

6/18/81

## Memorandum 81-38

Subject; Study L-602 - Probate Code (Intestate Succession--Miscellaneous Provisions)

This memorandum concerns various miscellaneous provisions of the Uniform Probate Code that relate to intestate succession.

Requirement That Heir Must Survive Decedent by 120 Hours

Under the UPC, a potential heir must survive the decedent by 120 hours in order to take by intestacy. UPC § 2-104. This covers the common accident situation if the Uniform Simultaneous Death Act (Prob. Code §§ 296-296.8) does not apply. Official Comment to UPC § 2-104. It avoids multiple administrations of the estate and keeps the property from passing to persons whom the decedent would not have wanted to benefit. Id. This provision appears to be a clear improvement in California law and has been endorsed by the State Bar. See State Bar of California, The Uniform Probate Code: Analysis and Critique 30 (1973).

Afterborn Heirs

Section 2-108 of the UPC provides that "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." This provision is consistent with Civil Code Section 29 which provides that a "child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth . . . ." This section permits afterborn heirs to take by intestacy in California. See In re Estate of Kurtz, 190 Cal. 146, 150, 210 P. 959 (1922). See also Prob. Code § 250 (a "posthumous child is considered as living at the death of the parent").

The staff proposes to include UPC Section 2-108 in the recommended legislation since it is a special application of the principle of Civil Code Section 29. (This would make the reference in Probate Code Section 250 to a "posthumous child" superfluous, and it could well be deleted.)

Effect of Adoption on Inheritance

Under California law, adoption of a child is "deemed a descendant of one who has adopted him, the same as a natural child, for all purposes

of succession by, from or through the adopting parent the same as a natural parent." Prob. Code § 257. Similarly, all inheritance from or by the blood relatives of the adopted child is cut off by the adoption. Id.; 7 B. Witkin, Summary of California Law Wills and Probate § 62, at 5585 (8th ed. 1974).

Section 2-109 of the UPC is to the same effect with one important exception: Where the adoption is by the spouse of a natural parent (i.e., a stepparent adoption), the adopted child may inherit from the adoptive parent and also from the natural parent who gave up the child for adoption and from relatives of that parent. (The possibility of a double inheritance is precluded by UPC Section 2-114, discussed below.)

The staff recommends the UPC rule that a stepparent adoption does not cut off the right of the adopted child to inherit from the natural parent who gives up the child for adoption. This probably conforms more closely to what most people would want in this situation than does the California rule.

#### Advancements

Under both the UPC and California law, an inter vivos gift to a potential heir is not treated as an "advancement" of the heir's intestate share (with the result that it would have to be deducted from the heir's intestate share) unless the donor's intention that the gift be treated as an advancement is declared in writing or unless the donee acknowledges the gift to be an advancement in writing. UPC § 2-110; Prob. Code § 1050. However, the UPC differs from California law in two respects: (1) The writing by the donor declaring the gift to be an advancement must be "contemporaneous" with the gift under the UPC; (2) When the gift is declared to be an advancement, it is only an advancement to the specific donee under the UPC, and is not treated as an advancement to the donee's issue if the donee predeceases the donor. On the second point, California law is exactly the opposite: If the donee predeceases the donor, the amount of the advancement is deducted from the shares the heirs of the donee would receive from the donor's estate "in like manner as if the advancement had been made directly to them." Prob. Code § 1053.

The staff prefers the UPC requirement that the donor's written declaration that the gift is an advancement be contemporaneous with the gift. Otherwise such a gift would be subject to defeasance long after it was made at the whim of the donor.

The staff also prefers the UPC rule that the advancement not be deducted from the intestate shares of the issue of a donee who predeceases the donor. This rule avoids practical problems such as tracing, recognizes that the deceased donee had full testamentary power over the property, and is consistent with the rule on debts owed to the decedent (discussed immediately below).

#### Offsetting Debt Owed to Decedent Against Heirs of Predeceased Debtor

Section 2-111 of the UPC provides that:

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

The UPC rule is consistent with California case law and the weight of authority in other U.S. jurisdictions. See *Estate of Berk*, 196 Cal. App.2d 278, 16 Cal. Rptr. 492 (1961). The theory of the rule is that the heirs of the predeceased debtor take directly from the decedent, not through the debtor; since such heirs are not personally liable for the debt, they owe nothing to the decedent's estate. *Id.* The State Bar has endorsed UPC Section 2-111. See *State Bar of California, The Uniform Probate Code: Analysis and Critique* 30 (1973). Accordingly, the staff recommends enactment of UPC Section 2-111.

#### Alienage

Section 2-112 of the UPC provides that "[n]o person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien." This provision is consistent with Article I, Section 20, of the California Constitution ("[n]oncitizens have the same property rights as citizens") and Section 671 of the Civil Code ("[a]ny person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State"). Moreover, acting on recommendation of the California Law Revision Commission, the Legislature in 1974 repealed

provisions which imposed certain limitations on the right of nonresident aliens to inherit. See 1974 Cal. Stats. ch. 425; Recommendation and Study Relating to the Right of Nonresident Aliens to Inherit, 2 Cal. L. Revision Comm'n Reports B-5 (1959).

Accordingly, the staff recommends enactment of UPC Section 2-112.

#### Dower and Curtesy

Section 2-113 of the UPC provides that "[t]he estates of dower and curtesy are abolished." This matter is presently covered by Section 5129 of the Civil Code, which provides: "No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband." It seems better to leave the matter covered by the Family Law Act as at present, rather than treating it in the Probate Code provisions on intestate succession. Accordingly, the staff proposes not to adopt UPC Section 2-113, but rather to refer to Civil Code Section 5129 in a Comment or in the recommendation.

#### Persons Related to Decedent Through Two Lines

UPC Section 2-114 provides that a "person who is related to the decedent through 2 lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share." The UPC drafters included this section because of the possibility of a double inheritance caused by the inclusion in another section (UPC § 2-109) of the rule that a stepparent adoption does not cut off the right of the adopted child to inherit from the surrendering parent and blood relatives of the latter. For example, suppose that after the death of a child's father, the child's mother marries the decedent's brother (i.e., the child's uncle) who then adopts the child as a stepparent. (Apparently this is a "not uncommon case." See Official Comment to UPC § 2-114.) If the adopting parent predeceases his parents (i.e., the child's paternal grandparents), the child could potentially inherit from the paternal grandparents both as a natural and as an adopted grandchild. See Official Comment to UPC § 2-114. UPC Section 2-114 precludes this possibility.

If the Commission approves the staff recommendation to adopt the UPC rule that a stepparent adoption does not cut off inheritance rights (see discussion above), then UPC Section 2-114 should also be included in the proposed legislation.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel