

Memorandum 82-39

Subject: Study L-612 - Probate Law (Simultaneous Death)

BACKGROUND

California Uniform Simultaneous Death Act

Probate Code Sections 296-296.8 set forth the California version of the Uniform Simultaneous Death Act. (A copy of these sections is attached to this memorandum as Exhibit 2.) This legislation, enacted in 1945, replaced the former disputable presumptions as to order of death when two or more persons died in a common accident with the rule that the property of each person is disposed of as if he had survived in a case where there is no sufficient evidence that the persons died other than simultaneously. The Uniform Simultaneous Death Act (USDA) leaves plenty of room for litigation in violent death cases since it operates only where there is not sufficient evidence to determine the order of death. For example, in Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967), a doctor applied his understanding of physics from his college days to hazard a guess that one passenger in a car was killed 1/150,000 of a second before the other. The USDA was held inapplicable in this case.

Uniform Probate Code Provisions

The Uniform Probate Code (UPC) adopts the rule that a person who fails to survive a decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession or taking under a will (subject to a contrary provision in the will). These provisions, which have been approved by the Commission, are set out as Sections 204.010 and 204.050 (wills) and 220.040 (intestate succession) of Exhibit 1 attached to this memorandum.

The UPC 120-hour (five-day) survival rule has several advantages over the USDA one-instant-of-survival rule:

(1) The UPC provisions avoid the type of result that occurred in Estate of Rowley referred to above. Litigation to determine whether one person survived another for an instant is avoided. The UPC provisions require a person to survive five days in order to take under a will or by intestate succession. If the person does not survive five days, the

person is deemed to have predeceased the decedent from whom he or she would otherwise take.

(2) The UPC provisions may avoid the need for two probate proceedings. If the person who did not survive five days does not take, there is no need to administer the same property in two probate proceedings--the proceeding of the decedent and then the proceeding of the person who survived less than five days. Also, double taxation may be avoided.

(3) It may be more consistent with the desires of the average decedent to disregard a person who does not survive the decedent by five days in determining the disposition of the decedent's property.

Law of Other States

There is no consistent approach used in other states to reconcile the 120-hour survival rule in the UPC with one-instant-of-survival result under the USDA. The USDA has been adopted in 46 states and three other jurisdictions. The rules followed in the various states are outlined below.

Make USDA survival requirement consistent with UPC

Texas has consistent survival requirements: Texas amended its version of the USDA to substitute the UPC 120-hour rule wherever the USDA applies its "no sufficient evidence that the persons have died other than simultaneously" test.

Ohio, which has enacted neither Uniform Act, has its own 30-day survival rule.

Explicitly provide that USDA subject to UPC rules

Idaho

New Jersey version of UPC provision on wills provides that it prevails over USDA.

Enact USDA section providing that USDA not applicable where other rules as to survivorship apply

Arizona

North Dakota

Utah

Repeal USDA and enact relevant UPC provisions

Alaska

Montana

Have both UPC and USDA without resolving conflict

Maine

Michigan

Nebraska

New Jersey has UPC sections on wills and intestate succession but only section on wills provides that it prevails over USDA if there is a conflict.

Omit UPC provisions so that USDA applies

Florida
Hawaii
Minnesota

Explicitly provide that USDA prevails over UPC

Colorado

Commission's Decision at March Meeting

At the March meeting, the Commission considered a staff recommendation that the Commission adopt the Texas approach of revising the USDA to adopt the UPC 120-hour survival rule whenever the USDA applies its "no sufficient evidence that the persons have died other than simultaneously" test. The Commission was unwilling to apply the UPC test to joint tenancies and was not persuaded that the UPC test should apply in the case of life or accident insurance benefits. Most of the discussion concerned joint tenancies. Opinion was divided, but there was a strong feeling that it might be unconstitutional to attempt to apply the 120-hour survival rule to existing joint tenancies. Some Commissioners also expressed the view that the 120-hour survival rule would interfere with the survivor's need to deal with joint tenancy property immediately after the death of the other joint tenant. However, in recognition of the desirability of avoiding disputes over the exact time of death such as may occur under the USDA, the Commission decided that a 12-hour survival rule should apply where two or more joint tenants die as a result of a common accident or event. Where deaths occur not as a result of a common accident or event, the one-instant-of-survival rule of the existing USDA was to be retained. The 12-hour rule apparently was intended to apply to insurance cases also. It was not entirely clear how the other provisions of the California USDA were to be revised.

The 12-hour survival period was selected because it would not seriously limit the survivor's ability to deal with joint tenancy property and might be less subject to constitutional objection. The common accident limitation on the application of the 12-hour survival rule was suggested because there is not likely to be a dispute over the time of death in cases not involving a common accident. The USDA one-instant-of-survival rule was to be retained for cases not covered by the 120-hour or 12-hour survival rules so that there would be a rule to cover the unlikely case where the deaths did not occur as a result of a common accident.

PROBLEMS

The staff has attempted to implement these decisions in a draft statute (see copy of staff draft attached hereto as Exhibit 1) but we have run into some serious problems and we would like the Commission to further consider the policies outlined at the March meeting. These problems are identified and discussed in the following material prepared by Stan Ulrich of the staff.

Is the 12-Hour Rule Needed to Permit Survivors to Deal With Property?

The view was expressed at the last meeting that imposition of a 120-hour survival rule on joint tenancies would unreasonably restrict the ability of the survivor to deal with the property within five days after the decedent's death.

The staff does not believe that the 120-hour rule would add any significant burden. We think it will be a rare case where there is a real need to do something momentous with the property within five days after the death of one joint tenant. And in any event, we doubt that there is much that can be done within such a short time. If there is doubt about the true nature of the property, which must occur in every case where property of married persons is in joint tenancy form, a third person would be foolish to assume that the surviving spouse can deal with the property as if he or she owns it outright. It must take at least five days to conclude a sale, lease, encumbrance, or other deal involving real property, particularly if title insurance is required. If real property is held in joint tenancy form, it will usually be necessary to make the survivorship a matter of record even assuming there are no complications involving the issue of the property's "true" nature. See 1 A. Bowman, Ogden's Revised California Real Property Law § 7.17 (1974). If the property is community property, the power to deal with the property does not fully ripen until after 40 days from the death of the decedent spouse. See Prob. Code § 203. Proceedings to determine the nature of community property and confirm it to the surviving spouse pursuant to Probate Code Sections 650-657 certainly take more than five days. It appears that funds in a joint tenancy bank account may be transferred to a surviving spouse without limitation under the Controller's blanket consent. See Handling a Decedent's Estate § 13 (Cal. Cont. Ed. Bar 1981).

In view of these factors, and there are probably other delaying complications, the staff believes that the 12-hour survival rule would not achieve the desired goal and should be reconsidered. The 120-hour survival period represents no significant impediment to dealing with property--either it overlaps other delays built into the system or the property may be dealt with notwithstanding any 120-hour survival period. To the extent that the 120-hour survival rule may result in any impediment to the ability to deal with property upon the death of one joint tenant, the staff thinks the impediment is a minor one and an acceptable price in view of the advantages of applying the same survival period to both community property and joint tenancy property, as discussed below.

Should We Provide Different Rules of Survival For Community Property and Joint Tenancy Property?

If one survival period applies to community property and another to joint tenancy property, as decided at the March meeting, the nature of the property must be determined in each case involving marital property before we know which rule to apply. And once more we find that what appeared to be a minor or technical problem is another tentacle of the seemingly omnipresent problem of the interrelation of joint tenancy and community property. (See generally Memorandum 82-32 and the background study attached thereto, on the agenda for this meeting, for further discussion of this problem.)

Consideration of some examples will illustrate the difficulties. Assume that we have the tripartite statute discussed at the last meeting: 120-hour survival required to take under a will or by intestate succession; 12-hour survival required to take by survivorship in a joint tenancy where both joint tenants die as the result of a common accident; and the USDA rule (no sufficient evidence of other than simultaneous death) in all other cases.

(1) Suppose that a husband and wife are involved in a car accident in which the husband dies and the wife is seriously injured but survives 13 hours. If they hold real property in joint tenancy, it passes to W by right of survivorship. But their community property is divided in half since the 120-hour survival rule was not satisfied. If both spouses died intestate, W's heirs take half the community and all of the joint tenancy property, and H's heirs take only half the community property. Unfortunately, we do not know whether property held in joint tenancy form is really community property. Having two survival rules encourages litigation in this case since H's heirs stand to gain if they can show

that the property held in joint tenancy form is actually community property.

(2) Under the facts of example (1), suppose that H has made a will devising his interest in the community property to a third person. Here again litigation is encouraged since the devisee will want to show that the property is community property in joint tenancy form so that it passes under the will rather than to W by right of survivorship.

The staff suggests that we avoid these problems in one of two ways:

(1) Apply the same survival period to community and joint tenancy property; that is, apply either the 120-hour rule or the 12-hour rule to property that passes by will or intestate succession and to property that passes outside probate by survivorship or contract. As noted above, there was some concern about the constitutionality of applying the 120-hour survival rule to existing joint tenancies and contracts. If the Commission is unwilling to adopt the 120-hour rule for this reason, we suggest that a uniform 12-hour survival rule be considered. Of course, a 12-hour rule would be out of line with the jurisdictions that have enacted a 120-hour survival period (about 11 states so far).

(2) Retain the 120-hour and 12-hour survival rules as discussed at the March meeting, but provide that community property held in joint tenancy form is subject to the 12-hour rule. This alternative would avoid disputes concerning the nature of the property in cases where the spouses die intestate and one dies more than 12 but less than 120 hours after the other. Of course, the true nature of the property will still be an issue if a spouse devises his or her interest in community property to a third person, but that is a problem that cannot be solved within the bounds of a survival statute. The staff draft attached to this memorandum as Exhibit 1 is based on this alternative.

Should the Common Accident Be Retained?

At the March meeting, the Commission decided that the right of survivorship in joint tenancy should be upset only if the deaths of joint tenants are the result of a common accident, common disaster, or other common event. The feeling was that there was little need for a survival period in cases other than those involving common accidents since it is unlikely that finding sufficient evidence of time of death will be a significant problem in other situations. However, if the rules applicable to the disposition of joint tenancy property and community property are different, then there will be a certain number of cases

where potential takers have something to gain or lose by making an issue out of whether the deaths resulted from a common accident, common disaster, or other common event. It should be noted that the USDA was carefully drafted to cover all cases where there is a need to determine whether one person survived another. Given the variety of manner of death and the bizarre situations that are recounted with some frequency in the press, we think it best to avoid this issue if possible and recommend that this condition on the 12-hour rule be abandoned, if the Commission decides to retain the 12-hour rule. For the time being, however, the staff draft in Exhibit 1 applies the common accident rule.

Trusts. Problems will arise in connection with trusts if different survival requirements apply depending on whether the trust is a testamentary trust (probably governed by UPC provisions, at least in part) or an inter vivos trust (governed by USDA). We have adopted the UPC rule in Section 114.030 (page 4 of Exhibit 1) to minimize this problem.

DRAFT STATUTE

Attached as Exhibit 1 is a draft of the provisions that supersede the Uniform Simultaneous Death Act. These provisions are discussed below.

§§ 110.010-110.030 (pages 1-2 of Exhibit 1)

The only new provision in this material is Section 110.030. This provision continues a portion of former Section 296.4 with two changes:

(1) The provision is extended to quasi-community property. This is a desirable clarification and appropriate since quasi-community property is generally treated upon death the same as community property.

(2) Existing law provides an exception to the rule stated in Section 110.030 for life and accident insurance policies. Life and accident insurance policies are governed by a special rule. See new Section 114.050. Section 110.030 continues this existing exception and provides a new exception for property held in joint tenancy (whether or not the property is community property held in joint tenancy form). Under the staff draft, property held in joint tenancy is not governed by Section 110.030; such property is governed by Section 114.040. The staff scheme avoids having one survival period that applies to community property held in joint tenancy and another period that applies to true joint tenancy property. See the discussion, supra, concerning this problem.

Note that Section 110.030 provides a 120-hour survival requirement. This is the same survival requirement as the one that applies in the case of wills and intestate succession under the Uniform Probate Code provisions approved by the Commission.

§ 114.010 (pages 2-3 of Exhibit 1)

Subdivision (a) of this section makes clear that the article does not apply in any case covered by the provisions relating to wills or intestate succession. These provisions have already been approved by the Commission and impose a 120-hour survival requirement.

Subdivision (b) continues the substance of a provision of existing law with the addition of a revision made by the 1953 amendments to the Uniform Simultaneous Death Act (1953 amendment not adopted in California). The word "trust" is substituted for the existing phrase "living trust" in subdivision (b).

§ 114.020 (page 3 of Exhibit 1)

This section continues a provision of existing law, but the various exceptions to the section greatly limit its application.

§ 114.030 (page 4 of Exhibit 1)

This section continues existing law but adds a new 120-hour survival requirement and incorporates a provision of the 1953 amendment to the Uniform Simultaneous Death Act.

§ 114.040 (pages 4-5 of Exhibit 1)

Section 114.040 states the Commission's decisions at the last meeting concerning joint tenancy and the requirement of survival. The complexity of the section results from two Commission decisions:

(1) The decision to provide a 12-hour survival rule where death results from a "common accident, common disaster, or other common event" and to retain the one-instant-of-survival rule for other cases. Not only does this make the section more complex, but it will give rise to litigation to determine whether a particular case is within or without the "common accident, common disaster, or other common event" provision. See this memorandum, supra, for more detailed discussion.

(2) The decision to provide a 12-hour survival rule for joint tenancies instead of the 120-hour rule otherwise generally provided. The staff has attempted to avoid the conflict between these two rules in the situation most likely to occur--where community property is held in the form of joint tenancy--by providing that the 12-hour survival rule

applies even though community property is held in joint tenancy form. This matter is discussed in more detail, supra, in this memorandum.

Some consideration should be given to the extent to which the 12-hour survival rule may constitutionally be applied to existing joint tenancies.

§ 114.050 (pages 5-6 of Exhibit 1)

The staff believes that subdivision (a) should be eliminated, that the "common accident, common disaster, or other common event" limitation should be removed from subdivision (b), and that the time period should be made 120 hours rather than 12 hours. This will give us a provision that is consistent with other provisions relating to wills, intestate succession, and community property. The insurance policy can provide a different period if that is desired.

Subdivision (d) would limit the new provision to policies issued on or after January 1, 1984; policies issued prior to that date would be governed by existing law.

§§ 114.510-114.550 (pages 6-9 of Exhibit 1)

These provisions present no policy issue.

§§ 204.010, 204.050, 220.040 (pages 9-11 of Exhibit 1)

These are previously approved provisions that do not present any new policy issues. The provisions have been numbered to fit into the proposed legislation under a tentative numbering scheme devised by the staff.

Educ. Code § 24606, Gov't Code § 21371 (pages 11-12 of Exhibit 1)

These are technical amendments that present no policy issue.

Transitional Provision

We have included one transitional provision in the recommended legislation. Section 114.050 (life and accident insurance) provides in part:

(d) This section does not apply where the insurance policy was issued prior to January 1, 1984 [or whatever date the Commission decides should be the operative date], and such insurance policy is governed by the law in effect on December 31, 1983.

We believe that an appropriate transitional provision for Article 1 (commencing with Section 114.010 on page 2) would be the following,

which could be an uncodified or a codified section:

Article 1 (commencing with Section 114.010) of Chapter 5 of Part 3 of Division 1 of the Probate Code does not apply in any case where the person the time of whose death is in issue died before the operative date of this act. Such cases continue to be governed by the law in effect immediately before the operative date of this act.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

DIVISION 1. DEFINITIONS AND GENERAL PROVISIONS

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 one-half of the community property that belongs to the decedent 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).

The Uniform Probate Code contains no provision comparable to Section 110.010, but Section 2-102A of the Uniform Probate Code recognizes by implication that one-half of the community property belongs to the surviving spouse.

405/476

§ 110.020. Quasi-community property

110.020. Upon the death of a married person domiciled in this state, one-half of his or her 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. See also Section [to be drafted] (defining "quasi-community property"). The one-half of the quasi-community property that belongs to the decedent 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). The Uniform Probate Code does not recognize the concept of quasi-community property.

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

110.030. Except as provided by Sections 114.040 and 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 the husband had survived and as if that half belonged to him.

(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 wife had survived and as if that half belonged to her.

Comment. Section 110.030 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 of Section 110.030 recognizes that Section 110.030 does not apply to community or quasi-community property if the property is held in joint tenancy form; property held by a husband and wife in joint tenancy form is governed by Section 114.040, whether or not the property is community property. The introductory clause of Section 110.030 also 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. As to a court proceeding to determine whether one spouse survived the other by 120 hours, see Sections 114.510-114.550.

18538

CHAPTER 5. ESTABLISHMENT OF SURVIVAL

Article 1. Simultaneous Deaths and Required
Periods of Survival

§ 114.010. Application of article

114.010. (a) This article does not apply in any case covered by Section 204.010 or 204.050 (wills) or 220.040 (intestate succession).

(b) This article does not apply in the case of a trust, deed, or contract of insurance, or in any other situation, where (1) provision is

made for distribution of property different from the provisions of this article or (2) provision is made 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 114.010 makes clear that the provisions of this article do not apply in intestate succession and will cases. Subdivision (b) makes clear, for example, that the distribution provision of the instrument controls where a different distribution of property than that provided for in this article is provided for in a trust, deed, contract of insurance, or other instrument. 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 204.050) and adds clause (2) of subdivision (b) (thereby adopting a revision made by the 1953 amendments to Section 6 of the Uniform Simultaneous Death Act).

10170

§ 114.020. No sufficient evidence of survivorship

114.020. Except as otherwise provided in this article and in Sections 110.030, 204.010, 204.050, and 220.040, if the title to property or the devolution of property depends upon priority of death and there is no sufficient evidence to establish that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he or she had survived.

Comment. Section 114.020 continues the substance of former Section 296 (California Uniform Simultaneous Death Act). The rule provided by this section may be varied by a provision in the governing instrument. See Section 114.010.

The introductory clause of Section 114.020 recognizes that Section 114.020 has limited application. It does not apply to cases covered by Sections 110.030 (community and quasi-community property), 114.030 (survival of beneficiaries), 114.040 (joint tenants), 114.050 (insurance policies), 204.010 or 204.050 (wills), or 220.040 (intestate succession). As to a court proceeding to determine whether the persons have died otherwise than simultaneously, see Sections 114.510-114.550.

§ 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 his or her 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 amended in 1953, but the 120-hour survival rule is new. Subdivision (b) supersedes former Section 296.1. See also Section 114.010 (provision of governing instrument prevails). As to a court proceeding to determine whether the beneficiary survived the other person by 120 hours, see Sections 114.510-114.550.

15775

§ 114.040. Joint tenants

114.040. (a) Except as provided in subdivision (b), if there is no sufficient evidence to establish that two joint tenants have died otherwise than simultaneously, 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.

(b) If the deaths of two joint tenants are the result of a common accident, common disaster, or other common event, and it cannot be established that one joint tenant survived the other by 12 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) Except as provided in subdivision (d), if there are more than two joint tenants and all of them have died and there is no sufficient evidence to establish that all of them have died otherwise than simultaneously, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the portion for 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) If there are more than two joint tenants who all die as a result of a common accident, common disaster, or other common event, and it cannot be established that any joint tenant survived any other joint tenant by 12 hours, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the portion for each joint tenant shall be administered upon or distributed, or otherwise dealt with, as if that joint tenant had survived the other joint tenants.

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

(f) This section applies when a husband and wife hold property in joint tenancy, regardless whether the property is community or quasi-community property.

Comment. Section 114.040 supersedes former Section 296.2. The former law is modified to adopt a 12-hour survival rule where death results from a common accident, common disaster, or other common event. Subdivision (e) was not found in former law but adopts the substance of a 1953 amendment to the Uniform Simultaneous Death Act. Subdivision (f) is a new provision and is designed to make clear that where community property or quasi-community property is held by married persons in joint tenancy, the five-day survival rule of Section 110.030 does not apply and the applicable rule stated in Section 114.040 applies. As to a court proceeding to determine whether joint tenants died other than simultaneously or whether a joint tenant survived the other joint tenant or joint tenants by 12 hours, see Sections 114.510-114.550.

16883

§ 114.050. Life or accident insurance

114.050. (a) Except as provided in subdivision (b), if the insured and a beneficiary under a policy of life or accident insurance have died and there is no sufficient evidence to establish that they have died otherwise than simultaneously, 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 death of an insured and a beneficiary under a policy of life or accident insurance are the result of a common accident, common disaster, or other common event, and it cannot be established that the beneficiary survived the insured by 12 hours, the proceeds of the policy shall be administered upon or distributed, or otherwise dealt with, as if the insured had survived the beneficiary.

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

(d) This section does not apply where the insurance policy was issued prior to January 1, 1984, and any such insurance policy is governed by the law in effect on December 31, 1983.

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 114.010. As to a court proceeding to determine whether an insured and a beneficiary have died other than simultaneously or whether the beneficiary survived the insured by 12 hours, see Sections 114.510-114.550.

18316

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 for the purposes of Section 110.030 whether one spouse has survived the other for the period of time specified in that section.

(b) To determine for the purposes of Section 114.020 whether persons have died other than simultaneously.

(c) To determine for the purposes of Section 114.030 whether the beneficiary survived the other person for the period of time specified in that section.

(d) To determine for the purposes of Section 114.040 whether joint tenants have died other than simultaneously or whether a joint tenant

survived the other joint tenant or joint tenants for the period of time specified in that section.

(e) To determine for the purposes of Section 114.050 whether an insured and a beneficiary have died other than simultaneously or whether the beneficiary survived the insured for the period of time specified in that section.

(f) To determine for the purposes of Section 204.010 whether a devisee has survived the testator for the period of time specified in that section.

(g) To determine for the purposes of Section 204.050 whether issue of a deceased devisee have survived the testator for the period of time specified in that section.

(h) To determine for the purposes of Section 220.040 whether a person who would otherwise be an heir has survived the decedent for the period of time specified in that section.

(i) 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.

(j) 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.

(k) To determine for the purposes of a case governed by the law in effect prior to January 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 to make the sections applicable to cases where the 120-hour or 12-hour survival rule applies.

18317

§ 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 described in the applicable provision of Section 114.510.

(b) Any other person interested in the estate of any person described in the applicable provision of Section 114.510.

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

18319

§ 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.

18320

§ 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 described in the applicable provision of Section 114.510 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.

§ 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 is satisfied that the named persons are dead, the court shall determine whether one person predeceased another by at least 120 or 12 hours, or that one person survived another, or that there is no sufficient evidence to establish that they died other than simultaneously, whichever is applicable under the circumstances of the particular case, and shall make an order to that effect. 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 such deceased persons.

Comment. Section 114.550 continues the substance of a portion of former Section 296.42 with modifications to make the section applicable to cases where the 120-hour or 12-hour survival rule applies.

7901

WILLS

§ 204.010. Requirement that devisee survive testator by 120 hours

204.010. (a) A devisee who does not survive the testator by 120 hours is treated as if he or she predeceased the testator $\bar{\gamma}$. If the time of death of the testator or of the devisee, or the time of death of both, cannot be determined, and it cannot be established that the devisee has survived the testator by 120 hours, it is deemed that the devisee did not survive for the required period.

(b) unless Subdivision (a) does not apply if the testator's will of decedent contains some language (1) dealing explicitly with simultaneous deaths or deaths in a common disaster $\bar{\gamma}$ or (2) requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

Comment. The first sentence of subdivision (a) and all of subdivision (b) of Section 204.010 are the same in substance as Section 2-601 of the Uniform Probate Code except that subdivision (b) omits the UPC provision that made the five-day survival rule not applicable if the will merely required the devisee to "survive the testator." Under

Section 204.010, the five-day survival rule applies unless the will either deals explicitly with simultaneous deaths or deaths in a common disaster or requires survival for a longer or shorter period stated in the will in order to take under the will. The second sentence of subdivision (a) is drawn from the second sentence of Section 2-104 of the Uniform Probate Code. The requirement that the devisee survive the testator by five days is new to California law. As to court proceedings to determine whether the devisee survived the testator by 120 hours, see Sections 114.510-114.550.

7905

§ 204.050. Anti-lapse

204.050. If a devisee ~~who is a grandparent or a lineal descendant of a grandparent of the testator~~ is dead at the time of execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he or she had survived the testator is treated as a devisee for the purposes of this section whether his or her death occurred before or after the execution of the will.

Comment. Section 204.050 is the same in substance as Section 2-605 of the Uniform Probate Code, except that Section 204.050 does not require any blood relationship between the testator and the predeceased devisee. Thus, the anti-lapse provisions of Section 204.050 substitute the issue of the predeceased devisee, whether or not the predeceased devisee is related to the testator. This revision makes Section 204.050 consistent with Civil Code Section 1389.4 (powers of appointment). Section 204.050 supersedes former Section 92, which limited the application of the anti-lapse provision to the case of a predeceased devisee who was "kindred" of the testator. As to court proceedings to determine whether issue of a deceased devisee have survived the testator by 120 hours, see Sections 114.510-114.550.

As to when a devisee "is treated as if he or she predeceased the testator," see Section 204.010 (requirement that devisee survive testator by 120 hours). The five-day survival requirement in Section 204.050 is consistent with survival requirement of Section 204.010. Section 204.050 does not apply if contrary intention is indicated by the will. See Section 204.030.

INTESTATE SUCCESSION

§ 220.040. Requirement that heir survive decedent by 120 hours

220.040. Any A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for ~~purposes~~ the purpose of ~~homestead allowance, exempt property and~~ intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the 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. This section ~~is not to be applied where~~ does not apply if its application would result in a taking of intestate estate by the escheat of property to the state under Section 2/105 .

Comment. Section 220.040 is the same in substance as Section 2-104 of the Uniform Probate Code except that Section 220.040 does not include the references in the Uniform Probate Code section to homestead allowance and exempt property. The requirement that the person survive the decedent by five days is new to California law. As to a court proceeding to determine whether a person who would otherwise be an heir has survived the decedent by 120 hours, see Sections 114.510-114.550.

405/989

CONFORMING REVISIONS

Education Code § 24606 (amended). State Teachers' Retirement System; provisions applicable in simultaneous death and similar situations

SEC. . Section 24606 of the Education Code is amended to read:

24606. ~~Where the member or retirant and the beneficiary have died and there is no sufficient evidence that they have died otherwise than simultaneously~~ The provisions of Chapter 5 (commencing with Section 114.010) of Part 3 of Division 1 of the Probate Code, when applicable, govern the distribution of the proceeds of any death benefit shall be distributed as if the member had survived the beneficiary payable under this system . In applying Chapter 5 (commencing with Section 114.010) of Part 3 of Division 1 of the Probate Code with respect to proceeds payable to a beneficiary, membership in the system shall be considered as having the same status as an insurance policy.

Comment. Section 24606 is revised in a manner consistent with Government Code Section 21371 (comparable provision of Public Employees' Retirement Law). For provisions relating to insurance policies, see Probate Code Sections 114.010(b), 114.050. See also Probate Code §§ 114.510-114.550 (court proceeding to determine issue of whether a person survived).

405/993

Government Code § 21371 (technical amendment). Public Employees' Retirement Law; provisions applicable in simultaneous death and similar situations

SEC. . Section 21371 of the Government Code is amended to read:

21371. The provisions of ~~the Uniform Simultaneous Death Act~~ Chapter 5 (commencing with Section 114.010) of Part 3 of Division 1 of the Probate Code, when applicable, ~~shall~~ govern the distribution of money payable under this system, including but not limited to retirement allowance accrued but not received prior to death and refund of member contributions. In applying ~~said act~~ Chapter 5 (commencing with Section 114.010) of Part 3 of Division 1 of the Probate Code with respect to benefits payable to a beneficiary, membership in the system shall be considered as ~~is~~ having the same status as an insurance policies policy .

Comment. Section 21371 is amended to reflect the repeal of the Uniform Simultaneous Death Act (former Probate Code Sections 296-296.8) and the enactment of Probate Code Sections 114.010-114.550. For provisions relating to insurance policies, see Probate Code Sections 114.010(b), 114.050. See also Probate Code §§ 114.510-114.550 (court proceeding to determine issue of whether a person survived).

EXHIBIT 2

Probate Code §§ 296-296.8 (repealed). Simultaneous death

DIVISION 2b

SIMULTANEOUS DEATH

CHAPTER 1. UNIFORM SIMULTANEOUS DEATH ACT

§ 296. Disposition of property; insufficient evidence of survivorship

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Comment. Former Section 296 is superseded by Section 114.020.

§ 296.1. Beneficiaries taking successively under another's disposition of property

Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.

Comment. Former Section 296.1 is superseded by subdivision (b) of Section 114.030.

§ 296.2. Joint tenants

Where there is no sufficient evidence that two joint tenants have died otherwise than simultaneously the property so held shall be administered upon, distributed, or otherwise dealt with, one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus administered upon, distributed, or otherwise dealt with, shall be in the proportion that one bears to the whole number of joint tenants.

Comment. Former Section 296.2 is superseded by Section 114.040.

§ 296.3. Life or accident insurance

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

Comment. Former Section 296.3 is superseded by Section 114.050.

§ 296.4. Community property

Where a husband and wife have died, leaving community property and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall be administered upon, distributed, or otherwise dealt with, as if the husband had survived and as if said one-half were his separate property and the other one-half thereof shall be administered upon, distributed, or otherwise dealt with, as if the wife had survived and as if said other one-half were her separate property, except as provided in Section 296.3.

If a portion of the estate which was the community property of the husband and wife would otherwise escheat to the state under this section and Sections 201, 228, and 231, or if a portion of the estate which was separate property of a previously deceased spouse would otherwise escheat to the state under Section 229, because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such portion of the estate shall be distributed in equal shares to the children of the other spouse and to their descendants by right of representation, or if such other spouse leaves no children, nor descendants of a deceased child, in equal shares to the parents of such other spouse, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of such other spouse and to their descendants by right of representation, or if such other spouse leaves neither parent, brother, sister, nor descendant of a deceased brother or sister, such portion of the estate goes to the next of kin of such other spouse in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

Comment. The first paragraph of former Section 296.4 is superseded by Section 110.030. The second paragraph is superseded by [].

§ 296.41. Proceedings to determine simultaneous death

When it is claimed that, in accordance with the provisions of this chapter, any persons have died under circumstances where there is no sufficient evidence that they have died otherwise than simultaneously, the executor or administrator of any such person, or any other person interested in the estate of any such person, may file a petition, in the estate proceeding where he received his appointment, or in which he claims an interest, seeking to have it determined that such persons died under circumstances where there is no sufficient evidence that they died otherwise than simultaneously. The clerk shall set the petition for hearing by the court and cause notice thereof to be personally served at least 10 days before the date of the hearing upon the executor or administrator of each other person claimed to have so died. If the representative of any such other person is also the petitioner then, in lieu of personal service upon him, such notice 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 hearing.

Comment. The first sentence of former Section 296.41 is superseded by Sections 114.510, 114.520, and 114.530. The remainder of former Section 296.41 is superseded by Section 114.540.

§ 296.42. Proceeding by executor or administrator to determine simultaneous death

At the time appointed, the court, upon proof that due notice of the hearing has been given, shall proceed to hear the petition and any objections thereto that may have been filed or presented; and if, after a full hearing, the court is satisfied that the named persons are dead and that there is no sufficient evidence that they died other than simultaneously, it shall make an order to that effect. If the court is satisfied that the named persons are dead and that they did not die simultaneously then the court shall make an order setting forth the order in which such persons died. Such order when it becomes final shall be a binding determination of the facts therein ~~set forth~~ and conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through or under any such deceased persons. The probate court which first acquires jurisdiction under Section 296.41 shall have exclusive jurisdiction to determine, by its order, that there is no sufficient evidence that the named persons died otherwise than simultaneously or to determine the order in which the named persons died.

Comment. The portion of the first sentence of former Section 296.42 relating to proof of giving of notice is superseded by the last sentence

of Section 114.540. The remainder of the first sentence and the second and third sentences are superseded by Section 114.550. The substance of the last sentence is continued in subdivision (b) of Section 114.530.

§ 296.5. Prospective effect of chapter

This chapter shall not apply to the distribution of the property of a person who has died before it takes effect.

Comment. Former Section 296.5 is not continued.

§ 296.6. Inapplicability of chapter where provision made for different distribution

This chapter shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this chapter.

Comment. Former Section 296.6 is superseded by Section 114.010.

§ 296.7. Construction to effect uniformity

This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those States which enact it.

Comment. Former Section 296.7 is not continued.

§ 296.8. Short title

This chapter may be cited as the Uniform Simultaneous Death Act.

Comment. Former Section 296.8 is not continued.