

Memorandum 86-46

Subject: Study L-640 - Assembly Bill 2652--Comprehensive Trust Bill
(Bond of Nonprofit Corporation)

Assembly Member Gary A. Condit has written the Commission to request amendment of AB 2652 with respect to bond requirements for nonprofit corporations acting as trustees. A letter discussing this matter from David L. Gianelli is attached to Assembly Member Condit's letter. Mr. Gianelli is concerned with the situation under existing Probate Code Section 1127.5, which reads as follows:

1127.5. Upon the petition of a nonprofit corporation named or designated as trustee in a will or acting as a successor trustee thereunder within the scope of its own charitable purposes and trust, the court may name as substitute or successor trustee a charitable corporation of which the nonprofit corporation is the sole member without requiring any bond not theretofore required of the nonprofit corporation.

Proposed Section 15602(e) in AB 2652 supersedes Section 1127.5. Section 15602 and its comment read as follows:

§ 15602. Trustee's bond

15602. (a) A trustee is not required to give a bond to secure performance of the trustee's duties, unless any of the following circumstances occurs:

(1) A bond is required by the trust instrument.

(2) Notwithstanding a waiver of a bond in the trust instrument, a bond is found by the court to be necessary to protect the interests of beneficiaries.

(3) An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court.

(b) Notwithstanding a provision in the trust instrument, the court may excuse a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

(c) If a bond is required by the court, it shall be filed or served and shall be in the amount and with sureties and liabilities ordered by the court.

(d) Except as otherwise provided in the trust instrument or ordered by the court, the cost of the bond shall be charged against the trust.

(e) Only trustees who are individuals may be required to give a bond, notwithstanding a contrary provision in the trust instrument.

Comment. Subdivisions (a)-(c) of Section 15602 are drawn from Section 7-304 of the Uniform Probate Code (1977). Subdivision (a)(3) restates part of former Probate Code Section 1127 without substantive change, except that subdivision (a)(3) applies only to an individual trustee who is not named or nominated as an original or successor trustee in the trust instrument. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy). In other respects this section supersedes former Probate Code Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation). Subdivision (d) supersedes the second sentence of former Probate Code Section 1127. Subdivision (e) makes clear that corporate trustees are not required to give a bond. This restates part of former Probate Code Sections 480 and 481 without substantive change.

Subdivision (e) makes clear that a bond may only be required of a trustee who is an individual. The rationale for this approach is that trust companies are adequately secured since they must satisfy reserve and deposit requirements provided by other law. We did not separately consider the situation of charitable corporations.

Mr. Gianelli suggests that nonprofit (or charitable) corporations be excused from any requirement of giving bond unless the trust instrument otherwise provides. He also suggests consideration of an alternative provision giving the court authority to require bond in such cases. Proposed Section 15602 absolutely excuses trustees who are not individuals from any bonding requirement, including one in the trust instrument, and does not permit the court to require bond. Hence, if this provision of AB 2652 remains unchanged, no charitable or nonprofit corporation could be required to give a bond.

What does the Commission wish to do? There are two major alternatives. One is to leave Section 15602 as it is, so that only individuals may be required to give bond. This takes care of Mr. Gianelli's concerns by providing a clear rule that avoids the need to give a bond. However, the staff is concerned that this provision goes too far in light of the reasons for excusing bonds for trust companies.

The other alternative is to amend Section 15602 substantially as follows:

(e) ~~Only trustees who are individuals may~~ A trust company may not be required to give a bond, notwithstanding a contrary provision in the trust instrument.

Comment. . . . Subdivision (e) makes clear that ~~separate trustees~~ trust companies are not required to give a bond. See Section 83 ("trust company" defined). This restates part of former Probate Code Sections 480 and 481 without substantive change. A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 83, and thus is subject to the provisions of this section relating to when a bond may be required. See also Corp. Code §§ 5140(k) (power of nonprofit public benefit corporation to act as trustee), 7140(k) (power of nonprofit mutual benefit corporation to act as trustee), 9140(k) (power of nonprofit religious corporation to act as trustee); Gov't Code § 12582.1 ("charitable corporation" defined for purposes of Uniform Supervision of Trustees for Charitable purposes Act).

It should also be noted that subdivision (a)(3) of Section 15602 refers to an "individual." If the section is revised as proposed, a charitable corporation not named in the trust instrument that is appointed as trustee by the court would not automatically be required to give bond, although bond could be required if needed under subdivision (a)(2).

Respectfully submitted,

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ASSEMBLY RURAL CAUCUS

March 26, 1985
Sacramento, California

John DeMouilly
California Law Revision Committee
4000 Middlefield Road, Suite #D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMouilly: *John*

I have been in touch with Assemblyman McAlister's office regarding amendments to AB 2652. They informed me that your Committee is the sponsor of this measure and to contact your office.

I have enclosed a proposed amendment for your consideration that I would like added to this bill. This amendment would change the way the text reads in the Probate Code §1127.5. Please review it, and if you have any technical questions contact David L. Gianelli at (916) 443-2051.

I would appreciate your prompt response as to your position on this amendment. Please contact my Legislative Aide, P. J. Whittingham, if any other information or assistance is needed.

Sincerely,

G. Condit
GARY A. CONDIT

GAC:pj

Enclosure

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March 3, 1986

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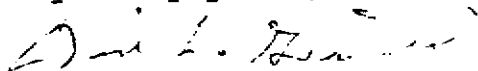
Dear DeeDee:

I have included the text of how I feel P.C. §1127.5 should read to make it consistent with the way our experience has shown that Superior Court judges are interpreting it. Although the section heading indicates that no bond is required of a nonprofit corporate trustee, the literal language of the section seems to indicate that only charitable corporations (a term that is not defined under California law - at least in the Corporations Code), of which the nonprofit corporation is a member, may be designated as substitute or successor trustee to serve without bond. It also seems to require that the charitable corporation can serve without bond only if the nonprofit corporation was named in the will to act as trustee and only upon petition of the nonprofit corporation.

Our proposal would bring the law closer to that of most other states which require bond be given only if the testator so requests it in the will. Bond still may be required in the court's discretion without a provision in the will if an interested person requests it. "Interested person" is intended to be defined the same way as it is use throughout the Probate Code.

DeeDee, I really appreciate your help on this. Let me know if there is any other information needed or if I can be of any assistance. Thanks.

Very truly yours,



DAVID L. GIANELLI

DLG:mar

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P.C. §1127.5

Unless it is otherwise provided in the instrument creating the trust, a nonprofit (charitable) corporation named or designated as trustee in a will or named by a court as a substitute or successor trustee, where action thereunder is within the scope of its own charitable purposes and trust, shall not be required to give bond (unless the court in its discretion, and upon petition of an interested party, determines that such bond shall be required).

*Optional provisions are in parenthesis.