

Memorandum 83-73

Subject: Study L-655 - Recording Affidavit of Death (Draft of Tentative Recommendation)

In connection with the Commission's work on joint tenancy, we have received the letter attached as Exhibit 1 from the County Recorders' Association of California, suggesting that it would be useful to provide express statutory authority for recording an affidavit of death of a joint tenant (as well as of a life estate or community property owner). There is currently no authority for recording such affidavits, although county recorders accept them based on their notification value to third parties and the lack of liability to the recorder. The county recorders would like to see express authority for recordation so they will be on more solid ground; express authority will also provide uniformity in recording practices throughout the state.

This suggestion ties in with other projects of the Commission, specifically those relating to improvement of probate law and of mechanisms for clearing land titles. The staff has developed the attached tentative recommendation to expressly provide for recording affidavits of death (as well as death certificates) and to give these recorded instruments prima facie evidentiary effect. This is integrated with the existing statutory procedure for obtaining a court decree of the fact of death.

If the Commission approves this tentative recommendation we will send it out for comment to the county recorders, title insurers, and other persons interested in probate and real property titles. We would hope to be able to prepare the recommendation for introduction in the 1984 legislative session.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



County Recorders' Association of the State of California

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April 21, 1983

Mr. John H. DeMouly
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94306

Dear Mr. DeMouly:

It is my understanding that the California Law Revision Commission will be meeting on May 6, 1983 to discuss the joint tenancy method of holding title to real property. The County Recorders' Association of California would like to submit the following for your consideration.

Currently County Recorders accept Affidavits of Death of Joint Tenant, Life Estate, Homestead Interest and Community Property Interest. Although these documents are not specifically required or permitted by statute to be recorded they are accepted based on their notification value to third parties and the lack of liability to the recorder recording these documents.

As practically all of the documents recorded are specifically provided for by law, the Association respectfully requests your consideration of developing statutory authority to record the affidavits discussed above. Such authority will provide for uniformity in recording practices throughout the State.

Please let me know if you have any further questions regarding this matter.

Very truly yours,

DICK HUGHES
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cc: Bernice Peterson
Legislative Committee

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

RECORDING AFFIDAVIT OF DEATH

Upon the death of a joint tenant the surviving joint tenant takes title to the property by right of survivorship. However, because recorded title to the property does not reflect the fact of the death of a joint tenant, the marketability of the survivor's title is impaired until steps are taken to make the decedent's death a matter of record. A similar situation applies to the title of a remainderman upon the death of a life tenant and to the title of a surviving spouse in community property where the deceased spouse has not made a testamentary disposition of the decedent's interest in the property.

The law provides a relatively expeditious proceeding to enable a survivor to obtain a court decree of the fact of death in these situations.¹ In an uncontested case the court may make the decree ex parte upon affidavits submitted to it, and the decree may be recorded and is prima facie evidence of the fact of death. Although the decree only establishes the fact of death and does not confirm the title of the survivor, it nonetheless enables the survivor to obtain title insurance and thus, as a practical matter, the decree is effective to clear title to the property.²

Although the court imprimatur is useful to establish the fact of death, in many cases there is no dispute and a court proceeding is wasteful. A practice has developed in such cases of simply recording an affidavit of the death of the decedent, which county recorders are willing to accept and record and which title insurers are willing to rely on,³ notwithstanding the fact that there is no legal authority for

1. Probate Code §§ 1170-1175 (establishment of fact of death).
2. See, e.g., 1 A. Bowman, Ogden's Revised California Real Property Law § 7.17 (1974); Broll, Property Not Subject to Probate Administration, in 1 California Decedent Estate Administration 135 (Cal. Cont. Ed. Bar 1971).
3. See, e.g., 18 Ops. Cal. Atty. Gen. 270 (1951).

the practice. An affidavit of death is not an instrument for which recordation is permitted or required by statute,⁴ nor is such an affidavit entitled to any presumptive effect.⁵

The affidavit procedure has obvious advantages over the court proceeding to establish the fact of death in cases where the fact of death is undisputed. The affidavit procedure is a simple, fast, and inexpensive means of clearing title to property that, in the common situation, passes to the surviving spouse by joint tenancy survivorship or community property succession. The procedure has become an accepted and integral part of California's scheme for passing clear title to property in many situations without the need for probate or other court proceedings.⁶

The use of the affidavit procedure to establish the fact of death for the purpose of clearing real property titles should be sanctioned by express statutory authority. This is consistent with legislation to achieve clear titles enacted in other jurisdictions,⁷ as well as with the declared California public policy to simplify and facilitate real property title transactions by enabling persons to rely on the record.⁸

The practice of county recorders to accept such affidavits for recordation should be recognized. The affidavit is executed under penalty of perjury⁹ and is ordinarily supported by a certificate of the

4. Only statutorily authorized documents are entitled to recordation, subject to local ordinance. See Gov't Code § 27322; 63 Ops. Cal. Atty. Gen. 905 (1980). A unilateral declaration by a person claiming an interest in property is not a recordable instrument within the meaning of Government Code Section 27280 (instrument affecting title to property).
5. Compare Health and Safety Code § 8628 (affidavit of death of joint tenant of cemetery plot may be relied on by cemetery authority).
6. The affidavit procedure is so entrenched that a 1951 law to require use of the court proceeding to establish the fact of death of a joint tenant created such a popular outcry the law had to be repealed on an urgency basis the next session. For more details, see Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927, 953 (1983).
7. See, e.g., P. Basye, Clearing Land Titles § 33 (2d ed. 1970).
8. Civil Code § 880.020 (marketable record title).
9. Code Civ. Proc. §§ 2003, 2015.5 (affidavits).

decedent's death.¹⁰ Recognition of the affidavit for recordation will provide the recorder with necessary legal authority and will promote uniformity in recording practices throughout the state.

The practice of title insurers to rely on such recorded affidavits should likewise be confirmed. The recorded affidavit should be given prima facie effect so that third persons as well as title insurers may rely on it with some assurance of security. This is consistent with the treatment California law gives generally to instruments that establish the fact of death.¹¹ But it does not preclude a person from disputing the fact of death in the rare situation where a dispute arises.¹²

Although these proposals would largely codify existing practice, they will provide useful clarification, standardization, and support for an important aspect of California law. The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend the heading of Chapter 21 (commencing with Section 1170) of Division 3 of, to add Part 7 (commencing with Section 241) to Division 2 of, and to repeal Article 1 (commencing with Section 1170) of Chapter 21 of Division 3 of, and the heading of Article 2 (commencing with Section 1190) of Chapter 21 of Division 3 of, the Probate Code, relating to establishing the fact of death.

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

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10. The certificate of death is itself a recordable document in some instances. Health and Safety Code §§ 10060 and 10570 (birth and death certificates). The statute should also make clear that such a certificate may be independently recorded as a title clearing document in a county where the decedent's real property is situated.
 11. See, e.g., Health and Safety Code § 10577 (death certificate prima facie evidence of fact of death); Probate Code § 1174 (court decree prima facie evidence of fact of death).
 12. Prima facie evidence is rebuttable; in this situation the presumption created affects the burden of proof. Evidence Code §§ 602 (prima facie evidence establishes rebuttable presumption), 603 (presumption affecting burden of producing evidence facilitates determination of action).

Probate Code §§ 241-252 (added)

SECTION 1. Part 7 (commencing with Section 241) is added to Division 2 of the Probate Code, as enacted by 1983 Cal. Stats. ch. ___, § ___, to read:

PART 7. ESTABLISHING FACT OF DEATH

CHAPTER 1. PROCEEDINGS TO ESTABLISH DEATH

§ 241. Proceedings authorized

241. If title to or an interest in real or personal property is affected by the death of a person, another person who claims an interest in the property may commence proceedings pursuant to this chapter to establish the fact of the death.

Comment. Section 241 continues the substance of the first portion of former Section 1170. This chapter is intended to provide an expeditious procedure for establishing the fact of death for the purpose of clearing title to property. See Chapter 2 (commencing with Section 250) (recording evidence of death). Other proceedings to establish the fact of death for other purposes include Health and Safety Code Sections 10550-10558 (court proceedings to establish record of birth, death, or marriage) and Probate Code Sections 300-453 (opening probate) and 1350-1359 (administration of estates of missing persons presumed dead).

406/115

§ 242. Commencement of proceedings

242. (a) Proceedings under this chapter shall be commenced in the superior court of the county of which the decedent was a resident at the time of death or in the superior court of any county in which the property is situated.

(b) Proceedings under this chapter shall be commenced by filing a verified petition that sets forth all of the following information:

- (1) The jurisdictional facts.
- (2) A particular description of the affected property and of the interest of the petitioner in the property.

Comment. Section 242 continues the substance of the last portion of former Section 1170.

§ 243. Pending administration proceedings

243. If proceedings for the administration of the decedent's estate are pending, proceedings under this chapter may be combined with the administration proceedings in the following manner:

(a) The petition shall be filed in the administration proceedings by the person affected or by the executor or administrator.

(b) The petition shall be filed at any time before the filing of a petition for final distribution. The petition may be included in a verified petition for probate of the will of the decedent or for letters of administration.

(c) The petition shall be filed without additional fee.

Comment. Section 243 continues the substance of former Section 1171.

24831

§ 244. Notice of hearing

244. (a) The clerk shall set the petition for hearing by the court and, except as provided in subdivision (b):

(1) The clerk shall give notice of the hearing in the manner prescribed in Section 1200.

(2) The person who commenced the proceedings shall cause notice of the hearing to be given in the manner prescribed in Section 1200.5.

(b) If the person who commenced the proceedings files an affidavit with the petition stating that the person has no reason to believe there is any opposition to, or contest of, the petition, the court may act ex parte.

Comment. Section 244 continues the substance of former Section 1172.

24841

§ 245. Hearing and judgment

245. (a) The petition and supporting affidavits may be received in evidence and acted upon by the court with the same force and effect as if the petitioner and affiants were personally present and testified to the facts set forth.

(b) The court may render judgment establishing the fact of the death. The judgment is prima facie evidence of the fact of the death. The presumption established by this subdivision is a presumption affecting the burden of producing evidence.

Comment. Section 245 continues the substance of former Section 1174. The judgment establishing the fact of death does not establish the title of the person who commenced the proceedings. The judgment may be recorded pursuant to Chapter 2 (commencing with Section 250).

24842

CHAPTER 2. RECORDING EVIDENCE OF DEATH

§ 250. Recording authorized

250. If title to real property is affected by the death of a person, another person who claims an interest in the property may record in the county in which the property is situated any of the following instruments establishing the fact of the death:

(a) An attested or certified copy of a record of death made and filed in a designated public office as required by law.

(b) An affidavit of death executed by a person having knowledge of the fact of death.

(c) A court order that determines the fact of death made pursuant to Chapter 1 (commencing with Section 241) or pursuant to another statute that provides for a determination of the fact of death.

Comment. Section 250 makes clear that an instrument establishing the death of a person is a document entitled to recordation. Cf. Gov't Code §§ 27280 (recordation of instrument or judgment affecting title to property); 27322 (recordation of instrument required or permitted by law to be recorded).

Subdivision (a) generalizes authority found in Health and Safety Code Sections 10060 and 10570 (birth and death certificates). A death certificate entitled to recordation must satisfy evidentiary standards. See Evid. Code §§ 1281 (record of death), 1530-1531 (secondary evidence of official writings).

Subdivision (b) codifies existing practice. See, e.g., 1 A. Bowman, Ogden's Revised California Real Property Law § 7.17 (1974); cf. Health and Safety Code § 8628 (affidavit of death of joint tenant of cemetery plot). It is comparable to authority found in a number of jurisdictions for affidavits as to death. See, e.g., P. Basye, Clearing Land Titles § 33 (2d ed. 1970). An affidavit must be made under oath or upon penalty of perjury. Code Civ. Proc. §§ 2003, 2015.5 (affidavits).

Subdivision (c) continues the substance of former Section 1175 (recordation of decree establishing fact of death). Other proceedings establishing the fact of death include Health and Safety Code Sections

10550-10558 (court proceedings to establish record of birth, death, or marriage) and Probate Code Sections 1350-1359 (administration of estates of missing persons presumed dead).

26253

§ 251. Recording and indexing

251. (a) An instrument establishing the fact of death recorded pursuant to this chapter is subject to all statutory requirements for recorded documents, including acknowledgment or proof and certification.

(b) The county recorder shall index an instrument establishing the fact of death recorded pursuant to this chapter in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the person whose death is established shall be deemed to be the grantor.

Comment. Section 251 provides indexing only for the decedent and not for the person who records an instrument establishing the fact of death. Recordation gives notice only of the fact of death; it does not establish the claim of any person who claims an interest in the property. See Section 252 (effect of recording).

26274

§ 252. Effect of recording

252. An instrument establishing the fact of the death of a person recorded pursuant to this chapter is prima facie evidence of the death insofar as the death affects title to real property situated in the county. The presumption established by this section is a presumption affecting the burden of producing evidence.

Comment. Section 252 is consistent with Section 245 (hearing and judgment) and Health and Safety Code Section 10577 (death certificate prima facie evidence of fact of death). This section is subject to express statutory provisions giving greater effect to an instrument that establishes the fact of the decedent's death. See, e.g., Probate Code §§ 1021 (conclusive effect of decree of distribution) and 1082 (conclusive effect of determination of heirship).

26761

Probate Code §§ 1170-1192 (chapter heading)

SEC. 2. The heading of Chapter 21 (commencing with Section 1170) of Division 3 of the Probate Code is amended to read:

21. Establishing ~~Fact of Death or Heirship~~ Identity of Heirs

Probate Code §§ 1170-1175 (repealed)

SEC. 3. Article 1 (commencing with Section 1170) of Chapter 21 of Division 3 of the Probate Code is repealed.

Comment. The substance of former Article 1, consisting of Sections 1170 to 1175 (establishment of fact of death) is continued in Part 7 of Division 2 as Sections 241-245 (proceedings to establish death) and Section 250 (recording authorized).

26964

Probate Code §§ 1190-1192 (article heading)

SEC. 4. The heading of Article 2 (commencing with Section 1190) of Chapter 21 of Division 3 of the Probate Code is repealed.

~~2. Identity of Heirs~~