

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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Backgrounder

LRC 56—Report on Presumptions of Survivorship

Date: October 1982

In some cases, the timing of individuals' deaths may affect their legal rights. For example, entitlement to a portion of a testator's estate can depend upon the beneficiary surviving the testator. Entitlement to receive the proceeds of a life insurance policy may also turn on the order of death of a number of individuals.

When two or more people die in a common disaster whether one survived another is a question of fact. But sometimes the facts are not available to establish with reasonable precision the order of deaths. Frustration with the common law approach to these cases led to the enactment of legislative presumptions intended to assist the courts in establishing the order of deaths. The first statute was passed in England in 1925. Similar legislation was passed in British Columbia in 1939. This legislation continues in force, under the name *Survivorship and Presumption of Death Act*.

As its title suggests, the *Survivorship and Presumption of Death Act* is primarily intended to serve two purposes. First, it sets out a mechanism for a person to apply to court for an order declaring that an individual is presumed to be dead, if the individual has been absent and not heard from for a period of time, the applicant has no reason to believe that the individual is alive, and there are reasonable grounds for supposing the individual to be dead. Second, the Act contains a general presumption that, when it is uncertain in what order two or more individuals have died, the order of death is to be determined by their seniority. That is, the younger individual is presumed to have survived the older.

This report focuses on the second aspect of the *Survivorship and Presumption of Death Act*—the general presumption applied in the courts to determine order of death in a common disaster. In addition to a brief introduction and conclusion, the report contains three substantive chapters. The first of these chapters examines the historical development of survivorship at common law. It notes some early theories, such as examining the nature of the disaster and the comparative robustness of the individuals. Finally, lacking any legal presumptions of survivorship, when confronted with a case that did not have sufficient evidence to establish the order of death, the law settled on a practice of granting administration to the respective next-of-kin of the deceased. The courts treated the question of

survivorship as one incapable of being determined, and, therefore, decided against the representatives of the beneficiary. The report notes that this approach caused two problems: (1) it encouraged litigation and (2) it could lead to serious problems in interpreting wills.

The next chapter reviews the legislation that was passed in the early part of the twentieth century to remedy the defects of the common law. The chapter looks at the forerunners of the British Columbia Act in English legislation and legislation recommended by the Uniform Law Conference of Canada. Then, it proceeds to examine the operation of the statute in a series of court cases.

Finally, the report reviews several models for reform, including an updated proposal by the Uniform Law Conference of Canada and a proposal by the American National Conference of Commissioners for Uniform State Laws. The report recommends reforms to the law of British Columbia based on the model proposed by the Uniform Law Conference of Canada. Under this model, questions of survivorship, in the absence of evidence, would be determined by distributing the estate of each deceased as if he or she had survived the other. In the commission's view, this change in the law would bring about fairer results. It would also bring the *Survivorship and Presumption of Death Act* into line with legislation in other provinces and with a specific survivorship rule for insurance policies, which is contained in the *Insurance Act*. The report then examines several subsidiary issues, including displacing the presumption by a contrary intention in an instrument, gifts to two or more beneficiaries or their survivors, appointment of personal representatives, and deaths occurring within a short period of time of each other.

Further Developments

The report's recommendations have not been implemented by legislation.