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# The Evolution of the Uniform Simultaneous Death Act and its Shortcomings

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# THE EVOLUTION OF THE UNIFORM SIMULTANEOUS DEATH ACT AND ITS SHORTCOMINGS

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## INTRODUCTION

When two or more persons die at the same time, legal challenges arise in the distribution of their estates; the Uniform Simultaneous Death Act (USDA) functions as a solution.[1] As discussed below, while the USDA's premise seems simple—when two or more persons die simultaneously, the USDA governs[2]—the original USDA's ramifications were found to be grave.[3] The major shortcoming of the original version of the USDA was its inflexibility in its simultaneity requirement, which surfaced as a substantial problem when two or more persons would die at *almost* the same time.[4] This

[1] The Uniform Simultaneous Death Act (1) is a "modern innovation[] actuated from lack of any logical or realistic method to resolve the legal difficulties that arise in the distribution of estates when two or more people in line of succession to them are killed in a common disaster and there is no satisfactory evidence as to the order in which they died; (2) … discards the idea of proving survivorship and proceeds on the presumption that each person is the survivor as to the property allotted him and administers the estate accordingly; [and] (3) … not only attempts to clarify the common-law rule but, in cases where two or more die in a common disaster and the order of death is uncertain, also eliminates the inequalities and uncertainties of the common law and the arbitrary presumptions to guide property successions where they exist and provide for an equitable disposition of estates[.]" Elizabeth T. Tsai, *Construction, Application, and Effect of Uniform Simultaneous Death Act*, 39 A.L.R.3d 1332 (1971) (quoting Miami Beach First Nat. Bank v. Miami Beach First Nat. Bank, 52 So.2d 893, 896 (Fla. 1951)).

[2] The Uniform Simultaneous Death Act governs in states that have adopted it and where other testamentary documents do not apply, such as where a will does not include a provision counteracting the relevant provisions of the Uniform Simultaneous Death Act. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2 cmt. b (AM. L. INST. 1999).

[3] There were quite a few cases with results that were considered to be unjust. *See* Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct.1985); *In re* Estates of Perry, 40 P.3d 492 (Okla. Civ. App. 2001); Prudential Ins. Co. of Am. v. Spain, 90 N.E.2d 256 (Ill. App. Ct. 1950).

[4] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2 cmt. b (AM. L. INST. 1999) "The shortcoming of the Original USDA was that it limited its result to instances in which there was no sufficient evidence that two decedents died otherwise than simultaneously. Experience under the Original USDA

situation arose most often in cases of "common disaster" where two or more persons died at about the same time, but not at exactly the same time.

After lengthy operation under the original USDA, unjust consequences, such as windfalls and heartbreaking litigation, came to the forefront. In an effort to curtail these consequences, the Uniform Probate Code (UPC) proposed USDA reform, which was adopted by many jurisdictions.[5] The major change to the original USDA was the 120-hour survival rule, which required survival for 120 hours in order for deaths to not be considered simultaneous.[6]

While the 120-hour survival rule set out to solve the issue of unjust consequences arising when two or more persons died at almost, but not exactly, the same time, the language of the reformed USDA did not cover all of its bases. As discussed below, the reformed USDA omitted crucial components: "common disaster" language and guidance on situations involving life-assisting technology. In an attempt to solve the injustices that resulted from application of the original USDA, by not specifying that the 120-hour survival rule should be applied *only* in "common-disaster" situations, the reformed USDA overcorrected the problems of the original USDA. Furthermore, by not providing guidance on whether to apply the 120-hour survival rule in situations involving life support, the reformed USDA may have created more questions than it answered. This paper explores potential solutions to these problems by employing a two-part inquiry. Through determining whether to apply the 120-hour survival rule of the reformed USDA and by amending or revising the reformed USDA to provide guidance to courts on what to do in situations involving life-support technology to avoid foul play and manipulation, the reformed USDA is likely to operate as it was intended to: to avoid unjust results.

## I. UNIFORM SIMULTANEOUS DEATH ACT: THE ORIGINAL VERSION

After 1940, when two or more persons died simultaneously, the USDA was the applicable law in most jurisdictions.[7] The original USDA provided for the delegation of property when there was not sufficient evidence that persons died other than simultaneously.[8] In relevant part,

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suggested that instances of near-simultaneous deaths—in which one decedent did survive the other but by an insubstantial period of time—should receive the same treatment.").

[5] *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2. (AM. L. INST. 1999).

[6] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS §1.2 cmt. c (AM. L. INST. 1999).

[7] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2 (AM. L. INST. 1999) (listing the states that adopted the original version of the Uniform Simultaneous Death Act).

[8] Tsai, *supra* note 1.

Section 1 of the USDA stated: "[w]here 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, except as provided otherwise in this act."[9] The USDA came into play in situations where two or more persons died at the exact same time, usually, but not always, in a "common disaster."[10]

In a case involving the USDA, the party claiming that there was survivorship—that one party outlived the other party, even if only briefly—had the burden of proving survivorship by a preponderance of evidence.[11] In the absence of sufficient evidence that one person survived the other, the USDA provided that the persons died simultaneously.[12] The USDA did not presume either simultaneous death or survivorship, rather, it relied on the theory that persons died simultaneously because the party claiming that the death was not simultaneous failed to prove it.[13] If it was found there was not sufficient evidence that the persons had not died simultaneously, the court would generally distribute the property as if the decedent had survived, thus, providing an incentive for the decedent's heirs to contest survivorship if its declaration would significantly impact the distribution of the estate.[14] Prior to reform, the original USDA would often yield adverse results when two or more persons, such as a husband and a wife or a mother and a son, would die at approximately the same time, but not exactly the same time.[15] The crux of the problem under the original USDA was evidenced by situations where there were near-simultaneous deaths.[16]

## II. UNIFORM SIMULTANEOUS DEATH ACT: ROAD TO REFORM

While the original USDA, adopted by the vast majority of the states, appeared facially to be a neutral solution to the real-world problem of estate

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[9] Tsai, *supra* note 1.

[10] Tsai, *supra* note 1 ("The question as to the applicability of the Uniform Simultaneous Death Act usually arises where two or more persons have died in a common disaster. Accordingly, the courts have frequently determined the antecedent question of whether there was sufficient evidence that the persons died otherwise than simultaneously in such disasters, caused by an airplane crash, asphyxiation, automobile accident, homicide-suicide, or natural or other causes.").

[11] *E.g.,* OKLA. STAT. tit. 58, § 1001 (1959) (stating a party only needs to prove that one party survived the other by at least one second).

[12] Tsai, *supra* note 1.

[13] Tsai, *supra* note 1.

[14] Tsai, *supra* note 1.

[15] J. Rodney Johnson, *The New Simultaneous Death Act: Welcome Changes for Donative Transfers*, 19 VA. BAR ASS'N J. 5, 5 (1993).

[16] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2 (AM. L. INST. 1999).

distribution in the wake of simultaneous deaths, its application often led to unjust results.[17] The USDA generated a wide range of problems when two or more persons, such as a husband and wife, died within a short period of time.[18] Such problems ranged from distributing the same property twice to windfalls.[19] The most basic complaint was "double distribution" of an estate after a "common disaster."[20] For example, suppose there was a husband (H) and a wife (W). Now suppose there was a house fire, in which W died in the fire and H died in the ambulance on his way to the hospital. Under the USDA, prior to its reform, H and W did not die simultaneously: H survived W. Thus, H would inherit W's entire estate, but since H had also died, W's estate would be distributed to the beneficiaries of H's estate.

In this example, and cases that were similar to it, the problem was that the same property would need to be distributed twice, which would have increased both the administrative expenses and the time to complete the administration of the estates.[21] Unfortunately, for some victims of the USDA before it was amended, "double distribution" was just the beginning of their problems.[22] In the cases that yielded the most unfair results,[23] uneasiness came when a party received a windfall[24] or was forced to go to court to deliberate which loved one died first within a matter of minutes.[25]

*Janus v. Tarasewicz* represents pure familial tragedy: Not only did the family have to endure the horrors of homicide, but the original USDA yielded a windfall as well.[26] After returning from their honeymoon, Stanley and Theresa Janus mourned the death of Stanley's brother, who died suddenly after taking a Tylenol capsule laced with cyanide.[27] Without knowing the cause of their brother's death, Stanley and Theresa both took the

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[17] Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct. 1985).

[18] Such problems ranged from distributing the same property twice to windfalls. *See* Johnson*, supra note* 15; *Janus*, 482 N.E.2d at 424.

[19] *Janus*, 482 N.E.2d at 424.

[20] *See* Johnson, *supra* note 15.

[21] *See* Johnson, *supra* note 15, at 5; *see also* Julia Kagan, *Uniform Simultaneous Death Act*, INVESTOPEDIA (Feb. 18, 2021), https://www.investopedia.com/terms/u/uniform-simultaneous-death-act.asp ("Without the [reformed Uniform Simultaneous Death Act], two probates would be necessary to process the transfer of estates before the assets are distributed . . . . Probate costs can be rather high, deflating the value of an inheritance . . . . ").

[22] *Cf. Janus*, 482 N.E.2d at 424 (resulting in a windfall more disturbing than the fact that they had to distribute the same property twice).

[23] Unjust results usually occurred in common disaster cases, such as an airplane crash, an automobile accident, or a homicide, when a court found that the persons did not die simultaneously. *See* Tsai, *supra* note 1.

[24] *See Janus*, 482 N.E.2d at 424.

[25] *See In re* Estates of Perry, 40 P.3d 492, 499 (Ok. Civ. App. 2001).

[26] *Janus*, 482 N.E. 2d at 424.

[27] *Id.* at 419.

cyanide-laced Tylenol.[28] Soon after, Stanley collapsed on the floor, and within minutes, Theresa began having seizures.[29] When they arrived at the emergency room, Stanley did not show any signs of blood pressure, pulse, or respiration; however, Theresa, while not showing any visible vital signs, had a measurable blood pressure and fixed, dilated pupils.[30] Stanley was pronounced dead shortly after he arrived at the hospital, while Theresa was said to be in a deep coma.[31] After various tests, such as an electroencephalogram and a cerebral blood flow test, Theresa was diagnosed as brain dead, and her life support was terminated.[32] Ultimately, Theresa was pronounced dead two days after Stanley.[33] The trial court held that there was sufficient evidence to show that Theresa survived Stanley. The court, however, could not say exactly how long she survived him, but the death certificates listed the dates of death as two days apart.[34]

Stanley had a life insurance policy, which named Theresa as the primary beneficiary and his mother as the contingent beneficiary.[35] Stanley's mother brought suit in an attempt to claim the proceeds of Stanley's life insurance policy as the contingent beneficiary.[36] The party claiming survivorship—in this case, Theresa's heirs—has the burden of proving survivorship by a preponderance of the evidence.[37] Thus, Theresa's heirs had to prove that Theresa died after Stanley to take the proceeds of Stanley's life insurance policy. If Theresa's heirs failed to prove that Stanley died first, and the court found that either Theresa died first or that the evidence was inconclusive, then Stanley's insurance policy would not become part of Theresa's estate and would be payable to Stanley's mother.[38] However, the trial court found, and the appellate court affirmed, that Theresa survived Stanley.[39] As a result, the Metropolitan Life Insurance Company paid the proceeds of Stanley's life insurance policy to the administrator of Theresa's estate, Theresa's father.[40]

Similarly, in *Prudential Insurance Company of America v. Spain*, the wife's heirs received a windfall after the Appellate Court of Illinois found there was sufficient evidence that the wife had survived her husband,

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[28] *Id.*
[29] *Id.* at 419-20.
[30] *Id.* at 420.
[31] *Id.*
[32] *Janus*, 482 N.E.2d at 420-21.
[33] *Id.* at 421.
[34] *Id.*
[35] *Id.* at 419.
[36] *Id.*
[37] *Id.* at 422.
[38] *Janus*, 482 N.E.2d at 424.
[39] *Id.*
[40] *Id.* at 421.

pursuant to the original USDA, after an automobile collision.[41] Roy and Marie Spain died at the scene of the accident after Roy drove their car into a freight train.[42] A switchman on the train, Malcolm Purcell, ran over to the car and immediately discerned that Roy was dead; he grabbed Roy's wrist to feel for a pulse, but he had no pulse and could not hear him breathing.[43] However, Purcell also testified that while he was examining Roy, he heard Marie groan, indicating she was still alive.[44] Another switchman, Ernest Jennings, testified that he also went to the car and knew from looking at Roy that he was dead.[45] Jennings, however, took Marie's wrist and felt a pulse; he also saw her move her head back and forth.[46] Both Roy and Marie had life insurance policies in which they named the other spouse as the beneficiary.[47] The trial court concluded, and the appellate court affirmed, that there was sufficient evidence that Marie survived Roy.[48]

In *Janus*, Theresa's father received a windfall;[49] in *Spain*, Marie's heirs received a windfall.[50] Both Theresa's father and Marie's heirs received part of an estate that was not in the original estate plan. One of the most sacred principles in wills and estate jurisprudence is to give effect to a testator's intentions as expressed in his will or other governing instrument; however, these oppressive results precluded the testator's intentions from being carried out. It would have been objectively fair for Stanley's mother, not Theresa's father, to receive the proceeds from Stanley's life insurance policy, and likewise in Marie and Roy's situation. These couples died at approximately the same time but not at exactly the same time.[51] The inflexibility of the original, unreformed USDA in its simultaneity requirement, which allowed for a determination that the persons died other than simultaneously if there was sufficient evidence that one survived the other by at least one second,[52] led to windfalls, such as those in *Janus* and *Spain*, that most are ready to claim as unjust.[53]

Even if an application of the original USDA did not lead to a windfall, its application could still prove to be tortuous for the families

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[41] Prudential Ins. Co. of Am. v. Spain, 90 N.E.2d 256, 259-60 (Ill. App. Ct. 1950).

[42] *Id.* at 258.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 258.

[47] *Spain*, 90 N.E.2d at 257.

[48] *Id.* at 259-60.

[49] *Janus*, 482 N.E.2d at 424

[50] *Spain*, 90 N.E.2d at 257-58.

[51] *Janus*, 482 N.E.2d at 421; *Spain*, 90 N.E.2d at 258.

[52] OKLA. STAT. tit. 58, § 1001 (1959)

[53] *See* Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1093 (1992).

involved.[54] For example, in *In re Estates of Perry*, the Court of Civil Appeals reversed the district court's decision that the wife survived her husband after they were in an automobile accident and both died at the scene.[55] Instead, it held that because the evidence was insufficient to establish survivorship, the husband and wife died simultaneously and the USDA applied.[56]

Determining whether the death of two or more persons from a "common disaster" were simultaneous could be taxing on those involved. In the *Perry* case, it was ultimately decided that the husband and wife's deaths were simultaneous, but it was an onerous journey getting to that conclusion.[57] Mr. Perry and Mrs. Jones-Perry, a married couple, were out for a drive when they were involved in a head-on collision.[58] At trial, the evidence presented consisted of the testimony of two eighteen-year-old witnesses who saw the collision and entered the scene to help the victims.[59] The teenagers ran to the scene, saw the vehicle catch on fire, and pulled Mr. Perry from the car; as they pulled Mr. Perry from the car, they heard him gurgle due to stuff in his throat.[60] One of the teenagers checked Mrs. Jones-Perry's pulse, which she still had, before they dragged her out of the car.[61] When they returned to check on Mr. Perry, he was no longer breathing; but at that point, Mrs. Jones-Perry was gurgling.[62] One of the teenagers was performing CPR on Mr. Perry, when another teenager detected that Mrs. Jones-Perry still had a pulse.[63] After they had considered Mr. Perry dead, they checked Mrs. Jones-Perry's pulse again and felt nothing.[64] One of the teenagers testified that Mrs. Jones-Perry survived Mr. Perry by at least one minute; another testified that she outlived him by three to six minutes.[65]

The District Court of Grady County held that there was sufficient evidence to conclude that Mr. Perry died before Mrs. Jones-Perry based on the teenagers' testimony; however, the Court of Civil Appeals disagreed.[66] Because none of the teenagers ever checked for Mr. Perry's pulse, the court concluded that it was possible that Mr. Perry could have had a pulse after they discovered that Mrs. Jones-Perry no longer had a pulse.[67] Thus, the evidence was insufficient to prove by a preponderance of the evidence that

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[54] *See In re* Estates of Perry, 40 P.3d 492, 499 (Okla. Civ. App. 2001).
[55] *Id.* at 493.
[56] *Id.* at 499.
[57] *Id.*
[58] *Id.* at 493.
[59] *Id.* at 494.
[60] *Perry*, 40 P.3d at 494.
[61] *Id.*
[62] *Id.* at 493.
[63] *Id.* at 495.
[64] *Id*.
[65] *Id.*
[66] *Perry*, 40 P.3d at 499.
[67] *Id.* at 496.

Mrs. Jones-Perry survived Mr. Perry, so Oklahoma's USDA was applicable.[68]

Because Mr. Perry and Mrs. Jones-Perry's estates were distributed to their respective heirs, the result was one that most were prepared to accept as "right." Even though, compared to cases like *Janus* and *Spain*, *Perry* concluded in a relatively "happy ending" because neither party to the litigation received a windfall, the nightmare that was the judicial deliberation to discern whether one spouse survived the other, when both died on the scene after a tragic head-on collision, was nevertheless a horrendous ordeal. Not only did Mr. Perry and Mrs. Jones-Perry's heirs have to lose their loved ones, but they also had to publicly debate whether one gurgled for a second longer.[69] Even in *Janus*, Stanley's mother and Theresa's father had to engage in nightmarish litigation over who survived whom, when the question of survival was in terms of a matter of days,[70] rather than minutes.[71] The main shortcoming of the original USDA, thus, was that it did not apply when two or more persons *almost* died at the same time.[72] Because of this inflexibility, windfalls and painful litigation, as *Janus*, *Spain*, and *Perry* demonstrate, were the unpalatable results that arose under the jurisprudence of the original USDA.

## III. UNIFORM SIMULTANEOUS DEATH ACT: REVISED

In response to the problems arising in cases involving near-simultaneous deaths, the Uniform Probate Code (UPC) created the bright-

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[68] *Id.* at 499.

[69] Many cases involved this kind of horrendous litigation. *See Perry*, 40 P.3d at 495; *see also* Lawrence's Estate v. Andrews, 383 N.E.2d 703, 704-06 (Ill. App. Ct. 1978) (holding the fact that a "'gurgling sound or escape of air' came from Mrs. Lowrance's body three times" was not sufficient evidence to establish that she survived her husband after they were both shot by their thirteen-year-old daughter); *See also In re* Estate of Moran*,* 395 N.E.2d 579, 580 (Ill. 1979) (holding there was not sufficient evidence that a son survived his mother, pursuant to the Uniform Simultaneous Death Act, when they both died from carbon monoxide poisoning, while sitting in a running car in an enclosed garage).

[70] *Janus*, 482 N.E.2d at 421.

[71] *Perry*, 40 P.3d at 495.

[72] J. Rodney Johnson, *The New Uniform Simultaneous Death Act*, 8 PROB. & PROP. 22, 22, 23(1994) ("If there is actual survivorship for any measurable period, however short, the facts control."); *E.g.*, *In re* Bucci's Estate, 293 N.Y.S.2d 994, 995-96 (N.Y. Sur. Ct. 1968) (holding there was sufficient evidence to conclude that the wife survived the husband after an airplane crash when the autopsy showed that there was carbon monoxide in the wife's blood, but not the husband's blood, indicating that the wife inhaled some of the carbon monoxide during the fire, thus briefly outliving her husband, if only by a few breaths).

line 120-hour survival rule.[73] The 120-hour survival rule elongates the required period of survival from one second[74] to 120 hours, thus requiring a person to survive for 120 hours in order for death to not be "simultaneous."[75] Sections 2-104 and 2-702 of the 1990 UPC are relevant in guiding the analysis of the reformed USDA. UPC section 2-104 applies to intestacy and is a rule of mandatory law, while UPC section 2-702 applies to wills and other governing instruments and is a rule of construction.[76]

UPC section 2-104, in relevant part, provides that *any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent* for purposes of homestead allowance, exempt property and interstate succession, and the decedent's heirs are determined accordingly.[77] *If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both cannot be determined, and it cannot be established that the person who would otherwise be an heir survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period.*[78]

UPC section 2-702(a), in relevant part, provides: "[f]or the purposes of this [code], except as provided in subsection (d), *an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event*."[79] Section 2-702(d) provides exceptions to the 120-hour survival rule, such as an overriding government instrument.[80]

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[73] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 1.2 (AM. L. INST. 1999).

[74] OKLA. STAT. tit. 58, § 1001 (1959).

[75] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS§ 1.2 (AM. L. INST. 1999).

[76] Halbach & Waggoner, *supra* note 53, at 1096.

[77] UNIF. PROB. CODE § 2-104 (amended 2019).

[78] UNIF. PROB. CODE § 2-104 (amended 2019).

[79] UNIF. PROB. CODE § 2-702(a) (amended 2019) (emphasis added). *See also* MINN. STAT. § 524.2-702 (2008) ("(a) Requirement of survival for 120 hours. A beneficiary of a trust in which the grantor has reserved a power to alter, amend, revoke, or terminate the provisions of the trust who fails to survive the grantor by 120 hours, a devisee who fails to survive the testator by 120 hours, a beneficiary named in a transfer on death deed under section 507.071 who fails to survive by 120 hours the grantor owner upon whose death the conveyance to the beneficiary becomes effective, or an appointee of a power of appointment taking effect at the death of the holder of the power who fails to survive the holder of the power by 120 hours is deemed to have predeceased the grantor, grantor owner testator, or holder of the power for purposes of determining title to property passing by the trust instrument, by the testator's will, by the transfer on death deed, or by the exercise of the power of appointment.").

[80] UNIF. PROB. CODE § 2-702(d)(1)-(2) (amended 2019).

In accordance with the 1990 UPC, the Commissioners of Uniform States Laws reformed the USDA, which extended the original USDA to situations such as, but not limited to, "common disasters," in which one individual survived another for an insubstantial period.[81] Section 2 of the Uniform Simultaneous Death Act, in relevant part, provides:

> [I]f the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead or family allowance depends upon an individual's survivorship of death of another individual, *an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual*.[82]

The reformed USDA was adopted in many jurisdictions.[83] By loosening the USDA's simultaneity requirement in allowing deaths that occurred almost at the same time to be considered "simultaneous" with the 120-hour survival rule, the reformed version eliminates the litigation and windfall issues that resulted from the original USDA.[84]

The reformed USDA has many benefits and advantages, but the most noteworthy is that "each individual's property would pass to his or her own relatives rather than to the other individual's relatives and that double administrative costs would be avoided because property would not pass from one estate to another estate."[85] Hence, if the 1990 UPC sections 2-104 and 2-702 had governed cases like *Janus*, they would have turned out very differently. For example, *Janus* would have been a cut-and-dry case yielding a welcomed outcome. In that case, Theresa survived Stanley by approximately forty-eight hours.[86] Because Theresa did not survive the requisite 120 hours to satisfy the 120-hour survival rule, under UPC section

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[81] 56 AM. JUR. 3D *Proof of Facts* § 2 (2000).

[82] UNIF. SIMULTANEOUS DEATH ACT § 2 (1993) (emphasis added).

[83] The reformed Uniform Simultaneous Death Act was adopted by fewer states than those that adopted the original Uniform Simultaneous Death Act. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 1.2 statutory note 2 (AM. L. INST. 1999) (listing the states that adopted both the original version and the reformed version of the Uniform Simultaneous Death Act).

[84] *See Janus*, 482 N.E.2d at 424; *Spain*, 90 N.E.2d at 257-58; and *Perry*, 40 P.3d at 495.

[85] Halbach & Waggoner, *supra* note 53, at 1095.

[86] *Janus*, 482 N.E.2d at 421.

2-702, Theresa would have been treated as if she predeceased Stanley.[87] Thus, rather than having Theresa's father receive a windfall, Stanley's mother would have received the proceeds of Stanley's life-insurance policy.[88] This result would have been perceived as much more just than the actual result under the original USDA.

While the reformed USDA advances the law by yielding a greater proportion of improved results, it is unfortunately still plagued by inadequacy. There are both minor shortcomings and major shortcomings. The most obvious shortcoming of the reformed USDA is a relatively minor one: It is quite simply that the 120-hour survival rule is limited to 120 hours. The clear rebuttal to that criticism is that a line had to be drawn somewhere. This line, however, will inevitably prove unfortunate for parties in some situations. For example, the reformed USDA's 120-hour survival rule would not have applied in *Estate of Peters*.[89] In *Peters*, Conrad and Marie Peters–husband and wife respectively–died 125 hours and ten minutes apart.[90] Although the Peters did not die of a "common disaster,"[91] as currently applied by courts today, the reformed USDA's 120-hour survival rule still would not have been applicable because Conrad's death was just outside the 120-hour window. Thus, Conrad would have been determined to have survived Marie, and UPC section 2-702 and the reformed USDA would not have changed that portion of the result in the *Peters* case.[92] The bottom line is that whenever a statute operates under a chosen period of time that is arguably arbitrary, there will inevitably be cases that fall just outside the chosen window.[93] Evidenced by the reformed USDA, the risk was ultimately one that many were willing to agree was worth it.[94] The risk that there are a few cases that fall outside

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[87] Halbach & Waggoner, *supra* note 53, at 1098.

[88] Halbach & Waggoner, *supra* note 53, at 1098.

[89] Matter of Estate of Peters, 526 A.2d 1005, 1006 (N.J. 1987).

[90] Halbach & Waggoner, *supra* note 53, at 1092. (The Supreme Court of New Jersey refers to the difference between their deaths as 126 hours, but the exact times of Conrad and Marie Peters' deaths were provided in the lower court's opinion: "Conrad Peters died at 9:00 p.m. on March 28, 1985. Marie Peters died at 3:50 p.m. on March 23, 1985 or 126 hours before her husband." Matter of Estate of Peters, 509 A.2d 727, 805 (N.J. Super. Ct. App. Div. 1986) (Simpson, J., dissenting).

[91] Nonetheless, even if Conrad and Marie Peters' deaths were within the 120-hour window and the case could have been governed under the reformed USDA, the 120-hour survival rule would not have applied, even if a court applied the proposed two-part inquiry solution (introduced below), because Conrad and Marie Peters' deaths were not the result of a "common disaster"; they died of independent causes. However, the case is worth mentioning because of the ironic amount of time between their deaths. *See also Peters*, 526 A.2d at 1006.

[92] Halbach & Waggoner, *supra* note 53, at 1098.

[93] Halbach & Waggoner, *supra* note 53, at 1098.

[94] Halbach & Waggoner, *supra* note 53, at 1098.

the 120-hour range is well worth the benefit of improved and fair results in cases of near-simultaneous deaths, such as *Janus*.[95]

More important than the minor shortcoming of a limited range, the major shortcoming of the reformed USDA is what it did not include. The words "common disaster" are nowhere in the text of the reformed USDA.[96] Furthermore, "time of death" does not address the situation where an individual is placed on life support.[97] By not including the language "common disaster" to define the applicability of the 1990 UPC Amendments and by not including further guidance in life-support situations, the reformed USDA is unfortunately flawed.

## IV. UNIFORM SIMULTANEOUS DEATH ACT: POTENTIAL FOR STILL UNJUST RESULTS

The reformed USDA should have included the language "common disaster" and provided further guidance for life-support situations; without these revisions, the statute engages in simple overcorrection and invites foul play. The main issues with the original USDA were that it led to windfalls and tortuous litigation. While the 1990 Amendments' 120-hour survival rule solves those issues wonderfully, it also creates new problems. The reformed USDA's major flaw is in what it omits. While there is little to no research into the inadequacies of the reformed USDA, this paper addresses how this major shortcoming leaves the door open to two main problems: (1) overcorrection and (2) invitation of foul play.

### A. Overcorrection

First, the reformed USDA overcorrects the shortcomings of the original USDA. Because the original USDA did not provide for any flexibility whatsoever in its simultaneity requirement, it often led to unjust results in many cases.[98] For example, as discussed above, if a married couple fell victim to the Chicago Tylenol Murders and died at approximately the same time, it simply does not seem fair that the heirs of one spouse received a windfall at the expense of the heirs of the other spouse.[99] Not only was there a tragic disaster, but the decedents' estates were not divided as the decedents had hoped and planned, as evidenced by their estate plans. Thus, the reformed

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[95] *See Janus*, 482 N.E.2d at 424.

[96] 56 AM. JUR. 3D *Proof of Facts* § 2 (2000).

[97] Stephen M. Arcuri, Note, *Does Simultaneous Really Mean Simultaneous? Interpreting the Uniform Simultaneous Death Act*, 17 QUINNIPIAC PROB. L.J. 338, 344 (2004).

[98] *See Janus*, 482 N.E.2d at 424; *Spain*, 90 N.E.2d at 257-58; and *Perry*, 40 P.3d at 495.

[99] *Janus*, 482 N.E.2d at 419.

USDA's 120-hour survival rule served to prevent those kinds of unjust results.

The language, however, does not specify "common disaster."[100] This absence represents a shortcoming because without that "common disaster" language, the 120-hour survival rule applies to persons who die within 120 hours of each other from independent causes. For example, a husband may die from a heart attack on a Monday and his wife may die from a fatal gunshot wound three days later on a Thursday. While these two deaths are completely unrelated, the deaths still occurred within 120 hours. Thus, the reformed USDA applies.[101] Under the reformed USDA and 1990 UPC Amendments, because the second decedent (the wife) did not survive the first decedent (the husband) by 120 hours, they technically died "simultaneously." However, this is not the type of problem the reformed USDA aimed to solve; rather, the reformed USDA aimed to solve problems of windfalls and painful litigation over who died first. Altering the survivorship requirement in situations where there are independent causes of death within 120 hours solves neither problem. Instead, it overcorrects the shortcomings of the original USDA.

This scenario is not difficult to imagine in day-to-day life. For example, in *Heirs of Ellis v. Estate of Ellis*, Mr. and Mrs. Ellis died three days apart of independent causes in Tennessee, where the case was subject to the Tennessee Uniform Simultaneous Death Act (TUSDA), which included the 120-hour survival rule.[102] Mr. Ellis died of natural causes, and three days later, his wife, Mrs. Ellis, also died of natural causes.[103] Because there was not survival of 120 hours, the TUSDA deemed Mr. and Mrs. Ellis to have died simultaneously in terms of Mr. Ellis' individual property.[104] However, that outcome also seems unjust. In this kind of situation, there was no "common disaster" to warrant the application of the reformed USDA. Rather, Mr. and Mrs. Ellis died of completely unrelated causes which just happened to be, tragically, within three days of each other.[105] In situations where there is no "common disaster," it would not be considered a windfall for the second decedent's heirs to receive the portion of the estate that the first decedent devised to the second decedent in his or her estate plan. That would be just.

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[100] UNIF. PROB. CODE § 2-104 (1969) (UNIF. L. COMM'N, amended 1990); UNIF. PROB. CODE § 2-702 (UNIF. L. COMM'N 1969).

[101] The reformed USDA applies in adopting jurisdictions absent applicable exceptions, such as an overriding will or another governing instrument. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 1.2 statutory note 2 (AM. L. INST. 1999); UNIF. PROB. CODE § 2-702(d)(1)-(2) (UNIF. L. COMM'N 1969).

[102] Heirs of Ellis v. Estate of Ellis, 71 S.W.3d 705, 708 (Tenn. 2002).

[103] *Id.*

[104] *Id.* at 709.

[105] *Id.* at 708.

It would be unjust if the couple were in a tragic car accident, and one spouse died on the scene while the other spouse died an hour later at the hospital or two days later after being in a coma. That is precisely why the original USDA was reformed. However, implicitly including independent causes of death in the reformed USDA by omitting "common disaster" language is an overcorrection of the primary issue.

There should not be a windfall if two persons die within 120 hours of independent, unrelated causes. It is a little freakish and uncanny, but it is not so far out of the realm of possibility as to justify a windfall. When two people die at almost the same time because of a "common disaster" – a car accident, an airplane crash, a homicide-suicide, etc. – the heirs of the party who "survived" the other gets an advantage that does not feel right. It is a gut-feeling reaction. That feeling stems mainly from the "common disaster" situation itself. Death is a tragedy, but everyone dies. Dying from a "common disaster" elevates the tragedy into something more horrific than dying of natural causes. For example, if two persons died of natural causes within 120 hours, it would undoubtedly be a tragedy, but it would not feel as gut-wrenchingly wrong for the heirs of the second decedent to take in that situations as it would in a case involving a "common disaster." Therefore, by not specifying "common disaster" as a prerequisite to the 120-hour survival rule, the reformed USDA overcorrected the issue of windfalls that came out of the original USDA.

One possible solution to this overcorrection would be for courts to employ a two-part inquiry into whether the reformed USDA's 120-hour survival rule should be applied. Courts would use this two-part inquiry when two (or more) persons die at approximately or almost the same time.[106] The first question should be: (1) Did the deaths occur within 120 hours? If the deaths did not occur within 120 hours, then the rule does not apply to that case. If the deaths did occur within 120 hours, then the second question should be: (2) Did the deaths occur as a result of a "common disaster"? If the two (or more) deaths did not arise from a "common disaster," then the rule does not apply to that case. But if the deaths did occur within 120 hours and they were the result of a "common disaster," then the 120-hour survival rule applies. These two questions should be the inquiry in every case when determining whether the reformed USDA's 120-hour survival rule governs.

The two-part inquiry would accommodate for the lack of "common disaster" language, meaning it would not require an amendment to the reformed USDA. Rather, courts would employ the two-part inquiry to determine whether the 120-hour survival rule governs and then proceed

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[106] The reformed USDA would govern in such cases if it was in an adopting jurisdiction and if it was absent applicable exceptions, such as an overriding will or another governing instrument. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 1.2 cmt b (AM. L. INST. 1999); UNIF. PROB. CODE § 2-702(d)(1)-(2) (UNIF. L. COMM'N 1969).

under simultaneous-death jurisprudence. While this proposed solution will add to the litigation in general, it will not counteract the purpose of solving a problem that prompted the reformed USDA in the first place. In other words, it will not create *painful* litigation. This additional step will not force family members to hash out which loved one died first; it will simply allow courts a mechanism to apply the law where it makes most sense to do so. One of the primary goals of the reformed USDA was to avoid windfalls. Utilizing this two-part inquiry will (1) eliminate windfalls in cases of "common disaster" because the 120-hour survival rule will apply and (2) eliminate windfalls in cases where there is no "common disaster," but independent causes of death, because the 120-hour survival rule will not apply. Therefore, the problems that led the original USDA on the road to reform in the first place would not resurface with the proposed two-part inquiry. Rather, the two-part inquiry would greatly help solve the problem of overcorrection facing the reformed USDA today.

### B. Foul Play

Second, looking at potential consequences cynically, the reformed USDA invites foul play. To understand how the reformed USDA invites foul play, it is necessary to take a closer look at the 1990 Amendment's phrase "time of death."[107] Section 5 of the Uniform Simultaneous Death Act, in relevant part, defines "time of death": "Death occurs when an individual … [has sustained either (1) irreversible cessation of circulatory and respiratory functions or (2) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards]."[108]

Thus, standards have been established to determine "time of death"; however, "advances in medical technology may prove that these determinations are not definite."[109] Note the limited nature of the definition: while the reformed USDA addresses when a person is "dead" according to the law, there is no mention of how life support affects the definition.[110]

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[107] UNIF. PROB. CODE § 2-104 (1969) (UNIF. L. COMM'N, amended 1990) ("Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and interstate succession, and the decedent's heirs are determined accordingly. If the *time of death* of the decedent or of the person who would otherwise be an heir, or the *times of death* of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period.") (emphasis added).

[108] UNIF. SIMULTANEOUS DEATH ACT § 5(1) (NAT'L CONF. OF COMM'R ON UNIF. STATE L. 1993).

[109] Arcuri, *supra* note 97, at 345.

[110] UNIF. SIMULTANEOUS DEATH ACT § 5(1), *supra* note 110.

If an individual is placed on life support, their life is extended for a period of time.[111] In terms of the reformed USDA, life support may be used to extend or deny "survival."[112] Hence, looking at humanity cynically, a family may be faced with a situation where their loved one is on life support, but because another loved one died extremely recently, the family may have the opportunity to manipulate the duration of life support (or deny it altogether) in order to extend "survival" or hasten "death" to end this individual's life on the desired side of the 120-hour benchmark to either satisfy, or fail, the 120-hour survival requirement under the reformed USDA. However, the reformed USDA does not contain a provision addressing this potential situation where an individual's life is extended or shortened so they "survive" or do not "survive" beyond the 120-hour survival period.[113] This type of manipulation, messing with life-sustaining technology to meet the reformed USDA's 120-hour survival rule, would be clearly inconsistent with its purpose to avoid unjust results. But no court that has adopted the reformed USDA has ruled on this issue.[114]

It is unknown how a court should deal with a situation involving the manipulation of life support because the reformed USDA does not provide any guidance on the subject.[115] Looking at the intent behind the reformed USDA alone, it seems clear that a court facing this kind of situation should not apply the 120-hour survival requirement due to bad faith and foul play by the parties, especially in an area as emotional as death. But because the reformed USDA does not take a stance on the subject, it is hard to say whether the omission was intentional, overlooked, or simply ignored. Thus, it appears necessary that the USDA be again revised or amended in order to provide that guidance to courts in anticipation of future litigation tackling these types of situations.

It is worth noting that this issue – absence of guidance on situations involving life-support technology – was also present in the original USDA.[116] Therefore, there has been the possibility of manipulation and foul play under the USDA since its existence. As medical technology advances, however, it seems more achievable for someone today to be able to toe the line of "actual death" under the law and extend, terminate, or deny life support to take advantage of the 120-hour survival rule than it did say seventy-five years or so ago. This issue is ultimately one that remains unsolved in the reformed USDA.

One possible solution to the life-support oversight is an amendment detailing the consequences for extension, termination, or denial of life

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[111] Arcuri, *supra* note 97, at 345.
[112] Arcuri, *supra* note 97, at 360.
[113] Arcuri, *supra* note 97, at 345.
[114] Arcuri, *supra* note 97, at 360.
[115] Arcuri, *supra* note 97, at 360.
[116] Tsai, *supra* note 1, at § 2(a).

support for the sole purpose of altering the 120-hour survival period. If it can be proved that the party extending, terminating, or denying life support for an individual did so in bad faith, the 120-hour survival provision of the reformed USDA should not apply. This solution would appear to be in conjunction with the reformed USDA's purpose to avoid unjust results.

## CONCLUSION

While revision was absolutely necessary, the reformed USDA's survivorship provisions raised new, unanswered questions. Having been enacted to address how to distribute estates when two persons die simultaneously, the original USDA functioned as an effective solution when the deaths occur at exactly the same time; however, the original USDA provided no flexibility in the definition of simultaneous. This inflexibility led to unjust results when two or more persons would die at almost the same time.

The original USDA was reformed to address the unintended consequences of windfalls and heartbreaking litigation for families. Omitting "common disaster" language and ignoring the reality of life-support technology, however, does not provide an adequate or complete solution to the inadequacies of the original USDA. As explored above, there are, however, relatively easy ways to tweak the reformed USDA and its application slightly to render it a more tolerable reformation. First, to solve the problem of overcorrection, courts should employ a two-part inquiry in determining whether to apply the reformed USDA's 120-hour survival rule. While still aiming to minimize windfalls, this proposed inquiry will ensure that the rule is only applied to cases involving near-simultaneous deaths that resulted from "common disasters." Second, to solve the problem of lack of guidance on situations involving life-support technology, the USDA should be revised again to provide some direction to courts. Until there is further guidance, courts will be unsure how to tackle cases involving bad-faith manipulation of life-support technology to interfere with the 120-hour survival rule.

In conclusion, the reformed USDA is welcomed legislation. It minimizes windfalls and reduces the amount of painful litigation families would have had to endure. While there is still work to be done, the reformed USDA should be adopted universally. Without a governing instrument stating otherwise, discerning a testator's intent and wishes for the distribution of his property will forever be an issue. Without knowing a decedent's wishes otherwise, in those tragic situations where two or more persons die almost simultaneously, however, for now, the reformed USDA provides a workable and palatable solution.