

#L-612

8/24/84

Memorandum 84-74

Subject: Study L-612 - Probate Law and Procedure (Period of Survival to Take by Intestacy)

The Commission's bill (AB 2288) to require a general survival period of 120 hours to take by will, intestate succession, joint tenancy, insurance, etc., did not pass the Legislature this session. There was opposition particularly to application of the 120-hour survival rule to wills and joint tenancies.

It may be that we could obtain passage of a more modest proposal to require a 120-hour survival period to take by intestate succession, without applying the rule to wills, joint tenancies, or other situations. The staff has drafted such a limited proposal which is attached to this memorandum. The staff thinks this proposal would be an improvement over existing law for the reasons set out in the attached draft. Does the Commission want to propose this to the 1985 session of the Legislature?

Respectfully submitted,

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Staff Draft

RECOMMENDATION

relating to

PERIOD OF SURVIVAL TO TAKE BY INTESTACY

When a husband and wife, or a parent and child, die in a common accident and there is clear and convincing evidence that one survived the other, the survivor may take from the other by intestate succession even if the period of survivorship is only a fraction of a second.¹ This may result in a serious injustice. 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 by clear and convincing evidence 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. The wife's children by her former marriage would receive nothing. It would be fairer to require some period of survival, such as 120 hours,² to take by intestacy. If this 120-hour survivorship requirement is not satisfied, the community property should be divided equally between the estates of the husband and wife.

The existing rule that one who survives the decedent by a fraction of a second may take by intestate succession from the decedent may also result in unnecessary double estate taxation. For example, consider the case where a divorced father and his adult daughter die intestate in a common accident. If the daughter survives her father for a few hours and the daughter is survived by her own children, the father's property passes into the estate of the daughter where it may be taxed, and then passes to the daughter's children. It would be better to require a period of survival such as 120 hours for the daughter to take by intes-

1. See Prob. Code § 6403; cf. Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (right of unrelated legatee who survived 1/150,000 of a second to take by will). See also Prob. Code § 220 (simultaneous death).
2. One hundred twenty hours is the period of survival required to take by intestate succession under the Uniform Probate Code. Uniform Probate Code § 2-104.

tacy. If the 120-hour survivorship requirement is not satisfied, the father's property should pass directly to his grandchildren, thus avoiding double taxation.

The Commission recommends adoption of a provision drawn from the Uniform Probate Code³ requiring that an heir must survive the decedent by 120 hours in order to take from the decedent by intestate succession. Wills often contain provisions requiring that the beneficiary survive the testator for a fixed period, usually a few days, in order to take the gift.⁴ The intestate succession laws should provide for a distribution that the average decedent probably would have wanted if an intention had been expressed by will.⁵

Provisions of this type have been adopted in a significant number of states in recent years.⁶ The requirement of a 120-hour survival period in intestate cases would avoid senseless and gruesome litigation over whether one family member survived another for a tiny fraction of a second.⁷ The 120-hour period is not so long that it would interfere with the ability of the survivor to deal with the property when a need arises, nor would it delay administration of the estate.

3. Uniform Probate Code § 2-104.

4. See Johnston, Outright Bequests and Devises, in California Will Drafting §§ 11.46-11.50, at 376-79 (Cal. Cont. Ed. Bar 1965).

5. Niles, Probate Reform in California, 31 Hastings L.J. 185, 200 (1979).

6. At least 14 states have adopted the rule that to take by intestate succession the heir must survive the decedent by 120 hours. Ala. Code § 43-8-43 (1982) (enacted 1982); Alaska Stat. § 13.11.020 (1983) (enacted 1972); Ariz. Rev. Stat. Ann. § 14-2104 (1975) (enacted 1973); Colo. Rev. Stat. § 15-11-104 (1974) (enacted ____); Idaho Code § 15-2-104 (1979) (enacted 1971); Me. Rev. Stat. Ann. tit. 18A, § 2-104 (1981) (enacted 1979); Mich. Stat. Ann. § 27.5107 (1980) (enacted ____); Mont. Code Ann. § 72-2-205 (1983) (enacted 1974); Neb. Rev. Stat. § 30-2304 (1979) (enacted 1974); N.J. Stat. Ann. § 3B:5-1 (West 1983) (enacted 1977); N.M. Stat. Ann. § 45-2-104 (1978) (enacted 1975); N.D. Cent. Code § 30.1-04-04 (1976) (enacted 1973); Tex. Prob. Code Ann. § 47 (Vernon 1980) (120-hour provision added in 1979); Utah Code Ann. § 75-2-104 (1978) (enacted 1975). Ohio has a 30-day survival rule. Ohio Rev. Code Ann. § 2105.21 (Page 1976). The Ohio provision is derived from a provision first enacted in 1932.

7. Cf. Estate of Rowley, supra note 1.

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

An act to amend Section 6403 of the Probate Code, relating to intestate succession.

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

8340

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

SECTION 1. 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 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~~ predeceased the decedent. 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. Section 6403 requires, for example, that a married person survive his or her spouse for 120 hours in order to take from the spouse by intestate succession. See also Section 103. Section 103 applies where it cannot be established by clear and convincing evidence that one spouse survived the other. In such a case, Sections 103 and 6403 are consistent with each other. If one spouse survives the other by a short period but less than 120 hours, then Section 103 does not apply but Section 6403 does.

Act does not apply if death occurs before January 1, 1986

SEC. 2. This act does not apply in any case where the decedent died before January 1, 1986, and such case continues to be governed by the law applicable to the case before January 1, 1986.