FORUM SHOPPING AND FORMALITIES OF EXECUTION IN ISRAEL AND ONTARIO

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ABSTRACT

This article discusses procedural and substantive legal issues arising when a testator with property in Ontario and Israel leaves a will that is invalid in Ontario but valid in Israel. The authors examine a method of 'curing' the defects under Ontario law by first obtaining probate in Israel and subsequently resealing the order in Ontario.

INTRODUCTION

Clients owning property in more than one jurisdiction create difficulties and opportunities for the person applying for probate. Consider the following scenario:
Max Schwartz owns a triplex at 123 Palmer Dr. in North York, ON, as well as his home in Forest Hills, ON. He has $2 million in GICs. Last year he moved to Israel to be close with his daughter Shoshana. Max's son has become estranged and speaks to his father infrequently.
Upon his arrival in Israel, Max fulfills a lifelong dream and buys a $1 million home in Yemin Moshe, which is an old neighbourhood in Jerusalem, overlooking the Old City. As an *Oleh Chadash* (New Israeli citizen) and resident of Jerusalem, Max wants to set his affairs in order. At her father's request Shoshana purchases a will kit off the internet for $58+GST and arranges for her father to go to a neighbour to witness the will. Max fills out the form leaving everything to Shoshana and nothing to his son. The neighbour and his wife see Max sign the will, but only the neighbour signs as a witness.
Max dies and Shoshana wants to probate his will.
1. Can this will be probated in Ontario?
2. Can, and should, this will be probated in Israel?
3. Can a testamentary document probated in Israel be resealed in Ontario?

Can this will be probated in Ontario?

Under Ontario law[1] a certificate of appointment of estate trustee with a will or without a will (alternatively referred to as "probate") is made to the Superior Court of Justice of Ontario and filed in the court office in the district in which the deceased had a fixed place of abode at the time of death. In our case, Max did not live in Ontario when he died so the legislation provides that the application for probate should be filed in the court office for the county or district where the deceased had property at the time of his death. However, while the legislation provides that Max may apply for a certificate of appointment in Ontario – should he? Perhaps not. The strict formalities of execution in Ontario suggests that Max's testamentary document would not be granted probate in Ontario.

The problem in our scenario is that the testamentary document would likely be invalid in Ontario.

1 See section 7 (1) and (2) of the *Estates Act*, R.S.O. 1990, c. E.21

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The requirements of due execution are set out in the *Succession Law Reform Act*:[2] A will is not valid unless,

(a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

The language of section 4(1) (a) of the *Succession Law Reform Act* is clear and unambiguous: A will is not valid unless it absolutely complies with the formalities of execution as set out in the legislation. However, there is a stream of case law in Ontario that suggests that substantial compliance with the formalities of execution may be sufficient. [3]

Some Canadian jurisdictions have enacted legislation specifically giving judges the discretion to dispense with the formalities of execution, as long as the document in question substantially complies with the formalities of execution required by its local provincial legislation and is in accordance with the testator's wishes. Examples of such legislation include Quebec's new *Civil Code*, Nova Scotia's new section 8A of its *Wills Act*, New Brunswick's *Probate Court Act*, the Prince Edward Island *Probate Act*, Manitoba *Wills Act*, and the Saskatchewan *Wills Act*.[4]

Unlike these jurisdictions, Ontario has no statutory provision that allows a will to be proven if there is "substantial compliance" with statutory requirements. There is no legislative authority in Ontario that allows a document that is in substantial compliance with the requirements of section 4 of the *Succession Law Reform Act* to be a valid testamentary document.[5] There is case law suggesting that Ontario courts do not have the discretion to dispense with the formal requirements imposed by the *Succession Law Reform Act* even if the court is satisfied as to the testamentary intention of the deceased.[6] Furthermore, Justice Cullity, a highly regarded judge in this area, rejected the notion of substantial compliance in Ontario and opined that in the absence of a legislative mandate, allowing substantial compliance would radically depart from the interpretation of section 4 and its predecessors in the *Wills Act*, R.S.O. 1970, c. 499 and the *Wills Act, 1837* (UK) have received in the past "...and introduce uncertainty and, could thereby, encourage even more litigation in a context in which it is notoriously endemic."[7]

2 Section 4(1), *Succession Law Reform Act*, R.S.O. 1990, c.S.26

3 See *Sisson v. Park Street Baptist Church*, [1998] O.J. No. 2885 (Ont. Gen. Div.), *Rava, Re* (1978), 3 E.T.R. 307 (Ont Surr. Ct.), and *Maluchen Estate, Re* (1994), 6 E.T.R. (2d) 217 (Ont. Gen. Div.).

4 See Feeney, Thomas G. & Jim Mackenzie, *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Toronto: Butterworths, 2000) paragraph 4.6

5 See Brian A. Schnurr, Estate Litigation, 2nd ed., chapter 18.13 and *Papageorgiou v. Waldstaff Estate* [2008] 2620, 42 E.T.R. (3d) (S.C.J.)

6 *Sills v. Daley* (2002), 3 E.T.R. (3d) 297 (S.C.J.)

7 *Ettorre Estate, Re* (2004), 11 E.T.R. (3d) 208, [2004] O.J. No. 3646, 2004 CarswellOnt 3618, (ONT. S.C.J.)

The bottom line is that until the Ontario Court of Appeal definitively rules on the issue of substantial compliance, any testamentary document that does not fully comply with the formalities of execution is unlikely to be probated in Ontario.[8]

SHOULD THIS WILL BE PROBATED IN ISRAEL?

The quick answer is yes. A will is not given binding force in Israel until it has been probated in Israel in accordance with Israeli Law.[9] Thus Shoshana will not be able to transfer the Yemin Moshe property to her name without an Israeli probate order.[10] If Shoshana does not file for probate and does not register the property in her name then eventually her heirs – if they wish to sell the property or have it registered in their names – will be required to file for probate of both the Wills of Max and Shoshana. At that time they are likely to incur extra legal costs and may run into complications and delays.

Jurisdiction/Choice of Law Issues: Max was domiciled in Jerusalem so the Jerusalem courts will claim jurisdiction over his estate.[11] Moreover, since Max was domiciled in Jerusalem Israeli law will be considered to apply to all estate assets even if they are not situated in Israel.[12] Under Ontario law, in a similar situation, the law applicable to estate assets is the law of the deceased's domicile for movables, and the law of the situs of the real estate for land.[13] This distinction between movables and real property is not made in Israeli law. Israeli law imposes the law of the domicile of the deceased on all estate assets; hence in Max's case, Israeli law will apply to all his assets. There is potential here for conflict. If we suppose that Max died intestate with respect to real estate assets in Ontario for example, Israeli law would claim jurisdiction over the division of those assets, and would also attempt to apply Israeli law, creating a conflict with Ontario law.[14]

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8 See *Schnurr, Estate Litigation*, 2nd Ed. 2 – Challenging the Validity of wills 2.1 – Nature of the Challenge; **Ontario – Estate Administration** Special Instructions, Authored Special Instructions Special Instruction 11A – Execution: Substantial Compliance with Legislation; In the text, *MacDonnell Sheard and Hull on Probate Practice* (4 Ed) (1996) Hull and Hull, the author, at page 65 states: Both witnesses must sign after the testator's signature has been made or acknowledged to them when both were present at the same time.

9 S. 39 of the *Israeli Inheritance Law*: בצוואה אפא אם ניתן עליה צו קיום לפי הוראות הפרק החמישי אין להתביע ובירית על פי צוואה יאין להיזקק לה While a probate order is required to transfer property, in some cases it is not required to transfer rights in a jointly held bank account. Section 13A of the Bank Ordinance permits banks to continue to honour the instructions of a survivor of a jointly held bank account provided the joint owners specifically agreed to such a rule. If Max had an Israeli bank account and did not make Shoshana a joint owner, or did not sign the appropriate form when he opened the account, Shoshana would not be able to access the bank account without a probate order. Section 13A of the Bank Ordinance does not affect the rights of heirs as amongst themselves, but it does release the bank from responsibility to the heirs.

10 *S. 123(b) Land Law*

11 *S. 136 Inheritance Law*

12 *S. 137 Inheritance Law*. An exception is made for property located in a jurisdiction that insists on its own sole jurisdiction to control estates. For example, jurisdictions that insist that a specified proportion of an estate must go to the issue of a deceased.

13 S. 36 *SLRA*

14 See section 36(1) of the *Succession Law Reform Act* and note that the laws of Israel and Ontario differ in several important respects concerning intestacy, among them the spouse's preferential share and the split among survivors. A discussion of these differences is beyond the scope of this article

Before proceeding further, let us change the scenario and suppose Max had been domiciled in Ontario at the time of his death. In that situation, Israeli courts would still claim jurisdiction to deal with his assets (both in Jerusalem and abroad[15]) but now – under Israeli law – the applicable law would be the law of Ontario since Max had been domiciled there at the time of his death.[16] Shoshana will still have to probate the will in Israel but now she will also need to file an affidavit concerning the law of Ontario.[17] Parenthetically, it should be emphasized that in most cases there is no 'resealing' procedure in Israel so that even if Max's will has been probated in Ontario it must nevertheless be probated again in Israel in the ordinary manner.[18]

Consider a variant scenario. Suppose Max spent part of his time in Israel and part in Ontario and died intestate during a visit to the United States. His heirs live in Israel and Ontario and he has movables in both jurisdictions as well as cash in a US bank account. The courts of both Israel and Ontario will be asked to determine Max's domicile at the time of death and they may well reach different conclusions.[19] An Israeli court may decide Max was domiciled in Israel and therefore Israeli law applies to all his assets, including the movables in Ontario and the US. On the other hand, an Ontario court might declare Max's domicile to be Ontario meaning that Ontario law would apply to his movables.[20] We have the potential for a set of competing claims regarding his movables,[21] which would have to be adjudicated in several jurisdictions.

Let us return to Shoshana in the case described at the beginning of this paper. She is now applying for probate of Max's will in Israel.

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15 S. 136 *Inheritance Law*. Israeli courts have interpreted this section to give them jurisdiction in theory over all the assets of a deceased who dies outside Israel, provided only that he left some asset in Israel, even if it is a minor article of clothing. *Ploni v. Ploni 109310/06* תייצ, בעימ 9914/09. Whether the Israeli courts would in fact take jurisdiction would depend on arguments concerning the most convenient forum, but note (see Ploni v. Ploni) that Israeli courts place a heavy burden of proof on the party claiming that the Israeli forum is not convenient. In Ploni the testator died outside Israel and most of the heirs and most of the assets were outside Israel yet the Israeli court claimed jurisdiction. This opens interesting possibilities. If Max, for example, had lived in Ontario and signed a will in Ontario that met Israeli formality requirements but did not meet Ontario formality requirements, his heirs could conceivably apply to an Israeli court for a probate order covering all of his worldwide assets based on a small bank account he had left in an Israeli bank. The heirs, presumably acting in concert, might be able to obtain an Israeli probate order covering all of Max's assets worldwide. If this probate order could be resealed in Ontario the estate could avoid the consequences of failure to abide by Ontario formality requirements re signing the will

16 S. 137, *Inheritance Law*.

17 According to s36(1) SLRA Israeli law will be applicable so ultimately Israeli law will govern the Yemin Moshe property.

18 Again 970/93 עייש; but in very rare cases a foreign probate order may be recognized (*I.R v. Apotropos, TA Family Ct., 102300/06* תייצ *published 12/3/09)*

19 While the essential definitions of domicile are the same in Ontario and Israel, each court might come to a different conclusion based on the facts presented to it.

20 *S. 36(2) SLRA*

21 Because of the differences between Israeli and Ontario intestacy rules

Shoshana will have to file the original will[22] with her application to the appropriate Israeli court. Probate applications in Israel are usually made to the Registrar of Inheritances, which is essentially a branch of the Apotropos, roughly the equivalent of the Public Guardian in Ontario.[23] If there are any extraordinary matters related to the will, such as failure to comply with the formalities of law, as in our case where only one witness signed the will, the registrar will transfer the file to the Family Court.[24]

Before considering the defect in the will, let us digress a moment and note that Max's will was a Canadian will kit in English. English language wills are generally probated in Israel without problem but they may cause confusion after probate is obtained. Typical probate orders in Israel state that the 'the will of deceased, a copy of which is attached, is valid.' When Shoshana takes such a probate order to the registry office and asks that the Yemin Moshe property be registered in her name, the clerks may well be confused by the English wording[25] and ask for a notarial translation of the entire will. They will study it intently to ensure they are not about to make a mistake. Where complicated wills have been drafted by lawyers in Ontario the process may become a time-consuming and expensive annoyance, which could have easily been avoided had Max been advised to consult an Israeli attorney to help him prepare a simple Israeli will.

We now turn to consider Max's failure to comply with the formalities of making a will in Israel.

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22 Where the original will is not available (for example, if it has been where it has been filed for probate outside Israel), an application must be made asking the court to accept a copy. Since her brother is not a named beneficiary Shoshana will not be required to notify him of the existence of the will or the probate application in Israel

23 If all parties agree in writing the application may be made to the Rabbinical Courts, which are also empowered to issue probate orders although they will operate to give effect to the testator's wishes in accordance with halachic norms. A fuller discussion of the differences between the Rabbinical Courts and the Registrar is beyond the scope of this article.

24 *S 67A Inheritance Law*

25 For example, suppose the will form that was used stated: "I give, devise and bequeath all of my property…to my said Trustees upon the following trusts." The clerk at the registry office may wonder if he is supposed to register the property in the name of the Trustees and not the beneficiary, Shoshana. Remember, these clerks have no experience reading complicated legal documents in English. Moreover, the description of the testamentary trusts may be complicated and may not ever refer to the Israeli real estate specifically as a separate item. The registry office clerk may well throw up his or her hands and tell Shoshana to go back to court and get a specific order concerning the disposition of the Israeli property

In general, wills in Israel must be signed in front of two witnesses who must also sign the will at the time the testator signs it.[26] Max had two witnesses but only one of them signed the will at the same time as Max. In Ontario, this situation might be fatal to the will but the Israeli Inheritance Law has for many years permitted courts to grant probate notwithstanding certain types of defects.[27] A recent legislative amendment in Israel makes it clear beyond doubt that the defect described in this paper can be ignored in Israel.

However, the remedy will not be automatic. Where a will appears on its face to have been made in compliance with formalities there is a presumption that it accurately reflects the independently formed wishes of the testator. But where there is a defect on the face of the will, as in our case, this presumption does not exist.[28] Shoshana will have to actively prove to the court that there is no doubt the will represented Max's true and independently formed wishes. Only after Shoshana has lifted this burden of proof and the court has been satisfied that the will represents Max's true intentions will a probate order finally be issued.

Max's son: Shoshana's brother, if he wished, might be able to attack the will and make life difficult for Shoshana. We've already seen that when there is an irregularity in the will the burden of proof that the will represents Max's true intentions, freely and independently made, shifts to Shoshana. Assuming there is no evidence that Shoshana exerted undue pressure on her father to make the will in her favour, her brother may attempt to claim that the gift to her is invalid because Shoshana – a beneficiary – actively participated in making the will. Section 35 of Israel's *Inheritance Law* voids bequests made to a person who 'drafted the will…or took a part in its drafting in some other manner'. Active participation in the process of drawing up a will is considered absolute evidence of undue pressure on a testator[29] and Israeli law is much less forgiving than Ontario law, which allows the courts to ignore the effects of undue influence. [30]

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26 S. 20 *Inheritance Law*. Note that under Israeli law one may also make a will in front of a judge or a notary public; no writing is required and no witnesses are required S.22. Holograph wills are acceptable, and a testator on his death bed may also make an oral will S. 19

27 S. 25 *Inheritance Law*. Israeli law recognizes a distinction between defects, which may be ignored or corrected, on the one hand, and fundamental defects, which go to the heart of the testamentary process on the other, case law. The former may be corrected; the latter invalidate a will. See *s. 25 of Inheritance Law*, as recently amended and decision of Supreme Court in *Ahuvia v. Ahuvia et al* 7818/00 פ"ד

28 See 2098/97 פ"ד Buskila

29 See 2098/97 פ"ד

30 Section 12(3), *Succession Law Reform Act*

Because of the harsh terms of s. 35 of the Israel's *Inheritance Law*, courts tend to interpret the rule narrowly. Shoshana has probably not disqualified herself by her activity as described in this paper but she is not far from the borderline. Imagine a few changes in the facts: suppose Max had asked Shoshana to choose the will kit she felt most appropriate, download it to her computer, print it out and fill in the form. Suppose Shoshana accompanied her father to the neighbours and explained to them what her father wanted to do. Depending on the exact details of her involvement, she may be very seriously exposed on this issue.

Before turning to a consideration of the situation in Ontario, let us assume Max's will has been probated in Israel. We should note that besides the differences between Ontario and Israeli succession law discussed above, there are others[31] that might also have unintended consequences, which could be avoided if proper legal counsel is obtained.[32]

Assuming that an Israeli court would grant probate to Max's will, is it possible to avoid Ontario's formalities of execution and use the Israeli probate to administer both the estate's real estate and liquid assets located in Ontario?

Rule 74.09 of the *Ontario Rules of Civil Procedure* provides,
"74.09 (1) An application for a certificate of ancillary appointment of an estate trustee with a will where the applicant has been appointed by a court having jurisdiction outside Ontario, other than a jurisdiction referred to in rule 74.08, (Form 74.27) shall be accompanied by,
(a) two certified copies of the document under the seal of the court that granted it;
(b) the security required by the *Estates Act*; and
(c) such additional or other material as the court directs. O. Reg. 484/94, s. 12; O. Reg. 740/94, s. 3; O. Reg. 653/00, s. 8.

While Ontario's *Rules of Civil Procedure* and *Estates Act* contemplate granting an ancillary certificate of appointment it becomes complicated depending on the nature of the assets of the estate.[33]

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31 These include the differences in the roles of executors and possibly a difference in the treatment of halachic wills, which are sometimes phrased as gifts made during the lifetime of the testator. Such gifts are recognized in Israel as Wills (*s. 54(c) Inheritance Law*) even if the language is one of *inter vivos* gift.

32 Many practitioners will recommend that the testator make a separate will in each jurisdiction. Any amendment of one will should, of course, be accompanied by a review of the other to ensure that the amendment will have no unintended consequences on the other will.

33 See *Ontario – Estate Administration*, Contribution Editor: Laura M. Tyrrell, Editor: Anne E.P. Armstrong, paragraph 2.12.2 – Certificate of Ancillary Appointment of Estate Trustee With A Will (Rule 74.09, E.A. s. 6)

Generally speaking, succession of movables is governed by the domicile of the deceased at the time of his death. In our situation that means that Max's movables would be governed by the law of Israel.[34] It is important to remember that there is a distinction between 'domicile' and 'residence.' For Max – Jerusalem was his domicile because he considered it his home, the fixed place of habitation. He did not have any present intention of moving from there. Domicile is much more than a 'residence,' which is merely a transient place of residence. One can have more than one residence, but one can only have one domicile. For the purposes of determining which law governs it is the domicile that is relevant.[35]

Ontario normally will accept the law of foreign jurisdiction to govern with respect movables like bank accounts.[36] So with respect to Max's GIC's in Ontario, the Israeli testamentary document will be valid. However, non-movables, like real estate are different.[37] Depending on governing conflict of law legislation, the Israeli will may not be determinative, with respect to real estate located outside of Israel.[38] A very relevant case for our consideration is *Chochinov v. Davis*.[39]

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34 *Widdifield on Executors and Trustees*, 6th Ed., **5.9.1 – Conflict of Laws – General Rules**

35 See *Cartwright v. Hinds* (1883) 3 O.R. 384 at 395 (Ont. C.A.); *Wanzer Lamp Co. v. Woods* (1890) 13 P.R. 511 at 514 (Ont. Master) and see *Widdifield on Executors and Trustees* 6th Ed., **5.9.2 – Domicile**

36 See *Ritchie, Re* 1942 CarswellOnt 36 [1942] O.R. 426 [1942] 3 D.L.R. 330. Estate had an interest in a movable located in Ontario. The deceased died in Ohio and it must, therefore, be distributed according to the law of Ohio.

37 See *Busslinger Estate* 1952 CarswellAlta 39 6 W.W.R. (N.S.) 408, which deals with Purported Revocation by Foreign Will. Testator a British Subject Then Domiciled in the Foreign Country – Effect as to Realty and Personalty. Paragraphs 5, 6 and 7 refer to an Ontario case to *Re Hoggard* (1923) 54 O.L.R. 109 [1924] 1 D.L.R. 1062 "... After pointing out that the principle of *lex situs* governs both as to the distribution of realty upon intestacy and as to the validity of any testamentary disposition thereof," Orde, J. (in the *Hoggard* case) observes that "any will affecting it must be executed according to the law of Ontario."

38 See *Crown Trust Co. v. Evans* 1963 CarswellBC 180 45 W.W.R. 434 42 D.L.R. (2d) 469 paragraph 18 ". .. The formalities required in a will disposing of immovables are those prescribed by the laws of the country where the immovable is situated: *Dicey's Conflict of Laws*, 7th Ed., pp. 512 and 518; *Falconbridge's Conflict of Laws*, 2nd Ed., pp. 515 and 528; *Cheshire's Private International Law*, 6th ed., p. 604."

39 *Chochinov v. Davis*, 1980 CarswellMan 114 [1980] 5 W.W.R. 614 4 Man. R. (2d) 325 7 E.T.R. 207 113 D.L.R. (3d) 715

In this case, Esther Zilberman moved to Israel and executed a testamentary document. She had both real estate and cash in Manitoba. Upon her demise, Esther's Israeli will was admitted to probate in an Israeli court. A will challenge was commenced both in Manitoba and Israel with allegations that the Israeli will was not duly executed by Esther Zilberman and that she was not of sound mind when the will was purportedly executed. Paragraph 15 of the Manitoba Court of Appeal decision is extremely relevant to our discussion, so I reproduce it in full, (emphasis added):

> A personal representative, appointed by an other jurisdiction, cannot administer the estate property in Manitoba, whether movable or immovable, unless a Manitoba court has resealed the grant of authority or unless ancillary letters are granted: *New York Breweries Co. v. A.-G.*, [1899] A.C. 62 (H.L.); *Re Fisher* (1966), 57 W.W.R. 552, (sub nom. *Re Pemberton; Fisher v. Barclays Bank Ltd.)* 59 D.L.R. (2d) 44 (B.C.S.C.). (And see Dicey & Morris, Conflict of Laws, 9th ed. (1973), p. 579, r. 94, note 16.) **The manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of Manitoba: the Wills Act,** C.C.S.M., c. W150, s. 39(1) [en. 1975, c. 6, s. 1], which is consonant with r. 105, Dicey & Morris, pp. 603-604. With respect to movable property, the intrinsic validity and effect of a will are governed by the internal law of the place where the testator was domiciled at the time of his death: s. 39(2) [en. 1975, c. 6, s. 1] of the Wills Act; Dicy & Morris, pp. 600-603, r. 104. In Manitoba, the Surrogate Court is the proper forum to decide matters affecting the granting of probate or administration of estates: the Surrogate Courts Act, C.C.S.M., c. C290, s. 21(1) and (2).

It would be a mistake to apply this Manitoba case to our fact situation given that Ontario has specific provisions in the *Succession Law Reform Act* dealing with Conflict of Laws.[40] The legislation governs wills made either in or out of Ontario as long as the will is made on or after March 31, 1978.[41]

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40 Please see Schnurr, Brian A. *Annotated Ontario Estates Statutes* (2d) ed. looseleaf (Toronto: Carswell 2003) and his commentary on sections 34-41 of the *Succession Law Reform Act R.S.O. 1990 c. S.26*

41 Section 35 *Succession Law Reform Act R.S.O. 1990 c. S.26;* Also see *Estates & Trusts Selected CED Titles; Wills; IV – Conflict of Laws; 2 Formal Validity,* IV.2 – 147-155, ET-CED Wills IV.2

Pursuant to section 36 of the act, the law where the land is situated governs with respect to the manner and formalities of making a will. With respect to movables, the law where the testator was domiciled governs. Does that mean that Max's will, which does not comply with Ontario's law governing the formalities of execution is invalid as it relates to his interest in land in Ontario? Not necessarily.

Section 37 of the Ontario Succession Law Reform Act is key. It reads as follows (emphasis added):

Application of law, time of making will
37.(1)As regards the manner and formalities of making a will of an interest in movables or in land, a will is valid and admissible to probate if at the time of its **making it complied with the internal law of the place where,**

> (a) the will was made;
> (b) the testator was then domiciled;
> (c) the testator then had his or her habitual residence; or
> (d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

Arguably, the executor of Max's estate could make a case for the proposition that the Israeli probated will is valid (for Ontario purposes) since Israeli law governs over both the movables and immovables in Ontario. The validity of the will stands despite its failure to comply with Ontario's legislative requirement regarding formalities of execution. Section 36 of the Succession Law Reform Act requires that with respect to the formalities of execution regarding interests in land it is governed by the law of Ontario where the land is situated. The relevant Ontario law would not be section 4 of the Succession Law Reform Act (Formalities of Execution), but section 37, which deals with Conflict of Laws and Formalities regarding interests in movables or in land.[42]

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42 Timothy G. Youden of Davies (www.dwpv.com/en/17635_4999.aspx) shared this insight with me when I consulted him as part of the research for this paper. The key to this issue is the phrase in section 37(1) "...is valid and admissible to probate if at the time of its making ..." The relevant Israeli legislation calls for two witnesses for the execution of a testamentary document, but it has a saving provision, which allows for probate if there is substantial compliance. However, that **may** *(still)* mean that **in** our scenario, because there was only one witness **who signed** at the time of its making, the will was not valid under Israeli law at the time of its making. The significance of this observation is that had the will been valid in Israel at the time of its making (for example, if the witness had been a notary) then the propounder of Max's will could have applied for an application for a certificate of appointment with a will in Ontario and need not have gone to Israel first and only then applied for ancillary certificate of appointment.

'If there is substantial compliance' is a phrase that's defined in the Israeli legislation to mean (in our case): a will in writing that has been 'brought' to two witnesses. That has taken place in our scenario. But because there was non-compliance in a non-substantial matter [i.e., one witness didn't sign], the court will place the burden of proof that the will represents the true wishes of Max on Shoshana.

Pursuant to section 37 of the act, the law of Ontario (where the land is situated) provides that Max's will is valid and admissible to probate because

1. at the time of its making it complied with Israeli law (substantial compliance with the formalities of execution), or
2. Israel is where the will was made; or
3. Israel is where the testator was domiciled and where the testator had his habitual residence. [43]

CONCLUSIONS ABOUT OBTAINING ANCILLARY PROBATE:

With section 37 of the *Succession Law Reform Act* in place, why not go for an application for a certificate of appointment with a will in Ontario? The answer lies the wording of the act. Section 37 states:
"....a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where the will is made...."

The Israeli law requires two witnesses for a testamentary document, but it provides for substantial compliance under certain circumstances. Arguably, while Israeli law allows for substantial compliance with the formalities of execution a court order is still required to validate it. Until an Israeli court rules that the testamentary document was duly executed because it substantially complied with Israeli law, Max's will is arguably not valid and admissible to probate and does not comply with Israeli law *at the time of its making*. Accordingly, in our fact situation, the executors have to first apply for probate in Israel for an ancillary certificate of appointment to be granted in Ontario.

Given that Israeli law does not provide from a comparable process to an ancillary certificate of appointment the executor for Max's estate would have to apply for probate in any event. After probate is granted one could hardly argue that section 37 of the Succession Law Reform Act has not been complied with. For the most part the policy of the Ontario courts is not to question the validity of the grant by applying Ontario's custom conventions and legislative strictures.[44] Problems may arise with a will challenge or where real estate must be transferred. In those situations applying for probate in the right place will be crucial.

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43 For specific definitions of the terms used see section 34 of the *Succession Law Reform Act*, which provides in sections 36-41:

(a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;
(b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land;
(c) "internal law" in relation to any place excludes the choice of law rules of that place. R.S.O. 1990 c. S.26, s.34.

44 See *Ontario – Estate Administration*, Contribution Editor: Laura M. Tyrrell, Editor: Anne E.P. Armstrong, paragraph 2.12.2 – Certificate of Ancillary Appointment of Estate Trustee With A Will (Rule 74.09, E.A. s.6). See also Re Gauthier 1944 CarswellOnt 23 [1944] O.R. 401 [1944] 3 D.L.R. 401

LESSONS FOR THE CLIENT/ ACCOUNTANT

Using will kits is dangerous. As people collect assets in different jurisdiction it IS incumbent on the client and those advising him/her to canvass the opinions of estate lawyers in the different jurisdictions or those familiar with the law of the different jurisdictions to ensure that testamentary intentions are properly carried out. This paper provides an insight to only one problem that can arise.

FOR THE ESTATE PLANNER/ LAWYER

Conflict of Laws cases is very difficult. When faced with such situations, one should carefully review the legislation and law in all jurisdictions where assets are located. For the lawyer/estate planner, the best advice is to remind the client then sophisticated testators have often used multiple wills when they have assets in more than that one jurisdiction.[45] It is incumbent for the professional to familiarize himself with the law of the jurisdiction and ensure that the testamentary instruments in question are executed properly.

45 See Multiple Wills (1979-81) 5 E. & T.Q. 200 J. A. Brulé, Q.C., which was quoted in *Grauvesky Estate v. Ontario* 1998 CanLII 14913 (ON S.C.) as follows: "...at p. 201: There is another and more practical solution to dealing with assets in different jurisdictions and that is to have a complementary will or, as sometimes referred to, multiple wills. In this instance there is an original will made for each jurisdiction in which assets exist. The principal advantage is that each will may be submitted to the proper court or put into effect without any dependency on the other will. There is no necessity to be limited to two wills where assets are in several jurisdictions. He further notes at p. 209: The use of multiple or complementary wills is becoming more and more widespread in the world today and those who practise in the field of wills and testamentary dispositions and have used these wills readily attest to their usefulness in both carrying out a testator's intentions and avoiding frequent complicated estate settlements after death.