Introduction

Choice of law questions arise when the parties are from different states or nations or their dispute stems from transactions or events that transcend territorial boundaries. In these situations, the court in which the action is brought may be called upon to decide whether to apply its own law or instead choose the law of another jurisdiction.

In making this determination, the forum court looks to its own choice of law rules. A potential exception to this rule is the doctrine of renvoi, under which the forum applies the choice of law rules of another jurisdiction. This technique allows for uniformity of result regardless where suit is brought, a desirable objective when, for example, title to land is at issue. The Arkansas Supreme Court has mentioned the doctrine without deciding whether to follow it, but the Court of Appeals employed it in a case in which the issue was ownership of certificates of deposit.

Most choice of law rules are judge-made. A notable exception is the Uniform Commercial Code, which includes provisions addressing choice of law. In some cases, an international treaty may be dispositive.

For many years, judge-made choice of law rules were mechanical in nature. Like most states,
Arkansas followed the approach reflected in the Restatement of Conflict of Laws (1934), under which the location of a transaction or event usually determined the applicable law. However, courts sometimes manipulated these rigid rules or used so-called "escape devices" to avoid unjust or undesirable outcomes, thereby undercutting the rules' intended predictability.8

In the 1950s and 1960s, critics of the Restatement rules – including Dr. Robert A. Leflar of the University of Arkansas School of Law – led a revolution in choice of law methodology.9 This period of ferment culminated in the Restatement (Second) of Conflict of Laws, which was adopted in 1969 and published in 1971. About half of the states have adopted the second Restatement, and its influence has been felt in others.10

The Arkansas Supreme Court joined the choice-of-law revolution in 1977. Influenced by the writings of Dr. Leflar, the Court in Wallis v. Mrs. Smith's Pie Co.11 followed other jurisdictions in "departing from a mechanical application of the traditional rule and applying a more flexible approach when faced with a situation which involves a choice of law between jurisdictions that have widely dissimilar laws."12 As discussed in Part VI, the Court employed the five "choice-influencing considerations" that Dr. Leflar identified in his scholarly work.13

The Arkansas Supreme Court has limited its use of the Leflar approach to torts cases. In contract cases, the Court has employed an approach similar in some respects to that of the second Restatement.14 In other substantive areas of law, such as property, the Court has followed traditional choice of law rules,15 which remained largely unchanged from the first Restatement to the second. On some occasions the Court has demonstrated an eclectic approach by referring to various methodologies in the course of deciding a case.16

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7. In tort cases, for instance, the controlling law was that of the state where the injury occurred. See, e.g., Missouri Pac. R. Co. v. Coca-Cola Bottling Co., 154 Ark. 413, 242 S.W. 813 (1922); St. Louis & S.F.R. Co. v. Coy, 113 Ark. 265, 168 S.W. 1106 (1914). See generally Restatement of Conflict of Laws §§ 377-378 (1934).


10. Judicial application has been inconsistent, however, and academic commentary largely negative. Friedrich K. Juenger, A Third Conflicts Restatement?, 75 IND. L.J. 403, 405 (2000).


12. Id. at 627, 550 S.W.2d at 456.

13. Id. at 629, 550 S.W.2d at 456. Because the Court's opinion also refers to the second Restatement, it may be viewed as "eclectic." Later decisions make clear, however, that the Court uses the choice-influencing considerations as its choice of law approach in torts cases. E.g., Schlemmer v. Fireman's Fund Ins. Co., 292 Ark. 344, 730 S.W.2d 217 (1987). See also Robert L. Felix, Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations, 52 Ark. L. REV. 35, 99 (1999).


15. See Parts VIII & IX, infra.

16. E.g., Gomez v. ITT Educ. Servs., Inc., 348 Ark. 69, 71 S.W.3d 542 (2002) (discussing the traditional rule, the second Restatement, and Leflar's choice-influencing considerations in deciding whether to apply the statute of limitations of Arkansas
II. Constitutional Limitations

As a practical matter, the effect of the U.S. Constitution in choice of law matters is minimal and state autonomy close to complete. An observation by Dr. Leflar more than forty years ago continues to ring true: "it is fair to say that the [Supreme] Court . . . embraces a 'states' rights' theory in the law of conflict of laws." 17

The Supreme Court has focused primarily on the Due Process Clause 18 and the Full Faith and Credit Clause 19 in evaluating the constitutionality of choice of law decisions. Although the Court at one time viewed the latter as imposing a more exacting standard than the former, it subsequently treated the two provisions together in fashioning a single standard that provides only modest restrictions.20

"[F]or a State's substantive law to be selected in a constitutionally permissible manner," the Supreme Court has explained, "that State must have a significant contact or significant aggregation of contacts creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 21 This test is reminiscent of the familiar "minimum contacts" requirement for personal jurisdiction, 22 but the power to exercise jurisdiction over the defendant does not automatically give the court power to apply the forum's substantive law. 23

So long as the forum state has the required contacts and interests, its courts may favor its own laws over those of other states. This is so even to the extent that the courts of one state may refuse to apply the sovereign immunity laws of a sister state. 24 Even if a court must, as a matter of constitutional law, apply the substantive law of another state in a particular case, it may apply the forum's statute of limitations.25

Other provisions of the Constitution may also come into play with respect to choice of law, but their impact has been slight. The Privileges and Immunities Clause 26 and the Equal Protection Clause 27 guard against the application of forum law that discriminates against an out-of-state party unless the underlying basis for the distinction bears


18. U.S. CONST. amend. XIV.
27. U.S. CONST. amend. XIV.
some rational relation to a legitimate state purpose. By virtue of the Commerce Clause, a state cannot apply its law to the "internal affairs" of foreign corporations.

III. Domicile

The concept of domicile cuts a wide swath across the law and applies in a variety of contexts other than choice of law, including citizenship in federal diversity cases, personal jurisdiction, tax liability, and eligibility to vote. For the most part, the Arkansas courts have followed the general rules for domicile reflected in the second Restatement.

Domicile is a person's "true, fixed, and permanent home," the place "to which, when absent, he intends to return and from which he has no present purpose to depart." Although a person may have more than one residence, he or she has only one domicile. Temporary military assignments to other states or to foreign countries do not affect domicile.

A change of domicile may be effected only by the simultaneous combination of two elements: (a) taking up residence in a different domicile with (b) the intention to remain there. While "no particular length of time is required to establish one's domicile," there must be residence "attended by such circumstances surrounding its acquirements to manifest a bona fide intention of making it a fixed and permanent place of abode."

The requisite intent to establish a new domicile is determined from all the facts and circumstances of the particular case. The factfinder is not bound to accept claims of intent when the circumstances point to a contrary conclusion. "When acts are inconsistent with a person's declarations, the acts will control, and declarations must yield to the conclusions to be drawn from the facts and circumstances proved.

A person can establish a domicile of his or her own volition only upon reaching majority. At birth, a child of married parents acquires the domicile of

his or her father. If the father dies thereafter, the domicile of the child remains that of the deceased father, unless the mother establishes a new domicile. A child born to unmarried parents takes the domicile of his or her mother.

At common law, a wife's domicile was that of her husband, even if the two lived separately. The Arkansas Supreme Court took this position for many years, though it did recognize that a wife could establish a separate domicile from that of her husband for purposes of divorce. In 1976, the Court held in a voter eligibility case that, on the facts presented, the wife did not acquire her husband's domicile upon marriage. This decision is consistent with the modern trend recognizing that spouses may have separate domiciles.

A mentally deficient adult may establish a domicile if he or she is capable of making the requisite choice. Absent such capacity, the person's prior domicile continues despite the fact he or she resides elsewhere, but a guardian may effect a change.

The foregoing principles apply to natural persons, not to corporations and other artificial creatures. Attribution of domicile to corporations "may lead to complications and confusion and should be avoided," but statutes sometimes use the terminol-


43. Nunn v. Robertson, 80 Ark. 350, 97 S.W. 293 (1906). If the father abandons the child, the domicile of the child might be changed by the act of another person standing in loco parentis. Landreth v. Henson, 116 Ark. 361, 173 S.W. 427 (1915).

44. Restatement (Second) of Conflict of Laws § 14(2) (1971).


46. See, e.g., Bruce v. Bruce, 176 Ark. 442, 3 S.W.2d 6 (1929); Johnson v. Taylor, 140 Ark. 100, 215 S.W. 162 (1919); Duffy v. Harris, 65 Ark. 251, 45 S.W. 545 (1898); Johnston v. Turner, 29 Ark. 280 (1874).

47. Whatley v. Whatley, 205 Ark. 748, 170 S.W.2d 600 (1943); McLaughlin v. McLaughlin, 193 Ark. 207, 99 S.W.2d 571 (1936); Mullenband v. Mullenband, 137 Ark. 505, 208 S.W. 801 (1919).

48. Martin v. Hefley, 259 Ark. 484, 533 S.W.2d 521 (1976). A statute enacted in 1999 provides that a married person "may be considered to have a domicile separate from that of his spouse for the purposes of voting or holding office," and that for these purposes, "domicile is determined as if the person were single." Ark. Code Ann. § 7-5-201(b)(5).

49. See Restatement (Second) of Conflict of Laws § 21, comment b (rev. 1988) (citing Martin v. Hefley for proposition that a wife, although living with her husband, may have a domicile apart from his). Section 21 states that the rules for domicile "are the same for both married and unmarried persons."

50. Equitable Life Assur. Soc'y v. Mann, 189 Ark. 751, 75 S.W.2d 232 (1934); Restatement (Second) of Conflict of Laws § 23(1) (1971). A person may be able to choose a domicile even though he or she cannot manage his or her own affairs or lacks capacity to enter into a contract. Restatement (Second) of Conflict of Laws § 23, comment a. See also Annot., 96 A.L.R.2d 1236 (1964).

51. See Reynolds v. Guardianship of Sears, 327 Ark. 770, 940 S.W.2d 483 (1997) (venue of guardianship proceeding was proper in county in which incapacitated person had established her domicile before she was transferred to nursing facility in different county); Phillips v. Sherrod Estate, 248 Ark. 605, 453 S.W.2d 60 (1970) (decedent had been held incompetent before he was taken to Texas, and there was no change in that condition prior to his death); Kindrick v. Capps, 196 Ark. 1169, 121 S.W.2d 515 (1938) (quoting Louisiana case upholding service of process on an insane person at his home, "notwithstanding that defendant was in an asylum elsewhere, since, if he had no capacity, he could not acquire a new domicile").


53. Restatement (Second) of Conflict of Laws § 11, comment l (rev. 1988).
ogy. Unless defined otherwise in a statute, a corporation’s domicile is usually its state of incorporation or, in some contexts, the state in which its principal place of business is located. With respect to domestic corporations, the Arkansas Supreme Court has on occasion described domicile as the county of the corporation’s principal place of business.

IV. Substance-Procedural Distinction

In Arkansas, as in most states, courts apply forum law to matters of procedure even if the law of another jurisdiction governs substantive rights and liabilities. Consequently, the first task in making a choice-of-law determination is to characterize the issue as substantive or procedural. If the latter, Arkansas law applies without further analysis; if the former, the court must turn to the state’s choice of law rules.

The Arkansas Supreme Court, quoting Dr. Leflar, has said that several matters "are without much doubt treated as procedural," including "the proper court in which to bring an action . . . , the form of action to be brought, the sufficiency of pleadings, the effect of splitting a cause of action, and [the] proper or necessary parties to the action."

Among the other issues held to be procedural in Arkansas are the standard of proof, the quantum of evidence necessary to support a jury verdict, costs and attorney's fees, the method of executing on a judgment, presumptions and the burden of proof, and the admissibility of evidence, including

the application of testimonial privileges. Also, Arkansas law determines whether the damages awarded by a jury are excessive, although the measure of damages is substantive and thus potentially governed by the law of another state.

Most courts have treated the mode of trial – i.e., whether an issue is to be tried by a jury or by the court – as procedural and thus governed by the law of the forum. In a 1931 case, however, the Arkansas Supreme Court applied an Oklahoma constitutional provision requiring that defenses of contributory negligence and assumption of the risk be submitted to the jury, even though directed verdict would have been proper under Arkansas law.

The survivability of a cause of action is regarded as substantive. Because "the laws of [the state] which create the cause of action in the first place are conceded to be substantive laws or laws of right as opposed to procedural, then it seems that the laws of the same state which keep the cause of action alive should also be considered as substantive."

On the other hand, statutes of limitation are generally considered procedural, the theory being that they bar the remedy but do not extinguish the underlying substantive right. However, a limitation period included in a statute creating a right, such as a wrongful death act, is treated as substantive. "The limitation of time for commencing an action under a statute creating a new right enters into and becomes a part of the right of action itself and is a limitation not only of the remedy but of the right also."

Most states have enacted statutes that "borrow" foreign statutes of limitations in certain circum-


65. St. Louis, I. M. & S. R. Co. v. Hesterly, 98 Ark. 240, 135 S.W. 874 (1911), rev’d on other grounds, 228 U.S. 702 (1913). See Restatement (Second) of Conflict of Laws § 171, comment f (1971) ("[t]he forum will follow its own local practices in determining whether the damages awarded by a jury are excessive.")


68. Missouri Pac. R. Co. v. Miller, 184 Ark. 61, 41 S.W.2d 917 (1931), cert. denied, 284 U.S. 688 (1932).


stances. The Arkansas General Assembly adopted such a statute, the Uniform Conflict of Laws Limitation Act, in 1985 but repealed it in 1999.74

In a case not involving choice of law, the Supreme Court has described a statute of repose75 as substantive, noting it "cuts off the right to a cause of action before it accrues" and creates a right "to be free from liability after a legislatively-determined period of time." Most courts treat statutes of repose as substantive for choice of law purposes.77

V. Characterizing the Issue

If an issue is determined to be substantive rather than procedural, the appropriate choice of law rule must be ascertained and applied. This process requires further characterization of the issue, as different methodologies are employed depending on the area of substantive law into which the question falls.78

When rigid rules dominated choice of law, characterization was at times used as an "escape device" to produce a result that the court deemed desirable.79 With the decline of the mechanical choice of law approach and the emergence of modern methodologies, characterization plays a diminished role as an escape device but remains "the natural and necessary starting point for the analysis of any conflicts case."80

A separate choice of law analysis is necessary for each issue in a case.81 By virtue of this process, the term of art for which is "depecage,"82 the substantive

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79. Dr. Leflar illustrated this point with cases involving an Arkansas statute that made telegraph companies liable for the mental anguish that resulted from negligence in transmitting, receiving, or delivering messages, even in the absence of physical injury or pecuniary loss. The Arkansas Supreme Court characterized the issue as one of tort law when a telegram originating in another state was delivered in Arkansas but one of contract when a telegram was sent from Arkansas to someone in a state that did not allow such damages. Compare W. Union Tel. Co. v. Chilton, 100 Ark. 296, 140 S.W. 26 (1911), with Western Union Tel. Co. v. Flannagan, 113 Ark. 9, 167 S.W. 701 (1914). Because of the then-operative choice of law rules, the divergent characterizations allowed the Court to apply the Arkansas statute in both situations. ROBERT A. LEFLAR, LUTHER L. MCDOUGAL & ROBERT L. FELIX, AMERICAN CONFLICTS LAW § 87 (4th ed. 1986). The statute remains on the books, ARK. CODE ANN. § 23-17-112, but has been preempted by federal law. See Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920).


82. The word is French. "When roughly translated, depecage refers to the process of cutting something into pieces. Here it refers to the process of cutting up a case into individual issues, each subject to a separate choice-of-law analysis." Ruiz v.
law of different states may apply to different issues.83

In a case involving a motor vehicle accident in Missouri, for example, the Arkansas Supreme Court held that the comparative fault statute of Arkansas applied, while Missouri's rules of the road governed questions of negligent driving.84 The Court did not refer to depecage by name and has not formally discussed its application; however, a federal district court sitting in diversity "perceive[d] no reason why the Arkansas Supreme Court would not adhere to this well-established doctrine."85

VI. Torts

In torts cases, the Arkansas Supreme Court uses five choice-influencing considerations identified by Dr. Leflar: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law.86

No single consideration is more significant than the others, and their relative importance "varies according to the area of the law involved, and all should be considered regardless of area."87 This is not to say, however, that each factor will be relevant in every case.88

Recent cases suggest that the Supreme Court has not altogether discarded the traditional "place of the injury" rule reflected in the first Restatement.89 In Gomez v. ITT Educational Services, Inc.,90 the Court noted that its adoption of the choice influencing considerations in prior cases "appears to be merely a softening of what previously had been a rigid formulaic application of the former rule of law."91 The Eighth Circuit has taken this statement to mean that a court must consider in tort cases the place of the injury rule "within the framework of the five Leflar factors."92
The Supreme Court quoted the "softening" comment with approval in Schubert v. Target Stores, Inc.\textsuperscript{93} In contrast to Gomez, however, the Court held Arkansas law applicable, not the law of law of the state where the injury occurred. Moreover, the Court rejected in Schubert the defendant's argument that the law of the place of the injury is controlling unless there are compelling reasons, based on application of the choice-influencing considerations, to hold otherwise. Thus, while the place of the injury is apparently to be taken into account, there is clearly no presumption in favor of applying the law of that state.

The Schubert opinion could further muddy the water by its use of the term "significant contacts," a term found in some Arkansas choice of law decisions involving contracts.\textsuperscript{94} But the case should not be read as signifying a change of direction. As discussed below, contacts between the litigation and the forum state are relevant to the fourth choice-influencing consideration, i.e., advancement of the forum's governmental interest, and the Court quite properly examined them in that context.

The first Leflar consideration, predictability of results, reflects the justified expectations of parties to planned transactions, including contracts, negotiable instruments, marriages, trusts, and wills.\textsuperscript{95} It "includes the ideal that the decision in the litigation on a given set of facts should be the same regardless of where the litigation occurs, so that 'forum shopping' will benefit neither party."\textsuperscript{96} This factor is primarily aimed at avoiding forum shopping and ensuring uniform results.

Predictability is of little importance in most tort cases — auto collisions and other accidents are unplanned\textsuperscript{97} — but is not completely irrelevant. For example, if the case involves failure to follow a rule of the road, certainty and predictability usually require the application of the law of the state in which the conduct occurred.\textsuperscript{98} As Professor McDougal has pointed out, predictability "can also become extremely important in international tort cases" and "may be of particular importance to defendants and their insurance companies."\textsuperscript{99}

The second consideration, maintenance of interstate and international order, counsels against the forum's reflexive application of its own law. When the forum has little or no interest in applying its own law, its parochial decision to do so anyway could adversely affect the smooth functioning of the federal system and lead to retaliation in future cases by courts in the other state with a substantial interest.

\textsuperscript{93} See Part VII, infra.


\textsuperscript{96} Miller v. Pilgrim's Pride Corp., 366 F.3d 672 (8th Cir. 2004); Hughes v. Wal-Mart Stores, Inc., 250 F.3d 618 (8th Cir. 2001); Schlemmer v. Fireman's Fund Ins. Co., 292 Ark. 344, 730 S.W.2d 217 (1987).

\textsuperscript{97} Williams v. Carr, 263 Ark. 326, 565 S.W.2d 400 (1978); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977).

\textsuperscript{98} Luther L. McDougal, Leflar's Choice-Influencing Considerations: Revisited, Refined and Reaffirmed, 52 ARK. L. REV. 105, 107 (1999) (a defendant "may decide how much liability insurance to buy and insurance companies may determine their premiums based on the law of the nation in which the defendant operates," and when the defendant only does business in a foreign country, "neither the defendant nor its insurance company should expect that a much more generous American law will be substituted for the foreign country's law").
in having its law applied. Dr. Leflar emphasized the need to avoid, or at least minimize, such friction among states and at the international level as well. Like predictability, this consideration is frequently considered to be of little significance in tort cases. However, when the forum state has little or no contact with a case and nearly all of the significant contacts are with another state, this factor suggests that the forum should not apply its own law to the dispute. As Professor McDougal has put it, "[i]f the other state or nation does have a real interest, then the potential for interstate or international friction should be weighed in the ultimate determination of which law to apply." 

The third consideration, simplification of the judicial task, explains the substance-procedure distinction discussed previously. As a practical matter, it would be difficult for the forum court to "import the whole procedural machinery" of another state or nation whose law governs substantive issues in the case. Dr. Leflar believed that simplicity and ease of application are properly taken into account with respect to substantive matters as well. Unlike some courts, the Arkansas Supreme Court has done so.

Moreover, the Court has made note of Dr. Leflar's point that whatever the context, courts should not resort to forum law simply as a matter of judicial convenience.

The fourth consideration, advancement of the forum's governmental interests, requires the court to identify the factual connections linking the case to the forum state and then determine whether those facts implicate state policies that would justify application of forum law to the particular issue. This process, Dr. Leflar wrote, calls for "thoughtful and intelligent analysis of the legal materials in the light of current socio-economic, cultural, and political attitudes in the community." Moreover, the court should consider not only the concerns of the government as a sovereign entity, but also the role of its courts in dispensing justice. Otherwise, there is a danger that a court will reflexively apply forum law.

The final consideration, application of the better rule of law, is the most controversial. As Dr. Leflar pointed out, however, courts long took this factor into account without disclosing it as the actual basis for their decisions. The consideration "does not
reflect a subjective judicial preference for one state's more or less elegant law, but is aimed at avoiding the application of unfair or archaic laws.”110 Put another way, the court should determine which law makes "good socio-economic sense for the time when the court speaks."111 Courts do not invariably view forum law as "better" than the law of another state and "sometimes realize that certain of their own laws, especially statutory ones, are archaic, anachronistic, out of keeping with the times.”112

In cases where the law of one state cannot be said to be better than that of another, this consideration becomes immaterial.113 Moreover, the Eighth Circuit has suggested that courts should refrain from resolving a choice of law question on the basis of the "better rule" consideration because "states often have competing policy considerations for governing similar transactions or events in different manners such that the laws do not necessarily lend themselves to being labeled either 'better' or 'worse."”114

The Arkansas Supreme Court, however, seems more willing to enter the thicket. In *Schubert v. Target Stores, Inc.*,115 for example, the Court found Arkansas law superior to that of Louisiana, under which the plaintiff's negligence action against the defendant, a "statutory employer" for workers' compensation purposes, would have been barred. Because Arkansas law did not appear to foreclose a tort action, the Court concluded that it represented the "better rule."116

### VII. Contracts

In contract actions, the Arkansas Supreme Court uses the "most significant relationship" test to determine which state's law to apply if the parties have not specified the governing law in their agreement.117 Contractual choice of law clauses are enforceable, provided that the law selected is reasonably related to the transaction and does not violate a fundamental public policy of the state.118

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110. Miller v. Pilgrim's Pride Corp., 366 F.3d 672, 675 (8th Cir. 2004). See, e.g., *In re Aircraft Accident at Little Rock*, 231 F. Supp. 2d 852, 875 (E.D. Ark. 2002), aff'd, 351 F.3d 874 (8th Cir. 2003) (concluding that Arkansas' punitive damages rule, which at the time had no statutory limits, was better than Texas rule placing cap on damages, because the latter deprived a jury of the ability to effectively deter a powerful defendant).


113. *E.g.*, Gomez v. ITT Educ. Servs., Inc., 348 Ark. 69, 79, 71 S.W.3d 542, 548 (2002) (neither state's law "offers a 'better' remedy than the other, as they both provide the same redress for the same wrong; the only difference is in the time period in which such a cause of action must be brought").

114. Hughes v. Wal-Mart Stores, Inc., 250 F.3d 618, 621 (8th Cir. 2001). See also Miller v. Pilgrim's Pride Corp., 366 F.3d 672, 675 (8th Cir. 2004) (“[t]his is not a case where unfair or archaic laws are alleged to be at play”); Harris v. City of Memphis, 119 F. Supp. 2d 893, 896 (E.D. Ark. 2000) (“[t]his Court also finds that it is not in the position to decide which is the better rule of law”).


116. See also Schlemmer v. Fireman's Fund Ins. Co., 292 Ark. 344, 730 S.W.2d 217 (1987) (Arkansas guest statute in effect at time of accident was "archaic and unfair" and Tennessee law, which did not bar recovery, was "better"); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977) (Arkansas comparative fault statute "is a fairer and more economically equitable standard of liability" than Missouri rule of contributory negligence).


Essentially the same principles apply when a contract is subject to the Uniform Commercial Code, which contains its own choice of law rules.\textsuperscript{119}

A word of caution is in order, for the Arkansas case law in this area is not as neat and tidy as the foregoing summary suggests. The Eighth Circuit, for example, has complained that the Arkansas decisions have "vacillated" between different lines of cases, "generally citing to one [leading] case without referencing the other."\textsuperscript{120} Moreover, it is not clear whether the "most significant relationship" terminology used by the Supreme Court reflects approval of the methodology of the second Restatement or adoption of a "significant contacts" approach,\textsuperscript{121} also known as "grouping of contacts" or "center of gravity."\textsuperscript{122} The Court has also "consistently inclined toward applying the law of the state that will make the contract valid rather than void."\textsuperscript{123}

Under the second Restatement, ascertaining the state with the most significant relationship requires consideration of several general principles: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.\textsuperscript{124}

Furthermore, the second Restatement directs courts to consider the following specific factors in...
contracts cases: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.\textsuperscript{125}

In \textit{Ducharme v. Ducharme},\textsuperscript{126} a case involving a contract without a choice of law clause and not subject to the U.C.C., the Arkansas Supreme Court said that "the law of the state with the most significant relationship to the issue at hand should apply."\textsuperscript{127} However, the Court did not mention the second \textit{Restatement}, instead relying on two of its decisions that speak in terms of significant "contacts."\textsuperscript{128}

Citing the \textit{Ducharme} case, the Court of Appeals has described the inquiry as "which state has the most 'significant contacts' with the issue" and listed the specific factors identified in the second \textit{Restatement} as pertinent.\textsuperscript{129} The Court did not fully explicate the second \textit{Restatement} methodology, which calls for the specific factors "to be taken into account" in applying the general principles set out above to determine the state with "the most significant relationship to the transaction and the parties."\textsuperscript{130} As Professor Couch has noted, the Court of Appeals apparently "was not making a conscious effort" to apply the second \textit{Restatement}, but "was merely illustrating contacts."\textsuperscript{131}

Professor Couch has predicted that the Arkansas Supreme Court will eventually adopt the second \textit{Restatement} or expand use of Leflar's choice-influencing to contract cases. For the moment, he wrote, "it can be said that Arkansas applies the significant contacts approach," although "it would be most interesting to have the Arkansas Supreme Court describe what they mean by that."\textsuperscript{132} Dr. Leflar anticipated that his methodology, having been adopted in Arkansas for torts cases, would "in due

\textsuperscript{125} \textit{ReSTATEMENT (SECOND) OF CONFLICT OF LAWS} § 188(2) (1971).

\textsuperscript{126} 316 Ark. 482, 872 S.W.2d 392 (1994).

\textsuperscript{127} 316 Ark. at 485, 872 S.W.2d at 394. \textit{See also} Lienemann v. King, 832 F. Supp. 257 (W.D. Ark. 1993), aff'd, 26 F.3d 126 (8th Cir. 1994) (discussing contacts as well as \textit{RESTATEMENT (SECOND) OF CONFLICT LAWS} § 193 (1971), which addresses contracts for fire, surety, and casualty insurance).


\textsuperscript{129} Southern Farm Bureau Cas. Ins. Co. v. Craven, 79 Ark. App. 423, 428, 89 S.W.3d 369, 372-73 (2002). The Court of Appeals also discussed the traditional rule of lex loci contractus – i.e., the law of the place where the contract was made – and concluded that Arkansas law was controlling "whether the lex loci contractus rule or the significant contacts analysis is applied." Id. at 428, 89 S.W.3d at 373. In a subsequent diversity case, the parties relied on the Craven case in "agree[ing] that Arkansas courts have resolved choice of law questions involving insurance contracts by applying the law of the state where the contract was made – the lex loci contractus rule." Hicks v. American Heritage Life Ins. Co., 332 F. Supp. 2d 1193, 1199 (W.D. Ark. 2004).

\textsuperscript{130} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 188(2) (1971). Courts elsewhere have also ignored this directive and instead simply identified the states in which the contacts listed in § 188 occurred. E.g., Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. App. 1983); O'Rourke v. Colonial Ins. Co., 624 So. 2d 84 (1993).


time" be applied "to contracts and other areas." 133

Under the Uniform Commercial Code, the parties may choose the law of a particular state or nation to govern their rights and duties under the contract, so long as the transaction "bears a reasonable relation" to the jurisdiction whose law is selected.134 However, if a particular code provision specifies the applicable law, a contrary agreement "is effective only to the extent permitted by the law (including the conflict of laws rules) so specified."135 Absent an agreement between the parties, the Arkansas version of the U.C.C. "applies to transactions bearing an appropriate relation to this state."136

In applying the U.C.C. provision on choice of law clauses, the Supreme Court has used the term "substantial contacts" to describe the requisite "reasonable relation" with the chosen state.137 The court has also identified contacts that are important in determining whether a reasonable relationship exists: where the transaction originated, where payments under the transaction were sent, and where the parties were located.138

Similarly, the Supreme Court has assessed contacts when a contract lacked a choice of law clause and, in addition, has presumed that the parties "intend to contract with a reference to the law that would uphold rather than invalidate their contract." 139 On at least one occasion, the Court of Appeals used Dr. Leflar's choice-influencing considerations in concluding that "the transactions in question bear an appropriate relation to this state."140 Regardless of the appropriate approach, courts have relatively few occasions to consider this question because of the widespread adoption of the U.C.C. and the common use of choice of law clauses in contracts.141

A choice of law clause, however, must be carefully drafted to achieve its intended result. In an Eighth Circuit case, for example, the clause stated that "the laws of the State of Texas shall govern interpretation" of the agreement. Emphasizing this narrow wording, the court concluded that the parties did not intend for Texas law to govern all aspects of their relationship, but only issues of contract interpretation.142


134. ARK. CODE ANN. § 4-1-301(1).

135. ARK. CODE ANN. § 4-1-301(2). This section lists the following provisions: § 4-2-402 (rights of creditors against sold goods); §§ 4-2A-105 & 4-2A-106 (leases); § 4-4-102 (bank deposits and collections); § 4-4A-507 (funds transfers); § 4-5-116 (letters of credit); § 4-8-110 (investment securities); §§ 4-9-301 to 4-9-307 (perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens).


By contrast, the Eighth Circuit quoted what it considered broader choice of law clauses from other cases, such as one from Arkansas providing that the contract "will be governed by the law of the State of Texas" and another stating "the intention of the parties that [the contract] shall be interpreted and the rights and obligations of the parties hereunder shall be governed by the law of the state of Georgia." The scope of a choice of law clause might be more broadly construed than a party might anticipate. In a California case, for example, the court held that a clause that "governs" an agreement "encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationships it creates." On the other hand, a federal district court has held that a clause stating that the agreement "shall be construed, interpreted and enforced in accordance with the laws" of a given state did not encompass the plaintiff's tort claims.

VIII. Real Property

The choice of law revolution for the most part bypassed the area of property law largely because the traditional rules offer desirable simplicity and stability and are generally consistent with policy considerations. Like most states, Arkansas follows the traditional approach.

With respect to real property, the governing law is that of the state in which the land is located. This so-called "situs rule" applies to questions concerning title to land. Examples include the capacity of a grantor to convey land, the validity or invalidity of a conveyance of land and the nature of the title passed, and the formalities essential to con...

\[\text{shall be governed by the laws of the State of Florida}]


\[\text{Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 470, 834 P.2d 1148, 1155 (1992). See also Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 309-10 (2d Cir. 1994) (choice of law clause held sufficiently broad to cover tort claims).}


\[\text{For choice of law purposes, property interests are traditionally classified as either "immovables" or "movables," a division generally the same as that between land and personalty. Eugene F. Scoles, et al., CONFLICT OF LAWS § 19.2 (4th ed. 2004). Some Arkansas cases use this terminology. E.g., Morris v. Cullipher, 306 Ark. 646, 816 S.W.2d 878 (1991); Strang v. Strang, 258 Ark. 139, 523 S.W.2d 887 (1975); Midland Valley Ry. Co. v. Moran Nut & Bolt Mfg. Co., 80 Ark. 399, 97 S.W. 679 (1906).}

\[\text{See ROBERT A. LEFLAR, LUTHER L. MCDOUGAL & ROBERT L. FELIX, AMERICAN CONFLICTS LAW § 165 (4th ed. 1986); Eugene F. Scoles, et al., CONFLICT OF LAWS § 19.1 (4th ed. 2004). For its part, the second Restatement generally follows the rules of its predecessor but leaves wiggle room to apply the law of the state that has the most significant relationship. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971).}

\[\text{Cooper v. Cherokee Village Development Co., 236 Ark. 37, 364 S.W.2d 158 (1963); Bell v. Wadley, 206 Ark. 569, 177 S.W.2d 403 (1944); O'Bar v. Hight, 169 Ark. 1008, 277 S.W. 533 (1925); Nakdimen v. Brazil, 137 Ark. 188, 208 S.W. 431 (1919); Polack v. Steinke, 100 Ark. 28,139 S.W. 538 (1911).}

\[\text{Waggoner v. Atkins, 204 Ark. 264, 162 S.W.2d 55 (1942) (sanity); Beauchamp v. Bertig, 119 S.W. 75, 80, 90 Ark. 351 (1909) (infancy). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223, comment c (1971). The same rule applies with respect to the capacity of the grantee to take title. Id., comment d.}

\[\text{Bell v. Wadley, 206 Ark. 569, 177 S.W.2d 403 (1944); McDaniel v. Grace, 15 Ark. 465 (1885). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971).}
Interpretation of an instrument of conveyance is also governed by the law of the situs. Contracts concerning land and covenants in deeds are not always subject to the situs rule, however. As to contracts, the law of the situs applies if the issue is characterized as pertaining to an interest in land. Otherwise, the court employs its usual choice of law methodology for contracts. The court's characterization may turn on the plaintiff's theory of the case. While an action seeking damages for breach of the contract will typically be treated as any other contracts case, a suit for possession or to enforce equitable rights in the land itself is determined by the law of the situs.

Because covenants that "run with the land" are transferred as part of ownership, their validity and effect are governed by the law of the situs. On the other hand, covenants that are personal to the parties to the transaction are treated as contracts. The law of the situs determines whether a covenant runs with the land or is personal.

Leases are subject to the law of the situs as to the nature of the rights created in land and questions of title, but other issues are governed by the choice of law rules for contracts. In one case, for example, the Supreme Court applied Arkansas law in interpreting provisions concerning rent in a lease of farm land in Mississippi.

The law of the situs governs the validity, construction, and effect of a mortgage or lien on land. However, the situs rule is not controlling with respect to a promissory note secured by a mortgage; rather, the applicable law "is to be determined under the ordinary choice of law rules for contracts, just as if there were no mortgage." The method for the foreclosure of a mortgage is determined by the law of the situs, as is the power of the mortgagor to redeem the mortgaged land.

The validity of a will devising land is determined by the law of the state where the land is located.

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161. Craig v. Carrigo, 535 Ark. 761, 121 S.W.3d 154 (2003); McPherson v. McKay, 207 Ark. 546, 181 S.W.2d 685 (1944); Robertson v. Robertson, 144 Ark. 556, 223 S.W. 32 (1920). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 (1971). By statute, a will properly executed in another state has "the same force and effect in this state as if executed in this state," ARK. CODE ANN. § 28-25-105. This provision, however, applies only to the formalities of execution, not to substantive issues of validity. Craig v. Carrigo, supra; Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S.W. 908 (1912); Warner v. Warner, 14 Ark. App. 257,
as is the question whether such a will has been revoked. Likewise, the law of the situs governs the effect and interpretation of such wills. In the event of an intestacy, questions relating to succession to interests in land will be determined by the law the situs.

With respect to marital property, the situs rule controls as to each spouse’s interest in real estate owned at the time of the marriage and acquired during it. Prenuptial agreements concerning property, as well as such agreements made after marriage in contemplation of separation or divorce, are generally treated the same as other contracts for choice of law purposes, but the situs rule applies to questions of the effect on such an agreement upon the interests of the spouses in land.

IX. Personal Property

Insofar as tangible personal property is concerned, the existence or nonexistence of title in a chattel was traditionally determined by the law of the place where the chattel was located at the time the title, if any, was created. The Arkansas Supreme Court followed this rule, under which, for example, the law of the situs determined whether title passed by sale or gift, what interests existed by reason of a chattel mortgage, and the effect of a conditional sale.

There is relatively little Arkansas law concerning intangible personal property, such as accounts, contract rights, debts and other choses in action. Under the medieval maxim mobilia sequuntur personam, the property followed its owner, and its "situs" was his or her domicile. But there were

687 S.W.2d 856 (1985).

162. McPherson v. McKay, 207 Ark. 546, 181 S.W.2d 685 (1944). See also Restatement (Second) of Conflict of Laws § 239, comment i (1971).

163. Craig v. Carrigo, 353 Ark. 761, 121 S.W.3d 154 (2003); Layman v. Hodnett, 205 Ark. 367, 168 S.W.2d 819 (1943); Bowen v. Frank, 179 Ark. 1004, 18 S.W.2d 1037 (1915). See also Restatement (Second) of Conflict of Laws § 240 (1971).

164. Wilson v. Storthz, 117 Ark. 418, 175 S.W. 45 (1915); Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S.W. 908 (1912). See also Restatement (Second) of Conflict of Laws § 236.


167. Restatement (Second) of Conflict of Laws § 234, comment b (1971).


170. E.g., Ghio v. Byrne, 59 Ark. 280, 27 S.W. 243 (1894).

171. E.g., Motors Securities Co. v. Duck, 198 Ark. 647, 130 S.W.2d 3 (1939); Morris v. Cohn, 55 Ark. 401, 17 S.W. 342 (1891).

exceptions. As to debts, for example, the law for many years was that a debt followed the debtor and could be attached in a quasi in rem proceeding. Moreover, the validity and effect of an assignment or transfer of an intangible chose in action were determined by the law of the place where the assignment or transfer was made. If the chose in action were integrated in a document, such as a promissory note or a check, the applicable law was that of the place where the document was located.

Many choice of law questions that might arise in disputes over personal property have been mooted by other developments. For example, issues pertaining to such property are often addressed by contracts, which are governed by a separate body of choice-of-law principles or by the law chosen by the parties in their agreement. Moreover, as discussed below, the Uniform Commercial Code reduces the number of potential conflicts through uniformity and establishes various choice of law rules governing personal property, and special choice of law rules cover decedents' estates and marital property.

The general choice of law rules in the Uniform Commercial Code have been considered previously in connection with contracts. Of its specific provisions, those governing security interests are most important for present purposes. Under the prior version of Article 9, the situs rule played a major role. By contrast, the present law puts "considerably more emphasis on the personal connection of the debtor."

The law governing perfection, nonperfection, and priority of security interests in tangible and intangible collateral is generally that of the jurisdiction where the debtor is "located." With some exceptions, that term is defined as the principal residence of an individual, the place of business of an organization, and the chief executive office of an organization with more than one place of business. However, "registered organizations"—i.e., corporations, limited partnerships, and other entities that require registration under state law—are located in the state of registration, not the state of their principal place of business.

The law of the debtor's location does not apply in all circumstances. For example, the law of the situs is also controlling as to perfection and priority in fixtures and timber to be cut. When a possessory security interest is involved, the governing law is

173. Chisholm v. Crye, 83 Ark. 495, 104 S.W. 167 (1907); Stone v. Drake, 79 Ark. 384, 96 S.W.2d 197 (1906); Smead & Powell v. D.W. Chandler & Co., 71 Ark. 505, 76 S.W. 1066 (1903). In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court held that the assertion of quasi in rem jurisdiction must satisfy the same "minimum contacts" requirement that applies to personal jurisdiction.


Where title to a chattel is embodied in a document, such as a bill of lading or warehouse receipt, the effect of a conveyance of an interest in the chattel is determined by the law of the state of location of the chattel. If the document itself is transferred, the effect is governed by the law of the state where the document was located. Restatement (Second) of Conflict of Laws § 248(2) (1971).


that of the jurisdiction where the collateral is located.\textsuperscript{182} The law of the debtor's location governs perfection of "nonpossessory security interests in negotiable documents, goods, instruments, money, or tangible chattel paper," but the law of the situs applies to questions of priority and the effect of perfection.\textsuperscript{183}

Questions of perfection of a security interest in goods covered by a certificate of title are determined by the law of the state that issued the certificate.\textsuperscript{184} In addition, there are special rules for agricultural liens,\textsuperscript{185} deposit accounts,\textsuperscript{186} investment property,\textsuperscript{187} and letter-of-credit rights.\textsuperscript{188}

If there is movement of the debtor or the collateral to another state, a perfected security generally continues to be perfected for a fixed period of time, usually four months in the case of the debtor and one year in the case of collateral.\textsuperscript{189} If a secured party does not reperfect the security interest before expiration of the appropriate time period, it "becomes unperfected and is deemed never to have been perfected as against a previous or subsequent purchaser of the collateral for value."\textsuperscript{190} Specific statutory provisions address possessory security interests, goods covered by a certificate of title, and security interest in deposit accounts, letter-of-credit rights, and investment property.\textsuperscript{191} However, agricultural liens are not included.\textsuperscript{192}

Outside the U.C.C. context, the validity of a will devising personal property is determined by the law of the decedent's domicile,\textsuperscript{193} as is succession to such property in the event that a person dies intestate.\textsuperscript{194}

Whether one spouse acquires an interest in personal property owned by the other spouse at the time of the marriage is governed by the domicile of the latter.\textsuperscript{195} Thereafter, the governing law is that of the marital domicile at the time particular personal property is acquired.\textsuperscript{196} If the spouses have separate

\textsuperscript{182} ARK. CODE ANN. § 4-9-301(2).

\textsuperscript{183} ARK. CODE ANN. § 4-9-301(3).

\textsuperscript{184} ARK. CODE ANN. § 4-9-303. See Meeks v. Mercedes Benz Credit Corp., 257 F.3d 843 (8th Cir. 2001) (motor vehicle).


\textsuperscript{186} ARK. CODE ANN. § 4-9-304.

\textsuperscript{187} ARK. CODE ANN. § 4-9-305.

\textsuperscript{188} ARK. CODE ANN. § 4-9-306.

\textsuperscript{189} ARK. CODE ANN. § 4-9-316(a).

\textsuperscript{190} ARK. CODE ANN. § 4-9-316(b).

\textsuperscript{191} ARK. CODE ANN. §§ 4-9-316(c)-(g).

\textsuperscript{192} See U.C.C. § 9-316, comment 7.

\textsuperscript{193} Torian's Estate v. Smith, 263 Ark. 304, 564 S.W.2d 521 (1978); McPherson v. McKay, 205 Ark. 1135, 172 S.W.2d 911 (1943). See also RESTATAMENT (SECOND) OF CONFLICT OF LAWS § 263 (1971).

\textsuperscript{194} Simmons v. Simmons, 203 Ark. 566, 158 S.W.2d 42 (1942); Gibson v. Dowell, 42 Ark. 164 (1883); Hewitt v. Cox, 55 Ark. 225, 17 S.W. 873 (1891). See also RESTATAMENT (SECOND) OF CONFLICT OF LAWS § 260 (1971).

\textsuperscript{195} RESTATAMENT (SECOND) OF CONFLICT OF LAWS § 257 (1971).

Neither a change of domicile by one or both of the spouses nor removal of chattels to another state affects their marital property interests. Some potentially unfair consequences of this rule are mitigated by the Uniform Disposition of Community Property Rights at Death Act, adopted in Arkansas in 1981. Its purpose is to preserve the rights of each spouse in property acquired in a community property state prior to change of domicile to Arkansas. At death, half of the property is the that of the decedent, while the other half is that of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the Arkansas succession laws. The decedent’s half is not subject to dower or curtesy or the surviving spouse’s right to elect against the will.

Prenuptial agreements concerning personal property, as well as such agreements made after marriage in contemplation of separation or divorce, are generally treated the same as other contracts for choice of law purposes.

X. Marriage and Divorce

The general rule in the United States has long been that the validity of a marriage is determined by the law of the place where it was performed, and a marriage valid there is valid everywhere. If a marriage violates a particularly strong public policy of the domicile of either party, however, it will be invalid.

The Arkansas cases reflect the general rule, which is embodied in a statute that dates to statehood. Relatively few decisions involve the public policy exception. The Supreme Court has upheld out-of-state marriages by underage persons and first cousins that would be invalid under Arkansas law, as well as common-law marriages.
recognized in the state where the parties cohabitated.\textsuperscript{209}

By contrast, the Court has said that "the Arkansas policy against incest is so strong that we would not recognize the validity of a marriage, even if performed in another state, between very close blood relatives, such as a father and daughter or a brother and sister."\textsuperscript{210} The Court has also suggested the same result for bigamous marriages.\textsuperscript{211}

In addition, the aforementioned recognition statute was revised in 1997 to except marriages "between persons of the same sex,"\textsuperscript{212} and a constitutional amendment approved at the 2004 general election is to the same effect.\textsuperscript{213} Under the federal Defense of Marriage Act, a state is not required to give full faith and credit to "a relationship between persons of the same sex that is treated as a marriage" by another state, a federal territory or possession, or an Indian tribe.\textsuperscript{214}

Because the decision whether to grant an annulment turns on the validity of the marriage, the applicable law is that of the state where the marriage was performed.\textsuperscript{215} In divorce cases, however, an Arkansas court will apply the law of the forum.\textsuperscript{216} Conversely, an Arkansas spouse may move to another state to obtain a divorce pursuant to its law, which may be more flexible. For example, a sister state is not compelled to recognize divorce restrictions that Arkansas has imposed for covenant marriages.\textsuperscript{217} A decree of judicial separation entered in another state does not bar a later action for divorce in Arkansas.\textsuperscript{218}

Choice of law issues concerning marital property have been discussed previously. The law of the situs generally applies with respect to real property,\textsuperscript{219} while the law of the domicile is usually control-

\textsuperscript{209} Craig v. Carrigo, 353 Ark. 761, 121 S.W.3d 154 (2003); Brissett v. Sykes, 313 Ark. 515, 855 S.W.2d 330 (1993); Osburn v. Graves, 213 Ark. 727, 210 S.W.2d 496 (1948); Estes v. Merrill, 121 Ark. 361, 181 S.W. 136 (1915); Evatt v. Mier, 114 Ark. 84, 169 S.W. 517 (1914).

\textsuperscript{210} Etheridge v. Shaddock, 288 Ark. 481, 482, 706 S.W.2d 395, 396 (1986).

\textsuperscript{211} State v. Graves, 228 Ark. 378, 381, 307 S.W.2d 545, 547 (1957) (quoting RESTATEMENT OF CONFLICT OF LAWS § 132 (1934)). The quotation included the Restatement's exception for marriage "between persons of different races where such marriages are at the domicile regarded as odious." Id. Statutes prohibiting interracial marriage were held unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967). At the time of that decision, Arkansas was among the states with such a statute. See Ark. Stat. Ann. § 55-104 (1947).

\textsuperscript{212} Ark. Code Ann. § 9-11-107(b) (codifying Act 144 of 1997, § 2). Under a companion statute, marriage "shall be only between a man and a woman," and a marriage between persons of the same sex is void. Id. § 9-11-109 (codifying Act 144 of 1997, § 1).

\textsuperscript{213} [I]legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman." Ark. Const. amend. 83, § 2. The amendment also states that marriage "consists only of the union of one man and one woman." Id., § 1.


\textsuperscript{215} Worthington v. Worthington, 234 Ark. 216, 352 S.W.2d 80 (1961).

\textsuperscript{216} Brickey v. Brickey, 205 Ark. 373, 168 S.W.2d 845 (1943). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971).


\textsuperscript{218} Butts v. Butts, 152 Ark. 399, 238 S.W. 600 (1922).

\textsuperscript{219} See notes 165-167, supra.
XI. Proof of Foreign Law

At common law, the law of a foreign jurisdiction was a question of fact proved by expert testimony, and courts would not take judicial notice of that law. Like most states, Arkansas has modified these principles. The present practice is set out in Ark. R. Civ. P. 44.1, which is identical to a superseded statute and substantially the same as the corresponding federal rule. Absent compliance with Rule 44.1, the court will apply the law of Arkansas.

Rule 44.1(c) expressly provides that the determination of the law of another jurisdiction is a question of law for the court, not a question of fact for the jury. Pursuant to Rule 44.1(b), the court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence." Moreover, a statute requires Arkansas courts to take judicial notice of the laws of other states, although a party must bring the matter to the court's attention.

Under Rule 44.1(a), a party who intends to raise an issue of foreign law "shall give notice in his pleading or other reasonable written notice." There is no rigid requirement that a party assert his or her reliance on foreign law at any particular point in the litigation; rather, the trial court "must exercise discretion in determining the proper timing of the notice in the light of requirements of the case and fairness to the parties." Waiting until trial is dangerous, but notice after trial and before judgment has been held sufficient where the parties implicitly relied on foreign law when trying the case.

When intent to rely on the law of another jurisdiction is not specifically stated, it may be inferred

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220. See notes 195-202, supra.


223. FED. R. CIV. P. 44.1. While the federal rule is "concerned only with the determination of the law of a foreign country," the Arkansas rule "applies to the law of any governmental unit outside the State of Arkansas." Reporter's Notes to Ark. R. Civ. P. 44.1.


from the pleadings. In one case, for example, the Supreme Court held that the plaintiff gave sufficient notice that it intended to rely on Texas law by attaching to the complaint a copy of the contract between the parties stating that it would be governed by the law of that state. Similarly, the Court concluded that a judgment creditor, by stating in a pleading that registration of an Ohio judgment was sought pursuant to the Uniform Enforcement of Foreign Judgments Act, had placed the judgment debtor on notice it could expect interest to be levied in accordance with Ohio law.


232. The 1948 version of the uniform act was repealed by Act 501 of 1989, when the 1964 version was adopted. The present codification is Ark. Code Ann. §§ 16·66·601 to 16·66·608.