THE LAW OF SURVIVORSHIP
IN SASKATCHEWAN

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BIOGRAPHICAL INFORMATION
Holly Ann Knott

Holly Ann earned a B.A. from the University of Saskatchewan in 1973 and an LL.B. in 1974, also from the University of Saskatchewan. She was called to the Saskatchewan Bar in 1975. Holly Ann practices mainly in the area of family law. She designed the Unified Family Court pilot project working with the provincial and federal governments to get it funded as a 3-year pilot project. From 1993 - 1995 Holly Ann was chair of the CBA Family Law and Alternate Dispute Resolution (North) section; In 1993 she was appointed chair of the Legal Aid Review Committee. In 1994 she was Co-chair of SKLESI's "Changing Family Law Practice" seminar. Holly Ann is a partner in the firm Knott & Jackson in Saskatoon.
I. INTRODUCTION
The law of survivorship, or commorientes (those dying together), covers succession to property when 2 or more people die in circumstances which make it difficult to determine the order in which their deaths occur.

A. QUESTION OF FACT
Who survived whom is a question of fact. However, the facts are not always determinable. Under what circumstances does uncertainty arise about the order of death? Obviously in cases of common disaster, a car accident, shipwreck, or plane crash, many people can die at the same time or essentially the same time.

However, uncertainty can also arise when two deaths occur in different places with no certainty as to when they happened, both in absolute terms and in relation to each other. (This is less likely to happen now than when communication was slow and travel difficult.)

Therefore, courts formerly applied assumptions based on relative robustness or health of the deceased. To counteract this legislators began legislating presumptions. In Canada a presumption based on age was adopted by the Uniform Law Commissioners in 1960 and provinces gradually followed this lead.

B. FORMER SASKATCHEWAN SURVIVORSHIP ACT
Most of us are familiar with the presumption from the former Survivorship Act that if the time of death of 2 or more people is uncertain or simultaneous, then it is presumed that the younger person survived the older. This presumption often leads to the beneficiaries of the younger person benefitting to the exclusion of the beneficiaries of the older person. Had the older person contemplated this result (such as in a will), that older person likely would have not intended to benefit the younger person's beneficiaries. Likely, the older person would prefer to benefit his/her own choice of alternate beneficiary.
This is not a major problem if the people in question are husband and wife and they have typical reciprocal wills (leaving everything to the surviving spouse, and failing that to their children, for example).

However, the result can be quite repugnant when there are no surviving children of the couple and the younger person dies intestate, or with a will leaving the residue to his/her relatives. The relatives of the younger spouse may be very distant relatives, who cannot believe their good fortune.

The former Saskatchewan Survivorship Act had not been changed since 1982. That Act in 3 short clauses established that "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 . . . presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older."

This presumption of survivorship based on age has now been replaced with the presumption that each dies before the other. The result assumes that the deceased's intention is more likely to be to benefit an individual, and less likely to be to benefit that individual's estate. If I die and my beneficiary dies within very short order, then I wish to choose who else is to benefit from my death.

Other provinces, including Ontario, Manitoba and New Brunswick, have moved to this new position.
II. THE SURVIVORSHIP ACT, 1993
A. THE NEW RULE - Sections 2 & 3

The new legislation (which came into force November 1, 1993) provides that, in case of simultaneous death or in circumstances such that you cannot tell who died first, each person is deemed to have survived the other, for the purposes of distribution of their property. Thus, the property of each person will pass to that person's heirs by will or according to the rules governing intestacy as if the other co-deceased had died first. Neither inherits from the other.

The Survivorship Act, 1993, sections 2 and 3:

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.

(2) For the purposes of subsection (1), the property of a person includes any property of which the person is competent to dispose.

(3) Subsection (1) applies for all purposes that affect the legal or beneficial title to, the ownership of or the succession to property.

3 Where two or more person die in circumstances that make it uncertain which of them survived the other or others, they are deemed for the purposes of this Act, to have died at the same time.

This is similar to the Insurance Act s. 177 which states:

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 survived the other, the insurance money is payable in accordance with subsection (1) of section 156 as if the beneficiary had predeceased the person whose life is insured.

Section 253, which applies to sickness and accident insurance is in similar terms.
The former *Survivorship Act* had previously made exceptions for insurance contracts by referring to the same sections of the *Insurance Act*.

B. **THE 5 DAY RULE - Subsection 4(1)**

The new legislation extends the presumption to cover not just simultaneous death and uncertainty of order of death, but also death of one person occurring within 5 days of the other.

Subsection 4(1):

4(1) Where two or more persons die within a period of five days, they are deemed, for the purposes of this Act, to have died at the same time.

Once again the rationale is to benefit the persons the deceased chooses or relatives of the deceased, rather than the estate of a beneficiary who does not live long enough to enjoy an inheritance.

Five days is an arbitrary time period, but a longer period would hold up administration of the deceased's estate and cause greater inconvenience.

With modern medical advances, I imagine that medical experts have even greater ability to prove who survived whom, even if only by minutes. After all, survivorship is really a question of fact. The use of a 5 day time period reduces the need to call experts to prove the order of death beyond any level of uncertainty.

The choice of 5 days follows the recommendation of the British Columbia Law Reform Commission in 1982. In reporting on the subject of survivorship presumptions, the Law Reform Commission of British Columbia considered the American proposal for a period of 120 hours and considered that the period need not be determined in hours. It is sufficient that the *Interpretation Act, 1995, S.S. I-11.2, s. 24* directs how time expressed in days is to be calculated. (I.e. the first day is excluded and the last day is included, so that if a person dies on a Wednesday, the beneficiary

The British Columbia approach was also recommended by the Alberta Institute of Law Research and Reform in its 1986 report, Survivorship.

The added benefit is that this should save some expenditures in probate fees, as the property of one will not go through the probating of 2 estates.

C. DEALING WITH PROPERTY WITHIN THE FIVE DAYS - Subsections 4(2) & (3)

Subsection 4(2) reads as follows:

(2) Notwithstanding subsection (1), where two persons die within a period of five days:

(a) the second person to die may, within the period of five days, do any act that creates in himself or herself or in a third person an interest in property that would have come to the second person on the death of the first person to die but for the operation of subsection (1); and

(b) the act described in clause (a) by the second person to die is effective to create the interest that it purported to create.

(3) Subsection (2) applies whether the act in question creates an interest that arises at the time of the act or on the death of the second person.

Circumstances where this might arise include joint ownership of real property or bank accounts.

The policy decision which had to be made was whether to create uncertainty at the savings institutions in dealing with surviving joint account holders or to put limits on how much, if anything, the survivor could withdraw within the 5 days. Apparently, the legislators chose to assume that if the deceased had chosen to share joint tenancy with someone, that person had to be
responsible enough for the legislators to trust, too. Alternatively, the cases of abuse would be infrequent and could be pursued as necessary.

The surviving joint tenant of real property probably could not effect a transfer to him or herself within the 5 days, as the Land Titles Office requires proof of death which is usually the official death certificate from Vital Statistics. (See The Land Titles Act, S.S., c. L-5 section 241.) I think that the quickest time within which I have obtained an official death certificate was 1 month.

D. CONTINGENT SURVIVORSHIP CLAUSES - Sections 5, 6 & 7

Previously, the presumption of death according to seniority was usually avoided in lawyer-drafted wills by providing that the beneficiary must survive the testator for a specified period.

Many of our wills provide that if 2 people die within 31 days of each other, then they are deemed to have died at the same time, to avoid the costs of double probate. These provisions are still effective.

Section 6 states:

6(1) This section applies to wills that contain a provision for the disposition of property that operates if a person designated in the will dies:

(a) within a specified period of time before another person;

(b) at the same time as another person; or

(c) in circumstances that make it uncertain which of them survived the other.

(2) The case for which a will described in subsection (1) provides is deemed to have occurred where the designated person dies:

(a) at the same time as the other person; or

(b) in circumstances that make it uncertain which of them survived the other.
(This is almost exactly the same as subsection 2(2) of the former Act.)

Sometimes, maybe when people do their own wills, reference is made to one person surviving another for an unspecified period of time. Section 5 covers this off by deeming the period of time to be greater than 5 days, unless a contrary intention is expressed. This does not have any effect on our wills which already provide for a specified period, such as 31 days.

Section 5 reads:

5 Subject to subsection 4(2), a reference in any will, written agreement or other document made after the coming into force of this Act to one person surviving another for an unspecified period of time is deemed to be a reference to the one person surviving the other for a period that is greater than the period set out in subsection 4(1) unless a contrary intention is expressed.

Where a will provides for a substitute executor, then section 7 reinforces that such provision is to be operative.

7(1) This section applies to wills that contain a provision for a substitute executor that operates if an executor designated in the will dies:

(a) before the testator;

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

(c) in circumstances that make it uncertain which of them survived the other.

(2) For the purposes of probate, the case for which a will described in subsection (1) provides is deemed to have occurred where the designated executor dies:

(a) at the same time as the testator; or
(b) in circumstances that make it uncertain which of them survived the other.

E. JOINTLY OWNED PROPERTY - Section 8

Section 8:

8 Where two or more persons hold title to property jointly and all of them die at the same time, those persons are deemed, for the purposes of this Act, to have held the title to the property as tenants in common in equal shares unless a contrary intention appears in a written agreement to which the persons are parties.

Where the deceased were joint tenants of property, the joint tenancy is severed, and the estate of each shares equally in the property. I.e. the parties are deemed to hold title as tenants in common.

A contrary intention may be indicated in a written agreement between the parties. So just including a contrary intention in a will would not be sufficient.

Parents with reciprocal wills may not wish (in the event of their dying within 5 days, or even 31 days, of each other) to have their joint property divided in two before the testamentary trusts for minor children are set up. Not only would this section require probate of both parents' wills, but 2 trusts for the children would be set up. So how should their contrary intention be evidenced?

My practice in drafting wills for parents, especially those who have minor children and who own real property jointly, is to refer to the written agreement in each will.

_It is my intention, if my spouse and I die within 31 days of each other, that any property which we own as joint tenants shall become the property of * (OR the younger one of us) as the surviving joint tenant so that the trusts and bequests set out in our reciprocal wills can be executed once, and not duplicated. In this regard I refer my Trustee to the written agreement between my spouse and me dated the * day of *, 199*._

The agreement I use is:
This agreement between W1 and H2 witnesses that we mutually agree that if we die within 31 days of each other, jointly owned property shall be inherited by W1, so that the trusts set out in our reciprocal wills can be executed once, and not duplicated.

Signed and sealed by us this day of October, 1996, at the City of Saskatoon, Saskatchewan.

W1

H2

The agreement should be sealed and witnessed.

F. INSURANCE CONTRACTS

Both the old and the new Survivorship Act maintain the separate treatment for insurance contracts and refer to the provisions of the Insurance Act, s. 177 and 253, which state that for life insurance contracts and accident and sickness contracts, when an insured and a beneficiary die at the same time or in circumstances rendering it uncertain which died first, the beneficiary is deemed to have predeceased the insured.

The Insurance Act, R.S.S. 1978, c. S-26 makes no provision for deaths within 5 days of each other.

III. OTHER LEGISLATION OF INTEREST

In addressing succession questions, one should also be mindful of the anti-lapse provisions in The Wills Act, S.S., c. W-14, s. 31, 32.

32 Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person:

(a) is a child or other issue or brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before his death; and
(b) leaves a spouse or issue any of whom is living at the time of the death of the testator;
the devise or bequest does not lapse but takes effect as if it had been made directly to the
persons among whom and in the shares in which the estate of that person would have been
divisible if he had died intestate and without debts immediately after the death of the
testator, except that the surviving spouse of that person is not entitled to receive the
preferential share provided for in section 4, 4.1 or 4.22 of The Intestate Succession Act.

The contrary intention seems to be fairly easy to indicate, if one includes the words, "surviving" or
"living at the time of my death". In Klenk v. Klenk (1985), 39 Sask. R. 1, 24 E.T.R. 93, (Q.B.) the
phrase "amongst my surviving children" was effective to cut out the surviving wife and children of
a son who predeceased the testator.

In Re Deutsch Estate (1990), 85 Sask. R. 70, (Surr. Ct.) the equivalent of "to my siblings and if one
predeceases, his/her share to the deceased's children living at the time of my death" eliminated the
share of a sister and her daughter who predeceased the testator, but who left a child of that daughter
(i.e. a grand niece or nephew).

In Re Sawicki Estate (1984), 33 Sask. R. 77, "to my children living at the time of my death",
excluded children (and their families) who predeceased the testator.

On the other hand in Re Slowski (1985), 38 Sask. R. 132 (Q.B.), "to all my natural children to be
divided amongst them in equal shares, share and share alike" resulted in a per stirpital distribution.
CASE STUDY 1
CASE STUDY NO. 1A

Husband (age 30) and Wife (age 28) from Sometown, Saskatchewan, are driving home on a Saskatchewan road one night in their car. They have with them their infant children, Boy and Girl. Disaster strikes and all are killed instantly except Wife. The Wife dies an hour later. They do not have wills.

The Husband leaves surviving his Mother and three Sisters. Wife leaves surviving her Father, Mother, and Brother.

The four deceaseds have the following assets:

1. House (mortgage life insured) registered in Husband and Wife's names as joint tenants and is worth $100,000.00.
2. Husband's Cadillac worth $20,000.00.
3. Wife's Acura worth $30,000.00.
4. Husband's Cabin in joint tenancy with his sisters. His share is worth $12,000.00.
5. Wife's $20,000.00 RRSP with husband named as beneficiary.
6. Husband's $15,000.00 RRSP with wife named as beneficiary.
7. Husband's life insurance policy for $75,000.00 on his life with wife named as beneficiary and his three sisters as contingent beneficiaries.
8. Girl's bank account worth $9,000.00.
9. Husband has joint Bank Account with his Wife's Brother of $15,000.00. The Husband contributed all the monies and these monies were to be used for the Husband's children's education.
10. Each deceased's estate receives a $10,000.00 death benefit from Saskatchewan Government Insurance.

CASE STUDY NO. 1B

Same facts as Case Study No. 1A except Boy dies ten (10) days later in hospital.

What does each beneficiary receive?
CASE STUDY NO. 1A

Please complete the columns on Case No. 1A as to who inherits the four deceased’s monies.

What does each beneficiary receive?

<table>
<thead>
<tr>
<th>CASE NO. 1A</th>
<th>Husband’s Mother</th>
<th>Husband’s Sisters</th>
<th>Wife’s Father and Mother</th>
<th>Wife’s Brother</th>
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<tbody>
<tr>
<td>House</td>
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<td>Cadillac</td>
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<td>Acura</td>
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<td>Interest in Cabin</td>
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<td>Girl’s Bank Account</td>
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<tr>
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<td>Husband’s Death Benefit</td>
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<td>Boy’s Death Benefit</td>
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</table>
CASE STUDY NO. 1A

Please complete the columns on Case No. 1A as to who inherits the four deceased’s monies.

What does each beneficiary receive?

<table>
<thead>
<tr>
<th>CASE NO. 1A</th>
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<th>Wife’s Father and Mother</th>
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<td>Acura $30,000.00</td>
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<td>Interest in Cabin $12,000.00</td>
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<td>Boy’s Death Benefit $10,000.00</td>
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</table>

* Sections 10 and 11 of The Intestate Succession Act c.I-13 (degrees of consanguinity - 3 living grandparents).
CASE STUDY NO. 1B

Boy dies 10 days later in the hospital. How does your answer change the results in each column?

What does each beneficiary receive?

<table>
<thead>
<tr>
<th>CASE NO. 1B</th>
<th>Husband's Mother</th>
<th>Husband's Sisters</th>
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</table>
CASE STUDY NO. 1B

Boy dies 10 days later in the hospital. How does your answer change the results in each column?

What does each beneficiary receive?

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<tr>
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<tr>
<td>Boy’s Death Benefit</td>
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