

UNIFORM SIMULTANEOUS DEATH ACT (1993)

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM SIMULTANEOUS DEATH ACT (1993)

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PREFATORY NOTE

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UNIFORM SIMULTANEOUS DEATH ACT (1993)

Prefatory Note

The Uniform Simultaneous Death Act (USDA) was first promulgated in 1940. It was amended in 1953 and has been enacted in the District of Columbia and all but three of the states.

The original USDA provided that, when there is no sufficient evidence that two individuals died otherwise than simultaneously, each individual's property is distributed as if he or she survived the other. The advantages of this approach are that each individual's property passes to that individual's relatives rather than to the other individual's relatives and that double administrative costs are avoided because property does not pass from one estate to another estate.

This revision of the USDA does not alter the result of the original Act. Rather, it expands the narrow application of the original Act so that, as revised, it no longer is restricted to situations in which there is no sufficient evidence that two individuals died otherwise than simultaneously. In 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 the original Act 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. Examples include *Janus v. Tarasewicz*, 482 N.E.2d 418 (Ill. App. Ct. 1985) (husband's brother died as result of ingesting Tylenol capsules laced with cyanide by unknown perpetrator prior to sale in stores; after learning of his death, but before the cause of his death had been determined, husband and wife returned from their honeymoon and each ingested contaminated Tylenol capsules; upon their arrival at intensive care unit of emergency room, neither showed visible 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); *Matter of Bucci*, 57 Misc.2d 1001 (N.Y. Surr. Ct. 1968) (husband and wife found dead when removed from wreckage of their small airplane, which crashed and burned after having collided in air with large airplane; existence of carbon monoxide in wife's blood found sufficient evidence to establish wife's survival of husband, whose skull was fractured and in whose blood no carbon monoxide was found).

Even in cases in which it is indisputable that one of the two survived the other, such as a case in which one is clearly dead at the scene of the accident and the other clearly dies in the ambulance on the way to the hospital, the policy of the original Act plainly should apply.

This version of the USDA, then, extends the application of the original Act to situations in which there *is* sufficient evidence that one of the individuals survived the other one, but the period of survival was insubstantial. This version originated in Sections 2-104 and 2-601 of the Uniform Probate Code of 1969, which imposed a 120-hour requirement of survival for intestate

and testate succession, and in the revisions of Article I and II of the Uniform Probate Code that were approved in 1990 and 1991, which extend the 120-hour requirement of survival to provisions of a "governing instrument" and to "co-owners with right of survivorship," as those terms are defined in Section 1. A clear and convincing evidence standard of proof of survival by 120 hours is imposed throughout in order to reduce litigation and to resolve close cases in favor of non-survival.

The sections specifically pertaining to community property and insurance policies contained in the original Act are unnecessary and omitted from this version. If a decedent spouse dies owning community property, those community property interests are covered by the general provisions of Sections 2 and/or 3. Similarly, insurance is covered by the general provisions of Section 3.

Section 5 of this version, titled "Evidence of Death or Status," covers an area not covered in the original Act. Paragraph (1) of Section 5 defines death by reference to the Uniform Determination of Death Act. Paragraphs (2) through (6) are drawn from Section 1-107 of the Uniform Probate Code as revised in 1991 and provide for evidence of death or status. Note that paragraph (6) is made desirable by the introduction of the requirement that survival by 120 hours must be established by clear and convincing evidence. Paragraph (6) provides that, in the absence of evidence disputing the time of death stipulated on a document such as a certified copy of a death certificate, such a document that stipulates a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.

Section 7 of this version is a new section made desirable by the extension of a 120-hour requirement of survival to all governing instruments, such as life-insurance policies, and to co-ownership arrangements with right of survivorship, such as joint tenancies and joint checking accounts. Section 7 grants protection to payors and other third parties who, before receiving written notice of a claimed lack of entitlement under the Act, pay off or in other ways rely on a survivor's apparent entitlement to succeed to property.

This version of the USDA is appropriate for enactment in states that have not enacted Sections 1-107, 2-104, and 2-702 of the Uniform Probate Code (1991).

Reference. This Act is discussed in Halbach & Waggoner, "The UPC's New Survivorship and Antilapse Provisions," 55 Alb. L. Rev. 1091, 1091-99 (1992).

UNIFORM SIMULTANEOUS DEATH ACT (1993)

SECTION 1. DEFINITIONS. In this [act]:

(1) "Co-owners with right of survivorship" includes joint tenants, tenants by the entirety, 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.

(2) "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 dispositive, appointive, or nominative instrument of any similar type.

(3) "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.

SECTION 2. REQUIREMENT OF SURVIVAL BY 120 HOURS UNDER PROBATE CODE. Except as provided in Section 6, if the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead or family allowance depends upon an individual's survivorship of the death of another individual, 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. This section does not apply if its application would result in a taking of intestate estate by the state.

Comment

By 1993 technical amendment, an anomalous exemption of securities registered under the Uniform TOD Security Registration Act from the 120-hour survival requirement of this section and of Section 3 was eliminated. The exemption reflected a temporary concern attributable to

UTODSRA's preparation prior to discussion of inserting a 120-hour survival requirement in this act.

SECTION 3. REQUIREMENT OF SURVIVAL BY 120 HOURS UNDER GOVERNING INSTRUMENTS. Except as provided in Section 6, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.

SECTION 4. CO-OWNERS WITH RIGHT OF SURVIVORSHIP; REQUIREMENT OF SURVIVAL BY 120 HOURS. Except as provided in Section 6, 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.

Comment

This section applies to property or accounts held by co-owners with right of survivorship. As defined in Section 1, the term "co-owners with right of survivorship" includes multiple-party accounts with right of survivorship. In the case of a joint checking account registered in the name of the decedent and his or her spouse with right of survivorship, the 120-hour requirement of survivorship imposed by this section will not interfere with the surviving spouse's ability to withdraw funds from the account during the 120-hour period following the decedent's death if the state has a facility-of-payment statute such as Section 6-222(1) of the Uniform Probate Code. A state without such a facility-of-payment statute should consider enacting one in conjunction with the enactment of this Act.

SECTION 5. EVIDENCE OF DEATH OR STATUS. In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual [is determined to be dead under the Uniform Determination of Death Act (1978/1980)] [has sustained either (i) irreversible cessation of circulatory and respiratory functions or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards].

(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.

(4) In the absence of prima facie evidence of death under paragraph (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which he [or she] has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His [or her] death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stipulated on a document described in paragraph (2) or (3), a document described in paragraph (2) or (3) that states a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.

Comment

States that have enacted the Uniform Determination of Death Act should enact the first set of bracketed language in paragraph (1). States that have not enacted the Uniform Determination of Death Act should enact the second set of bracketed language in paragraph (1).

SECTION 6. EXCEPTIONS. Survival by 120 hours is not required if:

(1) 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;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

(3) 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] [fail to qualify for validity under Section 1(a)(1), (b)(1), or (c)(1) or to become invalid under Section 1(a)(2), (b)(2), or (c)(2), of the Uniform Statutory Rule Against Perpetuities]; but survival must be established by clear and convincing evidence; or

(4) the application of a 120-hour requirement of survival to multiple governing

instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.

Comment

Subsection (1). Subsection (1) provides that the 120-hour requirement of survival is inapplicable if 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." The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that "in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first," my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under this section, G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (1), nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Subsection (2). Subsection (2) provides that the 120-hour requirement of survival is inapplicable if "the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a stated period."

Mere words of survivorship in a governing instrument do not expressly indicate that an individual is not required to survive an event by any specified period. If, for example, a trust provides that the net income is to be paid to A for life, remainder in corpus to B if B survives A, the 120-hour requirement of survival would still apply. B would have to survive A by 120 hours. If, however, the trust expressly stated that B need not survive A by any specified period, that language would negate the 120-hour requirement of survival.

Language in a governing instrument requiring an individual to survive by a specified period also renders the 120-hour requirement of survival inapplicable. Thus, if a will devises property "to A if A survives me by 30 days," the express 30-day requirement of survival overrides the 120-hour survival period provided by this Act.

Subsection (4). Subsection (4) provides that the 120-hour requirement of survival is inapplicable if "the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition." The application of this provision is

illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a \$50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised \$50,000 to the charity if W predeceased him. W's will devised \$50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (4), not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the \$50,000 devise, subsection (4) provides that the 120-hour requirement of survival is inapplicable. Thus, only the \$50,000 charitable devise in W's will is effective.

Subsection (4) also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established by clear and convincing evidence that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended \$50,000 devise from H's estate and half from W's estate.

Historical Note. This Comment was revised in 1993.

SECTION 7. PROTECTION OF PAYORS, BONA FIDE PURCHASERS, AND OTHER THIRD PARTIES; PERSONAL LIABILITY OF RECIPIENT.

(a) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a person designated in a governing instrument who, under this [act], is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this [act]. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a

claimed lack of entitlement under this [act].

(2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this [act], a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this [act], shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(b) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this [act] to return the payment, item of property, or benefit nor liable under this [act] for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this [act] is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this [act].

(2) If this [act] or any part of this [act] is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this [act], a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this [act] is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this [act] or part of this [act] not preempted.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among states enacting it.

SECTION 9. SHORT TITLE. This [act] may be cited as the Uniform Simultaneous Death Act (1993).

SECTION 10. REPEAL. The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

SECTION 11. SEVERABILITY CLAUSE. If any provision of this act or its application to any persons or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or

application, and to this end the provisions of this act are severable.

SECTION 12. EFFECTIVE DATE.

(a) This act takes effect _____.

(b) On the effective date of this act:

(1) an act done before the effective date in any proceeding and any accrued right is not impaired by this act. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right; and

(2) any rule of construction or presumption provided in this act applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

Comment

Subsection (b) is adapted from Section 8-101(b)(4) and (5) of the Uniform Probate Code.

Application to Pre-Existing Governing Instruments. For decedents dying after the effective date of enactment, the provisions of this Act apply to governing instruments executed prior to as well as on or after the effective date of enactment. The Joint Editorial Board for the Uniform Probate Code has issued a statement concerning the constitutionality under the Contracts Clause of this feature. The statement, titled "Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents," can be found at 17 Am. C. Tr. & Est. Couns. Notes 184 (1991) or can be obtained from the headquarters office of the National Conference of Commissioners on Uniform State Laws, www.uniformlaws.org.

Historical Note. This Comment was revised in 1993.