

A Fight Over Estate Jurisdiction

By Nicholas Rafferty

Cases Considered:

[*Re Foote \(Estate Of\)*, 2007 ABQB 654](#)

Introduction

Conflicts scholars tend to be fascinated with choice of law problems and the methods for their resolution. Most theoretical work has been directed towards the choice of law question and the basis on which foreign law is applied by local courts. In his classic *Conflict of Laws* (2nd ed. 1954), Falconbridge spoke barely a word on issues of jurisdiction. Indeed, he stated that the scope of the subject of the conflict of laws . . . does not cover the topic of jurisdiction of courts and the related topic of the enforcement of foreign judgments@ (p. 6).

It should be stressed, however, that disputes in private international law normally involve contests over the existence and the exercise of jurisdiction. Parties are simply fighting over the forum in which their dispute should be heard. Since 1990 the Supreme Court has issued a series of decisions that have radically re-shaped the subject: see *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 (S.C.C.); *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.); *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289 (S.C.C.); *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1 (S.C.C.); *Pro Swing Inc. v. Elta Golf Inc.* (2006), 273 D.L.R. (4th) 663 (S.C.C.). Only one of these cases, however, *Tolofson*, raised a choice of law question. The others addressed issues of jurisdiction, both domestic and in the context of the enforcement of foreign judgments. Therefore, the recent decision of Justice Robert A. Graesser of the Alberta Court of Queen's Bench in *Re Foote (Estate of)*, 2007 ABQB 654, is typical. Indeed, *Foote* was even further removed from the ultimate choice of law question because the fight was simply over the appropriate forum to determine a testator's domicile at death rather than the appropriate forum to resolve the underlying issues. The court, however, never made clear the significance of the testator's last domicile and one can only speculate.

Facts

The testator, Eldon Douglas Foote, was born in Alberta in 1924. He was educated and practised law there until 1967. He then moved away and lived in Japan and on Norfolk Island for many years before his death in 2004 in Edmonton, Alberta. He died an extremely wealthy man. The bulk of his estate was in the British Virgin Islands. He also left some property in Norfolk Island and British Columbia and a cottage, plus its contents, in Alberta. Foote made three wills, all of which were executed in Edmonton within a year of his death. One will dealt with his Canadian assets and it had been probated in Alberta. A second disposed of his property in Norfolk Island

and it had been probated there. A third dealt with his substantial remaining assets and it had been probated in the British Virgin Islands. Each will contained a provision (a Poison pill clause) to the effect that any gift to a beneficiary who contested the provisions of the will would be revoked. The testator appointed a long time friend who lived in Alberta as his executor. The testator's widow and five of his children were considering applying for family relief. To that end, they sought advice from the court as to (1) the interpretation and validity of the poison pill clause and (2) the testator's domicile at the time of death. The present case involved an application by the Lord Mayor's Charitable Fund, a charitable foundation of Melbourne, Australia, which was a beneficiary under the Norfolk Island will and an indirect beneficiary under the British Virgin Islands will. It was seeking a declaration that the Alberta court had no jurisdiction, or should decline jurisdiction, to deal with the issue of domicile. It argued that Norfolk Island had the closest connection to a hearing to determine the testator's last domicile and, therefore, that Norfolk Island was the appropriate forum. The Fund's standing to make such an application was unclear but the executor supported the application and the widow and children ultimately raised no objection.

Relevance of Testator's Domicile

Foote bears some similarity to the earlier Alberta case of *Gillespie v. Grant* (1992), 4 Alta. L.R. (3d) 122 (Surr. Ct.). In *Grant*, the court was also called upon to determine whether or not Alberta was the appropriate forum for the determination of where a testator was domiciled at death. In *Grant*, however, the court was crystal clear as to why the location of the testator's domicile was relevant. In contrast, in *Foote* Justice G. gave no indication as to the importance of the deceased's domicile at death. Apparently, three potential substantive questions were raised: (1) the validity of the poison pill clause, (2) the interpretation of the poison pill clause, and (3) the availability of family relief to the widow and children.

Validity of Poison Pill Clause

It is true that the validity of a will, or of some provision therein, is governed by the law of the testator's domicile at death, but only with respect to movables (basically personal property): see *Wills Act, R.S.A. 2000, c. W-12, s. 39(3)*. In the case of immovables (land), the validity of a provision in a will is referred to the law of the place where the land is situated: *Wills Act, s. 39(2)*. Interestingly, in *Foote* itself the primary asset of the estate in Alberta was an immovable, a cottage. On this basis, at least with regard to the Alberta estate, Foote's domicile at death was only marginally relevant.

Interpretation of Poison Pill Clause

The general rule is that a will is to be construed in accordance with the system of law intended by the testator. In the absence of contrary intention, that law is presumed to be the law of the testator's domicile. Moreover, this presumption applies to provisions dealing with both movables and immovables: *Re Fulford Estate* (1996), 146 Nfld. & P.E.I.R. 248 (P.E.I.S.C.). The testator's domicile, however, is to be determined at the time of execution of the will and not at the time of death. On this basis, Foote's domicile at death was not relevant at all.

Application for Family Relief

An application for family relief raises some interesting conflict of laws questions. The relevant statute in Alberta is the Dependents Relief Act, R.S.A. 2000, c. D-10.5. That statute contains no

conflicts provisions. It is not even restricted, as is some similar legislation, to cases where the deceased died domiciled in Alberta. There is, however, authority for the view that claims under this sort of legislation are regarded as relating to the essential validity of wills because such statutes limit the disposing power of testators. Thus, the courts have held that a judge, in making an order under family relief legislation, can just affect property that is governed by the forum's law, namely, land situated in the forum and movables where the testator died domiciled in the forum. For this reason, the court in *Re Corlet*, [1942] 2 W.W.R. 93 (Alta. S.C.), held that a widow could not bring a claim under Alberta's family relief legislation because her husband had died domiciled outside Alberta and his entire estate consisted of movables.

On this basis, the Alberta cottage would be available for the purposes of family relief irrespective of where the testator was domiciled at death. If Foote did in fact die domiciled in Alberta, then the court could resort to his movable property. The problem is that he left few movables in Alberta. If a court in exercising its family relief jurisdiction purported to affect the movables situated in Norfolk Island and the British Virgin Islands, then difficult questions would be raised as to whether, and the extent to which, such a determination would be recognized outside Alberta.

Forum Non Conveniens: Juridical Advantages

Foote illustrates the fact that normal principles of forum non conveniens apply in the context of succession as in any other context: see also *Gillespie v. Grant*, above. One of the Fund's arguments as to why Norfolk Island was clearly the more appropriate forum for the determination of the testator's domicile was that a party's domicile is governed by the law of the forum and a Norfolk Island court applying Norfolk Island law would be more likely to conclude that Foote died domiciled in Norfolk Island. That is probably correct on the facts as we know them. Alberta still follows the bizarre common law rule whereby, upon the abandonment of a domicile of choice, the domicile of origin revives to fill the gap until a new domicile of choice is acquired. On that basis, there was a good chance that Foote died domiciled in Alberta. In contrast, Norfolk Island has adopted the reforms enacted in Australia pursuant to which an existing domicile of choice remains until it has been replaced by a new domicile of choice. The Fund's argument seems to have been that it would incur a juridical disadvantage if domicile were determined by an Alberta court. There is no indication from the judgment, however, nor curiously any argument made by the Fund, that the law of Norfolk Island was more favourable to the Fund than Alberta law on the underlying substantive testamentary issues.

Conclusion

Overall, one is left wondering what the fight was all about and whether the high-priced legal talent on show could have been better employed. First, it was not clear to what extent the law of the testator's last domicile was even relevant. Secondly, it was not clear how the domestic testamentary laws of Alberta and Norfolk Island differed, if at all. Thirdly, it was not clear to what extent an Alberta court could realistically expect to affect the bulk of the estate which was located outside Alberta.