

AB 565 - Representation of trust beneficiaries

SUMMARY

AB 565 would enact a comprehensive statutory scheme governing virtual representation, which allows a competent adult to represent and bind trust beneficiaries or other individuals who lack the legal capacity to represent themselves, provided specified conditions are met, in line with what all states except for California, Louisiana and Oklahoma have enacted.

BACKGROUND AND ISSUE

Numerous sections of the Probate Code reference the need to provide notice to, or obtain consent from “all beneficiaries” of a trust, or similarly broad classes. For example, Probate Code section 15404 provides that an irrevocable trust may be modified or terminated without court approval upon the written consent of the settlor (the person who created the trust) and “all beneficiaries.” Similarly, Probate Code section 16061.7 requires a trustee to provide notice to “each beneficiary” of a trust, and “each heir” of the deceased settlor in certain circumstances.

Regardless of the benefit, beneficiaries who are Minors, Incapacitated, Unborn, or Unknown (MIUUs) cannot legally consent to a 15404 modification, so this procedure could not be used in common cases with a broad beneficial class unless a petition is brought in court to approve the modification or to appoint a guardian ad litem (GAL). Both alternatives are costly, time consuming, and necessarily involves the consumption of court resources.

In the case where the trustee is required to provide notice to all beneficiaries and heirs (which may include MIUUs), there is no clear statutory procedure about how such notice would be effectively provided to a MIUU individual, thus leaving the trustee unable to fulfil that duty without obtaining a court order deeming the notice to have been effectively delivered.

An alternative to the lengthy, costly and time-consuming courtroom process is “virtual representation,” a version of which has been enacted in every state except Louisiana, Oklahoma and California. Virtual representation allows a competent adult to represent and bind others who lack the legal capacity to represent themselves when 1) the competent adult owes a fiduciary duty to or has a substantially identical interest as those who are being represented, and 2) there is no conflict of interest between the representative and those who are being represented.

SOLUTION

To address these issues, AB 565 would permit virtual representation of a minor, an incapacitated person, a potential beneficiary who may be born in the future, or a person whose identity or location is unknown and not reasonably ascertainable (in other words – MIUUs). The logic behind virtual representation is that MIUUs do not have the legal capacity to protect their own interests, but another person who has substantially identical interests (or a fiduciary duty to protect those interests) will protect the MIUUs’ interests in the same way as the MIUUs would, had they been able to do so.

Importantly, the virtual representation statute established by AB 565 would create an alternative, without limiting the appointment of a GAL or otherwise seek court guidance as an option to represent the interests of MIUUs if desired by the parties.

In permitting virtual representation and aligning California with 47 other states, AB 565 authorizes a proven and well-established mechanism which provides clarity and a crucial update to the otherwise functional existing rules regarding the delivery of notice, and the modification or termination of a trust.

SIMILAR LEGISLATION

AB 1883 (2004, Harman) - Trustees: bonds - Chaptered

AB 479 (Shelley, 2001) - Guardians: conservators - Chaptered

SB 1496 (1992, Committee on Judiciary) - Decedents’ estates and litigation; powers of attorney- Chaptered

SUPPORT

California Lawyers Association, Trusts and Estates Section (Sponsor)
California Bankers Association (Co-Sponsor)

OPPOSITION

None on File.

CO-AUTHORS

None on File.

FOR MORE INFORMATION

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