

## Memorandum 82-21

Subject: Study L-607 - Probate Law (Meaning of "Surviving Spouse")

Attached to this Memorandum as Exhibit 1 is UPC Section 2-802 which provides that, as used elsewhere in the UPC, "surviving spouse" does not include a former spouse whose marriage to the decedent has been dissolved or annulled. As the UPC Comment notes, this "states an obvious proposition." However, the section also deals with the more difficult problem of the divorce or annulment in another jurisdiction which is not recognized in California, and applies an estoppel-type principle against the surviving spouse which is consistent with prior California law.

Section 2-802 presents no significant policy issue. The staff has added some language drawn from Probate Code Section 3700 to conform to California usage.

Respectfully submitted,

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## EXHIBIT 1

§ 2-802. Meaning of "surviving spouse"

2-802. (a) A person who is divorced from the decedent or whose marriage to the decedent has been dissolved, annulled , or adjudged a nullity is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. ~~A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.~~

(b) For purposes of Parts 1, 2, 3, & and 4 of this Article, and of Section ~~3/203~~ 422 , a surviving spouse does not include any of the following :

(1) ~~a~~ A person who obtains or consents to a final decree or judgment of divorce or dissolution of marriage from the decedent or ~~as a~~ a final decree or judgment of annulment or nullity of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife † .

(2) ~~a~~ A person who, following a decree or judgment of divorce , dissolution of marriage, or annulment , or nullity of marriage obtained by the decedent, participates in a marriage ceremony with a third person † ~~or~~ .

(3) ~~a~~ A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Comment. Section 2-802 is the same in substance as UPC Section 2-802, except that the second sentence of UPC Section 2-802 has been deleted. Under subdivision (b)(3), a decree of legal separation which divides the community property generally terminates the status of surviving spouse.

Paragraphs (1) and (2) of subdivision (b) are to deal with the problem of a divorce or annulment which is not recognized in California, and apply an estoppel principle against the surviving spouse. These paragraphs are consistent with prior California law. See, e.g., Spellens v. Spellens, 49 Cal.2d 210, 317 P.2d 613 (1957) (estoppel to deny validity of marriage); Estate of Atherley, 44 Cal. App.3d 758, 764, 119 Cal. Rptr. 41 (1975) (recognizing principle but declining to apply it).

## UNIFORM PROBATE CODE COMMENT

See Section 2-508 for similar provisions relating to the effect of divorce to revoke devises to a spouse.

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle

underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-204 as a renunciation of benefits under a prior will and, by intestate succession.

In 1975, the Joint Editorial Board recommended the addition, in the preliminary statement of subsection (b), of explicit reference to Section 3-203 which controls priorities for appointment as personal representative.