#L-640 01/30/84

Memorandum 84-18

Subject: Study L-640 - Trusts (Presumption of Revocability)

Civil Code Section 2280 provides in relevant part as follows: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." If the trust is silent as to the manner of revocation, Section 2280 permits revocation by a writing filed with the trustee, but where the trust provides a manner of revocation, the prescribed procedure must be followed. Rosenauer v. Title Ins. & Trust Co., 30 Cal. App.3d 300, 304, 106 Cal. Rptr. 321 (1973); but cf. Fernald v. Lawsten, 26 Cal. App.2d 552, 560-61, 79 P.2d 742 (1938) (statutory method of revocation is available notwithstanding other method specified in trust instrument, unless trust is irrevocable) (criticized in Hibernia Bank, infra).

The statutory presumption of revocability, enacted in 1931, is contrary to the common law rule. The Restatement (Second) of Trusts provides in Section 330(1): "The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power." It appears that only California, Oklahoma, and Texas provide the contrary rule that presumes transfers by inter vivos trust to be revocable. See G. Bogert, Handbook of the Law of Trusts § 148, at 534 (5th ed. 1973). Until Section 2280 was amended in 1931, California was in line with the general rule. It has been reported that the change was made (1) because "many trustors were not aware that they were creating inter vivos trusts" and (2) because "in many cases the income from the trusts became inadequate to support the trustors, who found themselves precluded from reaching the trust corpus", which was an acute problem in 1929 and 1930. Comment, 28 Calif. L. Rev. 202, 208 (1940). The first reason given is not convincing and we cannot discern any reason, other than inertia, for continuing the presumption that trustors do not really intend to make an effective disposition of property when executing an inter vivos trust. The second problem--that of dealing with trusts having too low a principal--should be dealt with directly, not by a presumption of revocability.

Outright gifts generally cannot be revoked. See Civil Code § 1148. The creation of a power of appointment, a close relative of a trust, is irrevocable unless the power to revoke is reserved in the instrument creating the power of appointment (or exists because the power of appointment is created in connection with a trust revocable under Civil Code Section 2280). See Civil Code § 1392.1. Exercise of a power of appointment is not revocable after assets have been effectively transferred (unless the power to revoke exists under Section 2280). Transfers to minors by way of a custodian under the Uniform Gift to Minors Act or the new Uniform Transfers to Minors Act are irrevocable. See Civil Code § 1157; Uniform Transfers to Minors Act § 11(b) (1983).

What is the purpose of presuming inter vivos trusts to be revocable? Practice commentaries recommend against relying on Section 2280. See Cohan, Drafting California Revocable Inter Vivos Trusts § 5.2, at 135 (Cal. Cont. Ed. Bar 1972). One source suggests that a "complicated revocation procedure may be useful when the settlor is concerned about future senility or future undue influence while in a weakened condition." J. Cohan & J. Kasner, Supplement to Drafting California Revocable Inter Vivos Trusts § 5.2, at 73 (Cal. Cont. Ed. Bar 1982); see also Hibernia Bank v. Wells Fargo Bank, 66 Cal. App.3d 399, 136 Cal. Rptr. 60 (1977) (attempted revocation by trustor in convalescent hospital held ineffective for failure to comply with revocation procedure provided in trust instrument). No one seems to recommend reliance on the statutory presumption of revocability.

A person unfamiliar with the exceptional rule applicable in California may find that a trust has not accomplished the intended tax savings since a trust silent on revocability will be considered revocable by the tax authorities. As one treatise puts it, the "draftsman's inadvertent silence on this subject can lead to disaster." Cohan, Planning the Irrevocable Trust, in Drafting California Irrevocable Inter Vivos Trusts § 7.7, at 8 (Cal. Cont. Ed. Bar 1973).

There may also be problems in a multi-state context even though the drafter knows of the presumption of revocability and intended by silence to make the trust revocable. This problem occurs if the trust is found to be governed by the law of another state (anywhere other than Oklahoma or Texas) where the presumption is that a trust is irrevocable. See

Hemmerling, Multi-State Trusts: Tax and Conflict Problems, in Drafting California Irrevocable Inter Vivos Trusts § 14.6, at 307, § 14.24, at 317 (Cal. Cont. Ed. Bar 1973); Hughes v. Commissioner, 104 F.2d 144, 147 (9th Cir. 1939) (California trustor subject to gift taxes for transfer of securities to Massachusetts trustee, even though trust executed in California, since place of administration was in Massachusetts whose law was held to govern). One can imagine similar problems where a trustor in any of the 47 states following the common law rule finds the trust governed by the exceptional rule of California Civil Code Section 2280. Problems may also arise where the trustor declares bankruptcy and the trust is found to be revocable because it is governed by California law. In this case the trustee in bankruptcy will have the power to revoke the trust.

Trustors may even encounter some problem in achieving an irrevocable trust where the magic words are not used. See, e.g., Estate of Alvin Hill, 64 T.C. 867 (1975) (words like "absolute" or "forever" not sufficient to make Texas trust irrevocable).

The staff recommends that California law be returned to the overwhelming majority rule that presumes irrevocability. This rule should not apply to inter vivos trusts executed before the operative date that are silent on revocability, unless the trust is amended after the operative date.

The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section is on record as supporting retention of the existing rule presuming revocability. Letter from Charles A. Collier, Jr. to Stan Ulrich (April 26, 1983). The Committee felt "this was a much better and safer rule." The Committee said that there are "relatively few irrevocable trusts drafted" and that "most trusts are used for estate planning and are revocable in nature." The staff assumes that the members of the Committee are careful to draft trusts that provide for revocation and the manner of revocation, and do not rely on Section 2280. It is difficult to see how the change in the rule would affect their clients' situations or others similarly situated. The Committee did not address the objections raised against the minority rule reflected in California law.

Other aspects of trust revocation will be considered when we receive Professor Gail Bird's study on modification and termination. Presumably there will be an opportunity at that time to mitigate any harshness inherent in a presumption of irrevocability as applied to a self-settled trust where no property is actually transferred.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel