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Choice of Law Rules and Validation of Powers of Appointment

CASE COMMENTS

CHOICE OF LAW RULES AND VALIDATION OF POWERS OF APPOINTMENT

In a society of ever-increasing mobility where families are often spread over several states, the trust has become a fertile field for conflict of laws problems. Of practical importance is the problem that arises when the holder (donee) of a general testamentary power of appointment[1] validly exercises that power in his domicile but, in so doing, possibly violates the law of the jurisdiction governing the original trust. A recent New York case, *In re Morgan Guaranty Trust Company*,[2] presents that problem and may be indicative of future treatment of the question.

In 1935, Margaret Maher Acheson entered into a trust indenture with Morgan Guaranty Trust Company. It created a trust for the life of the settlor's son and provided that, upon his death, the trustee was to divide the trust corpus into six equal parts, one of which was to be held in trust for the life of a grandson, Edward Goodrich Acheson III [hereinafter referred to as Acheson]. Upon Acheson's death, the trustee was to distribute the corpus of that trust as Acheson might appoint by will or, failing the exercise of that appointment, to his distributees as in intestacy. In 1965, Acheson died, survived by his widow, Helen, their daughter, Linda Belle, and five children by previous marriages. By his will, admitted to probate in California, Acheson exercised his power of appointment but, in so doing, violated the Rule Against Perpetuities.[3]

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[1]A power of appointment is a power conferred by one person upon another to select persons to whom designated property will pass. *See* 5 AMERICAN LAW OF PROPERTY § 23.1 (A.J. Casner ed. 1952). A general power of appointment is one in which the donor has drawn the power so that the donee may appoint to anyone, including himself or his estate. If such general power is exercisable by will alone, the power is a general testamentary power. *See* 5 AMERICAN LAW OF PROPERTY § 23.4 (A.J. Casner ed. 1952).

[2]28 N.Y.2d 155, 269 N.E.2d 571, 320 N.Y.S.2d 905 (1971).

[3]Acheson exercised his power of appointment by directing his trustee to divide his residuary estate into two trusts, one for the benefit of his widow and the other for the benefit of their daughter, Linda Belle. Specifically, the will provided that the trust for Linda Belle was to "cease and terminate twenty-one (21) years after the death of the last survivor of my wife, HELEN * * * my daughter, LINDA BELLE * * * and the children of my said daughter, living at the time of my death." 269 N.E.2d at 573, 320 N.Y.S.2d at 908. This would violate the Rule Against Perpetuities since Linda Belle was not a life in being at the time of the creation of the trust.

Acheson's executor, Bank of America, instituted an heirship proceeding in the California Superior Court, seeking an order reforming the will in such manner as to avoid the violation of the Rule Against Perpetuities.[4] The instant New York proceeding, previously commenced by Morgan Guaranty to settle its final account under the separate trust for the benefit of Acheson, was held in abeyance by a New York Supreme Court pending the conclusion of the California proceeding. In September of 1967, the California court granted the relief requested by Acheson's executor.[5]

In October, 1968, the New York court at Special Term held that the California order was entitled to full faith and credit in New York[6] and directed payment of the trust corpus to Acheson's executor under the terms of the will. The appellate division unanimously affirmed without opinion.[7]

The New York Court of Appeals affirmed the order insofar as it applied to those who appeared in the California proceeding[8] but held that

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[4]Specifically, the order sought was to require " 'termination of the Trust [for Linda Belle] * * * within twenty-one years after the death of HELEN F. ACHESON, the surviving spouse, if not sooner, terminated by the death of LINDA BELLE ACHESON.' " 269 N.E.2d at 573, 320 N.Y.S.2d at 908.

[5]Stating that " 'the obvious intent of the testator * * * [was] that the residuary trust be curtailed, if necessary, to preserve the testamentary plan to the fullest extent possible from invalidity under the rule against perpetuities,' " the court reformed the provisions of Acheson's will to require that " 'any trust still subsisting * * * twenty-one years after the death of HELEN F. ACHESON then terminates as to all assets in such trust derived from the MARGARET MAHER ACHESON trust.' " 269 N.E.2d at 573, 320 N.Y.S.2d at 908. The reformation was derived from an application of CAL. CIV. CODE § 715.5 (West Supp. 1971) which provides:

> No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code [the Rule Against Perpetuities] if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

[6]269 N.E.2d at 573, 320 N.Y.S.2d at 908. If the California reformation is accepted, there can be no objection to the will based upon the New York Rule Against Perpetuities. *See* N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.1 (McKinney 1967).

[7]*In re* Acheson's Trust, 34 App. Div. 718, 308 N.Y.S.2d 641 (1970), *aff'd sub nom. In re* Morgan Guar. Trust Co., 28 N.Y.2d 155, 269 N.E.2d 571, 320 N.Y.S.2d 905 (1971).

[8]The parties so bound by the full faith and credit order were Acheson's five children by earlier marriages. Had the exercise of the power been declared invalid, these children would have shared in the trust corpus, being distributees as in intestacy. Morgan Guaranty is the only party who could challenge the full faith and credit order, but as a passive stakeholder, awaiting instructions, it need not do so. The distribution of the corpus to Acheson's executor could not be challenged by anyone else. In other words, the question is answered for Morgan Guaranty. Whether it is bound is of no consequence under the circumstances of this case. 269 N.E.2d at 573-77, 320 N.Y.S.2d at 909-13.

the instruction was not entitled to full faith and credit as against Morgan Guaranty because the trustee did not appear. However, the trustee was only a passive stakeholder, awaiting instructions, and the practical effect of a decision binding all other parties was to clear the path for the trustee to distribute the trust corpus to Acheson's executor.[9]

The majority based its holding upon the proposition that the law of the testator's domicile will govern in determining the meaning and interpretation of language used by the testator in disposing of his personal property by will.[10] While that proposition is undoubtedly true as stated,[11] the underlying problems of so simple a solution under these facts may best be explored in conjunction with Judge Brietel's dissenting opinion.[12]

The dissent, pared to its simplest terms, maintains that the California court interpreted a power exercised by will rather than the will itself, an interpretation beyond the court's jurisdiction.[13] The traditional rule upon which this lack-of-jurisdiction argument rests is that there is an assumed agency relationship between the donor and donee of a general testamentary power of appointment.[14] The donee, under this assumption, is deemed an agent who merely appoints property which belongs to the donor. In other words, property subject to a general testamentary power of appointment passes directly from the donor to the appointees, the donee of the power acting merely as a conduit. As a result, the instrument exercising the power relates back as if it were a part of the instrument by which the power was created. Hence, the law governing the trust must also control the donee's appointment of the trust property.[15] The rule has been generally followed in New York[16] and other jurisdictions;[17] the cases reflect the

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[9]269 N.E.2d at 576-77, 320 N.Y.S.2d at 912-13.

[10]269 N.E.2d at 574-76, 320 N.Y.S.2d at 909-12.

[11]*See* N.Y. ESTATES, POWERS AND TRUSTS LAW § 3-5.1(b)(2), (e) (McKinney 1967); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 263-69 (1969).

[12]269 N.E.2d at 577-84, 320 N.Y.S.2d at 913-23.

[13]269 N.E.2d at 577-78, 320 N.Y.S.2d at 914.

[14]*See* 5 AMERICAN LAW OF PROPERTY § 23.3 (A.J. Casner ed. 1952); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274, comment (b) at 191 (1969); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 911 (2d ed. 1956); 5 SCOTT, TRUSTS § 635 (3d ed. 1967).

[15]Note 14 *supra.*

[16]*See In re* Bauer's Trust, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964); *In re* Deane's Will, 4 N.Y.2d 326, 151 N.E.2d 184, 175 N.Y.S.2d 21 (1958); *In re* New York Life Ins. & Trust Co., 209 N.Y. 585, 103 N.E. 315, *aff'g per curiam* 157 App. Div. 916, 142 N.Y.S. 1132, *aff'g mem.* 139 N.Y.S. 695 (Sur. Ct. 1913); *In re* Harriman's Estate, 217 App. Div. 733, 216 N.Y.S. 842, *aff'g* 124 Misc. 320, 208 N.Y.S. 672 (Sur. Ct. 1924).

[17]*See* Legg's Estate v. Commissioner, 114 F.2d 760 (4th Cir. 1940); Morgan Guar. Trust Co. v. Huntington, 149 Conn. 331, 179 A.2d 604 (1962); Liggett v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W.2d 720 (1938); Pitman v. Pitman, 314 Mass. 465, 50 N.E.2d 69 (1943); Bundy v. U.S. Trust Co., 257 Mass. 72, 153 N.E. 337 (1926); David v. Atlantic County Soc'y for Prevention of Cruelty to Animals, 129 N.J. Eq. 501, 19 A.2d 896 (Ch. 1941); Cleveland Trust Co. v. McQuade, 106 Ohio App. 237, 142 N.E.2d 249 (1957).

assumption embodied in the rule that ownership in the appointed property remains at all times in the donor of the power.[18]

The conflicting points of view expressed in the instant case, therefore, appear to hinge upon the distinction between a will and a power exercised by will. This distinction appears to be one of first impression as the prior applicable cases implicitly reflect the belief that the will and the exercise of the power are inseparable insofar as the will purports to dispose of the trust corpus.[19]

Perhaps the distinction can be explained in terms of the California statute[20] which allowed the reformation of Acheson's will. Faced with a statute of this type, the majority opinion may well be saying that once the California court has interpreted what Acheson's words mean, New York law may govern the validity of the exercise of the power.[21] In other words, New York will have jurisdiction to determine if the exercise is valid but only after California has determined what the exercise was intended to say. In the instant case, such a procedure would not interfere with the rule relating the appointment back into the instrument creating the power.[22] The disposition in accordance with the California reformation would not violate New York law. As an example of this application under different facts, if Acheson's exercise had violated the New York Rule Against Perpetuities even after the California reformation, the New York court would then have had jurisdiction to declare the exercise invalid.

However, the result of the *Morgan Guaranty* case is more meaningful when considered in relation to the dissenting opinion of *In re Bauer's*

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[18]Using this traditional rule, the dissent objected to the majority's implied concept of ownership in the *donee* when it speaks of "disposing of *his personal property* by will." 269 N.E.2d at 579, 320 N.Y.S.2d at 916.

[19]Notes 16 & 17 *supra.*

[20]*See* note 5 *supra.*

[21]If this statement is correct in light of the instant decision, it is an important and far-reaching result. Many jurisdictions have legislatively enacted at least partial perpetuities reform measures. *See* CAL. CIV. CODE § 715.5 (West Supp. 1971); CONN. GEN. STAT. ANN. §§ 45-95, -96 (1960); KY. REV. STAT. § 381.216 (1969); ME. REV. STAT. ANN. tit. 33, §§ 101-02 (1964); MD. ANN. CODE art. 93, §§ 11-102, -103 (1969); MO. ANN. STAT. § 442.555 (Supp. 1969); N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.2 (McKinney 1967); OHIO REV. CODE ANN. § 2131.08 (Baldwin 1971); PA. STAT. ANN. tit. 20, §§ 301.4-.5 (1950); TEX. REV. CIV. STAT. ANN. art. 1291b, §§ 1-4 (Supp. 1969); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV. CODE §§ 11.98.010-.030 (1965). In addition, other jurisdictions have judicially adopted partial reform measures. *See In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Merchant's Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953). One state, Hawaii, has judicially adopted a complete reform measure. *See In re* Estate of Chun Quan Yee Hop, 469 P.2d 183 (Hawaii 1970). *See generally* Comment, *Perpetuities Reform Through Judicial Adoption of Complete Cy Pres*, 28 WASH. & LEE L. REV. 184 (1971).

[22]*See* text accompanying note 14 *supra.*

Trust,[23] an earlier New York case which presented a similar problem.[24] In that case, involving an English domiciliary and a New York trust, the court of appeals applied the traditional jurisdiction-selection rule[25] in holding the exercise of the power invalid. The decision has been severely criticized,[26] and commentators have generally agreed with the dissenting opinion of Judge Fuld in which he termed the *Bauer* decision "an unfortunate example of adherence to mechanical and arbitrary formulae."[27] Even though he agreed that courts are justified in treating the donee of a power as the donor's agent when the power is "special,"[28] Judge Fuld maintained that where the power created is "general,"[29] whether exercisable by deed or will or by will alone, and no other restrictions are imposed, "the donee is vested with the equivalence of ownership as to the appointive property."[30] Under these circumstances, the agency assumption is no longer justified, especially where, as in *Bauer*, the donor and donee of the power are the same person. Judge Fuld emphasized that English law should have been applied because of the significant contacts with the testatrix's domicile, the lack of any important New York policy to be upheld, and the obvious intention of the testatrix.[31]

Two lines of reasoning are evident in that dissent. Primarily, the agency theory of a general power of appointment was criticized as inap-

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[23]14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964).

[24]In 1917, Dagmar Bauer, domiciled in New York, executed an irrevocable trust indenture in New York which designated herself as life beneficiary, reserved to herself the power to appoint the remaindermen by will, and provided for distribution under the New York law of intestate succession should the will fail to effect a valid disposition. Mrs. Bauer later established domicile in England and died there in 1956. In a will executed and submitted to probate in England, she attempted to exercise the power of appointment by bequeathing the trust corpus to an English bank as trustee for the benefit of two Danish nieces for life with the remainder to an English charity. In a proceeding for the settlement of the original trust, the New York Court of Appeals found the exercise invalid, ruling that New York law applied to all questions of distribution under the original indenture even though the distribution would have been valid under English law.

[25]*See* text accompanying note 14 *supra*.

[26]*See* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 564-65 (1971); Note, *Conflict of Laws: Choice-of-Law Rules for Validating Powers of Appointment*, 65 COLUM. L. REV. 348 (1965); Note, *Choice of Law in Estates and Trusts*, 1969 U. ILL. L.F. 354, 374-75.

[27]200 N.E.2d at 210, 251 N.Y.S.2d at 26. It should be noted that Judge Fuld, who wrote the dissent in *In re Bauer*, also wrote the majority opinion in the *Morgan Guaranty* case.

[28]A special power of appointment is one in which the donor restricts the persons to whom an appointment can be made, and the group of permissible appointees does not include the person who is to exercise the power. *See* 5 AMERICAN LAW OF PROPERTY § 23.4 (A.J. Casner ed. 1952).

[29]*See* note 1 *supra*.

[30]200 N.E.2d at 210, 251 N.Y.S.2d at 27.

[31]200 N.E.2d at 210-11, 251 N.Y.S.2d at 27-29.

propriate. Secondly, emphasis was placed upon the desirability of judging each case on its particular facts and rendering a decision in line with the law of the jurisdiction having the strongest interest in the issue in question. A combination of the two propositions may perhaps lead to an explanation of the *Morgan Guaranty* decision and, more generally, a workable solution for all future cases of this sort.

In assessing the merits of the first proposition, it is readily seen that although the weight of authority conforms to the view that ownership remains in the donor,[32] there is much commentary which adopts or urges adoption of Judge Fuld's dissent.[33] Others, without specifically endorsing Judge Fuld's position, concede that his view may come to be recognized[34] or, without going that far, take the position that a general power, even though testamentary, is not unlike a gift of ownership to the donee.[35] New York has legislatively recognized the validity of Fuld's position where the donor and donee are the same person.[36] For purposes of the Federal estate tax, property transferred by the exercise of a general testamentary power of appointment is included in the value of the decedent's (donee's) gross estate.[37] Further, if the donee of a general testamentary power makes an appointment in trust and the trust fails, there is a resulting trust to his estate, not to the estate of the donor.[38]

The second and broader of the two propositions urged in the *Bauer* dissent, that of giving emphasis to the law of the jurisdiction having the greatest interest in the particular issue, finds strong support in the commentaries[39] and is in line with the approach used by Judge Fuld in other

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[32]Notes 14, 16 and 17 *supra.*

[33]*See, e.g.*, 5 SCOTT, TRUSTS § 635 at 4041 (3d ed. 1967). Indeed, this section concedes that the weight of authority is that the validity of the exercise is determined by the law of the state governing the validity of the trust itself (and is cited for that proposition by Judge Brietel in the *Morgan Guaranty* dissent) but goes on to specifically endorse the dissenting opinion of Judge Fuld in *Bauer.*

[34]*See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274, comment (b) at 191 (1969).

[35]L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 861 (2d ed. 1956).

[36]N.Y. ESTATES, POWERS AND TRUSTS LAW § 3-5.1(g)(2)(C) (McKinney 1967). This section provides that where the donor of a general testamentary power of appointment is himself the donee, the law of the jurisdiction in which the donor was domiciled at death governs the exercise of the power.

[37]INT. REV. CODE of 1954, § 2041.

[38]RESTATEMENT (SECOND) OF TRUSTS § 426 (1959).

[39]*See* Reese, *Chief Judge Fuld and Choice of Law,* 71 COLUM. L. REV. 548, 565 (1971); Note, *Conflict of Laws: Choice-of-Law Rules for Validating Powers of Appointment,* 65 COLUM. L. REV. 348 (1965).

influential decisions such as *Auten v. Auten*.[40] This case rejected previously applied arbitrary and inflexible rules governing the field of contracts in New York. An even more influential decision in choice of law was *Babcock v. Jackson*,[41] a tort damages case, in which Judge Fuld stated that the controlling law should be the "law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."[42] Both cases recognized that the interest of a state in having a local rule applied must depend upon the underlying policy of the rule and the extent to which the policy will be upheld by an application of the rule.

However, by implication, these cases refuse to give support to a purely ad hoc approach. It may readily be seen that such an approach presents innumerable problems. If choice of law rules were *entirely* discarded in favor of applying in each case a decision based upon a selection of policies to be supported, the courts would be reduced to speculation as to what policies were embodied in laws of the various states. The practical result of such a standard might be the adoption of the desired result first with the reasoning built around that result. Precedents would be virtually impossible to establish because each decision would be entirely dependent upon judicial interpretation of policies in other states, and might be based to some extent upon the attractiveness of the policy found.[43]

While there are cases indicating the desirability of discarding rules in order to achieve substantial justice between the parties,[44] most commentators have foreseen the difficulties of an ad hoc approach and have instead recommended more narrow rules. These rules would be flexible in their scope and subject to modification through consideration of substantial policy interests and justice between the parties, but not solely dependent upon a case-by-case approach.[45] Judge Fuld has best articulated the theory through his dissent in *Bauer*.[46]

With this background for the two propositions asserted in the *Bauer*

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[40]308 N.Y. 155, 124 N.E.2d 99 (1954). The majority held that the rule which should be followed was that of the "grouping of contacts" whereby the law of the state having the greatest interest in the problem would be applied, thus permitting the courts to consider which rule produces the best practical result.

[41]12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[42]191 N.E.2d at 285, 240 N.Y.S.2d at 752.

[43]Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 558-61 (1971).

[44]*See* Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

[45]*See* Berger, *The General Power of Appointment as an Interest in Property*, 40 NEB. L. REV. 104, 127-28 (1961); Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 557-62 (1971).

[46]The *Bauer* dissent can be seen as a reflection of this approach. Maintaining that the donee of a *general* power, whether testamentary or presently exercisable, should be regarded

dissent, it is appropriate to turn to a consideration of the principal case in which the two appear to be combined to achieve the best practical result. *Morgan Guaranty* seems, at first glance, more noticeable for what it does not say than for any firm declaration of principles to be followed. However, this decision may be an important step forward in light of the above two propositions.

The narrow, flexible rule proposed in *Morgan Guaranty* is that the domiciliary state of the testator-donee of a general testamentary power will have jurisdiction to interpret the language of the testamentary disposition as a whole. Once the courts of the domicile have determined what has been said, the courts of the state having jurisdiction over the trust corpus will determine whether a power so worded is valid. The rule in its flexibility will be seen to reflect a consideration of policies to be upheld.

A contrast between Fuld's position in the *Bauer* dissent and his majority opinion in *Morgan Guaranty* should be noted. In *Bauer*, the dissent said, "[I]t is evident that the donee [of a general testamentary power] is vested with the equivalence of ownership as to the appointive property."[47] Hence, although Judge Fuld conceded that the trust indenture itself would be governed by the laws of New York, he maintained that the validity of the exercise should be determined by the domicile of the donee. In *Morgan Guaranty*, however, he retreats from this strong position: "It is quite true . . . that the validity of the power's exercise is a question to be determined solely by the courts of this State."[48] The reason may be one of practical necessity for the court is perhaps not willing to reverse itself so soon. In addition, although New York legislatively adopted the ownership concept where the donor and donee are the same person,[49] the statutes did not extend the doctrine to the situation where the donor and donee are differ-

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as the owner of the appointed property, Judge Fuld proposed a narrow rule in opposition to the old, broad agency rule of the donee of a power of appointment. More important is the fact that, in rejecting the old rule, he applied an approach whereby he recognized the lack of any relevant New York policy to be upheld, the intention of the testatrix, and significant contacts with England. 200 N.E.2d at 210-11, 251 N.Y.S.2d at 27-29.

The proposed rule is a compromise of two theories: the belief in the need for some rules as guidelines and the consideration of policies to be served in the particular case. Judge Fuld stated the position clearly when he said:

> The same considerations which prompted a departure from the inflexible and traditional choice-of-law rules in other cases . . . should move the court to re-examine the wisdom and justice of continuing to apply similarly inflexible rules, without regard to significant underlying factors, in disposing of cases such as the present one.

200 N.E.2d at 210, 251 N.Y.S.2d at 26-27.

[47]200 N.E.2d at 210, 251 N.Y.S.2d at 27.

[48]269 N.E.2d at 576, 320 N.Y.S.2d at 911.

[49]N.Y. ESTATES, POWERS AND TRUSTS LAW § 3-5.1(g)(2)(C) (McKinney 1967).

ent people. Such a failure to extend perhaps indicates disagreement. *Morgan Guaranty* probably should not be read as a weakening of a trend towards attributing ownership of the appointive property to the donee. Rather it should be seen as a piecemeal approach toward the adoption of that concept.

Turning from the underlying theme of *Morgan Guaranty*, one should give attention to those considerations which determine the "jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[50] Primarily, the New York policy underlying the Rule Against Perpetuities could not be supported by denial of full faith and credit to the California instruction order. If the California reformation were upheld, there would be no violation of the Rule Against Perpetuities.[51] New York's interest in the issue must, therefore, be minimal. On the other hand, California's interest is that of determining the nature of a testamentary disposition by its domiciliary. Furthermore, the New York Court of Appeals has long had a policy of validating a trust whenever possible.[52] In *Shannon v. Irving Trust Co.*[53] it was said, "[T]o enforce the laws of a sister state is not contrary to our public policy unless to do so would be manifestly injurious to the public interest or shocking to our morals or contrary to fundamental principles of justice . . . ."[54] New York has even strengthened judicial decisions to this effect by legislation.[55] It seems illogical that New York would follow such a flexible approach in the validation of trusts and yet resort to inflexible determinations of the exercise of a power of appointment.

The recognition of the donee of a general testamentary power of appointment as the owner of the appointive property has not been accepted by the American courts.[56] Nor have the courts generally begun to use flexible rules in relation to the facts of the particular case presented. Apparently, only Wisconsin has adopted this two-fold approach.[57] How-

[50]Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

[51]*See* N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.1 (McKinney 1967).

[52]*See, e.g.*, Hutchison v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933).

[53]275 N.Y. 95, 9 N.E.2d 792 (1937).

[54]9 N.E.2d at 794.

[55]N.Y. ESTATES, POWERS AND TRUSTS LAW § 9-1.3, practice commentary (McKinney Supp. 1971).

[56]Notes 16 and 17 *supra*.

[57]Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927). Here, the court stated a preference for treating the donee of a general testamentary power as the owner of the appointive property. However, the court recognized that there might be cases in which such a donee would not be the equivalent of an actual owner. It was said that each case must stand on its particular facts.