

Second Supplement to Memorandum 86-202

Subject: Study L-1025 - Creditor Claims (Actions Involving Decedent)

INTRODUCTION

The existing statutes governing causes of action and pending actions involving decedents are troublesome. They are scattered about the Code of Civil Procedure and Probate Code without apparent system; they overlap in some areas, leave gaps in other areas, and are inconsistent in yet others. They appear to have been developed primarily before the increasing importance of nonprobate transfers was recognized, and consequently do not appear adequate or appropriate in many situations.

In attempting to reconstruct the law in this area, we have been helped by an article by Judge Marshall. *Suits Against Decedents*, 47 Cal. St. B.J. 588 (1972). We have also had the benefit of a draft provided to us by the Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association, prepared by Jeffrey S. Pop, an experienced trial attorney. We have also received a few letters mentioning specific problems in actions involving decedents; these problems are raised below in connection with the draft provisions to which they relate.

A discussion of the relevant policies and considerations will be helpful. The issues may be broken down into the following categories:

- I. Cause of Action
 - A. Cause of action held by decedent
 - 1. Survival
 - 2. Statute of limitations
 - 3. Who may assert
 - B. Cause of action against decedent
 - 1. Survival
 - 2. Statute of limitations
 - 3. Who asserted against
 - a. Probate
 - b. Nonprobate transfer
 - c. Claims
 - C. Special cases
 - 1. Foreclosure
 - 2. Insurance claim
 - 3. Trust

- II. Action Pending At Death
 - A. By decedent
 - 1. Abatement
 - 2. Substitution of parties
 - B. Against decedent
 - 1. Abatement
 - 2. Substitution of parties
 - a. Claim in probate
 - b. Nonprobate transfer
 - c. Insurance claim

The following discussion adheres to this general outline.

I. CAUSE OF ACTION

A. Cause of Action Held by Decedent

1. Survival

If a person who has a cause of action dies, the cause of action survives (except for damages for pain, suffering, or disfigurement). Probate Code § 573.

2. Statute of Limitations

The person's death does not toll the applicable statute of limitations and the statute continues to run. The beneficiaries of the estate are viewed as having sufficient time to obtain appointment of a personal representative. See, e.g., *Tynan v. Walker*, 35 Cal. 636, 644 (1868); *Sanford v. Bergin*, 156 Cal. 43, 55, 103 P. 333 (1909); *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 24, 134 P. 981 (1913).

Existing law does, however, make some allowance for the person's death--the statute of limitations is extended until six months after the person's death if it would otherwise expire before that time. Code Civ. Proc. § 353. The six-month extension seems to make sense, since it may take the decedent's successors some time to investigate the decedent's affairs and take steps to act on a cause of action whose limitation period is about to expire at the decedent's death.

3. Who May Assert

Who may bring the action? Probate Code Section 573 provides that the action may be maintained by the decedent's personal representative. But the statute of limitations states that the action may be commenced by the decedent's "representatives." Code Civ. Proc. § 353. It is not clear whether "representatives" is intended to be broader than "personal representative," and if so, which provision

prevails. There is internal evidence in Code of Civil Procedure Section 353 itself that only "personal representative" is intended, since a later reference to "representatives" also speaks of issuance of letters.

Further light may be shed on this issue by reference to a special statute governing causes of action for wrongful death. Section 377 of the Code of Civil Procedure provides expressly that an action for the wrongful death of a person may be maintained by the person's "heirs or personal representatives," with the respective rights of the heirs in the award being determined by the court. Cases interpreting this provision distinguish between the wrongful death action, which is a cause of action that arises at death in favor of the survivors, and other causes of action owned by the decedent, in which the recovery belongs to the "estate." Thus, even if a personal representative sues under the wrongful death statute, the award belongs to the heirs and does not pass through estate administration.

If the analysis of these cases is correct, then causes of action belonging to the decedent at death are properly brought by the personal representative. However, in many cases there is no administration of the decedent's estate--the survivors take the assets by nonprobate procedures such as the affidavit procedure or the surviving spouse procedure. In these situations, shouldn't the decedent's successors in interest be able to sue to enforce a cause of action? Does it make sense to require opening a probate and appointment of a personal representative for the sole purpose of commencing and maintaining a lawsuit? Where the decedent had actually commenced a lawsuit before death, existing law permits the pending action to be continued either by the personal representative or by the decedent's successor in interest. Code Civ. Proc. § 385(a).

For these reasons the staff draft expands the law to allow a decedent's cause of action to be maintained either by the personal representative or by the successor in interest. There are mechanical problems with this approach, however. Suppose several persons claiming to be successors wish to sue? Suppose a probate is started and the personal representative also wishes to sue?

These questions point up the fact that a cause of action should really be viewed as a piece of property, a "thing in action" as it is sometimes denoted in the statutes. The property would be assignable and enforceable by the personal representative or heirs in the same manner as any other property that passes from the decedent at death. If probate proceedings are commenced, the personal representative may commence the action, if appropriate, or may distribute the cause of action to the beneficiaries. The staff draft includes a provision that grants the court authority to make appropriate orders in the litigation to implement this policy.

It is also worth noting that if the decedent created a trust during lifetime and assigned the cause of action to the trust, the trustee should bring the action. This is because there was an assignment of the cause of action to the trustee before death.

A trickier situation involves a cause of action owned by joint tenants. The death of one joint tenant results in the survivor acquiring the entire joint tenancy rights; in legal theory the survivor does not acquire the rights from the decedent by succession, but acquires the rights by virtue of the joint tenancy tenure which gives the survivor an undivided but contingent interest in the whole, the contingency being survival of the other joint tenants. Thus the cause of action is not part of the decedent's estate and is not enforceable by the decedent's personal representative.

B. Cause of Action Against Decedent

1. Survival

Suppose a person against whom there is a cause of action dies. The cause of action survives the decedent's death (but no exemplary or punitive damages are allowed). Prob. Code § 573. Existing law requires that the action be commenced against the personal representative. Probate Code § 573. Code of Civil Procedure Section 353 requires an action against "representatives," but it is apparent from a contextual reference to issuance of letters that "personal representative" is intended.

2. Statute of Limitations

Arguably, it may take some time for appointment of a personal representative, so it may be appropriate to extend the statute of limitations against the decedent. If no heir or devisee opens a probate, the person holding the cause of action may do so. The statute of limitations continues to run, but the creditor has at least one year after appointment of a personal representative in which to bring an action. Code Civ. Proc. § 353.

Is there a sound policy for extension of the statute of limitations until one year after appointment of a personal representative? It is can occur that a probate is not opened and no personal representative is appointed until many years after the decedent's death. Should the statute of limitations be tolled the entire period?

In this connection it is worth noting that the Code of Civil Procedure extension of the statute of limitations appears in some instances to conflict with the Probate Code, which provides that "no claim which is barred by the statute of limitation shall be allowed or approved". Prob. Code § 708. The two provisions can be read together to make sense where the statute of limitations has run before the decedent's death, but not where it is tolled by the decedent's death.

Tolling the statute of limitations for a long period serves no discernible public policy and violates the administration of justice reasons that lead to adoption of statutes of limitation in the first place. The staff thinks a better solution is to allow the ordinary time for a statute of limitations or, if the ordinary time expires within a short time after the decedent's death, to allow an additional time measured from the the decedent's death. The staff draft allows the cause of action to be asserted one year after the decedent's death if the statute of limitations expires within that term, though a shorter period may be appropriate. We are seeking a period that will give a creditor adequate time in which to act, and to obtain appointment of a personal representative if necessary, without extending the statute of limitations unduly.

3. Who Asserted Against

a. Probate. The policy of the law to channel causes of action against the decedent into administration proceedings is cemented by the requirement that a claim must be made in the proceedings before an action may be brought. Probate Code § 716.

b. Nonprobate transfer. Despite the absolute language of Section 716 ("no holder of a claim against an estate shall maintain an action thereon" unless the claim is first made), this provision must be read with other provisions that make the recipient of the decedent's property liable for claims against the decedent to the extent the property passes outside probate. See, e.g., Prob. Code §§ 13109 (transferee of property by affidavit personally liable for decedent's debts), 13550 (surviving spouse who takes property without administration personally liable for decedent's debts).

Suppose there is no administration and no person receives property under one of the statutory direct liability provisions. May the creditor enforce the decedent's liability directly against the decedent's successors in interest or must a probate be first commenced as the statutes seem to require? The general rule, as outlined in the foregoing discussion, seems to be that the creditor may not assert the cause of action directly, but must go through administration.

This approach makes some sense. Procedurally it ensures that all the decedent's beneficiaries are assessed their proper share of the debt, thereby avoiding the situation of the particular heir selected by a creditor having to bear the entire expense (or having to interplead or seek contribution from other heirs). It also may be simpler for a creditor with a large claim to commence probate, since by this vehicle the assets may be marshalled, rather than to try to join various recipients of the decedent's property. The probate procedure eliminates the need to resolve questions about tracing, and whether the heirs are liable for the assets actually received from the decedent or for their value. If there is more than one creditor and the property is insufficient, probate offers a way of ranking claims.

The staff draft makes clear that a cause of action may be asserted only in estate administration and not directly against successors in interest of the decedent unless a nonprobate transfer statute provides

direct liability. The draft also makes clear that the standard claim procedure must be followed in probate. Commissioner Stodden has observed in a letter to the staff that "It is amazing how many attorneys do not understand this."

c. Claim. Once a claim has been made, there is no impediment to the creditor bringing an action, although the statutes seem to imply that the creditor must wait until the claim is accepted or rejected. However, there is every reason for the creditor not to wait, since the making of the claim does not generally toll the statute of limitations. (Under existing law the creditor may deem the claim rejected if there is no action by the 10th day, and the statute is tolled for those 10 days. The Commission's current draft would extend this period to 30 days.)

If the statute of limitations has not run at the time the personal representative acts on the claim, then different rules apply. If the claim is accepted, the statute is tolled during administration. Prob. Code § 708. If the claim is rejected, the creditor has three months to bring an action on it. Prob. Code § 714. If the statute of limitations expires before the three months has run, however, the action may not be brought. The creditor must file a notice of the pendency of the action in the estate proceedings within 10 days after commencement of the action, and any payments or distributions made before the notice is filed are made free of any subsequent recovery by the creditor.

One might well ask whether all this intricacy is necessary or even useful. It certainly seems designed to cut off and trap creditors. This may in fact be the intent of the statutes, though whether that is good public policy is debatable. In the staff's opinion, a simpler and better scheme would be to provide that the making of a claim tolls the applicable statute of limitations. This would avoid the need for precipitous lawsuits. Then the claim could be processed in due course of administration. If the claim is accepted, that ends the matter--almost. (See discussion below.) If the claim is rejected, then and only then may the creditor bring an action. Inaction by the personal representative for 30 days could be treated as a rejection (as under the current Commission draft), and a full three months within which to bring the action seems appropriate.

Suppose the probate assets are insufficient to satisfy all claims. Under the new trust law, assets in a revocable trust could be reached to satisfy the decedent's creditors. What the applicable statute of limitations would be in such a situation is not clear, or whether a judgment against the personal representative would bind the trustee as well. Many of these difficulties would be cleared up if a procedure were provided whereby direct action by the creditor against the trustee is precluded and the trust assets are pulled in by the personal representative to the extent needed to satisfy creditors.

C. Special Cases

There are a number of situations where it may not make alot of sense to run a cause of action through the probate procedure. The statute deals expressly with two of these cases: foreclosure on security owned by the decedent and recovery on a claim covered by liability insurance.

1. Foreclosure

Probate Code Section 716 provides:

(a) Except as provided in subdivision (b), no holder of a claim against an estate shall maintain an action thereon unless the claim is first filed with the clerk or presented to the executor or administrator.

(b) An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint. The action may be brought whether or not the claim was filed or presented as provided in subdivision (a); but no counsel fees shall be recovered in the action unless the claim was filed or presented as provided in subdivision (a).

(c) As used in this section, "lien" includes, but is not limited to, a judgment that is a lien.

This provision for proceeding directly against property subject to a lien to foreclose seems to make sense, and the staff draft continues it.

Whether the procedure for enforcing a lien directly without a claim in probate is applicable to a lien established after the decedent's death (e.g., a judgment obtained before death and recorded after death), or whether it is even possible to establish a lien after the decedent's death, is an issue we have not tried to deal with here.

2. Insurance Claim

If a creditor's claim is covered by insurance, it may be proper to allow enforcement of the liability directly against the insurer without going through probate procedures. Existing statutes provide for this in two different ways:

(1) Under Probate Code Section 721 the creditor may sue the estate of the decedent up to the limits of the insurance coverage by obtaining leave of court and serving summons on the insurer. No claim in probate is necessary.

(2) Under Probate Code Section 707(b) the creditor may sue the estate of the decedent up to the limits of the insurance coverage by serving summons on the insurer without the need to obtain leave of court, if the estate qualifies for summary administration and the claim is for damages or injury to or death of a person caused by the wrongful act or neglect of the decedent. No claim in probate is necessary unless the plaintiff seeks an amount greater than the insurance coverage.

Under either of these sections, the creditor has an additional year after expiration of the statute of limitations in which to commence the action against the estate. Code Civ. Proc. § 353.

Is there a good reason to have different procedures for recovery on an insurance claim, or to extend the statute of limitations for another year when there is no need to go through probate?

Both Sections 707(b) and 721 of the Probate Code were enacted in 1971, though in different bills. The staff has not been able to ascertain whether an integrated scheme was actually intended here, or whether it is simply another case of the right hand not knowing what the left hand is doing. In any event, the staff would combine aspects of both procedures in a single simplified provision with the following features:

- The creditor may sue the decedent's estate to the limits of the insurance coverage.

- Leave of court is not required and no claim need be made.

- The creditor may seek amounts greater than the insurance coverage through the claim procedure in probate.

- The procedure is available in all estates, not just those qualifying for summary administration.

- The procedure is available for any insured claim, not just those for liability for damages, injury, or death.

- With respect to the one-year extension of the statute of limitations, the staff suggests no change. The extension encourages use of the direct procedure, without the need to start a probate solely for the purpose of commencing a lawsuit on the liability.

3. Trust

Where all the assets of the decedent's assets have gone into a trust, it may make more sense to sue the trustee directly, rather than to go through probate. We have not attempted to deal with this situation in this draft, since it needs to be integrated with the general rules we develop on creditors rights against trust assets. This is one of the matters the Commission has planned to work on. The staff believes it is important and should be given priority.

II. ACTION PENDING AT DEATH

A. By Decedent

1. Abatement

If the plaintiff in an action dies during pendency of the action, the action does not abate (if the cause of action survives). Code Civ. Proc. § 385(a). Essentially all causes of action survive (an action for dissolution of marriage or legal separation may be the only known exception, and even this issue has been reserved by the Commission for future review). Even though the action continues, damages are limited to those incurred before the plaintiff's death and may not include pain, suffering, or disfigurement. Prob. Code § 573.

2. Substitution of Parties

After the decedent's death the action may be continued by the decedent's representative or successor in interest, with court approval. Code Civ. Proc. § 385(a). This seems like a logical result, and the staff recommends no changes in the existing procedure.

B. Against Decedent

1. Abatement

If the defendant in an action dies during pendency of the action, the action does not abate (if the cause of action survives). Code Civ. Proc. § 385(a). Essentially all causes of action survive (see discussion above).

2. Substitution of Parties

The court may allow the action to be continued against the decedent's representative or successor in interest. Code Civ. Proc. § 385(a). Presumably the personal representative would be substituted if estate proceedings are commenced, and successors in interest if not.

a. Claim in probate. If estate proceedings are commenced, the plaintiff must make a claim within the standard creditor claim period or no recovery against the estate will be allowed in the action. Prob. Code § 709. The court may permit a late claim within a reasonable time (not exceeding one year) after the defendant's death but before final distribution of the estate if the court finds that the claim was not timely made because neither the plaintiff nor attorney was aware of the defendant's death. Prob. Code § 709.

b. Nonprobate transfer. If no estate proceedings are pending, of course, no claim can be made. Various nonprobate transfer provisions make clear that recipients of the decedent's property are liable for the decedent's debts. Presumably the plaintiff will simply substitute the successors in interest as parties under these provisions, as Code of Civil Procedure Section 385(a) seems to allow. For this purpose, the trustee of a trust would be a successor in interest, and the action could be continued against the trustee to the extent the estate is insufficient under Probate Code Section 18201. Alternatively, the plaintiff may initiate a probate, have a personal representative appointed, and substitute the personal representative.

This basic approach of the law breaks down where there is no statutory provision governing liability of successors in interest. The same problems are presented for pending actions in this situation as for causes of action. The staff draft addresses this problem by providing that the action may only be continued against the personal representative. This keeps the same rules whether an action was

pending at the time of the decedent's death or was still a cause of action. The fact that a complaint was filed before the decedent died shouldn't alter the rule that the creditor should get the claim on record in the estate before the estate is dissipated, and should proceed against the personal representative in the interest of efficiency.

c. Insurance claim. If there is insurance coverage for the liability that is the subject of the action and the decedent dies while the action is pending, it may be possible for the plaintiff to continue the action against the insurer without substitution of the decedent's personal representative or successor in interest as a defendant. Existing law provides two different ways in which this may be accomplished, parallel to the provisions governing causes of action:

(1) Under Probate Code Section 709.1, the creditor may continue the action against the decedent in the name of the estate of the decedent by obtaining leave of court. This procedure specifically incorporates the procedures, and terms and conditions, of Probate Code Section 721, i.e., summons must be served on the insurer, no claim against the decedent's estate is necessary, and recovery is limited to the insurance policy limits.

(2) Code of Civil Procedure Section 385(b) permits continuation of the action without leave of court and without substitution of parties if the amount of damages sought does not exceed the maximum insurance coverage and the decedent's estate qualifies for summary treatment. The insurer must be served with the complaint in the action.

In any case, whether or not the action continues against the insurance company or against the decedent's personal representative or successor in interest, the requirement that a claim be made against the estate is excused if the insurer has accepted the defense of the case and an appearance has been made on behalf of the decedent. A claim is required for amounts not covered by or in excess of the insurance, however. Prob. Code § 709.

Whether this elaborate scheme all makes sense or is perfectly integrated is open to question. The staff believes some simplification is in order; treatment of pending actions involving insurance claims should parallel the treatment given causes of action. The staff draft implements this policy.

ORGANIZATION OF STAFF DRAFT

The staff draft implementing the discussion above is divided into several parts. Exhibit 1 contains the main body of law governing civil actions involving a decedent. It constitutes a separate chapter in Title 3 of Part 2 of the Code of Civil Procedure, among the provisions applicable to "Parties to Civil Actions." In the process of preparing this chapter, the staff has also reorganized the Code of Civil Procedure provisions somewhat to provide a logical and orderly structure. See Exhibit 4 (conforming changes).

The relevant statutes of limitation where a decedent is involved belong with the other statutes of limitation in Title 2 of Part 2 of the Code of Civil Procedure, "Time of Commencing Civil Actions." See Exhibit 2.

Civil actions involving a decedent affect estate administration where the law requires a claim to be made against the estate. A chapter of special claim provisions in civil actions is located in the Probate Code along with the general claim requirements. See Exhibit 3.

Comments to repealed Probate Code sections that deal with this subject matter may be found in Exhibit 5.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Stan G. Ulrich
Staff Counsel

Exhibit 1

LITIGATION INVOLVING DECEDENT

Outline

CHAPTER 4. DEATH OF PARTY

Article 1. Cause of Action

- § 377.110. Survival of cause of action
- § 377.120. Parties
- § 377.130. Assignability of things in action

Article 2. Pending Actions

- § 377.210. Continuation of action
- § 377.220. Parties

Article 3. Insured Claim

- § 377.310. Action authorized
- § 377.320. Statute of limitations
- § 377.330. Procedure
- § 377.340. Defenses
- § 377.350. Damages

Article 4. Wrongful Death

- § 377.410. Parties
- § 377.420. Damages
- § 377.430. Joinder and consolidation of actions

Article 5. Miscellaneous Provisions

- § 377.510. Successors in interest
- § 377.520. Damages recoverable
- § 377.530. Personal representative for whom no letters issued
- § 377.540. Preference for actions involving decedent
- § 377.550. Service on personal representative

Code of Civil Procedure § 377.110-377.540 (added). Death of party

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. DEATH OF PARTY

Article 1. Cause of Action

§ 377.110. Survival of cause of action

377.110. (a) Except as otherwise provided by law, 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 377.110 restates the first portion of the first paragraph of former Probate Code Section 573 without substantive change. Subdivision (b) restates the fourth paragraph of former Probate Code Section 573 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).

Note. Approval of the approach reflected in this draft will result in the omission of draft Section 9821 (effect of death on causes of action) in the Recommendation Relating to Estate Management.

§ 377.120. Parties

377.120. (a) A decedent's cause of action that survives passes to the decedent's successor in interest as provided in Section 300 of the Probate Code and may be asserted by the decedent's personal representative or successor in interest. The court in which the action is pending may make any order concerning parties that is appropriate to ensure proper administration of justice in the case.

(b) 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. The first sentence of subdivision (a) of Section 377.120 restates the second sentence of Civil Code Section 954, the first portion of the first sentence of former Code of Civil Procedure Section 353, and part of the last portion of the first paragraph of former Probate Code Section 573, without substantive change. Under

subdivision (a), an action may be brought by the decedent's successor in interest as well as by the decedent's personal representative. The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, assignee, or other successor. See Section 377.510 (successors in interest).

The second sentence of subdivision (a) is new. The court in which the action 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 any person to assert the cause of action.

Subdivision (b) restates the first portion of the second sentence of former Code of Civil Procedure Section 353 and part of the last portion of the first paragraph of former Probate Code Section 573 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 subdivision (b), referring to Part 4 (creditor claims) of Division 7 of the Probate Code, is intended for cross-referencing purposes. See Sections 9400-9404 (claims in civil actions). For special rules governing liability covered by insurance, see Section 377.310.

See also Section 377.510 (successors in interest); Prob. Code § 58 ("personal representative" defined); Veh. Code § 17452 (continuation of action against personal representative of nonresident defendant involved in motor vehicle accident).

Note. Probate Code Section 573 provides for an action to be brought by or against the personal representative of the decedent, whereas Code of Civil Procedure Section 353 refers simply to the "representatives" of the decedent, which is arguably much broader.

The policy question underlying this difference is whether a probate must be commenced and a personal representative appointed before a suit may be brought by or against the decedent. Requiring suit against a personal representative seems appropriate in order to ensure that the interests of the decedent's successors in interest are adequately represented, among other reasons. See discussion in the memorandum.

The same considerations do not apply to suit by the successors in interest--those who have a stake will be those who are doing the suing. For example, the trustee has a duty to enforce claims that are a part of trust property. See Prob. Code § 16010 (AB 2652). The staff draft permits an action by the decedent's successors in interest, including a trustee, as well as by the personal representative.

Such a scheme should work well enough in the ordinary case. Suppose, however, that there is a creditor of a decedent who brings an action against the personal representative only to find the estate exhausted. There may be other assets of the decedent that passed outside probate administration, such as trust assets. It is appropriate that the creditor proceed against those assets. In the case of trust assets, the new law provides expressly that the assets are liable to the creditor to the extent the probate estate is insufficient. However, the new law fails to answer the types of

procedural questions we are dealing with here--what is the relevant statute of limitations for proceeding against the trust, can the trustee require contribution by other trusts or other nonprobate assets of the decedent, who has priority if there are several creditors whose claims would exhaust the estate, etc.? One possible solution is to allow the personal representative to pull the trust assets into the estate for the purpose of satisfying creditor claims for which the estate is inadequate. The Commission has not yet grappled with these issues, but should. Perhaps the present draft is the place to do this.

§ 377.130. Assignability of things in action

377.130. Nothing in this article shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to September 15, 1961.

Comment. Section 377.130 restates the last paragraph of former Probate Code Section 573 without substantive change.

Note. There is a question whether this provision is sound policy. Should a cause of action be survivable at death but not assignable during life? We are not sure what causes of action are intended to be covered by this provision (it's a 1961 Commission enactment), but we cannot think of any that should be survivable but not assignable.

Article 2. Pending Action

§ 377.210. Continuation of action

377.210. An action or proceeding does not abate by the death of a party if the cause of action survives.

Comment. Section 377.210 restates a portion of the first sentence of former Section 385(a) without substantive change.

Note. This provision is an overstatement. An action for divorce does not survive the death of a party. *Poon v. Poon*, 244 Cal. App. 2d 746, 751, 53 Cal. Rptr. 365 (1966). However, the staff has continued the existing language. The Commission has on its agenda for future study the problem of property rights of survivors when a party to a marital dissolution proceeding dies.

§ 377.220. Parties

377.220. In the case of an action or proceeding that does not abate, the court, on motion:

(a) Shall allow the decedent's action or proceeding to be continued by the decedent's personal representative or successor in interest.

(b) Shall allow an action or proceeding against the decedent to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest. 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 is first made.

Comment. Subdivision (a) of Section 377.220 restates a portion of former Section 385(a), 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).

The first sentence of subdivision (b) supersedes a portion of former Section 385(a). Under subdivision (b) an action may be continued only against the decedent's personal representative and not against a successor in interest. The second sentence restates the second sentence of former Probate Code Section 709 without substantive change. For special rules providing direct liability of successors in interest, see, e.g., Probate Code Sections 13109 (transferee of property by affidavit), 13550 (surviving spouse who takes property without administration).

Article 3. Insured Claim

§ 377.310. Action authorized

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

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

Comment. This article replaces former subdivision (b) of Section 385 of the Code of Civil Procedure, former Probate Code Sections 707(b), 709.1, and 721, and the third sentence of former Probate Code Section 709. It makes the following significant changes in the law:

(1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.

(2) Court approval is not required before the plaintiff may commence an action against the estate.

(3) The estate of the decedent need not qualify for treatment under Section 13100 *et seq.* of the Estate and Trust Code (affidavit procedure for collection or transfer of personal property).

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.

(5) The new provisions excuse a claim in probate only where the plaintiff is proceeding under this section, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent.

If the plaintiff seeks damages in excess of the insurance policy limits, the plaintiff must make a claim and establish the liability other than under this section. See Section 377.350 (damages).

The time limited for bringing an action under this article is one year after expiration of the applicable statute of limitations. See Section 377.320 (statute of limitations).

See also Prob. Code §§ 48 ("interested person" defined), 58 ("personal representative" defined).

Note. The reference to "injury" in existing Section 385 seems to refer to personal injury. Within paraphrases the requirements of this part of existing Code of Civil Procedure Section 385 by reference to "personal injury." See 4 B. Witkin, California Procedure Pleading § 285, at 340 (3d ed. 1985). However, similar language in Probate Code Section 720 relating to a claim for "injuries" that is not the subject of a pending action has been interpreted to cover a claim based on fraud. *Estate of Hoertkorn*, 88 Cal. App. 3d 461, 464-67, 151 Cal. Rptr. 806 (1979). To avoid these confusing technicalities and dubious distinctions Section 377.310 treats all claims covered by liability insurance in the same manner. This is the approach of Section 3-803(c)(2) of the Uniform Probate Code which applies to claims protected by "liability insurance."

The use of the summary administration standard in existing Section 385(b) (and in Probate Code Section 707(b)) is also troublesome. What happens if the claimant proceeds on the assumption that the estate qualifies for summary administration and turns out to be wrong? Judge Marshall has written that a petition should be filed in the probate court in order to proceed under this provision. See *Marshall, Suits Against Decedents*, 47 Cal. St. B.J. 588, 593 (1972). It is also suggested that if the claimant is in doubt, it should be assumed that the estate does not qualify. See *Nelson, Creditors' Claims*, in 1 *California Decedent Estate Practice* § 12.13 (Cal. Cont. Ed. Bar 1986). Again, the draft statute avoids this problem by treating all claims covered by liability insurance in the same fashion and eliminating the need to determine whether the estate qualifies under Section 630 (Section 13100, as of July 1, 1987).

Unless a small estate is involved, existing law requires court approval in order to proceed directly under the insurance liability provisions. We have received at least three letters commenting on this

point that court approval should not be necessary. Among the matters raised are the fact that only the insurer is at risk and no estate assets are involved, and that confusion is caused by overlapping jurisdiction of the probate and civil courts. The staff agrees, and we have omitted court approval from this draft.

§ 377.320. Statute of limitations

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

Comment. Section 377.320 restates the last portion of the second sentence of former Section 353 without substantive change.

§ 377.330. Procedure

377.330. An action under this article shall name as the defendant "Estate of (name of decedent), Deceased." Summons shall be served upon a person designated in writing by the insurer or, if none, upon the insurer. Further proceedings shall be in the name of the estate, but otherwise shall be conducted in the same manner as if the action were against the personal representative. On motion of an interested person or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant.

Comment. See the Comment to Section 377.310.

§ 377.340. Defenses

377.340. The insurer may deny or otherwise contest its liability by cross-complaint in the action [or by an independent action against the plaintiff]. Unless the personal representative is joined as a party, a judgment on the cross-complaint [or in the independent action] does not adjudicate rights by or against the estate.

Comment. See the Comment to Section 377.310.

Note. Section 377.340 is drawn from former Probate Code § 721(d), with the clarification that the estate is not affected, as suggested in the Jeffrey Pop draft (see the Memorandum). The staff questions the bracketed material in this section.

§ 377.350. Damages

377.350. (a) The damages sought in an action under this article shall be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance shall be waived. A judgment in favor of the plaintiff is enforceable only from the insurance protection and not against property in the estate.

(b) Subdivision (a) does not apply to the extent the insurer accepts the defense of the action and makes an appearance on behalf of the decedent and the plaintiff makes a claim under Section 9404 of the Probate Code.

Comment. See the Comment to Section 377.310.

Article 4. Wrongful Death

§ 377.410. Parties

377.410. 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 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.

(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 377.410 restates subdivision (b) and the first portion 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 377.110 (survival of cause of action) and 377.120(b) (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 wrongful death of the decedent, 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.

§ 377.420. Damages

377.420. 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 377.520. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

Comment. Section 377.420 restates the third and fourth sentences of former Section 377 without substantive change.

§ 377.430. Joinder and consolidation of actions

377.430. (a) An action under Section 377.120 may be joined with an action arising out of the same wrongful act or neglect under this article.

(b) Separate actions under this article and Section 377.120 arising out of the same wrongful act or neglect shall be consolidated for trial on the motion of an interested party.

Comment. Section 377.430 restates the fifth and sixth sentences of former Section 377 without substantive change.

Article 5. Miscellaneous Provisions

§ 377.510. Successors in interest

377.510. For the purposes of this chapter, a decedent's successor in interest is the decedent's heir, devisee, assignee, or other person who succeeds to the decedent's cause of action or other property of the decedent. In the case of a trust, the successor in interest is the trustee.

Comment. Section 377.510 is new. It makes clear that the trustee of a trust is a successor in interest for purposes of this chapter if the decedent assigned or devised the cause of action to the trust. The trustee of an inter vivos trust is liable on a cause of action against

the decedent to the extent provided in Probate Code Section 18201. The trustee of a testamentary or pour-over trust is liable to the same extent as other devisees.

§ 377.520. Damages recoverable

377.520. (a) In an action by a decedent's personal representative or successor in interest under this chapter, 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 might otherwise have recovered, and do not include damages for pain, suffering, or disfigurement.

(b) In an action against a decedent's personal representative or successor in interest under this chapter, all damages are recoverable that might otherwise have been recovered against the decedent except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.

Comment. Section 377.520 restates and generalizes the second and third paragraphs of former Probate Code Section 573.

§ 377.530. Personal representative for whom no letters issued

377.530. In an action by or against a personal representative, it is not necessary to join as a party a person appointed personal representative for whom no letters were issued.

Comment. Section 377.530 restates former Probate Code Section 577, broadening the former provision to apply to administrators as well as executors and conforming "issuance and qualification" to "appointment and issuance." See Prob. Code §§ 52 ("letters" defined), 58 ("personal representative" defined).

Note. The staff would delete this section since, under the procedure for appointing personal representatives in the draft statute, it no longer serves a useful purpose. Moreover, it raises an issue concerning the meaning of the term "personal representative" in every case where it is used.

This section is also duplicated in Section 9824 of the estate management statute.

§ 377.540. Preference for actions involving decedent

377.540. An action under this chapter is entitled to the preference granted other actions by Section 36.

Comment. Section 377.540 is new. It creates the same preference for actions involving a decedent as Section 36 grants to actions involving a party of 70 years or terminally ill.

Note. This section is drawn from a provision in the Jeffrey Pop draft (see the Memorandum). The staff is not sure of the policy behind this proposal; we can see the policy to expedite actions if it looks like a party will die, but once the party is dead we do not see the continued urgency. Of course the creditors and beneficiaries of the estate would like to have their rights resolved quickly, but the same can be said of anyone, whether or not there is a probate involved.

§ 377.550. Service on personal representative

377.550. In addition to any other means for service of process prescribed by statute, service of process on a personal representative in an action under this chapter may be made by either of the following means:

(a) Filing two copies of the summons and complaint with the clerk of the court in which proceedings for administration of the decedent's estate are pending. The clerk shall forthwith mail by registered mail one copy to the personal representative and shall retain one copy in the file.

(b) Serving the personal representative through the attorney of the personal representative.

Comment. Section 377.550 is new. Subdivision (a) is analogous to the procedure for service on a foreign personal representative by delivery to the Secretary of State. Under subdivision (b), the address of the attorney may be found on the notice of administration or in the probate file.

Note. The staff is not sure how great the problem addressed by this section is. We received a copy of a letter from Alan M. Mund of Los Angeles who had recently handled several cases that pointed up a "serious deficiency" in the law. He states that if the personal representative rejects or fails to act on a creditor's claim, the summons and complaint on the claim must be served on the personal representative. But if the personal representative wishes to avoid service, he or she must be treated just as a typical defendant who is evading service, with the concomitant expenditure of time and money necessary to effect substituted service. "Obviously, if service of a creditor's claim on the personal representative is sufficient merely by delivering the claim to the clerk of the court, it should be no different with regard to service of the summons and the complaint for the lawsuit which arises out of the personal representative's rejection of that claim. After all, the personal representative has already been served with the claim and has thereby received notice of the creditor's demand." Mr. Mund believes that the solution provided in this section would save a great deal of time and money without any loss of due process guarantees.

Exhibit 2

STATUTE OF LIMITATIONS

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

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 DEATH OF PERSON

§ 366.1. 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, an action may be commenced before expiration of the later of the following times:

- (a) Six months after the person's death.
- (b) The limitations period otherwise applicable.

Comment. Section 366.1 restates a portion of the first sentence of former Section 353, making clear that the decedent's death cannot shorten the limitations period applicable to the decedent's cause of action. As to survival of causes of action, see Section 377.110. For persons entitled to bring the action, see Section 377.120 (parties). See also Code Civ. Proc. § 355 (one-year limitations period after reversal).

§ 366.2. Death of person against whom action may be brought

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

- (a) One year after the person's death.
- (b) The limitations period otherwise applicable.

Comment. Section 366.2 supersedes the second sentence of former Section 353. Section 366.2 limits an action to one year after the decedent's death, rather than one year after issuance of letters to a personal representative as under former law.

As to survival of causes of action, see Section 377.110. For persons against whom an action may be brought, see Section 377.120(b). For cases where an action may be brought against the estate of the decedent, rather than the personal representative, see Sections 377.310-377.350 (liability insurance). See also Est. & Trust Code § 58 ("personal representative" defined).

Exhibit 3Probate Code

CHAPTER 9. CLAIMS IN CIVIL ACTIONS

§ 9400. Claim prerequisite to bringing action

9400. A cause of action against a decedent may not be asserted against the decedent's personal representative unless a claim is first made as provided in this part.

Comment. Section 9400 restates subdivision (a) of former Probate Code Section 716 without substantive change. For the time within which a claim must be filed, see Section 9100 (claim period). An action may be brought to enforce a liability of the decedent without first making a claim in the case of a secured obligation. Section 9404 (enforcement of security interest).

In addition to an action against a decedent's personal representative, a liability of the decedent may be enforced against the decedent's successors in interest outside of estate administration in some cases. See Sections 13109 (affidavit procedure) and 13550-13554 (debts of deceased spouse).

CROSS-REFERENCES

Definitions

Claim § 9000

Personal representative § 58

Note. Suppose the plaintiff is unaware of the decedent's death and files a complaint without first making a claim? The law should be clear that this provision and the other provisions in this chapter are not jurisdictional but simply provide a basis for objection by the defendant. The plaintiff's obligation to file a claim, in any case, is not triggered until the plaintiff acquires actual knowledge of administration of the decedent's estate, under general principals applicable to all claims. See Section 9100 (claim period). This is noted in the Comment. As a related matter, actions taken in the estate administration before the claim is made should not be affected by the pending action.

What about the situation where notice is given the plaintiff shortly before the estate is to be closed, so that the plaintiff has no opportunity to timely make a claim? The Jeffrey Pop draft (see the Memorandum) would excuse the claim in this situation. But we are not sure how this would work--who would the plaintiff sue after the estate is closed and assets distributed? Maybe a better solution is a general provision to preclude a petition for final distribution until 30 days after the close of the initial four month notification and claim period.

Suppose the plaintiff never receives notice of death. Should the claim requirement be excused? The staff sees no reason to treat this situation any differently from any other creditor of the decedent--we

do our best within reasonable limits to ensure notice. Once that is done, probate administration demands that there be an end to it and that further claims against the estate be barred.

§ 9401. Claim prerequisite to continuing action

9401. An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless a claim is first made as provided in this part.

Comment. Section 9401 restates the first sentence of former Probate Code Section 709 without substantive change. The personal representative must notify creditors, including plaintiffs in actions against the decedent, if the personal representative has actual knowledge of the creditor. Section 9505 (notice required). The creditor has until expiration of specified times after notification within which to make a claim. Section 9100 (claim period).

Note. In a poll of members of the Trust & Estate Planning Section of the Beverly Hills Bar Association, the requirement that a claim be filed for a pending action was opposed. (See Letter from Phyllis Cardoza, April 9, 1986, p. 3, attached to April 1986 Minutes.) In a similar vein, Section 3-804 of the Uniform Probate Code provides: "No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death." The staff believes orderly administration of the estate requires a claim just as much where an action is pending as where it has not yet been brought. See discussion in the memorandum.

The Beverly Hills Bar Association has suggested provisions revolving around the concept of a duty on the personal representative to search records in order to give actual notice to plaintiffs in any pending actions. (See Exhibit 4, pp. 10-11.) They advise that the personal representative should check civil indexes in various counties where the decedent lived or had property for actions and then give notice to any plaintiffs discovered. This seems to the staff to be a burdensome requirement that would not pick up all pending actions anyway. It is also counter to the Commission's concept that the personal representative should give notice to known creditors but should not be required to make a special search for creditors. We have not attempted to incorporate the Beverly Hills proposal in this draft.

§ 9402. Late claim

9402. (a) The court may permit a claim to be made within one year after expiration of the time otherwise provided in this part for making a claim, in the case of a cause of action against the decedent for damages for injury to or death of a person or in the case of an action pending against the decedent for any cause. The court may condition the late claim on terms that are just and equitable, and may appoint or reappoint a personal representative if necessary.

(b) The court order shall be on a hearing after petition by the creditor and notice given pursuant to Section 1200.5. The court may grant the petition if it determines that the claim was not timely made because neither the creditor nor the creditor's attorney had actual knowledge of the decedent's death at least 15 days before expiration of the time otherwise provided in this part for making a claim. The court shall deny the petition if not filed within a reasonable time after the creditor or the creditor's attorney had actual knowledge of the decedent's death.

(c) The court shall not permit a late claim if either of the following has occurred:

(1) A petition for final distribution has been filed.

(2) A preliminary distribution to beneficiaries or a payment to general creditors has been made after expiration of the time otherwise provided in this part for making a claim, and it appears that the making and establishment of the late claim would cause or tend to cause unequal treatment among beneficiaries or creditors.

(d) Property distributed pursuant to court order or a payment properly made before notice of the petition is served on the personal representative is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

Comment. Section 9402 combines the fourth sentence of the first paragraph and the second and third paragraphs of former Probate Code Section 709, which related to late claims in pending actions, with former Probate Code Section 720, which related to late claims involving causes of action not pending. The combination of provisions generally continues former law without substantive change, but does result in a number of changes for purposes of clarification or generalization:

(1) The required notice and hearing is specified rather than being left to the discretion of the court.

(2) The court may impose any appropriate terms on the late filing in the interest of justice and equity, and is not limited to reasonable conditions to avoid unequal treatment between beneficiaries and creditors.

(3) The petition need not be made within one year after a cause of action accrues, so long as the claim is made within one year after the time otherwise required for making claims. Of course, if the statute of limitations on the cause of action has expired, a late claim will be ineffective. See Section 9303 (effect of statute of limitations); see also Code Civ. Proc. § 366.2 (death of person against whom action may be brought).

It should be noted that a petition under this section must be verified. See Section 7251. This section does not apply to certain public entity claims which involve a written notice or request to the public entity and a response time governed by other law. See Sections 9251 (claims governed by other statutes) and 9254 (claim by Director of Health Services).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Claim § 9000

Personal representative § 58

Property § 62

Verification required § 7203

Note. The word "injury" in existing law is subject to different interpretations. At one time, the survival statute referred to actions for "physical" injury and wrongful death; the claim requirement (Prob. Code § 707) was consistent. When the survival statute was revised to permit survival of all causes of action in 1961, the claims statute was revised to refer to "injuries to or death of" a person, omitting "physical." The exception to the claim requirement for "injuries to, or death of, a person" (Prob. Code § 720) was enacted in 1969. In *Estate of Hoertkorn*, 88 Cal. App. 3d 461, 465, 151 Cal. Rptr. 806 (1979), the court reviewed this history and finds that, since the Legislature omitted the qualifier "physical," it did not intend that the exception be limited to personal injuries. The court also notes that "injuries to a person" has been interpreted differently in other contexts.

Should this exception to the claim requirement be limited to personal injuries and wrongful death? It appears that authorities writing before *Hoertkorn* assumed that Section 720 meant personal injuries. See, e.g., *Review of Selected 1969 Code Legislation* 188 (Cal. Cont. Ed. Bar 1969); *Marshall, Suits Against Decedents*, 47 Cal. St. B.J. 588, 590-91 (1972); see also 1 B. Ross & J. Swink, *California Practice Guide: Probate* §§ 8.52, 8.54 (Rutter Group 1986) (describing Section 720 as covering "personal injury" and stating that this includes fraud). The limitation to personal injuries and wrongful death makes some sense. The linkage of "injury" with "death" implies personal injury, not fraud. Once fraud is included within "injury," the rationale of the statute becomes less clear.

On the other hand, one might well ask why personal injury and wrongful death are given preferential treatment over other causes of action. The staff suspects this special provision is political rather than logical.

The Jeffrey Pop draft (see the Memorandum) would change the 15-day period in subdivision (b) to 20 days.

Subdivision (d) protects persons for distributions and payments made before notice of a petition for a late claim. The Jeffrey Pop draft would make an exception if the personal representative had actual knowledge of the creditor and failed to send timely notice. The staff does not believe such an exception is desirable. It undercuts the finality of probate proceedings. Direct remedies against the personal representative are available and preferable. We could add, "Nothing in

this subdivision excuses the personal representative for failure to give timely notice to a creditor when required by Chapter 2 (commencing with Section 9050)".

§ 9403. Claim covered by insurance

9403. (a) An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued under Section 377.310 of the Code of Civil Procedure, and a judgment in the action may be enforced, without first making a claim as provided in this part.

(b) An action to establish the decedent's liability for damages outside the limits or coverage of the insurance may not be commenced or continued under Section 377.310 of the Code of Civil Procedure unless a claim is first made as provided in this part.

(c) An insurer defending an action under Section 377.310 shall make a claim as provided in this part if the insurer seeks reimbursement under the insurance contract for any liability of the decedent, including but not limited to deductible amounts in the insurance coverage and costs and attorney's fees. Failure to make a claim is a waiver of reimbursement under the insurance contract for any liability of the decedent.

Comment. Section 9403 replaces part of the first sentence of subdivision (b) of former Probate Code Section 707, the third sentence of former Probate Code Section 709, part of former Probate Code Section 709.1, and subdivision (a) of former Probate Code Section 721. Section 9403, in conjunction with Code of Civil Procedure Section 377.310, makes the following significant changes in the former scheme:

(1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.

(2) Court approval is not required before the plaintiff may commence an action against the estate for the insured amount.

(3) The estate of the decedent need not otherwise qualify for treatment under Section 13100 *et seq.* (affidavit procedure for collection or transfer of personal property).

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.

(5) The new provisions excuse a claim in probate only where the plaintiff is proceeding under Code of Civil Procedure Section 377.310, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent.

Nothing in Section 9403 affects any applicable statutes of limitation relating to the action. Cf. Code Civ. Proc. §§ 366.2; 377.320.

CROSS-REFERENCES

Definitions

Claim § 9000

Note. The Pop draft from which subdivision (c) is drawn includes a requirement that the insurer both make a timely claim under the general claim provisions and serve a copy of it on the plaintiff. The staff does not see the point of service on the plaintiff, and has omitted this provision from the draft.

§ 9404. Enforcement of security interest

9404. The holder of a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, may bring an action to enforce the lien against the property that is subject to the lien, without first making a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate.

Comment. Section 9404 restates subdivisions (b) and (c) of former Probate Code Section 716, omitting the provision relating to attorney's fees.

CROSS-REFERENCES

Definitions

Claim § 9000

Property § 62

Note. In a May 9, 1986, letter from Michael J. Harrington, the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association suggests that existing language be deleted that states, "no counsel fees shall be recovered in the action unless the claim was filed or presented." The rationale is that attorney's fees should be available only if so provided in the instrument and should have nothing to do with whether a claim is presented. The staff agrees with this observation and has removed the offending language from the draft. Attorney fees, if provided in the contract, should be recoverable out of security without a claim.

§ 9405. Claim tolls statute of limitations

9405. The making of a claim tolls the statute of limitations applicable to the claim.

Comment. Section 9405 is new. It reverses the case law rule that a claim does not toll the statute of limitations. See, e.g., Nally v. McDonald, 66 Cal. 530, 6 P. 390 (1885). An action on a claim that is

rejected by the personal representative must be brought within three months. Section 9307 (action on rejected claim).

Note. If adopted, this provision will be relocated to a more appropriate place in the statutes. The statutes will also be revised to preclude the creditor from bring an action until the claim is rejected or 30 days has expired without either acceptance or rejection.

Exhibit 4

CONFORMING CHANGES

Outline

Civil Code

Civil Code § 954 (amended). Things in action
Civil Code § 1363 (amended). Association to manage common interest
development
Civil Code § 3294 (amended). Exemplary damages

Code of Civil Procedure

Code of Civil Procedure § 353 (repealed). Statute of limitations
Code of Civil Procedure § 353.5 (repealed). Statute of limitations
Code of Civil Procedure §§ 367-390:

TITLE 3. PARTIES TO CIVIL ACTIONS

Chapter 1. General Provisions (heading added)

§ 367. Real party in interest (amended)
§ 368. Assignment of thing in action (unchanged)
§ 368.5. Transfer of interest in pending action (added)
§ 369. Fiduciaries (amended)
§ 369.5. Partnership or association (added)
§ 369.9. Action against board of fire commissioners (added)

Chapter 2. Married Person (heading added)

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

Chapter 3. Disability of Party (heading added)

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

Chapter 4. Death of Party (heading added)

§§ 377.110-377.550. Death of Party (see Exhibit 1)

Chapter 5. Permissive Joinder (heading added)

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

Chapter 6. Interpleader (heading added)

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

Chapter 7. Intervention (heading added)

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

Chapter 8. Compulsory Joinder (heading added)

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

Probate Code

Probate Code § 13554 (amended). Enforcement of liability

Civil Code

Civil Code § 954 (amended). Things in action

SEC. . Section 954 of the Civil Code is amended to read:

954. ~~TRANSFER AND SURVIVORSHIP.~~ A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. ~~Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in interest.~~

Comment. Section 954 is amended to delete the sentence relating to survivorship. This sentence is restated in Code of Civil Procedure Section 377.120 (parties) without substantive change.

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

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

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

(b) 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.

(c) 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.

Civil Code § 3294 (amended). Exemplary damages

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

3294. (a) In an action for the breach of an obligation not arising from contract, where 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 conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.

(2) "Oppression" means subjecting 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 ~~377.430~~ of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

Comment. Section 3294 is amended to correct section references.

Code of Civil Procedure

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

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

~~353.--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 his representatives, after the expiration of that time, and within six months from his death.--If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, or an action against the estate provided for by subdivision (b) of Section 385 of the Code of Civil Procedure, subdivision (b) of Section 707 of the Probate Code or Section 721 of the Probate Code may be commenced within one year after the expiration of the time otherwise limited for the commencement thereof.~~

Comment. The first sentence of former Section 353 is restated in Sections 366.1 (death of person entitled to bring action) and 377.120(a) (parties) without substantive change. The second sentence

is restated in Sections 366.2 (death of person against whom action may be brought), 377.320 (statute of limitations), and 377.120(b) (parties), without substantive change.

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

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

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

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

Code of Civil Procedure § 367 (chapter heading). General provisions

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

CHAPTER 1. GENERAL PROVISIONS

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

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

367. Every action must be prosecuted in the name of the real party in interest, except as 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 Sections 369 (fiduciaries), 377.310-377.340 (liability insurance), Civil Code § 1363 (association to manage common interest development).

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

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

368.5. An action or proceeding does not abate by the transfer of an interest in the action or proceeding. 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 a portion of former Section 385(a) without substantive change.

Code of Civil Procedure § 369 (amended). Fiduciaries

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

369. ~~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~~ as a party the persons for whose benefit the action is prosecuted.:

(a) A personal representative.

(b) A trustee of an express trust.

(c) 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.~~

(d) Any other person expressly authorized by statute.

Comment. Section 369 is amended for purposes of reorganization and terminology. The changes are technical and not substantive. Cf. Prob. Code §§ 58 ("personal representative" defined), 82 ("trust" defined), 84 ("trustee" defined).

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

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

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

(b) A member of a 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 on behalf of the unincorporated association, a judgment against the member based on the member's personal liability may be obtained in the action, whether the liability is joint, joint and several, or several.

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

Code of Civil Procedure § 369.9 (added). Action against board of fire commissioners

SEC. . Section 369.9 is added to the Code of Civil Procedure, to read:

369.9. 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. Section 369.9 continues former Section 390 without change.

Note. The continued need for this section is under review.

Code of Civil Procedure § 370 (chapter heading). Married person

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

CHAPTER 2. MARRIED PERSON

Code of Civil Procedure § 372 (chapter heading). Disability of party

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

CHAPTER 3. DISABILITY OF PARTY

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

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

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

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

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

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

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

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

Code of Civil Procedure § 374 (added). Effect of disability on
pending action

SEC. . Section 374 is added to the Code of Civil Procedure, to read:

374. 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 or successor in interest.

Comment. Section 374 restates a portion of former Section 385(a), but makes clear that substitution of parties is mandatory rather than permissive.

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

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

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

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

(c) The father of an illegitimate child who maintains 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 action may be maintained against the person causing the injury. If any other person is responsible for any such 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 injury as to damages accruing before his or her 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 an action maintained after the death of the child or ward or against the ~~executor--or--administrator~~ personal representative of the person causing the injury, the damages recoverable ~~shall be~~ are as provided in Section 573 of the Probate Code 377.520.

(h) If an action arising out of the same wrongful act or neglect may be maintained pursuant to Section 377 377.410 for wrongful death of ~~any such a~~ a child described in this section, the action authorized by this section shall be consolidated therewith for trial on motion of any an interested party.

Comment. Section 376 is revised to correct cross-references and to add subdivision letters to the existing paragraphs. The other revisions are technical and make no substantive change.

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

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

~~377.---(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against~~

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

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

~~(1) 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 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) 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 provision of law.~~

Comment. Subdivision (b) and the first portion of the first sentence of subdivision (a) of former Section 377 are restated in Section 377.410 (parties) without substantive change. The last portion

of the first sentence of subdivision (a) is superseded by Sections 377.110 (survival of cause of action) and 377.120(b) (parties). The second sentence of subdivision (a) is superseded by Sections 377.410 (parties), 377.110 (survival of cause of action), and 377.120(b) (parties). The third and fourth sentences of subdivision (a) are restated in Section 377.420 (damages) without substantive change. The fifth and sixth sentences of subdivision (a) are restated in Section 377.430 (joinder and consolidation of actions) without substantive change.

Code of Civil Procedure § 378 (chapter heading). Permissive joinder

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

CHAPTER 5. PERMISSIVE JOINDER

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

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

~~385. (a) 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.~~

~~(b) In the case of an action for injury to or for the death of a person caused by the wrongful act or neglect of the defendant, and the defendant dies after the commencement of the action, the action may be continued, against the decedent as the original party defendant without the appointment of a representative or successor in interest, if the decedent had liability insurance applicable to the cause of action, the amount of damages sought in the action does not exceed the maximum amount of such insurance, or recovery of excess thereof is waived, and the estate of the decedent otherwise qualifies for summary probate proceedings pursuant to Part 1 (commencing with Section 13000) of Division 8 of the Probate Code. No action may be continued under this subdivision unless the insurer has been served with the complaint filed~~

~~in the action. For good cause, the court, upon motion of an interested person or upon its own motion, may order the appointment of a personal representative and his substitution as the defendant.~~

Comment. Subdivision (a) of former Section 385 is restated in Sections 368.5 (transfer of interest in pending action), 374 (effect of disability on pending action), and 377.210 (continuation of action).

The material formerly set out in subdivision (b) is replaced by Sections 377.310-377.350 (liability insurance).

Code of Civil Procedure § 386 (chapter heading). Interpleader

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

CHAPTER 6. INTERPLEADER

Code of Civil Procedure § 387 (chapter heading). Intervention

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

CHAPTER 7. INTERVENTION

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

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

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

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

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

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

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

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

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

Code of Civil Procedure § 389 (chapter heading). Compulsory joinder

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

CHAPTER 8. COMPULSORY JOINDER

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

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

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

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

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

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

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

Comment. Former Section 390 is continued in Section 369.9 without change.

Probate Code

Probate Code § 13554 (amended). Enforcement of liability

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

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

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

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

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

(b) The limitations period otherwise applicable.

Comment. Subdivision (c) of Section 13554 restates former Code of Civil Procedure Section 353.5 without substantive change. See also Code Civ. Proc. § 377.110 (survival of cause of action); Prob. Code § 78 ("surviving spouse" defined).

Note. Mr. Melvin Wilson has suggested that the four-month limit continued in subdivision (c) of the draft be extended to one year. Wilson, Decedents Estates: Synopsis of 1975 Changes in the

Administration of Community Property, at 42 (mimeo). He justifies this suggestion as follows:

The additional eight months would provide sufficient time to permit a personal representative to be appointed, publish notice to creditors, allow the four-month claim period to run, ascertain the nature and extent of claims, file a petition for apportionment under Probate Code § 980, and apportion claims. The additional period is also necessary to preserve the representative's right to contribution from the surviving spouse during a period reasonably necessary to accomplish these tasks. This solution seems advantageous to the surviving spouse because it eliminates the necessity for dilatory creditors seeking to preserve their claims to file panic suits before there has been a reasonable opportunity to apportion and pay uncontested debts.

Exhibit 5Comments to Repealed Probate Code Sections§ 573 (repealed). Survival of actions; continuation against personal representative

Comment. The first paragraph of former Probate Code Section 573 is restated in Code of Civil Procedure Sections 377.110(a) (survival of cause of action) and 377.120 (parties) without substantive change.

The second and third paragraphs are restated and generalized in Code of Civil Procedure Section 377.510 (damages recoverable).

The fourth paragraph is restated in Code of Civil Procedure 377.110(b) (survival of cause of action) without substantive change.

The last paragraph is restated in Code of Civil Procedure Section 377.130 (assignability of things in action) without substantive change.

* * * * *

§ 577 (repealed). Parties; executors who have not qualified

Comment. Former Probate Code Section 577 is restated in Probate Code Section 377.530 (personal representative for whom no letters issued) and broadened to apply administrators as well as executors.

* * * * *

§ 707 (repealed). Claim requirement

Comment.

Subdivision (b) is replaced by Code of Civil Procedure Sections 377.310-377.350 (liability insurance) and Probate Code Section 9403 (claim covered by insurance).

* * * * *

§ 709 (repealed). Claim pending against decedent

Comment. The first sentence of former Probate Code Section 709 is restated in Probate Code Section 9401 (claim prerequisite to continuing action) without substantive change. The second sentence is restated in Code of Civil Procedure Section 377.220(b) (parties) without substantive change. The third sentence is replaced by Code of Civil Procedure Sections 377.310-377.350 (liability insurance) and Probate Code Section 9403 (claim covered by insurance).

The fourth sentence of the first paragraph and the second and third paragraphs of former Probate Code Section 709 are restated in Probate Code Section 9402 (late claim), with clarifying and generalizing changes made to combine it with former Probate Code Section 720.

§ 709.1 (repealed). Continuance of pending action against estate

Comment. Former Probate Code Section 709.1 is replaced by Code of Civil Procedure Sections 377.310-377.350 (liability insurance) and Probate Code Section 9403 (claim covered by insurance).

* * * * *

§ 716. Claim as prerequisite to action; enforcement of lien

Comment. Subdivision (a) of former Section 716 is restated in Probate Code Section 9400 (claim prerequisite to bringing action) without substantive change.

Subdivisions (b) and (c) are restated in Probate Code Section 9404 (enforcement of security interest), omitting the provision relating to attorney's fees.

* * * * *

§ 720 (repealed). Claims for damages for injury or death where no action pending

Comment. Former Probate Code Section 720 is restated in Probate Code Section 9402 (late claim) with clarifying and generalizing changes made to combine it with former Probate Code Section 709.

§ 721 (repealed). Claim for liability covered by liability insurance

Comment. Former Probate Code Section 721 is replaced by Code of Civil Procedure Sections 377.310-377.350 (liability insurance) and Probate Code Section 9403 (claim covered by insurance).