



# It's Complicated: Solutions for Planning and Administering an Estate with Foreign Connections

Wednesday, September 23<sup>rd</sup>, 2020

We will begin in

5 minutes

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4 minutes

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3 minutes

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minutes

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# It's Complicated: Solutions for Planning and Administering an Estate with Foreign Connections

Wednesday, September 23<sup>rd</sup>, 2020  
10:30 a.m. – 11:30 a.m. EST

O'SULLIVAN  
  
ESTATE LAWYERS

# Thank you for joining us today!

- This session is being recorded for replay
- Listen-only mode during the presentation
- Please submit questions via the Question Panel
- Questions will be addressed in the Q&A session at the end of the presentation





# Presenters



Margaret O'Sullivan



Susannah Roth



Marly Peikes



Stephanie Battista

# Agenda

1. Wealth Succession: Which Laws Apply?
2. Separate Situs Wills and Powers of Attorney
3. Administering Property with Foreign Connections
4. Multiple Taxation on Death
5. Forced Heirship and Planning Options

# Wealth Succession: Which Laws Apply?



# Wealth Succession: Which Laws Apply?

## *Know Your Client:*

1. Review comprehensive statement of net worth
2. Location of all property
3. Review current estate planning structure and documents
4. Review/evaluate all legal obligations
5. Review family background, habitual residence, citizenship, domicile, and of intended beneficiaries
6. Consider applicable succession law based on private international law rules

# Wealth Succession: Which Laws Apply?

## *Conflict of Laws:*

- What is the “applicable law”?
- Common law jurisdictions:
  - Movables: domicile of deceased
  - Immovables: situs of assets



# Wealth Succession: Which Laws Apply?

## *Civil Law Jurisdictions:*

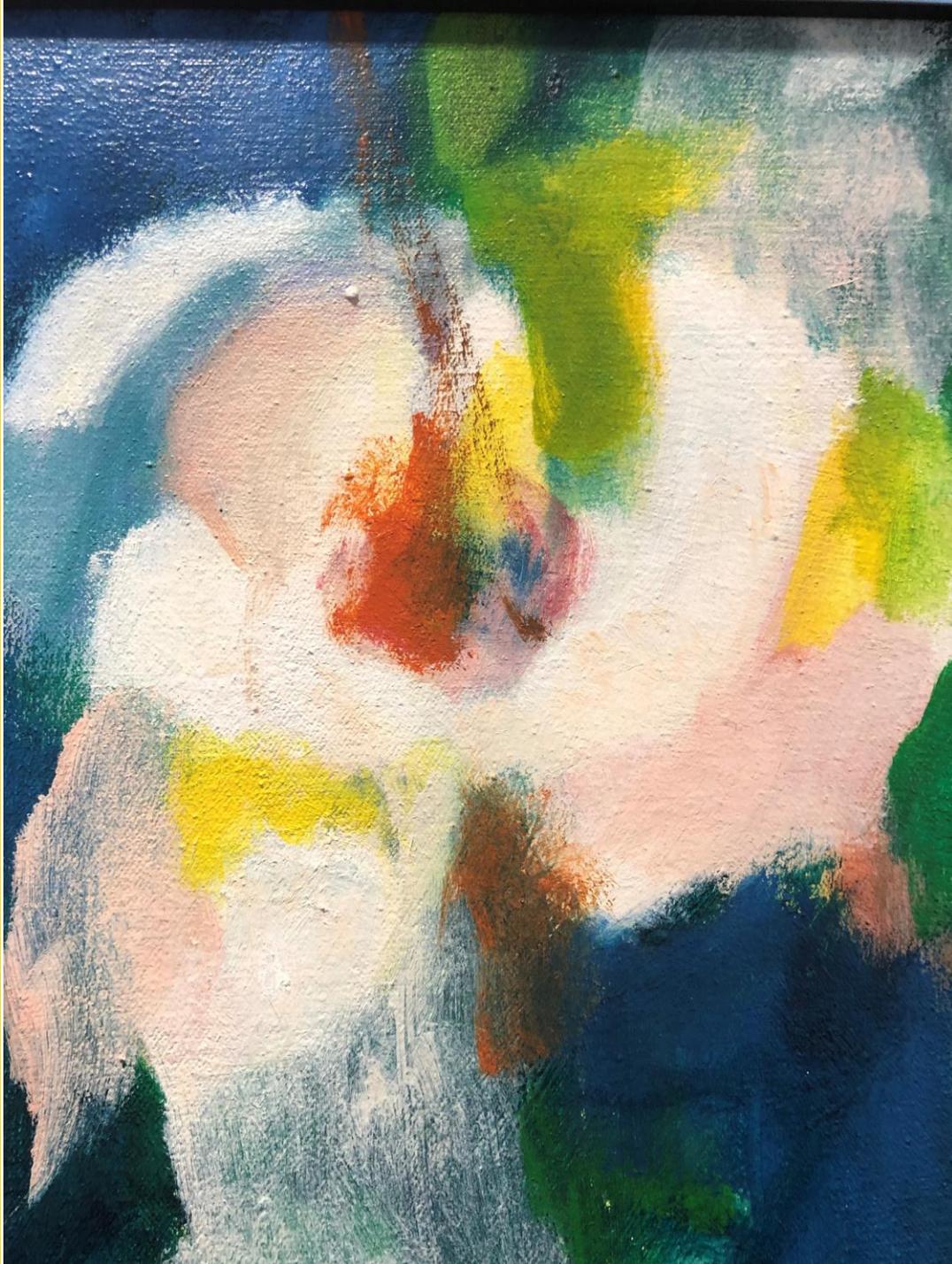
- Use different “connecting factors” including:
  - Nationality
  - Domicile (different from the common law meaning)
  - Habitual residence
- Some are “unitarian” – one law
- Others have “scission” – one law for movables and one law for immovables

# Wealth Succession: Which Laws Apply?

- What is “domicile” under the common law?
- Domicile of choice vs. domicile of origin
- What is the role of domicile and situs in succession matters?
  - Jurisdiction of the court
  - Intestate succession
  - Testate succession: capacity to make a will, receive a legacy, formal and intrinsic validity of a will, construction, revocation, dependant’s relief legislation.

# CASE STUDY

- Monica was born in Belgium and is a Belgian national.
- Monica marries Randall, a Canadian citizen, born and raised in Thunder Bay.
- Monica and Randall raise their family in Ottawa. They buy a condominium in Monaco which they furnish with valuable antiques and their European art collection.
- Monica and Randall retire to Monaco. Unfortunately, Monica dies shortly thereafter.



## Wealth Succession: Which Laws Apply?

- Which law governs succession to Monica's art collection?
- Is Monica's Ontario will which she signed while she lived in Canada valid? It provides for a trust of her art collection for Randall's lifetime with remainder to children, and the residue of her estate to Randall.

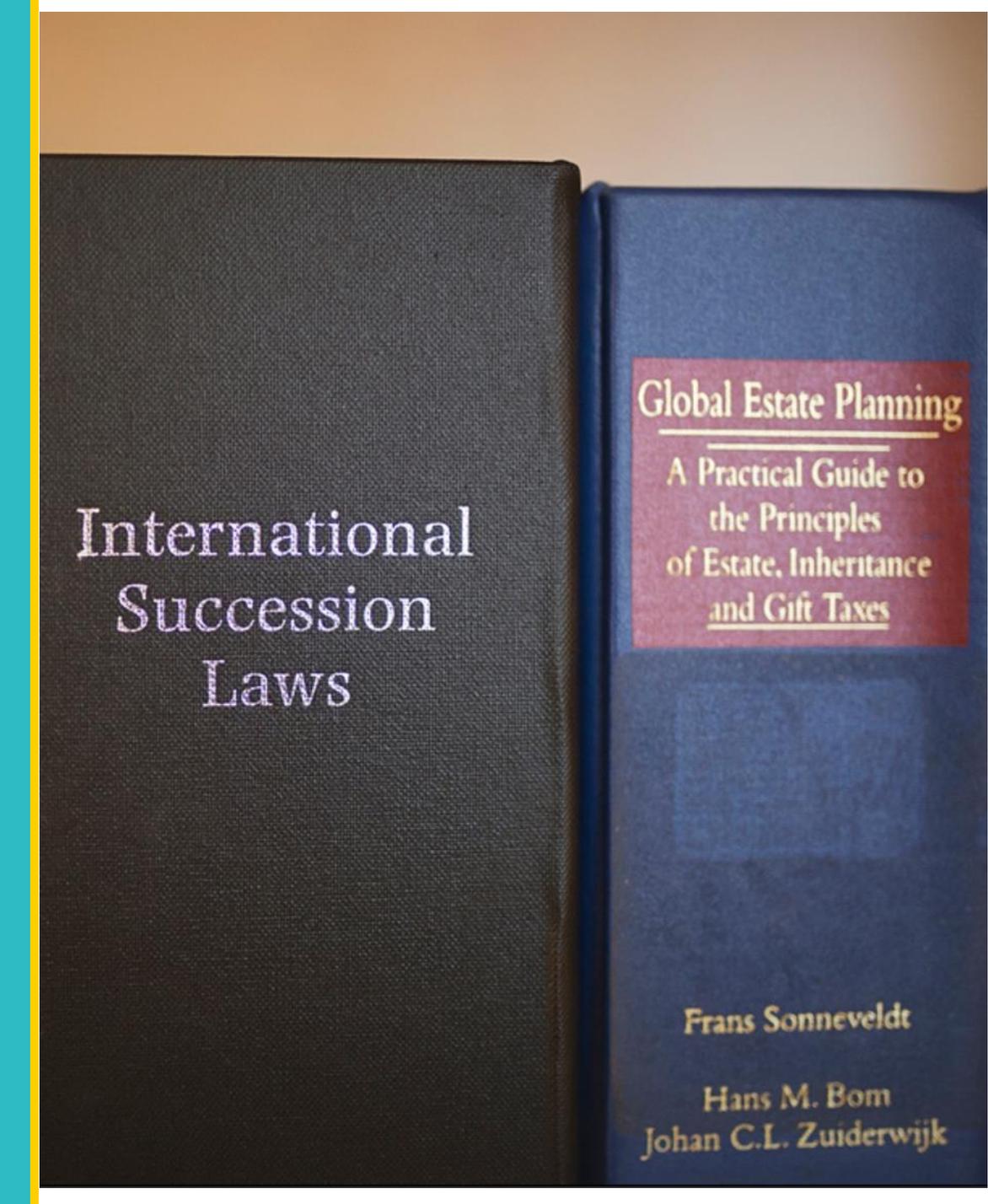
# Wealth Succession: Which Laws Apply?

## *Case Analysis:*

Validity of trust under Monica's will and provision for residue to Randall:

- Monegasque law does not, in general, recognize a trust.
- Monaco has adopted the Hague Convention on Trusts: the trust would be recognized if Monica made a choice of Ontario law in her will to govern it and any trust under it.
- Monaco has “forced heirship” – will not allow all of Monica's estate to pass to Randall: her children must receive a share of her estate.

# Separate Situs Wills and Powers of Attorney

The image shows two books. The book on the left is dark grey with the title 'International Succession Laws' in white serif font. The book on the right is blue with a red title label that reads 'Global Estate Planning: A Practical Guide to the Principles of Estate, Inheritance and Gift Taxes'. Below the label, the authors' names 'Frans Sonneveldt', 'Hans M. Bom', and 'Johan C.L. Zuiderwijk' are printed in gold.

International  
Succession  
Laws

Global Estate Planning

A Practical Guide to  
the Principles  
of Estate, Inheritance  
and Gift Taxes

Frans Sonneveldt

Hans M. Bom  
Johan C.L. Zuiderwijk

# Separate Situs Wills and Powers of Attorney

## *Advantages of Separate Situs Wills:*

- Minimize probate costs
- Use of local language and compliance with local formalities and rules
- Efficiency and ease of estate administration
- Ensure validity

# Separate Situs Wills and Powers of Attorney (*cont'd*)

## *Drafting Separate Situs Wills: Proper Preparation is Essential:*

- Understand existence of client's current will(s) to avoid accidental revocation.
- Avoid conflicts and irregularities by frequent review and updating of principal will and separate situs wills.
- Understand effect of matrimonial laws on succession.
- Which law will be the governing law?

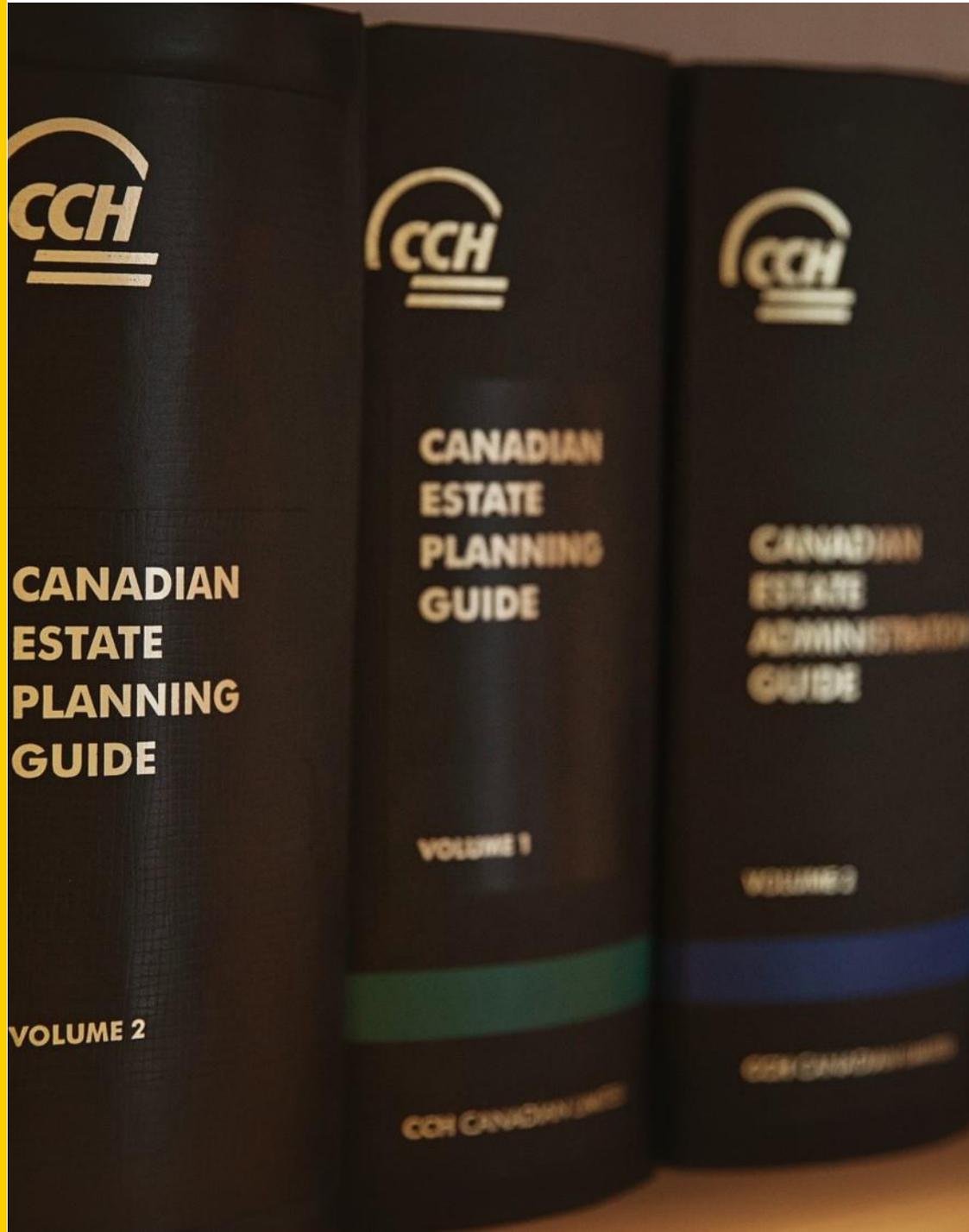


## Separate Situs Wills and Powers of Attorney

- Interpretation issues
- Careful planning for liquidity, payment of taxes and other liabilities and tax compliance
- Dependant's relief
- Forced heirship claims

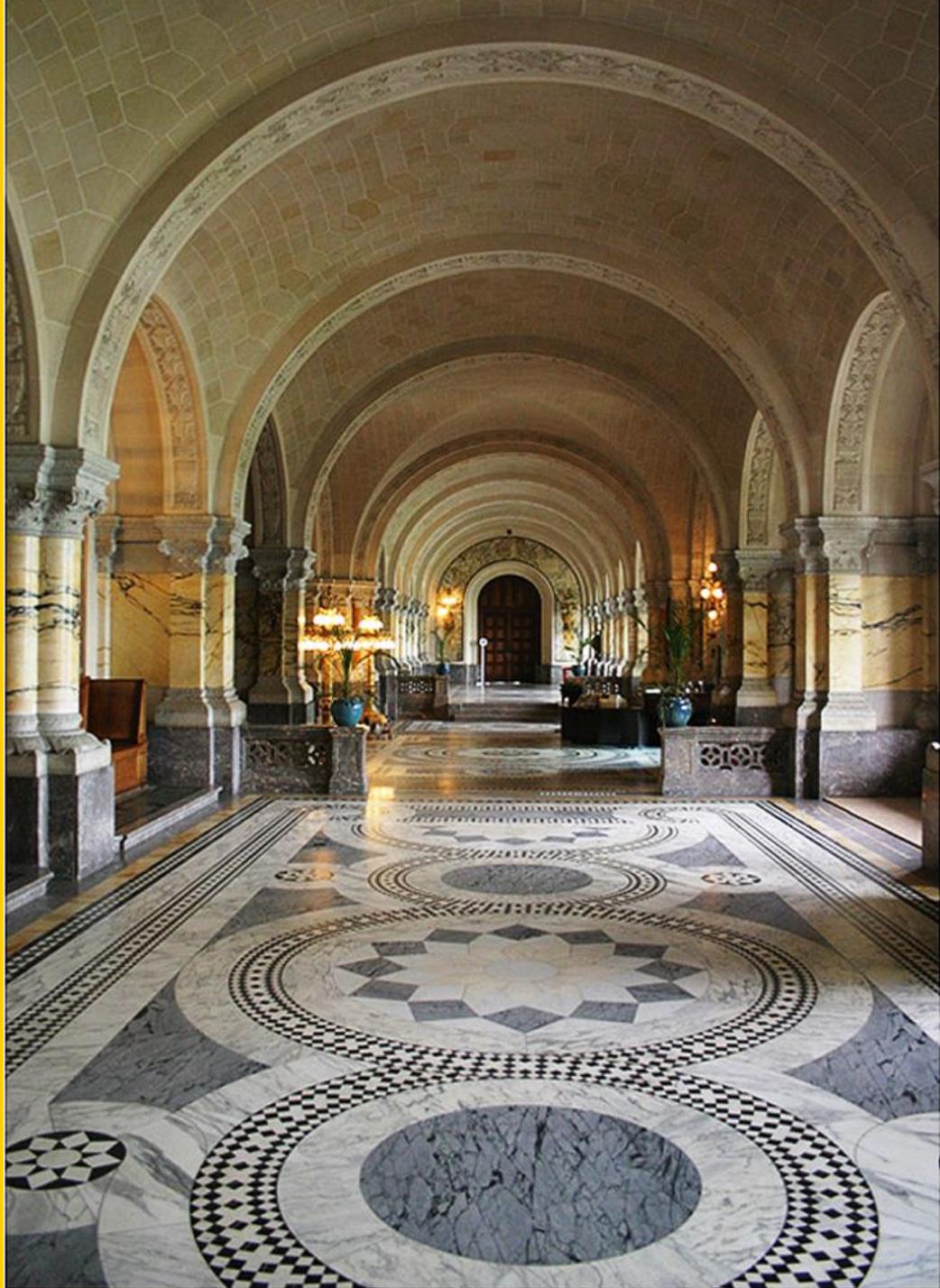
# Separate Situs Powers of Attorney

- The problem of recognition of the “home” power of attorney in another jurisdiction
- Practical solution: a power of attorney in each jurisdiction where one has assets or spends significant time
- Need to understand where assets are located and each person’s lifestyle and residence patterns



## Special Considerations in Drafting Multiple Powers of Attorney

- Inadvertent revocation of a prior power of attorney
- Multiple attorneys
- Termination
- Compensation of attorneys
- Standard of care
- Execution requirements



# Separate Situs Wills and Powers of Attorney

## *Developments in the European Union: Convention XXXV – The Hague Protection of Adults Convention*

- Convention XXXV provides rules for recognition of foreign powers of attorney called “powers of representation”
- Allows an adult person to choose the law to be applied to a power of attorney (otherwise the law of the person’s habitual residence applies at the time they made the power of attorney) among the following:
  - Nationality
  - Former habitual residence
  - Location of property



## Separate Situs Wills and Powers of Attorney

- It's an “open” convention and can apply to help Canadians in their estate planning to have their “home” power of attorney recognized in a contracting state.
- Austria, Czech Republic, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal, Scotland and Switzerland have ratified Convention XXXV.

# POLL

Do you, or your clients who have a residence outside Canada, have powers of attorney in that jurisdiction?

- a) Yes, or most clients do
- b) No, or few clients do
- c) Not applicable

# Administering Property with Foreign Connections

# Administering Property with Foreign Connections

## *Practical Challenges:*

- Locating assets
- Locating all wills and other testamentary documents
- Identification of assets which are governed under each will where there are multiple wills



# Administering Property with Foreign Connections

- Determining debts and liabilities and who has the obligation to pay them: the estate/executors and/or beneficiaries
- Foreign language and documentation
- Managing expectations, timelines, delays and costs



# Administering Property with Foreign Connections

## *Estate with Foreign Connections:*

- Foreign resident beneficiaries:
  - Taxation: withholding tax and loss of “rollover”
  - s.116 certificate requirements
  - Problematic issues of foreign beneficiary with interest in a Canadian corporation

# Administering Property with Foreign Connections

## *Estate with Foreign Situs Assets:*

- Forced heirship
- Foreign family law regimes
- Foreign laws for succession on registered accounts, pensions, life insurance

# Administering Property with Foreign Connections

## *Estate with Foreign Situs Assets (cont'd):*

- Foreign probate or other legal process
- Foreign tax considerations
- Treaties
- Responsibility for foreign tax liabilities and filings
- Multiple wills and liability to pay taxes and debts among multiple estates

# Administering Property with Foreign Connections

## *Foreign Estate with Connections to a Canadian Jurisdiction:*

- Canadian resident beneficiary
- Non-resident deceased Canadian citizen
- Non-resident executor: obtaining authority



# Administering Property with Foreign Connections

*Where should original probate be obtained? Consider:*

- Where is it required by a third party?
- Necessity to produce original will and requirements for original vs. secondary grant
- Level of probate costs
- Legal fees
- Bonding
- Qualifications for executor to be appointed
- Court process and level of oversight
- Protection to executor

# Administering Property with Foreign Connections

## *Court Grant by a Canadian Jurisdiction to a Non-Resident Executor:*

- Where there is no will
- Bonding
- Canadian income tax issues
- Anti-money laundering and tax evasion regulations: problem for non-residents including executors to open accounts with Canadian financial institutions

# CASE STUDY

## *“Probate Shopping”*

- Max was a Canadian citizen, former B.C. resident. He moved to London, U.K. to work in international private equity, where he died.
- Max had investment accounts in Guernsey with an international financial institution, and accounts in Vancouver managed by an affiliate of the same institution.
- His widow, Emily, is sole executor of his estate and has now returned to live in Vancouver. She wants to know where probate of Max’s will should be applied for.

# Administering Property with Foreign Connections

## *Case Analysis:*

- B.C. probate fees are high.
- Guernsey probate fees are much lower.
- Guernsey counsel advises that the will can be probated in Guernsey. Emily can apply as there are no restrictions on her ability to act.



# Administering Property with Foreign Connections

## *Case Analysis:*

- The Vancouver affiliate of the financial institution agrees that it will rely on either a B.C. grant or a Guernsey grant and that there is no need to “reseat” the Guernsey grant in B.C.
- To Emily’s delight, there is a savings of probate fees, and as well legal fees by not resealing in B.C.

# Multiple Taxation on Death

# Multiple Taxation on Death

- The “sleeper” issue that can lead to unintended consequences and double or even triple taxation.
- Canada: one of a few countries that tax capital gains on death along with Australia, New Zealand and Denmark.
- No federal Canadian estate, inheritance, gift or wealth or succession duties (yet!). Small exception: Ontario Estate Administration Tax and other Canadian jurisdictions with high probate costs.

# Multiple Taxation on Death

- Canada only has two treaties that allow a Canadian to credit estate or inheritance taxes against capital gains tax on death: U.S. and France.
- U.S. estate tax paid by estate of a deceased Canadian tax resident under the Fifth Protocol to the Canada/U.S. Income Tax Treaty can be credited against Canadian capital gains tax paid on the same assets.
- Canada-France Tax Treaty allows a deduction for French inheritance tax paid in France against Canadian capital gains tax on death.



# Multiple Taxation on Death

- Tax can be levied on the estate, deceased or beneficiary.
- Base for tax: citizenship, residence, domicile, location of assets.
- Most countries have an estate or inheritance tax and greater treaty relief among them.
- Need to consider in estate and will planning any tax liability of a foreign beneficiary on their inheritance.
- Need to consider tax liabilities arising on assets in a foreign jurisdiction.

# Multiple Taxation on Death

Inheritance and estate taxes can be very high, with limited exemptions

## *Example:*

- U.K. Inheritance Tax is levied on the estate: exemption of 325,000 pounds and tax rate of 40%.
- France: Inheritance tax is levied on the beneficiaries. Where the beneficiary is unrelated, the rate of tax is 60% with a small exemption of 1,594 €

# Multiple Taxation on Death

## *Will Planning:*

- Need to consider and get specific instructions whether the estate should bear burden of a beneficiary's inheritance tax, or whether the beneficiary should, where there are foreign beneficiaries.

# Multiple Taxation on Death

*Standard debts and death taxes clause makes all death taxes payable by the estate:*

“My trustees shall pay out of and charge to the capital of my general estate as if the same were debts of mine incurred by me during my lifetime all succession, accession, estate and inheritance duties or taxes and all taxes owing on any of my capital gains whether imposed by or pursuant to the law of this or any jurisdiction whatever (“hereinafter referred to as “death taxes”) that may be payable by reason of my death ...”

# POLL

If you had a beneficiary under your will who lived in a jurisdiction with a high inheritance tax, who do you think should bear it?

- a) The beneficiary
- b) The estate

# Forced Heirship and Planning Options

# Forced Heirship and Planning Options

- Most civil law jurisdictions have “forced heirship” or as civilians term it “mandatory family protection” and not testamentary freedom.
- Only a small portion of the estate – the “free estate” may be able to be disposed of without restrictions.
- Will planning must factor this in, in particular if the applicable law will be a jurisdiction with forced heirship: example: real estate where *situs* will determine the applicable law.

# Forced Heirship and Planning Options

## *Impact of the European Succession Regulation:*

- Objective: provide clarity and certainty for the applicable law for succession matters.
- Effective for all deaths in EU member states after August 17, 2015 (except Denmark, U.K. and Ireland that opted out).
- Habitual residence generally is the applicable law with a few exceptions allowed.
- Choice of law: allowed if nationality is different from place of habitual residence.



# Forced Heirship and Planning Options

## *How the Succession Regulation can Apply to Canadians:*

- A Canadian citizen can choose the law of his/her province or territory to govern succession where there is an EU connection such as:
  - Canadian citizen resident in a participating EU member state.
  - Canadian citizen and resident with assets in a participating EU member state.

# Forced Heirship and Planning Options

- Canadian citizen resident in a non-participating EU member state with assets in a participating EU member state.
- Forced heirship rules can thereby be avoided by making a choice of law of a Canadian jurisdiction.

# CASE STUDY

- Alessandro is an Italian academic. He moved to Alberta over 10 years ago to accept a teaching position at U of A and is now a Canadian citizen.
- Alessandro is alienated from the children of his first marriage who live in Italy. He has had no contact with them for more than 20 years.
- Alessandro wishes to leave his estate to his second wife, including his farm in Umbria he purchased as a vacation property.
- He is concerned Italian law will require that his children of his first marriage receive a share of his estate.

# Forced Heirship and Planning Options

## *Case Analysis:*

- In his Alberta will and in a separate situs Italian will, Alessandro can choose the internal law of Canada and the laws of Alberta as the jurisdiction in Canada with which he has the closest connection to govern succession of his real property in Italy for purposes of the European Succession Regulation.



## Forced Heirship and Planning Options

- The choice of law is available because Alessandro has more than one citizenship.
- Without a choice of law, Italian law would refer back to Alberta law as the law of habitual residence, which would then refer back to Italy as the law of situs of the real property in Italy - the farm property.

# Multijurisdictional Succession Checklist

- Identifies key issues where there are foreign connections – more than 23 headline topics
- Provides a general framework of reference for estate planning, including incapacity planning



# Resources:

1. [Multijurisdictional Checklist](#)
2. [Multijurisdictional and Separate Situs Powers of Attorney for the Mobile Client](#)
3. [Multijurisdictional and Separate Situs Will Planning](#)



# Our Blog and Advisories:

Our firm has a blog (twice per month) in which we cover current domestic, cross-border and multijurisdictional trust and estate issues. We strive to be clear, concise and also provocative. Our goal for each post is to provide a few “pearls of wisdom” – easy to comprehend, relevant, and when strung together, an important and valuable collection.

If you would like to subscribe to our Blog, and our newest firm Advisories, please register at <https://www.osullivanlaw.com/blog/>.

Our new Advisory, “Multijurisdictional Estate Administration Highlights” will be distributed in a week.



## Let's Connect!

Please also feel free to visit us at [www.osullivanlaw.com](http://www.osullivanlaw.com) and add us to [LinkedIn](#).



# Questions?

**To ask our speakers a question,**  
type your question into the Questions  
Panel located in the bottom right portion  
of the screen.

# Q&A

# Thank you for joining us today!



**Margaret O'Sullivan**

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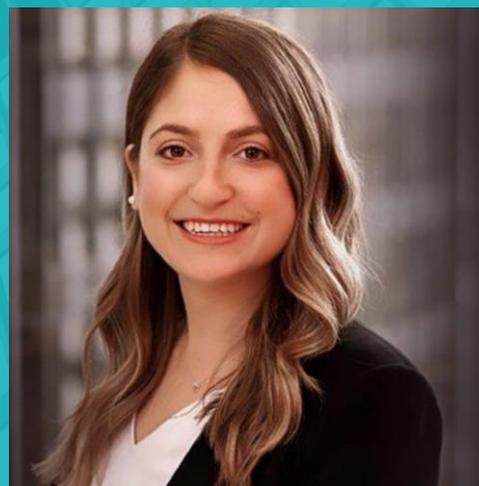
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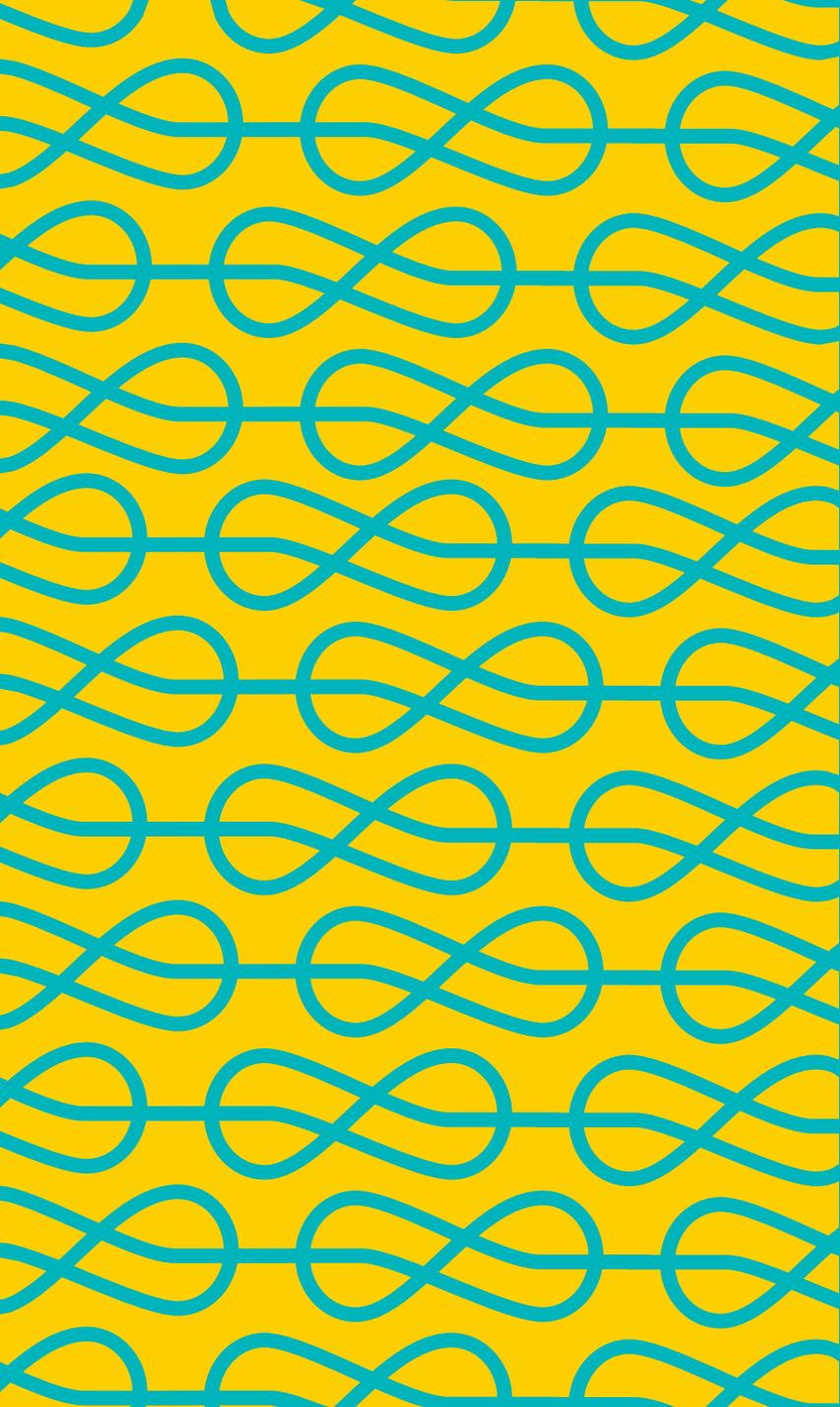
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Thank you!

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