

Memorandum 82-100

Subject: Study L-625 - Probate Law and Procedure (Required Period of Survival to Take as Survivor)

Attached to this memorandum, as Exhibit 1, are some of the comments from the State Bar members who reviewed the portion of the proposed legislation relating to the required period of survival to take as a survivor (proposed Sections 114.010-114.550).

States that Have Adopted 120-Hour Survival Rule

The memorandum from the State Bar attached hereto as Exhibit 1 states that "only about one-fifth of the states that have adopted the Uniform Probate Code have adopted the 120-hour period." On this basis, the memorandum questions the basic wisdom of the adoption of any period of survivorship.

In fact, one-fifth of the states which adopted the UPC have rejected the 120-hour survival rule: Florida, Hawaii, and Minnesota omitted the sections of the UPC providing the 120-hour period. Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Montana, Nebraska, North Dakota, and Utah have enacted the UPC 120-hour rule. New Jersey enacted the section on wills, but not intestate succession. Two non-UPC states provide survival periods: Texas incorporated a 120-hour period into its Uniform Simultaneous Death Act and Ohio provides a 30-day survival rule.

Proposed Staff Revisions

In response to the State Bar comments, the staff suggests the following revisions.

§ 114.040. Survival of joint tenants

The staff proposes to revise subdivision (a) of Section 114.040 as follows, as suggested by the State Bar:

(a) As used in this section, "joint tenants" includes owners of property held under circumstances that entitled one or more to the whole of the property on the death of the other or others.

Subdivision (d) of Section 114.040 gives a party to a joint account in a financial institution a continued right to withdraw funds after the death of another party to the joint account, whether or not 120 hours has elapsed after the death. If the surviving party then dies within

the 120-hour period, the State Bar asks whether the amount of the account to be divided into equal portions under subdivisions (b) and (c) of Section 114.040 includes the amount withdrawn during the 120-hour period. It will be an exceedingly rare case where one joint tenant to an account in a financial institution dies and the surviving party to the account makes a withdrawal after the death of the deceased joint tenant and then dies within the 120-hour period. Nevertheless, a rule should be provided to cover this rare case. We suggest that the following be substituted for subdivision (d) of Section 114.040:

(d) Nothing in this article limits or affects any right a party to a joint account or other multiple-party account in a financial institution may have to withdraw funds from the account, whether or not the withdrawal is made within 120 hours after the death of another party to the account. If a person having the right to do so withdraws funds from a joint account or other multiple-party account within 120 hours after the death of another party to the account and subdivision (b) or (c) applies, the amount to which subdivision (b) or (c) applies is the amount remaining in the account after the withdrawal.

The State Bar has elsewhere raised the question whether subdivision (d) should be broadened to give a right of immediate withdrawal to the surviving party to other types of liquid funds, such as checking accounts through brokerage houses, money market funds, and the like. This is a policy question. What is the Commission's view?

§ 114.510. Petition for purpose of determining survival

The staff would clarify the application of subdivision (e) of Section 114.510 by revising it as follows:

114.510. A petition may be filed under this article for any one or more of the following purposes:

(e) To determine for the purposes of a case governed by ~~the law in effect prior to January 1, 1985,~~ former Sections 296 through 296.8 whether persons have died other than simultaneously.

§ 114.540. Notice of hearing

Section 114.540 requires personal service on the executor or administrator of each person the priority of whose death is in issue. The State Bar suggests that this provision may have the unintended effect of requiring appointment of an executor or administrator where one would not otherwise be required. The State Bar also suggests that personal

service not be required, and that mailed service be used for all notice under this section. The personal service requirement is taken from existing law (Prob. Code § 296.41).

The staff proposes to address this by revising Section 114.540 to read as follows:

114.540. (a) The clerk shall set the petition for hearing by the court.

(b) Notice of the hearing on the petition shall be given for the period and in the manner required by Section 1200.5 to all of the following (other than persons joining in the petition):

(1) The executor or administrator of each person the priority of whose death is in issue if there is an executor or administrator for such person.

(2) All devisees of each person the priority of whose death is in issue.

(3) All known heirs of each person the priority of whose death is in issue.

(4) All persons (or their attorneys, if they have appeared by attorneys) who have requested special notice as provided in Section 1202 in the proceeding in which the petition is filed or who have given notice of appearance in person or by attorney in that proceeding.

(c) Proof of giving of notice as required by this section shall be made at or before the hearing.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

Also Klug Prior letterLAW REVIEW COMMISSION

SECOND SUPPLEMENT TO MEMORANDUM # 82-70

SIMULTANEOUS DEATH AND SURVIVALSummary of Second Supplement:

The Second Supplement contains three chapters of the general provisions part of the proposed legislation, as follows:

Chapter 1. Effect of Death of Married Person on Community and Quasi-Community Property

Chapter 2. Surviving Spouse's Right in California Real Property of Nondomiciliary Decedent

Chapter 6. Required Period of Survival to Take as Survivor.

Under the California version of the Uniform Simultaneous Death Act, if there is no sufficient evidence that the decedents died other than simultaneously, the property of each person is disposed of as if each had survived. The Uniform Probate Code adopts a 120 hour survivorship provision for the purpose of intestate succession or taking under a Will. At least eleven states have adopted the 120 hour survival rule. The proposed law adopts the 120 hour survival period for Wills and intestate succession and also for non-probate transfers upon death, such as survivorship under a joint tenancy and taking as a beneficiary of life or accident insurance, subject to a contrary provision governing survival in a governing instrument.

Comments:

As to the proposed period of 120 hours for survivorship, only about one fifth of the states that have adopted the Uniform Probate Code have adopted the 120 hour period. Thus, there is no overwhelming uniformity among the states that have adopted the Uniform Probate Code. We question the basic wisdom of the adoption of any period of survivorship.

Chapter 1: EFFECT OF DEATH OF MARRIED PERSON ON COMMUNITY AND QUASI-COMMUNITY PROPERTY.

§ 110.030, Recapture by Surviving Spouse of Certain Quasi-Community Property, provides that if a married person who died domiciled in this State who made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property of which the surviving spouse had an expectancy, the surviving spouse may require the transferee to restore to the decedent's estate one half of such property, if the decedent had a substantial quantum of ownership or control of the property at death. The Team feels that the provision is poorly drafted and is unclear as to the meaning of the terms underlined, or how to measure such terms. If the transfer had been made, we fail

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to see why there would be any quantum of ownership in the property at death. These terms should be clarified.

Chapter 6: Article 1. 120 HOUR SURVIVAL RULE.

§ 114.040, Survival of Joint Tenants:

Paragraph (a) describes joint tenants as including owners of property held under circumstances that entitle one to the whole of the property on the death of the other or others. The Team feels such phrase is unclear and it appears that it should not refer to just "one", but to "one or more" who are entitled to the whole on the death of the other or others.

Paragraph (b) provides that if property is held by two joint tenants who have both died and it cannot be established that one survived the other by 120 hours, the joint tenancy property shall be distributed one half as if one joint tenant had survived, and the other one half as if the other joint tenant had survived. No provision is made for any distribution based upon the contributions made to the joint tenancy property by the respective joint tenants. Thus, in situations where the joint tenants are not husband and wife, this provision may create a gift tax problem. This provision should be reviewed in order to correct the problem.

Paragraph (d) provides that nothing in Article 1. limits or affects any right a joint tenant or other person may have to withdraw funds from a joint tenancy account, whether or not the person making the withdrawal has at the time of withdrawal survived the other party by 120 hours. The Team feels this raises the question as to how (d) interrelates with (b), or whether it supersedes (b), i.e., if a survivor makes a withdrawal after the death of the first joint tenant, then dies and it cannot be determined that he survived the first joint tenant by 120 hours, would the amount to be divided be the entire amount in the account at the time of the first death, or what is left after the withdrawal? Clarified

Chapter 6: Article 2. PROCEEDINGS TO DETERMINE SURVIVAL.

§ 114.510, Petition for Purpose of Determining Survival, sets forth the purposes for which a petition may be filed under this Article. The Team questions whether or not the Section should also include the ability to determine survival by a contract. (However, this may be covered by Subsection (e) which is to determine survival for the purposes of a case governed by the law in effect prior to July 1, 1984.)

§ 114.540, Notice of Hearing, provides that the petitioner shall cause notice of the hearing of the petition to be served on the executor or administrator of each other person, the priority on whose death is in issue. The Team feels that this will require the appointment of an executor or administrator before a petition

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can be filed. We recommend that the provision be revised to require notice to be served on the executor or administrator, if any, and if there is no executor or administrator, then to the heirs and devisees of the person. The provision also requires personal service on the executor or administrator unless the representative of any such other person is also the petitioner, then notice of the hearing can be mailed to the heirs and devisees of such other persons. Why not just require that all the notices be by mail?