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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SHAOPING CORDER, Plaintiff and Appellant, v. LISA R. CORDER, Defendant and Respondent.	G033608 (Super. Ct. No. 01CC10590) O P I N I O N
LISA R. CORDER, Plaintiff and Respondent, v. SHAOPING CORDER, Defendant and Appellant.	(Super. Ct. No. 01CC00182)

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Motion for sanctions. Judgment affirmed. Sanctions denied.

Davis & Heubeck and John C. Heubeck for Plaintiff, Defendant and Appellant Shaoping Corder.

Law Office of Ronald E. Harrington and Ronald E. Harrington for Plaintiff, Defendant and Respondent Lisa R. Corder.

Shaoping Corder (Sherry) appeals a judgment that apportioned the proceeds of a settlement made with one of the defendants in a wrongful death action. The court apportioned the proceeds of the settlement 10 percent to Sherry, the decedent's surviving spouse, and 90 percent to Lisa R. Corder (Lisa), the decedent's adult daughter.[1] Sherry asserts the court lacked subject matter jurisdiction to apportion the proceeds, and argues the court committed other errors as well, which, although variously phrased, amount to a challenge to the adversary system of justice and to the sufficiency of the evidence. We reject all of Sherry's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sherry met Raymond Corder (Raymond) in August 1999; he proposed marriage to her in December 1999; and they married in September 2000. Eight months later, in May 2001, Raymond was killed in a construction accident.

In a consolidated wrongful death action originally brought separately by Sherry and Lisa, one of the defendants settled with both plaintiffs for an unapportioned

[1] Because both appellant and respondent share the same last name, we refer to them by their first names for convenience and to avoid confusion. No disrespect is intended.

lump sum of $1.1 million. On the same day the stipulated settlement was signed, Sherry and Lisa entered into another stipulation regarding the apportionment of their recovery. Their apportionment stipulation provided: "Following the verdict or settlement of the [wrongful death] case, should the Plaintiffs fail to agree on an allocation or apportionment of damages between the heirs, that either Plaintiff shall have the right to a further trial regarding the allocation or apportionment of damages among or between the Plaintiffs. Furthermore, either party may supplement their witness list by identifying witnesses not previously disclosed and that those witnesses may be called as witnesses at the further trial proceeding."

Following the settlement, plaintiffs went to trial against two remaining defendants, but the jury found neither was negligent and judgment was entered in favor of those defendants. Shortly after the trial, the parties commenced discovery proceedings in preparation for a further trial to apportion the settlement proceeds. In the midst of these discovery proceedings, all conducted under caption of the Orange County wrongful death case, Sherry filed a separate lawsuit in the Los Angeles County Superior Court seeking to "quiet title" to the settlement proceeds. Lisa responded by moving to set a trial date in the Orange County case, contending the Orange County court had jurisdiction to apportion the proceeds, and, in any event, Sherry's filing of a separate suit in Los Angeles County violated their stipulation. The court ruled it had jurisdiction to apportion the proceeds and set the trial date.

At the apportionment trial, the court honored the parties' stipulation by hearing evidence not presented at the wrongful death trial. The court also made clear, however, it would consider all of the evidence, including the evidence it had heard in the earlier proceeding. Most of the additional evidence at the apportionment trial was about Lisa's contention that at the time of Raymond's death he was contemplating dissolving his marriage to Sherry because he suspected she was engaging in prostitution. Evidence

was also presented to show the close relationship between Raymond and Lisa, his daughter. The court's written statement of decision sets forth a brief summary of the conflicting evidence and explains the court's resolution of those conflicts. We quote a portion of that statement as a succinct description of the basis for the court's decision.

"Evidence at the allocation trial demonstrated two conflicting views of the decedent's relationship to his wife, [Sherry] Corder. Lisa Corder, decedent's daughter, presented witnesses who testified that the decedent intended to divorce his wife. According to them the decedent felt that his marriage was a mistake because his wife had continued to work as a prostitute despite her promises to stop. Witnesses also testified that Lisa and her father had a very close relationship. Lisa Corder's argument was that since decedent was on the verge of divorcing his wife, the wife's share of the proceeds should be reduced drastically from what it would otherwise have been.

"On the other hand, [Sherry] Corder's witnesses indicated that the marriage was a good one and there was no intent manifested by the defendant to divorce his wife. Thus, the argument goes that because [Sherry] Corder would have been legally entitled to support from the decedent during their marriage, the lion's share of the proceeds should go to her.

"Having considered the conflicting evidence presented the court finds most persuasive the evidence that the marriage between [Sherry] Corder and decedent was on the verge of ending. While it is true that decedent had not yet filed for divorce or contacted an attorney, the court finds that had the decedent lived the marriage would have lasted a relatively short period of time given decedent's belief, expressed to several persons, that his wife was working as a prostitute against his wishes. Decedent may not have expressed his state of mind to all of those close to him, but such is life. For reasons that are usually unknown, people often keep secrets from some close friends or relatives

and not from others. The court finds unpersuasive the contention that Lisa Corder's witnesses came into court to commit perjury regarding the prostitution allegations.

"Given the above findings the court makes the following allocation as to the settlement proceeds: Lisa Corder 90%. [Sherry] Corder 10%. In making these findings the court has considered the total loss that each plaintiff suffered from the decedent's death."

Judgment was entered accordingly. Sherry's motions to vacate the judgment and enter a different judgment or for new trial were denied. She appeals the apportionment judgment and the denial of her posttrial motions. Lisa moves for sanctions. We affirm the judgment and denial of the motions to vacate or for new trial, and deny Lisa's request for sanctions.

DISCUSSION

The Orange County Superior Court Had Jurisdiction to Apportion the Settlement Proceeds

Sherry contends the entry of judgment in favor of the nonsettling defendants following the jury trial deprived the Orange County Superior Court of its jurisdiction to apportion the settlement proceeds between the two plaintiffs. Sherry argues the "one judgment rule" precluded the court from entering a "second judgment," and Code of Civil Procedure section 377.61[2] only authorizes the court to apportion the award of a jury, not the proceeds of a settlement. Sherry is mistaken.

Sherry misapprehends the "one judgment rule." "The theory [of the one final judgment rule] is that piecemeal disposition and multiple appeals in a single action

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58, p. 113.) For that reason, "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) But it is also settled that "'the rule requiring dismissal [of an appeal] does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party.'" (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437.) An appeal thus could have been taken from the judgment entered on the jury's verdict in favor of the nonsettling defendants. But that does not deprive the court of its jurisdiction to determine the issues remaining between *other* parties.

Here, the court had both the power *and the duty* to adjudicate all remaining issues in the wrongful death case including the allocation of settlement proceeds between adverse plaintiffs. (§ 377.61 ["The court shall determine the respective rights in an award of the persons entitled to assert the cause of action"]; *Watkins v. Nutting* (1941) 17 Cal.2d 490, 498 ["it is . . . the duty of the court, in a separate proceeding, to apportion the amount to be awarded each heir"]; § 578 ["when the justice of the case requires it, [the judgment may] determine the ultimate rights of the parties on each side, as between themselves"].) Indeed, the court is required to "decide any proceeding in which he or she is not disqualified" (§ 170), and "[m]andamus will . . . lie to compel the court to assume and exercise its jurisdiction, i.e., to hear and determine the case on its merits." (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 345, p. 934.) Accordingly, the court would have abdicated its clear duty had it failed to exercise its jurisdiction to apportion the settlement funds.

Sherry's other argument, that the court's jurisdiction to allocate a monetary recovery extends only to a jury award, and not to settlement proceeds, is unsupported by any apt authority. She relies on *Changaris v. Marvel* (1964) 231 Cal.App.2d 308 (*Changaris*), a case that is easily distinguished. In *Changaris*, attorney Changaris represented all five heirs in a wrongful death case. A lump sum settlement was reached, but the five claimants could not agree on how to allocate the proceeds. Attorney Changaris, having possession of the net settlement proceeds in his trust account, was faced with an obvious conflict of interest making it impossible to represent any one of the five claimants. He thus deposited the funds with the court and filed an interpleader action seeking to be relieved as counsel and discharged from any further responsibility. (*Id*. at p. 310.)

Changaris does *not* hold, as Sherry suggests, that a separate, independent interpleader or other action is *required* whenever there is no jury award and the court's sole task is to apportion a settlement fund. Here, each heir was separately represented. There was no need whatsoever for a separate, independent proceeding. Section 377.61, as uniformly interpreted by the decided cases, allows the court in which the wrongful death case is pending to complete the necessary adjudication of rights by determining the appropriate allocation of settlement proceeds between competing plaintiffs. Sherry's narrow interpretation of the word "award" so as to *exclude* from the wrongful death court's jurisdiction any power to adjudicate rights between adverse plaintiffs, unless the "award" is the result of a jury verdict, is unsupported by any authority, and is contrary to judicial economy, good sense, and the uniform interpretation of the courts. (See *Smith v. Premier Alliance Ins. Co.* (1995) 41 Cal.App.4th 691, 698 ["When the claims of all heirs are encompassed in a lump-sum settlement, the court has authority to apportion the settlement"]; *Estate of Kuebler v. Superior Court* (1978) 81 Cal.App.3d 500, 504 ["the court has jurisdiction to apportion the settlement proceeds"].)

Sherry argues that her jurisdictional argument was not raised in any of the cases which state that the wrongful death trial court has jurisdiction to apportion settlement proceeds and the statements to that effect in the decided cases are therefore nonbinding dicta. So far as we have found, that point appears to be right. But this observation does not advance her novel jurisdictional theory. It only confirms others have found it nonproductive to debate that which is self evident.

In *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512 (*Canavin*), the court discussed the 1949 amendment to former section 377, the first statutory authority for judicial apportionment of lump-sum wrongful death awards among the heirs. The court recognized the common sense and practical reasons for assigning that task to the court that heard the evidence at trial. "The 1949 statutory amendment to provide for judicial apportionment appears based upon legislative acknowledgment of the respective heirs' competing interests in the lump-sum award. The amendment reflects a belief it was more desirable not to add to the jury's burden the task of apportioning the damages [citation], and *the practical consideration the trial judge had already heard the evidence of the pecuniary damages*." (*Canavin, supra,* 148 Cal.App.3d at p. 533, italics added.) So it is here. The court already had heard the evidence of damages during the trial against the nonsettling defendants, and made clear at the apportionment hearing that it would consider both the evidence presented at the underlying trial and such additional evidence as the parties chose to present at the apportionment hearing. Under cover of an unmeritorious attack on the *jurisdiction* of the court, Sherry would have us discard the considerable judicial effort already invested in the case by the wrongful death trial court in favor of starting anew before a different court. We decline to do so. The court had jurisdiction over both the subject matter and the parties to complete the adjudication of *all* contested issues in the wrongful death case.

Lisa Was Entitled to Challenge the Amount of Sherry's Claim to the Settlement Proceeds and Was Not Estopped From Doing So

Sherry asserts it was an error of law to allow Lisa to challenge the amount of Sherry's share of the settlement proceeds, and even if such a challenge were allowed, Lisa was nevertheless estopped from doing so. We are not persuaded by either argument.

1. Lisa Had Standing to Challenge the Amount of Sherry's Share

Relying again on *Changaris*, Sherry contends, "Lisa Corder's claim for damages should stand on its own merits and not be enhanced or diminished by the claims of Sherry Corder." In support of this proposition, Sherry quotes the following passage from *Changaris*: "[W]hen there has been no trial of the death action but the money is the result of a compromise worked out between the plaintiffs and the tortfeasor, the relation among the plaintiffs and the measurement of their several claims in the compromise fund are not changed, each being entitled to share in the fund in the proportion that his personal damage bears to the damage suffered by the others. Each party plaintiff has contributed by compromise to the lump sum produced and his contribution is to be evaluated just as would have been the case if the lump sum had been determined by a jury. In either case, whether the lump sum be ascertained by trial or by compromise, *no plaintiff can have any proper reason for contesting the right of any other plaintiff. If a party be defeated in his right to share, that does not increase the right of any other to a larger award*. The right of each party plaintiff to recover, as well as the amount rightfully to be recovered, is separate and apart from the like rights of all the others and is neither added to nor lessened by the success or failure of any other party in establishing a right to recover or in proving the amount to be awarded under such right." (*Changaris*, *supra*, 231 Cal.App.2d at p. 313, italics added.)

We conclude portions of the above passage are incorrect statements of the law, and, moreover, are logically flawed. We shall explain.

"[A]n action for wrongful death in this state is rooted not in common law doctrine, but in legislative enactment which both created and limited the remedy." (*Canavin*, *supra*, 148 Cal.App.3d at p. 529.) Long ago, our Supreme Court construed the wrongful death legislative enactment as not authorizing "a verdict for separate damages for the individual plaintiffs, declaring the verdict should be given for a lump sum to all the plaintiffs, including the damages suffered by each of them." (*Id.* at p. 531, citing *Robinson v. Western States Gas etc. Co.* (1920) 184 Cal. 401, 410.) Thus, it is well established that "in computing the damages [for wrongful death], the court or jury must consider the pecuniary damage suffered by each heir and return an aggregate verdict for one sum."[3] (*Canavin*, *supra*, at p. 530.) The court then has the statutory duty to apportion the award among the heirs. (§ 377.16.)

The flaw in the reasoning of the *Changaris* court was its failure to recognize the obvious — the interests of the respective heirs are often adverse. The lump-sum award, whether by jury or by settlement, will often be less than the sum of the separate claims. In the face of this reality, the *Changaris* court inexplicably denied the existence of *any* adverse between wrongful death plaintiffs, saying "no plaintiff can

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[3] *Canavin* suggested in dictum that "plaintiffs upon *joint request* should be entitled to jury apportionment if the jury has been presented the case in a fashion requiring it to determine the damages sustained by each plaintiff before arriving at the aggregate award." (*Canavin*, *supra*, 148 Cal.App.3d at p. 531, italics added.) But the *Canavin* court was careful to condition its suggestion on a stipulation. "Although the findings would normally be advisory to the trial court at a later apportionment proceeding, valid stipulations by all parties should make them binding. We see no potential prejudice to either party. *Assuming valid stipulations*, we anticipate no potential conflict of interest among the plaintiffs and their respective counsel who may ethically argue each client's cause in an attempt to maximize the size of the lump-sum award." (*Canavin*, *supra*, at p. 536, italics added.)

have any proper reason for contesting the right of any other plaintiff." (*Changaris, supra*, 231 Cal.App.2d at p. 313.) If that proposition were true, a statutory provision for judicial apportionment would be wholly unnecessary. Courts adjudicate disputes, and disputes do not arise unless the litigants' respective interests are adverse.

The *Canavin* court identified the potential tension between coplaintiffs in a wrongful death case as the *raison d'être* for judicial apportionment. "The 1949 statutory amendment to provide for judicial apportionment appears *based upon legislative acknowledgment of the respective heirs' competing interests in the lump-sum award*." (*Canavin, supra*, 148 Cal.App.3d at p. 533, italics added.) And quite obviously, competing interests cannot be adjudicated unless litigants are entitled to challenge their adversary's position. If we were to deny wrongful death plaintiffs any standing to challenge the entitlement of their coplaintiffs, each plaintiff presumably would be able to present exaggerated and even falsified evidence, unimpeded by the protestations of any adversary.

Here, the settlement fund was fixed. It would never exceed $1.1 million. If one plaintiff could diminish the other plaintiff's entitlement, the total amount of the fund would not be decreased. Instead, the proportional share of the party mounting the successful challenge would increase. The *Changaris* court's statement to the contrary is simply wrong. We conclude, therefore, that plaintiffs contesting the apportionment of a wrongful death fund, whether the fund results from a lump-sum jury award or a lump-sum settlement, have standing to challenge the amount of their coplaintiff's share.

2. Lisa Is Not Estopped From Challenging the Amount of Sherry's Share

We acknowledge there may be circumstances wherein one wrongful death plaintiff is estopped from challenging a coplaintiff's right to recover. The *Changaris* court found one such circumstance. In that case, four adult children of the decedent had

acquiesced in the prosecution of the wrongful death action by the decedent's purported widow, all the while knowing she was neither the wife nor the putative wife of the decedent. The trial court drew the inference that the adult children had relied on the prosecution of the purported widow's claim to enhance the compromise settlement reached with the tortfeasor. The Court of Appeal affirmed, concluding it would be "most inequitable to permit [the adult children] to make this belated attack upon the right of [the purported widow] for the purpose of obtaining for themselves money to which they have no claim whatever." (*Changaris*, *supra*, 231 Cal.App.2d at p. 314.)

Here, Sherry's right to recover was never questioned. Only the amount of that recovery was at issue. At the trial against the nonsettling defendants, Lisa argued her loss of Raymond's society, comfort, care, and protection should be valued at $1,168,000. Sherry argued her economic loss was $1,100,000 and her loss of Raymond's society, comfort, care, and protection should be valued at $3,500,000, for a total of $4,600,000. Thus, the claim of each plaintiff exceeded the amount recovered in the unapportioned lump-sum settlement.

There is no evidence in the record to support a finding that Lisa launched a "belated attack" upon Sherry's status as a rightful heir, not entitled to share in the recovery. To the contrary, the opposite inference is more easily drawn. On the same date the settlement stipulation with the settling defendant was signed by plaintiffs, Lisa and Sherry, through counsel, entered into their own stipulation agreeing to a further apportionment trial at which the parties would be entitled to call additional witnesses not previously disclosed. The natural inference to be drawn is that instead of *relying* on either plaintiff's acquiescence to the amount demanded by the other, the plaintiffs *agreed* to resolve their dispute in the subsequent apportionment proceeding.

Importantly for purposes of our review, the trial court drew no inference of estoppel, nor was it even requested to make a finding on the issue. Each plaintiff

proposed issues to be resolved in the court's statement of decision. Estoppel was not listed by either party as a principal controverted issue, although Sherry did file an objection when the court failed to address estoppel in its statement of decision. In that objection, Sherry contended Lisa did not tell "any party" about her challenge to Sherry's claim. But we have found no evidence to support this statement, nor has counsel referred us to any.

Sherry's insistence that Lisa's deposition testimony, taken seven months before the settlement, constituted the source of an estoppel is not persuasive. The portion of Lisa's deposition — rejected by the court after Sherry belatedly offered it after both parties had rested — simply asked Lisa whether she had seen anything in Sherry's deposition she disagreed with. Lisa answered, "Seemed forthcoming to me." Sherry belatedly offered a portion of her own deposition into evidence, presumably to show what Lisa *should* have disagreed with when asked. This segment of Sherry's deposition recounted how Sherry and Raymond were planning to have children, and he had taken her to a doctor for that purpose one week before his death. Lisa's failure to take issue with these statements when asked whether there was *anything* in Sherry's deposition she disagreed with is better explained by counsel's failure to ask her specifically about this passage, or by the simple lack of personal knowledge about Sherry's plans for children, not as a concealment of what she may have known at that time about Raymond's intent to divorce Sherry. Moreover, this statement does not establish that Lisa's challenge to the amount of Sherry's share was not made known at other times in other ways, and the stipulation between the parties to take testimony from additional witnesses during the apportionment trial strongly implies the challenge was known.

Sherry did file a motion in limine seeking a ruling that Lisa was estopped *from offering evidence* to challenge Sherry's claim. Sherry relied solely on the snippet of Lisa's deposition testimony described *ante*. That motion was properly denied. But the

court's denial of the motion seeking to preclude Lisa from presenting her evidence did *not* preclude Sherry from offering evidence in support of *her* estoppel argument. She failed to do so. We presume there was none, except for the plainly insufficient and belated offer of Lisa's deposition testimony. Sherry was not even asked whether she knew of Lisa's challenge to her claim before she agreed to the terms of the settlement. Reliance is an essential element of any estoppel, and evidence that *Sherry* was ignorant of Lisa's challenge when she settled would have been far more probative than Lisa's inconsequential deposition testimony. (See generally 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 177, pp. 858-860.) After the close of evidence, Sherry made a belated request to offer the snippet of Lisa's deposition. After the court denied Sherry's request, the word estoppel is not found — not even once — in her closing argument. We take it there was no other evidence to argue. There was no estoppel, either as a matter of law or as a matter of fact.

Sherry's Contentions Regarding Sufficiency of the Evidence Lack Merit

Sherry makes two related contentions regarding sufficiency of the evidence. She argues the evidence was insufficient to support the court's finding that Raymond intended to divorce her. She also asserts the award of damages was excessive as to Lisa and inadequate as to her. We reject both contentions.

Her attack on the sufficiency of the evidence to support the court's finding that the marriage between Sherry and Raymond "was on the verge of ending" is doomed. Sherry reargues the weight of the evidence, ignoring the standard of review on appeal. But our review of factual issues is limited. Our power to do so "begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without

power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Instead, we indulge all inferences in favor of the judgment. (*Ibid*.) It is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the evidence, and we will not disturb the judgment if, as here, there is evidence to support it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.)

Three witnesses testified that before Raymond's death he had confided in them his marriage was over because Sherry had broken her promise to him that she would stop engaging in prostitution. One element of damage in a wrongful death case is the "loss of [decedent's] love, companionship, comfort, care, assistance, protection, affection, society, [and] moral support" (CACI No. 3921; see also BAJI No. 14.50) as well as the loss of *future* financial support, whether as of legal right or as a gift. (*Ibid.*; see also *Krouse v. Graham* (1977) 19 Cal.3d 59, 68 (*Krouse*); *Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 357-358.) Relevant to both of these measures of damage is the nature and *quality* of the relationship between the decedent and each wrongful death plaintiff. Inter alia, the trier of fact measures the likelihood that decedent would or would not have been generous to the wrongful death plaintiffs. The cases "have held admissible evidence of the closeness of the family unit [citation], the warmth of the feeling between family members [citation], and the character of the deceased as 'kind and attentive' or 'kind and loving' [citation] . . . . Adult children have received substantial awards for the wrongful death of retired, elderly parents [citation], and parents have received damages for the death of young children." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1424, p. 905.)

Our dissenting colleague's thesis that an award of wrongful death damages for loss of society, care, comfort and protection be allowed only for those wrongful death plaintiffs having a reasonable expectation of future services or other "benefits" is correct,

but puzzling. It is puzzling because it fails to address the evidence in this case, or the finding of the trial court that it had considered "the total loss that each plaintiff suffered from the decedent's death." Evidence of the "total loss" suffered by Lisa included: evidence that Raymond "was always there" for significant events in Lisa's life; that he taught Lisa to ski (and they skied together frequently), bowl, fish, and play softball; he "was always giving her cash and paying her rent and making sure that . . . if something wasn't paid, he would pay it and he would literally go and look in her refrigerator. If she didn't have food, he supplied it"; he cosigned for a Chevrolet for Lisa; he assisted her in making the down payment on a Honda; he allowed her to move in with him without charging for rent or board while she attended college, and later, when she no longer lived with him, he continued to help her with school fees and books; he made sure she had cash and that her rent was paid; and he scheduled time to get her car tuned up. To the extent the dissent suggests that compensable "benefits" are limited to those that can be valued in the marketplace, we note the cases discussed in the dissenting opinion fail to support that view. The decided cases rather uniformly recognize that a wrongful death plaintiff is entitled to recover for his or her reasonable expectation of "benefits" in the form of society, care, comfort, and protection. In *Krouse*, our high court emphasized the reality of injury to the decedent's family, even if not measurable in dollars, saying: "The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial 'injury' to the family for which just compensation should be paid." (*Krouse*, *supra*, 19 Cal.3d at p. 68.) The dissenting opinion's concern about the tension between the so-called pecuniary loss rule and the rule allowing for recovery of loss of society, care, comfort, and protection was reconciled by *Krouse*. *Krouse* excluded recovery for emotional distress or "wounded feelings," such as grief or sorrow, but allowed recovery for the *pecuniary value* of loss of society, care, comfort, and protection.

(*Id*. at pp. 68-70.) While this distinction may at times be difficult to apply, it is no more difficult a task for a jury than asking it to assign a pecuniary value for an injured plaintiff's pain and suffering, and to award in addition any economic loss sustained.

In *Benwell v. Dean* (1967) 249 Cal.App.2d 345 (*Benwell*) the court held evidence the decedent intended to leave his wife was relevant and admissible, but in that particular case the trial court did not abuse its discretion by excluding the evidence on the ground its probative value was outweighed by its prejudicial effect. In arriving at its conclusion, the *Benwell* court cited a long history of cases allowing evidence of "kind and loving" feelings between decedent and the wrongful death plaintiff, and quite logically concluded: "These decisions make it readily apparent that if it is proper for the beneficiary to produce evidence of the attitude and affection on the part of the decedent for the beneficiaries that then defendant should properly be able to rebut or negate such evidence." (*Id*. at p. 350.) As explained *ante*, if a defendant has this right, surely the adverse wrongful death plaintiff must also have this right when apportioning a lump-sum award. The statements of Raymond's intention to terminate the marriage, as related by three witnesses the court found credible, is substantial evidence in support of the court's finding of fact. It does not matter whether Raymond's suspicions or conclusions about his wife's behavior were right or wrong. What matters is what he intended to do about it — and that was proved to the satisfaction of the court with admissible evidence. We do not second-guess the court's findings on factual issues.

Our dissenting colleague suggests that *Benwell, supra*, 249 Cal.App.2d 345, stands mostly for the well-worn rule that evidence of a surviving spouse's actual or contemplated remarriage is inadmissible because it is highly speculative. The dissenting opinion then extrapolates that rule by arguing remarriage is a "far stronger bright line cutting off the right of a surviving spouse than the decedent's mere albeit expressed intention to leave his or her spouse." (Dis. opn., *post*, at p. 34.) The rule barring

evidence of remarriage, however, applies to evidence of actual remarriage or intent to remarry *at the time of trial*, the formation of the intent to remarry, or the actual remarriage, occurring *after* the decedent's death. It is inadmissible in *mitigation* of damages because remarriage was not contemplated *at the time of decedent's death* when the damages became fixed. If there were evidence that one of the spouse's intended to remarry *as of the time of the death*, presumably that evidence would include evidence of the intent first to seek a divorce, and would be admissible under *Benwell's* rationale.

Although *Sherry* never argues that evidence of Raymond's intent to divorce should have been excluded on the same basis courts exclude evidence of a surviving spouse's actual or intended remarriage, we nevertheless have considered that potential argument because the *dissent* raised it; and we reject it. As already noted, evidence of a surviving spouse's actual or intended remarriage would, if admissible, be relevant only with respect to mitigation of damages. Evidence of mitigation on account of remarriage is speculative because it requires a "comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse." (*Benwell, supra*, 249 Cal.App.2d at p. 356.) More fundamentally, such evidence is disallowed on the ground "a defendant should not be allowed to profit by an actual or possible remarriage of the widow, just as he may not profit through monies coming to her from insurance policies purchased by her husband upon his own life, or from some other collateral source." (*Ibid*.; see also *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 108 ["The principal basis for the rule is the same as that underlying other aspects of the collateral source rule"].) None of these considerations are present in the instant apportionment proceeding. The evidence of Raymond's intent to divorce was offered to show his disaffection for Sherry *at the time of his death*. The evidence was relevant to the amount of damage incurred, not its mitigation. And because this was a contest

between two heirs, and not the trial against the tortfeasor, the rationale grounded on the collateral source rule is not apt.

The dissent also argues that remarriage cuts off the legal right of support; mere divorce does not. Thus, the dissent reasons, if evidence of an event cutting off the right to support is inadmissible, an even more compelling case can be made to exclude evidence of decedent's intent to divorce. But allowing evidence of decedent's intent to divorce as of the time of death does not translate, without more, to a legal expectation of any particular level of lost economic support. Even if decedent intended to divorce, application of the factors set forth in Family Code section 4320, including the duration of the marriage, to determine the amount of lost spousal support could lead to a very large economic award to the surviving spouse. But if, as found by the trial court in the instant case, Raymond's eight-month marriage was about to end, the amount of support Sherry could expect would be subject, inter alia, to "[t]he goal that the supported party shall be self-supporting within a reasonable period of time. . . . [A] 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage." (Fam. Code, § 4320, subd. (l).) Thus, assuming the truth of the trial court's factual finding of Raymond's intent (as we must when supported by substantial evidence), achievement of the statutory goal of self-support would have given Sherry four months of spousal support (based on approximately $25,000 of income for that period), far less than the $110,000 she was awarded in the apportionment.

With respect to Sherry's contention that the award was excessive as to Lisa and inadequate as to her, her six-sentence argument makes no reference to the record or to legal authority. Instead, she simply makes the ipse dixit assertion the "award is unprecedented in Orange County history and probably in every other county in California and unsupported by the evidence." To be sure, not much guidance can be found in the decided cases as to what constitutes an excessive or inadequate award when a lump sum

is being apportioned. But we do know that in determining motions for a new trial on grounds of excessive or inadequate damages the trial court is statutorily constrained by section 657, subdivision 7 not to grant a new trial "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury *clearly* should have reached a different verdict or decision." (Italics added.) On appeal, our review is more limited. "The appellate court does not weigh the evidence on damages, and will reverse a judgment on appeal only if no substantial evidence supports the award." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 37, p. 542.)

The substantial evidence standard is appropriate in this apportionment case as well. And given the court's factual finding regarding Raymond's intent to divorce, substantial evidence supports the allocation. As discussed *ante*, Sherry's award was significantly more than she was likely to receive as spousal support had Raymond not died. And the evidence of Raymond's close relationship with Lisa was more than sufficient to support a significant award to her for loss of her father's society, care, comfort, and protection.

Sherry Misapprehends the Proper Basis for Apportionment

Sherry contends the court must apportion the fixed settlement fund, not on the basis of the proportion of damages suffered by each of the coplaintiffs, but rather on the basis of their relative "contributions" to the settlement fund. And Sherry argues the motivation of the settling defendant is what matters in measuring the relative "contributions." But this is wrong. Each plaintiff's "contribution" to the settlement fund is simply the amount of damage suffered by each, as compared to the damage suffered by the other. Even *Changaris*, the case Sherry relies upon throughout her brief, states each plaintiff is entitled to share in the fixed settlement fund "in the proportion that his

personal damage bears to the damage suffered by the others." (*Changaris*, *supra*, 231 Cal.App.2d at p. 313.) This entitlement is entirely unrelated to the factors the settling defendant may have considered when offering the settlement fund. The settling defendant may have acted with insufficient investigation or discovery, or it may have decided for reasons entirely unrelated to the merits of the litigation that a settlement would be more advantageous than a trial. It simply doesn't matter. "The defendant has no interest in the division which the plaintiffs may make among themselves, or which may be made for them, of the damages recovered. . . . Whether [the recovery] is divided among them after recovery or not, or how it is divided, are matters of no concern to the defendant." (*Robinson v. Western States Gas etc. Co.*, *supra*, 184 Cal. at pp. 410-411.) Here, the court stated in its written ruling, "[I]n making these findings the court has considered the total loss that each plaintiff suffered from the decedent's death." In short, the court considered the appropriate factors in apportioning the fund. Substantial evidence supports the finding.[4]

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[4] We find the dissenting opinion's extended discussion about a "zero-sum game" (dis. opn., *post*, at p. 17) somewhat mystifying. As we have clearly stated, we agree each plaintiff's contribution to the settlement fund is the amount of damage each suffered. But when the settlement fund is *fixed*, it is necessary to compare the relative contributions of each plaintiff, and to divide the settlement fund in the same proportion that each of the plaintiffs suffered damage, because the sum of the proved damage is not likely to match the amount of the *fixed* settlement fund. Surely a refund would not be offered to the settling defendant if the proved damages totaled less than the fund. Nor is there an opportunity to demand more from the settling defendant if the converse is true. We also part company with our dissenting colleague's suggestion that the settling defendant's reasons for offering the settlement amount be considered. An opinion of the pecuniary value of the loss of society, care, comfort and protection, is not the proper subject of expert opinion and is properly excluded. Without an evaluation of those damages, the damage evaluation is necessarily incomplete. And, as noted, the settlement amount offered is usually influenced by factors other than a strict calculation of the damages suffered.

Sherry's Contentions of Evidentiary Error Lack Merit

Sherry offered to present the testimony of the lawyer who had negotiated the settlement on behalf of the settling defendant. The court ruled the evidence was irrelevant. As noted *ante*, the relevant issue is the damage or loss suffered by each of the plaintiffs, not the defendant's motives or reasons for offering the settlement fund.

Sherry also contends the court erred in excluding the short snippet of Lisa's deposition testimony which stated she found no disagreement with the content of Sherry's deposition testimony. The offer was made after both parties rested, and the court denied Sherry's motion to reopen for the purpose of reading that testimony into the record, stating: "Why is it that you feel that it's appropriate now that everybody has rested and [Lisa has] been here and you could have called her at anytime yourself, why is it you feel now is an appropriate time to have it admitted into evidence?" Sherry's counsel explained his failure had been an oversight.

"Whether or not a motion to reopen should be granted is committed in all cases to the sound discretion of the trial court and it is seldom, indeed, that a record will justify a reversal of a judgment upon the ground that error was committed in denying a motion to reopen. [N]umerous cases have held that such a motion is properly denied, unless the court is satisfied that there is good excuse shown why the evidence sought to be introduced after reopening could not have been produced before the close of the evidence." (*Pocock v. Deniz* (1955) 134 Cal.App.2d 758, 761.) We discern no abuse of discretion. Even if we perceived error, it was not prejudicial. As discussed *ante*, the single sentence from Lisa's deposition testimony was wholly inconsequential.

The Court Did Not Err by Imposing Postjudgment Interest

The judgment of the court stated: "Given that the full 1.1 million dollar settlement proceeds are currently located in the Davis & Heubeck Trust Account, Davis

& Huebeck are hereby ordered to immediately pay to Plaintiff LISA CORDER and her counsel $990,000.00. [¶] Plaintiff LISA CORDER shall receive interest at the legal rate of 10% per annum from date of entry of judgment until her allocation of settlement proceeds is paid."

Sherry contends this was not a money judgment, she never had use of the money, and therefore interest should not have accrued. The argument that this was not a money judgment escapes us. Although the order is directed to Sherry's counsel, who had possession of the funds, it is clear he was holding the funds on behalf of both plaintiffs, and the order to Sherry's attorney was functionally equivalent to an order that Sherry pay Lisa her adjudicated share. The argument regarding Sherry not having use of the funds may well have applied to *prejudgment* interest. But once the dispute was adjudicated and judgment was entered, there was no reason for the disputed funds to be held by Sherry's counsel. Postjudgment interest could easily have been avoided by simply paying the $990,000, or enforcement of the judgment could have been stayed by posting an undertaking which would have been sufficient to cover any accrued interest. (See § 917.1, subd. (b).) There was no error.

Concluding Thoughts

Our dissenting colleague views the disposition of this case as a "profound injustice," and worries that our decision brings fault divorce back to California. We do not see it that way. There was no divorce. Raymond died while married to Sherry, and Sherry is entitled to all the rights of a spouse with respect to their community property. Rather, this was a case about compensable damages in a wrongful death case. The evidence credited by the court showed that at the time of Raymond's death, Sherry had a reasonable expectation of perhaps four months of spousal support from a husband who had concluded it was a mistake to have entered the marriage. The court found as a

factual matter that the marriage was on the verge of ending, and it is not our role to second-guess that determination. Our role is limited to reviewing the trial court proceedings to determine whether the court's decision is supported by substantial evidence, not to impose our independent view of a "just" allocation. Manifestly the bond between Lisa and Raymond was strong and loving. Substantial evidence supports the court's implicit finding that Lisa had a reasonable expectation of receiving the future "benefits" of her relationship with her father. We assuredly do not subscribe to our dissenting colleague's characterization of the father-daughter relationship shown by the evidence as a mere "wallow of warm fuzzies." (Dis. opn., *post*, at p. 12.) Nor do we presume, despite the trial court's findings to the contrary, that the award here was improperly based on Lisa's emotional distress. (Dis. opn., *post*, at p. 7.)

Lisa's Motion for Sanctions

Although we conclude Sherry's appeal is without merit, we deny Lisa's motion for sanctions. Some of the language in the *Changaris* case made Sherry's argument regarding Lisa's standing to challenge the amount of Sherry's award plausible, although wrong. Sanctions are not warranted in this circumstance.

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Lisa Corder shall recover her costs of appeal.

IKOLA, J.

I CONCUR:

O'LEARY, J.

SILLS, P. J., Dissenting.

I respectfully dissent. The trial judge based his allocation of the wrongful death award on evidence that turned the case into the equivalent of a fault divorce for a dead man. This wrong turn was the product of misunderstandings of the law governing the formation and allocation of wrongful death awards and resulted in a serious miscarriage of justice.

I. *A Profound Injustice: The Adult Daughter Gets Almost Everything While the Widow Gets Almost Nothing*

Here are the *relevant* facts of this case: A well-paid union crane operator died when a section of crane fell on him. He was survived by his wife and an *adult* daughter from a previous marriage. There was no evidence that at the time of his death he had either separated from his wife or had filed separation or dissolution proceedings. In fact, he hadn't even contacted an attorney about his relationship with his wife. An equipment manufacturing company then settled a consolidated wrongful death action in which both his wife and adult daughter were plaintiffs. The company paid $1.1 million -- roughly what the crane operator would have made if he had kept on working until age 65 -- to settle the case. The proceeds were then apportioned by the trial court between the wife and adult daughter with the widow getting only 10 percent and the adult daughter 90 percent. Why? Because the trial judge concluded that had the husband lived the parties would have eventually been divorced as a result of the wife's *fault*. Wow. This, despite the fact that over 30 years ago the Legislature abolished fault divorce in California. (Fam. Code, § 2335.)

The trial court had before it a widow who, *at the time of her husband's death*, had been entitled to her deceased husband's continuing support and half the community property of the marriage. It also had before it an adult daughter who, *at the time of her*

father's death, had no legally enforceable claim to any of her father's earnings, and only the most tenuous expectations of *pecuniarily* valuable "care, comfort and society." After all, adult children are usually financially independent of their parents.

So what did the trial court do? Based on irrelevant calumnies about the widow's character, and unacted-upon supposed intentions of the husband at the time of his death, the trial court awarded almost the entire fund to the adult daughter, and a mere 10 percent to the widow. The allocation is a profound injustice.

The same tactic of adult children attacking the character of a widow after a large wrongful death fund was initially established on the basis of *her* pecuniary interest in the dead husband's earnings was attempted in *Changaris v. Marvel* (1964) 231 Cal.App.2d 308. There, however, both the trial court and the appellate court rejected it for what it was: opportunism. Said the court in *Changaris*: "It would be most inequitable to permit appellants [four adult children] to make this belated attack upon the right of Alva [the widow] for the purpose of obtaining for themselves money to which they have no claim whatever." (*Id*. at p. 314.)

Alas though, the nature of wrongful death damages is not the clearest area of California law. Our Supreme Court has noted there is a "potential inconsistency" to the degree that it contains a rule that "only" pecuniary damages may be recovered while some cases seem to indicate that the "nonpecuniary" factors of care, comfort and society may also be the subject of recovery. (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, fn. 3.) This law can be reconciled, however, if we are willing to take the time to analyze the facts in the cases and carefully note precisely what each case has decided.

In a word, the reconciliation is this: While "only" -- *Horwich's* word -- pecuniary damages are recoverable in a wrongful death action, the so-called "nonpecuniary" factors of care, comfort and society can furnish a basis for recovery when they are linked to reasonably measurable pecuniary expectations.[5] A mere "close relationship" won't do.

[5] The majority's flat statement that "The decided cases rather uniformly recognize that a wrongful death plaintiff is entitled to recover for his or her reasonable expectation of 'benefits' in the form of society, care, comfort and

Further, California cases have drawn a clear line against emotional distress damages. Thus -- and here is an important point missed by today's majority -- while "comfort, care and society" have been allowed *as elements* of wrongful death recovery, they still must bear a *reasonable relationship* to measurable pecuniary value shown in the evidence. (See *Fitch v. Select Products* (2005) 36 Cal.4th __, __, 31 Cal.Rptr.3d 591, 595 ["In California, a wrongful death action is '"a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury"'"]; *Horwich, supra,* 21 Cal.4th at p. 276, fn. 3 ["heirs are limited to recovery for pecuniary damages only"]; *Parsons v. Easton* (1921) 184 Cal. 764, 773-774; *Ure v. Maggio Bros. Co., Inc.* (1938) 24 Cal.App.2d 490, 496; *Griffey v. Pacific Electric Ry. Co.* (1922) 58 Cal.App. 509, 522[6]; see also *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512 [three opinions all focusing on permutations of calculations of dead husband's earnings].)[7]

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protection" (slip op. at p. 16) is a gross oversimplification of the "decided cases." Those cases actually require a link between care, comfort and society and reasonably measurable pecuniary expectations that is conspicuously missing from the majority's unsupported formulations. One of the reasons this dissent is so long is to thoroughly support that link.

[6] The right of action for wrongful death is wholly statutory (see *Bond v. United Railroads* (1911) 159 Cal. 270, 276 ["The rights of action being wholly statutory, the statutory rule is the only measure of damages."]) and the statute has been around in some form since 1862 (see *Krouse v. Graham* (1977) 19 Cal.3d 59, 67), which means much of the foundational work on the meaning of the phrases that remain in the statute today was done in relatively early cases. It would be present-minded chronological imperialism to assume that merely because cases in this area were decided before oh, 1970, that they do not remain binding (if Supreme Court) or presumptively persuasive (if Court of Appeal) precedent. *Parsons*, for example, was cited as controlling precedent by the Supreme Court in 1999. (See *Horwich, supra,* 21 Cal.4th at p. 276, fn. 3.)

[7] *Estate of D'India* (1976) 63 Cal.App.3d 942 nicely embodies this reconciliation. In *Estate of D'India*, the decedent was a young married woman, survived by her husband and her mother. The widower commenced a wrongful death action, then settled it, obtaining net proceeds of about $16,000, which was to go to him as administrator of the estate. The mother sought "apportionment" in the probate court. (Actually, it wasn't really "apportionment," since she wanted the entire amount.) Her theory was that the decedent had given the mother small cash sums ($25 a month). The mother also arbitrarily valued the deceased daughter's comfort and society at $1,500 a year for the rest of the her life, coming to a grand total in excess of $30,000.

The court began with the general pecuniary loss rule -- wrongful death plaintiffs receive compensation for pecuniary loss only: "Under California law, an heir is entitled to recover wrongful death damages for pecuniary loss alone." (*Estate of D'India, supra*, 63 Cal.App.3d at p. 947, original emphasis.) Thus any subjective factors must still be assessable "in pecuniary terms under the evidence in the particular case." (*Ibid*., original emphasis.)

Given the conflicting evidence in the case before it as to whether the deceased daughter had indeed given her mother any money at all (see *Estate of D'India, supra*, 63 Cal.App.3d at pp. 949-950) and the wholly "arbitrary evaluation" of the loss to the mother of the daughter's comfort and society -- that is, emotionality separated from pecuniary interest -- the *Estate of D'India* court rejected the mother's challenge to distribution because she had not sustained "her burden of showing a measurably pecuniary 'loss of comfort and society' which California law requires." (*Id*. at p. 949, original emphasis.)

The necessary tether between "care comfort and society" and pecuniary interest was expressed very plainly by the Supreme Court in *Simoneau v. Pacific Electric Ry. Co.* (1911) 159 Cal. 494, 505: "While solace for wounded feelings may not be included in the damages awarded, the loss of society, comfort and care to a wife and children, as well as their support, may be considered *in so far as* they affect the question of pecuniary loss to them by the death of the husband and father." (Emphasis added.)

In the case before us, however, there is no way that what the trial court allocated to the adult daughter bears any rational relationship to pecuniarily measurable "care, comfort and society," in the way that such damages have been permitted in our case law. In fact (as shown below), the adult daughter's evidence of such a pecuniary interest here is flimsier than was presented in *Ure v. Maggio*, *supra*, 24 Cal.App.2d 490, and that evidence was held insufficient to establish a claim for compensable "care, comfort and society." It also bears noting that the adult daughter, *at the time of her father's death*, had absolutely no expectation of any *legally enforceable* claim to her father's future earnings. (See Fam. Code, § 3910, subd. (a) [no obligation to support adult child absent incapacity and insufficient means]; *In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 130 ["Absent special circumstances such as completing high school or incapacity, a court has no authority to order a parent to support an adult child."]; accord, *In re Marriage of Serna* (2000) 85 Cal.App.4th 482, 487-489 [reversing even indirect adult child support by artifice of increasing one spouse's spousal support to help pay for the other spouse's support of an adult child]; see also Fam. Code, § 3587 [adult child has no expectation of support absent an agreement by his or her parents].)

By contrast, *at the time of her husband's death*, the widow had every expectation of the pecuniarily measurable support embodied in the wrongful death award predicated on her late husband's earnings. She had a legal entitlement. (See Fam. Code, § 4300 ["Subject to this division, a person shall support the person's spouse."]; § 4301 ["Subject

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I think we can say with some confidence that no matter how our Supreme Court ultimately resolves the "potential inconsistency" noted by the *Horwich* court, it is unimaginable that the high court will adopt a model where pecuniary interests are obliterated and only subjective factors count.

to Section 914, a person shall support the person's spouse while they are living together out of the separate property of the person when there is no community property or quasi-community property."].)[8] And, as the deceased's wife, it was natural that *she* would have had a greater expectation of receiving her husband's "care, comfort and society," including whatever household services he might render. (See *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1227 [proper to use study on value of household services provided by one spouse to another].)

Thus, at the time of her husband's death, it was the widow, not the adult daughter, who had the more "just" -- and that is the statutory word -- claim to the lion's share of the award.[9] Yet underlying the trial court's decision was the assumption that because of the wife's fault, her support would have been less. Perhaps that was the law 30 years ago, but today a divorced spouse who has acted badly during the marriage still has a greater legal entitlement to support than a self-supporting adult daughter!

The majority justifies standing the otherwise ineluctably just allocation of the fund on its head by pointing to evidence that, *at the time of his death*, the deceased *intended* to eventually leave his wife and divorce her despite the fact that no concrete steps had been taken.

But the majority has missed the point that evidence of mere intention to separate from, or divorce, a spouse is, under California's regime of no-fault divorce, irrelevant. (See Fam. Code, § 2335 ["Except as otherwise provided by statute, in a pleading or

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[8] Family Code section 914 lists the debts to which a married person is "personally liable" during marriage, the first of which is: "A debt incurred for necessaries of life of the person's spouse while the spouses are living together."

[9] The majority opinion takes great pride in declaring that our court's role is to determine whether substantial evidence supports the 90-10 allocation of the trial court, not "to impose our independent view of a 'just' allocation." (Slip op. at p. 24.) First, they should read section Code of Civil Procedure section 377.61, which actually uses the word "just": "In an action under this article, damages may be awarded that, under all the circumstances, may be just . . . ." That's the word the Legislature put in. It follows from this very emphasis on justice *in the statute* that any "determination whether the trial court's decision is supported by substantial evidence" must *itself* have be made with reference to justice. A *90 percent* allocation of a *$1.1 million* award to a self-supporting adult daughter based on incidental help the father gave the daughter *in college*, guidance and teaching in her *childhood*, and helping her with unspecified amounts of cash and "scheduling" of time to "get her care tuned up" cannot seriously be described as a "just" allocation as against a widow who was married at the time of death, and in light of the fact that the award was based on the *widow's* future pecuniary interest.

proceeding for dissolution of marriage or legal separation of the parties, including depositions and discovery proceedings, evidence of specific acts of misconduct is improper and inadmissible."].) No doubt there are some relationships where the spouses form an intention to divorce on a daily basis, and the intention evaporates just as quickly. Mere intentions can be wonderfully evanescent. But unless legally cognizable, concrete steps are taken -- either actual separation or filing for separation or dissolution -- the existing legal rights and expectations between spouses remain intact, including expectations of continued support. California's family law takes no account of a mere, unacted-upon intention to separate or divorce. Even taking the step of seeing a lawyer does nothing to alter legal rights already in place. At the time of death, *when the rights of the parties were established*, the wife clearly had the (much) stronger pecuniarily cognizable claim on the deceased's earnings. To use the sports metaphor, when the buzzer went off, it was the wife who was winning.

California's case law has already wrestled with the analogous issue of whether a wrongful death award can be diminished because a widow's support rights were cut off by events after death, and the actual answer, contrary to today's result, is no. (See generally *Benwell v. Dean* (1967) 249 Cal.App.2d 345.) In *Benwell*, evidence of remarriage -- which even more than a divorce cuts off support rights to a spouse (and would allow money to be diverted to largesse toward an adult child) -- was not allowed to affect the award, because it was *too speculative*. A fortiori, an unacted-upon intention to divorce at the time of death should not affect expectations of support, *particularly* after California has dispensed with fault divorce for more than three decades.

It thus appears that, in net effect, the trial judge imposed on the widow a "fault divorce" that neither she nor her deceased husband had ever sought and certainly never took any concrete steps to effect. Having granted that de facto divorce, the trial judge then felt free to award the great bulk of a wrongful death award -- *an award based on the widow's pecuniary expectations in her husband's future income*, to an adult daughter who had, at the time of death, only the most minimal expectations of receiving anything

of pecuniarily measurable value from her father. In essence, the trial court converted a fund based on the deceased's lifetime earnings and the legal duty to support his spouse into a fund that was based on the emotional distress of the daughter in the loss of her father, and allocated almost all of that fund to the daughter. Our system of law is better than this result, and, as I will now show, California's well developed case law concerning wrongful death awards and their allocation among wrongful death claimants is indeed to the contrary.

II. *The Nature of Wrongful Death Damages and Their Allocation Among Claimants*

A. Wrongful Death and Pecuniary Loss

There is something profoundly wrong in allocating 90 percent of a wrongful death award to an adult child and only 10 percent to the widow or widower. But to understand just exactly how the trial court and the majority have erred, we must cover some of the basics of the nature of wrongful death awards and the rules governing their subsequent allocation among statutorily-entitled claimants.

There was no cause of action for wrongful death at common law. (See *Bond v. United Railroads* (1911) 159 Cal. 270, 275-276 ["At common law, no action would lie for an injury causing death."].) Thus the Legislature had to create the right to recover in a specific statute, and that right to recover is limited by the terms of the statute creating it. (See *id*. at p. 276 ["Rights of action by, or for the benefit of, parents, children, or heirs of the person killed, for the damage caused to them by his death, exist solely because of statutes and are limited by the statutory provisions which create or confer them."].)

California got its first wrongful death statute in 1862. The statute made express reference to "pecuniary" damages, but the word "pecuniary" was expressly removed 10

years later, as the statute was recodified as section 377 of the Code of Civil Procedure.[10] (*Krouse v. Graham* (1977) 19 Cal.3d 59, 67.) Cases for the next 100 years held that wrongful death damages "were recoverable only for the 'pecuniary' losses suffered by the decedent's heirs." (*Ibid*.)

B. The Tension Between the Pecuniary Loss Rule and Recovery for Care, Comfort and Society . . .

1. *Is Resolved by Grounding Recovery in Reasonable Expectations of Services or Benefits*

Not even the philosopher Jeremy Bentham would try to define the loss of the "utility" of a deceased human being to another merely in terms of an existing income stream. One has only to ponder the problem of the wrongful death of a traditional homemaker, otherwise not generating an income stream as such, to realize that courts were certainly not going to take such a narrow view of pecuniary loss. Thus, as the *Krouse* court pointed out, a line of cases developed which allowed recovery for (depending on what permutation of these words one prefers) "care," "comfort," "society" and (sometimes included in the formulation) "protection."

The *Krouse* court traced recovery for care, comfort and society back to the 1911 *Bond* decision. The *Bond* decision itself took the idea from the 1906 decision in *Sneed v. Marysville Gas & Elec. Co.* (1906) 149 Cal. 704. And *Sneed* relied (to the degree that it relied on California authority) on the 1895 opinion in *Redfield v. Oakland C.S. Ry. Co.* (1895) 110 Cal. 277. The trail of state authorities ends with *Redfield*, so let's start there to try to understand what *sort* of care, comfort and society was initially awardable under

[10] All references in this opinion to section 377, or to sections 377.60 and 377.61, are to the Code of Civil Procedure. Further, in the interests of reader convenience, the convention of the California Style Manual which lists the year of an opinion only once (when first mentioned), even if the case is substantively discussed much later, will be discarded in favor of the federal practice of reintroducing the year of a case in subsequent references at the author's discretion.

California case law, and then move to *Sneed*, *Bond* and ultimately to *Krouse* to see what, if anything, has changed over the years.[11]

Redfield was the archtypical death-of-a-homemaker case which is the hypothetical one immediately thinks of if wrongful death damages were posited to be limited to just an income stream. There, a wife, and mother of two minor children, died in a street car accident. The mother was a graduate of a seminary. (That fact seemed to impress the court, which suggested that it facilitated the homemaker's role as director of her children's moral education.) She gave her children music lessons (piano and voice). She was an accomplished clothes maker, directed the education of her children, nursed them when sick and "looked after the comfort of her husband as well." (See *Redfield*, *supra*, 110 Cal. at pp. 284-285.) As our high court noted, it was "difficult to fix the definite money value of the services of *such* a wife and mother." (*Id*. at p. 285, emphasis added.) (That word "such" is revealing, since it harbors the idea that there might be a rule for *other* wives and mothers, i.e., the key is the word "services.") Thus, the court ruled against the streetcar company's argument that the wrongful death award should be *arbitrarily* limited, as it was in some states. The *Redfield* court simply pointed out that the statute did not so limit amounts, but left the determination to the jury. (*Id*. at pp. 285-286.)

Sneed's contribution to the development of the area was by way of dicta, because there the court ordered a new trial, thus rendering moot the appellant's argument that the award was excessive. The case involved a mother seeking a wrongful death award for her 22 year-old son, who worked as a plumber at the time of death. Even so, in giving directions for the retrial, the *Sneed* court began with the basic pecuniary loss rule: "With regard to the measure of damages, in view of the argument made . . . it is proper to say that it is definitely settled that under our statute the damages to be recovered for an injury causing death are always limited to the pecuniary loss suffered by the heirs of the person

[11] The line requiring a pecuniary link to recovery, however, can be independently traced back even farther, to *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, 37-39, which I discuss at length in the portion of this opinion dealing with the *Benwell* opinion.

killed, by reason of his death." (*Sneed, supra*, 149 Cal. at p. 710.) But then the court articulated the rule so as to make "pecuniary loss" a matter of *reasonable expectations* (including voluntary support) of *actual benefits* though voluntarily conferred, as well as legal entitlements: "We think it may be further said that this pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be *reasonably expected such heirs would have received from the deceased had his life not been taken*, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only. [Citations, including one general citation to *Redfield*]." (*Ibid*., emphasis added.)

Finally, in *Bond*, a mother sought wrongful death damages for the death of her minor son; the father was already dead. The jury returned a verdict of $4,500, but the trial court reduced that amount to $405. The $405 amount was the net probable earnings of the deceased son until he reached the age of majority, and the main focus of the opinion was whether the mother could recover anything for loss after her son's majority. In the process of answering yes to this question, the *Bond* court explicitly broadened the pecuniary loss rule, though again the court still tied the rule to reasonable expectations of actual *pecuniary* loss.

But while the pecuniary loss rule was broadened in *Bond*, it was still framed in terms of a tie to *actual expectations established with reasonable certainty*. The court rejected the idea of damages based on loosy-goosy "fancy" and "speculation" -- there still needed to be some hard tie to actual pecuniary interests: "It would seem to follow from this rule absolutely limiting the damages in every case to the pecuniary loss occasioned by the death, and upon a consideration of that justice which the statute itself invokes, that this pecuniary loss should be extended to, and should include, *all pecuniary loss of every kind* which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute in the future, because of the death of the

victim. Nothing less would be a just compensation for the injury, and anything more, or anything in the realm of improbability, conjecture or mere fancy, would be beyond the purview of the statute and unjust to the defendant." (*Bond, supra*, 159 Cal. at p. 277, italics added.)

The need for grounding the award in firm expectations of benefits was emphasized in the next (very, very long) paragraph, where our high court quoted with approval several English decisions which stood for the rule that "the damages 'should be calculated in reference to a reasonable expectation of the life.'" Indeed, the phrase "reasonable expectation" is then repeated no less than three times in the next two sentences. (*Bond, supra*, 159 Cal. at pp. 278-279.)

Ultimately, then, the high court rejected the defendant's theory that expectations could be limited to just the legally entitled benefits that a parent might receive during a child's minority, and directed judgment for the full $4,500 that the jury initially awarded. (*Bond, supra*, 159 Cal. at pp. 279-287.)

However, in the process, the court also confronted the inevitable problem of parsing care, comfort and society (permitted) from emotional distress, grief and sorrow (not permitted). Essentially, the court wanted a grounding in pecuniary reality, rather than a wallow of warm fuzzies: "The rule that allowance may be made for *pecuniary loss from* deprivation of society, comfort, and protection of a son is apparently settled and cannot now be disturbed. It is evident to us, however, from the cases that have come before us, that it often leads to extravagant verdicts in which the jury, in fact, allow a supposed compensation for sad emotions and injured feelings, instead of *confining their verdict to actual pecuniary loss*." (*Bond, supra*, 159 Cal. at p. 285, emphasis added.)[12]

[12] My colleagues misread this passage of my dissent. In this passage I am not describing the relationship between Lisa Corder and her father. I am describing what the *Bond* court said, which is that, plainly put, there is no recovery for loss of warm fuzzies -- I choose the phrase deliberately to emphasize the contrast between "hard" pecuniary expectations and "soft" emotional distress -- and the majority's taking mock umbrage at the usage will not change the law as articulated by the Supreme Court in *Bond*. (If there are any readers who don't like the phrase, "warm fuzzies," they can mentally substitute the more cumbersome phrase "care comfort and society as a free-floating category of recovery severed from services that the deceased actually did for the claimant," i.e., the sort of emotional distress recovery that no California court has ever endorsed, until at least today when the majority

My reading of *Bond* is confirmed by another case, decided by our Supreme Court a mere two months after *Bond* and which appears in the official reporter less than 300 pages after *Bond*: *Simoneau v. Pacific Electric Ry. Co.*, *supra*, 159 Cal. 494. In *Simoneau*, the wife of the deceased was permitted to testify that she had two disabled "little girl[s]" (court's phrase, see *id*. at p. 504; the court was obviously conveying the idea that the daughters were *minor* children), and the defendant argued that such testimony created too much sympathy for the wife (see *id*. at p. 506). The court rejected the argument, because the disabled daughters needed extra care, but even so the evidence could "only be considered as an element of pecuniary loss." The court then launched, post-*Bond*, into a discourse on the wrongful death statute, culminating in a passage (all of it is quoted in the margin) which explicitly tied "comfort and society" to pecuniary recovery in terms of what each family member was "entitled to or required" from the deceased.[13]

2. *An Approach Not Changed*

In Krouse

A subtext of today's majority opinion is that *Krouse* cut loose wrongful death damage law from its moorings to actual pecuniary loss, so that wrongful death damages could be a simple matter of substantial evidence of a close relationship to the deceased,

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endorses it inferentially.) Since Lisa Corder's actual relationship with her father did have a small pecuniary component -- at the time of her death Dad was acting as a sometime underwriter of her rent -- the actual relationship between Lisa and her father obviously encompassed some sort of pecuniary expectation transcending warm fuzzies, though whether she presented sufficient proof of even that pecuniary expectation is another matter. But even assuming that Lisa presented evidence to properly value the services her father provided for her, can anyone say with a straight face that those services as described by the majority at page 16 of the slip opinion were really worth the bulk of a $1.1 million settlement based on the widow's claims? That valuation of the decedent's occasional payment of rent money and service as a dispatcher for car repair really is an injustice, and could only be the law if warm fuzzies by themselves were enough to sustain a 90 percent allocation of over $1 million, which it isn't, as the *Bond* court made clear.

[13] Here's the passage: "The statute does not provide for a distribution among the members of the family who take as the beneficiaries of the statute. There was such a provision in the statute of 1862, but it was not incorporated in the code, thus indicating an intention to restore the action to what it was originally intended to be, a means of providing for the family and each member thereof that which each could have expected to receive in the way of comfort and support from the lost father had he lived and kept the family together, *bestowing upon each such portion of his earnings as he or she were to entitled to or required*. (*Simoneau, supra*, 159 Cal. at p. 508, emphasis added.)

end of controversy, thank you very much.[14] A close reading of *Krouse*, however, reveals that the decision did no such thing. It left intact the need for a rational relationship to some reasonable expectation of services or benefits from the decedent. And in fact, the opinion *reversed* an award that the Supreme Court perceived to be based on emotional distress.

Krouse arose out of an auto crash killing a mother of five children, and injuring her husband and a neighbor. The husband and children were awarded a lump sum of $300,000 for the mother's wrongful death. The mother had performed nursing services for the husband who was suffering from emphysema, maintained the family home and garden, and had primary responsibility for attending to a minor son, who was "totally dependent" on her for "the comforts and conveniences usually afforded by a mother to a youth of his age." (*Krouse, supra*, 19 Cal.3d at pp. 66-67.) And she performed some care for the grandchildren. (*Id*. at p. 67.)

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[14] As shown in the language on page 15 of the slip opinion. Note the word choice: "One element of damage in a wrongful death case is the 'loss of [decedent's] love, companionship, comfort, care, assistance, protection, affection, society, [and] moral support' (CACI No. 3931; see also BAJI No. 14.50) *as well as* the loss of future financial support, whether as of legal right or as a gift." (Emphasis added.)

Not quite. In the first place, jury instructions are hardly persuasive authority of anything, particularly in an area of the law as nuanced as wrongful death damages. (*People v. Brown* (2004) 33 Cal.4th 382, 391 ["In contrast to legislative enactments or judicial decisions, the California Jury Instructions, Criminal (CALJIC) does not have the force of law."].) That "as well as" insinuates an (incorrect) separation of care, comfort and society from any pecuniary interest at all into the general model of wrongful damages -- and to that degree is surely at odds with the Supreme Court in, among other cases, *Horwich* and *Parsons* as well as -- as I am now about to show -- *Krouse*. But note this as well: After the majority uses a mere jury instruction as authority to suggest that care comfort and society can exist apart from pecuniary interest, another statement follows which, like a spacecraft off course, gets further away from its target the longer it goes without a course correction: "Relevant to both these measures of damage is the nature and *quality* of the relationship between the decedent and each wrongful death plaintiff." (Slip op. at p. 15, original emphasis.) The words "both of these measures of damage" suggest the (incorrect) idea that care comfort and society exists wholly independent of "the loss of *future* financial support, whether as of legal right or as a gift." Well, they don't. Read *Horwich* and *Parsons*.

But even worse, note the emphasized phrase, "and *quality* of the relationship." With that, we know the majority is firmly off course. The idea is that a trial judge, in allocating a wrongful death award, can look at the *disembodied* "quality" of a relationship. No. The majority thus indicates that the "quality" of a relationship, severed from evidence of pecuniary expectation making up the original wrongful death fund to be allocated, may be a disembodied basis for the allocation itself. The idea is contrary to a mountain of precedent concerning both the nature of wrongful death damages in the first place (e.g., *Krouse* (no emotional distress damages), and the nature of that allocation (e.g., *Changaris* (the trial judge's task is to figure out where the damages came from, not to allocate them ab initio)).

The tortfeasor attacked a jury instruction concerning what was functionally the husband's *consortium* claim. That consortium claim, of course, included loss of the wife's comfort, affection and society, as well as the loss of enjoyment of sexual relations. (See *Krouse, supra*, 19 Cal.3d at p. 70.) In that context the court noted that the husband sought "those elements of recovery" that would "be available to him as 'consortium' damages" anyway.[15] And from there the *Krouse* court examined the cases involving wrongful and pecuniary loss, in which care, comfort and society were seen to be recoverable even though they did not have an "ascertainable economic value." (*Id*. at p. 68.)

Ironically, the *Bond* case was the *Krouse* court's exhibit A for the idea that California had not "restricted wrongful death recovery only to those elements with an ascertainable economic value . . . ." Rather, said the *Krouse* court, "On the contrary, as early as 1911, we held that damages could be recovered for the loss of a decedent's 'society, comfort and protection' [cite to *Bond*]," but the court still recognized a need for some pecuniary tie: "[after the cite to *Bond*] though only the 'pecuniary value' of these losses was held to be a proper element of recovery." (*Krouse, supra*, 19 Cal.3d at p. 68.) The court then mentioned the (if you read it, very short and unquestionably superficial) Court of Appeal decision in *Griott v. Gamblin* (1961) 194 Cal.App.2d 577, the longer *Benwell* case, and finally the 1882 Supreme Court decision in *Cook v. Clay Street Hill R.R. Co.* (1882) 60 Cal. 604.

Despite its brevity, the *Griott* decision hardly endorses the emotionalism that the *Bond* court had openly worried about. In *Griott*, the decedent was the 78-year old "patriarch of an extremely close and devoted family" who was "dedicated to his children's comfort, society and protection," in that he "performed all of the household functions for one of his sons and some services for the other five children who resided in

[15] Here's the jury instruction: Husband "could recover 'reasonable compensation' for the loss of his wife's 'love, companionship, comfort, affection, society, solace or moral support, any loss of enjoyment of sexual relations, or any loss of her physical assistance in the operation or maintenance of the home.'" (*Krouse, supra*, 19 Cal.3d at p. 67.)

Los Angeles." (*Griott, supra*, 194 Cal.App.2d at p. 580.) The key to the opinion is that the total award amounted to less than $100 per month for seven years, and *that* was to be divided among the seven adult children. (*Ibid*.) Obviously a wrongful death case where the average recipient received less than $15 a month for about seven years (even in 1961 a particularly small amount of money) does not stand for the idea of recovery for care, comfort and distress *unhinged* from reasonable expectations of some kind of services.[16]

Benwell I discuss below. And *Cook* was very much a run-of-the-mill wrongful death case rooted to pecuniary expectations of support. There, the deceased made a "comfortable living for himself and his family" as a poultry dealer. The defendant objected to the allowance of testimony that he was "kind and attentive" to his house-bound invalid wife who was "dependent" on the deceased. That objection was, of course, unpersuasive. In affirming the award, the *Cook* court specifically pointed to the *services* of caretaking that the deceased husband had performed for his invalid wife: "The plaintiff [the widow] being an invalid, and having been for years dependent upon her husband, we cannot, as law, say that the amount given is more than 'under all the circumstances of the case,' is just." (*Cook, supra*, 60 Cal. at p. 610.)

Having made the point that care and comfort had indeed been awarded by prior California cases, the *Krouse* court wrote the sentence that is as close as it comes to supporting the idea that care comfort society damages could be severed from a need for pecuniary loss: "These cases suggest a realization that if damages truly were limited to 'pecuniary' loss, recovery frequently would be barred by the heirs' inability to prove such loss." (*Krouse, supra,* 19 Cal.3d at p. 68.)

Even so, the court could not bring itself to make care comfort and society a free-floating category of recovery severed from *services* that the deceased actually did for the claimant. The point was that pecuniary loss had to be broadly defined, so as to avoid a narrow, Gradgrindian focus on income stream. Thus, the requirement of reasonable

[16] The *Griott* court gave no indication of the problem of allocation between claimants, even though it would appear on the face of the facts of the case that the one adult child who was the special object of the "patriarch's" care had a much stronger claim to the recovery than the other children -- he, after all, really depended on the deceased.

expectation of services remained untouched: "The *services* of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial 'injury' to the family for which just compensation should be paid." (*Krouse, supra*, 19 Cal.3d at p. 68, emphasis added.)

And it was at that point in the opinion that the *Krouse* opinion began to pick up momentum on the problem of differentiating care and comfort from emotional distress. Up to that point, the opinion had, after all, simply been concerned with establishing the propriety of the *husband's* recovery for lost care and comfort of his spouse, and had not been concerned with the children's relationship to their mother. Now the *Krouse* court then launched into a long quotation from *Bond* (much of which I have already quoted) worrying about juries giving compensation for "'sad emotions and injured feelings, instead of confining their verdict to the actual pecuniary loss'" (see *Krouse, supra*, 19 Cal.3d at pp. 68-69, quoting *Bond, supra*, 159 Cal. at pp. 285), and quoted (in apparent approval) a similar passage from *Ure, supra*, 24 Cal.App.2d 490, which said that: "'it is only the pecuniary, and not the sentimental, value of such loss which may be taken into consideration in the assessment of damages.'" (*Krouse, supra*, 19 Cal.3d at p. 69, quoting *Ure, supra*, 24 Cal.App.2d at p. 496.)

With that, our high court had prepared the way to conclude that the jury instruction allowing the husband "nonpecuniary" damages was not prejudicial error. As the court had said, the husband otherwise had available to him *as consortium damages* what the challenged jury instruction allowed him in the way of care and comfort (and loss of sexual relations). So "[f]or all of the foregoing reasons" -- including its duplication in the form of a classic spouse's consortium claim -- the jury instruction allowing "nonpecuniary damages herein . . . properly set forth the elements of damage recoverable" by the husband. (*Krouse, supra*, 19 Cal.3d at p. 70.)

Thus, while it was okay for the jury to receive the functional equivalent of a consortium instruction regarding the *spouse's* particular nonpecuniary losses regarding

the *spouse's* wrongful death claim, it was not okay for the trial court to instruct the jury that all the claimants -- including the children -- "might recover for mental and emotional distress sustained by them." (*Krouse, supra*, 19 Cal.3d at p. 70.) An instruction that the jury could award reasonable compensation "for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by . . . plaintiffs" might have led the jury to "award damages" to the "heirs for their present and future mental and emotional distress resulting from" the decedent's death, and that was not proper in a wrongful death action." (*Id*. at p. 71.) Given that California cases "have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action" (*id*. at p. 72), the subject turned to whether the instructions were prejudicial. (*Ibid.*) The *Krouse* court concluded the answer was yes, because of several factors, including, interestingly enough, evidence of the closeness of the relationship with the decedent's family: "The sizable verdict in favor of the Krouse plaintiffs ($300,000) may very well have included a substantial award for their grief and suffering, a fair assumption in light of the extensive evidence of decedent's injuries, her good character, and her close relationship with her family." (*Id*. at pp. 72-73.)[17]

[17] Yet the majority assume a model of the law which allows awards for emotional distress under the guise of care comfort and society *apart* from pecuniarily measurable expectations. For example, in footnote 4, the majority say: "An opinion of the pecuniary value of the loss of society, care, comfort and protection, is not the proper subject of expert opinion and is properly excluded." But what is *pecuniarily measurable* care comfort and society if not daily household services, such as, for example in *Kinney, supra*, 96 Cal.App.4th at page 1227, things like mowing the lawn, doing the gardening, changing light bulbs, fixing leaky faucets or "whatever maintenance" was required around the house. And yet the Kinney court was very clear that expert testimony (based on a Cornell University study of household services) was quite properly admissible in determining damages in a wrongful death case. What the majority really want the law of wrongful death damages to be is to include a big, flabby, malleable component called "care comfort and society" *untethered* to economic interest or services -- after all, such a component is the only way to justify the award in this case.

C. The Proper Allocation of a Wrongful Death Award Between the Claimants

1. *Is Not a Zero-Sum Game Based On Equitable Allocation, But Is Based On the Contribution of Each Claimant to the Total Award*

Thus far my discussion has been dominated by cases explicating the elements of a wrongful death recovery in the context of what the wrongful death defendant must pay to the statutorily-entitled wrongful death claimants in the aggregate. Such a context, as far as the wrongful death claimants are concerned, is obviously non-zero sum. That is, no individual wrongful death claimant has anything to lose when the question is whether a given, lump sum award, based on "hard" pecuniary loss, is *increased* to reflect the "soft" loss of the deprivation of care, comfort and society. There is only a bigger pie to carve up.

Now, at first blush one might conclude that, *as between claimants*, allocation is a zero-sum game, where one claimant wins to the degree another claimant loses. The case law, however, belies this idea, and instead posits a wholly different model of allocation: The lump sum wrongful death award is the *sum of its constituent parts, each part representing the claimant's own damages*, and it is the task of the trial judge in apportioning a lump wrongful death award to ascertain *each* individual claimant's "respective" (the key statutory word, see section 377.61) contribution to the lump sum and give judgment accordingly. (See *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692 ["Although recovery under section 377 is in the form of a 'lump sum,' the amount is determined in accordance with the various heirs' separate interests in the deceased's life and the loss suffered by each by reason of the death, and no recovery can be had by an heir who did not sustain a loss."]; *Perkins v. Robertson* (1956) 140 Cal.App.2d 536, 543 ["But while a 'lump sum' verdict is required, the total recovery is

the aggregate of the pecuniary loss of each of the heirs entitled to recover by reason of the death of the deceased -- the damages of each are added to produce the total."]; see also *Simoneau v. Pacific Electric Ry., supra*, 159 Cal. at p. 508 ["what it was originally intended to be, a means of providing for the family and each member thereof that which each could have expected to receive."].)

A relatively recent example of the constituent-part model of allocation of wrongful death awards between claimants, as distinct from an "equitable allocation" model, is *Eli v. Travelers Indemnity Co.* (1987) 190 Cal.App.3d 901. *Eli* was a case where the deceased died in the course and scope of his employment, so the employers workers' comp insurer had a claim for $50,000 paid out, which was, alas, also the limits of the tortfeasor's liability insurance policy. The trial court allocated to the workers' comp insurer the whole amount, but the appellate court rejected the allocation, finding in both the Labor Code statute involving workers' comp insurer claims and, independently, in the wrongful death statute (then section 377), the idea that the trial court was to "ascertain the damages to which each claimant is entitled and then to apportion the total award accordingly." (*Id*. at p. 905.)

But the case that best illustrates the constituent-part-not-equitable-allocation model of wrongful death allocation most clearly is *Changaris v. Marvel* (1964) 231 Cal.App.2d 308, which, though one would never realize it from the majority opinion, is closely similar to the case before us.

Preliminarily, the majority opinion is quite correct to conclude that *Changaris* does not stand for the idea that the trial court had no *jurisdiction* to allocate the lump sum award. It clearly did. (See § 377.61 ["The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."].) The wife does her cause no good to assert on appeal that "award" only means jury awards.

That said, I am afraid that the majority opinion has not considered the full implications of *Changaris* as the case pertains to the allocation problem. (See particularly slip op. at p. 19.)

In *Changaris*, the decedent left a widow and four children from another relationship. There was a settlement (after attorney fees) of about $30,000. The children tried to defeat the widow's share entirely by arguing that her Tijuana marriage to decedent was invalid; they asserted that *their* mother was still the decedent's legal wife (or widow to be more exact). The argument didn't fly because the children had joined the widow in the wrongful death claim in order to inflate the ultimate award. (See *Changaris, supra*, 231 Cal.App.2d p. 311.)

It was in the context of upholding a judgment that gave the lion's share to the widow that the *Changaris* court articulated a non-zero sum, constituent part, model of the wrongful death settlement. The non-zero sum model was the product of the language chosen by the Legislature, especially the reference to "respective rights of the heirs" in old section 377, and still retained in section 377.61: "The court shall determine *the respective rights* in an award of the persons entitled to assert the cause of action." (Emphasis added.) From this language follows the sum-of-the-constituent-part model of wrongful death award allocation: "Although if the plaintiffs in a death action are successful, a judgment is rendered in a lump sum, that sum is arrived at simply by adding together the awards made to each of the claimants." (*Changaris, supra*, 231 Cal.App.2d at p. 312.) And further: "This is a simple matter if the case is tried without a jury for in that case the court would have separately determined the right of each claimant to recover, and the amount of recovery, and would distribute the total in accordance therewith." (*Id*. at pp. 312-313.) And even further: "[N]o plaintiff can have any proper reason for contesting the right of any other plaintiff. If a party be defeated in his right to share, that does not increase the right of any other to a larger award. *The right of each plaintiff to recover, as well as the amount rightfully to be recovered, is separate and apart from the like rights of all the others and is neither added to nor lessened by the success or failure of any other party in establishing a right to recover or in proving the amount to be awarded under such right*." (*Id*. at p. 313, emphasis added.)

In short, the trial court's task is *not* equitable, seat-of-one's pants, what-the-judge-had-for-breakfast apportionment, but reasonably close ascertainment of each claimant's contribution to each constituent part of the pie.

As it turned out in *Changaris*, the trial court had applied the constituent-part model correctly. The claims of the four adult children from a previous marriage in terms of their pecuniary expectations "were minimal." (*Changaris, supra*, 231 Cal.App.2d at p. 311.) Indeed, the tortfeasor's counsel could assert that without the widow's expectation, the award against the tortfeasor should have been mere "nuisance value." (*Ibid*.)

Finally, the *Changaris* court expressed a natural displeasure with the sheer unseemliness of the strategy of character assassination employed by the adult children from the previous marriage. The total award was largely the product of the widow's pecuniary expectations from her deceased husband. But now that the pie had been cooked, the children tried to grab and consume most of it, and the *Changaris* court (unlike the trial court or majority opinion in the case before us now) could easily see the arrant opportunism in the "throw mud at the second wife" strategy: "It would be most inequitable to permit appellants [the four adult children] to make this belated attack upon the right of Alva [the widow] for the purpose of obtaining for themselves money to which they have no claim whatever." (*Changaris, supra*, 231 Cal.App.2d p. 314.)

2. *But That Proper Method*
of Allocation Has Been Wholly
Ignored In the Case Before Us

The case before us now is remarkable in its parallels to *Changaris* -- and in fact it is in those parallels that one discovers just how great a miscarriage of justice is represented in the judgment before us.

Consider: The equipment manufacturing company's insurer who kicked in $1.1 million to settle the wrongful death case did so on the basis of the widow's expectation of life-time support and community property accumulation. There was no reason to settle the case for such a large sum based on the adult daughter's interest.

Here's a hypothetical to prove it: What if the decedent's wife had predeceased him and the only plaintiff in the wrongful death action was the adult daughter? Does anyone in his or her right mind think that the equipment manufacturing company's insurer would not have fought hard to limit the award to an amount much smaller, given that the adult daughter had no legal right of support, wasn't being supported by her father at the time of his death as a matter of voluntary largesse, and at best had only the expectation that she would inherit what her father might have saved from his earnings over his living expenses? No self-respecting adjuster lets his or her company pay $1.1 million to represent the pecuniary interest of an independent adult child not otherwise being supported or receiving services of any significant value from her parent. Case law confirms this. As the court noted in *Benwell:* "In a wrongful death claim arising out of the death of a husband, the *chief element* of damage is the present value of the earnings which said spouse would have contributed (or been liable to contribute) to the support of the survivor." (*Benwell, supra*, 249 Cal.App.2d at p. 357, emphasis added.)

The central flaw with the theory that there was substantial evidence that the decedent was going to leave his wife is that it separates the *origin* of a constituent part of the award from its *ultimate allocation.* The majority cannot point to any evidence that the payor of the award, the equipment manufacturer, forked over $1.1 million because of the *adult daughter's* "care, comfort and society." That sum represented the future earnings of the decedent, a sum to which *only the wife* had any enforceable entitlement -- including, ironically enough, even if there was a divorce. The trial court's award thus resembles what the greedy children in the *Changaris* case tried to do: You have a large sum established because of a widow's claim, and after that sum is safe and secure, the children try to muscle in on it by assassinating the widow's character. That is the really exasperating, maddening, unjust thing about today's result: A sum that wouldn't exist except that the decedent left a spouse who was entitled to his support gets retroactively reallocated to children of a previous relationship based on unacted-upon intentions of the deceased which find their origins in the same sort of character assassination ("second

wife was a loose woman, we should get dad's money") that was attempted in *Changaris*. Again, any reader who thinks that today's result is "just" should ponder just how small the settlement would have been in the first place if the adult daughter were the only wrongful death claimant.

3. *Deconstructing the Errors In the Majority Opinion*

Having now confronted the implications of the *Changaris* case, readers are now in the optimum position to see exactly how the majority opinion manages to arrive at a result that is not only unjust on its face, but contrary to statutory and case law.

Let's begin with what the majority says, without supporting authority, on pages 20-21 of the slip opinion: "Each plaintiff's 'contribution' to the settlement fund is simply the amount of damage suffered by each, as compared to the damage suffered by the other. Even *Changaris*, the case Sherry relies upon throughout her brief, states each plaintiff is entitled to share in the fixed settlement fund 'in the proportion that his personal damage bears to the damage suffered by the others.' [Cite to *Changaris*.] This settlement is entirely unrelated to the factors the settling defendant may have considered when offering the settlement fund." Then follows a reference to *Robinson v. Western States Gas & Elec. Co.* (1920) 184 Cal. 401, 410-411.)

The errors in the analysis in the quotation above are subtle, and it is easy to read over them, so a little deconstruction is in order.

In the first place, consider the phrase in the first sentence (again, to harp on the point, not supported by any authority): "as compared to the damage suffered by the other." The words "compare" and "the other" subtly insinuate a zero-sum model of wrongful death allocation by suggesting that one claimant's own damage may be reduced "compared to the damage suffered by the other." If the majority were accurate (that is, faithful to *Cross*, *Perkins*, *Eli* and *Changaris*), that a claimant's damage is her own, but there may be times when the total sum won't cover every claimant's individual damage,

the trial court may be forced to prorate the award based on every individual claimant's *own* damages.

This is all a fairly subtle point, but worth talking about because it is too easy to read the majority's formulation to suggest that some other claimant's damages can affirmatively reduce a particular claimant's award. If that happens, though, it is only a rule of necessity borne of the fact that the total award did not cover the total of each claimant's individual damages, and any reduction must necessarily be in proportion to each claimant's contribution to the whole. ("So you only got 80 percent of what you should have? Well, so did your sister, so each of you will only get 80 percent of what you should have.") The point is, to the degree that the majority's phraseology suggests some sort of interdependence between individual awards of the zero sum ("Daddy loved me more, so I should get more of the pot than you") it is contrary to *Changaris'* statement that "the right of each party plaintiff to recover, as well as the amount rightfully to be recovered, is *separate and apart from the like rights of all the others* and is neither added to nor lessened by the success or failure of any other party in establishing a right to recover or in proving the amount to be awarded under such right." (*Changaris*, *supra*, 231 Cal.App.2d at p. 313, emphasis added.)

Next in this critical passage in the majority opinion is the wonderfully begrudging, "Even," as in "Even *Changaris*, the case Sherry relies on . . . ."

Students of legal writing should carefully note the rhetorical technique of minimizing adverse authority here. (Except that here it is a little too heavy handed, given that *Changaris* currently represents the most sustained analysis concerning wrongful death allocation currently on the books.) The "even" makes it sound like *Changaris* is aberrant precedent -- something on the order of Irving Berlin's song about "Jimmy's mother" who was so proud that every soldier in the regiment was out of step but him. But the impression made with that "even" is misleading. *Changaris*, as precedent, is rooted in a rule laid down by our Supreme Court in *Cross*, and understood without complication by the Court of Appeal in *Perkins* and *Eli* -- a wrongful death award is what

each individual claimant individually contributes to the pot, and they are entitled to get that contribution back from the pot, and the only possible adjustment required of the trial court is if the pot isn't large enough to cover each claimant's individual contribution.

At this point, with the sentence "This entitlement is entirely unrelated to the factors the settling defendant may have considered when offering the settlement fund" (slip op. at pp. 20-21) the majority opinion really begins to stray. The sentence (again, no authority is offered) is wrong, particularly that bold, confident, and utterly incorrect inclusion of the words "entirely unrelated." With this one casual, throwaway sentence the majority opinion manages to chuck the existing edifice of wrongful death allocation law -- *Cross*, *Perkins*, *Changaris*, *Eli* at the very least -- into the waste bin.

Granted, there may be some "fudge" or leeway between the claims asserted by the individual claimants and the existing settlement fund, and some discretion is necessary to accommodate that fudge factor. (Cf. *Dickinson v. Southern Pacific Co.* (1916) 172 Cal. 727, 731 ["It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent."]; *Griffey, supra*, 58 Cal.App. at p. 522 ["it is not possible to measure in exact terms of money the damage resulting from a loss of that character"].)

But the model as laid down in currently existing case law cannot be reconciled with the majority's unsupported disconnect between fund and claim. (Of course, you realize why the majority wants such a disconnect. To get to the trial court's result in this case, you absolutely have to divorce the settlement money from any basis on which the equipment company might have paid it. If you don't, the egregious injustice of taking money clearly paid on the basis of the widow's claim and giving it to the adult daughter becomes an unbearable cognitive dissonance.)

Finally, the majority also try to buttress their disconnect between fund and pecuniary interest by a reference to the *Robinson* case and its statement that defendants have "no interest" in how the fund is divided among the claimants.

Several points need to be made about this use of *Robinson*. As a matter of logic, however, it doesn't follow that just because a defendant, having forked over some money that is to be divided among wrongful death claimants, has "no interest" in how the money is divided that there is no relationship between the money and the individual constituent claims of each wrongful death claimant. It is the trial court's job to ascertain those individual claims, and the reasons why the defendant paid into the pot are highly relevant to the assessment of them. The defendant may not have any standing to *object* to the trial court's allocation, but that doesn't mean that the basis on which the defendant paid the money isn't telling evidence about the size of each individual claim.

Secondly, *Robinson* was not an allocation case. Here's what happened: The decedent was supporting both his wife and mother at the time of his death in an accident involving power lines and a windmill. After threading through the question of whether the electric company could properly be held liable for the death (see *Robinson, supra*, 184 Cal. at pp. 403-409), the court turned its attention to the form of the verdict. (See *id*. at p. 409.) It seems that the jury had returned a verdict "for separate damages to each plaintiff," which (though there was no question that each separate award was justified) simply was not in a form authorized by law. (See *id*. at p. 410.) Our high court noted that section 377 simply "does not authorize separate actions by the several heirs," and went on to say that "[t]he persons entitled do not take as heirs or by succession, but as beneficiaries of the statute; the statute being framed upon the theory that the heirs will always constitute the family of the deceased." (*Id*. at p. 410.) Even so, there was no prejudice to the defendant electric company -- two times two equals four times one, no big deal. (See *ibid*.)

And it was in that context that the *Robinson* court wrote the soundbite which today's majority incorrectly extrapolate into a rule disconnecting a wrongful death settlement from the constituent entitlements of the claimants, i.e., the language about the defendant having "no interest in the division." (*Robinson, supra*, 184 Cal. at p. 410.)

In fact, interestingly enough for readers interested in judicial rorschach tests, the majority today omits from their quotation a sentence from *Robinson* which undercuts their result. Here it is: "The statute contemplates a single recovery for the benefit of the family of the deceased or those of his heirs *who are dependent*." (*Robinson*, *supra*, 184 Cal. at pp. 410-411, emphasis added.)

Who are dependent. Repeat: Dependent. That's what the Supreme Court said explicitly in *Robinson* in 1920, and implicitly in 1999 in *Horwich* and only a few months ago in *Fitch*, when it indicated the continued need for linkage to pecuniary interest. But dependency is a sticking point if you want to justify giving an award to an adult daughter who, like many self-supporting adult children didn't really depend on her father for much in the way of pecuniarily measurable benefits and taking it away from a spouse who really did depend on her deceased husband.[18]

In any event, to take the rule in *Robinson* (that wrongful death defendants can't object or complain about allocations between claimants) and say that it precludes consideration of why that defendant may have paid what it did to create the wrongful death fund) is a non-sequitur. *Robinson* is merely a manifestation of the now well-established and sensible procedural rule that California law contemplates only one wrongful death action, even if there are multiple wrongful death claimants. As the court stated in *Canavin*: "Throughout the provision's various amendments, case precedent has consistently held 'only *one action* [can] be brought for the wrongful death of a person thereby preventing multiple actions by individual heirs and the personal representative. [Citations.]'" (*Canavin*, *supra*, 148 Cal.App.3d at p. 529.) It cannot be transformed into

[18] Actual dependency is in fact the central underlying point of the wrongful death statute (though, granted, not the whole of it): The tortfeasor should bear responsibility for depriving dependent individuals of the human being they were dependent on. Hence, allocation issues between claimants have not been explored with anywhere near the depth that issues involving what the defendant should pay have been explored. Consider: Often, you don't have, as we have here, the dichotomy between a dependent spouse and a non and minimally dependent adult child. For an example of this usual situation, see *Hernandez v. Fujioka* (1974) 40 Cal.App.3d 294. In *Hernandez*, the court took two paragraphs in an otherwise lengthy opinion simply to say that there was no error in allocating one-third of a wrongful death award to the widower, where the decedent was both mother and wife, and one-third each to the two minor children. (*Id*. at p. 301) Well of course. All three parties (the widower and two minor children) were dependent on the decedent in a way that, in this case, the adult daughter wasn't.

a substantive rule severing a wrongful death award from each claim's pecuniary (or pecuniarily measurable) dependency on the decedent.

3. *And, What's More, Today's Result Is Also Directly Contrary to both the Ure and Krouse Cases*

Let me build on the hypothetical of the adult daughter being the only claimant a little more now. Would an award of 90 percent of $1.1 million to her in a straight-on wrongful death action even be sustainable? Consider the case of *Ure v. Maggio Bros. Co., Inc.* (1938) 24 Cal.App.2d 490 in that regard. In *Ure*, the court struck down an award of $10,000 as excessive, in a case where the evidence of care and comfort showed a stronger link than the present case.

In *Ure*, the deceased was a daughter who had given up her job as a minister to take care of her elderly mother. The daughter performed the services of a nurse,[19] accountant,[20] chef,[21] property manager[22] and general caretaker.[23] (*Ure, supra*, 24 Cal.App.2d at pp. 493-494.) Yet even so, the appellate court found the damages of $10,000 to the adult mother excessive because there was "no proof of the reasonable value of these services," including "the value of the services to be performed by Mary for her mother," and "no showing of the time" the daughter devoted to those services. (*Id*. at p. 495.)

In the present case, the adult daughter Lisa Corder showed even less by way of pecuniarily measurable services which her now deceased father rendered her, which might justify the $1 million award given by the trial court. What is the best the majority can point to support an award of $1 million to an *adult* daughter? It is almost

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[19] "She did everything in the world that loving hands could do." "Q. Did she perform the services of a nurse? A. To me."
[20] "Mary took charge of the finances."
[21] "Q. Who did the cooking? A. She did."
[22] "She did everything incident to maintaining the home."
[23] "'She was to be my caretaker.'"

embarrassingly paltry in terms of real pecuniary expectations: If you look at what the evidence given on page 16 of the slip opinion, you find that most the items occurred during Lisa's minority (always "being there" for her, teaching her to play softball), several of the items are natural for a young adult in college or just starting out in life (cosigning for a car loan, helping out with a down payment, helping out with school fees and books) and only a few continued on into adulthood (providing some extra cash and making sure the rent got paid). Thus *most* -- I grant, not all, but most -- of the $1 million to Lisa is, functionally and essentially, an award of emotional distress damages, unjustifiable under *Krouse* or *Ure* or *D'India* (discussed in footnote 3) or, for that matter, *Hazelwood v. Hazelwood* (1976) 57 Cal.App.3d 693, 697 [rejecting claim of parents of decedent because they showed no "actual financial dependency" even though parents relied on decedent for "comfort and affection"]. The judgment which today's majority affirms bears no reasonable relation to any pecuniarily measurable "care, comfort and society" that Lisa might have expected from her father, and is therefore contrary to the wrongful death statute. (See *Estate of Riccomi* (1921) 185 Cal. 458, 461 ["no substantial recovery on account of any heir who has not suffered substantial injury"].) As the *Ure* court observed, "But it must never be forgotten that, in fixing the amount, the jury is always bound by the fundamental rule that the *pecuniary* value of the society, comfort, and protection is the limit of recovery for a loss of that character, and the amount allowed therefor must have some reasonable relation to the pecuniary value shown by the evidence." (*Ure, supra*, 24 Cal.App.2d at p. 496, original emphasis.) *Only* an allocation that would give the widow the lion's share of the $1.1 million fund is consistent with the established law precluding emotional distress damages in wrongful death cases.

5. *Finally, By the Way, Constituent-Part Allocation Is the Only Workable Rule*

Sometimes the handiwork of the Legislature and of previous courts construing that handiwork is so awesomely sound that it takes a case like this one to show just how bad the alternative would be. Today's result is contrary to that handiwork (section 377.61's

centering on "respective interests") and case law (as *Changaris* shows, post hoc characterization does not affect the "respective interests" of the claimants), and, thus, it is not surprising it is also bad public policy, essentially importing mudslinging fault divorce into wrongful death award allocation.

The family dynamics are easily apparent from both *Changaris* and the case before us. With today's result, adult children, who usually have little in the way of expectation of pecuniary benefits from their even older parents --usually the pattern is just the opposite -- can now turn allocation proceedings into a parody of an old Smothers' Brothers' routine, except the target will be new spouses instead of siblings. ("Dad always thought you were a slut and planned to leave you -- give me the money!"). The net effect, of course, is to turn section 377.61 allocation determinations into the trial court equivalent of the Jerry Springer show, with family members all too eager to air any dirt, real or imagined,[24] against each other.

By choosing a model of looking to the constituent parts of an existing award rather than making the trial court the referee in a free-for-all smackdown as to who the decedent loved the most, the Legislature wisely tried to prevent allocation proceedings from becoming a bad re-run of the old divorce court show. I should merely add at this point that in affirming a judgment, the effect is to replace an inquiry into pecuniary rights with a model where the trial court has almost unlimited power to allocate wrongful death damages according to the most extremely subjective factors. The majority thus opens the door for the kind of unseemly internecine mudslinging traditionally associated with fault divorce. Allocation of wrongful death award proceedings can now become mudslinging contests, with relatives of the deceased heaping all sorts of salacious calumnies on rival claimants. Indeed, the sheer lopsidedness of this award is explicitly explained by the fact that the trial court believed the calumnies leveled at the wife, and decided to punish her

[24] Consider just how easy it is for the adult children of a first marriage to lie in a context like this one, where, according to today's majority, there can be substantial evidence without any objective corroboration of a parent's intent to leave.

for them. In that respect, the trial judge allocated the fund as if California's no-fault divorce law had never been enacted.

III. *The Problem of the Termination of a Claimant's Expectation of Support From the Deceased* A. Is Solved By Not Allowing Evidence of Mere Intention to Affect An Award

The central syllogism of the majority opinion is this: Because there was substantial evidence that the decedent was *thinking* of terminating his marriage to the wife, the trial court acted reasonably in apportioning 90 percent of the $1.1 million settlement to the adult daughter, 10 percent to the wife.

Besides being contrary to the established constituent-part model of wrongful death award allocation, the majority's rationale is, ironically enough, also contrary to the main case on which the majority rely, *Benwell v. Dean, supra,* 249 Cal.App.2d 345, which upheld the *exclusion* of evidence that the decedent was thinking of leaving his wife.

The majority say that *Benwell* held that "evidence the decedent intended to leave his wife was relevant and admissible." (Slip op. at p. 17.) Not quite. The *Benwell* court *held*, in its own words, that it was *not* "error to reject defendant's offer of proof that deceased, shortly before his death, had told a witness that he (the deceased) intended to leave his wife (the plaintiff), and that he could not stand her behavior." (*Benwell, supra*, 249 Cal.App.2d at p. 347.)

Granted, in the process of upholding the exclusion the *Benwell* court also observed -- not held -- that the proffered hearsay testimony about the decedent's intention was of some *small* relevance as to the deceased's mental state, but even then the court made it clear that "the true evidentiary bearing of the subject declarations was at best *slight and remote*." (*Benwell, supra,* 249 Cal.App.2d at p. 354, emphasis added.) Why only "slight and remote?"

The answer is found in the primary Supreme Court case cited by *Benwell* in what the majority characterize as the "long history of cases allowing evidence of 'kind and loving' feelings between decedent and the wrongful death plaintiff." (Slip op. at p. 17. (Actually, as it turns out, that "long history" consists of only four opinions. (See *Benwell, supra*, 249 Cal.App.2d at pp. 349-350.)) The case is *Beeson v. Green Mountain G. M. Co.* (1880) 57 Cal. 20, and *Beeson* is clear that evidence of spousal feelings toward each other are only relevant in terms of reasonably measurable pecuniary expectations.

In *Beeson*, the decedent died in a mine fire, and his widow brought a wrongful death suit. The trial court instructed the jury that in determining damages it had the right to take into account "the pecuniary loss, if any, suffered by [the widow] in the death of said George Beeson, by being deprived of his support; also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society." (*Beeson, supra*, 57 Cal. at p. 37.) The jury instruction was attacked on the theory that the "also the relations proved" language was erroneous because it allowed for the jury to award damages not "measured by the pecuniary loss."

If my colleagues were correct in their formulation of the law, the *Beeson* court would have simply approved the instruction, saying that care comfort and society apart from pecuniarily measurable damages could indeed be awarded under the wrongful death statute. But the court didn't. Rather, the high court saved the instruction by saying that if the instruction was "good from any point of view," it could be sustained, and then proceeded to emphasize the need for a link between the nature of the relations between the decedent and the widow and measurable pecuniary expectations. Here are the salient passages:

"It is true, that in one sense, the value of social relations and of society cannot be measured by any pecuniary standard . . . . but in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from

deprivation of society, *might be measured or at least considered from a pecuniary standpoint.* If the instruction be good from any point of view presented by the case . . . . [p] If a husband and wife were living apart, by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So, if the husband and wife had lived together, in concord, each rendering kindly offices to the other, such facts might be taken into consideration; not, as the books say, for the purpose of affording solace in money, *but for the purpose of estimating pecuniary losses*. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy. In *Penn. R. R. Co. v. Goodman*, 62 Pa. St. 339, the Court said, referring to the use of the word 'companionship,' that 'companionship was evidently used to express the relation of the deceased in the character of the service she performed. *The judge merely meant to say, that the loss should be measured by the value of her services as a wife or companion.* The form of expression, perhaps, was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be *measured by the nature of the service* characterized as it was by the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. . . ." (*Beeson, supra*, 57 Cal. at pp. 38-39, emphasis added.)

The other three cases cited by the *Benwell* court for allowing evidence of the relationship between spouses into evidence are similarly restrained -- the evidence of the relationship is of some relevance to the *value of services* which the decedent might have rendered, which would be, as *Beeson* noted, different in a case where a husband and wife had *already* separated than where the husband and wife were living together and were, in the court's 19th Century phrasing, "rendering kindly offices" toward each other.

Cook v. Clay Street Hill R. R. Co., supra, 60 Cal. 604, has been explained in detail above -- it is the classic case of the valuation of the services of a homemaker.

Even less was involved in *Kramm v. Stockton Electric R. R. Co.* (1913) 22 Cal.App. 737, where the testimony of a married daughter that the decedent left behind a "family" consisting of herself, the widow, and three minor children. The appellate court concluded that such testimony was unobjectionable. (See *id*. at p. 756.) The *Kramm* court made its comment about the "'loving and kind'" relationship with the minor children in the context of reiterating the *Beeson* approach: "Nor was it error to permit the same witness to say that the deceased was 'kind and loving' to his minor children. As has been shown, the loss to children of the society, comfort, and care of a parent by his or her death through the wrongful act of another may be shown as entering into the pecuniary loss thereby suffered, and such a consideration would obviously cut little, if any, figure in the estimation of such loss if the conduct of the parent toward his minor children were the opposite of that described by the witness." (*Kramm, supra*, 22 Cal.App. at p. 757.)

Finally, *Carroll v. Central Counties Gas Co.* (1929) 96 Cal.App. 161, was even more simple. A father asserted that the trial court erred in refusing to permit him to "show the attitude of his deceased daughter" to him, and the court simply refuted the assertion by noting that the father was indeed permitted to testify that his daughter was "industrious and affectionate, and that she at times earned money and always turned it over to her father." (*Id*. at p. 164.)

Thus neither *Benwell*, nor any of the cases cited by it for allowing evidence of relationship even remotely stands for the idea that a trial court is at liberty to allocate the great bulk of an already established wrongful death award to a daughter at a widow's expense, particularly when the award itself was created in light of the widow's claims. (At which point we're back to *Changaris*.)

However, even if those cases could be somehow contorted into giving trial courts wide latitude to explore the nature of a marital relationship in the context of a wrongful death allocation, the fact remains that those cases were decided before the Legislature abolished fault divorce. Today, the salient question is not some intrusive inquiry into the

intimacies of a marital relationship, but whether, at the time of death when the rights of the parties were fixed, the parties were living together or separated.

B. Which Evidence Is, Incidently,
Irrelevant According to the Established
Common Law Rule in Any Event

But there was more to *Benwell* than the decedent's intent to leave his wife. In fact, she remarried.[25]

Now, that remarriage would have definitely cut off any expectation of support that the widow would have had from the decedent. The defendant in *Benwell* attempted to use that convenient fact the same way the majority today uses the evidence that the deceased intended to leave his allegedly backsliding wife -- as a bar to an award premised on the usual duty of lifetime support that spouses owe to each other.

Well, it didn't work in *Benwell* and it shouldn't work here. Even in an era of fault divorce it was incorrect to try to reduce a wrongful death award based on the cutoff of a marital support claim.

The *Benwell* case was very clear that the California rule fixes the wrongful death damages at the time of the decedent's death and considers evidence of a subsequent remarriage too speculative. Juxtaposing the California (majority) rule that a widow's remarriage is irrelevant in fixing wrongful death damages with a Wisconsin case to the contrary, the *Benwell* court said: "This [Wisconsin case] stands for the authority that possibility of marriage or remarriage is always an element which is proper for the jury to consider in determining damages in a wrongful death action, and that when a remarriage has occurred by the time of trial, the jury should be permitted to consider such fact in assessing damages. This rule represents the minority rule in this country and is not in accord with the California rule. The majority rule is that *the surviving spouse's remarriage, or the possibility thereof, does not affect the damages recoverable in an*

[25] Of course, remarriage by itself would hardly indicate any past intention to leave a now-deceased husband. More facts are needed.

action for wrongful death of the deceased spouse [citation]. The rationale underlying the majority rule, with which California is in accord [citations], is that *the cause of action arises at the time of decedent's death and the damages are determinable as of the same time*, and that the rule providing for mitigation of damages on account of the surviving spouse's remarriage is highly speculative, because it involves a comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse [citations]." (*Benwell, supra*, 249 Cal.App.2d at pp. 355-356, emphasis added.)

Remarriage is a far stronger bright line cutting off the right of a surviving spouse than the decedent's mere albeit expressed intention to leave his or her spouse. People can change their intentions in a second -- think of all the politicians who say they have "no intention to run at this time" or all the spouses who, in a moment of anger, threaten to leave. A remarriage, by contrast, is a separately identifiable and significant *public* act with real and irremediable consequence. It goes as far as (a) seeing a lawyer, (b) separating, (c) formally filing for divorce or separation, (d) actually proceeding with such proceedings and (e) obtaining a formal judgment. Remarriage is a "hard" event at the opposite end of the spectrum from some unacted-on intention. If remarriage is too "speculative" to be allowed to reduce a wrongful death award, a fortiori the hearsay of a dead person's unacted-on intention is way too speculative to reduce a wrongful death award.

IV. *Conclusion*

The law is: No wrongful death recovery for mere emotional distress. Today's result is: The adult daughter gets almost everything on the theory that she had a "close relationship" with her father and the widow loses almost everything because the father's family say she is a trollop that dad was about to leave, even though he never actually did anything about it, much less actually leave her.

The law is: A wrongful death recovery represents the sum total of the individual claimants' pecuniary interests in the decedent. Today's result is: Money based on the widow's pecuniary interest is taken from her and given to the adult daughter.

The law is: Evidence of a decedent's intent to leave a spouse is irrelevant as too speculative to affect a wrongful death award. Today's result is: Evidence of intent to leave a spouse has been used to reallocate a sum based on that spouse's expectation of support from the decedent to an adult daughter.

The law is: California is a no-fault divorce state, and salacious allegations regarding a spouse's conduct are always irrelevant as regards the division of community property and support.[26] Today's result is: In reaction to salacious allegations regarding the marital relationship, a wrongful death award otherwise clearly attributable to the wife's pecuniary interests has been taken from her and given to a "worthy" but not dependent adult daughter.

The majority have pretty much ignored about 150 years of California case law dealing with wrongful death damages. I would reverse the judgment, with directions to the trial court to reallocate the wrongful death settlement in substantial conformance with each party's individual pecuniary interest in the decedent's life as it stood at the time of his death (and no fudging because of a divorce that never happened), which means the widow, Sherry Corder, must necessarily receive the lion's share of the fund.

SILLS, P. J.

[26] Okay, I'll qualify that -- almost always. Conduct that may "feel" like it belongs in a fault divorce setting may be, in rare cases, relevant concerning certain charges against one spouse's share of the community and perhaps concerning support orders as well (since support is based on so many factors as to be virtually open-ended (see Fam. Code, § 4320)).