

First Supplement to Memorandum 84-66

Subject: Study L-658 - Distribution of Small Estate Without Administration

The staff is preparing a draft statute to provide a procedure for obtaining a court order determining that property in a small estate passed to a close relative. The draft statute will be attached to Memorandum 84-66. The procedure will be drawn from Probate Code Sections 650-657, which provide a procedure for obtaining a court order determining or confirming title to property passing to a surviving spouse.

Attached as Exhibit 1 is a letter from the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association which makes several relevant suggestions:

(1) The proposed procedure would be likely to cause transfer agents and financial institutions to require a court order where none is now required under the affidavit procedure for small estates. A procedure for obtaining a court order should NOT be provided because it will substantially increase the time and expense of obtaining a transfer where one can now be obtained merely by presenting an affidavit.

(2) An affidavit procedure should be provided to permit the clearing of record title to real property of small value. The staff has been of the view that such a procedure would not be acceptable to titles companies. However, the staff has become aware of a 1983 statute enacted in Arizona that permits the clearing of title to real property of small value by filing an affidavit with an appropriate court and then obtaining a certified copy of the affidavit from the court. The certified copy is then recorded in the real property records and protects the purchaser or lender who relies on it. Apparently all title companies are accepting the affidavit in Arizona. See Exhibit 2 (letter, copy of statute, and Arizona Bar Journal article). We are asking the California Land Title Association to comment on whether adoption of the Arizona procedure in California would be useful and desirable.

(3) The affidavit procedure should be available so long as the gross value of the real and personal property in the estate does not exceed \$60,000. In other words, the existing \$10,000 lid on the gross value of the real property in the estate should be eliminated.

At the September meeting, the staff believes that all these suggestions should be given serious consideration. The staff believes that there is considerable merit to each suggestion. We are hopeful that the California land title insurance companies will find the Arizona procedure and experience thereunder to be satisfactory and, if so, we suggest that the Commission proceed to the drafting of legislation along the lines of the Arizona statute.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

HERTZBERG, CHILDS & MILLER

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TO FILE NO.

July 23, 1984

California Law Revision Commission
4000 Middlefield Road, Room B-2
Palo Alto, California 94306

RE: Study: #L-826
Memorandum: #84-41

Dear Commissioners:

Except as noted below, the views expressed in this letter have been endorsed by the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association upon the recommendation of its Legislation Subcommittee. I am writing on behalf of that committee.

Among matters considered by the sub-committee over the past several months is the Commission's proposal for including summary transfers of real property under Probate Code §630 et seq. While believing the need for such transfers to have been amply demonstrated and the concept to be a good one, we respectfully differ with the approach developed by your staff to accomplish the intended result (Exhibit 2, Memorandum 84-41). Our thinking, in no particular order, is summarized below:

1. Where no real property is involved, the entitled parties may, under the proposed legislation, elect one of two routes; namely, collecting by affidavit (Article 2) or by Court order (Article 3). Our concern here is that many (or at least a significant number of) stock transfer agents and/or banks/depository personnel will, albeit wrongfully, insist on receipt of the Court order. Based on past experiences of committee members (the writers included) a Court order is often regarded as sacrosanct. Thus, even though an alternative method is sanctioned, those of us in the field believe we will frequently and needlessly be consuming time (i.e., money) in attempting to convince transfer authorities, often to no avail, to accept an affidavit.

California Law Revision Commission

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2. Where qualified real property is involved (i.e., not exceeding \$10,000) the Court order path must be taken. In this regard the study, citing Ogden's Revised California Real Property Law §29.27, states . . . "an affidavit without more appears to be insufficient to transfer marketable title to real property." (emphasis added) Absent enactment of enabling legislation, the quoted provision seems correct. However, it is precisely such legislation which would constitute the something "more".

For many years affidavits have been routinely utilized for purposes of perfecting marketable title in the names of surviving joint tenant(s). More recently affidavits have been employed and accepted by title companies where real property, held by a husband and wife "as community property", is transferred outright to a surviving spouse under Probate Code §202.

In our view, the Court proceeding ought to be deleted and a prescribed form of affidavit (involving real property) substituted in its stead. In addition to requiring the signature of all persons entitled to any portion of the decedent's real property, the affidavit might be required to contain the following data:

(a) Attachment of a certified copy of the decedent's death certificate accompanied by a statement that the decedent mentioned in such certificate is the same person as the party in whose name the subject real property interest(s) is/are held of record.

(b) The data called for under Subdivision (c) through (g) of proposed §631.030.

(c) The legal description of all real property interests in this state, title to which was vested in the decedent's name at death.

(d) The interest(s) in such property to which each affiant/transferee is entitled.

(e) The counter signature of any probate referee of the county in which the decedent died, attesting to the fact that the aggregate value as of the date of decedent's death of the property interest(s) described in (c) above did not exceed \$10,000.

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California Law Revision Commission
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Of course, additional provisions similar to those applicable to personal property affidavits will be required covering such matters as the effect of furnishing such an affidavit, restitution if estate proceedings are commenced, creditor liability, etc.

The views set out in the preceding portion of this letter were unanimously adopted as the position of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association at its monthly meeting held June 19, 1984. Due to time constraints a further recommendation, though adopted by the committee, was not proposed to the section at large. Briefly stated, the committee urges the Law Revision Commission to consider revising the proposed legislation so as to eliminate the \$10,000 "lid" on real property. Summary transfers under §630 would then be available to qualified recipients where a decedent owns real and personal property having an aggregate value not exceeding \$60,000. Among other advantages, summary transfer requirements of residents would substantially conform to those applicable to non-residents as set forth under proposed Probate Code §§658.010 - 658.060 (see Memorandum 84-45, Study L-800).

We are grateful for the Commission's consideration of this letter.

Very truly yours,



ALEX S. URBACH

For the Legislative Subcommittee,
Probate, Trust and Estate Law
Section of the Beverly Hills
Bar Association

ASU:kl

cc: Shari Leinwand, Esq.
Ms. Phyllis Cardoza
Kenneth A. Feinfield, Esq.
Howard S. Klein, Esq.
Bruce D. Sires, Esq.
Lance M. Weagant, Esq.

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UNIVERSITY

TEMPE, ARIZONA 85287

COLLEGE OF LAW

August 6, 1984

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

Dear John:

Following up on our conversation at Keystone, I enclose a copy of the statute Arizona enacted in 1983 relative to transfer of real property by affidavit and a copy of the article I wrote which was published in the Arizona Bar Journal (with corrections of the printing error in the form). So far as I know, all title companies are accepting the affidavit here in Arizona.

I would appreciate your sending copies of the California legislation enacted this year in the area of probate, which we discussed, including your version of the Uniform Transfers to Minors Act.

Many thanks.

Sincerely,



Richard W. Effland
Professor of Law

RWE:af

Enc.

ARTICLE 12. TRANSFER OF TITLE TO SMALL ESTATES BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURE

Laws 1983, Ch. 196, § 3, substituted "Transfer of Title to Small Estates by Affidavit and Summary Administration Procedure" for "Collection of Personal Property by Affidavit and Summary Administration Procedure" as the heading for this article.

Laws 1983, Ch. 196, § 4 provides:

"The procedure for transferring title to real and personal property as provided in title 14, chapter 3, article 12, [Section 14-3971 et seq.] Arizona Revised Statutes, shall be effective for estates of decedents dying before or after the effective date of this act."

§ 14-3971. Collection of personal property by affidavit; ownership of vehicles; affidavit of succession to real property

A. At any time after the death of a decedent, any employer owing wages, salary, or other compensation for personal services of the decedent shall pay to the surviving spouse of the decedent the amount owing, not in excess of five thousand dollars, upon being presented an affidavit made by or on behalf of the spouse stating that the affiant is the surviving spouse of the decedent, or is authorized to act on behalf of the spouse, and that no application or petition for the appointment of a personal representative is pending or has been granted in this state.

B. Thirty days after the death of a decedent, any person indebted to the decedent, having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness, deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

1. The value of all of the personal property in decedent's estate, wherever located, less liens and encumbrances, does not exceed thirty thousand dollars.
2. Thirty days have elapsed since the death of the decedent.
3. No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.
4. The claiming successor is entitled to payment or delivery of the property.

C. A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection B.

D. The motor vehicle division shall transfer title of a motor vehicle from the decedent to the successor or successors upon presentation of an affidavit as provided in subsection B and upon payment of the necessary fees.

E. Six months after the death of a decedent, a person or persons claiming as successor or successors to the decedent's interest in real property, including any debt secured by a lien on real property, may file in the court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state then in any county in which real property of the decedent is located, an affidavit describing the real property and the interest of the decedent therein and stating that:

1. The value of all real property in the decedent's estate located in this state, less liens and encumbrances against the real property as of the date of death, does not exceed fifteen thousand dollars. The value of the decedent's interest shall be determined from the full cash value of the property as shown on the assessment rolls for the year in which the decedent died, except that in the case of a debt secured by a lien on real property the value shall be determined by the unpaid principal balance due on the debt as of the date of death.

2. Six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to the affidavit.

3. No application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction.

4. Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid.

5. The person or persons signing the affidavit are entitled to the real property by reason of the allowance in lieu of homestead and exempt property, by intestate succession as sole heir or heirs, or by devise under a valid last will of the decedent, the original of which is attached to the affidavit or has been probated.

6. No other person has a right to the interest of the decedent in the described property.

7. No federal or Arizona estate tax is due on decedent's estate.

8. The person or persons signing the affidavit affirm that all statements in the affidavit are true and material and further acknowledge that any false statement may subject the person or persons to penalties relating to perjury and subornation of perjury.

F. The normal filing fee shall be charged for the filing of an affidavit under subsection E unless waived by the court as provided by §§ 12-301 or 12-302. Upon receipt of the affidavit the registrar, upon determining that the affidavit is complete, shall cause to be issued a certified copy of the affidavit without attachments, and the copy shall be recorded in the office of the recorder in the county where the real property is located.

G. Nothing in this section shall limit the rights of heirs and devisees under § 14-3901.

§ 14-3972. Effect of affidavit

A. The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

B. The motor vehicle division issuing title pursuant to affidavit is discharged and released to the same extent as if it dealt with a personal representative of the decedent. It is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

C. A purchaser of real property from or lender to the person or persons designated as successor or successors in a certified copy of an affidavit issued under § 14-3971 and recorded in the county in which the real property is located is entitled to the same protection as a person purchasing from or lending to a distributee who has received a deed of distribution from a personal representative, as provided in § 14-3910.

succession. (My) (Our) relation to the decedent is _____

3. The description of the real property in the decedent's estate and the interest of the decedent therein are as follows:

4. The value of all real property, including any debt secured by a lien on real property, in the decedent's estate located in this state, less liens and encumbrances against said real property as of the date of death, does not exceed fifteen thousand (\$15,000.00) dollars.

5. No application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction.

6. All funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid.

7. The person(s) signing this affidavit (is) (are) entitled to the real property in the decedent's estate by reason of:

___ The allowance in lieu of homestead and exempt property.

___ Intestate succession as sole heir(s).

___ By devise under a valid last will of the decedent, the original of which is attached hereto or has been probated in _____

8. No other person has a right to the interest of the decedent in the described real property.

9. No federal or Arizona estate tax is due on decedent's estate.

10. (I) (We) affirm that all statements in this affidavit are true and material and further acknowledge that any false statement may subject (me) (us) to penalties relating to perjury and subornation of perjury.

Dated this _____ day of _____, 19____.

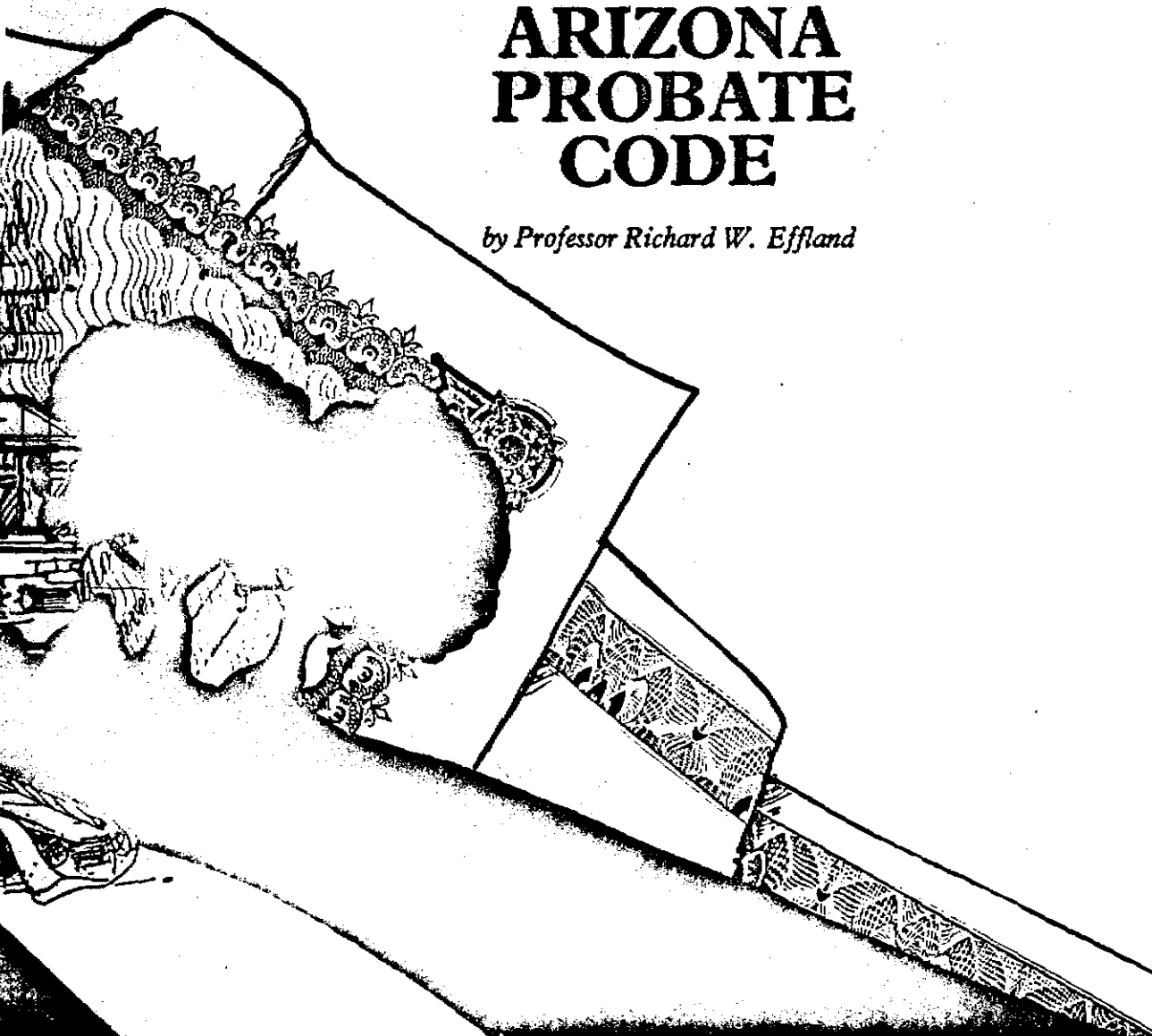
Subscribed and sworn to before me this _____ day of _____, 19____, by _____

Notary Public

My commission expires:

**HANDLING
REAL AND
PERSONAL PROPERTY
AT DEATH
WITHOUT
ADMINISTRATION
UNDER THE 1983
AMENDMENTS
TO THE
ARIZONA
PROBATE
CODE**

by Professor Richard W. Effland



Chapter 196, passed by the 36th Legislature and approved by the Governor on April 20, became effective July 27, 1983. It is a significant expansion of the prior Arizona Probate Code section for transfer of property of a decedent by affidavit rather than administration under Court procedures. It substantially increases the amount of property which can be transferred by affidavit; it also for the first time permits transfer of interests in real property without administration.

Before the amendment, Section 14-3971B permitted transfer of personal property by affidavit if the value of decedent's entire estate did not exceed \$10,000. Whenever the estate included an interest in real property, the statutory affidavit procedure was not available. However, some title companies have been willing to issue title policies on the basis of affidavits of succession, particularly if the

value of the realty is small. The \$10,000 amount was set in 1976, when the \$5,000 figure in the original Probate Code as enacted in 1973 was increased.

S.B. 1069 as originally introduced in the Senate in January of this year would have created a new statutory section (14-3975) to provide for transfer of title to real property without necessity of administration. Because the value of real property is much more difficult to determine than the value of personal property such as bank accounts, stocks and bonds, and motor vehicles, the bill as passed by the Senate tied the value to that shown on the assessment rolls for the year of death of the decedent. It would have required that the affidavit, which could be made 30 days after death, would become effective 6 months after filing. The procedure would have been available only to heirs in an intestate estate.

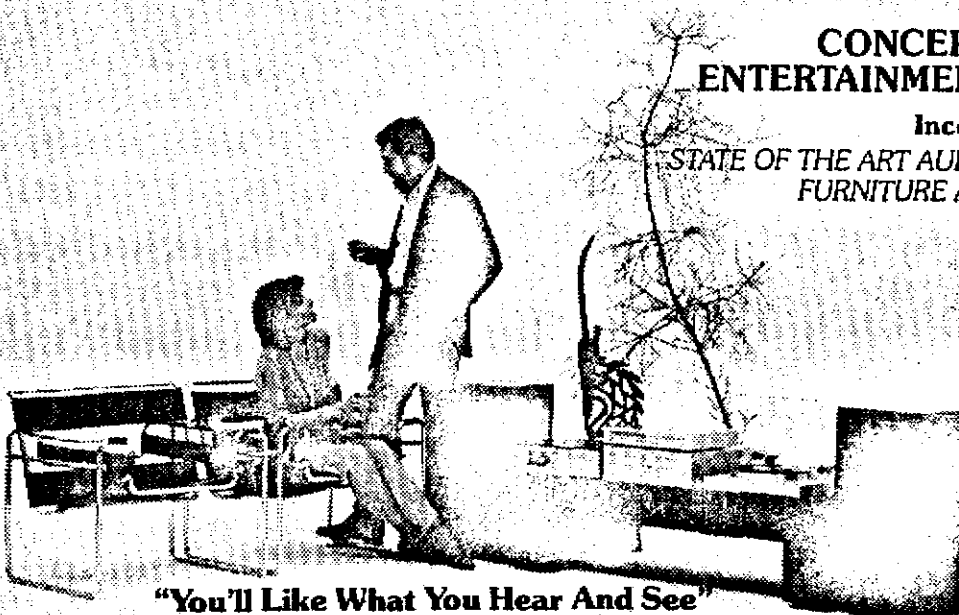
When the bill reached the

House, there was strong sentiment for a very substantial increase in the amount of property which could be transferred without administration. An unofficial committee composed of Larry Dahl, Chairman of the Legislative Committee of the Land Title Association of Arizona; Nancy Burnett, an employee of Harris Trust Company and a council member of the State Bar Section on Real Property, Probate and Trusts; William Perkins of Jennings, Strouss & Salmon, representing the Land Title Association of Arizona with respect to legislative matters and also a council member of the State Bar Section on Real Property, Probate and Trusts; and myself was also asked to make recommendations regarding technical features of the proposed procedure. The committee met for several long sessions and made its recommendations to a

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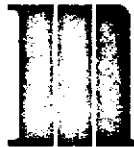
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Subcommittee of the House Judiciary Committee. These recommendations were submitted to the Subcommittee and were in large part incorporated in the bill as finally passed, although the dollar amounts were set by the Subcommittee.

Chapter 196 allows decedent's successors to transfer property without administration as follows:

- (1) Personal property up to \$30,000 in value can be transferred by affidavit, 30 days after decedent's death.
- (2) Decedent's interest in real property can be transferred by filing an affidavit with the court 6 months after death. The decedent's interest must not exceed \$15,000; but because the value is determined from the cash value shown on the assessment rolls for the year of death (an objective figure) and that value is about half of full market value, the procedure is really available for real property worth about \$30,000. Note also that liens or incumbrances are subtracted in determining value. Thus a piece of realty assessed at \$60,000 on tax rolls and subject to a \$50,000 mortgage or

deed of trust would easily qualify for the procedure. Moreover, when property is owned by a husband and wife as community property, and one of the spouses dies, the decedent's interest is only half. Thus community real property assessed at \$100,000 on the tax rolls and subject to a \$70,000 mortgage would still be within the statutory limit on death of one spouse.

Note the procedure for real property: (1) six months must have elapsed from the date of decedent's death.

- (2) An affidavit in the form set forth in the statute must be filed in court, with a certified copy of the death certificate attached. The form approved by the Superior Court for Maricopa County appears as Appendix I. If decedent had a will devising the realty, the original must also be attached, unless previously probated. Because the Probate Code allows informal probate without appointment of a personal representative, lawyers may prefer to probate any will informally within the 6 months period even though the estate appears to be such that the affidavit procedures can be used

to transfer title. Note that the real property affidavit requires payment of all unsecured debts of the decedent. In estates where the allowances and exemption from creditors (ARS §§14-2401 through 14-2404) are to be utilized to cut off creditors, a summary administration would become necessary.

- (3) A filing fee will normally be charged by the court; it can be waived. The Registrar has a limited function: to see that the affidavit is in proper form, that it is accompanied by a certified copy of the death certificate, and that, in a testate estate, the original of the will is attached or has been previously probated. The Registrar will then direct that a certified copy of the affidavit (without the attachments) be issued. Appendix II shows the Order used in Maricopa County. It is this certified copy which then should be recorded in the county recorder's office and becomes the basis for assuring title in the successor. The representatives of the title companies believed that the court filing rather than filing directly with the county recorder served as a deterrent to possible fraud.

Continued on page 39

The new procedures can be used for estates of decedents who died before the effective date. (Section 4, of the Act).

Under ARS 14-3971 before the amendment a problem existed regarding transfer of a security interest in real property. Suppose the owner of real estate sold it and retained a security interest for payment of part of the purchase price. Was his interest personal property -- the debt -- or was it real estate? The amended section resolves this problem and characterizes the interest as "real property". Hence the interest must be transferred by filing the affidavit with the Court and then filing with the county recorder's office a certified copy issued by the Court.

The act does not affect three other affidavit practices. An affidavit to collect wages or salary up to \$5,000 can still be used prior to application or petition for administration (ARS 14-3971A). In cases where no administration has been commenced and three years have passed since death, so that claims of unsecured creditors are barred (ARS 14-3803), title companies may insure title to real property on the basis of an affidavit of succession, under ARS §14-3901, (see new §14-3971G), even though the value of the realty exceeds \$15,000. Finally, a foreign domiciliary personal representative may use the affidavit procedure under ARS §14-4201, or under ARS §6-237 as to bank accounts.

Although the affidavit procedure for real property does not require title companies to insure on the basis of the recorded certified copy, the Act gives a purchaser from the person or persons designated as successor to the decedent's title the same protection as one purchasing from the successor named in a deed of distribution from a personal representative. It also protects a lender acting on the same basis. (ARS §14-3972C, new) This should enable title companies to insure with only the normal policy exceptions.

In assessing the size of estate which can be handled without administration, the following factors should be kept in mind:

(1) only half of community property is within the estate subject to administration, although a personal representative would have power over both halves if necessary to pay community debts;

(2) joint tenancy property with right of survivorship belongs to the survivor without administration;

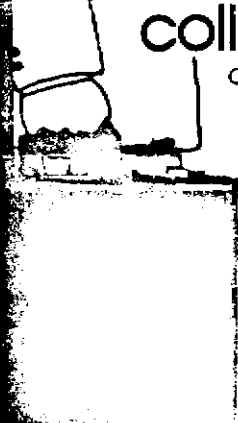
(3) revocable trusts set up by the decedent during lifetime are not part of the probate estate,

unless the trust agreement fails to give the principal to named beneficiaries at death of the settlor;

(4) multiple party financial accounts (joint accounts, trust accounts, and POD accounts) pass to the surviving party without administration;

(5) life insurance payable to named beneficiaries is not subject to administration;

(6) death benefits under retirement and pension plans may similarly be payable directly



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APPENDIX II
 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF MARICOPA

IN THE MATTER OF THE ESTATE OF _____)
) No. _____
) ORDER DIRECTING ISSUANCE
) OF CERTIFIED COPY OF
) AFFIDAVIT WITHOUT ATTACHMENTS

Deceased.)

The registrar having examined the affidavit and the attachments thereto filed herein and having determined that the affidavit is complete,
 IT IS ORDERED that the Clerk of the Court shall issue a certified copy of the affidavit without attachments.
 Dated this _____ day of _____, 19 _____.

REGISTRAR

Note: A certified copy of the affidavit shall be recorded in the office of the recorder in the county where the real property is located.

Although the Arizona Probate Code and the Uniform Probate Code, on which the Arizona Code is patterned, have substantially reduced the cost and delays of probate administration there is still room for improving the system. Continuing popularity of ownership in joint tenancy with right of survivorship and the increasing use of revocable living trusts demonstrate the public desire to avoid administration. The new affidavit procedure may achieve that goal for the modest-sized estate and at the same time provide both a base for title assurance and substantial protection against fraud. Lawyers will certainly utilize the new procedure for smaller estates, in order to minimize costs for clients. Some lay people may be encouraged to use the procedure without retaining a lawyer. However, administration remains a viable option even in small estates, particularly where creditor claims are likely. ■

the property has been transferred to a good faith purchaser, the persons taking by affidavit would be liable for the value of the property.

The Act may strike some attorneys as going too far in dispensing with administration. It is, however, in line with national trends. In California no administration is necessary when community property passes to the surviving spouse and the spouse is willing to assume the community debts. There is no dollar limit on this method of avoiding administration. In Texas estates of \$50,000 can be handled by an affidavit procedure, which includes a simple filing with the probate court.

Last year the National Conference of Commissioners on Uniform State Laws approved a Uniform Succession Without Administration Act, patterned on the civil law system long in force in Louisiana. The Act would amend the Uniform Probate Code to permit heirs or residuary devisees to take title to a decedent's estate by assuming personal liability for taxes, debts and claims, and distributions due to other heirs or devisees. Application must be made to the Registrar, who would then issue a statement making the applicants the "universal successors". The standing of a

universal successor is similar to that of a personal representative. Creditors can sue within three years of death, unless barred earlier by the normal statute of limitation on the particular claim. The personal liability of the universal successor is limited to his share of the estate received. Although the Act was not introduced in the last Arizona legislative session, it is likely to receive popular support when it is introduced. It behooves Bar leadership to give careful advance study to the Act.

Richard E. Brundage has been professor of law at Arizona State University since the founding of the law college in 1967. He is co-author of the Arizona Probate Code Practice Manual and of Cases and Materials on Decedent's Estates and Trusts (Foundation Press) now in its 6th edition. Prof. Brundage was one of the reporters for the Uniform Probate Code and currently is research director for the Joint Editorial Board for the Uniform Probate Code. He worked with the Arizona Legislative Council in preparing the Arizona Probate Code adopted in 1973. He also serves as a member of the Arizona Commission on Uniform State Laws.

