Study L-3016.01 October 24, 1995

Memorandum 95-60

Standing of Parents To Sue for Wrongful Death of Their Child

Attorney Albert Abramson of San Francisco writes that Commission-recommended legislation in 1992 inadvertently restricted the ability of parents to sue for wrongful death of their child. A copy of his letter is attached.

Before 1992, former Section 377 of the Code of Civil Procedure gave standing in wrongful death cases to the "persons who would be entitled to succeed to the property of the decedent" by intestate succession. The 1992 revision gave standing to "decedent's surviving spouse, children, and issue of deceased children, or, if none," to those who would take by intestate succession. Code Civ. Proc. § 377.60. The purpose of the 1992 revision was to make clear that decedent's children had standing, even if decedent was married and the estate was entirely community property, in which case the children would take nothing by intestate succession. It codified Fiske v. Wilkie, 67 Cal. App. 2d 440, 154 P.2d 725 (1945), which construed the wrongful death statute broadly to permit suit by those capable of inheriting from the decedent generally, without regard to the actual nature of the property in the estate.

The problem for parents is caused by the words "if none." The effect of the "if none" language is that non-dependent parents do not have standing if the decedent is survived by a spouse but no children, despite the fact that parents would take a share of decedent's separate property, if any. Prob. Code §§ 6401(c), 6402(b). (Dependent parents have standing under subdivision (b) of Section 377.60 of the Code of Civil Procedure.) Before 1992, the *Fiske* rationale would presumably have applied to parents, so that, if the decedent was survived by a spouse but no children, parents would have had standing because they would be capable of inheriting from their child generally, without regard to the actual nature of the property in the estate.

History of 1992 Revision

The Comment to the 1992 revision says it was to codify *Fiske*, and not to make other substantive revisions. The revised standing language was amended into the Commission's 1992 probate bill (SB 1496 by the Senate Committee on

Judiciary) without a tentative recommendation having first been circulated. As summarized in a 1992 staff memorandum (92-10), the revised language was drawn from the law of 14 other states, which permitted parents to recover for wrongful death only if the decedent was not survived either by a spouse or issue, using "if none" language like that now in the California statute. Twelve states permitted parents to recover for wrongful death of a minor or adult child without other qualification. Three states permitted parents to recover for wrongful death of a minor child without other qualification. One state permitted parents to recover for wrongful death of a minor child only if they had custody of the child. One state permitted parents to recover for wrongful death of a child only if the parents were dependent on the child.

After the revised standing language was amended into the bill, Senator Lockyer, then Chair of the Senate Judiciary Committee and a member of the Law Revision Commission, suggested that it should be removed from the bill and circulated for review and comment. As a result, the staff prepared amendments to remove the revised language from the bill, and to restore the original language in the bill as introduced. The original language would have given standing to the "persons, including the surviving spouse, who would be entitled under the statutes of intestate succession to the property of the decedent."

The staff sent to the Senate Judiciary Committee staff a draft of amendments to delete the revised language from the bill and to restore the language in the bill as introduced. The staff also prepared a tentative recommendation with the revised language for circulation to interested groups, including, as noted in another 1992 staff memorandum (92-27), those most directly affected — the California Trial Lawyers Association (now the Consumer Attorneys of California) and California Defense Counsel. But the Senate Judiciary Committee moved the bill forward without removing the revised language with the problematic "if none" clause. The Consumer Attorneys of California and California Defense Counsel did not receive a tentative recommendation for review. The adverse effect of the revision on standing of parents was not identified in Commission materials or in legislative committee analyses.

Policy Considerations

The purpose of standing rules for wrongful death is to limit standing to those family members of the decedent who would naturally suffer a loss of comfort, protection, and society, and who would have a plausible claim for loss of

anticipated future support from the decedent. See 6 B. Witkin, Summary of California Law *Torts* § 1213, at 649 (9th ed. 1988). Parents of a decedent who was married without children seem to be well within the class of relatives who could expect future support from the decedent, and who would suffer a loss of comfort, protection, and society because of the death of their child. This supports pre-1992 law giving standing to parents without regard to whether the decedent had children.

Is there a policy argument for keeping the law the way it is, and continuing to deny standing to non-dependent parents if the decedent leaves a surviving spouse? The law prefers the spouse and minor children over parents for purposes of intestate succession and support. See Prob. Code §§ 6401, 6402; Fam. Code §§ 3900 (absolute duty to support minor child), 4300 (absolute duty to support spouse), 4400 (duty to support parent only if "in need and unable to maintain himself or herself by work"). [Biblical quote?] Parents have a shorter life expectancy than their children, so a claim of a non-dependent parent for loss of anticipated future support from the child seems speculative.

By providing standing to a dependent parent but not to a non-dependent parent, the existing provision in the Code of Civil Procedure conforms to the special rule in Labor Code Section 2803, which applies when death is caused by decedent's employer. The Labor Code provision permits the employee's personal representative to sue on behalf of specified eligible beneficiaries that do not include a non-dependent parent of the decedent.

A possible objection to expanding standing for parents is that it may create a trap for the surviving spouse and children of the decedent and expose them to suit by parents who are not joined in the wrongful death action. The statute gives a single joint cause of action to all eligible beneficiaries. Only one action can be brought. Unless suit is by the personal representative as trustee for beneficiaries, all must be joined in order to recover. A beneficiary who refuses to join as plaintiff must be joined as a defendant under Code of Civil Procedure Section 382. 6 B. Witkin, *supra,* § 1203, at 640. A beneficiary who is not joined may later sue the recovering plaintiffs for failing to join him or her in the wrongful death action. Valdez v. Smith, 166 Cal. App. 3d 723, 212 Cal. Rptr. 638 (1985). But since parents now have standing in some situations (deceased child unmarried without issue or parents dependent on child, Code Civ. Proc. § 377.60), this objection seems weak.

Alternatives: Quick Fix or In-depth Policy Study?

One alternative is to communicate with the Senate Judiciary Committee to point out that the 1992 revision was made without full consideration of policy issues, and to suggest the following language to restore pre-1992 law:

> 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~~ there is no surviving issue of the decedent, the persons who would be entitled to the property of the decedent by intestate succession.
>
> . . . .

A second alternative is to circulate a Tentative Recommendation identifying policy issues and making a recommendation based on a policy analysis. If we were starting from scratch, we might prefer simply to list the persons who have standing without reference to intestate succession law, since the cause of action for wrongful death has no necessary connection with the right to take intestate property. And intestate succession in California is not limited to near relatives of the decedent — potential intestate takers include any blood relative, no matter how remote. See Prob. Code § 6402(f). If we were starting from scratch, we would probably want to limit standing to nearer relatives of the decedent.

A possible problem with this approach is that the Commission's authority to study this topic is marginal. Our 1992 recommendation was made in connection with related revisions to the Probate Code. A question might arise whether a recommendation affecting only the Code of Civil Procedure is within the Commission's authority to study the Probate Code, although the Commission's long-standing practice has been to be responsible for any follow-up legislation needed for matters originally enacted on Commission recommendation.

A concern with getting into tort law is that the Legislature has been active in the field, and it is highly-charged politically.

Respectfully submitted,

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: Standing to Sue for Wrongful Death,
22 Cal.L. Revision Comm'n Reports 955 (1992)

Dear Commissioners:

When the Commission recommended an amendment to C.C.P.§377 in April 1992, I believe that it inadvertently deprived non-dependent parents of a cause of action for wrongful death when their decedent leaves a spouse and no issue. Your Report states that the purpose of the amendment was to codify case law and to make clear that, even if decedent's estate is entirely community property, the decedent's issue are proper parties plaintiff, along with decedent's surviving spouse. Nothing is said as to when decedent's parents are proper parties plaintiff, so as to them I assume that the Commission intended no change in existing law.

The Commission's comments as to new C.C.P. §377.60 in Deerings Code states that the first part of the first sentence of subdivision (a) of the former section is restated "without substantial change, except as discussed below." The discussion below refers only to the clarification that the decedent's surviving spouse, children, and issue of deceased children are proper parties plaintiff in a wrongful death action. The first part of the first sentence of former subdivision (a) stated that "When the death of a person is caused by the wrongful act or neglect of another, his or her heirs ... may maintain an action for damages ...." Non-dependent parents are heirs when their decedent leaves a spouse and no issue. (Probate Code §§6401(c)(2)(B) and 6402(b). However, the plain language of the amendment gives them a cause of action only if there is neither a spouse or issue. This is true despite the Commission's comment that former subdivision (b) is also restated without substantial change. Subdivision (b)(1) defines "heirs" as those persons who would be entitled to succeed to decedent's property under the Probate Code, commencing with §6400, which would include non-dependent parents of a decedent leaving a spouse and no issue.

I presently represent non-dependent parents in a wrongful death action for the loss of their son, who was married, but had no children. A demurrer has been filed alleging that they have no standing to sue because the decedent left a wife, citing C.C.P. §377.60(a). Defendant argues that the words "if none" bar the parents as plaintiffs, even though they would be entitled to the property of the decedent by intestate succession under Probate Code §6401(c)(2)(B) and §6402(b), because decedent left a spouse and no child. Defendant claims that the parents have standing only if there survives neither spouse nor issue.

I have specialized in plaintiffs' personal injury work for 40 years and have handled scores of wrongful death actions. The right of non-dependent parents to sue when their decedent left a spouse and no issue has long been recognized in California. See, e.g., Gallo v. Southern Pac. Co. (1941) 43 Cal.App.2d 339; Gabehart v. Simonsen (1986) 176 Cal.App.3d 672; Coats v. K-Mart Corp. (1989) 215 Cal.App.3d 961.

I have tried to figure out why the words "if none" are used after identifying as plaintiffs the surviving spouse, children, and issue of deceased children, before referring to the persons who would be entitled to the property of the decedent by intestate succession. These words exclude the parents if the decedent leaves a spouse and no issue, even though parents are heirs under the above Probate Code sections. A possible explanation is that the author felt that the parents are provided for in such circumstances by subsection (b) when they are dependent. I gather this from footnotes 5 and 7 in your Report which state that it must be shown both that the plaintiff is an heir eligible to take the decedent's property and that the plaintiff has suffered actual pecuniary loss (usually loss of support from decedent). This comment appears to equate actual pecuniary loss with dependency, which has never been the law. Gallo v. Southern Pac. Co., supra, made this clear:

> While there was no evidence to show that the decedent had been actually giving his parents monetary assistance such evidence was not essential. It is true that damages in death cases are limited to the 'pecuniary loss' to the surviving heirs but such loss includes the 'loss of comfort,

> protection and society of the deceased.' [Citation.] Id. at 346.

Coats v. K-Mart Corp., supra, at p. 969 stated that a parent has a wrongful death cause of action under two circumstances: (1) if decedent had no surviving issue and (2) if there are surviving issue, only if the parent had been dependent on the decedent. Steed v. Imperial Airlines (1974) 12 Cal.3d 115 is to the same effect:

> Although the clear expression of legislative intent is determinative of the issue of statutory construction, we nevertheless deem it desirable to put to rest claims that those who are entitled to bring an action for wrongful death, that is, those who are to be deemed "heirs," are those who are dependent upon and thereby injured by the decedent's death. The heirs' right of action, however, is not predicated on a dependency relationship--an heir who is not a dependent is equally authorized with one who is a dependent to bring a wrongful death action although the amount of their recoveries may differ. [Citation.] Id. at p. 121.

Incidentally, Steed further explains that C.C.P. §377 was amended in 1968 so as to give dependent parents a wrongful death cause of action when they are excluded as heirs because their son left a spouse and children. (Id. at p. 121, fn. 4).

It is apparent to me that the Commission did not intend to make a major legislative policy change and exclude non-dependent parents when their decedent left a spouse and no issue. If it had, it would have said so in its comment on the section. The parent-child relationship is bonded shortly after birth and lasts a lifetime. The laws of intestate succession have long recognized this fact and have excluded them only when the decedent has begun a new family with spouse and child. If the Commission did not intend this change in the law, a clarifying amendment would be in order. I am sending a copy of this letter to Senator Bill Lockyer, who I assume proposed the amendment in Statute 1992, Ch. 178 §20, since it came from S.B. 1496.

Thank you for considering my thoughts. I am very interested in your comments.

Very truly yours,

Albert R Abramson

ALBERT R. ABRAMSON

ARA/keb

cc: Senator Bill Lockyer