

## Second Supplement to Memorandum 90-95

Subject: Study L-1030 - Disposition of Small Estate Without Probate  
(Additional Comments on TR)

Exhibit 1 is the report of Team 1 of the State Bar Estate Planning, Probate and Trust Law Section on the *Tentative Recommendation Relating to Disposition of Small Estate Without Probate*. Both Team 1 and the Executive Committee as a whole approve the TR. Team 1 agrees with the staff revision to the TR proposed in the basic memo, and agrees with the staff recommendation not to adopt several other suggested revisions.

Exhibit 2 is a letter from Kenneth Klug. He objects to adding a new requirement that a copy of decedent's will be attached to the affidavit when it is being used to collect personal property and the affiant claims under the will. This requirement is already in existing law when the affidavit procedure is used to obtain title to real property of small value, but not to collect personal property. This revision was not considered significant enough to be discussed in the narrative portion of the TR.

Mr. Klug says that to require a copy of the will to be attached to a personal property affidavit will put too heavy a burden on the holder of the property to determine whether the will is valid and to interpret its terms. He says the real property case is different from the personal property case: In the case of real property, a title company will review the transaction, and a title company has the expertise needed to review the will. Mr. Klug says he has discussed this with Dick Kinyon, and that Mr. Kinyon agrees with him.

In view of these objections, and the fact that this change is peripheral to the TR, the staff recommends we delete proposed subdivision (e) from Section 13101.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

CA LAW REV. COMM.

SEP 11 1990

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**REPORT**

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THE EXECUTIVE COMMITTEE IN GENERAL

**FROM:** WILLIAM V. SCHMIDT (Captain)  
Study Team No. 1

**DATE:** September 5, 1990

**RE:** LRC MEMORANDUM 90-95:  
Disposition of Small Estate Without Probate  
Study L-1030

This Memorandum was reviewed by Study Team No. 1 by me without a conference call. I have called Richard S. Kinyon and asked him to review the Memorandum. He is quite happy that all of his work in this area is near fruition. In the absence of any further report, you can assume that there is no objection to this Memorandum.

This subject matter has been reviewed several times by Study Team No. 1 as well as the Executive Committee as a whole. We are very happy that all of the public comment has been favorable.

We agree with the staff that changing the word "excluding" to "less" in subdivisions (a) and (b) of Section 1311 is a worthwhile change. We also agree with the staff that the other provisions of the Tentative Recommendation are satisfactory.

Respectfully submitted,

STUDY TEAM NO. 1

By:   
William V. Schmidt  
Captain

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Re: Study I-1030; 1st Supp. to Memo 90-95

Dear Bob:

I recommend that proposed subdivision (e) to Section 13101 as shown in the Tentative Recommendation be eliminated. This subdivision would require that a person collecting personal property by affidavit attach a copy of the decedent's will to the affidavit. No purpose is served by requiring attachment of the will; indeed, requiring attachment of the will creates more problems than it solves.

Under existing Section 13106 the holder of the decedent's property who relies in good faith on the affidavit is fully discharged from further liability, and has no duty to inquire into the truth of any statement in the affidavit. The proposed addition to Section 13101 will undercut that immunity and make it more difficult to obtain transfers of small estates. It is implicit in the proposal that the holder of the decedent's property will have a duty to examine the will and determine that the will provides as the affidavit says. This places upon the holder of the decedent's property the burden of:

- (1) Determining that the will is valid on its face;
- (2) Analyzing the language in the will;

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- (3) Determining the meaning of the language in the will;
- (4) Determining the beneficiaries under the will.

In effect, the holder of the decedent's property will be charged with functions traditionally reserved for the probate court.

I submit that it is inappropriate for holders of a decedent's property to be charged with the duty to review wills for sufficiency and content, but in any event there are three possible scenarios:

- (1) The holder of the property will correctly determine that the will is valid and the affiant is the beneficiary. In this event, attaching the will was surplusage, because the affidavit would have been sufficient for the holder to act upon.

- (2) The holder of the property will incorrectly determine that the will is valid and the affiant is the beneficiary. In this event the holder will nonetheless deliver the property to the affiant. Unless the holder is held liable, what purpose will have been served by attaching the will?

- (3) The holder of the property will determine that the will is not valid or the affiant is not the beneficiary. In that event the affiant will be required to commence a proceeding to have the will admitted to probate or bring an action to compel transfer under Probate Code Section 13105. If the court determines that the will is valid, the beneficiary will then collect the property the same as if the holder of the property had determined that the will was valid, and nothing will have been accomplished by requiring that the will be attached. The holder of the property is then exposed to a charge that refusal to transfer the property was unreasonable, with possible liability for attorney's fees.

- (4) Both the holder of the property and the court will determine that the will is invalid. If the takers under the invalid will were the same as the takers by intestacy, they start the affidavit procedure all over again. Only if the beneficiaries under a will are not the same as the intestate heirs does attaching the will

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to the affidavit have any effect, and then, only if the holder of the property determines the will is invalid.

The question, then, is whether the additional protection sought by attaching the will to the affidavit justifies the additional problems caused. The affidavit procedure already has built-in safeguards:

- (1) Proof of the affiant's identity is required.
- (2) The affiant is required to present evidence of ownership (e.g., stock certificate, promissory note, bank book, etc.), so only persons having access to the decedent's property can present an affidavit.
- (3) A forty day waiting period is required, to allow time for a valid will to be produced or for an administrator to be appointed.
- (4) The affiant is liable to restore the property to the estate, and is liable for treble damages for fraud.

The existing safeguards provide sufficient protection in the vast majority of cases, and little additional protection is gained by attaching the will to the affidavit.

The Comment to the proposed draft says that the purpose of adding subdivision (e) is to make Section 13101 consistent with Section 13200. Consistency is unnecessary, because the two Sections address different problems. Section 13101 is designed to make it easy for holders of decedent's personal property to transfer the property to the affiant with minimal expense. Banks and transfer agents should not need to submit the affidavits to house counsel for opinions on the validity of the decedent's will; a decedent's debtors should not have to retain counsel before paying over the decedent's debts to the affiants.

On the other hand, Section 13200 is designed to satisfy title companies on real property transactions the companies are called upon to insure. The title companies can easily review wills attached to affidavits for sufficiency as part of their overall review of title. Requiring that the will be attached to real property affidavits does not cause the problems that attachment to personal property affidavits causes.

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I represent some institutional clients for whom I have prepared "fill-in-the-blank" forms of affidavits for them to present to a decedent's heirs and beneficiaries. I know that institutions which frequently transfer small estates to a decedent's heirs or beneficiaries don't want to have to pay attorneys to review wills attached to affidavits. Rather, the institutions want to transfer the property to the appropriate persons in the simplest manner possible.

I have spoken with Dick Kinyon about this matter, and he agrees with me. I urge the Commission to drop the proposal to add Section 13101(e) from the Tentative Recommendation.

Very truly yours,



Kenneth M. Klug

cc: Irwin D. Goldring  
James V. Quillinan  
Sterling L. Ross, Jr.