

UNIFORM JURISDICTION AND CHOICE OF LAW RULES IN DOMESTIC PROPERTY PROCEEDINGS ACT

(1997 Proceedings at page 45)

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Comment: This uniform legislation is drafted to be added as a Part to the statute in the enacting province or territory that deals with the division of property owned by one or both spouses on the break up or termination of their relationship.

Whenever a dispute crosses over borders, involving more than one territory, questions arise concerning where proceedings should or can be brought (which court has jurisdiction to hear the dispute) and which territory's laws govern the resolution of the dispute (choice of law). Both the common law and civil law developed detailed legal rules to deal with these very complex questions. Most Canadian territories have amended at least some aspects of these rules as they apply to resolving disputes about domestic property. Not all Canadian territories have adopted the same approach to rationalizing the rules, and not all of the approaches adopted have been entirely successful.

This legislation sets out uniform principles to decide (a) when a court has jurisdiction to hear a dispute that concerns domestic property, (b) when a court that has jurisdiction should decline it, and (c) the selection of the territory whose law is to govern the disputes. The legislation applies where the dispute involves more than one Canadian territory as well as where it involves Canadian and non-Canadian territories.

Definitions and presumptions

1 (1) In this Part, "court" means the superior court of unlimited trial jurisdiction of [*enacting province or territory*];

"defendant" means a person who is or was in a marriage with the plaintiff and against whom a domestic property proceeding has been brought;

"domestic property" means real property or personal property, wherever located, owned by the plaintiff or defendant separately or as co-owners and acquired by them before or during their marriage;

"domestic property proceeding" means a proceeding brought in connection with an application for

- (a) a division of domestic property,
- (b) compensation in place of, or for foregoing, rights in domestic property, or
- (c) a declaration as to rights in domestic property;

"marriage" includes any relationship involving cohabitation that is recognized under the internal law of the territory selected under section 6, 7 or 8 that governs domestic property rights on the break up or termination of the relationship;

"plaintiff" means a person who has commenced a domestic property proceeding;

"regime of community of property" means any regime of domestic property that is imposed by law and that

- (a) determines the extent to which each spouse has rights in and over all or certain of the domestic property owned by the other spouse during the marriage, and
- (b) provides for the sharing of domestic property on the break up or termination of their marriage

and includes a regime of partnership of acquests, but does not include

- (c) a regime of separate property, or
- (d) a regime under which rights in or with respect to domestic property are deferred until, or after, the occurrence of an event signifying the break up or termination of the marriage;

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

- (a) the territory or legal system of the state in which the court is established, and
 - (b) a party to a proceeding in the court or the facts on which the proceeding is based.
- (2) Parties do not have common habitual residence in a territory while they live separate and apart in the territory.

Comment: Once this Part is placed in the context of the domestic property legislation of the enacting province or territory, which will have its own set of definitions, many of these definitions may be unnecessary or will require fine-tuning.

The definition of "regime of community of property" distinguishes between

- (a) various regimes that recognize rights in domestic property arise immediately by virtue of the marriage and
- (b) regimes that provide for
 - (i) separate property or
 - (ii) separate property during marriage and property division on the break up or termination of the relationship.

The legislation sets out one choice of law rule for domestic property proceedings that deal with property held in community of property (*see* section 7) and another choice of law rule for property not held in community of property (*see* section 8). The legislation sets out a choice of law rule that applies at the beginning of marriage where property is held in community of property because property sharing commences at that

time. For other property, the choice of law rule that applies is based on a test that applies at the end of the relationship. The definition only refers to situations where community of property is imposed by law. In cases where the spouses agree that their property will be held in community of property, section 6, which applies in all cases where an agreement is made, would govern.

Some territories have enacted legislation, or are contemplating enacting legislation, that allows the courts to divide property on the break up or termination of a common law, or a same sex, relationship. Consequently, the term "marriage" is given an expanded definition.

The legislation applies when marriage terminates by, *e.g.*, divorce or, where recognized under the applicable law, the death of a spouse. The definition of "marriage" also refers to the "break up" of the relationship to ensure that the legislation applies when the relationship does not terminate, but ends when, *e.g.*, a spouse obtains a court order recognizing that the spouses have separated from board and bed, or an order of nullity.

The legislation sets out jurisdiction and choice of law rules for proceedings relating to domestic property. *See* the definition of "domestic property." For a court to make an order that finalizes all aspects of a dispute over domestic property, it must be able to have regard to property located outside its own territory, including located outside Canada. To the extent that the order cannot be enforced outside the court's territory, other methods, described below, can be employed. *See* section 9.

The legislation addresses two separate issues: (a) what rules should determine when courts in a particular province or territory can entertain a proceeding relating to domestic property and (b) what rules should determine the law to be applied to resolve disputes concerning domestic property. The term "territorial competence" is used in the sections dealing with when a court has jurisdiction to entertain a proceeding. These sections are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act*.

The test of first "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property held in community of property. [*See* section 7] The test of last "common habitual residence" is used to select the law that applies to resolving a dispute over domestic property that is not held in community of property. [*See* section 8].

The fact that spouses lived in the same territory but did not cohabit, is not relevant for determining choice of law issues, although it may be relevant for determining whether the court has jurisdiction to hear the dispute. [*See* section 4] The phrase "common habitual residence" has been interpreted to mean "the place where the spouses most recently lived together as husband and wife and participated together

in everyday family life." (*Pershadsingh v. Pershadsingh*, (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); *Adam v. Adam* (1994), 7 R.F.L. (4th) 63, 67 (Ont. Gen. Div.) confirmed on appeal (1996) 65 A.C.W.S. (3d) 756 (Ont.C.A.). It embraces the idea of cohabiting. Section 1 (2) confirms that this interpretation also applies in the context of this legislation.

Territorial competence

- 2. The territorial competence of the court in a domestic property proceeding is to be determined solely by reference to this Part.**

Comment: Sections 2 to 5 are patterned after the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*UCJPTA*"). *UCJPTA* provides comprehensive rules for determining when the courts of a province or territory have jurisdiction to entertain a proceeding.

Territorial competence rules

- 3. The court has territorial competence in a domestic property proceeding that is brought against a defendant only if,**
- (a) the defendant has initiated another proceeding in the court to which the domestic property proceeding is a counterclaim,
 - (b) during the course of the domestic property proceeding the defendant submits to the court's jurisdiction,
 - (c) there is an agreement between the plaintiff and the defendant to the effect that the court has jurisdiction in the domestic property proceeding,
 - (d) either the plaintiff or the defendant is habitually resident in [*enacting province or territory*] at the time of the commencement of the domestic property proceeding, or
 - (e) there is a real and substantial connection between [*enacting province or territory*] and the facts on which the domestic property proceeding against the defendant is based.

Comment: Section 3 is based on *UCJPTA*, section 3.

Real and substantial connection

4. **Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a domestic property proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if,**
- (a) **the domestic property that is the subject matter of the domestic property proceeding is located in [enacting province or territory],**
 - (b) **the last common habitual residence of the plaintiff and defendant was in [enacting province or territory], or**
 - (c) **a petition with respect to the marriage of the plaintiff and defendant has been validly issued under the Divorce Act in [enacting province or territory].**

Comment: *UCJPTA*, section 10, sets out a number of factors from which it can be presumed that there is a real and substantial connection between the proceeding and the territory in which the court is located. Section 4 is based on *UCJPTA*, section 10, although the listed items are specially formulated to apply to domestic property proceedings and are not found in *UCJPTA*. A court whose jurisdiction derives solely from the fact that a minor portion of domestic property is located in the territory--item (a)--should ordinarily decline jurisdiction on principles of *forum non conveniens*. See section 5. Not all of the items listed in sections 3 and 4 will necessarily be consistent with other parts of the law of the enacting province or territory. *E.g.*, a Quebec court would not have jurisdiction unless one of the spouses currently has either domicile or residence in Quebec. In the absence of domicile or residence, parties cannot confer jurisdiction on a Quebec court by agreement. Each jurisdiction must consider whether a subsection is needed, or should be omitted because it is inconsistent with other provincial law.

Discretion about the exercise of territorial competence

5. (1) **After considering the interests of the parties to a domestic property proceeding and the ends of justice, the court may decline to exercise its territorial competence in the domestic property proceeding on the ground that the court of another territory is a more appropriate forum in which to hear the domestic property proceeding.**
- (2) **The court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which**

to try a domestic property proceeding, must consider the circumstances relevant to the domestic property proceeding, including

- (a) the comparative convenience and expense for the parties to the domestic property proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the domestic property proceeding,
- (c) the desirability of avoiding a multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

Comment: Section 5 is based on *UCJPTA*, section 11. It restates the doctrine of *forum non conveniens*. Principles of *forum non conveniens* should play an important role in domestic property proceedings that concern property in more than one territory, or where the spouses lived in more than one territory during the marriage. While several courts may be able to assume jurisdiction on a variety of reasonable bases, if the policy of settling domestic property disputes by reference to a single law in a single proceeding is to work well, usually the dispute should be heard in the territory that is the most appropriate forum.

Choice of law rules: contract

- 6. (1) If the plaintiff and defendant entered into a contract, either before the formation of, or during, their marriage, that specifies how domestic property is to be divided in the event of the break up or termination of their marriage, their rights in domestic property are determined by the contract.
- (2) The contract referred to in subsection (1) is enforceable subject to the internal law of the territory determined in accordance with section 8.

Comment: Under both civil law and common law, parties may enter into a contract about domestic property. Some provinces have legislation that allows a court to inquire

into the fairness of a contract made on or during marriage that relates to the disposition of domestic property on marriage break up or termination. Subsection (2) provides a rule for determining which law governs on that issue. *See* section 8. Suppose, *e.g.*, that an Alberta court has territorial competence to hear the proceeding, but the choice of law rules select Nova Scotia law. The Alberta court would apply Nova Scotia law, not Alberta law, to determine whether the contract is enforceable. Subsection (2) does not address the question of whether the contract was validly made, which would continue to be determined by rules of private international law.

Choice of law rules: marriage and community of property

7. **Subject to section 6, if the internal law of the territory in which the plaintiff and defendant first had a common habitual residence during their marriage provides that some or all of their domestic property is held in a regime of community of property, then regardless of a change of residence, their rights in the domestic property that is subject to the regime of community of property on the break up or termination of their marriage are determined by the internal law of that territory.**

Comment: Section 7 is based on a principle of both civil law and common law. It is called the "doctrine of immutability of original regime." The one difference is that the civil law and the common law tests are based upon domicile at the time of marriage, which may be different from residence. Using domicile as a test for resolving choice of law issues for matrimonial disputes has been expressly rejected in Canadian jurisdictions that have either (a) reconsidered choice of law issues, or (b) enacted legislation providing that a wife may establish a domicile independent of her husband. The alternative selected is to adopt an approach based on the proper law of the marriage, determined by a test that has regard to where the spouses first had a common habitual residence while married. Section 7 applies if the territory's law provides for community of property, which is given an expanded definition to embrace virtually every system that recognizes that one spouse has interests and rights in the property of the other by virtue of the marriage. *See* the definition of "regime of community of property."

The only Canadian jurisdiction that has community of property is Quebec, and only spouses who married without contract before July 1, 1970 would be under a regime of community of property. Since July 1, 1970, spouses in Quebec can still choose community of property by contract. If they do not make such a contract, they are subject to a regime of partnership of acquests. The definition of "regime of community of property" specifically includes partnership of acquests.

In most other cases, Canadian jurisdictions adopt principles of "deferred" community of property (*i.e.*, during the marriage, principles of separate property

determine ownership. It is not until marriage break up that legislation calls for a division of property, or an adjustment of each spouse's net worth through an equalizing payment). This rule accommodates the conflicting choice of law rules adopted by the common law (which looks to the end of the relationship) and those of the civil law (which look to the beginning of the relationship). The rule only applies to domestic property that is actually affected by the regime of community of property. In a jurisdiction such as Quebec, that has principles of community of property as well as separate property and partition of family patrimony at the break up or termination of the marriage, this rule would not apply to the domestic property that was held as separate property or that qualified as family patrimony. The law that applies to domestic property that is held outside of community of property is determined by section 8. See the definition of "regime of community of property."

Canadian legal policy is firmly in favour of community of property rules or deferred community of property rules for dividing domestic property on marriage break up or termination. Consequently, a regime of separate property will govern the dispute only if either (a) the parties so agree, or (b) section 7 does not apply and separate property rules are required by the law of the territory selected in accordance with the choice of law rules in section 8. If the territory provides for community of property, but the spouses have made a marriage contract providing for a different regime, section 7 would not apply.

Choice of law rules: proper law of the marriage

8. (1) **Subject to sections 6 and 7, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the parties had their last common habitual residence.**
- (2) **If the territory selected by the application of subsection (1) is located outside Canada and is not the territory most closely associated with the marriage, the substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory that is most closely associated with the marriage.**
- (3) **If there is no place where the parties had a common habitual residence, substantive rights of the plaintiff and defendant in a domestic property proceeding are determined by the internal law of the territory where the plaintiff has habitually resided.**

Comment: Domicile is no longer a practical test for determining the proper law of the marriage. There is a consensus among Canadian common law provinces that have reconsidered the common law rules that the proper law of the marriage is determined by

the common habitual residence of the spouses. If they resided in more than one location, it is the last common habitual residence. While the question of domicile depends upon a number of factors, including intention, residence is determined purely by the physical fact of maintaining a residence in a particular territory.

Procedural rules would be determined by the law of the territory in which the proceeding takes place. Substantive questions, such as who qualifies as a spouse, the determination of when rights in property arise, whether property can be divided between the spouses and in which proportions, and valuing property for the purpose of determining compensation in place of, or for foregoing, rights of property, *etc.* would be determined by the law of the territory in which the parties last had a common habitual residence.

A special rule is adopted where a non-Canadian territory is involved. It might be thought that more problems will arise from easy mobility within a federation such as Canada than between Canada and another nation. In a federation, people will relocate fairly freely--resulting in relatively casual ties between the laws of any one territory and the marriage--while movement between different nations is complicated by immigration laws and the ability to earn a living. But within the Canadian federation there is a basic similarity in approach on when rights to domestic property will be determined by separate property principles.

In contrast, a change in common habitual residence between nations might result in fundamentally different legal principles applying. Consequently, movement from one nation to another raises more difficult questions than movement between Canadian territories. Where the parties move to another nation, the policy suggested is that the court should inquire into whether the law of the last common habitual residence is that of a territory most closely associated with the marriage.

The approach adopted in this Uniform Act departs from the policy of the *Convention on the Law Applicable to Domestic Property Regimes*. The Convention was adopted by the Hague Conference on Private International Law in 1978, and sets out precise choice of law rules where the laws of two or more nations might apply in cases where the spouses have not made an agreement. These rules place restrictions on how easily the governing laws of one nation will be replaced by those of another. The basic rule is that property rights on the break up of a marriage are determined by the law of the territory where the spouses first establish a habitual residence after they marry. The laws of another territory in which they establish a habitual residence will be applied, however, if the habitual residence extends for 10 years or more, or it is the territory of their common nationality. As of July 9, 1996, the *Convention* had been ratified by France, Luxembourg and the Netherlands and signed by Austria and Poland.

The test of "common habitual residence" cannot be applied if the parties never cohabited. See section 1 (2). If the spouses never cohabited, the proper law is determined by the territory where the applicant last habitually resided. The references to internal law are to ensure that principles of *renvoi* do not apply.

Property located outside territory

9. (1) **A court with territorial competence to entertain a proceeding relating to domestic property may dispose of all issues relating to ownership and division of the domestic property.**
- (2) **If the court has territorial competence to entertain a proceeding relating to domestic property, some of which is located outside [enacting province or territory], the court may**
 - (a) **reapportion entitlement to domestic property within [enacting province or territory] to compensate for rights in domestic property located outside [enacting province or territory],**
 - (b) **order the party who has legal title to domestic property located outside [enacting province or territory] to pay compensation to the other party instead of dividing the domestic property,**
 - (c) **make an order in connection with domestic property located outside [enacting province or territory] that is enforceable against the party who owns the domestic property, including an order preserving the domestic property, respecting possession of the domestic property or requiring the owner to convey or charge all or part of the owner's interest in it to the other party, or**
 - (d) **if the internal law of the territory in which the domestic property is located allows for the recognition and enforcement of an order for non-monetary relief made by a court of another territory, make an order for non-monetary relief.**

Comment: Canadian courts routinely use the techniques set out in paragraphs (a) and (b) for arriving at a fair division of domestic property, although in some cases there is doubt concerning a court's ability to do so. Any such doubt would be put to rest by specifically incorporating these powers into the relevant legislation.

The option under paragraph (c), the *in personam* order, is often overlooked. It is open to the court to make an order requiring a person to perform a specific obligation. If the person subject to the order fails to obey it, contempt proceedings can be brought against that person to enforce it. Such an order is effective if the person is within the court's territory. It is an equitable jurisdiction that has been recognized since the 18th Century: *see, e.g., Penn v. Lord Baltimore*, (1750) 1 Ves. Sen. 444.

The policy underlying paragraph (d) is that a local court can make an order pertaining to the ownership or division of domestic property located outside the territory, if the territory in which the domestic property is located adopts legislation similar in policy to the *Uniform Enforcement of Canadian Decrees Act*. This provision is less useful in those provinces that adjust property rights on marriage break up or termination by requiring one spouse to make an equalizing payment to the other spouse. But even in those provinces, legislation allows the court to make a non-monetary order to facilitate separating the finances and property of spouses on marriage break up or termination.