

Memorandum 89-79

Subject: Study L-1030 - Collection by Affidavit Despite Probate

The affidavit procedure to collect personal property of an estate of \$60,000 or less may not be used if there are or have been California proceedings for administration of the estate. Prob. Code § 13108. We have received two letters expressing concern about this limitation: Exhibit 1 is a letter from Richard Kinyon suggesting that the affidavit procedure be permitted where probate is pending if the personal representative consents. Exhibit 2 is a letter from Jeffrey Dennis-Strathmeyer suggesting the affidavit procedure be permitted where a special administrator has been appointed for a limited purpose, e.g., to exercise an option or to purchase or take possession of property.

The attached staff draft permits use of the affidavit procedure despite pendency of probate if the following requirements are satisfied:

(1) The personal representative petitions the court administering the estate for authorization to use the affidavit procedure.

(2) It appears that the petition may be granted "without loss to creditors or injury to the estate or any interested person." Cf. Prob. Code § 11621 (preliminary distribution).

(3) The court grants the petition.

These requirements seem necessary to protect creditors.

Mr. Kinyon also suggests applying this authority to other summary procedures under Division 8. The attached draft includes this authority in the affidavit procedure for real property of small value, but not in the procedure for a court order determining succession to real property nor in the the community property set-aside. Where there is already a court proceeding, the affidavit procedure seems to cause more problems than it is worth.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

LAW OFFICES OF

MORRISON & FOERSTER

LOS ANGELES
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

345 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94104-2105
TELEPHONE (415) 434-7000
TELEFACSIMILE (415) 434-7522
TELEX 34-0154

NEW YORK
WASHINGTON, D. C.
LONDON
HONG KONG
TOKYO

WRITER'S DIRECT DIAL NUMBER

October 26, 1988

(415) 434-7035

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMMISSION

OCT 27 1988

RECEIVED

Attn: John H. DeMouly, Executive Secretary

Re: Affidavit Procedure for Collection
or Transfer of Personal Property
(Probate Code Sections 13100-13116)

Dear John:

Some time ago I spoke with you about a problem raised by the recodification of the above-referenced procedure, relating to the requirement in new Probate Code Section 13101(a)(4) that the affidavit or declaration include a statement that "[n]o proceeding is now being or has been conducted in California for administration of the decedent's estate." That provision makes the affidavit procedure unavailable in situations where it is desirable to institute a so called "dry probate" soon after death.

There are a number of advantages to having a will admitted to probate (or instituting a probate proceeding where the decedent died intestate) even if the estate can be disposed of without administration; and I can see no policy reason why the affidavit procedure, as well as the other summary procedures under Division 8, should not be available to the beneficiaries of a decedent's estate even though a probate proceeding has been initiated. Some of those advantages are as follows:

(1) The probate procedure enables creditors' claims to be dealt with generally and expeditiously with respect to all property subject to claims.

(2) It can be determined whether the decedent died testate, and if so, the terms of his or her last will (which can be particularly helpful if there is a question as to whether the decedent exercised a

MORRISON & FOERSTER

Mr. John H. DeMouilly
October 26, 1988
Page Two

testamentary power of appointment, and if so, the terms of any such exercise).

(3) If the decedent owned property situated in another state or country, the admission of his or her will in California may facilitate the ancillary administration of that property.

(4) If the decedent establishes a trust under his or her will to which non-probate assets such as insurance proceeds or employee benefits are payable directly as the named beneficiary, it is necessary to admit the will in order to establish the trust and enable the trustee to collect such proceeds or benefits.

(5) The availability of a personal representative, with letters, makes it easier to cure a technical defect in a transfer of property to the decedent's revocable trust or other third party prior to death or otherwise act with respect to the decedent, such as entering safe deposit boxes, handling tax controversies relating to periods or events preceding the decedent's death, etc.

It appears to me that this problem could be solved by simply amending Section 13101(a)(4) to provide either that (A) no procedure is now being or has been conducted in California for administration of the decedent's estate, or (B) such a procedure is now being or has been conducted and the personal representative consents (in writing) to the collection of the particular item of property pursuant to the affidavit or declaration.

Sincerely yours,

Dick Kinyon
Richard S. Kinyon

RSK:nlh
cc: Irv Goldring, Esq.
Bruce S. Ross, Esq.

-2-

B74178[RSK1]



CONTINUING EDUCATION OF THE BAR • CALIFORNIA

2300 Shattuck Avenue • Berkeley, California 94704 • (415) 642-3973 FAX: (415) 642-3788 Direct Phone: 642-8317

July 21, 1989

CALIF. LAW REV. COMM'N

JUL 24 1989

RECEIVED

John H. DeMouilly, Esq.
 California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Re: Study L-1030; Affidavit Procedure for
 Collection of Personal Property


Dear John:

I noted Dick Kinnion's letter of October 26, 1988 in your last agenda mailing, suggesting that it should be possible to use summary procedures with the personal representative's consent. He was concerned with facilitating what he described as a "dry probate."

I have a modestly related concern. Suppose that it is necessary to appoint a special administrator to perform a specific act during the 40 day waiting period. This might be necessary in order to exercise an option to purchase property or to take possession of property in order to protect it, etc. Does this constitute a proceeding for the administration of an estate which then precludes subsequent collection of the estate by entitled persons? It seems to me that we do not want to force an administration of the estate in this situation and the point should be clarified.

Thank you for your consideration.

Very truly yours,


 Jeffrey A. Dennis-Strathmeyer

JAD-S:kg

Probate Code § 13101 (amended). Furnishing of affidavit

SEC. _____. Section 13101 of the Probate Code is amended to read:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

(1) The decedent's name.

(2) The date and place of the decedent's death.

(3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."

(4) "No ~~Either that~~ "no proceeding is now being or has been conducted in California for administration of the decedent's estate," estate," or that "the court in which the administration of the decedent's estate is pending has made an order authorizing collection of decedent's property by affidavit."

(5) "The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."

(6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(8) Either of the following, as appropriate:

(A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."

(9) "No other person has a right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration. If the court has made an order pursuant to Section 13108 authorizing collection of decedent's property by affidavit, a certified copy of the order shall be attached to the affidavit or declaration.

Comment. Section 13101 is amended to reflect the new procedure for the court in which administration of decedent's estate is pending to authorize use of the affidavit procedure. See Section 13108.

Probate Code § 13108 (amended), Limitation on use of affidavit procedure

SEC. _____. Section 13108 of the Probate Code is amended to read:

13108. (a) The procedure provided by this chapter may be used only if no one of the following requirements is satisfied:

(1) No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(2) The personal representative petitions the court in this state where the decedent's estate is being administered for an order authorizing use of the procedure provided by this chapter, it appears that the petition may be granted without loss to creditors or injury to

the estate or any interested person, and the court grants the petition.

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Section 13108 is amended to add paragraph (2) to subdivision (a). The language concerning protection of creditors and the estate is drawn from Section 11621 (preliminary distribution).

Probate Code § 13111 (amended). Restitution if estate proceeding commenced

13111. (a) ~~Subject~~ Unless the court makes an order under Section 13108, and subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced in this state, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from that property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the person liable under this subdivision

presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

Comment. Section 13111 is amended to reflect the new procedure for the court in which administration of decedent's estate is pending to authorize use of the affidavit procedure. See Section 13108.

Probate Code § 13200 (amended). Filing affidavit in superior court; inventory and appraisal

SEC. _____. Section 13200 of the Probate Code is amended to read:

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior 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 at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 13209 stating all of the following:

(1) The name of the decedent.
(2) The date and place of the decedent's death.
(3) A legal description of the real property and the interest of the decedent therein.

(4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.

(5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

(7) "No Either that "no proceeding is now being or has been conducted in California for administration of the decedent's estate," estate," or that "the court in which the administration of the decedent's estate is pending has made an order authorizing collection of decedent's property by affidavit."

(8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Part 3 (commencing with Section 8800) of Division

7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) If the person or persons executing the affidavit claim under the decedent's will, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. If the court has made an order pursuant to Section 13108 authorizing collection of decedent's property by affidavit, a certified copy of the order shall be attached to the affidavit or declaration.

(f) The affiant shall personally serve or mail, postage prepaid, a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

Comment. Section 13200 is amended to reflect the new procedure for the court in which administration of decedent's estate is pending to authorize use of the affidavit procedure. See Section 13108.

Probate Code § 13206 (amended). Restitution if estate proceeding commenced

SEC. _____. Section 13206 of the Probate Code is amended to read:

13206. (a) ~~Subject~~ Unless the court makes an order under Section 13210, and subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the

property. For purposes of this paragraph, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of

the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13206 is amended to reflect the new procedure for the court in which administration of decedent's estate is pending to authorize use of the procedure provided in this chapter. See Section 13210.

Probate Code § 13210 (added). Court order authorizing use of affidavit procedure

SEC. _____. Section 13210 is added to the Probate Code, to read:

13210. The procedure provided by this chapter may be used only if one of the following requirements is satisfied:

(a) No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) The personal representative petitions the court in this state where the decedent's estate is being administered for an order authorizing use of the procedure provided by this chapter, it appears that the petition may be granted without loss to creditors or injury to the estate or any interested person, and the court grants the petition.

Comment. Section 13210 is new, and permits the court to authorize use of the procedure provided by this chapter notwithstanding the pendency of proceedings for administration of decedent's estate. See also Section 13108 (collection of personal property).