LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

"THE SURVIVORSHIP ACT"

September 7, 1982

Report #51

MG-3750

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I. INTRODUCTION

The purpose of this Report is to consider whether statutory reform of *"The Survivorship Act"*, C.C.S.M. c. S250, is required, and, if it is, to recommend the method and scope of legislative reform to be introduced.

"The Survivorship Act" furnishes a rule by which the succession to property may be determined where two or more perish and there is no proof as to the sequence of their deaths. The Act prescribes a presumption of sequence of deaths in such circumstances; the younger decedent is presumed to have survived the elder or, in the case of more than two decedents, deaths are presumed to have occurred in order of seniority. The Act also makes provision for substitutions where a testator and his beneficiary or executor die in circumstances governed by the Act. Finally, it contains a section making the Act subject to two provisions of *"The Insurance Act"*, C.C.S.M. c. I40. A copy of *"The Survivorship Act"* is reproduced in Appendix C.

Survivorship legislation is found throughout Canada, the United States and Great Britain. Statutory provisions were required because the common law did not provide for a rule regarding sequence of deaths unless the respective claimants could prove a sequence on the balance of probabilities.[1] For some deaths, especially those caused by common disaster, this proved impossible.

In Canada, survivorship has been the subject of uniform legislation. In 1939, the Uniform Law Conference of Canada (as it is now named) adopted a *Uniform Commorientes Act*[2] which was based upon earlier English legislation.[3] Manitoba

enacted the *Uniform Commorientes Act* three years later.[4] In 1960, the Uniform Law Conference revised and renamed their legislation the *Uniform Survivorship Act*.[5] The change of name was more than cosmetic; rather, it reflected the Act's more expansive scope. Whereas under the 1939 Act the presumption of sequence of deaths only applied to common disasters, it now became relevant to other multiple deaths, so long as there was uncertainty as to their sequence. Thus, the Act could now apply to deaths which occurred even in different jurisdictions.

The 1960 *Uniform Survivorship Act* was passed by the Manitoba Legislature in 1962[6] and has remained in force, substantially unaltered, ever since. In 1971, the survivorship legislation of the Uniform Law Conference of Canada and of Manitoba diverged. In that year, the Conference adopted a completely revised text for its survivorship legislation. The Uniform Commissioners elected for a new rule of presumption of sequence of deaths and new rules were also made with respect to joint tenancies and insurance proceeds. A copy of the 1971 *Uniform Survivorship Act* is reproduced in Appendix D.[7]

The 1971 *Uniform Survivorship Act* has been enacted in some jurisdictions. That is, it has been adopted by the Yukon Territory[8] and substantially implemented in Ontario[9] (Appendix E). The remaining common law provinces have survivorship legislation much the same as presently in force in Manitoba.[10] In Quebec, it is presumed that persons died simultaneously where there is uncertainty as to the order of deaths.[11] Thus, the estate of each decedent cannot take from the other.

When the Uniform Law Conference adopted the completely revised Act in 1971, they followed much of the American *Uniform Simultaneous Death Act*[12] (reproduced in Appendix F). The American Act was approved first in 1940 and then in a revised form in 1953 by the National Conference of Commissioners on Uniform State Laws. This uniform legislation has been substantially adopted in 48 States and the District of Columbia.

The structure of this Report is as follows. In Chapter II, the Commission examines the provisions of the 1971 *Uniform Survivorship Act* in detail and makes recommendations for their implementation in Manitoba, where appropriate. We also examine the need for further provisions than those contained in the 1971 Act and consequently the *Uniform Survivorship Act* has not been strictly adopted. Our recommendations for reform are summarized in Chapter III and two draft bills to implement them are found in Appendices A and B. The recommendations are made in light of two objectives: to provide rules which will create certainty in determining the matter of succession to property and, secondly, to establish rules which more closely approximate to what we believe the intentions of the decedents would be in the majority of cases had they directed their minds to the possibility of a situation that would give rise to a survivorship question.

II. RECOMMENDATIONS FOR REFORM

A. The Present Statutory Presumption

1. The sequence of deaths

Section 2(1) of *"The Survivorship Act"* presently reads as follows:

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

The order of deaths directed by this provision is simple in both theory and application; the younger decedent is presumed to have survived the older and, in the case of more than two decedents, the deaths are presumed to have occurred in order of seniority. Although the rule allows for certainty in determining the succession to property, it has been criticized for being "arbitrary"[13] and "unjust".[14] We have considered the criticisms directed against the present general rule. It is our view that the rule is inadequate as presently stated. Our reasons for this conclusion are set forth below.

The Act appears to apply most commonly to spouses. This is reasonable given that the Act essentially applies to common disasters and is only operative where a solution to succession to property is required. Given that in the majority of Canadian marriages, a husband is senior in age to his wife,[15]

the Act may have the effect of depleting his estate for the benefit of her estate. This will occur where the husband dies intestate[16] or where he names his wife beneficiary and does not make provision for alternate beneficiaries. The pertinent question for consideration is whether the husband would have liked his wife's estate to receive his property if they died simultaneously. Of course, the same consideration would apply where the wife is the elder.

We have examined the effect of the present rule with respect to the beneficiaries of each spouse's estate where spouses die either testate or intestate. Intestacies in Manitoba are governed by *"The Devolution of Estates Act"*, C.C.S.M. c. D70. This legislation sets forth statutory rules which determine who benefits from an estate where a decedent dies intestate. The general rule of survivorship operates in an arbitrary manner where intestacies occur. For a childless married couple, it means that the parents of the younger spouse are benefitted to the exclusion of the parents of the older spouse.[17] Consider further married couples with estates of less than $50,000[18] and with children from prior marriages who are not adopted by their parent's present spouse. If the spouse/step-parent were younger, these children would not receive any benefit from their parent's estate unless they initiated an application under *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50.[19] Where both spouses die testate, the effect of the general rule is cushioned by section 2(2) of the present Act. That is, subsection (2) has the effect of ensuring that where the elder spouse names the younger a principal beneficiary but makes provision for alternate beneficiaries in the event of simultaneous deaths,[20] that those alternate beneficiaries will take notwithstanding the general rule deems the principal beneficiary to have survived the testator. We explain subsection (2) in greater detail later in this Report. Suffice it to say at this point that subsection (2) allows for a more balanced

approach where decedents die testate and name alternate beneficiaries in the event of simultaneous death or uncertainty as to the order of death. However, it has no effect where the elder decedent names the younger his or her principal beneficiary and does not make provision for alternate beneficiaries.

This Commission would prefer the enactment of a statutory presumption which more closely resembles the intentions of the decedents generally had they directed their minds to the issue of survivorship. The Ontario Law Reform Commission,[21] the Uniform Law Conference of Canada[22] and the National Conference of Commissioners on Uniform State Laws (America)[23] have all proposed the same rule regarding presumption of sequence of deaths. They have adopted the presumption that where there is uncertainty as to the sequence of deaths, each decedent should be deemed to have survived all others. This means in effect that the estate of each decedent cannot take from the other(s).

We favour the approach adopted by these organizations. In abolishing the presumption of survivorship of one decedent over another, the new rule allows for a more balanced manner of determining succession to property and one we feel would more closely resemble the wishes of decedents generally. The same view was expressed by the National Conference of Commissioners on Uniform State Laws when they adopted their general rule.[24] The Commission accordingly recommends:

1. *That the statutory presumption of the sequence of deaths under "The Survivorship Act" be amended so that it shall be deemed that each decedent has survived the other or others.*

2. The scope of the rule

In a Study prepared by the Family Law Project for the Ontario Law Reform Commission it was proposed that consideration be given to expanding the scope of the general

survivorship rule. More particularly, the research team who prepared the Study suggested that consideration ". . . be given to a rule that would require the separate distribution of the estates of spouses who die within so many days of each other . . . ".[25] Presumably, this suggestion was rejected by the Ontario Commission (it is not discussed in their Report) and, in any event, it was not implemented by the Ontario Legislature in 1977 when the new survivorship provisions were enacted (see Appendix E).

We have considered whether the Act should have wider application than at present. We are of the view that it should retain its present objective, which is to deem a rule of sequence of deaths in the absence of clear evidence to the contrary. The Commission therefore recommends:

> 2. *That the proposed statutory presumption of the sequence of deaths apply where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others.*

3. Implementation of the general rule

There are some drafting differences between the general rules of the Ontario and the Uniform Acts. The *Uniform Survivorship Act* which sets forth the general rule of sequence of death takes the following form:

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

The Ontario rule reads similarly except that it does not contain the phrase, "for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property . . .", as in the *Uniform Survivorship Act* above. Both provisions, however, are similar in the following respects:

1. The estate of each decedent shall be disposed of as if (s)he had survived the other or others. This conforms to the presumption of sequence of deaths we proposed in recommendation 1. The effect of this presumption is that the estate of each decedent cannot take from the other.

2. The application of the presumption of sequence of deaths applies to simultaneous deaths and, more broadly, to other multiple deaths, as long as the sequence of deaths is uncertain. In this respect, section 1(1) of the uniform Act does not differ from the present survivorship provision in Manitoba. The subsection also conforms with the application of the statutory presumption we proposed in recommendation 2.

3. The application of the presumption applies "to the property of each person, or any property of which he is competent to dispose . . . ". This phrase is not found in the present survivorship rule; it is required because of the new presumption. That is, it is necessary to confine the rule to the property of each person so that it shall not be deemed, for example, that the husband has survived for the purpose of his wife's property, thereby allowing his estate to become entitled as a beneficiary of her estate. As to the phrase "property of which he is competent to dispose", this ensures that it includes property to which the decedent is beneficially entitled. As we explain later in this Report, it may also include powers of appointment which have been exercised by the deceased donee.[26]

The Commission prefers the drafting of the *Uniform Survivorship Act* because it clarifies the purpose of the proposed presumption of sequence of deaths. However, we would make one amendment to that section so that it is clear the proposed presumption is subject to other sections of the Act. This is because of the special provisions we recommend later in this Report regarding *"The Dower Act"*, substitute gifts, and powers of appointment which are not found in the uniform Act.

3. *That the Legislature adopt a general rule of survivorship as follows:*

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

B. *"The Dower Act"*

In Manitoba, legislation exists generally to ensure that surviving spouses receive a share of their decedent spouse's estate. The entitlement to a share is provided for in *"The Dower Act"*, C.C.S.M. c. D100. Section 15 of that Act states that, subject to certain exceptions,[27] a widow(er) who has not received one-half of the value of the net real and personal property of the decedent spouse's estate becomes entitled, upon filing an election, to one-half of the value of the net estate.[28] *"The Dower Act"* is the principal statute to govern the determination

of the portion of the estate to which the surviving spouse is entitled;[29] where a marriage terminates prior to death - that is either through separation or divorce - the portion of the assets to which each spouse is allowed to receive is found in other legislation.[30]

As we just explained, *"The Dower Act"* applies to ensure that, upon filing an election, a widow(er) will receive a certain specified portion of the estate of their deceased spouse. The Act also states, however, that in the event the surviving spouse dies before filing an election, this right is exercisable by his or her personal representative (section 18). Consequently, the right is not personal to the surviving spouse but rather devolves to the personal representative, so that the property eventually will be distributed to the beneficiaries or heirs-at-law of the estate of the surviving spouse.

It is unlikely that *"The Dower Act"* would apply where the husband and wife die in circumstances governed by survivorship legislation, at least if the presumption of sequence of deaths we propose in recommendation 1 is adopted. According to that presumption, each spouse would be deemed to survive the other for the purpose of determining the devolution of their respective estates. Given this proposed presumption it is improbable that either spouse could be seen to be a "widow" or "widower" and thus come within the scope of the right set forth in section 15 of the Act, as described above.

The effect of the proposed presumption of sequence of deaths would thus produce an anomaly insofar as the application of *"The Dower Act"* is concerned. That is, the Act would apply where one spouse dies leaving a widow(er); it would also govern in the event both spouses die and the sequence of deaths is certain; however, it would likely not apply where the spouses die in circumstances in which their sequence of deaths is uncertain, thereby invoking the provisions of the proposed survivorship statute.

It is our view that this discrepancy should be removed so that the right to make an election under *"The Dower Act"* will be available regardless of whether the sequence of deaths of spouses is certain or uncertain. The right of an election under section 15 should be subject to the other provisions of *"The Dower Act"* which generally affect the right to a share in the decedent spouse's estate. These provisions include the exceptions for large estates set forth in section 16(1) and the right of spouses to release or contract out of dower rights for valuable consideration under section 23. The right to make an election should be drafted so that it applies whenever spouses die simultaneously or in circumstances in which the order of their deaths is uncertain. The Commission recommends:

> 4. *That the proposed Survivorship Act contain a provision granting the executor of a deceased spouse the right to claim a share in the other spouse's estate as set forth in "The Dower Act", C.C.S.M. c. D100, when spouses die simultaneously or in circumstances in which the sequence of their deaths is uncertain.*

We use the term "executor" in recommendation 4 as it is defined in section 2(d) of *"The Dower Act"*; that is, the term is intended to include an administrator with will annexed.

We wish to emphasize that recommendation 4 is made for the immediate purpose of effecting a like treatment of spousal estates, whether the order of deaths is established by evidence which renders that consequence certain, or where it is uncertain, thereby invoking the statutory presumption of survivorship. The whole of *"The Dower Act"* is presently under review by this Commission. A major issue for our consideration is whether section 15 of *"The Dower Act"* should apply, as it does presently, to bring about distinctive and separate rules of sharing for marriages terminated by death than for marriages terminated during the lives of the parties, either through separation or divorce.[31] Accordingly, recommendation 4 is subject to any proposals for reform we may recommend in our forthcoming Report in which we will consider the whole of *"The Dower Act"*.

C. Insurance

At present, *"The Survivorship Act"* and *"The Insurance Act"*, C.C.S.M. c. I40, can give rise to inconsistent presumptions regarding the sequence of deaths where the insured and the beneficiary of the insurance policy die at the same time or under circumstances which render the order of deaths uncertain. The rule under *"The Insurance Act"*[32] provides that in such circumstances as a common disaster the proceeds of insurance are to be paid to the

insured. The general rule under *"The Survivorship Act"* is that the younger is deemed to have survived the older. Since the insured is often the elder, different rules apply on survivorship depending upon whether the property in question is insurance proceeds.

The law is complicated by conflicting common law authority with respect to the interrelationship between the two Acts. The *Re Law*[33] line of cases posits that *"The Insurance Act"* governs not only to whom the proceeds are payable, but also governs the manner of distribution of those proceeds to the ultimate beneficiary. Basically, this interpretation is reached because section 3 of *"The Survivorship Act"* (see Appendix C) is subject to "sections 193 and 222 of The Insurance Act" (sic this should read sections 193 and 230). The court in *Re Law* held that the insurance proceeds did not become part of the general assets of the estate of the insured but were to be distributed according to the presumption in *"The Insurance Act"*.[34] The effect under an intestacy is that the proceeds would go to the blood relatives of the insured and not to the blood relatives of the beneficiary named in the insurance policy.

The *Re Topliss*[35] line of cases comes to a different conclusion. The court concluded in *Re Topliss* that no conflict exists between the two Acts. *"The Insurance Act"* first presumes the insured to have survived the beneficiary. The effect is to put the insurance proceeds into the general assets of the insured's estate. *"The Survivorship Act"* then applies with its presumption. The effect under an intestacy is that the proceeds would go to the blood relatives of the beneficiary and not to those of the insured. *Re Topliss* has been followed in Manitoba by the case of *Re Cane*.[36]

No doubt the state of the law is uncertain on this point. In their report to the Uniform Law Conference of Canada in 1969, the Alberta Commissioners[37] favoured amending the Act such that it could not be interpreted to effect the distribution of insurance proceeds. They recommended this approach on the basis of fairness. They expressed the view that *Re Law* has the effect of putting the insurance proceeds where they should go while *Re Topliss* does not, unless the insured happens to be younger than the beneficiary.[38]

The change in the general survivorship rule we have proposed in recommendation 1 of this Report accomplishes this objective to some degree; that is, as the British Columbia Commissioners pointed out in their report to the Uniform Law Conference in 1971,[39] the insured would be deemed to have survived the beneficiary under the proposed general rule. However, for the sake of clarity, they did recommend that *"The Insurance Act"* be amended to make clear that its sections apply only as a rule for payment of proceeds, and not for subsequent administration of the assets.[40]

The Ontario Legislature[41] (see Appendix E) and the American Uniformity Commissioners[42] (see Appendix F) took a similar approach regarding insurance proceeds. However, in both instances, their provision is found in survivorship legislation and not in their respective insurance Acts. In our view, the effect is the same; however, the Ontario position is favoured for it consolidates the distribution of all property to the respective beneficiaries in one Act as opposed to two. We also favour that annotations be added to the relevant provisions of *"The Insurance Act"* which clarify that the proposed *"Survivorship Act"* need be consulted. We therefore recommend:

5. *That the proposed Survivorship Act contain a provision which would require the proceeds of insurance to be paid in accordance with sections 193 and 230 of "The Insurance Act" and thereafter the proposed "Survivorship Act" would apply to their disposition.*

6. *That annotations be added to sections 193 and 230 of "The Insurance Act" which indicate that the proposed "Survivorship Act" applies to distribute the insurance proceeds from the estate of the insured.*

D. Jointly-held Property

1. Joint tenants

One of the main features of jointly-held property is the rule of *jus accrescendi*[43] or survivorship. It provides by operation of law that the last surviving joint tenant receives the whole of the jointly-held property. There is no difficulty with the application of the general rule under *"The Survivorship Act"* at present to jointly-held property save that the estate of the older joint tenant will not receive any benefit. This result occurs because the general rule deems the younger joint tenant to survive the older joint tenant and accordingly the estate of the younger joint tenant receives the property by virtue of the rule of survivorship.

Although the proposed general rule results in an approach which more closely follows the wishes of the decedents, there is clearly a problem with the application of this proposed rule to joint tenancies. The rule deems each joint tenant to survive the other. Thus, there is a need for a provision similar to section 1(2) of the *Uniform Survivorship Act* to resolve the question of survivorship.

This subsection reads as follows:

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

This provision will allow the owners of joint tenancies and accounts to be treated in effect, as tenants in common so that their respective interests will pass under the proposed general rule.

The Ontario survivorship legislation (see Appendix E) reads similarly to the above subsection, with one distinction: it applies to persons who hold legal "or equitable" title to property. Out of an abundance of caution we favour Ontario's provision to ensure the subsection's application to a joint tenancy arising in trust. Accordingly, we recommend:

> 1. *That the Legislature adopt a rule of succession for joint tenants under the proposed Survivorship Act as follows:*
>
> *Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purpose of subsection (1), deemed to have an equal share with the other or with each of the others in that property.*

2. Tenancies by the entireties

Section 3 of the American *Uniform Simultaneous*

Death Act (Appendix F) is similar to section 1(2) of the *Uniform Survivorship Act* regarding the devolution of jointly-held property. However, it goes further in that its provision also applies to a tenancy by the entireties.[44]

This estate arose at common law when property was conveyed to a husband and wife in such a way that, had they been strangers, they would have taken as joint tenants. Joint tenancy arises from the unities of possession, time, interest and title. Tenancy by the entireties adds to these four unities a fifth: the unity of legal personality given to a husband and wife at common law.

Due to the fifth unity neither spouse is regarded as having even a potential share in the property; rather the law regards the spouses as being seised together as one individual. This fifth unity distinguishes a tenancy by the entirety from a joint tenancy in two respects. First, a tenancy by the entireties is unseverable[45] and consequently the right of survivorship is indestructible. In a joint tenancy each joint tenant has a potential share and can deal with this share independently of the other joint tenants. Thus, each joint tenant can sever the joint tenancy and convert it into a tenancy in common. The second distinction between the two estates concerns the right of creditors. Generally, creditors can reach only those interests in a debtor's property that the debtor can alienate. Since the individual spouses do not have a separate interest, it follows that a creditor cannot reach the interest of a tenancy by the entireties.[46] This leaves open the potential for fraud.[47] Whereas a tenancy by the entireties is out of the reach of creditors, this is not so with a joint tenancy. Instead each joint tenant has a potential share in the property and the effect of seizure is to convert the joint tenancy into a tenancy in common.[48]

It is open to conjecture whether tenancies by the entireties exist in Manitoba. In some provinces, but not here, legislation has expressly abolished their existence,[49] while other provinces have impliedly abolished them.[50] An argument can be advanced that *"The Married Women's Property Act"*, C.C.S.M. c. M70, destroys the common law characteristic of unity of husband and wife and therefore the estate has been impliedly abolished.[51] The position adopted in England is that the *Married Women's Property Act, 1882* has abolished tenancies by the entireties.[52] In Ontario, it has been found that *"The Married Women's Property Act"* does not oust the doctrine of the unity of the husband and wife.[53] We could find no Manitoba case law on point; we think the answer remains uncertain.

If tenancies by the entireties exist in Manitoba, the provision set out in recommendation 8, which is based upon section 1(2) of the *Uniform Survivorship Act*, would need to be expanded to refer specifically to the estate as it does in the American uniform Act. Otherwise, uncertainty would arise as to the effect of its devolution. We would then need to assess whether spouses could exclude the Act's application to property held in this capacity. This issue arises due to the element of unseverability.[54] The alternative course would be to abolish tenancies by the entireties. Their abolition has been recommended in Alberta[55] and in Newfoundland.[56] We agree with the Alberta Institute of Law Research and Reform that the estate is an anomaly and that its continuance is not necessary. Accordingly, rather than make special provision in the proposed *Survivorship Act*, we recommend:

> 8. *That "The Law of Property Act", C.C.S.M. c. L90, be amended to add a provision to abolish tenancies by the entireties.*

E. Substitutions

1. Gifts

Section 2(2) of the present Act contains a provision which allows for a gift to be substituted generally in the event of a common disaster. The exception reads as follows:

> Where a statute or an instrument contains a provision for the disposition of property operative if a person designated in the statute or instrument,
>
> (a) dies before another person; or
> (b) dies at the same time as another person; or
> (c) dies in circumstances rendering it uncertain which of them survived the other,
>
> and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the statute or instrument provides is deemed to have occurred.

The effect of this subsection is in our view three-fold:

1. *Where a testator dies with his principal beneficiary:* as we mentioned previously (page 5), subsection (2) ensures where a testator names a principal beneficiary who is younger than he and they die in circumstances governed by the Act that any alternate beneficiaries will take notwithstanding the present statutory rule presumes the principal beneficiary to have survived the testator.[57]

2. *Where two beneficiaries die:* subsection (2) also applies where, for example, a testator, gives his estate to his sister with a proviso that if she dies before her husband, then the estate shall go to his niece. If his sister and husband perish simultaneously, subsection (2) provides that the estate shall go to his

niece notwithstanding his sister is younger than her husband and is presumed to have survived him under the present statutory presumption of sequence of deaths.

3. *Where a person whose life is insured and a beneficiary die:* sections 193 and 230 of *"The Insurance Act"*, C.C.S.M. c. I40, state that where a person whose life is insured and a beneficiary die simultaneously, the proceeds of insurance are payable as if the beneficiary had predeceased the person whose life is insured. Subsection (2) makes certain that this provision applies notwithstanding the beneficiary may be younger and would therefore be deemed to have survived the person whose life is insured under the present statutory presumption.

The proposed statutory presumption of sequence of deaths set forth in recommendation 3 of this Report solves the majority of the problems subsection (2) attempts to correct. That is, referring to the first objective of this subsection set forth above, the proposed presumption would deem the testator to have survived his principal beneficiary. Consequently, his alternate beneficiary would take. We have recommended that the proposed *"Survivorship Act"* contain a provision clarifying the interrelationship between the Act and the provisions of *"The Insurance Act"* and, consequently, the third reason for the subsection no longer exists. We think, however, that the subsection is still necessary because of the second problem this provision attempts to correct. That is, we think that the proposed *"Survivorship Act"* should clarify that, using the above example, the testator's estate should devolve to his niece. We therefore recommend:

9. *That the Legislature adopt a rule regarding substitute gifts under the proposed "Survivorship Act" as follows:*

> *Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will*
>
> *(a) dies before another person;*
> *(b) dies at the same time as another person; or*
> *(c) dies in circumstances rendering it uncertain which of them survived the other,*
>
> *and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the will provides is deemed to have occurred.*

This provision is similar to section 2(3) of the British Columbia survivorship statute.[58]

2. Personal representatives

Section 2(3) of the present *"Survivorship Act"* and section 1(3) of the *Uniform Survivorship Act* of 1971 both contain a provision for substitute personal representatives. In 1971, the *Uniform Survivorship Act* takes the following form:

> Where a will contains a provision for a substitute personal representative operative if an executor designated in the will
>
> (a) dies before the testator; or
> (b) dies at the same time as the testator; or
> (c) dies in circumstances rendering it uncertain which of them survived the other,
>
> and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.

This subsection ensures that where a testator and his executor die in a common disaster any testamentary provision respecting an alternate personal representative will take effect. Although the subsection may not be necessary,[59] it does make certain that the testator's intentions are followed and consequently we think it should be contained in the proposed *"Survivorship Act"*. We recommend:

> 10. *That the Legislature adopt a provision pertaining to substitute personal representatives as follows:*
>
> *Where a will contains a provision for a substitute personal representative operative if an executor designated in the will*
>
> *(a) dies before the testator; or*
> *(b) dies at the same time as the testator; or*
> *(c) dies in circumstances rendering it uncertain which of them survived the other,*
>
> *and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred.*

F. Powers of Appointment

A power of appointment is an authority given to a person to dispose of property which belongs to someone else. The donor of the power is the person who grants the power while the donee is the person who receives it.[60] A power of appointment is therefore an authority conferred by deed or will, by which the donee of a power may determine who are to be the recipients of specified property owned by the donor of the power.[61] The power may be revocable or irrevocable; under a revocable power of appointment as its name implies, the donor reserves the right to withdraw or revoke the power of appointment.

Powers of appointment are classified as either general or special. A general power will impose no restrictions upon the donee's choice of recipients, allowing the donee to appoint to anyone including himself or herself. Thus, a gift "to X for life, remainder as he shall appoint" gives to X, the donee, a life interest and a general power of appointment. A special power of appointment may restrict the donee's choice to a limited class of persons;[62] the donor may grant, for example, a gift "to X for life, remainder to either A, B, or C as he shall appoint". When the donee fails to exercise his or her power of appointment then the power is considered in default. Provision is usually made for some person or persons to take in default of appointment; if this is not done, the donor is entitled in default of appointment.[63]

There are two problems which arise where a donor and a donee die simultaneously and the donee has exercised the power of appointment by a testamentary instrument. The first is whether the proposed statutory presumption set forth in recommendation 3, which follows section 1(1) of the *Uniform Survivorship Act*, is broad enough so that powers of appointment are subject to that presumption. Although this issue is unclear, we think the phrase "any property of which he is competent to dispose", which appears in the proposed section, would include property which is the subject of the appointment exercised by the donee.[64] Aside from this issue pertaining to the breadth of that phrase, we think the effect of powers of appointment under the proposed statutory presumption is also unclear. Does one presume, assuming the above facts, that the power has not been exercised so that it falls into the estate of the donor, or as (s)he has otherwise directed? Or, does one presume it has been exercised so that it falls as the donee has elected?

We think the proposed Act should provide a solution to these problems. In our view, the proper solution is as follows. Where the donee exercises the power (either general or special) by his/her will, then the property which is subject to the power should devolve as elected by the donee. This can be accomplished by providing that the donee shall be deemed to have survived the donor for the purpose of the power of appointment. If the donor demonstrates a contrary intention to the presumption of sequence of deaths, either by the deed in which the power is conferred or by will, then the donor's intentions should override the statutory presumption we propose. A contrary intention would arise, for example, where the donor has granted the donee a revocable power of appointment and the donor has validly revoked that power in his/her will. It would also arise where the power is granted by will but the donor provides for substitutions in the event the donee dies before the donor or dies at the same time. We recommend:

> 11. *That the proposed Survivorship Act contain a provision for the sequence of deaths with respect to general and special powers of appointment so that, unless a contrary intention appears, where the donee has purported to exercise the power of appointment by will, the donee shall be deemed to have survived the donor for the purpose of the power of appointment.*

G. Transition

The *Uniform Survivorship Act* (1971) does not contain any transition provision. Section 56 of the Ontario Act (Appendix E) states that its new survivorship rules apply to deaths "occurring on or after the 31st day of March, 1978". This Commission favours the inclusion of a specified transition period. In our view, the proposed *Survivorship Act* should contain a provision, like Ontario's, that limits its application to deaths occurring on or after a specified date. We

would go further, however, by recommending that the new Act apply unless it can be proved, on a balance of probabilities, that the deaths occurred prior to the effective date of legislation.[65] We recommend this broader transition rule because we believe the proposed statutory presumption of sequence of deaths proposed in recommendation 1 more closely resembles what the intentions of decedents would be had they directed their minds to the rules of survivorship. We therefore recommend:

12. *That the proposed Survivorship Act contain a transition provision whereby the Act will apply to all deaths unless the evidence establishes, on a balance of probabilities, that the deaths occurred prior to the date the proposed Act comes into force.*

III. SUMMARY OF RECOMMENDATIONS

The recommendations of the Commission may be summarized as follows:

1. That the statutory presumption of the sequence of deaths under *"The Survivorship Act"* be amended so that it shall be deemed that each decedent has survived the other or others. (p. 6)

2. That the proposed statutory presumption of the sequence of deaths apply where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others. (p. 7)

3. That the Legislature adopt a general rule of survivorship as follows:

   Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, for all purposes affecting the legal or beneficial title to, ownership of, or succession to, property, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others, except as provided otherwise in this Act. (p. 9)

4. That the proposed *Survivorship Act* contain a provision granting the executor of a deceased spouse the right to claim a share in the other spouse's estate as set forth in *"The Dower Act"*, C.C.S.M. c. D100, when spouses die simultaneously or in circumstances in which the sequence of their deaths is uncertain. (p. 12)

5. That the proposed *Survivorship Act* contain a provision which would require the proceeds of insurance to be paid in accordance with sections 193 and 230 of *"The Insurance Act"* and thereafter the proposed *Survivorship Act* would apply to their disposition. (p. 15)

6. That annotations be added to sections 193 and 230 of *"The Insurance Act"* which indicate that the proposed *Survivorship Act* applies to distribute the insurance proceeds from the estate of the insured. (p. 15)

7. That the Legislature adopt a rule of succession for joint tenants under the proposed *Survivorship Act* as follows:

   Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person is, for the purpose of subsection (1), deemed to have an equal share with the other or with each of the others in that property. (p. 16)

8. That *"The Law of Property Act"*, C.C.S.M. c. L90, be amended to add a provision to abolish tenancies by the entireties. (p. 18)

9. That the Legislature adopt a rule regarding substitute gifts under the proposed *"Survivorship Act"* as follows:

   Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will

   (a) dies before another person;
   (b) dies at the same time as another person; or
   (c) dies in circumstances rendering it uncertain which of them survived the other,

   and the designated person dies at the same time as the other person or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of that disposition, the case for which the will provides is deemed to have occurred. (pp. 20-21)

10. That the Legislature adopt a provision pertaining to substitute personal representatives as follows:

    Where a will contains a provision for a substitute personal representative operative if an executor

designated in the will

(a) dies before the testator; or
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides is deemed to have occurred. (p. 22)

11. That the proposed *"Survivorship Act"* contain a provision for the sequence of deaths with respect to general and special powers of appointment so that, unless a contrary intention appears, where the donee has purported to exercise the power of appointment by will, the donee shall be deemed to have survived the donor for the purpose of the power of appointment. (p. 24)

12. That the proposed *"Survivorship Act"* contain a transition provision where the Act will apply to all deaths unless the evidence establishes, on a balance of probabilities, that the deaths occurred prior to the date the proposed Act comes into force. (p. 25)

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"*, signed this 7th day of September, 1982.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

D. Trevor Anderson, Commissioner

George H. Lockwood, Commissioner

Richard Thompson

Richard Thompson, Commissioner

G. MacNamara

Geraldine MacNamara, Commissioner

M. Anne Riley

Anne Riley, Commissioner

NOTES

1. *Hitchcock v. Beardsly* (1738), 25 E.R. 1025.

2. Conference of Commissioners on the Uniformity of Legislation in Canada, *Proceedings of the Twenty-second Annual Meeting* (August, 1939) at 59.

3. *Law of Property Act*, 1925 (15 & 16 Geo. V, c. 20) s. 184.

4. *"The Commorientes Act"*, S.M. 1942, c. 8.

5. Conference of Commissioners on the Uniformity of Legislation in Canada, *Proceedings of the Forty-second Annual Meeting* (August, 1960) 109.

6. S.M. 1962, c. 73.

7. The *Uniform Survivorship Act* is reproduced from the following publication: Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-third Annual Meeting* (August, 1971) 412.

8. *Survivorship Ordinance*, O.Y.T. 1980 (1st), c. 31.

9. *Succession Law Reform Act*, R.S.O. 1980, c. 488, sections 55 and 56, reproduced in Appendix E.

10. *Commorientes Act*, R.S.P.E.I. 1974, c. C-13 as amended by the *Confirmation and Amendment Act*, S.P.E.I. 1975, c. 83, s. 3.

    "The Survivorship Act", R.S.N. 1970 c. 366 as amended by *"The Survivorship Act"*, 1971, S.N. 1971, No. 5, s. 2.

    Survivorship Act, R.S.N.S. 1967, c. 299.

    Survivorship Act, R.S.N.B. 1973, c. S-19.

    "The Survivorship Act", R.S.S. 1978, c. S-67.

    Survivorship Act, R.S.A. 1980, c. S-31.

    Survivorship and Presumption of Death Act, R.S.B.C. 1979, c. 398, sections 1 and 2.

    Survivorship Ordinance, R.O.N.W.T. 1974, c. S-12 as amended by O.N.W.T. 1976 (1st), c. 10, s. 1.

11. Quebec *Civil Code/Code Civil*, s. 603.

12. *Uniform Simultaneous Death Act*, Uniform Laws Annotated, Volume 8, 606, reproduced in Appendix F.

13. The Alberta Commissioners in a report to the Uniform Law Conference of Canada, *Proceedings of the Fifty-first Annual Meeting* (August,1969) 171 at p. 178 concluded that the present general rule is arbitrary and not based upon principle.

14. Ontario Law Reform Commission, *Report on Family Law: Part IV - Family Property Law*, 1974 at 170:

"It is thought that this rule is unjust to the relatives of the person deemed to have predeceased since the effect in many cases is to pass all the property to the relatives of the deemed survivor."

15. Statistics Canada, Catalogue No. 84-205 *Annual Vital Statistics - Volume II Marriages and Divorces - 1980*, TABLE 3 "Age of Bride by Age of Bridegroom, Canada, 1980.

16. Section 6(2) of *"The Devolution of Estates Act"*, C.C.S.M. c. D70, provides that where an intestate leaves a widow and issue, she gets the first $50,000 and one-half of the residue. Section 7 of that Act provides that where an intestate leaves a widow, but no issue, she gets the whole of his estate.

17. Section 8(1) of *"The Devolution of Estates Act"*, C.C.S.M. c. D70, provides that where an intestate dies without widow(er) or issue, the estate shall go to his or her parents in equal shares.

18. See *supra* n. 16.

19. The right of children to share in an intestate's estate under *"The Devolution of Estates Act"*, C.C.S.M. c. D70, is confined to "issue" which is defined in section 5(b) of that Act to include "lineal descendants". "Lineal descendant" is defined in *Black's Law Dictionary* (5th ed.) as "[a] person in the direct line of descent such as a child or grandchild as contrasted with a collateral descendant such as a niece". Although adopted children would be included in the definition of issue by virtue of section 96 of *"The Child Welfare Act"*, C.C.S.M. c. C80, there is no such similar provision regarding step-children and they would not fall in the general definition of a "lineal descendant". *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, could afford the child a portion of his or her parent's estate because, by virtue of section 3(5), the Act applies to intestacies.

20. On this point, section 2(2) of the Act states in effect that the alternate beneficiaries will take where the will says that the gift to the principal beneficiary is defeated in the event (s)he dies before the testator, dies at the same time or dies in circumstances rendering the sequence of deaths uncertain.

21. *Supra* n. 14.

22. *Supra* n. 7.

23. *Supra* n. 12.

24. *Supra* n. 12 at 607.

25. Ontario Law Reform Commission, *Study prepared by the Family Law Project: Vol. III - Property Subjects* (1967) at 567.

26. See page 24 of our Report.

27. The right to one-half of the value of the decedent spouse's net real and personal property under section 15 is subject to exceptions set forth in section 16 of the Act. These exceptions pertain generally to large estates. The right to a division of assets under the Act can also be released for valuable consideration. This is provided for in section 23 of the Act.

28. "Net real and personal property" and "net estate" are defined respectively in s. 2(i) and s. 2(h) of *"The Dower Act"*.

29. The other statutes which may govern the determination of the portion of the estate to which the surviving spouse is entitled are: *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50, which requires the court to make adequate provision for dependents (defined as the surviving spouse or child of the testator) where the testator has not made adequate provision for their proper maintenance and support, and *"The Devolution of Estates Act"*, C.C.S.M. c. D70, which sets forth rules determining who benefits from an intestacy.

30. *"The Marital Property Act"*, C.C.S.M. c. M45, provides for rules determining the division of assets between spouses where they terminate their marriage during their joint lives.

31. Section 15 of *"The Dower Act"* differs significantly from the provisions of *"The Marital Property Act"* which apply when parties terminate their marriage by either separation or divorce. Generally speaking, assets which are acquired before marriage are not shareable under *"The Marital Property Act"* whereas section 15 of *"The Dower Act"* applies to bring about a sharing of these assets. The formula for determining a surviving spouse's share under section 15 also differs significantly from *"The Marital Property Act"*. For a good discussion of *"The Dower Act"* see A.D. Hughes, "Reform of the Dower Act Rights of Widows" (1979) 9 No. 4 *Man. L.J.* 393.

32. *"The Insurance Act"*, C.C.S.M. c. I40, s. 193, 230.

33. *Re Law* [1946] 2 D.L.R. 378 (B.C.S.C.); *Prefontaine v. Cooperative Trust Company of Canada*, [1977] 3 W.W.R. 211 (Sask. Q.B.).

34. *Ibid* and see Gilbert D. Kennedy, (1946) 24 *Can.B. Rev.* 720.

35. *Re Topliss* (1957), 10 D.L.R. (2d) 655 (Ont. C.A.); *Re Cane* (1968), 66 D.L.R. (2d) 741 (Man. Q.B.); *Re Currie* (1963), 41 D.L.R. (2d) 666 (B.C.S.C.); *Re Fair* (1971), 17 D.L.R. (3d) 751 (N.S.S.C.).

36. *Ibid.*

37. Uniform Law Conference of Canada, *Proceedings of the Fifty-first Annual Meeting* (August, 1969) 171 at 178.

38. *Ibid.*

39. Uniform Law Conference of Canada, *Proceedings of the Fifty-third Annual Meeting* (August, 1971) 409 at 410.

40. This recommendation was implemented in the Yukon: *An Ordinance to Amend the Insurance Ordinance*, O.Y.T. 1980 (1st), c. 15.

41. *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 55(4).

42. *Supra* n. 12 at p. 621.

43. "The right of the survivor or survivors of two or more joint tenants to the tenancy or estate, upon the death of one or more of the joint tenants", *Black's Law Dictionary* (5th edition).

44. See section 3 of the *Uniform Simultaneous Death Act* (Appendix F). For a good discussion of this estate see J.M. Glenn, "Tenancy by the Entireties: A Matrimonial Regime Ignored", (1980) 58 *Can. B. Rev.* 711.

45. *Thornley v. Thornley* [1893] 2 Ch. 229.

46. John Ritchie, "Tenancy by the Entirety in Real Property with Particular Reference to the Law of Virginia" (1942) 28 *Va. L. Rev.* 608 at 617.

47. G.W. Klorfein, "Tenancies By The Entireties In New York", (1963) 9 *New York Law Forum* 460.

48. *Re Chisick* (1967), 62 W.W.R. (N.S.) 486 (Man. C.A.).

49. *Family Law Reform Act*, S.P.E.I., 1978, c. 6, s. 64(1); *Law of Property Act*, R.S.A. 1980, c. L8, s. 5(2)(3).

50. *"The Chattels Real Act"*, R.S.N. 1970, c. 36 as am. by S.N. 1972, No. 13, s. 2; *Property Law Act*, R.S.B.C., 1979, c. 340, s. 12.

51. See J.M.Glenn, *supra* n. 44, at 721.

52. *Supra* n. 45.

53. *Campbell v. Sovereign Securities and Holdings Co. Ltd.* [1958] O.W.N. 414 (Ont. C.A.).

54. D.G. Whelpley, "The Effect of Testamentary Survivorship Provisions on Tenancies by the Entireties under New York's Simultaneous Death Act" [1980] *Albany Law Review* 680.

55. Alberta Institute of Law Research and Reform, *Partition and Sale*, Report 23 (1977) at 17.

56. Gushue and Day, *Family Law in Newfoundland*, (1973) at 278 ff.

57. See Feeney, *Canadian Law of Wills: Construction* at 354 in reference to his interpretation of a similar provision in British Columbia.

58. *Supra* n. 10, section 2(3).

59. The provision may not be necessary because if the testator and his personal representative die simultaneously, the general rule could be interpreted as ensuring that the testator is deemed to survive the personal representative.

60. Megarry and Wade, *The Law of Real Property*, (4th ed) at 461.

61. D.W.M. Waters, *Law of Trusts in Canada* (1974) at 66.

62. For a fuller definition of a special power of appointment, see *The Canadian Law Dictionary* (1980).

63. *Supra* n. 60 at 463, 464.

64. See MacDonell, Sheard, Hull, *Probate Practice* (3rd ed.) at 185 where the authors refer to this uncertainty under section 55(1) of the Ontario statute, reproduced in Appendix E.

65. See MacDonell, Sheard, Hull, *ibid.* where the authors discuss section 56 of the Ontario Act (Appendix E) and refer to the uncertainty caused by that Act's transition period.

APPENDIX A

AN ACT RESPECTING SURVIVORSHIP

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

Short title

1 This Act may be cited as: "The Survivorship Act".

General rule

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

Substitute gifts

3(1) Unless a contrary intention appears, where a will contains a provision for the disposition of property operative in any one or more of the following cases, namely, where a person designated in the will

(a) dies before another person;
(b) dies at the same time as another person; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

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

Substitute personal representatives

3(2) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will

(a) dies before the testator; or

(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other,

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

Joint tenancy

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

Insurance

5 Where a person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the proceeds of the policy of insurance shall be paid in accordance with sections 193 and 230 of The Insurance Act and thereafter this Act applies to their disposition.

Powers of appointment

6 Unless a contrary intention appears, where a donee exercises a power of appointment by will and he and the donor die at the same time or in circumstances rendering it uncertain which of them survived the other, the property which is subject to the power of appointment shall be disposed of as if the donee had survived the donor.

Application of The Dower Act

7 Where a husband and wife die at the same time or in circumstances rendering it uncertain which of them survived the other, The Dower Act applies to each of their respective estates.

Transition

8 In respect of the deaths of persons who died before this Act comes into force, survivorship shall be determined as though this Act had not been enacted.

Repeal of prior Act

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

Commencement of Act

10 This Act comes into force on the day it receives the royal assent.

APPENDIX B

AN ACT TO AMEND THE LAW OF PROPERTY ACT

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

Section 10.1 added

1 The Law of Property Act, being chapter L90 of the Revised Statutes, is amended by adding immediately after section 10 the following section:

10.1 The estate of tenancy by the entireties and the common law rules related thereto are abolished, and every tenancy by the entireties existing immediately before the date this Act comes into force becomes on that date a joint tenancy.

Commencement of Act

2 This Act comes into force on the day it receives the royal assent.

APPENDIX C

"The Survivorship Act" C.C.S.M. c. S250.

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

Short title.

1 This Act may be cited as: "The Survivorship Act".

S.M., 1962, c. 73, s. 1.

General rule.

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

Substitute gifts.

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

(a) dies before another person; or
(b) dies at the same time as another person; or
(c) dies in circumstances rendering it uncertain which of them survived the other;

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

Substitute executors.

2(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will,

(a) dies before the testator; or
(b) dies at the same time as the testator; or
(c) dies in circumstances rendering it uncertain which of them survived the other;

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

S.M., 1962, c. 73, s. 2.

Exception.

This Act is subject to sections 193 and 222 of The Insurance Act.

3

APPENDIX D

Uniform Survivorship Act

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

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

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

(a) dies before the testator; or

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

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

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

Note:—

The Uniform survivorship provision in the respective Insurance Acts of the Provinces reads as follows:

> Unless a contract or a declaration otherwise provides, where the person whose life is insured and a beneficiary die at the same time or in circumstances rendering it uncertain which of them survive the other, the insurance money is payable in accordance with subsection—of section—as if the beneficiary had predeceased the person whose life is insured.

It is suggested that, to complement the new Uniform Survivorship Act and make clear that the insurance provisions only apply for the purpose of paying out the proceeds of the policy and not for the distribution of property, the Uniform insurance provision in the respective Insurance Acts be amended as follows:

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

APPENDIX E

SUCCESSION LAW REFORM ACT, R.S.O. 1980, c. 488, ss. 55 and 56 (Ont.)

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

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

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

(*a*) dies before the testator;

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

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

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

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 192 and 272 of the *Insurance Act* and thereafter this Part applies to their disposition. 1977, c. 40, s. 61.

56. This part applies in respect of deaths occurring on or after the 31st day of March, 1978. 1977, c. 40, s. 63.

APPENDIX F

UNIFORM SIMULTANEOUS DEATH ACT (American)

§ 1. No Sufficient Evidence of Survivorship

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.

§ 2. Survival of Beneficiaries

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

§ 3. Joint Tenants or Tenants by the Entirety

Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

§ 4. Community Property

Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived [and as if said one-half were his separate property,] and the other one-half thereof shall pass as if the wife had survived [and as if said other one-half were her separate property.]

§ 5. Insurance Policies

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, [except if the policy is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds shall be distributed as community property under Section 4.]

§ 6. Act Does Not Apply If Decedent Provides Otherwise

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

§ 7. Uniformity of Interpretation

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

§ 8. Short Title

This act may be cited as the Uniform Simultaneous Death Act.

§ 9. Repeal

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

§ 10. Severability

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

§ 11. Time of Taking Effect

This act shall take effect .....