

Memorandum 91-24

Subject: Study L-3018 - Litigation Involving Decedents (Transitional Issue)

The Commission's *Recommendation Relating to Litigation Involving Decedents* is part of the general probate package for this legislative session. We have received a letter from Linda A. Moody concerning some transitional issues that might arise in the application of the proposed law. (See letter attached as Exhibit 1.) This memorandum discusses the transitional issues and proposes the addition of two sections to the legislation.

Commencement of Action on Decedent's Cause of Action

The recommendation allows the decedent's personal representative or successor in interest to commence an action the decedent could have brought or to continue an action commenced by the decedent. Existing Code of Civil Procedure Section 385 authorizes a successor in interest to continue an action commenced by the decedent, but provides no authority for a successor to commence an action the decedent could have brought. The proposed law eliminates the distinction between commencement and continuation of the decedent's cause of action. It also provides a specific procedure to qualify the successor in interest by use of an affidavit modeled after the affidavit under the small estate procedure, and provides other protective rules.

Ms. Moody raises a question about the application of the proposed rule governing commencement of an action by a successor in interest to situations arising before the operative date of the new statute. The issue would arise if a decedent dies before the operative date of the new rule and the statute of limitations extends past the operative date. Would the successor, in a situation where no personal representative has been appointed, be able to commence an action on the decedent's cause of action? Since the proposed statute is procedural in nature, there should be no objection to applying the new rule in

cases where the decedent died before the operative date. The new rule does not create a new right of action, since a personal representative may be appointed under existing law to bring the action, nor does it change the applicable statute of limitations. It simply qualifies successors in interest to bring the action without the need to open a probate. As a policy matter it makes sense to apply the new rule on its operative date in any case where the statute of limitations has not run.

On the other hand, the new rule should not apply so as to revive erroneous filings by successors under prior law where the statute has run before the operative date of the new law. Hence, in the specific case posed in Ms. Moody's letter, the new statute should not resurrect the action where the statute of limitations on the decedent's cause of action has expired before the operative date. The filing of an action under the former law is not saved by later law. However, if the successor had filed a complaint before the operative date of the new rule and the statute of limitations extends past the operative date, it should be permissible to refile (or amend the complaint) under the new statute. This follows because the successor could open a probate to press the claim, if the statute of limitations has not yet run. Thus, the defendant is not being unfairly subjected to suit.

The staff agrees with Ms. Moody that the transitional question should be answered in the statute. Accordingly, the staff proposes to add the following section to the bill:

Code Civ. Proc. § 377.360 (added). Application of article

377.360. On and after January 1, 1992, this article applies to the commencement of an action or proceeding the decedent was entitled to commence, and to the continuation of an action or proceeding commenced by the decedent, regardless of whether the decedent died before, on, or after January 1, 1992.

Comment. Section 377.360 makes clear that, as of the operative date, the procedures provided by this article apply regardless of the date of the decedent's death. Thus, for example, if the limitations period provided in Section 366.1 has not run, a successor in interest of a decedent who died before January 1, 1992, may proceed under this article, assuming that a personal representative has not been appointed. See, e.g., Section 377.310 (commencement of action by personal representative or, if none, by successor in interest). However, if the limitations period under

Section 366.1 has run before January 1, 1992, this article cannot be applied to revive the cause of action. Similarly, an action commenced by a decedent who died before January 1, 1992, may be continued by a successor in interest or personal representative as provided in this article.

If the Commission approves this provision, we will add it to the probate bill at the next opportunity.

The alternative to the suggested provision would be to provide that the new procedure applies only in cases where the decedent died on or after the operative date. This would provide a clear rule, but would result in two bodies of applicable statutory law until statutes of limitations have run on all causes of action of decedents who died before the operative date. As a general rule, we try to avoid continuing former law unnecessarily, that is, unless an overriding policy or constitutional principle requires strictly prospective application. We find no such overriding policies here.

Actions Against Decedents

The staff has reviewed the other parts of this recommendation to see if we can discover any other lurking transitional issues. One area presents theoretical transitional problems. This involves the assertion of causes of action against the decedent. Although the likelihood of a problem in practical terms seems low, the staff believes it is probably best to include a transitional provision here to be on the safe side.

Existing law concerning commencing or continuing an action against the decedent's successor in interest is unclear. The proposed legislation provides explicit guidance by permitting assertion of the claim against a successor only if another statute authorizes the action against the successor (such as the statutes providing for liability of transferees who take the decedent's property by affidavit under Probate Code Section 13109). On its face, this new requirement is more limited than the general language in Code of Civil Procedure Section 385, even though we have found no cases applying that language in this type of case. Still, it is within the realm of possibility that a motion substituting a successor as defendant could be granted or pending on the operative date of the new rule in a case where the specific

statutory liability of the successor is lacking. If such a motion has been granted, it should not be disrupted by the new statute. Nor should pending motions be subject to the statute. Motions made after the operative date should be subject to the new rule.

Accordingly, to provide a parallel rule to the rule proposed for actions commenced by successors, the staff proposes to add the following section to the article concerning commencing or continuing actions against decedents' successors in interest:

Code Civ. Proc. § 377.440 (added). Application of article

377.440. On and after January 1, 1992, this article applies to the commencement of an action or proceeding the decedent was entitled to commence, and to a motion to continue an action or proceeding commenced by the decedent, regardless of whether the decedent died before, on, or after January 1, 1992.

Comment. Section 377.440 makes clear that, as of the operative date, the procedures provided by this article apply to commencing an action, or making a motion to continue an action, against a personal representative or successor in interest regardless of the date of the decedent's death. Thus, for example, if a motion to substitute a successor in interest as a defendant has been made before January 1, 1992, this article would not apply to the case. A motion made after January 1, 1992, would be governed by this article, however, even though the decedent died before that date. See, e.g., Section 377.420 (continuation of pending action against personal representative or successor in interest).

If the Commission approves this provision, we will add it to the probate bill at the next opportunity.

Respectfully submitted,

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Re: Recommendations relating to Probate Law, November 1990
"Litigation Involving Decedents"

Ladies and Gentlemen:

Although I am on your early review list, I seem to have missed a reading of your recommendations relating to "Litigation Involving Decedents" in its earlier phase. Just having read through the November 1990 (blue book), I have a question about applicable dates. Proposed Civil Code § 366.2 (at page 2798) states, "This section applies [sic] a person against whom an action may be brought who died on or after January 1, 1992." But this section relates only to decedents against whom an action may be brought.

After two searches, I fail to turn up any language fixing an applicable date for cases filed under proposed § 366.1. Consider the following hypothetical case: Decedent's date of death is April 1, 1990. There is a one-year statute of limitation applicable respecting a cause of action that survives the decedent. Suppose your recommendations are passed, with an effective date of July 1, 1991. Decedent's spouse files an action in September of 1990, but fails to qualify as personal representative within the one-year period. Is the complaint subject to demurrer under the authority of *Coats v. K-Mart Corp.*, 215 Cal. App. 3d 961, 264 Cal. Rptr. 12 (2d Dist. 1989)? Or will new § 366.1 (if passed) save the day?

I would appreciate a clarification in the proposed legislation, or failing that, a word from you regarding your interpretation of the proposed legislation in the circumstances presented above.

Yours truly



Linda A. Moody