



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

PROPOSAL TO REVISE PROBATE CODE SECTION 8200 (DUTIES OF CUSTODIAN OF A WILL)

LEGISLATIVE PROPOSAL (T&E-2014-04)

TO: Office of Governmental Affairs

FROM: Patrick A. Kohlmann, Member of the Executive Committee, Trusts and Estates Section

DATE: September 17, 2013

RE: Proposal to Revise Probate Code section 8200 (Duties of Custodian of a Will)

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: April 21, 2013

Approval vote: For 27 Against 0 Abstain 1

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SUMMARY OF PROPOSAL

INTRODUCTION

Probate Code section 8200 requires the custodian of the decedent's will to lodge the will with the clerk of the superior court of the county in which the decedent's estate may be administered within 30 days of learning of the decedent's death. The custodian

must also mail a copy of the will to the executor. Once the will is lodged with the clerk, it becomes a public document. Therefore, creditors wishing to learn whether there is a will may check with the clerk of the court in the county where the decedent died to find it.

The custodian of the will must lodge the will even if no probate is anticipated. A custodian who fails to do this is liable for all damages to any person injured by the failure.

A custodian may be a confidante, attorney, or other trusted advisor of the decedent. The decedent's principal motivation for entrusting the care of his or her will with a custodian is to ensure its safekeeping until the time of his or her death. Custodians ensure that executors are informed of the will and of their nomination as executor upon a decedent's death. Custodians generally have no beneficial interest in the decedent's estate. However, they serve an important role.

Probate Code section 8200 was amended effective as of June 27, 2012 to impose a fee upon custodians to lodge the decedent's will. Government Code section 70626 currently sets the amount of that fee at fifty dollars.

The Executive Committee of the Trusts and Estates Section (TEXCOM) believes that requiring custodians to incur a fee to lodge a will will have a chilling effect on their willingness to hold such original documents, and is likely to culminate in reluctance by such custodians to maintain and safeguard wills. The result of this may be fewer wills being delivered to executors, fewer wills being lodged with the court, and fewer creditors having knowledge of a decedent's will.

TEXCOM believes that an amendment to Probate Code section 8200 authorizing the person in possession of the decedent's will to deliver the will to either the executor or a beneficiary for lodging, and further confirming that any fee incurred by any party who lodges the will may be reimbursed to such party as an expense of administration, would encourage custodians to continue to hold and safeguard original wills in accordance with the intent of decedents, and would ultimately result in more wills being lodged in accordance with the intent of the law.

ISSUES AND PURPOSE:

The following paragraphs provide a detailed explanation of the proposed amended statute.

Authorized Delivery by Custodian to Executor or Beneficiary

The proposed amended statute would authorize the custodian of a will to either lodge the will as per the existing statute and be reimbursed from the estate for the fee they incur, or in the alternate to deliver the will to the person named in the will as executor, or if the executor's whereabouts are not known to a person named in the will as a beneficiary. Delivery would be required to be either by personal service including

proof that service was made on a form adopted by the Judicial Council or service by mail return receipt. In many situations it is likely that such a recipient's whereabouts would be known of by the custodian, and such a recipient would have an interest in the decedent's estate and hence an interest in lodging the will upon receipt from the custodian.

Required Notice of Duties to Accompany Delivered Will

Delivery by a custodian must, pursuant to the proposed amended statute, include a notification set out in a writing attached to the will in not less than 10-point boldface type, or a reasonable equivalent thereof stating the following: "As the successor custodian of the decedent's will, you have a duty pursuant to Probate Code section 8200 to deliver the will within 30 days of receipt to the superior court of the county in which the estate of the decedent may be administered. You may be liable for damages if you fail to comply with this requirement. Additionally, if you are not the executor, but know the whereabouts of the person named as executor in the will, you shall also mail a copy to the person named in the will as executor." This required notice would clearly inform the recipient of his or her duty to lodge the will.

Release of Custodian From Further Duties

Delivery pursuant to the proposed amended statute would relieve the original custodian of any further duties, and the executor or beneficiary in receipt of the will would be required, within 30 days of receipt of delivery, to deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered.

Fee as per Government Code section 70626 Required in All Cases, but Reimbursable from Estate

The fee for delivering a will to the clerk of the superior court, whether by the original custodian, executor, or beneficiary, would still be the fee as provided in Section 70626 of the Government Code. However, the amended statute would confirm that the fee for any will lodged pursuant to Section 8200 by any of the above parties is reimbursable from the estate as an expense of administration.

HISTORY:

Before 2012, Probate Code section 8200 provided that no fee shall be charged for delivering a will to the clerk of the superior court. The statute was amended, effective June 27, 2012, to impose a fee, as provided in Government Code Section 70626. (SB 1021, Stats. 2012, ch. 41, § 86.)

PENDING LITIGATION:

None known.

LIKELY SUPPORT & OPPOSITION:

TEXCOM anticipates support from trusts and estates practitioners. There is no known opposition.

FISCAL IMPACT:

No fiscal impact is anticipated. This proposal would modify the list of those who may be obligated to deliver a decedent's will to the superior court, but Probate Code section 8200 would continue to impose a duty to deliver that will and would continue to impose a fee for delivering that will.

GERMANENESS:

This proposal requires the special knowledge, training, experience and technical expertise of the members of TEXCOM because it relates to estate administration matters which are the special purview of the Committee.

TEXT OF PROPOSAL:

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

8200 (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 *either 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.~~ *Deliver 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, by either personal service including proof that service was made on a form adopted by the Judicial Council or service by mail return receipt, along with the following notification set out in a writing attached to the will in not less than 10-point boldface type, or a reasonable equivalent thereof: "As the successor custodian of the decedent's will, you have a duty pursuant to Probate Code section 8200 to deliver the will within 30 days of receipt to the superior court of the county in which the estate of the decedent may be administered. You may be liable for damages if you fail to comply with this requirement. Additionally, if you are not the executor, but know the whereabouts of the person named as executor in the will, you shall also mail a copy to the person named in the will as executor." Delivery pursuant to this section shall relieve the original custodian of any further duties under this section, and the executor or beneficiary in receipt of the will shall within 30 days of receipt of delivery from the custodian deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered. Additionally, if the will is delivered to a beneficiary, the beneficiary shall mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the beneficiary.*

(2) *If the custodian for any reason has not delivered the will to either the person named in the will as executor or to a beneficiary, the custodian shall do both of the following:*

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

(ii). ~~(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, *executor, or beneficiary in receipt* of a will who fails to comply with the requirements of this section is 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.

(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~~ The fee for any will delivered pursuant to ~~paragraph (1) of subdivision (a)~~ shall be reimbursable from the estate as an expense of administration.