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RESEARCH ARTICLE

An Assessment of the Doctrine of Commorientes and Its Implications for the Devolution of Testate and Intestate Property in Ghana

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Abstract
The Wills Act 1971 and the Intestate Succession Act 1985 embody commorientes rules that are inconsistent, unfair to one of the deceased persons and arguably undermine the expectations of Ghanaians. While the former presumes that a testator predeceases a beneficiary, the latter presumes that the older spouse died before the younger. Though these presumptions are essential for establishing entitlement to property, it would seem that they work to the advantage of one of the parties and to the detriment of the other. Accordingly, the commorientes rules must be modified to include presumptions that are equitable and consistent with the socio-cultural expectations of Ghanaians. This can be achieved by resorting primarily to expectations regarding succession at customary law.

Keywords: Commorientes; wills; intestacy; family; personal law

Introduction

This article critically analyses the doctrine of commorientes under the Wills Act 1971 (Act 360) and the Intestate Succession Act 1985 (PNDC Law 111) to uncover their inherent biases. While the former presumes that a testator predeceases a beneficiary, the latter presumes that the older spouse died before the younger. It is argued that though these presumptions are essential for establishing entitlement to property, they work to the advantage of only one of the parties: the beneficiary or the younger spouse. This article analyses both presumptions, explaining how they embody biases and result in the inequitable and unjustifiable acquisition of property. It also proposes alternative legal frameworks for sharing testate and intestate property in the event of simultaneous deaths and justifies them on the basis of the customary law principles of succession.

Understanding commorientes

In Ghana, the rights of succession to property depend on survivorship. Ordinarily, a beneficiary can only succeed to a deceased person's property under a will or the rules of intestacy if the beneficiary survives the deceased. Simply put, "[t]he living succeed to the dead".[1] Typically, there would be no

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1 *Hickman and Others v Peacey and Others* [1945] 2 All ER 215 at 221, per McMillan LJ (*Hickman v Peacey*).

difficulty ascertaining which of the deceased persons died first.[2] Nevertheless, there are situations where the deceased and their heirs die simultaneously or in circumstances that render the order of their deaths uncertain. Such contemporaneous deaths may result from common disasters and calamities, including floods, fire outbreaks, plane crashes, shipwrecks and car accidents.[3] They may also occur in human acts such as terrorist attacks and murder or gas poisoning accidents.[4] The phenomenon of such contemporaneous deaths or uncertainty in the order of deaths is described as commorientes. The term commorientes is also used to refer to persons who die simultaneously. It should be noted that it is not necessary that the deceased and their heirs should have died in the same calamity or disaster.[5] Commorientes occur so long as the deaths occur so close that it is virtually impossible to determine the sequence of deaths.[6]

Simultaneous deaths may present several issues concerning the legacies and devises in the wills of the commorientes or regarding the operation of the rules of intestacy, the determination of which depends on survivorship. What would happen, for instance, if the commorientes are husband and wife, and the husband bequeaths the residue of his estate to his wife, who in turn bequeaths her residuary estate to her mother and a legacy to her husband?[7] What would happen where the commorientes hold property in joint tenancy?[8] What happens if the commorientes are parties to the same life-insurance contract stipulating that the insured sum must be paid to the survivor?[9]

The issue of survivorship in cases of commorientes has been differently addressed in different jurisdictions over the years.[10] Roman and civil law, for instance, provided a solution to the uncertainties in some instances using artificial presumptions of survivorship, founded on biological considerations and the supposed strength of the deceased as estimated by their respective sexes, ages or state of health. For instance, it was presumed that a grown-up son survived his parent.[11]

At common law, none of the commorientes was deemed to have survived the other. Thus, where two or more persons perished in the same calamity or in circumstances that rendered their order of death uncertain, the court refused to presume that one survived the other or that they died at the same moment. The difficulty created by commorientes was resolved by the principle that a plaintiff who asserted that one of the parties survived the other had to prove it affirmatively. This position at common law and a critique thereof was succinctly captured by McMillan LJ in the following terms:

> "In the absence of any presumptions the English courts had to find some way of extricating the difficulty. What they did was to fall back on the principle that the plaintiff must prove his case —*actori incumbit onus probandi*. If a plaintiff's claim depended on showing that A survived B, then the plaintiff must establish the fact affirmatively by evidence; if sufficient evidence was not forthcoming the claim failed (*Re Phene's Trusts*). This impotent conclusion was not a solution

2 Id at 223.

3 See generally, *Re Kennedy* [2000] 2 IR 571; *Re Smith* [1956] NZL 992; *Elliot v Smith* (1882) 22 Ch D 236.

4 See *Hickman v Peacey Re Grosvenor, Peacey v Grosvenor* [1944] 1 All ER 81.

5 See *Hickman v Peacey* at 218 per Viscount Simon LC; and *Wing v Angrave* (1860) 8 HLC 183 at 208–09, per Lord Campbell LC.

6 See *Hickman v Peacey* at 218 per Viscount Simon LC.

7 *Re Lindop, Lee-Barber v Reynolds* [1942] 2 All ER 46.

8 See the Administration of Estates Act of Ghana 1961 (Act 63), sec 3(3), which provides that "[t]he interest of a deceased person under a joint tenancy where another tenant survives the deceased person is not property of the deceased person".

9 See L Roeleveld "Questions concerning simultaneous death" (1970) *Acta Juridica* 31; *McGowin v Menken* 223 NY 509; *United States Casualty Company v Kacer* 169 Mo 301 (1902); *Watkins v Home Life and Accident Insurance Company* 208 SW 587 (1919).

10 For comprehensive analyses of the position of the law in different jurisdictions over the years, see generally: L Roeleveld "Questions concerning simultaneous death" (1970) 37/3–4 *Acta Juridica* 31; LM Lyon "Presumption of survivorship: The common law and the Roman law" (1904) 23 *The Canadian Law Times* 329.

11 See generally *Hickman v Peacey*; HA de Colyar "Notes on the presumptions of death and survivorship in England and elsewhere" (1910) 11/2 *Journal of the Society of Comparative Legislation* 255; J Mee "Commorientes, joint tenancies and the law of succession" (2005) 56 *Northern Ireland Legal Quarterly* 171.

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> of the problem but rather an admission of its insolubility. Where the deceased persons had mutual claims to succeed the one to the other and there was no evidence that one survived the other, the fiction was adopted of holding that they died together at one and the same time (*In the Goods of Beynon*). This expedient of assuming the deaths to have occurred simultaneously did not proceed on any proof of the fact or on any presumption, but was merely a method of solving an otherwise insoluble problem which had to be solved somehow. Such a state of the law was far from satisfactory."[12]

To remedy the unsatisfactory state of affairs arising from this situation, the UK Parliament enacted a statutory presumption in section 184 of the Law of Property Act 1925. Under this provision, where two or more persons die in circumstances in which the order of their deaths is uncertain, the deaths are presumed to have occurred in order of seniority so that the younger is presumed to have survived the elder for all purposes affecting title to property. The exception to this presumption is where the deaths are of husband and wife or civil partners, and the elder died intestate: the intestacy rules apply as if the younger spouse or civil partner had not survived the elder. Ghana has similar statutory presumptions addressing the consequences of contemporaneous deaths. Before discussing these presumptions, we briefly explore statutory responses to simultaneous deaths in some common law countries to determine whether there are possible legislative practices Ghana may adopt.

Commorientes in other common law countries

We discuss the general provisions on commorientes in Kenya, Nigeria, India, South Africa and Australia. The Kenya Law of Succession Act 2012 provides:

> "Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, the deaths shall … be presumed to have occurred in order of seniority, and accordingly, the younger shall be deemed to have survived the elder: Provided that, in the case of spouses who died in those circumstances, the spouses shall be presumed to have died simultaneously."[13]

Thus, the Kenyan statute presumes that the younger survived the elder, implying that only the younger can inherit property from the older deceased person and not vice versa. The statute expressly bars the application of the presumption of survivorship to spouses by providing that, where spouses die in circumstances where the order of death is uncertain, the death is presumed to be simultaneous.

Though there is no single federal statute regulating succession in Nigeria, section 164(2) of the Evidence Act 2011 replicates the seniority presumption in section 184 of the Law of Property Act 1925: thus, "for the purpose of determining title to property where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority", similar to India's Hindu Succession Act.[14] Presumably, section 164(2) covers both simultaneous deaths and cases where the order of death is indeterminate. It should be noted that simultaneous deaths and commorientes are still used synonymously in both civil and common law jurisdictions.

The South African Wills Act 7 of 1953 does not contain a presumption of survivorship. Specifically, there is no presumption that the younger survives the older. Without evidence to the contrary, the law presumes that they died simultaneously.[15] Thus, beneficiaries under South

12 *Hickman v Peacey* at 221–22.

13 Cap 160, sec 43.

14 India's Hindu Succession Act 1956, sec 21 states: "Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder."

15 *Ex parte Graham* 1963 (4) SA 145.

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African law must prove that they survived the testator to benefit from the latter's estate. South African law heightens the need for wills, with common disaster clauses that provide specific instructions in the event of simultaneous deaths or indeterminacy in order of death. Because of the need to establish survivorship in South Africa, a beneficiary who dies simultaneously with the testator does not inherit anything unless the testator's will provides to the contrary.[16]

Australia, New South Wales,[17] Queensland,[18] Tasmania[19] and Victoria[20] have laws establishing a general presumption that the older is presumed to have died before the younger, thus instituting a statutory order of death in the event of uncertainty. Western Australia is unique in this regard. According to section 120(a) of its Property Act 1969:[21]

> "Where … two or more persons have died at the same time or in circumstances that give rise to reasonable doubt as to which of them survived the other or others (a) the property of each person so dying shall devolve and if he left a will it shall take effect, unless a contrary intention is shown by the will, as if he had survived the other person or persons so dying and had died immediately afterwards."

Accordingly, where the order of deaths is uncertain, the property of each devolves as if they survived each other, thereby preventing a disposition from vesting in a beneficiary and divesting afterwards.

These approaches from different common law jurisdictions (except Western Australia and South Africa) from which we draw inspiration either confirm the pristine common law position or reproduce the seniority presumption in section 184 of the English Law of Property Act 1925. While the original common law position on commorientes is unsatisfactory, the seniority rule is also riddled with many problems, rendering it an unconvincing tool to resolve commorientes disputes. This article discusses these defects and proposes equitable frameworks to resolve potential commorientes disputes in Ghana.

Commorientes under Ghanaian law: History and inconsistencies

Unlike other countries in the commonwealth, which have unified statutes on the law of succession,[22] Ghana's law of succession has had quite a chequered history, resulting in the passage of piecemeal legislation over time to regulate different parts of the law of succession. This approach can best be described as ad-hoc and reactionary, considering that the laws were developed on an as-needed basis.[23]

Ghana's rules on commorientes are contained in at least four pieces of legislation, namely the Wills Act 1971 (Act 360), the Evidence Act 1975 (NRCD 323), the Intestate Succession Act 1985 (PNDC Law 111) and the Courts Act 1993 (Act 459). The ensuing discussion briefly explores the relevant sections of these laws.

Before the passage of Act 360 in 1971, the statutory law that applied to wills in Ghana was the English Wills Act of 1837; its existence and application depended on its continued recognition as a

16 *Ex parte Wessels and Venter NNO: In re Pyke-Nott's Insolvent* Estate 1996 (2) SA 677 (O); MC Schoeman-Malan "When disaster strikes: A case law analysis of simultaneous deaths" (1 April 2017), available at: <https://journals.co.za/doi/10.10520/EJC-d1efc98fd> (last accessed 1 September 2021).

17 Conveyancing Act 1919, sec 35.

18 Succession Act 1981, sec 65.

19 Presumption of Survivorship Act 1921, sec 2.

20 Property Law Act 1958, sec 184.

21 This provision is similar to New Zealand's Simultaneous Deaths Act 1958, sec 3.

22 See, for instance, the Succession Act (India), the Law of Succession Act (Kenya) and the Succession Act cap 162 (Uganda).

23 See generally, "The reform of the law of succession in Ghana" (1959) 3/2 *Journal of African Law* 90. See also, NA Ollennu "Law of succession in Ghana" (1965) 2 *University of Ghana Law Journal* 4 at 17–18.

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statute of general application.[24] Act 360 largely reproduces the most important provisions of the English Wills Act of 1837 while allowing for expansive modifications where necessary.[25] More fundamentally, section 7 of Act 360 set out distinct rules on the construction of wills. Among these rules of construction is the presumption of survivorship in section 7(7), which states:

> "Where a testator and a beneficiary under his will die in circumstances: —
>
> (a) in which it appears that their deaths were simultaneous; or
> (b) rendering it uncertain which of them survived the other,
>
> the beneficiary shall be deemed to have survived the testator for all purposes affecting the entitlement to property under the will of that testator; but for the purposes of the entitlement of such testator to that property under any will of the aforementioned beneficiary, that beneficiary shall be deemed to have survived the aforementioned testator, unless a contrary intention appears from the will."

Four years after the passage of Act 360, the Evidence Act 1975 (NRCD 323) was passed to simplify and contextualize Ghana's law of evidence. Before the passage of the Act, the law of evidence consisted of common law rules described as "excessively complex, difficult to ascertain and sometimes based on uncertain principles and often unsuitable for application in the Ghanaian circumstances".[26] Apart from simplifying the law on evidence, NRCD 323 also sought to clarify the meaning and scope of certain key evidentiary expressions. For our purpose, we focus on the meaning of the term "presumptions", which the act defines as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action".[27] In addition, NRCD 323 categorizes presumptions as rebuttable and conclusive[28] while also stating the duty of a court when confronted with a presumption in a suit before it.[29] Among the presumptions recognized is that of simultaneous death. Section 34 of NRCD 323 states, "[s]ubject to the provisions of any enactment relating to succession to property, where two or more persons have died in circumstances in which it is uncertain which survived the other, the older is presumed to have predeceased the younger."

It is worth emphasising that this presumption is subject to any enactment relating to the succession of property. The importance of this proviso cannot be overlooked in interpreting the scope of the provision. Act 360 was already operational when NRCD 323 was passed. Evidently, the commorientes rules in these two pieces of legislation are different. In the former, the presumption depends on the existence of a testator and a beneficiary, while the latter depends on seniority. Clearly, if one of these provisions were not made subject to the other, there would be significant interpretative challenges.

Nonetheless, section 34 of NRCD 323 provided additional utility in that Act 360 was only intended to regulate testamentary dispositions in the event of simultaneous deaths or where the order of deaths was uncertain. Until a law on intestacy was passed ten years later, it was necessary to provide a legal regime to plug any lacunae that might arise where the commorientes died intestate. Therefore, Section 34 avoided an interpretation conundrum while establishing a temporary legal regime for intestacy.

A few months after Act 360 was passed, the Courts Act of 1971 (Act 372) was passed. Section 111(3) of Act 372 expressly provided that section 184, indicated above, and other sections of the English Law of Property Act 1925 were applicable in Ghana.

24 "Ghana: Courts Act, 1971" (1972) 16 *Journal of African Law* 59 at 65.
25 Id at 65–66.
26 Memorandum to the NRCD 323, para 1.
27 NRCD 323, sec 18(1).
28 Id, sec 18(3).
29 Id, sec 21–23.

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Of course, section 184 was subject to "such verbal announcements not affecting the substances as may be necessary to enable them to be conveniently applied in Ghana".[30] Under Act 360, the criterion for succession in the event of simultaneous deaths was for the beneficiary to have predeceased the testator; the criterion under the English Law of Property 1925 was that the younger would be presumed to have survived the older. Interestingly, section 111 of Act 372 begins "[u]ntil provision is otherwise made by law, the statutes of England specified in the First Schedule to this Act shall continue to apply in Ghana as statutes of general application". Considering that Act 360 was enacted before Act 372 and that the former made provision for simultaneous deaths, one can only conclude that section 184 probably referred to simultaneous deaths intestate. Nevertheless, the confusion was not lost on Samuel Azu Crabbe, a former chief justice of Ghana, who pointed out that the survivorship provisions in Act 360 and section 184 were different, thus giving rise to possible problems of interpretation.[31] Kludze, a legal scholar, aptly captures the various interpretations resulting from the two provisions.[32] According to him, there were at least two broad interpretive possibilities. First, since Act 372 was passed after Act 360, the former prevailed, meaning the commorientes rule in section 184 of the English Law of Property 1925 would apply instead of the provision in section 7(7) of Act 360. Second, though the English Law of Property 1925 was applicable in Ghana, it only ranked as a common law rule. By the Interpretation Act, then in force, statute law overrode common law.[33] A new Courts Act was promulgated in 1993, which should have addressed this inconsistency. Unfortunately, the Courts Act of 1993 (Act 459) repeated the applicability of section 184 of the English Law of Property in Ghana.[34]

The conclusion that can be drawn from this provision is that the concerns raised by both Crabbe and Kludze are still very much relevant. In fact, the repetition of section 111 of Act 372 in section 119 of Act 459 casts doubt on the assumption that the former applied in the event of death intestate because the latter was enacted after PNDC Law 111, which, in section 15, clearly indicates the legal consequences of contemporaneous deaths intestate. Until the redundant pieces of legislation are repealed, Ghana's commorientes rules remain convoluted and inevitably confusing.

While contending that section 184 of the English Law of Property Act 1925, which is applicable in Ghana by virtue of section 119 of Act 459, is superfluous, we also argue that section 7(7) of Act 360 has inherent problems, not envisaged, but which could lead to inequitable results in the distribution of property and incongruity. We now limit our discussion in the succeeding section to the problems and implications of the specific rules on commorientes contained in Act 360.

The Wills Act: Problems and implications

The presumption of survivorship in section 7(7) of Act 360, stated above, sets out a two-prong rule of construction for the disposition of property in the wills of the commorientes. On the one hand, where a testator and a beneficiary die in circumstances in which it appears that their deaths were simultaneous or in circumstances rendering the order of death uncertain, the beneficiary shall be deemed to have survived the testator for purposes affecting entitlement to property under the will of the testator. On the other hand, the second limb, the proviso, is to the effect that when the beneficiary also makes a will leaving that same property to the testator, the beneficiary is deemed to have survived the testator unless a contrary intention appears from the will. Though the legal consequences of these two limbs appear the same, they are, in fact, not the same.

Before section 7(7) of Act 360 can be meaningfully scrutinized, it must be noted that the commorientes rule is simply a presumption. It does not relieve any person who has an interest in the estate of any of the deceased persons from proving the order of death. Thus, a person with an

30 Act 372, sec 111(3).

31 SA Crabbe *Law of Wills in Ghana* (1998, Vieso Universal (Ghana) Ltd) at 97–98.

32 AKP Kludze *Modern Law of Succession in Ghana* (2014, Kludze Publications) at 114–15.

33 Interpretation Act 1960 (CA 4).

34 Act 459, sec 119.

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interest in the deceased person's estate bears the burden of proving that a purported beneficiary survived the testator.[35]

Over the years, divergent views have emerged regarding the meaning of the commorientes rule under Act 360 generally and its proviso in particular. Commenting on the presumption, Crabbe was of the view that:

> "There is no provision in the English Wills Act 1837 similar to Subsection 7 of Section 7 of Act 360. Subsection 7 does not only make it possible for a testamentary gift in the will of an older testator, to take effect in the event of a younger beneficiary dying simultaneously with the testator, but it also makes possible for a gift of any testator to have effect in respect of every beneficiary with whom he appears to have died simultaneously, whatever the age of the testator or the beneficiary. It is clear from the provisions of the subsection that a gift, which takes effect by this Doctrine of Commorientes, does not revert to the testator by the same rule, and this is believed to be an improvement on Section 184 of the English Law of Property Act 1925."[36]

From Crabbe's point of view, the commorientes rule under Act 360 is dissimilar from the English commorientes rule because, in the former, the ages of the deceased persons are immaterial; the sole determining factor in determining the order of death is the legal status of the testator and beneficiary. Also noteworthy is Crabbe's view that property disposed of by a testator cannot revert to the testator. Kludze, on the other hand, illustrates the effect of the second limb of the presumption:

> "We may vary the facts of *In Re Hensler, Jones v Hender*, to illustrate the possible effect of this provision. In this case, the father had devised his property to his son. The son had also made a will devising all his immovable property to his father. If both the father and son died simultaneously, as in a blazing fire or by drowning, the effect of the Ghanaian rule would appear to be that the son would be deemed to have died first. In that case, the father being survivor, the property would fall into the father's residue or intestacy. It should be noted that this exception applies only if it is the same property that the beneficiary has given to the testator; for, the rationale for the rule is to avoid only a situation where there would be an interminable reference backwards and forwards."[37]

These views are afflicted by two main predicaments. First, they fail to adequately draw out the distinction between the two limbs of the presumption. Second, they fail to acknowledge the latent duality of statuses possessed by the parties contemplated by the presumption and the legal consequences of this duality. We explain these in detail.

To begin, the first limb of the presumption is the basic rule that enables a beneficiary to benefit from the estate of a deceased. The beneficiary need not have made a will. However, this simple rule may not suffice in complex cases of mirror wills because a particular piece of property may move perpetually between the estates of the two persons. This is precisely what the second limb of the presumption is meant to address. Mirror wills are those "in which each testator is the principal beneficiary of the other's residuary estate, and identical provisions are included for substitute beneficiaries".[38] These types of wills are not the same as mutual wills or joint wills. With mutual wills, there is an agreement between two or more people to execute their wills to leave their property either wholly or partially in substantially similar terms.[39] For example, A and B agree that each

35 *Peters v Peters* [1962] 1 GLR 34–36 on appeal as *Peters v Peters* [1963] 2 GLR 182–211.

36 Crabbe *Law of Wills in Ghana*, above at note 31 at 97.

37 Kludze *Modern Law of Succession*, above at note 32 at 114.

38 R Double "Legacies, survivorship and mirror wills" (1997) 16 *Estates and Trusts Journal* 274 at 274.

39 C Rendell *Law of Succession* (1997, Macmillan Press) at 22–23.

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will leave a life interest to the survivor of either; upon the death of that survivor, the property should pass to their children B and C. Joint wills merge the intentions of two testators in the same document and take effect as the separate wills of each party.[40] Though not all mirror wills are mutual wills, some mutual wills may be mirror wills, especially between spouses. In English law, the presumption of survivorship applies in such a way that the courts have to make a choice between competing survivorship clauses in cases where the deceased persons made mirror wills. In Ghana, the presumption in section 7(7) works to limit the applicability of *both* survivorship clauses. The effect can best be understood with some illustrations. So, consider husband A and his wife B. They each make mirror wills in which there are the following residuary clauses:

In the will of A: "I give to my executors my estate anywhere in the world, including any property over which I have a general power of appointment to hold it in trust; to pay my debts, taxes, and funeral and testamentary expenses; to give the residue to my wife B."

In the will of B: "I give to my executors my estate anywhere in the world, including any property over which I have a general power of appointment to hold it in trust: to pay my debts, taxes, and funeral and testamentary expenses; to give the residue to my husband A."

Where A and B drown and it becomes impossible to tell who died first, the legal consequences will be as follows:

i) The residue of A's estate will pass to B's estate.
ii) The residue of B's estate will pass to A's estate.
iii) This is a cross-exchange of residuary estates because A and B survive each other. However, the residuary clauses indicate that the residue should be distributed to the other spouse. Here, we have a case where the application of B's residuary clause will operate as to make A entitled to his residuary estate in B's estate. For B, the application of A's residuary clause will also operate to make B entitled to her own residuary estate in A's estate. To avoid this situation, the second limb of the presumption operates such that the property remains in A and B without more. The second limb, therefore, operates to vitiate the residuary clauses after the initial movement of the residues between the estates.
iv) Since the residuary clauses cannot operate beyond this point, the residuary estates will fall into intestacy and devolve according to PNDC Law 111.

Such a situation can be avoided by indicating secondary residuary beneficiaries. The two clauses, for example, can be drafted to read:

In the will of A: "I give to my executors my estate anywhere in the world, including any property over which I have a general power of appointment to hold it in trust; to pay my debts, taxes, and funeral and testamentary expenses; to give the residue to my wife B; *but if this gift fails, to divide the residue equally between the Basket Weaver's Association and Nyamebeykere Orphanage."*

In the will of B: "I give to my executors my estate anywhere in the world, including any property over which I have a general power of appointment to hold it in trust: to pay my debts, taxes, and funeral and testamentary expenses; to give the residue to my husband A; *but if this gift fails, to divide the residue equally between the Basket Weaver's Association and Nyamebeykere Orphanage.*"

We believe that Kludze's illustration is a candidate for the first limb of the presumption and not the second. More so because a will comes into effect on the testator's death: the father and son in Kludze's illustration cannot expect that the dispositions of their immovable property during their lifetime would include that of the other.[41]

40 Kludze *Modern Law of Succession in Ghana*, above at note 32 at 13.

41 Act 360, sec 7(1): "A will shall take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will."

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It bears reiterating that the second limb of the presumption presupposes two wills and two parties. By this arrangement, each party is a *testator* under that party's will and a *beneficiary* under the will of the other party. As such, the presumption in section 7(7) will be applied to each party individually. This distinction is missing from the views of Crabbe and Kludze. While Crabbe conflated the two limbs and concluded that a testator cannot survive a beneficiary under any circumstance, Kludze argued that under the second limb or the proviso, the testator survives the beneficiary. We believe that Crabbe oversimplified the presumption to the extent that he ignored the possibilities that belie the second limb of this presumption. In short, he ignored a situation where both parties are testators of their own executed wills and beneficiaries under each other's will. Upon further examination, Kludze may have realized that the relationship between the father and son in his illustration would not just be a linear one of testator (father) and beneficiary (son) but also a reverse linear relationship of beneficiary (father) and testator (son), with the presumption applying to each relationship. Therefore, the erasure of the second relationship to disinherit the son is arbitrary and pernicious.

The discussion so far has concentrated on providing a coherent meaning to the presumption in section 7(7). However, there is one major fault line in this presumption. This pertains to the question of joint tenancies. It is hard to see how this presumption can work between a testator and a beneficiary who are joint tenants of a property. A joint tenancy is "a kind of co-ownership which is vested in a group of two or more persons; no individual has a separate share, and the last survivor of the group becomes sole owner".[42] The defining characteristics of a joint tenancy are the right of survivorship, often called jus/ius accrescendi, and the four unities of possession, interest, title and time. For our purposes, the right of survivorship is the most relevant; it means that when one of the joint tenants dies, his interest in the joint property accrues to the surviving tenants. This process continues until one surviving tenant remains. The surviving tenant thereafter retains the legal and beneficial interest in the property. It is important to state that the joint tenancy trumps dispositions of the joint property in wills, as epitomized by the Latin expression, *jus accrescendi praefertur ultimae voluntati* – the right of survivorship is preferred to the last will. One learned author accurately captures this thus:

> "There is nothing to convey or transfer, so no conveyance or transfer is needed. Indeed, the right of survivorship takes precedence over any attempted transfer on death: a person by his will cannot pass an interest under a joint tenancy because that interest does not belong to the deceased. The interest of the dead joint tenant accrues to the other joint tenants at the moment of death, so there is nothing to be left to a beneficiary of the will, even if an attempt has been made in the will explicitly to leave the deceased's 'share' in the land to someone else."[43]

As a result, it was held in an old case that when a joint tenant dies, the only condition that validates dispositions of the property in the testator's will is when the joint tenancy was brought to an end before the death of the testator.[44] Thus, can both joint tenants make dispositions of joint properties in their respective wills to each other when each has no separate interest in the property and the joint tenancy has not been severed?[45] Or can one joint tenant make dispositions with respect to the joint property? Obviously not. Time is of the essence in deciding which joint tenant has the accrued rights in the joint property. Where the last joint tenant dies, the property does not lapse but falls into the last joint tenant's estate and is distributed accordingly. The presumption under section 7(7) reconfigures the question as one of "testator" and "beneficiary" without providing

42 B Perrins *Understanding Land Law* (2000, Cavendish Publishing Limited) at xxi.

43 M Dixon *Modern Land Law* (2012, Routledge) at 129.

44 *Gould v Kemp* 39 ER 962.

45 See also Act 63, sec 3(3): "The interest of a deceased person under a joint tenancy where another tenant survives the deceased is not property of the deceased."

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guidance on how we might settle joint property between the two deceased persons who are joint tenants. Perhaps section 34 of NRCD 323 may be invoked so that the younger survives the older. If that is the true legal position, the presumption in section 7(7) circles back to the very problem it sought to avoid: the seniority rule.

Admittedly, the language of the presumption in section 7(7) is convoluted, making it difficult to understand. This accounts for the differing interpretations placed on it. However, we maintain that the presumption does not solve the problem it was created to solve. Reducing survivorship to a "testator"-"beneficiary" relationship leaves questions of joint tenancies unresolved, particularly where both parties are testators and beneficiaries in their own right. It is unsurprising that the presumption stands out from those of other jurisdictions surveyed earlier. Litigation over wills is rife in Ghana, and a problematic presumption such as this could be another source of wrangling among families.[46]

A proposed framework for the equitable sharing of property under Act 360

Exclusion of presumption

First, we propose that Act 360 should eliminate the presumption of survivorship since it does not result in the equitable distribution of property.

Inclusion of survivorship clause

Second, a suitable recommendation would have been to mandate extra-legislative intervention from the bar by directing lawyers to insert survivorship clauses in the wills they draft for clients. Thus, wills shall include that "all bequests and devises are subject to the condition that the legatee or devisee survives me". Such a clause will displace the statutory presumption and express a deceased testator's intentions concerning who they intend should survive them. It will also minimize the evidential burden of proving who survived the other and relieve the courts of determining the reliability of the evidence presented. Admittedly, this recommendation is not without problems, considering the generous and liberal meaning the Courts have given to documents that qualify as wills. A will is not considered a legal document within the meaning of the Legal Profession Act 1960 (Act 32), such that preparing a will is not the sole preserve of lawyers.[47] In fact, it has been held that a non-lawyer may prepare one for himself or for another upon request.[48] Though wills prepared by non-lawyers may sometimes lack the elegance of legal drafting, the courts are ready to uphold them once they fulfil the formal legal requirements for the execution of a will.[49] In a country where access to legal services is still a challenge, the courts appear to have adopted an approach that contracts the scope of documents exclusively prepared by lawyers and advances testamentary freedom. Where non-lawyers prepare wills, asking them to include survivorship clauses may seem unreasonable. As was held in *Re Alhassan's Application,* these types of wills are "prepared on the instructions of the testator by a letter-writer whose ignorance about such an important document is apparent on the face of the said document".[50] Nevertheless, we contend that if a testator is desirous of protecting their assets by taking steps to draft a will, they have a responsibility to educate themselves about how to protect assets by including all needed safeguards.

46 Cases questioning the compliance of a will with formal requirements of law include *Re Kotei (Decd.)*; *Kotei and Others v Ollennu and Others* [1975] 2 GLR 107; the capacity of the testator to make a will, *Re Essien Alias Baidoo* (Decd.); *Essien v Adisah and Others* [1987–88] 1 GLR 539; *Re Ayayee (Decd.)*; *Kukubor and Another v Ayayee* [1982–83] GLR 866; forgery of wills, *Re Okine (Decd): Dodoo and Anor v Okine and Ors* [2003–05] 1 GLR 630; *Welbeck v Welbeck* (Civil Appeal No.J4/45/2014, judgment delivered on 17 June 2015); *Kofigah v Kofigah* (Unreported judgment of the Supreme Court; Suit No. J4/05/2019).

47 *Re Cole, Cudjoe v Cole* [1977] 2 GLR 305.

48 Ibid.

49 *Re Alhassan's Application* [1968] GLR 940.

50 Id at 941.

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Surviving each other

Third, in the absence of a survivorship clause, the deceased persons should be considered to have predeceased each other, and dispositions to each other in their wills should lapse according to section 8(1) of Act 360.[51] Where, for instance, the deceased are husband and wife, the husband's estate would devolve to his other heirs as if his wife had predeceased him. Similarly, the wife's other heirs would inherit her estate as if her husband had predeceased her. By so doing, the estates of both spouses will receive equitable shares of the estates.

However, we observe that under section 8(2) of Act 360, where a gift is made to a descendant beneficiary who predeceases the testator, the gift will not lapse if the beneficiary and testator are survived by a child of the beneficiary. In this exceptional situation, if the surviving child of the beneficiary is below 18 years of age or lives with a disability rendering them incapable of financial self-support, our proposed section 7(7) shall be subject to section 8(2) of Act 360.

A modified section 7(7)

In light of the foregoing proposals, section 7(7) should be redrafted to read:

> 7(7) Where a testator and a beneficiary under his will die in circumstances: —
>
> (a) in which it appears that their deaths were simultaneous; or
> (b) rendering it uncertain which of them survived the other,
>
> The court shall enforce the survivorship clauses in the wills of the parties.
> (8) Unless a surviving child of a beneficiary is below 18 years of age or lives with a disability rendering them incapable of financial self-support, where the testator and a beneficiary do not have survivorship clauses in their wills, the testator and beneficiary shall be deemed to have predeceased each other for all purposes affecting the entitlement to property under their wills and subsection (1) of section 8 of this Act shall apply.

The Intestate Succession Law (PNDC law 111): The rules on commorientes

The presumption of survivorship in the Intestate Succession Act (PNDC Law 111) forms the basis of the succeeding discussion.

Before the passage of PNDC Law 111 in 1985, intestate succession was regulated by statute,[52] common law[53] and customary law.[54] The determination of applicable systems of law depended on one's personal law.[55] However, it seems that the incidence of one's ethnic group or the type of marriage contracted were the prime determinants of which system of law would be applicable.[56] The old regime was perceived as inconsiderate of the needs of the surviving wives and children of persons who died intestate. Additionally, the rules of the old legal regime were perceived to be complicated and difficult to apply. To protect spouses and children in the event that one spouse died intestate, PNDC Law 111 was passed.[57] Apart from containing a fractional distribution scheme to regulate the distribution of an intestate, PNDC Law 111 contemplates the problems that may

51 Act 360, sec 8(1) states, "A disposition made to a person who predeceases the testator, or which is contrary to law or otherwise incapable of taking effect shall lapse and fall into residue, unless a contrary intention appears from the will."

52 The Marriage Ordinance cap 127; The Marriage of Mohammedans Ordinance cap 129.

53 Under the Marriage Ordinance cap 127, sec 48, where a person had contracted a marriage under the Ordinance or was an issue of such a marriage and had died intestate, two-thirds of the person's property was to be distributed according to the English law of intestacy in existence as at 19 November 1884 and one-third according to the rules of customary law which would have applied to the person but for the provisions of the Ordinance.

54 Ollennu "*Law of Succession in Ghana*", above at note 23 at 18–19.

55 Ibid.

56 AKP Kludze "Problems of Intestate Succession in Ghana" (1972) 9 *University of Ghana Law Journal* 89.

57 Memorandum to PNDC Law 111.

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arise when spouses die simultaneously or in circumstances that make it uncertain who survived the other. The relevant provision is as follows:

> "Where spouses die in circumstances—
>
> (a) in which it appears that their deaths were simultaneous; or
> (b) rendering it uncertain which of them survived the other,
>
> the older shall, for the purposes of this Law, be presumed to have predeceased the younger."[58]

Before identifying the specific difficulties of the presumption in section 15, it must be noted that the PNDC Law 111 proceeds on very simplified assumptions about marriage. Despite its altruistic efforts to safeguard the welfare of surviving spouses and children, it ignores many social realities about the nature of marriages, the status of children and the impact of existing socio-cultural practices. PNDC Law 111 particularly fails to adequately acknowledge and make suitable provisions for persons in polygynous marriages. The law takes a contemporary understanding of marriage as a unit of a man, his wife and their children and extrapolates that to cover most provisions of the statute.[59] At best, PNDLC 111 is optimized to operate in the exclusive conditions of monogamous marriages. These views are supported by the memorandum to the law, thus:

> "The present law on intestate succession appears to be overtaken by changes in the Ghanaian family system. The nuclear family (ie, husband, wife and children) is gaining an importance which is not reflected in the current laws of succession. There is a tension between this smaller group and the traditional family unit as to the appropriate line of devolution of property upon the death intestate of a member of both units … the growing importance of the nuclear family brings with it its own logic of moral justice. Simply put, … a spouse is more likely to look after the children of on the death of the other partner than anyone else; and that the expectation of the spouses is probably both satisfied by giving the property of one to the other on the former's death."[60]

The memorandum assumes that the "logic and moral justice" of the smaller nuclear family should prevail over other traditional forms of marriage and rules of succession only because the surviving spouse has a greater inclination to take care of the children of the marriage or fulfil the intentions of the deceased spouse.

A consequence of assuming that a family unit is made up of a husband, wife and their children is that section 15 is drafted without due regard to the legal consequences that arise when persons who are not spouses die simultaneously. We have established that, within the meaning of commorientes, the deceased persons need not be husband and wife.[61] There are other possible relationships. For instance, a child and parent may die simultaneously, or a beneficiary at customary law may die simultaneously with one of the spouses. Where these possibilities arise, section 15 becomes inoperable, and the seniority rule under NRCD 323 becomes applicable. It appears that the consequences will be immaterial because both statutes use the seniority rule.

The presumption, which unduly favours the beneficiaries of the younger commorientes, is unfair and could lead to inequitable results in the distribution of intestate property. The Ontario Law Reform Commission has observed that although the seniority rule was "clear and easy to administer,

58 PNDC Law 111, sec 15.

59 EH Ofori-Amankwah "Intestate Succession Law, 1985 PNDCL 111" (2004) 1 *Kwame Nkrumah University of Science and Technology Law Journal* 1 at 9.

60 Memorandum to PNDC Law 111.

61 Act 360 avoids this difficulty by using "testator" and "beneficiary" instead of "spouse(s)".

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it was arbitrary and could produce capricious, if not harsh, results. The rule would disinherit the living relatives or beneficiaries of the more senior of the commorientes and involved the complexity of double succession."[62] It has also been said about the law that even though it "gives certainty … [it] is arbitrary and can result in the donor's property going to persons other than those whom the donor would prefer it go to".[63]

Discrimination against the older person's estate arises due to the simultaneous administration of estates of both commorientes. On the death of the commorientes, section 15 operates to make the younger spouse the surviving spouse. By so doing, a percentage of the estate, which is deemed to be the spousal entitlement of the younger spouse, is transferred from the estate of the older spouse to the estate of the younger spouse. The result increases the value of the younger spouse's estate while diminishing the estate of the older spouse.

Though the reduction in the estate's value affects all potential beneficiaries of the older deceased spouse, the position of children must be emphasized. There may be different sets of children involved, the inheritance due to each varying according to their legal relationship with either of the deceased. There may be children of the younger spouse and children of the older spouse, all born outside the marriage. There may be children in the marriage. Since the children of the older spouse will only inherit the deceased older spouse, they are likely to obtain smaller amounts relative to the heirs of the younger spouse. In fact, the children of the marriage will benefit from both estates. By contrast, the children of the younger spouse born outside the marriage will obtain larger beneficial entitlements because of the enhancement made to the estate of the younger spouse. This disproportionate treatment can, in theory, apply to the children of either spouse, depending on who is the older of the two. In practice, though, the children of male spouses are likely to bear the brunt of the discrimination because it seems that in Ghana, most men are older than their wives.

The presumption is based on the absurd statistical probability of an older person dying before the younger person, even if the younger is frail and sick and the two were born minutes apart.[64] It has been emphasized that:

> "Not only is the premise underlying the seniority presumption frequently suspect, but even in cases where it accurately represents the actuarial probabilities its focus is misplaced. The law of survivorship is concerned with reality and not hypothetical facts. The question in survivorship cases is not who would have outlived the other, but rather who, in fact, survived. The seniority presumption has only a fortuitous relationship with the probabilities of order of death. For example, where commorientes are exposed to hazardous conditions that make great physical demands on them, such as a shipwreck or a plane crash where passengers have survived the initial impact, it is likely, as the seniority presumption suggests that young robust adult passengers will outlive very elderly passengers. However, the same presumption suggests that the very young, even toddlers, will outlive the young adult. In many circumstances this is quite improbable."[65]

Moreover, it is often thought that in a polygynous marriage, the only legal relationship that can arise is the "bilateral" relationship between the man and each of his wives, thus overlooking the

62 "Report on the Estates of Deceased Persons" *Ontario Law Reform Commission* at 129, available at: <https://ia800501.us.archive.org/17/items/reportonadminist00onta/reportonadminist00onta.pdf> (last accessed 20 October 2021).

63 Institute of Law Research and Reform *Survivorship* (Report number 47, 1986) at 1, available at <https://www.canlii.org/en/commentary/doc/1986CanLIIDocs19#!fragment/zoupio_Tocpdf_bk_2/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1TMATAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTB80KTsIiJAA> (last accessed 16 October 2021).

64 L Baragona "A couple that found out they were born on the same day in the same hospital thinks they have a 'fated' relationship" (26 January 2018) *Insider*, available at <https://www.insider.com/couple-born-on-the-same-day-same-hospital-2018-1> (last accessed 15 October 2021).

65 Institute of Law Research and Reform *Survivorship*, above at note 63 at 20.

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"multilateral" relationship among all the spouses. In *Mensah v Mensah*,[66] the Supreme Court recognized that challenges could arise when the "equity is equality" principle used in distributing marital property upon the dissolution of the marriage is applied to polygynous unions. In the context of a three-party domestic arrangement, all parties bear the title of "spouses".[67] For example, a man and his two wives may be joint tenants of a farm.[68] When all three perish in a common disaster, how will section 15 resolve the issue of survivorship to arrive at the last true owner of the joint property since it clearly contemplates only two parties? It appears the presumption in section 15 does not consider the plurality of relationships.

Furthermore, joint tenancies within the context of commorientes have received extensive commentary. The scholarly discussions recognize the shifting debates on the distinction between simultaneous deaths and uncertain deaths.[69] As a consequence of this distinction, different legal rules apply to joint tenancies depending on whether or not a particular jurisdiction recognizes the faint distinction between simultaneous deaths and uncertain deaths. In Northern Ireland, for example, where persons die in "one blow", the estate is deemed to remain in joint tenancy for their respective heirs.[70] In other words, the joint tenancy survives the deceased persons because their heirs step into their shoes. In other jurisdictions, such as England, *Hickman v Peacey* has decidedly settled the position by refusing to acknowledge any distinction between simultaneous deaths and uncertain deaths by reconfiguring the latter to include the former, thereby establishing a regimented order of death. PNDC Law 111 obviates this distinction between simultaneous and uncertain deaths by expressly giving the same legal effect to simultaneous and uncertain deaths. Thus, a joint tenancy will never be able to survive the death of the joint tenants as there is a statutorily presumed order of death. Two cases help illumine the consequences of joint tenancies in the context of married couples. In *Yeboah v Yeboah,*[71] the divorced man sought to recover the matrimonial home occupied by his former wife and his children. Hayfron-Benjamin J, as he then was, per obiter, peerlessly captured the effects of joint tenancy between spouses in the following words:

> "*If a wife by contributing to the acquisition of the matrimonial home or any other property becomes a joint owner with her husband, then by the application of the doctrine of survivorship she becomes the sole owner in the event of her husband predeceasing her*. The rights which the family have hitherto claimed in the estate of the deceased's husband would have to be re-examined accordingly in order to ascertain more carefully what forms part of that estate. In such circumstances the matrimonial home would not form part of the estate of the deceased…. Where there is clear evidence that the parties intended to hold the property as joint tenants, the law would give effect to such an intention."[72]

This case was decided in 1971, three years before the Conveyancing Decree 1973 (NRCD 175) came into force. Before it came into force, joint property ownership was based on the common law presumption of joint tenancy. However, NRCD 175 changed the common law presumption of joint

66 *Gladys Mensah v Stephen Mensah* [2012] 1 SCGLR 391.

67 Ibid. See also F Otoo "Property rights of spouses in marital relationships in Ghana – is there the need for additional legislative intervention?" (16 December 2019). *SSRN*, available at <https://ssrn.com/abstract=3504800 or http://dx.doi.org/10.2139/ssrn.3504800> (last accessed 1 November 2021). The Property Rights of Spouses Bill of Ghana 2013 potentially obviates this difficulty in clause 20, which states: "(a) Joint property acquired in the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and (b) Any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage".

68 In Ghana, there is a statutory presumption of tenancy in common in conveyances affecting immovable property unless the conveyance expresses that the parties take the property as joint tenants, see Land Act 2020 (Act 1036), sec 40(3).

69 Mee "Commorientes, Joint Tenancies and the Law of Succession", above at note 11.

70 *Bradshaw v Toulmin* 21 Eng. Rep 417 (1784).

71 [1974] 2 GLR 114.

72 Id at 121 (our emphasis).

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tenancy to a statutory presumption of tenancy in common unless there was a contrary intention.[73] Thus, where spouses express their desire to hold jointly acquired matrimonial property as joint tenants, the property should ordinarily become the sole property of the surviving spouse. However, when the process of determining the surviving spouse is arbitrary, the other spouse could be disadvantaged. *Scarle v Scale*[74] illuminates this problem. John William Scale, aged 79 and his wife, Marjorie Ann Scarle, aged 69, were both found dead in their home. Both deceased persons died of hypothermia, and their bodies were found at various stages of decomposition. The deceased persons were also joint tenants of their house and maintained a joint account in which they had about £18,000 (GBP) at the time of death. Each of the deceased had a child, the plaintiff and the defendant in this case. If the time of death could be ascertained, section 184 would be inapplicable, and the survivor of the two would take the full benefit of the joint property. On the other hand, if it were established that the time of death could not be ascertained, section 184 of the Law of Property Act would apply, and the estate of Mrs Scarle would take the full benefit of the estate. While the plaintiff strenuously attempted to prove that Mrs Scarle died first, the defendant submitted that the time of death was uncertain, and section 184 should apply. Medical evidence was contradictory, and the expert witnesses were ambivalent as to which of the deceased persons died first. The judge held that the spouses' order of death was uncertain and the presumption in section 184 would apply in favour of Mrs Scarle.[75] Mrs Scarle's estate took the entire benefit of the joint property only because of an arbitrary presumption. Where the marriage property is of considerable monetary worth, the injustice done to Mr Scarle's child is glaringly obvious; she was deprived of any benefit in the property to which her father had contributed.[76]

Before suggesting a new framework for the sharing of intestate property, we analyse the implications of potential conflicts between section 7(7) of Act 360 and section 15 of PNDC Law 111.

Conflict between sections 7(7) and 15

We observe two possible major problems arising from the different commorientes rules in section 7 (7) of Act 360 and section 15 of PNDC Law 111. The first of these problems arises when one spouse dies intestate and the other dies testate. We illustrate these problems with examples.

Example 1:
Mr X (aged 40): Prepares a will which stipulates, among other dispositions, that:

a) Upon my death, I give to my wife, Mrs X, my house at Dansoman.
b) I give the residue of my estate to my wife, Mrs X.

Mrs. X (aged 35) dies intestate.

Example 2:
Mr X (aged 40): Prepares a will which stipulates, among other dispositions that:

a) Upon my death, I give to my wife, Mrs X, my house at Dansoman.
b) I give the residue of my estate to my wife, Mrs X.

Mrs X (aged 45) dies intestate.

In example 1, upon the simultaneous death of both parties in an accident, the devise of the house at Dansoman will be capable of taking effect under section 7(7) because the beneficiary in this case,

73 NRCD 175, sec 14(3); NRCD 175 has been repealed by Act 1036.
74 [2019] 4 WLR 119.
75 Id, para 64.
76 The Canadian State of British Columbia avoids results like this by severing the joint tenancy and converting it to tenancy in common, see Wills, Estates and Succession Act 2009, sec 5.

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Mrs X, will be deemed to have survived the testator, Mr X. When the devise is made to the wife's estate, the provisions of section 15 present no difficulties because Mrs X being the younger will be deemed to have survived Mr X, being the older.

The web of complexity begins when we consider example 2. Here, Mrs X survives Mr X under section 7(7) and takes the benefit of the specific devise of the house at Dansoman. To the contrary, Mr X survives Mrs X under section 15, and his estate will be entitled to the spousal allocations dictated by PNDC Law 111. Unlike example 1, where Mrs X survives Mr X under both enactments, Mrs X survives Mr X under only one enactment. This is an unsatisfactory situation.

The discordance between the two approaches goes a long way to increasing the costs of administrating both estates. That is the second problem. Where a specific property is subjected to multiple levels of administration, there is no doubt that it will increase the transactional cost of administration. In example 2, for instance, where Mr X's house at Dansoman is transferred to Mrs X, it may be valued and transferred back to Mr X's estate as his inheritance under PNDC Law 111. It should be noted that once it is transferred from the estate of Mrs X to Mr X, it falls into the residue. Then again, according to Mr X's residuary clause, the house falls back into Mrs X's estate. Thus, instead of the property devolving to the relevant beneficiaries under the will of one spouse, there is a continuous vesting and divesting of property; this is confusing, overly technical and expensive.

A proposed framework for the equitable sharing of property under PNDC Law 111

Unlike testacy, intestacy gives very few opportunities for personal initiative in ameliorating the harsh effects of the commorientes presumption. Accordingly, we make the following recommendations.

Exclusion of presumption

First, there should be no presumption of survivorship under section 15.

Replace the term 'spouses' with 'intestate'

Second, the use of the term "spouses" in section 15 should be replaced by the expression "intestate". This will make the provision more expansive and inclusive to cover parents, customary successors and children, among other persons.

Predecease each other

Third, persons who die intestate should be deemed to have predeceased each other for all purposes affecting entitlement to property. This should ensure an equitable distribution of intestate property.

Joint property

Fourth, joint property should be distributed equally amongst all estates concerned, whether there are two or more.

Exclusion of section 7(7) of Act 360

Where one or more deceased persons die testate and simultaneously with other persons who die intestate, the provisions of section 15 of PNDC Law should not apply. Our proposed section 7 (7) should apply.

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A revised section 15

In light of the foregoing, we propose that section 15 be redrafted to read:

> 15(1) Where persons die in circumstances:
>
> (a) in which it appears that their deaths were simultaneous; or
> (b) rendering it uncertain which of them survived the other.
>
> they shall be deemed to have predeceased each other for all purposes affecting entitlement to property.
> 15(2) Subject to subsection (1) of this section, joint property shall be distributed equally between the estates of the intestates.
> 15(3) Where one of the deceased persons dies intestate and another dies testate, subsection (7) of section 7 of the Wills Act, 1971 (Act 360) shall apply.

Justification for proposed frameworks

Having proposed frameworks for sharing the property of persons who die simultaneously or in circumstances that render the order of their deaths uncertain, we now analyse the socio-legal basis of our frameworks. In this section, we argue that section 7(7) of Act 360 and section 15 of PNDC Law 111 contravene the personal laws and socio-cultural expectations of Ghanaians regarding succession to property. We use the expression "personal law" to mean "the system of customary law to which … [a person] is subject".[77]

In Ghana, everyone is deemed to belong to a matrilineal or patrilineal family. As redundant as this statement may sound, it captures the essence of how property is expected to be shared under customary law, especially on death intestate. In fact, the socio-economic and political organisation of Ghanaian society revolves largely around matrilineal and patrilineal families.[78] Individual rights, responsibilities and entitlements depend on family membership.[79] Thus, it is almost unimaginable that an individual who creates wealth, all things considered, will intend it to devolve entirely on the family of another on death intestate or as a consequence of a statutory provision. The personal laws of Ghanaians have prescriptions regarding the distribution of wealth and eligibility for succession to property.

First, the rules of succession in Ghana outlining expectations regarding the sharing of intestate property are reflected in the matrilineal and patrilineal succession rules. In matrilineal communities, spouses are not entitled to inherit each other's intestate estate[80] because, at customary law, they do not belong to each other's family.[81] Similarly, in patrilineal communities, spouses do not inherit each other's property on death intestate for the same reason.[82] Even if spouses are subject to such legal limitations, it goes without saying that a law which gives the self-acquired property of a family member to the family of one's spouse, if applied, will likely be contested by Ghanaians, especially rural dwellers. Empirical research suggests they will still observe the customary rules of succession despite knowledge of PNDC Law 111.[83] When filling in perceived gaps in the law, the

77 See Act 459, sec 54.

78 LK Agbosu "Legal composition of the Akan family" (1983–86) 15 *Review of Ghana Law* 96.

79 Ibid.

80 *Quartey v Martey* [1959] GLR 377.

81 *Fordwour v Nimo* [1962] 1 GLR 305.

82 NA Ollennu *The Law of Testate and Intestate Succession in Ghana* (1966, Sweet and Maxwell) at 75, where Ollennu describes the constitution of the immediate paternal family without reference to a person's spouse.

83 V Gedzi "Principles and practices of dispute resolution in Ghana: Ewe and Akan procedures on females' inheritance and property rights" (PhD dissertation, Erasmus University 2009) at 112. See also E Kutsoati and R Morck "Family ties, inheritance rights, and successful poverty alleviation: Evidence from Ghana" (2012) *NBER Working Paper No. 18080*

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state must have regard for the prescriptions of the other legal systems it recognizes. It should be noted that even though PNDC Law 111 has modified the customary rules of succession, giving the bulk of the intestate estate to the nuclear family, the same law permits the application of these customary law rules to a portion of the intestate property, thus recognizing the criticality of cooperation between the state and customary legal systems.[84] The same sensitivity must be shown in legislating simultaneous deaths. Customary law is not perfect. In fact, its imperfections resulted in the promulgation of PNDC Law 111 in 1985 to give a greater portion of intestate property to surviving spouses and children. Nevertheless, with all its imperfections, we contend that it offers some guidance on what a presumption regarding property rights should consider.

Second, the personal law of Ghanaians prefers that wealth stays in families, the cornerstone of Ghanaian society. This fact is corroborated by Ollennu, a former judge and legal academic, who explains that "customary law prohibits a man from disposing of the whole or a major portion of his property to strangers, that is, persons outside the *circle of family* and dependants, … being his wife and children".[85] Allott, a legal academic, further confirms this: "If there was one thing which customary laws abhorred, it was the idea that the holder of property should be able to deprive his customary heirs and successors of their inheritance by a unilateral act of his own not sanctioned by his family."[86] This means that, under customary law, a greater portion of one's estate is expected to remain in one's family. It must be pointed out that family members are not legally bound by customary law to keep their self-acquired property in their families. Thus, individuals are not precluded from selling their self-acquired property, and a family member cannot sue to enforce this expectation. Nevertheless, section 7(7) of Act 360 and section 15 of PNDC Law 111 negate the expectation that property should be inherited by one's family members. Indeed, PNDC Law 111 shares property among *family* members. Also, section 13 of Act 360 permits *family* members such as a father, mother, spouse or minor child of a testator, for whom no reasonable provision was made in their relative's will, to apply to the court for maintenance if the testator's decision causes hardship. Indeed, family is important in the distribution of property, and if one's concept of family is unique, this uniqueness must be reflected unapologetically in related legislation. Unfortunately, both statutory presumptions unjustifiably bestow wealth on only one estate and disappoint Ghanaians' expectations.

At the very least, legislative provisions on commorientes should be subject to the choice of law rules embodied in section 54 of the Courts Act 1993 (Act 459), which determines the application of customary law vis-à-vis common law rules. The Act states that in determining the law applicable to an issue arising out of any transaction or situation, the courts shall apply the law intended by the parties to the transaction.[87] Regarding the devolution of a person's estate, *the courts shall apply their personal law in the absence of any intention to the contrary.*[88] Where the parties are subject to different personal laws, the court shall apply the relevant rules of their respective personal laws to achieve a result that conforms to natural justice, equity and good conscience.[89] Despite these statutory provisions, unless a party to the suit makes a case for applying customary law, the court is not obliged to do so. Unfortunately, neither litigants nor the courts take advantage of these provisions;

at 3, available at: <https://www.nber.org/system/files/ chapters/c13378/revisions/c13378.rev0.pdf> (last accessed 4 March 2023).

84 PNDC Law 111, secs 3–8.

85 NA Ollennu "Family law in Ghana" in *Le Droit De La Famille En Afrique Noire et À Madagascar* (1968, Editions G.P. Maisonneuve et Larose) 159 at 181.

86 AN Allott "What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950" (1984) 28 *Journal of African Law* 56 at 62.

87 Act 459, sec 54 (1) rule 1.

88 Id, sec 54(1) rule 2 (our emphasis).

89 Id, Sec 54(1) rule 5.

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the application of English common law is almost automatic. According to Date-Bah JSC, as he then was,

> "This is the result of our legal history and the law and practice relating to internal conflict of laws in Ghana. Since 1971, the practice of the courts in applying the choice of law rules … has meant that the customary law and systems of law other than the common law have not featured much in the Ghanaian law of civil obligations. … The rules offered an opportunity to our courts to be innovative and experimental, but that has not happened."[90]

This situation robs litigants and courts of the opportunity to engage with and apply customary law principles that could produce more equitable results. In finding a solution to the sharing of property in simultaneous deaths, it is contended that a reference to the personal law of Ghanaians is imperative because it presents a fairer solution.

Conclusion

This article has attempted to unearth the inequities in the presumptions of commorientes in the Wills Act and the Intestate Succession Act. We do not discount the role that these presumptions play in attempting to establish ownership in the event of simultaneous deaths. Unfortunately, what should have resolved issues of ownership clearly embody inherent biases which, as demonstrated, undermine the personal laws of Ghanaians. In light of these obvious biases, we proposed frameworks for sharing property where persons die simultaneously or in circumstances that render the order of their deaths uncertain. We concluded that, in such circumstances, the deceased persons should be considered to have predeceased each other in both the Wills Act and the Intestate Succession Law while also highly recommending the inclusion of survivorship clauses in wills. This should help the courts enforce the intentions of testators. Our proposed frameworks are justified based on the reasonableness of expectations regarding proprietary interests under customary law. Indeed, the law does not exist in isolation from its socio-cultural context; all legislative adventures must prioritize this fact. We do not seek to use notions of cultural relativism to defend the application of Ghanaian personal law to issues regarding commorientes. Instead, we seek to put the spotlight on the rationality of Ghanaian personal law on this issue and how this law should be considered in policymaking. Not everything that is labelled customary is unsuitable for modern needs.

Competing interests. None.

90 SK Date-Bah "Is our law of civil obligation in need of modernisation?" in HJAN Mensa-Bonsu and Others (eds) *Ghana Law Since Independence: History, Development and Prospects* (2007, Black Mask Ltd) 3 at 3.

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