

Memorandum 82-27

Subject: Study L-612 - Probate Law (Simultaneous Death)

Probate Code Sections 296-296.8 set forth the California version of the Uniform Simultaneous Death Act. (A copy of these sections is attached to this memorandum as Exhibit 2.) This legislation, enacted in 1945, replaced the former disputable presumptions as to order of death when two or more persons died in a common accident with the rule that the property of each person is disposed of as if he had survived in a case where there is no sufficient evidence that the persons died other than simultaneously. The Uniform Simultaneous Death Act (USDA) does not deal directly with the problem of repetitive taxation or administration since it operates only if there is not sufficient evidence that one person survived another. The USDA leaves plenty of room for exploring the gory physics of violent death in the search for sufficient evidence to determine the order of death. Particularly ridiculous in this regard is the case of Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967), in which a doctor applied his understanding of physics from his college days to hazard a guess that one passenger in a car was killed 1/150,000 of a second before the other. The USDA was held inapplicable in this case.

The Uniform Probate Code (UPC) adopts the rule that a person who fails to survive a decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession or taking under a will (subject to a contrary provision in the will). For your convenience, Sections 2-105 (intestate succession) and 2-601 (wills) are set out in Exhibit 3 attached to this memorandum. The Commission has approved Section 2-104 in the form set forth in the staff draft of Tentative Revisions of the Intestate Succession Provisions of the Uniform Probate Code attached to Memorandum 82-8, which is on the agenda for this meeting. Section 2-601 of the UPC is proposed for approval in Memorandum 82-18 (Rules of Construction), also on the agenda for this meeting.

The staff proposes to consolidate the substance of UPC Sections 2-104 and 2-601 with the Uniform Simultaneous Death Act, thereby providing a complete treatment of this subject. The staff draft of a revised simultaneous death statute is attached to this memorandum as Exhibit 1. This proposal would involve the deletion of Sections 2-104 and 2-601 as set out in the materials attached to Memorandums 82-8 and 82-18.

Law of Other States

There is no consensus among the states about how to reconcile the 120-hour survival rule in the UPC with the USDA. The USDA has been adopted in 46 states and three other jurisdictions. States that have enacted the USDA and at least part of the UPC break down as follows:

1. Explicitly provide that USDA prevails over UPC:
Colorado
2. Omit UPC §§ 2-104 and 2-601 so that USDA applies:
Florida
Hawaii
Minnesota
3. Have both UPC §§ 2-104 and 2-601 and USDA without resolving conflict:
Maine
Michigan
Nebraska
[New Jersey has UPC sections but only Section 2-601 provides that it prevails over USDA if there is conflict.]
4. Enacted USDA section providing that it is inapplicable if other rules on presumption as to survivorship apply:
Arizona
North Dakota
Utah
5. Explicitly provide that USDA subject to UPC rules:
Idaho
[New Jersey version of UPC Section 2-601 provides that it prevails over USDA.]

Alaska and Montana have enacted the relevant UPC provisions and repealed the USDA.

Texas has amended its version of the USDA to provide the UPC 120-hour rule wherever the USDA applies its "no sufficient evidence that the persons die other than simultaneously" test. The simple and unified approach of the Texas statute appeals to the staff, and is reflected in the staff proposal. A possible transitional problem is discussed below.

Also of interest is Ohio which has enacted neither uniform act, but has its own 30-day survival statute. And finally we have Louisiana

which retains the old set of presumptions based on age, health, and sex to determine survival in the absence of sufficient evidence.

Policy Issues

Period of survival. The staff draft in Exhibit 1 adopts the 120-hour period of survival proposed in the UPC. This period is proposed for the sake of uniformity. A longer period would better accomplish the policy of avoiding double taxation and double administration, but a line must be drawn somewhere, and we defer to the drafters of the UPC. Of course, a testator may always select a different period in his or her will and an insured may similarly qualify the right of beneficiaries under a life insurance policy.

Application of 120-hour period of survival to nonprobate transfers. If a state leaves the USDA in place and enacts UPC Sections 2-104 and 2-601, the USDA would continue to govern survivorship of joint tenants and insurance beneficiaries. However, the staff believes that it is desirable to apply the same survival rules to the passing of all property on death, so far as possible, regardless of whether the property goes by intestate succession, will, survivorship, or contract. This approach is reflected in the staff draft.

Contrary will provisions. Section 2-601 of the UPC provides that the 120-hour rule is inapplicable if the will "contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will." Section 6 of the USDA, as amended in 1953, provides that the act does not apply if provision is made for "distribution of property different from the provisions of this act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided." The staff draft adopts the UPC provision for wills and the USDA provision for other cases. Under this draft and the UPC, a devise "to X if he survives me" would make the 120-hour rule inapplicable, but if it cannot be established that X died more than 120 hours after the testator, presumably the 120-hour rule would apply, and X would be deemed to have predeceased the testator and the property would pass accordingly.

Transitional issue. There may be a problem in applying the 120-hour survival rule to existing joint tenancies and insurance contracts, although there did not seem to be any problem in applying the USDA to

joint tenancies and insurance contracts existing when it became operative. Probate Code Section 296.5 provides that the California USDA "shall not apply to the distribution of the property of a person who has died before it takes effect." However, we think that there is no problem of unconstitutional interference with vested rights in this instance, in light of the constitutionality of retroactive community property reforms and abrogation of dormant mineral rights. The staff is researching this question in connection with the study of joint tenancy and community property and will propose any necessary adjustments if insurmountable constitutional problems appear. In such a case, we would suggest that the existing USDA be left in place for pre-operative date joint tenancies and insurance contracts, but that the 120-hour rule apply to all other situations based on date of death.

Uniformity and drafting. The staff draft is significantly different from the USDA so that we propose not to continue the uniform short title (Probate Code Section 296.8) and the uniformity of interpretation provision (Probate Code Section 296.7). Approval of the staff draft will also result in not recommending enactment of UPC Sections 2-104 and 2-601. However, as discussed herein, the substance of these provisions is for the most part reflected in the staff draft. The California version of the USDA with the 120-hour rule as proposed in the staff draft is preferable to the UPC provisions because the USDA provides more detail and also provides some useful procedures. Of course, when the Commission considers revision of Division 3 of the Probate Code dealing with administration these procedural provisions should be reconsidered. Finally, the staff prefers the unified approach of the proposed draft, and it avoids any questions that might arise because of the inconsistencies between UPC Sections 2-104 and 2-601.

Respectfully submitted,

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EXHIBIT 1

STAFF DRAFT

Probate Code §§ 284.010-284.090. 120-Hour Survival Rule

Article 5. 120-Hour Survival Rule

§ 284.010. Survival by 120 hours

284.010. (a) If the title to property or the devolution of property depends upon priority of death, a person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent and the title to or devolution of the property shall be determined accordingly, except as otherwise provided in this article.

(b) If it cannot be established that a person has survived the decedent by 120 hours, it is deemed that the person failed to survive for the requisite period.

Comment. Section 284.010 supersedes former Section 296 (California Uniform Simultaneous Death Act). The 120-hour survival rule in subdivision (a) is drawn from Sections 2-104 and 2-601 of the Uniform Probate Code. Subdivision (b) is drawn from the second sentence of Section 2-104 of the Uniform Probate Code.

§ 284.020. Survival of heirs

284.020. A person who does not survive the decedent as provided in Section 284.010 is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly.

Comment. Section 284.020 supersedes former Section 296 insofar as it applied to intestate succession and is drawn from the first sentence of Section 2-104 of the Uniform Probate Code.

§ 284.030. Survival of devisee

284.030. (a) A devisee who does not survive the testator as provided in Section 284.010 is deemed to have predeceased the testator.

(b) Subject to subdivision (a), if two or more devisees are designated to take successively by reason of survivorship under the decedent's will and one devisee has not survived another as provided in Section 284.010, the property devised shall be divided into as many equal portions as there are successive devisees and these portions shall be distributed

respectively to those who would have taken in the event that each designated beneficiary had survived.

Comment. Subdivision (a) of Section 284.030 supersedes former Section 296 insofar as it applied to wills and is similar to a portion of Section 2-601 of the Uniform Probate Code. The rule provided in this subdivision is subject to a different provision in a will. See Section 284.080.

Subdivision (b) is drawn from former Section 296.1 (California Uniform Simultaneous Death Act). The introductory clause makes clear that this rule applies only if the devisees have satisfied the survival requirements generally applicable. See also Section 284.080 (contrary will provision prevails).

§ 284.040. Survival of joint tenants

284.040. (a) If a joint tenant does not survive another joint tenant as provided in Section 284.010, one-half of the property held in joint tenancy shall be administered upon or distributed, or otherwise dealt with, as if one joint tenant had survived, and the other half as if the other joint tenant had survived.

(b) If there are more than two joint tenants and each of them has failed to survive the others as provided in Section 284.010, the property held in joint tenancy shall be administered upon, distributed, or otherwise dealt with, in the proportion that one joint tenant bears to the whole number of joint tenants.

Comment. Section 284.040 continues the substance of former Section 296.2 except as modified to apply the 120-hour rule provided in Section 284.010.

§ 284.050. Survival of insurance beneficiary

284.050. If the beneficiary of a policy of life or accident insurance does not survive the insured as provided in Section 284.010, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

Comment. Section 284.050 supersedes former Section 296.3 (California Uniform Simultaneous Death Act).

§ 284.060. Survival of spouses as to community property

284.060. Except as provided in Section 284.050, if a husband and wife die leaving community property and one spouse does not survive the other as provided in Section 284.010, one-half of the community property shall be administered upon or distributed, or otherwise dealt with, as if the husband had survived and as if such half were his separate property, and the other half of the community property as if the wife had survived and as if such half were her separate property.

Comment. Section 284.060 continues the substance of the first paragraph of former Section 296.4 except as modified to apply the 120-hour rule provided in Section 284.010.

§ 284.070. Inapplicability of article to avoid escheat

284.070. This article shall not be applied if its application would result in the escheat of property to the state.

Comment. Section 284.070 supersedes a portion of the second paragraph of former Section 296.4 and is drawn from the last sentence of Section 2-104 of the Uniform Probate Code relating to intestate estates.

§ 284.080. Inapplicability of article if provision for different distribution

284.080. This article does not apply:

(a) In the case of wills, where a will contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster or requiring that the devisee survive the testator for a stated period in order to take under the will.

(b) In the case of living trusts, deeds, or contracts of insurance, or any other situation, where provision is made for distribution of property different from the provisions of this article, or where provision is made for a presumption as to survivorship that results in a distribution of property different from that provided by this article.

Comment. Subdivision (a) of Section 204.080 is drawn from a portion of Section 2-601 of the Uniform Probate Code. Subdivision (b) continues the substance of a portion of former Section 296.6 and incorporates the amendments made in 1953 to Section 6 of the Uniform Simultaneous Death Act.

§ 284.090. Proceedings to determine survival under this article

284.090. (a) If it is claimed that survival of any person is governed by this article, the executor or administrator of any such person, or any other person interested in the estate of any such person, may file a petition in the estate proceeding where the executor or administrator was appointed, or in which an interested person claims an interest, seeking an order determining survival under the provisions of this article.

(b) The clerk shall set the petition for hearing by the court and shall cause notice of the hearing to be personally served on the executor or administrator of each other person claimed to have died under the provisions of Section 284.010 at least 10 days before the date of the hearing. If the representative of any such person is also the petitioner, instead of personal service, notice shall be mailed to the heirs and

devisees of the person, so far as they are known to the petitioner, at least 10 days before the date of the hearing.

(c) At the hearing, the court, upon proof of service, shall hear the petition and any objections to the petition that may have been filed or presented. If the court is satisfied that the named persons are dead and that it has not been established that the one person predeceased another by at least 120 hours, the court shall make an order to that effect.

(d) An order under subdivision (c) 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 such deceased persons.

(e) The court that first acquires jurisdiction under subdivision (a) has exclusive jurisdiction under this section.

Comment. Section 284.090 continues the substance of former Sections 296.41 and 296.42 except as modified to apply the 120-hour rule provided in Section 284.010.

Education Code § 24606 (amended). Survival of beneficiary by 120 hours under State Teachers' Retirement System

SEC. . Section 24606 of the Education Code is amended to read:

24606. ~~Where the member or retirant and the beneficiary have died and there is no sufficient evidence that they have died otherwise than simultaneously~~ The provisions of Article 5 (commencing with Section 284.010) of Chapter 8 of Division 2 of the Probate Code, when applicable, govern the distribution of the proceeds of any death benefit shall be distributed as if the member had survived the beneficiary, under this system. In applying Article 5 (commencing with Section 284.010) of Chapter 8 of Division 2 of the Probate Code with respect to proceeds payable to a beneficiary, membership in the system shall be considered as having the same status as an insurance policy.

Comment. Section 24606 is amended to reflect the repeal of the Uniform Simultaneous Death Act (former Probate Code Sections 296-296.8) and the enactment of Probate Code Sections 284.010-284.090 (120-hour survival rule). Section 24606 is revised in a manner consistent with a portion of Government Code Section 21371 (survival of beneficiary under Public Employees' Retirement Law). For the provision relating to insurance policies, see Probate Code Section 284.050.

Government Code § 21371 (amended). Survival of beneficiary by 120 hours under Public Employees' Retirement Law

SEC. . Section 21371 of the Government Code is amended to read:

21371. The provisions of ~~the Uniform Simultaneous Death Act~~ Article 5 (commencing with Section 284.010) of Chapter 8 of Division 2 of the Probate Code, when applicable, ~~shall~~ govern the distribution of money payable under this system, including but not limited to retirement allowance accrued but not received prior to death and refund of member contributions. In applying ~~said act~~ Article 5 (commencing with Section 284.010) of Chapter 8 of Division 2 of the Probate Code with respect to benefits payable to a beneficiary, membership in the system shall be considered as ~~in having~~ the same status as an insurance policies policy .

Comment. Section 21371 is amended to reflect the repeal of the Uniform Simultaneous Death Act (former Probate Code Section 296-296.8) and the enactment of Probate Code Section 284.010-284.090 (120-hour survival rule). For the provision relating to insurance policies, see Probate Code Section 284.050.

EXHIBIT 2

Text of Probate Code Sections 246-296.8
(To Be Repealed)

Probate Code §§ 296-296.8 (repealed). Simultaneous death

Division 2b

SIMULTANEOUS DEATH

CHAPTER 1. UNIFORM SIMULTANEOUS DEATH ACT

§ 296. Disposition of property; insufficient evidence of survivorship

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Comment. Former Section 296 is superseded by Sections 284.010, 284.020, and 284.030.

§ 296.1. Beneficiaries taking successively under another's disposition of property

Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

Comment. Former Section 296.1 is superseded by subdivision (b) of Section 284.030.

§ 296.2. Joint tenants

Where there is no sufficient evidence that two joint tenants have died otherwise than simultaneously the property so held shall be administered upon, distributed, or otherwise dealt with, one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus administered upon, distributed, or otherwise dealt with, shall be in the proportion that one bears to the whole number of joint tenants.

Comment. Former Section 296.2 is superseded by Section 284.040.

§ 296.3. Life or accident insurance

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

Comment. Former Section 296.3 is superseded by Section 284.050.

§ 296.4. Community property

Where a husband and wife have died, leaving community property and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall be administered upon, distributed, or otherwise dealt with, as if the husband had survived and as if said one-half were his separate property and the other one-half thereof shall be administered upon, distributed, or otherwise dealt with, as if the wife had survived and as if said other one-half were her separate property, except as provided in Section 296.3.

If a portion of the estate which was the community property of the husband and wife would otherwise escheat to the state under this section and Sections 201, 228, and 231, or if a portion of the estate which was separate property of a previously deceased spouse would otherwise escheat to the state under Section 229, because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such portion of the estate shall be distributed in equal shares to the children of the other spouse and to their descendants by right of representation, or if such other spouse leaves no children, nor descendants of a deceased child, in equal shares to the parents of such other spouse, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of such other spouse and to their descendants by right of representation, or if such other spouse leaves neither parent, brother, sister, nor descendant of a deceased brother or sister, such portion of the estate goes to the next of kin of such other spouse in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

Comment. The first paragraph of former Section 296.4 is superseded by Section 284.060. The substance of the portion of the second paragraph relating to escheat is continued in Section 284.070. The remainder of the second paragraph is superseded by Sections _____.

§ 296.41. Proceedings to determine simultaneous death

When it is claimed that, in accordance with the provisions of this chapter, any persons have died under circumstances where there is no sufficient evidence that they have died otherwise than simultaneously, the executor or administrator of any such person, or any other person interested in the estate of any such person, may file a petition, in the estate proceeding where he received his appointment, or in which he claims an interest, seeking to have it determined that such persons died under circumstances where there is no sufficient evidence that they died otherwise than simultaneously. The clerk shall set the petition for hearing by the court and cause notice thereof to be personally served at least 10 days before the date of the hearing upon the executor or administrator of each other person claimed to have so died. If the representative of any such other person is also the petitioner then, in lieu of personal service upon him, such notice shall be mailed to the heirs and devisees of such other person, so far as they are known to the petitioner, at least 10 days before the date of hearing.

Comment. Section 296.41 is superseded by subdivisions (a) and (b) of Section 284.090.

§ 296.42. Proceeding by executor or administrator to determine simultaneous death

At the time appointed, the court, upon proof that due notice of the hearing has been given, shall proceed to hear the petition and any objections thereto that may have been filed or presented; and if, after a full hearing, the court is satisfied that the named persons are dead and that there is no sufficient evidence that they died other than simultaneously, it shall make an order to that effect. If the court is satisfied that the named persons are dead and that they did not die simultaneously then the court shall make an order setting forth the order in which such persons died. Such order when it becomes final shall be a binding determination of the facts therein set forth and conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through or under any such deceased persons. The probate court which first acquires jurisdiction under Section 296.41 shall have exclusive jurisdiction to determine, by its order, that there is no sufficient evidence that the named persons died otherwise than simultaneously or to determine the order in which the named persons died.

Comment. Section 296.42 is superseded by subdivisions (c), (d), and (e) of Section 284.090.

§ 296.5. Prospective effect of chapter

This chapter shall not apply to the distribution of the property of a person who has died before it takes effect.

Comment. Former Section 296.5 is not continued. For a transitional provision applicable to this article, see Section ____.

§ 296.6. Inapplicability of chapter where provision made for different distribution

This chapter shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this chapter.

Comment. The substance of former Section 296.6 is continued in Section 284.080.

§ 296.7. Construction to effect uniformity

This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those States which enact it.

Comment. Former Section 296.7 is not continued.

§ 296.8. Short title

This chapter may be cited as the Uniform Simultaneous Death Act.

Comment. Former Section 296.8 is not continued. The subject formerly governed the California Uniform Simultaneous Death Act (former Sections 296-296.8) is governed by Sections 284.010-284.090.

EXHIBIT 3

Uniform Probate Code Sections 2-104 and 2-601**Section 2-104. [Requirement That Heir Survive Decedent For 120 Hours.]**

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

COMMENT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see Section 2-601. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-302 and 3-307 prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from affecting inheritances by the last

eligible relative of the intestate who survives him for any period.

I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is *not* made a "terminable interest" and thereby disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will. The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it applies, rather than the unusual case of an unplanned estate involving large sums of money.

**Section 2-601. [Requirement That Devisee Survive Testator
by 120 Hours.]**

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

COMMENT

This parallels Section 2-104 requiring an heir to survive by 120 hours in order to inherit.