

Second Supplement to Memorandum 75-60

Subject: Study 23 - Partition of Real and Personal Property

Attached to this memorandum is a letter from Professor Lyden of California State University, Northridge, commenting on the partition recommendation. The comments are discussed below.

§ 873.010. Court authority concerning referee

Professor Lyden believes that the court's authority with regard to the powers, duties, and so on, of the referee should be made mandatory. Professor Lyden points out that it would be more efficient if the court were required to establish rules and procedures at the outset.

There are several problems with this suggestion. It would require the court on its own motion to make rulings on matters which may not be in controversy. It increases the possibility of reversible error should the court neglect to perform a mandated function. And instruction of the referee is really only necessary in those peculiar situations where the general rules governing the referee's proceedings are inadequate in the circumstances of the case.

The staff recommends that the court's authority concerning the referee remain permissive.

§ 873.910. Agreement of parties to partition by appraisal

Professor Lyden questions the need for an appraisal procedure where the parties have agreed; he sees greater need for such a procedure where the parties are unable to agree.

The need for a court procedure where the parties are able to agree is that they are unable to agree as to the value of the interests. Alternative methods of obtaining an appraisal are available--such as arbitration--but they do not

provide the same degree of protection for the interests of the parties. In arbitration, for example, there is no right to court review of the findings of the appraiser.

To require an appraisal where the parties have not agreed to it, however, the staff believes is unwise. It will unnecessarily increase costs in nearly every partition case; and it would be unfair to expose the interest of a party to sale, without his consent, at an arbitrary price arrived at by an appraiser.

§ 873.930. Court approval of agreement

Professor Lyden notes a technical defect in the statute: Section 873.930 provides for court approval of the agreement to partition by appraisal, but fails to provide a mechanism for obtaining the approval. The staff suggests the following amendment to Section 873.930:

873.930. (a) Any party to the agreement may, upon noticed motion, apply to the court for approval of the agreement.

(b) If the court determines that the agreement complies with Section 873.920 and that the terms and conditions are equitable, it shall approve the agreement and stay any pending division or sale of the property.

§ 873.940. Appointment of referee; referee's report

Professor Lyden questions the need for appointment of a referee and suggests that appointment of an appraiser is sufficient. However, he overlooks the fact that the agreement may contemplate referee's duties other than mere appraisal. See Section 873.920(f)(agreement may contain other terms including terms of credit, title and objections to title, deposits, and the like).

Professor Lyden also indicates that the contents of the referee's report require clarification. The staff agrees and suggests the provision be amended to read:

873.940. The court shall appoint one referee or, if provided in the agreement, three referees to appraise the property and the interests involved. The referee shall report his findings and valuations the valuations and other findings to the court ~~by report~~ in writing filed with the clerk.

Operative Date

A matter that is not raised in Professor Lyden's letter but that the staff believes should be raised at this time is the operative date of the statute. As drafted, the statute bears an operative date of January 1, 1977; this was intended as a deferred operative date, but because we will not be pushing the bill until 1976, this deferral feature will be lost.

The staff suggests the operative date be made July 1, 1977; this will provide a deferred date of six months--a whole year seems unduly long. The staff further suggests, however, that an action for partition by the owner or holder of a lien on a parity with that on which the owner's title is based should be required to be commenced prior to January 1, 1977. This will put such persons on notice that their existing rights are affected and will permit them several months between the time the bill is enacted and the time it takes effect to get their action filed.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

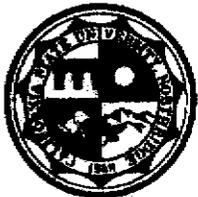


EXHIBIT I
CALIFORNIA STATE UNIVERSITY, NORTHRIDGE
Northridge, California 91324

School of Business Administration and Economics

Department of Business Law
885-2400

September 18, 1975

Mr. Marc Sandstrom
Chairman, California Law Revision Commission
Stanford Law School
Stanford California 94305

Dear Mr. Sandstrom:

I received a copy of your recommendations on partition procedure dated January 31, 1975. I would like to submit the following comments for your consideration:

1. I believe that section 873.010(b) should be mandatory. It should read, "The court shall" do those things listed under items (1)through(5). Only number (6) should be permissive. I believe that all matters that can be possibly covered, should be covered at the time the referee is appointed. By making items (1)through(5) permissive, the burden is being placed on the litigants or the referee to petition the court for relief when their interests are involved. This could result in several court hearings requiring appearances by all parties. Would it not be more efficient for the court to be required to establish the rules and procedures for the litigant and referee at the outset?
2. Chapter seven raises more questions in my mind than answers. The intent is laudable and there is a potential savings of time and expense for co-owners who can agree on an appraisal and sale.
 - a. It seems that an obvious question is raised. If two parties can agree, then why go to court? What is the necessity for filing the agreement and getting court approval? It seems to me the greater need is when the parties cannot agree. In these cases I would urge the court to get the property appraised and give each co-owner the opportunity to buy the interest of the other at the appraised value. If neither side chooses to do so, then the court could order a partition or sale.
 - b. Assuming the need to go to court, shouldn't the first step be to file a petition with notice and hearing to approve the agreement of the parties? I am unclear as to how one merely files the agreement as stated in section 873.920. How does one get the court to approve the agreement under 873.930?

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- c. In any event, I question the need for a referee to be appointed in view of the duties contemplated in Chapter 7. It would seem that an appraiser would be the more appropriate individual.

Section 873.920 (e) requires an appraisal. What other duties will a referee perform? He will not divide or sell the property in the manner described in prior chapters and no accounting is involved. Unless I have overlooked something in Chapter 7, I see no need for a referee.

If a referee is appointed he will, in turn, petition the court for permission to appoint an appraiser. Clearly, this requires another court appearance and an order with rulings on procedure. This seems an unnecessary expense. Why not appoint an appraiser in the first place?

If the referee is, himself, a qualified appraiser, then why call him a referee? It is not clear from section 873.940 what his report will include. I assume it will merely state the appraised value of the property and the liens outstanding. This should be clarified.

Again, I may be overlooking something in Chapter 7 regarding the duties of the referee.

I would appreciate your consideration of the above. If you wish to reply, I would appreciate your thoughts.

Very truly yours,


Donald P. Lyden
Professor of Business Law

DPL:df