

RESOLUTION 04-07-2012

DIGEST

Probate Bond: Including Cost of Recovery in Personal Representative Bond Amount
Amends Probate Code sections 8482 and 10453 and California Rules of Court, rule 7.207 to provide that personal representative bonds include an allowance for cost of recovery on the bond.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code sections 8482 and 10453 and California Rules of Court, rule 7.207 to provide that personal representative bonds include an allowance for cost of recovery on the bond. This resolution should be approved in principle because these revisions would harmonize the procedures for personal representative bonds with those already in place for conservators and guardians of the estate.

If the purpose of the bond is to make the estate whole in the event an act or omission of the personal representative causes the estate damage, such will not occur unless the bond is set in a sum that is large enough to accommodate the cost of recovering the damage amount in addition to the amount itself.

The Trusts and Estates Section has expressed the concern that the change proposed by this resolution is a fee shifting proposal that would require the court to grant a successful litigant attorney's fees and costs in every successful surcharge proceeding, whether or not there is a bond. The exact language provided by the proponent largely tracks that found in Probate Code section 2320, subdivision (c)(4), relating to guardians and conservators, where a bond is normally required, but can be waived under section 2321.

The proponent's stated goal is to provide that when a bond is required, the amount should include an allowance for attorney fees in the event of a surcharge. If the proponent's goal were in fact to provide for global fee shifting in surcharge proceedings, placing it in the provision relating to bonds would not make sense.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code sections 8482 and 10453 and that the Judicial Council amend California Rules of Court, rule 7.207 to read as follows:

- 1 § 8482
- 2 (a) The court in its discretion may fix the amount of the bond, but the amount of the bond
- 3 shall be not more than the sum of:

4 (1) The estimated value of the personal property.

5 (2) The probable annual gross income of the estate.

6 (3) If independent administration is granted as to real property, the estimated value of the
7 decedent's interest in the real property.

8 (b) Notwithstanding subdivision (a), if the bond is given by an admitted surety insurer,
9 the court may establish a fixed minimum amount for the bond, based on the minimum premium
10 required by the admitted surety insurer.

11 (c) If the bond is given by personal sureties, the amount of the bond shall be twice the
12 amount fixed by the court under subdivision (a).

13 (d) Before confirming a sale of real property the court shall require such additional bond
14 as may be proper, not exceeding the maximum requirements of this section, treating the expected
15 proceeds of the sale as personal property.

16 (e) A reasonable amount for the cost of recovery to collect on the bond, including
17 attorney's fees and costs. The attorney's fees and costs incurred in a successful action for
18 surcharge against a personal representative for breach of his or her duty under this code shall be
19 a surcharge against the personal representative and if unpaid shall be recovered against the surety
20 on the bond. The Judicial Council shall revise rule 7.207 of court to implement this paragraph.

21
22 § 10453

23 (a) If the personal representative is otherwise required to file a bond and has full
24 authority, the court, in its discretion, shall fix the amount of the bond at not more than the
25 estimated value of the personal property, the estimated value of the decedent's interest in real
26 property authorized to be sold under this part, the cost of recovery amount under rule 7.207 of
27 court, and the probable annual gross income of the estate, or if the bond is to be given by
28 personal sureties, at not less than twice that amount.

29 (b) If the personal representative is otherwise required to file a bond and has limited
30 authority, the court, in its discretion, shall fix the amount of the bond at not more than the
31 estimated value of the personal property, the cost of recovery amount under rule 7.207 of court,
32 and the probable annual gross income of the estate, or, if the bond is to be given by personal
33 sureties, at not less than twice that amount.

34
35 Rule 7.207

36 (a) Bond includes reasonable amount for recovery on the bond
37 Except as otherwise provided by statute, every personal representative, conservator or guardian of
38 the estate must furnish a bond that includes an amount determined under (b) as a reasonable
39 amount for the cost of recovery to collect on the bond under Probate Code sections 8482(e) and
40 2320(c)(4).

41 (b) Amount of bond for the cost of recovery on the bond
42 The reasonable amount of bond for the cost of recovery to collect on the bond, including
43 attorney's fees and costs, under Probate Code sections 8482(e) and 2320(c)(4) is:

44 (1) Ten percent (10%) of the value up to and including \$500,000 of the following:

45 (A) The value of personal property of the estate;

46 (B) The value, less encumbrances, of real property of the estate that the personal
47 representative, guardian or conservator has the independent power to sell without approval of
48 confirmation of the court under Probate Code sections 10450, 2590 and 2591(d);

49 (C) The probable annual income from all assets of the estate; and

50 (D) The probable annual gross payments described in Probate Code section 2320(c)(3);
51 and
52 (2) Twelve percent (12%) of the value above \$500,000 up to and including \$1,000,000 of
53 the property, income, and payments described in (1); and
54 (3) Two percent (2%) of the value above \$1,000,000 of the property, income and
55 payments described in (1).

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

Existing Law: Requires a conservator and guardian of the estate to post a bond for the value of the estate, which would include personal property, real property if granted power to sell and the annual gross income, plus an amount to include a cost of recovery as required under Rules of Court, rule 7.207. Personal representatives are required to only post bonds for the estimated value of the estate, which would include personal property, annual gross income and if independent administration is granted the estimated value of the real property, not for a cost of recovery amount.

This Resolution: Would coordinate all probate bonds to include the additional amount for cost of recovery in the event a personal representative, conservator or guardian is surcharged for breaching his or her fiduciary duty.

The Problem: In 2008 the legislature added Rules of Court, rule 7.207 due to the increase in surcharge actions against conservators and guardians for breach of their fiduciary duties. The bonding companies were required to pay out the full bond for these breaches, but the estates of the conservator or guardian would incur significant attorney's fees and costs to obtain the surcharge without ability to receive reimbursement. The additional amount under the new rule provides a surplus above the estimated value of the assets to seek reimbursement for the attorney's fees and costs if a surcharge is ordered. This new rule was in response to the increase theft and misuse of assets by conservators and guardians.

The problem is that conservators and guardians are not the only fiduciaries to breach their duties. The heirs of an estate are in the same position as conservatees and minors. They do not have access to the bank records or daily activities of personal representatives to know of a breach until an accounting is either prepared and filed with the court or the personal representative fails to file an accounting. Unfortunately, breach of fiduciary duties by personal representatives have increased in probate estates just as it has in conservatorships and guardianships. Whether it is due to the economy or greed, misuse and misappropriations of assets in probate estates have risen and occur as in conservatorships and guardianships. Courts are now reluctant to waive bond in most probate estates, but the court would still have the discretion to waive the bond.

This resolution would coordinate all bonds for probate estates, conservatorships and guardianships to required that a bond would also include the additional recovery of cost amount.

The law will only cost the estate a potentially small increase in the bond premium and would not have any financial impact on the courts.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Donnasue Ortiz

SECTION COMMENTS TO RESOLUTION 04-07-2012

TRUSTS & ESTATES SECTION OF THE STATE BAR OF CALIFORNIA

DISAPPROVE: The resolution purports to be about allowing the court to fix bond to allow for the recovery of additional attorney's fees and costs, but in fact it is a fee-shifting proposal that requires the court to grant a successful litigant attorney's fees and costs in every successful surcharge proceeding against an executor, whether or not the personal representative is bonded. By raising the stakes in every surcharge proceeding, the proposal, if enacted, will make it more difficult to resolve those disputes and delay distribution to the intended beneficiaries and will make it more difficult to find persons willing to serve as personal representative.

Disclaimer

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.
