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The New Simultaneous Death Act: Welcome Changes for Donative Transfers

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The New Simultaneous Death Act

Welcome Changes for Donative Transfers

EVERY will that is drafted in accordance with minimum professional standards will take into account the possibility that one or more of the intended beneficiaries might die prior to the testator or, in the case of a future interest, prior to the gift becoming possessory.² Thus the reciprocal wills of husband (H) and wife (W) might leave everything to the other “or, if s/he fails to survive me,” to their mutual beneficiaries. In most cases this provision will carry out the couple’s intent without any difficulty. However, in those cases where H and W die in close succession to each other, using nothing but this simple survivorship provision could result in a reduction in the amount that their mutual beneficiaries will receive and the passage of a longer period of time before they receive it. Suppose, for example, an automobile accident where H dies instantly and W dies on the way to the hospital, or sometime during the next day or so in the hospital. Under the above will provision, because W did in fact survive H, W did inherit H’s entire estate. Thus, even though W is now dead, following the administration of H’s estate the residue thereof must be distributed to W’s executor who, in turn, must administer the same property again (along with W’s original property) and distribute it to their mutual beneficiaries. The obvious problem in this case is that H’s property has to be administered twice—once to W and then (as a part of W’s estate) again to their mutual beneficiaries—with a consequent increase in administrative expenses and overall time for complete administration.³

Although the preceding hypothetical illustrates a time and expense problem of some significance, it pales in comparison to the problem of a complete loss or diversion of the inheritance that occurs in some cases.⁴ For example, assume a case where Testator (T) is a surviving parent and Son (S) and Daughter (D) are T’s children. T’s will might provide for a gift of one-half of T’s estate “(i) to S or, if S fails to survive me, (ii) to those of S’s children who survive me or, if none, (iii) to D or, if D fails to survive me, (iv) to those of D’s children who survive me.” The other one-half would go to D with parallel survivorship provisions. Suppose next that T and S are involved in an automobile accident, with T dying at the scene of the accident and S dying on the way to the hospital, or sometime during the next day or so in the hospital. As the key to taking under T’s will is “surviving T” and, as S clearly survived T, S (or S’s estate) will take one-half of T’s estate. But, as S is now dead and cannot personally benefit from this inheritance, the question naturally arises “Who is the real beneficiary in the sense of the ultimate recipient of this half of T’s estate?” Assuming S to be married, his will, if he has one, is likely to leave his entire estate to his spouse; if S has no will, the law of intestate succession will pass his entire estate to his spouse in the

typical case. Thus the one-half of T’s estate intended for S passes out of T’s family to a child-in-law. How does this result correspond with T’s intent? Not at all in the stated hypothetical or in the typical case. T’s intent and priorities are quite clear in both instances. T wants one-half of the estate to go to each child. If a child cannot beneficially take, T wants that child’s half to go to that child’s children or, if none, to the other child or, if none, to the other child’s children. But, because of S’s short period of survivorship, T’s intent is frustrated and one-half of T’s estate is diverted from T’s family to a child-in-law.

The negative results illustrated by these hypotheticals would not occur if, instead of one dying shortly after the other, H and W (or T and S) should die simultaneously. In such a case Virginia’s Uniform Simultaneous Death Act (USDA) provides that the beneficiary is deemed to have died prior to the testator. Thus, in the first hypothetical H’s estate would go directly to the mutual beneficiaries of H and W without first passing through W’s estate, and in the second hypothetical T’s estate would go to the next class or person named in T’s will instead of going out of the family to an in-law. However USDA does not apply where persons die at approximately or substantially the same time. If there is actual survivorship for any measurable period, however short, the act is not applicable. And, “(i)n cases in which both individuals caught in a common tragedy have died by the time third parties arrive at the scene, or shortly thereafter, the narrow application of (USDA) has sometimes led to 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.”⁵ In one instance the alleged period of survivorship was one breath,⁶ in another case it was 1/150,000 of a second.⁷ The shortest survival interval in a Virginia case having a published opinion was 73 minutes.⁸ Although one finds only a limited number of short-interval cases in appellate litigation under USDA, the reason is obvious. Current law is settled that survivorship for even the briefest interval takes the case from under USDA. Thus, regardless how regrettable the outcome in a particular short-interval case might be, there is simply no possible remedy and thus no litigation that could find its way to an appellate court. However, the reader is invited to take the equivalent of judicial notice regarding the number of short-interval survivorship cases that are regularly reported in the news.⁹ Furthermore, an analysis of the cases and literature leads to the permissible conclusions that (i) cases of true simultaneous death have never been but so frequent, and (ii) advances in medical science and technology since the promulgation of USDA have tended to make such determinations increasingly

infrequent. On the other hand, the number of short-interval survival cases is increasing and, regrettably, USDA provides no assistance in any of these cases in reducing administration time and expense, in carrying out a decedent's probable intent, or in keeping property in the family.

Standard Drafting Solutions

The problems caused by a beneficiary predeceasing the testator have led many attorneys to routinely insert some type of survivorship clause in the wills and trusts that they draft. Unfortunately, some of these survivorship clauses are no better than USDA because they deal only with the parties' "simultaneous" death. Thus the prior discussion of USDA's shortcomings can be incorporated by reference at this point to describe the problems that might be faced under these wills. Other lawyers prefer to use a clause that focuses on the parties dying from a common tragedy. Although a common tragedy provision is certainly broader in scope and operation than a simultaneous death provision, the common tragedy provision contains a major flaw and, for other reasons, can be somewhat of a problem producer in its own right.¹⁰ The major flaw associated with the common tragedy provision is its myopia, i.e., its failure to see that the time, cost, intent, and extra-family problems discussed above are not restricted to cases where the parties die as a result of the same tragedy. Instead, these problems arise whenever the parties die in close succession to each other, regardless of the cause. If the testator dies in Virginia in an accident or from natural causes on day one, and the beneficiary dies in California from whatever cause on day two, the case will present the same time, cost, intent, and extra-family problems as if they had died as a result of the same tragedy. The real problem is the death of the parties within a short period of each other. Whether or not their deaths result from the same tragedy is irrelevant.

The drafting solution to all of these problems is quite uncomplicated. As the common denominator of all of the described problems is death of the beneficiary within a short interval after the testator, it would appear that the rather elementary solution to this problem would be a survivorship "time" clause. A will provision simply stating that "any beneficiary who fails to survive me by x days shall be deemed to have predeceased me" would be sufficient to eliminate the above described time, cost, intent, and extra-family problems in all but a few cases. Of course the time clause can not be an absolute panacea because, no matter what time period is substituted for x in the above provision, there will be cases where death occurs on x plus one, etc. This minor deficiency notwithstanding, it is clear that, of the survivorship clauses available to the drafter, the time clause is the one most likely to carry out the testator's intent, to keep testator's property in the family, and to minimize the time and expense of administering the testator's estate in cases where a beneficiary dies shortly after the testator.

Enactment of USDA '91 and Its Primary Thesis

Life was simpler when USDA was promulgated in 1940, and the number and variety of legal problems was smaller.

Since that time, however, the problems previously discussed in the text have evolved, and the complete inadequacy of USDA to resolve these problems has become apparent. These developments did not go unnoticed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and, in response thereto, it recently promulgated a replacement for USDA—the 1991 Uniform Simultaneous Death Act (USDA '91).¹¹ Although USDA '91 differs from the original Act in many ways, it will not change the result in any case to which the original Act would have applied. Thus, in any case governed by USDA '91, where there is no sufficient evidence that the parties have died otherwise than simultaneously, its default rule still provides for the property of each party to be disposed of as if that party had survived the other. Instead of changing the original result of the original Act in cases of simultaneous death, USDA '91 goes beyond the operation of the original Act and provides for an intent-effectuating rule to operate in cases in which one party clearly did survive but where the period of survivorship was insubstantial. In other words, USDA '91 moves from a simultaneous death provision to a time provision. This feature of USDA '91, the time provision, might be referred to as its primary thesis. This thesis is said to be intent effectuating because of a belief that the typical testator would ordinarily prefer a gift to pass to testator's secondary beneficiary, even though the primary beneficiary actually survives, if that period of survivorship is so short that the primary beneficiary has neither the time to personally enjoy the gift nor the opportunity to make any after-the-fact disposition thereof. This assumption certainly corresponds with the writer's personal and vicarious experience and, indeed, it would seem impossible to refute in the typical case. The only difficulty lies with the quantification of a time period that will be acceptable to everyone as the "short" or "insubstantial" period contemplated by the new Act. However, prior to beginning the debate on the appropriate period for a statutory time clause, one must recognize that, although no one period will satisfy every person or situation, there has to be a default rule. Some choice must be made to govern in those cases where testator's will is silent, and this choice will likely require some compromise from advocates at both ends of the available spectrum.

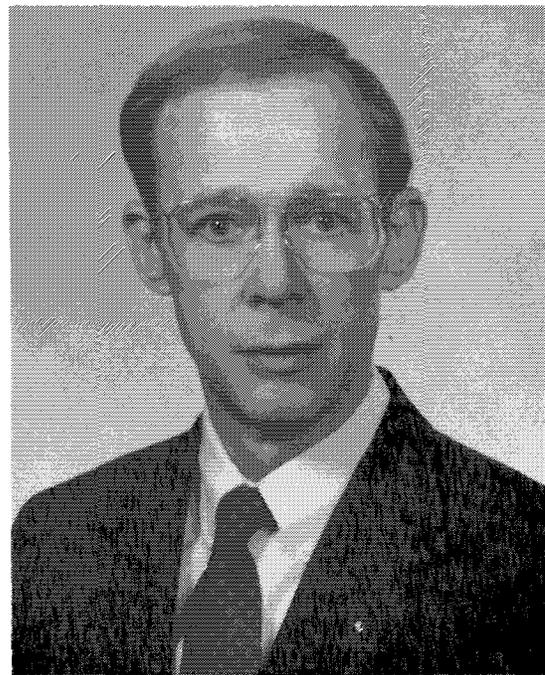
The Survivorship Period Under USDA '91.

The survivorship period chosen for the default rule of USDA '91 is five days, which is expressed as 120 hours. Looking at the secondary question first, one might ask "Why is the time period expressed in hours?" The simple answer is that 120 hours is a more precise way of stating five days and this form of expression will reduce the collateral litigation that is otherwise predictable. For example, if A dies at 10:00 a.m. on Thursday, and B dies at 2:00 p.m. on the following Monday, how many days have elapsed between their deaths? Does one focus on the number of 24-hour intervals beginning at the instant of A's death? Does one wait until midnight of the "act" day and then start counting full days? Does one count both the "act" and "end" days as full days, regardless of how many unexpired hours they contain, or does one round them off to

the nearest full day, etc.? Little reflection is required before most persons will accept the wisdom of stating a short period of time in the medium of hours instead of days.

Coming now to the primary issue, what is the basis for selecting a period of five days, instead of one, or ten, or some other number as the default rule? The answer is based partly on assumption and partly on experience. First, one must keep in mind that the goal of USDA '91 is to pass a testator's property on to a testator's secondary beneficiary where the primary beneficiary doesn't survive long enough to personally enjoy the gift or to have an opportunity to make any after-the-fact disposition thereof. The new Act takes the position that a primary beneficiary who dies less than five days after receiving traumatic injury (which time will most likely have been spent in a hospital's intensive care ward) typically will not, in this short period, have personally benefitted from, or made any after-the-fact disposition of, the property in question. But wouldn't this also be true if the time period was, for example, two days? The narrow answer is yes, but there is a further factor that must be considered. That factor is the prospect of complete survival. One who has survived the initial trauma and lived for a period of at least five days will have a greater prospect for complete survival than would be true in the case of a two-day survivor. Accepting this conclusion, one might logically extend it and ask if a time period of ten or thirty days might not be even more desirable as a predictor of complete survival? The narrow answer is yes, but again there is a further factor that must be considered. The longer the time period that is chosen for the final ascertainment of beneficiaries, the longer the estate and its assets will be in a form of limbo, and this limbo should not be extended beyond the point where it provides a corresponding benefit. It is relatively easy to argue that a five-day survivorship period would be both (i) significantly more predictive of complete survivorship than would a two day period and (ii) unlikely to create any significant administrative hardship. It is more difficult to argue that extending the period from five to ten days would be that much more helpful from a predictive standpoint that it would justify the increased potential for administrative difficulties that would result by doubling the survival period to ten days. Such then is the argument based on assumption.

The argument based on experience focuses on the use of a short interval survival requirement by the Uniform Probate Code for the last twenty-four years. Since 1969 the UPC has contained a 120-hour survival requirement as a condition precedent to taking by intestate succession or under a will.¹² The UPC has been adopted in fifteen jurisdictions since its promulgation in 1969 and the literature contains no evidence that this survivorship aspect is not functioning as intended. Indeed, it was the UPC's positive experience with its 120-hour survivorship rule in regard to testate and intestate succession that persuaded NCCUSL to extend this rule to survivorship tenancies and all other donative transactions under the Uniform Probate Code in 1990.¹³ And it was this successful experience under the Uniform Probate Code since 1969 that is the genesis of the 120 hour provision found in USDA '91 .



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The Scope of USDA '91.

Under present Virginia law,¹⁴ USDA applies (i) between the insured and the beneficiary in an insurance policy, (ii) to survivorship tenancies, (iii) to provisions for successive survivorship between beneficiaries in a third party's donative instrument and, (iv) "when the title to property or the devolution thereof depends upon priority of death." In the absence of this last "catch-all" category of application, present Virginia law would not be applicable to a number of cases. A non-exclusive listing of matters not included within the first three categories might include (i) beneficiary designations under an employer's pension, profit sharing or retirement program, (ii) certain joint bank accounts,¹⁵ (iii) exemptions and allowances, (iv) rights under augmented estate, (v) IRAs, (vi) etc.? Even with the applicability of the last "catch-all" category is it clear that the listed transactions (and all others not specifically

enumerated in the first three categories) are covered? Is it clear that they are not covered? It is submitted that there are some litigable matters at this point.

With the advantage of over fifty years of experience since USDA was promulgated in 1940, the drafters of USDA '91 have largely, if not completely, eliminated these interpretive problems as well as others not mentioned herein. The general approach of USDA '91 is to divide the various succession possibilities into three categories, as follows: (i) rights of a statutory nature (which includes intestate succession, allowances, exemptions, and augmented estate), (ii) rights under a governing instrument,¹⁶ and (iii) co-owners with right of survivorship.¹⁷ Although there is no guarantee that the new Act's classification system will eliminate every possible interpretive problem, it does appear to include all presently known concepts and to contain broad language of general application to handle matters that might arise in the future.

Determining Succession—Evidentiary Concerns.

Although it is not unusual to hear lawyers referring to the survivorship "presumptions" under USDA, no presumptions were in fact created by this enactment. Instead of establishing presumptions that might be rebutted by evidence to the contrary, the original Act created rules of substantive law to be applied in cases where there was no sufficient evidence that persons died otherwise than simultaneously. These substantive rules for simultaneous death cases can be summarized as follows: if the parties are (i) the insured and the beneficiary in an insurance policy, the insured survives; (ii) survivorship tenants, each tenant survives as to the proportion that one bears to the total number of tenants; (iii) beneficiaries with successive survivorship in a third party's donative instrument, each beneficiary survives as to the proportion that one bears to the total number of beneficiaries; and, (iv) in the general catch-all category of "when the title to property or the devolution thereof depends upon priority of death," each person survives as to that person's own property. USDA does not address the issues of burden of proof or standard of proof in any of these cases, it merely provides a rule for the disposition of contested property when neither side to the controversy has sufficient evidence of survivorship to establish the actual order of the parties' deaths.

USDA '91 not only addresses the burden of proof, it also establishes the standard of proof and addresses certain other evidentiary concerns. The first two of these matters is accomplished by a provision that "an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual."¹⁸ Thus the new Act settles the burden of proof issue by clearly placing the burden upon those who would profit by a finding of the beneficiary's survivorship. The new Act also requires that the fact of the beneficiary's survivorship be proved by clear and convincing evidence. In addition to the general rules of evidence otherwise applicable, USDA '91 makes specific provision for certain matters arising in cases dealing with the determination of death or status. It expressly

provides a standard for determining when the time of a person's death is deemed to occur which, in Virginia, would be pursuant to the general rules of § 54.1-2972 in most cases, and pursuant to Chapter 5 of Title 64.1 in cases of persons presumed dead. The new Act contains express rules governing the effect of copies of governmental reports, records or death certificates,¹⁹ which generally provide for them to be prima facie evidence of relevant facts recited therein.²⁰ In this regard the new Act further provides that, in the absence of any evidence disputing the time of death, such a document showing a time of death that satisfies the new Act's survivorship requirement establishes this fact by the requisite standard of clear and convincing evidence. In those cases where there are no governmental reports, records or death certificates to provide prima facie evidence of death, the new Act provides that the facts of death may be established by other, including circumstantial, evidence.

Exceptions

A primary purpose of USDA '91 is to create default rules that would carry out the presumed intent of the typical testator in cases where a beneficiary dies very shortly after the testator. It is axiomatic that no rule of presumptive intent should be applicable in instances where there is an expression of actual intent. Recognizing that the 120-hour rule should yield in such cases, the new Act contains four exceptions to its general rule. The first of these exceptions occurs in cases where "the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case."²¹ Although on first reading it might appear that this exception would be applicable whenever a document refers to "simultaneous" or "common disaster" deaths, this is neither the intent nor the operation of the exception. Focusing on the closing words of the exception, it is clear that, in addition to the requirement that the governing instrument contain language of "simultaneous" or "common disaster" deaths, there is an additional requirement that "that language is operable under the facts of the case."²²

By way of illustration, suppose H's will leaves everything to W but, "if W fails to survive me or if we die simultaneously," to the children of H and W. Assume further that H and W are involved in an automobile accident in which H dies immediately and W dies 24 hours later. The general rule of USDA '91 will apply and, as W failed to survive H by 120 hours, W is treated as predeceasing H and H's estate will pass directly to H's secondary beneficiaries, the children of H and W. Why doesn't the first exception prevent the new Act's general rule from applying? Because, although H's document had language referring to "simultaneous" death, that language was not "operable under the facts of the case." Although at first one may be dubious, a moment's reflection shows that this added qualification, "operable under the facts of the case," is truly indispensable to the intended operation of the new rule. As noted in the beginning of this article, there are numerous wills of living testators in circulation that contain ill-chosen "simultaneous"

or “common tragedy” death clauses. In addition, as the old forms and formbooks continue to be relied upon, many more such documents are likely to be drafted in the future. In this context, to allow such references, standing alone, to defeat the new rules would frustrate both (i) the legislative purpose in enacting USDA ’91, and (ii) the intent of the typical testator. Thus, in order to adhere as closely as possible to its basic premise, realization of probable intent, the new Act does not create an exception to its general rule for cases where the governing document merely refers to simultaneous death or death in a common tragedy. It reserves the exception for cases where this language is operable under the facts of the case.

The second exception to the new Act’s general rule focuses on those cases where “the governing instrument expressly indicates that an individual (is or) is not required to survive an event, including the death of another individual, by any specified period.”²³ As noted earlier, many lawyers are expressly dealing with the underlying problems in these death in close succession cases by using some type of time clause. In such cases, whether survivorship for a period of time is specifically required or specifically negated, whatever the document says should, and will, control. This second exception would also seem to be the basis for recognizing the “reverse-presumption” of order of deaths that is frequently employed in the tax wills of wealthier clients.²⁴ The third exception is concerned with those cases where an attorney has drafted for the absolute maximum period of contingency allowed by the Rule Against Perpetuities. To prevent an unintended failure of the gift by the addition of five more days in such a case, the third exception prevents the general rule from applying if “the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under the Rule Against Perpetuities.”²⁵

The fourth and final exception to the new Act’s general rule operates when “the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition.”²⁶ The primary operation of this exception can be illustrated by a case where H and W, desiring to make one \$10,000 gift to Charity (C) when both of them have died, provide in their wills that “if my spouse fails to survive me, I give \$10,000 to C.” Suppose that H and W are involved in an automobile accident in which H dies immediately and that W dies 24 hours later. As H has actually predeceased W, C would take \$10,000 under W’s will. As W would be treated as having failed to survive H under the new Act’s 120-hour rule, C would also take \$10,000 under H’s will. To prevent this unintended doubling of C’s gift, the fourth exception would prevent the 120-hour rule from applying. This would result in C taking one \$10,000 gift under W’s will because W was the actual last to die.

Third Party Liability.

Because of the relatively short survival period under USDA ’91, there will be few opportunities for making an inappropriate payment. Nevertheless, considerations of basic fairness and commercial certainty have resulted in the new Act including

a protective provision for payors²⁷ and other third parties who pay or deliver to an apparent beneficiary in good faith reliance upon a governing instrument.²⁸ This protection, which is premised on the payor’s good faith, ceases to exist after the payor has received written notice alleging the beneficiary’s lack of entitlement. But, to prevent a payor who has received such written notice from being caught up in a controversy between third parties, the new Act provides for a payor to obtain a complete discharge of a liability by making payment of the amount in issue into court.

It has previously been noted that USDA ’91 is broader in scope than the original 1940 Act. Among other things, the new Act expressly includes benefits under a pension, profit-sharing, retirement, or similar benefit plan. However, if such benefit plans are governed by the Employment Retirement Income Security Act of 1974 (ERISA), it has not yet been resolved whether or not the provisions of ERISA would supersede a state law such as USDA ’91. Although there is no ERISA provision that is in conflict with the provisions of USDA ’91, ERISA provides that its Titles I and IV “shall supersede any and all State laws insofar as they may now or hereafter *relate to* (emphasis added) any employee benefit plan” that is subject to ERISA.²⁹ NCCUSL has gone on record that there should be no ERISA supersession in the case in question.³⁰ But, recognizing that a federal court could find preemption, NCCUSL has supplied a two-part remedy for such a possibility. First, the new Act provides for the severability of any of its provisions held to be invalid, and the continuing validity of the remaining provisions.³¹ Second, the new Act provides that any person who receives a benefit or payment as a result of a preemption finding is personally liable in the same amount to the one who would have received the payment but for the ERISA preemption.³²

Effective Date.

As the general rules of USDA ’91 are intent-effectuating, the new Act seeks to give them the broadest possible application. Thus the new Act provides that its presumptions and rules of construction apply “to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.”³³ However, even though these rules are intent-effectuating, it is expressly provided that they will not have any effect on actions taken, or rights accrued, prior to the new Act’s effective date.³⁴ In this regard the new Act also provides that any right that would be acquired, extinguished or barred by the running of any statutory limitations period that has begun prior to the new Act’s effective date will continue to be governed by prior law.

Conclusion.

USDA ’91 does not alter the results that would presently be obtained in cases covered by Virginia’s version of the 1940 Act. However, the scope of the original Act has significantly narrowed with advancements in medical science that make it possible for the time of death to be determined with much greater certainty and thereby to reduce the number of cases

“where there is no sufficient evidence that the parties have died otherwise than simultaneously.” In addition, a realization has developed that, even though an intended beneficiary actually survives the testator, if the period of survival is so short that there is neither the opportunity for the beneficiary to personally benefit from the gift or to make any after-the-fact disposition thereof, the testator’s intent will normally be better served by treating the beneficiary as having predeceased the testator. Such an approach will also result in a desirable saving of administrative time and expense in a number of cases and more often result in keeping the testator’s property in the testator’s family. The concept of the 120-hour survival period has been in existence since 1969 as a part of the UPC and has been found satisfactory for its purpose. In addition to this main feature, USDA ’91 also provides (i) express coverage of property not mentioned in the original, (ii) clarification of the burden and standard of proof, (iii) desirable presumptions and rules of construction not found in the original, and (iv) protection for payors and bona fide purchasers not found in the original. The National Conference of Commissioners on Uniform State Laws is to be commended for the substance and form of this new uniform act and it is respectfully submitted that it should be enacted by the Virginia General Assembly.

FOOTNOTES

1. This article was written while the author was serving as chair of a committee studying the Uniform Simultaneous Death Act (1991) for The Virginia Bar Association’s Section on Wills, Trusts and Estates. The other members of this committee were C. Daniel Stevens, of Christian, Barton, Epps, Brent & Chappell, and Harry J. Warthen, III, of Hunton & Williams. The author is indebted to these colleagues for their thoughtful comments and suggestions during the committee’s study; however, the opinions expressed in this article, and any errors found herein, are the sole responsibility of the author.

2. This is also true for all other donative transfers that are designed to become effective in the future but, for purposes of convenience, this article will ordinarily refer only to wills, testators and beneficiaries in the text. It will be understood, however, that such usage is meant to be read in a generic sense as applicable to other donative transfers and the parties thereto.

3. It would be possible to avoid these problems if W’s executor disclaimed W’s inheritance from H, which would then pass directly from H to their common beneficiaries. However, the presence of this salvage doctrine does not eliminate concern with the underlying problem because (i) such use of disclaimers is not a part of the common knowledge possessed by all lawyers, (ii) approximately seventy percent of Virginia estates are administered by laypersons, and (iii) the opportunity to use a disclaimer can easily be lost by an act of dominion over the inherited property. See *Niklason v. Ramsey*, 233 Va. 161 (1987).

4. And, unlike the administrative time and cost problems discussed above, there is no potential for salvaging the testator’s intent with a disclaimer in these cases because of the ultimate taker’s conflict of interest.

5. Uniform Simultaneous Death Act (1991), Prefatory Note (U.L.A.). One of the cases cited as an example is *Janus v. Tarasewicz*, 482 N.E.2d 418 (Ill. App. 1985). In this case, H and W returned from their honeymoon to learn that H’s brother had just died. Naturally upset, and unaware that the brother’s death was due to taking Tylenol spiked with cyanide, both H and W took some of the same Tylenol. “(U)pon their arrival at intensive care unit of emergency room, neither showed vital signs; hospital personnel never succeeded in establishing in husband any spontaneous blood pressure, pulse, or signs of respiration and pronounced him dead; hospital personnel did succeed in establishing in wife a measurable, though unsatisfactory, blood pressure; although she had very unstable vital signs, remained in a coma, and had fixed and dilated pupils, she was placed on mechanical respirator and remained on the respirator for two days before she was pronounced dead; USDA found inapplicable because there was sufficient evidence that wife survived husband.” *Id.*

The cause of this litigation was H’s insurance policy that named W as primary beneficiary and H’s mother as secondary beneficiary if W failed to survive H. The decision in this case resulted in H’s insurance being paid over to W’s estate and, through it, to W’s family.

6. *Matter of Bucci*, 293 N.Y.S.2d 994 (Surr.Ct. 1968). Following a mid-air collision with another plane, H and W’s small airplane crashed and burned. H and W were both dead when their bodies were removed from the wreckage. Autopsy reports established (i) the presence of carbon monoxide in W’s blood, (ii) that H had a fractured skull, and (iii) the absence of carbon monoxide in H’s blood. H’s fractured skull and the absence of carbon monoxide in his blood indicated instantaneous death upon impact, before the fire developed, whereas the presence of carbon monoxide in W’s blood indicated that she survived impact and lived long enough after the fire began to inhale some of the carbon monoxide generated by the fire. Accordingly, the court concluded that W survived H.

7. *In Re Rowley’s Estate*, 65 Cal.Rptr. 139 (1967). T was a passenger in the front seat of an automobile being driven by B. Another vehicle struck this automobile with such force that both T and B died upon impact. B (the driver) was a beneficiary under the will of T (the passenger) and B’s gift would fail unless B survived T. B was found to have survived T because, as the other vehicle struck the automobile at a 90 degree angle on T’s side, T received the impact first and, as death occurred upon impact, T must have died first.

8. *Vaughn v. United States*, 536 F.Supp. 498 (W.D. Va. 1982). Father and Daughter were both shot in the same incident. F’s Virginia death certificate stated that he died at 10:45 p.m. in their home. D’s North Carolina death certificate stated that she died in the hospital at 11:58 p.m. the same evening.

9. In this regard, some of the language accompanying the original Uniform Simultaneous Death Act is interesting. “It may be a sad commentary, but the pace of modern living [in 1940] with its multiple forms of transportation has caused the instances of simultaneous death to occur with much greater frequency than in the past.” Uniform Simultaneous Death Act (1940) Prefatory Note (U.L.A.). Such being true of simultaneous deaths in 1940 should be *a fortiori* true of short-interval deaths at the present time.

10. Assume H and W have standard reciprocal wills naming each other as primary beneficiary, as primary executor, and providing that “if my spouse and I die as a result of a common tragedy my spouse shall be deemed to have predeceased me.” Suppose, as a result of an automobile accident, H dies immediately but W, though grievously injured, lingers on and perhaps appears to be recovering for a period of weeks or months before finally succumbing. What is to be done, vis-a-vis H’s estate during the period of W’s overlife?

Suppose, in a further case, H dies immediately and W, though surviving, receives such overwhelming injuries that W’s death occurs therefrom ten months later. Have H and W both died as a result of the common tragedy where their deaths are separated by such a lengthy period? (Hint—Could W’s personal representative bring a wrongful death action against the driver of the motor vehicle whose negligence caused the tragedy?) Suppose in this case W has already administered H’s estate and received (and perhaps transferred some of) H’s assets? Note that H’s estate would not be entitled to the marital deduction in this case as a result of using this common tragedy provision, unless its operation was limited to a maximum of six months after H’s death. I.R.C. § 2056(b)(3).

11. Uniform Simultaneous Death Act (1991) (U.L.A.) Copies of the Act may also be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611. Copies of the 1993 technical amendments will likely be available only from the National Conference in the immediate future. USDA ’91 is based upon the 1990 revision of the Uniform Probate Code’s Article II. The new Act’s fidelity to its source has resulted in a recommendation that “(s)tates that enact Sections 2-104 and 2-702 [of the UPC] need not enact the USDA as revised in 1991 and should repeal the original version of the USDA if previously enacted in the state.” Uniform Probate Code § 2-702, Comment (U.L.A.).

12. Uniform Probate Code § 2-104 (intestate succession) and § 2-601 (wills) (U.L.A.).

13. *Id.*, § 2-702 (U.L.A.).

14. Va. Code Ann. §§ 64.1-97 through 64.1-104.

15. In joint bank accounts between persons not married to each other, the parties own in proportion to their deposits in the account. Va. Code Ann. § 6.1-125.3. In the stereotypical case of older person depositing

all of the monies and placing younger person's name thereon so that, if necessary, younger person can reach the monies on older person's behalf (and a further intent in some cases for the younger person to become the account's owner at older person's death), it cannot be said that there is a joint tenancy between older person and younger person because younger person has no ownership rights during older person's lifetime.

16. "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, pension, profit sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type." Uniform Simultaneous Death Act (1991) § 1(2) (U.L.A.) This definition is identical to that found in U.P.C. § 1-201(19), except for the U.P.C.'s inclusion of "security registered in beneficiary form (TOD)," following the reference to POD accounts. Several of the 1993 Technical Amendments to USDA '91 were made for the purpose of extending its applicability to TOD transfers but the definition of "governing instrument" was left unchanged.

17. "Co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others." Uniform Simultaneous Death Act (1991) § 1(1) (U.L.A.). This definition could, perhaps, be improved by deleting the present reference to "accounts" and adding, immediately preceding "joint tenants," the language "parties to a joint account." This language would more clearly encompass both kinds of joint account, i.e., those where the parties are joint owners and those where they are not.

18. Uniform Simultaneous Death Act (1991) § 2 (U.L.A.), which is applicable to intestate succession and other statutory rights. This rule is not applicable if it would result in an escheat. Corresponding primary rules are found in § 3 and § 4. Section 3, which is applicable to donative provisions in governing documents, provides that "an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event." Section 4, which is applicable to co-owners with right of survivorship, provides that "if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners." The applicability of §§ 3 and 4 is subject to four exceptions found in § 6, discussed later in the text.

19. This part of the Act, presented as two separate provisions, suffers from a lack of parallelism. For example, § 5(3) dealing with records or reports specifically refers to those of "domestic or foreign" entities but there is no such reference in § 5(2) dealing with death certificates. The failure to draft these provisions in parallel form could lead to uncertainty and litigation when, for instance, a "foreign" death certificate is offered. It is respectfully submitted that the differences in these two provisions should be eliminated by harmonizing amendments. They presently read as follows:

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

20. This provision is significantly broader than present Virginia law which provides as follows:

Copies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in the clerk's office of a court, shall be received as prima facie evidence provided that such copies are authenticated to be true copies both by the custodian thereof and by the person to whom the custodian reports. Va. Code Ann. § 8.01-390.

This code section, which creates the "official written statements" exception to the hearsay rule, "does not extend to statements not within the personal knowledge and observation of the recording official." *Smith V. Woodlawn Construction Co.*, 235 Va. 424, 431(1988). USDA

'91 would partially negate the restriction of the Smith Case and permit the document's relevant facts regarding death or status to be introduced into evidence even though they are not within the personal knowledge or observation of the recording official. An enumeration of the relevant facts that would be admissible will be found in the preceding footnote.

21. Uniform Simultaneous Death Act (1991) § 6(1) (U.L.A.).

22. *Id.*

23. Uniform Simultaneous Death Act (1991) § 6(2) (U.L.A.). Under the new Act it is necessary that the expression of actual intent be found within the particular "governing instrument" in question. In this regard one aspect of present Virginia law is broader. Va. Code Ann. § 64.1-102, dealing with insurance policies, allows an insured to negate USDA by appropriate language in the contract of insurance or in the insured's will. Query—Is this statutory right to negate USDA by a provision in the insured's will an "incident of ownership" under IRC § 2042?

24. In order for a decedent's estate to be entitled to a marital deduction it is necessary that the property in question pass to a surviving spouse. Thus, if the evidence shows that the surviving spouse failed to survive the decedent there can be no marital deduction. Suppose, however, the actual order of deaths cannot be determined? I.R.S. Reg. § 20.2056(e)-2(e) provides in part that "(i)f the order of deaths of the decedent and his spouse cannot be established by proof, a presumption (whether supplied by local law, the decedent's will, or otherwise) that the decedent was survived by his spouse will be recognized . . ." Although presuming the spouse's survival might seem contrary to the administrative efficiency argument noted in the beginning of this article, the economic gain realized by obtaining the marital deduction in these cases (followed by the utilization of the surviving spouse's exemption equivalent and/or lower estate tax rates) will outweigh the extra administrative costs incurred by passing the same property through two separate estates.

Although it can be assumed that the new Act intends to recognize a reverse presumption, the express words of the second exception focus on language requiring or not requiring survival of "an event, including the death of another individual, by any specified period." However, many lawyers drafting reverse presumptions will have used the language of the I.R.S. regulations in order to achieve certainty of tax result. That language refers to deaths under circumstances "where the order of deaths . . . can not be established by proof," which does not compare very favorably with the language of the second exception. Thus, notwithstanding the assumed general intent, consideration might be given to inserting the language of this I.R.S. regulation into the first exception for the sake of specificity. If this insertion is made, it will also be necessary to exclude this insertion from the operation of the first exception's second condition, "and that language is operable under the facts of the case." The reason for this exclusion can be illustrated by the following case. H's will makes a gift to W that is intended to qualify for the marital deduction if at all possible. Thus H's will provides that if H and W die under circumstances where the order of their deaths cannot be established by proof, W shall be deemed to have survived. Suppose H and W are in an automobile accident in which H dies immediately and W dies several hours later. If the second condition of the first exception ("and that language is operable under the facts of the case") applies to this case, the gift to W will fail and there will be no marital deduction. Thus, although the second condition of the first exception should clearly apply to the ordinary cases, as noted in the text, it should not be applicable when the tax-oriented language is used.

Lastly, consideration might also be given to adding a "catch-all" provision to the first exception for the benefit of those estates where it is clear that (a) the marital deduction was desired, (b) application of the 120-hour rule would result in its loss, and (c) no specific exception to the rule is applicable. A redraft of the first exception, in light of the comments in this footnote, might read as follows:

§ 6. Exceptions.

Survival by 120 hours is not required if:

- (1) the governing instrument contains language dealing explicitly with (i) simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case.
- (ii) *deaths under circumstances where the order of death cannot be established by proof, or*
- (iii) *the marital deduction, or contains a provision to or for the benefit of decedent's spouse where it is decedent's intent, as manifested from the governing*

(Continued on page 23)

...Not surprisingly, we do not all agree as to what degree of either perceived injustice or predicted inconvenience will arise from the adoption or rejection of a given ruling. Sometimes we differ sharply and even passionately as to the acceptability of a ruling under scrutiny. At this level, there can simply be irresolvable differences of opinion ... (Pages 233-34.)

He does not suggest, however, that precedents or statutes or adherence to strict rules of logic are unimportant. Those matters, too, find their place, along with a stern charge to consider the societal and institutional consequences of the rule that you advocate, as the judges certainly will do. The point, rather, is that judges base their decisions on a seemingly infinite array of relevant (and sometimes irrelevant) considerations, and that advocates who would persuade must factor the entire array into their presentations.

What, then, is a lawyer to do? How are you to know (or even to make an intelligent guess) what is likely to persuade the judges who will hear your case? Judge Aldisert answers,

Know the court! Know this court! Know the court that will be reading your briefs!...

Find out how the judges react to the controlling general principles involved in your case ... Read their opinions with the view of learning something about their societal concerns, political preferences, economics hypotheses, behavioral interests, sociologi-

cal bias or prejudice and jurisprudential idiosyncrasies (for example, are they slaves to precedent or do they perceive the court as an instrument of social change?)...

...Have they written any law review articles? Have they made any speeches before bar groups or at law schools? ... (Pages 230-32.)

In short, work hard! Do your job! The job is not simple or easy, to be sure; and you often cannot bill your clients for all of the time that you spend on such matters. But it is a part of your professional calling and of your duty to your clients, as well as to the courts before whom you practice and to the legal system as a whole. And be assured that if you choose not to follow this advice, but adhere instead to a practice of color-matching of precedents to facts, you will be left behind by your professional colleagues who aspire to ever-higher standards of practice; you will lose some cases that might have been decided your way; and in the long run, your practice, your professional reputation, your client base, and your income will suffer as a result. If you choose to take the "road less travelled," however, this book will help to locate some important landmarks along the way.

((Ruggero J. Aldisert is a Senior Judge (and former Chief Judge) of the U.S. Court of Appeals for the Third Circuit. George A. Somerville is a partner with Mays & Valentine, in Richmond.))

The New Simultaneous Death Act

(Continued from page 11)

instrument or external evidence, that decedent's estate receive the benefit of the federal estate tax marital deduction;

25. Uniform Simultaneous Death Act (1991) § 6(3) (U.L.A.).

26. *Id.*, at § 6(4).

27. "'Payor' means a trustee, insurer, business entity, employer, government, governmental agency, subdivision, or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments." Uniform Simultaneous Death Act (1991) § 1(3) (U.L.A.). This definition is identical to the one found in Uniform Probate Code § 1-201(34) (U.L.A.), except for the addition of "instrumentality."

28. Uniform Simultaneous Death Act (1991) § 7(a) (U.L.A.). Similarly, a bona fide purchaser "who receives a payment or other item of property (from an apparent beneficiary) in partial or full satisfaction of a legally enforceable obligation" is also protected, but a gratuitous trans-

feree from the apparent beneficiary is liable to make full restitution. *Id.*, § 7(b)(1).

29. Section 514(a) of ERISA, 29 U.S.C. § 1144(a).

30. NCCUSL's position is set forth in Uniform Probate Code § 2-804, Comment (U.L.A.).

31. Uniform Simultaneous Death Act (1991) § 11 (U.L.A.).

32. Uniform Simultaneous Death Act (1991) § 7(b)(2) (U.L.A.).

Although initially this remedy itself may also appear to be subject to preemption for the same reasons, there is a significant difference between the general rule and the alternative remedy. Under the general rule one is in conflict with a plan administrator, which is a subject of ERISA's concern; whereas under the alternative remedy the plan administrator is not involved, there is simply a controversy between two third parties that has no impact upon the plan administrator. This distinction was recognized, on other facts, by the Virginia Supreme Court in *Brown v. Brown*, 244 Va. 319 (1992).

33. Uniform Simultaneous Death Act (1991) § 12(b)(2) (U.L.A.).

34. *Id.*, at § 12(b)(1).