

Memorandum 92-27

Subject: Study L-3016 - Standing to Sue for Wrongful Death

At the last meeting, the Commission approved revisions to the wrongful death statute to do two things:

(1) To codify case law that decedent's issue may sue for his or her wrongful death, whether or not decedent leaves a surviving spouse.

(2) To overturn case law that a murdering heir is not disqualified from suing for the victim's wrongful death.

These revisions were amended into the Commission's omnibus probate bill (SB 1496) by Senator Lockyer's staff. But Senator Lockyer wants to hold them for next session so they may be reviewed by interested groups. We assume they will be removed from the bill before the committee hearing.

In view of Senator Lockyer's concern, the staff prepared the attached draft of a *Tentative Recommendation: Standing to Sue for Wrongful Death*. The staff recommends we circulate it for comment with a view to submitting a recommendation to the 1993 Legislature. This will permit interested groups, including those most directly affected -- the California Trial Lawyers Association and California Defense Counsel, to review it and give us their comments.

Respectfully submitted,

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STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

STANDING TO SUE FOR WRONGFUL DEATH

April 1992

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. 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 revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN June 15, 1992.

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.

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4000 Middlefield Road, Suite D-2
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4/06/92

TENTATIVE RECOMMENDATION

If a person's death is caused by the wrongful act or neglect of another, a wrongful death action may be brought by the "persons who would be entitled to succeed to the property of the decedent" under the statutes of intestate succession.¹ Two questions have arisen in cases under this provision:

(1) Are the decedent's issue precluded from joining in the lawsuit if the decedent leaves a surviving spouse?²

(2) If the decedent is murdered by the person who, but for the murder, would inherit from the decedent, does the right to sue pass to the person next in line to inherit?³

Decedent's Issue as Proper Parties to Wrongful Death Action

If an intestate decedent leaves both a surviving spouse and issue, and the estate is entirely community property, the entire estate will go to the surviving spouse under the statutes of intestate succession.⁴ Because the surviving spouse will be the only heir in this case, the wrongful death statute arguably might limit the proper plaintiff to the decedent's surviving spouse, excluding the decedent's

1. Code Civ. Proc. § 377. Section 377 would be repealed and reenacted as Section 377.60 by Senate Bill 1496. See generally *Recommendation Relating to Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990). A wrongful death action may also be brought by the decedent's personal representative for the benefit of those who could sue in their own right. See Code Civ. Proc. § 377. In allowing the decedent's personal representative to sue, California law is consistent with the law in other states. The wrongful death statutes of other states are set out in 2 S. Speiser, *Recovery for Wrongful Death* 2d, Appendix A (1975 & 1990 Cum. Supp.).

2. See *Fiske v. Wilkie*, 67 Cal. App. 2d 440, 444, 154 P.2d 725 (1945).

3. See *Marks v. Lyerla*, 1 Cal. App. 4th 556, 2 Cal. Rptr. 2d 63 (1991).

4. Prob. Code § 6401.

issue from joining in the action or sharing in the recovery.⁵ But the statute has been broadly construed to permit suit by those who would be intestate takers regardless of the character of the decedent's property, i.e., both the surviving spouse and issue.⁶

The wrongful death statute would be clearer, and would conform to case law, if revised to codify this rule. The Commission recommends that suit be permitted by "decedent's surviving spouse, children, and issue of deceased children, or, if none, the persons who would be entitled to the property of the decedent by intestate succession."⁷

Effect of Homicide by Heir on Proper Parties to Wrongful Death Action

In a recent case,⁸ the paternal grandmother of an allegedly murdered infant sued the child's mother (ex-wife of her deceased son) for wrongful death of the child. Ordinarily, the mother would be the child's sole heir,⁹ and thus the only proper plaintiff in an action for the child's wrongful death. The grandmother argued that Probate Code Section 250, disqualifying a killer from inheriting from the victim, disqualified the mother from inheriting from her murdered child, and that, as next in line to inherit from the child, the grandmother should be able to sue for the child's wrongful death. The court rejected the grandmother's argument and held she lacked standing to sue.

The court observed that the wrongful death statute permits suit by takers under "Part 2 (commencing with Section 6400) of Division 6 of

5. To recover damages for wrongful death, the plaintiff must show both that the plaintiff is an heir eligible to take the decedent's property, and that the plaintiff has suffered actual pecuniary loss (usually loss of support from decedent). 6 B. Witkin, *Summary of California Law Torts* § 1197, at 632, § 1213, at 649 (9th ed. 1988).

6. *Fiske v. Wilkie*, 67 Cal. App. 2d 440, 444, 154 P.2d 725 (1945).

7. The Commission's recommendation would not change the rule that, to recover damages, a plaintiff must show actual pecuniary loss. See *supra* note 5.

8. *Marks v. Lyerla*, 1 Cal. App. 4th 556, 2 Cal. Rptr. 2d 63 (1991).

9. Prob. Code § 6402.

the Probate Code."¹⁰ In a technical reading of this provision, the court noted that Section 250 is not located in the part of the Probate Code referred to in the wrongful death statute -- "Part 2 (commencing with Section 6400) of Division 6." The court held that therefore Section 250 does not affect the question of who may sue for wrongful death.¹¹

Public policy precludes a killer from profiting from the killer's own wrong.¹² This should be implemented in the statute by providing that one who feloniously and intentionally kills the decedent may not sue for wrongful death or benefit from a wrongful death action brought by the decedent's personal representative,¹³ and that the question of who may sue is determined as if the killer had predeceased the decedent.¹⁴

10. Code Civ. Proc. § 377. Section 377 would be repealed and reenacted as Section 377.60 by Senate Bill 1496.

11. It is doubtful the murdering mother in *Marks v. Lyerla*, 1 Cal. App. 4th 556, 2 Cal. Rptr. 2d 63 (1991), could have successfully sued her co-conspirator for wrongful death of her child. Consent of the plaintiff is generally a complete defense to tort liability. Consent may consist of voluntary participation or acquiescence in acts otherwise amounting to an intentional tort. 5 B. Witkin, *Summary of California Law Torts* § 271, at 351 (9th ed. 1988).

12. See Prob. Code § 253; Civ. Code § 3517 ("[n]o one can take advantage of his own wrong"); Uniform Probate Code § 2-803, comment (1990).

13. Decedent's personal representative is a proper party plaintiff in an action for decedent's wrongful death. See *supra* note 1.

14. If a person entitled to sue for wrongful death disclaims all interest in the decedent's estate, the disclaiming heir may still sue for wrongful death. The right does not pass to those next in line to inherit. *Mayo v. White*, 178 Cal. App. 3d 1083, 224 Cal. Rptr. 373 (1986); *Lewis v. Regional Center of the East Bay*, 174 Cal. App. 3d 350, 220 Cal. Rptr. 89 (1985). The Commission would not change this rule.

RECOMMENDED LEGISLATION

Code Civ. Proc. 377 (amended). Parties in wrongful death action

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 The decedent's surviving spouse, children, and issue of deceased children, or, if none, the 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 by intestate succession.

(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 by 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) or (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. Paragraph (1) of subdivision (b) of Section 377 is amended to refer specifically to the decedent's surviving spouse, children, and issue of deceased children, as proper parties plaintiff in a wrongful death action. This makes clear that, even if the decedent's estate is entirely community property, the decedent's children and issue of deceased children are proper parties plaintiff, along with the decedent's surviving spouse. This codifies *Fiske v. Wilkie*, 67 Cal. App. 2d 440, 444, 154 P.2d 725 (1945).

Under Probate Code Section 258, Section 377 is subject to the rules relating to the effect of homicide. This changes the rule of *Marks v. Lyerla*, 1 Cal. App. 4th 556, 2 Cal. Rptr. 2d 63 (1991).

[Note. Section 377 would be repealed and recodified as Section 377.60 by the Commission's omnibus probate bill, Senate Bill 1496.]

Prob. Code § 258 (added). Action for wrongful death

258. A person who feloniously and intentionally kills the decedent is not entitled to bring an action for wrongful death of the decedent, or to benefit from the action if brought by the decedent's personal representative. The persons who may bring an action for wrongful death of the decedent and to benefit from the action are determined as if the killer had predeceased the decedent.

Comment. Section 258 is new and changes the rule of *Marks v. Lyerla*, 1 Cal. App. 4th 556, 2 Cal. Rptr. 2d 63 (1991). See also Code Civ. Proc. § 377 (persons who may sue for wrongful death).