

#L-655

0010b

6/20/85

Third Supplement to Memorandum 85-60

Subject: Study L-655 - Probate Referee System (Staff recommendations)

The matter of the probate referees is of substantial interest to the Legislature, and several policy committees as well as individual legislators will be looking to the Commission for a thoughtful and reasoned recommendation relating to probate referees. This is a matter the staff believes the Commission must deal with very carefully.

The staff's main recommendation to the Commission at this time is to absorb the information that has been assembled for the Commission relating to probate referees, but not to make any immediate decisions. A critical factor will be the extent to which appraisals will be required under the new code. This factor will not be clear until we have completed our basic work reviewing the substantive provisions of the code. For example, we have not yet begun to review the question of fees and commissions of attorneys and executors. Whether the Commission recommends continuation of the current system of fees and commissions based on the value of the estate or based on reasonable charges for services performed will substantially influence the decision whether a general appraisal of the entire estate is needed in most cases, and by whom.

It will not impede the drafting of the new code at all to defer decision on this point. The probate referee provisions are sufficiently distinct from the remainder of the code that the remainder can proceed and the probate referee provisions can be inserted in the future if appropriate.

If the Commission nonetheless wishes to make a preliminary decision now, the staff has a specific recommendation for treatment of the probate referee system. The staff recommendation is based not on any economic interest in this matter but on a careful consideration of all the information we have been able to gather and upon a weighing of

the various interests involved and the objective to create a simple, efficient, probate system with adequate protections for interested parties.

The existing probate referee system, it seems clear from the material we have received, is an inexpensive means of obtaining an appraisal in an estate, as to some types of property. Many attorneys like the convenience of the probate referee appraisal, believe it is a sound system, and would like to see it continued as is. See letters attached to earlier memoranda and the recently-received letters attached to this supplementary memorandum as Exhibits.

However, there are many estates where appraisal by the probate referee serves no useful purpose. Its effect is simply to add another cost and another complication to probate that is unnecessary. In simple estates where there are no disputes among the interested parties the appraisal requirement is meaningless. The estate is administered expeditiously and the property is distributed with essentially no need for an appraisal. Or, there may be a need for an appraisal, but only for limited property or limited purposes. A general appraisal of all the estate assets as of the date of death may be pointless.

It seems clear to the staff, then, that the probate referee appraisal serves a useful purpose in many estates but does not do so in many other estates. This may help to explain the division of opinion of the practicing bar about the utility of the probate referee appraisal as evidenced by the State Bar practitioner's survey. The obvious solution is to retain probate referee appraisal for those instances where it would be useful but to eliminate the appraisal where it would not.

But how? Existing law provides that appraisal by the probate referee may be waived by the court for good cause. Prob. Code § 605. This has the disadvantage of requiring a court appearance and hearing, adding yet another instance of judicial involvement and expense in an area where there is a perceived need for simplification.

An obvious alternative is to permit the personal representative to determine when a probate referee will be used and when not. This alternative is obvious because it is the system of appraisal that most

states use (although most do not have a public official available, but the personal representative may select a private appraiser, if needed). One problem the staff can see with this system is that there may be disagreements between the personal representative and other interested parties, or between interested parties (with the personal representative essentially neutral). Perhaps the greatest service that could be performed by the probate referee would be to be available in this situation as a neutral appraiser not subject to the control of any interested party.

This point was also made by one of the attorneys who wrote to us confidentially in opposition to the current probate referee system:

There may be instances when heirs or beneficiaries will have disputes over valuation of assets with the executor, or among themselves. This is not dissimilar to contests over accountings. The Probate Code has long provided a solution for such disputes, and this can be found in §927. The court can make a reference to one or more suitable parties. If this is expanded for inventories and appraisements, the personal representative would file a report, and would provide all interested parties with a copy thereof. (cf. §605 (a)(3) for such procedure.) If there is an objection, then the court could make an appropriate reference, perhaps to someone who formerly was a probate referee, or perhaps to a qualified person such as a C.P.A. if the issues involved valuation of a closely held business.

The staff recommendation to the Commission is to defer judgment at this point. If the Commission decides to go ahead with a preliminary determination, the staff recommends that the probate referee system be kept available for use in probate proceedings, but that use of the probate referee be required only where the personal representative so selects or upon request of any interested party. The request could be made at any time during the proceedings, and could be made with respect to any or all estate assets.

This proposal has a number of obvious virtues. It retains the system for those personal representatives and lawyers who find the system useful. Obviously, there are a great many of these, who would

continue to use the probate referee regularly, as they do now, because of its convenience and relative cheapness. But it does not impose the system on any estate where it is not desired.

Concern has been expressed that if the probate referee appraisal is not mandatory in all estates, fraud and self-dealing will result. The staff proposal avoids this problem by providing for the probate referee appraisal upon demand of any interested party. Concern has also been expressed that if the probate referee appraisal is not mandatory for all estates, it will not be cost-effective. This does not appear to be a compelling argument to the staff: In essence it asks many estates in which the probate referee appraisal is neither needed nor desired--often smaller estates--to subsidize other estates as well as the probate referee. Those estates where probate referee appraisal is inappropriate should not be required to pay only for the purpose of enabling the probate referee to offer bulk rates to others.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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TELEPHONE

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June 18, 1985

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

Re: Role of Probate Referee

Dear Members of the Commission:

I am an attorney practicing in San Jose and specialize in estate planning and probate administration.

I am aware that your presently reviewing the role of the Probate Referee in California probate and non-probate administration matters.

I wish to take this opportunity to state that in my experience that Probate Referees provide a very valuable and useful role to my clients and I continue to believe that in most probate administrations the mandatory role of the Probate Referee should be retained.

My experience is that the Probate Referee's appraisals are necessary (1) to determine statutory probate fees and (2) to provide an inexpensive and objective appraisal of assets in the estate for purposes of prorata distribution, bond, sale, death tax and income tax records. I believe these advantages outweigh the modest expense involved in obtaining the Probate Referee's written appraisals. In my view, in most cases, if the probate appraisals were not used, other alternatives would be less objective, less efficient, haphazard, and/or more expensive.

I appreciate that in a minority of cases the beneficiaries and fiduciary of the estate may rightly believe that no appraisal is necessary. In these cases we already have a procedure for asking the court to waive the requirement of a Probate Referee's appraisal. (To date, I have used such a waiver only in cases where a surviving spouse is the only beneficiary, is also the fiduciary, and where I have waived statutory attorney fees because the decedent's were relatives.

I believe changing the present system radically by eliminating the requirement of the referee's appraisal from all or most probates would (1) introduce widespread abuse problems and (2) threaten existence of the referee system because the economics would not be present to justify most referees staying in practice.

I wish to go on record as being a strong supporter of the present system for the reasons stated above. I know you will be weighing all the pros and cons of the present system in your review.

Sincerely,



Marsden S. Blois

MSB/lt

cc: Ed Brennan
Probate Referee
8060 La Jolla Shores
La Jolla, CA 92037

EXHIBIT 2

PAUL M. HAMERLY
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PETER T. HOSS
JAMES D. SCHWEFEL, JR.
MARTIN J. MAY
STEPHEN W. PEARSON
LLOYD W. LOWREY, JR.
ANNE SECKER
PAULA ROBINSON
MARK J. DREVER
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PETER G. ROSE

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OUR FILE No. _____

June 18, 1985

HARRY L. NOLAND
OF COUNSEL

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

In Re: Probate Referee System

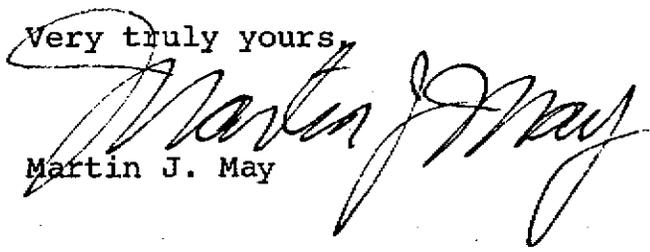
Gentlemen:

It is my understanding that your Commission will be studying the subject of the California Probate Referee System in the near future and I am writing this letter to indicate my support for the system.

I have been in practice for almost 20 years and have worked with the Referees almost on a weekly basis during that time.

It is my opinion that the California Probate Referee System provides a cost-effective method for estates to obtain appraisals of assets, particularly those that are difficult to value, namely real property and closely-held stock. Even in those instances where there is no Federal Estate Tax, the appraisals are important because they normally establish the income tax basis of the assets in the estate for Federal Income Tax purposes.

In conclusion, I would urge your Commission to make a finding that the present California Probate Referee System be maintained in its present form.

Very truly yours,

Martin J. May

MJM/mb

EXHIBIT 3

Superior Court

STATE OF CALIFORNIA
COUNTY OF LAKE
COURTHOUSE
LAKEPORT, CALIFORNIA 95453

June 19, 1985

(707) 263-2231

JOHN J. GOLDEN
SUPERIOR COURT JUDGE

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

Dear Ms. Stodden and Gentlemen:

This letter is prompted by the suggestion of Mr. F. D. Grothe, the probate referee for Lake County, that I convey to you my views concerning the retention of the office of probate referee.

With the abolition of the California Inheritance Tax, the significance of the office of probate referee in the fixing of death taxes is substantially minimized. Nevertheless, the office remains one of substantial importance in relation to a number of court-related functions.

The determinations which the referee currently makes with respect to the appraisal of property interests of a decedent are useful to a judge in fixing compensation of attorneys and personal representatives, in deciding whether to allow preliminary distributions and partial allowances on account of compensation of attorneys and personal representatives, in deciding whether to allow requests for extra-ordinary compensation for the services of attorneys and personal representatives, in determining whether to approve sales of estate property, and in concluding whether estates are subject to summary administration.

Beyond that, the determination made by a probate referee of the appraised value of a decedent's property interests is very useful to the attorney assisting in concluding a decedent's affairs and to the parties who

California Law Revision Commission

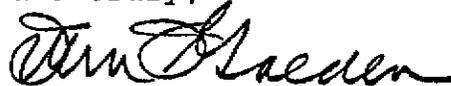
June 19, 1985

succeed to the decedent's property because that determination affords them an evidentiary basis upon which to make representations to federal taxing authorities in connection with estate tax and income tax consequences flowing from the devolution of property upon the decedent's death. The probate referee is generally perceived as a disinterested and objective government official whose opinion concerning the value of property is given great weight in the ascertainment of estate tax and also the ascertainment of a basis for property upon its subsequent disposition by the party to whom it passed following the decedent's death.

Because of this perception that the probate referee is a disinterested and objective official, I find that our local referee is used in a number of court-related functions, both by court appointment and by stipulation of parties. He is frequently used as a referee for the purpose of conducting a sale of marital property in a marital dissolution proceeding, for collecting, managing and selling property in debtor - creditor proceedings, and as an expert value witness in a wide variety of litigation cases.

For the foregoing reasons I conclude that the office of probate referee is one that has significant value to the court and is one which should be continued.

Yours truly,



John J. Golden
Judge of the Superior Court

JJG/eb

KENNETH CORY
CONTROLLER
STATE OF CALIFORNIA

EXHIBIT 4
RICHARD W. HENSON
STATE PROBATE REFEREE
909 LAUREL STREET
SAN CARLOS, CALIFORNIA 94070



415/591-7352

June 19, 1985

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

Re: Probate System

Dear Sirs:

Enclosed please find copies of two (2) letters thanking me for services rendered as a probate referee. The letters are but two of many received over the years, but as we do not keep the thank you letters in a separate file, it is hard to remember the names of the files where the attorneys and/or the executors made an effort to forward their appreciation.

In the hope that this may be a small help in your consideration of the probate system I remain,

Very truly yours,

Richard W. Henson

RWH/lp
Encl.

April 24, 1985

Richard W. Henson
State Probate Referee
909 Laurel Street
San Carlos, CA 94070

Re: Estate of KATHERINE OPPENHEIMER

Dear Mr. Henson:

Enclosed please find a check in the amount of \$75.00 as payment for services rendered in the above-entitled estate.

We appreciated your prompt response in completing the Inventory and Appraisement.

Thank you very much for your services.

Sincerely,

[Handwritten signature]

June 18, 1985

Richard W. Henson
State Probate Referee
909 Laurel Street
San Carlos, California 94070

Re: Estate of Roy Ghilardi

Dear Mr. Henson:

Enclosed herein please find a check
made payable to you in the amount of \$162.90 as
and for the appraisal in the above captioned matter.

Thank you for all your help.

Very truly yours,
W. C. ...

HOLMES AND SEVELY

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CALIFORNIA BOARD OF LEGAL SPECIALIZATION

June 19, 1985

VINCENT C. SEVELY

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

Re: Probate Referee System

Gentlemen:

It is my understanding that your Commission is studying the Probate Referee System as it presently exists in California.

I have been practicing law for approximately thirty years and a substantial portion of my practice has always been in the field of probate.

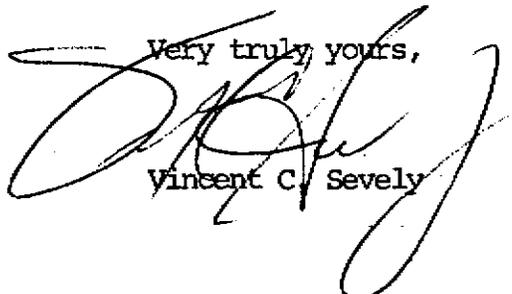
I assume, by now, that you have heard the litany of pros and cons of the system as it presently stands, but as a practitioner in the field, the Probate Referee System in my judgment, is fair, inexpensive, and is working well.

Having the Court appoint a disinterested third party to appraise the non-cash assets in any estate, achieves important functions. The valuations obtained are more likely to be accepted by the State and Federal taxing authorities for basis purposes rather than self-appraisals, or having the estate hire independent appraisers.

The system also eliminates any conflict of interest questions for attorneys dealing with clients, since their fees are dependent upon appraised values.

I would respectfully request that you do not alter or materially change the present system.

Very truly yours,



Vincent C. Sevely

VCS:eh

EXHIBIT 6

LAW OFFICE

ATKINSON & ATKINSON

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GEORGE E. ATKINSON, JR.
GEORGE E. ATKINSON, III

June 18, 1985.

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303.

Dear Commissioners:

I have been advised that the subject of eliminating the Probate Referees will possibly be before your Commission at the session of June 27, 1985, or thereafter, and since I am an attorney heavily involved in the handling of probate matters I would like to advise you that in my opinion the Probate Referees are doing a very necessary and worthwhile job and they should not under any circumstances be eliminated.

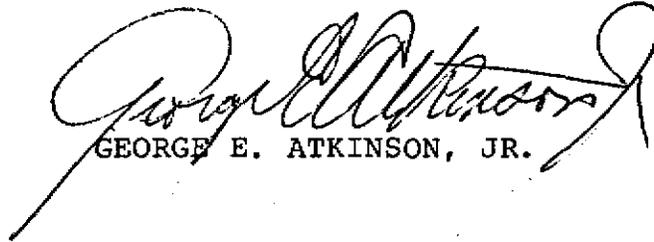
In many cases it is imperative to have a qualified appraisal and if the estates are forced to go out into the market and hire qualified appraisers other than Referees, the cost to the estates will be unreasonable. Those of you who have had experience in hiring qualified independent appraisers know that the costs run exceedingly high and for a simple piece of property it is seldom less than \$1,000.00 and for substantial property or complicated or valuable property it is not uncommon to have an appraiser's fee of \$5,000.00 or \$10,000.00 or even higher. In addition, it is very difficult to secure qualified appraisers who will act promptly, which of course is necessary in handling probate procedures.

In my opinion, the California Probate Referees' fee of 1/10th of 1% is extremely fair and reasonable and since they act promptly and are truly experienced in this field it is my opinion that the services they

California Law Review Commission
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render will not be replaced and they should not be eliminated for their services materially contribute to the orderly processing of the estates at a reasonable price. Therefore, I earnestly request that in considering this matter you keep in mind the three substantial benefits which they provide to the public involved in probate proceedings, namely, 1) prompt and efficient service, 2) qualified and experienced services and 3) the services are performed at a reasonable fee.

Very truly yours,



GEORGE E. ATKINSON, JR.

GEA:aj.

EXHIBIT 7

WARREN H. ECKERT

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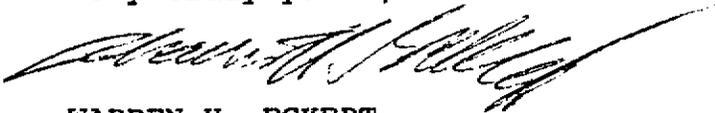
Dear Sirs:

I understand that the Commission is meeting shortly to determine what, if anything, should be recommended about the status of the California Probate Referees.

My practice is entirely in this field. I believe that we obtain the best service at the most modest possible cost under the present system. The referees have an official status and are subject to supervision.

I cannot conceive of any other system, especially appraisal by the representative, which would be nearly so satisfactory. I urge the Commission to make no change in the present status of the probate referees.

Very truly yours,



WARREN H. ECKERT
WHE/mp

EXHIBIT 8

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425 SHERMAN AVENUE, SUITE 100

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June 19, 1985

Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303

Gentlemen:

This letter is sent to you regarding proposals which you are considering affecting the probate referee system.

I am certain that your goal is to save the public fees and to simplify the system.

However when one gets involved in the appraisal of real and personal property as the result of a death, both federal and state tax authorities become involved. It would therefore seem that an independent and disinterested party should be the one doing the appraisal if it is going to have any meaning. The fees charged by the probate referees are very reasonable for the services rendered.

The court-appointed probate referee not only helps the heirs in establishing values of their property for tax purposes, but assists the courts and the attorneys in the orderly administration of estates.

It is for these basic reasons that I urge that you retain the present probate referee system in its present form.

Very truly yours,



Lino M. Guslani

LMG/mt

EXHIBIT 9

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HARRY O'BRIEN

June 20, 1985

California Law Revision Committee
4000 Middlefield Road
Palo Alto, California 94303

Dear Sir/Madam:

It has been brought to my attention that you are currently reviewing the Probate Code with the thought of changing the present practice in this area of law.

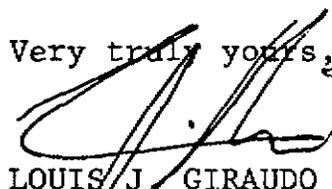
Our firm has for many years worked in the area of estate planning and probate. I believe that in this area that California has been a leader and no scandal has been reported, to the best of my knowledge, as result of the Probate system as it is currently practiced here. The same cannot be said for much of the rest of the United States.

One of the best features is the use of referees who are independent and work for the courts in determining the values of now cash assets in each and every estate. This system has saved the heirs considerable sums of money over the cost of outside appraisals and allows us to use these figures when dealing with the Federal Estate Tax auditors.

Throughout the years I have found that the referees are, on the whole, a courteous and efficient group that attorneys can rely upon to get the appraisals done in an expedient manner so that we are able to serve the public and the court in a quick and efficient manner.

Please do not change the present system that is now in place so that the people of the State of California will continue to receive this very fine service that is both efficient and inexpensive.

Very truly yours,


LOUIS J. GIRAUDO

LJG/jm