

Memorandum 89-29

Subject: Study L-1030 - Affidavit Procedure for Collection or Transfer
of Personal Property

Under existing law, the affidavit procedure for the collection or transfer of personal property of a small estate can be used only if no probate "proceeding is now being or has been conducted in California for administration of the decedent's estate."

Richard S. Kinyon, San Francisco lawyer, has written to suggest that this limitation be modified to permit use of the affidavit procedure not only where no probate proceeding is being or has been conducted in California but also where a probate is now being or has been conducted in California and the personal representative consents (in writing) to the collection of the particular item of property pursuant to the affidavit (or declaration).

A copy of Mr. Kinyon's letter, giving the reasons for this suggestion, is attached.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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CA LAW REV. COMMISSION

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Attn: John H. DeMouilly, 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

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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,



Richard S. Kinyon

RSK:nlh

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

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