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FOR DISCUSSION ONLY

Conflict of Laws in Trusts and Estates Act

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Conflict of Laws in Trusts and Estates Act

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Prefatory Note

The Uniform Conflict of Laws in Trusts and Estates Act (this "act") continues much of the familiar common-law approach to conflict of trust and estate laws while also updating, clarifying, and simplifying it to account for modern practice developments.

The point of departure for this act is the preservation of traditional law's recognition of a donor's freedom to choose the law that will govern most aspects of the donor's will or trust, subject to longstanding public policy limitations. This emphasis on the donor's freedom in choice of law is necessary for stability and predictability in estate planning. Moreover, it is familiar to practitioners and consistent with prevailing American law as well as the law of many foreign countries and international conventions.

To simplify and to take account of the reality of modern practice, however, this act modifies the mechanics of the traditional common-law approach to conflict of trust and estate laws in three important ways: (1) by de-emphasizing the distinction between real and personal property; (2) by minimizing the distinction between testamentary and inter vivos trusts; and (3) by eliminating the application of different laws to matters of construction and interpretation of a will or a trust. Additionally, although this act preserves separate rules for validity of a will or trust and for administration of a trust, those rules are simplified by largely eliminating the distinction between real and personal property and by minimizing the distinction between testamentary and inter vivos trusts. For recent scholarship discussing the need for simplification of trust-conflicts rules, see Robert B. Niles-Weed and Robert H. Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, 97 TUL. L. REV. 1013 (2023).

Real and Personal Property. This act reduces the significance of the historic distinction between movable (i.e., personal) and immovable (i.e., real) property for purposes of ascertaining the governing law in trust and estates matters. One reason for traditionally applying different conflict-of-laws rules to different types of property in the trust and estates context was that different rules of substantive succession law governed the distribution of movable and immovable property. In addition, the common law historically valued uniformity in the application of law with respect to land, insofar as "each parcel of land should be subject to the state in which it is situated, and that the law which would be applied by the courts of that state, whether its own local law or the local law of some other state, should be applied by the courts of all states." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 10, topic 2, intro. note.

These rationales for distinguishing between real and personal property have led to a rigid application of the "situs rule" – an approach that has been soundly criticized. *See, e.g.*, Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134 (2014) ("Despite the strength of the situs rule, there are clear cases in which the situs has no legitimate interest in applying its law. When a person is domiciled in one state and owns real property in another, the domicile state has strong interests in determining who owns the domiciliary' s property upon divorce or death."); Christopher A. Whytock, *Situs and Domicile in Choice of Law for Succession Issues*, 97 TUL. L. REV. 1181 (2023). Moreover, the distinction in the substantive law between succession for movable and immovable property no longer exists. Personal property in the form of liquid financial interests now tends to make up a greater part of an individual's wealth. *See generally* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988). And "land is now easily and routinely converted into personal property for succession purposes by putting it into a limited liability company or other corporate form so that, at death, what is transferred is the decedent's ownership share in the company." Niles-Weed and Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, *supra* at 1031.

In short, an inflexible application of the situs rule seems difficult to justify today both because it is so routinely avoided and because it seems difficult to defend in all instances, particularly on occasion in which the decedent and all the beneficiaries are located in one state and the land in another. In such cases, the "value judgments" regarding state public policies more appropriately belong to the "legislative competence" of the former state rather than the latter. SYMEON SYMEONIDES, PRIVATE INTERNATIONAL LAW 267 (2008). That is the approach of this act. Nevertheless, in some instances, it was deemed practically useful to retain the distinction and preserve the "situs" rule, see Sections 301. The situs rule is preserved, in the case of intestacy, out of the practical necessity of ensuring certainty of title. In areas other than trusts and estates, application of the law of situs with respect to matters involving real property remains important and is a defining characteristic of resolving conflict of laws in common-law jurisdictions. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (AM. L. INST. 1969) ("Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs."); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW 573 (5th ed. 2001) ("The title to land is, in theory at least, always controlled by the local law of the situs of the land."). The approach of this act is consistent with the Hague Convention on the Law Applicable to Trusts and on Their Recognition art. 4, July 1, 1985, 23 I.L.M. 1388 [hereinafter Hague Trust Convention], which maintains a unified approach for the law applicable to validity, administration, construction, and effects. *See* Hague Trust Convention art. 8.

<u>*Inter Vivos and Testamentary Trusts*</u>. This act adopts a more modern approach to the application of the governing law with respect to inter vivos and testamentary trusts by rejecting traditional law's distinction between testamentary and inter vivos trusts. The traditional approach was justified by a now outdated view that testamentary trusts were part of an estate plan whereas inter vivos trusts were like any other inter vivos transfer of property. In light of the nonprobate revolution, the traditional justification is no longer persuasive. Today, the inter vivos revocable trust is *the* nonprobate substitute that "most resembles a will in nature and function" and "has replaced the will as the centerpiece instrument for property transfer at death." ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 454, 475 (11th ed. 2022). Because inter vivos trusts are so commonly part of an integrated estate plan, the application of differing rules for conflict-of-laws purposes is generally no longer warranted. Once again, the more appropriate analysis — adopted by this act — involves balancing competing values and state policies.

<u>*Construction and Interpretation*</u>. This act simplifies the common-law rules that traditionally made distinctions between matters of interpretation and matters of construction. *See,*

e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268 cmt. a, 277 cmt. a. Interpretation was understood as the process of determining the donor's actual intention from the text of a trust instrument or a will and from extrinsic evidence. Construction was understood as the process of attributing intention from rules of construction and from constructional preferences. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (2003). Under traditional law, courts were said to apply the forum law to interpretation and the law chosen by the testator or settlor or the law of the state with the most significant relationship to the estate or trust for construction.

Crucially, however, both construction and interpretation are purely matters of a donor's actual or probable intent. Insofar as the donor could have provided for a substantive outcome in the terms of the donor's will or trust, the choice of the applicable governing law on these matters should be entirely within the donor's discretion. Accordingly, although the distinction between construction and interpretation is perhaps conceptually sound, the application of different rules for conflict-of-laws purposes does not occur in practice and is unwarranted. Many rules of interpretation are part of substantive, rather than procedural, trusts and estates law. This act therefore simplifies the traditional approach by applying the same rule for matters of construction and for matters of interpretation, namely, the law chosen by the testator or settlor or, in the absence of a choice, the law of the state in which the testator was domiciled at the time of death or, for trust matters, the law of the state in which the settlor was domiciled at the relevant time.

Validity. Matters of validity of a will or a trust or the terms of a will or a trust involve an array of issues, such as the formal requirements of execution necessary to establish a will or trust, the standards of capacity and consent necessary to create a will or trust, and the rules of substantive law that embody public policy limitations on a testator's or settlor's discretion in creating a will or trust. These matters raise distinct policy questions from matters of administration and from issues of construction and interpretation, insofar as they involve a balance between technical issues (e.g., some formalities) and other issues that embody stronger state interests for which a settlor's discretion should be limited (e.g., capacity). Accordingly, this act adopts different approaches for different matters of validation. With regard to formal validity, the well-accepted approach of broad alternative rules of validation for wills and trusts is preserved. With respect to substantive matters of validity, however, this act recognizes that the testator's or settlor's domicile is often the most important state, and therefore its law is usually applied. *See, e.g.*, Section 202 and Section 303.

Trust Administration, Principal Place of Administration, and Court Supervision. Issues of trust administration pertain to the day-to-day management of the trust. This act preserves the general approach of recognizing the settlor's freedom to choose the applicable law to govern matters of administration unless the designated law has no substantial relation to the trust. This approach achieves a balance between allowing for stability and planning by the settlor and preservation and recognition of state interests. In instances in which the settlor has not chosen an applicable law or when the choice is ineffective, this act applies the law of the state of the principal place of administration of the trust. This act also recognizes that the law governing the administration of a trust may be changed if the state with the most significant connection to the trust changes.

This act also provides a list of considerations that courts may use in deciding the principal place of administration of a trust. This concept is important not only for purposes of ascertaining which court has primary authority over a trust but also in deciding which state has the most significant connection to the trust. In many instances and on many matters, the state that is most connected to the trust will be the state in which the trust is administered. Consequently, the concept of the principal place of administration is doubly important and merits a detailed treatment in this act. See Sections 205, 206, and 208.

Public Policy. On some of the above matters, this act adopts an approach of generally granting the donor wide discretion to choose the applicable law, limited by certain factors in matters of substantive validity of a will or trust that the choice of law not violate a strong public policy of the state with the most significant connection to the estate or trust as to the matter at issue. Although this act does not attempt to specify what is or is not a strong public policy – leaving the matter to continued common-law development in case law or legislation – the act does provide guidance for a court in ascertaining what state has the most significant connection to an estate or to a trust as to the matter at issue, both for purposes of ascertaining whether the testator's or settlor's choice of law is valid and in instances in which the testator or settlor did not make a choice. In many instances, the distinctions between real and personal property held in an estate or a trust and between testamentary and inter vivos trusts may be relevant considerations for a court in ascertaining the state with the most significant connection to the estate or trust. But this act uses those distinctions only when important value judgments are at stake and only as competing factors rather than rigid distinctions to be employed in all cases.

Application of Different Laws. This act recognizes that the laws of different states may be applicable to different aspects of a trust or an estate (i.e., the applicability of *dépeçage*). See Section 104.

Testate and Intestate Succession. This act provides conflict-of-laws rules for intestacy and testate succession, including specific conflict-of-laws rules for issues such as revocation of wills by physical act and escheat. See Sections 306 and 307.

Governing Law. This act provides that in the absence limiting of qualifying language in a governing law clause, a general statement in a will or trust that the law of a particular state applies is a sufficient invocation of that state's laws under the various provisions of this act that allow for settlor or testator choice of law. See Sections 207 and 308.

Powers of Appointment. This act provides rules to identify the applicable law to govern the exercise of a power of appointment. Among the various issues raised by an exercise of a power of appointment are the formal as well as the substantive validity of the exercise. The latter category includes matters not only of capacity and consent of the powerholder but also substantive rules that may be implicated by the exercise of a power of appointment, such as the rule against perpetuities. All of the above matters, as well as matters of construction and interpretation of a power, are addressed by this act. See Sections 401, 402, 403, and 404.

Elective Share and Bars to Succession. This act provides specific conflict-of-laws rules for issues such as elective share rights and the slayer rule, which are applicable to both trusts and estates. See Sections 405 and 406.

Administration of a Decedent's Estate. Matters governing the administration of a decedent's estate are traditionally considered matters of procedure, rather than substance, and thus governed by the local law of the state in which the applicable court is located. As a result, these matters are excluded from the application of this act. See Section 105.

Organization of Act

This Act contains five articles that address conflict-of-law matters involving trusts and estates. Article I contains general substantive provisions applicable to the entire act. Article II governs choice-of-law matters with respect to trusts. Article III focuses on matters of testate and intestate succession. Article IV addresses powers of appointment, elective share rights, and bars to inheritance or forfeiture of rights. Finally, Article V addresses technical matters applicable to all uniform acts and the act's effective date.

Conflict of Laws in Trusts and Estates Act

[Article] 1

General Provisions

Section 101. Title

This [act] may be cited as the Conflict of Laws in Trusts and Estates Act.

Section 102. Definitions

In this [act]:

(1) "Administration of a trust" includes the exercise and performance of a trustee's or trust director's powers and duties. The term includes:

(A) a trustee's or trust director's investment, management, or allocation between principal and income;

(B) the distribution, disbursement, or decanting of trust property;

(C) the appointment of a trustee or trust director or a successor trustee or trust director;

(D) the removal of a trustee or trust director;

(E) the modification or termination of a trust;

(F) the remedies for a trustee's or trust director's breach; and

(G) virtual representation.

(2) "Construction and interpretation" means the process of determining actual intent from the terms of a will or trust and admissible extrinsic evidence, and the process of attributing intent by application of rules of construction and constructional preferences. The term includes use of:

(A) rules of interpretation within the law of trusts and estates that govern parol evidence, resolution of ambiguity, and reformation; and

(B) constructional preferences and rules for construing a will or trust in accordance with a general dispositive plan or in a way that achieves more favorable tax consequences.

The term does not include the application of the rules of evidence or other rules of civil procedure of this state.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Estate" includes the probate property of a decedent as originally constituted and as it exists from time to time during administration.

(5) "Execute", except in the definition of "sign", means carry out or complete the formalities necessary to make effective a will, trust, or exercise of a power of appointment, including compliance with the formalities of a state's law on signing, witnessing, notarizing, delivering, or orally declaring. The terms "execution" and "executed" have corresponding meanings. The terms "execute", "execution", and "executed" do not include the formalities for the transfer of property to a trustee.

(6) "Law", used to refer to the law of another state, excludes conflict of laws rules of the state except as provided in this [act].

(7) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(8) "Power of appointment" means [cite to Uniform Powers of Appointment Act Section 103(13)] [a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the

appointive property. The term does not include a power of attorney].

(9) "Powerholder" means [cite to Uniform Powers of Appointment Act Section 103(14)] [a testator or settlor having a power of appointment].

(10) "Property" means anything that may be subject to ownership including real and personal property or any interest in property.

(11) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(12) "Settlor" means [cite to Uniform Directed Trust Act Section 2(6)] [a person, including a testator, that creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion].

(13) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(14) "State" means, as may be appropriate:

(A) a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States; or

(B) a foreign country, or a territorial subdivision of a foreign country that has its own laws governing trusts or estates.

(15) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the instrument that contains some or all of the trust's provisions, including any amendments to the trust; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law; [or]

(ii) court order[; or

(iii) a nonjudicial settlement agreement under [Uniform Trust Code Section 111]].

(16) "Trust" means an express trust, whether charitable or noncharitable. The term includes:

(A) an amendment to the trust;

(B) a trust created under a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust; and

(C) a non-purchase money resulting trust if there are continuing interests that require the trust to be administered in the manner of an express trust.

(17) "Trust director" means [cite to Uniform Directed Trust Act Section 2(9)] [a person, other than a trustee, that is granted a fiduciary power over a trust. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or

not the person is a beneficiary or settlor of the trust].

(18) "Will" includes codicil and a testamentary instrument that appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

Legislative Note: *A state that has enacted the Uniform Powers of Appointment Act should replace paragraphs (8) and (9) of this section with cross-references to Sections 102(13) and (14) of that act. A state that treats some fiduciary powers, such as decanting, as a power of appointment should replace the bracketed language in paragraph (8) with its own definition of the term "power of appointment." A state that has enacted Uniform Probate Code Section 1-201 (38) and (57) should replace paragraphs (10) and (18) of this section with cross-references to those provisions. A state that has enacted Uniform Trust Code Section (15) should replace paragraph (12) of this section with a cross-reference to that provision.*

A state that has enacted Uniform Directed Trust Act Section 2(6) should replace the bracketed language of paragraph (12) with a cross reference to Section 2(6) of that act.

The definition of "terms of a trust" in paragraph (15) follows the Uniform Directed Trust Act (2017) as well as the Uniform Trust Decanting Act and Uniform Trust Code as those acts were amended in 2018 to conform to the Uniform Directed Trust Act. Thus, a state that has enacted the definition of "terms of a trust" from the Uniform Directed Trust Act or the as-revised identical definition from the Uniform Trust Decanting Act or Uniform Trust Code should cross-reference that definition. A state that has enacted the definition from an older version of the Uniform Trust Decanting Act or Uniform Trust Code, or that otherwise has a state statute defining "terms of a trust" in a way inconsistent with paragraph (15), should replace or update that definition to conform to paragraph (15).

A state that has not enacted Uniform Trust Code Section 111 should replace the bracketed language of paragraph (15)(B)(iii) with a cross reference to its statute governing nonjudicial settlement or should omit paragraph (15)(B)(iii) if it does not have such a statute.

The definition of "trust" is taken from Uniform Trust Code Section 102. Thus, a state that has enacted that section but not Uniform Probate Code Section 201(54) should replace paragraph (16) with a cross reference to Uniform Trust Code Section 102. A state that has enacted both Uniform Trust Code Section 102 and Uniform Probate Code Section 201(54) should conform those definitions to paragraph (16).

A state that has enacted legislation on trust directors, protectors, advisors, or comparable offices should replace the bracketed language in paragraph (17) with a cross reference to the state's statute defining the relevant term.

Reporter's Note

(1) *Administration of a trust*. The definition of "administration of a trust" includes matters related to the exercise of powers and duties of a trustee or trust director, and an illustrative list is included within the term "administration." It may include other matters not specifically listed in the definition. This definition is based upon comment (a) of Section 271 of the Restatement (Second) of Conflicts of Laws. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 271 cmt. a. According to the Restatement:

> [Matters of administration] include the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers…. They include the liabilities which may be incurred by the trustee for breach of trust…. They include questions as to what are proper trust investments…. They include the trustee's right to compensation…. They include the trustee's right to indemnity for expenses incurred by him in the administration of the trust.... They include the removal of the trustee and the appointment of successor trustees.... They include the terminability of the trust….

RESTATEMENT OF CONFLICT OF LAWS, *supra*, § 271 cmt. a. Matters of administration include both distributions of trust property to beneficiaries and disbursements of trust property to third parties, such as creditors. The inclusion of virtual representation within the concept of administration should be understood to include all matters of virtual representation without regard to the subject of the matter being litigated. Matters of administration do not, however, include matters of ascertaining the appropriate beneficiaries of a trust or the extent of their interests. These are more properly considered matters of construction. *See id*.

(2) *Construction and Interpretation*. The definition of "construction and interpretation" is informed by Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 cmt. c (2003). It includes, among other things, rules of construction applicable to abatement, ademption, allocation between principal and income, lapse and antilapse, classification and treatment of class gifts, conditions of survivorship, exoneration of liens, pretermission, and survivorship. It does not include rules governing hearsay, best evidence, and authentication of documents.

(3) *Electronic*. The definition of "electronic" is the standard Uniform Law Commission definition.

(4) *Estate*. The definition of "estate" is based upon Uniform Probate Code Section 1-201(13). It differs from the similar provision in the Uniform Probate Code by limiting the concept of an estate to property of the decedent only.

(5) *Execute*. The definition of "execute" includes complying with all the formalities of a transaction necessary to make it legally effective, such as the requirement that a will or trust be signed or witnessed. It is also broad enough to encompass compliance with the laws that allow for transactions that are effective even if not in writing, such as oral trusts or even oral wills. *See,*

e.g., UNIF. PROB. CODE § 401(2) ("A trust may be created by… declaration by the owner of property that the owner holds identifiable property as trustee.").

(6) *Law*. The definition of "law" as used in this act refers to a jurisdiction's "internal" law, rather than the "whole" law of a jurisdiction. Consequently, this act generally excludes application of the concept of *renvoi* under which a jurisdiction's choice-of-laws rules are considered. This act allows the courts of a state to apply the law of another state without consideration of the other state's choice-of-laws rules. This approach accords with modern conflict-of-laws codifications. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.06 (Tentative Draft No. 3 March 2022); LA. CIV. CODE art. 3517. For a discussion of the complications and problems with applying the doctrine of *renvoi*, see Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J 129, 159 (2014). Instances in which the broader term "law" is used in this act to include the conflict-of-laws rules of a state are in Sections 103 and 401(2).

(7) *Person*. The definition of "person" is the standard Uniform Law Commission definition.

(8) *Power of Appointment*. The definition of "power of appointment" is taken from Uniform Powers of Appointment Act Section 102(13).

(9) *Powerholder*. The definition of "powerholder" is based upon Uniform Powers of Appointment Act Section 101 (14). It differs slightly from the Uniform Powers of Appointment Act insofar as the definition in this act makes clear that a powerholder need not be granted a power of appointment but may be a powerholder due to a reservation of a power of appointment.

(10) *Property*. The definition of "property" is based upon Uniform Probate Code Section 1-201(38).

(11) *Record*. The definition of "record" is the standard Uniform Law Commission definition.

(12) *Settlor*. The definition of "settlor" is based upon the Uniform Trust Code Section 103(15) and the Uniform Directed Trust Act Section 2(6), as well as the Uniform Trust Decanting Act Section 25. When a decanting occurs, often a trust instrument will be signed by a person other than the original settlor, such as by a beneficiary, trustee, or some other person. In such a case, ascertaining who the appropriate settlor is of the decanted trust may prove challenging as the property in the decanted trust was contributed by the original settlor but the new trust may be created by a person other than the original settlor. In some instances, it may be more appropriate to consider the person who decants or creates the new trust as the settlor, *see, e.g.*, Sections 201 and 202. In other instances, it may be proper to consider the person who contributed the property to the original trust as the "settlor" of the decanted trust. *See, e.g.*, Section 203. In still other instances, both the original settlor and the person who decants may be appropriately considered as "settlors" of the decanted trust. *See, e.g.*, Sections 203 and 204.

(13) *Sign*. The definition of "sign" is the standard Uniform Law Commission definition.

(14) *State*. The term "state" is broadly defined in this act to ensure the applicability of this act to trusts and estates established under or governed by the laws in foreign countries as well as the various American states, as a trust or estate may be most closely connected to a country other than the United States. In situations in which the law of a foreign country does not prescribe applicable trusts and estates law, the law of the relevant political subdivision of the foreign country that does prescribe trusts and estates law should be applied. For example, the term "state" should be understood to refer to Quebec law for a trust created under the law of Quebec, as Canadian law does not prescribe trust law.

(15) *Terms of a trust*. The definition of "terms of a trust" is taken from the Uniform Directed Trust Act Section 2(8) and Uniform Trust Code Section 103(18) and recognizes that court orders and nonjudicial settlement agreements, both of which are of growing practical significance, are sometimes used to vary the terms of a trust from a settlor's original intent. The definition also takes notice of a power in a trustee or a trust director to modify the terms of a trust. The expanded definition of "terms of a trust" in this paragraph is consistent with the Restatement, which recognizes the possibility that the terms of a trust may later be varied from the settlor's initial expression. *See* RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. b(1) (2007) ("References . . . to the terms of the trust . . . also refer to trust terms as reformed or modified by court decree, and as modified by the settlor or others or by consent of all beneficiaries.").

(16) *Trust*. The definition of "trust" is taken from Uniform Trust Code Section 102, as modified by Restatement (Third) of Trusts, § 7 cmt e (Am. L. Inst. 2003). As recognized in the Uniform Trust Code, this act "is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code." UNIF. TR. CODE § 102 comment; *see also* John D. Morley & Robert H. Sitkoff, *Trust Law: Private Ordering and the Branching of American Trust Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew Gold, John C.P. Goldberg, Daniel B. Kelly, Emily L. Sherwin & Henry E. Smith eds., Oxford University Press, 2021); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); Thomas P. Gallanis, *Commercial Trusts in U.S. Legal Thought: Historical Puzzles and Future Directions*, 88 U. CIN. L. REV. 843 (2020).

(17) *Trust director*. The definition of "trust director" is taken from the Uniform Directed Trust Act Section 2(9).

(18) *Will*. The definition of "will" is taken from Uniform Probate Code Section 1-201(57).

Section 103. Common Law and Principles of Equity

The common law, including the common law of conflict of laws, and principles of equity supplement this [act], except to the extent modified by this [act] or other law of this state.

Reporter's Note

This section confirms that the common law and principles of equity remain applicable except to the extent modified by this act or other law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c ("In the United States, and in other Anglo-American countries, Conflict of Laws rules generally form part of the common law."). The common-law preference for the law of the lex fori, however, is one rule is that clearly modified in many cases by the provisions of this act. *See, e.g*., Albert A. Ehrenzweig, *The Lex Fori – Basic Rule in Conflict of Laws*, 58 MICH. L. REV. 637,637 (1960) ("Once a court has taken jurisdiction, it will usually apply its own law…").

Section 104. Law of More Than One State May Apply

Except as provided in Section 202(2), 303, or 402(2) concerning matters of capacity and consent, different matters under [Articles] 2, 3, and 4 may be governed by the law of different states.

Reporter's Note

This section confirms the continuing applicability of the principle of *dépeçage*. Under this principle, the laws of different states may apply to different issues of a case. *Dépeçage* may occur by virtue of legislation, judicial decision, or the volition of a party. *See, e.g*., SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW: AN INTERNATIONAL COMPARATIVE ANALYSIS 224 (2014). Legislative *dépeçage* occurs when legislation imposes different conflict-of-laws rules on an issue-by-issue basis. Volitional *dépeçage* occurs when a party, such as a settlor or testator, chooses the law of different states to apply on an issue-by-issue basis to parts of a trust or will. *See, e.g*., Sections 204 & 305 (regarding matters of construction and interpretation of a trust or will). Judicial *dépeçage* occurs when a court applies different conflict-of-laws rules on an issue-by-issue basis. This section expressly authorizes judicial *dépeçage*, in addition to legislative and volitional *dépeçage*. Most commonly, different laws may be chosen by a settlor to govern different matters of administration. For example, the settlor may choose the law of State X to govern matters of trustee compensation and the law of State Y for matters regarding investment decisions. The flexibility provided in this section to allow a settlor to choose different laws to govern different aspects of a trust or estate is consistent with the law recognized in virtually all states. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. c ("The settlor may provide that different matters of administration shall be governed by different laws. Thus, he may provide that the local law of one state shall govern the compensation of the trustee and that the local law of another state shall govern investments.").

The application of *dépeçage* can, in some instances, lead to undesirable consequences. *See, e.g*., SYMEONIDES, CODIFYING CHOICE OF LAW, *supra*, at 222; Symeon Symeonides, *Issue-by-Issue Analysis and* Dépeçage *in Choice of Law: Cause and Effect*, 45 U. TOL. L. REV. 751, 759 (2014). Care has been taken in this act and care should be taken by courts to avoid inappropriate *dépeçage. See, e.g.,* Section 205(b)(1) (applying the law of the state governing matters of administration of a trust to issues of construction and interpretation of a trust instrument.). For instance, if a settlor domiciled in State X creates a trust involving real property in State X but names a trustee located in State Y to administer the trust, a court is not required to apply different laws to different aspects of the trust. Depending upon the circumstances, a court may choose to avoid scission in favor of uniformity and apply the law of State Y not only to matters of administration but also to matters of construction and interpretation. Matters of validity should be assessed under Sections 201, 202, 203, 302, 303 and 304.

<u>International Convention and Regulation</u>. This section is consistent with Article 9 of the Hague Trust Convention. *See* Hague Trust Convention art. 9 ("In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.").

Section 105. Exclusions

This [act] does not apply to:

(1) choice of law that governs:

(A) transfer of property to a trustee, other than by decanting;

(B) recordation or registration of title to:

(i) trust property; or

(ii) except as provided in Section 301(b) concerning intestate succession to real property or Section 307 concerning no taker, property transferred from a decedent's estate;

(C) subject to Section 201 concerning formal validity of a trust, Section 202 concerning capacity and consent of a settlor, Section 203 concerning substantive validity of a trust, Section 204 concerning construction and interpretation of a trust instrument, and Section 205 concerning trust administration, protection of a person, other than a beneficiary, trustee, or trust director, in dealing with a trustee, trust director, or trust property;

(D) a nonprobate transfer, other than a transfer in trust;

(E) estate administration, including:

(i) the powers and duties of a personal representative; and

(ii) the time and manner in which a will may be probated; or

(F) a disclaimer; or

(2) the need for or requirements of a probate proceeding in this state if the decedent dies domiciled in another state.

Reporter's Note

The transfer of property to a trustee. This act does not apply to matters regarding the validity of a transfer to a trustee. Under basic principles of trust law, a trust in some instances is not created until the trustee receives the trust property. *See, e.g.*, UNIF. TR. CODE § 401(1) & cmt.; RESTATEMENT (THIRD) OF TRUSTS §§ 10, 40. As a result, the failure to effect a transfer of property to the trustee, such as when the transfer is affected by fraud or duress, could cause the invalidity of a trust. Choice-of-law rules applicable to other areas of law regarding the validity of inter vivos transfers. Similarly, this act does not provide a choice of law that governs whether the transfer of property to a trustee is a voidable or fraudulent transfer. *See* UNIF. FRAUDULENT TRANSF. ACT § 10.

Recordation or Registration of Title. This act does not apply to matters pertaining to the recordation or registration of title to property or trust assets, except for Section 301(b). The historic justification for application of the rigid situs rule regarding real property was that third persons concerned with real estate would be subject to a "greater burden, . . . if they could not always assume that the local law of the situs would be applied" and that certainty and predictability were necessary for land titles. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 cmt. a. This justification is persuasive insofar as a state may have an interest in ensuring the applicability of its recordation system when immovable property within its borders is involved. Similarly, a state may justifiably seek to apply its good faith purchaser doctrine or law of adverse possession when real estate is located within a state. Unfortunately, the situs rule has been applied overbroadly and too pervasively, even to matters in which the situs state would have very little interest in applying its law. For a modern critique of the overbroad application of the situs rule, see Whytock, *Situs and Domicile*, *supra* at 1181 *et seq*. As a result, this article removes certain external matters from the application of this article and therefore avoids overuse of the broad situs rule for conflict-of-laws matters internal to the trust. At the same time, this article allows a state to apply its general law to protect its recording system and third parties without interference or application of this article.

The protection of a person other than a beneficiary, trustee, or a trust director in dealing with a trustee, trustee director, or trust assets. Paragraph (1)(c) makes clear that the scope of this act is conflict-of-laws matters that are internal to the trust and which involve decisions and disputes concerning the essential parties to the trust relationship, e.g., settlor, trustee, and beneficiaries. This act does not purport to govern choice-of-law matters that arise by virtue of a trustee's interaction with third parties, such as creditors. For example, a trustee may grant a security interest in trust property, the attachment and perfection of which would be governed by the choice-of-law rules in the Uniform Commercial Code rather than this act. *See, e.g*., UNIF. COMM. CODE §§ 1-301, 4A-507, 5-116, 8-110, 9-301–9-307, or 12-107. Paragraph (1)(c) does, however, contain an important qualification, namely that it is subject to Sections 201, 202, 203, 204, and 205 of this act. In other words, if a matter connected with a person who is not a beneficiary, trustee, or trust director also deals with an issue of trust validity, administration, or interpretation and construction, the choice-of-law rules in this act would apply to such matters. For instance, if there is a question as to the nature or extent of a trustee's powers, this question may involve application of construction of the trust instrument pursuant to Section 204.

Nonprobate Transfers. This act also does not apply to nonprobate transfers other than transfer in trust. Thus, excluded from this article are transfers that occur through life insurance, retirement accounts, pay-on-death and transfer-on-death beneficiary designations, and similar arrangements. Although modern scholarship and law reform has advocated for the unification of much of the law applicable to wills and will substitutes, "to the extent appropriate," not all states are in accord in applying wills doctrine to will substitutes. *See, e.g.,* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003). The analogous application of the conflict-of-laws rules for wills, as opposed to contracts, to will substitutes is less clear. Obviously, however, transfers in inter vivos trusts are also nonprobate transfers, but such transfers in trust are not excluded and are, in fact, explicitly covered by Article 2 of this act.

Estate Administration. This act also does not apply to matters of estate administration, which are traditionally governed by the local law of the forum. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 316 ("The duties of an executor or administrator with regard to the conduct of the administration are usually determined by the local law of the state of appointment.); 4 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 414 (1968) ("Proceedings, of course, whether in litigious or in noncontentious matters, follow the *lex fori*, save for contrary positive rules…. [T]he ordinary formula says that it is the law of the court appointing the administrator that controls administration."). Questions of estate administration include the requisite level of court supervision, the filing of accountings, the posting of bond, the need for approval by a court of certain actions, the ability of a personal representative to pay certain debts or sell particular assets, and many other matters. Unlike laws governing the substantive devolution of an estate, estate administrative matters are "determined by the local law of the state of appointment even [if] it is not the state of domiciliary administration and [even if] the local law of the state of domiciliary administration is different. *See id*. at cmt (a). *See, e.g*., JILL GUSTAFSON AND KAREN L. SCHULTZ, 16 AM. JUR. 2D Conflict of Laws § 49 ("The original probate of a will is also a matter of state regulation and depends entirely upon the local law."); *In re Estate of High*, 19 So. 3d 1282 (Miss. Ct. App. 2009) (holding that Mississippi's statute of limitation applied in a Mississippi probate proceeding of a will executed in Wisconsin). Although Section 302 to 304 provide that wills executed pursuant to foreign state laws may be valid in this state, this state may apply its own law in establishing how such a will is proven. For example, states differ on whether a one-step or two-step affidavit makes a will self-proving. *See, e.g*., UNIF. PROB. CODE § 2-504. Also, states may differ on the type of proof required to establish the validity of a holographic will. *Compare* Tex. Est. § 256.154, *with* La. Code of Civ. Proc. art. 2883. *See Keane's Will*, 417 N.Y.S.2d 28, 28 (Sur. Ct. 1979) (applying New York law for probate of a will executed in Massachusetts and noting that "[t]he court has taken judicial notice of Massachusetts law, however, the problem here is not a question of the validity of the execution of the will which would be governed by Massachusetts law, but a procedural question, to wit, the proof of the will which is determined by the law of the forum.). Local law also usually governs the time and manner in which claims against an estate must be brought. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 345 ("The time within which a claim may be proved in a state is determined by the law of that state.") & 346 ("The manner in which a claim may be proved in a state is determined by the law of that state."); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW 690 (5th ed. 2001) ("Proof of claims is a matter of local administration purely."); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 22.21, 1328 (2018) ("Most questions of priority in the payment of claims, in both the domiciliary and ancillary jurisdictions, are usually assumed to be determined by the law of the forum."); *Lydem v. Feldman*, 414 A.2d 202, 204 (Conn. Super. Ct. 1979) (holding that a Connecticut statute of limitation relevant to a negligent automobile accident in Connecticut was inapplicable in Wisconsin estate administration, as the "proof of claims is governed by the law of the state of administration"). Matters pertaining to disclaimers are also traditionally viewed as matters subject to the local law of the forum. LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW 403 (5th ed. 2001) ("It is traditional that a forum court always applies its own procedural rules and practices, even though some other state's law governs the 'substantive' aspects of the case."). Given that the primary administration of a decedent's estate will likely occur in the place in which the decedent was domiciled at death, very often the local law will accord with the law of the decedent's domicile. *See, e.g.*, Adam J. Hirsch, *The Code Breakers: How States are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L.J. 325, 370 (Fall 2011) ("In the matter of disclaimers, for example, the benefactor's domicile provides the governing law."); Adam J. Hirsch, *Disclaimers and Federalism*, VAND. L. REV. 1871, 1902 (2014) ("In connection with disclaimers, however, conflicts of law present no danger. The plan documents might themselves contain a choice-of-law provision (in which event, the problem should not arise in connection with implied revocation either). Otherwise, under state law, the applicable rule is simple and clear: The domicile of the decedent governs disclaimers. The fact that the decedent might have migrated from one state to another is irrelevant and so is the possibility that the decedent and beneficiaries reside in different states.").

Ancillary Probate. Finally, this act does not purport to regulate, govern, or displace laws of a state regarding ancillary probate. The bulk of this act relates to matters of choice of law, and thus this article and this act generally prescribe rules that select or choose the applicable law to be applied in a particular case, rather than dictate whether a state may require a court proceeding within its territorial jurisdiction. State laws differ on the scope and the proceedings required for ancillary probate. *Compare* CAL. PROB. CODE § 12512 ("Notice of an ancillary administration proceeding shall be given and … the same proceedings had as in the case of a petition for probate of a will or appointment of a personal representative of a person who dies domiciled in this state."), *with* DC CODE § 20–341(a) "(A foreign personal representative of a nondomiciliary shall not be required to obtain letters in the District of Columbia for any purpose."). *See also* Tex. Est. Code Ann. § 501.005 ("On filing and recording a foreign will in accordance with this chapter, the foreign will: (1) is considered to be admitted to probate; and (2) has the same effect for all purposes as if the original will had been admitted to probate by order of a court of this state…”).

[Article] 2

Trusts

Prefatory Note

This article applies to the formal and substantive validity of the trust, which is governed by Sections 201, 202, and 203; matters of construction and interpretation of the terms of the trust, which is governed by Section 204; matters of trust administration, which is governed by Section 205; and authority of courts over a trust, which is governed by Section 208.

Matters of formal validity of a trust are governed by Section 201. Formal validity pertains to matters of execution including oral declaration. Matters of substantive validity of a trust are governed by Sections 202 and 203. Substantive validity includes matters of capacity and consent as well as whether a trust or the terms of the trust is appropriately created or violates some rule of substantive trust law.

Trust construction and interpretation under Section 204 pertains to the process of determining the donor’s actual intention from the text of the trust instrument, and the process of attributing intention from rules of construction and constructional preferences.

Section 205 applies to the law governing administration of a trust, which permits broad settlor discretion, or, in the absence of an effective choice of law by the settlor, provides that the law governing administration of a trust is determined by the principal place of administration of the trust.

Section 206 provides rules for ascertaining the principal place of administration of a trust. The principal place of administration of a trust has importance not only for ascertaining the applicable law governing administration of a trust but also has implications for court authority over a trust under Section 208. Section 206(b) provides allowable instances in which the settlor may make a choice of law regarding the principal place of administration of a trust. In the absence of an effective designation by the settlor. Subsection 206(c)(1) provides allowable instances in which the trustee may make a choice of law regarding the principal place of administration of a trust. Subsection 206(c)(2) provides default rules regarding the principal place of administration of a trust, in the absence of an effective choice of law by the settlor under Section 206(b) or the trustee under Section 206(c)(1). Section 206(d) specifies the governing law for a change in the principal place of administration of a trust.

Section 207 provides an internal rule of construction and interpretation for choice of law of governing law clauses in trusts. It provides examples of common governing law clauses used in trusts and makes clear that such clauses, in the absence of qualifying or limiting language, is effective to make a choice of law for all matters under this article for which choice of law is allowable.

Section 208 provides rules for determining which court has primary authority over a trust. In addition, this section also prescribes a basis for when a court should decline to exercise authority over a trust, despite having jurisdiction over the trust or trustee.

Sections 209 and 210 provide guidance in ascertaining the state with the most significant connection to a trust and a state with substantial relation to a trust, respectively. Section 209 provides a multi-factor balancing test, which includes both important geographic contacts between a state and a trust in Section 209(a)(1)-(5) and non-geographic factors in Section 209(a)(6) & (7). Ascertaining the state with the most significant connection between a trust and state is important under Section 203 for ascertaining whether a choice of law governing substantive validity of a trust is effective under this article and, in many instances, what state's law governs substantive validity of a trust. Unlike Section 209, Section 210 provides a safe harbor list of geographic contacts, any one of which provides a substantial relation between a trust and a state. Ascertaining whether a state has a substantial relation to a trust is important both under Section 203 for determining whether a choice of law governing substantive validity of a trust is effective and under Section 205 for determining whether a choice of law governing administration is effective.

This article does not apply to the validity of a will as a testamentary disposition, including issues of whether a will was executed with the appropriate formalities or whether the testator, at the time of execution of the will, lacked capacity or was subject to fraud, duress, or undue influence. To the extent that a will is affected by fraud, for example, and the will includes a trust, the invalidity of the will could also correspondingly result in the trust created by the will being invalid. This is not, however, a matter subject to this article, and instead is dependent on the validity of the will, the choice of law for which is governed by Sections 302, 303, and 304. Although the Restatement prescribes rules regarding the validity of testamentary trusts, it does so by referencing the rules regarding the validity of wills. *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. a (referencing the law of domicile for the validity of trusts created by will that involved personal property and the law of the situs for the validity of trusts created by will that involved real property). *See also id* § 263. Similarly, matters of construction and interpretation of a will are addressed in article 3 of this act, rather than this article.

Powers of appointment are also excluded from this article and are instead governed by article 4 of this act. Matters of the formal validity, substantive validity, and construction and interpretation of a power of appointment, including the substantive validity of a trust or power of appointment created or granted by such exercise, are covered by article 4, rather than this article. Nonetheless, various sections of article 4 recognize the formal or substantive validity of a power of appointment based upon the law applicable to the will or trust creating the power of appointment. *See, e.g.*, Sections 401(2)(A) and 403(b)(2).

Finally, the effect of a trust or its terms on elective share rights and bars to succession or forfeiture are also excluded from application of this article and instead covered by article 4 of this act.

Section 201. Formal Validity of Trust: Execution

(a) Except as provided in subsection (b):

(1) an inter vivos trust is valid as to a matter of execution if the trust is valid as to the matter under:

(A) the law of the state where the settlor was physically located at the time of execution of the trust;

(B) the law of the state where the settlor was domiciled, had an abode, or was a national at the time of execution of the trust;

(C) the law of the state where a trustee or trust director was domiciled or had a place of business at the time of execution of the trust; or

(D) the law of the state where any trust property was located at the time of execution of the trust; and

(2) a testamentary trust is valid as to a matter of execution if the will creating the trust is valid as to the matter under Section 302 concerning formal validity of a will.

(b) Subsection (a) does not apply to the formalities for the transfer of real or personal property to a trustee.

Legislative Note: *A state that has enacted Uniform Trust Code Section 403 (amended 2010) pertaining to "trusts created in other jurisdictions" or that has comparable applicable laws should repeal those provisions to be replaced by this section and by Sections 202 and 203.*

Reporter's Note

This section recognizes that the modern use of an inter vivos trust is predominantly as a will substitute and correspondingly adopts conflict-of-laws rules for validity, similar to those for wills, for inter vivos trusts. Testamentary trusts are obviously subject to the same law regarding formal validity as the will that contains or creates the testamentary trust.

Matters of execution. Matters of execution involve compliance with the formal requirements to make a trust. Under the law of most states, trusts of certain types of property may be created by oral declaration without the need of a writing. *See, e.g.*, UNIF. TR. CODE § 401 ("A trust may be created by: (1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death; (2)

declaration by the owner of property that the owner holds identifiable property as trustee; or (3) exercise of a power of appointment in favor of a trustee.); UNIF. TR. CODE § 407 ("Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.). Other states, however, require various types of writings for the effective creation of any type of trust. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 20 cmt a ("In a few states, statutes require a writing for the creation of enforceable inter vivos trusts of personal property."); LA. REV. STAT. ANN. § 9:1752 (" An inter vivos trust may be created only by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the settlor or by the affidavit of one of the attesting witnesses."); FLA. STAT. ANN. § 737.111(1) (applying the same formalities for wills to the testamentary aspects of trusts). This section adopts a broad rule of validation for the "execution" of written and oral trusts. The definition in Section 102(5) of "execute" includes within its ambit all formalities related to the carrying out or completion of a transaction to make it legally effective, such as signing, witnesses, or orally declaring.

A state's interest in enforcing its own laws on formal validity or execution is typically less significant than the protective functions served by the law of capacity and free consent, governed by Section 202. Thus, this act, like the Uniform Trust Code and the Uniform Probate Code, adopts a broad validating principle on matters of form. *See* UNIF. TR. CODE § 403; UNIF. PROB. CODE § 2-506. After all, "[i]t is improbable that the settlor intended to execute an instrument wholly or partially invalid." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. d. With respect to formal validity, "[i]f the settlor creates a trust to be administered in one state and is domiciled in another state at the time of the creation of the trust or at the time of his death, the trust is valid if valid under the local law of either of the states." *Id.* Because not all states impose identical form requirements for the creation of a trust, a broad validating rule is necessary to sustain the validity of trusts generally. *See, e.g.*, FLA. STAT. ANN. § 736.0403(2)(b) ("The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For purposes of this subsection, the term 'testamentary aspects' means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate."); *But see Glaeske v. Shaw*, 661 N.W.2d 420 (Wisc. Ct. App. 2003) (applying Wisconsin law to determine the formal validity of an inter vivos trust, rather than a broad alternative rule of validation, because Wisconsin had the "most significant relationship" to the trust.")

This section is consistent with existing law on the validity of the matter of formal execution of trusts. In addition to the use of traditional validating laws, such as place of execution and place of domicile, the Uniform Trust Code and the law of many states now include considerations of domicile and nationality as alternative validating laws, in part to avoid the vexing determination of where a testator is domiciled. In other words, the use of the term "abode" "may avoid discussion and debate over the singular place where a person is domiciled or habitually resident and therefore over what law to use if a person has houses in Texas and New York. Plausibly, the law of either state would be acceptable, irrespective of where one spends most of one's time." *See* Ronald J. Scalise Jr., *Validity in Wills and Trusts: Conflict Rules in Search of a Theory*, 97 TUL. L. REV. 887, 912 (2023).

Existing laws, however, are not without controversy. *See, e.g.*, Scalise, *Validity in Wills and Trusts, supra*, at 887. For example, use of the law of a state in which the settlor has an "abode" has been criticized as being no clearer than the traditional terms of "domicile" or "habitual residence." *See, e.g.*, Jeffrey Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1294 (1991-92); Scalise, *Validity in Wills and Trusts*, *supra*, at 909-912. Moreover, use of the law of the settlor's "nationality" can also raise questions when the settlor has more than one nationality or when the law of a particular nation does not prescribe rules regarding trusts. *See id*. Under this act, a settlor with more than one nationality would be allowed to use the law of any of the states in which the settlor is "a" national. F.A. Mann, *The Formal Validity of Wills in Case of Dual Nationality*, 35 INT'L L. Q. 423, 424 (1986). Thus, settlors with more than one nationality are afforded additional options of alternative validating laws. When a settlor is a national of a non-unified or composite state that does not prescribe trust law on a national level, the law of "the jurisdiction in which the settlor was . . . a national" should be considered to be the law of political subdivision of the nation that does prescribe laws pertaining to trusts. *See, e.g.*, Section 102(14) (defining "state" to include "as may be appropriate" the "territorial subdivision of a foreign country, that has its own laws governing trusts and estates.").

Subsection (a)(1)(D) provides that a trust may be validly executed in compliance with the "law of the state in which any trust property was located at the time of execution." Although the use of the law of the state in which "any" trust property is located as an alternative law of validation is an expansive rule of validation, it is consistent with the Uniform Trust Code and thus the law of most states. UNIF. TRUST CODE § 403(3) (referencing the law of the state in which "any trust property is located"). Ascertaining the location of tangible property is ordinarily not difficult, but determining the location of intangible property may prove more challenging. On this topic, the traditional rule is that of *mobilia sequuntur personam*,' according to which intangible personal property is found at the domicile of its owner." *Delaware v. New York*, 507 U.S. 490, 503 (1993) (quoting *Texas v. New Jersey*, 379 U.S. 674, 680 (1965)).

<u>*International Conventions and Regulations*</u>. Matters of trust execution are likewise governed by various international treaties. *See, e.g.* Hague Trust Convention art. 3 ("The Convention applies only to trusts created voluntarily and evidenced in writing."). Unlike this Section, the Hague Convention allows for settlor discretion in selecting the governing law. *See* Hague Trust Convention arts. 6 & 8. Public policy limitations on settlor discretion are also common in the international context. *See* Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions art. 1, Oct. 5, 1961, 510 U.N.T.S. 175, *and* Eng. Wills Act § 6(2) (1963).

Section 202. Substantive Validity of Trust: Capacity and Consent

A trust is valid as to a matter of the settlor's capacity or consent:

(1) in the case of an inter vivos trust, if the trust is valid as to the matter under the law of the state where the settlor was domiciled at the time of execution of the trust; and

(2) in the case of a testamentary trust, if the trust is valid as to all matters of a settlor's capacity and consent concerning the trust under the law of the state where the settlor was domiciled:

(A) at the time of execution of the trust; or

(B) at the time of death.

Legislative Note: *A state that has enacted Uniform Trust Code Section 403 affecting "trusts created in other jurisdictions" or that has comparable laws should repeal those provisions to be replaced by this section and by Sections 201 and 203.*

Reporter's Note

Unlike Section 201, this section addresses matters of capacity and consent, which are matters of substantive validity rather than formal validity.

Matters of capacity and consent. Matters of capacity and consent generally involve issues of disability related to minority or lack of capacity as well as the conduct of third parties that taint the free expression of a settlor's consent, such as fraud, duress, or undue influence. These matters are sometimes referred to as "intrinsic validity." *See, e.g.*, GEORGE GLEASON BOGERT ET AL., BOGERT'S LAW OF TRUSTS AND TRUSTEES § 293 ("The question of 'intrinsic validity' of a will or trust instrument usually relates to the competency or capacity of the person creating the will or trust instrument, or to fraud, undue influence, or another factor invalidating its creation."); N.Y. EST. POWERS & TRUSTS § 3-5.1(a)(4) ("'Intrinsic validity' relates to the rules of substantive law by which a jurisdiction determines the legality of a testamentary disposition, including the general capacity of the testator."). Unlike matters of formal execution of a trust instrument, which are generally accorded liberal flexibility under Section 201, a state may have a stronger interest in ensuring that its standard of capacity for execution of a trust is complied with when it differs from other states. *See, e.g.*, UNIF. TR. CODE § 601 ("The capacity required to create . . . a revocable trust . . . is the same as that required to make a will."); RESTATEMENT (THIRD) OF TRUSTS § 11(3) ("A person has capacity to create an irrevocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to transfer the property inter vivos free of trust in similar circumstances."). Similarly, states may have different standards and particular interests in ensuring that a settlor's consent to create a trust was freely given and not affected by fraud, duress, or undue influence. *See, e.g.*, UNIF. TR. CODE § 406 ("A trust is void to the extent its creation was induced by fraud, duress, or undue influence."). *Glaeske v. Shaw*, 661 N.W.2d 420 (Wisc. Ct. App. 2003) (applying Wisconsin law to a claim of undue influence after determining that Wisconsin had the most significant relationship to the trust.").

This section applies the law of the state of the settlor's domicile at the time of execution for inter vivos trusts and, for testamentary trusts, adopts the approach advocated by some scholars of finding capacity and free consent to exist if the settlor had capacity and free consent under the law of the jurisdiction of domicile either at the time of execution or a later time, such as the time of death. *See generally* Symeon Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029, 1053 (1987); SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW: AN INTERNATIONAL COMPARATIVE ANALYSIS 253 (2014); 4 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 322 (1968). Care, however, has been taken to ensure that the law of only a single jurisdiction is used in assessing both capacity and free consent, as to do otherwise could result in a trust that was not valid under the law of any one particular jurisdiction but treated as valid only because the laws of one state were used to assess capacity while the laws of another state were employed to evaluate free consent. *See, e.g.*, Ronald J. Scalise Jr., *Validity in Wills and Trusts: Conflict Rules in Search of a Theory*, 97 TUL. L. REV. 887 (2023). For example, if a settlor executes a testamentary trust in State A but dies in State B after having acquired a new domicile there, whether the settlor had capacity and was subject to undue influence must be assessed under either the law of State A or the law of State B. If the settlor had capacity and free consent under the law of either State A or State B, the trust will be valid. State A's law, however, cannot be used only for matters of capacity, while State B's law is used to assess free consent. Thus, under this section, a testamentary trust must be "valid as to all matters of capacity and consent" under either the law of the state in which the settlor was domiciled at the time of death or the law of the state in which the settlor was domiciled at the time of execution.

Other matters of creation and validity. Creation of a trust may involve other matters in addition to capacity, consent, and formal execution of a trust instrument. See Section 203.

Section 203. Substantive Validity of Trust: Creation and Validity; Trust Duration; Restraints on Alienation

(a) Except as provided in Section 201 concerning formal validity of a trust or Section 202 concerning capacity and consent of a settlor, a trust and the terms of the trust are valid as to a matter, including a restraint on the alienation of a beneficiary's interest in the trust, trust duration, or the rules governing perpetuities, accumulations of income, and suspension of the power of alienation, if the trust and the terms of the trust are valid as to the matter under the law of the state designated in the terms of the trust for that purpose, unless:

(1) the designated state has no substantial relation to the trust; or

(2) the application of the law of the designated state violates a strong public policy of the state with the most significant connection to the trust as to the matter at issue.

(b) Absent an effective designation under subsection (a), a matter of creation or substantive validity of the trust or the terms of the trust other than capacity and consent under Section 202 is governed by:

(1) in the case of an inter vivos trust, the law of the state where the settlor was domiciled at the time of execution of the trust;

(2) in the case of a testamentary trust, the law of the state where the settlor was domiciled at the time of death; or

(3) if application of the law in paragraph (1) or (2) violates a strong public policy of the state that has the most significant connection to the trust as to the matter at issue, the law of the state that has the most significant connection to the trust as to the matter at issue.

Legislative Note: *A state that has enacted Uniform Trust Code Section 403 affecting "trusts created in other jurisdictions" or that has comparable laws should repeal those provisions to be replaced by this section and by Sections 201 and 202.*

Reporter's Note

Overview. The general approach of this section is to grant the settlor discretion to choose the applicable law to govern matters of substantive validity unrelated to matters of capacity and consent, provided the settlor chooses the law of a state that has a substantial relation to the trust and the chosen law does not violate the strong public policy of the state that has the most significant connection to the trust. If the settlor makes such a choice, then subsection (a) makes the settlor's choice effective and controlling. In the absence of a choice of law by the settlor or if the settlor makes a choice that violates subsection (a) (i.e., the chosen law has no substantial relation to the trust or violates the strong public policy of the state with the most significant connection to the trust), then subsection (b) supplies the governing law. For explanation of subsection (b), see *infra*.

Matters of creation and validity. Creation of a trust may involve matters of validity in addition to capacity, consent, and formal execution of a trust instrument. As such, a trust or various provisions thereof may not be effective because the trust violates some other rule for creation or validity. *See, e.g*., UNIF. TR. CODE § 402 (providing, among other things, that a trust is created only if the settlor indicates an intent to create a trust, the trust has definite beneficiaries, and the trustee has duties to perform). In addition, a trust or the terms of the trust may be invalid for a variety of public policy reasons, such as when a trust contains an illegal condition. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. a.

Matters of creation and validity related to trust duration. A trust or the terms of the trust may be invalid for a variety of public policy reasons, such as when a trust provision violates the rules governing accumulations of income, suspension of the power of alienation, or perpetuities. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. a. In states that maintain a traditional version of the rule against perpetuities, the trust may be invalid in whole or in part if a future interest fails to vest within the perpetuities period. In other states that have adopted a more modern version of the doctrine, only the durational term of the trust may be invalid and subject to reformation if the trust violates the applicable state law regarding the rule against perpetuities. In either case, the applicability of the rule against perpetuities is a matter of the substantive validity of the trust or the term of the trust, although commonly spoken of as a matter of trust duration.

Matters of substantive validity must be assessed at all relevant times. As such, they are important not only at the time of creation of the trust but also at subsequent times, such as when a trust is amended. *See, e.g*., Section 102(16) (defining the term "trust" to included amendments). Substantive validity, however, is to be distinguished from construction and interpretation. Whether a settlor intended by the terms of the trust to limit the trust's duration is a matters of construction and interpretation, governed by Section 204. The extent to which such a provision is effective or valid, however, is a matter governed by this section.

Matters of creation and validity related to restraints on alienation. A trust or the terms of the trust may be invalid for a variety of public policy reasons, such as when a trust provision improperly restrains a beneficiary's ability to alienate an interest in trust. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. a. Although a beneficiary's interest in a trust is generally voluntarily alienable by the beneficiary, unless the terms of the trust provide otherwise, some states have imposed spendthrift limitations as default rules. *Compare* RESTATEMENT (THIRD) OF TRUSTS § 51, *with* N.Y. EST. POW. & TRST § 7-1.5 ("The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust."); DEL. CODE ANN. Tit. 12 §3536(a).

Substantive validity, however, is to be distinguished from construction and interpretation. Whether a settlor intended by the terms of the trust to restrain a beneficiary's ability to alienate his or her beneficial interest are matters of construction and interpretation, governed by Section 204. The extent to which such a provision is effective or valid, however, is a matter governed by this section.

Substantial Relation. For the meaning and requirements of the term "substantial relation," see Section 210. This section is consistent with the Restatement in generally allowing a settlor to choose the law of a particular state to govern validity for trusts of movables but differs insofar as the Restatement applies the situs rule for trusts involving real estate. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 269(b)(1), 270(a), 278. Like the Restatement, this section also limits the settlor's choice to the extent such a choice does not violate a strong public policy of the state with the most significant connection to the trust. *See also Russell v. Wachovia Bank, N.A.*, 578 S.E.2d 329, 335 (S.C. 2003) (upholding the validity of various trusts and noting that "a testator may designate the local law to govern the validity of the trust unless application of the designated law would be contrary to public policy of the state of testator's domicile at death" and provided "the designated state ha[s] a substantial relation to the trust"); *Wright v. Rains*, 106 S.W.3d (Tenn. Ct. App. 2003) (upholding the settlor's choice of Kentucky law to the validity, interpretation, and administration of a revocable inter vivos trust executed by the settlor while residing in Kentucky who thereafter died in Tennessee and noting that "Tennessee will honor a choice of law clause if the state whose law is chosen bears a reasonable relation to the transaction and absent a violation of the forum state's public policy"). To ascertain the state with the most significant connection to the trust, see Section 209.

Subsection (b) provides the rule for determining the applicable law on matters of substantive validity other than capacity and consent when the settlor has failed to effectively designate an applicable law. In such a case, the applicable law is the law of the state in which the settlor was domiciled either at the time of execution for an inter vivos trusts or at the time of death for testamentary trusts, which will also ordinarily be the state with the most significant connection to the trust. Consequently, in the interest of efficiency and predictably, the law of the settlor's domicile is used as the default rule under this subsection rather than the more amorphous test of the state with the most significant connection to the trust. Just as in the prior subsection, however, the law of the state with the most significant connection to the trust is still relevant and applicable when application of the law of the settlor's domicile would violate a strong public policy of the state that has the most significant connection to the trust. Matters of substantive validity must be assessed at all relevant times. As such, they are important not only at the time of creation of the trust but also at subsequent times, such as when a trust is amended. *See, e.g.*, Section 102(16) (defining the term "trust" to included amendments).

Subsection (b) applies both in cases which the settlor fails to designate a governing law and in cases which the settlor designates a governing law but the designation is not effective because the law of the chosen state has no substantial relation to the trust or the application of the chosen law violates a strong public policy of the state with the most significant connection to the trust as to the matter at issue. Unlike Section 204(b), which uses the term "designation," recognizing that the settlor has unlimited discretion to choose the applicable law governing construction and interpretation, subsection (b) uses the term "effective designation," which acknowledges that settlor has more limited discretion for choice of law under this section and that not all designations will be effective.

Strong Public Policy Exception. Subsection (a)(2) adopts the long-standing "strong public policy" exception to matters that are within the settlor's choice. In other words, this act generally accords broad flexibility to the settlor in choosing the applicable law, but not insofar as the choice of law would be counter to the strong public policy of the state with the most significant connection to the trust. Like other uniform acts, this act "does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time." *See* UNIF. TR. CODE § 107 cmt. As is evident from case law, the content and nature of public policy continues to evolve and develop. *See, e.g.*, *In re Huber*, 493 B.R. 798 (Bankr. W.D. Wash. 2013); *In re Rensin*, 600 B.R. 870 (Bankr. S.D. Fla. 2019); *Dahl v. Dahl*, 459 P.3d 276 (Utah 2015). A "strong public policy" should generally be understood to require more than the existence of a law in one state that is contrary to or different from a law in another state. After all, the very nature of the field of conflict of laws contemplates and appreciates differences between states in their laws. *See Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 847 (7th Cir. 1999) (Posner, C.J.) ("[O]bviously the mere fact that foreign and domestic law differ on some point is not enough to invoke the exception. Otherwise in every case of an actual conflict the court of the forum state would choose its own law; there would be no law of conflict of laws."). Rather, a "strong public policy" of a state would more appropriately be understood to be "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.). The Uniform Probate Code similarly provides that a testator may not choose the applicable law regarding matters of the elective share, exempt property and allowances, "or other [matters of] public policy of this state otherwise applicable to the disposition." UNIF. PROB. CODE § 2-703.

<u>International Conventions and Regulations</u>. This section differs from the Hague Trust Convention, which maintains a unified approach for the law applicable to validity, administration, construction, and effects. *See* Hague Trust Convention art. 8. As in subsections (a)(2) and (b)(3), the Hague Trust Convention also recognizes that there are certain public policies for which the forum may decide to override the choice of law that would otherwise apply. *See* Hague Trust Convention art. 15.

Section 204. Construction and Interpretation of Trust

(a) Construction and interpretation of the terms of a trust is governed by the law of the state designated in the terms of the trust for that purpose.

(b) Absent a designation under subsection (a), construction and interpretation of the terms of a trust is governed by:

(1) as to a matter of administration of a trust, the law of the state as determined under Section 205; or

(2) as to a matter not included in paragraph (1):

(A) in the case of an inter vivos trust, the law of the state where the settlor was domiciled at the time of execution of the trust; and

(B) in the case of a testamentary trust, the law of the state where the settlor was domiciled at the time of death.

Legislative Note: *A state that has enacted Uniform Trust Code Section 107 concerning "governing law" of trusts or that has comparable laws should repeal those provisions to be replaced by this section.*

Reporter's Note

Unifying Construction and Interpretation. This section unifies the rules governing the applicable law for matters of construction and interpretation, unlike the Restatement, which provides different rules governing matters of construction and interpretation. The unification of construction and interpretation under this act, however, should not be interpreted to require that a forum court apply the rules of procedure and evidence of another state.

Traditionally, matters of interpretation concern ascertaining the actual intent of the drafter, whereas matters of construction pertain to the probable intent of the settlor when there is a "gap in the instrument." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268 cmt. a, 277 cmt. a. In a matter of interpretation of a trust instrument, a court will, as a factual matter, attempt to ascertain the intent of the settlor, which under the Restatement is done based upon a court's own rules regarding admissibility of evidence. *Id.* §§ 268 cmt. a, 277 cmt. a. For example, if the settlor names Mary as a beneficiary of the trust, it is a matter of interpretation based upon admissible evidence under local law whether it can be established that the settlor actually intended Sally to be the beneficiary and mistakenly wrote Mary. Courts should not simply apply forum law to all matters of interpretation, however, as many rules of interpretation are substantive rather than procedural rules of trust law. Substantive rules of interpretation refer to the substantive law of trusts relevant to a settlor's intent, such as rules of parol evidence, rules resolving ambiguity, and rules of reformation of documents to correct a mistake, which allow a court to consider extrinsic evidence to varying degrees. *See, e.g.*, UNIF. TRUST CODE § 415; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS §§ 10.1 – 12.2.

On the other hand, if the settlor created a trust and named his "lineal heirs per stirpes" as beneficiaries of a trust, it would be a matter of construction, in the absence of evidence of actual intent, whether the phrase "per stirpes" should be construed to mean "English per stirpes" or "modern per stirpes." *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 224 cmts. c & d. As recognized by the Restatement, ascertaining the appropriate beneficiaries of a trust or the extent of their interests is properly considered a matter of construction. *See id.* § 271 cmt. a. Substantive rules of construction include, but are not limited to, default rules of law designed to achieve the likely intent of the settlor, such as abatement, ademption, allocation between principal and income, lapse and antilapse, classification and treatment of class gifts, conditions of survivorship, exoneration of liens, pretermission, and survivorship. In addition, the substantive rules of construction also include the numerous constructional preferences that are not rigid default rules but preferences for construing a document also designed to ascertain the settlor's intent, such as a preference for construing a document in accord with the donor's general dispositive plan or in a way that achieves more favorable tax consequences. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 11.3.

Although construction and interpretation are conceptually distinct, the practical significance of differentiating between these matters counsels in favor of a unified approach. The Restatement (Third) of Property: Wills and Donative Transfers explains that "[i]nterpretation and construction are not completely distinct processes, however, nor are they applied sequentially. Interpretation and construction are part of a single process." *Id.* § 11.3 cmt. c. Both construction and interpretation endeavor to discover the intention of the testator or settlor, whether through evidence of actual intention or through default rules in the absence of sufficiently persuasive evidence of contrary actual intention." *Id*. In either case, "the process of construction requires all factors to be brought to bear simultaneously and conflicting factors to be considered against each other. This is a single process." *Id*.

<u>*Distinguishing Forum Rules of Evidence*</u>. Unlike the substantive rules of trust law concerning construction and interpretation, procedure rules and rules of evidence include, but are not limited to, hearsay, best evidence, and rules of authentication of documents. Consequently, if a settlor executes a trust that is governed by State A for purposes of construction and interpretation and the terms of the trust misidentifies the beneficiary as X, rather than Y, who subsequently dies, then the forum state should apply the law of State A to ascertain whether the trust can be reformed to correct the settlor's mistake in identifying the beneficiary and the law of State A to ascertain whether the lapse of the beneficiary's interest should inure to the beneficiary's descendants. On the other hand, the forum state should apply its own law in resolving questions of hearsay, best evidence, and authentication.

<u>*Settlor Autonomy*</u>. Subsection (a) provides the general rule of unlimited settlor autonomy to select the law governing the construction and interpretation of the trust. Because the settlor has unlimited discretion to choose the applicable law to govern construction and interpretation, subsection (b) applies only absent a "designation" by the settlor. Unlike Section 203(b), which uses the term "effective designation," which acknowledges that not all designations under that section will be effective, subsection (b) is not so limited and applies only the absence of a "designation."   This section is consistent with the Restatement and with other international conventions and codifications. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268(1), 269(b)(i), 270(a), 271(a), 272(a), 277(1). It is similar to the approach on this matter provided by the Uniform Trust Code, which also grants a settlor a broad ability to choose the applicable law, even the law of a state with little or no connection to the trust. Under the Uniform Trust Code, "[t]he settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime." UNIF. TR. CODE § 107 cmt. In some instances, for example, a settlor may expressly provide that "the law of State A will govern matters of construction and interpretation of the trust." In other instances, ascertaining whether the testator designated a law for the purpose of construction and interpretation may itself be a matter of construction or interpretation, such as when a settlor without expressly referencing the concepts of construction or interpretation more generally provides that "the law of State A will govern the trust." *See* Section 207.

This section differs from the Uniform Trust Code, however, insofar as it does not provide a limitation on the settlor's discretion in choosing the applicable law to govern matters or construction and interpretation. *See* UNIF. TR. CODE § 107 ("The meaning and effect of the terms of a trust are determined by . . . the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant connection to the matter at issue."). Nineteen states have similarly deviated from the approach of the Uniform Trust Code on this issue. *See, e.g.*, Thomas P. Gallanis, *Trusts and Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 TUL. L. REV. 805 (2023) (citing ARIZ. REV. STAT. § 14-10107; FLA. STAT.

§ 736.0107; 760 ILL. COMP. STAT. 3/107; KANS. STAT. § 58a-107; 203E; MASS. GEN. LAWS 203E § 107 (reserved); MINN. STAT. § 501C.0107; MISS. CODE ANN. § 91-8-107; NEB. REV. STAT. § 30-3807; N.H. REV. STAT. § 564-B:1-107; N.C. GEN. STAT. § 36C-1-107; N.D. CENT. CODE § 59-09-07; OHIO REV. CODE § 5801.06; 20 PA. CONS. STAT. § 7707; S.C. CODE ANN. § 62-7-107; TENN. CODE ANN. § 35-15-107; UTAH CODE § 75-7-107; W. VA. CODE § 44D-1-107; WIS. STAT. § 701.0107; WYO. STAT. § 4-10-107).

Relative to matters of validity and administration, issues of construction and interpretation seem least related to the interests of a particular state, and thus the settlor is accorded maximum flexibility in choosing the applicable law. After all, the testator could have specified his or her actual intent in the trust instrument. Thus, both Section 268 of the Restatement, regarding movables, and Section 277 of the Restatement, regarding immovables, begin with a general statement that the trust instrument will be "construed in accordance with the rules of construction of the state designated for this purpose in the instrument." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268, 277. This is true even if the state law chosen to govern matters of construction has no connection with the trust. *Id.* § 268 cmt. b. This section continues the approach of the Restatement, and neither this section, nor the Restatement, limits a settlor's discretion in choosing the law applicable for matters of construction to laws that are not contrary to the "strong public policy" of the state with the "most significant relation" to the trust.

Default Rule in Absence of Settlor Prescription. Subsection (b) provides the rule for determining the applicable law when the settlor has failed to select an applicable law. When the matter pertains to one of administration, subsection (b)(1) provides that the law governing construction and interpretation should be the same as the applicable law for matters of administration. Thus, if the law of State A applies to a matter of administration, such as allocation between principal and income, then the law of State A should also generally be applicable in interpreting and construing the term of a trust that pertains to a trustee's ability to allocate between principal and income.

When the settlor fails to specify the applicable law, subsection (b)(2) provides two different rules for construction and interpretation of non-administrative matters, depending upon whether the trust is inter vivos or testamentary. For an inter vivos trust, the law of the settlor's domicile at the time of execution will ordinarily be the state with the most significant connection to the trust. Consequently, in the interest of efficiency and predictably, the law of the settlor's domicile at the time of execution is used as the default rule under this subsection rather than the more amorphous test of the state with the most significant connection to the trust. For testamentary trusts, however, the applicable law, for the same reason, is the law of the state in which the settlor is domiciled at death. The construction and interpretation rules of a particular state may refer or incorporate that state's rules on construction and interpretation of wills, to the extent applicable. *See, e.g.*, UNIF. TR. CODE § 112 ("The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.").

International Conventions and Regulations. Unlimited settlor autonomy on choice of law for matters of construction and interpretation is also common under various international sources of law. *See, e.g.*, Hague Trust Convention art. 6 ("A trust shall be governed by the law chosen by the settlor."); Conflict of Laws Rules for Trusts Act, R.S.B.C. 1996, ch. 65, § 3(1) (B.C.) ("A trust is governed by the law chosen by the settlor, which choice may be express or implied.").

Section 205. Administration of Trust

(a) Subject to subsection (b), the administration of a trust is governed by:

(1) the law of the state designated in the terms of the trust for that purpose, unless the designated state has no substantial relation to the trust; or

(2) absent an effective designation under paragraph (1), the law of the state of the principal place of administration of the trust as determined under Section 206.

(b) Unless the terms of the trust prohibit a change of the law governing administration of the trust, the law governing administration of the trust may be changed if the principal place of administration of the trust changes and the trustee complies with the requirements necessary to bring about the change that are provided in:

(1) the terms of the trust; and

(2) the law of the state governing administration of the trust applicable before the change.

Reporter's Note

Settlor Autonomy. Subsection (a)(1) provides the general rule, subject to some limitation, of settlor autonomy to select the law governing the administration of the trust. It is consistent with the Restatement and with other international conventions and codifications. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268(1), 269(b)(i), 270(a), 271(a), 272(a), 277(1). It provides a limitation on the settlor's ability to choose the applicable law governing administration, namely, that the settlor's choice of the law must have some substantial relation to the trust. For the meaning of the term "substantial relation," see Section 210. Unlike construction and interpretation under Section 204, therefore, a settlor does not have unfettered discretion as to the choice of the applicable law governing matters of administration. Subsection (a) differs from the Restatement, however, insofar as the Restatement allowed for complete settlor autonomy in selection the law governing administration but only for matters "which can be controlled by the terms of the trust." *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 271 and 272. Under the Restatement's approach, some matters of administration were matters of state public policy and outside the settlor's control. *See id*. § 271 cmt h.

Subsection (a)(2) specifies the applicable law to govern administration of a trust when no law has been chosen by the settlor or when the choice of the governing law is ineffective. In such a case, the law that does apply is a function of the state of the principal place of administration of the trust, as determined under Section 206. This approach is not identical to but generally accords with the approach of the Restatement with regard to inter vivos trusts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272(b). In the opinion of the drafting committee, the law of the state of the principal place of administration of the trust will ordinarily be the state with the most significant connection to the trust, and, in the interest of efficiency and predictably, the law of the state of the principal place of administration of the trust is used as the default rule under this subsection rather than the more amorphous test of the state with the "most significant connection" to the trust. Application of the "most significant connection" test is, however, a long-standing and important approach used by courts and is still relevant in other sections of this act as a public policy limitation. *See, e.g.*, *id*. §§ 270(a)-(b), 272(b). *See also Hutchinson v. Ross*, 187 N.E. 65 (N.Y. 1933) (upholding a trust created by a Quebec settlor, which would have been invalid under Quebec law but was valid under New York law, because the trust res was located in New York and the trust was administered in New York). For factors relevant in determining the most significant connection to the trust, see Section 210. This provision also generally accords with existing law. *See, e.g*., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 270(a)-(b), 272(b).

Change in Applicable Law. Subsection (b) recognizes that the law applicable to a trust's administration may change if the principal place of administration of the trust changes. The Restatement also recognizes that the governing law may change when the place of administration of the trust changes, such as when a successor trustee is appointed who is domiciled in a different state. At least with respect to movable property, the Restatement counsels that this "depends upon the terms of the trust, express or implied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. e. If the settlor has authorized the change, then it can be inferred that the governing law may be changed. For instance, "[a] simple power to appoint a successor trustee may include a power to appoint a trust company or individual in another state. In such cases, the law governing the administration of the trust thereafter is the local law of the other state and not the local law of the state of original administration." *Id.* § 272 cmt. e. *See also id*. § 271 cmt. g. What procedures and rules a trustee must follow to change the law applicable to the administration of a trust is a matter for the internal law of the applicable state rather than this act. For determination of the applicable state law, see section 206(d).

The issue of change of the law governing administration of the trust arose in *In re Peierls Family Inter Vivos Trust (Peierls III)*, where the beneficiaries of five inter vivos family trusts that were originally governed by the laws of either New Jersey or New York filed a petition requesting, among other things, that the Delaware chancery court accept jurisdiction over and modify the trusts. 77 A.3d 249 (Del. 2013). The court held that the initial designation of a law to govern the administration of a trust at its inception is "not absolute and unchangeable" when the settlor allows for the appointment of a successor trustee. *Id.* Consequently, when a Texas trust company became a successor trustee to a trust originally governed by New York law, the place of administration of the trust became Texas, as did the relevant law governing administration of the trust. *Id*.

If, however, the settlor has prohibited a change in the applicable law, then a change in the place of administration should not bring about a change in the law governing administration. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 272 cmt. e. Likewise, the Uniform Trust Decanting Act recognizes that although "a change of principal place of administration will usually change the law governing the administration of the trust, that is not the result under all circumstances." UNIF. TR. DECANTING ACT § 5 cmt. A review of the terms of the trust will be necessary to ascertain whether the settlor has prohibited a change in the applicable law. A generic statement that the administration of a trust is governed by the laws of a particular state should not be sufficient to prohibit a change in the applicable law. On the other hand, statements in the terms of the trust that "the applicable law cannot be changed" would obviously be sufficient to preclude a change in the applicable law, as should statements in the terms of the trust that "the law of State A shall always apply."

International Conventions and Regulations. Broad settlor autonomy on choice of law for matters of administration is also common under various international sources of law. *See, e.g.*, *see also* Hague Trust Convention art. 6 ("A trust shall be governed by the law chosen by the settlor."); Conflict of Laws Rules for Trusts Act, R.S.B.C. 1996, ch. 65, § 3 (B.C.) ("A trust is governed by the law chosen by the settlor, which choice may be express or implied."). The Hague Trust Convention also applies the law of the principal place of administration absent a designation of the governing law. Hague Trust Convention art. 7. The Hague Trust Convention also makes provision for the change in the applicable law governing administration. Hague Trust Convention art. 10.

Section 206. Principal Place of Administration of Trust

(a) In this section, "corporate trustee" means a trustee that is not an individual trustee.

(b) The terms of a trust designating the principal place of administration of the trust are controlling if:

(1) a trustee's place of business is located in the designated place;

(2) a trustee or trust director resides in the designated place; or

(3) all or part of the administration occurs in the designated place.

(c) Absent a controlling designation under subsection (b), the principal place of administration of a trust is:

(1) the place designated for administration of the trust in the most recently signed record by a majority of the trustees if:

(A) at least one trustee resides or maintains a place of business in the designated place; and

(B) administration of the trust in the designated place does not violate the trustee's obligations under [cite to Uniform Trust Code Section 108]; or

(2) absent an effective designation under paragraph (1), if:

(A) all trustees are individual trustees, the place of domicile of the individual trustee most actively involved in fiduciary decision making concerning the trust;

(B) all trustees are corporate trustees, the place of the physical location of the place of business of the trust officer most actively involved in fiduciary decision making concerning the trust; or

(C) the trustees are both individual and corporate, the domicile or physical location of the place of business of the trustee most actively involved in fiduciary decision making concerning the trust as provided for under subparagraph (A) or (B).

(d) Unless the terms of the trust prohibit a change in the principal place of administration of the trust, the principal place of administration of the trust may be changed if the trustee complies with the requirements necessary to bring about the change in:

(1) the terms of the trust; and

(2) the law of the state of the principal place of administration of the trust applicable before the change.

Legislative Note: *A state that has enacted Uniform Trust Code Section 108(a) should replace that provision with a cross-reference to subsection (a) of this section.*

In subsection (c)(1), a state should insert a statutory reference to the applicable provision in state law concerning a trustee's duties to administer a trust at an appropriate place and provide notice on transfer of a trust's principal place of administration.

Reporter's Note

Subsection (b) is derived from Section 108 of the Uniform Trust Code and Section 3 of the Uniform Directed Trust Act. It recognizes that "[a] settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust." UNIF. TR. CODE § 108 cmt. Such a designation is controlling provided the conditions of subsection (a)(1),(2), or (3) are met. In other instances, a court may consider the designation, but the designation of principal place of administration should not be viewed as controlling when no part of the administration occurs in that state and the trustee or trust director has no presence in that place. As the Uniform Trust Code acknowledges, "[d]esignating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms. A settlor is free to designate one state as the principal place of administration and another to govern the meaning and effect of the trust's provisions." UNIF. TR. CODE § 108 cmt. For recent scholarship regarding the settlor's discretion to choose the principal place of administration of a trust, see Thomas P. Gallanis, *Trusts and Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 TUL. L. REV. 805 (2023).

Subsection (c) provides a hierarchical list of controlling considerations in the absence of a controlling designation by the settlor as to the trust's principal place of administration. Subsection (c)(1) allows either a trustee to specify or cotrustees to agree upon the principal place of administration of a trust. This subsection can help facilitate certainty and predictability as to the principal place of administration of a trust. Of course, the designation or agreement as to the principal place of administration of a trust is effective only if the trust has some connection with the state, namely at least one trustee resides or maintains a principal place of business in the state. If cotrustees agree that the principal place of administration of a trust is a state with no connection to the trust, a court should decline to defer to such an agreement. In the more typical instance in which multiple cotrustees are in different states and all perform administrative functions, an agreement among them as to the principal place of administration is effective provided they choose the location of the domicile or principal place of business of a trustee. In agreeing on a principal place of administration, trustees should be mindful of potential obligations under general trust law, such as the "continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries," as well as the duty to notify qualified beneficiaries prior to the transfer of the principal place of administration of another state. UNIF. TR. CODE § 108(b) & (d). Thus, an agreement as to the principal place of administration of a trust by the trustees is effective only if it also complies with their obligations under existing trust law relevant to a trust's principal place of administration.

Subsection (c)(2) recognizes that in the absence of an effective designation by the trustees, the principal place of administration is the place of the domicile or business of the most active trustee. This section is applicable if there is only one trustee, if there are multiple corporate trustees, if there are multiple individual trustees, or if there is a combination of corporate and individual trustees. In all cases, ascertaining which of multiple trustees most actively exercises fiduciary decision-making will be the key consideration. If the most active trustee is an individual, the state of the place of domicile of the individual trustee is the principal place of administration of the trust. On the other hand, if a corporate trustee is determined to be the most active trustee, the state where the place of business of the corporate trustee is physically located will be the principal place of administration of the trust. In instances involving multiple corporate trustees, the Restatement (Second) of Conflict of Laws selects the place of business of the most active corporate trustee as the place of administration of the trust. *See id*. In the age of national trust companies with numerous satellite offices, ascertaining the place of business of a corporate trustee is not always an easy task. In lieu of the Restatement approach, subsection (c)(2)(B) opts for the state where the trust officer responsible for most actively managing the trust account is located. *See, e.g*., UNIF. TR. CODE § 108 cmt. If the trust has individual trustees only, the place of domicile of the most active individual trustee is the principal place of administration. On this matter, the Restatement suggests that "it is reasonable to infer in most situations that . . . [the] settlor expected the trustee to administer the trust at his or its place of business or domicil." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 267 cmt. c. *See also* UNIF. TR. CODE § 108.

The location of the principal place of administration of a trust as specified in subsections (b) and (c) in no way diminishes or alters the trustee's duty under general trust law to administer the trust in the appropriate place. *See, e.g*., UNIF. TR. CODE § 108(b) ("In all instances, a trustee must be mindful of the "continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.").

Subsection (d) provides guidance as to what law governs whether the principal place of administration of a trust may be changed and the requirements for doing so, unless the terms of the trust prohibit a change in the principal place of administration of the trust. For what constitutes prohibition, see the comments to Section 205. Nothing in this subsection precludes a court from exercising its authority to prescribe whether and when a change of principal place of a trust is allowable. When the settlor chooses a controlling principal place of administration, obviously settlor's intent should be honored, and the law of that state should prescribe whether and how a change in the principal place of administration is effectuated. Absent a controlling designation by the settlor, the law of the principal place of administration as determined by subsection (c) is the applicable law for whether a principal place of administration may be changed and the requirements for doing so.

Section 207. Designation of Governing Law of Trust

(a) Unless limited in the terms of the trust, the following terms or other comparable language are sufficient to designate the governing law for all matters under this [article] for which a designation is permitted:

(1) "the trust is governed by the law of (designated state)";

(2) "the trust is subject to the law of (designated state)";

(3) "the law of (designated state) applies to the trust";

(4) "the meaning and effect of the terms of the trust are determined by the law of

(designated state)"; or

(5) "the trust is administered under the law of (designated state)".

(b) A designation of governing law under this [article] is permitted for the following matters:

(1) substantive validity under Section 203(a);

(2) construction and interpretation under Section 204(a); and

(3) administration under Section 205(a).

Reporter's Note

Designation of Governing Law. Absent a provision in a trust to the contrary, this section specifies a default rule of construction and interpretation and provides that when a settlor specifies generally that a trust will be governed by the law of State X that such a provision is sufficient to invoke the choice of law of State X under the sections applicable to the specific matters relative to the trust, such as administration, construction and interpretation, and other related matters.

A designation of the governing law under this section will usually be an express statement, such as the examples provided in the text of this subsection (a). Nonetheless, implied designations are possible, such as when a settlor uses a language or terms of art that a particular to a specific state. For discussion of implied designations of the governing law, see the Comment to Section 308.

Section 208. Court Authority over Administration of Trust

A court of this state may decline to exercise jurisdiction over a trustee or trust director of a trust if the principal place of administration of the trust is located in another state.

Reporter's Note

Today a trustee may have multiple contacts with varying states and thus be subject to the personal jurisdiction of courts in multiple states. Consequently, courts in multiple states could simultaneously exercise jurisdiction over the administration of the same trust. To protect trustees from redundant litigations and potentially conflicting orders, this Section specifies instances in which courts should abstain from exercising their jurisdiction over a trust.

This Section provides the familiar rule that the principal place of administration serves as the basis for a court to assert primary authority over a trust. UNIF. TR. CODE § 108 cmt. ("Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 267 ("The administration of a trust of interests in movables is usually supervised by the court, if any, in which the trustee has qualified as trustee or by the courts of the state in which the trust is to be administered.").

Primary Authority is Not Exclusive Authority. Primary authority by courts in the state of the principal place of administration of a trust does not necessarily preclude courts in other states from exercising their authority over the trust. Rather, the appropriate consideration by a court in a state other than the principal place of administration should be whether exercising its authority over the trust would unduly interfere with the authority by the court with primary authority. *See, e.g.*, *id.* § 267 cmt. e. Whether such an interference will occur depends upon a number of factors, including the relief sought. *See id*. For example, if a court has acquired jurisdiction over a trustee, it may compel him to redress a breach of trust, but it will ordinarily decline to engage in decisions regarding matters such as the validity, administration, or construction and interpretation of the trust. *See id*.

This approach is consistent with modern judicial practice. For instance, in *IMO Daniel Kloiber Dynasty Trust*, the Delaware Chancery Court concluded that, even though Delaware was the current situs of the trust and Delaware law had been chosen as the applicable law for administrative purposes, a Kentucky court could still exercise jurisdiction over the trust. 98 A.3d 924 (Del. Ch. 2014). In *Kloiber*, a party who was both the primary beneficiary and the "special trustee" was involved in a divorce proceeding in which a Kentucky court entered a status quo order preventing dissipation of marital assets. *Id.* The wife in the divorce proceeding argued that the trust was a marital asset, but the husband, nonetheless, resigned as special trustee and appointed his son as successor special trustee, who in turn ordered the transfer of $100,000 from the trust to a separate account. *Id.* The Kentucky court added the trust as a party to the divorce proceeding and held the husband in contempt; the trust thereafter sought a declaration from the Delaware court that it had exclusive jurisdiction. *Id.* The Delaware court stated that, despite a Delaware exclusive jurisdiction statute, the connecting factors to Delaware, namely, the situs of the trust and the applicable law for administrative purposes, were "fragile" features, insofar as both could be changed by those who controlled the trust. *Id.* Consequently, the Delaware court would not interfere with the Kentucky court's exercise of its jurisdiction over the trust. *Id.*

Although exclusive jurisdiction statutes are not uncommon, many courts have declined to find them binding. *See Kloiber*, 98 A.2d at 940 n.6. For instance, in *Toni 1 Trust v. Wacker*, the Alaskan Supreme Court concluded that an Alaskan statute that purported to grant exclusive jurisdiction to Alaska courts over Alaskan trusts could not deprive a Montana state court or an Alaskan bankruptcy court of jurisdiction over fraudulent transfers made to the Alaska trust in an attempt to shield assets from a Montana state court judgment. 413 P.3d 1199 (Alaska 2018). To the extent courts in other states may give deference to the Alaska "exclusive jurisdiction" statute, it is out of comity, which is "not a legal rule; rather it is 'a principle under which the courts of one state give effect to the laws of another state . . . out of deference or respect.'" *Id*. at 1205. Although courts may elect to give deference to other statute statues, "they are not compelled to do so." *Id*.

Section 209. Most Significant Connection to Trust

(a) The following contacts and factors shall be considered in determining the state that has the most significant connection to a trust as to a matter at issue under Section 203 concerning substantive validity of the trust:

(1) the principal place of administration of the trust;

(2) the location and nature of trust property at issue;

(3) the domicile of the settlor;

(4) the domicile or place of business of a trustee or trust director;

(5) the domicile of any beneficiary whose interest is affected;

(6) the justifiable expectations of any interested party; and

(7) the policies underlying trust law and any other field of law relevant to the matter at issue.

(b) The contacts and factors in subsection (a) are not exclusive, and other contacts and factors may be relevant in determining the state with the most significant connection to a trust as to a matter at issue under Section 203.

Reporter's Note

The concept of "most significant connection" is used in various parts of this article as a type of "escape hatch" from the application of other rules. The term "most significant connection" is a neologism that is employed to avoid importing the approach of the Restatement (Second) of Conflict of Laws into this act, which utilizes the similar term "most significant relationship." *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. e ("What state has the most significant relationship with the trust may depend upon the particular ground of invalidity."). In an effort to avoid the complexities of the "most significant relationship" test, the Restatement (Third) of Conflict of Laws employs the term "manifestly most appropriate law." *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.03 (Am. L. Inst., Tentative Draft No. 3, 2022). In the vast majority of cases, this section will simply create certainty, as opposed to ambiguity, as to the state that actually has the most significant connection to the trust. For example, if the trustee, the settlor, the trust assets, and the principal place of trust administration are all located in State X but other beneficiaries are located in States Y and Z, this section confirms that State X likely has the most significant connection to the trust and that a court should apply the law of State X when it has been designated as the applicable law pursuant to Section 203.

Rather than prescribe definite rules for which state has the most significant connection to a trust, subsection (a) opts for a more flexible approach that is informed — but not rigidly dictated — by an illustrative list of certain factors. In determining the state with the "most significant connection," courts have long considered a multiplicity of factors, including the state where the trust instrument was executed, the state where the trust assets are located, the state of domicile of the settlor, the state of the domicile of the beneficiaries, and the justifiable expectation of the parties. This section continues that approach by providing factors for a court to consider in determining the state with the most significant connection to the trust. Restatement (Second) of Conflict of Laws § 270 cmt. c. *See also* Unif. Tr. Code § 107 cmt. (factors to consider in ascertaining the most significant connection to the trust and thus determining, in many instances, "the governing law 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"); *Glaeske v. Shaw*, 661 N.W.2d 420 (Wisc. Ct. App. 2003) (applying Wisconsin law to determine the formal validity of an inter vivos trust because Wisconsin had the "most significant relationship" to the trust, as the trust designated Wisconsin law to apply, the trustee and the primary beneficiary were residents of Wisconsin, and Wisconsin was the place of drafting and execution, whereas "Florida's only connection with the trust [was] that it [was] the state of the [settlor's] domicile at the time of his death.").

This act employs the concept of the state with the "most significant connection" to the trust only when a clearer and more definitive rule cannot be ascertained. This article uses concepts of "domicile" and "principal place of administration" as default rules in lieu of applying the law of the state with the "most significant connection" to the trust for matters of validity and administration, thereby reducing the significance of the role previously played by the concept of the state with the "most significant connection" to the trust. Primarily, the state of the principal place of administration of the trust is very often likely to be the state with the most significant connection to the trust.

In addition, this section includes the location or situs of trust property – real or personal – as a factor in the balance to determine what state is most significantly connected to the trust. The approach of the Restatement, by contrast, is to mandate that the law of the state of situs of the real property applies. *See, e.g.,* Restatement (Second) of Conflict of Laws §§ 278, 280. Although this act minimizes the significance of the traditional separation of rules based upon whether the trust assets are real or personal, it does not suggest that the law of the situs of trust property is entirely irrelevant. Rather, it recognizes in subsection (a)(2) that the situs of trust property, particularly if real, may be a relevant factor in determining the most significant connection to the trust.

Similarly, special consideration under this section may be given to the state of domicile of the decedent, particularly if a trust is testamentary. By contrast, the Restatement mandated that the law of the decedent's domicile be applied in many instances. *See* Restatement (Second) of Conflict of Laws § 271(b) & cmt h. As with the distinction between real and personal property, the elimination of rules mandating the application of the law of the decedent's domicile is not meant to suggest that the distinction is irrelevant. The Uniform Probate Code, for instance, grants broad flexibility to a testator in choosing the law applicable to wills, but makes that choice ineffective as to matters of public policy, such as matters affecting the elective share, exempt property and allowances, or any other public policy of this state otherwise applicable to the disposition. Under this section, a court may choose to apply the law of the decedent's domicile when to do otherwise would violate a state's strong public policy.

Subsections (a)(1) through (5) are locational or geographic contacts between a state and a trust that are important in determining the state with the most significant connection to a trust. Geographic contacts, however, are not the only important factors to be considered. Other factors to be considered pertain to the interests of states or parties in having the law of a particular state applied to a trust. Thus, in determining the state with the most significant connection to a trust, subsection (a) also considers non-geographic factors, such as the justifiable expectations of any interested party and the policies underlying trust law and any other field of the law relevant to the matter at issue.

Subsections (a)(5) and (6) are important factors rather than locational or geographic contacts that are also important in determining what state has the most significant connection to a trust. Consideration of the "justifiable expectations of any interested party" as a factor in ascertaining the state with the most significant connection to the trust also helps facilitate planning. *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 cmt g ("Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."). The term "interested party" is an intentionally broad and expansive one, which was used to distinguish it from the narrower term "party to the transaction" and may include not only the traditional parties to a trust, such as the settlor, trustee, and beneficiaries, but also third parties, such as creditors. Importantly, this section considers only "justifiable" expectations rather than any expectations as a factor. Unjustifiable beliefs or expectations formed to manipulate or artificially create a significant connection of a state to a trust should not be considered. Moreover, the relative weight of the contacts and factors depends upon the matter at issue. Thus, a court may in some circumstances give more weight to the "justifiable expectations" of one party, such as the settlor, over other parties, such as the beneficiaries, in assessing the above factors. In other situations, the relative weight of the parties' justifiable expectations may be different, and, in some cases, the parties may have expectations that so fundamentally conflict to make this factor irrelevant.

Consideration of the basic policies underlying a substantive area of law is a traditional consideration in application of choice-of-law rules. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 6. Application of this factor is important, particularly "where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules." *Id*. cmt h. For example, in deciding whether to apply one state's law that would uphold a trust rather than the law of another state, which might defeat the trust, courts should consider the basic trust-law policy of effectuation settlor intent and upholding a trust, if possible.

In ascertaining the state with the most significant connection to the trust, flexibility is afforded under this section as to the time of application of each of the relevant factors. Thus, the relevant weight of the factors and contacts considered in this section in ascertaining the state with the most significant connection to the trust depends upon the nature and timing of the matter at issue. In some instances, the time of execution of the trust may be an important time to consider some or all of the above factors, whereas in other situations a later timing may be more appropriate. It is important to consider the specific matter at issue, rather than the trust's general connections to a particular state. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 cmt. e ("What state has the most significant relationship with the trust may depend upon the particular ground of invalidity."); *Reilly v. Brunner*, 116 Wash. App. 1052 (Wash. Ct. App. 2003) (applying Idaho law to a claim of waste against a trustee for selling timberland because the land at issue was located in Idaho, even though the trust was created in Washington and the remaindermen lived in Washington).

International Conventions and Regulations. Use of a multi-factor approach to ascertain the state with the most significant connection exists under international sources of law. Hague Trust Convention art. 7; Conflict of Laws Rules for Trusts Act, R.S.B.C. 1996, ch. 65, § 3(4) (B.C.).

Section 210. Substantial Relation to Trust

(a) A state has a substantial relation to a trust if any of the following contacts is in the state:

(1) the principal place of administration of the trust;

(2) the domicile of the settlor;

(3) the domicile or place of business of a trustee or trust director; or

(4) the domicile of any beneficiary whose interest is affected.

(b) The contacts in subsection (a) are not exclusive, and other contacts between a state and a trust may be sufficient to create a substantial relation.

Reporter's Note

Unlike Section 209, which prescribes a multi-factor balancing test to ascertain the state with the most significant connection to a trust, this section provides a safe harbor, such that a state has a "substantial relation" to a trust if any of the above relevant contacts exist between the state and the trust. Subsection (b) recognizes that the list in Subsection (a) is merely illustrative. In some situations, a trust and a state may have a substantial relation even when none of the contacts in Subsection (a) exists if there are other meaningful connections between the trust and the state. For example, in some circumstances, such as when the trust res is substantial real property, the location of the trust property may be significant enough to make the relation between the trust and the situs state a "substantial" one. No attempt has been made to enumerate all possible substantial relations in all possible circumstances.

Substantial Relation. With regard to matters of creation and validity other than capacity and consent, Section 203(a)(1) allows the settlor to choose the applicable law, provided the chosen state has a substantial relation to the trust and the chosen state does not violate a strong public policy of the state with the most significant connection to the trust as to the matter at issue. Similarly, Section 205(a)(1) also allows the settlor to choose a state's law to govern the administration of a trust, provided the chosen state has a substantial relation to the trust. This section provides a framework for ascertaining if a state has a substantial relation to a trust. It is consistent with the Restatement, which provides that a state has a "substantial relationship" to a trust, if "it is the state in which the trust is to be administered; or that of the place of business or domicil of the trustee at the time of the testator's death, or that of the domicil of the testator at that time, or that of the domicil of the beneficiaries. There may be other contacts or groupings of contacts which will likewise suffice." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 269 cmt f. This Section, unlike the Restatement, provides a more nuanced list of factors in Subsection (a) and rather than provide merely that the "domicil of the beneficiaries" creates a substantial relation between a trust and a state, this section takes cognizance of the fact that beneficiaries are likely to be domiciled in various jurisdictions. Thus, the domicile of any beneficiary whose interest is affected by the matter at issue is sufficient to create a substantial relation between the trust and the state.

[Article] 3

Succession

Prefatory Note

This article applies to matters of choice of law that governs the transfer of property by intestate succession, which is governed by Section 301; the formal and substantive validity of a will and the terms thereof, which are governed by Sections 302, 303, and 304; matters of construction and interpretation of the terms of a will, which is governed by Section 305; the revocation of wills by physical act, which is governed by Section 306, by subsequent will, which is governed by Sections 302, 303, and 304, and revocation by law, which is governed by Section 305; and matters of escheat of property, which is governed by Section 307. The phrase "terms of a will" used in this article is obvious enough not to require a specific definition in this act, but, in cases of doubt, analogy can be had to Section 102(15), defining "terms of a trust."

This article does not apply to the validity of a testamentary trust, which is governed by Sections 201, 202, and 203. However, to the extent that a testamentary trust is contained within a will, the validity of the testamentary trust is dependent upon the validity of the underlying will. Thus, in some instances, the validity of a trust may be impacted if the underlying will is found to be invalid under Section 302, 303, or 304. Similarly, this article does not apply to the validity or the construction and interpretation of an exercise of a power of appointment granted under the terms of a will, which is covered under article 4. Finally, the effect of a will or its terms on elective share rights and bars to succession or forfeiture are also excluded from application of this article and instead covered by article 4 of this act.

Section 301. Intestacy

(a) The law of the state where a decedent is domiciled at the time of death governs intestate succession to the decedent's personal property.

(b) The law of the state where a decedent's real property is located governs intestate succession to the property and matters of recordation or registration of title to the property.

Reporter's Note

Although much of the remainder of this act de-emphasizes the significance of the distinction between real and personal property for purposes of conflict of trusts and estates laws, this section differs from that approach for practical purposes. Rather, this section preserves the traditional American conflict-of-laws approach, which applies different laws governing intestate succession based upon whether the property was real or personal. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 (AM. L. INST. 1969) ("The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs."), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (AM. L. INST. 1969) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death."); *see also* LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW 573 (5th ed. 2001) ("The title to land is, in theory at least, always controlled by the local law of the situs of the land."); *Mohr v. Langerman*, 858 N.W.2d 26 (2014) (applying Iowa law to determine heirship of a child claiming paternity to a decedent who died domiciled in Arizona but who owned real property in Iowa).

As discussed in the Prefatory Note to this act, the reason for distinguishing between real and personal property for purposes of conflict-of-laws is largely based upon anachronistic rationales that are no longer justifiable in the modern day. *See, e.g.*, Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L. J. 129, 134 (2014); Christopher A. Whytock, *Situs and Domicile in Choice of Law for Succession Issues*, 97 TUL. L. REV. 1181 (2023); Robert B. Niles-Weed and Robert H. Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, 97 TUL. L. REV. 1013,1031 (2023). One reason for historically applying different conflict-of-law rules to different types of property in the trusts and estates context was that different rules of substantive succession law applied to real and personal property. In the modern day, however, applying different rules of intestate succession to personal and real property has been soundly criticized by scholars, and no longer makes practical sense in a system that no longer maintains two separate bodies of law for the devolution of real and personal property. DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 150, 1417 (15th ed. 2012). In fact, "outside the common law world, the lex situs rule for intestate succession to land has been abandoned almost everywhere except in Austria, Belgium and France. It has therefore been suggested that the lex situs rule has outlived its usefulness and should be abandoned in favour of the law of the intestate's domicile. In the modern world it is a quite unnecessary complication to have different conflict rules for intestate succession to movables and immovables." *Id. See also* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 20.2, 1247 (2018) ("[T]he appropriateness of using the local law of the situs to determine the appropriate shares of family members in intestate litigation seems outmoded.").

Despite the academic critique, practical necessity exists for preserving the "situs" rule for real property in limited contexts. In many cases, the law is so firmly established that altering the rule would cause practical disruption. In other cases, such as when real property has been transferred by succession through multiple generations without any probate proceedings, altering the "situs" rule for real property would create administrative difficulty in establishing clear title. For personal property, however, the law of the decedent's domicile is retained. In many cases, application of the law of the decedent's domicile will result in the application of the law of a state where a decedent has spent most or large parts of the decedent's life. Nonetheless, in cases in which a decedent has spent considerable amounts of time in one state, e.g., State A, and moved, shortly before death, to another state, State B, the law of State B will govern the transfer of the decedent's personal property by intestate succession, provided the decedent has, before death, established a new domicile in State B. Although the concept of "domicile" is not a defined term, it is a flexible and malleable concept and subject to the continuing development of the common law. Standard definitions of domicile include those of the Restatement (Second) of Conflict of Laws § 11(1) (1971) (defining "domicile" as "a place, usually a person's home" and accords significance to that place "because of the person's identification with that place") and the tentative draft of the Restatement (Third) of Conflict of Laws § 2.01(2) and (3) (Am. L. Inst., Tentative Draft No. 1, 2020) (presuming that one's domicile, for natural persons, is the place where one's "life is centering for resolving choice-of-law issues" and, for juridical persons, where its "principal place of business for resolving a particular choice-of-law issue" is located). For further discussion of the meaning and application of the concept of domicile in conflict of laws, see PETER HAY ET AL., CONFLICT OF LAWS ch. 4 (6th ed. 2018); RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS ch. 2 (6th ed. 2010); LUTHER L. MCDOUGAL, III ET AL., AMERICAN CONFLICT OF LAWS ch. 2 (5th ed. 2001).

In addition to the basic application of the relevant state's statute of descent and distribution, this section governs the applicable law to determine who qualifies as an heir for purposes of inheritance. For example, under the law of some states, domestic partners or even cohabitants may have inheritance rights equal to or approximating the rights of a surviving spouse. *See, e.g.*, CAL. FAM CODE § 297.5 (stating that domestic partners "have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses"); NEV. REV. STAT. § 122A.200(a) ("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."); WASH. REV. CODE ANN. §26.16.030 ("Property … acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property."). In addition, some states also recognize putative spouses as having intestacy rights approximating spousal inheritance rights. The putative spouse doctrine is a remedial doctrine recognized in many states that allows a person in good faith to enjoy civil effects of marriage, despite not being a party to a legally valid marriage. *See, e.g.*, MODEL MARRIAGE & DIV. ACT § 209. Similarly, other states recognize rights of spouses under common law or informal marriages. *See, e.g.*, TEX. FAM. CODE § 2.401. Washington law allows individuals in a "committed intimate relationship" to receive an equitable distribution of property upon the termination of the relationship. Under Washington law, "committed intimate relationships" are given recognition under Washington courts' equitable power and are not treated as legal arrangements that give rise to a marriage relationship. *See, e.g.*, Oliver v. Fowler, 168 P.3d 348, 355 (Wash. 2007) ("Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married. But equity is limited; only jointly acquired property, but not separate property, can be equitably distributed.").

This section is applicable only to conflict-of-laws matters for ascertaining what law of succession governs the disposition of the decedent's property in the absence of a valid will that disposes of all the decedent's probate property. It is not applicable to concepts or provisions of law that grant an intestate share to an individual, such as statutes on pretermission. *See, e.g.*, UNIF. PROB. CODE §§ 2-301 (providing that an omitted spouse is "entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse would have received if the testator had died intestate") and 2-302 (providing that an "omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate"). Issues of pretermission and other provisions of law that grant intestate shares to individuals are more properly considered matters of construction and interpretation of a testament and are governed by Section 305. *See also* UNIF. PROB. CODE § 2-705 (construing class gifts in accord with intestate succession).

Recordation or registration of title to real property. Out of an abundance of caution, subsection (b) makes clear what is also stated in Section 105(1)(B)(ii) that subsection (a) specifically nor this act generally prescribes the law governing the recordation of registration of title to trust property. Under longstanding conflict-of-laws rules and subsection (b), the law of the situs or the location of the real property governs matters or recordation or registry concerning the real property.

International Conventions and Regulations. Preservation of the "situs" rule for real property in this section is different from the approach of many international regulations. *See* EU SUCCESSIONS REGULATION art. 21(1) ("Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of his death.").

Section 302. Formal Validity of Will: Execution

(a) A will, other than an oral will, is valid as to a matter of execution if the will is valid as to the matter under:

(1) the law of the state where the testator was physically located at the time of execution of the will; or

(2) the law of the state where the testator was domiciled, had an abode, or was a national:

(A) at the time of execution of the will; or

(B) at the time of death.

(b) Subject to Section 303 concerning a testator's capacity and consent and Section 304 on substantive validity of a will, an oral will is valid only if the will is valid under:

(1) the law at the time of declaration of the state where the testator was physically located at the time the will was declared; or

(2) the law of the state where the testator was domiciled at the time of death.

Reporter's Note

This section applies to matters of formal validity of wills. Sections 303 and 304 address matters of capacity and consent as well as other matters of substantive validity of a will.

Written wills. Matters of execution of wills involve compliance with the formal execution of an instrument, such as a writing requirement. As explained in the Comments to Section 201, a state's interest in enforcing its own laws on formal execution is typically less significant than the protective functions served by the law of capacity and free consent. For discussion of the rationale and purposes behind alternative rules of validation for execution formalities, see the Comment to Section 201.

Electronic Wills. Electronic wills are "written" wills and thus included within the ambit of subsection (a). Under the Uniform Electronic Wills Act, for example, an electronic will must be "readable as text" at the time of execution. *See, e.g.*, UNIF. ELEC. WILLS ACT § 5. Similarly, the Uniform Probate Code requires that a will be "in writing" and indicates that "[a]ny reasonably permanent record is sufficient." UNIF. PROB. CODE § 2-502 & cmt. Thus, the Uniform Electronic Wills Act "incorporates the requirement of writing by requiring that an electronic will be readable as text." *See* UNIF. ELEC. WILLS ACT § 5 cmt. Even without adoption of specific electronic-wills legislation, a growing body of case law has recognized intangible electronic or digital wills as written wills. *See, e.g.*, *In re Estate of Horton*, 925 N.W.2d 207 (Mich. App. 2018); *In re Estate of Castro*, No. 2013ES00140 (Ohio Ct. of Com. Pleas. Prob. Div. June 19, 2013) (reported at 27 QUINNIPIAC PROB. L.J. 412 (2014)). Like the Uniform Electronic Wills Act, this act does not allow "deemed" presence, as opposed to "physical" presence, to provide a sufficient connecting factor for application of a state's law regarding formal validity, even though some states deem a person not physically present to be located within a state at the time of execution. *See, e.g.*, NEV. REV. STAT. § 133.088(1) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Subsection (a)(1) of this act, as well as the Uniform Electronic Wills Act, rejects the concept of "deemed" presence and instead uses the concept of "physical[] locat[ion]" in a state at the time of execution as a sufficient connection for choice-of-law purposes. *See also* UNIF. ELEC. WILLS ACT § 4(1).

Oral wills. Subsection (a) does not provide for recognition of oral or nuncupative wills that are allowed in some states. Conflict-of-laws rules for formal validity of wills commonly allow for recognition of wills only if they are "in writing." *See, e.g.*, UNIF. PROB. CODE § 2-506 (must be in writing); Scalise, *Validity in Wills and Trusts, supra*, App. A. Subsection (b) provides a broader rule for recognition of oral wills, provided oral or nuncupative wills are recognized as valid either in the state in which the testator was physically located at the time the will was declared or the state in which the testator was domiciled at the time of death. *Compare* MO. REV. STAT. § 474.340 (2022) (allowing, in certain circumstances, for nuncupative wills of personal property not exceeding five hundred dollars when the declarant is in "imminent peril of death" and declared before "two disinterested witnesses), *with* FLA. STAT. § 732.502(2) (declining to recognize as enforceable either nuncupative or holographic wills executed by nonresidents of Florida, even if the will was "valid under the laws of the state or country where the will was executed.").

International Conventions and Regulations. International conventions also allow for settlor discretion in choice of law regarding formalities for wills. *See* Hague Trust Convention arts. 6 & 8.

Section 303. Substantive Validity of Will: Capacity and Consent

A will is valid as to a matter of the testator's capacity or consent if the will is valid as to all matters of the testator's capacity and consent concerning the will under the law of the state where the testator was domiciled:

(1) at the time of execution of the will; or

(2) at the time of death.

Reporter's Note

Matters of capacity and consent. Matters of capacity and consent generally involve issues of disability related to minority, incompetence, and insanity, as well as the conduct of third parties that taint the free expression of a settlor's consent, such as fraud, duress, or undue influence. These matters are sometimes referred to as "intrinsic validity." For discussion of matters of "intrinsic validity" and the rationale underlying state policy choices on matters of capacity and consent, see the Comment to Section 202.

This section adopts the approach advocated by some scholars of finding capacity and free consent to exist if the testator had capacity and free consent under the law of the jurisdiction of domicile either at the time of execution or a later time, such as the time of death. *See generally* Symeon Symeonides, *Exploring the "Dismal Swamp": The Revision of Louisiana's Conflicts Law on Successions*, 47 LA. L. REV. 1029, 1053 (1987); SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW: AN INTERNATIONAL COMPARATIVE ANALYSIS 253 (2014); 4 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 322 (1968). Other conflict-of-laws codifications similarly provide alternative validating rules with respect to testamentary capacity. *See, e.g.*, SWISS FEDERAL ACT ON PRIVATE INT'L LAW art. 94 ("A person is capable of disposing upon death if, at the time of making the disposition, they have the capacity to do so under the law of the state of their domicile or habitual residence, or under the law of one of the states of which they are a citizen."). Care, however, has been taken to ensure that the law of only a single jurisdiction is used in assessing both capacity and free consent, as to do otherwise could result in a will that is not valid under the law of any one particular jurisdiction but treated as valid only because the laws of one state were used to assess capacity while the laws of another state were employed to evaluate free consent. *See, e.g.*, Scalise, *Validity in Wills and Trusts, supra,* at 887. For example, if a testator executes a will in State A but dies in State B after having acquired a new domicile there, whether the testator had capacity and was subject to undue influence must be assessed under either the law of State A or the law of State B. If the testator had capacity and free consent under the law of either State A or State B, the will is valid as to matters of capacity and consent. State A's law, however, cannot be used only for matters of capacity, while State B's law is used to assess free consent. Thus, under this section, a will must be "valid as to all matters of capacity and consent" under either the law of the state in which the testator was domiciled at the time of death or the law of the state in which the testator was domiciled at the time of execution.

Section 304. Substantive Validity of Will: General Matters; Perpetuities; Accumulations of Income; Suspension of Power of Alienation

(a) Except as provided in Section 302 concerning formal validity of a will or Section 303 concerning capacity and consent of a testator, a will and the terms of the will are valid as to a matter, including the rules governing perpetuities, accumulations of income, and suspension of the power of alienation, if the will and the terms of the will are valid as to the matter under the law of the state designated in the will for that purpose, unless:

(1) the designated state has no substantial relation to the decedent's estate; or

(2) the application of the law of the designated state violates a strong public policy of the state with the most significant connection to the decedent's estate as to the matter at issue.

(b) Absent an effective designation under subsection (a), a matter of substantive validity of a will or the terms of the will other than capacity and consent under Section 303 is governed by:

(1) the law of the state where the testator was domiciled at the time of death; or

(2) if application of the law under paragraph (1) violates a strong public policy of the state with the most significant connection to the decedent's estate as to the matter at issue, the law of the state with the most significant connection to the decedent's estate as to the matter.

Reporter's Note

Overview. The general approach of this section is to grant the testator discretion to choose the applicable law to govern matters of substantive validity unrelated to matters of capacity and consent, provided the testator chooses the law of a state that has a substantial relation to the decedent's estate and the chosen law does not violate the strong public policy of the state that has the most significant connection to the decedent's estate. If the testator makes such a choice, then subsection (a) makes the testator's choice effective and controlling. In the absence of a choice of law by the testator or if the testator makes a choice that violates subsection (a) (i.e., the chosen law has no substantial relation to the decedent's estate or violates the strong public policy of the state with the most significant connection to the decedent's estate), then subsection (b) supplies the governing law. For explanation of subsection (b), see *infra*.

Matters of creation and validity. A will or the terms of the will may be invalid because it contains an illegal condition or for a variety of other reasons, such as the imposition of impermissible restrictions on spousal rights, unreasonable restraints on alienation or marriage, provisions promoting divorce, and provisions encouraging illegal activity. Similarly, a provision in a will may be invalid because it purports to preclude or prevent in an overbroad manner a challenge or contest to a will. *See, e.g.*, FLA. STAT. ANN. § 732.517 ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."). On these matters, and many others, state laws differ.

Substantial Relation. For discussion of the meaning of "substantial relation," see the Comment to Section 310.

Default Rule in Absence of Testator Prescription. Subsection (b)(1) provides the rule for determining the applicable law when the testator has failed to designate an applicable law. In such a case, the applicable law will usually be the law of the state in which the testator was domiciled at death, which will ordinarily be the state with the most significant connection to the estate. Consequently, in the interest of efficiency and predictably, the law of the testator's domicile is used as the default rule under subsection (b)(1) rather than the more amorphous test of the state with the most significant connection to the decedent's estate. The law of the state with the most significant connection to the estate is still relevant and applicable under subsection (b)(2) when application of the law of the testator's domicile would violate a strong public policy of the state that has the most significant connection to the decedent's estate.

Strong Public Policy Exception. For discussion of the "strong public policy" exception, See the Comment to Section 203.

Section 305. Construction and Interpretation of Will

(a) Construction and interpretation of the terms of a will is governed by the law of the state designated in the terms of the will for that purpose.

(b) Absent a designation under subsection (a), construction and interpretation of the terms of a will is governed by the law of the state where the testator was domiciled at the time of death.

Reporter's Note

Construction and Interpretation. For explanation of the distinction between rules of "construction and interpretation" and rules of procedure and evidence, see the Comment to Section 204.

Unifying Construction and Interpretation. For discussion of the rationale for unifying matters of construction and interpretation, see the Comment to Section 204.

Testator autonomy. For discussion of the role of testator autonomy in selecting the choice of law to govern matters of construction and interpretation, see the Comment to Section 204.

Default Rule in Absence of Testator Prescription. Absent a designation of the governing law by the testator, this section applies the law of the decedent's domicile at death for matters of construction and interpretation. Application of subsection (b) will usually result in the application of the law of the state with the greatest interest in having its law applied and "presumably be in accord with the expectations of the testator." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 264 cmt f. (AM. L. INST. 1969). Application of the law of the testator's domicile at death in the absence of a contrary designation by the testator is also consistent with other modern and traditional choice-of-law approaches. *See, e.g*., RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 7.28(b) (AM. L. INST. Prelim. Draft No. 7, Oct. 2021); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 264(2) (AM. L. INST. 1969); *but see* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 156, 1432 (15th ed. 2012). ("In the absence of indications to the contrary, [the law intended by the testator] is presumed to be the law of his domicile at the time when the will is made."). Some states, however, may have particular rules of construction and interpretation that refer to the laws of other states for construction of certain class terms used in wills. *See, e.g*., UNIF. PROB. CODE § 2-711 (providing that when a will uses a class term, that term should be construed "under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment"). Such a rule of construction may be part of the law of the state in which the testator was domiciled at the time of death and, as such, should be incorporated by this provision as the applicable choice-of-law rule for interpretation of those terms.

Consistent with Section 204 of this act, this section differs from the proposed Restatement (Third) of Conflicts by applying the same rule to matters of construction and interpretation. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 7.28, cmt a (AM. L. INST. Council Draft No. 9, Nov. 2023) ("This Section does not cover choice of law for issues about the interpretation of wills, which is distinct from construction. Interpretation is the process of determining the testator's actual intention based upon the text of the will and relevant extrinsic evidence. It is necessary to construe only if the testator's intent cannot be determined by interpretation. Insofar as the process of interpretation is intertwined with rules of evidence, it is governed by the law of the forum."). Although the proposed Restatement allows, in some instances, for consideration of the law of state of execution at the time of execution to govern matters of construction, the approach of this section is to fix the applicable law to the decedent's domicile at the time of death. A testator who executes a will in State A has little reliance interest in applying State A's rules of construction and interpretation as of the time of execution, as rules of construction and interpretation evolve over time. Even without moving from State A to State B, a testator's will would be construed and interpreted by the rules of State A at the time of the testator's death, rather than at the time of execution. Thus, a testator who moves to State B should be treated similarly and also be subject to the law of the testator's domicile at the time of death.

Matters of Construction. Matters of construction include a vast array of default rules for identifying the intent of the testator when the testator has not clearly provided an indication of preference. Substantive rules of construction include, but are not limited to, default rules of law designed to achieve the likely intent of the testator, such as abatement, ademption, allocation between principal and income, lapse and antilapse, classification and treatment of class gifts, conditions of survivorship, exoneration of liens, pretermission, and survivorship. In addition, the substantive rules of construction also include the numerous constructional preferences that are not rigid default rules but preferences for construing a document in accordance with the testator's intent, such as a preference for construing a document in accord with the donor's general dispositive plan or in a way that achieves more favorable tax consequences. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 11.3; UNIF. PROB. CODE §§ 2-601 to 2-711. For clarity, some of the above issues are elaborated upon below.

Survivorship. Under state law, an heir or devisee may not be allowed to inherit by virtue of failing to survive the decedent for a sufficient amount of time, unless a testator provides otherwise. Under the law of many states, an individual is deemed to have predeceased the decedent if the individual does not survive the decedent for 120 hours. UNIF. PROB. CODE § 2-104. Other states, however, employ different rules. *See, e.g.*, FLA. STAT. ANN. 632.701(2) ("When two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is insufficient evidence that the beneficiaries died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal parts as there are successive beneficiaries and the parts shall be distributed to those who would have taken if each designated beneficiary had survived."); LA. CIV. CODE art. 31 ("One claiming a right that has accrued to another person is bound to prove that such person existed at the time when the right accrued."). Because the rule of survivorship is a default rule that can be overridden by the testator, it is properly characterized as a rule of construction under this section.

Pretermission. In all states, except Louisiana, parents are entitled to intentionally disinherit their children. Pretermitted child statutes apply only in circumstances in which, in absence of clear intent of the testator, the omission of a child from the will appears to be unintentional. Thus, determining whether an omitted child is entitled to a share of or a claim against the decedent's estate is properly a matter of will construction or interpretation. Once it is determined that a child was unintentionally omitted, however, state laws differ on what rights, if any, a child who is accidentally omitted from a decedent's will is entitled to. Under the Uniform Probate Code, a pretermitted heir is entitled to an intestate share but that share may be reduced or limited to the extent the testator has provided for other children in a will. *See* UNIF. PROB. CODE § 2-302. Under Oklahoma law, however, no such limitation exists. *See, e.g.*, 84 OKL. STAT. ANN. § 131. Louisiana law contains no provision for unintentionally omitted children, but any children twenty-three years of age or younger would be entitled to rights as a forced heir. *See* LA. CIV. CODE art. 1494. For discussion of the various approaches employed by states to the matter of pretermission, see Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP., TR. & EST. L.J. 175 (2015). For a discussion of conflict of laws in the context of a pretermitted heir, see *In re Estate of Dow*, 260 A.3d 1 (N.H. 2001) (concluding that the trial court erred in applying the Massachusetts pretermitted heir statute as the decedent was domiciled in New Hampshire at the time of death); *In re Estate of Boyd*, 321 P.3d 1001 (Okla. Civ. App. Div. 1 2014) (applying Oklahoma's pretermitted heir statute to real property in Oklahoma, even though the decedent was domiciled in Texas). *But see Royce v. Estate of Denby*, 379 A.2d 1256 (N.H. 1977) (denying a claim of an omitted child to inherit despite the recognition of the right by the law of the decedent's domicile at death because the decedent was a longtime domiciliary of a state that did not grant such a right and was "mentally incapacitated from the time she was permanently moved to New Hampshire [the state of domicile at death] and had no opportunity to change her will").

A similar complexity exists for spouses who are unintentionally omitted from a deceased spouse's will. Again, the Uniform Probate Code grants a pretermitted spouse an intestate share, but only to the extent the testator has not devised property to certain children of the testator. UNIF. PROB. CODE §§ 2-301. Some states, such as Florida, do not similarly limit the surviving spouse's ability to assert rights as a pretermitted spouse and, instead, more broadly grant the surviving spouse an intestate share. FLA. STAT. ANN. § 732.301. Other states, such as Texas and Louisiana, provide no relief for unintentionally omitted spouses. The effect of such an omission, however, is lessened in community property states where a spouse already owns one-half of the marital property.

Section 306. Revocation of Will by Physical Act

A will is entirely or partially revoked by physical act if the will is entirely or partially revoked under:

(1) the law of the state where the decedent was domiciled or physically located at the time the will was entirely or partially revoked by physical act; or

(2) the law of the state where the decedent was domiciled at the time of death.

Reporter's Note

This section expands upon existing law, which generally applies the law of the decedent's domicile at death to acts of physical revocation. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263, cmt (i) ("The effect upon a will, insofar as it concerns movables, of an intentional act of revocation by the testator, such as the physical destruction of the will, is determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. The same law will be applied to determine whether the will has been entirely or partially revoked by operation of law, such as by marriage or by the birth of a child subsequent to the will's execution."); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW 573 (5th ed. 2001) ("The wills law of the domicile at death is generally held to determine whether there has been a revocation by any sort of act or event."); Herbert F. Goodrich, *Inheritance Problems in the Conflict of Laws*, 24 MICH. L. REV. 558, 573 (1926) ("A more intricate problem may arise, however, when a testator has changed his domicile to another state between the time of the alleged revocation and the time of his death, and the law of the two states differs, upon the question of revocation…. But whatever his intent, he must have fulfilled the requirements of the law which is to control, if that intent is to be made effective. If the question were that of the validity of the will, it has been shown that it is the law of the domicile at the time of the testator's death, not that at the time of execution that controls, unless a statute provides the contrary. By analogy, the same test would be applied in deciding the effectiveness of a revocation."). In addition to adopting the above familiar rule from existing law, this section recognizes the validity of a physical revocation if the act of physical revocation complied with the law at the time of revocation of the state in which the decedent was domiciled or physically located at the time of the revocatory act. Although this approach increases decisional costs, as it will sometimes require courts to ascertain historical law of other jurisdictions, it does so in an attempt to comport with the likely expectations of a testator at the time of performing the revocatory act. *See* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 159, 1442 (15th ed. 2012) ("[T]he question of whether a will has been revoked depends upon the law of the testator's domicile at the date of the alleged act of revocation.").

Revocation of electronic will. A state should consider the increasing phenomenon of electronic or intangible wills, which are already recognized in many states by virtue of a state's conflict-of-laws rules, and whether a state's existing law on physical revocation should be updated to provide an explicit method of physical revocation for electronic wills. *See, e.g.*, UNIF. ELEC. WILLS ACT Section 7(b)(2) (providing that "[a]ll or part of an electronic will is revoked by … a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.").

<u>Partial revocation by physical act</u>. Although all states allow a will to be entirely revoked by physical act, partial revocation by physical act is not permitted in some states. Under this section, a partial revocation of a will by physical act is recognized as a valid revocation if it is recognized by the law at the time of revocation of the state in which the decedent was domiciled or physically located when the will was entirely or partially revoked by physical act or by the law of the state in which the decedent was domiciled at the time of death. For a discussion of some of the complexities involved in conflict of laws pertaining to revocation of wills, see John P. Gaset, *Conflict of Law Regarding Revocation of Wills: Mutiny on the Situs Default*, 39 FLA. ST. UNIV. L. REV. 1105 (2012).

<u>Revocation by subsequent will or operation of law</u>. This section does not apply to revocation by subsequent will or revocation by operation of law. Whether a will is revoked by the execution of a subsequent will depends upon whether the subsequent will is valid and whether the term of the will evince the intent of the testator to revoke all or part of the prior will. This issue is more appropriately determined under Sections 302, 303 & 304 (governing matters of validity) and Section 305 (governing matters of construction and interpretation). *See, e.g., In re Estate of McHugo*, 237 A.3d 1239 (Vt. 2020) (stating that because the testator resided in Vermont at the time of her death, "Vermont law applie[d] to determine the validity of the [2006] will," even though the testator had previously executed a mutual will with her ex-husband while residing in Arizona in which the parties agreed not to revoke the mutual will).

Similarly, revocation by operation of law, such as by divorce, is more appropriately a matter of construction or interpretation governed by Section 305. *See, e.g.*, UNIF. PROB. CODE § 2-804 ("Except as provided by the express terms of a governing instrument,… the divorce or annulment of a marriage … revokes any revocable … disposition or appointment of property made by a divorced individual to the divorced individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse…).

Section 307. No Taker

If there is property of a decedent's intestate or testate estate to which no person or state is entitled under a will or a state's intestacy statute, the law of the state where the property is located at the time of the decedent's death governs succession to the property.

Reporter's Note

<u>No Taker</u>. The application of this section is limited to traditional instances in which a decedent's property is transferred to the State or a political subdivision in the absence of intestate or testate takers. Of course, this section should not be read to preclude the application of equitable principles and a court's authority to impose well-established probate remedies such as

a resulting or constructive trust. Under the law of some states, as exemplified by the Uniform Probate Code, the state inherits as an heir of last resort, rather than by virtue of escheat. In such a case, Section 301 applies rather than this section. *See, e.g.*, MICH. COMP. L. § 700.2105 ("If there is no taker under the provisions of this article, the intestate estates *passes* to this state.") (emphasis added). UNIF. PROB. CODE § 2-105 ("If there is no taker under the provisions of this [article], the intestate estate passes to the state."); COLO. REV. STAT. ANN. § 15-11-105. ("If there is no taker under the provisions of this article, the intestate estate passes to the state of Colorado…). This section has no applicability in instances in which the state receives property as an heir. This section also does not apply in instances in which a state takes property of a decedent by testate transfer. Thus, it does not include situations in which a testator provides that the state or a political subdivision is a devisee under a will.

In most states, however, the State is not considered an heir but takes property by escheat or as unclaimed property. *See, e.g.*, FLA. STAT. ANN. § 732.107 ("When a person dies leaving an estate without being survived by any person entitled to a part of it, that part shall escheat to the state."). Only in those cases is this section applicable. *See generally Delaware v. New York*, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat."). This approach is consistent with the prevailing rule under American conflict of laws. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 243, 266. *Id*. § 243 cmt (a) ("The state where a particular chattel is situated is the state which may escheat it."); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 7.28, cmt a (AM. L. INST. Prelim. Draft No. 7, Oct. 2021) ("Whether there is an escheat of property of a decedent to which no person is legally entitled to succeed is determined by the law of the state where the property was located at the time of death."); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 181, 650 (5th ed. 2001) ("Any state that is the situs of movables left by a decedent dying intestate and without heirs would declare itself rather than the domiciliary state to be the successor thereto by escheat."); N.Y. EST. POW. & TRUST § 4-1.5 ("No estate property, whether passing by intestacy or otherwise, which has its situs in this state, shall pass to any other state or territory of the United States, or to any foreign country or sovereignty in the event of the absence of an individual heir, distributee, legatee or owner of said property, but shall pass as abandoned property to the state of New York, and shall be held as such property pursuant to the abandoned property law."). For discussion of the conflict-of-laws issues raised by various state laws that transfer property by virtue of inheritance as opposed to escheat, see Ronald J. Scalise Jr., *The State as Heir? Escheat, Intestacy, and Unclaimed Property* (*forthcoming*). Moreover, the United States Supreme Court has held that "[n]o serious controversy can arise between States seeking to escheat 'tangible property, real or personal,' for 'it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat.'" *Delaware v. New York*, 507 U.S. 490, 498 (1993) (quoting *Texas v. New Jersey*, 379 U.S. 67, 67 (1965)). Although ascertaining the location of intangible property for purposes of escheat can be difficult, the Court's approach flows from the "common-law 'concept of *mobilia sequuntur personam*,' according to which intangible personal property is found at the domicile of its owner." *Id*. at 503 (quoting *Texas, supra*, 379 U.S. at 680 n.10). *But see Delaware v. Pennsylvania*, 598 U.S. 115 (2023) (recognizing abrogation of the common-law principles of escheatment in circumstances regulated by the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501 *et seq*.).

Transfer to a Political Subdivision of a State. In some jurisdictions, however, property is transferred to a political subdivision of the state rather than the state itself. *See, e.g*., Vt. Stat. tit. 14 § 681 ("When a person dies testate or intestate, seised of real or personal property in this State, leaving no heir nor person entitled to the same, the selectboard members of the town where the deceased last resided, if an inhabitant of the State, or of the town in which estate lies, if the absent person resided out of the State, may file a petition, on behalf of the town, with the Probate Division of the Superior Court for a hearing in accordance with the Rules of Probate Procedure.").

Property in One State; Intestate Heirs in Another State. This section applies only in the absence of a taker of the decedent's property pursuant to the application of the law as determined under Article 3 of this [act] or other applicable law. More specifically, before a state's law of escheat is applied, it must be determined that there is no devisee of the decedent's property under a will and no heir under the applicable law as provided in Section 301. This section does not apply merely because a decedent has property located in one state and no taker of that property under the law of that state. For example, if a decedent has property located in State X, whose laws of intestacy limit inheritance to descendants of the decedent's grandparents, but the decedent dies domiciled in State Y, whose laws of intestacy extend inheritance to all kindred, State X should only apply its law of escheat in the absence of all kindred of the decedent as determined by the law of State Y. In all instances of escheat (this section) or intestate inheritance (Section 301), however, real property located in a particular state can only be transferred to the state in which it is located.

Section 308. Designation of Governing Law of Will

(a) Unless limited in the terms of a will, the following terms or other comparable language are sufficient to designate the governing law for all matters under this [article] for which a designation is permitted:

(1) "the (will) (estate) is governed by the law of (designated state)";

(2) "the law of (designated state) applies to the (will) (estate)";

(3) "the (will) (estate) is subject to the law of (designated state)";

(4) "the meaning and effect of the terms of the will are determined by the law of (designated state)"; or

(5) "the (will) (estate) is administered under the law of (designated state)".

(b) A designation of governing law under this [article] is permitted for the following matters:

(1) substantive validity under Section 304(a); and

(2) construction and interpretation under Section 305(a).

Reporter's Note

Designation of Governing Law. For a discussion of the sufficiency of a designation of the governing law in a trust, see the Comment to Section 207. As referenced in the Comment to Section 207, a designation by the testator of the governing law may be implied, and courts should carefully construe the terms of a will to ascertain whether an implied designation has occurred. For example, if a testator writes a will in Greek and uses terminology particular to Greek law, a court may reasonably construe the terms of the will implicitly designate Greek law as the governing law for the will or estate.

Section 309. Most Significant Connection to Estate

(a) The following contacts and factors shall be considered in determining the state that has the most significant connection to a testator's estate as to a matter at issue under Section 304(a)(2) or (b)(2) concerning substantive validity of a will:

(1) the domicile of the testator at the time of death;

(2) the domicile of the testator at the time of execution of the will;

(3) the nature and location of the property at issue at the time of death of the testator;

(4) the domicile of any devisee or successor at the time of death of the testator whose interest is affected;

(5) the justifiable expectations of any interested party; and

(6) the policies underlying succession law and any other field of law relevant to the matter at issue.

(b) The contacts and factors in subsection (a) are not exclusive, and other contacts and factors may be relevant in determining the state with the most significant connection to a decedent's estate as to a matter at issue under Section 304(a)(2) or (b)(2).

Reporter's Note

For discussion of the use of the term and the concept of "most significant connection" to an estate, see the Comment to Section 209. The term "successor" in paragraph (4) of subsection (a) is used in contrast to the term "devisee" to refer to an individual who inherits property from the decedent via intestate succession, lapse, anti-lapse, or similar succession-related institution.

Section 310. Substantial Relation to Estate

(a) A state has a substantial relation to a testator's estate if any of the following contacts is in the state:

(1) the domicile of the testator at the time of death or at the time of execution of the will; or

(2) the domicile at the time of death of the testator of any devisee or successor whose interest is affected.

(b) The contacts in subsection (a) are not exclusive, and other contacts between a state and an estate may be sufficient to create a substantial relation of the state to the estate.

Reporter's Note

Substantial Relation. With regard to matters of creation and validity other than capacity and consent, Section 304(a)(1) allows the settlor to choose the applicable law, provided the chosen state has a substantial relation to the trust and the chosen state does not violate a strong public policy of the state with the most significant connection to the trust as to the matter at issue. For further explanation of the concept of "substantial relation," see the Comment to Section 210.

[Article] 4

Exercise of Power of Appointment, Elective Share Rights, and Bars to Succession or Forfeiture of Rights

Prefatory Note

This article applies to choice of law that governs the formal and substantive validity of an exercise of a power of appointment, which is governed by Sections 401, 402, and 403, as well as the construction and interpretation of the terms of an exercise of a power of appointment, whether in a will or trust, which is governed by Section 404. This article also applies to choice of law that governs elective share rights, statutory allowances, forced heirship or maintenance rights, which is governed by Section 405, and bars to succession or forfeiture of benefits from a decedent's estate or trust, which is governed by Section 406.

This article does not apply to choice of law that governs a will or a trust to the extent that the will or trust does anything other than exercise a power of appointment. To the extent that the terms of the will or trust pertain to other matters, Article 2 or 3 determines the choice of law on validity and construction and interpretation.

Section 401. Formal Validity of Exercise of Power of Appointment: Execution

An exercise of a power of appointment is valid as to a matter of execution if it is valid as to the matter under:

(1) the law of the state designated in the terms of a will or terms of a trust granting the power for that purpose; or

(2) absent a designation under paragraph (1), the the law of the state under which matters of execution of the will or trust that grants or exercises the power would be valid.

Legislative Note: *A state that has enacted Uniform Powers of Appointment Act Section 103 should repeal that provision to be replaced by this section and by Sections 402, 403, and 404.*

Reporter's Note

This section applies to matters of formal validity of a will or trust exercising the power of appointment. This section should be applied by extension or analogy to a powers of appointment that can exercised by a trustee, even if not technically a power exercised by will or trust. Sections 401 and 402 address matters of capacity and consent as well as other matters of substantive validity of the instrument.

"Granting" a Power of Appointment. The sections and comments in this article refer to the "grant" or "granting" of a power of appointment as something distinct from the power's "creation" within the meaning of the common law "relation-back theory." For example, if a power of appointment conferred by a trust is exercised in favor of the trustee of a second trust, which in turn confers a successive power of appointment on yet another powerholder, then the second, successive power of appointment is "granted" within the meaning of this article by the terms of the second trust, even if the "relation-back" doctrine treats the power as "created" by the terms of the first trust.

Will or Trust Formalities. If a power of appointment is exercisable by a powerholder by will or trust, question may arise as to what law applies to govern the formal validity of the will or trust exercising the power of appointment, as the law of the state of the donor's domicile may differ from the law of the state of the powerholder's domicile. For example, suppose a donor, who is domiciled in State A, which recognizes only attested wills, creates a power of appointment exercisable by a powerholder domiciled in State B, which recognizes both attested and holographic wills. Question may arise as to whether a powerholder, to validly exercise the power, must comply with the law of the powerholder's domicile or the donor's domicile. The situation would be no different if State A recognized holographic wills but State B did not. As in other sections of this act, on matters of execution or compliance with formalities, a liberal approach of alternative rules of validation is adopted, which recognizes that a state's interest in enforcing its own laws on formal execution is typically less significant than the protective functions served by the law of capacity and free consent or other matters of substantive validity. *See, e.g.*, Sections 401 and 402. As a result, unless the donor of the power prescribed compliance with the law of a particular state or pursuant to a particular formality (e.g., in writing before three witnesses), Paragraph (2) recognizes that an exercise of a power of appointment is formally valid if it complies with either the law of the state that governs execution of the will or trust that creates the power or with the law of the state that governs execution of a disposition by the powerholder of his own property. In the above example, the powerholder can use a holographic will to exercise the power if either the law of State A or the law of State B recognizes the validity of holographic wills. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b) (assessing matters of formalities and capacity "in accordance with either the law which determines the validity of the trust … or the law applicable to the disposition by the donee of his own property"). In addition, the holographic will would be valid if holographic wills were recognized under the law of any state in Section 302. DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 163 and Comment at 1450 (15th ed. 2012) ("[A] will exercising a power of appointment over movables or immovables will be treated as well executed if its execution conformed to the internal law in force in the country where it was executed, or in the country where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a State in which, at either of those times, he was a national. And a will in so far as it exercises a power of appointment over immovables will also be treated as well executed if its execution conformed to the internal law in force where the property was situated."); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 21.11, 1288-89 (2018) ("Although authority is scant, the issue of formal validity of an instrument exercising the power seems more clearly to fall within the alternative reference to sustain the exercise of the power.").

<u>*Additional or More Restrictive Requirements.*</u> The provisions of this section address solely matters of choice of law. A grantor of a power of appointment may impose additional or more restrictive requirements on a powerholder's exercise of a power of appointment. The enforceability of substantive requirements by the donor is beyond the scope of this section. For example, a donor may require that a power of appointment be exercised in an attested will or before three witnesses, even though the governing law may allow for holographic wills or for a will to be executed before only two attesting witnesses. Such additional or more restrictive requirements imposed by the grantor would likely be respected, and it is not the intent of this section to frustrate the intention of the grantor. Nevertheless, the intent of the grantor is not so sacrosanct as to allow the grantor to remove requirements imposed by applicable law or to require that a power of appointment be exercised by less restrictive requirements than imposed by applicable law. For example, even though a grantor provides that a power to appoint real

property may be exercised orally, applicable law will not respect the imposition of less restrictive requirements than those that would ordinarily impose a writing to exercise the power. Of course, no definitive statement can provide a definition, in all cases, of what constitutes an additional or more restrictive requirement.

Section 402. Substantive Validity of Exercise of Power of Appointment: Capacity and Consent

An exercise of a power of appointment granted by the terms of a will or terms of a trust is valid as to a matter of the powerholder's capacity or consent in the case of a power exercised by the terms of:

(1) an inter vivos trust, if the exercise is valid as to the powerholder's capacity and consent under the law of the state where the powerholder was domiciled at the time of execution of the exercise; and

(2) a will, if the exercise is valid as to all matters of the powerholder's capacity and consent concerning the power under:

(A) the law of the state where the powerholder was domiciled at the time of execution of the will or trust; or

(B) the law of the state where the powerholder was domiciled at the time of the powerholder's death.

Legislative Note: *A state that has enacted Uniform Powers of Appointment Act Section 103 should repeal that provision to be replaced by this section and by Sections 401, 403, and 404.*

Reporter's Note

This section applies to matters of capacity and consent of the powerholder in exercising a power of appointment. Sections 401 and 403 address matters of formal validity of a will or trust as well as other matters of substantive validity of the instrument.

<u>*Capacity and Consent*</u>. A power of appointment may be exercisable by inter vivos trust. In such a case, Paragraph (1) provides that the appropriate law in assessing whether the powerholder has capacity and free consent to exercise the power of appointment is the law of the powerholder's domicile at the time of execution of the exercise. The term "execution" is defined

in Section 102(5) and refers to completion of the formalities necessary to make an inter vivos trust effective. The approach of this paragraph is consistent with existing law. *See* UNIF. POW'R APP. ACT § 103(2).

If a power of appointment is exercisable by a powerholder by testamentary trust or will, question may arise as to what law applies to govern the level of mental capacity and free consent the powerholder must possess to execute a will exercising the power of appointment, as the law of the state of the donor's domicile may differ from the law of the state of the powerholder's domicile. For example, suppose a donor, who is domiciled in State A which recognizes that only individuals 18 years of age and older may execute wills, creates a power of appointment exercisable by a powerholder domiciled in State B, which recognizes a minimum age of capacity of 16 years of age to execute a will. Question may arise as to whether a powerholder, to validly exercise the power, must comply with the law of the powerholder's domicile or the donor's domicile. The situation would be no different if State A allowed for wills to be executed by 16-year-olds but State B did not. Paragraph (2) of this section is consistent with other sections of this act in which matters of capacity and consent are accorded a permissive approach that recognizes the validity of the exercise, if the powerholder had capacity and free consent under either the law of State or the law of State B. *See* Sections 202 and 303. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b) (assessing matters of formalities and capacity "in accordance with either the law which determines the validity of the trust … or the law applicable to the disposition by the donee of his own property"); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 21.11, 1288 (2018) ("The question of capacity of a donee seldom arises in the United States, and when it does there seems no reason why the maximum validation of the intention of the donor and donee should not be effected to sustain capacity by either the law applicable to the transaction by which the donor created the power, or that of the donee's domicile."). Once again, however, care has been taken to ensure that the law of only a single jurisdiction is used in assessing both capacity and free consent, as to do otherwise could result in an exercise of a power that is not valid under the law of any one particular jurisdiction but treated as valid only because the laws of one state were used to assess capacity while the laws of another state were employed to evaluated free consent. *See, e.g.*, Scalise, *Validity in Wills and Trusts, supra,* at 887. See comments to Sections 202 and 303.

Additional or More Restrictive Requirements. As with Section 401, this section concerns solely matters of choice of law for a powerholder's capacity and consent to exercise a power of appointment. For explanation of the concept of additional or more restrictive requirements, see comments accompanying Section 401.

Section 403. Substantive Validity of Exercise of Power of Appointment: Other Matters

(a) In this section, "presently exercisable general power of appointment" means a power of appointment exercisable by the powerholder at the relevant time in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate. The term:

(1) includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(A) the occurrence of the specified event;

(B) the satisfaction of the ascertainable standard; or

(C) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death.

(b) Except as provided in Section 401 on formal validity or Section 402 concerning capacity and consent of a powerholder, the validity of the exercise of a power of appointment granted by the terms of a will or terms of a trust is governed by:

(1) as to a presently exercisable general power of appointment, the law of the state applicable to the disposition by the powerholder of the powerholder's own property; or

(2) in a case other than under paragraph (1), the law of the state applicable to the substantive validity of the terms of the will or terms of the trust granting the power of appointment.

Legislative Note: *A state that has enacted Uniform Powers of Appointment Act Section 103 should repeal that provision to be replaced by this section and by Sections 401, 402, and 404.*

Reporter's Note

Subsection (a) is based upon the Uniform Powers of Appointment Act. *See* UNIF. POW'R APP. ACT § 102(6) & (15). *See also* VIRG. CODE ANN. § 64.2-308.1. ND Cent. Code § 59-11-02.

Paragraph (b)(1) accords with the traditional approach insofar as a general power of appointment is governed by the law applicable to disposition by the powerholder of the powerholder's own property. The rationale for this rule is that for a general power of appointment, the property subject to the power can be appointed to the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate. *See* UNIF. POW'R APP. ACT § 102(6). As a result, the property subject to the power is more appropriately treated as property of the powerholder rather than the donor of the power. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 19.1 cmt e (2011); *White v. United States*, 680 F.2d 1156 (7th Cir. 1982); JOHN A. BORRON JR., SIMES AND SMITH, THE LAW OF FUTURE INTERESTS PT 3 § 1274 (3d ed. 2002). The traditional approach also dictates that for nongeneral powers, the property is more appropriately treated as the donor's property, as the property cannot be appointed to the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate. *See* UNIF. POW'R APP. ACT § 102(10). Thus, the powerholder is merely carrying out the plan of the donor. BORRON, SIMES AND SMITH, THE LAW OF FUTURE INTERESTS PT 3 at § 1274 ("If the power is special, then the period of time in determining the validity of the appointment under the rule is measured from the creation of the power and not from the time of its exercise."). As a result, for purposes of substantive validity under the traditional approach, it is appropriate to apply the "relation back" doctrine, which refers to the law governing the donor's will or trust rather than the powerholder's exercise of the power. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 (a) (holding the exercise of a special appointment valid if it is exercised "in accordance with the law which determines the validity of the trust"); *see also id*. § 270 cmt f; JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 17.08 (2008); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 163 and Comment at 1454 (15th ed. 2012). Paragraph (b)(2) is also consistent with the above traditional approach insofar as it provides that the substantive validity of the exercise of a power of appointment that is not a presently exercisable general power of appointment is governed by the law of substantive validity applicable to the terms of the will or the terms of the trust creating the power of appointment. Rules applicable to the substantive validity of the terms of a trust or the terms of a will creating a power of appointment are found in Sections 204 and 305, respectively. As Sections 203 and 304 allow for settlor and testator to choose, within limits, the applicable law to govern substantive validity, the approach of paragraph (b)(2) is also generally consistent with the Restatement and the Uniform Powers of Appointment Act, which both accord discretion to the donor in selecting the governing law. Unlike the Uniform Powers of Appointment Act but similar to the Restatement, donor discretion under Sections 203 and 304 is recognized, provided the state selected has a substantial relation to the trust or estate and the application of the law of the designated state does not violates a strong public policy of the state with the most significant connection to the trust or estate as to the matter at issue. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b *with* UNIF. POW'R APP. ACT § 103. *See also* JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 17.08 (2008) (observing that "a party creating or exercising a power may specify the governing law, provided that the jurisdiction has a substantial relation to the power…). Despite the force of traditional doctrine, the Uniform Powers of Appointment Act applies the law of the powerholder's domicile to all "exercise[s], release[s], or disclaimer[s] of the power" unless the terms of the instrument creating the power provide otherwise, this section applies, as a default rule, the law of the powerholder's domicile, only if doing so does not violate a strong public policy of the state with the most significant connection to the appointed property. The approach of the Uniform Powers of Appointment Act has been subject to criticism. *See, e.g*., James P. Spica, *Alien Powers: Powers of Appointment, "Dogma," and the Pure Theory of Jurisdiction-Selecting Choice of Law*, 97 TUL. L REV. 1047, 1082 (2023) (observing that the authority for the “modern view” in UNIF. POW’R APP. ACT § 103(2) supports only a “narrow exception (to the relation back of powers in choice of law)” rather than a “wholesale rejection” of the relation back idea).

The traditional approach to the treatment of powers of appointment in conflict of laws has also been subject to a variety of critiques. It has been observed that the complete transitivity or “relation back” approach may, in limited instances, create anomalies, but this approach achieves a logical outcome in most cases and has also been retained for ease of application. *See* James P. Spica, *Conflict of Laws and the Transitivity of the "Relation Back” of Special Powers of Appointment*, 56 REAL PROP. TR. & EST. L. J. 333 (Fall/Winter 2021); James P. Spica, *Power Tools for Choice of Law on Trust Validity*, 59 REAL PROP. TR. & EST. L. J. 179 (Summer 2024) (critiquing a strict “relation back” approach with respect to successively generated special powers of appointment). Moreover, if a general power of appointment is testamentary power, further complexity exists, as the powerholder cannot appoint the property to himself but could do so to his estate. Although the power in such a case is less obviously that of the powerholder, it may well be the case “that in the case of a general power of appointment, even though it is a power to appoint only by will, the donee is substantially the owner of the appointive property, and that the disposition should be upheld if valid under the law applicable to the disposition by the donee of his own property, even though it would be invalid under the law governing the validity of the original trust.” RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 274 cmt (b).

Federal Estate and Gift Tax and the Generation Skipping Transfer Tax. The approach of this section is consistent with the treatment of powers of appointment under federal tax law. Under subparagraph (b)(1), the law of the state of the powerholder’s domicile at the time of exercise of the power applies to the validity of a general power of appointment because the power grants the powerholder an equivalent of ownership. Similarly, under federal law, assets subject to a general power of appointment are includable in the powerholder’s transfer tax base. IRC § 2041(a)(1) & (2). Thus, if the powerholder exercises the power during his lifetime, the exercise is treated as a gift and may be subject to gift taxation. Because the holder of a nongeneral power does not have rights equivalent to ownership, the exercise of such a power is not treated as a gift and is not subject to taxation. Rather, in exercising a nongeneral power, the powerholder “ merely filled in the blanks” created by the donor. *See* Eugene Kuntz, *Powers of Appointment*, 9 SW L.J. 141, 143 (1955). Correspondingly, under subparagraph (b)(2) of this Section, the validity of the exercise of a nongeneral power is governed not by the law of the powerholder’s domicile but relates back to the creation of the power and is governed by the law of the domicile of the donor of the power.

Through creative drafting, donors would often create nongeneral powers of appointment given to beneficiaries in trust that allowed the beneficiary to appoint property to third parties, usually children of the powerholder, which would avoid inclusion of the property in the beneficiary’s transfer tax base. In effort to prevent tax avoidance, Congress enacted the generation-skipping transfer tax (GST) in 1986, which imposes tax when a settlor “skips” a generation and transfers property to a beneficiary two generations or more removed from the settlor, thus closing the loophole used by creative estate planners employing nongeneral powers.

The Rule Against Perpetuities and the Delaware Tax Trap. Paragraph (b)(1) recognizes that because the holder of a presently exercisable general power of appointment can appoint the property to himself, the relevant perpetuities period begins to run from the time of exercise of the power. A testamentary general or nongeneral powerholder, however, does not have the equivalent of ownership, and thus the relevant perpetuities period relates back to the creation rather than the exercise of the power. This treatment of testamentary general or nongeneral powers is consistent with subsection (b).

Pursuant to a Delaware statute, an interest in trust created by any power of appointment – general or nongeneral – measures its validity from the time of exercise rather than from the time the power was created. This statute not only allowed for perpetual trusts but also historically for the avoidance of federal estate tax, provided the power used to create the trust was a nongeneral, rather than a general power. In an effort to close this tax loophole created by Delaware law, Congress amended federal tax law to the "Delaware Tax Trap." The "Delaware Tax Trap" is the common name for Sections 2041(a)(3) and 2514(d) of the Internal Revenue Code, which provides that assets subject to a power of appointment are included in the powerholder's transfer tax base to the extent the powerholder "exercises a power of appointment … by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power." IRC § 2041(a)(3). Thus, the interaction between federal tax law and Delaware state law meant that the exercise of a nongeneral power of appointment by a trust beneficiary to create a successive nongeneral power of appointment creates tax liability. Whether it is preferable to have assets subject to a nongeneral power of appointment pass to a subsequent generation and pay GST tax or to exercise the power to create a general power and thus subject the property to gift or estate tax depends, of course, upon a number of factors, including the applicable tax rates. For further discussion of the Delaware Tax Trap and the relation-back doctrine, see James P. Spica, *Another Trap for the Wary: What We Can Learn About the Relation-Back Doctrine from Pennsylvania's Anti-Delaware-Tax-Trap Statute*, 66 WAYNE ST. L. REV. 483 (2021).

Section 404. Construction and Interpretation of Exercise of Power of Appointment

(a) Construction and interpretation of the terms of a will or terms of a trust that exercise a power of appointment is governed by the law designated for that purpose in the terms of the will or trust exercising the power.

(b) Absent a designation under subsection (a), construction and interpretation of the terms of the will or terms of the trust that exercise a power of appointment is governed by, in the case of exercise by:

(1) an inter vivos trust, the law of the state where the powerholder was domiciled

at the time of execution of the will or trust exercising the power; and

(2) a will, the law of the state where the powerholder was domiciled at the time of death.

Legislative Note: *A state that has enacted Uniform Powers of Appointment Act Section 103 should repeal that provision to be replaced by this section and by Sections 401, 402, and 403.*

Reporter's Note

Authority of the donor of the power. Although a donor of a power may impose requirements for its exercise, such that the powerholder makes specific reference to the power in its exercise, a donor should not use a vague and seemingly unrelated choice-of-law provision in the granting of the power to accomplish that goal. Existing law also recognizes the donor's ability to impose requirements of exercise upon the powerholder. *See, e.g.*, UNIF. PROB. CODE § 2-704; UNIF. POW'R APP. ACT § 304. Under this section, choice-of-law for the exercise of a power of appointment is exclusively the province of the powerholder, provided the powerholder's choice of law does not conflict with any requirements imposed by the donor upon the powerholder necessary to exercise the power. *But see* JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 17.08 (2008) (observing that "a party creating or exercising a power may specify the governing law" and [w]ith respect to matters of construction, no relation to the donor or the donee of the power need exist."). *See also First Nat'l Bank v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972) (selecting New York law as the governing law with respect to a general power exercised by a Florida powerholder over an inter vivos trust created by Illinois settlors of assets largely located in Illinois and administered by an Illinois trustee).

What constitutes exercise of a power. What constitutes an exercise of a power of appointment and whether a powerholder must make specific reference in an instrument to the exercise of the power is an oft litigated question on which state laws differ. Under the law of some states, a residuary clause in a will that makes no specific reference to the exercise of the power is sufficient. Under the law of other states, however, specific reference to the power is a requirement of valid exercise. *See, e.g.*, *First Nat'l Bank v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972) (applying New York law as designated by the donor in determining that a residuary clause in a will was a sufficient exercise of a power in contrast to Illinois law in which such a clause would have been an insufficient exercise of the power). The Uniform Powers of Appointment Act adopts a blanket reference test based upon intent for general powers of appointment. *See* UNIF. POW'R APP. ACT §302. "Under no circumstances, [however,] does a residuary clause manifest an intent to exercise a nongeneral power." *See id.* cmt. Fundamentally, the question of whether a powerholder manifests an intent to exercise a power – general or specific – is a question of construction and interpretation of the operative instrument. Because the relevant conduct in question, i.e., the sufficiency of an attempted exercise of a power, is conduct of the powerholder rather than the donor of the power, the relevant law to be applied is the law of the powerholder's domicile, rather than the law of the donor's domicile. This approach accords with modern theory governing exercise of powers of appointment. *See generally* RESTATEMENT

(SECOND) OF CONFLICT OF LAWS § 274 Rptr's Note. ("Where the donee of a power exercises it by making an appointment upon a further trust, the construction of the appointment instrument is governed by the law applicable to the disposition by the donee of his owner property."); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 19.1 cmt. e (2003) ("The law of the donee's domicile governs whether the donee has effectively exercised a power of appointment, unless the instrument creating the power expresses a different intention."); LUTHER L. MCDOUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 186 at 666 (5th ed. 2001) ("Interpretation of a donee's will exercising a power presents problems no different from those in other cases involving interpretation of wills. The donee's language is his own, not the donor's, and will usually be construed where movables are concerned in keeping with the law of the donee's domicile…"); John Mulford, *The Conflict of Laws and Powers of Appointment*, 87 U. PA. L. REV. 403, 423 (1939) (acknowledging contrary authority but noting that in matters that are "a pure question of construction of the donee's and not the donor's will, the law of the donee's domicil should be controlling."). For an analogous rule under English law, see DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 162 (15th ed. 2012) ("[T]he question whether the will was intended to exercise the power must be determined by the law which governs the construction of the will, that is, in the absence of indications to the contrary, the law of the donee's domicile at the time when the will was made."). Herbert F. Goodrich, *Inheritance Problems in the Conflict of Laws*, 24 MICH L. REV. 558, 584 (1926) ("There is strong reason for saying that [construction of an exercise of a power of appointment] should be determined by the law of the domicile of the donee of the power…. And where the intention is not clearly expressed, but must be found by implication, or, perhaps more accurately, fixed by construction of the will, the law to govern this construction should be that with regard to which the will was written, the testator's (donee's) domicile.").

Section 405. Elective Share Rights; Statutory Allowances; Forced Heirship or Maintenance Rights

The existence, nature, and extent of the rights of an individual claiming an elective share, rights under [cite to the state's applicable statutory allowances, such as homestead, exempt property, or family], or rights of forced heirship or maintenance are governed by the law of the state where the decedent was domiciled at the time of death.

Legislative Note: *A state that has enacted Uniform Probate Code Section 2-202(2) should repeal that provision to be replaced by this section. A state that has enacted Uniform Probate Code Section 2-401 should repeal the second sentence of that provision to be replaced by this section.*

Reporter's Note

The general approach of this section is consistent with existing law. Elective share rights, statutory allowances, and forced heirship or maintenance rights vary greatly among states and are matters of state public policy that are generally not subject to a testator's discretionary control.

UNIF. PROB. CODE § 2-202(d) ("The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death."); UNIF. PROB. CODE § 2-401 ("Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death."). Both the modern and traditional approaches to conflict of laws on this matter recognize that the state of the decedent's domicile at death is most likely the state with the greatest interest in the applicability of its law. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 7.27 (AM. L. INST. Prelim. Draft No. 7, Oct. 2021) ("The law of the state of the testator's domicile at the time of death governs the rights, if any, of a person to take form the testator's estate even if the will does not so provide."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 265(1) ("The forced share interest of a surviving spouse in the movables of the deceased spouse is determined by the law that would be applied by the courts of the state where the deceased spouse was domiciled at the time of this death. These courts would usually apply their own local law in determining such questions."); *see also* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 20.14, 1266 (2018) ("The law of the decedent's domicile at death will generally determine the rights of a surviving spouse to a statutory forced share out of the personal assets of the decedent."); *In re Estate of Clark*, 236 N.E.2d 152 (N.Y. 1968) (applying law of state of domicile and treating it as having the most significant interest). *But see National Shawmut Bank of Boston v. Cumming*, 91 N.E.2d 337 (Mass. 1950) (applying law of trustee's domicile to defeat an elective share claim of a spouse domiciled out of state).

Under the Uniform Probate Code, the decedent's spouse and family are entitled to various statutory rights in addition to the elective share of the surviving spouse. Specifically, the Uniform Probate Code provides for a homestead allowance, an exempt property allowance, and a family allowance. See UNIF. PROB. CODE §§ 2-402, 2-403, and 2-404. These rights are public policy grants of family protection conferred by a decedent's state of domicile and thus appropriately are resolved by the law of the state of domicile at death. PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, AND CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 20.14, 1268 (2018) ("In the conflict-of-law setting, [policies of family protection] strongly suggest the predominant relationship to and concern of the state of the decedent's domicile, the usual center of family life.").

In addition to elective share rights and claims for statutory allowances, this section applies the law of the decedent's domicile at death to claims for forced heirship rights as exist in many foreign civil-law jurisdictions as well as Louisiana and to maintenance or family provision claims as exist in many foreign common-law jurisdictions. *See, e.g.*, FR. CIV. CODE art. 913; BGB § 2320; LA. CIV. CODE art. 1494 ("A forced heir may not be deprived of the portion of the decedent's estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him."); INHERITANCE (PROVISION FOR FAMILY AND DEPENDENTS) ACT 1975 (U.K.); INHERITANCE (FAMILY PROVISION) ACT 1972 (S. Austral.); *but see In re Will of Meyer*, 62 A.D. 3d 133 (N.Y. App. Div. 2009) (finding time barred a defendant's claim for recognition of forced heirship rights under French law but stating that "New York law … clearly provides that when a non-domiciliary directs her will to be probated in this state and governed by its law, the forced heirship laws of a foreign state do not apply").

Section 406. Bar to Succession or Forfeiture of Benefits from Decedent's Estate or Trust

Whether a person is barred by conduct proscribed under state law from receiving a disposition or appointment of property, holding a power of appointment, or serving in a fiduciary or representative capacity is determined by the law of state where the victim of the conduct was domiciled at the time of the conduct.

Reporter's Note

Whether an heir, devisee, or trust beneficiary should be precluded by law from inheriting or receiving benefits under a trust or from a decedent under a slayer statute or for unworthiness should be determined by the law of the state in which the decedent was domiciled at death. After all, such preclusive rules "are legislatively articulated value judgments." LA. CIV. CODE art. 3530 cmt b. Consequently, these "rules should be reserved to the law-making jurisdiction of the state where the deceased was last domiciled rather than the state where his property was located." LA. CIV. CODE art. 3530 ("The … unworthiness of an heir or legatee is determined under the law of the state in which the deceased was domiciled at the time of his death. Nevertheless, with regard to immovables situated in this state, the legatee must qualify as a person under the law of this state."). *But see* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Vol. 2, Rule 151, Sub-Rule, 1420 (15th ed. 2012). ("A legatee has capacity to receive a legacy of movables if he has capacity either by the law of his domicile or by the law of the testator's domicile.").

This section uses the term "victim" in an attempt to more accurately apply both the trusts and to estates. In the context of a will or intestacy, if a person is prevented from inherited because he caused the death of the decedent, then the application of this section is clear and the law of the domicile of the decedent applies. In the trust context, however, the situation is more complex, as when a remainder beneficiary of an existing trust kills an income beneficiary. In that context, the income beneficiary is the victim and thus the law of the state of domicile of the income beneficiary should be applied to ascertain whether the remainder beneficiary forfeits benefits from the trust.

Although most states have statues that preclude slayers from inheriting, state laws regarding slayers vary greatly in detail. *See generally* ROBERT H. SITKOFF AND JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 135-136 (11th ed. 2022). Under the Uniform Probate Code, the statute applies to anyone who "feloniously and intentionally kills the decedent." UNIF. PROB. CODE § 2-803 ("An individual who feloniously and intentionally kills the decedent forfeits all benefits … with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the intestate share."). Under other state statutes, only an "unlawful killing" is required, which includes "murder in the first degree, murder in the second degree or manslaughter" but not "vehicular homicide or negligent manslaughter in the death of the decedent." *See, e.g.*, MASS. GEN LAWS, ch. 265, sec. 64. Still other states impose a bar to inheritance for anyone engaged in the "intentional killing, or attempted killing, of the decedent or is judicially determined to have participated in the intentional, unjustified killing, or attempted killing, of the decedent." LA. CIV. CODE art. 941. Texas law, by judicial decision, imposes a constructive trust in certain cases in which the heir wrongfully causes the death of the decedent. *See Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977). A few states bar succession rights not only from slayers but also abusers. *See, e.g.*, WASH. REV. CODE § 11.84.020 ("No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.").

In addition to application of slayer rules, this section also governs when a parent or other person is precluded from inheriting from a decedent by virtue of disfavored conduct, such as abandonment. *See, e.*g., UNIF. PROB. CODE § 2-114 (barring parents from inheriting in certain circumstances); N.Y. EST. POW. & TRUST § 4-1.4(a) ("No distributive share in the estate of a deceased child shall be allowed to a parent if the parent, while such child is under the age of twenty-one years … has failed or refused to provide for the child or has abandoned such child, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child…).

[Article] 5

Miscellaneous Provisions

Section 501. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law, including conflict of laws, among states that enact it.

Section 502. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the federal statute cited in this section. However, the text "as amended" should be omitted in a state that: (1) does not permit incorporation of future amendments when a federal statute is incorporated* *into state law; or (2) incorporates future amendments into state law even in the absence of a legislative declaration.*

[Section 503. Severability]

[If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.]*

Section 504. Repeals; Conforming Amendments

(a) . . . .

(b) . . . .

(c) . . . .

Legislative Note: *A state should examine its statutes to determine whether conforming amendments are required by provisions of this act.*

Section 505. Effective Date

This [act] takes effect [...].