

‘Forced heirship’ in the United States of America, with particular reference to New York State

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Abstract

The degree of protection afforded to children in matters of succession in the United States is generally much more limited than the protection afforded children in many civil law jurisdictions outside the United States. However, many U.S. jurisdictions afford substantial protection in matters of inheritance to surviving spouses, which could be said to amount to a form of forced heirship for surviving spouses. The article first focuses on key provisions of New York law and of the Uniform Probate Code to illustrate the major approaches of most U.S. jurisdictions to the protection of children and spouses in matters of inheritance. The article then discusses the choice-of-law rules that may apply in U.S. jurisdictions to determine whether non-U.S. laws providing forced heirship protection can ever apply to U.S. property, illustrated by provisions of the Restatement (Second) on Conflict of Laws and by Section 3-5.1 of the Estates, Powers and Trusts Law of the State of New York. The article also comments on the role that the European Succession Regulation may come to play under the choice-of-law rules of New York State.

another law for the District of Columbia, since the USA is a federal state and has no national law of inheritance.¹ It is often said that the USA does not have ‘forced heirship’ in the civil law sense of the term except in the state of Louisiana. That may be relatively true, as the discussion in the section ‘Versions of “forced heirship” in the USA’ of this article illustrates, if one thinks of ‘forced heirship’ in the sense of legally requiring that parents leave substantial portions of their estates to their children. But it is not true in the more general sense of the term because, as the discussion below also illustrates, many states of the USA provide protections for surviving spouses in respect of the inheritances of deceased spouses in a way that is very distinctive from the civil law tradition (although it may be granted that these protections are more prominent in jurisdictions whose default matrimonial property regime is separate property rather than community property).

That most US jurisdictions have very limited or no effective inheritance protection for children does not of course eliminate the possibility that individuals from countries whose laws incorporate mandatory inheritance rights may die owning property in the USA, raising the complex question of whether jurisdictions in the USA should honour these non-US law claims in the disposition of property having a

The law of inheritance in the USA is really 50 laws of inheritance, one for each of the 50 states plus at least

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1. The USA, being a federal republic under the provisions of the US Constitution, does not have a national law of inheritance. Nonetheless, there are some federal statutes that may have an impact on matters of inheritance. For example: (a) section 205 of the Employee Retirement Security Act of 1974, as amended (“ERISA”) requires that may pension plans established in the USA that are governed by ERISA are required to provide spousal survivor benefits; and (b) section 203 of the Copyright Act of 1976, as amended (with regard to transfers or licenses of copyrights by an author on or after January 1, 1978) and section 304 thereof (with regard to transfers or licenses of copyrights by an author before January 1, 1978 of works existing on that date) require that, under certain conditions, surviving spouses, surviving children and surviving grandchildren of predeceased children of deceased authors may inherit rights to terminate transfers and licensing arrangements made by their authors.

situs in the USA or over which, for whatever reason, courts in the USA may have jurisdiction. A discussion of some aspects of the approach taken in the USA to this issue, which takes on new resonance with the advent of the European Succession Regulation, is the subject matter of the section 'US approaches to non-US forced heirship claims' of this article.

Versions of 'forced heirship' in the USA

Forced heirship

Louisiana

The only state of the USA that has a version of what civil lawyers call 'forced heirship' today is Louisiana.² The mandatory nature of Louisiana's forced heirship was significantly cut back by a reform of the law in the late 1980s. Heirs that are required to inherit now are limited to children under the age of 24 years and children who cannot take care of themselves.³ If a child dies before reaching the age of 24 years, any children of that child may take the deceased parent's share.⁴ In the case of a predeceased child, that child's children who are disabled may take their parent's share regardless of the age of their parent when he or she died.⁵ The total forced share is 25 per cent, if there is one surviving eligible child, and 50 per cent, if there are two or more surviving eligible children.⁶

For purposes of calculating a forced heir's actual entitlement, gifts made by the decedent within three years of death (other than gifts to a prior spouse) can be taken into account to determine the forced share; proceeds of insurance on the life of the deceased and contributions to certain retirement plans are not

included in the base for calculating the amount of the forced share but any such proceeds or benefits received by any forced heir are to be applied to reduce the property that must be distributed to that forced heir from the estate or gifts made before death. Also, if, under the rules of intestacy, a forced heir would receive a smaller amount than the forced share calculated in the manner just described, the forced heir is limited to the smaller intestate share.

In the case where there is a surviving spouse, the surviving spouse may be given a usufruct or life interest in the forced shares.⁷ Furthermore, a parent may disinherit a child for 'just cause' and thus deprive the child of any forced share.⁸ It also appears that a forced share may be satisfied with a disposition in trust.⁹

The future?

In his landmark decision in *Re Renard*, discussed later in this article, New York County Surrogate Millard Midonick observed that:

[o]ne day a uniform law, or state by state laws, may adopt a protective rule for infant children of decedents to continue support during infancy, rather than forced heirship, after the parent's death.¹⁰

Except for the generally very limited 'homestead' and 'exempt property' provisions described below, it does not appear that New York or indeed the USA in general has moved very much closer to the prospective legislation Surrogate Midonick seemed to envisage over 30 years ago. One wonders if the very moderate version of 'forced heirship' that Louisiana adopted in the late 1980s might have well reflected the type of protective legal regime that Surrogate Midonick had in mind.

2. Puerto Rico, which is a territory but not, as of the time of this writing, a state of the USA, has a version of forced heirship based on the civil law model.

3. La Civil Code ss 1493(A) and 1493(D).

4. *ibid* ss 1493(B) and 1493(D).

5. *ibid* s 1493(C).

6. *ibid* s 1495.

7. *ibid* s 1499.

8. *ibid* s 1494.

9. *ibid* s 1496.

10. 437 NYS 2d 860, 866 (Surr Ct NY Cty 1981), *aff'd* 447 NYS 2d 573 (App Div 1st Dept 1981), *aff'd* 453 NYS 2d 625 (NY 1982).

Homestead allowances and property exemptions for surviving spouse and minor children

New York

New York provides an exemption for benefit of family.¹¹ If a person dies leaving a surviving spouse or children under the age of 21 years, the following property vests in the surviving spouse or, in the absence of such, in the children under the age of 21 years: housekeeping utensils, musical instruments, sewing machine, jewellery that is not disposed of by will, clothing of the decedent, household furniture and appliances, electronic and photographic devices, and fuel for personal use—all of these not to exceed the value of \$20,000. Items used exclusively for business purposes are excluded. In addition, the family bible, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices—all of these not to exceed \$2,500 in value. In addition, domestic and farm animals with their necessary food for 60 days, farm machinery, one tractor, and one lawn tractor—all not exceeding the value of \$20,000. In addition, one motor vehicle not to exceed \$25,000 in value, with an option to take the equivalent value in cash. Finally, money not to exceed \$25,000, provided that that amount is to be set-off to the extent the value of any of the previous items exceeds the relevant dollar limits.

*Uniform Probate Code*¹²

The Uniform Probate Code (UPC) provides a 'homestead allowance' and an exempt property provision for the benefit of family.

Homestead allowance

Decedent's surviving spouse is entitled to a homestead allowance of \$22,500 (adjusted for inflation).¹³

If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$22,500 (adjusted for inflation), divided by the number of such minor and dependent children. The homestead allowance is exempt from and has priority over all claims against the estate. This amount is in addition to any share passing to the surviving spouse, or minor, or dependent children by will, unless otherwise provided, by intestate succession, or by elective share.

Exempt property

Decedent's surviving spouse is entitled to \$15,000 (adjusted for inflation) in household furniture, automobiles, furnishings, appliances, and personal effects.¹⁴ If there is no surviving spouse, the decedent's children are entitled jointly to property of the same value. In cases where these types of property may be encumbered by security interests, the spouse and children can be entitled to a monetary equivalent.

Family allowance

In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims.¹⁵

The allowance is payable to the surviving spouse or, if not living, to the children or persons having their care and custody. If a minor child is not living with

11. NY EPTL s 5-3.1.

12. States that have adopted art II of the UPC include Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico, North Dakota, and South Dakota. The UPC influences the discussion about these matters in many other states.

13. UPC ss 2-402 and 1-109.

14. *ibid* ss 2-403 and 1-109.

15. *ibid* s 2-404.

the surviving spouse, then the allowance may be paid partially to that child's guardian. The personal representative (ie the executor or administrator) may determine the family allowance in a lump sum not exceeding \$27,000 or periodic instalments not exceeding \$2,250 per month for a year (each amount to be adjusted for inflation).¹⁶

Homestead allowance: special cases

The homestead allowance in certain states like Florida and Texas deserve special mention. Under section 4(c) of Article X of the Florida Constitution, a:

homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

A homestead, for this purpose, if located outside a municipality, can include up to 160 acres of contiguous land; if located inside a municipality, it is limited to one-half acre used as the residence of the owner or the owner's family. The Florida Probate Code provides that Florida homestead property that cannot be so devised:

shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.¹⁷

Under a 2010 law change, a surviving spouse can elect to take a 50 per cent tenancy-in-common interest in the property with the surviving children in place

of a life estate in the property.¹⁸ Changes in Florida law in 2010 also clarified that homestead property can be owned by a revocable trust¹⁹ and also open up the possibility of leaving a homestead to an irrevocable trust, subject to certain conditions.²⁰ During the lifetime of the owner, however, it appears that the owner may mortgage, hypothecate, or transfer the property as long as the owner, if married, has the consent of the owner's spouse;²¹ as a result it is not possible to 'claw back' homestead property transferred by a decedent before the decedent's death as might be the case in a jurisdiction that has forced heirship based on the civil law model.

Under the homestead rules of Texas, homestead property may pass according to the usual rules of descent and distribution of Texas law, provided that the property may not be partitioned among the heirs of the decedent during the lifetime of the surviving spouse, or as long as the surviving spouse may elect to use or occupy the same as a homestead, or as long as a guardian of the minor children of the deceased may be permitted, by court order, to use and occupy the property.²² Homestead property may include, in the case of an urban home used as a home or as a home and a place of business, up to 10 acres of contiguous lots, and in the case of a rural home used as a home, for a family, not more than 200 acres (not necessarily contiguous) or for a single, adult person, not more than 100 acres (not necessarily contiguous).²³ Homestead property may be transferred to a revocable trust, or to an irrevocable trust subject to certain strict conditions, and still retain its homestead characteristics.²⁴ Again, it appears that the owner of homestead property may gift the property, at least with the consent of the owner's spouse, during lifetime, with no 'claw back' rights being left to the children.²⁵

16. *ibid* ss 2-405 and 1-109.

17. F S 732.401(1).

18. F S 732.401(2).

19. F S 732.4015(2).

20. F S 732.4017.

21. See F S 689.111.

22. Texas Constitution, art XVI, s 52.

23. Texas Property Code, s 41.002.

24. *ibid* s 41.0021.

25. Texas Family Code, s 5.001.

Elective share of surviving spouse²⁶

New York

New York provides a surviving spouse with 'a personal right of election' to take a share of the deceased spouse's estate (net of exempt property).²⁷ The New York approach, it can be said, represents a more traditional approach, seeking to replace the common law provision for surviving spouses (ie dower, curtesy, etc) with what is essentially a forced share of the pre-deceased spouse's estate, adjusting the estate to take into account certain pre-death transfers, reserved powers, and interests in certain accounts that pass by joint ownership concepts or statutorily created non-probate methods of passing property at death.

- a. The amount of the elective share is:

the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate.²⁸

- b. The estate, for purposes of the statute, generally includes the aggregate value of the assets of the probate estate (ie assets passing under decedent's Will) and the following (i) gifts *causa mortis*; (ii) transfers of property by the decedent within one year of the decedent's death, to the extent the decedent did not receive adequate and full consideration for the transfer (excluding certain gifts made under the gift tax exclusion rules of the US Internal Revenue Code); (iii) money deposited in trust accounts for other persons ('Totten Trusts'); (iv) money deposited in joint banking or savings accounts in the name of the decedent and another person; (v) transfers of property either held by

the decedent and others as joint tenants with right of survivorship or tenants by the entirety or that is payable to another person at the time of the decedent's death; (vi) transfers of property in trust under which the decedent retained the right to the possession or enjoyment of the transferred property or the right to income therefrom, except to the extent such transfer was made for adequate and fair consideration, or under which the decedent could revoke the transfer or consume or invade the principal thereof with the consent of a party who does not have an interest in the transferred property that is substantially adverse to the exercise of the power; (vii) various thrift, savings, and tax-deferred retirement savings arrangements (except in certain cases where the benefit would be mandatorily payable to the surviving spouse, only to the extent of 50 per cent thereof); (viii) property subject to a power in the decedent that was a presently exercisable general power of appointment and was held by the decedent at death or was relinquished by the decedent within one year of death or exercised by the decedent in favour of persons other than the decedent, or the decedent's estate; and (ix) securities transferred pursuant to a transfer on death account. All expenses of the estate (other than estate taxes) are deducted to arrive at the 'net estate'.²⁹

- c. The election must be exercised within six months of the date of issuance of letters testamentary or letters of administration but, in no event, later than two years after date of decedent's death, except by allowance of the Surrogate's Court that issued the letters.³⁰
- d. Waivers of the right of election must be in writing and acknowledged or proved in the same manner required for conveyances of real property.³¹

26. Study 10 of the American College of Trusts and Estate Counsel (ACTEC), 'Surviving Spouse's Rights To Share in Deceased Spouse's Estate', represents a summary of the elective share legislation of all US states and the District of Columbia and appears to have been last edited in 2004. The Study is available to ACTEC members on the ACTEC website.

27. NY EPTL ss 5-3.1 (a) and 5-1.1-A(a).

28. *ibid* s 5-1.1-A(a)(2).

29. *ibid* s 5-1.1-A(b).

30. *ibid* s 5-1.1-A(d).

31. *ibid* s 5-1.1-A(e).

e. The share of the net estate to which the electing spouse is entitled is the spouse's share of the 'net estate' reduced by the value of any property that passes absolutely to such surviving spouse or would have passed absolutely but was renounced.³² Unless the decedent provides otherwise, when a spouse exercises a right to an elective share, any property interest that does not pass absolutely to the surviving spouse is to pass as if the surviving spouse had predeceased the deceased spouse.³³

UPC

The approach in the UPC is based on the 'economic partnership' theory of marriage and tries to achieve what is essentially an 'equitable dissolution' of the marriage upon death analogous to what one might expect in the context of divorce.³⁴ Alternatively, it can be viewed as essentially creating in the surviving spouse a community property interest as if the couple had lived under a community property regime during their entire marriage, but calibrated to take into account the time the couple were married before the deceased spouse's death.

a. The surviving spouse has:

a right of election...to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.³⁵

A supplemental share amount is allowed when the value of property going to the surviving spouse from various sources does not equal \$75,000, to bring the surviving spouse's share up to that amount.³⁶

b. The decedent's augmented estate generally includes: (i) the value of the net probate estate; (ii) the value of decedent's non-probate transfers to others; (iii) the decedent's non-probate transfers to the surviving spouse; and (iv) the surviving spouse's property and non-probate transfers to others. The amount of the marital property portion of the augmented estate equals the sum of the values of the four components multiplied by a percentage ranging from three per cent (when the decedent's marriage to the surviving spouse lasted less than one year) to 100 per cent (when the deceased was married to the surviving spouse 15 years or more).³⁷

c. The value of 'decedent's net probate estate' is the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowance, exempt property, and enforceable claims.³⁸

d. 'Decedent's nonprobate transfers to others' generally include:

property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death,

including: (i) property over which the decedent held at the time of death a presently exercisable power of appointment; (ii) decedent's fractional interest in property held by the decedent in joint tenancy with right of survivorship with a surviving joint tenant other than the surviving spouse; (iii) decedent's ownership interests in any POD, TOD, or co-ownership registration with right of survivorship, to the extent any such account passes other than to decedent's estate or surviving

32. *ibid* s 5-1.1-A(a)(4).

33. *ibid* s 5-1.1-A(a)(4)(A).

34. See UPC ss 2-201-2-214.

35. *ibid* s 2-202(a).

36. *ibid* s 2-202(b).

37. *ibid* s 2-203.

38. *ibid* s 2-204. Since UPC s 2-301 (discussed below) seems to contemplate the possibility that the surviving spouse of an intestate deceased spouse could exercise a right of election, 'probate estate' presumably also includes an 'administered estate' under intestacy.

spouse; and (iv) proceeds of insurance, including accidental death insurance and insurance on the life of the decedent, assuming the decedent held a presently exercisable general power of appointment over the policy. It also includes 'property transferred in any of the following forms by the decedent during the marriage' (i) any irrevocable transfer to or for the benefit of any person other than decedent's spouse or decedent's estate; and (ii) transfers by which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person or with the consent of a non-adverse party to or for the benefit of the decedent, the decedent's creditors, the decedent's estate, or the creditors of the decedent's estate, to the extent exercisable in favour of anyone other than the decedent's estate or surviving spouse. It also includes 'property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent' in the following cases: (i) any property that passed as a result of the termination of a right or interest in, or power over, property referred to above that would have been included in the 'augmented estate' if the power had not been terminated before death; (ii) any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have otherwise been included in the 'augmented estate'; and (iii) any transfer of property, to the extent not already included in the 'augmented estate', made to or for the benefit of a person other than the decedent's spouse, to the extent the value of the property exceeds in either of the two years the amount of \$12,000.³⁹

- e. 'Decedent's nonprobate transfers to the surviving spouse' generally include: (i) the decedent's fractional interest in property held as a joint tenant with the right of survivorship passing to the surviving spouse as surviving joint tenant; (ii) the

decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent passing to the surviving spouse as surviving co-owner; and (iii) all other property that would have been included in the 'augmented estate' under the prior provisions regarding property, powers over 'property owned or owned in substance by the decedent' passing outside probate and 'property transferred... by the decedent during marriage' had it passed to or for the benefit of a person other than the surviving spouse, the decedent or the decedent's estate, the decedent's creditors or the creditors of the decedent's estate.⁴⁰

- f. 'Surviving spouse's property and nonprobate transfers to others' generally include: (i) property that was owned by the decedent's surviving spouse at the decedent's death including the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship, the surviving spouse's ownership of property or accounts in co-ownership registration with the right of survivorship; and property that passed to the surviving spouse other than the surviving spouse's right to homestead allowance, exempt property, or payments under the federal social security system; and (ii) property that would have been included in the surviving spouse's non-probate transfers to others, other than the spouse's fractional interests already mentioned had the spouse been the decedent.⁴¹
- g. Transfers referred to in the aforesaid provisions are reduced (i) to the extent, property was transferred in payment for full and adequate consideration and (ii) to the extent, property that was transferred with the joinder or written consent of the surviving spouse. Generally, the value of property transfers that figure in the calculation of the 'augmented estate' are reduced by the value of any enforceable claims against such property but also includes the commuted value

39. *ibid* s 2-205.

40. *ibid* s 2-206.

41. *ibid* s 2-207.

- of any present or future interest payable under any trust, life insurance policy, death benefit, and the like.⁴²
- h. The elective share is first satisfied from property that passes by Will or by intestacy and amounts that were transferred to the surviving spouse by the decedent outside the probate estate and the 'marital property portion' of the assets owned by the surviving spouse or transferred to others by the surviving spouse, and only then from assets of the net probate estate not passing to the surviving spouse and non-probate transfers to others.
 - i. The election must be made within nine months of the decedent's death or within nine months of the probate of the decedent's Will, whichever is later. Unless court permission is given to make a filing after the deadline just described, the share under any later election cannot include in the 'augmented estate' of the decedent's non-probate transfers to others.⁴³
 - j. The right of election may be waived in writing but will not be effective if fair disclosure of the property or financial obligations of the decedent was not made, the surviving spouse did not waive any right to such disclosure and did not have or could not have reasonably had an 'adequate knowledge of the property and financial obligations of the decedent'.⁴⁴

Protection of 'pretermitted' children

New York

New York provides some protection for a child born after the execution of a Will, for whom no provision has been made before the death of the deceased testator in a Will or by any other settlement. If the testator had one or more children when the testator executed the Will and made no provision for children, the after-born child has no claim against the estate (other than

possibly under the exempt property provision). If the testator had children at the time of the execution of the Will and made provision for any of them, the after-born child is entitled to an equal share of the property that the testator did leave to children but if it appears that the testator intended that the testamentary provision for children be limited to children living at the time of the Will, the after-born child is entitled to a portion of such testator's estate equal to what the child would have received had the testator died intestate.⁴⁵

UPC

An after-born or after-adopted child has no entitlement if it appears the omission of after-born or after-adopted children was intentional or the testator provided for the child by transfers outside the Will that can be assumed to have been made with the intent to provide for the child in place of a provision under the Will. If the testator had children at the time of the execution of the Will and made provision for any of them, the after-born or after-adopted child is entitled to an equal share of the property that the testator left to children. If the testator had no living children at the time the testator executed the Will, the after-born child or after-adopted child is entitled to the share the child would have received had the testator died intestate, unless the Will devised all or substantially all of the estate to the other parent of the after-born or after-adopted child and the other parent survives the testator and is entitled to take under the Will.⁴⁶

Protection of 'pretermitted' spouse

New York

New York does not appear to make any special provision for the contingency when a spouse dies leaving a Will executed before the marriage that makes no

42. *ibid* s 2-208.

43. *ibid* s 2-211.

44. *ibid* s 2-213.

45. NY EPTL s 5-3.2.

46. UPC s 2-302.

provision for the surviving spouse. The remedy of the surviving spouse would be to exercise the surviving spouse's right of election.

UPC

If a testator's surviving spouse married the testator after the testator executed a Will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to the portion of the estate that is not devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse and is not devised to a descendant of any such child or passes to such descendant by reason of an anti-lapse or similar statute. However, this provision does not apply if: (i) it appears the Will was made in contemplation of the marriage; (ii) the Will expresses the intent that it should be effective regardless of any subsequent marriage; or (iii) the testator made provision for the surviving spouse outside the Will with the apparent intent that such transfers take the place of any testamentary provision.⁴⁷

Community property

While technically distinct from issues of forced heirship, in so far as forced heirship concerns spouses as well as children, the discussion would be amiss if no mention were made that nine US states have adopted community property as the default method for spouses to hold property during marriage. These states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. In general, community property includes all property acquired during a marriage. Property acquired before the marriage (at least if kept separate from community property) and property acquired by inheritance during the marriage are generally kept separate from the

community. Upon death, the community property is divided equally between the deceased spouse's estate and the surviving spouse. California 'community property' law also includes, in the case of California domiciliaries who move to California from non-community jurisdictions, provisions to treat property acquired during the period in which the spouses may have lived in a separate property jurisdiction as part of the community ('quasi-community property'). Interesting choice-of-law issues can arise regarding the ownership of property acquired by a married couple while living in a community property state, who later move to a separate property state. New York respects the character of community property when it is brought into New York. New York Estates, Powers, and Trusts Law (EPTL) sections 6-6.1–6-6.7 aim to achieve that purpose when dealing with the estate of a deceased spouse and represent New York's adoption of the Uniform Disposition of Community Property Rights at Death Act.

US approaches to non-US forced heirship claims

State laws prohibiting enforcement of forced heirship claims

Some states of the USA have adopted legislation that prohibits the enforcement of forced heirship claims, mainly in the context of trusts. Thus, Delaware and South Dakota each expressly exclude forced heirship claims from the claims that creditors can take against 'qualified dispositions in trust' (ie Delaware's and South Dakota's respective form of asset protection trust).⁴⁸ New York law for many years has provided that:

[w]henver a person, not domiciled in this state, creates a trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and

47. *ibid* s 2-301.

48. Del Statutes Title 12, s 3573; South Dakota Statutes, c 55-16-15.

interpretation of the disposition in such trust of: (1) [a]ny trust property situated in this state at the time the trust is created, [and] (2) [p]ersonal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.⁴⁹

Basic principles under the Restatement (Second) of Conflict of Laws

The Restatement (Second) Conflict of Laws attempts to summarize and express the essence of the rules about choice-of-law in inheritance matters followed by US jurisdictions. The general scheme under the Restatement is to first designate the courts whose laws (presumably including their law about choice of law) would apply to questions about the disposition at death of immovable and moveable property. In virtually every instance, the Restatement goes on to say that the courts whose laws would not apply would generally apply their own local law to the relevant issues. This implicitly means that the law that would ultimately govern these issues would be dependent on a reference to the law of another jurisdiction, from which issues of remission ('renvoi') or transmission might arise. It therefore also puts into question whether a testamentary election by a US citizen domiciled in a country subject to the European Succession Regulation to have the law of the USA apply to his/her succession would be respected by a state that follows the Restatement approach.

Dispositions of land

In general, under the Restatement, dispositions of real property, whether by Will (section 239) or by intestacy (section 236) are 'determined by the law that would be applied by the courts of the situs' and 'these courts would usually apply their own local

law in determining such questions'. As pointed out in the comment to section 239:

[t]hese courts would usually apply their local law in deciding questions relating to a testamentary disposition of an interest in local land. They would do so in case of issues in which the situs has the dominant interest... and would also frequently apply their local law to issues in which it might be thought that the situs does not have a dominant interest, such as what categories of persons may own land, the conditions under which land may be held and the uses to which land may be put.

As far as the construction of a Will that disposes of an interest in land, the rules of construction designated in the Will would generally apply but, in the absence of such designation, the Will would be construed in accordance with the rules of construction that would be applied by the courts of the situs.

Interestingly, the Restatement refers to surviving spouses' elective shares as 'forced shares'. Under section 242:

[t]he forced share interest of a surviving spouse in the land of the deceased spouse is determined by the law that would be applied by the courts of the situs.

Similarly:

[w]hether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share or dower interest in the land of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the situs.

In both instances, the Restatement concludes:

[t]hese courts would usually apply their own local law in determining such questions.

49. NY EPTL s 7-1.10.

If we analogize the rule of section 242 to a forced share claim made by a child or other relative of a deceased person, it would appear that the courts of the *situs* can be expected to apply their own local rules. In the 49 states of the USA that do not recognize forced heirship claims for children (save for generally modest provisions under homestead allowances and exempt property rules), one would expect that such forced share claims would not be recognized in respect of real property located in those states and that, in Louisiana, such claims would be recognized, if at all, only to the extent recognized under Louisiana law.

Dispositions of movable property

In general, under the Restatement, dispositions of interests in moveable property by Will (section 263) as well as by intestacy (section 260):

are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.

As to dispositions by Wills:

[t]hese courts would usually apply their own local law in determining such questions.⁵⁰

As to intestacy, the comment to section 260 observes that:

[p]rovided that they apply the common law rules of choice of law, the courts of the state where the decedent was domiciled at the time of his death would look to their local law to determine what categories of persons are entitled to inherit upon intestacy

but that:

these courts might look to the local law of some other state to determine whether a particular person

claiming a share in the moveables of an intestate belonged to such a category.

As far as the construction of a Will disposing of an interest in moveables is concerned, according to section 264, the rules of construction adopted in the Will would generally apply but, in the absence of such designation, the Will would be construed in accordance with the rules of construction of the domicile of the testator at the time of the testator's death.

Under section 265:

[w]hether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share interest in the moveables of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of his death.

The comments conclude that:

[t]hese courts would usually apply their own local law in determining such questions

but also:

would usually determine whether a person is a 'widow' within the meaning of their local statute regulating forced shares in accordance with the law governing the validity of marriage . . . [and] might determine the effect of an agreement not to claim a forced share in accordance with the law governing the agreement.

There is an inherent tension in applying section 263 to the situation of moveable property over which a US court may have jurisdiction but which is part of the estate of a domiciliary from outside the USA. States like New York clearly contemplate that the fiduciary of a New York ancillary administration of a non-US

50. s 263(2) of the Restatement.

decedent's estate could transfer the assets to the estate administration in the non-US domicile so that the assets may be distributed as part of the general estate according to the dispositive documents and laws of that jurisdiction.⁵¹ In the case where the ancillary administrator distributes the assets directly to the testamentary beneficiaries, section 263 would seem to require that the law of the decedent's domicile should govern as if the administration were being conducted in the domiciliary jurisdiction. Assuming this is correct, applying section 265 by analogy to the forced share claims of a non-US decedent's children or other relatives, it would seem that the law of the decedent's domicile (including its rules of forced heirship) can and should be given effect.

Principles of New York law

Statutory provisions

The principal choice-of-law rules in New York state for dispositions under Wills having relations to other jurisdictions are contained in the very detailed provisions of section 3-5.1 of the EPTL.

- a. As a preliminary matter, the statute makes a distinction between the 'interpretation' of a Will and the 'effect' of a disposition under a Will:

Interpretation' means:

the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the testator where his intention is not otherwise ascertainable.⁵²

'Effect', on the other hand, means:

the legal consequences attributed under the law of a jurisdiction to a valid testamentary disposition.⁵³

- b. The 'interpretation' and the 'effect' of a testamentary disposition of real property are to be determined by the law of the jurisdiction in which the land is situated.⁵⁴ EPTL section 3-5.1(a)(1) defines 'real property' as:

land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon,

but EPTL section 3-5.1(i) provides that, notwithstanding the definition just cited:

whether an estate in, leasehold of, fixture, mortgage or other lien on land is real property governed by [EPTL section 3-5.1(b)(1)] or personal property governed by [EPTL section 3-5.1(b)(2)] is determined by the local law of the jurisdiction in which the land is situated.

- c. The 'interpretation' of a testamentary disposition of personal property is to be made in accordance with the local law of the jurisdiction in which the testator was domiciled at the time the Will was executed.⁵⁵ EPTL section 3-5.1(a)(7) defines 'local law' as:

the law which the courts of a jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction.

- d. The 'effect' of a testamentary disposition of personal property (and the manner in which such property devolves when not disposed of by Will) is to be determined by the law of the jurisdiction in which the decedent was domiciled at death.⁵⁶
- e. The 'effect' of a presently exercisable general power of appointment is governed by the law of

51. See NY SCPA s 1610(4).

52. NY EPTL s 3-5.1(a)(6).

53. *ibid* s 3-5.1(a)(5).

54. *ibid* s 3-5.1(b)(1).

55. *ibid* s 3-5.1(e).

56. *ibid* s 3-5.1(b)(2).

the jurisdiction in which the donee of such power was domiciled at the time of death.⁵⁷

- f. The effect of a general power of appointment exercisable by Will alone or a special (ie limited) power of appointment is governed: (i) in the case of a power created by Will, by the law of the jurisdiction in which the donor of the power was domiciled at death; (ii) in the case of a power created by an *inter-vivos* disposition, the law of the jurisdiction that the donor intended to govern the disposition; and (iii) in the case where the donor was the donee of a general power of appointment exercisable by Will alone, the law of the jurisdiction in which the donor of the power was domiciled at the time of death.⁵⁸
- g. EPTL section 3-5.1(h) contains the well-known provision that allows a non-New York domiciliary to vary the rule of EPTL section 3-5.1(b)(2) with regard to personal property located in New York State (as well as vary the principle set forth in Restatement section 263) by providing that:

[w]henever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state.

Application

- a. It should be noted that EPTL sections 3-5.1(b)(1) (providing that the 'effect' of a testamentary disposition of land should be governed by the 'law' of the jurisdiction in which the land is situated) and 3-5.1(b)(2) (providing that the 'effect' of a testamentary disposition of personal property

should be governed by the 'law' of the jurisdiction in which the decedent was domiciled at death) do not foreclose the possibility that a New York court could look to the 'whole law' of the jurisdiction in question (ie, the totality of that jurisdiction's laws, including its conflict-of-laws rules) because these provisions use the term 'law' rather than 'local law' as defined in EPTL section 3-5.1(a)(7). When the latter term is used, such as in EPTL section 3-5.1(h), the law of the designated jurisdiction is clearly to be applied as if the legal questions governed thereby had no relation to any other jurisdiction and therefore no choice-of-law issue could emerge.

- b. The enactment of the New York statute in the 1960s came in the wake of two influential 20th-century decisions of the New York County Surrogate's Court: *Re Tallmadge* and *Re Schneider's Estate*. *Re Tallmadge* (a/k/a *Re Chadwick's Will*),⁵⁹ was a case involving the disposition of the property of a US citizen who had resided in France at the time of his death and at a time when France looked to the law of nationality as governing law for succession; the New York Surrogate strongly rejected the application of *renvoi* to apply French law rather than New York law in the New York administration on the basis that the doctrine would create an 'indefinite oscillation' between the laws of the two jurisdictions. That rejection was strongly criticized in *Re Schneider's Estate*,⁶⁰ a case involving the disposition of the proceeds of sale of Swiss real property (sold after the death of the decedent who was a dual US–Swiss national, domiciled in New York at the time of his death), which was brought into the New York administration after the sale. Here, the Surrogate's Court, putting itself 'in the shoes' of a Swiss court, looked to the whole law of Switzerland and accepted *renvoi* from Switzerland because, it concluded, a

57. *ibid* s 3-5.1(g)(1).

58. *ibid* s 3-5.1(g)(2).

59. 181 NYS 336 (Surr Ct NY Cty 1919).

60. 96 NYS 2d 652 (Surr Ct NY Cty 1950).

Swiss court, under Switzerland's then conflict-of-laws principles, would defer, in the case of a decedent with a non-Swiss nationality, to the law of the decedent's domicile both for real property as well as personal property. In so doing, the Court believed it showed how *renvoi* could be applied without falling into the trap of the 'indefinite oscillation' between legal systems adduced by the *Tallmadge* Court.⁶¹

- c. The fact that EPTL section 3-5.1(h) provides that the 'effect' of a testamentary disposition of real property for which the testator has directed the application of New York law should be resolved by the 'local law' of New York, even if the testator dies a non-domiciliary of New York, serves to make very secure the elective 'shield' New York law offers against claims of forced heirship to non-New York domiciliaries over New York property. The leading case construing EPTL section 3-5.1(h) is *Re Renard*,⁶² in which Surrogate Midonick (cited earlier in this article) dismissed the forced heirship claim of the son of a French domiciliary who disposed of her New York property by a Will under which she directed the disposition of her New York property to be governed by New York law. Over the years since the *Renard* decision, there has been some concern that a set of circumstances could develop where the construction of EPTL section 3-5.1(h) in *Renard* could be upended, on the presentation of a suitable set of circumstances, by the choice-of-law method that the New York Court of Appeals endorsed in *Re Clark*.⁶³ In the latter case, the New York Court of Appeals, using the contacts and interest analysis typical of so-called 'modern' conflict-of-laws analysis, determined that the elective share claim of the spouse of a Virginia decedent who had directed the disposition of his

New York property be governed by New York law should in fact be governed by Virginia law. The statutory provision in effect in 1968 was the predecessor of EPTL section 3-5.1(h) but it referred only to the 'law' of New York rather than, as does the current statute, to the 'local law' of New York. The definition of 'local law' in the current statute, as already noted, seems by its terms to preclude the application of New York conflict-of-laws principles and therefore, in any cases where EPTL section 3-5.1(h) applies because a non-New York domiciliary has directed that New York law govern the disposition of New York property, any claim of forced heirship should be denied.⁶⁴

- d. However, in a case involving the disposition of New York personal property by a non-New York decedent who has not taken advantage of EPTL section 3-5.1(h), it appears that a forced heirship claim with regard to testamentary dispositions of New York property could be sustained but here, as noted above, one must pay close attention to the references in EPTL section 3-5.1(b) to the 'law' of the *situs* of real property and the 'law' of the domicile of personal property—which, unlike EPTL section 3-5.1(h), are not limited to the 'local law' of either property or domicile. Thus, the provision of EPTL section 3-5.1(b)(2) directing the application of the laws of the domicile of the decedent to personal property appears to open wide the door to an analysis of the choice-of-law rules of foreign jurisdictions of applicable *situs* or domicile and the acceptance of 'renvoi' back to New York in pertinent cases. That this was the intent behind the statute is evidenced by the foundational study for the current New York statute—a report of I. Leo Glasser and Samuel Hoffman to the State Commission that essentially rewrote much of New York's

61. More recently, Surrogate Kristin Booth Glen, in *Re Chappell*, 883 NYS 2d 857 (Surr Ct NY Cty 2009), a case involving a postponed general power of appointment (for which NY EPTL s 3-5.1 does not provide a choice-of-law rule), noted the traditional rejection of the doctrine of 'renvoi' in New York jurisprudence, but concluded that 'the present state of the law requires a more complex analysis to resolve the choice of law issue'.

62. See n (9).

63. 288 NYS 2d 993 (NY 1968).

64. It should be noted that a testator, by invoking the provisions of EPTL s 3-5.1(h), also confers on a surviving spouse who is not domiciled in New York a right of election over the testator's property situated in New York. EPTL s 5-1.1-A(c)(6).

statutory estate law in the 1960s, which states that the:

effect... of dispositions of real property... should be governed by the law of the situs of the property (including its conflict of laws)

and the:

effect... of a testamentary disposition of personality... should be governed by the law of the testator's last domicile (including its conflict of laws) (emphasis added).⁶⁵

Whether a New York court would simply apply a form of 'single reference renvoi' and accept a reference back to the law of New York in the case of a US citizen domiciled in a country whose choice-of-law rules defers to the law of nationality is not entirely clear, granted what one suspects is the lingering aversion for classical choice-of-law analysis exemplified in *Tallmadge*. One wonders if some courts might still feel compelled to test the 'reference back' under the 'modern' conflict-of-laws analysis involving the balancing of the interests of the relevant jurisdictions, in the manner of *Re Clark*.

- e. This issue now takes on even greater relevance in the wake of the adoption of the European Succession Regulation,⁶⁶ which offers to US citizens domiciled in most countries of the European Union the option of electing as the law of their succession the law of the USA, based on their nationality,⁶⁷ which (because the USA does not have a national law of inheritance or conflict-of-laws rules governing succession) would constitute

for each such US citizen a choice of the law of the state of the USA to which that US citizen had the closest connection.⁶⁸ Assuming that the European Succession Regulation is considered a 'choice-of-law' statute rather than a substantive law statute, it appears to this writer that a New York court, in considering a choice of New York law by a US citizen domiciled in a European country to which the Regulation applies in circumstances not covered by EPTL section 3-5.1(h), should, pursuant to EPTL section 3-5.1(b), consider the 'whole law' of the US citizen's non-US domicile and accept a reference back to New York law as long as that US citizen had the closest connection to New York among the jurisdictions that make up the USA.⁶⁹ Interestingly, the European Succession Regulation suspends the concept of 'renvoi' where the individual elected in his/her Will to have the law of his nationality apply to his/her succession,⁷⁰ so that a choice of US law, by virtue of one's nationality, by a US citizen whose closest connection among US jurisdictions was to New York would clearly be an election of the substantive law of New York and thus eliminate any danger of the 'indefinite oscillation' between legal systems about which the *Tallmadge* Court was so troubled.

- f. It should be noted, as a final point, that there is a long line of New York cases disallowing foreign law claims, including forced heirship claims, against lifetime dispositions of New York property by non-New York domiciliaries. In a very sweeping 2009 decision, *Re Meyer*,⁷¹ the Appellate Division for the First Department, relying on a line of Court of Appeals and other cases, held that gifts of New York property made during lifetime by a person who was allegedly a

65. 'The Decedent's Estate Law as Affected by Conflicts of Law Considerations'. Fifth Report of the Temporary New York State Commission on the Modernization, Revision and Simplification of the Law of Estates (1966) 610, 658.

66. Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

67. See art 22 of the European Succession Regulation.

68. *ibid* art 36(2)(b).

69. *ibid* art 36.

70. *ibid* art 34(2).

71. 876 NYS 2d 7 (App Div 1st Dept 2009).

French domiciliary at the time she made the gifts were not subject to forced heirship claims because:

the validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer.

The Court went on to say that:

[w]e perceive no valid policy distinction that would allow a nonresident testator to avoid French heirship claims by invoking New York law with respect to assets physically situated in New York . . . but not with regard to previous inter vivos transfers of assets physically situated [in New York].

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