

Memorandum 83-62

Subject: Study L-655 - Probate Referees

Assemblyman Don Rogers has written to the Commission to suggest that the Commission make an "immediate recommendation for the revision of Section 657 of the Probate Code as set forth in Assembly Bill 816 (1983)." See Exhibit 1 attached. This bill was introduced by Assemblyman Rogers to require that the executor or administrator of a decedent's estate appraise the assets of the estate and to permit, but not require, the use of the probate referee in making such appraisals. A copy of the bill is attached as Exhibit 2. The Bill Analysis of the Assembly Committee on Judiciary for this bill is attached as Exhibit 3. The analysis includes a statement of the reasons that the State Bar opposed the bill. See also the background information set out in Exhibit 4 (provided by State Bar). A staff analysis of the State Bar memorandum is attached as Exhibit 6.

The Commission last year decided to defer study of whether the probate referee system should be retained. The Commission decided that it would review the system after it had studied probate administration and determined the extent to which various probate provisions should be dependent upon an appraisal.

If the Commission decides to give this matter a priority, the staff believes that the Commission should study the matter in connection with fees of executors and administrators and attorneys. This is because the executor or administrator receives a statutory fee which is based on a percentage of the value of the estate (Probate Code § 901) and a contract for higher compensation is void (Section 903). The attorney is entitled to the same fee (Section 910). Higher fees may be allowed by the court for extraordinary services. The text of the relevant sections-- Probate Code Sections 900-911--is attached as Exhibit 5. The staff is concerned that there is a clear conflict of interest in permitting the executor or administrator to value the estate when his or her fee depends on the value given to the estate. The staff believes that we need to develop a different system for determining the fees of the executor or administrator if we are to have the executor or administrator value the

estate. Since the fee of the attorney is by statute the same as that of the executor or administrator, we will need to make provision for the attorney's fee also.

There may also be other problems that would be created if the proposal of Assemblyman Rogers were adopted. We believe that the proposal should be given a priority for study, together with the related problem of the fees for executors, administrators, and attorneys. A major argument presented by the State Bar in opposition to the Rogers proposal is that it is necessary to require an appraisal by the probate referee in most cases in order that the system be financially sound. If the system were optional, the cost would become much greater since the probate referee would be used only for difficult appraisals.

The staff recommends that this matter be given a high priority. We see no possibility, however, of submitting a recommendation in 1984. We propose that immediate study be given to the problem of how we can avoid the need for an appraisal in fixing fees for the personal representative and the attorney.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



Memo 83-62

Exhibit 1

Study L-655

COMMITTEES: 1983-1984

Economic Development and
New Technologies

Natural Resources

Transportation

Select Committee on Utility Performance,
Rates and Regulation

Member, Seismic Safety Commission

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Assembly California Legislature

DON ROGERS

ASSEMBLYMAN, THIRTY-THIRD DISTRICT

July 15, 1983

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMouilly:

I would like to suggest that the California Law Revision Commission make an immediate recommendation for the revision of Section 657 of the Probate Code as set forth in Assembly Bill 816 (1983). See copy enclosed.

Since repeal of the California Inheritance Tax by the people of the State of California, the Legislature has changed the Inheritance Tax Referees to "Probate Referees" and has required a complicated procedure to waive the mandatory appraisal of all but specified estates. (See Section 605 of the Probate Code).

Thirty-four states have eliminated the required use of a court-appointed referee to appraise assets. The personal representative of the estate makes the appraisal and can use a referee if he decides he needs one.

Unfortunately, in the small estate involving a family house or other limited assets, a minimum fee of \$75.00 still must be paid to the Probate Referee because it will cost this much in additional fees or cost of time to go through the order to show cause procedure to eliminate the \$75.00 cost. In these small family home cases, the sole child many times must advance his own money for fees and costs to get title into his or her name as the house may be the sole asset in the estate.

I understand the administrative part of the Probate Code is under consideration for revision, but it may be two years before this full study is completed. During this two-year period, beneficiaries in small estates will continue payment of fees for appraisals that are not needed since there is no inheritance tax

JOHN DE MOULLY

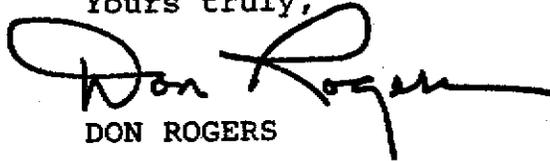
-2-

JULY 15, 1983

and no need for an accounting or for values to be established in these small estates.

Thank you for your cooperation.

Yours truly,

A handwritten signature in black ink that reads "Don Rogers". The signature is stylized with a large, looping "D" and a long horizontal stroke at the end.

DON ROGERS

DAR:BJC
ENCL.

AMENDED IN ASSEMBLY MAY 11, 1983

CALIFORNIA LEGISLATURE—1983-84 REGULAR SESSION

ASSEMBLY BILL**No. 816**

Introduced by Assemblyman Rogers

February 23, 1983

An act to amend ~~Section 605~~ *Sections 605 and 902* of the Probate Code, relating to administration of estates.

LEGISLATIVE COUNSEL'S DIGEST

AB 816, as amended, Rogers. Administration of estates: appraisal of assets.

Existing law requires the executor or administrator of an estate to appraise at fair market value specified assets of the estate, with certain exceptions, and requires a probate referee appointed by the court or judge to appraise all assets other than those appraised by the executor or administrator, with certain exceptions.

This bill would instead ~~authorize~~ *require* the executor or administrator of an estate to appraise at fair market value all assets of the estate, and would ~~require~~ *authorize an executor or administrator to employ or retain* a probate referee ~~appointed by the court or judge~~ to appraise ~~all~~ *one or more* assets of the estate *where, in the sole and absolute discretion of the executor or administrator, and upon the exercise of good faith, the utilization of an independent expert is deemed appropriate.* ~~other than those appraised by the executor or administrator, with no exceptions.~~

Under existing law an executor or administrator may be compensated for services rendered extraordinary to those rendered in the accounting for the estate, as specified.

This bill would include within the list of compensable extraordinary services, the appraisal by the executor or

administrator of assets of the estate which are not cash, cash-equivalent items, or deposits in financial institutions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 605 of the Probate Code is
2 amended to read:
3 ~~605. (a) The appraisement shall be made as follows:~~
4 ~~(1)~~
5 *605. (a) The executor or administrator may shall*
6 *appraise at fair market value the assets of the estate.*
7 ~~(2) All assets other than those appraised by the~~
8 ~~executor or administrator pursuant to paragraph (1) shall~~
9 ~~be appraised by a probate referee appointed by the court~~
10 ~~or judge.~~
11 ~~(b) The executor or administrator shall furnish to the~~
12 ~~referee such information concerning the assets appraised~~
13 ~~by him or her or to be appraised by the referee as the~~
14 ~~referee shall require.~~
15 ~~(c) The executor or administrator or his or her~~
16 ~~attorney shall not be entitled to receive compensation for~~
17 ~~extraordinary services by reason of appraising any asset~~
18 ~~pursuant to this section.~~
19 *(b) The executor or administrator may employ or*
20 *retain a probate referee to determine the fair market*
21 *value of one or more assets of the estate where, in the sole*
22 *and absolute discretion of the executor or administrator,*
23 *exercising good faith based upon the facts and*
24 *circumstances then existing, the utilization of an*
25 *independent expert is appropriate.*
26 *SEC. 2. Section 902 of the Probate Code is amended*
27 *to read:*
28 *902. Such further Further allowances may be made as*
29 *the court may deem just and reasonable for any*
30 *extraordinary services, such as sales or mortgages of real*
31 *or personal property, contested or litigated claims against*
32 *the estate, the preparation of estate, inheritance, income,*
33 *sales or other tax returns, or the adjustment or litigation*

1 or payment of any of ~~said~~ *those* taxes, litigation in regard
2 to the property of the estate, *the appraisal by the*
3 *executor or administrator of assets of the estate which are*
4 *not cash, cash-equivalent items, or deposits in financial*
5 *institutions*, the carrying on of the decedent's business
6 pursuant to an order of the court, and ~~such~~ other
7 litigation or special services as may be necessary for the
8 executor or administrator to prosecute, defend, or
9 perform.

10 The executor or administrator may also employ or
11 retain tax counsel, tax auditors, accountants, or other tax
12 experts for the performance of any action which ~~such~~
13 *those* persons, respectively, may lawfully perform in the
14 computation, reporting, or making of tax returns, or in
15 negotiations or litigation which may be necessary for the
16 final determination and payment of taxes, and pay from
17 the funds of the estate for ~~such~~ *those* services.

ASSEMBLY COMMITTEE ON JUDICIARY
ELIHU M. HARRIS, Chairman

AB 816

AB 816 (Rogers) As amended 05/11/83

SUBJECT

This bill would require the executor or administrator of a decedent's estate to appraise the assets of the estate.

DIGEST

Existing law provides that the executor or administrator of a decedent's estate must appraise at fair market value specified assets: moneys, currency, cash, amounts in bank accounts and on deposit with other financial institutions, proceeds of insurance policies and retirement plans. All other assets, unless they are subject to a statutory exception, are appraised by a probate referee appointed by the court or judge. However, the executor or administrator may obtain a waiver of the appointment of the probate referee upon a showing of good cause.

This bill would instead require the executor or administrator to appraise the assets of the decedent's estate at fair market value. In doing so, the executor or administrator may employ or retain a probate referee to determine the fair market value of estate assets where, in the executor's or administrator's discretion and good faith belief, the utilization of an independent expert is appropriate.

The bill would also authorize the court to order a reasonable allowance for extraordinary services incurred in the executor's or administrator's appraisal of estate assets which are not cash, cash-equivalent items, or deposits in financial institutions.

STAFF COMMENTS

1. Proposition 6 as approved on the June 1982 ballot repealed the state inheritance tax. AB 1607 (Ingalls), Chapter 1535, Statutes of 1982, was subsequently passed by the Legislature to conform statute to the repeal. However, AB 1607 also changed the name of the inheritance tax referees to "probate referees" and left intact existing law requiring most probate estates to have an appraisal of their assets by a probate referee. It made an exception for interspousal transfers and those estates not exceeding \$30,000 and provided that the court, for good cause, could waive the appointment of a referee for other estates in probate.

(CONTINUED)

AB 1607, moreover, made changes in the compensation received by probate referees. Currently, each referee receives from the appraised estate a commission of 1/10 of 1% of the total value of the assets appraised but in no event less than a minimum fee of \$75 or more than \$10,000. Upon the referee's application, the court may allow a fee in excess of the \$10,000 maximum if the court determines that the reasonable value of his services exceeds that amount. Each referee is also entitled to actual and necessary expenses as allowed by the court.

This bill would make an appraisal by a probate referee optional rather than mandatory by requiring the decedent's personal representative to appraise all the estate assets at fair market value. The personal representative would be permitted to employ or retain a probate referee to determine the fair market value of the assets where it would be appropriate to rely on the services of an independent expert. The author argues that, since Prop. 6 repealed the inheritance tax, there is no longer any reason to mandate costly appraisals. He states that the only useful function which probate referees can possibly perform now is strictly an optional one; if the administrator of an estate wanted some assistance in determining the value of the estate, a probate referee could be asked to assist. Changing the job title to "probate referee," he adds, does not make such referees more useful.

Under current law, the personal representative of an estate in probate, unless it comes within a statutory exception, must file a statement of good cause with the court in order to have the probate referee's appointment waived. A noticed hearing on the waiver is then held. The author claims that AB 816 will eliminate the extra legal paperwork, the unnecessary cost to the heirs, and the drain on the court's time.

2. In opposition to this bill, the State Bar Estate Planning, Trust and Probate Law Section asserts:
 - (a) AB 816 is unnecessary because existing law permits the decedent's personal representative, in the appropriate situation, to ask the court to waive the appointment of a probate referee upon a showing of good cause and notice to all persons interested in the estate.
 - (b) Appraisements are essential not only for fixing the value of assets for estate and income tax purposes but also in connection with approximately forty different probate functions which depend on independent appraisal. The probate referee system has a volume

(CONTINUED)

of work because the system is, for the most part, mandatory. The option proposed in AB 816 would make the system economically nonviable. The cost incurred by self-appraisal would be greater than the current statutory limitation. From a consumer standpoint, the existing probate referee system enables small estates to have the benefits of the same appraisal services as large estates and gives both the protection of an independent determination by an officer of the court.

- (c) Self-appraisal gives rise to serious conflicts of interest. There is considerable pressure on attorneys from some clients to secure excessively high appraisals in order to establish an unrealistically high basis for the determination of depreciation and gain or loss on eventual sale for income tax purposes. The probate referee stands as a buffer between the client and the attorney in resisting these pressures and also protects the taxpayers' interests by assuring a fair valuation of assets which receive a new base at death. Moreover, there is concern that, since the compensation of the personal representative and the attorney is based upon the value of the estate being administered, those persons should not be placed in the conflicting position of determining that valuation.
- (d) California has had a system of impartial probate appraisers, since 1850, long before it had an inheritance tax. Appraisal is the starting point for accounting, determination of compensation, protection of creditors, the reasonableness of prices received for assets sold, and the computation of the eventual distribution. The probate referee's appraisal minimizes the possibility of friction, and subsequent litigation, between persons interested in the estate and between such persons and the personal representative and the attorney.
- (e) The California Law Revision Commission is now studying the Probate Code in depth and has begun a review of Division 3 of which Section 605 is a part. It would be appropriate to await the results of its study rather than enact AB 816 at this time.

3. Technical amendments:

On page 2, line 24, delete "utilization" and insert "services".

On page 2, line 25, delete "is" and insert "are".

SOURCE

Author

SUPPORT

Unknown

OPPOSITION

Estate Planning, Trust and Probate Law Section of the
State Bar of California

THE APPRAISER'S ESSENTIAL FUNCTION IN
CALIFORNIA PROBATE ADMINISTRATION

This memorandum is based upon the assumption that the California electorate will adopt either, or both, the Rogers and Miller Initiatives repealing the California Inheritance and Gift Taxes at the June, 1982, Primary Election. It addresses the necessity of emergency legislation replacing the Inheritance Tax Referee system, repealed by these Initiatives, with an independent Probate Appraiser system in order to continue the orderly administration of Probate Estates.

Preliminarily, a brief review of the history and operation of the present system would be in order. California has had a system of impartial appraisers since 1850, long before it had an Inheritance Tax. Originally, the law required the Probate Judge to appoint three disinterested persons as Probate Appraisers (Stats. 1850, Ch. 129, § 107; 1872 CCP § 1444). Later, when the Inheritance Tax was enacted in 1893, the Legislature integrated it with the Probate process, and in so doing the State gained the use of the impartial Probate Appraisers appointed by the Court. In 1911 the law was amended to provide that one of the three Probate Appraisers appointed by the Court had to be an Inheritance Tax Appraiser in order to assure the qualification

of an appraiser for tax purposes. In practice this worked so well that in time it became the custom of the Probate Court to appoint only a single appraiser, the Inheritance Tax Appraiser, now known as the Inheritance Tax Referee to more clearly reflect the true duties of the office.

The present system of Inheritance tax determination and collection, combined with appraisal services in the administration of Estates of decedents, has worked very satisfactorily for almost 70 years. It involves a three-part balance between the Estate under Court supervision, the Controller's Office, and the Probate Court. The Inheritance Tax Referee is an officer of the Probate Court and although he is appointed by the Controller he is not an employee of that office. (Daggett v. Cranston, 189 Cal.App.2d 774, 776.) Apart from his duties in connection with the Inheritance Tax and Gift Tax Laws of this State, he has important duties and responsibilities to the Superior Court in which the Estate of the decedent is being administered.

The Inheritance Tax Referee performs a variety of functions within the very stringent fee limitation of ten cents, and in larger estates only five cents, per \$100.00 of value. His historical function, which must be continued after his tax functions are repealed, is that of the Probate appraiser. This aspect of his work is the starting point

for accounting, determination of attorneys' fees and personal representative's commissions, protection of creditors, and eventual distribution. He currently performs this function simultaneously with his work in fixing values upon which death taxes are determined. And by so doing he also simultaneously provides, in the great majority of instances, acceptable values for the Federal Estate Tax Return, where one is required.

To perform these functions, the Referee is provided with quasi-judicial powers, as is proper for an officer of the Court. He must examine evidence, has the right of subpoena and may examine witnesses, and upon the basis of all the facts presented to him he must reach a conclusion fair to all parties interested in the Estate.

The California Probate Administration system is a "Court Interventionist" system which depends upon the independent Probate Appraiser to function. Attached to this memorandum is a Schedule of "Probate Code References to Inheritance Tax Referee" detailing not only Code Sections directing the Referee to perform Probate Appraisal functions, but also setting forth Code Sections which by necessary implication rely upon the appraisal function. It is important to note that the administration of Guardianship or Conservatorship Estates also is wholly dependent upon the independent appraisal

system. This compilation is not exhaustive, but it is illustrative of the indispensable position of the Appraiser.

The efficiency, economy and impartiality of the independent appraiser system has been recognized for purposes other than Probate Administration, as is illustrated by the attached Schedule of "Inheritance Tax Referees in Non-Probate Non-Tax Areas." Although not indispensable to these non-probate proceedings, the loss of the referee system would result in greatly increased costs to litigants.

The only alternative to legislation preserving the independent Probate Appraiser system would be a complete revision of the Probate Code. By mandate of the Legislature, the Law Revision Commission presently is engaged in a comprehensive review of the Probate Code. It undoubtedly will address the policy question of whether the "Interventionist" system should be retained by California. That project, however, is too massive, and controversial, to be completed before the June, 1982, Primary election. Until it can be concluded, the existing system must be capable of uninterrupted operation. This can be achieved only by legislation recreating the historical Probate Appraiser in the event the Inheritance Tax Referee system is eliminated by the repeal of the taxes whereby it was created.

PROBATE CODE REFERENCES TO INHERITANCE TAX REFEREE

<u>§</u>	<u>DIRECT (NON-TAX)</u>
605	Appraisement Probate Estate
606	Limit on Who May Act as Referee
607	Appointment of Referee in Another County
608	Referee's Oath
609	Referee's Compensation
609.5	Sharing of Fees With Other County Referee
611	Supplemental Appraisement
664	Determination Allowable Homestead
665	Sale Homestead Exceeding Exemption
666	Confirmation Homestead Report
784	Sale of Real Property
2610	Appraisement Guardianship or Conservatorship

<u>§</u>	<u>INDIRECT</u>
55	Limit on Disposition of Personal Property by Nuncupative Will
90	Amount to be Allocated to Pretermitted Heir
91	Sources from which Share of Pretermitted Heir to be Satisfied
201.8	Whether Inter-Vivos Transfer of Quasi-Community Property is Avoidable by Surviving Spouse Because Not Made for Substantial Consideration
205	Liability of Surviving Spouse for Decedent's Debts

541 Bond of Personal Representative
553.3 Reduction Bond
612 Liability for Embezzlement
644 Applicability of Summary Administration
645.3 Liability for Debts in Summary Probate
681 Modification of Family Allowance
750 Abatement of Legacies
753 Contribution to Devisees and Legatees Whose
Property Has Been Sold to Pay Debts or Family
Allowance
754.5 Sale for Not Less than 90% of Real and Personal
Property as Unit
754.6 Sale of Certain Leaseholds
759 Damages for Improper Sale
830 Advantage of Borrowing Money
840 Advantage of Lease
860 Advantage of Exchange
901 Commissions
910 Fees
920 Basis for Accounting
971 Proration of Federal Estate Tax
980 Allocation of Debts
1001 Propriety of Preliminary Distribution
1020.1 Reasonableness of Assignment
1103 Probate Partition
1127 Trustee's Bond

INHERITANCE TAX REFEREES IN NON-PROBATE NON-TAX AREAS

Code of Civil Procedure

- §580a - Deficiency Judgment Proceedings
- §726 - Foreclosure Proceedings

Family Law Appraisers

Los Angeles Superior Court Manual of Procedures
for The Family Law Department (Central District) §23

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MATTHEW S. RAE, JR.
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AREA CODE 213
627-8104

September 2, 1982

Honorable Edmund G. Brown, Jr.
Governor
State Capitol
Sacramento, CA 95814

Re: AB 1607

Dear Governor Brown:

This is a State Bar supported Bill to solve the technical problems inadvertently created by Proposition 6 in the administration of Probate Estates. I urge you to sign it.

California's Probate Code revolves around an independent appraisal of assets. Some forty different functions, including those involving guardianships of minors and conservatorships as well as decedent's estates, are dependent upon this independent appraisement.

This system developed long before there was an Inheritance Tax, and utilized court-appointed probate appraisers. After the Inheritance Tax was adopted these functions for convenience were performed by the Inheritance Tax Referees, even those having nothing to do with taxation, such as the appraisement of a minor's estate. This Bill simply recreates the historical, and absolutely essential, office of probate appraiser now that the Inheritance Tax has been abolished.

The Bill meets an immediate crisis in the administration of estates, probate, conservatorship, and guardianship. Long range solutions will be studied by the Law Revision Commission in accordance with an ongoing review of the Uniform Probate Code mandated by the legislature and commenced two years ago. Some other system

Honorable Edmund G. Brown, Jr.
September 2, 1982
Page Two

of probate may be preferable for California, but until the Law Revision Commission reports to the legislature, estates must continue to be administered under the existing Code. That Code mandates independent appraisal. AB 1607 provides the cheapest, most effective means for carrying out that mandate.

Apart from its basic purpose, AB 1607 also was amended to preserve the will of the people as expressed by the adoption of Propositions 5 and 6. In the event pending litigation should result in an appellate court invalidating the repeal of Inheritance and Gift Taxes by the Initiatives, this Bill repeals them.

Sincerely,

MATTHEW S. RAE, JR.
Chair, Legislation Committee,
State Bar Section of Estate
Planning, Trust and Probate Law

MSR:bg

cc: John McDonnell
Peter Jensen

bcc: Irving Reifman

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AREA CODE 213
627-8104

October 5, 1982

Cal-Tax News
c/o California Taxpayers'
Association
921 11th Street
Suite 800
Sacramento, California 95814

Attention: Kirk West
Executive Vice President

Regarding: AB 1607

Dear Kirk:

I have the greatest respect for the California Taxpayers' Association and the work which it does, therefore, I am dismayed when even after a telephone conference with me, by one of your staff, a State Bar bill to benefit the consumer on which I personally worked is so totally misrepresented by Cal-Tax News.

I suppose I should be amused that in your haste to rush into print with your condemnation of the Bill you totally ignored the fact that it repeals the California inheritance and gift taxes in order to preserve the will of the people expressed at the polls on June 8 in the event, as is quite likely, that the Court should find Proposition 5 and 6 to be unconstitutional in response to Carlson, et al. v. Cory, Court of Appeal, First Appellate District, Division 2, No. A0 18984. I also find it ironic that Don Rogers voted against the Bill and, thus, in effect, voted for the retention of the inheritance and gift taxes if the Court rules against his proposition.

Your lead article implies that AB 1607 creates a cost to the taxpayers of California. It does not. The probate appraiser system has always been self-supporting. The cost is paid by those who benefit from the service.

Your separate article on the Bill implies that the adoption of Proposition 6 eliminated the function of the probate referee and that they became obsolete. One of their functions, that of determining the inheritance tax, became obsolete. The other extremely vital function of providing an independent appraisal of estate assets upon which the entire administrative provisions of the Probate Code depend remains. The State Bar's purpose in sponsoring legislation to provide for the appointment of these absolutely essential probate referees was to assure the continuance of a low cost and efficient independent appraisal system free from the possibility of its becoming a judicial spoils system.

You totally misconstrue the history of the probate appraisal system. Long before California had an inheritance tax, it developed its probate system, which is a court supervised system revolving around an independent appraisal of assets. Some forty different probate functions are dependent upon this independent appraisal. These functions involve not only assets of decedents, but also guardianships of minors and conservatorships of incapacitated persons. Before there was any death tax these probate appraisal functions were performed by probate appraisers operating on a very strictly limited statutory fee. After the inheritance tax was adopted, the Inheritance Tax Referees took over this function as a matter of convenience and efficiency. The only thing the State Bar accomplished by successfully securing the adoption of AB 1607 was to recreate the historically and absolutely essential function of the probate appraiser now that the inheritance tax has been, or by the Bill will be, abolished.

I am surprised that you, as a watchdog of the taxpaying consumer, do not realize that this is consumer oriented legislation designed to minimize the opportunities for litigation and to keep down the cost of administering estates. Without the severely limited statutory fee provided in the Bill and the system of independent appraisers which it makes possible, the persons interested in the estates of minors, incapacitated persons and decedents would face appraisal costs at least four or five times, and frequently ten times what the Bill permits a probate appraiser to charge. It is true that a slight increase in the fee formula was granted by the legislature at the last minute, not at the request of, but with

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October 5, 1982
Page Three

the understanding approval of the State Bar. This was to recognize the necessity of retaining an economically viable system in response to concerns expressed by the State Bar over the innovation of a provision for the Court to authorize self-appraisal.

I am also surprised that you do not seem to understand the Controller's "considerable disdain for the referee system." The State Bar, for years, has been opposing the efforts of Controllers of both parties to eliminate the independent referee system in order to permit the establishment of a civil service bureaucracy. Dealing with the civil servants of the Internal Revenue Service makes members of the California Bar particularly grateful for the fact that we have always run our death and gift tax and probate systems under the free enterprise theory of the private entrepreneur. Understandably, the Controller has never appreciated the fact that appraisements are made, and in the past, taxes were determined by independent officers of the Court, rather than subservient employees in another vast and expensive bureaucracy.

Every attorney with whom I have spoken who has any substantial probate practice, agrees that this new law will keep down probate costs. A majority of legislators in both Houses gave bipartisan support to this State Bar sponsored legislation. Those persons who, by reason of unfortunate bereavement or by reason of the necessity of protecting a family member will be facing the probate process, owe a debt of gratitude to the legislators who supported this State Bar Bill and to the Governor for signing it.

Sincerely,

Matthew S. Rae, Jr.

MSR:cs

cc: Honorable Robert G. Beverly,
Attention Mr. Tom Martin
Honorable Walter M. Ingalls
Harley J. Spitler, Esquire
Peter Jensen, Esquire
Dana W. Reed, Esquire

bcc: Irving Reifman, Esquire

Exhibit 5

Probate Code Sections 900-911

**CHAPTER 15. COMPENSATION
AND ACCOUNTING****ARTICLE 1. COMMISSIONS****§ 900. Allowance of expenses and compensation;
compensation provided by will; renuncia-
tion**

The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided; but when the decedent, by his will, makes other provision for the compensation of the executor, that shall be a full compensation for his services, unless by a written instrument, filed in the court, he renounces all claim for compensation provided for in the will.
(Stats.1981, c. 281, § 900.)

§ 901. Commissions; apportionment

The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first fifteen thousand dollars (\$15,000), at the rate of 4 percent; for the next eighty-five thousand dollars (\$85,000), at the rate of 3 percent; for the next nine hundred thousand dollars (\$900,000), at the rate of 2 percent; and for all above one million dollars (\$1,000,000), at the rate of 1 percent. If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each.

The commission to which the executor or administrator is entitled pursuant to this section shall be based upon the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate, if any. This paragraph shall apply whether or not a sale of property has taken place during the probate of the estate.

(Stats.1981, c. 281, § 901. Amended by Stats.1955, c. 174, § 1; Stats.1965, c. 115, § 1; Stats.1978, c. 1396, § 1.)

**§ 902. Additional compensation for extraordinary
services; employment of tax specialists**

Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any of said taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform.

The executor or administrator may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services.

(Stats.1981, c. 281, § 902. Amended by Stats.1939, c. 766, § 1; Stats.1951, c. 1604, § 1.)

**§ 903. Invalidity of contracts for higher compen-
sation**

All contracts between an executor or administrator and an heir, devisee or legatee, for a higher compensation than that allowed by the foregoing sections, shall be void.

(Stats.1981, c. 281, § 903.)

**§ 904. Allowance on commissions; notice; hear-
ing; order; service of notice**

Any executor or administrator, at any time after four months from the issuance of letters testamentary or of administration, and upon such notice to the persons interested in the estate as the court or a judge thereof shall require, may petition the court for an allowance upon his or her commissions; and on the hearing the court shall make an order allowing such portion of the commissions, for services rendered up to that time, as the court shall deem proper, and the

portion so allowed may be thereupon charged against the estate.

At least 10 days before the hearing of the petition notice of the hearing must be served upon the devisees and legatees whose interest in the estate is affected by the payment of such commissions, to the heirs of the decedent in intestate estates, to the State of California if any portion of the estate is to escheat to it, and to persons who have filed a request for special notice pursuant to Section 1202. Such notice shall be delivered personally or sent by first-class mail, or sent by air mail to any person residing outside the jurisdiction of the United States, at his or her last known mailing address.

(Stats.1931, c. 281, § 904. Amended by Stats.1968, c. 1407, § 2; Stats.1980, c. 955, § 19.)

ARTICLE 2. ATTORNEYS' FEES

§ 910. Ordinary proceedings; extraordinary services; determination or confirmation of community property

(a) Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

(b) Attorneys may charge a reasonable fee in representing the person filing a petition under Section 650, subject to approval by the court.

(Stats.1931, c. 281, § 910. Amended by Stats.1975, c. 173, § 11.)

§ 911. Allowance on fees; hearing; order; service of notice

Any attorney who has rendered services to an executor or administrator, at any time after four months from the issuance of letters testamentary or of administration, may petition the court for an allowance upon his or her fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith.

At least 10 days before the hearing of the petition notice of the hearing must be served upon the executor or administrator when he or she is not the petitioner, upon the devisees and legatees whose interest in the estate is affected by the payment of such fees, to the heirs of the decedent in intestate estates, to the State of California if any portion of the estate is to escheat to it, and to persons who have filed a request for special notice pursuant to Section 1202. Such notice shall be delivered personally or sent by first-class mail, or sent by airmail to any person residing outside the jurisdiction of the United States, at his or her last known mailing address.

(Stats.1931, c. 281, § 911. Amended by Stats.1968, c. 1407, § 3; Stats.1980, c. 955, § 20.)

Exhibit 6

Staff Memorandum

The Function of Appraisals in Probate

The State Bar has argued, apparently with some success, that the appraisals of probate referees are "essential . . . in connection with approximately forty different probate functions which depend on independent appraisement." (See page 2 of the Assembly Committee on Judiciary bill analysis attached as Exhibit 3; see also the letter from Matthew S. Rae, Jr. to Governor Brown in Exhibit 4.) The 40 functions argument apparently derives from the list of sections attached to the State Bar memorandum. (See Exhibit 4.) The State Bar memorandum lists exactly 40 sections in the Probate Code, as well as two sections in the Code of Civil Procedure. These 40 Probate Code sections do not describe 40 functions.

Analysis of the Forty Functions

The staff has briefly analyzed the provisions cited by the State Bar and has the following to report:

(1) Of the 12 sections described as "DIRECT (NON-TAX)" references to the referee, only three have any substance and only one describes a "function." Section 605 provides for an appraisement by the executor or administrator and the probate referee. See also Section 644. Section 2610 provides for an inventory and appraisement of a guardianship or conservatorship estate in the same manner as provided in Section 605. Section 784 describes a function for the appraisal; it provides that in a private sale of real property, the sale price must be at least 90% of the appraised value as determined by an appraisal within the previous year, subject to court relief. Three of the 12 sections cited, having to do with probate homesteads, were repealed in 1980. See 1980 Cal. Stats. ch. 955. Five of the remaining provisions do not govern any function, but rather provide for qualifications, oaths, commissions, fee splitting, and the like. See Sections 606, 607, 608, 609, 609.5. Section 611 provides for appraisals of newly discovered property, but this can hardly be counted as a distinct function.

(2) Twenty-eight Probate Code sections are described as "INDIRECT" references to probate referees. These provisions involve a valuation of

property in some way. The functions of these appraisals fall into the following categories:

(a) Division of property. Section 91 provides that the share due an omitted child is to be satisfied proportionately from the shares given devisees and legatees under the will. Section 91 would be continued in Section 6573 in the Commission's bill on wills and intestate succession-- AB 25. Apportionment of liability for debts and expenses under Section 750 may also require valuing devises. See also Section 753. Section 971 provides for proration of federal estate tax liability based on the value of the interest received. Section 1103 provides for partition of estate property by division or sale.

(b) Adequacy of consideration. A surviving spouse has the right to recapture one-half of quasi-community property that was transferred by the decedent without adequate consideration. See Section 201.8 (to be superseded by Section 102 in AB 25). The 90% of appraised value limitation applicable to private sales appears in Sections 754.5 (real and personal property sold as unit) and 784 (real property). The assignee of the interest of an heir or devisee may be subject to an inquiry into the adequacy of the consideration for the assignment or transfer before final distribution is made. See Section 1020.1. See also Section 860 (exchange of property).

(c) Limitations on surviving spouse's liability. The personal liability of the surviving spouse for debts chargeable to community property is limited in part by the value at the date of death of the spouse's interest in the property. See Section 205 (to be superseded by Section 649.4 in AB 25). Section 645.3 provides a similar limitation on personal liability in summary probate. Section 980 provides for allocation of debts payable by the decedent's estate and also by the surviving spouse between estate property and the surviving spouse's property.

(d) Bond amount. The amount of a bond required of a personal representative may depend upon the value of certain property in the estate. See Sections 541 (twice value of personal property and annual income from real property), 553.3. The bond of a successor trustee appointed by a court also depends upon valuing the estate. See Section 1127. See also Section 1001 (bond of preliminary distributee).

(e) Commissions and fees. The commissions of personal representatives may depend upon the value of the estate. See Section 901. Similar-

ly, the fees of attorneys for personal representatives may depend on the value of the estate. See Section 910.

(f) Liability for damages. If a person embezzles, conceals, smuggles or fraudulently disposes of estate property, an action may be brought to recover twice the value of the property. See Section 612. A personal representative is liable for sale proceeds exceeding the appraised value, but not for a deficiency if the sale was justly made. See Section 920.

(g) Sufficiency of estate. Before any preliminary distribution, it must be determined that the remaining estate is sufficient to satisfy claims of creditors. See Section 1001.

(3) Some sections cited in the State Bar memorandum do not appear to the staff to involve an appraisal function. See Sections 681 (modification of family allowance), 754.6 (sale of leasehold interests with over 10 years' term or with option to purchase), 759 (liability on bond), 830 (borrowing money), 840 (leasing real property). Section 55 which limited the value of an estate that could pass by a nuncupative will was repealed on Commission recommendation in 1982. See 1982 Cal. Stats. ch. 55, § 5.

Conclusion

The preceding analysis of the provisions cited by the State Bar point up the need to identify with some clarity the arguments in favor of the probate referee system. The argument against the system is simple: it is a needless expense in cases where an appraisal serves no essential function. While an appraisal may be used for several purposes if one is available, it does not follow that these permissive uses are necessary functions.

A general requirement of appraisals by probate referees is justifiable only if there is a general need for the sort of appraisal furnished by probate referees. We think this general need (as opposed to a need for an appraisal in a specific case for a special purpose) is characteristic only of commissions and fees of personal representatives and attorneys and of valuation of property for tax purposes. The other functions analyzed above do not support routine mandatory appraisals either because the need is infrequent (e.g., as a measure of damages) or because some suitable alternative scheme is available (e.g., appraisal by personal representative or private appraisers).

The memorandum recognizes that alternative methods of determining fees and commissions must be studied before proposing elimination of the mandatory appraisal system.

As for tax valuation, the question becomes whether those who do not need or do not want to use the services of a probate referee should be required to pay for such services in order to keep the system afloat. The State Bar has argued in effect that the system works because its mandatory nature ensures a sufficient volume of business to keep costs relatively low. (See para. 2(a) on page 2 of Exhibit 3.) On the other hand, Assemblyman Rogers' letter suggests that there are objections to paying even the minimum fee of \$75 on the part of small estates who are necessary to keep the system functioning. (See Exhibit 1.) The staff does not know in what percentage of cases this sort of appraisal is a necessity or only a convenience in satisfying later estate and income tax liabilities. However, as the minimum gross estate subject to federal estate tax is increased (to \$600,000 as of 1987), the utility of routine appraisals for tax purposes becomes doubtful.

Respectfully submitted,

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Staff Counsel