

Memorandum 91-39

Subject: Study L-3052 - Nonprobate Transfer to a Trustee Named in Decedent's Will

Attached is a staff draft of a *Tentative Recommendation relating to Nonprobate Transfer to a Trustee Named in Decedent's Will*. The Commission considered this draft at the last meeting. The proposal was supported by the Executive Committee of the State Bar Probate Section.

The existing Probate Code sections -- Sections 6320 to 6330 -- are set out in Exhibit 1, attached.

Requirement That Will Be Admitted to Probate

The draft considered at the last meeting was supported by the Executive Committee of the Probate and Trust Section of the Los Angeles County Bar, with the caveat that it should not change existing law requiring the decedent's will to be admitted to probate before a transfer is made outside probate to a trustee named in the will. The Commission asked the staff to make sure it is clear that the will must be admitted to probate.

It is clear in existing Section 6323, set out in Exhibit 1, that the will must be admitted to probate. The staff has added to the Comment to Section 6321 in the staff draft a reference to Section 6323.

Transitional Rules

The draft statute does not have transitional provisions. It relies instead on general transitional rules in Section 3 of the Probate Code. Section 3 provides that changes to the Probate Code apply immediately "on the operative date to all matters," with certain exceptions, such as orders made before the operative date in pending proceedings. Section 3 also permits the court to apply old law "to the extent reasonably necessary" if a party shows that application of the new law would "substantially interfere with the effective conduct of the proceedings or the rights of the parties."

Since the purpose of the draft statute is to avoid probate where the beneficiary of a nonprobate transfer is named or to be named in the decedent's will, the statute should apply to beneficiary designations made before as well as after the operative date, and without regard to

whether the decedent died before or after the operative date. This is the effect of Section 3.

The staff recommends the Commission approve the TR for distribution for comment.

Respectfully submitted,

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4/25/91

TENTATIVE RECOMMENDATION
relating to
NONPROBATE TRANSFER TO A TRUSTEE
NAMED IN DECEDENT'S WILL

In 1970, the Legislature enacted provisions to permit insurance and employee benefits to be paid at death directly to a trustee named or to be named in the will of the policyholder or employee without going through probate.¹ Before then, there was some question whether the insurance proceeds or employee benefits had to go through probate.²

These provisions would be more useful if they were broadened to cover all types of nonprobate transfers made to a trust named or to be named in a will. The Commission is informed that nonprobate transfers at death, such as multiple-party bank accounts, are often made to an existing inter vivos trust. Since the trust is already in existence, there is no need for a will to establish the trust or to name a trustee, and the property passes directly to the trust without going through probate.

1. 1970 Cal. Stat. ch. 835 (originally enacted as Prob. Code §§ 175-184, now codified as Prob. Code §§ 6320-6330). Although the insurance proceeds and employee benefits do not go through probate, the will itself must be admitted to probate. Prob. Code § 6323. The court in which the decedent's estate is being administered may determine the validity and terms of the trust and supervise its administration. Prob. Code § 6325.

For the beneficiary designation to be valid, it must be made in accordance with the provisions of the insurance contract or employee benefit plan or, in the absence of such provisions, as approved by the insurer or administrator of the plan. Prob. Code § 6321. The designation is ineffective unless the designator's will contains provisions creating the trust, or makes a disposition valid under the California Uniform Testamentary Additions to Trusts Act. Prob. Code § 6322. Failure to satisfy these requirements does not invalidate an otherwise valid trust created in the will. The consequence of failure to satisfy these requirements is that the benefits may have to go through probate. See *Review of Selected 1970 California Legislation*, 2 Pac. L.J. 275, 292 (1971).

2. See *Review of Selected 1970 California Legislation*, 2 Pac. L.J. 275, 292 (1971).

But if the designated beneficiary is a trustee named or to be named in a will and the designation is made in a type of nonprobate transfer not now covered by the statute, the proceeds or benefits may have to go through probate. One of the main reasons for a nonprobate transfer is to avoid probate. Although the will itself must be admitted to probate to establish its validity and to construe its terms,³ there is no need for the proceeds or benefits to pass through probate simply because they are in a bank account, and are not insurance proceeds or employee benefits.

The Commission recommends that the existing provisions for insurance and employee benefits be expanded to apply to all types of nonprobate transfers where the designated death beneficiary is a trustee named or to be named in the will.

3. See Prob. Code § 6323.

PROPOSED LEGISLATION

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

Heading to Chapter 8 (commencing with Section 6320) of Part 1 of Division 6 of the Probate Code (amended)

CHAPTER 8. TRUST-FOR-INSURANCE-OR-EMPLOYEE-BENEFITS
NONPROBATE TRANSFER TO TRUSTEE NAMED IN DECEDENT'S WILL

Prob. Code § 6320 (amended). Definitions

6320. As used in this chapter, unless the context otherwise requires:

(a) ~~"Contract or plan" means any~~ "Instrument" includes all of the following:

(1) 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).

(2) 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 or her employees.

(3) Self-employed retirement plans, and individual annuities or accounts, established or held pursuant to the Internal Revenue Code as now or hereafter amended.

(4) A multiple-party account as defined in Section 5132.

(5) Any other written instrument described in Section 5000.

(b) "Designation" means a designation made pursuant to Section 6321.

Comment. Subdivision (a) of Section 6320 is amended to define "instrument" as used in Section 6321. Formerly, Section 6321 referred to a "contract or plan" which was defined in Section 6320.

The basic definition of "instrument" is in Section 45. The definition of "instrument" in Section 6320 makes clear the scope and application of this chapter.

Prob. Code § 6321 (amended). Designation of trustee as beneficiary, payee, or owner

6321. ~~A contract or plan~~ An instrument 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 the beneficiary, payee, or owner. The designation shall be made in accordance with the provisions of the ~~contract or plan~~ instrument 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~~ instrument, if any. The designation may be made before or after the execution of the designator's will and is not required to comply with the formalities for execution of a will.

Comment. Section 6321 is amended to use the term "instrument" in place of the former term "contract or plan." "Instrument" is defined in Section 6320. This amendment broadens the application of this chapter to all kinds of nonprobate transfers permitted under California law, including multiple-party accounts in financial institutions, public employees' death benefits (Gov't Code §§ 21332-21335), and beneficiary designations made under Section 5000.

Before benefits or rights are transferred to the trustee named in decedent's will, the will must be admitted to probate. See Section 6323.

EXISTING LAW

CHAPTER 8. TRUST FOR INSURANCE OR EMPLOYEE BENEFITS

Prob. Code § 6320. Definitions

6320. As used in this chapter, unless the context otherwise requires:

(a) "Contract or plan" means any of the following:

(1) 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).

(2) 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 or her employees.

(3) Self-employed retirement plans, and individual annuities or accounts, established or held pursuant to the Internal Revenue Code as now or hereafter amended.

(b) "Designation" means a designation made pursuant to Section 6321.

Prob. Code § 6321. Designation of trustee as beneficiary, payee, or owner

6321. A contract or plan 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 the 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 is not required to comply with the formalities for execution of a will.

Prob. Code § 6322. Required provision in designator's will

6322. The designation is ineffective unless the designator's will contains provisions creating the trust or makes a disposition valid under Section 6300.

Prob. Code § 6323. Payment or transfer to trustee without administration

6323. Subject to the provisions of Section 6325, the benefits or rights resulting from the designation are 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 does not 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 the trustee are, 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 6300.

Prob. Code § 6324. Effect of designator's debts

6324. Except as otherwise provided in the designator's will, the rights and benefits and their proceeds paid or transferred to the trustee are not 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.

Prob. Code § 6325. Jurisdiction of court

6325. (a) The court in which the proceedings are pending for administration of the estate of the decedent has jurisdiction, before or after payment or transfer of benefits and rights or their proceeds to the trustee, to:

- (1) Determine the validity of the trust.
- (2) Determine the terms of the trust.
- (3) Fill vacancies in the office of trustee.
- (4) Require a bond of a trustee in its discretion and in such amount as the court may determine for the faithful performance of duties as trustee, subject to the provisions of Article 3 (commencing with Section 1540) of Chapter 12 of Division 1 of the Financial Code and Section 15602 of this code.
- (5) Grant additional powers to the trustee, as provided in Section 16201.
- (6) Instruct the trustee.
- (7) Fix or allow payment of compensation of a trustee as provided in Sections 15680 to 15683, inclusive.
- (8) Hear and determine adverse claims to the trust property by the personal representative, surviving spouse, or other third person.
- (9) Determine the identity of the trustee and the trustee's acceptance or rejection of the office and, upon request, furnish evidence of trusteeship to a trustee.
- (10) Order postponement of the payment or transfer of the benefits and rights or their proceeds.
- (11) Authorize or direct removal of the trust or trust property to another jurisdiction pursuant to the procedure provided in Chapter 5 (commencing with Section 17400) of Part 5 of Division 9.
- (12) Make any order incident to the foregoing or to the accomplishment of the purposes of this chapter.

(b) 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 the estate or trust may petition the court for an order under this section. Notice of hearing of the petition shall be given in the manner provided in Section 17203, except as the court may otherwise order.

Prob. Code § 6326. Applicability of Division 9

6326. As to matters not specifically provided in Section 6325, the provisions of Division 9 (commencing with Section 15000) apply to the trust.

Prob. Code § 6327. Appealable orders

6327. An appeal may be taken from any of the following:

- (a) Any order described in Section 7240 made pursuant to this chapter.

(b) An order making or refusing to make a determination specified in paragraph (1), (2), or (8) of subdivision (a) of Section 6325.

(c) As provided in Section 17207 for an order made pursuant to Section 6326.

Prob. Code § 6328. Absence of qualified trustee

6328. 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 is discharged from liability.

Prob. Code § 6329. No effect on other trusts

6329. Enactment of this chapter does not invalidate trusts, otherwise valid, not made pursuant to the provisions of this chapter.

Prob. Code § 6330. Chapter as restatement and continuation of former law

6330. This chapter, insofar as it is substantially the same as former Chapter 10 (commencing with Section 175) of former Division 1, repealed by Section 18 of Chapter 842 of the Statutes of 1983, shall be construed as a restatement and continuation thereof and not as a new enactment. After December 31, 1984, a reference in a written instrument to the previously existing provisions relating to the subject matter of this chapter shall be deemed to be a reference to the corresponding provisions of this chapter.