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DESCENT AND DISTRIBUTION-UNIFORM SIMULTANEOUS DEATH ACT--APPLICABILITY OF LAPSE STATUTE

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DESCENT AND DISTRIBUTION—UNIFORM SIMULTANEOUS DEATH ACT—APPLICABILITY OF LAPSE STATUTE—*H* and *W* were found dead or near death. The will of each left all property to the other. Nephews and nieces survived *W* while no relatives survived *H*. *W*'s relatives claimed both estates against a claim of escheat. The lower court found that *H* survived *W* and that *W*'s kin were entitled to take under the Maryland lapse statute.[1] On appeal, *held*, affirmed. Regardless of which party survived, application of the Uniform Simultaneous Death Act[2] and the lapse statute entitled *W*'s relatives to take against the claim of escheat. *Mayor and City Council of Baltimore v. White*, (Md. 1948) 56 A. (2d) 824.

In the absence of statute, or other provisions in the will, the failure of a sole beneficiary to survive the testator causes the bequest to lapse and the testator's property is disposed of as though he died intestate.[3] Today, of course, lapse statutes commonly seek to avoid such an intestacy. Statutory construction would generally seem to require, however, that a person claiming under such a statute must prove that the beneficiary predeceased the testator.[4] Had the lower court's finding that *H* survived *W* been allowed to stand, *W*'s kin would be entitled to take under the Maryland statute.[5] Even though the beneficiary and the testator were not related, those persons in being, at the death of the testator, who would be entitled to the distribution of the beneficiary's estate, if he then died intestate, may come in under the Maryland lapse statute.[6] Most other lapse statutes, it might be noted, apply only where there are lineal descendants of the deceased beneficiary.[7] When the Uniform Simultaneous Death Act is

[1] "No devise, legacy or bequest shall lapse or fail of taking effect by reason of the death of any devisee or legatee . . . in the lifetime of the testator, but every such devise, legacy or bequest shall have the same effect and operation in law to transfer the right, estate and interest in the property . . . as if such devisee or legatee had survived the testator." 2 Md. Code Ann. (1939) Art. 93, § 340.

[2] "Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived. . . ." Md. Code Ann. (Flack, Supp. 1947) Art. 35, § 89.

[3] 4 PAGE, WILLS, lifetime ed., §§ 1414, 1427 (1941) and cases cited therein.

[4] "Survivorship . . . must be proved by the person asserting it." Cowman v. Rogers, 73 Md. 403, 21 A. 64 (1891). In Carpenter v. Severin, 201 Iowa 969, 204 N.W. 448 (1925), claimants under the lapse statute were defeated because unable to sustain the burden of showing that the legatee predeceased the testator.

[5] Glenn v. Belt, 7 G. & J. 362, 20 Md. 254 (1835); Hays v. Wright, 43 Md. 122 (1875); Hemsley v. Hollingsworth, 119 Md. 431, 87 A. 506 (1913).

[6] See Vance v. Johnson, 171 Md. 435, 188 A. 805 (1937).

[7] See 4 PAGE, WILLS, lifetime ed., § 1422 (1941). Probably the most common

applied, the evidence is not, by hypothesis, sufficient to determine that the persons died otherwise than simultaneously. Under the act, the property of each of the *commorientes* is disposed of as though he had survived. As to *H*'s property, then, his will fails unless the lapse statute can be applied. As pointed out above, however, proof of survivorship of the testator would seem to be a condition precedent to application of the latter statute, but in the principal case, the court applied the statute even though the burden of proof was not sustained. A different result would seem to be in order, however, had relatives of *H*, rather than the city, been contesting the claim of *W*'s relations. In the principal case, *H*'s property was valued at $50,000 while that left by *W* was worth only $1000. It seems probable that most courts would, under similar circumstances, award *H*'s property to his own relatives. Mutual application of the Uniform Act and a lapse statute, such as that in Maryland, would, however, give *H*'s property to *W*'s relatives. The Commissioners on Uniform Laws studied the problem of simultaneous death for several years before submitting the present act. As originally proposed, the act provided that the *commorientes* "shall not inherit one from another and no property shall pass from or through one to the other." [8] This provision would indicate that the act and the lapse statute were mutually exclusive. Even though the provision is not in the act as adopted, its application would seem to preclude use of the lapse statute, in view of the inability to prove that the testator outlived the beneficiary. A New York surrogate's court, however, has also applied the Uniform Simultaneous Death Act and the lapse statute together in order to reach a highly desirable result.[9] When the Uniform Act was submitted for adoption by the National Conference on Uniform Laws, the commissioners stated that "The theory of the present Act makes no effort whatever to resolve the un-resoluble." [10] The difficulty of the problem faced by the commissioners is highlighted by the cases where simultaneous death and lapse become intertwined.

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type of lapse statute protects only lineal descendants of a beneficiary who was, himself, a lineal descendant of the testator. Other statutes allow lineal descendants of the beneficiary to come in if the beneficiary was a relative of the testator. The remaining statutes, including Maryland's, do not require that the beneficiary be a relative of the testator. Most of the latter statutes, however, unlike Maryland, bring in only lineal descendants of the beneficiary.

[8] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 294 (1938).

[9] Testator and his son were killed in a common disaster. Testator's will left one-third of his property to each of his children, including the deceased son. The statutes were applied together in order to let the latter's two children take the share which their deceased father would have taken. In re Macklin's Will, 177 Misc. 432, 30 N.Y.S. (2d) 706 (1941). The case is discussed in 55 HARV. L. REV. 691 (1942). The New York lapse statute limits its protection to lineal descendants of a beneficiary who was, himself, a descendant or brother or sister of the testator. N.Y. Decedent's Estate Law (McKinney, 1939) § 29.

[8] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS AND PROCEEDINGS 266 (1940).