

Memorandum 90-28

Subject: Study L-3018 - Litigation Involving Decedent (Draft of General Statute)

Attached to this memorandum is a staff draft of a tentative recommendation concerning the general rules governing survival of causes of action, continuation of actions to which a decedent was a party, and related matters. This draft is the remainder of a set of comprehensive staff proposals for reform and clarification of the law in this area. The Commission has approved (and the Legislature has enacted) other parts of this scheme, the main part being the provisions concerning liabilities covered by insurance. (See Prob. Code §§ 550-555.)

This draft seeks to modernize the statutes in the Code of Civil Procedure to take account of the increasing use of non-probate transfers. The draft would also improve the organization of the affected sections which we believe makes them easier to understand and apply.

Respectfully submitted,

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TENTATIVE RECOMMENDATION

relating to

LITIGATION INVOLVING DECEDENTS

In the course of revising the Probate Code, the Law Revision Commission recommended several changes in the law relating to litigation involving decedents.¹ The 1987 recommendation on this subject noted that the Commission "anticipates a future recommendation that treats the entire body of law in a comprehensive manner."² The statutes concerning litigation involving decedents that appeared in the Probate Code were revised on recommendation of the Commission, but related provisions in the Code of Civil Procedure concerning survival and continuation of actions, statutes of limitations, and proper parties have not been subject to comprehensive review. This recommendation would complete the revision of this area of the law.

Some of the provisions in the Code of Civil Procedure overlap or disagree with the Probate Code.³ The rules in the Code of Civil Procedure were developed before the increasing importance of nonprobate transfers was recognized. Consequently, unless a specific procedure in the Probate Code applies to the situation, the law may be unclear. The proposed law consolidates and reorganizes the existing statutes in a comprehensive fashion. In addition to making technical and clarifying

1. See Prob. Code §§ 550-555 (liability of decedent covered by insurance), 9350-9399 (claims in litigation). This revision resulted in the repeal of former Probate Code Sections 707, 709, 709.1, 716, 720, and 721, and the amendment of Code of Civil Procedure Sections 353 and 385.

2. See *Recommendation Relating to Litigation Involving Decedents*, 19 Cal. L. Revision Comm'n Reports 899, 903 (1988).

3. See, e.g., Code Civ. Proc. §§ 353, 353.5, 369, 377, 385.

changes, the proposed law makes a number of significant substantive changes described below.

Commencement of Decedent's Cause of Action

Existing law provides that a decedent's cause of action may be brought by the decedent's personal representative.⁴ However, in many cases there is no administration of the decedent's estate either because of its size or because all the substantial assets pass to successors by means of nonprobate transfers. In such a situation it makes little sense to open a probate proceeding for the sole purpose of appointing a personal representative to assert the decedent's cause of action. The cause of action belongs to the decedent's heirs or devisees on the decedent's death⁵ or rightfully passes to a successor in interest who takes property that is the subject of the litigation, e.g., by virtue of a pay-on-death or transfer-on-death provision. The proposed law authorizes the successors in interest to bring an action if there is no probate.⁶

Because disputes may arise as to who is a successor in interest entitled to bring the action, as to the management of litigation, or as a result of the later appointment of a personal representative, the proposed law empowers the court in which the action is brought to make any order concerning parties that is appropriate to ensure proper administration of justice in the case. This would include appointing the successor in interest as a guardian ad litem⁷ or special

4. Code Civ. Proc. § 353; Prob. Code § 573. Code of Civil Procedure Section 353 actually refers to the decedent's "representatives" rather than personal representative. However, it appears that the personal representative is intended, since the provision also speaks of issuance of letters.

5. Prob. Code § 7000.

6. This is consistent with the authority of successors in interest to continue litigation commenced by the decedent before death. See discussion of "Continuation of Decedent's Pending Action or Proceeding," below.

7. See Code Civ. Proc. §§ 372-373.5.

administrator⁸ to protect interests of other potential beneficiaries or successors.

Continuation of Decedent's Pending Action or Proceeding

If the plaintiff in an action or proceeding dies during its pendency, the litigation may be continued by the decedent's personal representative or successor in interest, with court approval.⁹ The proposed law limits the substitution of a successor in interest as a party to cases where there is no personal representative. This limitation will simplify problems of administration and will be consistent with the treatment given persons entitled to assert the decedent's cause of action.¹⁰

Commencement of Action on Decedent's Liability

If a person dies against whom a cause of action for personal liability exists, the cause of action may be asserted against the decedent's personal representative.¹¹ Where the decedent has assets that pass by nonprobate transfer, however, it makes little sense to open probate proceedings and appoint a personal representative to serve as a party defendant, since the assets are not subject to the control of the personal representative. The proposed law makes clear that a cause of action may be asserted directly against the decedent's successors in interest where another statute provides direct liability of the successors.¹²

8. See Prob. Code §§ 8540-8547.

9. Code of Civ. Proc. § 385(a). Although the existing statute refers to the decedent's "representative," it appears that the personal representative is intended, since the decedent's "successor in interest" is mentioned separately. While the statute states that the court "may" allow the litigation to proceed, in fact this is mandatory and the proposed law recognizes this. See, e.g., *Pepper v. Superior Court*, 76 Cal. App. 3d 252, 260, 142 Cal. Rptr. 759 (1977).

10. See discussion of "Commencement of Decedent's Cause of Action," above.

11. Prob. Code § 573.

12. Such statutes include Probate Code Sections 13109 (liability of transferee of property by affidavit), 13550 (liability of surviving spouse who takes property without administration), and 18201 (liability of property in living trust).

In all other cases involving the decedent's personal liability, the personal representative is the proper party. This rule ensures that all the decedent's beneficiaries are assessed their proper shares of the debt without the complications of interpleader and contribution. The rule also enables the creditor to marshal assets simply, without the need to join various recipients of the decedent's property and without complicating issues of the extent to which the property and its proceeds may be traced. And the rule provides a mechanism for ranking claims where there is more than one creditor.

Continuation of Pending Action or Proceeding Against Decedent

If a person against whom an action or proceeding is pending dies during the pendency of the litigation, the court may allow the litigation to be continued against the decedent's personal representative or successor in interest.¹³ The proposed law makes clear that a successor in interest may be substituted as a party only where there is an express statutory provision making successors in interest personally liable; in all other cases, the personal representative should be substituted. This will ensure consistent treatment of a cause of action against a decedent whether the cause is asserted before or after the decedent's death.¹⁴

If a pending action or proceeding that survives involves matters other than personal liability of the decedent, such as title to property that passes to a successor without going through probate administration, the proposed law makes clear that the successor in interest may be substituted as the party defendant.

13. Code Civ. Proc. § 385(a). The reference in the section to the decedent's "representative" is evidently intended to mean the decedent's "personal representative," since the decedent's successor in interest is mentioned separately.

14. See discussion of "Commencement of Action on Decedent's Liability," above.

OUTLINE

NEW SECTIONS

CODE OF CIVIL PROCEDURE

PART 2. CIVIL ACTIONS

TITLE 2. TIME OF COMMENCING CIVIL ACTIONS

CHAPTER 6. TIME OF COMMENCEMENT OF ACTION AFTER PERSON'S DEATH

- § 366.1. Limitations period after death of person entitled to bring action
- § 366.2. Limitations period after death of person against whom action may be brought

TITLE 3. PARTIES TO CIVIL ACTIONS

CHAPTER 4. EFFECT OF DEATH

Article 1. Definitions

- § 377.110. Beneficiary of decedent's estate
- § 377.120. Decedent's successor in interest

Article 2. Survival and Continuation

- § 377.210. Survival of cause of action
- § 377.220. Continuation of pending action
- § 377.230. Assignability of causes of action

Article 3. Decedent's Cause of Action

- § 377.310. Commencement of decedent's cause of action
- § 377.320. Continuation of decedent's pending action
- § 377.330. Affidavit or declaration by decedent's successor in interest
- § 377.340. Order concerning parties
- § 377.350. Damages recoverable in action by decedent's personal representative or successor in interest

Article 4. Cause of Action Against Decedent

- § 377.410. Assertion of cause of action against decedent
- § 377.420. Continuation of pending action against decedent
- § 377.430. Damages recoverable in action against decedent's personal representative

Article 5. Insured Claim

- § 377.510. Action on insured claim
- § 377.520. Statute of limitations
- § 377.530. Procedure
- § 377.540. Defenses to action on insured claim
- § 377.550. Damages in action on insured claim
- § 377.560. Application of article

Article 6. Wrongful Death

- § 377.610. Parties in wrongful death action
- § 377.620. Damages in wrongful death action
- § 377.630. Joinder and consolidation of actions

CONFORMING CHANGES

CIVIL CODE

- § 1363 (amended). Association to manage common interest development
- § 3294 (amended). Exemplary damages

CODE OF CIVIL PROCEDURE

[Shown in context with related unchanged provisions]

PART 2. CIVIL ACTIONS

- § 353 (repealed). Death of party before expiration of limitation period
- § 353.5 (repealed). Death of person against whom action may be brought; action against surviving spouse
- § 355 (amended). Limitation on new action following reversal on appeal

TITLE 3. PARTIES TO CIVIL ACTIONS

CHAPTER 1 (heading added). GENERAL PROVISIONS

- § 367 (amended). Real party in interest
- § 368 (unchanged). *Assignment of thing in action*
- § 368.5 (added). Transfer of interest in pending action
- § 369 (amended). Fiduciaries
- § 369.5 (added). Partnership or association

CHAPTER 2 (heading added). MARRIED PERSON

- § 370 (unchanged). *Action by or against married person*
- § 371 (unchanged). *Action against both spouses*

CHAPTER 3 (heading added). DISABILITY OF PARTY

- § 372 (unchanged). *Guardian ad litem for minor or incompetent*
- § 373 (unchanged). *Procedure for appointment of guardian ad litem*
- § 373.5 (unchanged). *Guardian ad litem for unascertained or unborn person*
- § 374 (repealed). Association to manage common interest development
- § 375 (added). Effect of disability on pending action
- § 376 (amended). Injury to minor
- § 377 (repealed). Wrongful death

CHAPTER 4. EFFECT OF DEATH

§§ 377.110-377.530. Effect of death [see above]

CHAPTER 5 (heading added). PERMISSIVE JOINDER

§ 378 (unchanged). *Permissive joinder of plaintiffs*
§ 379 (unchanged). *Permissive joinder of defendants*
§ 379.5 (unchanged). *Protective orders*
§ 382 (unchanged). *Class actions*
§ 385 (repealed). *Disability or death*

CHAPTER 6 (heading added). INTERPLEADER

§ 386 (unchanged). *Interpleader*
§ 386.1 (unchanged). *Interpleader funds*
§ 386.5 (unchanged). *Dismissal of stakeholder*
§ 386.6 (unchanged). *Costs and attorney's fees*

CHAPTER 7 (heading added). INTERVENTION

§ 387 (unchanged). *Intervention*
§ 388 (repealed). *Partnership or association*
§ 388 (added). *Copy of environmental litigation to Attorney
General*

CHAPTER 8 (heading added). COMPULSORY JOINDER

§ 389 (unchanged). *Compulsory joinder*
§ 389.5 (unchanged). *Joinder in action for recovery of property*
§ 389.6 (repealed). *Copy of environmental litigation to Attorney
General*
§ 390 (repealed). *Action against board of fire commissioners*

PROBATE CODE

§ 550 (repealed). *Action authorized*
§ 551 (repealed). *Statute of limitations*
§ 552 (repealed). *Procedure*
§ 553 (repealed). *Defenses*
§ 554 (repealed). *Damages*
§ 555 (repealed). *Application of chapter*
§ 573 (repealed). *Survival of actions; continuation against personal
representative*
§ 9390 (amended). *Claim covered by insurance*
§ 13554 (amended). *Enforcement of liability*

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Code of Civil Procedure §§ 366.1-366.2 (added). Time of commencement of action after person's death

SEC. . Chapter 6 (commencing with Section 366.1) is added to Title 2 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 6. TIME OF COMMENCEMENT OF ACTION
AFTER PERSON'S DEATH

§ 366.1. Limitations period after death of person entitled to bring action

366.1. If a person entitled to bring an action dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced before the expiration of the later of the following times:

(a) Six months after the person's death.

(b) The limitations period that would have been applicable if the person had not died.

Comment. Section 366.1 restates part of former Section 353(a) without substantive change. This section makes clear that the decedent's death does not shorten the limitations period applicable to the decedent's cause of action, but may extend it for up to six months. As to survival of causes of action, see Section 377.210. For persons entitled to bring the action, see Section 377.310 (holder of decedent's cause of action). See also Section 355 (one-year limitations period after reversal).

§ 366.2. Limitations period after death of person against whom action may be brought

366.2. Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, if a person against whom an action may be brought dies before the expiration of the applicable limitations period, an action may be commenced before the expiration of the later of the following times:

(a) One year after the person's death.

(b) The limitations period that would have been applicable if the person had not died.

Comment. Section 366.2 restates part of former Section 353(b)-(c). This section is concerned only with the time within which

an action against a decedent may be brought, not with the proper party in such a case. See Section 377.410 (assertion of cause of action against decedent). For cases where an action may be brought against the estate of the decedent, rather than the personal representative, see Sections 377.510-377.550 (insured claim). See also Prob. Code § 58 ("personal representative" defined). Filing a claim in probate tolls the statute of limitations. Prob. Code § 9352. If a claim is filed in probate and rejected, an action must be brought within the time provided in Probate Code Section 9353. As to survival of causes of action, see Section 377.210.

Note. This section is also the subject of proposed revisions in SB 1855. If that bill is enacted, the conflict will have to be resolved. At a minimum, the alternative limitations period in subdivision (b) would be eliminated, since SB 1855 provides for the one-year limitations period in all cases.

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Code of Civil Procedure §§ 377.110-377.630 (added). Effect of death

SEC. . Chapter 4 (commencing with Section 377.110) is added to Title 3 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 4. EFFECT OF DEATH

Article 1. Definitions

§ 377.110. Beneficiary of decedent's estate

377.110. For the purposes of this chapter, "beneficiary of the decedent's estate" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a particular item of property of the decedent under the decedent's will.

(b) If the decedent died without leaving a will, the sole person or all of the persons who succeed to the cause of action or particular item of property that is the subject of the cause of action under Sections 6401 and 6402 of the Probate Code or, if the law of a sister state or foreign nation governs succession to the cause of action or particular item of property, under the law of the sister state or foreign nation.

Comment. Section 377.110 is a new provision drawn from Probate Code Section 13006. See Section 377.120 ("decedent's successor in interest" defined).

§ 377.120. Decedent's successor in interest

377.120. For the purposes of this chapter, "decedent's successor in interest" means the beneficiary of the decedent's estate or other successor in interest who succeeds to the decedent's cause of action or the particular item of the decedent's property that is the subject of a cause of action.

Comment. Section 377.120 is new. The term "successor in interest" is derived from the second sentence of former Section 385. "Beneficiary of the decedent's estate" is defined Section 377.110, and refers to takers of assets that are or would be subject to probate. Other successors in interest include persons who take property at the decedent's death by operation of a pay-on-death or transfer-on-death provision in a contract or account agreement.

The decedent's successor in interest does not include a person to whom the cause of action or property was assigned during the decedent's lifetime.

Article 2. Survival and Continuation

§ 377.210. Survival of cause of action

377.210. (a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

Comment. Subdivision (a) of Section 377.210 restates the first part of former Probate Code Section 573(a) without substantive change. Subdivision (b) restates former Probate Code Section 573(d) without substantive change. The applicable limitations period may be affected by the death of a person. See Sections 366.1-366.2 (time of commencement of action after death of person).

§ 377.220. Continuation of pending action

377.220. A pending action or proceeding does not abate by the death of a party if the cause of action survives.

Comment. Section 377.220 restates part of the first sentence of former Section 385 without substantive change.

§ 377.230. Assignability of causes of action

377.230. Nothing in this chapter shall be construed as affecting the assignability of causes of action.

Comment. Section 377.230 restates former Probate Code Section 573(e) without substantive change.

Article 3. Decedent's Cause of Action

§ 377.310. Commencement of decedent's cause of action

377.310. A decedent's cause of action that survives passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.

Comment. Section 377.310 restates the first portion of the first sentence of former Code of Civil Procedure Section 353 and part of former Probate Code Section 573(a) without substantive change, but adds the reference to the successor in interest drawn from former Code of Civil Procedure Section 385. Under this section, an action or proceeding may be commenced by the decedent's successor in interest only if there is no personal representative. The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, assignee, or other successor has the right to proceed under this section. See Section 377.120 ("decedent's successor in interest" defined). See also Prob. Code § 58 ("personal representative" defined).

§ 377.320. Continuation of decedent's pending action

377.320. On motion, the court shall allow a decedent's pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest.

Comment. Section 377.320 restates part of former Section 385, but recognizes that the personal representative or successor in interest has an absolute right to be substituted for the decedent; substitution in this situation is not discretionary with the court. See, e.g., *Pepper v. Superior Court*, 76 Cal. App. 3d 252, 260, 142 Cal. Rptr. 759 (1977). See also Section 377.120 ("decedent's successor in interest" defined).

§ 377.330. Affidavit or declaration by decedent's successor in interest

377.330. (a) The person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedent's successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury under the laws of this state stating all of the following:

- (1) The decedent's name.
 - (2) The date and place of the decedent's death.
 - (3) "No proceeding is now pending in California for administration of the decedent's estate."
 - (4) If the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest.
 - (5) Either of the following, as appropriate:
 - (A) "The affiant or declarant is the decedent's successor in interest (as defined in Section 377.120 of the California Code of Civil Procedure) and succeeds to the decedent's interest in the action or proceeding."
 - (B) "The affiant or declarant is authorized to act on behalf of the decedent's successor in interest (as defined in Section 377.120 of the California Code of Civil Procedure) with respect to the decedent's interest in the action or proceeding."
 - (6) "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding."
 - (7) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."
- (b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.
- (c) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

Comment. Section 337.330 is new. The affidavit provided in this section is drawn from the affidavit provided in Probate Code Section 13101.

§ 377.340. Order concerning parties

The court in which an action is commenced or continued under this article may make any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem.

Comment. Section 377.340 is new. The court in which the action or proceeding is pending has authority to resolve questions concerning the proper parties to the litigation and to make conclusive and binding orders, including determinations of the right of a successor in interest to commence or continue an action or proceeding. The references to appointment of the successor in interest as a special administrator or guardian ad litem are intended to recognize that there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries. See Code Civ. Proc. §§ 372-373.5 (guardian ad litem); Prob. Code §§ 8540-8547 (special administrator).

§ 377.350. Damages recoverable by decedent's personal representative or successor in interest

377.350. In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

Comment. Section 377.350 restates former Probate Code Section 573(c) without substantive change, and adds the reference to the successor in interest. See Section 377.120 ("decedent's successor in interest" defined). The limitations in this section apply to the decedent's cause of action and not to a cause of action that others may have for the wrongful death of the decedent. See Sections 377.610-377.630 (wrongful death).

Article 4. Cause of Action Against Decedent

§ 377.410. Assertion of cause of action against decedent

377.410. Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.

Comment. Section 377.410 restates the first portion of the second sentence of former Code of Civil Procedure Section 353 and part of former Probate Code Section 573(a) without substantive change. For special rules providing direct liability of successors in interest, see, e.g., Prob. Code §§ 13109 (transferee of property by affidavit), 13550 (surviving spouse who takes property without administration), 18201 (trust assets).

The introductory portion of Section 377.410, referring to Part 4

(creditor claims) of Division 7 of the Probate Code, is intended for cross-referencing purposes. See Prob. Code §§ 9350-9399 (claims in litigation). For special rules governing liability covered by insurance, see Section 377.510.

See also Section 377.120 ("decedent's successor in interest" defined); Prob. Code § 58 ("personal representative" defined).

§ 377.420. Continuation of pending action against decedent

377.420. (a) On motion, the court shall allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.

(b) The court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims is first made.

Comment. Subdivision (a) of Section 377.420 supersedes part of former Section 385. Under subdivision (a) an action or proceeding may be continued against the decedent's successor in interest only if a statute provides for liability in such cases. For special rules providing direct liability of successors in interest, see, e.g., Prob. Code §§ 13109 (transferee of property by affidavit), 13550 (surviving spouse who takes property without administration), 18201 (trust assets).

Subdivision (b) restates the second sentence of former Probate Code Section 709 without substantive change.

See also Section 377.120 ("decedent's successor in interest" defined); Prob. Code § 58 ("personal representative" defined); Veh. Code § 17452 (continuation of action against personal representative of nonresident defendant involved in motor vehicle accident).

§ 377.430. Damages recoverable in action against decedent's personal representative

377.430. In an action or proceeding against a decedent's personal representative on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.

Comment. Section 377.430 restates former Probate Code Section 573(b) without substantive change.

Article 5. Insured Claims

Note. This article would continue the provisions concerning insured claims set out in Probate Code Sections 550-555. However,

these provisions could be left in the Probate Code, if the Commission desires. If so, the following cross-reference provision should be substituted for the provisions in this article:

§ 377.510. Action on insured claim

377.510. An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate as provided in Chapter 1 (commencing with Section 550) of Part 13 of Division 2 of the Probate Code.

§ 377.510. Action on insured claim

377.510. (a) Subject to the provisions of this article, an action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest.

(b) The remedy provided in this article is cumulative and may be pursued concurrently with other remedies provided.

Comment. Section 377.510 restates former Probate Code Section 550 without substantive change. If the plaintiff seeks damages in excess of the insurance policy limits, the plaintiff must file a claim and establish the liability other than under this section. See Section 377.420 (damages recoverable in action against decedent's personal representative). The time limited for bringing an action under this article is one year after expiration of the applicable statute of limitations. See Section 377.520 (statute of limitation). See Code Civ. Proc. § 377.120 ("decedent's successor in interest" defined); Prob. Code § 58 ("personal representative" defined).

§ 377.520. Statute of limitations

377.520. If the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action under this article may be commenced within one year after the expiration of the limitations period otherwise applicable.

Comment. Section 377.520 restates former Probate Code Section 552 without substantive change.

§ 377.530. Procedure

377.530. (a) An action under this article shall name as the defendant "Estate of (name of decedent), Deceased." Summons shall be served on a person designated in writing by the insurer or, if none, on the insurer. Further proceedings shall be in the name of the estate,

but otherwise shall be conducted in the same manner as if the action were against the personal representative.

(b) On motion of an interested person or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant.

(c) An action against the estate of the decedent under this article, may be consolidated with an action against the personal representative.

Comment. Section 377.530 restates former Probate Code Section 552 without substantive change. Subdivision (c) makes clear that an action directed toward collecting from the insurance proceeds under this article may be consolidated with an action against the decedent's personal representative for the excess. Consolidation may be appropriate since the issues relating to liability are the same. See also Section 377.510(b) (remedies cumulative), 377.540 (defenses). See Prob. Code § 58 ("personal representative" defined).

§ 377.540. Defenses to action on insured claim

377.540. The insurer may deny or otherwise contest its liability in an action under this article or by an independent action. Unless the personal representative is joined as a party, a judgment in the action under this article or in the independent action does not adjudicate rights by or against the estate.

Comment. Section 377.540 restates former Probate Code Section 553 without substantive change.

§ 377.550. Damages in action on insured claim

377.550. (a) Except as provided in subdivision (b), either the damages sought in an action under this article shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgment in favor of the plaintiff in the action is enforceable only from the insurance coverage and not against property in the decedent's estate.

(b) Where the amount of damages sought in the action exceeds the coverage of the insurance, subdivision (a) does not apply if both of the following conditions are satisfied:

(1) The decedent's personal representative is joined as a party to the action.

(2) The plaintiff files a claim under Section 9390 of the Probate Code.

Comment. Section 377.550 restates former Probate Code Section 554 without substantive change.

§ 377.560. Application of article

377.560. (a) This article applies only to an action commenced on or after July 1, 1989.

(b) The applicable law in effect before July 1, 1989, continues to apply to an action commenced before July 1, 1989, notwithstanding its repeal by Chapter 1199 of the Statutes of 1988.

Comment. Section 377.560 restates former Probate Code Section 555 without substantive change.

Article 6. Wrongful Death

§ 377.610. Parties in wrongful death action

377.610. A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The persons, including the surviving spouse, who would be entitled under the statutes of intestate succession to the property of the decedent.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

Comment. Section 377.610 restates subdivision (b) and the first part of the first sentence of former Section 377(a) without substantive change. If the wrongdoer dies before or after the decedent, the cause of action provided in this section may be asserted against the personal representative of the wrongdoer. See Sections 377.210 (survival of cause of action), 377.320 (parties).

Unlike other provisions of this chapter that relate to causes of action belonging to the decedent, this article relates to a cause of

action for the decedent's wrongful death, which belongs not to the decedent, but to the persons specified in this section. Thus, the cause of action is not property in the estate of the decedent, and the authority of the personal representative to assert the cause of action is for administrative convenience only and is not for the benefit of creditors or other persons interested in the decedent's estate.

§ 377.620. Damages in wrongful death action

377.620. In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.350. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

Comment. Section 377.620 restates the third and fourth sentences of former Section 377(a) without substantive change.

§ 377.630. Joinder and consolidation of actions

377.630. (a) An action under Section 377.310 may be joined with an action under Section 377.610 arising out of the same wrongful act or neglect.

(b) An action under Section 377.610 and an action under Section 377.320 arising out of the same wrongful act or neglect may be consolidated for trial as provided in Section 1048.

Comment. Subdivision (a) of Section 377.630 restates and generalizes the fifth sentence of former Section 377(a).

Subdivision (b) replaces the last sentence of former Section 377(a). This subdivision incorporates the general provision governing consolidation of actions which recognizes the court's discretion to order consolidation. Former Section 377(a) provided that the court "shall" order consolidation on motion of an interested party.

CONFORMING CHANGES

Civil Code

Civil Code § 1363 (amended). Association to manage common interest development

SEC. . Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association.

(b) An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association may--exereise--the has all of the following powers:

(1) The powers granted a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code. ~~An association, whether incorporated or unineorporated, may exercise the powers granted to an association by Section 374 of the Code of Civil Procedure and the~~

(2) Standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:

(A) Enforcement of the governing documents.

(B) Damage to the common areas.

(C) Damage to the separate interests that the association is obligated to maintain or repair.

(D) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

(3) The other powers granted to the association in this title. ~~The association may be referred to as a community association.~~

~~An association, whether incorporated or unineorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.~~

Comment. Section 1363 is amended to incorporate the substance of former Code of Civil Procedure Section 374 in newly designated subdivision (c). The section is also reorganized for clarity. The order of some provisions is altered to preserve the material in subdivision (b), as it was designated by 1988 Cal. Stat. ch. 123, § 1, since this provision is referred to in Section 1373. The subdivision designations added in 1988 were omitted when Section 1363 was amended by 1989 Cal. Stat. ch. 571, § 1.

Civil Code § 3294 (amended). Exemplary damages

SEC. . Section 3294 of the Civil Code is amended, to read:

3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to ~~Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code~~ Chapter 4 (commencing with Section 377.110) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for

joinder and consolidation contained in Section 377 ~~377.630~~ of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Comment. Section 3294 is amended to revise section references.

Code of Civil Procedure

Code of Civil Procedure § 353 (repealed). Death of party before expiration of limitation period

SEC. . Section 353 of the Code of Civil is repealed.

~~353. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within six months from the person's death.~~

~~(b) Except as provided in subdivision (c), if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against the person's representatives, after the expiration of that time, and within one year after the date of death.~~

~~(c) If a person against whom an action may be brought died before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the later of the following times:~~

~~(1) July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.~~

~~(2) The time limited for the commencement of the action.~~

Comment. Subdivision (a) of former Section 353 is restated without substantive change in Sections 366.1 (limitations period after death of person entitled to bring action) and 377.310 (commencement of decedent's cause of action). See also Section 377.210 (survival of cause of action). Subdivisions (b) and (c) are superseded by Sections 366.2 (death of person against whom action may be brought), 377.520 (statute of limitations), and 377.410 (assertion of cause of action against decedent).

Note. This section is also the subject of proposed revisions in SB 1855. If that bill is enacted, its provisions would be incorporated into the sections that supersede Section 353 in this draft.

Code of Civil Procedure § 353.5 (repealed). Death of person against whom action may be brought; action against surviving spouse

SEC. . Section 353.5 of the Code of Civil Procedure is repealed.

~~353.5. If a person against whom an action may be brought dies before the expiration of the statute of limitations for the commencement of the action and the cause of action survives, an action against the surviving spouse of the person which is brought pursuant to Chapter 3 (commencing with Section 13550) of Part 2 of Division 8 of the Probate Code may be commenced within four months after the death of the person or before the expiration of the statute of limitations which would have been applicable to the cause of action against the person if the person had not die, whichever occurs later.~~

Comment. Former Section 353.5 is restated in Probate Code Section 13554(c) (enforcement of liability) without substantive change.

Note. This section would be repealed by SB 1855. If that bill is enacted, it will be unnecessary to repeal it here.

Code of Civil Procedure § 355 (amended). Limitation on new action following reversal on appeal

SEC. . Section 355 of the Code of Civil Procedure is amended to read:

355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, ~~the plaintiff, or if he die and the cause of action survive,~~ his representatives, may commence a new action within is not barred by the statute of limitations until one year after the reversal.

Comment. Section 355 is amended for conformity with the revised rules concerning litigation after death of a party. See Sections 377.110-377.630. As revised, this section also avoids the former implication that the plaintiff had a right to bring the same action again after reversal. See, e.g., *Watterson v. Owens River Canal Co.*, 190 Cal. 88, 93, 210 P. 625 (1922).

Code of Civil Procedure § 367 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 367 of the Code of Civil Procedure, to read:

CHAPTER 1. GENERAL PROVISIONS

Code of Civil Procedure § 367 (amended). Real party in interest

SEC. . Section 367 of the Code of Civil Procedure is amended to read:

367. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided ~~in Sections 369 and 374 of this code~~ by statute.

Comment. Section 367 is amended to eliminate the obsolete listing of statutes that permit prosecution of an action in the name of a person other than the real party in interest. Statutes that permit prosecution in the name of a person other than the real party in interest include Civil Code Section 1363 (association to manage common interest development) and Code of Civil Procedure Sections 369 (fiduciaries) and 377.510-377.550 (insured claim).

Code of Civil Procedure § 368.5 (added). Transfer of interest in pending action

SEC. . Section 368.5 is added to the Code of Civil Procedure, to read:

368.5. An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

Comment. Section 368.5 restates part of former Section 385 without substantive change.

Code of Civil Procedure § 369 (amended). Fiduciaries

SEC. . Section 369 of the Code of Civil Procedure is amended to read:

369. (a) ~~An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute,~~ The following persons may sue without joining with ~~him or her~~ as parties the persons for whose benefit the action is prosecuted;

(1) A personal representative.

(2) A trustee of an express trust.

(3) Except for a person upon whom a power of sale has been

conferred pursuant to a deed of trust or mortgage, a person with whom, or in whose name, a contract is made for the benefit of another, ~~is a trustee of an express trust, within the meaning of this section.~~

(4) Any other person expressly authorized by statute.

(b) Notwithstanding subdivision (a), a trustee upon whom a power of sale has been conferred pursuant to a deed of trust or mortgage may sue to exercise the trustee's powers and duties pursuant to Chapter 2 (commencing with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil Code.

Comment. Subdivision (a) of Section 369 is reorganized and the terminology clarified. These changes are technical and not substantive. See also Prob. Code §§ 58 ("personal representative" defined), 82 ("trust" defined), 84 ("trustee" defined).

Code of Civil Procedure § 369.5 (added). Partnership or association

SEC. . Section 369.5 is added to the Code of Civil Procedure, to read:

369.5. (a) A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.

(b) A member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on the member as an individual, whether or not the member is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against the member based on the member's personal liability may be obtained in the action, whether the liability is joint, joint and several, or several.

Comment. Section 369.5 restates former Section 388 without substantive change.

Code of Civil Procedure § 370 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 370 of the Code of Civil Procedure, to read:

CHAPTER 2. MARRIED PERSON

Code of Civil Procedure § 372 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 372 of the Code of Civil Procedure, to read:

CHAPTER 3. DISABILITY OF PARTY

Code of Civil Procedure § 374 (repealed). Association to manage common interest development

SEC. . Section 374 of the Code of Civil Procedure is repealed.

~~374. An association established to manage a common interest development pursuant to Section 1363 of the Civil Code shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:~~

~~(a) Enforcement of the governing documents.~~

~~(b) Damage to the common areas.~~

~~(c) Damage to the separate interests which the association is obligated to maintain or repair.~~

~~(d) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.~~

Comment. Former Section 374 is restated in Civil Code Section 1363 (association to manage common interest development) without substantive change.

Code of Civil Procedure § 375 (added). Effect of disability on pending action

SEC. . Section 375 is added to the Code of Civil Procedure, to read:

375. An action or proceeding does not abate by the disability of a party. The court, on motion, shall allow the action or proceeding to be continued by or against the party's representative.

Comment. Section 375 restates part of former Section 385, but makes clear that substitution of the representative of a disabled person is mandatory rather than permissive.

Code of Civil Procedure § 376 (technical amendment), Injury to minor

SEC. . Section 376 of the Code of Civil Procedure is amended to read:

376. (a) The parents of a legitimate unmarried minor child, acting jointly, may ~~maintain~~ commence an action for injury to ~~sueh~~ the child caused by the wrongful act or neglect of another. If either parent ~~shall fail~~ fails on demand to join as plaintiff in ~~sueh~~ the action or is dead or cannot be found, then the other parent may ~~maintain-sueh~~ commence the action ~~and-the,~~ The parent, if living, who does not join as plaintiff ~~must~~ shall be joined as a defendant and, before trial or hearing of any question of fact, ~~must~~ shall be served with summons either in the manner provided by law for the service of a summons in a civil action or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to ~~sueh~~ that parent's last known address with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee creates a rebuttable presumption that ~~sueh~~ the summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(b) A parent may ~~maintain~~ commence an action for such an injury to his or her illegitimate unmarried minor child if a guardian has not been appointed. Where ~~sueh~~ a parent who does not have care, custody, or control of the child brings the action, the parent who has care, custody, or control of the child shall be served with the summons either in the manner provided by law for the serving of a summons in a civil action or by sending a copy of the summons and complaint by registered mail, with proper postage prepaid, addressed to the last known address of ~~sueh~~ that parent, with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee creates a rebuttable presumption that the summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(c) The father of an illegitimate child who maintains commences an action under this section shall have acknowledged in writing prior to the child's injury, in the presence of a competent witness, that he is the father of the child, or, prior to the child's injury, have been judicially determined to be the father of the child.

(d) A parent of an illegitimate child who does not maintain commence an action under this section may be joined as a party thereto.

(e) A guardian may maintain commence an action for such an injury to his or her ward.

(f) ~~Any-such~~ An action under this section may be maintained commenced against the person causing the injury. If any other person is responsible for ~~any-such~~ the wrongful act or neglect, the action may also be maintained commenced against ~~sueh~~ the other person. The death of the child or ward shall does not abate the parents' or guardian's cause of action for ~~his-or-her~~ the child's injury as to damages accruing before ~~his-or-her~~ the child's death.

(g) In every an action under this section, ~~sueh~~ damages may be ~~given-as~~ awarded that, under all of the circumstances of the case, may be just, except that ~~in-any~~:

(1) In an action maintained commenced after the death of the child ~~or-ward-or-against-the-executor-or-administrator-of,~~ the damages recoverable are as provided in Section 377.350.

(2) Where the person causing the injury is deceased, the damages recoverable ~~shall-be~~ in an action against the decedent's personal representative are as provided in Section ~~573-of-the-Probate-Code~~ 377.430.

(h) If an action arising out of the same wrongful act or neglect may be maintained commenced pursuant to Section ~~377~~ 377.610 for wrongful death of ~~any-such~~ a child described in this section, the action authorized by this section shall may be consolidated therewith for trial ~~on-motion-of-any-interested-party~~ as provided in Section 1048.

Comment. Section 376 is revised to correct cross-references, to add subdivision letters to the existing paragraphs, and to improve the wording. For consistency with the prevailing terminology in Title 2 (commencing with Section 312), references to "maintaining" an action have been replaced with "commencing" an action. The word "ward" in subdivision (g)(1) has been omitted as surplus. These changes are technical and not substantive.

Subdivision (h) is revised for consistency with Section 377.630.

Code of Civil Procedure § 377 (repealed), Wrongful death

SEC. . Section 377 of the Code of Civil Procedure is repealed.

~~377. (a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.~~

~~(b) For the purposes of subdivision (a), "heirs" means only the following:~~

~~(1) These persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code.~~

~~(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found the court to have believed in good faith that the marriage to the decedent was valid, and~~

~~(3) Minors, whether or not qualified under paragraphs (1) and (2), if, at the time of the decedent's death, they resided for the previous~~

~~180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support.~~

~~Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provisions of law.~~

Comment. The first part of the first sentence of subdivision (a) and subdivision (b) of former Section 377 are restated in Section 377.610 (parties in wrongful death action) without substantive change. The last part of the first sentence of subdivision (a) is superseded by Sections 377.210 (survival of cause of action) and 377.410 (assertion of cause of action against decedent). The second sentence of subdivision (a) is superseded by Sections 377.610 (parties), 377.210 (survival of cause of action), and 377.410 (assertion of cause of action against decedent). The third and fourth sentences of subdivision (a) are restated in Section 377.620 (damages in wrongful death action) without substantive change. The fifth sentence of subdivision (a) is restated and generalized in Section 377.630(a) (joinder of causes of action). The last sentence of subdivision (a) is superseded by Section 377.630(b) (consolidation of actions). See the Comment to Section 377.630(b).

Code of Civil Procedure § 378 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 378 of the Code of Civil Procedure, to read:

CHAPTER 5. PERMISSIVE JOINDER

Code of Civil Procedure § 385 (repealed). Disability or death

SEC. . Section 385 of the Code of Civil Procedure is repealed.

~~385. An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.~~

Comment. Section 385 is restated in Sections 368.5 (transfer of interest in pending action), 375 (effect of disability on pending action), and 377.220 (continuation of action) without substantive change, except that Section 375 provides that substitution of parties is mandatory rather than permissive.

Code of Civil Procedure § 386 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 386 of the Code of Civil Procedure, to read:

CHAPTER 6. INTERPLEADER

Code of Civil Procedure § 387 (chapter heading)

SEC. . A chapter heading is added immediate preceding Section 387 of the Code of Civil Procedure, to read:

CHAPTER 7. INTERVENTION

Code of Civil Procedure § 388 (repealed). Partnership or association

SEC. . Section 388 of the Code of Civil Procedure is repealed.

~~388. (a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.~~

~~(b) Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual, whether or not he is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against him based on his personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.~~

Comment. Former Section 388 is restated in Section 369.5 without substantive change.

Code of Civil Procedure § 388 (added). Copy of environmental litigation to Attorney General

SEC. . Section 388 is added to the Code of Civil Procedure, to read:

388. In an action brought by a party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects

which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. The copy shall be furnished by the party filing the pleading within 10 days after filing.

Comment. Section 388 restates former Section 389.6 without substantive change.

Code of Civil Procedure § 389 (chapter heading)

SEC. . A chapter heading is added immediately preceding Section 389 of the Code of Civil Procedure, to read:

CHAPTER 8. COMPULSORY JOINDER

Code of Civil Procedure § 389.6 (repealed). Copy of litigation to Attorney General

SEC. . Section 389.6 of the Code of Civil Procedure is repealed.

~~389.6. In an action brought by any party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. Such copy shall be furnished by the party filing the pleading within 10 days after filing.~~

Comment. Former Section 389.6 is restated in Section 388 without substantive change.

Code of Civil Procedure § 390 (repealed). Action against board of fire commissioners

SEC. . Section 390 of the Code of Civil Procedure is repealed.

~~390. Causes of action upon contract, or for damages arising out of, or pertaining or incident to the official administration of the fire departments created by acts of the legislature of this state, shall be brought directly by and against the municipality by its corporate name wherein the damage was sustained. And the said boards of fire commissioners shall not be sued as such, except to compel or restrain the performance of acts proper to be compelled or restrained under and not within the discretion intended to be conferred by this act.~~

Comment. Former Section 390 is omitted. This section, enacted in 1885, had become obsolete and was superseded by general provisions governing lawsuits by and against local public entities. See, e.g., Gov't Code §§ 810-996.6 (claims and actions against public entities and public employees).

Probate Code

Probate Code §§ 550-573 (repealed). Litigation involving decedent

SEC. . Part 13 (commencing with Section 550) of Division 2 of the Probate Code is repealed.

PART 13. LITIGATION INVOLVING DECEDENT

CHAPTER 1. LIABILITY OF DECEDENT COVERED BY INSURANCE

Note. The option of replacing Sections 550-555 or simply cross-referring to them in the Code of Civil Procedure is discussed preceding Code of Civil procedure Section 377.510, *supra*.

Probate Code § 550 (repealed). Action authorized

Comment. Former Section 550 is restated in Code of Civil Procedure Section 377.510 without substantive change. See the Comment to Code Civ. Proc. § 377.510.

Probate Code § 551 (repealed). Statute of limitations

Comment. Former Section 551 is restated in Code of Civil Procedure Section 377.520 without substantive change.

Probate Code § 552 (repealed). Procedure

Comment. Former Section 552 is restated in Code of Civil Procedure Section 377.530 without substantive change. See the Comment to Code Civ. Proc. § 377.530.

Probate Code § 553 (repealed). Defenses

Comment. Former Section 553 is restated in Code of Civil Procedure Section 377.540 without substantive change.

Probate Code § 554 (repealed). Damages

Comment. Former Section 554 is restated in Code of Civil Procedure Section 377.550 without substantive change.

Probate Code § 555 (repealed). Application of chapter

Comment. Former Section 555 is restated in Code of Civil Procedure Section 377.560 without substantive change.

CHAPTER 2. SURVIVAL OF ACTIONS

Probate Code § 573 (repealed). Survival of actions

Comment. Subdivision (a) of former Section 573 is restated in Code of Civil Procedure Sections 377.210(a) (survival of cause of action) and 377.310 (holder of decedent's cause of action) without substantive change.

Subdivision (b) is restated and generalized in Code of Civil Procedure Section 377.430 (damages recoverable in action against decedent's personal representative).

Subdivision (c) is restated and generalized in Code of Civil Procedure Section 337.350 (damages recoverable in action by decedent's personal representative or successor in interest).

Subdivision (d) is restated in Code of Civil Procedure 377.210(b) (survival of cause of action) without substantive change.

Subdivision (e) is restated in Code of Civil Procedure Section 377.230 (assignability of causes of action) without substantive change.

Probate Code § 9390 (amended). Claim covered by insurance

SEC. . Section 9390 of the Probate Code is amended to read:

9390. (a) An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued under ~~Section 550~~ Article 5 (commencing with Section 377.510) of Chapter 4 of Title 3 of Part 2 of the Code of Civil Procedure, and a judgment in the action may be enforced against the insurer, without first filing a claim as provided in this part.

(b) Unless a claim is first made as provided in this part, an action to establish the decedent's liability for damages outside the limits or coverage of the insurance may not be commenced or continued under ~~Section 550~~ Article 5 (commencing with Section 377.510) of Chapter 4 of Title 3 of Part 2 of the Code of Civil Procedure.

(c) If the insurer seeks reimbursement under the insurance contract for any liability of the decedent, including, but not limited to, deductible amounts in the insurance coverage and costs and attorney's fees, an insurer defending an action under Section 550 shall file a claim as provided in this part. Failure to file a claim is a waiver of reimbursement under the insurance contract for any liability of the decedent.

Comment. Section 9390 is amended to revise cross-references.

Note. This amendment will not be made if Probate Code Sections 550-555 are not moved to the Code of Civil Procedure.

Probate Code § 13554 (amended). Enforcement of liability

SEC. . Section 13554 of the Probate Code is amended to read:

13554. (a) Except as otherwise provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

(b) In any action based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

(c) The action may be commenced before the expiration of the later of the following times:

(1) Four months after the death of the deceased spouse.

(2) The limitations period that would have been applicable if the deceased spouse had not died.

Comment. Subdivision (c) of Section 13554 restates former Code of Civil Procedure Section 353.5 without substantive change. See also Code Civ. Proc. § 377.210 (survival of cause of action); Prob. Code § 78 ("surviving spouse" defined). A claim in probate is not a prerequisite to an action under this section, since this section provides direct liability of the decedent's successor in interest. See Code Civ. Proc. §§ 377.410-377.420 (parties).

Note. This section is also the subject of proposed revisions in SB 1855. If that bill is enacted, the conflict will have to be resolved.