

Memorandum 89-94

Subject: Study L-619 - Survival Requirement for Beneficiary of
Statutory Will

The Commission's *Tentative Recommendation Relating to Miscellaneous Probate Code Revisions* includes a recommendation proposing a 120-hour survival requirement for the beneficiary of a statutory will. We have prepared this recommendation in the form of a separate Recommendation which is attached.

The Tentative Recommendation was distributed to our list of interested persons and organizations for review and comment. We received only a few comments on this portion of the Tentative Recommendation. All were favorable.

The staff recommends that the Commission approve the attached Recommendation for printing and submission to the 1990 Legislature.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Survival Requirement for
Beneficiary of Statutory Will

December 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 547 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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December 1, 1989

To: The Honorable George Deukmejian
Governor of California, and
The Legislature of California

This recommendation proposes to impose a 120-hour survival requirement in order for a beneficiary to take under a statutory will.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

Newly-enacted legislation requires that a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent.¹ The law of intestate succession is, in effect, a statutory will for persons who have failed to execute their own wills.

The policies that suggest a 120-hour survival requirement for intestate succession apply with equal force to the right to take under a California statutory will.² However, the statutory will statute³ fails to include any survival requirement. Accordingly, the Commission recommends that the 120-hour survival requirement be incorporated into that statute.⁴

The recommended legislation amends sections of, and adds a section to, the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended legislation will become operative at the same time as the new Probate Code becomes operative.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments and new provision:

Probate Code § 221 (amended). Application of Uniform Simultaneous Death Act

221. (a) This chapter does not apply in any case where Section 103, 6146, 6211, or 6403 applies.

1. Prob. Code § 6403, as amended by 1989 Cal. Stat. ch. 544 § 5.

2. These policies are to dispose of the decedent's property in a manner consistent with what the decedent would have wanted in the circumstances, to minimize litigation over the precise moment of death in common accident cases, and to apply a survival period that is long enough to recognize most deaths that occur soon after an accident but short enough that it does not interfere with estate administration or the ability of the survivor to deal with the property. See *Recommendation Relating to 120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990).

3. See Prob. Code §§ 6200-6248 (California statutory will).

4. The 120-hour survival requirement would not apply where the testator died before the operative date of the proposed legislation.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

Comment. Section 221 is amended to add a reference to Section 6211 (120-hour survival requirement under California statutory will).

Note. This amendment to Section 221 is made to Section 221 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 230 (amended). Proceedings to determine survival

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

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, 6146, 6147, 6211, 6242, 6243, 6244, or 6403, or other provision of this code whether one person survived another.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived in order to receive benefits payable under the system.

(d) To determine for the purposes of Section 21371 of the Government Code whether a person has survived in order to receive money payable under the system.

(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons have died other than simultaneously.

Comment. Section 230 is amended to add a reference to Section 6211 (120-hour survival requirement under California statutory will).

Note. This amendment to Section 230 is made to Section 230 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 6211 (added). 120-hour survival requirement

6211. A reference in a California statutory will to a person "if living" or who "survives me" means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of the California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive 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 6211 is a new provision that provides a 120-hour survival rule. Section 6211 is the same in substance as Section 6403 (requirement that heir survive decedent by 120 hours). Section 6211 does not apply if the testator died before the operative date of the section. See Section 6247. See also Section 230 (petition to determine for the purposes of Section 6211 whether one person survived another).

Note. This new section is added to the Probate Code proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 6247 (amended). Inclusion of clauses as existing on date of execution

6247. (a) Except as specifically provided in this chapter, a California statutory will shall include only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the California statutory will is executed.

(b) Sections 6205, 6206, 6226, 6243, 6245, and 6246 apply to every California statutory will, including those executed

before January 1, 1985. *Section 6211 applies to every California statutory will, including those executed before July 1, 1991, except that the section does not apply if the testator died before July 1, 1991.*

(c) Notwithstanding Section 6222 and except as provided in subdivision (b), a California statutory will is governed by the law that applied prior to January 1, 1985, if the California statutory will is executed on or after January 1, 1985, on a form that (1) was prepared for use under former Sections 56 to 56.14, inclusive, repealed by Chapter 842 of the Statutes of 1983, and (2) satisfied the requirements of law that applied prior to January 1, 1985.

(d) A California statutory will does not fail to satisfy the requirement of subdivision (a) merely because the will is executed on a form that incorporates the mandatory clauses of Section 6246 that refer to former Section 1120.2, repealed by Chapter 820 of the Statutes of 1986. If the will incorporates the mandatory clauses with a reference to former Section 1120.2, the trustee has the powers listed in Article 2 (commencing with Section 16220) of Chapter 2 of Part 4 of Division 9.

Comment. Section 6247 is amended to add the second sentence to subdivision (b). See Section 6211 (120-hour survival requirement).

Note. This amendment to Section 6247 is made to Section 6247 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.