

Memorandum 87-28

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

Attached to this memorandum is the draft recommendation relating to inventory and appraisal. The staff has revised the draft to incorporate decisions made at the April meeting in Sacramento.

We need to complete our review of comments on the tentative recommendation where we left off--at Section 8902 (appraisal by probate referee) on page 28 of the draft. The comments are summarized in notes following the relevant sections. Copies of the letters referred to in the notes are attached to Memorandum 87-10, which was considered at the April meeting, and to the Minutes of the April meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Staff DraftRECOMMENDATION
Relating to
INVENTORY AND APPRAISAL

BACKGROUND

The major changes made by the new code affecting the inventory and appraisal relate to the role of the probate referee.

The 1982 legislation governing probate referees¹ made specific reference to the California Law Revision Commission study of the administration of estates of decedents, and directed that the study be monitored by the appropriate legislative policy committees.² The Commission has devoted substantial resources to investigating the functioning of the probate referee system, including reviewing material from legislative hearings concerning probate referees, surveying inventory and appraisal systems in other jurisdictions, and considering the views of the probate bar (including the State Bar, Los Angeles County Bar, Beverly Hills Bar, and other bar associations), as well as communications from many interested individuals and groups (including the California Probate Referees' Association, California Bankers Association, California Appraisers Council, and American Institute of Real Estate Appraisers). The Commission has also allocated substantial public meeting time to presentations by interested persons.

In addition, the Commission distributed widely throughout the probate community both a questionnaire concerning the functioning of the probate referee system and the need for reforms and a tentative recommendation for revision of the law. The Commission received more than 100 completed questionnaire responses and more than 35 tentative recommendation comments, including group responses from a number of

¹Prob. Code §§ 1300-1313, enacted by 1982 Cal. Stats., ch. 1535, § 13.

²Prob. Code § 1313.

probate bar associations, and responses from judges, court commissioners, public administrators, and practicing lawyers. Responses came from persons in more than 20 counties, both rural and urban.

The Commission has taken into account this substantial volume of information in developing the following recommendations for changes in the role of the probate referee in administration of decedents' estates.

RETENTION OF PROBATE REFEREE

The Commission considered removing the probate referee from decedent estate administration entirely, in reliance on appraisal by the personal representative. It has been argued that this would save money for most estates by eliminating the probate referee's fees and would simplify estate administration by eliminating an unneeded third party, with its attendant delays, from the process.

The Commission's investigation reveals that the cost to the estate of the probate referee appraisal is relatively small. The referee's fee is a statutory commission of one tenth of one percent of the value of the estate, plus actual expenses.³ This costs the estate substantially less than an independent appraisal by a private appraiser where such an appraisal is needed for tax or other reasons, and is one of the smaller costs associated with probate.

If an appraisal is not otherwise needed, however, the probate referee's fee is an unnecessary cost to the estate. The Commission recommends, below, a number of changes directed at this problem, relating to assets that may be appraised by the personal representative and procedures for waiver of a probate referee appraisal and reduction of fees.

The Commission's investigation also reveals that the probate referee's involvement causes little complexity or delay in the ordinary case. The probate referee's appraisal is fairly expeditious; 15 days is a typical time for the appraisal after delivery of the inventory by the personal representative. Usually, any delay caused is not due to

³Prob. Code § 609. The commission is subject to a statutory maximum of \$10,00 and minimum of \$75.

the referee's appraisal but to time spent by the personal representative in preparing the inventory.

There are cases in which a particular probate referee is dilatory or not performing up to standards. The Commission recommends, below, procedures to force expeditious appraisals in such cases, including sanctions against and procedures for removal of inadequate probate referees.

The probate bar generally believes the probate referee works efficiently and expedites and facilitates the probate process in the usual case. Most judges and practitioners think the referee provides a useful and ordinarily high quality service at modest cost to the estate, and that the referee system should be retained. Problems in the system should be resolved by attacking the problems directly, not by scrapping what is a basically sound system. The Commission concurs with these views, and recommends the following changes to cure problems in the probate referee system.

QUALIFICATIONS FOR APPOINTMENT AS PROBATE REFEREE

In order to ensure that a person appointed as a probate referee is qualified to appraise probate estates, existing law requires the State Controller to appoint only from among persons passing a qualification examination⁴ and permits the Controller to establish standards of training, performance, and ethics.⁵ The new code strengthens these requirements by making adoption of standards mandatory rather than permissive. The standards should help ensure the usefulness and accuracy of probate referee appraisals.

Existing law also limits the political patronage aspect of probate referee appointment by excluding persons who have been involved in or have contributed to a campaign for election of the State Controller or for other partisan state political offices.⁶ The new code strengthens

⁴Prob. Code §§ 1305-6.

⁵Prob. Code § 1307.

⁶Prob. Code §§ 1311-12.

enforcement of these limitations by requiring the probate referee to file an annual disclosure statement indicating relevant contributions or participation during the preceding year.

ASSETS APPRAISED BY REFEREE

In some estates the appraisal of assets is simple and does not call for an appraisal expert such as a probate referee. These are estates in which most assets are liquid and easily valued, and could well be appraised by the personal representative without resort to services of the probate referee.

Existing law recognizes this situation by permitting the personal representative to appraise bank accounts, lump-sum insurance payments, cash accounts, and a few other liquid assets.⁷ The new code expands these items to include lump-sum annuities, cash deposits and money market funds and accounts, including brokerage cash accounts, and refund checks issued after the decedent's death.

One area the Commission has examined closely is the appraisal of publicly traded stock listed on a national exchange. Although it appears that the personal representative rather than the probate referee might properly appraise such assets, the Commission does not recommend that this be done as a matter of course. The economy of scale that enables low-cost probate referee appraisals in the ordinary case would be substantially impaired by removing publicly traded stock as a routine matter. In addition, a major reason the probate referee system works efficiently is that the referee simply appraises all non-cash assets *en masse* and cheaply, without the time and expense of making distinctions between what particular items are and are not subject to referee appraisal. The savings achieved by attempting to distinguish among the many varieties of stock are not significant compared to the procedural costs involved, and could be counterproductive in many cases. Finally, experience has shown that appraisals of publicly traded and listed stock by inexperienced persons are frequently inaccurate, due to such problems as value fluctuations

⁷Prob. Code § 605.

on the date of death, failure to take into account x-dividend dates, and misidentification of the class of stock.

The Commission believes a better approach to appraisal of stock of all kinds, whether publicly traded or closely held, is to require as a matter of course that the referee be the appraiser, subject to waiver for good cause. This is existing law,⁸ and appears to work well in the ordinary case. In the unusual case, such as where the only major asset is stock in a difficult to value family corporation, it may be appropriate to waive the probate referee or to refer the matter to an independent expert for appraisal.⁹

The Commission also recommends that the probate referee's commission for appraisal of all publicly traded stock in an estate be subject to a \$250 maximum. This limitation recognizes that stock of this type is relatively easy to appraise and protects against an unreasonably high probate referee commission in an estate with a large amount of publicly traded stock.

WAIVER AND RELATED MATTERS

The Commission has found the existing procedure for waiver of the probate referee in appropriate cases to be basically sound. The one substantial revision in the waiver procedure made by the new code is to require that a waiver be made before the inventory is delivered to the probate referee. This will expedite administration by encouraging prompt action by the personal representative and avoid having the probate referee invest substantial work on an appraisal only to have the appraisal later waived.

The new code supplements the waiver procedure by a provision to permit a unique, unusual, or special item of tangible personal property to be appraised by a qualified independent expert. This would enable the personal representative to avoid appraisal by the probate referee and to select the appraiser in a case where there is need for a special expert. The independent appraisal would be subject to review by the probate referee, and the referee's fees would be subject to reduction

⁸Prob. Code § 605.

⁹See discussion below under "Waiver and Related Matters."

or waiver by negotiation with the personal representative or, if they are unable to agree, by the court.

SELECTION AND REMOVAL OF PROBATE REFEREE

Although most people who work with probate referees are satisfied with the operation of the system, there are some instances of dissatisfaction. The Commission has concluded that existing remedies for incompetent or otherwise inadequate referees are not sufficient,¹⁰ and the new code supplements the existing remedies.

Initially, the new code enables the personal representative to avoid appointment of a probate referee known to provide poor service by application to the court to appoint some other referee. The new code makes clear that the court has authority and discretion not to designate a particular probate referee, and need not designate a referee merely because that referee happens to be next in rotation on a panel.

The new code also enables the personal representative to select a particular probate referee, to a limited extent. This authority is limited in order to avoid favoritism and to prevent influencing the appraisal through a known bias of the referee. However, selection of a particular probate referee may be appropriate in some situations where, for example, the same referee has recently appraised the same property or will be making related appraisals of the same property in another proceeding. Selection of a particular referee by the personal representative is subject to court discretion and a showing of good cause by the personal representative.

Where a referee has already been appointed, the new code provides two new removal procedures. First, the personal representative may remove the first referee appointed as a matter of right, without the need for a showing of cause. This is similar to a peremptory challenge of the first judge appointed, and should be an expeditious and effective remedy to ensure the competence of probate referees (by making incompetence easily avoided). Second, the personal

¹⁰Existing remedies are generally under the State Controller. Prob. Code § 1308.

representative may seek removal by the court for cause. Cause in this context includes incompetence and undue delay. This will supplement the State Controller's removal authority with local control over appointments in individual cases.

TIME FOR APPRAISAL

The probate referee's appraisal is ordinarily made expeditiously and causes little delay in probate. This is not always the case, however, and the new code adds provisions to ensure that all probate referee appraisals are completed quickly.

The new code creates a statutory duty on the probate referee to appraise the property promptly and with reasonable diligence. The code does not set a specific standard, since the time required for the appraisal may vary with the size, character, and difficulty of assets in the estate. The Commission is informed that the current norm is 15 days after delivery of the inventory and other information necessary for the appraisal.

Under the new code, if 90 days have elapsed since delivery of the inventory and the probate referee has not returned the appraisal, the probate referee must report the status of the appraisal showing why the property has not been appraised and estimating the time needed to complete the appraisal.¹¹ The report is filed with the court and delivered to the personal representative, who may have the report set for hearing. Actions the court may take for a dilatory referee include reduction of fees and removal.

¹¹This is analogous to the report made by the personal representative in the event of delay in closing the estate. See Prob. Code § 1025.5. The 90 day period was selected in recognition of the fact that in many cases it takes at least 60 days for the probate referee to obtain necessary appraisal information from the personal representative where the information has not been delivered with the inventory.

In this connection, the new code extends the time within which the personal representative must file the inventory and appraisal from three months to four. See Prob. Code § 600. The four month period is more realistic under current conditions, and is consistent with the 90 day limit for the probate referee. For uniformity, the time for filing a supplemental inventory and appraisal is also extended to four months. See Prob. Code § 611.

It is current practice for some probate referees to withhold delivery of the appraisal, even though completed, until their fees have been paid. This is inappropriate because it delays probate and, in an illiquid estate, it may make it impossible to proceed since payment must come from proceeds of sale of appraised property. The new code prohibits a probate referee from withholding an appraisal until payment, but also makes clear that the probate referee's fees are an expense of administration, included in the highest statutory priority for payment in the administration proceedings.¹²

JUSTIFICATION OF APPRAISAL

If the probate referee's appraisal is questioned, there is no easy way to obtain the appraisal data used by the probate referee or for supporting the appraisal. The new code takes a number of steps to remedy this problem.

On demand by the personal representative or the beneficiary of property, the probate referee must provide any appraisal report or backup data concerning the property in the referee's files. This information must be provided without charge as part of the referee's regular services.

The referee may also be called upon to justify the appraisal at a hearing for a tax audit or otherwise. Because of the substantial time and effort that may be involved in this situation, the probate referee may be entitled to an additional fee, to be negotiated between the referee and person requiring the justification or, if they are unable to agree, to be fixed by the court.

These two remedies should be sufficient where a question concerning the appraisal arises within a shortly after the appraisal is made. However, existing law does not clearly require record-keeping, so that if an audit or other question arises later, the referee's files may no longer be available. The new code addresses this problem by requiring the referee to offer the files to the personal

¹²See Prob. Code § 950.

representative. If the personal representative does not request the files within three years, the files may be destroyed.

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DIVISION 2. GENERAL PROVISIONS

PART 12. PROBATE REFEREES

CHAPTER 1. APPOINTMENT AND REVOCATION

§ 400. Appointment by Controller

400. (a) The State Controller shall appoint at least one person in each county to act as a probate referee for the county.

(b) If there are fewer than three qualified applicants to serve in a county, the State Controller may designate a probate referee from another county or make an interim appointment, to serve until the vacancy has been filled by a qualified applicant.

Comment. Subdivision (a) of Section 400 continues a portion of the first sentence of the first paragraph of former Probate Code Section 1305 without change. Subdivision (b) supersedes the third sentence of the first paragraph. For qualification of an applicant, see Section 401.

§ 401. Qualifications for appointment

401. (a) Appointment shall be from among persons passing a qualification examination administered by the State Personnel Board. A person who passes the examination is eligible for appointment for a period of five years from the date of the examination.

(b) Appointment shall be on the basis of merit without regard to sex, race, religious creed, color, national origin, ancestry, marital status, or political affiliation.

Comment. Subdivision (a) of Section 401 restates a portion of the first sentence of the first paragraph and the fifth sentence of the second paragraph of former Probate Code Section 1305 without substantive change. Subdivision (b) continues the second sentence of the first paragraph of former Probate Code Section 1305 without change.

§ 402. Qualification examination

402. (a) The qualification examination for applicants for appointment to act as a probate referee shall be held at times and places within the state determined by the State Controller.

(b) The State Controller shall contract with the State Personnel Board to administer the qualification examination. Administration of the examination shall include:

- (1) Development of standards for passage of the examination.
- (2) Preparation of examination questions.
- (3) Giving the examination.
- (4) Scoring the examination.

(c) Each applicant shall pay a fee established by the State Personnel Board for taking the qualification examination. The State Personnel Board shall transmit to the State Controller a list of candidates who have received a passing score in the examination. The list is a public record.

Comment. Section 402 restates former Probate Code Section 1306 without substantive change.

§ 403. Term of office of probate referee

403. (a) The term of office of a probate referee is four years, expiring June 30. For a period of five years from the date of expiration of the term of office, a person appointed to act as a probate referee is eligible for reappointment.

(b) If the State Controller increases the number of probate referees in a county, the State Controller shall stagger the terms of the new appointees so that one-quarter or as close to one-quarter as possible of the terms of the probate referees in that county expire on June 30 of each succeeding year.

Comment. Section 403 restates the second, third, and sixth sentences of the second paragraph of former Probate Code Section 1305, with the addition that a probate referee's eligibility for reappointment lasts until five years after expiration of the referee's term of office.

§ 404. Standards for probate referee

404. (a) The State Controller shall establish and may amend standards of training, performance, and ethics of probate referees. The standards shall be a public record.

(b) The State Controller may revoke the appointment of a person to act as a probate referee for noncompliance with any standard of training, performance, or ethics established under subdivision (a). The State Controller may revoke an appointment under this subdivision without notice or a hearing, but the revocation is subject to review by writ of mandate to a court of competent jurisdiction.

Comment. Subdivision (a) of Section 404 restates former Probate Code Section 1307, making the adoption of standards mandatory rather than permissive. This codifies existing practice. Subdivision (b) restates former Section 1308(a) without substantive change.

§ 405. Termination of authority

405. (a) The authority of a person to act as a probate referee ceases immediately upon expiration of the person's term of office, revocation of the person's appointment, or other termination pursuant to law.

(b) Upon cessation of authority of a person to act as a probate referee, the State Controller shall notify the court of the county for which the probate referee was appointed. Upon receipt of notice, or if it otherwise comes to the attention of the court that the authority of a person to act as a probate referee has ceased, the court shall reassign any estate for which the person had been designated as probate referee.

Comment. Subdivision (a) of Section 405 restates former Probate Code Section 1309 without substantive change. Subdivision (b) codifies existing practice. Other termination pursuant to law includes resignation.

§ 406. Political activities of probate referee

406. (a) A probate referee, or any person who is an applicant for or seeking appointment or reappointment to act as a probate referee, shall not, directly or indirectly, solicit, receive, or contribute, or be in any manner concerned in soliciting, receiving, or contributing, any of the following:

(1) Any assessment, subscription, or contribution to any party, incumbent, committee, or candidate exceeding two hundred dollars (\$200) in any one year for any partisan public office of this state.

(2) An assessment, subscription, contribution, or political service for the office of State Controller in any amount, notwithstanding paragraph (1).

(b) A violation of subdivision (a) is a misdemeanor, and the State Controller shall revoke the appointment of a probate referee who violates subdivision (a).

(c) Upon a person's application for appointment as a probate referee, and thereafter annually during the person's eligibility for appointment, during the person's tenure as a probate referee, and during the person's eligibility for reappointment, the person shall file with the State Controller a verified statement indicating whether the person has done any act described in subdivision (a)(1) or (a)(2) during the preceding two-year period.

(d) The State Controller may not appoint or reappoint as a probate referee any person who, within the two-year period preceding the date of the appointment or reappointment, does any act described in subdivision (a)(1) or (a)(2), and any such appointment or reappointment is void. However, all acts not otherwise invalid performed by the person before revocation of the person's appointment are valid.

Comment. Subdivisions (a) and (b) of Section 406 restate former Probate Code Section 1311, with the addition of references to incumbency, reappointment, and committees, and the deletion of references to campaigns. The two hundred dollar limitation of paragraph (a)(1) does not apply to the State Controller; solicitation, receipt, or contribution of any amount to a State Controller campaign is absolutely prohibited by paragraph (a)(2).

Subdivision (c) is new. It is intended to facilitate compliance with the other requirements of this section.

Subdivision (d) restates former Probate Code Section 1312, with the added requirement of removal from office. The transitional provision is omitted because it is no longer necessary.

CHAPTER 2. POWERS OF PROBATE REFEREE

§ 450. General powers

450. Upon designation by the court, the probate referee has all the powers of a referee of the superior court and all other powers provided in this chapter.

Comment. Section 450 restates subdivision (b) of former Probate Code Section 1301 without substantive change. For general provisions relating to referees of the court, see Code Civ. Proc. §§ 638-645.1.

§ 451. Compelling appearance

451. (a) For the purpose of appraisal of property in the estate, the probate referee may require, and may issue a subpoena to compel, the appearance before the referee of the personal representative, guardian, conservator, or other fiduciary, an interested person, or any other person the referee has reason to believe has knowledge of the property.

(b) A subpoena issued under subdivision (a) is subject to the provisions of Section 2020 of the Code of Civil Procedure governing deposition subpoenas.

Comment. Subdivision (a) of Section 451 restates subdivision (a) of former Probate Code Section 1301 and former Probate Code Section 1302, with the addition of the reference to a guardian, conservator, or other fiduciary, since the probate referee may appraise estates other than decedents' estates. Subdivision (b) is new.

CROSS-REFERENCES

Definitions

Interested person § 48
Person § 56
Personal representative § 58
Property § 62

§ 452. Examination, testimony, and production of documents

452. (a) The probate referee may examine and take the 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.

(b) A subpoena issued under subdivision (a) is subject to the provisions of Section 2020 of the Code of Civil Procedure governing deposition subpoenas.

Comment. Subdivision (a) of Section 452 restates former Probate Code Section 1303, with the addition of the reference to production of documents. See Section 453 (protective orders and enforcement). Subdivision (b) is new.

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

§ 453. Protective orders and enforcement

453. (a) On petition of a person required to appear before the probate referee pursuant to this chapter, the court may make a protective order to protect the person from annoyance, embarrassment, or oppression. The petitioner shall mail notice of the hearing on the petition to the probate referee at least 15 days before the date set for the hearing. Any subpoena issued by the probate referee is stayed during the pendency of the petition.

(b) On petition of the probate referee, the court may make an order to show cause why a person who is required, but fails, to appear before the probate referee pursuant to this chapter, should not be compelled to do so. The probate referee shall mail notice of the hearing on the petition to the person at least 15 days before the date set for the hearing.

Comment. Subdivision (a) of Section 453 is drawn from Code of Civil Procedure Section 2037.8, with the addition of an automatic stay of enforcement during pendency of the petition. Subdivision (b) is drawn from Code of Civil Procedure Section 2034.

CROSS-REFERENCES

Definitions

Person § 56

Mailed notice § 1215

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 3. INVENTORY AND APPRAISAL

CHAPTER 1. GENERAL PROVISIONS

§ 8800. Inventory and appraisal required

8800. The personal representative shall file with the clerk an inventory of the property to be administered in the decedent's estate and an appraisal of the property in the inventory. The inventory shall be filed within three months, and the appraisal shall be filed within six months, after letters are first issued to a general personal representative. The court may, for reasonable cause, allow a further time for filing the inventory and appraisal.

Comment. Section 8800 restates the first portion of the first sentence of former Probate Code Section 600, extending the time for filing the appraisal (as opposed to the inventory) to six months. Since the probate referee has up to 90 days after delivery of the inventory to complete the appraisal, the six month extension in effect allows the personal representative three months in which to complete the inventory.

The inventory and appraisal procedure provided in this part applies to valuation in administration of decedents' estates, but may be incorporated in other proceedings. For example, in a small estate set-aside proceeding under Chapter 6 (commencing with Section 6600) of Part 3 of Division 6, an inventory and appraisal of the decedent's estate is required as provided in Section 6608. No inventory and appraisal of the decedent's estate is required where it is disposed of without administration under Division 8 (commencing with Section 13000) except to the extent an inventory and appraisal is required pursuant to Section 13103 (real property), subdivision (b) of Section 13152 (real property), subdivision (c) of Section 13200 (affidavit procedure), or Section 13658 (property passing or belonging to surviving spouse).

See also Code of Civil Procedure § 166 (actions in chambers).

CROSS-REFERENCES

Definitions

Letters § 52

Personal representative § 58

§ 8801. Supplemental inventory and appraisal

8801. If after the inventory is filed the personal representative acquires knowledge of property to be administered in the decedent's estate that is not included in the inventory, the personal representative shall file a supplemental inventory and appraisal of the property in the manner prescribed for the original inventory and appraisal. The supplemental inventory shall be filed within three months, and the supplementary appraisal within six months, after the personal representative acquires knowledge of the property.

Comment. Section 8801 restates former Probate Code Section 611, extending the two month time for filing to three and six months, paralleling Section 8800 (inventory and appraisal required). For enforcement of this requirement, see Section 8805 (failure to timely file inventory and appraisal).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

§ 8802. Form of inventory and appraisal

8802. The inventory and appraisal shall be in the form of a separate listing of each item with the fair market value of the item at the time of the decedent's death in monetary terms opposite the item.

Comment. Section 8802 restates the fifth sentence of former Probate Code Section 600.

§ 8803. Notice of filing of inventory and appraisal

8803. Upon the filing of the inventory and appraisal, the personal representative shall, pursuant to Section 1252, mail a copy to each person who has requested special notice.

Comment. Section 8803 is new.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Request for special notice § 1250

§ 8804. Objection to appraisal

8804. (a) At any time before the hearing on the petition for final distribution of the estate, an interested person may file with the court a written objection to the appraisal.

(b) The clerk shall fix a time, not less than 15 days after the filing, for a hearing on the objection.

(c) The person objecting shall give notice of the hearing, together with a copy of the objection, as provided in Section 1220. If the appraisal was made by a probate referee, the person objecting shall also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the date set for the hearing.

(d) The person objecting to the appraisal has the burden of proof.

(e) Upon completion of the hearing, the court may make any orders that appear appropriate. If the court determines the objection was filed without reasonable cause or good faith, the court may order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection.

Comment. Section 8804 restates former Probate Code Section 608.5, but requires an objection at or before the hearing on the petition for final distribution, replaces the 10 day minimum hearing time with 15 days consistent with the general notice provisions, and provides for an award of fees and costs in the event of a frivolous objection. It is drawn from Probate Code Section 927 and from former Revenue and Taxation Code Sections 14510-14513. See also Sections 8907 (appraisal report, backup data, and justification of appraisal) and 927 (exceptions to account, including objection to appraisal). For objection to the inventory, other procedures are available. See, e.g., Section Chapter 11 (commencing with Section 9860) of Part 5 (conveyance or transfer of property claimed to belong to decedent or other person).

CROSS-REFERENCES

Clerk to set matter for hearing § 1285

Definitions

Interested person § 48

Person § 56

Request for special notice § 1250

§ 8805. Failure to timely file inventory and appraisal

8805. (a) If the personal representative negligently or intentionally fails to file the inventory and appraisal within a reasonable time, upon petition of an interested person:

(1) The court may compel the personal representative to file the inventory and appraisal pursuant to the procedure prescribed in Section 921 to compel a personal representative to file an account.

(2) The court may remove the personal representative from office.

(3) The personal representative is liable for injury to the estate or to the interested person that directly results from the failure. The liability may include attorney's fees, in the court's discretion. Damages awarded pursuant to this subdivision are a liability on the bond of the personal representative.

(b) For purposes of this section, if an inventory and appraisal is filed within the time provided in Section 8800 or 8801, the inventory and appraisal is presumed to be filed within a reasonable time. The presumption created by this subdivision is a presumption affecting the burden of proof.

Comment. Section 8805 restates former Probate Code Section 610 and a portion of former Probate Code Section 611, codifying the case law rule that the statute applies to failure to timely file the appraisal as well as failure to timely file the inventory. Section 8805 is limited to negligent or intentional noncompliance by the personal representative and is not intended to apply where the personal representative was unable to file the appraisal due to the probate referee's delay, or where the personal representative made a good faith effort to file but was unable to due to circumstances beyond the personal representative's control. For delay caused by the probate referee, see Article 3 (commencing with Section 8940) of Chapter 3. The determination of a reasonable time under this section is flexible, depending on the circumstances of the particular estate. A reasonable time may be longer or shorter than the time provided in Sections 8800 and 8801, in the circumstances.

Subdivision (a)(1) is new.

Subdivision (a)(2) provides for removal as an independent sanction. For the removal procedure, see Article 6 (commencing with Section 8500) of Chapter 4 of Part 2. This supplements the removal sanction that is part of the procedure under subdivision (a) to compel a filing.

Under subdivision (a)(3) liability for injury arising from the failure of the personal representative to timely file the inventory and appraisal may include attorney's fees incurred in proceedings to compel the filing. Liability of the personal representative and of the sureties on the bond is joint and several. See Code Civ. Proc. § 996.410 et seq.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

CHAPTER 2. INVENTORY

Article 1. General Provisions

§ 8850. Contents of inventory

8850. (a) The inventory shall include all property to be administered in the decedent's estate.

(b) The inventory shall particularly specify the following property:

(1) Debts, bonds, mortgages, deeds of trust, notes, and other security for the payment of money to the decedent, with the name of each debtor, the date, the sum originally payable, and the endorsements, if any, with their dates. If security for the payment of money is real property, the inventory shall include a reference to the place in the records where the security interest is recorded or, if not recorded, a legal description of the real property.

(2) A statement of the interest of the decedent in a partnership in which the decedent was a member, appraised as a single item.

(3) An account of all money of the decedent.

(c) The inventory shall show, to the extent ascertainable by the personal representative, the portions of the property that are community, quasi-community, and separate property of the decedent.

Comment. Subdivisions (a) and (b) of Section 8850 restate the third and fourth sentences of former Probate Code Section 600 without substantive change. Subdivision (b)(1) includes a requirement of precise identification of real property security in order to achieve an accurate inventory for appraisal of the underlying obligation. Subdivision (c) restates former Probate Code Section 601, with the addition of the reference to quasi-community property.

CROSS-REFERENCES

Definitions

Community property § 28
Personal representative § 58
Property § 62
Quasi-community property § 66

§ 8851. Discharge or devise of claims

8851. The discharge or devise in a will of any debt or demand of the testator against the executor or any other person is not valid against creditors of the testator, but is a specific devise of the debt or demand. The debt or demand shall be included in the inventory. If necessary, the debt or demand shall be applied in the payment of the debts of the testator. If not necessary for that purpose, the debt or demand shall be distributed in the same manner and proportion as other specific devises.

Comment. Section 8851 restates former Probate Code Section 603 without substantive change.

CROSS-REFERENCES

Definitions

Devise § 32

Will § 88

§ 8852. Oath of personal representative

8852. (a) The personal representative shall take and subscribe an oath that the inventory contains a true statement of all property to be administered in the decedent's estate of which the personal representative has knowledge, and particularly of money of the decedent and debts or demands of the decedent against the personal representative. The oath shall be endorsed upon or attached to the inventory.

(b) If there is more than one personal representative, each shall take and subscribe the oath. If the personal representatives are unable to agree as to property to be included in the inventory, any personal representative may petition for a court order determining whether the property is to be administered in the decedent's estate. The determination shall be made pursuant to the procedure provided in Chapter 11 (commencing with Section 9860) of Part 5 or, if there is an issue of property belonging or passing to the surviving spouse, pursuant to Chapter 5 (commencing with Section 13650) of Part 2 of Division 8.

Comment. Subdivision (a) of Section 8852 restates former Probate Code Section 604 without substantive change. The requirement of an oath may be satisfied by a written affirmation. Code Civ. Proc § 2015.6.

Subdivision (b) is new. It is an exception to the rule of Section 9630 (where there is more than one personal representative, a majority may act).

CROSS-REFERENCES

Definitions

Personal representative § 58

Article 2. Discovery of Property of Decedent

§ 8870. Citation to appear and be examined concerning decedent's property

8870. (a) On petition by the personal representative or an interested person, the court may order that a citation be issued to a person to answer interrogatories and to appear before the court and be examined under oath concerning any of the following allegations:

(1) That the person has wrongfully taken, concealed, or disposed of property in the estate of the decedent.

(2) That the person has knowledge or possession of any of the following:

(A) A deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the decedent to property.

(B) A claim of the decedent.

(C) A lost will of the decedent,

(b) If the person does not reside in the county in which the estate is being administered, the superior court either of the county in which the person resides or of the county in which the estate is being administered may issue a citation under this section.

(c) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Subdivisions (a) and (b) of Section 8870 restate the first two sentences of former Probate Code Section 613. See also Section 7061 (actions in chambers).

Subdivision (c) supersedes the first sentence of former Probate Code Section 614.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Property § 62

Will § 88

Verification required § 1284

§ 8871. Interrogatories

8871. Interrogatories may be put to a person cited pursuant to Section 8870. The interrogatories and answers shall be in writing. The answers shall be signed under penalty of perjury by the person cited. The interrogatories and answers shall be filed with the court.

Comment. Section 8871 restates the third sentence and a portion of the first sentence of former Section 614 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

§ 8872. Examination

8872. (a) At the examination witnesses may be produced and examined on either side.

(b) If upon the examination it appears that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts to the personal representative.

(c) If upon the examination it appears that the allegations of the petition are not true, the person's necessary expenses, including a reasonable attorney's fee, shall be charged against the petitioner or allowed out of the estate, in the discretion of the court.

Comment. Subdivisions (a) and (b) of Section 8872 restate the second and fourth sentences of former Probate Code Section 614. Subdivision (c) supersedes the third sentence of former Probate Code Section 613. The court order of disclosure is enforceable in the same manner as other court orders. See, e.g., Code Civ. Proc. § 1209 (contempt); see also Section 1283 (rules of practice).

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 8873. Citation to appear and account

8873. (a) On petition by the personal representative, the court may issue a citation to a person who has possession or control of property in the decedent's estate to appear before the court and make an account under oath of the property and the person's actions with respect to the property.

(b) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Section 8873 restates former Probate Code Section 615, substituting a petition for a complaint. See also Code Civ. Proc. § 166 (actions in chambers). The duty to account under this section includes both property entrusted to a person and property that comes into the person's possession, including money, accounts, and other property and papers. For general provisions governing issuance and enforcement of citations, see Sections 1240-1242.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

§ 8874. Wrongful taking, concealment, or disposition of property in estate

8874. A person who, in bad faith, has wrongfully taken, concealed, or disposed of property in the estate of the decedent is liable for twice the value of the property, recoverable in an action by the personal representative for the benefit of the estate.

Comment. Section 8874 restates former Probate Code Section 612 with the addition of a bad faith limitation.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

CHAPTER 3. APPRAISAL

Article 1. Procedure

§ 8900. Appraisal by personal representative, probate referee, and independent expert

8900. The appraisal of property in the inventory shall be made by the personal representative, probate referee, or independent expert as provided in this chapter.

Comment. Section 8900 restates the introductory clause of former Probate Code Section 605(a) with the addition of the reference to an independent expert. See Section 8904 (appraisal by independent expert). Designation of a probate referee is made pursuant to Article 2 (commencing with Section 8920). The appraisal is made of the fair market value of the property at the time of the decedent's death. See Section 8800 (inventory and appraisal required).

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 8901. Appraisal by personal representative

8901. The personal representative shall appraise the following property, excluding items whose fair market value is, in the opinion of the personal representative, an amount different from the face value of the property:

(a) Money and other cash items. As used in this subdivision, a "cash item" is a check, draft, money order, or similar instrument issued on or before the date of the decedent's death that can be immediately converted to cash.

(b) Refund checks issued after the date of the decedent's death, including checks for wages earned before death, tax and utility refunds, and Medicare, medical insurance, and other health care reimbursements and payments.

(c) Accounts (as defined in Section 21) in financial institutions.

(d) Cash deposits and money market funds or accounts, whether in a financial institution or otherwise, including a brokerage cash account.

(e) Proceeds of life and accident insurance policies and retirement plans and annuities payable on death in lump sum amounts.

Comment. Subdivisions (a), (c), and (e) of Section 8901 restate former Probate Code Section 605(a)(1) with the addition of annuities in subdivision (c).

The definition of "cash item" in subdivision (a) is consistent with existing practice. California Probate Referees' Ass'n, Probate Referees' Procedures Guide 9 (1976).

Subdivisions (b) and (d) are new. The personal representative may appraise an item listed in subdivision (b) or (d), as well as items listed in subdivisions (a), (c), and (e), only if its fair market value can be determined solely from its face without calculation or reference to other sources. See introductory clause of Section 8901.

CROSS-REFERENCES

Definitions

Account § 21

Financial institution § 40

Personal representative § 58

Property § 62

§ 8902. Appraisal by probate referee

8902. Except as otherwise provided by statute:

(a) The personal representative shall deliver the inventory to the probate referee designated by the court, together with necessary supporting data to enable the probate referee to make an appraisal of the property in the inventory.

(b) The probate referee shall appraise all property other than that appraised by the personal representative.

Comment. Subdivision (a) of Section 8902 codifies existing practice. A statutory exception to the duty to deliver an inventory to the probate referee occurs in the case of a waiver of appraisal by the probate referee. See Section 8903. The personal representative must furnish the referee such information as the referee requires concerning the assets appraised by the personal representative or to be appraised by the probate referee. See Sections 450-453 (powers of probate referee).

Subdivision (b) restates a portion of former Probate Code Section 605(a)(2). The probate referee may serve an appraisal function in areas outside of decedent estate administration. See Comment to Section 8800 (inventory and appraisal required). There are statutory exceptions to appraisal by the probate referee. See, e.g., Section 2610 (inventory and appraisal of conservatorship under Lanterman-Petris-Short Act). For waiver of the probate referee, see Section 8903. For appraisal by an independent expert, see Section 8904.

Designation of a probate referee is made pursuant to Article 2 (commencing with Section 8920).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

§ 8903. Waiver of appraisal by probate referee

8903. (a) The court may, for good cause, waive appraisal by a probate referee in the manner provided in this section.

(b) The personal representative may apply for a waiver either in the petition for appointment of the personal representative or in a separate petition filed in the administration proceedings, but the petition may not be made later than the time the personal representative delivers the inventory to the probate referee. A copy of the proposed inventory and appraisal and a statement that sets forth the good cause that justifies the waiver shall be attached to the petition.

(c) The hearing on the waiver shall be not sooner than 15 days after the petition is filed. The personal representative shall mail a copy of the petition, a copy of the proposed inventory and appraisal, and notice of the hearing on the petition, to all of the following persons at least 15 days before the date set for the hearing:

(1) Devisees whose interest in the estate is affected by the waiver.

(2) Heirs in an intestate estate.

(3) The State of California if any portion of the estate is to escheat to it.

(4) Persons who have requested special notice under Section 1250.

(d) Notwithstanding Section 8901, if the petition is granted, the inventory and appraisal attached to the petition shall be filed pursuant to Section 8800.

Comment. Section 8903 restates former Probate Code Section 605(a)-(b), with changes to make clear that the application for waiver is made by petition, to specify the time within which the petition must be made, and to make clear that the inventory and appraisal attached to the petition is to be filed pursuant to Section 8800 (inventory and appraisal required).

CROSS-REFERENCES

Clerk to set matter for hearing § 1285

Definitions

Letters § 52

Person § 56

Personal representative § 58

Property § 62

Mailed notice § 1215

Verification required § 1284

Note. A number of commentators would in effect make use of the probate referee optional. Herbert P. Moore, Jr., of Orinda (Exhibit 1 to Memorandum 87-10) would add language to this section to make clear that a waiver of a probate referee appraisal may be made "in whole or in part". The Commission has rejected this approach in the past because it would enable the personal representative to pick and choose among assets, taking the easy ones and leaving the tough ones for the probate referee; the Commission has felt the waiver should be all or nothing. If picking and choosing by the personal representative is allowed, then the probate referee should also be able to pick and choose among what's left. This concept is in fact advocated by one of the commentators, below.

James M. Ruddick of Marysville (Exhibit 29 to Memorandum 87-10) notes that he has had little trouble obtaining waivers. "Over the past five years or so, I have obtained a waiver (under Section 605 of the Probate Code) of appraisal by the probate referee in every case that I have handled. I have been successful in obtaining such waivers in at least four different counties and no court has even questioned my request for such waiver nor have I been required to make an appearance in connection with any petition for a waiver." Nonetheless, he believes that the necessity to file a petition for waiver should be eliminated. "I believe that appraisal by probate referees is unnecessary in almost all cases and, therefore, should be purely optional." The personal representative would have the choice whether to use a probate referee or a qualified independent appraiser.

This point is also made by Russell G. Allen of Newport Beach (Exhibit 34 to Memorandum 87-10). "My fundamental objection, however, is to the assertion that the beneficiaries of all estates should share on a pro rata basis the cost of maintaining a referee system for those instances in which there is a need or desire to use a 'low cost' appraiser. I think much sounder policy would be to allow personal representatives (or beneficiaries) to retain the services of a probate referee when circumstances warrant and impose on the beneficiaries of those estates the costs of maintaining the probate referee system, rather than allocating that cost among the beneficiaries of all estates."

This position is also elaborated by Richard E. Llewellyn II and A. Steven Brown of Los Angeles (Exhibit 16 to Memorandum 87-10), who state "The best system would appear to be one which would permit not only the elective use of the referee as to the inventory, but the elective use of the referee as to selected assets in the estate." Their response to the argument that this would destroy the economic base of the referee system is straightforward. "We propose that instead the referee be given the opportunity to refuse to value certain assets, in which case the personal representative would then be forced to go to private expert appraisal, which is what happens now where the referee requests professional appraisal of certain assets."

This would in essence be a free market system. The personal representative would be free to use or not use the probate referee for any and all assets, and the referee, if concerned that some of the assets would be too difficult, would be free to refuse to value them. The staff believes such an approach would ultimately destroy the probate referee system, since every valuation would be approached from an economic analysis. Eventually, each asset would be appraised by the proper expert at market cost, thereby ending the convenience to the practitioner of all appraisal centered in one person. Llewellyn and Brown's response would be, that's OK. "We do not think the benefits of the probate referee system are so great that it should be preserved at all costs. Individuals concerned with income tax basis information and valuations under federal estate tax returns have reason enough to seek out the true valuation of the assets with which they are charged. Furthermore, the private sector appears to be very good at determining the fair market value of most assets and in those cases where the valuation is difficult, experts are currently needed even under the present probate referee system." They say that in smaller estates or in cases where the representative is unsophisticated, the use of a

probate referee could be elective in whole or in part. But as the staff views this scenario, that election would not be available, since the probate referee system would wither and disappear.

Several commentators would simplify the waiver procedure. Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10) would like to see a more efficient means of obtaining the waiver--"perhaps by something akin to a Notice of Proposed Action, instead of a noticed hearing."

Mr. Allen is concerned that a separate waiver petition will be required in all but the simplest estates because of the requirement that the inventory and appraisal be filed concurrently with the petition. He would allow the personal representative to combine the petition for waiver with the petition for appointment and postpone filing the proposed inventory and appraisal. "If waiver is appropriate because of the circumstances of the estate, one should be able to explain those circumstances to the court at the time of the petition for appointment without having to defer filing the appointment petition until an inventory and appraisal can be prepared." The proposed inventory and appraisal would later be filed within the standard time required for filing an inventory and appraisal.

Mr. Allen also suggests that the statute specifically allow a waiver of probate referee petition in connection with a final account and report. There is nothing in the current draft to preclude this; our one requirement is that the petition be made before delivery of the inventory to the probate referee. This could be pointed out in the Comment.

State Bar Team 1 (Exhibit to April Minutes) suggests a number of clarifications of the existing waiver procedure. In subdivision (b) they would provide, in essence, that the waiver petition may not be made after the personal representative has delivered an inventory to the probate referee, "if one has been appointed." They would require in subdivision (c)(2) that notice of the waiver hearing be given to heirs "whose interest in the estate is affected by the waiver." And they would delete the words "Notwithstanding Section 8901" from subdivision (d). These changes are all acceptable to the staff.

§ 8904. Appraisal by independent expert

8904. (a) A unique, unusual, or special item of tangible personal property may, at the election of the personal representative, be appraised by an independent expert qualified to appraise the item.

(b) Unless appraisal by a probate referee is waived, an appraisal of property pursuant to this section is subject to review by the probate referee. The personal representative and the probate referee may agree to a reduction or waiver of the commission of the probate referee as to the property. If the personal representative and the probate referee are unable to agree, the court shall determine the appropriate commission, if any.

Comment. Section 8904 is new.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. Section 8904 is a new provision, designed as a safety valve for concerns about forcing inappropriate use of the referee (and designed to save the referee the expense of hiring an expert to appraise an item the referee is not qualified to appraise). The reaction to this section was generally favorable. See, e.g., Robert K. Maize, Jr., of Santa Rosa (Exhibit 12 to Memorandum 87-10) ("I endorse the concept of being able to have unique, unusual or special items of property appraised by a qualified independent expert."); Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10) ("I believe the idea of the proposed law is a good one. To my knowledge, personal representatives often already use independent experts to appraise items such as jewelry and coin collections. The referees seem to rely on the experts.")

The form of the appraisal was the subject of comment by State Bar Study Team 1 (Exhibit 32 to Memorandum 87-10). They wonder whether the independent appraisal should be required to be in the same format as a probate referee appraisal. "The appraisal by the referee and the appraisal by the personal representative are required to be on certain standard Judicial Council forms. Should the appraisal of an independent appraiser be required to be on a form as well? We have seen appraisals by independent appraisers come in many sizes, shapes, and forms." The staff sees no problem here. If the Judicial Council has authority to require use of certain forms in probate, it can impose the same requirements on any documents filed with the court, including appraisals by independent experts submitted to the court by the personal representative. We could add a note to the Comment about this if it is believed helpful.

The procedure for use of an independent expert concerned the California Appraisers' Council (Exhibit 27 to Memorandum 87-10). They suggest a procedure whereby the probate referee declares property that, in the judgment of the probate referee, is beyond the capacity of the probate referee to personally appraise. Only this property would be subject to appraisal by the independent expert; the remainder would be appraised by the probate referee. This is the converse of allowing the personal representative to pick and choose which assets the referee will appraise and which assets will be appraised by other means. The potential for abuse here is, like the potential for abuse there, that the probate referee will pick the easy items to appraise at a profit and leave the difficult items to be appraised at the expense of the estate.

The independent expert provision is limited to unique, unusual, or special items of tangible personal property. Paul H. Roskoph and Dawne W. Hollis of Palo Alto (Exhibit 20 to Memorandum 87-10) wonder whether this can be construed to apply to items with an "artistic" value or items such as silver, antiques, etc. "It has been our experience that the Referee has requested the personal representative (through us as the attorneys) to obtain an appraisal of silver dollars (for example)

from a coin dealer and then submit that appraisal to the Referee." It was the Commission's conception that items such as these could and should be independently appraised. The staff is not certain it is a worthwhile endeavor to try to define "unique, unusual, or special", especially since the personal representative is given discretion to designate these items, and it seems unlikely that litigation would arise over this issue. We could add "artistic" and "collectible" items to the list, if that would be helpful.

Intangible, as well as tangible, personal property could be subject to independent appraisal, suggests John A. Dundas II of Pasadena (Exhibit 2 to Memorandum 87-10). "Why not include all personal property, so that it would cover closely held stock, for example?"

Real property, as well as personal property, should be covered by this section in the opinion of several of the commentators. Herbert P. Moore, Jr., of Orinda (Exhibit 1 to Memorandum 87-10) suggests that "consideration be given to excluding appraisals of real estate by experts whose primary business is fee appraisal of real estate with membership in a recognized, national real estate appraisal society." He gives an example of an MAI appraisal of \$2 million of real property he had recently that cost the estate \$7,000. "The probate referee, at my request, used the MAI appraisal, but charged a probate referee's fee of \$2,000 for a few hours work." Using the MAI appraisal instead of the probate referee appraisal would not unduly hurt the probate referees. "There really aren't that many situations where a formal fee appraisal is obtained from a professional fee appraiser, and therefore there won't really be that many instances wherein the probate referee is unfairly discriminated against."

Paul H. Roskoph and Dawne W. Hollis of Palo Alto (Exhibit 20 to Memorandum 87-10) feel the same way about residential real property. "We have had situations where the personal representative obtained an appraisal from a real estate agent 'as a courtesy' or at a reduced cost." Similarly, James M. Ruddick of Marysville (Exhibit 29 to Memorandum 87-10) states that, "if an expert appraisal of residential real estate is required, a local real estate broker can provide a more persuasive (for estate tax purposes) appraisal for a fee similar to (or less than) that established for the probate referee."

Russell G. Allen of Newport Beach (Exhibit 34 to Memorandum 87-10) states, "If the personal representative obtains an appraisal from a qualified appraiser of real property or any other asset to satisfy the executor's responsibilities for federal estate tax purposes, I see little reason to require 'independent' appraisal by the probate referee."

The Northern California Chapter of the American Institute of Real Estate Appraisers (Exhibit 26 to Memorandum 87-10) also recommends that the independent expert provision be expanded to cover real property. "It is the Chapter's opinion that there are real property interests that are as unique, unusual or special, from a valuation perspective, as any tangible personal property. We are unable to see any logic to limit the waiver to just one of the two."

The probate referee's fee for review of the independent expert appraisal provided in the section was criticized by a number of commentators. The criticisms can be grouped into three general categories--(1) Why have the probate referee review something that is

beyond the referee's area of expertise? (2) Why charge a second fee for the probate referee review? (3) If there is going to be a fee, it should be fixed and not subject to negotiation.

(1) As to the question of whether there should be referee review at all, Paul H. Roskoph and Dawne W. Hollis of Palo Alto (Exhibit 20 to Memorandum 87-10) state, "we feel that once an independent expert has appraised an item and signed an oath as to its veracity, a Referee does not need to review it and certainly does not need to be paid a fee, albeit a reduced fee, to look it over." Jerome Sapiro of San Francisco (Exhibit 13 to Memorandum 87-10) adds, "Why provide for review and payment of probate referee concerning appraisals by independent experts in fields in which the referee has no expertise or depth of experience?"

(2) As to the question of paying two fees, John A. Dundas II of Pasadena (Exhibit 2 to Memorandum 87-10) comments, "It is the practice of some referees to always tell the executor to obtain an expert appraisal of coins, stamps, jewelry, etc. The value of items the referee is not going to appraise should be automatically excluded from the referee's compensation--not just left subject to negotiation." James M. Ruddick of Marysville (Exhibit 29 to Memorandum 87-10) has a very similar perspective. "In a case which I am presently handling, the probate referee advised the personal representative that she should obtain appraisals of antiques and jewelry from a qualified independent expert and furnish those appraisals to the probate referee. Indeed, we have obtained such appraisals from qualified independent experts but we have no intention of submitting them to the probate referee so that the probate referee can charge a fee for simply adopting those values by reference."

(3) The question of negotiation over the fees was raised by Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10). He offers no specific suggestions, other than the referee's fees "should perhaps be more definitive."

§ 8905. Verification of appraisal

8905. A person who appraises property, whether a personal representative, probate referee, or independent expert, shall sign the appraisal as to property appraised by that person, and shall take and subscribe an oath that the person has truly, honestly, and impartially appraised the property to the best of the person's ability.

Comment. Section 8905 restates former Probate Code Section 608, with the inclusion of an independent appraisal expert. See Section 8904. The requirement of subscription of an oath may be satisfied by a written affirmation or a declaration under penalty of perjury. Code Civ. Proc §§ 2015.5-2015.6

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

§ 8906. Fee for appraisal by personal representative

8906. Neither the personal representative nor the personal representative's attorney is entitled to receive compensation for extraordinary services by reason of appraising any property in the estate.

Comment. Section 8906 restates former Probate Code Section 605(c) and expands it to preclude extra compensation not only for appraising cash items but also for appraising other property in the estate (for example where the probate referee is waived pursuant to Section 8903).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. Russell G. Allen of Newport Beach (Exhibit 34 to Memorandum 87-10) takes issue with the policy of this section. "If the personal representative or counsel for the personal representative devotes substantial time and effort to the appraisal of an asset, then that individual should be compensated for doing so. My impression is that testators frequently identify business associates or others enjoying substantial confidence because of their financial expertise to act as personal representatives. Often times in the closely-held business context or real estate investment context, those persons are the most qualified to gather and assess the significance of factors that affect the value of assets. It makes little sense to provide these particularly qualified people with an incentive to 'farm out' the work to a probate referee or other independent appraiser, simply because someone else can get paid for the work while the personal representative or his or her counsel cannot." The Commission's idea was that the reason for waiver of the probate referee is to save the estate money, but giving a commission to the personal representative or attorney will not save the estate money.

Herbert P. Moore, Jr., of Orinda (Exhibit 1 to Memorandum 87-10) hopes this section is clear enough to allow an attorney extraordinary fees for the time the attorney spends working with an appraiser in connection with federal estate tax appraisals. The staff has no ready solution for this concern; perhaps our experts can suggest clarifying or limiting language, if appropriate.

§ 8907. Appraisal report, backup data, and justification of appraisal

8907. A probate referee who appraises property in the estate shall, upon demand by the personal representative or by a beneficiary:

(a) Provide any appraisal report or backup data in the possession of the probate referee used by the referee to appraise an item of property. The probate referee shall not disclose any information that

was acquired by the probate referee subject to a statutory provision for confidentiality. The probate referee shall provide the appraisal report or backup data without charge. The cost of providing the appraisal report or backup data shall not be allowed as an expense of appraisal but is included in the commission for services of the probate referee.

(b) Justify the appraisal of an item of property if the appraisal is contested, whether by objection pursuant to Section 8804, by tax audit, or otherwise. The probate referee may be entitled to an additional fee for services provided to justify the appraisal, to be agreed upon by the personal representative or beneficiary and referee. If the personal representative or beneficiary and the probate referee are unable to agree, the court shall determine what fee, if any, is appropriate.

Comment. Section 8907 is new. Backup data required pursuant to subdivision (a) might include, for example, a listing of comparable sales used in the appraisal. The determination of an appropriate fee under subdivision (b) will depend in part upon the quality of the appraisal and whether the contest of the appraisal is reasonable.

CROSS-REFERENCES

Definitions

Beneficiary § 24

Personal representative § 58

Property § 62

Note. Stuart D. Zimring of North Hollywood (Exhibit 14 to Memorandum 87-10) believes this provision, especially as it relates "to the ability of the personal representative to obtain the background information utilized by the referee" is "long overdue". The provision is also supported by Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10).

State Bar Team 1 (Exhibit to April Minutes) is concerned about the type of information and the circumstances under which a probate referee receives information subject to a statutory requirement of confidentiality. "We are concerned that referees might assert confidentiality in failing to disclose information in many cases which were not intended by this statute." They wonder what exactly is intended by this limitation.

The staff notes that the confidentiality provision was added at the request of the probate referees who noted that they occasion obtain information as a court officer that would otherwise be confidential (e.g., from the tax assessor). Perhaps the probate referees could give us a listing of the common statutory confidentiality problems they encounter so that we could give a flavor of this either in the statute or comment.

§ 8908. Retention of records by probate referee

8908. A probate referee who appraises property in an estate shall retain possession of all appraisal reports and backup data used by the referee to appraise the property for a period of three years after the appraisal is filed. The probate referee shall, during the three year period, offer the personal representative the information used by the referee to appraise the property. Any information not requested by the personal representative may be destroyed at the end of the three year period without further notice.

Comment. Section 8908 is new.

CROSS-REFERENCES

Definitions

Beneficiary § 24

Property § 62

Note. Robert K. Maize, Jr., of Santa Rosa (Exhibit 12 to Memorandum 87-10) supports the "concept of clearly imposing a duty upon the probate referee to maintain his records for a specified period of time," as does Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10).

Demetrios Dimitriou of San Francisco (Exhibit 5 to Memorandum 87-10) suggests that it would be helpful to define the class or classes of data that must be retained and delivered to the personal representative. He does not believe "appraisal reports" and "backup data" is sufficiently precise. Does this mean the probate referee must maintain work product in the file but not used to support an appraisal? Does the referee have an obligation to reduce to writing and keep in the file thought processes or other activity dealing with concepts, ideas, information, or other data relevant to establishing the value of an asset appraised, whether used or not?

The staff does not believe the draft is as unclear as Mr. Dimitriou suggests. There is nothing in the section requiring the referee to generate paperwork for storage purposes, and the requirement is limited to material "used by the referee to appraise the property." Perhaps the probate referees can offer us some additional comment on this point.

Article 2. Designation and Removal of Probate Referee

§ 8920. Designation by court

8920. The court shall designate the probate referee from among the persons appointed by the State Controller to act as a probate referee for the county. If there is no person available who is able to act or if the court does not designate a person appointed for the county, the court may designate a probate referee from another county.

Comment. Section 8920 restates a portion of former Probate Code Section 605(a)(2), and makes clear that the probate referee is designated from the panel appointed for the county by the State Controller. See Section 400 (appointment by Controller). Where there is no person able to act, whether because all are disqualified or removed or because there are an insufficient number appointed or because the court elects not to designate a particular probate referee or otherwise, the court may appoint a probate referee from another county. This codifies existing practice. The designation of a probate referee may be made by the judge in chambers. Section 7061.

CROSS-REFERENCES

Definitions

Property § 62

Note. *Rawlins Coffman of Red Bluff (Exhibit 10 to Memorandum 87-10) doesn't find any reference in the statute to appointment of a referee for reappraisal of property to be sold. This is because the matter is dealt with specifically in connection with property sales. We could add in the Comment a cross-reference to Section 10309, which is the relevant provision in the estate management statute.*

§ 8921. Designation at request of personal representative

8921. The court may designate a person requested by the personal representative as probate referee, on a showing by the personal representative of good cause for the designation. The following circumstances are included within the meaning of good cause, as used in this section:

(a) The probate referee has recently appraised the same property that will be appraised in the administration proceeding.

(b) The probate referee will be making related appraisals in another proceeding.

(c) The probate referee has recently appraised similar property in another proceeding.

Comment. Section 8921 is new.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. *This provision, enabling a personal representative to exercise some control in the designation of a probate referee, received favorable comment. See Paul H. Roskoph and Dawne W. Hollis of Palo Alto (Exhibit 20 to Memorandum 87-10) ("A good addition to the Code is enabling the personal representative to select a Referee. We have worked with some very efficient Referees and have had the unfortunate*

and frustrating experiences of working with some not-so-efficient Referees."); Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10) ("This will solve a potential problem, and I support it."); Beryl A. Bertucio, Matthew Bender Senior Legal Writer (Exhibit 28 to Memorandum 87-10) ("especially like" this new section); Russell G. Allen of Newport Beach (Exhibit 34 to Memorandum 87-10) ("makes singularly good sense if we are to retain the probate referee system").

§ 8922. Discretion not to designate person as probate referee

8922. The court has authority and discretion not to designate a particular person as probate referee even though appointed by the State Controller to act as a probate referee for the county.

Comment. Section 8922 is new. The court may, but is not required to, designate probate referees in rotation from the panel for the county, or may use any other system of designation. The court may refuse to designate a particular person as probate referee if experience with that person is unsatisfactory, if experience with that person's office or staff (including office or staff shared with other probate referees) is generally unsatisfactory, or for other proper reasons in the court's discretion. Where there is no satisfactory probate referee for the county, or not a sufficient number of satisfactory probate referees for the county, the court may designate a probate referee from the panel appointed for another county. Section 8920 (designation by court).

Note. Irving Reifman of Los Angeles (Exhibit 23 to Memorandum 87-10) suggests that this section may be vague or insufficient to support the court's exercise of discretion. He would like to see some of the material from the Comment incorporated in the text of the section as a clear statement of legislative intent.

The staff does not believe that this is necessary. Courts look to and rely on the Commission comments regularly for an expression of legislative intent. We would be concerned about limiting the court's authority by adding specific language in the text of the statute. It is or should be clear that the mere fact the State Controller appoints a person to the probate referee panel for a county does not obligate the court to designate that person to act in a case.

§ 8923. Disqualification of probate referee

8923. The court may not designate as probate referee any of the following persons:

(a) The clerk or a deputy clerk.

(b) A partner or employee of the judge or commissioner who orders the designation.

(c) A person who is related within the third degree to the judge or commissioner who orders the designation or to the spouse of the judge or commissioner, or who is married to a relative within the third degree of the judge or commissioner.

Comment. Section 8923 restates former Probate Code Section 606 without substantive change.

Note. State Bar Team 1 (Exhibit to April Minutes) finds subdivision (c) difficult to read and would like to see it redrafted in a manner that makes it easier to read and understand. This might help:

(c) The following relatives of the judge or commissioner who orders the designation:

(1) The spouse of the judge or commissioner

(2) A person, or the person's spouse, who is related within the third degree to the judge or commissioner or to the spouse of the judge or commissioner.

§ 8924. Removal of probate referee

8924. (a) The court shall remove the designated probate referee in any of the following circumstances:

(1) The personal representative shows cause, including incompetence or undue delay in making the appraisal, that in the opinion of the court warrants removal of the probate referee. The showing shall be made at a hearing on petition of the personal representative. The personal representative shall mail notice of the hearing on the petition to the probate referee at least 15 days before the date set for the hearing.

(2) The personal representative demands removal of the probate referee, regardless of cause. The demand shall be made by affidavit or declaration under penalty of perjury filed with the court and a copy mailed to the probate referee, and thereupon the court shall remove the probate referee without any further act or proof. Removal pursuant to this paragraph is a matter of right, but may be exercised only once in the administration of the estate and only before the personal representative delivers the inventory to the probate referee.

(3) Any other cause provided by statute.

(b) Upon removal of the probate referee, the court shall designate another probate referee in the manner prescribed in Section 8920.

Comment. Section 8924 is new. Other causes provided by statute for removal of a probate referee include failure to make a timely appraisal or report. See Section 8941 (hearing and order). If experience with all the probate referees in a particular office is unsatisfactory, a referee from that office can be removed pursuant to Section 8924 or designation of a referee from that office can be avoided pursuant to Section 8922 (discretion not to designate a person as probate referee).

CROSS-REFERENCES

Definitions

Personal representative § 58
Mailed notice § 1215
Verification required § 1284

Note. Beryl A. Bertucio, Matthew Bender Senior Legal Writer (Exhibit 28 to Memorandum 87-10) especially likes this section.

State Bar Team 1 (Exhibit to April Minutes) would rephrase subdivision (a)(2) as follows:

(2) The personal representative shall have the right to remove the first probate referee who is designated by the court, regardless of cause. this removal shall be made by an affidavit or declaration under penalty of perjury filed with the court with a copy mailed to the probate referee. Thereupon, the court shall remove the probate referee without any further act or proof.

The staff has no problem with this redraft, except that we need to keep the requirement that the removal right may only be exercised before the personal representative delivers the inventory to the probate referee.

Article 3. Time For Probate Referee Appraisal

§ 8940. Time required for appraisal or status report

8940. (a) The probate referee shall promptly and with reasonable diligence appraise the property in the inventory that the personal representative delivers to the referee.

(b) The probate referee shall, not later than 90 days after delivery of the inventory, do one of the following:

(1) Return the appraisal to the personal representative.

(2) Make a report of the status of the appraisal. The report shall show the reason why the property has not been appraised and an estimate of the time needed to complete the appraisal. The report shall be delivered to the personal representative and filed with the court.

Comment. Sections 8940 and 8941 are new. They parallel Sections 12200 to 12205 (time for closing estate). The personal representative must deliver an inventory together with supporting data to the probate

referee. Section 8902 (appraisal by probate referee). Subdivision (a) of Section 8940 requires the probate referee to act promptly and diligently in making the appraisal, which in the ordinary case should occur well before the 90-day period provided in subdivision (b) has run. The 90-day period provided in subdivision (b) should be viewed as an unusually long period and not as the norm for accomplishing the appraisal.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. The Commission's recommendation states that ordinarily the appraisal by the probate referee is done quickly (typically within 15 days) and does not delay administration. This section imposes a duty on the probate referee to complete the appraisal expeditiously, and provides a procedure and sanctions if the appraisal is not completed within 90 days.

A number of commentators took issue with the Commission's claim that appraisals are completed within 15 days in the ordinary case. See Herbert P. Moore, Jr., of Orinda (Exhibit 1 to Memorandum 87-10) ("Most of the appraisers are great and perform their tasks within thirty days. However, I know of a few bad apples, and they are always late and/or need strong prodding."); John A. Dundas II of Pasadena (Exhibit 2 to Memorandum 87-10) ("I strongly disagree with the statement that 15 days is a typical time for the appraisal. My experience has been that 30 days is about the minimum, and 45-60 days is more usual."); Everett Houser of Long Beach (Exhibit 4 to Memorandum 87-10) ("If I could get an appraisal that quickly, I would not complain. My practice is primarily in Southern L.A. and Orange Counties. My experience is that the norm in my area is 60 days and even then, I may have to 'chase' it.")

Commentators also felt that 90 days was too long to allow before action is taken against a dilatory probate referee. Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10) states "I would like to see the time limit a little less than ninety days. Your background comments point out that fifteen days is the norm. A time allowance six times longer than the norm seems too much." Herbert P. Moore, Jr., of Orinda (Exhibit 1 to Memorandum 87-10) strongly recommends a 60 day limit, as does Everett Houser of Long Beach (Exhibit 4 to Memorandum 87-10). Mr. Moore points out that 60 days should be adequate since all that is required of the referee is a report, which could be a one-liner indicating, for example, that not all the background material has been received from the personal representative. Rawlins Coffman of Red Bluff (Exhibit 10 to Memorandum 87-10) suggests a 30 day period.

As a technical matter, State Bar Team 1 (Exhibit to April Minutes) notes that subdivision (b)(1) should refer to the return of the "completed" appraisal to the personal representative. The staff agrees with this point.

§ 8941. Hearing and order

8941. (a) The court shall, on petition of the personal representative or probate referee, or may, on the court's own motion, hear the report of the status of the appraisal. Notice of the hearing shall be served on the personal representative and the probate referee by citation.

(b) If the probate referee does not make the report of the status of the appraisal within the time required by this article or prescribed by the court, the court shall, on petition of the personal representative or may, on its own motion, cite the probate referee to appear before the court and show the reason why the property has not been appraised.

(c) Upon the hearing, the court may order any of the following:

(1) That the appraisal be completed within a time that appears reasonable.

(2) That the probate referee be removed. Upon removal of the probate referee the court shall designate another probate referee in the manner prescribed in Section 8920.

(3) That the commission of the probate referee be reduced by an amount the court deems appropriate, regardless of whether the commission otherwise allowable under the provisions of Sections 8960 to 8964 would be reasonable compensation for the services rendered.

(4) That the personal representative be removed.

Comment. Sections 8940 and 8941 are new. They parallel Sections 12200 to 12205 (time for closing estate).

Reduction of the probate referee's commission under subdivision (c)(3) may be appropriate if the time taken was within the control of the referee and was not in the best interest of the estate or interested persons. In making such a determination, the court should take into account any previous action taken under this article as a result of the delay.

Removal of the personal representative under subdivision (c)(4) may be appropriate where the personal representative's failure to supply necessary information is hindering completion of the appraisal.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Verification required § 1284

Note. The basic procedure outlined in this section is that a referee who hasn't completed the appraisal in 90 days files and serves a report of status of appraisal. No action is taken on the report unless the personal representative or referee or the court on its own motion moves to hear the report. At the hearing the court can impose sanctions, such as allowing further time, removing the referee, or reducing the commission of the referee.

Beryl A. Bertucio, Matthew Bender Senior Legal Writer (Exhibit 28 to Memorandum 87-10) especially likes this procedure.

Richard E. Llewellyn II and A. Steven Brown of Los Angeles (Exhibit 16 to Memorandum 87-10) think the procedure won't work, "for the same reason that prior enforcement sections have not worked." They state that in virtually every inventory it can be alleged that further information is required before the appraisal can be completed. "In some cases the referees have requested further information which is outside the realm of realistic information necessary for the appraisal. At the times those requests were made, we were aware that the offices of those probate referees were swamped with other work."

Everett Houser of Long Beach (Exhibit 4 to Memorandum 87-10) feels that in the ordinary case the procedure can be expedited by giving the referee 30 days to decide whether additional information is needed, and either make a demand for further information or release the appraisal. In a complicated case an extension of time would be in order. Rawlins Coffman of Red Bluff (Exhibit 10 to Memorandum 87-10) suggests something quite similar--the appraisal should be given to the personal representative within 30 days or a written statement of reasons for the delay submitted. If the delay extends to 90 days, the referee would have to apply to the court for a reasonable extension of time and be required to justify the extension.

State Bar Team 1 (Exhibit to April Minutes) makes the technical point that subdivision (a) seems to require the petitioner to serve notice of hearing on himself or herself. We have a general provision in AB 708 to cover this matter:

1201. If a person is required to give notice, the person required to give the notice need not give the notice to himself or herself or to any other person who joins in the petition. We could add a cross-reference to this provision if that would be helpful.

Article 4. Commission and Expenses of Probate Referee

§ 8960. Payment of commission and expenses

8960. (a) The commission and expenses provided by this article as compensation for the services of the probate referee shall be paid from the estate appraised by the referee.

(b) The probate referee may not withhold the appraisal until the commission and expenses are paid, but shall deliver the appraisal to the personal representative promptly upon completion.

(c) The commission and expenses of the probate referee are an expense of administration, entitled to the priority for payment provided by Section 11420, and shall be paid in the course of administration.

Comment. Subdivision (a) of Section 8960 restates a portion of the first sentence of the first paragraph of former Probate Code Section 609 without substantive change.

Subdivisions (b) and (c) are new. Section 11420 provides the highest priority for payment of expenses of administration, which take precedence over all other debts. A personal representative who fails to give the priority required by law to the commission and expenses of the probate referee is liable for the failure. Section [to be drafted] (liability of personal representative to administer estate according to law).

Note. Howard Serbin of the Orange County Counsel's office (Exhibit 24 to Memorandum 87-10) believes this section is quite important and should be enacted into law. Everett Houser of Long Beach (Exhibit 4 to Memorandum 87-10) says, "I especially thank you for providing a release of the appraisal prior to payment. I resent being treated as a cheap crook."

§ 8961. Amount of commission and expenses

8961. As compensation for services the probate referee shall receive all of the following:

(a) A commission of one-tenth of one percent of the total value of the property for each estate appraised, subject to Sections 8962 and 8963. The commission shall be computed excluding property appraised by the personal representative pursuant to Section 8901 and shall be reduced for property appraised by an independent expert to the extent required pursuant to Section 8904.

(b) Actual and necessary expenses allowed by the court for each estate appraised. The referee shall file with the inventory a verified account of the referee's expenses.

Comment. Section 8961 restates a portion of the first sentence and the second sentence of the first paragraph, and the second paragraph, of former Probate Code Section 609 without substantive change. The commission provided by this section is subject to a limitation for publicly traded stock pursuant to Section 8962 and a maximum and minimum pursuant to Section 8963.

CROSS-REFERENCES

Definitions

Property § 62

Note. George E. Atkinson, Jr., of Paramount (Exhibit 22 to Memorandum 87-10) is concerned about probate referee fees for reappraisal of property for sale. "It has been my experience that when a sale is made after the expiration of the one year period and a request for a re-appraisal is made, the Referee usually uses the sales price for the re-appraisal figure and charges the usual 1/10th of 1% of the value of the real property. I believe that since the Referee does no more than merely insert the sales price figure and sign his or her name to the appraisal that a reduced fee should be charged by the Referee for this particular service." This problem was also addressed by James M. Ruddick of Marysville (Exhibit 29 to Memorandum 87-10), who states that "in my experience, such reappraisals are done without any real analysis of the value of the asset involved."

Richard E. Llewellyn II and A. Steven Brown of Los Angeles (Exhibit 16 to Memorandum 87-10) have basic concerns with the whole probate referee function, which are reflected of course in concerns about referee fees. "To begin with, executors often object to the fee charged by the probate referee. In those cases where a beneficiary of the estate is also acting as executor, the objection is sometimes very strenuous. The objection is understandable when the personal representative is asked to supply all of the basic information for the appraisal so that in many cases the valuation is obvious. In those cases, the representative often resents the charge of the probate referee for what appears to be for confirming the work which the representative has done." They go on to point out that the personal representative may work diligently to establish values for an estate tax return, and then find that the referee's values disagree and may be used against the personal representative in an estate tax audit. Having to pay for that privilege is troublesome. "Second, in those cases where the assets are difficult to value, the probate referee typically asks that an appraisal be obtained for the referee to use in his or her valuation. This is extremely difficult for the attorney to explain to the client, and even though there is justification for the offset of the appraisal fee from the referee's fee, it raises the question in the personal representative's mind as to exactly what the responsibility is for the probate referee." The waiver and expert appraisal procedures in the draft address these problems.

§ 8962. Limitation on commission and expenses for publicly traded stock

8962. Notwithstanding Section 8961, the commission and expenses received by the probate referee for appraising publicly traded securities listed as of the date of the decedent's death on a national securities exchange registered under the Securities Exchange Act of 1934 shall not exceed two hundred fifty dollars (\$250).

Comment. Section 8962 is new. It applies to stock listed on an exchange on the date of the decedent's death, whether or not the exchange was open or stock was traded on that date.

Note. This section has been drafted as a limitation on both commissions and expenses, although we believe any expenses involved in appraisal of publicly traded stock are nominal.

The limitation to a "national securities exchange" is somewhat troublesome. In connection with this section, the staff consulted with a securities lawyer for a large Silicon Valley law firm who felt that the NASDAQ National Market System should also be considered. According to this lawyer, the minimum criteria for NASDAQ securities (number of shares, trading volume, net worth of company, net income of company, operating history of company, etc.) are comparable to those of exchange-listed securities, and in fact the NASDAQ system is preferred by most Silicon Valley public companies for a number of reasons. In 1981, shares traded on NASDAQ amounted to 65% of the New York Stock Exchange share volume and almost six times the share volume of the American Stock Exchange, and historically has consistently exceeded all stock exchanges combined except for New York. Current figures would certainly show an even greater market share for NASDAQ. As to the significance of brokers "making a market" for NASDAQ securities, this apparently is no different from what occurs in transactions on a stock exchange floor or from actions taken by public companies themselves to stabilize the price of their stock traded on an exchange.

§ 8963. Maximum and minimum commissions

8963. (a) Notwithstanding Section 8961 and subject to subdivision (b), the commission of the probate referee shall in no event be less than seventy-five dollars (\$75) nor more than ten thousand dollars (\$10,000) for any estate appraised.

(b) Upon application of the probate referee and notice given as provided in Section 1220 and mailed to persons who have requested special notice, the court may allow a commission in excess of ten thousand dollars (\$10,000) if the court determines that the reasonable value of the referee's services exceeds that amount.

Comment. Section 8963 restates a portion of the first sentence of the first paragraph and the third paragraph of former Probate Code Section 609 with the addition of the provision for notice in the case of an increase in commission.

§ 8964. Division of commission between referees

8964. If more than one probate referee appraises property in the estate, each is entitled to the share of the commission agreed upon by the referees or, absent an agreement, that the court allows. In no case shall the total commission for all referees exceed the maximum commission that would be allowable for a single referee.

Comment. Section 8964 restates former Probate Code Section 609.5 without substantive change. Reference to division of expenses is omitted, since each referee is entitled to actual and necessary expenses allowed by the court, regardless of the amount of the commission. It should be noted that the amount of the commission split by the referees may exceed the statutory maximum in a case where the court determines that the reasonable value of the services in the case exceeds the statutory amount. See Section 8963(b).

CROSS-REFERENCES

Definitions

Property § 62

Note. Russell G. Allen of Newport Beach (Exhibit 34 to Memorandum 87-10) doesn't believe this section covers the situation where one referee begins the appraisal process, leaves office, and that appraisal is completed by another referee. He suggests the section be amended to allow the court to allocate fees in that circumstance, as well as where more than one referee completes appraisal of part of the assets. The staff believes the section is intended to cover that situation, though maybe it is not adequately drafted. It might be useful to add to the section that the commission may be split if a referee appraises "or engages in activities to appraise" property.

COMMENTS TO REPEALED SECTIONS

CHAPTER 9. INVENTORY AND APPRAISEMENT

Probate Code § 600 (repealed)

Comment. The first portion of the first sentence of former Section 600 is restated in Section 8800 (inventory and appraisal required) without substantive change. See also Section 7061 (actions in chambers). The last portion of the first sentence is restated in Section (change in ownership statement) [to be drafted].

The second sentence is omitted because it no longer serves a useful purpose. The third and fourth sentences are restated in Section 8850 (contents of inventory) without substantive change. The fifth sentence is restated in Section 8802 (form of inventory and appraisal) without substantive change.

Probate Code § 601 (repealed)

Comment. Former Section 601 is restated in Section 8850 (contents of inventory) without substantive change.

Probate Code § 602 (repealed)

Comment. Former Section 602 is continued in Section (appointment of personal representative) without substantive change.

Probate Code § 603 (repealed)

Comment. Former Section 603 is restated in Section 8851 (discharge or devise of claims) without substantive change.

Probate Code § 604 (repealed)

Comment. Former Section 604 is restated in Section 8852 (oath of personal representative) without substantive change.

Probate Code § 605 (repealed)

Comment. The introductory portion of subdivision (a) of former Section 605 is superseded by Section 8900 (appraisal by personal representative, probate referee, and independent expert). Subdivision (a)(1) is superseded by Section 8901 (appraisal by personal representative). See also Estate and Trust Code Sections 40 ("financial institution" defined) and 8800 (inventory and appraisal required).

Subdivision (a)(2) is restated in Estate and Trust Code Sections 8902 (appraisal by probate referee), 8920 (designation by court), and Section 8903 (waiver of appraisal by probate referee) without substantive change.

Subdivision (a)(3) is restated in Section 8903(b)-(d) (waiver of appraisal by probate referee), with clarifying changes.

Subdivision (b) is superseded by Estate and Trust Code Sections 450-453 (powers of probate referee). Subdivision (c) is restated in Section 8906 (fee for appraisal by personal representative) and expanded to preclude extra compensation not only for appraising cash items but also for appraising other property in the estate.

Subdivision (d) is omitted as unnecessary. See Section 6608. Subdivision (e) is omitted as unnecessary. See Sections 13103, 13152(b), 13200(c), and 13658.

Probate Code § 606 (repealed)

Comment. Former Section 606 is restated in Section 8923 (disqualification of probate referee) without substantive change.

Probate Code § 607 (repealed)

Comment. Former Section 607 is omitted; the procedure provided in the section was ignored in practice.

Probate Code § 608 (repealed)

Comment. Former Section 608 is restated in Section 8905 (verification of appraisal), with the addition of an independent appraisal expert.

Probate Code § 608.5 (repealed)

Comment. Former Section 608.5 is restated in Section 8804 (objection to inventory and appraisal), with the clarification that the procedure applies to the inventory as well as the appraisal.

Probate Code § 609 (repealed)

Comment. The first portion of the first sentence of the first paragraph of former Section 609 is restated in Estate and Trust Code Sections 8960 (payment of commission and expenses) and 8961 (amount of commission and expenses) without substantive change. The last portion of the first sentence is restated in Section 8963 (maximum and minimum commissions) without substantive change. The second sentence is restated in Section 8961 (amount of commission and expenses) without substantive change. The third sentence is omitted because it was an obsolete relic from the inheritance tax function of probate referees.

The second paragraph is restated in Section 8961 (amount of commission and expenses) without substantive change. The third paragraph is restated in Section 8963 (maximum and minimum commissions), with the addition of a provision for notice.

Probate Code § 609.5 (repealed)

Comment. Former Section 609.5 is restated in Section 8964 (division of commission between referees) without substantive change.

Probate Code § 610 (repealed)

Comment. Former Section 610 is restated in Section 8805 (failure to timely file inventory and appraisal), which makes clear that failure to timely file the appraisal is included within the statute. Liability of the personal representative and of the sureties on the bond is joint and several. See Code Civ. Proc. § 996.410 et seq.

Probate Code § 611 (repealed)

Comment. Former Section 611 is restated in Estate and Trust Code Sections 8801 (supplemental inventory and appraisal) and 8805 (failure to timely file inventory and appraisal) without substantive change.

Probate Code § 612 (repealed)

Comment. Former Section 612 is restated in Section 8874 (wrongful taking, concealment, or disposition of property in estate) with the addition of a bad faith limitation.

Probate Code § 613 (repealed)

Comment. The first two sentences of former Section 613 are restated in Section 8870 (subpoena to appear and be examined concerning decedent's property), substituting a petition for a complaint and a subpoena for a citation. The third sentence is superseded by Section 8872 (examination).

Probate Code § 614 (repealed)

Comment. The first sentence of former Section 614 is superseded by Section 8870(c) (subpoena to appear and be examined concerning decedent's property). The third sentence is restated in Section 8871 (interrogatories) without substantive change. The second and fourth sentences are restated in Section 8872 (examination).

Probate Code § 615 (repealed)

Comment. Former Section 615 is restated in Section 8873 (subpoena to appear and account), substituting a petition for a complaint.

CHAPTER 23. PROBATE REFEREES

Probate Code § 1300 (repealed)

Comment. Former Section 1300 is omitted; it no longer serves a useful purpose.

Probate Code § 1301 (repealed)

Comment. Subdivision (a) of former Section 1301 is restated in Section 451 (compelling appearance), with the addition of the reference to a guardian, conservator, or other fiduciary, since the probate referee may appraise estates other than decedents' estates. Subdivision (b) is restated in Section 450 (general powers) without substantive change.

Probate Code § 1302 (repealed)

Comment. Former Section 1302 is restated in Section 451 (compelling appearance) without substantive change.

Probate Code § 1303 (repealed)

Comment. Former Section 1303 is restated in Section 452 (examination, testimony, and production of documents), with the addition of the reference to production of documents.

Probate Code § 1304 (repealed)

Comment. Former Section 1304 is superseded by Section 453 (protective orders and enforcement).

Probate Code § 1305 (repealed)

Comment. The first sentence of the first paragraph of former Section 1305 is restated in Section 400(a) (appointment by Controller) and the first sentence of Section 401(a) (qualifications for appointment) without substantive change. The second sentence is restated in Section 401(b) (qualifications for appointment) without change. The third sentence is superseded by Section 400(b) (appointment by Controller).

The first sentence of the second paragraph is omitted; it is a transitional provision that no longer serves a function. The second sentence is restated in the first sentence of Section 403(a) (term of office of probate referee) without substantive change. The third sentence is restated in Section 403(b) (term of office of probate referee) without substantive change. The fourth sentence is omitted; it is a transitional provision that no longer serves a function. The fifth sentence is restated in the second sentence of Section 401(a) (qualifications for appointment) without substantive change. The sixth sentence is restated in the second sentence of Section 403(a) (term of office of probate referee) without substantive change.

Probate Code § 1306 (repealed)

Comment. Former Probate Code Section 1306 is restated in Section 402 (qualification examination) without substantive change.

Probate Code § 1307 (repealed)

Comment. Former Probate Code Section 1307 is restated in Section 404(a) (standards for probate referee), making adoption of standards mandatory rather than permissive. This codifies existing practice.

Probate Code § 1308 (repealed)

Comment. Subdivision (a) of former Probate Code Section 1308 is restated in Section 404(b) (standards for probate referee) without substantive change. Subdivision (b) is omitted; the authority of the Controller to remove 10% of the probate referees in a county has not been used in modern times. Moreover, in a large county the terms of the probate referees are staggered so that the Controller will be able to replace probate referees continuously.

Probate Code § 1309 (repealed)

Comment. Former Probate Code Section 1309 is restated in Section 405 (termination of authority) without substantive change.

Probate Code § 1310 (repealed)

Comment. Former Probate Code Section 1310 is omitted; it relates to illegal activities in connection with the inheritance tax, which has been abolished.

Probate Code § 1311 (repealed)

Comment. Former Probate Code Section 1311 is restated in Section 406(a)-(b) (political activities of probate referee) without substantive change.

Probate Code § 1312 (repealed)

Comment. Former Probate Code Section 1312 (with the exception of the last sentence) is restated in Estate and Trust Code 406(c) (political activities of probate referee). The last sentence is omitted; it is a transitional provision that no longer serves a function.

Probate Code § 1313 (repealed)

Comment. Former Section 1313 is omitted. For the report of the California Law Revision Commission concerning administration of estates of decedents, see ____.