CHOICE-OF-LAW RULES AFFECTING MARITAL PROPERTY RIGHTS

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I. INTRODUCTION. This article discusses choice-of-law rules as they affect marital property rights in Texas. The discussion assumes personal jurisdiction over both spouses. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 326 (Tex. 1998) (personal jurisdiction required to adjudicate non-resident spouse's interest in marital property).

II. CHOICE OF LAW RULES. Traditional choice-of-law rules (a/k/a "conflict of law" rules) have been supplanted in the most instances by most significant relationship test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("the Restatement"). However, neither the Texas Legislature nor the Texas Supreme Court have supplanted traditional conflict of law rules in all areas involving marital property, so the traditional conflict of law rules must be examined along with the Restatement.

A. PROPERTY OWNED AT THE TIME OF MARRIAGE. Traditionally, the rights of a spouse in movable assets owned by the other spouse at the time of marriage were determined by the law of the first marital domicile. *See Avery v. Avery*, 12 Tex. 54, 56-57 (1854). The rights of a spouse in immovable assets owned by the other spouse at the time of marriage were determined by the law of the situs of the immovables. *See* 3 L. Simpkins, TEXAS FAMILY LAW § 16.2, at 177 (Spear's 5th ed. 1976).

B. PROPERTY ACQUIRED DURING MARRIAGE. Traditionally, the rights of the spouses in movable property acquired during marriage were controlled by the law of the marital domicile at the time of acquisition. *Oliver v. Robertson*, 41 Tex. 422, 425 (1974); *Tirado v. Tirado*, 357 S.W.2d 468, 471-72 (Tex. Civ. App.--Texarkana 1962, writ dism'd); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.). Traditionally, the rights of spouses in immovables acquired during marriage was determined by the law of the situs. *Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233-34 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.--El Paso 1944, writ ref'd w.o.m.).

C. CHANGE OF DOMICILE DURING MARRIAGE. Traditional choice-of-law rules held that spouses' changing domiciles during marriage did not affect their rights in their property acquired while domiciled at the earlier domicile. *See Avery v. Avery*, 12 Tex. 54, 56-57 (1854) (under the law of Georgia, the first marital domicile, the husband became the owner of all personal property owned by the wife at the time of marriage; upon removal of the spouses to Texas, the husband continued to be the owner of such property). This led upon divorce to claims that where title to property was acquired by a spouse in a "common law" jurisdiction, that property became his "separate property" upon moving to Texas, and was not subject to division in a Texas divorce. That contention was put to rest by the adoption in 1981 of Texas' so-called "quasi-community statute" and in 1982 by the Texas Supreme Court's decision in *Cameron v. Cameron*, both of which are discussed below. However, neither the quasi-community statute or *Cameron* apply outside of divorce or annulment, so other choice-of-law rules must be applied to problems such as creditors claims during marriage, management rights during marriage, and rights upon dissolution of marriage by death. *See Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (Tex. 1987) (when a spouse dies in Texas, property acquired by that spouse during marriage, but while domiciled elsewhere, is governed by the marital property law of the earlier domicile, and not by Texas marital property law).

D. THE RESTATEMENT (2d) OF CONFLICT OF LAWS. The RESTATEMENT (2d) OF CONFLICT OF LAWS (1971) ("the Restatement") adopted a new standard for choice-of-law decisions: the "most significant relationship" standard. The standard is defined in Section 6:

> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971):
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

> (a) the needs of the interstate and international system,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

The most significant relationship standard was applied, in the Restatement, to movable property acquired during marriage:

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258:

> (1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in section 6.
>
> (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law.

The Restatement continued to apply the law of the situs to real property acquired during marriage, but that includes the choice-of-law rules of the situs:

> The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234:
>
> (1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.
>
> (2) These courts would usually apply their own local law in determining such questions.

E. THE "MOST SIGNIFICANT RELATIONSHIP" STANDARD COMES TO TEXAS. In 1979, the Supreme Court of Texas rejected the traditional lex loci delicti choice-of-law rule for tort cases, and announced that henceforth the "most significant relationship" standard of the Restatement would apply to tort cases. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). In 1984, the Texas Supreme Court overturned the lex loci contractu choice-of-law rule for contract cases, and adopted Section 6 of the Restatement, for all cases except contract cases containing a choice-of-law provision. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). The Texas Supreme Court has not decided a case applying the most significant relationship test to marital property issues upon divorce. However, that test has been applied to marital property issues upon divorce in several court of appeals decisions, discussed below.

III. WHOSE MARITAL PROPERTY LAW GOVERNS DURING MARRIAGE? The Texas Family Code contains a choice-of-law clause, Section 1.103:

> Texas Family Code § 1.103. Persons Married Elsewhere
>
> The law of this state applies to persons married elsewhere who are domiciled in this state.

While Section 1.103 is not limited to marital property rights, as far as marital property rights are concerned the statute suggests that spouses who move to Texas begin to live under our marital property regime. It also means that Texas will apply its own law if the parties are divorced by a Texas court. Strangely, the statute is not relied on in marital property choice-of-law cases.

From the little case law there is on the subject, it appears that Texas courts lean toward the law of domicile in determining marital property rights in personal property during marriage. For example, in one dispute arising from the death of a married Mexican citizen who had money on deposit in a Texas bank, the appellate court applied the law of Mexico, saying:

> In choice of law questions dealing with ownership of personal property, as between spouses, the rule of domicile predominates. King v. Bruce, 145 Tex. 647, 201 S.W.2d 803, 809 (1947), cert. denied, 332 U.S. 769, 68 S.Ct. 82, 92 L.Ed. 355 (1947).

Ossorio v. Leon, 705 S.W.2d 219, 222-23 (Tex. App.--San Antonio 1985, no writ). The court backed up its "rule of domicile" statement with a "most significant relationship" analysis, and arrived at the same answer–that Mexican marital property law should apply.

The case of *Ramirez v. Lagunes*, 794 S.W.2d 501 (Tex.

App.–Corpus Christi1990, no writ), was a bill of discovery brought by a former wife, seeking information about money on deposit in Texas offices of financial institutes where she suspected that her former husband had hid money from her. Both former spouses were Mexican citizens and domiciliaries of Mexico. The financial accounts were opened during marriage. The appellate court affirmed the denial of discovery to the ex-wife, partially due to lack of personal jurisdiction over the ex-husband. The appellate court also turned to Texas choice-of-law rules to justify its decision, saying that money on deposit is personalty as to which the law of marital domicile applies, and further that Mexico was the country with the most significant relationship to the parties and the issues. The appellate court then reasoned that because Mexican law applied, the ownership of the funds was a matter within the jurisdiction of the Mexican divorce court, thus depriving the Texas court of jurisdiction over the res of the lawsuit. This last step in reasoning was perhaps a misunderstanding of the use of role of choice-of-law rules, but the opinion nonetheless reflects a tendency on the part of Texas courts of appeals to evaluate marital property choice-of-law issues from the standpoint of both 1) the law of marital domicile as to personalty and 2) the most significant relationship standard.

IV. WHOSE MARITAL PROPERTY LAW APPLIES TO DIVORCE? As noted above, traditionally upon divorce in Texas the rights of the spouses in property acquired while domiciled elsewhere was controlled by the law of the previous domicile. *Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). Today, however, this old choice-of-law rule has been abrogated by provisions of the Texas Family Code and by Texas Supreme Court case law.

A. STATUTORY CHOICE OF LAW RULE UPON TEXAS DIVORCE. Texas Family Code § 7.001 gives a Texas divorce court the power to divide community property that was acquired while the spouse was domiciled in Texas.

1. SECTIONS 7.001 AND 7.002.

> Texas Family Code § 7.001. General Rule of Property Division
>
> In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

Texas Family Code § 7.002 extends the authority of a divorce court, to divide the estate of the parties, to property acquired while domiciled elsewhere that would have been community property had Texas law applied to the acquisition.

> Texas Family Code § 7.002. Division of Property Under Special Circumstances
>
> In addition to the division of the estate of the parties required by Section 7.001, in a decree of divorce or annulment the court shall order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:
>
> (1) property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or
>
> (2) property that was acquired by either spouse in exchange for real or personal property and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

Although Section 7.002 is couched in terms of the power of the court, it incorporates a tacit choice of law rule: it tells the trial court to ignore the marital property law of the earlier domicile and to instead assume that Texas marital property law applies.

B. BURDEN OF TRACING. Section 7.002(2) applies a tracing concept to property that would have been community property had the domicile been Texas, etc. The statute does not declare who has the burden to trace. However, Texas Family Code § 3.003 establishes a presumption that all property on hand at the time of marital dissolution is community property, and is therefore divisible under Section 7.001. To overcome this presumption, a spouse must trace such property to its inception of title and establish that the circumstances surrounding the acquisition make the property a separate, not a community, asset. If those circumstances reflect an acquisition when the spouse was domiciled in another jurisdiction, they should also reflect whether the property would have been community property had the spouse been domiciled in Texas at the time of acquisition. As a practical matter, the effort of tracing back to an original acquisition while domiciled in another jurisdiction would only be undertaken by a spouse who wished to avoid

both Section 7.001 and Section 7.002. This may be accomplished by showing: (1) that the property in question was acquired when a spouse was domiciled elsewhere; and (2) that the property in question would not have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition. No case indicates whether the burden to show that the property is not divisible under Section 7.002 is by a preponderance or by clear and convincing evidence.

C. HOW DOES IT APPLY TO REAL PROPERTY? The interrelation of Section 7.002 with Texas conflict of laws rules raises interesting questions when it comes to real estate.

As noted above, Texas choice-of-law rules provide that the rights of a spouse in the property owned by the other spouse at the time of marriage are determined, as to the movables, by the law of the first marital domicile, and as to immovables, by the law of the situs. Similarly, as to the rights of spouses in property acquired during marriage, the law of marital domicile at the time of acquisition controls as to movables, and the law of the situs controls as to immovable property. Thus, where Section 7.002 applies, personalty will be considered to be separate or community according to the law of Texas, while realty will be considered as separate or community according to the law of situs. *See Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.--Dallas 1962, no writ); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.--El Paso 1944, writ ref'd w.o.m.). The law of the situs may characterize the land the same as the cash (personalty) used to buy the land, but if it does not, then realty may be characterized in a Texas divorce using another state's marital property law, even under Section 7.002. [Land in another state acquired by credit of one spouse alone raises additional questions.]

D. IS THERE SYMMETRY BETWEEN COMMUNITY AND SEPARATE PROPERTY? The court of appeals' opinion in *Dawson-Austin v. Austin*, 920 S.W.2d 776, 789-90 (Tex. App.--Dallas 1996), *reversed on other grounds*, 968 S.W.2d 319 (Tex. 1998), raised a question about how the Family Code choice-of-law concept applies to property that would have been *separate* property had the acquiring spouse been domiciled in Texas at the time of acquisition. The Court, speaking of Section 3.63(b), the forerunner to current Texas Family Code 7.002, said:

> Husband asserts that section 3.63(b)operates as a comprehensive choice-of-law provision in property characterization issues. He argues that section 3.63(b)(1) should be read as providing that the characterization of property is dependent solely on Texas law. Under Husband's interpretation of section 3.63 (b), if property is characterized as community property in the residential state of the acquiring party but would have been separate property if the parties had resided in Texas, then in a divorce proceeding in a Texas court, the property will be classified as separate property.
>
> We disagree with Husband's sweeping interpretation of section 3.63(b). The statute by its terms acts only to expand, not restrict, the definition of community property. Nothing in the legislative history of the statute or the development of the law in this area suggests that section 3.63(b) was intended to expand the definition of separate property and thus restrict the extent of community property. Even the popular name for the statute, the "quasi-community" statute, suggests that it is intended to expand the definition of community property. See Cameron, 641 S.W.2d at 223; Ismail v. Ismail, 702 S.W.2d 216, 219 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). If the legislature had intended for the statute to be a comprehensive choice-of-law provision, it would not have phrased the statute as an expanded definition of community property.

The Court of Appeals therefore went on to apply the most significant relationship standard to personalty acquired while domiciled elsewhere that would not have been community property if the acquiring spouse had been domiciled in Texas at the time of acquisition. The Court's reasoning is troubling, and the State Bar of Texas' Family Law Section has proposed a statutory amendment for the 2003 Legislature designed to eliminate this type of thinking from the equation.

E. ONLY ONE TEXAS DOMICILIARY. An issue has been raised as to whether it is proper to apply Section 7.002 in a divorce where only one spouse has moved to Texas. A California court of appeals ruled that California's "quasi-community" property statute should not have been applied to a divorce where only one spouse had moved to California. *See In re Marriage of Roesch*, 83 Cal.App.3d 96, 147 Cal.Rptr. 586 (Cal.Ct.App.1978), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1232, 59 L.Ed.2d 465 (1979). This contention was raised in *Ismail v. Ismail*, 702 S.W.2d 216, 220 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.), but the Texas appellate court criticized the reasoning in *Roesch*, and further distinguished the case on its facts (the non-resident's ties to the forum state in *Ismail* were stronger than in *Roesch*).

F. SUPREME COURT CHOICE OF LAW RULE UPON TEXAS DIVORCE. The Texas Supreme Court, in *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982), held:

> [P]roperty spouses acquire during marriage, except by gift, devise or descent should be divided upon divorce in Texas in the same manner as community property, irrespective of the domicile of the spouses when they acquire the property.

Thus, both our common law and our statutes apply Texas marital property law to a divorce.

This rule applies only to divorce and annulment. As noted in *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 664 (Tex. 1987):

> In Cameron, we held, however, that separate property acquired in common law jurisdictions merits different treatment in the limited context of divorce or annulment. While there were solid reasons for creating the Cameron rule in those situations, the same rationales are not applicable to probate procedures.

V. WHOSE MARITAL PROPERTY LAW APPLIES TO PROBATE? The Texas Supreme Court ruled in *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (Tex. 1987), that when an issue of marital property from other states arises upon the death of a spouse, that the Family Code divorce-related provisions, and the *Cameron* case, do not apply and that the property will be characterized by the law of matrimonial domicile at the time of acquisition.

VI. POWER OVER FOREIGN REALTY. Family Code §7.002 requires the court to divide the property in question, "wherever situated." A court having personal jurisdiction of the parties may, by operation of its decree alone, dispose of real property located in Texas and personal property located in Texas or in other jurisdictions. *Moor v. Moor*, 63 S.W. 347, 351-52 (Tex. Civ. App. 1901, writ ref'd) (court may divide personalty located outside Texas in divorce proceeding). It may not, however, by direct operation of its decree, pass title to realty in other jurisdictions. *Fall v. Eastin*, 215 U.S. 1, 13 (1909); *Rozan v. Rozan*, 317 P.2d 11, 15-16 (Cal. 1957). The court does have the power to require a party over whom it has in personam jurisdiction to execute a conveyance of real estate located in another state. *In re Marriage of Read*, 634 S.W.2d 343, 349 (Tex. App.--Amarillo 1982, writ dism'd); *In re the Marriage of Glaze*, 605 S.W.2d 721, 724 (Tex. Civ. App.--Amarillo 1980, no writ); *Risch v. Risch*, 395 S.W.2d 709, 713 (Tex. Civ. App.--Houston 1965, writ dism'd); *accord Kane v. Kane*, 577 P.2d 172, 175-76 (Wyo. 1978). Such decrees have been honored in other states. *See e.g., Noble v. Noble*, 546 P.2d 358, 361 (Ariz. 1976); *Woodruffe v. DeMola*, 368 A.2d 967, 969 (N.J. Super. Ct. Ch. Div. 1976); *Whitmer v. Whitmer*, 365 A.2d 1316, 1318-19 (Pa. Super. Ct. 1976).

VII. POST-DIVORCE DIVISION OF PROPERTY. The post-divorce division of property overlooked in the decree of divorce presents a special case, where the decree of divorce was issued by another state. The Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, requires that the courts of Texas give a sister-state decree of divorce the same effect that it would be accorded by the court of the issuing state. Thus, the question of whether a spouse can bring a post-divorce proceeding to divide marital property that was not divided in the decree of divorce is determined by the law of the other state, not the law of Texas. *Welsch v. Gerhardt*, 583 S.W.2d 615, 616 (Tex. 1979). This view is reflected in Texas Family Code § 9.203(b), which requires Texas courts in a post-divorce division proceeding to apply the law of the sister-state when full faith and credit requires it. Texas Family Code § 9.204(b) recognizes that the sister-state law does not apply, and Texas will apply its own law, where the sister-state court issuing the divorce did not have jurisdiction to divide the property in question.