

First Supplement to Memorandum 89-47

Subject: Study L-612 - Assembly Bill 158 (120-Hour Survival Requirement)

The Executive Committee of the Probate Section of the Los Angeles County Bar Association opposes the provision of Assembly Bill 158 for a 120-hour survival requirement for the purpose of intestate succession. The bill provides: "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 for the required period."

The Executive Committee gives three reasons for its opposition to the 120-hour survival requirement. See the letter, dated June 14, 1989, from the Executive Committee to Assembly Member Friedman (attached to Memorandum 89-47). The reasons given, which are ones not previously presented to the Commission, are discussed below.

Increase of Litigation

The Executive Committee comments:

a. The Section is concerned that many deaths that do occur are completely unwitnessed. Autopsies will be required to determine times of death in order to try to determine if two decedents died more or less than one-hundred twenty (120) hours apart. Because of varying conditions and rates of decomposition, exact moments of death cannot be determined with such scientific certainty that substantial litigation may not develop in numerous estates in order to determine the period of survival.

Under the present system the only area of doubt is in estates where the deaths appear to be simultaneous. Although litigation can be expensive in this area, this happens far less frequently than unwitnessed deaths and carries with it a much lower cost of litigation when spread over the population of decedents.

This comment overlooks one of the primary benefits of the 120-hour survival requirement. The 120-hour survival requirement avoids litigation where there is a common accident, such as an automobile accident, and the passengers in the automobile are dead when the emergency personnel arrive at the scene of the accident. Under existing law, if intestate succession rights depend on whether one passenger survived another, it is necessary to determine whether one of the passengers survived the other by a brief instant. These are the cases where expert testimony has been produced in an effort to establish the order of deaths. The same situation exists where there is an airplane crash and the right to intestate succession depends on which of two passengers killed in the crash survived the other. Experts may be produced to testify, for example, that one survived the other for a brief period because the person claimed to be the survivor showed signs of breathing fumes from the burning plane and the other appeared to have died instantly.

The 120-hour survival requirement avoids this litigation. If the persons upon whom the intestate succession rights depend are both killed in an accident, it matters not that one survived the other by a brief period during which no one was present to witness the survival. The person must survive by 120 hours. Thus, there is no need to litigate which person survived the other for a brief period. There is no need for litigation in connection with the automobile accident where the persons are dead when the emergency personnel arrive on the scene of the accident or where both are killed in an airplane crash. The concern expressed in the comment from the Executive Committee has much greater application to the existing rule which stimulates litigation when the persons are killed in a common accident and it is not clear which one survived the other.

Accordingly, the net result of the Commission's recommendation would be to reduce rather than increase litigation. Far less often will there be a dispute as to whether a person survived 120 hours than there will be a dispute as to whether a person survived another for a brief instant, especially when there are no witnesses present during that instant. The point made by the Executive Committee actually supports, rather than discredits, the Commission's recommendation.

Manipulation of Order of Death

The Executive Committee makes the following comment:

b. The Section believes that the one-hundred twenty (120) hour requirement will cause persons to manipulate the time of death of a second decedent in order to qualify to [sic] or disqualify that person as an heir. If a second decedent who is the heir of the first decedent is comatose or terminal, steps may be taken to lengthen or shorten that person's life solely to qualify or disqualify that person as an heir so as to affect the devolution of an estate. The Section believes that this may lead to serious consequences on numerous occasions and is generally bad for the health and safety of the people of California.

At least 20 states already have a survival requirement. In California, it is not uncommon to find a survival requirement in a will. The staff is unaware of any "serious consequences on numerous occasions" resulting from these existing requirements. In fact, we are unaware of any articles or reported cases involving manipulation of the time of death of the second decedent in order to qualify or disqualify that person as an heir under a 120-hour intestate succession survival requirement imposed by statute.

There are procedures that the doctor must follow before the doctor will be willing to take actions that might hasten the death of a person in a terminal condition. In San Diego county, for example, these procedures have recently been reduced to a written procedure. It is unlikely that the necessary procedures could be complied with within the 120 hours allowed. The staff sees no public policy of the State of California that would be violated if the persons making health care decisions for a person who appears to be in a terminal condition delay for 120 hours taking action to terminate the person's life. The ordinary case where the 120-hour survival requirement will apply is where one person is killed in an automobile accident and the other dies within a short time after the accident at the scene of the accident or on the way to the hospital. In other cases (where the person is alive on arrival at the hospital but apparently in a terminal condition), the decision as to whether or not to take measures to continue the patient's life will primarily be in the hands of the attending physician who will be motivated to continue the patient's life (for at

least 120 hours) in order to avoid potential civil liability and violation of ethical standards. In addition, in many cases, the order of death will be immaterial, since the same persons (e.g., children whose father and mother are killed in a common accident) will inherit. (The 120-hour survival requirement will, however, be significant in the case of a second marriage where each spouse has children by a prior marriage, and that case is discussed at some length in the Commission's recommendation.)

Is there a greater chance of manipulation of the time of death under the Commission's proposal than under existing law? Suppose that a husband and wife are involved in a traffic accident and both are in a terminal condition at the time of arrival at the hospital. Under existing law, one seeking to have one survive the other need only cause the one to survive for a few minutes more than the other. Under the Commission's proposal, it will be more difficult to manipulate the order of death in this situation, because it is necessary to cause the one to survive for a much longer time--120 hours.

In view of the shortness of the survival period (120 hours) and the experience in other states with similar legislation and the experience in California with respect to wills having a survival period, the staff is not persuaded that there is any merit to the objection of the Executive Committee. The opportunities for manipulation of the order of death appear to be at least as great under existing law as under the Commission's proposal.

Killing Potential Heirs Who are Not at That Moment Terminal

The last of the reasons given by the Executive Committee for its opposition to the 120-hour survival requirement is similar to the one just discussed:

c. The Section is also concerned that unscrupulous persons may use the one-hundred twenty (120) hour requirement to dispose of potential heirs who are not at that moment terminal. Under present law, heirship is a matter of surviving the moment of death. This removes the temptation for unscrupulous people to try and cause further deaths during an artificially created survival time period.

It is difficult to take this point seriously. It assumes that the existence of the 120-hour survival requirement would cause one person

to murder another in order to inherit and that the attending physician would cooperate in the murder. The staff believes that experience indicates that it is difficult to obtain the cooperation of physicians to terminate life support systems even where there is no doubt that the patient is in a terminal condition. One can not seriously argue that a physician would cooperate in the termination of life support systems where the patient is not in a terminal condition. No physician would expose himself or herself to the civil and criminal liability that would result from such an action. Moreover, the heirs of the surviving heir will serve as a check on any person who might take action to murder the surviving heir.

Reasons for Commission's Recommendation

Attached is a copy of the Commission's recommendation relating to the 120-hour survival requirement. The staff believes that the reasons given in support of the recommendation clearly outweigh any merit there might be in the reasons given by the Executive Committee in opposition to the Commission's recommendation.

One should also consider the tax consequences of the recommended survival period. If the 120-hour survival requirement is adopted and a father and mother die within the 120-hour period as a result of a common accident, their children may avoid estate taxes that otherwise would be imposed. This is because the property of each spouse (that spouse's one-half share of the community property and that spouse's separate property) will be distributed as the estate of that spouse.

Taking the example above, if the estate is all community property, this would permit an estate of 1.2 million dollars to pass to the children without estate tax. By way of contrast, absent the 120-survival requirement, the entire estate would pass to the surviving spouse who died within the 120-hour period, and half of the estate (\$600,000) would be subject to estate tax when the surviving spouse dies.

Reconsideration by Executive Committee

Perhaps on further consideration, the Executive Committee of the Probate Section of the Los Angeles County Bar Association will withdraw

its objection to the 120-hour survival requirement for intestate succession.

Respectfully submitted,

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