

Fourth Supplement to Memorandum 88-8

Subject: Study L-2009 - AB 2841 (1988 Probate Legislation--State Bar
Comments)

Attached are two technical reports from members of State Bar Study Team 1 received today concerning AB 2841. Mr. Quillinan's cover letter indicates that the reports reflect only the opinions of their authors and not of the Executive Committee, which has not reviewed the reports.

The staff plans to review these and the other technical reports received at the Commission meeting, calling to the Commission's attention any matters that appear to raise policy questions.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
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March 2, 1988

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Mr. John H. DeMouilly
 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 Terry Ross's and Dick Kinyon's technical reports on AB 2841. The reports represent the opinions of the authors only. The Executive Committee has not reviewed the reports. The reports are to assist in the technical and substantive review of those sections involved.

Very truly yours,

James V. Quillinan
 James V. Quillinan
 Attorney at Law

JVQ/h1
 Encls.

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

REPORT

TO: Valerie Merritt	COPIES: Charles A. Collier, Jr.
	James D. Devine
FROM: Richard S. Kinyon,	James C. Opel
Member of Study Team No. 1	Theodore J. Cranston
	James V. Quillinan✓
DATE: February 29, 1988	Irwin D. Goldring
	William V. Schmidt

SUBJECT: AB 2841, Introduced by Assembly Member Harris on January 26, 1988 -- Review of pages 138 - 151, plus pages 151, 152 and 177 - 180

A. Suggested Changes to Pages 138 - 151.

1. The word "any" should be substituted for the phrase "a beneficiary or other" on lines 1 and 2 of page 139.

2. The structure of Section 11601 on page 139 and Section 11701 on page 143 is awkward. I suggest that both sections begin as follows: "Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:" and that the subsequent paragraphs be redesignated as subdivisions. Cf. Section 11952(a) on pages 149 and 150.

3. "Attorney General" should be substituted for "State of California" on line 14 of page 139 and line 16 of page 143, and "the state" should be substituted for "it" on line 15 of page 139 and line 17 on page 143.

4. The word "is" should be substituted for the word "are" and the word "beneficiary," should be substituted for "beneficiaries" on line 18 of page 139.

5. The phrase "the County Treasurer if no property is to be or has been distributed to the state and" should be substituted for the word "if" at the end of line 18 on page 139.

6. The phrase "or the County Treasurer" should be inserted between the words "Controller" and "with" on line 21 of page 139.

7. The phrase "for service of a summons" should be inserted between the words "provided" and "in" on line 22 of page 140.

8. The phrase "order distribution" should be substituted for the phrase "grant a petition" on line 35 of page 140.

9. The word "the" is misspelled on line 28 of page 141.

10. The word "all" should be inserted between the words "When" and "debts" on line 3 on page 142.

11. The word "filed" should be substituted for the word "made" on line 5 of page 142.

12. The word "resolve" should be substituted for the word "include" on line 8 of page 142.

13. The words "by satisfaction" should be inserted within the parentheses after the word "ademption" on line 10 and the letter "s" should be inserted within the parentheses at the end of the word "advancement" on line 10 of page 142.

14. (Suggested Changes in Section 11701 on page 143 were referred to above.)

15. The phrase "allegations made in the" should be inserted between the words "any" and "petition" on line 9 of page 144. The last sentence of Section 11704 on lines 11 and 12 of page 144 seems unnecessary.

16. The phrase "in the estate" should be added between the words "property" and "in" on line 25 of page 144.

17. The phrase "of the distributee" should be inserted between the words "receipt" and "for" on line 40 of page 144.

18. The phrase "is entitled to but" should be substituted for the phrase "survives the decedent but who" on lines 28 and 29 of page 145.

19. The word "emancipated" should be substituted for the word "married" on line 8 of page 146.

20. The word "the" should be inserted between the words "order" and "personal" on line 5 after the word "order" and at the end of line 9 on page 147.

21. The phrase "for escheated property" should be inserted between the words "petition" and "filed" on line 26 of page 147.

22. The phrase "to be" should be inserted between the words "is" and "or" on line 8 of page 149.

23. The phrase "an order for" should be inserted between the words "before" and "distribution" on line 32 of page 149.

24. The words "become final" should be substituted for the phrase "been ordered" on line 33 of page 149.

25. The phrase "on the petition" should be inserted between the words "hearing" and "shall" on line 40 of page 149.

26. The phrase "or otherwise" should be substituted for the word "and" on line 12 of page 150.

B. Suggested Changes to pages 151, 152 and 177 - 180:

Because I have been asked by Bill Schmidt on behalf of the Executive Committee at its February 6, 1988, meeting to respond to Nathaniel Sterling's letter to Bill dated January 25, 1988, regarding proposed new Section 16315 relating to income on a specific gift in trust, I also reviewed pages 151 and 152 and pages 177 through 180 of the bill, relating to interest and income accruing during administration of an estate and trust. My suggested revision of Section 16314 on page 179 of the bill, set out below, would incorporate the substance of proposed new Section 16315 as well as interest on an annuity and a devise for maintenance payable from a trust.

1. The word "otherwise" should be inserted between the words "not" and "indicated" on line 11 of page 151.

2. The phrase "on the date interest commences to run" should be substituted for the phrase "one year after the date of the decedent's death" in the three places it appears on lines 15 and 16, lines 20 and 21, and lines 23 and 24 of page 151.

3. The phrase "following the date of death" should be substituted for the phrase "to which the expense is attributable" on line 2 of page 152.

4. The phrase "the specifically devised property" should be substituted for the phrase "share of the devisee" on line 3 of page 152.

5. The words "specifically devised" should be deleted from line 5 of page 152.

6. A new subdivision (d) should be added at the end of Section 12002 between lines 6 and 7 of page 152:

"(d) If specifically devised property is sold during administration of the estate, the devisee is entitled to the net income from the property until the date of sale, and interest on the net sales proceeds thereafter."

7. Subdivision (b) of Section 12006 on lines 30 and 31 of page 152 should be deleted. It is unnecessary and might conflict with suggested new subdivision (d) of Section 12002, above.

8. The word "terminates" should be substituted for the word "ceases" at the end of line 14 on page 178.

9. The word "all" on line 15, the word "to" on line 19, and the word "actually" on line 20 of page 178 should be deleted.

10. The word "if" should be substituted for the word "when" on line 4 of page 179. Cf. Section 16304(d).

11. The phrase "12003, terminates" should be substituted for the phrase "16304, ceases" on lines 5 and 6 of page 179.

12. The word "such" should be substituted for the word "the" at the end of line 7, and the phrase "prior to the termination of such right" should be deleted from line 8 of page 179.

13. Parentheses should be put around the phrase "or his or her personal representative" on lines 10 and 11 of page 179.

14. I suggest that the following new Section 16314 be substituted for Section 16314 on lines 15 through 32 of page 179:

"16314. A specific gift, a general pecuniary gift, an annuity, and a gift for maintenance distributable under a trust carries with it income or bears interest from the date of the settlor's death or such other event as the distributee's right to receive it occurs, in the same manner as a specific devise, a general pecuniary devise, an annuity, and a devise for maintenance under a will set forth in Chapter 8 (commencing with Section 12000) of Part 10 of Division 7."

The effect of this suggested new Section 16314 would be to treat distributions from a trust in the same manner as distributions from an estate, without regard to whether the right to them occurs as the result of the death of the settlor or any other event. This is a change in policy from Section 16314 as set out on page 179, which relates only to interest on a general pecuniary gift under a trust and would require that interest be payable from the date when the distribution is payable, except that interest on a distribution payable on the death of the settlor would commence one year after the settlor's death. It seems to me that it would be desirable to give the trustee a one-year grace period within which to pay all pecuniary gifts even if the event giving rise to the gift is not the settlor's death. In many cases such event is the death of a beneficiary (e.g., the surviving spouse) who also may be serving as the trustee, necessitating the qualification of a successor trustee and possibly the payment of federal estate taxes (e.g., with respect to a marital deduction trust), which may make it difficult or impossible for the gift to be distributed soon after the event.

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RE: Technical Review of AB 2841
Pages 36-52

Dear Valerie:

The following are my comments on AB 2841:

1. Page 37, Lines 5-9

This section authorizes the Court to appoint a guardian ad litem in probate proceedings. Subsection (c) provides as follows:

"The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the Court and paid as the Court orders, either out of the property of the estate involved or by the petitioner."

In other parts of the Probate Code, the term "expenses" does not include compensation but generally refers to costs and other charges incurred. The concepts of "expenses" and "compensation" should be kept separate.

Further, the term "petitioner" is unclear. In a Will contest where competing Wills are offered for probate, who is "the petitioner"?

Does the term "petitioner" refer to the party who sought the appointment of the guardian ad litem? This is unlikely since the appointment may be made on the Court's own motion.

I would suggest that the sentence be re-drafted as follows:

"The reasonable compensation and expenses of the guardian ad litem, including attorney's

fees, shall be determined by the Court and paid either out of the property of the estate involved or as the Court otherwise orders."

2. Page 40, Line 27

This sentence provides that:

"Chapter 21 (commencing with Section 1170) of Division 3 of the Probate Code is repealed."

The reference to Section 1170 should, I believe, be to Section 1190. My Code indicates that Section 1170 was repealed in 1984.

3. Page 47, Lines 20-21

This section specifies that in guardianship and conservatorship matters, Court authority is required for payment of compensation to any of the following:

- "(i) The guardian or conservator of the person or estate or both.
- (ii) An attorney for the guardian or conservator of the person or estate or both.
- (iii) An attorney for the ward or conservatee.
- (iv) An attorney for the estate.
- (v) The public guardian for costs and fees under Section 2902."

I interpret the term "compensation" to refer to fees and commissions for services rendered, rather than costs. This is generally the meaning of the term "compensation" throughout the Probate Code (e.g., PC 2640).

If my interpretation is correct, then the underlined addition improperly refers to costs of the public guardian. Further, the reference to "fee" is redundant.

I suggest that the underlined sentence be made into a new subsection (5) of subdivision (a) of Section 2430 and ought to specify that Court authorization is required for payment of fees and costs to a public guardian for services rendered pursuant to Section

2902. As a new subsection, it will not be a part of a sentence limited to compensation.

4. Page 51, Lines 1-14

Existing law directs that upon the death of the ward or conservatee the guardian or conservator may pay a reasonable sum for the expenses of the last illness and funeral of the ward or conservatee. This proposed amendment expands the category of allowable payments to include "other reasonable guardian or conservator charges, including unpaid Court approved attorney's fees." The amendment also substitutes the phrase "disposition of the remains" for the term "funeral".

First, the title of this Section must also be changed since it refers to "Expenses of Last Illness and Funeral."

Second, the phrase "other reasonable guardian or conservator charges" is ambiguous. What is a "charge"? Does it include compensation? If so, this Section suggests that compensation of the guardian or conservator may be paid, in this instance, without Court approval.

Subdivision (c) (Lines 33-40) suggests that a claim for such expenses "and charges" should be presented to the guardian or conservator who shall endorse thereon an allowance or rejection. How does one file a claim for his own "charges"? Additional definition is needed.

Very truly yours,



Sterling L. Ross, Jr.

SLR/am

cc: William V. Schmidt
Charles Collier
Jim Divine
Jim Opel
Ted Cranston
Jim Quillinan
Irv Goldring
Keith Bilter