

## Memorandum 82-28

Subject: Study L-613 - Probate Law (Testamentary Additions to Trusts;  
Life Insurance and Other Trusts)

This Memorandum recommends continuing the substance of existing California law on testamentary additions to trusts and life insurance and other trusts. This Memorandum presents no significant policy issues.

Attached to this Memorandum as exhibits are the following:

(1) Exhibit 1: The existing California sections on testamentary additions to trusts (Prob. Code §§ 170-173).

(2) Exhibit 2: The staff draft of the section on testamentary additions to trusts to be included in the proposed legislation which modifies the UPC language slightly to conform to existing California language (the changes to the UPC language to preserve the California terminology are shown by ~~strikeout~~ and underscore).

(3) Exhibit 3: The existing California sections on life insurance and other trusts (Prob. Code §§ 175-184), to be continued in the proposed legislation.

Testamentary Additions to Trusts

UPC Section 2-511 (Exhibit 1) is the same as Section 1 of the Uniform Testamentary Additions to Trusts Act which was enacted in California in 1965. See Prob. Code §§ 170-173 (Exhibit 1). Thus UPC Section 2-511 and Probate Code Section 170 are, except for minor differences in wording, identical. The main purpose of the provision is to validate a testamentary disposition into an inter vivos trust which may be amended in the future against the contention that that conflicts with the formalistic requirements of the Wills Act. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 360 n.89 (1976); 7 B. Witkin, Summary of California Law Wills and Probate § 148, at 5663-64 (8th ed. 1974).

The staff recommends including this section in the proposed legislation, using the California language where it differs from the UPC. The draft section and Law Revision Commission Comment are set forth in Exhibit 2. Subdivision (b) of the draft section preserves the transitional provision in existing California law (Prob. Code § 171). The

other two sections of the Uniform Testamentary Additions to Trusts Act (Prob. Code §§ 172-173) are superfluous and may be repealed: Section 172 (uniform construction) will be superseded by a general constructional provision (cf. UPC § 1-101); Section 173 (short title) will either be superseded by a short title for the entire act (cf. UPC 1-101) or will not be continued.

Life Insurance and Other Trusts

Sections 175-184 of the Probate Code (Exhibit 2) permit the testator to create a testamentary trust by will and have the proceeds from life insurance, pension or profit-sharing plans, IRA's, and the like paid into the trust. The statute makes clear that a provision in the benefit plan to have the proceeds paid to the trustee need not comply with the formalities for execution of a will and that the proceeds so designated are not subject to probate administration. See Prob. Code §§ 175, 177. See generally Review of Selected 1970 California Legislation, 2 Pac. L.J. 275, 291-93 (1971). The staff proposes to retain these provisions in the new law.

Respectfully submitted,

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## EXHIBIT 1

**§ 170. Authority; amendability or revocability of trust; manner of holding, administering and disposing of property devised or bequeathed; lapse**

A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts), if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

(Added by Stats.1965, c. 1640, § 1.)

**§ 171. Effect on prior wills**

This chapter shall not invalidate any devise or bequest made by a will executed prior to the effective date of this chapter.

(Added by Stats.1965, c. 1640, § 1.)

**§ 172. Uniform construction**

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(Added by Stats.1965, c. 1640, § 1.)

**§ 173. Short title**

This chapter may be cited as the Uniform Testamentary Additions to Trusts Act.

(Added by Stats.1965, c. 1640, § 1.)

## EXHIBIT 2

Section 2-511. Testamentary additions to trusts

2-511. (a) A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) ; and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

(b) This section does not invalidate any devise or bequest made by a will executed prior to September 17, 1965.

Comment. Subdivision (a) of Section 2-511 continues the substance of former Section 170 and is the same as Section 2-511 of the Uniform Probate Code. See also Section 1-201 ("devise" means a testamentary disposition of real or personal property).

Subdivision (b) continues the substance of former Section 171-- September 17, 1965, was the effective date of former Section 171.

## EXHIBIT 3

## CHAPTER 10. LIFE INSURANCE AND OTHER TRUSTS

- Sec.
175. Designation of trustee as primary or contingent beneficiary; payee or owner under insurance, annuity or endowment contract, etc.
176. Necessity of provisions in will creating trust or making valid disposition under section 170.
177. Payability or transferability of benefits or rights directly to trustee.
178. Liability of rights and benefits to debts of designator.
179. Jurisdiction of court before or after payment or transfer of benefits.
180. Applicability of Chapter 19 of Division 3 to trust.
181. Appeal from order.
182. Absence of qualified trustee to claim rights or benefits; payment to personal representative; discharge of obligor from liability.
183. Liability of insurance policy proceeds to inheritance tax.
184. Effect of chapter on trusts not made pursuant to chapter or construction of inheritance tax laws.

### Cross References

Transfer of place of administration or assets of trust to another jurisdiction, application to this chapter, see § 1139.

Uniform Testamentary Additions to Trusts Acts, see § 170 et seq.

### § 175. Designation of trustee as primary or contingent beneficiary, payee or owner under insurance, annuity or endowment contract, etc.

An insurance, annuity, or endowment contract (including any agreement issued or entered into by the insurer in connection therewith, supplemental thereto or in settlement thereof), a pension, retirement benefit, death benefit, stock bonus, profit-sharing or employees' saving plan, or contract created or entered into by an employer for the benefit of some or all of his employees, and a trust, security or account established or held pursuant to the Self Employed Individuals' Tax Retirement Act of 1962 (Pub.L. 87-792)<sup>1</sup> may designate as a primary or contingent beneficiary, payee, or owner a trustee named or to be named in the will of the person entitled to designate such beneficiary, payee, or owner. The designation shall be made in accordance with the provisions of the contract or plan or in the absence of such provisions, in a manner approved by the insurer if an insurance, annuity, or endowment contract is involved, and by the trustee, custodian, or person or entity administering the contract or plan, if any. The designation may be made before or after the execution of the designator's will and shall not be required to comply with the formalities for execution of a will.

(Added by Stats.1970, c. 835, § 1.)

<sup>1</sup>See 26 U.S.C.A. § 401 note.

### Cross References

Transfer of trust to another jurisdiction, see § 1139 et seq.

### § 176. Necessity of provisions in will creating trust or making valid disposition under section 170

The designation shall be ineffective unless the designator's will contains provisions creating the trust or makes a disposition valid under Section 170. (Added by Stats.1970, c. 835, § 1.)

### § 177. Payability or transferability of benefits or rights directly to trustee

Subject to the provisions of Section 179, the benefits or rights resulting from such designation shall be payable or transferable directly to the trustee, without becoming subject to administration, upon or at any time after admission of the designator's will to probate. A designation pursuant to this chapter shall not be deemed to have the effect of naming a trustee of a separate inter vivos trust but the rights and benefits or the proceeds thereof when paid to such trustee shall be, or become a part of, the testamentary trust or trusts established pursuant to the designator's will or shall be added to an inter vivos trust or trusts if the disposition is governed by Section 170. (Added by Stats.1970, c. 835, § 1.)

### § 178. Liability of rights and benefits to debts of designator

Except as otherwise provided in the designator's will, the rights and benefits and their proceeds paid or transferred to the trustee shall not be subject to the debts of the designator to any greater extent than if they were paid or transferred to a named beneficiary, payee, or owner other than the estate of the designator.

(Added by Stats.1970, c. 835, § 1.)

### § 179. Jurisdiction of court before or after payment or transfer of benefits

The court in which proceedings are pending for administration of the estate of the decedent shall have jurisdiction, before or after payment or transfer of benefits and rights or their proceeds to the trustee, to:

- (a) Determine the validity of the trust.
- (b) Determine the terms of such trust.
- (c) Fill vacancies in the office of trustee.

(d) Require an undertaking of a trustee or successor trustee in its discretion and in such amount as it

may determine for the faithful performance of duties as trustee, subject to the provisions of Article 3 (commencing with Section 1540) of Chapter 12, Division 1 of the Financial Code and Section 1127.5.

(e) Grant additional powers to the trustee, as provided in Section 1120.2.

(f) Instruct the trustee.

(g) Determine, fix or allow payment of compensation of a trustee as provided in Section 1122.

(h) Hear and determine adverse claims to the subject of the trust by the personal representative, surviving spouse, or other third person.

(i) Determine the identity of the trustee and his acceptance or rejection of the office, and upon request, furnish evidence of trusteeship to a trustee.

(j) Order postponement of the payment or transfer of the benefits and rights or their proceeds.

(k) Make any order incident to the foregoing or to the accomplishment of the purposes of this chapter.

(l) Authorize or direct removal of the trust or assets of the trust to another jurisdiction pursuant to the procedure provided in Article 3 (commencing with Section 1139), Chapter 19, Division 3.

The personal representative of the designator's estate, any trustee named in the will or designation or successor to such trustee, or any person interested in such estate or trust may petition the court to exercise the jurisdiction provided in this section. Notice of hearing of the petition shall be given in the manner provided in Section 1120, except as the court may otherwise order.

(Added by Stats.1970, c. 835, § 1. Amended by Stats.1971, c. 958, § 1.)

#### **Cross References**

Deposits with state treasurer, see Financial Code § 1540 et seq.

Probate of wills, jurisdiction, see § 300 et seq.

Bequests to minors, see § 186.8.

Trust administration, jurisdiction, see § 1120.

Transfer to another jurisdiction, see §§ 1132, 1139 et seq.

#### **§ 180. Applicability of Chapter 19 of Division 3 to trust**

As to matters not specifically provided in Section 179, the provisions of Chapter 19 (commencing with Section 1120) of Division 3 shall apply to the trust.

(Added by Stats.1970, c. 835, § 1.)

#### **Cross References**

Administration of trusts, see § 1120 et seq.

#### **§ 181. Appeal from order**

An appeal may be taken from any order described in Section 1240 made pursuant to this chapter and, in addition, from an order making or refusing to make a determination specified in subdivision (a), (b), or (h) of Section 179.

(Added by Stats.1970, c. 835, § 1.)

#### **§ 182. Absence of qualified trustee to claim rights or benefits; payment to personal representative; discharge of obligor from liability**

If no qualified trustee makes claim to the benefits or rights or proceeds within one year after the death of the designator, or if satisfactory evidence is furnished within such one-year period showing that no trustee can qualify to receive them, payment or transfer may be made, unless the designator has otherwise provided, by the obligor to the personal representative of the designator or to those thereafter entitled, and the obligor shall be discharged from liability.

(Added by Stats.1970, c. 835, § 1.)

#### **§ 183. Liability of insurance policy proceeds to inheritance tax**

The proceeds of an insurance policy, as defined in Article 6 (commencing with Section 13721), Chapter 4, Part 8, Division 2 of the Revenue and Taxation Code, when collected by a trustee acting pursuant to this chapter shall not be subjected to inheritance tax to any greater extent than if such proceeds were the proceeds of an insurance policy payable to the beneficiaries of the trust as named beneficiaries of the policy.

(Added by Stats.1970, c. 835, § 1.)

#### **§ 184. Effect of chapter on trusts not made pursuant to chapter or construction of inheritance tax laws**

Enactment of this chapter shall not invalidate trusts, otherwise valid, not made pursuant to the provisions of this chapter or affect the construction of inheritance tax laws in relation to such trusts.

(Added by Stats.1970, c. 835, § 1.)