SUPREME COURT OF NOVA SCOTIA
Citation: Davies v. Collins, 2010 NSSC 457

Date: 20101216
Docket: Hfx. No. 328880
Registry: Halifax

Between:

Pamela Mary Davies

Applicant

v.

Jennifer Jaroda Collins

Respondent

Revised decision:	The text of the original decision has been corrected according to the erratum dated December 17,2010. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	November 4, 2010 in Halifax, Nova Scotia
Written Decision:	December 16, 2010
Counsel:	Timothy C. Matthews, Q.C. for the Applicant J. Gordon Allen, for the Respondent

Background

[1] Dr. Anthony Davies married Jennifer Collins while on his deathbed in the Republic of Trinidad and Tobago (hereinafter "Trinidad").

[2] He was domiciled in Nova Scotia, Canada at the material time, yet the couple intended to continue to reside in Trinidad. Dr. Davies' Last Will and Testament, signed years earlier, remained in Nova Scotia. In both Trinidad and Nova Scotia a marriage revokes a prior Will by operation of law. However, Trinidad recognizes a separate species of marriage, termed a "marriage *in extremis*" or deathbed marriage, and that form of marriage does **not** revoke a prior Will in Trinidad. The question for this Court is whether the marriage *in extremis* in Trinidad revokes a prior Will made in Nova Scotia. This issue requires a careful examination and understanding of the effect of one jurisdiction's laws upon those of another - the area of law referred to as "conflicts of laws".

Jurisdiction of the Court

[3] In essence, the Applicant seeks the remedy of a declaration that, as a matter of law in Nova Scotia, the prior Will of Dr. Davies is **not** revoked by the marriage *in extremis* between Dr. Davies and Ms. Collins in Trinidad and Tobago, and that therefore, the Will may properly be probated here in Nova Scotia.

[4] By way of context, it should be noted Ms. Davies, Dr. Davies' ex-wife resident in Nova Scotia, presented the Last Will and Testament of Dr. Davies to have it probated in Nova Scotia. The Registrar of Probate by letter dated January 26, 2010, responded that:

> "I am unable to process a grant of probate for this Estate as a grant has already been issued in another jurisdiction. Section 29 of the Probate Act states that "A Court may issue a grant where... (b)... the Court is the Court for the probate district in which the deceased person had property at the time of death, if the deceased person did not reside in the Province at the time of death and **no grant or order to the like effect** with respect to the Estate of the deceased person has been made by an authority outside the province." (my emphasis added)
>
> It is my opinion you will have to present the Will to the Court in Trinidad and Tobago and request the grant of administration be revoked. Once a new grant is issued on the Will, you can then make an application for Extra Provincial Grant of Probate in Nova Scotia." - Exhibit K, May 5, 2010 affidavit of Ms. Davies.

[5] What is the source of this Court's jurisdiction to hear the matter and grant a declatory judgment? These issues were not specifically addressed by the Applicant or Respondent in their written arguments. Notably however, the application to this Court was made using Form 5.03, which is based upon *Civil Procedure Rule* 5.03. No objection was taken by the Respondent to this procedure; nor was there an argument that this Court does not have jurisdiction. Nevertheless, it is always important to understand the process underlying, and source of the Court's jurisdiction to hear a matter, and to grant the relief requested.

[6] While arguably the Applicant is seeking "judicial review" of the Registrar of Probate's decision, such relief would normally be brought under *Civil Procedure Rule* 7.05 and pursuant to Rule 7.11(d) for "a declaration that the Respondent [decision maker] lacks the authority or has authority to do something", or Rule 7.11(e) for "an Order providing anything formerly provided by prerogative writ".

[7] Rule 7.04 reads:

> "**The provisions of legislation**, such as the regulations under the Small Claims Court Act, **establishing procedures to be followed on a judicial review** or an appeal **prevail** over an inconsistent provision of this Rule."

[My emphasis]

[8] The *Probate Act*, S.N.S. 2000 c.3, as amended, and the *Probate Court Practice Procedure and Forms Regulations* made under s. 106 of the *Probate Act*, do provide a legislative basis for the Registrar's decision. S. 97(3) of the Act provides:

> "All other applications and other matters before the Court shall be heard and disposed of by the Registrar and, subject to subsection (1) the Registrar may make any order that the judge may make."

[9] Moreover, s. 99 of the Act reads:

> (1) Any application pursuant to this Act may be transferred by the Registrar to the judge.
>
> (2) Where an application is transferred to a judge pursuant to subsection (1), the judge may hear, determine and dispose of the application.

[10] Similarly, s. 64 of the Regulations [application respecting contentious matter] reads:

> (1) An application may be made to a Court under this Part respecting any **contentious matter**.

> (2) For the purposes of this Part, a "Respondent" includes, but is not limited to, any person interested in an Estate.
>
> (3) **A person interested in an Estate may commence an application under this Part by filing with a Court and serving** on the **Respondents**;
>
> (a) a notice of application in Form 45;
>
> (b) an affidavit in form 46 containing a list of persons interested in the Estate and swearing to the facts on which the application is based.
>
> (4) If a personal representative is not joined as an applicant in an application under this part, the personal representative shall be shown as a respondent in documents filed with the Court.
>
> [My emphasis]

[11] In as much as Rule 5.04 provides for a Notice of Contest of Chambers Application, and Rule 7.08 allows for a Notice of Participation by a Respondent, s. 66 of the *Probate Court Practice, Procedures and Forms Regulations* also allows for a Notice of Objection to be filed in response to "contentious" matters' applications.

[12] Section 102 of the *Probate Act* reads:

> "Where no provision is made in this Act or in the Probate Rules with respect to **practice or evidence** and insofar as this Act or the Probate Rules do not extend, the Civil Procedure Rules apply."
>
> [My emphasis]

[13] To like effect, s. 3 of the *Probate Court Practice, Procedure and Forms Regulations*:

> 3 (1) Where any **practice or procedure** respecting probate is not provided for by these Regulations or the Act, the Civil Procedure Rules apply.
>
> (2) Where any **practice or procedure** respecting probate is not provided for by these Regulations or the Civil Procedure Rules, a Court may make any order or decision concerning it that it considers necessary or appropriate in the circumstances.
>
> (3) **An order or decision** of a Court may be forwarded to the prothonotary of the Supreme Court who shall, on receipt of it, enter it as a record of the Supreme Court, and thereupon it becomes an order of the Supreme Court enforceable pursuant to the Civil Procedure Rules.
>
> [My emphasis]

[14] In summary then, where an Applicant seeks a declaration in a case such as the one at Bar, it seems that the Applicant could proceed on the basis of Rule 5.03

(Application in chambers on notice) and request relief pursuant to Rule 38.07(5); **or** argue that Rule 7.02 and 7.05 apply and that relief is requested under Rule 7.11(d), in relation to a decision taken by the Registrar of Probate. In the latter case process, the involvement of other parties (Rule 7.07) and the production of the record by the "decision making authority" (Rule 7.09), suggest that Rule 7 is less suited than is Rule 5 for situations such as in the case at Bar.

[15] In my opinion, the most appropriate **procedural** basis for proceeding in cases such as the one at Bar, is under the *Civil Procedure Rules*, and specifically Rule 5.03, as the Applicant has chosen to do in the case at Bar. This case involves not only consideration of Nova Scotia law and the Registrar's decision, but more significantly, the potential application of foreign law to a Nova Scotia Will. This is not the typical judicial review scenario. The more flexible Rule 5 process is better suited to determination of the issues herein.

[16] Jurisdiction of this Court to provide the remedy sought arises from its jurisdiction over the subject matter in question as derived from sections 7, 8, 97 and 99 of the *Probate Act* and pursuant to Part 4 (contentious matters) of the *Probate Court Practice, Procedures and Forms Regulations*.

[17] I am satisfied that the Application is properly before this Court, and that the Court has jurisdiction to deal with the issue and requested relief.

Evidence Presented at the Hearing

[18] This matter proceeded by way of Application in Chambers (appointed time) under CPR 5.03. The Applicant, Dr. Davies' ex-wife, and Respondent supported their positions by way of affidavits. No cross examination took place at the hearing. There was an agreement between counsel, that as a matter of fact and law, which I accept, that Dr. Davies' domicile was Nova Scotia, Canada at all material times. The affidavits filed were those of: Ms. Davies - sworn May 10, 2010, and October 14, 2010; Joint affidavit of Dr. Brian Shorey and Mrs. Andrea Shorey - sworn October 11, 2010; Neil Jacobi - sworn October 14, 2010; Justin Scale - sworn October 8, 2010; and Ms. Collins - sworn September 30, 2010.

[19] Also filed by consent, is Exhibit #1, being the complete 13 page expert report (i.e. letter dated November 25, 2009) authored by Catherine D. A. Watson of Boyne Clarke, Barristers and Solicitors in Dartmouth, Nova Scotia to Justice

Gobin of the High Court of Trinidad and Tobago respecting CV 2009 - 00597 in the matter of *The Estate of William Anthony Mosten Davies (deceased), Pamela Mary Davies v. Jennifer Collins* [an Application to revoke a Grant of Administration in Trinidad.] This report was jointly requested by the same parties herein, for the purpose of providing Justice Gobin proof of what effect a marriage *in extremis* in Trinidad would have on a prior will in Nova Scotia, **according to the laws of Nova Scotia**.

[20] Ms. Davies took the position that the issue of the effect of the marriage *in extremis* on the prior will in Nova Scotia should be characterized as a question of matrimonial law rather than a question of succession law. If so characterized, the governing law would be that of the intended matrimonial domicile [i.e. Trinidad] and not the deceased's domicile [i.e. Nova Scotia]. Ms. Davies would then be able to act as Executrix and be confirmed as sole beneficiary under the Last Will and Testament of Dr. Davies once the will was probated in Nova Scotia.

[21] Ms. Davies also made the argument that the marriage Dr. Davies and Ms. Davies in Trinidad on July 27, 2007 was not valid according to Nova Scotia law

and that therefore, there is no “marriage” as contemplated by s. 17 of the *Nova Scotia Wills Act*, R.S.N.S. 1989, c. 505 as amended.

[22] Ms. Collins vigorously defended her position that the marriage in Trinidad was formally and essentially valid according to the law of Nova Scotia and Trinidad, and that therefore the marriage was capable of, and did revoke the prior Will of Dr. Davies.

Legal Issues

1. Is the marriage of Dr. Davies and Jennifer Collins in Trinidad formally and essentially valid?

2. If the marriage is valid, what are the legal consequences of that marriage upon the Will made by Dr. Davies in 1989 in Nova Scotia?

Findings of Fact

[23] Based on the evidence presented and admissions made by the respective parties I am satisfied of the following facts:

1. Dr. Davies was born on October 11, 1939. He married Ms. Davies before they moved from the United Kingdom to Canada in 1971, and to Nova Scotia in 1975, where in 1976 they became Canadian citizens. On July 25, 1989, Dr. Davies executed a valid Last Will and Testament in Nova Scotia under which Ms. Davies was appointed executrix and sole beneficiary;

2. Dr. Davies and Ms. Davies lived separate and apart after 1993, and they were divorced on August 11, 2001 by the Supreme Court of Nova Scotia. The Corollary Relief Judgment thereto contained the Minutes of Settlement dated June 5, 2001 between the parties. - See Exhibit C to May 10, 2010 sworn affidavit of Ms. Davies.

3. Dr. Davies moved for work related reasons to Trinidad in 1999, and formed a relationship with Ms. Collins there in early 2000. That relationship continued throughout, and up until the time of Dr. Davies death.

4. On July 27, 2007, Dr. Davies was admitted to hospital in Trinidad, and while in dying condition he married Ms. Collins in what legislation in Trinidad characterizes as a "marriage *in extremis*";

5. Dr. Davies passed away on July 29, 2007 in Trinidad.

6. Both at the time of his marriage to Ms. Collins and his death, Dr. Davies' domicile was Canada, and more specifically Nova Scotia, whereas Ms. Collins' domicile was Trinidad.

7. On April 18, 2008, Ms. Collins was granted administration of the Estate of Dr. Davies as an intestate in Trinidad - Exhibit H to the May 10th, 2010 sworn affidavit of Ms. Davies;

8. Litigation was commenced by Ms. Davies against Ms. Collins in Trinidad as Ms. Davies' position was that the Will in Nova Scotia was valid, and the Grant of Administration in Trinidad and Tobago ought to be revoked. As a consequence, the High Court of Justice in Trinidad was provided with an expert opinion regarding "whether the marriage *in extremis* carried out in Trinidad and Tobago would be considered valid under Nova Scotian law for the purposes of revoking a pre-existing Will". This opinion was communicated by letter dated November 25, 2009 and authored by Catherine DA Watson of Boyne Clarke, Barristers and Solicitors - Exhibit #1 at the hearing. The opinion concluded that the marriage would revoke the prior will according to the law of Nova Scotia;

9. On December 17, 2009, Madame Justice Gobin rendered a decision in chambers without a hearing and issued an Order:

> "It is hereby ordered that:
>
> 1. The claimant's claim is dismissed.
>
> 2. The claimant to pay the defendant's costs in the sum of $14,500."

- Exhibit #Q to the May 10th, 2010 sworn affidavit of Ms. Davies. - See also paragraphs 40 and 45 of the affidavit;

10. After presenting Dr. Davies will in Nova Scotia to the Registrar of Probate, Ms. Davies received a January 26, 2010 letter from the Registrar which advised:

> "I am unable to process the grant of Probate for this Estate as a Grant has already been issued in another jurisdiction... it is my opinion that you will have to present the Will to the Court in Trinidad and Tobago and request the Grant of Administration be revoked. Once a new Grant is issued on the Will, you can then make an application for an Extra Provincial Grant of Probate in Nova Scotia."

- Exhibit K to the May 10th, 2010 sworn affidavit of Ms. Davies;

11. Dr. Davies and Ms. Collins have lived together in Trinidad since early 2000 and their existing and intended matrimonial domicile was Trinidad.

Legal Analysis

The validity of the marriage in Trinidad and Tobago

[24] In Castel and Walker, Canadian Conflict of Laws (Sixth Edition, Lexis Nexis Canada Inc. 2005 (updated to 2010)) [hereinafter "Castel"] the authors note under chapter 16 "Marriage", that whether or not a foreign marriage will be recognized in Nova Scotia requires a Court in Nova Scotia to examine the validity

of the form of the foreign marriage, - i.e. more specifically to examine its 1) formal validity and 2) essential validity.

[25] Under “Formal Validity” Castel states at p. 16-1:

> “Subject to certain exceptions [not relevant here] the formal validity of a marriage is governed by the lex loci celebrationis - the law of the place where the marriage is celebrated. The marriage is formally valid if it complies with the formal requirements of the lex loci celebrationis or the law indicated by the conflict of laws rules of that place for the formal validity of a marriage. This is so even if the marriage does not comply with the formal requirements of the law of the parties domicile or the conflict of laws rules of that law for the formal validity of the marriage... in other words, compliance with the lex loci celebrationis may be considered imperative and not permissive.”

[26] Under “Essential Validity - capacity and consent” at p. 16-7 Castel states:

> “There are two main doctrines concerning which law should govern capacity to marry:
>
> > The “dual domicile doctrine”,which requires each party to have capacity to marry under the law that governs their status before they married, and the “intended matrimonial home doctrine”, which requires the parties to have capacity to marry under the law of the place where they intend to establish their joint home, provided they do so within a reasonable time. It is not necessary for the parties to have capacity to marry under the law of the place where the marriage is celebrated.
>
> In Canada, judicial authority generally supports the view that capacity to marry is governed by the law of each party’s ante-nuptial domicile. **However, Canadian**

> **courts have sometimes referred to the intended matrimonial home doctrine**, which recognizes that the community in which the parties plan to live together as husband and wife is the one primarily interested in the validity of their marriage... The consent of the parties is a matter of the essential validity of a marriage. Thus, a marriage is invalid if under the law of either party's ante-nuptial domicile that party will lack consent."

[27] Exhibits E, F and J to the May 10th, 2010 sworn affidavit of Ms. Davies, contain certified documents from the Assistant Registrar General of Trinidad and Tobago certifying they are true and correct copies of entries in the marriage *in extremis* book in Trinidad.

[28] Although Ms. Davies' position in written arguments suggested skepticism at the integrity or validity of the marriage in Trinidad, I am satisfied as a matter of fact and law, that the marriage was formally and essentially valid according to the law of **both** Trinidad and of Nova Scotia. I note s. 42(2) of the *Evidence Act*, R.S.N.S. 1989 c. 154 as amended, also creates a presumption that if solemnization [in Trinidad] is proved then "such foreign marriage was duly solemnized in accordance with the foreign law".

[29] In all the circumstances, I find the marriage is formally and essentially valid.

[30] This leaves a residual question about whether a marriage *in extremis* is a "marriage" as contemplated by s. 17 of the *Wills Act*, R.S.N.S. 1989 c. 505 as amended, which reads:

> 17 Every Will is revoked by the marriage of the Testator except where
>
> (a) it is declared in the Will that the same is made in contemplation of such marriage:
>
> (b) the wife or husband of the testator elects to take under the Will by an instrument in writing signed by such wife or husband and filed, within one year after the testator's death, in the court of probate in which probate of such will is taken or sought to be taken; or
>
> (c) the Will is made in exercise of a power of appointment, when the real or personal property thereby appointed would not in default of such appointment pass to the heir, executor or administrator or the person entitled as next of kin.

[31] The *Interpretation Act*, R.S.N.S. 1989 c. 235, as amended, notes under the heading "Interpretation of words and generally":

> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> ...

> (5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[32] The parties were content to accept as proof of foreign law excerpts from the laws of Trinidad and Tobago as contained in Exhibits O and P of the May 10, 2010 sworn affidavit of Ms. Davies. I have no difficulty proceeding on this basis. I am supported in this further by Rules 54.01 and 54.04 of the *Nova Scotia Civil Procedure Rules* (2009) which read:

Rule 54 - Supplementary Rules of Evidence

54.01 (1) This Rule provides for rules of evidence and proof, in addition to those of the common law.

(2) Legislation that provides for rules of evidence or proof prevails over this Rule, to the extent the legislation is inconsistent with this Rule.

...

54.04 (1) The law of a foreign state may be proved in either of the following ways:

(a) reference to official publications of legislation, judicial decisions, and authoritative sources;

(b) expert opinion, introduced in accordance with Rule 55 - Expert Opinion and the rules of evidence.

(2) The law of a foreign state is presumed to be the same as the law of Nova Scotia, unless a party gives notice by a pleading that the law of a foreign state is in issue and proves that that law is not the same as the law of Nova Scotia.

[33] Although, the species of marriage known as “marriage *in extremis*” is not known to Canadian law, nor does it appear to be specifically referred to in English authority, the concept does exist “in the laws of all the Commonwealth Carribean territories” including the Islands of St. Christopher and Nevis, St. Vincent, St. Lucia, Dominica, Jamaica, Bahamas, Belize, the Cayman Islands, the Turks and Caicos Islands, Montserrat, Trinidad and Tobago, Antigua, Barbados, Grenada, The British Virgin Islands, Guyana, and on the Atlantic Island of Bermuda -

"Death Bed Marriages in the Commonwealth Carribean" N.J.O. Liverpool, (1986) Revue Générale de Droit, University of Ottawa pp. 537 - 552. The author, a well known Carribean legal Scholar notes that:

> (i) "It is quite clear that the historical origin of these provisions is religious... Canon 1079 permits a parish priest, when danger of death threatens, to grant dispensation to his parishioners wherever they are residing and to other persons who are actually present in his territory, from observing the usual form of the celebration of marriage." - p. 550, and
>
> (ii) "Finally, since the marriage has the effect of revoking a will only if it takes place in Barbados, Belize, the Cayman Islands, Guyana and Jamaica, litigation of the matter may have been avoided had the marriage been solemnized in one or other of the remaining thirteen Commonwealth Carribean Territories." - p. 552.

[34] According to the Laws of Trinidad, Section 42(1) Marriage Act, chapter 45:01 as amended, a marriage *in extremis* is defined as:

> "... the ceremony of marriage between persons, without notice being given of the intended marriage of such persons, or without a certificate duly issued, or before the issue of such certificate, or after the expiration of 6 months from the entry of notice of such marriage, if both the parties between whom the ceremony of marriage is performed are, at the time of the performance thereof, legally competent to contract marriage and are of full age, and also that one at least of them, to the best of the knowledge and belief of the marriage officer and of the other person signing the certificate herein after required shall be, at the time of the performance of such ceremony, in a dying state, and that such dying person is a member of the religious communion or denomination to which such marriage officer belongs."

[35] Notably, s. 42(4) reads:

> "No marriage solemnized under this section shall operate as a revocation of any will."

[36] Similarly, s. 38(1) of the *Wills and Probate Act* chapter 9:03 as amended, reads:

> Subject to the provisions of sub-section 2 and 3 of this section, every will made by a man or woman shall be revoked by his or her marriage:
>
> > provided that no marriage *in extremis* solemnized in accordance with the provisions of the Marriage Act shall operate as a revocation of any will.

[37] An ordinary marriage in Trinidad, similar to a marriage in Nova Scotia, revokes a prior Will. However, the peculiar characteristics of a marriage *in extremis*, qualify that form of marriage in Trinidad as **not** revoking a prior Will.

[38] In ***MacDougall v. Nova Scotia (WCAT)***, 2010 NSCA 92 [2010] N.S.J. No. 579 (CA) our Court of Appeal had to interpret s. 27(1)(b) of the *Nova Scotia Workers Compensation Act*. At issue was its "true meaning" and whether it intended that the Estate of a Nova Scotian worker killed in Newfoundland by a

colleague, could claim in Tort in Newfoundland in spite of the Nova Scotia legislation which appears to prohibit such suits in Nova Scotia. The Court found that "compensation claimable by the deceased worker under the Nova Scotia statute includes the right to commence a Newfoundland tort action".

[39] The Court's approach to the statutory interpretation of Nova Scotian legislation is relevant to my task of interpreting s. 17 of the *Wills Act*. As MacDonald, C.J.N.S. stated for the Court:

> The Supreme Court of Canada had endorsed the modern approach to statutory interpretation as proposed by Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87:
>
> > ... the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].
>
> - at para. 28.

[40] As suggested by the Nova Scotia *Interpretation Act*, the history of s. 17 of the *Wills Act*, the consequences of a particular interpretation, as well as the mischief to be remedied and the object to be attained, must all be considered.

[41] In Canada, with the exception of the province of Quebec, “A subsequent marriage automatically revokes all existing Wills and codicils without the Testator having the slightest intention to revoke them.” - James MacKenzie, Feeney’s Canadian Law Of Wills, 4th Edition, (Looseleaf, Markham, Ont: Lexis Nexis 2000 (updated to 2010)) at para. 5.9.

[42] Although the first statute dealing with probate matters was passed by the Nova Scotia House of Assembly in 1758, [being an Act relating to Wills, Legacies and Executors and for the Settlement and Distribution of the Estates of Intestates, SNS 1758 c. 11], it did **not** have a provision that revoked a Will upon a subsequent marriage.

[43] It was not until 1840 that such a provision was passed by the Nova Scotia Legislature.

[44] Notably, the wording of s. 17 of the *Wills Act* has its origin in an 1837 British statute. The statutory law in England was based on case law from the ecclesiastical and common law courts which created the “doctrine of implied revocation”. Those Courts developed two rules or applications of the doctrine of

implied revocation: “1. That marriage plus the birth of issue revoked a prior Will in the case of a male testator and; 2. That marriage alone revoked a prior Will in the case of a female testatrix.” - W. A. Graunke and J.H. Beuscher, “The Doctrine of Implied Revocation of Wills By Reason of Change in Domestic Relations of the Testator.” (1930) 5 Wis. L. Rev. 387.

[45] At least initially the rationale for these two rules was different:

> “In the case of the male testator, it was said with a complete change in his domestic situation, and the appearance of a new heir, he was presumed to intend a revocation of his prior will; at first this presumption was rebuttable, but eventually the courts came to consider it as a conclusive rule of law, ‘a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family’
>
> - Elizabeth Durfee “Revocation of Wills By Subsequent Change in the Condition or Circumstances of the Testator.” (1942) 40 Mich. L. Rev. 406.

[46] This presumption was obviously linked to the judicial belief that a man’s “new” family should be preferred to his “old” family.

[47] Elizabeth Durfee, in her article further stated, that the rationale for a female testatrix was that:

> "a married woman was incapable of making a will (except as to her separate equitable Estate or in the exercise of a power or by antenuptial contract) and hence was incapable of revoking one already made" - at page 407.

[48] In 1837, the revocation-of-wills-by marriage rule was codified in England. Section 18 of the *Wills Act*, *1837* (UK), 7 Will IV & 1 Vict, c. 26 read:

> Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal Estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions).

[49] In 1840, the Nova Scotia Legislature passed An Act Concerning Wills S.N.S. 1840, c. 25. Section 15 of that Act read:

> That every will made by a man or a woman shall be revoked by his or her marriage, (except a will made in exercise of a power of appointment,) when the Real or Personal Estate thereby appointed would not, in default of such appointment, pass to his or her Heir, Customary Heir, Executor, or Administrator, or the person entitled as his or her next of kin, under the aforesaid Act of this Province, for the settlement and distribution of the Estates of Intestates, or any Act made in addition to or to amend or alter the same.

[50] By 1851 the language had been modified slightly. Section 13 of the *Wills of Real and Personal Estate Act*, R.S.N.S. 1851, c. 114 read:

> All wills shall be revoked by marriage, except a will made in exercise of a power of appointment, when the real or personal Estate thereby appointed would not in default of such appointment pass to the heir, executor or administrator, or the person entitled as next of kin.

[51] It was not until the period between 1884 and 1900 that two additional exceptions were added to the rule. Section 18 of the *Wills Act*, R.S.N.S. 1900, c. 139 read:

> "Every Will shall be revoked by the marriage of the testator, except,
>
> a) where it is declared in the Will that the same is made in contemplation of such marriage;
>
> b) where the wife or husband of the testator elects to take under the Will by an instrument in writing signed by such wife or husband and filed, within one year after the testator's death, in the Court of probate in which probate of such will is taken or sought to be taken; or
>
> c) where the Will is made in exercise of a power of appointment, when the real or personal property thereby appointed would not in default of such appointment pass to the heir, executor or administrator, or the person entitled as next of kin."

[52] While it seems that the addition of these exceptions appear to have placed the focus more on the testator's intention, than the morality of preferring the "new" family over the "old", recent commentary including that from the Law Reform

Commission of Nova Scotia reiterates that revocation of a Will by marriage is intended to prefer the new family over the old: Final report: Reform of the Nova Scotia *Wills Act* (November 2003), online: The Law Reform Commission of Nova Scotia - http://www.lawreform.ns.ca/Downloads/Wills_Act_Final_Report.pdf at 28-29.

[53] The word "marriage" is not ambiguous, and particularly not so as it is situated in s. 17 of the *Wills Act*. Its ordinary sense, can easily be read harmoniously with the scheme and object of the Act. A consideration of the history of the Act explains the presence of s. 17.

[54] In summary, I conclude that the proper interpretation of "marriage" in s. 17 of the *Wills Act*, does not intend to distinguish between marriages based on whether they revoke a prior will or not, and that therefore, a marriage *in extremis* in Trinidad, falls within the definition of "marriage" in s. 17 of the *Wills Act.*

Should the Law of Trinidad and Tobago or the Law of Nova Scotia apply to determine the effect or consequence of a marriage *in extremis* in Trinidad and Tobago on the validity of a Will made in Nova Scotia?

[55] I have been unable to locate any cases where this specific issue has been raised. This case therefore necessarily requires a careful examination of the competing considerations inherent in the factual matrix presented, as well as the conflict of laws rules that seem to prevail at present. Those rules have been developed over centuries.

[56] As a consequence of their ancient origins in English law, they also represent some anachronistic perspectives on gender issues, and property distinctions, rooted in common law and statutes which are of tenuous persuasiveness and applicability to Canadian jurisprudence. Moreover, this tension between "traditional" and "modern" approaches to one's view of gender and property issues, challenges the continued acceptance of the underlying rationales for **some** "traditional" conflicts of law rules, and therefore the continued applicability of such "traditional" rules to cases such as the one at Bar.

[57] As stated above, it is my view that any form of marriage that is found to be formally and essentially valid according to Nova Scotia law, will constitute a "marriage" within the meaning of s. 17 of the *Wills Act* and therefore be **capable of** revoking, by operation of law, any prior Will of such marrying party.

[58] However, there is a conflict in the laws between the treatment accorded to a marriage *in extremis* in Trinidad, and its **effect** on a prior Will there, and the treatment of such marriage *in extremis* and its **effect** on a Will in Nova Scotia. In Trinidad, the Will would survive the marriage; in Nova Scotia the Will would be revoked by the marriage.

[59] It is important in my view to appreciate that it is not the different forms of marriage which create the conflict, but the **consequences** of the form of marriage in Trinidad upon a prior Will, which are distinct from the consequences on a prior Will according to Nova Scotia law.

[60] Since it is those consequences, if any, upon a Will, and because a Will determines succession to a testator's Estate, the core issue in this case traditionally should be viewed as a "succession" issue and not a matrimonial law issue.

[61] In light of that characterization, the issue would therefore properly be stated as a succession law conflict of laws issue, and those rules should be applied to the case at Bar.

[62] Treating the core issue as a "succession" issue is also consistent with Nova Scotia legislation which might apply to a spouse in the position of Ms. Collins. That legislation is designed to ensure that a spouse of a deceased person fairly receives a reasonable financial interest in the Estate. It appears the rationale for s. 17 of the *Wills Act* to prefer the "new family" is also evident in both the *Intestate Succession Act* and *Testator's Family Maintenance Act*.

[63] If the Will in Nova Scotia is **not** revoked, then Ms. Collins is entitled to make a claim as a "dependent" which includes a surviving spouse or "widow" under ss. 2(b) and 3 of the *Testator's Family Maintenance Act*, R.S.N.S. 1989, c. 465 as amended. This legislation is intended to allow a Court to make an order for the adequate and proper maintenance and support of a "dependent" who has not been provided for the in the Last Will and Testament of the Testator. In the case at Bar, the Last Will and Testament of Dr. Davies provides that his entire Estate is to go to his first wife, Ms. Davies, and that she is to be the Executrix of the Estate.

[64] If Dr. Davies had died intestate, pursuant to the *Intestate Succession Act,* R.S.N.S. 1989, c. 236 as amended, his entire Estate would go to his "surviving spouse" Ms. Collins, as there are no children.

[65] Thus, in so far as it can pronounce upon Estate assets within the jurisdiction of Nova Scotia, whether the Will is revoked or not, Nova Scotia law foresees possible avenues of redress for Ms. Collins in either event, in spite of the fact that the "marriage" was of an extraordinary nature, and could have an extraordinary consequence upon any Last Will and Testament of Dr. Davies.

[66] **However**, characterising the issue as one of "succession" for conflict of laws purposes leads one to a split in the applicable connecting factors: the *lex situs* will govern immovables and the law of the deceased's domicile will govern movables. It is therefore preferable in my view to accept Dicey's suggestion that whether a marriage revokes a will should be characterised as an independent category of conflict of laws in its own right, with the same choice of law rule (as if it were a matrimonial law issue): That the law of the Testator's domicile **at the time of marriage** (revocation) governs (the succession to the Estate's) movables **and** immovables. Dicey para. 2-039.

[67] Next it will be useful to examine:

1. The views of text writers;

2. The cases cited by the parties from which they argue the general principles they say are applicable to the case.

Text Writers

(i) Dicey on The Conflict of Laws

[68] Dicey, Morris and Collins on the Conflict of Laws, 14th edition, (London: Sweet and Maxwell, 2006) ("Dicey") are a leading English authority. In one of its introductory chapters entitled: "Characterization and the Incidental Question" , Dicey states, regarding the nature of the problem:

> **Characterisation is a fundamental problem in all traditional systems of the conflict of laws**, that is to say the systems applicable in England and other European countries. It results from the fact that the rules which have been evolved to deal with choice-of-law problems are expressed in terms of juridical concepts or categories and localising elements or connecting factors. This structure may be illustrated by considering some typical rules of the English conflict of laws: "succession to immovables is governed by the law of the *situs*"; "the formal validity of a marriage is governed by the law of the place of celebration"; "capacity to marry is governed by the law of the parties' domicile." **In these examples, succession to immovables, formal validity of marriage and capacity to marry are the categories, while *situs*, place of celebration and domicile are the connecting factors**.

The problem of a characterization consists in determining which juridical concept or category is appropriate in any given case. Assume, for example, that it is claimed that a marriage is void because the parties did not have the consent of their parents: should this be regarded as falling into the category "formal validity of a marriage" or should one take the view that it comes under "capacity to marry"? The answer could clearly determine the outcome of the case: this would be so if the law of the parties' domicile required them to obtain the consent of their parents, while the law of the place where the marriage was celebrated did not.

It might seem possible to solve the above problem simply on the basis of normal legal reasoning - though the untutored assumption of most lawyers that parental consent relates to capacity is not in fact the solution adopted by the English courts - but the next problem may seem more difficult. **Assume that a testator domiciled in England makes a will disposing of land in Utopia** (such will not being made in contemplation of marriage) **and subsequently marries. He dies shortly afterwards. Is the will revoked by the marriage? Under the law of England it will be, but we will assume that this is not the case under the law of Utopia. In such a situation, the answer to the question whether the will is revoked could depend on whether the issue is characterised as one relating to succession or to matrimonial law (proprietary consequences of marriage)**. [essentially the situation in the case at Bar]

It will be seen from the above examples that **the problem of characterisation arises whenever a system of conflict of laws is based on categories and connecting factors**. In such a system, it is always necessary to determine which is the appropriate category in any given case. Since the English rules of the conflict of laws are based on categories and connecting factors, there is no way of avoiding the problem, though it may be ameliorated by selecting narrower and more specific categories. **Thus the problem set out in the previous paragraph would disappear if there were a category "revocation of a will by subsequent marriage**." - Dicey - Chapter 2, pp. 37 - 38 (14th ed.)

[My emphasis]

[69] Later Dicey notes that in English law "the succession to moveables of an **intestate** is governed by the law of his domicile at the time of his death" [Rule 140, para. 27 R-010] and "succession to the immovables of an i**ntestate** is governed by the law of the country where the immovables are situated (*lex situs*)" [Rule 141, para. 27R-015]. [My emphasis]

[70] Regarding intestate succession, Dicey explains **why a single Rule should be adopted for moveables and immovables**:

> "According to the traditional English rule of the conflict of laws, intestate succession to immovables is governed by the *lex situs*. This rule made some sense before 1926 when there were two systems of intestate succession in English domestic law, one for realty and the other for personal property. It makes **less sense** today when England and most, if not all, other countries in the world have adopted one system of intestate succession for all kinds of property. Moreover, outside the common law world, the *lex situs* rule for intestate succession **to** land has been abandoned almost everywhere except in Austria, Belgium and France. **It has therefore been suggested that the *lex situs* rule has outlived its usefulness and should be abandoned in favour of the law of the intestate's domicile. In modern law it is a quite unnecessary complication to have different conflict rules for intestate succession to movables and immovables.**" - para. 27-016 at p. 123.
>
> [My emphasis added]

[71] Perhaps it is time for **one rule** to govern succession law of testate **and** intestate deceased persons? There is no compelling reason why different conflict

of laws rules should govern immovables and movables. I think that time has come; reform is long overdue. The domicile of the deceased at the relevant time should govern in all cases.

[72] If intestate succession is to be governed by the conflict of laws rule of the testator's domicile, then it is equally appropriate in cases of testacy and whether a marriage revokes an earlier Will.

[73] In chapter 27 "Succession", Dicey states:

> (6) Revocation
>
> Rule 150 - Subject to the exception hereinafter mentioned, the question of **whether a will has been revoked depends on the law of the testator's domicile at the date of the alleged act of revocation.** - Para. 27R-084.
>
> [My emphasis]

[74] Footnote 80 to that Rule reads:

> **This Rule applies to the revocation of wills of movables and immovables**. However, except in the case of revocation by subsequent marriage discussed below [paras. 27-087], there is no authority regarding immovables and it is

possible that the *lex situs* may apply in a case of revocation by burning, tearing or destroying the will.

[My emphasis]

[75] Dicey goes on:

The question what determines whether a will has been revoked is one of considerable nicety and does not appear to have received much discussion except as regards revocation by subsequent marriage.... Therefore, it is submitted that the law of the testator's domicile at the time of the alleged revocation should determine whether his will has been revoked. But in the absence of English authority, this submission must be made with hesitation.

Revocation by Subsequent Marriage [para. 27 - 087]

Under the law of some countries (for example England under s. 18 of the *Wills Act*, 1837) a marriage ipso facto revokes any will made before marriage by either party to the marriage, while under the law of other countries (for example Scotland or France) marriage does not revoke a will made before marriage either by the husband or the wife. As far as the conflict of law is concerned, in *bonis Reid* (1866) LR 1 P & D 74 was decided on the basis of s. 3 of *Lord Kingsdown's Act* (now repealed), which provided that no will or other testamentary instrument would be revoked by reason of any subsequent change in the domicile of the testator. **The Rule was, however, given a different foundation by Re: *Martin* [1900] P 211, in which the Court of Appeal held that revocation of the will by subsequent marriage is to be characterized as a question of the matrimonial, rather than testamentary law. Where the testator was a man**, this produced the same result since he was accepted that the proprietary consequences of marriage were **determined by the law of the husband's domicile at the time of marriage. Where the will was made by a woman**, it meant that the governing law was that of her husband's domicile at the time of marriage. **Since at that time, a woman automatically took her husband's domicile on marriage, this came to almost the same thing**: if the relevant time was immediately after the marriage, her domicile would of necessity be the same as his. **The position changed, however, on January 1, 1974 when the *Domicile and Matrimonial***

> ***Proceedings Act,* 1973 came into force, since this allowed a woman to retain a different domicile after marriage.** It is no longer acceptable that the revocation of a woman's will should be determined by the law of her husband's domicile. In chapter 28, **it is suggested that the abolition of the Rule concerning a wife's domicile necessitates a change in the Choice of Law Rule for determining the proprietary consequences of marriage: it is proposed that, where the husband and wife are domiciled in different countries, the governing law should be that of the country with which the parties and the marriage have their closest connection. It might be thought that this should now be the law to determine whether a will is revoked by marriage. However**, the new Choice of Law Rule was made necessary by the fact that the Matrimonial Property Regime must be determined by the same system of law for both husband and wife. **This is not the case with regard to the question whether a marriage revokes a will; therefore, the governing law for the latter remains that of the testator or testatrix's domicile immediately after the marriage.** This is the Rule which has been applied in all the decided cases, but it now has a different effect in view of the fact that a wife can retain a separate domicile. (Footnote 95)
>
> - pages 1264 - 1265 [My emphasis added]

[76] Footnote 95 reads:

> **See also above para. 2-038 where it is suggested that a better way of achieving the same result would be to regard the question of revocation of a will by subsequent marriage as a separate conflict category, the connecting factor being the domicile of the testator or testatrix at the time of marriage.** Alternatively, the relevant category could be regarded as "revocation of a will by means other than the execution of a new will": this would correspond to Rule 150.
>
> [My emphasis added]

[77] As referenced in Footnote 95, Dicey stated in Chapter 2:

Conclusions

In essence, characterisation is a process of refining English conflict rules by expressing them with greater precision. If the relevant rule is, for example, "succession to movables is governed by the *lex domicilii* of the deceased," characterisation involves deciding precisely which issues should be governed by the *lex domicilii*. The term "succession" is simply a useful way of referring to the bundle of issues that are regarded as appropriate for determination by the *lex domicilii*. To believe that at term such as "succession" has an objectively defined meaning which exists independently of the purpose for which it used is mere conceptualism. It is, therefore, pointless to search for the "true" meaning of the term. Moreover, since the purpose of the exercise is to reformulate rules of English law, it is contrary to principle to look to foreign law for the answer. This seems to have been recognised by the English courts. For example, in *MacMillan Inc v. Bishopsate Investment Trust Plc (No. 3)*, a recent English case in which the issue of characterisation received extended judicial discussion, Auld L.J. accepted that "the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence."

The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of the substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created. As Mance L.J. said in *Raiffeisen Zentralbank Öster-reich AG v Five Star General Trading LLC*, when dealing with the characterisation of issues, **"The overall aim is to identify the most appropriate law to govern a particular issue.** The classes or categories of issue which the law recognises at the first stage [i.e., for characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised...".

Revocation of a will by the subsequent marriage of the testator will serve as an example to demonstrate this methodology. The English rule, which is found s.18 of the Wills Act 1837, as substituted by s.18 of the Administration of Justice

Act 1982, is subject to certain exceptions, one of which is that if it appears from the will that, at the time when it was made, the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, it will not be revoked by his marriage to that person. This suggests that the purpose of the rule is to give expression to the presumed intention of the testator: except where the will is made in contemplation of marriage, one might assume that the change of circumstances brought about by the marriage will be such that th average testator would want to make a different disposition of his property. Scottish and French law take a different view. To which testators is it appropriate to apply the English Rule**? The best way of answering this question is to ask which testators would be most likely deliberately to have refrained from revoking their will because they thought it would be automatically revoked by reason of the English rule. The answer must be: those testators who, at the time of their marriage, thought that their affairs would be governed by English law. This suggests the law of the domicile at the time of marriage, both for movables and immovables.**

This result cannot be attained by characterising the question as relating to **succession** (essential validity of a will). In such a case, the governing law would be, in the case of movables, the law of the testator's domicile at death and, in the case of immovables, the *lex situs*. **If** the question is characterised as a matter of **matrimonial** law, as was done by the Court of Appeal in *Re Martin*, the applicable law would traditionally have been that of the *husband's* domicile at the time of marriage. Where the will is that of a woman, this would be unacceptable today. **In Chapter 28 it is suggested that, where the parties to a marriage are domiciled in different countries, the matrimonial property regime should today be determined by the law of the country with which the parties and the marriage have their closest connection. If revocation by subsequent marriage is characterised as being an aspect of the matrimonial property regime, this is the law that would govern. There is, however, an important difference between the matrimonial property regime in general and revocation of a will: the former must be governed by the same system of law for both spouses; the latter need not be. Consequently, there is good reason for regarding it as a special aspect of matrimonial law, with its own choice-of-law rule, the law of the domicile of the testator or testatrix at the time of the marriage. Alternatively, it could be regarded as an independent conflict category in its own right (with the same choice-of-law rule). If the question had been free from authority, the latter would have been the better solution.**

- Dicey, Chapter 2 - pp 48-50 (14th ed.)

[78] Dicey concludes:

> **It follows from the characterization adopted in *Re: Martin* that the same Rule should apply to wills of immovables:** "If the Rule as to revocation of a will by marriage is part of the matrimonial law and not of the testamentary law, it is difficult to see why or how there can be any distinction in this respect between movables and immovables. [citing from Davies v. Davies (1915), 24 D.L.R. 737 at p. 740 (Alta. S.C.)].
>
> - Dicey, Chapter 27, para. 27 -089 (14th ed.) p. 1265
>
> [My emphasis added]

(ii) Castel - Canadian Conflict of Laws

[79] In Castel and Walker, Canadian Conflict of Laws (6th Edition) Markham, Ontario, Lexis Nexis Canada Inc. 2005 (updated to 2010) ("Castel") the authors state in chapter 26 "Estates Administration":

> The administration of a deceased person's assets is governed the law of the State or of Province from which the personal representative derives his or her authority to collect them....with respect to questions of the applicable law, **administration does not include the distribution to beneficiaries of the deceased's net assets after paying of all debts, duties and expenses; this is a matter of succession, which is governed by separate rules** [see chapter 27].

[My emphasis]

[80] In chapter 27 entitled “Succession”, Castel states:

> “A Canadian common law Court will follow the decision of the Court of the deceased’s last domicile upon any question with regard to the succession to his or her movables, where ever situated. It will follow the decision of the Court of the place where the deceased’s immovables are situated upon any question with regard to the succession of those immovables.” (p. 27-2)

[81] Castel goes on to state:

> All the questions of succession to an **intestate’s** movables are governed by the law of his or her domicile at the time of death, and to his or her immovables by the *lex situs*. **However, it has been held that the deceased’s assets, irrespective of whether they are movables or immovables, should be assembled under the administrator’s umbrella and, after setting aside the highest preferential share permitted under the respective jurisdiction where the assets are located, the residue of the Estate should be divided by the applicable law of the deceased’s usual or habitual place of residence.** This approach prevents the surviving spouse from inheriting disproportionately by accumulating preferential shares where movables and immovable are located in several jurisdictions. Arguably, awarding the highest preferential share to the surviving spouse may be unfair where the law that provides it is that of a jurisdiction that has little or no connection to any of the parties. **Still, as the situation suggests, the application of a single law to intestate succession, irrespective of the nature of the assets involved, simplifies the distribution of the deceased’s assets.** (p. 27-5)

[My emphasis]

[82] Under the title “Revocation by Marriage”, Divorce or Annulment”, Castel states:

> **The question whether marriage revokes a previous will** of movables is governed by the law of the testator’s domicile at the time of the marriage (Footnote 61)....The question whether marriage revokes a previous will of immovables is governed by the *lex situs* (Footnote 64).
>
> [My emphasis]

[83] Footnote 61 reads in part:

> ...the rule of English law which makes a Will null and void on marriage is part of the matrimonial law and not of the testamentary law: Re: *Martin; Loustalan v. Loustalan*, [1900] P. 211 at 240 (C.A.); Re: Howard [1924] 1 D.L.R. 1062 at 1071 (Ont. High Court).

[84] Footnote 62 refers to:

> ...Re: *Martin; Loustalan v. Loustalan*, [1900] O, 211 (C.A.)....*Seifert v. Seifert*, [1914] O.J. 154, 23 D.L.R. 440 (S.C.); Davies v. Davies (1915), 24 D.L.R. 737 (Alta. S.C.).

[85] And lastly, Footnote 64 reads in part:

> Re: *Martin, Loustalan v. Loustalan*, [1900] P. 211 (C.A.); however, to the contrary see *Davies v. Davies* (1915), 24 D.L.R. 737 at 740 (Alta. S.C.) and Re:

> *Howard*, [1924] 1 D.L.R. 1062 (Ont. High Court); also Re: *Covone Estate*, [1989] B.C.J. No. 2338, 36 E.T.R. 114 (S.C.) (Law of Matrimonial Domicile applied).

[86] As these excerpts demonstrate, the text writers comments reflect a diversity of opinion regarding the appropriate Conflict of Laws Rules applicable to cases involving the question of whether marriage should revoke a prior Will.

[87] Dicey states:

> ...the governing law for [whether a marriage revokes a will] remains that of the testator's or testatrix's domicile immediately after the marriage.
>
> ...it follows from the characterization adopted in Re: Martin [Loustalan v. Loustalan [1900] P. 211 (C.A.)] that the same Rule should apply to wills of immovables. (para. 27-087; p. 1265)

[88] Similarly, Dicey stated:

> Therefore, it is submitted that the law of the testator's domicile at the date of alleged revocation should determine whether his will has been revoked. But in the absence of English authority, this submission must be made with hesitation. (para. 27-086; p. 1264)

[89] Castel, in contrast, suggests that the law that governs whether a previous Will is revoked by a marriage depends on whether it is the movables or

immovables under the Will which are at issue. That is, if movables are concerned, it will be the law of the testator's domicile at the time of marriage which governs, whereas if immovables are in issue, it will be the *lex situs* that governs (para. 27.4(i)at p. 27-11).

[90] In tabular form these views may be represented as follows:

	intestate succession (no will)	testate succession (will)
Movables	law of domicile at death governs [Dicey + Castel agree]	law of domicile at time of revocation (marriage) governs [Dicey + Castel agree]
Immovables	*lex situs* of property governs [but Dicey + Castel agree that law of domicile at death **should** govern immovables too]	law of domicile at time of revocation (marriage) **should** govern - [Dicey] *lex situs* of property governs [Castel]

N.B. - Castel suggests that a single approach/rule should be applied to movables and immovables in cases of intestate succession - p. 27-5.

- Dicey suggests that a single rule/approach should be applied to determine whether a will is revoked by marriage, regardless of whether immovables or movables are involved - para. 27 - 087 - p. 1265.

[91] For movables and immovables, it would seem consistent to require the same rule to apply to the question of whether the law of the testator's domicile (movables) **or** the *lex situs* (immovables) should apply to govern whether a Will is revoked by marriage. It is most logical for that single rule to be the domicile of the testator at the relevant time (time of the marriage). This is the proper approach to this issue in my opinion but it has not, as yet, been endorsed in any cases. The cases cited by the Applicant all reflect the Courts' unease with the traditional rules, not because of philosophical reasons, or on a principled basis, but rather because the outcomes based on those traditional rules seem illogical or contrary to the equities in the cases.

[92] I note that some problems of the "search for the applicable law" have been addressed in the *International Wills Act*, S.N.S. 2000 c.7 (in force may 27, 2001 - see Royal Gazette Part 1 vol. 212 No. 18 April 30, 2003). Unfortunately, while that Act and the underlying "Convention Providing a Uniform Law on the Form of An International Will", go some distance to create basic uniform standards to allow **the form** of Wills to be more acceptable as between countries, the issue herein of

revocation of a Will is specifically referred to as being “subject to the ordinary rules of revocation of Wills” - Article 14 Convention.

[93] I find most appealing the opinion of Dicey that the effect of a marriage on a will should be governed by the law of the domicile of the testator/testatrix at the date of marriage, which should be considered “an independent conflict category in its own right (with the same choice-of-law rule)” applying to movables and immovables - **Dicey** 14th ed. p. 50.

[94] Notably, a close examination of the cases cited in the footnotes to these competing provisions in **Dicey** and **Castel** contain a number of the authorities cited by the parties in the case at Bar:

1. *Re: Martin, Loustalan v. Loustalan*, [1900] P. 211;
2. *Seifert v. Seifert*, [1914] O.J. No. 154, 23 D.L.R. 440 (C.A.);
3. *Davies v. Davies* (1915), 24 D.L.R. 737 (Alta. S.C.);
4. *Re: Covone Estate*, [1989] B.C.J. 2338, 36 E.T.R. 114 (S.C.);
5. *Allison v. Allison*, [1999] 3 W.W.R. 438 (1998), 23 E.T.R. (2nd) 237, [1998] B.C.J. 2274 (S.C.).

[95] Let me therefore next turn to the authorities cited by the Parties in the case at Bar.

Position of the Parties

[96] The Applicant, Ms. Davies, argues in her written brief:

> From the foregoing review, I conclude the Canadian courts have tended to favour this analysis:
>
> 1. The validity of a will dealing both with real estate and other assets should be governed by the same law.
>
> 2. The effect of marriage on a will should be determined as a matter of matrimonial law in the matrimonial domicile.
>
> 3. The matrimonial law will be the law of the place where the marriage occurred so long as the spouses have a real and substantial connection with that place.

[97] Assuming that this is the correct position at law, on the facts of the case at Bar, the law of Trinidad as to the consequence of the marriage upon the prior Will **would govern** and the Will would not be revoked, and Ms. Davies could properly

be appointed Executrix and take as sole beneficiary under the Will. Ironically, the effect of adopting what Ms. Davies argues is the matrimonial law characterisation / matrimonial domicile rule in the case at Bar, will be to give preference to Dr. Davies' ex-wife over his present wife, thus defeating the apparent rationale for that rule. I suggest the rationale for the matrimonial domicile rule (that the law of the domicile of each spouse at the time of the marriage should govern whether the will is revoked by marriage) is to have the now married surviving spouse's matrimonial property regime jurisdiction also be the jurisdiction whose laws govern whether the deceased's spouse's will is revoked by that marriage. In the case at Bar, that rule deprives Ms. Collins of her rights as a spouse of an intestate in Trinidad solely because of the quirk that her marriage to Dr. Davies was a marriage *in extremis,* and that her domicile was Trinidad while Dr. Davies' was Nova Scotia Canada.

[98] Ms. Davies also notes that if the Will is valid, then the real estate in Trinidad, which would normally be governed by the *lex situs*, would in this case coincidentally also be governed by the law of Trinidad if the law of matrimonial domicile (i.e. Trinidad) was the appropriate law to govern whether the Will was revoked or not. I note that that will **not** be true of the property at Penarth in Wales, succession to which will be governed by laws of the United Kingdom.

[99] Ms. Davies also argues that "as a matter of logic and also of public policy, as well as reflecting contemporary mores of equality" the approach taken by the courts in British Columbia in the cases *Re: The Estate of Covone*, and *Allison,* are persuasive and correct.

[100] In response, Ms. Collins argues that the mere fact of a "marriage" is what is contemplated by s. 17 of the Nova Scotia *Wills Act*, and the distinction in Trinidad between an ordinary marriage and an extraordinary marriage such as one "*in extremis*" and in its attendant different consequences upon the validity of a prior Will, are distinctions that ought **not** to be made in deciding whether Dr. Davies' Will in Nova Scotia was revoked. Ms. Collins further notes that the cases cited by the Applicant deal with cases within the Canadian Federation and that those circumstances are sufficiently distinguishable to render those cases of no assistance to the Court in the case at Bar. Although the Ms. Collins concedes *Davies v. Davies* involved the State of Montana and Alberta, they distinguish it on its facts.

[101] Ms. Collins also notes that s. 19A of the *Wills Act* was proclaimed in force as of August 19, 2008, and that the legislation is an indication that the Nova Scotia

Legislature wished to avoid the very problem herein: where an individual long ago divorced, who commences a new relationship on a common law basis, but neglects to obtain a new Will, may discover after their re-marriage that the prior Will is still not revoked. Section 19A of the *Wills Act* now reads:

> Notwithstanding ss. 18 and 19, except where a contrary intention appears by the Will or a Separation Agreement or Marriage Contract, where, after the testator makes a Will, the testator's marriage is terminated by a judgment absolute of divorce or declared a nullity, a) a devise or bequest of a beneficial interest in property to the testator's former spouse; b) an appointment of the testator's former spouse as executor or trustee; and c) the conferring of a general of special power of appointment on the testator's former spouse are revoked and **the will shall be construed as if the former spouse had predeceased the testator**.
>
> [My emphasis added]

[102] It should be noted that Ms. Collins is not arguing that s. 19A should be applied by this Court.

[103] In this case, there were Minutes of Settlement between Dr. Davies and Ms. Davies which became part of a consent Corollary Relief Judgment and which specifically noted in part:

> 8. 11 Albany Court, Penarth, United Kingdom

> The wife shall within 18 days from the date of signing this agreement transfer her interest in the property located at 11 Albany Court, Penarth, United Kindgom, and she shall execute all documents necessary to transfer the said property to the husband. The husband and wife covenant and agree that the wife may remove her personal belongings from the said property at a time convenient to her.
>
> 9. Release of Right to Estate
>
> Each of the parties hereby renounce all rights which he or she has the administration of the other's Estate, and each party hereby releases and discharges the heirs, executors, administrators and assigns of the other's Estate from any claim which he or she has, can or may have to any share of that Estate, and subject to any disposition made by will, each party covenants and agrees the other's Estate shall be distributed as if he or she predeceased the other, notwithstanding the provisions of the Testator's Family Maintenance Act, the Matrimonial Property Act or any other statute now or hereinafter enforced whereby a husband or wife is or may be given, the right or interest in, or with respect to or any claim against, the other's Estate

(Exhibit C to the May 10, 2010 sworn affidavit of Ms. Davies).

[104] In *Re: Thibault Estate* 2009 NSSC 4 (2009), 44 E.T.R. (3rd) 2009, 272 N.S.R. (2nd) 371, Justice Duncan undertook a comprehensive examination of whether s. 19A of the *Wills Act* could operate retroactively or retrospectively and concluded that s. 19A of the *Wills Act* must be read **only** as being prospective. Justice Duncan's reasoning was adopted by Justice Boudreau in *Re: Hayword Estate* 2010, NSSC 6, (2010) 291 N.S.R. (2nd) 294.

[105] Ms. Collins also vigorously argues that the Applicant should be prevented from obtaining relief in this Court because of the doctrine of *res judicata*. Ms. Collins asserts that the application herein is "seeking an order determining the very question that had already been determined in the Trinidad litigation, namely 'since the laws of Trinidad and Tobago declare that a marriage *in extremis* does not revoke a parties' prior will', should it be given this effect under the *Wills Act*, R.S.N.S. 1989, c. 505 s. 17'?

[106] I shall deal with that issue later.

Are the case authorities cited by the Applicant persuasive?

[107] In *Re Martin; Loustalan v. Loustalan*, [1900] P. 211 (C.A.) is a oft cited authority. Although *Loustalan* is often referred to as authority for the summary on the first page of the case which reads: "The rule of English law which makes a woman's Will null and void on her marriage is part of the matrimonial, and not of the testamentary law"; a closer examination reveals that the two judges who concurred in the result as a majority, yet wrote separate decisions, rested their decision on the factual determination of what was the husband's domicile at the

time of marriage. Once the domicile of the husband was determined, by operation of law at the time of the marriage the wife adopted his domicile, which was found to be England, and as a consequence all his wife's moveables (her Estate contained nothing else at her death), were similarly, by operation of law, his property. Moreover, she was left in the position of being unable, by virtue of the marriage, to independently create another Last Will and Testament.

[108] I note that one of the Majority judges, Williams, L.J. stated at p. 240:

> ...**I think that the rule of English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary law, and that probate of this will ought not to be granted**; but as I am not sure that we ought to infer that there was at the time of the marriage agreement that the English law should govern the matrimonial property, **I prefer to ground my judgment on the change of the husband's domicile [to England] at the time of marriage**...
>
> [My emphasis added]

[109] More precisely Williams, L.J. had stated at p. 239:

> If my conclusion is right.....that he adopted an English domicile at the time of the marriage, then **at that time his wife's movables became his property; and I think that his wife's property in the movables having thereby ceased, it follows quite independently of the 18th section of the *Wills Act*, that this loss of the power of disposition put an end to her will, while it was still ambulatory,**

> **and rendered it or no effect, and thus nothing but republication could revive it.**
>
> [My emphasis added]

[110] Rigby, L. J. in a concurring judgment stated:

> I see no sufficient reason to differ from the [trial judge's] conclusion that the mutual rights of the spouses as to movables were to be determined by English law. If it is necessary in order to support this conclusion, to hold that the husband's domicile at the date of marriage, or at any rate the matrimonial domicile, was English, I should not hesitate to hold that it was....
>
> **I conclude that [the husband] intended English law to apply, and that law gave him, immediately on the marriage, the exclusive right of all the wife's movables -** that is to say everything that could pass by the holograph will of 1870. **As by the marriage, she would become incapable of a making another will, the will of 1870 should be revoked.** (pgs. 234-235)
>
> [My emphasis added]

[111] To the extent that *in Re Martin* is based on English statute and common law that, upon marriage (by operation of law) made a wife incapable of making another Will, and transferred all interests she had in any movables to her husband, such authority should be disregarded in a modern age where such concepts should no longer prevail. I further note that the Majority decisions, are in essence not based on this reasoning, though they endorse it generally, but rather are based on a

factual finding regarding the husband's domicile. The commentary that "the rule of English law which makes a woman's Will null and void on her marriage is part of the matrimonial and not the testamentary law" is *obiter dicta* and notably the case only involved movables in any event.

[112] In similar vien, I am not alone in criticizing the purported *ratio decidendi* from the *Martin* case. As noted in para. 11 in *Allison v. Allison*, [1998] B.C.J. 2274, (1998) 23 E.T.R. (2nd) 237, Justice Cohen made reference to J.D. Falconbridge, Essays on the Conflict of Laws (2nd edition 1954) where at pages 113- 115 the author was commenting critically on the *Martin* decision and stated:

> **Notwithstanding that some leading writers in England seem to have accepted, without critical reservations, the opinions expressed in the Court of Appeal in the Martin case in favour of the characterization of the rule of law now under discussion as one relating to a question of matrimonial law, it is submitted that this characterization is erroneous...** While it happens that the decision related to the revocation of the wife's will, [the trial judge] rightly pointed out that the rule of law now under discussion applies to the will either of a wife or of a husband, and therefore it is unjustifiable to use in favour of the characterization of the rule as relating to matrimonial law, the fact that under the old English common law a woman's will was "revoked" by her marriage, in the sense that her husband became entitled to the wife's moveables and her role is therefore rendered inoperative. Apart from this irrelevant fact, if the modern rule is considered in light of its terms and its context, it would seem clearly to be testamentary in character... **Furthermore the Court of Appeal in the *Martin* case not only failed to consider the implications of the context in which the rule now under discussion occurs, as above indicated, but also failed to consider the consequence of the Court's characterization of the rule. These consequences are inconvenient and undesirable insofar as they may involve**

> **probable diversity in the distribution of the assets, situated in different countries, belonging to the Estate of decedent, as between England on the one hand and 1) some other country as for example France or Scotland, the domestic law of which does not contain a rule that a will is revoked by the subsequent marriage of the testator, and in the law of which a foreign rule of this kind may be characterized as being testamentary and 2) some other country, as, for example a state of the United States of America, the domestic law of which contains a rule similar to or identical with the British rule, but in the law of which the rule is characterized as one of testamentary law.**
>
> [My emphasis added]

[113] The Applicant cites *Seifert* v. *Seifert* (1914) 23 D.L.R. 440 (Ont. S.C.) however Seifert is of limited assistance in this case, as conceded by the Applicant (p.6 Brief). That is, she concedes that Otto Siefert's domicile at the time of the marriage was Ontario, whereas his wife's domicile became Ontario at the date of their marriage. In that case, **the question of domicile at the date of marriage was the critical and important question** - p. 442. The judge found that the provision of the Ontario statute by which marriage would have revoked the Will, formed part of the matrimonial law, and not of the testamentary law, and operated in that case to revoke **the Will** executed in the Province of Quebec **which did not favour his wife's interests.** - p. 446.

[114] Moreover to the extent that *Seifert* relies on In *Re Martin*, its persuasiveness is diminished.

[115] Ms. Davies also relies upon *Davies* v. *Davies* (1915) 24 DLR 737 (Alta. S.C.).

[116] In *Davies* the husband was born in the United States, married and divorced in Montana (1901) and created a Will in Montana in 1903. He remarried in Montana in October 1903 and divorced in Montana in June 1904. In 1906 he moved to Alberta where he bought real estate and died in 1908.

[117] The question was whether his marriage in Montana revoked the Will in Montana? Justice Stuart found that the law of Montana was the proper law to apply, and that law caused a Will to be revoked by a later marriage, unless the Will was made in contemplation of marriage. Justice Stuart found that Mr. Davies had in fact made his Will in contemplation of marriage and therefore the Will survived the marriage.

[118] *Davies* is cited by the Applicant for the following excerpt by Justice Stuart:

> The majority [in *Loustalan v. Loustalan*] on account of the view they took of the question of domicile did not need to take much notice of the distinction between

> movables and immovables. It would seem to me however, that Dicey is right in the suggestion he makes in the note referring to the case which I quoted. If the rule as to revocation of a will by marriage is part of the matrimonial law and not of the testamentary law, **it is difficult to see why or how there can be any distinction in this respect between movables and immovables**. It is true that in a sense the rule is applied to a woman's will would be looked upon as more peculiarly part of the matrimonial law than as applied to a man's will because at common law it was only a woman's will, but not a man's will which was revoked by marriage. The revocation of a man's will by marriage is statutory law... **I am bound to say that there would appear to me to be something exceedingly illogical if not fatuous in saying that although a will may continue to be perfectly good after marriage, because at the time of marriage no real estate in this province was possessed by the testator, with the very moment he takes some of his money, his personal property, and turns it into real estate in Alberta, then in respect to that the will was revoked.** Even though the testator living and domiciled in Montana may not have had the slightest intention at the date of marriage of acquiring Alberta real estate, if the Alberta Court must hold that with respect to any property which he might in future there acquire, the will was revoked by the marriage. Of course if he had owned real estate in Alberta at the date of the marriage then the absurdity would not be so great; but even in that case **I think that the only reasonable rule to apply is the rule prevailing in the matrimonial domicile. This case seems to furnish an opportunity for the court to depart somewhat from the rigid rules which a reverence for real estate and everything connected with it as introduced in England. Of course English law prevails here by virtue of the statute**, but when there is no direct precedent to be found and there appears not to be, I think it's safe to adopt the suggestion of such an authority as Dicey, particularly when the suggestion appeals to one as conformable to reason, convenience and common sense. - pg. 740-741
>
> [My emphasis added]

[119] Justice Stuart, in order to avoid the "exceedingly illogical" result of different treatments between the law that governs movables and immovables in situations where the issue is whether marriage will revoke a prior Will, determined that the

parties' matrimonial domicile should govern as the **single law** that determines the effect of a marriage on an earlier Will on the Estate's movables **and** immovables.

[120] Notably in *Davies*, if the law that governed whether the Will was revoked by a later marriage was that of the testator's domicile, it is likely that the outcome would have been the same as the judge using matrimonial domicile as the governing law (if we accept that a single rule, be if the Testator's domicile or the matrimonial domicile should apply to both movables **and** immovables).

[121] The Applicant also cites, and relies upon two British Columbia cases: *Re Estate of Covone* (1989) 36 E.T.R. 114 and *Allison v. Allison* (1998) 23 E.T.R. (2nd) 237, [1998] B.C.J. 2274.

[122] In *Covone*, the testarix always was domiciled in Quebec, had made a Will in Quebec and died in Quebec, but had real estate in British Columbia. Her marriage did not revoke a Will in Quebec, but would revoke her Will according to British Columbia law.

[123] The issue was whether the marriage in Quebec revoked the prior Quebec Will, merely because there was the property in British Columbia? The Judge found that it did not. Although the Judge recognized that Castel in *Canadian Conflict of Laws* took the position that the question whether marriage revokes a previous Will of immovables is governed by the *lex situs*, which is the traditional English rule, he felt:

> "...it would seem unlikely that the testatrix would have been made aware at the time she acquired the B.C. property that her Will would be revoked by reason of her holding property in B.C. at the time of her death."

[124] He preferred the contrary view of Dicey and noted:

> "It is argued that marriages out of the province may not, under the applicable Conflict of Laws rule, revoke the will... counsel for the Applicant provided me with a copy of the decision of the Supreme Court of Alberta in *Davies v. Davies*... that decision was cited in support of the view expressed by Dicey and Morris referred to above. In the *Davies* case, Stuart, J. found that the law relating to the effect of a marriage upon a Will must go to the law of the matrimonial domicile and not to the law of the place where the property affected by the Will is situated... [citing from p. 806 of *Davies*] this quotation has considerable force in this proceeding."

[125] In *Re Estate of Covone* and in *Davies*, it does seem completely illogical that the testator's intention in a Will should be defeated by the mere ownership of real property (immovables) in a foreign jurisdiction. The outcomes in both cases are

understandable. Notably, they are distinguishable from *Allison* in which case only movables were in issue. One must question however, whether those Courts sought to find a more equitable outcome in spite of traditional conflict of laws principles.

[126] Lastly, the Applicant relies upon *Allison v. Allison* (1998) 23 E.T.R. (2nd) 237 [1998] B.C.J. No. 2274 (SC).

[127] In *Allison*, the testator, while domiciled in Quebec made a Will May 1, 1982 and married April 30, 1985, before moving in the summer of 1985 to British Columbia with his wife where he lived until his death in January 1994. Justice Cohen found as a fact that the testator was domiciled in British Columbia at the time of his death. His Estate consisted only of movables.

[128] According to Quebec law, a marriage would not revoke his prior Will whereas, according to British Columbia law, a marriage would revoke a prior Will.

[129] Justice Cohen found that the Quebec marriage did not revoke the Quebec Will. Justice Cohen concluded:

> "...I find it is the matrimonial domicile that governs whether a Will is revoked by a subsequent marriage." - para. 20.

[130] Justice Cohen found that the "matrimonial domicile" was Quebec - para. 6. This is **not** however, another example of a Court rejecting a traditional rule in favour of a new rule in order to achieve an equitable outcome. Only movables were in issue in *Allison*. Thus, the traditional rule, that the testator's domicile at the time of marriage, governed whether the marriage revoked a will. Coincidentally in *Allison*, both husband and wife were domiciled in Quebec at that time. There was therefore no dispute, as there is in the case at Bar, between the domicile of the husband (Canada) and wife (Trinidad) at the time of revocation of the Will (ie. marriage).

[131] Matrimonial domicile is usually, as a matter of fact, that jurisdiction where at the time of the marriage, **both** parties are domiciled. Ms. Davies' position that "the effect of a marriage on a will should be determined as a matter of matrimonial law in the matrimonial domicile... so long as the spouses have a real and substantial connection with that place" is **not** a principle or rule of law emerging from the cases, but rather a statement of the reality that in some cases, the testator's domicile (and that of their spouse) at the time of marriage, was also that of the

place of marriage (*Montana* in Davies; *Quebec* in *Covone*). Actually the rule governing movables is the law of the testator's domicile at the time of the marriage (i.e. Canada **not** Trinidad in the case at Bar).

[132] That rule, was correctly applied by Cohen, J. in *Allison*, **however**, the principles relied on in *Allison* do **not** support Ms. Davies position herein.

[133] As stated by Castel in Canadian Conflict of Law (6th Edition) at p. 25-1 regarding the matrimonial property regime applicable to the spouses while living:

> "What is the effect of marriage on the property - movable and immovable - that each of the spouses owned at the time of marriage or acquires afterwards? ... [a number of questions are posed] these are some of the choice of law questions that arise in the field of matrimonial property. Increased mobility of married couples and the increased incidence of marital breakdown have both contributed in the increased prevalence of such questions. **Nevertheless, the basic question is always the same: which law did the spouses intend to govern their property relation?**
>
> The answer may be that the parties entered into agreement that expressed their intention to be governed by a particular law or that indicated a law substantially connected with the agreement. **In the absence of an expressed choice, the parties agreement will be governed by the law most substantially connected with it.** In other words, the Courts must ascertain the proper law applicable to the spouses' property relations. This may be the law of the domicile of the parties at the time of the marriage or that of the common domicile or residence of the spouses immediately thereafter, or some other law.

> This analysis is not affected by the fact that the law expressly selected by the spouses or by the law most substantially connected, they must choose a regime, either by reference to one provided for in the legislation or by making their own, or that in the absence of choice one is imposed on them. If they do not choose a regime one is imposed on them, they are regarded as acquiescing in it. **Therefore, when the Courts apply, for example, the law of the domicile of the husband at the time of the marriage to determine the effect of the marriage on the movable property of the spouses, they do so "because the parties have expressly or impliedly agreed that the provisions of that law would govern their property** (either as the proper law of the contract or as the law incorporated by reference into the contract to supply the incidents thereof or as both) or because in the absence of an expressed contract or other indications to the contrary [English] law presumes that the parties made such an agreement." **The Courts regard an agreement on matrimonial property, whether it is expressed, implied or presumed, to be a necessary incident of marriage. The applicable regime, however it is determined, is established at the moment of marriage.**" - p. 25-2 - Castel.
>
> [My emphasis]

[134] In *Allison*, Cohen, J. concluded on this point:

> "With regard to the characterization of whether matrimonial versus testamentary domicile should govern the issue of validity, I also agree with Plaintiff's counsel that marriage is the triggering event which causes the Will to be revoked, not anything relating to testamentary matters. In principle, I find the reasoning of Stuart, J. in *Davies* most persuasive. As counsel postulated: "Why should a perfectly valid Will which survived the marriage be rendered invalid as a result of a change in domicile?" In my view, counsel's argument that there is a close connection between marriage and the **moral obligations** and status of one's testamentary preparations, whereas there is no connection between those same **moral obligations** and testamentary preparations and a change of domicile, is a sound position."
>
> [My emphasis]

[135] In the case at bar, Dr. Davies' domicile, at the time of marriage and death, was Canada / Nova Scotia. The "moral obligations" cited by Cohen, J. in *Allison* are likely obligations that Dr. Davies had to Ms. Collins as his widowed wife, rather than to Ms. Davies, his ex-wife. In that respect, the general persuasiveness of the reasoning in *Allison* that Ms. Davies seeks to rely on also falters.

[136] I have been unable to find any judicial consideration of *Allison v. Allison*.

[137] As noted earlier, according to Dicey, the question of whether a Will has been revoked depends on the law of the testator's domicile at the date of the alleged act of revocation (which rule should apply to the revocation of Wills of movables and immovables in the case of revocation by subsequent marriage) - p. 1263, para. 27 R-084.

[138] In Canada, it is accepted that the laws of the jurisdiction of a testate or intestate's domicile will govern succession of movables or personal property of that person - *Senkiw v. Muzyka* (1969) 68 W.W.R. 515, 4 D.L.R. (3rd) 708 (Sask. CA) at para. 16 affirmed (1970) 12 D.L.R. (3rd) 504 (S.C.C.).

[139] If, as *Senkiw* suggests, that the laws of a person's domicile at death will govern the succession of movables in his Estate, does it not therefore make sense to adopt the domicile of that person at the time of marriage, if testate, to determine whether marriage revokes the will?

[140] It is understandable that the traditional rule (of the *lex situs*), was supplanted in the *Davies* and *Covone* cases, based on their particular facts, involving as they did immovables, which implicated the laws of foreign jurisdictions with which the parties had only tenuous connections. It is the fact that the rules regarding immovables *(lex situs*) and movables differ that causes the disparate outcomes in the reported cases.

[141] Castel and Dicey have urged a single rule for intestate succession - p. 27-5; Dicey has urged a single rule for determining the law that should govern whether a will (movables and immovables) is revoked by marriage.

[142] In my view, a move toward revised rules in Canada is appropriate.

[143] In summary, I do not find the authorities cited by the Applicant to be binding upon me, nor do I find, upon closer examination, that they necessarily support the Applicant's position herein.

Conclusion regarding the proper conflict of laws rule that apply in this case

[144] The traditional rule regarding movables is that whether a marriage revokes a prior Will depends on the law of the testator's domicile at the date of the marriage. I suggest that there is authority in Dicey, to make the same rule applicable to movables and immovables and that that rule is appropriate in the case at Bar.

[145] It appears that where Courts have rejected the traditional rules, they have done so because there have been conflicts between the succession rules - that is, because the succession to **movables** is governed by the law of the testator's domicile **at the time of the marriage**, whereas the succession to immovables of a testate is governed by the law of the country where the **immovables** are situated (*lex situs*).

[146] In my view, there is sufficient authority and rationale to depart from the strict traditional rules. To the extent that an Estate of a testate contains both movables and immovables, the same rules should apply to movables as to immovables, and the question of whether a marriage revokes a prior Will should be considered to be governed by the law of the **domicile** of the testator / testatrix at the time of marriage. This accords with Dicey's analysis and conclusion that: This question should be regarded "as independent conflict category in its own right (with the same choice of law rule [i.e. The law of the testator / testatrix domicile at the time of marriage governs])" - para. 2-039 (14th ed.).

[147] This is also appropriate in my view, because a person's "domicile" is one of the more stable legal concepts in the area of conflicts of laws. Castel, in Canadian Conflict of Laws (6th Edition), notes under "nature of domicile":

> "**In Canada and other common law countries, many legal issues are resolved by reference to an individual's personal law, which is generally construed as the law of his or her domicile**. In other words, domicile serves as a connecting factor in several choice of law rules... **individuals are domiciled in that legal unit in which they have, or are deemed by law to have, their permanent home.** Every individual is regarded as belonging, at every stage of his or her life, to some community consisting of all persons domiciled in a particular legal unit, be it a Country, a State or, in Canada, a Province or Territory. However, the rules as to domicile are such that this legal idea might not correspond to the everyday reality of the situation. An individual might have no permanent home, but the law requires him or her to have a domicile. If he might have more than one home, but

> he or she must have only one domicile for any one purpose. He or she might reside in one Country or Province but deemed to be domiciled in another." - p. 4-1.
>
> [My emphasis]

[148] Castel goes on to discuss the differences between domicile of origin and domicile of choice:

> "The law attributes to each individual at birth, a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in the following respect:
>
> 1. The domicile of origin is received by operation of law at birth; The domicile of choice is acquired later by the individual actually moving to another Country, State, Province, Territory or legal unit and intending to remain there indefinitely.
>
> 2. The domicile of origin is retained until the acquisition of a domicile of choice; it can not be divested, although it remains in abeyance during the continuance of a domicile of choice; the domicile of choice is lost by abandonment where upon the domicile of origin will revive unless some other domicile is acquired; the domicile of choice is destroyed when it is lost, but may be acquired anew by fulfilling the same conditions as are required in the first instance.
>
> 3. The domicile of origin is more durable than a domicile of choice in the sense that it is more

> difficult to demonstrate a change of domicile than the domicile that is alleged to have been displaced is the domicile of origin." - p. 4-3

[149] Under "proof of change of domicile" Castel notes:

> "There is a presumption against a change of domicile. The burden of proving a change of domicile rests upon the person alleging it. A change of domicile is not to be likely inferred, and it must be proved clearly and unequivocally." - pg. 4-9

[150] These concepts have long been established. See for example, *K v. K* [1943], 2 D.L.R. 102 (N.S.S.C. En Banco).

[151] In the case at Bar, both Parties agreed as a matter of fact, that Dr. Davies' "domicile" at the time of his marriage was Canada, and more specifically, Nova Scotia.

[152] Therefore, regardless of whether *vis-a vis* movables or immovables, the law which should govern whether the marriage in Trinidad and Tobago revoked the prior Will in Nova Scotia, should be the law of Nova Scotia.

The effect of the Minutes of Settlement / Corollary Relief Judgment and whether they constitute a form of promissory estoppel?

[153] In it's Memorandum of Law the Respondent specifically draws attention to the Minutes of Settlement between Dr. Davies and Ms. Davies which became part of the consent Corollary Relief Judgment and Divorce of August 11, 2001 in Nova Scotia.

[154] Minutes of Settlement are contained in Exhibit "C' of the May 10, 2010 sworn affidavit of Ms. Davies. The Minutes of Settlement are dated June 5, 2001 and were signed by Dr. Davies June 5th, 2001 while he was present in Port of Spain, Trinidad. The Certificate of Independent legal Advice notes that he received his advice from legal counsel in Port of Spain, Trinidad on June 5th, 2001. The Minutes note that the parties have been living separate and apart since March 6, 1993 and they intend the Minutes to be "a full and final settlement of all their respective rights and liabilities against and to each other, and to and with reference to the property and Estate of the other arising out of their marriage to each other, and pursuant to the provisions of the *Divorce Act* 1985, the *Family Maintenance*

Act and the *Matrimonial and Property Act* of the Province of Nova Scotia."

Specifically, clauses 8 and 9 read respectively:

> 8. 11 Albany Court Penarth, United Kingdom.
> The wife shall within 18 days from the date of the signing of this agreement transfer her interests in the property located at 11 Albany Court Penarth, United Kingdom to the husband and she shall execute all documents necessary to transfer the said property to the husband. The husband and wife covenant and agree that the wife may remove her personal belongings from the said property at a time convenient to her.
>
> 9. Release of Right to Estate
> Each of the parties hereby renounces all rights which he or she has to the administration of the other's Estate, and each party hereby releases and discharges the heirs, executors, administrators and assigns of the other's Estate from any claim which he or she has, can or may have to any share of that Estate, and subject to any disposition made by will, each party covenants and agrees that the others Estate shall be distributed as if he or she predeceased the other, notwithstanding the provisions of the Testators Family Maintenance Act, the Matrimonial Property Act or any other statute now or hereinafter in force whereby a husband or wife is, or may be given, the right or interest in, or with respect to or claim against the other's Estate.

[155] These Minutes of Settlement from 2001 are notably inconsistent with the 1989 Last Will and Testament of Dr. Davies, in which he appointed Ms. Davies "or if my spouse has predeceased or is unable or unwilling to act, George A. Caines, Q.C. of Halifax, Nova Scotia, to be the executor of my Will"; and one finds in clause 4:

> I give all of my Estate, both real and personal and wheresoever situate to my spouse [previously identified as Ms. Davies].

[156] As noted earlier, the amendments to the *Wills Act* of August 19, 2008 which cause a Will upon divorce to be interpreted as if the surviving spouse pre deceased the testator are not retrospective or retroactive, and have no application in the case at Bar.

[157] Nevertheless, although not expressly articulated as such, the Respondent does appear to rely upon a form of promissory estoppel regarding the Minutes of Settlement. Ms. Collins suggests that the Court should disallow the Applicant, Ms. Davies' from now being able to take under the Will, even if the marriage in Trinidad is found **not** to revoke the prior Will. Although such argument could disentitle Ms. Davies, it would **not** disentitle other potential beneficiaries under the Will.

[158] There was some suggestion that in clause 9 (Release of Right to Estate) the words "and subject to any disposition made by Will" should be taken to mean the Minutes of Settlement should be interpreted to defer to the provisions of any prior Will made by the parties.

[159] In all the circumstances, I do not find that that is a reasonable interpretation, but rather the only reasonable interpretation is that the Minutes of Settlement intend that they be "subject to any disposition made by a Will", created by either of the parties **after** the Minutes of Settlement are signed and effectual.

[160] Nevertheless, as Ms. Davies' counsel points out in *Morrell Estate* v. *Robinson* 2009, NCSA 127 (2009) 52 E.T.R. (3rd) 1 our Court of Appeal has decided that where a party seeks specific performance of a renunciation to take under a Will pursuant to a clause in a separation agreement, such claims will generally be denied where the party claiming the benefit of the renunciation (Ms. Collins) was not a party to the separation agreement/contract, except for example, an executrix, such as Ms. Davies in the case at Bar, pursuant to the *Matrimonial Property Act* R.S.N.S. 1989 c. 275 section 28.

[161] While the Respondent's position is based not on the enforcement of the contract/separation agreement, but rather promissory estoppel, the principles are somewhat similar in that promissory estoppel relies on the fact that one party, by words or conduct, having made a promissory assurance to another, caused the other party to act in some way and change it's position, and that the doctrine should be

available to insist upon the first party respecting the assurances made. This issue was canvassed recently by Boudreau, J. in *Re Hayward Estate* 2010 NSSC 6 (2010) 291 N.S.R. (2d) 294 at paras. 51-56. In view of the reasoning in *Murell Estate*, supra, I am not convinced that the Respondent herein can rely on the equitable doctrine of promissory estoppel.

Whether the legal principle of *res judicata* prevents the Applicant from asserting the right to a remedy in this Court?

[162] The Respondent in its written submission also argues:

> We submit the unsuccessful party in the initial litigation (the Applicant herein) cannot bring a like action thereby implicitly challenging the correctness of the previous decision [the December 17th, 2009 decision of Justice Madame Gobin of the High Court of Justice of the Republic of Trinidad & Tobago] in subsequent proceedings. As referred to in *Kameka* (supra) in paragraph 15 quoting Phipson on Evidence, 14th Edition, 'it debars the unsuccessful party from challenging the correctness of a decision in subsequent proceedings.'
>
> The appropriate remedy for the applicant if she was unhappy with the initial decision [of Justice Gobin] would have been appeal, not seeking another "kick at the can" before another Court. As noted earlier, permitting this would undermine the judicial policy favouring finality and in particular that a judicial order pronounced by a Court of competent jurisdiction should not be brought into question [in] subsequent proceedings except those provided by the law for the express purpose of attacking it. – *Wilson* v. *The Queen* 1983, CANLII 35 (SCC).

[163] The Applicant submits that the burden of proof of establishing *res judicata* lies upon the Respondent. Therefore the Respondent, Ms. Collins, has the burden to show:

1. That the **same question** has already been decided by the Court in Trinidad & Tobago;
2. That the judicial decision which is said to create the estoppel was **final**; and
3. That the parties to the judicial decision in Trinidad & Tobago were the **same persons** as the parties to the proceeding in which the estoppel is raised.

   [My emphasis]

[164] Even if the Respondent is successful in establishing these three conditions, this Court is still entitled to determine, whether as a matter of discretion, it ought to decline to make a declaration of law that favours the Applicant.

[165] In relation to each of these issues, Ms. Davies, the Applicant takes the position that the Respondent has failed to satisfy the preconditions because:

1. The Court in Trinidad was dealing with an application to revoke a grant of letters of administration that had been given to Ms. Collins. The application in Nova Scotia is being made to determine the effect of the marriage *in extremis* in Trinidad & Tobago on a prior Will made in Nova Scotia. Ms. Davies argues that the application to revoke to grant of administration in Trinidad arose collaterally or incidentally and that the application to revoke the grant of administration was **not** so fundamental to the decision arrived at in the earlier proceedings that it constitutes the "same question.";

2. It was not disputed that the parties to the litigation in Trinidad are the **same** that appear before this Honourable Court;

3. The Court in Trinidad made **no final decision** because:

    1. The decision was issued in the context of a case management conference;
    2. It is in chambers;
    3. It is without a hearing;
    4. There is no record of the proceedings available;
    5. There are no written reasons provided by the presiding justice;

6. Effectively, there was no decision on the merits.

[166] Ms. Davies acknowledges that Exhibit #1 of the November 25th, 2009 letter from Catherine D.A. Watson provided an expert report to the High Court of the Republic of Trinidad & Tobago in the matter of the Estate of William Anthony Mostyn Davies (deceased) CV 2009-00597, P*amela Mary Davies v. Jennifer Collins*. Ms. Davies argues that Exhibit #1 however, is merely an expert **opinion** on whether the marriage in Trinidad & Tobago would be considered to be a valid marriage according to the laws of Nova Scotia, and not the decision of the Court, since the Court in Trinidad gave no reasons.

[167] I note however, that the "opinion" could be expected to have been determinative, on its face, of the Application to revoke the Grant of Administration. Furthermore the letter stated:

> The facts upon which I base my report are those set out in the letter of instruction provided jointly by counsel, a copy of which is attached.

[168] That letter is not attached in the evidence before me, but it is clear that Ms. Watson's opinion was requested by Ms. Collins and Ms. Davies jointly, and so both parties may be seen as endorsing the opinion as "expert".

[169] Ms. Collins September 30, 2010 sworn affidavit, which I accept, states:

> 46. In 2009, [Ms. Davies] began legal proceedings against me in an attempt to have the grant of administration revoked on the basis that Dr. Davies executed a prior will naming her as executrix of Dr. Davies' Estate.
>
> 47. These legal proceedings were very complex and involving, and I was advised by my solicitors that the main issue to be determined is a legal one relating to a conflict of laws problem between Canadian and Trinidad law.
>
> 48. During the course of these proceedings the Court requested that an expert opinion be obtained and both the applicant and I had agreed to request an expert legal opinion from a Nova Scotia lawyer Catherine D.A. Watson formally of Boyne Clarke, whereby she would render an opinion about whether a marriage *in extremis* carried out in Trinidad would be considered valid under Nova Scotia law for the purpose of revoking a pre-existing will.
>
> 49. This expert report was delivered via fax to the presiding judge, Honourable Madame Justice Carol Gobin on November 25th, 2009.
>
> • • •
>
> 50. On December 17th, having accepted the report that concluded the failing arguments of incapacity on the deceased's part, the marriage would be found to be valid and the will revoked pursuant to section 17 of the *Wills Act*, Justice Gobin declined to revoke the letters of administration, and dismissed the application.
>
> • • •
>
> 51. After these legal proceedings were dismissed, I did not expect for the applicant to bring further proceedings in Canada, because I was of the opinion that the issue of my ability to administer Dr. Davies' Estate had already been determined.

[170] Ms. Davies further argues that:

> Even if the foreign Court has decided the very same question between the same parties and rendered a final decision, it does not follow that the Court of the local forum is bound to accept it as *res judicata*. A very old exception relates to the interpretation of the laws of the forum applicable to real estate situate within the local jurisdiction (and, in particular, succession to title). In *Duke* v. *Andler* [1932] S.C.R. 734, the Superior Court of California had purported to direct the defendants Duke to execute the delivery deed to the plaintiffs to convey title to land in Victoria, British Columbia. When the matter was litigated in British Columbia by the defendants, the plaintiffs pleaded *res judicata*. The Supreme Court of Canada ruled that the Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right of possession of real estate not situate in their foreign country. This exception applies to this Estate in two respects:
>
> > First, if the Courts of Trinidad & Tobago had made a final decision concerning title to real estate outside that country, it would not be binding on the Courts of the forum where the land is located; in other words, the succession to the real estate in England and Wales can only be determined by Courts of that jurisdiction.
> >
> > Second, neither the Courts of England and Wales nor Nova Scotia can adjudicate on the succession to real estate situate in Trinidad & Tobago so as to oust the jurisdiction of the Courts of Trinidad & Tobago.

[171] At this point I note that *Duke* v. *Andler* is distinguishable in that the foreign Court purported to directly order that a conveyance take place in Canada (not being a succession matter of a deceased person), whereas in the case at Bar:

1. There is no evidence before me that there is any Canadian (Nova Scotian) real estate included within the Estate of Dr. Davies;

2. The Court in Trinidad has made a Grant of Administration and refused to revoke it, but that by itself does not determine to what extent Ms. Collins, as adminstratrix of Dr. Davies' Estate, can claim the right to manage the assets of Dr. Davies' Estate which might be in foreign jurisdictions;

3. As noted earlier, the Courts of the domicile of an intestate deceased (in this case Canada) have jurisdiction to determine the succession of all movables wheresoever situated, and such determination is binding throughout the world – see *Senkiw et al* v. *Mouzyka* (1970) 12 D.L.R. (3rd) 544 (SCC).

[172] I conclude in relation to this issue as follows:

1. In both the litigation in Trinidad and before this Court, the core question was: does the marriage *in extremis* in Trinidad revoke Dr. Davies' prior Will made in Nova Scotia? Therefore, it is the **same question** involved in both proceedings;

2. The **same parties** are involved in both legal proceedings;

3. Although the December 17th, 2009 decision of the High Court of Trinidad & Tobago is nowhere stated to be a final decision, the evidence is that the parties have treated it as such. There is no evidence that any further proceedings were taken in Trinidad & Tobago, or whether an appeal is even possible. I am therefore satisfied that the decision was a **"final" decision** as contemplated by the preconditions of the doctrine of *res judicata*.

[173] Nevertheless, I retain a discretion to decide whether *res judicata* ought to be applied in the circumstances of this case.

[174] Although I find the Supreme Court of Canada decision in *Duke v. Andler*, distinguishable, it does remind me that Courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits, and that while in the case at Bar the High Court of Trinidad & Tobago had the benefit of an expert legal opinion regarding whether the marriage *in extremis* in Trinidad would revoke the prior Nova Scotia Will of Dr. Davies, that Court did **not** have the benefit of a judicial determination of that question, and it would be more appropriate than not for this Court to consider and rule on that question given the

facts that: Dr. Davies was domiciled here at the time of his death and marriage; that his Will was made here and the Applicant properly sought to have it probated in Nova Scotia; and because it would appear that up to his death "...Dr. Davies maintained investment assets in Canada, continued to receive pensions from the Government of Canada, had a healthcare card and was entitled to medical, dental and prescription drug coverage under the Public Service Health Care Plan [of Canada]" – para. 13 of the May 10, 2010 sworn affidavit of Ms. Davies.

[175] In summary, in light of the competing considerations, not the least of which is that the Applicant herein requests declaratory relief rather than a more direct tangible remedy, it is my opinion that I should permit Ms. Davies to have the benefit of this Court's opinion by way of declaration as to whether the marriage *in extremis* in Trinidad revoked the prior Will of Dr. Davies.

CONCLUSION

[176] Therefore, I declare that, as a matter of law according to the laws of Nova Scotia, the marriage of Dr. Davies and Ms. Collins in Trinidad & Tobago on July 27th, 2007 was a valid marriage, constituted "marriage" as referred to in s. 17 of

the *Wills Act* R.S.N.S 1989 c. 505 as amended, and therefore revoked the Last Will and Testament of Dr. Davies dated July 25th, 1989 pursuant to the proper conflicts of laws' rules.

[177] I am prepared to hear the parties as to costs should they wish me to address that issue.

J.

SUPREME COURT OF NOVA SCOTIA
Citation: Davies v. Collins 2010 NSSC 457

Date: 20101217
Docket: Hfx. No. 328880
Registry: Halifax

BETWEEN:

Pamela Mary Davies

Applicant

v.

Jennifer Jaroda Collins

Respondent

ERRATUM

Revised judgment: The original judgment has been corrected according to this erratum dated **December 17, 2010**

HEARD: November 4, 2010 in Halifax, Nova Scotia

DECISION: December 16, 2010

COUNSEL: Timothy C. Matthews, Q.C., for the Applicant
J. Gordon Allen, for the Respondent

Erratum:

Paragraph 23 is replaced by the following:

"Based on the evidence presented and admissions made by the respective parties I am satisfied of the following facts:

1. Dr. Davies was born on October 11, 1939. He married Ms. Davies before they moved from the United Kingdom to Canada in 1971, and to Nova Scotia in 1975, where in 1976 they became Canadian citizens. On July 25, 1989, Dr. Davies executed a valid Last Will and Testament in Nova Scotia under which Ms. Davies was appointed executrix and sole beneficiary;"

J.