

#81

8/27/75

Memorandum 75-65

Subject: Study 81 - Transfer of Out-of-State Trusts to California

Attached are two copies of a revised staff draft of a tentative recommendation on the transfer of out-of-state trusts to California. In view of the limited response we have received to the other tentative recommendations we distributed for comment, the staff suggests that we approve this for printing and submission to the 1976 session of the Legislature without sending it out for comment. After a bill is introduced, we may receive some comments and can make any necessary amendments to the bill.

Accordingly, please mark your suggested editorial revisions on one copy to turn in to the staff at the October meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

ARTICLE 3. TRANSFER TO ANOTHER JURISDICTION [NEW]

Sec.

- 1189. Application of article.
- 1189.1 Transfer of place of administration or assets.
- 1189.2 Petition for transfer; contents.
- 1189.3 Notice and hearing; notice to persons named in petition and attorney general; opposition.
- 1189.4 Order; requirements.
- 1189.5 Manner of transfer; conditions; discharge of trustee.
- 1189.6 Other trusts; proceedings.
- 1189.7 Beneficiary defined.

§ 1189. Application of article

(a) This article applies to (1) a trust over which jurisdiction continues after distribution, as provided by Section 1120; (2) a trust subject to Chapter 10 (commencing with Section 175) of Division 1; (3) a trust subject to Article 2.5 (commencing with Section 1138) of this chapter; and (4) any other trust to which the provisions of this article are made applicable by statute or trust instrument.

(b) This chapter shall not be construed to prevent the transfer of the place of administration of a trust or of trust assets to another jurisdiction in any case where judicial approval of a transfer was not required under law in effect immediately prior to the effective date of this article.

(c) This article shall not apply to any proceeding or action pending on the effective date of this article.

(Added by Stats.1971, c. 958, p. 1869, § 9.)

§ 1189.1 Transfer of place of administration or assets

An order may be made by the superior court for the transfer of the place of administration of a trust or the transfer of some or all of the assets of a trust to another jurisdiction outside of California: (a) where, under Section 1120 of this code, jurisdiction is retained over any trust created by the will of a nonresident decedent, which will has been probated in the state of his residence and a duly appointed, qualified and acting domiciliary trustee has entered upon and is engaged in the administration of the same trust with respect to the assets situated in that state; or (b) where the trustee or beneficiary of a trust to which this article applies desires to transfer the place of administration of a trust to another jurisdiction outside of California, unless the trust instrument precludes the transfer of the place of administration to another jurisdiction outside of California.

(Added by Stats.1971, c. 958, p. 1869, § 9.)

§ 1189.2 Petition for transfer; contents

A petition for an order authorizing a transfer may be filed by the trustee or by a beneficiary of a trust. The petition shall be verified and shall set forth:

- (1) The names, ages and places of residence of the trustee administering the trust in this state, the trustee, including any domiciliary trustee, in the

other jurisdiction to whom administration of the trust or such trust assets will be transferred, and all persons who are interested in the trust as beneficiaries, so far as known to petitioner.

(2) Whether the trustee in the other jurisdiction has agreed to accept the trust. If he has, the acceptance or a true copy shall be attached as an exhibit to the petition, or otherwise filed with the court.

(3) A statement of the character, condition, location and value of the property comprising the assets sought to be transferred.

(4) A general statement of the qualifications of the trustee who will administer the trust in the other jurisdiction; the amount of his bond, if any; the nature and value of the assets of any trust of the decedent or trustor under his administration in the other jurisdiction; and the name of the court, if any, having jurisdiction of such trustee or of his accounts or in which a proceeding may be had, with respect to administration of the trust or the trustee's accounts.

(5) Whether there is any pending civil action in this state against the trustee.

(6) A statement of the reasons for the transfer.
(Added by Stats.1971, c. 958, p. 1869, § 9.)

§ 1139.3 Notice and hearing; notice to persons named in petition and attorney general; opposition

Upon the filing of such petition the clerk shall set the same for hearing and shall give notice of such hearing as provided in Section 1200 of this code at least 30 days before the time set for the hearing of the petition. Petitioner, at least 30 days prior to the time so set for hearing, shall cause to be mailed to each of the persons named in the petition, at their respective places of residence therein stated, a copy of such notice. If the trust involves or may involve a charitable trust, bequest or devise of the character specified in Section 328, a copy of the notice shall be mailed to or served upon the attorney general at least 20 days before the hearing. Any person interested in the trust, either as trustee, beneficiary or otherwise, may appear and file written grounds in opposition thereto.
(Added by Stats.1971, c. 958, p. 1870, § 9.)

§ 1139.4 Order; requirements

The court may, in its discretion, grant the petition and order the trustee to transfer the trust assets or to change the place of administration to the other jurisdiction, if, after hearing, it appears to the court:

(1) That the transfer of the trust assets to a trustee in another jurisdiction, or that the transfer of the place of administration of the trust to another jurisdiction, would facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein.

(2) That the substantial rights of residents of this state will not be materially affected thereby.

(3) That transfer will not violate the terms of the trust.

§ 1139.4

PROBATE CODE

(4) That any new trustee, to whom the trust assets are to be transferred, is qualified and able to administer the trust or such assets upon the same trusts.

(Added by Stats.1971, c. 958, p. 1870, § 9.)

§ 1139.5 Manner of transfer; conditions; discharge of trustee

If a transfer is ordered, the court may direct the manner of transfer and impose such terms and conditions as may be just, including but not by limitation, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order.

(Added by Stats.1971, c. 958, p. 1870, § 9.)

§ 1139.6 Other trusts; proceedings

In the case of trusts not subject to Chapter 10 (commencing with Section 175) of Division 1, or Article 1 (commencing with Section 1120) or Article 2.5 (commencing with Section 1138) of this chapter, a proceeding pursuant to this article shall be commenced in the superior court of the county in which is located the principal place of administration of the trust, as defined in Section 1138.3, unless the statute providing for the proceeding otherwise provides.

(Added by Stats.1971, c. 958, p. 1871, § 9.)

§ 1139.7 Beneficiary defined

For the purposes of this article, beneficiary means all persons in being who shall or may participate in the corpus or income of the trust.

(Added by Stats.1971, c. 958, p. 1871, § 9.)

Staff Draft

RECOMMENDATION

relating to

TRANSFER OF OUT-OF STATE TRUSTS TO CALIFORNIA

The increasing mobility of individuals and the expansion of investment of assets of trusts in different jurisdictions has created some problems with regard to the proper and most convenient place for administration of trusts involving present California residents or property now located in California.

In recognition of the need to change the place of administration in appropriate cases, a number of states have enacted legislation authorizing transfer of a locally administered trust to another state.¹ For example, California, which previously had permitted such transfer only in very limited situations,² in 1971 enacted Probate Code Sections 1139-1139.7³ to give superior courts discretion to order the transfer of trusts or assets of trusts from California to another jurisdiction upon a finding⁴ that: (1) the transfer will facilitate the economical and

1. See, e.g., Ky. Rev. Stat. § 386.170; Mass. Gen. Laws, Ch. 206, § 29 (1955); Mich. Stat. Ann. §§ 27.3178(364), 27.3178(365) (1962); N.C. Gen. Stat. §§ 36-6 through 36-8 (1966); Va. Code Ann. § 26-64 (1969); Wis. Stat. Ann. § 701.23 (1974).

2. Prob. Code §§ 1132-1136 (Cal. Stats. 1953, Ch. 350)(repealed). This procedure permitted transfer to another jurisdiction of trusts created by a nonresident decedent which consisted of assets of less than \$7,500 under the jurisdiction of the California court.

3. Cal. Stats. 1971, Ch. 958, § 9.

4. Prob. Code § 1139.4.

convenient administration of the trust and promote the best interests of the trust and those interested therein, (2) the substantial rights of residents of this state will not be materially affected thereby, (3) the transfer will not violate the terms of the trust, and (4) any new trustee, to whom the trust assets will be transferred, is qualified and able to administer the trust. The legislation in other states usually allows transfer when the beneficiaries reside in the state to which transfer is to be made. Typically, the statutes require that, prior to the transfer, the court in the jurisdiction to which transfer is to be made appoint a qualified trustee with the requisite bond to administer the trust in the transferee state.⁵

The problem in California is the lack of concomitant legislation providing a specific procedure for the acceptance of a transfer to this state of a trust which has been administered in another jurisdiction. Although there have been some cases in which California probate courts have actually accepted such a transfer, it is not clear what procedures should be used to effectuate such transfers or which court in California is the proper court to approve the transfer.⁶ Since California residents are often beneficiaries of trusts originally established and administered elsewhere, it would be appropriate and beneficial for California to adopt a specific procedure to provide for acceptance of transfer of an out-of-state trust when it is in the best interest of the parties.⁷

5. See statutes cited in note 1 supra. See generally 5 A. Scott, The Law of Trusts § 613 (3d ed. 1967).

6. 3 N. Condee, California Practice, Probate Court Practice § 1850 (2d ed. 1964).

7. See Condee, op. cit., supra note 2; Restatement of Conflict of Law § 271, Comment g.

Accordingly, the Commission recommends the adoption of legislation to provide a specific procedure to facilitate transfer of trusts administered in other jurisdictions to California. The following are the significant features of the recommended legislation.

(1) A trustee or beneficiary of a trust administered in a jurisdiction outside of California may petition the superior court in California⁸ for an order accepting transfer of place of administration of the trust or trust assets to California and appointing a trustee⁹ to administer the trust in California.

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8. Venue should be determined under Section 1138.3 of the Probate Code ("principal place of administration of the trust") unless the petition requests that only a nonresident of this state be appointed trustee, in which case venue is proper in the county where either any beneficiary of the trust resides or where a substantial portion of the trust assets to be transferred are located or will be located.
 9. In most cases where trust administration is transferred from another jurisdiction to California, the trustee or a newly appointed trustee will be a resident of California. One important reason for a transfer is to relieve the trustee in the original jurisdiction from the onerous obligations of administering a trust when the assets or the beneficiaries are located in another state. Except for the restriction on foreign corporations other than national banks serving as trustees in California (Fin. Code § 1503), there is no requirement that a trustee be a California resident. See 7 B. Witkin, Summary of California Law, Trusts § 30 (8th ed. 1974); Restatement (Second) of Trusts § 94 (19); see also J. Cohan, Drafting California Irrevocable Inter Vivos Trusts § 14.31 (Cal. Cont. Ed. Bar 1973). If a trustee appointed in another state is qualified, willing, and able to administer the trust in California, the court should have discretion to permit the trustee to administer the trust in California subject to bonding and other statutory requirements. Civil Code Section 1018 requires a nonresident fiduciary to appoint an agent for service for tax purposes.

(2) The court may, in its discretion, grant the petition upon a finding that: (a) the transfer will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein, (b) the transfer will not violate the terms of the trust, (c) the trustee to be appointed to administer the trust in California is qualified and willing and able to serve, and (d) the proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law in the other jurisdiction.

(3) When appropriate to facilitate transfer from another jurisdiction, the California court may issue a conditional order (prior to approval of the transfer by the court in the other jurisdiction) appointing a trustee to administer the trust in California and indicating that, upon issuance of the order of transfer by the court in the other jurisdiction, the transfer to California will be approved.

(4) Upon transfer to California, the nature of supervision of administration of the trust will depend upon the type of trust involved. If the trust is one which comes within the meaning of "trust" as set out in Section 1138, it will be administered in accordance with Article 2.5 (commencing with Section 1138) of Chapter 19 of Division 3 of the Probate Code. This article provides a comprehensive procedure for administration of a variety of written voluntary express trusts which do not fall within the scope of the probate court as ancillary to the administration of a decedent's estate.¹⁰ Under this procedure, a trustee, beneficiary, or remainderman may petition the superior court for a broad array of purposes concerning supervision of trust administration.¹¹ This procedure is well suited for trusts transferred to this state from another jurisdiction. If the trust is not one which comes within the meaning of "trust" as set out in Section 1138, the trust will be administered in the same manner as a trust of the same type which has been subject to supervision in California from the time of its creation.

10. Prob. Code §§ 1138-1138.13. The courts had held that the probate court had no general equity jurisdiction for the administration of trusts which had not come to the probate court as part of the administration of an estate. See *Wells Fargo Bank v. Superior Court*, 32 Cal.2d 1, 193 P.2d 721 (1948); *Gillette v. Gillette*, 122 Cal. App. 640, 10 P.2d 760 (1932). The need for this legislation providing for a procedure for administration of the large number of trusts which do not come within Probate Code Section 1120 was clearly pointed out in *Wile, Judicial Assistance in Administration of California Trusts*, 14 Stan. L. Rev. 321 (1961).

11. Prob. Code § 1138.1.

(5) Section 1215.1 which limits the requirement for notice in certain future interest cases should be amended to include within its provisions trusts transferred from other jurisdictions pursuant to the recommended legislation.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 1133 and 1215.1 of, and to add Article 4 (commencing with Section 1139.10) to, the Probate Code, relating to transfer of out-of-state trusts to California.

The people of the State of California do enact as follows:

Probate Code § 1138 (technical amendment)

SECTION 1. Section 1138 of the Probate Code is amended to read:

1138. (a) As used in this article, "trust" means a written voluntary express trust, with additions thereto, whether created by will or other than by will which is entirely administered or to be entirely administered in this state.

(b) As used in this article, "trust" does not mean a trust subject to court supervision under Article 1 (commencing with Section 1120) of this chapter or Chapter 10 (commencing with Section 175) of Division 1, a Totten trust, a business trust which is taxed as a partnership or corporation, an investment trust subject to regulation under the laws of this state or any other jurisdiction, a common trust fund, a voting trust, a deed of trust, a transfer in trust for purpose of suit or enforcement of a claim or right, a trust for the primary purpose of paying debts, dividends, interest, salaries, wages, pensions, or em-

ployee benefits of any kind, an arrangement under which a person is a nominee or escrow holder for another, a trust subject to supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code during the period when no private beneficiary or remainderman has or may claim an interest therein, nor a trust declared exempt from supervision under Section 12583 of the Government Code.

Comment. Section 1138 is amended to divide the section into two subdivisions. This permits reference to subdivision (b) of the section in Section 1139.18.

Probate Code §§ 1139.10-1139.19 (added)

SEC. 2. Article 4 (commencing with Section 1139.10) is added to Chapter 19 of Division 3 of the Probate Code, to read:

Article 4. Transfer From Another Jurisdiction

§ 1139.10. Application of article

1139.10. (a) This article applies to any written voluntary express trust or portion thereof, whether created by will or otherwise, administered in another jurisdiction outside of this state.

(b) This article shall not be construed to prevent transfer of place of administration of a trust or of trust assets to this state from another jurisdiction in any case where judicial approval of the transfer was not required under the law in effect immediately prior to the effective date of this article.

Comment. Section 1139.10 makes this article applicable to the transfer to California of the place of administration of trusts or trust assets administered in another jurisdiction outside of California. The article applies to trusts administered in foreign countries as well as those administered in sister states. Subdivision (b) is comparable to subdivision (b) of Section 1139.

§ 1139.11. Transfer of place of administration or assets to California

1139.11. Unless the trust instrument precludes the transfer of the place of administration to this state, an order may be made by the superior court as provided in this article accepting the transfer of the place of administration of a trust or the transfer of some or all of the assets of a trust from another jurisdiction to this state.

Comment. Section 1139.11 is comparable to a portion of Section 1139.1.

§ 1139.12. Petition for transfer

1139.12. A petition for an order accepting a transfer may be filed by the trustee or by a beneficiary of the trust.

Comment. Section 1139.12 is comparable to the first sentence of Section 1139.2.

§ 1139.13. Venue

1139.13. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the superior court of the county where the proposed "principal place of administration of the trust" (as defined by Section 1138.3 of the Probate Code) is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the superior court of the county where either (1) any beneficiary of the trust resides or (2) a substantial portion of the trust assets to be transferred are located or will be located.

Comment. Section 1139.13 provides venue rules. If a California resident is to be appointed trustee by the court, the section adopts the venue provisions of Section 1138.3. If no trustee proposed to administer the trust in this state is a California resident, the section provides that venue is proper in the county either where any beneficiary resides or where a substantial portion of the assets to be transferred are or will be located.

§ 1139.14. Contents of petition

1139.14. The petition shall be verified and shall set forth:

(a) The names, ages, and places of residence of:

(1) The trustee administering the trust in the other jurisdiction.

(2) The proposed trustee to whom administration of the trust or such trust assets will be transferred.

(3) All persons who are interested in the trust as beneficiaries as far as known to petitioner.

(b) Whether the trust has been subject to supervision over administration in another jurisdiction outside of California. If so, whether a petition or appropriate request for transfer of place of administration of the trust or such trust assets to this state has been filed, if necessary, with the court in the other jurisdiction and the status of such petition or request.

(c) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If he has, the

acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of fiduciary bond to be requested, if any.

(e) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(f) A statement of the character, condition, location, and value of the property comprising the assets sought to be transferred.

(g) A statement of the reasons for the transfer.

Comment. The information required by Section 1139.14 to be included in the petition will inform the court on the questions of identification of interested parties, the terms of the trust instrument, the assets of the trust, the satisfaction of requirements for transfer in the other jurisdiction, whether administration of the trust has been subject to supervision of a court in another jurisdiction, and the reason for the requested transfer. The section is patterned after Section 1139.2.

It should be noted that a foreign corporation other than a national banking association authorized to conduct trust business in this state cannot act as trustee in California. Fin. Code § 1503.

§ 1139.15. Notice and hearing

1139.15. (a) Upon the filing of the petition, the clerk shall set the petition for hearing and shall give notice of the hearing as provided in Section 1200 at least 30 days before the time set for the

hearing. Petitioner, at least 30 days prior to the time set for the hearing, shall cause to be mailed to each of the persons named in the petition, at their respective places of residence therein stated, a copy of the notice of the hearing.

(b) The court for good cause may shorten the time required for performance of any act required by this section.

(c) Any person interested in the trust, either as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Section 1139.15 is based upon Section 1139.3.

§ 1139.16. Order accepting transfer and appointing trustee

1139.16. The court may, in its discretion, grant the petition and issue an order accepting transfer of place of administration of the trust or such trust assets to this state, appoint a trustee to administer the trust in this state, and require the trustee to post appropriate bond, if necessary, if after hearing it appears to the court that:

(a) The transfer of such trust assets to a trustee in this state, or the transfer of place of administration of the trust to this state, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein.

(b) The transfer will not violate the terms of the trust.

(c) The trustee appointed by the court to administer the trust in this state, to whom the trust assets are to be transferred, is qualified, willing, and able to administer the trust or such assets upon the same trusts.

(d) The proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law of the other jurisdiction.

Comment. Section 1139.16 gives the court discretion to transfer trust assets or the place of administration of a trust from another jurisdiction to this state provided that, if the law in the other jurisdiction so requires, the proper court in the other state has approved the transfer. A foreign corporation, other than a national banking association authorized to conduct trust business in this state, cannot act as trustee in California. Fin. Code § 1503. Section 1139.16 does not require the court to issue formal findings.

§ 1139.17. Conditional order accepting transfer

1139.17. When appropriate to facilitate transfer of the trust assets or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction.

Comment. Section 1139.17 provides a method whereby the California court can indicate its willingness to accept jurisdiction over a trust presently administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration prior to approving transfer. See, e.g., Mass. Gen. Laws, Ch. 206, § 29 (1955); N.C. Gen. Stat. §§ 36-6 through 36-8 (1966); see Recommendation Relating to Transfer of Out-of-State Trusts to California, 13 Cal. L. Revision Comm'n Reports 0000 (1976).

§ 1139.18. Administration of transferred trust

1139.18. (a) If the trust transferred to this state pursuant to this article is a written voluntary express trust, including additions thereto, whether created by will or other than by will, and is not one excluded by subdivision (b) of Section 1138, the trust in this state shall be administered in accordance with Article 2.5 (commencing with Section 1138) of Chapter 19 of Division 3. Notwithstanding Section 1138.3, any proceedings under that article with respect to the trust transferred to this state shall be commenced in the superior court of the proper county as described in Section 1139.18.

(b) If the trust transferred to this state pursuant to this article is not one covered by subdivision (a), it shall be administered in the same manner as if the trust had been subject to supervision in this state from the time of its creation.

Comment. Subdivision (a) of Section 1139.18 provides that a trust which comes within the meaning of "trust" under Section 1138 shall be administered in accordance with Article 2.5 (commencing with Section 1138). Thus, for example, a testamentary trust which continues after probate of a will in another jurisdiction could be transferred to California to be administered under that article. Subdivision (b) requires that a trust which does not come within the meaning of "trust" as set out in Section 1138 be administered in the same manner as California trusts of the same type. For example, a charitable trust, during the period when no private beneficiary or remainderman has or may claim an interest would be subject to the supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, and any controversy would be determined by a civil action. See, e.g., Brown v. Memorial Nat'l Home Foundation, 162 Cal. App.2d 513, 329 P.2d 118 (1958).

§ 1139.19. "Beneficiary" defined

1139.19. For purposes of this article, "beneficiary" means all persons in being who shall or may participate in the corpus or income of the trust.

Comment. Section 1139.19 is the same as Section 1139.7. It eliminates the requirement of appointment of a representative for unborn beneficiaries.

Probate Code § 1215.1 (technical amendment).

SEC. 3. Section 1215.1 of the Probate Code is amended to read:

1215.1. Subject to other provisions of this article, it is a sufficient compliance with Sections 1120, 1123.5, 1125, 1125.1, 1126, 1138.6 , and 1139.7, and 1139.15, insofar as they require notice to be given to the beneficiaries of, or persons interested in the trust, or to beneficiaries or remaindermen, including all persons in being who shall or may participate in the corpus or income of the trust, to give notice in the cases hereinafter provided, as follows:

(1) When an interest has been limited on any future contingency to persons who shall compose a certain class upon happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceedings.

(2) When an interest has been limited to a living person, and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are, or may be, the distributees, heirs, issue or other kindred of such living person, notice shall be given to such living person.

(3) Except as otherwise provided in subdivision (2), when an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the same interest, or a share of such interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first such event.

Comment. Section 1215.1 is amended to include within its provisions trusts transferred from other jurisdictions pursuant to Article 4 (commencing with Section 1139.10) of Chapter 19 of Division 3.