

Memorandum 84-14

Subject: Study L-656 - Probate Law and Procedure (Bonds for Personal Representatives)

Charles Collier of the State Bar Estate Planning, Probate and Trust Law Section has written to suggest two changes to the Commission's Recommendation Relating to Bonds for Personal Representatives. A copy of Mr. Collier's letter is attached to this Memorandum as Exhibit 1. A copy of the Recommendation is attached as Exhibit 2. Mr. Collier's suggestions are discussed below.

Amount of Bond

Mr. Collier finds an inconsistency in Section 541: If bond is given by personal sureties, the bond shall be not less than twice the value of the personal property in the estate and the probable annual income from real property. If bond is given by a corporate insurer, the bond shall be not less than the value of the personal property in the estate and the probable annual income from real and personal property in the estate. Mr. Collier suggests we make these consistent by using all the income as a yardstick, not just the income from real property.

The staff is inclined to agree with Mr. Collier. There is no apparent policy reason for the inconsistency. The provision for personal sureties was put in the law in 1872, while the provision for corporate insurers was added in 1921. It would seem that the bond should be sufficient to cover all the income, regardless of source. Mr. Collier's suggestion may be adopted by approving the amendments to Section 541 set forth in Exhibit 3.

Bond by Out-of-State Executor or Administrator

If bond is waived in the will or by all estate beneficiaries, the court may nonetheless require bond for good cause. See Section 543. Mr. Collier is concerned about the practice of the courts in Los Angeles County of automatically requiring bond when the executor or administrator is not a California resident, even when no one wants the bond and all parties have waived it. Mr. Collier would like to discourage this practice by adding the following sentence to Section 543: "The fact that the executor or administrator is not a California resident is not

itself good cause for requiring a bond to be given or the amount thereof increased." The staff believes this is a desirable addition.

If the Commission approves this change, the staff will amend it into the bill.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

LAW OFFICES

IRELL & MANELLA

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1800 AVENUE OF THE STARS

SUITE 900

LOS ANGELES, CALIFORNIA 90067

(213) 277-1010 AND 879-2600

CABLE ADDRESS: IRELLA
TELEX 181258
TELECOPIER
(213) 277-5904 AND 553-9276

WRITER'S DIRECT DIAL NUMBER

ORANGE COUNTY OFFICE
840 NEWPORT CENTER DRIVE, SUITE 500
NEWPORT CENTER
POST OFFICE BOX 7310
NEWPORT BEACH, CALIFORNIA 92660
TELEPHONE (714) 760-0991

November 22, 1983

John H. DeMouilly
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Probate Code Sections 462, 541 and 543

Dear John:

Please excuse the delay in responding to your letter of October 18. Through inadvertence, it was set aside and hence the delay in responding to it.

I have the following comments:

1. I believe the language in the second and third sentences of §541(a) should be the same. I further believe that the language in the third sentence is more appropriate, as it takes into account all of the income, not just the income from the real property. Enclosed is a copy of the Judicial Council form for a petition for probate. Note the provisions under paragraph 3(c) relating to the way a bond is computed. This seems consistent with the last sentence in §541(a).

2. The wording of proposed subsection (c) of §462 appears adequate to cover both the waiver of a bond for special administrator by all interested parties and the situation where no bond is required under the Will for an executor and that person is named as special administrator.

3. The language on §543 gives me some concern. The courts have made a practice, for example, in Los Angeles County of requiring a bond whenever there is an out-of-state executor or administrator, whether or not there is a waiver of bond in the Will and whether or not there is a waiver of bond by all interested parties. In short, the Court, at

IRELL & MANELLA

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

John H. DeMouilly
November 22, 1983
Page Two

least in Los Angeles, automatically imposes a bond and presumably the Court would find good cause for imposing the bond merely because of non-residence. The Court's theory is that the bond gives the Court some control over the non-resident executor or administrator. You may want to give this further consideration.

Otherwise the proposed changes appear quite satisfactory.

Sincerely,



CHARLES A. COLLIER, JR.

CAC:jd

EXHIBIT 2

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Bonds for Personal Representatives

September 1983

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306
(415) 494-1335

DAVID ROSENBERG

Chairperson

DEBRA S. FRANK

Vice Chairperson

SENATOR BARRY KEENE

ASSEMBLYMAN ALISTER McAUSTER

ROBERT J. BERTON

ROSLYN P. CHASAN

JAMES H. DAYS

JOHN B. EMERSON

BONNIE M. GREGORY

BEATRICE P. LAWSON

September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission recommends clarifying amendments to the Probate Code to make clear that (1) a bond is not required, absent a showing of good cause, where all the beneficiaries or all the heirs have waived bond, and (2) a bond is not required of a special administrator when no bond will be required when the same person is later appointed as executor or administrator.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

BONDS FOR PERSONAL REPRESENTATIVES

The purpose of a bond for the personal representative of a decedent's estate is to ensure that the personal representative will faithfully perform the duties of the office.¹ The bond protects the persons interested in the estate by giving them security in the form of a promise by the surety to pay if there is a breach of trust.²

The annual cost of a required bond can be charged against the estate in an amount not exceeding \$50 for a bond of up to \$4,000, and half of one percent of the amount over \$4,000.³ For example, the annual cost that can be charged against the estate for a bond in the amount of \$100,000 is \$530.

The Probate Code includes provisions designed to permit the testator or all the persons who will take the decedent's estate to avoid the cost of a bond. If a will waives bond for the named executor, no bond is required if the named executor qualifies.⁴ If the will does not expressly require a bond, or if there is no will, the court is authorized—but not required—to direct that no bond be filed if all beneficiaries under the will, or all the heirs, waive bond.⁵ Where the will waives the bond or the court has directed that no bond be filed, the court may nevertheless order a bond be given if there is good cause to do so.⁶ The court may make such an order either on the petition of a person interested in the estate or on its own motion.⁷

¹ Prob. Code § 541.

² Code Civ. Proc. §§ 995.850, 996.410-996.495.

³ Prob. Code § 541.5.

⁴ Prob. Code § 541.

⁵ Prob. Code § 541. The allegation that all beneficiaries under the will, or all the heirs, have waived bond is made in a verified petition for letters testamentary or of administration. *Id.*

⁶ Prob. Code § 543.

⁷ Prob. Code § 543.

The Commission is informed that some courts require a bond without a showing of good cause even where all the beneficiaries or all the heirs have waived bond. The Commission recommends that the relevant statutory provisions be amended to make clear that a bond cannot be required if all the beneficiaries or heirs waive bond unless the court determines that there is good cause to require a bond.

The existing statute governing bonds for special administrators⁸ includes no provision governing waiver of bond. To recognize the existing practice of at least some courts, the Commission recommends that an express provision be added to the statute to make clear that, absent good cause, a bond is not required for a special administrator (1) where the will waives bond for the executor and the person named as executor in the will is appointed special administrator or (2) where all the beneficiaries or all the heirs waive bond for the special administrator.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 462, 541, and 543 of the Probate Code, relating to bonds.

The people of the State of California do enact as follows:

Probate Code § 462 (amended). Bond and oath of special administrator

SECTION 1. Section 462 of the Probate Code is amended to read:

462. (a) Before letters issue to a special administrator, except to a public administrator, ~~he must give the special administrator shall do both of the following:~~

(1) *Except as provided in subdivision (c), give a bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the*

⁸ Prob. Code § 462.

faithful performance of his duties; and he must take that the special administrator shall faithfully execute the duties of the trust according to law.

(2) Take the usual oath, and have the same indorsed on his the letters.

(b) Thereupon When the requirements of this section are satisfied, the clerk shall issue special letters of administration to him the special administrator.

(c) Subject to Section 543:

(1) Unless the will provides for a requirement of a bond, if a verified petition for special letters of administration alleges that all beneficiaries under the decedent's will, or that all the decedent's heirs if there is no will, have waived the filing of a bond, the court, if the petition so requests, shall direct that no bond be filed.

(2) If the will waives the requirement of a bond for the executor and the person named as executor in the will is appointed special administrator, the court shall direct that no bond be filed.

Comment. Subdivision (c) is added to Section 462 to dispense with bond of the special administrator where all the persons interested in the estate waive the filing of bond or where the will waives bond for the executor who is appointed special administrator. Even though the will waives bond or all the beneficiaries or all the heirs waive bond, the court nevertheless, for good cause, can require a bond. See Section 543. Subdivision (c) is drawn in part from subdivision (b) of Section 541 (bond of person to whom letters testamentary or of administration are directed to issue). The revisions of subdivisions (a) and (b) make no substantive change.

Probate Code § 541 (amended). Bond of executor or administrator

SEC. 2. Section 541 of the Probate Code is amended to read:

541. (a) Except as otherwise provided in this section, every person to whom letters testamentary or of administration are directed to issue (unless the testator has waived such requirement) shall, before receiving them, execute a bond to the State of California, to be approved by a judge of the superior court, conditioned that the executor

or administrator shall faithfully execute the duties of the trust according to law. If the bond is to be given by personal sureties, the amount shall be not less than twice the value of the personal property and twice the value of the probable annual income from the real property belonging to the estate, which values shall be ascertained by the court or judge by examining on oath the party applying, and any other persons. If the bond is to be given by an admitted surety insurer, the court in its discretion may fix the amount of the bond at not less than the value of the personal property and the probable value of the annual rents, issues and profits of all of the property belonging to the estate.

(b) ~~Unless~~ *Subject to Section 543, unless* the will provides for a requirement of a bond, if a verified petition for letters testamentary or of administration alleges that all beneficiaries under the ~~last will and testament of the decedent~~ *decedent's will*, or that all heirs at law of the ~~decedent~~ *the decedent's heirs if there is no will*, have waived the filing of a bond, the court, on the hearing of the petition, if the petition so requests, ~~may~~ *shall* direct that no bond be filed.

Comment. Subdivision (b) of Section 541 is amended to substitute "shall" for "may" and to add the reference to Section 543. The other revisions are not substantive. Even though the will waives bond or all the beneficiaries or all the heirs waive bond, the court nevertheless, for good cause, can require a bond on the hearing of the petition or later. See Section 543.

Probate Code § 543 (amended). Requiring bond or increased bond notwithstanding provision in will or prior court direction

SEC. 3. Section 543 of the Probate Code is amended to read:

543. When it is provided in the will that no bond shall be required of the executor, *or a petition requests pursuant to Section 462 or 541 that no bond be filed*, or the court pursuant to Section 462 or 541 has directed that no bond be filed or that it be filed in a reduced amount or sum, the court, upon its own motion or upon petition of any person interested in the estate, nevertheless, for good cause, may

require one to be given or the amount as in other cases thereof increased, either before or at any time after the issuance of letters.

Comment. Section 543 is amended to add a reference to Section 462 which dispenses with bond for a special administrator under specified circumstances and makes clear that the court, for good cause, may require a bond even though all the beneficiaries or all the heirs have waived bond under Section 462 or 541.

EXHIBIT 3

Probate Code § 541 (amended). Bond of executor or Administrator

541. (a) Except as otherwise provided in this section, every person to whom letters testamentary or of administration are directed to issue (unless the testator has waived such requirement) shall, before receiving them, execute a bond to the State of California, to be approved by a judge of the superior court, conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. ~~If the bond is to be given by personal sureties, the amount shall be not less than twice the value of the personal property and twice the value of the probable annual income from the real property belonging to the estate, which values shall be ascertained by the court or judge by examining on oath the party applying, and any other persons. If the bond is to be given by an admitted surety insurer,~~ The court in its discretion may fix the amount of the bond at not less than the value of the personal property and the ~~probable~~ probable annual rents, issues and profits gross income of all of the property belonging to the estate , or, if the bond is to be given by personal sureties, at not less than twice that amount.

(b)

Comment. Subdivision (a) of Section 541 is amended to require that income from personal property be taken into account in fixing the amount of bond for personal sureties, the same as for an admitted surety insurer. Under former law, income from real and personal property was considered in setting bond for an admitted surety insurer, but only income from real property was considered in setting bond for personal sureties. Subdivision (a) is amended to refer to "gross" income, consistent with usage in the Judicial Council Form for the Petition for Probate (revised effective January 1, 1981). The former language requiring the court to ascertain the value of personal property and probable income by examining on oath the party applying and any other persons has been deleted as unnecessary.

. . . .