

RESOLUTION 11-01-2019

DIGEST

Trusts: Service of Petition

Amends Probate Code section 17203 to require that a petitioner serve a copy of the petition on the trustee and beneficiaries of the trust.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 17203 to require that a petitioner serve a copy of the petition on the trustees and beneficiaries of the trust. This resolution should be approved in principle because a trustee and beneficiaries of a trust are already entitled to a copy of the petition and they should not be required to ask for a copy of the petition.

Probate Code section 17203, subdivision (b), provides that a notice of the hearing and copy of the petition shall be served in the manner provided for in Code of Civil Procedure section 413.10 on any person whose right, title and interest in the property would be affected by the petition. Code of Civil Procedure section 413.10 deals with the service of summons on a person. The purpose of requiring a copy of the petition to be served on any person whose right, title and interest in the property would be affected is to allow them their right to due process and the opportunity to be heard since their rights in the property may be adversely affected. So, it stands to reason that a person should be served with a copy of the petition.

Under Probate Code section 17205, a petitioner is required to provide a copy of the petition to a trustee or beneficiary who has served and filed a notice of appearance or served a written request for a copy of the petition to petitioner or petitioner's counsel. Petitioner is required to provide a copy of the petition within five days after service of the notice of appearance or receipt of the written request. Because a trustee and beneficiaries would be entitled to a copy of the petition, the proposed resolution would not drastically change petitioner's requirement to serve a copy of the petition on a trustee and beneficiaries of a trust.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 17203, to read as follows:

- 1 §17203
- 2 a) At least 30 days before the time set for the hearing on the petition, the petitioner shall
- 3 cause notice of hearing and a copy of the petition to be delivered pursuant to Section 1215 to all
- 4 of the following persons:

5 (1) All trustees.

6 (2) All beneficiaries, subject to Chapter 2 (commencing with Section 15800) of Part 3.

7 (3) The Attorney General, if the petition relates to a charitable trust subject to the
8 jurisdiction of the Attorney General.

9 (b) At least 30 days before the time set for hearing on the petition, the petitioner shall
10 cause notice of the hearing and a copy of the petition to be served in the manner provided in
11 Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure
12 on any person, other than a trustee or beneficiary, whose right, title, or interest would be affected
13 by the petition and who does not receive notice pursuant to subdivision (a). The court may not
14 shorten the time for giving notice under this subdivision.

15 (c) If a person to whom notice otherwise would be given has been deceased for at least 40
16 days, and no personal representative has been appointed for the estate of that person, and the
17 deceased person's right, title, or interest has not passed to any other person pursuant to Division
18 8 (commencing with Section 13000) or otherwise, notice may instead be given to the following
19 persons:

20 (1) Each heir and devisee of the decedent, and all persons named as executors of the will
21 of the decedent, so far as known to the petitioner.

22 (2) Each person serving as guardian or conservator of the decedent at the time of the
23 decedent's death, so far as known to the petitioner.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: East Bay Trusts & Estates Lawyers

STATEMENT OF REASONS

The Problem: Probate Code section 17203, subdivision (a) states that a notice of hearing on a petition filed under section 17200 must be delivered to trustees, beneficiaries and, in certain circumstances involving charitable trusts, the Attorney General. Subdivision (a) does not require that a copy of the petition be delivered with the notice of hearing. In contrast, Probate Code section 17203, subdivision (b) requires that notice of hearing and a copy of the petition must be served on any person, other than a trustee or beneficiary, whose right, title, or interest would be affected by the petition and who does not receive notice under subdivision (a). The inconsistency between the two rules consequently requires such a petitioner to serve all third parties, but not trustees or beneficiaries, with a copy of the petition. Trustees and beneficiaries, however, may have more at stake in the outcome of a trust proceeding than third parties, and should thus be served with a copy of the petition.

The Solution: Insert into Probate Code section 17203, subdivision (a) that the petitioner shall cause a copy of the petition and notice of the hearing to be served on trustees, beneficiaries, and in appropriate circumstances, the Attorney General. Aligning subdivision (a) with subdivision (b) will ensure that all interested parties, including trustees and beneficiaries, will be served with a notice of the hearing and a copy of the petition, thus ensuring due process to any person whose right, title, or interest would be affected by the petition. Doing so will also promote judicial economy and reduce the time, expense, and burden for trustees, beneficiaries, and other interested parties. Under current law, to obtain a copy of a petition, a trustee or beneficiary must

file a written request to compel service of a copy of a petition, resulting in complaints about violations of due process, and/or requests for continuances of hearings to obtain a copy of a petition.

CURRENT OR PRIOR RELATED LEGISLATION

Probate Code section 17203 was amended in 1997 by Assembly Bill 1172. (1997 Cal. A.B. 1172, 1997 Cal. A.L.S. 724, 1997 Cal. Stats. ch. 724 (Enacted October 7, 1997).) By this amendment, the Legislature added, in subdivision (b), the following language: “other than a trustee or beneficiary,”. By so doing, the Legislature limited on whom the petitioner must serve a copy of the petition, even though such limitation appears contrary to legislative intent when read together with subdivision (a). Subdivision (b), referencing notice and a copy of the petition, states that “the petitioner shall cause notice of the hearing and a copy of the petition to be served . . . on any person, other than a trustee or beneficiary, whose right, title or interest would be affected by the petition and who does not receive notice pursuant to subdivision (a).” In contrast, subdivision (a), referencing only notice, states that all trustees and all beneficiaries must be served a “notice of hearing,” but it omits that a copy of the petition must be served on trustees and beneficiaries. Thus, when the Legislature added the language, “other than a trustee or beneficiary,” to subdivision (b) with the 1997 Amendment, and omitted the language “and a copy of the petition” in subdivision (a), it carved a distinction for to whom a copy of the petition must be served, i.e., not on trustees and beneficiaries.

AUTHOR AND/OR PERMANENT CONTACT: Ryan Szczepanik, Hartog, Baer & Hand APC, 4 Orinda Way, Suite 200-D, Orinda, California 94563, Phone no. 925-253-1717, email rjs@hbh.law

RESPONSIBLE FLOOR DELEGATE: Ryan Szczepanik

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE

TEXCOM agrees that justice will be better served if the Notice of Hearing for a Petition be accompanied by a copy of the Petition that will be addressed at the hearing.

RESOLUTION 11-02-2019

DIGEST

Probate: Trustee Notification to Minors

Amends Probate Code section 16061.7 to provide a method of notice to a minor beneficiary of a trust.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 16061.7 to provide a method of notice to a minor beneficiary of a trust. This resolution should be disapproved because it does not make it clear that a parent should be served in any case, regardless of whether the parent is later determined to have a conflict of interest.

Under existing law, service of a notice under Probate Code section 16061.7 triggers a requirement that a beneficiary has 120 days from service of the notice, or 60 days from service of a copy of the trust (whichever is longer) to file an action to contest the trust. The current statute does not contain a mechanism to serve a minor beneficiary of the trust. The effect of this missing element is that the 120-day statute of limitations does not begin to run for a minor until a minor turns 18. This delays the ability to complete administration of a trust until after all beneficiaries have reached the age of majority. Probate Code section 16460, subdivision (b)(3), already provides a similar mechanism to give notice of trust accountings to a guardian or parent, triggering a 180-day statute of limitations to object to a trust accounting.

A solution is needed to address the question of how to serve a minor beneficiary of a trust, but the resolution should more closely mirror the language already in Probate Code section 16460 subdivision (b)(3) to make it clear that a guardian or parent should be served in any case, regardless of whether the parent is later determined to have a conflict of interest. Further, the language suggested in the resolution should be amended to make it clear that there is always an obligation to serve the notice on a guardian or parent, but that the notice is effective to trigger the statute of limitations provided that the parent does not have a conflict of interest.

The resolution may benefit from including language noting that notice on the parent is only effective for purposes of section 16061.8 so long as the parent does not have a conflict of interest.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 16061.7 to read as follows:

1 §16061.7

2 (a) A trustee shall serve a notification by the trustee as described in this section in the
3 following events:

4 (1) When a revocable trust or any portion thereof becomes irrevocable because of the
5 death of one or more of the settlors of the trust, or because, by the express terms of the trust, the
6 trust becomes irrevocable within one year of the death of a settlor because of a contingency
7 related to the death of one or more of the settlors of the trust.

8 (2) Whenever there is a change of trustee of an irrevocable trust.

9 (3) Whenever a power of appointment retained by a settlor is effective or lapses upon
10 death of the settlor with respect to an inter vivos trust which was, or was purported to be,
11 irrevocable upon its creation. This paragraph shall not apply to a charitable remainder trust. For
12 purposes of this paragraph, “charitable remainder trust” means a charitable remainder annuity
13 trust or charitable remainder unitrust as defined in Section 664(d) of the Internal Revenue Code.

14 (4) The duty to serve the notification by the trustee pursuant to this subdivision is the
15 duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

16 (b) The notification by the trustee required by subdivision (a) shall be served on each of
17 the following:

18 (1) Each beneficiary of the irrevocable trust or irrevocable portion of the trust, subject to
19 the limitations of Section 15804.

20 (2) Each heir of the deceased settlor, if the event that requires notification is the death of
21 a settlor or irrevocability within one year of the death of the settlor of the trust by the express
22 terms of the trust because of a contingency related to the death of a settlor.

23 (3) If the trust is a charitable trust subject to the supervision of the Attorney General, to
24 the Attorney General.

25 (4) In the event that a beneficiary or heir as provided in this section is a minor at the time
26 the notification must be served, the trustee shall effectuate service required by subdivision (a) on
27 the minor’s guardian, or if the minor does not have a guardian, on the minor’s parent so long as
28 the parent does not have a conflict of interest.

29 (c) A trustee shall, for purposes of this section, rely upon any final judicial determination
30 of heirship, known to the trustee, but the trustee shall have discretion to make a good faith
31 determination by any reasonable means of the heirs of a deceased settlor in the absence of a final
32 judicial determination of heirship known to the trustee.

33 (d) The trustee need not provide a copy of the notification by trustee to any beneficiary or
34 heir (1) known to the trustee but who cannot be located by the trustee after reasonable diligence
35 or (2) unknown to the trustee.

36 (e) The notification by trustee shall be served by any of the methods described in Section
37 1215 to the last known address.

38 (f) The notification by trustee shall be served not later than 60 days following the
39 occurrence of the event requiring service of the notification by trustee, or 60 days after the
40 trustee became aware of the existence of a person entitled to receive notification by trustee, if
41 that person was not known to the trustee on the occurrence of the event requiring service of the
42 notification. If there is a vacancy in the office of the trustee on the date of the occurrence of the
43 event requiring service of the notification by trustee, or if that event causes a vacancy, then the
44 60-day period for service of the notification by trustee commences on the date the new trustee
45 commences to serve as trustee.

46 (g) The notification by trustee shall contain the following information:

47 (1) The identity of the settlor or settlors of the trust and the date of execution of the trust
48 instrument.

49 (2) The name, address, and telephone number of each trustee of the trust.

50 (3) The address of the physical location where the principal place of administration of the
51 trust is located, pursuant to Section 17002.

52 (4) Any additional information that may be expressly required by the terms of the trust
53 instrument.

54 (5) A notification that the recipient is entitled, upon reasonable request to the trustee, to
55 receive from the trustee a true and complete copy of the terms of the trust.

56 (h) If the notification by the trustee is served because a revocable trust or any portion of it
57 has become irrevocable because of the death of one or more settlors of the trust, or because, by
58 the express terms of the trust, the trust becomes irrevocable within one year of the death of a
59 settlor because of a contingency related to the death of one or more of the settlors of the trust, the
60 notification by the trustee shall also include a warning, set out in a separate paragraph in not less
61 than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

62 “You may not bring an action to contest the trust more than 120 days from the date this
63 notification by the trustee is served upon you or 60 days from the date on which a copy of the
64 terms of the trust is delivered to you during that 120-day period, whichever is later.”

65 (i) Any waiver by a settlor of the requirement of serving the notification by trustee
66 required by this section is against public policy and shall be void.

67 (j) A trustee may serve a notification by trustee in the form required by this section on
68 any person in addition to those on whom the notification by trustee is required to be served. A
69 trustee is not liable to any person for serving or for not serving the notice on any person in
70 addition to those on whom the notice is required to be served. A trustee is not required to serve a
71 notification by trustee if the event that otherwise requires service of the notification by trustee
72 occurs before January 1, 1998.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Trust instruments are utilized to avoid probate and other court proceedings. Probate Code section 16061.8 provides that a person upon whom a trustee notification is served has 120 days from the date of the notification by the trustee or 60 days from the date on which a copy of the terms of the trust is delivered to him or her, whichever later, to file an action to contest a trust. However, under the current law, if a trust is silent as to who can assert the rights of a minor beneficiary or heir of the deceased settlor to contest the terms of a trust, then the 120-day statute of limitations does not begin to run until the beneficiary or heir reaches the age of majority. Accordingly, unless a guardian ad litem is appointed through a court proceeding, then the 120-day statute of limitations on the time to contest a trust does not begin to run and a trust administration cannot be completed in its entirety until all beneficiaries of a trust or heirs of a deceased settlor reach the age of majority and are provided notice under this section.

The Solution: This resolution utilizes the method from Probate Code section 16460(b)(3) as it

relates to the statute of limitations to contest a trust accounting. In Probate Code section 16460(b)(3) an accounting for a trust can be received by a minor's guardian or parent so long as the parent does not have a conflict of interest, in order to start the running of the 3-year statute of limitations. The statute of limitations will run in the normal course and the trust administration can close without the need of a guardian ad litem or waiting until the beneficiary or heir of the deceased settlor reaches the age of majority.

IMPACT STATEMENT

This resolution will affect Probate Code section 16061.8 as it will define who is to receive notice of a minor beneficiary or heir of a deceased settlor's right to contest the terms of a trust.

CURRENT OR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Kimberly R. McGhee, Esq., Black & McGhee, A Professional Law Corporation, 144 East Washington Ave., Escondido, CA 92025; (760) 745-2900.

RESPONSIBLE FLOOR DELEGATE: Kimberly R. McGhee, Esq., Black & McGhee, A Professional Law Corporation, 144 East Washington Ave., Escondido, CA 92025; (760) 745-2900.

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

The goals of this Resolution are to reduce the need to appoint a guardian ad litem for the purpose of providing notice to a minor beneficiary and shorten the limitations period to avoid a minor beneficiary instigating litigation upon attaining the age of majority. However, the Resolution, as drafted, does not appear to accomplish either of these goals.

Because notice is not effective as to a parent with a conflict of interest, litigation will likely ensue over whether a parent was conflicted since the term "conflict of interest" is not defined. If it can be shown that notice was provided to a parent of a minor beneficiary with a conflict of interest, the limitations period would not have run.

Further, even if the term "conflict of interest" could clearly and adequately be defined, it is the opinion of some that a conflict of interest may nearly always exist between a parent and child, thus requiring the appointment of guardian ad litem for notice purposes. In such a case, the stated goal of the Resolution (avoiding the need for the appointment of a guardian ad litem) could never be met.

TEXCOM disagrees that the appointment of a guardian ad litem is required each instance notice is required to be served upon a minor beneficiary. Rather, TEXCOM believes the appointment of a guardian ad litem is one of several tools available to a fiduciary attempting to toll the limitations period with certainty. Although appointing a guardian ad litem may guarantee that sufficient notice was in fact given, there are several theories that notice to a parent of a minor beneficiary may not result in the ability of a minor beneficiary to commence litigation upon attaining the age of majority. Some opine that Probate Code Section 16061.7 is a procedural provision to shorten the statute of limitations to an abbreviated 120 days, but that the general three year statute of limitations would still apply and limit the potential for long-term liability, even if the requirements of Section 16061.7 for notice were not met. Others opine that notice to a parent of a minor beneficiary may be sufficient. Finally, a fiduciary also has the option of filing a 17200 petition to determine the validity of the governing instrument as well as the beneficiaries of such trust.

The proposed modification of Section 16061.7 under the Resolution would require that a guardian ad litem be appointed for the purpose of serving notice whenever a parent of a minor has a conflict of interest. Because a conflict of interest may nearly always exist between a parent and child, the proposed language would create an administrative burden and expense that does not necessarily already exist under current law. For example, assume that a settlor's trust agreement provided for a \$1,000 gift to a grandchild upon the settlor's death. The administrative expense of appointing a guardian ad litem for notice purposes would well exceed the value of the gift to a minor grandchild. The fiduciary should continue to have the option under existing law to weigh the likelihood of future trust challenges and seek the appointment of a guardian ad litem (or 17200 petition) to establish certainty rather than be required to commence a court proceeding simply to comply with Section 16061.7.

Finally, TEXCOM was concerned that the Resolution may have a chilling effect on making gifts to minors.

RESOLUTION 11-03-2019

DIGEST

Probate Code: Delete Obsolete Reference to Repealed Section

Amends Probate Code section 15642 to delete reference to a repealed Probate Code section.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 15642 to delete a reference to a repealed Probate Code section. This resolution should be approved in principle because it clarifies the law.

The current version of Probate Code section 15642 includes a cross-reference to Probate Code section 21350. Probate Code section 21350 was repealed as of January 1, 2014. This resolution will therefore clarify the law by correcting an oversight by the Legislature.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 15642, to read as follows:

- 1 §15642
- 2 (a) A trustee may be removed in accordance with the trust instrument, by the court on its
- 3 own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.
- 4 (b) The grounds for removal of a trustee by the court include the following:
- 5 (1) Where the trustee has committed a breach of the trust.
- 6 (2) Where the trustee is insolvent or otherwise unfit to administer the trust.
- 7 (3) Where hostility or lack of cooperation among cotrustees impairs the administration of
- 8 the trust.
- 9 (4) Where the trustee fails or declines to act.
- 10 (5) Where the trustee's compensation is excessive under the circumstances.
- 11 (6) Where the sole trustee is a person described in ~~subdivision (a) of Section 21350 or~~
- 12 subdivision (a) of Section 21380, whether or not the person is the transferee of a donative
- 13 transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all
- 14 other facts and circumstances, which shall be made known to the court, the court finds that it is
- 15 consistent with the settlor's intent that the trustee continue to serve and that this intent was not
- 16 the product of fraud or undue influence. Any waiver by the settlor of this provision is against
- 17 public policy and shall be void. This paragraph shall not apply to instruments that became
- 18 irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following
- 19 conditions are met:

20 (A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more
21 of the trustees, the person who drafted or transcribed the instrument, or the person who caused
22 the instrument to be transcribed.

23 (B) The instrument is reviewed by an independent attorney who (1) counsels the settlor
24 about the nature of his or her intended trustee designation and (2) signs and delivers to the
25 settlor and the designated trustee a certificate in substantially the following form:
26
27

28 "CERTIFICATE OF INDEPENDENT REVIEW
29 I, _____, have reviewed
30 (attorney's name)
31 _____ and have counseled my client,
32 (name of instrument)
33 _____, fully and privately on the nature and
34 (name of client)
35 legal effect of the designation as trustee of _____
36 (name of trustee)
37 contained in that instrument. I am so disassociated from
38 the interest of the person named as trustee as to be in a position to
39 advise my client impartially and confidentially as to the
40 consequences of the designation. On the basis of this counsel,
41 I conclude that the designation of a person who would
42 otherwise be subject to removal under paragraph (6) of
43 subdivision (b) of Section 15642 of the Probate Code is clearly
44 the settlor's intent and that intent is not the product of fraud or
45 undue influence.
46 _____"
47 (Name of Attorney) (Date)

48
49 This independent review and certification may occur either before or after the instrument
50 has been executed, and if it occurs after the date of execution, the named trustee shall not be
51 subject to removal under this paragraph. Any attorney whose written engagement signed by the
52 client is expressly limited to the preparation of a certificate under this subdivision, including the
53 prior counseling, shall not be considered to otherwise represent the client.

54 (C) After full disclosure of the relationships of the persons involved, the instrument is
55 approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6
56 of Part 4 of Division 4.

57 (7) If, as determined under Part 17 (commencing with Section 810) of Division 2, the
58 trustee is substantially unable to manage the trust's financial resources or is otherwise
59 substantially unable to execute properly the duties of the office. When the trustee holds the
60 power to revoke the trust, substantial inability to manage the trust's financial resources or
61 otherwise execute properly the duties of the office may not be proved solely by isolated
62 incidents of negligence or improvidence.

63 (8) If the trustee is substantially unable to resist fraud or undue influence. When the
64 trustee holds the power to revoke the trust, substantial inability to resist fraud or undue
65 influence may not be proved solely by isolated incidents of negligence or improvidence.

66 (9) For other good cause.
67 (c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of
68 the trustee was not consistent with the intent of the settlor or was the product of fraud or undue
69 influence, the person being removed as trustee shall bear all costs of the proceeding, including
70 reasonable attorney's fees.

71 (d) If the court finds that the petition for removal of the trustee was filed in bad faith and
72 that removal would be contrary to the settlor's intent, the court may order that the person or
73 persons seeking the removal of the trustee bear all or any part of the costs of the proceeding,
74 including reasonable attorney's fees.

75 (e) If it appears to the court that trust property or the interests of a beneficiary may suffer
76 loss or injury pending a decision on a petition for removal of a trustee and any appellate review,
77 the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee
78 whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary
79 trustee. The court may also suspend the powers of the trustee to the extent the court deems
80 necessary.

81 (f) For purposes of this section, the term "related by blood or marriage" shall include
82 persons within the seventh degree.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem (including Existing Law): The existing Probate Code Section 15642(b)(6) references Probate Code section 21350 which was repealed effective as of January 1, 2014.

The Solution: Strike the reference to the repealed statute.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Miranda C. Franks, 3322 Sweetwater Springs Blvd, Suite 203, Spring Valley, CA 91977, voice 619-660-0520, fax 619-439-0033, e-mail mfranks@frankslawoffices.com

RESPONSIBLE FLOOR DELEGATE: Miranda C. Franks

RESOLUTION 11-04-2019

DIGEST

Wills: Requirement that Attesting Witnesses Print their Names

Amends Probate Code section 6110 to require that attesting witnesses to a will print their names next to their signatures.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 6110 to require that attesting witnesses to a will print their names next to their signatures. This resolution should be approved in principle because printed names will assist in locating the witnesses should they be needed to testify at trial regarding the attestation and the validity of the will.

Under existing law, in the event of a will contest, the proponent of the will bears the burden of proving that the will was duly executed and witnessed by at least two subscribing witnesses. Probate Code section 8253 specifies that “[a]t the trial, each subscribing witness shall be produced and examined.” While there are statutory provisions for relying on evidence of other witnesses to authenticate a witness signature, including eyewitness testimony (Evid. Code, §§ 1411-1412), lay opinion testimony about the writer’s handwriting (Evid. Code, § 1418), to identify the witness is crucial.

While this resolution’s requirement that the names of attesting witnesses be printed next to their signatures may not solve all identity problems, it will help clarify the identity of the attesting witness in the event of illegible signatures.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 6110, to read as follows:

- 1 §6110
- 2 (a) Except as provided in this part, a will shall be in writing and satisfy the requirements
- 3 of this section.
- 4 (b) The will shall be signed by one of the following:
- 5 (1) By the testator.
- 6 (2) In the testator’s name by some other person in the testator’s presence and by the
- 7 testator’s direction.
- 8 (3) By a conservator pursuant to a court order to make a will under Section 2580.

9 (c) (1) Except as provided in paragraph (2), the will shall be witnessed ~~by being signed,~~
10 during the testator's lifetime, by at least two persons each of whom (A) being present at the same
11 time, witnessed either the signing of the will or the testator's acknowledgement of the signature
12 or of the will and (B) understand that the instrument they sign is the testator's will. Each witness
13 shall print and sign their name on the will.

14 (2) If a will was not executed in compliance with paragraph (1), the will shall be treated
15 as if it was executed in compliance with that paragraph if the proponent of the will establishes by
16 clear and convincing evidence that, at the time the testator signed the will to constitute the
17 testator's will.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: It is frequently difficult to ascertain the identity of attesting witnesses to a will due to illegible signatures. This makes it difficult, if not impossible, to locate the witness if there is a challenge to the will or questions regarding its validity. (See, *Estate of Ben-Ali*, (2013) 216 Cal.App.4th 1026 [The trial court's admission to probate of a will with an attestation clause bearing the apparent signatures of the testator and two witnesses was reversed on appeal where the signature of one of the witnesses could not be identified. "Proof of the signatures of the decedent and the witnesses makes out a prima facie case of due execution. Proof of the signature of the decedent and only one of the witnesses does not. There was no adequate evidentiary basis for determining the illegible entry on the signature page was in fact a signature by a person distinct from the testator who was competent, present during the execution, and understood the instrument to be a will."].)

The Solution: The legislature has a well-established interest in guarding against false and fraudulent wills as evidenced by the requirement that there are two witnesses to a will. (*In re Estate of Seaman* (1905) 146 Cal. 455.) As further evidence of the legislature's desire to ensure effective witness attestation and the importance of the same, Probate Code section 6240 provides witnesses to statutory wills to provide their address, in addition to printing and signing their name. By requiring an attesting witness to print, in addition to signing their name, increases the likelihood the attesting witness may later be identified and located should a concern arise over the validity of the will. The function of an attesting witness to a will is to take note that those things are done which are required by statute and to subscribe his name to the instrument. (*Estate of La Mont* (1952) 39 Cal.2d 556.) A will with illegible signatures renders moot the attesting witness requirement the legislature has clearly signified is essential to proper execution.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Hilary J. Vrem, 1550 Hotel Circle North, Suite 300, San Diego, CA 92108-2911, voice 619-696-7066, fax 619-696-6907, e-mail hilary@bjjlaw.com

RESPONSIBLE FLOOR DELEGATE: Hilary J. Vrem

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

TEXCOM opposes this Resolution because it is not reflective of the direction that California law is headed with regard to the execution and validity of wills. TEXCOM believes that the current trend is to make it easier, rather than more difficult, for a testator to execute a will. Under the Resolution, if both witnesses' names are not printed, then the will would be invalid, absent a showing by clear and convincing evidence that the testator intended the document to constitute the testator's will.

Additionally, the proposed language suggests that each attesting witnesses' names must be printed rather than typed; this seems confusing or onerous.

Finally, TEXCOM is concerned with the chilling effect that this Resolution would have upon the ability of a testator to create their own will without the assistance of legal counsel, as well as the number of wills that could be denied validity due to improper execution.

RESOLUTION 11-05-2019

DIGEST

Probate Code: Failure to Claim Appointment as Administrator

Amends Probate Code section 8468 to create a deadline for claiming priority to appointment as administrator of a decedent's estate.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 8468 to create a deadline for claiming priority to appointment as administrator of a decedent's estate. This resolution should be disapproved because the court already has the discretionary power to disregard a person's priority for appointment.

California law currently sets no deadline for a person to claim priority to be appointed as the administrator of the estate. Thus, when another person files a Petition for Appointment, the person with priority can appear and seek appointment. (*Graybiel v. Burke* (1954) 124 Cal.App.2d 255, 261.) Priority for appointment, however, does not require the probate court to appoint the person with priority over the petitioning party. The failure to timely bring an action for probate can be good cause for the court not to appoint the person with priority.

The resolution addresses a real concern regarding the limit on the time period to claim priority. The proponent is also correct that there are instances where a person with priority may wait indefinitely before commencing probate proceedings. Thus, there is an issue to be addressed. The proposed solution, however, does not solve the problem because the court retains discretion to appoint any person with priority, even if the proposed time limit were adopted.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 8468 to read as follows:

§8468

- 1 Unless good cause for delay is shown, if persons having priority fail to claim appointment as
- 2 administrator within 90 days of the death of the decedent, the court may find that the person has
- 3 waived their rights to appointment and appoint any person who claims appointment.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Currently when a decedent dies intestate, Probate Code § 8461 establishes the priority for the appointment of an Administrator of the Estate. However, there is no limit on the

time period to claim priority. A person with priority may wait indefinitely before commencing probate proceedings, possibly to the detriment of the beneficiaries. If a person that is entitled to appointment, but with a lower priority, files a petition for probate, they risk that the person with higher priority may step in and claim the appointment. This can result in delay in the administration of the estate and the person with lower priority incurring the costs of filing a petition for probate.

The Solution: The amendment would create a deadline, for a person with priority, to claim the appointment as Administrator of the Estate. A court may find that there has been a waiver of priority and appoint another qualified person as Administrator of the Estate. The proposal is consistent with Probate Code § 8001 that establishes a waiver for an executor, named in a will, to claim appointment.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

AUTHOR AND/OR PERMANENT CONTACT: Edward K. Dunn, The Law Office of Edward K. Dunn, 850 Iron Point Road, Suite 113, Folsom, CA 95630; (916) 333-0534; edwarddunnattorney@att.net

RESPONSIBLE FLOOR DELEGATE: Edward K. Dunn

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

Sometimes there are legitimate reasons that a person with priority delays seeking appointment, or the need for a probate proceeding or appointment of a personal representative is under dispute. TEXCOM's position is that no one should be forced to give up their priority of appointment. The failure to file can be a factor the court considers in ordering an appointment.