

Memorandum 89-86

Subject: Study L-3026 - Procedure for Substitution of Parties in
Litigation Involving Decedent

The affidavit procedure for collection and transfer of small estates without administration (Prob. Code §§ 13000-13209) does not deal with substitution of parties in pending litigation. If the decedent's successor, as defined in Section 13006, seeks payment or delivery of personal property and is refused, the successor may sue the obligor under Section 13105(b). However, if the decedent had already sued the obligor before his or her death, the successor does not have a clear right to be substituted as the plaintiff in the action, although Code of Civil Procedure Section 385 does permit a "representative or successor in interest" to continue an action on motion. To require commencement of a formal probate in situations where the decedent brought the action before death defeats the purpose of the affidavit procedure of avoiding expense and delay in small estates.

The staff suggests that the Commission approve amendments to the affidavit procedure to fill this gap. The attached draft tentative recommendation would make the affidavit procedure available for substitution of successors in pending litigation.

Respectfully submitted,

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#L-3026

su470
09/25/89

TENTATIVE RECOMMENDATION
RELATING TO
AFFIDAVIT PROCEDURE FOR SUBSTITUTION OF PARTIES

The Probate Code provides a simple and efficient means for collection and transfer of small estates without the need for probate.¹ These statutes permit the successor of the decedent² to execute an affidavit or declaration and seek the transfer or payment of personal property to the successor. If the holder of the property or the person who owes a debt to the decedent refuses to transfer the property or pay the debt, the successor is entitled to bring an action to enforce transfer or payment.³

If the sequence of events is different, however, the affidavit procedure may not work. Where a person brings an action to enforce a right to payment or possession of property and dies while the action is still pending, the affidavit procedure provides no remedy for the successor, and a formal probate may be necessary even though the estate would otherwise qualify for the affidavit procedure. The successor of the decedent might be successful in making a motion to be substituted as a party in the action under the general rules of civil procedure,⁴ but this remedy is not clear.

1. See Prob. Code §§ 13000-13209. Currently these procedures are available in estates with real and personal property having a gross value not exceeding \$60,000. Excluded from this calculation is certain property such as joint tenancies, multiple-party accounts subject to a pay on death provision, motor vehicles, vessels, and mobilehomes, etc. See Prob. Code § 13050.

2. "Successor of the decedent" is defined in Probate Code Section 13006 to mean, in general, the person or persons who would take by will, if there is a will, or by the law of intestate succession, if there is no will.

3. See Prob. Code § 13105(b).

4. See Code Civ. Proc. § 385. This section provides in part that "[i]n case of the death . . . of a party, the court, on motion, may allow the action or proceeding to be continued by . . . his or her representative or successor in interest."

Accordingly, the Law Revision Commission recommends that the affidavit procedure for collection and transfer of small estates be supplemented to make clear that the decedent's successor may execute an affidavit and, on motion, be substituted for the decedent in any pending action or proceeding concerning money or other personal property claimed by the decedent's successor.

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

An act to add Section 13107.5 to the Probate Code, relating to substitution of parties.

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

Probate Code § 13107.5. Substitution of parties without probate

SECTION 1. Section 13107.5 is added to the Probate Code, to read:

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 may, without procuring letters of administration or awaiting probate of the will, seek to be substituted as a party in place of the decedent by motion under Section 385 of the Code of Civil Procedure. The successor of the decedent shall file the affidavit or declaration with the court when the motion is made. For the purpose of Section 385 of the Code of Civil Procedure, a successor of the decedent who complies with this chapter shall be considered as a successor in interest of the decedent.

Comment. Section 13107.5 is a new provision permitting the successor of the decedent (as defined in Section 13006) to seek to be substituted for the decedent in any action or proceeding involving the money or property claimed by the successor that was pending when the decedent died. This right is consistent with the right of the 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. This section is intended to coordinate the affidavit procedure of this chapter with the court's authority under Code of Civil Procedure Section 385 to allow an action or proceeding to be continued by the decedent's successor in interest.