Wyoming Law Journal

Volume 15 | Number 3 Article 6

December 2019

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of a threat to the mortgagee or judgment creditor at foreclosure sale. As the "pay off' tends to defeat that purpose of the statute, it cannot be upheld.

> The right of redemption is purely statutory, "and cannot be enlarged, abridged or defeated by the court in the foreclosure decree or otherwise."[24]

However admirable the "pay off" might be, we must necessarily conclude that legislation is the only means by which it can be implemented. As we have seen, statutory redemption in its present accepted form is grossly inadequate as a deterrent to sacrifice sales. It can only be hoped that when new statutes are passed, the legislatures of the different states will recognize the value of the "pay off" and make it a part of the law.

H. W. DEL MONTE

THE UNIFORM SIMULTANEOUS DEATH ACT AND ITS EFFECT ON JOINTLY OWNED PROPERTY

Under the common law when two or more persons perish in a common disaster or under circumstances which make it impossible to determine the sequence of death, there is no presumption as to survivorship and anyone claiming property through one of the victims whose ownership depended on his surviving the other victims, has the burden of proving such survivorship. If this party cannot sustain the burden of proof, his claim fails.[1] To correct the difficulties of the common law rule, some states enacted statutes providing a presumption of survivorship based upon age and sex. Such a statute exists in Wyoming[2] but those portions in conflict with the Uniform Simultaneous Death Act are no longer effective.[3] A problem then arises concerning estate planning. What provisions should a husband and wife make in their wills to cover the possibility of simultaneous death? Under the former statute[4] one could utilize the presumption for estate planning purposes.

One of the problems which arises in estate planning under the Act is how to have all of the property of husband and wife in one estate if both perish simultaneously. One reason for having all property in one estate is to minimize administration and probate costs. While it is also important to have all of the property in one estate, usually that of the wife, for purposes of utilizing the marital deduction, that subject is covered in the Internal Revenue regulations which state:

23. 140 Ill. 170, 29 N.E. 563, 565 (1892).
24. Ulhich v. Lincoln Realty Co., 180 Ore. 380, 168 P.2d 582, 587 (1946), quoting 3 Wiltsie on Mortgage Foreclosure, 5th Ed., 1665, § 1062.

1. Cowman v. Rogers, 73 Md. 403, 21 Atl. 64 (1891).
2. Wyo. Stat. § 1-189 (1957).
3. § 9, ch. 94, Laws 1941.
4. Wyo. Stat. § 1-189 (1957).

> Survivorship. If the order of death of the decendent and his spouse cannot be established by proof, a presumption (whether supplied by local law, the decedent's will, or otherwise) will be recognized.[5]

Since many hubsands and wives hold much of their property jointly or by the entireties, this article will be concerned primarly with the peculiar problems of joint ownership. On this point the Act provides:

> Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived.[6]

It will be readily seen that this provision of the Act defeats the purposes stated above. However, another section of the Act provides:

> This act shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of this act.[7]

Therefore the problem is to provide an estate plan which would place the estate of the husband and wife within this exclusion thereby allowing a plan which includes all of the property within one estate.

That courts will give effect to a presumption of survivorship in a will is well established.[8] It can be argued that the above mentioned section of the Uniform Simultaneous Death Act embraces such a presumption clause. However, it must be borne in mind that the usual presumption of survivorship clause has reference only to property passing by the will and not to jointly owned property. After a discussion of the law as it relates to property passing under the will, an attempt will be made to show how it can relate to joint property under the Act. Aside from the Act as it appears in Wyoming statutes, the Act as amended in August, 1953, provides:

> . . . or where provisions made for a presumption as to survivorship which results in a distribution of property different from that here provided.[9]

The comment following the Act as amended appearing in *Handbook of the National Conference of Commissioners on Uniform State Laws* states:

> The committee are of the opinion that the courts would construe the original act the same as the act as here re-written, if they adopt a liberal construction, but the amendment may clarify and be helpful.[10]

In addition to this, text writers suggest the inclusion of presumption of survivorship clauses in wills with no hesitancy.[11]

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5. Internal Revenue Reglations § 20.2056(e)-1-(e).
6. Wyo. Stat. § 34-104 (1957).
7. Wyo. Stat. § 34-101 (1957).
8. In re Fowles, 222 N.Y. 222, 118 N.E. 611 (1918).
9. Uniform Simultaneous Death Act, § 6, 9C U.L.A. (1957).
10. Uniform Simultaneous Death Act, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, 252 (1953).
11. Bowe, Estate Planning and Taxation, 62, 160-163 (1957).

Having advanced the supposition that under the statutes effective within this jurisdiction a presumption of survivorship in a decendent's will is effective, the next step is to see if it will be effective in the narrow question of producing the desired result in relation to joint tenancies and tenancies by the entireties.

At this point the whole problem is a result of the nature of joint tenancies and tenancies by the entireties. A presumption of survivorship clause in a will would naturally be supposed to affect only that property passing by the will. However, the jointly owned property does not pass by the will and any will provision which attempts to affect it is usually held to be invalid.[12] This is usually based on the theory that when the will operates at the death of the testator, he has no interest in the jointly owned property, it having passed on his death to the survivor.[13] It must be borne in mind that the reported cases holding that will provisions which attempt to affect joint property are invalid concern an attempt to adversely affect someone else's interest. These cases are indicative of the form which presumptions of survivorship which attempt to affect joint property must take. A presumption of survivorship clause which is in favor of the testator and attempts to appropriate all of the joint property to his own estate would probably be invalid. The presumption would then of necessity have to be in favor of the other joint owner. In the case of husband and wife the presumption would usually be in the husband's will providing a presumption of his wife's survivorship. Additional provision could be made in the wife's will presuming her own survivorship but in the light of the above it is difficult to see how this would be of any aid in obtaining the desired effect. A presumption of survivorship in the testator's will in favor of the other joint owner does not adversely affect the other joint owner's interest. Unlike the usual situation in which the jointly owned property all passes to the surviving joint tenant upon the death of the other, the Uniform Simultaneous Death Act would cause half of the joint property to be included in the estate of the testator. It is this property which would be affected by holding the presumption valid. Validity of the presumption would not interfere with the basic survivorship feature of joint ownership. The only purpose of such a presumption is to fill the void caused by lack of evidence as to who actually survived.[14] The result of the presumption would be to prevent one-half of the joint property from vesting in his estate under the provisions of the Uniform Simultaneous Death Act. It is on this point that any distinction must be based. Although there is no authority on this precise point, because of this distinction a court should give effect to the presumption since the cardinal rule in the construction of wills is to give effect to the testator's wishes if they are clearly ascertainable from the will and not contrary to law or public policy.[15] As is seen by the above construction of the Uniform Simultaneous Death Act permitting presumption of survivorship clauses in general and

12. In re Melcher's Will, 246 Wis. 45, 16 N.W.2d 373 (1944).
13. In re Kaspari's Estate, . . N.D. . , 71 N.W.2d 558 (1955).
14. 31 C.J.S. 723, Evidence, § 114 (1940).
15. 95 C.J.S. 731, Wills, § 590 (1940).

from the nature of the testator's interest, such a provisiion should operate to produce the desired effect. While it is necessary to the establishment of survivorship in this manner that the will be probated, the general purpose is accomplished in regard to savings on administration and for purposes of utilizing the marital deduction. The one remaining point would be to draft a presumption of surviorship clause which is sufficiently specific that a court would have no doubt as to the testator's intention.

In the light of the above it would seem that despite the provisions of the Uniform Simultaneous Death Act and the nature of joint tenancies and tenancies by the entireties, a presumption of survivorship clause in a will presuming the survival of the other joint owner to have survived would operate to place all of such property in one estate.

GEORGE L. ZIMMERS

EMPLOYEE LIFE INSURANCE FURNISHED BY THE EMPLOYER AS MITIGATING DAMAGES AGAINST THE EMPLOYER IN AN ACTION FOR WRONGFUL DEATH

At the outset, it should be noted that the subject discussed by this paper, as reflected by the title, concerns the effect, if any, life insurance proceeds may have upon the ascertainment of damages in an action for wrongful death. Because of the very strong weight of authority in the United States to the effect that such proceeds may not be considered to mitigate damages in a death action by recipients thereof,[1] this discussion concerns only a very narrow possible exception to this general rule.

Since any exception to a general rule must logically circumvent the reasons therefor, these reasons should be considered. The stated reasoning behind the general rule is that since the party effectuating the insurance policy had paid in consideration the full value of the premiums for compelte protection under the policy, there cannot be any equity in the claim of a defendant in the contract for which he has no concern or gave no consideration.[2] It must be conceded that in most cases it is a sound underlying policy that wrongdoers should not be protected to the extent that an untimely death has been contemplated by the decedent and provided for by a separate contract of insurance, however, the situation to which the possible exception would be applicable, simply stated, would arise in the case when the wrongdoer, who is a defendant in an action for wrongful death, has furnished the consideration for the life insurance policy. At this point it can be seen that the reasons for the rule, as stated above, fail to be appropriate.

1. Brabham v. Baltimore and O. R. Co. (C.C.A. 4th), 220 F. 35 (1914); Thompson v. Ft. Branch, 204 Ind. 152, 178 N.E. 440, 82 A.L.R. 1413 (1931); Annotation: 18 A.L.R. 686, s. 95 A.L.R. 579 (1935).
2. Baltimore and O. R. Co. v. Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384 (1877), reversed on other grounds in 104 U.S. 5, 26 L.Ed. 643 (1877).