

Conflict of Laws and the Exercise of Powers of Appointment

Harrison F. Durand

Charles L. Herterich

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Harrison F. Durand and Charles L. Herterich, *Conflict of Laws and the Exercise of Powers of Appointment*, 42 Cornell L. Rev. 185 (1957)
Available at: <http://scholarship.law.cornell.edu/clr/vol42/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CONFLICT OF LAWS AND THE EXERCISE OF POWERS OF APPOINTMENT

Harrison F. Durand
Charles L. Herterich†

INTRODUCTION

The rules of law governing the exercise of powers of appointment had their origin in England in the days when most wealth was concentrated in real property and when there was relatively little movement of the population. All matters concerning the grant and the exercise of powers of appointment came within the jurisdiction of a single court, unless the donee died domiciled in another country. There were no state lines to divide the judicial system into many parts.

In the early history of the United States the state having jurisdiction over the estate of the donor usually had jurisdiction over the estate of the donee, since estates frequently consisted of land, and families tended to continue to reside in the same state. Hence under English law and in the early history of the United States a conflict between the laws of two states, and in the case of English law, between the law of England and that of another country, was unlikely to occur.¹

These conditions no longer prevail, particularly in the United States. Estates now usually consist of stocks and bonds, which can be administered as readily in one state as another. Families migrate. The widow, and the children, as they grow up, may be expected to establish domiciles in other states. In recent years the power of appointment has become a standard device to achieve tax results permitted by the Internal Revenue Code for federal estate tax purposes.

We are, therefore, now faced with the application of legal principles developed during an era of virtual immobility of the property subject to such powers and the persons possessing them, to contemporary conditions in which the domicile of donees of powers may be expected to change and the intangible assets of their estates may be transported from one state to another by registered mail.

Historic principles of powers of appointment were never intended to deal with these conditions. Movements of persons or property across state lines may result in conflicts between the laws of different states. We propose to explore some of the more important instances in which the law of the state of the donee's domicile may conflict with that of the donor's domicile, and to suggest some facts which may enter into

† See Contributors' Section, Masthead p. 223, for biographical data.

¹ See, e.g., 5 American Law of Property § 23.2 (Casner ed. 1952).

a reasoned determination of the applicable law. We approach the subject primarily from the standpoint of estate planning but not entirely, for planning cannot solve all such problems.

Before turning to specific problems, a brief reference to the theory of powers of appointment will prove helpful. Theoretically, the donee of a power of appointment is the agent of the donor. By exercising the power, the donee in legal effect completes the will of the donor. He disposes of property which is not his own, but is that of the donor.² An extension of this theory naturally leads to the conclusion that where the law of the donor's domicile conflicts with the law of the donee's domicile, the validity, construction and effect of the exercise of the power will be determined by the law of the donor's domicile. In actual cases, however, the solution has not proved to be as simple as the theory indicates.³ A dogmatic application of the law of the donor's domicile may prove to be undesirable. Considerations such as the intention of the donee, the state having control over the appointive property, the state having jurisdiction over the trustees, and whether the case is presented to a court of the donee's domicile or a court of the donor's domicile, all enter the determination of an actual case. Opinions of the courts, though few in number, demonstrate that important problems of conflict of laws do exist. Judicial attempts to solve such problems, however, develop no consistent principles.⁴

Let us turn now to some specific problems. The law of the donor's domicile may conflict with that of the donee's domicile in at least six particulars, each of which must be resolved:

1. What law will determine whether or not the donee left a valid will?
2. What law will determine whether such will, if valid, operated as an exercise of the power?
3. What law will be applicable in the event that the exercise of the power contravenes the public policy of the domicile of the donor of the power, or the donee of the power, or both?
4. What law will determine the construction and effect of the exercise

² Matter of Harbeck, 161 N.Y. 211, 55 N.E. 850 (1900); 5 American Law of Property § 23.3, at 465, § 23.4 at 468 (Casner ed. 1952).

³ 5 American Law of Property, op. cit. supra note 1; Casner, "Estate Planning—Powers of Appointment," 64 Harv. L. Rev. 185, 208 (1950).

⁴ 5 American Law of Property, op. cit. supra note 1, at 467:

Where a power of appointment is present in a situation calling for an application of the rules of conflict of laws the temptation to resort to the "relation back" doctrine is obvious; but there is no reason to suppose that the doctrine will be any more meaningful in that field than elsewhere. Undoubtedly the law of powers of appointment and the considerations on which that law is based are significant in conflict of laws; but the "relation back" doctrine, never a reason for the law of powers, is neither an adequate nor an accurate exposition of it.

of the power, and the powers and authority of the trustee to whom the fund may be appointed?

5. Can the appointive property be transmitted from the domicile of the donor of the power to the domicile of the donee of the power for administration in the donee's domicile? If so, what law controls the administration of the appointive property?

6. How can a fiduciary appointed by the donee's will qualify to administer the appointive property in the domicile of the donor of the power?⁵

I.

What law will determine whether or not the donee left a valid will?

To put the problem in another way, may the proceeding for the probate of the donee's will in the donee's domicile be collaterally attacked in the state having jurisdiction over the estate of the donor of the power, (a) if such proceeding results in the probate of the donee's will, and (b) if the donee's will is denied probate in such proceeding?

In theory probate of the donee's will in the state of his domicile should not be subject to collateral attack. The donor has constituted the donee as his agent to complete the donor's will by naming the ultimate takers of the estate of the donor. The donor has authorized the donee to name such ultimate takers by the donee's last will and testament.⁶ The donor must have contemplated that the will of the donee purporting to exercise the power, wherever it was probated, should be conclusive and not subject to collateral attack. This simple theory, however, fails to solve the problem in actual practice. Perhaps a partial explanation for the failure of the theory is the fact that the ultimate determination as to whether the donee's will was validly probated, insofar as the donee's will exercises the power of appointment, must be made by the courts of the donor's domicile which, having control over the appointive property, will decree distribution to the donee's appointees.⁷

The problem posed may be reviewed by the following illustrations:

1. Suppose that the donee resided in New Jersey and his will was probated there in common form, without notice to the heirs at law and

⁵ Land, Trusts in the Conflict of Laws § 20 (1940).

⁶ See note 1 supra; Hope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932).

⁷ See Land, op. cit. supra note 5 at 161:

The few cases dealing with inter vivos trusts of intangible personal property which have passed upon the question of the choice of law in construing the donee's will have applied the law of the state in which the preponderance of the factors of the trust were located. In each of these cases the application of that law allowed the power to be exercised.

Matter of Gifford, 279 N.Y. 470, 18 N.E.2d 663 (1939), held that no ex parte probate of a foreign will can conclusively bind the courts in New York as to the disposition of personal property in New York. See also note 13 infra.

next of kin of the donee, or any other interested party.⁸ The time to appeal from such informal probate has expired.⁹ Is the New Jersey probate in common form subject to collateral attack in the donor's domicile, or to direct attack in the donee's domicile, by those persons interested in the donor's estate who may take in default of the exercise of the power? If the donee's will is denied probate, such persons may be entitled to the appointive property.¹⁰

2. Suppose that the donee's will was probated in New Jersey in solemn form and process was served not only on the heirs at law and next of kin of the donee, but upon all those persons interested under the will of the donor who would be adversely affected by the exercise of the power of appointment contained in the donee's will.¹¹ Would such New Jersey probate then be subject to collateral attack?¹²

3. Suppose on the facts outlined in illustration 1, the donee, decedent's wife, purported to exercise the power of appointment and to appoint the fund in further trust for her son, who was in being at the donor's death, for the son's life, remainder to the son's issue. Suppose the son, who was the person who would take outright in default of the exercise of the power and also the sole heir at law and next of kin of the donee, undertakes to have the donee's will denied probate in the donee's domicile. The result is that the son receives the appointive property outright, instead of a life estate as intended by the donee.

⁸ N.J. Stat. Ann. § 3A: 3-17 (1951); Rules Governing the New Jersey Courts 4: 89-6 (1953). The complaint in an action for such probate requires that proponent name as parties the testator's spouse, heirs at law and next of kin. The Rules do not contemplate naming persons who may be adversely affected by the exercise of a power of appointment, such as donor's next of kin.

⁹ Rules Governing the New Jersey Courts 4: 99-6 (1953).

¹⁰ The conclusiveness of probate in common form is based upon the res within the jurisdiction and the fact that the filing of the will is notice to the testator's heirs at law and next of kin. Such probate is entitled to full faith and credit. *Broderick's Will*, 88 U.S. (21 Wall.) 503 (1875). But where the res is not within the jurisdiction the *ex parte* probate decree is not conclusive. *Frederick v. Wilbourne*, 198 Ala. 137, 73 So. 442 (1916); *Matter of Gifford*, 279 N.Y. 470, 18 N.E.2d 663 (1939). *Contra*, *Martin v. Stovall*, 103 Tenn. 1, 52 S.W. 296 (1899). See generally, 3 American Law of Property § 14.37, pp. 718-28 (Casner ed. 1952). The persons who take in default of the exercise of the power are not usually donee's next of kin and may not be included in the class of persons bound by such *ex parte* probate.

¹¹ See *Matter of Cassidy*, 243 App. Div. 489, 278 N.Y. Supp. 162 (3d Dep't 1935).

¹² In *Matter of Cassidy*, *supra* note 11, in which both donor and donee resided in New York, the court held that those who take in default of the exercise of the power were necessary parties to the probate of donee's will. There the issue was the competency of the donee. The Presiding Justice said:

No one suggests that John's competency should be determined on an accounting of the trustee under William's will. Apparently it is mutually agreed that the probate proceeding as to John's will is the proper place to determine his mental capacity to exercise the power of appointment.

243 App. Div. at 491, 278 N.Y. Supp. at 164.

This should be equally true where donor and donee reside in different states. The filing of donee's will for probate should give donee's domicile sufficient in *rem* jurisdiction, even though the appointive property is in donor's domicile. For possible exceptions see note 13 *infra*.

The son's issue, as the intended remaindermen, are cut off. Is the denial of such probate by the state of the donee's domicile subject to collateral attack in the state having jurisdiction over the estate of the donor?¹³

The first two illustrations establish that those who are interested under the donor's will in default of the exercise of the power have in fact an interest in the probate of the donee's will. The third illustration further establishes that those who would take under the donee's will through the exercise of the power may have a vital interest in the probate of the donee's will as against both the distributees of the donee and those who would take under the donor's will in default of the exercise of the power. Until all such interests adversely affected by the probate of the donee's will or the denial of such probate have been extinguished in a proceeding in which they are named as necessary parties and the court obtains jurisdiction over them, it would appear that the probate, or the denial of probate, of the donee's will in the donee's domicile may be subject to collateral attack in the state having jurisdiction over the estate of the donor of the power.

The authorities have not dealt with all of the situations. They have established that the probate of the donee's will in solemn form is not binding on those interested under the donor's will and adversely affected by the exercise of the power unless jurisdiction is obtained over the persons interested in the donor's estate who would take in default of the exercise of the power.¹⁴ They have gone so far as to hold, as in illustration 3, that the state having jurisdiction over the estate of the donor of the power may inquire into the circumstances under which the donee's will was denied probate and may direct probate of that will in the state having jurisdiction over the estate of the donor for the purpose of exercising the power granted to such donee.¹⁵ There remains open the question of whether probate in common form will bind persons who would take in default of the exercise of the power under the donor's will and are adversely affected by such probate. The issue here is whether the informal probate of the donee's will in the state of the

¹³ On these facts it was held in *Matter of Harriman*, 124 Misc. 320, 208 N.Y. Supp. 672 (Surr. Ct. N.Y. County 1924), aff'd on op. below, 217 App. Div. 733, 216 N.Y. Supp. 842 (1st Dep't 1926), on authority of *Blount v. Walker*, 134 U.S. 607 (1890), that the decrees of California courts denying probate to donee's will and codicil were not conclusive on the New York courts; an independent probate proceeding in the solemn form required by New York practice was directed. *Pitman v. Pitman*, 314 Mass. 465, 50 N.E.2d 69 (1943), held that Massachusetts courts may admit donee's will to probate as an exercise of a power created by the will of a Massachusetts resident although donee's domicile has denied probate to the will on the ground it was revoked by donee's subsequent marriage.

¹⁴ See note 11 *supra*.

¹⁵ See note 13 *supra*.

donee's domicile is constructive notice to persons other than the donee's heirs at law and next of kin, namely persons who would take in default of the exercise of the power. Unless the informal probate constitutes that kind of notice, whatever statute of limitations prevails in the donee's domicile would not run as against such persons. Until that question has been decided, it would appear desirable, in jurisdictions permitting probate in common form, that wills purporting to exercise powers of appointment granted by non-resident donors should be probated in solemn form and jurisdiction obtained over all persons who might take in default of the exercise of the power, and whose interests will be adversely affected by such probate.

II.

What law will determine whether the donee's will, if valid, operated as an exercise of the power?

Once the donee's will has been duly admitted to probate in a proceeding which binds those adversely affected by the exercise of the power, the next question is what law will determine whether the donee's will operated to exercise the power.

Assume that the donee died domiciled in Maryland. Under the law of Maryland,¹⁶ as in some other states,¹⁷ a power of appointment is not deemed exercised unless the will contains a specific reference to the power. Assume, however, that under the law of Massachusetts, the donor's domicile, the residuary clause in the donee's will operates as an implied exercise of the power, even though the will fails to disclose an intention to exercise any power of appointment which may have been granted to the donee.¹⁸ *Sewall v. Wilmer*,¹⁹ and an unbroken line of subsequent authorities,²⁰ establish that the law of the state having jurisdiction over the estate of the donor of the power will determine whether or not such power has been validly exercised. On the facts stated, therefore, the donee's will operates as an implied exercise of the power.²¹

¹⁶ *Mory v. Michael*, 18 Md. 227 (1861). It should be noted that under Maryland law a power may be exercised if no specific mention thereof is made, provided that it is sufficiently clear that the testator had the power in view and meant by his will to execute it. *Reeside v. Annex Bldg. Ass'n*, 165 Md. 200, 167 Atl. 72 (1933).

¹⁷ 5 American Law of Property §§ 23.43-46 (Casner ed. 1952); 3 Page, Wills § 1331, pp. 906-11 (1941).

¹⁸ *Tudor v. Vail*, 195 Mass. 18, 80 N.E. 590 (1907).

¹⁹ 132 Mass. 131 (1882).

²⁰ 2 Beale, *The Conflict of Laws* § 288.1, pp. 1011-12 (1935). See also *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626 (1909); *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N.E. 337 (1926); *Walker v. Treasurer & Receiver-General*, 221 Mass. 600, 109 N.E. 647 (1915).

²¹ In *Matter of New York Life Ins. & Trust Co.*, 139 N.Y. Supp. 695 (Surr. Ct. N.Y. County), aff'd, 157 App. Div. 916, 142 N.Y. Supp. 1132 (1st Dep't), aff'd, 209 N.Y.

Had the facts been reversed so that the law of the donor's domicile was that the residuary clause did not operate as an implied exercise of the power, whereas under the law of the donee's domicile the residuary clause of the donee's will did operate to exercise the power, the donee's will would not exercise the power because the law of the donor's domicile would determine that question and such law did not recognize an implied exercise of the power.²²

The estate planner in drafting the donee's will should, of course, ascertain the existence of any powers which may have been granted to the donee. Any such power should be specifically mentioned in the donee's will and the donee should either specifically exercise or renounce the power.²³

A variation of the foregoing principle involves the rights of creditors. In some states the appointive property is subject to the rights of unpaid creditors of the donee, provided the power is a general power and the donee exercised the power.²⁴ In other states under like circumstances the creditors of the donee cannot reach the appointive property unless the donee appoints to his estate or to his creditors.²⁵ What are the rights of creditors of the donee if the law of the donor's domicile conflicts with that of the donee's domicile? If the appointive property remains subject to the jurisdiction of the donor's domicile and the donee's creditors cannot reach the appointive property under the law of that state, then no sound reason appears why the law of the donor's

585, 103 N.E. 315 (1913), the donee of a power over a trust created by the will of a New York decedent died a resident of Italy. Donee's will was executed in conformity to New York law, under which the residuary clause would constitute a valid exercise of the power even though the donee did not specifically refer thereto. The Surrogate dismissed a contention that donee's will failed to exercise the power because the law of Italy did not recognize powers of appointment and under Italian law any testamentary provision attempting to substitute the will of a third party for that of the testator was void, because he was able to find as a fact that the donee intended her will to be construed according to New York law. In affirming the decision of the Surrogate that the donee's will validly exercised the power, the Court of Appeals adopted the rule of *Sewall v. Wilmer*, 132 Mass. 131 (1882), and held as a matter of law that the construction and effect of the donee's will, insofar as it involves an exercise of a power of appointment, is governed by the law of New York, the domicile of the donor of the power and the situs of the property.

²² In *Matter of Kelly*, 174 Misc. 80, 20 N.Y.S.2d 6 (Surr. Ct. Westchester County 1940), the will of a New York donee which did not specifically refer to a power was held not to exercise the power as to property in Florida, the donor's domicile, but to exercise the power as to real property situated in Pennsylvania, the law of which, like that of New York, did not require a specific exercise of the power.

²³ Casner, *Estate Planning* 552, 557, 559 (1956); 3 Page, *Wills* § 1331 (1941); Casner, "Estate Planning—Powers of Appointment," 64 *Harv. L. Rev.* 185, 202 (1950).

²⁴ *McMurtry v. State*, 111 Conn. 594, 151 Atl. 252 (1930); *Jackson v. Franklin*, 179 Ga. 840, 177 S.E. 731 (1934); 5 *American Law of Property* § 523.14 (1952).

²⁵ *Hope v. Safe Deposit & Trust Co.*, 163 Md. 239, 161 Atl. 404 (1932). Cf. *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16 (1888), holding that a general power does not authorize the donee to charge the appointive property with the payment of his debts; *St. Matthews Bank v. De Charette*, 259 Ky. 802, 83 S.W.2d 471 (1935); *Hirsch v. Bucki*, 162 App. Div. 659, 148 N.Y. Supp. 214 (1st Dep't 1914).

domicile should not control and why the appointive property should not be distributed to the donee's appointees free of the claims of the donee's creditors.²⁶ But suppose that the situation was reversed. Under the law of the donee's domicile the appointive property is not subject to creditors' claims, whereas under the law of the donor's domicile it is. On such facts it would seem that the rights of the donee's creditors should not be enlarged by reason of the fact that the donor died domiciled in a state which accorded creditors greater rights than the state of the donee's domicile.²⁷

Another variation involves marshalling, an equitable principle employed by the courts to save otherwise invalid appointments.²⁸ For example, the donee of a general power of appointment devises and bequeaths his residuary estate, including therein the appointive property, on two separate trusts, one a valid trust and the second void as to the appointive property because the appointment violates the rule against perpetuities. The court may then so marshal the testamentary estate of the donee and the appointive property that the appointive property may be used to pay all administration expenses, inheritance and estate taxes, and debts of the donee, and to set up the valid trust under the donee's will. The testamentary estate of the donee, undiminished by payment of such obligations, is then used to set up the second trust, invalid as to the appointive property but valid as to the testamentary estate.

Marshalling has saved many otherwise invalid appointments. The device operates effectively when the donor and the donee reside in the same state, which has jurisdiction over both the appointive property and the testamentary estate of the donee.²⁹ How does marshalling operate

²⁶ Rhode Island Hospital Trust Co. v. Anthony, 49 R.I. 339, 142 Atl. 531 (1928); see also Mulford, "The Conflict of Laws and Powers of Appointment," 87 U. Pa. L. Rev. 403 (1939).

²⁷ But see Seward v. Kaufman, 119 N.J. Eq. 44, 180 Atl. 857 (Ch. 1935), in which donor died a resident of New Jersey and donee a resident of New York. Under New Jersey law an appointive fund is subject to claims of donee's creditors; under New York law it is not. The New Jersey court directed that the fund be applied to payment of donee's debts as established in the administration of donee's estate in New York. The court did not consider New York law upon the point.

²⁸ Fargo v. Squiers, 154 N.Y. 250, 48 N.E. 509 (1897); Restatement, Property § 363 (1940); 5 American Law of Property §§ 23.59, 23.60 (1952).

²⁹ In Chase Nat'l Bank v. Central Hanover Bank & Trust Co., 265 App. Div. 434, 39 N.Y.S.2d 541 (1st Dep't 1943), the court expressed serious doubt whether there could be marshalling where only one fund was within the jurisdiction of the court. But compare In re Bray's Will, 120 N.Y.S.2d 131 (Surr. Ct. Broome County 1953), in which the Surrogate in donee's domicile made detailed directions for marshalling in a case in which donor resided in Ohio. The Surrogate recognized that his decision did not bind donor's trustee:

The Ohio trustee is not a party to the present proceeding. However, I believe that it can be reasonably anticipated that this trustee and the Ohio court having jurisdiction of its accounting will be entirely willing to acquiesce in and follow necessary and proper directions for the clearing up of the present situation.
120 N.Y.S.2d at 140.

when the donor and donee died domiciled in different states? The practical difficulty is that the donor's domicile lacks jurisdiction over the property comprising the donee's testamentary estate which is available for distribution to the trusts created by the donee's will. Nevertheless the donor's domicile does have jurisdiction over the appointive property in the hands of the trustees under the donor's will and this should be sufficient to enable its courts, in the exercise of their equitable jurisdiction, to require as a condition to the distribution of the appointive property that the law of the donor's domicile as to marshalling be invoked to save the appointment to the maximum extent which such law permits. This could be accomplished as follows: the decree settling the accounts of the donor's trustees would direct distribution to the donee's executors of so much of the appointive property as was required by them to pay the donee's debts, the administration expenses of his estate, and inheritance and estate taxes, subject to the following conditions. First, that the donee's executor agree to pay such obligations out of the appointive property. Second, that the executor use the testamentary estate to set up the trust, invalid as to the appointive property, to the extent that the testamentary estate may be sufficient for the purpose. Third, that the appointive property which remains in the hands of the donor's trustees be used to set up the valid trust. If the appointive property is more than sufficient to set up the valid trust, the appointment would be invalid to the extent of such excess. If the appointive property is less than sufficient, then the testamentary estate, to the extent not required to set up the trust which would be invalid in the donee's domicile, would be distributed by the executor of the donee's will to set up in part the valid trust, the balance of which consists of the appointive property.

The difficulties of marshalling appear to be mechanical, not substantive.³⁰ With reasonable cooperation between the court having jurisdiction in the donee's domicile and the court having jurisdiction in the donor's domicile, otherwise invalid appointments can be saved or the invalidity diminished by marshalling.

³⁰ Note that while the court in *Chase Nat'l Bank v. Central Hanover Bank & Trust Co.*, supra note 29, held that there could be no marshalling on the facts before it, it did undertake to effectuate the appointment as far as possible out of the assets within its jurisdiction by directing their application to the valid dispositions under donee's will. The trust instrument directed payment of a part of the fund to donee's executors but the court held they were intended to be merely a conduit and directed distribution to them solely for purposes of transmission. However, no such obstacle was found in *Seward v. Kaufman*, discussed supra note 27. Similar directions could be made in a marshalling situation.

III.

What law will be applicable in the event that the exercise of the power contravenes the public policy of the domicile of the donor of the power, or the donee of the power, or both?

The rule against perpetuities and the rule against accumulation of income may be different in the donor's domicile from those in the donee's domicile.³¹ The attempted appointment may violate the public policy of the donor's domicile, but not that of the donee's domicile. The usual rule is that all questions concerning the validity of the exercise of the power are within the exclusive jurisdiction of the donor's domicile. This rule applies with particular force when the attempted appointment by the donee contravenes the public policy of the donor's domicile.³² But even this rule is subject to an important qualification, rarely expressed, that the issues concerning the public policy of the donor's domicile must be determined by the courts of that state while the appointive property remains in the donor's domicile and subject to its jurisdiction. There is authority to the effect that a decree directing distribution by the donor's trustees to the trustees of the non-resident donee without requiring their qualification as trustees in the domicile of the donor is a determination by the courts of the donor's domicile that the power has in all respects been validly exercised. By reason of such decree, the validity of the exercise of the power in respect of the public policy of the donor's domicile is no longer subject to collateral attack by the courts of either the donor's domicile or the donee's domicile.³³

The courts of the donor's domicile having, prior to distribution, observed a violation of public policy, whether such violation arises immediately by reason of the donee's death and the exercise of the power of appointment by his will, or whether such violation involves a total or partial invalidity, present or future, may be expected to take steps to retain jurisdiction and to apply all of the tools which have been evolved by the courts of the donor's domicile to limit the impact of the public

³¹ See Casner, "Estate Planning—Powers of Appointment," 64 Harv. L. Rev. 185, 198-200 (1950); Leach, "Perpetuities Legislation, Massachusetts Style," 67 Harv. L. Rev. 1349 (1954).

³² Law of donor's domicile controls as to personal property but law of situs controls as to real property. *Bishop v. Bishop*, 257 N.Y. 40, 177 N.E. 302 (1931). See also *Matter of Kelly*, 174 Misc. 80, 20 N.Y.S.2d 6 (Surr. Ct. Westchester County 1940).

³³ *Matter of Barrett*, 286 App. Div. 289, 143 N.Y.S.2d 143 (1st Dep't 1955); In re *Matthews' Estate*, 64 N.Y.S.2d 662 (Surr. Ct. N.Y. County 1944). See also *Matter of Shipman*, 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens County 1942). This principle may have influenced the decision in *Amerige v. Attorney General*, 324 Mass. 648, 88 N.E.2d 126 (1949), in which the New York court distributed donor's estate to Massachusetts trustees to be administered in Massachusetts.

policy violation on the appointive property.³⁴ These tools include such devices as marshalling, excision³⁵ and the "wait and see" principle.³⁶

The public policy of the donor's domicile is not usually enforced by the donee's domicile. Two reasons for this conclusion are: First, the decree directing distribution by the donor's trustees to the trustees under the will of the non-resident donee is a determination that the power was validly exercised and did not violate the public policy of the donor's domicile.³⁷ Otherwise its courts would not have decreed distribution. Second, the public policy laws of one state are not the concern of a sister state.

There remains to be considered the effect upon the attempted exercise of the power of the public policy of the donee's domicile. It is possible that the appointment by the donee's will may violate such policy. Will the donee's domicile enforce its own public policy if the appointive property is distributed by the donor's domicile for administration in the donee's domicile? Usually it will.³⁸ The appointive property becomes as fully subject to the law of the donee's domicile as though it had formed a part of the donee's estate. Since the donee, acting within the scope of the authority granted to him by the donor, must be deemed to have intended that the property be administered in his own domicile, he must likewise have intended to subject the appointive property to the law of his domicile. Public policy rules such as restrictions upon accumulation of income and assignment of income present no difficulty. The public policy of the donee's domicile becomes effective upon the exercise of the power in such manner as to require distribution to the donee's domicile.

The courts of the donor's domicile will not decree distribution to

³⁴ *Matter of Walbridge*, 178 Misc. 32, 33 N.Y.S.2d 47 (Surr. Ct. N.Y. County 1942).

³⁵ This device is aptly described by the New York Court of Appeals in *Matter of Trevor*, 239 N.Y. 6, 16, 145 N.E. 66, 69 (1924):

But, if a way may be found to preserve what is essential and legal, that which is illegal and of minor consequence must not be permitted to defeat the clear purpose of the testator. "The provision that in given circumstances a share shall fall back into the general body of the trust and remain unsevered from the bulk is so subordinate in importance and so separable in function that we are at liberty to cut it off and preserve what goes before." (*Matter of Horner*, 237 N.Y. 489, 495.)

See also *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891).

³⁶ Under this principle the validity of an attempted exercise of a power or of any other testamentary disposition under the prevailing rule against perpetuities is determined in the light of actual facts as they occur rather than prospectively, so that dispositions which might theoretically but do not in fact violate the rule may be preserved. This principle is advocated by Prof. Leach in "Perpetuities in Perspective; Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721 (1952) and "Perpetuities Legislation, Massachusetts Style," 67 Harv. L. Rev. 1349 (1954).

³⁷ See note 33 *supra*.

³⁸ See, e.g., *Amerige v. Attorney General*, 324 Mass. 648, 88 N.E.2d 126 (1949) applying the Massachusetts rule against perpetuities to appointive property placed in trust by New York donor.

the donee's domicile if the appointment violates the rule against perpetuities of the donor's domicile. There are, however, two situations in which the appointment may be valid in the donor's domicile, but void in the donee's domicile. To what extent should the donee's domicile enforce its rule against perpetuities?

First, the appointment may have been valid under the common law rule against perpetuities in the donor's domicile, but void under the two life rule prevailing in the donee's domicile.³⁹ Suppose, for example, the donee appoints for three lives in being at the date of the donor's death, in addition to his own, and directs distribution of the appointive property to his domicile for administration there. In this instance, we think that the courts of the donee's domicile would be justified in refusing to declare the appointment invalid. The donee should be permitted to place the administration of the appointive property in his own domicile as a matter of administrative convenience without rendering an otherwise valid appointment void.⁴⁰

Second, the donee may by his will create a second power of appointment. This does not violate the rule against perpetuities in the donor's domicile or in the donee's domicile. But when the second donee exercises his power of appointment, he may do so in a manner that will violate the rule against perpetuities of the first donee's domicile, as well as that of the donor's domicile. Assume that the donee appoints in further trust during the life of A, who was in being at the donor's death, remainder to A's appointees, and the donee's will directs distribution of the appointive property to his domicile for administration there. If on A's death, A appoints in further trust for the life of B, a person not in being at A's death, or at the death of the original donor, remainder to a class to be determined upon the death of B, the exercise of the powers by the first donee and A violate the rule against perpetuities of the first donee's domicile, as well as that of the donor's.⁴¹ In such circumstances,

³⁹ See, e.g., N.Y. Pers. Prop. Law § 11; N.Y. Real Prop. Law § 42.

⁴⁰ Cf. *Shannon v. Irving Trust Co.*, 275 N.Y. 95, 9 N.E.2d 792 (1937), which holds that a New Jersey grantor of an inter vivos trust can validly direct in the agreement that the trust shall be administered in New York, the trustee's domicile, and at the same time, direct that the trust term shall be measured by the New Jersey common law rule against perpetuities and that the trustee shall be permitted to accumulate income also as permitted by the law of New Jersey, the grantor's domicile. If the principle of this decision applies to powers of appointment, the impact of the public policy of the donee's domicile in such matters as the rule against perpetuities, the accumulation of income and the assignment of income may, if desirable, be avoided by a specific direction in the donee's will.

⁴¹ In *Amerige v. Attorney General*, 324 Mass. 658, 88 N.E.2d 126 (1949), A's appointment was held valid under Massachusetts law to the extent of the life estate of B, since such life estate vested within lives in being, but invalid as to the attempted disposition of the remainder upon B's death. Under the law of New York, donor's domicile, A's appointment would have been wholly invalid. See note 39 supra.

we believe that the courts of the donee's domicile should declare the appointment void as violating the rule against perpetuities of the donee's domicile, and distribute the invalidly appointed property to those who would take from the donee in default of a valid exercise of the power. We think that the rights of those who would take from the donor in default of such exercise must be deemed to have been cut off by the decree of the court of the donor's domicile directing distribution to the donee's domicile. Such persons had the opportunity to protect their interests by demanding that the courts of the donor's domicile retain jurisdiction until it could be determined whether or not A validly exercised the second power.⁴²

It therefore appears that each state must enforce its own public policy. Insofar as the appointment violates the public policy of the donor's domicile, the courts of the donor's domicile must take such practical measures as may be available to enforce its public policy while the appointive property remains within its jurisdiction. The time to enforce the public policy of the state of the donor's domicile, or, to make sure that the appointive property will be available at a future time when the public policy issue may arise, is upon the settlement of the account of the donor's trustees following the donee's death. The courts of the donee's domicile, to which the appointive property has been transmitted by decree of the court having jurisdiction in the donor's domicile, may enforce the public policy of the donee's domicile as though the appointive property had been a part of the donee's testamentary estate.

IV.

What law will determine the construction and effect of the exercise of the power and the powers and authority of the trustee to whom the fund may be appointed?

Consider this situation: The donee's will is valid. He exercises the power by appointing the fund in further trust. His will does not contravene the public policy of either the donor's or the donee's domicile. Having proceeded to this point, perhaps the next question in orderly sequence is: What law will determine the construction and effect of the donee's will and the powers and authority of the trustee in the administration of the appointive property? Words may have a meaning in the donee's domicile different from that in the donor's domicile. The

⁴² This apparently was the view of the court in *Amerige v. Attorney General*, supra note 41. Applying the doctrine of capture, the court held the fund passed on a resulting trust to A's estate and, since the invalid appointment had been made by the residuary clause of A's will, the fund passed as intestate property. The Restatement concurs in this disposition. Restatement, Property § 365 (1940).

rights of income beneficiaries and remaindermen may be different in the donee's domicile than in the donor's domicile. The donee's domicile may permit trustees to make investments under the "prudent man" rule,⁴³ whereas the donor's domicile may restrict investments to legal securities, or may have a statute permitting investment of a percentage of the fund in non-legal securities on "prudent man" principles.⁴⁴ These are but a few of many differences which may exist between the law of the donor's domicile and that of the donee's domicile.⁴⁵

The same authorities which deal with public policy questions make this sweeping generalization: All questions concerning the validity, construction and effect of the exercise of the power are determined by the law of the domicile of the donor.⁴⁶ This is true so long as the appointive property remains subject to the jurisdiction and control of the donor's domicile and the forum to which the issue is presented is a court in the state of the donor's domicile.

The rule that such questions are determined by the law of the donor's domicile has significant disadvantages. The donee may be expected to prepare his will in accordance with the law of his own domicile. He may be unacquainted with the law of the donor's domicile. Assume that the donee leaves the appointive property in further trust and then creates an identical trust out of his own testamentary estate. Should the dispositive provisions as to the trust of the appointive property be accorded a different meaning than the identical provisions of the donee's will disposing of his own testamentary estate, merely because the law of the donor's domicile is different from that of the donee's domicile? Should the income of the trust of the appointive property be different in amount from the income of the trust of the donee's own property because the law of the donor's domicile as to apportionments between income and principal was not the same as that of the donee's domicile? Should the donee's trustee be required to invest the appointive property in securities different from the securities in which the trusts of the donee's own

⁴³ *Harvard College v. Amory*, 26 Mass. (9 Pick.)* 449 (1830); Del. Code Ann. tit. 12, § 3302 (1953).

⁴⁴ N.Y. Pers. Prop. Law § 21. See generally: Report of Committee on Changing Concept of Trust Investments, Proceedings, Section of Real Property, Probate and Trust Law, Am. Bar Ass'n 101 (1955).

⁴⁵ For illustrations of typical problems, see Land, *op. cit. supra* note 5 at §§ 28-28.2; Casner, "Construction of Gifts to 'Heirs' and the Like," 53 Harv. L. Rev. 207 (1939); Proceedings, Section of Real Property, Probate and Trust Law, Am. Bar Ass'n 101 (1950).

⁴⁶ *Sewall v. Wilmer*, 132 Mass. 131 (1882); *David v. Atlantic County S.P.C.A.*, 129 N.J. Eq. 501, 19 A.2d 896 (Ch. 1941) (decided in donee's domicile); *In re Grabfelder's Estate*, 108 N.Y.S.2d 529 (Surr. Ct. N.Y. County 1951); *Matter of New York Life Ins. & Trust Co.*, 139 N.Y. Supp. 695 (Surr. Ct. N.Y. County), *aff'd*, 157 App. Div. 916, 142 N.Y. Supp. 1132 (1st Dep't), *aff'd*, 209 N.Y. 585, 103 N.E. 315 (1913); *In re Barton*, 348 Pa. 279, 35 A.2d 266 (1944) (same fund as in *David v. Atlantic County S.P.C.A.*, but decided in donor's domicile).

property were invested? Inconsistencies such as these should, if possible, be avoided.

Continued adherence to the rule offers no compensating advantages, except possibly in those cases in which the donee appoints outright, or appoints in further trust to a trustee residing in the donor's domicile.

We believe that the disadvantages of this rule may be overcome by permitting the donee, should he desire to do so, to provide in his will that all questions concerning the construction and effect of the exercise of the power, and all questions concerning the powers and authority of the trustee of the appointive property, shall be determined in accordance with the law of the donee's domicile. Such a provision in the donee's will should be valid. If space permitted, the donee could incorporate the law of his domicile *in haec verbae* in his will without exceeding the authority granted to him by the donor. He should be permitted to achieve the same result by incorporating the law of his domicile by reference.⁴⁷ The advantages of such a provision to the donee's trustee, presumably a resident of the donee's domicile, and to the donee's family, are manifest. The trustee would be enabled to administer the appointive property and the donee's own estate, invest and reinvest the funds, and make distribution of both income and principal all in accordance with the law of the donee's domicile. The trustee could do this even though the donor's domicile retained jurisdiction over the appointive property and the donee's trustee accounted there.

In some cases the appointive property will be administered in further trust in the donee's domicile. The donee may have blended the appointive property with his testamentary estate. He may have directed that the appointive property be administered by trustees in his domicile. The donee in these instances having intended that the appointive property be administered in the donee's domicile, the rule that the construction and effect of the exercise of the power is governed by the law of the donor's domicile is not applicable after the fund reaches the donee's domicile. Once the appointive property reaches the hands of the donee's trustees, the courts recognize that the law of the donee's domicile will determine the construction and effect of the provisions contained in the donee's will exercising the power of appointment as though such appointive property had been a part of the donee's testamentary estate.⁴⁸

⁴⁷ *Shannon v. Irving Trust Co.*, 275 N.Y. 95, 9 N.E.2d 792 (1937); 1 Page, *op. cit.* supra note 17 at §§ 249-69.

⁴⁸ *Amerige v. Attorney General*, 324 Mass. 648, 88 N.E.2d 126 (1949); *In re Camp's Estate*, 64 N.Y.S.2d 755, 756 (Surr. Ct. N.Y. County 1945) (holding that "the powers contained in the donee's will govern and regulate the administration of these trusts"); *Matter of Shipman*, 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens County 1942).

Thus, the construction and effect of the donee's will and the powers and authority of the trustee are determined by the law of the donor's domicile while the fund remains under the control of the courts of that state, but will be determined by the law of the donee's domicile after the appointive property has been distributed to the executors of and trustees under the donee's will for administration in the donee's domicile. The donee should be permitted to provide by his will that all questions concerning the construction and effect of the appointment and the powers and authority of the trustee to whom the fund is appointed should be determined by the law of the donee's domicile, even though the trustee must account in the donor's domicile.

V.

Can the appointive property be transmitted from the domicile of the donor of the power to the domicile of the donee of the power for administration in the donee's domicile? If transmitted to the donee's domicile what law then controls the administration of the appointive property?

In what state shall property validly appointed by the donee in further trust be administered? The state of the donor's domicile, or that of the donee? From what has been written, it is evident that the donor's domicile, having control of the fund and the trustees under the donor's will, is in a position to determine this issue and, if it chooses, to require the donee's trustees to qualify in the donor's domicile and to administer the appointive property in that state. The right to require administration in the donor's domicile has frequently been stated to be a rule of law to be applied in all except a few extraordinary situations.⁴⁹

Before considering whether there is such a rule of law, we submit for consideration two hypothetical cases. These cases involve circumstances which may make it desirable from the standpoint of the donee to place the administration of the appointive property in the donee's domicile.

First, the testator's surviving spouse is the donee of a general power of appointment over a trust under the will of her husband. The trust qualified for the marital deduction in her husband's estate. Subsequent to the donor's death, the donee became domiciled in another state, which was also the domicile of her son and daughter and their families. The donee would like to appoint the marital trust to a bank in the

⁴⁹ Matter of Walbridge, 178 Misc. 32, 33 N.Y.S.2d 47 (Surr. Ct. N.Y. County 1942); Matter of New York Life Ins. & Trust Co., 139 N.Y. Supp. 695 (Surr. Ct. N.Y. County), aff'd, 157 App. Div. 916, 142 N.Y. Supp. 1132 (1st Dep't), aff'd, 209 N.Y. 585, 103 N.E. 315 (1913).

donee's domicile to divide into two shares, one share to be held in further trust for the son and the second for the daughter. She desires that these funds be added to and administered as a part of the trusts of her testamentary estate for the son and daughter. She also desires to give the trustee discretion to use principal to meet emergencies.

Second, the same testatrix is beneficiary of another trust under her husband's will, identical with the marital trust, over which she is granted a similar power of appointment, except that in the second instance she cannot appoint to herself, her creditors or the creditors of her estate. She would also like to appoint the second trust to the same bank in her domicile, to be added to the trusts of her own testamentary estate.

Assume that the donee expresses her intention in her will and that her purposes violate no public policy of the donor's domicile. On these facts, no legal reason appears why her intention to so exercise both the general power and the special power in the manner outlined in the preceding paragraphs, should not be given legal effect. True, the donee is the agent of the donor. The general power, however, is said to be equivalent to ownership. She can appoint to anyone, including her estate. As donee of the special power, she can appoint to anyone except in effect her estate. Nothing in either power could possibly be construed to limit the power of the donee to appoint to a trustee in another state or direct that the appointive property be administered in such other state.⁵⁰ The purposes stated are those which many donees

⁵⁰ Authorities have recognized that a donee may make such directions as to the appointive property in certain circumstances. *Matter of Walbridge*, supra note 49; *Matter of McAuliffe*, 167 Misc. 783, 4 N.Y.S.2d 605 (Surr. Ct. Westchester County 1938). In *Estate of Philip J. Vogel*, 98 N.Y.L.J. 1407, col. 6 (Surr. Ct. N.Y. County 1937), the late Surrogate Foley said:

The donee's will specifically disposes of the appointive property and operates as a valid exercise of the power of appointment. . . . The disposition of the appointive property under the donee's will in no way contravenes the law of this State. The fact that a portion of the property is given to English Trustees to be administered in England does not affect the validity of the exercise of the power of appointment. In *Matter of Matthiessen*, 195 Misc. 598, 87 N.Y.S.2d 787 (Sup. Ct. N.Y. County 1949), it was held that the public policy of New York did not prohibit transmission of the principal of an inter vivos trust originally established in New York to a California trustee for further administration there when the court found it to be the intention of the grantor that such transfer might be made. Casner, relying on the *Amerige* case, believes that the donee may place the administration of appointive property in a state other than donor's domicile. Casner, "Estate Planning—Powers of Appointment," 64 Harv. L. Rev. 185, 208-10 (1950).

The late C. Alexander Capron, in an address before the American Bar Association in 1954 entitled "Situs of Trusts in the Conflict of Laws," recognized that a testator might direct the administration of trust property forming a part of his own estate in a state other than his domicile. Proceedings, Section of Real Property, Probate and Trust Law, Am. Bar Ass'n 39-41 (1954). The legislatures of some states have seen fit to enact laws to permit the removal in certain circumstances of testamentary trusts to a state other than testator's domicile. Conn. Gen. Stat. § 6862 (1949); Fla. Stat. Ann. § 737.02 (1951); N.J. Stat. Ann. § 3A:23-1 (1951); N.C. Gen. Stat. §§ 36-6 to 36-8 (1950); Pa. Stat. Ann. tit. 20, §§ 999, 1001, 3174 (Purdon 1950); Va. Code Ann. §§ 64-122, 64-123,

would like to achieve to effect a unified estate plan. The donee's desire to have the appointive property administered in the state in which she and her children reside is entirely reasonable. Her plan to add the appointive property to trusts created out of her testamentary estate is desirable to assure a simple, unified administration. She should be permitted to direct that the appointive property be administered in her domicile, if she chooses, unless prohibited from so doing by the terms of the donor's will.

Unfortunately, there is scarcely any authority for the suggestion that the donee of a general power or the donee of a special power, acting within the limits of such special power, may appoint the funds in further trust and direct that such further trust be administered in the donee's domicile. On the contrary, it has been stated that the property appointed never loses its identity as a part of the donor's estate, and that, until absolute vesting, the property remains subject to the jurisdiction and control of the courts of the domicile of the donor.⁵¹ Therefore, until the courts, or possibly the legislatures, have recognized that the donee may place the administration of the appointive property in the donee's domicile, the donee so planning her estate hazards the possibility that the courts of the donor's domicile may frustrate her plan.

In the case of the trust over which the donee has a general power of appointment (the marital trust in the foregoing illustration), the donee may place the administration of the appointive property in the state of her own domicile by the circuitous method of blending the appointive property with her own testamentary estate. The donee could accomplish this result by appointing the fund to the executor of her will to be administered and distributed by it as a part of her testamentary estate.⁵² However, in the case of the special power, the donee cannot blend the appointive property with her testamentary estate because that power

26-61 to 26-67 (1950); W. Va. Code Ann. §§ 4263-72 (1955); Wis. Stat. § 231.29 (1955). See 3 Bogert, *Trusts and Trustees* § 584, p. 25, n.70 (1946).

In *In re Henderson's Will*, 40 N.J. Super. 297, 123 A.2d 78 (Ch. 1956), the New Jersey court, acting pursuant to N.J. Stat. Ann. § 3A:23-1 (1951), directed distribution of the assets of a trust under the will of a New Jersey decedent, which had been administered in New Jersey, to California to be administered by substituted trustees in that state.

New York permits a non-resident to declare that the validity and effect of a testamentary disposition of real and personal property situated in New York shall be regulated by the law of New York. N.Y. Dec. Est. Law § 47.

⁵¹ *Sewall v. Wilmer*, 132 Mass. 131 (1882); *Matter of Walbridge*, note 34 supra; *Matter of New York Life Ins. & Trust Co.*, note 21 supra. In *Matter of Bradford*, 165 Misc. 736, 1 N.Y.S.2d 539 (Surr. Ct. N.Y. County), aff'd, 254 App. Div. 828, 6 N.Y.S.2d 156 (2d Dep't 1937), the New York Surrogate's Court declined to permit a representative of one of donee's trustees to account for the appointive property in New York, the donee's domicile, holding that such property must be accounted for in Massachusetts, the donor's domicile.

⁵² See, e.g., *In re Camp's Estate*, 64 N.Y.S.2d 755 (Surr. Ct. N.Y. County 1945); *In re Matthews' Estate*, 64 N.Y.S.2d 662 (Surr. Ct. N.Y. County 1944).

by its terms precludes appointment to the donee's estate. Therefore blending cannot be employed to achieve the unified administration desired by the donee in the foregoing illustrations.

Blending produces certain undesirable results meriting consideration by the donee of a general power of appointment who may contemplate using this method to place the administration of the appointive property in the donee's domicile.

1. *Rights of creditors.* In some states, the appointive property is not subject to the rights of creditors of the donee unless the donee appoints to his estate or to such creditors. Thus, if the donor died a resident of such a state, the donee could appoint the fund outright, or in further trust to be administered in the donor's domicile. Such appointment would not be subject to claims of the donee's creditors. On the other hand, if the donee blended the appointive property with his testamentary estate, the appointive property would be subject to creditors' claims. The effect of blending may be to secure payment of the donee's creditors at the expense of the natural objects of the donee's bounty.⁵³

2. *General legatees under donee's will.* By blending, the appointive property may also become available for the payment of general legacies under the donee's will. The effect may be to secure payment of general legacies under the donee's will, to the detriment of the residuary legatees who would otherwise take the appointive property to the exclusion of general legatees.⁵⁴

3. *Additional administration expenses.* In some states trustees who administer property subject to a power of appointment are entitled to a single trustee's commission for the period commencing with the date of the donor's death and continuing until the ultimate vesting of the appointive property in the remaindermen designated in the donee's will.⁵⁵ Should the donee blend the appointive property with his testamentary estate the total amount of commissions may be materially increased. The fund would be subject to one commission payable to the donor's trustees. It would then become subject to a second commission payable

⁵³ See Point II, *supra* p. 190.

⁵⁴ *Jackson's Estate*, 337 Pa. 561, 12 A.2d 338 (1940) (holding that whether the appointed property was blended with donee's individual estate was entirely a matter of donee's intent); *Twitchell's Estate*, 284 Pa. 135, 130 Atl. 324 (1925); *Forney's Estate*, 280 Pa. 282, 124 Atl. 424 (1924); *In re Pennsylvania Co. for Insurance on Lives, etc.*, 264 Pa. 453, 107 Atl. 840 (1919); *Restatement, Property* § 363 (1940).

⁵⁵ Such was clearly the rule in New York until 1945, when the trustee under the wills of the donor and donee was the same person. The courts deem the situation analogous to that of continuing secondary trusts under the will of a single testator. See *Matter of Coutts*, 260 N.Y. 128, 183 N.E. 200 (1932); *Matter of Moyses*, 188 Misc. 1030, 65 N.Y.S.2d 291 (Surr. Ct. N.Y. County 1945). In some recent cases, multiple commissions have been allowed when such appears to be the intention of the donee; *Matter of Culver*, 294 N.Y. 321, 62 N.E.2d 213 (1945); *Matter of Brown*, 192 Misc. 96, 80 N.Y.S.2d 672 (Surr. Ct. Monroe County 1948).

to the executors of the donee's will. Finally the appointive property would become subject to a third commission payable to the trustees under the donee's will. Thus, by blending, the appointive property may become subject to treble commissions, whereas only one commission would otherwise be payable.⁵⁶ The problem of additional commissions may be less acute in states where the amount of commissions is in the discretion of the court and dependent to a degree on the duration of the trust.

4. *Inheritance taxes payable to the state of the donor's domicile.* In some states the assessment by the state of the donor's domicile of a portion of the inheritance taxes on the appointive property is, or may be, deferred until the persons in whom the property will ultimately vest are ascertained.⁵⁷ Thus, if the donee appoints in further trust for her son and daughter, remainder to persons whose identity cannot be determined until the death of the son and daughter no tax on such remainder interests becomes payable until the termination of the intervening life estates. But if the donee blends the appointive property so as to transfer the administration of such property to her domicile, the taxing authorities of the donor's domicile may prevent distribution of the appointive property out of the donor's domicile until its taxes have been paid or secured.⁵⁸ Thus blending may accelerate the time when inheritance taxes on the remainder interests must be paid.

5. *Inheritance taxes payable to the donee's domicile.* In some states, the exercise of a general power of appointment is not subject to inheritance taxes in the domicile of the donee.⁵⁹ In such a state, the blending of the appointive property with the donee's testamentary estate may result in the appointive property becoming subject to inheritance taxes payable to the donee's domicile on the theory that the donee by blending had made the appointive property a part of his testamentary estate. In this instance, the appointive property would have escaped payment of any inheritance taxes to the domicile of the donee if the donee had not undertaken to blend the appointive property with the donee's testamentary estate.⁶⁰

To summarize, the weight of authority requires that the appointive

⁵⁶ The wisdom of allowing multiple commissions under the circumstances was questioned in *Matter of Brown*, supra note 55, but commissions were allowed where it appeared to the court that the donee so intended. See also *Matter of Culver*, supra note 55.

⁵⁷ N.H. Rev. Stat. Ann. § 86.70 (1955); N.J. Stat. Ann. §§ 54:36-4, 36-6 (1951).

⁵⁸ *Ibid.*

⁵⁹ Conn. Gen. Stat. c. 100 (1948); Ind. Laws of 1931, c. 75.

⁶⁰ *Hagen's Estate*, 285 Pa. 326, 132 Atl. 175 (1926); *Forney's Estate*, note 54 supra; *McCard's Estate*, 276 Pa. 459, 120 Atl. 413 (1923). See also *Barclay v. United States*, 175 F.2d 48 (3d Cir.), cert. denied, 338 U.S. 849 (1949), holding under § 302-a of the Revenue Act of 1926 that blending subjected the appointive fund to the federal estate tax.

property shall continue to be administered in the donor's domicile. No sound reason appears why the donee desiring to appoint in further trust cannot change the place of administration from the donor's domicile to that of the donee, unless restricted from making such change by the will of the donor. Administration in the donee's domicile may be desirable from the point of view of the donee. Blending the appointive property with the testamentary estate of the donee of a general power of appointment produces undesirable results which limit the use of this method to achieve a change in the place of administration to the donee's domicile.

VI.

How can a fiduciary appointed by the donee's will qualify to administer the appointive property in the domicile of the donor of the power?

The requirement that the trustees named in the donee's will qualify in the donor's domicile, as a means by which the donor's domicile retains jurisdiction over the appointive property, is not expressed in many reported decisions. The procedure is a detail of administration which probably has been worked out at the county level in a number of jurisdictions where there is a sufficient volume of estates and trusts to require the probate court of the county to establish a policy for dealing with appointive property. In New York County, where the volume is necessarily large, no cases defining the procedure appeared until the early 1940's. Commencing then and continuing to date, the Surrogates of that county have in opinions stated that the trustees under a non-resident donee's will must qualify in New York as trustees under the donor's will and administer the appointive property in the donor's domicile.⁶¹

The necessity for such qualification is plain, assuming that the court intends to retain jurisdiction. Jurisdiction must rest on something more substantial than the legal fiction that the appointive property remains the property of the donor until it ultimately vests and that the power of appointment as exercised by the donee is simply an enlargement of the donor's will.⁶² The court has no jurisdiction over a non-resident

⁶¹ Matter of Walbridge, 178 Misc. 32, 33 N.Y.S.2d 47 (Surr. Ct. N.Y. County 1942), appears to be the first New York case adopting this rule. See also Matter of Bradford, 165 Misc. 736, 1 N.Y.S.2d 539 (Surr. Ct. N.Y. County 1937), in which it appeared that Massachusetts had appointed a trustee to continue the administration of appointive property in donor's domicile.

⁶² In Matter of Barrett, 206 Misc. 363, 132 N.Y.S.2d 755 (Surr. Ct. N.Y. County 1954), the petitioner sought to compel the trustees under the will of donee, who had died a resident of New Jersey, to account in the New York court having jurisdiction over the donor's estate. The trust fund had previously been transmitted to donee's trustees, a New Jersey bank not doing business in New York, and an individual who resided in New York, pursuant to a decree of the New York court settling the final account of the trustees under donor's will at donee's death. Donee's trustees had not been required to qualify in New York. The court stated that the property attributable to the donor, even though physically in New Jersey, remained at all times in custodia legis of the New York court.

trustee under the will of a non-resident decedent. It may not even have jurisdiction over a resident trustee who has qualified as such under the will of a non-resident decedent.⁶³ Therefore, in a very practical sense, if the appointive property is distributed to trustees under the will of a non-resident donee by decree of the court of the donor's domicile, that court can no longer deal effectively with the appointive property. Lacking jurisdiction over the trustees and lacking control over the appointive property physically in the hands of trustees in another state, the court lacks the means to make its decree effective.⁶⁴

One difficulty in requiring that the donee's trustees qualify as trustees under the donor's will is that the donee's trustees may not be permitted to act as trustees in the state of the donor's domicile. A foreign trust company, for example, usually may not act as trustee unless there are reciprocal statutes under the banking laws of both states.⁶⁵ Even so, a complication may arise in those states such as New Jersey which permit reciprocity only when the corporate trustee is named in the will of the decedent whose estate is to be administered (namely, the donor's estate).⁶⁶ It may be suggested that, since the corporate trustee was named in the will of the donee and not in the will of the donor, the corporate trustee named by the donee may not, under the reciprocity statutes, act as trustee under the donor's will.⁶⁷ We think that such suggestion is untenable. If the donee's trustee is directed to qualify and act as trustee under the donor's will, such qualification must be based on the theory that the donee's will is to be read into the will of the donor for the purpose of exercising the power. Consistency requires that on the same theory the corporate trustee selected by the donee should be treated as though it had been named in the donor's will.

VII.

Conclusion

The exercise of a power of appointment by a non-resident donee usually involves the laws of two states. The laws of the states differ in

The Appellate Division reversed on the ground that the prior decree directing distribution of the appointive fund to donee's executors and trustees was not subject to collateral attack. 286 App. Div. 289, 143 N.Y.S.2d 143 (1st Dep't 1955).

⁶³ *Helme v. Buckelew*, 229 N.Y. 363, 128 N.E. 216 (1920); *Matter of Barrett*, 286 App. Div. 843, 143 N.Y.S.2d 816 (1st Dep't 1955).

⁶⁴ *Matter of Barrett*, supra note 62.

⁶⁵ *Matter of Walbridge*, 178 Misc. 32, 33 N.Y.S.2d 47 (Surr. Ct. N.Y. County 1942). State laws regarding the right of foreign trust companies to do business therein are collected in 1 CCH Trust and Estate Law Reporter, ¶¶ 8721-70.

⁶⁶ Conn. Gen. Stat. § 6979 (1949); N.J. Stat. Ann. § 17:9A-316 (1951).

⁶⁷ See *In re Hoagland's Estate*, 15 N.J. 592, 105 A.2d 825 (1954), in which decedent's will authorized any surviving trustee to appoint a New York trust company as co-trustee. The Court held that the exercise of this power of appointment did not relate back to the decedent's death, prior to the effective date of the restrictive statute, supra note 66.

so many particulars that conflicts have arisen and will arise with greater frequency as the effect of the tax laws makes itself felt. Recognition that the donee of the power usually has the right to direct that the appointive property shall be administered in the donee's domicile, and also the right to direct that the construction and effect of the exercise of the power and the powers and authority of the trustee to whom the fund is appointed shall be determined by the laws of his domicile, would help estate planners to avoid some of the more important conflicts.