

#L-625

6/24/82

Second Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--
General Provisions §§ 110.010-110.050, 110.510,
114.010-114.550)

Attached are three chapters of the General Provisions Part of the
proposed legislation:

- Chapter 1. Effect of Death of Married Person on Community and
Quasi-Community Property
- Chapter 2. Surviving Spouse's Right in California Real Property
of Nondomiciliary Decedent
- Chapter 6. Required Period of Survival to Take as Survivor

Also enclosed are the relevant portions of the preliminary portion of
the tentative recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Simultaneous Death and Survival

When two or more persons die in a common accident, there may be some difficulty determining the order of death for purposes of survivorship and inheritance. Under the California version of the Uniform Simultaneous Death Act,¹ if there is no sufficient evidence that the decedents died other than simultaneously, the property of each person is disposed of as if each had survived.² If there is evidence that one person survived the other, even if it is circumstantial evidence of survival only for an extremely short period,³ the simultaneous death act does not apply and the property passes accordingly. This may result in somewhat speculative litigation to prove survival by an instant by those who stand to gain thereby. If an instant of survival can be shown, the property may be subject to administration and taxation in the estates of both decedents. In some cases, such as where a husband and wife are childless or both have children of a former marriage, the property may pass to only one side of the family, contrary to the wishes of the decedents.

The Uniform Probate Code adopts the rule that a person must survive a decedent by 120 hours for the purpose of intestate succession or taking under a will (subject to a contrary provision in the will).⁴ Provisions of this type have been adopted in a significant number of states in recent years.⁵

1. See Prob. Code §§ 296-296.8.
2. Prob. Code § 296. If there is no sufficient evidence that two joint tenants have died other than simultaneously, the joint tenancy property is split between the two estates. Prob. Code § 296.2. If a husband and wife die and there is no sufficient evidence that they died other than simultaneously, one-half of the community property is dealt with in each spouse's estate. Prob. Code § 296.4. If an insured and a beneficiary die and there is no sufficient evidence that they died other than simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Prob. Code § 296.3.
3. See, e.g., Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (Simultaneous Death Act held inapplicable in case where testimony that one passenger in a car was killed 1/150,000 of a second before the other).
4. See Uniform Probate Code (1977) §§ 2-104 (intestate succession), 2-601 (wills).
5. At least 11 states have adopted the 120-hour survival rule--Alaska, Arizona, Idaho, Maine, Michigan, Montana, Nebraska, New Jersey, North Dakota, Texas, and Utah. Ohio has a 30-day survival rule.

The proposed law adopts the 120-hour survival period for wills and intestate succession. The short period of five days avoids litigation over survival for short periods of time and also avoids double administration and taxation in many cases. At the same time, the five-day period is not so long that it interferes with the ability of the survivor to deal with the property when a need arises, nor does it delay administration of the estate.

The proposed law also adopts a 120-hour survival rule for nonprobate transfers upon death, such as survivorship under a joint tenancy⁶ and taking as a beneficiary of life or accident insurance,⁷ subject to a contrary provision governing survival in the governing instrument. The rule of survival applicable to nonprobate transfers must be the same as the rule governing survival under a will or by intestate succession. Otherwise, capricious results will occur, as well as litigation over which rule is applicable, particularly in cases where married persons die in a common accident.⁸

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6. The 120-hour survival rule would not alter the power of the survivor to withdraw funds from a deposit account unless the deposit agreement provides otherwise.
 7. This rule would not apply to insurance contracts in existence before the operative date of the proposed law.
 8. For example, if the spouses hold real property in joint tenancy form and the husband dies intestate several hours after the wife, the disposition of the property may be in doubt. If the property is true joint tenancy property, it will be administered in the husband's estate, and if both spouses had children of a former marriage, the children of the wife will take nothing, the children of the husband everything. But if it can be shown that the property was actually community property held in joint tenancy form, the 120-hour survival rule would apply and the property would be divided in half between the two sets of children. See 2 California Decedent's Estate Administration § 22.14 (Cal. Cont. Ed. Bar 1975).

PART 3. GENERAL PROVISIONS

CHAPTER 1. EFFECT OF DEATH OF MARRIED PERSON
ON COMMUNITY AND QUASI-COMMUNITY PROPERTY§ 110.010. Community property

110.010. Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.

Comment. Section 110.010 continues the substance of a portion of former Section 201. The decedent's half of the community property is subject to the testamentary disposition of the decedent (Section 200.020) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 220.020). See Section 100.060 ("community property" defined). See also Section 110.050 (community property held in revocable trust).

§ 110.020. Quasi-community property

110.020. Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent.

Comment. Section 110.020 continues the substance of a portion of former Section 201.5. The decedent's half of the quasi-community property is subject to the testamentary disposition of the decedent (Section 200.020) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 220.020). See Section 100.380 ("quasi-community property" defined).

§ 110.030. Recapture by surviving spouse of certain quasi-community property

110.030. If a married person dies domiciled in this state who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 110.020 at

the time of the transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. All property restored to the decedent's estate under this section belongs to the surviving spouse pursuant to Section 110.020 as though the transfer had not been made.

Comment. Section 110.030 continues the substance of the first and third sentences of former Section 201.8. The second sentence of former Section 201.8 which required the surviving spouse to elect to take under or against the decedent's will is not continued. Under the law as revised, the rule for quasi-community property is the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides, or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 21-22, at 5542-44 (8th ed. 1974).

405/954

§ 110.040. Effect on community and quasi-community property where married person does not survive death of spouse by 120 hours

110.040. Except as provided by Section 114.050, if a husband and wife die leaving community or quasi-community property and it cannot be established that one spouse survived the other by 120 hours:

(a) One-half of the community property and one-half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse.

(b) The other half of the community property and the other half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse.

Comment. Section 110.040 supersedes the first paragraph of former Section 296.4 and extends to quasi-community property the rule formerly applicable only to community property. The introductory clause recognizes that Section 114.050 governs the disposition of life or accident insurance benefits where one spouse is the insured and the other the beneficiary, even if the source of the insurance premiums was community property. This continues the last clause of the first paragraph of former Section 296.4. See also Sections 114.510-114.550 (proceeding to determine whether one spouse survived the other by 120 hours).

§ 110.050. Community property held in certain revocable trusts

110.050. Notwithstanding Section 110.010, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Section 110.050 continues the substance of a portion of former Section 206.

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CHAPTER 2. SURVIVING SPOUSE'S RIGHT IN CALIFORNIA
REAL PROPERTY OF NONDOMICILIARY DECEDENT

§ 110.510. Surviving spouse's right in California real property of nondomiciliary decedent

110.510. If a married person dies not domiciled in this state and leaves a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death.

Comment. Section 110.510 continues former Section 201.6.

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CHAPTER 6. REQUIRED PERIOD OF SURVIVAL TO TAKE AS SURVIVOR

Article 1. 120-Hour Survival Rule

§ 114.010. 120-hour survival rule

114.010. Except as otherwise provided in this article, if the title to property or the devolution of property depends upon priority of death and it cannot be established that one of the persons survived the other by 120 hours, the property of each person shall be administered upon or distributed, or otherwise dealt with, as if that person had survived the other.

Comment. Section 114.010 supersedes former Section 296 and adopts a 120-hour survival rule (drawn from Sections 2-104 and 2-601 of the Uniform Probate Code) which is new. The introductory clause recognizes that Section 114.010 has limited application. Section 114.020 provides

that this article does not apply to cases covered by Sections 110.040 (community and quasi-community property), 204.010 or 204.330 (wills), or 220.040 (survival of heirs). Other provisions of this article provide rules that apply to particular cases. See Sections 114.030 (survival of beneficiaries), 114.040 (survival of joint tenants), 114.050 (survival of insurance beneficiaries). The rule provided by Section 114.010 may be varied by a provision in the governing instrument. See Section 114.020. See also Sections 114.510-114.550 (proceeding to determine whether one person survived another by 120 hours).

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§ 114.020. Application of article

114.020. (a) This article does not apply in any case where Section 110.040, 204.010, 204.330, or 220.040 applies.

(b) This article 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 article 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 article.

Comment. Subdivision (a) of Section 114.020 makes clear that the provisions of this article do not apply in cases where Sections 110.040 (effect on community and quasi-community property where married person does not survive death of spouse by 120 hours), 204.010 and 204.330 (wills), and 220.040 (intestate succession) apply.

Subdivision (b) provides that the distribution provision of a trust, deed, contract of insurance, or other instrument controls if it results in a different distribution of property than that provided for in this article. Subdivision (b) continues the substance of former Section 296.6 but omits the reference to "wills" and substitutes "trust" for "living trusts" (wills now being covered by Sections 204.010 and 204.330), adds language drawn from Section 2-601 of the Uniform Probate Code, and includes the substance of the 1953 revision to Section 6 of the Uniform Simultaneous Death Act. The 1953 revision, which was not adopted in California, inserted the phrase "or any other situation" and added the clause which appears as the last portion of clause (2) of subdivision (b) of Section 114.020.

§ 114.030. Survival of beneficiaries

114.030. (a) If property is so disposed of that the right of a beneficiary to succeed to any interest in the property is conditional upon surviving another person and it cannot be established that the beneficiary survived the other person by 120 hours, the beneficiary is deemed not to have survived the other person.

(b) If property is so disposed of that one of two or more beneficiaries would have been entitled to the property if he or she had survived the others, and it cannot be established that any beneficiary survived any other beneficiary by 120 hours, the property shall be divided into as many equal portions as there are beneficiaries and the portion of each beneficiary shall be administered upon or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries.

Comment. Subdivision (a) of Section 114.030 is drawn from the first sentence of Section 2 of the Uniform Simultaneous Death Act, as Section 2 was revised in 1953, but the 120-hour survival rule is new. Subdivision (b) supersedes former Section 296.1. See also Sections 114.020 (provision of governing instrument prevails), 114.510-114.550 (proceeding to determine whether one person survived another by 120 hours).

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§ 114.040. Survival of joint tenants

(a) As used in this section, "joint tenants" includes owners of property held under circumstances that entitled one to the whole of the property on the death of the other or others.

(b) If property is held by two joint tenants and both of them have died and it cannot be established that one survived the other by 120 hours, the property held in joint tenancy shall be administered upon or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived.

(c) If property is held by more than two joint tenants and all of them have died and it cannot be established that any of them survived the others by 120 hours, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the share of each joint tenant shall be administered upon or distributed, or otherwise dealt with, as if that joint tenant had survived the other joint tenants.

(d) Nothing in this article limits or affects any right a joint tenant or other person may have to withdraw funds from a joint account or other multiple-party account in a financial institution, whether or not the person making the withdrawal has at the time of withdrawal survived another party to the account by 120 hours.

Comment. Section 114.040 supersedes former Section 296.2. The rule governing the dividing of the property is the same as under former law, but the 120-hour survival requirement is new. See also Sections 114.020 (provision of governing instrument prevails), 114.510-114.550 (proceeding to determine whether one person survived another by 120 hours). Subdivision (d) makes clear, for example, that a joint bank account or a similar deposit account is not tied up as a consequence of this article during the 120-hour period after one joint account holder dies.

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§ 114.050. Life or accident insurance

114.050. (a) If the insured and a beneficiary under a policy of life or accident insurance have died and it cannot be established that the beneficiary survived the insured by 120 hours, the proceeds of the policy shall be administered upon or distributed, or otherwise dealt with, as if the insured had survived the beneficiary.

(b) If the insured and the beneficiary are married to each other, this section applies regardless of whether the policy is community, quasi-community, or separate property.

(c) This section does not apply to an insurance policy issued prior to July 1, 1984, and any such insurance policy is governed by the law in effect on June 30, 1984.

Comment. Section 114.050 supersedes former Section 296.3. The rule provided by this section is subject to contrary provisions in the insurance contract. See Section 114.020. See also Sections 114.510-114.550 (proceeding to determine whether one person survived another by 120 hours).

Article 2. Proceedings to Determine Survival

§ 114.510. Petition for purpose of determining survival

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

(a) To determine whether one person survived another for the period of time specified in Section 110.040, 114.010, 114.030, 114.040, 114.050, 204.010, 204.330, or 220.040.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee for the period of time specified in that section.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived for the period of time required 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 for the period of time required to receive money payable under the system.

(e) To determine for the purposes of a case governed by the law in effect prior to July 1, 1984, whether persons have died other than simultaneously.

Comment. Section 114.510 is a new provision that refers to various provisions that present an issue of survivorship. Sections 114.510-114.550 are drawn from former Sections 296.41 and 296.42 with modifications in light of the 120-hour survival rule.

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§ 114.520. Persons authorized to file petition

114.520. A petition may be filed under this article by any of the following:

(a) The executor or administrator of any person the priority of whose death is in issue under the applicable provision referred to in Section 114.510.

(b) Any other person interested in the estate of any such person.

Comment. Section 114.520 continues the substance of a portion of the first sentence of former Section 296.41.

§ 114.530. Court where petition to be filed

114.530. (a) The petition shall be filed in the estate proceeding in which the person filing the petition received his or her appointment or in the estate proceeding for the estate in which the person filing the petition claims an interest.

(b) The court that first acquires jurisdiction under this section has exclusive jurisdiction for the purposes of this article.

Comment. Subdivision (a) of Section 114.530 continues the substance of a portion of the first sentence of former Section 296.41. Subdivision (b) continues the substance of the last sentence of former Section 296.42.

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§ 114.540. Notice of hearing

114.540. The clerk shall set the petition for hearing by the court. At least 10 days before the date set for the hearing of the petition by the court, the petitioner shall cause notice of the hearing of the petition to be personally served on the executor or administrator of each other person the priority of whose death is in issue or to their attorneys if they have appeared by attorney in the estate proceeding. If the representative of any such other person is also the petitioner then, in lieu of personal service upon him or her, the notice of hearing 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 the hearing. Proof of giving of notice as required by this section shall be made at or before the hearing.

Comment. The first three sentences of Section 114.540 are drawn from a portion of former Section 296.41. The last sentence is drawn from a portion of the first sentence of former Section 296.42.

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§ 114.550. Hearing, determination, order

114.550. At the hearing, the court shall hear the petition and any objections to the petition that may have been filed or presented. If the court determines that the named persons are dead and that it has not been established that one person survived another by the applicable

period of time, the court shall make an order to that effect. If the court determines that the named persons are dead and that one person survived another by the applicable period of time, the court shall make an order setting forth the order in which the persons died. The order, 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 the deceased persons.

Comment. Section 114.550 continues the substance of a portion of former Section 296.42 with modifications in light of the 120-hour survival rule.