Situs and Domicile in Choice of Law for Succession Issues

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The predominant choice-of-law rule for succession issues involving personal property is that those issues are governed by the law of the decedent's domicile at the time of death. In contrast, the traditional choice-of-law rule for succession issues involving real property is that they are governed by the law of the state where the real property is located—that is, by the law of the situs. This Article argues in favor of extending the domicile rule to succession issues involving real property. Part II takes a historical look at the situs rule and suggests that it was more a product of historical peculiarities of the English legal system than a result of efforts to design a rational choice-of-law methodology for succession issues. Part III develops the case for extending the domicile rule to real property succession issues by evaluating the situs and domicile rules from the perspectives of succession policy, state interests, estate planning and probate, succession law's structure, and comparative law. Part IV considers several objections to extending the domicile rule. The Article concludes that, on balance, the domicile rule is preferable to the situs rule for succession issues involving real property. It argues for a unified approach, according to which the law of the decedent's domicile generally governs succession issues regardless of whether they involve personal property or real property.

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I. INTRODUCTION

In American conflict of laws, the traditional choice-of-law rule for issues related to real property is that those issues are governed by the law of the state where the real property is located.[1] This rule, which is known as the "situs rule," has broad application.[2] It covers not only "core" real property issues, such as issues about conveyances, recording systems, adverse possession and encumbrances, but also issues arising under other areas of substantive law—such as marital property and succession—when those issues involve real property.[3] The situs rule's breadth makes it controversial. Although the rule has defenders, many commentators have criticized it.[4]

This Article aims to build on prior work by examining the situs rule in a particular substantive law context: succession.[5] By taking this approach rather than generalizing about the situs rule overall, this Article offers a more in-depth and contextualized analysis of the rule's advantages and disadvantages that takes into account succession law's

1. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 215 (AM. L. INST. 1934) ("The validity of a conveyance of an interest in land is determined by the law of the state where the land is."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (AM. L. INST. 1971) ("(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are 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.").

2. *See* James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 161 (2014) (describing the rule's breadth and calling it "monolithic").

3. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 7, topic 2, intro. note; RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, top. 2, intro. note (adopting situs rule for issues related to real property, including, for example, conveyances, encumbrances, transfers by operation of law, marital property, and succession).

4. *See, e.g.*, Moffatt Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1105 (1965) (criticizing situs rule); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129, 131 (2014) (same); Daniel B. Listwa & Lea Brilmayer, *Jurisdictional Problems, Comity Solutions*, 100 TEX. L. REV. 1373, 1383 (2022) (defending situs rule); Stern, *supra* note 2, at 117 (same).

5. I address both testate and intestate succession. While I do not address the situs rule in the context of trusts, this Article's analysis should be relevant to choice of law for trusts issues. *See* Robert B. Niles-Weed & Robert H. Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, 97 TUL. L. REV. 1013, 1037 (2023) (arguing in favor of eliminating the situs rule for trusts choice-of-law issues).

structure and underlying policies, the interests of states in having their succession laws apply, the practical aspects of estate planning and probate, and the expectations of estate planners. Succession law has distinctive purposes, and judges and lawyers encounter distinctive problems when dealing with succession issues in probate and administration proceedings, as do persons planning for the disposition of their property. Therefore, the situs rule is likely to have distinctive implications in the field of succession.

While the situs rule is an appropriate choice-of-law rule for core real property issues, its costs tend to outweigh its benefits when used for issues about succession to real property. The well-established and generally uncontroversial choice-of-law rule for issues about succession to personal property is that those issues are governed by the law of the state of the decedent's domicile.[6] The domicile choice-of-law rule should also apply to issues about succession to real property. This Article explains the benefits of such a unified approach to choice of law for succession issues.

This Article proceeds as follows. Part II takes a historical look at the situs rule and suggests it is more a product of historical peculiarities of the English legal system than a result of efforts to design a rational choice-of-law methodology for succession issues. Part III develops the case for extending the domicile rule to real property succession issues by evaluating the situs and domicile rules from the perspectives of succession policy, state interests, estate planning and probate, succession law's structure, and comparative law. Part IV assesses several objections to extending the domicile rule. This Article concludes that, on balance, the domicile rule is preferable to the situs rule for choice-of-law issues involving succession to real property.

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6. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 306 (AM. L. INST. 1934) ("The validity and effect of a will of movables is determined by the law of the state in which the deceased died domiciled."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (AM. L. INST. 1971) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death."); *id.* § 263 ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions."); *id*. § 264 ("(1) A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death.").

II. THE ACCIDENTAL SITUS RULE: HISTORY, NOT CONFLICT OF LAWS

The American situs rule is more a product of historical peculiarities of the English legal system than a result of systematic efforts to design a rational approach to choice of law for succession issues.[7] Jurisdiction over succession matters was divided between the ecclesiastical courts and the common law courts. The ecclesiastical courts had jurisdiction over succession to chattels, while the common law courts had jurisdiction over succession to land.[8] Sorting out which courts had jurisdiction in different instances thus required a distinction between chattels and land. The same distinction was evident in England's substantive law of testate and intestate succession, which treated chattels and land differently.[9] These jurisdictional and substantive law features—not choice-of-law

7. *See* Hancock, *supra* note 4, at 1102 ("If one turns to the eighteenth-century English cases expecting to find the rationale of the situs formula fully discussed by court and counsel, he will be disappointed. The notion that a devise of English land had to conform to English domestic law was neither questioned nor defended; it was simply taken for granted as elementary and axiomatic.").

8. *See* R. H. HELMHOLZ, 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 388 (2004) ("English law made a basic division between succession to chattels and succession to land. Only jurisdiction over the former was held by the ecclesiastical courts."); Hancock, *supra* note 4, at 1102 ("Since the common-law courts had from time immemorial jealously guarded their exclusive jurisdiction over titles to real property, the validity of . . . a will [of real property] (including the testator's capacity) could only be litigated in an action of ejectment before a common-law judge and jury . . . . [On the other hand,] [t]he ecclesiastical courts had exclusive jurisdiction over the probate of . . . wills [of personal property]. If a will disposed of both real and personal property, the capacity of the testator could be disputed by the same parties before two different tribunals, each of which might reach a different conclusion."). The chancery courts also had jurisdiction over certain succession-related proceedings, but lacked jurisdiction over devises of land. *See* M.C. Mirow, *Wills: English Common Law*, *in* 6 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 102, 102 (Stanley N. Katz ed., 2009) ("Chancery gained a substantial jurisdiction in contentious suits over wills and testaments with the ecclesiastical courts maintaining noncontentious jurisdiction over probate of wills of personalty, the granting of administrations, and the appointing of executors [but] chancery could not decide cases concerning devises of land . . . .").

9. *See* Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 108 (1943) (during the Anglo-Saxon period, "different kinds of chattels and of land passed to different persons and the lord and the church had different claims concerning the various types of property"); Eugene F. Scoles, *The Hague Convention on Succession*, 42 AM. J. COMPAR. L. 85, 191-92 (1994) ("[At] an early time in England under primogeniture and in the United States when land represented the bulk of wealth in our agrarian society, the administration and succession of land differed from that of personal property."); Mirow, *supra* note 8, at 102 ("[T]he characterization of property as either land or chattel, mostly settled by around 1500, determined the treatment of the property for both testate and intestate estates.").

considerations—seem to have been the principal source of the situs rule's distinction between personal and real property.

Even before the situs choice-of-law rule emerged, the common law courts applied English law to successions involving land located in England. This was due to the rule that the common law courts could not hear claims based on foreign law.[10] The practice of applying the law of the situs to succession issues involving land thus resulted not from a situs choice-of-law rule as such, but rather from the common law courts' jurisdiction over successions involving land and the rule against hearing foreign law claims in those courts. Eventually, this practice evolved into the common law situs rule. For their part, the ecclesiastical courts developed a choice-of-law rule selecting the law of the decedent's domicile at the time of death for successions involving chattels.[11] As Moffatt Hancock summarized these developments in his historical examination of the situs rule:

> From time immemorial English common-law courts had exercised exclusive jurisdiction over the legal title to [English] land; no foreign court and no other court in England could adjudicate upon this important subject matter. And since, according to prevailing notions, a court necessarily applied its own law to all cases falling within its jurisdiction, the conclusion must have seemed inescapable that all questions relating to the title to English land should be determined by English law.[12]

The English approach to succession influenced the American legal system during its early development,[13] but it was the publication of Joseph

10. *See* J.J. FAWCETT, J.M. CARRUTHERS & PETER NORTH, PRIVATE INTERNATIONAL LAW 20 (14th ed. 2008) ("[I]t was only in the eighteenth century that an awareness of [choice-of-law] problems developed . . . . Blackstone did not mention them and it was the middle of the nineteenth century before an English treatise on private international law was written . . . . The intra-national conflicts, that had long been inevitable on the Continent owing to the existence of different legal systems within the territory of a single nation, could not arise in England after the whole country had been brought under the sway of a single common law. International conflicts were precluded by the rule, established at an early date, that the common law courts were unable to entertain foreign causes.").

11. *See* Moffatt Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1, 5 (1967) ("English courts in the latter part of the 18th century had held that the personal property of an intestate domiciled abroad should be distributed according to the law of his domicile. By 1830 the ecclesiastical courts finally decided that the same law should govern the validity of wills of personal property.").

12. Hancock, *supra* note 4, at 1104.

13. *See* Atkinson, *supra* note 9, at 122 (noting that "at the time when American colonial courts of justice were being established and when the colonies later separated from the mother country[,] [j]urisdiction over administration and succession upon death was divided between three sets of courts, ecclesiastical, common law, and Chancery"); Hancock, *supra* note 11, at 5-6 ("In

Story's monumental *Commentaries on the Conflict of Laws* in 1834 that firmly entrenched the situs rule in the United States.[14] In the *Commentaries*, Story sharply distinguished between movables and immovables and described the common law rule as declaring that "the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immoveable property."[15] He explicitly included within the rule's scope issues about testate and intestate succession to immovable property.[16] According to Story, succession issues involving movables were instead governed by the state where the decedent was domiciled at the time of death.[17]

Story adopted the movables/immovables distinction and the situs choice-of-law rule without discussing their historical origins or acknowledging the peculiar features of the English legal system—not shared by the American system—that gave rise to them.[18] Nor did Story systematically develop a choice-of-law rationale of his own for the rule in general or for succession issues in particular.[19] More full-fledged attempts

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the year 1800 it was one of the characteristic features of the English legal system that for many centuries it had maintained two sets of courts and two systems of law for the proof of wills or heirship: common-law courts, administering the common law and various statutes where legal estates in land were involved; and ecclesiastical courts, administering the civil law to control the disposition of personal property.").

14. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

15. *Id*. § 463, at 390.

16. *Id*. § 474, at 398 (as to wills of immovable property, "the law of the place, where the property is locally situate, is to govern as to the capacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will its due attestation and effect"); *id*. § 481, at 404 ("The descent and heirship of real estate is exclusively governed by the law of the country, within which it is actually situate.").

17. *Id*. § 468, at 394-95 ("[A] will of personal estate must, in order to pass the property, be executed according to the law of the place of the testator's domicil at the time of his death. If void by that law, it is a nullity everywhere, although it is executed with the formalities required by the law of the place, where the personal property is locally situate."); *id*. § 481, at 403 ("[T]he succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death.").

18. *See* Donald T. Trautman, *The Revolution in Choice of Law: Another Insight*, 99 HARV. L. REV. 1101, 1108-09 (1986) ("Choice of law in early England was essentially a choice of courts; common law courts exercised exclusive jurisdiction over titles to real property, and ecclesiastical courts had exclusive jurisdiction over probate of wills of personal property. Although the jurisdiction of American courts did not follow the English system, our unthinking reception and adoption of the English rule, with a boost from Justice Story, unnecessarily perpetuated its great inconvenience and awkwardness.").

19. Story did, however, express concern about:

> [T]he inconvenience of a nation suffering property, locally and permanently situate within its territory, to be subject to be transferred by any other laws, than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities

to justify the situs rule came later.[20] The historical and theoretical superficiality of Story's treatment of the situs rule is perhaps unsurprising, given his ambition for the *Commentaries*, which was primarily to document the common law and examine it in light of civil law thinking.[21] Nevertheless, this led one commentator to argue that Story bears some responsibility for American conflict of laws' "unthinking reception and adoption" of the situs rule.[22]

The Restatement of the Law, Conflict of Laws (First Restatement), published in 1934, followed Story's approach, distinguishing between movables and immovables and providing that succession issues involving the former are governed by the law of the decedent's domicile at the time of death,[23] and those involving the latter are governed by the law of the situs.[24] Like Story's *Commentaries*, the First Restatement offered no systematic justification for this approach.[25] The Restatement of the Law

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> of foreign laws, to regulate its own titles to such property, many of which laws can be but imperfectly ascertained, and many of which may become matters of subtile controversy.

STORY, *supra* note 14, § 440, at 373. He also praised the situs rule for being "a simple and uniform test." *Id.* § 463, at 390; *see also* Listwa & Brilmayer, *supra* note 4, at 1375-76 (arguing that Story's adoption of the situs rule may be explained by his view of "choice of law as a solution adopted by individual states to problems created by the law governing adjudicative jurisdiction and the recognition of sister-state judgments," combined with the special treatment of real property for purposes of adjudicative jurisdiction and judgment recognition and the desire of judges to avoid foreign law).

20. *See* Hancock, *supra* note 11, at 8 ("Since the time of Story, American text writers have . . . unanimously supported the land taboo in all its ramifications. Garnishing it with superficial, abstract arguments, they have contrived to make it appear to be one of the fundamental principles of American conflict of laws.").

21. *See* STORY, *supra* note 14, § 16, at 17 ("My object is . . . to present the leading principles upon some of the more important topics, and to use the works of the civilians, to illustrate, confirm, and expand the doctrines of the common law, so far at least, as the latter have assumed a settled form.").

22. Trautman, *supra* note 18, at 1108.

23. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 303 (AM. L. INST. 1934) ("The movables of one who died intestate which remain in the state after the estate is fully administered are distributed to the persons who are entitled to take by the law of the state of his domicil at the time of his death."); *id*. § 306 ("The validity and effect of a will of movables is determined by the law of the state in which the deceased died domiciled.").

24. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 245 ("The law of the state where the land is determines its devolution upon the death of the owner intestate."); *id*. § 249 ("The validity and effect of a will of an interest in land are determined by the law of the state where the land is.").

25. *See* Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 589 (1987) ("American courts had unthinkingly adopted the English rule, and Justice Story's exposition reinforced the rule's position. *The Restatement (First) of Conflict of Laws*

Second, Conflict of Laws (Second Restatement), published in 1971, likewise adopted the domicile rule for succession issues involving movables[26] and the situs rule for those involving immovables.[27] Unlike the First Restatement, the Second Restatement offered justifications for the situs rule, focusing on reasons of certainty of title, convenience for parties and their lawyers, and situs state interests.[28] It is fair to say that the

solidified the situs rule's absolute position . . . . As with the earlier English cases, the *Restatement* made little attempt to justify the situs rule. In an era when *Pennoyer v. Neff* held sway and legal thinkers were raised on territorial theories, the situs rule must have seemed self-evident.").

26. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (AM. L. INST. 1971) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death."); *id.* § 263 ("(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions.").

27. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 (AM. L. INST. 1971) ("(1) The devolution of interests in land upon the death of the owner intestate 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."); *id.* § 239 ("(1) Whether a will transfers an interest in land and the nature of the interest transferred are 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."). By referring to "the law that would be applied by the courts of the situs" rather than "the law of the state where the land is," the Second Restatement calls for the use of renvoi—that is, the application of the situs state's whole law, including not only its substantive law of succession, but also its choice-of-law rules. *See id.*, ch. 9, topic 2, intro. note ("The reference is to the 'law' of the situs, namely to the totality of its law including its choice-of-law rules. The reference is not to the 'local law' of the situs, by which is meant its purely domestic rules. The task of a court sitting in a state other than the state of the situs is to arrive at the same result a court of the situs would have arrived at upon the actual facts of the case. The court must therefore inquire whether the choice-of-law rules of the situs would have led the courts of that state to decide the issue in accordance with their own local law or with the local law of some other state.").

28. *See id.* ("In most instances, the courts of the situs would decide the case in accordance with their own local law. They would do so for sentimental and historical reasons as well as for reasons of certainty and convenience and for the sake of their title recording systems. The local law of the situs is the law with which the parties, their lawyers and title searchers will usually be most familiar. The burdens of lawyers and of title searchers would be increased if it were not possible for them as a general rule to confine their attention to the local law of the situs. Likewise, if this were not so, the security of land titles would be diminished."). The Second Restatement also asserted that the situs state has the dominant interest in determining "who may own land, the conditions under which the land may be held and the uses to which the land may be put." *Id.* The Second Restatement's justifications are less categorical than its black letter rules. *See id.* ("There will also be situations where the demands of certainty and the needs of a title recording system are not as pressing as are other demands. Thus, questions relating to the marital property interests of spouses, either upon divorce or at death, may be of greater concern to the state of domicil of the spouses than to the situs, and in such cases the situs courts might defer to the views of the domicil. That will particularly be so when the land is one item in an aggregate of things, both movable and immovable, which are situated in a number of states and which it is desirable to deal with as a

situs rule is the predominant approach to choice of law for real property-related succession issues in American courts today—but as will be discussed below, its position is not as firm as it once was.[29]

III. THE CASE FOR EXTENDING THE DOMICILE RULE

History suggests that the situs choice-of-law rule is neither inevitable nor necessarily likely to be optimal for real property succession issues. This may raise doubts about the situs rule's desirability. But would a domicile rule—which is already used for personal property succession issues—be any better? To answer that question, this Part evaluates the situs rule and the domicile rule in the specific context of succession law and practice from the perspectives of policy, state interests, estate planning and probate, succession law's structure, and comparative law. This Part concludes that the situs rule's costs outweigh its benefits and that the use of a domicile choice-of-law rule for real property succession issues is preferable.

A. Policy

The fundamental policy underlying the law of succession is freedom of disposition: the right of a person to dispose of their property as they wish when they die.[30] This policy has two corollaries: the policy of

unit."). These and other justifications for the situs rule are discussed below. *See infra* Parts III and IV.

29. *See infra* subpart IV.C.

30. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS, intro. (AM. L. INST. 1999) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please, either during life or at death."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 1 (10th ed. 2017) ("The American law of succession, both probate and nonprobate, is organized around the principle of *freedom of disposition*.").

construing a will in accordance with the testator's intent[31] and the policy of furthering an intestate decedent's probable intent.[32]

In most cases, the domicile rule is more likely than the situs rule to protect and promote these policies. For example, when writing and executing a will, a testator is probably more likely to rely on the law of their state of domicile than the law of another state where they happen to have real property.[33] Applying situs law to determine the will's validity or meaning would therefore risk frustrating the testator's intent. In the case of intestate succession, the decedent's decision not to make a will is more likely to have been made based on an understanding of how their property would pass under the intestacy law of their state of domicile rather than

31. *See In re* Est. of Phillips, 957 N.Y.S.2d 778, 780-81 (N.Y. App. Div. 2012) ("[I]n a will construction proceeding, the search is for the decedent's intent . . . ."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 264 cmt. d (AM. L. INST. 1971) ("If it is found impossible to ascertain the testator's intentions from the evidence, a rule of law is employed to fill what would otherwise be a gap in the will. This is done in order to carry out what was probably the testator's intention, or what probably would have been his intention, if he had foreseen the matter in dispute."); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 651 (2014) ("In accordance with the principle of freedom of disposition, '[t]he controlling consideration in determining the meaning of a donative document is the donor's intention.'") (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 1999)).

32. Regarding the policies underlying the law of intestate succession, see MELANIE LESLIE & STEWART E. STERK, TRUSTS AND ESTATES 1, 7 (4th ed. 2021) ("Because legislatures have little reason to 'punish' decedents who fail to write wills, intestate succession statutes typically reflect legislative guesses about how decedents would want to have their estates distributed . . . . Reasons of policy also support the legislative preference for close family members. Those are the very people most likely to have contributed to the accumulation of decedent's property, and they are also the people most likely to be dependent on that property."); SITKOFF & DUKEMINIER, *supra* note 30, at 63 ("In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death.").

33. In situations where a decedent makes a will while domiciled in one state and later moves to another state and dies domiciled there, estate planning considerations may favor application of the law of the decedent's domicile at the time of execution rather than the time of death for issues about formal validity and, perhaps, construction. This is because the decedent may have relied on the law of the earlier state—taking into account its formal validity rules and its rules of construction—when drafting and executing the will. However, there are countervailing considerations. First, a unified reference to the law of the decedent's domicile at the time of death has the advantage of being simpler and easier for courts to apply as it avoids the need to determine and apply the law of multiple states to govern different aspects of the same succession. Second, the state of the decedent's domicile at the time of death is likely to have a stronger interest in governing the succession than a state that no longer has a connection to the decedent. Third, because the predominant approach for succession issues involving personal property is to favor the law of the decedent's domicile at the time of death, scission can be best avoided by using the same choice-of-law rule for succession issues involving real property.

under the intestacy law of a different state where real property is located.[34] Moreover, insofar as a state's intestacy law is based on local norms and expectations,[35] domicile law is more likely than situs law to reflect the decedent's probable intent.[36]

B. State Interests

The domicile rule is also more likely than the situs rule to reflect state interests in the area of succession.[37] As noted above, the fundamental

34. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 cmt. b (AM. L. INST. 1971) ("[T]he courts of the state where the decedent was domiciled at the time of his death would look to their own local law to determine what categories of persons are entitled to inherit upon intestacy. Application of this law to determine such questions would presumably be in accord with the reasonable expectations of the decedent and his family."). *But see* JEFFREY A. SCHOENBLUM, 1 MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 11.03, at 11-8 (2010 ed. 2009) ("As for the invocation of the justified expectations of the parties, the decedent, at least, likely had none in light of his condition. It is highly improbable that the decedent would have known the differences between [state *X* and state *Y* law regarding intestate succession]. If he knew that, he probably also would have had the competency to make a will.").

35. *See* SITKOFF & DUKEMINIER, *supra* note 30, at 66 ("Debate over intestacy laws is fraught with questions of morality and the proper role of the state in establishing social norms.").

36. *See* Hancock, *supra* note 11, at 11 ("Real property of a foreign decedent should be distributed according to a scheme embodying the customs and mores of his home community, that is, the law of his domicile."); SCHOENBLUM, *supra* note 34, § 11.02, at 11-4 (2010 ed. 2009) (describing but critiquing argument that the law of the decedent's domicile at the time of death should govern intestate succession because that law is "the legislature's way of making a will for a decedent who failed to do so for himself. Its judgment reflects the prevailing customs and mores of the community. In light of this substantial interest, the situs state should defer to the domicile, just as it would expect deference when one of its own domiciliaries died with real property located abroad").

37. Originally developed by Brainerd Currie, interest analysis is among the most influential choice-of-law methods. A state's interest in having its law govern an issue depends on the state having both a policy regarding the issue and a connection to that issue (such as the domicile of a person or the location of an act, omission, or thing). In some cases, only one state may have an interest in having its law apply, giving rise to a so-called "false conflict." In other cases, more than one state may have an interest in having its law apply, giving rise to a so-called "true conflict." In false conflict situations, interest analysis provides for the application of the law of the interested state. In true conflict situations, Currie's version of interest analysis provided for the application of the law of the forum. Other versions of interest analysis provide for the law of the most interested state or the law of the state whose interests would be most impaired were its law not applied. *See generally* SYMEON C. SYMEONIDES, CHOICE OF LAW 98-106 (2016) (providing overview of interest analysis). Interest analysis is most commonly used to determine the applicable law in specific cases. It may also be used as a design principle for choice-of-law rules, whereby rules are designed to result in the application of the law of the state that is most likely to be the (most) interested state in most cases. It is among the design principles that have influenced the choice-of-law rules of the American Law Institute's Restatement of the Law Third, Conflict of Laws project. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. d (AM. L. INST., Tentative Draft No. 3, 2022) (referring to "the policies underlying the relevant laws [and] the

policy underlying the law of succession is freedom of disposition—that is, the right of persons to dispose of their property as they wish when they die.[38] The state with the closest connection to a person when they die is generally the person's state of domicile. A state is therefore likely to have a strong interest in having its succession laws define the freedom of disposition of its own domiciliaries as well as any limitations on that freedom.[39]

A state is unlikely to have a strong interest—if it has any interest at all—in defining the scope of a non-domiciliary decedent's freedom of disposition merely because the decedent has real property there.[40]

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connections between the relevant states and the particular issue under consideration"). It has also influenced the "manifestly more appropriate" law exception to those rules. *See id*. § 5.03 cmt. c (referring to "the relevant policies of the forum and other interested states [and] the relative interests of those states in the particular issue—determined in light of the strength and relevance of the contacts between the states and the issue").

38. *See* discussion *supra* subpart III.A.

39. Because limitations on freedom of disposition are usually animated by policies of protecting certain persons with a relationship to the decedent—such as a spouse or creditors—the state (or states) where such persons are domiciled may also have an interest in having its law define those limitations, particularly when that law is more protective of such persons than the law of the decedent's domicile, giving rise to a "true conflict." *See* SITKOFF & DUKEMINIER, *supra* note 30, at 519 ("For the most part, the American law of succession is built on the principle of freedom of disposition. But this principle is not absolute. [There are] limits on freedom of disposition for the protection of a surviving spouse and children."). In many and perhaps most cases, however, some or all of those persons will be domiciled in the same state as the decedent. Even when that is not the case, the state of the decedent's domicile may have an especially strong interest in having its succession law apply. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 cmt. b (AM. L. INST. 1971) (stating, in context of intestate succession to movables, that the state of the decedent's domicile at death "would usually have the dominant interest in the decedent at the time"); Scoles, *supra* note 9, at 97-98 n.17 ("[T]he domicile state's interest lies with the parties themselves. [I]t has a strong interest in assuring the fulfillment of the testator's dispositive scheme, which may well not have taken account of foreign law." (quoting JEFFREY SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 10.03, at 269-71 (1982))); *id*. at 91 ("[T]he nation having the predominant interest in the decedent's personal family affairs should determine any restrictions on testation designed to protect the family. That is, to the extent the owner's designation doesn't control, the law which governs the succession of assets at death should properly be the law of the place with which the deceased was most closely connected, i.e., where the decedent's personal life was centered."); Singer, *supra* note 4, at 136 ("The domicile . . . has strong and legitimate interests in regulating a relationship centered there and determining who inherits property when one of its residents dies . . . ."). *Cf*. Sitkoff, *supra* note 31, at 644 (arguing that "[f]or the most part . . ., the American law of succession facilitates, rather than regulates, the carrying out of the decedent's intent" and noting succession law's "emphasis on the *donor* rather than the *donee*").

40. *See* SYMEONIDES, *supra* note 37, at 618 ("The situs state qua situs has no interest in regulating matters such as: (1) whether a non-domiciliary has the proper age or mental capacity to make a testament, or whether he was subject to undue influence; and (2) whether children or spouses should be guaranteed a certain minimum share of the decedent's estate (forced heirship,

Moreover, the situs state is unlikely to be strongly concerned with whether one person or another will be the successor to real property merely because the property is located there.[41] Simply put, the law of succession is more fundamentally about the rights and interests of persons than about property as such.[42] In most cases, then, the state with the closest

statutory share), whether illegitimate children can inherit and how much, or whether an adopted child can inherit from her biological parents. The rules that regulate these matters embody certain societal value judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state.").

41. *See* LA. CIV. CODE ANN. art. 3533 cmt. (b) (2020) ("[W]hile it has a legitimate interest in matters of land utilization (*e.g.*, prohibited substitutions, perpetuities, etc.), the situs state has little interest in deciding matters of testamentary formalities, capacity, or wealth distribution among members of a family not domiciled therein. Also, while the situs has an interest in preserving the integrity of its recording system, that interest is fully satisfied by requiring recordation of the judgment at the situs and does not require application of situs substantive law on the merits."); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 425 (2000) ("The situs, as situs, surely has the strongest interest in resolving issues of land use, environmental protection, and alienability of title; but it is hard to see how the situs state's interest in its land is implicated by disputes involving succession . . . issues in which nonsitus states often will have vital interests."); Singer, *supra* note 4, at 134-36 ("[S]itus states lack any real interest in determining who owns property within their borders."); SYMEONIDES, *supra* note 37 ("[T]he situs state qua situs has no interest in regulating matters such as: (1) whether a non-domiciliary has the proper age or mental capacity to make a testament, or whether he was subject to undue influence; and (2) whether children or spouses should be guaranteed a certain minimum share of the decedent's estate (forced heirship, statutory share), whether illegitimate children can inherit and how much, or whether an adopted child can inherit from her biological parents. The rules that regulate these matters embody certain societal value judgments that have nothing to do with land utilization or certainty of title—the only legitimate concerns of the situs state. If the decedent and all the affected parties are domiciled in one state and the land is situated in another, these value judgments belong to the legislative competence of the latter state."); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.7, at 594 (6th ed. 2010) ("The situs . . . has no interest in deciding whether one or another non-resident shall take.").

42. More generally, the predominant understanding of property—that it is about rights rather than things as such—reinforces the perspective that real property-related succession issues are primarily issues about the rights and interests of persons. *See, e.g.*, RESTATEMENT (FOURTH) OF PROP. § 1 (AM. L. INST., Council Draft No. 1, 2019) ("'[P]roperty' refers to rights, obligations, and other legal relations among persons in and through a thing."); *id.* § 1, at cmt. a ("The definition [of property] here is designed . . . to clarify that this Restatement is concerned with legal rights and obligations of persons with respect to discrete things . . . ."); JOSEPH WILLIAM SINGER, PROPERTY § 1.1.1, at 2 (4th ed. 2014) ("Property concerns legal relations among people regarding control and disposition of valued resources. Note well: Property concerns relations *among people*, not relations between people and things . . . . [P]roperty is not about control of things; it is about relations among people with regard to things . . . ."); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4 (4th ed. 2017) ("[P]roperty consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object."); DAVID A. THOMAS, 2

connection to those persons is likely to have a stronger interest in having its law apply than a different state where property happens to be located.[43]

A state does have a strong interest in governing the operation of its real property recording system and promoting certainty of title to real property located there.[44] That interest can be promoted by the recordation of the successor's muniment of title in accordance with situs law at the conclusion of probate even if succession issues are determined under the law of the decedent's domicile.[45] A state also has a strong interest in regulating the use of real property located within its territory.[46] A devisee

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THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 14.03 (2019) ("The term property is used 'to denote legal relations between persons with respect to a thing,' and, in the legal sense, is not employed as indicative of the thing in regard to which the interest exists."). *But see* CHRISTOPHER SERKIN, THE LAW OF PROPERTY 9 (2d ed. 2016) (noting contested nature of definition of property and "fundamental disagreements about what property is" and noting critique of the bundle-of-rights perspective by scholars focusing on an owner's right to exclude).

43. A state may have a policy against the division of its real property into parcels that are too small to be used in an economically productive manner. In theory, the application of the law of the decedent's domicile may in certain cases result in such a division among multiple devisees. Under such circumstances, the situs state and the domicile state may both have an interest in having their laws apply, thus creating a true conflict. *See* WEINTRAUB, *supra* note 41, § 8.8, at 594 ("It is theoretically possible for the intestacy law of the situs to differ from that of another jurisdiction in a manner that may affect the use of the land as land and, therefore, affect the economy and vital interests of the situs. For example, the situs might have a rule designed to prevent the land from being broken up into parcels too small to be utilized economically. Its intestacy law might, instead of dividing the interests in the land among relatives of the same degree in equal shares, select some one or a few persons to take all . . . .").

44. *See infra* subpart IV.A.

45. *See* Singer, *supra* note 4, at 136 ("The situs state does have very strong interests in clarifying who owns real property within the state but any judgment about property title at the domicile can be implemented by requiring the relevant party to grant a deed of real property to the appropriate person who then can record the deed at the situs, thereby satisfying any interest the situs has in its title system.").

46. *See* Singer, *supra* note 4, at 132-33 ("Although often maligned, the situs rule makes perfect sense for whole classes of cases. All other things being equal, there is simply no reason to deviate from situs law when the issue involves zoning, servitudes, estates in land, nuisance, mortgages and other liens, and trespass. In each of these cases, the state where the property is located has strong interests in regulating its use, determining what estates in land are recognized and what encumbrances can be enforced, and what exceptions exist to the right to exclude non-owners."); SYMEONIDES, *supra* note 37, at 583 ("[T]he situs state has an interest in ensuring the certainty and integrity of its recording system, protecting good faith purchasers who rely upon the system, and facilitating the task of the title examiner who should not have to interpret foreign laws. The situs state also has an interest in ensuring the most efficient, productive, commercially sound, and environmentally prudent utilization of land within its borders and in prescribing rules for adverse possession, boundary disputes, easements, rules against perpetuities, and zoning, or environmental regulations. All of these are good reasons to have *a* situs rule. However, the question is whether it is necessary for such a rule to cover all issues . . . .").

or heir who takes an interest in real property from the decedent's estate would be subject to the situs state's land use regulations, thus satisfying the situs state's interest in regulating land use. Thus, as the Second Restatement acknowledges, "[I]t is unlikely that any policy of the state of the situs would be seriously infringed if the distribution upon intestacy of interests in local land were to be decided in accordance with the local law of another state."[47]

C. Estate Planning and Probate

Beyond state interests, the domicile rule has practical estate planning and probate advantages over the situs rule. The situs rule requires scission—that is, the division of the decedent's property into multiple parts, with personal property governed by the law of the decedent's domicile and each piece of real property governed by the law of the state where that property is located.[48] Scission's division along the lines of the personal property/real property distinction seems out of place given the distinction's virtual disappearance from the substantive law of succession.[49] Scission also has a variety of undesirable practical consequences. First, it requires estate planners and courts to characterize property as either personal property or real property—an exercise that is not always straightforward.[50]

Second, whenever an estate includes not only personal property, but also real property located in one or more states other than the decedent's state of domicile, scission requires the determination and application of the law of multiple states (including law that is foreign to the courts of the

47. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 cmt. a (AM. L. INST. 1971).

48. *See* Andrea Bonomi, *Succession*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1682, 1683-84 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017) ("Dualistic (or scissionist) systems are based on the idea that the succession of immovable property should be governed by the law of the country where the property is located . . . . As a consequence, immovable assets situated in different countries are not dealt with as part of one single, unitary estate, but as part of separate estates, each of them being governed by its own law.").

49. *See infra* subpart III.D.

50. *See* Scoles, *supra* note 9, at 105 (noting a single choice-of-law rule for real and personal property "alleviates the problems of characterizing assets as real or personal, immovable or movable. For example, should an investment in a partnership holding land, oil royalties, land under contract for sale, a condominium, a cooperative apartment, a real estate investment trust, a mortgage or mortgage pool, be considered real property, the location of which will determine the spouse's forced share? Under the traditional situs rule, bizarre results have occurred in similar cases. Whether one agrees or disagrees with the outcome of the cases litigating characterization, the uncertainty of litigation of this matter can simply be avoided by the unified application of the single reference under the Convention.").

domicile state, where primary probate proceedings are likely to occur). In these ways, scission adds uncertainty and complexity to estate planning and probate.[51]

Third, scission can produce incoherent and embarrassing results that are unlikely to have been intended by the decedent or expected by devisees, heirs, or others.[52] For example, a will may be simultaneously valid under domicile law and invalid under situs law, resulting in

51. *See* John P. Gaset, *Conflict of Law Regarding Revocation of Wills: Mutiny on the Situs Default*, 39 FLA. ST. UNIV. L. REV. 1105, 1109 (2012) (providing situs rule imposes "undue transaction costs" on testators because "[a]t a minimum, the testator wishing to give teeth to expressions of revocation is forced to comply with the laws of each state in which real property is owned"); Magdalena Pfeiffer, *Legal Certainty and Predictability in International Succession Law*, 12 J. PRIV. INT'L L. 566, 571 (2016) ("The traditional *lex rei sitae* rule for immovables under scission, if the immovable property is scattered across a number of countries, makes it a sophisticated and expensive exercise to organize succession in advance in accordance with a number of applicable laws."). *Cf*. Roberts v. Locke, 304 P.3d 116, 120 (Wyo. 2013) ("A Wyoming court having personal jurisdiction over the parties in a divorce action may therefore order one of them to convey his or her interest in real property to the other, even though the property is in a foreign country . . . . If this were not so, there would have to be ancillary divorce proceedings—much like ancillary proceedings in probate cases—in every state and foreign country in which parties to a divorce owned property. It is difficult to imagine the chaos, inconvenience, inconsistency, and jurisdictional issues that would result. On the other hand, a court with jurisdiction over the parties can effect an equitable distribution of property and enforce that distribution through the use of contempt sanctions . . . .").

52. *See* Mazza v. Mazza, 475 F.2d 385, 389 (D.C. Cir. 1973) (reasoning that "[i]f a decedent leaves property in several states, and if each situs applies its own law, some of the recipients may be required to contribute to payment of the federal estate taxes while others are not" which is an "anomalous result which can be avoided if all jurisdictions refer to the law of the domicile" rather than the law of the situs); Rudow v. Fogel, 426 N.E.2d 155, 160 (Mass. App. Ct. 1981) ("It is desirable that the same law apply to all property involved in the same transaction wherever situated. '(A)wkward or arbitrary results' can be produced . . . if different laws are applied to different portions of a settlor-testator's property based solely on the fortuitous physical location of his or her assets."); Bonomi, *supra* note 48, at 1782 ("The shortcomings of a scission of the succession are particularly evident when the substantive rules on succession under the governing laws are based on the consideration of the estate as a whole. This is for instance the case when one of the applicable laws provides for forced heirship rights, the calculation of which requires an assessment of the value of the entire estate and all financial provisions made by the deceased in favour of his/her close relatives. A unitary approach is also desirable when the issue at stake is the validity of a will or another *mortis causa* disposition by which the testator intended to dispose of the whole of the estate or assets situated in several countries. In such instances, the application of different laws to the individual assets belonging to the deceased's estate may lead to improper results and even cause injustice."); William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83, 145 (1997) (referring to "the often foolish results of scission"); Singer, *supra* note 4, at 134 ("The goal of all states in inheritance and testacy cases is to promote the will of the owner who writes a will while ensuring fairness for surviving family members . . . . Mixing and matching the law of various states has great potential to undermine all these shared policies, resulting in distributions no state thinks fair.").

disposition of the estate in accordance with the decedent's will, except for the real property, which would pass to heirs through intestacy rather than to the devisees indicated in the decedent's will. Similarly, if the domicile rules of construction are different than those of the situs, scission can result in the same will having different meanings in different states.[53] These consequences of scission are unlikely to promote freedom of disposition and testamentary intent.[54]

In addition to these practical disadvantages, estate planners can—and often do—circumvent the situs rule by conveying real property to a separate legal entity (such as a limited liability company) so that the decedent's estate will include securities of that entity, which are personal property, rather than the real property itself.[55] This has led to a "decline in prominence of real property as a locational anchor" in conflict of laws.[56] Moreover, insofar as this trend reflects a general interest among estate planners in avoiding scission (and, perhaps, avoiding situs law), it may be more desirable to have a default domicile choice-of-law rule for real property succession issues than to require estate planners to use devices like securitization to achieve these results.

For these reasons, a unitary approach using a general domicile choice-of-law rule that applies to both personal property and real property succession issues is likely to make estate planning and probate simpler, more efficient, and more rational than the situs rule and scission.[57] Before

53. *See* WEINTRAUB, *supra* note 41, at 613 ("[I]n a case in which the testator or testatrix has made the same cryptic provision concerning land situated in several states, with differing domestic rules of construction, applying the law of the domicile will avoid the absurdity of construing the will differently at each situs.").

54. *See* Lindsay v. Wilson, 63 A. 566, 569 (Md. 1906) ("The intentions of testators have frequently failed because they executed their wills according to the forms prescribed by the laws of their respective domiciles, which were not in accordance with the laws of the states where some of their lands were situated, and in this country where we have so many states, each one of which can determine such questions for itself, it cannot be doubted that such a statute as ours is more likely to accomplish the great object of the law applicable to wills—to carry out the intention of the testator—than the common-law rule. Perhaps nothing has shaken the respect of even intelligent laymen for the wisdom of the law more than the fact that a will will pass real estate in one state and be utterly null and void as to that in an adjoining state.").

55. *See* Niles-Weed & Sitkoff, *supra* note 5, at 1029 ("[L]and is now easily and routinely converted into personal property for succession purposes by putting it into a limited liability company or other corporate form so that, at death, what is transferred is the decedent's ownership share in the company."). Alternatively, for some but not all succession issues, an estate planner can accomplish this by including a choice-of-law clause in a will selecting the law of a different state.

56. *See* Niles-Weed & Sitkoff, *supra* note 5, at 1029.

57. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 9, topic 2, intro. note (AM. L. INST. 1971) (noting that "when the land is one item in an aggregate of things, both movable and

death, a unitary approach facilitates estate planning by allowing it to occur without reference to the (possibly inconsistent) succession laws of multiple states. After death, it simplifies administration and probate by allowing the personal representative and probate court to do their work without having to characterize property and determine and apply the law of multiple states.[58] A unitary approach also helps ensure the coherent treatment of estates without subjecting them to potentially inconsistent laws in ways that may frustrate state interests, a decedent's intent, or the expectations of devisees, heirs, or others.[59]

D. Succession Law's Structure

The substantive law of succession once distinguished between chattels and land, and that historical distinction may help explain the emergence of the situs rule and scission.[60] Today, however, the substantive law of succession has a unitary structure, providing a single set of rules that apply to both personal property and real property.[61] From this

immovable, which are situated in a number of states . . . it is desirable to deal with as a unit," and acknowledging that this consideration may in some situations be more pressing than the application of situs law); Bonomi, *supra* note 48, at 1683-84 ("Under the unitary approach, one single law governs all assets belonging to an estate, wherever they are situated . . . . The unitary approach thus avoids a scission of the succession and the complicated problems related to the simultaneous application of different laws to separate parts and distinct aspects of one single estate . . . ."); Peter Hay, *The Situs Rule in European and American Conflicts Law—Comparative Notes*, *in* SELECTED ESSAYS ON COMPARATIVE LAW AND CONFLICT OF LAWS 541, 542 (Hans-Eric Rasmussen-Bonne & Manana Khachidze eds., 2015) (noting that in succession cases, "the interest of the parties in a uniform disposition of the estate will be furthered better by a uniform rule, administered by courts with concurrent jurisdiction to determine claims, than by the traditional American rule differentiating between movable and immovable property (scission)"); Pfeiffer, *supra* note 51, at 571 (noting a unitary approach "makes estate planning easier and more foreseeable"); *see also* Richman & Reynolds, *supra* note 41, at 426 (suggesting that a third Restatement have choice-of-law rules for succession to real property that "mirror the current provisions for succession on death to movable property, thus preserving the policy of uniformity that animates the place-of-decedent's-domicile rule").

58. *See* Bonomi, *supra* note 48, at 1684 ("[S]ince the administration of the estate normally takes place, at least in part, at the place of the last domicile or of the last habitual residence of the deceased, these connecting factors often lead to the application of the domestic law of the state of the competent authority, thus avoiding or reducing the instances in which a foreign law is applicable.").

59. *See* Singer, *supra* note 4, at 134 ("The goal of all states in inheritance and testacy cases is to promote the will of the owner who writes a will while ensuring fairness for surviving family members . . . . Mixing and matching the law of various states has great potential to undermine all these shared policies, resulting in distributions no state thinks fair.").

60. *See* discussion *supra* Part II.

61. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. b (AM. L. INST. 1999) ("Although the rules for intestate succession to real and personal

perspective, the situs rule appears anachronistic as a choice-of-law rule for succession issues.[62] A general domicile rule would bring the choice-of-law rules for succession issues into structural alignment with the substantive law of succession.

E. Comparative Law

Outside the common law world, there is a tendency to take a unitary approach to succession issues based on a domicile or habitual residence choice-of-law rule.[63] According to one comparative analysis, many

property have major points of difference in a few American jurisdictions, and minor ones in some others, the trend has been to eliminate such differences. Today, in well over two-thirds of the states, there is a single system of inheritance for both real and personal property."). Neither the Restatement (Third) of Property: Wills and Other Donative Transfers nor the Uniform Probate Code's substantive rules of succession systematically distinguish personal property and real property.

62. *See* 2 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, para. 27-018, at 1416–17 (Adrian Briggs, Andrew Dickinson, Jonathan Harris & J.D. McClean eds., 15th ed. 2012) (noting that the personal property/real property distinction in choice of law for succession issues "made some sense before 1926 when there were two systems of intestate succession in English domestic law, one for realty and the other for personalty" but "[i]t makes less sense today when England and most, if not all, other countries in the world have adopted one system of intestate succession for all kinds of property"); Scoles, *supra* note 9, at 191-92 ("[T]he abolition of the distinction between real and personal property for the purposes of succession under the local law of the states of the United States and the jurisdictions of the United Kingdom results in the same family members taking the same intestate shares in both types of assets. This reflects the overwhelming policy at the local law level in the United States that succession to family property ought to depend on family relationships, not on the nature of the asset involved. The only significant area of succession in which this forceful policy of abolishing the distinction between real and personal property has not been given effect is in the retention of the antiquated conflict of laws rule of applying situs law to succession of land."); SYMEONIDES, *supra* note 37, at 617 ("[D]espite the disappearance of many substantive-law differences, the conflicts laws of these two worlds have not converged in any appreciable degree . . . . Anglo-American conflicts systems continue to maintain a sharp dichotomy between movables and immovables, looking at succession more in terms of the sovereign's power over property than as a means of transmitting personal or familial wealth from one generation to the next . . . .").

63. *See* SYMEONIDES, *supra* note 37, at 615-16 ("At a general level, the most pronounced difference between the conflicts laws of the civil-law and common-law traditions on the subject of successions may be synopsized in two words—'unity' and 'scission' of the estate. Unity of the estate is the operating principle in most civil law systems. With few exceptions, these systems treat the estate as a single unit to be governed by a single law, regardless of whether the estate consists of movables or immovables or their respective location . . . . In contrast, 'scission' has been the operating principle in most common law systems, including the American system. These systems differentiate sharply between immovables and movables and assign the former the law of the situs (*lex rei sitae*) and the latter to the law of the last domicile of the deceased."); WEINTRAUB, *supra* note 41, § 8.1, at 574-75 ("Civil law jurisdictions do not share the common law countries' fixation on the situs of realty. A survey of countries that are members of the Hague Conference on Private

European and Latin American countries take a unitary approach based on habitual residence or domicile, and Japan, South Korea, and most Arab countries take a unitary approach based on the decedent's nationality at the time of death.[64] The European Union Succession Regulation[65] and the Hague Succession Convention[66] take similar approaches.

This comparative perspective is significant for two reasons. First, by adopting a unitary approach based on the domicile rule, U.S. states could move their choice-of-law rules for succession issues closer to those of other countries.[67] This might modestly foster more choice-of-law uniformity in international contexts and, in turn, help simplify estate planning and administration of estates in those contexts.[68] Second, the widespread adoption around the world of a unitary approach for succession issues based on a state's connections to the decedent (such as habitual residence, domicile or nationality) suggests that the situs rule and scission are not inevitable, and that a domicile-based unitary approach is workable in practice.[69]

International Law revealed that most civil law jurisdictions applied the same law to both personal and real property (unity principle) for testate and intestate succession. Most applied the law of the decedent's nationality, but some applied the law of the decedent's domicile at death.").

64. Bonomi, *supra* note 48, at 1683-84. According to the study, China, Russia, Turkey, and several African countries take a scissionist approach. *Id. See generally* Georgina Garriga Suau & Christopher A. Whytock, *Choice of Law for Immovable Property Issues: New Directions in the European Union and the United States*, 74 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 81 (2022) (providing comparative analysis of trends away from the situs rule).

65. *See* Regulation 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 art. 21, 2012 O.J. (L. 201) 107, 109 (EU) [hereinafter EU Succession Regulation].

66. *See* HAGUE CONVENTION ON THE LAW APPLICABLE TO SUCCESSION TO THE ESTATES OF DECEASED PERSONS, art. 3 (UNIF. L. REV. 1989).

67. Although similar concepts, "domicile," "habitual residence," and "nationality" are not the same and should not be conflated. *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 4.11-4.16, at 277-85 (6th ed. 2018) (comparing these concepts).

68. Regarding the benefits of greater uniformity of choice-of-law approaches to issues about succession in international contexts, see EU Succession Regulation, *supra* note 65, at art. 7 (harmonization in the EU context mitigates difficulties faced by persons "in asserting their rights in the context of a succession having cross-border implications" and helps "citizens . . . organise their succession in advance."); Donovan W. M. Waters, *Explanatory Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons* para. 18, at 21 (1988) ("A single approach [to choice of law for issues about successions] would both simplify the winding up of deceased persons' estates and also reduce costs and the chances of error.").

69. *See* WEINTRAUB, *supra* note 41, § 8.2, at 576 ("A cogent indication that the law of the situs is not a rule written in heaven is that civil law jurisdictions apply the same law to testate and

IV. AN ASSESSMENT OF OBJECTIONS TO THE DOMICILE RULE

So far, I have argued that the situs rule was more a product of historical features of the English legal system than of systematic efforts to develop choice-of-law rules for succession issues, and that the domicile rule has a variety of advantages over the situs rule from the perspectives of policy, state interests, estate planning and probate, succession law's structure, and comparative law. There are, however, a variety of reasonable objections to extending the domicile rule to succession issues involving real property. This Part evaluates objections related to certainty of title, adjudicative jurisdiction, entrenchment, situs policies, and the uncertainty of domicile.

A. Certainty of Title

Perhaps the most frequently given rationale for the situs rule is that it promotes certainty of title.[70] The situs rule is said to promote certainty of title by helping to ensure uniform answers to questions about title to real property in accordance with the law of a single state: the state where the property is located.[71] Certainty of title to real property is important because uncertainty may discourage an owner from investing in improvements to it, a prospective purchaser from acquiring an interest in it, or a potential lender from relying on it as security for a loan. Thus, uncertainty of title may hinder the efficient operation of real property and

intestate succession of both realty and personalty. Most apply the law of the decedent's nationality, but some apply the law of the decedent's domicile at death.")

70. *See* SYMEONIDES, *supra* note 37, at 583 (listing "certainty and clarity of title" as among the main contemporary reasons given for the situs rule).

71. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 9, topic 2, intro. note (AM. L. INST. 1971) (asserting that "reasons of certainty and convenience" favor the situs rule; "[t]he local law of the situs is the law with which the parties, their lawyers and title searchers will usually be most familiar"; and "[t]he burdens of lawyers and of title searchers would be increased if it were not possible for them as a general rule to confine their attention to the local law of the situs . . . . [I]f this were not so, the security of land titles would be diminished."); ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 138, at 464 (6th ed. 2011) ("Good reasons may support the traditional rule that refers land title questions to situs law . . . . Predictability and uniformity of results are of first importance with land title questions, whether they arise from consensual transactions concerning land or at the stage when an abstract of title is being examined for the purpose of determining the state of the title . . . . In many situations, especially where bona fide purchasers are involved, the predictability consideration will be the dominant one, and the only state under whose law this consideration can normally be effectuated is the state of situs."); Singer, *supra* note 4, at 130 (acknowledging need for "a single law" to answer questions about "who holds title to property and what encumbrances burden it"; "Predictability and usability of property depend on clear answers to ownership questions. When you put it that way, having a single law apply to all these issues makes a great deal of sense.").

related credit markets, impede efficient land use, and subject purchasers to claims by persons asserting previously unknown rights to the property.[72] One might therefore object to the domicile rule on the ground that it is inferior to the situs rule from the perspective of certainty and uniformity.

The certainty-of-title rationale directly implies that situs law should govern a state's real property recording system.[73] Recording systems are a fundamental certainty enhancing institution.[74] They enable a real

72. *See* WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, THE FULL FAITH AND CREDIT CLAUSE 85 (2005) ("One argument for [the situs rule] relies on the need for the situs to maintain reliable land records, records that might be muddled by foreign decrees to the disadvantage of subsequent innocent purchasers. In other words, a foreign decree affecting title to land located in the situs might not properly be reflected in the land records in the situs and, therefore, would interfere with a proper search of the title. If that were to happen, the marketability (and, therefore, the value) of situs land, which depends on the quality of its title, would necessarily diminish."); SERKIN, *supra* note 42, at 137 (noting that certainty of title is "vitally important for the alienability of real property" and "[r]eal estate markets depend on buyers being able to identify who owns what, and on the security of ownership"); *see* Stern, *supra* note 2, at 117 (presenting a systematic defense of the situs rule on the grounds of certainty and uniformity, albeit not focused on succession issues in particular) ("[C]ertain peculiar problems associated with the formal attributes of property support the traditional situs rule. The key is exclusivity and its jurisdictional alter ego, uniformity: Because of property's in rem structure, the prospect that the substantive standard governing a controversy will depend upon the forum where it is litigated creates special conceptual and practical difficulties. Property uses the idea of an allocation as its central organizing idea, and as a result, a property entitlement is meant to be secure against the possibility of someone else holding a property entitlement that is logically incompatible with it. This model elevates the importance of conflict-of-laws uniformity in two ways. First, the structure of property law produces serious coordination difficulties, particularly when it comes to informing individual actors of their rights and obligations—think of a title search—and these would be compounded by the legal uncertainty non-uniform conflicts rules would produce. Second, and more fundamentally, a regime in which different legal regimes make contradictory assignments of rights in the same asset is at odds with the basic idea of a system of allocational rights. In other words, having multiple conflicts rules applicable to the same piece of property undermines the concept of property itself. The situs rule is in turn justified, at least as a general matter, because it is well-suited to facilitate uniformity in a number of ways.").

73. *See* 1 PATTON AND PALOMAR ON LAND TITLES § 2 (3d ed. 2021) ("Hawaii, Massachusetts, parts of Minnesota and Ohio, and a few counties in a few other American states utilize a method of title assurance developed in the last century, which may be referred to as registration of land titles. Most other nations with private property rights use title registration systems as well. With registration of title, a party acquiring an interest in land takes the instrument of transfer to the registrar and the registrar examines it. The registrar enters the name of the new owner in the registry and, in some locations, also issues a title certificate to the grantee. To determine the status of title in a title registration system, one merely looks at whom the registry lists as current owners and what the registry lists as outstanding encumbrances on the title.").

74. *See* SERKIN, *supra* note 42, at 137 ("Recordation, fundamentally, is about creating certainty in ownership of land . . . . Recordation . . . plays a central role in protecting the rights of third parties, and the rights of buyers against claims by third parties."); *id.* at 138 ("Recordation

property interest holder to file a public record of that interest. The consequences of recording (or failing to record) depend on the type of recording system. When two persons have conflicting claims to real property, a race system creates certainty of title by giving priority to the claim of the first person to record their interest (regardless of which person actually acquired their interest first).[75] A notice system gives priority to the claim of a preexisting interest holder if they properly recorded their interest; a subsequent purchaser is deemed to have constructive notice of the interest and takes subject to it. If the preexisting interest holder has not properly recorded their interest, a notice system prioritizes the interest of a subsequent "bona fide purchaser"—a purchaser for value who lacked notice of the earlier interest at the time of purchase.[76] A race-notice system gives priority to a subsequent bona fide purchaser only if they record their interest first.[77]

Recording systems promote certainty of title for prospective interest holders by allowing them to search real property records for preexisting interests before completing a purchase or extending credit. They also

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requirements . . . are designed to provide certainty in land transactions, certainty that is essential for the easy marketability of land."); *see also* SPRANKLING, *supra* note 42, at 424 ("The recording system . . . *protects existing owners* from losing their property to later purchasers . . . . The title protection arising from the recording system encourages owners . . . to undertake the investment necessary to maximize the productivity of their lands, and serves other utilitarian goals . . . . [T]he recording system [also] *protects new buyers*. A prudent buyer can commission a search of the public records before completing the purchase and thereby determine whether the seller is able to convey clear title . . . . In this manner, the recording system gives buyers the confidence necessary to invest.").

75. *See* SERKIN, *supra* note 42, at 138 ("Under a race statute, people with an interest in land are literally in a race against each other to file their paperwork first because the first to file wins. If a subsequent purchaser files her claim to the property first, then she wins against a prior unrecorded interest, whether or not she knew about it, and whether or not she was acting in good faith.").

76. In addition to actual notice and constructive (or "record") notice, a subsequent purchaser may have "inquiry notice" of a preexisting interest. Under the concept of inquiry notice, "[i]f a purchaser has actual notice of facts that would cause a reasonable person to inquire further, he is *deemed* to know the additional facts that inquiry would uncover *whether he inquired or not* . . . . Thus, inquiry notice usually arises when the purchaser fails to investigate suspicious circumstances." SPRANKLING, *supra* note 42, at 416. "Inquiry notice issues arise most commonly in two situations: (1) notice from possession of land and (2) notice from a reference in a recorded document." *Id.*

77. *See* SERKIN, *supra* note 42, at 139 ("A race-notice system essentially combines the two other systems. It awards property to subsequent purchasers only if they had no notice of the prior claim, *and* they filed first.").

promote certainty of title for existing interest holders who properly record by protecting them against conflicting subsequent claims.[78]

In general, recording systems are agnostic about the underlying substantive merits of conflicting claims to real property. Rather, the certainty a recording system provides depends primarily on uniform answers about the operation of the recording system itself. It is therefore as to those issues that the certainty-of-title rationale for the situs rule is most compelling,[79] such as issues about the types of real property documents that are eligible for recording, the formal requirements for recording (such as acknowledgment, attestation, a seal, transfer stamps, payment of filing fees, a statement of consideration, etc.), the circumstances that give rise to constructive notice and inquiry notice, the consequences of recording or failing to record, the requirements for a person's interest in real property to be protected by a recording act (such as being a subsequent purchaser for value without notice of the prior interest), what constitutes a purchaser for value, and the effect, if any, of the recording of a document that does not comply with required formalities.[80]

The certainty-of-title rationale for the situs rule is considerably weaker as to succession issues because that certainty can be promoted

78. *See* SPRANKLING, *supra* note 42, at 424 ("The recording system serves two basic purposes. First, it *protects existing owners* from losing their property to later purchasers . . . . The title protection arising from the recording system encourages owners . . . to undertake the investment necessary to maximize the productivity of their lands, and serves other utilitarian goals . . . . Second, the recording system *protects new buyers*. A prudent buyer can commission a search of the public records before completing the purchase and thereby determine whether the seller is able to convey clear title . . . . In this manner, the recording system gives buyers the confidence necessary to invest.").

79. *See* Richman & Reynolds, *supra* note 41, at 425 ("[One] argument for the [situs] rule relies on recording systems. Title searching should be made as simple as possible; the searcher should be able to examine conveyances in the chain of title and determine their effect easily, an exercise that is feasible only if the effect of such instruments is controlled by the law of the situs.").

80. *See generally* SPRANKLING, *supra* note 42, 626-55 (discussing frequently used post-closing protections against title defects, such as covenants of title, title opinions and abstracts, and title insurance). The certainty-of-title rationale for the situs rule is also persuasive as to the law governing the creation of security interests in real property or the conveyance of real property by deed. Even if the rights of third parties will depend primarily on the recording system, the rights between the parties to a mortgage transaction or conveyance depend on the effectiveness of the transfer of interests from the grantor to the grantee of the interest. Before extending credit or paying consideration, a mortgagee or grantee will want to be confident that they will effectively own the interest. These are among the "core real property" issues for which the most recent draft of the Restatement Third, Conflict of Laws calls for the application of situs law. See RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 7, intro. note (AM. L. INST., Council Draft No. 8, 2022); *id*. at §§ 7.02-7.11.

regardless of whether situs law or domicile law governs those issues.[81] Before death, the situs state's recording system, governed by situs law, enhances certainty of title to real property regardless of whether situs law or domicile law may eventually govern succession issues involving that property.[82]

After death, there may be uncertainty about how contested succession issues involving real property will ultimately be resolved—but that type of uncertainty can arise regardless of whether situs law or domicile law governs those contested issues.[83] Typically, those issues are resolved through proceedings overseen by a probate court.[84] Probate proceedings are usually initiated in the state of the decedent's domicile at the time of death. During probate, the rights of creditors and successors are determined and conflicting claims are resolved. Creditors are paid and, at the close of probate, the remaining property is transferred to those entitled to it.[85] These transfers may include devises of real property. The muniment of title needed to give effect to a devise will depend on the law of the situs. This may take the form of a personal representative's deed delivered to the devisee, an order of the domicile probate court, an order of a situs court in ancillary probate proceedings there, or, in some cases, a validly probated will.[86] The muniment of title can then be recorded in the situs state in accordance with situs law. In most cases, this process will resolve uncertainties regarding title to the decedent's real property.[87]

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81. *Cf.* Listwa & Brilmayer, *supra* note 4, at 1383 ("[T]he interest in . . . certainty of title only goes so far in justifying the [situs] rule's breadth.").

82. *See* SPRANKLING, *supra* note 42, at 631.

83. *See* 3 PATTON AND PALOMAR ON LAND TITLES § 524 (3d ed. 2021) (noting that there may be "uncertainty as to any title that rests on a devise until the matter is set at rest either by a decree-confirmed title binding on all adverse claimants or by lapse of time pursuant to a comprehensive limitation statute"). One could argue that if relevant parties are more familiar with situs law than domicile law, resolving those uncertainties may be more difficult—but that does not mean those uncertainties cannot be resolved in probate proceedings.

84. *See* SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES § 13.1, at 565 (6th ed. 2021) (discussing that for testate and intestate succession, "establishing to whom title to individually owned assets will pass must be proved in court unless an expedited small estate's procedure is available").

85. *See id.* § 13.2, at 570 ("Administration of estates is designed to assure that claims against the decedent are paid before the assets are distributed to the heirs or devisees.").

86. At least one state—Texas—treats a certified copy of a will and an order admitting it to probate as a muniment of title. 10 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 88.13 (2022).

87. *See* REYNOLDS & RICHMAN, *supra* note 72, at 85 ("One argument . . . relies on the need for the situs to maintain reliable land records, records that might be muddled by foreign decrees to the disadvantage of subsequent innocent purchasers . . . . The response to that argument

After probate has closed and the devisee's muniment of title has been properly recorded in the situs state, the situs state's recording system should assure certainty of title to the same extent regardless of whether situs law or domicile law governed the succession issues that were resolved in the probate proceedings.[88] The devisee will take subject to preexisting encumbrances.[89] Subsequent purchasers or lenders can search the real property records for preexisting interests before completing a purchase or extending credit and, if they acquire an interest in the property, they can record it in accordance with situs law.

In summary, certainty of title does not substantially depend on whether situs law or domicile law applies to real property succession

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is that the situs could easily protect its land records without discriminating against foreign judgments. It could do so by simply requiring one who claimed under a foreign decree to file that decree in the land records. Once filed, the decree would warn subsequent purchasers and mortgagees just as would any other document in the chain of title."). There may be exceptions. For example, if probate of a will is delayed, a third party may be misled into thinking that an heir has title through intestate succession, but a person may later claim to be a devisee to that property under a will. However, many states mitigate this problem by "protect[ing] bona fide purchasers or mortgagees from an heir if a will is not probated or recorded within a specified time after the testator's death" and "the UPC bars probate of a will after a court enters a decree of distribution to heirs." KURTZ ET AL., *supra* note 84, § 13.2, at 579-80. Moreover, a purported heir, devisee, or creditor may claim that the personal representative improperly transferred real property from the estate to another person. This problem is mitigated by protecting a bona fide purchaser of that property from such claims and instead holding the personal representative liable. *See id*. § 14.8, at 664 ("An improper sale that has already taken place can be vacated, but not if the buyer was a bona fide purchaser."); *id*. at § 14.9, at 682 ("When property of an estate or trust has been transferred to a bona fide purchaser for value, the latter is protected even if the fiduciary was acting improperly."); *see also id*. § 13.1, at 569 ("One who deals with the executor under an informally probated will in good faith, for example, by purchasing property of the estate, is protected even if the probate of the will is later set aside."). In any event, such difficulties can arise regardless of whether the probate court applies a situs rule or a domicile rule to determine the governing law.

88. *Cf*. WEINTRAUB, *supra* note 41, § 8.2, at 575-76 ("Th[e] argument based on the needs of the recording system has no relevance to the original parties to the transaction for which we are seeking the governing law . . . . If a court applied some law other than that of the situs to a transaction between the original parties, the victor, in order to preserve the victory against subsequent bona fide purchasers, would have to record the judgment at the situs.").

89. *See* 3 PATTON AND PALOMAR ON LAND TITLES § 525 (3d ed. 2021) ("The devisee takes title subject to all equities and liens that were against the title in the hands of the testator, and, usually, subject to the right of the testator's creditors to have the land sold to satisfy their claims."); *id*. § 526 ("The title that passes under the will . . . is subject to payment of the decedent's debts and sometimes is charged with the payment of legacies as well as state and federal inheritance taxes. A completed administration is the only method by which record evidence may be furnished that the title is free from encumbrance by reason of these items, until such time as enforcement of each is barred by limitation, if ever . . . . In states such as Texas that utilize an independent executor, a completed administration is not necessary to convey title to property. Under the Uniform Probate Code, in a formal testacy proceeding, a final closing procedure settles the estate.").

issues.[90] Therefore, the certainty-of-title rationale for the situs rule is less persuasive in the context of succession law than it is for core real property issues, such as issues about recording systems.

B. Adjudicative Jurisdiction

Another rationale for the situs rule—and another ground for objecting to a domicile rule—is that the situs state has exclusive jurisdiction to adjudicate claims involving real property.[91] As the United States Supreme Court stated in *Fall v. Eastin*, the "firmly established" rule is that a "court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree."[92] Therefore, the Court held that a deed to real property located in Nebraska made by a Washington commissioner at the order of a Washington court in a divorce action need not be recognized by a Nebraskan court under the Full Faith and Credit Clause of the U.S. Constitution.[93] If situs courts are assumed to apply situs law whenever they adjudicate matters involving in-state real property and if non-situs courts altogether lack subject matter

90. The Second Restatement itself acknowledges that the certainty-of-title rationale for the situs rule loses force when succession issues have been resolved through probate and administration. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 cmt. a (AM. L. INST. 1971) ("If, under the practice of the situs, the persons who are entitled to succeed upon intestacy to interests in local land are conclusively determined as against all others by a court decree in the administration proceedings or otherwise, there is no reason so far as title searchers and other third persons are concerned why intestate succession should not on occasion follow the local law of another state. For such title searchers and other third persons would only have to consult the local decree to determine the person or persons who had succeeded to interests in the land."); *see also id*. § 240 cmt. f (similar reasoning for testate succession).

91. *See* Listwa & Brilmayer, *supra* note 4, at 1392 ("As with in personam judgments, a sister-state judgment implicating real property rights and issued without proper adjudicative jurisdiction was not entitled to full faith and credit. And since only the situs of the property had jurisdiction, no other state's judgment is owed such conclusive treatment."); Richman & Reynolds, *supra* note 41, at 425 ("One argument for the [situs] rule is that only the situs courts can directly affect land within the situs state; therefore every nonsitus court should apply the law of the situs to insure that courts of the situs state will enforce the forum-court's judgment."); WEINTRAUB, *supra* note 41 § 8.2, at 576-77 ("The second reason for applying the law of the situs is well stated in an early draft of the Second Restatement: '[L]and and things attached to the land are within the exclusive control of the state in which they are situated, and the officials of that state are the only ones who can lawfully deal with them physically. Since interests in immovables cannot be affected without the consent of the state of the situs, it is natural that the latter's law should be applied by the courts of other states.'").

92. 215 U.S. 1, 11 (1909).

93. *Id*. at 2.

jurisdiction over such matters, then any choice-of-law rule other than the situs rule would be incongruous.[94]

This objection has limited force when applied to succession choice-of-law issues. Even if the situs state's courts had exclusive jurisdiction, this would not preclude them from applying non-situs law to issues involving succession to in-state real property of decedents domiciled outside the state.[95] In fact, situs state courts have applied non-situs law to these issues directly and, by using escape devices such as equitable conversion, indirectly.[96]

Moreover, the rule in *Fall v. Eastin* only extends to judgments directly affecting title to real property, not to judgments determining the rights of persons as to real property:

> A court of equity[,] having authority to act upon the person[,] may indirectly act upon real estate in another State, through the instrumentality of this authority over the person. Whatever it may do through the party[,] it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to [a]ffect it with liens or burdens.[97]

For example, a court has authority to order a party over whom it has personal jurisdiction to convey out-of-state real property, since "[i]n such case[,] the decree is not of itself legal title, nor does it transfer the legal

94. *See* Listwa & Brilmayer, *supra* note 4, at 1392-94 (developing this argument). Note that this is an adjudicative authority argument, not a choice-of-law argument. The U.S. Constitution does not compel a non-situs state's court to apply situs law to succession issues, but rather requires only a significant contact that gives the state an interest in applying its law. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."). For the reasons given above, the decedent's domicile is a contact that gives a state an interest applying its law to determine succession issues.

95. *See* Richman & Reynolds, *supra* note 41, at 425 ("One argument for the [situs] rule is that only the situs courts can directly affect land within the situs state; therefore every nonsitus court should apply the law of the situs to insure that courts of the situs state will enforce the forum court's judgment. [However,] the argument does not apply at all when the forum court *is* the situs."); WEINTRAUB, *supra* note 41, § 8.2, at 576-77 ("Even if it were true that only a court at the situs of realty has constitutional jurisdiction over the subject matter when litigation affects interests of persons in that realty, this would not logically compel application of the law of the situs. For example, if the situs courts believed that they would reach a more rational result by applying the law of some other state, they would be free to apply that other law.").

96. *See infra* subpart IV.C.

97. *Fall*, 215 U.S. at 8.

title"—and the situs state would have a full faith and credit obligation with respect to the order.[98]

Accordingly, a non-situs probate court may determine the rights of devisees, heirs, creditors, or others to a decedent's real property, provided it has personal jurisdiction over the affected parties and so long as its order merely establishes the parties' rights or compels a party to convey the

98. *Id*. at 11; *see also* FELIX & WHITTEN, *supra* note 71, § 138, at 464 ("The court of the non-situs state cannot by its judgment change the title to land, but it can by its judgment bind the parties who are before it. A judgment against the parties and their privies should be given faith and credit in the state where the land lies."); Hay, *supra* note 57, at 556-57 ("Jurisdiction to determine the *right to title*, the entitlement as distinguished from title itself, depends on the existence of personal jurisdiction: it affects rights and obligations as between the parties."); *id*. at 558-59 ("[S]tate court judgments do not directly affect *any* property outside the forum state. But they establish obligations which the Full Faith and Credit Clause requires the situs to recognize . . . in the sense, presumably, of issuing its decree to mirror that of the non-situs court: quieting title in the petitioner, dividing property, recognizing the establishment of a trust, and the like."); REYNOLDS & RICHMAN, *supra* note 72, at 84-85 ("[T]he rule [of *Fall v. Eastin* has a] very narrow scope. It is clear that the Supreme Court has no objection to a decree from an F-1 court that has an indirect effect on the land in F-2. In *Fall*, . . . if the Washington court had threatened the husband with contempt, and, under that duress, he had executed a deed conveying the Nebraska land to his wife, the deed would have been valid, and the Nebraska court would have recognized it. Further, if the wife had merely asked for a different remedy in Nebraska, she may have been successful. If instead of suing on the deed prepared at the order of the Washington court, she had sought recognition in Nebraska for the Washington decree ordering her husband to convey the land to her, the Nebraska court probably would have granted full faith and credit to that decree and issued its own order compelling the husband to execute the deed. The two hypothetical cases show that the *Fall* rule is very limited. It permits an F-2 court to ignore an F-1 decree only if it directly affects title to land in F-2. It does not, however, prevent an F-1 court from acting indirectly in ways that ultimately will control title to land in F-2."); Stern, *supra* note 2, at 169 ("[A] non-situs court might need to resolve issues between claimants to property in the course of some larger determination, as in a divorce or probate proceeding. The non-situs determination is purely *in personam*—it does not affect adverse strangers or successors, because it is not conceived of as acting upon the property itself—but it does provide relief between the parties where such relief is needed. Under these circumstances, the limitation on the exercise of non-situs jurisdiction can sensibly be relaxed."); SYMEONIDES, *supra* note 37, at 582 ("One of the reasons given for the dominance and breadth of the situs rule under the traditional approach was the 'power rationale'—the situs state has exclusive de jure and de facto power over land situated within its borders . . . . Statements such as these have led some courts to conclude that they do not have jurisdiction to adjudicate disputes involving non-forum land, even when they do apply situs law. This conclusion is accurate only with regard to in rem jurisdiction, that is, jurisdiction directly to affect non-forum land. On the other hand, a court that has in personam jurisdiction over the parties may indirectly affect non-forum land by ordering the parties to pay money or to execute the necessary conveyances. Under the full faith and credit clause of the Constitution, such a judgment would be enforceable in the situs state, regardless of whether it applied situs or non-situs law."); WEINTRAUB, *supra* note 41, § 8.12, at 627 ("The situs will rarely, if ever, have so substantial an interest qua situs in refusing to recognize a non-situs land decree that the situs' interest should be permitted to override the great national interest in recognition of sister-state judgments.").

property and does not purport to transfer title directly.[99] The party ordered to convey may then execute, deliver, and record the deed in accordance with situs law.[100] If the party fails to do so, the situs state may fulfill its full faith and credit obligation by enforcing the order to convey or by directly transferring title through ancillary probate proceedings.[101] Non-situs courts frequently issue judgments based on their in personam jurisdiction to indirectly affect title to foreign real property, and situs courts extend full faith and credit to and enforce such judgments in

99. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, cmt. d (AM. L. INST. 1971) ("A typical case is when a court of State X orders the defendant to convey to the plaintiff land situated in state Y, and a suit to enforce the X judgment is brought in Y. The X judgment will be enforced in this situation if the Y courts follow the majority rule. To be sure, the X court would have no jurisdiction to affect title to Y land directly by its decree. Hence a decree of the X court providing simply that title to the Y land should henceforth be in the plaintiff would be void and not entitled to recognition. But in the case put the X court has done no more than order the defendant who was subject to its jurisdiction to do a particular act. This the court had power to do. Its order that the defendant should convey Y land is therefore valid.").

100. *See* REYNOLDS & RICHMAN, *supra* note 72 ("[T]he situs could easily protect its land records without discriminating against foreign judgments. It could do so by simply requiring one who claimed under a foreign decree to file that decree in the land records. Once filed, the decree would warn subsequent purchasers and mortgagees just as would any other document in the chain of title.").

101. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, cmt. d (AM. L. INST. 1971) ("The Y court has alternative methods of enforcing the X decree when the defendant is subject to its jurisdiction. The court may order the defendant to convey the Y land in compliance with the X decree and punish him for contempt if he fails to do so. Or, since the land itself is subject to its jurisdiction, the Y court may itself transfer title to the land to the plaintiff. If, however, the defendant is not subject to the jurisdiction of the Y court, the only way that the Y court may enforce the X decree will presumably be to transfer title itself to the Y land to the plaintiff."); *see, e.g.*, Brigham Oil & Gas, LP v. Lario Oil & Gas, Co. 801 N.W.2d 677, 682-83 (N.D. 2011) (holding that devisee must initiate formal ancillary probate proceedings in North Dakota to formally transfer to him title to North Dakota real property, but that North Dakota probate court was required to accept California probate court's order as determinative devisee's right to that property, and that devisee also would have been entitled to seek specific performance of the California court's order in North Dakota); *see also* UNIF. PROB. CODE § 3-408 (revised 2019) ("A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes, or is based upon, a finding that the decedent was domiciled at death in the state where the order was made."); *id.* § 3-408, at cmt. ("This section . . . extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land."). This section does not extend to informal probate. *See id.* ("Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either Section 3-202 or this section.").

various contexts,[102] including in proceedings involving succession issues.[103]

102. *See, e.g.*, Roberts v. Locke, 304 P.3d 116, 120 (Wyo. 2013) (affirming trial court's judgment in divorce proceedings ordering spouse to convey her interest in Costa Rica real property that was among marital assets; citing "well-established" rule that "a court of equity having jurisdiction over a person may act indirectly upon that person's extraterritorial real estate by ordering him or her to act or to cease to act in some particular way in relation to the property. That is, courts distinguish judgments calculated to affect title to property itself from orders directing owners subject to their jurisdiction to take certain actions concerning property located outside the jurisdiction . . . . A Wyoming court having personal jurisdiction over the parties in a divorce action may therefore order one of them to convey his or her interest in real property to the other, even though the property is in a foreign country."); *In re* Marriage of Kowalewski, 182 P.3d 959, 960-64 (Wash. 2008) (affirming trial court's judgment awarding Poland real property to wife; rejecting husband's argument that trial court exceeded its jurisdiction by distributing ownership interests in foreign real property; holding that trial court with jurisdiction over parties "has power to divide the parties' personal interests in all property brought to its attention, wherever situated"; reasoning that '[a] dissolution decree impermissibly 'directly affects title' when it purports to operate as a muniment of title," but "a decree that declares the parties' personal rights or equities in the property is a valid in personam decree regardless of whether the parties are ordered to do anything with respect to the property"); TWE Ret. Fund Tr. v. Ream, 8 P.3d 1182, 1185 (Ariz. Ct. App. 2000) (holding that Nevada court had subject matter jurisdiction over claim for specific performance to compel sale of Arizona real property, even though it cannot directly affect title to property outside its jurisdiction (citing Fall v. Eastin, 215 U.S. 1, 9 (1902))).

103. *See, e.g.*, Great Am. Life Ins. Co. v. Tanner, 5 F.4th 601, 614-15 (5th Cir. 2021) (affirming judgment of the United States District Court for the Northern District of Mississippi in interpleader action finding void devise of Arkansas real property to appellant because decedent's will was product of appellant's undue influence, and ordering appellant to convey property to appellees; rejecting appellant's argument that matter was within exclusive jurisdiction of Arkansas courts because property was located there). "[A] court having in personam jurisdiction over a litigant may indirectly act upon realty situated in another jurisdiction by means of an equitable decree directing that party to convey title to the foreign realty to another. If the court, having properly acquired such personal jurisdiction over the party before it, enforces its decree by compelling a conveyance . . . such conveyance is entitled to Full Faith and Credit in the situs state." *Id*. (quoting *Fall*, 215 U.S. at 8); *see also* Est. of Von Baravalle, 434 P.3d 1255, 1256 (Haw. Ct. App. 2019) (holding that Hawaiian probate court had jurisdiction to order heir to convey improperly distributed California real property to decedent's estate because order only indirectly affected title to property; rejecting heir's argument that California had exclusive jurisdiction); OneWest Bank, FSB v. Erickson, 367 P.3d 1063, 1073 (Wash. 2016) (rejecting appellee heir's argument that Idaho court order imposing reverse mortgage on decedent's Washington real property was not entitled to full faith and credit because courts don't have jurisdiction over out-of-state real property; agreeing with appellant lender's argument that "actions involving personal interests in property, as opposed to actions adjudicating legal title to real property, need not be adjudicated in the state where the real property is located" and holding that Idaho court "merely used its jurisdiction over the person, not the property, to direct the mortgage"); Hirchert Fam. Tr. v. Hirchert, 65 So. 3d 548, 551 (Fla. Dist. Ct. App. 2011) (California court ordered appellee, decedent's spouse, to convey Florida real property to court-appointed receiver; when she failed to do so, California court had quitclaim deed executed on her behalf; Florida appellate court held that quitclaim deed not entitled to full faith and credit because California court lacked in rem jurisdiction over the real property, but order to convey was entitled to full faith and credit because

C. Entrenchment of the Situs Rule

Another possible objection is that the situs rule is so firmly entrenched that courts and legislators are unlikely to extend the domicile rule to real property succession issues—regardless of its advantages.[104] Given the long history of the situs rule, this is a legitimate concern. But it should not be exaggerated. The situs rule is not as entrenched today as its history may suggest.[105] First, courts have long used various techniques to apply the law of the decedent's state of domicile to real property succession issues without explicitly rejecting the situs choice-of-law

California court had personal jurisdiction over appellee, and instructed trial court to enforce California order to convey); *In re* Est. of Fields, 219 P.3d 995, 1015 (Alaska 2009) (affirming Alaska court order creating constructive trust over Washington real property and requiring decedent's children to convey property into decedent's trust; rejecting decedent's daughter's argument that court lacked jurisdiction over in rem action affecting out-of-state real property). In *In re Est. of Fields*, the court reasoned that the "superior court's authority to indirectly affect title to the Washington property" arose "from its personal jurisdiction over the four 'owners' of the property." 219 P.3d at 1015 ("[While] courts of one state may not directly affect or transfer title to real property situated in another state, a court may 'indirectly affect title to property located in another state through its power over individuals under the court's jurisdiction.'" (quoting Sylvester v. Sylvester, 723 P.2d 1253, 1260 (Alaska 1986))); *see also* Reid v. Reid, No. 2003-CA-000120-MR, 2004 WL 540133, at *1, *3 (Ky. App. 2004) (affirming trial court's judgment ordering decedent's son to convey decedent's Indiana real property to another son based on finding that prior transfer to first son had been fraudulently induced; reasoning that although trial court "correctly realized that it could not annul or rescind the deed," it appropriately "relied on its personal jurisdiction over the parties and the equitable powers to indirectly affect title to real estate located in another state as set forth in *Fall v. Eastin*); Day v. Wiswall, 464 P.2d 626, 632 (Ariz. App. 1970) (holding that California court judgment determining that step daughter was entitled to a portion of decedent's residual estate, including Arizona real property, was entitled to full faith and credit and enforcement according to its terms; reasoning that under full faith and credit principle, "[t]he courts of the situs should recognize such a decree as a final determination of a personal obligation to convey, an obligation analogous to that arising from a valid contract. It should be accepted as a valid cause of action in the jurisdiction of the situs and if a suit be brought upon it and personal jurisdiction obtained of the person bound, a new decree should be rendered").

104. *See* Andrew P. Dwyer II, *The Situs Rule*, 4 CONN. PROB. L.J. 325, 345-46 (1989).

105. *See id*. at 345 ("As can be seen in the development of case law, some courts are now deviating from strict mechanical application of the situs rule in favor of the policy consideration of carrying out the testator's intent."); Hay, *supra* note 57, at 559 ("In both jurisdiction and choice of law, American practice displays a trend away from an exclusive situs rule. The recognition that property claims arise in contexts which do not implicate situs interests, for instance in probate and marital property, increasingly leads situs courts to consider the application of the law more significantly related to the parties and the claim."); Scoles, *supra* note 9, at 105 ("The situs rule simply is not as monolithic as has often been assumed and courts have avoided it in many cases by various approaches. The area of succession is a principal area in which there has been substantial departure.").

rule.[106] These techniques include equitable conversion,[107] recharacterizing real property succession issues as personal property succession issues,[108] and refusing to apply situs state law if the parties fail to plead or give the court adequate information about that law.[109] An explicit domicile choice-of-law rule would make it unnecessary for courts to use these techniques to avoid applying situs law.

106. *See* Hancock, *supra* note 11, at 38 ("[D]espite the continual reiteration of the situs formula by courts and commentators, perceptive judges have not infrequently refused to make the needless sacrifices that it demands. To justify their unorthodox decisions, they have had recourse to various escape devices. These escape devices have in most instances had the unfortunate effect of obscuring the real ground of the unorthodox decision: a strong sense of dissatisfaction with the result the situs formula would have produced.").

107. *See, e.g.*, McGuire v. Andre, 65 So. 2d 185, 192 (Ala. 1953) (determining law of Kentucky, decedent's residence at time of death, governed inheritance of real property located in Alabama, due to characterization as personal property under doctrine of equitable conversion); Duckwall v. Lease, 20 N.E.2d 204, 211 (Ind. Ct. App. 1939) (applying Ohio law to determine to whom property should be transferred where Ohio was decedent's domicile and real property was in Indiana, reasoning that the will caused an equitable conversion of the real property into personal property and that the law of the decedent's domicile governs transfer of personal property by will); *In re* Wiley's Est., 36 N.W.2d 483, 489 (Neb. 1949) (using doctrine of equitable conversion, applying law of Nebraska, decedent's residence at time of death, to govern succession to real property in Wyoming); *see also* SCHOENBLUM, *supra* note 34, § 11.04, at 11-9 to 11-10 ("In circumventing the rigid choice-of-law rules pertaining to [intestate succession to] immovables, equitable conversion has become perhaps the leading device . . . . American courts have in many instances mechanically applied the doctrine of equitable conversion to reach the opposite outcome . . . ."); Trautman, *supra* note 18, at 1107 ("Because the traditional rules held that real property was governed by the law of the situs and personal property by the law of the owner's domicile, equitable conversion permitted courts to elude the law of the situs in favor of the law of the domicile. By simply holding that the real property ought to be sold and converted into personal property, a court could regard the property as if it were personal property and apply the law of the domicile.").

108. *See, e.g.*, Cohn v. Heymann, 544 So. 2d 1242, 1245 (La. Ct. App. 1989) (although Louisiana choice-of-law rule required that Louisiana law govern devise of Louisiana real property, real property was held by a Louisiana corporation; plaintiffs alleged that testator "transferred her interest in Louisiana immovable property to Louisiana corporations in order to convert her ownership interest to corporate stock (movable property), the disposition of which is controlled by the laws of the State of Pennsylvania and therefore not subject to Louisiana forced heirship laws," so as to deny them an interest; court rejected that argument and applied law of Pennsylvania, where decedent was domiciled at time of death); Craig v. Craig, 117 A. 756, 759 (Md. 1922) (characterizing leasehold interest as personal property rather than real property, so as to apply law of decedent's domicile at the time of death, rather than situs law, to govern devise of that interest).

109. *See, e.g.*, Est. of Taylor, 391 A.2d 991, 994 n.5 (Pa. 1978) (acknowledging choice-of-law rule that law of state where real property is located governs testate succession to that property; nevertheless applying law of Pennsylvania, where testator resided at time of death, to govern devise of real property located in Ohio, because neither party informed court as to the content of applicable Ohio law).

Second, for some real property succession issues, states have explicitly abandoned the situs rule. For example, instead of a situs rule, many states have validating statutes that do not distinguish personal property and real property, according to which a will is formally valid if executed in compliance with either that state's own law or the law of certain other specified states, such as the state where the will was executed or the state of the decedent's domicile at the time of death.[110] The Uniform Law Commission has adopted this approach rather than a situs rule in its Uniform Probate Code and Uniform Electronic Wills Act.[111] The Uniform Probate Code also provides that the elective share of a surviving spouse[112] and the "[r]ights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death."[113]

110. *See, e.g.*, Goodwin v. Colchester Prob. Ct., 133 A.3d 156 (Conn. App. Ct. 2016) (applying law of Pennsylvania, where testatrix was domiciled at time of death, to validate will devising real property located in Connecticut); Marr v. Hendrix, 952 S.W.2d 693, 693 (Ky. 1997) ("The will of a person domiciled out of this state at the time of his death shall be valid as to his personal property and his real property in this state, if it is executed according to the law of the place where he was domiciled."); *In re* Est. of Janney, 446 A.2d 1265 (Pa. 1982) (applying the law of Pennsylvania, where testatrix was domiciled at time of death, to determine testatrix's intent and the capacity of an attesting witness to take real property located in New Jersey); *see also* FELIX & WHITTEN, *supra* note 71, § 160, at 509 (6th ed. 2011) ("These validating statutes apply equally to wills of land and of personalty. A substantial majority of the American states now have statutes of this general sort."); Scoles, *supra* note 9, at 105 ("The situs rule is overridden by the validation policy reflected in the nearly universal statutes validating a will executed in compliance with the law of the place where executed or the law where at the time of execution or death the testator is domiciled, has a place of abode or is a national.").

111. *See* UNIF. PROB. CODE § 2-506 (revised 2019) ("A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national."); UNIF. ELEC. WILLS ACT § 4 (2019) ("A will executed electronically but not in compliance with [this act's execution requirements] is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is: (1) physically located when the will is signed; or (2) domiciled or resides when the will is signed or when the testator dies.").

112. *See* UNIF. PROB. CODE § 2-202 (b) (revised 2019) ("The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.").

113. *Id.* § 2-401; *see also* Reece v. Chu, No. 1 CA-CV 19-0415, 2020 WL 3053617, *1, *4 (Ariz. Ct. App. June 9, 2020) (ARIZ. REV. STAT. ANN. § 14-201) (2023)) (stating rule that "[r]ights to homestead allowance, exempt property and family allowance for a decedent who is not domiciled in this state at the time of death are governed by the law of the decedent's domicile at death" and, on that basis, rejecting claims of surviving spouse under Arizona law because testator was domiciled in New Jersey at time of death); Saunders v. Saunders, 796 So. 2d 1253, 1255 (Fla. Dist. Ct. App. 2001) (applying law of Colorado, where decedent was domiciled at time of death,

In addition, some courts have applied the domicile choice-of-law rule to issues about the construction of wills of real property.[114] Moreover, both the Second Restatement and the Uniform Probate Code provide that the law designated by the testator governs issues about the construction of wills, including wills of real property.[115] This enables estate planners to

to govern pretermitted spouse issue even though the issue arose as to real property located in Florida) (since superseded by statute).

114. *See, e.g.*, Houghton v. Hughes, 79 A. 909, 910 (Me. 1911) ("The general rule, both as to wills of personalty and realty, seems to be that a will is to be interpreted according to the laws of the country or state of the domicile of the testator, since he is supposed to have been conversant with those laws."); Beauchamp v. Beauchamp, 574 So. 2d 18, 20 (Miss. 1990) (stating rule that "the law of the person's domicile is to be used when construing the provisions of a testator's will, unless it is clear from the instrument itself that the testator intended that the laws of another jurisdiction should control"; construing will under law of Wisconsin, law of decedent's domicile at time of death, as to devise of real property located in Mississippi); Applegate v. Brown, 344 S.W.2d 13, 17 (Mo. 1961) (stating "general rule is that the construction of a will *for the purpose of ascertaining the testator's meaning and intention as expressed therein* is governed by the law of the testator's domicile, whether the will disposes of personal property or real estate"; approving construction of will under law of Nebraska, where testator was domiciled at time of death, as to devise of real property located in Missouri); Est. of Buckley, 677 S.W.2d 946, 947 (Mo. Ct. App. 1984) (applying choice-of-law principle that "[t]he primary purpose in construing a will is to ascertain the testator's intent, and this is governed by the law of the testator's domicile when the will was executed whether it disposes of personalty or realty," the court construed will of real property located in Missouri under law of Kansas, the state of testator's domicile at time of death); Matter of Goodyear, No. 1995-105010 (N.Y. Surr. Ct. Dec. 18, 2017) (construing will under law of New York, where testator was domiciled at time of death, as to devise of interests in real property located in Pennsylvania); *In re* Knickel's Will, 185 N.E.2d 93, 95 (Ohio Prob. Ct. 1961) ("It is elementary that the nature of an interest in land is determined by the law of the situs, but questions of interpretation and construction of wills are generally controlled by the law of the testator's domicile.") (holding that law of decedent's domicile, Ohio, governed construction of will as to real property located in Texas).

115. *See* UNIF. PROB. CODE § 2-703 (revised 2019) ("The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in [Part] 2, the provisions relating to exempt property and allowances described in [Part] 4, or any other public policy of this state otherwise applicable to the disposition."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 240(1) (AM. L. INST. 1971) ("A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will."). In the related field of trusts, the Uniform Trust Code similarly provides that "[t]he meaning and effect of the terms of a trust are determined by . . . the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue . . . ." UNIF. TR. CODE § 107(1); *id.* § 107 cmt. ("The settlor is free to select the governing law regardless of where the trust property may be physically located [and] whether it consists of real or personal property . . . ."); *see also* Thomas P. Gallanis, *The Use and Abuse of Governing-Law Clauses in Trusts: What Should the New Restatement Say?*, 103 IOWA L. REV. 1711, 1726 (2018) (documenting that as of 2018: "[Thirty of the thirty-two Uniform Trust Code jurisdictions] have enacted some form of Section 107(1) . . . Of the [thirty Uniform Trust Code]

select domicile law and avoid the situs rule and the problems of scission at least as to issues of construction. Permitting estate planners to avoid the situs rule so easily for these issues suggests that the policies favoring the situs rule may not be as important as they are sometimes said to be—at least in the context of succession.

Finally, some courts have rejected the categorical situs choice-of-law rule in the field of matrimonial property law and extended the marital domicile rule—which is the dominant approach for matrimonial property issues involving personal property—to matrimonial property issues involving real property.[116] The willingness of courts to do this in the context of matrimonial property law suggests that however entrenched the situs rule may be, it is not so entrenched as to preclude change.

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jurisdictions that enacted some form of Section 107(1), [sixteen] enacted Section 107(1) verbatim or essentially verbatim. The remaining [fourteen] jurisdictions made substantive changes."). Of the fourteen jurisdictions that made substantive changes to § 107(1), only two—Nebraska and Tennessee—made changes dealing with real property. *Id*. at 1727.

116. *See, e.g*., Quinn v. Quinn, 689 N.W.2d 605, 614 (Neb. Ct. App. 2004) (applying law of Washington, where the parties resided at the time of marriage, to determine that Washington real property owned by spouse before marriage was that spouse's separate property); Grappo v. Coventry Fin. Corp., 286 Cal. Rptr. 714, 719-20 (Cal. Ct. App. 1991) (stating rule that "marital interests in money and property acquired during a marriage are governed by the law of the domicile at the time of their acquisition, even when such money and property is used to purchase real property in another state"; holding that "the characterization of the parties' respective marital interests in the subject [Nevada real] property must be determined under the community property law of California"); Fehr v. Fehr, 284 S.W.3d 149, 153 (Ky. Ct. App. 2008) (stating rule that "[a]bsent an agreement to the contrary, in dissolution of marriage proceedings the law of the marital domicile applies" to the determination of the spouses' respective marital interest in real property; applying law of Kentucky, state of spouses' marital domicile at time of divorce, to determine spouses' interests in real property located in Netherlands Antilles); Whiting v. Whiting, 396 S.E.2d 413, 424 (W. Va. 1990) (applying equitable distribution law of West Virginia, state of spouses' marital domicile at time of divorce, to determine spouses' interests in Maryland real property); Noble v. Noble, 546 P.2d 358, 362-63 (Ariz. Ct. App. 1976) (holding that trial court was correct in applying law of Arizona, where spouses had their marital domicile at time of divorce, to determine spouses' property rights, including rights in real property located in Denmark; noting, however, that parties did not adequately raise possible choice-of-law issue); Haws v. Haws, 615 P.2d 978, 981 (Nev. 1980) (noting that, in case involving real property, "[t]he division of the community property is governed by California law because California was the marital domicile . . . at the time of the dissolution"); Matter of Marriage of Day, 904 P.2d 171, 174 (Or. Ct. App. 1995) (applying law of Oregon, state of wife's domicile and spouses' last marital domicile at time of divorce, to determine distribution of property, including real property located in California); *In re* Marriage of Scott, 835 P.2d 710, 714 (Mont. 1992) (applying law of Montana, where spouses had their last marital domicile before dissolution proceedings and where husband continued be domiciled, to divide property, including real property located in Washington; rejecting wife's argument that Washington law should govern division of that real property).

In short, courts and legislators have already moved away from a strict situs rule and toward a domicile rule for several types of real property succession issues, particularly issues about validation, the rights of the decedent's spouse, and construction. Even when those moves have been made using various escape devices rather than explicitly, courts have indicated that they are willing to break from the situs rule in practice.

D. Situs State Policies

One might also object that applying the law of the decedent's state of domicile to a real property succession issue might in certain cases offend a strong public policy of the state where the real property is located.[117] Since this objection's focus is on particular applications of the domicile rule rather than the domicile rule as such, it can be best addressed by ensuring that there are appropriate exceptions to the rule. For example, in situs state probate proceedings, a narrow public policy exception could allow a court to decline to decide an issue under foreign law if the application of that law would offend a strong public policy of the forum state.[118]

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117. An example might be Florida's constitutionally enshrined homestead exemption, which protects the decedent's homestead from claims by creditors and from putative devisees so that the surviving spouse and minor children may continue living there. *See* FLA. CONST. art. X § 4. *See generally* ABRAHAM M. MORA, SHELLY WALD HARRIS & M. TRAVIS HAYES, 12 FLORIDA PRACTICE, ESTATE PLANNING § 19:1 (2021-2022 ed.) ("The Florida Constitution and corresponding statutes work to help ensure the existence of a home for the surviving spouse and the minor children of the homesteader upon the death of the homesteader . . . . The ultimate goal of the exemption is to protect families from destitution and want by preserving their homes."); *see also id.* § 19:22 ("If the homesteader is survived by a spouse or lineal descendants, the property will descend according to the homestead statute and constitutional provision. Any provisions to the contrary in the will or revocable trust of the homesteader will not be effective."); *id.* § 19:45 ("Homestead property is not a probate asset in the event that the decedent is survived by a spouse and a minor child."); *id.* § 19:48 (providing homestead "is not subject to the claims of the estate's general creditors"). In the unusual circumstance that the decedent's domicile at the time of death was outside Florida but the decedent's homestead is deemed to be in Florida, and the decedent's surviving spouse and minor child are domiciled in Florida, a court in Florida probate proceedings might use the public policy exception to apply the Florida homestead exemption instead of domicile law. Given the protective policy underlying Florida's homestead exemption and Florida's relevant connections—the real property located and, more importantly, the surviving family members domiciled there—a court in domicile probate proceedings may conclude that Florida law is manifestly more appropriate than domicile law.

118. This is the proposed approach of the Third Restatement. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.04 (AM. L. INST., Tentative Draft No. 3, 2022) ("A court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy.").

In domicile state proceedings, a public policy exception to the domicile choice-of-law rule is unnecessary. A different kind of exception could allow a domicile court to apply the situs state's law to a succession issue in a case presenting "exceptional and unanticipated circumstances" in which situs law would be "manifestly more appropriate," based on the situs state's policies and interests in light of its connections to the issue.[119] However, if a domicile probate court decides a real property succession issue based on domicile law, it is unlikely that a situs state court would be constitutionally permitted to deny recognition of that decision due to that choice of law.[120] There is "no roving 'public policy exception' to the full faith and credit due *judgments*."[121] A state generally owes full faith and credit to another state's judgment, even if that judgment is based on a mistake of law or fact.[122]

For reasons already discussed, the law of the decedent's domicile will, in most cases, be the most appropriate law for governing both personal and real property succession issues.[123] This means that the use of

119. This is the proposed approach of the Third Restatement. *See id.* § 5.03 ("The law selected by the rules of this Restatement will not be used if a case presents exceptional and unaccounted-for circumstances that make the use of a different state's law manifestly more appropriate. In such cases, the court will select the manifestly more appropriate law."); *id*. § 5.03, cmt. c ("Whether a result is manifestly more appropriate is to be determined by considering factors including the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue-determined in light of the strength and relevance of the contacts between the states and the issue, and the protection of justified expectations.").

120. *See* Baker v. Gen. Motors Corp., 522 U.S. 222 (1998)**;** Fauntleroy v. Lum, 210 U.S. 230 (1908).

121. *See Baker*, 522 U.S. at 233-34 (1998) ("[This Court's] decisions support no roving 'public policy exception' to the full faith and credit due *judgments*." (citing Estin v. Estin, 334 U.S. 541, 546 (1947))); *Estin*, 334 U.S. at 546 ("[The Full Faith and Credit Clause] ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Fauntleroy*, 210 U.S. at 230 (determining judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested "upon a misapprehension of Mississippi law"); *see also* REYNOLDS & RICHMAN, *supra* note 72, at 102 ("A state cannot refuse to enforce a judgment because it is based on a claim that the enforcing state finds repugnant to its own public policy.").

122. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (AM. L. INST. 1971) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment, except as stated in § 105 [dealing with lack of competence of rendering court]."); *id*. § 106, cmt. a ("[A] party who is aggrieved by the judgment must seek correction of the error in the state of rendition by having the judgment vacated or reversed on appeal. The judgment will not be denied recognition and enforcement in other states because of such an error. As between States of the United States, the rule of this Section is one of constitutional law, being required by full faith and credit.").

123. *See* discussion *supra* Part III.

either a public policy exception or a manifestly-more-appropriate law exception should rarely be necessary. Narrowly crafted exceptions along these lines are nevertheless appropriate and may reduce the use of non-transparent escape devices.[124]

E. Uncertainty of Domicile

Finally, one might object that the domicile choice-of-law rule is less certain than the situs rule because, in some cases, the domicile of a decedent may be more difficult to determine than the location of real property. Unlike a person's domicile, which is not always clear, the location of real property is virtually always easily determined.[125] Extending the domicile rule to include real property succession issues as well as personal property succession issues means estate planners, administrators, and courts would more frequently need to determine where persons are domiciled.

This, too, is a reasonable concern. In many cases, however, a decedent's domicile is likely to be either uncontested or easily determined. In addition, most estates with real property are also likely to include at least some personal property. Because of the well-established domicile choice-of-law rule for personal property succession issues, this means that retaining the situs rule will not obviate the need for domicile determinations in most cases. Finally, if—as I have argued—the domicile rule is on balance preferable to the situs rule, concerns about the uncertainty of domicile could be addressed through efforts to clarify the concept and how a person's domicile should be determined. Such efforts are already underway in the American Law Institute as part of the ongoing Restatement Third, Conflict of Laws (Third Restatement) project.[126]

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124. *See* discussion *supra* subpart IV.C.

125. *See* Stern, *supra* note 2, at 150-51 ("The location of property also makes for a good focal point because it is often easy to determine, if not patently obvious . . . ."); SYMEONIDES, *supra* note 37, at 582 ("The situs rule is easy to apply and not as easy to manipulate. Immovables do not move, and usually there is little question as to whether a thing is an immovable, or where it is situated.").

126. The American Law Institute's Restatement (Third), Conflict of Laws project includes a chapter on domicile that aims, among other things, to clarify the determination of a person's domicile. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 2 (AM. L. INST. Tentative Draft No. 2, 2021).

V. CONCLUSION

The situs rule is more a result of distinctive historical features of the English legal system than a product of systematic efforts to design rational choice-of-law rules for succession issues.[127] On balance, the domicile rule is preferable to the situs rule for real property succession issues.[128] There are reasonable objections to the domicile rule, but they are unpersuasive in the particular context of succession law, policy, and practice.[129] For these reasons, this Article argues, the domicile choice-of-law rule—which is already used for personal property succession issues—should be extended to cover real property succession issues too.

The Third Restatement project is currently moving in this direction.[130] While the most recent drafts adopt the situs rule for core real property issues (such as issues about transfers of real property by deed and recording and priorities of real property interests),[131] they provide that the law of the decedent's domicile at the time of death governs most succession issues, without distinguishing personal property and real property.[132] Although domicile law is likely to be the appropriate law in most cases, no choice-of-law rule can guarantee that result in all cases. Therefore, current drafts of the Third Restatement incorporate narrowly defined public policy[133] and manifestly-more-appropriate-law exceptions.[134]

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127. *See* discussion *supra* Part II.

128. *See* discussion *supra* Part III.

129. *See* discussion *supra* Part IV.

130. In fact, one of the reasons given by conflict-of-laws scholars for a new conflict-of-laws restatement was to move away from a categorical situs rule for issues involving real property. *See, e.g.*, Richman & Reynolds, *supra* note 41, at 425 ("In light of the long-familiar flaws in the arguments for the situs rule, the third restatement has an immediate contribution to make by abandoning the rule."); SYMEONIDES, *supra* note 37, at 700 (urging the drafters of the new Restatement to revisit the situs rule and arguing that "[t]he time for debunking the 'situs taboo' is long overdue, and the new Restatement provides a perfect opportunity for doing so").

131. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 7.02-7.11 (AM. L. INST. Council Draft No. 8, 2022).

132. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 7.25-7.30 (AM. L. INST. Preliminary Draft No. 7, 2021). Similarly, the most recent draft adopts a marital domicile choice-of-law rule for most matrimonial property issues without distinguishing personal property and real property. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 7.16-7.24 (AM. L. INST. Council Draft No. 8, 2022).

133. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.04 (AM. L. INST. Tentative Draft No. 3, 2022) ("A court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy.").

134. *See id.* § 5.03 ("The law selected by the rules of this Restatement will not be used if a case presents exceptional and unaccounted-for circumstances that make the use of a different

As demonstrated above, courts and legislators have already started to move away from the categorical situs rule and toward extending the domicile choice-of-law rule to real property succession issues.[135] By continuing this trend, courts and legislators can promote an approach to succession choice-of-law issues that is more rational from the perspectives of succession policy, state interests, estate planning and probate, succession law's structure, and comparative law.

state's law manifestly more appropriate. In such cases, the court will select the manifestly more appropriate law."); *id.* § 5.03, cmt. C ("Whether a result is manifestly more appropriate is to be determined by considering factors including the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue—determined in light of the strength and relevance of the contacts between the states and the issue, and the protection of justified expectations.").

135. *See* discussion *supra* subpart IV.C.