

Memorandum 91-67

Subject: Study L-3052 - Nonprobate Transfer to Trustee Named in Will

Attached is the Commission's *Recommendation Relating to Nonprobate Transfer to Trustee Named in Will*. We have circulated it for comment. The only comment we received is from Team 1 of the State Bar Estate Planning, Trust and Probate Law Section. The report of Team 1 is attached to Memorandum 91-65 as Exhibit 1. In that report, Team 1 approved the *Recommendation* without change, noting that it was previously approved by the Executive Committee.

Accordingly, the staff recommends the Commission approve this *Recommendation* for printing and submission to the Legislature.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

**Nonprobate Transfer to
Trustee Named in Will**

September 1991

**California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Nonprobate Transfer to Trustee Named in Will*, 21 Cal. L. Revision Comm'n Reports 199 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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November 1, 1991

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation expands existing provisions permitting 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 to apply to all kinds of nonprobate transfers, including a multiple-party bank account.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec
Chairperson

NONPROBATE TRANSFER TO TRUSTEE NAMED IN 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.

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

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).

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

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.