

RESOLUTION 01-04-2011 (REVISED)

DIGEST

Heirship Determination Petitions: Role of Personal Representative

Amends Probate Code section 11704 to ~~clarify ambiguous language~~ restore the prior requirement that a Personal Representative must obtain prior court order to participate as a party ~~and the meaning of the phrase~~ “to assist the court.”

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 11704 to ~~clarify ambiguous language~~ restore the prior requirement that a Personal Representative must obtain prior court order to participate as a party ~~and the meaning of the phrase~~. This resolution should be approved in principle because it corrects an ambiguity in the statute and it conforms the statute to current case law.

Under Probate Code section 11700, a personal representative, beneficiary, or any person claiming entitlement to distribution may petition the court for a determination of the decedent’s estate. Probate Code section 11704 will permit a personal representative to participate in such proceedings as a party to “assist the court.” The phrase “to assist the court” is vague and there is no controlling explanation of how a personal representative is to act when participating in proceedings brought under Probate Code section 11700. Although the personal representative has a duty to remain impartial and represent all beneficiaries’ interests equally, a problem arises when a personal representative is also an heir and entitled to distribution from the decedent’s estate because the personal representative has an interest in the outcome and may not be neutral.

The statute, as currently written, allows a personal representative to advocate their own interest at the expense of the decedent’s estate where other beneficiaries have to do so at their own expense. This resolution would ~~limit the personal representative’s participation in the proceedings so that a personal representative can only participate where he or she has no~~ require the court to weigh the equities of the personal representative’s participation as a party against other considerations, such as (possibly) whether the personal representative has an interest adverse interest to the petitioner, the personal representative is not a beneficiary of the estate, and the personal representative’s participation would not or would violate their duty of impartiality by participating. This would not prevent someone who is a personal representative and a beneficiary from participating notwithstanding the denial of such an order if they petition as a beneficiary and use their own personal funds. Also, the amendment conforms the statute to the recent holding in the *Estate of Bartsch* (2011) 193 Cal.App.4th 885 which held that a personal representative could participate in the proceedings if he or she first petition the court and use the personal representative’s own funds, rather than the estate’s assets, to argue the personal representative’s own interests in the estate, but overrules the opinion to the extent it is inconsistent with the new language.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 11704 to read as follows:

SECTION 1. Section 11704 of the Probate Code is amended to read:

11704. (a) The court shall consider as evidence in the proceeding any statement made in a petition filed under Section 11700 and any statement of interest filed under Section 11702. The court shall not hear or consider a petition filed after the time prescribed in Section 11700.

(b) ~~The~~ *Upon prior order of the court, the personal representative may file papers and otherwise participate in the proceeding as a party to assist the court.*

SEC. 2. It is the intent of the Legislature in amending subdivision (b) of Probate Code Section 11740 to overrule the holding in *Estate of Bartsch* (2011), 193 Cal.App.4th 885, to the extent that it is inconsistent with this act.

(Proposed new language *italicized*; language to be deleted ~~stricken~~.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Section 11704(b) is ambiguous (what does “to assist the court” mean?), and if read literally *arguably* permits a personal representative to participate in a proceeding to determine persons entitled to distribution (commonly known as “Heirship Petitions”), despite the personal representative’s ancient common-law duty of impartiality among competing claimants to an estate. (*See, e.g., In re Lynn’s Estate* (1952) 109 Cal.App.2d 468 (because the executor is the representative of all legatees and devisees, his duty is to stand indifferent to all claimants and not to favor one above the other, and neither he nor his attorney can recover fees for litigating in an heirship proceeding).)

This Resolution: Would correct the ambiguity and conform the statute to the legislature’s intent. It would allow a personal representative to participate in an Heirship proceeding as a matter of right ~~solely to apprise the court of the facts as he or she understood them *only* in those rare cases where someone submitted a clearly weak or frivolous claim, and where the personal representative could locate no family members or others with a sufficient interest in opposing that claim, or in similar unusual circumstances~~ only upon prior order of the court. This is exactly what the legislature had envisaged (and enacted) when enacting the statute in 1976, according to the legislative history. In fact, that legislative history reveals that the legislature intended to allow limited participation by the personal representative only to oppose claims submitted by professional heir-hunters. Because there may be other situations where the personal representative’s participation is proper this Resolution would also allow the personal representative to participate if the Court so orders, after a hearing on a noticed motion.

The Problem: At least one California court has taken the unusual step of reading Section 11704(b) literally to allow a personal representative to participate in *any* Heirship Determination

dispute, even where that personal representative is also an interested party. The result is that such a personal representative's litigation expenses are allowable from the estate. Most personal representatives are in fact also beneficiaries of the estate, heirs of the decedent, or otherwise interested parties. To allow their litigation fees, and *only* theirs, to be paid from estate funds gives them an unfair advantage in litigation. There will be cases where an undue influencer or elder abuser who has succeeded in getting appointed as the personal representative can use estate funds to resist efforts by a proper heir or beneficiary to assert their claim. There will be cases where the rightful claimant to an estate will have his or her inheritance depleted by the litigation fees expended by the personal representative in opposing their rightful claim. As in any other litigation context, if the personal representative is also a financially interested party he should be required to pay his litigation expenses from his own pocket, like any other claimant. The fundamental principle is plain: in an inheritance dispute between competing beneficiaries, the beneficiaries themselves – and not the estate – should each bear their own attorneys' fees.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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Trusts & Estates Section of the State Bar of California (TEXCOM)

OPPOSE (CONCERNS ADDRESSED BY AMENDMENTS)

The proposal is far too restrictive of the personal representative's ability to participate in an estate entitlement proceeding. Often, the interests of many parties are adverse to a petitioning allegedly omitted heir, but no one adverse party has a sufficient pecuniary interest or sufficient means or sophistication to contest the petition. Without the personal representative's participation, the result will be a one-sided hearing. The proposal also assumes that the personal representative's participation will violate the personal representative's duty of impartiality in all circumstances. But the subject of the entitlement petition may be the construction of a will's ambiguous residuary clause. The personal representative should be able to file the entitlement petition in order to determine to whom the personal representative must distribute the estate. A more modest proposal would achieve the goal of avoiding a violation of the personal representative's duty of impartiality by allowing the personal representative to file the entitlement petition but not to participate further as personal representative in the dispute between beneficiaries.

Disclaimer

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