Michigan Law Review

Volume 65 | Issue 3

1967

Conflict of Laws-Public Policy Used To Apply Forum Law to Joint Bank Accounts of Foreign-Domiciliaries *Wyatt v. Fulrath*

Michigan Law Review

CONFLICT OF LAWS—Public Policy Used To Apply Forum Law to Joint Bank Accounts of Foreign-Domiciliaries—*Wyatt v. Fulrath**

The Duke and Duchess of Arion, nationals and domiciliaries of Spain, neither of whom had ever been to New York, deposited community property consisting of cash and securities in several New York banks. In establishing these accounts, the Duke and Duchess either expressly agreed in writing that the New York law of survivorship would apply to their accounts or signed standard bank survivorship forms which incorporated the survivorship laws of that state.[1] After her husband's death, the Duchess made the entire amount on deposit in New York subject to her will. Following the Duchess' death and during probate of her will, plaintiff, as an ancillary administrator of the Duke's estate, arguing that Spanish community property law governed the rights to property of a husband and wife and that it prohibited the separation of marital property by means of survivorship accounts,[2] brought suit against the Duchess' executor to establish claim to one-half of the property in the New York accounts. The action of the Supreme Court, Special and Trial Term,[3] in dismissing the complaint on its merits was affirmed by the Supreme Court, Appellate Division.[4] On appeal to the New York Court of Appeals, *held*, affirmed, three judges dissenting. New York courts may use "public policy" as the basis for applying their own laws to property placed in New York by married foreigners who request that New York survivorship laws govern their property's future disposition.[5]

---

* 16 N.Y.2d 139, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965) [hereinafter cited as principal case].

1. N.Y. BANKING LAW § 134(3), which was replaced in 1965 by N.Y. BANKING LAW § 675, provides that a deposit of cash and securities made with any bank in the name of a depositor and any other person in a form to be paid or delivered to either, or the survivor of them, is to be considered property of such persons as joint tenants. The bank may deliver the deposit to either during the lifetime of both or to the survivor after the death of one of them. The section further states that the making of such a deposit would be *prima facie* evidence of the intention of both depositors to create a joint tenancy and to vest title to the deposit in the survivor.

2. Under Spanish law, all property acquired by either spouse during marriage is community property, except for gifts and bequests from third persons. See CÓDIGO CIVIL ESPANOL art. 1401 (Fisher transl., 4th ed. 1930). Upon the death of one spouse, one-half of the community property immediately vests in the survivor, and the other half becomes part of the estate of the deceased spouse. See CÓDIGO CIVIL ESPANOL art. 1407 (Fisher transl., 4th ed. 1930). The Code also prohibits the alteration of the community aspect of the marital property by means of interspousal gifts or contracts. See CÓDIGO CIVIL ESPANOL arts. 1334, 1394 (Fisher transl., 4th ed. 1930).

3. 38 Misc. 2d 1012, 239 N.Y.S.2d 486 (Sup. Ct. 1963).

4. 22 App. Div. 2d 853, 254 N.Y.S.2d 216 (1964).

5. A second contest was the right to funds which the Duke and Duchess had placed in London bank accounts and which the Duchess transferred to New York after the death of the Duke. The court returned this issue to the lower court, directing

When the various operative elements of a case have some connection with a foreign jurisdiction as well as with the forum, and when the laws of these two jurisdictions conflict, it is necessary to determine which law is to govern the rights of the parties. The traditional choice of law rules which were designed to apply specific rules in particular categories of cases have been attacked by courts which are seeking to provide the forum with greater flexibility in its determination of the applicable choice of law.[6] Indeed, the New York Court of Appeals has paced the attack, and has frequently set aside the established rules for being too mechanistic and too inconsiderate of the relevant interests of the jurisdictions concerned.[7] In the principal case, the Court of Appeals admitted that, under the traditional rules, the law of the domiciliary jurisdiction would gov-

---

it to determine and apply English conflict laws in deciding the ownership of these funds. For a discussion of the principal case, particularly in regard to this matter, see 66 COLUM. L. REV. 790, 796 (1966).

6. When work on the *Restatement of Conflict of Laws* was commenced in 1923, Professor Joseph H. Beale's "vested rights" theory was widely accepted. According to Beale, rights and obligations were acquired in the jurisdiction where the critical events took place. To determine the jurisdiction to which they should be referred in their search for the rights and obligations, courts usually engage in a two-step process. First, a court will "characterize" the problem by ascertaining the area of law which the factual situation involves. This characterization will then automatically refer the court to one of the concerned jurisdictions by means of established choice of laws rules. For example, if a problem were characterized as one in tort, the established rule is to apply the law of the place of the injury, the *lex loci delicti*, for that is where the plaintiff's rights, if any, arose. See RESTATEMENT, CONFLICT OF LAWS § 384 (1934). Likewise, if a case were characterized as one involving contracts, the controlling law would be of the place of contracting or of performance. See RESTATEMENT, CONFLICT OF LAWS § 332 (1934). The "vested rights" theory has been avoided by courts seeking a more flexible method to solve the choice of law problem. See Fabricus v. Horgen, 4 Iowa 17, 132 N.W.2d 410 (1965); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

7. Although the "vested rights," or *lex loci*, approach of the traditional choice of law rules had the benefit of being easily applied and providing certainty of result, the New York Court of Appeals felt that such an approach was too inflexible since it ignored the interests and policy considerations which jurisdictions other than that of the *lex loci* might have. See Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), for an application of the forum's law in a case brought by a passenger who was injured in an automobile accident in Ontario. The Ontario guest statute, which if applied would have precluded recovery, was not considered controlling since the fact that the accident occurred in Ontario was deemed fortuitous. Rather, forum law was applied since both the plaintiff-guest and defendant-driver were from New York. The court explained:

> Justice, fairness and "the best practical result" may be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

Babcock v. Jackson, *supra* at 481, 191 N.E.2d at 283.

In Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), the court of appeals disregarded the usual *lex loci* rules governing the choice of law in contract cases and proceeded to apply the law of the jurisdiction with which the facts were in most intimate contact. This has become known as the "grouping of contacts" or "center of gravity" choice of law method, and it permits the forum to weigh the underlying policies of each concerned jurisdiction.

ern the respective rights of spouses to their marital personal property,[8] even when the property is transferred to a jurisdiction other than the domiciliary jurisdiction.[9] However, the court was able to avoid these traditional rules by applying New York's "public policy," saying that it was "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."[10]

The difficulty in the principal case centers around the use of "public policy" to avoid the automatic results of the traditional choice of law rules without adequately discussing the reasons for this approach. New York courts had initially held that the "public policy" of the state consisted of no more than the totality of the statutes and the constitution,[11] but this view was expanded to include judicial decisions.[12] In the principal case, the Court of Appeals found the "public policy" governing the factual situation before it to be embodied in section 47 of the state's Decedent Estate Law, which provides that New York law will govern the testamentary disposition of property in New York owned by foreign domiciliaries who request that it so govern; Section 12-a of the Personal Property Law, which provides that the state will honor a foreign settlor's request that New York law determine the validity of a trust if either the

8. See Bonati v. Welsch, 24 N.Y. 157 (1861); Matter of Mesa v. Hernandez, 172 App. Div. 467, 159 N.Y. Supp. 59 (1916), *aff'd*, 219 N.Y. 566, 114 N.E. 1069 (1916); RESTATEMENT, CONFLICT OF LAWS § 290 (1934); GOODRICH, CONFLICT OF LAWS § 124 (4th ed. 1964); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 312 (3d ed. 1963). However, the spouses' respective interests in immovable marital property is traditionally determined by the law of the situs. See Newcomer v. Orem, 2 Md. 297, 56 Am. Dec. 717 (1852); RESTATEMENT, CONFLICT OF LAWS §§ 237-38 (1934); GOODRICH, *op. cit. supra* § 122; STUMBERG, *op. cit. supra* at 342.

9. Property which is held in community retains this characteristic when transferred to a separate-property, or common law, forum. See Depas v. Mayo, 11 Mo. 202, 49 Am. Dec. 88 (1848); *In re* Kessler's Estate, 177 Ohio St. 136, 203 N.E.2d 221 (1964); Edwards v. Edwards, 108 Okla. 93, 233 Pac. 477 (1924); RESTATEMENT, CONFLICT OF LAWS § 292 (1934). Similarly, property which is separate remains so after it is transferred to a community property state. See Stephen v. Stephen, 36 Ariz. 235, 284 Pac. 158 (1930); *In re* Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934); Douglas v. Douglas, 22 Idaho 336, 125 Pac. 796 (1912); Huff v. Borland, 6 La. Ann. 436 (1851); Brookman v. Durkee, 46 Wash. 578, 90 Pac. 914 (1907); RESTATEMENT, CONFLICT OF LAWS § 293 (1934). See generally DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943).

Under the maxim *mobilia sequuntur personam*, the situs of the bank accounts, which are intangible property, would be in Spain where the owners resided, and the property would not have acquired a new situs in New York. It is now generally recognized, however, that bank accounts can have a situs separate and distinct from the domicile of the owner. See Matter of Kugel, 192 Misc. 61, 78 N.Y.S.2d 851 (Surr. Ct. 1948).

10. Principal case at 173, 211 N.E.2d at 639, 264 N.Y.S.2d at 236.

11. See Dammert v. Osborn, 140 N.Y. 30, 35 N.E. 407 (1893); Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892); Hollis v. Drew Theological Seminary, 95 N.Y. 166 (1884).

12. See People v. Hawkins, 157 N.Y. 1, 51 N.E. 257 (1898).

trust res or trustee is in the state; and *Hutchison v. Ross*,[13] in which the Court of Appeals noted that New York "public policy," as grounded in section 12-a of the Personal Property Law, dictated the use of the *lex fori* in determining the validity of a trust whose res and trustee were in New York and whose settlor manifested an intent that it be governed by New York law, even though the settlor and the beneficiaries were Canadian domiciliaries. Having found the "public policy," the court in the principal case asserted that the policy required application of New York's law whenever: (1) property is placed in New York and (2) the owners intend New York law to govern the rights to this property. However, although the court indicated the sources of "public policy" and when "public policy" will be applied, it neither clearly defined this policy nor explained why it is sufficient to override the Spanish interest in preserving the community status of the property. Consequently, it is submitted that in the principal case the court's use of "public policy" to find the applicable law is as inflexible an approach as are the traditional choice of law rules.

"Public policy" is a method which has been used by the courts in order to avoid the traditional choice of law rules,[14] but it has normally been used only when the foreign law which would have been applied would have violated a strong moral conviction of the forum or resulted in what the forum could consider an extremely unjust decision.[15] In *Loucks v. Standard Oil of New York*,[16] Judge Cardozo explained that judges are not free to invoke "public policy" at their own pleasure or to suit their individual notions of expediency. The forum should refuse to enforce the foreign claims, he said, only if enforcement "would violate some fundamental principle of justice, some prevelant conception of good morals, some deep-rooted tradition of the common weal."[17] To be sure, mere variations in the foreign law are not sufficient to justify a state's rejection of the applicable laws of a foreign state, where the foreign state has the greater interest and more significant contacts with the case.[18] Indeed, Cardozo's limitation on the use of "public policy" has received the widespread approval of commentators who fear that to permit a broader use of the doctrine would inevitably lead to a wholesale application of the laws of the forum and an abandonment of a

13. 262 N.Y. 381, 187 N.E. 65 (1933).

14. See 3 BEALE, CONFLICT OF LAWS § 612.1 (1935); GOODRICH, *op. cit. supra* note 8, § 11; STUMBERG, *op. cit. supra* note 8, at 166.

15. "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the *strong* public policy of the forum." RESTATEMENT, CONFLICT OF LAWS § 612 (1934). (Emphasis added.)

16. 224 N.Y. 99, 120 N.E. 198 (1918).

17. *Id.* at 111, 120 N.E. at 202.

18. See Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938).

thorough choice of law analysis which would include an examination of the foreign state's interests.[19] Moreover, traditionally, "public policy" has been used in conflict of laws cases in a negative sense, that is, to prevent a result contrary to the forum's interests which would occur if foreign law were applied.[20] New York courts, preferring to enforce rather than invalidate foreign claims, have been reluctant to invoke the "public policy" doctrine even in this negative sense.[21] However, in the principal case, as in *Hutchison*, "public policy" was employed in an affirmative manner, that is, not to prevent the application of the Spanish community property law because it was inimical to the New York law, but rather to make certain that because of New York's policy, New York law would govern the rights of the parties without regard to Spanish law or interests.[22] When so used, "public policy" substitutes itself for the usual and more involved choice of law analysis.[23]

The dissent disagreed with the majority on the factual question of whether the Duke and Duchess intended to have New York law alter their marital property rights, and it criticized the majority's use of "public policy" without considering the interests of Spain. However, it advocated the use of the traditional rules which would have automatically applied the foreign law without considering the interests of New York.[24] Thus the Court of Appeals was divided by

19. See 2 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 555-75 (2d ed. 1958); Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656 (1918); Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

20. See CHEATHAM, GRISWOLD, REESE & ROSENBERG, CASES ON CONFLICT OF LAW 403-05 (5th ed. 1964); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940).

21. See, *e.g.*, Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964) (gambling debts validly incurred elsewhere are enforceable in New York courts despite anti-gambling provisions in the New York Penal Law); Matter of May, 305 N.Y. 486, 114 N.E.2d 4 (1953) (New York recognizes marriage contracted in another state even though it would be incestuous and void if performed in New York); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945) (New York recognizes validity of common law marriage completed in another state).

22. Indeed, it would appear that "public policy" could not be used here in its usual negative sense for a New York court held: "Community property laws are in no way repugnant to the public policy of New York." Chesny v. Chesny, 197 Misc. 768, 771, 94 N.Y.S.2d 674, 678 (Sup. Ct. 1950), *modified*, 277 App. Div. 879, 98 N.Y.S.2d 151 (1950).

23. "[P]ublic policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule, the court may refuse on public policy grounds to apply the law to which the rule makes reference. . . . In such a view the "public policy" doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function. It is a way of saying, "In these circumstances this forum makes reference to its internal law rather than to the law of another state to which our 'normal' choice of law would direct us."

Paulsen & Sovern, *supra* note 19, at 981.

24. Principal case at 176, 211 N.E.2d at 641, 264 N.Y.S.2d at 238-39.

extreme views, the majority calling for an application of the *lex fori* and the minority invoking the laws of Spain under the traditional rules, with neither side considering the interests of the opposing jurisdiction.

In light of the trend in conflict of laws toward a more flexible approach in choosing the applicable law,[25] the court might have reached the same result by characterizing the problem in the principal case as one involving a marital contract. Such a classification could have readily followed from the trial court's finding that the joint account agreements served as express interspousal contracts to alter marital property rights.[26] Since the validity of an interspousal agreement concerning marital property rights is to be determined by the same rules that determine the validity of any other contract,[27] the Court of Appeals would thus have been able to apply the flexible "center of gravity" or "grouping of contacts" theory developed earlier by the same court in *Auten v. Auten*.[28] With the application of such a theory, "public policy" would not be used as a tool to apply mechanically the forum's law but, rather, would be considered as one of the many interests which the court would weigh in making its choice of law.

In determining which jurisdiction has the most significant contacts, the court should consider the fact that New York is the situs of the joint accounts and that the couple intended to have the property governed by New York law. The matter of intent is extremely important since courts will usually give effect to the justifiable expectations of the parties so long as there is a reasonable connection between the selected jurisdiction and the parties.[29] Also relevant is the fact that the "public policy of New York appears to be one of encouragement to non-residents to do business with New York banks."[30] On the other hand, the court should take note of the fact that Spain's ancient community property system is designed to give economic stability to the family unit,[31] and the application of New York law would not only thwart the Spanish policy, which is historically grounded in deep-seated notions of family obligation, but it would also allow interspousal agreements to alter interests in marital property at the expense of other members of the family.

25. See note 7 *supra*.

26. Wyatt v. Fulrath, 38 Misc. 2d 1012, 1017, 239 N.Y.S.2d 486, 492 (Sup. Ct. 1963).

27. GOODRICH, *op. cit. supra* note 8, § 125.

28. 308 N.Y. 155, 124 N.E.2d 99 (1954). See discussion of this case at note 7 *supra*.

29. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960) provides that the validity of a contract is determined by the local law of the state with which the contract has its most significant relationship and the state of the most significant relationship is the state chosen by the parties.

30. Wyatt v. Fulrath, 38 Misc. 2d 1012, 1016, 239 N.Y.S.2d 486, 491 (Sup. Ct. 1963).

31. Neither the majority nor dissenting opinion considered the fact that articles 806-08 of the Spanish Civil Code provide that parents must leave two-thirds of their individual estates to their descendants as "forced heirs."

Moreover, Spanish creditors undoubtedly rely upon the rights which these family members would normally have. Also, although courts may justifiably be influenced in their choice of law by the intentions and expectations of the parties, such expectations are only one of many considerations and are not necessarily controlling. The Restatement acknowledges that a contract's validity is generally determined by the chosen law, but it provides an exception to this rule when "application of the chosen law would be contrary to a fundamental policy of the state which would be the state of the governing law in the absence of an effective choice by the parties."[32] Providing for the individual spouse's and the heirs' financial security by means of the community property arrangement is clearly a fundamental policy of Spain which would be circumvented if the parties' intention to apply New York law were to prevail. To be sure, the resolution of the question as to which of the jurisdictions has the most compelling interests is no simple task, but to avoid the question by adopting a "public policy" approach, as did the court in the principal case, does nothing but revert to a mechanistic approach which the New York courts have sought to avoid.

---

32. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332a(c) (Tent. Draft No. 6, 1960).