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Jurisdiction and Choice of Forum
in Succession Matters: *Re Foote (Estate Of)*

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1. Introduction

- With greater mobility of people and globalization of assets, estate administration and contentious proceedings will become increasingly complex as we move forward into the rest of the 21st century.
- Multiple-will planning and separate situs wills are increasingly commonplace, in particular in Ontario estate practice.
- Client profiles are more intricate and complicated: multiple marriages, blended families, assets located in several jurisdictions, family members resident in different jurisdictions, affiliations of clients to several jurisdictions whether based on domicile, citizenship or residence.

2. Jurisdiction and Succession Matters

- Threshold issues: where can proceedings be brought involving a succession matter?

- Where an Ontario court issues a Certificate of Appointment of Estate Trustee, it has jurisdiction to determine succession to the property administered.
- Ontario courts have jurisdiction to issue a Certificate of Appointment of Estate Trustee in respect of any deceased person (*Estates Act*, R.S.O. 1990, c. E.21, s.7).
- In practice, courts exercise discretion in determining which succession matters they will hear.
- If property is located in Ontario, Ontario court has jurisdiction.
- If deceased died domiciled in Ontario, Ontario court has jurisdiction over all of the deceased's worldwide movables.
- Jurisdiction of the court of domicile to determine succession to movables may not be exclusive: the court where the movables are situate may also have jurisdiction.
- Where the law of the deceased's domicile conflicts with the place where the property is located, the law of the deceased's domicile may be ineffective.

3. Jurisdiction and Choice of Forum: *Re Foote (Estate Of)*¹

(a) Issues

- Deceased's spouse and children were considering making application for dependant's relief. They applied to the Alberta court for advice and directions as to:
 - (i) the interpretation and validity of an "in terrorem" or anti-litigation clause in the deceased's will and
 - (ii) where the deceased was domiciled at the date of his death.

- One of the major beneficiaries of the Estate, a foreign charity, then brought an application for a declaration that the Alberta court had no jurisdiction to deal with the issue of domicile, or for the court to decline jurisdiction on the domicile issue.

- Key issue addressed by the court: whether the Alberta court was the appropriate forum to determine the issue of the deceased's domicile.

(b) Facts

- The deceased was born and educated in Alberta, and practiced law there until 1967. He then resided in Japan, and then on Norfolk Island, a territory of Australia, for many years before his death in 2004 in Edmonton, Alberta.

¹ 2007 ABQB 654

- His Canadian assets included a condominium in British Columbia, and a cottage in Alberta. He had assets as well in Norfolk Island, but the bulk of his substantial assets were in British Virgin Islands.
- The deceased left three wills, all executed in Edmonton. Under each will, his long-time friend B, an Alberta resident, was appointed sole executor.
- One will dealt with his worldwide assets, except for assets in Canada and Norfolk Island, and was probated in British Virgin Islands. The second will dealt with his Norfolk Island assets and was probated there. His third will dealt with his Canadian assets and was probated in Alberta.
- The residue of the worldwide estate was left to a British Virgin Island corporation, which was required to divide its assets between an Australian charity and an Alberta charity (the Edmonton Community Foundation).
- On the issue of forum, the Australian charity asserted the appropriate forum to determine the deceased's domicile was Norfolk Island. The deceased's widow and children opposed the charity's application and took the position they were entitled as of right to take proceedings in Alberta because the executor resided in Alberta, and that the charity had not met the heavy onus of establishing that Norfolk Island was a clearly more appropriate forum to determine the domicile issue.

(c) Analysis and Findings

- Court reviewed relevant case law for the choice of appropriate forum, including lists of relevant factors to be considered.
- Under Alberta law, it concluded that the plaintiff's choice of forum was not entitled to be accorded any special status unless that forum has jurisdiction as of right, in which event if there is a superior forum having regard to the interests of both parties, litigation should be pursued in that forum.
- Both parties had agreed that the question of domicile should be determined in either Alberta or Norfolk Island. The court held the Australian charity had the onus to establish that Norfolk Island is more suitable if jurisdiction in Alberta is not as of right, or that Norfolk Island is clearly or distinctly more suitable than Alberta if Alberta possesses jurisdiction as of right.
- The court held that Alberta possesses jurisdiction over the executor as of right.
- It held there was no question Alberta had jurisdiction over the Alberta resident executor with regard to the Alberta estate, and that Alberta was both more suitable, but also, more clearly and distinctly suitable. It held that the application brought by the family for advice and directions as it related to the Alberta will and assets had been brought in the most suitable forum.

- The court held a number of jurisdictions had jurisdiction over the executor as a matter of right, and that jurisdiction was not exclusive, i.e. neither of the jurisdictions in question had sole jurisdiction.
- The court stated that no authority had been cited by the applicant Australian charity that a court where the defendant resides does not have jurisdiction over him when he acts in a representative capacity over non-resident matters. In fact, the court observed, the foreign beneficiary would likely look to the jurisdiction where the executor resides and has his business or assets if they wish to have redress or remedies against the executor.
- The court then considered a variety of factors to determine whether Norfolk Island was a clearly or distinctly more suitable forum than Alberta, including:
 - (i) the location of the majority of the parties: Alberta was favoured.
 - (ii) the location of key witnesses and evidence: neutral.
 - (iii) avoidance of multiplicity of proceedings: since there were no other proceedings, Alberta was favoured.
 - (iv) applicable law and its weight: neutral. The foreign charity argued that it would be prejudiced if Alberta was the forum since domicile would be determined under Alberta law, which differed from Norfolk Island law. Under Alberta law, if the deceased had abandoned his domicile of choice of Norfolk Island, his domicile would revert to Alberta as his domicile of origin. Under the law of domicile applicable to Norfolk Island, his domicile of choice would remain there unless a new domicile of choice was acquired. The court observed that these

differences were not factors that added weight to either jurisdiction, and that the matter went both ways.

(v) geographical factors suggesting the natural forum: Alberta favoured. Everyone, with the exception of the Norfolk Island witnesses and the deceased's spouse who resided in Norfolk Island, would be inconvenienced in going to Norfolk Island for an application on domicile.

(vi) where the cause of action arose: Alberta favoured. All three wills were made in Alberta. If the cause of action is failing to make adequate arrangements for dependants, the cause of action arose in Edmonton, Alberta.

- A number of other factors were determined to be neutral.
- The court concluded a majority of the relevant factors favoured Alberta, and that the Australian charity had failed to meet the burden of demonstrating Norfolk Island as clearly or distinctly more suitable than Alberta. Accordingly, Alberta was held to be the appropriate jurisdiction to determine the issue of the deceased's domicile.