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# Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions

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# EXPLORING THE “DISMAL SWAMP”: THE REVISION OF LOUISIANA’S CONFLICTS LAW ON SUCCESSIONS\*

Symeon C. Symeonides\*\*

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\* Copyright 1987 by the author. The views expressed herein are those of the author alone and do not necessarily represent the views of the Louisiana State Law Institute. This Article, which recounts some recent attempts at a legislative renovation of Louisiana conflicts law, is dedicated to the great champion of its judicial renovation, Judge Albert Tate, Jr. For Judge Tate’s pioneering work in Louisiana conflicts law, see Symeonides, *Louisiana Conflicts Jurisprudence, A Student Symposium: Introduction*, infra this issue at 1105.

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## I. INTRODUCTION

American conflicts law has been called a "dismal swamp"<sup>1</sup> and many other similar names. Indeed, conflicts law is viewed by the average American lawyer as a rather esoteric and inherently complex subject. Whether justified or not, this view renders legitimacy to the often asked question of whether conflicts problems are at all susceptible to legislative solutions. This question has been answered differently by the two great legal traditions which shaped the legal system of Louisiana, the continental civil law tradition and the Anglo-American common law tradition. While in most common law systems legislatures have meticulously avoided the "dismal swamp,"<sup>2</sup> civil law systems have long adhered to the view that

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1. "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." Prosser, *Interstate Publications*, 51 Mich. L. Rev. 959, 971 (1953).

2. In the United States the hands-off stance of the federal and state legislatures is generally in accord with "the persistent reluctance of American conflicts scholars to advocate legislative solutions. . . ." Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. Cal. L. Rev. 340, 359-60 (1971). For the reasons behind this position, see, e.g., Leflar, *Choice-of-Law Statutes*, 44 Tenn. L. Rev. 951 (1977); Reese, *Statutes in Choice of Law*, 35

conflicts legislation is not only feasible but also desirable.<sup>3</sup> Perhaps because they mistook the swamp for a bayou, or perhaps because of their innate expertise with swamps, the Redactors of the Louisiana Civil Code of 1808 decided to follow the civil law tradition and include some conflicts rules in the Preliminary Title of the Civil Code.<sup>4</sup> Thus, even before statehood, and twenty years before Samuel Livermore published in New Orleans the

Am. J. Comp. L. 395, 396 (1987) (“[n]o legislature, no matter how wise it may be, could envisage all of the almost endless possibilities”). See also Trautman, *Reflections On Conflict-of-Laws Methodology*, 32 *Hastings L.J.* 1612, 1621 (1981) (“legislative direction is inherently incapable of capturing the nuance and sophistication necessary for just and satisfactory choice-of-law solutions”). Although the same attitude prevailed in England for a long time, a codification process is now under way. See North, *Problems of Codification in a Common Law System*, 46 *Rabels Zeitschrift fur auslandisches und internationales Privatrecht [RabelsZ]* 490 (1982).

3. In the last twenty years alone, nine European countries have codified, or have begun the process of codifying, their conflicts law. They are listed below in chronological order followed by the year of enactment and a source where the enactment is published in a language other than the native language: Portugal [1967, 57 *Revue critique de droit international privé [R.C.D.I.P.]* 369 (1968), 32 *RabelsZ* 513 (1968)]; Spain [1974, 32 *Annuaire suisse de droit international [Ann. suisse dr. int'l]* 400 (1976), 39 *RabelsZ* 724 (1975)]; East Germany [1975, 25 *Am. J. Comp. L.* 354 (1977)]; Hungary [1979, 55 *Tul. L. Rev.* 63 (1980)]; Yugoslavia [1978 and 1983, 27 *Neth. Int'l L. Rev.* 121 (1980)]; Austria [1979, 28 *Am. J. Comp. L.* 197 (1980)]; Turkey [1982, 46 *RabelsZ* 184 (1982)]; West Germany [1986, 17 *Ga. J. Int'l & Comp. L.* 237 (1986); 76 *R.C.D.I.P.* 170 (1987)]; Switzerland [currently before Parliament, 1983 *Feuille fédérale I* 255, 68 *R.C.D.I.P.* 185 (1979)].

Together with the EEC Convention on Contractual Obligations of 1980, and the more than a dozen Hague Conventions concluded during the same period, these national codifications are strong testimony to the European legislatures' renewed willingness to navigate again the “dismal swamp.” For a detailed presentation of these continental codifications and international conventions, see S. Symeonides, *An Outsider's View of the American Approach to Choice of Law: Comparative Observations on Current American and Continental Conflicts Doctrine*, 305-59 (S.J.D. thesis on reserve with the Harvard and LSU Law Libraries (1980)); Cavers, *supra* note 2, at 340; Jayme, *Considerations historique et actuelles sur la codification du droit international privé*, 177 *Recueil des Cours* 9, 51-85 (1982); McDougal, *Codification of Choice of Law: A Critique of the Recent European Trend*, 55 *Tul. L. Rev.* 114 (1980); von Overbeck, *Les questions générales du droit international privé à lumière des codifications et projets récents*, 176 *Recueil des Cours* 9 (1982).

4. See arts. 9 and 10 of the Preliminary Title of the Digest of the Civil Laws Now in Force in the Territory of Orleans (1808). In 1825, the 1808 Digest was converted into a true civil code which, with one major revision in 1870 and several partial revisions since then, remains in force in Louisiana to date. Article 9 retains the same number and substance to date. See *infra* note 6. Article 10, reproduced in text accompanying *infra* note 35, was expanded in 1825 with the addition of a second and third paragraph discussed in text accompanying *infra* notes 214 ff. Since 1978, article 10 has been expanded further by the addition of other conflicts provisions transferred from other parts of the Civil Code. For a recent account of the history of the Louisiana Civil Code, see R. Kilbourne, *A History of the Louisiana Civil Code* (1987). For the influence of French sources on the 1808 Digest, see, *inter alia*, Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 *Tul. L. Rev.* 4 (1971); Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 *Tul. L. Rev.* 603 (1972).

first conflicts book on American soil,<sup>5</sup> Louisiana became the first American state to enact statutory conflicts rules.

Unlike their continental counterparts, however, these rules did not cover the entire spectrum of conflicts law. Notably, they did not cover, or were interpreted so as not to cover,<sup>6</sup> the area where conflicts are most frequent—torts. Thus, for more than a century and a half, Louisiana conflicts jurisprudence had to proceed in two gears: one for areas such as contracts and successions where the courts had the benefit of legislative guidance and the burden of legislative constraints; and the other for subjects such as torts where they had as much freedom as their common law counterparts. More than a century and a half later, both gears must be changed and the batteries recharged.

Drafted in the simpler days of the early nineteenth century and drawn from even earlier, medieval sources,<sup>7</sup> the conflicts rules of the Louisiana

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5. S. Livermore, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations* (1828). For the influence of this book and its author on Joseph Story, and through him, on American conflicts law, see K. Nadelmann, *Conflict of Laws: International and Interstate* 7-8 (1972); DeNova, *The First American Book on Conflict of Laws*, 8 *Am. J. Legal Hist.* 136 (1964); Juenger, *A Page of History*, 35 *Mercer L. Rev.* 419, 442-43 (1984).

6. Article 9 of the Louisiana Civil Code provides that "[t]he law is obligatory upon all inhabitants of the State indiscriminately; the foreigner, whilst residing in the State, and his property within its limits, are subject to the laws of the State." La. Civ. Code art. 9. This article could provide a legislative basis for the rule of *lex loci delicti*, at least in a unilateral form. In other words, this article could be read as requiring the application of Louisiana law to all torts committed within this state. Such reading would have been consistent with the French interpretation of article 3 of the Code Napoleon, which originated from the same source as article 9, and which provides that "[l]aws of police and public safety obligate all those inhabiting the territory." For a discussion of the meaning and application of this article in France, see 1 H. Batiffol & P. Lagarde, *Droit international privé* 321-36 (7th ed 1981). Nevertheless, although Louisiana courts had adhered to the rule of *lex loci delicti* for more than a century, they chose not to base it on this article, but rather on common law authorities. In retrospect, this turned out to be a blessing in disguise, since it reserved to the courts the power of overruling. See *infra* note 9.

7. The sources of La. Civ. Code arts. 9 and 10, the latter of which in 1808 contained only what is now its first paragraph, see text at *infra* note 35, are not entirely clear, but they are quite old. In terms of language, the two original articles parallel precisely two almost identical articles of the French *Projet du Gouvernement* of 1800. See arts. 9, 10, La. C.C. Comp. Ed., in 16 *West's LSA-C.C.* p.5-6 (1972); Batiza, *supra* note 4 at 45. However, there is some evidence that, in terms of substance, the two articles were intended to incorporate even older principles contained in the Spanish *Siete Partidas* (1256-63). See *The Laws of Las Siete Partidas, Which Are Still in Force in the State of Louisiana, Partida First, Title I, Law 15, and Partida Third, Title XIV, Law 15* (Lislet & Carleton Transl. 1820). See also, *LeBreton v. Nouchet*, 3 *Mart. (o.s.)* 60 (1813); *Comment, Conflict of Laws in Louisiana: Contracts*, 38 *Tul. L. Rev.* 726, 730-32 (1964). A third, less credible view, see *id.* at 731, is that these articles were derived from early American cases, especially those authored by Story who was in turn influenced heavily by continental jurists such as Huber and Voet. See *supra* note 5.

Civil Code performed their expected role reasonably well for some time. But, without a legislative updating or a jurisprudential tuning and readjustment, they have gradually become an obstacle to progress. Today, they are as useful as dry wood, incapable of carrying the load of the increased complexity of modern multistate activity.

In the parallel field of uncodified conflicts the situation is not much better. With respect to torts conflicts, Louisiana did join the American conflicts "revolution"<sup>8</sup> of the 1960s, albeit belatedly and half-heartedly. In *Jagers v. Royal Indemnity Co.*,<sup>9</sup> the Louisiana Supreme Court broke away from the territorialism of the traditional common law rule of *lex loci delicti*. Unfortunately, however, the court was rather delphic in its reasoning, and, although it provided a semi-method for resolving so-called "false conflicts," the court gave no indications as to the methodology it intended to follow in so-called "true conflicts."<sup>10</sup> The resulting gap has been filled by lower courts in a less than consistent manner.<sup>11</sup> The confusion among the lower courts, which still lingers fourteen years after *Jagers*, is best epitomized in the statement that "the interest analysis principles embodied in the Second Restatement [sic] are the applicable conflicts law of Louisiana. . . ."<sup>12</sup> Although a contradiction in terms, this statement also describes accurately the judicial practice in many sister states.<sup>13</sup>

To the observer at the beginning of this decade, Louisiana conflicts law was beginning to look again like a dismal swamp. It was time for

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8. The term "revolution," with or without quotation marks, has been used widely, with or without irony, for describing the way in which the established conflicts orthodoxy embodied in the 1934 conflicts Restatement was discarded in favor of new alternative methodologies. For a thorough and thoughtful critique, see Juenger, *General Course on Private International Law* (1983); 193 *Recueil des Cours* 119, 207-52 (1985-IV); Korn, *The Choice-of-Law Revolution: A Critique*, 83 *Colum. L. Rev.* 772 (1983).

9. 276 So. 2d 309 (La. 1973).

10. See the scholarly critique of *Jagers* in Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 *Tul. L. Rev.* 1 (1974). Professor Couch should be credited for helping convince the court to abandon the rule of *lex loci delicti*. See his earlier work, Couch, *Choice-of-Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook*, 45 *Tul. L. Rev.* 100 (1970), which was relied upon heavily in *Jagers*.

11. For a review of the torts-conflicts jurisprudence since *Jagers*, see *Choice of Law in Louisiana: Torts: Louisiana Conflicts Jurisprudence*, A Student Symposium, *infra* this issue at 1109. For a similar review for insurance conflicts, see *Conflict of Laws: Insurance: Louisiana Conflicts Jurisprudence*, A Student Symposium, *infra* this issue at 1213. For contract, see *Conflicts of Laws—Contracts: Louisiana Conflicts Jurisprudence*, A Student Symposium, *infra* this issue at 1181.

12. *Brinkley & West, Inc. v. Foremost Ins. Co.*, 499 F.2d 928, 932 (5th Cir. 1974). For the dangers of this kind of eclecticism, see Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 *Mercer L. Rev.* 645 (1983).

13. For a comprehensive review of judicial practice in other states, see Kay, *Theory into Practice: Choice of Law in the Courts*, 34 *Mercer L. Rev.* 521 (1983).

a new beginning. A comprehensive codification could restore unity and a new measure of certainty without sacrificing equity or flexibility. It could draw from the experience accumulated in the vast laboratory of American conflicts law where "everything worthy of trying has been tried."<sup>14</sup> It could take advantage of the major advances in drafting techniques which have been recently made in Europe.<sup>15</sup> A new codification could bring together the best of Louisiana's two worlds. These were lofty ambitions. Perhaps the swamp was again mistaken for a bayou. But if it is a swamp, can it get any more difficult to traverse than it already is? With the confidence inspired by its many other successes in law reform, the Louisiana State Law Institute<sup>16</sup> took this calculated risk in 1984 when it decided to commission the revision and expansion of the conflicts articles of the Civil Code. Once again, Louisiana would dare stir the stagnant waters of the dismal swamp. It remains to be seen whether it is still a swamp or rather a bayou. The reader will decide.

The project was assigned to a Reporter and an Advisory Committee composed of judges, attorneys, and law professors.<sup>17</sup> The actual drafting began in December, 1984, and by May, 1985, the first installment of the Committee's work, the Draft on the Law Governing Successions and Marital Property, was approved by the Council of the Institute.<sup>18</sup> A second draft on Conventional Obligations and a third one on Real Rights were also approved by the Council in June 1986. Two other drafts, one on Delictual and Quasi-Delictual Obligations and the other on Liberative Prescription, are currently before the Council. When these and subsequent drafts are completed, they will be consolidated and presented to the Legislature in one package, sometime in the middle of 1988. At that time, if everything goes well, Louisiana will become the first, but hopefully

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14. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 *Law & Contemp. Probs.* 860 (1963).

15. See *supra* note 3.

16. For the history and work of the Institute, see Crawford, *The Louisiana State Law Institute—History and Progress*, 45 *La. L. Rev.* 1077 (1985). One of the Institute's major goals is the revision and modernization of the Louisiana Civil Code of 1870. This goal has been partly attained by the revisions of the law of property (1976-83) and the law of obligations (1985). The conflicts revision is part of the revision of the Code's Preliminary Title which, like its continental counterparts, contains articles about the sources of law and the temporal and territorial operation of laws.

17. The following members participated in the discussions of this Draft: David Conroy, Cordell H. Haymon, Luther L. McDougal, Raphael J. Rabalais, Andrew Rinker, Jr., Katherine S. Spaht, and A. N. Yiannopoulos. Since then the Committee has been joined by Harvey Couch, James L. Dennis, Jeannette Theriot Knoll, Harry T. Lemmon, Howard W. L'Enfant, Saul Litvinoff, and Melvin A. Shortess. The contributions and invaluable guidance of this Committee is hereby gratefully acknowledged by this author who, as the Reporter, assumes full responsibility for any shortcomings of this Draft.

18. For the composition and role of the Council, see Crawford, *supra* note 16. The Council's approval is tentative, pending the recommendation of the Civil Procedure Committee of the Institute.

not the last, state in the United States to attempt a *comprehensive* conflicts codification.<sup>19</sup>

The purpose of this Article is to present to the legal community and the public at large, for purposes of information, criticism, and advice, the first installment of this project—the Chapter on Successions of the Draft on Successions and Marital Property.<sup>20</sup> To place the Draft in proper perspective, this Article engages in a rather extensive discussion of the current Louisiana law on the subject, and attempts brief comparisons with the conflicts law of the two great legal traditions which have contributed in the making of Louisiana law: Anglo-American common law and continental civil law.

## II. “UNITY” AND “SCISSION” OF THE ESTATE

At a general level, the most pronounced difference between the conflicts laws on successions of these two traditions may be synopsized in two words or labels—“unity” and “scission” of the estate.<sup>21</sup> Unity of the estate is the operating principle in most of the civilian world,<sup>22</sup> with

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19. In the meantime, the Commonwealth of Puerto Rico has also begun the process of re-codifying its conflicts law. This author is privileged to serve as the Reporter for that project, together with Professor Arthur T. von Mehren of the Harvard Law School.

20. This chapter is reproduced in full in the Appendix and is referred to hereafter as the “Draft.” For a presentation of the Marital Property chapter of this Draft, see Symeonides, Louisiana’s Draft on Successions and Marital Property, 35 Am. J. Comp. L. 259 (1987); Symeonides, In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics, 13:3 Comm. Prop. J. 11 (1986). For a critique, see Bruch, Codification of Conflicts Law: The Louisiana Draft, 35 Am. J. Comp. L. 255 (1987); Reppy, Viewpoint: Louisiana’s Proposed “Hybrid” Quasi-Community Property Statute Could Cause Unfairness, 13:3 Comm. Prop. J. 1 (1986).

21. One of the earliest but still pertinent and fascinating discussions of this subject can be found in F. von Savigny, A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time 222-31 (W. Guthrie trans. 1869). For more recent discussions, see F. Boulanger, Les successions internationales: problèmes contemporains 38-41, *passim* (1981); 4 E. Rabel, The Conflict of Laws: A Comparative Study 251-86 (1958); M. Wolff, Private International Law 567-72 (2d ed. 1950); Grahl-Madsen, Conflict Between the Principle of Unitary Succession and the System of Scission, 28 Int’l & Comp. L. Q. 598 (1979).

22. The following western European countries adhere to the principle of unity of the estate, with occasional exceptions for immovables situated within the enacting jurisdiction: Austria (§ 28 of the Federal Statute of June 15, 1978); Denmark (jurisprudence); Finland (jurisprudence); Federal Republic of Germany (see arts. 24 and 25 of the Introductory Law to the German Civil Code of 1900, and art. 25 of the Law of July 25, 1986, amending the Introductory Law); German Democratic Republic (§§ 25, 26 of the Act of December 5, 1975); Greece (art. 28 of the Greek Civil Code of 1940); Italy (art. 23 of the Preliminary Dispositions of the Civil Code of 1942); The Netherlands (jurisprudence); Norway (jurisprudence); Portugal (arts. 62-65 of the Civil Code as amended in 1966); Spain, see *infra*



the notable exception of France and some other members of the French legal family.<sup>23</sup> Under this principle the decedent's estate is treated as a single unit to be governed by a single law, regardless of whether it consists of movables or immovables and regardless of their respective location.<sup>24</sup> The applicable law may be either the law of the last nationality (*lex patriae*) or the last domicile (*lex domicilii*) of the deceased,<sup>25</sup> but it is always his personal law. "Scission" has been the operating principle in the common law world.<sup>26</sup> A sharp dichotomy is drawn between movables and immovables, and a different law is applied to each category. Immovables are governed by the law of the situs (*lex rei sitae*), while movables are governed by the law of the last domicile of the deceased.

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note 24; and Sweden (Law of March 15, 1937). Switzerland will soon be joining this group (see arts. 88 and 89 of the Swiss Draft on Private International Law of 1982). With the exception of Argentina, Bolivia, Peru, and Uruguay, all other Latin American countries follow the same principle. See F. Boulanger, *supra* note 21, at 383-85. For a detailed presentation of the substantive and conflicts law of most western European countries on successions matters, see the two volume collective work under the title, "Régimes matrimonial successions et libéralités: Droit international privé et Droit comparé," (Verwilghen ed. 1979), published by the Union internationale du notariat latin.

Unpublished information available to this author reveals that the principle of the unity of the estate has been adopted by an international Convention on the Law Applicable to Successions now at the drafting stage under the auspices of the Hague Conference on Private International Law. It may be noted that the United States, the United Kingdom, France and many other countries that presently follow the system of scission are participating in the drafting of this convention. However, the record of the United States and the United Kingdom in ratifying previous Hague conventions makes it highly unlikely that this new convention will ever be adopted by these two countries.

23. French jurisprudence distinguishes between movables and immovables and, with some exceptions, applies domicile law to movables and situs law to immovables. For an authoritative discussion, see 2 H. Batiffol & P. Lagarde, *Droit international privé* 387-455 (7th ed. 1983). Belgium, Liechtenstein, Luxemburg, and Monaco also follow the French practice. See F. Boulanger, *supra* note 21, at 371-74.

24. For a recent example of legislative reaffirmation of the principle of unity of the estate, see, e.g., art. 9 para. 8 of the Spanish Civil Code as amended in 1974, which provides that "succession shall be governed by the national law of the deceased at the moment of his death, irrespective of the nature of the property and the country where it is situated."

25. Previously, there was an even split between the countries that follow the nationality principle and those that follow the domiciliary principle. See E. Rabel, *supra* note 21, at 257-60. For the last 30 years however, the balance has been shifting towards the domiciliary principle. See F. Boulanger, *supra* note 21, at 46-53. For the purposes of this Article, both these groups of countries are treated alike and in juxtaposition to the countries that follow the system of scission.

26. For the United States, see Restatement (Second) of Conflict of Laws [hereinafter Restatement 2d] §§ 236, 239, 260, 263 (1971); E. Scoles & P. Hay, *Conflict of Laws* 767-92 (1982); R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* §§ 194-96 (4th ed. 1986) [hereinafter Leflar]. For England, see 2 A. Dicey & J. Morris, *The Conflict of Laws* 611-14 (10th ed. 1980). For other, including civilian, countries which adhere to the same principle, see the extremely valuable comparative tables in F. Boulanger, *supra* note 21, at 371-85.

Obviously, the principle of scission means that the succession of a single person may have to be governed by two or sometimes more sets of laws. Thus, if a person died domiciled in state *X* and owned movables and immovables in states *Y* and *Z*, his succession will be governed by three different laws: the law of state *X* for all his movables and the law of states *Y* and *Z* respectively for his immovables. This lack of uniformity in the treatment of a single estate has not troubled common law courts or legislatures. One reason could be that this was the only way to obtain another kind of uniformity which, for historical reasons, was considered more desirable—uniformity within each jurisdiction, or, more specifically, uniformity of treatment of all immovables within each jurisdiction, regardless of the domicile of the owner or any other personal and thus non-stable factor. In turn, this preoccupation with land and intrastate uniformity with regard to land may be traced to the feudal conceptions of tenurial ownership of land which prevailed during the period immediately following the Norman conquest in England. In a society that essentially did not recognize individual ownership of land, it was only natural, if not inevitable, that the location of the land, and not the domicile of the tenant would be the most significant factor. As one author put it, “[t]he feudal lords could not allow the descent of their land to be affected if one of their vassals should acquire a foreign domicile.”<sup>27</sup> It was different with regard to movables which, after all, were susceptible not only to individual ownership but also to movement from one place to another. Their location at a given place at a given time was therefore much less important if only because it could well be transient. Thus the domicile of the owner seemed to be a more meaningful connecting factor.

In the civil law world, on the other hand, there was no particular reason to treat conflicts with respect to land ownership differently from conflicts regarding any other type of ownership, since both movables and immovables were susceptible to full individual ownership and subject more or less to the same substantive rules. Ownership either existed or did not exist. When it did exist, it conferred not only the power to use and enjoy the thing, but also the power to dispose of it within the limits established by law.<sup>28</sup> Succession was simply one such means of disposition of ownership by one person to another.<sup>29</sup> Since at the domestic level this power of disposition was more or less the same with regard to movables and immovables, there was no particular reason to differentiate between the two at the multistate level. If anything, there seemed to be a good reason for wanting to ensure their uniform treatment under a single law. This reason was thought to be provided by Justinian’s principle of universality

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27. M. Wolff, *supra* note 21, at 567.

28. Cf. La. Civ. Code art. 477.

29. Cf. La. Civ. Code art. 871.

and continuity of the succession which is now shared by all civil law systems.<sup>30</sup> Actually, this principle stands for a rather different proposition, namely, that the heirs directly inherit the entire patrimony of the deceased and figuratively continue his personality.<sup>31</sup> This proposition does not compel, but is rather facilitated by, a uniform treatment of the estate at the multistate level, under a single law. Be that as it may, this principle of universality and continuity of the succession was instrumental in focusing attention on the *person* and his domicile rather than on his property and its location.

Much has changed since those formative years. For instance, substantive common law has eventually recognized a concept of individual land ownership that encompasses a power of disposition not dissimilar to that in the civil law. In fact, the lack of forced heirship in the common law would suggest an even greater power of disposition in the individual owner at death. Similarly, in both systems, the relative disparity in economic value between movables and immovables has all but disappeared. Yet, despite this blurring of the distinction between the two systems on matters of substantive law, they have not converged in any appreciable degree in their approaches to multistate problems. The labels of "scission" and "unity" continue to symbolize two quite different conflicts philosophies on the two sides of the Atlantic. Anglo-American conflicts systems continue to maintain a sharp dichotomy between movables and immovables, and to look at succession more in terms of the sovereign's power over property than as a means of transmitting personal or familial wealth from one generation to the next. Despite recent injections of what some call "realism," civil law systems continue to look at succession from the perspective of the society to which the deceased and his family belonged, and to attribute much less significance to the location of his property as such.

### III. LOUISIANA: THE CURRENT STATUTORY FRAMEWORK

Louisiana's legal system is typically characterized as mixed,<sup>32</sup> i.e., basically a civil law system with strong common law inroads. For at least the last one hundred years, Louisiana's conflicts law has been influenced more by common law than civil law authorities. In the area of succession conflicts, however, Louisiana law is more confused than either civil or common. Although this may sound like a harsh accusation, it is borne out by even a cursory look at Louisiana legislation and jurisprudence on

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30. See M. Wolff, *supra* note 21, at 568.

31. See, e.g., La. Civ. Code arts. 940-947 dealing with *seisin*, especially article 942.

32. For a summary of the grand debates on this issue, see, *inter alia*, Yiannopoulos, *Louisiana Civil Law: A Lost Cause?* 54 Tul. L. Rev. 830 (1980).

the subject. Given an incomplete and defective legislative framework, Louisiana courts have not done much to improve it. Even when they have chosen to abandon it, they have not done much better.

The bulk of Louisiana's statutory rules on the choice of law governing successions is contained in article 10 of the Louisiana Civil Code. Article 9 of the Civil Code is also pertinent, but for some reason has been ignored by the courts.<sup>33</sup> Additional rules of a much narrower scope are also contained in other Louisiana legislation.<sup>34</sup> Article 10 provides in pertinent part as follows:

[1] The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

[2] But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.

[3] The exception made in the second paragraph of this article does not hold, when a citizen of another state of the union, or a citizen or subject of a foreign state or country, disposes by will or testament, or by any other act *causa mortis* made out of

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33. La. Civ. Code art. 9 is reproduced *supra* note 6. The reason for which this article has been ignored by Louisiana courts is probably its excessive broadness. Indeed, one rarely encounters such an overbroad assertion of legislative jurisdiction. Not even the French have laid such a claim to regulate *everything* within the French territory. An identical article contained in the *Projet du Gouvernement* of 1800 was rejected by the redactors of the Code Napoleon in favor of much narrower rules now contained in article 3 of the Code Civil, which provides as follows:

Laws of police and public safety obligate all those inhabiting the territory.

Immovables, even those belonging to foreigners, are governed by French law.

Laws concerning the status and capacity of persons govern French citizens, even those residing in a foreign country.

A quick comparison of the two articles suggests that the phrase "the law" in article 9 cannot mean "all law," but perhaps only the public (e.g., criminal, or taxation) law of this state, or, at most "les lois de police et de sûreté." Similarly, neither the phrase "all inhabitants," nor the word "indiscriminately" should be taken at face value. As for the word "property," it should probably be confined to immovable property, in line with the French as well as American practice. Be that as it may, Louisiana courts have reduced the scope of article 9 to almost nothing. The article is cited in no more than a handful of cases and applied in even fewer cases. See *Dawson v. Capital Bank & Trust Co.*, 261 So. 2d 727 (La. App. 1st Cir. 1972) (applying article 9); *Succession of Villere*, 411 So. 2d 484, 487 (La. App. 4th Cir. 1982) (ignoring article 9 and saying that *Dawson* "was clearly inconsistent with accepted principles of conflicts of law"). For a critique of *Dawson* and of article 9, see Pascal, *The Work of the Louisiana Appellate Courts for the 1971-72 Term—Conflict of Laws*, 33 La. L. Rev. 276 (1973).

34. See, e.g., La. R.S. 9:2401 (1965) (testamentary formalities, discussed at *infra* note 63); La. Code Civ. P. arts. 2888, 3401-3405 and La. R.S. 9:2421-2425 (1965) (probate procedure and jurisdiction); La. R.S. 47:2403 (Supp. 1987) (inheritance tax).

this state, of his movable property situated in this state, if at the time of making said will or testament, or any other act causa mortis, and at the time of his death, he resides and is domiciliated out of this state. . . .

[5] Persons who reside out of the state, cannot dispose of the property they possess here, in a manner different from that prescribed by the laws of this state. . . .<sup>35</sup>

#### A. *Scope and General Characteristics of Article 10*

Although each of the above paragraphs of article 10 is discussed in some detail later,<sup>36</sup> it might be useful to identify at this point some general features of the article:

(a) In terms of scope, article 10 applies to the "form and effect of public and private written instruments,"<sup>37</sup> a term broad enough to encompass testaments, and, for that matter, any juridical act. Thus, article 10 applies to testate successions to movables as well as immovables. However, except perhaps for its fifth paragraph,<sup>38</sup> article 10 is conspicuously silent on the law governing intestate successions. In the abstract, it is of course arguable that testate and intestate succession should be governed by the same law, as indeed they are in most systems.<sup>39</sup> However, at least with regard to movables, this otherwise plausible argument may not and perhaps should not be readily acceptable in Louisiana.<sup>40</sup>

(b) Except for paragraph 3, which is confined to movables, the other paragraphs of article 10 do not distinguish between movables and immovables. However, as explained later,<sup>41</sup> this does not mean that Louisiana adheres to the civil law scheme of unity of the succession. Quite the contrary, what Louisiana has managed to contrive is a peculiar system of *double* scission, "and more."

(c) In terms of structure, the two working categories of article 10 are the terms "form" and "effect." The term "form" of a testament

35. La. Civ. Code art. 10. (The 1987 session of the Louisiana legislature, by virtue of Act No. 124, voted to redesignate article 10 as article 15, effective January 1, 1988. However, there were no changes to the substance of the article.)

36. See text accompanying *infra* notes 55-63, 210-39, 253-55.

37. La. Civ. Code art. 10.

38. See text accompanying *infra* notes 233-39, 254-55.

39. See F. Boulanger, *supra* note 21, at 177-200.

40. If, according to article 10, testate successions were governed by the law of the domicile, then applying the same law for intestate successions would be perfectly sensible, if not inevitable. On the other hand, if testate successions to movables are subjected by art. 10 to the law of the situs, see *infra* note 217 and accompanying text, then applying that law to intestate successions would be the same as erring twice in order to be right once.

41. See text accompanying *infra* notes 210-39.

is, of course, self-explanatory, but the term "effect" of a testament is far from clear. For instance, it is unclear whether "effect" encompasses issues of testamentary capacity, and generally whether it purports to include all, or simply some, of the issues which are *not* matters of form.<sup>42</sup>

(d) In terms of substance, article 10 is indeed a strange creature, setting Louisiana conflicts law apart from that of not only its sister states, but most continental countries as well. For matters other than form, paragraph 2 of the article calls for the application of "the laws of the country where such acts [e.g. testaments] are to have effect." This cryptic phrase is susceptible to at least three different interpretations. The first possibility is to say that a testament "has its effect" at the *domicile* of the deceased, with regard to *both* movables and immovables. This would mean that Louisiana would be classified together with most civil law jurisdictions, which adhere to the principle of unitary succession.<sup>43</sup> The second possibility is to accept this proposition *only* for movables. This would mean that Louisiana would be classified together with the common law systems as well as the French system, which follow the principle of scission.<sup>44</sup> Finally, the third possibility is to say that a testament has its effect at the *situs* of the property, not only with respect to immovables but also with respect to movables. This would mean that Louisiana adheres to a unique system which, for lack of a better name, can be called "double scission."

The differences between such a system and the other two can be illustrated by the following hypothetical: a person died domiciled in state *A* and disposed by testament of movable property situated in states *B* and *C*, and of immovable property situated in states *D* and *E*. In a system of unitary succession, all this property would be governed by a single law, the law of state *A*. Unity of treatment will also be attained by a system of "single" scission, but only with regard to movables, which will be governed by state *A* law. The immovables will be governed by the law of states *D* and *E* respectively. On the other hand, in a system of "double" scission, this particular succession will be governed by four different laws (*B*, *C*, *D* and *E*), and, what is worse, the law of the domicile would not even be among them. The absurdity of such a scheme is beyond description.

Yet, as explained later,<sup>45</sup> the *language* of article 10 seems to lend more support for this scheme than for either of the other two. Because Louisiana courts have never had to face such an extreme set of circum-

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42. See text following *infra* note 106.

43. See *supra* note 22.

44. See *supra* notes 23 and 26.

45. See text accompanying *infra* notes 210-17.

stances *in one case*, the law reports are free of such an abomination. However, by not having to face such a case, Louisiana courts also have never had the opportunity to subject the whole framework of article 10 to the scrutiny of reason and to square it with contemporary realities. The courts have received simpler cases which could be and which have been resolved in a piecemeal and less extreme way, without having to consider the efficiency and the logic of the system in its totality. This alone would be a sufficient reason for legislative intervention.

*B. Scope, Structure, and Working Categories of the Draft*

Even if the Draft accomplishes nothing else, it will at least resolve the many ambiguities smoldering under current Civil Code article 10. Hopefully, the Draft does more than that.

In terms of scope, the Draft is much broader than article 10 currently is. Thus, not only does the Draft expressly encompass intestate successions, it also provides rules for matters of capacity and interpretation of testaments,<sup>46</sup> neither of which are expressly covered by present article 10.

In terms of structure, the Draft abandons the ill-defined and largely inadequate categories of "form" and "effect" currently used by Civil Code article 10. The Draft employs instead the self-explanatory categories of form, capacity, and interpretation, and provides separate rules for each in articles 1-4. Any issues which do not fit clearly into these categories are then relegated to the residual articles 5-7 which apply to all other issues, whatever one might call them, e.g., "essential validity," "intrinsic validity," "substance," "effect," etc. Undoubtedly, the structure of the Draft is more complex than that of current article 10. However, it is hoped that, despite its complexity, or perhaps because of it, the Draft will prove safer, and perhaps gap-proof, in its actual application.

The Draft will also depart in another respect from the scheme of current article 10 which, aside from its third paragraph, does not distinguish between movables and immovables. While the first four articles of the Draft apply equally to movables and immovables, articles 5-7 distinguish between the two categories and establish different rules for each. Thus, although the Draft maintains a certain dichotomy between movables and immovables, it also reduces the depth of that dichotomy by, for instance, withdrawing from the exclusive domain of the law of the situs all issues of form, capacity, and interpretation. The Draft will also end Louisiana's isolation from both the civil and the common law worlds by assigning to the the law of the domicile most issues of succession to movables and some issues of succession to immovables.

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46. See text accompanying *infra* notes 113-22, 146, 200-07.

## IV. TESTAMENTARY FORMALITIES

A. *Anglo-American Law*

Under the traditional common law rule, the formal validity of wills, i.e., compliance with the formalities and solemnities necessary for the confederation of a valid testament, such as the mode of writing, the number of witnesses, the presence of a notary, etc., was governed by the law of the situs with regard to immovables, and by the law of the last domicile of the decedent with respect to movables.<sup>47</sup> This rule has since been expanded and liberalized by statutes modeled after the Uniform Wills Act,<sup>48</sup> which has been largely replaced by the Uniform Probate Code.<sup>49</sup> Under these statutes, which supplement rather than replace the traditional common law rule, a will is also valid as to form if it complies with the law of the place of making, or the place where, at the time of the making or at the time of death, the testator was domiciled, resided, or was a national.<sup>50</sup>

B. *Civil law*

A similar liberalizing trend can be seen in the civil law world. As in Louisiana, the starting point in most civil law systems was the rule of *lex loci actus*, i.e., that the law of the place of making governs the form of all juridical acts including testaments.<sup>51</sup> Unlike Louisiana, however, these systems have since liberalized their law by allowing alternative ref-

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47. See Restatement of Conflict of Laws §§ 249, 306 (1934) [hereinafter Restatement 1st]; Restatement 2d, *supra* note 26, §§ 239, 263; E. Scoles & P. Hay, *supra* note 26, at 775-78, 783-86; Rabel, *The Form of Wills*, 6 Vand. L. Rev. 533 (1953). See also Phillimore's epigrammatic criticism that this system was "unwisely, arbitrarily and unphilosophically" made. Quoted in E. Rabel, *supra* note 21, at 290.

48. Uniform Wills Act, Foreign Executed (1910). Based on the English Lord Kingsdown's Act of 1861, this Act was superseded by the Model Execution of Wills Act of 1940. Lord Kingsdown's Act was also replaced by the more liberal Wills Act of 1963, discussed in A. Dicey & J. Morris, *supra* note 26, at 617-22.

49. See Unif. Probate Code § 2-506, 8 U.L.A. 116 (1983). The Code has been adopted in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. 8 U.L.A. 1 (Supp. 1986).

50. See, e.g., Cal. Prob. Code § 6113 (West Supp. 1987); N.Y. Est. Powers & Trusts Law § 3-5.1(b) and (c) (McKinney Supp. 1987); Ariz. Rev. Stat. Ann. § 14-2506 (West 1975); Wis. Stat. Ann. § 853.05 (West 1971); Fla. Stat. Ann. § 732.502 (West Supp. 1987); Ill. Rev. Stat. ch. 110½, para. 7-1 (1978); N. D. Cent. Code § 30.1-08-06 (1976). See also Casswell, *The Conflict of Laws Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform*, 15 Osgoode Hall L.J. 165 (1977); Rees, *American Wills Statutes: II*, 46 Va. L. Rev. 856 (1960).

51. See E. Rabel, *supra* note 21, at 290, 292.



erences to the law governing the substance of the testament, the law of the last domicile or nationality of the testator and, with regard to immovables, the law of the situs.<sup>52</sup> In 1961, the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions expanded these references even further to the law of virtually any state that has any connection with the testator.<sup>53</sup> This Convention has since been adopted by thirty-four European and non-European countries.<sup>54</sup>

### C. Current Louisiana Law

Louisiana began from the same starting point as most other civil law jurisdictions but has been painfully slow in following the liberalizing trends in the civil as well as the common law worlds. The first paragraph of Civil Code article 10 relegates testamentary formalities to the *exclusive* domain of a single law, the law of the place of the making of the testament.<sup>55</sup> It is worth noting that this paragraph: (a) is the only provision in article 10 which addresses questions of form, and that all other paragraphs deal with matters of the effect of the testament;<sup>56</sup> (b) does not

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52. See, e.g., art. 26 of the Preliminary Dispositions of the Italian Civil Code; art. 11 of the Spanish Civil Code as amended in 1974; art. 65 of the Portuguese Civil Code as amended in 1967. For a similar development in France via the jurisprudence, see H. Batiffol & P. Lagarde, *supra* note 23, at 419-20. For the most recent legislative expression of this liberalizing trend in Europe, see article 26 of the Law of 25 July 1986 amending the Introductory Law of the German Civil Code, reproduced in French translation in 76 R.C.D.I.P., 170, 178-79 (1987).

53. See article 1 of the Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, concluded at the Hague on October 5, 1961. The Convention is conveniently reproduced in 9 Am. J. Comp. L. 705 (1960). Under this Convention, the validating laws are: place of making; nationality, domicile, or habitual residence of the testator at either the time of making or the time of death; and situs with regard to immovables. For an authoritative exposition, see A. von Overbeck, *L'unification des règles de conflits de lois en matière de forme de testaments* (1961). Von Overbeck served as the Rapporteur for the Convention. For a more recent bibliography, see *Les nouvelles conventions de La Haye*, III 259 (M. Sumampouw ed. 1984).

54. Among these countries are Australia, Austria, Belgium, France, East and West Germany, Greece, Italy, Spain, Portugal, Switzerland, and the United Kingdom. For a complete list, see 76 R.C.D.I.P. 211-12 (1987).

55. See La. Civ. Code art. 10 para. 1 reproduced in text accompanying *supra* note 35. See also art. 1596 of the Louisiana Civil Code of 1870 which provided that "testaments made in foreign countries, or the States and other Territories of the Union, shall take effect in this State, if they be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made." This article was repealed in 1960 and replaced by article 2888 of the Code of Civil Procedure. See *infra* note 69. Article 1596 can be traced to article 999 of the Code Napoleon. The slightly narrower language of the French article has since been expanded by French jurisprudence. See H. Batiffol & P. Lagarde, *supra* note 23, at 419-20.

56. See pertinent discussion in *Bernard v. Scott*, 12 La. Ann. 489, 490-91 (1857).

distinguish between movables and immovables and thus applies equally to both;<sup>57</sup> (c) applies equally to testaments made within<sup>58</sup> and without<sup>59</sup> Louisiana; and (d) dictates the application of the law of the place of the making of the testament without regard to the content of such law, i.e., regardless of whether it would validate or invalidate the testament.<sup>60</sup>

There is certainly some merit to the rule of applying the law of the place of the making of the testament, since, at least when the testament is drafted by a professional such as a notary, the person drafting it is

57. However, this rule encounters more resistance in cases involving immovables than movables. This resistance is usually manifested by a conspicuous disregard of para. 1 of article 10. Thus, in *Succession of Miller v. Moss*, 479 So. 2d 1035 (La. App. 3 Cir. 1985), writ denied, 484 So. 2d 135 (1986), a holographic will made in New Mexico and declared formally invalid by a New Mexico court, was declared valid by a Louisiana court which opined that "the New Mexico court is without jurisdiction to render judgment as to rights to real property located in Louisiana. It is well settled [sic] that immovable property is exclusively subject to the law of the State in which it is located." *Id.* at 1038. In a similar case, *Succession of Harrison*, 444 So. 2d 1191 (La. 1984), the supreme court took a more flexible approach when it pointed out that the testament was invalid not only under the law of Louisiana, where the immovable was situated, but also under the law of Mississippi, where the testament was made. See *id.* at 1194 n.4. *Succession of Hasling*, 114 La. 293, 38 So. 174 (1905) also ignored para. 1 of article 10 and applied the law of the foreign situs of the immovable rather than the law of Louisiana where the will was made and the testator domiciled. It is perhaps not a coincidence that in both *Miller* and *Hasling* the application of the law of the situs resulted in validating rather than invalidating the testament. The same is true of *Succession of Larendon*, 39 La. Ann. 952, 3 So. 219 (1887), which involved an *inter vivos* donation.

Most other cases involving immovables faithfully applied the law of the place of the making of the testament as dictated by para. 1 of art. 10, rather than the law of the situs of the immovable as suggested by most lawyers' instinct. See, e.g., *Guidry v. Hardy*, 254 So. 2d 675 (La. App. 3d Cir. 1971), writ denied, 260 La. 454, 256 So. 2d 441 (1972); *Succession of Martin*, 147 So. 2d 53 (La. App. 2d Cir. 1962), writ denied, 243 La. 1003, 149 So. 2d 763 (1963); *Moore v. Executive Committee of Foreign Missions of the Presbyterian Church*, 171 La. 191, 129 So. 920 (1930); *Shimshak v. Cox*, 166 La. 102, 116 So. 714 (1928); *Succession of M'Candless*, 3 La. Ann. 579 (1848).

For cases involving movables, see *Succession of Augustus*, 441 So. 2d 730 (La. 1983); *Succession of King*, 170 So. 2d 129 (La. App. 4th Cir. 1964), writ denied, 247 La. 409, 171 So. 2d 666 (La. 1965); *Succession of Drysdale*, 124 La. 256, 50 So. 30 (La. 1909)

58. See, e.g., *King*, 170 So. 2d 129 (following para. 1 of art. 10 and applying Louisiana law as law of place of making); *Hasling*, 114 La. 293, 38 So. 174 (ignoring para. 1 of art. 10 and applying Mississippi law *qua situs* to a will made in Louisiana).

59. *Miller*, 479 So. 2d 1035; *Harrison*, 444 So. 2d 1191; *Augustus*, 441 So. 2d 730; *Guidry*, 254 So. 2d 675; *Martin*, 147 So. 2d 53; *Moore*, 171 La. 191, 129 So. 920; *Shimshak*, 166 La. 102, 116 So. 714; *Drysdale*, 124 La. 256, 50 So. 30; *Abston v. Abston*, 15 La. Ann. 137 (1860); *M'Candless*, 3 La. Ann. 579 (1848); *Jones v. Hunter*, 6 Rob. 235 (La. 1843); *Succession of Robert*, 2 Rob. 427 (La. 1842).

60. Nevertheless, in all reported cases the application of the law of the place of making resulted in validating the testament. See, e.g., *Augustus*, 441 So. 2d 730; *Guidry*, 254 So. 2d 675; *King*, 170 So. 2d 129; *Moore*, 171 La. 191, 129 So. 920; *Drysdale*, 50 So. 30; *M'Candless*, 3 La. Ann. 579.

presumed to be familiar with and to have relied upon that law. However, one needs only recall that there is such a thing as a holographic testament to realize that this is by no means the most typical situation. From the legislative viewpoint, it is too mechanical and indeed dangerous to place such an *exclusive* and *a priori* reliance on the law of a single place and to disregard the testator's other more permanent connections with other states.<sup>61</sup> To mention only one example, a Louisianian who makes a holographic testament while vacationing in Pensacola, Florida, is probably relying more on Louisiana law than on Florida law. To invalidate his testament because Florida does not recognize holographic testaments<sup>62</sup> would not only frustrate his legitimate expectations, but would also defeat the policies of Louisiana, the only state with a legitimate claim in regulating his succession, without advancing any policies of Florida. It is one thing to apply the law of the place of the making in order to validate a testament, and another thing to apply that law in order to invalidate the testament. If favor testamenti is still the basic policy in the domestic law of successions,<sup>63</sup> then the only way this policy can be effectuated at the multistate level is by expanding the list of laws which may be applied in order to validate a testament that has connections with more than one state.

This message was heeded only partially by the enactment of Louisiana Revised Statutes (La. R.S) 9:2401, which added the law of the testator's domicile to that of the place of the making of the testament for determining the formal validity of testaments. This statute provides in effect that a testament is formally valid if it complies with the law of either the place of its making or the testator's domicile.<sup>64</sup> Although this was a step in the right direction, it did not go far enough. For one, this statute is confined by its terms to "will[s] made outside this state";<sup>65</sup> and, second,

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61. According to Rabel, any system which relies on a single connecting factor for determining the law applicable to testamentary form is "a monument of isolationism." E. Rabel, *supra* note 21, at 291.

62. See Fla. Stat. Ann. § 732.502(2) (West Supp. 1987).

63. See, e.g., Succession of Beattie, 163 La. 831, 112 So. 802, 804 (1926): "It is the policy of our law to carry out the wishes of deceased persons and not to push the legal requirements in such cases to extremes. And the tendency of our jurisprudence is to limit the rigid enforcement of the formalities required in the execution of wills only to those instances in which the law is palpably violated. Succession of Crouzeilles, 106 La. 442, 31 So. 64 . . . Prudhome v. Savant, 150 La. 256, 90 So. 640." and numerous other citations. See also Stephens v. Adger, 227 La. 387, 79 So. 2d 491, 494-95 (1955).

64. La. R.S. 9:2401 (1965) provides:

A will made outside this state in the manner prescribed by the law of the place of its execution or by the law of the testator's domicile, at the time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the will is in writing and subscribed by the testator.

65. See *supra* note 64.

unlike the uniform act that served as its model<sup>66</sup> as well as similar statutes in most sister states,<sup>67</sup> the Louisiana statute confines its reference to the testator's domicile to his domicile "at the time of its [the testament's] execution,"<sup>68</sup> as opposed to the time of his death.<sup>69</sup> Thus, in the above example, if at the time the testator made his Florida testament he was a Texas domiciliary but has since moved to Louisiana, his testament may have to be declared invalid unless it conforms to either Florida or Texas law.

#### *D. The Draft*

Taking due notice of the liberalizing trend in both the civil and the common law worlds, article 1 of the Draft expands the list of laws that may be applied in order to validate the testament. Article 1 provides as follows:

A testamentary disposition is valid as to form if it is in writing and is made in conformity with:

- (a) The law of this state; or
- (b) The law of the place of making at the time of making; or
- (c) The law of the place where the testator was domiciled at the time of making or at the time of death; or
- (d) With regard to immovables, the law that would be applied by the courts of the place where such immovables are situated.

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66. La. R.S. 9:2401 (1965) was modeled after the Uniform Wills Act of 1910. See *supra* note 48.

67. See Unif. Probate Code and state statutes, *supra* notes 49 and 50.

68. La. R.S. 9:2401 (1965), *supra* note 64. The Uniform Wills Act of 1910 did not contain the phrase quoted in the text, but simply referred to the domicile of the testator without any time specification. This was taken to be a reference to the domicile at the time of execution, but only because the application of the law of the domicile at death "was the old accustomed device of which no lawyer needed to be reminded." E. Rabel, *supra* note 21, at 300. The same view prevailed in interpreting the Model Execution of Wills Act of 1940 which confined its reference to the domicile at the time of execution. *Id.* Unfortunately, this sensible view could not be taken for granted in interpreting La. R.S. 9:2401 which was the first Louisiana statute to authorize any reference to domicile for matters of testamentary form.

69. By simply being silent on this issue, La. Code Civ. P. art. 2888 is less restrictive than La. R.S. 9:2401. Article 2888 provides that

[a] written testament subscribed by the testator and made in . . . another state in a form not valid in this state, but valid under the law of the place where made, or under the law of the testator's domicile, may be probated in this state by producing the evidence required under the law of the place where made, or under the law of the testator's domicile, respectively.

This article establishes a so-called "rule of validation," i.e., a rule designed to validate the testament by alternative references to any one of the laws enumerated therein which would uphold the testament.<sup>70</sup> Although this rule may sound too liberal to the uninitiated, it is actually more conservative than the corresponding article of the Uniform Probate Code which typifies the law of most sister states, or the Hague Convention which has been adopted by or influenced most civilian countries.<sup>71</sup> Thus, the liberality of article 1 is not only firmly grounded in comparative experience, but is amply justified by the familiar policy of "favor testamenti," which is perhaps the most important policy of the substantive law of succession.<sup>72</sup> It may also be justified by the assumption that, currently, the laws of the various states on questions of testamentary formalities usually differ on matters of detail rather than fundamental policy.<sup>73</sup> If this assumption is true, then failure to comply with the technical requirements of one state should not be fatal to the formal validity of a testament, as long as it conforms with the law of another state also related to the testator.<sup>74</sup> After all, "*valeat omni meliori modo, quo valere*

70. In the United States, the concept of a "rule," or actually a presumption, of validation was articulated by Ehrenzweig first in connection with contracts, see Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 Colum. L. Rev. 874, 875-80 (1959), and then extended to testaments and trusts, see I. A. Ehrenzweig, *Private International Law* 45-46 (1967), with numerous citations to European antecedents. Today the most fervent proponent of this rule is Professor Weintraub who argues persuasively in support of such a rule not only for testamentary formalities but also for the substantive validity of testaments, as well as contracts. See R. Weintraub, *Commentary on the Conflict of Laws* 387, 440, 463-64 (3d ed. 1986).

71. See *supra* notes 49-53 and accompanying text.

72. See *supra* note 63. See also E. Rabel, *supra* note 21, at 287: "invalidity of a will, discovered after the testator's death is irreparable."

73. For a sarcastic but accurate description of these differences, see E. Rabel, *supra* note 21, at 287-88:

[T]he general public resents . . . the innumerable small divergences in which the statutes seem to delight. How many witnesses for private, or for notarial wills: two? three? Two or three, two or five according to circumstances? Seven? Have the witnesses only to sign or also to give 'attestation?' Have all solemnizing persons to be present all the time? or only at the signature? . . . Must the testator sign in the presence of the witnesses or the official? At a certain place at the end?

Then the author continues: "[such] differences are [often] devoid of any territorial, moral, social, or other justification and plainly apt to irritate the people involved. Legal formalities are indispensable, but to allow their local shades to disturb otherwise unimpeachable post-mortuary dispositions compromises the law." *Id.* at 296-97. See also *infra* note 74.

74. See R. Weintraub, *supra* note 70 at 463, referring to substantive validity. "Frequently the difference between validating and invalidating rules will be one of degree, not basic policy, and resolution of the conflict in favor of validity will not seriously conflict with a strongly held policy of any state and will give effect to the estate plan of the testator." Cf. Restatement 2d, *supra* note 26, § 239 comment g, § 263 comment g.

*potest.*"<sup>75</sup>

In order to be validated by any one of the laws enumerated in this article, the testament must meet one minimum requirement—it must be in writing. This requirement was felt necessary in order to guard against foreign laws that may authorize oral wills. La. R.S. 9:2401 imposed the additional requirement that the testament be "subscribed by the testator."<sup>76</sup> Neither the Uniform Probate Code nor the Hague Convention contain such a requirement, and neither does the Draft.

Under sentence (a) of this article, a testament is formally valid in Louisiana if it satisfies the form requirements of domestic Louisiana law. Although this rule is neither novel nor uncommon,<sup>77</sup> it may be the cause of some concern since, theoretically, it may be invoked to validate a testament which has no connection with Louisiana (e.g., a testament made outside this state by a testator domiciled at all times outside this state, and which disposed of no property within this state). Practically, however, the rule of sentence (a) becomes pertinent only when a Louisiana court has jurisdiction, which presupposes one or more of the above connections.<sup>78</sup>

Sentence (b) of this article restates the current rule contained in the first paragraph of Civil Code article 10 and La. R.S. 9:2401, and clarifies a question implicit in these two provisions, namely that the pertinent law of the place of making is the law in force at the time of making and not later.<sup>79</sup> Thus, a testament which was valid under the law in force at the time of making will not be affected by a subsequent change in that law which would make such testament invalid. By the same token, if it was invalid under the law in force at the time of its making (and was also invalid under all other laws enumerated in the article), the testament will not be validated by a subsequent change in that law, unless of course the new law is clearly intended to validate such previous testaments.

To the extent it refers to the law of the domicile of the testator at the time of the making, sentence (c) also restates the current rule of La. R.S. 9:2401. However, this sentence also changes the law by authorizing the application of the law of the domicile at the time of death. Moreover, unlike La. R.S. 9:2401, which is applicable only if the "will [is] executed

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75. ("[O]ne cannot presume that a rational person desires to perform a purposeless, irrational act.") 1 Zeiller, *Kommentar über das allgemeine bürgerliche Gesetzbuch* 149 (1811), quoted in A. Ehrenzweig, *supra* note 70, at 45.

76. La. R.S. 9:2401, *supra* note 64.

77. Compare with Unif. Probate Code and other states statutes, *supra* notes 49 and 50.

78. See, e.g., La. Code Civ. P. arts. 2801, 2401-2425.

79. Compare with Unif. Probate Code and other states statutes, *supra* notes 49 and 50.

outside this state,"<sup>80</sup> the proposed article also applies when the testament is made within Louisiana.

Sentence (d) also changes the law by authorizing the application of the law of the state where the immovable is situated in order to validate the testament. This change brings Louisiana into line with all other states of the Union. It must be noted that the reference to the law of the situs for immovables is simply an alternative rather than an exclusive reference. Furthermore, such reference is permissible only with regard to immovables situated in that particular state and not with regard to immovables situated elsewhere or movables situated anywhere. In other words, a testament disposing of immovables will be valid as to form if it complies with the law of any state enumerated in the article, including but not limited to the state of the situs. On the other hand, if it conforms only to the law of the situs of an immovable, the testament will be considered valid only with regard to that immovable, but not with regard to immovables situated elsewhere, or movables situated anywhere.

It may also be noted that sentence (d) refers to "the law that would be applied by the courts" of the situs, rather than simply the law of the situs. This phrase may sound perplexing to the uninitiated who may be even more puzzled to hear that the phrase is meant to convey what sounds like a foreign notion, the notion of *renvoi*.<sup>81</sup> Actually, this notion is not as foreign as its name might suggest. At least with regard to immovables, *renvoi* has been an integral part of American conflicts law since as early as the days of the first conflicts Restatement.<sup>82</sup> Generally speaking, *renvoi* is the notion of applying the conflicts rule of a foreign state. *Renvoi* is a vehicle for promoting interstate uniformity, as well as for achieving a result considered desirable on other grounds. Here the desired result is validation, and *renvoi* can help achieve it by authorizing the application of the conflicts rule of the foreign situs, which may well be more liberal than this article. Nor is *renvoi* as complex a process as is commonly believed, at least in the form in which it is adopted in this article. It simply means that a Louisiana court invoking this sentence of article 1 should try to reach the same result as would be reached by the courts of the foreign situs, by applying the law designated as applicable

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80. La. R.S. 9:2401, *supra* note 64.

81. The classic exposition of this concept is Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (1958). For American perspectives, see Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 Am. U. L. Rev. 1049 (1981); Seidelson, *The Americanization of Renvoi*, 7 Duq. L. Rev. 201 (1968-69); von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, XXth Century Comparative and Conflicts Law 380 (1961).

82. See Restatement 1st, *supra* note 47, §§ 7, 8, 217, 303; Restatement 2d, *supra* note 26, §§ 8, 223, 226, 236, 239. In fact the Restatement 2d authorizes a *renvoi* even with respect to movables. See *id.* §§ 260, 263.

by the conflicts rule of that state.<sup>83</sup> If the conflicts rule of that state coincides with the rule of this article, this sentence will make no difference. On the other hand, if the other state has a more liberal conflicts rule—such as § 2-506 of the Uniform Probate Code<sup>84</sup> which, in addition to the laws enumerated in article 1 of the Draft, authorizes the application of the law of the testator's habitual residence or nationality—then this sentence will enable the Louisiana court to uphold the testament if the foreign court would. In such a case *renvoi* would promote the policy of validation as well as the goal of uniformity.

Finally, although this article does not mention revocation of a testament, there should be no doubt that it is meant to determine the *formal* sufficiency of any *juridical* act by which the testator purports to revoke his previous testament.<sup>85</sup> However, the substantive effect of such act on the previous testament will be determined according to the law applicable to the particular issue under articles 2, 4, or 5-7, as the case may be. Articles 5-7 will also apply to other types of revocation, such as revocation by physical act or revocation by operation of law.<sup>86</sup>

## V. CAPACITY

### A. Capacity to Make a Testament

In the civil law world, a person is capable of making a testament if at the time of the making he possesses those personal physical and mental qualities, such as proper age and soundness of mind, which the applicable law deems necessary and sufficient for confecting a valid juridical act.<sup>87</sup> Thus defined, capacity to make a testament is no different from capacity to enter into juridical acts in general,<sup>88</sup> but *is* distinguished from "capacity"

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83. If the situs is in Louisiana, sentence (d) of article 1 may of course be a tautology, although not an entirely useless one. If nothing else this sentence would serve as a reminder that the formal validity of a testament disposing of Louisiana immovables is not to be judged exclusively by the substantive law of this state, but rather by any of the laws whose application is authorized by this article.

84. See *supra* note 49.

85. For a recent case following this approach, see *Succession of Augustus*, 441 So. 2d 730 (La. 1983) (applying District of Columbia law to determine the formal validity of a will made in Washington and purporting to revoke a previous will made in Louisiana). For a legislative expression of the principle stated in the text, see article 2 of the Hague Convention, *supra* note 53. For the United States, see *Restatement 2d*, *supra* note 26, §§ 239 comment i, 263 comment i; E. Scoles & P. Hay, *supra* note 26, at 776-78, 786-88.

86. See *Succession of Senac*, 2 Rob. 258 (La. 1842) (involving revocation by subsequent birth of a testator's child).

87. See La. Civ. Code arts. 1470-1472, 1475-1477.

88. See La. Civ. Code arts. 1917-1926.



to dispose of particular assets, exceed a certain portion ("disposable portion") of the testator's patrimony,<sup>89</sup> or give to particular persons (capacity to receive).<sup>90</sup> Technically, the latter are not considered incapacities of the testator, but rather restrictions on his power of disposition of specific assets or to specific persons. As such, they are usually treated separately from the general capacity of the testator, both at the domestic and the multistate level.<sup>91</sup> The Draft and this Article adopt this difference in treatment.

### 1. *Anglo-American Law*

Given the traditional common law distaste for abstraction, it is not surprising that common law choice-of-law systems generally do not recognize the distinctions described above between the various kinds or shades of capacity. Furthermore, these systems do not even distinguish general juridical capacity from other issues or aspects of the particular juridical act. In the area of successions, this means that the capacity of a person to make a testament is determined under the same law as the one governing all other aspects of the succession, i.e., the law of the testator's last domicile with regard to movables, and the law of the situs with regard to immovables.<sup>92</sup> Again, this means that, if the testator owned movables and immovables in different states, there is a good chance that he may be found to possess capacity as to some of his assets but not as to others. In the words of Ernst Rabel, the fact that a person's capacity to make a will is judged separately "in every jurisdiction where an immovable is found transgresses the borders of tolerable tradition."<sup>93</sup> Yet tradition, or what has been aptly called a "taboo,"<sup>94</sup> is the only explanation for

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89. See La. Civ. Code arts. 1493-1501.

90. See La. Civ. Code arts. 1471, 1473, 1478-1490, discussed in *infra* notes 142-143, 148-156 and the accompanying text.

91. See H. Glenn, *La capacité de la personne en droit international privé français et anglais* 44-50, 191, 217-34 (1975).

92. See, Restatement 1st, *supra* note 47, § 249 comment a, § 306 comment b; Restatement 2d, *supra* note 26, § 239 comments a, c, § 263 comment a.

93. E. Rabel, *supra* note 21, at 272.

That eight pieces of land need eight different systems of liberty or restraint in testation is bad enough in all jurisdictions of the split law; but that even the capacity to make a will . . . [is] independent in principle in every jurisdiction where an immovable is found transgresses the borders of tolerable tradition.

*Id.*

94. "Land is something rather sacrosanct . . . . Thus it is taboo to allow a law other than the law of the land to control questions involving that land." Note, *Choice of Law for Land Transactions*, 38 *Colum. L. Rev.* 1049, 1051 (1938). One of the first commentators to expose and demystify the land taboo in American conflicts law was Professor Moffatt Hancock of Stanford. See his many articles on this subject collected in M. Hancock, *Studies*

this anomaly. It is the tradition of looking at the succession from the perspective of the land rather than from the perspective of the person that owns it. It is also the tradition of placing a higher value on intrastate uniformity, i.e., a uniform treatment of all immovables within a given jurisdiction, than on the unity of the estate, i.e., a uniform treatment of the estates of all persons domiciled in that jurisdiction.

The common law does achieve unity with respect to movables through the application of a single law to all movables wherever located. Unfortunately, however, this unity is achieved more by chance than by deliberate choice, and through application of the wrong law. The application of the law of the testator's domicile *at the time of death*<sup>95</sup> to matters of capacity is not the result of a separate consideration of this specific issue, but rather the consequence of the holistic notion that *all* issues pertaining to movables must be governed by the same law. It so happens, though, that what is a sensible choice of law for other issues may not necessarily be sensible for the issue of capacity. When a person makes a will while domiciled in one state and then dies while domiciled in another, it makes more sense to determine his testamentary capacity under the law of the former state than the latter.<sup>96</sup> An even better idea would be to allow an alternative reference to the law of either domicile, whichever would uphold the testament.<sup>97</sup> Again the tendency to look at succession from the perspective of the property involved rather than from the perspective of the person whose capacity is at issue may be responsible for the failure of common law systems to subject capacity to a separate choice-of-law analysis. What is ironic is that such an issue-by-issue analysis is claimed to be a uniquely American invention and is indeed a common feature of

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in *Modern Choice-of-Law: Torts, Insurance, Land Titles* 293-393 (1984). Today, the most influential critic of the situs rule is Professor Weintraub. See R. Weintraub, *supra* note 70, at 412-60.

[T]he situs qua situs, with rare exceptions, has an interest in applying its own law . . . only when choice of law will affect use of the land. Even when land use is affected, . . . the situs should probably yield to the conflicting rule of another state that has a genuine interest in validating the transaction that the situs rule would invalidate.

*Id.* at 460. See also Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1, 15-17 (1963).

95. See Restatement 2d, *supra* note 26, § 263, comment a. According to A. Dicey & J. Morris, *supra* note 26, at 614-15, the current English rule is to apply the law of the domicile at the date of the will rather than at the date of death.

96. "Once, Theobald wondered whether it was not a 'ridiculous idea' that the testator's ability should depend on a domiciliary law unknown to him at the time of executing his will." E. Rabel, *supra* note 21, at 320.

97. See article 2 of the Draft, *infra* note 113 and accompanying text.

all modern American conflicts methodologies at least with regard to torts and contracts.<sup>98</sup>

## 2. *Civil Law*

In the civil law world, capacity has always been considered a matter of personal status to be determined by the personal law, the law of the domicile or nationality of the person whose capacity is in question.<sup>99</sup> Transferred to the area of successions where most civil law systems follow the scheme of unitary succession,<sup>100</sup> this principle has meant that: (a) capacity to make a testament should be governed by a single law, regardless of the nature or location of the property; and (b) the governing law should be the personal law of the testator *at the time of the making of the testament*.<sup>101</sup> With regard to immovables, the superiority of this rule over the common law situs rule is too obvious for argument.<sup>102</sup> With regard to movables, however, the civil law rule of applying the law of the testator's domicile at the time of the making of the testament shares some of the weaknesses of the common law rule of applying the law of his domicile at the time of death. While it is true that the law of the testator's domicile at the date of the will is more relevant in terms of his expectations than the law of his domicile at the time of death,<sup>103</sup> the better view is to apply *either* law, whichever would uphold the testament. Endorsed by many reputable commentators<sup>104</sup> and sanctioned by the most

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98. See Reese, Recent Developments in Torts Choice-of-Law Thinking in the United States, 8 Colum. J. Transnat'l L. 181, 182 (1969).

99. See, e.g., § 12 of the Austrian Statute on Private International Law of 1978; arts. 7 & 9 of the Greek Civil Code; art. 7 of the Introductory Law to the German Civil Code of 1900 as well as art. 7 of the new Law of 25 July 1986; art. 17 of the Preliminary Dispositions of the Italian Civil Code; art. 9 para. 1 of the Spanish Civil Code; art. 63 of the Portuguese Civil Code; E. Rabel, supra note 21, at 321-22. For a comprehensive comparative treatment of the subject, see H. Glenn, supra note 91, at 44-50, 191, 217-34; J. Guinang, *Les conflits de lois en matière de capacité* (1970); von Overbeck, *Persons*, in 3 International Encyclopedia of Comparative Law 13-27 (1972).

100. See supra note 22. Even those countries which, like France, have yielded to the attractions of the system of scission and of the situs rule for immovables, have always considered capacity as a separate issue to be determined by the testator's personal law. See H. Batiffol & P. Lagarde, supra note 23, at 414-15; von Overbeck, supra note 99, at 14.

101. See, e.g., § 30 of the Austrian Statute on Private International Law of 1978; art. 25 of the Portuguese Civil Code; E. Rabel, supra note 21, at 321-22; von Overbeck, supra note 99, at 14.

102. See text accompanying infra notes 133-35, 184-91.

103. See supra note 96.

104. See, e.g., E. Rabel, supra note 21, at 322; R. Weintraub, supra note 70, at 36: "the general direction for resolution of a true conflict concerning the essential validity of a will should be toward validation." See also M. Wolff, supra note 21, at 581-82; Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 Calif. L. Rev. 185, 206, 262 (1958).

recent continental codifications,<sup>105</sup> this view is expressly adopted by the Louisiana Draft.<sup>106</sup>

### 3. Current Louisiana Law

Unlike the common law rule which, although not necessarily sound, is at least certain, the current Louisiana rule on the law governing testamentary capacity is a matter of speculation. This uncertainty results from the lack of express statutory directive and a rather sharp split in the jurisprudence on this issue. Unlike other civil codes, the Louisiana Civil Code does not contain an express choice-of-law rule for issues of capacity to make a testament, or, for that matter, capacity to enter into juridical acts in general. Assuming that these issues are included within the scope of Civil Code article 10, there still remains the difficulty of fitting them within either one of the two categories of that article, i.e., either the "form" or "effect" of the testament. Perhaps this first hurdle could be overcome easily by assuming that capacity is clearly *not* a matter of form. Even so, there would still remain the difficulty in determining *where* the testament is supposed to have effect. A more plausible position would be to conclude that capacity is neither a matter of form nor of effect of a testament, but rather a separate issue not covered by article 10. If the fact that most cases involving the issue of capacity invariably fail to mention article 10 is a reliable indication, this seems to be the position of the Louisiana jurisprudence. The resulting statutory gap could then be filled either by analogy from other Civil Code provisions, or by drawing from the rich repository of the civilian tradition.

Here again the position of the Louisiana jurisprudence is either unclear or inconsistent. A series of early Louisiana cases relied heavily on continental authorities to hold that capacity to enter into an inter vivos juridical act is governed by the law of the domicile, regardless of whether the act pertains to movables<sup>107</sup> or immovables.<sup>108</sup> Unfortunately, neither this principle nor the authority from which it was derived seemed to be clearly recognized in the few cases which involved testamentary capacity.

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105. See *infra* notes 126-27.

106. See article 2 of the Draft, text accompanying *infra* note 113.

107. See, e.g., *Lorio v. Gladney*, 147 La. 930, 86 So. 365 (1920); *Marks v. Loewenberg*, 143 La. 196, 78 So. 444 (1918); *National City Bank of Chicago v. Beringer*, 143 La. 14, 78 So. 134 (1918).

108. See *Marks*, 143 La. 196, 78 So. 444; *Kelly v. Davis*, 28 La. Ann. 773 (1876); *Augusta Ins. & Banking Co. v. Morton*, 3 La. Ann. 417 (1848); *Garnier v. Poydras*, 13 La. Ann. 177 (1839). But see *Bonneau v. Poydras*, 2 Rob. 1, 16 (1842) "[w]ith regard to a house in New York, it is the well established rule that the capacity to dispose of real property is to be determined by the *lex rei sitae*. . . ."

One case, *Succession of Robert*,<sup>109</sup> held that "with regard to movables, the capacity or incapacity of a testator is to be determined by the laws of his domicile."<sup>110</sup> However, it is unclear whether the court was following the common law or the civil law rule. Both rules would have led to the same result, because the testator had the same domicile at the time of the making of the testament and at the time of her death. The court relied on Story, but also noted that the same rule is espoused by civilian jurists like Pothier and Merlin. Later jurisprudence abandoned any reliance on continental authorities.<sup>111</sup> Finally, the most recent case involving immovables relied on common law authorities to hold that testamentary capacity is governed by the law of the situs.<sup>112</sup>

#### 4. *The Draft*

The Draft will eliminate this uncertainty and realign Louisiana with its civil law heritage by providing the following rule in article 2:

A person is capable of making a testament if, at the time of the making of the testament, he possessed such capacity under the law of the place where he was domiciled at the time of the making of the testament or under the law of the place where he was domiciled at the time of death.<sup>113</sup>

(a) *Scope.* Before explaining the rationale behind this article, it is important to clarify at the outset what it does and does not encompass. First, this article applies to both movables and immovables. This is in line with the civilian tradition of unity of the estate. Second, as suggested by the use of the term "capable of making a testament," rather than "capable of disposing by testament," this article is intended to be confined to questions of the general juridical capacity of the testator, as distinguished from his "capacity" to dispose either of particular assets or portions thereof, or to particular persons. In other words, article 2 governs all those matters which pertain to the personal physical and mental qualities the testator must possess at the time in order to confect a valid testament. This would include what the Louisiana Civil Code calls "absolute incapacities," which "prevent the giving . . . indefinitely with regard to all

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109. 2 Rob. 427 (La. 1842).

110. 2 Rob. at 436.

111. See, e.g., *Succession of Hasling*, 114 La. 293, 38 So. 174 (1905).

112. See *Guidry v. Hardy*, 254 So. 2d 675 (La. App. 3d Cir. 1971), writ denied, 260 La. 454, 256 So. 2d 441 (1972), discussed *infra* text accompanying notes 176-191.

113. The Draft under discussion here does not define the meaning of domicile. For the current statutory definition, see La. Civ. Code arts. 38-46. These articles will be revised at a later time. Thus, any criticisms of the notion of using domicile as a connecting factor may have to be deferred for a later time.

persons,"<sup>114</sup> such as unsound mind, or lack of minimum age,<sup>115</sup> as well as similar incapacities recognized by other legal systems.

Article 2 does not encompass what the Louisiana Civil Code calls "relative incapacities,"<sup>116</sup> namely "incapacities which prevent the giving to certain persons,"<sup>117</sup> such as tutors, concubines, illegitimates, doctors and ministers.<sup>118</sup> These incapacities are covered by article 3, which overlaps with article 2 to the extent it calls for the application of the law of the *last* domicile of the testator.<sup>119</sup> Similarly, article 2 is not intended to apply to the rules pertaining to the disposable portion, that is, the rules that prescribe *how much* of his property an otherwise capable person is permitted to dispose.<sup>120</sup> These matters are relegated to article 5 with regard to movables, and articles 6-7 with regard to immovables.<sup>121</sup> Finally, article 2 does not apply to questions pertaining to the type or form of testaments required by law for persons with a particular handicap, such as blindness, deafness, illiteracy, etc.<sup>122</sup> These are, properly speaking, questions of form and, as such, fall under article 1 of the Draft. The person laboring under such a handicap is, in fact, generally capable of making a testament, except that he must do so in the form prescribed by law for persons with that particular handicap.

(b) *Rationale*. Like article 1, article 2 is basically a "rule of validation," that is, a rule which projects at the multistate level the substantive policy of favor testamenti which is shared by most states.<sup>123</sup> Article 2

114. La. Civ. Code art. 1471.

115. See La. Civ. Code arts. 1475, 1476.

116. La. Civ. Code art. 1471.

117. *Id.*

118. See La. Civ. Code arts. 1478-1480, 1484-1485, and 1489.

119. See text accompanying *infra* note 146.

120. See La. Civ. Code arts. 1493.

121. Article 5, text accompanying *infra* note 238, calls for the application of the law of the last domicile of the deceased. Articles 6 and 7 call for the application of the law of the situs with some exceptions specified in these articles and discussed at text accompanying *infra* notes 260-267.

122. See La. R.S. 9:2443-44 (Supp. 1987) (statutory will for persons with sight impairment or illiterate persons). Compare with art. 5 of the Hague Convention, *supra* note 53.

123. For an early expression of this policy in the domestic level, see *Kingsbury v. Whitaker*, 32 La. Ann. 1055 (1880). "The presumptions of the law are in favor of capacity. . . . Doubts must be resolved in favor of the will." *Id.* at 1069.

To wrest a man's property from the person to whom he has given it, and to divert it to others from whom he desired to withhold it, is a most violent injustice, amounting to nothing less than post-mortem robbery, which no court should sanction, unless thoroughly satisfied . . . that the testator was legally incapable of making a will.

*Id.* at 1062-63. See also, *Succession of Lyons*, 452 So. 2d 1161 (La. 1984), discussed in Samuel, Shaw & Spaht, *Developments in the Law, 1983-84—Successions and Donations*, 45

promotes validation by alternatively assigning the capacity of the testator to the law of his domicile at either the time of the making of the testament or at the time of death, whichever would consider him capable.<sup>124</sup> Obviously, since the crucial point in time at which testamentary capacity is required is the moment of the making of the testament, that moment should always be the court's focal point of inquiry. However, if the testator has changed his domicile between the time of the making of the testament and the time of death, and the two states differ on the issue of capacity, there is a valid question as to which of the two states should supply the applicable law for determining whether, at the time of the making, the testator possessed the requisite capacity.<sup>125</sup> Applying the law of the domicile at death may be consistent with the notion that testaments do not take effect until death. Such a rule, however, may frustrate the expectations of a testator who, relying on the law of his domicile at the time of the making, made a testament valid there and then moved to a new domicile where he died without ever becoming aware that he was considered incapable by the law of his new domicile.<sup>126</sup> On the other hand, applying the law of the former domicile may create similar problems in the reverse situation, where a testator is deemed incapable by the law of the former domicile but capable by the law of his last domicile. He could well re-make the same testament after he moved to his new domicile.<sup>127</sup>

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La. L. Rev. 575, 604-08 (1984); Succession of Lambert, 185 La. 416, 169 So. 453 (1936); Succession of Mithoff, 168 La. 624, 122 So. 886 (1929). For a projection of this policy of validation at the multistate level, see R. Weintraub, *supra* note 70, at 36: "The general direction for resolution of a true conflict concerning the essential validity of a will should be toward validation." See also *id.* at 463-64; Yiannopoulos, *supra* note 104, at 206; Ehrenzweig, *supra* note 70.

124. For a similar rule of validation, see article 92 of the Swiss Draft of Private International Law of 1982 ("A person is capable of disposing mortis causa if, at the moment of disposing, he possesses such capacity by virtue of the law of the state of his domicile or his habitual residence, or by virtue of the law of one of the states of which he is a national"). See also *infra* note 127. For trusts, see Restatement 2d, *supra* note 26, § 269 (b) (ii) ("if there is no such effective designation, by the local law of the state of the testator's domicile at death, except that the local law of the state where the trust is to be administered will be applied if application of this law is necessary to sustain the validity of the trust").

125. In continental conflicts doctrine, this problem is known as the "*conflict mobile*." For a comprehensive treatment of these conflicts in general, see Rigaux, *Le conflit mobile en droit international privé*, 117 *Recueil des Cours* 329, 329-44, 378 (1966 I). For successions in particular, see F. Boulanger, *supra* note 21, at 201-08; H. Glenn, *supra* note 91, at 79-81.

126. Many systems take care of this problem by providing expressly that, once acquired, capacity is not lost by a change of domicile. See, e.g., arts. 7(2) and 24(3) of the Introductory Law to the German Civil Code of 1900 and arts. 7(2) and 26(5) of Law of 25 July 1986 on the Reform of Private International Law of the Federal Republic of Germany; art. 2 of the Treaty of Montevideo of 18 March 1940.

127. For a successful solution to this problem, see, e.g., § 30 of the Austrian Statute on

For these reasons, and in line with the basic policy of favor testamenti, article 2 authorizes the application of the law of either domicile, whichever would uphold the testament.<sup>128</sup>

With regard to movables, article 2 is consistent with the rule so far followed by the Louisiana jurisprudence and by all sister states, to the extent it authorizes the application of the law of *last* domicile.<sup>129</sup> To the extent it authorizes the alternative application of the law of the domicile at the time of the making, article 2 departs slightly from both the current Louisiana rule and the prevailing common law rule, for reasons already explained.<sup>130</sup> Whether this article changes the current practice with regard to immovables depends on which jurisprudence one chooses to rely. Although it is clearly consistent with the older jurisprudence which applied the law of the domicile,<sup>131</sup> this article departs from the situs rule followed by some more recent cases.<sup>132</sup> However, this departure finds ample support not only in the vast civilian literature but also in the teachings of most modern American commentators.<sup>133</sup>

Indeed, proponents of modern policy-oriented approaches, as well as observers of continental conflicts developments, should have no difficulty recognizing the rationale behind the domiciliary rule of article 2. This rule reflects a long overdue recognition that rules imposing an incapacity to make a testament are essentially legislated value judgments about a

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Private International Law of 1978, which provides that "[w]ere that law [i.e., of domicile at the time of the testament] to preclude validity, but the personal status law of the decedent to accord it, the latter law shall govern"; See also E. Rabel, *supra* note 21, at 322; M. Wolff, *supra* note 21, at 582.

128. See E. Rabel, *supra* note 21, at 322. "[W]hy not recognize a will made by a testator considered capable under his personal law either of the time of execution or at his death, in the latter event on the ground that he chose to let the will stand?" See also M. Wolff, *supra* note 21, at 581-82; Yiannopoulos, *supra* note 104, at 206, 262.

129. See *supra* notes 92, 109-10 and accompanying text.

130. See text accompanying *supra* notes 123-28.

131. See *supra* note 108.

132. See *supra* notes 111-12.

133. See *supra* notes 104, 126-28. Even the Restatement 2d, which adopts the situs rule for immovables, recognizes the possibility of, and need for exceptions. According to comment c under § 239, such exceptions are appropriate when it is determined that a certain rule of incapacity contained in the law of the situs "is applicable only to local domiciliaries and hence does not affect a testator who dies domiciled in another state;" or when "the concern of that other state in the decision on the particular issue is so great as to outweigh the values of certainty and predictability which would be served by application of . . . [situs] law." The comment then goes on to explain why—conventional wisdom to the contrary notwithstanding—the application of the law of the domicile would not undermine the situs interest in security of title. "Since the testator's capacity will have been conclusively established by the order [admitting the will to probate], it will not be necessary for title searchers and others to consult the local law of another state with respect to this issue." Restatement 2d, *supra* note 26, § 239 comment c.



person's maturity, clarity of thinking, or need of protection. These are judgments about people and societal values rather than about property *per se*. As such, these judgments belong more properly to the legislative competence of the community in which the testator—and most likely his family and legatees—is domiciled and whose values he shares, rather than that of the place where his property happened to be. For instance, the fact that the affected property is situated in Louisiana, without more, does not justify the application of this state's standards for competent age or soundness of mind, if the testator, and most likely his family and his legatees, are domiciled in California.<sup>134</sup> The opposite would naturally follow in the converse situation.<sup>135</sup> Thus, the application of the law of the domicile seems the best solution functionally, and conforms with the expectations of the testator. Finally, from a more practical viewpoint, since the testator could have only been domiciled in one state, the application of the law of that state to all these questions would ensure a uniform treatment of the estate as a single unit, regardless of the location of the property or its composition of movables or immovables. This fact alone should be sufficient to justify the domiciliary rule of article 2.

#### B. Capacity to Inherit or to Receive as Legatee

The Louisiana Civil Code defines incapacity to inherit as “the absence of those qualities required in order to inherit. . . .”<sup>136</sup> These qualities, which must be possessed by the heir “at the moment the succession is opened,”<sup>137</sup> are essentially no different from the general qualities a person must possess in order to acquire property and rights in general.<sup>138</sup> The question of capacity to inherit is, of course, to be distinguished from the question of whether a person is entitled to inherit *from a particular person*. The former question depends on only one factor: existence, or

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134. See *Guidry v. Hardy*, 254 So. 2d 675 (La. App. 3d Cir. 1971), writ denied, 260 La. 454, 256 So. 2d 441 (1972), discussed *infra* text accompanying notes 176-191, which applied Louisiana law to determine whether a person domiciled in California both at the time of the making of the testament and at the time of his death had capacity to make a testament.

135. In the converse situation the testator is domiciled in Louisiana throughout his life and makes a Louisiana testament purporting to dispose, among other things, of a California immovable. Would a Louisiana court be as willing as the *Guidry* court to apply situs law and to invalidate the will for, say, undue influence?

136. La. Civ. Code art. 950.

137. *Id.* See also La. Civ. Code art. 953. “In order to be able to inherit, the heir must exist at the moment that the succession becomes open.”

138. These qualities are collectively signified by the concept of “personality.” For the meaning and content of this concept, see, *inter alia*, 1 M. Planiol & G. Ripert, *Treatise on the Civil Law* 243-49 (English Translation by the Louisiana State Law Institute 1959).

personality, at the moment the succession is opened.<sup>139</sup> The latter question depends on whether one who was at least conceived at the moment of the opening of the succession, and thus possesses the general capacity to inherit, is also related to the deceased in the manner required by the law of intestate succession for persons to inherit from each other.<sup>140</sup>

The Code also uses the term capacity when it refers to the power of a person to donate to particular persons. Article 1471 speaks of "incapacities which prevent the giving to certain persons, or receiving from them," and characterizes these impediments as "relative incapacities."<sup>141</sup> However, unlike absolute incapacities of giving which pertain to the personal qualities of the donor and incapacities to inherit which pertain to the personal qualities of the heir, relative incapacities are essentially prohibitions or restrictions imposed by law on certain donations because of the nature of the relationship that exists between the donor and the donee. This relationship may be of such nature as to be reprehensible in itself, in the eyes of the law;<sup>142</sup> or it may involve a relation of such dependence by the donor on the donee as to render suspect any donation between them, because of the strong likelihood of undue influence.<sup>143</sup>

In multistate successions, the provisions of Louisiana law which impose the above incapacities may, and in fact have,<sup>144</sup> come in conflict with the

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139. See La. Civ. Code art. 953. "In order to be able to inherit, the heir must exist at the moment that the succession becomes open." See also La. Civ. Code arts. 954-955.

140. See La. Civ. Code arts. 880-901. See also text accompanying *infra* notes 161-63 for unworthiness of heirs.

141. La. Civ. Code art. 1471.

142. See, e.g., La. Civ. Code art. 1481, which prohibits persons living "in open concubinage" from donating immovables to each other, or movables exceeding 1/10th of the value of the donor's estate. For the leading case on the meaning and application of this article, see *Succession of Jahraus*, 114 La. 456, 38 So. 417 (1905). For a scholarly discussion, see Lorio, *Concubinage and its Alternatives: A Proposal for a More Perfect Union*, 26 Loy. L. Rev. 1 (1980). See also La. Civ. Code art. 1487 which prohibits a father who is survived by his parents from giving to his illegitimate children more than the disposable portion of his estate. Although nowadays the constitutionality of this article is at least doubtful, see *Jordan v. Cosey*, 434 So. 2d 386 (La. 1983), nevertheless this article as well as article 1481 reflect a legislative policy of discouraging illicit relationships in hopes of protecting the legitimate family.

143. See, e.g., La. Civ. Code art. 1478, which prohibits mortis causa donations by a minor to his tutor while under his authority; and La. Civ. Code art. 1489, which prohibits doctors or ministers "who have professionally attended a person during the sickness of which he dies [from receiving] any benefit from donations inter vivos or mortis causa made in their favor by the sick person during that sickness." For the leading case on the meaning and application of these articles in Louisiana domestic law, see *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894).

144. See, e.g., *Succession of Goss*, 304 So. 2d 704 (La. App. 3d Cir. 1974), writ denied, 309 So. 2d 339 (La. 1975), cert. denied sub nom., *Goss v. Zuckswert*, 423 U.S. 869, 96 S. Ct. 133 (1975); *Succession of Fisher*, 235 La. 263, 103 So. 2d 276 (1958); *Succession of Meunier*, 52 La. Ann. 79, 26 So. 776 (1899); *Succession of Petit*, 49 La. Ann. 625, 21 So. 717 (1897); *Jones v. Hunter*, 6 Rob. 235 (La. 1843).

provisions of a foreign law which do not recognize the same incapacities or which attach different consequences to them.<sup>145</sup> Article 3 of the Draft will provide the rule for resolving such conflicts. This article reads as follows:

Whether a person is capable of inheriting or receiving as a legatee is determined according to the law of the domicile of the deceased at the time of death.<sup>146</sup>

Two obvious questions must be answered with respect to the rationale of this article. First, why apply the law of the domicile of the testator rather than, say, the law of the situs with regard to immovables, or perhaps the law of the domicile of the heir or legatee? Second, why apply exclusively the law of the last domicile of the testator, rather than apply alternatively, as in article 2, the law of the domicile at either the time of the making or at the time of death?

### *1. Testator's Domicile vs. Situs*

The answer to the first question is essentially the same as with respect to article 2.<sup>147</sup> Like absolute incapacities, relative incapacities are legislatively articulated value judgments about people and about relations between them rather than about property as such. For instance, as said earlier, the relative incapacities established in the Louisiana Civil Code reflect a legislative reprobation of certain relationships,<sup>148</sup> or an *a priori* determination that certain dispositions are inherently suspect because of the likelihood of undue influence.<sup>149</sup> Since these legislative determinations have nothing to do with land utilization and little, if anything, to do with security of title, they should be reserved to the legislative jurisdiction of the state of the domicile of the decedent and his family rather than

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145. For comparative background, see H. Batiffol & P. Lagarde, *supra* note 23, at 415-16; F. Boulanger, *supra* note 21, at 101-04; W. Breslauer, *The Private International Law of Succession in England, America, and Germany* 75-80, 95-106; E. Rabel, *supra* note 21, at 328-30, 355-65.

146. Article 3 continues as follows: "However, with regard to immovables situated in this state, the legatee must qualify as a person under the law of this state." This proviso is intended to preserve the public policy of this state in those extreme cases in which, for instance, the law of the testator's foreign domicile permits legacies to animals. The proviso also applies to those unincorporated associations which are not permitted to own property under the law of this state. In this latter case, however, the incapacity may be cured if the foreign association subsequently incorporates under the law of this state.

147. See text accompanying *supra* notes 133-35.

148. See text accompanying *supra* note 142.

149. See *supra* note 143 and accompanying text.

of the location of the property.<sup>150</sup> Two examples should suffice to illustrate this point.

Louisiana Civil Code article 1481 prohibits persons living "in open concubinage" from donating to each other immovables, or movables exceeding 1/10th of the value of the donor's estate. The wisdom or the effectiveness of this article may appear dated today, or even dubious ab initio.<sup>151</sup> Nonetheless, this article reflects a conscious determination by the people of this state, acting through their representatives, *for the people of this state* that prohibiting donations of this kind would preserve the mores of this society, and protect the legitimate families of this state. This determination is relevant when, and only when, the deceased, and thus most likely his family, is a Louisiana domiciliary. This is so even if the donated property is not situated in this state. On the other hand, when the deceased was domiciled in another state, applying this article just because the donated property is situated in Louisiana would be a "misplaced paternalism"<sup>152</sup> at best, and an "officious intermeddling"<sup>153</sup> at worst. It would defeat the policy of that other state in striking its own balance between freedom of disposition and protecting families and their mores, without promoting any pertinent Louisiana policy.

The same applies to the incapacities of Louisiana Civil Code article 1478, which prohibits mortis causa donations by a minor to his tutor while under the tutor's authority; and article 1489, which prohibits doctors or ministers "who have professionally attended a person during the sickness of which he dies [from receiving] any benefit from donations inter vivos or mortis causa made in their favor by the sick person during that

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150. For similar conclusions, see R. Weintraub, *supra* note 70, at 434-38, 457-60. Even the Restatement 2d, which adopts the situs rule for immovables, recognizes the possibility of and need for exceptions. See Restatement 2d, *supra* note 26, § 239 comment d.

151. Effective after the completion of this writing, article 1481 has been repealed. See Acts 1987 No. 568. Nevertheless, this article remains a good example of the kind of value judgments which each society is entitled to make for its own people.

152. R. Weintraub, *supra* note 70, at 439.

The situs' rejection of nuncupative and holographic wills, designed to assure appropriate deliberation on the part of the testator and to prevent mistake and fraud, is understandable for the protection of citizens of the situs, but is misplaced paternalism when directed at citizens of other states when those states would strike a balance in such cases in favor of the intention of the decedent, even though the intention was somewhat informally expressed.

*Id.* Although referring to matters of form, this comment is even more appropriate for matters of capacity.

153. Hancock, In the Parish of *St. Mary le Bow*, in the Ward of *Cheap*, 16 Stan. L. Rev. 561, 573 (1964), reprinted in M. Hancock, *supra* note 94, at 225, 237. Professor Hancock's statement is in the context of criticizing the application of Texas law as the law of the situs to validate the will of an Ohio domiciliary which would have been invalid under an Ohio mortmain statute.

sickness."<sup>154</sup> Again, these articles embody *a priori* legislative determinations that certain dispositions are inherently suspect because of the donor's likely or real dependence on the donee. Essentially, these articles constitute Louisiana's version of the doctrine of undue influence,<sup>155</sup> albeit in a narrower and less flexible form. Therefore, these articles should be applied when, and only when, the testator was a Louisiana domiciliary, and regardless of whether the property is movable or immovable, or located within or without this state.<sup>156</sup>

## 2. *Testator's Domicile vs. Legatee's Domicile*

The choice of the testator's domicile rather than that of the heir or legatee may be justified on a number of grounds. The first reason is practical and follows from the principle of unitary succession. Whenever possible, inheritance rights in the succession of one person should not vary depending on the domicile of the beneficiary, for the same reasons that they should not vary depending on the location of the assets of the estate. The second reason is more theoretical. It may be stated somewhat arbitrarily by saying that the value judgments which are implicit in the rules imposing incapacities to give or to receive should be reserved to the state where the deceased lived rather than the one in which his many beneficiaries find themselves. It is his expectations that the law is interested in protecting and his wealth whose distribution is at stake.

However, the foregoing should not be taken to mean that the domicile of the heir or legatee has no say in these matters. It is an established principle of choice of law that the law of the domicile of the beneficiary determines whether he possesses those qualities which the law governing the succession (here the law of the testator's domicile) considers necessary for him to inherit or to receive as a legatee.<sup>157</sup> For instance, the law of the domicile of the deceased provides that surviving spouses are entitled

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154. These articles are derived from articles 907 and 909, respectively, of the Code Napoleon. For the treatment of these articles from the choice-of-law perspective, see H. Batiffol & P. Lagarde, *supra* note 23, at 415.

155. Undue influence is discussed *infra* text accompanying notes 170-75.

156. The same principle should, of course, hold for the converse situation. For a recent case reaching a similar result, see *In re Estate of Janney*, 498 Pa. 398, 446 A.2d 1265 (1982), which applied Pennsylvania law to uphold a testamentary disposition of a New Jersey immovable by a Pennsylvania domiciliary, although the disposition would have been invalid in New Jersey because a legatee was also an attesting witness. Professor Weintraub hails this decision as indicative of the new, enlightened trend. See R. Weintraub, *supra* note 70, at 457-58.

157. This principle is known in conflicts literature as the "preliminary" or "incidental question." For an able exposition of this question, see Gotlieb, *The Incidental Question Revisited—Theory and Practice in the Conflict of Laws*, 26 *Int'l & Comp. L. Q.* 734 (1977). For successions in particular, see E. Rabel, *supra* note 21, at 354-74.

to a certain percentage of the estate, legitimate children to another, and adopted children to another percentage. Whether the particular person qualifies as, i.e., enjoys the *status* of, a "spouse," or a "legitimate" or "adopted" child is normally determined by the law of the domicile of such persons rather than that of the domicile of the deceased.<sup>158</sup> The same is true with regard to juridical persons. Whether a particular entity possesses juridical personality so as to be capable to inherit and own property under the law of the domicile of the deceased is ordinarily determined by the law of the state in which such entity was organized.<sup>159</sup> Louisiana jurisprudence has recognized these principles,<sup>160</sup> and article 3 does not purport to overrule them.

### *3. Testator's Domicile at Time of Testament vs. Testator's Domicile at Time of Death*

Unlike article 2 which authorizes the alternative application of the law of the domicile of the deceased at either the time of the making of the testament or the time of death, article 3 of the Draft applies exclusively the law of the *last* domicile of the deceased. One reason for this difference is the simple fact that article 3 applies not only to testate but also to intestate successions. As to the latter, therefore, only the last domicile of the deceased is relevant. With regard to testate successions, a second reason for the difference may be provided by examining and comparing the nature of the incapacities encompassed by the two articles. As said earlier, absolute incapacities pertain to the personal qualities that the testator must possess *at the time of the making of the testament*. Therefore,

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158. See, e.g., Restatement 2d, *supra* note 26, §§ 237(2), 238(2), 241 comment b, 283, 287, 290.

159. "It should be even more certain than for individuals that the existence of corporations is determined by their personal law and the law of successions as such has nothing to do with it." E. Rabel, *supra* note 21, at 365. See also W. Breslauer, *supra* note 145, at 95-102.

160. See Succession of Fisher, 235 La. 263, 103 So. 2d 276 (1958) (applying Massachusetts law for determining whether a Massachusetts entity, the First Church of Christ, Scientist, possessed juridical personality required by the law of Louisiana which was the domicile of the testator and the situs of the property); Succession of Goss, 304 So. 2d 704 (La. App. 3d Cir. 1974), writ denied, 309 So. 2d 339 (La. 1975), cert denied sub nom. Goss v. Zuckswert, 423 U.S. 869, 96 S. Ct. 133 (1975) (applying the California presumption of legitimacy for determining whether a child born there was the legitimate child of a Louisiana testator and thus entitled to a forced share out of the testator's Louisiana property); Succession of Caballero v. the Executor, 24 La. Ann. 573 (1874) (applying the law of the place of celebration of the marriage, Cuba, for determining its effect in legitimating a previously born child and then applying Louisiana law for determining his rights under the will). See also Succession of Caldwell, 114 La. 195, 38 So. 140 (1905) (adoption); Scott v. Key, 11 La. Ann. 232 (1856); Marzette v. Cronk, 141 La. 437, 75 So. 107 (1917); Succession of Meunier, 52 La. Ann. 79, 26 So. 776 (1899).

the law of the testator's domicile at that time is the *first* logical choice for determining whether the testator in fact possessed those qualities at that time. This is the premise of article 2 which simply added a second, alternative choice for reasons already explained. On the other hand, relative incapacities are for the most part designed to protect, or effectively work to the benefit of, the intestate heirs or residual legatees, and thus pertain more to the state of affairs at or after the testator's death than at the time he made his testament. It was therefore thought more appropriate to assign such incapacities to the law of the last domicile than the domicile at the time of the making. Also, because these incapacities are based on strong public policy, it was not thought necessary or appropriate to allow an alternative reference to the law of the domicile at the time of the making of the testament.

*C. Excursus: Unworthiness of Heirs, Vices of Consent, and Undue Influence*

At the time of this writing, articles 2 and 3 of the Draft do not address expressly questions of vices of consent, undue influence, and unworthiness of heirs. It is very likely that, by the time it is submitted to the legislature, this Draft will be revised so as to address directly these questions and to correct some other deficiencies that have become obvious in the meantime. If such a revision does not take place, the position of vices of consent, undue influence, and unworthiness of heirs under the Draft will be a matter for judicial interpretation. If these questions are treated as, or analogized to, matters of capacity, then they will be governed by articles 2 and 3 of the Draft; otherwise they will be governed by the residual articles 5-7. The following tentative thoughts may be pertinent in that regard.

*1. Unworthiness of Heirs*

According to Civil Code article 965, "[t]here is this difference between being unworthy and incapable of inheriting, that he who is declared incapable of inheriting, has never been heir, whilst he who is declared unworthy, is not the less heir on that account, if he has the other qualities required by law to inherit."<sup>161</sup> It is doubtful, however, that this difference is important enough from the choice-of-law perspective to justify subjecting unworthiness of heirs to a law different than that which governs the capacity to inherit. Similarly, a casual look at the causes of unworthiness of the Louisiana Civil Code reveals that they reflect the same kind of

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161. La. Civ. Code art. 965.

value judgments as those embodied in the articles imposing the incapacity of receiving.<sup>162</sup> By parity of reasoning, therefore, they should be subject to the same law, i.e., the law of last domicile of the deceased under article 3 of the Draft.<sup>163</sup> One would hope that the courts would reach this conclusion even if the Draft is not eventually revised to provide expressly to that effect.

## 2. *Vices of Consent*

One of the basic prerequisites for the substantive validity of a testament is that it must reflect the free and unrestrained will of the testator unaffected by vices of consent.<sup>164</sup> However, although duress, fraud, and error are the typical examples of vices of consent in most legal systems, there are some differences from one system to another as to what else can be a vice of consent, the precise legal meaning of each vice, and the ultimate impact of each vice on the validity of the testament.<sup>165</sup> Thus, in a multistate context, this multiplicity of meanings and consequences may raise, in addition to a factual question, a genuine choice-of-law question: which law should govern the existence of vices of consent and their impact on the validity of the testament?<sup>166</sup>

In most common law systems this question is either ignored or answered too quickly in favor of the same law that governs the rest of the

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162. The causes of unworthiness are exhaustively listed in La. Civ. Code art. 966. See also La. Civ. Code art. 968. Among them are: being "convicted of having killed, or attempted to kill, the deceased;" and having "brought against the deceased some accusation found calumnious, which tended to subject the deceased to an infamous or capital punishment."

163. Continental systems subject the question of unworthiness to the same law that governs the succession. See E. Rabel, *supra* note 21, at 365; W. Breslauer, *supra* note 145, at 77-79. In most systems this would be the law of the domicile of the decedent at the time of death. In France, this would be true only for movables, but not for immovables.

164. See, e.g., La. Civ. Code arts. 1948-1965. Although located in the Title of the Civil Code dealing with conventional obligations, these articles are also applicable to declarations of will contained in unilateral juridical acts such as testaments. See La. Civ. Code art. 1917 and comments thereunder.

165. In fact some Louisiana cases suggest that La. Civ. Code art. 1492, *infra* note 170, prohibits any proof of duress, force, violence and all acts, conduct, or motives of the testator. See, e.g., *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); *Succession of Schlumbrecht*, 138 La. 173, 70 So. 76 (1915); *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894). Other cases suggest that such evidence of such acts may be admitted if these acts took place at the moment of the making of the testament, see, e.g., *Succession of Franz*, 232 La. 310, 94 So. 2d 270 (1957). In commenting on these cases, the author of a law review note rightfully concludes that "[i]t seems unthinkable that the court would not annul a disposition shown to be made under fear of harm or other duress." Note, *Donations—Testaments—Captation Under Article 1492*, 24 La. L. Rev. 925, 928 (1964).

166. For comparative background, see W. Breslauer, *supra* note 145, at 179-80; E. Rabel, *supra* note 21, at 322-24; M. Wolff, *supra* note 21, at 583.



succession,<sup>167</sup> i.e., the law of the domicile at death for movables and that of the situs for immovables. In civil law systems this question is at least raised, though not resolved authoritatively. The dilemma is whether to analogize vices of consent with issues of capacity and thus subject them to the law of the domicile at the time of the making of the testament, or whether to treat them together with the rest of the succession issues under the law of domicile at the time of death.<sup>168</sup> In those civil law systems that follow the principle of unitary succession, this dilemma is not terribly important from a practical viewpoint, because in the vast majority of cases the testator is domiciled in the same country at the time of the testament and at the time of death. However, in those civil law systems which, like France and Louisiana, follow the principle of scission of the estate into movables and immovables, this question acquires an added significance with regard to immovables. For, unless analogized to issues of capacity, vices of consent fall necessarily under the domain of the law of the situs, a particularly disturbing possibility.<sup>169</sup>

As far as it can be determined, this question has not been confronted so far in Louisiana conflicts jurisprudence. Regrettably, it has also not been addressed expressly by this Draft. One can only hope that, if it does arise in the future, this question will be resolved in a manner which would be consistent with the overall philosophy of the Draft. Suffice it to say in this respect that it would be inconsistent with the spirit of this Draft to apply the law of the situs qua situs for determining whether a testament, made perhaps thousands of miles away by a testator who might have never set foot at the situs, indeed reflects the free will of the testator.

### 3. *Undue Influence*

Undue influence is not recognized in Louisiana either as a vice of consent, or as a general incapacity to make or to receive through a testament.<sup>170</sup> In a conflicts case, however, a Louisiana court may have

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167. See, e.g., Restatement 2d, *supra* note 26, § 239 comments a and c and § 263 comment a.

168. "The question is, however, so open . . . that it must suffice . . . to point out the difficulty without giving illustrations or venturing a solution." W. Breslauer, *supra* note 145, at 180. See also M. Wolff, *supra* note 21, at 583.

169. This is indeed the French practice. See H. Batiffol & P. Lagarde, *supra* note 23, at 417.

170. See La. Civ. Code art. 1492. "Proof is not admitted of the dispositions having been made through hatred, anger, suggestion, or captation." For the history meaning and application of this article in Louisiana domestic law, see Note, *supra* note 165; Comment, Fraud, Undue Influence and Captation in Wills—A Comparative Study, 34 Tul. L. Rev. 585 (1960). For a comparative treatment, see Cahn, *Undue Influence and Captation A Comparative Study*, 8 Tul. L. Rev. 507 (1934); McGough, *Successions et Libéralités* 32 *Annuaire de législation*

to characterize undue influence one way or another in order to determine which article of the Draft is applicable. The following three options would then be available: (a) undue influence may be considered a vice of consent with the same consequences as described above;<sup>171</sup> or (b) undue influence may be analogized to incapacity to receive, or to what the Louisiana Civil Code calls "relative incapacity" to give.<sup>172</sup> If so, the applicable article of the Draft would be article 3, which calls for the application of the law of the last domicile of the testator with regard to both movables and immovables; or (c) undue influence may be deemed as depriving a person of the general capacity to make a testament, or what the Louisiana Civil Code calls "absolute incapacity."<sup>173</sup> If so, then the applicable article of the Draft, for both movables and immovables, would be article 2, which calls for the application of the law of the domicile either at the date of the will or at the date of death, whichever law would uphold the testament.

A conclusive answer to this question would require an in depth analysis of the whole institution of undue influence in the common law systems and a functional comparison with analogous concepts in the civil law. Such an analysis cannot be undertaken here.<sup>174</sup> Suffice it to say, however, that first, most Louisiana cases in which undue influence was alleged have approached the issue as one pertaining to the capacity of the testator

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française et étrangère (1985).

However, the Louisiana Civil Code does contain several provisions which seem to be motivated by the same policies as the common law institution of undue influence. Thus, to the extent that the concept of undue influence is used by common law systems as a vehicle for protecting the intestate heirs of the decedent, Louisiana accomplishes that same objective more directly and more discriminately through the institution of forced heirship, which guarantees to these heirs a certain minimum of protection. See La. Civ. Code arts. 1493-1518. To the extent that undue influence is used by common law systems as a means of policing suspect dispositions, Louisiana law does the same for certain dispositions which it considers *a priori* suspect, such as donations to concubines, tutors, etc. See supra notes 142 & 143. Finally, to the extent that undue influence is a means for ensuring that the testator expresses his volition freely and without restraints, Louisiana law does the same through the rules on vices of consent. See La. Civ. Code arts. 1948-1962, 1917, especially art. 1959 dealing with duress.

171. See text accompanying supra notes 164-69.

172. The problem with this analogy is that, while incapacities to receive are based on the very existence, without more, of a certain relationship between the donor and the donee, undue influence presupposes something more than that, i.e., a certain act by the donee designed to influence the donor. Furthermore, in undue influence cases the person exerting the undue influence may or may not be a legatee. On the other hand, the incapacities to receive are triggered only when the persons considered incapable of receiving are actually named legatees.

173. The domestic Louisiana jurisprudence seems to follow this option. See cases cited infra note 175.

174. See the authorities cited supra note 170.

rather than to his consent, or to the capacity of a legatee to receive.<sup>175</sup> Second, based on this jurisprudence, the Reporter's comments under article 2 state expressly that this article is intended to encompass undue influence. This statement reflects the Committee's and the Council's understanding about the scope of article 2. Finally, treating undue influence as an issue of testamentary capacity is the option most compatible with the overall philosophy and the objectives of the Draft, which assigns all matters pertaining to the personal qualities of the testator to his personal law rather than, say, to the law of the situs. Despite some conceptual ambiguities from the perspective of Louisiana substantive law, this seems to be the best solution from the choice-of-law perspective.

*Guidry v. Hardy*<sup>176</sup> is a good example of why undue influence should not be governed by the law of the situs qua situs. In *Guidry*, the testator, a California domiciliary both at the time he made his will and at the time of his death, made a will in California by which he gave most of his property, including a Louisiana immovable, to his California wife. The will was declared invalid by California courts for undue influence exercised on the testator by his wife in California. Plaintiff, the testator's child from a previous marriage, filed an action in Louisiana for a judgment declaring, among other things, "that the will is invalid and unenforceable insofar as it affects Louisiana immovable property because . . . the decedent lacked testamentary capacity. . . ."<sup>177</sup>

As in many other Louisiana cases,<sup>178</sup> the *Guidry* court accepted the premise that undue influence is an issue pertaining to the capacity of the testator, rather than an issue of vice of consent or incapacity to receive. But then the court went on to opine, citing common law authorities,<sup>179</sup> that "[t]he general rule is that issues relating to the capacity of the testator to make a will of immovable property will be resolved by applying the laws of the place where the property is situated, irrespective of the laws

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175. See, e.g., *Succession of Franz*, 232 La. 310, 94 So. 2d 270 (1957); *Cormier v. Myers*, 223 La. 259, 65 So. 2d 345 (1953); *Zerega v. Percival*, 46 La. Ann. 590, 15 So. 476 (1894); *Succession of Willis*, 149 So. 2d 218 (La. App. 2d Cir.), writ denied, 244 La. 132, 150 So. 2d 589 (1963); *Succession of Andrews*, 153 So. 2d 470 (La. App. 4th Cir.), writ denied, 244 La. 1005, 156 So. 2d 57 (1963). For a conflicts case, see *Guidry v. Hardy*, discussed in text accompanying *infra* notes 178-191.

176. 254 So. 2d 675 (La. App. 3d. Cir. 1971) writ denied, 260 La. 454, 256 So. 2d 441 (1972).

177. 254 So. 2d at 678.

178. See *supra* note 175.

179. The court cited one Arkansas case, the Restatement 2d, a common law conflicts hornbook, and two commercial common law encyclopedias. The only Louisiana citations, Civil Code article 10 and *Hasling v. Martin*, 114 La. 293, 38 So. 174 (1908), were equally unauthoritative. As explained earlier, Civil Code article 10 does not address directly questions of capacity. Similarly, *Hasling* did *not* involve a question of capacity and its dictum on capacity was also based on common law authorities.

of the domicile of the testator or of the place where the will was executed,"<sup>180</sup> and that "insofar as property in Louisiana may be affected, the issue of whether the testator had the capacity to make a will . . . must be governed by the laws of Louisiana."<sup>181</sup> The court appeared unconcerned by the fact that this same testament had already been declared invalid in California. In the court's thinking, since "[u]ndue influence . . . is not a ground for invalidating a will in Louisiana, as it is in California,"<sup>182</sup> "[w]e find that the testator was capable of executing the will at issue here. . . ."<sup>183</sup>

Before resuscitating a testament declared invalid by the courts of the domicile of the testator, the Louisiana court should have paused to consider, not only the question of adjudicatory jurisdiction which the court did not consider worthy of discussion,<sup>184</sup> but also the question of *legislative* jurisdiction. Had it been able to approach this question without the constraints of a so-called "general rule"—whose authority in Louisiana is suspect to begin with<sup>185</sup>—and without the influence of the "land taboo," the court would have realized that there was no legitimate reason to apply Louisiana law and every legitimate reason to apply California law to the issue of undue influence. Indeed, this case was completely alien to Louisiana, except for the location of one immovable. This latter factor, however, did not in any way implicate Louisiana's policies on the issue of undue influence and did not justify the application of Louisiana law. Whatever policy Louisiana has in not allowing undue influence of the

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180. 254 So. 2d at 679.

181. *Id.*

182. *Id.* at 681.

183. *Id.* at 682.

184. The fact that the plaintiff had filed an opposition in the California probate court and fully litigated the issue of the validity of the will, see *id.* at 678, was not as insignificant as the *Guidry* court seemed to assume. Nor was it "immaterial whether the California proceeding ha[d] resulted in a final judgment or not." *Id.* For an exhaustive, incisive discussion of this issue, see Hancock, Full Faith and Credit to Foreign Laws and Judgements in Real Property Litigation: The Supreme Court and the Land Taboo, 18 *Stan. L. Rev.* 1299 (1966), reprinted in M. Hancock, *supra* note 94, at 327. See also the conclusion of Weintraub's similar study: "There is no constitutional basis for reserving to the situs of realty exclusive judicial jurisdiction to affect the interests of persons in property. The situs will rarely, if ever, have so substantial an interest qua situs in refusing to recognize a non-situs land decree that the situs' interest should be permitted to override the great national interest in recognition of sister-state judgments." R. Weintraub, *supra* note 70, at 460. This conclusion seems to be reinforced today by *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association*, 455 U.S. 691, 102 S.Ct 1357 (1982). Although it did not involve questions pertaining to land, *Underwriters* is a sufficiently analogous case, having held that when a state with in personam jurisdiction over the parties asserts jurisdiction over a subject matter for which another state claims exclusive jurisdiction, the judgment so obtained in the former state cannot be collaterally attacked in the latter state.

185. See *supra* note 179.

generic type to affect the validity of the testament, it is a policy which is geared toward persons domiciled, rather than property situated, in this state.<sup>186</sup>

On the other hand, the policy underlying the California rule of undue influence was clearly implicated in this case on a number of grounds. If the purpose of the California rule of undue influence is to ensure that the testator's volition contained in his testament is free, genuine, and unrestrained,<sup>187</sup> then California would have every conceivable interest in applying its law, since the testator was a California domiciliary. The same would be true if the purpose of the undue influence rule is to discourage a certain kind of conduct and to punish the person engaging in it,<sup>188</sup> since the reprobated conduct was perpetrated in California by a California domiciliary against another California domiciliary. Finally, if the rule of undue influence is just an indirect way of protecting the family of the testator by scrutinizing gifts to strangers,<sup>189</sup> again California would have a genuine interest in applying its law, since the family in question was basically a California family.<sup>190</sup> Thus, the application of Louisiana law in *Guidry* defeated legitimate California interests without actually promoting any conceivable Louisiana interest.<sup>191</sup> No "general rule," no matter how old; and no "taboo," no matter how powerful should suffice to

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186. Cf. R. Weintraub, *supra* note 70, at 436, commenting on the infamous *Hickok* case, *Toledo Society for Crippled Children v. Hickock*, 152 Tex. 578, 251 S.W.2d 692 (1953), cert. denied, 347 U.S. 936, 74 S. Ct. 631 (1954), which applied Texas law as situs law in disregard of an Ohio mortmain statute, Ohio being the domicile of the testator. "Texas did not have any interest in validating the devise for the benefit of the charities when to do so would undermine the highly relevant purposes of Ohio to protect the Ohio wife and children and 'to prevent undue influence enhanced by the apprehension of approaching death.'" R. Weintraub, *supra* note 70, at 436.

187. See Cahn, *supra* note 170, at 517.

188. See McGough, *supra* note 170, at . . . especially as between cohabitants.

189. See Cahn, *supra* note 170, at 521.

190. See R. Weintraub, *supra* note 70, at 437, commenting on the analogous but narrower mortmain statutes as "primarily designed to protect the family from undue depletions of the estate by devises to charity. It is the settled residence of the testator and his family that is primarily concerned with the application of such a statute. . . . The situs does not have a legitimate countervailing interest. . . ." *Id.*

191. The only conceivable interest Louisiana might have in applying its law in this case may derive from what is sometimes stated as the policy behind La. Civ. Code art. 1492, namely, respect for the memory of the deceased and avoidance of "scandalous litigations, in which family controversies, private relations, and marital difficulties of a confidential order were paraded for the benefit of the idly curious, the malicious, and the purveyor of material for blackmailing." Cahn, *supra* note 170, at 509. If this is indeed the policy underlying article 1492, then Louisiana's interest in applying this article would not be based on it being the situs of the property, but rather on it being the forum and its desire to avoid the "scandalous litigation." Even so, however, the best way for the *Guidry* court to have avoided this scandalous litigation would have been to accept as conclusive the judgment of the California court, rather than to relitigate the merits.

justify such a result. It is hoped that, by departing from the situs rule for matters of capacity, the Draft will help to reduce the power of the "land taboo" and to avoid such results in the future.

## VI. INTERPRETATION OF TESTAMENTS

Like any juridical act, testaments may be ambiguous because they use legal terms incorrectly, because they use incomplete or unclear language, because they contain contradictory dispositions, etc. The process of resolving these ambiguities is called "interpretation" by the Louisiana Civil Code of 1870,<sup>192</sup> although the general literature on the subject distinguishes between "interpretation" and "construction."<sup>193</sup> "Interpretation" is the factual ascertainment of the intent of the testator as to matters in which he has spoken in his testament, albeit in an incomplete or ambiguous fashion. Words such as "share and share alike," "next of kin," etc., are given a meaning consistent with what is believed under the circumstances to be the true intent of the testator. Under this definition, Louisiana Civil Code article 1714 would be a rule of interpretation. This article provides that in case of ambiguity as to the identity of a legatee, as, for instance, when a legacy is bequeathed to one of two individuals bearing the same name, "the inquiry shall be which of the two was . . . of the most intimate . . . connection with the testator, and to him shall the legacy be decreed."<sup>194</sup> "Construction" is the process of completing or presuming the intent of the testator as to matters on which he could have, but has not, spoken. Here, the court tries through the use of legal presumptions, canons, and axioms to "complement" or "supply" the missing intent of the testator. Under this definition, article 1722 would, perhaps, be a rule of construction. This article provides that "[a] disposition, the terms of which express no time . . . refers to the time of making the will."<sup>195</sup>

It is often stated that, while the process of construction in a multistate case may involve choice-of-law questions, the process of interpretation is confined to a factual inquiry which does not involve such questions. The court simply tries to ascertain the intent of the testator from all the

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192. See La. Civ. Code art. 1712-1723.

193. See Restatement 2d, *supra* note 26, § 240 comments a, c and d, §264 comment a; E. Scoles & P. Hay, *supra* note 26, at 779-81, 789; E. Rabel, *supra* note 21, at 334-37; Yiannopoulos, *supra* note 104, at 242-52.

194. La. Civ. Code art. 1714.

195. La. Civ. Code art. 1722.

available evidence.<sup>196</sup> However, it would be more accurate to say that choice-of-law questions may well, and often do, arise in the process of interpretation, but they often go undetected and are unconsciously resolved under the law of the forum.<sup>197</sup> The fact that all systems share the cardinal principle stated in article 1712 of the Louisiana Civil Code that, “[i]n the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained” does not negate the possibility of conflicts in the implementation of this common principle from one system to the other. This is so because each system provides, judicially or legislatively, its own specific rules or guidelines for determining the testator’s intent.<sup>198</sup> Conflicts between such rules are inevitable, unless one assumes that these rules are identical, and are identically applied, in all systems.

There is of course a certain attraction to the idea of pushing the conflicts problem under the rug and interpreting testaments exclusively under the forum’s rules of interpretation. However, if such a practice is to be justified on grounds other than convenience, it must be based on one of two assumptions: that the forum’s rules of interpretation embody universal truths about mind-reading, or that the testator was so connected with the law of the forum at the time of making the testament as to be reasonably presumed to have been thinking in the terms of the law of the forum. Since neither assumption can be true in all cases, the systematic application of forum law to the interpretation of all multistate testaments must be rejected as a general practice.

Be that as it may, even if one accepts what may well be the prevailing view, namely that genuine conflicts problems arise only in construction but not in interpretation of testaments, it is important to remember that the border between the two is “ill-defined,”<sup>199</sup> and that the border between

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196. “Interpretation involves the establishment of a *fact* in accordance with rules in the nature of evidence and is hardly a choice-of-law problem. Construction, on the other hand, involves an *issue of law* to be determined in accordance with ‘directory’ rules . . . and may present a choice-of-law problem.” Yiannopoulos, *supra* note 104, at 243. See also E. Scoles & P. Hay, *supra* note 26, at 780-81.

197. For some Louisiana examples, see *Succession of Miller v. Moss*, 479 So. 2d 1035 (La. App. 3d Cir. 1985), writ denied, 484 So. 2d 135 (1986); *Succession of Simms*, 175 So. 2d 113 (La. App. 4th Cir. 1965), *aff’d* 250 La. 177, 195 So. 2d 114 (1966), cert. denied sub. nom. *Kitchen v. Reese*, 389 U.S. 850, 88 S. Ct. 47 (1967); *Succession of Fisher*, 235 La. 263, 103 So. 2d 276 (1958); *Succession of Robert*, 2 Rob. 427 (La. 1842); *Penny v. Christmas*, 7 Rob. 481 (La. 1844).

198. See, e.g., La. Civ. Code arts. 1713-1723 which purport to implement the general principle of La. Civ. Code art. 1712 quoted in the text *supra*. A comparison with the corresponding rules of most common law jurisdictions would reveal numerous differences which may be attributed to the fact that the common law rules are designed to “facilitate the task of juries.” E. Rabel, *supra* note 21, at 336.

199. E. Scoles & P. Hay, *supra* note 26, at 781.

rules of construction and rules of law is "equally indistinct."<sup>200</sup> If choice-of-law rules are needed for construction, no particular harm can occur by extending them to matters of interpretation. The real question is not whether such rules are needed, but what they should provide.

A good starting point would be to allow the testator to designate expressly the law that should be used in interpreting his testament. This would indeed be the most direct way of honoring the intent of the testator, consistently with Civil Code article 1712. When the testator fails to designate expressly the applicable law, it is equally consistent with the cardinal principle of honoring the intent of the testator to instruct the court to try to ascertain the legal system with reference to which the testator was thinking at the time of the making of the testament. Article 4, a tentative article currently before the Council of the Louisiana State Law Institute, authorizes the application of "the law expressly designated by the testator for that purpose, or clearly contemplated by him at the time of the making of the testament."

The notion of giving the testator a say in which law to apply for determining his intent is by no means novel, at least in this country.<sup>201</sup> It has been espoused by the Second Conflicts Restatement<sup>202</sup> and adopted by most modern statutes,<sup>203</sup> including the Uniform Probate Code.<sup>204</sup> Indeed, section 2-602 of the latter code goes much further in that it allows the testator to determine, through a choice-of-law clause, not only the meaning but also the "effect" of his disposition. Because of this, the Uniform Probate Code subjects the choice-of-law clause to a public policy exception. Such an exception will not be necessary under article 4, because, under this article, the law chosen by the testator will determine only the *meaning* of the disposition, *not* its effect. The effect of the disposition will be governed by articles 5, 6, and 7 of the Draft, as the case may be.<sup>205</sup> For instance, the court will look to the law designated by the testator for determining whether the disposition contained in his testament was intended by him to be a successive usufruct or rather a kind of substitution. Once this is determined, then the substantive validity and the effectiveness

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200. *Id.*

201. For other countries, see Boulanger's excellent study in F. Boulanger, *supra* note 21, at 208-16.

202. See Restatement 2d, *supra* note 26, § 240 for immovables, § 264 for movables.

203. See, e.g., N.Y. Est. Powers & Trusts Law § 3-5.1(e), (h) (McKinney Supp. 1987); Cal. Prob. Code Ann. §§ 6140, 6141 (West Supp. 1987); Mass. Gen. Laws Ann. ch. 191, § 1A (West 1981); Ill. Rev. Stat. ch. 10½, § 7-6 (1978); and Mich. Comp. Laws Ann. § 700.133 (1980).

204. See Unif. Probate Code § 2-602, 8 U.L.A. 129 (West 1983).

205. See text accompanying *infra* notes 239, 260, 262. Article 4 of the Draft also differs from § 2-602 of the Uniform Probate Code by providing for a residual law, applicable in the absence of an express or implied selection by the testator.



of the disposition will be judged by the law applicable to the merits, pursuant to articles 5, 6, and 7. If these articles call for the application of Louisiana law, and if the disposition is found to contain a prohibited substitution, then it will not be given effect.<sup>206</sup>

Because many testators may fail to exercise this newly recognized freedom of selecting the law applicable to interpretation, and because it may often be difficult to ascertain the law "clearly contemplated" by the testator, it will be necessary to designate legislatively the residual law for interpreting the testament. The law of the forum, i.e., Louisiana Civil Code articles 1712-1723, or the law of the domicile of the testator at the time of the making of the testament are the two candidates for this role.<sup>207</sup> The choice between the two belongs to the Council of the Institute. No decision has as yet been made.

## VII. SUCCESSION TO MOVABLES

### A. *Current Law*

#### 1. *Testate Successions*

Whatever their other differences, most systems on both sides of the Atlantic agree on at least one point—that succession to movables should

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206. See, e.g., *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957); *Perin v. McMicken's Heirs*, 15 La. Ann. 154 (1860). For a recent domestic case involving the same issue, see *Succession of Goode*, 425 So. 2d 673 (La. 1982).

207. See E. Scoles & P. Hay, *supra* note 26, at 781.

The legal frame of reference within which the testator planned his disposition is a significant fact whether it be that of the forum or a nonforum state . . . . [T]he law of the domicile of the testator at the time of execution is relevant as that most likely to have been the frame of reference for terminology and for planning the disposition of the estate.

*Id.* The Restatement 2d favors the application of the law of the testator's domicile at the time of the making of the testament. See Restatement 2d, *supra* note 26, § 240 comment f for immovables, § 264 comment f for movables. Professor Weintraub disagrees with the application of the law of the testator's domicile "qua testator's domicile." See R. Weintraub, *supra* note 70, at 447. Professor Hancock agrees, but offers a different reason: not because that law reflects the testator's probable intention, but rather because he is a member of that political community and it is appropriate to fill the gaps in his will "according to the notions of propriety prevailing in that community." Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 *Stan. L. Rev.* 1, 24 (1967), reprinted in M. Hancock, *supra* note 94, at 351, 374.

be governed by the personal law of the deceased at the time of death.<sup>208</sup> This is an old rule which, nevertheless, has withstood the test of time. From a practical viewpoint, this rule makes possible the uniform treatment of the estate as a single unit, thus facilitating orderly planning and enhancing predictability. From a functional viewpoint, this rule honors the justified expectations of the testator and, at the same time, strikes the best possible balance between the potentially competing claims of various states in regulating his succession.

Once again, Louisiana stands alone<sup>209</sup> in its unique ways, and for no good reason. Indeed, both the common law and the civil law lawyer will be surprised to hear that, if literally applied, article 10 of the Louisiana Civil Code would subject the foreign movables of a Louisiana testator to the law of the foreign situs, and the Louisiana movables of a foreign testator to the law of the place of the making of the testament. This seeming deference to foreign law is not the product of any rational altruism, or of a strong sense of comity or interstate cooperation, but rather is the result of a great deal of misunderstanding mixed with some good intentions. The results produced by a literal application of article

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208. For the United States, see Restatement 2d, *supra* note 26, §§ 260, 261, 263-265; Leflar, *supra* note 26, at 401, 543-47; E. Scoles & P. Hay, *supra* note 26, at 770-74, 783-86. For Europe and the rest of the world, see F. Boulanger, *supra* note 21, at 371-85 *passim*; E. Rabel, *supra* note 21, at 245-61. For critical appraisals of the domiciliary rule, see Plimpton, *Conflict of Laws and the Disposition of Decedents' Movables*, 24 *Me. L. Rev.* 43, 45-48, 71 (1972); Yiannopoulos, *supra* note 104.

209. In the United States, only New York and Mississippi deviate in any significant way from the domiciliary rule for movables. N. Y. Est., Powers & Trusts Law §3-5.1(h) (McKinney Supp. 1987) authorizes a testator domiciled outside New York to "elect" to have his property (including movables) situated in New York governed by the law of that state with regard to practically *all* issues pertaining to his testament, including capacity, effect, interpretation, and revocation. In the words of Professor Weintraub, "[s]uch a provision may attract business to New York, but it is also likely, officiously and selfishly, to override the strongly-held policies of sister states." R. Weintraub, *supra* note 70, at 465. For a detailed analysis of the history, meaning, and effect of this prime example of New York-style capitalism, as well as the case law before and after it, see Donovan & Farr, *Conflicts "Through the Looking Glass" or the Present State of the Choice of Law Rules in New York Involving Rights of Election*, 26 *N.Y.L. Sch. L. Rev.* 1007 (1981); Hendrickson, *Choice-of-Law Directions for Disposing of Assets Situated Elsewhere than the Domicile of Their Owner—The Refractions of Renard*, 18 *Real Prop. Prob. & Trust J.* 407 (1983); Note, *Avoiding Civil Law Forced Heirship by Stipulating that New York Law Governs*, 20 *Va. J. Int'l L.* 887 (1980).

Miss. Code Ann. § 91-1-1 (1982) provides that all movables situated in Mississippi are governed by Mississippi law, "notwithstanding the domicile of the deceased may have been in another state, and whether the heirs or persons entitled to distribution be in this state or not." According to E. Rabel, *supra* note 21, at 254, a similar position for domestic movables is taken by Mexico, Panama, Peru, Uruguay, and Venezuela. See also F. Boulanger, *supra* note 21, at 385. If this position is chauvinistic, it is at least consistent and practical. Louisiana's position in subjecting foreign movables to foreign situs law and Louisiana movables again to some foreign law is both impractical and foolishly altruistic.

10 are illustrated in some detail in a Table reproduced later. However, because these results are not only at odds with the practice of all other states, but also unbelievable in themselves, some lengthy technical explanations might be necessary.

The reader might recall that article 10, which is reproduced earlier,<sup>210</sup> begins with a rule in the first paragraph, then makes an exception to it in the second paragraph, and then an exception to the exception in the third paragraph. The first paragraph provides that the "effect" of a testament is governed by the law of the place of its making. The second paragraph provides that the "effect" of a testament which is made in one place but which is "to have effect in another" place is governed by the law of the latter place. While neither paragraph defines the place of the effect of a testament, the reading together of the two paragraphs indicates that the making of the testament and its effect may or may not coincide in the same state. This leaves the domicile of the testator and the situs of the property as the two possible places where a testament may be deemed to have its effect. The choice between the two would have been very easy, *had* article 10 ended there: the most logical conclusion would be that when a person domiciled in one state disposes by testament of movables situated in another state, his testament is deemed to have its effect in the state of his domicile and thus is governed by its law, rather than that of the situs. Such a conclusion would not only have been consistent with the explanations of the redactors<sup>211</sup> and the principle

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210. See text accompanying *supra* note 35.

211. In the 1823 *Projet* of the Civil Code of 1825, the three redactors provided the following explanation of why they were recommending the addition of what is today the second paragraph of article 10.

The introduction of this exception to the provisions of article 10 [i.e., to what is today the first paragraph of article 10], is of great importance. We have seriously reflected on its consequences, and it is only after a laborious examination of the opinions of legists on this question, that we propose this amendment. Thus, a marriage made in a foreign country between two inhabitants of this state who have not lost their domicile here, and who afterwards return here to reside, ought to be governed by our laws and not by those of the country where the marriage was celebrated. And a contract for personal service made in England or in France, to be executed here, ought to be governed by the laws of Louisiana, and so with a thousand other engagements which may be made in one country to be performed in another.

<sup>1</sup> Louisiana Legal Archives 2 (1937).

Although this explanation contains no reference to testaments, there is also nothing in it to suggest that either the redactors or the "legists" whom they had "laboriously" consulted were in any way subscribing to the view that a testament or other juridical act disposing of movables should be governed by the law of the situs. Instead, what the redactors were saying was that, rather than being governed by the law of the place of the making, certain "engagements" should be governed by the law of the place where they were intended to produce their legal and other consequences. In ordinary *inter vivos* transactions such as

of "*mobilia personam sequuntur*,"<sup>212</sup> but would also conform to the practice of sister states.<sup>213</sup>

Unfortunately, however, the addition in 1825 of the third paragraph,<sup>214</sup> and its phrasing as an exception to the second paragraph, suggest strongly that the legislators must have reached a different conclusion. They must have read the second paragraph as meaning that a testament has its effect at the situs of the property rather than at the domicile of the testator. The third paragraph provides that when a person who is domiciled outside Louisiana both at the time of the making of the testament and at the time of death makes a will outside this state and disposes of movables situated in this state, "[t]he exception made in the second paragraph . . . does not hold. . . ." Translated into simple English, this negative command means essentially that Louisiana law should not apply to cases which are completely alien to Louisiana, except for the fact that the property is situated in this state.<sup>215</sup> However, the only way these cases would be governed by Louisiana law in the first place would be if one were to read the second paragraph as requiring the application of the law of the situs. This is apparently how the legislators read the second paragraph, and it was in order to avoid this result that they added the third paragraph. Had they read the second paragraph as authorizing the application of the law of the testator's domicile, the third paragraph

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contracts, this could be the place of the performance, or the place intended by the parties, or their common domicile, or, to use a civilian "savignian" expression, the place where their relationship had its "seat." Indeed, this is more or less the route followed by Louisiana courts in contracts cases. Having started from the place of performance and following the shifting choice-of-law ideologies in the rest of the country, Louisiana courts have ended up applying the law of the place having the "most significant relationship" with the contract and the parties. See Comment, , *infra*, this issue (Karam); Comment, *supra* note 7; Comment, Conflict of Laws: Contracts and Other Obligations, 35 La. L. Rev. 112 (1974); Note, Conflict of Laws: Security Interests in Movables, 35 La. L. Rev. 913 (1975). Unfortunately, Louisiana courts have not taken a similarly functional view of paragraph 2 of article 10 in successions cases. One reason could be that the addition of paragraph 3, which is specifically applicable to successions, seemed to presuppose and to dictate a territorialist reading of paragraph 2 for such cases. See text at *infra* notes 215-17.

212. ("*Movables follow the person*"). The statement that movables have no situs ("*mobilia non habet situm*") other than at the domicile of the owner is encountered in several Louisiana cases, mostly by way of dicta. See, e.g., Succession of King, 170 So. 2d 129 (La. App. 4th Cir. 1964), writ denied, 247 La. 409, 179 So. 2d 666 (1965); Succession of Thomas, 35 La. Ann. 19 (1883); Perin v. McMicken's Heirs, 15 La. Ann. 154 (1860); Succession of Packwood, 9 Rob. 438 (La. 1845); Succession of Robert, 2 Rob. 427 (La. 1842).

213. See *supra* note 208 and accompanying text.

214. Paragraph 3 of article 10 was added during the legislative debate of the 1823 Projet, without the recommendation of the redactors. See 1 Louisiana Legal Archives 2 (1937). Since the debate of the 1825 Code was not recorded, there is no way of knowing the actual reasons for this addition.

215. See *infra* cases ## 16, 17 in Table in text accompanying note 218.

would either be unnecessary or it would not have been phrased as an exception to the second paragraph. This is why, despite numerous dicta to the contrary,<sup>216</sup> the proposition that a testament has its effect at the situs rather than at the domicile is followed by the few Louisiana cases that specifically addressed this issue.<sup>217</sup> In terms of literal interpretation, this is the correct understanding of article 10.

Such a literal interpretation may of course be discarded as simply too absurd today. But unless one is prepared to take such liberties with the letter of article 10, Louisiana's position on this matter would not only differ from that of most sister states and all civil law jurisdictions including France, but would be even more unique than the notoriously egocentric position of Mississippi and New York. To be sure, being alone is not necessarily bad, if such loneliness is the product of deliberate choice and the result of reasoned dissatisfaction with what the other systems have to offer. More than anything, however, Louisiana's uniqueness on this point seems to be more the result of an unfortunate historical accident than deliberate choice.

The apparent absurdity of such a literal, but largely unavoidable, application of article 10 is graphically illustrated in the Table reproduced below. The first four columns of the Table represent the four factual contacts considered pertinent by article 10, to wit: (1) the place of making

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216. See, e.g., Succession of M'Candless, 3 La. Ann. 579 (1848); Succession of Goss, 304 So. 2d 704 (La. App. 3d Cir.), writ denied, 309 So. 2d 339 (La. 1974), cert. denied sub nom. Goss v. Zuckswert, 423 U.S. 869, 96 S. Ct. 133 (1975); Weber v. Ory, 14 La. Ann. 537 (1859); Succession of Robert, 2 Rob. 427 (La. 1842); Succession of Thomas, 35 La. Ann. 19 (1883); In Re Estate of Lewis, 32 La. Ann. 385 (1880); Marcenaro v. Bertoli, 2 La. Ann. 980 (1847); Peale v. White, 7 La. Ann. 449 (1852); Perin v. McMicken's Heirs, 15 La. Ann. 154 (1860).

217. See, e.g., Succession of Gaines, 45 La. Ann. 1237, 14 So. 233 (1893). "The domicil of a testator, as to the form and effect of a will is ignored by our law. It is the place where it is made [as to form] and the property disposed of where situated [as to effect] that is recognized." *Id.* at 1245, 14 So. at 236. In commenting on paragraph 3 of Louisiana Civil Code article 10, the court in Succession of Senac, 2 Rob. 258 (La. 1842), said:

The meaning of this clause, although obscurely expressed, we take it to be, that although in general the effects of acts passed in one country to have their effect in another, is regulated by the laws of the latter country, yet in relation to testaments . . . , this does not hold where the testator . . . resided abroad both when the act was executed and when he died. In other words, that a will . . . , in order to have its effect here as a French will, must have been made in France, and the donor must have died there. If made here, and the testator died there, it will be governed by the local law, the *lex rei sitae*.

*Id.* at 263. See also Succession of King, 170 So. 2d 129 (La. App. 4th Cir. (1964), writ denied 247 La. 409, 179 So. 2d 666 (1965); In Re Estate of Lewis, 32 La. Ann. 385 (1880); Succession of Packwood, 9 Rob. 438 (La. 1845); Penny v. Christmas, 7 Rob. 481 (La. 1844); Cf. Dawson v. Capital Bank & Trust Co., 261 So. 2d 727 (La. App. 1st Cir. 1972).

of the testament; (2) the testator's domicile at the time of the making of the testament; (3) the testator's domicile at the time of death; and (4) the situs of the movables. The fifth column indicates the applicable paragraph of article 10, and the sixth column identifies the substantive law which is applicable under these paragraphs.

#	M	DM	DD	S	¶	APPL.L
1.	LA	LA	Tx	LA	1	LA
2.	LA	Tx	LA	LA	1	LA
3.	LA	Tx	Tx	LA	1	LA
4.	Tx	LA	LA	Tx	1	Tx
5.	LA	LA	LA	Tx	2	Tx
6.	LA	LA	Tx	Tx	2	Tx
7.	LA	Tx	LA	Tx	2	Tx
8.	LA	Tx	Tx	Tx	2	Tx
9.	Tx	LA	LA	LA	2	LA
10.	Tx	LA	Tx	LA	2	LA
11.	Tx	Tx	LA	LA	2	LA
12.	ARK	LA	LA	Tx	2	Tx
13.	ARK	LA	ARK	Tx	2	Tx
14.	ARK	ARK	LA	Tx	2	Tx
15.	Tx	ARK	ARK	Tx	2	Tx
16.	Tx	Tx	Tx	LA	3	Tx
17.	Tx	ARK	ARK	LA	3	Tx

Based on what is believed to be the assumption of the redactors, namely that a testament has its effect at the situs rather than at the domicile, cases ## 1-4 fall under the first paragraph of article 10, because the situs of the property and the place of the making of the testament coincide in the same state.<sup>218</sup> Cases ## 5-15 fall under the second paragraph because they involve situations where the testament was made in a different state than the one in which the movables are located.<sup>219</sup> Cases 16 and

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218. It may be noticed that paragraph one of article 10 establishes what is known in conflict doctrine as a "bilateral" choice-of-law rule. Bilateral rules are phrased in forum-neutral terms, which delineate the range of application of not only the law of the forum, but also of foreign law. Thus, under this paragraph, it makes no difference whether the place of the making of the testament and the situs of the property coincide in Louisiana (cases ## 1-3) or outside Louisiana (case # 4). For the notion of bilateral conflicts rules, see S. Symeonides, *supra* note 3, at 261-62, 270-72.

219. Paragraph two is also a bilateral rule, see *supra* note 218, and thus may lead to the application of either forum law (see cases ## 9-11) or foreign law (see cases ## 5-8, 12-15).

17 fall under the third paragraph<sup>220</sup> because they both involve testaments made outside Louisiana by a person domiciled outside this state both at the time of testament and at the time of death and disposing of movables located in this state.<sup>221</sup> This Table illustrates clearly that article 10 produces good results only randomly, and only in cases where the the state whose law is designated as applicable by the article also happens to coincide with the testator's domicile.

Thus, paragraph one produces a good result in case # 2 and an acceptable result in case # 1,<sup>222</sup> but totally unacceptable results in cases ## 3 and 4. Indeed, in case # 4, there is no justification for applying Texas law to the Texas movables of a Louisiana domiciliary simply because, for instance, many years earlier, he happened to be in Galveston, Texas during a hurricane and was so terrified as to make his last will there. Interestingly enough, neither Texas nor any other state of the Union would apply Texas law in such a case.<sup>223</sup> Nor is there much justification for applying Louisiana law in the converse case, case # 3, when all other states of the Union would apply Texas law.<sup>224</sup>

Paragraph two of article 10 produces good results in cases ## 6, 8, 9, and 11, acceptable results in cases ## 7 and 10,<sup>225</sup> and intolerable

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220. Unlike the two preceding paragraphs of article 10, paragraph three is a peculiar type of a "unilateral" choice-of-law rule. A unilateral rule is one that defines the circumstances under which forum law should apply, but which is silent on the conditions under which a foreign law would apply. For a detailed discussion with examples and authorities, see S. Symeonides, *supra* note 3, at 267-75. Paragraph 3 of article 10 is a peculiar unilateral rule in the sense that it determines when forum law should *not* apply.

221. As cases ## 16 and 17 illustrate, it is not necessary under paragraph three that the place of the making of the testament and the domicile of the testator coincide in the same state, as long as they are both outside Louisiana.

222. The reason the result in case # 1 is acceptable, though at variance with what Texas would do, is because, coupled with the other two connections, the testator's domicile in Louisiana at the time of the making is not a negligible factor in terms of his expectations.

223. See *supra* notes 208-09. All other states would apply Louisiana law as the law of the last domicile. This is true even for New York and Mississippi. For, although these two states have established an exception to the domiciliary rule with regard to movables situated therein, see *supra* note 209, they continue to adhere to the domiciliary rule with regard to movables situated in other states.

224. Case # 3 is identical with *Succession of Senac*, 2 Rob. 258 (La. 1842), except for the fact that, at the time of the making of the testament, though not at the time of death, the testator was supposedly a Louisiana domiciliary. As indicated by the excerpt from the court's opinion quoted in note 217 *supra*, the reason the court applied Louisiana law in *Senac* was not the testator's domicile in Louisiana at the time of the testament, but rather the location of his movables in this state at the time of death. The court's express statement that Louisiana law was applied as the *lex rei sitae*, leaves no doubt about this, while it also confirms the notion that, according to article 10, a testament has its effect at the situs of the movables rather than at the domicile of the testator.

225. See *supra* note 222.

results in cases ## 5 and 12-15. Case # 5 is particularly extreme, because although it is the complete reverse of the situation contemplated by paragraph three of article 10 (see case # 16), this case is handled entirely differently. Aside from the foreign situs of the property, case # 5 is a fully domestic Louisiana case. Yet, because it does not fit the requirements of paragraph three,<sup>226</sup> this case is subjected to the foreign situs law under paragraph two. Now, if the Louisiana legislature was so deferential to the interests of Texas in the reverse situation (case # 16), should not one be justified in expecting Texas to be equally deferential to Louisiana interests when the shoe is on the other foot? Ironically, as said earlier, Texas would indeed defer to Louisiana interests in such a case and would apply Louisiana law. Yet, fidelity to the language of article 10 would compel a Louisiana court to apply Texas law, and thus subordinate Louisiana's interests in regulating the succession of its domiciliaries without promoting any interests of the state of Texas.<sup>227</sup> The same absurdity is repeated in cases ## 12-15, especially case # 15, which is identical to case # 16, except for the situs of the property. However, because in case # 15 the property is *not* "situated in this state,"<sup>228</sup> i.e., Louisiana, the third paragraph is technically inapplicable, unless the court is prepared to "bilateralize" it.<sup>229</sup> Without such judicial liberality, case # 15 would fall under the second paragraph of article 10 and would be governed by Texas law, even though both Texas and Arkansas would apply Arkansas law. The only consolation against such an absurdity in this case is that it is unlikely that a Louisiana court would have jurisdiction.

As for the third paragraph of article 10, the only good thing about it is the intentions of those who drafted it. This paragraph was added to the article in 1825 apparently in an effort to ameliorate some of the bad consequences of paragraph two. Case # 16 is probably the kind of situation that was contemplated in drafting this paragraph, and illustrates that this addition was necessary: without paragraph three, this case would have been governed by paragraph two, which would lead to the application

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226. I.e., it does not involve a will "made out of this state," etc.

227. One way of avoiding this absurdity is to "bilateralize" paragraph three. Bilateralization is a well known process in Europe, by which a unilateral choice-of-law rule providing the circumstances in which foreign law should apply. See S. Symeonides, *supra* note 3, at 261-62, 270-72. Because paragraph three is a different type of unilateral rule, i.e., defining only when foreign law should apply, bilateralization would lead to application of forum law in case # 5. This reasoning would have to disregard the restrictive language of paragraph three and focus on what could well be the underlying spirit, namely that when one state's only connection with the case is the location of the decedent's movables in its territory, while another state has all the other pertinent connections, the law of the latter state should apply, whether it be Louisiana (case # 5) or another state (cases ## 16 and 15).

228. La. Civ. Code art. 10 para. 3.

229. See *supra* note 227.



of Louisiana law as the *lex rei sitae*.<sup>230</sup> Apparently realizing that such a result would not only be in conflict with the law of any other state in the Union but also unconscionable in itself, the drafters sought to avoid it by inserting the third paragraph.<sup>231</sup> Unfortunately, however, the words used to express this otherwise laudable objective were poorly chosen and created more problems than they resolved.

The first problem results from the fact that paragraph three was not phrased as a self-contained rule, but rather as an exception designed simply to prevent the application of paragraph two in certain narrowly defined situations. However, by being phrased as an exception to paragraph two, paragraph three leads back to paragraph one of article 10, which calls for the application of the law of the place of the making of the testament. That such a result is the ultimate absurdity is illustrated by case # 17, where Texas's only connection with the case is not only tenuous but, more than likely, fortuitous as well. Thus, the good motives behind paragraph three of article 10 were betrayed by the language used to implement them. The motives were to disclaim Louisiana legislative jurisdiction in cases which are essentially alien to Louisiana, except for the situs of the property. However, in implementing this sensible notion, the drafters assigned these cases to the domain of the wrong foreign law, i.e., the law of the place of the making of the testament rather than the law of the domicile of the testator.

The second problem has already been alluded to earlier and results from the unilateral phrasing of paragraph three. This paragraph grew out of a realization that when a state's only connection with the case is the fact that the property is located there, its law should not be applied. In other words, situs law should not apply *qua* situs. Nonetheless, for some curious reason, this otherwise sensible notion was phrased in such an awkward way as to confine its application to only those cases where the situs is in Louisiana. A comparison between cases ## 16 and 5, and between cases ## 17 and 15 illustrates this point.

In summary, therefore, article 10 begins with the wrong rule in paragraph one (place of making of testament), then makes exceptions to it in the second paragraph in favor of the wrong law (situs), and then returns to the wrong rule through paragraph three. It is not only wrong

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230. See Succession of Senac, 2 Rob. 258 (La. 1842).

231. Given Texas's multiple and significant connections with the testator, the application of Texas law in this case is the only sensible *result*. However, to use a phrase which is painfully familiar to some law students, "the result is correct, but for the wrong reason." As explained in the text, *infra*, the *reason* for which Texas law is declared applicable by article 10 is not because of Texas's three connections with this case, but rather because of one connection only—place of the making of the testament—which also happens to be the least significant.

but unheard of to apply the law of the place of the making for matters other than the form of a testament. It is also equally wrong, though not unheard of, to apply the law of the forum qua situs.<sup>232</sup> It is both wrong and unheard of to apply a foreign law qua situs, especially when that foreign law disclaims its own application. From a functional viewpoint—and despite the so called power-of-the-situs rationale—the situs of movables qua situs has the weakest claim to regulate the succession. From a practical viewpoint, this rule is problematic because of the difficulty in determining the situs of incorporeal movables, and because of the inherent mobility of corporeal movables. Finally, even from a narrow chauvinistic perspective this rule is self-defeating. As illustrated by case # 5, this rule would enable a Louisiana testator to evade Louisiana succession law by simply removing his movables out of state.

## 2. Intestate Successions

Article 10 was conspicuously silent on the law applicable to intestate successions until the year 1979, when it acquired what is now its fifth paragraph. This provision was not new but was simply transferred to article 10 from former Civil Code article 491 during the revision of the law of property. Paragraph five provides that “[p]ersons who reside out of the state, cannot dispose of the property they possess here, in a manner different from that prescribed by the laws of this state.”<sup>233</sup> The unqualified use of the word “property” makes this paragraph applicable not only to immovables but also to movables.<sup>234</sup> But whether this paragraph is at all applicable to intestate succession is very debatable. If it were applicable, it would dictate the application of Louisiana law to the succession of all Louisiana movables owned by Louisianians and non-Louisianians alike,<sup>235</sup>

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232. In this respect, Louisiana has the company of only Mississippi and New York. See supra note 209. However, New York's application of its own law qua situs is not automatic. It occurs only in testate successions and only when the testator so “elects.”

233. La. Civ. Code art. 10, para. 5.

234. See, e.g., *Dawson v. Capital Bank & Trust Co.*, 261 So. 2d 727 (La. App. 1st Cir. 1972)(relying on paragraph 5 of article 10, as well as article 9 of the Civil Code, and applying Louisiana property law for determining the ownership of a joint account of two Mississippians in a Louisiana bank). But see *Succession of Villere*, 411 So. 2d 484 (La. App. 4th Cir. 1982) (ignoring both provisions and saying that *Dawson* “was clearly inconsistent with accepted principles of conflicts law.” *Id.* at 487.) *Villere* involved exactly the reverse fact-pattern of *Dawson*. The court applied Louisiana law as law of the domicile. Despite appearances, neither of these two cases involved an issue of succession as such, but rather the different question of whether the funds actually belonged to the decedent in whole or in part.

235. This would confirm the 1825 legislature's bias in favor of the situs and against domicile. According to Professor Pascal “[T]he general conflict of laws rule that succession to movables is governed by the law of the decedent's domicile [is] the usual *practice* in Louisiana.” Pascal, supra note 33, at 277. He concedes that this practice is inconsistent with

while being silent on what law to apply to the succession of foreign movables owned by Louisianians. However, with regard to the Louisiana movables of non-Louisianians, such a reading would directly contradict the third paragraph of article 10, which, as explained earlier, *prohibits* the application of Louisiana law in all those cases of *testate* succession in which the non-Louisianian testator made his testament in a foreign state.<sup>236</sup>

It is much more likely that paragraph five of article 10 was simply never intended to apply to successions, and, in any event, not to intestate successions. A quick look at the history of this provision tends to confirm this reading. The original location of this provision in the part of the Civil Code dealing with ownership and its permissible dismemberments, and the explanations of the redactors as to why this provision was added in 1825<sup>237</sup> suggest strongly that they were concerned, not with successions as such, but rather with the permissible dismemberments of ownership. The redactors wanted to ensure that "persons who reside out of the state" would not be able to establish on their Louisiana property real rights or other burdens, such as prohibited substitutions or other restraints of alienation, which are incompatible with the law of this state. This self-evident proposition is, of course, applicable to dispositions attempted by "persons," whether by *inter vivos* or *mortis causa* acts, but not to rights created by operation of law, such as by the rules of intestate succession. This reading of paragraph five would of course mean that Louisiana did not have a statutory choice-of-law rule for intestate successions.<sup>238</sup> Perhaps it would come as no surprise that this has been all along the unconscious assumption of the jurisprudence.<sup>239</sup>

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para. 5 of article 10 and article 9 of the Civil Code, which "could be construed to require that Louisiana succession laws be applied to determine the inheritance of movables situated in Louisiana even if the deceased owner was domiciled elsewhere at the time of his death." He then questions strongly the "reasonableness" of such a construction because it leads to "results contrary to the expectations of the parties." *Id.* at 277-78.

236. See text accompanying *supra* notes 214-15, 228-31. The two paragraphs could of course be reconciled, with paragraph 5 functioning as the rule and paragraph 3 as the exception. But if so, the exception would be almost co-extensive with the rule.

237. Before its transfer to article 10, this provision was paragraph 2 of article 491 which was located in Book II of the Civil Code of 1870, entitled "Of Things and of the Different Modifications of Ownership." The first paragraph of art. 491 provided that "[p]erfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances." Paragraph two of art. 491 (i.e. present para. 5 of art. 10) was added in 1825 out of undue caution with the following explanation by the redactors. "Were it otherwise, it would only be necessary to reside out the State, in order to elude the most salutary dispositions of its laws." 1 Louisiana Legal Archives, 43 (1937).

238. But see La. Civ. Code art. 9, discussed *supra* notes 6 and 33.

239. *Perin v. McMicken's Heirs*, 15 La. Ann. 154 (1860) is one of the few cases that

### B. *The Draft*

Given the above described state of affairs, *any* change in the present law could only be an improvement. It is hoped that the Draft made the best possible improvement by providing in article 5 that:

Except as otherwise provided in the preceding articles, testate and intestate succession to movables is governed by the law of the domicile of the deceased at the time of death.

This article establishes the general<sup>240</sup> choice-of-law rule for testate and intestate succession to movables, wherever situated.<sup>241</sup> Not only will this article eliminate the confusion that has plagued the present statutory law and jurisprudence, but it will also realign Louisiana with the rest of the nation and the civilian world. Since the merits of the domiciliary rule have long been recognized and praised on both sides of the Atlantic, there is no need to expound them here. Suffice it say that this rule simply recognizes the obvious, i.e., that of all the states potentially involved in a multistate succession, the domicile at death has a more legitimate claim in applying its law to issues of succession to movables than either the state where the property happened to be at the time or, even less, the state where the testament happened to be made. The domiciliary rule also promotes two important succession-law policies: ensuring a uniform treatment of the estate as a single unit in cases involving movables in more

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has addressed the applicability to movables of what is today paragraph 5 of article 10. Referring to what was then article 483 of the 1825 Civil Code, the court said that “[a]s personal property has no *situs*, this article has not been considered to apply to property of that kind, which, at the death of the testator, resident abroad, happens to be within our territorial limits.” *Id.* at 155. Most other cases simply ignored article 10 and applied the law of the domicile, both for Louisiana and foreign decedents. See, e.g., *Succession of Harris*, 179 La. 954, 155 So. 446 (1934); *Succession of Thomas*, 35 La. Ann. 19 (1883); *In Re Estate of Lewis*, 32 La. Ann. 385 (1880). Cf. *Connor’s Widow v. Administrators and Heirs of Conner*, 10 La. Ann. 440, 450 (1855). See also *Succession of Petit*, 49 La. Ann. 625, 21 So. 717 (1897) (willing in principle to apply French domicile law but refusing to do so on grounds of strong public policy of Louisiana where the property was located).

240. Article 5 begins with the phrase, “Except as otherwise provided in the preceding articles.” This phrase indicates the residual character of this article. The preceding articles that provide otherwise are articles 1, 2, and 4, applicable respectively to questions of form, capacity, and interpretation. They authorize the application of other laws, in addition to the law of the domicile, in order to validate the testament. Whenever a given question does not fall precisely into any of these articles, one should fall back to this residual article.

241. Thus, article 5 establishes a bilateral choice-of-law rule. See *supra* note 218. This article is not intended to affect the application of Louisiana inheritance tax law. La. R.S. 47:2404 imposes state inheritance tax on “all tangible movable property physically in the State of Louisiana . . . whether inherited, bequeathed, given or donated *under the laws of this state or of any other state or country.*” *Id.* (emphasis added). See *Fredrickson v. Louisiana*, 64 U.S. (23 How.) 445 (1859).

than one state; and promoting the justified expectations of the testator who, in making or not making a disposition, is likely to have relied more on the law of his domicile than on any other law.

This is not to say that the domiciliary rule is beyond criticism. Quite the contrary, it has numerous and vocal critics. They can be divided into those who reject the very concept of a "rule" and those who reject the "domiciliary" aspect of it. The first group may be further subdivided into those who reject any type of choice-of-law rules favoring instead ad hoc approaches,<sup>242</sup> and those who would prefer a presumption of validation rather than a result-neutral rule.<sup>243</sup> The second group of critics consists of those who are uncomfortable with the concept of domicile as a connecting factor in any choice-of-law rule.<sup>244</sup>

The first group of critics must be ignored by anybody whose job it is to draft choice-of-law rules. As said elsewhere, "[t]he very decision to embark on a conflicts codification presupposes a rejection of Brainerd Currie's infamous aphorism that 'we would be better off without choice-of-law rules'."<sup>245</sup> It is important to note that Currie's aphorism was not heeded even in the common law world. Even at the peak of the conflicts revolution in the United States, the domiciliary rule was one of the few traditional rules that remained unscathed. In reaching this decision, the Louisiana Law Institute has carefully weighed the merits and the demerits of all possible alternatives: retaining the old rule of article 10 with all the surrounding confusion described earlier; simply repealing article 10 without replacing it, with all the adverse consequences on legal certainty; and replacing article 10 with a rule that would provide an optimum of certainty as well as uniformity with the sister states. The decision was as easy as it is correct. The domiciliary rule is capable of performing this task much better than any ad hoc approach.

Those who favor a presumption of validation in lieu of a result-neutral rule must find something satisfying in the Louisiana Draft. As already explained, the policy of validation was embodied in the two articles where it is mostly and truly needed, the article on form and the article on testamentary capacity. Beyond that, to elevate the policy of validation

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242. See, e.g., B. Currie, *Selected Essays on the Conflict of Laws*, (1963) ("I regard choice-of-law rules as an obstruction to clear analysis and hence to progress. . . .") *id.* at 616; ("We would be better off without choice-of-law rules.") *id.* at 183. For a critique of this view, see Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 *Ohio St. L. J.* 549, 550-52 (1985).

243. See, e.g., R. Weintraub, *supra* note 70, at 462-64, 32, 35-36; Yiannopoulos, *supra* note 104, at 206.

244. See, e.g., Plimpton, *supra* note 208, at 47-51.

245. S. Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 *Am. J. Comp. Law*, 259, 286 (1987).

to the plain of a general rule would have been simply "too much." In the first place, a rule of validation is meaningless in intestate successions. And with regard to testate successions, even these critics recognize that "[i]t is possible to carry this policy of validation too far."<sup>246</sup> If this is true in the ad hoc judicial resolution of conflicts, it is even more true of legislative rules.

Finally, the critics of domicile as a connecting factor have a good point which, however, they tend to overstate. They love to point to some old casebook favorites, such as *White v. Tennant*<sup>247</sup> and *In re Estate of Jones*,<sup>248</sup> as prime examples of the rigidity and, at the same time, elusiveness of the concept of domicile. *White* applied Pennsylvania law to the succession of a person who had ostensibly met the technical requirements of acquiring a domicile in that state after having abandoned his previous domicile in West Virginia and having lived in Pennsylvania for only a few hours before his death. This case is supposed to illustrate the rigidity of the domiciliary rule which compelled the court to apply the law of a state which, although technically the domicile of the deceased, had only a brief and tenuous connection with him and no connection with his heirs, all of whom were domiciled in West Virginia. Indeed, the application of Pennsylvania law in *White* could not be justified under any of the reasons for which the domiciliary rule was devised in the first place. But rather than proving the rigidity of the rule, this case simply proves the rigidity in the court's thinking. If anything can be done about this problem, it is something that should be done in the law school classroom, not in the legislative chambers.

*In re Estate of Jones* went the other way and applied the law of the abandoned domicile, Iowa, where the deceased had lived most of his adult life. He had left that state to return to his domicile of origin, Wales, and died a few days later on the ill-fated *Lusitania*, a British-flag vessel and thus fictionally a floating piece of British territory. Technically, he could be deemed to have regained his Welsh domicile, which was also the domicile of all his relatives and heirs, including an illegitimate child. This case is first criticized for doing what *White* did not do, i.e., applying the law of the abandoned domicile, which, although his domicile for most of his adult life, had ostensibly no interest in his succession since none of his heirs were domiciled there. *Jones* is then juxtaposed to *White* in order to demonstrate the inherent fluidity of the concept of domicile. Indeed, these cases involved essentially similar facts and yet reached different determinations of domicile. Thus, the critics charge,

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246. R. Weintraub, *supra* note 70, at 465.

247. 31 W. Va. 790, 8 S.E. 596 (1888).

248. 192 Iowa 78, 182 N.W. 227 (1921).

since there is no sure way of knowing where a court will fix the domicile of the deceased, the domiciliary rule fails to deliver on one of its main promises—predictability. If these two cases were in any way representative of good choice-of-law analysis or of contemporary American judicial practice, the critics might have had a good point. What tends to be forgotten is that these cases are: (a) not only quite old, but they are almost a half century apart from each other; and (b) they do not originate from the same jurisdiction and thus they did not benefit from a common pool of precedents.

Be that as it may, there is no use denying that, in the wrong hands, the domiciliary rule, like any other rule, may become unpredictable, even dangerous. But if this is true of a rule, it would be as true for the ad hoc approaches advocated by the critics. Indeed, there is no way of guaranteeing that all courts in the same jurisdiction will reach identical determinations of domicile under similar facts. But rather than being a defect, this is a virtue of the concept of domicile. Critics call it "elusiveness" or "slipperiness." Proponents call it flexibility. Domicile is a tool. Thank goodness, it is flexible enough. This flexibility may entail some costs in terms of predictability, but what may be lost in predictability will hopefully be gained in equity.

#### VIII. SUCCESSION TO IMMOVABLES: THE SITUS RULE AND ITS EXCEPTIONS

After all the above criticism of the situs rule and the praise of the domiciliary rule for movables, the reader would be justified in asking why the Draft has retained the situs rule for immovables. The easy answer is that the arguments in support of the situs rule are simply stronger with respect to immovables than with respect to movables. Still, much of what has been said earlier in support of the domiciliary rule for movables would seem to apply with equal force to immovables. A more complete answer therefore will have to be longer, although it may be synopsisized in one word—tradition.

Despite severe attacks by commentators in the last thirty years, it is fair to say that the situs rule remains firmly imbedded in American conflicts law. In summary,<sup>249</sup> the criticisms are to the effect that the situs rule is too broad, mechanical, arbitrary, and non-responsive to the true

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249. For the most representative samples of these criticisms, see, e.g., Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 *Stan. L. Rev.* 1095 (1965), reprinted in M. Hancock, *supra* note 94, at 293; Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 *Cornell L. Q.* 1 (1966). See also, R. Weintraub, *supra* note 70, at 412-60; Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1, 15-17 (1963).

policies implicated in most multistate successions disputes. Indeed, although the state of the situs has a legitimate interest in matters of land utilization (e.g., prohibited substitutions, perpetuities, etc.), that state has little interest in deciding matters of testamentary formalities, capacity, or, for that matter, wealth distribution among members of a family not domiciled therein. Also, while the situs has an interest in preserving the integrity of its recording system, that interest is fully satisfied by requiring recordation of the judgment at the situs, and does not require application of situs substantive law on the merits. In the context of American conflicts law, which assigns virtually *all* successions issues to the exclusive domain of the law of the situs, these criticisms are fully justified. Nevertheless, these valuable insights have yet to be translated into judicial,<sup>250</sup> and much less legislative, practice. Even after the so-called revolution which has swept away most other rules in American conflicts law, the situs rule continues to be taken for granted as if in the natural order of things.<sup>251</sup>

The same is true of Louisiana, although one would expect that the continental parentage of its conflicts law should have provided a more fertile ground for dissent against the situs rule.<sup>252</sup> The territorialist thinking which shaped and dominated American conflicts law since its very inception has had as much following in this state as it has in any sister state. For testate successions, the legislative authority for the situs rule is provided by paragraph 2 of article 10 of the Civil Code, which, for matters pertaining to the effect of a testament, authorizes the application of the law of the place where the testament is to have effect.<sup>253</sup> Unlike with movables, here there cannot be much doubt that the effect of the testament is at the situs. For intestate successions, a unilateral rule calling for the application of Louisiana law to immovables situated in Louisiana

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250. But see Weintraub's discussion of some recent cases in R. Weintraub, *supra* note 70, at 457-60, which concludes with the following optimistic note: "The cloak of the situs myth has too long robbed those Trojan trees of light and stunted their growth. Their day in the sun has come." *Id.* at 460 (footnotes omitted).

251. Even the otherwise progressive Restatement Second has retained the situs rule in a black-letter form. See Restatement 2d, *supra* note 26, §§ 236-39, 241-43. These sections are about the only black-letter rules retained by the Restatement Second.

252. See *supra* note 22 for the civil law countries that follow the principle of unitary succession. But see France which follows the situs rule for immovables, *supra* note 23.

253. La. Civ. Code art. 10 para. 2 is reproduced in *supra* text accompanying note 35. For representative jurisprudence applying the situs rule in testate succession to immovables, see, e.g., *Succession of Guillory*, 232 La. 213, 94 So. 2d 38 (1957); *Succession of Herber*, 128 La. 111, 54 So. 579 (1911); *Berthelot v. Fitch*, 44 La. Ann. 503, 10 So. 867 (1892); *Hughes v. Hughes*, 14 La. Ann. 85 (1859); *Alexander v. Alexander*, 357 So. 2d 1260 (La. App. 2d Cir. 1978); *Guidry v. Hardy*, 254 So. 2d 675 (La. App. 3d Cir. 1971) writ denied, 260 So. 454 (La. 1972); *Succession of Simms*, 175 So. 2d 113 (La. App. 4th Cir.), *aff'd* 250 La. 177, 195 So. 2d 114 (1965), cert. denied, sub. nom *Kitchen v. Reese*, 389 U.S. 850, 88 S. Ct. 47 (1967).



is contained in paragraph 5 of article 10, as well as in article 9.<sup>254</sup> This rule has been bilateralized by judicial practice, so that succession to immovables situated outside Louisiana is also governed by the law of the situs.<sup>255</sup> Thus, as in the rest of the country, the situs rule has been firmly imbedded in the conscience of the average Louisiana lawyer, and perhaps the average Louisiana layman as well.

Given this long tradition both within and around Louisiana, any thought of a wholesale abandonment of the situs rule at this point would have been unrealistic. One must remember that we do not live in an ideal world, and that in the art of rule-drafting, compromise is often more fruitful than intellectual purism. Especially as long as all surrounding states continue to adhere to the situs rule, the chances of abolishing it in this state will remain limited. If anything, in a mineral-rich state with a substantive law that is quite different from that of the neighboring states, there is a greater tendency to want local law applied in the local courts. This tendency may not always be rational, but, given the strong territorialist undercurrent that still seems to prevail in American society, it is natural and easily understood. It would have been futile to ignore it, and more productive to try to confine it. Until a more rational order prevails in American conflicts law, this is the best that can be hoped for.

By the same token, to sanction legislatively the dominant role enjoyed by the situs rule in the Anglo-American world would have been as backward-looking as it would be politically naive to discard the rule altogether. Thus, the real challenge was to find the golden mean between these two extremes. The Draft attempted to strike a balance between tradition and progress by retaining the situs rule in principle, while at the same time reducing its status from a primary, all-encompassing rule to a general, but residual rule, applicable only in the absence of a specific rule to the contrary. It would be fair to say that the Draft goes further than any other state in this country in carving exceptions out of the situs rule.

#### A. *The Draft's Forced Heirship Exceptions to the Situs Rule*

In addition to the exceptions pertaining to testamentary formalities, capacity, and interpretation, which have been described in connection with

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254. La. Civ. Code art. 10 para. 5 is reproduced in supra text accompanying note 35, and discussed in supra text accompanying notes 233-39. La. Civ. Code art. 9 is reproduced in supra note 6 and discussed in supra note 33. For representative cases involving intestate succession to Louisiana immovables, see *Abercrombie v. Caffray*, 3 Mart. (n.s.) 1 (1824); *King v. Neely*, 14 La. Ann. 165 (1859).

255. See, e.g., *Succession of King*, 201 So. 2d 335 (La. App. 4th Cir. 1967); *Succession of Westfeldt*, 122 La. 836, 48 So. 281 (1909); *Berthelot v. Fitch*, 44 La. Ann. 503, 10 So. 867 (1892).

articles 1-4,<sup>256</sup> and similar exceptions contained in the Marital Property chapter of the Draft,<sup>257</sup> articles 6 and 7 introduce what may well be the boldest exceptions to the situs rule. This is because these exceptions pertain to the law of forced heirship, until recently the sacred cow of Louisiana law.<sup>258</sup> Forced heirship is an ancient civilian institution which embodies Louisiana's value judgments about the appropriate balance between the competing policies of respecting individual freedom of disposition on the one hand, and protecting the family of the deceased on the other.<sup>259</sup> The premise of articles 6 and 7 is that these value judgments belong more properly to the legislative competence of the community in which the deceased and his family lived and whose values he shared, than to the state where his property happened to be located.<sup>260</sup>

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256. See text accompanying *supra* notes 69-207.

257. For a discussion of these exceptions, see Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 *Am. J. Comp. L.* 259, 266-70 (1987); Symeonides, *In Search of New Choice-of-Law Solutions to Some Marital Property Problems of Migrant Spouses: A Response to the Critics*, 13:3 *Comm. Prop. J.* 11 (1986).

258. Louisiana is one of the few civil law jurisdictions where forced heirship is constitutionally protected. See *La. Const. art. XII, § 5* (1974). This is indicative of the overall importance of forced heirship in Louisiana society. For a good sample of the debate about forced heirship in Louisiana, see the three articles under the common title "Forced Heirship in Louisiana," in 52 *Tul. L. Rev.* 5 (1977). The articles are: Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, *id.* at 5; Lemann, *In Defense of Forced Heirship*, *id.* at 20; and LeVan, *Alternatives to Forced Heirship*, *id.* at 29. As suggested by some of these titles, not everybody in Louisiana shares the value judgments underlying the institution of forced heirship. The conflicts legislator, however, must take these judgments as he finds them. For a more recent, less impassioned appraisal of forced heirship, see Samuel, Shaw & Spaht, *supra* note 123.

259. The law of forced heirship—that is, the legal rules granting certain dependents the right to participate in the distribution of the estate against the testator's express intention—necessarily represents a compromise between conflicting policies. The policies in favor of equal justice and fairness among the beneficiaries, protection of the family from pauperization, and indirectly, protection of the state from the obligation to support such pauperized families run counter to the policies underlying freedom of disposition and the protection of creditors.

Yiannopoulos, *supra* note 104, at 219. For Louisiana's balance between these competing policies, see *La. Civ. Code art. 1493*, which provides that the deceased may freely dispose ("disposable portion") three-fourths of this property if he is survived by one child, or one half if he is survived by two or more children. In the latter situation the children's forced share ("legitime") will depend on the total number of children.

260. See E. Scoles & P. Hay, *supra* note 26, at 770. "In a case in which the situs state's concerns of land use, public fisc or public record are not involved, it would seem that the concerns of the domicile of the decedent as the center of family life ought to determine what shares members of the decedent's family take in assets located in other states." Cf. R. Weintraub, *supra* note 70, at 428-30, 434-38; M. Hancock, *supra* note 249, at 1115, reprinted in M. Hancock, *supra* note 94, at 293, 313. All these authors take the further step of arguing that, in addition to forced heirship and similar issues, such as mortmain statutes, all issues of intestate succession should in principle be governed by domicile rather than situs

### 1. Louisiana Immovables

Based on this reasoning, article 6 of the Draft exempts from the application of Louisiana's forced heirship law certain succession cases which, although involving Louisiana immovables, are in all other respects alien to Louisiana. Article 6 provides as follows:

Except as otherwise provided in the preceding articles, testate and intestate succession to immovables situated in this state is governed by the law of this state. However, the forced heirship law of this state shall not apply if:

- (a) The deceased was domiciled outside this state at the time of his death and at the time he acquired the immovable; and
- (b) The deceased left no forced heirs domiciled in this state at the time of his death.

According to this article, Louisiana's forced heirship law will not apply to the cases of Louisiana immovables which meet cumulatively all the following characteristics: (a) the deceased left no forced heirs domiciled in Louisiana at the time of his death; (b) he himself was domiciled outside this state, both at the time of his death; and (c) at the time he acquired the Louisiana immovable.<sup>261</sup> If he left even one heir domiciled in Louisiana at the time of his death, then, regardless of the decedent's own domicile, Louisiana's forced heirship law would apply in order to protect that heir. Once this law becomes applicable for the protection of the Louisiana

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law. See, e.g., R. Weintraub, *supra* note 70, at 430. "Can the situs ever have a legitimate interest qua situs in controlling the intestate distribution of interests in realty? Not today as between states of the United States." See also M. Hancock.

In resolving such questions as the amount of the spouse's share, the rights (if any) of illegitimate or adopted children, and the rights of parents or kindred of the half-blood, a legislature will be influenced by the prevailing ideals and traditions of the local community. Construing such a statute in relation to a foreign decedent, the court of the situs ought to hold that the devolution of his real property falls outside the range of the statute. It establishes a scheme of distribution appropriate only for persons domiciled at the situs, and hence the foreign decedent's real property should be distributed according to the scheme that embodies the traditions and ideals of *his* home community, that is, the law of his domicile.

Hancock, *supra* note 249, at 1115, reprinted in M. Hancock, *supra* note 94, at 293, 313 (footnotes omitted). Unfortunately, for reasons explained in the text accompanying *supra* note 25, the Draft has not taken this further step.

261. Stated affirmatively, Louisiana forced heirship law would apply in all cases of succession to Louisiana immovables, which present one additional connection to Louisiana. This additional connection may be: (a) the decedent's domicile in Louisiana at the time he acquired the immovable; or (b) the decedent's domicile in Louisiana at the time of death; or (c) the domicile of at least one forced heir in Louisiana at the time of the decedent's death.

heir, reasons of fairness and evenhanded treatment require extending its benefits to other co-heirs who are domiciled outside Louisiana. Similarly, if the deceased was domiciled in Louisiana at the time he acquired the Louisiana immovable, but not at the time of his death, the immovable would still be subject to Louisiana forced heirship law so as to prevent longtime Louisiana domiciliaries from effectively disinheriting their children by moving outside that state shortly before death.<sup>262</sup> Admittedly, article 6 represents a very narrow concession by the Louisiana situs, but is the only one that realistically could be hoped for at this time.

## 2. Foreign Immovables

On essentially the same rationale, article 7 of the Draft makes another exception to the situs rule, this time at the expense of the foreign situs. This article provides:

Except as otherwise provided in the preceding articles, testate and intestate succession to immovables situated in another state is governed by the law that would be applied by the courts of that state.

However, if the deceased died domiciled in this state and was survived by forced heirs any of whom were at the time domiciled in this state, the value of such immovables shall be included in calculating the disposable portion and in satisfying the legitime.

The second paragraph of article 7 establishes an exception to the situs rule of the first paragraph in favor of Louisiana's forced heirship law when *both* the deceased and at least one of his forced heirs are domiciled in this state at the time of his death.<sup>263</sup> The rationale for this

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262. Admittedly, this solution is more compelling when the children have retained their Louisiana domicile than when they have not. However, it was not deemed necessary to make a differentiation on this ground, if only because the children may well be minors who cannot have a domicile separate from that of their parents.

263. To the extent it exists, any similarity with the French institution of *prélèvement* is coincidental. Based on article 2 of the Law of July 14, 1819 as interpreted by French jurisprudence, the doctrine of *prélèvement* operates in cases in which a succession is governed in whole or in part by foreign law, such as when it encompasses foreign immovables, or when the deceased was domiciled in another country. If that foreign law would give to a French heir or legatee less than he would have received under French successions law, then he can make up the difference out of assets located in France so as to receive the same amount that he would if the entire estate was subject to French law. For detailed discussions of this doctrine in France, see H. Batiffol & P. Lagarde, *supra* note 23, at 410-14, 435-36; G. Delaume, *American-French Private International Law*, at 41-44, 108 (2d ed. 1961). This doctrine is obviously much broader than article 7 of the Draft in at least two important respects: (a) The doctrine of *prélèvement* does not presuppose any connection of the deceased

exception is the same as that of article 6. Louisiana forced heirship law is designed for the protection of the descendants of the testator. When any such descendants are domiciled in Louisiana, this state has a genuine interest in protecting them. When the testator is also domiciled in Louisiana, the interest of this state in protecting his descendants by imposing on his freedom of disposition the limits considered appropriate by the collective will outweighs any adverse interest that the foreign situs may have. The fact that the property is not situated in Louisiana may create some problems of enforcement,<sup>264</sup> but does not detract from either the strength or the legitimacy of this interest. Indeed, the only interest that the foreign state may have in such cases is in preserving the integrity of its recordation system. This interest, however, will not be affected by the application of Louisiana law, since, as explained below, this article and a judgment rendered under it will not operate directly on the foreign immovable.<sup>265</sup>

Once the second paragraph of this article becomes applicable (because the deceased and at least one of his forced heirs were domiciled in this state at the time of death), the paragraph will benefit even those forced heirs of the deceased who are domiciled in another state. Although these foreign heirs do not come fully under the protective scope of the Louisiana law of forced heirship, the application of that law for their protection may be justified on grounds of evenhandedness, uniform treatment of the estate, and on other grounds.

Finally, it should be noted that the problems of enforcing the second paragraph are not as insurmountable as one might think. In the first place, this provision may be implemented without the need of enforcing the Louisiana judgment at the foreign situs, such as when the testator had enough movables or Louisiana immovables to satisfy the legitime. The Louisiana court will then include the value of the foreign immovable in calculating the mass of the estate and the value of the disposable

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with France. It applies even if he has never set foot in that country; and (b) The doctrine seems to have been extended beyond the minimum protection of forced heirship to the full share provided by French intestacy law for French heirs. In fact, despite severe criticism by the majority of French commentators, some old French decisions have extended this protection to French *legatees*, even though the text of the Law of 1819 speaks only of "heritiers." Be this as it may, this nationalistic doctrine has quite a few followers outside France. It has been accepted by Italian jurisprudence and introduced legislatively in Belgium, The Netherlands, Luxembourg, Argentina, Chile, Colombia, and several Central American countries. See F. Boulanger, *supra* note 21, at 357-62; E. Rabel, *supra* note 21, at 262-66. A similar but not identical doctrine was embodied in article 25 para. 2 of the Introductory Law to the German Civil Code. For discussion, see G. Kegel, *Internationales Privatrecht*, at 613-14 (5th ed. 1985). This provision has been repealed by the new Law of 30 July 1986.

264. See text accompanying *infra* notes 266-67.

265. See text accompanying *infra* notes 266-67.

portion, and will satisfy the legitime out of property within its jurisdiction, i.e., Louisiana immovables and movables wherever situated.<sup>266</sup> Even when the latter property is insufficient to satisfy the legitime, a Louisiana court may still be able to implement this provision with regard to the foreign immovable, if the court has in personam jurisdiction over the parties affected, by ordering them to execute the necessary conveyances. If carefully cast in terms not purporting to bind directly the foreign immovable, but only the parties before the court, the judgment will be valid. It will be enforceable in Louisiana by contempt proceedings, and at the situs through recognition proceedings under the full faith and credit clause of the federal Constitution.<sup>267</sup>

### *B. Return to the Rule*

Aside from the forced heirship exceptions, articles 6 and 7 authorize the application of the law of the situs for testate as well as intestate successions and for immovables situated both within and outside Louisiana. The term "immovable" is used here in its usual signification under Louisiana substantive law and includes incorporeals.<sup>268</sup> However, whether a particular thing actually qualifies as an immovable is determined by the law of the situs.<sup>269</sup>

Both articles begin with the phrase "except as otherwise provided in the preceding articles." This stylistically awkward phrase is designed to indicate the residual character of these articles. They are meant to apply only when the preceding articles do not apply, i.e., as to issues other than form, capacity, and interpretation.

One difference between the two articles is that, while article 6 calls for the application of "the law of this state," meaning obviously the

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266. Current Louisiana jurisprudence is to the effect that only the value of foreign immovables may not be included in the mass. *Berthelot v. Fitch*, 44 La. Ann. 503, 10 So. 867 (1892); *Jarel v. Moon's Succession*, 190 So. 867 (La. App. 2d Cir. 1939); *In Re Estate of Lewis*, 32 La. Ann. 385 (1880); *Hughes v. Hughes*, 14 La. Ann. 85 (1859).

267. See, e.g., *Fall v. Eastin*, 215 U.S. 1, 30 S. Ct. 3 (1909); *Rozan v. Rozan*, 129 N.W.2d 694 (N.D. 1964); *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961); *R. Weintraub*, supra note 70, at 421-27, concluding with this note: "Non-situs decrees affecting the interests in land of persons before the court should be entitled to the same recognition at the situs under full faith and credit as other judgments." *id.* at 427; *Currie, Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620, 672-76 (1954).

268. See La. Civ. Code arts. 462-475; *Succession of Simms*, 175 So. 2d 113 (La. App. 4th Cir.), *aff'd*, 250 La. 177, 195 So. 2d 114 (1965), cert. denied, sub. nom. *Kitchen v. Reese*, 389 U.S. 850, 88 S. Ct. 47 (1967); *St. Charles Land Trust Co. v. St. Amant*, 253 La. 243, 217 So. 2d 385 (1968); *Succession of Harris*, 179 La. 954, 155 So. 446 (1934).

269. See cases cited in supra note 268. Compare with Restatement 2d, supra note 26, § 236, comment a.

substantive successions law of Louisiana, article 7 calls for the application of "the law that would be applied by the courts" of the foreign state. In other words, article 7 authorizes the so-called *renvoi*.<sup>270</sup> This means that a Louisiana court dealing with the succession to a foreign immovable should look at the conflicts rule of the situs and should apply the same substantive law as the situs court would. More often than not, the courts of the foreign situs will apply their own internal, substantive law of succession, and, if so, the Louisiana court should do the same, and the problem will end there. Occasionally, however, the foreign courts may apply the law of another state with regard to certain issues.<sup>271</sup> If so, the Louisiana court should follow that reference to the law of the third state and end it there. While it introduces some complexity into the choice-of-law process, this *renvoi* has the advantage of ensuring a uniform treatment of questions pertaining to land, regardless of the forum in which these questions are litigated.

#### IX. SOME INTERIM CONCLUSIONS

Since the codification process is still in progress, both in a lateral and in a hierarchical sense, any conclusions that can be drawn from this Article can only be tentative, interim conclusions. Following the completion of the Successions Draft, the process has moved to other areas of the swamp, such as property, contracts, torts, and prescription. There are still many other corners to explore, and until all this is over, we will not know for sure when or whether we are out of the swamp. What this interim report has attempted to do was, first, to describe the state of current Louisiana conflicts law in the area of successions, and then to explain the measures taken by the Draft to ameliorate the situation.

On the first point, the diagnosis is indeed as dismal as Dean Prosser's swamp. The current statutory framework is incomplete and outdated, if not inherently defective. Worse yet, it is "a monument of isolationism,"<sup>272</sup> and for no good reason. With such a framework, it is not surprising that the courts did generally better when they ignored it than when they adhered to it.

On the second point, the final diagnosis belongs of course to others, including the reader. What can be said from this vantage point is that

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270. See *supra* notes 81-84. It should be noted that the Restatement Second authorizes a *renvoi* not only with regard to immovables but also with regard to movables. See Restatement 2d, *supra* note 26, §§ 236, 239, 260, 263.

271. See, e.g., Cal. Prob. Code § 120 (West Supp. 1987), referring to the law of the decedent's domicile for the inheritance rights of the surviving spouse to some California immovables.

272. Paraphrasing Rabel in E. Rabel, *supra* note 21 at 291.

the drafters have approached their task with an open mind, without preconceived ideologies and without fixed notions about the philosophical or geographical orientation of the revision. Individual viewpoints were as diverse as the members of the Committee and the Council of the Institute, and the debates as intense as the rules of the Institute would permit. At the end there emerged this Draft, a collective intellectual product that bears all the marks of a compromise, hopefully a successful one.

This compromise is visible in many different though overlapping fronts. For instance, the Draft has taken the middle position in the centuries-old clash between territorialism and extraterritorialism,<sup>273</sup> but with a tilt towards the latter. The middle position is seen in the fact that, although it abandoned the wholesale territorialism of the present law that requires the application of situs law even with regard to movables, the Draft did not move all the way to the other extreme of assigning all succession issues to the law of the domicile. The tilting towards extra-territorialism is evidenced by the fact that, although it retained the situs rule for immovables, the Draft reduced the role of this rule by removing from its scope issues of form, capacity and interpretation.

This same aspect of the Draft is also a testimonial to its so to speak "geographical" orientation. The Draft did not aspire to be civilian for the sake of being civilian, nor did it try to emulate the common law for the sake of being American. The civilian content and origin of Louisiana's substantive successions law which is built around the principle of the unity and continuity of the succession called for the adoption of the same principle in the field of conflicts law. At the same time, the fact that Louisiana is also very much an American state, surrounded by American states with a long adherence to the principle of scission of the estate necessitated a historic compromise between the two principles. The compromise was achieved by expanding the range of the domiciliary rule, and thus also of the principle of unity, beyond its traditional scope in the common law, but not as far as in the civil law world. As said earlier, under the Draft, the law of the domicile applies not only to all issues pertaining to movables as in the common law, but also to some important issues pertaining to immovables.

Similarly, by retaining the situs rule for all other issues pertaining to immovables and resisting the pressure of most academic commentators to abolish it, the Draft maintained a link with the local "folklore." In this sense, the Draft is a compromise between the forces of tradition and

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273. See De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 *Recueil des Cours* 435, 441-77 (1966); Juenger, *supra* note 5; Yntema, *The Historic Bases of Private International Law*, 2 *Am. J. Comp. L.* 297, 301-03 (1953). See also S. Gutermann, *From Personal to Territorial Law* (1972).



the forces of change. The same can be said about the perennial antagonism between the ideals of legal certainty and flexibility.<sup>274</sup> The Draft provides a good measure of certainty by establishing clear, unambiguous rules, and by articulating narrowly the exceptions to them. Through these exceptions, but also through the rules of articles 1, 2, and 4,<sup>275</sup> the Draft also provides the necessary measure of *built-in, guided* flexibility. This Draft deliberately avoided going any further in the direction of flexibility and purposefully steered away from "most significant relationships"<sup>276</sup> and generic escape clauses.<sup>277</sup> The underlying thinking was that in estate planning it is important to know the state of the most significant relationship and thus the applicable law *before*, not after death.

Finally, the Louisiana Draft makes its appearance on the national conflicts scene at the end of a not-so-glorious revolution and the beginning of a bitter counter-revolution, that is, at a period of transition, reorientation, and intense soul-searching in American conflicts law.<sup>278</sup> The civil

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274. See Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 *Law & Contemp. Probs.* 795 (1963); Vischer, *The Antagonism Between Legal Security and the Search for Justice in the Field of Contracts*, 142 *Recueil des Cours* 1 (1974); von Mehren, *Choice of Law and the Problem of Justice*, 41 *Law & Contemp. Probs.*, Spring 1977, at 27.

275. Article 1, reproduced and discussed in text accompanying supra notes 70-86, and article 2, reproduced and discussed in text accompanying supra notes 113-35, provide flexibility through their alternative references to whichever one of the listed laws would validate the testament. Article 4, text accompanying supra notes 200-07, does the same by allowing the testator to select the law that would be used in interpreting his testament. In the words of Professor Leflar, "[a]lthough statutes are typically less flexible, flexibility is not a virtue for every type of conflicts case. Moreover, flexibility can be built into a statute dealing with an area in which exactness is undesirable, just as it can be and is more often prescribed in the common law." Leflar, supra note 2, at 952.

276. The notion of applying the law of the state that has "the most significant relationship" with the particular issue is of course the familiar trade mark of the Restatement Second. However, when it came to successions, the Restatement avoided using this formula and opted for traditional-style black-letter rules. Professor Weintraub, who is critical of both the rules and the "non-rules" of the Restatement, advocates the application of "the law of the state with the predominant interest." R. Weintraub, supra note 70, at 462. This proposal is obviously sound as well as flexible. But, at least in a civil law system, the critical question is whether the determination of the "state of the predominant interest" should be made by the legislator or the judge. The view that prevailed in the debates of this Draft was that, because of the added need for legal certainty in estate planning, this determination should be made by the legislator. A different view has prevailed in the preparation of the contracts and torts drafts.

277. See Symeonides, *Louisiana's Draft on Successions and Marital Property*, 35 *Am. J. Comp. L.* 259, 286-87 (1987).

278. For representative samples of this collective soul-searching see the following conflicts symposia: *The Influence of Modern American Conflicts Theories on European Law*, 30 *Am. J. Comp. L.* 1 (1982); *Supreme Court Intervention in Jurisdiction and Choice of Law: From Shaffer to Allstate*, 14 *U.C. Davis L. Rev.* 837 (1981); *Reflections on Conflict-of-Laws Methodology: A Dialogue*, 32 *Hastings L.J.* 1609 (1981); *Conflict-of-Laws Theory after Allstate*

strife between interest-analysts, functionalists, neoterritorialists, Restatement advocates, "better-law" proponents, and their respective critics is still going on, though with less intensity.<sup>279</sup> The Louisiana Draft does not take sides in this strife. Indeed, in a philosophical sense, the Draft purports to be non-partisan in that it does not *consciously* subscribe to any particular one of the competing schools of American conflicts thought, but rather tries to draw from each of them whatever ingredients are deemed useful in the construction of a workable system. In drafting legislation, one cannot afford the luxury of scientific purism or the danger of intellectual partisanship. Thus, the pragmatic eclecticism that has become typical of so many judicial decisions may now be seen in a legislative product, and for the same reasons: they both aim at practical solutions rather than at philosophical victories.

However, by sheer example, the Louisiana Draft does take sides in the parallel debate between those who, like Brainerd Currie, continue to reject all conflicts rules as necessarily evil,<sup>280</sup> and those who believe that the time has come to attempt to regain some of the certainty lost in the revolution by turning towards some process of rule-making.<sup>281</sup> The Lou-

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*Insurance Co. v. Hague*, 10 Hofstra L. Rev. 1 (1981); A Response to the *Hague* Symposium, 10 Hofstra L. Rev. 973 (1982); Contemporary Perspectives in Conflict of Laws, Law & Contemp. Probs., Spring 1977, at 1; Conflict of Laws (pts. 1 & 2), 34 Mercer L. Rev. 469 (1983), 35 Mercer L. Rev. 417 (1984); Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability, 46 Ohio St. L.J. 457 (1985); 81 Columbia L. Rev. 946-1095 (1981).

279. For the most recent sample of this strife, see the Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability, 46 Ohio St. L.J. 457 (1985), containing contributions by Professors Kozyris, Brilmayer, Sedler, Weintraub, Juenger, Evrigenis, Berman, Zaphiriou, Shreve, Luneburg, and Symeonides. It may be of some significance that this author attempted to steer a middle course in that symposium. See, *id.* at 549.

280. "In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all." B. Currie, *supra* note 242, at 180. "I regard choice-of-law rules as an obstruction to clear analysis and hence to progress." *Id.* at 616. "We would be better off without choice-of-law rules." *Id.* at 183. See also Professor Leflar:

[I]t must be devoutly hoped that no such attempt [to codify conflicts law] will succeed until the bench and the bar have achieved a much better understanding of conflicts theory and the conflicts law itself has come to be more completely stabilized in keeping with the socio-economic and legal functions that it should serve.

Leflar, *supra* note 2, at 971. For a critique of Currie's views on this issue, see Symeonides, Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?, 46 Ohio St. L.J. 549, 550-52 (1985).

281. See, e.g., D. Cavers, The Choice-of-Law Process 108-113, 121-23 (1965); Cavers, The Value of Principled Preferences, 49 Tex. L. Rev. 211 (1971); Hay, Reflections on Conflict-of-Laws Methodology, 32 Hastings L.J. 1644, 1672 (1981); Kozyris, Interest Analysis Facing its Critics, 46 Ohio St. L.J. 569, 577-80 (1985); Rosenberg, The Comeback of Choice-of-

isiana Draft does not aspire to be the model in such a process. What is hoped, however, is that the Draft can serve as a point of reference in that debate.

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Law Rules, 81 Colum. L. Rev. 946 (1981); Rosenberg, Comments on Reich v. Purcell, 15 U.C.L.A. L. Rev. 551, 644 (1968). Professor Kozyris sums up these sentiments as follows:

[A]ny system calling for open-ended and endless soul-searching on a case-by-case basis carries a high burden of persuasion. With centuries of experience and doctrinal elaboration behind us, we hardly need more lab testing and narrow findings. Rather, we need to make up our minds and make some sense out of the chaos. This is not to say that conflicts rules may not be improved by reducing the generality of their scope, where indicated, or by opening up the realm of relevant contacts and upgrading the status of the personal contacts where appropriate. However, going over to a world of judicial particularistic intuitionism, as called for by the conflicts antirulists, is quite another matter. In my jurisprudential universe, fixed but revisable rules which lead to good results in the overwhelming majority of the cases, and which are supplemented by some general corrective principles to mitigate injustice in the remaining cases, are superior to, and incredibly more efficient than, a system in which each case is decided as if it were unique and of first impression.

Kozyris, *supra*, at 580 (footnotes omitted).

## APPENDIX

A Draft on the Law Governing Successions and Marital Property. (as approved by the Council of the Louisiana State Law Institute at its meetings of May 11, 1985).

## CHAPTER I. LAW GOVERNING SUCCESSIONS

*Art. 1. Formal validity of testamentary dispositions.*

A testamentary disposition is valid as to form if it is in writing and is made in conformity with:

- (a) The law of this state; or
- (b) The law of the place of making at the time of making; or
- (c) The law of the place where the testator was domiciled at the time of making or at the time of death; or
- (d) With regard to immovables, the law that would be applied by the courts of the place where such immovables are situated.

*Art. 2. Capacity to make a testament.*

A person is capable of making a testament if, at the time of the making of the testament, he possessed such capacity under the law of the place where he was domiciled at the time of the making of the testament or under the law of the place where he was domiciled at the time of death.

*Art. 3. Capacity of heir or legatee.*

Whether a person is capable of inheriting or receiving as a legatee is determined according to the law of the domicile of the deceased at the time of death. However, with regard to immovables situated in this state, the legatee must qualify as a person under the law of this state.

*Art. 4. Interpretation of testaments.*

Testaments are interpreted according to the law expressly designated by the testator for that purpose, or clearly contemplated by him at the time of the making of the testament.

In the absence of such an express or implied selection, the testament shall be interpreted according to [the law of this state] [the law of the

place where the testator was domiciled at the time of the making of the testament].<sup>282</sup>

*Art. 5. Succession to movables.*

Except as otherwise provided in the preceding articles, testate and intestate succession to movables is governed by the law of the domicile of the deceased at the time of death.

*Art. 6. Succession to immovables situated in this state.*

Except as otherwise provided in the preceding articles, testate and intestate succession to immovables situated in this state is governed by the law of this state. However, the forced heirship law of this state shall not apply if:

- (a) The deceased was domiciled outside this state at the time of his death and at the time he acquired the immovable; and
- (b) The deceased left no forced heirs domiciled in this state at the time of his death.

*Art. 7. Succession to immovables situated in another state.*

Except as otherwise provided in the preceding articles, testate and intestate succession to immovables situated in another state is governed by the law that would be applied by the courts of that state.

However, if the deceased died domiciled in this state and was survived by forced heirs any of whom were at the time domiciled in this state, the value of such immovables shall be included in calculating the disposable portion and in satisfying the legitime.

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282. The brackets indicate alternative language.