TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

UPDATING CALIFORNIA'S UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

LEGISLATIVE PROPOSAL (T&E 2017-3)

To: Office of Governmental Affairs

From: Patrick Kohlmann, Chair, Trusts and Estates Section Executive Committee
Gina Lera, Vice Chair, Trusts and Estates Section Executive Committee

Date: June 4, 2016

Re: Proposal to Update and Conform Probate Code Section 6300 Regarding the Uniform Testamentary Additions to Trusts Act

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee: June 4, 2016
Approval Vote: Aye 29, No 0, Abstain 0

Section Members:	**Section Legislative Co-Chairs:**
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PURPOSE

Probate Code Section 6300 et seq. incorporates the provisions of the Uniform Testamentary Additions to Trusts Act into California law. The Uniform Testamentary Additions to Trusts Act ("UTATA") was added to California law in 1990 (A.B. 759, enacted as Stats. 1990, c. 79) as part of the 1990 enactment of the California Probate Code. UTATA was later amended in 1991, and these revisions were generally intended to remove obstacles to carrying out the decedent's intention. These 1991 revisions included allowing the trust terms to be set forth in a written instrument executed after the will as well as before or concurrently with the will. As written, however, current Probate Code Section 6300 requires that the trust terms be set forth in a written instrument executed concurrently with or before the will. This creates the possibility that a decedent's intent could be thwarted by the mere timing of signature of the decedent's will relative to the decedent's trust (e.g., where the decedent signs the trust the day after signing his or her will). This proposal would conform California law with the current version of UTATA by allowing a decedent to reference trust terms in a written instrument executed after the will and thereby eliminate the possibility for this technicality to thwart the intention of a decedent.

PROPOSAL AND REASONS FOR PROPOSAL

Existing Law:

Probate Code Section 6300 states that a decedent may validly devise property to a trustee where the terms of the trust are set forth in an instrument executed before or concurrently with the decedent's will.

This Proposal:

This proposal would amend Section 6300 to permit a decedent to validly devise property to a trustee where the terms of the trust are set forth in an instrument executed after the decedent's will is executed, as well as where such trust terms are set forth in a written instrument signed before or concurrently with the decedent's will.

The Problem:

Probate Code Section 6300 states that a decedent may validly devise property to a trustee where the terms of the trust are set forth in an instrument executed before or concurrently with the decedent's will. However, it is possible that a decedent may reference a trust in his or her will the terms of which are contained in a written instrument executed shortly after the decedent's will. For example, a decedent may have their will and trust prepared concurrently, but simply as a matter of timing may execute their will one or more days prior to their trust (e.g., if a notary is initially unavailable, a decedent may sign their will on day 1, and then later sign their trust on day 2 or day 3 when they are able to arrange for a notary). This technical difference in execution timing should not be grounds to defeat a decedent's intent. This is particularly true since Section 6300 already permits the trust to be amended after the will was executed.

In recognition of the need to avoid this potential problem, the Uniform Testamentary Additions to Trusts Act was amended in 1991 to provide that terms of a trust may be contained in a written instrument executed before, concurrently with, and after the will providing for the devise in trust. In recent years, California has adopted legislation designed to liberalize certain will formality laws such that the decedent's intention is not so easily thwarted by technicalities (See e.g., Probate Code Section 6110(c), amended in 2008 to include a harmless error rule for will execution formalities).

This proposal is intended to eliminate this potential technicality as a means to defeat a testator's intent and also bring California law into conformity with the current version of the Uniform Testamentary Additions to Trusts Act.

History:

The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced.

Impact on Pending Litigation:

None known.

Likely Support & Opposition:

Probate practitioners will likely support this proposal because it prevents a technicality from thwarting the intent of a decedent and brings California law into conformity with the Uniform Testamentary Additions to Trusts Act now adopted in many other states. It seems unlikely that there will be opposition to this proposal.

Fiscal Impact:

There is no anticipated fiscal impact.

Germaneness:

The members of the Trusts and Estates Section Executive Committee have an interest in these issues and have expertise concerning them given that they represent clients in connection with Probate Code Section 6300 and related matters.

Disclaimer

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Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF PROPOSAL

§6300. Testamentary additions to trusts.

A devise, 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 settlor 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, or after 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 trust property). 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 not 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 or after the death of the testator (regardless of whether made before or after the execution of the testator's will). Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the devise to lapse.