Connecting the Dots: Determining the Most Appropriate Connecting Factor in Cases of Cross-Border Intestacy

Jeanne-Marie Bonnet

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago – Te Whare Wānanga o Otāgo

October 2021

Acknowledgements

My first thanks goes to Dr Maria Hook, not only for her expertise and advice, but also for her constant encouragement and reassurance. Since 2019 she has ignited in me a passion for the conflict of laws that I will carry into the future. What a privilege it is to have worked under her supervision! All my mistakes, naturally, remain my own.

I would like to thank my parents and my family for their support and love. Thank you Ma and Pa for encouraging me as I traversed the foreign world of law. Thank you Gerard and Antoine for reminding me that there are better things in life than being hidden in the library all day. Thank you Piet for showing me that everything worth saying should be summed up in two sentences.

Thank you to the Law Girls, the Danger Zone, and the Cosy Dwellings flatmates. You have all supported me throughout my time at Otago in more ways than any of us can count. For those who do not fall into those categories but remain important to me, thank you. You know who you are.

Thank you Kieran for tolerating me reading this entire dissertation to you over Zoom, for coming to my seminar on your birthday, and for always fighting in my corner. Your support is endless and appreciated beyond measure. You are my best friend and by far my biggest fan.

Psalm 121. All my help comes from the Lord.

Table of Contents

I Introduction: Choice of law for cross-border intestacy

"…a rational will is a better disposition than any that can be made by the law itself."[1]

Succession law is where family law and property law meet at an emotionally-charged crossroads. This is often a complex area of law, as the legislature must step in to distribute property according to the deceased's presumed intentions.[2] The intestacy rules of any jurisdiction are unlikely to ever perfectly mirror the deceased's hypothetical will, particularly where deceased had property at home and abroad. In this context, Cockburn CJ's comments ring true. Nevertheless, New Zealanders generally have poor testation rates. Only around half of New Zealanders over the age of 18 have a will.[3] That statistic is likely also representative of the almost one-million New Zealanders estimated to be living overseas,[4] meaning that cross-border intestacy rules should be carefully and thoughtfully crafted.

Carefully crafting cross-border intestacy rules is the work of the conflict of laws. The way that the conflict of laws deals with intestacy is complicated,[5] and in April 2021 the Law Commission suggested reform of the choice-of-law rules applicable to intestacy as part of its broader review of succession law in New Zealand.[6] The author agrees that the status quo should be reformed. This dissertation proposes an evaluation of existing choice-of-law rules (connecting factors) in order to determine which is most appropriate to govern cases of cross-border intestacy.

---

[1] Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 WB 549 at 565.

[2] This rationale is still recognised as the guiding policy concern in the intestacy space. See Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021) at 6.7. Herein after the "Law Commission Issues Paper."

[3] Law Commission Issues Paper, above n 2, at 6.2.

[4] The Law Commission estimates between 500,000-1,000,000 New Zealanders were living overseas prior to the COVID-19 epidemic in 2020: see the Law Commission Issues Paper, above n 2, at 17.1, citing Paul Spoonley *The New New Zealand: Facing demographic disruption* (Massey University Press, 2020),

[5] See Chapter III,

[6] For a general overview of the Law Commission's views on the conflict of laws in the succession sphere, see Chapter 17 of the Law Commission Issues Paper, above n 2.

To find the most appropriate choice-of-law rule for this context, Chapter II of this work will lay out the principles used by the author to evaluate the potentially applicable choice-of-law rules in this area, with reference to New Zealand conflict of laws jurisprudence and policy rationales. These principles will first be used to evaluate the status quo at Chapter III. At Chapter IV the author will set out her preferred choice-of-law rule: the closest and most real connection rule. This choice-of-law rule will be evaluated with reference to the principles identified at Chapter II. It will be shown that the broad and holistic enquiry required by the closest and most real connection rule most often indicates the application of the most appropriate governing law in cases of cross-border intestacy.

This will be contrasted in Chapter V with a principled evaluation of the remaining "personal" connecting factors, including the two interpretations of habitual residence. The Law Commission has suggested adopting a European-style understanding of habitual residence to determine choice of law for cross-border succession matters,[7] but the author has her reservations about this proposed approach. As will be explored at Chapter VI, the European understanding of habitual residence has the same aim as the closest and most real connection test, but is constrained in its enquiry by the need to consider residence-based factors. This can result not only in a difficult judicial enquiry, but also risks turning habitual residence into a term of art. Further, given that New Zealand has nearly thirty years of case law interpreting habitual residence according to common law tradition, a new meaning of habitual residence may muddy the waters for cross-border intestacy. Therefore, comparative analysis of habitual residence at Chapter VI reinforces the general conclusion of this dissertation; that the most appropriate choice-of-law rule to govern cross-border intestacy is the closest and most real connection rule. This factor has the necessary flexibility to account for diverse personal circumstances without a constrained reliance on residence. It likely corresponds with the deceased's presumed intentions, and by pointing

[7] Law Commission Issues Paper, above n 2, at 17.17-17.18, basing their proposal on 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 enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201/107; herein after "the EU Succession Regulation",

to a single governing law will prevent perceived injustices towards heirs. These benefits are more fully explored throughout this work, particularly at Chapters IV and VI.

Discussions of party autonomy and adaptation are beyond the scope of this work. In the context of intestacy, mechanisms to promote party autonomy are less relevant since the deceased had not exercised autonomy in selecting an applicable law (for example, through a will). Adaptation is a complex process that allows foreign rights in land to be recognised in different jurisdictions.[8] While it is possible for some heirs' claims to be satisfied by a transfer of property (which would need to accord with the realty laws of the situs), often estates are "liquidated" and the value distributed according to intestacy regimes. To simplify analysis, this dissertation will assume that foreign realty is not used to satisfy claims on the estate, but is rather sold and the entire residue distributed according to the intestacy rules indicated by the governing law.

Furthermore, this dissertation focuses on the "succession" aspect of intestacy law. Rather than evaluating the processes and responsibilities of administrators in the exercise of their duties, this dissertation will evaluate the rules which govern the final distributions of the estate. As such, the reasonable expectations of heirs are also relevant, but a discussion of the complexities faced by the administrator in tying up the estate, including tax implications, is beyond the scope of the work.[9]

In the conflicts space, succession is a complex area. Testate succession has a multitude of different applicable choice-of-law rules to determine the law applicable to particular aspects of the will, including validity, capacity, interpretation and revocation.[10] In the author's opinion, each choice-of-law rule should be analysed on its own terms, meaning that a general discussion of succession is beyond the scope of this work.[11] Rather, the

[8] See generally Gerhard Dannemann "Adaptation" in Stefan Leible (ed) *General Principles of European Private International Law* (Wolters Kluwer International BV, Alphen aan den Rijn, Netherlands, 2016).
[9] The author notes that the administrator may also be an heir, since he or she is often the person with the greatest beneficial interest in the estate. See s 6 of the Administration Act 1969.
[10] Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at 8.102-8.124. Herein after *"The Conflict of Laws in New Zealand"*.
[11] The breadth of the cross-border implications of succession law generally is recognised by the Law Commission Issues Paper, above n 2, at 17.25-17.36 in suggesting two scopes for their proposed reform.

author has focused this analysis on intestacy. While complex, its treatment as a monolithic block as opposed to a series of related conflicts questions makes it more accessible for a work of this nature.

II Identifying good law in the context of cross-border intestacy

A Introduction

When an individual dies intestate with property in more than one jurisdiction, the conflict of laws must be engaged to determine how that property will be distributed. Recourse to the conflict of laws is necessary, as complete reliance on domestic law in cross-border cases may result in injustice for the parties involved.[12] While there are many theoretical explanations for the conflict of laws and its methodologies,[13] in the context of this dissertation it is most important to identify the principles at work within the New Zealand courts that shape and guide the evolving conflicts jurisprudence.

This dissertation limits itself to choice of law, a key area within private international law. The choice-of-law process is relevant to intestacy as it determines which substantive regime (i.e. which country's intestacy rules) will dictate the distribution of the estate.[14] New Zealand courts have a settled approach to dealing with choice-of-law issues:[15] the issue is first *characterised*; that characterisation usually indicates a particular *connecting factor*; and the connecting factor points to the *applicable substantive law* to determine the issue.

This enquiry is usually described as rules-based,[16] but values are relevant in the development of these choice-of-law rules.[17] Principles and policy reasoning carry

---

[12] See Lawrence Collins (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [1-006]-[1-007] – herein after *"Dicey"*; David McClean and Kisch Beevers (ed) *Morris – The Conflict of Laws* (7th ed, Sweet & Maxwell, London, 2009) at [1-010]; and *The Conflict of Laws in New Zealand*, above n 10, at [1.15].

[13] See the summary of different schools of thought in *Morris – The Conflict of Laws*, above n 12, at chapter 21. For more modern theories, see for example Louise Weinberg "Theory Wars in the Conflict of Laws" (2005) 103 Mich L Rev 1631, especially her discussion of Dean Symeonides and David Cavers at 1650-1651,

[14] Note that in some cases intestacy rules will be state or "law district" intestacy rules rather than intestacy rules of a particular country. See comments in Chapter V.B.

[15] Authority for this process is *Macmillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 at 391-392. This dictum was adopted in its totality in *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412 at [32] by Miller J:

[16] *The Conflict of Laws in New Zealand,* above n 10, at 4.5-4.7,

[17] *The Conflict of Laws in New Zealand,* above n 10, at 4.9.

particular weight in the conflict of laws.[18] This means that finding the most appropriate choice-of-law rule for intestacy must take into account values underpinning New Zealand's approach to the conflict of laws, as well as policies relevant to intestacy in a domestic context.[19] This is not intended to mean that New Zealand's approach to choice of law is outcomes-based (determined based on comparing the results of potential governing laws). With the exception of outcomes that would offend fundamental societal values,[20] "conflicts justice" is not dependent on the relative merits of different outcomes.[21] "Conflicts justice" is not divorced from values, but rather seeks to strike a balance between the "conflicts interests" of parties, governments and the public.[22] This means that when developing the rules of the rules-based system, substantive values are important. New Zealand choice-of-law rules are necessarily imbued with policy rationales that reflect domestic legal perspectives and objectives. As will be discussed below, this likely means that New Zealand choice-of-law rules in this area should reflect the policies underlying the intestacy rules in the Administration Act.[23]

To discover both the values underlying New Zealand's substantive intestacy law,[24] and see the rationales informing choice of law in New Zealand, analysis of case law is important. New Zealand choice-of-law rules are generally found in the common law rather than in legislation,[25] making case law the touchstone for finding the operative principles of private international law. Case law reveals the rationales and principles that judges rely on when engaging in the choice-of-law process, although the conflict of laws is not restrained by the usual rules of persuasive hierarchies. New Zealand courts may look outside of the

[18] *The Conflict of Laws in New Zealand,* above n 10, at 1.25.
[19] Willis L M Reese "Choice of Law Rules or Approach" (1971-1972) 57(3) Cornell L Rev 315 at 330.
[20] That is, the so-called "public policy exception" in choice of law – see *The Conflict of Laws in New Zealand,* above n 10, at 4.88-4.106,
[21] For a deeper discussion of "conflicts justice" see Symeon C Symeonides "Material Justice and Conflicts Justice in Choice of Law" in Patrick J Borchers Borchers and Joachim Zekoll (eds) *International Conflict of Laws for the Third Millenium: Essays in Honour of Friedrich K Juenger* (Transnational Publishers, 2001) 125.
[22] *The Conflict of Laws in New Zealand,* above n 10, at 1.25.
[23] New Zealand's intestacy rules are set out at sections 75-80 of the Administration Act 1969.
[24] Meaning the rationales underlying the Administration Act 1969,
[25] *The Conflict of Laws in New Zealand,* above n 10, at 4.15,

common law legal system for guidance and follow legal trends from other jurisdictions if that would more appropriately solve an issue.[26]

The opportunity for courts to influence the law in this way is largely seen positively. The classic statement of the court's particular influence in this area of law comes from *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC,*[27] where the English Court of Appeal stressed the importance of courts determining the most appropriate governing law without relying on overly mechanical processes.[28] The New Zealand Court of Appeal has also affirmed that the purpose of the choice-of-law process is to determine the most appropriate applicable law.[29]

This indicates two key principles in the New Zealand private international law context: first, the choice-of-law process focuses on finding the most *appropriate* lex causae. Second, this lex causae must be appropriate in the specific *context* of each case. The combined effect is a pragmatic approach to choice of law.[30] According to the Court of Appeal, choice-of-law questions should always be resolved with reference to practical considerations and common-sense.[31]

Further, the characterisation-connecting factor analysis discussed above[32] reveals a basic principle of New Zealand conflict of laws: the appropriate lex causae is that which has the closest *relationship* with the person or issue. It is that relationship that is addressed by the connecting factor.[33] Connection goes beyond mere physical proximity. The principle of connection attempts to engage the substantive law which had the most *meaningful*

---

[26] See comments in *The Conflict of Laws in New Zealand,* above n 10, at 1.20, reflected in this context in the Law Commission's recommendation to follow the European Union in adopting habitual residence as the principle connecting factor in cases of cross-border intestacy in their Issues Paper, above n 2, at 17.17.
[27] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825,
[28] At [27].
[29] *Schumacher v Summergrove Estates Ltd,* above n 15, at [35].
[30] Maria Hook "A first principles approach to couples' property in the conflict of laws" (2019) 15(2) J Priv Int L 257 at 265.
[31] *Schumacher v Summergrove Estates Ltd,* above n 15, at [35].
[32] At page 8
[33] See Mo Zhang "Habitual Residence v Domicile: A Challenge Facing American Conflict of Laws" (2018) 70(2) Maine L Rev 161 at 161.

connection to the parties or assets impugned in the legal question before the courts.[34] This is a more nuanced position than Savigny's rigid view of a single, objective seat of any private international law issue, since it theoretically entertains the (very realistic) position that more than one set of substantive laws can be relevant to any case.[35]

B New Zealand choice-of-law principles in the intestacy context

The rationale underlying domestic intestacy rules is that the estate should be distributed according to the general shape of the deceased's hypothetical will.[36] This position is usually summarised by referring to the deceased's presumed intentions. Choice-of-law rules should also uphold this policy. The deceased's presumed intentions likely correspond to the general expectation that the deceased's property be devolved according to the substantive laws of a system he or she was familiar with,[37] and have been taken to extend to distributing the estate according to a single set of laws (unitary succession).[38]

Since connection is a guiding principle, this single law should naturally be that with the greatest connection to the deceased. Connecting factors such as the lex loci actus (in this case the actus likely being the death of the individual concerned) or the lex situs (location of the property) are unlikely to be appropriate, since they do not necessarily imply a close connection to the deceased.[39] Equally, a focus on the property itself is misplaced.[40] Connecting factors that focus on a connection between the deceased and a system of law are more relevant. In order to find a choice-of-law rule which best ensures this connection between the deceased and the lex causae, this dissertation will evaluate traditional "personal" connecting factors (domicile, nationality and habitual residence) as well as a

[34] *The Conflict of Laws in New Zealand,* above n 10, at 6.19.
[35] See, for example, *The Conflict of Laws* above n 10, at 4.10.
[36] See the Law Commission Issues Paper, above n 2, at Chapter 6, in particular at 6.7. Note that the Law Commission recommends updating section 77 of the Administration Act 1969 so that it better reflects current societal norms. Currently section 77 reflects a bias towards nuclear family units that may no longer be appropriate. However, it still recommends preserving this principle – see at 6.22.
[37] David Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates" (2004) DNotl Les Succession Internationales dans l'UE 359 at 361,
[38] Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates," above n 37, at 361.
[39] The lex situs rule as a connecting factor is further analysed at Chapter III.C.1.
[40] See a similar discussion Hook "A first principles approach to couples' property in the conflict of laws" above n 30, at 269-275.

"general" choice-of-law rule (the closest and most real connection test). As will become clear, the latter performs best in its ability to indicate an appropriate governing law with a significant and proximate connection to the deceased.[41]

Additional expectations that should not be undermined in the cross-border context belong to the heirs. While heirs' expectations are not influential in domestic policy as such, the frustration of their reasonable expectations due to the operation of conflicts rules should be avoided, since their remedies are curbed by the cross-border nature of the inheritance.[42] As explored in Chapter III, applying intestacy rules from different jurisdictions to the same estate may result in perceived unfair distributions. A classic case example of this is *Re Collens.*[43] In this case, the deceased's widow received a greater share of the total estate than expected due to the scission principle.[44] She received a substantial distribution from each jurisdiction in which her wealthy late husband had real property, which resulted in a smaller distribution to his children from an earlier marriage. Those children appealed this result due to perceived injustice, but Sir Nicolas Browne Wilkinson VC was unable to reach a different conclusion due to the English choice-of-law rules of the time – the same rules that are still operative in New Zealand. The Vice Chancellor expressed his regret at the outcome in strong terms:[45]

> In my judgment it is unjust that because the estate is spread around the world the widow takes not only one third under Trinidad and Tobago law but in addition the further capital sum under English law. However, in my judgment it is not possible on the construction of the Act to hold in favour of the children…
>
> …I reach the conclusion with some regret… However, that is the law as it stands at present… my job is to administer the law as it now is.

This is not a unique case: a factually similar, earlier case that has been equally criticised is the decision in *Re Rea,*[46] where the widow was again entitled to two legacies from the

[41] See in particular, Chapters IV and VI.
[42] See the discussion of Milly and Noah at Chapter III.B.2.
[43] *Re Collens (deceased), Royal Bank of Canada (London) Ltd v Krogh and others* [1986] 1 All ER 611 (Ch).
[44] Discussed at Chapter III.
[45] *Re Collens,* above n 43, at 615-616:
[46] *Re Rea* [1902] 1 Ir R 451,

estate, to the detriment of other heirs.[47] This should not be the case. The law should not frustrate the legitimate expectations of those entitled to a share of the estate.[48] Therefore, it is desirable that the distribution of the liquidated value of the estate be governed by a single set of legal rules. These should be the rules of a legal system that is connected to the deceased, rather than only to the deceased's property.[49]

Finally, an important consideration in this context is that the most appropriate choice-of-law rule should be simple. The conflict of laws has often been criticised as an area of law with needlessly complicated rules.[50] Whether or not this is a fair criticism, the undesirability of complex rules is related to the reasonable expectations of both the deceased and his or her heirs.[51] Unnecessary complexity is a main criticism of the status quo,[52] since scission leads to a complicated classification process for property in each jurisdiction, as well as different national rules for determining who may inherit property as legitimate heirs.[53] Selecting a simple choice-of-law rule is a solution that upholds the rule of law principle of transparent and clear law. Given that New Zealand is in a position where it wishes to reform the complex status quo,[54] the status quo should be replaced with a connecting factor which is simple to understand and apply. In keeping with New Zealand's pragmatic approach to choice of law, a simple connecting factor will likely save in time and transaction costs for those involved in distributing the estate.

[47] See further discussion of this case in JHC Morris "Intestate Succession to Land in the Conflict of Laws" (1969) 85 LQR 339 at 349.
[48] Mariusz Załucki "Attempts to Harmonise the Inheritance Law in Europe: Past, Present and Future" (2018) 103(5) Iowa L Rev 2317 at 2331.
[49] For example, lex situs does not regard who the deceased was, but rather only where he or she kept his or her property. See further see Hook "A first principles approach to couples' property in the conflict of laws" above n 30, for example at 258.
[50] For example, noted in Pierre A Lalive *The Transfer of Chattels in the Conflict of Laws: A Comparative Study* (reprint Scientia Verlag Aalen, Darmstadt, Germany, 1977) at 113.
[51] Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates," above n 37, at 363.
[52] For example, see discussion in *Dicey*, above n 12, at [27-018],
[53] Explored further at Chapter III.
[54] See the Law Commission Issues Paper, above n 2, at 17.16,

C Specific policy considerations regarding Māori property

Adopting a choice-of-law rule for cross-border intestacy must comply with the Crown's existing legal obligations, in particular its obligations to Māori. Under domestic law succession rules do not apply to Māori freehold land, which passes according to whakapapa connections under Te Ture Whenua Māori Act 1993.[55] Further, while the current intestacy rules do not specifically separate taonga from personal property,[56] there is increasing awareness that taonga should be treated differently to other forms of personal property.[57] The sui generis nature of Māori land and taonga should be reflected in New Zealand's cross-border intestacy rules to ensure that Māori connections with land and taonga are respected.

Bearing in mind the above comments about the desirability of a single law being applicable to succession without complicated additional rules, the author acknowledges that the best way to respect Māori interests in special property would likely be through an exception to the general choice-of-law rule to recognise that Māori freehold land and taonga do not form part of the deceased's estate.

This will likely be best achieved through the codification of a new choice-of-law rule and corresponding Māori property exception. This could be similar to the Article 30 proviso in the European Union Succession Regulation,[58] which deems certain immovable property subject to special rules.[59] The Māori property exception should be drafted as an overriding mandatory rule. Such a carve-out provision is unlikely to undermine the general benefit of a new connecting factor in cases of cross-border intestacy. A narrow exception for Māori interests is likely a legitimate precaution rather than overreach of the lex situs.[60] The form

[55] See sections 109-109A.
[56] See section 110 Te Ture Whenua Maori Act 1993,
[57] See the decision in *Biddle v Pooley* [2017] NZHC 338, and also discussion at Chapter 7 of the Law Commission Issues Paper, above n 2.
[58] EU Succession Regulation, above n 7,
[59] For further discussion, see Peter Stone's comments in *EU Private International Law* (3rd ed, Edward Elgar Publishing, Cheltenham, UK, 2014) at 506.
[60] For a similar discussion on Art 30 of the EU Succession Regulation, see discussion in Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates," above n 37, at 362.

of this exception is beyond the scope of this work, and further discussion of intestacy presumes that the deceased did not hold Māori freehold land or taonga.

D Summary of evaluative principles

To summarise, there are several important principles guiding this dissertation's analysis. First, in accordance with domestic law, the most appropriate connecting factor should indicate distribution according to the presumed wishes of the deceased. Those presumed wishes include distribution according to the substantive law that the deceased was familiar with.[61] The deemed presumed wishes of the deceased will often correspond to the reasonable expectations of the heirs under that same law, who would have expected the application of the substantive law most closely connected to the deceased. In both these cases, conflicts justice is likely achieved by finding a connecting factor that regularly points to the most appropriate substantive law.

Simplicity is also important. This means that a unitary intestacy rule is desirable in cases of cross-border intestacy.[62] A single choice-of-law rule makes the governing law easily identifiable by solicitors and the courts. Reliance on a unitary choice-of-law rule results in a simpler administrative task for those in charge of the estate, by avoiding the need for legal advice in each jurisdiction where the deceased held property. As observed by Miller J, choice of law is a practical question.[63] Therefore, choice of law should have a practical and pragmatic answer.

[61] Substantive law meaning the domestic law of the country indicated by the connecting factor.
[62] See for example The [Australian] Law Commission *Choice of Law* (ALRC 58, 1992) at 9.7; and the Law Commission Issues Paper, above n 2, implicitly at 17.16-17.18.
[63] *Schumacher v Summergrove Estates Ltd*, above n 15, at [35].

III The status quo

A Introduction

The choice-of-law rules governing cross-border intestacy are critically important, since they will dictate the applicable intestacy rules by which the estate will devolve. New Zealand's choice-of-law rules in cases of cross-border intestacy will be relevant for New Zealanders who live overseas and also those who live in New Zealand with property overseas. In New Zealand currently, cross-border intestacy results in a complicated and often counterintuitive task for the deceased's administrator. It can also result in complicated and unexpected results for heirs.

Cross-border intestacy in New Zealand operates on the principle of scission, meaning that there are different connecting factors depending on whether the property is "movable" or "immovable." The movable/immovable distinction is largely similar to the common law distinction between personalty and realty. While there are differences between these two classification systems,[64] they are not in issue in this work. The relevant choice-of-law rule for movable property is the lex domicilii,[65] while the relevant rule for immovable property is the lex situs (also called the *lex rei sitae* in European jurisdictions).[66] While scission is the norm in the common law world, its continued use has been almost unanimously criticised by academics and jurists, with most sharing the view that it is a "force of ancient history"[67] that should be retired.

The existence of two connecting factors under the scission principle is the result of the historical position of domestic English succession law. Until 1926, domestic intestate succession in England distinguished between real property and personal property.[68] Since

[64] See Gareth Miller *International Aspects of Succession* (Ashgate Publishing, Hampshire, 2000) at 33-34; and Paul Torrens and others (eds) *Cheshire, North & Fawcett on Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1251 – herein after *"Cheshire, North and Fawcett"*,
[65] This has been law since *Pipon v Pipon* (1744) Amb 25,
[66] According to *Cheshire, North & Fawcett*, above n 64, at 1351, citing *Nelson v Lord Bridport* (1846) 8 Beav 547, this is presumed to be the *lex situs* at the time of the proceedings rather than at the time of death.
[67] M Davies and others *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, Chatswood (NSW) 2020) at 38.1 – herein after *"Nygh's Conflict of Laws in Australia"*
[68] *Dicey*, above n 12, at [27-019]. The position in England changed with the Administration of Estates Act 1925 (UK).

the English position relied on scission at 1840, this position was inherited by New Zealand at colonisation.[69] The distinction between realty and personalty has since been abolished in New Zealand domestic cases of intestacy, but persists in New Zealand's conflict of laws rules. The Law Commission recommended reform of these choice-of-law rules almost twenty-five years ago,[70] but to no avail.

In April 2021, the Law Commission again reviewed the state of New Zealand's cross-border succession rules as part of its review of succession law generally. The Commission suggested dramatic changes to the relevant choice-of-law rules by replacing scission with the single, novel connecting factor of habitual residence.[71] The Law Commission's proposed changes to the lex successionis recognise that New Zealand's current choice-of-law rules for cross-border succession are no longer appropriate. This will be demonstrated through the following examples in Part B.

B Intestacy in practice: theoretical examples of the status quo

Where an individual has failed to keep a valid will, the law must step in and decide how the deceased's property must be distributed between his or her remaining family. Each legal system will have its own set of domestic intestacy rules, which may be the governing law in a conflict of laws case. There is nothing inherently good or bad about any particular set of intestacy rules. Each statutory division of property amongst next-of-kin is necessarily arbitrary, but is shaped by underlying domestic policy.

The issue is when heirs unwittingly find their inheritances curbed or changed by foreign intestacy rules that do not meet their expectations or sense of justice. This is particularly evident when a combination of different laws is involved,[72] since unfamiliar jurisdictions may have different values underpinning their intestacy rules than home jurisdictions. Heirs

[69] Nicola Peart and Prue Vines "Intestate Succession in Australia and New Zealand" in Kenneth G C Reid, Marius J De Waal and Reinhard Zimmermann (eds) *Comparative Succession Law* (Oxford University Press, Oxford, 2015) 349 at 355.
[70] See the Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39) at s 40 of the proposed Act, and accompanying commentary C145,
[71] Law Commission Issues Paper, above n 2, at 17.17 – the first time habitual residence has been used outside of ratification of a Hague or UN Convention.
[72] For example, see the discussion of *Re Collens* above at Chapter II.B,

may have expected that intestacy rules would be reasonably similar across jurisdictions, or that the overall intestacy would be dealt with in a singular fashion to avoid unfair "double portions" at their expense. Determining the content of intestacy regimes in different jurisdictions is a costly exercise for the estate in terms of both time and money.

Consider the following examples:

1) Oliver's Emirati assets

   Oliver is 65 years old. He was born in Australia. At the end of his university studies in engineering he secured a lucrative contract in Dubai managing a large construction project. During the time that Oliver was in Dubai, he began a relationship with a New Zealand woman Jane. They eventually pooled their financial resources to buy a property in Dubai.

   Eventually Oliver and Jane decide to move to New Zealand to be nearer to Jane's family. For the next thirty years they both live in Wellington and have their own children. Oliver also becomes a New Zealand citizen. The property in Dubai is not sold but rather rented out with a friend acting as property manager.

   Oliver dies suddenly without a will and Jane must administer his assets.

At the end of his life, Oliver was domiciled in New Zealand. Therefore, his New Zealand assets will be distributed according to the Administration Act 1969 since this is the substantive law of the lex domicilii. Jane will be entitled to Oliver's personal chattels, $155,000 as a statutory legacy, and one-third of the residue of the estate.[73] The remaining two-thirds goes to Oliver's children per stirpes.[74]

However, the property in Dubai is foreign immovable property and must therefore be distributed according to the substantive law of the lex situs. In this case, that means Emirati

[73] Section 77 of the Administration Act 1969.
[74] Section 77 of the Administration Act 1969.

law. Since this is an intestacy, Oliver has not contracted out of Sharia law.[75] The concept of joint ownership is not recognised under Sharia law, meaning that the property must be distributed as part of the estate.[76] The effect is quite different to what Jane would have expected under New Zealand law. Rather than Jane receiving one-third of the value of the Dubai property, she is only entitled to one-eighth of its value,[77] and may only inherit as a "sharer" rather than as a residuary beneficiary.[78]

2) Milly's Floridian contract

   Milly is a New Zealander who trained as an emergency physician. She has lived and worked in Auckland all her life and is now in her late fifties. She sees an advertisement for a three-year locum position at a hospital in Florida. She and her partner Noah decide that the money and adventure are worth a brief stint in the United States. Their adult children are now all working.

   Given the salary, she and Noah decide that after this they will come back and retire early in a quieter place. Taking advantage of the high house prices in their suburb, they sell their Auckland property for well over $2 million. Using half of that cash, they purchase a new house in Florida. The rest of the cash is left in a savings account in New Zealand, or put towards minor investments.

   Noah and Milly die in an accident towards the end of their three years in Florida. During their period in the United States, they have only returned to New Zealand once for a period of three weeks. Their eldest child is appointed as the administrator of their estates in New Zealand.

[75] "Buying a property in the UAE" (12 Feb 2020) The United Arab Emirates' Government Portal <https://u.ae/en/information-and-services/moving-to-the-uae/expatriates-buying-a-property-in-the-uae>.
[76] Abid Hussain *The Islamic Law of Wills and Inheritance* (Wrentham Consultancy UK, Huddersfield, UK, 2015) at 11.4.3(1).
[77] Hussain, above n 76, at 14.4,
[78] Hussain, above n 76, at 16.6.

Despite the time in Florida, Milly and Noah are likely still domiciled in New Zealand.[79] That means that all the movable assets are distributed according to New Zealand's intestacy rules.[80] The issue again lies with the property in Florida. This is foreign immovable property that must be distributed according to the intestacy rules of the foreign lex situs – in this case according to the Floridian intestacy provisions.[81]

The hurdles in this case stem from questions of status. In the best case scenario, a New Zealand court will decide questions of status according to New Zealand law before distributing the estate according to the applicable governing law(s). However, questions of status are usually determined by the lex successionis,[82] although some uncertainty remains concerning whether New Zealand's rules on the status of children apply when a foreign lex causae is applicable.[83] This can potentially lead to surprising and undesirable outcomes for Milly and Noah's family.

Under Floridian law, there is no intestacy provision for unmarried partners.[84] This would likely come as quite a shock to Milly or Noah, had either survived, given that in New Zealand de facto partners have almost all the legal rights and standing as married spouses or civil union partners. If only Milly had died, the value of her property would bypass Noah to be distributed among their children. If Noah and his children have a good relationship, this may be a simple technicality which would be sorted out within the family. If, however, Noah and his children were estranged, Noah might be left in precarious financial situation (especially if he has fewer assets than Milly did, and relied on her income to support them both). Since this is in the conflicts space, no claims can be brought by Noah under the Property (Relationships) Act 1976 in relation to the foreign immovable property.[85]

---

[79] See the discussion of domicile and its rules in Part C.2. In this case, since there was no intention to live in the United States permanently, Milly and Noah likely retained their New Zealand domicile.
[80] Administration Act 1969.
[81] These are found in the Chapter 732 of the Florida Statute Title XLII: Estates and Trusts.
[82] See *The Conflict of Laws in New Zealand,* above n 10, at 9.111-9.112,
[83] See discussion of this in *The Conflict of Laws in New Zealand,* above n 10, at 9.89-9.92.
[84] For a discussion of this, see for example Lawrence W Waggoner "With Marriage on the Decline and Cohabitation on the Rise, What about Marital Rights for Unmarried Partners?" (2015) 41 ACTC L J 49 at 68.
[85] Property (Relationships) Act 1976 at section 7.

Further, Noah and Milly's children "born out of wedlock" are not entitled to inherit from Noah's estate unless he has acknowledged his paternity or a court order to that effect has been obtained.[86] This is completely different to the position in New Zealand, since the distinction between "legitimate" and "illegitimate" children has been removed by virtue of section 3 of the Status of Children Act 1969. This is obviously an unexpected result that would cause feelings of surprise and hurt for these children.[87] Their remedies are also curbed, since while judges may take foreign property into account when determining quantum in a Family Protection Act claim, decisions concerning foreign immovable property cannot be made.[88] This is a shortcoming of the status quo that has been recognised by the Law Commission.[89]

C The shortcomings of the status quo

As is likely clear through the above examples, having two operative connecting factors in cases of intestacy can lead to unexpected results. The scission principle has been heavily criticised in common law jurisdictions, notably by the authors of *Dicey*[90] and various Law Commissions from across the common law world.[91] Most recently in New Zealand the Law Commission has recommended replacing this dual intestacy regime with a single choice-of-law rule.[92]

Scission is undesirable for many reasons, most of which would have become apparent in the preceding theoretical examples, as well as the discussion of *Re Collens* above at Chapter II.B. Scission subverts the reasonable expectations of the deceased and heirs alike since the two connecting factors usually point to different governing laws. This leads to

[86] Above n 81, Estates and Trusts Fla Stat Ann §732.108.
[87] See Gregg Strock "A Bastard by Any Other Name: A Requiem for the End of Disproportionate Treatment toward out of Wedlock Children in Florida's Probate System" (2018) 13 FIU L Rev 127.
[88] Classic authority for this position is *Re Bailey* [1985] 2 NZLR 656 (HC) at 658-550. Recent authority includes *Moleta v Darlow* [2021] NZHC 2016 at [74]-[76]. See also *The Conflict of Laws in New Zealand*, above n 10, at 8.126.
[89] Law Commission Issues Paper, above n 2, at 17.12.
[90] *Dicey*, above n 12, at [27-018]-[27-019]
[91] For the most relevant examples, see The [Australian] Law Commission, above n 62, at 9.4; Queensland Law Reform Commission *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, 1996) at 12; Law Commission *Succession Law: A Succession (Adjustment) Act*, above n 70, at s 40 of the proposed Act.
[92] Law Commission Issues Paper, above n 2, at 17.16.

unjust outcomes in the distribution of estates. Some heirs may find themselves left out of the estate,[93] and others may receive more than would have been expected if the estate had been distributed according to the laws of a single jurisdiction.[94]

A second pragmatic concern are the added transaction costs the scission principle poses on the estate.[95] These go beyond the general administration costs associated with resealing letters of administration in foreign jurisdictions.[96] First, administrators will have to receive advice as to how the assets in that jurisdiction are classified. The movable/immovable property distinction is a matter of local law (lex situs).[97] After that, the immovable assets must be distributed according to the lex situs, and administrators will likely need legal advice as to the correct division of the assets. The combination of these two tasks may prove to be a laborious process, and therefore an expensive one.

Further, distinguishing property according to whether it is movable or immovable is arbitrary in this context, since intestacy requires not the transfer of the deceased's assets per se, but rather distribution of the value of the deceased's property. It is therefore not strictly relevant whether the residue is composed of the value of immovable property not. It becomes absurd to distribute the value of an estate differently (in different proportions, or in some cases even to different people) simply because of the location of some of the assets prior to being sold. This is the frustration expressed by Sir Nicolas Browne Wilkinson VC in *Re Collens.*[98] Unitary succession avoids the complicated process of characterisation and its associated legal costs.[99]

---

[93] For example, Noah's children in the example at Chapter III.B.2,
[94] For example, *Re Collens,* above at Chapter II.B.
[95] See the persuasive discussion of this issue in the Max Planck Institute for Comparative and International Private Law *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession* (2010) 74(3) *Rabels Zeitschrift* 522 at [128].
[96] John Earles and others *Dobbie's Probate and Administration Practice* (6th ed, LexisNexis NZ Limited, Wellington, 2014) from 391 onwards.
[97] *The Conflict of Laws in New Zealand* above n 10, at 7.44; *Cheshire, North & Fawcett,* above n 64, at 1252. See also the rationale for this laid out *In Re Hoyles, Row v Jagg* [1911] 1 Ch 179 at 186 per Farwell LJ.
[98] See above at Chapter II.B.
[99] Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates," above n 37, at 361.

Beyond scission itself, the two choice-of-law rules that operate under the scission principle are unlikely best suited to dealing with intestacy. Each limb shall be evaluated in turn.

1 Lex situs

The lex situs rule requires applying the substantive law of the place where the property is located. The situs rule has been described as the "most monolithic of all choice-of-law rules",[100] for its constant application to issues involving foreign immovable property. It is a nationalist way of resolving realty disputes that has been engrained in most legal systems for centuries,[101] and has historically been vigorously defended by both academics and domestic courts.[102] The situs rule is usually justified by virtue of its practicality;[103] with reference to the principle of comity;[104] or even as an expression of territorial sovereignty,[105] since the situs has the legal jurisdiction to control property within its geopolitical jurisdiction. A commonly cited dictum to this effect in the intestacy space is Farwell LJ's comment in *Re Hoyles*: [106]

> "No country can be expected to allow questions affecting its own land, or the extent and nature of the interest in its own land which should be regarded as immovable, to be determined otherwise than by its own Courts in accordance with its own interests."

Over time, the hard-line defence of the lex situs rule has softened significantly.[107] Reliance on the lex situs as a choice-of-law rule is now usually justified as a facilitating rule, for

---

[100] Russell J Weintraub "Inquiry into the Utility of Situs as a Concept in Conflicts Analysis" (1966-1967) 52(1) Cornell L Rev 1 at 2,

[101] Bram Akkermans and Caroline S Rupp "Queen Lex Rei Sitae – Off With Her Head?" (2018) 7(3) EPLJ 209 at 209,

[102] For example, Story defended the situs rule as a matter of state sovereignty – see comments in Moffatt Hancock "Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: Disadvantages of Disingenuousness" (1967) 20 Stanford L R 1 at 10.

[103] See further John von Hein "Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques" (2017) 6(2) EPLJ 142 at 145;

[104] Miller, above n 64, at 35;

[105] Bram Akkermans and Eveline Ramaekers *Lex Rei Sitae in Perspective: National Developments of a Common Rule?* (Maastricht European Private Law Institute, Working Paper No. 2012/14) at 4. See also the strong comments of Jeffrey Schoenblum "Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates" (1991) 32(1) Va J Int'l L 83 at 100-102,

[106] *Re Hoyles,* above n 97, at 185-186:

[107] Akkermans and Ramaekers, above n 105, at 4.

example in terms of the ability to enforce judgments.[108] Further, in some cases the situs will have legitimate economic ties to the immovable property that it wishes to preserve.[109]

In the intestacy context the lex situs does have the advantage of easy application: it is an invariable rule that does not concern itself with the location, residence or nationality of the property owner. *But* the lex situs does not necessarily have any connection to the deceased. Further, despite being an invariable rule, it will usually point to various different governing laws. This will not result in unitary succession, and will therefore not avoid the current costs associated with distributions under the scission principle. The lex situs does have the advantage of never facing enforcement issues. *But* at the point of distributing the value of the property, there are likely no enforcement issues. Applying the lex situs does mean that interests in land are always recognised without the need for any complex, adaptation-type exercise.[110] *But* this advantage is irrelevant when the question is simply how to distribute the value of the deceased's estate, and among whom. While the lex situs is a useful and pragmatic rule in many conflict of laws areas, its advantages are not as relevant in the context of intestate succession. Morris goes as far as to say that there is no adequate justification of the situs rule's continued application in cases of intestacy.[111]

With reference to Chapter II, the situs rule is an inappropriate connecting factor. The situs rule will often fail to distribute property according to the reasonable expectations of the deceased, and may also often disappoint expectant heirs. This can be seen in the application of the situs rule to the theoretical examples from Part B. It is unexpected that the distribution of Oliver's estate should be dictated by Sharia law when he has had no connection to Dubai for decades. In the same way, it is unjust that if Noah had survived Milly, he may not be entitled to any of her estate under Floridian law. The reason why in each of these cases a "wrong" result is reached is that the lex situs is impersonal. It does

[108] *The Conflict of Laws in New Zealand* above n 10 at 7.92 citing Paterson J in *Birch v Birch* [2001] 3 NZLR 413 (HC).
[109] Akkermans and Ramaekers, above n 105, at 4.
[110] For a discussion of situs remedies see *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49 at [25]-[26]. For an insight into the European Union's approach to adaptation, see Dannemann, above n 8, at 311.
[111] Morris, above n 47, at 340.

not necessarily have any real connection with the deceased. In the words of Morris, this use of "an undiscriminating conflicts rule gratuitously manufactures a false problem – and then gives the wrong answer to it."[112]

Therefore, in the intestacy context, the situs rule has likely served its purpose and is ready to be retired.[113] Succession to realty is no longer seen as a matter of crucial national importance,[114] and in intestacies in particular no aspect of state sovereignty is impinged by the distribution of the value of that property. As such, the author joins the chorus advocating that lex situs is not an appropriate connecting factor for cases of cross-border intestacy.[115]

2 Lex domicilii

Reliance on the lex domicilii (the law of the person's domicile) is a historically popular choice-of-law rule used in common law jurisdictions.[116] Domicile is often relied on in family law as a "personal" choice-of-law rule. It has historically been used as a corresponding rule to the maxim *mobilia sequuntur personam* and aligns with the position that movable property has no locality.[117] A further rationale for this rule is that movable property is in the sphere of influence of the owner.[118]

New Zealand and Australia expressed renewed enthusiasm for the lex domicilii rule in the 1990s. The abolition of scission in favour of domicile was promoted by the Australian Law Commission in 1992,[119] followed shortly thereafter by the New Zealand Law Commission

[112] Morris, above n 47, at 340.
[113] *Dicey*, above n 12, at [27-018].
[114] See, for example, Morris, above n 47, at 370; and Hancock, above n 102, at 10 citing Story, Redfield and Baldwin J,
[115] See, for example, Morris, above n 47; and *Dicey*, above n 12, at [27-018].
[116] *The Conflict of Laws in New Zealand*, above n 10, at 4.163.
[117] Lalive, above n 50, at 34.
[118] Akkermans and Ramaekers, above n 105, at 3.
[119] The [Australian] Law Commission, above n 62, at 9.7-9.8. Note during its discussion it held that the difference between application of the lex domicilii and the deceased's last habitual residence as personal law would be small in practice – see 9.8 and 9.29,

in 1997.[120] In both cases this was favouring of personal law over application of the lex situs, but neither recommendation was accepted.

Domicile is often described in textbooks as the legal equivalent of one's permanent home,[121] meaning the country in which the individual has settled. This paints a rather deceptive picture of the term, since in the traditional common law context domicile is far from a simple enquiry.[122] Domicile is a "term of art",[123] which essentially means that it is a complex type of legal jargon which can be confusing and can lead to uncertain results.[124] It has been criticised both in jurisdictions where it is used and in jurisdictions where it is not used.[125] The editors of *Dicey* put it as follows: "While the notion of permanent home can be explained largely in the light of commonsense principles, the same is certainly not true of domicile."[126]

The position in England is more complex than in New Zealand, where loose nomenclature has resulted in multiple concepts using the name domicile.[127] In New Zealand, domicile has been modified from the traditional English understanding and has been codified in the Domicile Act 1976. In this Act, domicile itself is not defined. At birth, a child usually shares the domicile of his or her parents.[128] In order to change domicile, an eligible person must be present in a new country and intend to live there indefinitely.[129] Domicile therefore theoretically relies on some elements of attachment and connection between the situs and the subject. This does not mean that home and domicile are synonyms: while there is overlap between the concepts of home, residence and domicile, they remain distinct

[120] Law Commission *Succession Law: A Succession (Adjustment) Act*, above n 70, at s 40 of the proposed Act.
[121] *Dicey*, above n 12, at [6-004] and *The Conflict of Laws in New Zealand*, above n 10, at 4.163,
[122] See the discussion and criticisms of domicile in a New Zealand context in *The Conflict of Laws in New Zealand*, above n 10, at 4.163-4.185.
[123] *Nygh's Conflict of Laws in Australia*, above n 67, at 13.35,
[124] *Cheshire, North & Fawcett*, above n 64, at 146.
[125] Miller, above n 64, at 279. See also Leon Trakman "Domicile of Choice in English Law: An Achilles Heel" (2015) 11(2) J Priv Int'l L 317 at 321; and Peter McEleavy "Regression and Reform in the Law of Domicile" (2007) 56(2) The Int'l and Comp LQ 453 at 453.
[126] *Dicey*, above n 12, at [6-003].
[127] CMV Clarkson and Jonathan Hill *The Conflict of Laws* (4th ed, Oxford University Press, Oxford, 2011) at 305.
[128] Section 6 of the Domicile Act 1976.
[129] Section 9 of the Domicile Act 1976.

concepts.[130] A person can never be without a domicile,[131] which makes domicile a useful choice-of-law rule. However, this can also lead to difficult results.

In the past, allowing the lex domicilii to govern the distribution of movable property upon death was thought to respect the deceased's intentions in cases of intestacy as well as death under a will.[132] In particular, the deceased is assumed to know the requirements of the law of their domicile, meaning that it is legitimate and justifiable for that law to apply to the deceased as lex personalis.[133] The reality of domicile, in particular identifying a domicile of choice, makes that assumption less tenable.

Identifying whether an individual has changed their domicile can be a complex enquiry. There may frequently not be any identifiable intention to either change or retain one's domicile. Often individuals, even when moving about, are vague about whether they will spend the rest of their lives in a certain country.[134] This could prevent a finding of a change in domicile despite years of residence. This was the case in *Humphries v Humphries*,[135] where the individual in question had resided overseas for 35 years and yet was held to have retained his New Zealand domicile. This may indicate that irrespective of presence overseas, if an immigrant retains an idea to return to his or her country of origin at some point, they may never change their domicile.[136] The result in intestacy proceedings is an application of a law that lacks a significant connection to the deceased.

Further, there is a determinative difference in the domicile enquiry between having an intention to live in a country and having the required intention to settle there *indefinitely*. The point where one turns into the other is often arbitrarily decided by the court. For example, in *Ingle v Ingle* domicile was held to change when the individual in question found a third, better-paying job in Scotland, despite having already lived and worked in

[130] For example, see *The Conflict of Laws in New Zealand,* above n 10, at 4.186-4.187.
[131] Bill Atkin *International Family Law: The Law Relating to Domicile* (online ed, LexisNexis) at 11.7,
[132] Lalive, above n 50, at 45.
[133] Lalive, above n 50, at 41-42.
[134] Atkin, above n 131, at 11.12.
[135] *Humphries v Humphries* [1992] NZFLR 18 (HC),
[136] See the discussion in *Humphries,* above n 135, at 33-35.

Scotland in the same industry for the preceding three-and-a-half years.[137] Establishing the requisite intention to change domicile is a murky enquiry in any situation, let alone in a situation where the subject of the claim (the deceased) will not be able to testify as to his or her true intentions.

While recourse to the lex domicilii would result in the most appropriate outcome in both theoretical examples explored above at part B, this is not guaranteed in all cases. *Humphries* above demonstrates that the law of the subject's domicile may not belong to a legal system that is closely connected to them. In intestacy this would undermine the deceased's reasonable expectations, and also likely frustrate the expectations of would-be heirs. Furthermore, domicile is a difficult concept to understand and determine. It is not a simple choice-of-law rule. Therefore, in accordance with the principled analysis at Chapter II, complete reliance on the domicile rule is not the most appropriate reform option for cases of cross-border intestacy.

This is the opposite conclusion reached by the Law Commission in 1997,[138] and may be controversial. However, in recent literature there has generally been a move away from reliance on domicile given its status as "bedevilled" by rules.[139] The complex rigidity of the term has led to the increased reliance on habitual residence internationally, since it is seen to not suffer from the same constraints. This is reflected in the Law Commission's 2021 recommendation to replace scission and its limbs with the deceased's last habitual residence as the single connecting factor in the succession space. The author does not see this as the most desirable reform of the status quo. Rather, as shall be explored next in Chapter IV, the closest and most real connection factor is an advantageous and flexible factor which prioritises finding a real connection between a substantive legal system and the deceased. Habitual residence is unlikely to perform as well in the New Zealand intestacy space, as explored at Chapters V and VI.

[137] See the facts of *Ingle v Ingle* [1985] NZRL 275.
[138] Above n 70,
[139] *Cheshire, North & Fawcett,* above n 64, at 146.

IV The closest and most real connection rule

A Introduction

Perhaps by definition, the choice-of-law rule which would afford the greatest weight to the principle of proximity and connection is the closest and most real connection rule. This rule is elsewhere also called the "most significant connection rule",[140] the "manifest closest connection" rule[141] or the "centre of gravity approach",[142] but herein after will be referred to as the "closest connection" rule, test or factor. The closest connection rule is a general connecting factor that is used as a rule or alternative in the private international law of contract,[143] tort,[144] arbitration[145] and restitution.[146] In the intestacy context, the closest connection test would allow decision-makers broad discretion to take an objective and case-specific approach to cross-border intestacy, with the focus being to determine the legal system with the strongest connection to the deceased.

Most New Zealand case law on the application of this choice-of-law rule comes from cases on international contracts. Case law illustrates that judges are competent in applying this test, and also have experience in dealing with it. In their reasoning, judges are usually clear as to which factors sway them in finding a particular set of legal rules as being the proper law.[147] A particularly comprehensive collation of relevant factors can be seen in *Chevalier Wholesale Produce Ltd*,[148] where Associate Judge Bell set out a range of factors which

[140] Mathias Reimann "Savigny's Triumph – Choice of Law in Contracts Cases at the Close of the Twentieth Century" (1999) 39 VA J Int'l L 571 at 580,
[141] EU Succession Regulation, above n 7, for example at Recital 25
[142] Lawrence Collins "Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England" (1971) 2 J Mar L & Com 363 at 365; and Robert A Leflar "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54 Calif L Rev 1584 at 1584,
[143] *The Conflict of Laws in New Zealand* above n 10, at 6.17-6.19. For New Zealand case authority, see *New Zealand Basing Limited v Brown* [2016] NZCA 525 at [30]. Note this case was overturned on other grounds,
[144] This is reflected in the "flexible exception" to the lex loci delicti rule in the Private International Law (Choice of Law in Tort) Act 2017 at section 9. See commentary in *The Conflict of Laws in New Zealand,* above n 10, at 6.65-6.68,
[145] Gary B Born "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814, for example at [41]-[43]
[146] *The Conflict of Laws in New Zealand*, above n 10, at 7.318-7.321.
[147] For example, see *MH Publications Ltd v Komori (UK) Ltd* [2008] BCL 929 at [95]; *Webster v Jagger* [2021] NZHC 1146; BC202161350 at [32]-[33].
[148] *Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd* HC Auckland CIV-2010-404-4229,

could be of assistance in applying the closest connection rule.[149] These include obvious considerations such as the law of the place where the contract was made or was to be performed, but also allow judges the discretion to look at the nature of the subject-matter of the contract, connections with previous transactions, and wider terminology.[150] The choice-of-law enquiry, as expressed in New Zealand case law, requires an objective analysis that varies on the facts of each case to reach an outcome which is often quite clear, although on occasion can be finely balanced.

When used in specific contexts as part of a codified legal instrument, the closest connection factor is often expressed with guidance as to which factors should be influential in finding the legal system with the closest connection.[151] For example, when the Law Commission recommended adopting the closest connection test as the choice-of-law rule in cross-border relationship property disputes, it laid out nine factors that could be considered.[152] However, the author does not advocate for any *presumptions* to be codified along with the test.[153] Non-exhaustive guiding criteria may be useful, but considerations should be added by courts, as and where relevant, rather than having the legislature codify a set of presumptions or rigid criteria. The closest connection test should be free from presumptions and operate as a broad and objective test. [154] This is elsewhere referred to as a "bare" closest connection test.[155] As will be explored at Part C, such a broad and flexible connecting factor involves some trade-offs with certainty and predictability.

---

[149] At [19].

[150] *Chevalier*, above n 148, at [19].

[151] Reiman, above n 140, at 583 and 587. For real-life examples see the Convention 80/934/EEC on the law applicable to contractual obligations (Rome Convention) and its successor Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[152] Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at 19.33.

[153] For example, the author would not advocate for a presumption that the test will usually point to the deceased being most closely connected with the country of their last habitual residence – see Law Commission's Review of the PRA, above n 146, at 19.32. See also Hook "A first principles approach to couples' property in the conflict of laws" above n 30, at 281-282; P.M. North and J. I. Fawcett (eds) *Cheshire and North: Private international Law* (11th ed, Butterworths, London, 1987) at 464; and *Nygh's Conflict of Laws in Australia*, above n 67, at 19.19.

[154] For a discussion of the closest connection principle in a different context, see Hook "A first principles approach to couples' property in the conflict of laws" above n 30, at 282.

[155] Benjamin Hayward *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, Oxford, 2017) at 6.06-6.15.

B The closest connection in intestacy

Using the closest connection factor in cases of cross-border intestacy is unprecedented in the New Zealand context. Hence, there are no convenient lists setting out relevant factors that judges should take into account to determine the legal system to which the deceased had his or her closest connection. This is not necessarily disadvantageous. As mentioned above, guiding criteria are most useful when developed in the context of real cases. There are also likely factors which can be anticipated as being relevant in the enquiry to find the governing law most closely related to the deceased. Factors that are likely to be relevant include levels of integration in a particular community, length of residence in a particular state, and the relevant expectations of heirs.[156]

The result of such a broad enquiry is to find the significant relationship between the deceased and the governing law discussed at Chapter II. The closest connection factor is necessarily the choice-of-law rule which will find the most proximate relationship between the deceased and a substantive system of law. This is unlikely to be an onerous task since the term is self-explanatory rather than a term of art. Presumably, family members will be able to present a wide and varied range of evidence to ensure that the decision-maker can determine the legal system to which the deceased had a significant and real connection. If this evidence can be established, it likely means that the deceased did in fact have a very close connection to that legal system. If that is the case, it likely accords with the deceased's reasonable expectations that *that* legal system would govern the distribution of the deceased's estate.

This can be illustrated with reference to both hypothetical examples from Chapter III. In Oliver's case, he was likely most closely connected to the New Zealand legal system, despite some connections with the Australian system and the Emirati system. For the last three decades of his life, he had been living in New Zealand. His centre of interests lay in New Zealand: his family, friends, community, and location of hobbies. Using the closest

[156] Some of these factors are influenced by the Law Commission's proposed definition of habitual residence in its Issues Paper, above n 2, at 17.17-17.18. For a discussion of habitual residence, see Chapters V and VI.

connection test, there is clear evidence that points to New Zealand law being most appropriate law to govern his intestacy.

Equally, despite Molly and Noah having been infrequently present in New Zealand in the three years prior to one or both of their deaths, there is a clearly more manifest connection with New Zealand, and therefore New Zealand law. Although they had potentially built up a community in Florida and owned realty there, there were clear factors that indicated that New Zealand law was the legal system with which they were most significantly connected. These include the limited nature of Milly's contract, retention of New Zealand assets and their clear, objective intention to return to New Zealand.[157] It is likely that they would have had some expectation that their property be distributed according to the laws of New Zealand: the outcomes under Floridian law would likely affront their ideas of justice and how the law should operate.

The closest connection test would also likely accord with the reasonable expectations of the deceased's heirs. They would likely expect that the deceased's estate be dealt with according to a law with which the deceased was familiar. It makes no sense from an heir's perspective that the value of Oliver's apartment be distributed unequally between his sons and daughters according to Shariah law.[158] Equally, it is unexpected that Noah's children would have to prove their paternity to inherit from his estate if he died in Florida. In each case, the issue is that there is no connection between the purportedly relevant law and the deceased. This leads to unexpected results for both the deceased and heirs. A law that is related to the deceased is preferable. In other words, a close connection is desirable and prevents absurdities.

As is likely clear, the closest connection test leads to more meaningful results than the status quo. It also has the added advantage of pointing to a single applicable law, which is a simpler situation for the estate and its administrators. According to the evaluative

[157] Note that here intention is not treated as an element (c.f. domicile at Chapter III.C.2) but as a relevant consideration under the closest connection test.
[158] See Hussain, above n 76, at Chapter 48.

principles at Chapter II, the closest connection factor appears to be the most appropriate choice-of-law rule for cases of cross-border intestacy.

C Flexibility or certainty: evaluating a lex cirucumstancia

The closest connection test is a general connecting factor. It relies on a case-by-case appraisal of facts to find a meaningful connection to a substantive law.[159] While some factors could be compiled that generally point in certain directions,[160] the closest connection test cannot be said to generally point to a particular governing law. As such, it has been argued that the closest connection test is an uncertain choice-of-law rule.[161]

This uncertainty has been recognised in important legislative instruments, for example in the Rome Convention[162] and its successor the Rome I Regulation.[163] It is important to note that these instruments express that predictability is highly important.[164] However, while noting the importance of certainty and predictability, judicial discretion was retained to continue using the closest connection factor as needed.[165] Uncertainty was not enough to warrant avoiding the closest connection factor.

Moreover, in the cross-border intestacy context there are two clear responses to the uncertainty argument. First, the potential that some uncertainty would upset the law in cases of cross-border intestacy is not necessarily a realistic criticism. In most cases, the administrator of the estate could likely easily predict the legal system which had the closest connection to the deceased, despite the presence of property in foreign jurisdictions. The administrator is, or acts for, those with the largest beneficial interests in the estate, usually next-of-kin. This would indicate a close relationship with the deceased. Therefore, not only could the administrator likely supply relevant details and predict the most appropriate legal system to govern succession, but the governing law would meet the reasonable expectations of the administrator and heirs. The deceased's reasonable expectations would

[159] *The Conflict of Laws in New Zealand*, above n 10, at 6.19.
[160] See the list in *Chevalier* above n 148, at [19], or the discussion in *The Conflict of Laws in NZ* at 6.18,
[161] *The Conflict of Laws in New Zealand*, above n 10, at 6.19; Reese, above n 19, at at 317.
[162] Rome Convention, above n 151
[163] Rome I Regulation, above n 151.
[164] For example, see the Rome I Regulation, above n 151, at Recital 16.
[165] See Article 4 of the Rome Convention, above n 151; and Article 4 of the Rome I Regulation, above n 151.

also be upheld since the governing law would likely be a system with which the deceased was familiar.[166]

The hypothetical examples from Chapter III are illustrative of this. The intuitive or obvious solution to the choice-of-law problem in both of those examples coincides with the legal system to which the deceased was most closely connected. Further, as shall be explored in Chapter VI, in difficult cases where the deceased had perhaps equally shared his or her time between two or more jurisdictions, or where he or she had led a peripatetic existence, the closest connection test likely arrives at a better solution than other connecting factors.[167] Judges have access to more facts about the deceased in order to determine the appropriate governing law, which means that the "correct" lex successionis is more likely to be chosen.[168]

Second, uncertainty will likely be tempered by the judiciary. If the closest connection factor were adopted by New Zealand as the choice-of-law rule to determine the law governing cross-border intestacy, judges would soon indicate which factors are most persuasive in the closest connection enquiry. This is desirable so long as it remains clear that these factors do not constitute the elements of a rule or a rigid enquiry.[169]

Further, finding considerations that regularly point in certain directions in cross-border intestacy cases will likely be a simpler task than in cases of cross-border contracts. International contracts can range from employment arrangements to the delivery of goods. With such a wide scope, different considerations have varying levels of importance depending on the type of contract involved.[170] The distribution of an intestate estate is a narrower field, meaning that potentially comprehensive lists of factors could be easily

[166] See Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates" above n 37, at 361.
[167] See discussion at Chapter VI.B.
[168] c.f. habitual residence – see Chapter VI.
[169] See discussion of this in the [English] Law Commission and the Scottish Law Commission *Private International Law: The Law of Domicile* (Law Com No 168; Scot Law Com No 107, 1987) at [4.18]. While this is in a different context, it is useful to note the reluctance of the Commissions to making the closest connection test rigid. It is only useful as a fluid concept.
[170] See *Clifford v Rentokil Ltd (NZ)* [1995] 1 ERNZ 407 at 25-26 of the judgment.

developed by judges. This would also guide lawyers in questioning their clients about the deceased's life to find which law was most closely connected to the deceased.

D Conclusion

A flexible connecting factor is likely desirable in cases of cross-border intestacy, as it will cope well with unique lifestyles and the myriad of ways in which individuals may hold property at home and abroad. The flexibility of the test allows arbitrary investigations into the deceased's intentions to be avoided,[171] and also allows for a broad enquiry as to where the deceased had real connections.[172]

In some cases, judges may find a fine balance between different jurisdictions. However, in most cases the enquiry will be straight-forward. Enquiries will not be constrained by the deceased's intentions, presence or residence.[173] A holistic enquiry will lead to clear and expected results, as well as the application of a single substantive law, thereby avoiding the absurdities currently produced by having two operative choice-of-law rules in this area.

Therefore, given the strength of this connecting factor to point to the most appropriate governing law for the distribution of an intestate estate, the author prefers the closest connection test as the choice-of-law rule in cases of cross-border intestacy.

[171] As under the domicile enquiry, see Domicile Act s 9 and discussion in *The Conflict of Laws in New Zealand*, above n 10, at 4.177-4.183,
[172] *The Conflict of Laws in New Zealand*, above n 10, at 6.19.
[173] c.f. domicile (above at Chapter III.C.2) and habitual residence (below at Chapters V and VI).

V A choice of personal law

A Introduction

"Personal law" describes choice-of-law rules that focus on a connection to the person as the subject of the conflicts dispute, as opposed to property or location. The main choice-of-law rules described as lex personalis are domicile, nationality and habitual residence. Domicile has been discussed at Chapter III.C.2. While the closest connection factor will guarantee a governing law that is strongly connected to the deceased, personal connecting factors are specific alternatives which also have advantages, notably increased certainty. In this chapter the two major remaining personal connecting factors (nationality and habitual residence) will be discussed.

B Nationality (lex patriae)

Nationality is a common concept that laypeople understand. While not a traditional connecting factor in common law jurisdictions,[174] it has been commonly relied on by civil law jurisdictions, including in the context of succession prior to the EU Succession Regulation.[175]

Its attractiveness is reasonably self-evident. Nationality is a regulated status – each country has specific rules relating to the acquisition of nationality. Therefore, it will likely be easy to determine the deceased's nationality. Nationality cannot be lost or changed without notice. With reference to the evaluative principles guiding this work, nationality is a simple connecting factor in most cases. It will also usually point to the application of a single governing law.

However, immediate complications spring to mind in cases of dual-nationality. If the deceased was a citizen of more than one country, reliance on nationality as the connecting factor in cases of cross-border intestacy prima facie results in an impasse. There is no clear

[174] Clarkson and Hill, above n 127, at 328. See the EU Succession Regulation, above n 7,
[175] For a detailed summary of the European Union's approach to succession prior to the 2012 EU Succession Regulation, see David Hayton (ed) *European Succession Laws* (2nd ed, Jordans Publishing, Bristol, 2002) at Appendix C (531-532).

reason why either nationality should be preferred over the other. Further, nationality is an imprecise concept in the conflict of laws, as many countries may not have a "national law" that governs intestacy. For example, in Australia, intestacy is governed by each state. Distribution of an intestate estate according to "Australian law" is therefore impossible. Equally, there is no "British law" for cases of intestacy. In the United Kingdom, citizens may be subject to different intestacy provisions depending on whether they were nationals of England, Wales, Scotland or Northern Ireland. Reference to "British law" in such cases is not helpful, as each country (or "law district")[176] could govern intestacy differently.

Further, reliance on nationality may not always lead to a governing law that is most closely connected to the deceased. Often, citizens will have a strong link with their national legal system.[177] However, while there is clearly always *some* link between the person and his or her national legal system, this link may persist despite there being no ongoing association between the two. Nationality may therefore not be a connecting factor that represents the best connection between a deceased and a country or its legal system.[178] An extreme example is in the case of refugees.[179] A less extreme example is where an individual may settle in a new country, but be content with retaining his or her citizenship and acquiring only permanent residence in the new country. In some communities, application of a national or cultural law may be preferable.[180] However, in other cases it may be counterintuitive for a national law to apply to an expatriate who has been living in another country for most of his or her adult life.

Nationality is therefore a connecting factor that can lead to inadequate solutions in cases of intestacy.

---

[176] See Adrian Briggs *The Conflict of Laws* (2nd ed, Oxford University Press, 2008) at 21
[177] English and Scottish Law Commissions, above n 169, at 3.9.
[178] Alfonso-Luis Calvo Caravaca, Angelo Daví and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (online ed, Cambridge University Press, Cambridge, 2016) at Chapter 21.II.B.3 [8]-[9].
[179] English and Scottish Law Commissions, above n 169, at 3.10(d).
[180] For an interesting perspective on nationality as a connecting factor, see Michael Bogdan "Some Reflections on Multiculturalism, Application of Islamic Law, Legal Pluralism and the New EU Succession Regulation" 59-58 in The Permanent Bureau of the Hague Conference on Private International Law *A Commitment to Private International Law: Essays in honour of Hans van Loon* (Intersentia Publishing, Cambridge, 2013).

C Habitual residence

As seen, domicile and nationality can lead to counterintuitive results due to their rigidity. "Habitual residence" is a concept that was created to be a compromise between domicile (traditionally used by common law legal systems) and nationality (traditionally used by civil law legal systems).[181] Habitual residence has become an increasingly popular concept and connecting factor in the context of private international law,[182] especially in the European context.[183] The Hague Conference often uses it,[184] and the EU Succession Regulation relies on habitual residence as the choice-of-law rule indicating the lex successionis.[185] Most recently, in its Issues Paper on succession law, the Law Commission has recommended following suit and using habitual residence as the connecting factor in New Zealand cases of cross-border succession. [186]

Habitual residence is often described as the "factual headquarters"[187] of an individual; the centre of that person's business, social and family life.[188] As such, habitual residence aims to be an objective connecting factor which reflects the principle of proximity.[189] Habitual residence is supposed to be a flexible factor, and therefore has not been given any formal definition in most contexts.[190] This lack of definition has both been lauded as the concept's strongest feature and criticised for lack of certainty.[191] In the last thirty years, the supposedly simple enquiry has proven to be a complicated concept,[192] with clear divergence in interpretation emerging between common law and civil law jurisdictions.

---

[181] See the preface to the 1955 Hague Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile (not in force).
[182] Max Planck Institute, above n 95, at [131],
[183] *Dicey*, above n 12, at [6-123].
[184] For example, in the Hague Convention on Civil Aspects of International Child Abduction 1343 UNTS 89 (signed 25 October 1980, entered into force 1 December 1983). Perhaps most relevantly see the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (not in force),
[185] The EU Succession Regulation, above n 7.
[186] Law Commission Issues Paper, above n 2, at 17.17.
[187] Hayton *European Succession Laws,* above n 175, at 1.23
[188] Hayton *European Succession Laws,* above n 175, at 1.23.
[189] Caravaca, Daví and Mansel, above n 178, at Chapter 21.II [2].
[190] *Dicey*, above n 12, at [6-123].
[191] See Eveline Ramaekers "Cross-border Successions. The New Commission Proposal: Contents and a Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier." (2011) 15(1) EJCL 1 at 3. See also *Dicey*, above n 12, at [6-172].
[192] Pippa Rogerson "Habitual Residence: The New Domicile?" (2000) 49(1) Int'l & Comp LQ 86 at 89,

1 New Zealand's understanding of habitual residence

Habitual residence is a term found in eleven New Zealand statutes.[193] In each of these Acts, the term has been used incidentally as Parliament incorporates international instruments into New Zealand law. The relevant statutes for this dissertation are the Adoption (Intercountry) Act 1997[194] and the Care of Children Act 2004 ("COCA").[195] Statutory interpretation of these instruments is the only source of New Zealand case law on the concept of "habitual residence."

It should be noted that in this context habitual residence is part of the jurisdiction enquiry, as opposed to the choice-of-law enquiry. Habitual residence has not previously been used as a choice-of-law rule in New Zealand. Ordinary residence has been used as a connecting factor in various contexts,[196] but it is unclear whether ordinary residence and habitual residence should be treated in the same way. Dicta from the Court of Appeal indicates that the terms may only be marginally different in the conflicts context.[197] This position is supported by English academic authority.[198] Nevertheless, while the New Zealand Supreme Court has indicated that "ordinary residence" must be interpreted according to its statutory context,[199] in cases of habitual residence the point of departure is usually the developed common law elements of the test rather than a fresh exercise in statutory interpretation.[200] Therefore, this analysis proceeds according to the elements of habitual residence identified in case law.

---

[193] According to the author, these are the Civil Aviation Act 1990; the Maritime Transport Act 1994; the Arbitration Act 1996; the Adoption (Intercountry) Act 1997; the Maritime Crimes Act 1999; the Terrorism Suppression Act 2002; the Care of Children Act 2004; the Mercenary Activities (Prohibition) Act 2004; the Insolvency (Cross-border) Act 2006; the Immigration Act 2009; and the Contract and Commercial Law Act 2017.

[194] Which incorporates the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1870 UNTS 167 (signed 23 May 1993, entered into force 1 May 1995)

[195] Which incorporates the Hague Convention on Civil Aspects of International Child Abduction, above n 184.

[196] *The Conflict of Laws in New Zealand*, above n 10, at 4.186,

[197] *Punter v Secretary for Justice (No 2)* [2007] 1 NZLR 40 at [69].

[198] See *Dicey*, above n 12, at [6-124].

[199] *Greenfield v Chief Executive, Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261 at [32]-[34],

[200] See discussion of *SK v KP* (2005) 24 FRNZ 508 (CA) below.

New Zealand case law on the interpretation of habitual residence has developed most authoritatively in COCA cases in the context of international child abduction. The leading cases on the meaning of habitual residence in New Zealand are *Punter v Secretary for Justice*[201] and *SK v KP*.[202] Both are Court of Appeal decisions. These cases illustrate the development of New Zealand's understanding of habitual residence as relying on pre-existing English authority, notably the so-called *Shah* test.

The most authoritative statement of the New Zealand principles of interpreting habitual residence come from the judgment of Glazebrook J (as she then was) in *SK v KP*. She set out the New Zealand approach to habitual residence at [71]-[84]. Most relevantly, she said the following (emphasis added):

> [71]…habitual residence is primarily a question of fact to be decided by reference to the circumstances of each case…
>
> [72] The Courts have nevertheless developed certain principles in relation to habitual residence…
>
> [73] One of the most important concepts in habitual residence is that of settled purpose. It is widely accepted that the acquisition of a new habitual residence requires both a settled purpose and actual residence for an appreciable period. *[The* Shah *test, see below]*. It is also widely accepted that a settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately. As the gaining of a new habitual residence requires a period of actual residence this means that a person can be without a habitual residence…
>
> [80] Length of stay in the new State is a factor taken into account but it is only one factor. The purpose of the stay and the strength of ties to the existing State must also be taken into account. Where the period is limited and the purpose temporary, such as for holidays or visiting relatives, and the ties to the existing habitual residence strong, the Courts have normally found that the existing habitual residence subsists. Where, however, it is not so clear that the purpose of the stay was temporary, such as a stay for educational purposes or for fixed term employment, the Courts have been much

[201] Above n 197
[202] Above n 200.

> quicker to find a change in habitual residence, particularly if the ties to the former habitual residence are weak…

The preceding paragraphs align New Zealand's position with the English position pre-2013. This position seems somewhat contradictory. First, it is noted that habitual residence should not be treated as a legal "term of art."[203] Habitual residence should rather be read according to its ordinary and natural meaning. *But,* Glazebrook J goes on to say that case law has clearly set out certain elements which must be satisfied for habitual residence to be established.[204] These elements have become known as the *"Shah* test," named after the House of Lords decision which laid out interpretive principles for the term "ordinary residence" for the purpose of determining study grants.[205]

The *Shah* test, while coined in the context of "ordinary residence," has been accepted in England (prior to 2013)[206] and in New Zealand[207] as establishing the relevant principles for finding habitual residence. Applied in the habitual residence context, the test acknowledges that habitual residence is intensely fact-specific, but places particular emphasis on the elements of "settled purpose" and "[voluntary] actual residence for an appreciable period" of time.[208] Habitual residence can be lost in a single day, but requires presence within a particular jurisdiction for a period of time before a new habitual residence can be acquired. Further caselaw confirms that it is possible for a peripatetic individual to have no habitual residence.[209]

---

[203] Particularly Lord Brandon's dicta from *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 at 578-579.
[204] See Lady Hale's criticism of this in *A v A and Another (Children: Habitual Residence)* [2013] UKSC 60 at [54].
[205] *R v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 (HL)
[206] Cite *Dicey,* above n 12, at [6-124]
[207] *SK v KP,* above n 200, at [73]; *Punter (No 2),* above n 197, at [118]-[123]
[208] Per Lord Scarman in *Shah*, above n 205, at 235.
[209] See *Langdon v Wyler* [2017] NZHC 2535 at [30]-[31].

The *Shah* test was abandoned in the context of habitual residence in England in 2013 by the English Supreme Court,[210] but New Zealand has not followed suit.[211]

In the context of intestacy, application of habitual residence as currently understood in New Zealand can lead to undesirable results. This is especially true in relation to the court's willingness to find a loss of habitual residence before the acquisition of a new habitual residence. Habitual residence places emphasis on physical presence in any one state prior to acquisition of a new habitual residence, leading to an absence of connection to *any* state in the case of a peripatetic individual.[212] This is undesirable. In cases of intestacy, the connecting factor should always indicate a national lex causae. In the intestacy context, leaving the deceased without a habitual residence is the worst possible outcome since it leaves the deceased's heirs without standing to pursue their rights to the deceased's property situated overseas. It is possible that an alternative connecting factor could be relied on in such cases, but it is preferable to have a workable rule rather than a rule that requires exceptions to deal with foreseeable issues.

Further, a rapid loss of a previous habitual residence is undesirable per se in the context of cross-border intestacy. In the example of Milly from Chapter III.B.2, despite many strong links being retained to New Zealand, her settled purpose to move to the United States would likely be sufficient for her habitual residence to have changed during her three-year stay there. That means that if habitual residence were the relevant choice-of-law rule, at intestacy *all* of her estate would be subject to Floridian law. This is a worse outcome than at the status quo. A similar situation arose in *Re R*[213] where Munby J felt forced to reach the conclusion that a family's habitual residence had changed a few months into a temporary six-month stay in Germany, despite the lack of roots or integration in Germany

[210] *A v A*, above n 204 – see especially Lady Hale's comments preferring the European interpretation of habitual residence at [54]. It remains unclear what the English position will be post-Brexit. See further Part C.2,

[211] For a recent example, see *CW v DW* [2021] NZHC 427 where *Punter* is still cited as the leading case authority on the principles of habitual residence, affirming the *Shah* test. Note however, that the interpretation of ordinary residence in New Zealand does not rely on the *Shah* test – see *Greenfield v Chief Executive, Ministry of Social Development*, above n 199.

[212] See *Langdon v Wyler*, above n 209, at [30]-[31].

[213] *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam)

by any of the family members.[214] Further counterintuitive results could even arise in cases of international students dying intestate – while there are conflicting authorities on this point, it was expressly mentioned by Lord Scarman in *Shah,*[215] and above by Glazebrook J at [80].

2 The Law Commission's proposal

In its 2021 review of succession law, the Law Commission recommended replacing the scission principle with habitual residence as the choice-of-law rule.[216] However, the meaning of habitual residence suggested by the Law Commission is not the meaning that the author has explained above at Part C.1. Rather, the Law Commission has proposed a new conceptualisation of habitual residence as a holistic enquiry, with an aim to ultimately find the country to which the deceased had the "closest and most stable connection."[217] It appears that the Law Commission views this as different to the closest connection test explored at Chapter IV.[218] This definition attempts to align the New Zealand understanding of habitual residence with the concept's interpretation in the European Union, in particular as seen in the EU Succession Regulation.[219]

Habitual residence is a common European connecting factor, and is now used in many of the places where domicile is used in common law jurisdictions.[220] The European approach to habitual residence is different to the traditional common law understanding outlined above and evident in New Zealand case law. The European approach to habitual residence is more holistic than this understanding. Courts take a long-term view of connections between the individual and the country where they are residing, and would hold that habitual residence has been kept when New Zealand law would deem it to have been lost.[221]

---

[214] At [48]-[52]. See discussion of this case at [138] of *Punter (No 2)*, above n 197.
[215] *Shah*, above n 205, at 236,
[216] Law Commission Issues Paper, above n 2, at 17.17.
[217] Law Commissions Issues Paper, above n 2, at 17.17.
[218] For the author's response, see Chapter VI.B.
[219] Since the Law Commission is expressly informed in its recommendation by the EU Succession Regulation, this is strongly indicates that the habitual residence test is seen as different to the closest and most real connection test: see for example the EU Succession Regulation, above n 7, at Recital 25.
[220] *Dicey*, above n 12, at [6-146].
[221] *Dicey*, above n 12, at [6-155].

The European test for habitual residence was adopted by England in 2013. In *A v A* the Supreme Court of the United Kingdom rejected the *Shah* test in favour of the ECJ's articulation of habitual residence in *Mercredi v Chaffe,*[222] although the case was ultimately decided on the basis of nationality.[223] Habitual residence post-*A v A* is determined according to the level of "integration" by the individual in a new social environment.[224]

The European understanding of habitual residence is potentially a useful choice-of-law rule in the intestacy context, since it emphasises the importance of social integration to correctly identify the deceased's last habitual residence. At Recital 23 the EU Succession Regulation holds that in order to "ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised," habitual residence should be used. Habitual residence is to be determined according to "an overall assessment of the circumstances of the life of the deceased during the years preceding his death…[including] the duration and regularity of the deceased's presence…[and] conditions and reasons for that presence…[to] reveal a close and stable connection with the State."[225]

This is a reflection of the "integration test" preferred by Lady Hale in the context of child abduction, articulated in words more suited to the succession context. If the *Mercredi* approach has been described in literature as the child-centred approach,[226] in the cross-border intestacy context it could be described as a deceased-focused approach. This reinforces the driving policy that the lex causae should depend on a significant, personal connection between the deceased and the governing law. It should be noted that when first proposed in the European context,[227] the House of Lords' EU Committee preferred habitual residence as the unitary choice-of-law rule in cases of wills and succession.[228]

---

[222] *A v A,* above 204, at [53]-[54],
[223] See [60]-[61] finding that the Court had jurisdiction on the basis of A's British nationality.
[224] *A v A,* above n 204, at [54].
[225] EU Succession Regulation, above n 7, at Recital 23.
[226] See, for example, Rhona Schuz "Habitual Residence of the Child Revisited: A Trilogy of Cases in the UK" (2014) 26 Child & Fam L Q 342 at 341; and Morgan McDonald "Home Sweet Home: Determining habitual residence within the meaning of the Hague Convention" (2018) 59(E Supp) BC L Rev 427 at 442,
[227] European Commission Green Paper on Succession and Wills COM (2005) 65 final,
[228] *Morris – The Conflict of Laws,* above n 12, at 17-030.

Habitual residence has been criticised as uncertain in two respects. First, that it is too easy to change and is therefore an unstable connecting factor,[229] and second that it is too onerous a choice-of-law rule that requires lawyers to "play detectives" in order to provide legal answers to their clients.[230] The former criticism is usually levied at the connecting factor in other contexts, for example where habitual residence is a connecting factor for tax purposes and an individual will purposely live and work on opposite sides of a border to avoid tax obligations.[231] This is not a criticism that is particularly relevant in the intestacy context. If the deceased was particularly concerned with the distribution of his or her estate, rather than moving jurisdictions to find more favourable intestacy rules, he or she would have executed a will. The latter criticism is also less relevant in the intestacy space, since having lawyers "play detectives" is a much more desirable outcome than finding a connection with the less-appropriate governing law. In fact, the Law Commission's interpretation of this conceptualisation of habitual residence has likely laid out a useful set of criteria. The Law Commission recommends approaching habitual residence as a holistic enquiry with reference to the deceased's "social, professional and economic ties" to a particular country, in order to apply the "most relevant law" for that particular case "to give effect to the interests of the deceased, of people close to the deceased and of creditors."[232] This likely accords with the principle of proximity, in this case trying to find the closest connection between a legal system and the deceased. This will also point to a single governing law.

Nevertheless, the European approach represents a significant departure from the traditional common law understanding of habitual residence. While this may be an improvement to the concept in the intestacy space, it leaves the waters murky as to what habitual residence means within the New Zealand legal system. Further, when compared to the closest

[229] Ramaekers, above n 191, at 3,
[230] Angelique Devaux "The European Regulations on Succession of July 2012: A Path towards the End of the Succession Conflicts of Law in Europe, or Not?" (2013) 47(2) Int'l Law 229 at 232. See also Hana Jánošková "Current Issues of Succession Law in Europe in terms of Regulation EU No. 650/2012 of 4th July 2012" (paper presented at Wissenschaftskonferenz "Current Issues of Science and Research in the Global World", Vienna, May 2014) 72 at 77.
[231] Rogerson, above n 192, at 88.
[232] The Law Commission Issues Paper, above n 2, at 17.17. This closely reflects the EU understanding. See, for example, Angelika Fuchs "The new EU Succession Regulation in a Nutshell" (2015) 16 ERA 119, available online at DOI 10.1007/s12027-015-0391-2 at 25.

connection test, habitual residence is shown to lack the necessary flexibility to aptly deal with the complexities that arise in cases of intestacy. The closest connection factor better solves complex cases of individuals who regularly divide their time between various jurisdictions, as well as those who would be described as without a habitual residence by laypeople. Stretching the ordinary meaning of habitual residence to answer the choice-of-law question by reliance on non-residence-based factors is undesirable and risks turning a useful, flexible concept into another legal term of art. Not only is undesirable, but it is also unnecessary given the availability of the closest connection test as a more suitable choice-of-law rule in these circumstances. These arguments are fully evaluated below at Chapter VI.

VI House or Home? Comparing the closest connection test to habitual residence in cases of intestacy

A Introduction

As will have become clear throughout this work, the two best connecting factors according to the evaluative criteria developed at Chapter II are the closest connection test and the European-style understanding of habitual residence. The Law Commission, in its 2021 Issues Paper, expressly recommended adopting the latter factor.[233] This chapter will compare the relevant strengths of the closest connection test and the European-style understanding of habitual residence. It will be demonstrated that in the intestacy context, the most appropriate connecting factor is the closest connection test. In this relative trade-off, international harmonisation of choice-of-law rules is shown to be less important than the real risk of habitual residence indicating an inappropriate governing law.[234]

B When a house is not a home: constraints of a residence-based test

The Law Commission's proposed understanding of habitual residence encapsulates a broad, holistic enquiry to determine which legal system had the closest connection to the deceased. The Law Commission proposes recourse to a wide range of factors to ensure that there is a real connection or relationship between the governing law and the deceased. At first blush, this appears to share many of the advantages of the closest connection test.

In many cases, the selection of governing law may be the same. If an individual is habitually resident in a certain country or state, then that person will likely have an extended community in that area. The person will likely have his or her closest connection with the legal system of that country or state for the same reasons – extended community connections, hobbies, or work commitments. In fact, the listed guiding factors in the Law Commission's report would function well if adopted by the courts as guidelines to answering the closest connection enquiry.[235] However, the possibility that the result would

[233] Law Commission Issues Paper, above n 2, at 17.17.
[234] See part D.
[235] Law Commission Issues Paper, above n 2, at 17.17-17.18.

be the same in simple cases does not mean that habitual residence and the closest connection test are the same choice-of-law rule.[236]

Habitual residence is necessarily a residence-based enquiry. If it is not to be understood as a term of art,[237] then habitual residence, or the place where the individual "habitually resides" should equate to the place where an individual "usually lives." This is not necessarily the best connection to a legal system for cases of intestacy. As explored in Milly's example above at Chapter III.B.2, towards the end of her stay in Florida she had been residing in the United States for three years. If habitual residence is read in an ordinary way, Milly's last habitual residence had been in Florida and Floridian law is the governing law. As explored previously, dividing her estate under Floridian law is undesirable.

If the Law Commission's proposed understanding of habitual residence is accepted, a different result may be reached by reliance on broader factors such as the temporary nature of her work arrangements and retention of property and relationships in New Zealand. While reliance on such an interpretation would result in the "right" outcome, the "definition" of habitual residence is being promoted above its natural meaning. This is not only counterintuitive, but also cuts across the rhetoric that habitual residence is a flexible, "factual" concept rather than a term of legal jargon.[238]

In this context, the closest connection test still promotes evaluating the factors identified by the Law Commission: integration, language acquisition, centre of personal interests and so on.[239] The closest connection test could look at the surrounding circumstances of Milly's case and take into account that the overall intention was a brief period in the United States, before returning home to New Zealand. (Note that relevant intentions in this case are informative or helpful factors rather than rigid elements of a test to be satisfied).[240] The

[236] EU Succession Regulation, above n 7, at Recital 25.
[237] See Lord Scarman's comments in *Shah*, above n 205, at 233,
[238] Note that the factual/legal dichotomy itself has been criticised. See Maria Hook "The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes" 175-200 in Michael Douglas and others *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, Oxford, 2019) 175.
[239] Law Commission Issues Paper, above n 2, at 17.17-17.18.
[240] c.f. Chapter V.C.1.

governing law of the intestacy would still be found to be New Zealand law. However, the integrity of the test remains intact.

The point is that the Law Commission's proposal of habitual residence has the potential to become a misnomer. Despite the holistic evaluative definition proposed by the Law Commission, the effective framing of the closest connection test in terms of residence may be misleading. This is not the Law Commission's intention, but the broad definition of the test blurs the line between the two factors. While bearing in mind that the definition should be read purposively,[241] the focus of habitual residence should be, naturally, *residence-based*. When the definition is promoted over the natural meaning of the term, the enquiry becomes artificial and strained. The most extreme example comes from dicta in *A v A* which indicates habitual residence can be found without the individual having ever resided in that jurisdiction.[242] Habitual residence should not be distorted to deal with complex cases.[243]

In the author's opinion, it is therefore preferable to rely on the closest and most real connection test by name, rather than trying to capture the operation of the closest connection test in the guise of a European-style understanding of habitual residence. This gives judges broader freedom to find the most appropriate governing law that had a significant connection to the deceased without the need to strain the meaning of the words "habitual residence."

In complex cases, such as peripatetic individuals or individuals who spend equal amounts of time in different jurisdictions, habitual residence does not naturally give a conclusive answer without judicial creativity. At the date of writing, there had only been one ECJ judgment regarding the last habitual residence of the deceased under the EU Succession Regulation.[244] This case held that it was impossible for the deceased to have more than one

[241] Rogerson, above n 192, at 88,
[242] *A v A,* above n 204, at [92].
[243] Hayton "Determination of the Objectively Applicable Law Governing Succession to Deceased's Estates," above n 37, at 364.
[244] Case C-80/19 *EE & KDE* ECLI:EU:C:2020:569, referred by the Lithuanian Supreme Court (Lietuvos Aukščiausiasis Teismas). An English copy of the judgment was not available at the time of writing. The author relied on the French and Spanish copies of the judgment.

habitual residence at the time of death.[245] Once again, this is not the conclusion which is reached on the ordinary meaning of the words in cases of individuals who divide their time between jurisdictions.[246] This position is supported in academia,[247] but is straining the natural meaning of habitual residence to turn it into a useful conflicts concept.

In cases of peripatetic individuals, the application of habitual residence can also be strained. Both European[248] and English[249] authorities are reluctant to find that an individual has no habitual residence, even when this is the intuitive answer on the plain meaning of the term. Under a European approach, to find the habitual residence of a peripatetic person, factors such as nationality may have more weight than at other times,[250] or as a fallback the court can apply the closest connection test.[251] These considerations are not part of the ordinary meaning of habitual residence, but are turned to by courts to fashion an answer to the choice-of-law question when habitual residence cannot.

Therefore, while the *explanation* of habitual residence, with ever-broadening reference to strongest connections or integration in a society, may point to a solution, this is clearly not a *residence*-based answer. The author acknowledges that in such complex cases the application of the closest connection test may also be a complex enquiry. However, the closest connection test has the clear comparative advantage since the enquiry is not ostensibly residence-based. The distortion that habitual residence may introduce into the law is undesirable when the "right" outcomes can be reached under an existing choice-of-law rule. Moreover, that existing choice-of-law rule is one that judges are familiar with and are accustomed to applying.[252]

---

[245] At [33].
[246] *Dicey*, above n 12, at [6-137].
[247] Hayton *European Succession Laws*, above n 175, at 1.22,
[248] Caravaca, above n 178, at Chapter 21.II.B.2 [7] point (3)
[249] See for example *Re B (A Child) (habitual residence)* [2016] UKSC 4, [2016] 2 WLR 557 at [44]
[250] See the EU Succession Regulation, above n 7, at Recital 24, and also Caravaca, above n 178, at Chapter 21.II.B.2 [7] point (2),
[251] See the EU Succession Regulation, above n 7, at Recital 25, and also Caravaca, above n 178, at Chapter 21.II.B [12] point (2)(a).
[252] See Chapter IV.A.

C Divergent jurisprudence: a cause for concern ?

As was explored in Chapter V, the Law Commission's proposed meaning for habitual residence differs significantly from the way that the concept is currently understood in New Zealand jurisprudence. Whatever the reasoning, it is observable that despite the English Supreme Court having abandoned this "traditional" conceptualisation of habitual residence, New Zealand has not followed suit. *A v A* was decided in 2013, and even in 2021 New Zealand has resolutely followed the abandoned English approach.[253] Therefore, introducing the new definition of habitual residence into New Zealand jurisprudence in the intestacy space may lead to confusion.

It is arguable that the two approaches may be reconcilable. The European-style "integration" approach could include reference to length of stay and provide a purposive analysis of the deceased's intentions. However, these two conceptualisations of habitual residence are not the same.[254] This is most clearly illustrated by Lady Hale's strong comments in *A v A*.[255] The existence of two different approaches to a test bearing the same name, especially in the private international law context, has potential for unwanted results.[256]

Taken at its best, cases in an intestacy context could be aided by the proposed statutory definition of habitual residence recommended by the Law Commission.[257] This would lead to largely positive results. Judges may resolutely refuse to accept precedent from an international child abduction context, in which case both concepts could theoretically continue to develop in parallel. However, if cases are presented relying on existing case law when dealing with the new definition of habitual residence, the law could potentially become murky. A conflation or convergence of the two concepts is likely undesirable in the intestacy context since it will move the test away from its useful fluidity. Further, as

[253] *CW v DW*, above n 211.
[254] *Dicey*, above n 12, at [6-119].
[255] See expressly at [54] point (v).
[256] For a similar argument see Clarkson and Hill, above n 127, at 305, where the author comments on the regrettable fact that case law on the concept of domicile in England comes predominantly from domestic tax cases rather than cases in the conflicts arena.
[257] The Law Commission Issues Paper, above n 2, at 17.17-17.18.

laid out at Chapter II, the preferred intestacy rules are those that share a strong connection with the deceased. Over-reliance on elements such as "settled purpose" may draw the enquiry away from the governing law with the closest connection to the deceased and into a domicile-like enquiry.[258]

The risk of falling back to the elements developed by almost thirty years of case law is concerning,[259] since the result may not be a governing law that is closely connected to the deceased. This may be particularly difficult given that New Zealand courts already refer to habitual residence as a broad factual enquiry,[260] before falling back to reliance on defined criteria.[261] These risks do not exist in the application of the closest and most real connection rule, which will always point to the most relevant law to the deceased, and therefore the most appropriate law to distribute the estate. It will always require a holistic analysis of the deceased's life.

Therefore, in the opinion of the author, despite the codified meaning that the Law Commission intends to give the term, the precedential baggage that the term will drag into succession law from international family law is likely to be more confusing than informing. As such, the closest connection test is again a more appropriate connecting factor in cases of cross-border intestacy than habitual residence, under its current meaning and under the redefinition proposed by the Law Commission.

D Harmonisation of international conflicts rules

A comparison of the closest connection test and habitual residence would not be complete without a discussion on the value of harmonising private international law rules across jurisdictions. Harmonisation is an important principle in the conflict of laws.[262] Generally, the unification of choice-of-law rules is desirable to reduce forum shopping through

[258] Rogerson, above n 192, at 89.
[259] New Zealand signed the Hague Convention in 1980, see above n 184,
[260] *SK v KP*, above n 200, at [71]; *Punter (No 2)*, above n 197, at [88],
[261] *SK v KP*, above n 200, at [72]-[73]; *Punter (No 2)*, above n 197, at [88]-[89].
[262] See, for example, *The Conflict of Laws in New Zealand*, above n 10, at 1.21-1.24.

increasing uniformity of outcome.[263] In turn, this increases certainty in cases with a cross-border element.[264]

The importance of harmonisation varies depending on the context. For example, harmonisation and unification of private international law rules are particularly important in the European Union. International travel and relocation in Europe are relatively easy and common. The EU Succession Regulation was therefore seen as a desirable step towards harmonisation between Member States.[265]

New Zealand is very different to the countries within the European Union. New Zealand is geographically isolated from most countries besides Australia, with which New Zealand shares a common cultural history and value system.[266] The Law Commission is not suggesting harmonising choice-of-law rules with Australia, or even another common law country. This can likely be justified given the criticisms levied at the operation of the scission principle.[267] However, there seems no clear reason why New Zealand should reform its cross-border intestacy rules to correspond with the EU Succession Regulation.[268]

Harmonisation should not be seen as an end in itself. Rather, harmonisation must provide clear benefits in this context for it to be a weighty factor in determining the most appropriate connecting factor in cases of cross-border intestacy. Using a choice-of-law rule which consistently indicates the most appropriate lex causae for intestate New Zealanders likely outweighs the benefit to New Zealand conflicts jurisprudence of aligning our conflicts rule with the European Union. Harmonisation with the European Union is not, in the opinion of the author, worth the potential application of an inappropriate set of legal rules and the subversion of the deceased's reasonable expectations.

---

[263] *The Conflict of Laws in New Zealand*, above n 10, at 1.21. Forum shopping refers to parties bringing a claim in a certain forum, knowing that its choice-of-law rules will result in a more favourable governing law compared to the choice-of-law rules of another available forum.
[264] *The Conflict of Laws in New Zealand*, above n 10, at 1.21.
[265] Pierre Mayer and Vincent Heuzé *Droit international privé* (11th ed, LGDJ Lextenso éditions, Paris, 2014) at [875].
[266] In terms of legal values common to the common law system.
[267] For example, see the Law Commission Issues Report, above n 2, at 17.10-17.13.
[268] EU Succession Regulation, above n 7.

Further, the risk of forum shopping is not a pressing concern in the context of cross-border intestacy. In the author's view, this is not an area of law where there are necessarily opposing parties looking for the forum that will have the most advantageous choice-of-law rules to benefit some heirs over others.[269] If there are next-of-kin who are concerned about the distribution of the estate, they will likely take other avenues such as claims under the Family Protection Act 1955. Finally, if forum shopping was a concern in the case of intestacy, it seems like a problem that would easily be solved by a *forum non conveniens* submission.[270]

To summarise the harmonisation argument, choosing not to follow the European Union's approach is not necessarily a concern in New Zealand's case. Harmonisation is an end that should be justified by the means. In the intestacy context habitual residence is not, in the author's opinion, the right means. The closest connection rule, while not harmonising New Zealand's choice-of-law rules with either the United Kingdom or the European Union, does provide a stable connecting factor that leads to the most appropriate governing law in the intestacy context. This should be the goal of law reform, rather than following precedent from a very different operational context.

[269] There are other areas of law where there are procedural advantages to forum shopping. See Friedrich K Juenger "What's Wrong with Forum Shopping?" (1994) 16 Sydney L Rev 5 and Brian R Opeskin "The Price of Forum Shopping: A Reply to Professor Juenger" (1994) 16 Sydney L Rev 14.

[270] For a discussion of this doctrine see *The Conflict of Laws in New Zealand*, above n 10, at 2.256 and following.

VII Conclusion

In this dissertation, various choice-of-law rules have been evaluated according to their ability to point to the most appropriate substantive law in cases of cross-border intestacy. By developing evaluative principles to guide this enquiry, the author has reached the conclusion that the most appropriate connecting factor in the context of cross-border intestacy is the closest and most real connection rule.

This conclusion was reached after first establishing the relevant principles guiding decisions in the choice-of-law space at Chapter II. When evaluating the status quo at Chapter III there were two issues. First, the operation of the scission principle led to complicated and unexpected results. Second, at the choice-of-law level, each of scission's limbs were inappropriate connecting factors in the intestacy context. The lex situs rule is inappropriate as a sole connecting factor since it points to different governing laws depending on the location of the asset, and those governing laws may not have any connection with the deceased. Domicile was shown to be a complicated and rigid concept that was out-of-touch with modern expectations and the way in which people organise their lives. At Chapter V nationality was discounted as a contender for similar reasons, as both concepts are rigid and technical, which could lead to unexpected results in cases of cross-border intestacy.

At Chapters V and VI habitual residence was explored. Habitual residence, under the traditional understanding of the concept, can lead to undesirable results given the unhelpful precedential constraints the term carries in New Zealand. Most concerningly, this enquiry can theoretically point to *no* lex causae (although courts would likely strive to find a different connection to prevent leaving heirs at an impasse). This is an undesirable result for the conflict of laws: choice-of-law rules should be workable and should point to clear answers.

The Law Commission's reformulation of the habitual residence choice-of-law test was also evaluated. This was found to have strong similarities to the closest connection test, both in definition and in outcome. However, referring to the test as the closest connection test

rather than relying on habitual residence will likely avoid potential confusion between different understandings of the same term, and will also mean that the judiciary does not attempt to teach an old term new tricks. Further, reliance on the closest connection rule provides no foothold for unhelpful precedential criteria to (mis)inform the broad enquiry. Rather, it is a self-defining enquiry that requires a holistic evaluation of the deceased's life in order to find the most appropriate lex causae to distribute the deceased's assets. The Law Commission's definition of habitual residence attempts to encompass the closest connection concept, but framing it in terms of residence is unhelpful in certain contexts.

The closest connection rule is a choice-of-law rule that is flexible in its approach and therefore has the ability to take a holistic view of the deceased's life. This will indicate a governing law that has the most significant association or relationship with the deceased. This will likely be the result expected by heirs, and also what the deceased would have likely decided if he or she had considered executing a will before passing away.

As such, in the opinion of the author, the closest and most real connection rule is the most appropriate connecting factor in cases of cross-border intestacy.

Bibliography

A Cases

1 New Zealand

Basingstoke v Groot [2007] NZFLR 363 (CA)

Brown v New Zealand Basing Ltd [2017] NZSC 139

Chevalier Wholesale Produce Ltd v Joes Farm Produce Ltd HC Auckland CIV-2010-404-4229

Christie v Foster [2019] NZCA 623, [2020] 2 NZLR 238

Clifford v Rentokil Ltd (NZ) [1995] 1 ERNZ 407

CW v DW [2021] NZHC 427

Greenfield v Chief Executive, Ministry of Social Development [2015] NZSC 139, [2016] 1 NZLR 261.

Harvey v Harvey (2003) 23 FRNZ 186 (HC)

Humphries v Humphries [1992] NZFLR 18 (HC)

Ingle v Ingle [1985] NZRL 275

Johnston v Johnston [2020] NZHC 2887

Langdon v Wyler [2017] NZHC 2535

Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd [2010] NZSC 49

McGowan v Hamblett [2007] 1 NZLR 120 (HC)

Marsden v Marsden FP041/304/94, 17 February 1995

MH Publications Ltd v Komori (UK) Ltd [2008] BCL 929, BC200863028

Moleta v Darlow [2021] NZHC 564

Moleta v Darlow [2021] NZHC 2016

New Zealand Basing Ltd v Brown [2016] NZCA 525

Punter v Secretary for Justice (No 2) [2007] 1 NZLR 40 (CA)

RCL v APBL [2012] NZHC 1292

Re Bailey [1985] 2 NZLR 656 (HC)

Schumacher v Summergrove Estates [2014] NZCA 412, [2014] 3 NZLR 599

Secretary for Justice v SB (Retention: Habitual Residence) HC Christchurch AP 1/05 (12 April 2006)

SK v KP (2005) 24 FRNZ 518 (CA)

SP v SJA WHA FAM-2009-088-000451, 23 October 2009

Webster v Jagger [2021] NZHC 1146; BC202161350

2 Australia

Bonython v Commonwealth of Australia (1950) 81 CLR 486; [1951] AC 201, 219 (UKPC)

LK v Director-General, Department of Community Services [2009] HCA 9

Mhambrey v Vairaja [2018] FamCAFC 120

3 United Kingdom

A v A and Another (Children: Habitual Residence) [2013] UKSC 60.

Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50; [1983] 2 All ER (HL)

In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562

Re B (A Child) (habitual residence) [2016] UKSC 4, [2016] 2 WLR 557

R v Barnet London Borough Council, ex parte Shah [1983] 2 AC 309 (HL).

Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] QB 825

Re Collens (deceased), Royal Bank of Canada (London) Ltd v Krogh and others [1986] 1 All ER 611 (Ch)

Re Hoyles, Row v Jagg [1911] 1 Ch 179.

Re R (Abduction: Habitual Residence) [2003] EWHC 1968 (Fam)

4 European Union

Case C-80/19 *EE & KDE* ECLI:EU:C:2020:569

B Legislation

1 New Zealand

Administration Act 1969

Domicile Act 1976

Property (Relationships) Act 1976

Te Ture Whenua Māori Act 1993

Wills Act 2007

2 European Union

Convention 80/934/EEC on the law applicable to contractual obligations (Rome Convention)

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

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 enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201/107.

C Books and chapters in books

Frank Bates *Conflict of Laws as Taxonomy: A New Approach* (LexisNexis Butterworths, Chatswood, Australia, 2015)

Jean-Sylvestre Bergé, Stéphanie Francq and Miguel Gardeñes Santiago (eds) *Boundaries of European Private International Law* (Groupe Larcier, Editions Brulant, Brussels 2015).

Michael Bogdan "Some Reflections on Multiculturalism, Application of Islamic Law, Legal Pluralism and the New EU Succession Regulation" 59-58 in The Permanent Bureau of the Hague Conference on Private International Law *A Commitment to Private International Law: Essays in honour of Hans van Loon* (Intersentia Publishing, Cambridge, 2013).

Lindsay Breach (ed) *Nevill's Law of Trusts, Wills and Administration* (13th ed, LexisNexis NZ Limited, Wellington, 2019)

Adrian Briggs *The Conflict of Laws* (2nd ed, Oxford University Press, 2008).

Alfonso-Luis Calvo Caravaca, Angelo Daví and Heinz-Peter Mansel (eds) *The EU Succession Regulation: A Commentary* (online ed, Cambridge University Press, Cambridge, 2016).

CMV Clarkson and Jonathan Hill *The Conflict of Laws* (4th ed, Oxford University Press, Oxford, 2011).

J. G. Collier *Conflict of Laws* (3rd ed, Cambridge University Press, Cambridge, 2001)

C J.-G Castel (ed) *Canadian Conflict of Laws* (3rd ed, Butterworths Canada, Toronto, 1994)

Lawrence Collins (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012).

Gerhard Dannemann "Adaptation" in Stefan Leible (ed) *General Principles of European Private International Law* (Wolters Kluwer International BV, Alphen aan den Rijn, Netherlands, 2016)

M Davies and others *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, Chatswood (NSW) 2020).

M Davies and others *Nygh's Conflict of Laws in Australia* (9th ed, LexisNexis Butterworths, Chatswood (NSW) 2014)

Henry Dyson *French Real Property and Succession Law: A Handbook* (2nd ed, Robert Hale, London, 1991).

John Earles and others *Dobbie's Probate and Administration Practice* (6th ed, LexisNexis NZ Limited, Wellington, 2014)

HAJ Ford *Principles of the Law of Death Duty* (The Law Book Company Limited, Melbourne, 1971).

Louis Garb and John Wood (eds) *International Succession* (3rd ed, Oxford University Press, Oxford, 2010).

Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing, Oregan, 2017)

I. J. Hardingham *The Law of Intestate Succession in Australia and New Zealand* (The Law Book Company Limited, Sydney, 1978)

David Hayton (ed) *European Succession Laws* (2nd ed, Jordans Publishing, Bristol, 2002).

Benjamin Hayward *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, Oxford, 2017)

Maria Hook "The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes" 175-200 in Michael Douglas and others *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, Oxford, 2019) 175.

Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020).

Abid Hussain *The Islamic Law of Wills and Inheritance* (Wrentham Consultancy UK, Huddersfield, UK, 2015)

Pierre A Lalive *The Transfer of Chattels in the Conflict of Laws: A Comparative Study* (reprint Scientia Verlag Aalen, Darmstadt, Germany, 1977).

David McClean and Kisch Beevers (ed) *Morris – The Conflict of Laws* (7th ed, Sweet & Maxwell, London, 2009).

Pierre Mayer and Vincent Heuzé *Droit international privé* (11th ed, LGDJ Lextenso éditions, Paris, 2014)

Gareth Miller *International Aspects of Succession* (Ashgate Publishing, Hampshire, 2000).

John Murphy "Financial relief, matrimonial property and succession" *International dimensions on family law* (Manchester University Press, Manchester, 2005).

P. M. North and J. J. Fawcett (eds) *Cheshire and North: Private International Law* (11th ed, Butterworths, London, 1987)

David Pearl and Werner Menski *Muslim Family Law* (3rd ed, Sweet & Maxwell, London, 1998).

Nicola Peart and Prue Vines "Intestate Succession in Australia and New Zealand" in Kenneth G C Reid, Marius J De Waal and Reinhard Zimmermann (eds) *Comparative Succession Law* (Oxford University Press, Oxford, 2015) 349.

ILM Richardson and RL Congreve (eds) *Adams and Richardson's Law of Estate and Gift Duty* (5th ed, Butterworths, Wellington, 1978).

Peter Stone *EU Private International Law* (3rd ed, Edward Elgar Publishing, Cheltenham, UK 2014).

Symeon C Symeonides "Material Justice and Conflicts Justice in Choice of Law" in Patrick J Borchers Borchers and Joachim Zekoll (eds) *International Conflict of Laws for the Third Millenium: Essays in Honour of Friedrich K Juenger* (Transnational Publishers, 2001) 125

Paul Torremans and others (eds) *Cheshire, North & Fawcett on Private International Law* (15th ed, Oxford University Press, Oxford, 2017).

D Journal articles

Bram Akkermans and Caroline S Rupp "Queen Lex Rei Sitae – Off With Her Head?" (2018) 7(3) EPLJ 209

Max Atallah "The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation" (2015) 5(2) Baltic Journal of European Studies 130.

Roxana Banu "Conflicting Justice in Conflict of Laws" (2020) 53 Vand J Transnat'l L 461.
Gary B Born "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814

Jennifer Bost "Nothing Certain about Death and Taxes (and Inheritance)" (2013) 27 Emory Int' L Rev 1145.

Carol S Bruch "The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons: Do Quasi-Community Property and Mandatory Survivorship Laws Need Protection?" (1993) 56(2) Law and Contemporary Problems 309.

P B Carter "Domicil: The Case for Radical Reform in the United Kingdom" (1987) 36(4) Int'l and Comp LQ 713.

David F Cavers "Habitual Residence: A Useful Concept?" (1972) 21(3) Am U L Rev 475.
Ca Florentino Carreño "Cross-border planning for real estate: Spain" (2018) 24(1) Trusts & Trustees 34.

Eric M Clive "The Concept of Habitual Residence" (1997) Juridical Review 137.

Lawrence Collins "Arbitration Clauses and Forum Selecting Clauses in the Conflict of Laws: Some Recent Developments in England" (1971) 2 J Mar L & Com 363.

Walter Wheeler Cook "Logical and Legal Bases of the Conflict of Laws" (1923-1924) 33 Yale LJ 457.

David P Currie “The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws” (1966) 33(3) U Chi L Rev 429.

Angelique Devaux “The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?” (2013) 47(2) International Lawyer 229.

Beatriz Campuzano Díaz “Una nueva sentencia del TJUE sobre el concept de residencia habitual en el marco del Reglamento 2201/2003: Sentencia de 17 de octubre de 2018, UD y XB, AS 393/18 PPU” (2019) 11(2) Cuadernos de Derecho Transnacional 462.

Sjef van Erp “New Developments in Succession Law” (2007) 11(3) EJCL 1

Sjef van Erp “Succession, Registration and the Extraterritorial Application of the lex rei sitae” (2016) 3(4) Eur J Comp L & Governance 349
Richard Frimston “The European Union Succession Regulation No. 650/2012” (2013) 33(1) Est Tr & Pensions J 100.

Angelika Fuchs “The new EU Succession Regulation in a nutshell” (2015) 16 ERA 119 available online at DOI 10.1007/s12027-015-0391-2.

Erin Gallagher “A House is Not (Necessarily) a Home: A discussion of the common law approach to habitual residence” (2015) 47(2) NYU J Int’l L & Pol 463.

Atle Grahil-Madsen “Conflict between the principle of unitary succession and the system of scission” (1979) 28 Int’l & Comp LQ 598.

Javier Carrascosa González “Reglamento Sucesorio Europeo y Residencia Habitual del Causante” (2016) 8(1) Cuadernos de Derecho Transnacional 47.

Moffatt Hancock “Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: Disadvantages of Disingenuousness” (1967) 20 Stanford L R 1

David Hayton “Determination of the Objectively Applicable Law Governing Succession to Deceased’s Estates” (2004) DNotl Les Succession Internationales dans l’UE 359.

Qisheng He “Reconstruction of lex personalis in China” (2013) 6(1) Int’l and Comp LQ 137.

John von Hein "Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques" (2017) 6(2) EPLJ 142.

David Hill "The Continuing Refinement of Habitual Residence: *R, Petitioner*" (2016) 20 Edin LR 82

Maria Hook "A first principles approach to couples' property in the conflict of laws" (2019) 15(2) J Priv Int L 257

Anjali Iyer "Domicile and Habitual Residence" (1985) 6 Sing L Rev 115

Friedrich K Juenger "What's Wrong with Forum Shopping?" (1994) 16 Sydney L Rev 5.
Lag Paul Lagarde "Les principes de base du nouveau règlement européen sur les successions" (2012) 101(4) Rev crit DIP 691

Robert A Leflar "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54 Calif L Rev 1584

John Linarelli "Toward a Political Theory for Private International Law" (2016) 26(2) Duke J Comp & Int'l L 299.

K Lipstein "One Hundred Years of Hague Conferences on Private International Law" (1993) 42(3) Int'l & Comp LQ 553.

Morgan McDonald "Home Sweet Home: Determining habitual residence within the meaning of the Hague Convention" (2018) 59(E Supp) BC L Rev 427

Peter McEleavy "Regression and Reform in the Law of Domicile" (2007) 56(2) The Int'l and Comp LQ 453.

Gail McKnight Beckman "The Hague Conference on Private International Law Proceedings Leading to the 1988 Convention on Succession" (1987) 12(4) Int'l Legal Pract. 104.

Campbell McLachlan "Reforming New Zealand's Conflicts Process: The Case for Internationalisation" (1984) 14(4) VUW L Rev 443

JHC Morris "Intestate Succession to Land in the Conflict of Laws" (1969) 85 LQR 339.

Freskim Musliu and Armend Ahmeti “Legal Regulation of Succession in European Union Law, Case Study: Regulation no 650/12 of the European Union” (2018) 11 Relationes Internationales: Acta Universitatis Danubius 5

Ildikó Németh “The Successions in Europe: A Contribution to the Classification and Unification of the Succession System in Europe” (2015) 2 ELTE LJ 109

Brian R Opeskin “The Price of Forum Shopping: A Reply to Professor Juenger” (1994) 16 Sydney L Rev 14.

Nicola Peart “New Zealand’s Succession Law: Subverting Reasonable Expectations” (2008) 37 Common Law World Review 356.

Eveline Ramaekers “Cross-border Successions. The New Commission Proposal: Contents and a Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier.” (2011) 15(1) EJCL 1.

Willis L M Reese “Choice of Law Rules or Approach” (1971-1972) 57(3) Cornell L Rev 315

Mathias Reimann “Savigny’s Triumph – Choice of Law in Contracts Cases at the Close of the Twentieth Century” (1999) 39 VA J Int’l L 571

Barbara Rich “‘Habitual Residence’ in English Succession Law” (2011) 17(4) *Trusts & Trustees* 316

Eleanor Cashin Ritaine “National Succession Laws in Comparative Perspective” (2013) 14 ERA 131

Pippa Rogerson “Habitual Residence: The New Domicile?” (2000) 49(1) The Int’l and Comp LQ 86.

Iveta Rohová and Klára Drličková “Habitual Residence as a Single Connecting Factor under the Succession Regulation” (2015) Scientific Cooperation International Journal of Law and Politics 107.

Caroline S Rupp “The *lex rei sitae* and Its Neighbours – Debates, Developments and Delineating Boundaries Between PIL Rules” (2018) 7(3) EPLJ 267

Jeffrey Schoenblum “Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents’ Estates” (1991) 32(1) Va J Int’l L 83.

Rhona Schuz “Habitual Residence of the Child Revisited: A Trilogy of Cases in the UK” (2014) 26 Child & Fam L Q 342.

Pritanshu Shrivastava “Influence under Shariah Law” (2019) 6(12) Ct Uncourt 37.
So Dennis Solomon “The Boundaries of the Law Applicable to Succession” (2016) 18 Annals FAC LU Zenica 193.

Erwin Spiro “The Evolution of the Closest (Most Significant) Connection in the Conflict of Laws” (2990) 53(1) THRHR 74.

Peter Stone “The Concept of Habitual Residence in Private International Law” (2000) 29(3) Anglo-Am L Rev 342.

Gregg Strock “A Bastard by Any Other Name: A Requiem for the End of Disproportionate Treatment toward out of Wedlock Children in Florida’s Probate System” (2018) 13 FIU L Rev 127.

Leon Trakman “Domicile of Choice in English Law: An Achilles Heel” (2015) 11(2) J Priv Int’l L 317

Lawrence W Waggoner “With Marriage on the Decline and Cohabitation on the Rise, What about Marital Rights for Unmarried Partners?” (2015) 41 ACTC L J 49.

Nathalie Weber-Frisch and Radia Duquennois-Djoua “Domestic inheritance tax rules in EU Member States regarding cross-border successions” (2014) 15 ERA Forum 209.

Louise Weinberg “Theory Wars in the Conflict of Laws” (2005) 103 Mich L Rev 1631.
Wein Russell J Weintraub “Inquiry into the Utility of Situs as a Concept in Conflicts Analysis” (1966-1967) 52(1) Cornell L Rev 1.

Mariusz Załucki “Attempts to Harmonise the Inheritance Law in Europe: Past, Present and Future” (2018) 103(5) Iowa L Rev 2317

Mariusz Załucki “New Revolutionary European Regulation on Succession Matters: Key Issues and Doubts” (2016) 3(1) Revista de Derecho Civil 165

Mo Zhang "Habitual Residence v Domicile: A Challenge Facing American Conflict of Laws" (2018) 70(2) Maine L Rev 161

Gadi Zohar "Habitual Residence: An Alternative to the Common Law Concept of Domicile" (2009) 9(1) Whitier J Child & Fam Advoc 169

E Reports

1 New Zealand

Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017).

Law Commission *Pūrongo ā Tau: Annual Report 2019-2020* (NZLC E.31, 2020).

Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC IP46, 2021)

2 Australia

The Law Reform Commission *Choice of Law* (ALRC 58, 1992)

Queensland Law Reform Commission *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, 1996)

3 The United Kingdom

The Law Commission and The Scottish Law Commission *Private International Law: The Law of Domicile* (Law Com No 168; Scot Law Com No 107, 1987)

F Dissertations

Philip D Bremner "Bridging the Gap between Civil and Common Law: An Analysis of the Proposed EU Succession Regulation" (LLM Thesis, University of Aberdeen, 2010).

Giovanna Debernardi "Le Règlement européen sur les successions et nouvelles perspectives pour les systèmes juridiques nationaux" (LLD Thesis, Università degli Studi di Tornio and Université Côte d'Azur, 2017)

G Internet resources

Bill Atkin *International Family Law: The Law Relating to Domicile* (online ed, LexisNexis).

"Buying a property in the UAE" (12 Feb 2020) The United Arab Emirates' Government Portal <https://u.ae/en/information-and-services/moving-to-the-uae/expatriates-buying-a-property-in-the-uae>

H Other resources

Bram Akkermans and Eveline Ramaekers *Lex Rei Sitae in Perspective: National Developments of a Common Rule?* (Maastricht European Private Law Institute, Working Paper No. 2012/14).

Hana Jánošková "Current Issues of Succession Law in Europe in terms of Regulation EU No. 650/2012 of 4th July 2012" (paper presented at Wissenschaftskonferenz "Current Issues of Science and Research in the Global World", Vienna, May 2014) 72

Hague Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile

Hague Convention on the Law Applicable to the Estates of Deceased Persons 28 ILM 146 (1989)

Max Planck Institute for Comparative and International Private Law *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession* (2010) 74(3) *Rabels Zeitschrift* 522.