

11/20/86

Fourth Supplement to Memorandum 86-84

Subject: Study L-655 - Inventory and Appraisal (More Comments on Draft
of Tentative Recommendation)

Attached to this supplement are letters from the San Diego County Bar Association Subcommittee for Probate, Trust & Estate Planning Legislation (Exhibit 1) and from State Bar Study Team No. 1 (Exhibit 2), commenting on the draft tentative recommendation relating to inventory and appraisal.

The San Diego County Bar letter raises some basic issues concerning the probate referee's functions. The Bar Team letter is intended to assist in the technical review of the draft; it has been reviewed by the Executive Committee and is the position of the State Bar Estate Planning, Trust and Probate Law Section.

At the meeting we will orally review the issues raised in the letters in connection with the portions of the draft statute that they deal with.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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November 17, 1986

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Mr. John DeMouilly
California Law Revision Commission
4000 Middle Field Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Memorandum 86-84--Inventory & Appraisal

Dear Mr. DeMouilly:

The San Diego County Bar Association Subcommittee for Probate, Trust & Estate Planning Legislation considered the tentative recommendation for Inventory & Appraisal under Memorandum 86-84 and believe under Section 8901 the assets that a personal representative may appraise should include all cash accounts with brokers as well as public traded stocks and bonds. The Subcommittee disagrees with your tentative recommendation regarding assets appraised by the referee when the Commission concludes that the "Appraisals of even publicly traded and listed stocks by inexperienced persons are frequently inaccurate." There is no doubt that if an individual has no guidance and has no idea how to value publicly traded stocks according to the normal rules, inaccurate appraisals will result. However, many fiduciaries are quite experienced and will in almost all events have attorneys who are familiar with the proper procedure. Therefore, to make each such personal representative go through the procedure of obtaining a waiver for good cause, appears to be a needless expense and a waste of time.

Our Subcommittee also wishes the Commission would consider the use of voluntary appointments of probate referees instead of the present procedure requiring mandatory probate referees. Our Subcommittee sees no reason why an experience personal representative such as a CPA, Attorney or Corporate Fiduciary is not fully capable of handling a complete appraisal and it would certainly be possible to have provisions allowing any beneficiary to request the probate referee be appointed. There is no problem with retaining the probate referee's structure, but allowing a voluntary appraisal will alleviate many needless appraisals when either the beneficiaries have no desire to have a formal appraisal or in such other summary probate type procedures where even the minimum charge does not justify being forced to go through the appraisal process. In those situations where an appraisal would be beneficial or desired by any interested person, the appraisal procedure would be most important as it is presently.

Very truly yours,

Daniel B. Crabtree

Daniel B. Crabtree

**ESTATE PLANNING, TRUST AND
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R E P O R T

TO: JAMES V. QUILLINAN
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THE EXECUTIVE COMMITTEE IN GENERAL

FROM: STERLING L. ROSS, JR., ASSIGNED TEAM MEMBER,
STUDY TEAM NO. 1

DATE: NOVEMBER 6, 1986

SUBJECT: TECHNICAL COMMENTS ON LRC Memorandum 86-8^H
(Inventory and Appraisal - Draft of Tentative
Recommendation)

1. §403 Term of Office of Probate Referee

Change: The Comment should be modified as follows:

§403 continues the second, third, and sixth sentences of the second paragraph of former Probate Code ~~clarification~~ addition that a probate referee's eligibility for reappointment lasts until five years after expiration of the referee's term of office.

Reason: The statutory change that a probate referee's eligibility for reappointment lasts until five years after expiration of the referee's term of office is an addition, rather than a clarification, since existing law (§1305) contains no time limit for the appointment of referees once appointed.

2. §452 Examination, Testimony, and Production of Documents

Change: The text of §452 should be amended as follows: The probate referee may examine and take testimony under oath of a person appearing before the referee, or require, and issue a subpoena to compel, the person to produce any document in the person's possession or control, concerning the value of property in the estate.

Reason: The referee must have the power to issue a subpoena to compel production of documents.

3. §453 Protective Orders and Enforcement

Change: An additional subparagraph should be added to §453 clarifying that the procedure applicable to the motions referred to in subparagraphs (a) and (b) is the same as set forth in CCP §§1005 to 1020, inclusive.

4. §8800 Inventory and Appraisal Required

Change: The second paragraph to the Comment should be deleted.

Reason: The reference that the inventory and appraisal procedure provided in this part "may be incorporated in other proceedings" is ambiguous and unnecessary. The examples given in the second sentence of the second paragraph are not helpful since they do not illustrate instances where the inventory and appraisal procedure of §8800 is incorporated in other proceedings.

5. §8801 Supplemental Inventory and Appraisal

Change: The reference in the Comment to §8803 should be 8805.

Reason: Typographical error.

6. §8803 Notice of Filing of Inventory and Appraisal

Change: The reference in the statute to "Section [1200.5]" should be "Section [1202.5]."

Reason: Typographical error.

7. §8804 Objection to Inventory and Appraisal

Change: All references in subparagraphs (a) (d) and (e) to "the inventory" should be deleted.

Reason: Existing law (§608.5) establishes a procedure in which any interested person may file with the court a written objection to the appraisal submitted by the executor, administrator of probate referee. §8804 expands the procedure to apply to the inventory as well as the appraisal. It is unclear, however, on what basis one may object to the "inventory." May an interested party object that certain property has been included in the inventory which ought not to be subject to probate administration because it was held in joint tenancy or a living trust? If so, this procedure would duplicate the provisions of existing §851.5 regarding claims to property adverse to the estate.

8. §8805 Failure to Timely File Inventory and Appraisal

Change: (1) The following underlined portion of the first sentence of the Comment should be clarified since it just doesn't make sense.

§8805 restates former Probate Code §610 and a portion of former Probate Code §611, codifying the case law rule that failure to timely file the appraisal is included within the statute.

(2) The last paragraph of the Comment provides, in pertinent part, as follows:

Under subdivision (c) liability for injury arising from the failure of the personal representative to timely file the inventory and appraisal includes attorney's fees incurred in proceedings to compel the filing.

There is no reference in subdivision (c) that authorizes attorney's fees incurred in proceedings to compel the filing of the inventory. If the author of the comment is aware

of support for this proposition, the authorities should be set forth in the Comment.

Reason: Clarify.

9. §8851 Discharge or Devise of Claims

Change: The Comment should be modified to indicate that the reference to the discharge of any "debt" of the testator against the executor under former Probate Code §603 has been deleted.

Reason: The Comment states that §8851 restates former Probate Code §603 without substantive change. It appears, however, that the deletion of the term "debt" and substitution of the term "claim" is a substantive change to the former statute.

10. §8901 Appraisal by Personal Representative

Change: The reference to "subdivision (4)" in the last sentence of the third paragraph of the Comment should be changed to "subdivision (d)."

Reason: Typographical error.

11. §8920 Designation by Court

Change: The word "designated" in the fourth line of the statute should be changed to "designate."

Reason: Typographical error.

12. §8924 Removal of Probate Referee

Change: The statute should be amended to provide that the removal of the referee by the personal representative without cause, referred to in subparagraph (a) (2), may be exercised by declaration without the necessity of a petition or hearing.

Reason: Requiring a petition and hearing would create unnecessary time delays and administrative expense to the estate.

13. §8941 Report of Status of Appraisal

Change: This section provides that the status report filed by the referee showing the reason why the property has not been appraised in the prescribed time may be heard by the court

on its own motion or on motion of the personal representative or probate referee. Upon the hearing, the court may order that the appraisal be completed within a time that appears reasonable, that the probate referee be removed, that the commission of the probate referee be reduced, or that the personal representative be removed.

This section should be modified to require the issuance of a citation to the referee or personal representative prior to any proceedings which may result in removal or reduction of commissions.

Reason: The citation procedure is commonly accepted as the proper method to accomplish removal of a personal representative. The probate referee should also be accorded the protections that the citation procedure provides. Further, it may be jurisdictional as to the court's authority to enforce its order.

14. §8942 Failure to Make Appraisal or Report

Change: Subsection (b) should be amended to read as follows:

(b) Upon the hearing of the citation, motion or petition, the court may order either of the following:

Reason: It would be improper to hear the "citation," rather, it would hear the motion or petition.

15. §8962 Maximum and Minimum Commissions

Change: Subsection (b) of the statute should be amended to clarify the nature of the notice required to be given to the personal representative.

Reason: Under CCP §1003 the term "application" is denominated a "motion." If the statute intends that the form of notice and application should accord with motion procedures under CCP §§1005 to 1020, inclusive, then such reference should be made in the statute. If not, then a further description of the contents and time requirements of such notice is necessary.