

**DRAFTING AFFIDAVITS
FOR LOUISIANA
SMALL SUCCESSIONS
CONTAINING IMMOVABLE PROPERTY
(Act 81 of 2009)**

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I. INTRODUCTION

A common problem with land titles involves issues created by the death of one or more family members who were owners of immovable property. When no succession is opened for the decedent and no court action is taken to determine heirship, property most likely will remain on the tax rolls in the name of the deceased owner. The ad valorem tax statements will continue to be sent to the decedent, increasing the chances of an inadvertent failure to pay taxes. Unknown heirs may not be “reasonably ascertainable” and may not have rights under the 14th Amendment of the U.S. Constitution, when a suit to confirm the tax sale is filed. Heirship property is more likely to be lost for taxes than owner-occupied property. Often the taxes will be paid by one or more of the presumptive heirs, usually someone who lives on the property, and a number of years will pass before anyone recognizes the need or undertakes an effort to conform the record title to the rights of ownership provided by our Code.

Yet the Deceased’s heirs are owners of the deceased’s estate, even though they are not recognized, under the principle of “le mort saisit le vif.”

La. Civil Code Art. 934 – Commencement of succession

Succession occurs at the death of a person.

La. Civil Code Art. 935 – Acquisition of ownership; seizin

Immediately at the death of the decedent, universal successors acquire ownership of the estate and particular successors acquire ownership of the things bequeathed to them.

Prior to the qualification of a succession representative only a universal successor may represent the decedent with respect to the heritable rights and obligations of the decedent.

La. Civil Code Art. 871 - Meaning of succession

Succession is the transmission of the estate of the deceased to his successors. The successors thus have the right to take possession of the estate of the deceased after complying with applicable provisions of law. [Emphasis Added.]

La. Civil Code Art. 872 - Meaning of estate

The estate of a deceased means the property, rights, and obligations that a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property. The estate includes not only the rights and obligations of the deceased as they exist at the time of death, but all that has accrued thereto since death, and the new charges to which it becomes subject.

La. Civil Code Art. 937 - Transmission of rights of successor

The rights of a successor are transmitted to his own successors at his death, whether or not he accepted the rights, and whether or not he knew that the rights accrued to him. [Emphasis Added.]

LA. Civil Code Art. 938 - Exercise of succession rights

- A. Prior to the qualification of a succession representative, a successor may exercise rights of ownership with respect to his interests in a thing of the estate as well as his interest in the estate as a whole.
- B. If a successor exercises his rights of ownership after the qualification of a succession representative, the effect of that exercise is subordinate to the administration of the estate.

Inaction frequently inhibits the ability of family members lacking record title to exercise their rights of ownership of property including the rights to sell, to encumber, and to seek federal aid, such as Road Home funds.¹

¹ This author has estimated that anywhere from \$65,000,000 to \$200,000,000 of Road Home funds were not claimed due to title problems. UNO master of arts student, Robert C. Peterson, postulates that as much as \$9.2 billion worth of Louisiana land is in "dead capital" due to title issues. Dissertation, "Tenure Insecurity and Post-Disaster Housing: Case Studies in New Orleans and Tegucigalpa," May, 2009. Louisiana Appleseed, a pro bono organization of attorneys, committed to systemic solutions, rallied support for this legislation.

Additionally, because record title is not transferred to the Deceased's heirs, the insurance on the property generally remains in the name of the deceased owner, creating additional problems. After Hurricane Katrina, practitioners saw an increase in the number of successions opened because the insurance company issued a check in the name of the deceased owner and the heirs could not cash the check.

II. Getting Started

When assisting a client in resolving heirship property issues, the attorney should be prepared to undergo a comprehensive analysis of the client's property and family, including record and equitable ownership and the client's legal needs. Prior to the initial meeting with the client, if the client is capable of providing assistance, the attorney should advise the client to gather available information including copies of all deeds, tax receipts, death certificates, obituaries, and any other information on family members that will enable the attorney to determine the heirs of the deceased and the correct description of and title to the heir property. The attorney should also advise the client to include any title insurance policies, and mortgages and other information such as appraisals, bank statements and bills. If the client is not capable of obtaining this information, the attorney should solicit assistance from other family members or personally gather the information.

The attorney might consider furnishing the client a sample family tree and a form questionnaire as tools in gathering the information necessary to get started.

Most importantly, the attorney must determine whether the deceased had a will. The existence of a will determines, and limits the methods available to transmit the deceased's estate to his successors. A will must be probated judicially, and the small succession procedure would not be available.

III. Substantive Outline of Current Law including Act 81 of 2009

The acceptable method for establishing heirship in Louisiana sufficient to insure a merchantable title to immovable property has gone through various periods of uncertainty. Prior to June 18, 2009, most attorneys and title companies were operating under the assumption that heirship concerning immovable property could be established either by (1) filing a succession proceeding and putting heirs in possession with a formal “Judgment of Possession”; (2) filing a succession proceeding and having a succession representative transfer real rights; or (3) thirty-year acquisitive prescription coupled with an adjudication. However, in 2009, the Louisiana Legislature passed Act 81 (attached) and added a fourth method: When a person died owning title to certain real property, called “small succession immovable property”, the heirs could establish merchantable title by filing an affidavit in the conveyance records.² The run-up to this Act 81 of 2009 caused some controversy among practitioners because of the fear of fraud by family members, or the loss of legal fees, when the law no longer would require a judicial determination in every case. Clearly though, this work of drafting an Act 81 notarial affidavit constitutes the practice of law³, and cannot be handled by non-attorneys. Licensed attorneys have always been the gatekeepers as to fraud in their own notarial acts.

In fact, many practitioners and title companies had implemented a procedure similar to the new legislative method for many years. This new affidavit procedure does not run afoul of the Civil Code provisions on succession quoted above, but provides an alternate method of documenting heirship and the instant transmission of ownership

² Basically, small succession immovable property is defined by Act 81 as a contiguous piece of residential property and cemetery plots owned by the deceased.

³ See La. R.S. 37:212

consistent with the Civil Code. The writer has reviewed many titles where transmission of rights to a successor had been documented by affidavit alone, prior to 2009, especially in rural parishes involving people of modest means. Since the Louisiana Legislature has enacted Act 81 of 2009 to specifically permit the use of affidavits to establish heirship, that informal practice is now formalized, as to certain types of immovable property, and in circumstances limited to intestacy. Now, heirship property may be established by filing an heirship affidavit in compliance with Act 81 of 2009, as well as through succession or prescription proceedings in court. This presentation discusses the requirements of Act 81 of 2009.

IV. The attorney's prime duty: Determine and Meet the Client's Goals

The client's goals must determine the practitioner's actions. In many instances, the client's goal may be to determine ownership so that the client will qualify for a federal, state or local program in which ownership must be established and the title insured. In other instances, the client may desire to borrow money against the property or sell the property. The client may want a court to rule on claims of heirship in an adversary proceeding against those claiming to be descendants but who are not. Specific client needs may cause the practitioner to choose a particular solution for solving heirship property issues, even opting to do nothing because the client does not want ownership to be known by any outsider, or opting for a judicial filing when an affidavit is allowed.

V. Filing an Act 81 Heirship Affidavit

Since one possible option for establishing record heirship for Louisiana immovable property now is through the filing of an heirship affidavit, those clients who qualify should be informed of this expedited procedure, as legal fees would be greatly reduced and certain court costs would be eliminated. An heirship affidavit as provided

by Act 81 is a statement under oath by two or more affiants as to the death, domicile, ownership rights, and heirship of a deceased.

The Louisiana Legislature passed Senator Edwin R. Murray's Bill No. 184 as Act 81 entitled "[An Act]... to define a small succession to provide relative to small succession procedure and effects; to authorize recognition and conveyance of an ownership interest in certain immovable property through a small succession; to provide certain definitions, procedures, conditions and requirements [and]; to provide a prescriptive period for certain actions..."

Act 81 accomplishes its desired purpose of allowing affidavits filed in the conveyance records to establish heirship and other factual matters which must be made public. The Act provides that the affidavit must contain "...An affirmation that, by signing the affidavit, the affiants swear under penalty of perjury that the information contained in the affidavit is true, correct and complete to the best of their knowledge, information and belief." Filing a false affidavit is a criminal act and could result in civil damages.⁴ An affidavit, along with a certified copy of the decedent's death certificate, should be recorded in the conveyance office of the parish where the immovable property is situated. Act 81 states that once the affidavit is recorded, the affidavit or a certified copy is "admissible as evidence in any action involving small succession immovable property to which it relates or is affected by the instrument and shall be prima facie evidence of the facts stated therein, including the relationship to the deceased of the parties recognized as heirs, a surviving spouse in community, or usufructuary, as the case may be, and of their rights in the small succession immovable property of the deceased." [Emphasis added.]

⁴ See La. R.S. 44:110 and R.S. 14:125

The Act is specific and succinct. However, it does not include a sample form and leaves the drafting of the affidavit up to the attorney practitioner. Act 81 requires the affidavit, which can only be filed after 90 days from the death of the decedent, to be properly sworn to and acknowledged, be in recordable form, and recorded when immovable property is involved. Act 81 also sheds some light upon who should be the affiant and what information is required to make the title to the real estate marketable. The Act's focus upon merchantability with a two-year prescriptive period is in direct response to the espoused position that titles are not merchantable where there are no judicial proceedings. This two-year period is identical to the prescription period afforded to judgments of possession.⁵ Merchantable title should allow parties to freely sell and encumber property based upon title a willing seller and buyer would give and accept. Act 81 allows for an affidavit to document the transmission of a small estate without the suggestion of litigation.

Under Act 81, the practitioner should list each fact that the practitioner determines would have been necessary for a court to issue an order adjudicating the correct and current owners of the property in a Judgment of Possession. In some instances, more than one affidavit may be required. For example, if the decedent had a child who was also deceased, it is this writer's opinion that it would be best to file two affidavits: one for the decedent; and, a separate affidavit for the decedent's deceased child.⁶ Otherwise, the one affidavit becomes cumbersome and difficult to follow and may through inadvertence, lack some of the necessary facts that the practitioner desires to be made public as prima facie evidence in establishing title. A sample affidavit form is attached

⁵ La. R.S. 9:5630

⁶ The practitioner should keep in mind that under La. Civil Code Art. 937, supra, deceased successors transmit their succession rights to their successors.

which details the provisions of Act 81 in its footnotes. It is important to remember that the procedure set forth in Act 81 is only available if the gross value of the decedent's estate, including the small succession immovable property, is less than \$75,000.00.

VI. Judicial Determination of Heirship

Other than filing an heirship affidavit pursuant to the provisions and constrictions of Act 81 of 2009, an attorney has two options for establishing heirship—opening an estate or obtaining a judicial adjudication based upon acquisitive prescription of thirty years, coupled with adequate facts to prove “adverse” possession. If the goal of the client is solely to determine heirship, that goal may be accomplished by filing an affidavit if authorized by the Act. However, if no competent persons able to execute an affidavit can be found, or if the property does not qualify under Act 81 of 2009, a court will be required to act in order to make the title merchantable. In the latter event, the practitioner may elect to open a succession or file a petition based on prescription.