

Memorandum 88-31

Subject: Study L-2009 - AB 2841 (1988 Probate Legislation--amendments)

Assembly Bill 2841 was amended on March 15 to incorporate technical corrections, to add the Fiduciaries Wartime Substitution Law, and to implement changes made at the hearing on the bill in the Assembly Judiciary Committee. The bill will be amended again before the next Commission meeting to incorporate Commission decisions relating to operative date and transitional provisions and other Commission decisions made at the March meeting, and to add other minor changes discovered by the staff since then. The Commission should review the two amended versions of the bill to make sure all amendments are satisfactory, and should raise for discussion at the meeting any change a Commissioner has a question or concern about.

This memorandum will alert the Commission to changes the staff believes the Commission should note. This memorandum will also raise new matters that have been brought to the staff's attention for possible incorporation in the bill. The discussion in the memorandum omits references to page and line number of the bill, since we will be working with two versions of the bill.

Status of Portion of AB 2841 Relating to Probate Referees

Before considering specific changes in AB 2841, the Commission should decide how to proceed on the bill in light of political problems with the probate referees. At the March meeting the Commission reviewed the legislative actions that had been taken on the portion of AB 2841 relating to probate referees. Specifically:

(1) Assemblyman Harris, by an author's amendment made at the request of the probate referees, had removed the \$250 cap on the referee's commission for appraising publicly traded stock listed on the New York, American, or Pacific stock exchange. The purpose of this amendment was to allow Assemblyman Harris more time to review the merits of the question. It appears that Assemblyman Harris is not planning to restore the \$250 cap to the bill.

(2) The Assembly Judiciary Committee, at the request of the probate referees, voted to recommend approval of the bill after (i) consolidating the inventory and appraisal in a single document to be filed within 4 months after issuance of letters, and (ii) requiring appointment of a probate referee to receive notice of any petition for waiver of a probate referee in an estate with real property.

After considering these legislative actions, the Commission decided to request Assemblyman Harris to delete from the bill all the provisions relating to probate referees in order for the Commission to have an opportunity to review the whole scheme. The letter has been sent, and a copy is attached as Exhibit 1. Assemblyman Harris' response is attached as Exhibit 2. As you can see, he does not clearly state that he is not willing to delete the probate referee provisions from the bill, but this appears to be the only conclusion that can be drawn from his letter. If the Commission wishes to withdraw the entire bill and have it reintroduced next session, he will accommodate us.

At this point, the Commission has a number of options available to it:

(1) Request Assemblyman Harris to drop the bill entirely so the Commission can give it further study. This would have the effect of delaying implementation of the Commission's current recommendations for a year. There is nothing in the recommendations that is essential to enact this session. We plan to make recommendations concerning attorney and personal representative fees to the 1989 session. Other areas also probably will be covered by recommendations to the 1989 session. We could include the provisions of AB 2841 with these 1989 recommendations. Sometimes it is important in Sacramento to take a principled stand and allow a bill to die rather than accept amendments that would destroy a basic objective of the bill. Maintaining credibility is important to the Commission in the long run.

(2) Inform the Senate Judiciary Committee that the Commission no longer recommends the provisions relating to probate referees. The likely result of this course of action is that Senator Lockyer, who is the Commission's Senate Member and Chairman of the Senate Judiciary

Committee, would see to it that the probate referee provisions are deleted. The bill might then go to a conference committee. There is no telling what the outcome of the conference committee would be.

(3) Attack in the Senate Judiciary Committee the specific changes that were made in the Assembly Judiciary Committee. This, again, might require a conference committee. Assemblyman Harris suggests this for Commission consideration, and our sense is that he would accept this resolution so long as the Senate did not attempt to restore the \$250 stock cap.

(4) Work out a political compromise with the probate referees--e.g., agree to give up on the \$250 cap in exchange for restoration of the Commission's recommendations on separate inventory and appraisal and the existing waiver procedure. The staff favors this approach, if all parties are willing.

(5) Let the bill go as is, and make a separate recommendation to the next session of the Legislature to address the problem areas. Once the bill is enacted, however, it may as a practical matter be difficult to change the law on some of these issues. For example, the bill would change existing law to require appointment of a probate referee in every case where a waiver is sought and the estate includes real property. Once this change is made it would be next to impossible to restore existing law. The Commission needs to decide how strongly it feels about this.

§ 401. Qualifications for appointment

Under existing law, continued in AB 2841, the State Personnel Board administers the probate referee qualification examination. The State Controller (Exhibit 3) informs us that this is no longer done. Presently, the Controller contracts with Cooperative Personnel Services, an agency created through a joint powers agreement, to administer the examination. The staff has amended the bill to reflect this practice.

§ 404. Standards for probate referee

Section 404 continues existing Probate Code Section 1308(a) that the State Controller may revoke the appointment of a probate referee for violation of standards of training, performance, or ethics. However, Section 404 does not continue existing Probate Code Section 1308(b) that, "within any one year the Controller may also remove, at his pleasure, at least one probate referee, but not more than 10 percent of the probate referees in any one county." The reason the Commission omitted this provision is that the Commission was informed the provision has not been used in modern times, and the Comment to Section 1308(b) so states.

The State Controller (Exhibit 3) tells us we are misinformed:

This discretionary authority has been used in instances where the Controller believed that removal of a referee was in the best interest of the program but, under the particular circumstances, he did not feel that it was appropriate to remove the individual under subsection (a) of Probate Code Section 1308 for "noncompliance with any standard of training, performance or ethics." One referee, for example, was removed in 1986 and one in 1988 under the discretionary provision.

The Controller believes that, while the provision is not used often, it is important to the integrity of the referee system for the Controller to have this authority. The Controller would oppose any substantive change in law on this point.

The staff believes this is a political matter that the Commission should not become involved in. We recommend that existing law be preserved.

§ 406. Political activities of probate referee

The existing limitations on political activities of probate referees are found in Sections 1311 and 1312. The Commission has made an effort to expand and clarify the limitations in Section 406. As a result of Commission discussions at the January Commission meeting, the staff would make these further clarifications:

406. (a) ~~A probate referee, or any person who is an applicant for or seeking appointment or reappointment to act as a probate referee, shall not, directly or indirectly, solicit, receive, or contribute, or be in any manner involved~~
As used in this section, "prohibited political activity"

means directly or indirectly soliciting, receiving, or contributing, or being in any manner involved in soliciting, receiving, or contributing, any of the following:

(1) Any assessment, subscription, or contribution to any party, incumbent, committee, or candidate exceeding two hundred dollars (\$200) in any one calendar year for any partisan public office of this state.

(2) An assessment, subscription, contribution, or political service in any amount for the office of State Controller ~~in any amount, notwithstanding paragraph (1).~~

~~(b) A violation of subdivision (a) is a misdemeanor, and the State Controller shall revoke the appointment of a probate referee who violates subdivision (a).~~

~~(e) (b)~~ Upon a person's application for appointment as a probate referee, and thereafter annually in January of each year during the person's eligibility for appointment, during the person's tenure as a probate referee, and during the person's eligibility for reappointment, the person shall file with the State Controller a verified statement indicating whether the person has ~~done any act described in subdivision (a)(1) or (a)(2)~~ engaged in prohibited political activity during the preceding ~~two-year period~~ two calendar years.

~~(d) (c)~~ The State Controller may not appoint or reappoint as a probate referee any person who, within the ~~two-year period preceding the date of the appointment or reappointment, violates any provision of this section~~ preceding two calendar years has engaged in prohibited political activity, and any such appointment or reappointment is void and shall be revoked. The State Controller shall revoke the appointment of a person who, during the person's tenure as probate referee, engages in prohibited political activity. However, all acts not otherwise invalid performed by the person before revocation of the person's appointment are valid.

(d) A person shall not engage in prohibited political activity during the time the person is an applicant for appointment or reappointment, or during the person's tenure, as a probate referee. A violation of this subdivision is a misdemeanor.

(e) Subdivisions (a), (c), and (d) do not apply to any prohibited political activity that occurred before July 1, 1989, and the applicable law in effect before July 1, 1989, continues to apply. Subdivision (b) applies on July 1, 1989, to persons who apply for appointment on or after July 1, 1989; a person who applied for appointment or who was appointed before July 1, 1989, shall file the first statement required by subdivision (b) on or before July 1, 1989, and thereafter as prescribed in subdivision (b).

Under existing law, a referee or person seeking appointment may not solicit, receive, or contribute any assessment, subscription, contribution, or political service "for any campaign" for the office of State Controller. The Commission's draft would preclude these activities whether in connection with a campaign or for any other purpose. The State Controller objects. "We are not aware of any problem arising under the existing language since its enactment 18 years ago. On the other hand, we don't know what questions might arise with your revision. For example, would appraising a piece of property as an accommodation to this office be a "contribution" to the office of Controller."

Again, the staff believes this is a political matter that is inappropriate for Commission involvement. We would restore existing law on this point.

§ 1215. Manner of mailing

The staff plans to make the following amendment to the general notice provisions for completeness:

1215. Unless otherwise expressly provided:

(a) If a notice or other paper is required or permitted to be mailed to a person, notice shall be mailed as provided in this section or personally delivered as provided in Section 1216.

(b) The notice or other paper shall be sent by:

(1) First-class mail if the person's address is within the United States. First-class mail includes certified, registered, and express mail.

(2) Airmail if the person's address is not within the United States.

(c) The notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed.

(d) The notice or other paper shall be addressed to the person at his or her office or place of residence, if known, or, if neither address is known, to the person at the county seat where the proceedings are pending.

~~(d)~~ (e) When the notice or other paper is deposited in the mail, mailing is complete and the period of notice is not extended.

§ 7050. Jurisdiction and authority of court or judge

Anne Hilker, State Bar Team 3 captain (Exhibit 4), comments that the Commission has failed in the jurisdictional sections to consolidate the concepts of domicile and residence. She appears to be mistaken--the Commission has consolidated these concepts in Sections 7050 and 7051.

§ 7060. Disqualification of judge

A new subdivision should be added to the judge disqualification statute to preserve a transitional provision in existing law that would otherwise be lost.

(c) The amendments made to former Section 303 by Assembly Bill 708 of the 1987-88 Regular Session do not apply in any proceeding commenced before July 1, 1988.

§ 7660. Summary disposition authorized

Charles Schulz, a member of State Bar Team 3 (Exhibit 5), points out an ambiguity that could be clarified.

(b) Summary disposition may be made whether or not there is a will of the decedent in existence, notwithstanding the existence of the decedent's will if the will does not name an executor, or if the named executor refuses to act.

§ 7664. Liability for decedent's unsecured debts

Charles Schulz questions the policy of this section, which allows a creditor to recover the decedent's debts from beneficiaries who receive property under public administrator summary disposition authority. The reason the Commission added beneficiary liability is that creditors receive no notice under summary disposition--it is analogous to the affidavit procedure and thus the liability of beneficiaries is made analogous to liability under the affidavit procedure.

On the other hand, it can be argued that there are significant differences here from the affidavit procedure. The affidavit procedure can be exercised immediately, whereas the Commission's draft requires

the public administrator to wait four months and pay claims that come to the public administrator's attention before paying out funds to beneficiaries. The affidavit procedure is exercised by the beneficiaries themselves, whereas the summary disposition procedure by the public administrator involves a public official in control of the estate.

Does it make sense to allow a creditor to seize property distributed to a beneficiary where the beneficiary took no steps to initiate the distribution? Does it make sense to give a windfall to a beneficiary and leave the decedent's just debts to go unpaid? The staff is divided on these issues.

§ 8000. Petition

Anne Hilker notes that Team 3 had suggested for organizational purposes that Section 8000 be split into two separate sections. In response, we have split it into two separate subdivisions. She does not see this as a major difficulty.

§ 8002. Contents of petition

Charles Schulz points out that it may be useful to file a typewritten copy of a handwritten will whether or not the handwritten will is holographic. We would expand the relevant provision thus:

The petitioner shall attach to the petition a photographic copy of the will. In the case of a holographic will or other will of which material provisions are in the handwriting of the testator, the petitioner shall also attach a typed copy of the will.

§ 8113. Notice involving foreign citizen

At the March meeting the Commission requested the staff to check with the State Department to see whether the reference in Section 8113 to countries with which the United States has "treaty rights" is appropriate. The staff has checked with treaty and international will experts in the State Department in Washington, and they agree that the reference to treaty rights is inappropriate. We have revised Section 8113 along lines suggested by them to refer instead to countries having recognized diplomatic or consular officials in the United States.

§ 8121. Publication of notice

The law requires that notice of opening probate "shall be published for at least 15 days," with a minimum of three publications and at least 5 days intervening between the first and last publication dates. At the March meeting the Commission asked the staff to check with the newspaper publishers to see whether the phrase "published for at least 15 days" might not be clarified.

The staff has consulted with the California Newspaper Service Bureau (Michael D. Smith, General Manager) on this matter. The newspaper publishers believe the law requires the first publication to occur at least 15 days before the hearing.

The staff would clarify the statute to conform to existing practice, as suggested by the Beverly Hills Bar Association. CNSB has no problem with this. The staff would amend Section 8121(a) to read:

~~Notice shall be published for at least 15 days. The~~
first publication date of the notice shall be at least 15
days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.

§ 8252. Trial

Charles Schulz suggests the following clarification in Section 8252, which the staff would make.

If the will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate.

§ 8270. Petition for revocation

Section 8270 permits an interested person 120 days after a will is admitted to probate in which to petition for revocation of probate. Anne Hilker believes there should be a cross-reference here to Section 8225, which starts the 120 day period running on entry of the minute order admitting the will to probate. The Commission has addressed this matter in the Comment to Section 8270, which states that, "A will is admitted to probate when it is recorded in the minutes by the clerk

pursuant to Section 8225. Section 8225 (admission of will to probate)." Ms. Hilker notes at the beginning of her letter that she has had no opportunity to review the Comments.

§ 8466. Priority of creditor

Anne Hilker points out an ambiguity in the provisions relating to priority of a creditor for appointment as administrator. The statute should make clear that a person who has a higher priority (i.e., a relative of the decedent) does not lose the high priority if that person also happens to be a creditor.

8466. If a person whose only priority is that of a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person.

§ 8482. Amount of bond

Charles Schulz points out that the provision that refers to the amount of a personal representative's bond under independent administration is inconsistent with the independent administration statute. He is correct, and the general bond statute should be conformed to the independent administration statute.

(3) If independent administration is granted as to real property, the estimated value ~~of the decedent's interest in the real property~~ net proceeds of the real property authorized to be sold under Part 6 (commencing with Section 10400).

§ 8903. Waiver of appraisal by probate referee

This section was amended by the Assembly Judiciary Committee to provide that a probate referee must be appointed to receive notice of a waiver petition. In order to protect against unwarranted objections to the waiver by the referee, the Committee added a provision that the referee who objects may not thereafter be appointed to appraise property in the estate.

It may be worth considering an additional protection against unwarranted objection to the waiver by a probate referee. A provision could be added that if the probate referee unreasonably objects to the waiver, the probate referee must pay the litigation expenses incurred by the personal representative. This could be done by an amendment to the bill along the following lines:

(d) A probate referee to whom notice is given under this section may oppose the waiver. If the petition is denied, opposition fails and the court determines the opposition was made without substantial justification, the court shall award litigation expenses, including reasonable attorney's fees, against the probate referee. If the opposition succeeds, the court shall designate a different probate referee to appraise property in the estate. Neither the probate referee who opposed the waiver nor any other probate referee in the same office or with whom the probate referee has a financial arrangement, shall appraise, share in the commission, or in any other manner benefit from the appraisal of property in the estate.

§ 8904. Appraisal by independent expert

The probate referees have pointed out that the bill would require automatic assessment of attorney's fees against a probate referee who opposes appraisal by an independent expert, even though there may have been reasonable cause for the opposition. Again, the staff would add a provision parallel to the one recommended above in the case of a referee's opposition to a waiver.

The probate referee may, within five days after delivery of the inventory, petition for a court determination whether the property to be appraised by an independent expert is a unique, artistic, unusual, or special item of tangible personal property. On the determination, if the petition fails and the court determines that the petition was made without substantial justification, the court shall award litigation expenses, including reasonable attorney's fees, to the prevailing party against the probate referee.

§ 9350. Claims in litigation

The staff has divided this chapter into separate articles dealing with lawsuits on rejected claims, claims in pending actions, and actions where no claim is required. These organizational changes are made at the suggestion of Garrett Elmore, who rightly points out that as drafted, it is unclear what provisions apply to pending actions and what provisions are limited to lawsuits on rejected claims. By imposing an article structure on the chapter we are able to clarify this matter without having to do any redrafting of the statutes themselves.

§ 11004. Expenses of personal representative

We have added a new Section 11004, which restates a provision currently found in Section 900. By inserting this provision now, we kill two birds with one stone: (1) We simplify the task of later disposing of this provision in connection with compensation of the personal representative; and (2) We avoid having a gap in numbering caused by the Commission's deletion of the provision formerly located at Section 11004.

§ 11951. Petition

As drafted, this section precludes a petition for partition of estate property after distribution of the property has been ordered. As Richard Kinyon points out, this is inconsistent with the rest of the Probate Code, which permits petitions that affect estate property at any time until the order for distribution becomes final. In addition, it may not be clear that there is a problem that should be solved by partition until after an order is made requiring distribution of the property in undivided interests. For these reasons the staff has incorporated Mr. Kinyon's suggestion.

Other technical changes

The staff may add a number of technical amendments to conform "appraisement" to "appraisal" terminology in other statutes, particularly in the guardianship and conservatorship law.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335



March 17, 1988

Hon. Elihu M. Harris
State Capitol
Room 6005
Sacramento, CA 95814

Re: Assembly Bill No. 2841--probate referees

Dear Assembly Member Harris:

You introduced Assembly Bill 2841 to effectuate 10 recommendations of the Law Revision Commission relating to probate law and procedure. The Commission has reviewed the amendments to this bill made at the Assembly Judiciary Committee hearing on March 2. The Commission is unable to recommend enactment of the portion of the bill relating to probate referees and inventory and appraisal (as amended at the March 2 hearing) and respectfully requests that you remove these provisions from the bill so that they can be given further study by the Commission and others interested in this matter.

The March 2 amendments made three basic changes in the recommended provisions relating to probate referees. The Commission and representatives of the State Bar Estate Planning, Trust and Probate Section and local bar associations that were present at a Commission meeting held on March 10-11 believe that two of these basic changes will cause serious practical problems and that the other will destroy the compromise the Commission proposes in order to preserve the probate referee system. The three basic changes made at the March 2 hearing are briefly discussed below.

Removal of \$250 cap on appraisal of stock listed on established stock exchange. One of the amendments made at the March 2 hearing was an author's amendment to remove from the bill the proposed \$250 cap on the referee's commission in each estate for appraising publicly traded stock listed on an established exchange. This was done, we understand, so that referee compensation would not be an issue in AB 2841 but could be considered on its merits separately.

People in the probate field overwhelmingly believe that probate referees should not be involved in the appraisal of publicly traded stock at all. About two-thirds of the probate lawyers, as well as state and local bar associations, believe that the personal representative--not the probate referee--should value stock listed on the established stock exchanges.

Appraisal of stock is a pivotal matter for the whole probate referee system. The Commission has taken the position that the probate referee system should be preserved. (This position was certainly influenced by your strong presentation to the Commission a few years ago through your assistant Mark Harris to the effect that the system not be harmed.) In order to preserve the system it is necessary to keep referee appraisal of stock so that the referee fee base will be adequate. The \$250 cap is an important safety valve. It will impact the referee only in the rare large estate having in excess of \$250,000 of publicly traded stock, but it will avoid the outrageous windfall case that causes concern about the whole system.

Modification of waiver procedure. A Committee amendment, offered at the request of the California Probate Referees Association, was adopted at the March 2 hearing to require appointment of a referee to receive notice of a waiver petition where the estate includes real property. The referee appointed to receive notice would thereafter be precluded from appraising the estate.

Perhaps the most important safety valve for the system is the ability to waive appointment of a probate referee in cases where referee appraisal is unnecessary and the personal representative demonstrates this to the court. The waiver procedure goes to the heart of the probate referee system in that it enables us to justify imposing a referee appraisal on every estate in the first instance. But appointment of a referee for the sole purpose of receiving notice and objecting to the waiver may destroy the effectiveness of the waiver procedure. The cost of litigating a contested waiver will make it impractical for the personal representative to pursue the matter in all but the most unusual cases. The amendment requiring appointment of a referee to receive notice calls into question the basic structure of the probate referee system.

This amendment was strongly opposed by representatives of the state and local bar associations present at the March 10-11 Commission meeting. They believe that the amendment would change the nature of the relationship between the attorney and probate referee from a cooperative one to an adversary one.

Consolidation of inventory and appraisal in one document. A Committee amendment, offered at the request of the California Probate Referees Association, was adopted at the March 2 hearing to consolidate the inventory and appraisal in a single document.

The Commission's proposal to split the inventory and appraisal into two documents is designed to solve a very real problem that exists in estate administration. Existing law requires the inventory and appraisal to be filed in three months, which may be adequate for preparing an inventory but not necessarily for an appraisal, particularly where a federal estate tax return is involved. Freeing the appraisal from the inventory enables us to move the probate along expeditiously by adhering to the three-month inventory, without restricting the additional time needed for an appraisal in appropriate

cases. This proposal does not directly involve the probate referee system so much as it is a needed reform in probate administration, strongly supported by the practicing bar.

The Commission understands that some compromise is necessary in the legislative process, but is seriously concerned that these amendments destroy the balance the Commission had built into its probate referee recommendations. Of the 10 separate Commission recommendations on probate law contained in AB 2841, the recommendations relating to probate referees have consumed by far the greatest amount of Commission time and attention. These recommendations have been carefully worked out in numerous drafts and meetings over a period of several years, with the probate referees in full attendance and participating at every meeting, as well as the probate sections of the State Bar, the Los Angeles County Bar, and the Beverly Hills Bar associations. The probate referee recommendations were also the subject of an extensive survey of hundreds of lawyers, judges, and others in the probate field, and were also reviewed and revised in light of the comments of numerous probate specialists around the state.

The concerns of the Commission and the representatives of the probate bar with the amendments made in the Judiciary Committee are quite serious and go to the core of the Commission's recommendations on these matters. Because of depth of its concerns, the Commission respectfully requests that you remove the probate referee and inventory and appraisal provisions in toto from AB 2841. This will simply leave existing law as it now stands, and will ensure that an unbalanced bill is not enacted into law. It will also give the Commission and the probate bar an opportunity to further study these issues in light of the Assembly Judiciary Committee actions.

Sincerely,

Ann E. Stodden
Chairperson



CALIFORNIA LEGISLATURE

Assembly Committee

on

Judiciary

ELIHU M. HARRIS
CHAIRMAN

CA LAW REV. COMM'N

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April 15, 1988

Ann Stodden
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Assembly Bill 2841 - Probate Referees

Dear Chairperson Stodden:

Thank you for your letter dated March 17, 1988, regarding the amendments made on March 2, 1988, to AB 2841.

Please be advised that I am not free to unilaterally remove these amendments which were adopted by the Assembly Committee on Judiciary on March 2, 1988. However they may be removed by the Senate Committee on Judiciary, to which you may address your concerns. In the alternative, if these amended provisions go to the heart of this bill, you may want to consider dropping it and reintroducing it next year.

Sincerely,

ELIHU M. HARRIS

EMH:DMD:mea

cc: John DeMouilly ✓



CALIF. LAW REV. COMM.

MAR 31 1988

RECEIVED

GRAY DAVIS

Controller of the State of California

P. O. BOX 942850

SACRAMENTO, CA 94250-0001

(916)445-7940

March 29, 1988

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Rd., Rm. D-2
Palo Alto, CA 94303

Dear Mr. Sterling:

This is in reference to our telephone conversation yesterday regarding A.B. 2841 (Harris).

As discussed with you, the Controller's Office is concerned with the revisions made in provisions pertaining to Probate Referees in proposed Probate Code Sections 400 to 406, commencing at page 32 of the amended bill. The existing provisions of law are contained in Probate Code Sections 1300, et seq.

Under subsection (b) of Section 1308, the Controller presently has the authority to remove at his pleasure within any one year "at least one probate referee, but not more than 10 percent of the probate referees in any one county." Since its enactment in 1970 in Revenue and Taxation Code Section 14773, this provision has been interpreted as allowing the Controller the discretion of removing at least one referee per county, or up to 10% of the referees in counties having 20 or more referees (Los Angeles County).

This discretionary authority has been used in instances where the Controller believed that removal of a referee was in the best interest of the program but, under the particular circumstances, he did not feel that it was appropriate to remove the individual under subsection (a) of Probate Code Section 1308 for "noncompliances with any standard of training, performance or ethics." One referee, for example, was removed in 1986 and one in 1988 under the discretionary provision.

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While this provision is not used often, we believe it is important to the integrity of the referee system for the Controller to have such authority. For this reason, the Controller's Office would oppose any substantive change of the law in this regard. Accordingly, we request that the following be added to proposed Section 404 (page 34 of the amended bill):

(c) Notwithstanding the provisions of subdivision (b), within any one year the Controller may also remove, at his pleasure, at least one probate referee, but not more than 10 percent of the probate referees in any one county.

In addition to the above, we also request that you consider several other technical amendments to the probate referee sections:

- (1) On page 33, line 2, delete "administered by the State Personnel Board".

On page 33, lines 13-14, delete "the State Personnel Board", and substitute: "another agency".

On page 33, lines 22-23, delete "by the State Personnel Board".

On page 33, line 24, delete "State Personnel Board", and substitute: "agency administering the examination".

These changes result from the fact the State Personnel Board no longer administers examinations. Presently, we contract for the examination to be administered by Cooperative Personnel Services which is an agency set up through a joint powers arrangement.

- (2) On page 34, line 35, after the word "service", insert: "for any campaign".

This reference to any campaign is in the existing law. I don't know why it was deleted in your revision; however, the deletion may suggest that a substantive change was intended. We are not aware of any problem arising under the existing language since its enactment 18 years ago. On the other hand, we don't know what questions might arise with your revision. For example, would appraising a piece of

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property as an accommodation to this office be a
"contribution" to the office of Controller?

During our conversation, you indicated that there should be no problem in including the 10% removal provision and the other technical amendments in the bill. If, however, there may be some question or opposition by the Commission to these changes, I would appreciate your notifying me as soon as possible so that we might consider other alternatives.

Again, I regret that there might have been a breakdown in communications on this bill between our two agencies. If any matters should arise which you believe may involve the Controller's Office, please let me know and I will make sure that you receive a response.

Thank you for your cooperation.

Very truly yours,

GRAY DAVIS, STATE CONTROLLER

By


Lawrence E. Gercovich
Deputy Controller

LEG:df

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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April 4, 1988

Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
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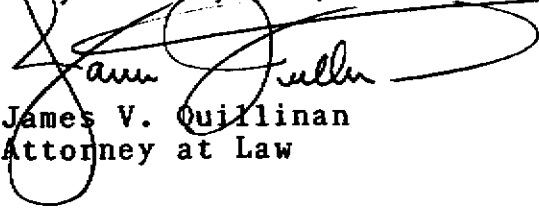
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Re: AB 2841 (Partial)

Dear John:

I have enclosed a copy of Anne Hilker's technical report on AB 2841. The report represents the opinions of the author only. The Executive Committee has not reviewed the report. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine
 Irv Goldring Ted Cranston

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March 30, 1988

Reply to:

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James V. Quillinan, Esq.
Diemer, Schneider, Luce
& Quillinan
444 Castro Street
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Mountain View, California 94041

Re: Line by Line of Draft Version of
AB 2841

Dear Jim:

I have reviewed the draft of AB 2841, pages 77 to 111, with respect to our line-by-line comments prepared in November of 1987. I have not been able to review whether our requested changes to the legislative comments have been incorporated. However, almost all of our changes have been included with respect to the statute, and I will note here only the exceptions:

1. For section 8000, we requested that the second sentence of subparagraph (b) have its own section, to be headed "Effect of Loss of Will on Petition for Probate." This was not included. However, I do not see it as a major difficulty.

2. An item about which I think we should be concerned is the failure in Section 8270 to include a cross reference to Section 8225 with respect to the date of the entry of the minute order. Section 8270 contains the period of the running of the will contest. Without at least a cross reference or other emphasis, the fact that the date of the entry of the minute order may differ from the entry of the court order may continue to be a trap.

James V. Quillinan, Esq.
March 30, 1988
Page 2

3. We had earlier asked for use of residence instead of domicile within the jurisdictional sections. The new sections retain both concepts. Since we have lived with this for some time, I do not think this is a significant problem.

4. In Section 8466, we had asked that the section preserve the priority of a relative who is also a creditor. This was not picked up, but again may not be a substantial problem.

Respectfully submitted,

Anne K. Hilker
Captain, Team 3

cc: D. Keith Bilter, Esq.
Irwin D. Goldring, Esq.
Charles G. Schulz, Esq.
Leonard W. Pollard, II, Esq.
H. Neal Wells, Esq.
John A. Gromala, Esq.
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April 4, 1988

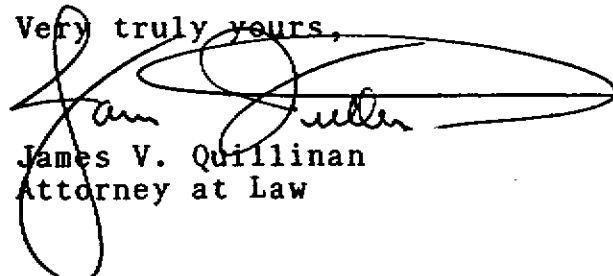
Mr. John H. DeMouly
 Executive Director
 California Law Revision Commission
 4000 Middlefield Road, Room D-2
 Palo Alto, CA 94303

Re: AB 2841 (Partial)

Dear John:

I have enclosed a copy of Charles Schulz's, a member of Team 3, technical report on AB 2841. The report represents the opinions of the author only. The Executive Committee has not reviewed the report. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


 James V. Quillinan
 Attorney at Law

JVQ/h1
 Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine
 Irv Goldring Ted Cranston

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April 1, 1988

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Mountain View, CA 94041

Re: Line by Line of Draft Version of AB 2841

Dear Jim:

Having received Ann Hilker's letter to you, March 30, 1988, and not knowing how much of this has already been covered, I am writing just to you and her with some of my own observations.

I am referring to the March 15, 1988 version of AB 2841.

1. Section 7660(b). The way this sentence reads, it is unclear whether there are three separate situations in which summary disposition may be made (no will, will does not name an executor, or named executor refuses to act) or whether the last two "if" clauses modify the situation in which a will exists.

2. Section 7664 states that a person to whom property is summarily distributed is personally liable for the unsecured debts of the decedent. But section 7662 directs the Public Administrator to pay claims presented before distributing the decedent's property. Why should personal liability continue to the distributees? This sounds like a mini-probate without the normal protections. Probably, the creditor would be unsuccessful in pursuing a claim part of which (or perhaps all of which) had already been paid by the Public Administrator, but some collection bureaus are quite aggressive.

3. Section 8002(b)(1) refers to attaching a typed copy of a holographic will. What about a will which is handwritten but witnessed? I sometimes have to do this, in emergency situations. Would it be better to refer to a will in which substantial portions are in handwriting, as well as a holographic will?

4. Section 8252(a). In line 30, I suggest the word "will" be added so that the line will read "shall be determined first whether the later will is entitled to probate".

James V. Quillinan, Esq.
Page two

April 1, 1988

5. Section 8401(a). "Appointment" is misspelled in line 32.
6. Section 8404(c). Does this change indicate that the comma has been removed after the word "is"?
7. Section 8482(a)(3). The question is whether the estimated value of the decedent's interest in real property, for bonding purposes under IAEA, should be the net or gross value of the decedent's interest? Probate Code § 10453(a), effective July 1, 1988, uses the concept "estimated net proceeds of the real property authorized to be sold under this part". I prefer the concept of "estimated net proceeds" because it is simpler to calculate: estimated value less encumbrances. However, the current law for bonds, I believe, is that the court generally considers gross values. The only exception which is creeping into the law has to do with the setting of bond for representatives who have the power to sell real property without going through the court confirmation process.

Sincerely,



CHARLES G. SCHULZ

CGS:bh

cc: Ann K. Hilker, Esq.
Gibson, Dunn & Crutcher
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