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Conflict of Laws in Estate Plannning

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CONFLICT OF LAWS IN ESTATE PLANNING

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The usual objective of an estate plan is to so arrange the disposition of an individual's assets as to obtain the nearest possible satisfaction of the ends desired with the least possible cost. The mobility of people and property in our society makes it necessary for the estate planner to consider the conflict of laws problems in nearly every estate plan that passes through his office. If these problems are undetected or ignored, the resulting distortion of the dispositive scheme may substantially defeat the estate owner's desires. For example, multiple administrations in different states often result in a transfer cost even greater than the taxes with which much present-day planning is over concerned. In view of the ever growing number of retired persons in a population that is already less than half native born[1] and the many persons in the state having residences here and elsewhere, the Florida practitioner certainly cannot ignore the significance of conflict of laws.

Since intensive treatment of all areas of conflict of laws relating to estate planning would be impossible within the scope of a single article, only a few of the more significant problems will be treated. Considerable knowledge of conflict of laws on the part of the reader will be assumed, and the article will necessarily only refresh his recollection of the usual approaches to the general area so as to assure a common ground for analysis and comment. Although interstate problems will be dealt with primarily, the international problems should not be minimized. As Florida grows in its standing as an international resort area and a point of entry into the United States, problems of private international law will become more common to the Florida lawyer.

In the Anglo-American system of law there are dual rules of conflict of laws relating to property, one in regard to immovable assets and one in regard to movable assets. Consequently, at the outset of a decision on conflict of laws the forum must characterize the assets in question as either movables or immovables for the purpose of de-

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[1]See U.S. CENSUS (1950).

termining the applicable conflict of laws rules. The local or internal law of a state is usually concerned only with the distinctions between real and personal property for the purposes of administration and descent and distribution. This distinction should be compared with the classification of immovables and movables used in discussing conflict of laws problems. Even though "immovables" relate to interests in land and "real property" covers generally the same subjects, the distinction is worth while because it avoids confusion in that twilight area in which different characterizations may be made in different situations. For example, a leasehold may be considered an immovable for the purpose of choosing the applicable law but be considered personal property within the operation of the law so chosen.[2] Likewise, land subject to a direction to sell or a contract to sell may be characterized as an immovable to determine the governing law but thereafter be considered as personal property for purposes of local law application.[3] This dichotomy enables the reader to more nearly understand the situation in which there is one characterization for the purpose of conflict of laws and another for descent and distribution. Although the problem of characterization must originally be made by the forum in which the case arises, it seems settled that, in the absence of considerations of res judicata, the characterization will finally be determined by the situs of the land in which an interest is claimed.[4]

PART I – DISPOSITIVE PROBLEMS

INTER VIVOS TRANSFERS

Gifts

Questions concerning the effect of a purported gift of an immovable, for example, land, will probably come before the court of the situs of the land. In such event the forum would apply its own law to determine questions of validity and construction of the purported

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[2]Duncan v. Lawson, 41 Ch. D. 394 (1889). *But cf.* Craig v. Craig, 140 Md. 322, 117 Atl. 756 (1922); Despard v. Churchill, 53 N.Y. 192 (1873).

[3]Equitable Trust Co. v. Ward, 29 Del. Ch. 206, 48 A.2d 519 (Ch. 1946); Toledo Soc'y for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W.2d 692 (1953); *In re* Burke, [1928] 10 L.R. 318; *In re* Berchtold, [1923] 1 Ch. 192. *But cf.* Planson v. Scott, 26 Ohio App. 122, 158 N.E. 588 (1927); 29 N.Y.U.L. REV. 1138 (1954).

[4]Clarke v. Clarke, 178 U.S. 186 (1900); Norris v. Loyd, 183 Iowa 1056, 168 N.W. 557 (1918); Paul's Estate, 303 Pa. 330, 154 Atl. 503 (1931).

transfer.[5] Thus the deed should conform to the laws of that state. By statute, however, some states recognize the validity of a deed of land within their borders if it satisfies the law of the place of execution.[6] The effect of a gratuitous transfer of land would be governed by the same law, that is, the situs, even though the question should come up in the courts of a nonsitus state as forum, since the rule that the law of the situs determines the validity of an inter vivos transfer of land is one of the most stable rules in conflict of laws.[7] For example, if a deed executed in *Y* to land in *X* is brought into question in the courts of *F*, the *F* court will look to the law of the situs, *X*. In the usual situation the internal law requirements of state *X* will govern. If, however, *X* has a statute declaring deeds to *X* land valid if valid by the law of the place of execution, *F* will sustain the deed if it satisfies the law of *Y*, since the law of *X* would be applied by the courts of that state if the same case were before them.[8]

Gratuitous inter vivos transfers of movables, for example, chattels, raise more difficult problems than transfers of immovables. At early common law the maxim that "movables follow the person" required application of the law of the donor's domicile to inter vivos transfers of chattels.[9] This view is no longer followed; today the courts apply the law of the location or situs of the chattels at the time of the transfer.[10]

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[5]Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821); United States v. Crosby, 11 U.S. (7 Cranch) 115 (1812); Connor v. Elliott, 79 Fla. 513, 85 So. 164 (1920); Thompson v. Kyle, 39 Fla. 582, 23 So. 12 (1897); Robinson v. Queen, 87 Tenn. 445, 11 S.W. 38 (1889).

[6]*E.g.*, CONN. GEN. STAT. §7087 (1949); ILL. REV. STAT. c. 30, §§19-21 (1955); MICH. STAT. ANN. §26.528 (1953); OHIO REV. CODE §5301.06 (1954); WIS. STAT. §235.23 (1955); *cf.* FLA. STAT. §695.03 (1955).

[7]See McGoon v. Scales, 76 U.S. (9 Wall.) 23 (1869); Thompson v. Kyle, *supra* note 5; STORY, CONFLICT OF LAWS §428 (5th ed. 1857); Cook, *'Immovables' and the 'Law' of the 'Situs,'* 52 HARV. L. REV. 1246 (1939); Goodrich, *Two States and Real Estate,* 89 U. PA. L. REV. 417 (1941); Lorenzen, *The Validity of Wills, Deeds and Contracts As Regards Form in the Conflict of Laws,* 20 YALE L.J. 427 (1911).

[8]See 1 BEALE, CONFLICT OF LAWS §8.1 (1935); DICEY, CONFLICT OF LAWS 59 (6th ed. 1949); RESTATEMENT, CONFLICT OF LAWS §8 (1934).

[9]See Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636 (1892); Nichols v. Mase, 94 N.Y. 160 (1883); Loftus v. F. & M. N. Bank, 133 Pa. 97, 19 Atl. 347 (1890); CHESHIRE, PRIVATE INTERNATIONAL LAW 559 (3d ed. 1947); STORY, *supra* note 7, at 379-80, 390.

[10]Warner v. Florida Bank and Trust Co., 160 F.2d 766 (5th Cir. 1947); Banque de France v. Chase Nat'l Bank, 60 F.2d 703 (2d Cir. 1932); O'Neil v. O'Neil, 43 Mont. 505, 117 Pac. 889 (1911); Goetschius v. Brightman, 245 N.Y. 186, 156 N.E. 660 (1927); *In re* Korvine's Trust, [1921] 1 Ch. 343; Cammell v. Sewell, 5 H. & N. 728,

Although the conflict of laws rule is quite simple, its application in cases involving intangibles is complicated by two factors. First, many intangibles involve some contractual rights, and there is the initial question whether this interest is to be treated as a contract or a property interest. If treated as a contract interest, contract assignment rules apply. Within the United States the assignability of the interest in a contract is determined by the law governing the original contract,[11] while the validity of the assignment itself is tested by the law of the place where the assignment is made.[12] Fortunately, most of the interests of a contractual nature that make up intangible assets are interests in which the obligation is represented by a document that passes from hand to hand much as if it were a chattel. These chattelized contract interests, such as negotiable instruments and negotiable documents of title, are treated as if they were chattels; and the law of the situs of the document or instrument at the time of transfer determines the validity of the transfer.[13]

The problem of transfer of corporate shares is the same in principle, although some problems exist in practice. All of the states have adopted the Uniform Stock Transfer Act,[14] which treats the certificate as the property interest itself rather than merely evidence of property. Clearly, since the act intends to chattelize the certificate, the location of the certificate should determine the applicable law.[15] This result is to be expected, but it is arrived at by the courts by a somewhat circuitous route. Traditionally the transfer of corporate shares has been governed by the law of the place of incorporation of the company.[16] This rule still stands; but, since all states of incorporation now determine the validity of a transfer by the situs of the certificates at the time of transfer, the ultimate governing law by recog-

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157 Eng. Rep. 1371 (1860). *But cf.* Gidden v. Gidden, 176 Miss. 98, 167 So. 785 (1936).

[11]Coleman v. American Sheet and Tin Plate Co., 285 Ill. App. 542, 2 N.E.2d 349 (1936); Northwestern Mut. Life Ins. Co. v. Adams, 155 Wis. 335, 144 N.W. 1108 (1914).

[12]Mutual Benefit Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116, 35 N.W. 853 (1888); Spencer v. Myers, 150 N.Y. 269, 44 N.E. 942 (1896).

[13]United States v. Guaranty Trust Co., 293 U.S. 340 (1934); Weissman v. Banque de Bruxelles, 254 N.Y. 488, 173 N.E. 835 (1930); Embiricos v. Anglo-Austrian Bank, [1905] 1 K.B. 677.

[14]6 U.L.A. 6 (Supp. 1955).

[15]See Peters, *Conflict of Laws Problems Concerning the Uniform Stock Transfer Act,* 41 IOWA L. REV. 414 (1956).

[16]Jellenik v. Huron Copper Mining Co., 177 U.S. 1 (1900).

nition of this reference is the situs of the stock certificate.[17] The problem becomes significant only when the Uniform Stock Transfer Act does not apply, for example, when the act covers only stock issued since its adoption.[18] In that event the local law of the state of incorporation may apply to the shares issued before passage of the act. Within this limited exception the statutory provision of the Florida Stock Transfer Act[19] is of doubtful effect, since it provides that the transfer shall be effective when the certificate is within the state, whether the shares are in local or foreign corporations. There may well be a serious question as to whether a state of incorporation would be required to recognize the Florida transfer of a certificate if the state of incorporation did not chattelize the interest in the certificate. Certainly the weight of authority before the general adoption of the Uniform Stock Transfer Act would recognize only the transfer at the place of incorporation.[20] In view of the general adoption of the act, however, this problem will shortly become academic.[21]

The above instances represent the principal deviations; the authorities clearly indicate that the validity of a gift of either tangibles or intangibles will in most instances be governed by the law of the situs of the subject matter at the time of the gift, that is, at the time of an effective delivery of the subject matter or instrument of gift.

Trusts and Future Interests

a. Immovables

Inter vivos trusts of immovables fall within the traditional situs rule as to governing law.[22] Consequently, since title questions usually arise only at the situs, the situs court usually applies its own law to

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[17]Direction der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22 (1925); Simpson v. Jersey City Contracting Co., 165 N.Y. 193, 58 N.E. 896 (1900); Mills v. Jacobs, 333 Pa. 231, 4 A.2d 152 (1939).

[18]U.S.T.A. §23, 6 U.L.A. 27 (1922). *But cf.* FLA. STAT. §614.24 (1955).

[19]FLA. STAT. §614.24 (1955).

[20]Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Jellenik v. Huron Mining Co., 177 U.S. 1 (1900).

[21]It is possible that an alternative reference may develop to sustain an effective transfer of shares, *i.e.*, transfer will be effective if valid either by law of place of certificate or place of incorporation; see Morson v. Second Nat'l Bank, 306 Mass. 588, 29 N.E.2d 19 (1940).

[22]Acker v. Priest, 92 Iowa 610, 61 N.W. 235 (1894); Peabody v. Kent, 153 App. Div. 286, 138 N.Y. Supp. 32 (2d Dep't 1912), *aff'd*, 213 N.Y. 154, 107 N.E. 51 (1914).

determine the validity of the transfer and the extent or nature of the interests of the parties. Inasmuch as the creation of a trust of land is a gratuitous transfer as between grantor-settlor and grantee-trustee, the foregoing discussion of gifts is applicable in most instances to transfers in trust.[23] In this connection the law of the situs to be applied by a neutral forum includes any applicable conflict of laws rule of the situs.[24]

One of the complicated problems in trusts of immovables concerns a direction to sell or to purchase land in different states. Since the direction to buy or sell is a provision commonly encountered in estate planning, the planner should be aware of the problems that may arise. Like most problems in conflict of laws, the outcome of the case often depends upon the particular question of validity involved. For example, the law of the situs of the land should govern if the issue is the capacity of the settlor to make the grant or if a question of due execution of the deed of land in trust for sale is raised.[25] When validity is doubted because of undue suspension of alienation or undue accumulation of income, however, the policies of the state in which property is held for long periods are involved, and the law of that state should decide the question.[26] Thus, if land in state *X* is transferred to trustees for sale and reinvestment in land or movables in state *Y*, the formalities of the transaction should be governed by the law of *X*, while questions as to the Rule Against Perpetuities should be determined by the law of *Y*. In this way the law of each state decides those questions with which it is most concerned.

A related but separate problem arises when the trustee is not required to convert but may do so under his powers of sale and investment. If the trust is valid under the initial governing law, the purchase of an immovable in another state should not adversely affect its essential validity.[27] The only question should go to the propriety of

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[23]See note 5 *supra* and accompanying text.

[24]See note 8 *supra* and accompanying text.

[25]See Peabody v. Kent, *supra* note 22; LAND, TRUSTS IN THE CONFLICT OF LAWS 29 (1940); Stumberg, *Testamentary Dispositions and the Conflict of Laws*, 34 TEX. L. REV. 28, 32 (1955); Note, 32 COLUM. L. REV. 680 (1932).

[26]*Cf.* In the Matter of Chappell, 124 Wash. 128, 213 Pac. 684 (1923). *But cf.* LAND, TRUSTS AND CONFLICT OF LAWS 30 (1940).

[27]Fisk's Appeal, 81 Conn. 433, 71 Atl. 559 (1908); Acker v. Priest, 92 Iowa 610, 61 N.W. 235 (1894); Bishop v. Bishop, 258 N.Y. 216, 179 N.E. 391 (1932); Matter of Bradford, 165 Misc. 736, 1 N.Y.S.2d 539 (Surr. Ct. 1937); see RESTATEMENT, CONFLICT OF LAWS §242 (1934). Courts do not always indicate their awareness of these problems; see Waterbury v. Munn, 159 Fla. 754, 32 So.2d 603 (1947).

the particular investment by the trustee.[28]

The approach indicated above is not always taken as to trusts with a direction to convert; many courts view the mandatory direction as effecting a change of governing law for all purposes.[29] This of course suggests that no direction to sell or to buy property in a particular state should be included in an estate plan unless the possible ramifications have been thoroughly explored in both jurisdictions. After investigation, however, it may be that the draftsman will find that the conflicts rules of the particular states involved afford means of achieving greater compliance with the wishes of the estate owner.[30] An interesting example of this arose in probating the estate of Marshall Field, whose will covered immovables located in several states.[31] One clause provided that, if the terms of the trust were invalid under the laws of any state, the land located therein was to be sold and the proceeds held under the terms of the testamentary trust, which was governed by different laws.

The use of nonmandatory and hence nonconverting investment authorizations to the trustee also affords a means of gaining the advantages of investment in another state that would deny the validity of the trust if originally created within that state or if a direction to invest in immovables were to be included therein.

Problems relating to future interests of immovables most often arise in cases involving trusts; and, like trusts and gifts of immovables, the problems of validity, extent, and nature of the future interest, as well as its destructibility or construction, are controlled by the situs.[32] The same reference to the situs of immovables has developed in the cases concerning powers of appointment.[33] Illustrative of the usual rule

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[28]McCullough's Ex'rs v. McCullough, 44 N.J. Eq. 313, 14 Atl. 123 (Ch. 1888); Ormiston v. Oleatt, 84 N.Y. 339 (1881).

[29]Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890); Jenkins v. Guarantee Trust and Safe Deposit Co., 53 N.J. Eq. 194, 32 Atl. 208 (Ct. Err. & App. 1895); Mount v. Tuttle, 183 N.Y. 358, 76 N.E. 873 (1906); Bible Soc'y v. Pendleton, 7 W. Va. 79 (1873). This approach is approved and considered the majority view in LAND, TRUSTS IN THE CONFLICT OF LAWS 30 (1940); Note, 29 N.Y.U.L. REV. 1138 (1954). *Cf.* 2 BEALE, CONFLICT OF LAWS §240.3 (1935).

[30]See LAND, TRUSTS IN THE CONFLICT OF LAWS 36 (1940).

[31]Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 (1911).

[32]RESTATEMENT, CONFLICT OF LAWS §§214-22 (1934).

[33]Ligget v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W.2d 720 (1938); Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Russell v. Joys, 227 Mass. 263, 116 N.E. 549 (1917); Sewall v. Wilmer, 132 Mass. 131 (1882); In the Matter of

is a New York case[34] involving Florida and Pennsylvania land, in which the appointment by the donee was treated as invalid in New York, the domicile of the donee, but valid by the law of the situs of the land in question. In sustaining the exercise of the power the court stated:[35]

> ". . . I find that the law of that State [Florida] is applicable to this question with respect to the Florida real estate . . . . The trust fund now before the court contains an undivided interest in Pittsburgh, Pa., real estate, and I find that the law of that State is applicable thereto."

It should be borne in mind that the determinative law is that indicated at the creation of the power; consequently, when the power to appoint is contained in a trust, a subsequent sale and conversion to movable property does not change the governing law.[36]

The law governing trusts and powers of appointment of immovables is in a state of active growth. In the area of trusts generally the autonomy of the settlor in choosing the governing law is developing rapidly.[37] Although still usually limited to trusts of movables, evolution of this autonomy is to be anticipated in the area of immovables as well, particularly through development of the concept of trustee ownership of interests in land as ordinary investments subject to change. Powers of appointment, long characterized as devices whereby the donor's property is directed to a recipient by the donor's agent,[38] have

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Kelly, 161 Misc. 255, 291 N.Y. Supp. 860 (Surr. Ct. 1936); Lawrence's Estate, 136 Pa. 354, 20 Atl. 521 (1890); Blount v. Walker, 28 S.C. 545, 6 S.E. 558 (1888); Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927); see 3 POWELL, REAL PROPERTY §397 (1952); RESTATEMENT, CONFLICT OF LAWS §234 (1934); Mulford, *The Conflict of Laws and Powers of Appointment,* 87 U. PA. L. REV. 403 (1939).

[34]In the Matter of Kelly, 161 Misc. 255, 291 N.Y. Supp. 860 (Surr. Ct. 1936).

[35]*Id.* at 257, 291 N.Y. Supp. at 862.

[36]In the Matter of Sloan, 7 Cal. App.2d 319, 46 P.2d 1007 (1935); Greenough v. Osgood, *supra* note 33; Russell v. Joys, *supra* note 33. *But cf.* Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942); Bible Soc'y v. Pendleton, 7 W. Va. 79 (1873).

[37]Wilmington Trust Co. v. Wilmington Trust Co., *supra* note 36; Amerige v. Attorney-General, 324 Mass. 648, 88 N.E.2d 126 (1949); Chase Nat'l Bank v. Central Hanover Bank and Trust Co., 265 App. Div. 434, 39 N.Y.S.2d 541 (1st Dep't 1943); In the Matter of Chappell, 24 Wash. 128, 213 Pac. 684 (1923).

[38]Wilmington Trust Co. v. Sloane, 30 Del. Ch. 103, 54 A.2d 544 (Ch. 1947); Pitman v. Pitman, 314 Mass. 465, 50 N.E.2d 69 (1943); Harlow v. Duryea, 42 R.I. 234, 107 Atl. 98 (1919).

shown exceedingly rapid development under the impact of the federal estate tax.[39]

As the courts cut through the often outmoded concepts of an earlier time, greater emphasis will probably be placed upon the intention of the donor-settlor and upon the circumstances under which the donee is acting at the time of exercise.[40] As the law stands now, however, the law of the situs of immovables is rather rigidly applied. A possible planning technique that would give choice of controlling law to the settlor of land in a state whose law is unfavorable is to create an inter vivos trust of movables, with administration in a state whose law is sympathetic to the settlor's desires, and permit the trustee to purchase the land in question as an investment.

b. Movables

Trusts of movables, tangible or intangible, are usually the most flexible devices available for carrying out the wishes of an estate owner — at least as far as problems of conflict of laws are concerned. Since future interests in movables are nearly always created in the form of trusts, the problems in both trusts and future interests will be discussed concurrently. Although the issues under consideration may arise in almost any court, they usually arise either at the domicile of the settlor or that of the trustee, probably more often at the latter. It will be the conflict of laws of one of these states that will be in question in most instances.

The gratuitous transfer in trust is of course a gift as far as the transfer itself is concerned. The usual rules relating to gifts apply to trusts, so that the situs of the asset transferred at the time of the creation of the trust controls its validity.[41] The leading case is *Hutchison v. Ross*,[42] in which the settlor was domiciled in Quebec, where he signed a trust agreement that was sent to New York. There the trustee signed it and received delivery of certain securities subject

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[39]Casner, *Estate Planning — Powers of Appointment*, 64 HARV. L. REV. 185 (1950); Craven, *Powers of Appointment Act of 1951*, 65 HARV. L. REV. 55 (1951); Lauritzen, *Drafting Powers of Appointment Under the 1951 Act*, 27 N.Y.U.L. REV. 314 (1952); see also Brown and Brown, *Uses of Powers of Appointment in Iowa Estate Planning Under Current Tax Law*, 40 IOWA L. REV. 607 (1955); Freeman, *If This Be Simplification*, 40 CORNELL L.Q. 500 (1955).

[40]See Durand, *Which State's Law Governs Exercise of Power of Appointment*, 95 TRUSTS AND ESTATES 424 (1956); 50 COLUM. L. REV. 239 (1950).

[41]See note 10 *supra*.

[42]262 N.Y. 381, 187 N.E. 65 (1933).

to the trust. The trust was administered in New York, where it was later attacked on the basis of invalidity under the law of Quebec. The New York court recognized that it was "dealing with a conveyance in trust of documents which in the market-place are treated as property and not merely evidence of property . . . ."[43] After discussing the various contacts that different jurisdictions had with the case, the court concluded that "the validity of a trust of personal property must be determined by the law of this State, when the property is situated here and the parties intended that it should be administered here in accordance with the laws of this State."[44]

The controlling factors in the case were the situs of the movables and the intention of the settlor. Since these assets can be moved at will, particularly intangibles in the form of documents, the ease with which a favorable governing law based on location can be provided is apparent. The other factor of moving consideration for the New York court was the settlor's intention relating to governing law. In the trust area the intention factor is fast becoming the most significant of all. This is reflected in cases, most of which have been decided in New York, that clearly set the pattern of trust litigation in other states.[45] For example, in *Shannon v. Irving Trust Co.*[46] a New Jersey settlor created an inter vivos trust in New York, with a New York trustee, and provided that New Jersey law was to control all questions except com-

[43]*Id.* at 391, 187 N.E. at 69.

[44]*Id.* at 395, 187 N.E. at 71; *accord,* Warner v. Florida Bank & Trust Co., 160 F.2d 766 (5th Cir. 1947) (applying Florida conflicts rules, court sustained a trust established in Minnesota by Florida residents by applying Minnesota law); Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, 25 F.2d 493 (D. Mass. 1928); Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942); Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co., 14 Del. Ch. 332, 127 Atl. 56 (Ch. 1924); Heirs of Hullin v. Fauré, 15 La. Ann. 622* (1860); National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Russell v. Joys, 227 Mass. 263, 116 N.E. 549 (1917); Cutts v. Najdrowski, 123 N.J. Eq. 486, 198 Atl. 885 (Ct. Err. & App. 1938); Appeal of Fowler, 125 Pa. 388, 17 Atl. 431 (1889); see Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927); Cavers, *Trusts Inter Vivos and Conflict of Laws,* 44 HARV. L. REV. 161 (1930); *cf.* Beverly Beach Properties v. Nelson, 68 So.2d 604 (Fla. 1953).

[45]Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, Inc., 25 F.2d 493 (D. Mass. 1928); Wilmington Trust Co. v. Wilmington Trust Co., *supra* note 44; Riggs v. Barrett, 308 Ill. App. 671, 32 N.E.2d 392 (1941); Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); Russell v. Joys, *supra* note 44; Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937); see N.Y. PERS. PROP. LAW §12a; R.I. ACTS AND RESOLVES c. 977 (1941). *But cf.* Clark v. Baker, 186 Ga. 65, 196 S.E. 750 (1938).

[46]275 N.Y. 95, 9 N.E.2d 792 (1937).

pensation. The trust provided for an accumulation of income valid in New Jersey but invalid in New York. The New York court, in sustaining the trust by applying New Jersey law, stated: "The instrument should be construed and a determination of its validity made according to the law chosen by the settlor unless so to do is contrary to the public policy of the state."[47]

The settlor of an inter vivos trust of movables does not have complete autonomy in the matter of selecting the governing law; the law chosen must bear some reasonable relationship to the trust transaction.[48] This perhaps means that the courts are looking for the state having the most significant contacts, but with intent as the factor given the most weight. The intention factor is particularly significant in that whenever possible the courts sustain the trust.

The use of intent and situs factors in choice of law in trust cases has not only provided effective selection of governing law at the creation of a trust but also makes it possible to change the governing law after the trust is created. The cases on this point are few,[49] with the leading case of *Wilmington Trust Co.* v. *Wilmington Trust Co.*[50] permitting the governing law of a trust to be changed from New York to Delaware by reason of the appointment of a successor trustee. Direction in the instrument was interpreted to effectuate such a change upon the naming of a successor trustee in a different state. It seems clear that if an effective change of governing law is to be made after creation of the trust it must be through operation of the settlor's intention, clearly expressed, and must operate prospectively only and have no retroactive validating effect.

The point at issue in the *Wilmington Trust* case was the validity of the exercise of a power of appointment as against a "Rule Against Perpetuities" objection, the appointment being sustained under the Delaware law. This case, standing alone, illustrates the related nature of trusts and powers of appointment. Taken with other cases it indicates that powers of appointment are probably closely akin to

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[47]*Id.* at 102, 9 N.E.2d at 794.

[48]City Bank Farmers Trust Co. v. Cheek, 202 Misc. 303, 110 N.Y.S.2d 434 (Sup. Ct. (1952).

[49]Wilmington Trust Co. v. Sloane, 30 Del. Ch. 103, 54 A.2d 544 (Ch. 1947); Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1952); Application of New York Trust Co., 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949); *cf.* Curtis v. Curtis, 185 App. Div. 391, 173 N.Y. Supp. 103 (1st Dep't 1918). *But cf.* LAND, TRUSTS IN THE CONFLICT OF LAWS 124-30 (1940).

[50]26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1952).

trusts for conflicts purposes.[51] The ancient agent-of-the-donor concept in powers of appointment leads the courts to apply the law governing the creation of the power.[52] This largely ignores the circumstances in which the donee of the power acts. In the case of the general power of appointment the donee's interest is treated as ownership for some purposes in some states.[53] This may very well cause a serious problem when one of the states involved has a different rule from the other.[54] Clearly, if the estate of the client includes assets in different states, the device of the inter vivos trust permits a most flexible approach to planning. It is imperative that an estate planner make a complete analysis of the conflicts question as well as the internal law matters when powers of appointment are involved or are to be employed. Full use of express choice of law clauses can well enable an attorney to effect a desirable plan that would be frustrated by application of internal law rules alone.[55]

Contractual Transactions

Contracts. The area of contracts in conflict of laws has long been confused by an apparent multiplicity of choice of law rules.[56] The

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[51]Particularly in regard to the importance of the element of the donor's intention; see Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Chase Nat'l Bank v. Central Hanover Bank & Trust Co., 265 App. Div. 434, 39 N.Y.S.2d 541 (1st Dep't 1943); Harlow v. Duryea, 42 R.I. 234, 107 Atl. 98 (1919).

[52]Wilmington Trust Co. v. Sloane, *supra* note 49; Sewall v. Wilmer, 132 Mass. 131 (1882); Harlow v. Duryea, *supra* note 51.

[53]For example, in some jurisdictions the creditors of the donee can reach the power, even though exercised in favor of another. McMurtry v. State, 111 Conn. 594, 151 Atl. 252 (1930).

[54]See Durand, *supra* note 40.

[55]An illustrative clause is: "The validity, construction, effect and administration of this agreement shall be governed and determined under the laws of the State of ....." LAND, TRUSTS IN THE CONFLICT OF LAWS 124 (1940). Also, "The trust hereby created shall be deemed to be a Georgia trust and shall be, in all respects, governed by the laws of the State of Georgia so long as the original trustee herein named acts as such trustee, but in the event of a change of Trustee, as hereinabove provided, shall thereafter be deemed to be a trust under, and shall thereafter, in all respects, be governed by, the laws of the state or country in which said substituted Trustee has its domicile or principal place of business, and in that event all of the trust funds and property shall be removed to said state or country. The entire trust property shall at all times be held and administered by the then Trustee in the state or country in which such Trustee has its domicile or principal place of business." BOGERT, TRUSTS AND TRUSTEES 131 (1955).

[56]BEALE, CONFLICT OF LAWS 1077 (1935); GOODRICH, CONFLICT OF LAWS 321 (3d ed.

confusion has stemmed to some extent from failure to appreciate the fact that the laws of different states may govern different matters under the same contract. Although the rule that the place of making governs the validity of a contract is often repeated,[57] it has probably been most often limited to problems of capacity and matters of form.[58] The authorities are split, however, even on this use of the place-of-making rule.[59] At the same time, problems concerning excuses for nonperformance and the like have most often been governed in the United States by the law of the place of performance.[60] Most of the courts applying either of these two rules usually bolster their decisions with language indicating that the chosen law is that of the state intended, or presumably intended, by the parties to govern.[61] Consequently, there has developed considerable authority that the parties can choose the law applicable to their contract.[62] Particularly significant are the courts' attempts to use this approach to sustain the contract if at all possible.[63] Often this autonomy is denied,[64] but here again there may be an explanation for the results reached. State laws, common or statutory, relating to contracts are of two kinds: (1) mandatory or regulatory, such as those requiring consideration and those prohibiting gambling contracts; and (2) permissive or intention sup-

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1949); STUMBERG, CONFLICT OF LAWS 226 (1951); see, *e.g.*, Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (1st Dep't 1936).

[57]Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875); Conner v. Elliott, 79 Fla. 513, 85 So. 164 (1920); Thompson v. Kyle, 39 Fla. 582, 23 So. 12 (1897); Forsyth v. Barnes, 228 Ill. 326, 81 N.E. 1028 (1907); Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 271 (1878); Berger-Crittenden Co. v. Chicago, M. & St. P. Ry., 159 Wis. 256, 150 N.E. 496 (1915).

[58]Freeman's Appeal, 68 Conn. 533, 37 Atl. 420 (1897); Fidelity & Cas. Co. v. Long, 94 Fla. 547, 114 So. 239 (1927); Conner v. Elliott, *supra* note 57; Milliken v. Pratt, *supra* note 57; Forsyth v. Barnes, *supra* note 57.

[59]Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930); see Davenport v. Karnes, 70 Ill. 465 (1873); Poole v. Perkins, 126 Va. 331, 101 S.E. 240 (1919).

[60]Louis-Dreyfus v. Paterson S.S., Ltd., 43 F.2d 824 (2d Cir. 1930); Union Nat'l Bank v. Chapman, 169 N.Y. 538, 62 N.E. 672 (1902).

[61]Pritchard v. Norton, 106 U.S. 124 (1882).

[62]Seeman v. Philadelphia Whse. Co., 274 U.S. 403 (1927); Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948); Hal Roach Studios, Inc. v. Film Classics, Inc., 156 F.2d 596 (2d Cir. 1946); see Cook, *'Contracts' and Conflict of Laws: 'Intention' of Parties*, 32 ILL. L. REV. 899 (1939).

[63]Pritchard v. Norton, 106 U.S. 124 (1882); Green v. Northwestern Trust Co., 128 Minn. 30, 150 N.W. 229 (1914); see Seeman v. Philadelphia Whse. Co., 274 U.S. 403 (1927); Grand v. Livingston, 4 App. Div. 589, 38 N.Y. Supp. 490 (4th Dep't 1896).

[64]E. Gerli & Co. v. Cunard S. S. Co., 48 F.2d 115 (2d Cir. 1931).

plying, such as those that create presumptions relating to certain sales agreements or promissory notes, which apply only in the absence of an expressed intention to the contrary.

Parties cannot lift themselves by their bootstraps and simply say that the law of some distant state shall apply because it permits what local law prohibits; but they can replace many of the legal presumptions with evidence of their intention, expressed in writing or incorporated by reference. It is therefore submitted that the parties can without limitation choose their law when the matter involved is in the permissive classification.[65] The courts have also indicated that, when the contacts or connections that a transaction has with two different states are fairly evenly divided and substantial, the parties may choose the law, even of a regulatory nature, of either state to govern — unless some act is required to be performed in a state in which it is illegal or otherwise violently opposed to local public policy.[66]

In viewing the confusion of the rules in the contracts area, some courts[67] and several writers[68] have quite frankly said that the method of determining the governing law has in fact been, and should be, to weigh all of the contacts that each state has with the transaction, apply the law of that state whose connection to the contract matter in question is most substantial, and recognize that the intention of the parties is an important factor.

This goes to indicate that in planning contract aspects of the multistate estate the attorney must recognize that the conflict of laws rules are subject to considerable uncertainty and that they are different from those applied to trusts and estates. This requires increased care in their use.

Insurance. Life insurance performs functions that involve both

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[65]See E. Gerli & Co. v. Cunard S. S. Co., *supra* note 64; Cheatham, *Book Review*, 48 COLUM. L. REV. 1267 (1948). *But cf.* Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 Atl. 158 (1937).

[66]See note 62 *supra;* Brierley v. Commercial Credit Co., 43 F.2d 724 (E.D. Pa. 1929), *aff'd*, 43 F.2d 730 (3d Cir. 1930).

[67]W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); Spahr v. P. & H. Supply Co., 223 Ind. 591, 63 N.E.2d 425 (1945); Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (1st Dep't 1936).

[68]CHESHIRE, PRIVATE INTERNATIONAL LAW 311 (3d ed. 1947); 2 RABEL, CONFLICT OF LAWS 480 (1947); STUMBERG, CONFLICT OF LAWS 238 (2d ed. 1951); Comment, 34 TEX. L. REV. 114 (1955).

the contract and the estate policies of a state. It is a device that bridges the gap between contract and property disposition at death. It is therefore to be expected that different choices of law may be made as different problems between different parties arise.[69] For example, problems relating to the validity of the contract as between insured and insurer, such as the ability of the insurance company to cancel the policy during the lifetime of the insured, are clearly contract type problems. Here, then, contract concepts would be applied to determine the governing law. In Florida, conflict of laws cases involving contracts other than insurance have been traditional, the courts preferring the place of making or performance, without any real distinction as to when one rather than the other will be applied.[70] The place-of-making concept, however, has been generally applied in insurance cases to govern most questions that arise under a policy.[71] The place of making is made definite by characterizing it as the place where the policy is delivered. Under this approach both validity and construction have been governed by the place where the contract was entered into, that is, the place delivered,[72] although there is some indication that stipulations of governing law might have some effect.[73]

When the insured dies some aspects of insurance give rise to many of the same considerations that arise in decedents' estates. The states' policies relating to protection of the surviving spouse and the children, or creditors, and those relating to tax matters come into play. Consequently, it is often urged that the domicile of the deceased is the state most concerned after his death and that its laws should govern these aspects of the insurance problems.[74] Although Florida has

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[69]*Cf.* Knights Templars v. Greene, 79 Fed. 461 (S.D. Ohio 1897); Expressman's Mut. Benefit Ass'n v. Hurlock, 91 Md. 585, 46 Atl. 957 (1900); Millard v. Brayton, 177 Mass. 533, 59 N.E. 436 (1901).

[70]Equitable Life Assur. Soc'y v. Clements, 140 U.S. 226 (1891); *In re* Mutual Life Ins. Co., 188 F.2d 424 (5th Cir. 1951); De Long v. Jefferson Standard Life Ins. Co., 109 F.2d 585 (5th Cir. 1940); Mutual Life Ins. Co. v. Hilton-Green, 202 Fed. 113 (5th Cir. 1913); Equitable Life Assur. Soc'y v. McRee, 75 Fla. 257, 78 So. 22 (1918).

[71]Mutual Life Ins. Co. v. Hilton-Green, *supra* note 70; Sovereign Camp v. Mixon, 79 Fla. 420, 84 So. 171 (1920).

[72]*In re* Mutual Life Ins. Co., *supra* note 70; De Long v. Jefferson Standard Life Ins. Co., *supra* note 70.

[73]*Cf.* Mutual Life Ins. Co. v. Hilton-Green, 202 Fed. 113 (5th Cir. 1913).

[74]Knights Templars v. Greene, 79 Fed. 461 (S.D. Ohio 1897); see CARNAHAN, CONFLICT OF LAWS IN INSURANCE §14.62 (1942); Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws,* 55 COLUM. L. REV. 261 (1955).

shown extraordinary concern for the surviving members of the family generally,[75] in this area the domicile arguments have gone unheeded and the usual contracts rule has been applied to insurance questions. For instance, when life insurance is made payable to the estate of the insured, a Florida statute[76] causes the proceeds to pass to the surviving spouse and children rather than to the estate or the creditors. In the conflicts area, however, the Florida Court has held this statute inapplicable to non-Florida contracts. In *Equitable Life Assurance Society v. McRee*[77] the contract was issued to an Alabama resident who later, while a resident of Georgia, changed the policy and designated the personal representative as the beneficiary. The insured subsequently died while domiciled in Florida, and the statutory beneficiaries claimed the proceeds as against the Florida administrator. The Court held the statute inapplicable and gave the proceeds to the administrator. This case is some indication that the Court is willing to characterize all problems of insurance as contract matters and, perhaps in order to achieve greater certainty, disregard the law of the insured's domicile at death.

One matter in which Florida local policy has prevailed is the allowance of attorneys' fees to successful claimants against insurance companies.[78] Here the Court, using the well-established substance and procedure dichotomy,[79] has held that, since remedies are governed by the forum,[80] the Florida policy of discouraging companies from contesting contracts in Florida will be applied.[81] Although the statements by the Court are without express limitation, the cases decided thus far have pertained to insurance contracts held by persons residing in Florida at their death. It seems likely that those claimants who have little other reason to sue in Florida courts could well be denied

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[75]See, e.g., FLA. STAT. §§222.13, 731.27, .34, 733.20 (1955); Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

[76]FLA. STAT. §222.13 (1955); see Black and Scoles, *Disposition of Life Insurance Proceeds Payable to Insured's Estate,* 26 FLA. L.J. 131 (1952).

[77]75 Fla. 257, 78 So. 22 (1918).

[78]FLA. STAT. §625.08 (1955).

[79]See Ailes, *Substance and Procedure in the Conflict of Laws,* 39 MICH. L. REV. 392 (1941); Cook, *"Substance" and "Procedure" in Conflict of Laws,* 42 YALE L.J. 333 (1933).

[80]See Brown v. Case, 80 Fla. 703, 86 So. 684 (1920).

[81]Fidelity-Phenix Fire Ins. Co. v. Cortez Cigar Co., 92 F.2d 882 (5th Cir. 1937); Foy v. Mutual Life Ins. Co., 127 F. Supp. 916 (N.D. Fla. 1955); Feller v. Equitable Life Assur. Soc'y, 57 So.2d 581 (Fla. 1952).

the benefits of the statute by an application of the doctrine of *forum non conveniens*.[82]

An exception to the usual conflicts approach in insurance contracts, which may or may not be significant in the planning of a particular estate, relates to the matter of death benefits in mutual fraternal benefit associations. In *Sovereign Camp v. Mixon*[83] it was held that the delivery of an insurance certificate in Florida caused Florida law to control,[84] resulting in the invalidation of a contract provision that reduced the period of limitations. Although similar statutes have been permitted to apply to other types of contracts, the Supreme Court of the United States in a long line of cases[85] has held unconstitutional their application to benefits under certificates of fraternal mutual benefit associations when the place of organization of the association permitted the contractual provision. These cases require that full faith and credit be given the statutes relating to the organization of the association and charter provisions thereunder. So far this approach has been expressly limited to the fraternal association cases; but, as pointed out by dissenting members of the Court,[86] there is little doctrinal reason to preclude its application to any mutual company. *Sovereign Camp v. Mixon* must be considered as erroneous in light of these subsequent developments.

Bank Accounts. Although there has been little litigation on the matter, banks and attorneys are often bothered by the problem of who is entitled to the proceeds of a bank account in the joint names of the deceased and another, or in the name of the deceased as trustee for another, or with a direction to pay to another upon death. While the local statute[87] protects the bank, it does not always determine the out-

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[82]See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

[83]79 Fla. 420, 84 So. 171 (1920).

[84]See FLA. STAT. §95.03 (1955).

[85]*E.g.*, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947); Sovereign Camp v. Bolin, 305 U.S. 66 (1938); Modern Woodmen of America v. Mixer, 267 U.S. 544 (1925); *cf.* Southern Mut. Aid Ass'n v. Cobb, 60 Fla. 198, 53 So. 505 (1910).

[86]Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 625 (1947) (Black, J., dissenting).

[87]FLA. STAT. §659.29 (1955). All but one of the states reportedly now have similar statutes; see Note, 53 COLUM. L. REV. 103 (1953); see also FLA. STAT. §659.30 (1955); Note, 53 COLUM. L. REV. 132 (1953).

come of litigation between the payee and the personal representative of the original depositor.[88] A significant conflicts problem arises when the original depositor and the bank are domiciled in different states. If characterized as a gift or inter vivos trust, the law of the location of the bank, as the place of transfer of the intangible involved, would seem to govern. If a contract is deemed to be in issue, probably here again the law of the bank's location would govern, either by reason of the place-of-making or performance doctrines. If neither of these approaches is taken, the deposit may be viewed as an asset in the deceased depositor's estate at death and hence subject to the law of his domicile. The litigated cases,[89] with few exceptions,[90] have applied the law of the bank's location, though there is some confusion as to the reasons for the result. Rather clearly the contacts center about the bank, and commercial needs indicate that the law of the place where the bank does business should govern. A similar analysis seems indicated in the case of bonds payable on death, profit-sharing plans, pension plans, and the like.[91]

The Buy-and-Sell Agreement. This agreement, so common in estates involving partnerships or closely held corporations, is probably within the traditional conflicts rules relating to contracts. In using these agreements, in order to avoid the possibility of some unforeseen law thwarting the intention of the parties, the attorney should plan the transaction so that the local law requirements of each state are satisfied. The significance of the place of incorporation, the principal place of business, the domicile of the parties, and the location of assets should not be overlooked in this regard. If immovables, that is, land interests, are involved, location may well be controlling. Then the contacts subject to control by the parties should be so arranged as to indicate the desired law, and the contract should expressly indicate the same law as governing. If the contract is of doubtful enforceability by reason of choice of law rules, it is advisable to set up some alternative arrangement, such as an escrow trust, to carry out the needed program.

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[88]*E.g.*, Cerny v. Cerny, 152 Fla. 333, 11 So.2d 777 (1943); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927).

[89]See, *e.g.*, Cutts v. Najdrowski, 123 N.J. Eq. 481, 198 Atl. 885 (Ch. 1938); Boyle v. Kempkin, 243 Wis. 86, 9 N.W.2d 589 (1943).

[90]See In the Matter of Weinstein's Estate, 176 Misc. 592, 28 N.Y.S.2d 137 (Surr. Ct. 1941).

[91]See Notes, 53 COLUM. L. REV. 103, 132 (1953).

TRANSFERS AT DEATH

Intestacy

Admittedly a client seldom dies intestate after having his estate planned; but, because intestacy is the background for all planning and because of the possibility of intestacy by reason of revocation or defective execution, the conflicts problems of intestacies will be considered briefly. As to immovables, the usual situs rule applies, and their descent and distribution are governed thereby.[92] The major problem here is characterization; and, as previously indicated, this problem arises in the area of leases, royalties on mineral rights, and the like.[93] Once, however, it is determined that an interest in land is involved, the situs rule, including the applicable conflict rule of the situs state, if any, will govern.[94]

In all but one of the states, movables are distributed according to the law of the domicile of the deceased at the time of his death.[95] The sole exception is Mississippi, which applies local law to both movables and immovables.[96] The general view is always subject to the qualification that the state in which the movables are located for purposes of administration may distribute locally if the law of the domicile is strongly contrary to its own.[97] Fortunately this seldom occurs, however, since differences in policy are slight among the states.

Wills and Testamentary Trusts

a. Immovables

The traditional situs rule applies to govern the validity of a will or of a trust of immovables created by will.[98] The situs is usually the

[92]See Clarke v. Clarke, 178 U.S. 186 (1900); Brandeis v. Atkins, 204 Mass. 471, 90 N.E. 861 (1910); Montgomery v. Montgomery, 101 Tex. 118, 105 S.W. 38 (1907).

[93]Equitable Trust Co. v. Ward, 29 Del. Ch. 206, 48 A.2d 519 (Ch. 1946); Toledo Soc'y for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W.2d 692 (1953); *In re* Burke, [1928] 10 L.R. 318; *In re* Berchtold, [1923] 1 Ch. 192.

[94]See 1 BEALE, CONFLICT OF LAWS §8.1 (1935); DICEY, CONFLICT OF LAWS 59 (6th ed. 1949); RESTATEMENT, CONFLICT OF LAWS §8 (1934).

[95]See Bullen v. Wisconsin, 240 U.S. 625 (1916); Ennis v. Smith, 55 U.S. (14 How.) 400 (1852); Lawrence v. Kitteridge, 21 Conn. 577* (1852); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).

[96]See MISS. CODE ANN. §467 (1942).

[97]See Lawrence v. Kitteridge, 21 Conn. 577* (1852).

[98]See Robertson v. Pickrell, 109 U.S. 608 (1883); Riley v. Doing, 66 F. Supp. 825

forum, of course, but occasionally an action will be brought in another jurisdiction. In such a case the "law" of the situs includes the reference of any applicable conflicts law. For example, if the court of the situs of the land determines descent of land by referring to the law of the deceased owner's domicile, another state would, by applying the conflicts rule of the situs, also look to the domicile of the deceased for determination of descent.[99]

Another quite common example occurs when a will invalid under the local law of the situs may be validated by a situs statute that refers to the law of the place of execution or of the deceased's domicile at the time of execution or at death.[100] If the will is valid by the law of the state of one of these alternative references, it will be sustained anywhere.[101] The conflicts concern over the requirement of three witnesses in some states is reduced, since each of these states has a statute recognizing wills valid by the law of the place of execution.[102] These statutes serve a most desirable purpose in a mobile society, particularly in those states in which there is growth and influx of residents as in Florida. Of the more than thirty states having such a statute,[103] Florida is conspicuous by her absence. The enactment of

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(S.D. Fla. 1946); Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Crolly v. Clark, 20 Fla. 849 (1884); Lynch v. Miller, 54 Iowa 516, 6 N.W. 740 (1880); Toledo Soc'y for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W.2d 692 (1953).

[99]*In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950); also cases cited note 93 *supra.*

[100]See, *e.g.,* Model Execution of Wills Act, 9 U.L.A. 419; Wills Act, 1861, 24 & 25 VICT. c. 114.

[101]*Cf.* Irwin's Appeal, 33 Conn. 128 (1865); Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566 (1906); In the Matter of Logasa's Estate, 161 Misc. 774, 293 N.Y. Supp. 116 (Surr. Ct. 1937); In the Matter of Fowler, 161 Misc. 204, 291 N.Y. Supp. 639 (Surr. Ct. 1936).

[102]CONN. GEN. STAT. §6951 (1949); GA. CODE ANN. §113-709 (1933); ME. REV. STAT. ANN. c. 154, §14 (1954); MASS. ANN. LAWS c. 191, §5 (1955); N.H. REV STAT. ANN. §551:5 (1955); S.C. CODE §19-207 (1952); VT. REV. STAT. §2840 (1947). Three witnesses may be preferable because of the value of an extra witness. See ATKINSON, WILLS 350 (2d ed. 1953). The conflicts effect of the requirements in Louisiana are alleviated by a similar provision, LA. REV. STAT. ANN. §9:2401 (1950).

[103]ARIZ. CODE ANN. §38-215 (1939); ARK. STAT. ANN. §60-405 (Supp. 1955); CAL. PROB. CODE §362 (Deering 1949), as amended 1953; CONN. GEN STAT. §6951 (1949); GA. CODE ANN. §113-709 (1933); IDAHO CODE ANN. §15-222 (1947); ILL. REV. STAT. c. 3, §237 (1955); IOWA CODE §633.49 (1954); KAN. GEN. STAT. ANN. §59-609 (1949); LA. REV. STAT. ANN. §9:2401 (1950); ME. REV. STAT. ANN. c. 154, §14 (1954); MD. CODE ANN. art. 93, §365 (1951); MASS. ANN. LAWS c. 191, §5 (1955); MICH. STAT. ANN. §27.3178(97) (Supp. 1955); MINN. STAT. §525.183 (1953); MONT. REV. CODES ANN. §91-115 (1947); NEB. REV. STAT. §30-204 (1943); NEV. COMP. LAWS §9929 (1929);

a statute similar to Section 7 of the Model Execution of Wills Act[104] would be of particular service to the people of Florida.

Because of a few problems that have arisen under this statute and its precedecessor, some modifications should be made.[105] One of these problems is caused by the omission from the statute of a reference to the problem of revocation. The authorities are divided as to whether foreign revocation is included under the term "execution,"[106] although apparently the purpose of the statute is to include foreign revocation as well as execution. A particularly acute though fortunately not common aspect of this problem is revocation resulting from the operation of law upon a divorce or a subsequent birth of a child. Clearly these provisions are of concern to the domicile at the time of death and to the domicile at the time of the event causing automatic revocations. Nevertheless the situs law has usually controlled as to immovables. Problems concerning validity, other than those relating to the formalities, are also determined by the law of the situs.[107] Con-

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N.H. REV. STAT. ANN. §551:5 (1955); N.M. STAT. ANN. §30-1-10 (1953); N.Y. DECED. EST. LAW §§22a, 23; N.D. REV. CODE §56-0306 (1943); OKLA. STAT. tit. 84, §72 (1951); R.I. GEN. LAWS c. 566, §35 (1938); S.C. CODE §19-207 (1952); S.D. CODE §56.0212 (1939); TENN. CODE ANN. §32-107 (1955); UTAH CODE ANN. §74-1-14 (1953); VT. REV. STAT. §2840 (1947); WASH. REV. CODE §11.12.020 (1951).

[104]9 U.L.A. 419.

[105]The previously recommended Uniform Wills Act, Foreign Executed, included an alternative reference to the testator's domicile. The Model Act substitutes the domicile at the time of execution. Since the purpose of the act is to avoid thwarting the testator's expressed intentions by the accident of conflict of laws, both references should be included. This change plus one aimed at the revocation problem would result in a provision appropriate for enactment in Florida such as the following:

> *Foreign Execution of Wills.* A will executed or revoked outside this state in a manner prescribed by the laws of this state, or a written will executed or revoked outside this state in a manner prescribed by the law of the place of its execution or revocation or by the law of the testator's domicile at the time of its execution or revocation or by the law of the testator's domicile at the time of death, shall have the same force and effect in this state as if executed or revoked in this state in compliance with the provisions of the laws of this state.

[106]See *In re* Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949); In the Matter of Traversi, 189 Misc. 251, 64 N.Y.S.2d 453 (Surr. Ct. 1946); Owen v. Younger, 242 S.W.2d 895 (Tex. Civ. App. 1951); see also In the Matter of Patterson, 64 Cal. App. 643, 222 Pac. 374 (1924).

[107]See Riley v. Doing, 66 F. Supp. 825 (S.D. Fla. 1946); Crolly v. Clark, 20 Fla. 849 (1884); Frazier v. Boggs, 37 Fla. 307, 20 So. 245 (1896); Peet v. Peet, 229 Ill. 341, 82 N.E. 376 (1907); Amerige v. Attorney-General, 324 Mass. 648, 88 N.E.2d 126

sequently, limitations upon the testamentary power designed to protect the family of the testator[108] or to prevent undue dispositions to charity[109] are generally governed by the law of the situs notwithstanding the apparent dominant interest of the testator's domicile.

Although most courts probably would look to the situs of the immovable for a construction of the testator's will affecting it,[110] the draftsman should not rely upon this. In choosing the language of the will he should also consider its effect at the domicile of the deceased at the time of execution and at the place of execution. Clearly his choice of terms should preclude any possible adverse construction in any of these three jurisdictions as well as in a jurisdiction that he may anticipate to be the testator's domicile at the time of death. This is necessary because some courts have taken the view that a man generally uses language in common usage at his home, that is, his domicile; if the language is that of his attorney, the place of execution determines the common usage.[111] Although there is some force in both these views and those that refer to the situs, the moral for the draftsman is to avoid language having an adverse or different effect in any of the states whose law may be applicable.

Here, as in the case of inter vivos trusts of immovables, the doctrine of equitable conversion affords a limited possibility of controlling the choice of law in the case of land.[112] As has been noted previously, for choice of law purposes it is possible that a court will consider as movables land devised under direction to sell.[113] Likewise, some will interpret a direction to purchase land in another state as

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(1949); Pratt v. Douglas, 38 N.J. Eq. 516 (Ct. Err. & App. 1884). *But see* Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897); Ford v. Ford, 70 Wis. 19; 33 N.W. 188 (1887).

[108]See Spence v. Spence, 239 Ala. 480, 195 So. 717 (1940); Bankers Trust Co. v. Greims, 110 Conn. 36, 147 Atl. 290 (1929); *In re* Randolph's Estate, 175 Kan. 685, 266 P.2d 315 (1954); Ehler v. Ehler, 214 Iowa 789, 243 N.W. 591 (1932); *cf.* Estate of Bir, 83 Cal. App.2d 256, 188 P.2d 499 (1948).

[109]See Decker v. Vreeland, 220 N.Y. 326, 115 N.E. 989 (1917); Joslin, *Conflict of Laws Problems Raised by "Modern Mortmain Acts,"* 60 DICK. L. REV. 7 (1955).

[110]*E.g.*, Frazier v. Boggs, 37 Fla. 307, 20 So. 245 (1896); Scofield v. Hadden, 206 Iowa 597, 220 N.W. 1 (1928); Thompson v. Penn, 149 Ky. 158, 148 S.W. 33 (1912).

[111]See Higinbotham v. Manchester, 113 Conn. 62, 154 Atl. 242 (1931); Houghton v. Hughes, 108 Me. 233, 79 Atl. 909 (1911); Staigg v. Atkinson, 144 Mass. 564, 12 N.E. 354 (1887); Matter of Dialogue, 159 Misc. 18, 287 N.Y. Supp. 237 (Surr. Ct. 1936).

[112]See p. 407 *supra.*

[113]*E.g.*, Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N.E. 59 (1911).

making the law of that state applicable.[114] Although this is a rather slim reed upon which to plan an estate, it may have some use in a particular case.

b. Movables

The flexibility of means of handling movable assets in the estate plan, particularly in the case of intangibles represented by documents, is reflected in the testamentary as well as the inter vivos dispositions. The trust device is the most flexible for conflict of laws purposes, though significant developments have occurred in the case of outright bequests. The traditional choice of law rules are clear enough in our Anglo-American system of law; they refer to the law of the testator's domicile at death. Thus the valid execution of a will,[115] the validity of its provisions,[116] and the identification of beneficiaries,[117] with but few exceptions, are governed by the testator's domicile at death. The simplicity of the rule, as in the case of immovables, does not mean that there are no problems. On the contrary, the fact of near automatic application of the law of the last domicile to all problems often causes considerable question as to the reasonableness of the result. This is perhaps pointed out by the problem of revocation of bequests by operation of law by reason of divorce.[118] In determining the appropriate property settlement on divorce, the parties and the court will naturally consider the law of the state of the current domi-

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[114]Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890); Jenkins v. Guarantee Trust and Safe Deposit Co., 53 N.J. Eq. 194, 32 Atl. 208 (Ct. Err. & App. 1895); Mount v. Tuttle, 183 N.Y. 358, 76 N.E. 873 (1906); Bible Soc'y v. Pendleton, 7 W. Va. 79 (1873). This approach is approved and considered the majority view in LAND, TRUSTS IN THE CONFLICT OF LAWS 30 (1940); Note, 29 N.Y.U.L. REV. 1138 (1954). *Cf.* 2 BEALE, CONFLICT OF LAWS §240.3 (1935).

[115]Smith v. Croom, 7 Fla. 81 (1857); Gourley v. Miller, 302 Ky. 759, 196 S.W.2d 360 (1946); Moultrie v. Hunt, 23 N.Y. 394 (1861); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).

[116]Bullen v. Wisconsin, 240 U.S. 625 (1916); Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Healy v. Reed, 153 Mass. 197, 26 N.E. 404 (1891).

[117]Lowndes v. Cooch, 87 Md. 478, 39 Atl. 1045 (1898); Anderson v. French, 77 N.H. 509, 103 Atl. 1042 (1915); Simmons v. O'Connor, 149 S.W.2d 1107 (Tex. Civ. App. 1941); *In re* Laurence's Will, 93 Vt. 424, 108 Atl. 387 (1919). *But cf.* Hood v. McGehee, 237 U.S. 611 (1915); *In re* Crossley's Estate, 135 Pa. Super. 524, 7 A.2d 539 (1939).

[118]See FLA. STAT. §732.261 (1955); In the Matter of Patterson, 64 Cal. App. 643, 222 Pac. 374 (1923); see also note 106 *supra*.

cile as the background for their conclusions.[119] Upon a subsequent change of domicile prior to death the new governing law may be different, thus destroying the reasonable expectations of the parties.[120] In the case of revocation by reason of subsequent birth of a child, the inappropriateness of the last domicile rule is not so apparent, because it operates as a family protection device in which the domiciliary state at death normally has the dominant interest.[121] Particularly would this be true if the births of different children were subject to varying laws. In such a case the need for uniformity would call for a single reference, and the last domicile might well be the most appropriate choice. In such a highly unusual situation a court could well be expected to reach such a solution by appropriate construction of a foreign execution or revocation statute. The courts, however, have quite rigidly applied the law of the last domicile in such matters.[122] The statutes relating to foreign execution have not, as previously indicated,[123] solved this particular problem, although appropriate statutory language could remedy the situation.

Limitations on Testation. The state has the power to restrict the privilege of making testamentary transfers of property,[124] and all states have done so in some fashion. Some of the restrictions, such as the requirements for execution of wills, are designed to protect the testator against a disposition based on undue influence or casual statements;[125] others are designed to protect those members of the testator's

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[119]This because both jurisdiction and governing law are within the province of the law of the state of the plaintiff's domicile at the time of the action, *i.e.*, local law. See Torlonia v. Torlonia, 108 Conn. 292, 142 Atl. 843 (1928); Stewart v. Stewart, 32 Idaho 180, 180 Pac. 165 (1919); Rose v. Rose, 132 Minn. 340, 156 N.W. 664 (1916).

[120]See In the Matter of Patterson, 64 Cal. App. 643, 222 Pac. 374 (1923); Irwin's Appeal, 33 Conn. 128 (1865); Moultrie v. Hunt, 23 N.Y. 394 (1861); *cf. In re* Cutler's Will, 114 Misc. 203, 186 N.Y. Supp. 271 (Surr. Ct. 1921). *But cf.* In the Matter of Traversi, 189 Misc. 251, 64 N.Y.S.2d 453 (Surr. Ct. 1946).

[121]*Cf.* Healy v. Reed, 153 Mass. 197, 26 N.E. 404 (1891); Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates,* 8 U. FLA. L. REV. 151 (1955).

[122]In the Matter of Patterson, *supra* note 120; *In re* Culley's Will, 182 Misc. 998, 48 N.Y.S.2d 216 (Surr. Ct. 1944); Matter of Coburn's Will, 9 Misc. 437, 30 N.Y. Supp. 383 (Surr. Ct. 1894); *In re* Smith's Estate, 55 Wyo. 181, 97 P.2d 677 (1940). *But cf. In re* Martin [1900] P. 211.

[123]See note 106 *supra* and accompanying text.

[124]Irving Trust Co. v. Day, 314 U.S. 556 (1942).

[125]This is the general purpose of the statutes of wills, *e.g.*, FLA. STAT. §731.07 (1955), and statutes prohibiting dispositions to charity within short periods before

household that the custom of society indicates should be provided for before he considers gifts to strangers.[126] These family protection restrictions take various forms; in this country homestead, dower, forced share, family allowance, and community property give direct interests to particular family members. Restrictions on gifts to charity rest upon policies reflecting attitudes opposing undue influence and undue accumulations by charities, as well as a desire to protect the estate owner's family. Homestead interests are peculiarly local and attach to movables, which usually have a location at the domicile; consequently, few conflict of laws problems arise in this regard.[127]

Dower, forced share, and family allowance matters raise significant conflicts problems for the estate planner. For example, the interest of the surviving spouse may be measured by assets located in states other than the domicile.[128] This is true in Florida, where the widow may receive a third of the movables wherever they may be located, and the statute purports to give this portion before creditors' claims are considered.[129] In a case involving foreign assets it is possible for the domicile to include out-of-state movables in measuring the nonbarrable interest of the surviving spouse, but it must be remembered that these out-of-state assets are subject to administration and probably to creditors' claims wherever they are located.[130] Consequently, in the case of movables the domicile's assets may bear substantially the entire burden of the widow's election. In administration, premature reliance should not be placed on an election or failure to elect in ancillary proceedings, since such an election is probably not binding at the domicile.[131]

Community Property. Community property concepts can cause considerable confusion in the estate of a client who has spent any part

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death, *e.g.*, D.C. CODE ANN. §19-202 (1951), FLA. STAT. §731.19 (1955).

[126]*E.g.*, FLA. CONST. art. X, §1; FLA. STAT. §§731.27,.34 (1955); IOWA CODE §633.3 (1954); N.Y. DECED. EST. LAW §17.

[127]*E.g.*, FLA. CONST. art. X, §1; see Scoles, *supra* note 121, at 180.

[128]Estate of Clemmons, 242 Iowa 1248, 49 N.W.2d 883 (1951); see also Caruso v. Caruso, 106 N.J. Eq. 130, 148 Atl. 882 (Ct. Err. & App. 1930).

[129]See FLA. STAT. §731.34 (1955); Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936); see also Griley v. Griley, 43 So.2d 350 (Fla. 1949); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

[130]Frick v. Pennsylvania, 268 U.S. 473 (1925).

[131]Griley v. Griley, *supra* note 129; Murphy v. Murphy, *supra* note 129; see Scoles, *Conflict of Laws and Election in Administration of Decedent's Estate*, 30 IND. L.J. 293 (1955).

of his married life in a community property state.[132] Rights in community property attach in most instances to movables according to the law of the marital domicile at the time of acquisition, and the assets are impressed with these interests wherever they may be taken and into whatever form they may be traced;[133] under the doctrine of substitution community property interests in the proceeds persist on conversion. Because community assets belong to both spouses, the decedent can dispose of only one half of them and the balance belongs to the survivor.[134] This means that, should the husband die, his estate for purposes of distribution would include only one half of those assets impressed with community property rights.[135] The surprising effect that this could have upon an estate planned solely on the assumption of common law property concepts could of course be disastrous. Therefore it is necessary to determine whether any of the estate assets were acquired while the married client lived in a community property state or can be traced to property acquired in such a state.

Charities. Restrictions on dispositions to charities have taken different forms in the United States. Florida invalidates bequests to charities in instruments executed a short time before the testator's death.[136] These "hell-fire" statutes are to be compared with the "charity begins at home" statutes,[137] which prevent charitable gifts of more than a limited portion of the estate when certain members of the testator's family survive. These statutes, designed primarily to protect the family of the testator, can appropriately be viewed as restrictions upon power of testation. Consequently, the domicile at death is the state having the dominant interest and whose law should be controlling. This is generally the case when the question concerns

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[132]See MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS (1952); Stumberg, *Marital Property and Conflict of Laws,* 11 TEX. L. REV. 53 (1932); Thomas and Thomas, *Community Property and Conflict of Laws,* 4 SW. L.J. 46 (1950).

[133]Depas v. Mayo, 11 Mo. 314 (1848); Edwards v. Edwards, 108 Okla. 93, 233 Pac. 477 (1925); *cf.* King v. Bruce, 145 Tex. 647, 201 S.W.2d 803 (1947). *But cf.* Gooding Milling & Elevator Co. v. Lincoln County State Bank, 22 Idaho 468, 126 Pac. 772 (1912).

[134]See Stumberg, *Testamentary Dispositions and the Conflict of Laws,* 34 TEX. L. REV. 28 (1955).

[135]*Cf.* Harral v. Harral, 39 N.J. Eq. 279 (Ct. Err. & App. 1884).

[136]FLA. STAT. §731.19 (1955); see also D.C. CODE ANN. §19-202 (1951); OHIO REV. CODE §2107.06 (Page 1955).

[137]*E.g.,* IOWA CODE §633.3 (1954); N.Y. DECED. EST. L. §17.

movables.[138] The underlying policy considerations would seem to indicate a preference for domicile control in charitable dispositions of immovables as well, but this has not generally been true.[139] Even in the area of dispositions of movables there has been a significant deviation from the usual rule when a policy favoring charitable trusts has come in conflict with a policy of lesser strength than those concerning the family.[140] In these cases there is a marked tendency to sustain the charitable trust.

Trusts. The policy toward sustaining trusts in general has had a significant effect in the area of trusts of movables. Most of the litigated cases have involved the Rule Against Perpetuities, rules against accumulation of income, or questions concerning the exercise of powers of appointment. Since these problems are usually present in connection with trusts rather than legal interests in movables, the trust cases represent the bulk of litigation in this area. In those cases the courts have permitted the testator's intent to control to the extent that he can probably choose the law to govern the trust if that law has a reasonably substantial connection with the trust. This is best illustrated by two similar cases. In *Cross v. United States Trust Co.*[141] the settlor, domiciled in Rhode Island, left a will executed in New York, where she died, leaving property to a New York trustee to be administered there for New York beneficiaries. The trust was invalid under the New York rule against perpetuities but valid under the law of Rhode Island. The New York court, in applying Rhode Island law and holding the trust valid, stated:[142]

> "It does not follow that a trust created by the laws of another state is contrary to our public policy with respect to accumulations and the suspension of the absolute ownership, simply because the law of the state differs in some respects from ours.

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[138]Healy v. Reed, 153 Mass. 197, 26 N.E. 404 (1891).

[139]Matter of Dwyer, 159 Cal. 680, 115 Pac. 242 (1911); Decker v. Vreeland, 220 N.Y. 326, 115 N.E. 989 (1917).

[140]See Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Note, 32 COLUM. L. REV. 680, 684 (1932): "[T]he decided cases have manifested marked effort to sustain charitable trusts, but the applicable rule is highly unclear. In the one matter of unconverted land, the cases agree upon a choice, that of the *lex rei sitae*. In personalty, the result has been almost uniformly favorable to the validity of the trust, but the route is dubious."

[141]131 N.Y. 330, 30 N.E. 125 (1892).

[142]*Id.* at 341, 30 N.E. at 127.

> It may be assumed that all our sister states have enacted laws on this subject having the same general purpose in view as our own. Some of them permit a longer and others provide for a shorter period of suspension, but the policy of all is the same."

The second case, *In the Matter of Chappell,*[143] came before the Washington court. The *Chappell* trust was invalid under the law of the domicile, California, but valid under the law of Washington, where it was to be administered. The court sustained the trust on the basis that the testator intended that Washington law apply. The significance of these cases lies in the fact that the testator's intention was carried out, thus sustaining the trust. The first court accomplished this by means of a traditional doctrinal vehicle, while the other used the more recently developed concept of the intended choice of law.[144] Similar results have been reached in other cases.[145] It is clear that in this area of trusts the draftsmen by use of an express provision can choose the governing law from among those states having some reasonable connection with the trust.[146]

Recent statutory developments have indicated that in the area of nontrust testamentary dispositions, as well as those subject to a trust, the draftsman's control is being increased. Several states have adopted

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[143]124 Wash. 128, 213 Pac. 684 (1923).

[144]In an analogous case, Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892), the New York court further indicated its concern with the law intended by the testator, applying the law of the place of administration of a testamentary trust rather than the law of the testator's domicile to sustain the trust. Also, in connection with inter vivos trusts the court in sustaining a trust has applied the law of the domicile of the settlor, on the theory that this law was the one intended by him. Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937); *cf.* Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

[145]National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); Sewall v. Wilmer, 132 Mass. 131 (1882); Fellows v. Miner, 119 Mass. 541 (1876); see also Wilmington Trust Co. v. Sloane, 30 Del. Ch. 103, 54 A.2d 544 (Ch. 1947); Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (Sup. Ct. 1942).

[146]LAND, TRUSTS IN THE CONFLICT OF LAWS 118 (1940), states: "The cases seem to indicate that, in both testamentary and intervivos trusts of intangible personal property the creator may control the choice of the law governing the essential validity of the trust by an express provision in the trust instrument provided he selects the law of a state which has some substantial connection with the trust. In cases dealing with the essential validity of the exercise of a power of appointment, it is possible, but not certain, that a donor could effectively provide that an appointment be good if the donee's will satisfied the law of the donee's domicile."

statutes providing that testamentary dispositions by nonresidents of assets located in the state shall be governed by local law if the testator so provides.[147] Hence the testator can by locating assets within such a state gain the advantage of any favorable local law relating to the disposition of property therein.[148] Considering all of these trends, the indication is certainly toward more control of conflict of laws problems by the draftsman in the area of testamentary dispositions of movable assets. The planner of the multi-state estate should avail himself of this additional insurance for avoiding conflicts problems by including a well-drafted choice of law clause.

PART II – ADMINISTRATIVE PROBLEMS

A significant part of planning any estate is the consideration of the problems of administration. During administration the benefits or defects of any plan appear. By then, however, except in the alterable inter vivos trust, it is often too late to make corrective modifications. Consequently, an appreciation of administration is a necessary prerequisite to effective planning and drafting.

TRUST ADMINISTRATION

Immovables

The law governing administration of trusts of immovables, whether inter vivos or testamentary, is traditionally referred to the situs of the land involved.[149] This means that any powers given to the trustee or to be exercised by the trustee must necessarily be valid according to the law of the situs. The rights of beneficiaries and the extent to which their interests may be subjected to or protected from claims of creditors are likewise questions for the situs.[150] This should be qualified by the recognition that the doctrine of equitable conversion, as

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[147]ILL. REV. STAT. c. 3, §241 (b) (1955); MICH. STAT. ANN. §27.3178 (Supp. 1955); N.Y. DECED. EST. LAW §47.

[148]For definition of assets located within state see ILL. REV. STAT. c. 3, §207 (1955).

[149]McLoughlin v. Shaw, 95 Conn. 102, 111 Atl. 62 (1920); Kerr v. White, 52 Ga. 362 (1874); Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); White v. White, 197 Misc. 322, 97 N.Y.S.2d 74 (Sup. Ct. 1949).

[150]Spindle v. Shreve, 111 U.S. 542 (1884); Moore v. Sinnott, 117 Ga. 1010, 44 S.E. 810 (1903); Sinnott v. Moore, 113 Ga. 908, 39 S.E. 415 (1901); Fowler v. Webster, 173 N.C. 442, 92 S.E. 157 (1917); *cf.* Collier v. Blake, 14 Kan. 250 (1875).

determined by the law of the situs,[151] may treat land as movable; hence a change of governing law may occur.[152] Equitable conversion should be distinguished from ordinary sales and reinvestments by the trustee. The latter should not entail a change of governing law in so far as internal problems of the trust are concerned.[153]

Although the force of the existing authorities indicates that an accounting of the trustee of land shall be in the courts of the state of the situs,[154] there is an exception for emergency. For example, should a trustee have sold the land, refused to perform the trust, and moved to another jurisdiction, the courts will entertain an accounting when personal jurisdiction can be acquired, upon a showing that the defendant trustee is not available for suit at the more appropriate forum.[155]

Although there are few reasons why most administrative matters should not be ruled by nonsitus law if so desired by the settlor, there is little authority supporting this control by the settlor. The specification of express powers, however, will in many instances effectively accomplish the settlor's wishes and be recognized at the situs. Also, since an investment of trust assets in foreign land does not change the governing law to that of the situs of the land, it is possible to prevent the application of the situs law by establishing a trust of movables with the trustee authorized to invest in foreign real estate and then selling the land to the trustee.

There is need to limit the effective interest of the situs state to problems of recording and alienability and to protection of third parties relying on the record. Since it is possible that a reference to nonsitus law for administrative purposes might be sustained, a specific

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[151]See Clarke v. Clarke, 178 U.S. 186 (1900); Fidelity Union Trust Co. v. Ackerman, 123 N.J. Eq. 556, 199 Atl. 379 (1938); Chamberlain v. Chamberlain, 43 N.Y. 424 (1870).

[152]See First Nat'l Bank v. National Broadway Bank, 156 N.Y. 459, 51 N.E. 398 (1898); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892).

[153]Fisk's Appeal, 81 Conn. 433, 71 Atl. 559 (1908); Acker v. Priest, 92 Iowa 610, 67 N.W. 235 (1894); Bishop v. Bishop, 258 N.Y. 216, 179 N.E. 391 (1932). *But cf.* Sinnott v. Moore, *supra* note 150; Collier v. Blake, 14 Kan. 250 (1875); First Nat'l Bank v. National Broadway Bank, *supra* note 152.

[154]Clarke v. Clarke, 178 U.S. 186 (1900); Williams v. Nichol, 47 Ark. 254, 1 S.W. 243 (1886); Monypeny v. Monypeny, 202 N.Y. 90, 95 N.E. 1 (1911); Will of Hebblewhite, 228 Wis. 259, 280 N.W. 384 (1938).

[155]Smyrna Theatre Co. v. Missir, 198 App. Div. 181, 189 N.Y. Supp. 4 (2d Dep't 1921); Watkins v. Watkins, 160 Tenn. 1, 22 S.W.2d 1 (1929); *cf.* Falke v. Terry, 32 Colo. 85, 75 Pac. 425 (1904).

provision in the dispositive instrument designating the law intended should not be discounted even in trusts of immovables.[156]

Foreign Corporations As Trustees

Before discussing the general choice of law problems as to movables, the matter of the identity of the trustee should be noted. In most instances a trustee will be an individual residing at the place where the trust is to be administered or a corporation authorized to do business there. It is quite a common occurrence, however, that a client's needs or desires indicate the selection of a nonresident individual or a foreign trust company. Florida, like many other states, has some pertinent statutes on this matter. A statute in the banking code[157] provides that a foreign corporation cannot act as trustee of local real estate, but it does permit the foreign corporation to receive bequests of money or intangibles in trust.[158] Though re-enacted in 1953 as part of the banking code, this statute has been in effect for many years.[159] The Trust Accounting Law,[160] adopted in 1951, contains provisions that might well be considered to have intended a modification of the provision prohibiting administration of realty by a foreign corporation. This last statute expressly recognizes the settlor's power to choose the governing law and the place of administration of the testamentary trust. The statute states, in part:[161]

> ". . . provided, however, that if the trustee is a nonresident individual or a corporation organized under the laws of some other jurisdiction and having its principal place of business in some other state or country and where it appears from the will that the testator intended the trust to be administered in and subject to the laws of the jurisdiction in which the individual trustee resides or the corporate trustee has its principal place of business, such individuals or corporate trustee shall be exempt from the provisions of this chapter and the county judge shall authorize distribution of any property *devised* or bequeathed to the trustee without requiring such individual or corporate trustee to establish his qualifications hereunder."

156*Cf.* SHATTUCK, AN ESTATE PLANNER'S HANDBOOK 328 (1950).
157FLA. STAT. §660.10 (4) (1955).
158FLA. STAT. §660.10 (3) (1955).
159See, *e.g.*, FLA. STAT. §655.27 (1949).
160FLA. STAT. §737.02 (1955).
161FLA. STAT. §737.02 (1) (1955). Emphasis supplied.

This provision appears to recognize the settlor's privilege of appointing a foreign corporate trustee not only in cases of movables but also in cases of "devises," that is, testamentary trusts of real estate. Although this would be a forward-looking legislative step that would be welcomed by many,[162] it is doubtful that the Legislature intended to take the step in such a casual manner. Nevertheless, the provision exists, and it should be noted that, even though the Florida Legislature has adopted some rather provincial provisions in the estates area,[163] it has also led the way with some very effective provisions that recognize the existence of a mobile population.[164]

Movables

As is the case in other areas of trust law, the law governing the administration of trusts of movables has seen much recent development. Although there is some evidence that a few courts might apply the law of the testator's domicile at death to problems of administration of trusts of movables,[165] the weight of authority indicates that domicile is not the controlling factor in the choice of law applicable to trusts,[166] particularly inter vivos trusts.[167] The courts have generally refused to permit any single factor to control in determining the governing law but have applied the law of the state with the most significant contact with the trust.[168] The significant contact is usually determined by a preponderance of the factors at the time of execution of the trust instrument or at the time it becomes effective.[169] Of the many factors that are considered, it appears that the intention of the settlor is a pri-

[162]See, *e.g., Need for Reciprocity on Out of State Trust Institutions,* 31 TRUST BULL. 3 (1951).

[163]*E.g.,* FLA. STAT. §732.36 (1955).

[164]*E.g.,* FLA. STAT. §734.30 (1955).

[165]See 2 BEALE, CONFLICT OF LAWS §297.1 (1935).

[166]See Cadbury v. Parrish, 89 N.H. 464, 200 Atl. 791 (1938); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Lanius v. Fletcher, 100 Tex. 550, 101 S.W. 1076 (1907); Will of Risher, 227 Wis. 104, 277 N.W. 160 (1938); *cf.* FLA. STAT. §737.02 (1955).

[167]People v. First Nat'l Bank, 364 Ill. 262, 4 N.E.2d 378 (1936); National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

[168]Union and New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 727 (1928); Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524 (1892); People v. First Nat'l Bank, *supra* note 167; Harvey v. Fiduciary Trust Co., 299 Mass. 457, 13 N.E.2d 299 (1938).

[169]Sale v. Saunders, 24 Miss. 24 (1852); Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 (1932); Hope v. Brewer, *infra* note 170; Cadbury v. Parrish, 89 N.H. 464, 200

mary one.[170] This is of course consistent with the most basic policy in the area of planning, that is, to effectuate as nearly as possible the desires of the estate owner. This intention may be reflected in an express choice of law clause[171] or perhaps implied by a favorable law presumption[172]— that is, that law must have been intended that would enable the trust to accomplish the settlor's wishes. The intention also may be implied from other contacts with a particular state,[173] but the state whose law is so designated must have a substantial relation to the trust.[174] This suggests what has probably been the next most significant factor: the place of administration of the trust as indicated by the trustee's residence and place of business and the location of the assets.[175]

A third contact that should probably be mentioned in the case of a testamentary trust is the domicile of the settlor at the time of his death.[176] Because of occasional statutory requirements that a testamentary trustee shall qualify before and account to the probate court, this factor assumes considerable significance in some states.[177] The Florida statute,[178] on the other hand, clearly permits the testator to avoid ap-

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Atl. 791 (1938); Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919); Cronin's Case, 326 Pa. 343, 192 Atl. 397 (1937); Lanius v. Fletcher, 100 Tex. 550, 101 S.W. 1076 (1907).

[170]Estate of Beckwith v. Cooper, 258 Ill. App. 411 (1930); Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Will of Risher, 227 Wis. 104, 277 N.W. 160 (1938).

[171]Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, Inc., 25 F.2d 493 (D. Mass. 1928); National Shawmut Bank v. Cumming, *supra* note 167; Matter of Adriance, 158 Misc. 857, 286 N.Y. Supp. 936 (Surr. Ct. 1936); Will of Risher, *supra* note 170.

[172]Hope v. Brewer, *supra* note 170; Lanius v. Fletcher, *supra* note 169.

[173]Rosenbaum v. Garrett, 57 N.J. Eq. 186, 41 Atl. 252 (Ch. 1898); Matter of McAuliffe, 167 Misc. 783, 4 N.Y.S.2d 605 (Surr. Ct. 1938); Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919).

[174]See LAND, TRUSTS IN THE CONFLICT OF LAWS 242 (1940); Cavers, *Trusts Inter Vivos and the Conflict of Laws,* 44 HARV. L. REV. 161, 167 (1930).

[175]Union and New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 727 (1928); People v. First Nat'l Bank, 364 Ill. 262, 4 N.E.2d 378 (1936); Greenough v. Osgood, 235 Mass. 235, 126 N.E. 461 (1920); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Lanius v. Fletcher, 100 Tex. 550, 101 S.W. 1076 (1907).

[176]See Sale v. Saunders, 24 Miss. 24 (1852); Cadbury v. Parrish, 89 N.H. 464, 200 Atl. 791 (1938).

[177]See, *e.g.,* McCullough's Ex'rs v. McCullough, 44 N.J. Eq. 313, 14 Atl. 123 (1888); Bradford's Estate, 165 Misc. 736, 1 N.Y.S.2d 539 (Surr. Ct. 1937); Cronin's Case, 326 Pa. 343, 192 Atl. 397 (1937).

[178]FLA. STAT. §737.02 (1955).

plication of the law of the domicile even in testamentary trusts, and this is the dominant view in the United States.[179] The result of these varying attitudes is to permit the settlor in most cases to control the law governing administration by designating the law he desires to be applied, by indicating the place of administration, and by appointing a trustee who resides or does business in that place. It is the planner's duty to see that the law so chosen is favorable to the trust program, so that its provisions are not thwarted.

Once the law governing administration is determined, it will apply to such matters as investments, implied powers of the trustee, when and to whom the trustee must account, depreciation and amortization questions, and whether creditors can reach beneficiaries' interests.[180] Illustrative of the flexibility possible in a given estate, the governing law perhaps may be split up. For example, the law of one state may govern compensation of the trustee and of another state the powers of the trustee.[181] This is, of course, subject to the qualification that the states whose law is so chosen must have a significant relationship to the trust. The split governing law cases may be more reasonably explained on the ground that the settlor could have spelled out the provision in question and has simply used a shorthand method of so doing – a type of incorporation by reference.[182] If this is the real basis, there seems to be no need for significant contacts with the state so selected; but the courts have not yet recognized this.

Another technique for which there is authority and which may well be useful, particularly in long-term trusts, is to bring about a shift or subsequent change in law governing administration of a trust. By using this approach it is possible in some cases to have the trust administered under the law of one state for a period of time and then under the law of another for a subsequent period. Thus the appointment, pursuant to the trust terms, of a successor trustee domiciled in a state different from that in which the trust was originally administered has been held to effect a change of law governing administration.[183]

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[179]See notes 170, 171, 172 *supra.*

[180]See LAND, TRUSTS IN THE CONFLICT OF LAWS 197 (1940).

[181]See Macy v. Mercantile Trust Co., 68 N.J. Eq. 235, 59 Atl. 586 (Ch. 1904); Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937); Keeney v. Morse, 71 App. Div. 104, 75 N.Y. Supp. 728 (1st Dep't 1902).

[182]See LAND, *op. cit. supra* note 180, at 247.

[183]Wilmington Trust Co. v. Wilmington Trust Co., 26 Del. Ch. 397, 24 A.2d 309 (1942); In the Matter of New York Trust Co., 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. 1949); *cf.* Wilmington Trust Co. v. Sloane, 30 Del. Ch. 103, 54 A.2d 544 (Ch.

There probably must be some evidence of an intention on the part of the settlor to accomplish this result. The mere change of residence by an individual trustee has been held insufficient to change governing law.[184]

The trend toward permitting greater flexibility in the intention of the settlor in the general area of trusts is reflected in conflicts problems. The use of the choice of law clause for the purpose of fixing the law governing administration of a trust appears to assure the application of the designated law in nearly every instance, provided the state whose law is so chosen bears some substantial relationship to a significant element of the trust. The draftsman of an estate plan that includes present or possible future interstate elements should avail himself of this method of reducing the conflicts problems relating to administration of trusts.

Probate and Administration of Wills

Administration is sometimes referred to as the proving ground for estate planning, as it is during administration that any oversights are certain to appear. While a detailed analysis of conflict of law problems in administration cannot be undertaken here, some of the matters that must be relied upon in planning most cases will be outlined.[185] Administration involves four major functions: probating the will, collecting assets, paying claims and charges, and distribution. Under the American system of administration the estate owner must anticipate administration in every state in which he leaves property at death.[186] Although this requirement is quite inappropriate for a mobile society, it nevertheless has few exceptions.[187] Further, the will may well have to be proved in each state. In the case of immovables the will must be proved at each situs as an original probate,[188] and any

1947); Estate of Beckwith v. Cooper, 258 Ill. App. 411 (1930); Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); see also Conn. Rev. Stat. §4838 (1930).

184Swetland v. Swetland, 107 N.J. Eq. 504, 153 Atl. 907 (Ct. Err. & App. 1931); Lewis v. County of Chester, 60 Pa. 325 (1869).

185See Rheinstein and Scoles, *Conflict Avoidance in Succession Planning*, 21 Law & Contemp. Prob. 499 (1956).

186See Frick v. Pennsylvania, 268 U.S. 473 (1925); Crolly v. Clark, 20 Fla. 849 (1884).

187See Opton, *Recognition of Foreign Heirship and Succession Rights to Personal Property in America*, 19 Geo. Wash. L. Rev. 156 (1950).

188Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. Doing, 66 F. Supp. 825 (S.D. Fla. 1946); Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940); Hofferd v. Coyle, 212 Ind. 520, 8 N.E.2d 827 (1937); *In re* Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658

exceptions must rest upon the provisions of the governing law of the situs.[189]

Although movables likewise are subject to administration at their situs,[190] the problem of determining this situs may be quite complicated. Chattels, that is, tangibles, are subject to administration where found.[191] Negotiable instruments, in which the paper is complete evidence of the obligation, likewise are subject to administration where the paper is located.[192] Since adoption of the Uniform Stock Transfer Act by all of the states it seems likely that the same approach will be taken in administering corporate stocks when transferable by endorsement or delivery.[193] Though there is some authority for this approach at common law,[194] most cases prior to the Uniform Stock Transfer Act required administration at the corporate domicile, the place of incorporation.[195]

Because of the expense and inconvenience of ancillary administration, the opportunities for avoiding it should be kept in mind in planning the multi-state estate. By opportune location of securities many administrative problems can be avoided. Ancillary administration of accounts receivable due the deceased can be avoided by voluntary payment to the domiciliary administrator. The debtor in such a case is protected if local administration has not begun,[196] and probably if he has no notice of any local administration.[197] A Florida stat-

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(1949).

[189]See Crippen v. Dexter, 79 Mass. 330 (1859); WIS. STAT. §310.07 (1953).

[190]See Carey, *Jurisdiction Over Decedents' Estates,* 24 ILL. L. REV. 44 (1929); Goodrich, *Problems of Foreign Administration,* 39 HARV. L. REV. 797 (1926).

[191]*Cf.* Cox v. Kansas City, 86 Kan. 298, 120 Pac. 553 (1912); Morrison v. Hass, 229 Mass. 514, 118 N.E. 893 (1918).

[192]Smith v. Normart, 51 Ariz. 134, 75 P.2d 38 (1938); Lang's Estate, 301 Pa. 429, 152 Atl. 570 (1930). Nonnegotiable debts and choses in action are subject to administration where jurisdiction can be obtained over the debtor for suit to collect. Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606 (1940); Gordon v. Shea, 300 Mass. 95, 14 N.E.2d 105 (1938); see also Harris v. Balk, 198 U.S. 215 (1905).

[193]See Baker, *In the Administration of Intangibles: Missouri's Section 466.010 in Perspective,* 19 Mo. L. REV. 1 (1954); Hopkins, *Conflict of Laws in Administration of Decedents' Intangibles,* 28 IOWA L. REV. 422 (1943); Pomerance, *The 'Situs' of Stock,* 17 CORNELL L.Q. 43 (1931); *cf.* ILL. REV. STAT. c. 3, §207 (1955).

[194]Lohman v. Kansas City So. Ry., 326 Mo. 868, 33 S.W.2d 117 (1930); Griswold v. Kelly Springfield Tire Co., 94 N.J. Eq. 308, 120 Atl. 325 (Ch. 1916).

[195]*E.g.,* Albuquerque Nat'l Bank v. Citizens Nat'l Bank, 212 F.2d 943 (5th Cir. 1954); Kennedy v. Hodges, 215 Mass. 112, 102 N.E. 432 (1913).

[196]Wilkins v. Ellett, 108 U.S. 256 (1883).

[197]Maas v. German Sav. Bank, 176 N.Y. 377, 68 N.E. 658 (1903); see Beale,

ute[198] authorizes suit against debtors of the estate by the foreign personal representative and approves direct payment by the debtors to the foreign representative if no written demand by the local personal representative has been received within three months after appointment of the foreign representative. Wider adoption of this type of statute would result in more prompt and efficient settlement of many estates. To overcome any possible limitations by will, the executor should be given power in the will to act outside the state of his appointment and to negotiate settlement of such matters on behalf of the estate.

The will should be first probated at the domicile in nearly every case, since, as to movables, its admission there is usually taken as conclusive evidence of its validity elsewhere;[199] the probate may also be conclusive as to immovables if the situs has an act similar to Lord Kingsdown's Act[200] or the Model Execution of Wills Act.[201]

One of the more troublesome provincial concepts in the area of administration, which often prevents prompt settlement of the estate, relates to claims of creditors. Creditors can usually initiate administration of the estate if it is not begun by others.[202] Also creditors are permitted to file a claim in any court administering estate assets;[203] and, although payment discharges the claim, disallowance by one court generally has not been a bar to another claim on the same facts in a second state.[204] Even though a state rather clearly cannot discriminate against nonresidents by giving priority to local creditors,[205] the doctrine in this area of creditor's rights has not yet seen a mature development. The unity of an estate consisting of assets in several jurisdictions has been substantially recognized only in cases involving in-

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Voluntary Payment to a Foreign Administrator, 42 HARV. L. REV. 597 (1929); Mersch, *Voluntary Payment to Foreign Administrator,* 18 GEO. L.J. 130 (1930).

198FLA. STAT. §734.30 (1955); see also COLO. REV. STAT. §152-6-4 (1953); ILL. REV. STAT. c. 3, §419 (1955).

199Lee v. Monks, 318 Mass. 513, 62 N.E.2d 657 (1945); Martin v. Stovall, 103 Tenn. 1, 52 S.W. 296 (1899); *cf.* FLA. STAT. §734.31 (1955).

200Wills Act, 1861, 24 & 25 VICT. c. 114.

2019 U.L.A. 419.

202See Putnam v. Pitney, 45 Minn. 242, 47 N.W. 790 (1891).

203Buckingham Hotel Co. v. Kimberly, 138 Mass. 445, 103 So. 213 (1925); *In re* Estate of Hirsch, 146 Ohio St. 393, 66 N.E.2d 636 (1946); Coffey v. Durand, 27 Tenn. App. 704, 167 S.W.2d 684 (1940); Tyler v. Thompson, 44 Tex. 497 (1876).

204Ingersoll v. Coram, 211 U.S. 335 (1908); Johnston v. McKinnon, 129 Ala. 223, 29 So. 696 (1900); Nash v. Benari, 117 Me. 491, 105 Atl. 107 (1918).

205See Blake v. McClung, 172 U.S. 239 (1898).

solvent estates.[206] This places an exceptional value upon the negotiating ability of the domiciliary executor if he is to persuade all creditors to file their claims at the domicile and to forego requiring administration elsewhere. The draftsman should at least make certain that the will does not limit the executor; he should be given extensive powers to negotiate out-of-state settlements without restriction.

The final opportunity for overcoming distortions in the testamentary scheme caused by multi-state administration comes with distribution. If there are sufficient assets at the domicile and all legatees must look to domiciliary assets for satisfaction of their legacies, the plan of distribution valid at the domicile can usually be given substantial effect notwithstanding distortions caused by foreign law. Distribution of immovables occurs at the situs.[207] Ordinarily, however, distribution of ancillary movables will not only be made according to the law of the domicile but usually is made by the domiciliary court after transmission to it for that purpose.[208] Only occasionally, because of a strong local public policy, will the nondomiciliary situs of movables exercise the prerogative of local distribution by ancillary law.[209] In such cases the domicile can, by being the last to distribute, adjust its own distribution to compensate for any distribution elsewhere. Two leading Florida cases are *Griley v. Griley*[210] and *Murphy v. Murphy*.[211] Each permitted a widow who had taken a contrary position in ancillary administration to receive only that total amount to which she would be entitled by Florida law, offsetting against that share the amounts received elsewhere.[212] Although the law of Florida is fairly clear in this regard, possible litigation could be avoided by the inclusion of a specific authorization to the executor directing him, in making distribution under the will, to consider amounts received by a legatee or intestate successor of the decedent's estate in any jurisdiction.

In approaching the problems of planning that are potential by

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[206]See Ramsay v. Ramsay, 196 Ill. 179, 63 N.E. 618 (1902); Goodall v. Marshall, 11 N.H. 88 (1840); *In re* Estate of Hirsch, *supra* note 203; Estate of Hanreddy, 176 Wis. 570, 186 N.W. 744 (1922).

[207]Clarke v. Clarke, 178 U.S. 186 (1900).

[208]See GOODRICH, CONFLICT OF LAWS 576 (3d ed. 1949).

[209]Lawrence v. Kitteridge, 21 Conn. 577 (1852).

[210]43 So.2d 350 (Fla. 1949).

[211]125 Fla. 855, 170 So. 856 (1936).

[212]See also Cumming's Estate, 153 Pa. 397, 25 Atl. 1125 (1893); Van Dyke's Appeal, 60 Pa. 481 (1869); *In re* Lawrence's Will, 93 Vt. 424 (1919); Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 308 (1955).

reason of multi-state administration of the decedent's estate, the planner must consider the future effect of location of assets and of varying law and give the executor complete powers to act, so that if the courts will approve his acts he is at least not hampered by a restrictive instrument.

PART III – TAX PROBLEMS

Double Taxation

One of the fears of the wealthy client is that his estate assets may be subjected to the burden of a death tax by more than one state. As far as the United States Constitution is concerned the fear is well justified. The Supreme Court has held that taxes imposed upon an estate measured by intangibles and based upon a finding of domicile within more than one state are not unconstitutional. Illustrative is the famous *Dorrance* litigation,[213] in which the estate paid over $10,000,000 in taxes to Pennsylvania only to discover that New Jersey also considered the decedent a domiciliary and required the payment of an additional tax of over $15,000,000. Such action was not found to present a reviewable constitutional question. In a subsequent case the Supreme Court put it thus:[214]

> "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decision of the courts of different states as to the place of domicile, where the exertion of state power is dependent upon domicile within its boundaries."

Double taxation may also result from different tax bases, such as

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[213]Dorrance v. Thayer-Martin, 115 N.J. Eq. 268, 170 Atl. 601 (Prerog. Ct. 1934), *aff'd*, 13 N.J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 362, 184 Atl. 743, *cert. denied*, 298 U.S. 678 (1936); Hill v. Martin, 296 U.S. 393 (1935); New Jersey v. Pennsylvania, 287 U.S. 580 (1933) (motion to file bill of complaint denied); Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932); *cf.* Massachusetts v. Missouri, 308 U.S. 1 (1939); Texas v. Florida, 306 U.S. 398 (1939).

[214]Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937); see also Guterman, *Avoidance of Double Death Taxation of Estates and Trusts*, 95 U. Pa. L. Rev. 701 (1947); Knapp, *Solutions of the Double Domicile Problem*, 15 Conn. B.J. 251 (1941); Tweed and Sargent, *Death and Taxes Are Certain — But What of Domicile*, 53 Harv. L. Rev. 68 (1939); *cf.* Bittker, *The Taxation of Out-of-State Tangible Property*, 56 Yale L.J. 640 (1947); Harrow, *Relation of Jurisdictional Limitations*

domicile and situs. The existing authorities seem to permit the domicile to tax foreign inter vivos trusts of movables in which some benefit or control is retained by the deceased settlor,[215] with a probable though not certain exception as to assets having a business situs elsewhere.[216] The state in which tangibles or intangible assets are located may also impose a tax without constitutional violation.[217] This burdensome possibility has been alleviated through adoption of reciprocal and nonresident exemption statutes by most of the states.[218] These do not afford automatic protection to an estate, however, particularly because of different construction of the different statutes. It is incumbent upon the estate planner to advise his client that location of assets in different states may result in additional tax burdens. Further, the law of each state in which assets are located, in which the estate owner may be considered domiciled, or in which there are trusts administered that might be included in the estate for tax purposes, must be investigated and considered. If assets can be located so as to force the taxing states into the courts of a single state for satisfaction of their claims, the states submitting their case to a common tribunal will be effectively bound by the findings of that court.[219]

The problem of multiple taxation exists also in the international area, where considerable relief has been afforded by treaties with different countries.[220] It should be borne in mind that the problem is not limited to death taxes but also exists in regard to income and property taxes, as to which the same precautions should be taken.[221]

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on Power to Tax to Conflict of Laws in Decedents' Estates, 20 A.B.A.J. 116 (1934).

[215]Curry v. McCanless, 307 U.S. 357 (1939); Bullen v. Wisconsin, 240 U.S. 625 (1916).

[216]Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers Trust Co. v. Schnader, 293 U.S. 112 (1934); see also Commissioner v. Aldrich, 316 U.S. 174 (1942); Frick v. Pennsylvania, 268 U.S. 473 (1925).

[217]See Treichler v. Wisconsin, *supra* note 216; Curry v. McCanless, *supra* note 215; City Bank Farmers Trust Co. v. Schnader, *supra* note 216; Bullen v. Wisconsin, 240 U.S. 625 (1916).

[218]See, *e.g.*, FLA. STAT. §§198.02,.03,.44 (1955); 1 P-H INH. & TRANS. TAX SERV. (11th ed.) ¶851 (1956).

[219]See Matter of Trowbridge, 266 N.Y. 283, 194 N.E. 756 (1935); see also Curry v. McCanless, 307 U.S. 357 (1939); Matter of Benjamin, 289 N.Y. 554, 43 N.E.2d 531 (1942).

[220]4A P-H FED. TAX SERV. ¶128,011 (1956).

[221]See generally Bittker, *supra* note 214; *cf.* Northwest Airlines v. Minnesota, 322 U.S. 292 (1944); Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940); New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937); State *ex rel.* Wisconsin Trust Co. v. Phelps, 172 Wis. 147, 176 N.W. 863 (1920).

APPORTIONMENT OF FEDERAL AND STATE ESTATE TAXES

A difficult conflicts problem in the administration of taxable estates is raised by the question of which beneficiaries must bear the burden of the federal or state estate taxes. Under our system of law, the burden of *federal* tax is determined by *state* law.[222] In the absence of testamentary directions the general common law view was to fund the payment of estate taxes from the residue of the estate in the hands of the executor in the same manner that other preferred debts of the estate are handled.[223] This approach has been changed in about half the states to provide that the estate taxes shall be apportioned among the recipients of the assets that constitute the taxable estate.[224] Some states have adopted this doctrine by decision, but most have adopted it by statute. Florida has one of the typical statutes,[225] patterned after the original New York law on the subject, though there is some authority indicating decisional adoption of the rule of apportionment in Florida.[226] To determine whether there is to be an apportionment of taxes relating to testamentary dispositions, it is possible that many states will follow tradition and apply the law of the decedent's domicile to movables and the law of the situs to immovables.[227] The existing cases,[228] however, all decided in New York, indicate that the law of the decedent's domicile will be applied to determine apportionment matters as to both movables and immovables.

Under existing tax structures many inter vivos transfers are subjected to the estate tax, and it is these transfers that cause the most difficult problems. The significance of this matter is indicated by the fact that, of the four litigated cases involving inter vivos trusts, three have involved Florida estates. New York, in *Matter of Gato*,[229] held

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222Riggs v. Del Drago, 317 U.S. 95 (1942).

223Gelin v. Gelin, 229 Minn. 516, 40 N.W.2d 342 (1949); Turner v. Cole, 118 N.J. Eq. 497, 179 Atl. 113 (Ct. Err. & App. 1935); see Sutter, *Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention*, 51 MICH. L. REV. 53 (1952).

224See Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955).

225FLA. STAT. §734.041 (1955).

226Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

227*Cf.* Riggs v. Del Drago, 317 U.S. 95 (1942); Scoles, *supra* note 224, at 291.

228*In re* Peabody's Estate, 115 N.Y.S.2d 337 (Sup. Ct. 1952); Matter of Ruperti, 194 Misc. 376, 86 N.Y.S.2d 887 (Surr. Ct. 1949); *In re* Bernie's Estate, 74 N.Y.S.2d 887 (Surr. Ct. 1947); *In re* Goodman's Estate, 66 N.Y.S.2d 706 (Surr. Ct. 1946); *In re* Dommerich's Estate, 74 N.Y.S.2d 283 (Surr. Ct. 1945).

229276 App. Div. 651, 97 N.Y.S.2d 171 (1st Dep't 1950).

that the domicile at death, that is, Florida, should govern the apportionment in regard to an inter vivos trust created and administered in New York. Massachusetts, on the other hand, has held that the law governing the trust, that is, the place of creation and administration, and not the settlor's domicile at death should govern.[230] Minnesota has followed the Massachusetts view in denying application of the Florida law to a trust administered in Minnesota that was created by a settlor who later died domiciled in Florida.[231] The fourth case is an instance in which the matter appears not to have been appropriately presented to the Michigan court.[232] In refusing to apply the Florida apportionment law against a Michigan trust, even though the settlor died domiciled in Florida, the court did not indicate its awareness of the conflict of laws problem presented.[233] This matter is of the utmost concern to the domiciliary personal representative, since he must pay the tax and enforce any available contribution if apportionment is required. The personal representative may, of course, use his full power of retention and set off, or he may sue to enforce contribution.

Nearly all of these problems are within the control of the draftsmen, because the matter of who is to bear the burden of the estate tax is subject to the decedent's properly expressed intention. Therefore, every dispositive instrument should include an express provision covering the impact of estate taxes. If the taxes are to be paid from the residue this should be stated, and adequate funds should be provided for the purpose. If the testator desires the tax to be apportioned this should also be stated, with an indication of which gifts are to contribute and which, if any, are not. Reliance upon the statutory presumption is not sufficient because of its possible limited application. Particular attention should be paid to inter vivos dispositions. The governing intention should be stated in both the will and the inter vivos instrument to assure the desired result, without regard to the conflicts attitude of the courts that might later pass on the question.

CONCLUSION

Much of what has been discussed indicates that most, though perhaps not all, conflict of laws problems in estate planning can be

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[230]Isaacson v. Boston Safe Dep. and Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950).

[231]First Nat'l Bank v. First Trust Co., 242 Minn. 226, 64 N.W.2d 524 (1954).

[232]Knowles v. National Bank, 345 Mich. 671, 76 N.W.2d 813 (1956).

[233]For a recent discussion of the inter vivos trust cases see Note, *Conflict of Laws*

avoided by careful planning and drafting. While most clients are not willing to plan their lives to avoid all such problems, an ounce of prevention is worth much more than many untested cures.

In meeting the complicated problems of the multi-state estate the attorney must advise his client to locate assets in those states in which desired dispositions are effective. He must bear in mind that there is no substitute for a well-drafted instrument that satisfies the law of all states having contact with it. Such instruments should make liberal use of provisions indicating the owner's intention as to dispositive and administrative matters and as to the conflict of laws problems that may arise. Since no estate owner or estate planner can foresee future circumstances, the most valuable protection against the unexpected distortion of the estate plan is regular and frequent review of the plan to accommodate the changed circumstances. This should be done regardless of whether the estate is large or small, local or interstate.

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in Estate Tax Apportionment — The Inter Vivos Trust, 9 U. FLA. L. REV. 194 (1956).

SCOLES, CONFLICT OF LAWS IN ESTATE PLANNING

TABLE OF HEADINGS AND SUBHEADINGS