

## Memorandum 92-13

Subject: 1992 Legislative Program (Current Report)

Our lineup of bills for the 1992 legislative session is now in place:

<u>Subject</u>	<u>Bill</u>
Nonprobate Transfer of Community Property	AB 1719 (Horcher)
Relocation of Powers of Appointment	AB 1722 (Horcher)
Estate Planning and Probate	SB 1496 (Committee)
Recognition of agent's authority	
Preliminary distribution without court supervision	
Litigation involving decedent	
[Acknowledgment of power of attorney]	
[Nonprobate transfer to trustee named in will]	
[Notice of trustees' fees]	
[Interest and income on trust distributions]	
Guardianship and Conservatorship	SB 1455 (Mello)
Compensation	
Transfer of property to trust	
Special Needs Trusts	AB 3328 (Horcher)
Family Code	AB 2650 (Speier)
Conforming changes	AB 2641 (Speier)
Creditors' Remedies	SB 1372 (Deddeh)
Wage garnishment technicalities	
Discovery technicalities	
Calendar of Topics of CLRC	SCR 66 (Committee)

AB 1719 (Horcher)

This bill implements the Commission's recommendation on nonprobate transfers of community property. The Senate Judiciary Committee, in approving the bill, required the following language to be added to make clear that a spousal consent to a nonprobate transfer of community property is effective only if the consent is validly given:

5015. Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent to a provision for a nonprobate transfer of community property on death.

The staff believes this language is consistent with the Commission's recommendation. Professor Kasner, who was present at the hearing, believes the amendment is acceptable.

SB 1496 (Committee)

Senator Lockyer has agreed to carry the omnibus probate bill as a Senate Judiciary Committee bill. This means there can be nothing controversial in it. We hope to add the items shown in brackets above by amendment at the first opportunity, assuming Senator Lockyer and the Committee are agreeable. The staff proposes some fine-tuning in the language of the proposal on a nonprobate transfer to a trustee named in a will. See Exhibit 1.

One other small matter--recognition of a trustee's authority--we will also add by amendment if we can get the language in a form that eliminates opposition of the California Bankers Association.

The Commission has previously approved clarifying language concerning honorary trusts under the Uniform Statutory Rule Against Perpetuities for inclusion in the bill. The staff has now received additional information concerning this matter, and has held up the amendment pending an opportunity for the Commission to review the new information.

SCR 66 (Committee)

The annual resolution continuing the Commission's authority, Senator Lockyer has also agreed to carry as a Senate Judiciary Committee resolution.

Current Statuts of Bills

Attached is a status chart showing where the bills now are in the legislative process.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

## Exhibit 1

Re: Nonprobate Transfer to Trustee Named in Will  
From: Robert J. Murphy, Staff Counsel

At the January meeting, the Commission considered a letter from Melvin Wilson of the California Bankers Association's State Trust Governmental Affairs Committee. He suggested the definition of "instrument" in Probate Code Section 6320(b) be broadened as follows:

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

The Commission approved, subject to the staff making sure the proposed language is consistent with the Internal Revenue Code. The reference to "individual retirement annuities or accounts" is consistent with Internal Revenue Code Section 408, which refers to an "individual retirement account" and an "individual retirement annuity," so the proposed addition of the word "retirement" in Section 6320 seems satisfactory.

The reference to "employee welfare benefit plans" is found in the Employee Retirement Income Security Act (ERISA), 29 U. S.C. § 1002(1). ERISA refers both to "employee pension benefit plans" and "employee welfare benefit plans," so Section 6320 should probably use the more inclusive term "employee benefit plan." It also seems better to put this new language in paragraph (2) instead of paragraph (3). The staff discussed these revisions with Mr. Wilson, and he agrees.

The staff also discussed with Mr. Wilson the question of whether paragraph (2) should make a specific reference to ERISA. We decided that it should not, because ERISA excludes certain plans (governmental and church plans), and our intent is to make Section 6320 as inclusive as possible.

The Commission was concerned about the reference in Section 6320 to the Internal Revenue Code as "now" or hereafter amended. This language was added by the Commission in its 1983 revision of wills and intestate succession law. Section 6320(a) came from former Section 175 of the Probate Code, which referred to an account "established or held

pursuant to the Self-Employed Individuals' Tax Retirement Act of 1962." The purpose of the "now or hereafter" language in Section 6320 appears to have been to include plans whenever established or held, without getting into technical arguments about whether a plan established or held under an amended version of the code is not covered.

The "now or hereafter" language of Section 6320 is consistent with Probate Code Section 7, which says a reference to a law includes amendments and additions "heretofore or hereafter made." The staff thinks Section 7 adequately covers the matter, and would delete the duplicative language from Section 6320, with a cross-reference to Section 7 in the Comment.

The foregoing may be accomplished by revising Section 6320 as set out below. Amendments previously recommended in the Commission's *Recommendation: Nonprobate Transfer to Trustee Named in Will* are shown in single underscore. The new recommended amendments are shown in double underscore:

Prob. Code § 6320 (amended). Definitions

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

(a) ~~"Contract or plan" means any~~ "Designation" means a designation made pursuant to Section 6321.

(b) "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, employee benefit plan, or contract created or entered into by an employer for the benefit of some or all of ~~his or her~~ the employees.

(3) ~~Self-employed retirement plans, and individual annuities or accounts~~ A self-employed retirement plan, or an individual retirement annuity or account, established or held pursuant to the Internal Revenue Code as ~~now or~~ hereafter amended.

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

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

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

**Comment.** Former subdivision (a) of Section 6320 is redesignated as subdivision (b), and 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. Former subdivision (b) is redesignated as subdivision (a) for purposes of alphabetization.

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.

Paragraph (2) of subdivision (b) is amended to add "employee benefit plan." This includes both employee welfare benefit plans and employee pension benefit plans, and is consistent with the intent to make the definition of "instrument" broadly inclusive.

Paragraph (3) of subdivision (b) is amended to refer to individual "retirement" annuities or accounts, consistent with Section 408 of the Internal Revenue Code.

The former reference in paragraph (3) to the Internal Revenue Code as "now or hereafter amended" is revised to eliminate duplicative language. See Section 7 (reference to a law applies to all amendments and additions heretofore or hereafter made).

STATUS OF 1992 COMMISSION LEGISLATIVE PROGRAM

(as of March 4, 1992)

Legislative Program:

SB 1372 (Deddeh): Wage Garnishment, etc.  
 SB 1455 (Mello): G & C Compensation etc.  
 SB 1496 (Committee): Omnibus Probate Bill

AB 1719 (Horcher): Nonprobate Transfers of Comm. Prop.  
 AB 1722 (Horcher): Powers of Appointment  
 AB 2641 (Speier): Family Code Conforming Revisions  
 AB 2650 (Speier): Family Code  
 AB 3328 (Horcher): Special-Needs Trusts

SCR 66 (Committee): Continuing authority to study topics

BILL STATUS		SB 1372	SB 1455	SB 1496	AB 1719	AB 1722	AB 2641	AB 2650	AB 3328		SCR 66
Introduced		Feb 3	Feb 11	Feb 13	3/8/91	3/8/91	Feb 11	Feb 11	Feb 20		Feb 13
Last Amended					Mar 3	Jan 6					
First House	Policy Committee	[Mar 10]			Jan 27	Jan 23	[Mar 25]	[Mar 25]			
	Fiscal Committee		----	----	----	----	----				
	Passed House				Jan 30	Jan 28					
Second House	Policy Committee				Mar 3	Mar 3					
	Fiscal Committee		----	----	----	----	----				
	Passed House										
Concurrence						----					
Governor	Received										----
	Approved										----
Chaptered by Secretary of State	Date										
	Ch. #										

• Unless otherwise noted, all dates are in 1992. [ ]: scheduled hearings. ----: not applicable.