

Memorandum 92-10

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

The Commission's omnibus probate bill, SB 1496, contains the Commission recommendation on *Litigation Involving Decedents*. The bill would repeal the provision on who may sue for wrongful death (Code Civ. Proc. § 377), and reenact it as Section 377.60. A recent case (discussed below) on the effect of homicide on the killer's right to sue suggests amendments to Section 377.60 are needed. As presently drafted in SB 1496, Section 377.60 reads:

377.60. A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The persons, including the surviving spouse, who would be entitled under the statutes of intestate succession to the property of the decedent.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

AMENDMENTS RECOMMENDED BY STAFF

Effect of Homicide on Right to Sue for Wrongful Death

In *Marks v. Lyerla*, 1 Cal. App. 4th 556 (1991), the paternal grandmother of an allegedly murdered 15-month-old child sued the child's mother (ex-wife of her deceased son) for wrongful death of the child. The court held the grandmother lacked standing.

The case was decided under existing Section 377, which permits suit by takers under "Part 2 (commencing with Section 6400) of Division 6 of the Probate Code." But for the homicide, the mother would be the child's sole heir. But Probate Code Section 250 provides that one who

feloniously and intentionally kills the decedent may not inherit from the victim. The court noted that Section 250 is not located in "Part 2 (commencing with Section 6400) of Division 6" referred to in Section 377, and held that therefore Section 250 does not affect the question of who may sue for wrongful death.

This problem was caused inadvertently by a conforming revision in a 1983 Commission bill when the intestate succession statute was split out and put in a different part of the code from the statute on effect of homicide. The problem may be cured by the fact that Section 377.60 in SB 1496 does not refer to specific sections of intestate succession law. We should make clear that a murdering heir is disqualified from suing for wrongful death by adding a new Section 258 to the Probate Code as set out below.

May Decedent's Issue Join in Suing When There is a Surviving Spouse?

If decedent leaves a surviving spouse and issue and the estate is entirely community property, only the surviving spouse takes decedent's property. Prob. Code § 6401. Arguably, this might limit wrongful death recovery to the surviving spouse, excluding children and more remote issue. The statute, however, has not been so construed.

In *Fiske v. Wilkie*, 67 Cal. App. 2d 440, 444, 154 P.2d 725 (1945), the court said that, as used in the wrongful death statute, "heirs" means those who can inherit from the decedent generally, not limited to the person who would take community property (the surviving spouse). Thus, the fact that decedent leaves a surviving spouse does not prevent decedent's issue from recovering damages.

Subdivision (a) of Section 377.60 would be clearer, and would conform to the *Fiske* case, if revised to say a wrongful death action may be brought by decedent's surviving spouse, children, and issue of deceased children, or, if none, by those who would take by intestacy, as set out below.

Staff Recommendation

The staff recommends amending Section 377.60 in SB 1496, and adding a new Section 258 to the Probate Code, as follows:

Code Civ. Proc. 377.60 (amended). Parties in wrongful death action

377.60. 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 decedent's surviving spouse, children, and issue of deceased children, or, if none, the persons, including the surviving spouse, who would be entitled under the statutes of intestate succession to the property of the decedent by intestate succession.

. . . .

Comment. Section 377.60 restates subdivision (b) and the first part of the first sentence of subdivision (a) of former Section 377 without substantive change.

Unlike former Section 377, subdivision (a) refers specifically to decedent's children and issue of deceased children, in addition to the surviving spouse. This codifies Fiske v. Wilkie, 67 Cal. App. 2d 440, 444, 154 P.2d 725 (1945). Under Section 258 of the Probate Code, Section 377.60 is subject to the rules relating to effect of homicide. This changes the rule of Marks v. Lyerla, 1 Cal. App. 4th 556, ??? Cal. Rptr. ??? (1991).

. . . .

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

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

Comment. Section 258 is new and changes the rule of Marks v. Lyerla, 1 Cal. App. 4th 556, ??? Cal. Rptr. ??? (1991). See also Code Civ. Proc. § 377.60 (persons who may sue for wrongful death).

AMENDMENTS NOT RECOMMENDED BY STAFF

U. S. Law Generally

Section 377.60 is generally consistent with the law in other states as summarized in Exhibit 1. All states permit a wrongful death action to be brought by close relatives, or by decedent's personal representative for the benefit of close relatives. These close relatives always include the surviving spouse, usually include children, and often include parents, issue of children, and brothers and sisters of the decedent, or, if none, more remote relatives.

California, Idaho, and Washington expressly include stepchildren. California, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, and West Virginia require actual dependency on the decedent for certain beneficiaries, especially for relatives more remote than the surviving spouse and children, and, in Hawaii, for nonrelatives.

To prevail in a wrongful death action, plaintiff must show pecuniary loss (usually loss of support), in addition to being in the statutorily described class. 6 B. Witkin, *Summary of California Law Torts* § 1197, at 632, § 1213, at 649 (9th ed. 1988). It will usually be difficult for remote relatives not in decedent's household to show pecuniary loss. This mitigates possible mischief from allowing remote relatives to sue.

Some states award damages in fixed shares, either as a statutory share or in the same proportions as beneficiaries take by intestacy (Georgia, Kentucky, Maine, Massachusetts, New Jersey, North Carolina, Pennsylvania, Rhode Island, and South Carolina). Other states apportion damages among eligible beneficiaries according to their respective losses (Hawaii, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, New York, North Dakota, Ohio, Oregon, South Dakota, Texas, Virginia, and West Virginia). Connecticut and Michigan permit damages to go to devisees under decedent's will. Florida, Mississippi, Montana, and New Hampshire provide that damages go into decedent's estate.

After reviewing the law in other states, the staff does not propose any revisions of Section 377.60 other than those discussed above. The Legislature has been active in this field (see, e.g., *Review of Selected 1975 California Legislation*, in 7 Pac. L.J. 237, 562-65 (1976)), and it has highly-charged political implications.

Effect of Disclaimer

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

The staff would not change this rule. Although the staff has been unable to find any case from another state directly on point, it is the general rule in other states that, if a party entitled to sue fails to do so, the right does not pass to those next in line in the absence of a statute so providing. 2 S. Speiser, *Recovery for Wrongful Death* 2d § 11.39, at 244-47 (1975). The reason given is that the cause of action for wrongful death accrues immediately on decedent's death, and exists for the exclusive benefit of the beneficiary in whom it vests. *Id.* This reasoning supports the conclusion that a disclaimer cannot pass a right of action for wrongful death to other beneficiaries, since a disclaimer is made after decedent's death when the cause of action has already accrued.

Respectfully submitted,

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STATE STATUTES: WHO MAY BRING ACTION FOR WRONGFUL DEATH
(This summary is taken from 2 S. Speiser, Recovery for
Wrongful Death 2d, Appendix A (1975 & 1990 Cum. Supp.))

Alabama: For wrongful death of an adult, by personal representative. For wrongful death of a minor, by father or mother. If father and mother both are dead, decline to bring the action, or fail to do so within six months after death, by the minor's personal representative. Ala. Code §§ 6-5-391, 6-5-410.

Alaska: By personal representative. Damages are exclusively for the benefit of decedent's spouse and children, or, if none, other dependents. Alaska Code Civ. Proc. § 09.55.580.

Arizona: For wrongful death of an adult, by the surviving spouse or personal representative on behalf of the surviving spouse, children, or parents, or, if none of these survive, on behalf of decedent's estate. For a minor, by either parent or by the guardian. Ariz. Rev. Stat. Ann. § 12-612.

Arkansas: By personal representative or, if none, by heirs at law, on behalf of surviving spouse, children, parents, brothers and sisters, persons standing in loco parentis to deceased, and persons to whom deceased stood in loco parentis. Ark. Stat. Ann. § 16-62-102.

California: By heirs or personal representatives. "Heirs" means (1) those entitled to succeed to decedent's property under Probate Code §§ 6400-6414; (2) if dependent on decedent, the putative spouse, children of putative spouse, stepchildren, and parents; and (3) if dependent on decedent for half or more of their support, minors resident in decedent's household for 180 days before death. Code Civ. Proc. § 377. When death is caused by decedent's employer, by personal representative on behalf of surviving spouse, children, dependent parents, and dependent brothers and sisters, in this order of preference. Lab. Code § 2803.

Colorado: In first year after wrongful death of an adult, by surviving spouse or, on written election of the surviving spouse, by the surviving spouse and heirs, or by heirs. If no surviving spouse, by heirs. In second year after wrongful death of an adult, by surviving spouse and heirs, or by surviving spouse or heirs. For wrongful death of an unmarried adult or minor without descendants, father and mother may join, and each has an equal interest in judgment. Colo. Rev. Stat. § 13-21-201.

Connecticut: By personal representative. Damages distributed as provided in decedent's will, or, if none, as intestate property. Conn. Gen. Stat. Ann. §§ 45-280, 52-555.

Delaware: By personal representative. Del. Code Ann. tit. 10 § 3701.

District of Columbia: By personal representative on behalf of spouse and next of kin. D.C. Code Ann. §§ 16-2701, 16-2702.

Florida: By personal representative on behalf of decedent's estate, and of surviving spouse, minor children (including mother's child born out of wedlock, and, if father has recognized responsibility for child's support, father's child born out of wedlock), parents, and, if dependent on decedent, blood relatives and adoptive brothers and sisters. Fla. Stat. Ann. §§ 768.19, 768.20.

Georgia: For wrongful death of spouse or parent, by the surviving spouse, or, if none, by children. The surviving spouse is entitled to not less than one-fourth of the damages, and holds the rest for children per capita and descendants of children per stirpes. Ga. Code Ann. § 105-13002 (19xx). For wrongful death of an unmarried child without issue, by the mother, or, if no mother, by the father. Ga. Code Ann. §§ 105-1307, 74-108.

Hawaii: By legal representative or surviving spouse, children, father, mother, and any person dependent on decedent. Jury allocates damages among those entitled. Hawaii Rev. Stat. § 663-3.

Idaho: By heirs or personal representatives. "Heirs" means those entitled to succeed to decedent's property under Idaho Code § 15-1-201(21), spouse, children (including the mother's illegitimate child, and, if the father has recognized a responsibility for the child's support, the father's illegitimate child), stepchildren, parents, and, if dependent on decedent, blood relatives and adoptive brothers and sisters. Idaho Code § 5-311.

Illinois: By personal representatives for benefit of surviving spouse and next of kin. Damages allocated by court according to ratio of percentage dependency of each person on decedent to sum of percentages of dependency of all persons on decedent. Ill. Ann. Stat. ch. 70, § 2.

Indiana: For wrongful death of an adult, by personal representative for benefit of surviving spouse, and of dependent children, if any, or if none, of dependent next of kin. For wrongful death of an unmarried child under 20 (under 23 if a student), by the custodial parent, custodial grandparent, or guardian. For death of a child, damages include loss of the child's love, companionship, and services, and is computed to the time when the child would have reached age 20 (23 if a student) or the date of the last surviving parent's death, whichever would have occurred first. Ind. Code Ann. §§ 34-1-1-2, 34-1-1-8.

Iowa: By administrator, surviving spouse, or children. Court apportions damages among surviving spouse and children consistent with loss of services and support. Iowa Code Ann. §§ 613.15, 633.336. For wrongful death of a minor child, by the parents. Damages include loss of services, companionship, and society. Iowa R. Civ. Proc., Rule 8.

Kansas: By heirs at law. Damages include mental anguish, suffering, or bereavement, loss of society, companionship, comfort, or protection, loss of marital care, attention, advice, or counsel, loss of filial care or attention, loss of parental care, training, guidance, or education, and reasonable funeral expenses. Court apportions damages among heirs. Kan. Stat. Ann. §§ 60-1902, 60-1903, 60-1905.

Kentucky: By personal representative for benefit of kindred of decedent in the following order: If decedent leaves surviving spouse and no children, all to surviving spouse. If decedent leaves children but no surviving spouse, all to children. If decedent leaves surviving spouse and children, half to surviving spouse and half to children. If decedent leaves neither surviving spouse nor children, to parents (including adoptive parents); if no parent survives, to decedent's estate to pass to kindred under intestate succession law. If decedent is a minor child, parents' damages include loss of affection and companionship. Ky. Const. § 241; Ky. Rev. Stat. Ann. §§ 411.130, 411.135.

Louisiana: By surviving spouse and children. If none, by parents. If none, by brothers and sisters. La. Civ. Code Ann., art. 2315.2.

Maine: By personal representative for benefit of surviving spouse and children, half to surviving spouse and half to children if both survive. If none survive, for heirs. Damages include loss of comfort, society, and companionship. Me. Rev. Stat. Ann. tit. 18-A, § 2-804.

Maryland: By personal representative for benefit of surviving spouse, parents, and children. If none, for any person related to decedent by blood or marriage who was wholly dependent on decedent. Damages apportioned among all eligible beneficiaries. Md. Cts. & Jud. Proc. Code Ann. § 3-904.

Massachusetts: By personal representative for benefit of surviving spouse and children, one-third to surviving spouse and two-thirds to children, or, if only one child or issue of one deceased child survives, half to surviving spouse and half to child or issue. If none survive, to next of kin. Damages include loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice. Mass. Gen. Laws Ann. ch. 229, §§ 1, 2.

Michigan: By personal representative for benefit of decedent's surviving spouse, children, descendants, parents, grandparents, and brothers and sisters; if none survive, to those who would inherit if decedent died intestate; for children of decedent's spouse; for devisees under decedent's will; and for beneficiaries of a living trust if decedent's will made a devise to that trust. Damages apportioned according to respective injury. Damages include loss of financial support, society, and companionship. Mich. Stat. Ann. § 600.2922.

Minnesota: By court-appointed trustee for benefit of surviving spouse and next of kin, proportionate to pecuniary loss suffered by each. Minn. Stat. Ann. § 573.02.

Mississippi: By personal representative, surviving spouse, parent, child, brother, or sister. Damages for wrongful death of a married person go equally to surviving spouse and children. If none, to parents and brothers and sisters. If none, to personal representative. Miss. Code Ann. § 11-7-13.

Missouri: By spouse, children, or parents. If none, by brother, sister, or their descendants. If none, by court-appointed plaintiff ad litem for benefit of those who would take under laws of descent. Damages include pecuniary losses, reasonable value of services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support. Mo. Rev. Stat. §§ 537.080, 537.090, 537.095.

Montana: By personal representative for benefit of the estate. Mont. Code Ann. § 27-1-513.

Nebraska: By personal representative for benefit of surviving spouse and next of kin. Damages apportioned according to pecuniary losses suffered by each. Neb. Rev. Stat. § 30-810.

Nevada: By personal representatives and heirs who would inherit decedent's separate property. Each such person may recover damages for grief, sorrow, loss of probable support, companionship, society, comfort, and consortium, and for pain, suffering, or disfigurement of decedent. Nev. Rev. Stat. § 41.085.

New Hampshire: By administrator for benefit of the estate. No limitation on damages if decedent leaves surviving spouse, child, parent, or dependent relative; otherwise, damages may not exceed \$50,000. N.H. Rev. Stat. Ann. §§ 556:10, 556:12-556:14.

New Jersey: By personal representative or administrator ad prosequendum for benefit of those entitled to take any intestate property of decedent in the same proportion which they would take. N.J. Stat. Ann. §§ 2A:31-2, 2A:31-4.

New Mexico: By personal representative for benefit of surviving spouse, children, and children of deceased children by right of representation (for wrongful death of an unmarried minor child without children, to parents). If none, to brothers and sisters; if none, to intestate takers. N.M. Stat. Ann. § 41-2-3.

New York: By personal representative for benefit of distributees of decedent's estate. Damages apportioned according to pecuniary injury suffered by each. N.Y. Est. Powers & Trusts Law §§ 5-4.1, 5-4.4.

North Carolina: By personal representative for benefit of intestate takers. N.C. Gen. Stat. § 28A-18-2.

North Dakota: By the following in the order listed: surviving spouse, children, parents, and personal representative. If a person entitled to bring the action fails to do so for 30 days after demand of the person next in order, the latter may bring the action. Action is for the benefit of heirs at law in such shares as the judge shall fix in the judgment. N.D. Cent. Code § 32-21-03, 32-21-04.

Ohio: By personal representative for benefit of surviving spouse, children, parents, and other next of kin. Damages apportioned according to pecuniary injury of each. Damages include loss of support, services, society, companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, loss of prospective inheritance, and mental anguish. Ohio Rev. Code Ann. § 2125.02.

Oklahoma: By personal representative for benefit of surviving spouse, children, and next of kin. Damages include loss of consortium and grief of surviving spouse, mental pain and anguish of decedent (which goes to surviving spouse and children, or if none, to next of kin in the same proportion as decedent's personal property), pecuniary loss to surviving spouse, children, and next of kin, and grief and loss of companionship to decedent's children and parents. Okla. Stat. Ann. tit. 12 §§ 1053, 1055.

Oregon: By personal representative for benefit of surviving spouse, children, parents, and those who would inherit decedent's personal property by intestate succession. Damages include decedent's disability, pain, suffering, and loss of income, pecuniary loss to decedent's estate, and pecuniary loss, loss of society, companionship, and services for spouse, children, and parents. Court apportions damages according to each beneficiary's loss. Or. Rev. Stat. §§ 30.020, 30.050.

Pennsylvania: By surviving spouse, children, or parents, or if none, by personal representative. Damages distributed to surviving spouse, children, and parents in same proportion as personal property of intestate decedent. 42 Pa. Cons. Stat. Ann. § 8301.

Rhode Island: By personal representative for benefit of surviving spouse, children, and next of kin. If spouse and children survive, damages go half to spouse and half to children. If neither spouse nor children survive, all to next of kin in same proportion as personal property of intestate decedent. R.I. Gen. Laws § 10-7-2.

South Carolina: By personal representative for benefit of surviving spouse and children, or if none, parents, or if none, heirs at law or distributees. Damages are divided in the same proportion as intestate shares of those eligible. S.C. Code Ann. §§ 15-51-20, 15-51-40.

South Dakota: By personal representative for benefit of surviving spouse and children, or if none, parents and next of kin. Damages apportioned by court as fair and equitable, considering age and condition of beneficiaries and law of intestate succession. S.D. Codified Laws Ann. §§ 21-5-5, 21-5-8.

Tennessee: By surviving spouse, or if none, by children or next of kin or personal representative for benefit of surviving spouse or next of kin; or to natural parents or next of kin if decedent was in parents' custody; or to adoptive parents. Tenn. Code Ann. § 20-5-106.

Texas: By surviving spouse, children or parents for the benefit of all. If none of these commence an action within three months, personal representative shall do so unless requested not to by all parties. Jury apportions damages among those entitled. Tex. Civ. Proc. Code §§ 71.004, 71.010.

Utah: For wrongful death of an adult, by heirs or by personal representatives for benefit of heirs. For wrongful death of a minor child, by parent or guardian. Utah Code Ann. § 78-11-6, 78-11-7.

Vermont: By personal representative for benefit of surviving spouse and next of kin. If decedent is survived by spouse but no children, all damages go to spouse. Vt. Stat. Ann. tit. 14, § 1492.

Virginia: By personal representative. Jury apportions damages to surviving spouse, children, and grandchildren; if none, to parents, brothers, and sisters. Damages may include sorrow, mental anguish, solace, society, companionship, comfort, guidance, kindly offices, advice, loss of income of decedent, and services, protection, care, and assistance provided by decedent. Va. Code §§ 8-634, 8-636.1, 8-638.

Washington: For wrongful death of an adult, by personal representative for benefit of surviving spouse, children, and stepchildren. If none, for parents, sisters, and brothers dependent on decedent for support. For wrongful death of a minor child, by parents. Wash. Rev. Code Ann. §§ 4.20.010, 4.20.020, 4.24.010.

West Virginia: By personal representative. General damages not exceeding \$10,000 apportioned to those who would take by intestacy. Additional damages not exceeding \$100,000 for pecuniary loss by intestate takers dependent on decedent. W. Va. Code § 55-7-6.

Wisconsin: By personal representative or by person to whom amount recovered belongs. If spouse and minor children survive, court may set aside not more than half for children. If no minor children, all to spouse. If no spouse, to decedent's lineal heirs. If none, to brothers and sisters. Damages are for pecuniary injury without limitation on amount. Additional damages not exceeding \$50,000 for loss of society and companionship may be awarded to spouse, children, and parents. Wis. Stat. Ann. § 895.04.

Wyoming: By personal representative. Wyo. Stat. § 1-38-102.