

First Supplement to Memorandum 91-2

Subject: Study L-3049 - California Statutory Will

The attached letter (Exhibit 1) from the Western Surety Company takes the view that the explanation of what the bond does should remain a part of the statutory will form itself. The revised statutory will form deletes this explanation from the form itself and sets out the substance of the explanation in the Questions and Answers material which will accompany the form.

The staff recommends that the Commission continue the substance of the existing provision in the form itself. Accordingly, we propose that the portion of the form relating to the bond read as follows:

9. Bond. My signature in this box means a bond is not required for any person named as executor or guardian. A bond will be required if I do not sign in this box. (The bond provides a fund to pay those who do not receive a share of your estate to which they are entitled, including your creditors, because of improper performance of duties by the executor or guardian. Your estate must pay for the bond if one is required.)

No bond shall be required.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DEC 24 1990



Western Surety Company

Office of General Counsel

December 21, 1990

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Sir/Madam:

Re: Study L-3049; California Statutory Will
(Our Special Files CA-4372-F and CA-3949)

I am writing to comment on Study L-3049 and Memorandum 90-123 which will apparently be on the agenda for your January 10 and 11 meeting.

By way of introduction, Western Surety Company is a national company, doing business in all 50 states. We write more fidelity and surety bonds than any other company in America, and we write large numbers of fiduciary bonds in California.

My comments relate to Section 7 of the proposed new California statutory will form. As drafted, this section would remove from California's statutory will form the explanation of what a bond is. This explanation would then appear, with some insubstantial differences, in the proposed "Questions and Answers About This California Statutory Will."

We believe the explanation of what the bond does should remain a part of the will form itself. Fiduciary bonds have historically been viewed as very important in the California probate system. The State Bar of California published a comprehensive 240-page study of your state's probate system in 1973, entitled "The UPC: Analysis and Critique." Unfortunately, I have but one copy of that report; you might be able to obtain a copy from the State Bar. This study agreed with the proposition that the bond is inexpensive insurance that the testator should be permitted to require. It stated in part, "the California (bonding) provisions are preferable (to the UPC). In many instances, the presence of a bond has resulted in the beneficiaries receiving something from an estate where otherwise they would not have received anything."

As you know, a surety company performs two basic services in a fiduciary setting. It first "qualifies" the fiduciary by investigating his or her financial experience and character.

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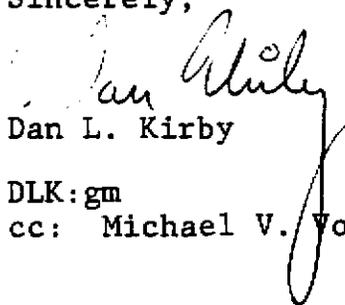
While this investigation is not generally comprehensive in the small probate setting contemplated by statutory will forms, the fact remains that sureties do help screen out of the system a few persons who are clearly unqualified to act in a fiduciary capacity.

The second role of a surety is more obvious. We pay claims. Recent industry experience in California suggests that fiduciary bonds provide cheap protection for heirs, wards, and creditors in the fiduciary setting.

Accordingly, we suggest that the explanation of the bond option be retained within the statutory will form. If that is for any reason unacceptable to the drafters, we alternatively suggest removing the parenthetical note from proposed new Section 7 which states, "Your estate must pay for the bond if one is required." We believe that leaving that reference to payment on the statutory form without any explanation of the benefit of a bond creates a negative presumption against bonding. We would replace this parenthesis with a cross reference to Section 16 of the "Questions and Answers" which explains the bond and repeats the fact that its cost is paid from the assets of the estate.

Thank you for considering our views as you continue to refine the proposed new California statutory will form.

Sincerely,



Dan L. Kirby

DLK:gm

cc: Michael V. Vollmer, Esq.