

#L-651

6/27/83

Memorandum 83-55

Subject: Study L-651 - Probate Law (Nearly Simultaneous Deaths)

At the June meeting, the Commission discussed the 1984 legislative program and approved the proposal to submit a series of recommendations dealing with individual aspects of probate law. Attached to this memorandum is a staff draft of one such recommendation, dealing with simultaneous death and survival. This recommendation revives an earlier Commission proposal to provide a 120-hour survival rule in place of the Uniform Simultaneous Death Act.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

SIMULTANEOUS DEATH AND SURVIVAL

August 1, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN SEPTEMBER 8, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

SIMULTANEOUS DEATH AND SURVIVAL

When two persons die in a common accident and there is evidence that one person survived the other for any amount of time, even a fraction of a second, property may pass to the survivor by will, intestate succession, or right of survivorship.¹ In this type of case, where one person dies soon after another, a serious injustice may result. For example, where a husband and wife who each have children from a former marriage die intestate in an automobile accident, all the community property will pass to the husband's children if it can be shown that he survived his wife for a fraction of a second. The wife's interest in the community property would pass to the husband in this instant of survival and then to his children. In the same way, property held in joint tenancy would go to the husband and then on his immediate death to his heirs, leaving the wife's heirs with nothing. A simple will calling only for survivorship would have the same result.

1. Legislation enacted in 1983 on recommendation of the Law Revision Commission revised the California version of the Uniform Simultaneous Death Act (former Prob. Code §§ 296-296.8) to require "clear and convincing evidence" that one decedent survived another to avoid application of the Act. See Prob. Code §§ 103, 220-224, 230-234, as enacted by 1983 Cal. Stats. ch. ____, operative January 1, 1985. See also Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301, 2345-46 (1982). Under prior law, the Act applied only if there was "no sufficient evidence" that the decedents died other than simultaneously. See, e.g., Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (Simultaneous Death Act held inapplicable in case where testimony that one passenger in car was killed 1/150,000 of a second before the other).

The Uniform Simultaneous Death Act, when it applies, disposes of the property of each decedent as if each had survived. Prob. Code § 296 (to be superseded by Prob. Code § 220). If there is no sufficient evidence that two joint tenants have died other than simultaneously, the joint tenancy property is split between the two estates. Prob. Code § 296.2 (to be superseded by Prob. Code § 223). If a husband and wife die and there is no sufficient evidence that they died other than simultaneously, one-half of the community property is dealt with in each spouse's estate. Prob. Code § 296.4 (to be superseded by Prob. Code § 103). If an insured and a beneficiary die and there is no sufficient evidence that they died other than simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Prob. Code § 296.3 (to be superseded by Prob. Code § 224).

The Commission has concluded that, as a matter of general policy, it is unfair to determine the recipients of property based on an instant of survival. The Commission recommends that the policy reflected in the Uniform Simultaneous Death Act, which generally divides property between the estates of the decedents, should be applied to situations of nearly simultaneous death. Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family depending upon an instant of survival.

Opinions will vary on what would be an appropriate period of survival required to take. A widely accepted figure is 120 hours--five days--and this is the required period of survival recommended by the Commission. The Uniform Probate Code adopts the 120-hour rule for purposes of taking by intestate succession or under a will (subject to a contrary provision in the will).² Provisions of this type have been adopted in a significant number of states in recent years.³

The 120-hour survival period would avoid litigation over survival for short periods of time. The 120-hour period is not so long that it interferes with the ability of the survivor to deal with the property when a need arises, nor does it delay administration of the estate.

As recommended by the Commission, the 120-hour rule would apply to property passing by intestate succession and also to property passing by will, unless the will provides a different rule, in which case the will governs. The 120-hour rule should also apply to nonprobate transfers upon death, such as survivorship under a joint tenancy⁴ and taking as a

2. See Uniform Probate Code §§ 2-104 (intestate succession), 2-601 (wills) (1977).
3. At least 13 states have adopted a 120-hour survival rule. See Alaska Stat. §§ 13.11.020, 13.11.220 (1982); Ariz. Rev. Stat. Ann. §§ 14-2104, 14-2601 (1975); Colo. Rev. Stat. §§ 15-11-104, 15-11-601 (1974); Idaho Code §§ 15-2-104, 15-2-601 (1979); Me. Rev. Stat. Ann. tit. 18A, §§ 2-104, 2-601 (1981); Mich. Stat. Ann. §§ 27.5107, 27.5132 (1980); Mont. Code Ann. §§ 72-2-205, 72-2-511 (1981); Neb. Rev. Stat. §§ 30-2304, 30-2339 (1979); N.J. Stat. Ann. §§ 3B:3-32, 3B:5-1, 3B:6-6 (West 1983); N.M. Stat. Ann. §§ 45-2-104, 45-2-601 (1978); N.D. Cent. Code §§ 30.1-04-04, 30.1-09-01 (1976); Tex. Prob. Code Ann. § 47 (Vernon 1980); Utah Code Ann. §§ 75-2-104, 75-2-601 (1978). Ohio has a 30-day survival rule. Ohio Rev. Code Ann. § 2105.21 (Page 1976).
4. The 120-hour survival rule would not alter the power of the survivor to withdraw funds from a deposit account unless the deposit agreement provides otherwise.

beneficiary of life or accident insurance,⁵ subject to a contrary provision about survival in the governing instrument. The rule of survival applicable to nonprobate transfers must be the same as the rule governing survival under a will or by intestate succession. Otherwise, capricious results would occur, as well as litigation over which rule should be applied, particularly in cases where married persons die in a common accident.⁶

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 1389.4 of the Civil Code, to amend Sections 103, 220, 222, 223, 224, 234, 6146, 6147, 6242, 6243, 6244, and 6403 of, and to amend the heading for Part 5 (commencing with Section 220) of Division 2 of, the Probate Code, relating to period of survival required to take property.

The people of the State of California do enact as follows:

-
5. This rule would not apply to insurance contracts in existence before the operative date of the proposed law.
 6. For example, if the spouses hold real property in joint tenancy form and the husband dies intestate several hours after the wife, the disposition of the property may be in doubt. If the property is true joint tenancy property, it will be administered in the husband's estate, and if both spouses had children of a former marriage, the children of the wife will take nothing, the children of the husband everything. But if it can be shown that the property was actually community property held in joint tenancy form, the 120-hour survival rule would apply and the property would be divided in half between the two sets of children. See generally Hemmerling, Death in a Common Disaster and Establishing Simultaneous Death, in 2 California Decedent Estate Administration § 22.14, at 983 (Cal. Cont. Ed. Bar 1975).

Civil Code § 1389.4 (amended). Power of appointment

SECTION 1. Section 1389.4 of the Civil Code is amended to read:

1389.4 (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving who survive the donee by 120 hours, the surviving issue of such appointee shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee by 120 hours, except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take by representation as provided in Section 240 of the Probate Code.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.4 is amended to adopt the 120-hour survival rule of Probate Code Section 220.

3101

Probate Code § 103 (amended). Effect on community and quasi-community property where married person does not survive death of spouse by 120 hours

SEC. 2. Section 103 of the Probate Code is amended to read:

103. Except as provided by Section 224, if a husband and wife die leaving community or quasi-community property and it cannot be established by clear and convincing evidence that one spouse survived the other by 120 hours:

(a) One-half of the community property and one-half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse.

(b) The other half of the community property and the other half of the quasi-community property shall be administered upon or distributed,

or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse.

Comment. Section 103 is amended to provide a 120-hour survival rule applicable to succession of community and quasi-community property. See also Sections 230-234 (proceeding to determine whether one spouse survived the other by 120 hours).

3072

Probate Code - heading for Part 5 (commencing with Section 220)
(amended)

SEC. 3. The heading for Part 5 (commencing with Section 220) of Division 2 of the Probate Code is amended to read:

PART 5. SIMULTANEOUS DEATH PERIOD OF SURVIVAL
REQUIRED TO TAKE AS SURVIVOR

Probate Code § 220 (amended). Proof of survival by 120 hours

SEC. 4. Section 220 of the Probate Code is amended to read:

220. Except as otherwise provided in this chapter, if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other by 120 hours, the property of each person shall be administered upon or distributed, or otherwise dealt with, as if that person had survived the other.

Comment. Section 220 is amended to provide a 120-hour survival rule, drawn from Uniform Probate Code Sections 2-104 and 2-601. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours).

3068

Probate Code § 222 (amended). Survival of beneficiaries

SEC. 5. Section 222 of the Probate Code is amended to read:

222. (a) If property is so disposed of that the right of a beneficiary to succeed to any interest in the property is conditional upon surviving another person and it cannot be established by clear and convincing evidence that the beneficiary survived the other person by 120 hours, the beneficiary is deemed not to have survived the other person.

(b) If property is so disposed of that one of two or more beneficiaries would have been entitled to the property if he or she had survived the others, and it cannot be established by clear and convincing evidence that any beneficiary survived any other beneficiary by 120 hours, the property shall be divided into as many equal portions as there are beneficiaries and the portion of each beneficiary shall be administered upon or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries.

Comment. Section 222 is amended to provide a 120-hour survival rule. See also Section 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours).

3067

Probate Code § 223 (amended). Survival of joint tenants

SEC. 6. Section 223 of the Probate Code is amended to read:

223. (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.

(b) If property is held by two joint tenants and both of them have died and it cannot be established by clear and convincing evidence that one survived the other by 120 hours, the property held in joint tenancy shall be administered upon or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived.

(c) If property is held by more than two joint tenants and all of them have died and it cannot be established by clear and convincing evidence that any of them survived the others by 120 hours, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the share of each joint tenant shall be administered upon or distributed; or otherwise dealt with, as if that joint tenant had survived the other joint tenants.

(d) Nothing in this chapter 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 funds are withdrawn.

Comment. Section 223 is amended to provide a 120-hour survival rule. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours). Subdivision (d) is added to make clear, for example, that a joint bank account or similar account is not tied up as a consequence of this chapter during the 120-hour period after one joint account holder dies.

3066

Probate Code § 224 (amended). Life or accident insurance

SEC. 7. Section 224 of the Probate Code is amended to read:

224. (a) If the insured and a beneficiary under a policy of life or accident insurance have died and it cannot be established by clear and convincing evidence that the beneficiary survived the insured by 120 hours, the proceeds of the policy shall be administered upon or distributed, or otherwise dealt with, as if the insured had survived the beneficiary.

(b) If the insured and the beneficiary are married to each other, this section applies regardless of whether the policy is community, quasi-community, or separate property.

(c) This section does not apply to an insurance policy issued before January 1, 1985, and any such insurance policy continues to be governed by the law applicable before January 1, 1985.

Comment. Section 224 is amended to provide a 120-hour survival rule. See also Section 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours). Subdivision (c) is added to make clear that the 120-hour rule does not apply to insurance contracts issued before the operative date of this chapter.

3062

Probate Code § 234 (amended). Hearing and order

SEC. 8. Section 234 of the Probate Code is amended to read:

234. At the hearing, the court shall hear the petition and any objections to the petition that may have been filed or presented. If the court determines that the named persons are dead and that is has not

been established by clear and convincing evidence that one person survived another by the applicable period of time, the court shall make an order to that effect. If the court determines that the named persons are dead and that there is clear and convincing evidence that one person survived another by the applicable period of time, the court shall make an order setting forth the order in which the persons died. The order, when it becomes final, is a binding determination of the facts set forth in the order and is conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through, or under any of the deceased persons.

Comment. Section 234 is amended to take account of the 120-hour survival rule. See Sections 220-224. See also Section 221 (provision of governing instrument prevails).

3060

Probate Code § 6146 (amended). Requirement that devisee survive testator by 120 hours or until future time

SEC. 9. Section 6146 of the Probate Code is amended to read:

6146. (a) A Subject to subdivisions (b) and (c), a devisee who fails to survive the testator by 120 hours or until any future time required by the will does not take under the will. For the purposes of this subdivision, unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devise is to take effect in enjoyment.

(b) In the absence of a contrary provision in the will:

(1) If it cannot be established by clear and convincing evidence that the devisee has survived the testator by 120 hours, it is deemed that the devisee did not survive the testator.

(2) If it cannot be established by clear and convincing evidence that the devisee survived until a future time required by the will, it is deemed that the devisee did not survive until the required future time.

(c) The requirement of subdivision (a) that a devisee survive the testator by 120 hours does not apply if both of the following requirements are satisfied:

(1) The will contains (A) a provision dealing explicitly with simultaneous deaths or deaths in a common disaster, (B) a provision

requiring the devisee to survive the testator for a stated period in order to take under the will, or (C) a presumption as to survivorship.

(2) The provision or presumption results in a distribution of property different from that provided by this chapter.

Comment. Section 6146 is amended to provide a general rule requiring a devisee to survive the testator by 120 hours. Subdivision (c) makes clear that a contrary provision in the will prevails over the general 120-hour rule.

3054

Probate Code § 6147 (amended). Anti-lapse

SEC. 10. Section 6147 of the Probate Code is amended to read:

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator by 120 hours or until a future time required by the will, the issue of the deceased devisee take in his or her place by representation. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or substitute disposition. With respect to multiple devisees or a class of devisees, a contrary intention or substitute disposition is not expressed by a devise to the "surviving" devisees or to "the survivor or survivors" of them, or words of similar import, unless one or more of the devisees had issue living at the time of the execution of the will and that fact was known to the testator when the will was executed.

Comment. Section 6147 is amended to recognize the 120-hour survival rule provided in Section 6146.

Probate Code § 6242 (amended). Full text of paragraph 2.1 of all California statutory wills

SEC. 11. Section 6242 of the Probate Code is amended to read:

6242. The following is the full text of paragraph 2.1 of both California statutory will forms appearing in this chapter:

If my spouse survives me by 120 hours, I give my spouse all my books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use. If my spouse does not survive me by 120 hours, the executor shall distribute those items among my children who survive me by 120 hours, and shall distribute those items in as nearly equal shares as feasible in the executor's discretion. If none of my children survive me by 120 hours, the items described in this paragraph shall become part of the residuary estate.

Comment. Section 6242 is amended to recognize the 120-hour survival rule provided in Section 6146.

3414

Probate Code § 6243 (amended). Full text of property disposition clauses of California statutory will

SEC. 12. Section 6243 of the Probate Code is amended to read:

6243. The following are the full text of the property disposition clauses referred to in paragraph 2.3 of the California statutory will form set forth in Section 6240:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

If my spouse survives me by 120 hours, then I give all my residuary estate to my spouse. If my spouse does not survive me by 120 hours, then I give all my residuary estate to my descendants who survive me by 120 hours.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

I give all my residuary estate to my descendants who survive me by 120 hours. I leave nothing to my spouse, even if my spouse survives me.

(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL:

The executor shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according

to the laws of the State of California in effect on the date of my death relating to intestate succession.

Comment. Section 6243 is amended to recognize the 120-hour survival rule provided in Section 6146.

3107

Probate Code § 6244 (amended). Full text of property disposition clauses of California statutory will with trust

SEC. 13. Section 6244 of the Probate Code is amended to read:

6244. The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the California statutory will with trust form set forth in Section 6241:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.

(1) If my spouse survives me by 120 hours, then I give all my residuary estate to my spouse.

(2) If my spouse does not survive me by 120 hours and if any child of mine under 21 years of age survives me by 120 hours, then I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, post-graduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(3) If my spouse does not survive me by 120 hours and if no child of mine under 21 years of age survives me by 120 hours, then I give all my residuary estate to my descendants who survive me by 120 hours.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD IN ONE TRUST TO PROVIDE FOR THEIR SUPPORT AND EDUCATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

(1) I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal, or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(2) If no child of mine under 21 years of age survives me by 120 hours, then I give all my residuary estate to my descendants who survive me by 120 hours.

(3) I leave nothing to my spouse, even if my spouse survives me.

Comment. Section 6244 is amended to recognize the 120-hour survival rule provided in Section 6146.

Probate Code § 6403 (amended). Requirement that heir survive decedent

SEC. 14. Section 6403 of the Probate Code is amended to read:

6403. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the decedent's heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive the decedent for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

Comment. Section 6403 is amended to provide a 120-hour survival rule. See also Sections 230-234 (proceeding to determine whether one person survived another by 120 hours).

3413

SEC. 15. This act does not apply in any case where any of the decedents upon whose time of death the disposition of property depends died before January 1, 1985, and such case continues to be governed by the law applicable to the case before January 1, 1985.