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Interest analysis has come to be recognized as a phrase of legal art[1] and an acceptable method of resolving choice-of-law problems. In a relatively short period of time, the method has been embraced by courts impressive both in number[2] and in individual judicial prestige.[3] The essence of interest analysis lies in the fashioning of an indicative law[4] which will result in the resolution of a choice-of-law problem by the

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1. *See, e.g.*, REESE & ROSENBERG, CONFLICT OF LAWS, CASES AND MATERIALS 571 (1971); WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 226 (1971); CRAMPTON & CURRIE, CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS 208 (1968); SCOLES & WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS 442 (1967).

2. WEINTRAUB, *supra* note 1, at 234: "In a short time, the District of Columbia and at least 21 states have rejected the place-of-wrong rule in some context, usually in a court decision revealing general acceptance of the premises of state-interest analysis." Professor Weintraub, at the same citation, indicates judicial approval of the technique has come also from the Supreme Court of the United States, the Third Circuit and the House of Lords.

The trend toward interest analysis was illustrated in a recent diversity case. Both litigants agreed that the trial court correctly determined "that North Dakota would now abandon its older rule of 'lex loci delecti' [sic] and follow the more modern conflict of law principle of 'significant contacts.'" Trapp v. 4—10 Investment Corp., 424 F.2d 1261, 1263 (8th Cir. 1970).

3. A determination of the prestigiousness of courts is admittedly highly subjective. Having made that concession, I would note that among those courts having embraced interest analysis are the Supreme Court of California, the Court of Appeals of New York, the Supreme Court of Pennsylvania and the United States Court of Appeals for the District of Columbia. *See*, respectively, Reich v. Purcell, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Cipolla v. shaposka, 439 Pa. 563, 267 A.2d 854 (1970); Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968).

4. The phrase "indicative law" is intended to refer to "those rules which indicate the system of dispositive rules which is to be applied." Taintor, *Foreign Judgments in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. PITT. L. REV. 223, 233 & n.58 (1942). It seems to me that "indicative law" is simpler and no less descriptive than such phrases as "conflict-of-laws laws" or "conflict-of-laws rules."

application of the dispositive law[5] of that state having the greatest interest in the specific issue presented. It is the antithesis of that older methodology which resolved choice-of-law problems by the mechanical application of rigid indicative laws, dictated by the cause of action asserted.[6] Thus, many courts which once resolved virtually all choice-of-law problems in tort cases by the application of lex loci delicti, have now come to recognize the propriety of precisely formulating the issue presented, determining which states have legitimate interests in that issue, identifying each of those interests, deciding which state's interests are paramount, and applying the dispositive law of that state to resolve the specific issue presented.[7]

As interest analysis has become more generally accepted and utilized by courts, counsel have become more facile in recognizing the possibilities of using interest analysis to further their clients' causes. This facility is manifested by an ever increasing degree of innovation and sophistication in identifying state interests in a particular issue and emphasizing—or denigrating—the significance of those interests.[8] Consequently, it becomes an ever more demanding and complex judicial task to consider and weigh intelligently the asserted interests of the states involved. One measure of assistance in accomplishing that task lies in the court's capacity, with the assistance of counsel, of enhancing the degree of specificity of the facts before the court and relevant to the choice-of-law problem. It would seem that the greater the degree of factual specificity achieved by the court, the greater would be the likelihood of the court's achieving the soundest choice-of-law resolution attainable. Yet, there is already some evidence of reluctance or even

5. The phrase "dispositive Law" is intended to refer to "those rules which are used to determine the nature of rights arising from a fact-group, *i.e.*, those which dispose of a claim." Taintor, *supra* note 4. It seems to me that "dispositive law" is more accurate and descriptive than such phrases as "municipal law" or "internal law." I am indebted to the late Dean Charles W. Taintor II for his creation of the phrases "indicative law" and "dispositive law."

6. *See, e.g.*, Coster v. Coster 289 N.Y. 438, 46 N.E.2d 509 (1943); Mike v. Lian, 322 Pa. 353, 185 A. 775 (1936).

7. Compare the cases cited *supra* note 6 with those cited *supra* note 3.

8. In *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967), defendant attempted (unsuccessfully) to distinguish *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), and to diminish New York's interest in the choice-of-law problem presented (potential application of the Massachusetts ceiling on recovery in wrongful death actions) by apprising the court of the beneficiaries' change of domicile after decedent's death. In *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970), defendant attempted (unsuccessfully) to diminish the interest of plaintiff's domicile state (Connecticut) in his recovery by arguing that that state's indicative law (lex loci delicti) would lead to the imposition of the potentially applicable (Iowa) guest statute and a judgment for the New Jersey defendant. See Seidelson, *The Americanization of Renvoi*, 7 DUQ. L. REV. 201, 222 (1969).

active resistance toward achieving such an enhanced degree of specificity on the part of some courts and some legal writers. The reluctance or resistance demonstrated sometimes rests on a relatively broad policy assertion—"a choice-of-law rule need not achieve perfect justice every time it is invoked in order to be preferable to the no-rule approach"[9]—and sometimes rests upon a more particular ground, depending on the particular fact about which greater specificity has been offered by counsel or sought by the court. It is the purpose of this article to examine the efficacy of an enhanced degree of factual specificity in resolving a particular choice-of-law problem in a wrongful death action and the validity of some of the reasons offered, or which may be offered, to reject such enhanced specificity. It is intended that such an examination may suggest an appropriate technique applicable to other conflicts problems in other types of cases. To accomplish the first stated purpose (and to hope to fulfill the stated intention), a hypothetical set of facts is nearly essential.

It may be helpful to fashion a hypothetical fact situation not basically dissimilar from cases already decided.[10] Assume that X, domiciled in New York, lost his life in an airplane crash in Massachusetts. The flight, a regularly scheduled interstate trip, began in New York and was intended to end in Massachusetts. D, whose plane crashed, is a com-

9. Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 644 (1968). Professor Rosenberg's article is cited in REESE & ROSENBERG, *supra* note 1, at 603 with this prefatory comment:

> However worthy the concern of modern conflicts scholars for case-by-case justice instead of an illusionary quest for uniformity, simplicity and predictability, there are clear signs that the no-rules approach has gotten out of hand. An agitated statement of that conclusion [was made] by one of the editors of this volume. . . .

The above prefatory comment is followed by an excerpt from Professor Rosenberg's article. In turn, that excerpt is followed by this language:

> Soundly designed principles and rules will avoid some of the escalating complexities of the no-rules approaches. They will escape the illogicality of using liability insurance as a choice-influencing consideration without taking evidence on whether it exists and to what extent!

Id. at 604.

Perhaps the most dependable method of avoiding consideration of a potential non-fact in resolving a choice-of-law problem is to secure an enhanced degree of specificity as to the relevant fact. A court willing to do that presumably would receive evidence as to the existence and extent of liability insurance in the situation described by Professor Rosenberg. Thus, judicial acquiescence in or insistence on an enhanced degree of specificity seems to be the surest way of avoiding Professor Rosenberg's identified illogical conclusion. It seems somewhat startling to find that the methodology eschewed by Professor Rosenberg is uniquely efficacious in avoiding his exclamatory undesirable conclusion.

It should be noted, too, that an enhanced degree of specificity is not synonymous with a "no-rules approach." Rather, it would result in the development of rules to be applied in a highly refined and appropriately discriminating manner.

10. See Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967); Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

mercial airline, incorporated in Massachusetts and doing business in New York, Massachusetts, and many other states. P, X's surviving widow, institutes a wrongful death action against D in a New York court. D asserts the Massachusetts ceiling on recoveries in wrongful death actions,[11] and P contends that the ceiling is inapplicable because of New York's paramount interest in the specific issue presented.

It seems reasonable to assume that a critical factor in determining the extent and degree of New York's interest will be the domicile in New York of P.[12] If the Massachusetts ceiling is imposed to the economic jeopardy of a New York domiciliary (especially a dependent widow), she

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11. At the time of the operative facts which gave rise to *Kilberg, Pearson,* and *Gore, supra* note 10, Massachusetts had a statute specifically applicable to common carrier defendants and limiting recovery in a wrongful death action to not less than $2,000 nor more than $15,000, depending on the degree of culpability of the defendant. MASS. ANN. LAWS ch. 229, § 2 (1949). However, at that same time, Massachusetts had a statute providing for recovery of not less than $2,000 nor more than $20,000 in wrongful death actions against defendants generally. MASS. ANN. LAWS ch. 229, § 2C (1951). Prior to the 1951 amendment, the maximum recovery against defendants generally was $15,000. MASS. ANN. LAWS ch. 229, § 2C (1947). At the present time, Massachusetts has a statute applicable both to common carrier defendants and defendants generally which limits recovery in a wrongful death action to not less than $5,000 nor more than $50,000, depending upon the degree of culpability of the defendant. MASS. ANN. LAWS ch. 229, § 2 (1967).

12. Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (2d Cir. 1962); *Id.* at 144 (dissenting opinion). Determining the extent and degree of the Massachusetts interest in having its statutory ceiling imposed is complicated by the Massachusetts legislative scheme. See note 11 *supra.* The statute specifically applicable to common carriers would suggest a rather sharply focused interest in protecting the economic integrity of Massachusetts based carriers for the purpose of assuring that state continued essential public carriage service. However, the existence of a Massachusetts statute applicable to defendants generally and providing for similar limited liability necessarily tends to broaden (and perhaps dilute) the interest of Massachusetts into one concerned with protecting the economic integrity of all Massachusetts wrongful death action defendants.

The problem is complicated further by judicial recognition of two potentially inconsistent purposes underlying the Massachusetts ceiling statute. It has been stated that the statute is penal and intended to deter culpable conduct by predicating the amount of liability on the degree of culpability. Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128 (1956); Tiernan v. Westext Transport, Inc., 295 F. Supp. 1256, 1263 (D. R.I. 1969). Simultaneously, it has been held that the ceiling statute is intended to protect Massachusetts residents from large recoveries in death cases. Tiernan, *supra* at 1264.

In the context of the choice-of-law problem considered in the text, those ambivalent purposes probably would lead to these conclusions. To the extent that the ceiling statute is intended to be penal and thus deterrent, the interest of Massachusetts would be served better by the application of New York's no-ceiling law, since the sting of unlimited recovery would more effectively penalize the culpable defendant and deter it and others similarly situated from such future conduct. That suggests a false conflict situation in that the interests of both states would be served better by the application of New York's law. However, to the extent that the ceiling statute is intended to protect Massachusetts residents from large recoveries in death cases, there is a true conflict. New York's interest in the New York plaintiff would be advanced by the application of the New York law, and the interest of Massachusetts in the Massachusetts defendant would be advanced by the application of the Massachusetts ceiling. It seems appropriate to conclude that the penal interest of Massachusetts is one limited by the ceiling figure, and that, beyond that figure, the Massachusetts interest is directed at protecting Massachusetts defendants from large recoveries in death cases. Therefore, our hypothetical case presents a true conflict.

may become indigent and a ward of the state. As her state of domicile, it will be New York which would bear the primary expense of contributing to the support of its ward. Since New York has no ceiling on recoveries in wrongful death actions (and a state constitutional provision prohibiting such a ceiling),[13] the forum may well conclude that New York is sufficiently concerned about the continued economic integrity of its dependent survivors and its state to justify the non-imposition of the Massachusetts ceiling. In short, the New York court may find New York to have the paramount interest in the issue presented and fashion an indicative law referring to the dispositive law of New York.

But wait. Suppose counsel for D offers to prove that, after the death of X, P abandoned her New York domicile and established a bona fide domicle in Maryland. Should the court hear the offered evidence and, assuming it demonstrates the newly acquired domicile, determine the effect of the change of domicile on the choice-of-law problem presented? Several courts have said no;[14] one has said yes.[15] Of those courts refusing to consider the newly acquired domicile, each seems to have been influenced by a presumed impropriety in taking into account such an after-the-death (of X) change of domicile because of the potential offered to P for forum shopping,[16] or, as Professor Weintraub has labelled it, "house-shopping."[17] The impropriety, of course, is based on the concern that, if P's new domicile were to be recognized judicially, she might be tempted to make an after-the-death move with an eye toward the potential dollar value of the wrongful death action. And so she might. Thus, the issue is framed: Should the court consider the enhanced degree of specificity available as to a fact critical to resolution of the choice-of-law problem, or does the invitation to engage in "house-shopping" require judicial "ignorance" of a fact known to all?

In referring to *Gore v. Northeast Airlines, Inc.*,[18] Professor Weintraub

13. N.Y. CONST., art. I, § 16.
14. Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968); Reich v. Purcell, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967).
15. Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).
16. *See* cases cited *supra* note 14.
17. WEINTRAUB, *supra* note 1, at 249 (1971). Perhaps a more accurately descriptive phrase would be "domicile shoping."
18. In comparing *Gore* with *Reich v. Purcell*, 63 Cal. Rptr. 31, 432 P.2d 727 (1967), one is confronted with a dilemma. In the former case, the Second Circuit fashioned an unrealistic interest on the part of New York (in the physical safety of the New York domiciled decedent), as a means of avoiding a feared invitation for forum shopping and the awkwardness of pretending that the wrongful death action beneficiaries were domiciled in New York when all (including the court) knew they were domiciled in Maryland. In *Reich*, Chief Justice Traynor, as a means of avoiding a feared invitation for forum shopping, candidly treated the wrongful death action beneficiaries as Ohio domiciliaries when

has written that judicial consideration of P's change of domicile from New York to Maryland would have been inappropriate because (1) the move did not enhance the potential value of the wrongful death action, but, if anything, diminished it, and (2) "we would not want the widow's move to more congenial surroundings in a time of intense bereavement to have the draconian effect of reducing compensation for the dependents by many hundreds of thousands of dollars."[19] On the other hand, if the after-the-death change of domicile has the capacity of enhancing the dollar value of the wrongful death action, Professor Weintraub would have the court consider the change in resolving the choice-of-law problem "if it is unlikely that the move . . . was made in order to influence the choice of applicable law."[20]

I like to think that I possess some of Professor Weintraub's sensitivity to human emotions "in a time of intense bereavement" and perhaps a little (though not nearly so much) of his concern over motivation for the change of domicile. But it seems to me that the appropriate question to ask is: Has the plaintiff-beneficiary acquired a new bona fide domicile? If the answer to that question is no, the change of residence should be ignored in resolving the choice-of-law problem since the continuing state of domicile retains its legitimate interest in the economic integrity of its domiciliary. However, if the answer to that question is yes, then the interest of the former state of domicile is substantially diminished, the interest of the new state of domicile in the continuing economic integrity of its domiciliary becomes one of critical importance, and the forum should consider the change in resolving the choice-of-law problem. The court may determine that a change of residence by the surviving widow from New York to Maryland with the intention of remaining temporarily with her mother[21]—perhaps until the "time of intense bereavement" had passed—was not a change of domicile. Similarly, a change of residence motivated solely by a desire to enhance the dollar value of the wrongful death action, and unaccompanied by the requisite

all (including the court) knew they were California domiciliaries: "Although plaintiffs now reside in California, their residence and domicile at the time of the accident are the relevant residence and domicile." 63 Cal. Rptr. at 34, 432 P.2d at 730. It is difficult to determine which of the two judicial postures is the more awkward.

For a discussion of what might have occurred had Chief Justice Traynor looked to Ohio's indicative law, see Seidelson, *supra* note 8, at 213.

19. WEINTRAUB, *supra* note 1, at 250. Professor Weintraub noted that the rationale of *Gore* "seems unrealistic." The rationale was that New York's no-ceiling law was intended to make others more careful in dealing with the lives and physical integrity of New York domiciliaries. See Seidelson, *supra* note 8, 208 & n.23.

20. *Id.* at 251.

21. Gore v. Northeast Airlines, Inc., 373 F.2d 717, 719 (2d Cir. 1967).

intent, might be found judicially not to be a bona fide change of domicile. Yet if the residence and intent required legally to effect a bona fide change of domicile are found to exist, even where the surviving widow was motivatd to move either by a desire for "more congenial surroundings" or a potentially larger wrongful death action judgment or settlement, the change of domicile should be considered by the court. And such consideration would appear to be appropriate whether the bona fide change of domicile had the capacity of enhancing or diminishing the dollar value of the action. For a court to conclude *seriatim* that (1) a critical factor in determining which state has the paramount interest in the issue of whether or not a ceiling on recovery should be imposed in a wrongful death action is the domicile of the dependent survivor, (2) because that state of domicile has the greatest concern over the support of its potentially indigent domiciliary, but (3) an after-the-death change of domicile by the dependent survivor will be ignored would constitute a perversion of interest analysis. It would impose upon a court, purporting to resolve a choice-of-law problem by rational consideration of the legitimate interests of the states involved, a non-fact: that the widow is domiciled in one state when in law and in fact she is domiciled in another. That kind of indulgence in fiction is contrary to the very essence of interest analysis.

To those who may remain offended by P's capacity to affect the litigation by effecting a bona fide change of domicile after X's death, some consolation may be found in a long accepted legal precedent. A potential divorce-action plaintiff, by effecting a bona fide change of domicile, may determine the availability of jurisdiction to hear and determine the divorce action[22] *and* the statutory grounds available for divorce.[23] Those consequences of the plaintiff's acquisition of a new

22. Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. North Carolina, 317 U.S. 287 (1942); Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948); Voss v. Voss, 5 N.J. 402, 75 A.2d 889 (1950).

A three-judge federal court has held that a statutory residence requirement (over and above domicile) for divorce actions is violative of the equal protection and due process clauses, since such a requirement denies bona fide domiciliaries access to the only means of securing a divorce, judicial proceedings. Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971). In my own view, the capacity to make refined choice-of-law decisions provided by interest analysis would justify treating divorce actions as transitory and eliminating domicile as a jurisdictional requirement. See Seidelson, *Interest Analysis and Divorce Actions*, 21 BUFF. L.R. 315 (1972).

23. The rule is . . . well established that it is the divorce statute of the forum which governs the granting of a divorce. This is true even though all the operative facts occurred in some other state. If those facts constitute grounds for divorce according to the law of the forum, the divorce may be granted. If they do not, it may not be. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 327 (1968).

If divorce were a transitory action, an indicative law fashioned through interest analysis

domicile exist even though the change of domicile is made after the conduct constituting the grounds for divorce has occurred and even though the divorce-action defendant has no legal capacity to control the plaintiff's selection of a new domicile. It is true, of course, that if the divorce-action defendant is not served within the forum state or does not enter an appearance in the proceedings, he may collaterally attack the forum's determination of plaintiff's domicile.[24] It is also true that, absent personal jurisdiction over the defendant, the forum will lack appropriate jurisdiction to enter an alimony decree entitled to full faith and credit in other states.[25] But those jurisdictional limitations do not make the divorce-action analogy inapposite to our hypothetical wrongful death action. For if the divorce-action defendant is personally before the court, the court's determinations—including those of plaintiff's domicile and the alimony rights and liabilities of the parties—will be binding on the defendant.[26] In our wrongful death action, the litigants are personally before the court. Therefore, as in the truly contested divorce action, the issue of P's domicile may be fully litigated and finally concluded.

There is another aspect of the divorce proceeding which is analogous to our wrongful death action. That which serves to provide jurisdiction to hear and determine the divorce action and to make available to the forum its own dispositive law in determining the grounds for divorce is plaintiff's domicile in the forum state. Why? Because of the recognized legitimate interest which each state has in the marital status of its domiciliaries.[27] Similarly, in our wrongful death action, it is P's recently acquired domicle which gives Maryland a legitimate interest in the potential applicability of the Massachusetts ceiling statute. After all, Maryland has a legitimate interest in the economic integrity of its domiciliaries.

Finally, there is a distinction between the divorce action and our

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probably would refer the forum to the statutory grounds in the state of plaintiff's domicile. Seidelson, *supra* note 22, at 331.

24. Williams v. North Carolina, 325 U.S. 886 (1945); Williams v. North Carolina, 317 U.S. 287 (1942). *See* Seidelson, *The Full Faith and Credit Clause; An Instrument for Resolution of Intranational Conflicts Problems*, 32 GEO. WASH. L. REV. 554, 571 (1964); Corwin, *Out-Haddocking Haddock*, 93 U. PA. L. REV. 341 (1945).

25. U.S. CONST. art. IV, § 1. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

26. Sherrer v. Sherrer, 334 U.S. 343 (1948); Carter v. Carter, 147 Conn. 238, 159 A.2d 173 (1960) (personsal service on the defendant); Keen v. Keen, 191 Md. 31, 60 A.2d 200 (1948) (personal appearance by the defendant). *Cf.*, Gherardi de Parata v. Gherardi de Parata, 179 A.2d 723 (D.C. Mun. App. 1962), noted at 31 GEO. WASH. L. REV. 515 (1962).

27. *See* note 22, *supra*.

wrongful death action which provides an emphatic a fortiori propriety to the court's consideration of the newly acquired domicile in the latter action. In the divorce action, the forum is permitted the direct application of its own dispositive law in determining the grounds available for divorce to its new domiciliaries. In our wrongful death action, the forum's consideration of P's change of domicile is not to serve the parochial interests of the forum in the direct application of its own dispositive law. Quite the contrary. The forum's consideration of the after-the-death change of domicile is for the purpose of determining which of the "competing" states has the paramount interest in the specific issue presented so that the forum may fashion and utilize an indicative law referring to the dispositive law of *that* state.

To those still offended by P's capacity to affect the litigation by effecting a bona fide change of domicile after X's death, there remains at least a partial factual consolation. Not every widow confronted with similar circumstances is likely to effect a similar change of domicile. Many such widows might find a change of domicile during "a time of intense bereavement" intolerable—even in the face of advice from counsel to effect such a change where the change could enhance the dollar value of the wrongful death action. These widows might well decide to remain near relatives and friends rather than emigrate to a "strange" state. The consolations offered by familial, friendly or familiar attachments might outweigh even the enticement of enhancing the dollar value of the wrongful death action. And to add to the partial factual limitations on such after-the-death domicile changes, it should be remembered that only a distinct minority of the states continues to have wrongful death action recovery ceilings.

Even having noted those factual limitations, I feel compelled by candor to pose and answer the following question: If the forum were to consider the after-the-death change of domicile in determining the applicability of a ceiling on recovery, would some (perhaps a relatively substantial number) of such widows effect a self-aggrandizing change of domicile? Undoubtedly. But given the reasons underlying interest analysis, it would be intellectually dishonest and inherently inconsistent for a court to ignore a factual change in a factor critical to the resolution of the choice-of-law problem presented.

Assuming that the forum in our hypothetical wrongful death action does take into account P's new domicile, what are the likely legal consequences? Clearly, New York's interest in the issue presented is

diminished substantially, and Maryland's interest is enhanced dramatically. Presumably, the forum would then look to Maryland's dispositive law to determine if that state, like Massachusetts, has a recovery ceiling. The forum will discover no such ceiling in Maryland's dispositive law; thus there continues to be a conflict between the dispositive law of P's domicile state and the dispositive law of Massachusetts, the state in which X sustained the death-producing injury. Then, either because of its own intellectual curiosity or at the insistence of counsel for D, the court may look to Maryland's indicative law. If it does, it will discover that the highest appellate court of Maryland has expressly disavowed interest analysis in favor of the rentention of lex loci delicti in tort cases, even those cases involving Maryland domiciliaries.[28] Consequently, if P had brought the wrongful death action in Maryland, her present domicile, the court would have imposed the Massachusetts ceiling on recovery. There would appear to be no legitimate reason for the New York forum to treat P better than she would be treated in the courts of her state of domicile as to a specific issue in which P's domicile has a unique interest.[29] In fact, if the New York forum did not impose the Massachusetts ceiling, it would be extending an invitation to P and others similarly situated to engage in the most undesirable kind of forum shopping.

If the forum does impose the Massachusetts ceiling, would it violate any constitutional right of P? The answer must be no. After all, the choice-of-law resolution resulted from the volitional act of P in changing her domicile. Whether or not P actually knew the legal consequences of that volitional act, she should be held to constructive knowledge of the consequences flowing from the legally significant act of effecting a domicile change. Since P will have retained counsel before initiating formally the wrongful death action, she will have had the opportunity to be made aware of the potential legal consequences resulting from her domicile change. She seems to be in no position to assert successfully a due process[30] surprise argument. Moreover, since the forum's conclusion is predicated on the legitimate interest of Maryland, P's domicile, in the specific issue presented, it is a choice-of-law resolution comfortably resting on legal contacts automatically convertible into acceptable legal interests on the part of Maryland. The forum has done no more than to

28. White v. King, 244 Md. 348, 223 A.2d 763 (1966), noted at 27 MD. L. REV. 85 (1967).
29. *See* note 12, *supra*.
30. U.S. CONST. amend. XIV, § 1.

utilize interest analysis in such a way as to resolve a choice-of-law problem by the application of the law (and in this instance the total law, including the indicative law) of a state having the paramount interest in the issue presented.

Let's reverse the consequences. If P had been domiciled in Maryland at the time of X's death in Massachusetts, and subsequently acquired a new domicile in New York, her after-the-death move would have the potential of enhancing the dollar value of the wrongful death action. Should the New York forum consider that domicile change in resolving the choice-of-law problem presented by the Massachusetts ceiling on recovery? I think the answer must be yes. Still assuming that the forum finds that P's domicile state has the paramount interest in the issue presented, because of its concern over the economic integrity of its domiciliary, it would pervert the basic rationale underlying interest analysis to ignore the legal fact of P's New York domicile. If that domicile is recognized judicially, nonapplication of the Massachusetts ceiling seems certain.

What considerations might deter the forum from so concluding? First, the forum could be concerned that its decision would have the effect of influencing others in circumstances similar to P's to migrate to New York. That kind of migration raises two related concerns: (1) such dependent survivors could impose an undue economic burden on New York, and (2) such migration could increase New York's population at a time when it did not care to have a population increase. The first concern seems not to be an overwhelming one. If New York takes into account P's change of domicile, with the resultant non-application of the Massachusetts ceiling, P's recovery will have the potential of compensating her for the pecuniary loss occasioned by X's death. Presumably, then, P would create no unique economic burden for New York as a single additional self-sustaining domiciliary.

The second concern is a slightly more complicated one, if for no other reason than its capacity for raising a constitutional problem. May the New York forum, in the process of resolving a choice-of-law problem, take into account the potential effect of that resolution on New York's population, and so resolve the problem that the likelihood of a population increase is averted? The privileges and immunities clause,[31] the equal protection clause[32] and a recent three-judge decision in a

31. U.S. CONST. art. 4, § 2.
32. U.S. CONST. amend. XIV, § 1.

federal court in Wisconsin[33] at least imply that it may not. If it may not, the court, once judicially recognizing P's New York domicile, could not avoid the choice-of-law consequences of that legal fact. P would enjoy the non-application of the Massachusetts ceiling, and New York would be compelled to expose itself to a potential immigration of wrongful death action plaintiffs (as new domiciliaries) previously domiciled in other states having wrongful death action recovery ceilings or indicative laws which would impose such ceilings.

If, on the other hand, the New York forum would be constitutionally free to consider its state's (presumed) desire not to enlarge its population, the court would be compelled to weigh that desire (which would be fulfilled by the application of the Massachusetts ceiling) against New York's desire to avoid having potentially indigent domiciliaries who might become state wards (which would be fulfilled by the non-application of the Massachusetts ceiling). The forum would be weighing competing interests of the same state in a specific issue. Yet, New York's constitutional and internal judicial law, repudiating such recovery ceilings, would not be dispositive of the issue since each was fashioned for wholly domestic purposes, and our case presents a choice-of-law problem. Judicial resolution of the issue probably would be influenced greatly by the court's prediction of how many wrongful death action plaintiffs would be induced to become New York domiciliaries if such a domicile change enlarged the dollar value of the action.

In making that prediction, the court would be assisted enormously if counsel were permitted to demonstrate to the court (a) the number of states having wrongful death action recovery ceilings, (b) the number of states having indicative laws which would impose such ceilings, (c) the number of wrongful death actions per year in each of those states, and (d) the number of those actions in which after-the-death domicile changes could affect the dollar value of the cause of action. Should counsel be permitted the opportunity to adduce such evidence, thus enhancing the degree of specificity of facts relevant to the court's decision? The answer should be yes. Otherwise, the court's prediction is much less likely to be an accurate one and, by definition, it will be speculation without available data. Let's assume such information is received by the court and that it impels the court to the conclusion that non-application of the Massachusetts ceiling would not result in an undesirable population expansion in New York. Then the court could

33. Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

refuse application of the ceiling with some degree of certainty that the state's desire for a relatively stable population would not be frustrated. But suppose, despite judicial receipt of the data indicated above, the court's prediction proves to be inaccurate and experience demonstrates that a much larger number of wrongful death action plaintiffs than anticipated are enticed into New York as domiciliaries, contrary to New York's population control desires. Should a New York court subsequently confronted with a similar choice-of-law issue consider that experience in resolving the issue? Of course. The forum would then have the advantage of an enhanced degree of specificity about a fact relevant to the choice-of-law decision.

There is a second consideration which might deter the court from recognizing P's domicile change, and, therefore, should be considered here. D might assert that judicial recognition of the after-the-death change of domicile, with its dollar value consequence, violates D's due process[34] rights. In essence, D's argument would be that it had a right to rely on a random distribution of domiciles on the part of the wrongful death action beneficiaries, unaffected by after-the-death domicile changes by those beneficiaries. To recognize such domicile changes would frustrate D's legitimate expectations, subject it to choice-of-law decisions it could not have contemplated and thereby impose liability to a constitutionally disproportionate extent. Perhaps the single most critical question to be determined in resolving that constitutional assertion is the propriety of D's expectation of a random, which in this instance means static, distribution of domiciles. Every natural person has the legal and factual capacity to change his domicile. D, as a legal entity, should be held to knowledge of that capacity. Therefore, factually, D could not reasonably have anticipated unchanged domiciles on the part of the wrongful death action beneficiaries. More precisely, what D would be asserting is something like this: It could and should have anticipated after-the-death domicile changes by the beneficiaries, but it could not have anticipated that any legal consequences would have followed from such domicile changes.

The assertion is not very persuasive. From the earliest cases of interest analysis, it has been clear that the interest of plaintiff's state of domicile could be sufficiently great to indicate the manner in which choice-of-law problems would be resolved.[35] More specifically, it has been clear that,

34. U.S. CONST. amend. XIV, § 1.
35. Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959);

in determining the applicability of a wrongful death action ceiling on recovery, the interest of plaintiff's domicile could be sufficiently great to dictate the manner in which that particular choice-of-law problem would be resolved. The single most influential reason for that determination has been the domicile state's interest in the continuing economic integrity of its dependent domiciliary. When that conclusion is coupled with the predictability of domicile changes by wrongful death action beneficiaries, D's due process argument tends to evaporate.

It is concluded and suggested, therefore, that in resolving the choice-of-law problem of the applicability of a ceiling on recovery in a wrongful death action the court should recognize and give appropriate effect to an after-the-death change of domicile by the beneficiary, whether such a change tends to diminish or enhance the dollar value of the action.

Let's consider now a different fact relevant to the choice-of-law problem and about which counsel may offer, or a court may desire, information capable of producing an enhanced degree of specificity. We can do so and still retain most of the original hypothetical set of facts, discarding only P's change of domicile after X's death. The choice-of-law problem remains whether or not to apply the Massachusetts ceiling on wrongful death action recoveries. It already has been noted that the state of domicile of P (New York) has a legitimate interest in that issue because, if the ceiling is imposed, P may become indigent and a state ward. That interest on the part of P's domicile state may be deemed greater than the interests of Massachusetts in having its ceiling imposed, even in a case where the defendant is a Massachusetts corporation.

But suppose counsel for the defendant offers to prove that P is the life beneficiary of an irrevocable trust which assures that she will be comfortably cared for, economically, the rest of her life. Let's assume that the settlor was not one whose death would give rise to a wrongful death action in which P would be a beneficiary.[36] Should the court receive and consider the evidence in resolving the choice-of-law problem? Rather clearly, the evidence, if received and considered, has the capacity

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Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). The interest of plaintiff's state of domicile was indicated more recently in *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), and emphasized in Mr. Justice Roberts' dissent in *Cipolla*, 439 Pa. at 573, 267 A.2d at 859. See *Symposium on Cipolla v. Shaposka—An Application of "Interest Analysis,"* 9 DUQ. L. REV. 347 (1971).

36. The purpose of the assumption is to eliminate the divergent simultaneous considerations which would confront one interested in P's economic welfare and cognizant that his death might leave a wrongful death action. That dilemma is considered later in regard to husband's purchase of life insurance and his estate planning.

of diminishing substantially New York's concern that, if the Massachusetts ceiling is imposed, P will become an indigent ward of her domicile state. To the extent that such a concern is the primary basis of New York's legitimate interest in the issue to be resolved, the evidence is relevant.

Two principal objections to the evidence can be anticipated: (1) consideration of P's economic status would violate the equal protection clause,[37] and (2) consideration of P's economic status would have an adverse policy effect.

The constitutional objection presumably would go something like this. To the extent that P's economic status is considered in determining whether or not to impose the Massachusetts ceiling, the court would be engaged in fashioning one law for the wealthy and a different one for the not so wealthy. Stated that way, the objection has substantial surface appeal. After all, should there not be one law for both the rich and the poor?[38] There are, however, several factors to be considered before that rhetoric is conclusively embraced.

First, it should be remembered that the hypothetical case before the court is a wrongful death action. By generally accepted judicial precedent, the dollar value of such an action will be directly and dramatically affected by the economic status of the decedent. Decedent's income at the time of his death and his demonstrated and potential earning capacity will be critical factors in determining the amount of support P could have contemplated receiving from X, had he been permitted to live out his life expectancy. If X was a lawyer earning $70,000 a year at the time of his death, with a demonstrated upward curve in his income which was likely to have continued for another 20 years, the dollar value of P's wrongful death action would be substantially greater than would be the case if X had been a construction la-

37. U.S. CONST. amend. XIV, § 1.

38. There have been recent judicial indications to the contrary. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that a state could not deny access to its divorce courts to those unable to pay the court fees and costs attendant to such an action. In finding such denial a violation of due process, the Court may have been equating litigants with disparate financial means, but the consequence of its decision is to exact such fees from those able to pay them and to forgive such fees for those unable to pay. In *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1971), *prob. juris. noted*, 401 U.S. 991 (1971), a three-judge court determined that Pennsylvania's confession of judgment provision, PA. STAT. ANN. tit. 12, § 739 (1957), was violative of the due process rights of natural persons having incomes of under $10,000 a year who did not knowingly waive their rights by signing leases or consumer transaction agreements containing such a provision. Rather surprisingly, defendants did not appeal; only the plaintiffs appealed, seeking to have the provision held unconstitutional without regard to income. 401 U.S. 991 (1971). *Swarb* was affirmed by the Court, 40 U.S.L.W. 4227 (February 24, 1972).

borer earning $4 an hour, with no demonstrated or likely increase in earnings, and demonstrated and likely periods of unemployment due to seasonal layoffs. With the dollar value of a wrongful death action so directly dependent upon the economic status of decedent, it seems a bit paradoxical to suggest that consideration of the beneficiary's economic status would be unconstitutional.

Second, it should be remembered that the problem before the court is one of choice-of-law. If the court utilizes interest analysis in resolving that choice-of-law problem, the court must determine which of the competing states has the greater interest in the particular issue to be decided. It is for the purpose of diminishing the interest of P's domicile state, and thereby relatively enhancing the interest of Massachusetts, that counsel for D has offered the evidence of P's economic status. Consequently, if the forum considers the evidence for the purpose offered, it will be doing so not to determine the direct applicability of one state's dispositive law, but for the choice-of-law function of intelligently weighing the competing interests of the two states. Stated another way, the New York court will not be considering P's economic status for the purely internal purpose of determining the applicability of New York's no-ceiling law, but, rather, for the purpose of determining whether New York or Massachusetts has the greater interest in the specific issue identified: Should the ceiling be imposed?

The distinction is more than a play on words. When the framers of the New York constitution included a provision prohibiting the imposition of a ceiling on wrongful death action recoveries, they imposed a mandate on the state legislature and the state courts in dealing with wholly local or internal wrongful death actions. Both were precluded from imposing such a ceiling in such wholly local actions. Yet neither was precluded from imposing such a ceiling in wrongful death actions in which New York's role was solely that of the forum, or in which some state other than New York had a legitimate interest in the imposition of such a ceiling.[39] Where New York's role was simply that of the forum, such a prohibition almost certainly would be unconstitutional.[40] Where some other state had a greater interest in the issue, such a prohibition almost certainly would be simultaneously unwise and incon-

39. Maynard v. Eastern Air Lines, 178 F.2d 139 (2d Cir. 1949).

40. Absent a legitimate interest in the issue presented, the forum's refusal to apply a sister-state's ceiling would violate the full faith and credit clause. U.S. CONST. art. IV, § 1. See Seidelson, *supra* note 24, at 563; Seidelson, *Full Faith and Credit: A Modest Proposal . . . or Two*, 31 GEO. WASH. L. REV. 462 (1962).

sistent with interest analysis.[41] By way of further elaboration, one could concede the impropriety of a New York court's consideration of the economic status of a wrongful death action beneficiary in determining the applicability of New York's no-ceiling law in a wholly domestic case without conceding the impropriety of such consideration in resolving the choice-of-law problem as to which of two states has the greater interest in the issue of whether or not a ceiling should be imposed.

The distinction does not rest solely on the fact that New York's no-ceiling law is of state constitutional origin. For example, the Massachusetts ceiling is a legislative product absent state constitutional sanction. Yet in a wholly domestic wrongful death action, that statute would be an affirmative mandate requiring a Massachusetts court to impose the ceiling. Consideration of the economic status of the wrongful death action beneficiary in that wholly domestic case would be a judicial impropriety. If, however, the Massachusetts court found itself hearing a wrongful death action in which Massachusetts had no interest other than that of forum, imposition of the Massachusetts ceiling almost certainly would be unconstitutional. If the Massachusetts court found itself hearing a wrongful death action in which decedent had been, and the beneficiary and defendant were, domiciled in some state other than Massachusetts (with Massachusetts being the site of the death-producing injury), imposition of the Massachusetts ceiling, through the application of lex loci delicti,[42] despite precedent, would surely be inconsistent with interest analysis. Moreover, in that last instance, should the Massachusetts court decide to utilize interest analysis, consideration of the economic status of the beneficiary would not be clearly inappropriate, as it would be in a wrongful death action purely local to Massachusetts. It seems, then, that a court enjoys greater latitude in considering evidence for the purpose of resolving a choice-of-law problem than it does for the purpose of determining the direct applicability of the dispositive law of its own or some other state.

Such a conclusion ought not to be surprising. Generally, the dispositive laws of a given state, whether of constitutional, legislative or judicial origin, are fashioned for the purpose of governing wholly local proceedings. When a court finds itself confronted with a choice-of-law

41. Tramontana v. Varig Airlines, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 943 (1966).
42. *Cf.*, Snow v. Northeast Airlines, Inc., 176 F. Supp. 385 (S.D. N.Y. 1959).

problem, it is not bound by those dispositive laws intended for purely local application. Moreover, if the court has adopted interest analysis as its technique for resolving choice-of-law problems, it must determine which state has the greatest interest in the specific issue presented. To do that, the forum must weigh the interests of the competing states in that specific issue. That process of weighing each state's interests necessarily requires consideration of factors inapposite to determinations of the applicability of a state's dispositive laws to wholly domestic cases.

This is not to suggest that the totality of the judicial process involved in interest analysis is unrelated to the purposes underlying the dispositive laws of the competing states. In fact, once the court has identified the specific issue to be resolved and the existence of a conflict between the dispositive laws of the states involved, the court will be required to determine the respective reasons for the conflicting dispositive laws as a critical step in determining which state's interest is paramount. Thus, in our hypothetical case, once finding a conflict between the dispositive law of New York (no ceiling) and the dispositive law of Massachusetts (ceiling), the court must decide what reasons or purposes explain the existence of each of those conflicting laws. Still assuming that the court concludes that the principal purpose to be achieved by New York's no-ceiling law is the prevention of indigency on the part of the wrongful death action beneficiary (once that beneficiary is identified as a New York domiciliary), the court will have determined that New York has a legitimate interest in the specific issue.

To determine the relative significance of New York's interest, as opposed to the interest of Massachusetts in the imposition of its recovery ceiling, the court may well decide that the likelihood of that potential indigency being realized is a factor to be considered. If the beneficiary's economic status is such that the potential will never be converted to reality, even with the imposition of the Massachusetts ceiling, New York's interest has been diminished in relation to the interest of Massachusetts. That impact on the relative interests of the two states comes as the product of judicial consideration of a factor (P's economic status) which would be irrelevant in determining the applicability of either state's dispositive law in a wholly local proceeding—but which is relevant and appropriate in determining which state has the superior interest for the purpose of resolving a choice-of-law problem. As to that latter purpose, the court should be free to consider all those factors affecting each state's interest in the issue to be resolved.

Should the New York court conclude that, because of P's demonstrated economic status, New York's interest in the issue is substantially diminished, with a relative enhancement of Massachusetts' interest, and therefore the Massachusetts ceiling should be imposed, it would be fashioning one indicative law for the wealthy (and presumably a different indicative law for the not so wealthy) only because the beneficiary's economic status is so directly and intimately related to New York's interest in the choice-of-law problem to be resolved. It would not be determining that New York's dispositive law is inapplicable to wealthy wrongful death action beneficiaries in wholly local proceedings or that the Massachusetts dispositive law is applicable only to wealthy wrongful death action beneficiaries in wholly local (Massachusetts) proceedings. In fashioning an indicative law which takes into account the economic status of the plaintiff, the court would merely be recognizing a factor critical to New York's interest in the choice-of-law problem. If the economic status of a litigant must be ignored in resolving a choice-of-law problem through interest analysis in a case where the interests of one or both of the competing states rest almost entirely on economic considerations, interest analysis is likely to become as stultified as its tort predecessor, lex loci delicti.

Perhaps the most absolute way of determining the constitutional propriety of judicial consideration of P's economic status in resolving the choice-of-law problem is to fashion a statute so providing.[43] Assume that the New York state assembly enacted a choice-of-law statute providing that (1) no ceiling on wrongful death action recoveries should be imposed, (2) except in cases where a state having such a ceiling has a legitimate interest in that issue, (3) provided, however, that even then the ceiling should not be imposed on a New York domiciled beneficiary, (4) where such imposition posed a threat that such beneficiary would become an indigent ward of the state. Would such a statute violate the equal protection clause? I think not. The statute would have described a discernible class of persons who were to be treated in a special way, with that special treatment bearing a rational relationship to the characteristics of the class and based on an appropriate state concern. And, after all, a court's consideration of P's economic status in resolving the same choice-of-law problem, absent such a statute, would be based on exactly the same factors.

It was noted earlier that decedent's economic status would directly

43. *See generally*, LEFLAR, AMERICAN CONFLICTS LAW § 98 (1968).

affect the dollar value of P's wrongful death action. There are other instances in which economic status bears directly on legal consequences: liability and the extent of liability for federal and often state and local taxation, eligibility for welfare assistance, the amount of social security benefits which may be retained by an employed recipient. Recently, a New York appellate court asserted jurisdiction over a *Seider*-type case even though the plaintiff was a non-resident of New York—in large measure because of the economic status of the plaintiff.[44] In each of the above instances, the economic status of the individual immediately involved in the legal process was deemed critical to the result. In each instance except the last the individual's economic status was critical to the direct application of a sovereign's dispositive law. In the last example, the plaintiff's economic status was vital to the sovereign's determination to assert jurisdiction. Those precedents suggest further and a fortiori the constitutional propriety of judicial consideration of P's economic status in deciding which of two competing states has the greater interest in the question of whether or not a ceiling should be imposed in her wrongful death action.

It is suggested that where the interests of one of the competing states in a choice-of-law problem are based on that state's concern over the economic integrity of one of the litigants, it does no violence to the equal protection or due process clause if the forum hears and considers evidence of the economic status of that litigant in resolving the choice-of-law problem. In fact, if such consideration is deemed to be violative of the equal protection clause, in every case where a state's interests are predicated on its concern over the economic integrity of a litigant, the forum will be compelled to resolve the choice-of-law problem in judicial ignorance of the factual degree and extent of that state's interest. In such a situation, the forum could easily be placed in the awkward posture of determining that New York's interests were superior to those of Massachusetts because of the domicile's legitimate interests in avoiding the indigency of one of its domiciliaries in a case in which everyone in the world knew to a certainty that such indigency could not result.

Let's change one aspect of our hypothetical case. Instead of having P the life beneficiary of an irrevocable trust, let's leave her without any independent source of means or income after X's death. Suppose that,

44. McHugh v. Paley, 63 Misc. 2d 1072, 314 N.Y.S.2d 208 (1970); *Cf.*, Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (1968). See Seidelson, *Seider v. Roth, et seq: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970).

before learning of that fact, the court finds that the competing interests of New York and Massachusetts are rather neatly balanced. If counsel for P offers evidence of her economic status, should the court receive it? The answer must be yes. After all, the offered evidence demonstrates that New York's interest in preventing the indigency of a New York domiciliary is more than a general and theoretical concern; if the Massachusetts ceiling is imposed, P will almost certainly become indigent (and a ward of the state of New York) within a predictable time period. That enhanced degree of specificity about P's economic status, which converts theory into reality, necessarily enhances New York's interest in the specific issue to be resolved. How can judicial consideration of such evidence be deemed unconstitutional? Just as consideration of P's economic status, to the ultimate litigation jeopardy of P, in resolving the choice-of-law problem should not be considered violative of P's equal protection rights, so should such consideration, to the ultimate litigation jeopardy of D, not be deemed violative of D's due process rights. In both cases, the evidence of P's economic status is a legitimate and appropriate factor to be considered judicially in determining which state's interests are superior.

Assuming the constitutionality of such consideration, there remains the question of the wisdom of considering P's economic status as a matter of policy. If the court does consider P's economic status in resolving the choice-of-law problem, is there created the potential for any adverse consequences? Theoretically, yes. If the fact that P is the life beneficiary of an irrevocable trust may jeopardize her in the judicial resolution of the conflicts problem, such trusts may be eschewed. The settlor, during his lifetime, could be advised by counsel that if he created such a trust it could adversely affect the dollar value of a wrongful death action arising out of X's death and brought by P. That advice would bear some potential for dissuading the settlor from establishing such a trust. Presumably, the absence of that form of assurance of P's economic integrity would be an adverse consequence from the point of view of New York, P's domicile. Conversely, if P is without any independent source or means of income, consideration of her economic status in resolving the choice-of-law problem would enhance the dollar value of the action. Theoretically, that could persuade P and others interested in her economic integrity to strive toward that economic condition on the part of P. That certainly would be an adverse consequence from the point of view of New York. The critical question becomes: Is either of

those theoretical potentials likely to be realized? The apparent answer is no. It is difficult to imagine that one sufficiently concerned about P's continued economic integrity to consider establishing an irrevocable trust with P as a life beneficiary, would be dissuaded from doing so by the possibility that P may become the beneficiary of a wrongful death action in which two states have legitimate interests in the issue of damages and one of the two states has a recovery ceiling. Similarly, it is nearly inconceivable that P or anyone interested in her continued economic integrity would be persuaded to strive toward making her a potential indigent by the same set of contingencies. The court should not be deterred from considering P's economic status in the process of resolving the choice-of-law issue by potential adverse consequences which predictably would never be converted into realities. Should the prediction prove to be erroneous, as demonstrated by experience, the court could then re-examine the validity of the policy reasons stated.

The same hypothetical case gives rise to a related problem involving the propriety of examining P's economic status. Let's eliminate the irrevocable trust in favor of P. Instead, let's asume that counsel for D offers to prove to the court that P has received $500,000 in life insurance benefits as a result of X's death. Should the court accept and consider the offered evidence in resolving the choice-of-law problem as to whether or not a ceiling on recovery should be imposed? The evidence is relevant in that it tends to demonstrate the unlikelihood of P becoming an indigent ward of her domicile state if the ceiling is imposed. Constitutional considerations similar to those examined in regard to the irrevocable trust suggest that judicial examination of the evidence would do no violence to P's equal protection rights. That leaves the policy considerations.

If the court does receive and consider the offered evidence of life insurance benefits, may adverse social and economic consequences be anticipated? There is the potential that New York husbands will purchase less life insurance for the benefit of their New York wives if a consequence of substantial insurance benefits is an enhanced likelihood that a ceiling on recovery in wrongful death actions may be imposed. Is the potential sufficiently likely to be converted into reality to dissuade the court from receiving and considering the offered evidence? First, the statistical likelihood of such a case arising in terms of a coincidence of factors such as a husband's death arising from an injury sustained by him in a state having such a ceiling is about the same as it would be in

the situation involving the trust. However, statistically, the likelihood of a husband purchasing life insurance for the benefit of wife is probably much greater than the likelihood of someone creating an irrevocable trust for P's benefit. The majority of husbands can afford the former economic protection for their wives; only a few individuals can afford the latter method of providing economic protection for another since it would require an extraordinarily large sum of money (or its equivalent) to comprise a corpus sufficiently great to assure a comfortable life income to the beneficiary. Numerically then more husbands will be considering the purchase of life insurance for the protection of their wives than will individuals be considering the creation of an irrevocable trust for the protection of another. Therefore more husbands may consider the potential adverse consequence in a conflicts case arising from substantial life insurance benefits than other individuals may consider the same consequence arising from a substantial life income from an irrevocable trust. Just in terms of numbers, the conflicts potential may have the capacity of affecting more husbands and their wives if the court considers evidence of P's life insurance benefits. Yet, there is a countervailing factor that may affect the numbers game. Of the total number of husbands contemplating the purchase of life insurance, only a handful are likely to consult a lawyer. Of the total number of individuals contemplating a trust, virtually all will consult a lawyer. Thus, while the first total may be much larger than the second, the portion of the first total who will become aware of the possible choice-of-law consequence probably will be not much larger numerically than the portion of the second total who will become so aware, at least as the result of direct legal counselling. But even absent direct legal counselling, husbands contemplating the purchase of life insurance may become aware of the choice-of-law consequence as a result of the kind of general awareness of judicial opinions which ultimately circulates among the community. One could predict, therefore, that such a general awareness of judicial action would result in a greater absolute number of husbands contemplating the purchase of life insurance becoming aware of the conflicts potential than the absolute number of individuals contemplating irrevocable trusts. But absolute numbers of those becoming aware of the choice-of-law consequence should not be deemed exclusively critical to the propriety of judicial consideration of the offered evidence. More critical by far would be the court's determination of how likely those in each class (husbands contemplating life insurance

to protect their wives and those individuals contemplating an irrevocable trust to protect another) would be to abstain from the contemplated action by realization of the potential consequence in a wrongful death action raising the choice-of-law problem under consideration.

The purchase of life insurance by a husband for the economic protection of his wife is an act done with conscious awareness of the certainty of death and an abiding desire to afford economic protection for wife should husband predecease her. Such a purchase is an act done for the explicit purpose of providing wife with some degree of economic stability upon husband's death. To borrow a phrase of legal art from another context, it is an act done in contemplation of death.

The amount of life insurance purchased by husband with wife as the primary beneficiary may be affected by a number of factors: husband's purchasing capacity in terms of money available for such a purpose, husband's purchasing capacity in terms of an insurer's willingness to undertake the risk, and the contemplated economic needs of wife. Perhaps the last factor would be the most critical in determining the amount of life insurance purchased. And it is a factor which can be affected by a number of circumstances: wife's capacity to earn money upon husband's death, the number of minor children who will be dependent on wife should husband predecease her, and other sources of money available to wife upon husband's death. In turn, other sources of money available to wife upon husband's death can be affected by social security benefits, annuities purchased by husband and having dollar value at his death, and the manner in which husband dies. Should husband's death be the result of an accident, two economic consequences may ensue: first, the possibility of double recovery under the life insurance contract, and, second, the possibility of a wrongful death action against the entity responsible for husband's death. While it is only a possibility, it seems not unduly inconsistent with reality to suggest husband's active consideration of both the likelihood of a wrongful death action, and, assuming such an action, its potential dollar value, in deciding the amount of life insurance to purchase for wife's benefit. If community knowledge of judicial decisions suggests that the greater the amount of life insurance the greater the likelihood of a ceiling on recovery being imposed, husband may be persuaded to purchase less insurance than he otherwise might. If husband travels into states having wrongful death action recovery ceilings, that dissuasive effect may be intensified. Consequently, there seems to be a predictable risk that

consideration of wife's economic status, as it is affected by life insurance benefits received by her upon husband's death, may have the socially and economically undesirable effect of inclining husbands toward purchasing less life insurance for their wives. To the extent that such a conclusion is achieved by the court, the court probably would conclude that it is unwise policy to consider such life insurance benefits in determining the applicability of a wrongful death action ceiling on recoveries. Such a conclusion suggests an additional related problem.

Suppose that counsel for D offers to prove that the amount of money which wife will receive from husband's estate—separate and apart from life insurance benefits—assures that P will never become an indigent ward of the state of her domicile, as a means of persuading the court to impose the Massachusetts ceiling. Should the court receive and consider the offered evidence? Again, the evidence is relevant, and consideration of it seems unlikely to be unconstitutional. But how about the policy implications? As was the case with husband's purchase of life insurance, his determination of how much of his total estate to leave to wife at his demise will have been made in contemplation of his death. Whether as the result of direct legal counselling or general community awareness, at the time of making that determination husband may well have been aware of its potential for affecting the choice-of-law problem here considered. If so, (and assuming the greater the portion of husband's estate left to wife the greater the likelihood that the ceiling on recovery would be imposed), husband may have been dissuaded from leaving wife as great a portion of his estate as he otherwise might have. Presumably, the court would consider it to be an undesirable policy to fashion a rule of law which would deter husbands from leaving their wives as large a portion of the husbands' estates as the husbands would wish to. It is suggested, therefore, that the court should not consider the value of X's estate left to P in determining the applicability of the Massachusetts ceiling.

To what extent should that determination be affected by the legal fact that, whatever X's wishes in the matter may have been, P will receive an irreducible portion of X's estate?[45] If X died testate, devising or bequeathing to P the statutory minimum share of his estate, or any portion greater than that minimum but less than the totality of the estate, he may have been influenced by a fear that leaving wife a greater portion would jeopardize her right to an unlimited recovery in a wrongful death

45. N.Y. ESTATE, POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967).

action arising from X's death. If X died intestate in circumstances in which P would receive less than the totality of X's estate, X may have been dissuaded by a similar fear from executing a will leaving P the entire estate. But what if X died testate leaving P the entire estate? Would the court then be safe in assuming that X had not been affected by such a concern? Probably not. After all, X could have disposed of a portion of his property by inter vivos actions, thus diminishing the dollar value of the total estate left to P. Should the court hear and consider evidence as to whether or not X did so, and, if so, because of his concern over the potentially adverse litigation consequence? I think not. Once the court has determined there is a significant potential that husband may be dissuaded from providing by will or intestacy as fully as he would have wished for wife, the court has determined the existence of a legitimate policy consideration which justifies rejecting evidence of the extent of those provisions. The possibly undesirable consequences were there, X may have been aware of them and, therefore, affected by them. Moreover, and of critical significance, that effect would have been a potentially influential factor at a time when X was engaged in making an irrevocable decision. Those considerations suggest the impropriety of judicial consideration of the dollar value of P's share of X's estate in determining the applicability of the Massachusetts ceiling.

Earlier it was suggested that it would be appropriate for the forum to consider P's economic status as it would be affected by the existence of an irrevocable trust of which P was a life beneficiary. Is that conclusion inconsistent with the suggestion at the end of the preceding paragraph? I don't think so. In each instance, the critical determination was the degree of likelihood of judicial consideration dissuading the actor from performing a persumably desirable act. The settlor, someone other than P's husband, and one whose death would not give rise to a wrongful death action for the benefit of P, would be less likely than X to be so dissuaded. In addition to the reasons for that conclusion set forth earlier, another should be noted. X, as P's spouse, would be uniquely susceptible to consideration of the wrongful death action consequences of his decisions regarding P's economic status after his death. It would be that eventuality—his death before that of P—which would give rise to both the wrongful death action and P's receipt of her share of X's estate. That concurrence of consequences, and X's realization of them, would make X far more sensitive to the possibility of the estate consequences adversely affecting the dollar value of the wrongful death action.

Still earlier in the article it was suggested that P's change of domicile after X's death should be considered in determining the applicability of the Massachusetts ceiling. Is that conclusion inconsistent with the suggestion that the court should not consider X's estate planning in regard to P? I think not. Once more, the critical determination is the degree of likelihood that such judicial consideration would dissuade the actor from engaging in a desirable act. P would appear to be less likely to be dissuaded from effecting a domicile change "in a time of intense bereavement" than X would be dissuaded from providing fully for his potential widow, by the subsequent litigation consequences. To complement the reasons already offered in support of that conclusion, the marked difference in the degree of finality of those two acts should be emphasized. While X, throughout his lifetime, may have the continuing capacity to reject or amend any previously fashioned arrangements for P's economic security after his death, each time he exercises that capacity the same concern over litigation consequences will be present and equally pressing. And, like each of us, X will never know to a certainty that there will be one more chance to reconsider, even with the continuing concern; death, while certain, is incapable of chronological prediction. P, however, in attempting to assuage her acute emotional reaction to X's death, possesses two methods of avoiding irrevocable legal consequences flowing from a change of domicile. First, she may effect a temporary, and relatively long lasting, residence change to any place more conducive to emotional convalescence, without effecting a change of domicile. Second, should she make a move which does constitute a change of domicile, for general convalescence purposes, she would continue to possess the capacity to effect another domicile change prior to formal initiation of the wrongful death action or at least prior to judicial determination of the choice-of-law problem. Thus, judicial consideration of P's domicile change seems not to possess that level of likelihood of an adverse social consequence sufficient to justify judicial ignorance of that relevant fact. Professor Weintraub's concern over P's psychic well-being is indeed convertible into a legitimate judicial concern; it would seem, however, that the forum would be wholly justified in determining that judicial consideration of P's after-the-death change of domicile does not possess a significant likelihood of deterring P from ameliorating her "intense bereavement" by a change of locale.

By way of general summary, these conclusions and suggestions are offered. A court confronted with a choice-of-law problem should be

willing generally to hear and consider evidence having the capacity to lend an enhanced degree of specificity to any of the facts relevant to the conflicts issue. In determining specifically when to hear and consider such evidence, the court should determine (1) if consideration of the evidence is constitutionally permissible, and (2) if consideration of the evidence is unlikely to result in undesirable consequences in terms of future conduct. If the court decides both of those questions affirmatively, it should hear and consider the offered evidence. In that manner, courts confronted with choice-of-law problems and utilizing an interest analysis methodology to resolve those problems will be best equipped to determine accurately the true weight and significance of the interests asserted. In doing so, courts will be taking a logical step forward in regard to the appropriate function of counsel in assisting courts to resolve such problems. Under the older application of lex loci delicti to resolve all issues in a tort case, counsel had little or no effective role to play in resolving the conflicts problem. Once the court characterized the action as "tort," it automatically punched the lex loci delicti button and the choice-of-law problem was resolved. With the coming of interest analysis, counsel achieved the opportunity of attempting to demonstrate to the court which of the competing interests were of greater significance. That, in turn, has compelled the courts to become ever more selective and discriminating in weighing those competing interests, and that heightened judicial effort necessarily must produce ever better results. Counsel's role should be further enlarged to permit the introduction of evidence which will provide the court with an enhanced degree of specificity as to those facts relevant to resolution of the conflicts problem. In granting counsel that role, courts will be providing a greater degree of assurance that the underlying rationale of interest analysis—resolution of choice-of-law problems in a sensible and rational manner—will be satisfied.