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Commorientes – On the problem of simultaneous death in the law of inheritance

In the course of the re-codification of Hungarian civil law, the problems of the legal construction in general called simply *"presumption of simultaneous death in common disaster"* have occurred. In this paper we intend to present the historical roots in Roman law **(I.)** and in authoritative codifications of the modern age **(II.)** and to consider the regulation variations of the issue one by one **(III.)**. After that we shall illustrate the differences between the effective Hungarian Civil Code (Ptk.), the amendment and the settlement based on the proposal by some practical examples **(IV.);** then, *de lege ferenda* we shall sum up the, in our opinion, optimal solutions **(V.)**.

I. With regard to the regulation of inheritance from each other of persons who died in a common event / common disaster Roman law textbooks state, that the following: *"To make it easier to decide inheritance disputes, in post-classical Roman law it has been presumed that in circumstances where ascendants and descendants died in a common disaster, underage children were deemed to have died before their parents, and grownup children to have died after their parents."*[1] Yet, in circumstances where several persons who are not relatives die at the same time, the source takes a stand for simultaneous occurrence of death. To examine the solution outlined first, we shall carry out in-depth analysis of four of the seven loci in Iustinian's *Digest* and concerning the regulation referred to as the second option, four from among the twelve texts available to us.[2]

I. 1. In Papinian's[3] fragment[4] the father-in-law and his son-in-law entered into an agreement that in circumstances where a one-year-old male child is left behind after the death of the girl or wife, the dowry will belong to the husband; if, however, the child dies during the life of his/her mother, then the husband can keep only a certain part of the dowry, on condition, as a matter of fact, that the marriage bond existed at the time of the woman's death.[5] The mother and her child died in a shipwreck and as the order of death could not be determined subsequently, it seemed probable to the jurist that the mother survived the infant; therefore, the husband could keep only a part of the dowry. One of Gaius's[6] loci[7] determines it as a rule

[1] See e.g. NÓTÁRI, T.: *Római köz- és magánjog*. (Hungarian Public and Private Law) Kolozsvár 2011. 190.
[2] On the sources disussed in this paper see HAMZA, G.: *Az együtt elhaltakra vonatkozó vélelmek a római jogban*. (Presuptions concerning commorientes in Roman Law) Acta Univ. Budapestinensis Sectio Politico-Juridica 18. 1976. 347–361; HAMZA, G.–SAJÓ, A.: *Az együtt elhalás néhány jogi kérdése*. (Some legal questions concerning commorientes) Magyar Jog 1976/3. 191–202.
[3] On Papinian see F. SCHULZ: *Geschichte der römischen Rechtswissenschaft*. Weimar 1961. 126; J. A. ANKUM: *Papinian, ein dunkler Jurist?* Orbis Iuris Romani 2. 1996.
[4] Pap. D. 23. 4. 26. pr. *Inter socerum et generum convenit, ut, si filia mortua superstitem anniculum filium habuisset, dos ad virum pertineret, quod si vivente matre filius obisset, vir dotis portionem uxore in matrimonio defuncta retineret. Mulier naufragio cum anniculo filio periit, quia verisimile videbatur ante matrem infantem perisse, virum partem dotis retinere placuit.*
[5] See M. LAURIA: *Matrimonio e dote in diritto romano.* Napoli 1952., A. Wacke: *Actio rerum amotarum.* Köln–Graz 1963.
[6] See A. N. HONORÉ: *Gaius.* Oxford 1962; GY. DIÓSDI: *Gaius, der Rechtsgelehrte*. In: ANRW II. 15. 1976.
[7] Gai. D. 34. 5. 23. *Si mulier cum filio impubere naufragio periit, priorem filium necatum esse intellegitur.*

in a normative form that in circumstances where the mother and her underage male child[8] die in a shipwreck, the child shall be deemed to have died first.[9]
In Tryphonin's[10] fragment[11] the father and his son were killed in war; the mother claimed the son's property based on the son's later death – most probably on the grounds of the *senatus consultum Tertullianum* (Ulp. D. 26, 8.),[12] which can be dated to the time of Hadrian's rule; on the other hand, agnate relatives claimed the father's total property by referring to the son's earlier death. The legal scientist refers to Hadrian's *rescriptum* which deems the father to have died earlier, and accordingly decides the legal dispute in favour of the mother.[13] Although the fragment does not specify the boy's age, we can most probably assume that being a grownup young man he took part in the war together with his father as a soldier.[14] A following fragment of Tryphonin[15] also specifies two possible variations for an inheritance law issue where the simultaneous death of the father and his son – who is his father's only testamentary heir[16] - constitutes the basis of the state of facts: If the boy is grownup, then he shall be deemed to have survived the father and his successors are entitled to the estate; if, however, the boy is underage, then the father shall be deemed to have survived his son. As a matter of fact, the presumption can be refuted by proving the opposite. On the other hand, it should be noted that Max Kaser considers the phrase *"nisi contrarium approbetur"* interpolation.[17]
I. 2. Ulpian's fragment[18] dealing with the validity of donation between marital partners first establishes that donation shall be invalid when the donee dies first from among the persons taken captive. What would be the solution if both of them die during the same natural disaster (shipwreck, fire) and it cannot be determined who dies first? The legal scientist, referring to *oratio Severi* from 206, considers donation valid because the donee shall not be deemed to

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[8] See also A. B. SCHWARZ: *Die justinianische Reform des Pubertätsbeginns und die Beilegung juristischer Kontroversen.* ZSS 69. 1952; J. A. ANKUM: *Les 'infanti proximi' dans la jurisprudence classique.* In: Estudios F. Hernandez-Tejero. Madrid 1993.
[9] HAMZA op. cit. 1976. 350.
[10] See P. KRÜGER: *Geschichte der Quellen und Literatur des römischen Rechts.* 1912. 225; Schulz op. cit. 126.
[11] Tryph. D. 34. 5. 9. 1. *Cum bello pater cum filio perisset materque filii quodsi postea mortui bona vindicaret, adgnati vero patris, quasi filius ante perisset, divus Hadrianus credidit patrem prius mortuum.*
[12] On *senatus consultum Tertullianum* see C. SANFILIPPO: *Di una interpretazione giurisprudenziale dei senatoconsulti Orfiziano e Tertulliano.* In: Festschrift F. Schulz I. Weimar 1951.
[13] Cf. M. KASER: *Beweislast und Vermutung im römischen Formularprozess.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 71. 1954. 239.
[14] HAMZA op. cit. 1976. 350.
[15] Tryph. D. 34. 5. 9. 4. *Si Lucius Titius cum filio pubere, quem testamento scriptum heredem habebat, perierit, intellegitur supervixisse filius patri et ex testamento heres fuisse, et filii hereditas successoribus eius defertur, nisi contrarium approbetur. Quod si impubes cum patre filius perierit, creditur pater supervixisse, nisi et hic contrarium approbetur.*
[16] See also M. AMELOTTI: *Le forme classiche di testamento I–II.* Torino 1966–1967.
[17] KASER op. cit. 239; HAMZA op. cit. 1976. 351.
[18] Ulp. D. 24. 1. 32. 14. *Si ambo ab hostibus capti sint et qui donavit et cui donatum est, quid dicimus? Et prius illud volo tractare. Oratio, si ante mors contigerit ei cui donatum est, nullius momenti donationem esse voluit: ergo si ambo decesserint, quid dicemus, naufragio forte vel ruina vel incendio? Et si quidem possit apparere, quis ante spiritum posuit, expedita est quaestio: sin vero non appareat, difficilis quaestio est. Et magis puto donationem valuisse et his ex verbis orationis defendimus: ait enim oratio si prior vita decesserit qui donatum accepit: non videtur autem prior vita decessisse qui donatum accepit, cum simul decesserint. Proinde rectissime dicetur utrasque donationes valere, si forte invicem donationibus factis simul decesserint, quia neuter alteri supervixerit, licet de commorientibus oratio oratio non senserit: sed cum neuter alteri supervixerit, donationes mutuae valebunt: nam et circa mortis causa donationes mutuas id erat consequens dicere neuteri datam condictionem: locuples igitur heredes donationibus relinquent. Secundum haec si ambo ab hostibus simul capti sint amboque ibi decesserint non simul, utrum captivitatis spectamus tempus, ut dicamus donationes valere, quasi simul decesserint? An neutram, quia vivis eis finitum est matrimonium? An spectemus, uter prius decesserit, ut in eius persona non valeat donatio: an uter rediit, ut eius valeat; mea tamen fert opinio, ubi non reverterunt, ut tempus spectandum sit captivitatis, quasi tunc defecerint: quod si alter redierit, eum videri supervixisse, quia redit.*

have died earlier; accordingly, donation must be considered valid also in mutual donation; therefore, the gift shall belong to the inheritor.[19] If marital partners making mutual donation provably do not die at the same time after having been taken captive, according to Ulpian, in theory the following solutions can be taken into account: on the basis of *fictio legis Corneliae*[20] being taken captive is considered as it were simultaneous death, and in this case donation will remain valid; the marriage terminated already in their life in the moment when they were taken captive, and for this reason donation is invalid; donation will be valid only in the event that the donee survived the donation; and the donation will be valid only when the donee returned. Ulpian presumes the first version: when being taken captive the marital partners died at the same time, and so donation can be considered valid – in his solution he extends the presumption of simultaneous death based on *fictio legis Corneliae* through analogy to persons taken captive simultaneously as well.[21]

One of Tryphonin's fragments[22] addresses the issue of validity of *stipulatio* aimed at returning *dos receptitia*[23] and made subject to fulfilling the condition of the wife's death occurring during the marriage; in simultaneous death of the martial partners it arises as a question whether this condition has been satisfied. If the woman had survived her husband, the condition of the transaction would not have been fulfilled since it would have been possible to consider the marriage terminated through the husband's death already. The legal scientist presumes simultaneous death of the marital partners – without even mentioning the possibility of the wife's dying earlier – and as the marriage terminated upon the wife's death, the condition of *stipulatio* must be accepted as fulfilled.[24]

Tryphonin's fragment discussing the position of substitute inheritor[25] reveals the following state of facts: the testator has two underage sons and orders Titius to be the substitute inheritor of the son who dies later; however, the two underage boys die at the same time in shipwreck. Whose estate will belong to Titius? If the brothers had died one after the other, the one who died later would have inherited the property of the boy who died earlier, and so Titius as inheritor of the child having died later could have acquired both estates. Yet, Titius was appointed the inheritor of the child who dies later, however, setting out of the presumption of simultaneous death, none of the brothers can be considered to have survived the other; according to Tryphonin, one must set out from the fact that both brothers shall be considered as having died later.[26] Marcian's fragment[27] raises the issue of inheritance of simultaneously dying *substitutus* – in this case the inheritor's sibling – and the inheritor, and the inheritance of simultaneously dying siblings acting as mutually substitute inheritors of each other from each other and the inheritance of the *substitutus*. Marcian – in the absence of the opposite

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[19] HAMZA op. cit. 1976. 354.
[20] NÓTÁRI op. cit. 201.
[21] HAMZA op. cit. 1976. 354.
[22] Tryph. D. 34. 5. 9. 3. *Si maritus et uxor simul perierint, stipulatio de dote ex capitulo si in matrimonio mulier decessisset habebit locum; si non probatur illa superstes viro fuisset.*
[23] See NÓTÁRI op. cit. 216.
[24] HAMZA op. cit. 1976. 355.
[25] Tryph. D. 34. 5. 9. pr. *Qui duos impuberes filios habebat, ei qui supremus moritur Titium substituit: duo impuberes simul in nave perierunt: quaesitum est, an substituto et cuius hereditas deferatur. Dixi, si ordine vita decessissent, priori mortuo frater ab intestato heres erit, posteriori substitutus: in ea tamen hereditate etiam ante defuncti filii habebit hereditatem. In proposita autem quaestione ubi simul perierunt, quia, cum neutri frater superstes fuit, quasi utrique ultimi decessisse sibi videantur? An vero neutri, quia comparatio posterioris decendentia ex facto prioris mortuo sumitur? Sed superior sententia magis admittenda est, ut utrique heres sit: nam et qui unicum filium habet, si supremum morienti substituit, non videtur inutiliter substituisse: et proximus adgnatus intellegitur etiam qui solus est quique neminem antecedit: et hic utrique, quia neutri eorum alter superstes fuit, ultimi primique obierunt.*
[26] HAMZA op. cit. 1976. 356.
[27] Marci. D. 34. 5. 18. pr.

being proved – presumes their death simultaneous by a general, rule-like formulation, and declares that they cannot inherit from each and that the *substitutus* cannot inherit either.[28]

I. 3. After having surveyed the sources, it seems to be appropriate to add some terminological remarks to the fragments that discuss the issue of simultaneous death: The phrase *"commorientes"* occurs only in one source.[29] Nevertheless, several times it is possible to read the phrases *"simul perierint"*[30] or in *singularis "simul perierit"*[31] and "simul perit"[32] or their synonyms, for example, *"simul obissent"*[33], *"simul functus sit"*[34], *"pariter decesserint"*[35] and *"pariter mortuis"*[36] as well.[37] The source of danger, which results in the simultaneous death of several persons, is not named *in concreto* in most of the loci;[38] the possible sources of danger are defined in the widest scope by the fragment that indicates, in addition to shipwreck, collapse and attack, danger in general that threatens with occurrence *"in some other form"*,[39] and elsewhere the text most often mentions shipwreck,[40] fire, collapse and being taken prisoner of war[41]. Based on all that it can be established that the term *"died in common disaster"* cannot be supported by Roman sources as we cannot meet with the phrase *"periculum commune"* in them.[42]

From among the cases quoted in the first group, the first two sources from Gaius and Papinian report the simultaneous death of a parent and his underage child, while the loci cited from Tryphonin gives an account of the simultaneous death of a grownup child and his parent. In case of common death of the underage child and the parent, experience of everyday life makes it more probable that the person in weaker physical condition, i.e., the underage child will not survive the parent. Consequently, it can be fully accepted that Papinian raises probability in his *responsum* as reason;[43] accordingly, *praesumptio* can be applied without exception.[44] In the circumstances where the parent and his grownup child decease at the same time, legal scientists never refer to the point that owing to his more viable physical conditions the child would by all means survive the parent since it is far from being certain, although this does not seem to be unacceptable in case of an elderly parent and an adult child; it is sufficient to think of the possibilities and circumstances of the destruction of a young adult parent and his just grownup child. For this reason, legal scientists, being aware of the fabricatedness of the presumed order of death themselves, support their opinion by general humanity[45] or a given imperial decree[46]; and in certain cases to assert other legal law aspects they take exception to applying the presumption.[47] Consequently, Roman law did not set up any presumption of general validity for the case of simultaneous death of grownup and

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[28] HAMZA op. cit. 1976. 358.
[29] Ulp. D. 24. 1. 32. 14.
[30] Tryph. D. 34. 5. 9. 3; Papin. D. 28. 6. 42.
[31] Tryph. D. 34. 5. 9. 2.
[32] Marci. D. 34. 5. 16. pr.
[33] Marci. D. 36. 1. 35.
[34] Marci. D. 34. 5. 18. 1.
[35] Marci. D. 34. 5. 18. pr.; Marci. D. 39. 6. 26.
[36] Marci. D. 34. 5. 16. pr.
[37] Cf. HAMZA op. cit. 1976. 348.
[38] D. 24. 1. 32. 14; 28. 6. 34. pr.; 28. 6. 42; 34. 5. 8; 34. 5. 9. 2; 34. 5. 9. 3; 34. 5. 9. 4; 34. 5. 16. pr.; 34. 5. 16. 1; 34. 5. 17; 34. 5. 18. pr.; 34. 5. 18. 1; 36. 1. 35; 39. 6. 26.
[39] Ulp. D. 36. 1. 18. 7.
[40] D. 23. 4. 26. pr.; D. 34. 5. 22; D. 34. 5. 23; Tryph. D. 34. 5. 9. pr.
[41] Ulp. D. 24. 1. 32. 14.
[42] Cf. HAMZA–SAJÓ op. cit. 192. 200; HAMZA op. cit. 1976. 347.
[43] D. 23. 4. 26. pr.
[44] HAMZA op. cit. 1976. 352; HAMZA–SAJÓ op. cit. 193.
[45] D. 34. 5. 22. See also F. SCHULZ: *Prinzipien des römischen Rechts.* Leipzig 1934. 128–150.
[46] D. 34. 5. 9. 1.. eod. 16. pr.
[47] HAMZA op. cit. 1976. 353; HAMZA–SAJÓ op. cit. 193.

underage persons; age presumed earlier occurrence of death of any of the persons involved solely in simultaneous death of the parent and their child, so in a very narrow scope![48]
The fragments listed in the second group generally assert the presumption that assumes simultaneous occurrence of death in case of common death of several persons, and based on this *praesumptio iuris* legal scientists rule out the possibility of inheritance from each other of persons who died at the same time. It should be noted that this proposition could be applied only in the event that the simultaneous death of the persons concerned was caused by the same event, natural disaster.[49]

II. First, we shall survey the relevant provisions of *Code civil*, then German codes of law, more specifically ALR, ABGB, the Saxon BGB of 1863 and the German BGB of 1900, after that, two Anglo-Saxon laws, the British Law of Property Act and the American Uniform Simultaneous Death Act, finally, Hungarian codification attempts.
II. 1. In *Code Civil*[50] we can find the presumption of the right of mutual inheritance of persons who died in the same event *(un mème événement)*, based on difference of age, which, however, could be applied only subsidiarily, i.e., in case it was not possible to determine who died earlier; in accordance with Section 720 presumption of survival shall be established on the basis of actual circumstances – in accordance with Section Cc. 1353 presumption based on actual circumstances is nothing else than authorisation of the judge to form a presumption of the probability occurring in the state of facts – and in the absence of actual circumstances on the basis of age or gender.[51] When creating the legal presumption, the lawmaker took the given persons' physical capacity to resist as a basis.[52] The aim of the provision was to reproduce the logically most reasonable state of facts rather than to settle the financial standing as fairly as possible. The regulation of the *Code Civil* developed a highly complicated casuistic system, which states that the older from among the persons younger than fifteen years old who die in the same event, the younger from among the persons over sixty who die in the same event, and the younger of two persons when one of them is under fifteen and the other one is over sixty shall be deemed to have survived the other.[53] From among a man and woman between fifteen and sixty who die in the same event – when they are of the same age or the difference of age between them is not more than one year – the law presumes the man to have survived the woman, and if they are of the same gender, then the younger shall be considered survivor based on the natural order of their obtaining the inheritance.[54] This latter rule places the presumption set up on a completely different basis: so far physical capacity to resist constituted the basis of reference, while here reference is made to the regular order of inheritance; the former cause of reference is not necessarily valid because – as HAMZA and SAJÓ notes – *"there is nothing to be said for the regular resistance to illnesses and suffering being authoritative in the situations regulated here, …: in the case*

[48] HAMZA op. cit. 1976. 359.
[49] HAMZA op. cit. 1976. 359.
[50] On *Code Civil* see E GAUDEMET: *L'interpretation du Code civil en France depuis 1804.* Paris 1935; A. BÜRGE: *Ausstrahlungen der historischen Rechtsschule in Frankreich.* ZeuP 5. 1997. 643–653.
[51] HAMZA–SAJÓ op. cit. 193.
[52] Cc. 720. § *Si plusieurs personnes respectivement appelées à la succession l'une de l'autre, périssent dans un mème événement, sans qu'on puisse reconnaître laquelle est décédée la première, la présomption de survie est determinée par les circonstances du fait, et, à leur défaut, par la force de l'àge ou du sexe.*
[53] Cc. 721. § *Si ceux qui ont péri ensemble, avaient moins du quinze ans, le plus âgé sera présumé avoir survécu. S'ils étaient tous au dessus de soixante ans, le moins âgé sera présumé avoir survécu. Si les uns avaient moins de quinze ans, et les autres plus de soixante, les premiers seront présumés avoir survécu.*
[54] Cc. 722. § *Si ceux qui ont péri ensemble, avaient quinze ans accomplis et moins de soixante, le màle est toujours présumé avoir survécu, lorsqu'il y a égalité d'âge, o si la différence qui existe n'excède pas une année. S'ils étaient du même sexe, la présomption de suivre quidonne ouverture à la succession dans l'ordre de la nature, doit être admise: ainsi le plus jeune est présumé avoir survécu au plus âgé.*

of an exploding aeroplane there is scarcely any difference between a circus strongman and his fragile wife."[55] Nevertheless, the detailed regulation of *Code Civil* does not provide any solution for the case when the two *commoriens* in common disaster are between fifteen and sixty or over sixty. French legal practice did not welcome this provision of the *Code Civil* since it constitutes exception to the general rule on absentees[56] and to the *"affirmanti incumbit probatio"* principle[57], therefore, they apply it only to intestate succession by exercising *interpretatio restrictiva* and require identical cause of death.[58]

II. 2. In its provisions applicable to persons who died in common disaster the *Preußisches Allgemeines Landrecht*[59] defines the term of *gemeinsames Unglück* – later introduced in Hungarian terminology – and the state of facts of simultaneous death; in both cases it orders to presume death that occurs at the same time if the actual order of death cannot be determined.[60] The Austrian *Allgemeines Bürgerliches Gesetzbuch*[61] does not set up a casuistic presumption system regarding the order of death; it states instead that whenever it is doubtful who died earlier, the burden of proof shall be borne by the party who refers to the earlier or later death of the given deceased; when the demonstration fails to produce any result, one must set out from the point that death occurred at the same time in the case of both persons.[62] The term of common disaster is not set out in the paragraph of the *Allgemeines Bürgerliches Gesetzbuch*, having been repealed since then; its regulation is similar to the solution of classical Roman law of refutable presumption of death of non-family members as a result of the same event,[63] it provides the possibility of demonstration but in case it fails, it presumes simultaneous death.[64] The *Bürgerliches Gesetzbuch für das Königreich Sachsen* of 1863 – although within the personal and not the inheritance part – regulates the issue similarly to the ABGB;[65] in other words, in the absence of counter-evidence simultaneous death shall be assumed.[66] In accordance with the Swiss *Zivilgesetzbuch*[67], when it cannot be proved that one of several deceased persons has survived the other, then death occurring at the same time shall be assumed;[68] the term of common disaster has not been adopted in legal literature because it

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[55] HAMZA–SAJÓ op. cit. 194.

[56] Cc. 135. § *Quiconque réclamera un droit échu à un individu dont l'existence ne sera pas reconnue, devra prouver que ledit individu existait quand le droit a été ouvert: jusqu'à cette preuve, il sera déclaré non recevable dans sa demande.*

[57] Cf. Paul. D. 22. 3. 2; FÖLDI–HAMZA op. cit. 159.

[58] HAMZA–SAJÓ op. cit. 194.

[59] On *Allgemeines Landrecht* see H. THIEME*: Die preussische Kodifikation.* ZSS GA 57. 1937; *200 Jahre Allgemeines Landrecht für die preußischen Staaten. Wirkungsgeschichte und internationaler Kontext.* Frankfurt a. M. 1995.

[60] ALR 39. § *Wenn zwei oder mehrere Menschen ihr Leben in einem gemeinsamen Unglücke verloren haben, daß nicht ausgemittelt werden kann, welcher zuerst verstorben sei; so soll angenommen werden, daß keiner den anderen überlebt habe.*

[61] On *Allgemeines Bürgerliches Gesetzbuch* see W. BRAUNEDER: *Das Allgemeine Bürgerliche Gesetzbuch für die gesamten Deutschen Erbländer der österreichischen Monarchie von 1811*. In: Gutenberg-Jahrbuch 1987; IDEM*: Das österreichische ABGB als neuständische Zivilrechtskodifikation*. In: Vestigia Iuris Romani. Festschrift für G. Wesener. Graz 1992.

[62] ABGB 25. § *Im Zweifel, welche von zwei oder mehreren verstorbenen Personen zuerst mit Tod abgegangen sei, muß derjenige, welcher den früheren Todesfall des Einen, oder des Anderen behauptet, seine Behauptung beweisen; kann er dieses nicht, so werden Alle als zu gleicher Zeit verstorben vermuthet, und es kann von Übertragung der Rechte des Einen auf den Anderen keine Rede sein.*

[63] Marci. D. 34. 5. 18. pr.

[64] HAMZA–SAJÓ op. cit. 195.

[65] 2007. §

[66] HAMZA–SAJÓ op. cit. 195.

[67] See also H. LEGRAS-HERM: *Grundriss der schweizerischen Rechtsgeschichte.* Zürich 1935; P. TUOR: *Le Code civil Suisse. Exposé systématique.* Zürich 1942.

[68] ZGB 32. § 2. *Kann nicht bewiesen werden, daß von mehreren gestorbenen Personen die eine die andere überlebt habe, so gelten sie als gleichzeitig verstorben.*

would lead to unnecessary narrowing of the cases that belong to this scope.[69] The provision of the German *Bürgerliches Gesetzbuch*[70] – now having been repealed – presumes death of persons who die in common disaster occurring at the same time;[71] it is worth adding that the relevant paragraph contains the term of *gemeinsame Gefahr* and no reference is made to the possibility of counter-evidence, i.e., to the fact that this rule can be applied only when the order of death cannot be proved.[72]

II. 3. The *Law of Property Act* of 1925 provides that in case two or more persons die in circumstances where it is not possible to decide who has survived the other, the younger one shall be considered survivor.[73] However, this solution – which rests solely on a logical basis but suits *common sense* often referred to in the Anglo-Saxon legal system – is not applicable when the question of the order of death arises between marital partners; in this case it is not possible to refer to presumption of survival with regard to any of them; that is, none of them will inherit from the other.[74] In the United States of America, the *Uniform Simultaneous Death Act* with almost identical text in all of the states from the 1950's regulates the issue as follows. Where property or other title depends on priority of death, and simultaneous death cannot be sufficiently proved, the property of each person shall be considered as if such person had been the survivor. If the beneficiary's right depends on whether he/she survives the other, and simultaneous death cannot be proved properly, the entitled party shall be considered a not-survivor. In the case of mutual beneficiaries the property shall be divided into equal parts in a number corresponding to the number of the beneficiaries and these parts shall be divided among those who would be beneficiaries in case they survived. Regarding spouses' joint property and joint ownership the division is fifty percent, and in life insurance the beneficiary shall be considered survivor. So, the American regulation lets the principle of *"affirmanti incumbit probatio"*[75] prevail, and when production of evidence brings no result or is impossible, it presumes simultaneous death, which makes mutual inheritance possible.[76]

II. 4. The *General Private Law Bill* of 1871 of Boldizsár Horváth, in its part on persons, sets up a refutable presumption in case of doubt of the simultaneous death of *"several persons who die in the same danger of death"*.[77] The first text of the *Hungarian General Civil Code* published in 1900 also sets up refutable presumption of simultaneous death of persons who die in common disaster at the same time in case the time of death cannot be proved;[78] this regulation proposal is taken over by the 1913 version as well.[79] The *Private Law Bill* of 1928 does not set up presumption concerning persons who die in common disaster, and the reasons for declaring somebody legally dead[80] mentions[81] that the *Private Law Bill* places the burden

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[69] HAMZA–SAJÓ op. cit. 195.
[70] On *Bürgerliches Gesetzbuch* see J. W. HEDEMANN: *Die Fortschritte des Zivilrechts im XIX. Jahrhundert. Ein Überblick über die Entfaltung des Privatrechts in Deutschland, Österreich, Frankreich und der Schweiz.* Berlin 1910–1935; M. JOHN: *Politics and Law in Late Nineteenth-Century Germany. The Origins of the Civil Code.* Oxford 1989.
[71] BGB 20. § *Sind mehrere in einer gemeinsanem Gefahr umgekommen, so wird vermutet, daß sie gleichzeitig gestorben seien.*
[72] HAMZA–SAJÓ op. cit. 196.
[73] *Law of Property Act (1925.)* 184.
[74] HAMZA–SAJÓ op. cit. 196.
[75] Paul. D. 22. 3. 2.
[76] HAMZA–SAJÓ op. cit. 197.
[77] *Általános Magánjogi Törvénykönyv Tervezete Magyarország számára I.* Közlemény Általános Rész. Pest 1871. § 31.
[78] *Indokolás a Magyar Általános Polgári Törvénykönyv Tervezetéhez I.* Budapest 1901. § 15.
[79] § 18.
[80] Mjt. 39–42. §
[81] *Indokolás Magyarország Magánjogi Törvénykönyvének Törvényjavaslatához I.* Budapest 1929. 32.

of proof on the party who alleges the order of death, as it states *expressis verbis* that it does not intend to construct any presumption for this case.[82]

III. On the basis of the regulations looked at so far and the possible logical combinations the question could be settled – according to the opinion of Gábor Hamza and András Sajó – as follows.[83]
When the parties have the possibility of production of evidence concerning the time of death, then we distinguish three main regulatory directions:

a) In total absence of legal presumption the parties have unlimited possibility of production of evidence, as it is set out in the currently effective Hungarian Civil Code (Ptk.) as well. For lack of evidence the judge is compelled to take a stand for simultaneous death. The disadvantage of the solution is that total freedom of proof and accidental factors of survival might make the parties apt to manipulate the facts.[84]
b) In case of unsuccessful production of evidence under total freedom of proof, legal presumption shall be applied to the order of death, as it can be seen in the system of the *Code civil*. (More specifically, we distinguish the two sub-cases where, on the one hand, even quite weak proofs can eliminate the presumption, and, on the other hand, only convincing determination of the order of death makes it possible not to apply the presumption.)
c) As a general rule the presumption is applied and production of evidence lies only as exception. This solution can be separated only logically from the above outlined possibility which states that only substantiated proofs taken into account primarily make it possible to eliminate the presumption as secondary alternative.[85]

If we exclude the parties' right of proof, then there are two solutions and the second version again raises two possibilities.

a) We determine an obligatory order of death.
b) We presume simultaneity of death. In this latter case, it occurs as one of the possibilities that the parties mutually inherit from each other as they died at the same time; the other possible path to take seems to be that as persons eliminated from succession they do not inherit from each other since none of them can be considered being alive after the other person's death. The first possibility can be correct only in a certain aspect, for example, in the system of demonstration based on the *Code civil*, however, as the aim is just to avoid undesirable proving, it should be logically rejected.[86]

IV. After the logically deducible regulation models let us look at this problem area through a few examples, which we solve on the basis of the effective Hungarian Civil Code (Ptk.), the draft amendment and the proposal. In accordance with Section 600 a) of the Civil Code a person who dies before the testator will be eliminated from succession. Consequently, one can share the estate if the given person has survived the testator. So, succession – as acquisition in case of death – is considered acquisition subject to the condition of survival.[87] This concise regulation also reveals that our law of inheritance does not define the presumption of simultaneous death in common disaster. This results in that in case of family members who die in traffic accident it is necessary to clarify the time of death of each family member and

[82] HAMZA–SAJÓ op. cit. 198.
[83] HAMZA–SAJÓ op. cit. 198–199.
[84] HAMZA–SAJÓ op. cit. 198.
[85] HAMZA–SAJÓ op. cit. 198.
[86] HAMZA–SAJÓ op. cit. 199.
[87] VILÁGHY M.–EÖRSI GY.: *Magyar polgári jog.* (Hungarian civil law) Budapest 1965. II. 410.

the order of death to be able to determine the order of succession.[88] Lack of the presumption of simultaneous death in common disaster causes serious difficulties in production of evidence when determining the order of death and the order of succession of the persons who die.[89] We agree with Lajos Vékás that in this case – except for inheritance under a will – chance influences the order of succession.[90]

The concept of the new Civil Code (Ptk.) would amend the effective text (Section 600 a)) as follows *"a person who does not survive the testator will be eliminated from succession"*.[91] The concept adduces the following reason for changing the wording *"with such formulation inheritance disputes on succession to simultaneously died persons can be prevented"*.[92] We are on the opinion that this reason is not fully valid because a person who does not survive the testator dies before or at the same time as him or her. So, the draft formulation has a wider sense than the currently effective text variant to the extent that a person dying at the same time as the testator will be also eliminated from succession. However, this variation will not solve the difficulty of determining and proving the times of death and the order of death and does not eliminate chance either.

Yet, we agree with the assumption of the concept that *"in this respect it is worth pondering over the determination of a cause of elimination that in such cases excludes inheritance from each other of persons who die in 'common disaster', today much rather in a common accident or as a result of other similar event, actually not completely at the same time—the inheritance of the person who dies later from the person who dies earlier"*.[93] The concept provides the following reasons—in our opinion logically invalidly as we shall detail it later: *"Today this question can be no longer solved by presumptions; yet, without such a rule strikingly unjust results can be produced. This especially applies to inheritance from marital partners who die without descendants where survival of one of them by any short period – usually without the spouse who dies later recovering consciousness – would devolve the estate of both of them to the family of the spouse who dies later. Unfortunately, today such accidents are not exceptional at all."*[94] This solution would provide succession only for the person who survives the common event indeed, irrespective if he/she was a participant of the common event.

When we look at various succession situations, then it can be cleared up whether it is the text (a) of the law in force, (b) of the planned amendment or (c) of the proposal that leads to a juster result.

First, let us look at the situation brought up as an example:

Spouse 1 ---------- Spouse2 (without descendants)

In a traffic accident Spouse1 dies first, Spouse2 survives him/her by a few minutes without recovering consciousness.

a) In the absence of descendants[95] Spouse2 will inherit, thereafter he/she will be the testator and as he/she also dies, the common property of Spouse1 and Spouse2 will devolve to the parents of Spouse 2.[96]

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[88] GELLÉRT GY. (ed.) *A polgári Törvénykönyv magyarázata.* (Commentary on Hungarian Civil Code) Budapest 2001. 2002.-2003.

[89] VÉKÁS L.: *Magyar polgári jog. Öröklési jog*. (Hungarian civil law. Law of inheritance) Budapest 1995. 20.

[90] VÉKÁS op. cit. 20–21.

[91] MK 15. II. 2002. január 31. *Az új Polgári Törvénykönyv koncepciója.* (Concept of the new Hungarian Civil Code) 187.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] Ptk. 607. § (4)

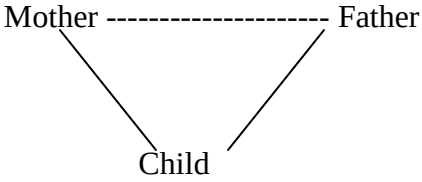
b) As Spouse2 survived Spouse1, in accordance with Section 607 (4) of the Civil Code (Ptk.), he/she will inherit, and through his/her death a few minutes later, in accordance with Section 608 (1) of the Civil Code his/her parents will be the inheritors. Consequently, the planned amendment to the text does not provide better solution for this case.

c) If we exclude inheritance from each other of persons who die in common disaster, then the parents of the two testators (Spouse1, Spouse2) will inherit in equal parts; that is, the proposal to supplement the text would result in a juster solution.

If Spouse1 and Spouse2 (also without descendants) died provably at the same time in a traffic accident, then

a) in accordance with the effective text none of them died before the other, that is, they mutually inherit from each other (!) and their parents inherit from them;
b) based on the draft text of the concept now the parents of Spouse1 and Spouse2 will inherit in equal parts;
c) the proposed arrangement would lead to this result as well.

If



have died in an air crash, and the order of death has been determined (1: mother, 2: father, 3: child)

a) the child inherits from his/her parents but as he/she does not have any descendants, spouse, parents (because they died before him/her) and the parents do not have any descendants, the grandparents (in the absence of them the grandparents' descendants) of the testator (the child) will be the intestate heirs in equal parts;[97]

b) the planned change to the text would also lead to the result set out in point a). (Here, only simultaneous death leads to more appropriate result than point a): the deceased persons do not inherit "from one end to the other" from each other, the next parentela – here the grandparents – will inherit);

c) exclusion of inheritance from each other of persons who die in a common accident would also lead to the inheritance of the grandparents' parentela. Consequently, in this situation there is no difference between the possibilities provided by the three rules.

If we reverse the order of death of this succession situation: 1) child, 2) father, 3) mother, then the following can be outlined:

a) the deceased child does not have descendants, spouse; so, his/her parents will inherit from him/her in equal parts. The mother (as spouse) will inherit from the father, due to elimination of the descendant, and through her death – in the absence of descendant and her spouse – the mother's parents will be the inheritors; in other words, the total estate will belong to the mother's family;

b) as both the mother and the father survived the child, they were not eliminated from succession; so, the solution set out in the draft text is equal to the solution set out in point a), i.e., it is not any juster;

c) according to the proposal the father and the mother cannot inherit from the child (and they cannot inherit from each other); so, in the absence of descendants, spouse, and parents (and their descendants) the child's grandparents (the parents of the father and mother) will inherit in equal parts.

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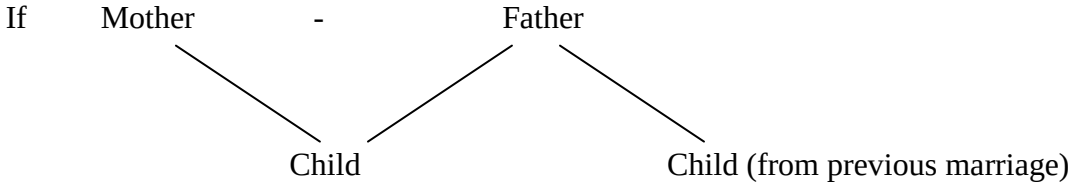
[96] Ptk. 608. § (1)
[97] Ptk. 609. § (1), (2)



die in an air crash and the order of death is: 1) mother 2) father 3) common child (the separate child is survivor or is not participant of the accident):

a) the common child will inherit from the mother, the two children will inherit from the father (half-and-half), after the death of the common child, in the absence of descendants, spouse and parents, his/her half-sibling, the separate child will inherit;[98]

b) the alteration of the concept leads to the same not quite fair solution. In case of simultaneous death a juster result would be produced: the separate child and the grandparents on the mother's side would inherit half-and-half;

c) in the case of exclusion of inheritance from each other of persons who die in a common event – irrespective of the order of death – the common child's grandparents on the mother's side and the father's separate child would inherit half-and-half.

If the order of death changes: 1) father, 2) common child 3) mother, then the following solutions can be outlined:

a) the two children will inherit from the father in equal parts, the mother will inherit from the common child, and the mother's parents will inherit from the mother in equal parts; so, the property will be divided between the two families;

b) the draft text – including the case of simultaneous death – also leads to the result set out in point a);

c) the proposal also provides the solution outlined in point a): the father's child from the previous marriage and the mother's parents will inherit the property.

In case times of death differ again: 1) father 2) mother 3) common child, the following remarks can be made:

a) in case the father dies, the two children will inherit in equal parts, when the mother dies, the common child will inherit, and if the common child dies – as in the place of the parent eliminated from succession his/her descendant will inherit – the separate child will inherit;

b) the draft text would lead to the result described in point a), only simultaneous death would be juster than that because through the succession of the separate child and the mother's parents the estate would be divided between the two families;

c) the proposal would be juster: from the first, it would lead to inheritance in equal parts between the separate child and the mother's parents.

If death occurred as follows: 1) mother 2) common child 3) father, then:

a) the common child will inherit from the mother, the father will inherit from the common child, and the separate child will inherit from the father;

b) the text variant of the concept would also result in this chain of inheritance, except for the case of simultaneous death (see point c));

c) the proposal would be fairer for the two families, the separate child and the mother's parents would inherit.

[98] Ptk. 608. § (2)

If the common child dies first and he/she is followed by the parents (father and mother – in this order), then:

a) the father and mother will inherit from the common child in an equal proportion, the separate child will inherit from the father, and the mother's property will devolve to her parents;

b) the same result is produced in the planned amendment, including the case of simultaneous death;

c) based on the proposal the separate child and the mother's parents will share the estate in equal parts.

If the common child is followed by the mother and then by the father, the solution is identical with the above: the common child's parents will inherit from him/her in equal parts; while the separate child will inherit from the father, the mother's parents will inherit from the mother, based on almost all the three texts of the rule (effective, draft amendment, proposal). As a matter of fact, the situation outlined in the above two paragraphs applies to the property of the died common child, the parent's common property will devolve in accordance with the above quoted provisions of inheritance law.

In the long process of the re-codification of the Hungarian Civil Law (Ptk.) the lawmaker adhered to the provisions set out in the concept of 2002. In 6:4 (Elimination from succession) the Expert's Proposal of 2008[99] provides as follows: "A person who does not survive the testator will be eliminated from succession. With respect to inheritance from each other, persons who die in a common accident or other similar emergency situation shall be considered eliminated from succession irrespective of the order of the occurrence death". In the reasons attached to this requirement[100] the Expert's Proposal expresses the codifier 's intention not to regulate this scope of issues by presumption because "at best, by legal presumption the order of inheritance of persons who die in common disaster can be determined, but the so produced unjust result cannot be avoided". The aim set is that "the Proposal should formulate the rule that the persons who die in a common accident or other similar emergency situation shall be considered eliminated from succession with respect to intestate succession and testamentary succession to each other irrespective of the order of the occurrence of death. By this solution it is possible to avoid the unjust solution that depending on the order of the deaths and thereby the opening of inheritance that follow each other by chance (and are quite often hard to determine), the property of the testator (usually spouse or common law partner) should devolve within a short time to the family of the intestate (possibly testamentary) heir who just survives him/her". As we have analysed it above through several specific examples, this solution leads to a fairer solution than the effective Civil Law; however, iniquities arising from death in common disaster are not eliminated. Furthermore, the formulation of the second French paragraph of the provision might seem to set up an irrefutable presumption: "….shall be considered eliminated"; therefore, it is possible that the lawmaker's intention was expressly to avoid creation of legal presumption,[101] however, in this respect the wording of the legal rule has not become unambiguously clear.

The wording of Act CXX of 2009 (the "new Civil Code") not entered into force is even less fortunate, following the ideas of the Expert's Proposal the wording meant to be identical/synonymous even adds to the problems that arise in the former:

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[99] Vékás L. (ed.): Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez. (Expert's Proposal on new Hungarian Civil Code) Budapest, 2008.
[100] Ibid. 1154.
[101] Ibid. 1154.

- it states elimination only with respect to persons who ”die at the same time” in a common accident or other similar emergency situation, and does not state it with respect to persons who die in the same common event within a short time following each other;
- if it is only persons who die at the same time that are eliminated from succession, then why is it necessary to write the term ”irrespective of the order of the occurrence of death” into the norm text since there is no order of death in death at the same time; so, there is tension even within the second French paragraph of the given section, and the careless, self-contradictory wording pushes the reader even more towards irrefutable presumption-like interpretation.

The proposal of the ”New Civil Code” Codification Committee[102] repeats the text of the Expert’s Proposal with one difference: the term ”died” is replaced by the term ”deceased”;[103] thus preserving its above-described anomalies.

V. Based on all the above, we sum up our opinion as set out below:
We can agree with the statements formulated in the concept of the new Hungarian Civil Code (Ptk.) to the extent that we exclude inheritance from each other of persons who died in a common event. This is done in some form or other by Roman law – apart from the presumption, applicable in a very narrow scope, which regulates the order of death by refutable presumption and allows inheritance from each other in the parent/child relation – as well as by most of the codifications of the modern age, either by preferring priority of the presumption or reserving it in case of unsuccessful production of evidence.
The drafter of the concept appropriately admits that it is more fortunate to use the term *”common event”* instead of *”common disaster”* in view of the fact that – as we have detailed it in the passages on legal history – the term of “common disaster” has not become a consistently and uniformly applied *terminus technicus*, its use has become generally accepted mostly in German legal terminology and was adopted from there into Hungarian legal language. It is not less significant than the tradition of terminology that by *”common disaster”* we usually mean a link standing in the rear of the chain of causes that leads to death, which is not identical with the particular cause that gives rise to death; whereas, *”common event”* means the event that directly evokes death.[104] Nevertheless, the term common event needs to be further narrowed: on the one hand, it is necessary that, in addition to relation in time – simultaneity – relation in space – for example, identical theatre of operations in war – should exist as well; and, on the other hand, it is an indispensable conceptual element that the act of none of the persons should be the cause of the other person’s death – one should think of a person who kills his family and then kills himself or a person who gives help to somebody who gets into emergency. Yet, it is not necessary that the cause of death should be identical in case of both persons – in a shipwreck, one of them is killed by fire breaking out on the ship and the other one gets drowned – however, the different causes of death must arise from the event that directly threatens the life of both of them. Therefore, we consider the source of danger a common event that stands at the beginning of a chain of causes which can directly give rise to the death of several persons and accordingly defines the scope of possible victims exactly.[105]
Yet, we cannot agree with the element of the reasons for the concept of the Civil Code which states that it does not consider the question an issue that can be solved by presumptions. The maker of the concept considers common event causing death of several persons an

[102] 7:4. §
[103] 7:4. § (1)
[104] HAMZA–SAJÓ op. cit. 201.
[105] HAMZA–SAJÓ op. cit. 201.

independent hypothesis and states as a disposition that none of these persons will inherit from the other. Stating this independent disposition, however, suggests as if this were not a general principle of inheritance law – more specifically, only the survivor can inherit and that persons who do not survive will be eliminated – since a separate disposition attached to a separate hypothesis can be considered necessary only in cases where the lawmaker would expect different conduct indeed. It is needless to repeat the above-mentioned basic principle of inheritance law with regard to a special situation since we might deduce it from this partial emphasis *a contrario* that the basic principle actually does not exist, and in every situation different from the hypothesis the contrary of just the disposition emphasised here should prevail.[106]

If we do not want to give room to complicated proving that promises little result and, above all, leads quite often to unfair result, then inheritance from each other of persons who die in a common event – and this event must be exactly circumscribed by using the above definition – should be excluded and should be inserted in the Civil Code as cause of elimination. In our opinion, owing to the above-deduced causes of legal logic, this can be done by creating irrefutable presumption.

[106] HAMZA–SAJÓ op. cit. 200.