

Memorandum 82-22

Subject: Study L-607 - Probate Law (Effect of Homicide)

Both California by statute and the UPC disqualify one who commits an intentional homicide from taking the victim's property by will or intestate succession. See Prob. Code § 258 (attached to this memorandum as Exhibit 1); UPC § 2-803 (attached to this memorandum as Exhibit 2). The UPC also covers other kinds of benefits such as insurance and joint tenancy, while in California some of these issues have been resolved by case law. The significant substantive differences between California law and the UPC are three in number and present the following policy questions:

(1) Should the civil or criminal standard of proof be used in the civil proceeding to disqualify the killer from taking property from the victim?

(2) Should an acquittal after a criminal trial conclusively establish in the civil proceeding that the killer is not disqualified from taking from the victim?

(3) In the freakish case where the killer accidentally kills a person from whom the killer would stand to inherit during the commission of a felony which brings the killing within the felony murder rule, should the killer be disqualified from taking property from the victim?

Burden of Proof; Effect of Acquittal in Criminal Proceeding

The first two policy questions above are closely related, since an acquittal in a criminal proceeding establishes that there was not proof beyond a reasonable doubt, but does not establish that there was not proof by a preponderance of the evidence. For this reason, a California case has held that since Probate Code Section 258 (Exhibit 1) gives a criminal acquittal conclusive effect in a later civil proceeding, the criminal burden of proof must be employed in the civil proceeding where there has been no criminal trial; otherwise there might be a serious constitutional question of the arbitrariness of having different standards of proof depending on whether or not there had been a criminal trial and disposition. See Estate of McGowan, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39 (1973).

Unlike California law, the UPC applies the civil standard of proof in the civil proceeding, and, consistent with this rule, gives no effect in the civil proceeding to a criminal acquittal. See UPC § 2-803 and Official Comment thereto (Exhibit 2).

In its 1973 critique of the UPC, the State Bar expressed a preference for the California rule. The argument was that if the alleged killer is acquitted in the criminal proceeding, the killer should not have to undergo a second trial in a civil proceeding and risk the stigmatization that would result from a civil finding of an intentional killing. See State Bar of California, Uniform Probate Code: Analysis and Critique 59 (1973).

However, the staff finds the counter-argument of the Joint Editorial Board that the civil and criminal laws serve different purposes to be persuasive. See Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 18 (1974). The possibility of a death sentence or long imprisonment in the criminal proceeding justifies the more stringent burden of proof. Although a civil judgment may stigmatize, there are interests of the victim's other heirs, as well as the notion that one should not profit from his or her own wrong, to be balanced against the need for procedural protection for the alleged killer.

The attorney who represented the victim's sister in the McGowan case supra and sought to disqualify the alleged killer has written an article supporting the view of the Joint Editorial Board: To deny a civil determination on the merits after a criminal acquittal thwarts the substantive policy of California, and "there is no reason why a stigma should not attach to a murderous heir." Wild, The Felonious Heir in California, 49 St. B.J. 528, 532 (1974). As noted in the UPC Comment, an analogy exists in tax law where the taxpayer may be acquitted of tax fraud in a criminal proceeding, yet be found to have committed the fraud in a civil proceeding.

Accordingly, the staff recommends the UPC rule which uses the civil standard of proof in the civil proceeding and does not give any civil effect to an acquittal in a prior criminal proceeding.

Accidental Killing Which Constitutes a Felony Murder

The UPC disqualifies one who "feloniously and intentionally kills" the victim. California (Prob. Code § 258) goes further, however, by disqualifying one who:

(1) "Unlawfully and intentionally" causes the victim's death.

(2) Causes the victim's death "in the perpetration [of] or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, Penal Code" (felony murder rule--see Penal Code § 189; 1 B. Witkin, California Crimes Crimes Against the Person § 311, at 283-84 (1963)).

Under the second branch of the California rule, a killing which takes place during the commission of one of the described felonies need not be intentional as under the first branch of the rule: An accidental killing which constitutes a felony murder will disqualify the killer from taking the victim's property.

The importance of this substantive difference between California law and the UPC is greatly diminished by the fact that it is difficult to imagine a situation in which one who kills the victim accidentally during the commission of a felony would stand to inherit from the victim. Wild, supra at 528 n.2.

The staff is inclined to recommend the UPC provision for two reasons:

(1) To the extent that the disqualification of a killer from taking from the victim is based on the need to eliminate any incentive for the crime, a rule which disqualifies one who kills by accident does not serve the purpose of the rule. Cf. Official Comment to UPC § 2-803 (UPC disqualification "excludes the accidental manslaughter killing").

(2) National uniformity in this area of law "appears desirable." Official Comment to UPC § 2-803.

Kinds of Property Acquisitions From the Victim Prohibited

With respect to the coverage of the various ways the killer may benefit from the victim, the UPC is more detailed and inclusive than the California statute, but is consistent with California case law. The California statute (Prob. Code § 258) only disqualifies the killer from taking from the victim by will or intestate succession. However, the California cases have gone far beyond this by imposing a constructive trust on property received by the killer as a result of the victim's death from life insurance, joint tenancy, and retirement benefits, and

have disqualified the killer from receiving a family allowance from the victim's estate. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 367 n.105 (1976).

The UPC covers all these matters expressly, disqualifying the killer from taking by will, intestate succession, elective share, homestead, family allowance, joint tenancy, life insurance, joint and multiple-party bank accounts, bonds with pay-on-death provisions, and the like. The UPC provision is a much better statement than the California provision and is consistent with California cases.

Protection of Bona Fide Purchaser

The UPC has a useful provision which protects the rights of a third person who, before an adjudication disqualifying the killer from taking, purchases from the killer for value and without notice property which the killer would have received but for the disqualification. Instead the killer is made liable. UPC § 2-803(f). The UPC also protects a financial institution which makes payment before receiving written notice of a claim under the disqualification provisions. Id. California has no comparable provision.

The UPC rule states good policy, and it seems useful to have the matter dealt with explicitly by statute. Accordingly, the staff recommends the UPC protection for bona fide purchasers.

Conclusion

The UPC's substitution of a civil for a criminal burden of proof would be a significant improvement in California law. The UPC section is better drafted, and its greater inclusiveness would clarify California law by covering some kinds of property acquisitions which have not been dealt with by California case law. Accordingly, the staff recommends that UPC Section 2-803 be adopted in place of Probate Code Section 258.

Respectfully submitted,

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EXHIBIT 1

PROBATE CODE § 258

§ 258. Causing death; succession prohibited

No person who has unlawfully and intentionally caused the death of a decedent, and no person who has caused the death of a decedent in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, Penal Code, shall be entitled to succeed to any portion of the estate or to take under any will of the decedent; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter or under the will of the decedent. A conviction or acquittal on a charge of murder or voluntary manslaughter shall be a conclusive determination of the unlawfulness or lawfulness of a causing of death, for the purposes of this section. (Stats.1931, c. 281, § 258. Amended by Stats.1955, c. 1110, § 1; Stats.1963, c. 857, § 1.)

EXHIBIT 2

UNIFORM PROBATE CODE § 2-803

[Section 2-803. [Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations.]

(a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.]

COMMENT

This section is bracketed to indicate that it may be omitted by an enacting state without difficulty.

A growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable. The section is confined to intentional and felonious homicide and excludes the accidental manslaughter killing.

At first it may appear that the matter dealt with is criminal in nature and not a proper matter for probate courts. However, the concept that a wrongdoer may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the murdered person's family under wrongful death statutes. While conviction in the criminal

prosecution under this section treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding. In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.