

DID THE "SPEARS" REFORM HIT THE TARGET?



Assembly Bill 1194



A Discussion of AB1194 and Its Implications on Conservatorships Post Brittany




Hon. Mary Thornton House



Probate & Estate Planning Section - April 28, 2022

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Alert: CANON 3B(9) of the California CODE OF JUDICIAL ETHICS



"A judge **SHALL NOT** make any **public** comment about a pending or impending proceeding in any court and **SHALL NOT** make any **nonpublic** comment that might substantially interfere with a fair trial or hearing."

This rule applies to assigned judges, temporary judges, court-appointed referees, and court appointed arbitrators.

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After Today's Session, You Will Have:

- Learned About Changes to the Probate and Business and Professions Code that Impact Licensed Professional Fiduciaries and Attorneys
- Learned About the History of How the Bill Came Into Being
- Heard the Panelists discuss the Impact of those Changes

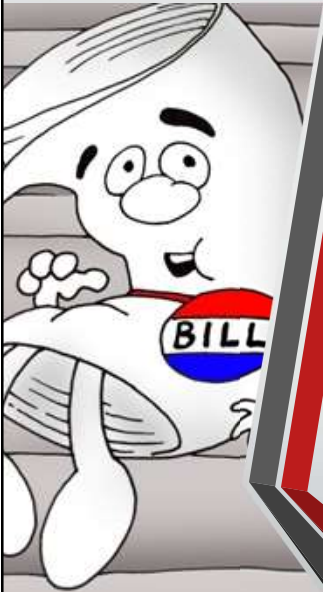


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A SCHEMATIC OF THE BILL

- 26 Sections
- New Business and Professions Code §6563 and §6580
- New Probate Code §1458, §1851.6, §2112
- Amendments to Probate Code §1051, §1471, §1460, §1826, §1850, §1851, §1851.1, §1860.5, §1862, §1863, §2250, §2250.6, §2253, §2401, §2620, §2623, §2640, §2641, §2653

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A cartoon character with a large nose and glasses is holding a large white bill with the word "BILL" written on it in a red and blue circle. The character is looking towards the right.

Short Summary

- 12 of the 26 Sections involve Court Investigators and Must Be Funded to be Implemented
- 3 Sections are Related to Limited Conservatorships
- New LPF [Licensed Professional Fiduciary] Requirements Regarding Fee Schedules
- Selection of their Own Attorney by a Proposed Conservatee

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A 3D rendered red question mark is shown next to a small white 3D figure of a person standing and looking up at the question mark. The background is a light gray gradient with a red and black diagonal stripe.

HOW/WHY DID **AB 1194** COME INTO EXISTENCE?

WHAT WERE SOME PERMUTATIONS?

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THE NEW PROBATE CODE SECTION 1471 – specifically (d) and (e) [Section 6 of AB 1194]

- (d) If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court *shall allow representation by the preferred attorney, even if the attorney is not on the court's list of court-appointed attorneys*, and the attorney shall provide zealous representation as provided in subdivision(e).

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Probate Code
§1471(e)

- (e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a *zealous, independent advocate representing the wishes of their client*, consistent with the duties set forth in Section 6068 of the Business and Profession Code and the California Rules of Professional Conduct.

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Tug of War Resolved?

- Best Interests versus Zealous Advocate Debate

The slide features a 3D illustration of a tug-of-war competition. On the left, three white figures are pulling a rope towards the left. On the right, three grey figures are pulling a rope towards the right. The rope is a thick, brownish-yellow cord. The background is dark grey with a red and white diagonal stripe on the left side. The text 'Tug of War Resolved?' is centered at the top, and the bullet point 'Best Interests versus Zealous Advocate Debate' is positioned below it.

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So.....



- You represent a proposed conservator, seeking a conservatorship for her 88 year old mother, Lulu.
- Lulu appears in court with a young woman, who announces that she is counsel for Lulu, Emma Tudor.
- The court asks Lulu why she wants Ms. Tudor to be her lawyer.
- Lulu says, "Well, she's the daughter of a friend who asked me if Emma could represent me because she's just graduated from law school and needs the experience. I've also known Emma since she was a young girl and she's very smart."

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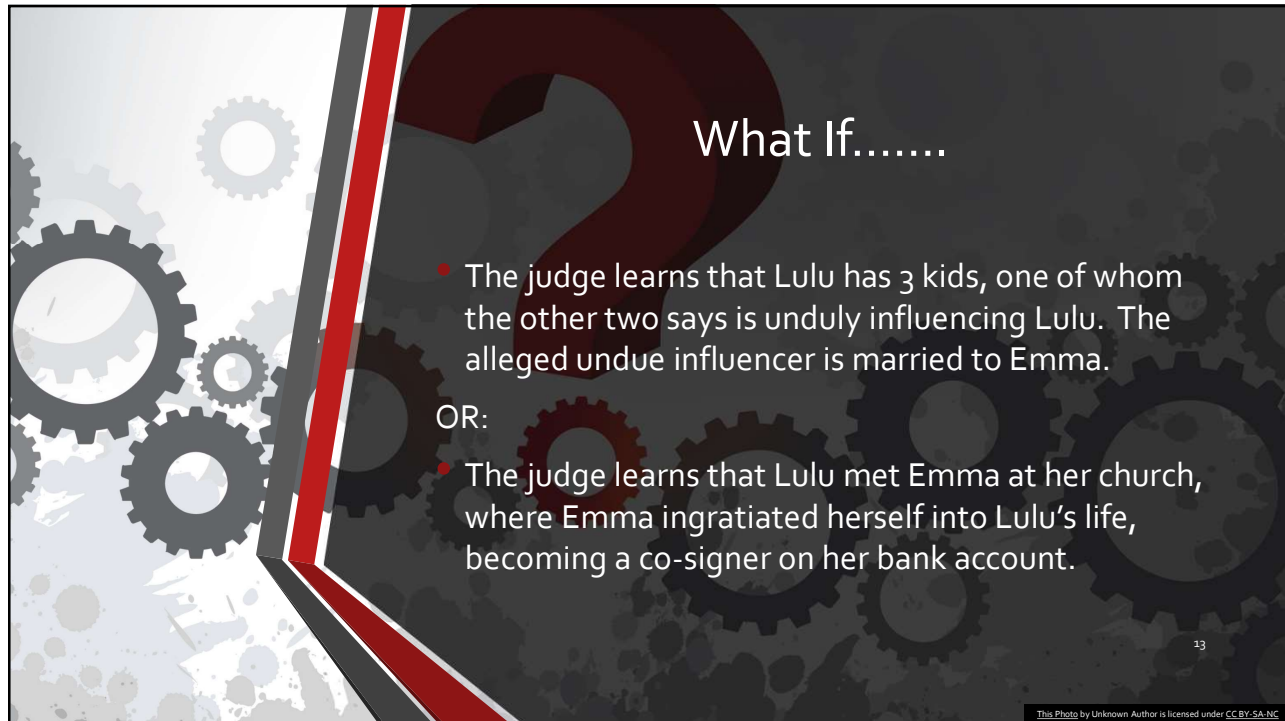
What Do You Think the Judge Should Do?

- A: Deny the proposed conservatee's request for her own counsel, and in particular, young Emma Tudor.
- B: Grant the request to let the proposed conservatee to have Emma represent her.
- C: Grant the request, but still appoint CAC to "monitor" the situation.

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What If.....

- The judge learns that Lulu has 3 kids, one of whom the other two says is unduly influencing Lulu. The alleged undue influencer is married to Emma.

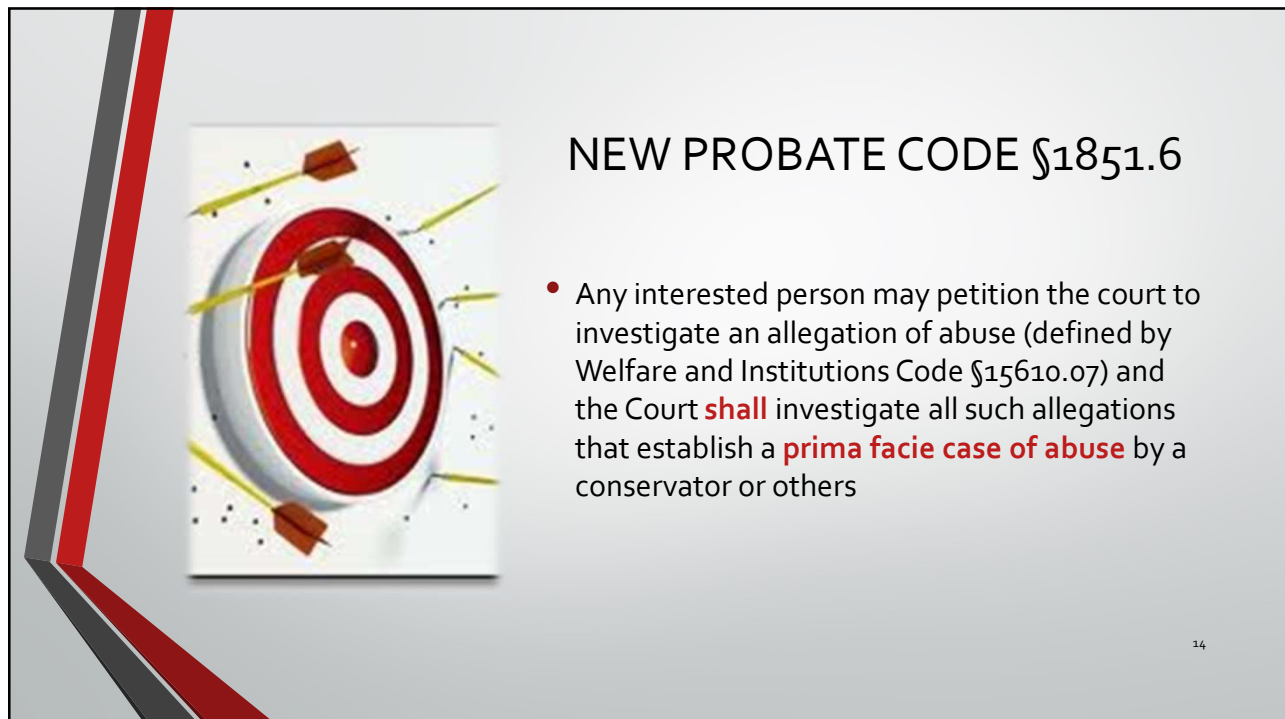
OR:

- The judge learns that Lulu met Emma at her church, where Emma ingratiated herself into Lulu's life, becoming a co-signer on her bank account.

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NEW PROBATE CODE §1851.6

- Any interested person may petition the court to investigate an allegation of abuse (defined by Welfare and Institutions Code §15610.07) and the Court **shall** investigate all such allegations that establish a **prima facie case of abuse** by a conservator or others

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IMPACT ON FIDUCIARIES: POSTING OF FEES

- New Business and Professions Code §6533, effective January 1, 2023:
- A licensed LPF with a website is required to post on their website a schedule or range of fees, including but not limited to hourly rates for services offered
- If a LPF does not maintain a website, they are required, prior to execution of a contract, provide a prospective client with a schedule or range, if asked they are to provide, and to provide all interested persons with the schedule/range



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YOUR THOUGHTS?

- Should a LPF be required to post their fees?
- If a LPF has to, why not a non-licensed fiduciary?

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BUSINESS AND
PROFESSIONS
CODE §6580
[Section 2 of AB
1194]

- Expands and defines the grounds for sanctions that can be imposed by the Fiduciary Licensing Board: (a) breaching a legal duty which created financial, physical or mental harm to a client; (b) abuse as defined by the W & I code, and (c) violation of a statute or regulation related to Chapter 6 of the Professional Fiduciaries Act

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BUSINESS
AND
PROFESSIONS
CODE §6580...
Continued

- Expands the sources from investigating on their own or in response to a complaint from any person, to include a report from a court indicating that a court has imposed a penalty on a LPF, court removal of a LPF, or a court has determined that a LPF has abused a conservatee

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New Probate Code §2112 [Section 17 of AB 1194]

- Subject to Legislature providing Funding
- Directs the court to impose a fine of up to \$10,000 on a LPF upon the determination that the LPF has abused a conservatee; \$1000 for non-professional
- This fine is payable to the conservatee's estate
- Finding must be made pursuant to the W & I Code

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Fees for Seeking Fees.....Applicable to All Fiduciaries and Attorneys!

- Found in amended Probate Code §§ 2623, 2640, and 2641 – simply, if the court reduces a fee request, no fees for defending the request may be awarded
- Applies to anyone acting in a fiduciary capacity
- Fees “shall not be awarded” to a conservator/attorney in connection with their (a) unsuccessful defense of their fee request; (b) unsuccessful objections to a petition; (c) any unsuccessful request or action brought by the conservator.

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DO THESE AMENDED SECTIONS REGARDING FEES 'MISS THE MARK?'

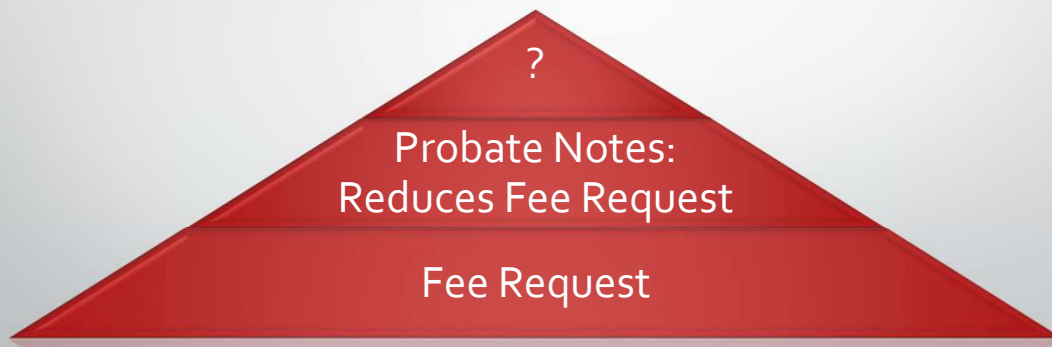


- Good faith exception: Court may award fees if the unsuccessful request for fees or objections was made in good faith, made based on the best interest of the conservatee and didn't harm the conservatee
- No definition for "unsuccessful attempt" – Judicial Council tasked with defining it in a proposed Rule of Court
- "Good faith" seems linked with "no harm" to the conservatee – how define "no harm"

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How Can This be Avoided?



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QUESTIONS?

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