TWO RESTATEMENTS OF CONFLICT OF LAWS CONCERNING EXERCISES OF SPECIAL POWERS OF APPOINTMENT

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Author's Synopsis: The Restatement (Second) of Conflict of Laws *innovates a narrow departure from the choice of law implications of the so-called "relation back theory" for the case in which a testamentary power of appointment granted by the terms of a trust is (or may have been) exercised by a bequest that does not mention the power when the trust instrument neither requires nor waives specific reference and the law governing construction of the donor's trust is different from that governing construction of the donee's will. A Comment in the* Restatement (Third) of Property: Wills and Other Donative Transfers *seems to elevate that narrow innovation to a general "[c]hoice of law [rule determining] whether the donee has effectively exercised a power of appointment." Because it does not distinguish the "effective[ness of an] exercise[of] a power," on the one hand, from the validity of an appointment, on the other, that Comment is liable to be interpreted as sweeping away all of the traditional choice of law implications of the relation back theory, including that the substantial validity of an appointment under a special power that is granted by the terms of a trust is determined by the law that governs the validity of the trust regardless of what law may govern dispositions by the donee of her own property. This Article concludes that so sweeping an interpretation is contrary to the only authority adduced for the Comment, viz., the* Restatement (Second) of Conflict of Laws.

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I. CHOICE OF LAW AND THE "RELATION BACK" OF SPECIAL POWERS

Perhaps the most familiar implication of the so-called "relation back theory"[1] of powers of appointment is that the period during which the exercise of a special power[2] can postpone the vesting of future interests is measured from the time the power was created:[3] "Where an appointment

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[1] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (AM. L. INST. 2011); *see also* JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 911 (3d ed. 2004).

[2] Traditionally, the signal characteristic of a "special" power of appointment was merely that the class of permissible appointees should be expressly limited by the terms of the instrument granting the power. *See, e.g.*, GERAINT THOMAS, THOMAS ON POWERS ¶ 1.17 (2d ed. 2012); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 60 (1979). In the United States, the acceptation of the term "special power" came to include the idea that the power is *not* a *general power*, "general power" having come to mean a power exercisable in favor of the power holder, her creditors, her estate, or the creditors of her estate. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. b; *see also* UNIF. POWERS OF APPOINTMENT ACT § 102(6), (10) (UNIF. L. COMM'N 2013) (defining terms "general power of appointment" and "nongeneral power of appointment," respectively).

[3] *See, e.g.*, JOHN C. GRAY, THE RULE AGAINST PERPETUITIES §§ 474.2, at 467, 514–15 (Roland Gray ed., 4th ed. 1942); BORRON, *supra* note 1, § 1274. The particular implication of the relation back theory that concerns remoteness of vesting applies to testamentary general powers as well as special powers. *See, e.g.*, GRAY, *supra*, § 514. On the other hand, that implication does *not* apply to presently exercisable general powers of appointment, "the remoteness of an appointment under [which] is to be judged from the point of time of its exercise, and not from the time of its creation." GRAY, *supra*, § 524. "[A] general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee." Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1669 (1985); *see also* GRAY, *supra*, § 477.

is made under a special power, the appointment is *read back* into the instrument creating the power (as if the donee were filling in blanks in the donor's instrument) *and the period of perpetuities is computed from the date the power was created*."[4] As a general account of the meaning and effect of powers, the relation back theory is open to criticism;[5] but the particular implication of the theory concerning remoteness of vesting was thoroughly entrenched in the common law[6] as the principle that the remotest date on which future interests granted by the exercise of a special power of appointment must vest (if at all) is reckoned from the time the power was created rather than the time of exercise.[7]

Another implication of the relation back theory concerns the conflict of laws that can occur when, for example, an *inter vivos* trust whose validity is determined by the law of one state, *State A*,[8] grants a testamentary power of appointment to a donee[9] domiciled in another state, *State B*: assuming the power itself is valid,[10] that exercise of the power

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[4] MAUDSLEY, *supra* note 2, at 62 (emphasis added) (quoting W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 653 (1938)).

[5] *See, e.g.*, GRAY, *supra* note 3, §§ 523.1–523.2; BORRON, *supra* note 1, §§ 913, 1274, at 274–75.

[6] "Common law" in the sense of judge-made rules and principles, legal *and* equitable, applicable in common law jurisdictions since the statutory unification of law and equity in England by the Judicature Acts of 1873–75. *See, e.g.*, J.E. PENNER, THE LAW OF TRUSTS ¶¶ 1.10–1.15 (8th ed. 2012) (discussing unification of the jurisdictions in England). In this sense, "common law [is] contrasted with *statute law*" so that "equity is just another form of common law." A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson ed., 2d series 1973) (emphasis added).

[7] *See supra* note 2 and accompanying text. For examples of modern codification of the principle, see 20 PA. CONS. STAT. § 6104(c) (2017); MICH. COMP. LAWS § 556.124(1) (1967) (amended by 2012 Mich. Pub. Acts 485).

[8] For conflict of laws purposes, the "governing law" applicable to a given express trust comprises the law governing the trust's validity, that governing the construction (i.e., meaning and effect) of the trust's terms, and that governing the trust's administration. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 10, topic 1, intro. note (AM. L. INST. 1971). These may be unitary or divergent in a particular case and they may change over time. *See, e.g.*, Wilmington Tr. v. Wilmington Tr., 24 A.2d 309, 315 (Del. 1942) (finding settlor of trust created in New York intended change of law governing administration to effect a change of law governing construction).

[9] The "donee" of a power of appointment is the person to whom the power is granted—the *holder* of the power. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.2(b) (AM. L. INST. 2011).

[10] Trust provisions granting a power of appointment must conform to general constraints according to which the terms of an express trust having definite or definitely ascertainable beneficiaries (i.e., an express trust *other than* a charitable trust or a

was intentional,[11] and that the intended exercise is within the scope of the power,[12] the appointment (i.e., the exercise in question) may be valid under the law of *State A* but invalid under the law of *State B* or *vice versa*.[13] In that case, if the power is a power to appoint "movables,"[14] then "as to questions of substantial validity,"[15] the appointment is valid if it is valid

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noncharitable "purpose trust") must be practicable, lawful, congenial to public policy, and for the benefit of the trust's beneficiaries. *See* UNIF. TR. CODE §§ 105(b)(3), 404 (UNIF. L. COMM'N 2010); RESTATEMENT (THIRD) OF TRUSTS §§ 27(2), 29–30 (AM. L. INST. 2003); HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 317–26 (Jill E. Martin ed., 13th ed. 1989). Furthermore, excepting presently exercisable general powers, *see supra* note 2, a power of appointment was invalid at common law, *see supra* note 6, unless it could only be exercised within the perpetuities testing period. *See, e.g.*, MAUDSLEY, *supra* note 2, at 60–61; JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 922 (8th ed. 2009). And that principle has its analogy under modern "wait-and-see" reforms. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(b)–(c) (UNIF. L. COMM'N 1990). Thus, a power may be invalid if it can be exercised at a time beyond the testing period of an applicable rule against perpetuities (RAP) or if it is not exercised within the wait-and-see period of an applicable perpetuities reform statute. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. a.

[11] "A power of appointment is exercised to the extent that: (1) the donee manifests an intent to exercise the power in an otherwise effective document . . . ." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1(1).

[12] *See generally id.* §§ 19.1(2)–(3), 19.8–19.15. For the notion of so-called "fraud on a power," see *id.* § 19.16; *see also* BORRON, *supra* note 1, § 981, at 547; THOMAS, *supra* note 2, ¶ 9.04.

[13] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b.

[14] I.e., property in things other than land. Conflict of laws principles concerning powers vary depending on whether the property subject to appointment is or is not real property. *See id.* ch. 10, topic 1, intro. note.

[15] *Id.* § 274(a). In the nomenclature of the Restatement (Second) of Conflict of Laws, the limbs of the standard (if sometimes mysterious) dichotomy, in issue characterization, between substantive questions, on the one hand, and question about formalities and capacity, on the other, are tagged by the terms "substantial validity" and "formal validity," respectively. *See id.* § 274 cmt. b–c. Other secondary sources distinguish formal validity from, for example, "essential," "intrinsic," or "material" validity. *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 9–11, 19 (2d ed. 2008). As to the role of issue characterization in conflicts analysis generally, see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7; BRIGGS, *supra*, at 8–13, 28; BRAINERD CURRIE, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 376, 381–82 (1963).) The "substantial validity" of a given exercise of a power of appointment will depend, for example, on whether future interests granted by the exercise are liable to vest beyond the testing period of an applicable RAP. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b. The "formal validity" of an exercise will depend, for example, on requirements for the manner of exercise imposed by the instrument granting the power and on the donee's capacity. *See id.* cmt. c.

under the law of the state which determines the validity of the trust itself[16] (*State A* in our example); and if the power is a *special* power, the appointment is valid *only if* it is valid under that law,[17] which is what we would expect "if the donee were filling in blanks in the donor's [trust] instrument."[18]

> It is frequently said that the property which passes upon the exercise of a power of appointment is the property of the donor and not the property of the donee of the power. *It is said that the instrument by which the power is exercised is to be read back into the instrument which created the power. For this reason it is said that the substantial validity of the exercise of the power is determined by the law which determines the validity of the trust under which the power was created.*
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> This is undoubtedly so where the power is a special power, that is, a power to appoint among a limited class of persons. The appointees take the property from the donor rather than from the donee, even though the donee may select which members of the class shall take and in what proportions. If an appointment is made in trust and the trust fails there is a resulting trust to the estate of the donor and not to the estate of the donee. The permissible period under the rule against perpetuities begins at the time of the creation of the power and not at the time of its exercise. *The applicable law is that which governs the validity of the trust and not that which would govern a disposition by the donee of his own property*.[19]

Thus, the relation back theory is capable of supplying a potent "foreign element"[20] in a given case. It may supply the only such element: on the right facts, the law determining the validity of a trust that grants a power

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[16] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *see also id.* § 274 cmt. b.

[17] *See id.*

[18] *See supra* note 4 and accompanying text.

[19] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (emphasis added) (citations omitted).

[20] This is the conventional term in conflicts of law for an aspect of a legal matter that, relative to one jurisdiction with which the matter is connected, connects the matter with the law of some other jurisdiction. *See, e.g.*, *id.* § 2 cmt. a; BRIGGS, *supra* note 15, at 1.

of appointment could be the only appropriate reference to any law other than, for example, the law of the donee's domicile.[21] And in any case, regardless of the number and weight of "connecting factors"[22] linking the matter to the *lex fori* or the law of a third state, the relation back theory will *determine* the choice of law[23] on the substantial validity of an appointment provided that the power in question is a special power[24] (and

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[21] *See, e.g.*, *infra* Part III. As to what may constitute an "appropriate reference" to a jurisdiction's law on a particular issue, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (concerning limitations on choice of law).

[22] This is to use Adrian Briggs' term for what the Restatement (Second) of Conflict of Laws calls "bases for the application of the local law of a state." BRIGGS, *supra* note 15, at 20–21; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f.

[23] "Choice of law" is the department of conflict of laws conventionally distinguished from issues of jurisdiction and recognition of foreign judgements. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a; BRIGGS, *supra* note 15, at 1. Choice of law rules are conventionally "jurisdiction-selecting":

> When a case arises in which a foreign law is offered in evidence or in which the applicability of the law of the forum is denied, a court faithful to the conventional approach will turn in search of a conflict of laws rule to determine the *jurisdiction* whose law should govern the question at issue. The conflicts rule indicates in which jurisdiction the appropriate law may be found. Assuming the law offered to be from that jurisdiction, the court will then proceed with the case, employing that law as a rule of decision.

DAVID F. CAVERS, *A Critique of the Choice-of-Law Problem*, *in* THE CHOICE OF LAW: SELECTED ESSAYS, 1933–1983, 3, 9 (1985); *accord* BRIGGS, *supra* note 15, at 28.

[24] *See supra* notes 17–19 and accompanying text. The decisiveness with which the conflict of laws implication of the relation back theory operates as a choice of law rule for the substantial validity of an appointment—that the implication determines the choice of law without regard to the number or weight of connecting factors linking the case to the *lex fori* or the law of a third state—is fairly characteristic of choice of law rules pertaining to property:

> [A]ny rule of choice of law, like any other common law rule, represents an accommodation of conflicting values. Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in [RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6]. In certain areas, as in parts of Property, such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as in Wrongs and Contracts, the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that

the law of the forum is not so eccentric as to have rejected every other implication the relation back theory).[25]

"[A]s to questions of formalities and of the capacity of the donee,"[26] the conflict of laws implication of the relation back theory is more relaxed: a putative exercise of a power granted by the terms of a trust is formally valid, and the exercising donee has sufficient capacity, if those things are true under *either* the law that determines the validity of the trust (that of *State A* in our example) *or* the law applicable to dispositions by the donee of her own property,[27] which, in the case of a testamentary power, is the

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> can presently be done in these areas is to state a general principle, such as application of the local law "of the state of most significant relationship," which provides some clue to the correct approach but does not furnish precise answers.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (internal cross references omitted).

[25] It is doubtful whether a state that systematically rejected every *other* implication of the relation back theory would adhere to the conflict of laws implication described *supra* in the text accompanying notes 17–19. Delaware, for example, has legislatively abrogated the implication of the theory concerning remoteness of vesting (described *supra* in the text accompanying notes 1–7). *See* DEL. CODE ANN. tit. 25, § 501; GRAY, *supra* note 3, § 514 n.1. But a legislative intention to reject *all* of a common law theory's implications cannot be *inferred* form a rejection of any one of them. Legislation apart, a state's conflict of laws rules are as much a part of the common law of that state as are the state's rules concerning remoteness of vesting and resulting trusts (to mention the two non-conflicts implications of the relation back theory adduced in the Restatement Comment quoted *supra* in the text accompanying note 19). *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; BRIGGS, *supra* note 15, at 32. And the practical necessity that judges must understand legislation that modifies the common law *in light of* what is being modified makes interpretation of such legislation conservative in the sense that "[t]he presumption is for a minimum change to be effected by legislation in a common law area." RUPERT CROSS, STATUTORY INTERPRETATION 43–44 (John Bell & George Engle eds., 3d ed. 2005); *see* Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 304–05 (1959); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 119 (2013) (indicating that "[a]mong other substantive canons . . . statutes that alter the common law should be strictly construed"). Furthermore, a legislature intending to reform a doctrine that is as deeply entrenched in the common law as is the relation back theory will often find that it is more convenient to retain some vestige of the doctrine than to extirpate it entirely. *See, e.g.*, DEL. CODE ANN. tit. 25, § 504 (retaining vestige of relation back theory as would-be statutory anti-Delaware-tax-trap protection); James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L.J. 673, 676–77 (2009).

[26] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b); *see supra* note 15.

[27] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b).

law of the donee's domicile[28] (the law of *State B* in our example). In this context, the foreign element that the relation back theory supplies is additive: the theory provides an *additional* "close relationship to the case"[29] for purposes of a general, alternative reference[30] principle for the choice of law regarding formalities:

> Situations will arise where a will although invalid under the local law of the state where the decedent was domiciled at the time of his death, is valid under the local law of some other state having *a close relationship to the case* such as the state where the testator was domiciled at the time the will was executed. If in such a situation the courts of the state of the last domicil would uphold the validity of the will by application of the local law of the other state, the forum will do likewise. The courts of the last domicil would be particularly likely to reach such a result in a situation where the difference between their own local law and that of the other state is relatively slight and does not stem from a significant divergence in policy. In such a situation, the courts of the last domicil might feel it more important to give effect to the intentions of

[28] When the power in question is a testamentary power (like the testamentary special power in our example), the hypothetical disposition by the donee of her own property that is most analogous to an exercise of the power of appointment is a *testamentary* disposition, and the law applicable to testamentary dispositions by the donee of her own property is the law of the donee's domicile governing the validity of domestic wills. *See id.* § 274 cmt. c. As we shall see, that law may include "alternative references" to the laws of other states. *See infra* notes 30–31 and accompanying text.

[29] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 cmt. g.

[30] The same idea is sometimes referred to in the literature as "*alternate* reference": "[T]o determine the validity of a will not conforming to the law of the testator's last domicil, the Model Execution of Wills Act prescribes, by way of *alternate reference*, the law of the place of execution or the law of the testator's residence at the time of execution . . . ." DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 227 (1965) (emphasis added). But apropos of a *choice* of law, the term "*alternate* reference" evidently illustrates the solecism of taking "alternate" (by turns) to mean "alternative" (offering a choice). *See* H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 20a (Ernest Gowers ed., 2d ed. 1965); MICHAEL DUMMETT, GRAMMAR & STYLE FOR EXAMINATION CANDIDATES AND OTHERS 89 (1993).

> the testator by upholding the will than to insist upon a rigid application of their local law.[31]

In the case of a testamentary power granted by the terms of a trust, the confluence of that alternative reference principle regarding formalities and the relation back theory yields that:

> In the absence of [express requirements for specified formalities of execution in the trust instrument granting the power], the courts will, in their desire to uphold the exercise of the power and thus give effect to the intentions of the donor and of the donee, hold that powers exercised by will or inter vivos are validly exercised by an instrument which meets the formal requirements of the law which governs the validity of the trust or of the local law applicable to the disposition by the donee of his own property. Thus, if the donee is given a power to appoint by will, the appointment is validly exercised by a will which satisfies the requirements of the domicil of the donor or of the domicil of the donee.[32]

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[31] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 cmt. g (emphasis added) (stating alternative reference principle for "will[s] of movables"); *see id.* § 239 cmt. g (stating alternative reference principle for "will[s] of land"). The "local law" of a given state is the state's domestic law, i.e., the state's law *excluding* conflict of laws rules. *See id.* § 4; *see also id.* § 222 cmt. e, ch. 9, topic 2, intro. note; CAVERS, *supra* note 30, at 70. Thus, the Restatement (Second) of Conflict of Laws regards alternative reference rules like those found in Uniform Probate Code (UPC) section 2-506, and Uniform Trust Code section 403, as choice of law rules within the enacting state's conflict of laws apparatus. *Accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. a (thus characterizing alternative reference rule of Model Execution of Wills Act's counterpart to UPC section 2-506); CAVERS, *supra* note 30, at 227 (same). But that characterization is not beyond controversy:

> This [i.e., the Model Execution of Wills Act's counterpart to UPC section 2-506] is not so much a rule of alternative reference to the law of the state of execution, or of domicile, as it is a recognition that the policies of all the states are substantially the same and may be fulfilled by compliance with any—not just a particular one—of the formal requirements.

BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 186 (1963).

[32] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. c. (The assumption at the end of the quoted passage, that the law governing the validity of the trust in question is the law of the donor's domicile is sloppy: that may or may not be the case. *See, e.g.*, *id.* § 270 (regarding validity of trust of movables created *inter vivos*).).

So, as to questions of formalities and of the capacity of the donee, a putative exercise of a testamentary power of appointment granted by the terms of a trust is valid if it is valid in those respects under *either* the law that determines the validity of the trust *or* the law of the donee's domicile.[33] But as to questions of *substantial* validity,[34] if the power in question is a special power, the conflict of laws implication of the relation back theory dictates that the appointment is valid only if it is valid under the law that determines the validity of the trust.[35] Those are the relevant choice of law rules[36] (regarding formal and substantial validity, respectively) that are clearly set out in the *Restatement (Second) of Conflict of Laws* (*RSC*).[37]

II. A DIFFERENT RESTATEMENT, A DIFFERENT RULE?

We must therefore be surprised to read in the *Restatement (Third) of Property: Wills and Other Donative Transfers* (*RTP*), in a Comment headed "Choice of law," that "[*t*]*he 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."[38] That statement (*RTP* Statement) clearly contradicts the choice of law rules expressed in the *RSC* (*RSC* Rules)[39] *if* the question "whether the donee has effectively exercised a power" equates to the question addressed by the *RSC* Rules, *viz.*, whether the donee has *validly* exercised the power—exercised it, that is, so as to make a valid appointment: in that case, even if the question is only one "of formalities and of the capacity of the donee"[40] (and not "of substantial validity"),[41] the *RTP* Statement requires the exercise of a testamentary power granted by the terms of a trust to satisfy the formal requirements for testamentary exercise set by the law of the donee's domicile,[42] whereas according to the *RSC* Rules, the exercise is formally valid if it satisfies the formal requirements set by *either* the law

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[33] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. c.

[34] *See supra* note 15 and accompanying text.

[35] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a).

[36] *See supra* note 23.

[37] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *see also id.* cmt. b.

[38] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (AM. L. INST. 2011) (emphasis added).

[39] *See supra* Part I.

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b).

[41] *Id.* § 274(a).

[42] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e; *see supra* note 38 and accompanying text.

of the donee's domicile *or* the law that determines the validity of the trust.[43]

And, of course, the *RTP* Statement also contradicts the *RSC* Rules on a broader "effectively"-means-"validly" interpretation[44] according to which the Statement's supposed concern with *validity* is with "substantial validity" as well as formalities and capacity:[45] in that case, the *RTP* Statement entails that an appointment by exercise of a testamentary special power granted by the terms of a trust is valid if the appointment is substantially (as well as formally) valid under the law of the donee's domicile,[46] whereas, according to the *RSC* Rules, such an appointment is valid only if it is substantially valid under the law that determines the validity of the trust under which the power was granted,[47] and in the sort of case we have in view, the law of the donee's domicile and the law that determines the validity of the trust are different.[48]

III. A CASE IN POINT

It may be helpful, at this point, to elaborate such a case. So, let us fill out our example involving *States A* and *B* by supposing that a settlor, *S*, settles an irrevocable *inter vivos* trust under the terms of which a beneficiary, *D*, is granted a testamentary special power, *p*, to appoint the trust assets "by a specific reference [to the power] in a valid will"; the validity of the trust is determined by the law of *State A*; the trust assets are "movables" within the meaning of the *RSC*;[49] *p* is a valid power under the local law[50] of *State A*;[51] *D* attempts to exercise *p* by a specific reference to

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[43] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b); *see also supra* notes 26–33 and accompanying text.

[44] I.e., an interpretation based on the supposition that the question "whether the donee has effectively exercised a power" (in the *RTP* Statement's formulation) equates to the question whether the donee has *validly* exercised the power in the sense contemplated by the *RSC* Rules that is broader than the interpretation of that kind mooted *supra* in the text accompanying notes 39–41.

[45] *Cf. supra* text accompanying notes 40–41.

[46] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e; *see supra* note 38 and accompanying text.

[47] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *see supra* notes 17–19 and accompanying text.

[48] *See supra* text accompanying notes 8–13.

[49] *See supra* note 14 and accompanying text.

[50] *See supra* note 31 and accompanying text.

[51] *See supra* text accompanying note 10.

the power in *D*'s will; at both the time of testation and the time of her death, *D* is a domiciliary of, and is actually located in (different) *State B*;[52] the attempted exercise is within the scope of the power;[53] the dispositive arrangement effected by the exercise would be void *ab initio* in *State B* as a violation of the common law rule against accumulation of income;[54] but *State A* has abrogated that common law rule,[55] and *D*'s dispositive arrangement is also otherwise substantially valid under the law of *State A*; *D*'s will itself is invalid under the law of *State B* for want of a third disinterested witness (and a "dispensing power" statute);[56] *State A*'s statute of wills requires only two witnesses for a nonholographic will, and *D*'s will and capacity at the time of testation also otherwise meet *State A*'s formal requirements for the exercise of a testamentary special power.

In that case, on the narrower "effectively"-means-"validly" interpretation of the *RTP* Statement, according to which the Statement's supposed concern with validity is only with formal (as opposed to *substantial*) validity,[57] *D*'s attempted appointment is invalid because *D*'s will, having been attested by only two disinterested witnesses, does not satisfy the formal requirements for the exercise of a testamentary power under the

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[52] The assumptions made here about where *D* is domiciled and located at the time of testation will allow us to ignore the possibility that *State B* has an alternative reference choice of law rule like UPC section 2-506 as part of its conflict of laws apparatus. *See supra* note 31 and accompanying text.

[53] *See supra* note 12 and accompanying text.

[54] Although its durational limit is that of the common law RAP testing period, the rule against accumulation of income is a common law rule independent of the RAP and is recognized as such in the United States. *See* Gertman v. Burdick, 123 F.2d 924, 931 (D.C. Cir. 1941); *see generally* BORRON, *supra* note 1, § 1466; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 503–07 (2006). In some common law jurisdictions, violation of the rule wholly voids a prescribed accumulation; in others, violation voids accumulations only to the extent that they may exceed the perpetuities testing period. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2, reporter's note 1 (AM. L. INST. 1986); BORRON, *supra* note 1, § 1469. Our hypothesis in the text entails that *State B*'s reception of the common law rule imported the stricter interpretation.

[55] For real-life examples of such abrogation by legislation, see DEL. CODE ANN. tit. 25, § 506 (West 2003); MICH. COMP. LAWS § 554.93(1)(d) (1967) (amended by 2012 Mich. Pub. Acts 485).

[56] I.e., a statute like UPC section 2-503, "which allows a will to be upheld despite a harmless error in its execution." UNIF. PROBATE CODE § 2-503, general cmt. (UNIF. L. COMM'N 2010) (referring to UPC section 2-503 as "dispensing power").

[57] *See supra* notes 39–41 and accompanying text.

law of *D*'s domicile, *State B*;[58] whereas under the *RSC* Rules, the appointment is formally valid (on *D*'s death) because it satisfies the formal requirements (for the exercise of a testamentary power) of the law that determines the validity of *S*'s trust, the law of *State A*.[59] On the broader "effectively"-means-"validly" interpretation of the *RTP* Statement, according to which the Statement's supposed concern with validity contemplates substantial as well as formal validity,[60] *D*'s appointment is substantially invalid (as well as formally invalid)[61] according to the *RTP* Statement because the appointment violates the common law rule against accumulation of income enforced by the law of *D*'s domicile, *State B*;[62] whereas under the *RSC* Rules, the attempted appointment is substantially valid (as well as formally valid)[63] because the state whose law determines the validity of *S*'s trust, *State A*, has abrogated the common law rule against accumulation of income (and the attempted exercise is also otherwise substantially congenial to the law of *State A*).[64]

IV. WHAT'S IN AN ADVERB?

Thus, on the "effectively"-means-"validly" interpretation of the *RTP* Statement, that Statement and the *RSC* Rules yield more or less contradictory substantive results on the facts of our elaborated example;[65] *more or less* depending on whether the Statement is interpreted broadly or narrowly in the senses described above—the broader interpretation, according to which the Statement's supposed concern with validity contemplates substantial as well as formal validity, doubles the number of contradictions yielded by alternately applying the *RTP* Statement and the *RSC* Rules to our facts.[66] But the "effectively"-means-"validly" interpretation is resistible; there are indications that the question "whether the

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[58] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (AM. L. INST. 2011).

[59] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b); *see also supra* notes 26–33 and accompanying text.

[60] *See supra* notes 44–45and accompanying text.

[61] *See supra* notes 57–58 and accompanying text.

[62] *See supra* text accompanying notes 38, 54.

[63] *See supra* note 59 and accompanying text.

[64] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *see also supra* notes 17–19 and accompanying text.

[65] *See supra* Part III.

[66] *See supra* text accompanying notes 57–64.

donee has effectively exercised a power" is *not* the question of validity, substantial *or* formal, addressed by the *RSC* Rules.[67]

One important clue is that the *RTP* Statement is expressed as a rule of construction: "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*."[68] In fact, the only authority cited for the *RTP* Statement is a Comment to a section of the *RSC*[69] that sets out an exception to the relation back concept for the case in which a rule of construction is needed because "a power to appoint by will interests in movables is *exercised by a general bequest not mentioning the power*"[70] and the donor of the power has not indicated whether the power can or cannot be exercised without a specific reference.[71] And it turns out that the principle adopted by the *RSC* for that narrow circumstance, the principle that constitutes the *RTP* Statement, is *against* the weight of decided cases—it is an instance of the *RSC*'s trying to make the law a little tidier or more rational than it actually is by "restating" it:

> In the absence of a provision in the trust instrument or will that the power shall or shall not be exercised by a will which does not mention the power, there is a conflict of authority on the question whether the power is exercised by a general bequest which does not mention the power . . . . *The difficulty arises only where there is no evidence as to [the donee's] intention and it is necessary to resort to a rule of construction. Most of the cases hold that the rule of construction of the state whose local law governs the creation of the trust*, which is ordinarily in the case of a testamentary trust the state of the donor's domicile, is applicable. It would, however, be more in accordance with the general principles applicable to construction to apply the rule of construction of the donee's domicile since it is his intention that is determinative. At any rate,

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[67] *Cf.* text accompanying notes 39–41.

[68] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (AM. L. INST. 2011) (emphasis added).

[69] *See id.* (citing only RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. c (AM. L. INST. 1971)).

[70] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 (emphasis added).

[71] *See id.* cmt. b.

> it is to be borne in mind that a rule of construction is applicable only in the absence of evidence rebutting it.[72]

What this background makes clear is that the *RTP* Statement is based on a special choice of law rule—a reforming choice of governing construction rule (CGC Reform)[73]—whose application, when it is needed, is logically prior to the *RSC* Rules: at its source in the *RSC*, the CGC Reform has to do analytically neither with "questions of substantial validity"[74] nor with "questions of formalities and of the capacity of the donee";[75] it has to do with the question of *whether there has been an exercise (of the power in question) at all*. That is why *at its source*, the CGC Reform does not contradict the *RSC* Rules: questions about substantial and formal validity *assume an attempted exercise*,[76] and the CGC Reform applies, if it does, because the donor of a power has neither expressly required specific reference to the power—thereby making mention of the power a requisite formality—nor expressly waived such a reference,[77] and the donee has not indicated whether she particularly intended to exercise the power.[78] The CGC Reform applies when a rule of construction is our only way of determining whether there has or has not been an exercise about whose validity, substantial or formal, we can inquire under the guidance of the *RSC* Rules.

V. A SECOND CASE IN POINT

We can illustrate such a situation by changing the facts of our elaborated example above[79] so that apart from indicating that *p* is a

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[72] *Id.* cmt. c (emphasis added).

[73] I.e., the rule of Restatement (Second) of Conflict of Laws section 275. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e.

[74] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a).

[75] *Id.* § 274(b).

[76] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1(1).

[77] "If the settlor or testator has provided in the trust instrument or will that the power shall not be exercised by a will which does not mention the power, it cannot be exercised by the donee by a will not mentioning the power." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. b. Though such a provision may itself be subject to statutory construction. *See, e.g.*, UNIF. PROBATE CODE § 2-704 (UNIF. L. COMM'N 2010) (rebuttably presuming reference requirement in instrument granting power is intended merely to prevent inadvertent exercise).

[78] *See supra* notes 70–72 and accompanying text.

[79] *See supra* Part III.

testamentary power that cannot be exercised in favor of *D*'s estate or the creditors of *D*'s estate,[80] the terms of *S*'s trust say nothing about the manner of *p*'s exercise; those terms do not provide a gift over (of the trust assets subject to *p*) in default of exercise; *D*'s will does not refer to *S*, *S*'s trust, or any power of appointment, but it "devise[s] the residue of [*D*'s] property" to someone who would be a permissible appointee under *p*; surrounding circumstances do not suggest that *D* would likely have made that residuary bequest only if she thought she was exercising *p*,[81] and there is no evidence outside of *D*'s will indicating that *D* intended an exercise; the *ratio decidendi* of a judicial decision binding as precedent in *State A* interprets *State A*'s enactment of Uniform Probate Code (UPC) section 2-608[82] as entailing that in the absence of a specific-reference requirement in the instrument granting the power, a general residuary clause in the donee's will is treated as expressing an intention to exercise a *special* power *only if* the will "manifests an intention to include the property subject to the power";[83] a binding judicial precedent in *State B* (where UPC section 2-608 has *not* been enacted) derives from the court's strong "desire to uphold the exercise of [a] power and thus give effect to the intentions of the donor and of the donee,"[84] the result that a residuary clause in a will is treated as expressing an intention to exercise a special

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[80] I.e., that *p* is a testamentary *special* power of appointment. *See supra* note 2 and accompanying text.

[81] Thus, the case does not fall under the principle that "where the donee makes dispositions . . . which are of the type one would be likely to make if he were dealing with the property covered by the power, it is inferable that the donee intended to pass the appointive assets." RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS CONTINUED AND CONCLUDED § 343 cmt. a (AM. L. INST. 1940).

[82] Which reads:

> In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power exercisable in favor of the powerholder's estate and the creating instrument does not contain an effective gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

UNIF. PROBATE CODE § 2-608.

[83] *Id.* That is something that the will can do without a specific reference to the power if it says, for example, "All the residue of my estate, including any property over which I have a power of appointment, I devise to . . . ." *Id.* § 2-608 cmt.

[84] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. c (AM. L. INST. 1971).

power granted by the terms of a trust if the trust does not provide either a specific-reference requirement or a gift over in default of exercise and the residuary disposition does not cause property subject to the power to pass to anyone who is not a permissible object of the power.

In that case, we cannot tell after *D*'s death whether *D* did or did not exercise *p* without the benefit of a presumption one way or the other, and the respective presumptions provided by the laws of *States A* and *B* are liable to yield different results: statutory authority in *State A* entails that *p* was not exercised on these facts because *p* is not "a general power exercisable in favor of [*D*'s] estate";[85] whereas judicial authority in *State B* (which lacks an analogous statute) indicates that *p was* exercised, given the absence of provisions for takers in default.

VI. DIFFERENT CHOICES OF LAW ON DIFFERENT QUESTIONS

So, analytically, we confront a discrete potential conflict of laws *before* we meet the conflicts that the *RSC* Rules are intended to resolve—a conflict between rules of construction for the case in which (1) a testamentary power granted by the terms of a trust may have been exercised by a residuary clause or general bequest not mentioning the power, (2) the trust instrument granting the power does not indicate whether the power can or cannot be exercised without a specific reference, and (3) the law that governs the construction of the trust instrument is different from the law that governs the construction of the donee's will.[86] *That* is the potential conflict of laws that the CGC Reform aims to resolve.[87]

What has that potential conflict to do with the question nominally addressed by the *RTP* Statement, the question of "whether the donee has effectively exercised a power of appointment"?[88] It is true that by yielding a choice of law in the narrow circumstances to which it applies, the CGC Reform can tell us how to determine whether there has or has not been a would-be exercise of the power in question, and, of course, whatever constitutes an "effective exercise of a power" under given law must constitute *an exercise of a power* under that law. But surely the *RTP*

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[85] *See supra* note 82 and accompanying text.

[86] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. f.

[87] *See id.*

[88] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (AM. L. INST. 2011).

Statement would better represent the authority expressly adduced for it[89] if it said:

> *The law of the donee's domicile governs whether the donee will be presumed to have exercised a testamentary power of appointment over movables granted by the terms of a trust when the power may have been exercised by a residuary clause or general bequest not mentioning the power and the trust instrument granting the power does not indicate whether the power can or cannot be exercised without a specific reference.*[90]

That statement would be warranted by the CGC Reform; *that* statement would not invite the misconception that an exercise of a special power that is "effective" within the meaning of the *RTP* Statement is, *for that reason*, "valid" within the meaning of the *RSC* Rules.

VII. CONCLUSION

As things are, the *RTP* Statement's formulation as a rule of construction and the lonely citation of the CGC Reform as authority[91] are our only clues that the *RTP* Statement wants an "effectively"-does-*not*-mean-"validly" interpretation[92] on which the Statement, like the CGC Reform itself, is not competitive with the *RSC* Rules but rather *precedes* them analytically: the *RTP* misleadingly fails to indicate that the CGC Reform is inapplicable in a case like our first elaborated example in which the donee of the power in question has clearly indicated an intent to exercise the power,[93] and there is no qualifying advertence elsewhere in the *RTP*'s treatment of powers of appointment to boarder conflict of laws principles like the *RSC* Rules.[94] At face value, the *RTP* Statement elevates a narrow, tidying-up innovation of the *RSC* that is uncharacteristically

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[89] *See supra* note 69 and accompanying text.

[90] *See supra* notes 70–71 and accompanying text; *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e.

[91] *See supra* notes 68–69 and accompanying text.

[92] *Cf. supra* Parts II–III.

[93] *See supra* notes 69–70 and accompanying text. "The difficulty arises only where there is no evidence as to [the donee's] intention and it is necessary to resort to a rule of construction." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. c (AM. L. INST. 1971).

[94] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS div. VI.

dismissive of the conflict of laws implications of the relation back theory to a general principle governing "[c]hoice of law [on the question of] whether the donee has effectively exercised a power of appointment."[95]

But if we interpret the *RTP* Statement in light of the only authority cited for it, *viz.*, the CGC Reform, the embedded adverb "effectively" adds nothing to the Statement's meaning; the expression "effectively exercised a power of appointment"[96] just means *exercised a power of appointment* so that, like the CGC Reform, the *RTP* Statement is a choice of law rule for determining *whether there has been an exercise* of a testamentary power granted by the terms of a trust in circumstances in which we need a rule of construction to tell us that, and the law that governs the construction of the trust instrument is different from the law that governs the construction of the donee's will.[97] That resolves a conflict of laws, if there is one, about whether, in the circumstances, there was an exercise at all. Whether an exercise, *if there was one*, effected a valid appointment in those circumstances is a different question, one on which there may also be a conflict of laws. The latter potential conflict is the province of the *RSC* Rules, under which the relation back theory liberalizes the donee's opportunities of achieving "formal validity"[98] and, in the case of a special power, determines "substantial validity" *tout court*.[99]

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[95] *Id.* § 19.1 cmt. e.

[96] *Id.*

[97] *See supra* note 86 and accompanying text.

[98] *See supra* notes 26–33 and accompanying text.

[99] *See supra* Part I.