OPINION

OFFICIAL OPINION NO. 11

May 13, 1965

Hon. Marie T. Lauck
Indiana State Senator
323 Peoples Bank Building
Indianapolis, Indiana

Dear Senator Lauck:

This is in reply to your letter of recent date, in which you request an Official Opinion upon the following question:

"It comes to my attention that the following two bills:
SB #348 Signed by the Governor 3-12-65
HB #1267 Signed by the Governor 3-11-65
both filed at Secretary of State's Office the same day are on the same subject matter relative to the probate code.

"Would it be asking too much to request an official opinion from you as to which of the Acts now holds?"

A careful examination of the records of the Secretary of State reveals that Senate Enrolled Act No. 348 was approved by the Governor and filed in the Office of the Secretary of State at 8 P.M. on March 12, 1965. House Enrolled Act No. 1267 was approved by the Governor and filed in the Office of the Secretary of State at 7:30 P.M. on March 11, 1965.

Section 2 of House Enrolled Act No. 1267, being Chapter 296 of the Acts of 1965, reads as follows:

"SEC. 2. Acts 1953, c. 112, s. 1950 is amended to read as follows: Sec. 1950. (a) When the whole estate of a minor does not exceed the values hereinafter stated, after payment of reasonable medical expenses, hospital bills, attorney's fees and other expenses incidental to the collection of any claim due the minor, the court may, in its discretion, without requiring the appointment of a guardian or the giving of bond, authorize the deposit, delivery or payment thereof in the manner hereinafter indicated provided
that the person receiving such money or other asset shall hold and dispose of the same in such manner as the court shall direct:

“(1) Where the value of such estate does not exceed $6,000.00, the court may authorize the deposit in a depository authorized to receive fiduciary funds, payable, after deduction of reasonable charges and expenses of such deposit, to the guardian of the estate when appointed or to the minor upon his attaining the age of majority. The court shall retain continuing jurisdiction over the investment and use of said funds and income therefrom until the minor shall have attained majority.

“(2) If the assets do not consist of money and do not exceed $6,000.00 in value, the court may authorize the delivery thereof to a suitable person designated by the court, deliverable after payment of reasonable charges for and expenses of such safekeeping, to the guardian of the estate when appointed or to the minor upon his attaining the age of majority.

“(3) Where the value of such estate does not exceed $2,000.00, regardless of whether such estate consist of money or some other form of asset, the court may authorize the payment or delivery thereof to the parent of the minor, or to the person having the care or custody of the minor or to the minor himself.

“(b) When the whole estate of a person over the age of twenty-one who has been adjudicated incompetent does not exceed the value of $2,000, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize the deposit thereof in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court, or if the assets do not consist of money, authorize the delivery thereof to a suitable person designated by the court. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct, and shall be entitled to reasonable compensation and to reimbursement for reasonable expenses.”
Section 4 of Senate Enrolled Act No. 348, being Chapter 379 of the Acts of 1965, reads as follows:

"SEC. 4. Acts 1953, c. 112, s. 1950 is amended to read as follows: Sec. 1950. (a) When the whole estate of a minor does not exceed the value of two thousand dollars ($2,000.00), after payment of reasonable medical expenses, hospital bills, attorney's fees and other expenses, incidental to the collection of any claim due the minor, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize:

"(1) The deposit thereof in a depository authorized to receive fiduciary funds, payable, after deduction of reasonable charges and expenses of such deposit, to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,

"(2) If the assets do not consist of money, the delivery thereof to a suitable person designated by the court, deliverable after payment of reasonable charges for and expenses of such safe-keeping, to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,

"(3) The payment or delivery thereof to the parent of the minor, or to the person having the care or custody of the minor or to the minor himself. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

"(b) When the whole estate of a person over the age of twenty-one (21) who has been adjudicated incompetent does not exceed the value of $2,000.00, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize the deposit thereof in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court, or if the assets do not consist of money, authorize the delivery thereof to a suitable person designated by the court. The person receiving such money or other assets shall hold and dispose of
the same in such manner as the court shall direct, and shall be entitled to reasonable compensation and to reimbursement for reasonable expenses."

Obviously, the Legislature attempted, in these two enrolled acts, to amend the same section of the Probate Code. Statutes passed at the same session of the Legislature and relating to the same subject matter are in pari materia and should be construed together, if at all possible; however, where there is an irreconcilable conflict one statute must take precedence over the other. It is obvious that there can only be one Section 1950 of the Acts of 1953, ch. 112. The section leads to both of the acts herein in question read—"Acts 1953, c. 112, s. 1950 is amended to read as follows:"

In Sutherland Statutory Construction, 3rd Ed., Vol. 2, § 5202, p. 535, the following is stated:

"Statutes are considered to be in pari materia—to pertain to the same subject matter—when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object. . . .

"To be in pari materia, statutes need not have been enacted simultaneously or refer to one another. However, application of the rule that statutes in pari materia should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day, and in the case where the later of two or more statutes relating to the same subject matter refers to the earlier. In these situations the probability that acts relating to the same subject matter were actuated by the same policy is very high, for in the first three cases they were enacted by the same men and in the last were declared to be within the knowledge of the legislature at the same time. But in construing an ambiguous enactment it is held proper to consider not only acts passed at the same session of the legislature or to which the act refers, but also acts passed at prior and subsequent
OPINION 11

sessions to which the act does not refer. However, if a subsequent act is in irreconcilable conflict with the act under consideration, the subsequent act must prevail.”

There are many possible situations which can give rise to an apparent conflict between two statutes, such as where two statutes, passed at the same session of the Legislature, amend the same section of an act, with one of the statutes containing an emergency clause; or where two statutes, enacted at different sessions of the Legislature, amend the same section of an act; or where two statutes, passed at the same session or at different sessions of the Legislature, amend different acts but are in apparent conflict; or where two original acts, passed at the same session or at different sessions of the Legislature, are in conflict. In the situation at hand there are two amendatory acts, passed at the same session of the Legislature, attempting to amend the same section of an act, approved by the Governor on different days, which will go into effect at the same time. Neither one of said acts contains an emergency clause and both will, therefore, go into effect in accordance with the express terms of the Indiana Constitution, Art. 4, § 28, which provides that:

“No act shall take effect, until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency; which emergency shall be declared in the preambles, or in the body, of the law.”

This is not a situation where an amendatory act is attempting to amend a previously amended act which had already gone into effect, in which case it has been held that the amendment of a statute operates to repeal it and an act purporting to amend a previously amended statute is void. Peeble v. Ohio & Indiana Oil Co., 158 Ind. 374, 63 N.E. 763 (1902).

An analysis of the two amendatory acts herein involved reveals that subsections (a) are in apparent conflict.

In Sutherland Statutory Construction, 3rd Ed., Vol. 1, § 1609, p. 276, appears the following:

“Because the courts do not favor implied repeal, two acts on the same subject taking effect on the
same day will be harmonized and construed as one act if at all possible. When two statutes on the same subject passed on the same day are absolutely repugnant, the one passed later will prevail. In the absence of evidence as to which act is the latest, the statute that is the clearest expression of the legislative intent will prevail.”

Also, in Sutherland, *supra,* § 2020, p. 484, is the following:

“In the absence of an irreconcilable conflict between two acts of the same session, each will be construed to operate within the limits of its own terms in a manner not to conflict with the other act. However, when two acts of the same session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms. . . .”


An examination of the authorities reveals that in Indiana it is well established that where two inconsistent statutes are passed at the same session of the Legislature and will go into effect at the same time, the last to be approved will prevail. In *Metsker v. Whitesell,* 181 Ind. 126, 103 N.E. 1078 (1914), the Court was confronted with a situation very similar to the one at hand: two amendatory acts passed at the same session of the Legislature attempting to amend the same section of an act were in question; the last approved act contained an emergency clause. The Court stated:

“. . . Both acts cannot be in effect, for there is but one section numbered 62, and it can read only one way. *Draper v. Falley,* 33 Ind. 465; *Detroit, etc., R. Co. v. Barnes Paper Co.***, 172 Mich. 586, 138 N.W. 211. Section 21, art. 4, of our Constitution provides that, in amending or revising an act, the act, as revised or amended, shall be set forth at full length.

* * *

“In *State ex rel. v. Board,* 170 Ind. 595, 621, 85 N.E. 513, it was held that, of two irreconcilable acts passed
at the same session, the one approved last will prevail, even though both were designed to go into effect at the same time.

"Where an amendment is adopted without an emergency clause, the old act remains in force until the publication of the Session Acts. Cummins v. Pence (1909), 174 Ind. 115, 91 N.E. 529.

"When the act of March 14, 1913, was adopted, section 62 of the original highway act was in existence, and consequently, when the act of March 15th (page 914) was passed, section 62 of the original act of 1905 was constitutionally amended, and thereafter ceased to exist; and, when the Session Laws were subsequently published, there was no section 62 of the act of 1905 to which the amendatory act of March 14th could apply. Had there been no emergency clause to the act of March 15th, nevertheless it would have superseded the act of March 14th. State ex rel. v. Board, 170 Ind. 595, 621, 85 N. E. 513. Viewed from either standpoint, the act of March 15th must prevail, and we therefore hold that the act of March 14th (page 690) is void."

Here the Court is saying that regardless of the fact that the last approved act contained an emergency clause it would, nevertheless, have prevailed because it was, in fact, the last approved.

In Newbauer v. State, supra, the Supreme Court of Indiana said:

"Should there be an irreconcilable conflict between two statutes, a later expression of the Legislature will prevail against a former one. Swinney v. Ft. Wayne, etc., R.R. Co. (1877) 59 Ind. 205, 217; Shea v. City of Muncie (1896) 148 Ind. 14, 46 N.E. 138. When two acts are passed at the same session of the Legislature the presumption is strong against implied repeal, and effect must be given to each if possible; but if the two are irreconcilable, the one which was approved last will prevail. State ex rel. v. Board, etc. (1908) 170 Ind. 595, 621, 85 N.E. 513. The later of two incon-

The Supreme Court of Indiana, in *Shea v. City of Muncie*, 148 Ind. 14, 46 N.E. 138 (1897), stated:

‘‘. . . The repeal of statutes by implication is not favored by the law, and where two statutes are enacted, as in this case, at the same session of the legislature, they should be construed together, if possible, but, if they be irreconcilable, the later supersedes the earlier. . . .’’

The Supreme Court of Indiana concluded, in *State ex rel. Board of Commissioners of Hendricks County v. Board of Commissioners of Marion County*, 170 Ind. 595, 85 N.E. 513 (1908), that:

‘‘. . . When two acts are passed at the same session of the Legislature, the presumption is strong against implied repeal, and effect must be given to each, if possible; but, if the two are irreconcilable, the one which was approved last will prevail, even if they took effect on the same day. 26 Am. & Eng. Ency. Law, p. 736; *Blumenthal v. Tibbits*, 160 Ind. 70, 72, 73, 66 N.E. 159; *State v. Rackley*, 2 Blackf. (Ind.) 249; *Davis v. Whidden*, 117 Cal. 618, 49 Pac. 766; *State v. Halliday*, 63 Ohio St. 165, 57 N.E. 1097; *Rex v. Justices of Middlesex*, 2 Barn. & Adol. 818; Dowl. P.R. 116; 1 Lewis’ Sutherland, Stat. Const. §§ 180, 247, 267, 268; Wilberforce, Stat. Law, 315; Potter’s Dwarris, Stat. 170. . . .’’

Reference is also made to the case of *Long v. Kinney*, 210 Ind. 192, 1 N.E.2d 929 (1936), wherein the Supreme
OPINION 11

Court, in considering two acts passed at the same session of the Legislature, stated:

"... It is the duty of the court to so construe such statutes, especially those enacted at the same session of the Legislature, where such construction gives effect and efficiency to both statutes. Of course, if there is conflict between the two acts, the last one passed must prevail. Newbauer v. State (1928) 200 Ind. 118, 161 N.E. 826; Shea v. City of Muncie (1897) 148 Ind. 14, 46 N.E. 138; Wayne Township v. Brown (1933) 205 Ind. 437, 186 N.E. 841; Starr v. City of Gary (1934) 206 Ind. 196, 188 N.E. 775."

From the early history of the State of Indiana it appears that the Courts have consistently agreed with the above method of statutory construction. As early as 1882 the Supreme Court, in Wright v. The Board of Commissioners of the County of Tipton, 82 Ind. 335 (1882), held:

"It is a correct doctrine that where two statutes are passed upon the same subject, by the same Legislature, at the same session, they should be construed together, and both allowed to stand if possible. The law does not favor repeals by implication; but where the statutes are in irreconcilable conflict with each other, then the later one approved supersedes the former; notwithstanding they both were intended to take effect and go into operation at the same time, the later must be regarded as the last expressed will of the Legislature, the same as the codicil of a will, although it takes effect the same time of the will, must be regarded as the last expressed will of the testator, and it supersedes any irreconcilable provision in the original will. Indiana Central Canal Co. v. State, 53 Ind. 575; Hutts v. Hutts, 62 Ind. 240."

A statute is approved, according to the Constitution of Indiana, Art. 5, § 14, when the Governor signs it. Other provisions of said section of the Indiana Constitution relative to the manner by which and the time at which acts may become law are immaterial in the present problem for the reason that the Governor approved each of the acts in question.
The reasoning contained herein is in accordance with the Official Opinion of a previous Attorney General, wherein he concluded that in a situation comparable to the one herein, the last approved act would prevail. 1933 O.A.G., p. 133.

In conclusion, therefore, it is my opinion that Senate Enrolled Act No. 348, approved by the Governor on March 12, 1965, prevails and will be the law upon distribution and circulation, as provided by the Indiana Constitution.

OFFICIAL OPINION NO. 12

May 18, 1965

Hon. Frederick T. Bauer
Indiana State Representative
House Majority Leader
525 Ohio Street
Terre Haute, Indiana

Dear Representative Bauer:

This is to acknowledge receipt of and answer your letter of April 13, 1965, in which you request an Official Opinion on the following factual situation:

"In the City of Terre Haute, Indiana, a Member of the Common Council of that City died approximately three weeks ago. Burns Section 48-1220 prescribes that the number of Members of the Common Council in cities of the second class shall be nine and no more.

"Pursuant to Burns Section 48-1246, a Special Meeting of the Council was called, within the prescribed number of days, in order to elect a suitable person to fill the vacancy.

"The Common Council met pursuant to the notice of said Special Meeting, but was unable to elect, by a majority vote, an individual to fill the vacant Council position. The meeting was recessed, and the Council subsequently met on several later occasions in unsuccessful attempts to fill the vacant Council seat. To date, this Special Meeting still stands in recess, and the vacancy has not been filled. There is a likelihood that the vacancy may never be filled and it now be-