SUPREME COURT OF NORWAY

O R D E R

issued on 15 February 2021 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Ragnhild Noer
Justice Wenche Elizabeth Arntzen
Justice Erik Thyness
Justice Kine Steinsvik

HR-2021-291-A, (case no. 20-093263SIV-HRET)
Appeal against Borgarting Court of Appeal's order 12 May 2020

A
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M (Counsel Claus Krag Brynildsen)

v.

N (Counsel Marie Nesvik)

This is a translation of the ruling given in Norwegian. The translation is provided for information purposes only.

(1) Justice **Arntzen:**

Issues and background

(2) This case concerns Norwegian courts' jurisdiction in an inheritance dispute arisen during a private division of an estate with international ramifications.

(3) O died on 7 July 2009 on the island of Gran Canaria. O was a Norwegian citizen with registered domicile in Switzerland. He left a considerable fortune. The assets were mainly invested in real estate in Norway or deposited in foreign banks, particularly in Luxembourg and Switzerland.

(4) In O's will, it is set out that his estate is to be divided privately in Norway, subject to Norwegian inheritance law. Supreme Court Advocate J, or a substitute at the same law firm, is appointed as executor of the will. In line with this, the probate court in the canton of Appenzell Innerrhoden in Switzerland appointed Advocate Ståle Kihle at the law firm Eckhoff, Fosmark & Co. DA as executor of the will.

(5) The will has been changed several times, latest on 14 March 2002. Then, an addition was made stating that N was to inherit 1/16 of the estate's assets. N is domiciled in South Africa.

(6) All heirs except for N have received their inheritance in accordance with the will. N's potential share, as well as a considerable reserve for administrative estate expenses among others, has been retained and deposited on a bank account in Norway.

(7) The other heirs under the will brought an action against N in a Swiss court, challenging the validity of the testamentary disposition of 14 March 2002. The Swiss court of first instance applied Norwegian inheritance law in line with the instructions of the will and declared the testamentary disposition for the benefit of N invalid, see section 57 subsection 2 second sentence of the former Inheritance Act on annulment due to subsequent circumstances. N's appeal was dismissed by the Swiss appellate court. The judgment is not yet legally binding.

(8) On 17 April 2019, N brought an action in Oslo District Court against the heirs domiciled in Norway, requesting that the testamentary disposition of 14 March 2002 be declared valid and that the defendants pay him 1/16 of the estate's assets. In the writ of summons, the claim was calculated to be in excess of NOK 73 million with the addition of default interest. The heirs responded by requesting the Court to declare the case inadmissible due to Norwegian courts' lack of territorial jurisdiction, see section 4-7 subsection 3 of the Dispute Act.

(9) By an order 18 November 2019, Oslo District Court declared the case inadmissible and ordered N to cover the defendants' costs.

(10) N appealed to Borgarting Court of Appeal, which 12 May 2020 issued the following order:

> "1. The case is admissible.

2. A, H, M, G, B, K, F, J, D, C, P and L will – jointly and severally – pay costs to N in the District Court of NOK 70 762.50 within two weeks of the service of this order.

3. A, H, M, G, B, K, F, J, D, C, P and L will – jointly and severally – pay costs to N in the Court of Appeal of NOK 210 650 within two weeks of the service of this order."

(11) The Court of Appeal found that the Dispute Act's general rule for international jurisdiction is applicable in disputes during a private division, and that Norwegian courts have jurisdiction under section 4-3 of the Dispute Act.

(12) A and others have appealed to the Supreme Court. The appeal challenges the Court of Appeal's interpretation of the law. On 10 July 2020, the Supreme Court's Appeals Selection Committee referred the appeal to a division of the Supreme Court sitting with five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act.

(13) P died on 5 September 2020. The deceased's direct descendants, E and I, have joined the case, see section 16-16 of the Dispute Act.

The parties' contentions

(14) The appellants – *A and others* – contend:

(15) Norwegian courts do not have territorial jurisdiction in cases related to succession and inheritance when the deceased was not domiciled in Norway at the time of his or her death. The non-applicability of sections 4-3 and 4-4 of the Dispute Act in such cases follows from the non-statutory principle of domicile in Norwegian international law on the division of estates. As stated in the Supreme Court ruling Rt-1999-1333, the principle of domicile in section 8 subsection 2 of the Probate Act (*skifteloven*) 1930 also applies during international division processes. The provision concerns public division, but disputes arising during a private division are also covered by the principle of domicile. If there is no explicit legal basis stating otherwise, all issues related to the effectuation of the division must be decided by a competent court of the country where the deceased was last domiciled.

(16) Nothing in the sources of law indicates that the issue of Norwegian jurisdiction depends on whether the deceased's estate is subject to private or public division. The principle of domicile stems from the considerations of unity and universality of the division process, and these considerations are just as relevant when the deceased's estate is to be divided privately. If an action for the distribution of inheritance in international cases is considered in several countries pursuant to national venue rules, this may give conflicting decisions regarding the same claim.

(17) The appellants have requested the Supreme Court to issue this order:

"1. Borgarting Court of Appeal's order of 12 May 2020 is set aside.

2. M, K, A, D, E, I, B, F, C, G, H, L and J are awarded costs in the Supreme Court."

(18) The respondent – *N* – contends:

(19) Section 4-3 of the Dispute Act, the basic rule on Norwegian jurisdiction in international affairs, provides that an action may only be brought before Norwegian courts if the dispute has a sufficiently strong connection to Norway. The defendants have ordinary venue in Norway, see section 4-4 of the Dispute Act, and the connection requirement is met for that reason alone. National rules on venue for inheritance disputes are also the clear starting point for international jurisdiction.

(20) The principle of domicile in section 8 subsection 2 of Probate Act only applies to a public division of an estate and the related proceedings. The provision is not applicable to inheritance disputes arising during a private division.

(21) The respondent has requested the Supreme Court to issue this order:

> "1. The appeal is dismissed.
>
> 2. N is awarded costs in the Supreme Court."

My opinion

Legal starting points

(22) In a second-tier appeal against an order, the Supreme Court's competence is limited to assessing the Court of Appeal's procedure and the general interpretation of a written legal rule, see section 30-6 of the Dispute Act. The term "written legal rule" also covers non-statutory principles in procedural law and events where the judicial solution requires reading of several legal rules in context, see Tore Schei at al., *Tvisteloven: Kommentarutgave* [commentary on the Dispute Act], section 30-6 note 5, *Juridika*, revised on 1 December 2019.

(23) The question is whether the venue for a dispute arising during private division of a deceased's estate is determined by the Dispute Act's general rules on international jurisdiction or by the principle that inheritance disputes should be decided by the court where the deceased was last domiciled – in this case Switzerland. Both Norway and Switzerland have ratified the Lugano Convention, but it does not apply to "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession", see Article 1 no. 2 (a). Nor is there a convention between Norway and Switzerland governing inheritance disputes. The jurisdiction issue must consequently be resolved based on Norwegian international law.

(24) Norwegian courts' competence in international disputes is regulated in section 4-3 subsection 1 of the Dispute Act:

> "Section 4-3. *International venue*
>
> (1) Disputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway."

(25) The clear main rule is that the connection requirement is met when Norway has jurisdiction. If the defendant has ordinary venue here under section 4-4 of the Dispute Act, only

extraordinary circumstances may exempt the case from Norwegian jurisdiction, see the Supreme Court ruling Rt-2013-1089 with a reference to Rt-2012-1951 paragraph 88.

(26) The Court of Appeal found that the facts of the case, at the outset, have sufficiently strong connection to Norway, pointing out that the defendants live in Norway and thus have ordinary venue here. There is no disagreement on this individual assessment, which in any case cannot be reviewed by the Supreme Court. However, the appellants contend that the principle of domicile in section 8 subsection 2 of the Probate Act 1930 also applies as a non-statutory principle of mandatory international jurisdiction for disputes during a private division. The principle of domicile implies that the division of estate is to be carried out in the court where the deceased was domiciled at the time of his or her death.

(27) On 1 January 2021, the Probate Act was replaced by Act 14 June 2019 no. 21 relating to inheritance (the Inheritance Act), but the new Act only applies to cases where the testator died after it entered into force, see the transition provision in section 180. The Inheritance Act contains no changes or specifications of direct significance to the issue of Norwegian jurisdiction.

Disputes without international ramifications

(28) In purely domestic disputes related to inheritance and wills, the rules on jurisdiction for the division process follow a two-track system, distinguishing between public and private division.

(29) According to section 8 subsection 2 first sentence of the Probate Act, "[t]he division of an inheritance shall be carried out by the probate court in the circuit where the deceased had his last domicile or – if no domicile can be ascertained – where he last was known to sojourn."

(30) This venue rule is thus based on the principle of domicile, and is applicable to "all questions regarding the effectuation and conclusion of the division", see section 9 of the Probate Act. Disputes related to succession and inheritance, including disputes challenging the validity of wills, are thus to be heard in the court carrying out the public division. The same applies to inheritance disputes resolved through legal action pursuant to section 30.

(31) Inheritance disputes during private division must, however, be brought before the Conciliation Board or the District Court in accordance with ordinary procedural rules. As a starting point, the claimant may choose to bring an action at the ordinary venue of the defendant, see section 4-4 of the Dispute Act, or at the most recent ordinary venue of the deceased, see section 4-5 subsection 6, provided that the prescribed six-month time limit is complied with. Jurisdiction under section 8 subsection 2 of the Probate Act is limited to the court's division procedure *before* the estate is handed to the heirs for private division through the issuance of a division certificate, see section 82 of the Probate Act.

(32) This two-track system is upheld in the current Inheritance Act, providing rules in section 84 on venue for all public parts of the division. Disputes during a private division are governed by section 126 subsection 2, referencing the rules in the Dispute Act.

Disputes with international ramifications

(33) Section 8 subsection 2 of the Probate Act, stating that the division of an inheritance shall be carried out where the deceased had his last domicile, applies directly only to the relationship between Norwegian courts. In the Supreme Court ruling Rt-1999-1333, it is stated on page 1336 that the provision "expresses a principle that also regulates the relationship between Norwegian and foreign jurisdiction" in division matters. The principle that inheritance disputes are ordinarily to be settled in the country where the deceased was last domiciled, is assumed in section 85 subsection 2 of the new Inheritance Act.

(34) The question is then whether this procedural principle of domicile also applies to inheritance disputes arising during a private division with international ramifications. If yes, the Norwegian venue rules under the two-track system – in practice section 4-4 and section 4-5 subsection 6 of the Dispute Act – must yield to a non-statutory rule on mandatory venue at the court of the deceased's domicile.

(35) I cannot see that there is a basis in written sources of law to lay down such a rule.

(36) The appellants have invoked statements in preparatory works, case law and legal literature regarding the principle of domicile in Norwegian international law on the division of estates. However, these statements refer to *public division.* Given our two-track system, they are in my opinion not transferable to private division. Had the intention been that the principle of domicile should apply to disputes during a private division, it would have been natural to specify this. As set out in Norwegian Official Report 2007: 16 item 18.3.1 on international division competence, the Standing Committee on Division of Estates seems, on the contrary, to assume that the general venue rules apply to international inheritance disputes during a private division, see page 168:

> "… [T]he conditions for requesting the division to be carried out in Norway should harmonise with the conditions for international jurisdiction in inheritance matters, i.e. the rules on ordinary disputes between or against the heirs. According to section 4-4 of the Dispute Act, actions may be brought at the ordinary venue of [the defendant] (procedural domicile). It implies that an action regarding rights of succession may be brought at an heir's venue. It also follows from section 4-5 (6) of the Dispute Act that actions 'against heirs may be brought at the most recent ordinary venue of the deceased', i.e. procedural residence."

(37) The Committee describes in other words the venue rules in the two-track system under the section regarding international jurisdiction in division matters.

(38) In my view, policy considerations do also not imply that the principle of domicile during a public division applies correspondingly to international inheritance disputes during a private division.

(39) Admittedly, a main consideration and ideal starting point in international inheritance law is to maintain the unity and universality of the division process, see Rt-1999-1333 on page 1337:

> "The rule governing the relationship between Norwegian courts may nonetheless not automatically determine the relationship between Norwegian and foreign courts' jurisdiction, as it must be emphasised that Norwegian international rules deviate from internationally recognised principles. Relevant here are the principles of unity and

> universality of the division, expressed as follows by Gjelsvik: 'One testator, one estate, one division'."

(40) The emphasis in international inheritance law on the principles of unity and universality is also highlighted by the Supreme Court in Rt-2008-1376 paragraph 38. The unity principle implies that division may only be carried out in one state, while the universality principle implies that the division comprises all of the estate's assets and liabilities regardless of where in the world they are located.

(41) The unity principle requires that the states apply the same criteria for their courts' international jurisdiction. During a public division, the main rule also internationally is that division may be requested in the deceased's country of domicile, see Norwegian Official Report 2007: 16 page 165. However, the domicile term is not the same in all countries; in some countries jurisdiction is determined by the deceased's citizenship or the location of his or her real estate.

(42) In comparison, there are no indications that the principle of domicile constitutes an internationally recognised jurisdiction rule for disputes during a private division. However, the implementation of the unity principle for such disputes requires international collaboration. As mentioned, there is no convention between Norway and Switzerland regulating succession and inheritance.

(43) The appellants have mentioned that the EU Regulation on succession (Regulation (EU) No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession) applies to *both* public and private division.

(44) I cannot see that the Regulation prescribes an invariable principle of domicile in a case like ours. On the contrary, the Regulation recommends flexible solutions permitting jurisdiction based on factors such as the nationality of the deceased and choice of law, see Articles 6 and 10. According to Article 12 (1), jurisdiction may also be established in a third state where the deceased's assets are located, if the rulings of the domicile court "will not be recognised and, where applicable, declared enforceable in that third State".

(45) This illustrates that the principles of jurisdiction must be seen in context with the rules on recognition and enforcement of rulings. According to section 19-16 of the Dispute Act, the legal force (*rettskraft*) – and thus also the enforceability (*tvangskraft*) – of foreign rulings requires a legal basis in a statutory provision or agreement with a foreign state, alternatively an agreement on venue under section 4-6 of the Dispute Act. As long as the Lugano Convention does not apply to inheritance disputes, a Swiss ruling in a dispute between heirs during a private division cannot be enforced in Norway. The correlation found in civil procedural set of rules implies, in my view, that Norwegian legislation should not lay down a non-statutory principle of domicile in international inheritance disputes that in reality involves a unilateral renunciation of Norwegian jurisdiction and enforcement authority.

(46) Both parties have referred to HR-2020-2175-A, concerning the competition exemption in Article 1 (2) (b) of the Lugano Convention. There, the Supreme Court found that a claim in a Danish bankruptcy was inadmissible in Bergen District Court because it should have been brought in the country where the bankruptcy occurred. This was in line with section 145 subsection 1 (3) of the Bankruptcy Act, stating that any dispute concerning notified claims

must be decided by the court dealing with the bankruptcy estate. In paragraph 61, the Supreme Court cites the following from HR-2017-1297-A:

> "In my view, policy considerations strongly suggest that disputes covered by the bankruptcy exemption are subject to the jurisdiction of the country where the bankruptcy was declared. This is where the issues are most relevant, and the concern for procedural economy, legal costs and uniformity of law suggest the same."

(47) The comparison to the case at hand reaches, in my view, no further than to disputes during a public division. In both cases, the national venue rule coincides with the international venue rule, and it is the public division that is to ensure effective distribution of the assets of the deceased's estate.

(48) During a private division, the estate's assets are released to the heirs, who are the ones with the capacity to sue when a dispute arises, cf. section 2-1 subsection 1 (e) of the Dispute Act. The criterion of "most strongly connected" and the consideration of effectiveness and procedural economy will vary from case to case depending on in which country the heirs and a possible executor live, and on where the deceased's assets are located. Which country's law applies to the division of the estate is also significant.

(49) I agree with the appellants that the consideration of avoiding different rulings from different courts in the same case implies, in itself, that the disputes should be coordinated within the same jurisdiction. However, this is not sufficient for establishing a non-statutory international principle of domicile in Norwegian law contrary to the venue rules in the Dispute Act chapter 4. The venue rules are typical positive law rules, and the consideration of international uniformity of the law is not as prominent as for instance in issues regarding the choice of law. Finally, I reiterate that only extraordinary circumstances may exempt the case from Norwegian jurisdiction when the defendants have ordinary venue here.

(50) Against this background, I find that the case must be brought before Norwegian courts pursuant to section 4-3 of the Dispute Act, with Oslo District Court as venue, see section 4-4, cf. section 15-2 subsection 1 (a).

Conclusion and costs

(51) My conclusion is that the appeal must be dismissed.

(52) The respondent has claimed costs in the Supreme Court of NOK 280 000 with the addition of VAT. The claim is accepted, see section 20-8 subsection 2, cf. section 20-2 subsection 1 of the Dispute Act.

(53) I vote for this

O R D E R :

1. The appeal is dismissed.

2. A, B, C, D, E, F, G, H, I, J, K, L and M will – jointly and severally – pay costs to N in the Supreme Court of NOK 350 000 – threehundredandfiftythousand – within 2 – two – weeks of the service of this order.

(54) Justice **Steinsvik:** I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(55) Justice **Thyness:** Likewise.

(56) Justice **Noer:** Likewise.

(57) Justice **Øie:** Likewise.

(58) Following the voting, the Supreme Court gave this

O R D E R :

1. The appeal is dismissed.

2. A, B, C, D, E, F, G, H, I, J, K, L and M will – jointly and severally – pay costs to N in the Supreme Court of NOK 350 000 – threehundredandfiftythousand – within 2 – two – weeks of the service of this order.