



Wrongful death – standing, pleadings and related considerations

Determining standing, which causes of action to include, drafting the pleadings, and collecting the right evidence to prove our case

By **TAL RUBIN**

You are in your office, meeting with a family devastated by a recent incident that cost the life of one of their family members. The decedent's parents and siblings are there. The decedent's spouse is there with the decedent's minor children. They all want to know their respective rights and ask you whether they can each be a plaintiff in a wrongful-death action. This article will provide plaintiffs' counsel with a guide regarding standing, and related matters.

Standing

A wrongful-death cause of action is a statutory claim providing compensation for specified heirs of the decedent for the loss they suffered as a result of the decedent's death. As our Supreme Court has explained, "Because it is a creature of statute, the cause of action for wrongful death exists only so far and in favor of such person as the legislative power may declare." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 575).

Thus, the right to bring such an action is limited to those persons identified within the wrongful-death statute, and a plaintiff seeking to bring a wrongful-death claim bears the burden of pleading and proving his or her standing to do so.

Standing in wrongful-death actions is governed by Code of Civil Procedure Section 377.60, which provides in pertinent part:

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, parents...

(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.

Let's take each subdivision individually and discuss its essence, along with related issues.

C.C.P. § 377.60, subd. (a)

The first group that has standing are spouses, domestic partners, children, and issue of deceased children. (The term "spouse" refers to "persons who are lawfully married to each other." (Fam. Code, § 11.) "Domestic partner" means a person who, at the time of the decedent's death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code.

The second part of subdivision (a) confers standing on other certain individuals, but *only if the decedent had no surviving issue*. "Issue of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent." (Prob. Code, § 50.)



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If the decedent did not have surviving issue, then standing is conferred on anyone who would be entitled to the decedent's property via intestate succession. Intestate succession refers to the process that specifies which heirs are entitled to a person's estate when that person dies without a will. (Prob. Code, § 6401 et. seq.)

If the decedent dies without surviving issue, the decedent's surviving parents have standing (even if the decedent was married at the time of death) because the parents would be heirs under Probate Code section 6402, subdivision (b). This standing is conferred regardless of whether the parents *actually* inherited decedent's assets. It is the fact that they "would be entitled to the property" that controls. If the decedent died without surviving issue or parents, then counsel should go through the intestacy hierarchy chart to ascertain which parties may have standings based on the case-specific circumstances.

Importantly, subdivision (a) was recently amended. It now authorizes a decedent's legal guardians to bring a wrongful-death action if the decedent's parents were authorized to bring a civil action but they are deceased, or if the legal guardians were dependent on the decedent and the decedent's parents are deceased.

C.C.P. § 377.60, subd. (b)

Subdivision (b) *expands* standing beyond the group listed in subdivision (a). A putative spouse, children of the putative spouse, stepchildren and parents can also have standing, so long as they were *dependent* on the decedent (even if the decedent had surviving issue, and regardless of their status as heirs).

For purposes of this subdivision, dependence refers to financial support. (*Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693, 697-698). "The term 'dependent' would be rendered virtually meaningless if emotional dependency was sufficient to sue for wrongful death ... financial dependency should be the test

for parents who are not heirs of the decedent." (*Perry v. Medina* (1987) 192 Cal.App.3d 603, 608).

Financial dependence generally presents a question of fact, which "should be determined on a case-by-case basis." (*Perry v. Medina, supra*, 192 Cal.App.3d at p. 610). "No strict formula can be applied nor did the Legislature suggest a formula...." (*Ibid.*) Notwithstanding the absence of an exact formula, published cases have defined financial dependence to be financial support for basic *life necessities*, or "financial support which aids...in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without." (*Ibid.*)

In a common scenario, decedent is survived by a spouse, children, and parents. Since subdivision (a) does not confer standing to parents whose deceased child left surviving issue, the parents can only have standing pursuant to subdivision (b), which requires proof of financial dependency. Plaintiff's counsel should therefore be thoroughly familiar with subdivision (b) and related case law. Plaintiff's counsel should also work with the parents to establish their financial dependency on the decedent by obtaining evidence such as receipts, billing statements, bank statements, and other related financial records. Proper preparation of discovery responses and deposition testimony is essential to prove standing for the parents as additional plaintiffs, and thus access to significant wrongful-death damages.

The determination under subdivision (b) is simply a case-by-case analysis. All subdivision (b) claimants have to show is that they "were actually dependent, *to some extent*, upon the decedent for the necessities of life." (*Hazelwood, supra*, 57 Cal.App.3d at p. 698) (emphasis added). Contrast this with claimants under subdivision (c), who have to prove that they were dependent on the decedent for *at least* one-half their financial support. It is therefore clear that the legislature did not intend to make such a quantitative threshold upon claimants

seeking standing under subdivision (b). This is an important distinction that should be asserted in instances where the defense challenges the extent of the financial support.

Personal representative

The personal representative is the person responsible for supervising the administration of the decedent's estate through the probate court. Either the decedent's personal representative on behalf of the heirs or the specified heirs may assert the wrongful-death claim – but not both. (*Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1511).

A personal representative maintains a wrongful-death action on behalf of the heirs, i.e., as a statutory trustee to recover damages for the benefit of the heirs. (*Monschke v. Timber Ridge Assisted Living, LLC* (2016) 244 Cal.App.4th 583.) It is important to note, however, that unlike the survival action (discussed below), this claim does not belong to the estate even if prosecuted by a personal representative. It is prosecuted on behalf of the claimants who have standing under Code of Civil Procedure section 377.60.

One action rule and nominal defendants

Code of Civil Procedure section 377 does not expressly prevent more than one lawsuit by different heirs of a decedent; however, the "one action rule" prohibits a series of individual wrongful-death suits against a defendant, requiring that all claimants generally must join or be joined in one lawsuit. Actions for wrongful death are joint, single, and indivisible. This phrase is explained by the Supreme Court in *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690:

In stating that an action for wrongful death is joint, it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is single, it is meant that only one action for wrongful death may be



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brought whether, in fact, it is instituted by all or only one of the heirs...and when it is said that the action is indivisible, it is meant that there cannot be a series of suits by heirs against the tortfeasor for their individual damages. (*Id.* at p. 694.)

Any heir who does not consent to be joined as a plaintiff in the wrongful-death action must be named as a nominal defendant. If an heir is not included in the original wrongful-death action, the heir may not subsequently bring an independent action against the tortfeasor unless the tortfeasor had knowledge of the existence of the heir at the time of the settlement. (*Valdez v. Smith* (1985) 166 Cal.App.3d 723, 726-727). This is true even if the plaintiff was aware of the existence of another heir. (*Id.* at p. 726). The wrongfully omitted heir's remedy is against the heir (plaintiff) who brought the wrongful-death action. (*Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 697). Although plaintiff's counsel has no duty to an omitted heir, there is a duty of care for your own client. To avoid any future actions by an omitted heir against your client, it is critical to obtain information from the client as to any other potential wrongful-death plaintiffs and then name and serve them as nominal defendants so that notice is given.

If the lawsuit is filed by the personal representative of the estate, the various claimants need not be joined because the personal representative is authorized to sue on behalf of all eligible claimants. (Code Civ. Proc., § 377.60; *Adams v. Sup. Ct.* (2011) 196 Cal.App.4th 71, 77.) The personal representative maintains the action on behalf of the heirs – i.e., as “a statutory trustee to recover damages for the benefit of the heirs.” (*Ruiz v. Santa Barbara Gas & Electric Co.* (1912) 164 Cal. 188, 192.) It is therefore preferable to bring the lawsuit on behalf of the personal representative if the heirs are too numerous, cannot all be located, or are unknown.

Survival actions

Unlike a cause of action for wrongful death, a survival cause of action is not a new cause of action that vests in the heirs on the death of the decedent. Rather, it is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event.

Survival actions are authorized by Code of Civil Procedure section 377.30. A cause of action that survives the death of a person passes to the decedent's successor in interest and is enforceable by the “decedent's personal representative or, if none, by the decedent's successor in interest.” Survival actions are usually contemplated if the decedent did not die immediately as a result of the incident and, in the period of time between the injury and death, incurred damages.

In the typical survival action, the damages recoverable by a personal representative or successor in interest on a decedent's cause of action are limited by statute to “the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and *do not* include damages for pain, suffering, or disfigurement.” (Code Civ. Proc., § 377.34) (Note – there is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survival action. Such damages are expressly recoverable in a survival action under the Elder Abuse Act if certain conditions are met. Also, this rule does not apply to civil-rights cases brought under federal law.)

When considering whether or not to add a survival cause of action to a wrongful-death lawsuit, plaintiff's counsel should weigh the pros and cons. By way of example, California statutes and decisions have been interpreted to bar the recovery of punitive damages in a wrongful-death action. (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 450.) On the other hand, survival actions allow

for recovery of punitive damages and therefore must be added as a cause of action in instances where punitive damages are warranted. Further consideration must be given, however, in instances where the decedent received pre-death medical care which was related to the subject incident and paid for by either Medi-Cal or Medicare.

Pre-death Medi-Cal and Medicare liens

If the decedent incurred pre-death medical bills related to the incident, and those bills were paid for by Medi-Cal, DHSC may assert a lien against the recovery if the lawsuit included a survival action. Medi-Cal cannot assert a lien, however, if the action is strictly for wrongful death. [*Editor's note: See thorough coverage of this Medicare topic in the article by John Rice in the April issue of Advocate.*]

In *Fitch v. Select Products Co.* (State Dept. Of Health Services) (2005) 36 Cal.4th 812, our Supreme Court held that “... a Medi-Cal lien may *not* be asserted in a wrongful-death action when the damages recoverable by the plaintiff in that action do not and could not include compensation for medical services provided to the decedent by Medi-Cal.” (Emphasis added.) The court reasoned: “Because the damages awarded in a wrongful-death action are for the harm done to the survivors, not to the deceased, medical expenses for treating the final illness or injury are *not* recoverable.” (*Id.* at p. 819.)

Plaintiffs' counsel should therefore decide whether under the specific circumstances of that case, the clients' potential net recovery warrants the inclusion of a survival action (along with wrongful death) because such inclusion will subject the recovery to a Medi-Cal lien.

Similar consideration applies to Medicare. The Medicare Secondary Payer Manual (MSPM) contains a provision stating that when a liability insurance payment is made pursuant to an action brought under a state's wrongful-death



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statute, Medicare may recover from the payment only if the state statute permits recovery of medical expenses. (MSPM, Chapter 7, § 50.5.4.1.1.) This section of the MSPM also provides that if a state wrongful-death statute does not permit recovering medical damages, Medicare has no claim to the wrongful-death payments. (*Ibid.*) The situation gets more complicated if the case settles pre-litigation, where Medicare can assume that medical expenses were a part of the settlement, regardless of the language in the settlement agreement. Counsel should therefore contact

Medicare prior to final settlement to obtain a waiver.

Conclusion

Plaintiffs in wrongful-death cases seek closure as much as any monetary compensation. One of the most rewarding aspects of our profession is our ability to seek and obtain justice and closure for our clients. We begin by determining standing, strategically deciding which causes of action to include, properly drafting the pleadings, and making sure we collect the right evidence to prove our case – including standing. These tasks



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require a full understanding of the statutes governing these unique causes of action, along with related cases interpreting them.

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