

11. Survivorship

- Application of survivorship clauses to intestacy
- Length of time
- Preventing bona vacantia
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11.1 This chapter looks at whether there should be a general delay of a specified period before each estate vests in those who are entitled. The question of survivorship, as it affects intestacy provisions, arises in two situations:

- where the intestate and someone who may be entitled to take on intestacy have both died (either in the same event or separately) but, because of the circumstances of the deaths, the order in which they died is uncertain; and
- where a person who is otherwise entitled survives the intestate but dies within a certain number of days (usually less than a month) of the intestate.

The first situation will be dealt with in the National Committee's final report on the administration of estates of deceased persons.¹

APPLICATION OF SURVIVORSHIP CLAUSES TO INTESTACY

11.2 Two Australian jurisdictions provide for the situation where a person who is entitled to take on intestacy survives the intestate but dies within a certain number of days of the intestate.

11.3 SA provides that when a spouse or partner does not survive the intestate by more than 28 days, the estate will be distributed as if the spouse or partner had not survived the intestate.²

11.4 Queensland covers all people entitled on intestacy, not just spouses or partners, and states that, if the person does not survive the intestate for a period of 30 days, the estate will be dealt with as if the person had not survived the intestate.³

Law reform developments

11.5 The Queensland Law Reform Commission, in 1978, recommended the inclusion of a survivorship clause.⁴

11.6 In Canada, general survivorship clauses have been proposed by the Uniform Law Conference of Canada in 1983,⁵ in Manitoba in 1985,⁶ and in Alberta in 1999.⁷

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1. National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons* (Report, 2007).
 2. *Administration and Probate Act 1919* (SA) s 72E. See also *Administration of Estates Act 1925* (Eng) s 46(2A).
 3. *Succession Act 1981* (Qld) s 35(2).
 4. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.

11.7 In 1989, the Law Commission of England and Wales recommended a survivorship clause that applied only to spouses.⁸

11.8 The National Committee has previously recommended that the law of wills include a survivorship clause.⁹

Arguments for and against

11.9 There are a number of benefits of such provisions, chiefly related to reducing the cost of probate. First, they avoid the cost of multiple administration in some cases.¹⁰ Secondly, they do away with the need to determine the order of death in the case of simultaneous or near-simultaneous deaths, since such determinations may require expert evidence.¹¹ Consultations carried out by the English Law Commission singled out the absence of a survivorship clause as a “factor leading to delay and extra expense”.¹² Such savings in a limited number of cases will need to be offset against any perceived complexity or delays involved in applying survivorship clauses to all intestate estates.¹³

11.10 Provisions requiring that beneficiaries survive testators by 30 days are common in wills. The Queensland Law Reform Commission, in 1978, recommended the inclusion of a 30-day survivorship clause

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5. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 229-231.
 6. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53-54. This was implemented in 1990: *Intestate Succession Act*, SM 1989-90 c 43, CCSM c I-85, s 6(1). In 2003, the Manitoba Law Reform Commission recommended an extension of their survivorship provisions from 15 to 30 days: Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 71.
 7. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.
 8. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57. This recommendation was implemented by *Law Reform (Succession) Act 1995* (Eng) s 1.
 9. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.47.
 10. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 173; Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230; Probate Committee, Law Society of SA, *Consultation*; Public Trustee of Queensland, *Submission* at 4.
 11. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 56.
 12. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 22, and see also para 56 and 57.
 13. See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57.

for the sake of consistency with similar provisions recommended in the case of wills.¹⁴ Such provisions were originally included in wills to avoid an accumulation of death duties in the case of simultaneous or near-simultaneous deaths.¹⁵ They can now be justified on the grounds that they may prevent part or all of the intestate's estate going to the heirs of the deceased beneficiary - a result that could be seen as contrary to the intestate's wishes.¹⁶ For example, if one of two children were to die within a few days of the intestate, in the absence of a survivorship clause, half of the estate would go to be distributed according to the deceased child's will.¹⁷ This could be against the wishes of the intestate, who is likely to have wished the whole of the estate to go to the surviving child. Another example may be seen where a wife dies shortly after her husband, perhaps as the result of an accident, with no surviving children. In such a case, the entire estate will go to the wife's family.¹⁸

LENGTH OF TIME

11.11 Varying lengths of time have been proposed and implemented in different jurisdictions.

11.12 In 1978, the Queensland Law Reform Commission recommended the inclusion of a 30-day survivorship clause for intestate estates for consistency with proposals for a 30-day survivorship provision for testate estates.¹⁹

11.13 In 1983, a report to the Uniform Law Conference of Canada recommended a period of only five days for a survivorship clause. However, this recommendation contemplated survivorship only in the context of a common disaster where serious injuries were inflicted:

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14. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
 15. NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.45.
 16. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53.
 17. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230.
 18. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57. See also England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at para 5.14; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 172.
 19. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.

Although a longer period, such as 14 days, could be chosen, it is unlikely that this would alter the operative effect... fatally injured persons who linger on for five full days after an accident will probably survive a 14 day period as well.²⁰

The Uniform Law Conference ultimately, in 1985, recommended a 15-day period.²¹ This was supported by the Manitoba Law Reform Commission in 1985.²² However, in 2003, the Manitoba Commission recommended a period of 30 days, on the basis that other jurisdictions had adopted this period for survivorship provisions relating to bequests and intestacies.²³ In 1999, the Alberta Law Reform Institute supported 15 days, on the grounds that the period “should not be so long as to interfere significantly with the administration of estates but should be long enough to deal with deaths arising from a common accident”.²⁴

11.14 The National Conference of Commissioners on Uniform State Laws in the US also proposed a limited period of 120 hours (that is, five days). However, this was on the basis that, under the Uniform Probate Code, informal letters of administration cannot be issued in the first five days after death.²⁵

11.15 The Law Commission of England and Wales suggested that the appropriate period was 14 days, claiming that “any longer might lead to unacceptable delays in the administration of estates”.²⁶

11.16 The Commission’s survey of wills disclosed that 177 of 548 wills (32.3%) included a survivorship clause. The median length chosen was 30 days. Sixty one percent of clauses were 30 days and 23.2% were one

20. Uniform Law Conference of Canada, *Proceedings of the Sixty-Fifth Annual Meeting* (1983) at 230-231.

21. Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 287.

22. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 53-54.

23. Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report 108, 2003) at 41-42, 71. The Commission had previously recommended a period of 15 days following proposals of the Uniform Law Conference: Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 54.

24. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.

25. Uniform Probate Code s 2-104 and comment.

26. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 57.

calendar month, making approximately 84% being for around one month. The remainder (15.8%) ranged between 14 and 365 days.²⁷

PREVENTING BONA VACANTIA

11.17 There may be situations where the application of the survivorship clause will result in the intestate's estate passing to the Crown as *bona vacantia*. Some survivorship provisions state that they do not apply where their application would result in the estate passing to the Crown.²⁸ Examples include the proposals of the Uniform Law Conference of Canada,²⁹ the Uniform Probate Code³⁰ and Manitoba.³¹ Neither Queensland nor SA have such provisions associated with their survivorship clauses.

11.18 In 1999, the Alberta Law Reform Institute recommended that a survivorship clause should not apply where it would result in the estate passing to the Crown.³²

APPLICATION TO CHILDREN EN VENTRE SA MERE

11.19 There is a question whether the 30-day survivorship clause should apply to a child born posthumously. Queensland provides that a person *en ventre sa mere* must remain alive for a period of 30 days after birth.³³ The survivorship clauses, as currently formulated, cannot readily apply to a child who may be born more than 30 days after the death of the intestate.

11.20 In Australia in 2000, the death rate for children aged under 28 days (referred to as "neonatal mortality") was 3.5 deaths per 1,000 live births. In the same period, the death rate for children aged between 28 days and one year (referred to as "postneonatal mortality") was 1.7 deaths per 1,000 live births. These rates have declined markedly in the last two decades of the 20th century.³⁴ It is much more likely that

27. See J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.27.

28. See Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.

29. *Uniform Intestate Succession Act* s 5(3) in Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting* (1985) at 287.

30. Uniform Probate Code s 2-104.

31. *Intestate Succession Act*, SM 1989-90 c 43, CCSM c I-85 s 6(3).

32. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 177.

33. *Succession Act 1981* (Qld) s 5A.

34. See Australian Bureau of Statistics, *Australian Social Trends 2002 - Health - Mortality and Morbidity: Infant Mortality*.

a child that dies under the age of one year will die within the first 28 days of life. It would, therefore, appear to be the case that a survivorship clause that applies to children born posthumously could avoid a double administration in some cases. However, the circumstances in which this would make a difference would be extremely limited. For example, if the posthumously born child was a child of the intestate, the intestate would have to have had children by another relationship for the rule to have any effect. In the case of the children of other relatives born after the death of the intestate, the child would also have to have been predeceased by whichever parent was the intestate's relative.

SUBMISSIONS AND CONSULTATIONS

11.21 There was some support for including a 30-day survivorship clause in the intestacy rules³⁵ and for extending it to all potential beneficiaries.³⁶

11.22 Consultations in SA suggest that the SA provision has utility, and there was support for such a provision covering all beneficiaries and not just the spouse. The Queensland legislation was referred to as a possible model.³⁷

11.23 However, some opinions were expressed that 28 or 30 days was simply an arbitrary cut-off.³⁸

NATIONAL COMMITTEE'S CONCLUSION

11.24 A section along the lines of the Queensland provisions should be included. Even if the cut-off is arbitrary, there will be cases in which it will save a double administration, or other costs. Thirty days is appropriate because:

- it will not unduly delay the administration of an estate;
- it is consistent with the National Committee's recommendation in the Wills Report;

35. Trustee Corporations Association of Australia, *Submission* at 21; Succession Law Section, Queensland Law Society, *Consultation*; Law Society of Tasmania, *Submission* at 16; J North, *Submission* at 5.

36. Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee of Queensland, *Submission* at 4; J North, *Submission* at 5.

37. Probate Committee, Law Society of SA, *Consultation*.

38. See Trustee Corporations Association of Australia, *Submission* at 21; Public Trustee NSW, *Submission* at 15.

- it contemplates other circumstances in which potential beneficiaries may die in close proximity, not just in the context of fatal accidents;
- it is consistent with the majority of survivorship clauses in wills in NSW.

11.25 The National Committee also considers that it is inappropriate if the operation of a survivorship clause results in an estate passing to the Crown as *bona vacantia*. A clause should, therefore, be included which states that the provisions do not have effect if they result in the estate passing to the Crown as *bona vacantia*.

11.26 Finally, for the sake of consistency, a person *en ventre sa mere* at the death of the intestate must remain alive for a period of 30 days after birth.

Recommendation 40

A 30-day survivorship period should apply to all persons entitled to take on intestacy.

A 30-day survivorship period should apply to persons born after the death of the intestate but who were *en ventre sa mere* at that death.

The 30-day survivorship period should not apply where the effect would be that the intestate estate passes to the Crown as *bona vacantia*.

See Intestacy Bill 2006 cl 4(2), (3).