



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

NOMINATION OF ADMINISTRATOR OF A DECEDENT'S ESTATE BY A NON-RESIDENT

LEGISLATIVE PROPOSAL (T&E 2012-09)

To: Saul Bercovitch, Legislative Counsel
State Bar Office of Governmental Affairs

From: James P. Lamping, Member of the Executive Committee of the Trusts and Estates
Section

Date: June 9, 2011

Re: Nomination of Administrator of a Decedent's Estate by a Non-Resident
A proposal to amend § 8465 of the Probate Code

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: September 26, 2010

Approval Vote: For: 28 Against: 0 Abstain: 3

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SUMMARY OF PROPOSAL

This proposal would provide that a person otherwise entitled to nominate an administrator of a decedent's estate will not be disqualified from doing so solely by virtue of the fact that the nominating person is not a resident of the United States.

ISSUES AND PURPOSE

Current law provides that a person who is not a resident of the United States is not competent to nominate the administrator of a decedent's estate. Under Probate Code section 8465, the court may appoint as the administrator a person "nominated by a person otherwise entitled to appointment." However, Probate Code section 8402(a)(4) provides that a person who is not a resident of the United States is not competent to act as a personal representative (and therefore not "otherwise entitled to appointment").¹ As a result, a person who is not a resident of the United States is precluded from nominating an administrator, solely by virtue of his or her residence.

Because of this statutory preclusion, an heir who is not a resident of the United States is unable to nominate a person he or she knows and trusts as administrator of the decedent's estate (even when there is a single heir who is entitled to receive the entire estate). Non-resident heirs therefore have no choice in who acts as administrator, as the public administrator takes over cases where no one is available to nominate an administrator.² The public administrator's office is overburdened with cases, and it often takes more time to process the estate administration to conclusion than it would with a private administrator.

The wisdom of the current statutory preclusion was questioned in *Estate of Damskog* (1991) 1 Cal.App.4th 78, where the public administrator was appointed as administrator despite nominations by the decedent's heirs, who resided in Norway. In concluding that a nonresident was incompetent to nominate an administrator, the court stated:

Finally, Marchi questions the wisdom of a residency requirement for nominators. While it makes sense to require administrators to reside in the United States where the probate court can exercise personal jurisdiction over them, if need be, as they perform their duties, no such jurisdictional need justifies a residency requirement for nominators. This very persuasive argument is better addressed to the Legislature than to the courts. (*Estate of Damskog* (1991) 1 Cal.App.4th 78, 82.)

This proposal seeks to address this issue by eliminating the requirement that a person be a resident of the United States in order to be competent to nominate an administrator, and allowing a non-resident heir to nominate anybody who is otherwise qualified to act as administrator.

¹ As discussed below, under Probate Code section 8402(b), section 8402(a)(4) does not apply to a person named as executor or successor executor in the decedent's will. Section 8402(b) therefore permits a person who is not a resident of the United States to serve as personal representative *if* named as executor in the decedent's will.

² When this happens, the public administrator is entitled to receive the statutory probate fees that would otherwise be paid to a private administrator.

HISTORY: In 1999, a proposed statutory amendment similar to this proposal was part of an omnibus bill sponsored by what was then known as the State Bar’s Estate Planning, Trust & Probate Section (AB 239 (Kaloogian), Chapter 175, Statutes of 1999). The California State Association of Public Administrators opposed that provision in the bill, believing that “the provision is ill-advised because it would allow someone outside of the United States ‘to control affairs that would otherwise properly be in the venue of the public administrator who is responsible to the court.’ ” (Senate Judiciary Committee Analysis, June 24, 1999). A question was also raised regarding the impact of this provision of the bill upon heir hunters, “who sign up foreign heirs for up to 40 percent of the estate, then have themselves nominated as administrator of the estate.” (Id.).³ Author’s amendments deleted that provision of the bill, thereby removing all opposition, and the other provisions in the bill moved forward. (Senate Floor Analysis, July 7, 1999).

IMPACT ON PENDING LITIGATION: The Executive Committee of the Trusts and Estates Section is not aware of any current litigation regarding this issue.

LIKELY SUPPORT & OPPOSITION:

<p><u>Support:</u> Non-resident heirs of decedents, and individuals associated with non-resident heirs who would otherwise be eligible to be nominated by those heirs to serve as administrators of estates</p>	<p><u>Reasons:</u> This proposal will permit a non-resident heir to nominate an administrator</p>
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³ Now, as in 1999, the Executive Committee of the Trusts and Estates Section sees no problem with this, as the probate court controls how much of a fee the administrator gets, and would be apprised of and scrutinize these contracts.

<p><u>Oppose:</u> This proposal may generate opposition from the California State Association of Public Administrators</p>	<p><u>Reasons:</u> Public administrators may argue, as they did in 1999, that this proposal would allow someone outside of the United States to “control affairs that would otherwise properly be in the venue of the public administrator who is responsible to the court.” It should be noted, however, that this proposal would simply provide the ability to <i>nominate</i>. The nominee would still need to meet the existing qualification requirements in order to be <i>appointed</i> as administrator, and, if appointed, a private administrator would be responsible to the court and subject to the court’s jurisdiction, to the exact same extent as a public administrator. In addition, Probate Code section 8402(b) currently permits a non-resident of the United States to serve as personal representative if named as executor in the decedent’s will. Allowing a non-resident to <i>nominate</i> an administrator involves a lesser “power” than what already exists in the Probate Code.</p>
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FISCAL IMPACT: No anticipated fiscal impact.

GERMANENESS: The members of the Trusts and Estates Section Executive Committee have interest and expertise in the administration of decedents’ estates.

TEXT OF PROPOSAL

SECTION 1. Section 8465 of the Probate Code is amended to read:

(a) The court may appoint as administrator a person nominated by ~~a~~ *any of the following persons:*

(1) A person otherwise entitled to appointment ~~or by the~~.

(2) *A person who would otherwise be entitled to appointment but who is ineligible for appointment under subdivision (a)(4) of Section 8402 because he or she is not a resident of the United States.*

(3) *The guardian or conservator of a person otherwise entitled to appointment.*

The nomination shall be made in writing and filed with the court.

(b) If a person making a nomination for appointment of an administrator is the surviving spouse or domestic partner, child, grandchild, other issue, parent, brother or sister, or grandparent of the decedent, the nominee has priority next after those in the class of the person making the nomination.

(c) If a person making a nomination for appointment of an administrator is other than a person described in subdivision (b), the court in its discretion may appoint either the nominee or a person of a class lower in priority to that of the person making the nomination, but other persons of the class of the person making the nomination have priority over the nominee.