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## Recent Decisions (Trusts-Conflict of Laws)

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## RECENT DECISIONS

TRUSTS — CONFLICT OF LAWS — TRUST CALLING FOR ESTABLISHMENT OF CLINIC-HOSPITAL ILLEGAL AT FORUM CANNOT ESCAPE INVALIDITY BY FOREIGN PERFORMANCE. — Involved was a testamentary trust providing for the establishment of a clinic-hospital which would apply methods of nutrition, blood chemistry, radionics and other types of non-medical healing. The lower court, while conceding that such an institution would be violative of local criminal and civil law if established in Texas, ruled that insofar as the trust provision authorized performance of the acts in California, its validity should be determined with respect to California rather than Texas law. On appeal to the Court of Civil Appeals of Texas, *held*: the trust is invalid. Since Texas is the situs of the trust and the domicile of the decedent, the trust's validity depends upon the laws of Texas, and fails for local public policy violation. *Wilson v. Smith*, 373 S.W. 2d 514 (Tex. Civ. App. 1963).

Perhaps no situation affords a court greater discretion than one which presents a trust-conflict of laws combination, for the "case law . . . is disturbingly sparse and shallow and text authority almost completely absent,"<sup>1</sup> and, therefore, the area presents less possibility for stating precise and universal rules than most.<sup>2</sup> However, it is generally unquestioned that the validity of trusts of land is governed both as to creation and administration by the law of the place of the land.<sup>3</sup> So controlling is the location of land that in a suit involving only Ohio residents and brought to contest the testament of an Ohio domiciliary, the fact that the realty concerned was situated in Texas was deemed the overwhelming factor in allowing Texas courts to decide its devolution.<sup>4</sup> The Supreme Court casts the importance of the land's location in these terms:

It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.<sup>5</sup>

The principle applies to all immovables.<sup>6</sup>

Where personal property is involved, its location is not the primary consideration. Courts will generally look to the last domicile of the testator to ascertain applicable legal rules.<sup>7</sup> This is so at least where a testamentary trust of tangible personal property is concerned.<sup>8</sup> A testamentary trust of intangible personal property apparently permits the most flexible choice since it is to be governed by the law of whatever state has the most substantial connection with it.<sup>9</sup> From these basic considerations, then, it seems clear that the statement, "Each state has plenary power and authority to determine the disposition of decedents' property, real or personal, found within the state's borders,"<sup>10</sup> is subject to serious qualification.

The facts in *Wilson* render impossible any attempt to impeach the authority of the Texas court to decide the applicable law. The decedent was a domiciliary of Texas at the time of his death. The situs of all property at issue, both real and personal, was also at the forum. The will itself was probated and the estate administered in Texas. But that the court had authority to decide what law was

1 Heyman, *Estate Planning and Conflict of Laws*, 27 U. CINC. L. REV. 234 (1958).

2 Hoar, *Some Aspects of Trusts in the Conflict of Laws*, 26 CAN. B. REV. 1415 (1948).

3 Bozeman, *The Conflict of Laws Relating to Wills, Probate Decrees and Estates*, 49 A.B.A.J. 670, 675 (1963); Cavers, *Trusts "Inter Vivos" and the Conflict of Laws*, 44 HARV. L. REV. 161, 162 (1930).

4 Toledo Soc. for Crippled Children v. Hickok, 152 Tex. 578, 261 S.W. 2d 692, (1953).

5 De Vaughn v. Hutchinson, 165 U.S. 566, 570 (1897).

6 Albuquerque Nat. Bank v. Citizens Nat. Bank in Abilene, 212 F.2d 943 (5th Cir. 1954).

7 Bozeman, *supra* note 3, at 674.

8 Cavers, *supra* note 3, at 162-63.

9 LAND, TRUSTS IN THE CONFLICT OF LAWS 204-05 (1940).

10 Bozeman, *supra* note 3, at 670.

to be applied is not necessarily a justification of its final decision. Its very compelling jurisdiction over the estate might have allowed it to subject the provisions to foreign law in order to uphold the trust. It was a Texas court which stated:

Our courts, by reason of their ultimate power over lands situated within our state, no doubt have the *jurisdictional* authority in a given case to vary the . . . rule and apply the domiciliary law in preference to our own, if they should find compelling reasons so to do.<sup>11</sup>

The great flexibility in the trust-conflict arena strikes one as both a cause and an effect of a strong disposition on the part of judicial tribunals to uphold testamentary provisions. Hence, automatic application of one law or another may be spurned "because of the substantial policy felt by judges everywhere for upholding dispositions of property according to the intent which was expressed or implied."<sup>12</sup> It is not far from correct to state that in nearly every case the courts have chosen that law affording validity to the trust's provisions.<sup>13</sup>

A highly persuasive factor in settling trust situations, and one which, it is submitted, the *Wilson* court grossly underplayed, is the intent of the decedent. Certainly his wishes should be given considerable weight before frustrating the thrust of his estate plan because of some technical defect, which he might easily have cured while living. By a proper choice of trustees, a suitable situation of the property involved, a prudential choice of domicile and other formalistic devices, the testator, before death, can foreclose the possibility of having his testamentary trust voided by some court overzealous in its application of rigid law. Would it not be easier and more rational to let the intent of the settlor govern whenever possible? After all,

To make the choice of law depend on actions so little related to the substance of the transaction and so wholly subject to the arbitrary control of the parties, seems to be letting in the doctrine of intent by the back door. Otherwise it gives to the crossing of a state line an almost ritualistic significance.<sup>14</sup>

Just how explicit the intent must be is open to question, and at least two views are worthy of consideration. The first of these would effectuate the wishes of the testator if the instrument indicates that the law of a particular state shall govern.<sup>15</sup> Even here, however, the preference itself—so long as the specific state chosen is clear—can be expressed or implied.<sup>16</sup> The chances for implementation of the testator's predilection are closely related to the closeness of the association existing between the trust and the indicated state.<sup>17</sup>

A more liberal view would make the testator's desire supreme, whether expressed or implied, at least where personal property is concerned and the otherwise applicable law is that of the forum. In such a situation, to preclude application of law of the domicile, the only requirement is that there be "sufficient evidence of a contrary intent."<sup>18</sup> If the intent need be only implied, a further question arises as to the degree of clarity required. It is apparently sufficient if it can be "ascertained,"<sup>19</sup> although this lacks a good deal of certainty when one is confronted with a concrete situation. A guide to this ascertainment is the following:

Where there is no . . . express declaration, the court should examine the facts of the transaction and the circumstances surrounding it in an effort to . . . effectuate any intent which is inferable therefrom.<sup>20</sup>

11 Toledo Soc. for Crippled Children v. Hickok, *supra* note 4, at 696.

12 Heyman, *supra* note 1, at 268.

13 Leflar, *Estates and Trust—Conflict of Laws Problems*, 12 ARK. L. REV. 29, 34 (1957-58).

14 Cavers, *supra* note 3, at 194.

15 Risher v. American Surety Co., 227 Wis. 104, 277 N.W. 160 (1938).

16 Bozeman, *supra* note 3, at 675.

17 Hoar, *supra* note 2, at 1433.

18 *Id.* at 1423.

19 LAND, *op. cit. supra* note 9, at 15.

20 Cavers, *supra* note 3, at 195.

It is true that the foregoing advice was advanced in connection with living trusts, but no convincing reason is perceived for attaching any less weight to it if applied to testamentary trusts as well; for it is in the latter case that a special effort need be made in searching out the creator's wishes. While such a process presents the height of flexibility, it does present the clearest opportunity for doing justice to the creator whose property, after all, will sponsor the carrying out of the judge's decision.

Could the court in *Wilson* have used an intent doctrine in reaching a different result, one which would not have thwarted the essential purpose of the trust? No express preference for foreign law was found in the instrument; in fact, the appellate court agreed with the lower court's finding that the testator intended the trust to be administered in Texas, and that its corpus should remain in, and be subject to, the jurisdiction of Texas courts.<sup>21</sup> But surely to maintain that this intent would be unaltered by knowledge that execution in Texas would be illegal and hence performance of the trust impossible is to say that the creator intended the result reached by the court, a rather unreal observation. Perhaps it would have been more accurate to ask whether the testator would have preferred foreign performance of his purpose or the disposition of the property which will ensue as a result of the court's ruling. To have confronted the instrument in this manner would have been a more pragmatic "effort to . . . effectuate any intent which is inferable therefrom," and the answer would have provided a sufficiently-implied intent to have California law control.

Had the requisite intent been found, the illegality objection might still have arisen, for, while most courts strive to uphold a trust where possible, they are reluctant so to do if the trust "violates some strong local public policy of the state in which the case comes up."<sup>22</sup> The *Wilson* court declared that it would not have

Texas land and personal property administered by Texas trustees under Texas law, and the revenue sent to another State for a purpose which is criminal under our laws, although it is not condemned as criminal in the foreign jurisdiction.<sup>23</sup>

Such an objection might easily have been overcome; court policy, in passing upon foreign-charity bequests which violate either the laws of one state or the other, have held such laws to apply only to "domestic wills to be carried out locally," and therefore sustain the bequests if valid under either state's laws.<sup>24</sup> Likewise, in situations where the trust violates the perpetuities rule of the domicile but not of the foreign jurisdiction, "[T]he way of escape usually followed has been to construe the statute of the domicile not to apply to trusts to be administered abroad."<sup>25</sup> Professor Goodrich, positing the situation where property is to be held in trust for the founding of a charitable institution in another state, which trust is in contravention of the domiciliary but not the foreign law, states there is authority for allowing the arrangement on the grounds that it is the administration which is objectionable, not the giving.<sup>26</sup> To that effect is *Hope v. Brewer*.<sup>27</sup> At issue was a New York instrument calling for the foundation and endowment of a Scotland infirmary. The court upheld the trust though its terms were too vague to satisfy New York law regarding beneficiaries. Holding that the trust's execution hinged not upon the trustees' will but upon the law of the country where the fund would be used, the court stated:

[A] disposition of personal property made in this state, by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid,

21 373 S.W. 2d at 516-17.

22 Leflar, *supra* note 13, at 34.

23 373 S.W. 2d at 517.

24 Bozeman, *supra* note 3, at 674.

25 Cavers, *supra* note 3, at 166.

26 GOODRICH, *CONFLICT OF LAWS* 517 (3d ed. 1949).

27 136 N.Y. 126, 32 N.E. 558 (1892).

although not in compliance with our statute or the rules of law in force here . . . providing it is valid by the law of the place where the gift is to take effect. . . .<sup>28</sup>

Such reasoning has also been employed where trusts contravened such local prohibitions as limitations upon the suspension of the power of alienation or of absolute ownership of property: the limitations were "so construed as not to apply to wills creating trusts which are to be administered in other states."<sup>29</sup> The Texas court had every reason for refusing to abet the establishment of such a hospital in Texas: public policy. But it is not so clear that such a hospital in California violates Texas public policy. Texas has no stake in such an institution.

Since the illegality should be patent before the nullification of a trustor's intent is justified,<sup>30</sup> the *Wilson* trust should have been made to depend upon the law of the place of performance; this seems the better standard, and the one generally leaned upon in contract suits. Whether certain acts result from a testamentary trust or from a contractual agreement, the danger to local public policy is the same, yet the validity of a multi-state contract is gauged by the law of the state where the performance is to be carried out. A relevant instance is *Zenatello v. Hammerstein*,<sup>31</sup> where the Pennsylvania court, having construed a New York contract to call for out-of-state performance, enforced the agreement though such performance at the place of making the contract would have been illegal. Much of the language in *Zenatello* might have found fruitful application to the *Wilson* situation:

The law will not presume that the parties contracted to do an unlawful thing, or violate a statutory prohibition in carrying out its terms, but that their purpose was the accomplishment of a lawful object, and the performance of the agreement in a place or territory where its performance was permissible.<sup>32</sup>

Applying very little strain to either, the court in *Wilson v. Smith* could have applied the doctrines of intent and performance so as to uphold the Ferguson trust and follow the spirit of the Restatement's declaration that "the charitable trust is not invalid if the substantial purpose of the trust can be achieved by other methods which are not illegal."<sup>33</sup>

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LABOR LAW—DUTY OF FAIR REPRESENTATION—BREACH OF DUTY NOT UNFAIR LABOR PRACTICE.—Lopuch, a teamster driver who worked for the Miranda Fuel Co., was eleventh man on a twenty-one-man seniority list, under a seniority arrangement between his company and the union. As part of the collective agreement, the company and the union provided that drivers with seniority insufficient to prevent their layoff during the "slack season" (April 15 through Oct. 15) could take those months off and obtain employment elsewhere without losing any seniority. To maintain the seniority, however, the drivers had to sign in at the end of the period (Oct. 15). Lopuch had sufficient seniority to guarantee his steady employment.

On April 12, with his employer's permission, Lopuch left his job on account of his brother's death. This plus a subsequent personal illness, kept Lopuch away from work beyond the sign-in date.

Lopuch's failure to return caused the union to ask the employer to reduce his seniority, a request that was dropped upon learning of his illness. Other drivers

28 *Id.* at 562.

29 STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 392 (3d ed. 1963).

30 *Jenkins v. First Nat. Bank in Dallas*, 107 F.2d 764, 765 (5th Cir. 1939).

31 231 Pa. 56, 79 Atl. 922 (1911).

32 *Id.* at 923.

33 RESTATEMENT, TRUSTS § 377, comment *d* (1935).