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#L-655

First Supplement to Memorandum 86-18

Subject: Study L-655 - Estates and Trusts Code (Probate Referees--
waiver of probate referee)

Attached to this supplementary memorandum is a letter from the California Probate Referees Association urging the Commission to recommend to the Legislature that the provisions of existing law for waiver of a probate referee be deleted and that a provision be added granting the probate referee immunity from professional liability. The Association takes the position that these two steps are important in order to maintain the present low cost probate referee appraisal system. Their rationale is set out in the letter.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

California Probate Referees Association

February 3, 1986

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California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-7439

Attention: Nat Sterling

Dear Nat:

The California Probate Referees Association wishes to urge the Law Revision Commission to delete the waiver provisions currently contained in Probate Code section 605(a)(2)(c).

1. STATUTE

Subsections 605(a)(2) and 605(a)(3) of the Probate Code reads as follows:

(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 631.

(C) Such cases in which the court waives for good cause, the appointment of a probate referee.

(3) If an executor or administrator seeks a waiver of the appointment of a probate referee pursuant to subparagraph (C) of paragraph (2), the executor or administrator, at the time of filing the inventory and appraisal pursuant to

Section 600, shall file an appraisal of the fair market value of all assets of the estate and a statement which sets forth the good cause which justifies the waiver. The clerk shall set a hearing on the waiver not sooner than 15 days after the filing. A copy of the inventory and appraisement, the statement, and notice of the date of the hearing shall be served on and in the same manner as on, all persons who are entitled to notice pursuant to Section 926.

2. LEGISLATIVE HISTORY

An explanation of the legislative history of section 605 is attached hereto as Exhibits "A," "B" and "C".

3. JUSTIFICATION FOR MANDATORY REFEREE APPRAISAL

It is the Association's position that the low cost benefits of the probate referee system are justification for the mandatory utilization of probate referees in every probate proceeding.

First of all, the probate referee is a statutory officer of the court and is an adjunct of the probate judge. Th referee's job is to review the background data and material necessary to provide the judge with an independent review and appraisal of non-cash assets. The probate court has lengthy calendars and must deal with many cases and issues in a limited time period. These issues often require an immediate decision without lengthy testimony and the judge cannot take the time to look into all of the factual background of the values of the assets. The judge relies upon the referee to have reviewed all values, free of conflicts of interest. The judge therefore, can make decisions with confidence that the values are independently determined.

It is also our view that the referee's appraisal fee is a form of assessment, sometimes requiring larger or less complicated estates to subsidize this system so that all estates may benefit from this independent service. Although a statutory officer of the court, the referee is not paid by local or state governments, but by the fees generated by the appraisals. Referees are required to maintain independent

California Law Revision Commission
Attention: Nat Sterling
January 29, 1986
Page Three

offices, pay rent, postage, auto and telephone expenses and paralegal and appraisal assistants. The required probate appraisal system works efficiently on a low-cost, high volume basis because of the mandatory nature of the referees' services.

Moreover, the law allows numerous ways to avoid the probate process for those persons who so desire. Inter vivos trusts, set aside and confirmation proceedings and joint tenancy allow opportunities to avoid probate. As a result, with the recent increases in the availability of these methods, referees have suffered reductions of income which jeopardize the system. Competent referees may soon find that it is not economically feasible to continue to serve the courts in this capacity.

4. JUDICIAL IMMUNITY

As a referee of the superior court, the referee should have the same judicial immunity from professional liability as does the judge. This immunity from professional liability is another factor which keeps the cost of the system low. Since this immunity is not expressly contained in the law, we request the Law Revision Commission to make it part of the Estate and Trust Code.

5. CONCLUSION

In summary, if the present low cost system is to continue, the referee appraisal should be mandatory in all probate cases and the referee should have express judicial immunity from professional liability.

. Thank you for your consideration.

Very truly yours,

Edward V. Brennan

EDWARD V. BRENNAN, for
Ferris, Brennan & Britton
A Professional Corporation

EVB:RLB

LEGISLATIVE HISTORY OF PROBATE CODE §605(a)(2)(C) and (3)

REGARDING WAIVER OF PROBATE REFEREE

I am an attorney duly licensed to practice law in the State of California and I was an advisor to the Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar at the time of the 1982 session of the California Legislature.

As a part of my State Bar and related activities, I was extensively involved in working for the passage of AB 1607 during the 1982 session of the Legislature which was enacted as Chapter 1535, Statutes of 1982. Among other things, this legislation amended Probate Code §605 relating to the appraisement of estate assets. I drafted the amendment to §605 in cooperation with other involved parties. During the consideration of the changes to this section by the California Legislature, I testified before Legislative and Conference Committees on the subject and I was a party, on behalf of the California State Bar, to negotiations with Legislators relating to the intent of the changes, their effect, and their eventual adoption by the Legislature.

It was the intent of the Legislature; as it was my intent and the intent of the State Bar, that the use of a

EXHIBIT "A"

Probate Referee for the appraisalment of non-cash type assets be mandatory in all cases, except for interspousal transfers by Probate Code §650, transfers of assets by declaration under Probate Code §630 and those limited situations where the Court, upon a noticed motion, after a hearing and a showing of good cause, permitted the waiver of the use of a Referee.

This waiver requirement was not inserted into the Bill until it already had cleared Conference Committee in the form of legislation mandating the use of the Probate Referee in all cases except those involving §§630 and 650 and then was rereferred to Committee by the Speaker of the Assembly in order to provide some limited flexibility in those unusual situations where the waiver of an independent appraisalment by the Referee might be warranted. I participated by telephone in drafting the waiver requirements which deliberately were made quite onerous so that a personal representative seeking the waiver of the use of a Probate Referee would have to do so without compensation by noticed motion and present to the Court and all interested persons an Inventory and Appraisalment of all of the assets of the estate and a statement of good cause justifying the waiver. The objective of these requirements was to place the Court, and all interested parties who might desire to object if their interests were adversely affected by the loss of an independent appraisal, in possession of full information as

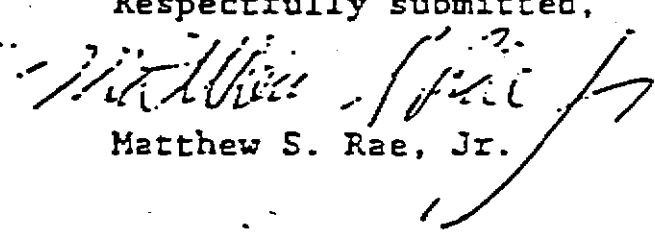
to the extent of the value of the estate as determined by the personal representative and the reasons why the estate should not receive the protection of an independent appraisal. It was contemplated that this limited area for waiver of the use of a probate referee would permit the avoidance of an independent appraisal in an appropriate and unique situation, such as where the non-cash type assets of the estate consisted almost entirely of securities listed upon an established stock or bond exchange or, at the other end of the spectrum, where the non-cash type assets of the estate consisted almost entirely of rare and extremely hard to value assets such as major works of art or antique pieces of jewelry which in any event would require the services of an independent appraiser specifically skilled and qualified in the area of appraisement involved.

Testimony before the Legislature, and particularly before the Conference Committee by myself as representative of the State Bar and by other interested parties, and argument and discussion in the Committee meeting made it clear that the mandatory nature of the bill was essential for the Probate Referee's system with a severely limited statutory fee to be economically viable. It was recognized by the Legislators and other parties participating in the process that the system would not be able to provide adequate compensation to retain persons willing to act as Referees if it were made an entirely voluntary system. The intent of the waiver provision was to require the Court to

consider each request for a waiver on its merits and to grant a waiver only in those unusual cases where the protection of an independent appraisement was provided by other means such as assets concerning the valuation of which there could be little dispute, or assets so difficult to value that a specialist would be required in any event.

It is my opinion that the language used in the statute is so restrictive as to make the intent of the Legislature absolutely certain. For a Court to do other than scrutinize each application for a waiver with the greatest of care and to grant the waiver without giving major consideration to the protection of the estate provided by an independent appraisement would be to contravene the plain language and procedures of the statute.

Respectfully submitted,


Matthew S. Rae, Jr.

DYE, THOMAS & LUEBS

DONALD H. DYE
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April 9, 1985

To whom this may concern:

I am an attorney at law in private practice in Riverside, California and was formerly a member of the California Assembly.

In 1982 I became the principal sponsor of AB 1607 in the Assembly and managed that bill through Conference Committee and through passage by the Assembly and Senate.

The attached legislative history by Matthew S. Rae is most accurate and correctly summarizes the discussions at the Conference Committee and at the informal meetings that were held immediately thereafter regarding AB 1607 and in particular the amendment to Section 605 of the Probate Code.

I believe that I can accurately state that all of the legislators involved at the Conference Committee understood that the provision for waiver of referee would be used in extreme and unusual circumstances, as Mr. Rae sets out and that the waiver was not to be used to allow self appraisal of real estate, closely held businesses or other assets which referees typically appraise.

The legislative intent was to preserve the independent appraisal system and require the referee to appraise all assets, except in the very limited situations which Mr. Rae describes. Any other system would cause deterioration of the economic viability of the referee system and quickly destroy that system which has proven itself repeatedly over the last 30 years.

Very Truly Yours,

DYE, THOMAS, LUEBS & INGALLS


M. Ingalls

WMI:ksm

EXHIBIT "B"

U. S. Congress of the United States

House of Representatives

Washington, DC 20515

HOWARD L. BERMAN

26TH DISTRICT, CALIFORNIA

April 8, 1985

To Whom It May Concern:

I am currently a member of the U.S. House of Representatives. In 1982 I was a member of the California Assembly and worked with Assemblyman Walter Ingalls to develop the Conference Committee report on A.B. 1607 and have the Conference Committee adopt a version of the bill that was acceptable to both houses of the Legislature.

I have read the attached summary by Matthew S. Rae, Esq. and it is accurate. Mr. Rae is known to most members of the California Legislature as a leading expert on the probate system in California and who regularly represents the State Bar and other organizations on probate issues.

It was certainly the intention of the Conference Committee to preserve the independent appraisal system which has worked so well in California for so long and provides an outstanding service to our citizens at a comparatively low cost.

There was considerable sentiment among my colleagues and members of the Senate to pass AB 1607 without the amendment providing for waiver of referee....

However, it was the opinion of the Bar and the referees themselves, and the members of the Conference Committee, that the amendment providing for waiver of referee was fair and reasonable. It was clearly intended, however, that waiver would apply in the most limited of circumstances, only after a thorough showing of good cause and a court hearing, and a finding by the court that waiver was appropriate and would not undermine the independent appraisal system.

Frankly, all the testimony and discussion on this issue pertained to the large multi-million dollar single block of stock in a publicly held corporation, or the unique object of art, antique, rare book or painting, or similar item, where there were only a few prominent private appraisers in the world and it was felt unnecessary that the estate would have to pay that private appraiser and then also pay the referee.

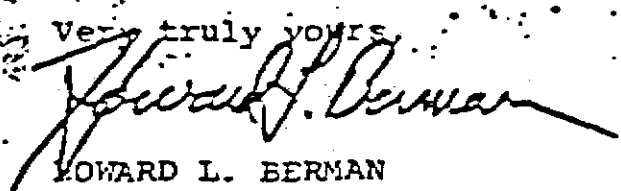
EXHIBIT "C"

P. 2

The Amendment to Probate Code Section 605 which now appears as Section 605.A.3 was never intended to be an alternative to the use of the referee in a typical case, but was to be the rare exception allowed after Petition, the hearing and decision. Mr. Rae's statement is accurate and, if anything, understated.

Should any party have any questions regarding my involvement in this issue, I would be most happy to hear from them or meet with them.

Very truly yours,


HOWARD L. BERMAN
Member of Congress

HLB:cn

enclosure

to preserve
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to my child

to preserve
provisional

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