

First Supplement to Memorandum 89-79

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

Attached to the basic memo are letters recommending that we carve out two exceptions to the prohibition against using the summary procedure to collect decedent's personal property by affidavit when an estate proceeding is pending in California:

(1) When the personal representative consents to collection of a particular item of property by affidavit (see letter from Richard Kinyon attached to basic memo).

(2) When a special administrator has been appointed to perform a particular act and general administration is not contemplated (see letter from Jeffrey Dennis-Strathmeyer attached to basic memo).

The staff draft attached to the basic memo requires court approval to use the summary collection procedure when an estate proceeding is pending, and exempts the person collecting the property from turning the property over to the personal representative.

Attached to this Supplement as Exhibit 1 is a second letter from Mr. Dennis-Strathmeyer expressing dissatisfaction that the staff draft exempts the person collection from turning the property over to the personal representative if needed in the estate proceeding. He says it is not necessary to go so far.

The staff finds Mr. Dennis-Strathmeyer's letter persuasive. Accordingly, the staff has revised the draft and prepared it as a Tentative Recommendation. The revised draft (1) permits the personal representative to consent to collection by affidavit without court approval, and (2) requires the person collecting the property to restore the property to the estate if requested to do so by the personal representative. The revised draft is attached to this Supplement as Exhibit 2 and replaces the draft attached to the basic memo.

If a special administrator is appointed, the revised draft requires consent of the special administrator for collection by affidavit. This seems simpler and safer than trying to draw a statute

that permits collection by affidavit without the special administrator's consent when the appointment is to perform "particular acts," but requiring consent when the special administrator is appointed with the powers of a general personal representative. See Prob. Code § 8540.

Mr. Dennis-Strathmeyer has suggested language to permit the court to terminate special administration when it appears the estate may be collected by summary procedures. This appears to be authorized under existing law: A special administrator may be appointed on such "terms as the court may direct." *Id.* § 8540. The powers of the special administrator cease on issuance of letters to a general personal representative "or as otherwise directed by the court." *Id.* § 8546. The staff would make clear that the court may terminate special administration when the estate may be collected by summary procedures by adding the following to the Comment to Section 8540 or 8546 or both:

The court may terminate special administration when it appears that further administration is unnecessary because estate property may be collected using summary procedures under Division 8 (commencing with Section 13000).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

SEP 20 1989

R E C E I V E D

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September 18, 1989

Robert J. Murphy III, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Study L-1030 Collection by affidavit despite probate.

Dear Bob:

I have reviewed the memorandum of September 11, 1989. I think that the concern for the protection of creditors results from going way beyond what was initially suggested in that the proposed amendments appear to provide that a person using the affidavit collection procedure with the consent of the court and the personal representative will not be liable for restoration of the property, etc.

In terms of Dick Kinyon's desire to be able to perform a "dry probate" in order to do such things as establish the terms of a testamentary trust funded by life insurance, I do not think he was suggesting that an executor's consent to a collection by affidavit would bar subsequent recovery by the personal representative in order to pay creditors. The executor is merely allowing a change of possession without anyone otherwise giving up any rights. Presumably the executor remains subject to the risks which are always present when estate property is left in the possession of a presumed heir rather than being taken into possession.

In terms of my concern that it should be possible to have a special administrator perform a specific act without that being deemed a proceeding which would prevent collection by affidavit, I certainly did not contemplate anything that would change leave creditors in a position any different than if the special administration to approve the specific act had not occurred. I would simply like the court appointing a special administrator to have power to determine that a particular special administration proceeding has not been a proceeding for the administration of the estate which precludes the use of small estate proceedings, and to authorize delivery of custody of property in possession of the special administrator to a claimant (without adjudicating title). This could be accomplished with something on the order of the following.

Add Probate Code §8540(c) to read:

"Except as otherwise specified in the appointing order or subsequent order of the court, the appointment of a special administrator shall constitute a proceeding for the administration of the estate for purposes of Division 8 of this Code."

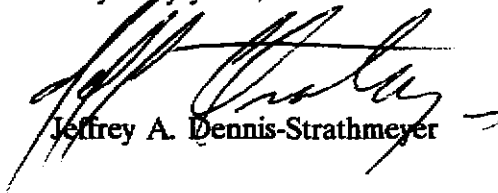
Provide with respect to the Probate Code 8546(b) duty of the special administrator to deliver property to the general personal representative, "Except as provided in subsection (d)". Then add subsection (d) to read:

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"If a special administrator is appointed without the powers of a general personal representative, the court may terminate the special administration at any time upon a determination that further special administration appears unnecessary because the persons apparently entitled to the estate appear entitled to collect the property of the estate without administration under Division 8 of this code." Such a determination may be included in the appointing order without additional notice. No such termination shall be ordered if a petition for appointment of a general personal representative is pending or general personal representative has been appointed. Nor shall such a determination be made if property in the possession of the special administrator is known to be subject to conflicting claims. Termination under this subsection does not bar subsequent special or general administration of the estate and does not constitute an adjudication of any rights to property."

Some of the issues underlying my concerns here are discussed in the enclosed excerpt from the August 1989 issue of the CEB Estate Planning and California Probate Reporter at page 3 under the heading: "Is Subsequent Administration of the Estate Required."

Very truly yours,



Jeffrey A. Dennis-Strathmeyer

Exhibit 2

Staff Draft

TENTATIVE RECOMMENDATION
relating to
SUMMARY COLLECTION OF DECEDENT'S PROPERTY
DURING OR AFTER PROBATE

Persons entitled to a decedent's property may use summary procedures to collect the property without probate or court authorization:

(1) If the gross value of decedent's property in this state does not exceed \$60,000, personal property may be collected by providing the holder of the property with an affidavit or declaration showing the entitlement of the person seeking the property.¹

(2) If the gross value of decedent's real property in this state does not exceed \$10,000, real property may be collected by filing with the court an affidavit showing the entitlement of the person seeking the property, and by recording a certified copy of the affidavit.²

Neither of these procedures may be used if proceedings for administration of the decedent's estate are pending or have been conducted in this state.³

An estate may be administered for a limited purpose, without full administration being contemplated. For example, a special

1. Prob. Code §§ 13100, 13101. The following is excluded in determining whether the estate value is \$60,000 or less: joint tenancy property; property in which decedent held a life or other interest terminable on decedent's death; property passing to decedent's surviving spouse under community property set-aside provisions; multiple-party accounts in financial institutions; vehicles registered or titled under the Vehicle Code; vessels numbered under the Vehicle Code; a manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under the Health and Safety Code; amounts due to decedent for service in the armed forces; and not more than \$5,000 in salary for personal services from employment. Prob. Code § 13050.

2. Prob. Code §§ 13200, 13202.

3. Prob. Code §§ 13108, 13200.

administrator may be appointed to perform a particular act,⁴ such as to take possession of property to protect it, or to exercise an option to purchase property. Or a so-called "dry probate" may be conducted to establish terms of a testamentary trust funded by life insurance, to determine whether decedent exercised a testamentary power of appointment, to facilitate ancillary administration in another state, to enter decedent's safe deposit box, or to handle tax controversies that arose during decedent's lifetime. In such cases, it should be permissible for the personal representative to consent to summary collection of decedent's property, without requiring full administration of the estate.

The Commission recommends that the persons entitled to decedent's property be permitted to use the summary collection procedures, despite the pendency of proceedings for administration of the estate, if the personal representative consents in writing and a copy of the consent is attached to the affidavit. If it later appears that the property is needed in the estate proceeding and the personal representative requests that the property be restored to the estate, the persons who collected the property should be required to comply.⁵

4. Prob. Code § 8540.

5. This would be consistent with the provision of existing law which permits the personal representative to leave real or tangible personal property in possession the person presumptively entitled to it, or to surrender the property to that person, unless or until, in the judgment of the personal representative, the property is needed for purposes of administration of the estate. Prob. Code § 9650.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 13101, 13108, 13111, 13200, and 13206 of, and to add Section 13210 to, the Probate Code, relating to decedent's estates.

The people of the State of California do enact as follows.

Probate Code § 13101 (amended). Furnishing of affidavit

SECTION 1. 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 "decedent's personal representative has consented in writing to 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 decedent's personal representative has consented to collection of decedent's property by affidavit, a copy of the consent shall be attached to the affidavit or declaration.

Comment. Section 13101 is amended to reflect the new authorization for decedent's personal representative to consent to collection of decedent's property by affidavit, notwithstanding that an estate proceeding is pending or has been conducted in this state. 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) Decedent's personal representative consents in writing to use of the procedure provided by this chapter.

(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) to provide that, if decedent's personal representative consents, the procedure provided by this chapter may be used to collect decedent's property, notwithstanding that an estate proceeding is pending or has been conducted in this state.

Probate Code § 13111 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. _____. Section 13111 of the Probate Code is amended to read:

13111. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced in this state, or if decedent's personal representative has consented to collection of decedent's property under this chapter and the personal representative later requests that the property be restored to the estate, 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 authorization for decedent's personal representative to consent to summary collection of decedent's property, notwithstanding that an estate proceeding is pending or has been conducted in this state. 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 "decedent's personal representative has consented in writing to collection of decedent's property pursuant to this chapter."

(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 decedent's personal representative has consented to collection of decedent's property pursuant to this chapter, a copy of the consent shall be attached to the affidavit.

(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 authorization for decedent's personal representative to consent to collection of decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

Probate Code § 13206 (amended). Restitution if estate proceeding commenced or on request of personal representative

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

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if decedent's personal representative has consented to collection of decedent's property under this chapter and the personal representative later requests that the property be restored to the

estate, 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 authorization for decedent's personal representative to consent to summary collection of decedent's property, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

Probate Code § 13210 (added). Limitation on use of procedure provided by this chapter

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) Decedent's personal representative consents in writing to use of the procedure provided by this chapter.

Comment. Section 13210 is new, and permits decedent's personal representative to consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See also Section 13108 (summary collection of personal property).