#L-640 6/1/84

Memorandum 84-34

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

At the last meeting, the Commission decided to retain the California rule that a trust is presumed to be revocable unless it expresses a different intention. (See Memorandum 84-18 considered at the April meeting.) The Commission recognized, however, that this might result in some problems where a trust created in another state relies on the rule applicable in 47 states that a trust is presumed irrevocable unless it provides for revocability. Accordingly, the Commission directed the staff to prepare a draft provision to deal with this problem. The staff suggests the following:

§ 4201. Presumption of revocability

4201. (a) Unless expressly made irrevocable by the instrument creating the trust, a trust is revocable by the trustor.

(b) If a trust was created when the trustor was a resident of another state and the intention of the trustor can not be determined, the revocability of the trust is governed by the law of the other state and not by subdivision (a).

Comment. Subdivision (a) of Section 4201 continues the substance of part of the first sentence of former Civil Code Section 2280. For the procedure for revoking a trust, see Section _____.

Subdivision (b) is a new provision that is intended to avoid the application of the presumption of revocability to a trust created by a nonresident trustor. Subdivision (b) recognizes that a nonresident trustor may not be aware of the rule on revocability in force in California, since most jurisdictions presume trusts to be irrevocable unless the right to revoke is reserved. See 5 A. Scott, The Law of Trusts § 581, at 3857 (3d ed. 1967). If the trustor manifests an intention to make California law applicable, however, subdivision (b) does not make inapplicable the presumption of revocability provided in subdivision (a).

This draft statute should be read in the context of general rules governing conflict of laws. As summarized by Professor Scott these rules are as follows:

> [1] If the settlor designated the law of a particular state to govern the validity and effect of the trust, the law of that state is applicable to determine whether the trust is revocable. . . .
>
> [2] Where the settlor has not designated the applicable law and the trust is to be administered in the state in which the settlor resides, the law of that state is applicable as to the revocation or amendment of the trust. . . .

> [3] Where a settlor domiciled in one state creates a trust of movables and fixes the administration of the trust in another state, it has been held that the law of the latter state is applicable on the question of the settlor's power to revoke the trust. . . .
>
> [4] On the other hand, if no place of administration is fixed by the settlor, the revocability of the trust will be determined by those contacts which for this purpose are most significant. . . .

5 A. Scott, The Law of Trusts § 581, at 3857-59 (3d ed. 1967) (footnotes omitted); see also Restatement (Second) of Conflict of Laws § 268 & comment g (1969) (as to movables, in absence of trustor's intent, instrument construed under law of state trustor "would probably have desired to be applicable"); id. § 277 & comment c (as to land, in absence of trustor's intent, instrument usually construed under rules applied by courts of situs).

The problem under consideration arises under the third and fourth rules set out above. Under the third statement the place of administration is generally critical as to movable property; by implication from this principle and under Section 277 of the Restatement, it appears that the law of the situs of land governs. In the case of land, the question is complicated by the fact that the law of the situs may apply the rules of construction of another jurisdiction such as where the trustor is domiciled. If a trust is created in another state involving land in California, the question may arise as to whether the trust is revocable under the California presumption. The draft statute would make clear in this case that the law of the jurisdiction where the trustor is domiciled when the trust is created governs revocability.

The second area where there is a need to tamper with general rules is where a "significant contacts" test would be applied, as under the fourth statement set out above or under Section 268 of the Restatement. Under the draft statute the revocability rule of the state of domicile at the time of creation of the trust would apply notwithstanding a different result that might obtain under the significant contacts test. This is based on the assumption 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.

In other situations the staff has considered, it appears that the general conflict of laws rules would avoid application of the California presumption of revocability as against nonresidents. The draft statute would not change the result in Hughes v. Commissioner, 104 F.2d 144 (9th

Cir. 1939), however. In this case a California trustor transferred securities to a Massachusetts trust company and made no provision for revocation in the trust instrument. In a proceeding involving the trustor's gift tax liability the court held that the Massachusetts presumption of irrevocability governed so that the trustor was subject to the gift tax. The draft statute only applies to cases where California can avoid application of its deviant rule to trusts of nonresidents.

The draft statute leaves open two questions. If the Commission decides to continue the availability of oral express trusts (see Memorandum 84-25), the literal language of draft Section 4201(a), which is the same as Civil Code Section 2280, seems to preclude oral irrevocable trust since there is no "instrument." If the Commission wishes to retain oral express trusts, then perhaps this language should be revised to permit irrevocable oral trusts where the trustor has expressed that intent.

The other problem that argues for a revision of the language from Civil Code Section 2280 is that the meaning of "expressly made irrevocable by the instrument" may be in doubt. Although we are not aware of any reported California cases where this language presented a problem, Texas law has been interpreted to find words like "absolute" and "forever" insufficient to make the trust irrevocable. Estate of Alvin Hill, 64 T.C. 867 (1975). The staff suggests that the Commission consider revising the language of existing law so that revocability depends on the trustor's intent rather than the contents of the trust instrument.

Respectfully submitted,

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