ALL HAIL *KING V. BRUCE*: THE RULE OF DOMICILE PREVAILS, DESPITE *MCKEEHAN V. MCKEEHAN* AND THE SECOND RESTATEMENT OF CONFLICTS

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I. INTRODUCTION

In July 2011, the Texas Court of Appeals in Austin issued its opinion in *McKeehan v. McKeehan*.[1] In *McKeehan*, the court enforced a contractual choice-of-law clause found in a Ford Motor Company employee's investment account agreement.[2] Under the choice-of-law clause, Michigan law applied to any survivorship rights in the investment account.[3] As a result of the court's analysis in *McKeehan*, the account owner's surviving spouse was entitled to ownership of the account as a joint tenant with rights of survivorship.[4] However, Texas law requires that investment account agreements contain specific survivorship language to produce this result.[5] The significance of this case arises from its choice-of-law analysis and the public policy implications of its holding.

McKeehan contradicts the holding of the 1947 Texas Supreme Court decision in *King v. Bruce*, which promulgated a different choice-of law analysis.[6] Under the First Restatement of Conflict of Laws, which was in place at the time of *King*, the law of the place of contracting would apply

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[1] 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. filed).

[2] *See id.* at 293.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 286 (citing TEX. PROB. CODE ANN. §§ 46(a), 439(a) (West 2003 & Supp. 2012)).

[6] *Compare* McKeehan v. Mckeehan, 355 S.W.3d 282, 293 (Tex. App.—Austin 2011, pet. filed) (applying a Second Restatement section 187 analysis to the choice of law problem) *with* King v. Bruce, 201 S.W.2d 803, 809 (Tex. 1947) ("The rule of the domicile pre-dominates as between the spouses.").

when a contractual dispute arose between parties.[7] However, the Texas Supreme Court in *King* declined to rely on a traditional First Restatement choice-of-law analysis.[8] Instead, the court carved out a special exception where it used the law of the spouse's domicile in the dispute.[9] In 2011, however, the court in *McKeehan* refused to follow the rule created in *King*.[10] Instead, the court in *McKeehan* applied a conventional Restatement (Second) of Conflict of Laws choice-of-law analysis.[11]

Under the conventional Second Restatement choice-of-law analysis, when a contractual choice-of-law clause is found within a contract, the court will look to section 187 of the Second Restatement.[12] Under section 187(1), the law of the state chosen by the parties to govern their contract will be applied if the issue is one that the parties could have resolved by explicit agreement.[13] However, for matters that the parties cannot resolve by a specific provision, the court will look to section 187(2).[14] Under section 187(2), the contractual choice-of-law provision can still be enforced, but it will be subject to the qualifications found within section 187(2).[15] Section 187(2) states that a contractual choice-of-law provision will not be enforced if the contractually chosen state has no substantial relationship to the parties or the transaction and there is no other rational basis for selecting the state, or if the laws of the chosen state are contrary to a fundamental policy of the state that would apply in the absence of the parties' contractual choice-of-law provision, pursuant to § 188.[16]

Since *King v. Bruce*, Texas ultimately adopted the analysis under the Second Restatement, which gives far more deference to contractual choice-of-law clauses than the First Restatement.[17] Nevertheless, *King*'s rule of domicile is still a viable carve-out to the Second Restatement's choice-of-law analysis in Texas. Despite Texas's adoption of the Second Restatement,

[7] RESTATEMENT OF CONFLICT OF LAWS § 311 (1934).

[8] *See King*, 201 S.W.2d at 809.

[9] *Id.*

[10] *See Mckeehan*, 355 S.W.3d at 293 n.9.

[11] *See id.* at 291.

[12] *See id.*

[13] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

[14] *McKeehan*, 355 S.W.3d at 292.

[15] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

[16] *Id.*

[17] *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420–21 (Tex. 1984); *see also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–78 (Tex. 1990).

King's rule of domicile specifically applies when the property of a married couple is the subject of litigation and will potentially be enjoyed by a surviving spouse in the state of Texas.

McKeehan also has important implications that run counter to the long-standing policy behind the requirement of specific survivorship language rooted in the Texas Constitution and its amendments. The court in *McKeehan*, in its rejection of the principles articulated in *King* and also in its application of a traditional Second Restatement analysis under sections 187(1) and 188 of the Second Restatement, mistakenly concluded that the law found in the contractual choice-of-law clause applied to the dispute. The court, in applying section 187(1) of the Second Restatement, held that it did not have to consider public policy implications in its analysis.[18] However, although not explicitly mentioned, the Second Restatement always allows room for policy considerations in both its application and analysis.[19]

This article will, therefore, analyze the holding of the Texas Court of Appeals in *McKeehan v. McKeehan*, and the court's application of the Second Restatement, in light of *King v. Bruce*. This article will also address the Second Restatement's public policy test and its proper analysis in regards to creating rights of survivorship in Texas. In Part II, this article will provide the facts and analyses used in *King* and, subsequently, in *McKeehan*. Part III will serve as a critique of the *McKeehan* court's analysis under section 187(1) and will address the proper analysis under section 187(2). Part IV will discuss the public policy implications of survivorship language in Texas and the proper application of section 187(2) to this issue. Part V will discuss whether the public policy analysis applies under section 187(1), even though it is not explicitly addressed by the Second Restatement. Finally, this article will conclude with an explanation of why, on appeal, the Texas Supreme Court should apply Texas law to the investment account in *McKeehan*, and the possible implications this case might have on legal practitioners in Texas.

II. KING V. BRUCE AND MCKEEHAN V. MCKEEHAN

When *King v. Bruce* was decided in 1947, Texas courts followed the First Restatement of Conflict of Laws.[20] Under the First Restatement, when

[18] *McKeehan*, 355 S.W.3d at 292.

[19] *See infra* note 199.

[20] Richman v. Comm'r, 68 T.C.M. (CCH) 527, 531 (1994).

resolving choice-of-law questions involving contracts, courts generally applied the law of the state where the contract was made—*lex loci contractus*.[21] In *King*, the Texas Supreme Court established an exception to the *lex loci contractus* rule.[22] *King* held that, with respect to spouses who left Texas in an attempt to create community property rights as joint tenants with right of survivorship, the law of the spouse's domicile should be applied.[23] In 2011, *McKeehan v. McKeehan* presented a set of facts very similar to those of *King*: a spouse had contracted in another state that his property would be held in a certain way.[24] Although the facts were similar, the result was quite the opposite when the court in *McKeehan* rejected *King*'s rule of domicile and instead applied the Second Restatement.[25]

A. King v. Bruce: Facts

In *King*, a married couple from Texas, Homer and Clara Bruce, sought to segregate community property into separate property.[26] In order to do so, the couple traveled to a New York bank and divided their community property through a contract with the bank and a series of physical transactions.[27] To create the separate property rights, the couple transferred their Texas community property funds into an account at the New York bank, which they opened in Homer's name.[28] While in New York, Homer withdrew the funds he had transferred to the bank.[29] Homer then physically divided the majority of the funds into two containers of silver dollars and stated that the respective amounts in each container should each become the separate property of Homer and Clara through a contract with each other and the bank.[30] The contract recited that it was "wholly executed and

[21] *Id.*

[22] King v. Bruce, 201 S.W.2d 803, 809 (Tex. 1947).

[23] *Id.*

[24] *Compare* King v. Bruce, 201 S.W.2d 803, 804 (Tex. 1947) *with* McKeehan v. McKeehan, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, pet. filed).

[25] *McKeehan*, 355 S.W.3d at 293 (refusing to apply the rule that passage of title to personal property of decedents domiciled in Texas is governed by Texas law because of threshold questions regarding the nature of the property, ownership of the property, and how it was owned as determined pursuant to Michigan law).

[26] 201 S.W.2d at 803–04.

[27] *Id.* at 804.

[28] *Id.* at 805.

[29] *Id.*

[30] *Id.* He also used cashier's checks to divide some of the funds. *Id.*

performed in New York and that the parties intended that the laws of New York . . . should apply, govern and control the validity and effect of the contract and the title to the properties acquired by each thereunder."[31] The Bruces remained citizens of Texas throughout the New York transactions.[32] The couple then returned to Texas after the transaction in New York was complete.[33] Soon after the couple's return, King, a creditor, attempted to collect on a writ of garnishment against Homer, and tried to garnish the Bruces' bank accounts in Texas.[34] The Bruces believed that King could only reach half of the assets found in the bank accounts because half of the bank account funds were Clara's separate property as a result of the New York transactions.[35] King argued that the bank account funds were not acquired by Clara in a way permissible under article XVI section 15 of the Texas Constitution and also that the New York contract violated a civil statute because it altered the order of descent of community funds under Texas law.[36] King therefore argued that the contract was contrary to public policy and was, consequently, unenforceable.[37]

Ultimately, the Supreme Court of Texas agreed with King that, because the Texas Constitution only permitted property to be acquired in a specific way, the New York transaction was not a permissible means to create separate property rights in Clara.[38] Although under New York law a wife could own real or personal property as her own separate property,[39] the Texas Supreme Court held that, because the Bruces were domiciliaries of Texas when they entered into the transactions in New York, the community property they owned at the time of contracting continued to remain community property.[40] Despite the existence of a contractual choice-of-law clause stating that New York law applied, the court refused to enforce the choice-of-law provision.[41] The court's decision was not based on the law of

[31] *Id.*
[32] *Id.* at 803.
[33] *See id.* at 804–05.
[34] *Id.* at 804.
[35] *Id.*
[36] *Id.* at 805.
[37] *Id.*
[38] *Id.* at 807-08.
[39] *See id.* at 806.
[40] *Id.* at 808–09.
[41] *See id.* at 807–08.

the place of contracting,[42] as was traditionally used under the First Restatement.[43] Instead, the court promulgated an exception to rule under the First Restatement: the court stated that because the trip to New York was with the declared purpose to secure the enjoyment and benefits of the property for Clara to be enjoyed in Texas, the law of Texas remained applicable under the First Restatement of Conflict of Laws Section 292.[44] The transaction was, therefore, void, even though the contract recited that the law of New York applied.[45]

B. McKeehan v. McKeehan

1. Facts

In *McKeehan*, Dale McKeehan began working for the Ford Motor Company in Dallas, Texas, but eventually moved to work at the company in Michigan.[46] In 1988, while in Michigan, Dale opened a Ford investment account.[47] In 1998, he retired, married, and moved with his wife to Texas.[48] In 2008, Dale was diagnosed with terminal cancer, Dale and his wife met with Dale's banker in an effort to put Dale's personal affairs in order.[49] With the help of his banker, Dale completed a "Ford Interest Advantage Change Request Form," which added Marcia as a joint owner to the Ford investment account.[50] Soon after, Dale died and left all of his property, including his Ford investment account, to a revocable trust.[51] Although the

[42] *Id.* at 809.

[43] RESTATEMENT OF CONFLICT OF LAWS § 311 (1934).

[44] *King*, 201 S.W.2d at 808 (citing Union Trust Co. v. Grosman, 245 U.S. 412, 416 (1918); RESTATEMENT OF CONFLICT OF LAWS § 292 (1934)).Under this Restatement provision, "[m]ovables held by spouses in community continue to be held in community when taken into a state which does not create community interests." RESTATEMENT OF CONFLICT OF LAWS § 292. The court in *King* applied this rule, in addition to holding that the property would remain community property, because the property was to be enjoyed by Clara in Texas. 201 S.W.2d at 809.

[45] *King*, 201 S.W.2d at 807–08.

[46] McKeehan v. McKeehan, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, pet. filed).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See id.* at 285. Under the revocable trust, the first $2,500,000 went to Dale's wife Marcia, the next $200,000 went to Marcia's daughter (and Dale's stepdaughter) Allison, and the remainder of Dale's estate went to Mark and Leigh (Dale's two children). *Id.*

investment account was devised to Dale's adult children under Dale's revocable trust plan, Dale's wife, Marcia, argued that the Ford investment account passed to her as a non-probate asset because she was a joint owner.[52] Dale's children disagreed, and they countered that the account was a probate asset under Texas law because there was no specific survivorship language on the investment account.[53]

A Ford Credit representative's deposition stated that the more *recent* versions of the application for the Ford investment account contained explicit language that defined the scope of joint ownership.[54] The Ford Credit representative confirmed that the application stated that a joint tenancy with rights of survivorship would be presumed.[55] Further, the Terms and Conditions of the policy stated that Michigan law would apply to any dispute.[56] However, because Dale's original application had been lost, no evidence was produced that his *specific* application, which had been signed twenty years prior to this dispute, contained similar language.[57]

Instead of survivorship language, the investment account language merely stated that Dale and his wife were to be joint owners of the account.[58] Under Texas law, this is insufficient to create a right of survivorship.[59] However, Marcia argued that the investment account was governed by Michigan law as a result of a choice-of-law provision found within the investment account program's terms.[60] Michigan law presumes survivorship when spouses are merely joint owners;[61] therefore, Marcia argued that, as a result of the application of Michigan law to the investment account, she was the outright owner of the account.[62] In response, Dale's devisees argued that, under *King*, the rule of domicile governed the passage

[52] *Id.*

[53] *Id.*

[54] *Id.* at 292.

[55] *Id.*

[56] *Id.* at 286.

[57] *Id.* at 287, 292 n.7 ("Given . . . testimony that Dale's application would have been the same type as the current application, it is *likely* that his application included a similar provision." (emphasis added)).

[58] *See id.* at 284–85.

[59] *Id.* at 286.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 285.

of the account.[63] Because Dale and his wife were Texas domiciliaries, and the account was to be enjoyed in Texas upon Dale's death, the devisees argued that the account was governed by Texas law.[64] Therefore, as a result of the lack of specific survivorship language, the account would pass into the revocable trust for the benefit of Dale's adult children.[65]

2. The Court's Analysis in *McKeehan*

The Texas Court of Appeals, in deciding the rightful owner of the account, applied a choice-of-law analysis in which it first considered which jurisdiction's law applied to the ownership of the Ford investment account.[66] Marcia argued that Michigan law was the proper law to use in construing the status of the Ford investment account.[67] Because a choice-of-law provision found within the Terms and Conditions of the agreement stated that the "Ford investment Program shall be governed by and construed in accordance with the laws of the State of Michigan," Marcia argued that Michigan law applied.[68] Dale's devisees countered that the law of the decedent's domicile governed the passage of personal property; therefore, Texas law applied.[69]

The court began its analysis by first determining whether there was a difference between the laws of Texas and Michigan.[70] The court concluded Texas and Michigan laws differ in their treatment of jointly held assets.[71] After concluding that Dale agreed to be bound by the terms and conditions of the Ford investment program by participating in the program,[72] the court then analyzed whether the contractual choice-of-law provision was enforceable.[73] To determine the enforceability of the choice-of-law clause, the court relied on Section 187 of the Second Restatement of Conflicts.[74]

[63] *See id.* at 293 n.9 (noting that the devisees cited to *King* in support of their argument).

[64] *Id.* at 284-85.

[65] *See id.* at 285.

[66] *Id.* at 286.

[67] *Id.*

[68] *Id.* (brackets omitted).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 286–87.

[73] *Id.* at 291.

[74] *Id.*

Section 187 of the Second Restatement guides the proper analysis for enforceability of contractual choice-of-law provisions.[75]

Under section 187(1), the law of the state chosen by the parties is to be applied if the issue is one which the parties could have resolved by an explicit agreement.[76] The court in *McKeehan*, therefore, had to determine whether ownership status of a jointly owned investment account could be resolved by an explicit provision in the investment account agreement.[77] The court ultimately, and succinctly, concluded that. under section 187(1), Michigan law, which presumes survivorship for joint accounts, was applicable.[78] The court stated that the ownership status of a jointly owned investment account was one that the parties could have resolved by an explicit provision in their agreement.[79] As a result, the investment account was deemed to pass non-probate to Marcia as a joint tenant with an automatic right of survivorship under Michigan law and under section 187(1) of the Second Restatement of Conflicts.[80]

The devisees disagreed, urging that the Michigan choice-of-law provision could not be valid because it conflicted with Texas's public policy against the presumption of a right of survivorship absent specific language.[81] The court responded that the creation of a right of survivorship does not violate Texas policy, but, even if it did, the policy test would not be triggered unless section 187(2) was the proper analysis.[82] Section 187(2) is applicable only when the issue to be resolved could not be resolved under section 187(1)—that is, by an explicit provision in the parties' agreement.[83] Thus, the court refused to perform a public policy analysis for section 187(2), stating that it was not required.[84] However, the court did briefly discuss what the outcome would have been if it had chosen to apply the test

[75] *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990).

[76] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

[77] *Mckeehan*,355 S.W.3d at 291.

[78] *Id.* at 292.

[79] *Id.* at 291.

[80] *Id.*at 296.

[81] *Id.* at 292.

[82] *Id.*

[83] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (1971); Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 420 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

[84] *McKeehan*, 355 S.W.3d 282 at 292.

under section 187(2).[85] The court, in hypothetically applying section 187(2), stated that Michigan would still be the state of applicable law in the absence of an effective choice-of-law clause by the parties.[86] The court reasoned that because Michigan was the place of negotiation, the place where Dale enrolled in the program, the location of Ford, the place where at least part of the contract was to be performed, and the location of the subject matter of the contract, Michigan law would still apply.[87]

In a last attempt to steer the court in their favor, Dale's devisees argued that the passage of title to personal property of a Texas domiciliary-decedent is governed by Texas law, citing *King v. Bruce*, among other Texas cases reaffirming the rule of domicile as between spouses.[88] The court in *McKeehan* was not swayed.[89] It stated that it had already answered the questions of who owned the Ford investment account and whether it was owned as a joint tenancy with rights of survivorship.[90] Therefore, because the court had already resolved the answers to the ownership of the account and had decided that Michigan law applied, there was no need to apply the rule of domicile to the passage of the title to the property.[91]

C. Comparison of King and McKeehan: Differences

There are two significant differences between *King* and *McKeehan* that are notable and that may have led to the different conclusions reached by both courts. The first difference is factual in nature, while the second difference is the law at the time of the decision. In *King*, the spouses, who

[85] *Id.*

[86] *Id.*

[87] *Id.* (applying the test under Section 188 of the Second Restatement). The court held that because the public policy test is applied between the chosen state and the state chosen under Section 188 to have a "materially greater interest than the chosen state in the determination of the particular issue," Michigan law would still be the applicable law. *Id.*

[88] *Id.* at 293 n.9 (noting the cases that Dale's devisees cited in support of their argument); *see also* Saner-Ragley Lumber Co. v. Spivey, 238 S.W. 912, 915 (Tex. Comm'n App. 1922, judgm't adopted).

[89] *McKeehan*, 355 S.W.3d at 293.

[90] *Id.* (noting the courts must first determine who owned the account and whether it was owned as a joint tenancy with right of survivorship before it determines passage of the title to the property).

[91] *See id.* ("[T]he answers to those questions must be determined pursuant to Michigan law because Dale and Ford Credit chose to have the Ford investment program governed and construed pursuant to Michigan law. Once the questions as to the nature of the property are answered, we can then apply Texas law to determine the proper disposition of the property.").

were citizens of Texas throughout all transactions, traveled to New York only temporarily in order to enter into the contract at the New York bank.[92] However, this was not true in *McKeehan*. In *McKeehan*, Dale began as a resident of Texas, then moved to Michigan, which is where he entered into Ford investment agreement, and, finally, upon retirement from Ford, moved with his wife to Texas.[93] However, the most important distinction between *King* and *McKeehan* is that, at the time of *King*, the First Restatement was the rule that was used in Texas, as the Second Restatement of Conflict of Laws was not yet in existence.[94] Similarly, the First Restatement did not provide for the enforcement of choice-of-law clauses and generally disfavored contractual choice-of-law clauses on the grounds that they promoted "private legislation."[95] Therefore, the court in *King* gave little weight to the contractual clause stating that New York law would govern and apply to the parties' agreement.[96] However, under the First Restatement, the validity of a contract is determined by the law of the state where the contract was made—a concept that is commonly referred to as *lex loci contractus*.[97] Under a *lex loci contractus* analysis, because New York was the place of contracting,[98] New York law would have ultimately been applicable under the First Restatement. However, the Texas Supreme Court deviated from the *lex loci contractus* rule in holding that the domicile of spouses determines the validity of a contract that affects the spouses' rights in some way.[99] Therefore, because the Bruces were domiciliaries of Texas, and the property was for the benefit and enjoyment of Clara in Texas, Texas law applied despite contracting in New York.[100] Despite their intentions, and because of the Court's newly carved-out exception to the general rule, the Texas couple was not able to rely on the contractual choice-of-law

[92] King v. Bruce, 201 S.W.2d 803, 803-04 (Tex. 1947).

[93] *Id.*

[94] *See, e.g.*, *id.* at 808.

[95] 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 332.2 (1935).

[96] *See King*, 201 S.W.2d at 808.

[97] *Id.* at 809; *see also* RESTATEMENT OF CONFLICT OF LAWS § 311 (1934).

[98] *King*, 201 S.W.2d at 805.

[99] *See id.*at 809 ("The rule of the domicile predominates as between the spouses.") (citing Taylor v. Leonard, 275 S.W. 134, 135 (Tex. Civ. App.—Texarkana 1925, no writ)); *see also* Reeves v. Schulmeier, 303 F.2d 802, 807 (5th Cir. 1962); *In re* Estate of Perry, 480 S.W.2d 893, 894–95 (Mo. 1972).

[100] *King*, 201 S.W.2d at 808.

clause stating that New York law applied, and the property, therefore, remained community property.[101]

1. Texas Adoption of the Second Restatement of Conflicts for Contract Disputes

The First Restatement of Conflicts was the law in Texas for contract disputes until section 6 of the Second Restatement, the "most significant relationship" test for contracts, was adopted in Texas in 1984 in *Duncan v. Cessna Aircraft Co.*[102] Section 6 of the Second Restatement applies the law of the state with the "most significant relationship to the dispute" based on a variety of factors.[103] Under section 6, in all choice-of-law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issues will be applied.[104] The Texas Supreme Court, in *Duncan*, also applied section 188 of the Second Restatement, which is also used when there is no effective choice-of-law clause. [105] Section 188 contains factors to be considered to determine which state's law applies to a disputed contractual issue.[106] The court in *Duncan* went further than applying the Second Restatement, however. The court also stated that "*lex loci* rules will no longer be used in [Texas] to resolve conflicts problems."[107] Therefore, *Duncan* outright rejected any further use of the

[101] *Id.*

[102] 665 S.W.2d 414, 420–21 (Tex. 1984).

[103] Under Section 6 of the Second Restatement, when there is no statutory directive on what state's law applies, the factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[104] *Duncan*, 665 S.W.2d at 421.

[105] M. Cody Mueller, Comment, *Texas Contract Choice of law Rules After* Duncan v. Cessna Aircraft Company, 36 BAYLOR L. REV. 491, 497 (1984).

[106] Section 188 factors are applied when there is no effective choice-of-law clause. These factors include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[107] *Duncan*, 665 S.W.2d at 421.

First Restatement in Texas, at least in respect to disputes that do not involve contractual choice-of-law clauses.[108]

2. Texas Courts Continue to Apply the Rule in *King*

Despite *Duncan*'s rejection of the First Restatement, one year later, in *Ossorio v. Leon*, the court applied *King*'s rule of domicile.[109] In *Ossorio*, spouses who were citizens of Mexico deposited funds at a bank in Laredo.[110] "The account provided that all deposits would be owned by the depositors as joint tenants with the right of survivorship."[111] When one of the spouses died, a dispute arose over ownership in the account under descent and distribution laws.[112] Citing *King v. Bruce*, the court held that in choice-of-law questions dealing with ownership of personal property, courts should apply the law of the domicile of the parties.[113] However, the court in *Ossorio* applied *King*'s domicile rule *as well as* the most significant relationship analysis found in section 6 of the Second Restatement.[114] The court in *Ossorio* first stated that under *King*, because the parties were domiciled in Mexico, Mexican law governed the parties' agreement.[115] The court then discussed the application of the Second Restatement section 6 most significant relationship test to reach the same conclusion that Mexican law applied.[116] The court clearly stated: "We consequently hold, based on *King v. Bruce* and *Duncan v. Cessna*, that the gift made to appellant was valid under the laws of Mexico, and that the laws of Mexico should apply."[117]

In 1990, the First Restatement's analysis for contracts was significantly replaced when the Texas Supreme Court expressly adopted section 187 of the Second Restatement in *DeSantis v. Wackenhut Corporation*.[118] Section

[108] *See id.*

[109] 705 S.W.2d 219, 222 (Tex. App.—San Antonio 1985, no writ).

[110] *Id.* at 220.

[111] *Id.* at 220–21.

[112] *Id.* at 221.

[113] *Id.* at 222–23 (holding that all of the relevant contacts were contacts between the Ossorios and the jurisdiction of their domicile in Mexico).

[114] *Id.* at 223.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] 793 S.W.2d 670, 677–78 (Tex. 1990).

187 is used specifically for contractual choice-of-law clauses.[119] However, only twenty-three days after *DeSantis*, and despite the explicit rejection of the First Restatement's *lex loci* rules by the court in *Duncan v. Cessna Aircraft* in 1984, the Texas Court of Appeals confirmed and endorsed *King's* rule of domicile, with an additional analysis under the Second Restatement section 6.[120] The court in *Ramirez v. Lagunes*, citing *King*, stated:

> Traditionally, where choice of law questions deal with ownership of personal property, as between spouses, the Rule of Domicile applies . . . . *Furthermore*, where there are conflict of law issues, the "most significant relationship" approach set forth in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws is used . . . . In the present case, it is uncontroverted that both parties are citizens and *domiciliaries* of Mexico. Thus, the accounts are considered personal property under Mexican jurisdiction . . . .
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> . . . .
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> Mexican law has the *most significant relationship* to the discovery of the assets in question because, should any of the assets be properly characterized as "community" property, the Mexican divorce court has jurisdiction to divide it.[121]

The court further tracked the language of *King*, stating "[a]ssuming *arguendo*, that [Appellant] would *use and enjoy* these funds in Mexico and that the assets in the accounts were community property, any division and apportionment would have to be done by the Mexican divorce court using Mexican law."[122] Thus, the Mexican court had jurisdiction to categorize and divide the funds, since Mexico was the domicile of the parties, based on an analysis using *King*'s rule of domicile.[123] The court *then* used the most significant relationship test to determine which court, Texas or Mexico, had jurisdiction to grant the *discovery* of the Texas bank account information,

[119] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. a (1971).

[120] Ramirez v. Lagunes, 794 S.W.2d 501, 506 (Tex. App.—Corpus Christi 1990, no writ).

[121] *Id.* at 506–07 (citations omitted) (emphasis added).

[122] *Id.* (emphasis added).

[123] *Id.* at 507.

the second issue in the Texas lawsuit.[124] The court concluded that the Mexico court had jurisdiction to grant the discovery of the bank account information, since Mexico had the most significant relationship to the dispute, given the pending divorce suit.[125] Therefore, the court in *Ramirez* used both *King*'s rule of domicile as well as the most significant relationship test under the Second Restatement of Conflicts.

Both *Ossorio* and *Ramirez* suggest that in Texas, despite the adoption of the Second Restatement's most significant contacts test in 1984 and the contractual choice-of-law analysis adopted later in 1990, *King* may still be viable in rare instances involving personal property, such as bank funds and property rights between spouses.[126] Although it is possible that the application of *King*'s rule of domicile may have been infrequent, the rule was still alive in 1990.[127] It is, therefore, possible that *King* is still viable today under a specific set of facts and circumstances, such as those of *McKeehan v. McKeehan.*

III. CRITIQUE OF *MCKEEHAN'S* ANALYSIS: THE SECOND RESTATEMENT SECTION 187

A. The Court's Application of Section 187

As a result of *DeSantis v. Wackenhut*, Texas courts approach contractual choice-of-law clauses under section 187 of the Second Restatement.[128] Section 187 contains an analysis in which the court must first determine if the laws of two jurisdictions differ when a party contends that a contractual choice-of-law provision requires a court to apply the law of another jurisdiction.[129] In *McKeehan*, the court stated that laws differed in their treatment of jointly owned assets, since Michigan presumed survivorship, but Texas required specific language in writing.[130] The second part of the

[124] *Id.*

[125] *Id.*

[126] *See id.* at 506 (applying *King*'s domicile rule); *see also* Ossorio v. Leon, 705 S.W.2d 219, 222–23 (Tex. App.—San Antonio 1985, no writ) (same).

[127] *See Ramirez*, 794 S.W.2d at 506.

[128] *See, e.g.*, McKeehan v. McKeehan, 355 S.W.3d 282, 291 (Tex. App.—Austin 2011, pet. filed) (citing to *DeSantis* to support the proposition that it needed to use section 187 of the second Restatement to solve its choice of law question).

[129] *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 419 (Tex. 1984).

[130] *McKeehan*, 355 S.W.3d at 286 (citing TEX. PROB. CODE ANN. §§ 46(a), 439(a) (West Supp. 2012)) ("Texas law presumes that, unless specifically indicated in writing, joint ownership

section 187 analysis requires a court to decide if the contractual choice-of-law provision is enforceable.[131] Choice-of-law provisions are not "valid per se; [their] validity must be tested by section 187."[132] In order to determine if the clause is enforceable, a court must choose between application of either section 187(1) or section 187(2).[133] Under section 187(1) of the Second Restatement, the law of the state chosen by parties to govern their contractual rights and duties will be applied if the particular issue is one which parties could have resolved by explicit agreement directed to that issue.[134] Examples of issues that can be resolved by a contractual choice-of-law provision under section 187(1) include construction of a contract, conditions precedent and subsequent, and performance.[135] Parties cannot provide for contractual capacity, formalities, and substantial validity.[136] Additionally, according to the comments to section 187(2), parties "cannot dispense with formal requirements, such as that of a writing, by agreeing with the other party that the contract shall be binding without them."[137] Although the parties in *McKeehan* did not attempt to dispense with formal requirements of the Ford investment account itself, to apply the law of Michigan under section 187(1) would dispense with the requirement in Texas that written and specific survivorship language be used to establish a right of survivorship. This was a significant misstep by the court. Instead, the court in *McKeehan* posited that the parties could resolve the ownership status of a jointly owned investment by explicit agreement because Texas law allows parties to create joint tenancies with rights of survivorship.[138] Although under Texas case law, whether parties could have explicitly resolved the survivorship status of the account by a choice-of-law clause is a question for the court to address.[139] However, the analysis does not end

of an asset does not include a right of survivorship.").

[131] *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 681 (Tex. 1990).

[132] Mueller, *supra* note 105, at 502.

[133] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

[134] *Id.* § 187(1).

[135] *Id.* § 187 cmt. c.

[136] *Id.* § 187 cmt. d; *see also* McKeehan v. McKeehan, 355 S.W.3d 286, 291 (Tex. App.—Austin 2011, pet. filed); Michael G. Guajardo, Comment, *Texas' Adoption of the Restatement (Second) of Conflict of Laws: Public Policy Is the Trump Card, But When Can It Be Played?*, 22 TEX. TECH L. REV. 837, 854 (1991).

[137] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d.

[138] *See McKeehan*, 355 S.W.3d at 292.

[139] Chase Manhattan Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 724 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("Whether a contract is enforceable is a matter for a

there. Under the Second Restatement, "[w]hether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be determined by the local law of the state selected by application of the rule of [section] 188."[140] The court in *McKeehan* did not perform this analysis and briefly concluded that section 187(1) applied, thus stating that the parties could explicitly agree that Michigan law would govern any rights of survivorship.[141] The court in *McKeehan* also indicated, in dicta that, under section 188, Michigan would be the proper state to determine whether parties could explicitly contract for an automatic right of survivorship.[142] However, the court misapplied section 188 in its determination, and thus erred in applying section 187(1).

B. The Court's Application of Section 188

Under the comment to subsection 1 of section 187, "[w]hether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be determined by local law of the state selected by application of" section 188.[143] Section 188 lists factors to be considered, but does not require that the factors be given equal weight.[144] Under section 188, the relevant factors to be considered include: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, or place of business of the parties.[145] "These contacts are to be evaluated according

court to determine."); *see also* Bendalin v. Delgado, 406 S.W.2d 897, 899 (Tex. 1966) ("[T]o be enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties thereto."); *cf* Calarco v. Sw. Bell Tel. Co., 725 S.W.2d 304, 307 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled on other grounds by* Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668 (Tex.1999) (indicating the parties to an agreement are not the ones who determine its enforceability); Baron v. Mullinax, Wells, Mauzy & Baab, Inc., 623 S.W.2d 457, 461 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) ("When a contract is against the law or public policy it will not be enforced."); Emco, Inc. v. Healy, 602 S.W.2d 309, 311 (Tex. Civ. App.—Texarkana 1980, no writ) (stating that, because of public policy concerns, the law will not enforce the payment of a debt growing out of an illegal transaction).

[140] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c.

[141] *See* 355 S.W.3d at 291.

[142] *See id.* at 292.

[143] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (1971).

[144] *See id.* § 188.

[145] *Id.* § 188(2).

to their relative importance with respect to the particular issue."[146] Therefore, it is not the number of contacts with a particular state that will be determinative under section 188.[147] Some contacts will be more important than others "because they will implicate state policies underlying the particular substantive issue."[148] Therefore, ultimately, the applicable law will depend on the "qualitative nature of the particular contacts."[149]

In the application of the first two factors alone to *McKeehan*—the place of contracting and negotiation—Michigan would be the governing law. In *McKeehan*, Dale signed the contract for his original Ford investment account while Dale was living and working in Michigan.[150] The place of negotiation of the contract was also in Michigan, where Dale opened the Ford investment account.[151]

However, when considering the third factor, place of performance, Texas courts have long held that, in a contract for the rendition of services, the place of performance is given paramount importance under section 188.[152] The Texas Supreme Court, in *Maxus Exploration v. Moran*, stated that there are several virtues to the law of the place of performance,[153] which is a principle found in the First Restatement.[154] In 1991, the Texas Supreme Court reaffirmed the rule that the law of the place of performance governs a contract that is made in one jurisdiction but that relates to and is to be performed in another jurisdiction.[155] Therefore, even the Texas Supreme Court in *Maxus* seemed to be applying principles found in the First Restatement, in spite of *Duncan* and *DeSantis*.[156] This suggests the importance of this factor when performing an analysis under section 188; therefore, Texas law would probably apply based on this factor in *McKeehan* since the contract was to be paid out in Texas. Texas was the place of the most significant aspects of performance on the contract—it was

[146] *Id.*

[147] Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

[148] *Id.*

[149] *Id.*

[150] McKeehan v. McKeehan, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, pet. filed).

[151] *Id.*at 292.

[152] Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50, 53 (Tex. 1991).

[153] *See id.*

[154] *See* RESTATEMENT OF CONFLICT OF LAWS § 311 (1934).

[155] *See Maxus*, 817 S.W.2d at 53–54.

[156] *See id.* at 53 (citing Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1048 (5th Cir. 1970)).

where the benefits from the contract would have been paid.[157] When the place of performance factor and the final fifth factor, place of domicile, are taken together, these two factors alone are of extremely relevant importance as a result of *King v. Bruce.* Similar to *King*, in *McKeehan*, Dale and his wife were domiciliaries of Texas.[158] Furthermore, the property of the Ford investment account was to be paid to a spouse domiciled in Texas.[159] Therefore, under the relevant section 188 factors, the court in *McKeehan* should have found that Texas law would be the chosen state. Thus, when the court in *McKeehan* applied section 187(1) to determine whether the parties could have determined a particular issue by explicit agreement, under section 188, the laws of Texas should have applied. Therefore, Texas law should have been used to determine whether the parties could have explicitly agreed to create a right of survivorship absent specific language. As a result of the proper analysis under section 188, because joint tenancies require specific survivorship language in order to be effective, this is not an issue that the parties could have explicitly contracted away; therefore section 187(1) was inapplicable.

C. Application of Section 187(2) Was Required

The court in *McKeehan* relied on section 187(1), which provides that: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[160] However, the court should have used section 187(2), which states that the law of the state chosen by the parties in a contractual choice-of-law provision should apply if the parties could not have resolved that issue by an explicit agreement under section 1871(1).[161] Section 187(2) further qualifies the application of the contractual choice-of-law clause:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either:

[157] *See* Mayo v. Hartford Life Ins. Co., 220 F. Supp. 2d 714, 758 (S.D. Tex. 2002) *aff'd*, 354 F.3d 400 (5th Cir. 2004) (place of the most significant aspects of performance deemed an important factor under section 188).

[158] *See* McKeehan v. McKeehan, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, pet. filed).

[159] *See id.* at 285.

[160] *Id.* at 291 (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)).

[161] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a *fundamental* policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[162]

The second and final inquiry under section 187(2) is, therefore, three-pronged.[163] Under section 187(2), the court's analysis must first determine whether the contractually-chosen state has no "substantial relationship" to the parties or their transaction.[164] In the case of *McKeehan*, this means that the court needed to determine whether Texas had a more significant relationship to the parties and transaction than Michigan law. Under the second prong, the court must determine if Texas has a materially greater interest in deciding the issue.[165] Finally, the court must determine whether the application of foreign law would be contrary to a fundamental policy of Texas.[166] The court's hypothetical analysis in *McKeehan* in its application of section 187(2)(a)[167] was therefore correct. Because Ford is incorporated in Michigan, the contract was signed and negotiated in Michigan, and Dale worked in Michigan, Michigan had a substantial relationship to the parties' transaction and was a reasonable basis for the parties' choice of law.[168] However, once this inquiry was met under section 187(2)(a), the court should have then performed the analysis under section 187(2)(b), which contains the latter two prongs.[169] Before considering the last two prongs of the test under section 187(2)(b), the court must first determine the state that

[162] *Id.* (emphasis added).

[163] Chase Manhattan Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 725 (Tex. App.—Houston [1st Dist.] 1992, no writ).

[164] *See id.*; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

[165] *See Chase Manhattan Bank*, 835 S.W.2d at 725.

[166] *See id.*

[167] *See* McKeehan v. McKeehan, 355 S.W.3d 282, 292 (Tex. App.—Austin 2011, pet. filed).

[168] *See id.*

[169] *See Chase Manhattan Bank*, 835 S.W.2d at 725 ("[T]he second and final inquiry under section 187(2) is three-pronged.").

would be the state of applicable law under section 188.[170] Once the court determines the state chosen under section 188, the court then decides if the state chosen by section 188 has a materially greater interest in the determination of the issue and also if the application of the law chosen by the parties would not be contrary to a fundamental policy of the state chosen under section 188.[171] The court in *McKeehan*, however, did not properly perform the analysis under section 188 because under section 188, Texas would have been the state of the applicable law.[172] Therefore, the court should have analyzed whether Texas had a materially greater interest in the determination of the issue and also whether the application of Michigan law would be contrary to a fundamental policy of Texas. Had the court performed this analysis, both answers would be in the affirmative.

1. Texas Has a Materially Greater Interest in Determination of the Survivorship Rights in the Account

The forum court has the ability to apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of section 187(2) and whether another state has a materially greater interest than the state of the chosen law in the determination of the particular issue before the court.[173] Had the court in *McKeehan* performed more than a cursory analysis of section 188 and section 187(2), the court would have found that Texas has a materially greater interest in deciding whether the parties had effectively created a right of survivorship in the account. Ford had no interest in the ultimate determination of the beneficiary of the policy and was not a party to the litigation.[174] Texas, however, is directly interested in the resolution of ownership of the policy because the property is to be enjoyed in Texas by a domiciliary of Texas, whether that domiciliary is Dale's spouse or adult children.[175] The issue of ownership of the account is therefore directly related to the probate of the estate of Dale McKeehan, which was opened in Texas.[176] Similarly, Texas

[170] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

[171] *See id.*

[172] *See supra* Part III.B.

[173] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b); *see also Chase Manhattan Bank*, 835 S.W.2d at 725.

[174] *See* McKeehan v. McKeehan, 355 S.W.3d 282, 285 (Tex. App.—Austin 2011, pet. filed).

[175] *See id.*

[176] *Id.*

also has a long-standing history of specific requirements to establish survivorship rights in Texas.[177] To apply Texas law would not have an adverse effect on any Michigan interests. Conversely, applying Michigan law directly violates Texas's public policy and contravenes Texas's interest in determining the ownership of the account during a probate that will affect a Texas family. Texas therefore has a materially greater interest in the determination of the ownership and survivorship (if any) of the account.

2. Application of the Michigan Choice-of-law Provision Would Violate Fundamental Texas Policy

Under the last part of the analysis under section 187(2)(b), the court in *McKeehan* would have had to find that there was no violation of a fundamental public policy of Texas in order to reach the conclusion that Michigan law applied.[178] The devisees in *McKeehan* argued that the choice-of-law provision was not valid because it conflicted with Texas public policy against the presumption of the creation of a right of survivorship.[179] The court disagreed and held that Michigan law applied, which presumes survivorship rights for spouses who are merely joint owners.[180] The court reasoned that there was no violation of Texas public policy simply because Texas permits joint tenancies with rights of survivorship.[181] Even though the court concluded that joint tenancies are not against the law in Texas, the court seemed to forget that the requirements to create a joint tenancy are rooted within the Texas Constitution.[182]

IV PUBLIC POLICY AND SURVIVORSHIP RIGHTS IN TEXAS

Although Texas law favors the enforcement of contractual choice-of-law provisions,[183] contractual choice-of-law provisions are not enforced in Texas if the law of the chosen state violates a fundamental public policy of

[177] *See id.* at 286 ("Texas law presumes that, unless specifically indicated in writing, joint ownership of an asset does not include a right of survivorship." (citing TEX. PROB. CODE ANN. §§ 46(a), 439(a) (West 2003 & Supp. 2012))).

[178] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b); *see also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 678 (Tex. 1990).

[179] *McKeehan*, 355 S.W.3d at 292.

[180] *Id.*at 286, 292.

[181] *Id.*

[182] *See infra* Part IV.B.1.

[183] DuVal Wiedmann, LLC v. InfoRocket.com, Inc., 620 F.3d 496, 501 (5th Cir. 2010).

Texas.[184] "The parties' choice is merely a presumptive preference," and can be displaced "if the results of enforcing the choice-of-law clause are contrary to strongly-held forum state policy."[185] Thus, the freedom of parties to contract as to which "jurisdiction's law will apply to their agreement is not unlimited . . . . [They cannot, by] agreement, thwart or offend the public policy of the state whose law would otherwise apply."[186] Thus, "[b]ecause there is no absolute rule for determining whether a given agreement is contrary to public policy, each controversy must be determined on a case-by-case basis."[187]

Comment d of section 187(2) states that "[p]ermitting the parties in the usual case to choose the applicable law is not, of course, tantamount to giving them complete freedom to contract."[188] Their power to choose the applicable law is qualified.[189] A further look at comment g shows that "regard must be had for state interest and state regulation."[190] The parties' chosen law should not be applied without regard for state interests under section 188 analysis.[191] Therefore:

> In analyzing whether a fundamental policy is offended under section 187(2)(b), the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction.[192]

In order to violate public policy, a significant difference must be shown in the application of the law in the two states; a mere different result is not

[184] Smith v. EMC Corp., 393 F.3d 590, 597 (5th Cir. 2004).

[185] James B. George, *Choice of Law: A Guide For Texas Attorneys*, 25 TEX. TECH L. REV. 833, 849 (1994).

[186] Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 419 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing and quoting DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (quotations omitted)).

[187] Guajardo *supra* note 136, at 879.

[188] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (1971).

[189] *Id.*

[190] *Id.* § 187 cmt. g.

[191] *Id.*

[192] Chase Manhattan Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 726 (Tex. App.—Houston [1st Dist.] 1992, no writ) (quoting DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990)).

enough.[193]

A. Public Policy in Texas Generally

What exactly constitutes a "fundamental" public policy? "[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power," such as statutes that concern the rights of an insured individual.[194] "[A]n agreement is [also] against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates a public statute, is against good morals, or tends to interfere with the public welfare of safety."[195] Comment g of section 187 provides that "[t]o be 'fundamental,' a policy must in any event be a substantial one."[196] Forum states are, therefore, "more inclined to defer to the policy of the state which is closely related to the contract and the parties."[197] "The greater the interest of the most significantly related state, the less fundamental its policy need be to invalidate the choice-of-law. Conversely, the more fundamental the policy being violated, the less "materially greater interest" is required to invalidate the choice of law."[198] Therefore, a Texas court is justified in applying the public-policy doctrine if it appears that the foreign law is "against good morals or natural justice, or that for some other such reason the enforcement of the foreign law would be prejudicial to the general interests of [Texas] citizens."[199] The problem, however, is that the Second Restatement still provides little guidance for defining a fundamental public policy.

Public policy has prevented the application of foreign law in a few instances in Texas. In *Lodge v. Lodge*, a settlement agreement providing for permanent alimony was held to be unenforceable in Texas even though it

[193] *See* Gutierrez v. Collins, 583 S.W.2d 312, 322 (Tex. 1979).

[194] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g.

[195] Guajardo, *supra* note 136, at 879 (1991).

[196] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (emphasis in original).

[197] *Id.*

[198] Guajardo, *supra* note 136, at 858 (emphasis in original) (citation omitted).

[199] California v. Copus, 309 S.W.2d 227, 232 (Tex. 1958); *see also* Larchmont Farms, Inc. v. Parra, 941 S.W.2d 93, 95 (Tex. 1997) (holding that the court of appeals erred in refusing, on public policy grounds, to enforce New Jersey workers' compensation law, which was substantially similar to Texas law); Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979) ("Texas courts will not enforce a foreign law that violates good morals, natural justice or is prejudicial to the general interests of our own citizens.").

was valid in the state where it was executed.[200] In *DeSantis v. Wackenhut Corp.*, the Texas Supreme Court refused to apply a choice-of-law clause in a noncompetition agreement, even though the parties had some connection with the state selected.[201] The Court in *DeSantis* determined that Texas had a materially greater interest in determining the validity of the noncompetition agreement, and application of the law of another state to determine the validity of a noncompetition agreement to be performed in Texas would be contrary to fundamental policy of Texas.[202] "[T]he most often found violators of public policy are contracts contrary to statutory law, agreements, the enforcement of which would injuriously affect the state of the forum, or the rights of its citizens."[203] "Examples of fundamental Texas policy include regulations concerning products liability, unreasonable restraints on trade, and indemnity. An example of a non-fundamental Texas policy would be regulations concerning usury."[204]

B. Public Policy and McKeehan

In light of Texas case law, the court in *McKeehan* may have been too hasty in concluding that the parties' agreement did not violate Texas policy against the presumption of rights of survivorship. The court in *McKeehan* reasoned that even if the public policy test applied to the choice-of-law provision, Texas would not be the applicable state under section 188 because: (1) Michigan was the place of contracting; (2) Michigan was

[200] 368 S.W.2d 40, 41 (Tex. Civ. App.—Austin 1963, no writ).

[201] 793 S.W.2d 670, 678–79 (Tex. 1990).

[202] *Id.* at 679, 681; *see also* Seth v. Seth, 694 S.W.2d 459, 463 (Tex. App.—Fort Worth 1985, no writ) (refusing to apply Islamic law that allowed ex parte divorce procedure because of unfairness to divorced wife).

[203] 12 TEX. JUR. 3D *Conflict of Laws* § 38 (2004) (footnotes omitted) (citing Cont'l Cas. Co. v. Allen, 710 F. Supp. 1088, 1098 (N.D. Tex. 1989); Sacks v. Dall. Gold & Silver Exch., Inc., 720 S.W.2d 177, 180 (Tex. App.—Dallas 1986, no writ); M.I.I. v. E.F.I., Inc., 550 S.W.2d 401, 404 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); J.R. Watkins Co. v. McMullan, 6 S.W.2d 823, 824 (Tex. Civ. App.—Austin 1928, no writ)).

[204] J. Chad Newton, *When Choice of Law Is No Choice At All: Will The Parties Choice Of Law Provision Govern Their Agreement?*, 39 STATE BAR OF TEX. LITIG. SECTION REPORT ,THE ADVOC. 15, 17 (2007) (footnotes omitted) (citing Panatrol Corp. v. Emerson Elec. Co., 163 S.W.3d 182, 189 (Tex. App.—San Antonio 2005, pet. denied) (product liability); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990) (restraints on trade); Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 178 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (indemnity); Saturn Capital Corp. v. Dorsey, No. 01-04-00626-CV, 2006 Tex. App. LEXIS 5633, at *23 (Tex. App.—Houston [1st Dist.] June 29, 2006, pet. denied) (mem. op.) (usury)).

where part of the contract was performed; and (3) Michigan was the location of employer's place of business.[205] However, as discussed, this was not the proper conclusion.[206] Using similar factors considered in *King*, the court in *McKeehan* should have considered that the spouses were domiciled in Texas, the estate was being probated in Texas, and the account was to either be enjoyed by the surviving spouse in Texas or to pass into the Texas probate estate.[207] Texas public policy regarding the creation of rights of survivorship should therefore have been considered.

1. Policy Behind Joint Tenancies with Rights of Survivorship in Texas

There is a long history behind joint tenancies with rights of survivorship in Texas, which the *McKeehan* court overlooked. Texas did not always allow for the creation of rights of survivorship.[208] In 1961, in *Hilley v. Hilley*, the Texas Supreme Court held it unconstitutional for spouses to hold community property with rights of survivorship.[209] However, immediately after *Hilley*, the Texas Probate Code was amended to recognize survivorship rights.[210] In 1987, Article XVI, Section 15, an amendment to the Texas Constitution, was approved by Texas voters and passed by the Texas Legislature.[211] This constitutional amendment provided that spouses could agree in writing that all or part of their community property would become the property of the surviving spouse upon the death of the first spouse.[212] Two years later, Part 3: *Community Property with Rights of Survivorship*, was added to Chapter XI of the Texas Probate Code for non-testamentary transfers.[213] This new section governed agreements between spouses regarding rights of survivorship in community property.[214]

[205] 355 S.W.3d 282, 292 (Tex. App.—Austin 2011, pet. filed).

[206] *See supra* Part III.C.

[207] *See supra* Part III.C.1.

[208] *See* Hilley v. Hilley, 342 S.W.2d 565, 568 (Tex. 1961), *superseded by constitutional amendment*, Tex. Const. art. XVI § 15.

[209] *Id.*

[210] 38 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 1.35 (West 1993).

[211] Tex. Const. art. XVI, § 15.

[212] Tex. Const. art. XVI, § 15; Tex. S.J. Res. 35, 70th Leg., R.S., 1987 Tex. Gen. Laws 4114.

[213] Act of May 26,1989, 71st Legis. R.S. ch. 655 § 451 et seq., 1989 Tex. Sess. Law Serv. 655 (West) (codified at TEX. PROB. CODE ANN. § 451 et seq.).

[214] *See id.*

Similarly, Section 46 of the Texas Probate Code does not presume survivorship in regards to separate property absent specific language.[215] Thus, survivorship rights today can be created in both separate property and community property through a written agreement with very specific language.[216]

Supporters of the 1987 constitutional amendment argued that the proposed amendment "would eliminate a trap for the unwary couple who [would] execute a signature card [at a] financial institution and [mistakenly] believe they . . . created an effective joint tenancy with right of survivorship for their community property."[217] The purpose of the amendment was, therefore, to provide a simple means by which both spouses of the written instrument could provide that the survivor was entitled to any portion of the community property without making a will.[218] This amendment removed the constitutional hurdles to creating a right of survivorship in community property because many banks and savings and loans associations were failing to provide forms where customers could create effective joint tenancies.[219]

2. Current Texas Law: Creating Rights of Survivorship

Currently, under Section 439 of the Texas Probate Code, a survivorship agreement must be signed by a party who dies and must be substantially in a specific form that reads: "On the death of one party to a joint account, all sums in the account on the date of death vest in and belong to the surviving party as his or her separate property and estate."[220] To create a right of survivorship, the written instrument must clearly manifest the intention that the right of survivorship be created.[221] The Texas Supreme Court construed Section 439 of the Texas Probate Code in *Stauffer v. Henderson*.[222] In *Stauffer*, the Court stated that under Texas law, section 439 is the *exclusive*

[215] *See* TEX. PROB. CODE ANN. § 46 (West 2003).

[216] *See id.* § 439(a).

[217] Texas Legislative Council, *Analysis of Proposed Constitution Amendments and Referenda Appearing on the November 3, 1987, Ballot*, 87-2 INFO. REP. at 36 (Sept. 1987).

[218] S. Judiciary Comm., Resolution Analysis, Tex. S.J. Res. 35, 70th Leg., R.S. (1987).

[219] *See* Ernest L. Duncan, Jr., *Survivorship Bank Accounts in Texas*, 18 BAYLOR L. REV. 501, 517–19, 522 (1966).

[220] TEX. PROB. CODE ANN. § 439 (West Supp. 2012).

[221] Shroff v. Deaton, 220 S.W.2d 489, 492 (Tex. Civ. App.—Texarkana 1949, no writ).

[222] *See* 801 S.W.2d 858, 862–65 (Tex. 1990).

means to create a right of survivorship in a joint account.[223] Additionally, the court held that a written agreement signed by a decedent to create a right of survivorship was emphatic and necessary.[224] In 2007, the Texas Supreme Court confirmed the *Stauffer* ruling in *A.G. Edwards & Sons, Inc. v. Beyer* while recognizing a bright-line rule in section 439(a) "requiring specific language in a writing signed by the decedent to create a right of survivorship."[225] As case law in Texas indicates, absent specific words of survivorship, even words such as "share and share alike," "jointly,"[226] and "payable to the survivor of either"[227] are insufficient to create joint tenancy with right of survivorship.

Additionally, *Stauffer* made it clear that it is Texas policy that extrinsic evidence is not admissible in cases where the court is determining whether a right of survivorship has been created.[228] Rather, "an account's status is determined solely on the basis of the terms of the written agreement and not by resorting to dubious and contradictory evidence of what the decedent intended."[229] Despite this, the court in *McKeehan* considered evidence that "Dale wanted Marcia added as a joint owner,"[230] which may have influenced the court's outcome and subsequent analysis. Thus, the *McKeehan* court also erred in considering extrinsic evidence of Dale's intent to create a right of survivorship in his bank account because such evidence is not admissible to determine a party's intent regarding rights of

[223] *Id.* at 862.

[224] *Id.* at 863.

[225] 235 S.W.3d 704, 709 (Tex. 2007) (citations omitted).

[226] Roberdeau v. Jackson, 565 S.W.2d 98, 100 (Tex. Civ. App.—Austin 1978, no writ); *see* Chandler v. Kountze, 130 S.W.2d 327, 329 (Tex. Civ. App.—Galveston 1939, writ ref'd).

[227] Krueger v. Williams, 359 S.W.2d 48, 51–52 (Tex. 1962); *see also* Duncan, *supra* note 219, at 525.

[228] 801 S.W.2d at 863.

[229] Brief of Appellees at 7–8; McKeehan v. McKeehan, 355 S.W.3d 282 (Tex. App.—Austin 2011, pet. filed) (No. 03-10-00025-CV). The court in *Stauffer* held that no presumptions are created in order to contradict the alleged creation of a joint account or supply a term missing from its provisions (such as specific language creating a right of survivorship) because such a presumption would violate the parole evidence rule and the express prohibition of Section 439(a) of the Texas Probate Code against inferring a right of survivorship from the mere creation of a joint account. Therefore, if the terms of a joint account agreement are clear, the parties may *not* introduce extrinsic evidence of the parties' intent and thus Section 439(a) overrules prior case law to the contrary. 801 S.W.2d at 863.

[230] McKeehan v. McKeehan, 355 S.W.3d 282, 294 (Tex. App.—Austin 2011, pet. filed).

survivorship.[231]

3. The Court in *McKeehan* Erred in its Analysis of Section 187(2)(b)

In light of the history behind joint tenancies with rights of survivorship, the court in *McKeehan* failed to consider the policy behind the requirement that specific survivorship language be used, as has been a part of the Texas Constitution since 1987 and part of the Texas Probate Code since 1961. Just as the court in *King* would not allow a Texas couple to circumvent the Texas constitution,[232] the *McKeehan* court should have abided by the same principles, regardless of the court's application of the First or Second Restatement. Under section 187(2)(b), therefore, Texas has a materially greater interest in the dispute, and an automatic right of survivorship—absent specific language as has been part of Texas history—would run directly contrary to a fundamental public policy in Texas. Therefore, under section 187(2), Texas law should have applied, and the account should have passed into Dale's estate.

V. THE PUBLIC POLICY ANALYSIS ALSO APPLIES UNDER SECTION 187(1)

The court in *McKeehan* stated that even if there was a violation of Texas public policy as a result of the Michigan choice-of-law clause, the court did not have to address the public policy under section 187(1) as it did under section 187(2).[233] Other jurisdictions have stated that if section 187(1) applies, a court need not perform a section 187(2) analysis.[234] However, even though a complete analysis under section 187(2) may not be

[231] *See Stauffer*, 801 S.W.2d at 863–64; *see also* Philip M. Green, *Extrinsic Evidence Is Not Admissible to Determine Parties' Intent Regarding Right of Survivorship on Joint Bank Accounts:* Stauffer v. Henderson, 22 TEX. TECH. L. REV. 1237, 1246–47 (1991).

[232] *See supra* Part II.A.

[233] *See McKeehan*, 355 S.W.3d at 292.

[234] Swanson v. Image Bank, Inc., 77 P.3d 439, 443-44 (Ariz.2003) ("[B]ecause the disputed issue in the instant case is one that the parties were able to resolve pursuant to the express language of § 187(1), we need not address the question whether application of the law of Texas, the state chosen by the contracting parties, would violate a fundamental policy of Arizona." (citing Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 933 (7th Cir. 1996) (finding the court does not perform a Section 187(2) analysis where Section 187(1) applied); Sheldon v. Munford, Inc., 660 F.Supp. 130, 135 (N.D. Ind. 1987) (same); Armstrong Bus. Servs., Inc. v. H & R Block, 96 S.W.3d 867, 872–73 (Mo. Ct. App. 2002) (same))).

applicable, the basic principles of public policy can always be considered.[235] Therefore, although the public-policy test is not *explicitly* triggered by the application of section 187(1), it is not precluded either. Texas courts can always take into consideration Texas policies.[236] Even before the Second Restatement, as a general principle of contract law, Texas courts have held that they will not enforce a foreign law that violates good morals, natural justice, or is prejudicial to the general interests of Texas citizens.[237] Therefore, although it is not explicitly addressed under section 187(1) or the comments of section 187(1), a court can always address public policy implications of the application of a foreign law in regards to contracts.[238]

VI. CONCLUSION

Larger considerations involving a choice-of-law analysis in Texas now exist as a result of *McKeehan*. The policy behind the Second Restatement is to protect the justified expectations of parties and to foretell with accuracy what a party's rights and liabilities are under a contract, thus creating certainty and predictability.[239] However, the protection of justified expectations is not the only value in contract law: State interests and state regulations must also be respected.[240] The law chosen by the parties "should

[235] Chase Manhattan Bank, N.A. v. Greenbriar N. Section II, 835 S.W.2d 720, 725 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing Sherwin-Williams Co. v. Perry Co., 424 S.W.2d 940, 949 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Benson v. Lacy, 202 S.W.2d 689, 690 (Tex. Civ. App.—Texarkana 1947, no writ)) (applying Section 187(1) but stating that "Obviously, parties may include whatever conditions in their contract they see fit, as long as the conditions do not violate law or public policy.").

[236] *See* Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n, 999 S.W.2d 820, 823–24 (Tex. App.—Corpus Christi 1999, pet. denied); *cf* State v. Williams, 938 S.W.2d 456, 462 (Tex. Crim. App. 1997).

[237] Castilleja v. Camero, 414 S.W.2d 424, 427 (Tex. 1967).

[238] Salazar v. Coastal Corp., 928 S.W.2d 162, 167 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (applying Section 187(1) but stating that "Since there is a reasonable relationship to Texas, we need only ascertain whether there is any countervailing public policy that requires the application of Ecuadorian law.").

[239] *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990); *see also* Willis L.M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 21 (1977).

[240] *DeSantis*, 793 S.W.2d at 677 ("With roots deep in two centuries of American jurisprudence, *limited* party autonomy has grown to be the modern rule in contracts conflict of laws." (emphasis added)).

not be applied without regard for interests of the state which would be the state of applicable law in the absence of an effective choice by the parties."[241]

It is a fundamental policy of the state of Texas and an elementary principle of Texas law that passage of title to personal property of decedents domiciled in Texas is governed by Texas law. "It is a universal rule recognized in this state that, as a matter of comity, the laws of the domicile of the intestate will control the succession of movable or personal property of his estate."[242] *King* followed the First Restatement, which is no longer in use in Texas, but *King* also promulgated a special rule of domicile for property owned by spouses and to be enjoyed in Texas that still has life today, despite Texas' adoption of the Second Restatement.[243]

Despite the adoption of the Second Restatement in Texas, it has been largely criticized as "vague and unprincipled" with the "distinct virtue of suggesting to judges that they are not bound by any hard and fast rules, which inevitably prompt[s] undesirable outcomes in interstate and international cases."[244] It is universally agreed that guidelines similar to the factual connectors set forth in section 6 of the Second Restatement should be established to determine what constitutes "public policy."[245] However, the judiciary and legislature have seemingly overlooked this area. Specific guidelines need to be adopted to give parties advance warning of circumstances that will prohibit their freedom of contractual choices. Of course, a movement by Texas courts toward a system of bright-line rules similar to the First Restatement would be useful to address the public policy test, applicability of the Second Restatement, and special carved-out exceptions in Texas.

Because the Second Restatement's approach is "judicially adopted, the courts are not technically bound by black letter law and may be swayed by advocacy."[246] It is, therefore, "critical that practitioners thoroughly understand" the commentary of the Second Restatement and grasp the

[241] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

[242] Saner-Ragley Lumber Co. v. Spivey, 238 S.W. 912, 915 (Tex. Comm'n App. 1922, judgm't adopted); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 cmt. c (1971).

[243] *See* King v. Bruce, 201 S.W.2d 803, 809 (Tex. 1947).

[244] Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403–05 (2000) ("How does one restate gibberish?").

[245] Guajardo, *supra* note 136, at 881 (emphasis in original).

[246] Scott D. Nader, Comment, *Twenty Years After* Gutierrez v. Collins*: Public Policy and Conflict of Laws Analysis in Texas Tort Cases*, 52 BAYLOR L. REV. 207, 234 (2000).

subtleties of it.[247] In particular, for estate planners, it is important to be able to properly analyze and identify the effect of contractual choice-of-law provisions, such as those found in non-probate or contractual assets similar to those in *McKeehan*. Because of Texas's presumption in favor of the enforcement of choice-of-law provisions, a client's estate plan may be drastically affected by a choice-of-law provision, as occurred in *McKeehan.* An attorney arguing a conflict of laws issue before a court must therefore also have a keen understanding of the policies and legislative history behind a particular Texas law.[248] The Second Restatement, because of its ambiguities, creates room for argument and requires understanding of the inner workings of the Restatement in order to prevail in court.

Finally, courts need to create certainties for parties who seek to travel to other states to create agreements by contract that a foreign state's law will apply, even though the property is to be enjoyed in Texas. Therefore, in *McKeehan*, on appeal, the Texas Supreme Court should address whether in fact *King*'s rule of domicile is still alive in a Texas conflict of law analysis. The Court should also address the public policy test to determine whether section 187(1) permits application of a public policy test. The Court should perform the analysis under section 187(2), and should also address whether fundamental public policy of Texas is violated by the application of the Michigan choice-of-law clause. As discussed, the requirement of specific survivorship language is a fundamental policy in Texas, which is rooted in the Texas Constitution and its amendments. Therefore, under section 187(2), or even section 187(1), of the Second Restatement, the investment account should pass as a probate asset into Dale McKeehan's estate.

Under the Second Restatement, courts can deem a clear winner before the analysis has even begun, using section 187 to justify its result, as seems to have occurred in *McKeehan*. Without further instruction from the Texas Supreme Court and without meaningful enforcement mechanisms to ensure courts apply the proper analysis of the Second Restatement (rather than using it as a means to an end) the Second Restatement can only be as predictable as the court's preference between the parties litigating. Although Texas has shown intent to adopt the Second Restatement in its entirety, it is also possible that *King* is still viable under a specific set of facts and circumstances, such as the facts of *McKeehan*. Texas courts and

[247] *Id.*

[248] *See id.*

practitioners should therefore feel safe relying on *King* until it is explicitly declared outmoded or is explicitly overruled.