

**RESOLUTION 11-01-2019**

**DIGEST**

Probate: Service of Trust Petition on All Interested Persons.

Amends Probate Code section 17203 to provide for service of a copy of a trust petition on all beneficiaries and trustees.

**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

**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 in a trust administration.

**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. This resolution provides for the same manner of service and when utilized in conjunction with Resolution BANSDC – No. 2019- \_\_\_\_, 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**

Resolution BANSDC – No. 2019-

**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.

**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.

**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 affective 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 Witness Print Their Name

Amends Probate Code section 6110 to include a requirement that attesting witnesses to a will print their name.

**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 (including Existing Law): 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

## 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.

### 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
- 2 appointment as administrator within 90 days of the death of the decedent, the court may find
- 3 that the person has waived their rights to appointment and appoint any person who claims
- 4 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