

First Supplement to Memorandum 84-34

Subject: Study L-640 - Trusts (Comments on Presumption of Revocability as to Foreign Trusts)

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar has submitted comments on Memorandum 84-34 which discusses conflict of laws problems arising out of the California rule that trusts are revocable unless they provide otherwise.

The State Bar Committee suggests that the heading of draft Section 4201 (see Memorandum 84-34) be changed from "presumption of revocability" to "revocability of trusts". (See Memorandum 84-58, Exhibit 6, p. 7.) The staff agrees with this suggestion.

The State Bar Committee argues that the term "resident", as used in draft Section 4201(b), is unclear:

[T]he term "resident" should be defined. For example, a California domiciliary may have a summer "residence" in another state, and enter into a trust agreement in California. Will the question of revocability be determined by the law of California? Would the answer to that question depend upon whether the trust agreement were signed in California or in the other state? Would it depend on whether the trust agreement were signed during the summer (while resident in another state) or during the winter? Those questions can be eliminated by substituting the word "domiciliary" for "resident" in § 4201(a).

(See Memorandum 84-58, Exhibit 6, p. 6.) The same questions might have been asked of Probate Code Section 301 (jurisdiction for admitting will to probate) since that section also uses "resident" instead of "domiciliary". The courts have decided that residence in this context is synonymous with domicile. See, e.g., Estate of Glassford, 114 Cal. App.2d 181, 186, 249 P.2d 908 (1952). The meaning of "resident" in draft Section 4201(b) should have the same meaning as in Probate Code Section 301. The staff recommends that the comment to draft Section 4201 make this clear by citing Estate of Glassford for the proposition that these terms are synonymous.

The State Bar Committee recommends that both subdivisions (a) and (b) of draft Section 4201 be made subject to the contrary intention of the trustor as determined from the trust instrument. (See Memorandum 84-58, Exhibit 6, p. 7.) The staff raised the issue in the memorandum whether subdivision (a) of draft Section 4201 should be revised to

permit irrevocable oral trusts where the trustor has expressed that intent. The State Bar Committee believes that "oral express trusts should never be irrevocable," although no reasons are given. The staff would abolish oral express trusts as discussed in Memorandum 84-25, but if the Commission decides to retain them, we see no reason why a trustor should not be able to make an effective irrevocable disposition in trust.

Draft Section 4201(b) refers to the intention of the trustor; this is not limited to trustor's intention as expressed in the trust instrument. The State Bar Committee would limit the determination of intention to the provisions of the trust. (See Memorandum 84-58, Exhibit 6, p. 7.) The staff is not sure whether this is intended to eliminate oral declarations. Does the State Bar Committee intend "provisions of the trust" to have the same meaning as "instrument creating the trust"? The staff would not limit the scope of subdivision (b) in the manner suggested by the State Bar Committee. This provision was drafted in light of the traditional rules for determining the applicable law, which may depend upon factors such as where the property is located and where the trust is to be administered. The intention of the trustor as to the law governing construction of the trust may be inferred from circumstances. If draft Section 4201(b) were limited to expressions of intent in the trust instrument, the determination of the trustor's intent would be unduly restricted.

The State Bar Committee also suggests that the rule of draft Section 4201(b) might be the desired rule for all aspects of the trust, not just revocability. (See Memorandum 84-58, Exhibit 6, p. 7.) The memorandum (84-34) discusses the reasons for the special treatment of revocability. In sum, a special rule is needed in this situation so that the determination of revocability will not depend on a "significant contacts" test. As the memorandum notes, the staff assumes in general that "nonresidents who do not indicate an intention to adopt California law or to make the trust revocable would not want the trust to be revocable."

Respectfully submitted

Stan G. Ulrich
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