

# Family Provision across Borders

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## Abstract

It takes little for family provision claims to cross borders, whether state or national. The property may be located in different places — other states or countries; the personal representatives, claimants or beneficiaries under the will may be from different places; or the deceased may have had a strong personal connection with another place. Any one of those cross-border considerations raises questions of a court's jurisdiction to deal with a family provision application, or of the law that will apply to it. In this article, we give an account of the principles of private international law — which in this area also apply in interstate matters — that affect family provision claims in Australia. In doing so, we explore recurrent complications with these cross-border family provision claims, including those arising under the cross-vesting scheme and in the federal jurisdiction. While we consider that the current equitable principles of choice of law remain best placed to address how provision should be made from different forms of property, reforms must be made to the equitable principles of jurisdiction if complications raised by the cross-vesting scheme and the possible exercise of federal jurisdiction in family provision claims are to be overcome.

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## I Introduction

Australia and other common law countries in the Commonwealth have long made opportunities available for spouses and children (and other dependants — by a judge’s decision) to receive property from a deceased estate when a will or intestacy rules did not provide for this. Family provision laws, or testator’s family maintenance, are a late 19<sup>th</sup>-century New Zealand invention.<sup>1</sup> From 1906, these laws were gradually, but not uniformly, adopted by the Australian states and territories.<sup>2</sup> Subsequently, there was broad, but far from universal, uptake of family provision laws across the common law Commonwealth.<sup>3</sup> Family provision laws are just one means by which countries might prioritise the moral claims that dependants have on a former breadwinner’s estate over the will-maker’s autonomy.<sup>4</sup> In other countries, the competing claims of will-makers, state-directed distributions on intestacy and dependants are often addressed differently. The spouse or child might have a ‘forced share’ or ‘compulsory portion’ of the estate: a minimum proportionate entitlement to the property.<sup>5</sup> The legal system may have a scheme of marital or community

<sup>1</sup> *Testator’s Family Maintenance Act 1900* (NZ). See Rosalind Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900: The Stouts, the Women’s Movement and Political Compromise’ (1990) 7 *Otago Law Review* 202.

<sup>2</sup> Titles of the original statutes are given here in chronological order: *Widows and Young Children Maintenance Act 1906* (Vic); *Testator’s Maintenance Act 1912* (Tas); *Testator’s Family Maintenance Act 1914* (Qld); *Testator’s Family Maintenance and Guardianship Act 1916* (NSW); *Testator’s Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance 1929* (ACT) pt VII; *Testator’s Family Maintenance Ordinance 1929* (NT).

<sup>3</sup> Canada (statute titles in chronological order): *Married Women’s Relief Act*, SA 1910 (2<sup>nd</sup> Sess), c 18 (Alberta); *An Act to Amend the Devolution of Estates Act*, SS 1910–11, c 13 (Saskatchewan); *Testators’ Family Maintenance Act*, SBC 1920, c 94 (British Columbia); *Dependants’ Relief Act*, SO 1929, c 47 (Ontario); *Testators’ Family Maintenance Act*, SNS 1956, c 8 (Nova Scotia); *Testators Family Maintenance Act*, SNB 1959, c 14 (New Brunswick); *Family Relief Act*, SN 1962, No 56 (Newfoundland); *Dependants’ Relief Ordinance*, SY 1962 (1<sup>st</sup> Sess), c 9 (Yukon); *Dependants Relief Ordinance*, SNWT 1971 (2<sup>nd</sup> Sess), c 5 (Northwest Territories); *Testator’s Dependants Relief Act*, SPEI 1974, c 47 (Prince Edward Island). England and Wales: *Inheritance (Family Provision) Act 1938* (UK); Northern Ireland: *Inheritance (Family Provision) Act (Northern Ireland) 1960* (UK). See also Bora Laskin, ‘Dependants’ Relief Legislation: The Inheritance (Family Provision) Act 1938’ (1939) 17 *Canadian Bar Review* 181, 181–2.

<sup>4</sup> See J Gareth Miller, ‘Family Provision on Death: The International Dimension’ (1990) 39(2) *International and Comparative Law Quarterly* 261; Anthony Gray, ‘Family Provision Applications: A Critique’ (2017) 91(9) *Australian Law Journal* 750.

<sup>5</sup> International examples abound, particularly among civil law systems: see, eg, Cécile Pérès, ‘Compulsory Portion in France’ in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmerman (eds), *Mandatory Family Protection* (Oxford University Press, 2020) vol 3, 78; Alexandra Braun, ‘Forced Heirship in Italy’ in Reid, de Waal and Zimmerman (eds) at 108; Sergio Cámara Lapuente, ‘Forced Heirship in Spain’ in Reid, de Waal and Zimmerman (eds) at 139; Jan Peter Schmidt, ‘Forced Heirship and Family Provision in Latin America’ in Reid, de Waal and Zimmerman (eds) at 175; Reinhard Zimmerman, ‘Mandatory Family Protection in the Civilian Tradition’ in Reid, de Waal and Zimmerman (eds) at 648. The *ius relictæ* and the children’s *legitim* of Scots law are the most familiar to common law courts (the *ius relictæ* requiring a surviving wife to be given a one-third to one-half share of her husband’s estate): see, eg, *Naismith v Boyes* [1899] AC 495; *Re Douglas*; *Umphelby v Douglas* (1909) 9 SR (NSW) 269. Sharia provides for forced shares for wives and children: see, eg, *Haque v Haque* [No 1] (1962) 108 CLR 230 (‘*Haque* [No 1]’).

property that denies an individual a complete testamentary power to distribute it.<sup>6</sup> Some property may simply be inalienable.<sup>7</sup> Even where the means of striking this balance is family provision laws, there are differences between countries and states as to who is entitled to make a claim.<sup>8</sup> Furthermore, different courts may be prepared to make distributions from modest estates or to relatives who are relatively wealthy.<sup>9</sup>

It takes little for family provision claims to cross borders, whether state or national. The property may be located in different places. The personal representatives, claimants or beneficiaries under the will may be from different places. The deceased may have had a strong personal connection with another place. Any one of those cross-border considerations can give rise to questions of a court's jurisdiction to deal with an application, and of the law that will apply. Our article, therefore, gives an account of the principles of private international law — which in this area also apply in interstate matters — that affect family provision claims in Australia.<sup>10</sup> At no point do we enter into questions of the substantive law of family provision. Private international law is adjectival in the sense that it provides the structure within which claims are considered but does not supply the dispositive law by which courts address the merits of those claims. Indeed, private international law is increasingly seen as enabling the prior issues about where to litigate and what law to apply to be addressed without reference to the merits — in a practical sense, often giving a clearer legal context for the settlement of claims.<sup>11</sup>

In this article, we therefore locate family provision laws inside broader considerations of adjudicative jurisdiction and applicable law (or 'choice of law'). No Australian family provision statute<sup>12</sup> gives a hint as to how these principles of jurisdiction and applicable law can confine its operation. In the past, family provision laws have given what turned out to be misleading indications as to when a court could deal with provision from out-of-state property. Indeed, in the early evolution of cross-border family provision law, it is sometimes unclear whether a judge considered that the court's power to make provision from out-of-state property was limited by jurisdictional considerations or applicable law rules.

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<sup>6</sup> Community property schemes are commonly found in civil law countries: see generally Eugen Dietrich Graue, 'The Rights of Surviving Spouses under Private International Law' (1966–67) 15(1–2) *American Journal of Comparative Law* 164; Michael W Galligan, 'International Estate Planning for US Citizens: An Integrated Approach' (2009) 36(10) *Estate Planning* 11, 12–13.

<sup>7</sup> For an account of different regimes, see Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (West, 6<sup>th</sup> ed, 2018) 1266–8.

<sup>8</sup> For example, in New South Wales any child can make a claim: *Succession Act 2006* (NSW) s 57 ('*NSW Act*'). But in Victoria only children who are under 18 (or, if students, under 25) or who have a disability may make a claim: *Administration and Probate Act 1958* (Vic) ss 90, 90A ('*Vic Act*'). This is a longstanding policy difference: cf Australian Law Reform Commission, *Choice of Law* (Report No 58, March 1992) 110 [9.6].

<sup>9</sup> Anthony Dickey, *Family Provision after Death* (Law Book Company, 1992) 138–45; Leonie Englefield, *Australian Family Provision Law* (Lawbook Co, 2011) 119–22; John de Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2021) 110–24.

<sup>10</sup> For an earlier account of this question, see David St Ledger Kelly, 'Testator's Family Maintenance and the Conflict of Laws' (1967) 41(8) *Australian Law Journal* 382.

<sup>11</sup> *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 468.

<sup>12</sup> With the possible exception of New South Wales legislation: see below nn 99–107 and 139–147 and accompanying text.

In Part II, therefore, we introduce the basic structure of territorial limitations on family provision law: the principle of scission. This principle requires the different treatment of issues concerning movable property and of those concerning immovable property. In brief, succession to movable property is governed by the law of the deceased's domicile (*lex domicilii*) and succession to immovable property by the law of the place where the property is situate (*lex situs*). The principle of scission governs the whole of Australian cross-border succession law — whether that arises in probate jurisdiction or the equitable jurisdiction relating to the administration and distribution of estates. It dictates different jurisdictional capacities and legal approaches for dealing with property classified as movable or immovable.

In Part III, we deal with applicable law in family provision claims — the law selected by equitable choice of law rules to determine the issues in dispute. Efforts at modifying these equitable choice of law rules are also entwined with a second territorial limitation on the reach of family provision laws: the constitutional limitations on state and territory powers to legislate extraterritorially. It is not usual in private international law to deal with applicable law before questions of adjudicative jurisdiction, but the issues we consider in Parts II and III have implications for Australian courts' jurisdiction to decide family provision claims. We therefore consider adjudicative jurisdiction in Part IV, where the additional complications arising under the cross-vesting scheme and in federal jurisdiction will also be explored. In Part V, we make recommendations about the best direction for the law.

## II Fundamental Structure: Scission

The shape of Australian cross-border law for family provision reflects the shape of cross-border succession law in general. It is still structured by the principle of scission and that principle's unqualified distinction in English probate and equitable jurisdictions between the reliance on domicile for questions relating to movable property, and *situs* (or location) for immovable property. Furthermore, there is a strong identity in cross-border family provision between those connections that identify applicable law and those that ground adjudicative jurisdiction. The (also unqualified) alignment of applicable law and jurisdiction is typical of the handling of cross-border suits within a court's equitable jurisdiction — so much so that it is sometimes unclear in early family provision applications whether a statute is being applied because it is selected by applicable law rules or because the applications are within the court's jurisdiction.<sup>13</sup> In the development of classical equitable doctrine, the distinction between applicable law and jurisdiction was sometimes irrelevant.<sup>14</sup>

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<sup>13</sup> This is because terms referring to jurisdiction and applicable law rules or 'making provision' out of the estate are used interchangeably — see, eg, *Pain v Holt* (1919) 19 SR (NSW) 105, 106–7; *Re Found*; *Found v Semmens* [1924] SASR 236, 240 ('*Found*'); *Re Osborne* [1928] St R Qd 129, 130–1 ('*Osborne*') — or they are not used at all: *Re Stewart* [1948] QWN 11 ('*Stewart*').

<sup>14</sup> This was especially the case when domicile was the connection for applicable law: see, eg, *Enohin v Wylie* (1862) 10 HL Cas 1, 15–16. A divergence between jurisdiction and applicable law was more likely where interests in real estate were in issue: see, eg, *Nelson v Bridport* (1846) 8 Beav 547; 50 ER 215.

Yet the cost-efficiency of family provision litigation — and, in Australia, constitutional and legislative principles of jurisdiction — mean that the distinction must be made.

The principle of scission creates different regimes for questions relating to movable property on the one hand, and immovable property on the other.<sup>15</sup> Australian courts have traditionally insisted in strong terms on maintaining the scission (or separation) of property regimes in cross-border succession law. In *Lewis v Balshaw*, the High Court of Australia endorsed the view that a grant of probate made in England — the testatrix's place of domicile (*forum domicilii*) — was valid only for movable property located outside England; insofar as immovable property outside England was concerned, it was invalid.<sup>16</sup> The estate included movable and immovable property in New South Wales, including land. The trial judge in New South Wales, Nicholas J, considered that 'convenience and international comity' justified a unitary grant of probate — giving plenary effect to the grant made in the *forum domicilii*.<sup>17</sup> This entitled the English executor to deal with land in New South Wales. The High Court categorically rejected that view,<sup>18</sup> refusing to recognise the grant to the extent that it admitted a power to deal with land and other immovables. Rich, Dixon, Evatt and McTiernan JJ said: 'no forum but the *forum situs* and no law but the *lex situs* can govern the title to land. Considerations of convenience and of comity could not, and have not, overcome this rule.'<sup>19</sup>

Certain practicalities, particularly relating to the disposition of land, motivate not only the scission of an estate, but also its being addressed by two or more, potentially different, applicable laws. This may give rise to *depeçage* — that is, the application of different places' laws to different assets of the estate. However, even in *Lewis v Balshaw*, the High Court recognised the inconvenience of the principle,<sup>20</sup> and law reform agencies have consistently recommended dealing with the estate under principles of 'unitary succession'. The Hague Conference on Private International Law, on concluding its *Convention on the Law Applicable to Succession* ('*Succession Convention*') in 1989,<sup>21</sup> recommended a single applicable law for all succession claims — including family provision.<sup>22</sup> This Convention has not been ratified by a single country, and Australia has shown no interest in it. At first blush, the applicable law under the *Succession Convention* appears to be the law of the place of the deceased's habitual residence at the time of death, as long as the

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<sup>15</sup> Atle Grahl-Madsen, 'Conflict between the Principle of Unitary Succession and the System of Scission' (1979) 28(4) *International and Comparative Law Quarterly* 598; H Christian AW Schulze, 'Conflicting Laws of Conflict in Cases of International Succession' (2001) 34(1) *Comparative and International Law Journal of Southern Africa* 34; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2023) 565–7; Martin Davies, Andrew Bell, Paul Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2020) 775–81.

<sup>16</sup> *Lewis v Balshaw* (1935) 54 CLR 188.

<sup>17</sup> *Ibid* 194–5 (Rich, Dixon, Evatt and McTiernan JJ).

<sup>18</sup> *Ibid* 195, 198.

<sup>19</sup> *Ibid* 195.

<sup>20</sup> *Ibid* 195, 197.

<sup>21</sup> *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, opened for signature 1 August 1989 (not yet in force) ('*Succession Convention*').

<sup>22</sup> *Ibid* art 7(2)(a).

testator was also a national of that place. However, default laws and exceptions apply (but still to the whole estate) when nationality and habitual residence do not coincide. These can take the question of succession to the law of the place of nationality, the law of the place with which the deceased had his or her closest connection, or the law chosen by the deceased (so long as there is also a connection of nationality or habitual residence).<sup>23</sup> If the applicable law is that of a state not party to the *Succession Convention*, a transmission of the applicable law — a form of *renvoi*<sup>24</sup> — is permitted if that state's choice of law rules make the law of a second non-party state applicable.<sup>25</sup> The *Succession Convention* also allows *depeçage*, providing for the deceased to be able to choose different laws for application to different assets of the estate, the one estate thus being governed by multiple chosen applicable laws.<sup>26</sup> In 1992, the Australian Law Reform Commission ('ALRC') also endorsed a principle of unitary succession.<sup>27</sup> However, compatibly with its preference throughout the *Choice of Law* report for using the common law concept of domicile, the ALRC recommended that the applicable law for all questions of succession — including family provision<sup>28</sup> — would be the law of the place where the deceased was domiciled at the time of death.<sup>29</sup>

Still, greater care needs to be taken before endorsing these approaches. Even countries that claim to have schemes of unitary succession often make exceptions for land located in a foreign country,<sup>30</sup> which is not much different to the principle of scission. The Hague Conference and the ALRC prefer that the single applicable law is the *personal law* of the deceased, an applicable law that could simply prove unworkable when title to foreign land is involved. The legal disposition and management of land are usually questions in which state interests loom large — the control of land being the essence of state sovereignty.<sup>31</sup> In this respect, external efforts to control title to foreign land, or its use, through application of the residential law, the national law (*lex patriae*) or the *lex domicilii* may just be futile. In partial recognition of this, the *Succession Convention* displaces the law of the place of habitual residence where the *lex situs* dictates an inheritance regime for economic, family or social reasons.<sup>32</sup> This effectively recognises that scission cannot be completely eliminated from cross-border succession law. However, the *Succession Convention* also exemplifies the problem of efforts at reaching a regime of unitary succession. The complexity of an applicable law requiring the simultaneous assessment of habitual residence, nationality and the place of closest connection has little to commend it. In fact, the *Succession Convention's* allowance of *depeçage* is a denial of the objective of unitary succession. The ALRC was critical of the

<sup>23</sup> Ibid arts 3, 5.

<sup>24</sup> See below nn 117–133 and accompanying text.

<sup>25</sup> *Succession Convention* (n 21) art 4.

<sup>26</sup> Ibid art 6.

<sup>27</sup> Australian Law Reform Commission (n 8) 110–11.

<sup>28</sup> Ibid 118.

<sup>29</sup> Ibid 110–11. See also Kelly (n 10) 391–2.

<sup>30</sup> Geoffrey Schoenblum, 'Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates' (1991) 32(1) *Virginia Journal of International Law* 83, 87–8.

<sup>31</sup> Ibid 89–90.

<sup>32</sup> *Succession Convention* (n 21) art 13. Cf Schoenblum (n 30) 89.

potential role of testamentary choice in identifying the applicable law, and so allowing a testator to evade Australian family provision laws by choosing an applicable law that did not have a family provision statute.<sup>33</sup> However, the ALRC also made no concession to the interests of another state in the land it comprises. While admitting that foreign laws restricting inheritance to land ‘might be a problem’, it still insisted that the *lex domicilii* could deal with that.<sup>34</sup> The ALRC’s recommendations are, in truth, both simplistic and unsatisfactory. However, nothing is likely to come of these proposals. The *Succession Convention* has not been ratified by a single country, and the ALRC’s report, made in 1992, lies forgotten.

A difficult implication of the principle of scission is the need initially to classify items of property as either movable or immovable — a distinction that does not necessarily parallel the common law classifications of realty and personalty. A lease, for instance, which is personalty at common law, is immovable property in private international law.<sup>35</sup> The principles by which Australian law will classify different kinds of property as movable or immovable were explored by the High Court in the *Haque* litigation. The question was whether to prioritise the will-maker’s autonomy as recognised by the law of Western Australia, or the forced shares for a wife and children that were provided for by sharia. In *Haque v Haque [No 1]*, the High Court accepted that sharia, as the personal law applicable to the testator as an Indian-domiciled Muslim, would govern the distribution of the movable property of the estate.<sup>36</sup> In *Haque v Haque [No 2]*, the Court therefore had to identify what assets in the testator’s complex estate amounted to movable property.<sup>37</sup> The basic proposition was that interests in land were immovable,<sup>38</sup> although not every equity or interest in land would be sufficiently close to the land to assure it of an immovable quality.<sup>39</sup> Accordingly, in *Haque [No 2]* a vendor of land’s lien for unpaid purchase money was regarded, by a majority, as movable because the ‘principal thing’ was the right to the money.<sup>40</sup> The same conclusion was reached for an interest in a partnership (even one holding land).<sup>41</sup> Most controversially in *Haque [No 2]*, a mortgage debt was classified as movable because the repayment of the debt was regarded as the most valuable quality of the mortgage and this could shift with the location of the mortgagor.<sup>42</sup> In this connection *Haque [No 2]* effectively overruled the New South Wales family provision case of *Donnelly*, where Harvey CJ in Eq held that a mortgage debt should be treated as

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<sup>33</sup> Australian Law Reform Commission (n 8) 118–19.

<sup>34</sup> *Ibid* 111.

<sup>35</sup> *Freke v Carbery* (1873) LR 16 Eq 461, 466; *Duncan v Lawson* (1889) 41 Ch D 394, 398.

<sup>36</sup> *Haque [No 1]* (n 5).

<sup>37</sup> *Haque v Haque [No 2]* (1965) 114 CLR 98 (*‘Haque [No 2]’*).

<sup>38</sup> *Ibid* 119.

<sup>39</sup> *Ibid* 129, 133, 146, 152.

<sup>40</sup> *Ibid* 129, 133–4, 152. Cf *ibid* 121, 146.

<sup>41</sup> *Ibid* 122, 130, 134, 152.

<sup>42</sup> *Ibid* 129, 133; followed in *Re Greenfield* [1985] 2 NZLR 662, 664 (*‘Greenfield’*). See also Frank Kitto, ‘Are Mortgage Debts Immovables?’ (1928) 2(3) *Australian Law Journal* 85, 87. In England and Canada, mortgage debts are regarded as immovable: *Re Hoyles*; *Row v Jagg* [1911] 1 Ch 179 (Court of Appeal) (*‘Hoyles’*); *Hogg v Provincial Tax Commissioner* [1941] 4 DLR 501 (Saskatchewan); *Re Ritchie* [1942] 3 DLR 330 (Ontario).

immovable property.<sup>43</sup> Intellectual property rights have sometimes been a point of contention, but the tendency is to treat them as movable.<sup>44</sup>

The whole question of classification is complicated by the theoretical requirement that the law of the place where the property is situate (*lex situs*) itself determines whether property is to be regarded as movable or immovable.<sup>45</sup> The classifications outlined in the *Haque* litigation are only to be made if the property is situate in Australia; other classifications of an item of property may be applicable if it is located somewhere else.<sup>46</sup> The whole approach fails if the *lex situs* does not recognise the distinction between movable and immovable property — which is the case with the law of countries that apply sharia.<sup>47</sup> However, the original reason for importing the movable-immovable distinction into the common law was to have common ground with the continental civil law systems when classifying property.<sup>48</sup> Presumably, this also maximises the possibility that a foreign *lex situs* will use the distinction between movable and immovable property. In truth, this requirement is usually ignored and the identification of property as movable or immovable is, in practice, implicitly made by reference to Australian law.<sup>49</sup>

### III Applicable Law

The settled approach to statutes in cross-border settings is to examine the ‘text, context or subject matter’ of the statute for indications of its territorial application.<sup>50</sup> However, when a statute is expressed in general terms that suggest no territorial limits on its application, it may be interpreted as applicable only if it is part of the

<sup>43</sup> *Re Donnelly* (1927) 28 SR (NSW) 34, 37 (‘Donnelly’). See Kitto (n 42) 85–6.

<sup>44</sup> See *Re Usines de Melle’s Patent* (1954) 91 CLR 42, 48. Cf *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 494. See the treatment of copyright in *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179 (High Court of New Zealand); *Lucasfilm v Ainsworth* [2012] 1 AC 208.

<sup>45</sup> *Haque [No 2]* (n 37) 139; *Re Cutcliffe’s Will Trusts*; *Brewer v Cutcliffe* [1940] Ch 565, 571; *Macdonald v Macdonald* 1932 SC (HL) 79, 85.

<sup>46</sup> If a mortgage debt were located in Canada or England, it would be classified as immovable: see above n 42.

<sup>47</sup> See the discussion of sharia succession principles in the Karachi High Court in *Yusuf Abbas v Ismat Mustafa* PLD 1968 480. However, some Arab states have legislated to adopt a distinction between realty and movables: William Ballantyne, *Essays and Addresses on Arab Laws* (Taylor & Francis, 2014) 146–7.

<sup>48</sup> See *Hoyles* (n 42) 185; *Haque [No 2]* (n 37) 109. For further background on the introduction of this distinction, see JA Clarence Smith, ‘Classification by the Site in the Conflict of Laws’ (1963) 26(1) *Modern Law Review* 16, 17.

<sup>49</sup> Cf Mortensen, Garnett and Keyes (n 15) 566–7; Davies et al (n 15) 777–8.

<sup>50</sup> *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 160; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956, 964–5 [33]–[39]; *Karpik v Carnival plc* (2023) 98 ALJR 45, 52 [21] (‘Karpik’). See also *Mynott v Barnard* (1939) 62 CLR 68, 86, 89, 94; *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418, 424–6; *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274, 283.



law selected by the relevant choice of law rule.<sup>51</sup> The latter is effectively the approach taken to family provision legislation in Australia.<sup>52</sup>

Family provision legislation usually does not specify its intended scope of application in cross-border cases. Even if it did, it would be applied by the relevant forum court without reference to whether it formed part of the otherwise applicable law (although it might not be given an overriding effect by other Australian courts). Rather, family provision legislation tends to have its geographical operation determined in the traditional manner by equitable choice of law rules. The New South Wales family provision laws have, at times, ambiguously suggested a broader geographical reach than the equitable principles allowed.<sup>53</sup> Nevertheless, while the New South Wales family provision statute still states its geographical application, the statute probably now conforms to the principles of equity.<sup>54</sup>

The questions that arise when applicable law is being considered in a court exercising federal jurisdiction are important to note. Federal jurisdiction may arise in family provision claims.<sup>55</sup> Section 79(1) of the *Judiciary Act 1903* (Cth) (*'Judiciary Act'*) provides that state and territory laws — including 'laws relating to procedure, evidence, and the competency of witnesses' — bind a court exercising federal jurisdiction in that state or territory. Section 80 then provides:

So far as the laws of the Commonwealth are not applicable ... the common law in Australia as modified by the *Constitution* and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the *Constitution* and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

The reference to 'the common law in Australia' in s 80 is to the common law in the broad sense, including judge-made principles of equity<sup>56</sup> and, although there

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<sup>51</sup> *Karpik* (n 50) 52 [22]. See also Adrian Briggs, 'A Note on the Application of the Statute Law of Singapore within its Private International Law' [2005] *Singapore Journal of Legal Studies* 189, 194. See also Mary Keyes, 'Statutes, Choice of Law, and the Rule of the Forum' (2008) 4(1) *Journal of Private International Law* 1, 10–16, 32–3; Maria Hook, 'The Conflict of Laws as a Shared Language for the Cross-Border Application of Statutes' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 175, 178–80.

<sup>52</sup> *Family Provision Act 1969* (ACT) ss 7–22 (*'ACT Act'*); *NSW Act* (n 8) ss 55–73; *Family Provision Act 1970* (NT) ss 7–22 (*'NT Act'*); *Succession Act 1981* (Qld) ss 40–44 (*'Qld Act'*); *Inheritance (Family Provision) Act 1972* (SA) ss 6–16 (*'SA Act'*); *Testator's Family Maintenance Act 1912* (Tas) ss 3–11 (*'Tas Act'*); *Vic Act* (n 8) ss 90–99A; *Family Provision Act 1972* (WA) ss 6–21A (*'WA Act'*). See also Kelly (n 10) 382–3.

<sup>53</sup> *Family Provision Act 1982* (NSW) s 11(1)(b), repealed by *Succession Amendment (Family Provision) Act* (NSW) s 5. See *Hitchcock v Pratt* (2010) 79 NSWLR 687; below nn 99–107 and accompanying text.

<sup>54</sup> *NSW Act* (n 8) s 64.

<sup>55</sup> See below nn 179–206 and accompanying text. State courts are invested with any federal jurisdiction which the High Court has under ss 75 and 76 of the *Commonwealth Constitution: Judiciary Act 1903* (Cth) s 39(2).

<sup>56</sup> See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152, where Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ use the term 'common law of Australia' when referring

is yet no authority directly on point, rules of probate.<sup>57</sup> Before the High Court's decision in *Rizeq v Western Australia*,<sup>58</sup> the position was that choice of law rules, whether purely judge-made or modified by state or territory legislation, came to apply in federal jurisdiction through both sections,<sup>59</sup> or either just s 79<sup>60</sup> or s 80 — with the more recent authority supporting the latter.<sup>61</sup> In *Rizeq*, a case that did not concern applicable law, Bell, Gageler, Keane, Nettle and Gordon JJ took a much narrower approach to the scope of s 79. They held that the section only 'pick[s] up' the text of state legislation 'governing' how state jurisdiction is exercised, and applies it 'as a Commonwealth law to govern the manner of exercise of federal jurisdiction'.<sup>62</sup> An aspect of this that may affect the application of rules of private international law is that, as Bell, Gageler, Keane, Nettle and Gordon JJ noted, '[i]t would be wrong ... to seek to delimit the scope of the section's operation by invoking the difficult and sometimes elusive distinction between "substance" and "procedure"'.<sup>63</sup> Kiefel CJ took the same approach.<sup>64</sup> This approach also means that s 79 is not the source by which *judge-made* law — including judge-made applicable law rules — is applied in the exercise of federal jurisdiction.<sup>65</sup>

The High Court confirmed the narrower approach of *Rizeq* in *Masson v Parsons*.<sup>66</sup> However, neither *Rizeq* nor *Masson* delineated the related question of the role of s 80 in the exercise of federal jurisdiction.<sup>67</sup> Its relationship with s 79 nevertheless suggests that its pre-*Rizeq* interpretation no longer stands, and like s 79 the scope of s 80 will have shrunk.<sup>68</sup> Although it has been mooted that the reconfiguration of ss 79 and 80 could mean, in effect, the outcome of a cross-border case could be affected by whether it is determined in the exercise of state or federal jurisdiction,<sup>69</sup> this remains conjectural. A number of reasons, even within the *Rizeq*–*Masson* paradigm, suggest that approaches to applicable law in the exercise of state

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to equitable principles. See also Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 223–4, 269–70.

<sup>57</sup> See also *Lipohar v The Queen* (1999) 200 CLR 485, 551 ('*Lipohar*'), where Kirby J describes the common law of Australia as being constantly defined and refined by judges.

<sup>58</sup> *Rizeq v Western Australia* (2017) 262 CLR 1 ('*Rizeq*').

<sup>59</sup> *Musgrave v Commonwealth* (1937) 57 CLR 514, 543–4, 547–8 ('*Musgrave*'); *Pedersen v Young* (1964) 110 CLR 162, 169–70; *Parker v Commonwealth* (1965) 112 CLR 295, 306; *Suehle v Commonwealth* (1967) 116 CLR 353, 356; *Commonwealth v Mewett* (1997) 191 CLR 471, 554–5 ('*Mewett*'); *Agrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 258. Cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 529–32 ('*Pfeiffer*').

<sup>60</sup> *Musgrave* (n 59) 532.

<sup>61</sup> *Mewett* (n 59) 492–3, 521; *Northern Territory v GPO* (1999) 196 CLR 553, 574–5; *Blunden v Commonwealth* (2003) 218 CLR 330, 339; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 403.

<sup>62</sup> *Rizeq* (n 58) 27; *Masson v Parsons* (2019) 266 CLR 554, 564, 574 ('*Masson*').

<sup>63</sup> *Rizeq* (n 58) 33 (citations omitted). Accordingly, statutes of limitation are expressly listed as matters that are 'picked up' by s 79 even though they are regarded as matters of substance under common law applicable law rules: *Pfeiffer* (n 59) 544. See also James Stellios, 'Choice of Law in Federal Jurisdiction after *Rizeq v Western Australia*' (2018) 46 *Australian Bar Review* 187, 196–8.

<sup>64</sup> *Rizeq* (n 58) 15. Cf Edelman J in *Rizeq* (n 58) 73.

<sup>65</sup> *Ibid* 31.

<sup>66</sup> *Masson* (n 62) 564, 574; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 623. Cf Edelman J in *Masson* (n 62) 587–90.

<sup>67</sup> *Rizeq* (n 58) 14.

<sup>68</sup> Leeming (n 56) 289–93. Cf Stellios (n 63) 203.

<sup>69</sup> Stellios (n 63) 196–201.

and federal jurisdictions are still aligned. First, even if s 80 were inapplicable, the common law of Australia (in the broad sense) applies in federal jurisdiction. The common law ‘that is constantly in the process of definition and refinement by the judges of the several courts of Australia’<sup>70</sup> has a status that is prior even to the *Commonwealth Constitution*, and therefore applies in courts exercising federal jurisdiction ‘as part of the ultimate constitutional foundation’.<sup>71</sup> It does not need federal legislation, such as s 80, to make it applicable in a court exercising federal jurisdiction.<sup>72</sup> Second, in *Rizeq* itself, Bell, Gageler, Keane, Nettle and Gordon JJ recognised that

State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction — because they are laws.<sup>73</sup>

Again, even if s 80 were inapplicable, state laws could be applied by their own force and effect in federal jurisdiction because they are part of Australia’s ‘composite body of law’ made by the federal and state Parliaments and the self-governing territories’ legislatures.<sup>74</sup> Any state legislative modification of choice of law rules would therefore still seem to be applicable in the exercise of federal jurisdiction by a court — whether state or federal — that was sitting in the state in question. Although Justice Leeming has cautioned, extra-curially, that we should be careful not to draw implications from the recognition of this ‘composite body of law’, he himself concluded that the determination of cross-border cases in the exercise of state and federal jurisdictions after *Rizeq* remained aligned. To infer otherwise would be ‘capricious and arbitrary’.<sup>75</sup> There is also no case law or obiter dicta since *Rizeq* to suggest the contrary.<sup>76</sup> In considering, then, the equitable principles of applicable law in family provision cases, the safest assumption is that they should be applied in the exercise of federal jurisdiction as they would be in the exercise of state or territory jurisdiction — as part of the common law of Australia and, where modified in the family provision legislation,<sup>77</sup> the ‘composite body of law’ created by Australia’s Parliaments and legislatures.<sup>78</sup>

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<sup>70</sup> *Lipohar* (n 57) 551 (Kirby J).

<sup>71</sup> *Pfeiffer* (n 59) 531 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Leeming (n 56) 292.

<sup>72</sup> Leeming (n 56) 292.

<sup>73</sup> *Rizeq* (n 58) 24.

<sup>74</sup> *Ibid* 21–2. See Davies et al (n 15) 124.

<sup>75</sup> Leeming (n 56) 266, 292; Davies et al (n 15) 124.

<sup>76</sup> In *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303, 311 [32], Markovic, Downes and Kennett JJ observed that, by reason of ss 79 and 80, ‘federal cases become part of the normal flow of business in [state] courts and usually do not even need to be consciously identified as such’.

<sup>77</sup> See below nn 93–107 and accompanying text.

<sup>78</sup> In intra-Australian family provision cases, whether in the exercise of state or federal jurisdiction, any conflict of laws is also necessarily between the statutes of two different states or territories. There are suggestions that the *Commonwealth Constitution*, and s 118 in particular, should have a direct role in determining these conflicts, without recourse to applicable law rules: see Jeremy Kirk, ‘Conflicts and Choice of Law within the Australian Constitutional Context’ (2003) 31(2) *Federal Law Review* 247; Stephen Gageler, ‘Private Intra-national Law: Choice or Conflict, Common Law or Constitution’ (2003) 23 *Australian Bar Review* 184, 186–8. However, to date, the courts have not

The equitable principles for applicable law questions relating to the distribution of estates were assumed to apply when a cross-border family provision case first arose. This was in the pre-Judicature system Equity Division of the Supreme Court of New South Wales, and so only the equitable principles could have been adopted.<sup>79</sup> A form of scission had developed in property suits in the Court of Chancery during the 18<sup>th</sup> and early 19<sup>th</sup> centuries. Personal property was held to be governed by the law of the deceased's residence in 1744,<sup>80</sup> with that connection eventually being recast as the place of domicile.<sup>81</sup> Real estate was explicitly recognised as subject to distribution under the *lex situs* from 1808.<sup>82</sup> On Chancery's adoption of the movable–immovable distinction,<sup>83</sup> the modern shape of applicable law in questions of the distribution of deceased estates was settled.

### A *Movable Property: The Equitable Principles*

There was formerly some prospect that family provision laws might be considered an aspect of the administration of the deceased's estate and, as a question of administration, governed by the law of the forum (*lex fori*). Indeed, the Victorian laws, found in the *Administration and Probate Act 1958* (Vic), may be more easily characterised in those terms. An argument to this effect was put in 1919 to Harvey J in the Supreme Court of New South Wales in *Pain v Holt*,<sup>84</sup> the first case in which family provision was considered in a cross-border application. The testator, killed on active service in 1918, left a will providing for his executors to pay for the maintenance of his wife and children and, after the youngest child turned 21, to distribute the estate to the wife and children as they saw fit. The estate comprised movable property: life assurance policies, shares and bank accounts. Having applied for provision under the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), the wife confronted the executors' objection that the applicable law in a question of succession to movable property was the *lex domicilii* — and that her husband had died domiciled in Fiji, where there was no family provision law. The wife's argument was that a family provision 'right' was a chose in action for an unliquidated amount, and that those entitled to make claims were, in effect, creditors of the estate. Harvey J noted that the Act of 1916 required debts to be paid before the estate was available for family provision, and administration to be completed

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addressed intra-national family provision cases in this way: see *Hitchcock v Pratt* (n 53); *Blackett v Darcy* (2005) 62 NSWLR 392; *O'Donnell v O'Donnell* (2019) 19 ASTLR 160 ('*O'Donnell (ACT)*'); *O'Donnell v O'Donnell* [2022] NSWSC 1742 ('*O'Donnell (NSW)*'). Further, the reasons given by the High Court for reshaping the applicable law rule for torts to conform to the *Commonwealth Constitution* would seem equally to apply to questions of succession. However, no court has been prepared to extend this approach beyond the sphere of cross-border torts: Mortensen, Garnett and Keyes (n 15) 360–1.

<sup>79</sup> *Pain v Holt* (n 13).

<sup>80</sup> *Pipon v Pipon* (1744) Amb 25; 27 ER 14, 15; *Thorne v Watkins* (1750) 2 Ves Sen 35; 28 ER 24, 25; *Solomons v Ross* (1764) 1 H Bl 131n; 126 ER 79; *Jollett v Deponthieu* (1769) 1 H Bl 133n; 126 ER 80. Cf *Wallis v Brightwell* (1722) 2 P Wms 88; 24 ER 652, 652, where residential law was applied because it represented the testamentary intent.

<sup>81</sup> *Brodie v Barry* (1813) 2 Ves & B 127; 35 ER 267, 268–9.

<sup>82</sup> *Curtis v Hutton* (1808) 14 Ves Jr 537; 33 ER 627, 628; *Brodie v Barry* *ibid*; *Nelson v Bridport* (n 14) 224.

<sup>83</sup> *Freke v Carbery* (n 35) 466.

<sup>84</sup> *Pain v Holt* (n 13).

before an order for distribution to relatives was possible; the usual principle that movables follow the person (*mobilia sequuntur personam*) applied.<sup>85</sup> Although, significantly, that principle could be displaced by the clear words of the statute, there were no such words.<sup>86</sup> The question was governed by the law of the place of the testator's last domicile and, that being the law of Fiji, no claim was possible.<sup>87</sup> If the testator died domiciled in a place that does not have family provision laws, the movable property of the estate is not available for provision.<sup>88</sup>

This rule has been consolidated in subsequent adjudication, and is the settled equitable principle.<sup>89</sup> Indeed, whenever the rule has been expressly challenged, Australian and New Zealand courts have continued also to confirm that family provision is not, for choice of law purposes, a question of administration governed by the *lex fori*.<sup>90</sup> This choice of law rule evidently entitles the court to make provision from movable property wherever in the world it might be, as long as it is distributed in accordance with the *lex domicilii*.<sup>91</sup> It is certainly lumbered with the need to determine the testator's domicile at death although, given that the testator will inevitably have been of an age where a domicile of choice can be identified, that may not be as problematic in family provision as it is in other areas where a person's domicile is relevant.<sup>92</sup>

## **B Movable Property: Legislative Modification**

In *Osborne*, Woolcock J hinted that a family provision order under the Queensland laws could be made in relation to movable property in the state — but not explicitly because it was the place of the testatrix's last domicile.<sup>93</sup> Stronger observations were made in *Found* where, in the Supreme Court of South Australia, Murray CJ concluded that provision could be made out of any assets situated in the state.<sup>94</sup> A possible, but not convincing, interpretation of family provision legislation is that it

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<sup>85</sup> *Ibid* 107.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Taylor v Farrugia* [2009] NSWSC 801, [26].

<sup>89</sup> *Osborne* (n 13) 129–30 (probable Queensland domicile); *Re Paulin* [1950] VLR 462, 467–8 ('*Paulin*'); *Greenfield* (n 42) 664.

<sup>90</sup> *Re Butchart (Deceased)* [1932] NZLR 125, 131 ('*Butchart*'); *Heuston v Barber* (1990) 19 NSWLR 354, 359; *Hitchcock v Pratt* (n 53) 690.

<sup>91</sup> *Re Sellar* (1925) 25 SR (NSW) 540, 545.

<sup>92</sup> The utility of the concept of domicile can be doubted, especially since use of the personal connection of 'habitual residence' has become more common: see, eg, Leon Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11(3) *Journal of Private International Law* 317. 'Habitual residence' is a connecting factor with respect to the formal validity of a will: *Wills Act 1968* (ACT) s 15C(c); *NSW Act* (n 8) s 48(1)(b); *Wills Act 2000* (NT) s 46(1)(b); *Qld Act* (n 52) s 33T; *Wills Act 1936* (SA) s 25B; *Wills Act 2008* (Tas) s 60(1)(b); *Wills Act 1997* (Vic) s 17(1)(b); *Wills Act 1970* (WA) s 20(1)(b). At least where, as with family provision, reliance is on the testator's domicile, the technicalities that bedevil the domicile of children born outside wedlock or born with the assistance of reproductive technology are unlikely to arise: see Mortensen, Garnett and Keyes (n 15) 319–24; Davies et al (n 15) 338–43.

<sup>93</sup> *Osborne* (n 13) 132. The testatrix's last domicile is unclear from the judgment. She had been domiciled in Queensland 'for many years' but towards the end of her life, as Woolcock J noted, '[s]he did not live in one place altogether, but moved from place to place': at 130.

<sup>94</sup> *Found* (n 13) 240.

allows provision to be made out of movable property in the state even when the testator died domiciled somewhere else. In fact, Murray CJ expressed the opinion in *Found* that ‘the subject of domicile may be disregarded’.<sup>95</sup> *Osborne* is ambiguous in this respect because the testatrix was *probably* domiciled in Queensland.<sup>96</sup> And, while *Found* is an overt challenge to the *lex domicilii* rule, Murray CJ also found ‘unhesitatingly’ that the testator had died domiciled in South Australia and consequently the case did not turn on the question.<sup>97</sup> Sholl J gave some consideration to *Found* in his judgment in *Paulin*, and thought that *Found* ‘runs counter to the general view’ unless the South Australian legislation had expressly provided for a different rule.<sup>98</sup>

The question is therefore whether legislation ever has, by clear words, provided a different choice of law rule for family provision from movable property. The most likely candidate for this arose in 1989 when the New South Wales Parliament amended its family provision legislation. At that point, the amended s 11(1)(b) of the *Family Provision Act 1982* (NSW) provided:

An order for provision out of the estate or notional estate of a deceased person may ... be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of his death, domiciled in New South Wales.

Section 11(1)(b) was re-enacted in s 64 of the *Succession Act 2006* (NSW) (*‘Succession Act’*). As will be seen,<sup>99</sup> in *Hitchcock v Pratt* Brereton J ruled that s 64 exceeded the constitutional powers of the state Parliament.<sup>100</sup> The section had to be read down so as to apply only in circumstances in which the testator was domiciled in the state if property outside New South Wales was to be included in a family provision order.<sup>101</sup> A secondary question concerning s 64 was whether it could, in effect, have served as a legislative modification of the equitable choice of law rule. If there was property in the state, could s 64 allow a family provision order to be made even if the testator was not domiciled in New South Wales at death?

*Taylor v Farrugia* had given the opportunity to consider this but, in that case, Brereton J held, without commenting on s 64, that he did not have power to deal with movable property in New South Wales when the testator had died domiciled in Malta.<sup>102</sup> Under the law of Malta, the spouse and children did not have family provision rights but, instead, had forced shares of the estate.<sup>103</sup> In effect, Brereton J’s method in *Taylor v Farrugia* confined the application of s 64 to property in New South Wales only when the testator had died domiciled in the state. The question was later raised in *Hitchcock v Pratt*, but could not be finally resolved because in

<sup>95</sup> *Ibid.*

<sup>96</sup> *Osborne* (n 13) 130.

<sup>97</sup> *Found* (n 13) 240.

<sup>98</sup> *Paulin* (n 89) 468.

<sup>99</sup> See below nn 139–145 and accompanying text.

<sup>100</sup> *Hitchcock v Pratt* (n 53).

<sup>101</sup> *Ibid* 692–3, confirming *Balajan v Nikitin* (1994) 35 NSWLR 51, 60–1.

<sup>102</sup> *Taylor v Farrugia* (n 88) [26].

<sup>103</sup> *Ibid.*

that application no property whatsoever was in New South Wales.<sup>104</sup> The effect of Brereton J's decisions under s 64 is therefore twofold. First, an order for provision from any property within New South Wales, regardless of where the testator had been domiciled at death, is within state legislative power.<sup>105</sup> Secondly, the language of s 64 had not been sufficiently clear to displace the equitable limitations on the application of the family provision laws and, even under s 64, they could only apply to movable property when New South Wales was the place where the testator had died domiciled. It is evident that the geographical operation of family provision laws can only be changed when that is given the clearest express indication in the legislation itself.

Section 64 of the *Succession Act* was repealed and replaced in 2018.<sup>106</sup> The Act now provides: 'A family provision order may be made in respect of property situated outside New South Wales when, or at any time after, the order is made only if the deceased person was, at the time of death, domiciled in New South Wales.'<sup>107</sup> The amendment plainly responded to *Hitchcock v Pratt* and the problem of the section's constitutional over-reach. However, in addressing the constitutional question the Parliament also removed the express statement of the repealed s 64 that an order for provision could be made out of property *inside* New South Wales. It is now even clearer that the applicable law to movable property in New South Wales is the *lex domicilii*.

### C *Immovable Property*

The principle of scission has the inevitable implication that the law governing family provision from any immovable property in the estate is the law of the place where the property is situate (*lex situs*). However, as we explain below,<sup>108</sup> where the *situs* is outside the state, the choice of law rule also directs a limitation on the jurisdiction of the court to deal with it — a limitation that is possibly reinforced by other restrictions on adjudicative jurisdiction.<sup>109</sup> As a result, in family provision claims an Australian court rarely considers how to deal with a foreign immovable, even if the terms of the foreign *lex situs* are properly established. In this respect, the conclusion that the *lex situs* is the applicable law is generally inferred from the approach taken to adjudicative jurisdiction.<sup>110</sup> There are nevertheless two ways that foreign immovable property has been considered when making family provision orders, even when the local legislation is inapplicable to it.

The first approach is to recognise that the immovable property is unavailable to the court when making orders for provision, but to take it into account when

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<sup>104</sup> *Hitchcock v Pratt* (n 53) 694, 695–6, 701.

<sup>105</sup> *Ibid* 694.

<sup>106</sup> *Justice Legislation Amendment Act 2018* (NSW) sch 1.

<sup>107</sup> *NSW Act* (n 8) s 64.

<sup>108</sup> See below n 137 and accompanying text.

<sup>109</sup> See below nn 148–157 and accompanying text.

<sup>110</sup> For an express statement of the choice of law rule in family provision claims, see *Re Bailey* [1985] 2 NZLR 656, 660 ('*Bailey*'); *Hitchcock v Pratt* (n 53) 695; *Lai v Huang* [2016] NZHC 2828, [65]. For inferences from the limitations on jurisdiction over claims involving immovables, see *Butchart* (n 90) 131; *Paulin* (n 89) 465, 467; *Bailey* (n 110).

determining the size of the estate and, so, the kind and quantum of orders that can be made from it. In *Chen v Lu*, the testator had died domiciled in New South Wales with a net distributable estate of movable and immovable property in the state of around AUD325,000.<sup>111</sup> There were more substantial holdings of Chinese immovable property valued at around AUD700,000.<sup>112</sup> Brereton J noted that no claim was made against the Chinese property, but also that the existence of the property could be used to inform his decision about making provision out of the assets that *were* located in the state.<sup>113</sup>

A second, even more direct, application of family provision laws to out-of-state assets was made in the Supreme Court of Queensland in *Stewart*.<sup>114</sup> The testator, domiciled in Queensland, left an estate covering properties in Queensland and New South Wales. Recognising that he did not have power to deal with the immovable property in New South Wales, Macrossan CJ nevertheless held that he had the power to deal with the income earned from it. He considered that, once earned, the income became personalty and, therefore, movable. It was therefore available under the Queensland family provision laws that were applicable to movable property as the *lex domicilii*. Once more, Sholl J gave *Stewart* some consideration in *Paulin* and ‘respectfully’ ventured that it also ran ‘counter to the general view’.<sup>115</sup> Indeed, if the New South Wales court had exercised jurisdiction in a family provision claim against the same real estate, the decision in *Stewart* risked different states’ orders being applied to the same property.<sup>116</sup>

## D *Renvoi*

The whole area of succession to property is one in which the doctrine of *renvoi* has a recognised role.<sup>117</sup> Although *renvoi* is rare, in the cases where it has arisen it has commonly involved a question of succession.<sup>118</sup> A question of *renvoi* arises where the applicable law for an issue that is selected by the Australian choice of law rule itself requires a different law to govern the case. It has occurred particularly in England where the court determining the case has initially identified that a foreign law applies to the claim as the *lex domicilii* or *lex situs*. The foreign law gives a forced share of an estate to a spouse or child, but also has its own choice of law rule

<sup>111</sup> *Chen v Lu* [2014] NSWSC 1053, [74] (‘*Chen*’).

<sup>112</sup> *Ibid* [75].

<sup>113</sup> *Ibid*. See also *Re Turnbull* [1975] 2 NSWLR 360, 367; *Taylor v Farrugia* (n 88) [26], [70], [74]; *Re Grundy* [2018] NSWSC 104, [95]–[101].

<sup>114</sup> *Stewart* (n 13).

<sup>115</sup> *Paulin* (n 89) 467.

<sup>116</sup> *Ibid* 467–8.

<sup>117</sup> *Macmillan Inc v Bishopgate Investment Trust plc [No 3]* [1995] 1 WLR 978, 1008.

<sup>118</sup> For Australia, see *Simmons v Simmons* (1917) 17 SR (NSW) 419 (‘*Simmons*’); *Kong v Yan* [2021] SASC 82, [91]–[92]. For England, see, eg, *Collier v Rivaz* (1841) 2 Curt 855; 163 ER 608; *In the Goods of Lacroix* (1877) 2 PD 94; *In the Goods of Brown-Sequard* (1894) 70 LT 811; *Re Trufort; Trafford v Blanc* (1887) 36 Ch D 600; *Re Johnson; Roberts v Attorney-General* [1903] 1 Ch 821; *Re Annesley; Davidson v Annesley* [1926] Ch 692 (‘*Annesley*’); *Re Ross; Ross v Waterfield* [1930] 1 Ch 377 (‘*Ross*’); *Re Askew; Marjoribanks v Askew* [1930] 2 Ch 259; *Re O’Keefe (Deceased); Poingdestre v Sherman* [1940] Ch 124; *Re Duke of Wellington; Glentanar v Wellington* [1947] Ch 506 (‘*Duke of Wellington*’); *Re Estate of Fuld, dec’d [No 3]* [1968] P 675; *Vucicevic v Aleksic* [2017] EWHC 2335 (Ch) (‘*Vucicevic*’). Cf *Bremer v Freeman* (1857) 10 Moo PC 306; 14 ER 508.



requiring the national law (*lex patriae*) to apply to the question of beneficial succession, and the foreign law considers that the national law is either English or the law of a third country.<sup>119</sup> The question of *renvoi* has been whether the English court should apply the first applicable law (and give effect to the forced shares), or accept the foreign choice of law rule's return to English law ('remission') or its application of the third country's law ('transmission'). The tendency in common law countries is to decide the case as the foreign court would.<sup>120</sup>

*Renvoi* therefore arises when the choice of law rules of the forum and the choice of law rules of the applicable law differ, and the forum's rules select the choice of law rules of the applicable law and not just its internal law.<sup>121</sup> It has arisen in respect of both movable<sup>122</sup> and immovable<sup>123</sup> property. In *Simmons v Simmons*, a New South Wales court identified the law of New Caledonia (the *lex domicilii*) as the applicable law for a question of forced shares in an estate, only to find that the law of New Caledonia required the law of New South Wales to apply to the issues as the *lex patriae*.<sup>124</sup> It therefore decided the case as it was presumed that a New Caledonia court would decide it, and that was in accordance with New South Wales law.<sup>125</sup> *Renvoi* has been relatively rare, and is generally discouraged in international instruments.<sup>126</sup> However, in Australia the High Court gave it significant impetus in *Neilson v Overseas Projects Corporation* where, without precedent, *renvoi* was recognised as being available in cross-border tort claims.<sup>127</sup> Although care was taken in *Neilson* to emphasise that the recognition of *renvoi* in tort cases did not mean it was available in all cross-border claims,<sup>128</sup> there was nothing particularly distinctive to tort in the adoption of the doctrine.<sup>129</sup> As a result, it was subsequently recognised in Australia even in a cross-border claim in contract.<sup>130</sup>

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<sup>119</sup> See, eg, *Annesley* (n 118); *Ross* (n 118); *Duke of Wellington* (n 118). See generally Graue (n 6) 178–9.

<sup>120</sup> *Simmons* (n 118); *Annesley* (n 118); *Ross* (n 118); *Duke of Wellington* (n 118); *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 ('*Neilson*'). For an overview of the foreign court theory's application, see Graue (n 6) 179.

<sup>121</sup> Reid Mortensen, "'Troublesome and Obscure": The Renewal of *Renvoi* in Australia' (2006) 2(1) *Journal of Private International Law* 1, 12–18.

<sup>122</sup> *Simmons* (n 118); *Annesley* (n 118); *Ross* (n 118).

<sup>123</sup> *Duke of Wellington* (n 118); *Vucicevic* (n 118).

<sup>124</sup> *Simmons* (n 118).

<sup>125</sup> *Ibid.*

<sup>126</sup> See, eg, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40 art 24; *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 11 July 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6 art 20. Cf *Succession Convention* (n 21) art 4 (which allows *renvoi* where the applicable laws of non-contracting states are concerned); *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* [2012] OJ L 201/107 art 35.

<sup>127</sup> *Neilson* (n 120).

<sup>128</sup> *Ibid* 366, 388, 421.

<sup>129</sup> Mortensen (n 121) 23.

<sup>130</sup> *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25. Cf *Proactive Building Solutions v MacKenzie Keck Ltd* [2013] NSWSC 1500, [27]–[29], where McDougall J said it was not open to a trial judge to extend *renvoi* to contract cases.

As the use of *renvoi* in succession cases long preceded the decision in *Neilson*, this fact can only strengthen the conclusion that the doctrine is available in family provision cases. The fact that family provision approaches to the moral claims of relatives against estates have only been taken in Commonwealth countries, and that the relevant Commonwealth countries use the same choice of law rules, means that the conflicting choice of law rules needed to give rise to the problem of *renvoi* have not yet occurred in cross-border family provision cases.<sup>131</sup> Having said that, Sholl J in *Paulin*<sup>132</sup> and Prichard J in *Bailey*<sup>133</sup> recognised the possibility of *renvoi* in family provision claims. *Renvoi*'s probable appearance in family provision applications would be more likely if, at any point, the equitable principles of applicable law were, in any one place, adjusted by legislation.

#### IV Jurisdiction

Family provision claims are initiated by application to the relevant state or territory Supreme Court.<sup>134</sup> The cross-border jurisdiction of the court is therefore not determined merely by reference to service of initiating process outside the state;<sup>135</sup> it could arise even when all interested parties are inside the state. Interpretation of family provision laws has also consistently refused to require any connection between the claimant and the state.<sup>136</sup> Geographical limits on jurisdiction have had to be developed differently. In this respect, the Supreme Courts maintain the *pre-Judicature Act* approaches of courts of equity and have developed principles of jurisdictional competence and choice of law together. The equitable principles are relatively settled. Having sifted through the previous 30 years of adjudication on cross-border family provision, Sholl J comprehensively summarised the principles of jurisdiction in 1950 in his decision in *Paulin*:

- (1) The Courts of the testator's domicile alone can exercise the discretionary power arising under the appropriate testator's family maintenance legislation of the domicile so as to affect his movables and immovables in the territory of the domicile ...
- (2) The same Courts alone can exercise such discretionary power so as to affect under the same legislation his movables outside the territory of the domicile ...
- (3) The Courts of the *situs* can alone exercise a discretionary power to affect, and then only if there is testator's family maintenance legislation in the *situs* providing for it, immovables of the testator out of the jurisdiction

<sup>131</sup> *Bailey* (n 110) 660.

<sup>132</sup> *Paulin* (n 89) 466–7.

<sup>133</sup> *Bailey* (n 110) 660.

<sup>134</sup> *ACT Act* (n 52) s 8(1); *NSW Act* (n 8) s 58; *NT Act* (n 52) s 7(1); *Qld Act* (n 8) s 41(1); *SA Act* (n 8) s 7(1); *Tas Act* (n 8) s 3(1); *Vic Act* (n 8) s 90A(1); *WA Act* (n 52) s 6(1).

<sup>135</sup> As under *Service and Execution of Process Act 1992* (Cth) ss 12, 15; *Trans-Tasman Proceedings Act 2010* (Cth) s 9; and the various long-arm jurisdictions exercised under rules of court that permit service on persons outside Australia and New Zealand: Mortensen, Garnett and Keyes (n 15) 43–64; Davies et al (n 15) 41–76.

<sup>136</sup> *Found* (n 13) 239–40; *Donnelly* (n 43) 35; *Butchart* (n 90) 129; *Paulin* (n 89) 465, 467; *Bailey* (n 110).

of the Courts of his domicile; and the Courts of his domicile cannot exercise their discretion so as to deal with such immovables.<sup>137</sup>

Sholl J's summary continues to be accepted as the definitive statement of adjudicative jurisdiction in family provision claims, except where legislation (within its constitutional limits) has adjusted it.<sup>138</sup> In *Hitchcock v Pratt*, Brereton J noted that these rules of jurisdiction had been modified by s 11(1)(b) of the *Family Provision Act 1982* (NSW) and its successor, the then s 64 of the *Succession Act*.<sup>139</sup> This legislation erased these rules of adjudicative jurisdiction completely. In removing any requirement that the testator had been domiciled in New South Wales to entertain an application for provision, the legislation eliminated jurisdictional grounds (1) and (2). In enabling a court to deal with 'property' situated outside New South Wales, the legislation eliminated jurisdictional ground (3). *Hitchcock v Pratt* involved claims against an estate of a testator who had died domiciled in Victoria, and who — it was ultimately determined — left no assets in New South Wales. The claims clearly illustrated how s 64 of the *Succession Act* purported to apply to estates that had no connection with New South Wales.

The question of s 64's violating the extraterritorial limits on state legislative power had already been raised in previous litigation.<sup>140</sup> As state legislation must address considerations that have at least *some* connection with the state,<sup>141</sup> in *Hitchcock v Pratt* Brereton J had no qualms in ruling s 64 invalid.<sup>142</sup> However, New South Wales law also enabled constitutionally suspect legislation to be read down if, in doing so, its validity could be maintained.<sup>143</sup> Brereton J held that a connection with New South Wales could be established if s 64 were read as allowing a court to deal with movable property in New South Wales of testators who were domiciled elsewhere, and of immovable property outside New South Wales of testators who were domiciled in the state.<sup>144</sup> These connections, while saving the legislation, are not the connections that had been recognised as giving jurisdiction or selecting the applicable law in equity, and therefore still allowed s 64 to adjust *Paulin* jurisdictional grounds (1) and (3). As it turned out, when s 64 was amended in 2018, all references to dealing with property inside New South Wales were also removed.<sup>145</sup> Accordingly, s 64 no longer explicitly adjusts jurisdictional ground (1) and, on normal principles, it is possible to regard this limitation as having been restored in New South Wales. This was precisely the argument that was

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<sup>137</sup> *Paulin* (n 89) 465.

<sup>138</sup> *Taylor v Farrugia* (n 88) [26]; *Hitchcock v Pratt* (n 53) 691.

<sup>139</sup> *Hitchcock v Pratt* (n 53) 689. See above nn 99–107 and accompanying text.

<sup>140</sup> *Balajan v Nikitin* (n 101) 60–1, applying *Flaherty v Girgis* (1985) 4 NSWLR 248, 267. See also *Re Theiss*; *Brinkman v Johnston* (Supreme Court of New South Wales, Hodgson J, 4 February 1994) 19; *Bepper v Steed* (Supreme Court of New South Wales, Master McLaughlin, 17 December 1996) 22–3; *Blackett v Darcy* (n 78) 395; *Chen* (n 111), [75]; Note, 'Family Provision Act: Extraterritorial Operation' (1994) 68(8) *Australian Law Journal* 612.

<sup>141</sup> *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 (Gleeson CJ), 34 (Gaudron, Gummow and Hayne JJ); *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692, 723–5.

<sup>142</sup> *Hitchcock v Pratt* (n 53) 693.

<sup>143</sup> *Interpretation Act 1987* (NSW) s 31.

<sup>144</sup> *Hitchcock v Pratt* (n 53) 694.

<sup>145</sup> See above n 107 and accompanying text.

subsequently made by the defendants in a summary judgment application in *Gardner v Selby*, but Hallen J found that the question was more appropriate for determination at trial.<sup>146</sup>

To the extent that, when a testator has died domiciled in New South Wales, the Supreme Court can order provision from immovable property outside the state, s 64 does modify jurisdictional ground (3).<sup>147</sup> At present, a modification of the effect of jurisdictional ground (3) may only be possible in New South Wales. There is a general prohibition in Australia in all civil litigation on dealing with claims involving foreign immovable property. The ban stems from the House of Lords' decision in *British South Africa Co v Companhia de Moçambique*, where it was held that an English court cannot hear any matter concerning title to or possession of foreign land, or any action relating to trespass to foreign land.<sup>148</sup> The *Moçambique* rule is law in most parts of Australia and has been extended to other immovable property.<sup>149</sup> Although in recent years the High Court has expressed doubts about its value,<sup>150</sup> it is still accepted as remaining a part of the common law of Australia.<sup>151</sup>

The *Moçambique* rule has been completely abolished by statute in New South Wales.<sup>152</sup> Instead, in New South Wales, a court that has a question before it involving immovable property outside the state may decline to exercise jurisdiction if it considers that it is not the appropriate court to hear the matter<sup>153</sup> — but it is not *required* to decline jurisdiction. To the extent that a question of title to land is not involved, the rule is partially modified in the Australian Capital Territory.<sup>154</sup>

There are a number of claims in admiralty, probate and equity relating to immovable property in which the *Moçambique* ban is inapplicable, including proceedings for the administration and distribution of deceased estates.<sup>155</sup> The application of the *Moçambique* rule to family provision claims dealing with foreign immovable property was explored at some length in *Bailey*.<sup>156</sup> There, Prichard J left the question open, but accepted that the choice of law rules applicable to family provision from immovable property had much the same effect as the application of *Moçambique* at the point of determining jurisdiction.<sup>157</sup> To this could be added jurisdictional ground (3) which, without modification by statute, limits consideration of immovable property to the *forum situs*. This also suggests that jurisdictional

<sup>146</sup> *Gardner v Selby* [2022] NSWSC 298, [113].

<sup>147</sup> *Xiang v Tong* [2021] NSWSC 44, [314].

<sup>148</sup> *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 629 (Lord Herschell LC).

<sup>149</sup> *Potter v Broken Hill Pty Co Ltd* (n 44) (patents).

<sup>150</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520; *Moti v The Queen* (2011) 245 CLR 456, 474–5.

<sup>151</sup> *Singh v Singh* (2009) 253 ALR 575. Cf *Uhlmann v Harris* [No 2] [2018] 3 Qd R 392, 400–1. For the survival of the *Moçambique* rule in bankruptcy proceedings in the Federal Court, see *Re Doyle; Ex parte Brien and Doyle* (1993) 41 FCR 40. Cf *Dagi v Broken Hill Pty Co Ltd* [No 2] [1997] 1 VR 428; JLR Davis, 'The Ok Tedi River and the Local Actions Rule: A Solution' (1998) 72(10) *Australian Law Journal* 786.

<sup>152</sup> *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) s 3.

<sup>153</sup> *Ibid* s 4.

<sup>154</sup> *Civil Wrongs Act 2002* (ACT) s 220.

<sup>155</sup> Mortensen, Garnett and Keyes (n 15) 72–4; Davies et al (n 15) 82–5.

<sup>156</sup> *Bailey* (n 110).

<sup>157</sup> *Ibid* 658–9.

ground (3) should receive similar treatment to *Moçambique* when the complex interaction of cross-vested and federal jurisdiction is considered.

### A *Cross-Vested Jurisdiction*

The uniform state and territory cross-vesting Acts see the swapping of all Supreme Court jurisdictions in any ‘state matter’ between the state and territory Supreme Courts.<sup>158</sup> For present purposes, this includes all jurisdictions that a Supreme Court has in relation to land and other immovable property in its state or territory, any statutory jurisdiction that a Supreme Court is given under its family provision laws, and any restrictions placed on its jurisdiction by the general law. From the inception of the cross-vesting scheme, it has been recognised that it has profound implications for the application of *Moçambique* in interstate property questions in Australia.<sup>159</sup> So where, before the cross-vesting scheme commenced, the Supreme Court of Queensland had no jurisdiction under *Moçambique* to deal with a question involving title to land in New South Wales, the cross-vesting scheme now gives the Queensland court the jurisdiction that the Supreme Court of New South Wales has in ‘state matters’ dealing with title to land in the state.<sup>160</sup> To some extent,<sup>161</sup> this makes *Moçambique* irrelevant in interstate questions in Australia.

It follows that, before the cross-vesting scheme, *Paulin* jurisdictional ground (3) meant that the Supreme Court of Queensland had no power under its family provision laws to order provision from land in New South Wales — even where the testator had died domiciled in Queensland.<sup>162</sup> The New South Wales cross-vesting legislation now gives to the Supreme Court of Queensland the Supreme Court of New South Wales’s discretionary powers under its family provision laws to make provision from land in New South Wales. Jurisdictional ground (3), therefore, ‘must give way and is cut down’ in family provision questions that cross state and territory borders.<sup>163</sup> So where, under jurisdictional ground (2), a state Supreme Court as *forum domicilii* has had an unlimited extraterritorial jurisdiction to make provision from movable property, the cross-vesting scheme gives it an Australia-wide jurisdiction to make provision from immovable property located anywhere in the country. The *situs* remains relevant for choice of law, though, insofar as any item of immovable property is still to be addressed by the family provision laws of its *situs*.

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<sup>158</sup> *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (SA) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 4(3); *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA) s 4(3).

<sup>159</sup> See, eg, David St L Kelly and James Crawford, ‘Choice of Law under the Cross-Vesting Legislation’ (1988) 62(8) *Australian Law Journal* 589, 591; *Starr-Diamond v Diamond* [No 3] [2013] NSWSC 351, [6]–[9] (‘*Starr-Diamond*’); *Greater Bank Ltd v Official Trustee in Bankruptcy* [2017] NSWSC 1496, [4].

<sup>160</sup> *Starr-Diamond* (n 159); *Uhlmann v Harris* [No 2] (n 151) 397–8.

<sup>161</sup> See below nn 179–206 and accompanying text.

<sup>162</sup> See above n 137 and accompanying text. Cf *Osborne* (n 13); *Stewart* (n 13).

<sup>163</sup> *Uhlmann v Harris* [No 2] (n 151) 398 (Jackson J).

Where different family provision applications are brought concurrently in different states, the cross-vesting scheme gives the Supreme Courts power to transfer the proceedings to the single most appropriate court for dealing with them.<sup>164</sup> It seems most likely that the state or territory providing the applicable law for the predominant portion of the estate must have a reasonable claim to receive the transfer of proceedings,<sup>165</sup> and the Supreme Court of the place of the testator's domicile at death must have a significant claim in that respect.<sup>166</sup>

Two transfer cases arguably test this logic. In *Sherrin v M J Sherrin Pty Ltd*, the deceased died domiciled in New South Wales where he left much of his AUD14 million estate.<sup>167</sup> In the Supreme Court of South Australia, the deceased's brother claimed various forms of relief against the deceased's personal representatives. Olsson J viewed the plaintiff's fifth claim under the *Inheritance (Family Provision) Act 1972–75* (SA) as a “fall back” position<sup>168</sup> — an alternative to his first four claims. The corporate defendant applied to transfer proceedings to New South Wales where five separate proceedings for family provision had been commenced by relatives of the deceased. Olsson J refused to transfer the South Australian proceedings which were not only first in time but also involved ‘specific and discrete causes of action’ and a question about ‘the occupancy of South Australian land’.<sup>169</sup> Those seeking transfer to New South Wales were ‘to be seen as the tail seeking to wag the dog, in a manner which could possibly prejudice the plaintiff's causes of action’.<sup>170</sup>

*O'Donnell (ACT)*<sup>171</sup> does not necessarily challenge the significance of the *forum domicilii* in transfer cases, as the testator's domicile at death was considered to be ‘evenly balanced’ between New South Wales and the Australian Capital Territory,<sup>172</sup> but there was an arguable case that he was domiciled in New South Wales and the proceedings were ultimately transferred there. However, *O'Donnell (ACT)* does also suggest that juridical advantages to the claimants might assist the decision to transfer. The testator died in Canberra leaving a large estate with a net value of AUD6.64 million to be divided equally among his five children. In addition to those estate assets that were located exclusively in the Australian Capital Territory, the testator had owned ‘very substantial assets, including real property in NSW’ tied up in ‘trusts controlled by companies of which he was a director and in

<sup>164</sup> *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Qld) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (SA) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Tas) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 5; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA) s 5. See *Hitchcock v Pratt* (n 53) 695–6.

<sup>165</sup> Cf *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400. See *Hitchcock v Pratt* (n 53) 695–6.

<sup>166</sup> *Sherrin v M J Sherrin Pty Ltd* (Supreme Court of South Australia, Olsson J, 31 July 1992) (*‘Sherrin’*). Cf *O'Donnell (ACT)* (n 78).

<sup>167</sup> *Sherrin* (n 166).

<sup>168</sup> *Ibid* 2.

<sup>169</sup> *Ibid* 4.

<sup>170</sup> *Ibid* 6.

<sup>171</sup> *O'Donnell (ACT)* (n 78) 176.

<sup>172</sup> Cf *O'Donnell (NSW)* (n 78) [297], [299], [314].

some cases a shareholder'.<sup>173</sup> Two sets of proceedings for family provision were pending in the Supreme Courts of both jurisdictions.<sup>174</sup> Crowe AJ of the Supreme Court of the Australian Capital Territory concluded that it was more appropriate and in the interests of justice to transfer family provision proceedings to New South Wales for determination.<sup>175</sup> A decisive consideration was New South Wales's 'unique' notional estate provisions.<sup>176</sup> If the testator was domiciled in the Australian Capital Territory, as the Supreme Court of New South Wales subsequently found,<sup>177</sup> only the net estate would be available for provision. On the other hand, if the testator died domiciled in New South Wales, the Supreme Court of New South Wales could make an order taking into account net assets *and* any property designated as notional estate.<sup>178</sup> The proceedings were transferred to New South Wales.

## B Federal Jurisdiction

In proceedings that are heard in federal jurisdiction, a different account is required. As Jackson J pointed out in *Uhlmann v Harris [No 2]* — a Queensland case for the recovery of land in New South Wales — the cross-vesting of Supreme Court jurisdictions in any 'state matter' does not include any federal jurisdiction exercised by a Supreme Court.<sup>179</sup> Further, the federal cross-vesting legislation does not address, at all, the federal jurisdiction of the state and territory Supreme Courts.<sup>180</sup> This has two consequences. First, no federal jurisdiction held by a state or territory Supreme Court is invested in any other Supreme Court, or in any federal court.<sup>181</sup> Secondly, no state or territory Supreme Court receives the federal jurisdiction of another state or territory Supreme Court. In other words, once a Supreme Court is exercising federal jurisdiction, the possibility that it could exercise a cross-vested jurisdiction is excluded.

It is conceivable that a family provision application could find itself in federal jurisdiction simply because the parties before the court — applicants, affected beneficiaries, personal representatives — are residents of different states. Section 75(iv) of the *Australian Constitution* provides that the High Court has original jurisdiction '[i]n all matters ... between residents of different States'. The section paraphrases art III § 2 of the *United States Constitution*. In both countries, there is a complicated jurisprudence surrounding this federal 'diversity jurisdiction' but,

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<sup>173</sup> *O'Donnell (ACT)* (n 78) 168.

<sup>174</sup> Subsequently, six proceedings arising out of the estate were heard together: *O'Donnell (NSW)* (n 78) [1].

<sup>175</sup> *O'Donnell (ACT)* (n 78) 168.

<sup>176</sup> *Ibid* 179. See *NSW Act* (n 8) s 63(5).

<sup>177</sup> *O'Donnell (NSW)* (n 78) [313]–[320].

<sup>178</sup> *O'Donnell (ACT)* (n 78) 169.

<sup>179</sup> *Uhlmann v Harris [No 2]* (n 151) 399.

<sup>180</sup> *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 4.

<sup>181</sup> The constitutional limitations on federal courts receiving state jurisdictions do not apply in this instance: cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Brown v Gould* (1998) 193 CLR 346. It is possible for federal legislation to invest in federal courts the federal jurisdictions it has given to state and territory Supreme Courts, by means other than the cross-vesting of existing court jurisdictions. The federal Parliament has tended not to do this: see, eg, *Re Kodak (Australasia) Pty Ltd v Commonwealth* (1988) 22 FCR 197; *Courtice v Australian Electoral Commission* (1990) 21 FCR 554.

unlike the United States, in Australia it can be exercised by state courts due to the *Judiciary Act* investing the original jurisdiction of the High Court in all state courts.<sup>182</sup> This is subject to several limitations that do not, however, affect diversity jurisdiction.<sup>183</sup> Not uncommonly, it can arise in ordinary civil litigation before state courts.

There is also a longstanding scepticism that federal jurisdiction in general, and diversity jurisdiction in particular, contribute anything of value to Australian law.<sup>184</sup> In 1922, Higgins J said diversity jurisdiction was ‘a piece of pedantic imitation of the Constitution of the United States, and absurd in the circumstances of Australia’.<sup>185</sup> Efforts have therefore been made to limit its incidence.<sup>186</sup> In *Watson v Cameron*, a unanimous High Court held that, wherever one party on each side was resident in the same state, diversity jurisdiction would not arise.<sup>187</sup> Proceedings brought by co-parties resident in Victoria and New South Wales against a New South Welsh resident were held not to be within diversity jurisdiction. The High Court has also consistently denied that a corporation can be considered a ‘resident’ of a state for the purposes of s 75(iv)<sup>188</sup> — although corporations are attributed a *situs* and residence for many other purposes of the law. Further, the presence of a single corporation amongst the parties seems to disqualify the entire proceedings from diversity jurisdiction, even if the natural parties would otherwise satisfy the conditions for it to arise.<sup>189</sup> There is no logic or textual justification for this; the High Court’s glosses represent a sustained policy of stifling the incidence of diversity jurisdiction. It would, though, assure that diversity jurisdiction could never arise in a family provision claim when a corporation had been appointed the personal representative, and was necessarily a party to the application.

However, diversity jurisdiction remains a possibility in Australian family provision claims. American federal courts, which otherwise have no jurisdiction in matters of probate or the administration of estates,<sup>190</sup> have assumed jurisdiction on

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<sup>182</sup> *Judiciary Act* (n 55) s 39(2).

<sup>183</sup> *Ibid* s 38.

<sup>184</sup> Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 606–8; Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959) x, xv; Leslie Zines, ‘Federal, Associated and Accrued Jurisdiction’ in Brian Opeskin and Fiona Wheeler, *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 266; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2<sup>nd</sup> ed, 2020) 221 n 130.

<sup>185</sup> *Australasian Temperance & General Mutual Life Assurance Society v Howe* (1922) 31 CLR 290, 330 (‘Howe’).

<sup>186</sup> Zelman Cowen, ‘Diversity Jurisdiction: The Australian Experience’ (1957) 7 *Res Judicatae* 1; Cowen (n 184) 74–93; Zines (n 184) 284–5.

<sup>187</sup> *Watson v Cameron* (1928) 40 CLR 290, 330.

<sup>188</sup> *Howe* (n 185); *Cox v Journeaux* (1934) 52 CLR 282; *Crouch v Commissioner of Railways (Qld)* (1985) 159 CLR 22.

<sup>189</sup> *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191, 196.

<sup>190</sup> In general, the ‘probate exception’ to federal diversity jurisdiction precludes American federal courts from probating wills or administering estates. For an overview of authorities on the probate exception, see *Marshall v Marshall*, 547 US 293, 306–12 (2006).



the basis of diversity of state citizenship,<sup>191</sup> a term approximating domicile.<sup>192</sup> In Australia, again in contrast to the United States, there has never been any decision that the subject-matter of a civil claim could prevent its being captured by diversity jurisdiction — despite all other judicial efforts to limit the reach of s 75(iv). However, it is even more likely that probate and equitable jurisdictions relating to succession could be brought within Australian diversity jurisdiction than American.<sup>193</sup> There are certainly instances, when in diversity jurisdiction, of Australian courts entertaining equitable claims.<sup>194</sup> It would therefore appear that there is no subject-matter restriction on a court in diversity jurisdiction exercising the equitable jurisdiction that envelops the application of family provision statutes.<sup>195</sup>

And it may well happen. Although there are no explicitly recognised instances of diversity jurisdiction arising when making family provision, the conditions for the jurisdiction to arise seem to have been present in *Hitchcock v Pratt* and, possibly, *Donnelly* and *Found*. It has sometimes only been an afterthought; recognised after the proceedings have been running.<sup>196</sup>

Although in *Uhlmann v Harris [No 2]* Jackson J referred to *Rizeq*<sup>197</sup> and concluded that s 79 of the *Judiciary Act* was inapplicable,<sup>198</sup> he held that, as he was sitting in federal diversity jurisdiction, *Moçambique* applied as part of the common law in Australia under s 80 of the *Judiciary Act*.<sup>199</sup> The silence of the *Rizeq–Masson* paradigm on s 80 means this interpretation was open to Jackson J,<sup>200</sup> although *Moçambique* might be best considered applicable in federal jurisdiction simply because courts exercising it apply the common law of Australia.<sup>201</sup> Following this analysis, if federal diversity jurisdiction is engaged in a family provision claim, the proceedings are governed by the common law of Australia, including its equitable

<sup>191</sup> *Borer v Chapman*, 119 US 587, 600–1 (1887); *Lawrence v Nelson*, 143 US 215, 223–4 (1892); *Sutton v English*, 246 US 199, 205 (1918). See Note, ‘Federal Jurisdiction in Matters Relating to Probate and Administration’ (1930) 43 *Harvard Law Review* 462, 465–6; Allan Vestal and David Foster, ‘Implied Limitations on the Diversity Jurisdiction of Federal Courts’ (1956) 41 *Minnesota Law Review* 1, 13–23.

<sup>192</sup> See *Messick v South Pennsylvania Bus Co*, 59 F Supp 799, 800 (ED Pa 1945); Zelman Cowen, ‘Diversity Jurisdiction: The Australian Experience’ (1954–55) 4 *Utah Law Review* 480, 487. Cf *Howe* (n 185) 324 (the terms ‘resident’ and ‘residents’ in s 75(iv) of the *Australian Constitution* mean the person is an habitual resident).

<sup>193</sup> See also Michael Pryles and Peter Hanks, *Federal Conflict of Laws* (Butterworths, 1974) 144.

<sup>194</sup> See, eg, *Glover v Walters* (1950) 80 CLR 172, 172; *Bromley v Ryan* (1956) 99 CLR 362, 381, 412; *McM v C [No 2]* [1980] 1 NSWLR 27; *Tweedie v Treffery* (Supreme Court of New South Wales, Bryson J in Eq, 13 January 1987); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 399.

<sup>195</sup> In the exercise of its original jurisdiction, the High Court is empowered to grant ‘all such remedies’ as is appropriate to resolve the controversy between the parties: *Judiciary Act* (n 55) ss 31–2.

<sup>196</sup> This appears to have happened in *Uhlmann v Harris* (2017) 327 FLR 394, and in numerous tribunal proceedings after *Burns v Corbett* (2018) 265 CLR 304 where the High Court held that, as state tribunals cannot exercise federal jurisdiction, they cannot hear proceedings between ‘“residents of different states” within the meaning of s 75(iv) of the *Constitution*’: at 342–5, 413.

<sup>197</sup> See above nn 55–78 and accompanying text.

<sup>198</sup> *Uhlmann v Harris [No 2]* (n 151) 398.

<sup>199</sup> *Ibid* 401.

<sup>200</sup> See above nn 67–74 and accompanying text; *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280, [405].

<sup>201</sup> See above nn 70–72 and accompanying text.

principles. Any state family provision laws that apply would do so in federal jurisdiction, where the law of the state in which the court is sitting becomes applicable.<sup>202</sup> That being so, the jurisdiction is not one relating to a ‘state matter’, and cannot be invested in another Supreme Court under the state or territory cross-vesting laws. Jackson J was not entirely certain that the common law limitations of the *Moçambique* rule would apply to a question concerning possession of land in another state when a court is exercising federal jurisdiction.<sup>203</sup> However, those doubts arose more from the continuing authority of *Moçambique* at common law, especially in an interstate setting, and not from any claim that the *Judiciary Act* could not import limitations within state jurisdictions into a federal jurisdiction.<sup>204</sup> In *Uhlmann v Harris [No 2]*, Jackson J actually did conclude that, when in federal diversity jurisdiction in a Queensland court, *Moçambique* applied to limit the court’s power to deal with a question of the possession of land in another state.<sup>205</sup> The decision strongly suggests that, if a family provision claim were to fall within federal jurisdiction, *Paulin* ground (3) would also limit the capacity of most Australian Supreme Courts to make orders for provision from immovable property in other states or territories. The exception would again be the Supreme Court of New South Wales, which could claim under the amended s 64 of the *Succession Act* to deal with immovable property outside the state if it were the *forum domicilii*.<sup>206</sup>

## V Conclusion

As we have emphasised, an issue that persists in cross-border succession law is Australia’s strong insistence on the principle of scission. This can commonly see the laws of two or more places apply to the one estate. Attempts to have a single applicable law govern the distribution of a whole estate have been unsuccessful. But as problematic as application of the principle of scission might be,<sup>207</sup> the caution inherent in making the *lex situs* the applicable law for immovable property remains, in our view, the best option. Especially in the case of land, the state’s sovereign interests in determining title to and the management of immovable property inside its borders lie at the heart of its existence as a separate political entity. Straightforward application of the *lex situs* as the applicable law for immovable property therefore ensures that the law respects another state’s sovereignty.

We have, on the other hand, drawn attention to the problems that the *situs* rule creates in questions of adjudicative jurisdiction. These problems need addressing. In most states and the territories, *Paulin* jurisdictional ground (3) limits the power of the court to order provision from immovable property<sup>208</sup> — subject, perhaps, to the power to take foreign immovable property into account when determining the value of the estate, and how much is available for family

<sup>202</sup> See above nn 55–78 and accompanying text.

<sup>203</sup> *Uhlmann v Harris [No 2]* (n 151) 398.

<sup>204</sup> *Ibid* 400–1.

<sup>205</sup> *Ibid* 401.

<sup>206</sup> See above nn 139–145 and accompanying text.

<sup>207</sup> See above nn 35–49 and accompanying text.

<sup>208</sup> See above nn 137–157 and accompanying text.

provision.<sup>209</sup> At present, if strictly applied, jurisdictional ground (3) requires a separate family provision application to be made in every state, territory or country in which real estate (and other immovable property) is held. As long as all of these concurrent applications are within Australia, the cross-vesting scheme enables the jurisdictional problems to be resolved by a transfer to one Supreme Court, able to exercise the powers of every Australian *forum situs* under the relevant state or territory family provision statutes.<sup>210</sup> There will still be separate application of the *leges situs* to immovable property in different states, but the one court can make that determination.

However, as has so often been the case, the peculiarities of federal jurisdiction in Australia disrupt the solutions of the cross-vesting scheme.<sup>211</sup> Jackson J's analysis in *Uhlmann v Harris [No 2]* of the effect of federal jurisdiction on the *Moçambique* rule is a compelling one. It is hard to escape the conclusion that it is equally applicable to *Paulin* jurisdictional ground (3) in family provision claims. As far as immovable property is concerned, a state Supreme Court exercising federal jurisdiction in an application for family provision will only be able to draw on immovable property in that state. It takes little imagination to foresee that, if the property comprising an estate spans borders, claimants for family provision, beneficiaries and personal representatives are also likely to live in different states — and so, as we have suggested, are just as likely to engage federal diversity jurisdiction. Ironically, as *Uhlmann v Harris [No 2]* established, it is easier to recover land in another state when none of the parties are resident there. Equally, it is easier to gain access to immovable property in other states and territories for family provision when all of the parties to the application live in only one single state or territory.

The answer to the problem of importing jurisdictional ground (3) into federal jurisdiction is, as has occurred in New South Wales, modifying it by legislation. The purpose of s 64 of the *Succession Act* was not to address jurisdictional problems raised by the cross-vesting scheme. However, it does have the collateral benefit of addressing them effectively, allowing immovable property outside the state to be dealt with in an order for family provision when the testator has died domiciled there.

Legislation modelled on those lines has much to commend it. It would give every state and territory Supreme Court the power to make reference to the whole estate, wherever the property is located, for family provision, as long as the court in question was the *forum domicilii*. Section 64-style legislation would eliminate jurisdictional ground (3) but extend jurisdictional ground (2) to include immovable property as well as movables. The power would be applicable even where federal jurisdiction was being exercised because residents of different states were involved. Claimants would still be forced to apply for provision in the place of the testator's domicile, but it would immediately eliminate the need to make concurrent applications in different courts to bring claims against real estate within the powers of any Supreme Court.

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<sup>209</sup> See, eg, *Chen* (n 111) [75]. See above nn 111–113 and accompanying text.

<sup>210</sup> See above nn 158–165 and accompanying text. Cf Kelly (n 10) 392.

<sup>211</sup> See above nn 179–206 and accompanying text.