

Title

When the parties to a trust relationship, as well as its subject property, are located in different states, which state's law governs the construction and enforceability of the trust's dispositive provisions?

Text

Consider the following situation. Settlor owns a thousand acres of land in a domestic-asset-protection haven (DAPT state). While he is alive, he transfers in trust the land to a corporate trustee that does business exclusively in a non-DAPT state. Trust is fully discretionary. There is no express reserved right to revoke, and no express designation of which state's law shall govern the construction and enforceability of its dispositive provisions. Settlor is the initial beneficiary. There is a spendthrift clause that is intended to be enforced *ab initio*. Is the spendthrift clause enforceable against the settlor's future creditors? Borrowing the analogies of one commentator, one could say that the Uniform Trust Code (UTC)'s conflict-of-laws rules are clear as "mud" in such situations; the Restatement (Second) of Conflict of Laws (hereinafter "Restatement (Second)"), specifically its Chapter 10 (Trusts), on the other hand, have rules that, for good or for ill, are "crystal" clear in such situations, at least by comparison to the UTC. See Thomas P. Gallanis, *Trusts and the Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 Tul. L. Rev. 805, 816 (2023). For a DAPT primer, see my May 7, 2024 JDSUPRA posting: <https://www.jdsupra.com/legalnews/uniform-trust-code-utc-and-uniform-9217529/>. Recall that rules of construction relate to the disposition of the trust property, not to the trust's fiduciary administration. Interpretation and construction are not synonymous. Interpretation ascertains the settlor's intentions; rules of construction kick in when there is no satisfactory evidence of the meaning words were intended to bear. What follows are some specifics as to why the Restatement (Second) is more user friendly than the UTC when it comes to scoping out what rules of construction are likely applicable if a particular trust has multijurisdictional contacts.

The Restatement (Second) tackles the governing-law issue by first doctrinally separating trusts of land and trusts of movables. Each category is then further sub-divided into testamentary trusts and inter vivos trusts. As to the inter vivos trust of land, the Restatement (Second) is crystal clear, *at least in our situation*: It is the law of the situs, the state in which the land is located, that governs how the clause is construed, *see* § 277, and when, if ever, it is enforceable, *see* § 280. Whether the law of the situs will ultimately call for application of local law or the law of some other state is a separate issue. In our situation, local law would be applied. *See* § 280, cmt. a.

The UTC, on the other hand, specifically § 107, puts the trust of land and the trust of movables into the same governing-law doctrinal pigeonhole. When it comes to sorting out which state's law governs the construction and enforceability of a trust's dispositive provisions in the absence of a controlling designation in the terms of the trust, it is "the law of the jurisdiction having the most significant relationship to the matter at issue" that governs, whether it is a trust of land or a trust of movables. No definition of "significant relationship to the matter at issue" is supplied. In our hypothetical, then, which state's law does govern? Unclear *from the statute*. All that is supplied is a comment that proffers some "factors to consider" in determining the governing law. They include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. "Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result." It is self-evident that "[a] multiple-factor analysis without clear guidance about the weight to be given to the various factors is difficult to implement." Thomas P. Gallanis, at 811. "Of the thirty-six jurisdictions

that have enacted enough of the UTC to be counted by the ULC as enacting jurisdictions, seventeen have enacted...[UTC § 107]...verbatim or near-verbatim. The other nineteen either have not enacted...[UTC § 107]... at all, or they have enacted non-uniform versions of ...[UTC § 107]...” Thomas P. Gallanis, at 816. To further clutter the jurisprudence, there is now on the drawing board a free-standing uniform act on the conflict of laws in trusts and estates, and on another drawing board a Restatement (Third) of Conflict of Laws.