

Second Supplement to Memorandum 89-79

Subject: Study L-1030 - Collection of Life Insurance Proceeds by
Affidavit

Howard Serbin of Santa Ana has written the Commission that, "An attorney who does retirement work told me of his concern that the current 13100 does not seem to allow the transfer of life insurance or retirement fund benefits, since these did not vest in the decedent's life and therefore would not seem to constitute 'money due the decedent'. Therefore, when no beneficiary is mentioned, or the beneficiary is 'the estate', an estate must be opened, even if the amount involved is very small."

The staff believes this uncovers a real defect in the statute, which is drafted on the assumption that life insurance proceeds and other nonprobate transfer funds need not be dealt with since they pass directly to the named beneficiaries. But if the named beneficiary is the estate, we have a gap in the statute, with the anomalous result that ostensibly nonprobate property passes neither by the regular nonprobate mechanism nor by the small estate nonprobate mechanism, but only through probate proceedings.

This result was obviously not intended, and the staff believes it should be remedied by statute. Nonprobate assets passing to the estate of the decedent should be counted as part of the estate to determine whether it is a small estate or not, and if so, should be subject to the affidavit procedure just as any other property in a small estate. The property should likewise be subject to creditor claims and to restoration to the estate, just as any other property taken by affidavit.

The simplest way to accomplish this result is to define "property of the decedent" for purposes of the affidavit procedure to include nonprobate assets that pass to the decedent's estate, thus:

Prob. Code § 13005 (added). Property of the decedent

13005. "Property of the decedent", "decedent's property", "money due the decedent", and similar phrases include property that becomes part of the decedent's estate on the decedent's death, whether by designation of the estate as beneficiary under an insurance policy on the decedent's life or under the decedent's retirement plan, or otherwise.

Comment. Section 13005 makes clear that the affidavit procedure under Chapter 3 (commencing with Section 13100) may be used by the successor of the decedent to collect insurance on the decedent's life payable to the estate of the decedent and other property that becomes part of the decedent's estate on the decedent's death. Such property also is included in determining whether the decedent's real and personal property in this state exceeds \$60,000 for the purpose of Section 13100. Property may become part of the decedent's estate from a number of other causes besides designating the estate as beneficiary, including failure of a named beneficiary to survive the decedent, disclaimer by a named beneficiary, and failure of the decedent to name a beneficiary in cases where the instrument provides no default beneficiary.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary