

**VOLUME NO. 33**

**Opinion No. 33**

**EXECUTORS AND ADMINISTRATORS - Foreign corporations; Trustees; Banks and banking. Sections 5-201, 15-2248, 15-2299, 91-519, 91-1302, and 91-1405, R.C.M. 1947.**

- HELD:**
- 1. A foreign bank, although competent to act as executor over a Montana estate, must first procure a certificate of authority allowing it to transact such business within the state.**
  - 2. A foreign bank may hold title to real property in Montana, and may manage the same as inter vivos or testamentary trustee, but is must first procure a certificate of authority allowing it to transact such business within the state.**

October 13, 1970

Mr. John A. Dowdall  
Superintendent of Banks  
Mitchell Building  
Helena, Montana 59601

Dear Mr. Dowdall:

You have requested my opinion on the following questions:

1. Whether a nonresident bank is legally competent to act as executor over a Montana estate and, if so, may it so act without first procuring a certificate of authority.
2. Whether a nonresident bank may hold title to real property in Montana and manage such property as testamentary trustee without first procuring a certificate of authority.
3. Whether a nonresident bank may hold title to real property in Montana and may manage such property under an inter vivos trust, without first procuring a certificate of authority.

Former Attorney General of Montana, L. A. Foot, issued a 1931 opinion in which he stated, in part, that the executor or administrator of an estate probated in Montana must be a resident of Montana. 14 **Official Opinions of the Attorney General**, page 80. So far as this opinion restricted the right of a nonresident bank to act as executor over a Montana estate, it is hereby overruled.

It is true that such a restriction once existed in Montana. Section 45, Probate Practice Act, effective until July 1, 1895, provided in part:

“No person is competent to serve as executor, who, at the time the will is admitted to probate, is:

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“Third, . . . absent from or resides out of the territory.”  
(Emphasis supplied)

The underlined part of this provision was deleted in the Code of Civil Procedure of 1895 (section 2401) which replaced the Probate Practice Act cited above. Since the legislature is presumed to have acted with the existing law in mind, it must be presumed that the deletion of the residence clause was intentional. **In re Wilson's Estate**, 102 Mont. 178, 56 P.2d 733.

Although the “bona fide resident” qualification has been **expressly** retained as a requirement of the competence of an administrator, section 91-1405, Revised Codes of Montana, 1947, it has not been so retained for executors. Section 91-1302, R.C.M. 1947, carries no

allusion to the residence clause, abandoned in 1895, nor does it carry any provision which precludes a nonresident bank from acting as executor in Montana.

A bank, or other corporation, is legally competent to act as an executor pursuant to section 91-519, R.C.M. 1947, which reads:

“ ‘Person’ as used in this act shall mean a corporation, association, copartnership or any other legal entity, as well as a natural person, and the singular thereof shall include the plural.”

Therefore, it is my conclusion that a nonresident bank would be competent to act as executor over a Montana estate.

Your query, of course, is more far-reaching since a nonresident bank is also a foreign corporation and must comply with the corporation laws. Since no foreign corporation may “transact business” in the state of Montana without first acquiring a certificate of authority, as required under section 15-2299, R.C.M. 1947, it becomes necessary to determine whether the act of serving as executor, or as authorized by section 5-106, R.C.M. 1947, of holding title to real property and of managing the same as a trustee (whether testamentary or inter vivos), constitutes such a “transaction of business” as would require a nonresident bank to acquire a certificate of authority.

Precisely what constitutes a “transaction of business” by a foreign corporation is often a difficult question and one which must be determined by the special circumstances of each particular case. *Cottonwood Coal Co. v. Junod, State Treasurer*, 73 Mont. 392, 398, 236 Pac. 1080.

Here, however, we are dealing with banks and the “business” of banks is more easily ascertainable than that of most corporations. Banks are required in their articles of incorporation to state “the purpose, or purposes for which the corporation is organized.” Section 15-2248, R.C.M. 1947. The bank is required to provide greater specificity than other corporations. Section 5-201 (6), R.C.M. 1947, requires the following information:

“6. The purpose for which the association or company is formed, which may be set forth by use of the general terms herein defined, with reference to **each line of business** in which the proposed corporation desires to engage.” (Emphasis supplied)

Clearly, therefore, if a bank is authorized by its charter to perform in the capacity of an executor, or a trustee, these constitute the defined “lines of business” of the bank. And if the bank is so authorized, and desires to perform in such a capacity in Montana, it obviously desires to

“transact its business” in our state and must procure a certificate of authority in accordance therewith.

“A foreign corporation entering a state to exercise some of the functions for which it was created, as in the case of a foreign trust company asserting ownership of land devised to it as testamentary trustee and assuming to administer the trust is ‘transacting business’ in the state.” *In re Wellings’ Estate*, 221 Pac. 628, 631, 192 Cal. 506.

THEREFORE, IT IS MY OPINION that:

1. A foreign bank is competent to act as executor over a Montana estate, but must first procure a certificate of authority to transact business within the state.
2. A foreign bank may hold title to real property in Montana, managing it as an inter vivos or testamentary trustee, but is must first procure a certificate of authority to transact business within the state.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General