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# Transnational Probate and Estates: Procedural Strategy in Light of Latin American Law and Practices

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# TRANSNATIONAL PROBATE AND ESTATES: PROCEDURAL STRATEGY IN LIGHT OF LATIN AMERICAN LAW AND PRACTICES

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*The authors have written this article based on a hypothetical presented to them by the editors of the Inter-American Law Review. In light of the recognition that Florida has become a center for the deposit of foreign citizens' assets, estate planners and probate courts have been faced with a wide range of legal and choice of law issues emerging from this phenomenon. Consequently, the editors have asked the authors to address the legal issues posed by a hypothetical situation involving a foreign decedent and the interplay of domestic and foreign law.*

## I. INTRODUCTION

Foreign investors from the four corners of the globe (and of course from Latin America) are acquiring assets in the United States to an unprecedented extent.<sup>1</sup> Therefore, U.S. lawyers can no longer ignore the existence of foreign legal systems and foreign law.<sup>2</sup> Visitors and immigrants arriving, with or without their fami-

1. The importance of direct foreign investment in the United States, said to be well in excess of \$100 billion, has given rise to extensive literature. See Butler, Book Review, 19 INT'L LAW. 1041 (1985) (review of one recent manual, *Manual of Foreign Investment in the United States*).

2. See generally J. MERRYMAN, *THE CIVIL LAW TRADITION* (1969) (general discussion of the historical development and principal characteristics of the civil law system prevalent in

lies bring with them a panoply of legal relationships and marital property regimes that often involve concepts unknown to the common law practitioner.

Once facing prosperity in the United States, many of these aliens accumulate assets within our borders without any thought to estate planning. Some, accustomed as they are to community property and forced heirships, totally ignore the issue of post-mortem distribution of their United States property. Others, discovering with delight North American freedom of testamentary disposition and our well-developed methods for avoiding probate, take full advantage of these devices to the detriment of their family members to whom their home country law traditionally affords seemingly ironclad protection.

U.S. attorneys are now faced with an increasing number of clients, often the "forced heirs" of nonresident aliens, who find that their legitimate expectations have been shattered by their decedent's unexpected disposition of estates they thought inviolable. Transnational divorces and separations also complicate the situation in many cases. For heirs that find themselves pretermitted for whatever reason, the attorneys they hire in the United States become important figures. In order to serve such clients properly, the U.S. attorney increasingly is obliged to develop an expertise, not only in the inheritance law of foreign legal systems, but also in the conflict of laws rules of local jurisprudence regarding jurisdiction and choice of law.

In addition to the substantive aspects of these transnational probate cases, the attorney needs to acquire a knowledge of the procedural devices available in the forum to insure that the client's interests are not mooted by irreparable dissipation of assets. These devices include such traditional mechanisms as the preliminary injunction and discovery. They also include the more exotic aspects of the enforcement of foreign judgments.

Because of the large number of foreign investments and the establishment of Miami as an international financial center, the state of Florida promises to become a major arena for international probate litigation involving Latin America. This article raises some of the salient issues confronting the practitioner in this field. The problems discussed center on a composite hypothetical that is intended to facilitate comprehension of the often complex

conundrums prevalent in this area. The authors hope it will sufficiently scratch the surface to encourage deeper excavation.

## II. FACTUAL SITUATION

Carmen Arenz-Rodriguez de Gomez-Gonzalez is the widow of the fabulously wealthy international entrepreneur, Carlos Gomez-Gonzalez.<sup>3</sup> They were married in Miami in 1965, two years after Carlos left his native Colombia and acquired resident alien status in Miami. The couple had a long and loving marriage prior to his death. Although Carlos had three children (two naturally born and one adopted) by a previous marriage in Colombia to Maria Martinez, it was his intention that his estate go only to Carmen and his two children by her.<sup>4</sup> This was so because Carlos had already transferred many millions of dollars *inter vivos* to his former wife and their three children in Colombia.

In planning his estate, Carlos had placed the bulk of the assets he acquired after moving to Miami jointly in the names of himself and his wife.<sup>5</sup> As for the remaining assets that stood in his name alone and which he had acquired before he moved to Miami, Carlos executed a will in Florida, naming Carmen his personal representative,<sup>6</sup> distributing all of his worldly goods to Carmen and his

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3. At the risk of belaboring what should be well known to any practitioner with clients from the Spanish-speaking cultural sphere, may it be pointed out that such individuals often use two last names, the first being that of the person's father, the second being that of the mother. If Carlos Gomez Gonzalez had been born in the United States, he would give, as his proper name, Carlos Gomez. Similarly, upon marrying, women do not change names but indicate their status by linking their husband's last name to their own with the preposition "de," meaning "of." Cf. M. Atwood, *THE HANDMAIDEN'S TALE* (1985) (in a futuristic United States, women are known by names such as Offred (of Fred) or Ofglen (of Glen)). Carmen thus would give her name as Carmen Arenz de Gomez. Interestingly, U.S. courts use a hyphen when giving the full name of Latin American parties, e.g., Calero-Toledo, to avoid classifying Latin Americans by their maternal patronym.

4. The first marriage in Colombia was terminated pursuant to a Colombian judicial decree of *separación de cuerpos*. See *infra* notes 8-9.

5. In Florida, a conveyance of real property to husband and wife, even though it does not specify how they are to take, creates an estate by the entireties, absent expression of any contrary intent. *In re Estate of Silvan*, 347 So. 2d 632, 634 (Fla. 4th DCA 1977) (citing *Losey v. Losey*, 221 So. 2d 417 (Fla. 1969)). Both personal and real property may be held by the spouses as tenants by the entireties. *Winters v. Parks*, 91 So. 2d 649 (Fla. 1956). For statutory methods by which a spouse holding title to real property may create a tenancy by the entireties, see FLA. STAT. § 689.11(1) (1987).

6. If Carlos had died a nonresident of Florida, in his (foreign) will he could have appointed a personal representative to administer the Florida estate. FLA. STAT. § 734.102(1) (1987). Such a personal representative would be entitled to have ancillary letters issued to him or her on condition that he or she be qualified to act in Florida. *Id.* Section 733.304 of

two children by her, and disinheriting his three Colombian children.<sup>7</sup>

The estate was substantial since Carlos had been a rich man, having inherited substantial sums of money from his father when Carlos was still quite young. Part of Carlos' wealth could be attributed to good fortune. For example, a \$5,000 Venezuelan gold certificate, given to him as a child by his father, had steadily appreciated in value and was worth over ten million dollars by the time of his death. However, it was also through a combination of hard work and shrewd investments, first in Colombia and later in the United States, that Carlos had compounded his initial inheritance many times over.

Carlos had amassed much of his fortune during his marriage to María Martínez in Colombia primarily by acquiring interests in corporations and real estate throughout Colombia and Venezuela. However, by Colombian judicial decree, Carlos and Maria were separated in 1960.<sup>8</sup> In connection with their separation, Carlos, complying with Colombian law, gave his first wife over five million dollars representing one half of his Colombian community property assets.<sup>9</sup>

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the Florida Probate Code provides that:

[a] person who is not domiciled in the state cannot qualify as personal representative unless the person is: (1) A legally adopted child or adoptive parent of the decedent; (2) Related by lineal consanguinity to the decedent [a parent/grandparent or a child/grandchild of the decedent]; (3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or (4) The spouse of a person otherwise qualified under this section.

FLA. STAT. § 733.304 (1987).

7. Under Florida law, only children of the testator born after the making of the will are considered pretermitted. FLA. STAT. § 732.302 (1987). It is difficult if not impossible to disinherit children under the laws of most Latin American countries. See, e.g., Cód. Civ. arts. 1265-1269 (Colom.) (list of circumstances, involving principally criminal behavior of descendant forced heirs towards testator, under which disinheritance is justified); Cód. Civ. arts. 1207-1211 (Chile) (*id.*).

8. In 1960, Colombia did not recognize vincular divorce in the case of Catholic spouses who had married in the Catholic Church. See M. G. MONROY CABRA, MATRIMONIO CIVIL Y DIVORCIO EN LA LEGISLACIÓN COLOMBIA, 101-02, 172 (1979) [hereinafter MONROY CABRA] (even after recent legislation establishing vincular divorce for spouses married outside the church, there is no possibility of vincular divorce for Catholics). See also Cód. Civ. art. 167 (Colom.) (marital community, but not marital bond, dissolved by *separación de cuerpos*).

9. In Colombia, one consequence of a *separación de cuerpos* is the liquidation of the couple's community property. Cód. Civ. art. 1820 (Colom.). See generally E. SCOLES & P. HAY, CONFLICT OF LAWS, 449-72 (1982) [hereinafter SCOLES & HAY] (discussion of the community property system in general).

Carlos' generous support of his Colombian family did not end with his separation from María and his move to Miami. Although the three children from his first marriage had shown him little love or affection after his separation from their mother, Carlos continued to permit his eldest Colombian son to use a power of attorney Carlos had granted to that son in Colombia prior to the separation. The son used the power of attorney to transfer an additional \$25,000,000 of Carlos' property to his children in Colombia. The transfers were effected during Carlos' second marriage to Carmen. The property transferred was primarily Florida real estate Carlos had acquired after his move to Miami.<sup>10</sup>

In addition, Carlos transferred certain monies to José Martínez, María's estranged brother, who had moved to Miami around the same time as Carlos and who had subsequently become quite close to Carlos, Carmen and their two children. Carlos had deposited those funds in Miami banks in various joint accounts labeled "Carlos and José, as joint tenants with right of survivorship and not as tenants in common."<sup>11</sup>

Carmen obtains letters of administration appointing her personal representative of Carlos' estate.<sup>12</sup> She identifies the following assets for purposes of filing the inventory for the estate.<sup>13</sup>

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10. Thus it would be difficult for Carlos' first wife to claim in Colombia that this Florida real estate acquired subsequent to the *separación de cuerpos* is community property. Cón. Civ. art. 167 (Colom.).

11. Section 665.063(1)(a) of the Florida Savings Association Act creates a conclusive presumption that absent fraud or undue influence, funds in joint accounts held in a federal or state savings and loan association are intended by the parties to vest in the survivor. FLA. STAT. § 665.063(1)(a) (1987). As regards joint accounts held in Florida-chartered commercial banks, there is also a presumption that the parties intended such funds to vest in the surviving account holder, but this presumption may be rebutted not only by proof of fraud or undue influence, but also by "clear and convincing proof of a contrary intent." FLA. STAT. § 658.56(1)-(2) (1987). This disparate treatment of joint accounts in banks and savings and loans has been held constitutional by the Florida Supreme Court. *In re Estate of Gainer*, 466 So. 2d 1055 (Fla. 1985).

12. Carlos named Carmen his personal representative in his will, as permitted by FLA. STAT. § 733.301(1)(a) (1987). It should be noted that had Carlos died intestate, Carmen, as surviving spouse, would be entitled to preference to be personal representative. FLA. STAT. § 733.301(2)(a) (1987). Should María contest Carmen's appointment as personal representative on the ground that she, not Carmen, is Carlos' widow, María would have to overcome the strong presumption under Florida law that the most recent marriage is valid. *See In re Estate of Perez*, 470 So. 2d 43 (Fla. 3d DCA 1985) (apparent attempts to conceal first marriage when marrying second wife abroad considered important factor in first wife's overcoming presumption of validity of second marriage). Of course, if María had filed a complaint, Carlos might have been found guilty of bigamy, a third degree felony in the state of Florida. FLA. STAT. § 826.01-.02 (1987).

13. In Florida, the personal representative is required to file an inventory of all known



A. PROBATE ASSETS [in Carlos' name alone]

	<u>Value</u>
1. Colombian coffee plantation	\$ 3,000,000
2. Shares of stock in Venezuelan oil production co. (located in Carlos' Venezuelan lawyer's office) <sup>14</sup>	1,500,000
3. Shares in Costa Rican commercial fishing venture (located in safe deposit box in Miami) <sup>15</sup>	4,500,000
4. Bank accounts in New York	2,000,000
5. \$5,000 Venezuelan gold certificate (issue date 1875) (located in safe deposit box in Miami) <sup>16</sup>	<u>10,000,000</u>
Total:	\$21,000,000

Under Carlos' Florida will, Carmen and her two children would inherit a gross estate of \$21,000,000 consisting of realty and personalty located throughout the world.

The following transfers of Carlos' assets will take effect outside probate upon Carlos' death:

B. JOINT ASSETS PASSING TO CARMEN  
(outside of probate)

	<u>Value</u>
1. Carmen & Carlos' home in Coral Gables <sup>17</sup>	\$ 5,000,000
2. Bank accounts in Miami	1,000,000
3. Florida Real Estate	10,000,000
4. Commercial paper (stocks, bonds & promissory notes) (located in safe deposit box in Miami)	<u>4,000,000</u>
Total:	\$20,000,000

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assets of the estate within 60 days of issuance of letters of administration. FLA. STAT. § 733.604 (1987).

14. Section 731.106 of the Florida Probate Code provides that "[c]ommercial paper, investment paper, and other instruments are located where the instrument is at the time of death." FLA. STAT. § 731.106(1) (1987).

15. See *id.*

16. *Id.*

17. If the real property here listed was held by Carlos and Carmen as tenants by the entireties, that property would not be homestead property. FLA. STAT. § 732.401(2) (1987). Because a tenancy by the entireties entails the right of survivorship, the property automatically would pass to Carmen upon Carlos' death. FLA. STAT. § 689.15 (1987). See *In re Estate*

C. JOINT ASSETS PASSING TO MARIA'S ESTRANGED BROTHER (outside of probate)

	<u>Value</u>
1. Bank accounts in Miami <sup>18</sup>	\$1,000,000

Carlos' estate plan called for approximately \$40,000,000 going to Carmen and their two children, both through probate and outside probate, and for \$1,000,000 to go to José outside probate. Of course, by his *inter vivos* transfers to María and her children upon his separation from María and thereafter, his Colombian family had already received over \$30,000,000 from Carlos.

Shortly before the deadline for filing the inventory, Carmen learns from María's estranged brother, José, that María and her children are not content with their \$30,000,000. They have initiated probate proceedings in both Colombia and Venezuela to assert their alleged rights to Carlos' estate in those countries. María contends, in effect, that she is entitled to recover from the estate (and from any of Carlos' transferees) a one-half community property share of the assets that were not partitioned in the course of their separation proceedings, *i.e.*, the property Carlos owned outside Colombia at the time of the separation.<sup>19</sup> In addition, María claims that her Colombian separation proceedings did not terminate her status as Carlos' spouse or her right to take a spouse's share of Carlos' estate.<sup>20</sup> María has retained a lawyer in Miami to assert her claims under Florida law to a spouse's elective share of the estate<sup>21</sup> and to recover a community property share of the as-

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of Silvian, 347 So. 2d 632, 634 (Fla. 4th DCA 1977) (tenancy by the entireties expressly excepted from § 689.15, purpose of which is to abolish right of survivorship in joint tenancies where right not expressly mentioned).

18. See FLA. STAT. § 665.063 (1)(a) (1987).

19. Separation proceedings in Colombia entail the liquidation of community property. See Cód. Civ. art. 1820 (Colom.). In Colombia, if one spouse fraudulently conceals community property in connection with a liquidation of the marital community, not only does that spouse forfeit the normal one-half interest in the concealed property, but must return to the community a sum equal to double the property. Cód. Civ. art. 1824 (Colom.).

20. See *infra*, notes 32-35 and accompanying text, for a discussion of the effects in Colombia of a *separación de cuerpos* on the separated spouse's status as intestate heir or right to an elective share.

21. Under Florida law, the surviving spouse of a resident decedent may claim an elective share equivalent to 30% of the fair market value on the date of death of all property of the decedent wherever located that is subject to administration, except real property not located in Florida. FLA. STAT. §§ 732.201, 732.206-207 (1987). There is, however, no elective share in Florida property for the surviving spouse of a nonresident decedent. FLA. STAT. § 732.205 (1987).

sets Carlos had transferred to Carmen through joint ownership.<sup>22</sup> Finally, under the forced heirship laws of Colombia and Venezuela, María's children contest their disinheritance by Carlos' will.<sup>23</sup>

As in many multinational probate cases, the above situation requires that counsel for all parties evaluate a host of choice of law rules, substantive principles of several legal systems, and complex jurisdictional issues. Although Carlos died domiciled in Florida with a majority of his assets located in Florida, representation of his Florida wife plainly can no longer be confined to the Florida courts and to Florida law. Indeed, in virtually every Florida probate proceeding where a decedent leaves property in various jurisdictions and has family ties outside Florida, it will be critical for attorneys to familiarize themselves with the choice of law rules of Florida and any other domestic forum involved, as well as with the substantive principles, choice of law rules and procedural law of each jurisdiction where the decedent had ever maintained property or residence.<sup>24</sup>

In such cases, the importance of the foreign elements cannot be overemphasized. For example, the courts of other states or foreign countries may not recognize and enforce the decree of a Florida probate court purporting to determine title to property within their jurisdiction.<sup>25</sup> In the case of Carlos' Colombian plantation

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22. This claim might not prosper under Colombian law, because property acquired after the liquidation of the marital community subsequent to a *separación de cuerpos* arguably is not part of that now inexistent community. See *supra* note 10.

23. Cód. Civ. arts. 1239-1264 (Colom.); Cód. Civ. arts. 883-887 (Venez.). Children of the testator are entitled, in most civil law jurisdictions, to a forced heirship or "legitimate portion" (la legítima) and save limited exceptions, cannot be disinherited to the extent of that forced heirship. See Opton, *Recognition of Foreign Heirship and Succession Rights to Personal Property in America*, 19 GEO. WASH. L. REV. 156, 180-82 (1950). For a summary of forced heirships in Europe, see R. LAWRENCE, *INTERNATIONAL TAX AND ESTATE PLANNING* 40-41, App. A (1983) [hereinafter LAWRENCE]; see also Yiannopoulos, *Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary "Rule,"* 46 CALIF. L. REV. 185, 221-42 (1958) [hereinafter Yiannopoulos].

24. See generally SCOLES & HAY, *supra* note 9, at 766-99; 822-76 (1982); Heilman, *Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases Involving "Election,"* 25 ILL. L. REV. 778 (1931); Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 398 (1956) [hereinafter Scoles, *Estate Planning*]; Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U. FLA. L. REV. 151 (1955) [hereinafter Scoles, *Nonbarrable Interest*]; Scoles & Rheinstein, *Conflict Avoidance in Succession Planning*, 21 LAW & CONTEMP. PROBS. 499 (1956); Stimson, *Conflict of Laws and the Administration of Decedents' Real Estate*, 6 VAND. L. REV. 545 (1953); Stimson, *Conflict of Laws and the Administration of Decedents' Personal Property*, 46 VA. L. REV. 1345 (1960).

25. For a general discussion of the enforcement of Florida judgments abroad, see generally Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign*

and Costa Rican fishing venture stock, for example, or his Venezuelan gold certificate and oil company shares, or even his New York bank accounts, the courts in Colombia, Venezuela and New York might not defer to a Florida court's determination as to the rightful distributees of those assets.<sup>26</sup> Similarly, although Carlos died a Florida resident with a will prepared and executed in Florida, courts in Florida, and *a fortiori* courts outside of Florida, may not apply Florida law to all questions raised as to the proper distribution of Carlos' assets.<sup>27</sup>

In view of the proceedings that María has already commenced in Colombia and Venezuela, and in view of the tremendous amounts at stake in those countries as well as in New York, it is essential to retain Colombian, Venezuelan and New York counsel to assist in evaluating María's claims under the laws of those jurisdictions. Nevertheless, despite the assistance of local counsel, a working knowledge of foreign law and procedure is becoming increasingly important to the U.S. attorney's ability to defend a decedent's out-of-state property from foreign claimants. In fact, such knowledge also will be important in protecting a foreign decedent's Florida estate from foreign claimants, because rulings by foreign courts could affect substantially the outcome of the probate proceedings in Florida.

### III. THE RIGHTS OF THE PARTIES IN LATIN AMERICA

#### A. *Economic and Legal Consequences of Decedent's Marital Situation*

Under the laws of Colombia,<sup>28</sup> as in most civil law jurisdictions,<sup>29</sup> property acquired by either spouse during marriage is clas-

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*Judgments*, 16 INT'L LAW. 425 (1982) [hereinafter Bishop & Burnette]; Larsen, *Enforcement of Foreign Judgments in Latin America: Trends and Individual Differences*, 17 TEX. INT'L L.J. 213 (1982) [hereinafter Larsen]; Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588, 623-29 (1979) [hereinafter *Foreign Judgments in Florida*].

26. See generally Larsen, *supra* note 25; Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221 (1944).

27. See Yiannopoulos, *supra* note 23; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 239-242, 257-260, 263-265 (1969).

28. COD. CIV. art. 180 (Colom.). See generally MONROY CABRA, *supra* note 8 (rules as to what assets are community property and how the community is administered and liquidated); 5 VALENCIA ZEA, DERECHO CIVIL, DERECHO DE FAMILIA (1978).

29. See, e.g., Cód. Civ. art. 135 (Chile); Cód. Civ. art. 148 (Venez.) (in the absence of an antenuptial agreement, "son comunes, de por mitad, las ganancias o beneficios que se

sified as community property in which each owns an undivided fifty percent share.<sup>30</sup> We will assume for purposes of the following discussion that all property acquired by decedent during his first Colombian marriage is community property under Colombian law.<sup>31</sup>

In 1960, decedent and his Colombian spouse were separated by judicial decree.<sup>32</sup> Although similar in many respects to divorce in the United States, these separation proceedings did not constitute a *vinculo* divorce and decedent was not permitted, under the laws of Colombia, to remarry.<sup>33</sup> Thus, under Colombian law, the

*obtengan durante el matrimonio*"); Cód. Civ. art. 126 (Guat.) (if no antenuptial agreement, assets acquired during coverture are community property); Cód. Civ. art. 1400 (Dom. Rep.) (if no antenuptial agreement, spouses are governed by community property rules); Cód. Civ. art. 176 (Peru); Cód. Civ. art. 258 (Braz.); Cód. Civ. arts. 1315-1316 (Spain) (if no antenuptial agreement, community property system); cf. C.C.D.F. (Mex.), art. 178 (marriage must be either according to the community property system or a separate property system; the parties enjoy wide discretion as to the details of content and administration of marital and personal assets); Cód. Civ. art. 40 (Costa Rica) (in the absence of an antenuptial agreement, the marriage is deemed contracted under a system of absolute separation of assets); Cód. Civ. art. 169 (Hond.) (spouses may establish any agreement they wish as to their property; if there is no agreement, there is absolute separation of property); Cód. Civ. art. 1163 (Pan.) (same).

30. In the United States, the following states recognize the community property system by statute: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. With respect to the characterization of marital property as community property or separate property in the case of migrant couples within the United States, see Annotation, *Change of Domicile as Affecting Character of Property Previously Acquired as Separate or Community Property*, 14 A.L.R. 3d 404 (1967); see also Clausnitzer, *Property Rights of the Surviving Spouses and the Conflict of Laws*, 18 J. FAM. L. 471 (1979) [hereinafter Clausnitzer]; Juenger, *Marital Property and the Conflict of Laws: A Tale of Two Countries*, 81 COLUM. L. REV. 1061 (1981) [hereinafter Juenger].

31. Cód. Civ. arts. 1781, 1830 (Colom.).

32. Indeed, by obtaining the decree, they did everything permitted to them under Colombian law to dissolve their marital and economic bonds. Until 1976, vincular divorce was not accepted under Colombian law, and after the *la Ley* of 1976, was possible only for civil marriage as opposed to religious, i.e., Catholic marriage, in which vincular divorce remains impossible. Cód. Civ. arts. 152, 167 (Colom.). See MONROY CABRA, *supra* note 8, at 172. Disenchanted Catholic spouses may obtain nothing more than a *separación de cuerpos* (divorce *ad mensa et thoro*) or a *separación de bienes*. Cód. Civ. arts. 165-168 (Colom.) (*separación de cuerpos*), 197-208 (Colom.) (*separación de bienes*), both of which have as a primary consequence the liquidation of the marital community, or *sociedad conyugal*. We are assuming for purposes of this article that Carlos and Maria obtained a *separación de cuerpos*, by judicial decree based on a complaint filed by Maria. Colombian law now permits *separación de cuerpos* by mutual consent. Cód. Civ. art. 165(2) (Colom.). Vincular divorce even in the case of Catholic marriages is now admitted in Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Argentina (Law No. 23,515 of 1987), Bolivia, Brazil, Ecuador, Peru, Uruguay and Venezuela. There is no vincular divorce in Chile or Paraguay, nor for Catholic marriages in Colombia or in the Dominican Republic celebrated after August 6, 1954.

33. Cód. Civ. arts. 140(2), 167 (Colom.).

Colombian wife remained decedent's spouse until his death.<sup>34</sup>

Economically, however, decedent's separation was very similar to a *vinculo* divorce. Their community property ties were terminated, and the community was definitively severed by that decree.<sup>35</sup> However, and of critical importance to our case, Colombian law requires that at the time of their separation, all community property owned by the spouses, whether acquired in Colombia or elsewhere, be divided between them, or "partitioned."<sup>36</sup>

In our hypothetical, only Colombian community property was partitioned in the course of the separation.<sup>37</sup> To the extent the Colombian spouse can demonstrate that non-Colombian community assets were not partitioned in the Colombian separation, she would have the right under Colombian law to bring a proceeding to obtain her community share of these non-Colombian assets.<sup>38</sup> Indeed,

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34. Cód. Civ. art. 167 (Colom.).

35. *Id.* Divorce in the case of *civil* marriages in Colombia not only dissolves the marital community but also specifically terminates any right of either spouse to inherit from the other as intestate heir or to claim the marital portion (*porción conyugal*). Cód. Civ. art. 162 (Colom.).

36. Cód. Civ. arts. 1830, 1832 (Colom.). Rules for determining what assets are community property and what constitutes separate property are contained in Cód. Civ. arts. 1781-1804 (Colom.). Rules are also included for determining what expenses are to be charged or reimbursed to each of the spouses. *Id.* No distinction is made in these rules between realty or personalty situated in Colombia and assets situated abroad.

37. This is a situation frequently encountered in cases involving United States realty owned by Latin American clients. Many Latin American countries strictly regulate investment abroad by their citizens. Nationals of those countries, therefore, often do not want any United States property listed in an inventory made in the country of their nationality. Also, such United States property is often the object of "side" agreements in the framework of a division of community property because it is felt that such agreements, executed in the United States, will achieve their objectives more easily and more quickly. This reasoning stems from the fact that the agreements can be drawn up and executed in the United States, by local lawyers and in compliance with local requirements, and may be recorded with less difficulty than if executed in another country with the attendant difficulties of authentication, legalization and notarization, often requiring the intervention of U. S. consular personnel.

38. Cód. Civ. art. 1832 (Colom.) (provides that the division of the community property shall be carried out following the rules given for the partition of decedents' estates). Article 620 of the Colombian *Código de Procedimiento Civil* provides for a *partición adicional* or additional judicial partition which calls for an additional inventory that shall include only property that was not included in the first inventory. See H. MORALES, CURSO DE DERECHO PROCESAL CIVIL, 487-88 (1960). Such a proceeding conceptually does not affect the separation agreement, nor does it constitute a reopening of the separation procedure. By operation of law, a partition of community property pursuant to a marital separation (*de cuerpos* or *de bienes*) covers all community property. The fact that one spouse may have neglected to include, or fraudulently failed to include, certain property is not a ground for setting aside the separation itself, as might be the case with a Florida property settlement agreement. In Colombia, the concealing spouse runs the risk of losing the property in question and of

this is one of the principal claims of the Colombian spouse in her present action in Colombia.

*B. Succession to Decedent's Colombian Estate Under Colombian Law*

1. Colombian Choice of Law Rules

The Colombian Civil Code provides that succession to a decedent's assets, both personal and real, generally should be determined under the law of the decedent's last domicile.<sup>39</sup> However, there are certain important exceptions to this general rule.<sup>40</sup> When a Colombian national dies domiciled in a foreign country, the Colombian courts will recognize the succession rights of his Colombian forced heirs under Colombian law to the exclusion of the law of decedent's last domicile, at least to the extent necessary to protect the Colombian forced heirs.<sup>41</sup> Moreover, Colombian courts will apply Colombian law with respect to the succession to real or personal property located within the borders of Colombia.<sup>42</sup>

In our hypothetical case, Florida law would not affect the disposition of decedent's Colombian coffee plantation and his shares in the Costa Rican commercial fishing venture, since Colombian courts would be likely to apply Colombian law to this Colombian property.<sup>43</sup> Thus, another reason for the Colombian wife to pro-

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having to return double its value to the community (Cód. Civ. art. 1824 (Colom.)), and of course the injured spouse may bring an additional partition proceeding. Cód. Civ. art. 1826 (Colom.). Thus, there is no requirement that there be "full disclosure" in the American sense of that term in connection with a Colombian separation, because by law the separation will cover all property that qualifies as community property. For the same reason, it is irrelevant to inquire into the "intent" of the spouses who are presumed to know the consequences of their separation. Thus, a Colombian separation of community property agreement, constitutes a "complete property settlement" in the sense of § 732.702 of the Florida Probate Code. *See* FLA. STAT. § 732.702 (1987).

39. Cód. Civ. art. 1012 (Colom.).

40. Cód. Civ. arts. 1012, 1054 (Colom.); *see also* CAICEDO CASTILLA, *DERECHO INTERNACIONAL PRIVADO* 425-29 (1960) (general discussion of Colombian conflicts rules relating to decedents' estates); P. EDER, *AMERICAN-COLOMBIAN PRIVATE INTERNATIONAL LAW* 47-55 (1956) [hereinafter EDER].

41. Cód. Civ. art. 19 (Colom.). *See* EDER, *supra* note 40, at 48.

42. EDER, *supra* note 40, at 48. Eder points out that there is disagreement among the writers as to whether article 20 of the Civil Code of Colombia, which provides that property situated in Colombia is subject to Colombian law, constitutes an exception to article 1012, whereby successions mortis causa are governed by the law of decedent's domicile at death. *Id.* at 50, n.90.

43. Florida courts may purport to assume jurisdiction over decedent's personal property located in Colombia, because under Florida law, courts of the decedent's domicile, have

ceed in Colombia is to insure that decedent's attempt to disinherit her and her children, in his Florida will, fails by virtue of the forced heirship provisions of Colombian law.

## 2. Colombian Substantive Law of Succession

If the Florida spouse retains counsel in Colombia to present decedent's Florida will to a Colombian court, the formal validity of the will will be the preliminary issue to be addressed.<sup>44</sup> If the Colombian courts hold that decedent's Florida will was not validly executed under Colombian law, or if the Florida spouse does not present her claims based on the Florida will in Colombia, the Colombian laws of intestate succession will apply.<sup>45</sup> Under Colombia intestacy laws, the Florida wife would take nothing because under Colombian law the Colombian spouse, not the Florida wife, would be recognized as the surviving spouse.<sup>46</sup> In any event, under the Colombian laws of intestacy, the surviving spouse does not take as an intestate heir when the decedent is survived by his children, although she may take a conjugal portion, which in intestate estates, is a forced share equal to that of a legitimate descendant.<sup>47</sup> The conjugal portion, however, is not available to a spouse who has

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jurisdiction to determine the distribution of his personal assets wherever located. However, because it would seem likely that in Colombia a foreign decree will have no effect on how personal or real property located in Colombia is distributed, the Colombian courts are likely to ignore a Florida decree favorable to decedent's Florida wife regarding the distribution of decedent's personalty located in Colombia. See EDER, *supra* note 40, at 54 (citing Succession of Morelli, 52 G.J. 811-14 (1941)) (Colombian court would not recognize Italian decree).

44. EDER, *supra* note 40, at 53 (testamentary provisions in wills executed abroad relating to property situate in Colombia are subject to Colombian law). See Cód. Civ. arts. 1084, 1085 (Colom.) (Colombian residents may execute a will abroad in the Colombian consulate of their residence with the formalities prescribed in Colombian law).

45. Cód. Civ. art. 1037 (Colom.). See H. CARRIZOSA PARDO, LAS SUCESIONES 155-59 (4<sup>a</sup> Edición 1959) [hereinafter CARRIZOSA PARDO].

46. A *separación de cuerpos* does not dissolve the marriage bond in Colombia in the case of a Catholic marriage. Cód. Civ. art. 167 (Colom.).

47. Cód. Civ. arts. 1045, 1236 (Colom.). For a discussion of the alternatives available to a surviving spouse under Colombian law (spouse's forced share (conjugal portion or *porción conjugal*), intestate share and of course her half of the community property), see CARRIZOSA PARDO, *supra* note 45, at 377-93. Carrizosa Pardo points out that when a decedent is survived by the spouse and descendants, the spouse is not, technically speaking, an intestate heir, but takes a conjugal portion which is an equal per capita share with the descendants. *Id.* at 389. In community property jurisdictions, it is generally considered that the surviving spouse is sufficiently protected by the half of the community property received upon decedent's death, and does not need the added protection of a substantial intestate share of the estate.



received her share of the community property.<sup>48</sup>

Even if the Florida spouse does present, in a Colombian court, the Florida decree admitting decedent's will to probate in Florida, and even if the formal validity of the will is recognized in Colombia,<sup>49</sup> Colombian restrictions upon testamentary disinheritance must still be considered.<sup>50</sup> Under Colombian law, the decedent's children, as forced heirs are entitled to take against the will, an equal per capita share of one half of the estate as their *legítima* or legitimate portion.<sup>51</sup> This is true under Colombian law for both adopted and illegitimate children.<sup>52</sup> Therefore, decedent's adopted child, as well as the "illegitimate" children decedent had with his second wife in Florida, will have the same right in Colombia to a forced heirship as the legitimate children of decedent's first marriage. The Colombian spouse, however, in all likelihood would not be able to claim an interest in the Colombian estate, because she has already received her community property interest in connection with her separation from decedent.<sup>53</sup>

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48. See *infra* note 53.

49. It is likely that Colombian courts would recognize decedent's Florida will as validly executed based on the Florida probate decree, notwithstanding that decedent may have failed to comply with the formalities required of a will executed in Colombia. EDER, *supra* note 40, at 48-49. Colombian law generally provides that an instrument, valid where executed, is valid in Colombia. Cón. Civ. art. 1084 (Colom.). Colombian courts would likely treat as valid wills executed in the United States as valid where the decree admitting those wills to probate is presented. *Id.*

50. See *supra*, note 23. Thus, decedent's attempt to disinherit his Colombian children would not prosper under the circumstances of our hypothetical. Assuming the Colombian court would admit the Florida will, as a matter of public policy, it nevertheless would apply the Colombian law of forced heirship to decedent's Colombian estate, under which one half of the estate descends to all the children in equal parts, one quarter, the *mejora*, may be distributed to one or more of the forced heirs (here, the children), but to no other heirs, in any way the testator wishes, and the remaining one quarter may be freely disposed of by the testator (here, to the Florida children). See Cón. Civ. arts. 1226-1264 (Colom.). Colombian law provides for a modification of any will that does not respect these forced heirship provisions. *Id.* arts. 1274-1278. See also EDER, *supra* note 40, at 49-50 (pursuant to art. 19, Cón. Civ., succession of a Colombian who dies domiciled in a foreign country is governed, as to the Colombian wife and relatives, by Colombian law, which determines *inter alia* all rights in succession opened in the foreign country that derive from separation, order of inheritance, *legítima*, conjugal or community share, etc.).

51. Cón. Civ. arts. 1240-1242 (Colom.). While the invalidity of the Florida marriage would render decedent's children by his Florida wife illegitimate under Colombian law, this illegitimacy would have no impact upon their rights of succession. Colombian law provides that the illegitimate children of a decedent take equally with the legitimate children. Cón. Civ. arts. 1045 (Intestacy), 1240(1) (Colom.) (testate succession) (as modified by Law 29 of 1982).

52. Cón. Civ. art. 1240(1) (Colom.).

53. As a general rule, a surviving spouse under Colombian law has the choice between

### C. *The Rights of the Parties Under Venezuelan Law*

In Venezuela, as in Colombia, the Colombian wife and her children seek to acquire their interest in the property decedent owned in that jurisdiction at his death, including their rights to decedent's \$10,000,000 gold certificate. As in Colombia, Venezuelan courts will apply their own law with regard to the distribution of decedent's forum property, whether or not the decedent or his heirs have any relationship to Venezuela.<sup>54</sup> Moreover, Venezuela will apply its own law to determine the spouse's community interest in the decedent's property.<sup>55</sup> If the Florida spouse presents the decedent's Florida will in Venezuela, and assuming Venezuela rec-

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taking her half of the community property or opting for the conjugal portion (*porción conyugal*), which would be an equal (to that of the children) per capita share of 50% of the estate. In effect, in cases where there is a surviving spouse and children of the decedent, the spouse is counted as another child of the decedent, except in very limited circumstances. Because in our hypothetical the wife has already received her 50% share of the community property she had with decedent following their separation, she would not be entitled to this *porción conyugal* which might be compared to a sort of elective share, *mutatis mutandis*. See CARRIZOSA PARDI, *supra* note 45, at 387. The result would be in this case that despite decedent's Florida will, each of decedent's five children would be entitled to a one-fifth part of 50% of the Colombian estate. It is conceivable that the Colombian court, assuming it recognized the validity of the Florida will, would construe the Florida will as validly transferring to the Florida children the 25% *mejora* and to the Florida "spouse" and children the 25% of *libre disposición*, or free disposition.

54. Cód. Civ. art. 10 (Venez.). See generally R. LOMBARD, *AMERICAN-VENEZUELAN PRIVATE INTERNATIONAL LAW* 53-61 (1965) [hereinafter LOMBARD]. Venezuelan law governs the nature of property rights in Venezuelan assets left by decedent. *Id.* at 56.

55. See LOMBARD, *supra* note 54, at 43 (citing *Baro v. Arque*, 3d Civ. Ct. of First Instance, Fed. Dist. Jan. 25, 1952, *Gaceta de Tribunales*, Feb. 1952, p.1; *rev'd*, 2d Civ. Sup. Ct., Fed. Dist. Mar. 28, 1952, *Gaceta de Tribunales*, Aug. 1952, p. 4). In *Baro*, the Venezuelan court applied Venezuelan law to determine the effect of the laws of succession and of community property upon the distribution of real property located in Venezuela and belonging to an intestate decedent, despite the fact that the decedent and all of the interested claimants were residents of Spain. *Id.* Venezuela ratified the Bustamante Code of Private International Law with reservations. *Id.* at 53. The Código Bustamante of 1928 was ratified by many of the Central and South American countries in the form of a treaty. See A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* 23 (1962) (Código Bustamante was ratified by all Central American States and Bolivia, Brazil, Chile, Ecuador, Peru and Venezuela). It is applicable in theory only to conflict cases involving property or nationals of the signatory countries. The United States never signed nor ratified the Bustamante Code, in part because of certain difficulties created by the United States federal system. In certain cases, nevertheless, the Código Bustamante may be consulted usefully for its orientation as to the position Venezuelan courts might take in a given international conflict of laws situation. See, e.g., Judgment of June 21, 1961, Ct. Sup. Dist. Fed. Jurisprudencia Ramirez y Garay, (1<sup>er</sup> semestre 1961, p. 57) (although Código de Bustamante only applies to contracting states, it indicates legislative intent of provisions of Venezuelan law), cited in T. DE MAEKELT, *MATERIAL DE CLASE PARA DERECHO INTERNACIONAL PRIVADO* 152 (1979).

ognizes the formal validity of the will,<sup>56</sup> the Venezuelan restrictions upon disinheritance as well as Venezuela's community property laws must be examined.<sup>57</sup> Under Venezuelan law, a surviving spouse is entitled to a fifty percent share of the couple's community property.<sup>58</sup> The surviving spouse's community share is not considered part of the decedent's estate.<sup>59</sup> The Colombian wife's share in the Venezuelan community property will pass to her independently of the estate. However, because of her separation, she will have no rights as a forced heir to the decedent's property.<sup>60</sup>

In sum, even if decedent's Florida will were to be considered by Venezuelan courts, it is unlikely decedent's Florida wife and her children would receive anywhere close to the \$12,000,000 in Venezuelan assets that decedent intended should pass to them. First, the Colombian children would each be able to take their forced share in decedent's Venezuelan property. Second, Venezuela quite probably would recognize the Colombian wife's community property claim to decedent's Venezuelan assets on the ground they were community property and never partitioned in connection with her separation. Thus, a substantial portion of the Venezuelan assets decedent intended for his Florida wife and children, would pass instead to the Colombian spouse and children.<sup>61</sup>

The law that foreign courts would be likely to apply in the jurisdictions where the first wife is litigating could lead to alarming

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56. Cód. Civ. art. 879 (Venez.). It appears that Venezuela, like Colombia, would recognize the Florida will as valid upon presentation of the Florida decree admitting that will to probate. See generally LOMBARD, *supra* note 54, at 57-59.

57. Forced heirs lose their right to a forced heirship only in certain cases specifically set forth in article 810 of the Venezuelan Civil Code. Forced heirships (the legitimate portion or *legítima*) is governed by articles 883-87 of the Venezuelan Civil Code. See generally E. CALVO BACA, *MANUAL DE DERECHO CIVIL VENEZOLANO* 233-36 (1984) [hereinafter CALVO BACA].

58. Cód. Civ. arts. 148, 173, 183 (Venez.). See CALVO BACA, *supra* note 57, at 55-60.

59. CALVO BACA, *supra* note 57, at 202 (community property rules are separate from rules of inheritance; surviving spouse in principle has already received her half of the community property before partition of the estate, such estate of course includes the community property share of the decedent).

60. The general rule in Venezuela is that when an intestate decedent is survived by a spouse and children, the children and the spouse take equal shares per capita of the estate. Cód. Civ. art. 824 (Venez.). See CALVO BACA, *supra* note 57, at 201-02. In Venezuela, however, the law is clear that when the spouses have obtained a final *separación de bienes*, each forfeits his right to inherit *ab intestato* from the other. *Id.* at 200; Cód. Civ. art. 831 (Venez.).

61. For a discussion of the Colombian spouse's community property claim to property such as the Venezuelan assets that decedent acquired during their marriage, see text accompanying notes 75-81, *infra*.

results for the Florida wife's interests in decedent's estate. With regard to decedent's Latin American assets, there exists a clear and present possibility that the Colombian spouse could succeed in wresting away part of the estate through her community property claims in Colombia and Venezuela. More importantly, the determination by a Colombian court that certain marital rights of the Colombian spouse in decedent's estate survived the separation, if given effect by Florida courts, could prove to be devastating in Florida to decedent's Florida wife. In plotting strategy, therefore, the next step for the Florida wife's counsel is to consider the impact of the Latin American proceedings and law on the Florida proceedings.

#### IV. THE RIGHTS OF THE PARTIES IN FLORIDA — THE FIRST WIFE'S FLORIDA STRATEGY

##### A. *Preliminary Considerations*

##### 1. Jurisdiction

Because decedent died while domiciled in Florida, it is clear that Florida is an appropriate forum in which to probate his Florida estate.<sup>62</sup> In Florida, as in most jurisdictions, real property is properly probated, as a jurisdictional matter, in the forum where it is located.<sup>63</sup> Jurisdiction to probate personalty will lie where such property is located or at the decedent's last domicile.<sup>64</sup> Thus, Florida courts will clearly take jurisdiction to probate decedent's Florida realty, as well as his personalty, wherever located.<sup>65</sup> It is equally clear that if decedent's Colombian wife wishes to pursue her claims to decedent's Florida property, she must be prepared to litigate in Florida.

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62. FLA. STAT. § 733.101(1)(a) (1987). See, e.g., SCOLES & HAY, *supra* note 9, at 823 (principal place of probate of will and administration of decedent's estate normally is in state where decedent was domiciled at death).

63. See, e.g., *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856, 868 (1936); *In re Estate of Swanson*, 397 So. 2d 465, 466 (Fla. 2d DCA 1981); *In re Estate of Siegel*, 350 So. 2d 89, 90-91 (Fla. 4th DCA 1977).

64. See *In re Estate of Siegel*, 350 So. 2d 89, 91 (discussing the maxim *mobilia sequuntur personam*).

65. Of course, this does not mean that foreign courts will recognize Florida's jurisdiction over personal property within their own borders. See, e.g., EDER, *supra* note 40, at 53 (property situated in Colombia governed by Colombian law and distributed in accordance therewith); LOMBARD, *supra* note 54, at 54 (assets located in Venezuela are subject to forced shares regardless of nationality or domicile of testator).

In addition, because foreign courts are likely to accept jurisdiction over part of decedent's estate, the effect of foreign probate judgments in Florida probate proceedings is an important factor to be considered in establishing overall strategy. There is authority in Florida for the proposition that Florida courts, in probating a non-resident decedent's Florida estate, will give effect to probate decrees from decedent's last domicile.<sup>66</sup> However, if the decedent was a Florida resident, Florida courts would not defer to the probate decrees of courts in other jurisdictions in determining how the decedent's Florida property should be distributed.<sup>67</sup> This is so even if all interested parties were present in the foreign probate forum.

## 2. Location of Assets

Generally speaking, it is not difficult to determine the location of real property and tangible personal property. However, a preliminary issue often arises as to the location of intangible personal property such as commercial paper, stocks, bonds and notes for jurisdictional and choice of law purposes.<sup>68</sup> For example, in our hypothetical, decedent left commercial paper in Miami evidencing obligations owed to him by debtors in various other countries. The question thus arises as to whether this property is situated in Florida, where the paper evidencing the obligation is found, or elsewhere, i.e., where the debtors reside. The importance of this issue can be appreciated with respect to the Venezuelan gold certificate: the paper is in Florida, but the debtor is in Venezuela. The question is crucial because distribution of the \$10,000,000 may differ

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66. See *Biederman v. Cheatham*, 161 So. 2d 538, 543 (Fla. 2d DCA 1964) (citing *Loewenthal v. Mandell*, 125 Fla. 685, 170 So. 169, 173-74 (1936)).

67. See *Trotter v. Van Pelt*, 144 Fla. 517, 198 So. 215 (1940); *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936); see also *In re Estate of Swanson*, 397 So. 2d 465 (Fla. 2d DCA 1981). See generally *Hopkins, The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221 (1944). However, foreign decrees concerning related issues, such as status, might well be given effect by the Florida courts. See *infra* note 75. Moreover, Florida courts might defer to rulings by foreign courts concerning such issues as the status of property as community property, at least where all parties claiming rights to that property are before the foreign court. See *Quintana v. Ordonez*, 195 So. 2d 577 (Fla. 3d DCA 1967).

68. In the United States, where choice of law does not depend on the location of personalty, the issue of the location of intangibles will affect jurisdiction only. In Latin America, however, where the courts generally apply forum law to personalty within their borders, this issue can be outcome determinative. It has been held in Florida that Florida courts have authority to determine the jurisdiction of a foreign court. *Lewis v. Hodges*, 254 So. 2d 397, 400 (Fla. 2d DCA 1971) (Florida as forum court may determine that decedent was not domiciled in Georgia and that letters of administration granted by a Georgia court must fail).

depending upon whether the certificate is deemed to be located in Venezuela (requiring application of Venezuelan law) or in Florida (requiring application of Florida law).<sup>69</sup>

The rule in most U.S. jurisdictions is that the situs of negotiable instruments is the place where the paper is found, while the situs of non-negotiable instruments is where the debtor is found.<sup>70</sup> If this rule applies, the Venezuelan gold certificate will be distributed in accordance with the laws of Florida, since that is where the certificate itself is found, whereas decedent's Venezuelan oil company shares will be distributed in accordance with Venezuelan law because the stock certificates were kept in decedent's lawyer's office in Caracas.

### 3. Applicable Law

The Colombian spouse ultimately will have to resort to the Florida courts for determination of her various claims to decedent's property. However, this does not mean that her claims will be governed exclusively by Florida law. Florida choice of law rules, which have preliminary applicability in the case of a decedent who died domiciled in Florida, are as follows: (1) the formal validity of a will is governed by the laws of the place of execution;<sup>71</sup> (2) succession to personalty is determined by the law of the decedent's last domicile;<sup>72</sup> (3) succession to real estate is determined by the law of the situs of the property;<sup>73</sup> (4) the validity and effect of pre-nuptial and separation agreements is determined by the law of the place of execution or the marital domicile at the time of execution;<sup>74</sup> (5) personal status, i.e., the relationship of a person to the decedent, is determined by the law of the family domicile;<sup>75</sup> (6) the status of assets as community property or separate property is de-

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69. The practitioner, of course, must consider whether a foreign court of the place where the asset underlying a negotiable instrument, or the place where the debtor is domiciled, will also consider the location of the asset to be where the paper is located.

70. See, e.g., FLA. STAT. § 731.106(1) (1987).

71. FLA. STAT. § 732.502(2). Cf. *In re Estate of Swanson*, 397 So. 2d 465, 467 (Fla. 2d DCA 1981) (pointing out possible hiatus in present law where will is invalid under law of the place of testator's domicile at time of execution or death but also invalid under law of place of execution).

72. See, e.g., *In re Estate of Siegel*, 350 So. 2d 89 (Fla. 4th DCA 1977).

73. *Trotter v. Van Pelt*, 144 Fla. 517, 198 So. 215, 217 (1940); *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245 (1896).

74. See *Gessler v. Gessler*, 273 F.2d 302, 304 (5th Cir. 1959); *Hagen v. Viney*, 124 Fla. 747, 169 So. 391, 394 (1936).

75. See *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 715 (1938).

terminated by the law of the marital domicile at the time the property was acquired;<sup>76</sup> (7) a foreign divorce decree is given effect as to status if either spouse was domiciled in the rendering forum, whether or not the other spouse was present;<sup>77</sup> and (8) a foreign divorce decree is given effect as to financial relations between the spouses, if it meets the requirements applicable to foreign judgments settling personal disputes, i.e., both parties must have appeared before the rendering court.<sup>78</sup>

Like most choice of law principles, those applied in Florida are subject to exceptions more numerous than can be discussed in this article. However, they are applied in Florida often enough to form the basis for predicting the possible outcome in Florida of an international probate contest and for mapping out a preliminary strategy. Application of these basic rules to the foreign spouse's claims will also provide some guidance as to the issues to be addressed when defending the Florida wife's rights in Florida courts.

In our hypothetical, decedent died domiciled in Florida leaving real property with a situs in that state. Thus, Florida substantive law should apply to decedent's real property and would determine: (1) the validity of decedent's testamentary dispositions as to this Florida property; (2) the status of the property acquired by decedent after his separation from his first wife in Colombia and subsequent move to Miami; and (3) the validity of his marriage in Florida and consequently the legitimacy of the two children he had with his Florida wife. However, under Florida conflicts principles, Colombian law should apply to determine: (1) the status as community or separate property of the assets decedent acquired in Florida during his Colombian marriage; (2) the effect of the Colombian separation agreement and decree upon the Colombian spouse's rights to that property; and (3) the continuing validity *vel non* of the Colombian first marriage.

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76. *Quintana v. Ordone*, 195 So. 2d 577 (Fla. 3d DCA 1967).

77. *Pawley v. Pawley*, 46 So. 2d 464 (Fla. 1950); *Kittel v. Kittel*, 194 So. 2d 640 (Fla. 3d DCA 1967); *Schwartz v. Schwartz*, 143 So. 2d 901 (Fla. 2d DCA 1962).

78. *Pawley*, 46 So. 2d at 473.

*B. The Colombian Wife's Community Property Interest in Certain Assets of Decedent's Estate*

1. Law Applicable to Characterization of Assets

Florida conflicts law provides that assets are characterized as community property or separate property pursuant to the law of the jurisdiction of the marital domicile at the time the property was acquired.<sup>79</sup> This applies regardless of the present situs of the property and regardless of the jurisdiction within which the property was acquired.<sup>80</sup> Therefore, although Florida is not a community property jurisdiction, an asset in Florida will be treated as community property if it was acquired by a married resident of a community property jurisdiction.<sup>81</sup>

When the marital domicile changes during marriage, however, the issue is less clear. In particular, the question arises as to the status of property owned by spouses originally domiciled in a community property jurisdiction who later move to a non-community property jurisdiction.<sup>82</sup> Generally recognized choice of law rules provide that only the property acquired by the spouses prior to the change of marital domicile would be treated as community property.<sup>83</sup> Property acquired subsequently in the non-community property forum would be treated as the separate property of the acquiring spouse.<sup>84</sup>

In our hypothetical, the status of property acquired by decedent during his Colombian marriage will be determined by the Florida courts in accordance with Colombian law.<sup>85</sup> Like most Latin American civil law countries, Colombia is a community prop-

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79. *Quintana*, 195 So. 2d 577 (Fla. 3d DCA 1967).

80. *Id.*

81. *Id.*

82. *See supra* note 30.

83. *See e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1969).

84. *Id.* at § 258. Of course, it is not always easy to determine when property was acquired. The question would be one of fact. What constitutes "acquisition" would in all probability be governed, according to the maxim *locus regit actum*, by the *lex loci celebrationis*, or law of the place where the act was carried out.

85. New York courts have adopted a similar choice of law approach on the issue of community property. Therefore, the Colombian spouse's claim to a community share of decedent's New York bank accounts likely will be governed in New York by Colombian law. *See In re Crichton's Estate*, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967). Of course, Venezuelan courts will apply their own community property law to any property located within Venezuela, regardless of where the spouses were domiciled at the time the property was acquired. *See LOMBARD, supra* note 54, at 42-43.



erty jurisdiction in which, as a general rule, husband and wife each own an undivided fifty percent share of property acquired by either spouse during marriage or of property that otherwise qualifies as community property under the applicable rules.<sup>86</sup> Accordingly, prior to her separation from decedent, decedent's Colombian spouse owned an undivided one half share of the couple's community property.

## 2. Effect of Separation

The viability of the Colombian spouse's community property claim will depend, as a preliminary matter, on her ability to avoid the preclusive effect of her Colombian separation. Florida courts will determine the validity and effect of a separation agreement according to the law of the place of execution.<sup>87</sup> Florida courts also will give effect to a foreign judicial decree determining the financial incidents of a divorce, at least when, as here, both parties were present before the foreign tribunal.<sup>88</sup> Consequently, the Colombian spouse's community property claims will fail unless she can demonstrate that under Colombian law, her community property rights survived her separation proceedings with the decedent.

Under Colombian law, her separation from decedent terminated their *sociedad conyugal*, or marital community. Nevertheless, she could still bring an action in Colombia to recover her fifty percent share in any property that had not been partitioned in connection with the separation. Therefore, her strategy to overcome the effect of her Colombian decree will be to argue that the assets acquired by decedent outside Colombia during their marriage remained community property and must be partitioned. She must demonstrate that under Colombian law she is entitled to bring such an action of "additional partition," and must submit her claim to the Florida court of the situs.

If the Florida court should reject that contention, the only solution for the Colombian spouse is to continue her proceedings in Colombia to have the property declared community property and duly partitioned. She then would attempt to enforce the Colombian decree in Florida.

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86. See Cód. Civ. arts. 1830, 1832, 1781-1804 (Colom.).

87. See *supra* note 74.

88. See *supra* note 78.

### 3. Procedural Considerations

(a) *Tracing*. The Colombian spouse's first objective in Florida and in Venezuela will be to recover her community property share of those non-partitioned, community assets owned by decedent outside Colombia at the date of their separation. Moreover, she does not have to limit her community property claim to these assets. By virtue of the doctrine of tracing, she may pursue all property acquired by decedent after his move to Miami which was purchased with those assets or the proceeds of those assets.

Florida courts have recognized that when property located within this state is traceable to community assets, such property will itself be subject to community property claims, with the result being that the holder of such property will be deemed to hold it as trustee for the spouse entitled to it.<sup>89</sup>

(b) *Resulting Trust*.<sup>90</sup> Under general principles of Florida law, resulting trust claims lie against all holders of the property of another<sup>91</sup> with the exception of bona fide purchasers for value, i.e., persons who have paid value for the property and have acquired it in good faith and without notice of any competing claims to the assets.<sup>92</sup>

(i) *Discovery*. One factor that makes it particularly appropriate to bring an action based on a resulting trust claim in order to recover diverted community property is that such an action empowers the court to require the putative holders of community assets to explain how and from whom the assets were initially ac-

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89. See, e.g., *Camara v. Camara*, 330 So. 2d 818 (Fla. 3d DCA 1976), *cert. denied*, 339 So. 2d 1167 (Fla. 1976).

90. The nature of the Colombian spouse's resulting trust/conversion claims to recover her community assets, while they affect decedent's probate estate, are not technically probate claims. Unlike probate claims (such as the Florida spouse's claims to recover assets under decedent's will) which are *in rem*, the Colombian spouse's claims to recover those assets under forced heirship rights (the constructive trust/conversion claims to recover a community share of decedent's property) constitute actions *in personam* against the holders of the property sought. The personal nature of the community property claims, as opposed to the *in rem* nature of the probate claims, will make an important difference in terms of the preclusive effect a foreign court would attribute to any decree ultimately rendered.

91. The courts have found a resulting trust, in cases in which property acquired by one spouse after the marital domicile had been moved out of a community property jurisdiction to have been acquired with assets derived from property acquired while the marriage domicile was still within the community property jurisdiction. *Quintana v. Ordonez*, 195 So. 2d 577, 580 (Fla. 3d DCA 1967). This case should be applicable in the instant context.

92. Pursuant to Florida law, good faith takers for value without notice cannot be bona fide purchasers for value if they acquire the property from the converter/resulting trustee.

quired. An action for a resulting trust thus facilitates the tracing of community assets to which a spouse has been held entitled under community property principles.<sup>93</sup>

(ii) Preliminary Injunction.<sup>94</sup> Another advantage of a resulting trust claim to recoup diverted community property is that preliminary injunctive relief is available in appropriate cases to prevent the holder from dissipating the assets. Of course, a temporary injunction will be effective only if it is obtained before the holder learns of the likelihood of suit.

Injunctions are particularly important when cash held in a bank account is traceable to community assets or is otherwise subject to foreign claims, as is the case with the funds in the joint account decedent opened with the estranged brother of his Colombian spouse.<sup>95</sup> If the defendant should learn of the plaintiff's intention to sue, he could close out his bank account and leave Florida with the funds. In that case, the plaintiff would be left with no recourse other than chasing defendant and suing him personally wherever he could be found. Moreover, no action would lie against the bank.<sup>96</sup> Even if a bank permitted the defendant to withdraw the funds after the bank was advised of plaintiff's claim, Florida banking law would insulate the bank from liability unless the bank had been enjoined by court order.<sup>97</sup> It is critical, therefore, that a

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93. It is well established that a resulting trust claim cannot be defeated by a mere change in form of the assets involved, *e.g.*, from cash to property or from property to cash. *See, e.g.*, *Brown v. Hanger*, 368 So. 2d 63 (Fla. 3d DCA 1979) (proceeds of entreties property/property of husband and wife). If the Colombian spouse can demonstrate that decedent sold community assets in Venezuela and used the proceeds to acquire his and his Florida wife's house in Miami, the court may impose a resulting trust upon the house to the extent Venezuelan community assets were used to acquire it.

94. The requirements for establishing the right to preliminary injunctive relief are: (a) the likelihood of irreparable harm, and the unavailability of an adequate remedy at law; (b) the substantial likelihood of success on the merits; (c) that the threatened injury to petitioner outweighs any possible harm to the respondent, and; (d) that the issuance of the injunction will not disserve the public interest. *Sanchez v. Solomon*, 507 So. 2d 1264 (Fla. 3d DCA 1987) (preliminary injunction granted freezing joint account opened by Venezuelan decedent with two of twelve alleged children pending determination of whether Florida or Venezuelan law governed funds). In ordinary actions at law, injunctive relief or pre-judgment garnishment is extremely difficult to obtain.

95. Assuming that the one million dollars that decedent transferred to his separated wife's brother is traceable to community assets and that the brother is likely to abscond with the cash as soon as he learns that his sister has sued to impose a resulting trust upon those funds, the Colombian wife can obtain a temporary injunction, without prior notice to her brother, precluding the bank from disbursing the funds pending the ultimate outcome of the resulting trust claim. *See Sanchez*, 508 So. 2d at 1264.

96. FLA. STAT. § 658.55 (1987).

97. *Id.*

plaintiff, such as decedent's Colombian spouse do everything possible to keep her intentions private until an injunction has issued.

(c) *Conversion*. If the depository bank that permitted defendant to withdraw alleged community funds prior to the issuance of a temporary injunction was on notice when it accepted the deposits that the deposited funds had been converted, the bank itself would be liable for conversion. Mere negligence by the bank in failing to discover the converted nature of the fund would not suffice; actual notice of the conversion must be shown to expose the bank to liability. If the foreign spouse could show that both defendant account holder and the bank had actual knowledge of her community property claims to the \$1,000,000 at the time the bank accepted those funds, the bank would be a converter and as such, liable for the full amount of the deposit.<sup>98</sup>

#### 4. Interrelationship Among the Proceedings

A practitioner bringing claims on Florida assets based on the community property laws of Latin America must carefully coordinate the actions to be taken in the various countries. Indeed, in few other areas of international practice will proceedings be so interdependent. The Colombian spouse in our hypothetical has demonstrated her awareness of this interdependence by bringing additional proceedings in Colombia to partition omitted property, thus attempting to avoid any claim, that pursuant to the separation decree, all community property claims were barred. Moreover, courts in the various jurisdictions where community property is located are likely to lend weight to a prior foreign decree determining the community property rights of the claimant spouse as against the holders of alleged community property, because community property claims, unlike probate claims, are personal in

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98. The ramifications of a claim for conversion under those circumstances against a bank are explosive, especially in an international banking community such as Miami. Because bankers in Miami arguably are on notice of the community property laws of Latin America, a colorable claim could be made that each time a married Latin American nonresident deposits money in his own name in a Miami bank account, the bank is on notice that such funds may be community property. Upon the account holder's transfer of the money to a Miami mistress, the bank could be held liable for conversion. Obviously, given the potentially enormous liability in such cases and the chilling effect it would have on everyday financial transactions, such imputed notice would be construed very narrowly. Nonetheless, if strong indications exist of a bank's complicity with the depositor to divert community property from the spouse, the possibility of bringing such a claim against the bank should be considered.

nature.<sup>99</sup>

When all the parties are before a court in an action to determine community property rights in specific property, a final decree from the forum court is likely to be afforded preclusive effect as to subsequent community property claims in other jurisdictions.<sup>100</sup> Alternatively, even if all of the interested parties are not before the court, principles of international comity might well lead one court to afford greater weight to the claims of a party who has previously been successful in establishing or defeating a community property claim to the decedent's assets in another jurisdiction.<sup>101</sup> In this case, for example, the ability of the Colombian spouse to convince a court to issue a preliminary injunction in Florida would be enhanced if she could demonstrate that in Colombian proceedings she had successfully established her community property claim to specific assets of the decedent.

A spouse who has already established a community property claim in one forum may also attempt to enforce the judgment in a second forum based on comity, or may request temporary measures through international judicial assistance. However, it must be kept in mind that these remedies are time consuming and certainly not foolproof. It is prudent, therefore, to pursue a community property claim in every jurisdiction in which putative community assets are located.<sup>102</sup> In our hypothetical, for example, although United States conflicts principles and section 731.106(1) of the Florida Probate Code suggest that negotiable commercial paper is located at the situs of the paper as opposed to where the debtor resides, the current holder of the paper can always petition a court in the jurisdiction where the debtor resides and request relief which, if granted, would bar the remedy sought by the claimant spouse. The Colombian spouse, then, would be wise to consider pursuing her community property claim to decedent's commercial paper and other certificates both in Florida, where the paper is lo-

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99. In probate cases, which are considered to be *in rem* proceedings, a local court will rarely record a foreign judgment determining the distribution of assets outside the jurisdiction of the rendering court. Resulting trust or conversion claims to recover community property, however, are personal actions that may be brought in any jurisdiction where the claimant can obtain personal jurisdiction over the purported holders, and a judgment in such a case is more likely to be afforded extraterritorial effect.

100. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1969).

101. *Id.*

102. Such multiple actions arguably would not be barred, even though interested parties might raise the issue of *lis pendens*. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 86 (1969).

cated, and in the forum where the debtor resides.

### *C. Inheritance Rights of the Colombian Spouse in Florida*

#### 1. Choice of Law Considerations

Under Florida law, succession to a decedent's real estate is to be determined in accordance with the law of the situs.<sup>103</sup> Succession to decedent's personalty, however, is determined by the law of decedent's last domicile, wherever that personalty may have been located at the date of death.<sup>104</sup> Consequently, the validity of decedent's will and the distribution of decedent's Florida real estate, as well as his Florida and New York personalty, will be determined under Florida law.<sup>105</sup>

#### 2. Applicable Substantive Law: The Florida Elective Share

In Florida, only the surviving spouse can elect against decedent's will.<sup>106</sup> The surviving spouse's elective share under Florida law is thirty percent of decedent's Florida realty and of his personal property wherever located.<sup>107</sup> In our hypothetical, decedent's Florida spouse, assuming she is found to have that status, would have no interest in opting to take her elective share, because her share under the will is greater than what she would take under Florida's forced heirship provision.

Also, in our hypothetical, decedent left a Florida will specifically naming his Florida wife as his principal heir and personal representative. Consequently, a judicial finding in Florida that the Colombian first wife was the surviving spouse would not disinherit the Florida second wife, and arguably would not disqualify her from acting as the estate's personal representative.<sup>108</sup> However,

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103. See *Trotter v. Van Pelt*, 144 Fla. 517, 198 So. 215, 217 (1940); *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245 (1896).

104. See *In re Estate of Siegal*, 350 So. 2d 89 (Fla. 4th DCA 1977).

105. New York has adopted the same choice of law approach as Florida on the issue of succession to a decedent's personalty. See *In re Estate of Clark*, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968). Thus, a New York court also would apply Florida law to determine the succession to decedent's New York bank account. Venezuela and Colombia, on the other hand, in all likelihood would not recognize Florida law as governing the succession of any property within their borders, be it personalty or realty. See *supra* note 65.

106. FLA. STAT. § 732.201 (1987).

107. FLA. STAT. § 732.207 (1987).

108. Of course, if decedent had died intestate and the Colombian wife were determined to be the surviving spouse, the Florida wife under the same circumstances would lose any

such a finding would reduce the Florida spouse's inheritance as a consequence of the Colombian spouse's right to take thirty percent of decedent's assets against his will. The first question, therefore, is whether Florida courts will recognize the Colombian wife as the surviving spouse for purposes of the elective share provisions of the Florida Probate Code.

The incidents of decedent's marital relationship with his Colombian spouse likely will be determined by the law of Colombia, where the parties were married and later separated.<sup>109</sup> Because under Colombian law the effect of the judicial separation decree was to sever only their economic bonds, and because decedent never obtained a divorce in any other jurisdiction, in all likelihood it would be determined under Florida conflicts rules that the Colombian spouse retained her status as decedent's wife through the date of death.<sup>110</sup>

The validity of decedent's Florida marriage will be determined according to the law of Florida, the place of celebration.<sup>111</sup> In Florida, marriage by a person already married is bigamous.<sup>112</sup> A Colombian *separación de cuerpos* does not destroy the marriage bond.<sup>113</sup> Therefore, when decedent married his Florida wife, he was still married under Colombian law, and his attempted Florida marriage was bigamous. Under Florida law, a bigamous marriage is void and invalid.<sup>114</sup> Therefore, assuming Florida applies Colombian law to determine decedent's marital relationship with his Colombian wife, the Colombian wife would be deemed decedent's surviving spouse. Furthermore, if in accordance with traditional conflicts rules, Florida courts apply forum law to determine the rights of a surviving spouse to decedent's estate and in particular her right to

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claim to the probate assets and any right to serve as personal representative. FLA. STAT. § 733.301(2)(a) (1987).

109. Florida recognizes the general principle that the validity of a marriage is determined by the law of the place of celebration. *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 715 (1938); *Young v. Viruet de Garcia*, 172 So. 2d 243 (Fla. 3d DCA 1965).

110. Florida law would have permitted a full divorce, once decedent established his domicile in Florida, notwithstanding the provisions of Colombian law to the contrary. See *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. 1st DCA 1961) (as forum, Florida need not adhere to nor enforce incidents of a status which are repugnant to local forum's laws or policy). Whether Colombia would recognize such divorce is doubtful, given the strong public policy in that country regarding the indissolubility of Catholic marriages. See *supra* note 8.

111. See *supra* note 109.

112. See *supra* note 12.

113. Cód. Civ. art. 167 (Colom.).

114. See *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 715 (1938). See generally 25 FLA. JUR. 2d *Family Law* § 33-37 (1981).

the elective share, the Colombian spouse would be able to elect to take thirty percent of decedent's probate assets, in Florida and New York, against his Florida will.

Assuming, *arguendo*, that the Colombian wife will be considered the surviving spouse, her right to take an elective share still will depend on whether she can avoid any adverse effect of her separation from decedent under the Colombian law of testate succession. The question is whether her separation in Colombia terminated her right to claim a forced heirship in Colombia in a case of testamentary succession.

Under Colombian law, it is clear that the Colombian spouse's community property rights were terminated by her separation decree.<sup>115</sup> It is clear also that she remains decedent's spouse.<sup>116</sup> As regards intestacy, in certain cases, she could claim an intestate forced heirship in spite of the separation, although not when there are children.<sup>117</sup> With regard to testate succession, a surviving spouse in Colombia is not entitled to a *legítima* or legitimate portion, i.e. a true forced heirship,<sup>118</sup> her only claim against a will being be the conjugal portion, generally one quarter of the estate.<sup>119</sup> Under Colombian law, however, the conjugal portion is incompatible with a community property share, that is, a surviving spouse must elect between her community property or her conjugal portion.<sup>120</sup> Because the Colombian spouse in this situation already received her community property in the course of the separation, it is likely that she would not be able to claim a conjugal portion or Colombian elective share in Colombia.<sup>121</sup> If Florida looks to Colombian law, therefore, arguably she should not be entitled to an elective share in Florida.

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115. See *supra* note 9.

116. Article 167 of the Colombian Civil Code provides that the *separación de cuerpos* does not dissolve the marriage bond, although it suspends cohabitation.

117. See CARRIZOSA PARDO, *supra* note 45, at 386-87.

118. The only heirs entitled to a *legítima* under Colombian law are descendants (legitimate, adopted or extramatrimonial, i.e., illegitimate), ascendants, adoptive parents and natural parents of a child adopted in simple adoption. Cód. Civ. art. 1240 (Colom.). The surviving spouse is protected by the *porción conyugal*.

119. Cód. Civ. arts. 1230-1238 (Colom.). See CARRIZOSA PARDO, *supra* note 45, at 386-87.

120. See CARRIZOSA PARDO, *supra* note 45, at 386-87.

121. See Cód. Civ. art. 594 (Colom.) (when surviving spouse can elect between the *porción conyugal* and a community property share, election must be made before inventory and appraisal).



### 3. Potential Windfalls

(a) *The Double Whammy*. If a Florida court does not accept this consequence of the application of Colombian probate law, the Colombian spouse might well overcome the effect of her separation and establish her status as surviving spouse. She then could elect to take thirty percent of decedent's probate assets in Florida and New York against his Florida will. This result would be clearly anomalous.<sup>122</sup> Community property rights in jurisdictions that have adopted the community property system are designed for much the same purpose as the surviving spouse's elective share rights in common law jurisdictions, i.e., to protect a spouse from total disinheritance by the other. However, neither in common law nor in civil law jurisdictions are the rights of the surviving spouse intended totally to bar the rights of the decedent's other heirs or to eliminate decedent's right freely to dispose of at least part of his or her property.<sup>123</sup>

Further, under Colombian law, in the limited number of cases in which inheritance rights are available over and above a surviving spouse's community property, the community property assets received are set off against those rights.<sup>124</sup> In Florida, if a decedent leaves a will disinheriting the spouse, the spouse can take at least thirty percent of the probate estate as her elective share.<sup>125</sup> However, there are no community property rights in Florida.<sup>126</sup> If the Colombian spouse prevails in her contention that the court should apply traditional choice of law principles pursuant to which the status of property is determined by the law of the marital domicile and her inheritance rights are determined by the law of decedent's last domicile, she will get the windfall protection of both the Colombian community property laws and Florida's forced heirship

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122. For a discussion of similarly problematic results on the inheritance of the surviving spouse when a couple moves from a common law state to a community property state or from a community property state to a common law state, see Juenger, *supra* note 30, at 1074-76; Scoles, *Estate Planning*, *supra* note 24 at 422; see also Clausnitzer, *supra* note 30 (discussion of various statutory solutions to the problem, principally in the community property states of the United States).

123. In fact, a surviving spouse may claim both her community property share and an elective share in the other's estate in only a few community property jurisdictions. See generally Clausnitzer, *supra* note 30.

124. Cód. Civ. art. 1234 (Colom.). See CARRIZOSA PARDO, *supra* note 45, at 380-86.

125. FLA. STAT. § 732.207 (1987).

126. Although Florida is not a community property state, the adoption of the doctrine of equitable distribution might be construed as a step in this direction. See Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

laws. As a result, she would receive property far exceeding that which she could claim under Colombian or Florida law alone.<sup>127</sup>

The Florida Probate Code does contain a provision which can be relied upon as a basis for restricting the potential for such double recovery, at least in cases where civil law spouses have fully settled their community property rights. Section 732.702 of the Florida Probate Code provides that where a spouse has entered into a complete property settlement in connection with a separation, that spouse forfeits any right as an intestate heir in the estate of the other.<sup>128</sup> The statute also provides an analogous forfeiture as to the elective share.<sup>129</sup> Accordingly, in certain cases where, as here, Latin American spouses have separated under a system where only the economic bonds — not the marriage bonds can be severed, and where the parties have, in fact, separated their property, Section 732.702 should be considered as a possible basis for defeating a claim for intestacy or elective share rights.

(b) *A Bite of What Apple?* In addition, the Florida Probate Code may provide another possible windfall in favor of the Colombian spouse. The Code limits the calculation of the surviving spouse's elective share in the testate estate of a Florida decedent to the decedent's Florida realty.<sup>130</sup> Real property located outside Florida is expressly excluded.<sup>131</sup> However, all decedent's personal property wherever located is included.<sup>132</sup> By entitling a surviving

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127. See Scoles *supra* note 24, at 435.

128. FLA. STAT. § 732.702 provides:

(1) the right of election of a surviving spouse, the rights of the surviving spouse as intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead, exempt property, and family allowance, or any of them, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party. Unless it provides to the contrary, a waiver of 'all rights,' or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead property, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to either from the other by intestate succession or by the provisions of any will executed before the waiver or property settlement. . . .

(emphasis added).

129. *Id.*

130. FLA. STAT. § 732.206 (1987) provides that "[t]he elective share shall be computed by taking into account all property of the decedent wherever located that is subject to administration except real property not located in Florida."

131. *Id.*

132. *Id.*

spouse to claim thirty percent of all decedent's personalty wherever located, the legislature apparently presumed that the courts in other jurisdictions where a Florida decedent's personalty might be located would simply transfer that property to the Florida probate court for distribution.<sup>133</sup> This may not always be the case.

While the general rule is that distribution of personalty is governed by the law of decedent's domicile at death, courts in other jurisdictions might not agree that a given asset is personalty, that decedent was domiciled in Florida at the date of death, or that an heir has the status to inherit as such.<sup>134</sup> In addition, such jurisdictions may require an ancillary probate proceeding, with the attendant uncertainties of characterization and choice of law. The same problems, and others, can and do arise in connection with personal property located outside the United States. Although state courts in the United States tend to refer distribution of a decedent's personalty to the probate court in the decedent's domiciliary forum, this is not necessarily the practice outside the United States. In addition, Colombia and Venezuela might not recognize a Florida court's decree transferring decedent's personalty within their borders to Florida. Also, they may not distribute decedent's personal property within their borders to the testamentary heirs designated in decedent's Florida will.

Accordingly, a Florida court might be moved to take the Colombian spouse's entire elective share, an amount equal to thirty percent of decedent's Florida realty and of his personalty everywhere, entirely out of decedent's Florida probate assets. A gross injustice would result.<sup>135</sup> Even if the Florida court applied the statutory percentages to the Florida probate assets only (seventy percent to the intended heirs and thirty percent to the Colombian

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133. Cf. FLA. STAT. § 731.106 (1987) (Florida Probate Code). In the case of a nonresident decedent leaving assets, tangible or intangible, having a situs within Florida:

(2) The court may, and in the case of a decedent who was at the time of his death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile, as the case may be.

*Id.*

134. See SCOLES & HAY, *supra* note 9, at 770-74.

135. Under traditional conflicts rules, a similar windfall situation occurs among states of the United States whenever a couple married and acquired substantial property in a community property jurisdiction and later moved to a common law jurisdiction prior to decedent's death. See generally Clausnitzer, *supra* note 30.

spouse), acting under the assumption that courts in other jurisdictions will divide decedent's personalty located in the forum in like manner, the intended heirs would receive far less than seventy percent of decedent's total estate overall, given their probable inability to obtain those percentages of decedent's personalty in Latin America.<sup>136</sup>

#### *D. The Rights of the Disinherited Colombian Children*

Florida does not recognize forced heirship for descendants. Because Florida law will govern the distribution of decedent's Florida property, none of that property will pass to decedent's Colombian children by virtue of decedent's disinheriting them in his will. Of course, they could attempt to claim their *legítima* against the will in other jurisdictions, although it is unlikely that a Florida court would enforce a Colombian judgment purporting to accord the Colombian children a forced share of Florida real property.

#### *E. Decedent's New York Bank Account*

Although in certain cases some jurisdictions have alleviated the need for ancillary administration of a non-domiciliary's personal estate within their borders (principally in cases of small ancillary estates), New York and Florida have not. Accordingly, it will be necessary for the Colombian spouse to obtain ancillary letters of administration in New York to obtain title to the money in decedent's New York bank accounts. Whether she will need to appear personally in New York to assert her right to an elective share under Florida law will depend upon whether a New York probate court will determine the distribution of decedent's personal property under New York law, or alternatively, after providing for any local creditors, merely order that the New York assets be transferred to the Florida personal representative for distribution under Florida law.<sup>137</sup>

Depending upon how the Florida court determines the right

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136. See *infra* note 166.

137. Ancillary letters may be obtained in Florida by a foreign domiciliary personal representative provided he or she is qualified to act in Florida. FLA. STAT. § 734.102(1) (1987). To qualify in Florida, the nonresident personal representative must be related to the decedent. FLA. STAT. § 733.304 (1987). If the foreign personal representative is not qualified, those entitled to a majority interest of the Florida property may designate a personal representative who is qualified. FLA. STAT. § 734.102 (1987).

to, and distribution of, the elective share assets, the Colombian spouse or the Florida spouse may want to assert that the Florida ruling on distribution of decedent's personalty should be binding in New York. The rule in Florida is that not only does the law of the decedent's domicile at death govern distribution of personalty outside the domiciliary jurisdiction, but further that the domiciliary decree is binding on the non-domiciliary proceedings as to personalty.<sup>138</sup>

New York choice of law principles clearly provide for the application of Florida law to the distribution of decedent's New York personalty. Therefore, the spouse's right to an elective share will be determined according to Florida law.<sup>139</sup> It is not clear, however, whether a New York court would consider itself bound by a Florida probate decree as a matter of *res judicata* or alternatively merely would order that decedent's New York monies be transferred to the Florida personal representative. Thus, it is possible that the elective share issue, and even the community property claim, might need to be raised by the spouse in New York with respect to the New York accounts.

If the Colombian spouse can avoid the effect of her separation, application of basic conflicts principles in her Florida and New York proceedings could result in her acquisition of both a fifty percent community property share of a substantial portion of decedent's probate and non-probate assets, and a forced heirship elective share in an additional thirty percent of decedent's probate assets in Florida and New York.

## V. THE FLORIDA WIFE'S STRATEGY AND DEFENSES

### A. *Intervention in Latin American Proceedings*

The first and perhaps most important strategic decision for decedent's Florida wife is whether or not she should enter an appearance in Colombia and Venezuela to contest the Colombian wife's claims. A critical objective of the Florida wife's defense in any jurisdiction where decedent possessed property would be to establish the effect of the Colombian wife's separation from dece-

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138. It is not entirely clear from § 734.102 whether a Florida court would itself determine distribution of the personalty of a nonresident decedent, or instead would transfer the assets to the domiciliary personal representative for distribution.

139. See SCOLES & HAY, *supra* note 9, at 793.

dent.<sup>140</sup> In this regard, the effect of an appearance by the Florida spouse in the Colombian proceedings upon her ability to rely on the extraterritorial effect of the separation decree must be considered. It is also important to consider the property which she might forfeit to the Colombian spouse by failing to intervene in the Latin American proceedings.

# 1. Intervention in Colombia as It Affects the Florida Spouse's Reliance on the Colombian Separation Decree

If the Colombian spouse is unopposed in her efforts in Colombia to obtain a community property share of the Florida property pursuant to her separation decree on the ground that the property was community property and was never partitioned, she will probably obtain a Colombian judgment establishing her community property claim to a significant portion of decedent's non-Colombian assets.<sup>141</sup> However, the problem with intervention from the Florida spouse's point of view, is that if the Colombian spouse succeeds in Colombia in the face of opposition by the Florida spouse, this opposition could lead to the Colombian judgment declaring additional assets located outside Colombia to be community property. Partitioning them would be giving effect in tribunals outside Colombia.<sup>142</sup>

If the Florida spouse does not appear in the Colombian proceeding, she could argue in Florida that any decree rendered in

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140. The Florida spouse would wish to make sure that no property of decedent that is not properly characterized as community property is erroneously partitioned. Her intervention also would serve to underscore in the United States the nature of the Colombian *separación de cuerpos* and the fact that it constitutes a "complete property settlement" as that term is used in § 732.702 of the Florida Probate Code.

141. See *Foreign Judgments in Florida*, *supra* note 25, at 602-06 (procedure to be followed in attempting to enforce such a judgment in Florida). Florida courts have recognized that the establishment of non-record title interests arising out of community property claims should be settled in the forum state. See *Estabrook v. Wise*, 348 So. 2d 355, 357 (Fla. 1st DCA 1977).

142. If the Colombian spouse can convince courts outside Colombia that the Colombian separation decree by its nature settled her claims only as to property partitioned pursuant to that decree, she could without more, assert her community forced heirship claims to decedent's property outside Colombia. In any event, the Florida spouse must convince the courts outside Colombia that the nondisclosure of decedent's foreign assets, at the very most, gives the Colombian wife the right to bring supplemental partition proceedings in Colombia, and does not allow her to modify or set aside the decree. The effect of nondisclosure in a liquidation of the marital community pursuant to a Colombian *separación de cuerpos* is thus entirely different from the effect of a similar nondisclosure by a United States spouse in connection with a marital separation in a common law state.

that proceeding is not entitled to extraterritorial effect and should not be enforced outside Colombia. The argument might succeed.<sup>143</sup> When determining whether to recognize and enforce a foreign judgment, Florida courts follow traditional principles of comity. Pursuant to these principles a foreign judgment or decree will be recognized in the United States only if the foreign court had personal jurisdiction over all interested parties and all interested parties actually appeared to litigate the matter.<sup>144</sup>

There appears to be no precedent to suggest how a court would respond to the argument that the non-intervention of the Florida wife in a community property proceeding in Colombia should enable her to avoid the effect of a judicial partition of additional community property. However, there is precedent in support of the proposition that the Colombian separation decree precludes Florida courts from entertaining any claim by the Colombian spouse to decedent's property in Florida.<sup>145</sup>

In *Estabrook v. Wise*,<sup>146</sup> the appellate court ruled that it would do injustice to the doctrine of *res judicata* for a Florida court to recognize a spouse's community property claim to Florida realty in the face of a prior Texas divorce decree severing the parties' community property.<sup>147</sup> The court reached this result notwithstanding the fact that the wife in *Estabrook*, like the Colombian spouse here, claimed that the Florida property at issue had not

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143. One of the defenses to an action to enforce a foreign judgment in Florida is that there was no notice or opportunity to be heard. See *Foreign Judgments in Florida*, *supra* note 25, at 610-16. However, the Colombian spouse's additional partition action likely would be found to be in the nature of an *in rem* proceeding and the judgment consequently might be held binding *erga omnes*. *Id.* at 613 (discussing *Atlantic Ship Supply, Inc. v. M/V Lucy*, 392 F. Supp. 179 (M.D. Fla. 1975)).

144. See *Foreign Judgments in Florida*, *supra* note 25, at 607; Bishop & Burnette, *supra* note 25, at 431-32.

145. See *Estabrook v. Wise*, 348 So. 2d 355 (Fla. 1st DCA 1977). But *c.f.*, *Sachlas v. Sachlas*, 440 So. 2d 1289 (Fla. 4th DCA 1983) (in suit by husband to establish resulting trust in Florida real property standing in wife's name, court saw no reason to leave decision to Canadian court where couple's divorce action was pending, because Florida law controlled the issues and Florida expressly conferred personal jurisdiction over defendants in matters involving ownership of property).

146. 348 So. 2d 355 (Fla. 1st DCA 1977).

147. *Id.* at 357. It should not be fatal to the Florida spouse's reliance upon *Estabrook* that the full faith and credit clause of the United States Constitution does not require Florida courts to recognize a decree rendered by a court in a foreign country. The modern trend is for United States courts to treat foreign judgments, for purposes of *res judicata* and collateral estoppel, in the same way as judgments rendered by courts in their sister states. See *SCOLES & HAY*, *supra* note 9, at 920-80. See also Bishop & Burnette, *supra* note 25, at 440-42.

been disclosed to her or to the Texas court which entered the decree settling the parties' community claims to each other's property. Thus, non-intervention by the Florida spouse might make it easier for her to argue that a decree declaring additional assets to be community property should not be enforced outside Colombia, and especially not in Florida, the state of the situs.<sup>148</sup>

On the other hand, by not appearing in Colombia, the Florida spouse might forfeit any chance to defeat on substantive grounds the attempt in Colombia to establish that Florida and Venezuelan assets actually were community property. In summary, she might gain nothing from her non-intervention strategy, while running the risk that in spite of her non-appearance, a Florida court might recognize the Colombian decree as binding with respect to the status of the property.<sup>149</sup>

## 2. Intervention in Latin America as It Affects the Florida Spouse's Rights To Decedent's Latin American Assets

A will executed in Florida might not be recognized as valid in Colombia or Venezuela unless a decree admitting the will to probate in Florida is presented to the Colombian and Venezuelan courts.<sup>150</sup> If the Florida spouse fails to introduce the Florida will in Colombia or Venezuela, or otherwise does not contest the Colombian or Venezuelan proceedings, she might forfeit her claim to any of decedent's Latin American property under his Florida will. Of course, both Colombian and Venezuelan intestacy law, applicable in those jurisdictions if the will were rejected,<sup>151</sup> would entitle the Florida children to take an intestate share of decedent's estate, despite any alleged illegitimacy on the grounds that the Florida marriage was arguably bigamous.<sup>152</sup> Nevertheless, the Florida spouse's

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148. Even if the Florida spouse's non intervention in the proceeding prevents the Colombian spouse from urging that the decree be given effect outside Colombia, the latter certainly can argue that a foreign court should not recognize the initial separation judgment. It is hornbook conflicts law that comity does not require recognition of a foreign decree which is demonstrated to have been secured by fraud. Moreover, it might be argued that in Florida non-disclosure should vitiate the wife's consent to separate, even though Colombian law provides a remedy for non-disclosure of community assets in this situation. *See Foreign Judgments in Florida*, *supra* note 25, at 618-20.

149. The Florida court might hold the Colombian decree to be *in rem* and binding on the entire world.

150. *See* EDER, *supra* note 40, at 53-55 (regarding Colombian law); LOMBARD, *supra* note 54, at 57-59 (regarding Venezuelan law).

151. Cód. Civ. art. 1037 (Colom.); Cód. Civ. art. 807 (Venez.).

152. In Colombia, natural children take the same intestate share as legitimate



failure to appear in Colombia or Venezuela might result in the entire estate in those countries being adjudicated to the Colombian spouse and her children.

In determining whether the assets at issue warrant filing an appearance, counsel for the Florida spouse should research the foreign conflicts principles in calculating which assets are "located" in Latin America. For example, in our hypothetical, decedent's Venezuelan gold certificate was physically located in Miami. Under Florida conflicts principles, the certificate is negotiable and therefore would be considered to have a situs in Florida, not Venezuela.<sup>153</sup> One cannot be certain, however, that a Venezuelan court would reach the same result as to location of the certificate.<sup>154</sup> Conceivably, the court might go so far as to direct the Venezuelan government to issue new certificates to persons who qualify as heirs under Venezuelan law. Indeed, when a decedent dies in one jurisdiction holding stock in a corporation located in another, there is always the potential for such inconsistent results.<sup>155</sup> In order to fully protect the client's interest in the stock, the prudent approach would be to intervene in any existing proceedings, or if none have been initiated, to seek court rulings as to situs in both the jurisdiction where the corporation or issuing entity is located and the jurisdiction in which the certificates are physically present. A declaratory judgment proceeding might be indicated.

*B. The Florida Spouse's Defenses to the Colombian Spouse's Community Property Claims*

In our hypothetical situation, there is a distinct possibility that the Colombian spouse claiming a community property interest in Florida and Venezuelan assets would succeed in overcoming a defense premised upon her separation with the decedent. This, would have to be defended against the Colombian spouse's community property claim by a showing that the assets are not community property.

As a general rule, assets acquired during marriage in a community property jurisdiction are subject to the community property

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descendants. Cód. Civ. art. 1045 (Colom.). In Venezuela, they take a half share. Cód. Civ. art. 823 (Venez.).

153. FLA. STAT. § 731.106(1) (1987).

154. See Cód. BUSTAMANTE, arts. 105-107.

155. See Scoles, *Estate Planning*, *supra* note 24, at 433.

rights of the spouses.<sup>156</sup> Also, property acquired with community assets or the proceeds thereof generally becomes community property.<sup>157</sup> The Colombian spouse's community property claim will attach to property decedent acquired during marriage and all property decedent later acquired in Miami with funds earned during the marriage.<sup>158</sup>

Under Florida conflicts principles, the characterization of the following property will depend on Colombian law: (1) property which decedent acquired during the Colombian marriage which was purchased with money decedent had earned prior to marriage;<sup>159</sup> (2) appreciation during marriage of property decedent acquired prior to marriage;<sup>160</sup> (3) income earned during marriage from property acquired prior to the marriage; (4) property decedent acquired during marriage which appreciated in value after separation and the move to Miami; and (5) income earned after the separation and move to Miami from property acquired by de-

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156. See generally *SCOLES & HAY*, *supra* note 9, at 427-34.

157. *Id.*

158. The general view is that a spouse's community property rights are cut off after the marital domicile has been moved to a non-community property jurisdiction, at least as regards property acquired after the move which is not traceable back to assets previously acquired during coverture. See, e.g., *Clausnitzer*, *supra* note 30, at 472-73; *Juenger*, *supra* note 30, at 1073-74; *Scoles, Nonbarrable Interest*, *supra* note 24, at 165-68. In our case, then, even assuming that the Colombian spouse can succeed in an action to partition property owned by decedent at the time of her separation but which was not then partitioned, her rights to claim an interest in the property acquired by decedent after his move to Miami in 1963 will be terminated. There is no precedent to suggest how a court should treat property acquired by decedent between the decree in 1960 and his move to Florida in 1963. This of course would be a question of first impression to be decided under the Colombian law of community property.

159. The Florida spouse can make a compelling argument that if the Colombian spouse is entitled to a community share of property acquired after the separation by alleging that that property was acquired with community funds, then by the same token, property acquired during the marriage with funds earned by decedent before the marriage should be separate property.

160. The treatment of appreciation and income is a more muddled issue. Where property acquired by one spouse while the marital domicile was a community property jurisdiction has generated income or appreciated in value after the marital domicile has moved to a non-community property state, courts have split fairly equally on the issue. Similar uncertainty could be expected regarding decedent's Venezuelan gold certificate acquired prior to decedent's marriage but which appreciated in value during the marriage. To the extent the Florida spouse argues, in order to protect part of the value of the Venezuelan gold certificate from a community property claim, that all appreciation and income should be treated in the same manner as the underlying asset, regardless of when accrued, she must be prepared to live with a consistent application of that rule with regard to appreciation and income earned by decedent after his separation and move to Miami on property originally acquired during his Colombian marriage.

cedent during marriage.

Arguments as to whether the various assets are community property must be considered carefully. In particular, counsel for the Florida spouse must be prepared to establish that as many assets in the estate as possible were acquired either prior to decedent's marriage in Colombia or after the date of decedent's separation decree and move to Miami.<sup>161</sup> An expert accountant should be retained because of the complexities inherent in determining when the monies used to acquire a given asset were earned, the extent to which the value of the asset is due to appreciation, and when the bulk of such appreciation occurred.

### *C. Defenses Against the Colombian Spouse's Elective Share Claims*

Even if the Florida spouse is not successful in using the separation to defeat the Colombian spouse's claim to an elective share under Florida law, she has several other arguments in her favor.

#### 1. Public Policy

For public policy reasons, courts have recognized exceptions to the traditional conflicts rule that the law of the place of divorce applies to property settlements. For example, in numerous cases in which a party has been divorced in a jurisdiction where remarriage is barred, courts have upheld the validity of a second marriage in a different forum where marriage following divorce is permitted.<sup>162</sup> An argument could be made by the Florida spouse that for all intents and purposes, the Colombian separation is tantamount to a divorce barring remarriage, and thus Florida should recognize the validity of her marriage to decedent.

#### 2. Laches and Estoppel

Florida courts have invoked the equitable doctrines of laches and estoppel to prevent first wives from assuming that their divorces are valid and remaining silent over the years while their

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161. For example, the Florida spouse might be able to demonstrate conclusively that the Venezuelan gold certificate was inherited by decedent prior to his marriage and that he earned much of his wealth after his separation and move to Miami.

162. See SCOLES & HAY, *supra* note 9, at 427-34.

spouses remarry, only to assert the invalidity of the divorce years later when it best suits them financially.<sup>163</sup> The Colombian spouse, although not divorced in the strict sense, has been silent for fifteen years in the face of decedent's marriage in Florida, and the argument may be made that she is estopped from claiming a spouse's elective share in decedent's estate.

### 3. Assets Not Subject to Elective Share Set-Off

In the event that the Colombian spouse's right to an elective share is recognized, the Florida spouse must attempt both to reduce the number of assets subject to the thirty percent claim and to offset against the claim, any other property the Colombian spouse receives from decedent's estate as community property. In effect, the Florida spouse will base her arguments on the proposition that to give the Colombian spouse a thirty percent elective share would be unfair because it would ignore both the Colombian spouse's successful recovery of community property from decedent's estate and her own potential acquisition, in numerous other jurisdictions over which the Florida court would have no control, of much more than thirty percent of decedent's overall estate.<sup>164</sup> Such a result would frustrate decedent's testamentary intent.

With respect to the first approach, i.e., minimizing the assets subject to the thirty percent elective share, it must be kept in mind that the Florida statute requires, in the case of a decedent domiciled in Florida, that the thirty percent be calculated upon the decedent's Florida real property and all his personal property wherever located.<sup>165</sup> It will be critical to call the court's attention to the fact that while the Florida statutory scheme is based on the assumption that the testamentary heirs will receive their seventy percent remainder of the estate after subtraction of the spouse's thirty percent elective share, it is quite probable that in fact decedent's intended heirs will take far less than seventy percent of his Latin American personalty. The Florida spouse and children will argue that distribution to the Colombian spouse in Florida should be made taking into account the distribution of personalty in other

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163. See *Lanigan v. Lanigan*, 78 So. 2d 92 (Fla. 1955).

164. If the Colombian spouse is successful in proving outside Florida that certain of the probate assets are community property, she would take ultimately more than thirty percent of those probate assets: part as her share of the community property, part as her elective share of the estate.

165. FLA. STAT. § 732.206 (1987).

jurisdictions, given the legislative intent of the Florida statute that a decedent's testate heirs receive seventy percent of decedent's total estate wherever located.<sup>166</sup>

Another argument in support of minimizing the assets that the Colombian spouse can claim as her elective share is that the court should set off against the elective share all property she receives as her community share of decedent's Florida assets. There is authority in Florida for the proposition that the elective share afforded the spouse of a Florida decedent should be reduced by the assets she has taken in other jurisdictions under a will.<sup>167</sup> It should be argued that the policy underlying these decisions is that calculation of the spouse's thirty percent elective share in Florida must take into account the total assets she receives from the estate. If this is indeed the thrust of the cases, a compelling argument is that community property acquired in other jurisdictions is analogous to testamentary inheritance in other jurisdictions and should be set off against the elective share.<sup>168</sup>

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166. The principle has been recognized that a court should take into account the overall estate plan in allotting specific property in one jurisdiction to an heir who has (or has not) received property in another jurisdiction. See, e.g., *Griley v. Griley*, 43 So. 2d 350, 353 (Fla. 1949) (when making allotment of dower to widow who elects to take against the will, probate judge should take into account prior benefits received in Canal Zone under same will). The French doctrine of *prelevement* provides that in transnational estates, if French heirs are legally barred from taking estate property in a foreign jurisdiction so as to maintain the percentage of the entire estate to which they are entitled under French law, French courts will grant them enough of the French estate to reestablish their percentage. See Note, *Avoiding Civil Law Forced Heirship by Stipulating that New York Law Governs*, 20 VA. J. INT'L L. 887, 894; Code civil, art. 726 (France) and Law of July 14, 1819 thereunder; see also Cód. Civ. art. 726 (Dom. Rep.): "En los casos de divisoria de una misma sucesión entre coherederos extranjeros y dominicanos, estos retirarán de los bienes situados en la República una porción igual al valor de los bienes situados en país extranjero, de los cuales estuviesen excluidos por cualquier título que fuese." Scoles, *Nonbarrable Interests*, *supra* note 24, at 168-69 (because movables are usually transmitted to domicile for distribution, there is sufficient reason for domicile to measure legal forced share by all movables in estate wherever located).

167. See *Griley v. Griley*, 43 So. 2d 350 (Fla. 1949); *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936); *Henderson v. Usher*, 170 So. 846 (Fla. 1936). See generally SCOLES & HAY, *supra* note 9, at 166-72. Where a spouse takes under a will in the jurisdiction of the decedent's domicile, the majority of jurisdictions have held that her elective share claims are barred elsewhere. See SCOLES & HAY, *supra* note 9, at 794.

168. Of course, if the only policy behind the case law is to preclude inconsistent remedies, it will be more difficult to establish the analogy.

*D. The Power of Attorney Transferring Decedent's Florida Realty to the Colombian Children*

Issues concerning title to real property are determined as a general rule by the law of the situs.<sup>169</sup> Thus Florida law will govern the validity of the *inter vivos* transfers of decedent's Florida real property to his Colombian children.<sup>170</sup>

Those transfers were carried out by decedent's eldest Colombian son through a power of attorney granted by decedent in Colombia. As regards execution of the deed transferring the property from decedent to himself and his brothers and sisters, the decedent's son, as attorney-in-fact, will likely have observed the formalities of Florida law.<sup>171</sup> A problem might arise, however, in that Florida law also requires that powers of attorney used to convey real property be executed with the formalities required for the deed itself.<sup>172</sup> Powers of attorney executed in Latin American countries are rarely subscribed to by witnesses.<sup>173</sup> They generally are executed as public documents before a civil law notary.<sup>174</sup> If

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169. See *supra* note 73.

170. *Id.*

171. Florida law requires not only the signature by the grantor, but also that said signature be attested to by two subscribing witnesses. FLA. STAT. § 689.01 (1987).

172. FLA. STAT. § 709.015(2) (1987) (if exercise of power of attorney requires execution of recordable instrument, power of attorney must be executed and recorded with same formalities as required of instrument itself).

173. See, e.g., Cód. Civ. art. 2149 (Colom.) (mandate may be by public or private document) and Decree 960 of 1970 (Colom.), art. 29 (Cód. Civ., Editorial Temis Libreria 1985, 699) (no witnesses needed for documents executed before notary); Cód. Civ. arts. 1251 (general power of attorney must be granted by public document), 733 (public document is one executed before notary, who acts without witnesses unless (i) required by law, (ii) a party requests them, or (iii) the notary judges it necessary) (Costa Rica); Cód. Civ. arts. 2054, 1743 (document executed before a notary and incorporated into notary's *protocolo* or registry is *escritura publica* or public document) (Ecuador); Cód. Civ. art. 134 (Braz.).

174. A notary public in civil law countries is an official whose importance and prestige generally is far superior to that of the Notary Public in the United States. See generally BANUELOS SANCHEZ, FROYLAN, DERECHO NOTARIAL 1-59 (1984) [hereinafter BANUELOS] (discussion of the history of Notaries Public from Roman times). The principal difference between the English notarial system and the "Latin" system lies in the fact that in the latter, the Notario is an officer of the State and a legal professional, whereas in the former, the Notary Public is not a civil servant and generally notarizes only signatures. *Id.* at 56-57. Florida law defines "civil law notary" as

[A]n official of a foreign country who has an official seal and who is authorized to make legal or lawful the execution of any document in that jurisdiction, in which jurisdiction the affixing of his official seal is deemed proof of the execution of the document or deed in full compliance with the laws of that jurisdiction.

FLA. STAT. § 695.03(3) (1987) (authorizing recording of documents relating to real property that have been legalized or authenticated by civil law notaries).

the power of attorney granted by decedent to his eldest Colombian son indeed was executed in this matter, the Florida spouse may argue, on behalf of decedent's estate, that the power is deficient and all transfers made with it are invalid. Also, because Florida law requires that a power of attorney used to make a gift expressly mention that use,<sup>175</sup> the lack of specific authorization to make a gift might provide another ground for setting aside the transfer of decedent's Florida realty.<sup>176</sup>

The Colombian children may attempt to defeat these arguments by citing the Protocol on Uniformity of Powers of Attorney Which Are To Be Utilized Abroad (Protocol), to which both the United States and Colombia are signatories.<sup>177</sup> Under the Protocol, a power valid in the contracting state country where executed is valid in all treaty countries, provided they are executed in conformity with the rules of the Protocol.<sup>178</sup> It is not clear, however, whether such a treaty would apply to sustain the validity of a transfer of Florida real property carried out by power of attorney. It might be argued, in effect, that while Florida must recognize the general validity of the power of attorney under the treaty, it may limit its use for purposes of transferring Florida real estate.<sup>179</sup>

Similarly, the Protocol will not be a defense on the issue of the use of the power to effectuate a gift, because the treaty itself requires that for a power of attorney to be utilized to effectuate a gift it must expressly so provide.<sup>180</sup>

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175. See *Hodges v. Surratt*, 366 So. 2d 768, 773-74 (Fla. 2d DCA 1979); *Johnson v. Fraccacreta*, 348 So. 2d 570, 572 (Fla. 4th DCA 1977).

176. Florida law also provides that a transfer by an attorney-in-fact is presumptively invalid if the attorney conveys the property to himself. See *Tanner v. Robinson*, 411 So. 2d 240, 241 n.2 (Fla. 3d DCA 1982) (citing *Hodges v. Surratt*, 366 So. 2d 768 (Fla. 2d DCA 1979) *Johnson v. Fraccacreta*, 348 So.2d 570 (Fla. 4th DCA 1977)). This would not be a ground for invalidating the transfer in our hypothetical situation because it is clear in this case, however, that decedent ratified the transfers in question and the Colombian children can prove it.

177. Protocol on Uniformity of Powers of Attorney Which Are to Be Utilized Abroad, Oct. 3, 1941, 56 Stat. 1376, 161 U.N.T.S. 229 [hereinafter Protocol].

178. *Id.* art. V.

179. It should be noted that Florida by statute authorizes the recording of instruments concerning real property that are acknowledged abroad before a civil law notary. FLA. STAT. § 695.03(3). See *supra* notes 138-141 and accompanying text.

180. Protocol, *supra* note 177, art. IV (to authorize acts of ownership, special powers of attorney must specify in concrete terms the nature of the powers conferred). The Colombian spouse can argue, then, as to the issue of the use of the power of attorney to effectuate a gift, and with some support under Florida precedent, that where a "gift is made for estate purposes, same can be conferred under a general power."

## VI. CONCLUSION

Many questions raised in this article have no ironclad answer, although state legislatures, and Florida in particular, have begun to consider potential foreign elements when adopting statutory solutions.<sup>181</sup> The area of transnational wills and estates is thus a field in which attorneys are called upon to argue local and international policy, legal theory, sociology and equitable justice, in sum, to be creative.

The central figure of our hypothetical never divorced his first wife. Her claim to a community property share of decedent's assets, based on the source doctrine or tracing, would seem to have a chance of succeeding. Her more imaginative claim to a spouse's elective share against decedent's Florida will is far more uncertain to prosper, although it raises fundamental questions at a point where law, policy and fundamental fairness converge. It is even more difficult to predict the ultimate outcome of the second Florida wife's intervention in the Latin American proceedings. She may be able to secure certain assets, at least for her children, but will face serious obstacles in light of her awkward marital position.

Whatever final strategy is adopted by the attorney confronted with such a transnational hall of mirrors, certain analytical approaches provide a valuable means of ascertaining the position of the parties. The first step is of course to prepare an inventory of the assets and to make a preliminary determination of their nature and status in light of the procedural posture, marital status, nationality and domicile of the parties. Next, possible action to secure assets that may be dissipated must be considered. Once any preliminary protective measures thought to be necessary have been taken, the analysis of law and policy begins.

The analytical process that must be undertaken is far easier to chart than to put into practice. The key factors are the law applicable to the status of the parties, the succession, and the assets of the estate; the probabilities that courts of the various fora would apply such law; the probabilities that the courts whose rulings are necessary to an overall result favorable to the client's interests

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181. See, e.g., FLA. STAT. § 733.205 (1987) (providing for probate of will in possession of notary entitled to its custody in a foreign state *or country*; § 695.03(3) (providing for execution of conveyances of Florida real estate before a civil-law notary); § 734.104(2) (providing for affidavit in lieu of petition for foreign probate when no petition required as prerequisite to probate of will in foreign jurisdiction).



would accept jurisdiction of the case; and finally, the extraterritorial validity of a judgment recovered in a given forum in all jurisdictions in which execution will be sought. The party who takes the offensive has greater room to maneuver and greater flexibility in establishing the parameters of the action and the theory of the case. Being able to impose a structural framework to bring order out of apparent chaos constitutes an important advantage in conceptually complex cases of this type.<sup>182</sup>

Until the United States has entered into treaties of private international law addressing the numerous vexed questions that characterize transnational probate, counsel involved in this fascinating but frustrating field would do well to reflect on the conventional wisdom of litigators worldwide: a bad settlement is better than a good lawsuit.

As of the date of this publication, an appeal is pending in the Third District Court of Appeal of Florida in the case of *In re Estate of Mario Sanchez*. On December 30, 1987, the Eleventh Judicial Circuit Court in and for Dade County, Florida, determined that Venezuelan law and not the Florida law of totten trusts applied where the decedent took his Venezuelan assets to Florida before his death and deposited them in trust for two of his fourteen children. *In re Estate of Mario Sanchez*, 84-2067 (Dec. 30, 1987).

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182. In *Branca v. Security Beneficial Life Insurance Company*, 773 F.2d 1158 (11th Cir. 1985), a case against a U.S. insurer in which an Argentine judgment declaring the presumption of death of an Argentine insured was admitted as an exception to the hearsay rule. Plaintiff beneficiaries relied on a Florida probate decree handed down in reliance on the Argentine judgment rather than alleging the collateral estoppel effect of the Argentine judgment itself. The Eleventh Circuit indicated that it at least would have considered the issue, driving home the importance of formulating the issue in proper terms from the beginning. *Id.* at 1162 n.15.