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120 Hours Until the Consistent Treatment of Simultaneous Death Under the California Probate Code

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120 HOURS UNTIL THE CONSISTENT TREATMENT OF SIMULTANEOUS DEATH UNDER THE CALIFORNIA PROBATE CODE

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“[A] man’s dying is more the survivors’ affair than his own.”¹

Murders, plagues, accidents, tragedies, and disasters regularly claim multiple lives in one fell blow.² The issue of simultaneous death arises when

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1. THOMAS MANN, *THE MAGIC MOUNTAIN* 532 (H.T. Lowe-Porter trans., Alfred A. Knopf, Inc. 13th ed. 1963) (1927).

2. Advances in modern transportation may increase the frequency with which simultaneous deaths occur. See Stephen M. Arcuri, Note, *Does Simultaneous Really Mean Simultaneous? Interpreting the Uniform Simultaneous Death Act*, 17 QUINNIAC PROB. L.J. 338, 340–41 (2004) (noting the National Conference of Commissioners on Uniform State Laws’ recognition that “instances of simultaneous death [would increase] as a result of the advances in forms of transportation”); Richard W. Harris, *Federal Estate Tax Consequences of Common Disasters or Closely Proximate Deaths*, 47 TAX LAW. 763, 763 (1994); Keith A. Pagano,

there is insufficient evidence that two individuals died otherwise than simultaneously. Imagine, for example, a newly married couple is riding on a train. A tragic accident ensues and the train is derailed. Husband is partially decapitated, and Wife's heart is unceremoniously severed by a metal stake. The first medical expert speculates that Husband survived Wife by at least three minutes. After examining the remains, this expert believes that the partial decapitation left the spinal column intact, and blood flow continued to Husband's brain for several minutes. Conversely, the second medical expert asserts that Wife survived Husband. She believes that both Husband and Wife died immediately after receiving their injuries, but Wife's injuries were incurred later than Husband's, based upon where she was seated in the train car at time of impact. If it is resolved that Wife survived Husband, Wife's heirs will inherit Husband's assets through Wife. And if it is resolved that Husband survived Wife, Husband's heirs will inherit Wife's assets through Husband. As a result, much is at stake for the heirs apparent,³ and litigation ensues.

In the case of closely proximate deaths, the legal issue that must be resolved is the order of death. Irrebuttable prescription of a particular order of death simplifies resolution of this question of fact. Therefore, many states have adopted arbitrary time periods by which one decedent must survive the other to inherit.⁴ In California, the simultaneous death statutes are asymmetrical. As a result, the devolution of property in such cases will hinge entirely upon the type of estate plan adopted by the decedents.⁵

If the decedent dies intestate, California Probate Code (CPC) section 6403 requires clear and convincing evidence of survival by 120 hours.⁶ CPC section 6211 applies to statutory wills, and adopts the same standard.⁷ CPC section 220 is applicable to those decedents who die with a non-statutory will in place—such as a holographic will or a formally attested will.⁸ This section requires clear and convincing evidence of death, but does not adopt the 120-hour rule.⁹

Note, *Simul et Semel: Estate Planning Principles and the Uniform Simultaneous Death Act's Corresponding Tax Consequences*, 14 QUINNIPIAC PROB. L.J. 449, 449–50 (2000).

3. An heir apparent is defined as “a person who is certain to inherit unless excluded by valid will.” THE LAW DICTIONARY 195 (7th ed. 1997).

4. See Harris, *supra* note 2, at 764–65.

5. See 3 California Probate Practice, § 23.05(2)(b)(i) (LexisNexis Matthew Bender 2009).

6. CAL. PROB. CODE § 6403(a) (West 2010).

7. CAL. PROB. CODE § 6211 (West 2010).

8. See CAL. PROB. CODE § 220 (West 2010).

9. *Id.*

The same policies that prompted the California Legislature to adopt the 120-hour rule in some instances can be argued to support the 120-hour rule in other instances. A more compelling argument in favor of legislative symmetry, however, is the fact that inheritance should not turn merely upon the testamentary instrument—or lack thereof—selected by the decedent. The present inconsistency has little or no detrimental effect upon a decedent who retains counsel to draft his testamentary instruments, while the self-represented decedent is adversely affected.

This Article proposes that the 120-hour rule be codified as a default rule, applying to all instruments in lieu of a provision to the contrary. Section I considers the evolution of the California simultaneous death statutes. The inconsistencies in the California statute are considered in Section II, and weighed against a broader normative standard. Section III sets forth the proposal that the 120-hour rule be consistently adopted through the CPC as the standard default rule, and counters criticisms.

I. AN OVERVIEW OF SIMULTANEOUS DEATH¹⁰ IN CALIFORNIA

A. *Overview of Simultaneous Death*

Rapid mass transportation, natural disasters, and multiple homicides¹¹ are common situations in which a decedent and his heir apparent will perish without clear evidence as to the order of death.¹² Order of death is the question raised by the closely proximate deaths of the decedent and his heir ap-

10. The term “simultaneous death” is a misnomer, since the two individuals may not have died simultaneously. In this Article, the term is used to indicate a scenario in which the two individuals are known to have died at approximately the same time, but the order of their death is uncertain.

11. One multiple murder case occurred in Woodstock, Illinois, when Richard Church allegedly brutally beat and stabbed his former girlfriend’s parents and attacked the girlfriend and her younger brother. Marja Mills & Nancy Ryan, *New Clue in Woodstock Slayings: 2 NIU Students Report Seeing Suspect Richard Church*, CHI. TRIB., Sept. 13, 1989, at D6. The coroner’s office determined that the parents died within a minute of each other. *Id.* Due to the close proximity of their deaths, a simultaneous death issue arose as to whose heirs should get the proceeds of a \$360,000 life insurance policy. *Id.* Based on their wills, if the mother had been deemed to have survived, the money would go to her estate and the children would inherit the proceeds. *Id.* However, based on the coroner’s report, the father was deemed to have survived the mother by one minute; therefore, the proceeds were to go to his father, recently deceased. *Id.* Fortunately, the family members negotiated the disbursement of these funds and ensured the children were provided for; however, this is not always the case. Mills & Ryan, *supra*. Newspapers across the country are inundated with stories of murders and other types of incidents where multiple deaths occur within close proximity of each other.

12. Perhaps there are no surviving eyewitnesses to attest to order of death, or alternatively, the nature of the disaster or accident leaves the order of death in question.

parent. Much hinges on the answer to the question. Order of death will ultimately determine if the devolution and distribution of assets will flow from the decedent through his heir apparent, who is also now deceased, to the beneficiaries of his heir apparent—or alternatively, if inheritance will flow from the decedent directly to his heirs, bypassing the heir apparent entirely.¹³ This is significant, in that the average decedent would prefer to leave property to his heirs, rather than the beneficiaries of his heir apparent.

The order of death is a question of fact.¹⁴ Advancements in medical science and technology sometimes blur where the line should be drawn between life and death.¹⁵ Medical experts often offer contradictory opinions on the precise time of death,¹⁶ wielding sanguinary medical evidence, and fueling protracted litigation.¹⁷ When deaths occur within a short period of time,¹⁸ determination of order of death may be nothing short of speculative.¹⁹

13. See generally David Polin, *Proof of Survivorship of Common Disaster*, 56 AM. JUR. PROOF OF FACTS 3D 255, § 3 (2009).

14. David W. Meyers, *Time of Death: Medicolegal Considerations*, 16 AM. JUR. PROOF OF FACTS 2D § 11 (2008).

15. Even the definition of death remains somewhat ambiguous. Some courts have used Black's Law Dictionary's definition of death. See, e.g., *In re Estate of Schmidt*, 67 Cal. Rptr. 847, 854 (Ct. App. 1968) (holding the wife had survived her husband by ten to fifteen minutes on evidence of her moaning and breathing through the application of Black's Law Dictionary definition, which focuses on "the total stoppage of the circulation of the blood and [a] cessation of the animal and vital functions [consequent thereon] such as respiration, . . . pulsation," etc.). Other courts have resorted to signals of death which may contradict one another such as receptivity—or lack of—to painful stimuli, lack of movement or breathing for at least an hour, EEG readings, and hypothermia. See *In re Haymer*, 450 N.E.2d 940, 945 n.9 (Ill. App. Ct. 1983). When cases turn on the determination of time of death and the definition is not standard, the outcome of such cases may rest solely on the judge hearing the case. See, e.g., *Smith v. Smith*, 317 S.W.2d 275, 282 (Ark. 1958). One such case involved a husband and wife who were killed in a common accident. *Id.* at 276. The husband was dead and unresponsive to resuscitation while machines supported the wife for seventeen days. *Id.* The case turned on whether the wife had simultaneously died with the husband or whether her coma state was enough to deem that she survived him by seventeen days. See *id.* at 277. The court decided that the fact she was breathing, albeit with the assistance of machines, was sufficient to support a finding that she survived the husband. See *id.* at 276, 282.

16. Polin, *supra* note 14, § 37.

17. See Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1095 n.24, 1149 (1992).

18. As an interesting side note, two new studies have found a "bereavement effect" in which close individuals die within short periods of time of each other due to factors such as emotional attachment and shared environments, with elderly couples most at risk of simultaneous deaths. See generally Chris Emery, *Science Seeks Explanations; Shared Emotions and Environments Can Contribute to Simultaneous Deaths*, BALT. SUN, July 30, 2006, at A16.

19. See Halbach & Waggoner, *supra* note 17, at 1094 ("Too often, proof of survival, even survival by only an instant, became impossible in such cases.").

At common law, in simultaneous death scenarios, heirs were expected to prove survivorship by whatever means available.²⁰ When it was not possible to establish order of death, decedents were treated as having died at the same moment in time, and property was distributed accordingly.²¹ Upon a finding of instantaneous death, the share that would have gone to the beneficiary—now deceased—was deemed to have lapsed and either passed to those mentioned in the residuary clause of a will, or passed through intestacy to the heirs of the decedent.²² To bring efficiency to this area of the law, several state legislatures attempted to resolve order of death through the use of arbitrary presumptions.²³

Irrebuttable prescription of a particular order of death simplifies problems created by indeterminable death order, such as double administration, conflict, and litigation.²⁴ When there is insufficient evidence of order of death, approximately twenty-one states have incorporated a 120-hour survival requirement into their statutes—requiring that an heir apparent survive the decedent by 120 hours to inherit from the decedent.²⁵ California is one such state.²⁶

B. *Governing Statutes in California*

A valid will in California may come in one of three forms: An attested will, a statutory will, or a holographic will.²⁷ California has adopted a 120-hour rule for both intestacy and statutory wills.²⁸ California Probate Code section 6403 governs intestacy and provides a bright-line workable stan-

20. Harris, *supra* note 2, at 765.

21. *Id.* (citing *In re Estate of Conover*, 259 N.Y.S.2d 618, 621 (N.Y. Sup. Ct. 1965)).

22. See generally THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953).

23. Harris, *supra* note 2, at 765–66 (explaining that presumptions included “‘the younger person survives the older,’ or ‘the male survives the female,’ or that a ‘parent survives a minor child or infant’”).

24. Mark A. Lester, *Identifying and Solving Selected Problems in Probate Administration*, 15765 NAT’L BUS. INST. 47, 75 (2005).

25. Harris, *supra* note 2, at 763–64.

26. See CAL. PROB. CODE §§ 6403, 6211 (West 2010).

27. CAL. PROB. CODE § 6110 (West 2010) (attested will requirements); CAL. PROB. CODE § 6111 (West 2010) (holographic will requirements); CAL. PROB. CODE § 6200 (West 2010) (statutory will requirements); see also 14 WITKIN, SUMMARY OF CALIFORNIA LAW, WILLS AND PROBATE § 111 (10th ed. 2005) (discussing attested and holographic wills); *Id.* § 115 (discussing statutory will requirements).

28. CAL. PROB. CODE §§ 6403, 6211.

dard.²⁹ In order to take an intestate share, the deceased beneficiary's estate must show by clear and convincing evidence that the beneficiary survived the intestate decedent by at least 120 hours.³⁰ Failure to meet this time requirement results in the beneficiary being treated as predeceasing the decedent, unless the treatment would cause the property to escheat to the state.³¹ The 120-hour rule was adopted for intestacy to protect married couples with children from prior relationships who die simultaneously.³² A similar provision protects those who use statutory wills pursuant to California Probate Code section 6211, as long as specific, standard language is used in the will.³³

California Probate Code section 220 is the default rule governing simultaneous death and applies to formally attested and holographic wills.³⁴ Section 220 requires that the beneficiary show survival by clear and convincing evidence.³⁵ If order of death cannot be determined by clear and convincing evidence, section 220 prescribes that each party will be treated as if that party predeceased the other.³⁶ A beneficiary may take under the will as long as there is clear and convincing evidence of survival by one breath, as no 120-hour limitation is incorporated into this statute.³⁷ Unless the beneficiary's

29. See CAL. PROB. CODE § 6403(a) (intestacy standards); CAL. PROB. CODE § 6211 (statutory will standards).

30. CAL. PROB. CODE § 6403(a).

31. CAL. PROB. CODE § 6211.

32. See *Recommendation Relating to Simultaneous Deaths*, 17 CAL. L. REVISION COMMISSION REP. 443, 447 (1984).

33. See CAL. PROB. CODE § 6211. The 120-hour rule applies in a statutory will provided that the language contains either the phrase "if living" or who "survives me," and failure to survive will similarly cause the gift to lapse and return to the estate of the deceased testator. *Id.* The statutory will form cannot have words crossed out, and all provisions provide "survive [sic] me." CAL. PROB. CODE § 6240 (West 2010). The accompanying instructions advise:

A person must survive you by 120 hours to take a gift under this Will. If that person does not, then the gift fails and goes with the rest of your assets. If the person who does not survive you is a relative of yours or your spouse, then certain assets may go to the relative's descendants.

Id.

34. See CAL. PROB. CODE §§ 220, 6111 (West 2010).

35. CAL. PROB. CODE § 220. The clear and convincing standard has been interpreted as "clear, explicitly and unequivocal;" "so clear as to leave no substantial doubt;" and "sufficiently strong to commend the unhesitating assents of every reasonable mind." Lester, *supra* note 24, at 76 (citing *In re Angelia P.*, 623 P.2d 198 (Cal. 1981), *superseded by statute*, WELF. & INST. § 366.26, as recognized in *In re Cody W.*, 36 Cal. Rptr. 2d 848 (Ct. App. 1994) and cases cited therein).

36. CAL. PROB. CODE § 220.

37. *In re Estate of Schmidt*, 67 Cal. Rptr. 847, 852 (Ct. App. 1968) ("If the burden of proof is met, survival by one second is enough to make the statute inapplicable.") (citing *In re Estate of Di Bella*, 100 N.Y.S.2d 763, 765 (Surr. Ct. 1950)). Although it seems drastic, courts

estate can sufficiently prove survival or the will explicitly provides a contrary presumption, the testator will be presumed to have outlived the named beneficiary.³⁸ If the beneficiary's estate fails to show survival by clear and convincing evidence, the person asserting survivorship has failed to meet the burden of proof and the property lapses, returning to the testator's estate.³⁹

C. *The Model Uniform Code and the Uniform Simultaneous Death Act*

The simultaneous death provisions in the California Probate Code have been adapted from the Model Uniform Probate Code and the Uniform Simultaneous Death Act (USDA),⁴⁰ both of which are "model codes" offering uniform rules that states may adopt in whole, part, or not at all.⁴¹

The USDA was created in response to various cases in which the need to determine the order of death became apparent.⁴² To replace "the former arbitrary and complicated presumptions of survivorship with effective, workable,

have upheld survival by seconds. *See In re Estate of Rowley*, 65 Cal. Rptr. 139, 141, 143 (Ct. App. 1967) (court held that wife had survived the husband by 1/150,000 of a second and allowed her estate to take a share under the will rather than have it pass through the will's residuary clause).

38. *See* LAWRENCE P. KELLER, *WILLS: SIMULTANEOUS DEATH STATUTORY PROVISIONS*, app. K (2009).

39. Lester, *supra* note 24, at 79.

40. *See* Harris, *supra* note 2, at 763–64. The USDA was created in 1940 and adopted, at least in part, by forty-six states and the District of Columbia by 1994. *Id.* at 763. The Act sought to simplify the probate issues that surround cases of simultaneous death and establish the order of death in a manner consistent with most testators' intentions. *See id.*; Nancy G. Henderson, *Drafting Dispositive Provisions in Wills (Part 2)*, *PRAC. LAW.* July 1997 at 15, 29 [hereinafter Henderson, *Drafting Dispositive Provisions*].

41. For an overview of the adoption of the Uniform Probate code by state see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 *ALB. L. REV.* 891, 900 (1992).

42. *See, e.g.*, *Janus v. Tarasewicz*, 482 N.E.2d 418, 418 (Ill. App. Ct. 1985). Stanley and Theresa, husband and wife, returned from their honeymoon to find that Stanley's brother died from undetermined causes. *Id.* at 419. While the family gathered at Stanley's brother's house to mourn, both Stanley and Theresa unknowingly ingested the same Tylenol—laced with cyanide—that had been ingested by Stanley's brother. *Id.* The case centered on the determination of the order of death of Stanley and Theresa for the distribution of Stanley's life insurance policy, which named his wife as the primary beneficiary and his mother as the contingent beneficiary. *Id.* In disregard of Stanley's obvious intent, the court ultimately found that Theresa had survived Stanley, and the insurance proceeds flowed through her to her family. *Id.* at 424. The trial included contradictory evidence of various experts as to Theresa's survival. *Janus*, 482 N.E.2d at 423. One expert testified that after reviewing her charts, she was brain dead upon arrival to the hospital, while another contended she died several days later. *Id.* The *Janus* case brought nationwide attention to the simultaneous death problem.

and equitable rules,⁴³ the USDA prescribes a fictitious order of death in cases where it is impossible to determine the true order.⁴⁴ In these situations, the estate passes as though each person predeceased the other.⁴⁵ For example, if a husband and wife die in a common accident and the order of death cannot be determined with sufficient evidence, the husband will be treated as predeceasing the wife for the purpose of the disposition of the wife's estate and vice versa for the husband's estate.⁴⁶ When this occurs, the wife's estate no longer passes through the already deceased husband but rather passes to those next in line.⁴⁷ If there is a will, this property will pass to the next person listed as a beneficiary or named in the residuary clause.⁴⁸ In intestacy, this would mean this share of property would go to her heirs instead of passing on to his heirs.⁴⁹

The Uniform Probate Code, prior to 1990, created an arbitrary minimum requirement for survivorship of 120 hours for both wills and intestacy.⁵⁰ This requirement was adopted to protect the average decedent's intent of passing property for the benefit and enjoyment of his heirs.⁵¹ The 120-hour rule permits the property to revert back to the decedent's heirs if the deceased beneficiary is unable to outlive the decedent by 120 hours.⁵² This time requirement effectuates the probable intent of the decedent to pass on property to the closest or named beneficiary without adverse tax consequences, while at the same time balancing the decedent's intent to pass property to his heirs rather than to the already deceased beneficiary's heirs.⁵³

In 1990, the Uniform Probate Code's 120-hour rule was incorporated into the Uniform Simultaneous Death Act, which made the 120-hour rule mandatory for intestacy pursuant to USDA section 2-104.⁵⁴ It also instituted a provision under section 2-702 for wills, life insurance policies, and joint

43. *Azvedo v. Benevolent Soc'y of Cal.*, 270 P.2d 948, 952 (Cal. App. Dep't Super. Ct. 1954) (per curiam).

44. *Harris*, *supra* note 2, at 763; *see also* 14 WITKIN, *supra* note 27, § 288 (describing these situations as unresolvable).

45. *See* UNIF. SIMULTANEOUS DEATH ACT, prefatory note (1993).

46. *See* UNIF. SIMULTANEOUS DEATH ACT § 2.

47. *See* UNIF. SIMULTANEOUS DEATH ACT, prefatory note.

48. *See* UNIF. PROBATE CODE § 2-603(b)(4) (amended 2006).

49. UNIF. PROBATE CODE § 2-103 (amended 2006).

50. Halbach & Waggoner, *supra* note 17, at 1095.

51. *Id.* at 1095-96.

52. *See Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 ("Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival.").

53. Halbach & Waggoner, *supra* note 17, at 1095-96.

54. *Id.* at 1096.

tenancies as a default when there is no provision to the contrary in the document.⁵⁵ These provisions increased the requisite standard of proof for survivorship, requiring proof of survival by 120 hours by clear and convincing evidence.⁵⁶ This 120-hour rule is extended to those who die testate or intestate under the Uniform Probate Code but can be contracted out through contrary express language in a will.⁵⁷ These changes sought to decrease litigation by statutory resolution of close calls by creating a presumption of non-survival.⁵⁸

II. THE EFFECT OF INCONSISTENT LEGISLATION IN CALIFORNIA

The 120-hour rule is not the panacea for conflict and litigation in every instance where two people die within seconds, minutes, or hours of each other, but it is an easily articulated and understood objective standard by which order of death is efficiently resolved.⁵⁹ The 120-hour rule ensures consistent and efficient estate administration, thus protecting the intent of the average testator,⁶⁰ avoiding double administration of estates,⁶¹ and decreasing litigation when the deaths occur within a short period of time.⁶² If a time requirement is inconsistently incorporated into the Code—applying to some estate plans, but not others—several of these policies are frustrated in part or in whole.⁶³

55. *Id.* at 1096 & n.28.

56. *Id.* at 1096–97. The old standard of proof was a preponderance of the evidence.

57. *Id.* at 1094 (“[S]ection 2-702, which applies to wills and other dispositive documents . . . is a rule of construction, or default rule, that yields to a contrary intention.”).

58. Halbach & Waggoner, *supra* note 17, at 1097.

59. *See Recommendation Relating to Simultaneous Deaths, supra* note 32, at 448 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

60. *See id.* (“Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival.”).

61. Henderson, *Drafting Dispositive Provisions, supra* note 40, at 30 (“The primary purpose of requiring a beneficiary to survive a certain period of time after the client’s death is to reduce the likelihood that the property will pass through two administration proceedings to reach the ultimate beneficiaries.”).

62. *Recommendation Relating to Simultaneous Deaths, supra* note 32, at 448 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

63. *See id.* at 449.

A. Holographic Wills

California is one of twenty-eight states⁶⁴ that recognize holographic wills.⁶⁵ Pursuant to California Probate Code section 6111, a holographic will is valid provided that “the signature and . . . material provisions are in the handwriting of the testator,”⁶⁶ and it was executed with the requisite testamentary intent.⁶⁷ A holographic will has very few formal requirements,⁶⁸ providing an estate planning “safe harbor” for those who are unwilling or

64. Other states that recognize holographic wills, with varying requirements, include: Alaska (ALASKA STAT. § 13.12.502(b) (2009)), Arizona (ARIZ. REV. STAT. ANN. § 14-2503 (2009)), Arkansas (ARK. CODE ANN. § 28-25-104 (2009)), Colorado (COLO. REV. STAT. § 15-11-502 (2009)), Hawaii (HAW. REV. STAT. § 560: 2-502 (2009)), Idaho (IDAHO CODE ANN. § 15-2-503 (2010)), Kentucky (KY. REV. STAT. ANN. § 394.040 (West 2009)), Louisiana (LA. CIV. CODE ANN. art. 1575 (2009)), Maine (ME. REV. STAT. ANN. tit. 18-A, § 2-503 (2009)), Maryland (MD. CODE ANN., EST. & TRUSTS § 4-103 (LexisNexis 2009)), Michigan (MICH. COMP. LAWS § 700.2502 (2009)), Mississippi (MISS. CODE ANN. § 91-5-1 (2009)), Montana (MONT. CODE ANN. § 72-2-522 (2009)), Nebraska (NEB. REV. STAT. § 30-2328 (2009)), Nevada (NEV. REV. STAT. § 133.090 (2009)), New Jersey (N.J. STAT. ANN. § 3B:3-3 (West 2009)), New York (N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 2009)), North Carolina (N.C. GEN. STAT. § 31-3.4 (2009)), North Dakota (N.D. CENT. CODE § 30.1-08-02 (2009)), Oklahoma (OKLA. STAT. tit. 84, § 54 (2009)), South Dakota (S.D. CODIFIED LAWS § 29A-2-502 (2009)), Tennessee (TENN. CODE ANN. § 32-1-105 (2009)), Texas (TEX. PROB. CODE ANN. § 60 (Vernon 2009)), Utah (UTAH CODE ANN. § 75-2-502 (2009)), Virginia (VA. CODE ANN. § 64.1-49 (2009)), West Virginia (W. VA. CODE § 41-1-3 (2009)), Wyoming (WYO. STAT. ANN. § 2-6-113 (2009)). Those states that have no statutory provision for holographic wills include: Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. See Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 161 & n.15 (1988). Similarly, the District of Columbia has no statutory provision for holographic wills. See *id.*

65. CAL. PROB. CODE § 6111 (West 2010). A “holographic will” is [a] will that is handwritten by the testator. Such a will is typically unattested. Holographic wills are rooted in the civil-law tradition, having originated in Roman law and having been authorized under the Napoleonic Code. French and Spanish settlers introduced holographic wills in America, primarily in the South and West. Today they are recognized in about half the states.—Also termed *olographic will*.

BLACK’S LAW DICTIONARY 1735–36 (9th ed. 2004).

66. CAL. PROB. CODE § 6111(a). Section 6111(c) allows the statement of testamentary intent to be in the testator’s handwriting or part of a commercially printed will. CAL. PROB. CODE § 6111(c). Section 6111 applies to testators who died on or after January 1, 1985. CAL. PROB. CODE § 6111 cmt.

67. See *In re Estate of Geffene*, 81 Cal. Rptr. 833, 839–40 (Ct. App. 1969) (finding that instructions to attorney for will provisions had the necessary testamentary intent to be admitted to probate). The failure to include a date will not invalidate the will unless there is an issue of testamentary capacity, or it is inconsistent with another will, and order of execution of the documents cannot be determined. CAL. PROB. CODE § 6111(b)(1)–(2).

68. Natale, *supra* note 64, at 160.

unable to satisfy the requirements of a formally attested will.⁶⁹ Holographic wills are a viable alternative for those who are unable to seek the assistance of an attorney,⁷⁰ and by and large, holographs are drafted by unrepresented testators.⁷¹ While the perceived ease of drafting these wills has some benefit, problems often arise when these wills are probated due to the lack of legal guidance.⁷² The convenience of a holographic will may not outweigh the failure of these informal instruments to adequately effectuate the testator's intent, as the drafter may not understand the legal implications of words or omissions in the document.⁷³ The problem of simultaneous death would understandably be overlooked by a layperson drafting a holographic will.⁷⁴ California Probate Code's failure to incorporate a 120-hour rule adversely impacts such a testator—and this impact results primarily from the testator's unrepresented status.⁷⁵

The unrepresented testate decedent will have likely executed either a statutory will or a holographic will. In a simultaneous death scenario, this (likely uninformed) choice will produce an inconsistent result. While the 120-hour standard will apply to a statutory will,⁷⁶ it will not apply to the holographic will.⁷⁷ In the latter circumstance, the share the testator intended for

69. *Id.* at 159–60 & n.9.

70. See Robert P. Kirk, Comment, *The New Holographic Will in California: Has It Outlived Its Usefulness?*, 20 CAL. W. L. REV. 258, 272 (1984); Kathy Kristof, *Document Your Wishes Before Tragedy Strikes*, L.A. TIMES, Apr. 17, 2005, at E3 (“You can take a cocktail napkin at a bar, write down what you want to happen to your assets and sign it, and you are set.” (quoting attorney Bill Abrams)).

71. Donald R. Travers, *Holographic Will*, in CALIFORNIA ESTATE PLANNING, HOLOGRAPHIC WILLS § 5.12 (Robert Denham et al. eds., 2008).

72. Natale, *supra* note 64, at 160.

73. See *id.* at 160 & nn.9–10 (citing *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982)).

74. See Kristof, *supra* note 70 (“Still, a form is preferable because it includes various options you may not think to include” in the holographic will, such as “how to distribute your assets if your spouse should die at the same time as you.”).

75. See *id.*

76. CAL. PROB. CODE § 6211 (West 2010). The 120-hour rule applies in a statutory will provided that the language contains either the phrase “if living” or who “survives me,” and failure to survive will similarly cause the gift to lapse and return to the estate of the deceased testator. *Id.* The statutory will form cannot have words crossed out, and all provisions of the will form include “survive [sic] me.” See CAL. PROB. CODE § 6240 (West 2010). The accompanying instructions advise,

[a] person must survive you by 120 hours to take a gift under this Will. If that person does not, then the gift fails and goes with the rest of your assets. If the person who does not survive you is a relative of yours or your spouse, then certain assets may go to the relative's descendants.

Id.

77. See CAL. PROB. CODE § 6211 (West 2010). Only a clear and convincing evidence standard will be applied. CAL. PROB. CODE § 220 (West 2010).

the beneficiary may pass on to the now-deceased beneficiary's estate rather than to the testator's own heirs.⁷⁸ Presumably, the average testator would prefer to pass the property to his own relatives rather than to a relative of the beneficiary, because the heirs of the beneficiary are receiving a share based on their relation to the beneficiary instead of their relationship to the testator, who is the original owner of the property.⁷⁹

As a practical matter, the clear and convincing evidence standard leads to the "battle of the expert witnesses" arising from conflicting expert opinions on exact times of death with respect to two decedents.⁸⁰ Often the determination of death is one in which experts have to weigh complex definitions of death and analyze factors such as the manner of death, indicators of struggle or suffering, the position of the bodies, differences in body temperatures, signs of rigor mortis and lividity of the skin, condition of the eyes, and differences in the putrefaction or decomposition of the bodies.⁸¹ The interplay between these sometimes contradictory factors is compounded by the fact that only 300,000 out of an average million and a half deaths a year in the United States are investigated by coroners or medical examiners, leaving much of the determination of death to laypeople at the time of death or later by a jury.⁸²

The decision to utilize a holographic will leaves the decedent without the protection of the 120-hour rule. Sadly, the decedent would be protected by the 120-hour rule if they had executed no instrument at all—allowing his property to pass via intestacy. While the 120-hour rule does not eliminate complexities regarding determination of death, it is an efficient approach to ordering survival when mere seconds, minutes, or hours is the yardstick against which a determination must be made.

78. *Id.*

79. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448 ("Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours or even days. They would not want property to pass to one side of the family solely due to an instant of survival.").

80. See Alexander Morgan Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 92–93 (1972) (regarding difficulties in determining death); see also *id.* at 93 n.23 (defining death according to Black's Law Dictionary (citing *Thomas v. Anderson*, 215 P.2d 478, 482 (Cal. Ct. App. 1950))). For an example of the effects of determination of death, see Henry Pierson Curtis, *Medical Examiner on Hot Seat*, ORLANDO SENTINEL, Nov. 8, 2002, at B1 (couple dies in head-on collision and medical examiner originally determines times of deaths to be identical, but later reviews the findings and determines the wife outlived the husband by minutes entitling the wife's heirs to the entire \$250,000 life insurance policy).

81. Elizabeth T. Tsai, Annotation, *Construction, Application, and Effect of Uniform Simultaneous Death Act*, 39 A.L.R.3d 1332, 1339 (1971).

82. *Id.*

B. *Formally Attested Wills*

When planning an estate for a married couple, a competent attorney will address a potential simultaneous death issue in the drafting process⁸³ by incorporating language into the governing testamentary instrument.⁸⁴ It is typical for the will of a husband or a wife to stipulate either that one survived the other in the case of simultaneous death, or alternatively, that one spouse must survive the other by a specified period of time—or will be treated as “predeceased.”⁸⁵

“However, such provisions are rarely used between parents and their children”⁸⁶ More often than not, the document will provide only that property is gifted to a child or beneficiary on the condition that he survive the testator, “otherwise to (an alternative beneficiary).”⁸⁷ The problem with this is obvious. The order of death is not proscribed in the instrument, and as section 220 applies, only the clear and convincing standard will apply to the order of the deaths, without the ease of administration offered by the bright line of a 120-hour rule.⁸⁸

Several problems arise when an attorney fails to include an adequate survivorship clause in the formally attested will because the clause is ambiguous, incomplete, or omitted.⁸⁹ This failure will likely result in a malpractice action filed against the drafting attorney,⁹⁰ and the wronged heir will have standing to sue as a third party beneficiary of the will.⁹¹

83. A common practice guide advises attorneys to include a survivorship provision in a will. Donald R. Travers, *Survivorship and Alternate Disposition*, in CALIFORNIA ESTATE PLANNING § 5.38 (Robert Denham et al. eds., 2008).

84. *See id.*

85. Harris, *supra* note 2, at 766.

86. *Id.*

87. *See id.* at 766–67.

88. CAL. PROB. CODE § 220 (West 2010).

89. For instance, common disaster clauses may not protect the testator when the decedents die in a close proximity of time but because of different events. *See* Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 123 (1991) (“Many wills contain common disaster clauses. . . . [H]owever, the clause does not apply because testators do not die as a result of the same event.”).

90. *Id.* at 110 & n.65, 130 (citing *Ogle v. Fuiten*, 445 N.E.2d 1344, 1346 (Ill. App. Ct. 1983), *aff’d*, 466 N.E.2d 224, 228 (Ill. 1984)); *see also* 4 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 34:12 (2010) (noting that draftsmanship of a will containing errors in the substance of the documents is a common claim for malpractice).

91. *See* Begleiter, *supra* note 89, at 104–05.

In a state such as California,⁹² this omission will almost certainly give rise to malpractice recovery, because every attorney who drafts a will is held to the expertise of a certified specialist.⁹³ In effect, an attorney will be held to the higher standard of care that is imposed upon certified specialists, even if the attorney claims not to be a specialist, and has never held himself out to the public as a specialist, so long as his case is one where the attorney should have recognized the existence of a specialty area and should have referred the case to a specialist.⁹⁴

However, a malpractice action against an unskilled or incompetent attorney is not an adequate remedy in this instance, as the main actor—viz. the decedent—is unable to bear witness and testify.⁹⁵ A malpractice suit is often impossible or impractical when the attorney did not accurately or adequately counsel the decedent about simultaneous death because a malpractice action requires that the decedent's intent be established, and an obvious evidentiary obstacle exists.⁹⁶

Amending an inconsistent statute is clearly a more efficient alternative to a malpractice action. Under current Code provisions, the intestate decedent—who fails to express his wishes regarding the devolution of his estate—is more protected than either the unrepresented decedent who attempts to write his own will, or the decedent who unknowingly retains incompetent

92. The following states offer specialization directly to lawyers: Arizona, California, Florida, Louisiana, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Texas. ABA Standing Committee on Specialization, Sources of Certification, <http://www.abanet.org/legalservices/specialization/source.html> (last visited Feb. 26, 2010). The following states approve specialization programs by state bars or other organizations: Alabama, Idaho, Indiana, Maine, Minnesota, Ohio, Pennsylvania, and Tennessee. *Id.*

93. See 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 20:4 (2010) (discussing the increasing likelihood of malpractice where an attorney undertakes a task in a specialized area of the law and fails to “exercise the degree of skill and knowledge possessed by those attorneys, who practice in that specialty”); see also *Goebel v. Lauderdale*, 263 Cal. Rptr. 275, 276 (Ct. App. 1989) (bankruptcy attorney was sued for failing to inform his client of certain penal code sections); *Day v. Rosenthal*, 217 Cal. Rptr. 89, 104 (Ct. App. 1985) (attorney was sued for failure to discuss tax law consequences with client); *Horne v. Peckham*, 158 Cal. Rptr. 714, 716 (Ct. App. 1979) (general practitioner was sued in connection with drafting *Clifford* trust).

94. Buddy O. Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 86 (1998).

95. In most instances, conversations between the attorney and the decedent will be private and confidential—without witnesses present. If and when a witness is present for such conversations, it may be the spouse or child whose closely proximate death, ironically, gives rise to the simultaneous death issue at the crux of a malpractice action.

96. See *Begleiter*, *supra* note 89, at 110–11.

counsel.⁹⁷ Amending the Code would provide a statutory safety net for the latter decedents.

III. INCONSISTENT LEGISLATION—INDICATES INTENTIONAL OMISSION

In 1980, the California Legislature passed a resolution to have the California Law Revision Commission (CLRC) study probate law and provide recommendations for revisions to the California Probate Code.⁹⁸ The CLRC concluded that the California Legislature needed to supplant the “clear and convincing evidence” evidentiary standard in the California Probate Code with a 120-hour rule.⁹⁹ At the time the study was conducted, at least thirteen states had adopted the same requirement.¹⁰⁰

The CLRC expressed concern about the serious injustice that may arise from the application of the “clear and convincing evidence” standard in cases where a husband and wife each have children from a prior marriage.¹⁰¹ Generally, there was a concern with the inequities that inhere to the devolution of a decedent’s estate hinging upon a mere snapshot in time.¹⁰² The study found that the average person does not want all of his estate to pass to *someone else’s heirs*, as opposed to his own, simply because he had the misfortune of dying five minutes too soon.¹⁰³

The CLRC believed that the 120-hour rule would prove to be more of a panacea than a pitfall, and it should apply as a default standard for both wills and intestacy.¹⁰⁴ They found that it is an efficient rule, that almost entirely eliminates the need for litigation to determine order of death, and yet, it is a brief period of time that will not delay the administration of an estate.¹⁰⁵

When it came time to codify the recommendation of the CLRC, the California Legislature incorporated a 120-hour rule into California Probate Code

97. Intestate decedents are protected by the 120-hour rule in California Probate Code section 6403(a) which is absent from section 220. CAL. PROB. CODE §§ 220, 6403(a) (West 2010).

98. *Recommendation Relating to Non-Probate Transfers*, 15 CAL. L. REVISION COMMISSION REP. 1605, 1607 (1980).

99. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 445.

100. *Id.* at 448 n.3.

101. *Id.* at 447. The number of people with children from different marriages has risen. Averill, *supra* note 41, at 895 & n.19.

102. *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 448.

103. *Id.*

104. *See id.*

105. *Id.*

section 6403,¹⁰⁶ but not into California Probate Code section 220.¹⁰⁷ As a result, the 120-hour rule applied only to intestacy. One can only speculate as to the reasons underlying the partial legislative change, as the legislative history on this issue is scant.¹⁰⁸ A decade later, arguments set before the California Legislature may clarify the hesitancy to extend the rule across the breadth of the California Probate Code.

In 1990, Senate Bill 1775 proposed the application of the 120-hour rule to the California statutory will.¹⁰⁹ The stated purpose for this revision was to distribute property in a “manner most consistent with the decedent’s intentions and to avoid litigation over the precise time of death in common accident cases.”¹¹⁰ Additionally, it was noted that the revision would create consistency between statutory wills and intestate succession.¹¹¹ The drafters of the bill recognized the policy behind the 120-hour rule was just as applicable to statutory wills “since a person executing a statutory will cannot indicate a preference as to the length of time a person must survive him or her in order to be a beneficiary under the will.”¹¹²

106. The Committee’s recommendations were enacted in part through the addition of the 120-hour time requirement for intestacy to California Probate code section 64. See 1989 Cal. Stat. 1818-19.

107. See 1989 Cal. Stat. 1815-26.

108. There is not a lot of legislative history at the time of adoption for this part of Assembly Bill 158. This may have been because there was an unrelated highly controversial part of the bill which pertained to no contest clauses (in terrorem clauses).

109. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary, 1990 Reg. Sess. (Aug. 8, 1990) [hereinafter Assem. Comm. on Judiciary]. Statutory wills were first enacted in California in 1982. See CAL. PROB. CODE § 6240 (West 1990). These wills are designed as an alternative for those who would otherwise die intestate. Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 779 (1993).

110. Cal. Bill Analysis, SB 1775, S. Rules Comm., 1990 Reg. Sess. (Aug. 16, 1990).

111. CAL. LAW REVISION COMM’N, AUTHOR’S STATEMENT, RECOMMENDATION OF S.B. 1775, at 1 (1990).

112. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary, *supra* note 109, at 3. The statutory will is not a flexible instrument, in that it cannot be amended or changed by the testator. CAL. PROB. CODE § 6226(b) (West 2010). Section 6226(b) of the *California Probate Code* provides:

Any additions to or deletions from the California statutory will on the face of the California statutory will form, other than in accordance with the instructions, shall be given effect only where clear and convincing evidence shows that they would effectuate the clear intent of the testator. In the absence of such a showing, the court either may determine that the addition or deletion is ineffective and shall be disregarded, or may determine that all or a portion of the California statutory will is invalid, whichever is more likely to be consistent with the intent of the testator.

Id.

This statutory amendment was not without its opposition, although at best, it can be described as substantively vacuous.¹¹³ The State Bar of California Estate Planning, Trust and Probate Section objected to the extension of the 120-hour rule as it would shift assets to non-intended beneficiaries and result in adverse federal transfer tax consequences.¹¹⁴ The overarching purpose of the probate code is to govern the way in which the decedent's assets are distributed, and almost any change or amendment can be said to directly or indirectly shift property to an unintended beneficiary. This argument, without more, is superfluous as almost any change to the probate code can be objected to on the grounds that it would shift property to non-intended beneficiaries since the entire code's purpose is to determine the distribution of property. Additionally, there is no subsequent discussion as to how the State Bar of California Estate Planning, Trust and Probate Section came to the conclusion that a statutory will drafter would prefer to pass property on through a deceased beneficiary with the result that it is given to non-blood relatives of the deceased. Without any reference to the contrary, it would seem obvious that average testators would rather have their property pass to their relatives than relatives of their spouse if their spouse only managed to survive them by seconds or hours.¹¹⁵ Although tax avoidance is often a concern in estate planning, most decedents would probably prefer to leave their property to their blood relatives than to avoid generation transfer skipping taxes, and these taxes often apply to larger estates, which presumably would not be using a statutory will.¹¹⁶

With regard to Senate Bill 1775, the CLRC found that the same policies that justified the earlier adoption of the 120-hour rule for intestacy justified its present extension to statutory wills; intestate succession is akin to a statu-

113. See Memorandum from Maurine C. Padden, Legislative Counsel, Cal. Bankers Ass'n on Study L-3022-Access to Decedent's Safe Deposit Box, to Bill Lockyer, Cal. State Sen. 1 (June 18, 1990).

114. Cal. Bill Analysis, SB 1775, Assem. Comm. on Judiciary Republican Analysis, 1990 Reg. Sess. (Aug. 14, 1990) [hereinafter Republican Analysis].

115. *Recommendation Relating to Simultaneous Deaths*, supra note 32, at 448. "Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival." *Id.*

116. The Generation Skipping Tax (GST) applies when a gift skips a generation, going from grandparent to grandchild. Sandy Kasten, *Tax Considerations in Estate Planning*, in COMPLETE PLANS FOR SMALL AND MID-SIZE ESTATES § 3.50, 100-01 (2006). The gift is viewed as going from the parent to the child and then to the grandchild; and by doing so, imposes a transfer tax at each generation. *Id.* However, this tax often only applies to larger estates because of a GST tax exemption for estates smaller than \$2,000,000 in 2006. *Id.*

tory will for those who have failed to execute any type of will.¹¹⁷ However, the CLRC changed its position—albeit quietly—with regard to incorporation of the 120-hour rule into California Probate Code section 220,¹¹⁸ which as a practical matter, would extend the 120-hour rule to holographic wills and formally attested wills. In a footnote, the CLRC expressed that the 120-hour rule is superfluous for non-statutory wills, noting that

[w]hen a will is drafted for a testator, the person drafting the will can include or omit a survival requirement for beneficiaries of the will, according to the direction of the testator. A 120-hour survival requirement is recommended for a statutory will because the substance of that will is fixed by statute.¹¹⁹

In drawing this conclusion, the CLRC presupposes that every testate decedent has the assistance of competent counsel. As explored earlier in this Article, a survivorship clause may be unknowingly omitted when either the testate decedent drafts his own holographic will, or the decedent is represented by incompetent counsel.¹²⁰

IV. CALIFORNIA'S SOLUTION

The asymmetry in California's Probate Code emerges from the adoption of the 120-hour rule in a piecemeal “estate plan specific” manner—meaning, its application hinges upon the estate plan in effect at the time of the decedent's death. The 120-hour rule is the standard applied when the decedent dies intestate, or testate with a statutory will in effect. Conversely, the 120-hour rule is not applied when the decedent dies testate with a formally attested will or holographic will in effect.

That which makes the 120-hour rule a necessary protection for some decedents, renders it a necessary protection for all decedents. Application of this rule in an estate-plan specific manner leaves unprotected two important groups of decedents: The decedent who writes his own holographic will, and the decedent who unwittingly retained incompetent counsel to execute a formally attested will.

The legislative solution is simple: California Probate Code section 220 must be amended to replace the “clear and convincing evidence” standard

117. *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 CAL. L. REVISION COMMISSION REP. 549, 553 (1989).

118. *See* CAL. PROB. CODE § 220 (West 2010).

119. *Recommendation Relating to Survival Requirement*, *supra* note 117, at 553 n.2.

120. *See supra* Part II.A–B.

with a 120-hour rule. In effect, this will create a default 120-hour rule in California, and repair present legislative inconsistencies that prejudice the self-represented or incompetently represented. Further, section 220 must contain a proviso that a survivorship clause in a will may override the default rule.

A. *Benefits of the 120-Hour Rule*

The 120-hour rule is efficient in a myriad of ways, including decreasing litigation, avoiding double administration, and effectuating the average testator's intent.

This rule imposes an objective—though arbitrary—time period of five days between the two deaths, by which one decedent must survive the other to inherit.¹²¹ Under the “clear and convincing evidence” standard, the devolution of a decedent's estate will hinge upon whether one decedent survived the other by mere seconds or minutes—whereas, the 120-hour rule renders unnecessary expert opinions as to the precise second or minute. It provides an objective “yardstick” allowing deaths to be “ordered” for purposes of inheritance, without a costly battle of expert witnesses and protracted litigation.¹²² Arguably, even with the 120-hour rule, there will be cases where the experts will disagree about whether the time standard has been met. However, fewer cases will hinge upon determinations of mere seconds or minutes.

Further, in cases of closely proximate deaths, the 120-hour rule will allow property to avoid double administration, thereby preserving a greater portion of the probate estate.¹²³ Estate administration is not inexpensive.¹²⁴ In California, probate fees are statutorily predetermined and correlate to the size of the probate estate.¹²⁵ For an estate between \$100,000 and \$1,000,000, probate fees are approximately two percent of the probate estate value plus \$3000 for both the attorney and executor.¹²⁶ In the case of a \$500,000 estate

121. See CAL. PROB. CODE § 6403.

122. See *Recommendation Relating to Simultaneous Deaths*, *supra* note 32, at 447–48 (“The 120-hour survival period would avoid litigation over survival for short periods of time.”).

123. See CAL. PROB. CODE § 6403.

124. See Posting of Jennifer Sawday, *What Does Probate Cost in California?*, to California Estate Planning Practice Blog, http://sawdaydrake.typepad.com/estate_planning/2006/02/what_does_proba.html (last visited Feb. 25, 2010).

125. *Id.*

126. Law Offices of Merwyn J. Miller, *Frequently Asked Questions on Probate and Administration*, http://www.aboutlivingtrusts.com/Estate%20Admin/Estate%20Admin%20Faq.htm#_1_9 (last visited Feb. 26, 2010) [hereinafter *Frequently Asked Questions on Probate and*

that goes through double administration, the attorney and executor, combined, will receive fees totaling \$26,000 through the first probate process.¹²⁷ After these fees are netted, and the property passes to the deceased beneficiary's heirs through the second probate process, the attorney and executor, combined, will receive fees totaling \$24,960.¹²⁸ The fees total \$50,960 for the double administration of this estate, and additional fees may accrue if there are any services provided by the attorney or executor that are beyond the normal services.¹²⁹ Further, this is exclusive of costs of probate or any tax consequences to the estate.¹³⁰

Monetary considerations are not the only disadvantage of double administration of an estate. Probate is a time consuming process, sometimes taking more than a year for each administration.¹³¹ Fewer estates would suffer through double administration if the 120-hour rule were the default statutory position. This is a desirable outcome for most, if not all, estate plans. Conversely, it may be an undesirable outcome for the attorneys reaping a windfall from the fees earned on double administration.

Finally, assuming that Mother and Father—a married couple, each with children from prior marriages—are killed in an automobile accident, the children of Mother will receive all property of both Mother and Father—to the exclusion of Father's children—if they are able to establish that Mother survived Father by mere moments under a “clear and convincing evidence” standard.¹³² The application of the 120-hour rule for intestacy is said to effectuate the average intent of the decedent.¹³³ The average decedent would

Administration]. This is an oversimplified estimate of the calculation of the estate fees provided by an estate attorney. *Id.* The true values are

[f]our percent on the first one hundred thousand dollars (\$100,000), . . . [t]hree percent on the next one hundred thousand dollars (\$100,000), . . . [t]wo percent on the next eight hundred thousand dollars (\$800,000), . . . [o]ne percent on the next nine million dollars (\$9,000,000), . . . [o]ne-half of [one] percent on the next fifteen million dollars (\$15,000,000).

CAL. PROB. CODE § 10810 (West 2010).

127. See Posting of Jennifer Sawday, *Probate Cost*, *supra* note 124. This estimate includes only the attorney and executor fees. *Id.* Additional expenses for this size estate maybe closer to \$28,000. See *id.* (finding the approximate cost to be \$28,035 for an estate of \$515,000).

128. See *id.*

129. See Frequently Asked Questions on Probate and Administration, *supra* note 126.

130. See *id.*

131. Posting of Jennifer Sawday, *What is Probate?*, to California Estate Planning Practice Blog, http://sawdaydrake.typepad.com/estate_planning/2006/07/what_is_probate_2.html (last visited February 24, 2010) (“[P]robate can tie up the property and other estate assets for months and sometimes even more than a year.”).

132. *Recommendations Relating to Simultaneous Deaths*, *supra* note 32, at 447, 447 n.1.

133. See *id.* at 448 (“Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They

rather pass property to his heirs than to the heirs of his beneficiary. In no case is this clearer than when the two decedents have children from different marriages or relationships.¹³⁴

B. *Anticipated Criticisms*

The CLRC suggested that the 120-hour rule was superfluous and unnecessary in non-statutory wills because the drafter could omit or include a survivorship clause at the direction of the testator.¹³⁵ As explored in Section B of Part II, a troubling conundrum lurks at the heart of this conclusion: California authorizes the probate of holographic wills, largely—if not entirely—used by the unrepresented decedent, while simultaneously denying the same protections offered to the unrepresented decedent who opts for intestacy or executes a statutory will.¹³⁶ Further, the CLRC ignores the practical reality of incompetent representation—which may result in an uninformed or unintended omission of a survivorship clause from a professionally drafted will. Malpractice is not always a feasible remedy and is certainly less efficient than a default survivorship rule.

Other critics suggest that the 120-hour rule does not go far enough and the timeframe should be considerably longer.¹³⁷ The longer the survival requirement, the more reliable the approximation of the time of death becomes.¹³⁸ The 120-hour timeframe is concededly arbitrary;¹³⁹ however, it is

would not want property to pass to one side of the family solely due to an instant of survival.”).

134. *See id.* at 447 (“In this type of case, where one person dies soon after another, a serious injustice may result. For example, where a husband and wife who each have children from a former marriage die intestate in an automobile accident, all the community property will pass to the husband’s children if it can be shown that he survived his wife for a fraction of a second.”).

135. *See Recommendation Relating to Survival Requirement, supra* note 117, at 553 n.2.

136. *See supra* Part II.B.

137. Nancy G. Henderson, Henderson & Caverly LLP, Speech Prepared for the National Business Institute: The Basics of Will Drafting 61 (Sept. 20, 2004) (speech outline available at the Nova Law Review) [hereinafter Henderson, Speech] (“Most clients would prefer a longer survivorship period [than 120 hours] to accommodate the possibility of a common disaster which results in the death of the testator and the beneficiary within a relatively short period of time.”).

138. *See Recommendation Relating to Survival Requirement, supra* note 117, at 553 n.2. Unquestionably, it would be easier to determine with greater accuracy whether two people died more than a year apart, or even decades apart, than it would be to determine the deaths within a second or fractions of a second.

139. While it may be argued that twenty days or two days should be used, the time limit is not entirely arbitrary. *See Henderson, Speech, supra* note 137, at 61. For example, ninety days and six-month limits would trigger undesirable consequences, namely a loss of the bene-

simple and easily applied.¹⁴⁰ The 120-hour rule does not interfere with a testator's freedom to include a survivorship clause with a longer timeframe in his will.¹⁴¹ In this instance, the 120-hour rule of California Probate Code section 220 would be overridden by the language of testator's will.

A policy that drives this area of the law is the desire to effectuate the testator's intent.¹⁴² Symmetrical application of the 120-hour rule as a default position clearly approximates the intent of the average testator. In 1990, when the 120-hour rule was extended to statutory wills, the State Bar of California Estate Planning, Trust and Probate Section objected on the grounds that assets would be shifted to non-intended beneficiaries and adverse federal tax consequences would result.¹⁴³ The State Bar Section framed the wrong issue. The issue is not whether assets will flow to a "non-intended beneficiary"—but instead, whether the decedent would prefer that his assets devolve to the heirs of his "intended (deceased) beneficiary." The natural object of the average decedent's affection will be his heirs apparent—and as a matter of policy, it seems that the decedent would prefer that his assets flow to the natural object of his bounty, rather than the natural object of someone else's bounty.

V. CONCLUSION

In death, the California Probate Code does not afford the unrepresented layperson all of the same protections as the represented.¹⁴⁴ The 120-hour rule governs the devolution of assets in a simultaneous death scenario.¹⁴⁵ However, the adoption of the 120-hour rule by the California Legislature has been piecemeal and estate plan specific: Applying to intestacy and statutory wills, but not to non-statutory wills (including formally attested wills and holographic wills).

fit of generation skipping tax and the loss of the marital deduction to avoid estate tax, respectively. *Id.* (“[A] survivorship period of not more than 90 days is permissible for a grandchild to benefit from the generational move-up resulting from the death of a parent for purposes of the generation skipping transfer tax. Further, if a survivorship period of more than six months is imposed upon a surviving spouse's right to inherit, the marital deduction will not be available to shelter the gift to the spouse from estate taxes.”).

140. 14 WITKIN, *supra* note 27, § 288.

141. *See* CAL. PROB. CODE § 221 (West 2010). It is not uncommon for an estate planner to include a survivorship clause ranging from sixty to one hundred twenty days.

142. *See* 96 C.J.S. *Wills* § 831 (2010) (explaining that the cardinal rule for will construction requires the intent of the testator be effectuated so long as it is ascertainable and does not violate law or public policy).

143. Republican Analysis, *supra* note 114, at 1.

144. *See* CAL. PROB. CODE §§ 220, 6403 (West 2010).

145. *See* CAL. PROB. CODE § 6403.

The testator with a non-statutory will is subject to the “clear and convincing evidence” standard of section 220, unless the instrument contains a simultaneous death provision.¹⁴⁶ Absent attorney incompetence or contra-vening testator’s intent, a formally attested, professionally drafted will generally contains a simultaneous death provision. Conversely, holographic wills are usually handwritten by a layperson decedent—and typically fail to contain simultaneous death provisions.

In a simultaneous death scenario, the devolution of a decedent’s estate should not be contingent upon the type of testamentary instrument (or absence thereof) executed by the decedent. Therefore, the 120-hour rule must be consistently applied throughout the California Probate Code, and adopted as a “safety net” when a non-statutory will does not express a contrary intent or standard. The policy rationale of the 120-hour rule, which prevents double administration of the estate and effectuates decedents’ probable testamentary intent, is equally applicable to those who create holographic wills or formally attested wills with insufficient survivorship clauses. The 120-hour rule should be incorporated into the current California Probate Code section 220 and associated code sections, thus creating equal protection for those who draft holographic wills or for testators whose attorney fails to provide a contrary survival provision in their will.

146. See CAL. PROB. CODE § 220.