



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

CLARIFICATION REGARDING CLERK'S DUTY TO PROVIDE COPY OF LODGED WILL

LEGISLATIVE PROPOSAL (T&E-2015-11)

TO: Office of Governmental Affairs

FROM: Bart Schenone, Chair, Trusts and Estates Section Executive Committee
Jeremy B. Crickard, Vice Chair, Trusts and Estates Section Executive Committee
Herb Stroh and Jeff G. Carchidi, Co-Chairs, Litigation Subcommittee

DATE: August 6, 2014

RE: A proposal to amend Probate Code section 8200(c)

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee: June 7, 2014
Approval Vote: Aye 22 ; No 0; Abstain 2

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PURPOSE

Probate Code section 8200 requires the custodian of a will, unless a petition for probate of the will has been filed, to deliver the will to the clerk of the Superior Court of the county in which the estate of the decedent may be administered (paying a fee currently set at \$50), and to mail a copy of the will to the person nominated as executor or alternatively to a person named in the will as a beneficiary. Once the will has been lodged with the clerk, the statute is ambiguous as to who is entitled to obtain a copy from the clerk. Section 8200(c) states that the clerk shall release a copy of the will on receipt of payment of the required fee and *either* a court order for production of the will *or* a certified copy of a death certificate of the decedent. However, after section 8200(c) was last amended, the Legislature, seeking to combat identity fraud, created two classes of certified death certificates instead of one: an “authorized” certified copy and an “informational” certified copy. The clerk’s office of the Los Angeles Superior Court informally has construed section 8200(c) to include “authorized” copies but exclude “informational” copies, thereby hindering the accessibility of copies of lodged wills. This proposal would amend section 8200(c) to clarify that “informational” certified copies of death certificates fall within the scope of the statute and entitle the bearer, who pays the required fee, to a copy of a lodged will from the clerk.

PROPOSAL AND REASONS FOR PROPOSAL

The goal of this proposal is to harmonize Probate Code section 8200(c) with Health and Safety Code section 103526 so as to remove ambiguity with regard to the meaning of the term “certified copy of a death certificate of the decedent” in section 8200(c).

Section 8200(c) essentially creates two avenues for an applicant to obtain a copy of a lodged will from the clerk. The faster and less expensive route is the presentation of a certified copy of a death certificate. If the certified copy is not accepted, the applicant will have to petition the court to obtain a copy of the lodged will, resulting in the payment of a filing fee as well as attorney’s fees. It is noteworthy that section 8200(c) does not provide any standard by which courts are to assess the merits of petitions to release copies of lodged wills.

History of Probate Code Section 8200(c)

When the Legislature re-enacted Probate Code section 8200 in 1990, subdivision (c) read as follows:

(c) The clerk shall release a copy of a will delivered under this section for attachment to a petition for probate of the will or otherwise on *receipt of a court order* for production of the will and payment of the required fee.

Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991 (emphasis added). Thus, in 1990 a court order *was required* to obtain a copy of a will.

Then, in 1994, section 8200(c) took its current and more permissive form, as follows:

(c) The clerk shall release a copy of a will delivered under this section for attachment to a petition for probate of the will or

otherwise on receipt of payment of the required fee and *either a court order for production of the will or a certified copy of a death certificate of the decedent.*

Stats.1994, c. 806 (A.B.3686), § 25 (emphasis added).

By this amendment of section 8200(c), the Legislature expressly *expanded* access to copies of lodged wills to *anyone* with a certified copy of the death certificate of the decedent, *i.e.*, a court order was no longer required. In 1994, as in prior years, certified copies of death certificates were available to *any* requesting party,¹ the net result being that anyone could obtain a copy of a lodged will simply by providing the clerk with a readily-obtained certified copy of the decedent's death certificate. The Legislature in 1994 presumably was well aware of the accessibility of death certificates and felt comfortable allowing anyone who took the time to obtain a certified copy of a death certificate to obtain a copy of a lodged will.

Legislature Creates Two Categories of Death Certificates Without Corresponding Clarification of Probate Code Section 8200(c)

In 2002, the Legislature enacted Health and Safety Code section 103526, creating two classes of certified copies of death certificates: "informational" copies available to all applicants and "authorized" copies available only to authorized applicants (close family members, law enforcement agents, etc.). (Sen. Bill No. 247 (2001-2002 Reg. Sess.)) The signatures on an "informational" death certificate are electronically redacted and the certificate displays the legend: "INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY." (Health & Saf. Code § 103526, subs. (b)(1), (f).) Otherwise, the "informational" copy and the "authorized" copy are identical.

"Informational" copies are reliable because they must be printed from the single statewide database prepared by the State Registrar. (Health & Saf. Code § 103526, subd. (f).)

Originally, Senate Bill 247 was intended to control only access to birth certificates. The State Department of Public Health ("DPH") introduced the bill in response to reports from the Office of the Inspector General of the United States Department of Health and Human Services that California birth certificates were unique "breeder documents" that played a major role in identity theft crimes. (Sen. Judiciary Com., Bill Analysis of SB 247 (2001-2002 Reg. Sess.) Jan. 15, 2002, p. 3.) Later reports revealed 85-90 percent of the birth certificate fraud encountered by the Immigration and Naturalization Services and Passport Services involved theft of valid California birth certificates. (Sen. Rules Com., Bill Analysis of SB 247 (2001-2001 Reg. Sess.) Aug. 26, 2002, p. 4.) The bill was amended to include death certificates following news accounts that the State of California had sold birth and death records of more than 25 million Californians to private companies, which had published the records on the Internet. (Assem. Com. on Judiciary, Bill Analysis of SB 247 (2001-2002 Reg. Sess.) Jan. 18, 2002, p. 5.)

¹ See former Health & Safety Code § 10575 (West 1995), repealed by Stats.1995, c. 415 (S.B.1360), § 125. In 1995, the Legislature replaced section 10575 with section 103525, and thus continued the policy of open access to certified copies of death certificates. See Health & Safety Code § 103525 (West 2002).

Some stakeholders advocated for stricter controls on access to birth and death certificates, such as restricting access to only persons named in the certificates. But, after hearing concerns from legitimate users of certificates who were not named in the legislation as authorized persons, the author of Senate Bill 247 decided to retain unlimited access to certified copies for any lawful application. (Sen. Judiciary Com., Bill Analysis of SB 247 (2001-2002 Reg. Sess.) Jan. 15, 2002, pp. 3-4.) “While inhibiting those who would use birth and death certificates to defraud others, the changes introduced by this bill will continue to ensure access for those who seek them for legitimate purposes.” (Assem. Com. on Judiciary, Bill Analysis of SB 247 (2001-2002 Reg. Sess.) June 10, 2002, p. 7.)

Accordingly, an informational certified copy of a death certificate is intended for all legitimate uses except identification. (Health & Saf. Code § 103526, subd. (b)(1).) As DPH simply states: “Authorized and informational copies are both ‘certified copies.’” (See <http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/AthorizedCopyvsInformationalCopy.aspx> [as of June 7, 2014].) Likewise, a DPH publication, dated January 1, 2014 and entitled “How to Obtain Certified Copies of Death Records,” explains: “There are two types of certified copies available upon request” and unequivocally provides that “[b]oth types of documents are certified copies of the original document on file with our office.”

Both Categories of Certified Copies Should Entitle the Bearer to a Copy of a Lodged Will

When Senate Bill 247 was enacted in 2002, the Legislature did not refine its prior use of the term “certified copy of a death certificate” in Probate Code section 8200(c), thus resulting in the present ambiguity.

Although there is no appellate case on point, principles of statutory interpretation indicate that “certified copy” in section 8200(c) encompasses both “informational” and “authorized” certified copies of death certificates.

“We look first to the words of the statute itself as the most reliable indicator of legislative intent.” (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 195.) Since both “informational” and “authorized” copies of death certificates are classified as “certified” in section 103526, either category of copy should qualify under section 8200(c).

Moreover, as discussed above, the Legislature in 1994 amended section 8200(c) to permit anyone with a certified copy of a death certificate to obtain a copy of a lodged will from the court clerk and at the time there was only one type of certified copy that was available to all, regardless of relationship to the decedent. Interpreting Senate Bill 247 as narrowing the scope of section 8200(c) to persons bearing “authorized” but not “informational” certified copies would be inconsistent with the prior broad access given by the Legislature. The implied amendment of an existing statute is disfavored. (*McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 219.) “The principle of amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. . . .” (*Id.* at 222-223 (internal quotations omitted).) There is nothing “repugnant” about allowing bearers of

certified informational copies of death certificates to obtain copies of lodged wills given the history of open access to certified copies of death certificates.

The clerk's office of the Los Angeles Superior Court recently has taken the informal position, not set forth in any local rule, that an "authorized" copy of a death certificate is required to obtain a copy of a will without a court order under section 8200(c). Although we have not surveyed the other counties, it is possible that clerk's offices beyond the Los Angeles Superior Court take this same view.

The proposed simple clarification of section 8200(c) would provide clear direction to clerk's offices statewide, ensure a uniform application of the law, and avoid unnecessary petitions for the release of copies of lodged wills when the petitioner is ineligible to obtain an "authorized" certified copy of the decedent's death certificate.

Consider, for example, a person who has information to believe that he or she may be named as a beneficiary in a will but who is not a close family member entitled to an "authorized" copy of the decedent's death certificate under Health and Safety Code section 103526(c). Unless such a person can use an "informational" copy of the death certificate to obtain a copy of the lodged will, his or her only alternative will be to petition the court under section 8200(c) and incur both the attendant substantial expense and the delay associated with obtaining the court's ruling on the petition. Nor would such a petition necessarily be granted because of the lack of any standard to guide the court in deciding whether to release a copy of the will.

Legislature Adopts AB 464 to Recognize Informational Certified Copies as "Certified Copies" in the Context of Real Property Title

In 2013, the Legislature unanimously passed AB 464 (Stats.2013, c.). Sponsored by the County Recorders' Association of California, the bill in pertinent part amended Probate Code section 210 to clarify that informational certified copies of death certificates may be submitted to prove the fact of death when title to real property is affected by the death, as when a joint tenant dies. The Senate Judiciary Committee's bill analysis reported the author's estimate that 20 percent of county recorders were rejecting informational copies of death certificates based on the advice of county counsel. Hence, the purpose of the bill was to clarify that informational copies of death certificates should be accepted so as to ensure consistent application of the law across the counties and facilitate uniformity in the transfer of property to surviving joint tenants.

HISTORY: Except for AB 464 (discussed above), the Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced either in this session or during a previous session.

IMPACT ON PENDING LITIGATION: None known.

LIKELY SUPPORT & OPPOSITION:

Estate planners and litigators generally will support this proposal as it clarifies Probate Code section 8200(c) and makes it less expensive for interested parties to obtain copies of lodged wills.

Some practitioners may disfavor the proposal on the ground that decedents and their beneficiaries have privacy interests in lodged wills such that copies of wills should not be made available to anyone who incurs the modest fee (currently \$21) associated with obtaining an informational certified copy of a death certificate. However, such access to lodged wills was clearly available when the Legislature amended Probate Code section 8200(c) in 1994. Rather than broadening access to copies of lodged wills, the proposed amendment of section 8200(c) confirms the access that already should be deemed to exist.

It is also noteworthy that many contemporary wills are “pourover” in nature, meaning that the will provides for the decedent’s assets to pass to the trustee of the decedent’s trust to be administered according to the terms of that trust. Since pourover wills typically do not recite the distributive terms of the associated trust, the release of the pourover will would not substantially impair privacy interests of the decedent or the decedent’s named beneficiaries.

FISCAL IMPACT: There is no anticipated fiscal impact.

GERMANENESS: The members of the Trusts and Estates Executive Committee have an interest in this issue in that they have occasion to obtain copies of lodged wills.

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.

TEXT OF PROPOSAL

SECTION 1. Section 8200 of the Probate Code is amended to read:

(a) Unless a petition for probate of the will is earlier filed, the custodian of a will shall, within 30 days after having knowledge of the death of the testator, do both of the following:

(1) Deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered.

(2) Mail a copy of the will to the person named in the will as executor, if the person’s whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person’s whereabouts is known to the custodian.

(b) A custodian of a will who fails to comply with the requirements of this section shall be liable for all damages sustained by any person injured by the failure.

(c) The clerk shall release a copy of a will delivered under this section for attachment to a petition for probate of the will or otherwise on receipt of payment of the required fee and either a court order for production of the will or a certified copy of a death certificate of the decedent. For purposes of this subdivision, a “certified copy of a death certificate” shall include an “informational certified copy” as described in Section 103526 of the Health and Safety Code.

(d) The fee for delivering a will to the clerk of the superior court pursuant to paragraph (1) of subdivision (a) shall be as provided in Section 70626 of the Government Code. If an estate is commenced for the decedent named in the will, the fee for any will delivered pursuant to paragraph (1) of subdivision (a) shall be reimbursable from the estate as an expense of administration.