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Second Supplement to Memorandum 86-18

Subject: Study L-655 - Estate and Trust Code (Probate Referees--letter
from California Probate Referees Association)

Attached to this supplementary memorandum is a letter from the California Probate Referees Association responding to the Commission's request for written suggestions for reform of the current probate referee system.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

California Probate Referees Association

February 28, 1986

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California Law Revision Commission

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Attention: John De Mouilly

Dear John:

At the February meeting, the chairman requested written comments from the California Probate Referees Association as to specific suggestions for improving the present system.

As background we should state that at the June meeting, the Commission reached a consensus that the present Probate Referee system should be continued. There were a number of suggestions for improvement which the Referees and the Bar were invited to comment upon.

1. Procedures to ensure that Referees provide prompt, competent and reliable service.

2. A requirement that Referees provide backup information on their appraisals.

3. An improved waiver procedure.

4. The possible exclusion of unique assets of tangible personalty, listed stocks and certain additional cash-type items from the assets subject to Referee appraisal.

5. The need to provide reasonable additional compensation for any burdensome or extraordinary services rendered by the Referee.

The Referees' Association wishes to submit the following comments on these matters.

1. The Association agrees that the present system is a good system which provides the inexpensive appraisals which are necessary for an efficient and reliable probate court system in California.

2. The Association recognizes that there have been complaints about the competence and reliability of some Referees. If a single peremptory challenge is allowed, any Referee who does not perform adequately will most certainly improve or resign. In addition, if a Referee is nonresponsive to a representative, the judge should have the power to remove the dilatory Referee from serving on that particular estate. The judge would appoint another Referee to complete the appraisal. The judge, however, should not have the power to remove Referees from the panel since that is an executive function.

The other side of the coin of dealing with incompetent Referees is to encourage competent Referees to serve on the panel. One method of doing this is to make the economic base adequate for professional persons to undertake this responsibility. It is our position that the fee base should not be reduced and that Referees should be allowed, in unusual cases, to submit a declaration to the probate judge for additional compensation of a reasonable amount even after the closing of the probate.

3. With reference to the issue of whether Referees should appraise and be compensated for appraising listed securities, it is the position of the Referees' Association that any reduction in the already diminishing fee base will undermine the present system and discourage competent Referees from serving. In addition, appraising stocks is not always a simple and easy task. Brokerage printouts are usually inaccurate to some degree and they usually have the wrong valuation date. Moreover, most attorneys do not have accurate brokerage printouts available to them and must rely upon the Referee. Finally, any removal of listed securities from the Referees' fee base will undermine the present fee system.

4. Although the Association is willing to consider an alternate compensation system, we are of the opinion that restructuring the fee system would be an enormous task which would destroy the present low cost system.

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5. With reference to unique tangible assets such as jewelry collections, antiques and art collections, the Association does not oppose a law whereby the Referee would waive or reduce his fee on such appraisals if the Referee determines that an outside appraiser is necessary. If the Referee and the estate agree that an outside appraiser is necessary, then the Referee would review the appraisal by the outside expert, but would waive or reduce his fee for such appraisal. If the Referee and the representative do not agree as to the fee, the probate court could determine that such outside appraisal was necessary and that no Referee fee or a reduced fee should be charged for the unique assets so appraised.

6. With reference to the present waiver provisions of the Probate Code, the present system is confusing and tends to undermine the Referee system. In addition, it puts the attorney in a conflict. Attorneys have stated that they do not wish to be put in the position where they may feel a duty to the estate to have a Referee appraisal with an opposing duty to explain the fact that a petition to waive the Referee appraisal can be filed if the representative wishes. An attorney may be asked to file a request for waiver even though the attorney has a serious doubt as to whether the waiver procedure is appropriate. Moreover, if the waiver procedure becomes widespread, the entire fee base of the Referee system is undermined.

For this reason, the Association believes that the Referee system should be mandatory without any provision for waiver. Nevertheless, if the Commission determines that the waiver is appropriate, it should be allowed only for good cause after notice of motion to all beneficiaries as well as notice to the Referee after he or she is appointed. A finding of good cause should include a determination that the entire estate consists solely of unique assets of tangible personalty such as an art collection which must be appraised by an independent expert or that the entire estate consists of a single publicly held stock.

7. The Association agrees that the executor may self appraise cash type assets if the executor swears under penalty of perjury that he is of the opinion that the cash asset does not have a fair-market value as of the date of death which is different from its face value. This would, therefore, not apply to tax or other refunds which are subject to dispute.

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8. In addition, because of the professional liability crisis that is affecting the entire professional and business community, the present Referee system cannot be sustained unless the present judicial immunity is preserved. An express statutory provision should provide that there is judicial immunity and that this is merely a statement of existing law.

Once again, thank you for the opportunity to submit these comments. We would like to work with the Commissioners on the language to be used in any new provisions regarding probate referee appraisals and waivers.

Very truly yours,

A handwritten signature in cursive script that reads "Edward V. Brennan".

EDWARD V. BRENNAN

EVB:RLB

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