

## Memorandum 89-20

Subject: Study L-612 - 120-Hour Survival of Intestate Takers

The Commission distributed its Tentative Recommendation Relating to 120-Hour Survival to Take by Intestacy (December 1988) to interested persons for review and comment. The Comments received are attached as Exhibits to this memorandum. A copy of the Tentative Recommendation also is attached.

General Reaction to Tentative Recommendation

All of the comments received supported the concept of the Tentative Recommendation, except for Team 2. After a telephone conference, Team 2 voted to oppose the Tentative Recommendation "as creating some problems while purporting to solve others and not leading to a consistent logical system in this area." The primary concern is that there may be a possibility that there may be a generation skipping tax imposed in a situation that probably will never occur.

Analysis of Objection of Team 2

The objection of Team 2 is based on possible adverse estate tax consequences. The Tentative Recommendation is based on a concept of justice, not a saving of taxes. Nevertheless, it would appear that in the ordinary situation where the statute will apply (where the spouses are killed in a common accident), there can be a tax saving. Assume that the community property of the spouses is worth \$1.2 million. If one spouse dies and the second a few hours later, the surviving spouse takes the entire 1.2 million. The surviving spouse will take the estate of the first to die without an estate tax, but there will be an estate tax on the estate of the surviving spouse because the estate exceeds the \$600,000 exemption. The scheme of the tentative recommendation avoids any estate tax in this situation, because one-half of the estate is administered in the estate of each of the spouses, thus making the \$600,000 exemption available to each estate. The staff does not consider the objection of Team 2 to be a reason not

to submit this recommendation to the Legislature. It appears to the staff that estate tax savings are more likely than estate tax increases. However, tax considerations are not a significant consideration, because it is unlikely that an estate of \$1.2 million will be an intestate estate, and, if it is an intestate estate, that there will be occasion to apply the 120-hour survival rule.

#### 120-Hour Survival Period

The 120-hour survival period is taken from the Uniform Probate Code. Seventeen other states have adopted the 120-hour period. A few states require a longer statutory period of survival. Some commentators suggested that the Commission consider a longer survival requirement, pointing out that wills frequently require a longer survival period. One writer (Exhibits, pages 5-6) gives a thoughtful analysis of considerations to be taken into account in fixing the survival period. The staff recommends that the survival period be retained at 120 hours.

#### Approval for Printing

The staff recommends that the Recommendation be approved for printing and submission to the 1989 Legislature.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

LAW OFFICES OF  
VAUGHAN, PAUL & LYONS  
1418 MILLS TOWER  
220 BUSH STREET  
SAN FRANCISCO 94104  
(415) 392-1423

December 8, 1988

CA LAW REV. COMM'N

DEC 09 1988

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California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: #L-602  
120-Hour Survival to Take  
by Intestacy

Gentlemen:

I approve of your proposal. I agree that it will make the law more consistent with the probable desires of the spouses. The proposed exception in the case of escheat is also desirable.

Very truly yours,

  
John G. Lyons

JGL:car

RUSSELL G. ALLEN

610 NEWPORT CENTER DRIVE, SUITE 1700

NEWPORT BEACH, CALIFORNIA 92660-8429

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12/9/88

*This is a good idea!*

*I strongly support the  
recommendation.*



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December 9, 1988

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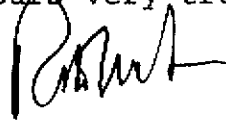
California Law Revision Commission  
 4000 Middlefield Road, Suite D-2  
 Palo Alto, CA 94303-4739

Re: Tentative Recommendation Regarding  
120-Hour Survival To Take By Intestacy

Gentlemen:

I have received and read your tentative recommendation referred to above. You make a very strong case in favor of the proposed amendment to Section 6403 of the Probate Code. I heartily endorse the proposal.

Yours very truly,



ROBERT A. MARTIN

RAM/sb:F/013

## ALVIN G. BUCHIGNANI

ATTORNEY AT LAW

ASSOCIATED WITH  
JEDEIKIN, CONNOR & GREEN445 WASHINGTON STREET  
SAN FRANCISCO, CA 94111  
(415) 421-5050

December 12, 1988

CA LAW REV. COMM'N

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California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: 120 hour Survival to Take by Intestacy

Ladies and Gentlemen,

I am pleased to comment on your December 1988 tentative recommendation. I agree heartily with the requirement of a minimum period of survivorship for purposes of intestate succession. My only suggestion is that a 30 day period would be more appropriate than a 5 day period.

Recognizing that a five day period is common, I prefer to make the analogy to the shortest likely survivorship period that a testator would include in his will, if the matter were put to him. In my experience, survivorship periods in wills are never less than 30 days. Since testators routinely use survivorship periods of 30 days or more, for many different purposes, I suggest at least a 30 day survivorship period for purposes of intestacy.

Very sincerely,



Alvin G. Buchignani

AGB/amc  
d30

CA LAW REV. COMM'N

**ROBERT K. MAIZE, JR.**  
A PROFESSIONAL LAW CORPORATION

**DEC 14 1988****RECEIVED**

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SANTA ROSA, CALIFORNIA 95406

(707) 544-4462

December 12, 1988

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Probate --  
120-Hour Survival To Take By Intestacy

Gentlemen:

I concur with the concept of requiring some minimum survivorship requirement to take by intestacy. However, I do not have any specific recommendations as to what would be the appropriate time length.

Further, I think it would be appropriate to provide for a general survivorship requirement in testate situations also because I believe it is rarely done and the same, or similar, kinds of difficulties can arise in testate situations as arise in intestate situations. The literature I have seen discussing survivorship requirements is generally in regards to marital deductions and discusses what should not be done. However, little if any literature discusses what you should or might do and what possible benefits or burdens follow from such provisions.

When I am considering survivorship requirements, whether in a trust or in a will the following is the general guideline that I use and the reasons for the times selected:

1. 170 days -- This time period is the maximum that I use; it will not invalidate any marital deduction. Also, where there is significant administration to be accomplished either by probate of a will or by allocation of a trust into multiple shares, it is my opinion that you are not imposing a significant burden on the heirs because it takes at least this long to accomplish those tasks.
2. 40 days -- This is the time period that I recommend for less complicated estates because the property cannot be accumulated by declaration under Probate Code §13100 in less than 40 days, and in the case of a Spousal Property

Petition this would be roughly the shortest time it takes to identify the assets of the decedent, prepare the Petition, give notice, and have the hearing held (where the probate calendar is called weekly).

3. 15 days -- This is the time frame I use for assets that I expect will need to be, for administration purposes, distributed from the estate or trust as soon as possible. I primarily use this for personal effects and when all the beneficiaries in the estate are in agreement the distributions are made with a receipt whereby the recipient agrees to reimburse the estate for the inventory value of the asset received.

I hope that I have been able to provide you with useful information in regards to considering your proposal.

Very truly yours,

ROBERT K. MAIZE, JR.,  
A Professional Law Corporation

BY: 

ROBERT K. MAIZE, JR.

RKM:jas



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**WILBUR L. COATS**  
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

December 12, 1988

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, Ca 94303

In Re: Tentative 120-Hour Survival-Intestacy

Dear Administrator:

I agree with the recommendation to include the 120-Hour  
delay in the Probate Code.

Thank you for the opportunity to comment.

Very truly yours,

  
Wilbur L. Coats

**MacCARLEY, PHELPS & ROSEN**

A PROFESSIONAL LAW CORPORATION

3800 ALAMEDA AVENUE, SUITE 1150

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CALIF. REV. COMM'N

**DEC 16 1988****R E C E I V E D**

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(818) 841-9712

December 14, 1988

California Law Revision Commission  
4000 Middlefield Road - Suite D-2  
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating to  
120-Hour's Survival to Take by Intestacy  
Recommendation L-602

Dear Sirs/Madam:

I read the above Tentative Recommendation and agree  
with it.

The 120-hour. Appears reasonable. I do not have any  
changes to suggest to this tentative recommendation.

Very Truly Yours

MacCARLEY, PHELPS &amp; ROSEN

By

  
RUTH PHELPS

3854r

CA LAW REV. COMM'N

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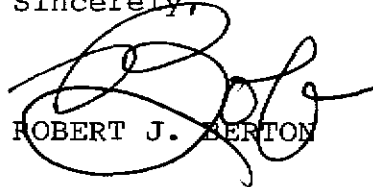
December 13, 1988

Mr. John Demoulley  
 Executive Director  
 California Law Revision Commission  
 4000 Middlefield Road, Suite D-2  
 Palo Alto, California 94303-4739

Dear John:

I support the 120-hour survival rule set forth in  
 the December 1, 1988, Tentative Recommendation.

Sincerely,



ROBERT J. BERTON

RJB:jb

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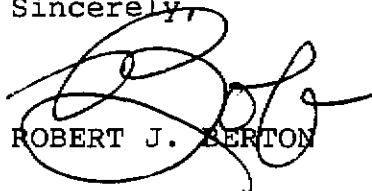
December 13, 1988

Mr. John Demoulley  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Dear John:

I support the 120-hour survival rule set forth in  
the December 1, 1988, Tentative Recommendation.

Sincerely,



ROBERT J. BERTON

RJB:jbb

HENRY ANGERBAUER, CPA  
4401 WILLOW GLEN CT.  
CONCORD, CA 94521

CA LAW REV. COM. DIV.  
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12/27/88

California Law Revision Commission

I agree with your conclusions and recommendations  
of law relating to "the 120-Hour Survival Period  
to take by intestacy. Thank you for permitting  
me to make my views known.

Sincerely  
Ja

POST OFFICE BOX 156

RAWLINS COFFMAN  
ATTORNEY AT LAW  
RED BLUFF, CALIFORNIA 96080

TELEPHONE 527-2021  
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CA LAW REV. COMM'N

January 3, 1989

JAN 06 1989

R E C E I V E D

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

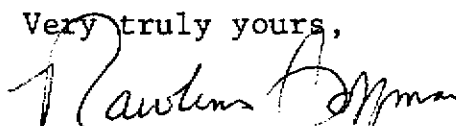
Re: Tentative Recommendation #L-602  
120 Hours Survival

Dear Gentlefolk:

Congratulations!

I agree 100% with your recommendation  
for a 120-hour survival to take by intestacy.

Very truly yours,



RAWLINS COFFMAN

RC:mb

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

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*Vice-Chair*  
JAMES V. QUILLINAN, Mountain View

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CA LAW REV. COMM'N

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*Executive Committee*  
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IRWIN D. GOLDRING, Los Angeles  
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LYNN P. HART, San Francisco  
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JAMES V. QUILLINAN, Mountain View  
BRUCE S. ROSS, Los Angeles  
STERLING L. ROSS, JR., Mill Valley  
MICHAEL V. VOLLMER, Irvine

January 9, 1989

REPLY TO:

444 Castro St. Suite 900  
Mountain View, CA 94041

John H. DeMouilly  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

Re: LRC TR - 120 Hour Survival

Dear John:

I have enclosed copies of Team 2's report on the TR noted. The report has not been reviewed by the Executive Committee and represents the opinion of the author only. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

*James V. Quillinan*  
James V. Quillinan  
Attorney at Law

JVQ/hl  
Encls.

cc: Valerie Merritt  
Terry Ross Irv Goldring

TO: JAMES V. QUILLINAN  
IRWIN D. GOLDRING  
STERLING L. ROSS  
EXECUTIVE COMMITTEE

FROM: VALERIE J. MERRITT

DATE: JANUARY 6, 1989

RE: CALIFORNIA LAW REVISION COMMISSION  
TENTATIVE RECOMMENDATION RELATING TO 120-HOUR SURVIVAL  
TO TAKE BY INTESACY

Team 2 had a telephone conference on January 4 with Ken Klug, Jim Goodwin, Beatrice Laidley Lawson and Valerie Merritt participating. The following is a distillation of our comments.

The scope of this recommendation is extremely limited as it applies only to intestate estates and would not affect planned estates or assets which pass by contractual arrangements or by operation of law. The simultaneous death provisions remain unaltered, although Ken Klug expressed the fear that this is merely the first step to a proposal to alter them.

Ken pointed out that this could create a generation-skipping transfer tax problem if the decedent had an estate of over \$1,000,000 and the child of decedent died within 120 hours afterwards. There would be intestate succession in the grandchildren, but there would be a direct skip and tax at the highest bracket as the child was alive at the decedent's date of death and the property was not included in the child's estate. This tax would have been avoided if the property had passed to the child and then to the child's children. While these facts might occur rarely, they may occur as often as the ones cited in the example in the tentative recommendation.

The vote of the team was to oppose the recommendation as creating some problems while purporting to solve others and not leading to a consistent logical system in this area.

I attach a copy of Ken's prior letter on this issue which was not previously distributed to the entire committee.



November 29, 1988

Mr. James V. Quillinan  
Diemer, Schneider, Luce & Quillinan  
444 Castro Street, Suite 900  
Mountain View, CA 94041

Re: LRC Memo 88-20, 120-Hour Survival

Dear Jim:

These are my personal comments on the above-referenced memo. The proposal is apparently designed to alleviate a perceived inequity where married persons die intestate as a result of a common accident. The perceived hardship is that in a second-marriage situation, the children of the surviving spouse will be favored over the children of the predeceased spouse. I submit that the recommended cure is a good example of hard cases making bad law.

First, the statute is limited to intestate situations. Our section strongly opposed its application to testate situations because a statutory 120-hour survival rule would thwart the intention of testators who consciously chose a straight survival provision. Similarly, the proposal would not (and should not) extend to life insurance beneficiary designations, joint tenancies, pension beneficiary designations, IRA accounts, etc. In short, even assuming that a problem exists as the memorandum perceives, by letting all of those other forms of ownership pass on survival, the proposal merely puts a band-aid on the problem.

The staff draft of the tentative recommendation states that in 1973 the State Bar endorsed the 120-hour survival requirement for intestate succession. As a result of changes in the law, that support is outdated. For example, we now have a generation-skipping transfer tax which

Mr. James V. Quillinan  
November 29, 1988  
Page 2

we did not have in 1973. If a parent dies intestate, a share of the parent's separate property will pass to the children. If a child is deceased at the time the parent dies, the share of the deceased child will pass to his or her issue and still be exempt from the generation-skipping transfer tax. Under the proposal, if the child survives the parent but dies within 120 hours, that child's share would pass to the grandchildren. In such event, there is a generation skip because the child was alive at the death of the parent: property passing to the grandchildren may be subjected to a generation-skipping transfer tax at a 55 percent rate, in addition to the general estate tax.

The generation-skipping transfer tax enacted by the federal government evidences a strong national policy in favor of vesting inheritances at death. (The fact that the generation-skipping tax is assessed at the onerous rate of a flat 55 percent evidences that Congress wants people to leave their property to their children, and not to their grandchildren. Although the federal tax allows for a \$1,000,000 exemption, the exemption is insignificant considering land values today.) I believe it would be bad policy for California to enact a statute which might inadvertently cause anyone to back into a generation-skipping transfer tax at a 55 percent rate.

Very truly yours,

Kenneth M. Klug

cc: Valerie Merritt

December 1, 1988

STATE OF CALIFORNIA  
California Law Revision Commission

TENTATIVE RECOMMENDATION

*relating to*

120-HOUR SURVIVAL TO TAKE BY INTESACY

December 1988

*This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1989. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.*

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 10, 1989.**

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2

PALO ALTO, CA 94303-4739

(415) 494-1335

**LETTER OF TRANSMITTAL**

This recommendation proposes to enact the Uniform Probate Code requirement that a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent. This is to provide a more just result where a husband and wife each have children of a prior marriage and are both killed in an accident.

Without the 120-hour survival rule, if one spouse survives the other by a fraction of a second, that spouse's children will inherit all the community property and a disproportionate share of the separate property. With the 120-hour survival rule, the separate property of each spouse and half the community property passes to that spouse's heirs, a result more consistent with what the spouses probably would have wanted.

**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.

These are the results 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 (1982).

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 443-60 (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.