

Memorandum 90-134

Subject: Study L-1030 - Disposition of Small Estate Without Probate
(Interrelation with General Recommendation Relating to
Litigation Involving Decedent)

This memorandum discusses revisions needed to resolve some technical inconsistencies between two Commission recommendations that have been approved for introduction in 1991: *Recommendation Relating to Disposition of Small Estate Without Probate* [March 1990] and *Recommendation Relating to Litigation Involving Decedents* [September 1990].

As part of a set of revisions in the law relating to disposition of small estates without probate, the Commission approved Probate Code Section 13107.5 permitting the successor of the decedent to be substituted for the decedent in an action or proceeding involving money or property claimed by the successor that was pending when the decedent died. This section would apply only where the value of the estate, as determined pursuant to Section 13050, does not exceed \$60,000. The right to be substituted was viewed as an extension of the right of a successor under Section 13105(b) to bring an action to recover money or property that the holder refuses to pay or deliver to the successor.

In a separate study of the law concerning the effect of death on causes of action and pending litigation, the Commission approved Code of Civil Procedure Section 377.320 permitting a motion by a decedent's successor in interest to be substituted as a party in a pending action commenced by the decedent. This procedure also provides for filing an affidavit like that required in the small estate procedure.

These two procedures do the same thing in the case of a small estate, the small estate procedure being a special, limited case of the general procedure provided in the litigation involving decedents revisions. The small estate procedure of proposed Probate Code Section 13107.5 is not really needed if the general statute is enacted, but is useful as a cross-reference provision that ties the two statutes

together and informs those using the small estate statute of the availability of the general procedure in the Code of Civil Procedure.

Accordingly, the staff suggests that a different version of proposed Probate Code Section 13107.5 be included in the *Recommendation Relating to Litigation Involving Decedents* that serves as a cross-reference from the small estate procedure in the Probate Code to the general procedure in the Code of Civil Procedure:

Prob. Code § 13107.5 (added). Substitution of parties without probate

13107.5. Where the money or property claimed in an affidavit or declaration executed under this chapter is the subject of a pending action or proceeding in which the decedent was a party, the successor of the decedent shall, without procuring letters of administration or awaiting probate of the will, be substituted as a party in place of the decedent by making motion under Section 377.320 of the Code of Civil Procedure and filing the affidavit or declaration required by Section 377.330 of the Code of Civil Procedure.

Comment. Section 13107.5 makes clear that the general procedure for substituting the decedent's successor in interest provided in the Code of Civil Procedure applies to disposition of small estates without probate under this part. For this purpose, a "successor of the decedent" as defined in Section 13006 is a "decedent's successor in interest" as defined in Code of Civil Procedure Section 377.120.

Note. This version of Section 13107.5 would be substituted for the version of Section 13107.5 set out in the Commission's *Recommendation Relating to Disposition of Small Estate Without Probate*.

If the general litigation recommendation is not enacted, the version of Section 13107.5 set out in the *Recommendation Relating to Disposition of Small Estate Without Probate* would remain as it is.

Respectfully submitted,

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