

Memorandum 88-20

Subject: Study L-602 - 120-Hour Survival to Take by Intestacy

Attached to this Memorandum is a staff draft of a *Recommendation Relating to 120-Hour Survival to Take by Intestacy*. The draft recommends adoption of the Uniform Probate Code rule that a potential heir must survive the decedent by at least 120 hours in order to take by intestate succession.

The attached recommendation is a more limited version of a recommendation made by the Commission to the Legislature in 1983 that the 120-hour survival requirement be applied to intestate succession, wills, and certain nonprobate transfers. That recommendation was disapproved by the Assembly Committee on Judiciary in 1984. The State Bar Section was concerned that the recommendation would create uncertainty in the case of a will that did not include a survival requirement.

The attached recommendation applies the 120 survival requirement only in case of intestate succession. The argument for the 120-hour survival requirement is stronger where the decedent is intestate than where the decedent has a will, because the will may provide for survivorship if the testator so desires.

To give a simple illustration of the effect of the recommendation, it covers the case, for example, where a husband and wife each have children by previous marriages and die in a common accident and do not have wills. Under existing law, if one spouse survives the other by an instant, the children of that spouse take all of the community property, and the children of the other spouse take none of the community property. Under the attached recommendation, unless one spouse survives the other by 120 hours, the children of both spouses would share in the community property, without regard to which spouse died first.

Respectfully submitted,

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Staff Draft

**TENTATIVE RECOMMENDATION**

*relating to*

**120-HOUR SURVIVAL TO TAKE BY INTESTACY**

If a husband and wife each have children of a prior marriage and are killed in an accident, the property each child will take by intestate succession depends on which spouse died first.

The following examples illustrate how existing California law operates in a relatively simple case. Assume that the husband has three children by a former marriage and that the wife has one child by a former marriage. Assume that they have \$500,000 of community property, that the husband has \$300,000 of separate property, and that the wife has \$100,000 of separate property.

**Example 1. Intestate succession rule—wife survives husband by five minutes.** Wife inherits from husband his half of the community property (\$250,000)<sup>1</sup> and one-third of his separate property (\$100,000).<sup>2</sup> Wife dies. Her child receives \$700,000, consisting of the following:

- (1) All of the community property (\$500,000 (the wife's half and the half she inherited from her husband).
- (2) All of the wife's separate property (\$100,000).
- (3) The share of the husband's separate property inherited by the wife (\$100,000).

The three children of the husband each receive \$66,666.67 (a one-third share of \$200,000, the portion of the husband's separate property not passing to the wife).

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1. Prob. Code § 6401(a).
  2. Prob. Code § 6401(c)(3)(A).

Example 2. Intestate succession rule—husband survives wife by five minutes. Husband inherits from wife her half of the community property (\$250,000)<sup>3</sup> and one-half of her separate property (\$50,000).<sup>4</sup> Husband dies. Each of his children receives a one-third share of \$850,000 (\$283,333.33), consisting of the following:

(1) All of the community property (\$500,000) (the husband's half and the half he inherited from his wife).

(2) All of the husband's separate property (\$300,000).

(3) The share of the wife's separate property inherited by the husband (\$50,000).

The child of the wife receives \$50,000 (the share of the wife's separate property not passing to the husband).

These examples show the drastic difference in the amounts received by the children, depending on the wholly fortuitous event of which spouse died first. If the wife dies before the husband, her child receives \$50,000; but, if the wife dies after her husband, her child receives \$700,000. If the husband dies before his wife, his children each receive \$66,666.67. But if the husband dies after his wife, his children each receive \$283,333.33. It is apparent that the existing California intestate succession rule operates in an arbitrary manner, contrary to what the spouses would have wanted if they had an opportunity to indicate their desires.

Where one or both of the spouses who die in a common accident have no children, the California intestate succession rule is difficult to

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3. Prob. Code § 6401(a).

4. Prob. Code § 6401(c)(2)(A).

determine and apply, and operates in manner contrary to what the spouses would have desired.<sup>5</sup>

The California Uniform Simultaneous Death Act<sup>6</sup> deals with the situation where the parties have died simultaneously. If it cannot be established by clear and convincing evidence that one survived the other, the property of each person is dealt with as if that person had survived the other.<sup>7</sup> Thus, the husband's half of the community property and his separate property will go to his heirs. The wife's half of the community property and her separate property will go to her heirs.

If the rule of the California Uniform Simultaneous Death Act is applied to the examples set out above, the following are the results.

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5. Existing law is very difficult to determine and apply. This is because the so called in-law inheritance statute (Prob. Code § 6402.5) may apply. For example, suppose a husband is childless but has a brother, the wife has a child by a former marriage, they do not have wills, and they are killed in an accident but do not die simultaneously. If the husband dies first, his property will pass to his wife. When the wife dies, both her property and property she received from her husband that is not subject to the in-law inheritance statute will pass to her heirs to the exclusion of her husband's heirs. The brother of the husband will take property subject to the in-law inheritance statute (Prob. Code § 6402.5). Property is not subject to the in-law inheritance statute unless it consists of property "attributable to" (received from) the decedent's predeceased spouse (1) who died not more than 15 years before the decedent in the case of real property or (2) who died not more than five years before the decedent in the case of personal property. Subject to this limitation, if one spouse inherits from the other by intestate succession, property subject to the in-law inheritance statute consists of (1) all real property which was separate property of the first spouse to die and his or her half of community real property, and (2) all the personal property of the first spouse to die (his or her separate personal property and his or her half of community personal property) for which there is a written record of title or ownership if the aggregate value is \$10,000 or more. *Id.* All other property passes according to the usual rules of intestate succession. See Prob. Code § 6402.

6. Prob. Code §§ 220-234.

7. Prob. Code §§ 103, 220. See also Prob. Code § 6403.

**Example 3. Simultaneous death rule—wife survives husband by five minutes.** Child of the wife as her sole heir inherits \$350,000, consisting of the wife's separate property (\$100,000) and the wife's one-half share of the community property (\$250,000).

Each child of the husband inherits \$183,333.33, a one-third share of \$550,000, consisting of the following:

- (1) The husband's share one-half share of the community property (\$250,000).
- (2) The husband's separate property (\$300,000).

**Example 4. Simultaneous death rule—husband survives wife by five minutes.** Same results as in Example 3.

This is the result the spouses probably would have wanted. However, the California Uniform Simultaneous Death Act is only a partial solution. If there is clear and convincing evidence that one spouse survived the other, even if only for a tiny fraction of a second, then the Uniform Simultaneous Death Act does not apply.<sup>8</sup>

The Uniform Probate Code provides a more complete solution to this problem by requiring that a potential heir survive the decedent by at least 120 hours in order to take by intestacy from the decedent. If the heir fails to survive for that period, the heir is treated as having predeceased the decedent.<sup>9</sup> Thus, in the common accident situation where the husband and wife die within 120 hours of each other, the UPC achieves the same result as the Uniform Simultaneous Death Act: The half of the community property and the separate property of the spouse passes to his or her heirs.

Intestate succession law should dispose of the decedent's property in a manner consistent with what the decedent would have wanted if the decedent had a will. Survivorship provisions are commonly found in wills.<sup>10</sup> Twenty states require some period of survival to take from

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8. In one extreme case, the court held that the act did not apply because there was testimony that one accident victim survived the other by 1/150,000th of a second. *Estate of Rowley*, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (1967). The clear and convincing evidence requirement was added to avoid this kind of speculation as to the time of death. See Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301, 2345-46 (1982).

9. Uniform Probate Code § 2-104.

10. See King, *Outright Testamentary Gifts*, in *California Will Drafting Practice* § 8.21, at 349 (Cal. Cont. Ed. Bar 1982).

the decedent by intestate succession: Seventeen states use the 120-hour period of the UPC,<sup>11</sup> one requires survival for 72 hours,<sup>12</sup> and two require survival for 30 days.<sup>13</sup> In 1973, the California State Bar endorsed the 120-hour survival requirement for intestate succession in Section 2-104 of the Uniform Probate Code.<sup>14</sup>

Five days is an appropriate survival period. Most fatalities occur within the first five days after an accident, so the 120-hour test will provide an equitable rule to cover the usual case of death caused by a common disaster. Yet the 120-hour survival period is short enough not to delay administration of the estate or to interfere with the ability of the survivor to deal with the property.

The Commission recommends adoption of the Uniform Probate Code rule requiring that a potential heir must survive the decedent by at least 120 hours to take by intestate succession from the decedent.<sup>15</sup>

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11. Ala. Code § 43-8-43 (1982); Alaska Stat. § 13.11.020 (1985); Ariz. Rev. Stat. Ann. § 14-2104 (1975); Colo. Rev. Stat. § 15-11-140 (1974); Del. Code Ann. tit. 12, § 504 (1987); Idaho Code § 15-2-104 (1979); Me. Rev. Stat. Ann. tit. 18A, § 2-104 (1981); Mich. Stat. Ann. § 27.5107 (1980); Mont. Code Ann. § 72-2-205 (1985); Neb. Rev. Stat. § 302304 (1985); N.J. Stat. Ann. § 3B:5-1 (West 1983); N.M. Stat. Ann. § 45-2-104 (1978); N.D. Cent. Code § 30.1-04-04 (1976); Or. Rev. Stat. § 112.085 (1983 & 1985 reprint); S.C. Code Ann. § 62-2-104 (Law. Co-op. 1987); Tex. Prob. Code Ann. § 47 (Vernon 1980); Utah Code Ann. § 75-2-104 (1978).

12. Wis. Stat. Ann. § 852.01 (West Supp. 1987).

13. Md. Est. & Trusts Code Ann. § 3-110 (1974) (limited to descendants, ancestors, or descendants of an ancestor of the decedent); Ohio Rev. Code Ann. § 2105.21 (Page 1976).

14. State Bar of California, The Uniform Probate Code: Analysis and Critique 30 (1973). The State Bar thought the 120-hour survival requirement for wills in Section 2-601 of the Uniform Probate Code was unnecessary because the testator may provide for survivorship in the will. *Id.* at 51.

15. For a previous Commission recommendation on this subject, see 17 Cal. L. Revision Comm'n, Reports, Recommendations, and Studies, at 443 (1984).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 6403 of the Probate Code, relating to the period of survival required to take property.

*The people of the State of California do enact as follows:*

Probate Code § 6403 (amended). Requirement that heir survive decedent

SECTION 1. Section 6403 of the Probate Code is amended to read:

6403. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive ~~the decedent~~ 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 6403 is amended to provide a 120-hour survival rule. As amended, Section 6403 is the same in substance as Section 2-104 of the Uniform Probate Code (1982) insofar as that section relates to taking by intestate succession. Where Section 6403 applies, the 120-hour survival requirement is used to determine whether one person survived another for the purposes of Sections 103 (simultaneous death of husband and wife) and 234 (proceedings to determine survival).

Uncodified transitional provision

SEC. 2. This act does not apply in any case where any of the decedents upon whose time of death the disposition of property depends died before the operative date of this act, and such case continues to be governed by the law applicable to the case before the operative date of this act.