Chapter 7: Conflict of Laws

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Conflict of Laws

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§ 7.1. Contract Choice-of-Law Rule — Statute of Frauds — Law of Jurisdiction Which Validates Transaction Controls. Contract cases have been a particular problem in the conflict of laws because of the confusion which has characterized the conflicts law pertaining to the validity of contracts. Three choice of law rules have emerged in determining the validity of contracts in a multistate setting: (1) the law of the place of the making of the contract; (2) the law of the place of the performance of the contract; and (3) the law intended by the parties to control the contract.1 Until recently, American courts have applied any one of these three rules without acknowledging their inconsistency. The original Restatement of Conflict of Laws adopted the place-of-making rule, lex loci contractus.2 Automatic application of the lex loci contractus rule generally was rejected by the American courts, however, because in a large number of cases the doctrine did not identify the state with the greatest interest in the contract.

Although the indiscriminate use of the three traditional rules has continued,3 a new approach to the validity-of-contract problem has been receiving increasing approbation by the courts and publicists. The “grouping of contracts” theory emphasizes that the law of the place which has significant contacts with the parties and with the transaction should govern the validity of the contract. Obviously, the “grouping of contacts” theory gives less certainty and predictability than the original Restatement’s rigid place-of-making rule. Nevertheless, the rule permits a court to focus upon the law of the jurisdiction which has the paramount interest in the multistate transaction. The Restatement (Second) of Conflict of Laws has aligned itself with the “contacts” standard. In rejecting the dogma of the lex loci contractus, the Restatement (Second) states that

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2 RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

3 See LEFLAR, supra note 1, at § 145; SCOLES & HAY, supra note 1, at § 18.14.
the validity of a contract is governed by the law of the state with which the transaction has "its most significant relationship."4

Recently, the Massachusetts Supreme Judicial Court indicated its willingness to abandon the traditional place-of-making rule in favor of "a more functional approach" when determining what law to apply in contract cases.5 During the Survey year, the Supreme Judicial Court, in *Bushkin Associates, Inc. v. Raytheon Co.*,6 again considered the conflict of laws rule in a contract case. In answer to questions certified to it by the United States Court of Appeals for the First Circuit,7 the Court chose as its conflicts rule the law which validated the contract.8

The plaintiffs, Bushkin Associates, Inc. and Merle Bushkin ("Bushkin"), brought suit to recover on an oral fee agreement allegedly made between Bushkin and the defendant, Raytheon Company ("Raytheon"), for services in connection with Raytheon's acquisition of Beech Aircraft Corporation ("Beech").9 Bushkin also sought payment for the reasonable value of any information Bushkin gave Raytheon, and alleged that Raytheon had engaged in unfair and deceptive acts and practices.10 The factual background in *Bushkin* identified New York and Massachusetts as the states connected with the transaction.11 Bushkin, a New York resident specializing in mergers and acquisitions, was president of Bushkin Associates, a corporation organized and based in New York.12 Raytheon was a Delaware corporation with its principal place of business in Massachusetts.13

Bushkin's dealings with Raytheon concerning the acquisition of Beech began in 1971.14 Negotiations were carried on via telephone conversations between Bushkin in New York and Raytheon in Massachusetts.15 Bushkin alleged that the oral fee agreement was made in a telephone call which occurred in January, 1975. During this conversation Raytheon's representative acknowledged that Raytheon was interested in acquiring Beech, and that Raytheon would pay a fee of one percent of the value

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4 *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 188 (1971).
7 Id. at 622-23, 473 N.E.2d at 664.
8 Id. at 636, 473 N.E.2d at 671.
9 Id. at 624, 473 N.E.2d at 664.
10 Id. at 638-39, 473 N.E.2d at 672. See G.L. c. 93A.
11 393 Mass. at 624, 473 N.E.2d at 664.
12 Id.
13 Id.
14 Id.
15 Id.

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of the transaction to Bushkin if the acquisition of Beech took place.\textsuperscript{16} Raytheon's representative later told Bushkin that Raytheon had decided that it was no longer interested in Beech.\textsuperscript{17} Subsequently, Raytheon contracted in writing with another company for consulting services concerning mergers and acquisitions, and, in February, 1980, Raytheon acquired Beech with the help of its new consulting company, paying the latter $1,100,000 for its services.\textsuperscript{18}

Bushkin brought a diversity suit to recover on the oral fee agreement allegedly made with the defendant, Raytheon, in the United States District Court for the District of Massachusetts.\textsuperscript{19} Raytheon moved for summary judgment, contending that the New York statute of frauds should apply to this case and that, under New York law, the oral agreement would be unenforceable.\textsuperscript{20} Bushkin answered that the Massachusetts statute of frauds, which would not invalidate the oral agreement, should control.\textsuperscript{21} The district court ordered summary judgment for Raytheon, holding that the New York statute of frauds governed the action and that, under New York law, the oral agreement was invalid.\textsuperscript{22}

The district court, in compliance with the \textit{Erie-Klaxon} doctrine applicable in cases involving diversity jurisdiction, followed the conflicts law of Massachusetts\textsuperscript{23} and concluded that the Supreme Judicial Court would not apply the principle that choice of law would be governed by the place of contracting.\textsuperscript{24} The court further concluded that the Restatement (Second) of Conflict of Laws "most significant relationship" test was not an effective means for resolving the conflicts problem in the case.\textsuperscript{25} Instead, the court opted for "interest" analysis as the way to settle the conflict between New York and Massachusetts law.\textsuperscript{26} Applying this analysis, the federal district court held that New York had a strong interest in protecting defendants against unfounded claims, even when New York brokers and finders sued non-New Yorkers.\textsuperscript{27} Turning to Massachusetts law, the court found that Massachusetts had only a minimal interest in apply-

\textsuperscript{16} Id. at 624–25, 473 N.E.2d at 664–65.
\textsuperscript{17} Id. at 625, 473 N.E.2d at 665.
\textsuperscript{18} Id. at 626, 473 N.E.2d at 665.
\textsuperscript{20} 570 F. Supp. at 596.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 603.
\textsuperscript{24} 570 F. Supp. at 599.
\textsuperscript{25} Id. at 600.
\textsuperscript{26} Id. at 600–01.
\textsuperscript{27} Id. at 601–02.
ing its law to this case.\textsuperscript{28} The court concluded that "interest analysis clearly tips the scale in favor of applying New York law to the facts of this case."\textsuperscript{29}

Applying New York law, the federal district court found that the New York statute of frauds clearly invalidated the oral contract between Bushkin and Raytheon.\textsuperscript{30} The court also held that the statute of frauds barred Bushkin's implied contract claim for the reasonable value of the information and services rendered to Raytheon.\textsuperscript{31} Finally, the court rejected Bushkin's allegation that Raytheon engaged in unfair and deceptive acts and practices, noting that this claim merely restated Bushkin's express and implied contract claims.\textsuperscript{32} The federal district court therefore allowed Raytheon's motion for summary judgment and dismissed Bushkin's complaint.\textsuperscript{33} Bushkin then appealed to the United States Court of Appeals for the First Circuit.\textsuperscript{34}

Concluding that it was not "confident of the choice that would be made by the Supreme Judicial Court in this important case," the federal court of appeals certified to the Supreme Judicial Court the question whether the Massachusetts or New York statute of frauds should be applied in this action involving an alleged oral agreement between the plaintiff Bushkin and the defendant Raytheon.\textsuperscript{35} An action based on such an oral agreement would be barred under the New York statute of frauds, but would not be barred under the Massachusetts statute of frauds.\textsuperscript{36}

The Supreme Judicial Court stated that the federal district court in Bushkin was correct in concluding that the Court would not allow the choice of law question to turn on where the contract was made.\textsuperscript{37} The Court had rejected the simple \textit{lex loci contractus} rule in its opinion in \textit{Choate, Hall & Stewart v. SCA Services, Inc.}\textsuperscript{38} Although unable to select among current theories as alternatives to the old \textit{lex loci contractus} rule because of the fact pattern in \textit{Choate}, the Court had cited with approval Currie's "interest" analysis and the Restatement (Second) of Conflict of Laws "most significant relationship" test.\textsuperscript{39} The facts in \textit{Bushkin},

\begin{footnotesize}
\begin{enumerate}
\item Id. at 602.
\item Id.
\item Id.
\item Id. at 603.
\item Id.
\item Id.
\item Id.
\item Id. at 626, 473 N.E.2d at 666.
\item Id. at 622–23, 473 N.E.2d at 664.
\item Id. at 623, 473 N.E.2d at 664.
\item Id. at 630, 473 N.E.2d at 668.
\item Id. at 541, 392 N.E.2d at 1048–49.
\end{enumerate}
\end{footnotesize}
cited its decision in Cohen v. McDonnell Douglas Corp., in which it recognized that established conflicts principles "are a useful starting point in determining whether the Commonwealth of Massachusetts bears an 'appropriate relation' to a given transaction or occurrence." The Court ruled, therefore, that chapter 106, section 1-105(1) authorized the Court to apply Massachusetts common law conflicts principles to commercial transactions.

The Supreme Judicial Court turned to its recent decision in Bushkin Associates, Inc. v. Raytheon Co. as a source of relevant common law conflicts principles. In Bushkin, the Court adopted the general principles advanced in the Restatement (Second) of Conflict of Laws to resolve conflicts problems involving contracts. Section 191 of the Restatement provides that the law to be applied to a contract involving the sale of a chattel is "the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties." The Court endorsed this rule on the grounds that "[d]elivery is the most significant stage of the sales transaction," and that "[t]he rule also furthers the values of certainty, predictability and uniformity of result."

The Court also noted that the rule of section 191 is consistent with traditional emphasis on the place of delivery in Massachusetts decisions of conflicts cases involving the sale of goods. Section 191, comment d, of the Restatement (Second) provides that "in an f.o.b. contract, the place of delivery ordinarily is that where under the terms of the contract the seller is to deliver the goods to the carrier f.o.b." The Supreme Judicial Court observed that this rule conforms with the principle in the Uniform Commercial Code that in the case of an f.o.b. point-of-shipment contract, delivery occurs at the point where the goods are placed in the hands of the carrier. The Court noted that it was undisputed that the

23 389 Mass. at 331, 450 N.E.2d at 584.
24 394 Mass. at 98, 474 N.E.2d at 1073.
25 393 Mass. 622, 473 N.E.2d 662 (1985). The Bushkin decision is discussed in section one of this chapter.
26 Id. at 632–34, 473 N.E.2d at 669–70.
27 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 comment e (1971).
28 394 Mass. at 99, 474 N.E.2d at 1073 (quoting RESTATEMENT (SECOND) § 191 comment e).
30 394 Mass. at 100, 474 N.E.2d at 1074. See G.L. c. 106 §§ 2-319(a), 2-504.
Travenol products were all sold "F.O.B. Cambridge, Massachusetts." The Court concluded, therefore, that the goods at issue were delivered in Massachusetts and that Massachusetts law should govern this controversy between Travenol and Zotal.

The Supreme Judicial Court's decision in Travenol strengthens the Restatement (Second) as the preferred approach to resolving conflicts problems in Massachusetts. The Court, by using the principles of the Restatement (Second) to interpret the "appropriate relation" test of section 1-105 (1) of the Uniform Commercial Code, has given welcome specificity to the choice-of-law rule governing the sale of chattels. Travenol also affirms the Court's policy of protecting the "justified expectations" of the parties to a contract, the critical criterion for conflicts contract cases set forth by section 6(2)(d) of the Restatement (Second). This policy, the Court noted, pointed to the application of Massachusetts law in this case, "since presumably both parties must have expected that goods purchased would be properly paid for." It is submitted that the Massachusetts rule which validated the contract between Travenol and Zotal is the proper one. This law of validation, as the Court stated in Travenol, "furthers the values of certainty and predictability, and is thus consistent with the public interest, that a seller be entitled to the price of goods accepted."

§ 7.3. Legitimation of Child Born Out of Wedlock — Law of Child's Domicile Controls. In recent years, the notion of the inferior status of the illegitimate child has largely disappeared and the attitudes of society toward such a child have become much more humane. Legal rules which, in the past, discriminated against illegitimate children increasingly have been declared unconstitutional. In a 1977 decision, Trimble v. Gordon, the United States Supreme Court held that an Illinois statute, which excluded an illegitimate child as a distributee of the father's estate, discriminated against the child in a manner prohibited by the equal protection clause of the fourteenth amendment. In Weber v. Aetna Casualty & Surety Co., the Court held that in making awards under a state workmen's compensation law for the death of the father, legitimate and

31 394 Mass. at 100, 474 N.E.2d at 1074.
32 Id.
33 Id.
34 Id.

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the Court continued, presented the opportunity unavailable in Choate.\textsuperscript{40} The Court decided that it would not tie Massachusetts conflicts law to any specific choice of law doctrine, but sought instead a functional choice of law approach that responded to the interests of the parties and the states involved.\textsuperscript{41}

The Supreme Judicial Court found an obvious source of guidance in the Restatement (Second) of Conflict of Laws.\textsuperscript{42} Section 141 of the Restatement resolves conflicts questions involving a statute of frauds according to the choice of law principle applicable to all substantive contract issues.\textsuperscript{43} Sections 187 and 188 of the Restatement provide that, in the absence of a choice of law by the parties, their rights "are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties."\textsuperscript{44} Section 188 identifies the contacts determinative of the state of most significant relationship as: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.\textsuperscript{45}

After analyzing the contacts Bushkin and Raytheon had with Massachusetts and New York, the Court decided that neither state qualified as the one with the more significant relationship to the transaction or the parties.\textsuperscript{46} The Court then turned to the choice-influencing factors listed in section 6(2) of the Restatement (Second) and found the significant consideration in section 6(2)(d): the protection of justified expectations.\textsuperscript{47} This consideration, the Court stated, favored the application of Massachusetts law.\textsuperscript{48} The Court concluded that Bushkin and Raytheon expected that any oral agreement between them would be enforced. The Court noted that Raytheon had made other, similar agreements with Bushkin, and since Bushkin was not in the business of supplying free information, the Court observed, he certainly expected the fee agreement with Raytheon to be enforced.\textsuperscript{49} Where relevant contacts are balanced, the Court ruled, "we are inclined to resolve the choice by choosing that law 'which would carry out and validate the transaction in accordance with intention,\textsuperscript{40} 393 Mass. at 631, 473 N.E.2d at 668.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 632, 473 N.E.2d at 669.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 633–34, 473 N.E.2d at 669–70.
\textsuperscript{47} Id. at 634–35, 473 N.E.2d at 670. The Court noted that Leflar's five choice-influencing considerations parallel the factors contained in § 6(2) of the Restatement (Second). Id.
\textsuperscript{48} Id. at 635, 473 N.E.2d at 670–71.
\textsuperscript{49} Id. at 635, 473 N.E.2d at 671.
in preference to a law that would tend to defeat it.''

In this case, the Court stated, the law that would validate the agreement was that of Massachusetts. Consequently, in answer to the principal question certified by the federal court of appeals, the Supreme Judicial Court concluded that the law of Massachusetts should determine the issue of the validity of the oral agreement between Bushkin and Raytheon.

The Supreme Judicial Court's decision in Bushkin is important in that for the first time the Court has chosen among extant conflicts doctrines regarding choice-of-law questions in a contract case. Bushkin makes it clear that the Court has rejected the vested rights lex loci contractus doctrine, reaffirming its holding in Choate. Moreover, the Court clearly endorses the Restatement (Second) contacts or functional approach to contract conflicts issues in which it had indicated an interest in an earlier conflicts contract case. The Restatement (Second) approach, already adopted in a large number of states, determines the state of most significant relationship by qualitative analysis, and not merely by "adding up various contacts." Section 6(2)(d) of Restatement (Second) identifies the protection of justified expectations as the significant contact in choosing the proper law to resolve a conflicts contract case. This paramount consideration of the justified expectations of the parties led the Supreme Judicial Court in Bushkin to apply the law of Massachusetts to validate the contract between Bushkin and Raytheon in accordance with the intention of the parties. The law of validation (lex validitatis) is emerging as the preferred choice-of-law rule in contract cases. The Court's decision in Bushkin recognizes this development in conflicts contract law and properly endorses it.


51 393 Mass. at 636, 473 N.E.2d at 671.
52 Id. In answer to a second question certified by the federal court of appeals, the Court stated that Raytheon was entitled to the exemption of G.L. c. 93A, § 3(1)(b)(i) because the alleged deceptive acts and practices forming the basis of Bushkin's chapter 93A claim did not occur primarily in Massachusetts. Id. at 637–39, 473 N.E.2d at 671–72.
53 Id. at 631, 473 N.E.2d at 668.
54 Id. at 630–31, 473 N.E.2d at 668.
55 Id. at 631–32, 473 N.E.2d at 668–69.
57 393 Mass. at 632–33, 473 N.E.2d at 669.
58 See LEFLAR, supra note 1, at §§ 103, 148.
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Ltd., the Supreme Judicial Court of Massachusetts once again indicated its preference for the Restatement (Second) of Conflict of Laws approach.1 In Travenol, the Court used the apposite sections of the Restatement (Second) to interpret the “appropriated relation” criterion of Massachusetts General Laws chapter 106, section 1-105(1), the choice-of-law provision of the Uniform Commercial Code.2

In 1974, the defendant Zotal, Ltd. ("Zotal") was appointed the exclusive distributor in Israel of certain medical products of a company which was later acquired by and became a division of the plaintiff Travenol Laboratories, Inc. ("Travenol").3 In November, 1979, Travenol informed Zotal that it was terminating the distributorship arrangement, and that it was appointing an affiliate, Travenol Laboratories (Israel) Ltd. ("Travenol Israel"), as its new Israeli distributor.4 In February, 1980, Travenol Israel, acting on behalf of Travenol, demanded that Zotal pay $42,449, the balance due on its account.5 Zotal answered by sending a letter, subsequently characterized as a notice of set-off, in which it stated that it had incurred $63,100 in damages because of the termination of its distributorship, and that it had the right to set off these damages against the amount owing for goods sold and delivered.6 In August, 1980, Zotal brought suit in Tel Aviv against Travenol Israel for damages for termination of its distributorship.7

In the case at issue, Travenol brought suit to recover $40,873.15 for goods sold and delivered to Zotal.8 Travenol moved for summary judgment, and Zotal moved to stay all proceedings pending entry of judgment in the suit which it had brought in Israel.9 A judge of the Middlesex superior court denied the motion for a stay and granted Travenol's motion for summary judgment.10 Zotal appealed and the case was transferred to

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§ 7.2 1 394 Mass. 95, 474 N.E.2d 1070 (1985).
2 G.L. c. 106, § 1-105(1) provides:
Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this state.
3 394 Mass. at 96, 474 N.E.2d at 1071.
4 Id.
5 Id. Later, a credit given to Zotal reduced the amount owed to $40,873.15. Id. at 96 n.3, 474 N.E.2d at 1072 n.3.
6 Id. at 96, 474 N.E.2d at 1072.
7 Id. Travenol was added as a defendant in April, 1981. Id. at 96 n.2, 474 N.E.2d at 1072 n.2.
8 Id. at 95, 474 N.E.2d at 1071.
9 Id.
10 Id. at 95–96, 474 N.E.2d at 1071.
the Supreme Judicial Court. Applying Massachusetts law rather than Israeli law, the Court concluded that the superior court had been correct in denying Zotal’s motion for a stay and in granting Travenol’s motion for summary judgment.

Turning to the issue of the grant of the plaintiff Travenol’s motion for summary judgment, the Supreme Judicial Court noted that the crucial question was whether Massachusetts or Israeli law governed the defendant Zotal’s notice of set-off. The Court noted that if Massachusetts law applied to this controversy, it was not disputed that Zotal’s notice of set-off would not constitute payment for goods sold and delivered, and thus Travenol would be entitled to summary judgment. The Massachusetts Uniform Commercial Code permits the buyer to deduct damages resulting from a breach of contract only if the damages stem from a breach of the same contract under which the seller is attempting to recover his price. Moreover, under Massachusetts law it is well established that the buyer’s obligation to pay for goods accepted does not arise under the “same contract” as the alleged breach of an exclusive distributorship agreement by the seller. Zotal, however, contending that Israeli law applied to the controversy, argued that Israeli law would allow the buyer to set off damages arising from the breach of a distributorship arrangement against the price owing for goods sold and delivered.

The Supreme Judicial Court concluded that the relevant conflict of laws rules required the application of Massachusetts law. The Court noted that under chapter 106, section 1-105(1), the choice-of-law provision of the Uniform Commercial Code, Massachusetts law applies to “transactions bearing an appropriate relation to this state.” The Court

11 Id. at 96, 474 N.E.2d at 1071.
12 Id. at 96, 474 N.E.2d at 1072. Because Zotal did not brief the issue of the denial of its motion for a stay of the proceedings in Massachusetts, the Court concluded that it was not required to address the issue. Id. at 97, 474 N.E.2d at 1072. The Court noted, however, that a motion to stay proceedings ordinarily was a matter addressed to the sound discretion of the trial judge. Id. Since Zotal already had admitted liability for the goods sold and delivered by Travenol, the Court ruled that there was no abuse of discretion by the superior court. Id.
13 Id.
14 Id.
16 529 F. Supp. at 1387.
17 394 Mass. at 98, 474 N.E.2d at 1073.
18 Id.
19 Id.
20 G.L. c. 106, § 1-105(1).
21 394 Mass. at 98, 474 N.E.2d at 1073.
illegitimate children must be treated equally. Two 1968 decisions ruled that when considering the right of a mother to recover in a wrongful death action for the death of her child,\(^4\) and the right of a child to recover for the death of his or her mother,\(^5\) distinctions based on the difference between illegitimate and legitimate children will fall under an equal protection attack. These United States Supreme Court decisions have been instrumental in removing the traditional prejudice, both social and legal, against those born out of wedlock.

Conflict of laws rules pertaining to legitimation reflect the attitude favoring equality of treatment for illegitimate children. During the Survey year, the Supreme Judicial Court, in *Powers v. Steele*,\(^6\) considered the question whether a child born out of wedlock was “issue” of the donor of a trust. In holding that the child was “issue” for purposes of the trust,\(^7\) the Court evidenced the humane and progressive policy of Massachusetts toward illegitimate children.

*Powers* was submitted to the Supreme Judicial Court on an agreed-upon statement of facts.\(^8\) In April, 1957, the donor established an inter vivos trust providing for payment of income to the donor for life, then to his wife for life, and then to his two sons for their lives.\(^9\) The trust was to terminate upon the death of the survivor of the donor, his wife and his children.\(^10\) On termination, the trustees were to divide the trust “as it shall then exist into equal shares, . . . one share for each deceased child of the Donor having then living issue, and the Trustees shall transfer, pay over and convey one such share by right of representation to the then living issue of each deceased child.”\(^11\) The indenture of trust further authorized the trustees “to pay to or for the benefit of the issue of the Donor such amounts of principal as the Trustees may deem necessary for comfort, maintenance, support and education.”\(^12\) The trust was “governed by and [was] to be construed and administered according to the laws of the Commonwealth of Massachusetts.”\(^13\)

\(^7\) *Id.* at 310, 475 N.E.2d at 398.
\(^8\) *Id.* at 307, 475 N.E.2d at 395.
\(^9\) *Id.* at 307, 475 N.E.2d at 395–96.
\(^10\) *Id.* at 307, 475 N.E.2d at 396.
\(^11\) *Id.*
\(^12\) *Id.*
\(^13\) *Id.* The trust instrument also provided that if there were no issue of the donor living at the termination of the trust, the trustees were to convey the trust estate “to those persons who would be the heirs at law of the Donor determined as though he had deceased intestate and unmarried immediately after the termination of the trust, a resident of the Commonwealth of Massachusetts, said persons to take the same in the proportions to which they
The donor died on June 1, 1961, survived by his wife, since deceased, two sons, and no other issue.\textsuperscript{14} A daughter was born out of wedlock to one of the sons on February 26, 1977, in New Hampshire.\textsuperscript{15} The donor’s son had the child’s birth certificate amended to include his name as the child’s father.\textsuperscript{16} On January 30, 1984, a judge of the superior court in New Hampshire declared the child “legitimate” under the applicable New Hampshire statute.\textsuperscript{17}

The plaintiff Powers, a trustee, brought suit in the Probate Court for Suffolk County on February 14, 1984,\textsuperscript{18} seeking a declaration that the legitimated child was the “issue” of the donor and his son for purposes of the trust and, therefore, was entitled to succeed to the son’s interest in the trust.\textsuperscript{19} A guardian ad litem appointed for the minor issue of the donor’s nieces and nephew, the defendant, opposed the relief sought by the trustee, Powers.\textsuperscript{20} The probate judge granted the parties’ joint motion to report the complaint without decision to the Appeals Court for determination.\textsuperscript{21} The Supreme Judicial Court allowed the parties joint application for direct appellate review.\textsuperscript{22}

The Supreme Judicial Court first considered the appropriateness of the declaratory relief requested by the plaintiff, Powers, under chapter 231A.\textsuperscript{23} Powers asserted that such relief was necessary in order to determine the legitimated child’s status as a prospective beneficiary of the trust and the estate planning problems of her father, which depended upon her beneficiary status.\textsuperscript{24} The Court held that declaratory relief was appropriate, quoting its authoritative decision in \textit{Billings v. Fowler}.\textsuperscript{25} The Court stated: “[E]state planning interest is sufficient to permit declaratory relief, particularly in view of c. 231A, § 9, requiring that the chapter be ‘liberally construed,’ so as ‘to remove, and to afford relief from, uncertainty . . . with respect to rights.’”\textsuperscript{26}

would be entitled under the laws of said Commonwealth now in force.” \textit{Id.} at 307 n.2, 475 N.E.2d at 396 n.2.
\textsuperscript{14} \textit{Id.} at 307, 475 N.E.2d at 396.
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.} at 308, 475 N.E.2d at 396.
\textsuperscript{19} \textit{Id.} at 306–07, 475 N.E.2d at 395.
\textsuperscript{20} \textit{Id.} at 308 n.4, 475 N.E.2d at 396 n.4. The donor’s nieces and nephew are “the presumptive remaindermen of the trust upon the decease of the Donor’s last surviving son,” if the legitimated child is determined not to be the issue of the donor. \textit{Id.}
\textsuperscript{21} \textit{Id.} at 308, 475 N.E.2d at 396.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 308, 475 N.E.2d at 396–97.
\textsuperscript{26} \textit{Id.} (quoting \textit{Billings v. Fowler}, 361 Mass. 230, 234, 279 N.E.2d 906, 909 (1972)).
The Court then proceeded to determine the merits of the plaintiff’s claim.27 The plaintiff’s principal argument was that because the child was deemed legitimate under the law of her domicile, she must be considered the donor’s legitimate issue for purposes of the trust under the law of Massachusetts.28 The plaintiff acknowledged the traditional presumption that the term “issue” as used in a will or trust includes only legitimate children,29 but pointed out that Massachusetts had long followed the rule that the status of a person as to legitimacy was defined by the law of his or her domicile, and that Massachusetts would recognize such status unless it was contrary to public policy.30

The Supreme Judicial Court noted that the child was born in New Hampshire and was domiciled there with her mother and father.31 Her father had complied with the procedure established by New Hampshire law to legitimate a child.32 The Court concluded, therefore, that the child was legitimate under Massachusetts law.33

The defendant argued that the indenture of trust stated that the construction of the trust was to be determined by the laws of Massachusetts.34 The defendant contended that the child could not be deemed legitimate because her parents had not married as required under Massachusetts law.35 The Supreme Judicial Court held that the defendant’s interpretation of Massachusetts law as to legitimacy, however, was erroneous.36 The Court stated that the Massachusetts conflict of laws rule determined the status of legitimacy of a person by the law of his domicile, the lex domicilii.37 The Court affirmed its adherence to the lex domicilii rule.38

Finally, the defendant argued that deference to New Hampshire law in the circumstances found in Powers contravened Massachusetts policy.39 The Supreme Judicial Court disagreed.40 The Court characterized Mas-

27 Id. at 308, 475 N.E.2d at 397.
28 Id. at 308–09, 475 N.E.2d at 397.
31 394 Mass. at 309, 475 N.E.2d at 397.
32 Id.
33 Id.
34 Id. at 309–10, 475 N.E.2d at 397.
35 Id. at 310, 475 N.E.2d at 397. See G.L. c. 190, § 7.
36 394 Mass. at 310, 475 N.E.2d at 397.
38 394 Mass. at 310, 475 Mass. at 397.
39 Id.
40 Id.
Massachusetts policy as "progressive" in its concern for removing "the obstacles to the legitimation of innocent children, who have no responsibility for the circumstances of their birth, and thus ameliorating some of the apparent harshness of the common law . . . ." Consequently, the Court concluded that the child was the legitimate issue of the donor's son and remanded the case to the probate court for entry of judgment declaring that the child was the issue of the donor and his son as that term was used in the trust.

Conflict of laws doctrine with respect to legitimacy is concerned with two issues: (1) the law governing legitimacy, and (2) the incidents of legitimacy created by foreign law. The first issue deals with the status of a child. The second issue focuses on the effects recognized in one state after a legitimation subsequent to the birth of a child under the laws of another state. Questions involving legitimacy as a status—that is as a relationship entirely apart from its incidents—do not arise frequently in conflicts cases. Most legitimacy conflicts cases are concerned with the incidents or effects of legitimacy. In practice, however, courts will not decide matters involving the incidents of legitimacy until they have determined whether or not legitimacy did exist. The Supreme Judicial Court followed this practice in Powers.

The concept of legitimacy involves family relations and responsibilities. Thus, the domicile of the child and his or her parents has the most significant interest in the solution of these problems. Where the parent and the child have been domiciled in a state from the time of the child's birth, as in Powers, legitimation of the child following the law of that state will be recognized everywhere. Therefore, the Supreme Judicial Court was correct in Powers when it held that the child was legitimate as determined by the law of New Hampshire, her domicile.

Among the incidents that may depend upon a person's legitimacy are the right to his or her father's name and support and the right to share in the latter's estate. As Powers reveals, whether a person is legitimate may also have a decisive bearing upon the questions of construction, such as whether he or she is included within such terms as "children" or

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41 Id. at 310, 475 N.E.2d at 397–98; See Green, 228 Mass. at 605, 118 N.E. at 237.
42 394 Mass. at 310, 475 N.E.2d at 398.
43 Id.
45 See W. REESE & M. ROSENBERG, supra note 1, at 863.
46 Id.
47 Id.
48 Id.
49 See RESTATEMENT (SECOND), supra note 44, at § 287 & comment f.
50 Id. at § 288 comment a.
"issue" contained in a will or trust.\textsuperscript{51} It is established conflicts doctrine that a state will give the same incidents or effects to the status of legitimacy created by a foreign law that it gives to the status created under its own law.\textsuperscript{52} Thus the Supreme Judicial Court, in \textit{Powers}, ruled that the child, as legitimate "issue", was entitled to succeed to her father's interest in the trust. The Court's decision reflects the progressive and humane conflict of laws rules now being applied in cases concerned with the legitimation of children born out of wedlock.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.} at § 288 and comment b.