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CLIENT ALERT**SIMULTANEOUS DEATH WITH NO ESTATE PLANNING****PRACTICE AREAS**

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In June 2007 in Georgia, professional wrestler Chris Benoit, murdered his wife, Nancy, and their seven year old son, Daniel, before killing himself. Did Benoit strangle Nancy and then Daniel, or did he kill Daniel first? Investigators said that Benoit killed Nancy and then Daniel. However, Nancy's parents contested those findings and their lawyers filed a petition asking the Georgia court to determine the order of the deaths. Why, you might ask. The answer is simple. Even though only minutes might have separated their deaths, the order determines who inherits millions of dollars – Benoit's two children from a previous marriage or Nancy's parents.

Georgia, like many other states, has a "slayer's statute" that prevents killers from profiting from their crimes. For purposes of estate distribution, it treats Benoit as if he died before his wife and son. Thus, as neither Benoit nor Nancy left a will, the distribution of their assets is determined under Georgia intestate law.

If Nancy died first, under intestate succession, Benoit's fortune would first be divided equally between his three children and then Daniel's third would pass to his half-siblings. So ultimately the entire estate would go to Benoit's two surviving children. However, if Daniel died first, Benoit's assets would be split between Nancy and his two surviving children with Nancy's portion ultimately passing to her parents and out of the Benoit family. (Note, this assumes that Benoit and Nancy did not own anything in joint tenancy and that the majority of

the assets were in Benoit's name. If all the assets were owned in joint tenancy and Nancy was deemed to have survived Daniel, everything would pass to Nancy's parents and nothing to Benoit's surviving children.)

In order for a court to determine the order of deaths, medical testimony and autopsy findings must be examined. If it cannot be determined, Nancy and Daniel will be deemed to have died "simultaneously." Most states have enacted Simultaneous Death Acts which provide in such a situation, each individual's property is distributed as if he or she survived the other.

However the definition of "simultaneous" varies among jurisdictions. Some states have enacted a version of the current Uniform Simultaneous Death Act ("USDA") that provides people dying within 120 hours of one another are deemed to have died "simultaneously." Other states, such as Illinois, still rely on an earlier form of the USDA which instead looks to see if there is "sufficient evidence" that the persons died other than simultaneously. This is referred to as the "last breath" test. Under that test a person need only have lived longer by a single breath in order to be deemed a survivor of the other.

An unfortunate example of the application of the Illinois statute is the infamous case of *Janus v. Tarasewicz*. In that case, recently married Stanley and Theresa unknowingly ingested Tylenol laced with cyanide and died soon thereafter. The order of their deaths was not clear and at issue was the distribution of

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SIMULTANEOUS DEATH WITH NO ESTATE PLANNING

Stanley's life insurance policy. Both Stanley's mother and Theresa's father claimed right to the proceeds. If Stanley was deemed to have died first, the proceeds from Stanley's policy would go to Theresa's father. However, if Stanley survived Theresa, the proceeds would go to Stanley's mother, who had been named the alternate beneficiary of the policy. Under Illinois law, the Court, found sufficient evidence that Theresa had survived Stanley, the proceeds thus going to her father. Under the USDA, however, as Theresa and Stanley died "simultaneously" (within 120 hours of one another), the proceeds would have been payable to Stanley's mother - the person Stanley most likely would have wanted to receive it.

In the case of jointly held property, both the Illinois statute and the USDA provide if the test of survival is not met then 1/2 of the jointly held property is distributed as if each joint owner survived and 1/2 as if he or she had not survived. On that basis the property is divided equally between each family. Again, however, in Illinois you look to see which party drew the last breath to determine if the survival test was met. With respect to a life insurance policy, the Illinois act provides that if the survival test is not met, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. Applying that to the *Janus* case, the proceeds would have been distributed to Stanley's mother. Because of its "all or nothing" results, the Illinois "last breath" test is more likely to generate litigation. In

cases like *Janus*, each side will attempt to prove that its decedent drew the last breath and therefore survived the other. This, of course, can result in protracted litigation. As an example, in the Benoit case, the dispute over his estate between Nancy's parents and Benoit's two surviving children was reported to have been settled but only after spending in excess of \$500,000 in legal fees.

The easiest way to address any issue of uncertainty and avoid litigation is through estate planning. In your will, you can incorporate a survival presumption of 120 hours, such as that in the USDA, or provide your own survival test that would be applied by a Court in any litigation involving your death. The obvious question is, whom do you wish to benefit from your estate? Generally if there are children surviving, there is less of an issue. However, there is the potential for the entire family to perish as with Benoit, Nancy and Daniel. Also, as in the Benoit situation, is the possibility of a second marriage with surviving children from a first marriage.

Do you want one person or family to receive all of the benefit? There are estate tax reasons why you might want your spouse or yourself to be deemed to have survived. However, if you and your spouse are recently married with only a house and two 401(k) accounts, do you really want only one of the sets of your parents to receive the entire estate? Or, if you are in a second marriage and you have three children from a previous marriage and your spouse also has two children from a previous

marriage, do you really want the entire estate distributed on the basis of a finding by a court as to which of you drew the last breath?

The solution is in the planning. Give it consideration when filling out the beneficiary designation forms for your company's retirement plan and your life insurance form. Give it consideration by having an estate plan. The important point is you want to have control over the distribution of your estate and not be dependent on the application of a state statute.

Please contact KUBASIAK, FYLSTRA, THORPE & ROTUNNO, P.C. regarding this letter and any other estate planning matter.

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