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Conflict of Laws - Torts - Husband and Wife [*Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968)]

Ralph W. Christy

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deter the widespread abuse resulting from insider trading. A proper application of the deputization rationale serves as a valid vehicle for preventing the insider abuse that section 16(b) was intended to discourage. The decision in *Martin Marietta* represents a judicial attempt to maintain the statute's inhibiting effect while at the same time avoiding extension of its provisions beyond circumstances envisioned by Congress. Although on the facts presented the court's deputization finding does not unduly extend the statute's application, the lack of a sufficiently crystallized standard raises the danger of an overbroad application in future cases. The difficulty in structuring definitive guidelines exemplifies the unwieldiness of judicial attempts to resolve problems bordering on an area more suited for legislative action. Thus, until such time as Congress acts to impose additional restrictions upon insider trading, the courts should be reluctant to manipulate the congressionally sanctioned standards of section 16(b).

WILLIAM B. LAWRENCE

CONFLICT OF LAWS — TORTS — HUSBAND AND WIFE

Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

Over recent years a frequent and seemingly endless dilemma of choice-of-laws has confronted this nation's courts. Today's mobile and complex society¹ has magnified the dilemma and created an urgent need to resolve the problem raised by much of the present day litigation involving parties whose activities have come within the jurisdiction of several states. Past answers to conflict of laws have proved to be too inflexible,² too general, or in many instances, lacking a realistic connection with either the parties involved in the litigation or the legislative policies of the related states.³ As a

¹ See RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS, Introductory Note to Topic 1, Chapter 7 (Proposed Official Draft 1968) [hereinafter cited as RESTATEMENT].

² *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (interspousal tort immunity conflict). In rejecting Nebraska law (the place of the accident), the Wisconsin court stated: "Instead of the rigidly applied rule of *lex loci [delicti]*, we adopt a flexible but, we believe, a practical and workable principle to be used in solving 'choice of law' problems." *Id.* at 621, 133 N.W.2d at 410.

³ See RESTATEMENT, Introductory Note to Topic 1, Chapter 7, at 2.

result, courts have continued to search for a better solution and approach that could lend predictability and, at the same time, realism to decisions.

The rule of *lex loci delicti*, the law of the place of the accident governs, is one answer that has long dominated the field of conflicts in spite of increasingly strong opposition to it.⁴ However, the Supreme Court of Arizona, when recently confronted with a conflicts problem in a case of first impression, summarily discarded the old rule of *lex loci delicti* and replaced it with a new solution to choice-of-laws. As a result of an automobile accident in Arizona involving a New York couple, the wife brought an action against her husband and the driver of the other car to recover for her personal injuries. Of paramount importance in *Schwartz v. Schwartz*⁵ was the initial question of Mrs. Schwartz's capacity to sue her husband in tort for negligence. This problem arose when the Arizona law of interspousal immunity⁶ ran headlong into the New York law permitting such actions.⁷ Mrs. Schwartz's suit against her husband was dismissed and the decision was affirmed in the lower state courts in light of Arizona's past adherence to the doctrine of *lex loci delicti*.⁸ Clearly the dismissal was correct if *lex loci* was to remain the controlling rule; however, the Arizona Supreme Court chose to examine the fundamental question whether to retain the established doctrine or to adopt a different approach to choice-of-laws.

After a perfunctory examination of existing choice-of-laws theories propounded both by scholars and courts in recent years, the Arizona court adopted the contacts theory⁹ as its preferred approach to all choice-of-laws problems. This theory seemed to offer the court the "brightest prospects for a rational yet flexible approach."¹⁰

⁴ Referring to the old rule of *lex loci delicti*, the *Wilcox* court stated:

[T]he mere fact that a rule is old does not make it bad. In fact, its antiquity is compelling evidence that it must have been reasonably satisfactory, and the rule, though old, should be retained if it continues to serve its purpose. We need, however, only to cite a few examples to see that the application of the rule of *lex loci* has on occasions produced absurd and unjust results. 26 Wis. 2d at 622, 133 N.W.2d at 410.

For further discussion of the rule, see notes 13-18 *infra* & accompanying text.

⁵ 103 Ariz. 562, 447 P.2d 254 (1968).

⁶ Arizona follows the common law doctrine prohibiting husband-wife suits for negligent torts. *Id.* at 255.

⁷ New York had abolished such immunity by statute in 1964. *Id.*

⁸ *Schwartz v. Schwartz*, 7 Ariz. App. 445, 440 P.2d 326 (1968).

⁹ For a discussion of this theory, see note 36 & text accompanying notes 28-35 *infra*. The contacts theory has been adopted in recent Tentative Drafts to the *Restatement (Second) of Conflict of Laws*.

¹⁰ 103 Ariz. at 562, 447 P.2d at 257.

Applying the contacts theory to the *Schwartz* case, the court found that New York had the most significant contacts with the parties and with the occurrence,¹¹ and therefore the law of New York should determine the wife's capacity to sue her husband. Use of this theory meant that each issue of the case must be independently examined for significant contacts to determine the law applicable to that issue.¹² Conceivably a situation could arise where New York law would be determinative of one issue in the case, while Arizona law might be used for another issue in the same case.

It is suggested that the four major choice-of-laws theories examined by the court — *lex loci delicti*, *lex loci domicillii*, the government interest theory, and the contacts theory — represent more of an evolution of the rational approach to all choice-of-laws problems than they do an actual divergence of incompatible views. In order to conceptualize this evolution it is necessary to examine in detail the various theories preceding the contacts theory.

Lex loci delicti, a derivation from the vested rights doctrine,¹³ is the oldest and least flexible of all the modern theories on conflicts questions. It provides simplicity and predictability in its application, for it merely requires use of the law of the state in which the cause of action arose. Often, however, difficult cases brought departures from the rule¹⁴ and courts today are prone to ignore the rule in order to arrive at what they feel is a just result.¹⁵ Some courts distinguish between procedural and substantive issues in a case,¹⁶ applying *lex loci delicti* only to the substantive law of the

¹¹ The contacts that the court considered were: "(a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Id.* at 257, quoting RESTATEMENT § 379 (Tent. Draft No. 9, 1968). See also notes 38-39, 41 *infra*.

¹² 103 Ariz. at 566, 447 P.2d at 258. "In other words, the identity of the state of the most significant relationship is said to depend upon the nature of the tort and upon the particular issue." RESTATEMENT, Introductory Note to Topic 1, Chapter 7, at 2.

¹³ RESTATEMENT, Introductory Note to Topic 1, Chapter 7, at 1. This doctrine "called for the enforcement everywhere of rights that had been lawfully created under the local law of a state." *Id.*

¹⁴ As noted in *Wilcox*: "It appears therefore, that *lex loci* has not provided a 'fixed star,' but rather has been merely a point of departure in hard cases." 26 Wis. 2d at 624, 133 N.W.2d at 412.

¹⁵ In a recent Kentucky decision the court stated: "To say that the law of the state where an automobile accident occurs always governs the rights of the parties avoids the necessity of examining the true legal relationship of the parties or other considerations which might be more consonant with a just result." *Wessling v. Paris*, 417 S.W.2d 259, 260 (Ky. 1967).

¹⁶ See, e.g., *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d at 624, 133 N.W.2d at 412.

state. Other courts ignore the rule completely in favor of what are professed to be overriding state policies.¹⁷ Consequently in recent years few, if any, courts automatically apply the rule as originally conceived. *Lex loci delicti* in its original form is a dying concept, and yet a majority of the courts cling tenaciously to the doctrine for lack of a good replacement.¹⁸

The law of domestic relations, and particularly that controlling intrafamily torts, serves special needs that could not be filled by the fortuities of a *lex loci* doctrine. These special considerations provided the stimulus for the introduction of a new theory, *lex loci domicillii*, and one further departure from the original *lex loci* doctrine. The *domicillii* rationale is founded on the concept that in order to preserve the harmony and unity of marriage, people ought to be governed by one set of rules that follows them in their travels. The policy underlying this rule is that it would be extremely difficult for families to govern their daily relationships if

Originally the doctrine of *lex loci* was applied arbitrarily to all substantive issues of a case without regard to interrelationships of the parties, the occurrence, or a particular issue. Predictably, the law governing a case, for example in the area of negligent torts, might bear little relevance to the parties or issues. RESTATEMENT, Introductory Note to Topic 1, Chapter 7, at 2. Any connection between a negligent act and the parties was entirely fortuitous. As indicated by the *Wilcox* court:

All of the commentators and all of the cases that end up in disagreement with the unbending application of *lex loci* have a common thread that runs through the skein of rationale, and that thread is that the place of the occurrence of an unintentional tort is fortuitous, and it is by mere happenstance that the *lex loci* state is concerned at all. 26 Wis. 2d at 629, 133 N.W.2d at 414.

On the other hand, the intentional tortfeasor can be presumed to have contemplated his actions and the law of the place where the act occurred should properly govern. This distinction between negligent and intentional torts could be the basis for some of the departures from the application of the older conflicts rules.

The commercial world evidenced an early recognition of the importance of providing a proper nexus among the governing body of law, the parties and the issues. Through guidance from the *Uniform Commercial Code*, the area of contract law departed from old *lex loci* concepts and is now generally governed by a contacts rationale. See UNIFORM COMMERCIAL CODE § 1-105, Comment 3. Arizona adopted the *Code* effective January 1, 1968. ARIZ. REV. STAT. ANN. § 44-2201 (1968).

¹⁷ See, e.g., *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964) (to avoid expenditure of public funds and possible hardship to his family, a spendthrift's contracts are voidable); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (policy to provide compensation for negligent injuries). As stated by the *Lilienthal* Court: "Foreign law would not be applied if it '* * * would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'" 239 Ore. at 18, 395 P.2d at 547, quoting Mr. Justice Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) (dissenting opinion).

¹⁸ For a compilation of family relations cases following *lex loci delicti*, see Annot., 96 A.L.R.2d 973 (1964).

they were subject to variable laws as they traveled from one state to another.¹⁹

Although not without merit, *lex loci domicillii* appears to be another jurisdiction-selecting rule²⁰ which is nearly as arbitrary as *lex loci delicti*. Fortunately, however, many of the courts utilizing the *domicillii* doctrine have unwittingly done more than arbitrarily apply the rule.²¹ It appears that they have also considered *why* they should apply the law of the domicile by comparing competing policies of the interested states.²² Where this has been done either consciously or unconsciously, most observers would agree that the results have been satisfactory. Nevertheless, there have been arbitrary applications of the rule that have produced inappropriate decisions if considered in the light of all competing interests.²³

Professor Brainerd Currie through his "government interest theory" began to articulate what the courts had been grasping at with something less than complete success — the necessity for recognition of competing interests involved in choice-of-laws situations. This observation added interest analysis to the compendium of conflicts solutions. Currie's contribution was valuable in providing a more rational approach to conflicts problems, as well as creating a vehicle with which to cull out the "false conflict" from the "true conflict."²⁴ The false conflict arose where a state had no real in-

¹⁹ See generally *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959); RESTATEMENT, Explanatory Notes § 11.

²⁰ "In other words, domicile was the key used to choose a jurisdiction to supply the governing law, without regard to the content of that law, not as a factor relevant to a choice between a rule conferring immunity and one denying it." *Cavers, Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1219, 1221 (1963) [symposium hereinafter cited as *Comments on Babcock*].

²¹ In a mobile society it is not unusual for a family to have both a temporary residence and a domicile, or home of record. Careless intermingling by courts and writers of the terms "residence" and "domicile" could create confusion with interpretation of the rule and of decisions based on the rule. The *Restatement*, Chapter 2, attempts to clarify these terms, but unless all writers adhere uniformly to this or some other standard the possibility of confusion will persist.

²² See, e.g., *Magid v. Decker*, 251 F. Supp. 955 (W.D. Wis. 1966) (interspousal immunity); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (intrafamily tort immunity); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (survivorship of action after death of tort-feasor); *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966) (interspousal immunity). For a critical analysis of the *domicillii* rationale, see B. Currie, *Comments on Babcock*, 63 COLUM. L. REV. 1233 (1963); D. Currie, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 595 (1968).

²³ See B. Currie, *supra* note 22; Weintraub, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 556 (1968).

²⁴ What may at first appear to be a conflict is really a "false conflict" if it is shown that one state has no real interest in applying its laws. See B. CURRIE, SELECTED

terest in the litigation, other than the fortuitous relationship that might arise, for example, in an automobile accident involving only out-of-state parties. There would be no valid interest in applying that state's law to the case. On the other hand, where the forum state had any interest at all (Currie's "true conflict"), *lex fori*, the law of the forum, should be applied even though a stronger policy of the other interested state might thereby be defeated.²⁵ Here again there is a hint of arbitrariness, but it is interposed at a later step in the process than with either of the two previous theories.

Since 1955,²⁶ an increasing number of courts have recognized the importance of the competing interests of both states and litigants in the process of final resolution of choice-of-laws. Although the courts were unwilling in many instances to fully endorse Currie's theory, they did retain the concept of interest analysis.²⁷ Growing from this concept, the contacts theory²⁸ appears to combine the best aspects of all the aforementioned theories. This theory requires application of the law of the state which has the most significant contacts both with the occurrence *and* with the parties. There is use of *lex loci delicti* concepts, interest analysis after separation of issues, and a mating of family law and tort law through *lex loci domicillii*. Proponents of the contacts theory agree that the significant contacts would be meaningless unless determined in terms of policies and interests of both the states and the parties involved,²⁹ for a mere counting of the contacts would not be beneficial but

ESSAYS ON THE CONFLICT OF LAWS (1963); Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

²⁵ Whitman, *Conflict of Spousal Immunity Laws: The Legislature Takes a Hand*, 46 N.C.L. REV. 506, 514 (1967-68).

"Eventually we must accept the proposition that, in the absence of action by higher authority, each state must be conceded the right to apply its own laws for the reasonable effectuation of its own policies." B. Currie, *supra* note 22, at 1237.

²⁶ *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

²⁷ For a progression of cases in three states using interest analysis, see *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Kjeldsen v. Ballard*, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Spec. T. 1967); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959); *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Magid v. Decker*, 251 F. Supp. 955 (W.D. Wis. 1966).

²⁸ Use of this theory in the New York case of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), provided a major impetus to its growth and eventual acceptance in the later tentative drafts to the *Restatement*. See, e.g., Tentative Drafts Nos. 8, 9.

²⁹ B. Currie, *supra* note 22, at 1235.

rather could result in courts "groping"³⁰ for contacts to promote use of forum law. The contacts theory differs from Currie's theory of governmental interest because it requires *weighing* the competing interests to determine which should be given greater consideration in the decision making process, and from this *qualitative* comparison the final choice-of-laws is made.³¹ Professor Ehrenzweig, an eminent authority in the field of conflicts, is of the opinion that this weighing of the contacts is a step beyond the Currie theory;³² yet perhaps it is nothing more than a modernization of Currie's distinction between true and false conflicts.³³

Ideally, if the contacts theory is workable, a change of the forum should not produce a different result. If the courts have properly analyzed and accurately weighed the policies and contacts of each of the states involved in the litigation, location of the forum is immaterial. However, critics have expressed the concern that application of the contacts theory is fraught with the danger of forum courts unconsciously advancing the interests of the forum state by attaching more significance to its contacts in order to guard against the loss of judicial sovereignty.³⁴ Such fear may be grounded on results of many of the early cases where, because of the particular facts involved, the state having the most significant contacts conveniently happened to be also the forum state. Similar results occurred with application of the *lex domicillii* rule. Thus, there is a strong suggestion that the decisions were merely an application of forum law under the guise of a new theory, and that the courts may not have been so willing to apply such a theory if the weight of other contacts had been elsewhere.³⁵

³⁰ Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence versus Groping for Contacts*, 16 BUFFALO L. REV. 537, 567 (1966-67).

³¹ See *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); RESTATEMENT §§ 6, 145 and comments thereto.

³² Ehrenzweig, *Comments on Babcock*, 63 COLUM. L. REV. 1243 (1963).

³³ See notes 24-25 *supra* & accompanying text.

³⁴ See generally Ehrenzweig, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 570 (1968); Leflar, *Comments on Babcock*, 63 COLUM. L. REV. 1247 (1963).

"[C]ourts continue to pick and choose among contacts according to their own table of *Sigs* [significant contacts]." Baer, *supra* note 30, at 556. *But see* Cavers, *supra* note 20, at 1228, wherein he writes:

I prefer Justice Traynor's view that "the forces against provincialism are strong today," that: "a judge trained to look through the partisan wrappings of a conflict will be inclined to look through provincial wrappings as well. There is no reason why he should be less dispassionate in a conflicts case than in any other. The hazard is less of impassioned provincialism than of the lingering ills of a passive formalism." (footnote omitted).

³⁵ These fears, raised in such typical cases as *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240

It is notable that the Arizona Supreme Court chose *Schwartz* as the vehicle with which to discard *lex loci delicti*. In view of the court's decision that New York had the most significant contacts relating to the issue of capacity to sue, there can be no suggestion that the Arizona court was merely advancing its own state's interests, or that it intended the other courts of the state to do so in the future. On the contrary, it is evident that Arizona has indeed adopted the rationale of the contacts theory. Of the material contacts involved in *Schwartz*, *quantitatively* there appeared to be a balance. However, as noted earlier, under this theory the determination of the most significant contacts should be primarily *qualitative, not quantitative*.³⁶ It was necessary for the court to evaluate the contacts in light of the particular issue, the policies and interests of the states involved, the occurrence, and the parties.³⁷ It was only after this process, aided by guidelines set forth in the *Restate-*

N.Y.S.2d 273 (1963), and *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), have been dispelled to some degree by later cases within those same jurisdictions. Cases such as *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), and *Kjeldsen v. Ballard*, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Spec. T. 1967), have applied a law other than that of the forum to the issue at hand, the latter by recognizing more significant contacts in another state, and the former by recognizing that the forum state had no interest.

If the courts can suppress any tendency to advance their own interests and instead analyze the contacts with reference to what Ehrenzweig calls a "superlaw" rather than to their own law, then the results should be ideal. See Ehrenzweig, *supra* note 34, at 574.

³⁶ The qualitative considerations that combine to make up the rationale of the contacts theory have been divided in the *Restatement* into five groups of principles:

- 1) Those that promote mutually harmonious and beneficial relationships in the interdependent community.
- 2) Those that focus upon purposes, policies, aims, and objectives of each of the competing local laws (state interests).
- 3) Those that protect the justified expectations of the parties, providing certainty and predictability of result.
- 4) Those that serve to implement the basic policies underlying the particular field of law.
- 5) Those that look to the needs of judicial administration. RESTATEMENT, *supra* note 1, comment *b* to § 145.

³⁷ Although the contacts theory appears to have practical application to the so-called difficult case, there will be a greater burden on the courts and on counsel to impartially sift and meaningfully assess the policies and interests of the states and of the parties involved. In a period when dockets are filled to overflowing, it is understandable that courts may be hesitant to wholeheartedly endorse such a task. As noted in a brief submitted to the *Schwartz* court:

The spreading disenchantment with the amorphous "center of gravity" rule can be traced to the realization that it is not a rule at all. This explains why writers of textbooks and law review articles are more sympathetic to it than are the judges who must apply it on a day to day basis to real life situations. Brief for Appellee at 16, *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968).

ment (Second) of Conflict of Laws, that the *Schwartz* court decided that New York law should apply to the issue.³⁸

The court was able to resolve through use of the *Restatement* a quantitative balance of contacts. However, it can only be a matter for conjecture what would have happened if qualitatively there had been a balance. Neither the *Schwartz* court nor the drafters of the *Restatement* appear to have been concerned with this potential problem. The court may well have thought a qualitative balance to be impossible in light of the many factors to be considered. Indeed, the question was unnecessary to the *Schwartz* decision, and the case would not have been an appropriate vehicle with which to resolve this question. It would seem, however, that guidance for the Arizona courts may be appropriate for certainly the potential for such a balance exists.³⁹ In light of the necessity to give weight to the policies and interests of a state in a qualitative assessment of contacts, where the contacts are balanced qualitatively the situation approaches the ultimate in what Currie envisions as the true conflict. A completely impartial assessment of contacts, on the other hand, approximates comparison with Professor Ehrenzweig's "superlaw"⁴⁰ — that illusive law in the sky which is partial to no particular state interest. Pragmatically, it may be impossible to qualitatively assess contacts in relation to an impartial, fictional set of laws. Ultimately, evaluation may relate to the forum state's policies and laws, and if a balance occurs the courts must rely on some arbitrary measure as was done with each of the other theories. Perhaps Currie's suggested use of forum law when confronted with the true conflict is the only solution, that in reality in each of the preceding theories it was recognized that eventually in the legal process the arbitrary coin must be tossed. It is suggested that dissatisfaction with each of the old theories may have grown out of the realization that arbitrary measures such as those used in *lex loci* and *lex domicillii* were employed too soon in the determination process. In an effort to provide decisions founded on a rational consideration of interrelated but competing interests, proponents of

³⁸ See note 11 *supra*. The court quoted in part section 379 of Tentative Draft No. 9 of the *Restatement*: "In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states."

³⁹ Apparently the writers of the *Restatement* did not consider the possibility that the situation could arise where contacts would balance qualitatively, for no provision has been made for such contingency. The weight assigned the contacts will obviously vary through the subjective interpretations of the individual courts.

⁴⁰ Ehrenzweig, *supra* note 34, at 574.

each new theory discarded the old and required more analysis of the facts in the cases. By adopting the contacts theory, Arizona has taken a major step to insure a fair and appropriate application of the law controlling the cases coming before its courts, even though it may still be necessary to make an arbitrary choice of laws if ever confronted with the dilemma of balanced contacts.⁴¹

It would appear that the Arizona Supreme Court has charted a good course for its future conflicts case law. Admittedly, some of the terms used in the *Restatement* are vague and subject to many interpretations.⁴² It will not always be easy to decide the conflict; the process may be involved and tedious, and no two courts may completely agree on the importance of the contacts.⁴³ To approach wisely this task of coordinating the laws of many states as they affect the relations between two or more people, the law of conflicts "must have a flexibility of method that will enable it to cope with the infinite variety of human transactions that cut across state and

⁴¹ The Arizona court also may have left a question unresolved by its failure to clarify the use of quotations apparently from Tentative Draft No. 9 of the *Restatement*. Passages from the more recent Proposed Official Draft of the *Restatement* had been presented in a Brief of Amicus Curiae at 10-11, *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968), but for unknown reasons the Proposed Official Draft was not used in the court's opinion. There are significant differences between the two drafts, and lower courts of Arizona may feel compelled to follow Draft No. 9 until given further guidance from their supreme court. Compare §§ 379, 390g of Tentative Draft No. 9, with §§ 6, 145, 169 of the Proposed Official Draft.

The Official Draft provides the courts with better guidance in choice-of-laws principles, makes it clear that issues are to be considered separately, and considers both domicile and residence as possible contacts — attributes that are lacking in Draft No. 9. Furthermore, in the area of intrafamily immunity Draft No. 9 is simply a rule of *lex loci domicilii*. The Official Draft, while giving considerable importance to the domicile contact, recognizes there may be more important contacts and thus is not limited to a mere jurisdiction-selecting rule.

⁴² As pointed out by one writer:

The expressions "center of gravity" and "grouping of contacts" are at least as adequate to define a principle of law as the terms "due process of law," "property," . . . which the courts constantly employ. One reason for their generality is that we are at a new beginning At the early stage in any field of the law common-law courts are accustomed to employ very general terms. Cheatham, *Comments on Babcock*, 63 COLUM. L. REV. 1229, 1230 (1963).

Using goals of justiciability, certainty, predictability, and simplicity, case law will then shape this contact theory and channel it in the desired direction. See RESTATEMENT, *supra* note 1, at § 6 and comments thereto.

⁴³ Compare the language of the Arizona Court of Appeals in 7 Ariz. App. at 448, 440 P.2d at 329, wherein the court states: "Under almost any theory including the 'grouping of contacts theory', 'the most significant contacts', or the 'center of gravity', the State of Arizona would have the most contacts, the most significant contacts, . . . and not the State of New York," with the holding of the Arizona Supreme Court. 103 Ariz. 562, 562, 447 P.2d 254 (1968).