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A.B. 2841 and the Probate Code: Simplifying and Expediting the Administration of Estates in California

Jeffrey Mitchell

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**A.B. 2841 and the Probate Code:
Simplifying and Expediting the
Administration of Estates in California**

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BACKGROUND

A. Overview of the Law Revision Commission's Plan

In 1980, the California Legislature directed the Law Revision Commission (Commission) to study the question of whether the Legislature should revise the California Probate Code, and whether California should adopt, in whole or in part, the Uniform Probate Code (UPC).¹ Eight years earlier, shortly after the Commissioners of Uniform State Laws promulgated the UPC, supporters of the UPC began efforts to replace California's existing Probate Code with the

1. A. Con. Res. 107, 1980 Cal. Stat. res. ch. 37, p. 5086.

UPC.² In response to these efforts, the California State Bar appointed a committee to study the UPC to determine whether its adoption in California would improve the administration of probate matters.³ The Committee's report concluded that the UPC, although containing some useful ideas which should be adopted, was in general inferior to California's system.⁴ In line with these suggestions, the Commission declined to recommend wholesale adoption of the UPC. Instead, the Commission began recommending revisions to the Probate Code, with an ultimate goal of replacing entirely the existing Code.⁵

Over the past eight years the Commission has increasingly devoted its time and energy to this project. The Commission solicited suggestions and comments regarding the Probate Code revisions under consideration from individuals and organizations throughout California that represented the full spectrum of interests involved in probate proceedings.⁶ Contributors included members of the public, attorneys, local bar associations, probate referees, public administrators and guardians, personal representatives, members of court, and anyone else having a special or particular interest in an aspect of probate law.⁷ The Commission considered all of these views in developing the final recommendations made to the Legislature. The State Bar Association, the Los Angeles County Bar Association, and the Beverly Hills Bar Association made particularly noteworthy contributions by regularly providing advice and assistance at Commission meetings and by reviewing materials prepared for consideration by the Commission.⁸

In 1986 the Commission made the decision not to delay proposing needed reforms until the Commission had completed work on the new probate code.⁹ The Commission elected instead to submit recommendations to the legislature revising substantial portions of the Probate Code in 1987¹⁰ and in 1988.¹¹

2. Marshall, *State Pride: The Probate Code's New Look*, 7 L.A. LAWYER, at 26 (April 1984).

3. STATE BAR OF CAL., THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE, at xi (1973).

4. *Id.* at xxxiii-xxxiv.

5. *Annual Report*, 18 CAL. L. REVISION COMM'N REP. 1701, at 1710 (1986).

6. *Annual Report*, 19 CAL. L. REVISION COMM'N REP. 501, at 511 (1987).

7. *Id.*

8. *Id.* at 511. The following expert consultants have also advised the Commission in its study of the Probate Code: Professors Paul E. Basye, Hastings College of the Law, Gail Borman Bird, Hastings College of the Law, Jesse Dukeminier, U.C.L.A. Law School, Susan F. French, U.C. Davis School of Law, Edward C. Halbach, Jr., U.C. Berkeley Law School, and Russell D. Niles, Hastings College of the Law. *Id.* at 512.

9. *Annual Report*, 18 CAL. L. REVISION COMM'N REP. 1701, at 1711 (1986).

10. 1987 Cal. Stat. ch. 923, at _____ (enacted by A.B. 708). *See also Recommendations*

For 1989, the Commission plans to make urgent changes to the provisions of the Probate Code dealing with notice to creditors.¹² However, the Commission's plans are tentative and subject to change as the Commission receives comments and suggestions from interested parties.¹³ Recently the United States Supreme Court, in *Tulsa Professional Collection Services, Inc. v. Pope*,¹⁴ held that a violation of due process occurs when a state's nonclaim statute¹⁵ bars a creditor's claim against a decedent's estate even though that creditor was known or reasonably ascertainable and the executor of the estate had not provided actual notice.¹⁶ In California, existing law provides for actual notice to creditors known to the personal representative.¹⁷ But existing law expressly relieves the personal representative of any duty to search for creditors, whether reasonably ascertainable or not.¹⁸ Under Assembly Bill 2841 (A.B. 2841),¹⁹ certain creditors failing to file a claim²⁰ within four months of the opening of probate and having no actual knowledge of the administration of the estate during the four month period may petition for leave to file a late claim.²¹

Relating to Probate Law, 19 CAL. L. REVISION COMM'N REP. 1 (1988). Recommendations covered estate management (including powers and liabilities of personal representatives, investments, real property of the estate, and purchase and sale of real and personal property of the estate), creditors' claims against the decedent's estate, and independent administration of estates. See generally *Review of Selected 1987 California Legislation*, 19 PAC. L.J. 439, 440-454 (1988) (review of A.B. 708).

11. 1988 CAL. STAT. ch. 1199 (enacted by A.B. 2841). See also CAL. LAW REVISION COMM'N, *Official Comments to Assembly Bill 2841* (September 27, 1988) [hereinafter *Comment[s]*]; *Recommendations Relating to Probate Law*, 19 CAL. L. REVISION COMM'N REP. 701 (1988) [hereinafter *Recommendations*]. See generally *infra* notes 33-210 and accompanying text; *Review of Selected 1988 California Legislation*, 20 PAC. L.J. 435, 435-440 (1989) (review of A.B. 2841).

12. Telephone interview with John H. DeMouly, Executive Secretary, California Law Revision Commission (Dec. 8, 1988). Notes on file at *Pacific Law Journal*.

13. *Id.*

14. 108 S.Ct. 1340 (1988).

15. The challenged Oklahoma statute provided that any creditor's contract claim not presented to the executor of the estate within two months of the publication of a notice advising creditors that probate proceedings had commenced was forever barred. *Id.* at 1341; see OKLA. STAT. tit. 58, § 333 (1981).

16. 108 S.Ct. at 1348.

17. 1988 Cal. Stat. ch. 1199, sec. 84, at ____ (enacting CAL. PROB. CODE § 9050(a)) (providing that a personal representative has knowledge of a creditor if the personal representative is aware that the creditor has demanded payment from the decedent or the estate). Notice is to be by mail or personal delivery. *Id.* § 1215.

18. *Id.* § 9053(c). See CAL. LAW REVISION COMM'N COM., CAL. PROB. CODE § 9053(c) (Deering Supp. 1988).

19. 1988 Cal. Stat. ch. 1199, sec. 84.5, at ____.

20. 1988 Cal. Stat. ch. 1199, sec. 84.5, at ____ (enacting CAL. PROB. CODE § 9103(b)) (creditor's claim must relate to an action or proceeding pending against decedent at time of death or, when no action or proceeding was pending, to an out of state non-business or non-profession related debt).

21. *Id.* § 9103(a). See *Comment*, *supra* note 11, at 98 (Probate Code section 9103).

The Commission intends by its tentative recommendations for 1989 to bring California's probate procedures into compliance with the due process requirements of *Tulsa Professional Collection Services* by providing known or reasonably ascertainable creditors two remedies. First, all known or reasonably ascertainable creditors without actual knowledge of the administration of the estate may petition for leave to file a late claim before the estate has been distributed.²² Second, in the case of an estate which has already been distributed, the distributees of the estate are personally liable for the claim of a creditor known or reasonably ascertainable within four months of the issuance of letters.²³ The Commission also intends to propose a one year statute of limitations on creditor claims, which would begin to run automatically as of the date of the decedent's death.²⁴

In addition, the Commission plans to recommend other legislation in 1989 or 1990 that will address the determination of attorney and personal representative fees,²⁵ trustees' fees,²⁶ no contest clauses,²⁷ multiparty accounts in financial institutions,²⁸ and the adoption of a rule requiring 120 hour survival to take by intestacy.²⁹ Finally, in the next biennial legislative session, the Commission expects to propose

22. California Law Revision Commission, *Tentative Recommendation Relating to Probate Law and Procedure—Notice to Creditors*, at 6-7 (October 1988) (proposed amendment to Probate Code section 9103). See also *id.* at 2 & n.7 (distinguishing existing law from the proposed change), *id.* at 7 (tentative comment to proposed Probate Code section 9103). Assembly Member Elihu Harris introduced these recommended revisions regarding notice to creditors as A.B. 155. A. B. 155, 1988-89 Cal. Legis., 1st Reg. Sess (Dec. 19, 1988).

23. California Law Revision Commission, *Tentative Recommendation Relating to Probate Law and Procedure—Notice to Creditors*, at 8 (October 1988) (proposed new Probate Code section 9392). See also *id.* at 2 & n.8, *id.* at 8-9 (tentative Comment to proposed Probate Code section 9392).

24. *Id.* at 4 (proposed amendments to Civil Procedure Code section 353(b), (d)); *id.* at 7 (proposed amendments to Probate Code section 9103(b)(2)). See also *id.* at 2-3, 5, 7 (tentative Comments to proposed Civil Procedure Code section 353, and Probate Code section 9103).

25. Cal. Law Revision Comm'n, *Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative* (October 1988). Assembly Member Elihu Harris introduced these recommended revisions regarding compensation to estate attorneys and personal representatives as A.B. 156. A. B. 156, 1988-89 Cal. Legis., 1st Reg. Sess. (Dec. 19, 1988).

26. Cal. Law Revision Comm'n, *Tentative Recommendation Relating to Trustees' Fees* (October 1988).

27. Cal. Law Revision Comm'n, *Tentative Recommendation Relating to Probate Law and Practice—No Contest Clause* (July 1988). Assembly member Elihu Harris introduced these recommended revisions regarding no contest clauses as A.B. 158. A. B. 158, 1988-89 Cal. Legis., 1st Reg. Sess. (Dec. 19, 1988).

28. California Law Revision Commission, *Tentative Recommendation Relating to Multiple-Party Accounts in Financial Institutions* (October 1988).

29. California Law Revision Commission, *Tentative Recommendation Relating to 120-Hour Survival to Take by Intestacy* (October 1988).

legislation which repeals and reenacts the entire Probate Code.³⁰ Although not intended to make major substantive changes, this repeal and reenactment recodifies and fully integrates the Code, making all the technical corrections necessitated by the Commission's revisions to the Code and retaining the same section numbers currently in use.³¹

B. 1988 Revisions to the Probate Code

During the 1987-88 session the legislature adopted A.B. 2841, which made substantive changes to the Probate Code affecting public guardians and administrators, inventory and appraisal, the opening of estate administration, abatement, accounts, litigation involving decedents, rules of procedure in probate, distribution and discharge, nondomiciliary decedents, and interest and income during administration.³² The remainder of this Note addresses these revisions to the Probate Code. Part II, "The Players," discusses Probate Code revisions which particularly affect the appointment, roles, and removal of the individuals who play key parts in the probate process—the probate referee, the personal representative, the public administrator, and the public guardian. Part III, "The Rules," addresses the revisions made to the conduct of probate proceedings in California.

II. THE PLAYERS

A. Probate Referee

The Commission extensively investigated the probate referee system, soliciting and receiving substantial input from experts and practitioners in the field.³³ The Commission considered eliminating the role of the probate referee entirely and relying instead on the personal representative to conduct the estate appraisal.³⁴ In the end, however,

30. *Annual Report* (Draft), 19 CAL. L. REVISION COMM'N REP. 1151, 1161 (1988).

31. Telephone interview with Nathaniel Sterling, Assistant Executive Secretary, California Law Revision Commission (Dec. 15, 1988). Notes on file at *Pacific Law Journal*.

32. See generally *supra* note 11 and accompanying text (principal source material used in this note). Part V of this note contains a list of sections affected by A.B. 2841.

33. *Recommendations*, *supra* note 11, at 745.

34. *Id.* at 746.

the Commission concluded that the probate referee system as a whole works well and should be retained, subject to the following substantive changes.³⁵

1. Appointment

In California today, the State Controller (Controller) appoints at least one probate referee for each county³⁶ from among those individuals passing a qualification examination.³⁷ A.B. 2841 provides for additional flexibility by permitting the personal representative to select, within limits, a probate referee.³⁸ To avoid possible favoritism or the selection of a particular referee because of a known bias, the appointment requires a showing of good cause justifying the selection.³⁹ As used here, good cause includes situations in which the referee has recently appraised the same or similar property or will be making related appraisals in another proceeding.⁴⁰ A.B. 2841 also grants to the court wide authority and discretion not to designate as probate referee the person the Controller appoints for the county.⁴¹

2. Qualifications, Duties, and Powers

Before the enactment of A.B. 2841, the Controller had authority to establish standards of training, performance, and ethics for probate referees.⁴² A.B. 2841 makes the establishment of these standards mandatory rather than permissive.⁴³ A.B. 2841 strengthens enforce-

35. *Id.* at 746-47.

36. 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 400(a)), (restating a portion of former section 1305). *Comment, supra* note 11, at 23 (Probate Code section 400).

37. 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 401(a)), (restating a portion of former section 1305). *Comment, supra* note 11, at 23 (Probate Code section 401).

38. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8921).

39. *Id.*

40. *Id.* § 8921(a)-(c). *See Recommendations, supra* note 11, at 750.

41. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8922). This kind of a decision is appropriate, for example, if experience with the referee or personnel in the referee's office is unsatisfactory, or if the person selected is habitually unduly slow at making appraisals. *Comment, supra* note 11, at 95 (Probate Code section 8922).

42. 1982 Cal. Stat. Ch. 1535, sec. 13, at 5973 (enacting CAL. PROB. CODE § 1307). Of note, to date no such standards have been established under the authority of this section.

43. 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 404(a)). According to the Commission, A.B. 2841 codifies existing practice. *See Comment, supra* note 11, at 24 (Probate Code section 404).

ment of limitations in existing law⁴⁴ on contributions to political campaigns by providing that the Controller may not appoint, and is required to remove, any applicant or tenured probate referee engaging in prohibited political activity⁴⁵ within the two preceding calendar years.⁴⁶ To facilitate compliance with this requirement, A.B. 2841 requires that upon application for appointment and annually during a person's tenure as probate referee, the individual must file a verified statement detailing any prohibited political activity during the previous two years.⁴⁷

In almost all cases the probate referee completes the appraisal expeditiously.⁴⁸ However, A.B. 2841 ensures this will be so by imposing a statutory duty on the referee to appraise property promptly and with reasonable diligence once the personal representative delivers the inventory.⁴⁹ Although A.B. 2841 neither defines "promptly and with reasonable diligence" nor sets a specific time limit, the referee must now, after 60 days,⁵⁰ either return the completed appraisal to the personal representative or deliver to the personal representative and file with the court a written report on the status of the appraisal.⁵¹ The referee's report must explain why the probate referee has not completed the appraisal and give an estimated time for completion.⁵² A.B. 2841 also provides for citing and ordering the referee to appear before the court to show cause why a timely appraisal was not completed.⁵³ At a hearing on the status report, the court has wide discretion to choose a proper course of action.⁵⁴

44. *Id.* § 407(a), (c), (d), restating former Probate Code sections 1311-12. *See Comment, supra* note 11, at 25 (Probate Code section 407).

45. Prohibited political activity is defined as any involvement that includes directly or indirectly soliciting, receiving, or contributing any amount to an individual's campaign for Controller, or any similar involvement in the campaign for any other partisan public office in California, if the value of this involvement exceeds \$200. *Id.* § 407(a)(1), (2).

46. *Id.* § 407(c).

47. *Id.* § 407(b).

48. *Recommendations, supra* note 11, at 751.

49. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8940(a)). *See generally Recommendations, supra* note 11, at 751.

50. *But see Comment, supra* note 11, at 96 (Probate Code section 8940) (appraisal should ordinarily be done in considerably less than 60 days; 60 day period should be viewed as "an unusually long period and not as the norm").

51. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8940(b)(1), (2)).

52. *Id.* § 8940(b)(2).

53. *Id.* § 8941(b).

54. *Id.* § 8941(c)(1)-(5) (court may order completion of appraisal within a reasonable time, remove the probate referee, reduce the referee's commission, issue an order that the personal representative deliver needed information to the referee, or make other appropriate orders).

Once the appraisal is complete, existing law does not provide an easy way for a personal representative to obtain the data the referee relied upon in completing the appraisal.⁵⁵ Without this data, a personal representative will find it difficult to challenge successfully the referees's appraisal. A.B. 2841 addresses this concern in two ways. First, on demand of the personal representative or a beneficiary, the probate referee must provide the data used to support the appraisal,⁵⁶ except data required by law to be kept confidential.⁵⁷ Second, if an interested party⁵⁸ contests the appraisal, the probate referee may have to justify the appraisal at a hearing.⁵⁹ These two requirements should resolve any questions which might arise soon after the probate referee completes the appraisal.⁶⁰ Additionally, A.B. 2841 provides for resolution of questions arising later by requiring the probate referee to offer the data to the personal representative after filing the appraisal.⁶¹ The probate referee may dispose of the data used in the appraisal if the personal representative has not requested it for three years.⁶²

Before passage of A.B. 2841, nothing prevented a probate referee from electing to withhold the appraisal until payment of the referee's fees.⁶³ This practice delayed probate, and for cases in which the estate lacked sufficient liquid assets, prevented probate from pro-

55. *Recommendations, supra* note 11, at 752.

56. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8908(a)). See also *Comment, supra* note 11, at 95 (Probate Code section 8908) (backup data may include, e.g., listing of comparable sales used in the appraisal).

57. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8908(a)). Confidential materials include tax assessor information obtained by the probate referee under § 408 of the Revenue and Taxation Code. *Comment, supra* note 11, at 95 (Probate Code section 8908).

58. The term "interested party" is not defined within the Probate Code; in other contexts, it has been variously described. See, e.g., *Estate of Powers*, 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366, 368 (1979) (interested person in will contest is one who has an interest that may be impaired or defeated by probate of will, or benefitted by setting will aside); *Estate of McMillin*, 46 Cal. 2d 121, 127, 292 P.2d 881, 884 (1956) (in context of contesting an accounting, doubt as to question of interest should be resolved in favor of person claiming interest in estate).

59. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8908(b)). Justification may also be required when the appraisal is contested for other reasons, such as a tax audit. *Id.* § 8908(b). When justification is required, the probate referee may be entitled to an additional fee to be agreed upon by the person demanding the justification and the referee, or determined by the court if these parties can not agree. *Id.* See generally *id.* § 8906(a)-(e) (establishing procedures by which interested persons may object to the appraisal).

60. *Recommendations, supra* note 11, at 751.

61. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8909).

62. *Id.*

63. *Recommendations, supra* note 11, at 751.

ceeding altogether.⁶⁴ A.B. 2841 forbids this, requiring the referee to deliver the appraisal to the personal representative promptly upon completion.⁶⁵ A.B. 2841 clarifies that the commission⁶⁶ and expenses⁶⁷ of the probate referee are expenses of administration, payable out of the estate.⁶⁸ With the exception of debts to the United States or the State of California, these administrative expenses are entitled to the highest priority, taking precedence over all other debts.⁶⁹

3. Removal and Discharge

Existing law provides that the Controller⁷⁰ has limited discretion to remove probate referees for cause.⁷¹ A.B. 2841 provides two additional methods by which the personal representative, through the court, may remove a probate referee from office. First, the personal representative may have the court remove the first probate referee as a matter of right, provided that the personal representative does so before delivery of the inventory to the referee.⁷² Second, the personal representative may persuade the court to remove any subsequent probate referee upon a showing of cause.⁷³

64. *Id.*

65. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8960(b)).

66. *Id.* § 8961(a) (setting the amount of commission), (restating former Probate Code section 609). *Comment, supra* note 11, at 97 (Probate Code section 8961).

67. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8961(b)) (defining expenses to include actual and necessary expenses), (restating former Probate Code section 609). *Comment, supra* note 11, at 97 (Probate Code section 8961).

68. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8960(a), (c)).

69. CAL. PROB. CODE § 11420(a) (Deering's Supp. 1988). *See Comment, supra* note 11, at 97 (Probate Code section 8960).

70. 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 405) (up to ten percent of any county's referees may have their appointments revoked in any one calendar year at the pleasure of the Controller), (restating former Probate Code section 1308(b)). *Comment, supra* note 11, at 24 (Probate Code section 405). Such revocations are independent of the Controller's authority to revoke for cause under Probate Code section 404(b). 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 405); *Comment, supra* note 11, at 24 (Probate Code section 405).

71. 1988 Cal. Stat. ch. 1199, sec. 44, at ____ (enacting CAL. PROB. CODE § 404(b)) (for cause removal premised on noncompliance with standards for training, performance, or ethics established by the Controller), (restating former Probate Code section 1308(a)). *Comment, supra* note 11, at 24 (Probate Code section 404). *See also supra* note 43 and accompanying text (A.B. 2841 makes establishment of these standards mandatory).

72. 1988 Cal. Stat. ch. 1199, sec. 82.5, at ____ (enacting CAL. PROB. CODE § 8924(a)(2)). The personal representative must file an affidavit or declaration with the court and mail a copy to the probate referee. *Id.*

73. *Id.* § 8924(a)(1). Cause is defined to include incompetence or undue delay in making the appraisal. *Id.* The personal representative must mail notice to the referee of the hearing

B. Personal Representative

The Commission's efforts to clarify the Probate Code have prompted a simplification of the terminology used to describe various individuals and steps in the administration of the estate.⁷⁴ For example, A.B. 2841 replaces previous references to executors, administrators, administrators with the will annexed, and special administrators with the general title of "personal representative," except when use of a particular reference is necessary to draw a distinction.⁷⁵

1. Appointment

Prior law placed the court in the unenviable position of having to choose between persons equally entitled to administer the estate who disagreed about which of them the court should appoint as personal representative.⁷⁶ A.B. 2841 provides a remedy for this situation by permitting the court to appoint as personal representative either the public administrator or a disinterested person.⁷⁷ The disinterested person, however, must have the same or the next lower priority as the individuals unable to agree.⁷⁸ Until the legislature revised the laws governing intestate succession in 1983,⁷⁹ the priority of persons for appointment as administrator corresponded to their priority for inheritance of the estate.⁸⁰ A.B. 2841 brings this priority for appointment of an administrator as personal representative back into conformity with the laws governing intestate succession.⁸¹ Prior law

on the petition to remove the referee at least 15 days before the hearing. *Id.* § 8924(a)(1). *See also id.* §§ 8941(b),(c)(2) (referee may be removed for failure to make timely appraisal report); 8922 (granting the court authority and discretion not to designate a person as referee).

74. *Recommendations*, *supra* note 11, at 791 & n.2.

75. *Id.* Similarly, the various forms of reference (*e.g.*, granting of letters and of administration, and admission as executor) formerly used to describe the process by which the court appointed a personal representative have been standardized to refer to "appointment of a personal representative." *Id.*

76. 1931 Cal. Stat. ch. 281, at 608 (enacting CAL. PROB. CODE § 425).

77. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8467).

78. *Id.*

79. 1983 Cal. Stat. ch. 842, sec. 55, at 3080-85 (enacting CAL. PROB. CODE §§ 6400-6413) (Deering's Supp. 1988); *see generally Review of Selected 1983 Legislation*, 15 PAC. L.J. 423, 440-442 (1984) (discussing revisions to the laws governing intestate succession).

80. *Recommendations*, *supra* note 11, at 795.

81. *Id.*; 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE §§ 8460(a), 8461); *Comment*, *supra* note 11, at 83 (Probate Code section 8461). *Compare* 1988

provided for the appointment of a special administrator in specific circumstances.⁸² Consistent with other provisions of the Commission's recommended revisions increasing the flexibility of the court,⁸³ A.B. 2841 rejects a statutory listing of grounds and provides instead for immediate appointment of a special administrator whenever the court determines circumstances warrant.⁸⁴ Appointment of the special administrator may be on petition of an interested person or by the court *sua sponte*⁸⁵ and may be made on any terms as the court directs.⁸⁶

The spouse of the decedent had first priority under prior law for appointment as personal representative.⁸⁷ However, when litigation to dissolve the marriage was pending and the spouses were living apart at the time of decedent's death, the surviving spouse received a lower priority than that of the decedent's brothers and sisters.⁸⁸ The only exception to this rule was when a waiver of right to petition⁸⁹ for a determination that the decedent's property passed to the surviving spouse without administration had been executed.⁹⁰ A.B. 2841, however, automatically reduces the surviving spouse's priority to one level below that of the decedent's brothers and sisters in all cases when the spouses were living apart at the time of death of the decedent and the surviving spouse was party to proceedings

Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8461)) (priority for appointment as administrator) *with* CAL. PROB. CODE § 6402 (Deering's Supp. 1988) (intestate share of heirs other than surviving spouse). *But see infra* note 91 and accompanying text (circumstances depriving surviving spouse of priority prescribed by 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8461)).

82. 1931 Cal. Stat. ch. 281, at 610 (enacting CAL. PROB. CODE § 460) (appointment of special administrator appropriate when, for example, there is a delay granting letters testamentary or of administration, or when letters are granted irregularly, or no sufficient bond is filed as required, or when an executor or administrator dies or is suspended or removed).

83. *See supra* notes 40, 54, 73, 78 and accompanying text, *and infra* notes 84-88, 95, 101, 114-15, 144-45, 187 and accompanying text.

84. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8540(a)). *See generally Comment, supra* note 11, at 87 (Probate Code section 8540) (examples of grounds sufficient to support appointment include when no application is made for personal representative or there is a delay in appointment, an insufficient bond is given or letters are granted irregularly, an appeal is taken from an order revoking probate of a will, there is a will contest, or any other reason preventing the personal representative from acting).

85. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8540(a)).

86. *Id.* § 8540(b).

87. 1931 Cal. Stat. ch. 281, at 608 (enacting CAL. PROB. CODE § 422).

88. 1987 Cal. Stat. ch. 923, sec. 31, at ____ (amending CAL. PROB. CODE § 422(a)(6)).

89. 1986 Cal. Stat. ch. 783, sec. 24, at ____ (enacting CAL. PROB. CODE §§ 13650-51) (procedure and contents of petition).

90. 1987 Cal. Stat. ch. 923, sec. 31, at ____ (amending CAL. PROB. CODE § 422(a)(1), (6)).

for separate maintenance or to dissolve or annul the marriage.⁹¹ The premise behind this reduction of priority is the belief that when proceedings to dissolve a marriage are underway, an inherent conflict of interest exists between the surviving spouse and the other heirs.⁹² By automatically reducing the priority of the surviving spouse in such a situation, the Commission hoped to reduce litigation by avoiding this conflict altogether.

Under prior law, the court could disqualify a person for appointment as personal representative based upon grounds that were either imprecise or potentially susceptible to challenge.⁹³ In place of these provisions, A.B. 2841 disqualifies any person subject to a conservatorship of the estate, or incapable or otherwise unfit to execute the duties of personal representative.⁹⁴ Additionally, A.B. 2841 allows the court to disqualify an individual who would be subject to removal from office⁹⁵ if appointed, reversing prior case law.⁹⁶

2. *Qualifications, Duties, and Powers*

Efficient administration of the estate requires that the personal representative have a basic understanding of the responsibilities of the office. A.B. 2841 attempts to ensure this by requiring the personal representative to file a signed acknowledgement of duties and liabilities before the court issues letters and the appointment becomes effective.⁹⁷

91. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8463). See *id.* § 8461(f) (establishing priority for brothers and sisters).

92. *Comment, supra* note 11, at 83 (Probate Code section 8463).

93. 1931 Cal. Stat. ch. 281, at 606 (enacting CAL. PROB. CODE § 401) (grounds included conviction of an infamous crime, incompetence due to drunkenness, improvidence, or want of understanding or integrity).

94. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8402(a)(2)). The phrase "otherwise unfit" clearly does not replace prior law with a bright line test. Whether the court used this ground or the grounds under prior law of "incompetence due to drunkenness" or "want of . . . integrity," an individual so labeled could challenge the applicability of the label. The prior grounds, however, were subject to the additional challenge that they were unrelated to the individual's qualification for the position of personal representative.

95. See *id.* § 8502(a)-(e) (grounds for removal include commission of waste, fraud, or embezzlement against the estate; wrongful neglect of the estate; or where removal is provided for by other statute or is necessary to protect the estate).

96. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8402(a)(3)) (reversing, e.g., *Estate of Backer*, 164 Cal. App. 3d 1159, 1164, 211 Cal. Rptr. 163, 166 (1985) (holding that a nominated executor has the right to appointment in the absence of one of the express grounds of incompetency under the Probate Code)). *Comment, supra* note 11, at 80 (Probate Code section 8402(a)(3)).

97. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8404(a)).

By definition, an individual serving as administrator with the will annexed is appointed by the court and not the testator.⁹⁸ Because the testator did not make the appointment, prior law dictated that the administrator with the will annexed not exercise the full range of discretionary powers which the testator had specifically conferred upon the named executor, except when statutory or case law granted the same powers.⁹⁹ The Commission recognized that there are times, however, when allowing the administrator to exercise the full range of powers which the will granted would benefit the estate the most.¹⁰⁰ A.B. 2841 provides for these kinds of cases by permitting the court to allow an administrator with the will annexed all of the discretionary powers the will confers.¹⁰¹

Currently, the personal representative rather than the probate referee may appraise certain types of property in the estate inventory.¹⁰² A.B. 2841 expands this list of liquid assets appraisable by the personal representative,¹⁰³ subject to the limitation that the personal representative may appraise only those items whose fair market value, in the opinion of the personal representative, is the same as their face value.¹⁰⁴ A.B. 2841 also amends current law to enable the personal representative to have a qualified independent expert appraise any "unique, artistic, unusual, or special item of tangible personal property" that the probate referee would have appraised.¹⁰⁵

Trust companies acting as personal representatives are excluded from this requirement. *Id.* The statement is derived from similar statements used in probate courts throughout the state, and is contained in a form prescribed by A.B. 2841. *Id.* § 8404(c); see *Comment, supra*, note 11, at 80 (Probate Code section 8404). A.B. 2841 specifies that if the Judicial Council elects to prescribe a form for the statement, that form will be used instead. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8404(a)).

98. Black's Law Dictionary 43 (5th ed. 1979) (definition of administrator with the will annexed).

99. 1931 Cal. Stat. ch. 281, at 607 (enacting CAL. PROB. CODE § 409).

100. *Recommendations, supra* note 11, at 797.

101. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8442(b)); see also *Comment, supra* note 11, at 82 (Probate Code section 8442).

102. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8901(a)-(e)) (personal representative authorized to appraise moneys, currency, cash items, bank accounts and amounts on deposit, and the proceeds of life and accident insurance policies and retirement plans payable upon death in lump sum amounts). See *supra* notes 48-61 and accompanying text (discusses referee's power and duties regarding appraisal).

103. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8901(a), (b), (d), (e)); see also *Comment, supra* note 11, at 92 (Probate Code section 8901). As expanded the list now includes lump-sum annuities, cash deposits and money market funds and accounts including brokerage cash accounts, checks for wages earned before death but issued after death, and refund checks issued after death. *Id.*

104. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8901).

105. *Id.* § 8904(a). See also *Comment, supra* note 11, at 94 (Probate Code section 8904)

Election of the independent appraiser requires a notation on the inventory sheet delivered by the personal representative to the probate referee.¹⁰⁶ Upon petition by the probate referee, the court will determine whether the item in question is in fact unique, artistic, unusual, or special.¹⁰⁷ If the petition fails and the court concludes that the probate referee petitioned the court without substantial justification, the court will award litigation expenses, including reasonable attorney's fees, against the probate referee.¹⁰⁸ This provision should guard against frivolous challenges by the probate referee and encourage expeditious settlement of the estate.

When the personal representative can show good cause, existing law authorizes the court to waive appraisal by the probate referee.¹⁰⁹ By specifying that the waiver application must be made not later than the time of delivery of the inventory to the referee,¹¹⁰ A.B. 2841 encourages the personal representative to avoid the waste of effort which would occur if the representative waived appraisal after the probate referee had invested substantial amounts of time and effort.¹¹¹

3. Removal and Discharge

A.B. 2841 provides for removal of an administrator¹¹² upon the petition of a surviving spouse or relative of the decedent (or this

(specifying that if the Judicial Counsel adopts a form for the inventory and appraisal filed with the court, the independent expert appraiser must use that form or otherwise comply with the rules established by the Judicial Council).

106. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8904(b)).

107. *Id.* Although neither A.B. 2841 nor the Commission's writings suggest what criteria the court should use to make this determination, it seemed likely that the item must be one for which no ready market exists, or at least for which a market value is not readily ascertainable.

108. *Id.*

109. *Id.* § 8903(a), (b). The probate referee may oppose the waiver; if the court determines the opposition was made without a substantial justification, however, the court will award litigation expenses against the referee. *Id.* § 8903(d). If the probate referee succeeds in opposing the waiver, the court has discretion to designate a different referee to appraise the estate. *Id.*; see *Comment, supra* note 11, at 93 (Probate Code section 8903) (neither the probate referee opposing the waiver, any other referee in the same office, nor anyone sharing in a financial arrangement with the probate referee should normally appraise the estate or in any way benefit from the opposition to the waiver).

110. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8903(b)).

111. See generally *Recommendations, supra* note 11, at 749.

112. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8503); administrator as used here is meant to apply only to administrators, and not to personal representatives generally. Telephone conversation with Nathaniel Sterling, Assistant Executive Secretary, California Law Revision Commission (Dec. 15, 1988). Notes on file at *Pacific Law Journal*.

person's nominee) entitled to a higher priority than that of the administrator.¹¹³ The court has the discretion to deny the petition if removal would be contrary to the sound administration of the estate.¹¹⁴ To reflect developments in case law, A.B. 2841 permits the court to remove the personal representative upon a determination by the court that removal is necessary for the protection of the estate or interested persons.¹¹⁵ In addition, the legislature took account of other changes in A.B. 2841¹¹⁶ allowing for the appointment of a nonresident as personal representative.¹¹⁷ Finally, A.B. 2841 simplifies the procedures by which the personal representative is discharged from future liability after final distribution of the estate, by discontinuing the requirement that the personal representative provide satisfactory vouchers¹¹⁸ and by allowing for discharge on ex parte application.¹¹⁹

113. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8503(a)). The relative must also be entitled to succeed to all or part of the estate. *Id.*

114. *Id.* § 8503(b)(2). An example of a situation warranting this exercise of the court's discretion would be when administration of the estate is nearly complete. *Comment, supra* note 11, at 85 (Probate Code section 8503).

115. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8502(d)); *see, e.g.*, Estate of Cole, 240 Cal. App. 2d, 324, 330-31, 49 Cal. Rptr. 419, 424 (1966) (while there is no statutory basis for disqualifying a person named in the will from serving as executor on the grounds of adversity of interest, the court has inherent power to remove a personal representative whose interests and actions are inimical to the heirs and creditors); *accord* Estate of Daigh, 59 Cal. 3d 367, 369, 29 Cal. Rptr. 273, 274, 379 P.2d 761, 762 (1963).

116. *See* 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE §§ 8570-77) (pertaining to appointment of nonresident personal representative as personal representative in California).

117. *Id.* § 8502. Permanent removal from the state is no longer ground for dismissal. *Comment, supra* note 11, at 85 (Probate Code section 8502); *Compare* 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8502) with 1931 Cal. Stat. ch. 281, at 614 (enacting CAL. PROB. CODE § 521) (prior law that provided for dismissal of personal representative for permanent removal from the state). Conflict of interest may be grounds for removal of the personal representative, depending on the circumstances of the case, but not every conflict of interest necessarily requires removal. *Comment, supra* note 11, at 85 (Probate Code section 8502(d)). Other causes for removal include, *e.g.*, failure to provide a bond, failure of a nonresident personal representative to file a statement of permanent address with the court, and failure of the personal representative to attend or answer when a petition for the representative's removal is filed. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE §§ 8480(c), 8573, 8500(c)); *Comment, supra* note 11, at 85 (Probate Code section 8502). *Also see generally Recommendations, supra* note 11, at 800 (discusses removal of personal representatives generally).

118. 1931 Cal. Stat. ch. 281, at 657 (enacting CAL. PROB. CODE § 1066) (vouchers required to prove payment of all sums of money due from the personal representative). The personal representative must still file appropriate receipts unless excused by the court. 1988 Cal. Stat. ch. 1199, sec. 93, at ____ (enacting CAL. PROB. CODE § 12250).

119. 1988 Cal. Stat. ch. 1199, sec. 93, at ____ (enacting CAL. PROB. CODE § 12250); *Comment, supra* note 11, at 116 (Probate Code section 12250).

C. Public Administrator

1. Qualifications, Duties, and Powers

Existing law directs the public administrator to take charge of a decedent's property when the court determines that certain circumstances involving a risk to the property exist.¹²⁰ A.B. 2841 expands this requirement to encompass circumstances when the property is subject to misappropriation.¹²¹ A.B. 2841 protects the public administrator from liability by providing express immunization in the event the property is beyond the possession or control of the public administrator.¹²²

D. Public Guardian

1. Appointment

A.B. 2841 remedies a source of potential confusion that existed in prior law concerning whether the court could order the public guardian of a county to accept the guardianship or conservatorship of any person or estate.¹²³ Under A.B. 2841, the court may order the public guardian to apply for appointment as guardian or conservator of the person, estate, or person and estate.¹²⁴ Before taking this action, however, the court must first give the guardian or conservator 15 days notice, consider all alternatives, and make a determination that the appointment is necessary.¹²⁵

120. 1988 Cal. Stat. ch. 1199, sec. 80.5, at _____ (enacting CAL. PROB. CODE § 7601(a)) (either upon court order or when there is no personal representative and the property is subject to loss, injury, or waste) (restating a portion of former section 1140(a)). *Comment, supra* note 11, at 70 (Probate Code section 7601).

121. 1988 Cal. Stat. ch. 1199, sec. 80.5, at _____ (enacting CAL. PROB. CODE § 7601(a)); *see also Comment, supra* note 11, at 70 (Probate Code section 7601).

122. 1988 Cal. Stat. ch. 1199, sec. 80.5, at _____ (enacting CAL. PROB. CODE § 7601(b)); *see also Comment, supra* note 11, at 70 (Probate Code section 7601).

123. 1968 Cal. Stat. ch. 836, sec. 2, at 1608 (amending CAL. WELF. & INST. CODE § 8006) ("guardian *may* act as guardian or conservator of any person or estate *ordered* into his hands by the court") (emphasis added). *See Recommendations, supra* note 11, at 711-12 (prior law unclear whether public guardian must accept court referral).

124. 1988 Cal. Stat. ch. 1199, sec. 72, at _____ (enacting CAL. PROB. CODE § 2920(b)).

125. *Id.* *See also Comment, supra* note 11, at 62 (Probate Code section 2920).

2. Qualifications, Duties, and Powers

Regardless of whether the court ultimately appoints the public guardian as guardian or conservator,¹²⁶ circumstances may dictate that the public guardian take immediate possession or control of property in need of protection.¹²⁷ A.B. 2841 expands the powers of the public guardian to reach and preserve property, making these powers consistent with those of the public administrator.¹²⁸ A.B. 2841 rejects prior law¹²⁹ and enables the public guardian to employ private attorneys when satisfactory pro bono or contingency fee arrangements can be made as well as when the cost of employment is defrayed out of estate funds.¹³⁰

III. THE RULES

A. Opening Estate Administration

1. Petitioning and Notice

At any time after the death of the decedent any interested person¹³¹ may petition the court to commence proceedings for administration of the estate.¹³² A.B. 2841 places on the petitioner the duty to publish notice of the hearing¹³³ and consolidates into a single form all the

126. See *supra* notes 125-26 and accompanying text (appointment as guardian or conservator).

127. *Recommendations*, *supra* note 11, at 712. For example, the property may be subject to waste, lack of care, or loss. *Id.*

128. See 1988 Cal. Stat. ch. 1199, sec. 72, at ____ (enacting CAL. PROB. CODE §§ 2900) (adding misappropriation as a ground for taking control of property), 7601 (allowing the public administrator to take possession or control of property that is subject to misappropriation); see also *Comments*, *supra* note 11, at 62 (Probate Code sections 2900, 7601). See also *supra* notes 119-21 and accompanying text (discussing changes to the qualifications, duties, and powers of public administrators).

129. 1967 Cal. Stat. ch. 1667, sec. 42, at 4182 (enacting CAL. WELF. & INST. CODE § 8010).

130. Cal. Prob. Code § 2941. Compare *id.* with 1967 Cal. Stat. ch. 1667, sec. 42, at 4182 (enacting CAL. WELF. & INST. CODE § 8010) (providing that private attorneys could be employed only when the costs of employment could be defrayed out of estate funds). See also *Comment*, *supra* note 11, at 63 (Probate Code section 2941).

131. See *supra*, note 59 (discussing definition of interested person).

132. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8000). See generally *id.* § 8002 (contents of the petition); *Comment*, *supra* note 11, at 73 (Probate Code section 8002).

133. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8003(b)).

required notices of hearing to open estate administration whether served or published.¹³⁴ A.B. 2841 deletes the requirement under prior law that a notice be posted in three public places within the decedent's community in the event that no newspaper of general circulation is distributed in the community.¹³⁵

2. Estate Account Contents

A.B. 2841 supersedes prior law¹³⁶ concerning the content of the estate account, bringing it more in line with a standard balance sheet.¹³⁷ As revised by A.B. 2841, the account provides both a financial statement (including a summary statement and supporting schedules) and a report of administration containing statements of the estate's liabilities, creditor claims, and other statements needed to show the condition of the estate and to permit interested persons to understand the report.¹³⁸ Upon court order or the request of an interested person, the personal representative may be required to provide any necessary documentation to support the accounting.¹³⁹

3. Delivery of the Will

Prior law gave the custodian of a will the option of delivering the will to either the clerk of the court or the executor named in the will within 30 days of being informed of the death of the testator.¹⁴⁰ A.B. 2841 alters this by deleting the option of delivering the will to

134. *Id.* § 8100; *Comment, supra* note 11, at 74 (Probate Code section 8100).

135. Compare 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8121) with 1979 Cal. Stat. ch. 731, sec. 7, at 2556 (enacting CAL. PROB. CODE § 333(a)).

136. See 1987 Cal. Stat. ch. 923, sec. 45, at ____ (amending CAL. PROB. CODE § 920.3) and 1931 Cal. Stat. ch. 231, at 648 (enacting CAL. PROB. CODE § 921).

137. 1988 Cal. Stat. ch. 1199, sec. 91, at ____ (enacting CAL. PROB. CODE § 10900); see Note, *California Probate Accounting Procedures*, 39 S. Cal. L. Rev. 316 (1966) (which provided the concepts upon which this section was based); *Comment, supra* note 11 to § 10900. The new procedures are intended to encourage sound bookkeeping, reduce costs of the accounting by deleting unneeded detail, and generally provide a more descriptive and useful document. *Recommendations, supra* note 11, at 881.

138. 1988 Cal. Stat. ch. 1199, sec. 91, at ____ (enacting CAL. PROB. CODE § 10900(b), (c)); *Comment, supra* note 11, at 102 (Probate Code section 10900); *Recommendations, supra* note 11, at 881.

139. 1988 Cal. Stat. ch. 1199, sec. 91, at ____ (enacting CAL. PROB. CODE § 10901). See also *Comment, supra* note 11, at 103 (Probate Code section 10901) (voucher procedure extended to supporting documents generally).

140. 1931 Cal. Stat. ch. 281, at 601 (enacting CAL. PROB. CODE § 320).

the named executor.¹⁴¹ The custodian must now deliver the will to the clerk of the superior court in the county where the estate may be administered within 30 days of acquiring knowledge of the decedent's death.¹⁴² The custodian must also mail a copy of the will to the executor of the estate or, if the executor's whereabouts are unknown, to any named beneficiary whose whereabouts are known, within 30 days.¹⁴³

B. Adjudicating the Estate

1. Powers of the Court

Traditionally, the superior court while sitting in probate is viewed as a court of limited jurisdiction and limited power, in the sense that its power derives wholly from, and is thereby limited wholly to, that provided in express statutory language.¹⁴⁴ A.B. 2841 rejects the limitations on the power of the court described in several California appellate decisions,¹⁴⁵ while at the same time clarifying that the superior court sitting in probate has all the powers of a court of general jurisdiction.¹⁴⁶

2. Procedure

A.B. 2841 combines several prior procedural provisions¹⁴⁷ and requires that, in general, all petitions, objections, responses, reports,

141. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8200(a)); *Recommendations*, *supra* note 11, at 791.

142. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8200(a)(1)).

143. *Id.* § 8200(a)(2).

144. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, WILLS AND PROBATE § 233, at 5741-42 (8th ed. 1974).

145. See, e.g., *Copley v. Copley*, 80 Cal. App. 3d 97, 106-7, 145 Cal. Rptr. 437, 441 (1978) (superior court's jurisdiction while sitting in probate is limited in subject to a species of in rem jurisdiction); *accord* Estate of Munson, 86 Cal. App. 2d 67, 72, 194 P.2d 70, 73 (1948). See also Goldberg, *The Sterilization of Incompetents and the "Late Probate Court" in California: How Bad Law Makes Hard Cases*, 18 PAC. L.J. 1, 7-15 (1986) (examining the need for the probate court to have general equity powers).

146. 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7050(b)); *Comment*, *supra* note 11, at 66 (Probate Code section 7050).

147. See, e.g. 1931 Cal. Stat. ch. 281, at 605 (enacting CAL. PROB. CODE § 380) (petition to contest will admitted to probate); *id.*, at 609 (enacting CAL. PROB. CODE § 440) (petition for letters of administration); *id.*, at 614 (enacting CAL. PROB. CODE § 522) (filing allegations that executor or administrator should be removed).

or accounts must be in writing and signed by all the persons petitioning, objecting, responding, or making the report or account.¹⁴⁸ A.B. 2841 provides an exception to this requirement when the person petitioning, objecting, or responding is absent from the county or for some other cause unable to sign or verify.¹⁴⁹ In these cases, the person's attorney may sign the paper if the person whose signature is required is not a fiduciary.¹⁵⁰

3. Will Contests

Prior statutory law appeared to put the burden of proof in a will contest on the will contestant, but left the specifics on burden and order of proof unclear.¹⁵¹ A.B. 2841 codifies existing law requiring the contestant to prove lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.¹⁵² In addition, the rule under case law that the proponent of the will—aided by a presumption of due execution arising if the signatures on the will are proved genuine—bears the burden of proof of due execution is made express.¹⁵³

4. Elimination of Jury Trials

The debate over the question of whether a jury trial should be available in probate proceedings is well documented.¹⁵⁴ In line with

148. 1988 Cal. Stat. ch. 1199, sec. 56, at ____ (enacting CAL. PROB. CODE § 1020). *See also Comment, supra* note 11, at 45 (Probate Code section 1020).

149. 1988 Cal. Stat. ch. 1199, sec. 56, at ____ (enacting CAL. PROB. CODE § 1023).

150. *Id.* § 1023(a). The attorney is also permitted to verify the petition, objection, or response. *Id.* § 1023(b). *See generally Comment, supra* note 11, at 47 (Probate Code section 1023).

151. 1931 Cal. Stat. ch. 281, at 605 (enacting CAL. PROB. CODE § 371). *See generally Recommendations, supra* note 11, at 793 & n.12.

152. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8252(a)). These details are drawn from the UPC and are consistent with California case law. *See* UPC § 3-407 (1982); *Comment, supra* note 11, at 78 (Probate Code section 8252); *see also* Estate of DeMont, 132 Cal. App. 2d 720, 723, 282 P.2d 963, 966 (1955) (contestant bears burden of showing incapacity); Estate of Daniels, 120 Cal. App. 2d 284, 287, 260 P.2d 991, 993 (1953) (contestant is plaintiff and bears the burden of proof); Estate of Holmes, 88 Cal. App. 2d 360, 365, 198 P.2d 708, 711 (1948) (policy of the law is to favor testacy rather than intestacy, and so burden is on contestant if contest is filed).

153. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8252(a)); *see* Estate of Browne, 159 Cal. App. 2d 99, 101, 323 P.2d 827, 829 (1958) (fact that document on its face appears regularly executed is enough to raise presumption of due execution); Estate of Stone, 59 Cal. App. 2d 263, 268-69, 138 P.2d 710, 712 (1943) (effect of this presumption is that, absent proof by the contestant "which, standing alone, would have warranted a finding that the will had not been duly executed," the duty of the court is to dismiss the contest). *See also Recommendations, supra* note 11, at 793 & n.10. *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, WILLS AND PROBATE §§ 122, at 5637-38; 397, at 5855 (8th ed. 1974).

154. *See generally, e.g., Recommendations, supra* note 11, at 793 & n.12; 7 B. WITKIN,

other Commission recommendations designed to expedite the probate process,¹⁵⁵ A.B. 2841 makes revisions to a number of sections scattered throughout the Probate Code, implementing an overall scheme to eliminate jury trials generally in probate proceedings.

Although the California Supreme Court has held that there is generally no right to jury trial in probate proceedings unless a statute states otherwise,¹⁵⁶ a line of cases has developed interpreting one provision of prior law as establishing a right to trial by jury in any case in which the probate code provided for the framing of factual issues.¹⁵⁷ A.B. 2841 clarifies this area by providing that no right to jury trial exists unless expressly provided by statute.¹⁵⁸

In addition to clarifying that jury trials are never available in probate proceedings unless specifically provided for by statute, A.B. 2841 eliminates the provisions in prior law that had specifically provided for the right to a jury trial. Prior statutory law specified that all questions of fact substantially affecting the validity of a will in a will contest were to be tried by jury.¹⁵⁹ This system of jury trials has been the subject of much criticism in cases and by scholars as being erratic and wasteful¹⁶⁰ and has frequently lead to reversal of verdicts on appeal.¹⁶¹ A.B. 2841 discontinues this rule and eliminates

CALIFORNIA PROCEDURE, TRIAL § 96, at 94-5 (3d ed. 1985); Bloom, *The Right to a Non-Jury Trial for Trust and Probate Issues*, 7 L.A. LAWYER, at 34 (June 1984). The UPC resolves the question by providing for a right to jury trial when any controverted fact arises. UPC § 1-306 (1982).

155. See *supra* notes 49-53, 65, 95-96, 103, 110-11, 118-19 and accompanying text; *infra* notes 158, 162, 164, 166, 177-79, 183-86, 189, 202 and accompanying text.

156. Estate of Beach, 15 Cal. 3d 623, 642-43, 542 P.2d 994, 1007, 125 Cal. Rptr. 570, 582-83 (1975) (determination by jury inappropriate since claims in probate proceedings are necessarily based on conduct subject to the control and supervision of the same court in which the claim is asserted). See also Heiser v. Superior Court, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745, 747-48 (1979) (jury trial unavailable when it would risk undermining supervisory role of court or where impractical to expect jury to comprehend complexities of such things as an accounting).

157. See 1931 Cal. Stat. ch. 281, at 668 (enacting CAL. PROB. CODE § 1230) (continued in 1987 Cal. Stat. ch. 923, sec. 60.5, at ____ (enacting CAL. PROB. CODE § 1280)), cited in, e.g., Budde v. Superior Court, 97 Cal. App. 2d 615, 620, 218 P.2d 103, 109 (1950) (holding that trial by jury was appropriate whenever the Probate Code frames triable issues of fact); Beach, 15 Cal. 3d at 642, 542 P.2d at 1007, 125 Cal. Rptr. at 583 (acknowledging and implicitly accepting this line of cases by distinguishing it from the case then at bar).

158. 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7200); *Comment, supra* note 11 at 68 (Probate Code section 7200).

159. 1931 Cal. Stat. ch. 281, at 605 (enacting CAL. PROB. CODE § 371).

160. See, e.g., Evans, *Comments on the Probate Code of California*, 19 CALIF. L. REV. 602, 616 (1931) (criticism by the author of 1931 Probate Code directed at questions the jury is allowed to resolve, concluding it would be more logical to do away altogether with jury trial in will contests). Jury trials in probate matters are not constitutionally required and, it has been argued, involve issues of fact which could be better addressed by the court. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 555-557 (1946); Beach, 15 Cal. 3d at 642, 542 P.2d at 1007, 125 Cal. Rptr. at 582.

161. See, e.g., Estate of Mann, 184 Cal. App. 3d 593, 610, 229 Cal. Rptr. 225, 234 (1986):

jury trials in will contests, providing instead that the court is to try and determine any contested issue of fact affecting the validity of the will.¹⁶² For cases involving a properly contested allowed claim, prior law granted both the contestant and claimant the right to insist on a jury trial of all issues of fact.¹⁶³ A.B. 2841 deletes this express authorization for jury trial.¹⁶⁴ Prior law provided a special procedure for determining persons entitled to distribution, including a right to jury trial of the facts and special evidentiary rules.¹⁶⁵ A.B. 2841 discontinues both the provision for jury trial and the special evidentiary rules.¹⁶⁶

5. *Appealability of Orders*

A.B. 2841 codifies and clarifies the former rules developed under case law that orders granting or revoking letters of administration with the will annexed are appealable, but that letters of special administration or letters of special administration with general powers are not.¹⁶⁷ Orders granting or modifying a family allowance are

"It is no secret that instructions such as this are repeatedly ignored. In 1892 our Supreme Court unhappily observed that 'juries lean against wills which to them seem unequal or unjust.' [citation omitted] . . . The Supreme Court more recently adverted to this problem in *Estate of Fritschi*, 60 Cal. 2d 367, [373,] where it pointed out that a "legion" of appellate decisions have been necessary in order to "strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties."

162. 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE § 8252(b)); *Comment, supra* note 11, at 78 (Probate Code section 8252). Under prior law a jury was also required in any proceeding contesting the will after the will was admitted to probate. 1931 Cal. Stat. ch. 281, at 606 (enacting CAL. PROB. CODE § 382). As in the case of a will contest prior to admission to probate, A.B. 2841 discontinues the use of jury trials in proceedings instituted to revoke probate. *Compare id. with* 1988 Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE §§ 8271(b)), 8272(a); *see Comments, supra* note 11, at 79 (Probate Code section 8271 and 8272).

163. 1931 Cal. Stat. ch. 281, at 649 (enacting CAL. PROB. CODE § 928).

164. *Compare id. with* 1988 Cal. Stat. ch. 1199, sec. 91, at ____ (enacting CAL. PROB. CODE § 11002); *see Comment, supra* note 11, at 104 (Probate Code section 11002).

165. 1941 Cal. Stat. ch. 801, sec. 1, at 2346-47 (amending CAL. PROB. CODE § 1081).

166. *Compare id. with* 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 11704(a)) (discontinuing special evidentiary rules and right to jury trial). There is nothing so special about these proceedings as to warrant unique rules of evidence. *See Comment, supra* note 11, at 108 (Probate Code section 11704) and *Recommendations, supra* note 11, at 958.

167. 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7240(a)). *See Estate of Smith*, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46, 48 (1959) (order granting letters of administration is appealable); *Estate of Hughes*, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858, 860 (1978) (order refusing to revoke letters of special administration not appealable). *See also Comment, supra* note 11, at 68 (Probate Code section 7240).

appealable under existing law;¹⁶⁸ A.B. 2841 extends this to allow appeals from orders terminating family allowances.¹⁶⁹ Finally, A.B. 2841 discontinues¹⁷⁰ the rule permitting appeal from an order relating to determination of heirship,¹⁷¹ since the procedures established under prior law for determining heirship¹⁷² are redundant.¹⁷³

C. Nondomiciliary Decedents

1. Use of Summary Procedures by Sister State Representatives

Administration of a decedent's estate is primarily at the decedent's domicile.¹⁷⁴ When the decedent is a nondomiciliary of California, but leaves property located in the state, existing law provides for a system of ancillary administration (secondary probate) to protect local creditors and to transfer title to real property.¹⁷⁵ Current law provides summary procedures to allow for the collection of personal property without administration when the value of decedent's real and personal property located within the state does not exceed \$60,000.¹⁷⁶ A.B. 2841 makes these affidavit procedures regarding personal property available to sister state personal representatives.¹⁷⁷ Although A.B.

168. 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7240(e)), (restating former Probate Code section 1297(e)). *Comment, supra* note 11, at 68 (Probate Code section 7240).

169. 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7240(e)).

170. *Compare id. with* 1988 Cal. Stat. ch. 1199, sec. 80.5, at ____ (enacting CAL. PROB. CODE § 7240). *See Comment, supra* note 11, at 68 (Probate Code section 7240).

171. 1987 Cal. Stat. ch. 923, sec. 60.5, at ____ (enacting CAL. PROB. CODE § 1297(m)).

172. 1931 Cal. Stat. ch. 281, at 664-65 (enacting CAL. PROB. CODE §§ 1190-92).

173. *Comments, supra* note 11, at 68, 55 (Probate Code section 7240, repealed section 1190). The Commission concluded that these procedures were not needed where administration is pending, since the issue of who is entitled to share in the decedent's estate is determined in the proceedings for distribution. *Comment, id.*, at 55 (repealed Probate Code section 1190). Where administration is not pending, it may be appropriate to institute an action to quiet title. *Comment, supra* note 11, at 55 (repealed Probate Code section § 1190). *See* CAL. PROB. CODE §§ 1080-82 (Deering's Supp. 1988) (procedures for determining distribution).

174. *Recommendations, supra* note 11, at 997; Durham, *Ancillary Administration*, 3 CALIFORNIA DECEDENT ESTATE PRACTICE § 33.1, at 33-3 (Cont.Ed.Bar 1988).

175. *Recommendations, supra* note 11, at 997; *See* Durham, *supra* note 174, §§ 33.3-33.4, at 33-5, 33.17, at 33-14; 2 A. BOWMAN, OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW § 29.27, at 1449 (Cont.Ed.Bar 1975).

176. CAL. PROB. CODE § 13100 (Deering's Supp. 1988). *See generally id.* §§ 13100-15 (Deering's Supp. 1988) (detailing the affidavit procedure for collection or transfer of personal property).

177. *Id.* § 12570. The affidavit procedures are not available to foreign representatives. *See id.* § 12507 (excluding a foreign nation's personal representatives from the definition of sister state personal representative).

2841 does not make the provisions under existing law creating affidavit procedures for collecting real property¹⁷⁸ applicable to sister state personal representatives, the beneficiaries may employ the affidavit procedures.¹⁷⁹

2. *Recognition of Out of State Orders Admitting Wills to Probate*

Prior law recognized orders admitting wills to probate in sister states unless the order admitting the will failed one or more of four specific conditions.¹⁸⁰ One of those conditions required the California court to determine that the order admitting the will to probate was valid according to the law of the place where the decedent was domiciled or according to the law of California.¹⁸¹ The Commission concluded that this condition was in conflict with the Full Faith and Credit Clause of the United States Constitution;¹⁸² A.B. 2841 deletes the requirement¹⁸³ and grants automatic recognition to a sister state's determination admitting the will to probate or establishing or proving the will unless the contestant can establish that the sister state's determination fails one of the three remaining specified conditions.¹⁸⁴

178. See CAL. PROB. CODE §§ 13200-09 (Deerings Supp. 1988) (affidavit procedures for collecting real property); 13200(a)(8) (person seeking to use affidavit procedures must be successor in interest to decedent); 13006(a), (b) (Deerings Supp. 1988) (defining successor as beneficiary of decedent's will or persons entitled to succeed to decedent's property under laws governing intestate succession).

179. 1988 Cal. Stat. ch. 1199, sec. 99.5, at ____ (enacting CAL. PROB. CODE § 13200(a)) (allowing any person claiming to be decedent's successor to use affidavit procedures); see *Comment, supra* note 11, at 120 (Probate Code section 12570). A sister state personal representative must use other procedures. *Id.*

180. 1972 Cal. Stat. ch. 713, sec. 3, at 1302 (amending CAL. PROB. CODE § 362).

181. *Id.* For an order to be recognized, the court was required to find that (1) the decedent was domiciled in the other jurisdiction at death; (2) all interested parties were given notice and an opportunity for contest; (3) the order was final and not subject to revocation; and (4) that the order was valid according to the law of the other jurisdiction or according to the laws of California. *Id.*

182. U.S. CONST. art. IV, § 1; *Recommendations, supra* note 11, at 998-99 (fourth requirement inappropriate because it calls for the California court to reconsider the correctness of a sister state's determination that the will is valid). See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW CONSTITUTIONAL LAW § 16, at 3260, §§ 19-22, at 3262-66 (8th ed. 1974); E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 22.1-22.4 (1982).

183. Compare 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12522) with 1931 Cal. Stat. ch. 281, at 604 (enacting CAL. PROB. CODE § 362).

184. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12522). The contestant must show either that the determination in the sister state is not based on a finding that the decedent was domiciled in the sister state at the time of death, all interested parties were not given notice and a chance to contest the will in the sister state proceeding, or the determination in the sister state is not final. *Id.* § 12522(a)-(c). The only other substantive

Wills admitted to probate in a foreign nation are now subject to the same three conditions as wills admitted in a sister state,¹⁸⁵ except that A.B. 2841 places on the proponent of the will the burden of establishing to the satisfaction of the court that the foreign proceeding satisfied the three conditions.¹⁸⁶ In addition, A.B. 2841 permits the court to refuse to recognize a foreign nation's order made under a judicial system that does not provide procedures compatible with the requirements of due process of law.¹⁸⁷

3. *Sister State Personal Representative's Priority as Personal Representative*

When the will of a decedent who died while domiciled in a sister state nominates a specific individual to be personal representative in this state, that individual will have priority for appointment.¹⁸⁸ But when the decedent's will is silent, A.B. 2841 gives priority for appointment as personal representative in this state to the personal representative appointed by a court of the decedent's domicile, provided the decedent died while domiciled in the sister state.¹⁸⁹ The sister state personal representative must still qualify for appointment under the applicable rules in California.¹⁹⁰

change from prior law is the discontinuation of the requirement that the sister state's determination not be subject to revocation. *Compare id. with* 1972 Cal. Stat. ch. 713, sec. 3, at 1302 (amending CAL. PROB. CODE § 362). *See generally Comment, supra* note 11, at 118 (Probate Code section 12522) (sister state order admitting will to probate presumed valid; burden on opponent to show order not entitled to full faith and credit).

185. *See supra* notes 180-81 and accompanying text (conditions for recognition of orders admitting wills to probate in sister states).

186. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12523(a)); *Comment, supra* note 11, at 118 (Probate Code section 12523).

187. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12523(b)). This provision is drawn from the Uniform Foreign-Money Judgments Recognition Act. *Compare id. with* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1), 13 U.L.A. 268 (1962); *see also* CAL. CIV. PROC. CODE § 1713.4(a)(1) (Deering's 1981); *Comment, supra* note 11, at 118 (Probate Code section 12523); *Recommendations, supra* note 11, at 999. *Cf. Note, Recognition of Foreign Country Judgments - A Case for Federalization*, 22 TEX. INT'L L. REV. 331, 334-35 (1987) (explaining this practice on grounds of convenience and doctrinal symmetry). *But cf. Smit, International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 45-46 (1962) (contending that it is error to allow the requirements of the Full Faith and Credit Clause to dictate the circumstances under which foreign orders should be recognized).

188. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12513).

189. *Id.* Unlike the Uniform Probate Code section from which this provision was drawn (UPC section 3-203 (1982)), the priority is given only to a personal representative appointed by the sister state, not to one appointed by a foreign country. *Comment, supra* note 11, at 118 (Probate Code section 12513).

190. *Comment, supra* note 11, at 118 (Probate Code section 12513). *See generally* 1988

A.B. 2841 expressly provides that a personal representative appointed by a sister state or foreign nation submits personally in a representative capacity to the jurisdiction of the California courts by exercising any of the rights afforded a personal representative under California law.¹⁹¹ Consistent with existing case¹⁹² and statutory law,¹⁹³ A.B. 2841 makes a personal representative appointed by a sister state or foreign nation subject in a representative capacity to the jurisdiction of the California courts to the same extent that the nondomiciliary decedent was at the time of death.¹⁹⁴

D. Abatement

A.B. 2841 replaces several prior provisions of the Probate Code¹⁹⁵ with one section drawn from the UPC¹⁹⁶ which continues the mandate that abatement be conducted according to the testator's will, plan, or purpose.¹⁹⁷ Where the testator makes no provision for abatement, or the debts and expenses of the estate exceed the amount provided, A.B. 2841 codifies the system of prioritization developed under existing case¹⁹⁸ and prior statutory law¹⁹⁹ by which first property not

Cal. Stat. ch. 1199, sec. 81.5, at ____ (enacting CAL. PROB. CODE §§ 8400-8404) (qualifications for appointment as personal representative).

191. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12590). These include filing a petition for ancillary administration, receiving money or other personal property under the affidavit procedures provided for administration of small estates, and doing any act in the state as a personal representative that would have given the state jurisdiction over the person as an individual. *Id.* § 12590(a)-(c); *cf.* UPC § 4-301 (1982). *See generally* Comment, *supra* note 11 to § 12590.

192. *See, e.g.,* Mitsui Manufacturers Bank v. Tucker, 152 Cal. App. 3d 428, 430-31, 199 Cal. Rptr. 517, 519 (1984) (holding that not to subject the foreign personal representative to the court's jurisdiction to the same extent as the decedent would be inconsistent with the legislative purpose behind California's long-arm statute).

193. *See* CAL. CIV. PROC. CODE § 410.10 (Deering's 1972) (California's long-arm statute).

194. 1988 Cal. Stat. ch. 1199, sec. 94.5, at ____ (enacting CAL. PROB. CODE § 12591); *see also* Comment, *supra* note 11, at 122 (Probate Code section 12591).

195. 1987 Cal. Stat. ch. 923, sec. 38-40, at ____ (repealing and enacting CAL. PROB. CODE §§ 736, 750-52); *see* Comment, *supra* note 11, at 125 (Probate Code section 21400).

196. *See* UPC § 3-902(b) (1982).

197. 1988 Cal. Stat. ch. 1199, sec. 108, at ____ (enacting CAL. PROB. CODE § 21400); Comment, *supra* note 11, at 126 (Probate Code section 21400). *See also* Estate of Jenanyan, 31 Cal. 3d 703, 712, 646 P.2d 196, 200, 183 Cal. Rptr. 525, 529 (1982) (general rules governing priority of abatement will be overruled when testator's intent to change the order of abatement is clearly indicated).

198. *Jenanyan*, 31 Cal. 3d at 711-12, 646 P.2d at 200, 183 Cal. Rptr. at 529 (citing the "almost universally followed" rule that general gifts abate proportionally before specific gifts). *Accord* Estate of Buck, 32 Cal. 2d 372, 376, 196 P.2d 769, 771 (1948); Estate of De Santi, 53 Cal. App. 2d 716, 719-21, 128 P.2d 434, 436-37 (1942).

199. 1987 Cal. Stat. ch. 923, sec. 38-40, at ____ (repealing and enacting CAL. PROB. CODE §§ 750-52).

disposed of by the will is abated, then residuary gifts, then general gifts, and finally specific gifts must be reduced.²⁰⁰ Finally, A.B. 2841 clarifies that the term "relatives" as used to determine which individuals will receive greater protection during abatement includes all those who would have taken had the testator died intestate leaving no one else with a greater priority.²⁰¹

E. Interest and Income

A.B. 2841 enacts specific provisions to cover the accrual of interest and income during estate administration when the testator's will does not indicate any intentions otherwise in this regard.²⁰² For example, as a rule a specific devise²⁰³ does not bear interest.²⁰⁴ Exceptions to this general rule include general pecuniary devises not distributed within one year of the testator's death, annuities commencing at the testator's death that are not paid within the period specified (although no interest accrues during the first year after the testator's death), and devises for maintenance (including support).²⁰⁵ For those specific devises that do bear interest, the interest rate is fixed at one percent above the minimum rate payable on a Series EE United States savings bond purchased one year after the decedent's death and held to maturity.²⁰⁶ A.B. 2841 codifies existing law and provides that a specific devise carries with it income on the devised property from the date of death, which is to be reduced by expenses incurred during

200. 1988 Cal. Stat. ch. 1199, sec. 108, at ____ (enacting CAL. PROB. CODE § 21402(a)(1)-(6)); *Comment, supra* note 11, at 127 (Probate Code section 21402).

201. 1988 Cal. Stat. ch. 1199, sec. 108, at ____ (enacting CAL. PROB. CODE § 21402(b)). Thus "relatives" includes a spouse, adoptive children, foster parents, and stepparents. *Comment, supra* note 11, at 127 (Probate Code section 21402). This entire section concerning order of abatement, however, is subject to the transferor's intent under section 21400. *See supra* note 197 and accompanying text (discussing Probate Code section 21402); *Comment, supra* note 11, at 127 (Probate Code section 21402).

202. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE §§ 12000-12007).

203. *See generally Comment, supra* note 11, at 113 (Probate Code section 12002) (section 12002 applies to specific devises of both real and personal property).

204. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 12002(a)); *accord* Estate of McKenzie, 199 Cal. App. 2d 393, 399-400, 18 Cal. Rptr. 680, 683-84 (1962).

205. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE §§ 12003, 12004(a), (b), 12005).

206. *Id.* § 12001(a), (b); *Comment, supra* note 11, at 113 (Probate Code section 12001). The rule of this section is incorporated by reference in Probate Code section 16314 (income and interest on trust distributions). *Comment, supra* note 11, at 113 (Probate Code section 12001).

administration of the estate attributable to the devised property.²⁰⁷ If the income derived from the property is insufficient to cover expenses attributable to that property, the deficiency will be paid out of the estate for one year or until the devisee occupies or takes possession of the property.²⁰⁸ The amount of the deficiency paid out of the estate that is attributable to the period commencing one year after the testator's death will be charged against the devisee's share, and the personal representative is given an equitable lien on the specifically devised property as against the devisee until repayment of the expenses.²⁰⁹ The equitable lien is not good, however, against a transferee who gives fair consideration for the property and takes without knowledge of the lien.²¹⁰

IV. CONCLUSION

Legislation recommended by the Commission and enacted by the Legislature in 1988 significantly revises a number of areas of the Probate Code. Changes in the probate referee system, for example, reflect both a decision to retain the probate referee system and a desire to make the system more flexible, responsive, and accountable to personal representatives and courts. The decision to eliminate jury trials in probate proceedings—probably the most visible change effected by A.B. 2841—also resolves an area of considerable controversy. The Commission concluded, and the legislature agreed, that jury trials in probate proceedings are cumbersome, time consuming, and result too often in verdicts which unfairly ignore the intent of the decedent.

The changes A.B. 2841 brings about also reflect the use of two disparate methods to achieve the common goal of simplifying and expediting probate administration. First, the discretion and power of

207. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 12002(b)); see also, e.g., *In re Estate of Daly*, 202 Cal. 284, 287, 260 P. 296, 297 (1927). Expenses attributable to the property are those that directly result from the use or ownership of the property, and include maintenance, insurance, property taxes, and income taxes allocable to income from the property. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 12002(b)); *Comment, supra* note 11, at 113 (Probate Code section 12002).

208. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 12002(c)); accord *Estate of Reichel*, 28 Cal. App. 3d 156, 158, 103 Cal. Rptr. 836, 838 (1972) (specifically devised real property that produces no income but which the devisee occupies rent free from the time of testator's death accrues expenses on the property chargeable to the devisee); *Comment, supra* note 11, at 113 (Probate Code section 12002).

209. 1988 Cal. Stat. ch. 1199, sec. 91.5, at ____ (enacting CAL. PROB. CODE § 12002(c)).

210. *Comment, supra* note 11, at 113 (Probate Code section 12002).

the probate court are increased in certain areas, making its decisions less susceptible to challenge on appeal. Second, other changes clearly reflect an effort to allow more estate administration to take place outside the court's purview. However dissimilar these two methods may appear, A.B. 2841 illustrates that they can be successfully combined to achieve a common goal.

In light of the chronic overcrowding of court calendars today, the efforts embodied in A.B. 2841 represent a positive response to many perceived shortcomings of the probate system in California. In a field often viewed as still shackled by its English common law roots, the practicing bar should welcome the changes.

Jeffrey A. Mitchell

APPENDIX

Code Sections Affected

Civil Code § 2417 (amended); Code of Civil Procedure §§ 1700, 1700.1, 1700.2, 1700.3, 1700.4, 1700.5, 1700.6, 1700.7, 1700.8 (repealed); §§ 153, 166, 353, 580a, 904.1, 1026, 1421, 1441, 1443, 1449, 1913 (amended); Financial Code § 6950 (amended); Government Code § 29616 (repealed); §§ 27430, 27431, 27432, 27433, 27434, 27435, 27436, 27444 (new); §§ 12598, 13944, 27643, 69503 (amended); Health and Safety Code § 1289.4 (amended); Labor Code § 100.5 (amended); Military and Veterans Code § 1035.05 (amended); Penal Code § 653.5 (repealed); Probate Code §§ 261, 268, 270, 300, 301, 302, 303, 304, 305, 320, 321, 322, 323, 324, 326, 327, 328, 328.3, 328.7, 329, 330, 331, 333, 334, 351, 352, 360, 361, 362, 370, 371, 372, 372.5, 373, 374, 380, 381, 382, 383, 384, 385, 400, 401, 402, 403, 404, 405, 405.1, 405.2, 405.3, 405.4, 405.5, 405.6, 406, 407, 408, 409, 410, 420, 421, 422, 423, 424, 425, 426, 427, 440, 441, 442, 443, 450, 451, 452, 453, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 480, 481, 500, 501, 502, 510, 511, 512, 520, 521, 522, 523, 524, 525, 526, 540, 541, 541.1, 541.5, 542, 543, 544, 549, 550, 553.3, 553.5, 600, 601, 602, 603, 604, 605, 606, 607, 608, 608.5, 609, 609.5, 610, 611, 612, 613, 614, 615, 660, 661, 662, 663, 664, 665, 707, 709, 709.1, 716, 719, 720, 721, 736, 750, 751, 752, 753, 920, 920.3, 920.5, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 956, 1000, 1001, 1002, 1003, 1004, 1020, 1020.1, 1021, 1021.5, 1022, 1023, 1024, 1025, 1025.5, 1026, 1027, 1028, 1040, 1041, 1042, 1043, 1043a, 1054, 1055, 1060, 1060.1, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1080, 1081, 1082, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1140, 1140.5, 1141, 1142, 1142.3, 1142.5, 1143, 1144, 1144.5, 1145, 1146, 1147, 1147.5, 1148, 1149, 1150, 1152, 1154, 1155, 1190, 1191, 1192, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 2523, 9257, 9863, 17208, 21100, 21120 (repealed); §§ 3, 39, 45, 81, 300, 301, 350, 351, 352, 353, 354, 355, 356, 360, 361, 365, 366, 370, 371, 372, 373, 374, 380, 381, 382, 383, 385, 386, 387, 388, 400, 401, 402, 403, 404, 405, 406, 407, 408, 450, 451, 452, 453, 550, 551, 552, 553, 554, 555, 1000, 1001, 1002, 1003, 1004, 1020, 1021, 1022, 1023, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1210, 2900, 2901, 2902, 2903, 2920, 2921, 2922, 2940, 2941, 2942, 2943, 2944, 6104, 6105, 6154, 6179, 7000, 7001, 7050, 7051, 7052, 7060, 7070, 7071, 7072, 7200, 7220, 7240, 7241, 7242, 7260, 7261, 7262, 7263,

7280, 7600, 7600.5, 7601, 7602, 7603, 7604, 7620, 7621, 7622, 7623, 7624, 7640, 7641, 7642, 7643, 7644, 7660, 7661, 7662, 7663, 7664, 7665, 7666, 8000, 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8100, 8110, 8112, 8113, 8120, 8121, 8122, 8123, 8124, 8125, 8200, 8201, 8202, 8220, 8221, 8222, 8223, 8224, 8225, 8226, 8250, 8251, 8252, 8253, 8254, 8270, 8271, 8272, 8400, 8401, 8402, 8403, 8404, 8405, 8406, 8420, 8421, 8422, 8423, 8424, 8425, 8440, 8441, 8442, 8451, 8460, 8461, 8462, 8463, 8464, 8465, 8466, 8467, 8468, 8480, 8481, 8482, 8483, 8484, 8485, 8486, 8487, 8488, 8500, 8501, 8502, 8503, 8504, 8505, 8520, 8521, 8522, 8523, 8524, 8525, 8540, 8541, 8542, 8543, 8544, 8545, 8546, 8547, 8570, 8571, 8572, 8573, 8574, 8575, 8576, 8577, 8800, 8801, 8802, 8803, 8804, 8850, 8851, 8852, 8870, 8871, 8872, 8873, 8874, 8900, 8901, 8902, 8903, 8904, 8905, 8906, 8907, 8908, 8909, 8920, 8921, 8922, 8923, 8924, 8940, 8941, 8960, 8961, 8963, 8964, 8980, 9350, 9351, 9352, 9353, 9354, 9370, 9390, 9391, 9399, 9605, 9614, 10900, 10901, 10950, 10951, 10952, 10953, 10954, 11000, 11001, 11002, 11003, 11004, 11005, 11006, 11050, 11051, 11052, 11600, 11601, 11602, 11603, 11604, 11605, 11620, 11621, 11622, 11623, 11624, 11640, 11641, 11642, 11700, 11701, 11702, 11703, 11704, 11705, 11750, 11751, 11752, 11753, 11801, 11802, 11850, 11851, 11852, 11853, 11854, 11900, 11901, 11902, 11903, 11904, 11950, 11951, 11952, 11953, 11954, 11955, 11956, 12000, 12001, 12002, 12003, 12004, 12005, 12006, 12007, 12200, 12201, 12202, 12203, 12204, 12205, 12206, 12250, 12251, 12252, 12500, 12501, 12502, 12503, 12504, 12505, 12506, 12507, 12510, 12511, 12512, 12513, 12520, 12521, 12522, 12523, 12524, 12530, 12540, 12541, 12542, 12570, 12571, 12572, 12573, 12574, 12590, 12591, 16314, 16315, 21400, 21401, 21402, 21403, 21404, 21405, 21406 (new); §§ 20, 52, 58, 260, 275, 280, 284, 287, 288, 295, 900, 1203, 1215, 1220, 1250, 1252, 1260, 2100, 2250, 2320, 2325, 2333, 2430, 2580, 2610, 2616, 2631, 3082, 3918, 6112, 6221.5, 6327, 6527, 6607, 6608, 6803, 6805, 9001, 9002, 9050, 9103, 9253, 9255, 9620, 9704, 10003, 10005, 10301, 10405, 12404, 12408, 13006, 13051, 13052, 13103, 13111, 13112, 13114, 13152, 13154, 13200, 13203, 13501, 13502, 13503, 13550, 13553, 13650, 13655, 13656, 13658, 13659, 15804, 16225, 16304, 16305 (amended); Revenue and Taxation Code §§ 480 (amended); Welfare and Institutions Code §§ 8000, 8001, 8002, 8003, 8004, 8005, 8006, 8006.5, 8007, 8008, 8009, 8010, 8011, 8012, 8013, 8015 (repealed).

Support and Opposition

AB 2841 (Harris); 1988 STAT. Ch. 1199

Support: City & County of San Francisco Public Administrator;
California State Bar—Estate Planning, Trust & Probate Section;

California State Association of Public Administrators, Guardians &
Conservators; California Probate Referees