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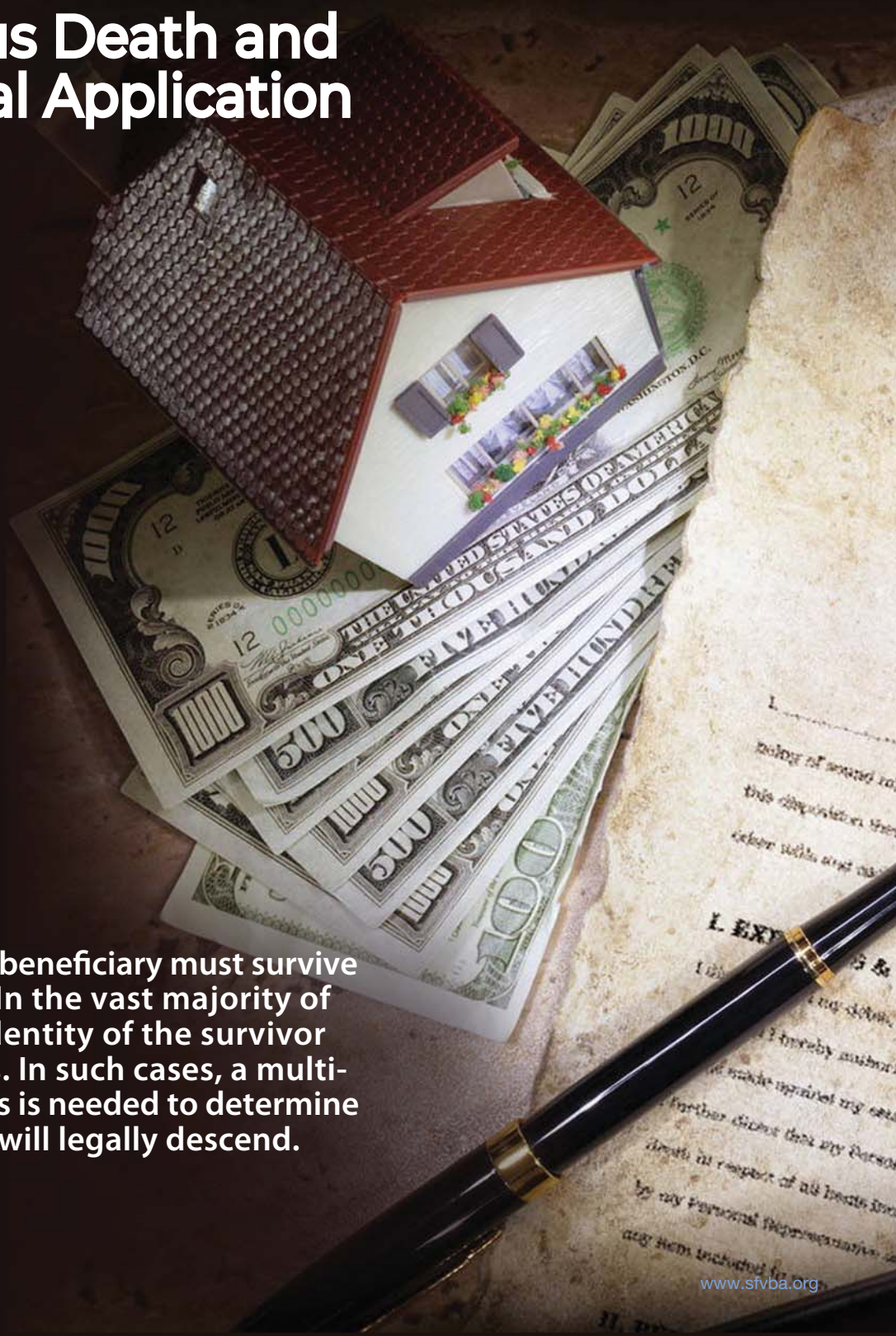
Survivorship Rules:
Simultaneous Death and their Unequal Application

By Mark J. Phillips



Under California law, a beneficiary must survive a decedent to inherit. In the vast majority of cases, of course, the identity of the survivor is clear, but not always. In such cases, a multi-step process of analysis is needed to determine to whom the property will legally descend.

UNDER CALIFORNIA LAW, A BENEFICIARY MUST survive a decedent to inherit. Probate Code § 21109, applicable to both wills and trusts, states that "*A transferee who fails to survive the transferor of an at-death transfer...does not take under the instrument*."

In the vast majority of cases, of course, the identity of the survivor is clear, but not always, and when it cannot be determined by clear and convincing evidence that the transferee survived the transferor a multi-step process of analysis is needed to determine to whom the property will descend.

Determination of death is defined under state law, and all states have now enacted in some form the Uniform Determination of Death Act, which California adopted in 1954.

In California, an individual is dead when they have sustained either irreversible cessation of circulation and respiratory functions, or irreversible cessation of all functions of the entire brain, including the brain stem. Health and Safety Code § 7180.

But determining the fact of death is only the first step. When two or more persons die at or near the same time, the right to inherit depends not just on the establishment of death, but on *the order of death*.

Thus, parties may find it necessary to litigate that sequence, and in a surprising and fascinating number of cases the determination of survivorship is no more than speculative at best.

The most famous case is from the courts of Illinois. Newlyweds Stanley and Teresa Janus returned from their honeymoon in September of 1982 to find that Stanley's brother, Adam, had died suddenly of heart failure at age 27.

Assembled to grieve with his family in Adam's home, Stanley professed to a headache, and Teresa agreed that she could also use some aspirin. In Adam's bathroom, they found a recently purchased bottle of Tylenol. They both took some.

Minutes later, Stanley collapsed on the kitchen floor. Teresa was still standing when Diane O'Sullivan, a registered nurse and a neighbor of Adam's, was called to the scene. Stanley's pulse was weak, and Ms. O'Sullivan began CPR.

Within minutes, Teresa also began having seizures and collapsed. Paramedic teams arrived, and both Stanley and Teresa were carried out to ambulances.

Ms. O'Sullivan, the registered nurse, believed that both Stanley and Teresa were dead before they were taken from the home, but she could not tell who died first. They were 25 and 19 years old, respectively.

A 'Riveting' Lawsuit

The lawsuit that followed, *Janus v. Tarasewicz*[1], was a small but riveting episode in the much larger saga of deaths from cyanide-laced Tylenol capsules in Chicago in the fall of 1982, one of the most notorious unsolved crimes in the last generation.

The seven victims, four women, two men and a 12-year old girl, died after taking capsules that had been purchased from drugstores and groceries in the Chicago area.

Someone had opened the capsules and replaced some of the acetaminophen with cyanide, and returned them to the shelves. Stanley, Adam and Teresa were the only related victims. The killer was never identified,[2] but the deaths caused wide-spread panic and led to the implementation of tamper-resistant packaging.

Before they left on their honeymoon, Stanley named Teresa as the primary beneficiary of a $100,000.00 life insurance policy at work, designating his mother as the contingent beneficiary.

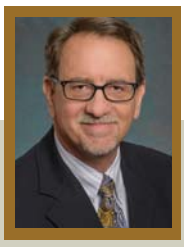
If Teresa survived Stanley that evening in Adam's home, her family was entitled to the proceeds of the policy. If she did not, Stanley's mother was entitled to them.

The case illustrates both the difficulties inherent in establishing an exact moment of death, and the discrepancy in the way state law handles the devolution of assets which variously pass under wills, intestacy, joint tenancy, and life insurance. Whether a beneficiary survives, and how long they survive, determines how these assets are distributed.

Survivorship in cases such as *Janus* simply cannot be determined scientifically. When the paramedics arrived in Adam's home on the evening of September 29, 1982, both Stanley and Teresa were unconscious with non-reactive pupils.

Neither showed any signs of being able to breathe on their own, both had some level of blood pressure, but because Stanley never developed that pressure spontaneously nor recovered pulse or respiration, he was pronounced dead at the hospital at 8:15 p.m.

With Teresa, however, a nurse made an entry in the medical records that she had detected a minimal reaction to light in her right pupil. Teresa was therefore kept in



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the hospital for further tests, though she never recovered additional signs of life.

Death certificates issued more than three weeks later listed Stanley's date of death as September 29, 1982 and Teresa's date of death as October 1, 1982.

The Pay-Out

Concluding that Teresa had survived Stanley, the insurance company paid the proceeds of Stanley's life insurance to the administrator of Teresa's estate. Litigation followed from Stanley's mother, contending that they had died simultaneously, and because Teresa had not survived Stanley that she, as contingent beneficiary, was entitled to the insurance proceeds.

When it is impossible to determine the order of death of two individuals, there is a strong presumption that the persons died simultaneously.

This presumption, codified by adoption of the Uniform Simultaneous Death Act, is an attempt "... *to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable, and equitable rules applicable to the ever-increasing number of cases where two or more persons have died under circumstances that there is no sufficient evidence to indicate that they have died otherwise then simultaneously*."[3]

In that circumstance, where it cannot be proven that one individual survived the other, the assets of each decedent are administered and distributed as if each decedent survived the other.

The California Probate Code § 220 provides:

> "... *[I]f the title to property or the devolution of property depends on priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other*."

As the statute makes clear, survivorship must be proven to a standard of clear and convincing evidence. This change in the standard of proof, effective January 1, 1985, was intended to eliminate cases where survivorship appeared to be no more than mere conjecture.

See, for example, *Estate of Rowley* 257 Cal.App.2d 324 (1967), in which two women were killed in a high-speed automobile accident, and the court determined that the victim in the front passenger seat died first on evidence no stronger than the fact that the car was struck from that direction.

The court in *Rowley* took pains to distinguish its opinion form that of *Estate of Wallace*, 64 Cal. App. at p. 113 (1923) in which all of the occupants of an automobile died following impact with a train moving at more than fifty miles an hour, the equivalent of seventy-three feet a second.

The court observed, "*The fact is that the death-dealing impacts occurring between some part or parts of the engine or of the broken automobile and the persons of these unfortunates were so nearly synchronous, in an absolute sense, that for all practical purposes it is impossible to regard them as discrete events separated in time… It is as unbecoming as it is idle for judicial tribunals to speculate or guess whether . . . one or the other may not have ceased to gasp first*." (Id. at 115.)

The Standard of Proof

In raising the standard of proof to the higher level of clear and convincing, the legislature sought to spare courts from this tortuous duty of analyzing spare facts to find survival. *Rowley* ignores many possible scenarios where the driver could have succumbed before the passenger.

This writer has handled numerous estates of individuals dying together in circumstances where it would have been purely conjecture to assume survivorship, including victims of the Jonestown suicide in Guyana, several crashes of private aircraft, and the death of a young couple hiking in Hawaii believed to have stumbled on drug traffickers and whose bodies were not discovered for weeks.

In the early case of *Azvedo v. Benevolent Soc. of Calif.*, 125 Cal.App.2d 894 (1954), payment of insurance proceeds depended upon whether the beneficiary Anthony survived the insured Sylvia. Both were found dead in Anthony's home, the murder victims of Anthony's Aunt Gussie, who subsequently committed suicide.

The court remanded the matter back to the trial court which had earlier ruled the deaths simultaneous. The Appellate Court made clear its inference that Anthony survived Sylvia, because he died after a struggle and she had been killed in her sleep, which the Court believed could not have happened in reverse.

In Illinois at the time of *Janus*, state law did not call for the higher standard of proof. The then provisions of the Illinois version of the Uniform Simultaneous Death Act called for a determination of simultaneous death where "*no sufficient evidence*" existed that one person survived the other.

This extraordinarily low level of proof led to the result of Teresa's family inheriting Stanley's life insurance, against which good sense rebels.

The burden of proof rests sensibly with the party who benefits from survivorship. In *Estate of Lensch* 99 Cal.Rptr.3d 246 (2009), the court ruled that the burden of proof rests with the party who would benefit from survivorship, even when not the petitioning party.

In *Lensch*, 98-year-old Gladys Lensch died in a San Mateo County nursing home, leaving in a handwritten will one-half of her estate to her son, Jay.

His body was discovered later that day, the victim of a self-inflicted gunshot wound, and the death certificates reflect that difference of eleven hours. If Jay survived Gladys,

then her assets would pass to his estate, and his will had disinherited his two sons.

If, however, he had predeceased Gladys, under the anti-lapse statutes of Probate Code § 21109, *et seq.*, Jay would be deemed to have predeceased his mother gifts and the inheritance pass to his surviving sons.

Because otherwise unsupported facts set forth in a death certificate are not conclusive, nor does the presumption of correctness in Health and Safety Code § 103550 shift the burden of proof[4], the court remanded the case back to the trial court to allow the grandsons to present evidence on the order of the deaths.

Still, the reach of the simultaneous death statute is notoriously uneven. Even after proving by clear and convincing the order of the deaths, the next step is to determine *how long the surviving individual lived*.

The concept of inheritance of property based on survivorship for mere minutes or hours is offensive to many, and was the motivation for the Law Review Commission to recommend adoption of provisions similar to those of Uniform Probate Code, which imposes stricter survivorship requirements.[5]

> The Commission stated:
> "[*A]s a matter of general policy, it is unfair to determine the recipients of property based on an instant of survival. The Commission recommends that the policy reflected in the Uniform Simultaneous Death Act, which generally divides property between the estates of the decedents, should be applied to situations of nearly simultaneous death. Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival*."[6]

The recommendations were not adopted when Probate Code § 220 was amended in 1983 to add the standard of clear and convincing evidence.

The Legislature Acts

In 1989, however, the Legislature adopted the 120 hour (5 day) survivorship requirement, but only for intestate succession, codified in Probate Code § 6403, and for the comparatively rare cases of statutory wills under Probate Code § 6211.

In testate cases, in the absence of express provisions in a will or trust setting forth a required period of survivorship, inheritance rights accrue even when the period of survivorship is mere minutes.

Accordingly, it is prudent and increasingly common for estate planning documents to include survivorship requirements, and practitioners will routinely see provisions for thirty days or more.

Longer periods are acceptable, but more than 120 days is discouraged because such a long period results in a terminable interest and the loss of the federal estate tax marital deduction for transfers between spouses.[7]

Accordingly, the third step is to determine *the type of asset passing from a decedent*, as different types of assets continue to devolve differently based on the timing of death.

In the case, for example, of a married couple with uncommon heirs, such as a second marriage with children from prior marriages, the heirs will find themselves treated differently based on the length of the interval between the two deaths.

The parties will first litigate the issue of survivorship, with each set of heirs attempting to prove by clear and convincing evidence that the person from whom they inherit survived by any measure of time. If they are successful, joint tenancies, pay-on-death multiple party accounts, life insurance, annuities and retirement plans pass to the heirs of the survivor.

But intestate assets and assets passing under statutory wills do not so pass, as Probate Code § 6403 requires survivorship for 120 hours, so those assets will still pass to the heirs of the first to die unless the survivor lived beyond that period.

Finally, assets passing under estate planning documents that incorporate longer survivorship periods, such as thirty days, will also pass assets to the heirs of the predeceased spouse.

Even in the expertly-planned estate, proven survivorship by a few minutes or hours will cause a surviving spouse to be deemed to have predeceased under the provisions of the will or trust requiring survival by thirty days or more, and yet that spouse will continue to inherit under the beneficiary designation of the decedent's retirement plan or life insurance, often the couple's largest assets.

Only a specially crafted beneficiary designation would avoid this result, which most estate planners do not prepare.

Thus, the resulting inequity of application will result in different assets passing to different heirs depending upon the length of survivorship, the existence of a will, and the presence of non-probate property.

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[1] 482 N.E.2d 418 (Ill. 1985).
[2] One James W. Lewis was convicted and spent twelve years in jail for trying to extort $1,000,000.00 from Tylenol's manufacturer, but was never charged in the killings.
[3] *Azvedo v. Benevolent Soc. of Calif.*, 125 Cal.App.2d 894 (1954).
[4] *Bohrer v. County of San Diego*, 104 Cal.App.3d 155 (1980); *Romero v. Volunteer State Life Ins. Co.*, 10 Cal.App.3d 571 (1970); *Estate of Lensch*, 99 Cal.Rptr.3d 246 (2009).
[5] Uniform Probate Code § 2-104. 17 Cal. Law Rev. Com. Reports, pp. 447, 448. Internal Revenue Code § 2056(b)(7).
[6] 17 Cal. Law Rev. Com. Reports, pp. 447, 448.
[7] Internal Revenue Code § 2056(b)(7).