 1971) ("In ascertaining the intentions of the testator, the forum will consider the ordinary meaning of the words used, the context in which they appear in the will, and the circumstances under which the will was drafted. The forum will consider whether the draftsman was probably using the language of the state where the testator was domiciled at the time when the will was executed. The forum will also consider any other properly

admissible evidence that casts light on the actual intentions of the testator. The question to be determined is one of fact rather than one of law. The forum will apply its own rules in determining the admissibility of evidence, and it will use its own judgment in drawing conclusions from the evidence."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08[C], at 14-49 to 14-50 (2010 ed. 2009) (regarding interpretation: "The inquiry here is one of fact; what did the testator actually intend? Precisely because a factual inquiry is involved, the usual choice of law process is inappropriate. The search for facts requires consideration of all relevant evidence. Thus, when a question of interpretation is involved, the forum ordinarily imposes its own ground rules.").

2. Comment b. Rationale—Governing law indicated. See Unif. Probate Code § 2-703 (revised 2019) ("The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in [Part] 2, the provisions relating to exempt property and allowances described in [Part] 4, or any other public policy of this state otherwise applicable to the disposition."); In re Firth's Estate 127 N.Y.S. 2d 407, 409 (N.Y. Surr. Ct. 1953) (applying New York law to will of nondomiciliary testator when will designated New York law); In re Estate of Bursheim, 483 N.W. 2d 175, 182 (N.D. 1992) ("The law of a state designated by the decedent's will should control the effect of the will."). See also Restatement of the Law Second, Conflict of Laws § 240(1) (AM. L. INST. 1971) ("A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will."); id. at § 264(1) ("A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will.").

Regarding public policy, see § 5.04 ("A court may decline to decide an issue under foreign law if the use of foreign law would be offensive to a strong forum public policy."). If § 5.04's conditions are satisfied, a court may construe a will under forum law rather than the foreign law designated by the will.

Regarding the rationale for subsection (1) of this Section, see Restatement of the Law Second, Conflict of Laws § 240, Comment *e* (AM. L. INST. 1971) ("The forum will give effect to a provision in a will that it should be construed in accordance with the rules of construction of a particular state. It is not necessary that this state have a substantial connection with the testator or with the land. This is because construction is a process for giving meaning to a will in areas where the intentions of the testator would have been followed if these intentions had been made clear. When the testator designates the law of a state as the applicable law in matters of construction, it is to be inferred that he intends the local law of that state to govern. The forum will therefore apply the rules of construction of the designated state."); id. § 263, Comment *e*. See also JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08[D], at 14-51 (2010 ed. 2009) ("The reason for deference to the rules of construction of [the state designated in the will] is this: the testator's governing law clause is a shorthand statement that he wishes ambiguities regarding his intentions to be resolved in accordance with the law of [that state]. The issue is the testator's intent, and his choice of a specific jurisdiction's law is an expression of that intent.").

3. Comment c. Rationale: Governing law not designated. See In re Brace's Estate, 180 Cal.App.2d 797, 801 (Cal. App. Ct. 1960) ("Since personal property has, broadly speaking, no locus apart from the domicile of its owner, and there being no reason why the sovereign within whose jurisdiction it chances to be physically situated should interfere with the method of its devolution, it is steadily held that in regard to . . . construction the law of the state or country in which the testator was domiciled at the time of his death controls."); Executive Council of Protestant Episcopal Church in Diocese of Del., Inc. v. Moss, 231 A.2d 463, 465 (Del. Ch. 1967) (stating rule that "[t]he validity and nature of a bequest are determined by the law of a testator's domicile"; construing will under law of New York, where testator was domiciled at time of death); Second Bank-State St. Trust Co. v. Weston, 174 N.E. 2d 763, 767 (Mass. 1961) ("The rules of construction at the testator's domicil should be applied . . . in the absence of indication that the testator intended some other law to be applied. . . ."; construing will under law of Maryland, where testator was domiciled at time of death); Houghton v. Hughes, 79 A. 909, 910 (Me. 1911) ("The general rule, both as to wills of personalty and realty, seems to be that a will is to be interpreted according to the laws of the country or state of the domicile of the testator, since he is supposed to have been conversant with those laws."); Beauchamp v. Beauchamp, 574 So.2d 18, 20 (Miss. 1990) (stating rule that "the law of the person's domicile is to be used when construing the provisions of a testator's will, unless it is clear from the instrument itself that the testator intended that the laws of another jurisdiction should control"; construing will under law of Wisconsin, law of decedent's domicile at time of death, as to devise of real property located in Mississippi); Applegate v. Brown, 344 S.W.2d 13, 17 (Mo. 1961) (stating "general rule is that the construction of a will for the purpose of ascertaining the testator's meaning and intention as expressed therein is governed by the law of the testator's domicile, whether the will disposes of personal property or real estate"; approving construction of will under law of Nebraska, where testator was domiciled at time of death, as to devise of real property located in Missouri); Estate of Buckley, 677 S.W.2d 946, 947 (Mo. Ct. App. 1984) (applying choice-of-law principle that "[t]he primary purpose in construing a will is to ascertain the testator's intent, and this is governed by the law of the testator's domicile when the will was executed whether it disposes of personalty or realty," the court construed will of real property located in Missouri under law of Kansas, the state of testator's domicile at time of death); Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F.Supp.2d 309, 314 (S.D.N.Y. 2007) ("Indiana follows the majority rule that the law of the domicile of the testator at his or her death applies to all questions of a will's construction."); Matter of Goodyear, 2017 WL 6498334 (N.Y. Surr. Ct. 2017) (construing will under law of New York, where testator was domiciled at time of death, as to devise of interests in real property located in Pennsylvania); Will of Brown, 466 N.Y.S. 2d 988, 991 (N.Y. Surr. Ct. 1983) ("As a general principle of New York law, the courts of this state will look to the law of the testator's domicile for the meaning and interpretation of language used by him in disposing of his personal property by will."); Toledo Trust Co. v. Santa Barbara Found., 512 N.E.2d 664, 667 (Ohio 1987) (construing will under law of California, where testator was domiciled at time of death); In re Knickel's Will, 185 N.E.2d 93, 95 (Ohio Prob. Ct. 1961) ("It is elementary that the nature of an interest in land is determined by

the law of the situs, but questions of interpretation and construction of wills are generally controlled by the law of the testator's domicile."; holding that law of decedent's domicile, Ohio, governed construction of will as to real property located in Texas). Cf. Estate of Buckley, 677 S.W.2d 946, (Mo. Ct. App. 1984) (stating rule that "[t]he primary purpose in construing a will is to ascertain the testator's intent, and this is governed by the law of the testator's domicile when the will was executed whether it disposes of personalty or realty"; construing will under the law of Kansas, the state of testator's domicile both at time of will's execution and at time of death, as to devise of real property located in Missouri).

See also Restatement of the Law Second, Conflict of Laws § 263 (AM. L. INST. 1971) ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions."). For statements of the traditional rule, according to which the law of the state where real property is located governs the construction of wills as to such property, see, e.g., Craig v. Carrigo, 121 S.W.3d 154, 158 (Ark. 2003) ("[W]hile the courts of some states hold otherwise, it is well settled in this state that the law of the situs of the real property controls the construction of wills by which same is devised."); Restatement of the Law Second, Conflict of Laws § 240 (AM. L. INST. 1971) ("(1) A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the situs.").

Regarding the purpose of construction, see Matter of Phillips, 101 A.D.3d 1706, 1708 (N.Y. App. Div. 2012) ("[I]n a will construction proceeding, the search is for the decedent's intent. . . ."). One rationale for the rule that the law of the state of the decedent's domicile at the time of death governs construction of wills is that this purpose is generally more likely to be achieved under the law of the state of domicile than the law of the state where property is located. See Zombro v. Moffett, 44 S.W.2d 149, 152 (Mo. 1931) (stating rule that "the construction of a will for the purpose of ascertaining the testator's meaning and intention as expressed therein is governed by the law of the testator's domicile, whether the will disposes of personal property or real estate. This general rule is based upon the presumption that the maker of a will is more familiar with the law of his domicile than with the law of other jurisdictions, and that his will is written with the law of his domicile in mind."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08[B], at 14-46 (2010 ed. 2009) ("[I]t could be argued that the testator's domicile at death has the primary interest. The testator moved [there], and may have assumed that his will would be construed under its law."); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.15, at 612–613 (6th ed. 2010) ("The reasons advanced for the rule pointing to the domicile of the testator or testatrix on questions of construction of the will are that the domicile's rule will be most likely to coincide with the actual intention of the testator or testatrix.").

It is sometimes argued that the more appropriate reference would be to the law of the state where the testator was domiciled at the time the will was executed (rather than at the time of death). See Restatement of the Law Second, Conflict of Laws § 240, Comment *f* (AM. L. INST. 1971):

> [T]here are weighty reasons favoring application of the rules of construction of the state where the testator was domiciled at the time the will was executed. The testator is more likely to have been familiar with the rules of this state than with those of the state of the situs, and the same is true of the lawyer who drafted the will provided that he was employed in the state of the testator's domicil. The land may be located in two or more states. If so, it is almost certain that the testator intended the words used in the will to bear a single meaning and not mean perhaps as many different things as there are states in which there is land covered by the will. . . . Furthermore, application of the rules of construction of the state of the testator's domicil is desirable in the interest of applying a single rule not only to his movables but also to his land wherever situated. The purpose of construction is to carry out the testator's intentions and it is probable that he intended the words used in the will to bear the same meaning throughout and not mean perhaps different things when applied to land and to movables. . . . A change of domicil after the execution of the will could hardly be considered as affecting the meaning of the words used therein.

However, in many cases, the state of the testator's domicile at the time of death will also be the state where the testator was domiciled when the will was executed. Even when those states are not the same, subsection (b) of this Section calls for the application of the law of state of the decedent's domicile at the time of death in order to avoid the need to apply one state's law to issues about construction and a different state's law to other issues about the same succession. The reference to the decedent's domicile at the time of death also favors the state that will usually have the strongest interest in the succession overall. See Introductory Note, Comment *c*.

This Chapter's choice-of-law rules, like the other choice-of-law rules of this Restatement, are also intended to resolve conflicts "in a way that is reasonable in light of party expectations. . . ." § 5.01, Comment *d*. It is often assumed that a person is most likely to expect the law of their state of domicile to govern succession issues when they die, including with respect to the construction of wills. See Restatement of the Law Second, Conflict of Laws § 240, Comment *e* (AM. L. INST. 1971) ("[A]pplication of the rules of construction of the state of the testator's domicil is desirable in the interest of applying a single rule not only to his movables but also to his land wherever situated. The purpose of construction is to carry out the testator's intentions and it is probable that he intended the words used in the will to bear the same meaning throughout and not mean perhaps different things when applied to land and to movables.").

Regarding the advantages of a unified approach and the disadvantages of scission for construction issues, see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08[B], at 14-46 (2010 ed. 2009) ("[S]ociety's interest in uniform construction of will provisions militates toward application of the law of a single jurisdiction, and the most logical

candidate would arguably be the domicile at death, since it controls most other aspects of estate administration."); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.15, at 612–613 (6th ed. 2010) ("[I]n a case in which the testator or testatrix has made the same cryptic provision concerning land situated in several states, with differing domestic rules of construction, applying the law of the domicile will avoid the absurdity of construing the will differently at each situs."). See also Introductory Note, Comment *e*.

4. Comment d. Domicile. Regarding domicile for purposes of resolving choice-of-law issues, see Chapter 2 of this Restatement.

5. Comment e. Domestic and international contexts. See EU Succession Regulation art. 26(1) ("For the purposes of Article[] 24 . . . the following elements shall pertain to substantive validity: . . . (d) the interpretation of the disposition . . . "). Article 24 indirectly refers issues about substantive validity to Article 21, which provides for the application of "the law of the State in which the deceased had his habitual residence at the time of death." See Juliana Rodríguez Rodrigo, *Article 24: Dispositions of Property upon Death Other Than Agreements as to Succession*, in THE EU SUCCESSION REGULATION: A COMMENTARY 351, 372, para. 7 (Algonso-Luis Calvo Caravaca, Angelo Davì & Heiz-Peter Mansel eds., 2016) ("Article 24 . . . refers, albeit tacitly, to article 21 ESR (which provides that the law of habitual residence at the time of death will apply to legal or intestate succession)"). Although the EU Succession Regulation refers to interpretation, not construction, its choice-of-law rules for succession would likely extend to issues about construction as defined in this Restatement, since they both aim "to ascertain the will of the person making the disposition." Id. at 401. See also Hague Succession Convention art. 3:

> (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
>
> (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

The Hague Succession Convention is silent as to choice of law for the construction of wills, but states can choose to apply the Convention's general choice-of-law rules for issues about succession to matters of construction. See Donovan W. M. Waters, Explanatory Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, para. 37, at 29 (1988) ("[I]f the Convention is silent on an issue, such as it is on the interpretation or construction of the meaning of wills and agreements as to succession, then the Convention simply makes no provision for that issue, and, again should a Contracting State either through its legislature or its courts decide

that the issue falls within its own concept of succession, it can then apply the applicable law under the Convention to that issue . . . ").

6. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 240 (AM. L. INST. 1971) ("(1) A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the situs."); id. at § 264 ("(1) A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death.").

§ 7.29. Intestate Succession

The law of the state of the decedent's domicile at the time of death governs the transfer of property by intestate succession.

Comment:

a. Scope. This Section covers choice of law for issues about intestate succession, that is, succession to property of a decedent that is not disposed of by a valid will. These issues include, for example, issues about which persons qualify as heirs for purposes of intestate succession and about the shares of the decedent's estate to which they are entitled. They also include issues about the incidents of a given status (such as status as a spouse, a partner in a nonmarriage domestic relationship, or a child) for purposes of intestate succession, but they do not include issues about whether a person has such a status (see § X.XX]).[2]

b. Rationale. For intestate-succession issues related personal property, this Section follows the Restatement of the Law Second of Conflict of Laws and reflects the predominant choice-of-law rule. It extends that rule to intestate-succession issues related to real property. By doing so, it recognizes the interests of states in governing succession issues involving their own domiciliaries, favors application of the law that is most likely to approximate the results intended by a decedent

[2] NOTE: This Restatement's choice-of-law rules for issues about a person's status as a spouse, child, etc., have not yet been drafted. The Restatement of the Law Second, Conflict of Laws covers these issues in Chapter 11.

domiciled in a particular state, and avoids the problems of scission, which occurs when a court is required to apply the law of different states to govern intestate succession to different items of property in the same estate. This Section's unified approach to choice of law for intestate-succession issues also reflects the widespread rejection of the personal property/real property distinction in the substantive law of intestate succession.

This Section's choice-of-law rule usually should result in the application of the law of the most interested state. The primary policy underlying the law of intestate succession is to produce a distribution of estate property that approximates the probable intent of the decedent. A natural person's domicile is the place where their life is centered and where they are physically present. See § 2.03. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, a state is likely to have a stronger interest than other states in governing issues about intestate succession as to its own domiciliaries. In many cases, some or all of the persons entitled to take from an intestate decedent's estate will be domiciled in the same state as the decedent, thus reinforcing that state's interest in having its law govern the succession.

In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern intestate succession issues solely because the succession relates to real property that happens to be located there. A state does have a legitimate interest in having its law govern issues about its real-property-recording system; which real-property documents are eligible for recording; the required formalities for recording; and the effect of recording or failing to record a real property document on the priorities of interests in that real property. These issues, as well as other core real property issues, are governed by the law of the state where the real property is located, thus satisfying those situs state interests. See Introductory Note, Comment *c*.

This Section's choice-of-law rule also reflects the most likely expectations of the decedent and related persons regarding the applicable law. Insofar as persons have particular expectations regarding the law that would govern issues about intestate succession to a decedent's property, they would more likely expect the law of the decedent's domicile to govern rather than the law of some other state with a weaker connection or no connection to the decedent. There is little reason to presume that persons would expect the law of a nondomicile state to govern a succession solely because the succession relates to real property located there, and there is even less reason to presume that they would expect different items of property in the same succession to be governed by the law of different states merely because those items of property are characterized as personal

property rather than real property, or vice versa, and located in different states. See Introductory Note, Comment *d*.

Moreover, this Section's choice-of-law rules result in the application of a single state's law—the law of the decedent's domicile at the time of death—to issues about intestate succession to a single decedent's property. In contrast, the traditional fragmented (or "scissionist") approach refers to domicile law for personal property-related intestate succession issues and situs law for real property-related intestate-succession issues. For estates that include personal property, and also real property located in states other than the state of the decedent's domicile, scission requires the application of the law of multiple states to a single succession. It thus requires estate administrators and courts to characterize property as either personal property or real property, invites the use of devices such as equitable conversion to avoid particular outcomes, and requires courts to determine and apply the law of multiple states. This unnecessarily adds uncertainty and complexity to the probate process and risks frustrating the policy of approximating the decedent's likely intent. This Section's unitary approach avoids these problems, thereby fostering predictability, simplicity, and efficiency in estate administration and probate proceedings and furthering the policy goal of approximating the testator's probable intent. See Introductory Note, Comment *e*.

c. Domicile. A natural person's domicile is the place where the person's life is centered and the person is physically present. Determining where a natural person's life is centered depends on objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities. See § 2.03. The law of the forum governs determinations of domicile. See § 2.09.

d. Domestic and international contexts. This Section applies in both domestic and international contexts. This Section's reference to the law of the state of the decedent's domicile at the time of death to govern intestate succession is similar to, but must not be confused with, the reference in the EU Succession Regulation and in the Hague Succession Convention to the law of the state of the decedent's habitual residence at the time of death for issues regarding intestate succession. Regarding the similarities and differences between domicile and habitual residence, see § 2.03, Comment *h*.

REPORTERS' NOTES

1. Comment a. Scope. Regarding the concept of intestate succession, see Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 2.1 (AM. L. INST. 1999) ("(a) A decedent who dies without a valid will dies intestate. A decedent who dies with a valid will that does not dispose of all of the decedent's net probate estate dies partially intestate. (b) The decedent's intestate estate, consisting of that part of the decedent's net probate estate that is not disposed of by a valid will, passes at the decedent's death to the decedent's heirs as provided by statute.").

Regarding the distinction between the law governing the incidents of a given status for intestate-succession purposes and the law governing whether a person has such a status, see Estate of Obata, 27 Cal. App. 5th 730, 733 (2018) ("Under rules of conflict of laws and principles of comity, the status of adoption is determined by the laws of the jurisdiction where the adoption was effected, and the rules of inheritance are determined by the laws of the jurisdiction of domicile of the decedent at time of death."); Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) ("[T]he courts of the state where the decedent was domiciled at the time of his death would look to their own local law to determine what categories of persons are entitled to inherit upon intestacy. Application of this law to determine such questions would presumably be in accord with the reasonable expectations of the decedent and his family. On the other hand, these courts might look to the local law of some other state to determine whether a particular person claiming a share in the movables of an intestate belonged to such a category."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 12.04[A], at 12-40 (2010 ed. 2009) ("The determination of a child's status . . . is not governed by the same choice-of-law principles" as those governing whether a child with a certain status has rights to take property.).

2. Comment b. Rationale. See Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD, 766 F. Supp. 2d 1122, 1138 (W.D. Wash. 2011) ("The traditional rule, under both the First and Second Restatement of Conflicts, for determining the testamentary or intestate disposition of personal property is to look to the law of decedent's domicile at the time of death."); McGuire v. Andre, 65 So.2d 185, 192 (Ala. 1953) (law of Kentucky, decedent's residence at time of death, governed inheritance of real property located in Alabama, due to characterization as personal property under doctrine of equitable conversion); Raley v. Spikes, 614 So.2d 1017, 1018 (Ala. 1993) (stating rule that "the descent and distribution of personal property (movables) is governed by the laws of the domiciliary state at the time of death"; applying law of Alabama, state of intestate decedent's residence at time of death, to govern succession); Barboza v. McLeod, 853 N.E.2d 192, 195–196 (Mass. 2006) ("It is a familiar rule of law that the right of succession to the estate of a deceased person, whether he leaves a will or dies intestate, depends upon the law of his domicil" insofar as personal property is concerned.); Ministers & Missionaries Ben. Bd. v. Snow, 45 N.E.3d 917, 925 (N.Y. 2015) (issues about "the manner in which [personal] property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death"). See also Restatement of the Law Second, Conflict of Laws § 260 (Am.

L. Inst. 1971) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.").

Regarding the trend away from the personal property/real property distinction in the modern law of intestate succession, see Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 2.1, Comment *b* (AM. L. INST. 1999) ("Although the rules for intestate succession to real and personal property have major points of difference in a few American jurisdictions, and minor ones in some others, the trend has been to eliminate such differences. Today, in well over two-thirds of the states, there is a single system of inheritance for both real and personal property."). Cf. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW § 8.7, at 594 (6th ed. 2010) ("Can the situs ever have a legitimate interest qua situs in controlling the intestate distribution of interests in realty? Not today as between states of the United States. Their laws on intestacy are too similar in both letter and purpose, differing on details that do not concern a state that has no contact except as situs."). See also DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, VOL. 2, Rule 150, Comment, at 1416–1417 (Adrian Briggs, Andrew Dickinson, Jonathan Harris & J.D. McClean eds., 15th ed. 2012):

> [The traditional situs rule] made some sense . . . when there were two systems of intestate succession . . . , one for realty and the other for personalty. It makes less sense today when England and most, if not all, other countries in the world have adopted one system of intestate succession for all kinds of property. Moreover, outside the common law world the *lex situs* rule for intestate succession to land has been abandoned almost everywhere except in Austria, Belgium and France. It has therefore been suggested that the *lex situs* rule has outlived its usefulness and should be abandoned in favour of the law of the intestate's domicile. In modern law it is a quite unnecessary complication to have different conflict rules for intestate succession to movables and immovables.

Regarding the policies underlying the law of intestate succession, see MELANIE B. LESLIE & STEWART E. STERK, TRUSTS AND ESTATES 7 (4th ed. 2021) ("Because legislatures have little reason to 'punish' decedents who fail to write wills, intestate succession statutes typically reflect legislative guesses about how decedents would want to have their estates distributed. . . . Reasons of policy also support the legislative preference for close family members. Those are the very people most likely to have contributed to the accumulation of decedent's property, and they are also the people most likely to be dependent on that property."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 63 (10th ed. 2017) ("In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death.").

States also have an interest in having their law govern intestate succession for their own domiciliaries because that law reflects each state's own norms. See Moffatt Hancock, *Conceptual*

Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness, 20 STAN. L. REV. 1, 11 (1967) ("Real property of a foreign decedent should be distributed according to a scheme embodying the customs and mores of his home community, that is, the law of his domicile."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 64 (10th ed. 2017) ("As social norms continue to evolve . . . , and family and family-like relationships become ever more varied and complex, basing intestate succession on a model of a traditional family may no longer be apt. What of adoption, assisted reproductive technology, multiple marriages, blended families with stepchildren, and unmarried cohabiting partners? To tack the probable intent of the typical intestate decedent, the law of intestacy must continually evolve."); id. at 66 ("Debate over intestacy laws is fraught with questions of morality and the proper role of the state in establishing social norms."); SYMEON C. SYMEONIDES, CHOICE OF LAW 618 (2016) ("[T]he situs state qua situs has no interest in regulating matters such as . . . whether [nonmarital] children can inherit and how much, or whether an adopted child can inherit from her biological parents. The rules that regulate these matters embody certain societal value judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state.").

Given these policies, the state of the decedent's domicile at the time of death will usually have the strongest interest in having its law govern intestate succession to that decedent's property. See Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) (state of decedent's domicile at time of death "would usually have the dominant interest in the decedent at the time."); id. at § 236, Comment *a*:

> The state of the situs has an obvious interest in having interests in local land decided upon intestacy in a manner that complies with its notions of what is reasonable and just. This point, however, should not be overemphasized. There may in the given case be other states which have an even greater interest in this question, such as would probably be true of a state where the decedent and all of his heirs were domiciled. Also undoubtedly all States of the United States provide for a method of distribution upon intestacy that is reasonable and just, and the differences between the laws of the several States as to the manner of division may be said to lie more in the area of detail than of principle. Hence it is unlikely that any policy of the state of the situs would be seriously infringed if the distribution upon intestacy of interests in local land were to be decided in accordance with the local law of another state.

See also JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.02, at 11-4 (2010 ed. 2009) (describing but critiquing argument that the law of the decedent's domicile at the time of death should govern intestate succession because that law "is the legislature's way of making a will for a decedent who failed to do so for himself. Its judgment reflects the prevailing customs and mores of the community. In light of this substantial interest, the situs state should

defer to the domicile, just as it would expect deference when one of its own domiciliaries died with real property located abroad"); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.7, at 594 (6th ed. 2010) ("The situs, which has no interest in the fractions in which the interests in realty are divided among non-residents, also has no interest in deciding whether one or another non-resident shall take."). See also Introductory Note, Comment *c*.

Cf. Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017):

> The most obvious advantage to [an approach based on the law of the state of the decedent's domicile at the time of death] is that it leads to the application of the law of a country with a real and significant connection not only for the deceased but also for most other persons interested in the succession (members of the family, potential heirs, legatees, creditors etc). Moreover, since the administration of the estate normally takes place, at least in part, at the place of the last domicile or of the last habitual residence of the deceased, these connecting factors often lead to the application of the domestic law of the state of the competent authority, thus avoiding or reducing the instances in which a foreign law is applicable.

Regarding the expectations of the decedent, see Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) ("[T]he courts of the state where the decedent was domiciled at the time of his death would look to their own local law to determine what categories of persons are entitled to inherit upon intestacy. Application of this law to determine such questions would presumably be in accord with the reasonable expectations of the decedent and his family."). See also Introductory Comment *d*. But see JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.03, at 11-8 (2010 ed. 2009) ("As for the invocation of the justified expectations of the parties, the decedent, at least, likely had none in light of his condition. It is highly improbable that the decedent would have known the differences between [state *X* and state *Y* law regarding intestate succession]. If he knew that, he probably also would have had the competency to make a will.").

Regarding the benefits of a unified approach rather than scission, see Restatement of the Law Second, Conflict of Laws § 260, Comment *b* (AM. L. INST. 1971) ("It is desirable that insofar as possible an estate should be treated as a unit and, to this end, that questions of intestate succession to movables should be governed by a single law."). See also Introductory Note, Comment *e*.

Regarding judicial avoidance of the situs rule by applying the doctrine of equitable conversion, see, e.g., McGuire v. Andre, 65 So. 2d 185, 192 (Ala. 1953) (applying law of Kentucky, decedent's residence at time of death, to govern intestate succession to real property in Alabama). Cf. In re Wiley's Estate, 36 N.W. 2d 483, 489 (Neb. 1949) (applying law of Nebraska, decedent's residence at time of death, to govern succession to real property in Wyoming). See also JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.04, at 11-9

to 11-10 (2010 ed. 2009) ("In circumventing the rigid choice-of-law rules pertaining to [intestate succession to] immovables, equitable conversion has become perhaps the leading device. . . . American courts have in many instances applied the doctrine of equitable conversion to reach the opposite outcome. . . ").

3. Comment c. Domicile. Regarding domicile for purposes of resolving choice-of-law issues, see Chapter 2 of this Restatement.

4. Comment d. Domestic and international contexts. See DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, VOL. 2, Rule 150, Comment, at 1417 (Adrian Briggs, Andrew Dickinson, Jonathan Harris & J.D. McClean eds., 15th ed. 2012) ("[O]utside the common law world the *lex situs* rule for intestate succession to land has been abandoned almost everywhere. . . "); European Succession Regulation art. 21(1) ("Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death."); id. at art. 23(2)(b) (scope of applicable law includes "the determination of the beneficiaries [and] of their respective shares"); Esperanza Castellanos Ruiz, *Article 23: The Scope of the Applicable Law*, *in* THE EU SUCCESSION REGULATION: A COMMENTARY 351, 355–356, para. 7 (Algonso-Luis Calvo Caravaca, Angelo Davì & Heiz-Peter Mansel eds., 2016) (scope of applicable law under Article 23(2)(b) of European Succession Regulation extends to whether a transfer of assets is intestate or testate and, "in the case of intestate successions, the different categories of successors, generally grouped in grades of kinship, specifically which heirs are called to succeed and their order"). See also Hague Succession Convention art. 3:

> (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
>
> (3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Id. at art. 7(2)(a) (scope of applicable law includes "the determination of the heirs, devisees and legatees [and] the respective shares of those persons"); DONOVAN W. M. WATERS, EXPLANATORY REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS, para. 39, at 29 (1988) (for purposes of Hague Succession Convention, "'[s]uccession to the estates of deceased persons' refers to all forms of succession, whether through testacy or intestacy").

5. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 236 (AM. L. INST. 1971) ("(1) The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."); id. at § 260 ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.").

§ 7.30. Escheat

Whether there is an escheat of property of a decedent to which no person is legally entitled to succeed is determined by the law of the state where the property was located at the time of death.

Comment:

a. Scope. The law of a state may provide that a decedent's property escheats—that is, it passes to the state—in the absence of a person entitled to succeed to it. This Section covers choice of law for determining whether such property escheats. This Section applies to both real property and personal property. This Section does not cover choice of law for issues about whether a decedent's property passes by testate or intestate succession (see §§ 7.25–7.29) or issues about the matrimonial property rights of a surviving spouse upon the death of a spouse (see § 7.20). This Section covers only choice of law between states. It does not cover choice of law between States and the federal government or federal preemption of State law governing escheat.

b. Rationale. In Delaware v. New York, 507 U.S. 490, 498 (1993), the U.S. Supreme Court reaffirmed the rule that "only the State in which the property is located may escheat." This substantive rule implies that the law of the state where property is located determines whether that property escheats, as stated in this Section's choice-of-law rule. The law of the state where property is located may provide that certain property may escheat to another state, but the law of the other state cannot compel that result.

c. Location of intangible property. For purposes of this Section's choice-of-law rule, intangible property is generally deemed to be located in the state of the decedent's domicile at the time of death. However, the U.S. Supreme Court in *Delaware v. New York*, 507 U.S. at 499–500, reaffirmed the following primary and secondary rules regarding debt:

> [B]ecause the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the State of "the creditor's last known address as shown by the debtor's books and records." [I]f the primary rule fails because the debtor's records disclose no address for a creditor or because the creditor's last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated. These rules arise from our "authority and duty to determine for [ourselves] all questions that pertain" to a controversy between States, and no State may supersede them by purporting to prescribe a different priority under state law.

For purposes of the secondary rule, as to bank deposits, the bank is a "debtor," and as to assets held by an intermediary for the benefit of a creditor, the intermediary is the "debtor." To be consistent with these substantive rules, when applying this Section's choice-of-law rule, the location of a debt owed to a decedent-creditor is deemed to be: (1) the state of the their last known address, as shown by the debtor's books and records; or (2) the state in which the debtor is incorporated if the debtor's records disclose no address for the decedent-creditor or if their last known address is in a state without laws providing for escheat.. In many if not most cases, the state of the creditor-decedent's last known address is likely to be the same as the creditor-decedent's domicile at the time of death, but this will not necessarily always be the case (for example, if the decedent's state of domicile changed but the records were not updated with a new domicile address).

d. Domestic and international contexts. This Section's choice-of-law rule applies in both domestic and international contexts. However, some states' succession laws provide that if a decedent dies intestate and no natural heirs can be identified, the decedent's property passes to the state itself as an heir—not as a matter of escheat, but as a matter of civil succession. If a decedent's domicile at the time of death was in a civil-succession state, but property of that decedent is located in an escheat state, the question arises whether the property should pass to the civil-succession state or to the escheat state. Under § 7.29, the law of the state of the decedent's domicile at the time of death governs intestate succession. If that state's law provides for civil succession, then the decedent's property passes to that state as an heir as a matter of succession and, because escheat occurs only if no heir can be identified, the issue of escheat by the situs state need not be reached.

However, the state where that property is located may, by reason of public policy, decline to permit its transfer to a civil-succession state. This result may be most likely when the property at issue is real property.

REPORTERS' NOTES

1. Comment a. Scope. Escheat is the transfer of a decedent's property to the state when there is no person entitled to succeed to that property. See SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 1.1, at 8 (6th ed. 2021) ("When a person dies without a will and without heirs, the person's property passes to the state by 'escheat.'"). Therefore, before determining whether a decedent's property escheats (which is the issue governed the law of the state indicated by this Section), it must be determined whether that property has passed by testate or intestate succession (see §§ 7.25–7.29) or by virtue of the operation of matrimonial property rights (see § 7.20). See Restatement of the Law Second, Conflict of Laws § 266, Comment *a* (AM. L. INST. 1971) ("The rule of this Section is concerned with the state which may escheat the assets of a decedent in the absence of a person entitled to succeed thereto."); id. at Comment *c* ("Whether there are persons entitled to succeed to the assets of a decedent will be determined by application of the law governing succession."); W. E. Shipley, *Escheat of Personal Property of Intestate Domiciled or Resident in Another State*, 50 A.L.R.2d 1375 (originally published 1956) ("In most of the few cases which have considered the question it has been held that while the law of the domicil will ordinarily be applied in determining the order of succession, yet in the absence of any right to take by succession, the law of the situs of the property will be applied and the goods will be retained by that state."); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.02[A], at 13-27 (2010 ed. 2009) (regarding escheat, "before it can be concluded that the property is ownerless, it must be ascertained whether any individual has a right to succeed to it").

For an overview of state statutes governing escheat, see 16 POWELL ON REAL PROPERTY § 89.06 (2021); id. § 89.01, n. 2 ("The statutes in most jurisdictions declare that the property of a person 'who dies intestate, without heirs' shall escheat. Others are worded in terms of persons who die intestate, without heirs permitted to take; or persons who die with wills which fail to make complete disposition and without heirs able to take the part not disposed of by the will; or of persons who die intestate with no known heir; or of persons who die intestate because of no claimant, or because of renunciations plus no heirs.").

In some situations, federal law may preempt state law governing escheat. See, e.g., 38 U.S.C.A. § 5502 (veterans' benefits "which under the law of the State wherein the beneficiary had last legal residence would escheat to the State, shall escheat to the United States"). See generally JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.02[A][5], at 13-31 (2010 ed. 2009) (discussing federal-state dimension of escheat).

2. Comment b. Rationale. See Goodyear v. Trust Co. Bank, 276 S.E. 2d 30 (Ga. 1981) (applying Georgia law to determine whether real property located in Georgia escheated to state);

In re Mills' Estate, 212 A.2d 799 (N.J. Super. Ct. 1965) (applying New Jersey law to determine when state acquired by escheat real property located in New Jersey); Thomas v. Oklahoma Natural Gas Co., 527 P.2d 856 (Okla. Ct. App. 1974) (applying Oklahoma law to determine whether real property located in Oklahoma escheated to state). See also See also Restatement of the Law Second, Conflict of Laws § 243 (AM. L. INST. 1971) ("Whether there is an escheat of an interest in land is determined by the local law of the situs.").

3. Comment c. Situs of intangible property. In Delaware v. New York, 507 U.S. 490, 498–499 (1993), the U.S. Supreme Court acknowledged that the situs rule is difficult to apply to intangible property since it "'is not physical matter which can be located on a map,' and frequently no single State can claim an uncontested right to escheat such property." The Supreme Court's primary rule "flowed from the common-law 'concept of 'mobilia sequuntur personam,' according to which intangible personal property is found at the domicile of its owner.'" Id. at 503.

The reference in the primary rule of *Delaware v. New York* to the creditor's last known address will in many cases be the same as a reference to the decedent's domicile at the time of death. See PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 20.4, at 1250 (6th ed. 2018) ("In abandoned property cases involving intangibles, the United States Supreme Court has concluded that the state of the last known address of the owner of the intangibles is the only state having jurisdiction to escheat. This is a reference to the assumed domicile of the owner which reinforces the domicile reference in a situation where competing claims are difficult to base on 'situs.'"). Of course, however, these will not always be the same. See JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.02[A][3], at 13-30 (2010 ed. 2009) (noting that the terms "domicile" and "last known address" "simply do not have the same meaning" and may "in many instances point to entirely different jurisdictions"). See also Granite Equipment Leasing Corp. v. Hutton, 525 P.2d 223, 226 (Wash. 1974) ("the situs of an intangible follows the situs of the domicile of the owner"); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 20.4, at 1249 (6th ed. 2018) ("When an intangible is not represented by a document it has no particular situs and the reference by the forum would be directly to the domicile.").

Regarding bank deposits and securities held by intermediaries, see *Delaware v. New York*, 507 U.S. at 502 ("deposits are debtor obligations of the bank"); id. at 504 ("intermediaries who hold unclaimed securities distributions in their own name are the relevant 'debtors' under the secondary rule").

4. Comment d. Domestic and international contexts. See, e.g., In re Utassi's Will, 209 N.E.2d 65 (Ct. App. NY 1965) (holding that Swiss municipality entitled to take property of intestate decedent domiciled there and without heirs, in accordance with Swiss civil-succession law, even though property was located in New York); Matter of Khotim, 362 N.E.2d 253, (Ct. App. NY 1977) (following rule in *In re Utassi's Will*, but stating that "[t]he rule is permissive . . . [and] the State has the power by legislation to preclude sovereignties from 'inheriting' assets located within the State"). Regarding the problem of situations involving civil-succession states,

see generally JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 13.02[B], at 13-32 to 13-37 (2010 ed. 2009). As noted there, "even a country prepared to respect a foreign jurisdiction as an heir in the instance of personal property might not do so in the case of real property." Id. at 13-36.

The approach suggested in Comment *d* is similar to that adopted by EU Succession Regulation and the Hague Succession Convention. See EU Succession Regulation art. 33 ("To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole."); Hague Succession Convention art. 16 ("Where under the law applicable by virtue of the Convention there is no heir, devisee or legatee under a disposition of property upon death, and no physical person is an heir by operation of law, the application of the law so determined does not preclude a State or an entity appointed thereto by that State from appropriating the assets of the estate that are situated in its territory.").

5. Prior Restatement. See Restatement of the Law Second, Conflict of Laws § 243 (AM. L. INST. 1971) ("Whether there is an escheat of an interest in land is determined by the local law of the situs."); id. at § 266 ("The chattels of an intestate pass to the state in which they are administered when it is determined that by law no person is entitled to succeed thereto.").

APPENDIX A
BLACK LETTER OF PRELIMINARY DRAFT NO. 7

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§ 5.03. Manifestly More Appropriate Law

The law selected by the rules of this Restatement will not be used if a case presents exceptional and unanticipated circumstances that make the use of a different state's law manifestly more appropriate. In such cases, the court will select the manifestly more appropriate law.

§ 5.04. Public Policy

A court may decline to decide an issue under foreign law if the use of foreign law would be offensive to a strong forum public policy.

§ 7.25. Formal Validity of Wills

The law of the state of the testator's domicile at the time of death governs the formal validity of a will.

§ 7.26. Invalidity of Will Due to Testator's Incapacity or Another's Wrongdoing

The law of the state of the testator's domicile at the time of death governs whether a will is invalid due to the testator's incapacity or another's wrongdoing.

§ 7.27. Rights of Certain Persons to Take from Estate

The law of the state of the testator's domicile at the time of death governs the rights, if any, of a person to take from the testator's estate even if the will does not so provide.

§ 7.28. Construction of Wills

(a) The construction of a will is governed by the law of the state designated for that purpose in the will.

(b) In the absence of such a designation, the law of the state of the decedent's domicile at the time of death governs the construction of the will.

§ 7.29. Intestate Succession

The law of the state of the decedent's domicile at the time of death governs the transfer of property by intestate succession.

§ 7.30. Escheat

Whether there is an escheat of property of a decedent to which no person is legally entitled to succeed is determined by the law of the state where the property was located at the time of death.