Bloomberg BNA

Family Law Reporter®

VOL. 41, NO. 31 JUNE 16, 2015

HIGHLIGHTS

Facebook Posts May Be Admitted to Show Alimony Recipient's Relationship
A divorced woman's Facebook postings, along with those of her paramour, were properly admitted in her ex-husband's action to terminate his spousal maintenance obligation in light of her alleged ''de facto marriage,'' the Illinois Appellate Court decides. The postings, it says, reveal how the obligee and her paramour presented themselves as a couple. However, it reverses the termination order, finding that they merely had an ''intimate dating relationship,'' where the only thing they shared was a golf club membership. **Page 1379**

"Prodigious Increase" in NFL Player's Income Means More Child Support
2009 Super Bowl MVP Santonio Holmes's monthly support payments for his nonmarital child were properly upped from $4,000 to $6,500, where three years after the support order was entered, his annual income had jumped from $2.875 million to $8.314 million, the Ohio Court of Appeals says. Noting that his contract with the New York Jets was expected to top $13 million, it does not address the fact that he has been injured, traded, and released since entry of the modified order and is now an unsigned free agent. **Page 1380**

Custody Court May Nix Request That Children Testify
A trial court has the discretion to determine whether children should be called to the stand in their parents' custody dispute, the Kentucky Supreme Court holds. Rejecting an appellate court's finding that custody courts may not exclude testimony from a child who is called as a witness by one of the parties if they have not been found incompetent to testify, it cites the ''elementary principles of humanitarianism'' in saying that a child should be protected from being placed between his or her parents. **Page 1383**

No GAL for Mentally Ill Mother in Termination Proceeding
State officials' petition to terminate a mother's parental rights as to her adjudicated dependent child on the ground that her ''mental health complications'' render her incapable of caring for him did not trigger an obligation on the court's part to inquire into her competence and entitlement to a guardian ad litem, the North Carolina Supreme Court rules. Citing differences between the standards for determining competency and incapability, it finds no abuse of discretion in the court's failure to appoint a GAL for the mother. **Page 1381**

Also . . .
Fractured U.S. Supreme Court court rejects woman's constitutional claim of right to know why alien husband's visa was denied (**Page 1389**) . . . Military father must pay support for days he couldn't exercise custody rights because of deployment overseas, Tennessee court says (**Page 1384**) . . . Arkansas judge orders state to recognize ''window period'' same-sex marriages (**Page 1386**)

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BNA Insights

Property Division

My State or Your State? Conflicts of Law for Relocated Spouses

By Christopher C. Melcher

Introduction

When must a divorce court apply the substantive law of another state in determining the property rights of the parties? This article examines two possible situations: 1) The spouses acquire property as residents of one state, then move to a different state where a divorce is filed (referred to as the ''forum state''); and, 2) When the parties make a premarital agreement which chooses the law of a state other than the forum state to govern their property rights. It is uncommon to have a conflicts of law dispute in a family law action, but when the problem arises it usually involves a large estate. The rights and obligations of the parties can change drastically, depending on which state law is applied. Therefore, it is good to know when a court can use the law of another state in determining property rights.

Attorney Christopher C. Melcher is a partner in the law firm of Walzer Melcher LLP in Los Angeles, California. He specializes in complex divorce litigation, premarital agreements, and family law appeals. He is a former chair of The State Bar of California Family Law Section, and is a Fellow of the American Academy of Matrimonial Lawyers.

Analyzing Conflicts of Law

This section discusses the various approaches that exist to deal with the property rights of spouses when they relocate from one state to another, without a premarital agreement. For example, if the parties acquire property in State A (which is a community property state), then move to State B (which is an equitable distribution state) and file for divorce, will the property acquired in State A be divided equally under the community property rules of State A, or will the equitable distribution principles of State B apply?

There is no uniform rule in the United States as to which state law applies in a divorce action to property acquired by the spouses while living in another state. Various approaches have evolved, state-by-state, which are discussed below. Some states apply their own law, regardless of where the property was acquired. Other states look to the law of the state where the property was acquired. And then there are states with no clear rules. The following steps are helpful in making sense of a conflicts of law problem:

Step One: Determine Forum Rule

Look to the law of the forum state (i.e., where the divorce action is properly pending) to see if that state has a rule about how to characterize property acquired when the parties lived elsewhere. For example, California has a statute that applies community property principles to all property acquired by the parties during marriage while they were living outside California.[1] In other words, property acquired in a prior state of residence is re-characterized according to California law when the parties move to California and file for divorce there. Other states, like Idaho, will apply the law of the state where the property was acquired to characterize the property.[2] Some states have not developed a rule dealing with property acquired out-of-state. Courts in those states generally will consider constitutional principles, the reasonable expectations of the parties, the interest of each state, and public policy to determine which state law to apply. This is the most challenging scenario because there are no clear rules.

Step Two: Residency in Forum

If a rule exists in the forum state for property acquired outside of that state, then the next question is

[1] Cal. Fam. Code § 125.
[2] See, *Berle v. Berle*, 546 P.2d. 407, 410 (Idaho 1976).

whether *both* parties were residents of the forum state at the time the divorce action was filed. If so, all that needs to be done is to follow the forum state rule. There is a split of authority as to whether to apply forum law when the parties were *not* common residents of the forum state at the time the divorce was filed, which takes us to the next step.

Step Three: No Common Residence

In certain states, like California, a party cannot invoke forum state law to re-characterize property rights by unilaterally moving to that state and filing for divorce; there are constitutional concerns and the motivation for forum-shopping would be too great.[3] In those states, the law of the last common residence of the parties will be used to determine their property rights when only one party to the divorce action is a resident of the forum state.[4] Other states, like Arizona, do not see a constitutional problem in applying the substantive law of the forum state to determine property rights of the parties, so long as the forum state has personal jurisdiction over both parties.[5]

With these steps in mind, this article will now discuss the approaches which have been adopted by various states across the United States.

Total Mutability Approach

''Under this approach, all of the spouses' marital property rights at divorce are to be determined by the law of the jurisdiction where the divorce is granted, regardless of when or where their property was acquired.''[6] Total mutability is a clear rule that the law of the forum state will apply to property acquired by either party, at any time or place, during marriage. The benefit is that the forum state court will not have to learn the law of a different state, a monumental task which would interject a risk of making an erroneous decision.[7] This approach also reduces the costs of litigation because the parties will not have to fight over which state law applies. For example, the following states have adopted this approach:

■ **Arizona:** ''[P]roperty acquired by either spouse outside this state shall be deemed to be community property if the property would have been community property if acquired in this state.''[8] Arizona will apply its substantive property law, even if only one party is a resident of the state, provided that Arizona has personal jurisdiction over both parties.[9]

■ **California:** Quasi-community property means all real or personal property acquired ''[b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.''[10] The community estate includes quasi-community property, which must be divided equally.[11] This statute does not apply to property acquired while the parties were living outside of California unless both parties were residents of California at the time the divorce action was filed.[12] If only one party moves to California and institutes a divorce action, then the property rights of the parties will be determined according to the law of their last common residence.[13]

■ **Maine:** The equitable distribution statute in Maine ''makes clear the court's authority to divide all of the property under Maine law, regardless of its location. It imposes no restriction on the power of the court to distribute out-of-state property . . . .''[14]

■ **Montana**: ''[T]he court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title to the property and assets is in the name of the husband or wife or both.''[15] Rights on death of a spouse, however, are controlled by the Uniform Disposition of Community Property Rights at Death Act, which Montana adopted in 1989.[16] The practical effect of the act is that ''property acquired by spouses while domiciled in a community property state is not only presumed to have been acquired as community property, but also to have remained community property.''[17]

■ **New Mexico:** ''[Q]uasi-community property shall be treated as community property, if both parties are domiciliaries of New Mexico at the time of the dissolution or legal separation proceeding.''[18]

■ **Texas:** ''[T]he court shall order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage: [] property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition.''[19] Texas law has been applied to determine the rights of a non-resident husband in a divorce action where the real property at issue was located in Texas and the husband had significant contacts with the state.[20]

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[3] See, *Marriage of Roesch,* 83 Cal.App.3d 96, 106-107 (Cal. Ct. App. 1978).

[4] See, *Marriage of Roesch, supra.*

[5] See, *Martin v. Martin,* 156 Ariz. 440, 443-446 (Ariz. 1986).

[6] J. T. Oldham, What if the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the U.S., Family Law Quarterly, ABA, Summer 2008 (42:2), p. 263.

[7] Kenneth W. Kingma, Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States, 35 ACTEC Journal 81 (2009).

[8] Ariz. Rev. Stat., 25-318, subd. (A).

[9] *Martin v. Martin, supra.*

[10] Cal. Fam. Code § 125.

[11] Cal. Fam. Code §§ 63 & 2550.

[12] *Marriage of Roesch, supra; Marriage of Fransen,* 142 Cal.App.3d 419, 429-431 (Cal. Ct. App. 1983).

[13] *Marriage of Roesch, supra.*

[14] *Zeolla v. Zeolla,* 908 A.2d 629 (Me. 2006); 19-A M.R.S. § 953, subd. (1).

[15] Mont. Code. Ann., § 40-4-202, subd. (1); *Marriage of Scott,* 835 P.2d 710, 714 (Mont. 1992).

[16] Mont. Code. Ann., §§ 72-9-101 to -120.

[17] C. W. Wiley, Effect in Montana of Community-Source Property Acquired in Another State (and Its Impact on Montana Marriage, Dissolution, Estate Planning, Property Transfers, and Probate), Mont. Law Review, Vol. 69 [2008], Iss. 2, Art. 1, Vol. 69, pp. 330-337 (2008).

[18] N.M. Stats., § 40-3-8, subd. (D).

[19] Tex. Fam. Code, § 7.002, subd. (a).

[20] *Ismail v. Ismail,* 702 S.W.2d 216, 220-222 (Tex. 1985).

  FLR ISSN 0148-7922

Place of Acquisition Approach

Other states take the opposite approach, and will apply the law of the state where personal property was acquired to characterize personal property (referred to as movables). As to real property (or immovables), the law of the state where the real property is located will generally control how that property will be characterized. This treatment of personal and real property stems from the Restatement (Second) of Conflicts of Law.[21] Earlier cases have followed this approach strictly, while more modern cases have applied a rebuttable presumption that personal property will be characterized according to the law where acquired, unless the party opposing that treatment proves that the forum state has a more significant governmental interest in the applying its law to the property.[22] For example:

■ **Colorado:** The character of personal property acquired by a spouse during marriage is determined by the law of the domicile of the spouses at the date of acquisition of the property.[23] Community property retains its character when it is removed to a common law state.[24]

■ **District of Columbia:** ''The District of Columbia has followed the recent trend adopting the 'governmental interest analysis' approach to resolve choice of law questions. This approach requires us to evaluate the governmental policies underlying the applicable conflicting laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review.''[25]

■ **Idaho:** Property acquired during marriage, prior to a move to Idaho, is to be characterized according to the law of the state where acquired.[26]

■ **Florida:** ''The interest of one spouse in moveables acquired by the other during marriage is determined by the laws of the domicile of the parties when the moveables are acquired.''[27]

■ **Georgia:** ''In an action in the courts of this State involving property acquired by the wife while domiciled in another State, her title or interest therein will be determined by the laws of such foreign State, where such laws are properly pleaded and proven.''[28] A party who intends to raise an issue concerning the law of another state must give reasonable notice of this intention and prove that the foreign law applies.[29] In the absence of notice or proof of foreign law, Georgia law applies.[30]

■ **Lousiana:** ''[T]he rights and obligations of spouses with regard to movables [i.e., personal property], wherever situated, acquired by either spouse during marriage are governed by the law of the domicile of the acquiring spouse at the time of acquisition.''[31] ''[T]he rights and obligations of spouses with regard to immovables [i.e., real property] situated in this state are governed by the law of this state. Whether such immovables are community or separate property is determined in accordance with the law of this state, regardless of the domicile of the acquiring spouse at the time of acquisition.''[32] ''Upon termination of the community, or dissolution by death or by divorce of the marriage of spouses either of whom is domiciled in this state, their respective rights and obligations with regard to immovables situated in this state and movables, wherever situated, that were acquired during the marriage by either spouse while domiciled in another state shall be determined as follows: (1) Property that is classified as community property under the law of this state shall be treated as community property under that law; and (2) Property that is not classified as community property under the law of this state shall be treated as the separate property of the acquiring spouse. However, the other spouse shall be entitled, in value only, to the same rights with regard to this property as would be granted by the law of the state in which the acquiring spouse was domiciled at the time of acquisition.''[33]

■ **Mississippi:** ''While a foreign defendant may have sufficient contacts with Mississippi to be amenable to suit here, it does not follow that this state's substantive law will govern the rights and responsibilities of the parties.''[34] However, later cases have seemed to apply a different rule, where the law of Mississippi was applied to all property acquired during the marriage: ''Our most recent decisions in family law direct us to apply Mississippi law to divorces sought within our jurisdiction.''[35]

■ **Missouri:** ''[T]he law of the state where the appellant and his former wife were domiciled when the appellant acquired an interest in the [promissory] note controls in determining whether the appellant's interest in the [promissory] note was as a tenant by the entirety or as a tenant in common . . . .''[36]

■ **Nebraska:** ''Generally, the law of the situs shall exclusively govern in regard to all rights, interests and titles in and to immovable property. In the context of marriage, when a spouse owns an interest in land at the time of the marriage, the effect of marriage upon that interest is determined by the law that would be applied by courts of the situs.''[37]

■ **Nevada:** ''The nature of the rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matri-

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[21] Rest. 2d. Conflicts of Law, §§ 6, 234, 258 & 259; G. H. MILLS, JR., CONFLICT OF LAWS: PROPERTY ACQUIRED AFTER MARRIAGE, LOUISIANA LAW REVIEW, VOL. 35, NO. 1 (1974).

[22] Rest. 2d. Conflicts of Law, § 258, cmt. b & c.

[23] *People v. Bejarano,* 358 P.2d 866, 868 (Colo. 1961).

[24] *People v. Bejarano,supra.*

[25] *Williams v. Williams,* 390 A.2d 4, 5-6 (D.C. App. 1978).

[26] *Berle v. Berle,* 546 P.2d. 407, 410 (Idaho 1976); *Mc Hugh v. Mc Hugh,* 699 P.2d 1361, 1363 (Idaho 1985).

[27] *Camara v. Camara,* 330 So.2d 818, 820 (Fla. 1976).

[28] *Wallack v. Wallack,* 211 Ga. 745, 747, 88 S.E.2d 154, 155–56 (Ga. 1955).

[29] O.C.G.A. §§ 24-7-24, 9-11-43 (c); *Samay v. Som,* 213 Ga.App. 812, 814, 446 S.E.2d 230 (Ga. 1994).

[30] *Giarratano v. Glickman,* 232 Ga.App. 75, 501 S.E.2d 266 (Ga. 1998).

[31] La. Civ. Code Ann. Art. 3523; see also, *Hand v. Hand,* 834 So.2d 619 (La. 2002).

[32] La. Civ. Code Ann. Art. 3524.

[33] La. Civ. Code Ann. Art. 3526.

[34] *Newman v. Newman,* 558 So. 2d 821, 823 (Miss. 1990).

[35] *Hemsley v. Hemsley,* 639 So. 2d 909, 915 (Miss. 1994); *Savelle v. Savelle,* 650 So.2d 476, 478 (Miss. 1995).

[36] Farmers Exchange Bank v. MetroContracting Services, Inc., 107 S.W.3d 381, 390-394 (Mo. 2003).

[37] *Quinn v. Quinn,* 689 N.W.2d 605 (Neb. App. 2004), citing Rest. (Second) of Conflict of Laws § 233 (1971), internal quotes and citations removed.

monial domicile of the parties at the time the property is acquired. [Citation.]''[38]

■ **Ohio:** ''It is generally recognized that the character of community property, even though it is personalty, does not change as to the nature of the holding, where the married couple remove themselves from a community-property state to a common-law state. The converse is also true, that is, the character of property acquired in a common-law state is not altered merely by the removal of the couple to a community-property state.''[39]

■ **Virginia:** ''The general rule is that a change of domicil from a state where the community property law prevails to a common-law state does not affect the community character of property previously acquired. The law of the state to which the parties remove will regulate their future conduct and acquisitions, but the removal will not alter the rights of either to property then in possession, the title to which had vested under the community property law.''[40]

■ **Washington:** ''In a conflict of laws case, the applicable law is decided by determining which jurisdiction has the 'most significant relationship' to a given issue.''[41]

■ **Wyoming:** ''Succinctly stated, the nature of interests conveyed in personal property is frequently determined by the law of the state where the chattel is situated at the time of the conveyance, and title to personal property acquired under the law of one state where the chattel is situated will be recognized in another state into which the chattel is taken.''[42]

Premarital Choice of Law

This section discusses the effect of a choice of law provision in a premarital agreement. Under the Restatement (Second) of Conflicts of Law, the parties to a contract may chose the law that will govern the validity of the agreement,[43] unless the chosen state has no substantial relationship to the parties and there is no other reasonable basis for that state's law to apply, or the enforcement of the agreement would violate fundamental public policy of the forum state.[44] The focus of this article is on premarital agreements drafted pursuant to the Uniform Premarital Agreement Act (UPAA), which has been adopted in 26 states.[45] For an excellent survey of the variants of the UPAA that have been adopted and interpreted by these states, see the article by Amberlynn Curry[46] and the book by Linda J. Ravdin.[47] Decisions of other states interpreting a uniform act, such as the UPAA, may be persuasive authority, except where the two statutory schemes vary.[48]

The UPAA states that parties to a premarital agreement may contract with respect to ''the choice of law governing the construction of the agreement.''[49] In other words, the parties may select the state law that will be used to interpret the *meaning* of the agreement. Some courts have construed this provision of the UPAA broadly, so that the law of the selected state will be used to determine whether the agreement is valid or enforceable. Other states have taken a narrow view, and have applied the chosen law only as to disputes concerning the interpretation of the agreement.

The exact wording of the choice of law provision must be examined in each case. For example, in *DeLorean v. DeLorean*[50] the parties executed a premarital agreement in California and married in California. The choice of law clause stated the agreement ''shall be construed under the laws of the State of California and enforceable in the proper courts of jurisdiction of the State of California.'' The parties moved to New Jersey and a divorce proceeding was initiated there. The New Jersey court used California law to determine if the agreement was valid. Had New Jersey law been applied, the agreement would have been invalid due to New Jersey's higher disclosure standard.

When the choice of law clause is limited to the ''construction of the agreement,'' the court must determine what state law applies regarding any dispute other than as to the construction of the agreement. In *Marriage of Proctor*[51] a similar provision was held to apply only to the interpretation of the premarital agreement, not as to the substantive law governing the marriage. The Proctors were married in California. The premarital agreement included a choice of law provision stating that ''this agreement is made and entered into between the parties in California and shall be interpreted as construed in accordance with the laws of the State of California.'' The parties relocated to Oregon. The Oregon trial court ordered a reimbursement to the husband for contributions he made to the acquisition of marital assets with his separate property, in the amount of $453,845.63. Such reimbursement is mandatory per California law if certain requirements are met.[52] The trial court concluded that the choice-of-law provision in the premarital agreement required that marital assets be divided pursuant to California law. The Oregon appellate court reversed, holding that the trial court erred in applying California substantive law to the division of property. ''The [choice of law] provision does not relate to the law applicable to the division of property on dissolution. Furthermore, there is no other provision in the premarital agreement that can be understood to require

[38] *Braddock v. Braddock,* 542 P.2d. 1061, 1063 (Nev. 1975).
[39] *Estate of Kessler,* 177 Ohio St. 136, 138, 203 N.E.2d 221 (Ohio 1964)—dealing with succession tax.
[40] *Commonwealth v. Terjen,* 90 S.E.2d 801, 802 (Va. 1956), internal quotes removed.
[41] *Seizer v. Sessions,* 940 P. 2d 261, 265 (Wash. 1997); *Marriage of Wright*, 319 P.3d 45, 50 (Wash. 2013).
[42] *Lurie v. Blackwell,* 51 P.3d 846, 849 (Wyo. 2002), internal quotes removed.
[43] Rest. 2d. Conflicts of Law, §§ 234 cmt. b, 257 cmt. d, 258 cmt. d.
[44] Rest. 2d. Conflicts of Law, § 187(2) cmts. f & g.
[45] See http://www.uniformlaws.org/Act.aspx?title=Premarital Agreement Act (visited Feb. 10, 2015).
[46] A. Curry, Uniform Premarital Agreement Act and its Variations Throughout the States, Journal of the American Academy of Matrimonial Lawyers, vol. 23, p. 355 (2010).
[47] L. J. Ravdin, Premarital Agreements: Drafting and Negotiation, ABA (2011).
[48] See *In re Marriage of Sareen* 153 Cal.App.4th 371, 378 (Cal. Ct. App. 2007)—dealing with UCCJEA.
[49] Uniform Premarital Agreement Act, § 3(a)(1)-(8).
[50] *DeLorean v. DeLorean,* 511 A.2d 1257 (N.J. 1986).
[51] *Marriage of Proctor,* 203 Or.App. 499 (2005).
[52] Cal. Fam. Code § 2640, subd. (b).

  FLR ISSN 0148-7922

the application of California law to the division of property.[53]

Dealing with No Choice of Law

If the premarital agreement is silent as to what law governs disputes unrelated to the construction of the agreement, then conflicts-of-law principles must be applied to resolve the issue. This is a complex issue, as Julia Halloran McLaughlin observed in her article regarding the portability of premarital agreements.[54]

Many courts follow the modern approach in the Restatement (Second) of Conflicts of Law.[55] Section 187(1) of the Restatement states that ''the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.''[56] As explained in the comment to Section 187(1), ''even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied. So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied.''[57]

Although intent may be inferred, it may not be invented. The rationale for broadly applying section 187(1) is ''to protect the justified expectations of the parties . . . in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby.''[58] If the parties intended for the premarital agreement to be portable, then the question should be asked why they failed to include a choice of law provision in the agreement. The problem is particularly difficult when the parties have moved to another state which has a radically different system of dividing property upon divorce.

When the parties have not effectively chosen the substantive law to apply to their contract, section 188 of the Restatement (Second) provides that the law of the state which has ''the most significant relationship to the transaction and the parties'' shall apply.[59] The following factors must be considered when conducting this analysis: (1) The place of contracting; (2) The place of negotiation of the contract; (3) The place of performance; (4) The location of the subject matter of the contract; (5) The residence of the parties; (6) In multistate transactions, the need for mutually harmonious and beneficial relationships in the interdependent community; (7) The purposes, policies, aims and objectives of each interested state; (8) The protection of the justified expectations of the parties and the need for certainty and predictability of result; (9) The basic policy underlying the particular field of law; and, (10) The needs of judicial administration, namely with ease in the determination and application of the law to be applied.[60]

Conclusion

Conflicts of law questions are complex because there is no uniform rule in the United States as to how to solve the problem. Still, divorce lawyers must be familiar with these issues when representing clients who have acquired property in other states before moving to the state where the divorce action is pending.

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[53] *Marriage of Proctor, supra,* p. 503.

[54] J. H. McLaughlin, Premarital Agreements and Choice of Law: ''One,. Two, Three, Baby, You and Me'', Missouri Law Review, vol. 72, iss. 3, art. 3, p. 795 (2007).

[55] See, *Nedlloyd Lines B.V. v. Sup. Ct.,* 3 Cal.4th 459, 464 (Cal. 1992); *Esser v. McIntyre,* 661 N.E.2d 1138, 1142 (Ill. 1996).

[56] Rest. 2d. Conflicts of Law, § 187(1).

[57] Rest. 2d. Conflicts of Law, § 187(1) cmt. a.

[58] Rest. 2d. Conflicts of Law, § 187(1) cmt. e.

[59] Rest. 2d. Conflicts of Law, § 188(1).

[60] Rest. 2d. Conflicts of Law, § 188(2) cmt. b. Factors 1 through 5 in this article are taken directly from section 188(2) of the Restatement. Factors 6 through 10 are from section 6 of the Restatement, which is incorporated by reference in section 188 and underlie all choice of law rules in the Restatement.