APPROACHES TO CHOICE OF LAW ISSUES IN TRUST AND ESTATE LITIGATION

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Due in large part to the mobility of our society, the litigator regularly practicing in the field of trust and estate litigation is likely to encounter choice of law questions with increasing frequency. Such questions are typically presented in the context of disputes over the validity and construction of governing instruments and fights over the principal place of trust administration. This outline will focus on various approaches to resolve choice of law issues in these categories through application of the relevant uniform acts and the Rest. (2d) Conflict of Laws. Along the way, several recent cases will be annotated.

It goes without saying that the outcome in any particular case will be governed by the facts of that dispute, the availability of a uniform act to address the issue and the precedent of the forum. The purpose of this outline is to provide a quick reference guide and research tool for the trust and estates practitioner who may encounter conflict of laws issues in future cases. For easy reference, attached are enactment summaries made available by the Uniform Law Commission website (as of July, 2017) showing the enactment of the Uniform Probate Code and Uniform Trust Code among the various states.

I. VALIDITY

A. Trusts

1. UTC § 403.

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.

a. At common law, a trust was created if it complied with the law having the most significant contact with the trust (factors included domicile of trustee, domicile of settlor, location of trust property, place where the trust was executed, domicile of the beneficiary). UTC § 403, cmt.

b. UTC § 403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. This rule applies to the "entire process of a trust's creation" and is broader than UPC § 2-506, § I (B) (1) infra (governing wills). UTC § 403, cmt.

2. Rest. (2d) Conflict of Laws, Chp. 10.

The Restatement focuses on the distinction between immovables (land and fixtures) vs. movables (all things not immovable) [Bogert, § 291].[1]

a. Immovables. The validity of a trust (intervivos or testamentary) of an interest in land is determined by the law that would be applied by the courts of the situs. Rest. (2d) Conflict of Laws § 278. As to land:

Unless provided otherwise by statute,[2] the courts of the situs will normally apply its local law (rather than the law of the testator's domicile) as to the testator's capacity and formalities to execute a will or trust. Cmt. b. Courts of the situs usually apply local law as to restrictions in dispositions by will (e.g., forced spousal share, rule against perpetuities). Id. Validity of the conveyance of land into trust is determined by the law of the situs. Id. at Cmt. C. If the instrument provides that the land is to be sold and the proceeds administered in a different state, the place of administration may govern the validity of the trust as long as a strong public policy of the situs is not violated. Id. at Cmts. D, E (beneficial interest may be considered personal property—where the

person has the right to receive the proceeds from the land rather than the land itself, her interest is treated as personal property).

If the interest has been converted to personal property such as a leasehold interest or a seller's interest in a real estate contract, rules of movables may apply.

b. Movables.[3] Generally, it is desirable that all of the movables contained in a trust be governed by the same law even though these movables may be located in different states. Rest. (2d) Conflict of Laws, Topic 2, intro.

(1) As to matters that affect the validity of the will as a testamentary disposition, by the law that would be applied by the courts of the state of the testator's domicile at death. § 269 (a). Questions as to formalities necessary for the execution of a will are determined by the local law of the testator's domicile at death. Cmt. a. However, the Restatement notes that statutes in most states provide that wills are valid as to form if they comply either with the state's own requirements or the requirements of other states such as the state where the testator was domiciled when the will was executed. Id.

(2) As to matters that affect only the validity of trust provisions, the law designated by the grantor is to govern the validity of the trust, provided that the state chosen has a substantial relationship to the trust, unless the state of the grantor's domicile would invalidate the selection due to a strong public policy against it. § 269 (b)(i).

(3) If there is no such designation, the local law of the state of the grantor's domicile at death will apply, except that the local law of trust administration will apply if necessary to sustain the validity of the trust at issue (§ 269 (b)).

(4) Further as to movables (§ 270):

(a) Cmt. b, governing law designated. Effect will be given to a provision in the trust instrument that the validity of the trust shall be governed by the local law of a particular state, provided that this state has a *substantial relation to the trust* and that the *application of its local law does not violate a strong public policy* of the state with which as to the matter at issue the trust has its most significant relationship. See, In Re Zuckerkorn, 484 B.R. 182, 192 (B.A.P. 9th Cir. 2012) (Restatement reflects strong policy of favoring enforcement of choice of law provisions).

Note: § 270, cmt. b, most significant relationship factors (not exclusive): (a) state which settlor designated as place of administration; (b) place of business or domicile of trustee at the time of trust creation; (c) location of trust assets at that time; and (d) domicile of settlor or beneficiaries at that time

(b) Cmt. c, governing law not designated. The matter shall be decided under the local law of the state with which, as to the matter at issue, the trust has its most significant relationship. To determine most significant relationship:

i. Is the place of administration designated? The most important factor is which state the grantor stated the trust is to be administered. Id.; see also, Id. at cmt. e. This may be expressly stated in the instrument or, in the absence of such a provision, it is reasonable to infer that the grantor expected the trustee to administer the trust at its place of business (corporate) or domicile (individual). In the case of co-trustees (corporate and individual), inference is that the grantor wanted trust administered in place of business of corporate trustee. In the case of two individuals named as co-trustees, either domicile may apply, unless one of them actively administers trusts. § 267, cmt. c.

ii. Is the place of administration not designated? If the grantor has not manifested an intention regarding place of administration, the validity of the trust is determined by the law of the state with the most significant relationship to the trust, including the state where the trust was executed and delivered; where the assets were then located; grantor's domicile at the time; domicile of beneficiaries.

Note: Most significant relationship factors pursuant to Rest. (2d) Conflict of Laws § 6:

1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

A) the needs of the interstate and inter-national systems;

B) the relevant policies of the forum;

C) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

D) the protection of justified expectations;

E) the basic policies underlying the par-titular field of law;

F) certainty, predictability and uniformity of result; and

G) ease in the de-termination an application of the law to be applied.

(c) Cmt. d, preference of law upholding validity. If the grantor failed to designate a governing law, it is inferred that he would intend to make applicable the law of the state under which the trust would be valid.

3. Selected Case Law

a. In re Estate of Mullin, 155 A.3d 555, 560 (N.H. 2017) (a case which involved dual legal proceedings in the states of California and New Hampshire to determine whether a decedent's trust agreement would control the disposition of her real and personal property at her death. The New Hampshire Supreme Court affirmed the trial court's decision to dismiss the lawsuit in that state on grounds of forum non-conveniens.

The trust agreement at issue was executed in the State of California and contained a choice of law provision which stated "[t]he "law of the State of California ... shall govern the validity, construction, and administration of this Trust, except that all matters relating to real property shall be governed by the laws of the situs of that real property." The grantor moved to New Hampshire in 2008 and lived there until her death in 2014. She had, however, created her trust in California in 2012 but died intestate in New Hampshire. She owned substantial real and personal property in California where she lived for many years before 2008 as well as New Hampshire real property.

The Court resisted the invitation to construe the choice of law provision narrowly and held that the provision could be construed to govern whether a transfer of property was valid and whether a trust violates state property rules. "This dispute turns upon the validity of the decedent's inter vivos transfers to her own Trust, and specifically whether those transfers conform to the requirements established by the relevant statutes of New Hampshire and California. Thus, the choice of law provision in the Trust is controlling, and we uphold the circuit court's decision implementing the decedent's intent.")

b. In Re Zuckerkorn, supra (In bankruptcy case where trustee sought inclusion of trust into debtor's estate, the Court applies § 270 to conclude that choice of law provision in spendthrift trust should be enforced, that it was not offensive to California public policy and that California did not have a greater interest in the outcome than Hawaii which is where the grantor lived and corporate trustee administered the trust.).

c. In Re Huber, 493 B.R. 798, 809 (Bankr. W.D. Wash. 2013) (In bankruptcy proceeding involving self-settled asset protection trust with Alaska choice of law provision, Court disregarded the grantor's choice of law (Alaska), finding that (a) the domicile (Washington) of the grantor had a more substantial relationship to the trust than Alaska; and (b) Washington state has a strong public policy against self-settled asset protection trusts. The only relationship Alaska bore to the trust was that it was where a co-trustee was to be located and the location of a $10,000 certificate of deposit. All other assets of the trust were transferred from Washington, a Washington attorney drafted the instrument, all the beneficiaries were Washington residents and the debtors' creditors were all Washington residents.).

d. Russell v. Wachovia Bank, N.A., 578 S.E.2d 329 (S.C. 2003) (Undue influence will contest in which Court applied law of Decedent's domicile (South Carolina) to dispose of UI claim on summary judgment and, as to the UI claims pertaining to Decedent's revocable and irrevocable trusts, applied the law of the jurisdiction (North Carolina) specified in the subject trust agreements to determine that no UI existed under North Carolina law and that the trusts were valid as a matter of law. Trust agreements identified North Carolina as situs and stated that the law of North Carolina shall govern administration, construction and rights of beneficiaries. Court applied Rest. (2d) Conflict of Laws §§ 268-270 to find that, because Decedent designated North Carolina law and because the trustee and trust property were located in North Carolina, North Carolina had a substantial relationship to the trusts at issue.).

e. Glaeske v. Shaw, 661 N.W.2d 420 (Wis. Ct. App. 2003) (Grantor moved from Wisconsin to Florida but in subsequent years regularly continued to visit Wisconsin

in summer months. During a visit to Wisconsin after grantor moved to Florida, he executed a trust agreement with the assistance of his long-time estate planner who practiced law in Wisconsin. The agreement was challenged post-mortem on the grounds that it was not properly witnessed as required by Florida law, the state of grantor's domicile at death. Affirming summary judgment in favor of trustee, the Wisconsin Court of Appeals refused to view either the designation of choice of law in the trust or the state of the grantor's domicile [in the case of a trust presumptively consisting only of movables] as dispositive. The Court instead applied a significant relationship analysis holding that because the trust stated that it would be construed according to Wisconsin law and designated Wisconsin as the trust situs, named Wisconsin residents as trustees and beneficiaries and because Wisconsin was the place of its drafting and execution, that state had the most significant relationship to the Trust. In contrast, Florida's only relationship was that it was the state in which the grantor was domiciled at his death. Applying the law with the most significant relationship to the Trust (Wisconsin), the Court found that Florida's execution requirements did not apply and that the instrument was validly executed under Wisconsin law. Court assumes in its analysis that it is a trust consisting of movables only.).

f. Wachovia Bank v. Moody Bible Institute of Chicago, 642 S.E.2d 118 (Ct.App. Ga. 2007) (Grantor executed written revocable trust agreement naming charitable institution as trustee and ultimate beneficiary and subsequently attempted two written revocations of the trust instrument. Trustee refused to acknowledge validity of either revocation. Trustee and charitable beneficiary argued that grantor's verbal statements purportedly renouncing the revocations formed an oral trust. The trust agreement stated that Illinois law would apply. Court found that first revocation revoked the trust because it was in writing and delivered to the trustee as specified in the trust agreement. However, the Court found that the choice of law provision in the revoked trust would not control whether subsequent verbal statements by the grantor created a verbal express trust. Because the grantor of the alleged verbal trust lived in Georgia and made the subject statements while in Georgia, Georgia law would govern whether an oral express trust was created by her statements. Because Georgia law does not recognize oral express trusts, the verbal statements by the alleged grantor could not create an oral express trust as a matter of law.).

B. WILLS

1. UPC § 2-506

A written will is valid if it complies with the requirements of UPC § 2-502 (witness requirements) or § 2-503 (harmless error) or if its execution complies with (a) the law at the time of execution of the place where the will is executed; or (b) 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.

a. Cmt. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone.

b. Cmt. If a national of Mexico executes a written will in this state which does not meet the requirements of § 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators.

c. Estate of Zelikovitz, 923 P.2d 740 (Wyo. 1996) (Decedent was a Wyoming resident who executed his will in Oklahoma, and litigation ensued over whether the notary properly also served as a will witness; held under a provision similar to UPC § 2-506, that Court only needed to look to the witness requirements of Wyoming law to determine the satisfaction of will execution requirements and, ruling that a notary could in fact be a witness under Wyoming law, there was no need to test the issue under Oklahoma law – only if the execution of the codicil failed to comply with Wyoming law would the Court be justified in turning to the law of the place of execution.).

2. Rest. (2d) Conflict of Laws

a. § 278, cmt. b, Immovables. The Court of the situs will ordinarily apply the local law of the situs to the validity of the will, rather than the local law of the testator's domicile. This is true also as to the testator's capacity to make a will and the formalities for will execution; however statutes such as § 2-506 will apply to wills disposing of interests in land.

b. § 269, Movables. As to matters that affect the validity of the will as to a testamentary disposition, validity determined by the law that would be applied by the Court of the testator's domicile at death.

3. Selected Cases

a. In re Will of Wolf, 958 N.Y.S.2d 867 (NY Surr. Ct. 2012) (In a case where the Decedent domiciled in New York at the time of her death with an estate of over $12,000,000 in New York real estate executed an allegedly testamentary instrument in Pennsylvania, the New York Court applied New York statutes which stated that the formalities of a will's execution may be decided by the laws of the State of New York, the state where the will was executed or Decedent's domicile at the time of his death or execution; using New York law, the Court analyzed the instrument at issue and found that it was wholly non-testamentary in nature and, as a result, the proponent's attempt to probate the instrument failed as a matter of law.).

b. Lazelle v. Crabtree, 225 P.3d 11 (Ct. App. Okl. 2009) (Oklahoma court appointed guardian for Decedent in 2003; the guardian subsequently moved Decedent to a retirement facility in Arizona where he executed a will in 2004. When Decedent became terminally ill in 2006, he returned to Oklahoma where he resided in a nursing home, died and was then buried in Oklahoma. Decedent's will was challenged on the grounds that it was not executed in compliance with Oklahoma law which required the will to be acknowledged in the presence of a District Court judge and also that the will was the product of undue influence and lack of capacity. Oklahoma law states that a will executed by a resident in another state is valid when executed in compliance with the law of that state. Oklahoma law also stated that an order appointing a guardian for a person does not deprive that person of the capacity to acquire a new state of domicile. The Oklahoma Court of Appeals affirmed the trial court's decision that Decedent was domiciled in the State of Arizona for the purposes of executing his will based in part on the facts that he lived there for three years, had obtained an Arizona identification card and had expressed to his estate planning attorney that he liked living in Arizona and intended to return to Oklahoma only for the purpose of being buried next to his wife. As to the lack of capacity and undue influence claims, the Court applied Arizona substantive law and affirmed the trial court's decision rejecting these challenges on the grounds that they did not meet the requirements for such claims under Arizona law.).

c. Palecki v. Palecki, 920 A.2d 413 (Ct. Chancery Del. 2007) (Delaware law recognizes a "written will signed by the testator" which is executed in another state only where (i) it is signed by the testator (or at his express direction and in his presence) and properly witnessed; or (ii) its execution complies with the law at the time of execution of the place where the will was executed; or (iii) its execution complies with the law of the place where at the time of the execution or at the time of death the testator is domiciled, has a place of abode or is a national. In 1985, Decedent created a handwritten will which was signed but which she purported to subsequently amend at some time prior to 1991 using a handwritten, unsigned and undated codicil. At the time of the will and "the codicil," Decedent lived in the State of New Jersey which at the times the instruments were created required such testamentary documents to be signed by the testator. Decedent moved to Delaware in 1994 and died a Delaware resident. Her estate was subsequently administered in the State of Delaware. Importantly, in 2004, more than ten years after the creation of the two instruments—but before Decedent died—New Jersey eliminated the signature requirement for handwritten codicils if it is proven with clear and convincing evidence that Decedent intended the codicil to amend her will. On summary judgment, the Court refused to recognize the validity of the codicil even though it might be valid under the modified New Jersey law on the grounds that the Delaware choice of law provision expressly required wills executed in other states to be "signed by the testator" to be given effect in Delaware. While the Court recognized that a New Jersey court might recognize the validity of the codicil based on the change to the signature requirement, it was constrained to follow the unambiguous mandates of the Delaware choice of law provision and believed that doing otherwise would invade the province of the Delaware legislature.).

d. Estate of Prestie, 138 P.3d 520 (Nev. 2006) (Decedent was a California resident who married his wife (also a California resident) in Nevada in 1987 and divorced her two years later. Decedent subsequently moved to Nevada and his former spouse joined him, although initially they lived separately from each other. Decedent executed an *inter vivos* trust agreement in California in 1994 which named his son as the sole trustee and beneficiary. In 2001, Decedent amended his trust

to provide his former spouse with a life estate in his Nevada condominium. He subsequently remarried her and died nine months later. Wife claimed a one-half interest in Decedent's estate on the grounds that his will did not provide for her and should be treated as revoked as to her because it was executed before they married each other, she was not provided for in the will and because they married without a marriage contract. Son claimed California law applied based on the language of the trust which stated "[Decedent's] estate may be administered under the California Independent Administration of Estates Act" and "[T]his Trust Agreement is a California contract and the validity of this Trust shall be determined by the laws of the State of California." The Court rejected this argument, holding that the first provision was not a choice of law provision but simply permissive language which provided that a California court may appoint a personal representative to administer Decedent's estate. The Court refused to apply California law using the second provision on the grounds that the validity of the trust was not at issue—the only issue being whether the will was revoked as to Decedent's surviving spouse. The Court also found that Decedent was domiciled in Nevada at the time of his death and also that his condominium was located in that state. Therefore, the Court applied the rule that "[w]hether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs." The Court went on to conclude that Decedent did not provide for his spouse under his will and did not have a marriage contract with her and, based on a simple reading of the controlling Nevada statute, Decedent's will was revoked as to his wife who was as a result entitled to a one-half intestate share.).

e. Contracts to make wills

(1) Harper v. Harper, 600 S.E.2d 659 (Ga. Ct.App. 2004) (Disinherited son brought action in Georgia seeking to establish a contract to make a will with his father, a Florida resident who died owning multiple rental properties in Florida. On summary judgment, the facts showed that son devoted substantial efforts to help his father manage his rental properties after his father suffered a debilitating heart attack. The Georgia Court of Appeals found that any agreement between petitioner and Decedent was reached in the State of Florida, that Florida courts will not enforce a contract to make a will unless it is in writing and properly signed by the testator and witnessed, that petitioner's agreement with Decedent was verbal and, accordingly, that petitioner's claim was without merit under Florida law and should not be viable in Georgia. The Court also found that the claim was a compulsory counterclaim which petitioner should have raised in a quiet title action initiated by Decedent's estate in Florida.).

(2) Estate of Loflin, 81 P.3d 1112 (Colo. Ct.App. 2003) (Husband and wife executed a joint will in Kansas in 1975 and then moved to Oklahoma, where husband died. Wife probated the Kansas will in Oklahoma, and his estate passed to her pursuant to the Kansas estate plan. Wife then moved to Colorado where she executed a new will which reduced the inheritance which would have otherwise passed to husband's family after her death as originally provided in the Kansas will. Upon wife's death, husband's family initiated litigation in Colorado to establish the Kansas will as a contractual will, arguing that Kansas law should apply to determine whether such a contract existed. Wife's family argued that Colorado law should apply because that was the state of wife's domicile at her death and where her estate was being administered. Colorado had more rigorous requirements to prove the existence of a contract to make a will. The Court held that, with respect to the validity of contracts generally, Colorado applies the law of the state in which the contract was made and would do so in a contract to make a will dispute. Doing otherwise (i.e., applying the law of the survivor's domicile) would allow the survivor to move to a state where such contracts were not recognized or where more stringent requirements were imposed and thereafter unilaterally revoke the contractual will. This would inject instability in the estate planning expectations of the first spouse to die. Therefore, the Court held that Kansas law would decide the question of whether the Kansas will was a contractual will. The Court then applied Kansas law to determine that the will was a contractual will under Kansas law. However, the Court found that the Colorado will revoked the Kansas will as to other wishes such as selection of a personal representative and burial instructions and, as to those matters, the Colorado law would apply.).

(3) Powell v. Am. Charter Fed. Sav. & Loan Ass'n, 514 N.W.2d 326, 331 (Neb. 1994) (A contract to make a will case decided under the most significant relationship test set out in the Rest. (2d) Conflict of Laws, which applied to contract actions). Minnesota husband and wife executed a joint and mutual will in Minnesota (the state of their domicile) which provided that

"[w]e give, devise and bequeath unto the survivor of us all and any real and personal property owned by us, either jointly or severally, for his or her own use." The will further provided that upon the death of the survivor, "we give, devise and bequeath all of the rest, residue and remainder of our estate of every kind and nature wheresoever situated whether or not owned by us or hereinafter acquired by us including any lapsed legacy" in the certain percentages to a number of beneficiaries. At the time Decedent and her husband executed the will, they were joint tenants in certain real property located in Minnesota and also shared joint tenant ownership in stocks and certificates of deposit. After his death in Minnesota, surviving wife conveyed the Minnesota real estate to herself and a smaller number of beneficiaries. She subsequently sold the Minnesota real estate and invested the sales proceeds in a variety of financial accounts (along with the proceeds of financial accounts she inherited from her husband) which all passed to certain beneficiaries pursuant to a number of non-probate transfers. After husband's death, the surviving spouse moved to Nebraska where she remained until her death.

When she died, the question was whether the assets which passed pursuant to the non-probate transfers she created should be included in her probate estate as seemingly required by the joint will executed with her husband. The Court noted recent holdings which stated that the validity and interpretation of a contract are governed by the law of the state where the contract was made absent an express statute or public policy which prevents application of such a state's law. The Court also recognized recent decisions applying the significant relationship test to contract actions. The Court elected to analyze the conflict question using the significant relationship test.

The Court found that Minnesota was the state with the most significant relationship to the transaction and the parties. At the time Decedent and her husband entered into their agreement, they both resided in Minnesota; they executed the joint will in Minnesota; a significant portion of the property they owned consisted of real property which was located in Minnesota; and Decedent's husband performed his promise in Minnesota when he died and the will was probated. The only relationship Nebraska had to the contract was that Decedent was a resident of Nebraska when she died. Minnesota had the most significant relationship to the formation of the contract.

The Court held that the predeceased husband's estate had no interest in the non-probate transfers, that the title to this property passed automatically to the survivor and that under Minnesota law, husband could have devised the property by will only if he had severed the joint tenancy before his death. The joint will did not sever the joint tenancy.

Nevertheless, the subject accounts were still considered to be the estate property of the surviving spouse and subject to the restrictions contained in the joint will. The Court held that the survivor had a contractual duty not to intentionally or unreasonably defeat the purpose of the joint will by creating the non-probate transfers. The issue was whether Decedent's use of the proceeds from the sale of the real property and her use of any other estate property were intended to defeat the purpose of the joint will or were so unreasonable that the result was to defeat the purpose of the will. The matter was remanded to the trial court to hear evidence on this issue.).

II. CONSTRUCTION

A. Trusts

1. UTC § 107

The meaning and effect of trust terms are determined by the: (a) law of the jurisdiction designated in the terms of the trust 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 (b) 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.

a. UTC § 107 allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property and whether the trust was created by will or during the settlor's lifetime. UTC § 107, cmt.

b. As to "most significant relationship," factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property and the domicile of the settlor, the trustee and the beneficiaries. Other more general factors that may be pertinent in particular cases include the

relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. UTC § 107, cmt. See, Dahl v. Dahl, § III (C) (2) infra.

2. Restatement approach distinguishes between "interpretation"[4] and "construction"[5]

—rules below apply as to construction

a. As to movables (Rest. (2d) Conflict of Laws § 268):

(1) A will or other instrument creating a trust in movables is construed in accordance with the rules of construction of the state designated for this purpose in the instrument. § 268 (1).

(a) It is not necessary that the state selected have any connection with the trust. Cmt. b.

(b) In the absence of an express designation, it may be apparent from the language of the instrument or other circumstances as to which state the grantor or testator intended to govern construction issues. Cmt. b.

(2) If there is no such designation and his desires in this regard are not apparent, as to matters pertaining to administration, construction determined in accord with the rules of construction adopted by the state whose law governs the administration of the trust. § 268 (2)(a). Administrative matters include the powers and duties of the trustee, investment authority, trustee compensation, right to indemnity for expenses, liabilities for breach of trust and powers of a beneficiary to terminate. Cmt. d.

(3) If there is no such designation and his desires in this regard are not apparent, as to matters not pertaining to administration, construction determined in accord with the rules of construction of the state which the testator or grantor would probably have desired to apply. § 268 (2)(b). Construction as to who may be included as a beneficiary or the disposition of trust property are issues covered by this rule. Cmt. e. Absent evidence of a contrary intention, the will is ordinarily construed according to the law of the testator's domicile at his death. Cmt. f. If the testator has changed his domicile after execution of the instrument, the rule of construction of his domicile at the time of the execution of the instrument will ordinarily be applied. Rptr. Note. In determining who is entitled to property through the construction process, the state of the grantor's domicile is less significant in the case of inter vivos trusts than it is in the case of wills. Id. The law of the state which bears the most significant relationship to the trust will likely apply. Id.

b. As to land (Rest. (2d) Conflict of Laws § 240)[6]:

(1) To be construed according to the rules of construction of the state designated for this purpose in the will. § 240 (1). It is not necessary that the state designated have a significant connection with the testator or the land. Cmt. e.

(2) In the absence of such a designation, the will shall be construed in accord with the rules of construction that would be applied by the courts of the situs. § 240 (2). Comments to this section, however, note tension between this rule and the result of applying the law of the state of the testator's domicile when the will was executed. Cmt. f.

B. Wills

1. UPC § 2-703

Meaning is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4 or any other public policy of the state otherwise applicable to the disposition.

a. This section intended to cover all governing instruments, not just wills, and enables the law of a particular state to be selected in the governing instrument for purposes of interpreting the instrument without regard to the location of property covered thereby. UPC § 2-703 cmt.

2. Restatement - *See above*

3. Selected Case Law

a. Siegemund v. Shapland, 324 F.Supp.2d 176, 186 (U.S. Dist. Maine 2004) (Testatrix lived in Maine at death but had been a life-long Massachusetts resident, and will was drafted by Massachusetts attorney. General rule that will is to be interpreted according to the state of domicile is disregarded in favor of Massachusetts which is the state whose laws the testatrix was likely more familiar with.).

b. Parish v. Parish, 704 S.E.2d 99, 104 (Va. 2011) (In will contest involving Florida conservatee who moved to Tennessee where he executed a will with the assistance of Tennessee counsel and then subsequent to the will execution moved to and died in Virginia, the Virginia Supreme Court analyses testamentary capacity and undue influence claims using Virginia law even though the will was executed in Tennessee noting that Virginia recognizes an exception to its *lex loci* rule as to capacity claims.).

c. Hannan v. Glover, 523 N.W.2d 672 (Neb. 1994) (Where Virginia domiciliary executed will in Virginia in 1977 providing that her residuary estate "shall be divided in equal shares among her surviving children and the issue of her deceased children per stirpes." Adopted child of a deceased child (James) filed a petition in Virginia to establish her rights to the share that James would have received of his mother's estate had he survived her. The Virginia Supreme Court held that the term "issue" did not include adopted children, and that petitioner was not entitled to James' share. An ancillary proceeding was subsequently opened in Nebraska to probate real estate Decedent owned there. The adopted child filed a petition in the Nebraska ancillary proceeding to determine her rights as an adopted child to James' share of the Nebraska real estate based on Nebraska law. The Nebraska Court held that Virginia applies its own law as to the devise of real property located in Virginia and does not have a reciprocity provision with respect to the orders of other states construing wills. As a result, the Nebraska court did not give reciprocity to the Virginia order and held that Nebraska law would apply to the construction of the term "issue." Under Nebraska law, "issue" included adopted children and, as a result, petitioner inherited James' share of the Nebraska real estate even though she was not entitled to said share under Virginia law.).

III. ADMINISTRATION

A. UTC Approach

1.

Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of a trust designating the principal place of administration are valid and controlling if (1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or (2) all or part of the administration occurs in the designated jurisdiction. UTC § 108 (A). *See,* Hudson v. UMB Bank, N.A., 447 S.W.3d 714, 721 (Mo. Ct. App. 2014) (where grantor expressly identified UMB "with an office and place of business in Topeka, Kansas" as the trustee, he unambiguously expressed his intent that the trustee *would be located in Kansas*. Hudson's designation of the place of business for the trustee expresses the intent that the place of administration of the trusts would be Kansas. This conclusion is reinforced by Hudson's directive in his Will that the trustee should have "all powers conferred upon trustees by the provisions of the Kansas Uniform Trustees' Powers Act," an act that addressed the administration of trusts in Kansas prior to its repeal in 2002).

2.

Usually, the law of the trust's principal place of administration will govern administrative matters, and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions. UTC § 107, cmt.

3.

A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions. UTC § 108, cmt.

4.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. UTC § 108, cmt.

5.

Allows the trustee to change the principal place of administration. See, Beardmore v. JPMorgan Chase Bank, N.A., 2017 WL 1193190, at *6 (Ky. Ct. App. Mar. 31, 2017) (approving transfer and citing cost savings as basis for doing so).

B. Restatement Approach

1.

"Administrative matters" include those matters related to the management of the trust, including those related to the duties owed by the trustee to the beneficiaries, the powers of the trustee, the exercise of discretionary

powers, liabilities incurred by the trustee for breach of trust, proper trust investments, trustee fees and trustee removal. Rest. (2d) Conflict of Laws § 271 cmt. a. Identification of beneficiaries and the extent of their interests are questions of construction rather than administration. Rest. (2d) Conflict of Laws § 272 cmt. a.

2.

The administration of an inter vivos trust of interests in movables is governed by (a) the local law of the state designated by the settlor to govern administration; or, (b) in the absence of such a designation, by the local law of the state to which the administration of the trust is most substantially related. Rest. (2d) Conflict of Laws § 272. However, note that there may be matters of administration which the grantor simply may not control. Rest. (2d) Conflict of Laws § 271 cmt. h (e.g., exculpation of trustee from liability).

a. A grantor normally is free to regulate most matters of administration. The language of the trust or other circumstances may provide evidence of the grantor's intention with respect to governing law in the absence of an express designation in the trust. Rest. (2d) § 272 cmt. c.

b. In the absence of a designation, the most important state would be the state where the grantor manifested an intention that the trust be administered. If he has not designated a law to control the administration of the trust and has not manifested an intention that the trust be administered in a particular state, the administration of the trust will be regulated by the law of the state to which the administration is most substantially related. *Id.* at cmt. d.

(1) If the place of administration changes through a new trustee or the domicile of the trustee changes, the law which governs the administration of the trust may change to that jurisdiction if expressly or implicitly allowed by the trust terms. *Id.* at cmt. e.

(a) In re Peieris Family Inter Vivos Trusts, 77 A.D.3d 249 (Del. 2013) (This case involved multiple petitions affecting different trusts to approve the resignation of then current trustees, confirm the appointment of successor trustees, confirm Delaware law as the law governing the administration of the trust, reform certain administrative provisions and accept jurisdiction of the trusts. None of the trusts were executed or administered in Delaware at the time the petitions were filed. One set of instruments provided, "all questions pertaining to their validity, construction, and administration shall be determined in accordance with the laws of the state of New York." Another set contained a provision which stated the "validity and effect are determined by the laws of the state of New Jersey." Another set provided that the trusts shall be "governed by and their validity, effect and interpretation governed by the laws of the State of New York." The trusts all allowed the trustees the ability to appoint successor trustees without any geographical limitation. The lower court held that Delaware law could never control trust administrative terms in the face of the express choice of law provisions in the trusts. The Delaware Appellate Court did not agree. The Court held that without evidence that the grantor of a trust intended the law governing administration at inception to *always* govern trust administration, the grantor's initial selection of law is not absolute. A trust agreement may expressly allow a change in the law of administration or it may implicitly do so. Therefore, where a grantor does not provide that the law of the state of initial administration is permanent and the trust agreement grants a power to appoint a successor trustee, the trust agreement will be read to implicitly allow the change of law governing administration. The Court adopted the Restatement comment which states that a change in the place of administration resulting from the valid appointment of a successor trustee will affect a change in the law of administration as well, unless the change would be contrary to the grantor's intent. Thus, the Court held that while the grantor initially appointed a New York trustee to administer the trust under the law of the State of New York, by allowing the trustee to appoint a successor he implicitly approved the change of law of the place of administration. Therefore, the choice of law provision can be changed when accompanied by an out-of-state trustee, even when the trust includes a choice of law provision.

Delaware has a statute which provides that as to trusts administered in that state, its law shall govern administration unless otherwise provided by the instrument or court order. However, because none of the trustees had yet resigned and because the trusts were all managed outside the state of Delaware, this statute did not apply. Therefore, while the Court believed that the law of administration could be changed to Delaware, it was unwilling to modify the trusts or approve the resignation of the trustees because the trusts were

not Delaware trusts. Questions as to reformation, for example, would have to be addressed to the court in the state of administration.).

(b) Meyer v. Meyer, 931 So.2d 268 (Fla. Ct. App. 2006) (The trust at issue provided that "all questions concerning the validity, construction and administration of this agreement and any trust created hereunder shall be judged and resolved in accordance with the laws of the state of Florida." A beneficiary of the trust filed suit in Florida after grantor's death to compel the successor trustee of the trust to distribute the trust assets. The other two beneficiaries intervened and argued that the suit could not be maintained in Florida based on a Florida statute which prohibited proceedings in Florida for a trust registered in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration. The Court found that, while the trust contained a choice of law clause, it also contained a provision which allowed the trustee to relocate any and all trusts created thereunder "when in the sole judgment of the trustee the relocation of the trust or trusts from the current jurisdiction controlling its interpretation to another jurisdiction is desired."

The grantor lived in New York at the time of his death, and the successor trustee also lived in New York and administered the trust from that state. The Appellate Court held that the parties had no relationship with the State of Florida and remanded the action to the trial court to determine if all interested parties could be bound by litigation of the controversy in New York as provided by the referenced Florida statute. The Court also found that, although the trust agreement contained a choice of law provision, it did not designate Florida as the principal place of administration. Unless specified in the trust, under Florida law, the principal place of administration is the trustee's usual place of business where records of the trust are kept or, if he has no place of business, the trustee's residence. Accordingly, New York was the principal place of administration. Furthermore, the trust allowed the trustee to remove the principal place of administration to another state if he chose to do so. Having chosen to locate the principal place of trust administration in New York, the choice of law provision of the trust in favor of Florida would not provide a basis for affirming the trial court's decision to deny the motion to dismiss. The matter was reversed and remanded. See also, Perry v. Agnew, 903 So.2d 376 (Ct.App. Fla. 2005) (Florida statute prevents initiation of proceedings in Florida against a trust with a principal place of administration in another state unless all interested persons could not be bound by litigation in that state. Choice of law provision in trust did not designate principal place of administration. Undisputed evidence was that principal place of administration was in Massachusetts. Court of Appeals reversed trial court's decision to dismiss claim and remanded the matter with instruction to the trial court to consider whether Massachusetts law would bind all interested persons.).

C. Selected Cases

1. Newcomer v. Roan

Newcomer v. Roan, 2016 WL 618091 (Ct.App. Ohio 2016) (Husband and wife were Florida residents who spent their summers in Ohio for many years. In 1991, husband created a revocable trust in Florida. Wife also created a trust in that year (also in Florida). The husband died in 1991. Following his death, the surviving wife executed a number of instruments either amending or restating her trust which included a 1999 Restatement. In 2003, with the assistance of Florida counsel and acting in Florida, the surviving wife restated her trust agreement modifying certain trust provisions and allowing for distributions free of trust—thereby eliminating the remainder interests in favor of her grandchildren. The 2003 Restatement provided that the trust was to be administered under the laws of the State of Florida. In 2006, with the assistance of Ohio counsel, the surviving wife executed an amendment which made no reference to the 2003 Restatement but which named her Ohio attorney as trustee and which "restat[ed] and reaffirm[ed] each and every paragraph" of the 1999 Restatement.

After her death in Florida in 2011, the trustee of the trust filed a declaratory judgment action in Ohio seeking a determination as to whether the 2003 or 2006 instrument governed. The petition invoked a number of cross and counterclaims, including allegations of lack of capacity and others arguing, on the one hand, that the inclusion of the referenced phrase was mere boilerplate and the counterargument, on the other hand, that the phrase was included in order to actually restate the substantive dispositive terms of the 1999 Restatement.

The Ohio Court looked to Florida statutory law to determine the requirements for a valid trust amendment.

Applying this law, it determined that the 2006 amendment was a valid amendment to the 2003 trust. The Court then interpreted the 2006 amendment citing Florida common law regarding the importance of testator intention, the admission of extrinsic evidence, rules of construction, patent vs. latent ambiguity and incorporation by reference. Applying these principles and considering the careful attention paid to the 2003 amendment during the preparation and drafting process (in contrast to the major substantive effect which was being read into a mere phrase in the 2006 amendment by appellant) and the testimony of the attorney who drafted the 2006 amendment who testified that he believed that the effect of that instrument was only to name a different trustee and not to revoke the then current version of the trust, the Court found that the 2006 amendment did not effectively incorporate the 1999 Restatement.

As to the lack of capacity claims, the Court noted that while the 2003 Restatement provided that the trust was to be administered under the laws of the State of Florida, the 2006 amendment was executed in Ohio and, while it applied Florida law to the validity and construction issues, that Ohio common law would govern whether the surviving wife had capacity to execute the amendment. As a matter of law, the lack of capacity claim failed under Ohio law.).

2. Dahl v. Dahl

Dahl v. Dahl, 2015 WL 5098249 (Utah 2015) (A consolidated unpublished appeal involving the question of whether assets of husband's allegedly irrevocable Nevada trust would be subject to division in his Utah divorce proceeding. At issue was *inter alia* whether the trust agreement was revocable. The trust agreement provided that the "validity, construction and effect of the provisions of this Agreement in all respects shall be governed and regulated according to and by the laws of the State of Nevada."

The Utah Supreme Court initially concluded that Utah is the forum and thus Utah's choice of law rules should apply. Under Utah choice of law rules, the Court noted that it would normally apply the choice of law provision contained in a trust agreement *unless* doing so would undermine a strong public policy of the State of Utah. To that point, the Court cited several Utah cases expressing Utah's strong policy that all of the assets of a married couple shall be considered in their divorce proceeding and that the resulting property division must be conducted in an equitable manner. Therefore, to the extent that the trust contained marital property, Utah had a strong interest in ensuring that such property was properly considered for division in the divorce action. Because Utah had a strong policy of equitable division of marital assets, the Court declined to enforce the choice of law provision on the grounds that doing so would deny the Court the ability to accomplish an equitable division of the parties' marital property. Accordingly, the Court refused to apply the choice of law provision and proceeded to construe the trust instrument according to Utah law.

Because the husband reserved the unrestricted power to amend the trust, under Utah common law, the Court found that husband retained the ability to revoke the trust. It was therefore revocable. In determining the wife's rights to trust assets, the Court found that she was a settlor of the trust because she held an interest in property which was used to fund it, even though she was never provided a copy of the trust agreement. Under Utah law, because she was a settlor of the revocable trust, she had the right to revoke it as to the property she contributed to it. The matter was remanded to determine her rights under these principles.).

3. Morris v. Morris

Morris v. Morris, 756 S.E.2d 616 (Ct. App. Ga 2014) (Tragic case in which grantor, Derek, created an irrevocable trust in Georgia in 1998, funding it with the proceeds of a personal injury settlement. The trust provided that it shall be governed by Georgia law. The trust provided that upon Derek's death, the balance was to be distributed as Derek appointed in his will and, if he died intestate, to his living descendants and, if none, to his siblings.

Derek subsequently married, had one child and then, with his wife Sarah and their child, moved to North Carolina. Five years later, while living in North Carolina, Derek murdered his child and then in the same event killed himself. Derek had failed to appoint the balance of the trust prior to his death. Sarah sued Derek's estate for wrongful death and obtained a default judgment. The trustee of Derek's trust then filed suit in Georgia seeking a determination as to whether the balance of the trust should be distributed to Derek's siblings pursuant to the trust terms or to Sarah as administrator of their deceased child's estate. At issue was the

construction of the trust as it applied to the disposition of the remainder interest.

On summary judgment, the trial court found that North Carolina law should apply to determine who predeceased who within its jurisdiction, because Derek and his wife and child resided in that state for five years and it was the state in which the killings occurred. Under North Carolina probate law, under such circumstances the order of death is reversed, and the victim would be deemed to have survived her killer to permit the victim to inherit from her slayer. As a result, the child's estate would be entitled to the balance of the trust upon Derek's death.

The Georgia Court of Appeals reversed, holding that the trust had the most significant relationship to the State of Georgia. The trust was created in Georgia and had always been administered there, that the trust specified Georgia law as governing and that Georgia had no public policy against enforcing Georgia law in this context. Under Georgia law, because the settlor (Derek) of the trust had transferred his title to the trust property to a trustee, that property passed outside his probate estate. As a result, Georgia law would determine the disposition of the remainder interest. Under that law, the trust property passed outside Derek's probate estate, and the terms of the trust would control the disposition of the remainder interest.

Additionally, the corpus of the trust was not available to satisfy the wrongful death judgment Sarah had obtained against Derek's estate. The Court applied Georgia law to construe and apply the spendthrift clause and to determine that under Georgia law Sarah could not avoid the spendthrift clause and reach the trust corpus to satisfy the wrongful death judgment against Derek's estate.).

4. Wright v. Rains

Wright v. Rains, 106 S.W.3d 678 (Ct.App. Tenn. 2003) (Grantor created a revocable trust which provided that Kentucky law shall "govern the validity, interpretation and administration [of the trust], notwithstanding the residence in another jurisdiction of the [Deceased] or of any beneficiary hereunder." The grantor subsequently executed a will while living in the state of Tennessee which purported to make disposition of assets which might have been otherwise controlled by the trust. At issue on appeal was the effect of the Tennessee will on the Kentucky trust. The Court found that there was no violation of Tennessee public policy to apply the choice of law provision contained in the trust to determine whether the Tennessee will impacted the Kentucky trust. Under Kentucky law, if the grantor of a revocable trust reserved the power to revoke the trust, he must do so during his lifetime and may not do so with his will. As a result, the Court found that under Kentucky law the will had no impact on the trust and, as a result, the trust assets would pass under the terms of the trust not impacted by the language of the Tennessee will.).

E. Interplay between Probate Proceedings

Ex parte Scott, 2016 WL 6310771, at *9 (Ala. Oct. 28, 2016) (holding that claimant may not assert his claim for indemnity against estate assets subject to administration in Decedent's estate pending in England which were not part of decedent's estate being administered in the State of Alabama. The probate court has jurisdiction only over the estate assets that are part of the Jefferson County administration.)

LEGISLATIVE FACT SHEET – UNIFORM PROBATE CODE

ACT	Probate Code
ORIGIN	Completed by the Uniform Law Commissioners in 1969, and substantially revised in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2008, and 2010.
DESCRIPTION	The UPC updates and simplifies most aspects of state probate law. The UPC also contains related acts on guardianships and protective proceedings, powers of attorney, and non-probate transfers at death.
ENDORSEMENTS	(Approved by the American Bar Association)
ENACTMENTS	Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, U.S. Virgin Islands, Utah
2017 INTRODUCTIONS	Maine
STAFF LIAISON(S)	Benjamin Orzeske

LEGISLATIVE FACT SHEET – UNIFORM TRUST CODE

ACT	Trust Code
ORIGIN	Completed by the Uniform Law Commissioners in 2000, and amended in 2001, 2003, 2004 and 2005.
DESCRIPTION	The Uniform Trust Code provides a comprehensive model for codifying the law on trusts.
ENDORSEMENTS	(Approved by the American Bar Association, ABA Real Property, Probate and Trust Law Section, AARP)
ENACTMENTS	Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming
2017 INTRODUCTIONS	Illinois
STAFF LIAISON(S)	Benjamin Orzeske

Notes

1 The Restatement notes several state statutes which provide that the validity and interpretation of wills as to real property are governed by the laws of the situs and as to personal property as to the law of the testator's domicile. Rptr. Notes (1971 compilation references Idaho, Montana, North Carolina, New York, North Dakota, Oklahoma, South Dakota and Utah).

2 This is a significant caveat, as many states have statutes which provide as to will formalities that the instrument shall be valid if valid in the state of situs, place of execution or place of testator's domicile.

3 A related area is in the choice of law governing non-probate transfers for movables. See e.g., Meyer v. Heymann, 62 A.D.3d 133 (NY App. Div. 2009), where estranged child of a French citizen filed suit in New York seeking to recover more than $15 million in gifts which his mother made while living in New York to individuals and a charity on the grounds that his mother was a French domiciliary and that French law allowed a child a forced heirship share and the ability to recover inter vivos gifts which reduced the amount of said share; held, validity and effect of inter vivos transfers are determined by the law of the state where the property was situated at

the time of the transfer, not by the law of the domicile of the donor. In support of its ruling, the Court cited inter alia Wyatt v. Fulrath, 211 N.E.2d 637 (1965), where husband and wife domiciliaries of Spain established joint tenancy accounts in New York, and husband's descendants upon his death attempted to seek their heirship rights in New York against the account based on Spain's forced share rights for children; held, New York law would govern the disposition of the assets in the account over the law of the domicile of the account owner; and DeWerthein v. Gotlib, 616 N.E.2d 1104 (1993), where deceased Argentinian national created "Totten Trust" accounts in New York in favor of brother, and Decedent's spouse filed suit in New York to recover her forced share under Argentina's forced heirship law; held, New York law rather than the law of the domicile of the account owner would control whether surviving spouse had any interest in the referenced account. Choice of law issues arise in non-probate problems in ways much less exotic than the facts of the above cases. One such area is in determining whether a beneficiary designation is proper. See e.g., Smith v. Marez, 719 S.E.2d 226 (N.C. Ct App. 2011) (In a case in which Decedent created traditional and rollover IRA accounts with Pershing LLC as the custodian, the North Carolina Court of Appeals applied the law of New York which was the state specified in the choice of law provisions of the IRA account agreements; under New York law, Decedent failed to properly designate a beneficiary to his IRA accounts and expressly revoked all prior beneficiary designations); see also, Ronald Volkmer, Ownership of IRAs Resolved by Strict Compliance Standard, 39 Est. Plan. 47, 48 (2012); Kinkle v. Kinkle, 699 N.E.2d 41 (Ohio 1998) (Ohio Supreme Court applies Ohio law to determine that under antenuptial agreement surviving spouse waived her right to inherit husband's IRA even though IRA agreement contained choice of law provision dictating the application of Massachusetts law); but see, Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (ERISA preempts automatic revocation provisions in state divorce statutes which provide that divorce revokes beneficiary designations in favor of former spouse) as discussed in Estate of Merrit ex rel. Merritt v. Wachter, 428 S.W.3d 738, 740 (Mo. Ct. App. 2014), which found that ERISA controlled disposition of IRA account in favor of former spouse over automatic revocation provision of Missouri's divorce law.

4 The comments to this portion of the Restatement discuss interpretation at length, stating: "The forum will first examine the trust instrument in order to ascertain the intention of the settlor or testator. It will consider the ordinary meaning of the words used, the context in which they appear in the instrument, and the circumstances under which the instrument was drafted. It will consider whether the instrument was drafted by the settlor himself or whether it was prepared for him, and whether he was probably using the language of his domicile or of the place of execution or of the place in which the trust was to be administered. Resort may be had to any other properly admissible evidence which casts light on the actual intention of the settlor or testator. The question to be determined is one of fact rather than one of law. The forum will apply its own rules in determining the admissibility of evidence, and it will use its own judgment in drawing conclusions from the evidence. This process is called interpretation. See § 224." Rest. (2nd) Conflict of Laws § 268 (1971).

5 As to construction, the Restatement states: "If it is found impossible to ascertain from the evidence the settlor›s or testator›s intention, something in the nature of a presumption must be indulged in to fill out what would otherwise be a gap in the instrument. The purpose is to carry out what was probably his intention, or what probably would have been his intention if he had foreseen the matter in dispute. This process is called construction. See § 224. States often have differing rules of construction…Whereas the forum makes its own interpretation, it will apply the rules of construction of the state selected by application of the rule of this Section. But in any case the inference raised by a rule of construction may be rebutted by properly admissible evidence of a contrary intention of the settlor or testator." Rest. (2nd) Conflict of Laws § 268 (1971).

6 Ancillary issues include transfers by operation of law and the creation of intestate interests.

Whether there has been a transfer of an interest in land by operation of law and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. Rest. (2d) Conflict of Laws § 226 (1).

The devolution of interests in land upon the death of the owner intestate is determined by the law that would apply to the courts of the situs. Rest. (2d) Conflict of Laws § 236 (1). There may be situations where the courts of the situs would look to the law of some other state to determine certain questions. For example, courts of the situs would look to their own law to determine what categories of individuals will inherit in intestacy but may look to the law of another state to determine if a person belongs to one of these categories (such as the case with a spouse). Cmt. a. According to the Restatement, the effect of marriage upon an interest in land owned by a spouse at the time of marriage is determined by the law of the situs. Rest. (2d) Conflict of Laws § 233 (1). Beneficial entitlement due to questions of legitimacy, adoption and forced share are typically controlled by the situs. Rest. (2d) Conflict of Laws § 237 (legitimacy), § 238 (adoption) § 242 (forced share).

As to the applicable law which governs the validity of marriages, see Rest. (2d) Conflict of Laws § 283 which states:

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.