Standing of Parents to Sue for the Wrongful Death of Their Married Child

By Mark Quigley and Ivan Puchalt

While it should be a non-issue, there is some disagreement among the bar (and at least one district court opinion) as to whether parents have standing to sue for wrongful death when the decedent leaves a spouse but no issue, even if the parents did not rely upon the decedent for support. Thus, it is important not to overlook adding these potential parties in any wrongful death action.

The beginning and end of the issue is dependent upon the meaning of Code of Civil Procedure section 377.60.

Section 377.60 provides in pertinent part, with emphasis added:

> 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, domestic partner, children, and issue of deceased children, *or, if there is no surviving issue of the decedent*, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession. (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.

Once it is determined that the decedent died without issue, it is that portion of subdivision (a) which provides that standing is conferred on "the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession" that controls here.[1]

Some defendants urge that this provision should be read to mean that if there is a surviving spouse of the decedent, then there is no one else who would have standing – even if that person would be entitled to the property of the decedent by intestate succession. But that is the direct opposite of what the statute says. Indeed, the Legislature, by expressly stating that this provision does not apply if the decedent has issue, presumably intended "issue" to be the sole exception to that standing provision. (See *Mut. Life Ins. Co. v. City of L.A.* (1990) 50 Cal.3d 402, 410 ["Under the familiar rule of construction, expressio unius est exclusio alterius, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."].) If the Legislature had intended the existence of a surviving spouse to likewise cut off standing under that subdivision, it would have stated as such.

Indeed, the subject phrase of section 377.60, subdivision (a) reflects that (1) there may be more than one person (it refers to the plural "the persons") and (2) the category of potential plaintiffs includes but is not limited to the surviving spouse or domestic partner (it uses the phrase "including" these individuals and then goes on to use the qualifier "who would be entitled to the property of the decedent by intestate succession").

Some defendants appear to argue that by using the word "including" in the subject provision, the Legislature really meant "limited to" so that only the surviving spouse or domestic partner would have standing. In *Cruz v. Superior Court* (2004) 121 Cal.App.4th 646, 652, the Court of Appeal rejected a similar argument regarding another statute using the term "including," in the following harsh terms:

> Section 2032, subdivision (a) authorizes physical examinations "in any action in which the ... physical condition (including the blood group)" is in controversy. Citing no authority, mother wants us to read the clarification "including" to mean "limited to." This argument borders on the frivolous. If the statute were limited to testing for blood groups, it would say so. And we need not cite authority for the self-evident proposition that the word "including" is not a synonym for "limited to."

Likewise the defense argument that subdivision 377.60 (a), referring to "the *persons*, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession" really means that standing is

Mark Quigley is a partner with the firm of Greene, Broillet & Wheeler LLP in Santa Monica. He represents plaintiffs in insurance bad faith cases, as well as matters involving wrongful death, employment discrimination, legal malpractice, wrongful termination and intellectual property.

Ivan Puchalt is with the firm of Greene, Broillet & Wheeler LLP in Santa Monica. His practice focuses on products liability, catastrophic personal injury, wrongful death and municipal liability.
www.greene-broillet.com

limited to any surviving spouse *or* domestic partner if such individuals exist, also borders on the frivolous. The statute uses the word "persons," the plural of "person." If defendants' argument was true, then whenever there is no issue, the only person with standing would be the surviving spouse or domestic partner, always a single person. Yet, under the section's plain text which allows for "persons" to recover, we know that there is a possibility of multiple plaintiffs when, in addition to a surviving spouse, there is anyone else who would take property by intestate succession under the applicable Probate Code sections.

The issue therefore becomes whether the surviving parents are individuals "who would be entitled to the property of the decedent by intestate succession" even though there was a surviving spouse. The clear answer to this question is "yes."

Probate Code section 6402 controls the individuals who would be entitled to intestate succession. That section provides in pertinent part:

> Except as provided in Section 6402.5, the part of the intestate estate not passing to the surviving spouse or surviving domestic partner, as defined in subdivision (b) of Section 37, under Section 6401, or the entire intestate estate if there is no surviving spouse or domestic partner, passes as follows:
>
> ... As to separate property, the intestate share of the surviving spouse or surviving domestic partner, as defined in subdivision (b) of Section 37, is as follows:
>
> (1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.
>
> (2) *One-half of the intestate estate in the following cases*:
>
> (A) Where the decedent leaves only one child or the issue of one deceased child.
>
> (B) *Where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them.* (Emphasis added.)

Thus, where a married decedent has no issue and leaves a surviving spouse and parents, the surviving parents and spouse are each entitled to one-half of the decedent's separate property by intestate succession.

While there is no California case authority saying that a parent and surviving spouse cannot have simultaneous standing, at least one respected treatise expressly says that there could be such dual standing: **"**Parents: Parents have standing to sue if the deceased victim *left no issue. This is so even where the victim left a surviving spouse***."** (TRG: Rutter (2007) Personal Injury, par. 3:290, p. 3-296, emphasis in original and added.)

The only case which even arguably supports defendant's position is a 14-year-old disapproved trial court opinion from the Federal District Court in *Reynolds v. County of San Diego* (D. Cal. 1994) 858 F.Supp. 1064, reversed on other grounds in *Reynolds v. County of San Diego* (9th Cir. 1996) 84 F.3d 1162. There, the court without any analysis concluded: "Under Section 377(a), Denise Reynolds cannot bring the wrongful death action as an heir because the decedent has a surviving spouse, Jeannette Reynolds, who has filed a claim for wrongful death. Since Denise Reynolds does not have standing as an intestate heir, she can only bring a state law cause of action if she was dependent on the decedent." (*Id*. at p.1069.)

This district court opinion interpreting a California statute is not binding on a California trial court – particularly to the extent that its analysis is directly at odds with the section in question. (*Bowen v. Workers' Comp. Appeals Bd*. (1999) 73 Cal.App.4th 15, 21.)

Indeed, the legislative intent of the subject section reveals just the opposite of what *Reynolds* says. That history is summed up in the Senate Judiciary Committee analysis of SB 449, 1997-98 session, as follows:

> Prior to 1993, a parent may assert a claim for the wrongful death of a son or daughter pursuant to Code of Civil Procedure Section 377 which set forth the rules for standing in wrongful death claims. Under that section and Probate Code Section 6402, a parent may assert a wrongful death claim for the death of a son or daughter when the decedent did not leave a surviving issue (i.e., any lineal descendent).
>
> In 1992, the Legislature enacted SB 1496, an omnibus probate bill sponsored by the California Law Revision Commission. One of the changes repealed Code of Civil Procedure Section 377 and instead enacted CCP Section 377.60. However, *an unintended consequence* of the change, which was not discussed in any of the policy committee or floor analyses, *was that a parent of a victim killed by another's misfeasance or malfeasance lost the ability to sue for wrongful death damages except when there was no surviving spouse, no surviving children, and no surviving issue of children.*
>
> In 1996, the Legislature enacted SB 392, another omnibus probate bill sponsored in part by the California Law Revision Commission, to amend Section 377.60 *to restore the right of parents to sue for wrongful death damages when there was no surviving issue of the decedent, as it was prior to the enactment of SB 1496.* However, that proposal applies only prospectively, to causes of action arising on or after January 1, 1997.
>
> Existing law, CCP Section 377.60, as amended by SB 392 of 1996 and effective on January 1, 1997, provides that *a parent has standing to seek wrongful death damages for the death of a son or daughter when there is no surviving issue of the decedent.*
>
> This bill would state that CCP Section 377.60 applies to any cause of action arising on or after January 1, 1993.
>
> It would also state that the *Legislature's intent in enacting SB 1496 of 1992 was not to adversely affect the standing of any party having standing under prior law*, and that the standing of parties governed by that version of this section (as added by SB 1496; Chapter 178 of the Statutes of 1992) shall be the same as specified herein as amended by SB 392 of 1996.

Additional support for a parent's standing where there is a surviving spouse is found in the "ARGUMENTS IN SUPPORT" section of the Senate Bill analyses of SB 449.[2]

> ARGUMENTS IN SUPPORT: Proponent contends that drafting oversights in two recent Probate Code measures have unfairly deprived him and other parents like him of the ability to file a wrongful death cause of action for the death of a son or daughter.

This condition resulted from the repeal of CCP Section 377 and the enactment of CCP Section 377.60, which was intended to allow an issue of the decedent to file a wrongful death claim *even when there is a surviving spouse*. (See Standing to Sue for Wrongful Death, 22 Cal. L. Revision Comm'n Reports 955 (1992).) An unintended consequence of a drafting oversight, however, repealed the right of a parent to assert a wrongful death action unless there were no surviving spouses, children, or issue of deceased children." (Emphasis added.)

Based on the above language, it can be concluded that if the Legislature intended "to allow an *issue* of the decedent to file a wrongful death claim even when there is a surviving spouse," then the Legislature arguably intended for parents *also* to have standing even when there is a surviving spouse. Under Probate Code section 6402, parents are similarly situated to any of a decedent's issue because each is entitled to one-half of decedent's separate property under intestate succession when there is a surviving spouse.

Finally, before ending this article, it is important to note that under section 377.60, subdivision (a), standing is not determined by whether there was actually any property to pass by intestate succession. The section is worded in terms of whether there are "persons, including the surviving spouse or domestic partner, who *would be entitled* to the property of the decedent by intestate succession." (Emphasis added.)

The section is not framed in terms of persons who actually obtained property by intestate succession.

Indeed, if actual intestate succession were required, then whenever a decedent had a will disposing of property and therefore foreclosed any intestate succession altogether, standing under that subdivision would be negated in its entirety. (See 14 Witkin Summ. of Cal. Law (10th ed. 2005) section 74, p. 137 [intestate succession applies to property of a person who dies without disposing of it by a will].) There is no indication that the Legislature intended its determination of which individuals had standing to sue for wrongful death to be based upon whether the decedent happened to have a will or, if not, whether the decedent happened to actually have property that would pass by intestate succession.

It would be absurd for the Legislature to have determined that individuals could sue for wrongful death if their daughter died owning a very small amount of separate property – even $1 – (to which they would be entitled to one-half) while they could not sue if no such property existed or if the decedent had a will.

The provision at issue applies when the survivors in question are not dependent upon the decedent (if they are dependent, then standing is afforded under section 377.60, subd. (b)). Thus, the recoverable damages in question are largely for loss of comfort and society. (See *Krouse v. Graham* (1977) 19 Cal.3d 59, 67-68.) Whether or not a married decedent happened to possess any amount of separate property, and happened to have no will so that one-half of that separate property would pass to their parents, has absolutely no relation to the loss of comfort and society suffered by those parents. Rather, what matters is that the Legislature determined that the relationship between the decedent and these survivors was close enough so that they "would" inherit property if there was any. By enacting section 377.60, the Legislature recognized that individuals in such a close relationship could be expected to suffer compensable lost comfort and society.

Thus, whether or not there was actually property to be passed to the parents through intestate succession should have no bearing on their standing to sue for wrongful death.

In sum, when a married decedent dies without issue, then it is important not to overlook the fact that the decedent's parents – in addition to the surviving spouse – have standing to sue for wrongful death under the text of section 377.60(a) as well as its history. This standing is conferred regardless of whether the parents actually inherit any of the decedent's property. ■

---

[1] This article assumes that the parents were not relying upon the decedent for support. If such support is afforded, then standing to sue for wrongful death is conferred under subdivision (b).

[2] This same language is not found in the Assembly analysis of SB 449.