

June 20, 1985 0001W

Note. Changes may be made in this Agenda. For meeting information, please call John H. DeMouilly (415) 494-1335.

Time

June 27 (Thursday) - 1:00 p.m. - 9:00 p.m.
June 28 (Friday) - 9:00 a.m. - 5:00 p.m.

Place

State Bar Building
555 Franklin Street
San Francisco

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

June 27-28, 1985

1. Minutes of May 16-17 Meeting (sent 6/7/85)
2. Administrative Matters

Legislative Program

Memorandum 85-59 (enclosed)

Schedule for Probate Code Project and Outline of New Code

Memorandum 85-64 (sent 6/17/85)

First Supplement to Memorandum 85-64 (sent 6/18/85)

3. Study L-1020 - Probate Code (Powers and Duties of Personal Representative)

Memorandum 85-13 (sent 1/9/85; another copy sent 5/28/85)

Draft Statute (attached to Memorandum)

Second Supplement to Memorandum 85-13 (sent 3/13/85; another copy sent 5/28/85)

Third Supplement to Memorandum 85-13 (sent 4/1/85; another copy sent 5/28/85)

Fourth Supplement to Memorandum 85-13 (sent 6/18/85)

4. Study L-640 - Probate Code (Trusts - Spendthrift Trusts)
Memorandum 85-61 (sent 6/7/85)
First Supplement to Memorandum 85-61 (enclosed)
5. Study L-601 - Probate Code (Multiple-Party Accounts)
Memorandum 85-62 (sent 6/18/85)
Staff Draft of Recommendation (attached to Memorandum)
6. Study L-655 - Probate Referee System
Memorandum 85-60 (sent 5/28/85)
First Supplement to Memorandum 85-60 (sent 6/17/85)
Second Supplement to Memorandum 85-60 (enclosed)
Third Supplement to Memorandum 85-60 (to be sent)

AGENDA ITEM 6 IS SPECIAL ORDER OF BUSINESS AT 7:00 P.M. ON JUNE 27

7. Study L-1025 - Probate Code (Presentation of Claims)
Memorandum 85-34 (sent 2/28/85; another copy sent 5/28/85)
Draft Statute (attached to Memorandum)
Revised First Supplement to Memorandum 85-34 (sent 4/1/85;
another copy sent 5/28/85)
Second Supplement to Memorandum 85-34 (sent 6/7/85)

AGENDA ITEM 7 IS SPECIAL ORDER OF BUSINESS AT 9:00 A.M. ON JUNE 28

8. Study L-1026 - Probate Code (Payment of Demands)
Memorandum 85-35 (sent 2/22/85; another copy sent 5/28/85)
Draft Statute (attached to Memorandum)
Revised First Supplement to Memorandum 85-35 (sent 4/1/85;
another copy sent 5/28/85)
Second Supplement to Memorandum 85-35 (sent 5/28/85)
9. Study L-1027 - Probate Code (Accountings)
Memorandum 85-36 (sent 2/28/85; another copy sent 5/28/85)
Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-36 (sent 3/8/85; another copy sent 5/28/85)

Revised Second Supplement to Memorandum 85-36 (sent 4/1/85; another copy sent 5/28/85)

10. Study L-502 - Dying and Termination of Life Sustaining Procedures

Memorandum 85-66 (sent 6/17/85)

First Supplement to Memorandum 85-66 (enclosed)

11. Study L-1029 - Probate Code (Distribution and Discharge)

Memorandum 85-63 (sent 6/7/85)

Draft Statute (attached to Memorandum)

First Supplement to Memorandum 85-63 (sent 6/7/85)

12. Study L-800 - Probate Code (Abatement; Distribution of Interest and Income)

Memorandum 85-65 (sent 6/7/85)

First Supplement to Memorandum 85-65 (to be sent)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JUNE 27-28, 1985
SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on June 27-28, 1985.

Law Revision Commission

Present:	Edwin K. Marzec, Chairperson James H. Davis, Vice Chairperson Bion M. Gregory (June 27)	Roger Arnebergh Arthur K. Marshall Ann E. Stodden
Absent:	Bill Lockyer, Member of Senate Elihu M. Harris, Member of Assembly	John B. Emerson

Staff Members Present

John H. DeMouilly	Nathaniel Sterling
Robert J. Murphy III	Stan G. Ulrich

Consultants Present

Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Robert Bannon, Los Angeles County Bar Association,
Los Angeles
Richard M. Betts, Pres., No. Cal. Chairman, American
Institute of Real Estate Appraisers, Berkeley (June 27)
Edward V. Brennan, California Probate Referees, San Diego
Elizabeth Bird, Bank of America, San Francisco (June 27)
Phyllis Cardoza, Beverly Hills Bar Association, Probate
Section, Beverly Hills
Ted Cranston, State Bar Estate Planning, Trust and Probate
Law Section, San Diego
Nancy E. Ferguson, California Probate Referees, Oroville
(June 27)
L.F. Gianelli, California Probate Referees, Modesto
(June 27)
F.D. Grothe, California Probate Referees, Lakeport (June 27)
Mark T. Harris, Esq., Chief of Staff to Assembly Member
Harris, Sacramento (June 27)
Sandra Kass, California Bankers Association, Los Angeles
Ken Klug, State Bar Estate Planning, Trust and Probate
Law Section, Fresno (June 28)
Albert J. Nicora, California Probate Referees/Attorney,
Albany (June 27)
James Quillinan, State Bar Estate Planning, Trust and
Probate Executive Committee, Mountain View

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Janet A. Rae, Los Angeles County, Manhattan Beach (June 27)
Matthew S. Rae, Jr., Attorney, Los Angeles (June 27)
Irving Reifman, California Probate Referees, Los Angeles
(June 27)
Neville Rich, Jr., California Probate Referees, San
Francisco (June 27)
Gerald Scott, California Probate Referees, San Jose (June 27)
W. David Snook, California Appraisers Council, Davis
(June 27)
Harley Spitler, State Bar Estate Planning, Trust and Probate
Law Section, San Francisco (June 28)
LeVone A. Yardum, California Probate Referees, Los Angeles
(June 27)

ADMINISTRATIVE MATTERS

MINUTES OF MAY 16-17, 1985, MEETING

The Minutes of the May 16-17, 1985 meeting were approved as submitted after the following correction was made: On page 23, lines 13 and 14, of the Minutes as submitted, "Sections 9520 and 9521" was substituted for "Sections 6520 and 6521". [Although not noted at the meeting, the reference in lines 5 and 6 on page 4 of the Minutes to the First Supplement to Memorandum 85-36 should be a reference to the First Supplement to Memorandum 85-56.]

COMMISSIONER EMERSON EXCUSED FROM ATTENDING MEETING

The Chairperson announced that he had received written and telephone communications from Commissioner Emerson indicating that he would be unable to attend the June meeting and requesting that he be excused from attending. The Commission excused Commissioner Emerson from attending the meeting.

COMMISSIONER DAVIS TO SERVE AS CHAIRPERSON OF COMMISSION; COMMISSIONER MARZEC TO SERVE FOR ADDITIONAL TERM FROM OCTOBER 1, 1985 TO JUNE 30, 1986.

Chairperson Marzec announced that the Commission had agreed that (1) Vice Chairperson Davis will serve as Chairperson of the Commission

from the time immediately following the June meeting of the Commission until the time when the term of Commissioner Davis expires (October 1, 1985), and (2) Upon the expiration of the term of Commissioner Davis as Chairperson, Commissioner Marzec will become Chairperson of the Commission for an additional term ending June 30, 1986.

THANKS TO THE STATE BAR

The staff was directed by the Commission to write a note of thanks to the State Bar for use of the facilities and for the luncheon at the meeting on Friday.

SCHEDULE FOR FUTURE MEETINGS

The Commission scheduled an additional meeting to be held on August 30 and 31 in Los Angeles. The Commission did not set the exact times for the August 30-31 meeting, but the times when the meeting is tentatively scheduled to be held are indicated below.

The following is the schedule for future meetings of the Law Revision Commission.

August

August 30 (Friday)	10:00 a.m. - 5:00 p.m.	Los Angeles
August 31 (Saturday)	9:00 a.m. - 12:00 noon	

September

September 12 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
September 13 (Friday)	9:00 a.m. - 6:00 p.m.	

October

October 10 (Thursday)	3:00 p.m. - 10:00 p.m.	Orange County
October 11 (Friday)	9:00 a.m. - 6:00 p.m.	

December

December 5 (Thursday)	3:00 p.m. - 10:00 p.m.	State Capitol
December 6 (Friday)	9:00 a.m. - 6:00 p.m.	

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LEGISLATIVE PROGRAM GENERALLY

The Commission considered Memorandum 85-59. The Executive Secretary made the following report on the legislative program.

Enacted

1985 Stats. ch. 41 (Assembly Bill 98) - Creditors' Remedies
1985 Stats. ch. 90 (Assembly Bill 690) - Uniform Transfers to Minors
Assembly Concurrent Resolution 4 - Continues Authority to Study
Previously Authorized Topics

Sent to Governor

Assembly Bill 96 - Property Law

Approved by Conference Committee

Assembly Bill 97 - Probate Notices and Other Probate Matters (Urgency Bill) (Conference Committee Report Adopted by Assembly and Pending in Senate)

Sent to Floor in Second House

Assembly Bill 150 - Family Law
Senate Bill 1270 - Powers of Attorney

Passed First House; Set for Hearing in Second House

Assembly Bill 196 - Probate Law (Set for hearing on July 9)
Assembly Bill 1030 - Mediation Privilege (Set for hearing, subject to latest amendments to bill being approved by Commissioner Marzec)

Dead (Placed on Inactive File)

Assembly Bill 195 - Revision of Law Revision Commission Statute

ASSEMBLY BILL 96

The Executive Secretary reported that this bill was amended to validate a severance of a joint tenancy where the severing instrument is executed within three days of the death of the severing joint tenant and the severing instrument is recorded within seven days after the death of the severing joint tenant.

ASSEMBLY BILL 97

The Executive Secretary reported that Assembly Bill 97 as amended in the Conference Committee report has been approved by the Assembly. But the Senate has not approved the bill as so amended because a representative of the probate referees has asked Senator Keene to

delay presenting the bill to the Senate. The representative of the probate referees at the meeting stated that the association will instruct its legislative not to oppose Assembly Bill 97. Representatives of other organizations present at the meeting indicated that they would send Assembly Member McAlister letters in support of the bill.

Edward V. Brennan, representing the California Probate Referees Association, objected to the amendment made to Assembly Bill 97 on the ground that it represented an action by the staff that was never considered or approved by the Commission. For a discussion of this objection, see these Minutes infra under "Review of Amendments to Bills Recommended by the Commission."

ASSEMBLY BILL 195

The Executive Secretary had reported at the May meeting that Assembly Bill 195 relating to the Law Revision Commission was amended in the Senate by the Senate Judiciary Committee to authorize each of the legislative members of the Commission to designate an alternate who, in the absence of the member, may vote, count toward a quorum, and receive expenses authorized by law. After the May meeting, Assembly Member McAlister, upon request of the Commission's Chairperson, placed this bill on the Assembly Inactive File.

ASSEMBLY BILL 196

The staff handed out at the meeting a copy of Assembly Bill 196 as amended June 19, 1985. Also handed out was a draft of amendments to Assembly Bill 196 (copy attached to these Minutes as Exhibit 1). The amendments were approved as submitted. The Commission reviewed the staff drafted Comment to Section 6124 (to be added by the amendments) (lost will presumed revoked) and approved the Comment.

The staff handed out at the meeting a draft of a report containing new and revised Comments to Assembly Bill 196 (copy attached to these Minutes as Exhibit 2). The Commission deferred

taking action on the report over night to permit Commissioners to read the Comments and the bill and to suggest revisions in the report for consideration by the Commission at its meeting on the next day. No revisions were suggested or made.

ASSEMBLY BILL 1030

The staff reported that Assembly Bill 1030 has been amended to remove the objections of the California Attorneys for Criminal Justice and the American Civil Liberties Union. The amendments made to remove these objections make no substantive change in the bill. The amendments also revise the bill to require that only the significant portions of the statutory law are required to be set out in the agreement of the parties to the mediation.

The staff distributed to the Commissioners a revised Comment to the section that the bill would add to the Evidence Code (attached to these Minutes as Exhibit 3). The revisions to the Comment are technical revisions needed to conform the Comment to the amended bill and not substantive.

Commissioner Marzec requested that he be given an opportunity to review the bill as amended by the latest amendments before the bill is heard in the Senate. Also the other members of the Commission should be sent a copy of the bill for review and they should advise the staff if they have any problems with the latest amendments made to the bill. The Commissioners should also be sent a copy of the revised Comment to the bill at the time they are sent the copy of the bill.

SENATE BILL 1270

The staff distributed to the Commissioners a report containing revised and new Comments to sections in Senate Bill 1270 to reflect the amendments made to the bill after its introduction (attached to these Minutes as Exhibit 4).

REVIEW OF AMENDMENTS TO BILLS RECOMMENDED BY COMMISSION

Edward V. Brennan, representing the California Probate Referees, objected to the Commission that the amendments made to Assembly Bill 97 (urgency probate bill) after the May meeting of the Law Revision Commission were made upon the initiative of the Executive Secretary and did not reflect the views or decisions of the Commission itself. The Commission noted that the approved Minutes of the May 16-17, 1985, Meeting set out in full the exact text of the amendments made to Assembly Bill 97 and that the exact text of the amendments made to Assembly Bill 97 was set out on the yellow sheets that are a part of the First Supplement to Memorandum 85-56 which were reviewed and approved at the May meeting. Moreover, the amendments follow closely the language suggested by the State Bar Estate Planning, Trust & Probate Law Section in item 5 of the letter attached to Memorandum 85-56 which also was considered at the May meeting, which letter suggested that language along the lines suggested be added by amendment to Assembly Bill 97. Upon reviewing the matter, the Commission concluded that the staff had faithfully carried out the Commission's decisions concerning Assembly Bill 97.

The Commission discussed the policy that the staff should follow with respect to asking the legislator carrying a Commission bill to amend the bill. What procedure should be followed, for example, (1) when there is an objection to a Commission recommended bill that can be removed by making a clarifying or substantive amendment to the bill or (2) when a question is raised concerning the meaning of a provision of a Commission recommended bill and the intent of the Commission can be made clear by a clarifying amendment to the bill or (3) when a suggestion is made that a provision be added to the bill to make a technical or clarifying revision in the area of law dealt with in the bill.

The Commission decided that no change should be made in a Commission recommended bill without the change being first approved by the Chairperson of the Commission or, if it is not possible to contact

the Chairperson, the Vice Chairperson of the Commission. The staff is not authorized to suggest to the legislative member carrying the bill that he or she agree to amendments proposed at legislative hearings and should seek a delay (before determining whether to suggest to the legislative member carrying the bill that he or she agree to the amendment) to permit time to contact the Chairperson to obtain approval of the amendment or, if unable to contact the Chairperson, to obtain approval of the Vice Chairperson. The procedure outlined above applies whether or not the staff believes that the amendment is substantive or nonsubstantive. If an amendment is made to a Commission recommended bill by the legislative committee itself at the legislative hearing on the bill, the amended bill shall be presented to the Commission for review and action at the next Commission meeting.

SCHEDULE FOR PROBATE CODE STUDY

The Commission considered Memorandum 85-64 and the First Supplement thereto relating to the schedule for completion of the new Probate Code, and the outline and drafting of the new code. The Commission made the following decisions concerning these matters.

Organization of new code. The trust law should be located at the end of the code rather than in Division 3. Division 3 should be reserved for the provisions governing powers of appointment and powers of attorney, which should be moved into the new code in the future. See discussion of schedule for completion, below.

Name of new code. The new code should be named the Estates and Trusts Code. The staff should consult with the Legislative Counsel concerning whether this should be in the singular or plural.

Schedule for completion. The trust law should be completed during the remainder of this year and submitted to the Legislature independently for enactment at the 1986 legislative session. The powers of appointment and powers of attorney provisions should be deferred until after completion and enactment of the remainder of the new code. The Commission adopted the revised schedule for completion of work on the new code set out in Memorandum 85-64.

STUDY L-502 - DYING AND TERMINATION OF LIFE SUSTAINING PROCEDURES

The Commission considered Memorandum 85-66 and the First Supplement to Memorandum 85-66.

The Commission considered a suggestion made in the Memorandum (attached to Memorandum 85-66) from the State Bar Section on Estate Planning, Trust and Probate Law. The State Bar Section memorandum, written by Harley Splitter, suggests that the Commission support the creation of a special "blue ribbon" Governor's commission to study the difficult questions relating to dying and termination of life sustaining procedures.

Mr. Splitter made an oral presentation before the Commission. The following is a summary of his remarks.

The State Bar Section believes that there is a need for a state-wide commission to study the problems in connection with dying and the related problems. The State Bar Section consists of lawyers and judges and can bring a legal perspective to the issues. But in the field of dying and the related problems there are many other disciplines involved and what is needed in California is a cross-disciplinary study. Since the President's commission has completed its report and gone out of existence, the field has been somewhat vacant nationally. But some efforts are being made in some states, such as New York where a special Governor's commission has been created by the Governor.

California should have a special commission. The composition of the commission should reflect the various disciplines involved in these issues, such as representatives from the the ministry, physicians, hospitals, possibly district attorneys to address the crime aspects, the elderly, attorneys at law, and academic representatives who can address the ethical and philosophical issues, and perhaps one, two, or three at large members who would not

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necessarily fit into the above classifications. In the State Bar Section's consideration of basic problems related to dying, the Section has felt weakened by the fact that the Section did not have this cross-disciplinary approach. And that is the reason that the State Bar Section addressed a memorandum to the Commission an extract of which is attached to Memorandum 85-66.

The New York Times reports almost daily concerning some problem in this area. The decisional law is developing rapidly. This is a reason why the State Bar Section believes that a special commission should be created. The Law Revision Commission has the ability to start a movement that hopefully would result in the creation of a special state-wide commission to study dying and related problems.

I am here to ask the Law Revision Commission to recognize the importance of the problem and the need to deal with it. It is not a simple problem that can be solved in two afternoon sessions. California should be involved in the solution of this problem.

The Chairperson asked Mr. Spitler what role the Commission could plan in bringing the various disciplines together in an effort to deal with the problems. Mr. Spitler responded that the Commission could recommend to the Governor that a special commission be established or could draft legislation to establish such a commission. The commission created to study this problem must be a cross-disciplinary commission that would represent disciplines that are not represented here.

Some concern was expressed by the mechanics provided in the Hayden bill for appointing the members of the "blue ribbon" commission.

The Chairperson asked Mr. Spitler whether he believed that the Law Revision Commission itself could study these problems and draft legislation, working in cooperation with the various disciplines interested in the problems. Mr. Spitler responded that he did not believe that the Commission itself could perform the task required; rather, the Commission could serve as the catalyst for the formation of another group the composition of which would be suitable to the

development of solutions to the problems. In addition, it would require considerable time to develop solutions to these problems; the Law Revision Commission is now devoting substantially all of its time and resources to the study of probate law and that study should not be abandoned by the Commission. For these reasons, it would be difficult for the Law Revision Commission to study and develop solutions to these problems.

The Commission felt strongly that something should be done to deal with this problem on a priority basis. Judge Marshall asked Mr. Spitler what course of action he recommended be taken by the Commission right now. Mr. Spitler responded that he believed that two courses of action were possible. One is to recommend to the Governor right now that a special blue-ribbon Governor's commission be created to study dying and related problems. Or, as an alternative, the Commission could seek to revise the Hayden bill and use that. The Chairperson suggested that the Commission might draft a bill to create a special commission. However, it was recognized that the Commission is not authorized to study this areas of law.

Commissioner Stodden stated that she did not believe that it was an appropriate issue for Commission study. Commissioner Arnebergh stated that he did not want to delay the Probate Code study by undertaking this matter as a new topic. Commissioner Marshall stated that he did not believe that the Commission had the time to make such a study and Commissioner Davis was of the same view.

Commissioner Stodden made a motion, seconded by Commissioner Arnebergh, that the Commission do nothing on this matter at this time. Commissioner Marshall stated that he did not want to set aside the Probate Code study to work on this other matter, but he did not see why other bodies should not go ahead on it. The Chairperson expressed agreement with what the other Commissioners said, but he feared that the Governor and legislators will fail to deal with this matter on a priority basis. He stated that he thought that the Commission should do something to cause something to be done on this matter. The motion was not adopted.

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Commissioner Marshall made a motion that some inquiry of legislators, the Governor, and others as to whether it would be appropriate for the Commission to become any further involved in an effort to establish a blue-ribbon commission. Commissioner Arnebergh and Commissioner Marshall expressed concern that such an inquiry might result in a direction to the Commission to study dying and related problems and abandon the Probate study. The motion was withdrawn.

Commissioner Marshall made a motion that the Chairperson write a letter to the Governor, the legislative members of the Commission, and others stating that the Commission is of the opinion that a special inter-disciplinary commission should be created to study the problem of dying and related problems. The motion was adopted, Commissioner Stodden abstaining.

STUDY L-640 - PROBATE CODE (SPENDTHRIFT TRUSTS)

The Chairman made a statement summarizing the views of the Commission concerning the law of spendthrift trusts. The Commission is in agreement that the law of spendthrift trusts should continue as it existed in Civil Code Sections 859 and 867 before the 1984 amendment of Code of Civil Procedure Section 709.010. The intent is to avoid any erosion of the protection of spendthrifts as it formerly existed under the Civil Code. The new provisions should provide as much protection against the rights of creditors as former law and perhaps the protection against creditors should be strengthened. The Civil Code provisions should be moved into the new trust law.

STUDY L-655 - PROBATE REFEREE SYSTEM

The Commission considered Memorandum 85-60 and the first three supplements to that memorandum, together with the following material

distributed at the meeting, containing background information and viewpoints concerning the probate referee system:

Letters Concerning Probate Referees
Communication from Legislative Committee of Probate, Trust, and
Estate Planning Section of Beverly Hills Bar Association
Communication from Judge Raymond J. Arata, Jr.
Questionnaire Results, Los Angeles County Bar Association Probate
and Trust Law Section
Communication from California Appraiser's Council

Copies of the material distributed at the meeting are attached to these Minutes as Exhibits 5 to 9, inclusive. The Commission also heard comments from interested persons and organizations present at the meeting.

The California Probate Referees Association took the position that a mandatory referee system has worked extremely well in California and is the optimum system for probate in California. Representatives of the Association made a number of points, including the following. Initial appointment of the probate referee by the Controller removes the opportunity for local graft in the appointment. The probate referee is a quick and efficient means of getting estate appraisals done. The probate referee acts as a clearinghouse to check incorrectly completed documents and to assist inexperienced executors and attorneys. The probate referee is a local person with knowledge of local property values. The referees' statewide association provides continuing education and standards and ethics for practice. Some referees waive fees for small estates handled by the public administrator. The independence of the referee helps prevent fraud and self-dealing in the administration of the estate. Many local judges and lawyers do not think the public would be well served by any changes in the existing system. The existing system is a stable, economic, and efficient one, and any changes would be a step backward and would cause the system to be economically nonviable and to collapse. It is not a problem for the small estate to pay for the probate referee's services since the small estate may well not be probated for a number of reasons, including trusts, spousal set-aside, and affidavit procedure, and in any event if

it is probated the cost will be small and the advantages great. Among the uses of the probate referees appraisal are (1) setting attorney and personal representative fees, (2) establishing sale values, (3) accurate funding of tax-sensitive trusts, (4) estate and income tax values, (5) preventing fraud by personal representative, (6) acting as a buffer between personal representative and heirs, (7) use as a planning tool for the bar, (8) ensuring inventories and accounts are complete, (9) monitoring of estate sales, and (10) a low-cost and speedy means of minimizing litigation. It was pointed out that until repeal of the inheritance tax, the federal estate tax examiners had to spend fewest resources reviewing California estate tax returns because the probate referee's appraisal was presumed accurate because it was necessary for the state. Since the waiver procedure was enacted, the probate referees have experienced a 25 to 50 percent decline in cases. They are right now at the margin of economic viability, and if lucrative areas such as valuation of publicly traded stocks were removed from their jurisdiction, or if the system were otherwise optional, the system would break down completely. Moreover, an optional system would not work well because courts would be further burdened and heirs wouldn't know of their right to insist upon an independent appraiser.

The Commissioners asked a number of questions of the probate referee representatives. Some of the key questions and responses may be summarized as follows.

- Q. How do fees of probate referee compare with private appraiser?
 - A. Approximately 25% lower.
- Q. Why doesn't IRS accept probate referee's appraisal.
 - A. In many cases they do; depends on the referee.
- Q. Why does referee being questioned maintain separate office?
 - A. Obligation to offer services on full-time basis.
- Q. What is case load of referee being questioned?
 - A. About 25 to 27 cases a month (San Francisco).

Q. What is income of referee being questioned?

A. Gross \$60,000/year, net \$22,000 to \$25,000/year.

It was also noted that there are 175 referees in the state and many do the job as a public service, without profit to themselves.

Q. What result if public stock removed from referee?

A. In big cities, it would drive referees out of business or require fees to be increased. In rural areas maybe a 10% decrease in business--hard but not disastrous.

Q. How do laymen make erroneous appraisals of public stock?

A. Usually x-dividend; sometimes misidentification of class.

Q. Any suggestions for getting rid of bad referees?

A. Allow probate judge to remove. The existing discipline system works well. Only one has been removed by controller in past decade, but in practice, investigation and recommendation of removal by professional association results in resignation before removal.

Q. What about initial selection by probate court?

A. This would create political patronage and sweetheart deal pressures.

Q. Why do 80% of the states allow self-appraisal?

A. In those states the personal representative doesn't actually appraise, but hires appraiser at high cost.

Matthew S. Rae, Jr., spoke as an individual attorney in support of the existing probate referee system. Among other points made by Mr. Rae were that the probate referee system is consumerism designed to protect the public and to minimize litigation. He pointed out that the court need not appoint an incompetent referee. He felt that allowing the personal representative to select which assets the referee should value would result in removal of the easy assets with the effect of raising costs and killing the system.

Mark Harris spoke on behalf of Assembly Member Elihu Harris. Mr. Harris expressed concern about efforts to change the existing system,

pointing out that the existing system made the probate referees (1) independent, (2) objective, (3) equitable, and (4) accountable.

Phyllis Cardoza spoke on behalf of the Legislative Committee of the Probate, Trust, and Estate Planning Section of the Beverly Hills Bar Association. Among other suggestions, that Committee proposes that the petitioner for probate may request waiver of the referee in the initial petition, thereby avoiding additional legal fees. If the waiver is allowed, the appraisal would be served on interested parties as an advice of proposed action, which would be subject to objection by interested parties.

James Quillinan spoke on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. He pointed out that the Committee basically supports the existing system, with some suggestions of areas for study pointed out in their letter to the Commission. Ted Cranston, also for the Committee, noted one area for study of particular importance--obtaining back-up data on the referee's appraisal.

Sandra Kass spoke on behalf of the California Bankers Association. Their position is that appointment of a probate referee should be optional--the personal representative should be able to have one appointed if it is needed in the particular estate. She pointed out that not all the referees are very good--many do not do independent work but rely on the estimate made by the personal representative, the IRS will not accept many of their appraisals, and if a question arises, backup data is not available. An optional system would drive the incompetent referees out of business, and the competent ones would have all the business they could handle.

David Snook spoke on behalf of the California Appraisers Council. They agree with the assessment of the California Bankers Association, and believe it is unethical for an appraiser to take a fee based on the value of the appraised assets. They would like the opportunity to submit additional comments to the Commission.

Richard Betts spoke on behalf of the Northern California Chapter of the American Institute of Real Estate Appraisers. They believe there should be a free choice in probate of either the probate referee or a qualified certified appraiser.

The Commission expressed a need to gather more information concerning possible improvements in the probate referee system. Specifically, the Commission directed the staff to prepare a letter for distribution to the Probate Referees Association, the bar associations, and the various persons who have corresponded with the Commission concerning the probate referees. The letter should request their opinions about specific proposals for improvements that have been suggested, and should solicit additional specific proposals from them. Specific proposals mentioned by Commissioners at the meeting that they would like to see commentary on include:

(1) Procedure whereby estate could remove one probate referee peremptorily by affidavit.

(2) Procedure whereby court could remove probate referees for cause upon petition by estate. Cause in this context would mean incompetence or delay.

(3) Require State Controller to receive and act upon recommendations of referees association concerning disciplining or removing referee.

(4) Make backup appraisal data available upon request, and require that referee justify appraisal in case of subsequent contest.

(5) Improve waiver procedure, such as in manner proposed by Beverly Hills Bar Association.

(6) Allow waiver as to specific items that are unique and require an expert, such as art collections and other special collections.

(7) Allow self-appraisal of publicly-traded stock. Respondents should be aware that this proposal could require higher fees as to other assets left for referee appraisal.

(8) Expand the definition of cash items to be self-appraised to include such items as tax refund checks and the like.

The letter should solicit comments for review in time for the Commission's October 1985 meeting.

STUDY L-1020 - PROBATE CODE (POWERS AND DUTIES OF EXECUTORS
AND ADMINISTRATORS)

The Commission resumed consideration of Memorandum 85-13 from the previous meeting, the attached staff draft of new Probate Code provisions concerning powers and duties of personal representatives, and the Second and Third Supplements to Memorandum 85-13. The Commission began at draft Section 7555 and made the following decisions:

§ 7555. Operation of decedent's business other than partnership

It should be made clear that the provision for the court to authorize the personal representative to continue the operation of the decedent's business (other than a partnership) is permissive: The personal representative should be able to operate the business without a court order, but should be able to obtain a court order on petition. Perhaps this will go in a general provision. See discussion under Section 7600 infra .

As drafted, Section 7555 requires notice to "all interested persons." This should be made clearer by specifying those entitled to notice, such as heirs, devisees, creditors, etc. Perhaps this will be governed by a general notice provision. The Comment should note that the court may require additional notice under the successor section to Probate Code Section 1204, or possibly under a local court rule.

§ 7556. Possession and operation of decedent's partnership

It should be made clear that Section 7556 deals with the case where the decedent was a general partner, not a limited partner. The language omitted by staff that the court may, after notice, compel the

surviving partner to account "by attachment" should be restored in substance. Perhaps the drafting can be improved.

§ 7557. Delivery of real property to heirs or devisees

The section should be revised to refer to "debts or taxes of the decedent or expenses of administration." The staff should consider how this section interrelates with draft Sections 7551 and 7553.

§ 7558. Voting rights with respect to corporate shares or memberships or property

In the introductory clause, "held in the estate" should be revised to read "belonging to the estate."

§ 7559. Option to purchase given in will

The Commission decided to delete paragraph (3) of subdivision (a) (finding that tax has been paid or Controller has consented). The requirement that the optionee's petition be filed within six months after issuance of letters should be replaced with a requirement that the petition be filed before the petition for distribution of the property subject to the option, subject to any time limitation stated in the decedent's will.

§ 7560. Joint personal representatives

The language "absent from the state or" should be deleted from subdivisions (b) and (c). Guardianship-conservatorship law (Prob. Code § 2105) should be conformed to this section so that a court order is not required for the remaining joint guardians or conservators to act, and so that a guardian or conservator does not lose the power to act because of absence from the state.

§ 7561. Petition for instructions

The Commission decided to restore to Section 7561 the substance of existing law that a petition for instructions may be filed when "no other or no different procedure is provided by statute." The introductory clause should include reference to an heir or devisee, rather than relying on the definition of "interested person." The Comment should note that if the petitioner is not sure whether some

other or different procedure applies, the petitioner may petition for instructions in the alternative, giving notice under the more restrictive of the possibly applicable sections.

§ 7570. Bank and savings accounts

The staff should consider why Section 7570 refers to a trust company "authorized to conduct a trust business in this state," but Sections 7571, 7572, and 7573 refer simply to a "trust company." Probably they should all be consistent. Perhaps "trust company" should be a defined term. The staff should consider whether it is possible to deposit money in a trust company as Section 7570 provides.

§ 7580. Effect of death on causes of action

This article deals with actions and proceedings by or against the personal representative, but there is no general statement of the authority of the personal representative to sue and be sued as in the Guardianship-Conservatorship Law (see Section 2462). There should be a section similar to Section 2462 in this article.

The staff should consider whether subdivision (e) of Section 7580 may be unnecessary. If the subdivision is to be kept, it should be redrafted to delete the reference to "enactment of Chapter 657 of the Statutes of 1961" and to substitute a reference to the operative date of that statute (September 15, 1961).

§ 7581. Action for partition

Section 7581 will be made superfluous by the inclusion of general authority for the personal representative to sue and be sued (see discussion under Section 7580 supra). Section 7581 should therefore be deleted.

§ 7582. Action on bond of former personal representative

The words "as such" should be deleted from Section 7582.

§ 7583. Dispensable parties

The word "those" following the word "join" should be moved so it follows the word "parties."

§ 7600. Authority to compromise claims and actions and to extend,
renew, or modify obligations

The statement in Section 7600 that the personal representative may act "with or without prior court approval" probably should be put in a general provision that would say where a personal representative is authorized to act and there is no specific requirement of court approval, the personal representative may act with or without court approval. If this is done, the Comment to Section 7600 should refer to the general provision. See also the discussion under Section 7555 supra.

When Memorandum 85-13 is taken up again at a future meeting, the Commission will begin at Section 7620.

STUDY L-1025 - PROBATE CODE (PRESENTATION OF CLAIMS)

The Commission considered Memorandum 85-34 and the Revised First and the Second supplements thereto, together with the attached draft statute relating to creditors' claims in probate. The Commission made the following decisions with respect to the draft statute.

§ 7900. "Claim" defined

Subdivision (a)(2) of this section should be limited to funeral expenses. Subdivision (a)(3) should be limited to taxes incurred prior to the decedent's death (and as such may be already covered by subdivision (a)(1)). The staff should check to make sure the law is clear that a claim is not prerequisite to foreclosure of a lien on property, and should add an appropriate cross-reference to the Comment. The Comment might also include language from the Comment to Section 7902 concerning the definition of "claim".

§ 7901. Notice to creditors.

Subdivision (b), relating to actual notice to known or reasonably ascertainable creditors, should be continued in brackets in the draft pending receipt and review of language prepared by the Uniform State

Laws Commission relating to this point. The meaning of the term "creditor" as used in this section should also be reviewed.

§ 7910. How claim is made

The claim should be made by filing with the clerk. The creditor should also serve a copy of the claim on the personal representative, and the claim should include a statement under penalty of perjury that the creditor has done so. However, failure of the creditor to serve the personal representative should not affect the validity of a properly filed claim.

§ 7913. Procedure when claim filed

This section should be deleted. The staff should check the general provisions relating to entry of documents filed in the court register.

§ 7914. Claim presented by notary

This section should be deleted.

§ 7915. Where personal representative is creditor

The staff should review this section for consistency with the newly adopted claims procedure. The staff should also review the provision applicable in Los Angeles for noticed hearing in case of a claim by the personal representative for services in excess of \$1,000.

§ 7916. Where judge is creditor

This section should be deleted.

§ 7920. Four-month claim period

The staff should check on whether a notice of death is given when a special administrator, with or without powers of a general administrator, is appointed, in order to determine whether this section will work. The staff should also research whether legislation is needed relating to amendments to claims--can a claim be verified after the time has run, can the amount of the claim be modified, can supporting documents be added later?

§ 7923. Late claims

Subdivision (a)(1), relating to a claimant who did not receive notice because the claimant was out of state should be revised to

provide that in the case of an individual claimant, the excuse should apply only if the claimant was out of state for the entire claim period. In the case of a business claimant, the excuse should only apply if the claimant does not do business in the state. The staff should review this section in connection with the provisions, if any, that are developed for giving actual notice to creditors. if any. The staff should also coordinate the provisions of this section with the provisions governing preliminary distribution.

§ 7930. Claim prerequisite to action

The words "against an estate" should be deleted from this section. The introductory language noting exceptions otherwise provided in the article should make specific reference to relevant sections.

§ 7931. Enforcement of security interest

The statute should make clear the enforceability of attorneys fees provided in the security instrument for enforcing a lien.

§§ 7932-7934. Claims in civil actions

These provisions should be referred to the trial lawyers and defense counsel associations for comment and suggestions for any needed revisions or clarifications.

§ 7950. Claim by public entity required

The Comment should set out the definition of public entity.

§ 7951. Claims governed by other statutes

The staff should review the statutes listed in this section to determine whether the phrase "written request" is used, and if not, should substitute the appropriate language.

§ 7954. Claim by Director of Health Services

This and other special notice provisions should be cross-referenced in the general statutes on notice.

§ 7960. Procedure by personal representative

This provision should be conformed to the claim filing procedure. In addition, it should be revised along the lines suggested by the Beverly Hills Bar Association to provide a single

form for allowance or rejection, and the allowance or rejection should be filed with the court. The form should include the ability to make a partial allowance. The staff should consider how to implement the form concept--whether by putting a temporary form in the statute, by general language of instruction in the statute, or by a sample form sent to the Judicial Council.

§ 7961. Procedure by court

The section should make clear that it does not apply where the estate is being administered under the Independent Administration of Estates Act. The staff should investigate whether there are general provisions that eclipse the bracketed language in subdivision (a). In subdivision (b) the word "legal" should be deleted, and evidence should be "received" rather than "heard". Subdivision (c) should be deleted from the statute.

§ 7962. Effect of statute of limitations

A provision should be added to this section codifying the rule that making a claim does not toll the statute of limitations on the claim.

§ 7963. Allowed and approved claims

The staff should consider whether subdivision (a) should be relocated to the provisions on payment of claims.

§ 7964. Notice of rejection

This section should be deleted.

§ 7965. Failure of personal representative or court to act

The comparable provision of the Civil Code should be conformed to the change in this section from 10 to 30 days.

§ 7966. Partial allowance

The staff should consider relocating this section in conjunction with the general provisions on allowance or rejection of claims.

§ 7967. Action on rejected claim

The period after which action on a denied claim must be brought was changed from two months to three months in the case of a claim not yet due. The statute should make clear that reference to a referee or

to arbitration satisfies the three month statute. Notice of the filing of pendency of action should be mailed to the personal representative, and proof of mailing filed with the original notice. As to the question of allowing claims to be litigated in the probate court, the staff was requested to research the law under the existing code provisions that now govern probate and guardianship/conservatorship.

§ 7968. Reference to determine disputed claim

The reference to a written decision separately stating facts found and conclusions of law should be replaced by a reference to a memorandum of decision as provided by Section 632, or a comparable incorporation of general provisions. A parallel change should be made in Section 2405 (guardianship/conservatorship).

§ 7969. Submission of claim to arbitration

The staff should check to see whether the arbitration is binding, and if not, should add a provision to make it binding.

§ 7980. Money judgment against decedent

This section might include a cross-reference to Section 7983.

STUDY L-1026 - PROBATE CODE (PAYMENT OF DEMANDS)

The Commission considered the portion of the First Supplement to Memorandum 85-35 containing the letter of Ken Klug relating to proration of estate taxes. The Commission reviewed Mr. Klug's draft and decided to prepare a tentative recommendation along the lines of the draft. The objective is to have a bill on this subject for enactment at the 1986 legislative session. The provisions would be located in the place where the comparable provisions now appear in existing law, and would be renumbered when the new code is enacted.

§ 8631. Proration among persons interested in estate

This section refers to equitable proration. The staff should review the succeeding sections of the chapter to determine whether the equitable language should be specifically incorporated.

The reference to a written instrument in subdivision (b)(1) should be expanded to provide in essence, "Where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in the inter vivos instrument." The staff should see whether the drafting of this concept could be improved.

§ 8633. Allowance for credits, deductions and other adjustments

Subdivision (a) was revised to refer to allowances made for "credits allowed for state or foreign death taxes in determining the federal tax payable and for exemptions and deductions allowed for the purpose of determining the taxable estate." The Comment should note that reference is made to exemptions in case of enactment of exemptions in the future.

The language of subdivision (c) should be reviewed to make sure it accurately provides for proration based on fair market value rather than special use value. The Comment should give an example of how this works, e.g.: An estate consists of two properties, one worth \$5 million and one worth \$6 million. The total fair market value of the estate is \$11 million. If the \$6 million property has a special use valuation of \$5 million, the proration should be based on the tax that would have been assessed on the total fair market value of \$11 million--5/11 and 6/11--with the credit applied to this amount, rather than on a 50% basis that would be attained by valuing each property at \$5 million.

§ 8635. Where property not in possession of personal representative

The words "required to be included in the gross estate for federal estate tax purposes" and the words "and the court may by order direct the payment of the amount of taxes by such persons to the personal representative" should be deleted in reliance on general provisions.

§ 8636.1. Who may commence proceedings

The order of subdivisions (b) and (d) should be reversed and (c) should be made a separate section.

§ 8636.2. Notice of hearing

The staff should work on procedures and language for service on a person over whom the probate court may lack jurisdiction because the person is out of state.

§ 8639. Proration of deferred estate tax

References to "deferral" in the lead line and Comment should be changed to "extension".

§§ 8650-8657. Proration of Taxes on Generation-Skipping Transfers

These provisions should be conformed to the changes made in the estate tax proration provisions.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for
corrections, see Minutes of next
meeting)

Date

Chairperson

Executive Secretary

AMENDMENTS TO ASSEMBLY BILL NO. 196 AS AMENDED IN
SENATE JUNE 19, 1985

Amendment 1

In line 2 of the title, strike out "Section" and insert:

Sections 13113.8 and

Amendment 2

In line 6 of the title, strike out "591.9" and insert:

6124

Amendment 3

In line 9 of the title, strike out "Section 591.1" and
insert:

Sections 591.1 and 591.9

Amendment 4

On page 10, between lines 26 and 27, insert:

SEC. 2.5. Section 13113.8 of the Health and Safety Code is
amended to read:

13113.8. SET OUT TEXT OF AMENDED SECTION WITH AMENDMENT
INDICATED ON ATTACHED SHEET

9 13113.8.

(a) On and after January 1, 1986, every single-family dwelling and factory-built housing, as defined in Section 19071, which is sold shall have an operable smoke detector. The detector shall be approved and listed by the State Fire Marshal and installed in accordance with the State Fire Marshal's regulations. Unless prohibited by local rules, regulations, or ordinances, a battery-operated smoke detector shall be deemed to satisfy the requirements of this section.

(b) On and after January 1, 1986, the transferor of any real property containing a single-family dwelling, as described in subdivision (a), whether the transfer is made by sale, exchange, or real property sales contract, as defined in Section 2985 of the Civil Code, shall deliver to the transferee a written statement indicating that the transferor is in compliance with this section. The disclosure statement shall be either included in the receipt for deposit in a real estate transaction, an addendum attached thereto, or a separate document.

(c) The transferor shall deliver the statement referred to in subdivision (b) as soon as practicable before the transfer of title in the case of a sale or exchange, or prior to execution of the contract where the transfer is by a real property sales contract, as defined in Section 2985. For purposes of this subdivision, "delivery" means delivery in person or by mail to the transferee or transferor, or to any person authorized to act for him or her in the transaction, or to additional transferees who have requested delivery from the transferor in writing. Delivery to the spouse of a transferee or transferor shall be deemed delivery to a transferee or transferor, unless the contract states otherwise.

(d) This section does not apply to any of the following:

(1) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code.

(2) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in the administration of an estate, transfers pursuant to a writ of execution, transfers by a trustee in bankruptcy, transfers by eminent domain, or transfers resulting from a decree for specific performance.

(3) Transfers to a mortgagee by a mortgagor in default, transfers to a beneficiary of a deed of trust by a trustor in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, or transfers by a sale under a power of sale after a default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale.

(4) Transfers by a fiduciary in the course of the administration of a guardianship, conservatorship, or trust.

(5) Transfers from one coowner to one or more coowners.

(6) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(7) Transfers between spouses resulting from a decree of dissolution of a marriage, from a decree of legal separation, or from a property settlement agreement incidental to either of those decrees.

(8) Transfers by the Controller in the course of administering the Unclaimed Property Law provided for in Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure.

(9) Transfers under the provisions of Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code.

(e) No liability shall arise, nor any action be brought or maintained against, any agent of any party to a transfer of title, including any person or entity acting in the capacity of an escrow, for any error, inaccuracy, or omission relating to the disclosure required to be made by a transferor pursuant to this section. However, this subdivision does not apply to a licensee, as defined in Section 10011 of the Business and Professions Code, where the licensee participates in the making of the disclosure required to be made pursuant to this section with actual knowledge of the falsity of the disclosure.

(f) Except as otherwise provided in this section, this section shall not be deemed to create or imply a duty upon a licensee, as defined in Section 10011 of the Business and Professions Code, or upon any agent of any party to a transfer of title, including any person or entity acting in the capacity of an escrow, to monitor or ensure compliance with this section.

(g) No transfer of title shall be invalidated on the basis of a failure to comply with this section, and the exclusive remedy for the failure to comply with this section is an award of actual damages not to exceed one hundred dollars (\$100), exclusive of any court costs and attorney's fees.

(h) Local ordinances requiring smoke detectors in single-family dwellings may be enacted or amended. However, the ordinances shall satisfy the minimum requirements of this section.

(i) For the purposes of this section, "single-family dwelling" does not include a manufactured home as defined in Section 18007, a mobilehome as defined in Section 18008, or a commercial coach as defined in Section 18001.8.

(j) This section shall not apply to the installation of smoke detectors in dwellings intended for human occupancy, as defined in and regulated by Section 13113.7 of the Health and Safety Code, as added by Senate Bill No. 1443 in the 1986-87 Regular Session.

probate
estate

Amendment 5

On page 23, between lines 2 and 3, insert:

SEC. 13.5. Section 591.9, added to the Probate Code by Section 1 of Chapter ___ of the Statutes of 1985 (Assembly Bill 97 of the 1985-86 Regular Session), is repealed.

[SET OUT TEXT OF REPEALED SECTION IN STRIKEOUT]

Amendment 6

On page 23, lines 17 and 18, strike out "agent's and broker's" and insert:

agents' and brokers'

Amendment 5

On page 25, between lines 34 and 35, insert:

SEC. 15.5. Section 6124 is added to the Probate Code, to read:

6124. If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with intent to revoke it. This presumption is a presumption affecting the burden of producing evidence.

Exhibit 2

COMMUNICATION FROM CALIFORNIA LAW REVISION COMMISSION
CONCERNING ASSEMBLY BILL 196

Assembly Bill 196 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Transfer Without Probate of Certain Property Registered by the State, 18 Cal. L. Revision Comm'n Reports 129 (1986), Recommendation Relating to Distribution Under a Will or Trust (January 1985), and Recommendation Relating to Effect of Adoption or Out of Wedlock Birth on Rights at Death (January 1985). The Comments in the Commission's recommendations to the sections contained in Assembly Bill 196 remain applicable except to the extent they are replaced or supplemented by the revised and new Comments set out below.

Civil Code § 1134.5 (amended). Statement concerning structural alterations

Comment. Paragraph (4) of subdivision (b) of Section 1134.5 is amended to make clear that the section does not apply to transfers by a fiduciary in the course of administration of a probate estate. This amendment is consistent with the purpose of that paragraph.

Health & Safety Code § 13113.8 (amended). Statement concerning smoke detectors

Comment. Paragraph (4) of subdivision (d) of Section 13113.8 is amended to make clear that the section does not apply to transfers by a fiduciary in the course of administration of a probate estate. This amendment is consistent with the purpose of that paragraph.

Health & Safety Code § 18102 (amended). Transfer of manufactured home, mobilehome, commercial coach, or truck camper without probate

Comment. Section 18102 is amended to add the provision for a 40-day delay after the decedent's death, and to make clear that a beneficiary who takes a manufactured home, mobilehome, commercial coach, or truck camper under the decedent's will (whether or not the beneficiary is related to the decedent) may secure a transfer of registration of the title or interest of the decedent without the need to probate the decedent's estate. This is consistent with the practice of the department. Since Section 18102 applies only where the decedent left no other property necessitating probate, the amendment to Section 18102 avoids the need to probate the decedent's estate merely to secure a transfer of registration of the title or interest of the decedent. The amendment makes Section 18102 consistent with Section 630 of the Probate Code which permits a beneficiary under the decedent's will to have record title to a right

or interest transferred to the beneficiary upon furnishing the registrar or transfer agent with an affidavit (or declaration under penalty of perjury) showing the beneficiary's right to have the transfer made.

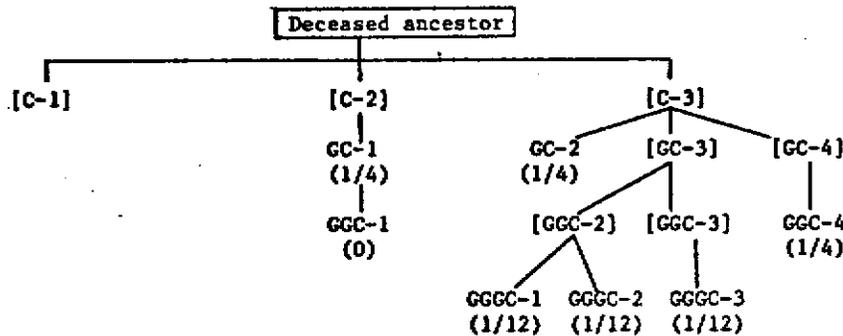
Section 18102 is also amended so that the requirement that creditors of the decedent have been paid is limited to unsecured creditors.

For other provisions comparable to Section 18102, see Veh. Code §§ 5910 (vehicle), 9916 (vessel).

Probate Code § 245 (new). Distribution according to intestate distribution system

Comment. Section 245 is new and gives one drafting a will or trust the option of selecting the distribution system provided in Section 240. Section 240 is the distribution system used in case of intestate succession. Under Section 240, if the first generation of issue of the deceased ancestor are themselves all deceased, the initial division of the property is not made at that generation, but is instead made at the first descending generation of issue having at least one living member. See generally Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Research J. 321, 380.

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 240 is made as follows (brackets indicate those who are dead when distribution is made):



If GGGC-3 in the above example were deceased, leaving three surviving children, each of the surviving children would take a $\frac{1}{36}$ share.

The language in subdivision (a) that "when a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner", it is governed by Section 240 continues a provision formerly found in Section 240.

Subdivision (b) provides that certain language is not an expression of a contrary intention sufficient to negate application of Section 245. For example, if property in a testamentary trust is to be distributed when the trust terminates to "the descendants of the testator per capita" and at the time of distribution the testator's three children survive and one of the surviving children has five children, each of the surviving children takes a one-third share; the five grandchildren of the testator take nothing since their parent survives. This results from applying the distribution scheme of Section 240. Under paragraph (1) of subdivision (b) of Section 245, this scheme is not negated by use of the term "per capita," since the living members of the designated class ("descendants of the testator") are not all of the same generation. In this context, it is reasonable to assume that the use of the term "per capita" is not intended to provide a share for a class member whose parent or other ancestor is still living and takes a share, although the drafter of the instrument may provide for such a result by appropriately clear language. In order for the testator's grandchildren in the above example to take under Section 245, their parent (the testator's child) must be dead at the time of distribution. In such a case, the testator's two living children each take a one-third share and the five children of the deceased child share equally in the one-third share their deceased parent would have taken.

Probate Code § 591.1 (repealed and added). Petition for independent administration

Comment. Section 591.1 is added to replace former Section 591.1. The new section restates the substance of the old section, with the addition of the authority in paragraph (2) of subdivision (b) for the petitioner to request authority to administer the estate under this article without authority to sell or exchange real property or to grant an option to purchase real property under this article. A new provision is also added in subdivision (g) requiring an endorsement on the letters when such limited authority has been granted, the endorsement indicating that the independent administration authority is so limited. If the court grants such limited authority, sales or exchanges of real property or the granting of an option to purchase real property must be accomplished under the provisions of this code for supervised administration. See Sections 584.3 (granting options to purchase real property), 750-764, 780-814 (real property sales), 860 (exchange of property).

Probate Code § 591.2 (amended). Matters for which court supervision required

Comment. Section 591.2 is amended to add paragraph (4) to subdivision (a) and to delete the last portion of the second sentence of subdivision (b). Paragraph (4) is added in view of the new provision in Section 591.1 for the court to exclude authority for the executor or administrator to sell or exchange real property or grant options to purchase real property without court supervision. The deletion of the last portion of the second sentence of subdivision (b) ("no publication of notice of hearing is required") has the effect of broadening that sentence so that notice of sale need not be published when the sale is to be accomplished without court supervision, consistent with Section 591.9(a).

Probate Code § 591.3 (amended). When advice of proposed action is required; waiver

Comment. Section 591.3 is amended to add subdivisions (c) and (d) to permit a person otherwise entitled to receive advice of proposed action either to consent to the proposed action, to waive the advice, or to waive particular aspects of the advice. This codifies existing practice. See McCarroll, 1 California Decedent Estate Administration Supplement § 7.130, at 202 (Cal. Cont. Ed. Bar 1984).

Probate Code § 591.4 (amended). Advice of proposed action

Comment. Section 591.4 is amended as follows:

(1) A requirement is added that the advice of proposed action be accompanied by a copy of the form prepared by the Judicial Council for objecting to a proposed action (see Section 591.8(b)).

(2) A requirement is added that the advice of proposed action be in substantially the form prescribed in Section 591.8.

(3) A requirement is added that, when the proposed action involves the sale or exchange of real property or the granting of an option to purchase real property, the advice of proposed action include, if applicable, the amount of or method of calculating any

commission or compensation paid or to be paid to an agent or broker in connection with the transaction.

Probate Code § 591.5 (amended). Objection to proposed action

Comment. Section 591.5 is amended to do the following:

(1) The second sentence is added to subdivision (b) to make clear that an executor or administrator who takes the proposed action without court supervision after notice of a restraining order or written objection has violated his or her fiduciary duty and may be removed from office. He or she may also be surcharged by the court.

(2) Subdivision (d) is revised to make clear that one who consents to the proposed action or waives his or her right to receive advice of proposed action may not later seek a court review of the action.

(3) Subdivision (e) is added to provide that any person who objects to the proposed action is entitled to notice of hearing of a petition for court authorization or confirmation of the proposed action.

Probate Code § 591.8 (added). Form for advice of proposed action

Comment. Section 591.8 is added to prescribe a statutory form for the advice of proposed action, to authorize the Judicial Council to prescribe an alternate form, and to require the Judicial Council to prepare a form for objecting to the proposed action. See also Section 591.4 (requirement that advice of proposed action, accompanied by copy of Judicial Council form for objecting to proposed action, be given).

Probate Code § 591.9 (added). Sales of property

Comment. Subdivision (a) of Section 591.9 makes clear that a sale of property under this article is not subject to the provisions that apply to sales subject to court confirmation. Subject to the applicable fiduciary duties of the executor or administrator, the property may be sold either at public auction or private sale, and with or without notice, as the executor or administrator may determine. This provision is comparable to the provision governing the authority of the executor under Section 757 when property is directed by the will to be sold or authority is given in the will to sell property. Subdivision (a) makes clear that notice of sale need not be published, and that the 90-percent-of-appraised-value requirement for sales of real property that must be confirmed by the court does not apply to a sale under this article. The property may be sold at a price that the executor finds acceptable and on such terms and conditions as the executor determines if no person given advice of the proposed action objects. Subdivision (a) also makes clear that the executor or administrator need not obtain court approval of the commission for the services to the estate of the agent, if any, used for the sale. This is consistent with the provision of Section 591.2 that the sale may be made without obtaining judicial authorization, approval, confirmation, or instructions. The last sentence of subdivision (a) makes the subdivision applicable to any sale made under this article on or after January 1, 1985. This will eliminate any problem that might otherwise exist with respect to such a sale because of the uncertainty as to the possible applicability of various provisions relating to sales of real property.

Subdivision (b) makes clear that, in cases where a bond is otherwise required (where, for example, the bond is not waived in the will or by the heirs or devisees), the estimated net proceeds of the real property are included in fixing the amount of the bond if the executor or administrator is authorized to sell the real property under this article. If the executor or administrator is not authorized to sell the real property under this article (see subdivision (b)(2) of Section 591.1), subdivision (b) of Section 591.9 does not apply and the amount of the bond is determined in the same manner as if independent administration authority had not been granted.

Probate Code § 6124 (added). Lost will presumed revoked

Comment. Section 6124 codifies existing case law. See Estate of Obernolte, 91 Cal. App.3d 124, 153 Cal. Rptr. 798 (1979); 7 B. Witkin, Summary of California Law Wills and Probate § 381, at 5844 (8th ed. 1974). For a discussion of the showing required to overcome the case law presumption codified in Section 6124, see Estate of Moramarco, 86 Cal. App.2d 326, 194 P.2d 740 (1948); 7 B. Witkin, supra § 382, at 5845. The repeal of former Section 350 did not affect the case law presumption codified in Section 6124.

The presumption codified in Section 6124 does not apply if a duplicate original of the will is found after the testator's death. For example, if a duplicate original is in possession of the testator's attorney, it is less likely that the testator will preserve his or her duplicate original with the same care as if it were the only such instrument.

Probate Code § 6147 (amended). Anti-lapse

Comment. Section 6147 is amended to do the following:

(1) The reference to Section 240 is substituted for the former reference to taking "by representation." This change is nonsubstantive.

(2) The second and third sentences of subdivision (c) are added to make clear that the anti-lapse provisions of Section 6147 do not apply when the will requires that the devisee survive for a specified period of time after the death of the testator or until a future time related to probate of the will or administration of the estate. Wills often require that a devisee survive for periods ranging from 30 to 180 days after the death of the testator. See Johnston, Outright Bequests and Devises, in California Will Drafting § 11.48, at 378 (Cal. Cont. Ed. Bar 1965). The amendment to subdivision (c) ensures that such provisions will negate application of the anti-lapse statute as the drafter likely intended. See id. § 11.12, at 360.

Probate Code § 6152 (amended). Halfbloods, adopted persons, and persons born out of wedlock

Comment. Section 6152 is amended to add "spouse" to the first sentence of subdivision (b), consistent with the existing reference to the parent's "surviving spouse." Thus, a child will be included in class gift terminology in the testator's will if the child lived while a minor as a regular member of the household of the parent's spouse or surviving spouse. As a result, a child born of a marital relationship will almost always be included in the class, consistent with the testator's likely intent.

Probate Code § 6205 (amended). Descendants

Comment. Section 6205 is amended to substitute the reference to Section 6152 (rules of construction for wills) for the former reference to the definitions of child and parent in Sections 26 and 54. Formerly Section 6205 applied the intestate succession rules for determining the parent-child relationship (see Sections 6408, 6408.5) because Sections 26 and 54 incorporate those rules. As amended, Section 6205 applies the rules of construction of wills for determining the parent-child relationship. This makes the construction of a California statutory will consistent with the construction of wills generally.

Vehicle Code § 5910 (repealed and added). Transfer of vehicle without probate

Comment. New Section 5910 continues former Section 5910 with a revision that permits a beneficiary who takes a vehicle under the decedent's will (whether or not the beneficiary is related to the decedent) to secure a transfer of registration of the title or interest of the decedent without the need to probate the decedent's estate. Since Section 5910 applies only where the decedent left no other property necessitating probate, this revision avoids the need to probate the decedent's estate merely to secure a transfer of registration of the title or interest of the decedent in the vehicle. This revision also makes new Section 5910 consistent with Section 630 of the Probate Code which permits a beneficiary under the decedent's will to have record title to a right or interest transferred to the beneficiary upon furnishing the registrar or transfer agent with an affidavit (or declaration under penalty of perjury) showing the beneficiary's right to have the transfer made.

Section 5910 is also amended so that the requirement that creditors of the decedent have been paid is limited to unsecured creditors.

For other provisions comparable to Section 5910, see Health & Safety Code § 18102 (manufactured home, mobilehome, commercial coach, or truck camper), Veh. Code § 9916 (vessel).

Subdivision (c) of Section 5910, which permits a combined form, is consistent with the prior practice pursuant to which a combined form was used.

Vehicle Code § 9916 (repealed and added). Transfer of vessel without probate

Comment. New Section 9916 continues former Section 9916 with revisions that (1) add the provision for a 40-day delay after the decedent's death, (2) permit a beneficiary who takes a vessel under the decedent's will (whether or not the beneficiary is related to the decedent) to secure a transfer of ownership of the title or interest of the decedent without the need to probate the decedent's estate, (3) eliminate the provision that made the section not applicable if the total value of the decedent's property in this state exceeds the amount specified in Section 630 of the Probate Code, and (4) limit to unsecured creditors the requirement that creditors of the decedent have been paid.

Since Section 9916 applies only where the decedent left no other property necessitating probate, the revision making Section 9916 apply

where the beneficiary takes the vessel under the decedent's will avoids the need to probate the decedent's estate merely to secure a transfer of ownership of the title or interest of the decedent in the vessel. This revision makes Section 9916 consistent with Section 630 of the Probate Code. See the Comment to Section 5910.

Elimination of the former provision that made Section 9916 not applicable where the value of decedent's property in this state exceeds the amount specified in Probate Code Section 630 makes Section 9916 consistent with Section 5910 (vehicles) and Health & Safety Code Section 18102 (manufactured home, mobilehome, commercial coach, or truck camper).

**COMMUNICATION FROM CALIFORNIA LAW REVISION COMMISSION
CONCERNING ASSEMBLY BILL 1030**

Assembly Bill 1030 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Protection of Mediation Communications (January 1985). The Comment set out below supersedes the Comment set out in the Commission's recommendation.

Evidence Code § 1152.5 (added). Mediation for the purpose of resolving dispute

Comment. Subject to the conditions and exceptions discussed below, Section 1152.5 gives effect to a written agreement that oral and written information disclosed in a mediation will not later be disclosed in a civil action (defined in Section 120 to include civil proceedings). Nothing in Section 1152.5 prohibits consideration of information disclosed in a mediation if the evidence is received without objection. Thus, information made inadmissible by the section should be considered to the extent it is relevant when it is presented to the trier of fact without objection. This is consistent with the protection given to an offer to compromise under Section 1152. See the Comment to Section 1152 as originally enacted. In addition, subdivision (b) permits admission of evidence when all the persons participating in the mediation consent to the disclosure.

Section 1152.5 provides protection to information disclosed during mediation to encourage this alternative to a judicial determination of the action. The same policy that protects offers to compromise (Section 1152) justifies protection to information disclosed in a mediation.

Because of the variety of means and methods of mediation, Section 1152.5 does not attempt to define "mediation." Instead, the applicability of the section is limited to a case where the persons who will participate in the mediation (including the mediator) execute a written agreement before the mediation begins stating that Section 1152.5 of the Evidence Code applies to the mediation. The agreement must set out the full text of subdivisions (a) and (b) of Section 1152.5.

Subdivision (d) makes clear that in a case where Section 4351.5 or 4607 of the Civil Code or Section 1747 of the Code of Civil Procedure is applicable, the admissibility of communications is determined under that section and not under Section 1152.5.

Subdivision (e) makes clear that Section 1152.5 has no effect on the protection afforded under Section 1152 (offer to compromise, and conduct and statements made in negotiation thereof, inadmissible) or under any other statutory provision. Accordingly, for example, even though a communication is not made inadmissible by Section 1152.5, the communication is protected if it is protected under Section 1152.

COMMUNICATION FROM CALIFORNIA LAW REVISION COMMISSION
CONCERNING SENATE BILL 1270

Senate Bill 1270 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Durable Powers of Attorney (January 1985). The Comments contained in the Law Revision Commission recommendation to the various sections of the bill remain applicable except to the extent they are superseded by the revised and new Comments set out below.

Civil Code § 2400 (amended). Durable power of attorney

Comment. Section 2400 is amended to delete the last sentence of subdivision (a) and all of subdivisions (b) and (c). The last sentence of subdivision (a) is superseded by Section 2400.5. See also Corp. Code § 702(e). Subdivisions (b) and (c) are superseded by Section 2510. See also Section 2512 (protection of third person relying in good faith upon power of attorney).

Civil Code § 2400.5 (added). Proxy given by attorney in fact

Comment. Section 2400.5 supersedes language formerly found in subdivision (a) of Section 2400. This revision is clarifying and more accurately states the original intent of the superseded language.

For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005.

Civil Code § 2432 (technical amendment). Requirements for durable power of attorney for health care

Comment. Subdivision (c) of Section 2432 is amended to conform the certificate to the language used for the attorney's certificate in Sections 2421, 2433(c)(2), 2451, and 2501. The remaining revisions of Section 2432 are technical or clarifying. As to the use of forms printed before January 1, 1986, see Section 2444.

Civil Code § 2433 (amended). Requirements for printed form; certificate of attorney in lieu of warning statements

Comment. The introductory clause of subdivision (a) of Section 2433 is extended to apply to any printed form that is "otherwise distributed" in this state and the requirement that the statement be in 10-point boldface type is made more flexible by providing that the statement be "in not less than 10-point boldface type or a reasonable equivalent thereof." These revisions conform Section 2433 to Section 2451(a) (Statutory Short Form Power of Attorney), Section 2501(a) (Statutory Form Durable Power of Attorney for Health Care), and Section 2510(b) (introductory clause).

A new warning statement is substituted for the one formerly provided by subdivision (a). The new warning statement is drawn from the warning statement prescribed in Section 2500 (Statutory Form Durable Power of Attorney for Health Care). See the Comment to that section.

As to the use of forms printed before January 1, 1986, see Section 2444.

The introductory clause of subdivision (c) is revised so that the subdivision applies to a durable power of attorney prepared for execution by a person resident in this state, without regard to where the durable power of attorney is prepared. Formerly, subdivision (c) applied to a durable power of attorney "prepared in this state," without regard to whether the durable power of attorney was prepared for execution by a person resident in this state or by a person not resident in this state.

Civil Code § 2444 (added). Use of form printed under prior law

Comment. Section 2444 permits a printed form of a durable power of attorney for health care to be used after the amendments to Sections 2432 and 2433 go into effect if the form complies with prior law. The amendments to Sections 2432 and 2433 make revisions to the contents of a durable power of attorney for health care. Section 2444 avoids the need to discard the existing supply of printed forms when the amendments go into effect. But a form printed after the amendments go into effect may be sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel only if the form complies with the requirements of Sections 2432 and 2433 as amended.

§ 2510 (added). Warning statement in printed form

Comment. Section 2510 continues the substance of former subdivisions (b) and (c) of Section 2400 with the following revisions:

(1) Subdivision (a) of Section 2510 is a new provision that recognizes that other provisions prescribe the content of the warning statement for particular types of durable powers of attorney. See Sections 2433 and 2500 (durable power of attorney for health care); Sections 2450 and 2451 (Statutory Short Form Power of Attorney). See also Section 2433(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

(2) The warning statement requirement is extended to apply to a printed form that is "otherwise distributed" in this state and the requirement that the statement be in 10-point boldface type is made more flexible by providing that the statement be "in not less than 10-point boldface type or a reasonable equivalent thereof." These changes make Section 2510 consistent with portions of Section 2433(a) (introductory clause), Section 2451(a) (Statutory Short Form Power of Attorney), and Sections 2501(a) and 2503(c) (Statutory Form Durable Power of Attorney For Health Care).

(3) The last paragraph of the warning statement is added. A comparable provision is included in other required warning statements. See Sections 2433, 2450, and 2500.

Section 2510.5 permits a printed form to be used after January 1, 1986, if the form complies with prior law. But a form printed after January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 2510. See Section 2510.5.

Civil Code § 2510.5 (added). Use of form printed under prior law

Comment. Section 2510.5 permits continued use of a printed form that complies with the form prescribed by subdivision (b) of Section 2400 as originally enacted. Section 2400 has been amended to eliminate former subdivision (b). Section 2510.5 permits use of the form prescribed by subdivision (b) of Section 2400 even after the amendment to that section takes effect. Accordingly, after Section 2510 takes effect, either the form set forth in Section 2400 as originally enacted or the form set forth in Section 2510 may be used. This avoids the need to discard existing printed forms on the date Section 2510 takes effect. However, a form printed on or after

January 1, 1986, may be sold or distributed in this state for use by a person who does not have the advice of legal counsel only if the form satisfies the requirements of Section 2510.

§ 2512 (added). Protection of person relying in good faith on power of attorney

Comment. Section 2512 is a new provision designed to assure that a power of attorney, whether or not durable, will be accepted and relied upon by third persons. The section gives a third person immunity from liability only if all of the following requirements are satisfied:

(1) The third person must act in good faith reliance upon the power of attorney.

(2) The person presenting the power of attorney must actually be the attorney in fact named in the power of attorney. If the person purporting to be the attorney in fact is an imposter, the immunity does not apply.

(3) The power of attorney must appear to be valid on its face and must include a notary public's certificate of acknowledgment. The third person can rely in good faith upon the notary public's certificate of acknowledgment that the person who executed the power of attorney is the principal.

Subdivision (b) makes clear that this section merely provides an immunity from liability if the requirements of the section are satisfied. This section has no relevance in determining whether or not a third person who acts in reliance upon a power of attorney is liable under the circumstances where, for example, the power of attorney does not include a notary public's certificate of acknowledgment. The immunity of a health care provider who relies upon a health care decision of the attorney in fact is determined under Section 2438, not under this section. Other immunity provisions are not limited by this section. See, e.g., Sections 2403 (lack of knowledge of death of principal), 2404 (lack of knowledge of termination of power), 2437 (lack of knowledge that durable power of attorney for health care has been revoked, 2510 (reliance in good faith upon durable power of attorney not containing "warning" statement required by Section 2510). See also Prob. Code § 3720 ("Any person who acts in reliance upon the power of attorney [of an absentee as defined in Probate Code Section 1403] when accompanied by a copy of a certificate of missing status is not liable for relying or acting upon the power of attorney.").

Letters Concerning Probate Referees

Since Memorandum 85-60 and its supplements were written, we have received additional letters concerning probate referees. Most of the letters make the same points concerning probate referees as the previous letters attached to the memorandum and supplements. All the newly received letters are listed below. We have reproduced a few that contain new ideas for distribution at the meeting. The other letters are available for review at the meeting. If any Commissioner would like to receive a copy of any of the other letters, we will reproduce and send it.

<u>AUTHOR</u>	<u>DATE</u>	<u>CITY</u>	<u>POSITION</u>	<u>VIEW ON CURRENT SYSTEM</u>	<u>COPY</u>
Stephen Dorsi	6/6/85	San Louis Obispo	Attorney	Support	
Roger Marshall					
John Burghardt	6/13/85	Chico	Attorneys	Support	
Rod. Martinelli	6/13/85	San Rafael	Attorney	Support	
Nancy Ferguson	6/18/85	Oroville	Prob. Ref.	Support	
Peter Hentschel	6/19/85	Quincy	Attorney	Support	
M. B. Kambel	6/19/85	Long Beach	Attorney	Support	
William Meux	6/19/85	Fresno	Attorney	Support	
Geo. Stephenson	6/19/85	San Pedro	Attorney	Support	
Henry Wien	6/19/85	El Centro	Judge	Support	
Cliff. Caldwell	6/20/85	El Centro	Attorney	Support	
Robert Hess	6/20/85	Los Angeles	Attorney	Oppose	*
Imperial County Bar Ass'n	6/20/85	Imperial Co.	Attorneys	Support	*
Rob. Kirkpatrick	6/20/85	Long Beach	Attorney	Support	
Darrell Stevens	6/20/85	Oroville	Attorney	Support	
Roland Hall	6/21/85	Santa Cruz	Judge (Ret.)	Support	
Robert Hays	6/21/85	San Francisco	Attorney	Support	
John Knowles	6/21/85	Laguna Beach	Attorney	Support	
Joseph McMullin	6/21/85	Altadena	Attorney	Support	
Burt. Pacioretty	6/21/85	San Francisco	Attorney	Support	
Kevin Eckard	6/22/85	Placerville	Prob. Ref.	Support	
James Stewart	6/23/85	San Jose	Judge	Support	*
Timothy Abel	6/24/85	Hayward	Attorney	Oppose	*
Clarence Hancock	6/24/85	South Pasadena	Attorney	Support	
Chris Rockas	6/24/85	Fresno	Attorney	Support	
Albert Russell	6/24/85	San Jose	Estate Tax Attorney	Support	*
Thomas Suttner	6/24/85	Arcadia	Attorney	Support	
John Whatley	6/24/85	Pasadena	Attorney	Support	
Richard Wolcott	6/24/85	Sacramento	Appraiser	Oppose	*
Robert Harlick	6/25/85	San Francisco	Attorney	Support	*
Edward Reidy	6/25/85	San Francisco	Court Comm'r	Support	

C. M. GOULD*
WILLIAM C. FARRER*
LEON S. ANGVIRE*
JOHN N. MCLAURIN*
VINCENT C. PAGE*
EDWIN H. FRANZEN*
STANLEY E. TOBIN*
JACK R. WHITE*
HARRY L. HATHAWAY*
KYLE D. BROWN*
WILLIAM M. BITTING*
ROBERT P. HESS*
DAVID A. EBERSHOFF*
HARDY L. THOMAS*
TODD M. SLOAN*
STUART H. YOUNG, JR.*
STEVEN W. BACON*
TIM C. BRUINSMA*
WM. HAROLD BORTHWICK
ARTHUR B. COOK
JAMES G. JOHNSON
DARRELL J. SALOMON

HILL, FARRER & BURRILL

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW

THIRTY-FOURTH FLOOR-UNION BANK SQUARE

445 SOUTH FIGUEROA STREET

LOS ANGELES, CALIFORNIA 90071

TELEPHONE (213) 620-0460

TELEX 298905 HILL

A. J. HILL (1881-1953)
WM. M. FARRER (1894-1971)
STANLEY S. BURRILL (1902-1957)

June 20, 1985

RICHARD R. PACE
GEORGE KOIDE
DARLENE B. FISCHER
SCOTT L. GILMORE
SCOTT V. OGILVIE
KEVIN H. BROGAN
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GREGORY S. DRAKE
ALFRED M. CLARK, III
DANIEL J. MCCARTHY
F. SCOTT PAGE
AUGUST W. CAIMI
DEAN E. DENNIS
MELVYN C. EMBREE

OF COUNSEL
CARL A. STUTSMAN, JR.
JOHN J. WILSON*
FRANK F. CHUMAN

*A PROFESSIONAL CORPORATION

Mr. Sterling
40 Middlefield Rd. #d2
Pal Alto, CA

Dear Mr. Sterling:

It was a pleasure speaking with you last week concerning the matter of probate referees in the State of California. In my opinion the use of probate referees should be left to the discretion of the representative of a decedent's estate. In many instances, the value of a decedent's property is irrelevant with respect to the distribution of assets to beneficiaries. If the representative of an estate or the successor trustee of a living trust wished to hire an appraiser, they should be able to engage the services of one of the people who are now called probate referees.

In estates that are left in fractional shares to various beneficiaries, which is often the case, the only persons other than the taxing authorities that are interested in the value of the assets are the probate referees, the executors and the attorneys whose statutory fees are set by the value. I have heard that many attorneys who feel the retention of probate referees is necessary indicate that they provide appraisals for a reasonable fee. If this is true, it would appear that those same referees could provide the same services whether they were called a probate referee or an independent appraiser. The value placed on the property by a probate referee is not binding for any purpose other than the establishment of the fees mentioned above.

As we further discussed, I am of the opinion that probate proceedings should not be required in

Mr. Nat Sterling

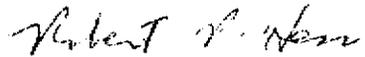
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June 20, 1985

any event unless requested by the representative of the estate or by any other person interested in the estate. It would appear that in a vast majority of cases, the primary beneficiaries of the probate proceedings are the attorneys and that probate proceedings provide no benefit whatsoever to the beneficiaries of the decedent. I would think that such a result could be accomplished quite simply by enacting provisions similar to those governing court supervision of the administration of living trusts upon the petition of interested parties.

Please feel free to let me know if you would like any further comments.

Sincerely,



ROBERT P. HESS

OF

HILL, FARRER & BURRILL

RPH:jb

IMPERIAL COUNTY BAR ASSOCIATION

June 20, 1985

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: California Probate Referee System

Dear Commission Members:

The Imperial County Bar Association was recently informed that the California Law Revision Commission is reviewing a proposal to do away with the existing Probate Referee System in California. In response to a request from the local probate practitioners, this Association appointed certain board members to review the local situation as it exists in regard to the Probate Referee System. The determination of the board is that the existing Probate Referee System provides a valuable and irreplaceable service at a reasonable cost.

Inventory & Appraisalment - Importance of Appraisals

The starting point for all decedents' probate estates is to marshal existing assets and determine the values to be assigned to such assets on the date of the decedent's death. These valuations help determine the California and federal estate taxes payable on death, the proration of taxes, commissions, attorneys' fees, and other costs of administration, the reasonableness of sales prices as they relate to the sales of estate assets, the income tax basis of assets after death which in turn determines the amount of gain or loss for state and federal income tax purposes on the subsequent sale of estate assets, and the value of assets for the purpose of distributing separate assets to different beneficiaries on a preliminary or final distribution or in payment of pecuniary damages.

Independence of Probate Referee

The values as determined by the Probate Referee are central to almost every major planning determination made during the process of a probate. Since the personal representatives in most probates are related parties, heirs, or devisees, there invariably exists some conflict of interest in regard to the valuation process. The ability to have an independent party (i.e., a Probate Referee) make the crucial determinations of valuation gives credence and protection to the valuation

process. If forced to a system with an independent Probate Referee, the problem of shopping for different appraisers will become an immense burden on the Bar. Not only will the position of the legal counsel for the estate be compromised, but the burden on counsel to obtain valid appraisals will become heavy indeed.

The independence of the Probate Referee is recognized by the taxing authorities and, in most cases, auditors for state and federal taxing authorities look to the valuation of the Probate Referee as a reliable measure against which additional third party appraisals (obtained by the taxpayer) may be weighed. This is much in the same manner as taxing authorities look to the current reappraisal by the County Tax Assessor for a reasonable reflection of current value. Removal of the Probate Referee from the role of impartial appraiser would only make the job of legal counsel and the taxing authorities more difficult.

Cost Efficiency

The appraisal job undertaken by the Probate Referee is currently very cost effective. The Probate Referee values not only the real property, but the personal property, stocks in closely held corporations, sole proprietorships, partnerships, etc. The rates charges for these appraisals are very reasonable and, in the local Bar's experience, these charges would be hard, if not impossible, to match. There is the additional cost savings in the present system in that one individual (the Probate Referee) is responsible for appraisal of all assets. Legal counsel does not have to deal with separate appraisers who appraise only limited type of real and/or personal property or are limited to certain geographic areas.

Summary

It is the position of the Imperial County Bar Association that the California Probate Referee system is the best system currently available. We would urge the Commission Members to retain the California Probate Referee system as it currently exists.

If you have any questions or if you would like to discuss this matter further with the local Bar representatives,

California Law Revision Commission

June 20, 1985
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please feel free to contact the Imperial County Bar Association or its representatives.

Very truly yours,

IMPERIAL COUNTY BAR ASSOCIATION

By *Dennis Morita*
DENNIS MORITA, President

Superior Court of the State of California

COUNTY OF SANTA CLARA

191 NO. FIRST STREET

SAN JOSE, CALIFORNIA 95113

CHAMBERS OF
JAMES W. STEWART
JUDGE

California Law Revision Commission
4000 Middlefield Road #D-2
Palo Alto, California, 94303

June 23, 1985

Dear Commissioners:

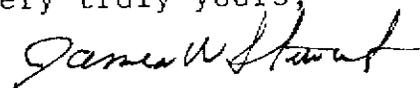
I am informed that you are considering recommending to the State Legislature that the position of Probate Referee either be abolished, or that the use of Referees in probate cases be entirely voluntary.

In my view, either recommendation would be a mistake. The need for Probate Referees has clearly outlived the elimination of the state inheritance tax. Probate Referees now provide, at minimal cost, a means by which competing claims of estate recipients may be resolved in an expeditious manner. The alternative to an independent referee is the system whereby each opposing side hires its "own" appraisers and the Court ultimately appoints its own appraiser. This procedure costs three times the present system whereby an independent Probate Referee is appointed by the Court early in the probate proceedings. It should also be recognized that the present system provides a reliable independent arbitrator in disputes between taxing authorities and those who pay those taxes, when the amount of the tax is determined by the value of property on the date of the owner's death.

The effect of making the use of Probate Referees voluntary would be that the full compliment of Referees in each County could no longer stay in business. Those Referees who would remain in business under a voluntary system, would be those least capable of earning an adequate living in some other field of endeavor. These persons are presently the least likely to provide superior service. Full freedom of choice between Referees will provide better service. But an underfunded, voluntary system would cause the least capable to rise to the top.

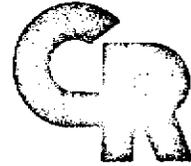
While the views expressed herein are mine alone, I would urge you to obtain the thoughts of Judges with extensive probate experience. It might also be helpful to obtain the views of attorneys specializing in Probate work. They are in an excellent position to evaluate the need for services presently performed by our Probate Referees.

Very truly yours,



James W. Stewart

Clark-Robbins Co., Inc.



Real Estate Analysts And Consultants

June 24, 1985

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

RE: Probate Referee System

Dear Mr. Sterling:

I regret I will not be able to attend the Commission's meeting on June 27 on the referenced matter. I have discussed the topic with Mr. Richard Betts, MAI, President of Northern California Chapter No. 11 of the American Institute of Real Estate Appraisers. He has an interest and further knowledge of the topic and has expressed an interest in attending the meeting. I hope he will do so and convey our views.

Under the present probate procedures, I do ^{not} believe the Probate Referee System is necessary and certainly not as a mandatory service which is frequently not needed.

There are certainly occasions when estate representatives find it necessary to have real property appraised. There are many where they do not. Rather than have a mandatory service and its related costs in place, the legal representatives of an estate should be allowed to make a determination as to if and when appraisals are necessary and the standards they should meet.

While it might be argued that the system is available and inexpensive, the argument is irrelevant if the service is not needed.

Where appraisals are required there is an abundant supply of appraisers available in private practice that can provide various levels of expertise.

The Internal Revenue Service has increased their appraisal expertise and ability to evaluate appraisals. Their requirements are becoming more exacting.

Allowing the representatives of the estate to determine the need for and significance of an appraisal would then lead to a selection of the appropriate level of expertise and competency required by the needs of the estate.

The present system does not result in a proper matching of needs and competency.

Under present laws, the need for appraisals is usually occasioned by properties of greater magnitude and complex valuation problems. The level of expertise and competency must increase accordingly and is not necessarily available in the present system. Even the routine appraisal of a house to be sold from the estate can now if needed, be efficiently and economically performed by appraisers in private practice without the need to maintain an outdated system in existence.

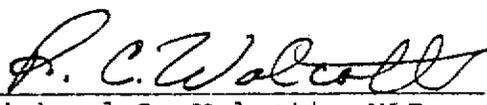
The growing scrutiny of appraisals for estate tax purposes is not conducive to continuing what usefulness the probate system's appraisals may have had in the past.

The elimination of the inheritance tax in California left in place a system whose main reason for existence was no longer required. The efficient process of government requires that the system be discontinued.

The opportunity to express my views is appreciated.

Sincerely,

CLARK-ROBBINS COMPANY, INC.

By: 
Richard C. Wolcott, MAI

cc: Mr. Richard Betts, MAI

RCW:lf

TIMOTHY ABEL
ELIZABETH ABEL

MICHAEL J. WOOLSTON

LAW OFFICES OF
ABEL & ABEL
22300 FOOTHILL BLVD., SUITE 501
POST OFFICE BOX 3128
HAYWARD, CALIFORNIA
94540-3128
415-886-6434
REPLY TO HAYWARD OFFICE

FREMONT OFFICE:
415-791-7965
OAKLAND OFFICE:
415-351-3400
SAN JOSE OFFICE:
408-298-4488
SAN RAMON OFFICE:
CROW CANYON RD. AT
101 PARK PLACE
415-837-3323

June 24, 1985

California Law Commission

Since repeal of The California Inheritance Tax by the people of the State of California, the legislature has changed the Inheritance Tax Referees to Probate Referees and has required a complicated procedure to waive this procedure. (See section 605(a)(3) of the Probate Code).

Thirty-four of the states have eliminated the required use of a court appointed Referee to appraise assets. The personal representative of the estate makes the appraisal and can use a Referee if he decides he needs one.

Unfortunately, in the small estate involving a family house or other limited assets, a minimum fee of \$75.00 still must be paid to the probate referee because it will cost this much in additional fees or cost of time to go through the order to show cause procedure to eliminate the \$75.00 cost. In these small family home cases, the sole child many times must advance his own money for fees and costs to get title into his or her name as the house may be the sole asset in the estate.

A survey of states (See Exhibit A) was made in 1981 and determined the following:

The historical trend is away from the requirement of a probate referee.

The retention of the mandatory appraisal existed in the states which still had an inheritance or death tax while the states without the tax had abolished the requirement or made it optional at the discretion of the personal representative of the estate.

Clients consistantly ask why they have to pay an appraiser when they are not selling the property out of the estate. Since most do not need an appraisal for income tax purposes the only answer is "because the legislature says it must be done". These clients do not like to pay for something they do not want or need. Nor do I think they should be required to pay for an appraisal.

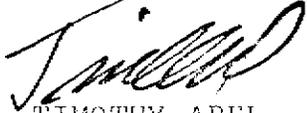
Although I had thought I would be able to appear at the Law Revision Commission Hearing to answer questions I now find I must be out of the Bay Area on business during your hearing.

Please excuse my inability to attend. If any commissioners wish any additional information please do not hesitate to call me.

Thank you.

Very truly yours,

ABEL & ABEL



TIMOTHY ABEL
Attorney at Law

TA/cq

enc.

EXHIBIT A

STATES IN WHICH ESTATE ASSETS ARE
VALUED BY PERSONAL REPRESENTATIVE

STATES IN WHICH THE COURT IS
REQUIRED TO APPOINT AN APPRAISER

STATES IN WHICH ESTATE ASSETS ARE VALUED BY PERSONAL REPRESENTATIVE		STATES IN WHICH THE COURT IS REQUIRED TO APPOINT AN APPRAISER
+ ALASKA	+ MONTANA	x DISTRICT OF COLUMBIA
ALABAMA	+ NEBRASKA	o ILLINOIS
+ ARIZONA	NEVADA	o INDIANA
ARKANSAS	+ NEW JERSEY	o IOWA
+ COLORADO	+ NEW MEXICO	x KENTUCKY
CONNECTICUT	*NEW YORK	x LOUISIANA
+*DELAWARE	NORTH CAROLINA	x MAINE - for some assets only
FLORIDA	+ NORTH DAKOTA	x NEW HAMPSHIRE
GEORGIA	OREGON	x OHIO
+ HAWAII	*RHODE ISLAND	x OKLAHOMA
+ IDAHO	+ SOUTH DAKOTA	x PENNSYLVANIA
+*KANSAS	TENNESSEE	x SOUTH CAROLINA
+ MARYLAND	*TEXAS	x WYOMING
*MASSACHUSETTS	+ UTAH	
+ MICHIGAN	*VERMONT	
+ MINNESOTA	*VIRGINIA	
+ MISSOURI	+ WASHINGTON	

In MISSISSIPPI, an appraiser need not be appointed if there is a waiver in the will.

* The court may appoint an appraiser upon request of the personal representative or other interested party.

+ Statute specifically provides that the personal representative may hire an independent appraiser to aid him if he chooses to.

o States known to have state inheritance tax.

x States believed to have state inheritance tax.

Internal Revenue Service

Department of the Treasury

District
Director

123 East Gish Road
San Jose, California 95112

Person to Contact: Albert Russell

Telephone Number: (408) 291-7413

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Refer Reply to: Field Audit, 2nd Floor

Date: June 24, 1985

Gentlemen:

Mr. Gerald Scott, a California Probate Referee in San Jose, has asked me to write to you concerning your current review of the California Probate Code and Procedures including the role of the Probate Referee. I am an Estate Tax Attorney with the Internal Revenue Service and there are a number of similarities between my position and the services provided by the probate referees. Primarily these similarities are in the area of real estate and business appraisal. For a number of years many of the referees (formerly as inheritance tax referees and now as probate referees) in the counties in which I have worked have been very helpful to me in providing background information on estate assets appraised by them. They have also been helpful and cooperative in taking the time to explain their appraisals.

Since, for many estates in California, the appraisal by the referee provides the initial values (values may be adjusted on audit) for the estate tax return, it is advantageous to the estate and to the IRS to have the referee provide both the information and the explanation. This saves a great deal of time not only for the estate but also for me.

I have also heard that the existence of the referee system in California provides substantial cost savings for many estates because, in other states, where no such system exists, each estate must spend substantial sums for professional appraisals to obtain values for federal estate tax purposes.

All in all, I can only reiterate that the referees have been most helpful and cooperative.

Very Truly Yours,

Albert Russell
Estate Tax Attorney

cc Mr. Gerald Scott

PELAVIN, NORBERG, HARLICK & BECK

A PROFESSIONAL CORPORATION

TWO EMBARCADERO CENTER • 23RD FLOOR • SAN FRANCISCO 94111 • TELEPHONE (415) 398-4600

CABLE ADDRESS: PELAVVLA SAN FRANCISCO • TWX: 9103721076

ROBERT M. HARLICK

June 25, 1985

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Probate Referee

Dear Members of the Commission:

I have been advised that the Commission is in the process of studying the Probate System of this state and specifically, the Probate Referee System.

I have practiced Probate Law in excess of 25 years and have been for over 15 years an Adjunct Professor of Law at Golden Gate University teaching wills, estate and gift taxation and estate planning.

I am a proponent of an independent Probate Referee System. I have found that it is a relatively inexpensive and often extremely useful method of valuing diverse assets in an estate. Although, of course, not binding on the federal taxation system, an appraisal by an independent California Probate Referee of real property or stock in a closely-held corporation has often had great persuasive weight in terms of the audit of the federal estate tax return.

By no means is this short letter intended to be inclusive, but I would like to set forth before the Commission two areas in which I feel that an independent Probate Referee System is of great benefit.

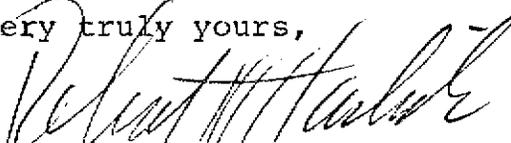
I have always been apprehensive as to the job that would be done in terms of a "self appraisal" by a non-related person in a conservatorship proceeding. An independent referee system is of benefit both in terms of the setting of a bond if one is required, and in terms of making certain the property of the conservatee had an independent valuation of the assets comprising the conservatorship.

California Law Revision Commission
June 25, 1985
Page 2

In a probate situation more and more executors are put to elections which have to take into account valuations of property in terms of disclaimer elections into protective trusts and elections regarding qualified terminable interest property. I know that I would feel more comfortable with a Probate Referee's valuation of the property, especially when dealing with a non-professional executor.

It is my belief that the independent Probate Referee System gives persons interested in the property of the deceased persons or persons unable to take care of their own affairs, more protection than if the valuations of assets in estates and conservatorships were made by non-professional fiduciaries. I hope the Commission will consider retaining the Probate Referee System as it presently exists.

Very truly yours,



Robert M. Harlick

RMH:lah

Exhibit 6

WALTER, FINESTONE, RICHTER & KANE

JEFFREY R. RICHTER
WILLIAM FINESTONE
JOHN F. WALTER
KEVIN R. KANE
MELINDA J. TOOCH
CHRISTOPHER TESAR
FREDERICK F. MUMM
ROBERT S. SMITH
JEFF M. NOVATT
L. GREGORY NELSON
ANTHONY G. KARAVANTES

LAWYERS
A PROFESSIONAL CORPORATION
10920 WILSHIRE BOULEVARD
SUITE 1400
LOS ANGELES, CALIFORNIA 90024-8592
(213) 824-0800

CABLE ADDRESS:
SURELAWC

REFER TO FILE NO.

11537-8 000

June 21, 1985

California Law Revision Commission
4000 Middlefield Road
Room D2
Palo Alto, California 93306

Re: Probate Referee System

Dear Commissioners:

The Legislative Committee of the Probate, Trust, and Estate Planning Section of the Beverly Hills Bar Association (the "Committee") has studied extensively Study L-655-Probate Referee System. The consensus of the Committee is that the current Probate Referee System should be preserved in some respects only. We believe that an optional system, similar to the system currently in use, should be utilized and that the valuation of certain assets should be made by the personal representative as opposed to the Probate Referee.

The Committee agrees that referees generally provide reliable, independent, and relatively inexpensive appraisals. The major objection is to the referee fee which is based upon a statutory commission of 1/10 of one percent of the value of the appraised assets. While this fee scheme is probably preferable to a "reasonable value" fee scheme (a reasonable value determination will inevitably lead to disputes), in many instances the statutory fee is based on appraisals of assets that can otherwise be readily and accurately appraised by the personal representative.

California Law Revision Commission

June 21, 1985

Page Two

It appears that the greatest concern to proponents of the current system is that a personal representative may not fairly or accurately appraise the property and may fraudulently under or over value property. The First Supplement to Memorandum 85-60 sets forth in much detail the reasons for the necessity of an independent appraisal. We concur with the views of the staff relating to conflicts of interest. However, we do not believe that the possibility of abuse justifies the requirement of a probate referee in all instances. For this reason we propose that the personal representative be given the option to utilize a probate referee or to petition the court, either in his or her initial petition for appointment or via separate petition later in the proceedings, to waive the appointment of a probate referee. Thus, any interested party could object to the waiver and the court would determine the issue.

We have attached hereto proposed changes to the Probate Code. The Probate, Trust, and Estate Planning Section of the Bar was polled on the proposals at our regular meeting held on June 18, 1985, and voted overwhelming approval of the proposed changes.

Basically, we propose that the probate referee system be optional, at the request of the personal representative, and subject to Probate Court approval. The specific proposal is outlined in detail below. Additionally, we propose that in any case, even if a probate referee is appointed, the personal representative shall appraise, in addition to the assets now set forth in Section 605(a)(1) "checks and other cash equivalents, securities listed on an established stock or bond exchange in the United States". We believe that a personal representative is qualified to appraise all cash equivalents, including checks and drafts dated after the decedent's death, cash dividends declared but payable to shareholders after the date of death, bond coupons which mature after the decedent's death, and similar cash equivalents. Additionally, it was the opinion of the Committee that publicly traded securities should be appraised by the personal representative. Stocks and bonds have readily ascertainable values, easily accessible through a stock broker, exchange, or publications such as the Wall Street Journal. The primary objection of practitioners regarding the current probate referee system is that in many cases the only assets in an estate are cash, checks and securities all of which are easily appraised by the personal representative; involving the referee and the attendant fee adds undue expense and delay in administering the probate estate.

California Law Revision Commission
June 21, 1985
Page Three

Our proposal to implement an optional probate referee system is as follows: The petitioner may request a waiver of the appointment of a probate referee in his or her initial petition for appointment (Sections 326, 333, and 440) or by separate petition (Section 605(a)(3)). If the waiver is requested in the initial petition for appointment, the matter will be heard in the same manner as other matters addressed in the petition for appointment. This procedure will dispense with the additional legal fees necessitated by a separate noticed hearing as is currently required. If the petition for waiver is not included in the initial petition for appointment and is requested by separate petition, the notice provisions of Section 1200, 1202 and 1202.5 will apply. In either case, the objecting party will be required to show good cause why the waiver should not be granted.

If the appointment of a probate referee is waived, prior to the filing of the inventory and appraisal, the personal representative shall serve a notice of advice of proposed action, including a copy of the proposed inventory and appraisal (Section 591.4). The provisions of Section 591.5 will apply; accordingly, if a party fails to object to the proposed filing of the inventory and appraisal, he or she will be barred from later objecting. If however, an inventory and appraisal is filed in a case where a probate referee has been appointed, the provisions of Section 608.5 will remain applicable, allowing objection to an inventory and appraisal at any time prior to entry of the decree of final distribution.

Additionally, Judicial Council Form 205 (Petition for Probate) and Form 213A (Order for Probate) should be modified to provide for the waiver of appointment of the probate referee.

We believe that the proposal satisfies the principal concerns of many practitioners: (1) expeditious probate administration by allowing the petitioner to request a waiver of the appointment of a probate referee and (2) protection against abuses by requiring notice of the proposed waiver of the probate referee and approval only upon court hearing, and by requiring service of the proposed inventory and appraisal by advice of proposed action to further allow all interested parties to review the proposed appraisals, subject to further court process if objection is made.

California Law Revision Commission

June 21, 1985

Page Four

We hope that this proposal will be favorably considered. If you require further analysis or clarification, do not hesitate to contact the undersigned.

Very truly yours,



Melinda J. Tooch
Chair, Legislative Committee

MJT/lt
Enclosure

cc: Kenneth Feinfield, Esq.
Members of the Legislative Committee of the
Probate, Trust, and Estate Planning Section

PROPOSED CHANGES TO THE PROBATE CODE

326. Content and Form of Petition for Probate

A petition for the probate of the will must state:

- (1) The jurisdictional facts;
- (2) Whether the person named as executor consents to act or renounces his or her right to letters testamentary;
- (3) The street number, street, city, and county of the decedent's residence at the time of his or her death;
- (4) The names, ages, residences, and relation to decedent of the heirs, devisees and legatees of the decedent, so far as known to the petitioner;
- (5) The character and estimated value of the property of the estate;
- (6) The name of the person for whom letters testamentary are prayed; and
- (7) Whether petitioner requests a waiver of the appointment of a probate referee.

Where the necessary jurisdictional facts actually exist but through defect of form or error, they or any of them are incorrectly stated in any petition or pleading, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error shall make the order admitting the will to probate or any subsequent proceeding void.

333. Publication of Notice of Death

(a) Publication of notice pursuant to this section shall be for at least 10 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting such publication dates, are sufficient. Notice shall be published in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction over the estate pursuant to subdivision (3) of Section 301. If there is no such newspaper, the decedent did not reside in a city, or the property is not located in a city, then notice shall be published in the newspaper of general circulation in the county which is circulated within the community in which the decedent resided or the property is located. If there is no such newspaper, notice shall be given in written printed form, posted at three of the most public places within such community. For purposes of this section "city" means a charter city as defined in Section 34101 of the Government Code or a general law city as defined in Section 34102 of the Government Code.

(b) Whether published or posted, the caption of such notice and decedent's name shall be in at least 8-point type, the text of the notice shall be in at least 7-point type, and the notice shall state substantially as follows:

"NOTICE OF DEATH OF

AND OF PETITION TO
ADMINISTER ESTATE NO. _____

To all heirs, beneficiaries, creditors and contingent creditors of _____ and persons who may be otherwise interested in the will and/or estate:

A petition has been filed by _____ in the Superior Court of _____ County requesting that _____ be appointed as personal representative to administer the estate of _____ [under the Independent Administration of Estates Act] and that the appointment of a probate referee may be waived. The petition is set for hearing in Dept. No. _____ at _____ (address) _____ on _____ (date of hearing) _____ at _____ (time of hearing) _____.

IF YOU OBJECT to the granting of the petition, you should either appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court or present it to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in Section 700 of the Probate Code of California. The time for filing claims will not expire prior to four months from the date of the hearing noticed above.

YOU MAY EXAMINE the file kept by the court. If you are interested in the estate, you may serve upon the executor or administrator, or upon the attorney for the executor or administrator, and file with the court with proof of service, a written request stating that you desire special notice of the filing of an inventory and appraisal of estate assets or of the petitions or accounts mentioned in Sections 1200 and 1200.5 of the California Probate Code.

(Name and address of petitioner,
or his or her attorney)"

(c) No petition filed pursuant to Section 326 or 440 may be heard by the court unless an affidavit showing due publication of notice has been filed with the clerk upon completion of the

publication. Such affidavit shall contain a copy of the notice, and state the date of its first publication.

(d) When, however, notice has been previously published and an affidavit showing due publication of notice, containing a copy of the notice, and stating the date of its first publication, has been filed with the clerk upon completion of the publication, then, whether published or posted, the caption of any subsequent notice, and decedent's name shall be in at least 8-point type, the text of the notice shall be in at least 7-point type, and the notice shall state substantially as follows:

"NOTICE OF PETITION

TO ADMINISTER ESTATE NO. _____

To all heirs, beneficiaries, creditors and contingent creditors of _____ and persons who may be otherwise interested in the will and/or estate:

A petition has been filed by _____ in the Superior Court of _____ County requesting that _____ be appointed as personal representative to administer the estate of _____ [under the Independent Administration of Estates Act] and that the appointment of a probate referee may be waived. The petition is set for hearing in Dept. No. _____ at _____ (address) _____

on _____ (date of hearing) at _____ (time of hearing) _____

IF YOU OBJECT to the granting of the petition, you should either appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

YOU MAY EXAMINE the file kept by the court. If you are interested in the estate, you may serve upon the executor or administrator, or upon the attorney for the executor or administrator, a written request stating that you desire special notice of the filing of an inventory and appraisement of estate assets or of the petitions and accounts mentioned in Sections 1200 and 1200.5 of the California Probate Code.

(Name and address of petitioner,
or his or her attorney)"

440. Contents of Petition.

A petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, and must state:

- (1) The jurisdictional facts;
- (2) The street number, street, city, and county of the decedent's residence at the time of his or her death;
- (3) The names, ages, residences, and relation to the decedent of the heirs of the decedent, so far as known to the applicant;
- (4) The character and estimated value of the property of the estate; and

(5) Whether the petitioner requests a waiver of the appointment of a probate referee.

Where the necessary jurisdictional facts actually exist but, through defect of form or error, they or any of them are incorrectly stated in any petition or pleading the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error shall make an order appointing an administrator or any subsequent proceeding void.

591.3 Advice of Proposed Action by Executor -- Actions Without Court Supervision.

(a) Prior to the consummation of any of the actions described in subdivision (b) without court supervision, the executor or administrator to whom authority has been granted to act without court supervision shall advise the persons affected by the proposed action of his or her intention to take such action. The advice, known and referred to in this article as "advice of proposed action," shall be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and to persons who have filed a request for special notice pursuant to Section 1202.

(b) The actions requiring such advice are all of the following:

(1) Selling or exchanging real property.
(2) Granting options to purchase real property.
(3) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in Sections 770 and 771.5 when sold for cash.

(4) Leasing real property for a term in excess of one year.

(5) Entering into any contract, other than a lease of real property, not to be performed within two years.

(6) Continuing for a period of more than six months from the date of appointment of the executor or administrator of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death, or the sale or incorporation of such business.

(7) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(8) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan association accounts, in units of a common trust fund described in Section 585.1, in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of (A) those obligations, or (B) repurchase agreements with respect to any obligation regardless of maturity in which the fund is authorized to invest.

(9) Completing a contract entered into by the decedent to convey real or personal property.

(10) Borrowing money or executing a mortgage or deed of trust or giving other security.

(11) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, such property, or determining decedent's claim to real or personal property title to or possession of which is held by another.

(12) Filing of an inventory and appraisement which includes the appraisal of any asset by the executor or administrator pursuant to the provisions of Section 605(a)(2)(C).

591.4 Form--Notice--Advice of Proposed Action

(a) The advice of proposed action shall be delivered personally or sent by first-class mail, or sent by airmail to any person residing outside the jurisdiction of the United States, to each person described in Section 591.3 at his or her last known address. The advice of proposed action shall state the name and mailing address of the executor or administrator, the person and telephone number to call to get additional information, and the action proposed to be taken, with a reasonably specific description of such action, and the date on or after which the proposed action is to be taken. Such date shall not be less than 15 days after the personal delivery, or not less than 20 days after the mailing of the advice.

(b) When the proposed action involves the sale or exchange of real property, or granting of an option to purchase real property, the advice of proposed action shall state the material terms of the transaction, including, if applicable, the sale price. The failure of the executor or administrator to comply with the provisions of this section shall not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with the executor or administrator who changed their position in reliance on the action, conveyance or transfer without actual notice of the failure of the executor or administrator to comply with such provisions.

(c) When the proposed action involves the filing of an inventory and appraisement, the advice of proposed action shall include a copy of the inventory and appraisement proposed to be filed.

(d) No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not the executor or administrator has complied with the provisions of this section.

605. Procedure for Appraisal by Executor, Probate Referee

(a) The appraisement shall be made by the executor or administrator and probate referee as follows:

(1) The executor or administrator shall appraise at fair market value moneys, currency, cash items, bank accounts and amounts on deposit with any financial institution, checks and other cash equivalents, securities listed on an established stock or bond exchange in the United States, and the proceeds of life and accident insurance policies and retirement plans payable upon death in lump sum amounts, excepting therefrom such items whose fair market value is, in the opinion of the executor or administrator, an amount different from the ostensible value or specified amount.

As used in this subdivision, "financial institution" means a bank, trust company, federal savings and loan association, savings institution chartered and supervised as a savings and loan or similar institution under federal or state law, federal credit union or credit union chartered and supervised under state law.

(2) All assets other than those appraised by the executor or administrator pursuant to paragraph (1) shall be appraised by a probate referee appointed by the court or judge, except with respect to the following:

(A) Interspousal transfers, as provided in Section 650.

(B) Estates subject to summary probate proceedings pursuant to Section 630.

(C) Such cases in which the court has granted the request of the executor or administrator that a probate referee may be waived.

(3) If an executor or administrator seeks a waiver of the appointment of a probate referee and such has not been requested in his petition for appointment, an executor or administrator seeking such waiver shall petition the court for such waiver by separate petition. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200, and at least 10 days before the date set for the hearing of such petition by the court, the petitioner shall cause notice of the hearing thereof to be mailed to all legatees and devisees and to all known heirs of the decedent, and to all persons who have requested notice as provided in Sections 1202 and 1202.5. The notice of the hearing of the petition for such waiver, whether included in the petition for appointment or in a separate petition, shall specify that such waiver is being requested. Any person interested in the estate may appear and object to the granting of the requested waiver by filing a written statement setting forth his objections. Unless the court shall determine that the objecting party has shown good cause why such waiver should not be granted, the court shall grant such waiver.

(b) The executor or administrator shall furnish to the probate referee such information concerning the assets appraised by or to be appraised by the probate referee as the probate referee shall require.

(c) The executor or administrator or his attorney shall not be entitled to receive compensation for extraordinary services by reason of appraising any asset pursuant to this section.

608.5 Objections to Appraisement

(a) Except as to an inventory and appraisement filed pursuant to Section 591.3(b)(12), at any time prior to the entry of the decree of final distribution of the estate, any interested person may file with the court a written objection to the appraisement by the executor, administrator, or probate referee.

(b) The clerk shall fix a time, not less than 10 days after the filing, for a hearing on the objection.

(c) The person objecting shall give notice of the hearing, together with a copy of the objection, to the persons and in the manner provided in Section 1200.5. If the appraisement was made by the probate referee, the person objecting shall also mail a copy of the objection and of the notice to the probate referee at least 10 days before the time set for hearing.

(d) The person objecting to the appraisement has the burden of proof.

(e) Upon completion of the hearing, the court may make any orders it deems appropriate.

Superior Court of California

San Francisco



RAYMOND J. ARATA, JR., JUDGE

June 25, 1985

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca. 94303

Dear Commission Members:

A letter writer I am not -- but, here is another letter to your group!

Yesterday afternoon, by telephone, I was advised you were to consider at a hearing this week, the elimination of the state Referee position.

Whatever the motive or reason for such consideration, it is important for the commission to realize the importance of such a position within our court system. As I have pointed out to you before, the integrity of the system and the public's reliance on it should be of paramount importance to the commission.

The court must have the tools to do the job required and expected of it in running a proper probate court. Independent appraisers, not hired by the parties, allow the court to present a straight forward system to the public and particular beneficiaries who have placed their trust in it. The court has likewise placed its trust on the referee, to isolate itself from the advocacy inherent in a system whereby each side or faction would present its own "hired" appraisal.

In short, the State of California, known for its progressive leadership, would be taking a step into the past were we to eliminate the referee system.

Thank you for your consideration.

Very truly yours,

RAYMOND J. ARATA, JR.

RJA:rjm

cc: Ed Brennan, Probate Referee

Exhibit 8

LOS ANGELES COUNTY BAR ASSOCIATION
PROBATE AND TRUST LAW SECTIONPROBATE REFEREE SYSTEMQUESTIONNAIRE RESULTS

<u>Statement</u>	<u>Response</u>	<u>%</u>
<u>REFEREE</u>		
Retain present Probate Referee System without change	53	26
Retain present Probate Referee System with changes	122	56
Transfer of Certain items from Attachment 2 (referee appraisal) to Attachment 1 (self appraisal) i.e., publicly traded securities	98	48
Permit representatives to select the referee in place of present system of Court appointment	55	27
Allow use of referee to be optional	58	28
Abolish use of Probate Referees and permit appraisal by representative	26	13

ATTORNEYS' FEES

Retain present system without modification	72	35
Retain present system with some modification, i.e., increase statutory fee schedule for smaller estates and decrease it for very large estates	96	47
Change to reasonable fees subject to Court approval (as in Community Property Petitions under Section 650)	15	7
Change to reasonable fees per agreement with representatives, without Court supervision (as in distributions under a living trust).	26	13

TOTAL NUMBER OF RESPONSES: 205

TOTAL NUMBER OF QUESTIONNAIRES SENT: 970

W.D. Snook & Co.

Real Estate Evaluation Services

June 15, 1985

Klaas Bos, President
California Appraiser's Council
80 So. Lake Ave, Suite 708
Pasadena, Ca. 91101

Re: Probate Referee System
California Law Revision Commission

Dear Klaas;

Attached is a letter we received from Nathaniel Sterling, Assistant Executive Secretary of the California Law Revision Commission.

The subject of the letter appears to be a matter for consideration of the Council.

This matter was discussed with the members of the Board of the Sacramento Chapter, ASA. Our conclusion is that we are not well enough informed as to the Probate Referee System to feel capable of meaningful contribution to the hearing. Our reactions to the issues mentioned in the letter are:

- We feel that some disinterested party should be responsible for selection of a Probate Referee and that the use of a Probate Referee should be mandatory.
- Self appraisal of assets carries obvious risk.
- Selection of appraisers should be on a capability basis in respect to the asset/s involved.
- Appraisals are (or ought to be) prepared for a specific 'purpose'. The 'function' of the appraisal (used to settle an estate, secure a loan, etc.) is a separate matter.
- Appraisal fees should not be based in any fashion on the value of the asset appraised. Effort, skill, quality of product and market forces of competition are considered (by us) to be the proper factors in a Fee determination.

If you need a representative to attend a meeting and report the proceedings to the Council we will be pleased to do so at your request.

Regards,



W. David Snook, ASA
NP-North

cc: A. Doyle Reed, Secretary
California Appraisers Council

✓ CC: Mr. Nathaniel Sterling
Calif. Law Revision
Committee