

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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