

## Memorandum 90-81

Subject: Study L-3018 - Litigation Involving Decedents (Comments on Tentative Recommendation)

This memorandum reviews comments we have received on the *Tentative Recommendation Relating to Litigation Involving Decedents* (April 1990). A copy of the tentative recommendation is attached. Also attached as exhibits are letters from eight interested persons.

Summary of Comments

Seven out of nine commentators support the recommendation with varying degrees of enthusiasm. One reports "no objection" and another appears to believe it should deal with a different problem entirely.

Linda Silveria of San Jose approves the tentative recommendation in the following terms (Exhibits at 1):

I am currently involved in a case where the issue on appeal is whether the successor in interest has standing to bring suit for return of attorney fees paid by her late husband. These proposed amendments are very necessary.

Ruth E. Ratzlaff of Fresno believes the proposed changes are "valid ones and should be adopted" and that they help resolve conflicts between the Probate Code and the Code of Civil Procedure. (Exhibits at 2.) Paul H. Roskoph of Palo Alto believes the proposal to be "excellent" and "most practical." (Exhibits at 6.) Margaret R. Roisman of Oakland finds the proposal to be an improvement, but believes that it should go further (as discussed below). (Exhibits at 7-8.) David W. Knapp, Sr., of San Jose finds the recommendations "especially appropriate now that so many clients are converting their estate planning to include the inter vivos trust." (Exhibits at 9.) Frank M. Swirles of Rancho Santa Fe finds the recommendation to be "straight forward" and has "no objection." (Exhibits at 10.) Howard Serbin of Santa Ana approves the recommendation with a reservation discussed below. (Exhibits at 11.)

Wilbur L. Coats of Poway concurred without further comment; Henry Angerbauer of Concord reported "no comment." Their letters have not been reproduced.

Delay on Use of Affidavit

Howard Serbin approves the proposal in the main, but is somewhat concerned that an heir who may not act in the estate's best interest can beat a personal representative to the punch if there is delay in appointing the personal representative. (See Exhibits at 11.) He suggests that the affidavit under Section 377.330 should not be available until "so many days after death."

The staff believes Mr. Serbin has a valid concern, and we are not particularly opposed to providing a waiting period such as the 40-day period applicable to taking property in a small estate on an affidavit under Probate Code Sections 13100-13101. The reason this delay was not proposed by the staff initially is that the risk seems minimal in the context of litigation as compared to the situation where a successor is seeking possession of money or other personal property. In addition, the affidavit under proposed Code of Civil Procedure Section 377.330 is directed to a court, not to a person in possession of property, and the court has full authority to control the proceedings before it and to make any necessary orders to protect the interested parties. On the other hand, we do not see that a 40-day delay would impose any substantial burden on successors and it would provide a grace period for the appointment of a personal representative. While it could be argued that a 40-day delay would prevent successors acting where time is of the essence, we do not anticipate that this would be a very frequent occurrence, and the situation could be dealt with by appointing a special administrator or guardian ad litem. The only significant exception could be where the statute of limitations is near expiration and immediate action is necessary. But we cannot judge whether this risk outweighs the concern expressed by Mr. Serbin. Does the Commission want to impose a 40-day delay on the ability of decedent's successor in interest to commence or continue an action?

### Reluctant Successors

Margaret R. Roisman raises an issue concerning successors who are reluctant or unwilling to assume a decedent-plaintiff's role in litigation. (See Exhibits at 7-8.) Ms. Roisman reports experience with the difficulties faced by a defendant who needed to serve papers on the decedent's personal representative and the refusal of the decedent's family to accept appointment as special administrator. She suggests expansion of the proposed law to permit someone other than the decedent's successors to file the affidavit designating the successor as the proper party.

The staff does not believe that it would be appropriate to use this procedure to force an unwilling successor to take on the burdens of litigating a pending case. While it may present some procedural complications, the procedure for appointing a special administrator is better designed to handle the difficulties arising in this type of situation.

### Tax Enforcement

Paul Gordon Hoffman of Los Angeles raises an issue involving enforcement of federal income tax liability against a decedent and surviving spouse. (See Exhibits at 3-5.) In Mr. Hoffman's case, there was no probate and he is concerned that the IRS has "refused to accept the surviving spouse as the sole proper party to the suit" for the tax deficiency on a joint income tax return. He states the IRS position as being that "if the surviving spouse fails to open a probate and defend on behalf of the estate as well as on behalf of the surviving spouse individually, the Service would seek to obtain a default judgment against the decedent and attempt to enforce it directly against the surviving spouse." Later, Mr. Hoffman refers to the controversy as involving Tax Court litigation and describes it as a "suit to avoid payment of a liability." Mr. Hoffman believes the IRS is wrong but he has "always proceeded to open a no-asset probate" since it is the least expensive alternative. He also finds that the Commission's tentative recommendation is "siding with the Service in its view of the law," which he finds "nonsensical."

The staff believes that Mr. Hoffman's concern should not be directed toward the tentative recommendation. Perhaps we do not fully

understand his points, but we do not see what the recommendation has to do with Tax Court litigation or with the IRS refusal to rely on the liability provision in Probate Code Section 13550. It is not apparent to the staff that California law can authorize an action for determination of taxes by a surviving spouse in a case involving federal tax liability. Accordingly, we can recommend no changes to deal with the problems Mr. Hoffman has encountered. However, in light of the complexity of the issues raised, the staff plans to do further research and will report to the Commission at the July meeting.

Respectfully submitted,

Stan Ulrich  
Staff Counsel

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

relating to

## Litigation Involving Decedents

April 1990

*This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.*

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JULY 1, 1990.**

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

*I am currently involved in a case where the issue on appeal is whether the successor in interest has standing to bring suit for return of attorney fees paid by her late husband. These proposed amendments are very necessary.*

Study L-3018  
COMM'N  
JUN 04 1990  
RECEIVED

RUTH E. RATZLAFF  
Attorney at Law  
925 N Street, Suite, 150  
P.O. Box 411  
Fresno, California 93708  
(209) 442-8018

May 29, 1990

RE: Tentative Recommendation Relating to Litigation  
Involving Decedents

California Law Revision Commission  
4000 Middlefield Rd., Suite D-2  
Palo Alto, Ca 94303-4739

Dear Commissioners:

I have reviewed your tentative recommendation relating to litigation involving decedents. I believe that the changes you propose are valid ones and should be adopted.

As a probate specialist, I am frequently contacted by civil litigators on the issues that your recommendation covers. The conflict in the Probate Code and the Code of Civil Procedure have resulted in some interesting discussions, but the changes you propose will result in more clarity in the practice of law.

Sincerely,



Ruth E. Ratzlaff

RER/dr

HOFFMAN  
SABBAN &  
BRUCKER

LAWYERS

10880 Wilshire  
Boulevard  
Suite 1200  
Los Angeles  
California 90024  
(213) 470-6010  
FAX (213) 470-6735

CA LAW REV. COMM'N  
JUN 04 1990  
RECEIVED

May 30, 1990

California Law Revision Commission  
4000 Mittlefield Road  
Suite D-2  
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating to  
Litigation Involving Decedents

Ladies and Gentlemen:

There is one particular item which I do not believe is adequately dealt with in the above mentioned Tentative Recommendation. This has to do with litigation involving the decedent's liability for income taxes.

I have been involved in several situations where the Internal Revenue Service asserted a proposed income tax deficiency against a decedent based upon the joint income tax return filed by the decedent and his surviving spouse. When the decedent died, there was no probate administration since all of the assets passed to the surviving spouse without the need for an administration, pursuant to California Probate Code § 13500 et seq.

Notwithstanding the fact that the surviving spouse is liable for all of the debts of the decedent pursuant to § 13550, and is potentially liable for the entire tax deficiency (on a joint and several basis) by virtue of there being a joint income tax return, the Internal Revenue Service has refused to accept the surviving spouse as the sole proper party to the suit. Rather, the Service has maintained that if the surviving spouse fails to open a probate and defend on behalf of the estate as well as on behalf of the surviving spouse individually, the Service would seek to obtain a default judgment against the decedent and attempt to enforce it directly against the surviving spouse. Having been unable to convince the Service of the error

California Law Revision Commission  
May 30, 1990  
Page -2-

of its views, and since the cost of opening a probate is relatively small in comparison to the legal fees that might have to be incurred to assert my position in the Tax Court, I have always proceeded to open a no-asset probate.

The nature of Tax Court litigation does not fall neatly within the categories discussed in the Tentative Recommendation. It is not a suit brought on the decedent's cause of action since it is a suit to avoid payment of a liability. In the Tentative Recommendation, you indicate that in an action on the decedent's liability, where the plaintiff does not proceed directly against the decedent's successors in interest,

"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. This 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."

Based on these statements, it seems clear to me that you are siding with the Service in its view of the law. However, this seems nonsensical to me. First, the liability of the surviving spouse in the normal case is unquestionable. The surviving spouse is liable for the decedent's debts pursuant to Section 13500 et seq. Second, there is joint and several liability on behalf of the spouses when they file a joint income tax return. Third, I see no reason to unnecessarily expend court time on handling a "dry probate".

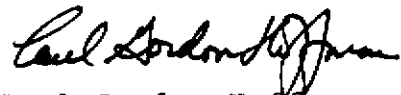
I would urge you to specifically authorize a surviving spouse who takes assets pursuant to § 13500 et seq. to commence an action for a determination of taxes, where no administration of the estate is pending at the date the action is brought, and to make a determination of the Tax Court binding based on all the assets of the decedent. While it may be that, in obscure cases, a beneficiary of the decedent other than the surviving spouse may





California Law Revision Commission  
May 30, 1990  
Page -3-

be named as the executor, and be adversely affected by his or her inability (upon subsequent appointment by the court as executor) to participate in the litigation, I have never seen such a situation which could have arisen, and in the vast majority of cases my proposal would streamline procedures and eliminate unnecessary court involvement.

Very truly yours,  
  
Paul Gordon Hoffman

PGH34:cdb

California Law Revision Commission

June 1, 1990

Page 2

4. Elimination of Seven-Year Limit for Durable Powers of Attorney:

I heartily concur. I have never understood why a limitation should be imposed; furthermore, if it is to be limited, I do not understand why it should differ from the limitation upon the directive to physicians. I concur with your proposal that the limitation be eliminated completely.

5. Litigation Involving Decedents:

Your proposal regarding litigation involving decedents is excellent. The ability to continue these actions without commencing a probate and appointing a personal representative is most practical. I have not had an opportunity to fully evaluate this proposal, but I support its intent and purpose. I will leave to those with greater litigation experience the full analysis of your proposal.

Very truly yours,



Paul H. Roskoph

PHR/rer  
PHR248/1637:2

*Transcribed from handwritten remarks (following page) by Margaret R. Roisman, of Crosby, Heafey, Roach & May, 1999 Harrison St., Oakland, CA 94612:*

Although this appears to be an improvement over existing law, it does not appear to deal with problems we have encountered in litigation pending at the time of decedent's death: No probate proceedings are commenced because the decedent-plaintiff either had no assets or all assets were held in joint tenancy with spouse or child, or all held in revocable trust. Papers must be served on the decedent's "personal representative" in order for the defendant to move the case to conclusion, enforce an order entered prior to the decedent's death, etc. The plaintiff-decedent's spouse or child, etc., is not cooperative about being appointed special administrator, and much court time is expended in getting someone appointed as [special administrator]. Could this proposal be revised to provide for affidavit by someone other than the decedent's successor-in-interest that so-&-so is the successor-in-interest under 6401 or 6402, etc. (with appropriate opportunity for challenge), to provide more options when no probate, no 13100, no 13500 . . . [elipses in original]

/s/ Margaret R. Roisman

Although this appears to be an improvement over existing law, it does not appear to deal with problems we have encountered in ~~probate~~ litigation pending at the time of decedent's death; ~~when~~ no probate proceedings are commenced because the decedent-plaintiff either had no assets ~~left~~ or all assets were held in joint tenancy with spouse or child, or all held in revocable trust. Papers must be served on the

STATE OF CALIFORNIA

# CALIFORNIA LAW

## REVISION COMMISSION

decedent's "personal representative" in ~~order to accomplish~~ order for the defendant to move the case to conclusion, enforce an order entered prior to the decedent's death, etc. The plaintiff-decedent's spouse or child, etc, is not cooperative about being appointed special administrator, and much court time is expended in getting someone appointed as S.A. ~~But this~~

### Litigation Involving D

TENTATIVE RECOMME

relating to

MARGARET R. ROISMAN  
ATTORNEY AT LAW

CROSBY, HEAFEY, ROACH & MAY  
PROFESSIONAL CORPORATION

April 1990

1999 HARRISON STREET  
OAKLAND, CALIFORNIA 94612  
TELEPHONE (415) 763-2000  
TELECOPIER (415) 273-8832

333 BUSH STREET  
SAN FRANCISCO, CALIFORNIA 94104  
TELEPHONE (415) 543-8700  
TELECOPIER (415) 391-8269

*This tentative recommendation is being distributed advised of the Commission's tentative conclusions ~~and you may make their views known to the Commission.~~ Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.*

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JULY 1, 1990.**

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Could this proposal be revised to provide for affidavit by ~~somebody other than the~~ someone other than the decedent's successor-in-interest that so-and-so is the successor-in-interest under 6401 or 6402, etc. with appropriate opportunity for challenge, to provide more options when no probate, no 13700, no 13500.

*Margaret R. Roisman*

CA LAW REV. COMM'N

JUN 06 1990

RECEIVED

LAW OFFICES

**KNAPP & KNAPP**

1093 LINCOLN AVENUE  
SAN JOSE, CALIFORNIA 95125  
TELEPHONE (408) 298-3838

DAVID W. KNAPP, SR.  
DAVID W. KNAPP, JR.

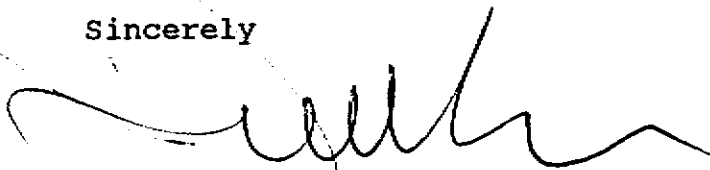
June 5, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

RE: LITIGATION INVOLVING DECEDENTS

Your recommendations are to the point and long over-due and specially appropriate now that so many clients are converting their estate planning to include the inter vivos trust.

Sincerely



DAVID W. KNAPP, SR.  
KNAPP & KNAPP  
DWK:dd

FRANK M. SWIRLES  
LAW CORPORATION

JUN 22 1990

RECEIVED

June 19, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendations -

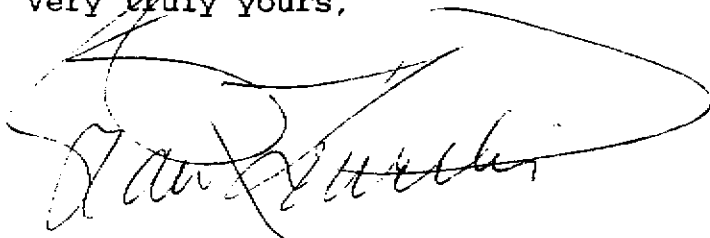
Gentlemen:

1. Litigation involving decedents - This appears to be straight forward. I have no objections to your recommendation.

2. Elimination of the seven-year limit for durable powers of attorney for health care - The recommendation is satisfactory, but the question is still with us. What do we do with all of those instruments which are now floating around and will probably lapse just before they are needed?

3. Uniform Statutory Rule Against Perpetuities - The uniform act is good. I would suggest that the language on page 30, in section 21230(c)(2) be changed by adding a "by" in the 3rd line so that the sentence reads, "The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who would be affected by the termination . . . . .".

Very truly yours,



Frank M. Swirles

100 BOX 4000  
RANCHO SANIA FE, CALIFORNIA 92067  
TEL: 760 730 5000

RECEIVED

Post Office Box 1379  
Santa Ana, California 92702-1379

June 29, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Ladies and Gentlemen:

Thank you for sending me your most recent tentative recommendations relating to Probate Law.

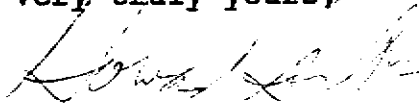
Although I am a Deputy County Counsel for the County of Orange, as before, the opinions expressed here are my individual views, and I do not write as a representative of the County of Orange, the Orange County Counsel, or the Orange County Public Administrator/Public Guardian.

I support the tentative recommendations concerning debts that are contingent, disputed, or not due.

I also think the tentative recommendations concerning litigation involving decedents are in the main well-taken. I especially approve of proposed Code of Civil Procedure Section 377.320, recognizing the right of the personal representative or successor in interest to be substituted for the decedent.

I am somewhat concerned about proposed Code of Civil Procedure Section 377.330. I would like to avoid situations where, because a personal representative was not appointed promptly, he is "beaten to the punch" by an heir who may take steps the personal representative would not deem in the estate's best interest. Perhaps the law should provide that the Section 377.330 affidavit cannot be used until so many days after death. Otherwise, I support the proposed affidavit procedure.

Very truly yours,


Howard Serbin  
Deputy County Counsel

HS:mm

cc: William A. Baker, Orange County Public Administrator/Public Guardian  
Carol Gandy, Assistant Orange County Public Administrator/Public Guardian  
Dwight Tipping, Supervising Deputy Public Administrator, Orange County

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

relating to

## Litigation Involving Decedents

April 1990

*This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.*

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JULY 1, 1990.**

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739



STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

---

---

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2  
PALO ALTO, CA 94303-4739  
(415) 494-1335

EDWIN K. MARZEC  
CHAIRPERSON  
ROGER ARNEBERGH  
VICE CHAIRPERSON  
BION M. GREGORY  
ASSEMBLYMAN ELIHU M. HARRIS  
SENATOR BILL LOCKYER  
ARTHUR K. MARSHALL  
FORREST A. PLANT  
ANN E. STODDEN

**Letter of Transmittal**

This tentative recommendation would modernize and reorganize the statutes in the Code of Civil Procedure concerning survival and continuation of actions after the death of parties. It would also permit an action to be continued by a decedent's successors in interest without the necessity of opening a probate and appointing a personal representative.

This tentative recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.



## RECOMMENDATION

In the course of revising the Probate Code, the Law Revision Commission recommended several changes in the law relating to litigation involving decedents.<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup> 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 changes, the proposed law makes a number of significant substantive changes described below.

---

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.

### **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.<sup>4</sup> 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 may not make 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 death<sup>5</sup> or rightfully passes to a successor in interest who takes property that is the subject of the litigation, e.g., by virtue of a contract provision or account agreement or by operation of law. The proposed law authorizes the successors in interest to bring an action if there is no probate.<sup>6</sup>

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 litem<sup>7</sup> or special administrator<sup>8</sup> to protect interests of other potential beneficiaries or successors.

---

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.

8. See Prob. Code §§ 8540-8547.

### **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.<sup>9</sup> 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.<sup>10</sup>

### **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.<sup>11</sup> 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.<sup>12</sup>

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

---

9. Code 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. See Prob. Code §§ 13109 (liability of transferee of property by affidavit), 13550 (liability of surviving spouse who takes property without administration); see also Prob. Code § 18201 (liability of property in living trust).

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.<sup>13</sup> 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.<sup>14</sup>

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).

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

## OUTLINE

### **A. NEW SECTIONS IN 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

**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

**B. CONFORMING REVISIONS****CIVIL CODE**

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

**CODE OF CIVIL PROCEDURE**

- § 353 (repealed). Death of party before expiration of limitation period
- § 353.5 (repealed by SB 1855). *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**

*[Shown in context with related unchanged provisions]*

**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 (added). EFFECT OF DEATH**

§§ 377.110-377.530 (added). Effect of death [see Section A *supra*]

**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**

§ 573 (repealed). *Survival of actions; continuation against personal representative*

**PROPOSED LEGISLATION**

**Code Civ. Proc. §§ 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, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

**Comment.** Section 366.2 restates part of former Section 353(b) [as amended by SB 1855] without substantive change. 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 Section 377.510 and Prob. Code §§ 550-555 (insured claims). 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.

**Code Civ. Proc. §§ 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 cause of action or 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 law or 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, or other successor has the right to proceed under this article. 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, with facts in support thereof:

(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).

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 and Prob. Code §§ 550-555.

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. 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, except that 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.** Section 377.420 supersedes part of former Section 385. 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). 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**

**§ 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.

**Comment.** Section 377.510 is a new provision that provides a cross-reference to the special provisions in the Probate Code concerning insured claims against the decedent.

**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 subdivision (a) of former Section 377 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 REVISIONS***Civil Code***Civ. 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 exercise 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 unincorporated, 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 unincorporated, 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.

**Civ. 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 Civ. Proc. § 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 subdivisions (c) and (d), if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply. Subject to Chapter 8~~

~~(commencing with Section 9350) of Part 4 of Division 7 of the Probate Code, the time provided in this subdivision for commencement of an action is not tolled or extended for any reason:~~

~~(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.~~

~~(d) If a person against whom an action may be brought died on or after July 1, 1988, and before January 1, 1991, 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 before the expiration of the later of the following times:~~

~~(1) January 1, 1992.~~

~~(2) One year after the issuing of letters testamentary or of administration, or the time otherwise limited for the commencement of the action, whichever is the later time.~~

**Comment.** Subdivision (a) of former Section 353 [as amended in SB 1855] 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)-(d) are superseded by Sections 366.2 (death of person against whom action may be brought), and 377.410 (assertion of cause of action against decedent).

**Code Civ. Proc. § 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 *other than on the merits*, ~~the plaintiff, or if he die and the cause of action survive, his representatives, may commence~~ a new action *may be commenced* within 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. This section is also revised to make clear that it does not apply where the judgment was reversed on the merits. See, e.g., *Watterson v. Owens River Canal Co.*, 190 Cal. 88, 93, 210 P. 625 (1922); *Schneider v. Schimmels*, 256 Cal. App. 2d 366, 370, 64 Cal. Rptr. 273 (1967).

**Code Civ. Proc. § 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 Civ. Proc. § 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), Code of Civil Procedure Section 369 (fiduciaries), and Probate Code Sections 550-555 (insured claims).

**Code Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 an action for injury to ~~such~~ *the* child caused by the wrongful act or neglect of another. If either parent ~~shall fail~~ *fails* on demand to join as plaintiff in ~~such~~ *the* action or is dead or cannot be found, then the other parent may maintain ~~such~~ *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 ~~such~~ *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 ~~such~~ *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 an action for such an injury to his or her illegitimate unmarried minor child if a guardian has not been appointed. Where ~~such~~ *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 ~~such~~ *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 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 an action under this section may be joined as a party thereto.

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

(f) ~~Any such~~ An action under this section may be maintained 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 against ~~such 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, ~~such~~ 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 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 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. The word "ward" in subdivision (g)(1) has been omitted as surplus; this is a technical, nonsubstantive change.

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

**Code Civ. Proc. § 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) Those 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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 Civ. Proc. § 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***

**Prob. Code § 573 (repealed). Survival of actions**

**SEC. .** Chapter 2 (commencing with Section 573) of Part 13 of Division 2 of the Probate Code is repealed.

**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.**