

RESOLUTION 04-03-2008

DIGEST

Probate: Termination of Deposit of Estate Planning Documents

Amends Probate Code section 732 to provide for the transfer of estate planning documents to the court clerk when an attorney in active practice terminates the deposit of the documents.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 732 to provide for the transfer of estate planning documents to the court clerk when an attorney in active practice terminates the deposit of the documents. This resolution should be disapproved because the cost involved seemingly outweighs the limited benefit.

Under existing law, attorneys have a duty to take reasonable steps to safeguard client estate planning documents deposited with the attorney. The deposit can only be terminated as provided for by statute. Current statutory law allows a deposit to be terminated if the attorney mails notice to reclaim the documents to the depositor at the depositor's last known address and the depositor fails to do so within 90 days. However, there is no current requirement that the documents thereafter be preserved.

This resolution recommends a process by which documents which would otherwise be destroyed be preserved indefinitely by the court clerk of the county of the depositor's last known domicile. The benefit of the change would be that documents which would otherwise be lost forever would now remain accessible pursuant to the suggested change. The detriment in the process is that there could be a significant cost associated with the storage and indexing of the great number of records which this change would require. On balance, the utility of a few useful documents being preserved indefinitely by the county clerk would appear to be outweighed by the significant cost of storing, maintaining and accessing a large number of documents that will very seldom be used.

Without compelling evidence that the significant cost of this change would be worth the effort, the resolution should be disapproved at this time.

SECTION/COMMITTEE REPORTS

TRUSTS AND ESTATES SECTION

APPROVE IN PRINCIPLE

This resolution would allow an active attorney wishing to terminate a deposit of estate planning documents to deposit those documents with the clerk of the court if the client could not be

located. Under present law, where an attorney is deceased or inactive, estate planning documents can be deposited with the court clerk. Where the attorney is active, the only current option is to transfer the documents to another attorney. Allowing the deposit to the court clerk even by an active attorney does seem to improve client protection by making it easier to locate documents.

There are potential significant issues, however. First, this could turn into a de facto will registry and be a burden on the courts. Second, there are a number of issues to be resolved on what constitutes an “estate planning document”. Finally, the cost of making the deposit and who should bear the cost needs to be determined.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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 RESOLUTION

RESOLVED, that the Conference of the Delegates of California Bar Associations recommends that legislation be sponsored to amend Section 732 of the Probate Code, as follows:

1 §732

2 (a) An attorney may terminate a deposit under this section if the attorney has
3 mailed notice to reclaim the document to the depositor's last known address and the
4 depositor has failed to reclaim the document within 90 days after the mailing. The
5 document shall be transferred to the clerk of the superior court of the county of the
6 depositor's last known domicile. The attorney shall advise the clerk that the document is
7 being transferred pursuant to Section 732.

8 (b) Subject to subdivision (f), an attorney may terminate a deposit under this
9 section by transferring the document to another attorney. All documents transferred under
10 this subdivision shall be transferred to the same attorney.

11 (c) Subject to subdivision (f), if an attorney is deceased, lacks legal capacity, or is
12 no longer an active member of the State Bar, a deposit may be terminated under this
13 section by transferring the document to the clerk of the superior court of the county of the
14 depositor's last known domicile. The attorney shall advise the clerk that the document is
15 being transferred pursuant to Section 732.

16 (d) An attorney may not accept a fee or compensation from a transferee for
17 transferring a document under this section. An attorney may charge a fee for receiving a
18 document under this section.

19 (e) Transfer of a document by an attorney under this section is not a waiver or
20 breach of any privilege or confidentiality associated with the document, and is not a
21 violation of the rules of professional conduct. If the document is privileged under Article 3

22 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the
23 document remains privileged after the transfer.

24 (f) If the document is a will and the attorney has actual notice that the depositor has
25 died, the attorney may terminate a deposit only as provided in Section 734.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Provides means for termination of a deposit of estate planning documents with an attorney. The statute provides that a deceased, incapacitated or inactive attorney may transfer the documents to the court clerk. An active attorney may not do so.

This Resolution: Amends Probate code Section 732(a) to provide that when an attorney notifies the depositor to reclaim a document and the depositor fails to do so, the deposit is terminated by the attorney's transferring the document to the court clerk of the depositor's last known domicile.

The Problem: Under existing law, attorneys have a duty to take reasonable steps to safeguard client estate planning documents deposited with the attorney. The deposit can only be terminated as provided in the statutes. The existing statute allows a deposit to be terminated if the attorney mails notice to reclaim the document to the depositor at the depositor's last known address and the depositor fails to do so within 90 days. There is no requirement that the document be preserved. Other provisions of the statute allow an attorney who dies, is incapacitated or becomes inactive to terminate a deposit by transferring the document to the clerk of the superior court of the depositor's domicile. Client protection would be enhanced by adding a provision allowing transfer of the document to the superior court clerk after the depositor is given notice and fails to reclaim the document.

IMPACT STATEMENT:

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

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The proposed change would require a significant amount of time and resources to facilitate the storage of documents at a time when the State Court system's resources are already stretched. To

facilitate this resolution, the State would be required to find existing or create new storage facilities in which to store the original documents. Because the state would be storing original documents, these facilities would need to be state of the art environmentally controlled storage facilities. Such facilities are difficult to find and very expensive to maintain. The State would also be required to create an index / retrieval system and to develop new regulations and protocols for the storage and retrieval of these original documents. These requirements would no doubt be labor intensive, thus adding additional costs. On a daily basis we are bombarded with news of budget cut and mandatory spending requirements. The Court's budgets are stretched to the maximum with many unfunded mandates which are paralyzing it. Now is not the time to add to that burden.

The measure also seeks to relieve attorneys of their duties to their clients at the expense of the taxpayers. The state of the law in this area is clear, as are the duties of an attorney who chooses to maintain such original documents. Maintenance of these original documents is not a requirement and is actually discouraged by many insurance carriers due to concerns over future liability. For a variety of reasons, some attorneys choose to do so anyway. The best course to resolve the problems created by the alleged non compliance with the law is for the attorney to not agree to safeguard the originals in the first place. The small benefits of this proposal are far outweighed by the enormous costs of establishing and maintaining this system.