

Financial Advisor

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“Common disaster” confusion

When people die at the same time or under circumstances where you can't tell who died first, it's called a "common disaster" or "simultaneous death". Yet while it may not be possible to tell who died first, it's often important to know, to pass property to survivors in a timely fashion, and to avoid expensive disputes and double taxation. Common disaster rules in contracts, wills and provincial laws provide rules for sorting out how property passes when people die at the same time, or when you can't tell who died first. Unfortunately, the rules often work in contradictory ways, resulting in confusion as we try to plan for a possibility we hope won't occur. In this bulletin we'll try to sort out some of the common disaster confusion.

True simultaneous deaths, such as could happen in an explosion or building collapse, are extremely rare. Often, forensic evidence can determine who died first. However, there are situations where victims haven't died simultaneously, but the sequence of deaths is impossible to determine (i.e. house fires or marine disasters).

As a general rule, it must be proven that heirs and beneficiaries outlived the person they inherit from. In circumstances where you can't tell who died first, wills, provincial laws and contracts contain rules that determine the sequence of death to make it easier and less costly to administer a person's estate. However, provincial laws vary, and differ in approach from contractual provisions that deal with common disasters and simultaneous deaths.

Wills

Many spouses write their wills to give all their property at death to the other spouse. If one spouse outlives the other, the will then says that all their property goes at their death to their children. Many wills also say that a beneficiary has to outlive the testator (the person who created the will) by a fixed number of days, often 30, to get anything.

These provisions help avoid needless expense and delay in distributing an estate. If a husband and wife die within a few days of each other, it makes little sense for each to send their combined assets into each other's estates only to have them go almost immediately after that to their children. Not only do the added steps delay the ultimate distribution of their estates, they add to the complexity and cost of administering their estates, increase the probate fees that their estates may have to pay, and expose all their assets to the claims of both spouses' creditors.

Let's consider how the distribution of a couple's estate works in a common disaster situation using an example. A husband and wife have wills where they each give all they own to each other when they die. Their wills also say that if one dies before the other, or doesn't outlive the other by 30 days, the couple's children become the beneficiaries. Unfortunately, both husband and wife are killed in a car accident, and it's impossible to say who died first.

Without a common disaster clause (and ignoring provincial law for the moment), we wouldn't know how to proceed because we wouldn't know which spouse outlived the other. Ultimately, the couple's executors¹ could apply to a judge for directions, but that's an expensive process. However, since both wills contained common disaster clauses, their executors can distribute their estates more efficiently. Though we don't know who died first, we do know that neither spouse outlived the other by 30 days, so neither spouse could be a beneficiary of the other's will. Therefore, the assets from both spouses' estates would pass to their children rather than first going through each other's estates.

Provincial law

In the absence of a valid will or common disaster clause the provinces and territories have created rules describing what happens when two people die at the same time, and you can't say who died first. Unfortunately, there are two sets of laws, depending on where you live. In some provinces and territories the older person is deemed to have died first.² In others, each person is deemed to have outlived the other.³ In Quebec, if two people die and you can't tell who died first, they're deemed to have died at the same time "if at least one of them is called to the succession of the other. The succession of each then devolves to the persons who would have been called to take it in their place".⁴ As a result, if you can't tell who died first, the one who would inherit from the other is deemed to have survived.

Consider our example from above, assuming again that you can't say which spouse died first, and also assuming that neither spouse's will had a common disaster clause. If the husband was older than his wife, and if they lived in Alberta (where the older spouse would be deemed to have died first) the husband would be deemed to have died first. The husband's assets would go to his wife's estate. Since the wife would be presumed to have survived her husband, all of her estate, including any assets coming to her estate from her husband's estate, would then go to their children.

Ultimately, the children would receive all their parent's assets. However, before the children got all their father's assets, some of those assets may have been subjected to two sets of probate taxes and administrative costs, once when those assets passed through their father's estate to their mother's estate, and again when those same assets passed through their mother's estate to the children.

The advantage to the provincial rule is that it eliminates the need to determine who died first, which can require expensive legal proceedings. However, the presumption is less cost-effective than the disposition under a will containing a common disaster clause because some assets belonging to the older spouse may be subject to probate and administrative fees twice.

Consider instead what could happen if the couple lived in British Columbia, where each is presumed to have outlived the other. Of course it's impossible for two people to outlive each other, but the presumption serves a useful purpose in avoiding an inquiry to determine who died first.

From the perspective of the husband's executor the presumption means that the wife's estate can't receive anything from the husband's estate, since he's presumed to have outlived her. Therefore, the children become the beneficiaries of the husband's estate. From the perspective of the wife's executor we reach the same result. Because she's deemed to have outlived her husband, his estate can't receive anything from her estate. Instead, their children become the beneficiaries of her estate.

In each case, deeming both spouses to have outlived the other when you can't say who died first eliminates them as beneficiaries of each other's estates, allowing their property to pass directly to their children.

¹ An executor is someone named in the will to administer the deceased's estate, assuming the executor agrees to serve.

² Alberta, Nova Scotia, Prince Edward Island, Newfoundland, the Northwest Territories and Nunavut.

³ British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, and the Yukon Territory.

⁴ Québec Civil Code, Article 616, 1991, c. 64, a. 616; I.N. 2014-05-01.

Jointly owned property

Most couples own their homes as joint tenants with right of survivorship. They may own other assets this way, too. Under this form of ownership, each person owns an equal interest in the asset. If one person dies, their interest in the asset passes instantly to the surviving owner. Since the transfer takes place entirely outside of the deceased's estate, it doesn't matter what the will says or whether the owner even had a will.

In those provinces and territories where the older spouse is presumed to have died first there shouldn't be any confusion over where the property goes.⁵ In our example the husband is the older spouse and is presumed to have died first, so his share in the property goes to his wife's estate for distribution to her beneficiaries. Since the husband's interest passed to his wife outside his estate, there are no extra probate or administrative costs associated with the transfer, only some additional paperwork to be completed to register the property transfer.

However, in those provinces (and in the Yukon Territory) where each spouse is presumed to have survived the other, the presumption that each spouse outlived the other could cause extra expense and delay.⁶ If the husband is presumed to have outlived his wife, his share in the home will pass to her estate. But since the wife is presumed also to have outlived her husband, her share in the home will pass to her husband's estate. After all is said and done, all that will have been accomplished is a swap of identical interests in the same piece of property.

In response to this potential difficulty, the laws in those provinces and in the Yukon Territory where each person is presumed to have outlived the other, also provide that if it can't be said which person died first, those who own their property jointly with right of survivorship will instead be deemed to have owned their property as tenants in common. The key difference is that there's no right of survivorship among tenants in common. When a tenant in common dies, their interest in the jointly owned property becomes an asset of their estate, and is disposed of according to the terms of their will, or according to the laws of intestate succession in their province or territory. If you can't say which spouse died first, each spouse will be presumed to have outlived the other, neither will receive the other's share in the property they jointly owned, and each spouse's property will pass to their children according to the terms of their wills or the laws of intestate succession in their province or territory.

Life insurance policies

A life insurance policy common disaster clause works differently from a clause in a will or under provincial law. In all provinces and territories except Quebec, if the life insured and beneficiary die at the same time, or if you can't say who died first, the life insured is presumed to have survived the beneficiary. In Quebec, the beneficiary is presumed to have survived the policy owner when the owner and beneficiary die at the same time and the owner doesn't have a will and doesn't have heirs. In those circumstances, the death benefit will go to the heirs of the beneficiary and not to the policy owner's estate.

Assume that the wife is a beneficiary of a life insurance policy that her husband owns on his life. If both spouses die in a common disaster, and you can't say who died first, the beneficiary (the wife) will be deemed to have died before the life insured (the husband). If the husband had designated a contingent beneficiary, like their children, to receive the death benefit if he outlived his wife, the death benefit will go directly to the children, bypassing the wife's estate.

If the husband hadn't designated a contingent beneficiary to his life insurance policy, the life insurance company would pay the death benefit to his estate. Once the death benefit is in his estate, the terms of his will, or provincial or territorial law, will say where the money goes. These rules will operate without regard to the life insurance policy common disaster rules.

If the husband's will provided that a beneficiary had to outlive him by 30 days, the life insurance policy death benefit would be paid to the couple's children, because the wife wouldn't have outlived the husband by the required number of days.

If the couple had no wills, or if their wills lacked common disaster clauses, and if they lived in a province where the older person (the husband in our example) was presumed to have died first, the life insurance policy death

⁵ Alberta, Nova Scotia, Prince Edward Island, Newfoundland, the Northwest Territories and Nunavut.

⁶ British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick and the Yukon Territory.

benefit would be paid from the husband's estate to the wife's estate because provincial law would deem her to have outlived him. After that, the death benefit would go from the wife's estate to the couple's children. If the couple lived in a province (or in the Yukon Territory) where each was presumed to have outlived the other, the life insurance policy death benefit would be paid from the husband's estate to the couple's children, bypassing the wife's estate, because the husband would be presumed to have outlived the wife.

Business planning for common disasters

What happens if two business owners die in a common disaster and you can't tell who died first?

If A and B are equal shareholders in a business, their buy-sell agreement could provide that B has to buy A's shares from A's estate if A dies, and vice versa, both using promissory notes to pay for the shares they buy, and both promising to pay over time. But if they both die in a common disaster, the reciprocal obligations in the buy-sell agreement accomplish nothing. After B's estate buys A's shares, and A's estate buys B's shares, each estate ends up with the same shares they had before A and B died. What happens then? In the absence of any further provision in the shareholder's agreement, each estate would pass its shares to its respective beneficiaries.

What each shareholder wanted, however, was for the other shareholder to continue the business, and for their own families to have the money from the sale of shares. The problem can't be resolved by modifying the buy-sell agreement. The reason is the only buyers the parties contemplated have died.

However, if the parties use life insurance to fund the buy-sell agreement, the estates of A and B will have money in addition to shares, and will therefore have choices. If only one shareholder dies, the survivor gets the money needed to buy the deceased's shares. When both die, however, the estates of A and B have money and shares. One option for their estates could be to use the life insurance money to help them keep the business going long enough to find a buyer willing to pay a fair price. Another choice would be to liquidate the business. Although neither estate would get nearly as much from a liquidation sale as they would from selling the business as a going concern, they wouldn't need to worry much about that because the life insurance proceeds would already have provided significant value for both families.

Advisors need to help clients think about the unthinkable

The common disaster rules add certainty in circumstances where resolving uncertainty about who died first would cost a lot of time and money. But if someone has failed to plan, or hasn't coordinated provisions dealing with a common disaster in their wills, life insurance policies and business agreements, these rules could add to the uncertainty. It's therefore important to understand the rules to provide the best advice you can for clients.

Often clients consider only the case where they predecease their business partner(s) or their personal beneficiaries, like a spouse or a child. Advisors can help clients consider the implications of outliving a spouse by many years or having a beneficiary predecease the insured. Advisors can also offer guidance in planning for deaths out of sequence, at the same time or in confusing circumstances.

It's hard enough getting clients to think about what would happen if they died. It's even harder to think about different tragic scenarios involving their deaths and another's, usually a loved one or close business associate.

Advising clients

Where appropriate, encourage clients to designate a contingent beneficiary(s) to their life insurance policies to address the possibility of the primary beneficiary outliving the insured, or being deemed to have outlived the insured if both insured and primary beneficiary die in a common disaster.

- Also encourage clients to have wills, and encourage them to discuss the possibility of a common disaster with the lawyer who writes their wills.
- Know how the law works in the province or territory where each client lives or owns property. That may include one or more Canadian provinces, but it can also include other countries. While you won't be able to provide legal or tax advice, you will be able to better understand and explain the reasons for why a client needs to see a lawyer.
- Encourage clients who own businesses or business interests to see their lawyers about putting a buy-sell agreement in place, discussing the possibility of simultaneous deaths, and encourage them to fund their respective obligations with life insurance.
- Build relationships with estate planning lawyers in your community and with those in other jurisdictions.

Any examples presented in this article are for illustration purposes only. No one should act upon these examples or information without a thorough examination of the tax and legal situation with their own professional advisors after the facts of the specific case are considered.

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Common disaster rules

Province	What provincial law says if you can't tell which of 2 or more people died first	If 2 or more people own property jointly with rights of survivorship	What provincial insurance acts say if you can't tell whether the life insured or beneficiary died first
British Columbia	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first
Alberta	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
Saskatchewan	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first
Manitoba	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first
Ontario	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first
Quebec	Each deemed to have died at the same time if one called to the succession of the other; the one who would inherit from the other is deemed to have outlived the other	Not applicable	Beneficiary deemed to have died first
Nova Scotia	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
New Brunswick	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first
Prince Edward Island	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
Newfoundland	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
Northwest Territories	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
Nunavut	Older deemed to have died first	Not applicable	Beneficiary deemed to have died first
Yukon Territory	Each deemed to have survived the other	Deemed to have owned as tenants in common	Beneficiary deemed to have died first

Provincial succession laws

British Columbia – Wills, Estates and Succession Act, SBC 2009, c. 13, subsection 5(1)

5(1) If 2 or more persons die at the same time or in circumstances that make it uncertain which of them survived the other or others, unless a contrary intention appears in an instrument, rights to property must be determined as if each had survived the other or others.

Alberta – Survivorship Act, R.S.A. 2000, c. S-28, section 1

If 2 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 sections 2 and 3, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.

Saskatchewan – The Survivorship Act, 1993 c. S-67.1, subsection 2(1)

Except as otherwise provided in this Act, where two or more persons die at the same time, the property of each person is to be disposed of as if that person had survived the other or others.

Manitoba – The Survivorship Act, C.C.S.M. c. S250, section 1

Except as otherwise provided in this Act, 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 the person is competent to dispose, shall be disposed of as if that person had survived the other or others.

Ontario – The Succession Law Reform Act, R.S.O. 1990, c. S-26, subsection 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 or she's competent to dispose, shall be disposed of as if he or she'd survived the other or others.

Québec – Civil Code of Québec, S.Q. 1991, c. 64, article 616

Where persons die and it's impossible to determine which survived the other, they're deemed to have died at the same time if at least one of them is called to the succession of the other. The succession of each then devolves to the persons who would have been called to take it in their place.

New Brunswick – Survivorship Act, SNB 2012, c. 116, section 1

Except as otherwise provided in this Act, when two or more persons die at the same time, 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 the person is competent to dispose, shall be disposed of as if that person had survived the other or others.

Nova Scotia – Survivorship Act, R.S. c. 454, subsection 3(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, such deaths are, subject to subsections (2) and (3), for all purposes affecting the title of property, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.

Prince Edward Island – Commorientes Act, R.S.P.E.I., c. C-12, subsection 1(1)

Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to subsections (2) and (3), for all purposes affecting the title to property, be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.

Newfoundland – Survivorship Act, R.S.N. 1990, c. S-33, subsection 2(1)

Where 2 or more persons die at the same time or in circumstances making it uncertain which of them survived the other, the deaths are presumed to have occurred in the order of seniority and accordingly the younger is considered to have survived the older.

Yukon Territory – Survivorship Act, Revised Statutes of the Yukon, 2002, Chapter 213, subsection 1(1)

If 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 each is competent to dispose, shall be disposed of as if each had survived the other or others.

The Northwest Territories – Survivorship Act, R.S.N.W.T. 1988, c. S-16, subsection 1(1)

Subject to subsections (2) and (3), if two or more persons die at the same time or in circumstances making it uncertain which of them survived the other or others, the deaths are presumed to have occurred in order of seniority and the younger shall be deemed to have survived the older.

Nunavut

Same as the Northwest Territories

Life's brighter under the sun

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