

Memorandum 90-13

Subject: Study L-1041 - Bond of Nonresident Personal Representative
(Suggestion for Substantive Revision)

Under the Probate Code the general rule is that a bond is required of the personal representative, unless waived by the will or by all beneficiaries. Section 8481(a). Even if waived, the court may nonetheless, for good cause, require a bond. Section 8481(b).

If the personal representative is a nonresident, the court in its discretion may require a bond, whether or not "good cause" is shown. Section 8571. The implication of the statute is that the court may exercise discretion without having good cause for doing so. The Los Angeles County Superior Court, by court rule, has taken this a step further and requires a bond of a nonresident in all cases; no discretion is permitted. Rule 7.12.

In a letter circulated to the Commission at the July meeting from Henry A. Preston of Chicago (July 7, 1989), Mr. Preston relates his experiences as an executor in a simple estate in Los Angeles County. Mr. Preston complains that he was required to give a bond to serve as personal representative in Los Angeles County despite the fact that both the will and beneficiaries waived bond, and despite the fact that Mr. Preston was a relative of the decedent, had served as her trustee for many years, and was, as trustee, the principal beneficiary of the estate. He points out that the cost of the required bond was \$1,400 per year on a \$360,000 estate, "a not inconsiderable amount in view of the total size of the estate. In Illinois, the Court can, in its discretion, require surety on an out-of-state executor's bond by a beneficiary or other person interested in the estate. In all my practice, I've never heard of a case in Illinois where a waiver of surety on an Executor's bond has been totally ignored, as was done in this case."

The staff agrees with Mr. Preston to some extent, but not completely. The bond is intended to protect other interested persons besides beneficiaries, such as creditors; in fact there was a major creditor that had to litigate in order to get the debt paid in Mr. Preston's case. For this reason California law allows the court on its own motion to require a bond despite the waiver by all beneficiaries:

8481. (a) A bond is not required in either of the following cases:

(1) The will waives the requirement of a bond.

(2) All beneficiaries waive in writing the requirement of a bond and the written waivers are attached to the petition for appointment of a personal representative. This paragraph does not apply if the will requires a bond.

(b) Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person or on its own motion the court may for good cause require that a bond be given, either before or after issuance of letters.

However, the staff believes it is an abuse of discretion for the court to require a bond automatically without considering the circumstances of the case. The staff would repeal the special rule for out of state personal representatives (Section 8571) and instead rely on the general rule of Section 8481 that the court for good cause may require a bond on its own motion notwithstanding a waiver.

~~8571.---Notwithstanding---any---other---provision---of---this chapter---and---notwithstanding---a---waiver---of---a---bond,---the---court---in its---discretion---may---require---a---nonresident---personal representative---to---give---a---bond---in---an---amount---determined---by---the court.~~

Comment. Former Section 8571 is not continued. The court may for good cause require a bond of a nonresident personal representative under Section 8481.

The staff would circulate the proposed revision for comment.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary