

*Minutes*

Date of Meeting: May 15-16, 1959  
Date of Memo: May 7, 1959

Memorandum No. 3

Subject: Study #33 - Survival of Tort Actions

Attached are (1) a memorandum summarizing briefly the staff's findings relating to certain questions raised at the April meeting, and (2) a draft of proposed amended Probate Code Section 573, in which certain changes in language have been made as a result of the work done by the staff since the meeting.

Respectfully submitted,

Glen E. Stephens  
Assistant Executive Secretary

5/7/59

MEMORANDUM

Subject: Study No. 33 - Survival of Tort Actions.

The following is a report on questions raised at the Commission's April meeting with regard to proposed legislation on the above subject.

1. At the April meeting a question arose (1) whether the broad language suggested in amended Probate Code Section 573 might have the effect of creating causes of action against an estate not now existing arising out of obligations based on the family relationship, and (2) whether such a possibility would be obviated by the provision, taken from the Connecticut statute, that "this section does not apply to any cause or right of action to the extent that the purpose thereof is defeated or rendered useless by the death of any person."

A review of the decisions construing the Connecticut statute proved unhelpful; none were found with respect to the survival of such actions nor construing the particular phrase in question. In Iowa, however, which has a very broad survival statute,<sup>1</sup> it has been held that actions for divorce or alimony do not survive.<sup>2</sup>

We think it is unlikely that a court would construe the suggested survival statute as permitting the survival of a cause of action for divorce and alimony or for separate maintenance. Alimony may be awarded only in conjunction with a divorce action, which is an action to dissolve a marriage; by specific statutory provisions marriage is terminated by death.<sup>3</sup>

Therefore an action for divorce and alimony would be a cause of action "the purpose of which is defeated or rendered useless by the death of either party." A parallel argument applies to separate maintenance: an action for separate maintenance is in effect an action for the specific enforcement of the obligation for support arising out of the marriage relationship;<sup>4</sup> since the existence of a valid marriage is essential to the action<sup>5</sup> it seems clear that such an action could not survive. (Presumably, of course, alimony or support accruing prior to death could be recovered from an estate.)

There are, however, other obligations arising out of the family relationship which could create problems under such a broad survival statute. For example, Civil Code Section 206 creates a duty to provide for the support of a father, mother or adult child who is unable to care for himself, enforceable by an equitable action.<sup>6</sup> Although by its terms the statute does not create a cause of action against an estate for support after the decedent's death, we found no decision specifically so holding.

The duty of a parent to provide for the support, maintenance and education of a minor child is also purely statutory.<sup>7</sup> At common law where such duty existed it did not survive against an estate.<sup>8</sup> In California, however, there are decisions holding that at least where provision for child support is made in a separate maintenance or divorce decree the obligation survives against the estate of a deceased parent.<sup>9</sup> Since such a decree theoretically merely specifically enforces an already existing duty, it may be argued that even in the absence of a decree a minor child not otherwise provided for by the decedent would have a cause of action for support against his parents' estate. Indeed, there is language in some

California cases indicating our courts might so hold.<sup>10</sup> In the case of an illegitimate child, however, the courts have held that no such cause of action against the father's estate exists<sup>11</sup>

Thus this problem is presented: if the proposed survival statute were to state that all causes of action survive, without exception, it might create causes of action not now existing against an estate for support and maintenance; on the other hand, if such actions are specifically listed as exceptions this might have the effect of making actions fail to survive which do or might survive under existing law. To avoid both of these consequences and to preserve whatever may be the status quo in this regard the following language is included in the proposed revision of Probate Code Section 573:

nor does this section authorize an action to be brought against an executor or administrator for the support, maintenance, education, aid or care of any person for any period following the decedent's death except insofar as such an action may be authorized by the laws of this State apart from this section.

2. A second, somewhat similar question arose at the April meeting as to what the effect would be of eliminating the following language now found in Probate Code Section 573:

and all actions by the State of California or any political subdivision thereof founded upon any statutory liability of any person for support, maintenance, aid, care or necessities furnished to him or to his spouse, relatives or kindred, may be maintained against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates.

The Welfare and Institutions Code contains various sections

authorizing the reimbursement of the state or county for aid or support furnished to relatives: § 864 (Juvenile Court Law -- Aid furnished to ward of court); § 1504 (Assistance furnished needy child); §§ 2181, 2224 (Support furnished under Old Age Security Law); § 2576 (Aid rendered by county to indigent); § 2881 (Aid under Relief Act of 1945); § 3088 (Aid to needy blind); § 3474 (Aid to partially self-supporting blind); § 4189 (Aid to needy disabled); §§ 6650, 6658 (Care and transportation of mentally ill or inebriates in state institutions).

Of the above sections only Section 6650, with respect to the mentally ill or inebriates in state institutions, appears to specifically create an obligation on the part of the estates of deceased relatives; the other sections are silent on this matter. On the other hand the provisions for reimbursement under the Old Age Security Act seem quite clearly not to contemplate recovery against an estate, since such recovery must be based on a "Relative's Contribution Scale" which determines liability according to the relative's current monthly income.

There is, of course, little doubt that the present language of Probate Code Section 573 provides for the survival of causes of action arising under the above statutes for support or aid rendered prior to the decedent's death.

A difficult question arises, however, as to whether the Legislature intended by the language in question (which was inserted in the statute in 1935) to create obligations not otherwise existing for the support, maintenance or care of a decedent's relatives from his estate, i.e., whether by virtue of Probate Code Section 573, the actions authorized under the above sections of the Welfare and Institutions Code may be

brought against the estate of a named relative to reimburse the state for support or aid furnished after the relative's death.<sup>12</sup> A somewhat limited search has revealed no case authority on this point. If such obligations are created by this language, at what point would they terminate? Presumably the Legislature did not intend that decedents' estates remain open indefinitely to provide such support. It might also seem unlikely that the Legislature thus intended to create a right in the State for reimbursement in situations where the estate of the decedent might not be otherwise liable to the relative himself for support or maintenance after the decedent's death.

If the Commission feels that the language in question does create obligations for reimbursement for support or aid furnished after death, or if it feels the matter is uncertain, then a paragraph could be added to the amended Section 573 reinstating this provision.

# FOOTNOTES

1. The Iowa statute reads: "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." Code of Iowa, 1958, § 611.20.
2. Hill v. Victoria, 180 Iowa 417, 161 N.W. 72; Barney v. Barney, 14 Iowa 189; O'Hagan's Ex'r, 4 Iowa 509. See also Dennis v. Harris, 179 Iowa 121, 153 N.W. 343.
3. Cal. Civ. Code, § 90.
4. Johnson v. Johnson, 33 Cal. App. 93, 164 Pac. 421 (1917).
5. Turknette v. Turknette, 100 Cal. App.2d 271, 223 P.2d 495 (1950); Patterson v. Patterson, 82 Cal. App.2d 838, 187 P.2d 113 (1948).
6. Lawson v. Lawson, 15 Cal. App. 496, 115 Pac. 461 (1911).
7. Cal. Civ. Code §§ 137, 137.1, 137.2, 139, 196, 196a, 199, 203, 207; Cal. Pen. Code § 270.
8. See Newman v. Burwell, 216 Cal. 608, 15 P.2d 511 (1932).
9. Taylor v. George, 34 Cal.2d 552, 212 P.2d 505 (1949); Newman v. Burwell, 216 Cal. 608, 15 P.2d 511 (1932); Estate of Smith, 200 Cal. 654, 254 Pac. 567 (1927).
10. Myers v. Harrington, 70 Cal.App. 680, 234 Pac. 412 (1925).
11. Schumm v. Bury, 100 Cal.2d 407, 224 P.2d 54 (1950); DeSylvia v. Ballentine 96 Cal.2d 503, 215 P.2d 780 (1950); Myers v. Harrington, 70 Cal. 680, 234 Pac. 412 (1925).
12. It should also be noted that Cal. Civil Code Section 205 provides that if a parent chargeable with the support of a child dies, failing to provide for its support and leaving it chargeable to the County or in a State institution to be cared for at State expense, the County or State may claim provision for its support from the parent's estate.

*Munich*

## PROPOSED AMENDMENTS TO PROBATE CODE SECTION 573

573. No cause or right of action shall be lost by reason of the death of any person. An action Actions-for-the-recovery-of-any-property, real-or-personal,-er-for-the-possession-thereof,-er-to-quiet-title-thereto, or-to-enforce-a-lien-thereon,-er-to-determine-any-adverse-claim-thereon, and-all-actions-founded-upon-contracts,-er-upon-any-liability-for physical-injury,-death,-er-injury-to-property, may be maintained by or and against an executors or and administrators in any all cases in which the same cause-of-action-whether-arising-before-or-after-death-is-one which-would-not-abate-upon-the-death-of might have been maintained by or against their-respective-testators-or-intestates, his decedent; provided, that this section does not apply to any cause or right of action to the extent that the purpose thereof is defeated or rendered useless by the death of any person, nor does this section authorize an action to be brought against an executor or administrator for the support, maintenance, education, aid or care of any person for any period following the decedent's death except insofar as such an action may be authorized by the laws of this State apart from this section.\* and-all actions-by-the-State-of-California-er-any-political-subdivision-thereof founded-upon-any-statutory-liability-of-any-person-for-support,-maintenance, aid,-care-er-necessaries-furnished-to-him-er-to-his-spouse,-relatives-er

\* or the foregoing clause might read:

. . . nor does this section create any right or cause of action, not otherwise existing, against an executor or administrator for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.



~~kindred, -may-be-maintained-against-executors-and-administrators-in-all  
cases-in-which-the-same-might-have-been-maintained-against-their  
respective-testators-or-intestates.~~

In an action brought under this section against an executor or  
administrator, all damages may be awarded which might have been recovered  
against the decedent had he lived except penalties or punitive or  
exemplary damages.

When the person having a cause or right of action dies before  
judgment, the damages recoverable by his executor or administrator are  
limited to such loss or damage as the decedent sustained or incurred prior  
to his death.

This section is applicable where a loss or damage occurs simul-  
taneously with or after the death of a person who would have been  
liable therefor if his death had not preceded or occurred simultaneously  
with the loss or damage.