INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

# SURVIVORSHIP

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## INSTITUTE OF LAW RESEARCH AND REFORM

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## ACKNOWLEDGEMENT

The Institute acknowledges the contribution of Professor M.M. Litman of the Faculty of Law, University of Alberta. Professor Litman undertook the initial research for this project; prepared a draft report; attended meetings of the Board and actively participated in its deliberations. He then drafted this Report. The Institute's Board assumes sole responsibility for the opinions and recommendations contained in this Report. However, Professor Litman wishes it to be recorded that he associates himself with those recommendations.

SURVIVORSHIP

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## PART I. SUMMARY OF REPORT

This report recommends the adoption of a new rule to cover the case in which property is to go to B on A's death and there is doubt which of them died first. The new rule would be that B, the beneficiary, would be deemed to have died first unless it can be proved that he survived A by five days.

The present Alberta Survivorship Act provides that in cases of doubt the older of the two will be deemed to have died first. The property will then go to the estate of the younger. This gives certainty but is arbitrary and can result in the donor's property going to persons other than those whom the donor would prefer it go to. Moreover, presuming an order of death on the basis of seniority can give rise to multiple administration of estate property. There is another problem in that there is doubt whether existing exceptions to the rule that the older is deemed to have died before the younger limit the rule so severely that it is only applicable to a minority of situations.

The solution which this report recommends focuses on what most donors would want to happen. A gift is made to benefit the donee. If the donee dies before receiving it that intention is defeated. If that happens a donor would usually want the property to go under the donor's will and not to the estate of the donee and thus to persons whom the donor has no intention of benefiting. Deeming the beneficiary to have died first will give effect to what most donors would want by channelling the property into the donor's estate and thus to those who would take under the donor's will or intestacy. It will also avoid increased estate administration costs by eliminating multiple

administrations of estate property.

By requiring that the beneficiary survive for five days our recommendation goes one step farther. Even though B survives briefly the donor's intention is defeated and the same rule should apply. The five day period is chosen to cover most cases of common disaster without delaying the administration of estates.

The report recommends the enactment of several exceptions to the five day survivorship requirement. It recommends that the five day period not apply where a statute or instrument manifests an intention to the contrary. It recommends that for probate purposes, if a will designates a substitute for an executor, the first designated executor be deemed to have died first if the deaths of that executor and the testator occur at the same time or in an uncertain sequence. It recommends that the presumption be reversed in the case of the donee of a power of appointment; if the deaths are simultaneous or in an uncertain sequence the donee will be deemed to have outlived the donor.

# PART II. REPORT ON SURVIVORSHIP

## CHAPTER 1. INTRODUCTION

The Survivorship Act[1] furnishes rules for fixing the order of death of persons whose order of death is uncertain. It is necessary to determine order of death because under the law of succession an individual's right to succeed to the property of another person is dependent upon his having survived that other person. With few exceptions, a testamentary gift will lapse or fail if a designated beneficiary does not survive the testator. Similarly, rights to succession of property under an intestacy, to survivorship under a joint tenancy, and to insurance proceeds can be affected by the order in which persons die. Uncertainty as to this order most often arises from common disasters, such as transportation accidents, in which close family members are killed. However, sheer coincidence can also confound the sequencing of death where a testator and a beneficiary have died from different causes and the precise time of death of either or both cannot be ascertained.

This report will first examine and critically evaluate the law of survivorship. Recommendations for reform will then be advanced. This area of law has recently come under close scrutiny in Canada (in Manitoba and British Columbia) where law reformers have done exhaustive reports on the subject. Rather than replicating these detailed studies this report will take a broad policy oriented approach.

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[1] R.S.A. 1980, c. S-31.

# CHAPTER 2. HISTORY OF SURVIVORSHIP LAW

## (A) The Common Law

In most common law cases concerned with an uncertain order of death of two or more persons, courts did not presume an order of death. Rather they required that the order of death be established by evidence. The onus of proof rested with the estate of the heir, named beneficiary or co-tenant who was alleged to have survived the deceased. If, for example, A's will provided that his entire estate was to go to B and A and B died in circumstances which rendered uncertain the order of death the onus of proving that B survived A was on B's estate. In many cases, if not most, the evidence was insufficient to establish this order and, in consequence, the surviving next of kin of A succeeded to his estate. With the exception of a few early authorities, the courts did not expressly presume that the commorientes (literally "those who perish together in a calamity") died simultaneously, although the estates of the various deceased were distributed as if their deaths had in fact occurred simultaneously. The result was that the estate of each decedent would pass to his surviving heirs rather than to the surviving heirs of the decedent's beneficiary; utilizing the previous example, to A's surviving heirs rather than B's surviving heirs. This result would generally be viewed as a desirable one by modern reformers of the law of survivorship, though there appears to be no evidence whatever that the common law developed with this goal in mind. The application of the common law to commorientes who held property as joint tenants gave rise to the equitable result of the surviving heirs of the

deceased joint tenants themselves holding as joint tenants.[2]

Occasionally, the application of the common law rule produced unfortunate results. The common law operated mischievously, for example, in the not uncommon situation where each spouse, in reciprocal wills, left his property to the other and, in the alternative, in the event that the other spouse died first, to a common beneficiary; that is, both wills in effect leaving the property "to my spouse but if he should predecease me to X." If X could not prove that either spouse survived the other there would be an intestacy and X would not receive either estate, notwithstanding the obvious common intention of the will makers that in their absence X should succeed to their property. This was the result in the notorious English case of Wing v. Angrave[3] where a husband and wife died in a drowning accident. The result could have been avoided if the court had made the inference, as it was invited to do, that the husband because of his comparative physical strength had survived his wife. The court's refusal to infer an order of death from the relative robustness of the commorientes was approved on appeal on the basis that any other decision would have been based on "surmise, speculation and guess...."[4]

Determining survivorship by focusing on the nature of the disaster and the relative fitness of the commorientes reflects the approach of civil law systems and some early common law cases. While this approach may be logical it has generally been

[2] Bradshaw v. Toulmin (1784) Dick. 633, 21 E.R. 417.

[3] (1866) 8 H.L.C. 183, 11 E.R. 397.

[4] Underwood v. Wing (1855) 4 DeG. M & G 633 at 657 (per Wightman J.), 43 E.R. 644.

regarded as being, at best, of limited utility. As at least one judge has recognized, comparative robustness could not realistically be said to improve one's chances of surviving numerous, if not most, modern common disasters arising out of transportation accidents.[5]

Courts, occasionally, though not consistently, also made inferences as to order of death by sifting though technical medical testimony. In Re Warwicker[6] the order of death of a husband and wife was at issue. Both had drowned in a common disaster. By will, each had left their estate to the other; each had also provided that in the event the other died first their estates were to go to their adopted son. The court inferred from conflicting medical testimony that the husband had survived his wife. As a result the couple's adopted child, who would not have benefited on an intestacy, inherited both estates, and the result in Wing v. Angrave was avoided.

The impetus for legislative reform of the common law stemmed from the recognition of two of its principal defects. First, the common law yielded unacceptable results in cases like Wing v. Angrave[7] where a particular person was designated as an alternate beneficiary in reciprocal wills if the principal beneficiary failed to survive the decedent. Secondly, it was felt that the common law promoted litigation since the central issue in survivorship cases was one of fact. The willingness of

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[5] Bennett v. Peattie (1925), 57 O.L.R. 233 at 240 (Ont. C.A., per Middleton J.A. where he specifically refers to railway accidents).

[6] [1936] O.W.N. 329, O.R. 379.

[7] Supra note 3.

some judges to base decisions about the order of survivorship upon tenuous possibilities certainly provided an incentive to litigate. As the distinguished editor of the Canadian Bar Review, Cecil A. Wright observed

> In the present state of the law in the common law provinces in Canada, this problem is one which not only seems destined to produce litigation, and thus places a strain on the estates involved, but such litigation itself will be based on an array of flimsy opinion evidence on which courts will be asked to make a decision of fact in situations that are all but impossible of determination. That some courts will be prone to act in such situations in accordance with their sympathies in order to reach a fair result is natural, and in no way reflects on the judicial process. On the other hand, some courts will refuse to enter into what is at best mere guesswork, and this regardless of harsh results.[8]

In several cases courts expressed their discomfort with the common law and openly called for reform.[9]

(B) Survivorship Legislation

(1) First Generation Statutes

(a) English Law of Property Act, 1925

The "first generation" of survivorship legislation provided that in the event of uncertainty as to the order of death of two or more persons, death shall be presumed to have occurred in order of seniority with the younger surviving the elder (hereafter referred to as "the seniority presumption"). Such a provision was first enacted in Section 184 of the English Law of

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[8] "Case & Comment" (1936) 14 Canadian Bar Review, 503 at 504.

[9] See for example Middleton J.A.'s comments in Bennett v. Peattie, supra note 5 at 240.

Property Act.[10] This approach solved the Wing v. Angrave problem because it eliminated the only possible finding that could deprive the alternate beneficiary of reciprocal wills of his right of succession--simultaneous death of the testator and testatrix. It was argued in the English case of Hickman v. Percy[11] that multiple deaths could occur simultaneously and where this inference could be made the statutory presumption would not apply because there would be no uncertainty to resolve. This argument prevailed at the Court of Appeal, but it was rejected in the House of Lords on the basis that the inference of contemporaneous death was not justified on the facts. Furthermore, in the view of Lord Porter[12] the presumed order of death in the statute applied even where simultaneous death was proved. He stated:

> I think the section itself is so framed as to exclude the possibility of simultaneous death from ever being recognized as a certainty and to include it amongst the uncertainties. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some *tertium quid* which is neither the one nor the other.

In 1964[13] the Alberta legislature endorsed Lord Porter's theory by expressly extending the statutory presumption to cases where "two or more persons die at the same time."

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[10] 15 & 16 Geo. 5, c. 20.

[11] [1944] Ch. 138 (C.A.), rev'd [1945] A.C. 304 (H.L.).

[12] Id., at 337.

[13] S.A. 1964, c. 91.

Whether the statutory presumption has the effect of diminishing the incentive to litigate is somewhat debatable. Theoretically there is no reason why it should. At common law the right to succeed to another person's property required that survivorship be proved on the balance of probabilities. Similarly, under the statute a claim that an older person survived a younger must also be proved on the balance of probabilities.[14] The suggestion that the statutory regime requires that survivorship be proved with evidence that is more compelling than that required by the civil burden has been discredited.[15] As a matter of practice, courts faced with a presumed statutory order of death may well be less receptive to arguments based upon speculative possibilities and inferences than were the courts who were administering the common law. However there is no "hard" evidence to substantiate this point. The British Columbia Law Reform Commission report suggests that in the circumstances in which the issue of survivorship arises it will be "very difficult" to rebut the statutory presumption "even if" the standard of proof or rebuttal is the civil standard.[16] It is suggested that if there has been a reduction in the incentive to litigate arising from the difficulty of rebutting the statutory presumption this is a function of a change in judicial practice rather than a change in legal theory.

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[14] Re Missirtis [1971] 1 O.R. 303 at 308; Adare v. Fairplay [1955] O.W.N. 950 (Ont.H.C.J.); MacLauchlan v. MacLauchlan (1968), 68 O.L.R. (2d) 556 (B.C.S.C.).

[15] See Peacy v. Hickman [1945] A.C. 304 at 318 (per Lord Simon).

[16] Law Reform Commission of British Columbia, Report on Presumptions of Survivorship, (LRC 56, 1982) at p. 16.

(b) Uniform Acts

The Uniform Acts adopted by the Conference of Commissioners on Uniformity of Legislation in Canada are important for this discussion because its first generation Uniform Acts have been substantially adopted in Alberta. We will discuss the first generation Uniform Acts here, leaving the current second generation Uniform Act for later discussion.

The Conference's first Uniform Act was the Uniform Commorientes Act of 1939 which was adopted by the Alberta Commorientes Act of 1948. The 1939 Uniform Act and the 1948 Alberta Act embodied as their general rule the seniority presumption contained in the 1925 English legislation. However, they subjected this presumption to two exceptions. One related to the disposition of life insurance proceeds where an insured and his beneficiary perished in a common disaster. The Uniform Insurance Act of 1923 provided that if all beneficiaries predeceased the insured, the insurance proceeds should be paid to the estate of the insured. It further provided that in the event of a common disaster it shall be presumed that the beneficiary predeceased the insured. The Uniform Commorientes Act made it clear that the specific Insurance Act presumption prevailed over the seniority presumption.

The second exception to the basic statutory rule (hereafter referred to as the "substitute beneficiary exception") related to instances where a testator provided for the contingency that a beneficiary might predecease or die at the same time as him or die in circumstances rendering uncertain whether the beneficiary survived the testator (hereafter these contingencies will be

referred to as "the survival contingencies"). If the testator's will provided that upon the failure to satisfy any survival contingency a gift over should take effect and if the sequence of the testator's and beneficiary's death was uncertain, the law presumed (under this exception) that the beneficiary predeceased the testator. This presumption was made even though the beneficiary in question may be more elderly than the testator.

It is important to note that the principle underlying both exceptions to the basic statutory presumption is that it is preferable for a decedent's property to go to his surviving heirs rather than the surviving heirs of his deceased beneficiary.

In 1960, the Commissioners on Uniformity completely revised the Uniform Act and renamed it "The Survivorship Act".[17]

(c) Alberta Act

In 1964, The Commorientes Act of Alberta was repealed and replaced by "The Survivorship Act"[18] which was modeled on the 1960 Uniform Act. The current Alberta Survivorship Act does not differ in any significant respect from the 1964 Act. It provides as follows:

SURVIVORSHIP ACT

CHAPTER S-31

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

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[17] Conference of Commissioners on the Uniformity of Legislation in Canada, Proceedings of the Forty-second Annual Meeting (August, 1960) 109, which is reproduced in Appendix A to this report.

[18] S.A. 1964, c. 91.

1. If 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the deaths are, subject to sections 2 and 3, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.

2. When a statute or an instrument contains a provision for the disposition of property operative if a person designated in the statute or instrument

(a) dies before another person,

(b) dies at the same time as another person, or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the statute or instrument provides is deemed to have occurred.

3. When a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator,

(b) dies at the same time as the testator, or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

4. This Act is subject to sections 284 and 376 of the Insurance Act and section 320e of chapter 159 of the Revised Statutes of Alberta, 1955.

This is still a first generation statute based on the presumption that death occurs in the order of seniority. However, it differs from the 1948 Alberta Commorientes Act in several respects. Section 1 expressly extends the presumption to cases of simultaneous death. Most of the other changes purport to enlarge the scope of the exceptions to the presumption.

Section 2 expressly extends the substitute beneficiary exception to circumstances of simultaneous death. Section 3 creates a "substitute personal representative exception" patterned completely on the substitute beneficiary exception. Accordingly, if a 50 year old decedent in his will designates A (a 30 year old) to be his executor and, alternatively, appoints B to administer his estate if A fails to satisfy any of the survival contingencies, then on the death of the decedent and A, whether simultaneously or in circumstances where the order of death is uncertain, the decedent will be deemed to have survived A. In the result B will be viewed as the named executor for probate purposes.

(d) The Statutory Sequence Exception

Undoubtedly, the most important difference between the 1948 Alberta Commorientes Act and present Alberta Survivorship Act is that the existing Act recognizes the order of death contemplated by statutes such as the Insurance Act and, perhaps, the Wills Act and the Intestate Succession Act. Section 2 of the Survivorship Act provides that where another statute contains a provision for the disposition of property upon the failure of a designated person to satisfy any of the survival contingencies, and simultaneous death or death in an uncertain order occurs, then, for the purposes of the property regulated by the statute, the order of death contemplated by the other statute is deemed to have occurred. Hereafter this provision is referred to as the "statutory sequence exception".

The history of the "statutory sequence exception" goes back to the enactment of provincial legislation patterned on the

common disaster provisions of the Uniform Insurance Act and the Uniform Commorientes Act, in Alberta in 1926[19] and 1948[20] respectively. Considerable judicial[21] and academic[22] debate developed over whether the Insurance Act provision was merely a direction to an insurance company to pay the proceeds of an insurance policy to the insured's estate or whether, as well, it determined the actual ownership of the proceeds once paid. If it was the former, the insured's estate would hold the proceeds for the benefit of the beneficiary's estate. If it was the latter, the proceeds would form part of the insured's estate.

The incorporation of the statutory sequence exception into the 1960 Uniform Survivorship Act and the Alberta Commorientes Act of 1964 may have clarified the law in favour of the view that the Insurance Act provision was a true exception to the seniority presumption. The Alberta case of Re Biln[23] and the Saskatchewan case of Prefontaine v. Co-operative Trust Company of Canada [24] so hold.

On the other hand in Re Cane[25] Matas J. did not apply the statutory sequence exception in the Manitoba Act, and as a result

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[19] The Insurance Act S.A. 1926, c. 31 s. 238.

[20] The Commorientes Act S.A. 1948, c. 16.

[21] See for example Re Law [1946] 2 W.W.R. 405, [1946] 2 D.L.R. 378 (B.C.S.C.) and Re Topliss [1957] O.W.N. 513, 10 D.L.R. (2d) 654 (C.A.).

[22] See C.D. Kennedy's comments on Re Law in XXIV, Canadian Bar Review, 720 (1946), and Kenneth B. Potter's comments on Re Carl and Re Biln (1968-69) 7 Alberta Law Review 323.

[23] (1967), 59 W.W.R. 229, 61 O.L.R. (2d) 525 (Alta. S.C.).

[24] [1977] 3 W.W.R. 211 (Sask. Q.B.), per Sirois J.

[25] (1967) 66 D.L.R. (2d) 741 (Man. Q.B.).

the wife's heirs obtained the insurance proceeds through her estate. Matas J. did not ignore the Insurance Act presumption as to order of death. He held that the Insurance Act had the effect of compelling the insurance company to pay the proceeds to the husband's estate as if he had survived his wife. However, he also concluded that once the payment was made "[t]he effect of the Insurance Act is then spent"[26] and the ownership of the proceeds is determined by the seniority presumption of the Suvivorship Act. The judgment in Re Cane does not discuss the statutory sequence exception and it appears not to have been raised in argument. Re Cane is consistent with the preponderance of Canadian authorities which have considered the interplay of insurance and survivorship acts.[27] However, these authorities considered the issue within the context of survivorship acts that did not contain the statutory sequence exception. In light of this exception, it seems clear, that the legislature could not have intended to deny the beneficiary's estate insurance proceeds under the Insurance Act and to return them to his or her estate under the Survivorship Act.[28] This point was made rather emphatically in the Prefontaine[29] case where Sirois J. considered the effect of the statutory sequence exception of the Saskatchewan Survivorship Act. He stated:

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[26] Id., at 746.

[27] See the discussion of these cases of the British Columbia Law Reform Commission's report on the law of survivorship, supra note 16 at pp. 13-14.

[28] This is precisely what McFarlane J. concluded in Re Law, supra note 19 at 408. The Re Law case was also concerned with survivorship legislation that did not contain a statutory sequence exception to the basic seniority presumption.

[29] Supra note 24.

> I find unacceptable and unreasonable, a construction that in respect of the same thing a presumption is declared to have effect at one moment and a moment later to be set aside by another when the first presumption is declared to be the prevailing one in respect of that subject matter.[30]

In 1960 the Superintendents of Insurance recast the provisions of the Uniform Life Insurance Act. The presumption that the beneficiary predeceased the insured was broadened so as to apply where the insured and his beneficiary died simultaneously or in circumstances in which the order of death was uncertain. Previously the presumption had been limited to common disasters. In Alberta, these changes were incorporated into the Insurance Act in 1960 in respect to life insurance[31] and in 1970 in respect to accident and sickness insurance.[32] Today these provisions are found in sections 284 and 376 respectively. In effect, both provide that (in the absence of a contract or declaration to the contrary) where an insured and beneficiary die at the same time or in an unknown order, insurance proceeds are "payable" to the insured's personal representative.[33]

The cases have not applied the statutory sequence exception to a statute other than the Insurance Act. However, it is cast in general terms and in theory applies to any statute.

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30 Id, at 214.

31 See S.A. 1960, c. 49. Section 4 of the Act repeals section 248 and substitutes therefore s. 263 which is the predecessor of the existing section 284 of the Insurance Act.

32 S.A. 1970, c. 59. Section 15 of the Act introduced section 320(m) which is the predecessor of the existing section 376 of the Insurance Act.

33 Both sections 284 and 376 of the Insurance Act incorporate other sections of the Act, ss. 263(1) and 371(1) respectively. These sections specify that payment should be made to the deceased's personal representative.

Therefore, it can be argued that the exception has some unexpected and unintended effects.

The Intestate Succession Act contains numerous provisions setting out to whom an intestate's property is to be disposed in the event that persons designated by the Act have predeceased the intestate. For example, section 5 provides that

> If an intestate dies leaving no surviving spouse or issue, his estate goes to his father and mother in equal shares if both are living, but if either of them is dead the estate goes to the other of them if still living.[34]

This is obviously a "provision for the disposition of an intestate's property operative if a person designated in the statute... dies before another person." Section 2 of the Survivorship Act goes on to say that if the designated person dies simultaneously with the other person or in circumstances in which the order of death is uncertain, "then, for the purpose of that disposition, the case for which the statute or instrument provides is deemed to have occurred." The argument would be that the case provided for is that the intestate dies without a surviving spouse. If this provision comes within the scope of the statutory sequence exception, then on the death of an intestate and his younger wife in a common tragedy (assuming they are childless) the intestate's parents and not, as is widely believed, his spouse's parents would succeed to his property.[35]

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[34] R.S.A. 1980, c. I-9.

[35] The Manitoba Law Reform Commission Report on "The Survivorship Act", (Report #51, 1982) at p. 5 concludes as follows: "[t]he general rule of survivorship operates in an arbitrary manner where intestacies occur. For a childless married couple, it means that the parents of the younger spouse are benefitted to the exclusion of the parents of the

The same argument would apply to the dispositive provisions of section 23 of the Wills Act.[36] That section provides

> Except when a contrary intention appears by will, real or personal property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void
>
> (a) by reason of the death of the devisee or donee in the lifetime of the testator, ...
>
> is included in the residuary devise or bequest, if any, contained in the will.

Accordingly, if a legatee under a will dies at the same time as the testator or in circumstances rendering uncertain the order of their death, notwithstanding that the legatee may be younger than the testator, it can be argued that the legatee will be deemed to have died first.

If in fact the statutory sequence exception in the Survivorship Act is broad enough to incorporate Wills Act and Intestate Succession Act provisions, as it does the Insurance Act provisions, this is extremely significant as the scope for the operation of the presumption based upon seniority would be quite limited. The seniority presumption would still clearly apply to cases of joint tenancy and might apply to cases where a residuary beneficiary and a testator died simultaneously or in an uncertain order.[37] However, it would not be applicable in any other

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[35](cont'd) older spouse.

[36] R.S.A. 1980, c. W-11.

[37] The reason for this is that there exists British Columbia authority to the effect that its lapse provision, which is enacted in precisely the same terms as the Alberta provision, has no application to cases where residuary legatees or devisees predecease the testator. See Re Stuart Bell (1964), 47 W.W.R. 500 (B.C.S.C., Nemetz J.).

circumstances. Having regard to the breadth of the wording of the statutory sequence exception and the policy implications of incorporating under it various provisions of the Wills Act and Intestate Succession Act, it is suggested that courts could take an expansive view of the exception and conclude that these Acts are "statutes" within the meaning of section 2 of the present Survivorship Act. Whether they would do so would have to be determined by litigation. We think that the situation is unsatisfactory. If the legal argument we have outlined is accepted, the Survivorship Act purports to lay down a general rule but the exception makes it almost universally inapplicable to cases it is presumably designed to cover. If the legal argument is not accepted, we think, for reasons discussed below, that the Survivorship Act presumption is based on bad policy.

(2) Second Generation Statutes

The "second generation" of Survivorship legislation adopts a different principle. Instead of a presumption of death in the order of seniority, such legislation is based on the presumption that a beneficiary dies before the donor or testator. Second generation statutes are in force in most American states, and the present Uniform Survivorship Act is a second generation statute. In Canada, Ontario, Manitoba and the Yukon Territories have enacted second generation statutes.

The Alberta Commissioners, in their 1969 report on the interaction of the Survivorship and Insurance Acts, expressed the view that the Uniform Survivorship Act should be changed so that the determination of sequence of death is based on principle

rather than an "arbitrary rule".[38] The seniority presumption certainly operates arbitrarily. It has been suggested[39] that this presumption is based on the statistical probability of a younger person surviving an older person. This makes little sense. The expected lifetime of an older person may be greater than that of a younger person. This is certainly true of a married couple where the wife is the senior, by a year or two, of her husband. This is also true of a couple whose senior spouse is robust and healthy and whose younger spouse is plagued by serious illness. Not only is the premise underlying the seniority presumption frequently suspect, but even in cases where it accurately represents the actuarial probabilities its focus is misplaced. The law of survivorship is concerned with reality and not hypothetical facts. The question in survivorship cases is not who would have outlived the other, but rather who, in fact, survived. The seniority presumption has only a fortuitous relationship with the probabilities of order of death. For example, where commorientes are exposed to hazardous conditions that make great physical demands on them, such as a shipwreck or a planecrash where passengers have survived the initial impact, it is likely, as the seniority presumption suggests, that young robust adult passengers will outlive very elderly passengers. However, the same presumption suggests that the very young, even toddlers, will outlive the young adult. In many circumstances this is quite improbable.

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[38] Proceedings of the Conference of the Commissioner on Uniformity of Legislation in Canada, (1969) 171 at 176 and 178.

[39] See the British Columbia report on Survivorship law, supra note 16 at p. 8 where this theory is criticized.

Not surprisingly, as it is an arbitrary rule, the seniority presumption gives rise to undesirable results. It has the effect of distributing property in a manner inconsistent with the general policy of law as encompassed in the long standing doctrine of lapse. This doctrine generally precludes deceased beneficiaries from succeeding to property. The effect of the lapse rule is to pass property to living heirs of a donor in preference to the heirs of a deceased donee. It is clearly a rule based upon presumed intention and the statutory exceptions to the lapse doctrine[40] reflect circumstances in which it is thought reasonable to assume that a donor would intend the heirs of his deceased beneficiary to succeed in priority to his own living heirs. Though the doctrine of lapse is not in a technical sense undermined by the seniority presumption, as the deceased beneficiary is regarded in law as having survived the donor, this form of survivorship is more technical than real. Accordingly, it is suggested that application of the seniority presumption frequently outflanks the policy basis of the lapse rule.

The history of survivorship legislation is marked by a growing commitment to the principle that the heirs of the donor rather than the heirs of the deceased beneficiary should succeed to property. The substitute beneficiary exception to the seniority presumption found in the earliest forms of Canadian Commorientes legislation is an indication that from the beginning legislators thought it appropriate, in some circumstances, to distribute the decedent's property in accordance with this principle. The statutory sequence exception, depending upon its intended scope signalled a broad commitment to the principle.

[40] See ss. 33-35 the Wills Act, supra note 36.

In 1940, the American Bar Association and the National Conference of Commissioners on Uniform State Laws gave expression to the principle that the decedent's heirs, rather than the heirs of his beneficiaries, should succeed to estate property. They did so by approving the Uniform Simultaneous Death Act,[41] under which the estate of each decedent is disposed of on the basis that he or she survived others who either died at the same time or whose order of death was uncertain. Though it is illogical to conclude that each decedent has survived the other(s), this approach gives rise to the socially desirable result of passing property to living persons rather than to the estates of deceased persons. Not only does this reflect the probable intentions of each decedent but it reduces the transactional costs associated with succession of property because the decedent's property is probated once rather than two or more times. The American Uniform Act was revised in 1953 and has been adopted in all but two states.[42]

In 1971 the Uniform Law Conference of Canada adopted the American approach to the sequencing of death. The full text of the 1971 Survivorship Act is as follows:

> (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

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[41] See the Uniform Simultaneous Death Act, Uniform Laws Annotated, V. 8, 606 reproduced in Appendix B to this report.

[42] Simultaneous Death Act, Uniform Laws Annotated, v. 8A, Cumulative Annual Pocket Part, pp. 66-67.

(2) Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other, and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

This Act was adopted in 1980 by the Yukon Territory[43] and implemented in 1977 with minor changes in Ontario.[44] The Act with substantial revisions also formed the basis of both the recently re-enacted Manitoba Survivorship Act[45] and the suggested reforms to the British Columbia Survivorship Act. In Quebec the policy of distributing property to a decedent's living heirs, rather than to the estate of the deceased beneficiary, has been achieved by the Civil Code presumption that the parties died simultaneously.[46]

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[43] Survivorship Ordinance, O.Y.T. 1980 (1st), c. 31.

[44] See Part IV of the Succession Law Reform Act, R.S.O. 198, c. 488 as am. 1981, c. 66 the relevant sections of which are reproduced in Appendix C to this report.

[45] The Survivorship Act S.M. 1982-83-84, c. 28 (also C.C.S.M. c. 250, which is reproduced in Appendix D to this report.

[46] Quebec Civil Code/Code Civil, art. 603.

The 1971 Uniform Survivorship Act adopted a presumption which is the same as that in the Uniform Insurance Act. It therefore eliminated the conflict between survivorship presumptions found in the Uniform Insurance Act and the former Uniform Survivorship Act. This new harmony, if reflected in Provincial enactments, would undoubtedly eliminate the prospect of a repetition of conflicting case law on the question of distribution of insurance proceeds. If the survivorship presumptions in the two Acts are in accord the only debatable point would be which Act determines the distribution of insurance proceeds, a purely conceptual point. Since under both Acts the beneficiary would be deemed to have predeceased the insured there would be no conflict as to who is entitled to succeed to the proceeds and no practical reason to seek clarification of the conceptual point. Nevertheless, in 1971 when the Uniform Survivorship Act was adopted, the Uniformity Commissioners, as a matter of legislative housekeeping, clarified their intention that the Survivorship Act presumption determine the ultimate disposition of insurance proceeds. They recommended that the uniform survivorship provision in the Insurance Acts of the of the provinces be amended by limiting its application to the administrative obligation of an insurance company to pay out the proceeds of insurance. That revision reads as follows:

> Unless a contract or a declaration otherwise provides where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, for the purpose only of paying out the proceeds of the policy, the insurance money is payable in accordance with subsection .... of section .... as if the beneficiary had predeceased the person whose life is insured.
>
> [Emphasis added]

This provision was adopted by the Council of Yukon Territory in 1980[47] in the same sitting in which it enacted the provisions of the 1971 Uniform Survivorship Act. In Ontario a more cautious approach was utilized to clarify the non-distributive role of the survivorship provisions of its Insurance Act. Section 55(4) of the Ontario Succession Law Reform Act[48] provides:

> The proceeds of a policy of insurance shall be paid in accordance with sections 192 and 272 of the Insurance Act and thereafter this Part applies to their disposition.

The American Uniform Simultaneous Death Act adopts a somewhat similar approach.[49] In Manitoba the Law Reform Commission recommended an enactment closely resembling section 55(4) and in addition recommended that "annotations be added to the relevant provisions of The Insurance Act which clarify that the proposed Survivorship Act need be consulted."[50] The first recommendation was adopted by the Manitoba legislature.[51]

(3) Third Generation Statutes

Under both first and second generation survivorship statutes if it can be proved that an individual survived a decedent for any period of time whatever the survivor's estate will succeed to the decedent's property.[52] "Third generation" statutes go one

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[47] Insurance Ordinance, an Ordinance to Amend, O.Y.T. 1980 (1st), c. 15.

[48] Supra note 44.

[49] Supra note 41 s. 5.

[50] Supra note 35 at p. 14.

[51] Supra note 45, s. 4.

[52] However, the courts have held that a beneficiary who has survived a decedent by as much as forty minutes has died

step beyond the second generation statutes. They provide that a beneficiary does not receive a decedent's property unless it can be proved that he survives the decedent by a stated period (which is usually 5 days).

Under a second generation statute, if a will simply provides for a testator's wife to get his entire estate and his wife survives him by five minutes the testator's estate will pass to his wife's estate and ultimately to her surviving heirs. Assuming the couple is childless the end result may be that the wife's parents, rather than the husband's parents, would inherit the testator's property. Solicitors, in the preparation of wills, can avoid this result through the use of survivorship clauses. These clauses require that beneficiaries survive the decedent for a prescribed period of time and further provide that in the event that the beneficiaries fail to survive the period a designated alternate beneficiary shall succeed to the property. A survey of Edmonton practitioners and trust companies indicated that these clauses are utilized routinely by virtually all practitioners[53] and that the survivorship periods range from ten to thirty days, with the latter period being the most prevalent. These clauses have the effect of increasing the scope for operation of the principle that a decedent's living heirs and not his beneficiary's estate should succeed to property. If a

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[52](cont'd) simultaneously with the decedent for the purpose of a simultaneous death provision contained in the decedent's will. See Re Ernst Estates an unreported Toronto Weekly Court decision decided in May 1975. The Ontario Court of Appeal, without reasons, dismissed the appeal of the trial judgment and leave to appeal to the Supreme Court of Canada was similarly refused.

[53] Several practitioners indicated that they utilized survivorship clauses only in respect to gifts to spouses.

beneficiary cannot enjoy the property left to him it makes little difference whether the reason is that he predeceased the testator by one day or died one day after the testator. In either event it makes sense for the decedent's property to go to an alternate beneficiary designated by him. Another advantage of survivorship clauses is that they can avoid multiple estate administrations. Under the existing seniority presumption, in the absence of survivorship clauses in wills, a common tragedy involving parents and two children can result in the father's property, assuming he is the eldest, being administered on four separate occasions.

In the United States the Uniform Probate Code includes two statutory survivorship clauses. They are limited versions of the clauses typically utilized by Canadian practitioners. Section 2-104 of the Code provides as follows:

> [Requirement That Heir Survive Decedent For 120 Hours.]
>
> Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes 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 its application would result in a taking of intestate estate by the state under Section 2-105. [S. 2-105 provides when property escheats to the state.]

Section 2-601 is a comparable provision which has application to claims for benefits under a will. Its text is as follows:

> [Requirement That Devisee Survive Testator by 120 Hours.]

> A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicity with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.[54]

The commentary in the third working draft of the Uniform Probate Code purports to justify these provisions on the basis that they avoid multiple administrations and "in some instances prevent ... property from passing to persons not desired by the decedent."[55]

In 1967 a report prepared for the Ontario Law Reform Commission recommended that consideration be given to enacting a statutory survivorship clause that would ensure separate distribution of estates of spouses who die "within so many days of each other."[56] This recommendation was not implemented into the survivorship provisions of the 1977 Ontario Succession Law Reform Act and was not referred to in the Ontario Law Reform Commission report leading up to the Act. The 1982 Manitoba Commission report recommended against the enactment of a statutory survivorship clause. It reasoned as follows:

> We have considered whether the Act should have wider application than at present. We are of the view that it should retain its present objective, which is to deem a rule of sequence of deaths in the absence of

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[54] Fourteen American states have adopted the Uniform Probate Code including the survivorship clauses found therein. See the Uniform Probate Code, Uniform Laws Annotated, v. 8, Cumulative Annual Pocket Part, 1.

[55] Third Working Draft Uniform Probate Code With Comments, National Conference of Commissioners on Uniform States Laws (1967), 68.

[56] Ontario Law Reform Commission, Study Prepared By the Family Law Project: Vol. III - Property Subjects (1967) at 567.

clear evidence to the contrary.[57]

We think, however, that the inclusion of a rule sequencing death should not be the objective of survivorship legislation but should rather merely be a mechanism for achieving the real objective, which should be the distribution of property to those persons desired by decedents. First generation survivorship legislation was intended to eliminate the harsh results flowing from the common law rule and to reduce the incentive to litigate. These were useful purposes, but the legislation created new problems. The objective of second generation survivorship legislation is to ensure that a decedent's property passes to those persons desired by the decedent. A provision sequencing death so that beneficiaries are deemed to have predeceased decedents helps to achieve this objective, but proponents of third generation statutes would argue that more can be done.

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[57] Supra note 35 at 7.

## CHAPTER 3. REFORM IN ALBERTA

### (A) The Principles of Reform

Existing survivorship law in Alberta is seriously deficient. The scope for the operation of the seniority presumption is unclear and debatable. The history of survivorship legislation suggests growing discomfort with the arbitrary nature of the presumption. Virtually all legislative amendments to the original Commorientes Act of Alberta have introduced or enlarged exceptions to it. Other jurisdictions have either followed the same pattern or eliminated the presumption altogether. Whatever its scope in Alberta,[58] the seniority presumption operates arbitrarily and causes property to be distributed contrary to the probable intentions of deceased persons. This intention may be gauged by the widespread use of survivorship clauses in professionally drawn wills. It seems that when the issue is brought to the attention of will makers they generally opt for a scheme of distribution in which property passes through their estates rather than the estates of their deceased beneficiaries. The seniority presumption can also have the effect of increasing transaction costs in the administration of estates by causing specific property to be the subject matter of multiple administrations. We think that the existing law should be changed and that the only real question is what form that change should take.

The goals of reform of the law of survivorship should be

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[58] This report suggests that the scope for the operation of the seniority presumption is unclear. See text accompanying notes 35 to 37, supra.

(1) to give effect to the probable intentions of deceased persons by passing their property to their living heirs and not the heirs of their deceased beneficiaries, and

(2) to minimize the transactional costs of administering the estates of persons whose order of death is uncertain or who have died within a short time of each other.

As illustrated above, the particular reform which most often and best achieves these goals is the statutory survivorship clause. The longer the requisite period of survivorship under such a clause, the greater the likelihood that these goals will be achieved. Obviously a five day survivorship clause will not be as effective in preventing a decedent's property from passing through the estate of his deceased beneficiary as would a clause incorporating a longer survivorship period.

Though a statutory survivorship period may be of any length its outermost natural limit is the period of time it takes for an estate to be distributed. By definition, once an estate is actually distributed to a designated beneficiary the problem of the decedent's estate merely passing through the estate of a deceased beneficiary is avoided. It is true that the beneficiary who has actually received estate property may die shortly after receiving it. It is also true that in these circumstances the heir of the deceased beneficiary will in effect succeed to the decedent's property and that this property will, within a short period of time, be the subject matter of a second estate administration. However, it is impractical and wrong in principle to establish rules designed to recapture estate assets that have actually been distributed to a beneficiary. Such rules

could have the effect of encumbering the property itself and undermining the ownership that the decedent intended the beneficiary to have.

Since different considerations apply when an heir or beneficiary dies prior to the distribution of a decedent's estate it might be suggested that a statutory survivorship clause be enacted which would require heirs or beneficiaries to survive until the date of distribution. Such an enactment would be seriously flawed. The pace of administration and the good faith of the administrator would determine beneficial ownership of estate property. This would, in many cases, lead to conflict and inevitably to litigation between beneficiaries and personal representatives.

What is required is a specific survivorship period. The choice of period must be somewhat arbitrary. However, several principles and considerations should be taken into account. The survivorship period should not be so lengthy as to

(1) delay estate administration,

(2) delay the distribution of estate property,

(3) impair the ability of personal representatives to provide interim maintenance to beneficiaries prior to the distribution date,or

(4) create undue stress in beneficiaries.[5']

Moreover, it must be remembered that a survivorship requirement

[5'] The survey of local practitioners indicated that some practitioners were utilizing shorter survivorship periods with a view to reducing "widow anxiety."

renders contingent the interest of beneficiaries. The law generally prefers vested interests. All these factors suggest that the survivorship period be as short as possible. Balancing these factors with the interest of the testator that a more extensive period be adopted requires that a difficult judgment call be made. Though it is tempting to recommend that a 30 day period be adopted on the basis that it is relatively brief and seems to have widespread acceptance, we nevertheless recommend that a five day period be adopted. This reflects a bias in favour of the living over the dead hand of the past, is consistent to a degree with uniformity considerations[40] and most important of all, solves the problem of a common tragedy where several family members are mortally injured and die within a few days of each other. The recommendation that the survivorship period be five days rather than 120 hours as expressed in the American Uniform Probate Code is designed to overcome the uncertainty that will arise where evidence establishes that a beneficiary died on a particular day but does not establish the particular time of day.

Section 22(4) of the Interpretation Act[41] directs how time expressed in days in a statute is to be computed. It provides for the exclusion of the first day and the inclusion of the last day. If the decedent died on Wednesday, the beneficiary would have to survive until the end of Monday in order to inherit.

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[40] The five day survivorship period was also recommended by the British Columbia Commissioners, supra note 16 at 22, and is similar to the American Uniform Probate Code period of 120 hours.

[41] R.S.A. 1980, c. I-7.

While the British Columbia Law Reform Commission has recommended the adoption of a five day survivorship period no Canadian jurisdiction has enacted such an approach. Consequently if Alberta were to enact a five day survivorship rule,conflicts of law issues could easily arise. The British Columbia Law Reform Commission considered these issues and concluded that they were not overly problematic and certainly were not of such a nature so as to justify a departure from the five day survivorship rule. After noting that even apart from a five day rule, conflicts problems may arise (presumably because of existing variation in provincial survivorship law) it reasoned as follows:

> The general principle for choice of law, with respect to succession, is that immovables, such as land, are governed by the law where the land is situated (the lex rei sitae). Movables (personal property) are governed by the law of the deceased's domicile. That is a fairly simple principle to apply. If, in some cases, depending on the governing law, one beneficiary will receive the deceased's personal property and another his real property, that is not necessarily a "bad" result, nor does it justify creating special rules to resolve hypothetical conflicts problems in advance.
>
> In our opinion, a five day rule promotes the fairest result. If, occasionally, that rule will raise conflicts problems, that is not reason enough to depart from it. Uniformity is not worth the price, if that price is unfair or produces unreasonable results. That jurisdictions may differ respecting what constitutes fair results is the reason why absolute uniformity is difficult to achieve.
>
> In any event, since a five day rule would have beneficial results, it is our hope that other jurisdictions will follow British Columbia's example. The possibility of conflicts problems does not alter our conclusion that a five day rule should be enacted.'[2]

We think that the incidence of conflicts problems which

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[2] Supra note 16 at 22.

would arise out of the differences between second and third generation statutes in all probability would be very low. This is because the two types of statutes are substantially compatible. Where the order of death is uncertain both statutory regimes would yield the same result. Similarly where a beneficiary survives a decedent by more than five days both statutory regimes would recognize the beneficiary to have survived the decedent. Only where a beneficiary survives a decedent but dies prior to the expiration of the five day posthumous period would conflicts issues be triggered. In this event, as noted by the British Columbia Law Reform Commission, the applicable conflicts principles are straightforward and workable. Moreover, to the extent that conflicts principles effectuate the survivorship rules of third generation statutes, better and fairer results would ensue than would be the case under the rules of second generation statutes. Finally, it should be noted that many potential conflicts problems which arise in practice in Alberta have a north-south dimension to them involving the law of Alberta and the law of various American jurisdictions. Several, though still the minority, of these latter jurisdictions have adopted third generation order of death statutes.

(B) Principal Reform

Recommendation 1

> We recommend that the Survivorship Act be repealed and replaced by a statute which provides for all purposes affecting legal or beneficial ownership of property a person who is not proved to have survived a decedent owner by 5 days shall be deemed to have predeceased him.

The onus of proof under this regime should be on the claimant and therefore in the absence of sufficient evidence that the claimant survived the deceased for five days it will be deemed that the claimant failed to survive the requisite period.

(C) Modifications & Exceptions to Principal Reform

(1) Contrary Intention

Since the recommended five-day survivorship rule is largely based upon presumed intention it ought to be subject to contrary intention manifested by the insured or decedent. It should be open for a decedent or insured to deal explicitly with simultaneous death or a common disaster or to require that a devisee or beneficiary survive for a period in excess of or even less than the recommended statutory period.

Though typically succession legislation that is based upon presumed intention leaves it to the courts to determine, in any given case, whether contrary intention exists[3] it may be necessary to provide some elaboration of the concept of contrary intention in a re-enacted survivorship statute. A gift to "A but if he predeceases me to B" or simply a gift to "A if he survives me" could easily be interpreted as reflecting sufficient contrary intention to rebut the recommended five-day survivorship requirement. This certainly appears to be the result under the U.S. Probate Code[4] which requires that a beneficiary survive a decedent by 120 hours unless, inter alia, "the will of the decedent contains some language ... requiring that the devisee

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[3] See for example, ss. 22-27 of the Wills Act R.S.A. 1980, c. W-11.

[4] See text at p. 27.

survive the testator...." Applying this Code provision to the hypothetical noted above if A and the testator are victims of a common disaster and A survives the testator for any period of time whatever, A's estate and subsequently A's heirs, would succeed to the testator's property. It is suggested that in almost all cases, despite the express use of the survival contingency, such a distribution would undermine rather than effect testamentary intention. Accordingly, a clause in the testamentary document or insurance designation requiring that a beneficiary survive the decedent should not, in itself, be treated as sufficient evidence of contrary intention. This could be accomplished by providing that in the absence of evidence to the contrary a survivorship requirement imposed by the decedent on a beneficiary shall be interpreted as requiring survivorship for a five-day period. Under such a statutory regime departure from a five-day survivorship requirement would only be justified when the decedent has explicitly (1) rejected the statutory period, (2) established personal order of death rules to deal with simultaneous death or death arising from a common disaster, or (3) provided his own defined survivorship period.

Recommendation 2

> We recommend that Recommendation 1 not apply if the statute or instrument rejects the statutory period, establishes its own order of death rules, or provides a defined survivorship period.

(2) Appointment of Personal Representatives

Although personal representatives are not heavily engaged in administration in the days immediately following the death of a

decedent, some acts of administration, such as payment of bills and the making of funeral arrangements, do take place. It is also conceivable that limitation of action rules will require the personal representative to commence or defend proceedings during this period.[65] Hence the five-day survivorship rule is inappropriate to determine the order of death of a decedent and a named executor. Such a rule could impair the administration of an estate during the early posthumous period. It might be thought that no rule sequencing the death of a decedent and his personal representative is required. After all, if an executor has died prior to being awarded probate, the courts will simply issue letters of administration to another applicant.[66] Still there is some utility in a sequencing provision ordering the death of a decedent and his personal representative if provision has been made for an alternate executor to act if the first appointee has predeceased the testator. This is often done, and effect should be given to such a direction. The current Alberta Survivorship Act and the Uniform Act give effect to such a direction by providing that:

> Where a will contains a provision for a substitute personal representative operative if an executor designated in the will (a) dies before the testator; or (b) dies at the same time as the testator; or (c) dies in circumstances rendering it uncertain which of them survive the other, and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survive the other, then, for the purposes of probate, the case for which

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[65] See the Limitation of Actions Act R.S.A. 1980, L-15, s. 45.

[66] An executor of a sole or last surviving executor of a testator is the executor of the testator. See Ingalls v. Reid (1865), 13 U.C.C. 490 (C.A.) and Re Stephenson (1984), 24 O.R. 395. However, the office of executor will not devolve to the executor's executor where the original executor has not obtained a grant of probate. See s. 22 of the Administration of Estates Act R.S.A. 1980, c. A-1.

the will provides is deemed to have occurred.[17]

Recommendation 3

> We recommend that Recommendation 1 not apply to the appointment by will of a substitute executor.

(3) Joint Tenancies and Gifts to the Survivor of Two or More Beneficiaries for Life

The doctrine of *jus accrescendi* or the right of survivorship vests exclusive ownership in jointly held property in a surviving joint tenant. The five-day survivorship rule should apply to determine the order of death of joint tenants. There is only a technical difference between jointly held property and property belonging to individuals who have provided in their wills, as spouses frequently do, that their estates should pass to the survivor. In principle if property which is regulated by such a mutual dispostion scheme is bound by a five-day survivorship rule so should property that is the subject-matter of a joint tenancy. The existing Alberta Survivorship Act makes no special provision for determining the order of death of joint tenants who have died simultaneously or in an uncertain order. Therefore, when joint tenants die together the youngest is deemed to have survived the other(s). That the heirs of the youngest joint tenant acquire exclusive ownership of jointly held property is unfair and capricious. In these circumstances the seniority presumption compounds the fortuitous basis[18] of ownership of jointly held property. A more equitable solution to the problem created by

[17] Supra note 1, s. 3.

[18] Fortuitous in the sense that survivorship and therefore ownership of jointly held property, is based ultimately on the chance occurrence of order of death.

common death of joint tenants is for the estate of each co-tenant to share equally in the property. The Uniform Act adopts such a solution by providing in section 1(2) that:

> Unless a contrary intention appears, where two or more persons hold legal title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purposes of subsection (1), deemed to have an equal share with the other or with each of the others in that property.[69]

A similar provision has been enacted in Manitoba[70] and is found in the American Uniform Simultaneous Death Act.[71] In British Columbia the Law Reform Commission recommended the enactment of a provision comparable to section 1(2) of the Uniform Act.[72] What is required in Alberta is a provision which on the failure of a joint tenant to survive a co-tenant by five days, thereby converts the tenancy into a tenancy in common.

The application of a five-day survivorship rule could create temporarily financial difficulties for the surviving joint tenant of a joint bank account. This is because the rule could be interpreted as requiring or perhaps framed to require that the bank account be frozen for a period of five days. We believe that suspension of access to a bank account for such a short period would not create any serious hardship. Moreover, any statutory solution to the problem of bank access would be

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[69] Uniform Law Conference of Canada, Uniform Survivorship Act (1971 Proceedings).

[70] Supra note 45, s. 3.

[71] Supra note 41, s. 3.

[72] Supra note 16 at 20.

cumbersome, difficult to administer or deficient in its own right.'[73]

In the British Columbia Law Reform Commission Report on Survivorship separate consideration was given to gifts which took the following form, "to A and B for life, remainder to the survivor." That report recommends that if A and B die together the property be divided equally between the estates of the deceased's beneficiaries. This approach is justified on the basis that "[d]ividing the gift equally between the estates of deceased beneficiaries in circumstances of simultaneous death, when the testator has expressed no preference among them, is an

[73] For example the problem can be overcome by a legislative enactment which authorizes banks upon the personal application of a surviving joint tenant to advance to the survivor funds up to a specified figure. This figure will necessarily be arbitrary, however, $2,000 would seem reasonably generous. The legislation could exempt a total of no more than $2,000 of all or any jointly held bank accounts from the five-day survivorship rule and provide for the application of existing survivorship principles for the amount advanced up to the maximum of $2,000. Problems could arise where several bank accounts are held in joint tenancy. Survivors, particularly where the accounts are situated at different banks, could collect more than their entitlement of $2,000. Problems could also arise when a single account is situate at a bank which is unaware of the death of a co-tenant and permits the survivor to withdraw more than $2,000. The administrative costs of preventing such abuse would seem excessive, especially having regard to its probable incidence and also the probability that a surviving joint tenant will survive the five-day period. However, in the event of an excessive withdrawal in the five-day period by a surviving joint tenant who dies prior to the expiry of five days, the estate of the decedent will have available to it both legal and equitable remedies to effect the restitution. Under such a legislative scheme banks could be provided with immunity from suit for any advance in excess of $2,000 so long as the advance was made without knowledge of its excess. An alternate, less cumbersome method, of overcoming the potential short term cash flow difficulty of a surviving joint tenant is to exempt demand accounts from the five-day survivorship rule and to subject such accounts to the Uniform Act provision. However, under such a scheme, the heirs of a joint tenant who has only just survived his co-tenant may inherit very substantial sums - a possibility which the five-day rule attempts to preclude.

equitable solution."[14] A gift in this form, if it does not in fact create a joint tenancy, is only technically distinguishable from it and therefore upon the common death of the beneficiaries should be treated as a joint tenancy. Hence it is recommended that the provison regulating the distribution of jointly held property be drafted sufficiently broadly so as to encompass a gift to the survivor of two or more beneficiaries who have life interests in the property.

Since the recommended five days survivorship rule for the division of jointly held property is based upon presumed intention, in principle, it ought to be subject to contrary intention. However, the persons creating a joint tenancy and the joint tenants themselves may be different persons and confusion and litigation may arise where some but not all of these persons express an intention to oust the rule. Moreover, the ability to oust the five-day rule could well create probative problems for any surviving joint tenant (or such a tenant's estate) and administrative problems for various institutions including corporate and government offices involved in the registration of title. Since joint owners would still be free to utilize contracts, trusts, and wills to determine what is to be done to their property after their deaths, it is recommended that the statutory survivorship period be applied notwithstanding the expression of an intention to the contrary.

Recommendation 4

We recommend that if

(1) all of the joint tenants of property, or

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[14] Supra note 16 at 19.

(2) all of the beneficiaries to whom a gift is made for life with remainder to one or more of them

fail to survivie their co-tenants or co-beneficiaries by five days, each shall be deemed to have an equal share in the property.

(4) Alternate Donees

A statutory provision that deems a beneficiary who has survived a decedent by less than five days to have predeceased the decedent will be of no assistance in sequencing the deaths of beneficiaries who are required to survive persons other than the decedent in order to take property. For example, if a decedent's will provides that his estate is to go to "B for life, remainder to C if he survives B and if not to D" and B and C, die as commorientes more than five days after the testator's death, such a provision could not be utilized to sequence B and C's deaths. Since it is apparent that the decedent intended D to enjoy the property if C's demise precluded C from doing so it would be consistent with the policy promoted in this report to statutorily require that C survive B by five days.

Recommendation 5

We recommend that the statutory five-day survivorship period be drafted broadly enough so as to apply to beneficiaries who are required to survive persons other than the decedent in order to succeed to property.[75]

[75] If this recommendation were adopted and B, C & D were to die as commorientes more than 5 days after the decedent's death, D's estate would succeed to the property as D's contingent remainder would vest. Vesting would occur because C did not survive B. Whether vesting would occur in favour of D, as it would if D were deemed to have survived C, or D's estate, as it would if D were deemed to have predeceased C, is of no consequence. In the latter event D's contingent remainder in the decedent's estate would, upon his death, pass to his

(5) Powers of Appointment

A power of appointment confers on a person the authority to dispose of the property of another person. Such a power may be conferred by deed or will and exercised by deed or will or either--depending on the terms of the conferring document. The grantor of a power is called a donor and the grantee a donee. The power may give a donee unlimited discretion to determine who the recipients of the property will be - including the donee himself - in which case the power is called a general power. If the class of recipients who may benefit from the exercise of the power is restricted the power is called a special power. The grant to "A for life, remainder to those of his nephews as he may by will appoint" creates a special power of appointment. If the donee of a power fails to exercise his power the power is in default and the property reverts to the donor or his estate, unless the conferring document has made, as it often does, specific provision for beneficiaries to take in default of appointment. A donor may reserve to himself the right to withdraw a power of appointment by specifically including in the conferring document a power of revocation. If a will purports to confer a power of appointment on a donee who has predeceased the

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[75](cont'd) estate and subsequently to his designated beneficiaries or his heirs. See s. 3 of the Wills Act, supra note 36 and In Re Creswell (1883), 24 Ch. D. 102 at 106 and cases cited therein.

A provision similar to the one recommended is found in Uniform s. 2 of the American Simultaneous Death Act, supra note 41. Its introductory words could be utilized in framing the recommended provision. The words read as follows: "If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person ...."

donor the power will lapse or fail.[76]

The application of a five day survivorship rule to powers of appointment where a donee has failed to survive the donor by five days would give rise to undesirable results. Even if the donee has purported to exercise the power of appointment the donee's failure to survive the donor by five days would render the power invalid and the property which is the subject matter of the power of appointment would revert to the donor's estate or into the hands of person entitled in default of appointment. This result runs contrary to the probable intention of donors of most powers of appointment.

Recommendation 6

> We recommend that the re-enacted Survivorship Act contain a provision to the effect that unless a contrary intention appears in a document creating a power of appointment,[77] if the donee of the power of appointment survives the donor for any period whatever or dies simultaneously with the donor or in circumstances where the order of their deaths is uncertain, then for the purpose of the power of appointment the donee shall be deemed to have survived the donor.

A similar statutory solution to the problem created by

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[76] Jones v. Southall (No. 2) (1862) Beau. 31, 55 E.R. 121; Bater, Steadman v.Dicksee [1934] W.N. 94 (C.A.). However, where a donee of the power predeceases the donor a gift over in default of appointment will not lapse. See Nichols v. Haviland (1855) M.J. 504, 69 E.R. 588.

[77] The Manitoba report on survivorship, supra note 35 at 34, discusses contrary intent in the following terms: "A contrary intention would arise, for example, where the donor has granted the donee a revocable power of appointment and the donor has validly revoked that power in his/her will. It would also arise where the power is granted by will but the donor provides for substitutions in the event the donee dies before the donor or dies at the same time.

contemporaneous death of a donor and donee of a power of appointment was recommended by the Manitoba Law Reform Commission.[78]

(6) Insurance Proceeds

There is no reason in principle why succession to insurance proceeds should be governed by different survivorship rules than succession to ordinary property.[79] When a beneficiary has predeceased the insured or died shortly after the insured, subject to contrary intention expressed by the insured, insurance proceeds should pass through the estate of the insured and not through the estate of the deceased's beneficiary. Moreover, multiple administration of insurance proceeds should be avoided. We therefore think that the five-day survivorship rule be drafted so as to apply to insurance proceeds. As was recommended with respect to general estate property, the onus should be on the beneficiary's estate to prove that the beneficiary survived the deceased by the statutory period.

Implementation of this recommendation would require legislative amendment of the simultaneous death provisions, sections 284 and 376, of the Insurance Act.[80] Section 284 presently provides that

> Unless a contract or a declaration otherwise

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[78] Id.

[79] It might be pointed out that statutory anti-lapse rules affect succession to ordinary property but not succession to insurance proceeds. If this difference in the existing state of the law suggests any course of action, it is submitted (see pp.48-49 of the text) that it suggests that the anti-lapse rules be extended to insurance proceeds.

[80] R.S.A. 1980, c. I-5.

> provides, if the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money is payable in accordance with section 263(1) as if the beneficiary had predeceased the person whose life is insured.

Section 376 is virtually identical except it applies to accident insurance and is not limited to life insurance. The amendments of these provisions would mirror the five-day survivorship provisions in the re-enacted Survivorship Act; that is, they would provide that subject to a contract or a declaration to the contrary if a beneficiary failed to survive an insured by five days, for the purposes only of paying out the proceeds of the policy,[81] the insurance money shall be paid out as if the beneficiary predeceased the insured. As noted earlier identical survivorship requirements in the Survivorship Act and the Insurance Act would undoubtedly remove the spectre of a continuation of the somewhat unsettled and conflicting case law on survivorship for the purposes of succeeding to insurance proceeds. As well, having identical provisions in both Acts would allow for simplification of the Survivorship Act by eliminating the need[82] for two existing provisions. Both section 4 of the Survivorship Act which subordinates the Act to the simultaneous death provisions of the Insurance Act[83] and section

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[81] See pages 24-26 of the text which explain the utility of this provision.

[82] Though it can be argued that only one of these provisions, s. 2, is necessary. The existence of the other section, s. 4, seems to arise from an abundance of caution.

[83] The existing s. 4 of the Survivorship Act subjects the Act to sections 284 and 376 of the existing Insurance Act and s. 320(e) of the 1955 Insurance Act, c. 159. Section 320(e) was repealed in 1970 by s. 15, S.A. 1970, c. 59 which was an Act to amend the Alberta Insurance Act. This repeal was not cross-referenced to the Survivorship Act. Even if no

2, the statutory sequence exception would be unnecessary under such a statutory regime.

If a beneficiary of a policy of life insurance survives the insured for a period of less than five days, the application of the five-day survivorship rule to the proceeds of insurance would have the effect of making those proceeds part of the insured's estate. Accordingly, the proceeds would be available to the creditors of the insured. This is not necessarily an undesirable result. The policy of the law is to ensure that insurance proceeds go to beneficiaries clear of claims made by the insured's creditors. However, it has not been the policy of the law to provide the same protection to the heirs of designated beneficiaries. On the other hand, such a lack of protection can result in hardship. For example, if the insured designates his son as a beneficiary with a view to making provision for the son's family, including the son's wife and young children, the ability of creditors to access insurance funds could frustrate the insured's plan and create financial distress for the son's surviving family. This same hardship can arise, of course, where a beneficiary predeceases the insured. The hardship flows form the testamentary doctrine of lapse which is incorporated into the existing Insurance Act in section 263(c). This section provides as follows:

> If a beneficiary predeceases the person whose life is insured and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable.

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[43](cont'd) substantial reform of the existing Survivorship Act is undertaken as a matter of legislative housekeeping the reference to s. 320(e) in s. 4 should be dropped.

> ... (c) If there is no surviving beneficiary, to the insured or his personal representative.

The Wills Act provides anti-lapse rules but these rules only affect succession to ordinary property and not succession to insurance proceeds. We think that the hardship created by the "premature" demise of certain beneficiaries of insurance can be substantially overcome by enacting an anti-lapse provision which is made applicable to insurance proceeds.

Another possible objection to the application of the five-day survivorship rule to insurance proceeds is that conflict of law issues could arise out of the difference between the suggested five-day rule and the order of death provisions of other provinces. Indeed, the mobility of Canadians and the long term nature of life insurance contracts suggest that such issues will likely arise. For example, an Ontario resident may contract for life insurance and later take up residence in Alberta. If the insured and the designated beneficiary under the contract (for example, a spouse) were to die as a result of injuries sustained in an accident, a question as to applicable law might arise. Because of the substantial compatibility between statutes which presently presume that the insured survived the beneficiary (as does the Ontario statute) and the suggested five-day rule, this applicable law question would arise only occasionally. Specifically, it would only arise where the beneficiary survived the insured but did so for a period of less than five days. In this circumstance, Ontario and Alberta law would lead to different conclusions on the question of entitlement to the proceeds and, therefore, the applicable law question would

require resolution. Fortunately, the relevant conflicts of law principles are straight forward and workable. Quite clearly, the law which applies to the contract at the outset will continue to do so.[84] Only if survivorship law can be characterized as procedural or evidentiary would Alberta law be the applicable law. In Re Cohn[85], Uthwatt J. expressly rejected the argument that the law of survivorship is part of the law of evidence. It follows that the insurance industry in other jurisdictions will not have to make any of the minor administrative changes that will be required in Alberta in order to accommodate the five day survivorship rule.

Recommendation 7

We recommend that

(1) the Insurance Act be amended so that subject to a contract or a declaration to the contrary the 5-day survivorship provision would apply to insurance proceeds.

(2) the Insurance Act be amended so as to include an anti-lapse provision which would be applicable to insurance proceeds.

(7) Exclusion of Ultimate Heir

Recommendation 8

We recommend that following the model provision of the American Probate Code, the provisions in the Survivorship Act as

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[84] See Colmanares v. Manfs Life Assur. Co. (1965), 54 D.L.R. (2d) 386 (Ont. C.A.) per MacKay J.A.; Rossanou-Mfrs. Life Insurance Co. Ltd., [1962] 2 All E.R. 214 (Q.B.); James Miller & Partners v. Whitworth Street Estates (Manchester), [1970] 1 All E.R. 796 (H.L.); and Compagnie d.Armement Maratime S.A. v. Compagnie Tunisienne de Navigation S.A., [1971] A.C. 572 at 593, 602-603 (H.L.).

[85] [1945-46] 1 Ch. R. 5 at 7-8 (C.A.).

re-enacted not apply where application would result in the Crown taking on an intestacy under the Ultimate Heir Act.[‘‘]

(8) Transitional Provision

Section 56 of the Ontario Succession Law Reform Act identifies those deaths which will be governed by the new survivorship rules contained in that Act. It provides that its new rules apply to deaths "occurring on or after the 31st day of March 1978." Similarly section 5 of the Manitoba Act provides that "...[i]n respect of the deaths of persons who died before July 1, 1983, survivorship shall be determined as though this Act had not been enacted."

Recommendation 9

We recommend that

(1) the proposed Survivorship Act contain a provision similar to the Ontario provision which limits the application of the new Act to deaths occurring on or after a specified date.

(2) unless it can be proved, on the usual civil standard, that the deaths in question occurred prior to the specified start up date of the new legislation, the survivorship rules under the new Act determine order of death.

Where doubt exists as to the day of death of persons the applicable survivorship rules should be those which most closely approximate the intention of decedents.

(D) Alternate Proposed Reforms

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‘‘ R.S.A. 1980, c. U-1, as am. S.A. 1983, c. D-11.1; 1984, c. 9.

The linchpin of the recommended reform of the Alberta Survivorship Act is the statutory five day survivorship clause. This reform is preferred over the model of reform found in the Uniform Act and adopted by Manitoba and Ontario in which beneficiaries or heirs are presumed to have predeceased decedents. The statutory survivorship clause approach is preferrable because it goes further in both promoting the policies of effectuating testamentary intention and eliminating or reducing the incidence of wasteful multiple administration of estate property. It also extends to non-professional draftsmen of legal documents the benefit of survivorship clauses which are employed extensively by professional draftsmen. Moreover, the statutory survivorship clause approach can be given effect to by legislation that is, at least as workable and straightforward as the Ontario and Manitoba scheme.

If for any reason the statutory survivorship clause approach is unacceptable then the uniform approach enacted in Ontario and Manitoba ought to be adopted. Modifications of the uniform approach would be required to deal with specific situations that call for special treatment such as contrary intention, appointment of personal representatives, joint tenancies, alternate donees, insurance proceeds etc. By and large these modifications are admirably dealt with in the report on survivorship produced by the British Columbia Law Reform Commissioners.

A final alternative is to utilize the structure and content of the existing Survivorship Act and to fine tune this legislation by

(1) inserting a provision deeming the Intestate Succession Act and s. 23 of the Wills Act to be statutes within the statutory sequence exception to the seniority rule, and by otherwise

(2) modifying the existing legislation to overcome deficiencies in the law relating to joint tenancies, alternate donees, insurance etc.

Though this approach would have the advantage of leaving intact an existing statute with which some lawyers and other professionals concerned with succession are familiar, it is the least attractive method of reforming the existing law. The final product of such a reform would be an Act comprised of a series of exceptions to a primary rule--the seniority rule--which is generally viewed as being irrational. It is simply undesirable for legislation to take the form of a primary statutory rule which is made illusory in its operation by universally applicable statutory exceptions. Such a statutory regime could easily lead to confusion in and difficulty of interpretation by members of the Public, the Bar and the Bench.

## CHAPTER 4. SUMMARY OF RECOMMENDATIONS

Recommendation 1

We recommend that the Survivorship Act be repealed and replaced by a statute which provides for all purposes affecting legal or beneficial ownership of property a person who is not proved to have survived a decedent owner by 5 days shall be deemed to have predeceased him.

Recommendation 2

We recommend that Recommendation 1 not apply if the statute or instrument rejects the statutory period, establishes its own order of death rules, or provides a defined survivorship period.

Recommendation 3

We recommend that Recommendation 1 not apply to the appointment by will of a substitute executor.

Recommendation 4

We recommend that if

(1) all of the joint tenants of property, or

(2) all of the beneficiaries to whom a gift is made for life with remainder to one or more of them

fail to survive their co-tenants or co-beneficiaries by five days, each shall be deemed to have an equal share in the property.

Recommendation 5

We recommend that the statutory five-day survivorship period be drafted broadly enough so as to apply to beneficiaries who are required to survive persons other than the decedent in order to succeed to property.

Recommendation 6

We recommend that the re-enacted Survivorship Act contain a provision to the effect that unless a contrary intention appears in a document creating a power of appointment, if the donee of the power of appointment survives the donor for any period whatever or dies simultaneously with the donor or in circumstances where the order of their deaths is uncertain, then for the purpose of the power of appointment the donee shall be deemed to have survived the donor.

Recommendation 7

We recommend that (1) the Insurance Act be amended so that subject to a contract or a declaration to the contrary the 5-day survivorship provision would apply to insurance proceeds.

(2) The Insurance Act be amended so as to include an anti-lapse provision which would be applicable to insurance proceeds.

Recommendation 8

We recommend that following the model provision of the American Probate Code, the provisions in the Survivorship Act as re-enacted not apply where application would result in the Crown taking on an intestacy under the Ultimate Heir Act.

Recommendation 9

We recommend that

(1) the proposed Survivorship Act contain a provision similar to the Ontario provision which limits the application of the new Act to deaths occurring on or after a specified date.

(2) unless it can be proved, on the usual civil standard, that the deaths in question occurred prior to the specified start up date of the new legislation, the survivorship rules under the new Act determine order of death.

## APPENDIX A

## [UNIFORM] SURVIVORSHIP ACT [CANADA]

## AN ACT RESPECTING SURVIVORSHIP

(Revised 1960)

1. This Act may be cited as *The Survivorship Act*.

2. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the deaths are, subject to subsections (2) and (3), presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.

(2) Where a statute or an instrument contains a provision for the disposition of property operative if a person designated in the statute or instrument,

(a) dies before another person,

(b) dies at the same time as another person, or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the statute or instrument provides is deemed to have occurred.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will,

(a) dies before the testator,

(b) dies at the same time as the testator, or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

3. This Act is subject to sections and of the

*Insurance Act (presumption as to order of death in Life Insurance Part and in Accident and Sickness Insurance Part where the person insured and beneficiary die in same disaster).*

## APPENDIX B

## U.S. UNIFORM SIMULTANEOUS DEATH ACT

### § 1. No Sufficient 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 act.

### § 2. Survival of Beneficiaries

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

### § 3. Joint Tenants or Tenants by the Entirety

Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed 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 distributed shall be in the proportion that one bears to the whole number of joint tenants.

The term "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.

**§ 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 pass as if the husband had survived [and as if said one-half were his separate property,] and the other one-half thereof shall pass as if the wife had survived [and as if said other one-half were her separate property.]

**§ 5. Insurance Policies**

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, [except if the policy is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds shall be distributed as community property under Section 4.]

**§ 6. Act Does Not Apply If Decedent Provides Otherwise**

This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

**§ 7. The Uniformity of Interpretation**

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

**§ 9. Repeal**

All laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

**§ 10. Severability**

If any of the provisions of this act or the application thereof to any persons or circumstances is held invalid such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are declared to be severable.

**S 11. Time of Taking Effect**

This act shall take effect .....

## APPENDIX C

## ONTARIO SUCCESSION LAW REFORM ACT

### PART IV SURVIVORSHIP

**61.** (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection 1, to have held as tenant in common with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will.

(a) dies before the testator;

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other, and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred.

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 190 and 268 of *The Insurance Act* and thereafter this Part applies to their disposition. R.S.O. 1970, c. 454, s. 1(2); 1972, c. 43, s. 1, *amended*.

**62.** (1) *The Survivorship Act*, being chapter 454 of the Revised Statutes of Ontario, 1970, and *The Survivorship Amendment Act, 1972*, being chapter 43, are repealed.

(2) The enactments repealed by subsection 1 continue in force as if unrepealed in respect of

deaths occurring before the 31st day of March, 1978.

**63.** This part applies in respect of deaths occurring on or after the 31st day of March, 1978.

# APPENDIX D

## CHAPTER S250

## THE SURVIVORSHIP ACT

(Assented to August 18, 1983)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

**General rule of survivorship.**
1 Except as otherwise provided in this Act, where 2 or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which the person is competent to dispose, shall be disposed of as if that person had survived the other or others.
S.M. 1982-83-84, c. 28, s. 1.

**Substitute gifts.**
2(1) Unless a contrary intention appears in the will, where a will contains a provision for the disposition of property in the event that a person designated in the will

(a) dies before another person; or

(b) dies at the same time as another person; or

(c) dies in circumstances rendering it uncertain which of them survived the other;

and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, the case for which the will provides is deemed to have occurred for the purposes of that disposition.

**Substituting personal representatives.**
2(2) Where a will contains a provision for a substitute personal representative in the event that an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other;

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, the case for which the will provides is deemed to have occurred for the purposes of probating the will.

S.M. 1982-83-84, c. 28, s. 2.

**Joint tenancy.**

3 Unless a contrary intention appears in a written agreement to which the persons are a party, where 2 or more persons hold legal or equitable title to property as joint tenants or have a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, those persons shall be deemed, for the purposes of section 1, to have held the title to the property or the joint account, as the case may be, as tenants in common with equal shares.

S.M. 1982-83-84, c. 28, s. 3.

**Insurance.**

4 Where a person whose life is insured under a life insurance contract or an accident or sickness insurance contract and a beneficiary under the policy die at the same time, or in circumstances rendering it uncertain which of them survive the other, the insurance moneys payable under the contract on the death of the insured shall be paid in accordance with The Insurance Act and, if the insurance moneys are paid to the personal representative of the insured, this Act applies to their disposition by the personal representative.

S.M. 1982-83-84, c. 28, s. 4.

**Transitional provision.**

5 In respect of the deaths of persons who died before October 1, 1983, survivorship shall be determined as though this Act had not been enacted.

S.M. 1982-83-84, c. 28, s. 5.

**Reference in Continuing Consolidation.**

6 This Act may be referred to as chapter S250 of the Continuing Consolidation of the Statutes of Manitoba.

S.M. 1982-83-84, c. 28, s. 6.

**Repeal.**

7 The Survivorship Act, being chapter S250 of the Revised Statutes, is repealed.

S.M. 1982-83-84, c. 28, s. 7.

**Commencement of Act.**

8 This Act comes into force on October 1, 1983.
S.M. 1982-83-84, c. 28, s. 8.