

# Judicial Council of California • Administrative Office of the Courts

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## INVITATION TO COMMENT SPR14-16

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Title	Action Requested
Probate, Decedents' Estates: Waiver of Bond by Heirs or Beneficiaries of Decedents' Estates	Review and submit comments by June 18, 2014
Proposed Rules, Forms, Standards, or Statutes Adopt form DE-142/DE-111(A-3d))	Proposed Effective Date January 1, 2015
Proposed by Probate and Mental Health Advisory Committee Hon. Mitchell L. Beckloff	Contact Douglas C. Miller 818-558-4178, <a href="mailto:douglas.c.miller@jud.ca.gov">douglas.c.miller@jud.ca.gov</a>

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### Executive Summary and Origin

In response to concerns expressed by judicial officers in the probate departments of a number of superior courts, the Probate and Mental Health Advisory Committee proposes the adoption of a mandatory form for beneficiaries of decedents' estates to waive surety bonds that otherwise would be required of the proposed personal representatives of these estates.

### Background

#### Under current law

The personal representative<sup>1</sup> of a decedent's estate must post a surety bond for the benefit of persons interested in the estate, conditioned on the faithful execution of the duties of the office.<sup>2</sup> The decedent's will may waive the bond.<sup>3</sup> If the will neither requires nor waives the bond or there is no will, all beneficiaries of the estate may waive the bond.<sup>4</sup> Despite a waiver of bond by the decedent or by all beneficiaries, the court—on its own motion or on the petition of any interested person—may, *for good cause*, require a bond: acceptance of waiver of bond by the

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<sup>1</sup> See Probate Code section 58(a). Unless otherwise stated, all code references are to the Probate Code.

<sup>2</sup> See section 8480(a) and (b).

<sup>3</sup> Section 8481(a)(1). A link to section 8481 is provided at the end of this invitation to comment (ITC).

<sup>4</sup> See section 8481(a)(2). The term "beneficiary" as used in section 8481 refers to both a devisee of real or personal property under a decedent's will and an heir of an intestate decedent. See sections 24(a) and (b), 32, and 34(a).

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

decedent or by the beneficiaries is the court's default position.<sup>5</sup> The beneficiaries' waivers must be in writing and are to be attached to the petition for the personal representative's appointment.<sup>6</sup>

Bond waivers to be signed by estate beneficiaries are usually prepared by the proposed personal representative or his or her counsel; circulated to all beneficiaries, sometimes by mail or e-mail; returned to the personal representative or attorney after execution; and collected for attachment to the appointment petition or for separate filing shortly after that petition is filed. The waivers are usually quite brief and do not explain the voluntary nature of the act or the consequences to estate beneficiaries if the bond is waived and problems that would have been covered by it arise in the administration of the estate. The form for a beneficiary's bond waiver provided in typical legal forms publications usually reads something like the following:

“[Name of beneficiary], [statement of relationship] to [name of decedent], the decedent in the above captioned matter, and beneficiary under the decedent's will, hereby waives posting of bond by [name of proposed personal representative], the proposed personal representative, with respect to the Petition for Probate filed on [date of filing] in this matter.”<sup>[7]</sup>

Judicial officers in probate assignments have advised the committee that beneficiaries interested in estates that have had administration problems following bond waivers frequently complain that no one explained the consequences of the waivers they were asked to sign, or even say that they were led to believe that a waiver was necessary to permit administration to begin or continue or to enable them to receive their shares of the estate. The committee has concluded that estate beneficiaries asked to waive bond should be advised about (1) the possible consequences of a waiver; (2) their right to consult with counsel independent of the proposed personal representative or the representative's counsel; and (3) that their rights to expect commencement or timely completion of administration and receipt of their shares of the estate are not conditioned on waiving bond.

### **Under Assembly Bill 2567**

Legislation recently introduced in the 2014 Legislature would repeal and reenact section 8481. Assembly Bill 2567 (Daly), introduced February 21, 2014 and amended on March 19, 2014, would reverse the default position of the court concerning bond waivers by the decedent or by all estate beneficiaries. The legislation would require the court to order a bond unless it makes a good faith determination that the waiver of bond by the decedent or by the beneficiaries *will not* result in harm to the beneficiaries and creditors of the estate. (See AB 2567, § 2, restated section 8481(b).)<sup>8</sup>

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<sup>5</sup> Section 8481(b).

<sup>6</sup> Section 8481(a)(2).

<sup>7</sup> See West's California Code Forms, Probate §8481 Form 1 (7th Ed.).

<sup>8</sup> A link to AB 2567 is provided at the end of this ITC.

## The Proposal

The Probate and Mental Health Advisory Committee recommends adoption of a Judicial Council form for waiver of bond to be signed by estate beneficiaries. The *Waiver of Bond by Heir or Beneficiary* (form DE-142/DE-111(A-3d)) is proposed as a mandatory form under rule 1.31 of the California Rules of Court. The signed form would thereby become the only way a written waiver of bond by an estate beneficiary under Probate Code section 8481 could be established in a California estate proceeding (rule 1.31(a)).

## The form

Two drafts of the new form follow this invitation to comment. The first draft is based on current law; the second assumes passage of AB 2567 in its present iteration. The power of the court for good cause to require a bond despite waivers by the decedent's will or by all beneficiaries under current section 8481(b) is reflected in paragraphs A and B of the first draft with the words "and the court agrees . . ." Changes in the second draft reflecting the legislation are shown underlined or in strike-out in paragraphs A and B of the Notice portion of the text.<sup>9</sup> The changed text advises of the responsibility placed on the court by the legislation to make a good faith determination that a waiver of bond will not harm beneficiaries or creditors of the estate before accepting a waiver of bond in the decedent's will or by the estate's beneficiaries under reenacted section 8481(b). The stricken text in paragraph D reflects the legislation's repeal without reenactment of current section 8481(b)'s provision for a petition by any person interested in the estate to require a bond despite its waiver.

The new form is modeled after an existing waiver form, the *Waiver of Notice of Proposed Action* (form DE-166), in that it consists of a notice section (a "warning" in form DE-166) followed by the text of the waiver. But a difference between the existing and proposed forms is that the latter is designed as both a standalone form (designated as form DE-142) and an attachment to a *Petition for Probate* (form DE-111) (designated as form DE-111(A-3d)).

This unusual design reflects current experience with beneficiary bond waivers. Most are filed as attachments to form DE-111 because section 8481(a)(2) (section 8481(a) in the restated section in AB 2567) calls for them to be attached to the petition for appointment of a personal representative, which is form DE-111.<sup>10</sup> However, some waivers are not filed until after the petition has been filed, primarily because they have not been returned by beneficiaries in time to be attached to the petition before it is filed. In that situation, the petitioner has filed the appointment petition before receiving all of the signed waivers in the hope that all will be returned before the initial hearing on the petition, which may be 45 or more days after filing. The standalone form's design features, including full first-page party/attorney, court, and title caption boxes, would help ensure that late-filed waivers find their way to the proper case file in time for the matter to go forward without delay at the initial hearing.

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<sup>9</sup> The underlining and strike-out are for emphasis here only. If the second draft of the form is proposed to the Judicial Council because AB 2567 has been enacted, the underlining and stricken text would be omitted.

<sup>10</sup> See items 3d(2) and 3d(3) on page 2 of form DE-111.

The notice portion of the form consists of paragraphs A–F. The first two paragraphs summarize the basic requirement of a bond and exceptions to that requirement, including the beneficiary-waiver provisions of existing section 8481(a)(2) (restated section 8481(a) in AB 2567). The description of a bond and the source of payment of its cost in the last two sentences of paragraph A come from the answer to question 15, “[s]hould I require a bond?” in the introduction to the statutory will in section 6240.

The most important notice to a beneficiary asked to sign the form is in bold text in paragraph C. This paragraph advises that if an estate with no bond suffers a loss that would have been covered by the bond, all or a part of the loss may not be recoverable from the personal representative and therefore may eliminate or reduce the share of the estate distributable to the beneficiary.

Paragraph D of the first version of the form advises beneficiaries that their waivers cannot be withdrawn after the personal representative is appointed without a bond, but they would remain eligible after the appointment to petition the court to require a bond, the same right held by any person interested in the estate under existing section 8481(b). As noted above, AB 2567 would eliminate that petition. Therefore, the last portion of the final sentence in the paragraph would be eliminated in the second form.

Paragraph E acts as a reminder to a personal representative interesting in procuring bond waivers from estate beneficiaries that a Guardian ad Litem or other legal representative with specific authority to waive bond for a minor, an incapacitated person, and certain beneficiaries that are unascertained or not yet in being.<sup>11</sup> The phrase “other legal representative” is intended to cover waivers by guardians or conservators of the estates of beneficiaries, as well as attorneys in fact of principal beneficiaries with capacity or under durable powers of attorney.

Paragraph F, in bold text for emphasis, advises beneficiaries not to sign the form until they have consulted with counsel independent of the lawyer for the proposed personal representative if they do not understand the form.

The waiver portion of the form consists of four numbered paragraphs. Paragraph 3 confirms the beneficiary’s understanding that he or she is not required to waive bond to allow estate administration to start or proceed or to receive his or her share of the estate. The express waiver in paragraph 4 is specific to a particular personal representative, whose name is to be inserted in the form. This limited waiver means that the beneficiaries must be consulted again about waiving bond if a successor personal representative is required during the estate administration.

### **Alternatives Considered**

This proposal was modified to include an alternative version of the proposed form only after the committee became aware of Assembly Bill 2567 in the 2014 Legislature, introduced after the

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<sup>11</sup> See section 1003.

committee approved circulation of the first version of the form. The committee decided this unusual step would be preferable to (1) waiting a full year before proceeding with either version of the form to see whether section 8481 would be rewritten; or (2) going forward with the first version of the form this year, with a revision in 2015 if the legislation is enacted. The first option would deprive estate beneficiaries of the advice provided in the form for an additional year. The second option would duplicate the implementation and training costs to be incurred by the Judicial Council and the courts noted below, with no significant advantage gained.

No alternative to a mandatory form was considered, to ensure that all estate beneficiaries will receive the same disinterested and accurate advice concerning the risks of waiving bond and their rights as beneficiaries, whether or not they choose to waive bond.

### **Implementation Requirements, Costs, and Operational Impacts**

Either version of this form will incur the modest costs of distribution of any new form to the courts. Training costs to court staff concerning the use of the form should also be minimal. The form has no optional or alternative items for users to select and court staff to review, beyond its identification as an attachment (by activation of a check box and filling in a “(2)” or “(3)” in a space provided in the title caption box of the form) if it is attached to and filed with the *Petition for Probate*, and execution by a single identified estate beneficiary. The form should actually reduce current court staff time and expense in their initial reviews of newly-filed estates because it is a single-page waiver for each beneficiary of identical appearance, save only for the identity of the signer, instead of multiple signatures on a single sheet or separate signature blocks following variations of waivers prepared by personal representatives or their counsel from a variety of sources.

## Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address its stated purpose?
- Should advice now contained in the form be modified or should additional advice be added?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost or time savings in staff review of beneficiary bond waivers? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### Attachments and Links

1. Form DE-142/DE-111(A-3d), version 1 (if AB 2567 is not enacted), at page 7
2. Form DE-142/DE-111(A-3d), version 2 (if AB 2567 is enacted), at page 8
3. Probate Code section 8481:  
[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=PROB&sectionNum=8481](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PROB&sectionNum=8481)
4. Assembly Bill 2567, as amended March 19, 2014:  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB2567](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2567).

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i>  TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	<h2 style="margin: 0;">Draft Not Approved by the Judicial Council</h2>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
ESTATE OF <i>(Name):</i> _____, DECEDENT	
<b>WAIVER OF BOND BY HEIR OR BENEFICIARY</b>  <input type="checkbox"/> Attachment 3d     to <i>Petition for Probate*</i>	CASE NUMBER: _____

**NOTICE: READ PARAGRAPHS A–F BEFORE YOU SIGN**

- A. Unless the decedent's will admitted to probate waives a bond and the court agrees, the law requires the executor or administrator of the estate (the estate's **personal representative**) to give a bond approved and ordered by the court. A bond is a form of insurance to replace assets that may be mismanaged or stolen by the personal representative. The cost of the bond is paid from the assets of the estate.
- B. If there is no will of the decedent admitted to probate or there is such a will and it does not require a bond, **all** persons eligible to receive a share of the estate may waive the requirement of a bond. If they all waive bond and the court agrees, the personal representative will NOT have to give a bond.
- C. **If bond is not ordered by the court, and the estate suffers loss because the personal representative fails to properly perform the duties of the office, the loss or some part of it may not be recoverable from the personal representative. If so, your share of the estate may be partially or entirely lost.**
- D. You may waive the requirement of a bond by signing this form and delivering it to the petitioner for appointment of a personal representative or to the petitioner's attorney. Your waiver cannot be withdrawn after the court appoints the personal representative without requiring a bond, but you would remain eligible to petition the court to require a bond after giving your waiver.
- E. A *guardian ad litem* or other legal representative with specific authority under law to waive bond must sign for a minor, an incapacitated person, an unascertained beneficiary, or a designated class of persons who are not ascertained or not yet in being. See Judicial Council forms DE-350 and DE-351 and Probate Code section 1003.
- F. **If you do not understand this form, do not sign it until you have asked a lawyer (who is independent of the lawyer for the proposed personal representative) to explain it to you.**

**WAIVER**

1. I have read and understand paragraphs A through F above.
2. I understand that before signing this form, I am free to consult with a lawyer of my choice concerning the possible consequences to me of waiving bond.
3. I understand that I do not have to waive bond to allow the estate administration to begin or proceed, or to receive my share of the estate.
4. I **WAIVE** the posting of bond in this estate by *(Name of personal representative):* \_\_\_\_\_

Date: \_\_\_\_\_

_____ (TYPE OR PRINT NAME OF BENEFICIARY (AND AUTHORIZED SIGNER IF BENEFICIARY IS NOT AN INDIVIDUAL))	_____ (SIGNATURE)
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*\*(This form may be filed as a standalone form (as form DE-142) or as Attachment 3d(2) (will) or Attachment 3d(3) (intestacy) to the Petition for Probate (form DE-111) (as form DE-111(A-3d).)*

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i>  TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	<h2 style="margin: 0;">Draft Not Approved by the Judicial Council</h2>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
ESTATE OF <i>(Name):</i> _____, DECEDENT	
<b>WAIVER OF BOND BY HEIR OR BENEFICIARY</b>  <input type="checkbox"/> Attachment 3d    to <i>Petition for Probate</i> *	CASE NUMBER: _____

**NOTICE: READ PARAGRAPHS A-F BEFORE YOU SIGN**

- A. Unless waived by the decedent's will admitted to probate and by the court, after the court makes a good faith determination that the waiver will not harm the beneficiaries and creditors of the estate; the law requires the executor or administrator of the estate (the estate's **personal representative**) to give a bond approved and ordered by the court. A bond is a form of insurance to replace assets that may be mismanaged or stolen by the personal representative. The cost of the bond is paid from the assets of the estate.
- B. If there is no will of the decedent admitted to probate or there is such a will and it does not require a bond, **all** persons eligible to receive a share of the estate may waive the requirement of a bond. If they all waive bond and the court joins the waiver, after making a good faith determination that the waiver will not harm the beneficiaries and creditors of the estate, the personal representative will NOT have to give a bond.
- C. **If bond is not ordered by the court, and the estate suffers loss because the personal representative fails to properly perform the duties of the office, the loss or some part of it may not be recoverable from the personal representative. If so, your share of the estate may be partially or entirely lost.**
- D. You may waive the requirement of a bond by signing this form and delivering it to the petitioner for appointment of a personal representative or to the petitioner's attorney. Your waiver cannot be withdrawn after the court appoints the personal representative without requiring a bond, ~~but you would remain eligible to petition the court to require a bond after giving your waiver.~~
- E. A *guardian ad litem* or other legal representative with specific authority under law to waive bond must sign for a minor, an incapacitated person, an unascertained beneficiary, or a designated class of persons who are not ascertained or not yet in being. See Judicial Council forms DE-350 and DE-351 and Probate Code section 1003.
- F. **If you do not understand this form, do not sign it until you have asked a lawyer (who is independent of the lawyer for the proposed personal representative) to explain it to you.**

**WAIVER**

1. I have read and understand paragraphs A through F above.
2. I understand that before signing this form, I am free to consult with a lawyer of my choice concerning the possible consequences to me of waiving bond.
3. I understand that I do not have to waive bond to allow the estate administration to begin or proceed, or to receive my share of the estate.
4. I **WAIVE** the posting of bond in this estate by *(Name of personal representative):* \_\_\_\_\_

Date: \_\_\_\_\_

_____ <small>(TYPE OR PRINT NAME OF BENEFICIARY (AND AUTHORIZED SIGNER IF BENEFICIARY IS NOT AN INDIVIDUAL))</small>	▶	_____ <small>(SIGNATURE)</small>
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*\*(This form may be filed as a standalone form (as form DE-142) or as Attachment 3d(2) (will) or Attachment 3d(3) (intestacy) to the Petition for Probate (form DE-111) (as form DE-111(A-3d).)*