

Commorientes – a legislative change

The Latin term *commorientes* refers to two or more people who die, often in a common disaster, in circumstances where there is uncertainty as to the order of their deaths. The cases are a catalogue of shared tragedy with unfortunate victims succumbing to car accidents, fire, murder, massacre, shipwreck, exploding bombs, gas poisoning and in one case strawberries and cream laced with arsenic¹.

Issues arise in relation to the dispositions in wills of the *commorientes* or concerning the operation of the rules of intestacy. For example, if X has left property to Y, it is crucial to know which of the two survived the longer because the gift to Y would lapse if Y died first. Similarly, X may have left property to Y, with a proviso that the property should pass to Z if Y dies during X's lifetime. Furthermore, where the parties hold property under a joint tenancy, the right of survivorship applies and the property should pass to the estate of the last surviving joint tenant.

The common law position can be summed up as follows, "*when the order in which two persons died cannot be satisfactorily determined, neither is deemed to have survived the other, with the result that their estates cannot benefit from each other*".

Prescription exists in many jurisdictions having developed in light of the Napoleonic Code in France which relied upon a series of presumptions based on considerations such as the age or sex of the parties to try to reach the most probable result in terms of the order of death usually being a notion of convenience with no firm basis in probability at all! The relevant presumptions are elaborate, for example, they regard the youngest person as surviving where all the deceased were over 60 years of age, but the eldest when all were under 15 years of age. Where the deceased were all aged between 15 and 59, the male is presumed to survive the female (although in Louisiana, where the European Civil Law system was adopted one judge dismissed the "*rule of the continental sort*" as "*grotesquely false to human nature as we observe it*" suggesting that "*some monkish jurist of the Middle Ages must have been its composer*").

The rule which established itself in English law was that for a person to have survived a particular period the fact must be established affirmatively by evidence and in the absence of proof, the law will not accept that either party survived the other. The relevant rule is illustrated by one of the leading authorities *Wing v Angrave*², the case concerned a husband and wife who had been swept off a sinking ship by the same wave and never seen again. The husband had left his property to his wife and, in the event that his wife died in his lifetime, the property was to pass (given the deaths of other potential beneficiaries) to Wing. Similarly, Wing was to benefit under the wife's will if the husband were to die in her lifetime. However, because of the circumstances in which the spouses had died, it was impossible for Wing to prove affirmatively either that the wife had died during the husband's lifetime or *vice versa*. Therefore, he was unable to benefit under either spouse's will.

The law does not assume that the parties have died at the same time (simultaneously) on the basis that as time is divisible two people can never die at exactly the same time. This strays dangerously into metaphysics, Lord Greene M.R. in the Court of Appeal in *Hickman v Peacey*³ commented "[T]he statement that time is infinitely divisible was said to be a scientific fact. I should prefer to call it a metaphysical conception. No doubt, when a bevy of angels is performing saltatory exercises on the point of a needle it is always possible to find room for one more, but propositions of this character appear to me to be ill suited for adoption by the law of this country which proceeds on principles of practical common sense". Brilliant.

¹ *Re Comfort* [1947] VLR 237

² (1860) 8 HLC 183

³ [1945] AC 304

The laws struggle with precise simultaneous deaths was confirmed in the unusual case of *Re Rowland*⁴, where a husband and wife had made wills providing for gifts over in the event of the other spouse's death "preceding or coinciding with" his or her own. They subsequently perished in a shipping accident in the South Pacific and there was no evidence as to the precise time and circumstances of the loss of the ship. Lord Denning M.R. (clever chap he was) cheerfully observed "death in these waters does not normally occur from cold or exposure but from being eaten by fish". The Court of Appeal held that it could not be proven that the spouses' deaths had coincided within the terms of their wills, since it was quite possible that one had survived the other by some period of time, therefore the bequests in the wills were of no effect.

As alluded to earlier an even more difficult problem arises when joint owners of land die in a common accident and it is not possible to prove who died first. There is no assistance from *Jessup* which simply says that the personal representatives naturally apply for a Court Order directing the transmission of the respective moieties as on an intestacy. It is hard to see a theoretical basis on which such an order can be made. Nevertheless, the Court does make such orders, notwithstanding the fact there is South Australian authority which does not support the practice⁵. Obtaining the order is expensive and time consuming.

One argument in favour of extending some form of legislative change relating to commorientes is that the deceased would prefer to benefit their own successors rather than those of the beneficiary if the beneficiary were to die shortly after. There would also be the advantage of reducing transactional costs associated with succession of property because the deceased's property is probated once rather than two or three times. A final advantage is the avoidance of unfortunate litigation in which the representative of one of the individuals attempts, through the use of gruesome medical evidence, to prove that the one he or she represents survived the other by an instant or two.

In WA⁶, ACT⁷ and even New Zealand⁸, property held by persons as joint tenants is to devolve as if it had been held by them in equal shares as tenants in common. The effect of these provisions is that the estate of the younger person does not receive the windfall that results from a presumption of survivorship by seniority like in Queensland⁹.

In all jurisdictions except South Australia, there is legislation which creates a statutory order of death where two or more people have died and the facts leave the actual order of deaths uncertain. The legislation in four states NSW, Qld, Tas and Vic create a general presumption that the older is presumed to have died before the younger¹⁰. The statutory provisions do not take away from the Court the power to decide, if it can, which of two or more persons died first, and the statutory provisions apply only where the Court is unable to decide the question.

The statutory provisions are not confined in their operation to deaths in a common disaster, but are wide enough to cover deaths in entirely unconnected circumstances such as in *Re Watkinson*¹¹. Albert Watkinson, the testator, who died in 1942 left certain monies to be invested and directed his trustees to pay the income to his younger brother Ernest Watkinson. Ernest had not been seen or heard of for a number of years and the Court was asked to declare whether the trustees could distribute the estate on the basis that Ernest had predeceased Albert. Section 184 of the Victorian Property Law Act 1928

⁴ [1963] Ch 1

⁵ *in re Caire* 1 ALJ 306

⁶ Property Law Act 1969 s120(d)

⁷ Administration and Probate Act 1929 s49P

⁸ Simultaneous Deaths Act 1958 s3(d)

⁹ Succession Act 1981 s65

¹⁰ Conveyancing Act 1919 NSW s35, Succession Act 1981 Qld s65, Presumption of Survivorship Act 1921 Tas s2 and Property Law Act 1958 Vic s184

¹¹ [1952] VLR 123

(as it then was) read that in all cases where two or more persons have died after 2nd December 1925 in circumstances rendering it uncertain which of them survived the deaths shall presume to have occurred in order of seniority. Although Albert's death was certain, in 1942, Ernest had last been seen in Melbourne early 1925, and not since. The Court's approach was to decide that as it could not be certain, even applying the common law presumption of death after seven years absence, that Ernest died *after* 2nd December 1925, the statutory presumption did not apply.

For a great article discussing presumptions of death in greater detail see Last Testament December 2011 article by Leonie Millard.

The NT¹², WA¹³ and ACT¹⁴ also have provisions which create a general presumption that the older commorientes is presumed to have died before the younger, but the provisions are overridden in relation to the devolution of property. If the order of deaths is uncertain, the property of each devolves as if he or she had survived the other or others of them and had died immediately afterwards. The effect of the provisions is to preserve the gift – that is, to prevent the gift vesting in a beneficiary and it divesting immediately afterwards.

Except in the Northern Territory, none of the statutory provisions cover cases where one or more of the deaths are presumed (though not proved).

There are also reasons for making a gift contingent on the beneficiary surviving the testator by a specified period such as 30 days. First, if the testator and the beneficiary die in a common accident, there is the possibility that the order of deaths may be uncertain, a 30 day survivorship requirement eliminates the resulting problems in almost all cases.

Taking this into account, the legislatures in 5 jurisdictions, ACT¹⁵, NSW¹⁶, NT¹⁷, Qld¹⁸ and Vic¹⁹ have all made beneficial testamentary bequests subject to a 30 day survivorship condition (except where the testator expresses a contrary intention). The National Committee for Uniform Succession Law has recommended adoption of such a provision.

In Queensland there is provision for requiring intestate beneficiaries to also survive the testator by 30 days²⁰ but in the ACT, NSW, NT and Vic, there is no provision requiring an intestate beneficiary to survive the testator by 30 days. This has the odd consequence that if a testamentary gift is made to a person who dies after the testator but within 30 days, in ACT, NSW, NT and Vic, the testamentary gift will fail but if the failed gift then falls to be distributed on intestacy and the beneficiary will not be excluded from taking the intestate benefit.

Obviously it is desirable for the law to provide a solution to the problem of the succession of property in circumstances where it is not known which of a number of people died first.

What South Australia does have is in relation to an intestate and his or her spouse who die within 28 days of each other and where it is uncertain which spouse survived the other, the estate of each is to be distributed as if the spouse had not survived the intestate²¹.

¹² Law of Property Act s216

¹³ Property Law Act 1969 s120(a)

¹⁴ Administration and Probate Act 1929 s49P

¹⁵ Wills Act 1968 s31C

¹⁶ Succession Act 2006 s35

¹⁷ Wills Act 2000 s34

¹⁸ Succession Act 1981 s33B

¹⁹ Wills Act 1997 s39

²⁰ Succession Act 1981 s35(2)

²¹ 72E Administration and Probate Act

Recommendations

1. Question whether legislation should extend further to fix a date of a presumed death.
2. There should be a requirement that to take under a will or under relevant intestacy rules, the person must survive the testator or person by a period of 28 days.
3. There should be a statutory enactment of the *Re Benjamin* principle to overcome the situation where *Benjamin* orders are not sought through ignorance of their availability²².
4. Despite the availability of *Benjamin* orders and a possible 28 day rule, there is still a need to deal with the order of deaths of people who die, or are presumed to have died, in circumstances where it is uncertain as to who survived the other, the presumption should be that the younger is to presume to have survived the elder by a day (as in s65 Succession Act 1981 Qld).
5. Where persons, who have died in circumstances where it is uncertain who survived the other or others, held property as joint tenants, the property devolves as if they had owned it as tenants in common in equal shares (as in WA Property Law Act 1969 s120(d)).
6. Devolution of proceeds of an insurance policy where persons who have died in circumstances where it is uncertain who survived the other (already legislated in 120(c) Property Law Act 1969 WA).

²² An order of the kind sought known as a *Benjamin* order is so styled after the case of *In re Benjamin; Neville v Benjamin* [1902] 1 Ch 723, a decision of Joyce J. In that case, the administrator did not know whether a beneficiary had perished, and, if so, whether he had done so before the testator. Joyce J held that the beneficiary should be presumed to be dead, and, there having been no claim by any executor of the estate of the beneficiary, that the administrator could proceed on the basis that the beneficiary had not survived the testator.

Proposed legislative amendments (for discussion purposes only)

Commorientes Act

1. Application

This Act applies in respect of:

- (1) all property that devolves on the death or presumed death of a person according to a law of the State and all appointments of trustees that are made according to a law of the State; and
- (2) deaths of persons who die after the commencement of this Act and presumed deaths of persons who are presumed after the commencement of this Act to be dead,

whether the deaths or presumed deaths occur in the State or elsewhere.

2. Presumption of death

- (1) For the purposes of this Act:
 - (a) whose death is not established;
 - (b) who has been absent for a continuous period of 7 years during which he or she has not been heard from; and
 - (c) whose absence is not satisfactorily explained after diligent search or inquiry,is presumed to be dead.
- (2) A will, trust, settlement, disposition, appointment or other instrument by which property devolves on the death of a person does not take effect unless a court of competent jurisdiction of the Commonwealth or a State or Territory has, on the basis of the criteria in subsection (1), made a finding that has the effect of presuming the person to be dead.

3. Beneficiaries must survive by 28 days

- (1) If a testator makes a disposition to a person and that person dies within 28 days after the death of the testator, the testator's will is to take effect as if the person had died immediately before the testator.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.
- (3) For the avoidance of doubt, a general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purposes of this section.
- (4) Where a person entitled to take any part of an intestate estate does not survive the intestate for a period of 28 days that part of the intestate estate shall be treated as if that person had died before the intestate.

4. Dispositions not to fail because issue have died before testator

- (1) Subject to this section, if:
 - (a) a person makes a disposition to an issue of the person;
 - (b) the interest in property disposed is not determinable at or before the death of the issue; and

(c) the issue does not survive the testator for 28 days,

the disposition is to be held on trust for the issue of the first-mentioned issue who survive the testator for 28 days in the shares they would have taken of the residuary estate of the first-mentioned issue if the first-mentioned issue had died intestate leaving only issue surviving.

- (2) Subsection (1) applies to dispositions that are to an issue as an individual or as a member of a class.
- (3) Subject to subsections (4) and (5), subsection (1) does not apply if a contrary intention appears in the will.
- (4) For the purposes of subsection (3):
 - (a) a general requirement or condition that issue survive the testator or attain a specified age does not indicate a contrary intention; and
 - (b) a gift of a joint tenancy does not alone indicate a contrary intention.
- (5) If a condition is imposed on an original beneficiary and the beneficiary fails to survive the testator for 28 days, the issue of the beneficiary may not take under this section unless the original beneficiary fulfilled the condition.

5. Devolution of property in cases where order of death uncertain

- (1) This section applies subject to the appearance of a contrary intention in a will, trust, settlement, disposition, appointment or any other instrument.
- (2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them:
 - (a) subject to this section – the property of each of those persons is to devolve as if he or she had survived the other or others of them and had died immediately afterwards;
 - (b) in any case where any of those persons life is insured under a policy of life or accident insurance and another or others of them would, on surviving the insured person, be entitled (other than under a will or on the intestacy of a person) to the proceeds or a part of the proceeds payable under the policy, the proceeds are to be distributed as if the insured person had survived the other or each of the others and had died immediately afterwards;
 - (c) any property that is owned jointly and exclusively by any 2 or more of those persons and was not held by them as trustees, is to devolve as if it were owned by them as tenants in common in equal shares when they died;
 - (d) in any case where:
 - (i) property is devised or bequeathed or appointed by will or other testamentary instrument to the survivor of 2 or more of the testator's children or other issue; and
 - (ii) all or the last survivors of those children or other issue are from amongst those persons who die or are presumed dead,

that provision applies as if the devise or bequest or appointment were in equal shares to those survivors who leave a child or children who survives or survive the testator; and

- (e) in any case where those persons who die or are presumed dead include a testator and one or more of his or her issue (however remote) the testator is to be taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards and, accordingly, a devise or bequest by the testator to any of his or her issue who die or are presumed dead or who had already died during the testator's lifetime:
 - (i) lapses unless any of the donee's issue, other than those persons who die or are presumed dead, survives the testator; or
 - (ii) if any of the issue referred to in subparagraph (i) survives the testator – takes effect in accordance with that provision.

6. Presumption of survivorship

In any other case affecting the title to property or the appointment of trustees not referred to in this Act:

- (a) if:
 - (i) 2 or more persons die;
 - (ii) 2 or more persons are presumed dead; or
 - (iii) one or more persons die and one or more persons are presumed dead; and
- (b) the circumstances of those person's deaths or presumed deaths gives rise to reasonable doubts as to which of those persons survived the other or others,

the deaths or presumed deaths or deaths and presumed deaths are presumed to have occurred in order of seniority and, accordingly, the younger is presumed to have survived the elder for a period of 1 day.

7. Nothing in this Part prevents making of Re Benjamin orders

Nothing in this Part prevents the distribution of the estate of a deceased person in the case where a beneficiary cannot be found and there is no evidence that the beneficiary predeceased the testator.