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Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403

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Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403

*Eugene F. Scoles**

TABLE OF CONTENTS

I. INTRODUCTION	213
II. UNIFORM TRUST CODE—SECTIONS 107 AND 403	214
III. DOMINANT POLICY SHARED BY ALL STATES	215
IV. NARROWING THE ISSUES	220
V. PRACTICAL RESOLUTION OF CHOICE OF LAW ISSUES	222
A. <i>Validity of Trusts—Formalities</i>	224
1. Testamentary Trusts of Movables and Immovables	224
2. Inter Vivos Trusts of Movables	225
3. Inter Vivos Trusts of Immovables	227
B. <i>Validity—Matters of Substance</i>	227
1. Transfer in Fraud of Creditors	228
2. Spousal and Family Protection	228
3. Homestead	229
4. Rule Against Perpetuities	229
C. <i>Interpretation/Construction—Dispositive Provisions</i>	229
1. Meaning of Trust Terms	230
2. Trust Dispositions and Contrary Public Policy	233
D. <i>Construction—Administrative Provisions</i>	236
1. Powers of Trustee	236
2. Exercise of Trustee’s Powers	238
VI. CONCLUSION	239

I. INTRODUCTION

It is perhaps appropriate to start this Article on trusts and conflict of laws by noting that there are only minor differences in the law of trusts among the states of the United States. The states uniformly are guided by the intention of the settlor to be given effect, unless, in the particular instance, there is an overwhelmingly strong public policy to the contrary. In looking back over his definitive work on trusts, Austin Wakeman Scott noted:

There is not an American law of trusts, although the . . . judges have occasionally spoken as though there were. . . . There is, nevertheless,

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an Anglo-American *system* of law, which consists of legal concepts and principles and traditional techniques. It is this system, insofar as it relates to trusts, with which I have been dealing in this treatise. . . . The remarkable thing, it seems to me, is not the divergences but the similarities in the law of trusts as administered in the American states. . . . [T]he concepts of the law of trusts are simple and easily understood. They are based not on technique but on broad human principles of conduct. They are based upon a sense of justice and fair play. . . . The evolution of the trust has been a great adventure in the field of jurisprudence. It has not ended. As long as the owner of property can dispose of it in accordance with his legitimate wishes, the great adventure will go on. The law of trusts is living law.¹

This similarity of the law among the states greatly reduces the occasions on which a conflict of laws occurs that leads to litigation. Consequently, the Uniform Trust Code (“UTC”), particularly as regards conflict of laws, does not break much new ground but primarily gives guidance to lawyers and their clients, and, occasionally, to judges when litigation occurs. The guiding choice of law is set out in two brief sections dealing with meaning and creation.

II. UNIFORM TRUST CODE—SECTIONS 107 AND 403

SECTION 107, GOVERNING LAW. The meaning and effect of the terms of a trust are determined by:

- (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

1. Austin Wakeman Scott, *Epilogue* to [VA] AUSTIN WAKEMAN SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* 643-45 (4th ed. 1989) [hereinafter SCOTT ON TRUSTS]. The “adventure” continues. See Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CAL. L. REV. 1877, 1883 (2000). According to Professor Halbach:

Property owners today generally have longer life spans and often live into substantial periods of diminished physical or mental health. Trusts are also now being used by broader segments of society than in the past, and with greater diversity of objectives (ranging from tax and probate avoidance, to property management late in life, to highly sophisticated multifamily, multigeneration plans of disposition), but increasingly without aid of legal counsel who are skilled in the complexities of estate and trust planning.

Id.

(2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.²

SECTION 403, TRUSTS CREATED IN OTHER JURISDICTIONS.

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.³

III. DOMINANT POLICY SHARED BY ALL STATES

The pervasive shared policy that controls nearly all issues in trust law is to give effect to the settlor's intent. Indeed, the accepted definition of a trust is "a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of" others.⁴

2. UNIF. TRUST CODE § 107 (2000) [hereinafter UTC].

3. UTC § 403.

4. RESTATEMENT (THIRD) OF TRUSTS § 2 (Tentative Draft No. 1, 1996); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS & TRUSTEES* § 1 (rev. 2d ed. 1984); SCOTT ON TRUSTS, *supra* note 1, § 2.3. Trust doctrine is a creature of Anglo-American common law and equity not normally found in civil law nations, but it is becoming more widely recognized internationally. *Cf.* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1868-69 (2000). According to Professor Gordley:

It would not be fair to say that every difference between the Anglo-American law and civil law of property reflects poorly on the Anglo-American law. There is one creation of the courts of equity that is useful indeed and has no civil law parallel: the trust. One person, the settlor, can transfer assets to another, the "trustee," who is then obligated to use them for the benefit of someone else, "the trust beneficiary." The trust is unlike a civil law mandate. In a mandate, one person instructs another to perform an action on his behalf. In a trust, the settlor can no longer exercise control over the trustee. A trust is unlike a civil law contract in favor of a third party because the third party has a real right to the assets in the trust, not merely a contract claim against the trustee. In fact, the trust is so useful that civil law countries are considering adopting it.

Id.; *see also* D.J. HAYTON, S.C.J.S. KORTMANN & H.L.E. VERHAGEN, *PRINCIPLES OF EUROPEAN TRUST LAW* 13-21 (1999).

This manifestation of intention is encapsulated in the “terms of the trust,”⁵ which govern the interests and actions of the parties except when contrary to overriding public policy prohibiting unlawful purposes relating to criminal or tortious acts, fraud, economic regulation, or judicial enforcement of trusts.⁶ This policy of giving effect to the settlor’s intention not only permeates the substantive law of trusts but also underlies the generally accepted choice of law applicable to resolving most interstate and international issues relating to the interests or propriety of acts of the parties.⁷ The policy of supporting the settlor’s purpose and intent is so strong that it is not unusual for a court to sustain that intent by alternative reference to the law of a related state that validates the trust.⁸ The rationale being that the settlor could have chosen the governing law, and the settlor clearly intended to create a valid trust, hence sustaining the trust. Hence, sustaining the trust is giving effect to that intention.

A trust is a *disposition of property* from the owner to the trustee. Hence, the trust is imposed on various assets that are effectively transferred. Without title to assets in the trustee, there is normally no trust. As a consequence, an intended trust can be valid as to those assets effectively transferred but not as to other assets not effectively transferred. The administration of a trust may extend over a long period of time and involve many different circumstances and parties. Because of these complexities, it is necessary to consider the particular choice of law issue in question in light of the circumstances related to the trust

5. RESTATEMENT (THIRD) OF TRUSTS § 4 (Tentative Draft No. 1, 1996); UTC § 103(17). Of course, the intent must be manifested by evidence admissible in judicial proceedings. RESTATEMENT (THIRD) OF TRUSTS §§ 20, 21, 22 (Tentative Draft No. 1, 1996); UTC §§ 401, 407.

6. RESTATEMENT (THIRD) OF TRUSTS §§ 28, 29 (Tentative Draft No. 2, 1999); UTC §§ 404, 405, 406; *see also* BOGERT & BOGERT, *supra* note 4, § 211; SCOTT ON TRUSTS, *supra* note 1, §§ 61-64. Economic regulation includes protection of family members from disinheritance.

7. *See, e.g.*, SCOTT ON TRUSTS, *supra* note 1, § 555. Giving weight to the purpose of the local laws in question is a highly important factor in choice of law. *See, e.g.*, Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 296 (1990). According to Professor Kramer:

The point is elegantly simple: if—in the interests of comity and mutual accommodation—we presume that a state’s law is intended to apply only in cases that are connected to the state in some important way, the significant contacts ought to be those that implicate the reasons the law was enacted for wholly domestic cases.

Id.; *see also* Elliot E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 965-69 (1952).

8. *See, e.g.*, Estate of Klinkner, 151 Cal. Rptr. 20, 23 (Ct. App. 1975); Ford v. Ford, 44 N.W. 1057, 1059-60 (Mich. 1890); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 (1971).

regarding that particular issue. This disjunction of issues means that the choice of law rules must be flexible enough to accommodate the variety of matters that call for resolution. Each question needs to be approached as to how the settlor's intention and the relevant law and policy relate to the narrow matter at issue.⁹

UTC Section 107 reflects the strength of the policy of giving effect to the settlor's intention by assigning first priority to the settlor's designation of the governing law in determining the meaning and effect of the terms of the trust. Because the settlor could spell out, or incorporate by reference, the meaning of terms, it is appropriate for the settlor to designate the law by which meaning can be assigned to trust terms.

In the absence of a designation, the default reference is to the law having the most significant relationship to the matter of issue. This is the choice of law approach articulated by the American Law Institute in the 1971 *Restatement of Conflict of Laws*,¹⁰ and it directs the parties and courts to consider the significance of presumed intention and the circumstances at the time the issue arises. The approach taken in the UTC also parallels that of the Uniform

9. "It is necessary always to consider the precise questions at issue. Absolute rules simply will not do." SCOTT ON TRUSTS, *supra* note 1, § 555. Prior to the mid-1930s in the United States, jurisdictional concepts led to simple choice of law rules based on single prominent factors such as the place of the tort, the place of the contract, or the situs of real property. The situs rule was particularly dominating in Anglo-American trust law because, historically, inter vivos trusts commonly involved a large productive parcel of land to be administered to support a spouse and then to be turned over to mature children. The central feature was to manage this key family asset. Because both land and chattels were most frequently located at the domicile, testamentary trusts became identified with the domicile without serious infringement on the situs rule. It was only when ownership of land outside the domicile began to raise issues that situs courts began to hear conflict of laws issues. The forum's judicial jurisdictional rules and its familiarity with local conveyancing regulation reinforced the situs rule in resolving the occasional choice of law case. With the increasing significance of trusts and wealth in the form of securities and secured debt instruments, along with the increased mobility of families, choice of law issues became more frequent and the inadequacies of simple rules became apparent.

During and following the promulgation of the first *Restatement of Conflict of Laws* in 1934, debate blossomed over what the courts were doing, in fact, and what they should do, in this area. Many theories were articulated, but nearly all criticized single contact rules as being inadequate and unjust in the varied circumstances of modern society. See E. Cheatham, *American Theories of Conflict of Laws*, 58 HARV. L. REV. 361, 372 (1945). The *Restatement (Second) of Conflict of Laws* articulated the Choice of Law approach reflected in the UTC. The debate on how best to explain and theoretically to support the evolving choice of law has continued, but nearly all commentators agree with Scott that simple rules do not work. Austin Scott was Associate Reporter for the *Restatement (Second) of Conflict of Laws*, and Volume VA of *Scott on Trusts* is the leading treatment of choice of law in trusts.

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971).

Commercial Code,¹¹ although, in trusts, the governing intent is autonomous to the settlor and not dependent on agreement of two or more parties. Referring to the law of the state with the most significant relationship with regard to the particular issue has dominated the resolution of conflict of laws issues in the United States during the last half-century.¹² This method means that the resolution of disputes might involve reference to different law for different issues. For example, if the settlor provided for the annual income to be divided among “the children of my sons living in their household,” and three sons lived in states different from the settlor’s domicile, different law could be utilized to determine “children in the household” if that furthers the settlor’s intention.

In the absence of settlor direction, Section 107’s general reference to the law of the jurisdiction having the most significant relationship to the matter at issue is subject to the criticism of being a “non-rule” and overly vague. This same criticism was leveled at the *Restatement (Second) of Conflicts*, as academics struggled to articulate the process of reasonable resolution where the laws of two states are alleged to be controlling. However, the articulation of a method of seeking a just resolution to the endless variety of circumstances relevant to the meaning of the varied expressions of thousands of settlors precludes simple, single-factor rules.¹³

Referring to the law of the state most significantly related to the issue requires the parties and the courts to consider all of the factors bearing on the settlor’s intent and the reasonable expectations of the parties, as well as the different policies of the states involved.¹⁴ The most significant relationship to the issue is simply an extension of the legal system’s requirement and an

11. See U.C.C. § 1-105 (amended 2001) (“[T]he parties may agree that the law either of this state or of such other state . . . shall govern. . . . Failing such agreement, this Act applies to transactions bearing an appropriate relation to this state.”); U.C.C. § 1-301 (amended 2001).

12. See generally Patrick J. Borchers, *Courts and the Second Conflicts Restatement*, 56 MD. L. REV. 1232 (1997); Friedrich K. Juenger, *How Do You Rate a Century?*, 37 WILLAMETTE L. REV. 89 (2001); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1 (2001); see also Kramer, *supra* note 7, at 296-97, 336-37. But c.f. J.A. Schoenblum, *Conflict of Laws Under the Uniform Trust Code*, TRUSTS E ATTIVITA FIDUCIARIE, 16-26 (Gennaio, 2001).

13. See SCOTT ON TRUSTS, *supra* note 1, § 555.

14. See WALTER W. LAND, L.L.M., TRUSTS IN THE CONFLICT OF LAWS §§ 21, 37.1 (1940) (listing elements bearing on choice of law issues, such as: the domicile of the settlor; the place in which the trust instrument was executed; the language of the trust instrument; the location of the trust property; the domicile of the trustee; the domicile of the beneficiary; the place in which the business of the trust is to be carried on; and, the implied intention of the settlor); see also von Kaulbach v. Keoseian, 783 F. Supp. 170 (S.D.N.Y. 1992); Davis v. Neilson, 871 S.W.2d 35 (Mo. Ct. App. 1993); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 222 (1971).

application of the lawyer's skill in determining the *relevance* of facts and law to a matter in dispute.¹⁵ It also permits the development of more narrow presumptive rules or presumptive choices as experience is acquired with precise issues arising from these variable factors. This also makes it appropriate for legislative direction. It is especially appropriate in the Code because the past development of choice of law in trust cases offers strong support for this approach. The UTC provisions reflect the current evolving common law and accommodate future development. Looking at the particular issue in light of intent and circumstances has led the courts to reach generally predictable choices of law in the resolution of disputes in trusts when the settlor's direction is not effective.¹⁶

Of course, most questions are resolved by the settlor's directions, express or implied. Because the settlor's intention is the primary factor, sustaining that intention under the circumstances will resolve most differences. This means that difficult choice of law problems do not often arise with regard to the terms of the trust unless some element of state policy is urged to avoid a particular result.

It is important to emphasize the necessity of isolating and identifying the particular narrow issue to be resolved. Significant considerations may involve circumstances relating to the settlor's relationship to a particular jurisdiction, such as domicile or the nature and location of property subject to the trust, or whether the matter in dispute is the transfer of property into the trust, *i.e.*, a creation issue, or a trust administration matter, or a matter involving construction of the trust terms. This multiplicity of issues has led to the development of patterns of results on common matters that might be called sub-rules, which have evolved from the encompassing approach reflected in the UTC.

15. See Kramer, *supra* note 7, at 301.

16. See, e.g., *Wilmington Trust Co. v. Wilmington Trust Co.*, 24 A.2d 309, 314 (Del. Ch. 1942) (A New York inter vivos trust by a New Yorker had a successor trustee appointed in Delaware. Later, a beneficiary exercised the power of appointment, which would be valid only in Delaware. The appointment was sustained. "There is no substantial reason why a donor, in dealing with that which is his own, may not provide for a change in the location of his trust with a consequent shifting of the controlling law."); *Hope v. Brewer*, 32 N.E. 558 (N.Y. 1892) (Devise of New York land to be sold and proceeds to go to Scottish trustees for infirmary in Scotland. Disposition, void in New York, sustained by Scot's Law.); *Chappell's Estate*, 213 P. 684 (Wash. 1923) (A California testator's will created a trust of Washington personal property. The trust violated the perpetuity limit in California, but not in Washington, and was sustained even without a choice of law clause because the testator obviously intended a valid trust and that intent should be given effect if possible.).

IV. NARROWING THE ISSUES

In either litigation or planning, the first consideration usually is the *creation* of the trust, which involves the *effective transfer* of trust property to a trustee. The formal requirements of the intended transfers are often dependent upon the non-trust law relating to the ownership interest in the asset in question. For example, a testamentary trust requires a valid will effectively transferring property to the trustee.¹⁷ It is only after this first local law step of an effective transfer, declaration, or exercise of a power that one gets to the requirements for creating a trust summarized in UTC Section 402. Reflecting the policy of furthering the testator's intention, most states have statutes sustaining a will devising movables or immovables if it complies with the law of any of several alternative states referenced to the forum for consideration. The Uniform Probate Code ("UPC") is illustrative of this point. UPC Section 2-506 provides:

A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.¹⁸

These provisions of wills statutes, patterned after Britain's Lord Kingsdown's Act, have led many to assert that a person hardly can die intestate if a serious attempt is made to execute a will anywhere in the world. As a consequence, there are few instances of invalid lawyer-drawn wills containing testamentary trusts.

Trusts also can be created by transfer other than by will, such as a transfer of property by deed, assignment, or delivery during the settlor's lifetime, by declaration of the owner of property to hold in trust, or by exercise of power of appointment. The appropriate choice of law will differ depending on the method of transferring property into the trust. To meet the requirements of these different methods, the drafters of the UTC included Section 403, analogous to UPC Section 2-506, reflecting the policy to further the intent of the settlor, a policy shared by all states and nations recognizing trusts.

Under UTC Section 403, an inter vivos trust created outside the forum is valid if it complies with the law of the place of execution of the trust instrument, or where the settlor was domiciled, had a place of abode or was a national, or where the trustee was domiciled or had a place of business, or where any trust property was located. These alternative references sustain a trust that is created

17. See UTC § 401.

18. UNIF. PROBATE CODE § 2-506 (amended 1998).

by a transfer that complies with the law of the jurisdiction that is significantly related to the transfer.

By the law of all states, certain formalities are required for the transfer of real property, an immovable. These formalities of transfer led to an earlier general statement that the law of the situs of land determines the validity of a trust of immovables because, without an effective transfer to the trustee, no trust would attach to the land. However, different questions of trust validity may turn on whether the asset is subject to equitable conversion by direction to sell, or a power to sell by trustee, or whether the real property is an investment or is actually managed by the trustee, or whether corporate shares have been substituted for the land, or whether the matter at issue relates to something other than the land's use, occupancy, development, taxation, or regularity of title.¹⁹ Thus, a simple situs rule cannot accommodate the many different considerations incident to real property included in trust assets or what a forum may call immovables. Just as the alternative references to validate a will can sustain the validity of a will creating a testamentary trust, most states also have statutes validating inter vivos deeds of local land by alternative reference to the place of execution, in addition to the situs.²⁰ Of course, there may be substantive questions of validity other than the formalities of a valid deed. Shortly put, if these questions relate to use, occupancy, or regularity of title records, these are issues to which the situs of land seems most significantly related. But if the question refers to capacity of the owner or witness to a foreign execution, construction of the terms of the trust, spousal consent, or power of the trustee, the significance of the situs fades, and the reasonable expectations of the parties and the settlor under other law become dominant.²¹

UTC Section 403 accommodates necessary consideration of the usual interests of other states in questions relating to the valid creation of inter vivos trusts. The reference to location of property is significant as to movables, as well as to immovables. The location of assets may impose requirements for valid transfer. Chattels or intangibles chattelized by certificates of ownership, such as securities, may be moved to a different jurisdiction and a trust created there

19. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 19.1-20.6 (3d ed. 2000).

20. See Earnest G. Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws*, 20 YALE L.J. 427, 431-34 (1911); see also 765 ILL. COMP. STAT. ANN. 5/23 (West 2001); KAN. STAT. ANN. § 58-2228 (1994); OR. REV. STAT. § 194.555 (2001).

21. See R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW §§ 8.10-.22 (4th ed. 2001); Moffatt Hancock, *In the Parish of St. Mary le Bow in the Ward of Cheap*, 16 STAN. L. REV. 561, 571 (1964); Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585 (1987); cf. Saunders v. Saunders, 796 So. 2d 1253, 1254-55 (Fla. Dist. Ct. App. 2001); Rudow v. Fogel, 426 N.E.2d 155, 159-61 (Mass. App. Ct. 1981).

under the usual choice of law for transfers of movable property.²² The possibility of sales in an open market protecting third parties introduces factors that may override the interests of the settlor's domicile. Electronic transfer of securities to a trust company acting as trustee in another jurisdiction illustrates one instance in which the trustee's domicile or place of business reasonably might be relied on to create a trust. Under the UTC, the enacting forum is saying, "we will recognize a trust validly created as to property in another state that has one of these significant relationships to its owner."

In addition to formal validity matters, substantive matters may limit the settlor's autonomy in a disposition in trust. For example, the strong policy of protecting a spouse's reasonably expected participation in the assets of a decedent at death may invalidate, at least in part, a unilateral disposition by the other spouse. This protective policy touches only lightly in relation to the particular assets but rather arises out of the state's interest in the marital or domestic relations of its citizens. A question about whether a trust disposition is in violation of spousal rights has little significance with regard to the location of the asset except to protect innocent purchasers relying on the record or market circumstances. One would expect a court to apply the law of the marital domicile rather than that of the situs of assets to measure spousal rights.²³

V. PRACTICAL RESOLUTION OF CHOICE OF LAW ISSUES

In the process of identifying and resolving the particular matter in dispute, it is necessary to distinguish matters relating to validity from matters of construction. In matters of validity, the formalities necessary to transfer particular assets must be distinguished from substantive limitations based on

22. See SCOLES ET AL., *supra* note 19, §§ 19.11-32.

23. See E. Scoles, *Choice of Law in Family Property Transactions*, 209 HAGUE ACADEMY OF INT'L LAW RECUEIL DES COURS 79 (1988-II) [hereinafter Scoles, *Family Property*]; Eugene F. Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U. FLA. L. REV. 151, 172 (1955) [hereinafter Scoles, *Nonbarrable Interests*]; cf. UNIF. PROBATE CODE § 2-201(b) (amended 1998). The relevant policy is aptly stated in *In re Estate of Clark*, 236 N.E.2d 152, 156, 158 (N.Y. 1968). According to the court:

As between two states, the law of that one which has the predominant, if not the sole, interest in the protection and regulation of the rights of the person or persons involved should, of course, be invoked. . . . "In sum, Virginia's overwhelming interest in the protection of surviving spouses domiciled there demands that we apply its law to give the widow in this case the right of election provided for her under that law. We find nothing . . . in the public policy of New York which would permit a decedent, by a mere expression of intent, to change this result."

Id. But cf. *Nat'l Shawmat Bank v. Cumming*, 91 N.E.2d 337, 340-41 (Mass. 1950).

other policies of the law. Questions of substantive validity generally concern limits on the settlor's methods or powers of disposition, *i.e.*, matters beyond the settlor's control. In matters of construction, a distinction needs to be made between matters concerning the substantive dispositions to beneficiaries and matters concerning the administration of the trust. Matters of construction are largely subject to the settlor's control as an extension of the settlor's intention, express or implied, although even a dispositive provision or action of the trustee may lead to a judicial modification of the settlor's intention by reason of the force of a limiting state policy.

An issue related in part to creation and in part to administration involves the revocability of a trust. Whether a trust is revocable or irrevocable seems to be a matter related to its creation but is subject to the expressed or implied intention of the settlor. Thus, if a trust is created in one state by a settlor domiciled in another state, a choice of law clause would control. Absent designation by the settlor, the matter may well depend on when and how the issue is raised, *i.e.*, by an attack at the time of creation or after the trust has been operating, as in an attack by creditors. Whether a trust is revoked by subsequent action of the settlor involves the exercise of a power reserved by the settlor and notice directed to the trustee. This, rather clearly, would be subject to the settlor's direction in the trust. In the absence of direction, the law of the place where the trust is administered and the trustee must account would seem most appropriate. These issues are possible because most states have a presumption that a trust is irrevocable in the absence of a reservation of the power to revoke. The UTC in Section 602 changes this presumption. Under the UTC, a trust is revocable unless expressly made irrevocable.

As revocation and amendment both involve post-creation acts by the settlor, a similar approach would seem applicable to amendment issues. Further, releases of the power of revocation also would seem to be sustained by the law of the place of administration or by the law chosen by the settlor.²⁴

Whatever the issue, the courts generally try to give effect to the settlor's dispositive scheme as far as possible. With regard to validity issues, this frequently means sustaining the validity by any reasonably related law under Section 403. In construction matters regarding dispositions or administrative matters, the settlor's expressed or implied intent controls against the background of the law of the state having the most significant relationship to the matter at issue, as in Section 107. Some examples of common concerns under the UTC follow.

24. See SCOTT ON TRUSTS, *supra* note 1, § 581.

A. *Validity of Trusts—Formalities*

1. Testamentary Trusts of Movables and Immovables

Early on, the common law developed the choice of law reference to the law of the decedent's domicile at death to determine the validity of a will of movables. The effect was to sustain wills, as most movables in a person's estate usually were located at the decedent's family home, and it was deemed desirable that the estate be administered as a unit.²⁵ Also, in early times, real estate was not administered as a general asset in the decedent's estate, so no occasion for choice of law arose. Later, statutes were enacted to sustain the will if there was a change of domicile after a valid execution at a former domicile.²⁶ In 1861, England enacted Lord Kingdown's Act that sustained wills of British subjects valid under the law of England, the place of execution, the decedent's domicile at time of execution, or the decedent's domicile of origin in the British dominions.²⁷ At about the same time, the matter began receiving legislative attention in the United States. In 1910, the Uniform Wills Act, Foreign Executed, was promulgated, sustaining a will valid either where executed or at the testator's domicile. This Uniform Act was followed in 1940 by the Model Execution of Wills Act, which sustained wills valid at the place of execution, or the testator's domicile at death or domicile at time of execution. These acts were widely adopted in the United States, and, as real estate became more frequently subject to probate and administration, these statutes usually applied to both real and personal property.²⁸ In recognition of the strong policy to further the testator's intention, the 1969 Uniform Probate Code expanded this approach to sustain a written will if executed in accordance with the law of the forum state; in accordance with the law at the time of execution at the place of execution; or

25. See SCOLLES ET AL., *supra* note 19, §§ 20.3, 20.9.

26. See SCOTT ON TRUSTS, *supra* note 1, § 589.

27. Wills Act, 1861, 24 & 25 Vict., c. 114 (Eng.).

28. See, for example, N.Y. EST. POWERS & TRUST LAW § 3-5.1(c) (McKinney 1998), which states:

(c) A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or non-domiciliary thereof, is formally valid and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

(1) This state;

(2) The jurisdiction in which the will was executed, at the time of execution; or

(3) The jurisdiction in which the testator was domiciled, either at the

with the law where, at the time of execution or at the time of death, the testator was domiciled, had a place of abode, or was a national.²⁹ The UPC reflected concern for international wills, as well as the experience in England with the Wills Act of 1963.³⁰ The references to nationality and place of abode accommodate the civil law countries' reliance on nationality and habitual residence rather than the common law of domicile. Because of the strength of the commonly-shared policy of furthering testamentary intent and the very slight differences in formalities for executing wills, "place of abode" avoids litigation over variations in the overlapping concepts of "domicile" and "habitual residence."³¹ Further, a person wanting to execute a will is most likely to think about and attempt to satisfy the legal requirements where he or she lives or where he or she seeks legal assistance. Thus, a person who seriously wants to execute a will scarcely can die intestate even as between states where the common purpose of the rules for valid execution may be differently articulated. As a consequence of this development, the formal validity of testamentary trusts, being dependent on the validity of the testamentary instrument of transfer, seldom is in doubt. While the choice of law rule focused on the state of the most significant relationship, *i.e.*, the domicile, statutes also included the place of execution in order to give maximum effect to the shared policy to support the dispositive intent of the owner of property, reasonably expressed.

2. Inter Vivos Trusts of Movables

Trusts have a long history, and the policy of carrying out the settlor's dispositive intent is equally strong and applicable to both inter vivos and testamentary trusts. The incidents of choice of law problems involving the formal validity of inter vivos trusts rarely arise because the inter vivos trust is usually a planned transfer of property to the trustee. Lawyers simply make sure that all steps necessary for the transfer are taken, and, if there is an omission, go back and correct it with further documentation by the settlor. The sporadic common law cases indicated that the settlor's intent should be carried out,³² and

29. UNIF. PROBATE CODE § 2-506 (amended 1998).

30. Wills Act, 1963, 11 & 12 Eliz. 2, c. 44 (Eng.).

31. See Eugene F. Scoles, *The Hague Convention on Succession*, 42 AM. J. COMP. L. 85, 90, 98-99, 105 (1994); Symeon Symeonides, *Louisiana's Draft on Succession and Marital Property*, 35 AM. J. COMP. L. 259, 270-81 (1987).

32. See, e.g., *Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 795 (N.Y. 1937) ("[W]e find nothing in our public policy which forbids extending comity and applying the New Jersey laws so as to carry out the wish of the settlor and sustain the trust."); *Hutchison v. Ross*, 187 N.E. 65, 70 (N.Y. 1933) ("Where a non-resident settlor establishes here a trust of personal property intending that the trust should be governed by the law of this jurisdiction, there is little reason why the courts should defeat his intention by applying

the analogy to the desirability of sustaining the formal validity of wills was clear to legislative drafters. Because inter vivos trusts are created by transfers of property by a competent living owner, the choice of law references in any legislation sustaining the settlor's intent needed to accommodate the law of the jurisdictions related to inter vivos transfers of property to another, the declaration of trust by an owner, and the creation of a trust by exercise of a power of appointment, as well as by will.³³ The existing choice of law rules regarding these types of inter vivos transfers focused on the law most significantly related to the transfer. As to chattels or chattelized interests such as securities, the place where the goods or negotiable documents of title were located at the time of the transfer was important as market considerations were necessary and delivery was a significant factor.³⁴ Similar market considerations existed in assets subject to registration or recording, such as land, when compliance with the law of the situs at the time of the transfer supported the title of the trustee and of the trustee's transferees.³⁵ Many trustees required or encouraged parties to satisfy the requirements of transfer under the law to which the trustee was most likely to be subjected, namely the trustee's domicile or place of business. Capacity of the settlor and satisfaction of requirements of the law most related to the settlor would seem to suggest satisfying the standards at the settlor's domicile. However, because of the many forms in which ownership interests in property may be represented and because of the transactional mobility of owners, not all of these jurisdictional reference points occur in all transfers in trust. As to some issues of formal validity, domicile of the settlor is sufficient; as to others, satisfaction of the law of the situs is sufficient. But the underlying purpose of all of the transfer requirements is to provide evidence demonstrating the settlor's intent, and the state-to-state variations in the detail of demonstrating that intent are minor. There is little difference in the policy among these jurisdictions as they all attempt to sustain the settlor's intended disposition reasonably evidenced. Consequently, in order reasonably to sustain the settlor's intention to create a trust, on the analogy to existing wills legislation, the UTC necessarily provides the alternative references in Section 403.

the law of another jurisdiction.”).

33. See UTC § 401.

34. See *Morson v. Second Nat'l Bank of Boston*, 29 N.E.2d 19, 20-21 (Mass. 1940); SCOLES ET AL., *supra* note 19, §§ 19.11-32.

35. See SCOLES ET AL., *supra* note 19, §§ 19.1-10.

3. Inter Vivos Trusts of Immovables

The alternative references in Section 403 apply to all assets, including real property, as has been the approach of the states in sustaining wills.³⁶ The many statutes validating deeds of local land by either the place of execution or the situs support this alternative approach because differences in formalities are slight and all share the policy of sustaining the intended transfer of the owner by reasonable evidence of intent.³⁷

Because of jurisdictional limitations, litigation regarding transfers of real property nearly always occurs in the courts of the situs of real property. If the state of the situs enacts Section 403, that state validates the trust as to all assets in the state, but jurisdictional considerations would limit its determination, other than between the parties before it, as to other assets. If a non-situs state has Section 403 and the situs state does not, the situs state must decide whether its policy of carrying out the testator's intended transfer and its interest in interstate comity would permit the trustee to complete the transaction, for example, either by exercise of power or by specific performance, in the absence of formal compliance with local law in the trust creation. Obviously, this is a rare case concerning inter vivos trusts, for the parties simply would comply unless death or a subsequent change of mind intervened.

B. Validity—Matters of Substance

In addition to formalities, Section 403 purports to apply "to the entire process of a trust's creation, including . . . [the requirement] that there be trust property."³⁸ This process clearly would apply to the elements treated in Sections 401 to 409. As to such issues as trust purposes or charitable nature, it is highly unlikely that there would be differences of law or policy sufficient to raise a question of adverse public policy. The rarity of invalidity for issues within Sections 401 to 409 results also from the consideration that the trust attaches to different items of property, and there is a general recognition of the utility of treating the assets similarly in administering the trust. However, the reach of Section 403 to cover an issue of validity relating to matters other than those suggested by Sections 401 to 409 may be unclear. To the extent that a matter is not within the Code, the common law will apply.

36. *Supra* notes 27-28 and accompanying text; see N.Y. EST. POWERS & TRUST LAW § 3-501(c) (McKinney 1998); UNIF. PROBATE CODE § 2-506 (amended 1998).

37. See 765 ILL. COMP. STAT. ANN. 5/23 (West 2001); KAN. STAT. ANN. § 58-2228 (1994); OR. REV. STAT. § 194.555 (2001).

38. UTC § 403 cmt.; see also Lorenzen, *supra* note 20, at 461-62; *supra* note 20 and accompanying text.

1. Transfer in Fraud of Creditors

Attacks on the disposition of assets in trust can raise questions of the validity of a gratuitous transfer to another as possibly being in fraud of the settlor's existing creditors. UTC Section 505, *Creditors Claims Against the Settlor*, deals with claims asserted against any beneficial interest in the trust retained by the settlor. This Section subjects a revocable trust to the settlor's creditors during life or at death. This limits the concerns of existing creditors to the creation of an irrevocable trust. The comment to Section 505 declares that "[t]his subject . . . is left to the State's law on fraudulent transfers" or federal bankruptcy law. Likewise, issues relating to defects in the settlor's asserted ownership also would be left to other law.

2. Spousal and Family Protection

Possible family protection claims against irrevocable trusts are not treated in the UTC and are left to other law. Spousal claims against inter vivos irrevocable trusts are generally treated as raising issues of ownership, such as in community property or, occasionally on analogy to creditors, fraud on the spousal share.³⁹ The matter of potential claims by family members at the settlor's death is specifically treated in Section 505 as to trusts revocable at the settlor's death by subjecting the trust assets to such claims to extent the probate estate is inadequate. The major family protection claim in states without community property is generally at the death of the settlor of a revocable trust. The issue of what law determines the extent of the spouse's share is not treated in the UTC. This issue of the appropriate law to measure the spouse's claim is viewed generally as a probate matter.⁴⁰ Also, it does not fit comfortably within Section 403 particularly to preclude or limit the spousal or family claim. Nor are these nonbarrable interests something over which the settlor has control, and, as a consequence, Section 107 should not be viewed as permitting the testator to cut them off by choice of law. It is here that the concept of referring to the law of the jurisdiction having the most significant relationship to the matter in dispute should be utilized to resolve these issues. The debate over whether other situs states should defer to the domicile at death has been treated at length elsewhere.⁴¹ The applicable policies rather clearly indicate that the family center, *i.e.*, the testator's domicile, is the state whose law is most significantly related to what interests family members may assert to overcome the testator's

39. See W.D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960); Scoles, *Family Property*, *supra* note 23, at 60.

40. *Cf.* UNIF. PROBATE CODE §§ 2-201 to 2-202 (amended 1998).

41. See generally Scoles, *Nonbarrable Interests*, *supra* note 23.

intention to deprive them.⁴² As to testamentary dispositions, the matter is specifically treated in UPC Section 2-201(a), which gives the “surviving spouse of a decedent domiciled in this State” an elective share,⁴³ and in UPC Section 2-201(c), which provides that the right of the spouse of a non-domiciliary decedent to an elective share “is governed by the law of the decedent’s domicile at death.”⁴⁴ This reference to the decedent’s domicile is supported in the cases.⁴⁵ Statutes permitting the testator’s intent to override these interests are contrary to the policy of providing nonbarrable family protection interests. Further, to provide a nonbarrable share to domestic spouses but to deny the claim of the spouse of a decedent domiciled elsewhere well may violate constitutional concepts of equal protection.

3. Homestead

Depending upon the detail of local law, homestead rights for family members may limit the owner’s disposition of particular assets. It is not frequently a matter that raises choice of law problems because homestead rights usually attach to particular assets located in the domicile. The real property constituting the home of the decedent and the furnishings of the home are the usual subjects of homestead laws. Because any choice of law and jurisdiction over the assets center in the forum, as the domicile of the decedent at death, local law is the source for both determination of rights and enforcement.

4. Rule Against Perpetuities

While it is possible to assert that a violation of the forum’s rule against perpetuities is a matter of validity, these issues relate to the nature of the interest given in the disposition. Choice of law issues relating to perpetuities questions will be treated below in considering construction of dispositions.

C. Interpretation/Construction—Dispositive Provisions

UTC Section 107, as was noted above, is a strong declaration of the pervasive purpose in trust law to carry out the settlor’s intent. The choice of law directive in Section 107(a) is that “the meaning and effect” of the terms of a trust are determined by the law of the jurisdiction designated in the terms “unless” contrary to a strong public policy of the jurisdiction having the most significant

42. See Scoles, *Family Property*, *supra* note 23, at 65.

43. UNIF. PROBATE CODE § 2-201(a) (amended 1998).

44. UNIF. PROBATE CODE § 2-201(c) (amended 1998).

45. See SCOLES ET AL., *supra* note 19, §§ 20.14–15.

relationship to the matter at issue.⁴⁶ Thus, the enacting forum is saying, “our principal policy is to give effect to settlor’s intention, and we will honor his direction as to the legal background against which to read his dispositions in trust.” Further, the forum is saying, “the only limitation on those dispositive directions is strongly overriding public policy of the jurisdiction most significantly related to, *i.e.*, is the most concerned about, the particular matter at issue.” The latter is a recognition by the enacting forum that the differences of policy among the states limiting intention are very slight, and, in the interest of comity, the forum will defer to another state that is more genuinely concerned with the matter. There are generally two kinds of questions that arise as to a trust that is validly created. The first relates to matters that the settlor could spell out in detail but the actual meaning is somehow incomplete or ambiguous. This is a matter of seeking the actual intention of the terms used from whatever evidence of usage is available. This is largely a question of fact, and no choice of law is raised. If the evidence does not provide adequate direction, the courts will fall back to the presumed meaning of the terms against the legal background that the settlor probably had in mind, or would have had in mind if he had thought about it, when the terms were used. These matters are the kinds of things that raise only issues of what the settlor did, not whether the settlor legally could do it.

The second kind of question is reached when the matter involves some legal limitation on the disposition the settlor has provided in the trust. Examples of the first of these will be discussed first.

1. Meaning of Trust Terms

As noted above, the forum court, called upon to interpret terms of a trust, first will look to the language used in light of the circumstance surrounding the settlor at the time the trust was created. However, when this initial attempt at interpretation fails, the court may engage in construction, *i.e.*, adopt the meaning as presumed in the legal system most relevant to the matter in dispute.⁴⁷ As this

46. UTC § 107(a).

47. *See, e.g.*, *Second Bank-State St. Trust Co. v. Weston*, 174 N.E.2d 763, 765-67 (Mass. 1961). A Maryland testatrix willed her estate to Massachusetts trustees in trust for her daughters with gift over on her daughters’ death without issue to the testatrix’s “heirs at law.” *Id.* at 765. The court applied the Maryland rule to refer to heirs at the time of death of the surviving daughter, contrary to the Massachusetts rule. *Id.* at 766-67. The court described its process as follows:

We first attempt to ascertain the testatrix’s intention by interpretation of the language used by her, giving weight to the ordinary meaning of the words used, the context in which they appear, and other relevant evidence, including the circumstances in which the will was drafted. If her intention cannot be ascertained by such interpretation, we must have resort to rules of

is an effort to assign meaning, the settlor could incorporate by reference the law by which meaning is defined and effect is determined. The choice of law designation in Section 107(1) does that, and the court will follow that direction. This rationale and result reflect the commonly-accepted approach taken by the courts in common law cases.⁴⁸

The settlor's designation could refer particular issues to different law. For example, it is not uncommon to assign different law to construction of dispositions and to administrative matters, or the designation may cover only selected matters, such as compensation of the trustee. The only limitation occurs when the designation somehow raises a possible contrary policy related to the disposition or the trustee's action in question. The significant policy in such a case is that of the state mostly strongly related to or concerned with the matter at issue.

In this approach, the settlor can direct that most issues be relegated to a particular legal system. This obviously simplifies matters for the parties and the courts, and is the course frequently advised by experienced lawyers. Care, however, needs to be taken by the lawyer in drafting choice of law clauses; consideration must be given to the different states whose policies may impact the many aspects of the trust. The lawyer's interest in the simplicity of resolving issues by a blanket reference of "all matters" to the law most familiar to the drafter, in some instances, can override the reasonable expectations of the settlor and the parties as the trust continues over the years.

construction.

Id. at 765-66.

Failing to find adequate evidence of guiding intention, the court turned to construction and concluded:

We are concerned, however, with the construction of a testamentary trust of movables in matters not relating to its administration. The rules of construction at the testator's domicile should be applied in such matters, in the absence of indication that the testator intended some other law to be applied or adopted an instrument drafted under the principles of some other law. . . . Although this trust had Massachusetts aspects, we find no indication that the testatrix affirmatively intended that the substantive provisions of her will should be construed in accordance with Massachusetts rules. Accordingly, we are remitted to the Maryland law.

Id. at 767.

48. See, e.g., *Wilmington Trust Co. v. Annan*, 531 A.2d 1209, 1215 (Del. Ch. 1987); *In re Moore*, 493 N.Y.S.2d 924, 925-26 (Sup. Ct. 1985); see also SCOTT ON TRUSTS, *supra* note 1, § 575; M.A. Moore, *Choice of Law in Trusts: How Broad the Spectrum*, 36th UNIV. OF MIAMI SCHOOL OF LAW PHILIP E. HECKERLING INST. ON EST. PL., 6-1 (2002); cf. UNIF. PROBATE CODE §§ 2-601, 2-701 (amended 1998).

If the governing law direction is absent or fails, then the court would choose the law of the jurisdiction most related. A few examples follow. Matters of administration are separately treated subsequently.

Non-administrative issues usually relate to identification of beneficiaries or the extent of an interest given. For example, an identification issue arises when the income from property is given to son *A* for life, and, at *A*'s death, the property goes to his children. If *A* and his family live in a different state from the forum and his family includes natural born and adopted children, there may be a choice of law issue asserted if the law of the settlor's domicile and *A*'s domicile differ on whether "children" is presumed to include adopted children. While this is a matter that the settlor could have clearly provided, if the evidence does not show his preference, which view should the court take? What "children" are meant? As the settlor was obviously thinking of *A* and *A*'s family, it would seem that the law that reasonably should determine the meaning of *A*'s family as the law most significantly related to *A*'s family, and that would be *A*'s domicile at the time of *A*'s death. However, as a caveat, this has been an area in which the settlor's domicile has been the dominant choice under the usual approach in wills and under a broad choice of law clause.⁴⁹

A few observations on this case illustrate that, while results under Section 107 are not always predictable, there is guidance on how these cases may be resolved. Consider the blanket direction by the settlor that "the law of the state of my domicile shall govern all matters under this trust." Such a blanket direction in the case with a trust for *A*'s "children" where the laws relating to adoption differ, could exclude children adopted at birth and reasonably considered by the settlor and *A* to be included.⁵⁰ Drafting care needs to be taken. A similar unsatisfactory result might be reached under the common application of the decedent's domiciliary law to testamentary trusts.⁵¹ In such a case, considering the present policy to treat adopted and natural children alike for property purposes, the court likely would avoid the choice of law issue by finding factual support for interpreting the trust to include the adopted children.⁵² If the law changed after the trust was created, the fact pattern could mean that the unanticipated change was not intended to be included in the settlor's direction. Or, if after the settlor had died, *A*, late in life, adopted a spouse, a housekeeper, or a gay partner, the application of the settlor's direction probably would be questioned and the court would be forced to decide the matter. At that point,

49. See SCOTT ON TRUSTS, *supra* note 1, § 578; see also *supra* note 47.

50. See, e.g., Guar. Trust Co. of N.Y. v. Brunton, 74 N.Y.S.2d 254, 258-59 (Sup. Ct. 1947).

51. See, e.g., Houghton v. Hughes, 79 A. 909 (Me. 1911); *In re Battell's Will*, 35 N.E.2d 913, 915-916 (N.Y. 1941).

52. See Halbach, *supra* note 1, at 1905; cf. McIlvaine v. Am. South Bank N.A., 581 So. 2d 454, 458-61 (Ala. 1991).

even though a maximum degree of prediction could not be expected, still the court is directed to consider the law most significantly related to the matter at issue in that particular case.

While the search for intent in testamentary trusts often centers on the domicile of the settlor, as the courts have done historically, UTC Section 107 invites the scrivener to anticipate the significance of circumstances surrounding potential choice of law issues, and to solicit and express the settlor's preference clearly. This instructive aspect is a laudable objective of the statute. This is particularly true in the drafting of inter vivos trusts where it is usually appropriate to designate the law of the place of administration, *i.e.*, the domicile or place of business of the trustee, to govern matters of administration. However, the choice of law clause drafted to ease administration should not necessarily or thoughtlessly govern dispositive provisions. The circumstances and reasonable expectations of the settlor and beneficiaries should be considered and not overridden by trustee concern for familiar local law. The search and regard for the settlor's true intention is essentially the same in both testamentary and inter vivos trusts. Also, with regard to identifying and respecting the settlor's intention, similar considerations of the settlor's intention should be made with respect to different assets. While the settlor's intention may be related to a particular beneficiary having a particular benefit in specific assets, for example, occupancy of real estate, voting rights in a closed corporation, or even employment in an enterprise, the trust instrument should consider and direct the governing law as to the dispositive interest in the event matters not specifically addressed occur during the course of the trust.

In this era of migrating family members, this Section imposes responsibility on those advising settlors and drafting trusts to give choice of law matters close study. As to the rare case of peculiar, unanticipated facts, the statute essentially leads the courts or the parties to consider the relevance of all circumstances to the matter at issue. In dealing with unpredictable human activity, this is what society and the law are forced to do.

2. Trust Dispositions and Contrary Public Policy

A disposition of property in trust under directions that raise questions of public policy falls somewhere between matters of substantive validity and matters of construction. Here, as in other matters, the courts have attempted to sustain the testator's intention, if valid, under the law of a state reasonably related to the matter at issue.

The comment to UTC Section 107 notes that the governing law designated to determine the meaning and effect of terms need not be otherwise related to the trust. This reflects the rationale that the designation is similar to incorporating by reference a law spelling out that meaning. While this autonomy is purportedly given by the first part of UTC Section 107(1), it is taken away by the

“unless” clause if the designated law “is contrary to the strong public policy” of the jurisdiction most significantly related to the matter at issue. In other words, if the application of the law chosen is strongly contrary to the law of the state that is genuinely concerned with the matter, the choice is ineffective as to that matter.⁵³ On the other hand, a thoughtful estate planner rarely, if ever, would designate an unrelated law in drafting a trust for a client.

Cases involving the rule against perpetuities in the past have raised issues of construction and validity, and they may well arise in the future in light of recent legislation in different states. If the policy differences are minor, such as differing numbers of lives or years measuring the permissive time, it would seem the testator’s intention would be sustained if a reasonably related state permitted it.⁵⁴

Perpetuity problems relate to the manner in which property is held and the impact that has on economic or market interests. These often are interrelated particularly with regard to land. However, the strength of restrictive policies may depend on whether the affected asset is subject to a power of sale, a direction to sell, or a direction to retain. Also, there are different legislative views as to the effect of a violation, *i.e.*, whether the gift fails, or is modified or pruned back to conformity, or whether determination awaits the actual facts. In each of these cases, it seems probable that the intention of the settlor will be found to intend the application of the law having the least destructive impact on the intended disposition.⁵⁵

53. See SCOTT ON TRUSTS, *supra* note 1, § 591. The limitation of public policy is the forum’s traditional escape valve from flagrantly offensive results in choice of law and probably would be available to the forum even without the statutory restatement. This residual exception to the application of foreign law is to be resorted to only when the fundamental policy of the most concerned state is seriously offended. Mere difference in the law or results are not enough to involve this seldom-used doctrine. Judge Cardozo’s classic statement counseled against parochial use of the public policy exception unless application of the foreign law “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonwealth.” *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918); see also SCOLES ET AL., *supra* note 19, §§ 3.15-.18; HAGUE CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND THEIR RECOGNITION, Arts. 6, 18 (1985).

54. A leading case is *Cross v. United States Trust Co. of New York*, 30 N.E. 125 (N.Y. 1892), in which the New York court sustained a trust that violated the New York perpetuities rule. The testamentary trust of a Rhode Island testator consisted of movables in New York to be administered in New York by a New York trustee. *Id.* at 125-26. The New York court held the trust valid under the more liberal Rhode Island rule against perpetuities and not contrary to New York public policy. See *id.* at 127-30; see also SCOTT ON TRUSTS, *supra* note 1, § 593; Halbach, *supra* note 1, at 1893.

55. See *Shannon v. Irving Trust Co.*, 9 N.E.2d 792 (N.Y. 1937). *Shannon* involved an attack on an inter vivos irrevocable trust by a son who received a limited income

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Perpetual trusts raise a perpetuity question that goes to the entire trust and not simply to a particular asset's disposition. If there is an effort to evade the law of a settlor's domiciliary forum that is also the place of administration of a long continuing trust for family purposes, the forum may impose a perpetuities limitation to accommodate its policy, which favors turning property over every two generations. Whether a forum at the place of administration would respect a duration limitation of a settlor's foreign domicile out of a sense of comity seems more doubtful. It is upon this latter uncertain assumption of comity that the "runaway" dynasty trust is considered potentially viable.⁵⁶ There is a substantial difference between the usual perpetuities problem with a particular disposition, as discussed above, and the perpetual or dynasty trust in which the policy issue encompasses the entire trust. It is quite possible that an interested forum would find a greater contrary policy in the case of a perpetual trust than the usual perpetuity case. Hence, such an interested forum might entertain an imaginative attack on the trust as to elements within its jurisdiction.⁵⁷

An analogous problem exists with so-called asset protection trusts that attempt to avoid exceptions to spendthrift trust doctrines or other law subjecting assets to governmental or other claims against the beneficial owners.⁵⁸ The policy against defrauding creditors has led the domiciliary forum to impose personal contempt sanctions on local settlors⁵⁹ of foreign asset protection trusts to coerce the repatriation of assets from a trust created and administered in an

interest with the excess to be accumulated for the son's issue or a Pennsylvania charity. *Id.* at 793. The trust administered by the New York trustee violated the New York rule on accumulations but not the rule of New Jersey, the domicile of the settlor and the state whose law the settlor directed to apply to matters other than the trustee's compensation, which was to be governed by New York law. *Id.* The court sustained the trust and 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 this state." *Id.* at 794. "[W]e find nothing in our public policy which forbids extending comity and applying the New Jersey law so as to carry out the wish of the settlor and sustain the trust." *Id.* at 795.

In a somewhat analogous area of public policy, the pattern of cases has been to sustain contracts against the charge of usury by alternative reference to the most lenient law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971); *cf.* Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1213-14 (9th Cir. 2001).

56. *Cf.* Shannon-Vail, 270 F.3d at 1213-14; Cross, 30 N.E. at 125.

57. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971); John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 649, 695 (1985); Conrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 972 (1956).

58. *See* UTC §§ 501-507.

59. It perhaps also includes even attorneys who knowingly assist clients in defrauding others. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2 (amended 1998).

off-shore jurisdiction.⁶⁰ As in all such cases, the forum's jurisdictional reach over parties or assets is usually the dominant factor in determining the outcome of attempts to reach assets in trusts set up to evade local restrictions at the settlor's domicile or place of business.

The use of asset protection trusts to avoid spousal or family obligations of the settlor is likely to raise serious questions of policy. While the concept of fraud on the spouse has lost much of its force in recent years, the clear violation of the policy of the highly interested forum at the marital domicile could engender attacks on interests of parties to a foreign asset protection trust or their attorneys who set up the trust.⁶¹

D. Construction—Administrative Provisions

1. Powers of Trustee

Trust administration is an area nearly completely within the control of the settlor, excepting only limited elements that are so important to the recognition of the trust concept, to the protection of the beneficiaries, or to the protection of the public, that they cannot be dispensed with by the settlor. For example, if there is no obligation to observe the fiduciary relationship or there is no obligation on the trustee to account for wrongdoing, there is no trust; the alternative is an outright gift to the trustee. UTC Section 105 lists these matters that are such important aspects of an intended trust that they cannot be waived by the settlor.⁶²

Many of these considerations limit exculpatory clauses sometimes inserted in a trust at the suggestion of a trustee, possibly without full understanding by the settlor. As such, these provisions also may protect a settlor from overreaching by a prospective trustee. Under either the common law or UTC Section 107, the law designated by the settlor, absent different direction for specific matters, will govern the duties, powers, and liabilities of the trustee, including such matters as sales, investment, management, compensation, accounting, and control by the courts—*i.e.*, the matters usually relating to the administration and protection of the interests of the beneficiaries.

Because the usual matters of administration occur at the principal place of administration, the settlor's description of the principal place of administration needs to be related to the corporate trustee's place of business or the individual trustee's residence under UTC Section 108. The trustee is under a duty to

60. *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1242-44 (9th Cir. 1999).

61. *Cf. MACDONALD, supra* note 39; *SCOTT ON TRUSTS, supra* note 1, § 622.

62. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 2, 50 (Tentative Draft Nos. 1 & 2, 1996 & 1999).

administer the trust at a place appropriate for its purpose. Section 108 also provides expressly for moving the place of administration.

The common law has given extraordinary deference to the settlor's intention, express or implied, in matters of administration and has permitted the governing law regarding administration to be designated, divided, or changed. As a consequence, there has been little choice of law controversy over the duties and powers of the trustee identified in Article 8. When the trustee acts outside the place of administration, there may be choice of law issues involving third parties or there may be judicial jurisdiction issues relating to proceedings by or against the trustee; however, these are generally not unique to trusts, and the law most substantially related to the issue in dispute normally will be applied. If the settlor does not designate governing law, choice of law centers on the principal place of administration, which normally is located at the place of business of the corporate trustee or the residence of the individual trustee.

In the case of trusts created by will, the most common place of administration of both the probate estate and the testamentary trust is the testator settlor's domicile. However, even there, occasional designations of a different place of administration have been sustained.⁶³ As a common manner of creating inter vivos trusts has been to execute the trust instrument with an accompanying transfer or delivery of assets to the trustee, corporate or individual, the place of business of the trustee of an inter vivos trust is usually the place of administration of the trust. If there are assets to be actively managed, such as a going business or farm, requiring administration at the location of that particular enterprise, there may be divided administration and specific directions that include a choice of law designation as to a particular asset. Divided administration simply may be what is necessary to carry out the trust's purposes. This is well within the range of UTC Section 107, identifying the choice of law as intended by the settlor or as most significantly related to the matter at issue.

UTC Section 108 permits a change of the place of administration or the transfer of trust assets to a trustee at another location appropriate for the administration of the trust. This also can change the law governing administration.⁶⁴ A simple example is where the trust involves discretionary action or distribution for the support, assistance, or education of beneficiaries who live in, or have moved to another state. Section 108 is drafted to accommodate such a mobile trust in the effort to implement the settlor's intention.

63. SCOTT ON TRUSTS, *supra* note 1, § 607.

64. SCOTT ON TRUSTS, *supra* note 1, §§ 613-615; *see* Moore, *supra* note 48, at 6-10.

2. Exercise of Trustee's Powers

Although the concept that the place of administration ordinarily determines issues regarding the existence of or limits on the trustee's powers, the exercise of the trustee's powers in the routine business of administering the trust can involve the law of other jurisdictions. This is particularly true of the investment, purchase, or sale of assets requiring registration or recording of title. Registration or recording, for example, can occur in the purchase or sale of a business, accounts receivable, mobile equipment, mortgages, or land. In such a case, although there is no question as to the trustee's power, compliance with local rules at the situs of the asset will be necessary to complete the transaction.

Transactions with third parties carry the risk of a breach of trust and third-party liability for participation in a breach of trust. Whether there is a breach will be measured by the trustee's powers and duties under the trust and the law governing them, but the liability of others may well depend upon the notice or tainted knowledge requirements at the place where the third party acts. Again, however, this is a normal choice of law reference to the law of the state most significantly related to the matter at issue. Hence, determining whether a third party is a bona fide purchaser of property wrongfully sold by the trustee will be governed by the law applicable to that transaction, which need not be that law that governs the trust generally. Many such matters may come within other uniform acts such as the Uniform Commercial Code, which has a choice of law pattern compatible with the UTC.⁶⁵

As is often the case, concepts of judicial jurisdiction relevant to the parties and the issue are crucial. Such is the case of the runaway trustee called to account in a court where jurisdiction is obtained over the trustee or over assets belonging to the trust. While the trustee's amenability to the forum is determined by forum law, the obligation to account will be measured by the law governing the trustee's powers and duties as discussed above. Historically, courts have been quite willing to enforce foreign trust obligations against an absconding trustee who is apprehended with their jurisdiction.⁶⁶ A similar pattern of resolving choice of law issues follows when a trustee wrongfully injures a third party in the course of conducting trust administration. The issue of liability to the injured plaintiff may well be determined by the law most

65. U.C.C. § 1-301 (as amended 2001) (original version at U.C.C. § 1-105 (1999)); *see supra* note 11.

66. *See, e.g.,* *Rogers v. Girard Trust Co.*, 159 F.2d 239, 242-43 (6th Cir. 1947); *Strawn v. Caffee*, 178 So. 430, 431-33 (Ala. 1938); *Knox's Estate*, 126 P.2d 108, 110-14 (Cal. Ct. App. 1942); *Application of Chassman*, 99 N.Y.S.2d 651, 653 (Sup. Ct. 1950); *Jones v. Jones*, 30 N.Y.S. 177, 178-80 (Sup. Ct. 1894); *cf.* UTC §§ 201-202 cmt.

related to the conduct of the trustee and the victim,⁶⁷ while the question whether the trustee is entitled to reimbursement or must bear the recovery as a personal liability would be governed by the law relating to trust administration.

Although this Article is concerned with choice of law questions, it should be noted that litigation raises jurisdictional, as well as other, issues of conflict of laws. UTC Section 202(a) provides that the trustee submit to the jurisdiction of the courts of the state regarding matters involving the trust by accepting the trusteeship of a trust having its principal place of administration within the state. This seems consistent with the reach of most long-arm statutes. Subsection (b) of Section 202 also purports to subject the “beneficiaries” of a trust with its principal place of administration in the state to the jurisdiction of this state with respect to their interest in the trust “regarding any matter involving the trust.”⁶⁸ This Section likewise subjects the “recipients” of a “distribution” from the trust “personally to the jurisdiction of . . . this state regarding any matter involving the trust.”⁶⁹

These “any matter” provisions of Section 202(b) may well be overly extensive in some situations and may be constitutionally restricted to causes of action reasonably related to the particular “interest” or “distribution” on which jurisdiction is based. This possibility is somewhat suggested by Section 202(c), which notes that other methods of obtaining jurisdiction over interested parties in this or other states are not precluded by Section 202.⁷⁰ These issues would be resolved under the existing law relating to judicial jurisdiction over litigants.⁷¹

VI. CONCLUSION

The variety of matters that may call for a determination of choice of law requires a statute that accommodates that variety and also does not preclude reasonable approaches in resolving new and unforeseen issues generated by changing circumstances. Assigning priority to the settlor’s designation of the governing law, subject to reasonable limits accommodating contrary state policy, permits the settlor and the estate planner to consider and formulate directions to resolve foreseeable issues. If no designation is made, reference to the law most relevant, *i.e.*, the law of the jurisdiction most significantly related to the matter

67. *Cf.* *Hanson v. Denckla*, 357 U.S. 235 (1958).

68. UTC § 202(b).

69. UTC § 202(b).

70. UTC § 202(c).

71. *See* SCOLES ET AL., *supra* note 19, at chs. 5-11; *cf.* Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 294 (2001). For a discussion of the varied features of the trust that are reflective of the *in personam/in rem* jurisdictional distinctions, see T.W. Merrill & H.E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 843 (2001).

at issue, accommodates and encourages thoughtful resolution of issues that are not foreseen. The UTC does that with trusts, and its provisions provide an approach that dovetails with the development of choice of law doctrine in other areas of the law, as well.