

## RESOLUTION 04-01-2008

### DIGEST

#### Joint Tenancy: Restriction to Natural Persons

Amends Civil Code section 683 to require that only natural persons may hold title in joint tenancy with right of survivorship.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Civil Code section 683 to require that only natural persons may hold title in joint tenancy with right of survivorship. This resolution should be approved in principle because allowing an entity, which will never die and always be the survivor, to join in joint tenancies with a right of survivorship, defeats the purpose of this form of ownership.

Joint tenancies are an ancient form of real property ownership, created by the common law, before modern entities existed. Entities which do not die are a more modern creation. Because an entity will never die, it will always be “the survivor” of joint tenancies, and thus creates a trap for the unwary. Current California law as to the participants in a joint tenancy is uncertain, as this issue has never been adjudicated, and this resolution will clarify the law.

### SECTION/COMMITTEE REPORTS

#### TRUSTS AND ESTATES SECTION

#### DISAPPROVE

This resolution would add the word “natural” in front of persons in Civil Code Section 683. There is little evidence of any problems from the lack of the word in the current statute, and it appears that joint tenancies actually occur with entities other than natural persons, such as corporations. To the extent that such joint tenancies exist, this resolution would likely deprive persons of property rights. In addition, trusts, which are a relationship rather than an entity, exist in joint tenancy with persons and it’s not clear how this resolution would affect those relationships. Because the impact is uncertain and may very well deny persons existing property rights, TEXCOM disapproves this resolution.

**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 Delegates of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 683 to read as follows:

- 1 § 683.
- 2 (a) A joint interest is one owned only by two or more natural persons in equal shares,
- 3 by a title created by a single will or transfer, when expressly declared in the will or transfer
- 4 to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or
- 5 from tenants in common or joint tenants to themselves or some of them, or to themselves
- 6 or any of them and others, or from a husband and wife, when holding title as community
- 7 property or otherwise to themselves or to themselves and others or to one of them and to
- 8 another or others, when expressly declared in the transfer to be a joint tenancy, or when
- 9 granted or devised to executors or trustees as joint tenants. A joint tenancy in personal
- 10 property may be created by a written transfer, instrument, or agreement.
- 11 (b) Provisions of this section do not apply to a joint account in a financial institution if
- 12 Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such
- 13 account.

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

**PROPONENT:** San Diego County Bar Association

**STATEMENT OF REASONS:**

Existing Law: The right of survivorship is considered the single most important feature of a joint tenancy that distinguishes it from other forms of cotenancy. *Estate of Propst* (1990) 50 Cal.3d 448. Under existing California law, however, the term "person" is generally construed to include legal entities, including corporations. Since the perpetual life of a corporation would prevent a cotenant of the corporation from holding any meaningful survivorship rights, it appears inconsistent with the concept of a joint tenancy to allow a corporation to be a joint tenant. However, the literal language of Civil Code section 683 suggests that a corporation or other entity could be a joint tenant. Although this problem was recognized more than 50 years ago in a California appellate decision, *Bank of America v. Long Beach Federal Savings and Loan Ass'n.* (1956)141 Cal App. 2d 618, it has never been resolved.

This Resolution: Would clarify that legal entities may not be joint tenants.

The Problem: Under current law, a person who reads Civil Code section 683 may conclude that a joint tenant could include a legal entity. This legislation will clarify the law and remove a "trap for the unwary" that may exist under the current statute.

**IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** Art Wilcox

## **RESOLUTION 04-02-2008**

### **DIGEST**

#### Probate: Jurisdiction for Elder Abuse Actions

Amends Welfare & Institutions Code section 15657.3 to give the probate departments of trial courts initial jurisdiction of elder abuse cases.

### **RESOLUTION COMMITTEE RECOMMENDATION**

#### **DISAPPROVE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Welfare & Institutions Code section 15657.3 to give the probate departments of trial courts initial jurisdiction of elder abuse cases. This resolution should be disapproved because sending cases to a “probate department” versus a “civil department” is ambiguous and an inappropriate legislative management of the judiciary.

The essence of the proposed change is to allow probate departments, versus civil departments, to have initial jurisdiction of elder abuse cases under Welfare & Institutions Code section 15600, et seq. The nature of the department in which a case is heard depends on the nature of the case itself. There is no hard division under the law for probate departments and civil departments. Accordingly, this determination is better left to the trial court to be made on a case-by-case basis. Another proposed change by this resolution would purport to transfer jurisdiction to “probate departments” if a “conservator of the person and/or estate has been appointed for the plaintiff and has qualified prior to the initiation of the action for abuse...” It is unclear why such a conservator must have been appointed previously or what “qualification” they must have had.

### **SECTION/COMMITTEE REPORTS**

#### **TRUSTS AND ESTATES SECTION**

#### **DISAPPROVE**

This resolution would modify Welfare & Institutions Code §15657.3 to provide that the Probate Court has concurrent jurisdiction over all elder abuse actions and that such actions “shall” be transferred to the Probate Court where there is a pending conservatorship, where the conservator has been appointed prior the elder abuse action, or where no good cause is shown to keep the matter in civil court.

This resolution should be disapproved, because as written there could be significant unintended consequences in terms of assignments between courts. The designation “Probate Court” is more a matter of form than substance; legally, it is simply part of the Civil Court, so the presiding judge in a court has authority to decide where a case is assigned. In addition, the direction that the matter “shall” be transferred to the Probate Court is too restrictive as there are times when, even with the existence of a conservatorship, it may be desirable to have the action outside of the

probate court and the plaintiff should have the option to stay in civil court. Specifying concurrent jurisdiction in the probate court would enable the action to remain in probate, should that be the more appropriate venue, even if there is not a currently pending conservatorship. If the resolution were considered, it should at a minimum, delete new section (b), thus allowing permissive filing in probate court but not mandating it.

**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 Delegates recommends that Welfare & Institutions Code section 15657.3 be amended as follows:

1 §15657.3.

2 (a) The department of the superior court having jurisdiction over probate  
3 conservatorships shall also have concurrent jurisdiction over civil all actions and  
4 proceedings involving a claim for relief arising out of the abduction, as defined in Section  
5 15610.06, or the abuse of an elderly or dependent adult, ~~if a conservator has been~~  
6 ~~appointed for plaintiff prior to the initiation of the action for abuse.~~ under the "Elder Abuse  
7 and Dependent Adult Civil Protection Act" (EADACPA), pursuant to Welfare &  
8 Institutions Code section 15600 et seq.

9 (b) When a civil action has been filed which cites EADACPA, that action shall be  
10 transferred to the department of the superior court having jurisdiction over probate  
11 conservatorships for litigation if either of the following apply:

12 (1) A conservator of the person and/or estate has been appointed for the plaintiff  
13 and has qualified prior to the initiation of the action for abuse, or

14 (2) No good cause is shown to retain the action in the Civil Court.

15 ~~(b)~~ (c) The department of the superior court having jurisdiction over probate  
16 conservatorships shall not grant relief under this article if the court determines that the  
17 matter should be determined in a civil action, but shall instead transfer the matter to the  
18 general civil calendar of the superior court. The court need not abate any proceeding for  
19 relief pursuant to this article if the court determines that the civil action was filed for the  
20 purpose of delay.

21 ~~(e)~~ (d) The death of the elder or dependent adult does not cause the court to lose  
22 jurisdiction of any claim for relief for abuse of an elder or dependent adult.

23 ~~(d)~~ (e) Upon petition, after the death of the elder or dependent adult, the right to  
24 maintain an action shall be transferred to the personal representative of the decedent, or if  
25 none, to the person or persons entitled to succeed to the decedent's estate.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS:**

Existing Law: Provides that the Probate Division has concurrent jurisdiction for purposes of actions brought under the Elder Abuse statutes shall be in the Probate Division only where a conservatorship has been filed.

This Resolution: Would clarify that any action brought pursuant to EADACPA, shall be filed and heard in the Probate Department of the Superior Court, unless good cause exists to transfer the action to the civil division.

The Problem: Actions brought under EADACPA come in a variety of forms including, abduction, physical abuse, and financial abuse. Under existing statutes such actions may be brought in the Probate Division only where there is a current conservatorship action on file. Where no such conservatorship action is on file, abuse actions are typically brought in the civil court. However, there are a large number of EADACPA actions which involve claims for elder abuse which also involve claims under the Probate Code for return of a deceased elder's property or in connection with elder abuse in connection with a Trust. Decedent's claims and Trust claims come under the exclusive jurisdiction of the Probate Department, but do not appear to be permitted in the Probate Department under this section of EADACPA. The clarification would permit all EADACPA actions to be brought or transferred to the Probate Division, which is uniquely suited to dealing with matters relating to Elder Abuse.

**IMPACT STATEMENT:**

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

**AUTHOR AND PERMANENT CONTACT:** Mary V. J. Cataldo, 1917 Palomar Oaks Way, Ste. 300, Carlsbad, CA 92008 (760) 931-9700

**RESPONSIBLE FLOOR DELEGATE:** Mary Cataldo

**COUNTERARGUMENT**

**WOMEN LAWYERS OF SACRAMENTO**

Most elder abuse and dependent adult cases arise from physical injuries and financial fraud inflicted on the elder and/or dependent adult. The Civil Division of the Superior Court has long been used to determine personal injury actions and fraud and is as suited, if not more suited, than the Probate Division to deal with such matters.

By forcing all EADACPA claims into the Probate Division, the proposed amendment to Welfare & Institutions Code § 15657.3 will deprive elders and dependent adults of their right to a jury

trial. In probate proceedings, there is no right to a jury trial absent an express provision in the code. Instead, the Probate Court decides, in its discretion, whether a particular case or issues in a case should be permitted to go to a jury. [*Estate of Beach* (1975) 15 Cal.3d 623; *Heiser v. Superior Court* (1979) 88 Cal.App.3d 276.]

Moreover, many civil attorneys are not familiar with probate procedures and rules and, in the interests of avoiding potential legal malpractice, may not be willing to pursue EADACPA cases in the Probate Division. These civil attorneys provide a valuable resource to elders and dependent adults, working on a contingency fee basis and advancing the costs necessary to litigate EADACPA cases. The proposed amendment could deprive elders and dependent adults of the services of these attorneys.

Those cases which are more suited to the Probate Division will most likely be directed there in any event by the court or the attorney handling the case, since a trust and estates attorney will be more comfortable in that forum and a civil attorney may not risk handling probate issues which are outside his or her area of expertise.

## **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.

**AUTHOR AND/OR PERMANENT CONTACT:** Patrick H. Fabian, 101 Howard Street, Suite 310, San Francisco, CA 94105, 415.543.5443; fax: 510.525.5517; e-mail phf@phfabian.com

**RESPONSIBLE FLOOR DELEGATE:** Patrick H. Fabian

**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.

## RESOLUTION 04-04-2008

### DIGEST

#### Probate: Civil Standard of Proof for Determining Felonious and Intentional Killing

Amends Probate Code section 254 to change the civil standard of proof for “felonious and intentional killing” to clear and convincing evidence and adds Probate Code section 254.1 to appoint defense counsel in such cases.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code section 254 to change the civil standard of proof for “felonious and intentional killing” to clear and convincing evidence and adds Probate Code section 254.1 to appoint defense counsel in such cases. This resolution should be approved in principle because it provides valuable procedural protections to a person accused of a “felonious and intentional killing” that are currently lacking in probate proceedings.

In a criminal action, the accused has a panoply of protections, including the right to counsel and proof beyond a reasonable doubt. Even in a wrongful death suit, the accused has the right to a jury trial. By contrast, in probate court, an heir accused of killing the decedent has no right to a jury trial or counsel and may be found culpable based only on a preponderance of the evidence. Raising the standard of proof is justified as a procedural protection. This resolution would provide the benefit of appointed counsel, where appropriate. The cost of defense counsel is not at the expense of the state, but at the expense of the estate.

### SECTION/COMMITTEE SECTION

#### TRUSTS AND ESTATES SECTION

#### DISAPPROVE

The issue raised by the proponent is that, prior to any criminal finding of a felonious killing, the probate court can make a determination which would deprive the accused of rights in the probate estate using only a preponderance of the evidence standard and that, in light of the far higher standard in criminal law, this standard should be increased. TEXCOM believes that the right of which the accused is being deprived here is a property right and therefore there is no reason to have a higher standard than for any other tort. In addition, the proposal for appointment of counsel is likely to create significant burdens by using public defenders in cases where the disinheritance is upheld.

**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 Delegates of California Bar Associations recommends that legislation be sponsored to add section 254.1 and to amend Probate Code section 254 to read as follows:

- 1    § 254.
- 2           (a) A final judgment of conviction of felonious and intentional killing is conclusive
- 3    for purposes of this part.
- 4           (b) In the absence of a final judgment of conviction of felonious and intentional
- 5    killing, the court may determine by ~~a preponderance of~~ clear and convincing evidence
- 6    whether the killing was felonious and intentional for purposes of this part. The burden of
- 7    proof is on the party seeking to establish that the killing was felonious and intentional for
- 8    the purposes of this part.
- 9
- 10   § 254.1.
- 11           (a) The court may appoint a public defender or private legal counsel for an accused
- 12    person in any proceeding under this division if the court determines the accused person is
- 13    indigent, not otherwise represented by legal counsel and that the appointment would be
- 14    helpful to the resolution of the matter or is necessary to protect the accused person's
- 15    interests.
- 16           (b) If a person is furnished legal counsel under this section, the court shall, upon
- 17    conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel.
- 18    The sum may, in the discretion of the court, include compensation for services rendered,
- 19    and expenses incurred, before the date of the order appointing counsel.
- 20           (c) Compensation determined in (b) shall be paid first from any estate assets
- 21    transferred from the decedent to the defendant and then from any assets of the defendant
- 22    including but not limited to, assets owned jointly with the decedent or assets represented
- 23    by a partial interest in assets owned by the decedent.

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

**PROPONENT:** Sacramento County Bar Association

**STATEMENT OF REASONS:**

Existing law: Section 254 of the Probate Code, provides that a surviving spouse or joint tenant may, without criminal proceeding and by a preponderance of the evidence presented, be deemed to have feloniously and intentionally caused the death of the deceased spouse or joint tenant.

This Resolution: This resolution would change the standard of determination by the Probate court to “clear and convincing evidence” when considering motions under Section 254, and thereby make the Probate Code standard for determining felonious action commensurate with the standard of the Penal Code for determining such action.

The problem: The standard under the Probate Code for determining that a person has feloniously and intentionally killed another is too low. The problem is best demonstrated by a hypothetical scenario. Assume that a husband dies and leaves joint/community property assets. A party with an interest in the estate of the husband can bring a motion under Section 254 to have the probate court declare that the wife feloniously and intentionally caused the death of the husband, and the standard of proof to convince the court of this is by the preponderance of the evidence. The moving party only needs to convince a single mind that it is a 51% possibility that the wife committed the killing. Once a determination of a felonious and intentional killing is made, the wife may be barred from inheriting the husband’s interest in any community property. This then has the effect of tying up any community assets and most likely preventing the wife from utilizing such assets to fend off the accusation that she killed her husband. Without the additional safeguard of having to convince an entire jury, the standard of a preponderance of evidence is simply too low.

By setting a higher standard of proof, and allowing the court discretion to appoint counsel if necessary, a motion under Section 254 can no longer be used as an “end run” around the Penal Code and the presumption of innocence.

## **IMPACT STATEMENT**

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

**AUTHOR AND/OR PERMANENT CONTACT:** Carter Glahn, Law Offices of Ronald H. Severaid, 1805 Tribute Rd., Suite H, Sacramento CA 95815. (916) 929-8383 voice, (916) 925-4763 fax. cglahn@sbcglobal.net

**RESPONSIBLE FLOOR DELEGATE:** Carter Glahn

## **COUNTERARGUMENT**

## **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY**

This Resolution would not only raise the burden of proof for demonstration of felonious death from preponderance of the evidence to clear and convincing, but would also add a provision that the person alleged to have caused the death be defended at the expense of the Decedent. Thus, instead of affording a Decedent's heirs an expeditious way to disinherit the wrongdoer for the felonious murder of the Decedent, the Resolution would punish them through no fault of their own by having them pay for the wrongdoer's defense of the action. The amendment proposed by this Resolution would encourage the bad actor to prolong litigation, thereby depriving Decedent's heirs of prompt full distribution.

## RESOLUTION 04-05-2008

### DIGEST

#### Probate: Appointment of Temporary Trustee During Appeal of Probate Order

Amends Probate Code section 1310 to add temporary trustees to the list of court-appointed persons allowed on appeal of a probate order and that a bond may be paid from the trust estate.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code section 1310 to add temporary trustees to the list of court-appointed persons allowed on appeal of a probate order and that a bond may be paid from the trust estate. This resolution should be approved in principle because the basic thrust of the resolution, adding to the effectiveness of “temporary trustees,” is a good idea, and the resolution effects this purpose in an appropriately narrow manner.

The resolution makes minimal changes to existing law to create the possibility of temporary trustees being appointed, and being able to act, during the course of an appeal, when the probate court has determined that the trustee must be removed due to, for instance, incompetence or dishonesty. Under current law, the court has discretion to appoint temporary fiduciaries for guardianships, conservatorships, and probate estates in similar circumstances, but not for trusts. This change would allow the court flexibility in cases involving trusts, while not requiring this procedure if the court determines it is not necessary.

The resolution also appropriately adds that payment for a bond on appeal may be made from the trust estate at issue.

### SECTION/COMMITTEE REPORTS

#### TRUSTS AND ESTATES SECTION

APPROVE IN PRINCIPLE

**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 Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1310 to read as follows:

1 §1310

2 (a) Except as provided in subdivisions (b), (c), (d), and (e), an appeal pursuant to  
3 Chapter 1 (commencing with Section 1300) stays the operation and effect of the judgment  
4 or order.

5 (b) Notwithstanding that an appeal is taken from the judgment or order, for the  
6 purpose of preventing injury or loss to a person or property, the trial court may direct the  
7 exercise of the powers of the fiduciary, or may appoint a temporary guardian or  
8 conservator of the person or estate, or both, or special administrator, or temporary trustee,  
9 to exercise the powers, from time to time, as if no appeal were pending. All acts of the  
10 fiduciary pursuant to the directions of the court made under this subdivision are valid,  
11 irrespective of the result of the appeal. An appeal of the directions made by the court under  
12 this subdivision shall not stay these directions.

13 (c) In proceedings for guardianship of the person, Section 917.7 of the Code of  
14 Civil Procedure shall apply.

15 (d) An appeal shall not stay the operation and effect of the judgment or order if the  
16 court requires an undertaking, as provided in Section 917.9 of the Code of Civil Procedure,  
17 and the undertaking is not given.

18 (e) An appeal shall not stay the operation and effect of a judgment for money or an  
19 order directing payments of money, unless one of the following applies:

20 (1) A bond is posted as provided in Section 917.1 of the Code of Civil Procedure.

21 (2) The payment is to be made from a decedent's estate being administered under  
22 Division 7 (~~commencing with Section 7000~~) or from the estate of a person who is subject  
23 to a guardianship or conservatorship of the estate under Division 4 (~~commencing with~~  
24 Section 1400) or from a trust estate under the jurisdiction of the court. However, a court  
25 may require bond as provided in subdivision (d).

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

**PROPOSED BY:** Los Angeles County Bar Association

**STATEMENT OF REASONS:**

Existing Law: Probate Code section 1310 applies to stays on appeal of a probate order. As is true for most civil appeals, the appeal of a probate order or judgment stays the decision in most cases. However, recognizing that removal of a dishonest or incompetent fiduciary should not be stayed, subsection (b) provides for trial court appointment of a temporary fiduciary for guardianships, conservatorships and probate estates.

This Resolution: The resolution expands the exceptions to stays on appeal by adding “temporary trustee” to expand the covered fiduciaries to trustees and by expanding the discretion of the court to require the posting of bond for a money judgment.

The Problem: With the continued growth of living trusts as a testamentary disposition avoiding probate, there are many trust administrations which are the equivalent of a probate estate administration without court supervision. In some of those cases, the trustee who acts after death of a settler may be incompetent or dishonest. In those cases where the matter has been litigated and the court has found the trustee must be removed, it is usually because of a need to protect the trust estate and beneficiaries. By the time of judgment, substantial damage may have already occurred. To continue to allow the incompetent or dishonest fiduciary to act pending the appeal (especially without the safeguard of posting bond) would compound the damage. The provisions of Probate Code section 1310 apply to court-supervised fiduciaries, but the potential for damage is greater in the case of trustees who are not court-supervised fiduciaries. The same considerations occur for trusts other than living trusts. Ongoing trusts are established to protect beneficiaries and that purpose is frustrated if the court is without discretion to appoint a temporary trustee during appeal or to require the posting of bond. Probate Code section 1310 does not apply to appointment of a temporary trustee of a trust, thus allowing the “bad” trustee to stay in office during the pendency of the appeal. Moreover, there does not even seem to be a power in the trial judge to require the posting of a bond for a payment of money from a trust estate during the pendency of an appeal.

**IMPACT STATEMENT:**

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

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