

# Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation

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## *Abstract*

*Despite not being party to the EU Succession Regulation, it is recognised that the Regulation has the potential to affect the estates of UK nationals.<sup>1</sup> This chapter considers some aspects of the jurisdiction and applicable law rules within the Regulation, the current and possible future private international law of succession in Scotland, and the potential impact of the Succession Regulation on cross-border succession cases involving some people who are connected with Scotland, focussing in particular on estate planning.*

## I. Introduction

Scotland has a mixed legal system that has been influenced by Roman law and the common law system of England and Wales.<sup>2</sup> Its substantive law of succession has also been influenced by feudal and canon law.<sup>3</sup> Its legal system is separate from the English system and its law of succession differs from that in England and Wales.<sup>4</sup>

Scotland, as part of the United Kingdom, is not bound by Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation).<sup>5</sup>

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<sup>1</sup> EU Succession Regulation (Legislative Comment) *Scottish Private Client Law Review*, 2015, 53, 4-5; Elizabeth B Crawford and Janeen M Carruthers, 'Speculation on the Operation of Succession Regulation 650/2012: Tales of the Unexpected' (2014) 22; *European Review of Private Law*, 847.

<sup>2</sup> P Beaumont and P McEleavy, *Anton's Private International Law*, (3<sup>rd</sup> edn. W Green 2011) 6-11 (to be known hereafter as *Anton's Private International Law*); L Garb and J Wood, *International Succession*, (4<sup>th</sup> edn, Oxford 2015) 719.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> European Union Committee, *The EU's Regulation on Succession* (HL 16 December 2009 WS 274) The UK made the decision not to opt into the regulation, but to continue informal negotiations with the aim to improve the proposal and if successful to opt in at a later stage. The negotiations failed to adequately address UK concerns over habitual residence and clawback.

In 2009, although initially supportive of a system that would simplify and harmonise cross-border succession,<sup>6</sup> the United Kingdom made the decision not to opt into the Succession Regulation, identifying three main areas of concern.<sup>7</sup> The first, the use of habitual residence at the time of death to determine the applicable law was considered to be a weak connecting factor, in that it lacked the certainty required to determine the applicable law to a succession and to aspects of the succession.<sup>8</sup> The second and third concerns were essentially characterisation issues. Clawback, a device used to make a claim against *intervivos* gifts when the estate does not make sufficient provision for forced heirship beneficiaries does not fall within the UK's succession law.<sup>9</sup> This is in contrast to many civil law systems where clawback is an established tool within succession law, albeit one where the nature is changing.<sup>10</sup> In reality, there is evidence to show that the use of clawback within the EU is diminishing as Member States are moving away from family centric succession towards testamentary freedom.<sup>11</sup> The original need for forced heirship, that of protecting the family unit and providing financial support for vulnerable parties, is lessening as people live longer and their heirs are more likely to be financially independent.<sup>12</sup> Indeed, France, which has what would seem at first glance to be a strict policy towards forced heirship and clawback, reformed its substantive law in

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<http://www.publications.parliament.uk/pa/ld200910/ldselect/lducom/75/7504.htm> accessed 14/12/2015; Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation) [2012] OJ L 201/107 recital 82.

<sup>6</sup> Jack Straw, HC 16<sup>th</sup> December 2009, col 141WS.

<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm> accessed 14/12/2015.

<sup>7</sup> Professor Matthews, House of Lords, European Union Committee, Minutes of Evidence (2009) Q. 28; Clawback was raised as a 'redline' issue for the UK in the Supplementary letter from Lord Grenfell, Chairman of the European Union Committee, to Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice of 25 October 2007 in HL European Union Committee, <http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/12/7101005.htm> accessed 14/12/2015.

<sup>8</sup> Anton's Private International Law (n 2)1063; Jonathan Harris, 'The Proposed EU Regulation on Succession and Wills: Prospects and Challenges.' (2008) *Trust Law International* 1, 19. "One might wonder how legal certainty, and the internal market, can be improved by the introduction of a connecting factor upon which no consensus as to its meaning exists."

<sup>9</sup> Anton's Private International Law (n 2); J Holliday, 'Reconciling the European Union Succession Regulation with the Private International Law of the UK' in Bergé, Francq and Gardeñes (eds), *Boundaries of European Private International Law* (Bruylant 2015) 287.

<sup>10</sup> The substantive laws within the EU relating to clawback vary greatly; to the extent that in some Member States it is possible to 'clawback' the actual property from the donee or from a third party. In other cases, clawback is restricted to a claim for value from the donee, rather than the actual gift. The prescription period is also extremely variable, ranging from two years (Greece – Article 1836 (2) Civil Code) from the death of the deceased, to thirty years (Belgium – Article 2262 Civil Code) from the death of the deceased. These factors are contrary to common law values attributed to security of title. See Ministry of Justice, European Proposal on Succession and Wills, Consultation Paper, CP41/09, 15. For a comparative analysis of the succession laws of the Member States on the issue of Clawback see Annex I, Appendix I and II by Professor Roderick Paisley within CP41/09.

<sup>11</sup> Walter Pintens, 'Need and Opportunity of Convergence in European Substantive Succession Laws' in M Anderson and E Arroyo I Amayuelas (eds) *The Law of Succession: Testamentary Freedom* (European Law Publishing 2011) 9; Marius J de Waal, 'A Comparative Overview in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmerman (eds) *Exploring the Law of Succession Studies National, Historical and Comparative* (Edinburgh University Press 2007) 16.

<sup>12</sup> Reid, Marius J de Waal and Zimmerman, (n 11)16.

2006 to allow future heirs to ‘waive the right to claim the recovery of gifts’.<sup>13</sup> There is also a general trend towards moving away from forced heirship shares towards a monetary claim.<sup>14</sup> In certain Member States the ‘person with a right to a compulsory portion is no longer an heir but is considered a creditor with a monetary claim.’<sup>15</sup> This factor, arguably alters the character of the claim within these Member States. A monetary claim on the estate of the deceased by the heir would not be considered a succession issue within the UK, it would fall within the administration of estates and would be governed by the *lex fori*.

The third issue concerned the administration of estates. The UK separates the settling of the debts and tax and ingathering of the estate from the distribution of the estate.<sup>16</sup> Only the latter part falls within the law of succession within the UK, with the administration of estates being considered a separate category and governed by the *lex fori*.<sup>17</sup> These issues were still unresolved by the time the negotiation process ended and as a result the UK took the decision in 2012, not to opt into the final version of the Succession Regulation.<sup>18</sup>

However, despite not being party to the Regulation, it is clear that the Regulation has the potential to affect the estates of UK nationals.<sup>19</sup> This chapter considers the jurisdiction and applicable law rules within the Regulation, the current and possible future private international law of succession in Scotland, the potential impact of the Succession Regulation on cross-border succession cases involving some people who are connected with Scotland, focussing in particular on estate planning.

## II. The Succession Regulation

### The Succession Regulation and the UK National

#### i. Party Autonomy and the UK National

Even though the UK has not opted into the Succession Regulation, it is important to recognise that certain UK parties may still be affected by the Regulation. The Succession Regulation allows for a level of party autonomy and a UK national who is habitually resident in a participating Member State with property in that State or other participating Member State will be able to choose the law of his or her nationality to govern his or her succession.<sup>20</sup> The UK national testator would be wise to expressly choose the law of Scotland as choosing the law of the UK could lead to the choice being held to be invalid or to the law of the wrong part of the UK being applied. Article 36 of the Succession Regulation provides rules for States with more than one

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<sup>13</sup> W Pintens (n11)16.

<sup>14</sup> W Pintens (n11)16.

<sup>15</sup> W Pintens (n11) eg. Austria, France, Germany, Netherlands, 16/17.

<sup>16</sup> Anton’s Private International Law (n 2)1000.

<sup>17</sup> See Geert Van Calster, *European Private International Law* (Hart Publishing 2013) 3.

<sup>18</sup> Succession Regulation recital 82. Scottish Government Consultation on Technical Issues of Succession (Scottish Government 2014) <http://www.gov.scot/Resource/0045/00457666.pdf> accessed 18 December 2015: ‘In 2012 the EU Regulation (No 650/2012) on Succession was adopted...The UK, as agreed with Scottish Ministers, will not be party to this Regulation when it comes into force in 2015.’ 5.1.

<sup>19</sup> Crawford and Carruthers (n1).

<sup>20</sup> Succession Regulation art 22.

legal system. So if the succession is being decided in a participating Member State it will apply Article 36 to determine what happens when a UK national makes a choice of UK or Scots law to govern his or her estate. Article 36(1) directs the decision maker to the internal conflict-of-laws rules in the UK. No such rules exist to determine what happens when a UK national chooses UK law or a law of a part of the UK to govern his or her estate. Therefore, the decision maker in the participating Member State will apply Article 36(2)(b) of the Regulation. This directs him or her to regard a reference to the law of the UK to be construed as ‘referring to the law of the territorial unit with which the deceased had the closest connection’.<sup>21</sup>

What should the decision maker in the participating Member State do when the UK national testator has expressly chosen Scots law to govern his or her succession? On a literal reading of the Regulation the decision maker may only give effect to this choice of Scots law if Scotland happens to be the territorial unit with which the deceased had the closest connection in the UK. The policy reason behind such a literal construction would be to respect the fact that the State of the nationality of the deceased may have an interest in not giving the testator unlimited freedom to choose any law in that State. If that State has not created its own internal conflict-of-laws rules on the matter, as permitted by Article 36(1) of the Regulation, then the EU legislature has created a default rule that assumes the State would want a very close connection between the testator and the particular legal system he or she has chosen to govern his or her succession. Further support for a literal construction can be found in recital 38 to the Regulation which explains why the testator’s choice of the applicable law is limited to the law of his or her nationality in the following terms: ‘in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.’ The last mentioned policy of avoiding the choice of a law that would frustrate the legitimate expectations of persons entitled to a reserved share could occur where a UK national with a strong connection to Scotland were to choose English or Northern Irish law to govern his or her estate in order to avoid the reserved shares given by Scots law to wives and children. A testator with a strong connection to England and Wales or Northern Ireland by choosing Scots law to govern their succession would not frustrate the legitimate expectations of persons entitled to a ‘reserved share’ because no such shares exist. However, if the policy behind the recital is stretched to others with legitimate expectations to benefit from an estate then the choice of Scots law could deprive adult dependents in England and Wales or Northern Ireland of significant claims that they would be entitled to make against an English and Welsh or Northern Irish estate of the testator.<sup>22</sup>

On the other hand, there is a lot to be said for the decision maker in the participating Member State presuming that where a UK national testator has expressly chosen Scots law to govern his or her succession that Scotland is the territorial unit with which the deceased had the closest connection. This presumption can be based on the policy of the Regulation favouring the party autonomy of the testator to choose any law of which he or she holds nationality. Article 22 of the Regulation does not restrict the choice of testators with more than one nationality to the law of the

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<sup>21</sup> See Gregor Christandl, ‘Multi-Unit States in European Union Private International Law’ (2013) 9 *Journal of Private International Law* 219, 233.

<sup>22</sup> See J Holliday, ‘Characterisation within Private International Law: Maintenance or Succession?’ in P Beaumont, B Hess, L Walker and S Spancken (eds), *Recovery of Maintenance in the EU and Worldwide* (Hart, 2014) 443, esp 446-453. Garb and Wood, (n 2) 260-261, 631-632.

nationality with which he or she had the closest connection. It can also be argued that such a presumption would help to meet the goal established by recital 38 to the Regulation which provides that: ‘This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality’. A testator should be able to organise his or her succession in advance. Any UK national testator with connections with a participating Member State to the Succession Regulation should be able to organise his or her affairs in advance by choosing the law of his or her nationality to govern his or her succession. Creating a presumption that the law of the part of the UK chosen by the testator is the part of the UK with which the testator has the closest connection facilitates the testator being more certain that his or her choice of the law of one part of the UK with which he or she has a connection will be upheld. The testator is not given too much freedom to choose the law governing his or her estate because a presumption that he or she has the closest connection with the part of the UK that he or she has chosen its law to govern his or her succession can be very easily rebutted when he or she has very little connection with that part and a much more significant connection with another part of the UK.

If the testator is foolish enough to choose the law of the UK to govern his or her succession, then he or she has not done due diligence in estate planning. Therefore, the uncertainty that may be associated with a decision maker in a participating Member State having to determine which part of the UK the ‘deceased’ had the closest connection with cannot be avoided.

Another issue to be resolved is what is the ‘relevant time’ at which the connection between the ‘deceased’ and the territorial unit in the UK with which he or she ‘had the closest connection; has to be determined? Is it the time when the deceased chose the law of his or her nationality to govern his or her succession or is it the time when the deceased died? In order to uphold the policy in recital 37 to the Regulation to enable citizens “to know in advance which law will apply to their succession” the relevant time should be construed as the time when the testator chose the law of his or her nationality to govern his or her succession. The connection between the part of the UK and the deceased should be measured as it was at the time of the choice and not as it was at the time of his or her death as many years may separate these two dates and the testator’s connections with different parts of the UK may have changed dramatically. The only fair time to consider the connections between the testator and the different parts of the UK is the time of the choice. However, the matter is complicated by Article 22 of the Regulation giving the testator the power to make a future choice based on the law of his or her nationality at the time of death. Thus if the testator chooses UK law to govern his or her estate and at the time of making the choice he or she did not have UK nationality but did have such nationality by the time of his or her death then the relevant time to consider with which part of the UK he or she has the closest connection under Article 36(2)(b) of the Regulation is the time of the testator’s death.

If the testator chooses Scots law as the relevant part of the law of his UK nationality, then internal Scots law applies to the succession. The private international law of Scotland (which still has scission whereby the *lex situs* applies to the immoveable property and the law of the testator’s domicile at death applies to the moveable property), will not apply because no renvoi is possible under the Regulation when the testator has chosen the law of his or her nationality to govern the

succession.<sup>23</sup> Therefore, all of the testator's property, whether moveable or immovable, in the participating Member States will go to those entitled to receive it under the internal law of Scotland after the creditors have been paid out of the estate.

It is worth noting that the choice of Scots law can be implied under the Regulation. So a UK national, who is more closely connected with Scotland than England and Wales or Northern Ireland, could impliedly choose Scots law to govern his or her succession. Recital 39 to the Regulation provides that a choice of law could be regarded as demonstrated by a will 'where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.' Thus if a testator drafted his will in accordance with the standard terms used in a Scots law will it is possible that a decision maker in a participating Member State will decide that for the purposes of the Succession Regulation the testator chose Scots law to govern his or her succession. Clearly for estate planning purposes it would be better if the testator made an 'express' choice of Scots law when he envisages that a decision maker in a participating Member State might one day have to decide whether he or she chose the law of Scotland to govern his or her estate. However, testators are not always well advised by their lawyers (some of whom might not think about the implications of the Succession Regulation permitting the choice of the succession law of a State of which the testator is a national) and the laws of the United Kingdom do not yet permit a testator to make an express choice of the law to govern their estate. It is difficult to know if a testator by using the standard terms of a will in Scotland intends that only the internal law of Scotland should apply to his or her succession. The testator may be aware that Scots private international law does not permit a choice of succession law and that its private international law rules have scission. Such an aware person could only be deemed to be avoiding scission of their European Union property by an express choice of Scots law to govern their succession. On the other hand, unaware or badly advised UK national testators may well have chosen the internal law of Scotland to govern the succession of their property in other parts of the EU if they knew they could do so and therefore it should be implied that they chose Scots law to govern the succession to that property by the use of standard Scots law terms in their will.

ii. UK Nationals who do not Choose the Law of their Nationality and are Habitually Resident in a Participating Member State

If the testator does not expressly choose the law of his nationality within his will to govern his succession, then the jurisdiction and applicable law governing his estate will be that of his habitual residence at death unless it is possible to show that he was more closely connected to another country.<sup>24</sup>

Additionally, if the UK national is habitually resident within a participating Member State and does not expressly choose the law of his nationality to govern his estate, if the succession laws of his habitual residence permit clawback then any gift made by the testator will be subject to the clawback rules of that State even if the testator's residence there could not have been anticipated at the time the gift was

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<sup>23</sup> Succession Regulation art 34(2).

<sup>24</sup> Succession Regulation art 21.

given. This creates great uncertainty for all parties involved and was the point in the Succession Regulation that UK charities found the most objectionable.<sup>25</sup> It is not clear whether the UK courts will recognise and enforce judgments from other EU Member States ordering clawback of gifts made by a testator in the UK. This is not a matter covered by the Brussels I Regulation which excludes “wills and succession” from its scope.<sup>26</sup> In so far as the matter is covered by the common law on recognition and enforcement of judgments,<sup>27</sup> or the statutory schemes provided by Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933,<sup>28</sup> and the foreign judgment meets the indirect rules of jurisdiction under the common law or the statutory schemes it is thought likely that any clawback in the foreign judgment would not be recognised and enforced in Scotland due to it being held to be contrary to public policy due to the desire to protect the legitimate expectations of the parties involved. Of course the issue of public policy is determined in the concrete case in which recognition and enforcement is sought. It may be that in some circumstances it would not be contrary to Scottish public policy to recognise and enforce a foreign judgment ordering clawback against someone who is domiciled in Scotland. This might be the case, for example, where the testator made the gift to the donee warning the donee that it might be subject to clawback under the law of his or her nationality which he or she had already nominated as the law that would govern his or her succession.

#### Participating Member State Nationals Evading Forced Heirship by buying Immoveable Property in Scotland

If nationals of participating Member States wish to avoid some of their estate going to their forced heirs under the law of their habitual residence at death under the Succession Regulation, then it is possible that they could invest in immoveable property in the UK. If they make a will leaving their UK immoveable property to people other than their forced heirs under the law of their habitual residence at death, then under the laws of the different parts of the UK testators are free to leave their immoveable property to whomever they will. In this situation the law of the relevant part of the UK would prevail over the law of the habitual residence at death in relation to the immoveable property because only the authorities in the place of the immoveable property can enforce obligations in relation to that property.<sup>29</sup>

#### Areas of Concern to the United Kingdom

##### i. Habitual Residence

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<sup>25</sup> (n 5).

<sup>26</sup> See Art 1(2)(f) of the Brussels I Recast (Reg 1215/2012 [2012] OJ L351/1) and Art 1(2)(a) of Brussels I (Reg 44/2001 [2001] OJ L12/1).

<sup>27</sup> See Anton’s Private International Law (n 2) at 374-394.

<sup>28</sup> See Anton’s Private International Law (n 2) at 395-402 and 1028.

<sup>29</sup> Admittedly the authorities of the habitual residence of the deceased might be able to ensure that the forced heirs are paid their full entitlement under that law from the rest of the estate but this may not always be possible when a lot of the deceased’s estate is in immoveable property in third States.

In 2009 the European Commission put forward a proposal to simplify the settlement of international successions and to make the rules governing them more predictable.<sup>30</sup> The Commission proposed the use of the last habitual residence of the deceased as the connecting factor to determine both the jurisdiction and the applicable law.<sup>31</sup> It was suggested that by using habitual residence as the connecting factor to determine the applicable law '(...) we are offering greater legal certainty and greater flexibility, enabling people to contemplate the future more serenely.'<sup>32</sup> The Commission's reasoning was that the existence of scission within certain States, where moveable property is governed by one law and immoveable property is governed by the law or laws of the place or places where the immoveable property is situated, created many difficulties in international succession cases such as where the different laws pointed to different heirs, or differences in the division of the succession.<sup>33</sup> The abolition of the system of scission was therefore considered to be beneficial and the proposal for a single connecting factor to determine the applicable law to succession was put forward.

Therefore, under the Succession Regulation 'the courts of the Member State where the deceased had his habitual residence at the time of his death has jurisdiction to rule on the succession as a whole'.<sup>34</sup> The general choice of law rule in the Succession Regulation is that the law applicable to the whole estate will be the law of the State where the deceased had his or her habitual residence at the time of death.<sup>35</sup> One exception to this is where it is clear that the deceased was manifestly more closely connected to another State than the State of his or her habitual residence at the time of his death.<sup>36</sup> Another exception accommodates a degree of party autonomy. Article 22(1) allows a testator to choose the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death. This exception has been discussed in some depth above.

Yet, it is recognised that the concept of habitual residence is more commonly used to establish jurisdiction rather than to determine the applicable law.<sup>37</sup> It is considered to be unsuitable as the sole connecting factor for determining the applicable law as it will not work if the person has no habitual residence or has more than one habitual residence.<sup>38</sup> Unfortunately the Succession Regulation is drafted on

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<sup>30</sup> Europa Press Release, 'The Commission proposes to simplify the settlement of international successions and to make the rules governing them more predictable.' (2009) Brussels, [http://europa.eu/rapid/press-release\\_IP-09-1508\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-09-1508_en.htm?locale=en) accessed 9 December 2015,

<sup>31</sup> Draft Succession Regulation COM (2005) 65 Final article 16.

<sup>32</sup> *ibid.*

<sup>33</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 Final 14 October 2009 6.

<sup>34</sup> Succession Regulation art 4.

<sup>35</sup> Succession Regulation art 21.

<sup>36</sup> Succession Regulation art 21(2).

<sup>37</sup> See C M V Clarkson and J Hill, *The Conflict of Laws* (4th edn, OUP 2011) 341; E Clive, 'The Concept of Habitual Residence' [1997] *Juridical Review* 137, 137; Rhona Schuz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771, 789; *Ikimi v Ikimi* [2002] *Fam* 72 (Divorce); *Re J (A Minor)(Abduction: Custody Rights)*[1990] 2 AC 562 (Child Abduction); *Nessa v Chief Adjudication Officer* [1997] 1 WLR 1937 (Granting Income Support); *R v Barnet LBC ex parte Shah* [1983] 2 AC 309 (Granting loans for University).

<sup>38</sup> P Rogerson, 'Habitual Residence the New Domicile?' (2000) 49 *International and Comparative Law Quarterly* 84-107, 101; Clarkson and Hill (n 37) 341.

the assumption that the decision maker will always be able to find a testator to be habitually resident somewhere at the date of his or death and indeed only habitually resident there and nowhere else. Even at the time of the drafting of the Regulation it was known that the Court of Justice of the European Union had decided in the context of the Brussels IIa Regulation that it is possible that a person may have no habitual residence at a given time.<sup>39</sup> The point was made several times during the negotiations but the majority of States refused to create a fallback rule for the situation where the testator had no habitual residence at the time of his or death. Instead an escape clause was introduced to allow the decision maker to apply the law of the manifestly more closely connected State than the State of the habitual residence of the deceased at death. This can be made to work in cases where the deceased has no habitual residence by focusing on finding the law of the country with which the deceased was most closely connected at the time of his or her death.<sup>40</sup>

However, where the main aim of the Succession Regulation is that citizens must be able to organise their succession in advance,<sup>41</sup> and to meet this aim the citizen needs to know which law will apply to their succession, the use of habitual residence for the purpose of determining the applicable law of succession, in the more difficult cases when a person may have no habitual residence or multiple habitual residences, is clearly contrary to this aim.<sup>42</sup>

## ii. Clawback

Unlike the Hague Succession Convention, where its application in relation to clawback is contentious,<sup>43</sup> the EU Succession Regulation clearly was intended by its

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<sup>39</sup> Case C-523/07 A [2009] ECR I-2805. For a recent discussion of the lack of clarity in determining habitual residence by the CJEU and the UK Supreme Court see P Beaumont and J Holliday, 'Recent developments on the meaning of habitual residence in alleged child abduction cases' in M Župan, (ed): *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Faculty of Law J J Strossmayer University of Osijek, 2015) 39 and in Centre for Private International Law, Working Paper No 2015/3

[http://www.abdn.ac.uk/law/documents/Recent\\_Developments\\_on\\_the\\_Meaning\\_of\\_Habitual\\_Residence\\_in\\_Alleged\\_Child\\_Abduction\\_Cases.pdf](http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases.pdf) accessed 18 December 2015.

<sup>40</sup> Anton's Private International Law, (n 2) 1065.

<sup>41</sup> Succession Regulation recital 7.

<sup>42</sup> Anton's Private International Law, (n 2) 1065.

<sup>43</sup> See the ambiguity created by the exclusion from scope in Art 1(2)(d) of 'property rights, interests or assets created or transferred otherwise than by succession' with the inclusion in Art 7(2) of a statement that the applicable law governs inter alia: 'c) any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees; d) the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death'. The Hon. Mr Justice David Hayton gave evidence arguing that from a UK perspective, clawback is excluded from the applicable law under the Hague Succession Convention although Civilian systems could rely on Art 7(3) 'to extend the *lex successionis* to those rules except in regard to property that had been the subject of a valid gift unimpeachable by succession law according to the governing *lex situs* eg English or Irish law', see The EU's Regulation of Succession – European Union Committee, Written Evidence, (European Union Committee Publications, March 2010). <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/75/75we05.htm> accessed 20/09/2014. David Hayton's views on the matter are important as he was a member of the UK delegation that negotiated the Convention. However, the matter is not clear from the Waters Explanatory Report, see <https://www.hcch.net/en/publications-and-studies/details4/?pid=2959&dtid=3> accessed 10/12/2015, as he does not expressly comment on the issue of clawback. However, what he does say at para 79 of his report suggests that clawback does fall within the scope of the applicable law

drafters to include clawback within its scope as a matter to be governed by the law applicable to the succession. The clarity on the issue is intended to be provided by the exclusion from scope of ‘property rights, interests and assets created or transferred otherwise than by succession’ in Article 1(2)(g) being expressly made subject to ‘point (i) of Article 23(2)’. Article 23(2)(i) of the Succession Regulation is explicit that the applicable law shall govern in particular ‘any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries’. However, the clarity hoped for by the drafters is not achieved by the drafting. Article 23(2)(i) of the Succession Regulation is the equivalent of Article 7(2)(c) of the Hague Succession Convention.<sup>44</sup> It seems from the explanatory report to the Hague Succession Convention that this provision applies to hotchpotch or collation and not to clawback. It is intended to cover requirements in many legal systems that a beneficiary who has received lifetime gifts from the testator must account for those gifts in determining the share of the estate that he or she is entitled to in comparison to the other beneficiaries.<sup>45</sup> This interpretation is supported by a literal construction of Article 23(2)(i) of the Succession Regulation which applies only to restoring or accounting for gifts ‘when determining the shares of the different beneficiaries’ not when deciding that a non-beneficiary under the applicable law should restore a lifetime gift made to that person in order to increase the size of the estate available for those with a reserved share. It is significant that the Waters explanatory report on the Hague Succession Convention seems to bring clawback into the scope of the applicable law through Article 7(2)(d).<sup>46</sup> This provision has its equivalent in Article 23(2)(h) of the Succession Regulation which provides that the law applicable to succession governs: ‘the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs’. However, Article 23(2)(h) is not given priority over the exclusion from scope in Article 1(2)(g) of ‘property rights, interests and assets created or transferred otherwise than by succession’ which seems to exclude lifetime gifts to people who are not beneficiaries of the estate from the scope of the Succession Regulation.

Clawback for the purpose of succession is not part of the domestic law in any part of the UK although there is a provision which is similar to clawback in relation to the Inheritance (Provision for Family and Dependents) Act 1975 in England and Wales.<sup>47</sup> Scotland has forced heirship found within the protection of the legal rights of certain heirs but it does not have clawback.<sup>48</sup>

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under the Convention. Waters states that the applicable law under the Convention does apply to ‘attempts by the deceased – in his lifetime... - to avoid reserve, *légitime*, forced shares, or judicial discretionary allocation of assets to immediate family members.’

<sup>44</sup> *ibid.*

<sup>45</sup> See the Waters Report (n43) at para 78.

<sup>46</sup> See n43 above.

<sup>47</sup> CP41/09, 8. S. 10 of the 1975 Act allows a person who has made a claim for financial provision under the Act to make a claim against any person who benefitted from a gift given by the deceased less than six years before the death for money so that the claim for financial provision can be satisfied. However, this can be seen as more restrictive than a typical clawback provision because it requires the claimant to satisfy the court that the gift was made by: ‘the deceased with the intention of defeating an application for financial provision under this Act’. Proving an intention on the part of the deceased to defeat an application for financial provision will be difficult because it is always hard to prove what a dead person intended by their acts when alive and because the gift would have to divest the deceased of most of his assets if it is to have the effect of ‘defeating’ an application for financial provision under the 1975 Act. See also Gareth Miller, *International Aspects of Succession* (Ashgate, Aldershot 2000)

Therefore, a legislative system that protects clawback in the format found within the Regulation, would require the UK, if it had opted in, to enforce clawback. This would ‘undermine the security of UK *intervivos* gifts and defeat the UK donees’ legitimate expectations if applied in the UK’ was clearly not going to be acceptable in that format, and highlights the conflict in characterisation between the legal traditions.<sup>49</sup>

If a Scottish domiciliary gifted his property to a UK charity but then three years later dies having in the meantime become habitually resident in Belgium, albeit still domiciled in Scotland, unless he had chosen Scots law as the law of his nationality to govern his estate, the Belgian authorities would have to deal with the succession under Article 4 of the Succession Regulation and the gift he made to the charity would be subject to Belgian law and the possibility of clawback.<sup>50</sup> The retroactive element to this approach is highly questionable.<sup>51</sup> If the UK charity has assets in any EU Member State participating in the Succession Regulation (not just as in the past in the country concerned – in this case Belgium – a much less likely proposition) it may not be able to simply ignore an order of the Belgian courts to repay the gift to the estate.

In extreme cases, clawback may apply to gifts that were given decades before the death of the deceased and may be claimed by a beneficiary to the estate decades after the death of the donor.<sup>52</sup> In these cross-border succession cases for the purpose of managing the estate, how will a notary/executor know whether a gift has been made if there is no record of the donation because at the time the gift was made there was no indication that clawback would apply and therefore no need to record the event? It will be interesting to see how this will work in practice.

### *Scenario*

*In 2012, George, a thirty-two-year-old married man, domiciled and habitually resident in Scotland, gifted immovable property of a house, which was situated in Scotland, to his close friend Kate who was also domiciled and habitually resident in Scotland. In 2015, George moved to a participating EU Member State, gets married,*

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227. There is a similar provision in Northern Ireland in the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 Art 12 <http://www.legislation.gov.uk/nisi/1979/924> accessed 18 December 2015.

<sup>48</sup> See Ministry of Justice, European Proposal on Succession and Wills, Consultation Paper, CP41/09, 15. For a comparative analysis of the succession laws of the Member States on the issue of Clawback see Annex I, Appendix I and II by Professor Roderick Paisley within CP41/09, para 17. Law Society of Scotland in their response to the Ministry of Justice’s public consultation on the European Commission’s proposal on Succession and Wills 2009 stated that ‘(...) clawback plays little or no part in the current law of succession, but historically did so in the restricted circumstances of ‘deathbed’ gifts.’

<sup>49</sup> Letter from the Hon. Mr Justice David Hayton, The EU’s Regulation of Succession – European Union Committee, Written Evidence, (European Union Committee Publications, March 2010) para 2. <http://www.publications.parliament.uk/pa/ld200910/ldselect/lducom/75/75we05.htm> accessed 20/09/2014.

<sup>50</sup> House of Lords Select Committee of the European Union, The EU’s Succession Regulation on Succession, HL 75, 24<sup>th</sup> March 2010, Box 6.

<sup>51</sup> Anton’s Private International Law, (n 2)1063.

<sup>52</sup> See Ministry of Justice, European Proposal on Succession and Wills, Consultation Paper, CP41/09, 15. For a comparative analysis of the succession laws of the Member States on the issue of Clawback see Annex I, Appendix I and II by Professor Roderick Paisley within CP41/09.

*has two children and becomes habitually resident there. He dies intestate in that State in 2035 aged 55.*

Under the Succession Regulation, in the absence of choice, the law of George's habitual residence at the time of death governs the estate. That law will therefore apply to the forced heirship claims and clawback. Under that law the property would be liable to be returned to the estate to meet the claims.

In the meantime, Kate has been living in her house for 23 years. At the time the gift was made, the law that governed the gift was the *lex situs*, the law of Scotland. The law of Scotland did not recognise clawback for the purpose of succession at the time the gift was made and the issue of clawback could not have been foreseen by either the donor or the donee. If Kate had known about the risk she could have made a decision whether to accept the property or not, or to take out insurance against a possible future claim. In Scotland, the Land Registry guarantees the title of the property, therefore introducing clawback at this point risks undermining that title and would infringe Kate's right to the peaceful enjoyment of her property.

The decision by the negotiators of the Succession Regulation to use the law applicable to the succession in relation to gifts that can be restored to the estate for the purpose of clawback, has the potential to constitute a disproportionate and intolerable interference in the donee's right *in rem* as the issue of clawback was not foreseeable and therefore impairs the substance of the donee's guaranteed rights.

### III. Private International Law of Succession in Scotland

#### Historical Background

A fact that is often overlooked is that 'domicile' is a civilian concept brought into English law from continental laws and writings with help from Scots law.<sup>53</sup> As early as 1426, Scots law recognised that the law of the domicile would apply to testamentary dispositions which was further inferred to mean that '(...) the effects of

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<sup>53</sup> See A E Anton, 'The Introduction into English Practice of Continental Theories as to the Conflict of Laws' (1956) 5 *International and Comparative Law Quarterly* 534; Anton's *Private International Law* (n8) at 8-12; and P Beaumont and P Bremner, 'Inter-Regional conflicts within the United Kingdom relating to private international law of succession – the development of the applicable law rule' (2010) 54 *Revista Valenciana d'Estudis Autònoms* 238-271; P Bremner, (2010) 'Bridging the gap between civil and common law: An analysis of the proposed EU Succession Regulation' (Masters Thesis, University of Aberdeen, 84), 'The word domicile is not found in Viner's Abridgment, Bacon's Abridgment, Comyn's Digest, or in any of the law books from which Bracton down to Blackstone, so it must be comparatively new to the English law. It is in fact borrowed from the continental usage and after it had there become the determining factor in questions of law. When we borrowed the notion of personal law, we found that domicile was established as its criterion.'; Cf the very significant impact of English Law on the historical development of the substantive law of succession and on administration of estates discussed by W David H Sellar, 'Succession Law in Scotland – a Historical Perspective' in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmerman (eds) *Exploring the Law of Succession Studies National, Historical and Comparative* (Edinburgh University Press 2007) 49.

Scotsmen were to be governed by the law of Scotland wherever such effects should be situated'.<sup>54</sup>

The case law in the seventeenth and eighteenth centuries shows that the Scottish courts were willing to hear arguments from counsel based on continental jurists and legal thinking in order to find solutions to problems that were not adequately dealt with under Scots law.<sup>55</sup> In 1744, in *Brown v Brown*,<sup>56</sup> the Inner House of the Court of Session in Edinburgh was referred to Voet's work for inspiration, as Scots law was silent on the issue of whether succession in relation to moveables was governed by the law of the deceased's domicile or the law of the place where the moveables were at the time of his death. The outcome was that the court followed the continental European applicable law rule on domicile of the deceased at the time of death, rejecting the idea that the *lex situs* which applies to immoveables should apply to moveables instead of the *lex domicilii*, a decision which formed the basis of the principle of scission.<sup>57</sup>

The subsequent development of the applicable law rule in private international law of succession in Scotland is the result of the evolving case law in the courts of Scotland and England.<sup>58</sup> The Act of Union in 1707 triggered the development of principled rules of private international law between Scotland and England, with the House of Lords as the final court of appeal for both jurisdictions playing a significant part.<sup>59</sup> The key rule established by the decision of the Inner House of the Court of Session in *Brown v Brown* was finally affirmed by the House of Lords in *Bruce v*

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<sup>54</sup> D Robertson, *A treatise on the rules of the law of personal succession, in the different parts of the realm: and on the cases, regarding foreign and international succession, which have been decided in the British courts* (T Clark, Edinburgh 1836) 82.

<sup>55</sup> See Anton (1956) (n53) 535-536, see also Kames, *Principles of Equity* (3<sup>rd</sup> ed, Edinburgh 1778) Vol ii esp 310, 333 and 342.

<sup>56</sup> (1744) M.4604. For a recognition of the importance of this case and the detail of the plea by the defender that was upheld in this case, see Anton (1956) (n53) at 537-538.

<sup>57</sup> Anton, *ibid* at 537-538, notes that the judgment of the court in *Brown* is not reported but that Falconer's report says that the judges 'agreed the case was to be determined by the law of nations, and by it the domicile of the creditor' [the deceased] 'was to be the rule.' Beaumont and Bremner (n53) summarise the issue as follows: 'The case concerned a Scottish domiciled deceased who owned Irish government debentures. Under the terms of the debenture, the money was to be repaid to the deceased, his executors, administrators or assignees. By the law of Scotland, this passed to the deceased's brother as his next of kin. This, however, was challenged by the deceased's nephew, who claimed that by the law of Ireland, he was entitled to a share...Scots law was applied.' Distribution of an estate according to the law of the domicile of the deceased had not been accepted by the Scottish institutional writers at that time, see Stair, *The Institutions of the Law of Scotland* (Edinburgh 1681) III 8.35 and Bankton, *An Institute of the Laws of Scotland* (Edinburgh 1751) III 8.5. It was however, accepted a little later by another institutional writer, see Erskine, *An Institute of the Law of Scotland* (Edinburgh 1773) III 9.4.

<sup>58</sup> For an analysis of the case law in England and Scotland and the development of the applicable law see P Beaumont and P Bremner, (n53). The English cases include *Pipon v Pipon* (1744) Amb. 26 and *Thorne v Watkins* (1750) 2 Ves. Sen. 35. The Scottish cases include some that seem to have reverted to the *lex situs* rule, see *Davidson v Elcherson* (1778) Mor. 4613 (though this may be better explained as a case where the Scottish court declined to exercise jurisdiction in favour of a case pending before a court in Hamburg, Germany); *Henderson v McLean* (1778) Mor. 4615; and *Morris v Wright* (1785) M. 4616, and some that followed the approach in *Brown v Brown* (1744) M.4604, see *MacHargs v Blain* (1760) M. 4611. Beaumont and Bremner speculate that the Scottish cases that appear not to follow *Brown* could be early examples of accepting an implied choice of law based on a will being drawn up under that system of law.

<sup>59</sup> See Beaumont and Bremner, *ibid*, and Anton (1956) (n53) at 538-539.

*Bruce* in 1790.<sup>60</sup> The case concerned a Scotsman who died in India, whilst working for the English East Indian Company, leaving property in England, India and on the sea. It was determined in the Court of Session that the deceased had an English domicile at the time of his death and therefore the succession to his moveable property was governed by the law of England. As a result of this, a half-blood relative was allowed to inherit, which would not have been the case under Scots law. The whole-blood relations appealed the Court of Session's decision to the House of Lords, who quashed the appeal. The authority of this Scottish decision of the House of Lords was subsequently clearly accepted as the law of England and Wales.<sup>61</sup>

However, as the concept of domicile developed within the law of the UK, continental Europe took a different path and since the nineteenth century replaced the concept of domicile with the concepts of nationality.<sup>62</sup> and, more recently, habitual residence.

## Contemporary Private International Law of Succession in Scotland

### a. Administration of Estates

In Scotland, heirs do not inherit directly on the death of the deceased. If the law applicable to the estate is Scots law then the estate will need to be administered under Scots law whether in Scotland or in another EU Member State.<sup>63</sup>

The administration of the estate in contrast to some civil law systems is not the duty of the heir.<sup>64</sup> The administration is carried out by a personal representative of the deceased, either an executor or an administrator,<sup>65</sup> who gains authority to deal with the estate by obtaining a grant of representation from the court.<sup>66</sup> This procedure for administering property after the death of its owner is fundamentally different from the civil law approach where it is common for the property of the deceased to pass directly to the heirs on death.<sup>67</sup>

For the purposes of confirmation the local sheriff responsible for the area where the deceased was domiciled at death has jurisdiction.<sup>68</sup> If there is heritable property in Scotland but the deceased was domiciled outside of the UK then Edinburgh has jurisdiction.<sup>69</sup>

The estate is dealt with in two stages. The first stage involves the administration of the estate followed by succession. Only once the administration of the estate has taken place, which involves the ingathering of the estate and the

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<sup>60</sup> (1790) 3 Pat. 163. See also (1790) 6 Bro. P.C. 566 and 2 Bos. & Pul. 226. See the analysis in Anton, *ibid*, 538-539 and Beaumont and Bremner, *ibid*.

<sup>61</sup> See Beaumont and Bremner, *ibid*; Anton, *ibid*, 539-540; *Hunter v Potts* (1791) 4 T.R. 182; *Bempde v Johnstone* (1796) 3 Ves. Jun. 199, 200 (per Lord Chancellor Loughborough), *Somerville v Somerville* (1801) 31 E.R. 839 and Story, *Commentaries on the Conflict of Laws* (T Clark, Edinburgh 1835) discussed by E Lorenzen, 'Story's Commentaries on the Conflict of Laws – One Hundred Years After' (1934-35) 48 Harvard Law Review 15 at 24.

<sup>62</sup> See for example Lorenzen, *ibid* at 32-33.

<sup>63</sup> Anton's Private International Law, (n 2) 1022.

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid*, 1000.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*, 1002.

<sup>68</sup> Garb and Wood (n 2) 733.

<sup>69</sup> *ibid*, 734.

payment of debts and tax, can the estate be shared amongst the beneficiaries.<sup>70</sup> In the UK, the administration of estates is governed by the *lex fori*.<sup>71</sup>

Scots law therefore governs the priority of the debts and their extinction through lapse of time.<sup>72</sup> It is also irrelevant whether the creditor is Scottish or foreign.<sup>73</sup> It is possible for a personal representative to deal solely with the assets within Scotland for a deceased who died domiciled outside of Scotland. In this case the executor will still apply the *lex fori* and have a duty to pay the creditors following the order prescribed by Scots law.<sup>74</sup> The personal representative will not release the assets to a foreign executor during the first six months after the death of the deceased as during this time he risks personal liability for debts intimated to him during this time.<sup>75</sup>

The duty to pay a maintenance debt, where a dependent is owed maintenance by the deceased is dealt with under the administration of estates and not under succession law.<sup>76</sup> As long as the personal representative is made aware of the debt within the first six months of the death of the deceased then the debt must be treated as any other and paid according to the priority set out in law.

## b. Jurisdiction in Succession

Jurisdiction and the recognition and enforcement of judgments in matters concerning ‘wills and succession, including maintenance obligations arising by reason of death’ are excluded from the scope of the Brussels I Regulation (Recast).<sup>77</sup> Schedule 4 of the Civil Jurisdiction and Judgments Act 1982, which modified the Brussels Convention for allocation of jurisdiction within the United Kingdom, applies to matters that fall within the scope of the Brussels Convention and where the defender or defendant is domiciled in another part of the United Kingdom with the effect that matters of succession are excluded. However, matters of succession are not excluded from the ordinary rules of jurisdiction in Scotland, which are found within Schedule 8 of the Civil Jurisdiction and Judgments Act 1982, as it was argued that ‘(...) the additional rules of jurisdiction not derived from the Convention should apply’.<sup>78</sup>

The ‘general jurisdiction rule’ is based on the domicile of the defender.<sup>79</sup> The ‘special jurisdiction rules’ relevant to matters of succession are Schedule 8, r.2(g) relating to trusts, Schedule 8, r.2(h)(i) and (ii) where the defender is not domiciled in the United Kingdom, he may be sued in the courts where moveable property belonging to him has been arrested or where any immoveable property in which he

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<sup>70</sup> *ibid*, 1000.

<sup>71</sup> *ibid*, 1002; E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective* (4<sup>th</sup> edn, W Green 2015) 679.

<sup>72</sup> Anton’s Private International Law, (n 2)1018.

<sup>73</sup> *ibid*.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.

<sup>76</sup> Family Law (Scotland Act) 1985 s1(4); Family Law (Scotland) Act s.29 allows a cohabitant to apply to the courts for a transfer of property (both immoveable and moveable) from the estate of the deceased not exceeding the amount to which a surviving spouse would be entitled to.

<sup>77</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Recast) [2012] OJ L 351/1-32 art 1 (1) (f). (Brussels I Regulation (Recast)).

<sup>78</sup> Anton’s Private International Law, (n 2)1028.

<sup>79</sup> *ibid*. Garb and Wood, (n 2) 733.

has any beneficial interest is situated and Schedule 8, r.2(i) where ‘proceedings are brought to assert, declare or determine proprietary or possessory rights, or rights of security, in or over moveable property, or to obtain authority to dispose of moveable property, in the courts for the place where the property is situated’.

The exclusive jurisdiction rules relevant to matters of succession concern ‘(...) proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts for the place where the property is situated’.<sup>80</sup> Prorogation of jurisdiction rules that are relevant to matters of succession are those involving trust instruments.<sup>81</sup>

### c. Applicable Law in Succession

The Scottish choice of law rules are complicated by the principle of scission which refers to the difference in rules in succession between the law applicable to moveable property and the law applicable to immovable property.<sup>82</sup> As previously stated, the law applicable to the succession of moveable property is governed by the law of the deceased’s domicile at death, while the law applicable to the immovable property is governed by the *lex situs*.<sup>83</sup>

In Scotland, this is complicated further with the requirement to take into account ‘legal rights’, a forced heirship provision for spouses/civil partners and children that apply in both testate and intestate succession.<sup>84</sup> These rights limit testamentary freedom in Scotland.<sup>85</sup> This system is currently an area put forward for major changes by the Scottish Law Commission.<sup>86</sup> The idea that has been proposed is that instead of the legal rights only being available from the moveable estate it is recommended that it is no longer property specific and comes from the estate as a whole.<sup>87</sup>

In intestate succession, there are also prior rights that provide rights to a spouse, civil partner and in cases concerning a croft tenancy to cohabitants where the relationship was of at least two years in length.<sup>88</sup>

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<sup>80</sup> Anton’s Private International Law, (n 2)1028.

<sup>81</sup> *ibid.*

<sup>82</sup> The problems that arise from the principle of scission are recognised by the Scottish Law Commission who observed that ‘(...) it is widely acknowledged that the scission principle leads to wide variations in the distribution of the estate depending on the location and the character of the asset.’ Scottish Law Commission, *Report on Succession* (Scot Law Com No 215 2009) para 5.2. <http://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf> accessed 18 December 2015. Although the Scottish Law Commission recommended that there should be a review of the principle of scission within Scotland, it is unlikely that this will happen in the foreseeable future, see fn 91.

<sup>83</sup> Anton’s Private International Law, (n 2) 1026.

<sup>84</sup> *ibid.*, 1029. Also applies to the civil partner see Civil Partnership Act 2004 s.131.

<sup>85</sup> Succession (Scotland) Act 1964, Parts I and II.

<sup>86</sup> Scottish Government, Consultation on the Law of Succession (2015) [https://consult.scotland.gov.uk/civil-law-reform-unit/consultation-on-the-law-of-succession/user\\_uploads/consultation-paper---final-as-at-26-june-2015.pdf-3](https://consult.scotland.gov.uk/civil-law-reform-unit/consultation-on-the-law-of-succession/user_uploads/consultation-paper---final-as-at-26-june-2015.pdf-3) accessed 16 December 2015.

<sup>87</sup> *ibid.* 2.8.

<sup>88</sup> Anton’s Private International Law, (n 2) 1033. See Succession (Scotland) Act s.8 for the prior rights of the surviving spouse, on intestacy, in dwelling house and furniture.

## IV. Future Development of the Private International Law of Succession in Scotland

### Scottish Government Consultation on Technical Issues relating to Succession

A consultation by the Scottish Government in 2014, in anticipation of law reform on the technical issues relating to succession, contained a question that asked whether ‘(...) any aspects of EU Regulation (No 650/2012) on Succession might be usefully implemented in Scots Law?’<sup>89</sup>

Brushing aside the generality of the question, there were a few responses that indicated that there was some support for the abolition of scission. However, there was no consensus as to which law should apply to the whole of the estate.<sup>90</sup> The Scottish Government concluded in their analysis of the consultation that:

Given the lack of consensus on what aspects of the (Succession) Regulation might represent improvement to, and provide benefits to individuals over, our (Scots) current law and procedures in this area, and given its complex nature, we will not move to implement any part of the Regulation as part of this body of work.<sup>91</sup>

From a UK perspective, there is seemingly no opposition to abolishing scission and replacing it with a single law applicable to the whole of a person’s estate.<sup>92</sup> Although whether the UK has the energy to see this through is questionable. It is said that the UK approach that treats moveable and immovable property differently is a ‘historical anomaly’.<sup>93</sup> However if we were to change the law relating to succession then the use of a single applicable law rule would indeed need to have sufficient certainty to be workable.

### Succession (Scotland) Bill

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<sup>89</sup> [https://consult.scotland.gov.uk/civil-law-reform-unit/consultation-on-the-law-of-succession/user\\_uploads/consultation-paper---final-as-at-26-june-2015.pdf-3](https://consult.scotland.gov.uk/civil-law-reform-unit/consultation-on-the-law-of-succession/user_uploads/consultation-paper---final-as-at-26-june-2015.pdf-3) accessed 15 December 2015.

<sup>90</sup> See Responses to the Scottish Government Consultation on Technical Issues relating to Succession, <http://www.gov.scot/Publications/2015/07/6682/downloads#res481641> accessed 23 July 2015.

<sup>91</sup> <http://www.gov.scot/Resource/0047/00478965.pdf> accessed 10 December 2015.

<sup>92</sup> European Union Committee, The EU’s Regulation on Succession, Chapter 4 para 57. The abolition of scission is advocated in Anton’s Private International Law (n 2) at 1064. From the English private international law perspective, Dicey advocates reform and states that this would be best achieved by treating the whole estate as one, that both immovable property and moveable property should be governed by the law of the deceased’s domicile at the time of death see L Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell 2012) 1417.

<sup>93</sup> Oliver Parker, EU’s Regulation on Succession, Evidence, Wednesday 16<sup>th</sup> December 2009 Q128. <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf> accessed 15 December 2015.

On 16<sup>th</sup> June 2015 the Succession (Scotland) Bill was introduced in the Scottish Parliament. If the Bill goes through it will modernise and clarify technical aspects of the law of succession in Scotland, covering:<sup>94</sup>

1. testamentary documents and special destinations - this includes reforms which relate to the rectification of wills; the effect of divorce, dissolution or annulment on a will or special destination; and the revival of a revoked will;
2. survivorship – the provision of new rules where there is uncertainty about the order of death;
3. forfeiture – updating the rules in respect of forfeiture;
4. estate administration – putting in place protections for trustees and executors in certain circumstances and for persons acquiring title in good faith;
5. other reforms – abolishing donations mortis causa and the right to claim the expense of mournings; and introducing a new ground of jurisdiction for executors confirmed in Scotland.<sup>95</sup>

Of note is that the Bill seeks to close a jurisdictional gap to ensure that Scottish Courts have jurisdiction when Scots law applies to succession by introducing a new ground of jurisdiction for executors confirmed in Scotland.<sup>96</sup>

Section 22 – Additional ground of jurisdiction: executor confirmed in Scotland

60. As a matter of principle the Scottish courts should have jurisdiction whenever Scots law is the applicable law to the succession issue in question. At present there is a jurisdictional gap where the deceased's executor is not domiciled in Scotland. Unless the will creates an express trust it may be that none of the provisions in Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 which deals with the jurisdiction of the Scottish courts will apply. As a result, those raising actions against executors in connection with the administration of a Scottish estate may have to do so in the courts of the country in which the executors are domiciled.

61. This section amends rule 2 of Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 so that a person wishing to raise an action in respect of the administration of a Scottish estate by an executor who is not domiciled in Scotland may do so in the Scottish courts if the executor obtained the legal documentation necessary to authorise the making and receiving of payments on the estate known as confirmation, in Scotland. 'Confirmation' is a legal document from the court giving the executor(s) authority to uplift any money

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<sup>94</sup> The Succession (Scotland) Bill at the time of writing is at Stage 2 of the legislative process. The amended Bill can be found at [http://www.scottish.parliament.uk/S4\\_Bills/Succession%20\(Scotland\)%20Bill/SPBill75AS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/SPBill75AS042015.pdf) accessed 15 December 2015. See also Succession (Scotland) Bill, Explanatory Notes p3, [http://www.scottish.parliament.uk/S4\\_Bills/Succession%20\(Scotland\)%20Bill/b75s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd-en.pdf) accessed 18 December 2015.

<sup>95</sup> Explanatory Notes (n 94) p3.

<sup>96</sup> Explanatory Notes (n 94) p3.

or other property belonging to a deceased person from the holder (such as the bank), and to administer and distribute it according to law.<sup>97</sup>

However this reform still leaves some jurisdictional gaps that were recommended to be filled by the Scottish Law Commission.<sup>98</sup>

In relation to administration of estates the Bill also seeks to put in place protections for trustees and executors in certain circumstances and for persons acquiring title in good faith.<sup>99</sup> The existing common law protects a person who acquires property in good faith and for value.<sup>100</sup> If accepted the amendment will provide a greater level of protection to those who acquire property in good faith and for value directly or indirectly from the executor or a person (such as a legatee) who derived it directly from the executor.<sup>101</sup>

## V. Estate Planning

As noted above the introduction by the Succession Regulation of the possibility for testators to choose the law of their nationality to govern their succession creates opportunities for UK nationals with a closer connection to Scotland than any other part of the UK to choose Scots law to govern their succession. Although such party autonomy is not yet part of the private international law of succession in any part of the UK it will be given effect to in relation to the testator's property in any participating EU Member State. This will be a particularly wise thing for a UK national who wants Scots law to govern his succession to do if there is any danger that he might be regarded as habitually resident in a participating EU Member State at the time of his or her death.

On the other hand, a national of a participating EU Member State will not be able to escape the application of Scots law if he or she dies domiciled in Scotland by the device of choosing the law of his or her nationality to govern his or her succession. In such a case the assets of that person in a participating EU Member State would devolve according to the law of the chosen nationality whereas the moveable assets in the UK would devolve according to the law of Scotland and the immovable assets in the UK would devolve according to the law of that part of the UK.

The Succession Regulation does not open up any other options for estate planning because the party autonomy was deliberately restricted to nationality.<sup>102</sup>

## VI. Conclusion

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<sup>97</sup> Explanatory Notes (n 94) p13.

<sup>98</sup> See Anton's Private International Law (n2) at 1062.

<sup>99</sup> Explanatory Notes (n 94) p3.

<sup>100</sup> Explanatory Notes (n 94) p12.

<sup>101</sup> Explanatory Notes (n 94) p12.

<sup>102</sup> See Anton's Private International Law (n 2) at 1064 advocating wider party autonomy under the Regulation and under domestic law reform in the UK.

The aim of the Succession Regulation was to harmonise the conflict of law rules in cross-border succession cases in order to allow testators to plan their estates with certainty. As not all Member States are party to the Regulation it is clear that the intention has not been met and as demonstrated within this paper, there will be continuing conflict of laws and jurisdiction issues when dealing with cross-border succession cases involving a participating Member State and Scotland, as part of the UK and, for the purpose of the Succession Regulation, a 'third' country.

considers some aspects of the jurisdiction and applicable law rules within the Regulation, the current and possible future private international law of succession in Scotland, and the potential impact of the Succession Regulation on cross-border succession cases involving some people who are connected with Scotland, focussing in particular on estate planning.

1. Introduction. Scotland has a mixed legal system that has been influenced by Roman law and the common law system of England and Wales.
2. Its substantive law of succession has also been influenced by feudal and canon law.
3. Its legal system... However, neither the substantive inheritance laws of the 24 EU Member States nor the fiscal aspects of international successions are affected. The EU Succession Regulation has already entered into force on 16 August 2012 but in principle will only have direct effect on deaths on or after 17 August 2015. With regard to deaths before 17 August 2015 the 24 EU Member States will continue to apply their existing national conflict-of-law rules.

**Key Elements. Last Habitual Residence.** Under the EU Succession Regulation only one single criterion remains for determining the jurisdiction and the law applicable to cross-border successions: the last habitual residence at the time of death of the deceased (art. 4 and art. 21 sec. The sources of PIL include: --common law, --acts of Parliament --act of EU institutions --international conventions adopted by the Hague Conference on Private International Law. --Scottish courts refer extensively to English literature and case-law in their judgments. PIL and other areas of Law. PIL has connections with different areas of law: --All areas of private law (can have a foreign element - contract, delict, succession, property) --EU law (harmonised by EU regulations relevant with private law) --Comparative law (sometimes used as a method in PIL) --Public international law (relations between states though) --Human rights law (particularly procedural q's can be relevant). Harmonisation effects. PIL rules differ from one legal system to another. The External Dimension of EU Private International Law after Opinion 1/13 - November 2016. A connection exists between the spatial scope of application of EU legislative measures relating to judicial cooperation in civil matters and the development of the external relations of the EU in the same field. EU measures apply, in principle, whenever an issue within their material scope of application is to be decided by a court, or other authority, of a Member State for which the relevant measure is in force. Two different scenarios, however, need to be considered in this respect, depending on whether the provision concerned is intended to apply erga omnes rather than inter partes.