CLAIMS AGAINST IRREVOCABLE TRUSTS IN DIVORCE PROCEEDINGS: SELECT TOPICS FROM A LITIGATOR'S PERSPECTIVE

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CHILD OR SPOUSAL SUPPORT CLAIMS AGAINST SPENDTHRIFT TRUSTS

Trustors often want to benefit their descendants, particularly their children, while protecting these gifts from creditors of the beneficiaries, including their former spouses, whether in the form of spousal support or even child support. Spendthrift provisions have become a common technique for protection against the beneficiaries' creditors, but have limited or no usefulness in divorce proceedings as against claims of child or spousal support. While this article focuses on spendthrift provisions, there may also be claims against discretionary trusts even without spendthrift provisions, and courts in some states will look to the right of a beneficiary to receive distributions from a trust, even if discretionary, in calculating spousal and child support.

Spendthrift provisions, prohibited under the English common law and in this country until the Supreme Court's 1875 decision in *Nichols v. Eaton*, are now a common planning technique and have gained widespread use.[1] Whether spendthrift provisions should be enforceable against spousal and child support claims implicates competing public policy concerns. In this country, we value the concept of free testation above all other nations, even England from which we inherited the tradition.[2] Thus, we expect our testamentary intentions concerning the disposition of our hard-earned (or inherited) wealth to be respected. With certain limitations, we seek to uphold the desire of the donor to protect the beneficiary from his or her own improvident behavior and to support the beneficiary notwithstanding the claims of creditors. On the other hand, we have a long tradition of protecting spouses and certainly children. Our policies have been aimed at encouraging the concept of a family unit that includes a wife who devotes her time and energy to maintaining the home and raising children, making it unjust to require that she suddenly become a breadwinner. Even though the protections for spouses may be somewhat antiquated in light of changing societal norms, these safeguards remain important tools (particularly given that the evidence is indisputable

that women still do not receive equal treatment in the workplace).

A "spendthrift provision" is "a term of a trust which restrains both voluntary and involuntary … [irrevocable] … transfer[s] of a beneficiary's … [equitable or beneficial] interest."[3] When we speak of spousal and child support claims, we typically consider these to be "involuntary" transfers, in the sense that they are typically the subject of claims by a divorcing spouse for spousal and/or child support.

Notwithstanding the general enforceability of spendthrift provisions against creditor claims, section 157 of the Restatement (Second) of Trusts provides the following important exception for purposes of this article: "Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support, or by the wife for alimony;…."

Many states have enacted statutes that expressly provide exceptions or limitations to the use of spendthrift trusts to protect against claims for spousal or child support. For example, California Probate Code section 15305 provides:

> (a) As used in this section, "support judgment" means a money judgment for support of the trust beneficiary's spouse or former spouse or minor child.
>
> (b) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future.
>
> (c) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.
>
> (d) This section applies to a support judgment notwithstanding any provision in the trust instrument.

California courts have grappled with the question of whether they can compel trustees of discretionary trusts to exercise that discretion to satisfy child support judgments. In *Ventura Cty Dept. of Child Servs. v. Brown*, the California Court of Appeal affirmed a trial court decision granting a petition to compel trustees to exercise their discretion to make distributions to a beneficiary, the father of seven children, to satisfy a support judgment.[4] The court noted that Probate Code section 15305 provides an exception to the enforceability of spendthrift provisions of a trust for enforcing spousal or child support obligations. There could be no dispute under the provisions of the statute that an order requiring spousal or child support can be enforced notwithstanding spendthrift provisions in a trust. What the statute does not answer is whether the courts can compel a trustee of a discretionary trust with a spendthrift provision to exercise that discretion in order to satisfy a child support judgment. The court agreed with the lower court that a petition to compel the trustees to do so was justified. The court reasoned that: (i) even when trustees have absolute discretion, they cannot exercise that discretion in bad faith or with an improper motive; and (ii) while it is essential in evaluating the trustee's duty to exercise discretion, the settlor's intent is paramount, and in the context of the trust at issue, it was clear that the settlor intended that grandchildren would be benefitted in the event the parent were deceased. Though the settlors' son in this case was still alive, the court believed the trust evinced an intent to benefit the grandchildren. Although the case did not address

whether the same result would flow to satisfy a judgment of spousal support, it is interesting to note that the trust in question did also provide that, in the event a child was deceased, the trustee had discretion to make distributions to the spouse of a deceased child.

In *Pratt v. Ferguson*, David Pratt obtained orders requiring his ex-wife, Cynthia Vedder, to pay child support and expenses.[5] Vedder was the beneficiary of a trust established by her grandparents. Pratt filed a petition to compel the trustee of the grandparents' trust to satisfy the orders. The court denied the petition, distinguishing it from the *Ventura County* case, because the trust contained not only spendthrift provisions, but what the parties referred to as a "shutdown" clause. The Court of Appeal reversed. The court also reversed the trial court's ruling that Pratt was not entitled to a judgment lien against the trust for Vedder's obligation to compensate Pratt for his claim to community property. The trust provided that the trustee was required to pay net income to the beneficiary between ages 25 and 65, and had the discretion to make distributions for health, support, maintenance, and education. At ages 50, 55, 60, and 65, the trust required the trustee to distribute certain portions of the principal. However, in addition to a spendthrift provision, the trust had a provision which the parties referred to as the "shutdown" clause which prevented the trustee from making the distributions of principal at ages 50, 55, 60, and 65, for the period and to the extent that such distributions could be subject to claims of creditors. The court disagreed that the case was distinguishable from *Ventura County*. Vedder argued that her grandparents' trust did not evince an intent to benefit grandchildren. It provided that distributions to which a deceased beneficiary would have been entitled would be distributed through the beneficiary's probate estate and that there were no grandchildren at the time the trust was established. The court found that the non-existence of grandchildren at the time the trust was created could not be interpreted as an intention not to benefit them. Indeed, the court believed the provisions of the trust did demonstrate an intention to benefit future grandchildren. Further, the court explained that the Probate Code expressly allows a child support creditor to satisfy obligations from a trust notwithstanding any terms of the instrument:

> Third, applying Probate Code section 15305, would the result in this case be different if (as the Trustee argues) the Trustors had not expressed an intent to benefit Vedder's children or even had expressed an intent to not benefit them? No. Probate Code section 15305 expresses this state's policy that child support judgments may be enforced against the distribution of assets from a trust. Indeed, subdivision (d) of section 15305 specifically provides that "[t]his section applies to a support judgment notwithstanding any provision in the trust instrument."[6]

The Court of Appeal also disagreed that the "shutdown" clause compelled a different result. First, the court noted that it applied only to the period distributions of principal, and not to the mandatory distributions of income and discretionary distributions of principal. Second, and more importantly, the court essentially found that the clause was nothing more than a form of a spendthrift provision, and such provisions cannot be used to avoid child support obligations. The court remanded, instructing the trial court to exercise its discretion, with the strong public policies against enforcing spendthrift provisions as to child support orders, to compel the trustee to make distributions.[7]

Other states have statutes similar to California. Some explicitly except both spousal and child support orders from enforcement of spendthrift provisions, while other statues except only child support orders. Texas Family Code section 154.005 provides an exception for child support orders:

> (a) The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments as provided by this chapter.
>
> (b) If disbursement of the assets of the trust is discretionary, the court may order child support

payments from the income of the trust but not from the principal.

New York Estates, Powers & Trusts Law, section 7-1.5(d) provides:

The beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring or assigning any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

Florida Trust Code section 736.0503, entitled "Exceptions to spendthrift provision," provides:

(1) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or any other state.

(2) To the extent provided in subsection (3), a spendthrift provision is unenforceable against:

(a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

Delaware is, of course, one of several states with substantial creditor protection statutes. With respect to spendthrift trust provisions, the Delaware statute has no exception, on its face, for spousal or child support obligations. The statute provides in part:

(a) Except as expressly provided in subsections (c) and (d) of this section, a creditor of a beneficiary of a trust shall have only such rights against or with respect to such beneficiary's interest in the trust or the property of the trust as shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State. The provisions of this subsection shall be effective regardless of the nature or extent of the beneficiary's interest, whether or not such interest is subject to an exercise of discretion by the trustee or other fiduciary, and shall be effective regardless of any action taken or that might be taken by the beneficiary. Every interest in a trust or in trust property or the income therefrom that shall not be subject to the rights of creditors of such beneficiary as expressly provided in this section shall be exempt from execution, attachment, distress for rent, foreclosure, garnishment and from all other legal or equitable process or remedies instituted by or on behalf of any creditor, including, without limitation, actions at law or in equity against a trustee or beneficiary that seeks a remedy that directly or indirectly affects a beneficiary's interest such as, by way of illustration and not of limitation, an order, whether such order be at the request of a creditor or on the court's own motion or other action, that would:

(1) Compel the trustee or any other fiduciary or any beneficiary to notify the creditor of a distribution made or to be made from the trust;

(2) Compel the trustee or beneficiary to make a distribution from the trust whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary;

(3) Prohibit a trustee from making a distribution from the trust to or for the benefit of the beneficiary whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary; or

(4) Compel the beneficiary to exercise a power of appointment or power of revocation over the trust.

Every direct or indirect assignment, or act having the effect of an assignment, whether voluntary or involuntary, by a beneficiary of a trust of the beneficiary's interest in the trust or the trust property or the income or other distribution therefrom that is unassignable by the terms of the instrument that creates or defines the trust is void. No beneficiary may waive the application

of this subsection (a). For purposes of this subsection (a), the creditors of a beneficiary shall include, but not be limited to, any person that has a claim against the beneficiary, the beneficiary's estate, or the beneficiary's property by reason of any forced heirship, legitime, marital elective share, or similar rights. The provisions of this subsection shall apply to the interest of a trust beneficiary until the actual distribution of trust property to the beneficiary. Regardless of whether a beneficiary has any outstanding creditor, a trustee may make direct payment of any expense on behalf of such beneficiary to the extent permitted by the instrument that creates or defines the trust and may exhaust the income and principal of the trust for the benefit of such beneficiary. A trustee shall not be liable to any creditor of a beneficiary for paying the expenses of a beneficiary.

….

(d) For purposes of subsection (a) of this section, a creditor shall have no right against the interest of a beneficiary of a trust or against the beneficiary or trustee of the trust with respect to such interest unless:

(1) The beneficiary has a power to appoint all or part of the trust property to the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate by will or other instrument such that the appointment would take effect only upon the beneficiary's death and the beneficiary actually exercises such power in favor of the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate but then only to the extent of such exercise.

(2) The beneficiary has a power to appoint all or part of the trust property to the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate during the beneficiary's lifetime and the beneficiary actually exercises such power in favor of the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate but then only to the extent of such exercise.

(3) The beneficiary has the power to revoke the trust in whole or in part during the beneficiary's lifetime and, upon such revocation, the trust or the part thereof so revoked would be possessed by the beneficiary. This paragraph shall have no application to any part of the trust that may not be so revoked by the beneficiary.[8]

Nevertheless, despite the enshrinement of the principles that support spendthrift provisions by the Delaware legislature, the Delaware Supreme Court long ago held that a spouse seeking maintenance is not a "creditor" and therefore not subject to the protections against creditor claims afforded by spendthrift provisions or limitations of discretionary trusts.[9] Subsequent cases have confirmed that this is a narrow exception applicable to a beneficiary's support obligations despite attempts by others, such as trust beneficiaries, claiming breaches of fiduciary duty, to claim that they too should not be considered "creditors."[10]

Furthermore, even under Delaware Code section 3536, there are three important limitations: when (i) the beneficiary is a settlor/trustor; (ii) the beneficiary has power to revoke the trust "in whole or in part" during the beneficiaries' lifetime; or (iii) the beneficiary has power to appoint trust assets to the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the beneficiary's estate's creditors. There are other common law bases upon which a transfer to a trust may be attacked.[11]

CLAIMS AGAINST TRANSFERS TO SELF-SETTLED TRUSTS

In most states, self-settled trusts will not protect assets from the reach of creditors. As noted above, Delaware is one of a number of states with statutes that provide significant asset protection rights in the context of self-settled trusts. Delaware enacted the Qualified Dispositions in Trust Act (Act) in 1997 for this purpose.[12] The Act provides protection of trust

assets against claims by creditors if certain requirements are met. There are no particularly informative Delaware cases applying the Act; however, the Act itself reveals that trusts that fail to comply with certain requirements will be vulnerable to attack, particularly trusts that allow the "transferor" too much control. The Act is discussed herein for purposes of providing an example of limitations that may provide a basis for attack by creditors to asset protection trusts even in states where they are sanctioned.

Under section 3572:

> [N]o action of any kind, including, without limitation, an action to enforce a judgment … shall be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless such action shall be brought pursuant to [6 Del. C. § 1304-05, i.e. fraudulent conveyance statutes] … and, in the case of a creditor whose claim arose after a qualified disposition, unless the qualified disposition was made with actual intent to defraud such creditor.[13]

Thus, a "qualified disposition" can be insulated from creditors, so long as it was not a fraudulent conveyance (or certain debts, including pre-existing tort liability, discussed below). As one court put it, "little case law interpreting the [Act] exists."[14]

A "'[q]ualified disposition' means a disposition by or from a transferor (or multiple transferors in the case of property in which each such transferor owns an undivided interest) to 1 or more trustees, at least 1 of which is a qualified trustee, with or without consideration, by means of a trust instrument."[15]

A "transferor" is defined as:

> a person who, as an owner of property, as a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the holder's estate, or as a trustee, *directly or indirectly* makes a disposition or causes a disposition to be made.[16]

A "qualified trustee" that is not a natural person must be:

> authorized by the law of [Delaware] to act as a trustee and whose activities are subject to supervision by the Bank Commissioner of the State, the Federal Deposit Insurance Corporation, or the Comptroller of the Currency and … [m]aintains or arranges for custody in [Delaware] of some or all of the property that is the subject of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or otherwise materially participates in the administration of the trust.[17]

Under the definition of "qualified trustee," it is specified that "nothing in [the Act] shall preclude a transferor from appointing one or more advisors," including "protectors" and other advisors described under section 3313.[18] Section 3313, in turn, provides a nonexhaustive list of powers a "protector" can hold.[19]

Section 3570 provides in part:

> A person may serve as an *investment advisor* described in § 3313 of this title, notwithstanding that such person is the transferor of the qualified disposition, but such a person may *not serve as trustee or otherwise serve as advisor* of a trust that is a qualified disposition *although such person may retain any of the powers and rights described in paragraph (11)b. of this section*.[20]

It is likely a court would conclude this language limits the hats a transferor—not an investment advisor—can wear. First, it references section 3570(11)(b), which addresses powers a *transferor* can retain. Second, it is unlikely the legislature was concerned with an investment advisor serving other roles with respect to the trust, such as a distribution advisor, since in the absence of advisors the trustees can be tasked with making both investment and distribution decisions. Additionally, section 3571 specifies that a transferor cannot have any powers other than those under section 3570(11)(b), and "serv[e] as an investment advisor pursuant to [section 3570(8)]."[21]

Accordingly, it is likely that a transferor cannot serve as a trustee or an advisor, except for an investment advisor and (arguably) an advisor (including one labeled a protector) with rights limited to those allowed under section 3570(11)(b).

Trusts protected under the Act can provide for the transferor to receive all income, but can provide for a transferor to receive, or potentially receive, principal only if it would be the result of a trustee acting:

> At the direction of an advisor … who is acting:
>
> I. In such advisor's discretion; or
>
> II. Pursuant to a standard that governs the distribution of principal and does not confer upon the transferor a substantially unfettered right to the receipt of or use of principal.[22]

Trusts can provide "a lifetime or testamentary power of appointment (other than a lifetime or testamentary power to appoint to the transferor, the transferor's creditors, the transferor's estate or the creditors of the transferor's estate) exercisable by will or other written instrument of the transferor."[23] A power of appointment in favor of anyone is permissible if it is for the limited purposes of paying income tax on trust income and/or liabilities and taxes due upon a transferor's death.[24]

There are several other delineated powers that a transferor can retain under section 3570(11)(b)(7). A transferor can:

- Retain power to: veto a distribution;[25]
- Receive income or principal from (i) a grantor-retained annuity trust if transferor receives up to five percent of the initial value of the trust assets each year; or (ii) from a charitable remainder annuity trust;[26]
- Possess a qualified personal residence and reacquire trust property if it is replaced with property of equivalent value;[27]
- Receive income to pay income tax on income of the trust;[28]
- Pay debts and taxes of the transferor with trust assets upon the transferor's death;[29] and
- Serve as a representative of the trust.[30]

Attacking transfers as fraudulent conveyances

Transfers to an irrevocable trust, including an asset protection trust under the laws of a settlor-friendly state like Delaware, may still be reached as fraudulent conveyances. Keeping with the example of Delaware, particularly given that its laws provide significant asset protection from creditors, a creditor can recover assets from a qualified disposition trust under the Act if the claim is "brought pursuant to the provisions of § 1304 or § 1305 of Title 6 [i.e. fraudulent conveyance statutes]" and, in the case of a creditor whose claim arose after the assets were transferred, only if the disposition was made "with actual intent to defraud such creditor."[31] For purposes of determining when a claim arises, the Act defines a "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[32]

If the creditor's claim arose after the transfer to a qualified disposition trust, it appears a transfer to a qualified disposition trust will be fraudulent only if it was made with "actual intent to defraud such creditor."[33] This plain language has not been applied by the courts, and is significantly narrower than the rule, outside the context of transfers made to a qualified disposition trust, that a transfer will be fraudulent if it is made with "actual intent to hinder, delay, or defraud any creditor"[34] or if it is made:

> Without receiving a reasonably equivalent value in exchange for the transfer or obligation, [if] the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed or reasonably should have believed that the debtor would

incur, debts beyond the debtor's ability to pay as they became due.[35]

To determine actual intent under the general fraudulent conveyance statute:

> [C]onsideration may be given, among other factors, to whether:
>
> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (6) The debtor absconded;
>
> (7) The debtor removed or concealed assets;
>
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[36]

This "provides a non-exclusive list of indicia that can be considered" for determining whether the debtor acted with the requisite intent.[37] It is arguable that at least some of these factors are not appropriate for a claim by a creditor seeking to recover from a qualified disposition trust because the factors concern intent to "hinder, delay, or defraud any creditor"[38] rather than the standard under the Qualified Dispositions in Trust Act which is intent "to defraud such creditor" bringing the claim.[39]

If a creditor's claim arose before a transfer to a qualified disposition trust, the grounds to establish a fraudulent conveyance are broader—specifically, if the transfer was made by the debtor:

- With "actual intent to hinder, delay, or defraud any creditor";[40]
- "Without receiving a reasonably equivalent value in exchange for the transfer or obligation, [if] the debtor:

  a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

  b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due";[41]
- "[W]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation";[42] or
- "[T]o an insider for an antecedent debt, [if] the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent."[43]

In *Waldron v. Huber*, the court held transfers to an Alaska self-settled trust constituted a fraudulent conveyance.[44] Washington's fraudulent conveyance statute identifies a number of non-exclusive badges of fraud:

- The transfer or obligation was to an insider;
- The debtor retained possession or control of the property transferred after the transfer;
- The transfer or obligation was disclosed or concealed;

- Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- The transfer was of substantially all the debtor's assets;
- The debtor absconded;
- The debtor removed or concealed assets;
- The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[45]

Sham or illusory trusts

Generally, gifts of assets to an irrevocable trust in which a spouse has no beneficial interest are not divisible as part of the marital estate or subject to claims for support. But can such assets be reached on a theory that the trust is merely a sham? What is a sham trust?

A decision of the United Kingdom's High Court in 2017 brought great attention to such claims outside the US In *Mezhprom Bank v. Pugachev*, Sergio Pugachev, a former Russian Federation senator and an oligarch also known as "Putin's Banker," established Mezhprom Bank, which grew to become one of Russia's largest private banks.[46] The bank became insolvent and the liquidator determined Pugachev embezzled approximately $1 billion. Pugachev fled to England between 2011 and 2013 where he established five irrevocable discretionary trusts with approximately $95 million for the benefit of himself, his partner Alexandra Tolstoy (a relative of Leo) from whom Pugachev was later estranged, and their children. The liquidator brought action in the UK High Court claiming that the trusts were shams and thus available to satisfy judgments obtained by the liquidator against Pugachev. Meanwhile, in violation of orders of the High Court, Pugachev, purportedly out of fear for his life from Russian agents, fled to France. Pugachev was of course aware of the claims that might be brought against him at the time of creating the trusts. He named himself as protector with broad powers including the power to add beneficiaries, remove the trustees with or without cause, and veto the trustees' exercise of powers of distribution, investment, modifying terms, and removal of beneficiaries. The initial trustees were New Zealand companies owned by partners of a New Zealand law firm that drafted the trust deeds and were replaced by Pugachev in 2015 by persons more closely associated with Pugachev.

Ms. Tolstoy testified that Pugachev was a "control freak." Justice Birss reached a similar conclusion, which may have impacted his findings which were controversial among many practitioners, including the finding that Pugachev's powers as protector, coupled with the fact that he was the settlor and a discretionary beneficiary, demonstrated that he intended at all times to retain complete control over the assets. Justice Briss also concluded that transfers supposedly made by Pugachev's "young adult" son Victor were really transfers by Pugachev and that naming Victor as successor protector further demonstrated that Pugachev intended to ensure his ability to pull the strings. Justice Birss concluded that the trusts were illusory or sham intended solely to evade creditor claims while Pugachev retained control and that the trustees were complicit. Pursuant to the judgment of the High Court, therefore, the assets could be attached by the Bank's liquidator.

The issue of sham or illusory trusts has been taken up by some US courts with perhaps less fanfare. In *VanderLugt v. VanderLugt*, the New Mexico Court of Appeals rejected such a claim based upon the evidence before it, but provided some interesting guidance.[47] Husband appealed the ruling of the trial court that Wife had a community lien in assets of an irrevocable trust created before the marriage. In that case, Husband settled an irrevocable life-insurance trust naming his father as trustee. If married at the time

of distribution, the trust would benefit his spouse, and if not, then his children. At the time of the trust's creation, Husband was unmarried and had no children. However, after marrying, Husband paid insurance premiums on the trust's sole asset, an insurance policy, with community funds. The funds were characterized as gifts on the couple's tax returns. The Court of Appeals explained that although an irrevocable trust created by a spouse in which he or she has no beneficial interest is not marital property subject to division, a court may reach the trust's assets if the trust was established for fraudulent purposes, including in anticipation of divorce. The Court of Appeals reversed the trial court's decision, finding no evidence of fraudulent intent, nor, with a nod toward the argument about sham trusts, an intent by Husband and his father to use the artifice of the trust to unfairly benefit husband:

> Husband is not a beneficiary or a trustee and does not have a property interest in the Trust. Husband also testified that he is not able to access the assets of the Trust. Wife is also not a beneficiary or a trustee and has no property interest in the Trust because she lost her beneficiary status upon divorce. The parties regarded the community funds used to pay the life insurance premiums as gifts and treated them as such for tax purposes. No argument has been made that Husband set up the Trust for an improper or fraudulent purpose, or that he made any fraudulent transfers to the Trust for the purpose of safeguarding assets from division in the divorce. Although Wife relied on, and the district court seemed to have been motivated by, the possibility that the trustee, Husband's father, might use the funds in a way that would unfairly benefit Husband, Wife offered no evidence that the trustee had ever acted improperly in any respect. Wife's concerns are therefore unsupported and speculative. Moreover, no evidence was presented that Wife was defrauded or fooled into paying the life insurance premiums from community funds. We further acknowledge Wife's concern that Husband may remarry, and that under the terms of the Trust, her children could lose any interest they have in the corpus of the Trust, or that the assets of the Trust might be depleted through distributions the trustee could make to Husband if he finds it is in the best interests of the children or of Husband's future spouse. While we sympathize with Wife's position, the Trust was set up for legitimate reasons, and we see no reason why it should not be enforced as written.[48]

One can see, however, that in a case where the evidence establishes that the trust had been disregarded and treated instead as an instrument of the spouse settlor, a court could reach a different conclusion (i.e., that the trust was a sham and the assets should be subject to division).

The Rhode Island case of *Pezza v. Pezza* provides an interesting approach to the concept of challenging an irrevocable trust in a divorce proceeding as a sham or illusory trust. Wife contended Husband's transfer of real estate parcels into an irrevocable trust was a fraudulent attempt to deprive her of statutory rights providing a surviving spouse with a fee simple in the decedent spouse's property. Although the case started as a divorce proceeding, it moved to the probate court after Husband died during the pendency of the divorce since "the Family Court's jurisdiction over this trust died with Anthony Pezza, Jr."[49]

The trial court noted that the test of whether the trust was illusory was equally applicable to determining the wife's right to a life estate after Husband's death or her right to alimony had he lived. Thus, the first question concerning how to determine whether a trust is illusory or is a sham, is equally applicable in either. The trial court concluded that Husband's intent was twofold: to provide for his children from his prior marriage and to deprive his current wife of her rights in a life estate in property. Nevertheless, the court held that the trust was not illusory because objectively the husband had relinquished all of his right, title, and ownership in the property, even if he continued to have a beneficial right in income generated by the trust. The trial court rejected the concept of testing whether the trust was illusory based on intent and relied instead on "reality" as had the court of appeals in *Newman v. Dore*, a 1937 New

York case involving whether a revocable trust could defeat a wife's elective share.[50]

In *Newman*, Husband transferred essentially all of his assets into a trust three days before his death, undoubtedly to deprive his wife of her elective share under New York law. The Court of Appeals rejected the approach of some states which test the validity of the trust based on the settlor's intent to divest his spouse of her legal rights, and instead elected to follow the illusory transfer approach adopted by other states, which tests the validity of a transfer on whether it was real or illusory (i.e., the spouse, in effect, retained control over the assets). The court explained:

> Motive or intent is an unsatisfactory test of the validity of a transfer of property…. Intent may, at times, be relevant in determining whether an act is fraudulent, but there can be no fraud where no right of any person is invaded. "The great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed." (*Leonard v. Leonard*, 181 Mass. 458, 462, and cases there cited.) Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory. That is the test applied in *Leonard v. Leonard* (*supra*). The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. "The good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property. It is, therefore, apparent, that the fraudulent interest which will defeat the gift inter vivos cannot be predicated of the husband's intent to deprive the wife of her distributive share as widow." (*Benkart v. Commonwealth Trust Co.*, 269 Penn. St. 257, 259.) In Pennsylvania the courts have sustained the validity of the trusts even where a husband reserved to himself the income for life, power of revocation and a considerable measure of control. (Cf. *Lines v. Lines*, 142 Penn. St. 149; *Potter Title Trust Co. v. Braum*, 294 Penn. St. 482; *Beirne v. Continental-Equitable Title Trust Co.*, 307 Penn. St. 570.) In other jurisdictions transfers in trust have been upheld regardless of their purpose where a husband retained a right to enjoy the income during his life. (*Rabbitt v. Gaither*, 67 Md. 94; *Cameron v. Cameron*, 10 Miss. 394; *Gentry v. Bailey*, 6 Grattan [Va.] 594; Hall v. Hall, 109 Va. 117; *Stewart v. Stewart*, 5 Conn. 317; *Osborn v. Osborn*, 102 Kan. 890.) In some of these cases the settlor retained, also, a power of revocation. In no jurisdiction has a transfer in trust been upheld where the conveyance is intended only to cover up the fact that the husband is retaining full control of the property though in form he has parted with it. Though a person may use means lawfully available to him to keep outside of the scope of a statute, a false appearance of legality, however attained, will not avail him. Reality, not appearance should determine legal rights. (Cf. *Jenkins v. Moyse*, 254 N.Y. 319.)[51]

Applying the "reality-based" test instead of the settlor's subjective intent, the court in *Pezza* concluded, based upon the record before it, that the trust was not illusory: "Whatever his intent may have been in creating the trust in 1983, the actions he took in 1986 eliminated any question that the trust was a sham or illusory. The trust was real…. He did not 'own' the real property when he died."[52]

JURISDICTION OVER TRUSTS VERSUS MARITAL DISSOLUTION

When referring to the court's jurisdiction, there is both the question of the court's subject-matter jurisdiction and its personal jurisdiction over the parties. A court will have personal jurisdiction over the parties to a marriage depending upon the marital domicile, or, in some circumstances, the residence of the spouses. Though beyond the scope

of this article, there are circumstances in which the spouses do not live within the same jurisdiction and individual state rules apply as to when residence in a state is sufficient to establish jurisdiction for purposes of family law matters.

A court's jurisdiction over a trust and those with an interest in the trust is also a creature of state law. In California, for example, a court within the principal place of administration of the trust will have jurisdiction over the trust.[53] The principal place of administration is determined as follows:

> (a) The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust.
>
> (b) If the principal place of administration of the trust cannot be determined under subdivision (a), it shall be determined as follows:
>
> (1) If the trust has a single trustee, the principal place of administration of the trust is the trustee's residence or usual place of business.
>
> (2) If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed upon by them or, if not, the residence or usual place of business of any of the cotrustees.[54]

In California, when a court has jurisdiction over a trust, it has personal jurisdiction over the parties who are interested in the trust:

> (a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this division.
>
> (b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this division.[55]

A California court with jurisdiction over the trust also has exclusive, subject-matter jurisdiction over the internal affairs of the trust.[56] The internal affairs of a trust are comprehensive:

> (b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:
>
> (1) Determining questions of construction of a trust instrument.
>
> (2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
>
> (3) Determining the validity of a trust provision.
>
> (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
>
> (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
>
> (6) Instructing the trustee.
>
> (7) Compelling the trustee to do any of the following:
>
> (A) Provide a copy of the terms of the trust.
>
> (B) Provide information about the trust under Section 16061 if the trustee has failed to provide the requested information within 60 days after the beneficiary's reasonable written request, and the beneficiary has not received the requested information from the trustee within the six months preceding the request.
>
> (C) Account to the beneficiary, subject to the provisions of Section 16064 , if the trustee has failed to submit a requested account within 60 days after written request of the beneficiary

and no account has been made within six months preceding the request.

(8) Granting powers to the trustee.

(9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation.

(10) Appointing or removing a trustee.

(11) Accepting the resignation of a trustee.

(12) Compelling redress of a breach of the trust by any available remedy.

(13) Approving or directing the modification or termination of the trust.

(14) Approving or directing the combination or division of trusts.

(15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service.

(16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

(17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.

(18) Approving removal of a testamentary trust from continuing court jurisdiction.

(19) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 16105.

(20) Determining the liability of the trust for any debts of a deceased settlor. However, nothing in this paragraph shall provide standing to bring an action concerning the internal affairs of the trust to a person whose only claim to the assets of the decedent is as a creditor.

(21) Determining petitions filed pursuant to Section 15687 and reviewing the reasonableness of compensation for legal services authorized under that section. In determining the reasonableness of compensation under this paragraph, the court may consider, together with all other relevant circumstances, whether prior approval was obtained pursuant to Section 15687.

(22) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a deceased member under Section 9764, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a deceased member shall apply to the petition brought under this section.

(23) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a disabled member under Section 2468, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a disabled member shall apply to the petition brought under this section.

Sometimes there is a question of whether the court with jurisdiction over the marital estate and the parties to the marriage will also be able to exercise personal and subject-matter jurisdiction over trusts. A case from Rhode Island highlighted a distinction courts may make between the divorce court's jurisdiction over a trust settled by a third party (such as a parent) in which a spouse has a beneficial interest versus a trust settled by one of the divorcing spouses.

In *Pezza*, Wife filed for divorce and attempted to set aside a trust created by Husband as sham and illusory.[57] Husband created the trust, which was initially revocable, with himself as trustee and beneficiary funded with essentially all of his assets, including

five parcels of real property and the stock in his business. Husband subsequently amended the trust to make it irrevocable, and resigned as trustee in favor of his son Michael from a prior marriage. Husband retained the right to receive income from the trust during his lifetime. Wife filed a complaint in the divorce proceedings against Michael, as trustee of the trust, and the trust. Michael successfully moved to dismiss the complaint for lack of jurisdiction as to him. The trial court granted the motion, relying on a decision in *Concannon v. Concannon*,[58] in which, in very similar circumstances, the court dismissed an action asserted against a trust established by the mother of one of the divorcing spouses. The Rhode Island Supreme Court affirmed the decision dismissing the action against Michael as trustee on the grounds that he was a "third party" unrelated to the divorce proceeding, while holding that it had jurisdiction over the trust:

> We would like to point out that there is a crucial difference between the *Concannon* case and the case at hand. In the *Concannon* case the trust in question had been created by a third party, and there was no question regarding the validity of the trust. In the instant case the trust was created by a party to the divorce and may involve a fraudulent transfer to a trustee in violation of the other spouse's rights.
>
> We therefore read into the statute that the Family Court has jurisdiction over an express trust such as the one in question as a necessary adjunct to its power to adjudicate a divorce. The Family Court must have jurisdiction to set aside a trust established by a marriage partner if it appears that the trust was created with the intent to keep assets from the other marriage partner, and the Court should be able to order payments from such a trust to implement an order for support.[59]

Unanswered by the case is how the court could effectively and finally adjudicate the validity of the trust without the trustee's participation. For a multitude of reasons, it would seem that even if the court were to determine the trust to be a sham and the assets belonged at all times to the husband, how could a decision be binding on the trustee?

CHOICE OF LAW

In addition to the potential jurisdictional complications in a divorce proceeding, an even more challenging question can be the law applicable to the trust. Interestingly, in circumstances where a spouse may want to make claims that the trust is invalid, the choice-of-law rules may apply to "save" the trust under the laws of a different forum. Further, there may be limitations to choice-of-law provisions, such as in California which prohibits selection of a foreign law that would contravene the community property laws of California as violative of public policy.

> [T]he primary duty of the court in construing all documents is to give effect to the intention of the maker, and we can see no justification for any distinction in this regard between instruments operating *inter vivos* and those taking effect at death since the intention to be gathered from similar words or provisions, whether they be contained in a declaration of trust or a will, would ordinarily be the same.[60]

California statutory authority also requires courts to give effect to the settlor's intent to the greatest extent possible.[61] The interpretive mandates of California Probate Code sections 21102 and 21120 apply to inter vivos trusts.[62] Thus, because it is assumed that a settlor would not intend to create an invalid trust, where applying the law of one forum would uphold a trust but applying the law of another would invalidate it, the law favors applicability of the law that would uphold the trust.[63]

However, it is important to note that the settlor's intended choice of law may give way where it would violate either a public policy of California or of the settlor's domicile. Whether California's policy or that of the settlor's domicile controls depends on which choice-of-law test applies: that contained in the California Probate Code or the Restatement. Unfortunately, case law has not made clear when the tests enumerated in the Probate Code apply and when the Restatement applies, but the stronger argument

is likely that California statutory authority trumps the Restatement.[64]

The California probate code

Under California's Probate Code, courts apply the local law of the state "selected by" the donor, unless the selected law would violate California's community property regime or California's public policy. California Probate Code section 21103 provides the choice of law principles applicable to the validity of dispositions made by trusts:

> The meaning *and legal effect of a disposition* in an instrument is determined by the *local law of a particular state selected by the transferor* in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy *of this state* applicable to the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6.[65]

Section 21101 provides that "[u]nless the provision or context otherwise requires, [section 21103] applies to a will, trust, deed, and any other instrument." In *Ehrenclou v. MacDonald*, the court applied section 21103 to uphold the donor's choice of California law in a trust instrument where the donor "plainly stated his choice of law: 'This instrument and all matters pertaining to the administration, execution and performance of this trust shall be governed and determined in all respects by and in accordance with the laws of the State of California.' Subject to exceptions not here applicable, California law requires us to honor [donor's] choice."[66]

A choice-of-law provision may dictate whether the selected law may be applicable to the validity of the dispositive provisions of a trust. Assume the trust's choice-of-law provision does not state that the law to be applied to the trust will apply to the validity of the trust, but merely states: "This trust agreement shall be *construed* in accordance with the laws of California." Case law appears to require an explicit reference to validity or language connoting validity. This is not surprising because the ordinary meaning of the word "construed"—the starting point in the interpretation of any document[67]—is "to give the meaning or intention of; explain; interpret."[68]

An unpublished case, *Steiger v. Steiger*, supports the view that a court would likely not interpret the word "construed" without more to apply to questions of validity.[69] In *Steiger*, the trust's choice-of-law provision stated that the trust "shall be construed for all purposes in accordance with laws of the State of New Jersey."[70] The court held that California, and not New Jersey, law applied to questions of trust administration because the choice-of-law clause "did not expressly indicate [the testator's] intent regarding which state's law should apply to administration."[71] Indeed, "[t]he drafting attorney's decision to use the term 'construed' to reference the use of New Jersey law, rather than specifically referencing administration, implies that [the testator] did not intend to designate a particular state's law to govern trust administration."[72]

A published New York decision reached the same conclusion. In *In re Sahadi's Estate*, the court considered whether a trust was valid against the claim of an omitted spouse.[73] The trust contained a provision stating that "it shall be construed and administered in accordance with the laws of New York," but the court held that the inclusion of the provision was insufficient to require the application of New York law—instead of the law of New Jersey where both the widow and the decedent resided—to questions of validity. The court reached this conclusion even though: (i) the testator described himself as a resident of New York; (ii) the powers of trustees were defined as those permitted under the laws of New York; and (iii) the trust was prepared by a New York attorney and executed in New York, the personal property was located in New York, and the decedent conducted business in New York.[74] The court reasoned that "[n]either alone nor in combination do these or other cited facts amount to an invocation of New York law as the law regulating the validity and effect of bequests," particularly where the testator explicitly stated "New Jersey law was to govern the succession to property not effectively disposed of."[75]

At the other end of the spectrum, other case law makes clear that choice-of-law provisions will be held to apply to questions of validity where they expressly reference issues of validity or do so by implication. In *Salem United Methodist Church v. Bottorff*, the court applied Missouri law to a question of validity where the trust had a choice-of law provision stating that it was to be "construed under and be regulated by the laws of the State of Missouri, and the validity and effect of this agreement shall be determined in accordance with the laws of Missouri."[76] Likewise, in *Matter of Catanio*, the court applied New Jersey law to a question of validity where the trust had a provision stating, "[t]his Declaration of Trust shall be construed and enforced in accordance with the laws of the State of New Jersey."[77]

If it can be ascertained from the trust that the trustor intended a particular state's law to apply, this may be sufficient even absent a choice-of-law provision.[78] For example, in *In re Griswold's Trust*, the court held that where the grantor intended New Jersey law to apply to trust administration, and "the trust had its roots in New Jersey in the domicile of the individual trustees, in the location of the trust securities, and in its administration," then the court should conclude that "the law of New Jersey was selected by the grantor as the touchstone for judging the validity of the trust" and apply New Jersey law.[79] The court further held "[i]f the residence of a trustee is a sufficient association to warrant the imposition of a tax, it may be urged that the law of the residence of the trustee shall be applied in appropriate circumstances when it will effectuate the plain intent of the grantor as to who shall take the corpus of a trust."[80]

In *In re Estate of Gracey*, the California Supreme Court refused to interpret a will in such a way that Pennsylvania law would have applied because doing so would have defeated the testator's intended distribution of assets. "[I]f such conversion were intended and should be effectuated the entire California estate would be transmitted to the executor in the Pennsylvania administration [Pennsylvania law would apply] and the benefactions under the codicil would be entirely defeated. We cannot ascribe such an intention to the testator."[81] Instead "[h]e must be held to have known that … the only way in which the beneficiaries under the codicil could receive their bounties would be by the probate of his will, including said codicil, in California, without an equitable conversion thereof into personalty. Otherwise his benefactions under the codicil would fail."[82] Thus, the interpretation of the will had to be consistent with, and not override, the clearly expressed intent of the testator. Likewise in *Sahadi's Estate,* the court refused to interpret the trust as applying New York law to questions of validity because application of New York law would have defeated the distributions specified in the trust.[83]

The Restatement notes that a trust instrument should be interpreted as selecting the law that will uphold the validity of the bequests contained therein.[84] Courts have applied this principle, and honored the donor's intent, even when the law of the donor's domicile is inconsistent with his wishes. For example, in *Hutchison v. Ross*, the court applied New York law to uphold the validity of an inter vivos trust of personal property that would have been invalid under the laws of the donor's domicile.[85] There was no express designation of the law to govern validity, but the court held the parties' implied intent controlled, and explained:

> 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 law of another jurisdiction … [A] construction which would deny effect to intention appearing by implication would be unreasonable," particularly where such denial would invalidate the trust.[86]

Similarly, in *National Shawmut Bank v. Cumming*, the court applied Massachusetts law to uphold the validity of a trust that would have been invalid under the law of the settlor's domicile because Massachusetts was the site of the "presence of the property or its evidences, the completion of the trust agreement by final execution by the trustee, the

domicil and the place of business of the trustee, and the settlor's intent that the trust should be administered by the trustee [in Massachusetts]."[87] The court explained that "[t]he general tendency of authorities elsewhere is away from the adoption of the law of the settlor's domicil where the property, the domicil and place of business of the trustee, and the place of administration intended by the settlor are in another State."[88]

The Restatement

Some courts in California have applied the Restatement to questions related to trusts.[89] As a general matter, "choice of law provisions are usually respected by California courts in the area of both contracts and trusts."[90] The Restatement applies different tests to issues of construction, validity, and administration depending on whether a trust contains movable or immovable property. An immovable property is an interest in land.[91] Where immovable property is at issue, the local law applies. Movables include "interests in chattels, rights embodied in a document such as bonds and shares of stocks, or in rights not so embodied."[92]

An inter vivos trust of interests in movables is valid if:

> (a) under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relationship to the trust and that the application of its 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 under the principles stated in § 6, or
>
> (b) if there is no such effective designation, under the local law of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6.[93]

As noted above, absent a strong public policy reason for not doing so:

> *[o]ne factor which the courts consider in determining the state of the applicable law is whether application of a particular law would result in sustaining the validity of the trust.* It is improbable that the settlor intended to execute an instrument wholly or partially invalid. Some indication of his intention, if any, as to which law should govern the validity of the trust may be provided by the circumstance that under the local law of one state closely connected with the trust, the trust or a particular trust provision would be invalid, whereas under the local law of another state also closely connected with the trust there would be no such invalidity. The tendency of the courts to uphold trusts and thus protect the expectations of the settlor, is particularly pronounced in the case of charitable trusts.[94]

One such reason may arise when a particular law is chosen to avoid the law of the settlor's domicile benefiting surviving spouses or other family members. Comment b states:

> Thus, where the settlor creates a revocable trust in a state other than that of his domicile, *in order to avoid the application of the local law of his domicile giving his surviving spouse a forced share of his estate, it may be held that the local law of his domicile is applicable*, even though he has designated as controlling the local law of the state in which the trust is created and administered. See Comment e.

Comment e, in turn, states:

> As to most grounds for invalidity, the trust will be upheld if valid under the local law of the state of the place of administration. It may be, however, that *when the purpose of the settlor in creating an inter vivos trust is to avoid claims of the settlor's spouse or family*, the trust will be held invalid if it would be invalid under the local law of the state of the settlor's domicile.

Many courts have held that even where the creation of a trust effectively limits the claims of a surviving spouse or children under the domestic law of the testator's domicile, the trust is nevertheless valid. In *National Shawmut Bank*, for example, the court

reasoned that even though the settlor knew his surviving wife would be entitled to a much larger share of his estate under the laws of Vermont, the trust was governed by Massachusetts' laws. Such a finding did not mean, however, that he created the trust with intent to defraud her and the trust was therefore valid.[95]

"The domicile of a testator is the place that he or she considers home."[96] To acquire a domicile, an individual must be physically present in a place and must have an intent to remain there.[97] In determining an individual's domicile, courts evaluate the following factors: where an individual votes, acts and declarations of the party, and the individual's mailing address.[98] Additionally, California tax authorities consider the following factors:

> place where individual is registered to vote, place where individual actually casts his vote, location where individual files his US tax return; place where an individual's children (particularly minor children) attend schools; location of bank accounts and financial accounts; location of individual's permanent "home"; place where individual spends his vacation and non-working hours; jurisdiction under which individual prepares and signs his testamentary documents; jurisdiction in which individual has a driver's license or other type of residency identification card; location where an individual registers his vehicles; a claim by an individual to a homeowner's property tax exemption for a residence located in CA or in another state; amount of time spent in one jurisdiction contrasted with another, organizational ties.[99]

An individual must always have a domicile, and can only have one domicile at a time.[100] Once established, a domicile continues "until it is superseded by a new domicil."[101] Moreover, "[w]hen a person with capacity to acquire a domicil has more than one dwelling place, his domicil is in the earlier dwelling place unless the second dwelling place is his principal home."[102] "The burden of proof is on the party who asserts that a change of domicil has taken place."[103] The forum applying its conflict of laws determines an individual's domicile according to its own standards.[104]

In making determinations of domicile, there is abundant and often conflicting evidence. Accordingly, the totality of the circumstances and facts must be considered in order to arrive at a just decision. For example, in *In re Timblin's Will*, the decedent was domiciled in New York for many years with her husband, but upon his death she sold her New York home, moved some personal items into storage, and then bought and moved into a home in California.[105] During a trip to New York, she told friends and relatives that she would be returning to live in her new home in California and requested that they visit her there. However, she soon fell ill and passed away in California.[106] Evidently as a result of decedent's frequent travel, the parties disputed whether the domicile of the decedent was Finland, Ohio, California, or New York.[107] The court ultimately held that "[a] New York domicile is clearly shown to have been established, and the necessary burden of proof indicative of an unequivocal intent to permanently reside in California or other State, and an abandonment of decedent's established New York domicile has not been met."[108] In other words, despite the conflicting evidence, the court reasoned that when a decedent is originally domiciled in a particular state and never truly establishes a domicile elsewhere, that state is their domicile by default.

In *Gaudin v. Remis*, the court held that a Canadian mother who had entered the United States on a B-2 visa lacked domicile in the United States, and therefore, under the Hague Convention, could not maintain her action in a federal court in Hawaii seeking the return of her children.[109] The court stated that:

> [n]otwithstanding the objective evidence of Gaudin's move to Hawaii and the uncertainty concerning her subjective intent to relocate permanently there, we disagree with the district court's conclusion. We base our judgment on the fact that, at present, Gaudin is precluded by law from relocating permanently to the United States. Gaudin is a Canadian citizen who has invoked the Immigration and Nationality

> Act ('INA') § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B), as the basis for her current presence in the United States…. That provision describes, in relevant part, the following class of "nonimmigrant aliens": "an alien ... having a residence in a foreign country *which he has no intention of abandoning* and who is visiting the United States *temporarily for business or temporarily for pleasure*."[110]

The Restatement comments to section 270 Clause (b) explain that even where the settlor has failed to designate the law that controls validity, "the most important insofar as the validity of the trust is concerned is the state, if any, where the settlor manifested an intention that the trust should be administered."[111] If there is no such manifestation, the Restatement comment indicates that the court should consider contacts including "the state where the trust instrument was executed and delivered; the state where the trust assets were then located; the state of the domicile of the settlor at that time; and the state of the domicile of the beneficiaries" and the factors under section 6.[112] Under section 6, factors relevant to the choice of the applicable rule of law include:

> (a) the needs of the interstate and international 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 expectation,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.[113]

Although domicile is considered, it is no longer determinative. As the Massachusetts Supreme Court explained:

> The elements entering into the decision as to the law of which State determines the validity of the trust are, on the one hand in Vermont, the settlor's domicile, and, on the other hand in Massachusetts, the presence of the property or its evidences, the completion of the trust agreement by final execution by the trustee, the domicile and the place of business of the trustee, and the settlor's intent that the trust should be administered by the trustee here. *The general tendency of authorities elsewhere is away from the adoption of the law of the settlor's domicile* [in the circumstance] where the property, the domicile and place of business of the trustee, and the place of administration intended by the settlor are in another. We are of opinion that the question of validity is to be determined by the law of this Commonwealth.[114]

In a case decided under the Kansas version of the Uniform Trust Act, *Commerce Bank, N.A. v. Bolander*, the court was required to determine "the jurisdiction having the most significant relationship" to the trust and considered:

> (1) clear intent by [settlor] in providing unambiguous language in the Trust document for administration pursuant to laws of Kansas; (2) the Trust originated in Kansas, was revocable by [settlor], and [settlor] was the trustee while living in Kansas for nearly 5 years; (3) the Trust document gave the Trustee powers pursuant to the Kansas Uniform Trustees Powers Act (K.S.A. 58-1201 et seq.; repealed L. 2002, ch. 133); (4) the Trust documents indicated the Trust assets included Kansas real estate; (5) the Trust was the residual beneficiary under [settlor 's] will probated in Montgomery County, Kansas; (6) [settlor's] spouse at the time of her death was a Kansas resident; and (7) [the other trustee] was still a Kansas resident when the petition for probate was filed and when he was personally served with process.[115]

For example, in *Estate of Renard*, decedent's son objected to the distribution of assets in conformity with decedent's will on the grounds that he was entitled to a forced share interest in decedent's New York property under French law.[116] The court identified the conflicting policies as "New York's interest in the freedom of testamentary disposition" and "France's policy of narrowly circumscribing testamentary freedom in favor of descendants," and reasoned that France's interest in having its policy implemented was "attenuated" by the fact that "the decedent's son was a resident of California when she died, and has remained as such."[117]

In *Wyatt v. Fulrath*, the court held that the law of New York (providing that all jointly held property goes to survivor), rather than Spanish forced inheritance laws, was applicable to property placed in joint accounts in New York by Spanish nationals. The court explained:

> It seems preferable that as to property which foreign owners are able to get here physically, and concerning which they request New York law to apply to their respective rights, when it actually gets here, that we should recognize their physical and legal submission of the property to our laws, even though under the laws of their own country a different method of fixing such rights would be pursued. Thus we would at once honor their intentional resort to the protection of our laws and their recognition of the general stability of our Government which may well be deemed interrelated things. [118]

Similarly, in *Hutchison v. Ross*, Husband and Wife were domiciled in Quebec when Husband established a trust of personal property for the benefit of the wife in New York with a New York trustee. The court held that New York law should govern the validity of the trust which would have been invalid under the law of Quebec.[119] The public policy of New York is to uphold the intent of the trustor with respect to trust assets located in New York, and furthermore, application of Quebec law would violate New York public policy because "[i]f we hold that a non-resident settlor may also not establish a trust of personal property here which offends the public policy of his domicile, we shackle both the non-resident settlor and the resident trustee."[120]

California similarly has a strong public policy of assuring persons the right and freedom to dispose of their assets as they wish, holding this freedom to be as fundamental as the freedom to acquire the assets in the first instance.[121]

In *Waldron v. Huber*, Debtor, who was involved in real estate development in the Puget Sound area for over 40 years, experienced a downturn in business with the 2008 housing market crash and his various credit facilities were in a fragile state.[122] In September of 2008, Debtor established an asset protection trust in Alaska, subject to Alaska law, for the express purpose of protecting a portion of his assets from creditors. Debtor also expressed urgency to the attorney retained to draft the trust. Debtor transferred $10,000 in cash and ownership interest in 25 entities into DGH, LLC, an Alaska limited liability company, owned 99 percent by the trust and one percent by Debtor's son as manager. Debtor transferred his principal business directly into the trust and transferred his Washington residence into DGH and took a lease back, while the trust paid the mortgage. Debtor retained insubstantial assets. All assets owned by the trust were located in Washington except for a CD purchased with the $10,000 in cash. Two of Debtor's children were trustees, along with an Alaska trust company, and were the ultimate beneficiaries. Debtor received discretionary income distributions. Debtor submitted requests; his son as trustee submitted a payment request; and the bank approved without question. Debtor filed for Chapter 11 bankruptcy protection in 2011. The bankruptcy trustee sought to invalidate the trust under Washington law, which does not recognize self-settled, asset protection trusts. The Ninth Circuit courts follow the Restatement (Second) of Conflict of Laws. Under the Restatement, the debtor's choice of Alaska law would have to be upheld if Alaska had a substantial relation to the trust at the time it was created and it would not violate the public policy of the state with the most significant relationship. Factors include whether: (i) the settlor was domiciled in the

state; (ii) the assets were located in the state; and (iii) the beneficiaries are located in the state. The court found that the only relations of the trust to Alaska were that one of its trustees was located in Alaska and it was supposed to be administered in Alaska. Even the drafting lawyer was located in Washington. The court also held that application of Alaska law would violate Washington's policy against self-settled trusts. The court thus disregarded the selection of Alaska law and applied Washington law to determine the trust's validity.

Notes

1 91 US 716 (1875).

2 See A. Streisand and L. Streisand, Conflicts of International Inheritance laws in the Age of Multinational Lives, 52 Cornell Int'l L.J. 4, 675, 687-95 (Winter 2020).

3 Restatement (Third) of Trusts § 58.

4 117 Cal. App. 4th 144 (Cal. Ct. App. 2004).

5 3 Cal. App. 5th 102 (Cal. Ct. App. (2016).

6 Id. at 113 (emphasis added).

7 The court agreed that the spendthrift provisions precluded Pratt from satisfying his community property judgment against the trust, but reversed on the basis that Pratt properly requested a judgment lien to satisfy the judgment in the event of distributions to Vedder from the trust.

8 12 Del. C. § 3536(a), (d).

9 Garretson v. Garretson, 302 A.2d 737 (Del. 1973).

10 See, e.g., Mennen v. Fiduciary Trust Int'l of Del., 167 A.3d 507 (Del. 2016).

11 See, e.g., Kulp v. Timmons, 944 A.2d 1023, 1030 (Del. Ch. 2002) (trust created by sole beneficiary to avoid creditors was void and a fraudulent conveyance).

12 12 Del. C. §§ 3570-3576. Nevada, Rhode Island, Utah, South Dakota, Missouri, Tennessee, Wyoming, New Hampshire, Virginia, Hawaii, Mississippi, Oklahoma, Ohio, West Virginia, and Michigan have passed similar laws in hopes of competing with non-US jurisdictions that provide for asset protection trusts.

13 12 Del. C. § 3572.

14 TrustCo Bank v. Mathews, No. CV 8374-VCP, 2015 WL 295373, at *12 (Del. Ch. Jan. 22, 2015).

15 12 Del. C. § 3570(7).

16 12 Del. C. § 3570(10) (emphasis added).

17 12 Del. C. § 3570(8).

18 12 Del. C. § 3570(8)(c)(1).

19 12 Del. C. § 3313(f).

20 12 Del. C. § 3570(8)(d) (emphasis added).

21 12 Del. C. § 3571.The Legislative History regarding amendments to Section 3571 underscore this, explaining that current Section 3571 "is intended to affirm that a transferor may have no rights in the trust that is the subject of a qualified disposition other than those rights specifically permitted by statute. Courts in other jurisdictions have suggested that transferors of trusts similar to the those permitted by the Qualified Dispositions in Trust Act have been able to retain a greater measure of control over the trust assets than is apparent from the trust document and the governing law. The Act is intended to negate any such suggestion with respect to a qualified disposition." 2000 Delaware Laws Ch. 341 (S.B. 318).

22 12 Del. C. § 3570(11)(b)(6)(C).

23 12 Del. C. § 3570(11)(b)(2).

24 12 Del. C. §§ 3570(11)(b)(2), (9) and (10).

25 12 Del. C. § 3570(11)(b)(1).

26 12 Del. C. § 3570(11)(b)(4) and (5).

27 12 Del. C. § 3570(11)(b)(8).

28 12 Del. C. § 3570(11)(b)(9).

29 12 Del. C. § 3570(11)(b)(10).

30 12 Del. C. § 3570(11)(b)(11).

31 12 Del. C. § 3572(a).

32 12 Del. C. § 3570(1).

33 12 Del. C. § 3572(a).

34 6 Del. C. § 1304(a)(1).

35 6 Del. C. § 1304(a)(2).

36 6 Del. C. § 1304(b).

37 Quadrant Structured Products Co., Ltd. v. Vertin, 102 A.3d 155, 198 (Del. Ch. 2014) (holding actual intent to hinder, delay, or defraud was alleged adequately because the "[c]omplaint identifies several indicia of fraud" under Section 1304(b) at the time of interest payments under a promissory note, "including (i) the [debtor's] insolvency, (ii) [the recipient's] insider status, and (iii) the lack of any need to continue paying interest on the" promissory notes.")

38 6 Del. C. § 1304(a).

39 12 Del. C. § 3572(a).

40 6 Del. C. § 1304(a)(1).

41 6 Del. C. § 1304(a)(2).

42 6 Del. C. § 1305(a).

43 6 Del. C. § 1305(b).

44 493 B.R. 798 (W.D. Wash. 2013).

45 RCW 19.40.041(b).

46 [2017] EWHC 2426 (CH).

47 429 P.3d 1269 (N.M. Ct. App. 2018).

48 Id. at 1276.

49 Pezza v. Pezza, C.A. No. PC 91-0458, 1994 WL 930902 (Mar. 29, 1994) (superseded by R.I. Gen. Laws §33-25-2(b), as stated in Barrett v. Barrett, 894 A.2d 891 (R.I. 2006)).

50 9 N.E.2d 966 (N.Y. 1937) (superseded by statute).

51 Id. at 379-80.

52 Pezza, 1994 WL 930902, at *5.

53 Cal. Prob. Code § 17002.

54 Id.

55 Cal. Prob. Code § 17003.

56 Cal. Prob. Code § 17000.

57 571 A.2d 1123 (R.I. 1990).

58 356 A.2d 487 (R.I. 1976).

59 Id. at 1125.

60 Brock v. Hall, 206 P.2d 360, 363 (Cal. 1949). See also Copley v. Copley, 126 Cal. App. 3d 248, 269 (Cal. Ct. App. 1981) (same); Gregge v. Hugill, 1 Cal. App. 5th 561, 570-571 (Cal. Ct. App. 2016) (A public policy of California is to "'giv[e] effect to the purposes expressed by the testator'"); Scott and Asher On Trusts, § 45.4.2.1 ("When a settlor creates an inter vivos trust of movables, it is of the first importance that the settlor's intention be carried out, unless the trust or a provision thereof is invalid on some ground as to which there is a strong public policy."); 60 Cal. Jur. 3d Trusts § 41 ("The primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor.")

61 Cal. Prob. Code §§ 21102(a) ("The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."); 21102(b) ("The rules of construction in this part apply where the intention of the transferor is not indicated by the instrument."); 21120 ("The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer.").

62 See Cal. Prob. Code § 21101 ("Unless the provision or context otherwise requires, this part applies to a will, trust, deed, and any other instrument.").

63 Scott and Asher On Trusts, § 45.4.2.3 (when determining what law governs validity, a court may take into consideration that "under the law of one of the states that has a relationship with the trust, the trust or one of its terms would be valid, whereas under the law of another state that has a relationship with the trust, it would be invalid"); see also id. at § 45.4.2.3 (where a settlor has not designated a law governing validity, "it is to be inferred that … he … would have intended to make applicable the law of a state under which the trust would be valid.").

64 See, e.g., Restatement (Second) Conflict of Laws § 6(1) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); see also id., cmt a. ("A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so.").

65 Cal. Prob. Code § 21103 (emphasis added).

66 117 Cal. App. 4th 364, 369 (Cal. Ct. App. 2004); see also Ammerman v. Callender 245 Cal. App. 4th 1058, 1083-84 (Cal. Ct. App. 2016) (citing section 21103 to apply California law where the trust stated it was governed by California law); Green v. Zukerkorn (In re Zukerkorn), 484 B.R. 182, 192 (B.A.P. 9th Cir. 2012) (citing section 21103 for the proposition that "choice of law provisions are usually respected by California courts in the area of both contracts and trusts").

67 See Cal. Prob. Code § 21122.

68 Dictionary.com, http://www.dictionary.com/browse/construed.

69 D0683852016, 2016 WL 4156689, at *1 (Cal. Ct. App. Aug. 5, 2016).

70 Id. at *1.

71 Id. at *5.

72 Id.

73 30 Misc.2d 166, 167-68 (N.Y. Sur. Ct. 1953).

74 Id. at 168-69.

75 Id. at 169.

76 138 S.W.3d 788, 794 (Mo. Ct. App. 2004).

77 703 A.2d 988, 991 (N.J. Super. Ct. App. Div. 1997).

78 See, e.g., In re Estate of Gracey, 253 P. 921, 925 (Cal. 1927), 490 (court should not interpret a will in a way that would result in application of a law that would defeat the testator's intended bequests); Cal. Prob. Code § 21102 (providing that "[t]he intention of the transferor … controls the legal effect of the dispositions made in the instrument," even where such intent "is not indicated by the instrument" and authorizing use of extrinsic evidence to determine the transferor's intent); Restatement (Second) Conflict of Laws § 270 cmt. b. ("Despite the absence of an express designation, it may otherwise be apparent from the language of the trust instrument or from other circumstances, such as the extent of the contacts with a particular state, that the settlor wished to have the local law of a particular state govern the validity of the trust."); Wilmington Trust Co. v. Wilmington Trust Co., 24 A.2d 309, 313 (Del. 1942) ("frequently, perhaps, the trust instrument contains no expression of choice or jurisdiction; but, again, *there is no sufficient reason why the donor's choice should be disregarded if his intention in this respect can be ascertained from an examination of attendant facts and circumstances*, provided that the same substantial connection between the transaction and the intended jurisdiction shall be found to exist." (emphasis added).

79 In re Griswold's Trust, 99 N.Y.S.2d 420, 427-428, 431 (N.Y. Sup. Ct. 1950).

80 Id. at 431. See also Wilmington Trust Co., 26 Del. Ch. at 406--410 (place of administration persuasive determining choice of law); Glaeske v. Shaw, 661 N.W.2d 420, 428 (Wis. Ct. App. 2003) (applying Wisconsin law to uphold validity of trust where "trust specifies that it 'shall be construed' according to Wisconsin law, designates Wisconsin as the location of the trust situs, names Wisconsin residents as trustee and primary beneficiary, and identifies Wisconsin as the place of its drafting and execution."); Scott and Asher § 45.4.2 ("the settlor may manifest the intention to fix the administration of the trust in a particular state by naming as trustee an individual … domiciled or having a place of business in that state, although it is not the set-

tlor's domicile."); Id. § 45.4.2.1 ("the courts have held that when the settlor has failed by express provision to designate as applicable the law of any particular state, but has fixed the place of trust administration, the law of the place of administration may be applied to validate the trust.").

81 Gracey, 253 P. at 925.

82 Id.

83 30 Misc.2d at 167-68.

84 Restatement (Second) Conflict of Laws § 270, cmt. (d) ("One factor which the courts consider in determining the state of the applicable law is whether application of a particular law would result in sustaining the validity of the trust. It is improbable that the settlor intended to execute an instrument wholly or partially invalid. Some indication of his intention, if any, as to which law should govern the validity of the trust may be provided by the circumstance that under the local law of one state closely connected with the trust, the trust or a particular trust provision would be invalid, whereas under the local law of another state also closely connected with the trust there would be no such invalidity. The tendency of the courts to uphold trusts and thus protect the expectations of the settlor, is particularly pronounced in the case of charitable trusts.") See also Griswold's Trust, 99 N.Y.S.2d at 432-33 ("in the absence of a specific indication, a court may invoke the law of that particular state which will effectuate the purposes and plain intent of the creator of the trust, provided the state so chosen by the court has some substantial factual connection with the trust.").

85 187 N.E. 65 (N.Y. 1933).

86 Id. at 395.

87 91 N.E.2d 337, 341 (Mass. 1950).

88 Id; see also Lewis v. Hanson 128 A.2d 819, 826 (Del. 1957) ("In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered.…. Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration."); Wilmington Trust Co., 24 A.2d at 406, 407 (when determining conflict of law questions, "the donor's domicile is no longer regarded as the decisive factor"; rather "if the intended jurisdiction is substantially linked to the trust, the intention or desire of the donor should be honored" regardless of "[w]hether choice of jurisdiction has been affirmatively stated in the trust instrument, and is, therefore, directly provable, or whether the donor's intention is deducible from surrounding facts and circumstances."); Griswold's Trusts, 99 N.Y.S.2d 240 (a settlor's domicile is not the dominant factor when determining conflict of law; instead, other factors such as the trustee's domicile, the place of execution, the location of the property, and the place where the business of the trust was performed may well outweigh the importance of the testator's domicile.).

89 See, e.g., Zukerkorn, 484 B.R. at 192 (applying California law and citing to the Restatement's trust and contract provisions); Hardy v. Hardy 330 P.2d 278, 280 (Cal. Dist. Ct. App. 1958) (referencing the First Restatement's provision regarding the administration of a trust of movables).

90 Zukerkorn, 484 B.R. at 192.

91 Id.

92 Restatement (Second) Conflict of Laws, Introductory Note, Movables (Am. L. Inst. 1986 Revisions).

93 Id. § 270; see also Russell v. Wachovia Bank, N.A. 578 S.E.2d 329, 335-36 (applying Restatement § 270 and holding "the Testator designated that North Carolina law should apply, and the trustee as well as the trust property are located in North Carolina. There is a substantial relationship between the trust and North Carolina. We hold that a settlor may designate the law governing his trust, and absent a strong public policy reason, or lack of substantial relation to the trust, the choice of law provision will be honored.") Uniform Trust Code § 107 (currently adopted in 32 states and the District of Columbia) (the law designated in the trust governs the meaning "and effect" of the terms of the trust unless that law is contrary to the "strong public policy" of the jurisdiction having the "most significant relationship to the matter at issue").

94 Restatement (Second) Conflict of Laws § 270, cmt. (c) (Comment on Clause (b)) (emphasis added).

95 91 N.E. at 340-341; see also Wyatt v. Fulrath, 211 N.E.2d 637 (N.Y. 1965) (applying New York law to a New York trust rather than Spain's forced inheritance laws, thus depriving the children of their share); Sahadi's Estate, 30 Misc.2d at 168 (refusing to apply New York law to a will, and in doing so, depriving a spouse of her ability to elect against the estate); Riggio v. Southwest Bank, 815 S.W.2d 51 (Mo. Ct. App. 1991) (where both spouses were domiciled in Illinois, Missouri law nevertheless applied and invalidated Totten trusts created by deposits by wife in Missouri bank); Rose v. St. Louis Union Trust Co. 253 N.E.2d 417, 420 (Ill. 1969) (the law of Missouri, not the law of the testator's domicile at time of death, applied to the question of the validity of an inter vivos trust which limited the spouse's share where the trust was negotiated and executed in Missouri, administered in Missouri, and the corpus of the trust was located in Missouri); Johnson v. La Grange State Bank (Ill. 1978) 383 N.E.2d 185, 189 (although testator was domiciled in Florida, Illinois law applied to the validity of her trust, which effectively disinherited her husband); In re Brown, 521 B.R. 205, 229 (Bankr. S.D. Tex. 2014), aff'd in part, appeal dismissed in part, 807 F.3d 701 (5th Cir. 2015) (same).

96 2 Witkin, California Procedure, Jurisdiction § 127 (5th ed. 2008).

97 DeMiglio v. Mashore, 4 Cal. App. 4th 1260, 1268 (Cal. Ct. App. 1992).

98 Fenton v. Bd. of Dirs., 156 Cal. App. 3d 1107, 1116 (Cal. Ct. App. 1984).

99 Thomas Garvin, Tax Planning For Individuals Arriving In Or Leaving California: California Taxation of Residents & Non-Residents; see also CEB, Establishing Domicile, § 37.31.

100 Restatement (Second) Conflict of Laws § 11(2).

101 Id. § 19; see also In re Glassford's Estate, 249 P.2d 908, 911 (Cal. Dist. Ct. App. 1952) ("[D]omicile has a continuing

quality because a person always has a domicile and does not lose one until another is acquired").

102 Restatement (Second) Conflict of Laws § 20.

103 Id. § 19, cmt. c.

104 Id. § 13.

105 162 N.Y.S.2d 783, 785 (N.Y. Sur. Ct. 1957).

106 Id. at 784-85.

107 Id. at 786.

108 Id.

109 379 F.3d 631 (9th Cir.2004).

110 Id. (italics in original). See also Anselmo v. Glendale Unified School Dist., 124 Cal. App. 3d 520 (Cal. Ct. App. 1981) (child of immigrants present on a tourist visa not eligible for public school where a condition of the visa was "an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States" and school statute incorporated visa requirements); Carlson v. Reed, 249 F. 3d 876 (9th Cir. 2001) (student could not establish California domicile for purposes of getting in-state tuition where her visa was expressly conditioned on an intent not to establish permanent residence in the United States); Comptroller of Treasury v. Mollard, 455 A.2d 72 (Md. Ct. Spec. App. 1983) (a businessman's subjective intent is not dispositive on the issue of domicile if his visa for a foreign country is "intended to restrict his intent" explaining that "[a]n intent inconsistent with law is unrealistic and insufficient to establish a domicile"). But see In re Marriage of Dick, 15 Cal. App. 4th 144, 156 (Cal. Ct. App. 1993) ("[W]e agree with those courts which have held that the federal requirement of maintaining a residence in a foreign country is not necessarily inconsistent with establishing domicile under state law."); Illingworth v. State Bd. of Control, 161 Cal. App. 3d 274 (Cal. Ct. App. 1984) (distinguishing Anselmo and finding that appellant's visa status did not render him ineligible for assistance under the California's Victims of Violent Crime Act that, unlike the act in Anselmo, did not incorporate federal visa requirements).

111 Restatement Conflict of Laws § 270, cmt. (c) (Comment on Clause (b)).

112 Id.

113 Restatement (Second) Conflict of Laws § 6.

114 National Shawmut Bank, 325 Mass. at 341 (citations omitted, emphasis added); Griswold's Trust, 99 N.Y.S.2d at 432 ("[U]nder the conflict of laws rules of New Jersey as well as New York, the domicile of the grantor of an inter vivos trust of intangibles is not decisive of the law governing the essential validity. Other elements of the trust, such as domicile of the trustees, location of the property, place of execution of the deed of trust, and place where the business of the trust was carried on, may well outweigh the domicile of the creator.")

115 239 P.3d 83, 90 (Kan. Ct. App. 2007).

116 108 Misc.2d 31 (N.Y. Sur. Ct. 1981).

117 It is important to note that New York has a strong stated policy against forced heirship. A New York statute expressly provides: "Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state." NY CLS EPTL § 3-5.1. The court in *Renard*, after examining the legislative history of this statute, explained, "it would seem necessary to conclude that the Legislature intended subdivision (h) to permit a decedent, in a case like the one before the court, to avoid the application of the French law of forced heirship to her personalty by invoking New York law in her will." 108 Misc.2d at 36.

118 16 N.Y.2d at 173; see also Wilmington Trust Co., 24 A.2d at 313 ("where the donor in a trust agreement has expressed his desire, or if it pleases, his intent to have his trust controlled by the law of a certain state, there seems to be no good reason why his intent should not be respected by the courts, if the selected jurisdiction has a material connection with the transaction"); Sanchez v. Sanchez De Davila 547 So. 2d 943 (Fla. Dist. Ct. App. 1989) (holding that pursuant to Florida statute and caselaw, Florida law, rather than Venezuela's forced inheritance laws, governed the assets of a Venezuelan domiciliary located in Florida "Totten trust" accounts).

119 262 N.Y. 381, 394 (N.Y. 1933).

120 Id. at 394-95; see also Matter of Meyer, 62 A.D.3d 133, 136, 138 (N.Y.App.Div. 2009) ("forced heirship provisions of a civil law jurisdiction like France are inapplicable to inter vivos transfers of property executed in New York, irrespective of whether the transferor's domicile was New York or France" because "the validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer" and "the policy rationale permitting testamentary freedom from forced heirship rules should also prevail with equal force to inter vivos transfers.").

121 See, e.g., Renard, 108 Misc.2d at 39; Wyatt, 16 N.Y.2d at 173; Feinberg v. Feinberg (In re Estate of Feinberg), 919 N.E.2d 888, 896 (Ill. 2009) (upholding limitations in will that disinherited grandchildren who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage, because the limitations did not conflict with Illinois' strong public policy supporting testamentary freedom, explaining "[a]s demonstrated by the Probate Act, the Trusts Act, the Statute Concerning Perpetuities, and the Rule in Shelley's Case Abolishment Act, the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law.… Our case law also demonstrates the existence of a public policy favoring testamentary freedom, reflected in the many cases in which a court strives to discover and to give effect to the intent of a deceased testator or settlor of a trust.").

122 493 B.R. 798 (W.D. Wash. 2013).