

First Supplement to Memorandum 89-86

Subject: Study L-3026 - Affidavit Procedure for Substitution of Parties

Background

The attached letter from Leonard W. Pollard II supports the concept of the draft statute proposed in Memorandum 89-86. That draft statute makes clear that the affidavit procedure may be used by the successor in interest of the decedent to substitute the successor in interest for the decedent in a pending action to which the decedent is a party. In such case, the appointment of a personal representative is unnecessary.

There are limitations on use of the affidavit procedure. The affidavit procedure can be used only where 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)." See Section 13101(a)(5).

The excluded property described in Section 13050 consists of the following:

--Property which, at the time of the decedent's death, was held by the decedent as a joint tenant.

--Property in which the decedent had a life or other interest terminable upon the decedent's death.

--Property which was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500.

--A multiple-party account to which the decedent was a party at the time of the decedent's death to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary.

--Certain vehicles, vessels, manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes.

--Amounts due to the decedent for services in the armed forces of the United States.

--The amount, not exceeding \$5,000, of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

Suggestion that statute clearly authorize substitution of surviving spouse for deceased spouse in pending action to which deceased spouse was a party

The attached letter suggests that it be made clear that the surviving spouse may be substituted as a party in a pending action to which the decedent was a party, without the need for appointment of a personal representative, where a surviving spouse is the successor in interest of the decedent under Section 13500 (passage of property to surviving spouse without administration).

The staff does not believe any revision of the proposed draft statute is necessary. Where the gross value of the estate, excluding the property described in Section 13050, does not exceed \$60,000, the draft statute permits the surviving spouse to use the affidavit procedure to be substituted for the decedent as a party to a pending action. In applying the \$60,000 limit, property is excluded if it passed to the decedent's surviving spouse pursuant to Section 13500. See Section 13050(a)(1). (Section 13500 provides that no administration is necessary for property of a decedent that passes to the surviving spouse by testate or intestate succession.)

Based on the above analysis, the draft statute permits the affidavit procedure to be used to substitute the surviving spouse for the deceased spouse in any case where the surviving spouse is the successor in interest to the property which is the subject of the pending action, without regard to the amount in controversy in the pending action, so long as the estate of the deceased spouse (excluding the property described in Section 13050) does not exceed \$60,000.

The draft statute would not avoid the need to appoint a personal representative to maintain the pending action if the decedent's estate exceeds the \$60,000 limit for use of the affidavit procedure. Should there be a provision that permits the substitution of the surviving spouse for the deceased spouse where the decedent's estate exceeds the \$60,000 limit for use of the affidavit procedure?

Although we do not believe any revision of the draft statute set out in Memorandum 89-86 is necessary, we do recommend that the Comment to the draft statute be revised to cover the situation where a surviving spouse is the successor in interest and the estate passing to others (excluding property described in Section 13050) does not exceed \$60,000.

Amendment of Probate Code Section 573

Subdivision (a) of Section 573 of the Probate Code provides:

(a) Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative.

The attached letter indicates that this subdivision might be construed to require the appointment of a personal representative. In response to a suggestion in the attached letter, the staff recommends that Section 573 be amended to add the following clarifying subdivision:

(f) Nothing in this section limits the right of the successor of the decedent (as defined in Section 13006) to commence or continue an action to have property that is described in an affidavit or declaration executed pursuant to Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 paid, delivered, or transferred to the successor of the decedent.

We will discuss Section 573 in the preliminary portion of the Tentative Recommendation and we will write an appropriate Comment to Section 573 to describe the situations covered by new subdivision (f).

Deletion of sentence from preliminary portion of Tentative Recommendation

The staff also recommends that the last sentence of the second paragraph of the preliminary portion of the Tentative Recommendation be deleted. See Tentative Recommendation attached to Memorandum 89-86.

Respectfully submitted,

John H. DeMouilly
Executive Secretary



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December 15, 1989

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DEC 27 1989

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Dear Mr. DeMouilly:

Re: Procedure for Substitution of Parties in Litigation
Involving Decedent

An amendment for the substitution of parties in litigation involving a decedent may be in order for Probate Code section 573 (continuation of action after death by "personal representative") and those sections (sections 13,500, et seq.) dealing with passage of property to surviving spouses without administration.

An attorney from Los Angeles relayed the following information to the undersigned: Prior to death a decedent was prosecuting an action against his employer for wrongful termination. All property was community property between the decedent and his wife. No estate proceeding was opened, nor was a community property set aside done. The wife sought to substitute herself in as plaintiff in the wrongful termination action; in response, the employer asserted the action could be maintained only by a "personal representative", citing Probate Code section 573.

As you are aware, Code of Civil Procedure section 358 allows the continuation of an action by a person's "representative" or "successor in interest." There is no reference in Probate Code section 573 to the term "successor in interest."

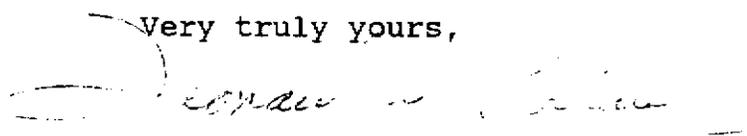
LRC Memo 89-86 involved the procedure for substitution of parties in litigation involving decedents. You proposed the addition of a new section to make the point of substituting parties clear stating neither Probate Code section 13105(b) nor Code of Civil Procedure section 385 expressly allowed the successor to be substituted in the action. The Executive Mr.

December 15, 1989

Committee of the Estate Planning, Trust and Probate Law Section of the State Bar supported your position. The undersigned believes it would also be appropriate to put a similar provision in the 13,500 sections, regarding the passage of community property, and to amend Probate Code section 573 to make clear that not only the decedent's "personal representative" but also "successors in interest" for a small estate (section 13,100 et seq.) and the passage of community property without administration (sections 13,500, et seq.) are both covered.

This suggestion is made by the undersigned as an individual and without the matter first having been presented to the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.

Very truly yours,



LEONARD W. POLLARD II

LWP:ns

cc: Nat Sterling
Bruce Ross
Jim Quillinan