Wills & Estates
Winter Term 2018

Lecture Notes – No. 12

FAILED GIFTS: 'LAPSE'

Assume that the testatrix has provided properly in her Will for a gift to a named legatee; that is, the provision is valid on all points of certainty and formality. Suppose that the legatee has pre-deceased the testatrix. What happens?

The common law rule is that a gift to a person who predeceases the testatrix 'lapses' and is void, with the result that the gift falls into the residue of the estate (unless it was a gift of part of the residue, in which cases it is distributed as an intestacy). In Ontario, the Succession Law Reform Act provides as follows:

> 23. Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,
>
> (a) the death of the devisee or donee in the lifetime of the testator; or
>
> (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,
>
> is included in the residuary devise or bequest, if any, contained in the will.

Re Stuart
(1964), 47 W.W.R. 500; (BCSC)

The testator made his own Will which contained a number of specific gifts of money. Following the provision of various gifts, the Will went on to provide as follows in Clause 36:

> I wish to express and make it clear to the Executors of my will that any balance left over after the amounts hereto before noted are all paid in full, this **balance of my estate is then to be equally divided among the following persons named herein** as listed below...

One specific gift was to a niece who predeceased the testator; she was also one of the names listed as taking the residue of the estate pursuant to cl.36. The issue then became whether the niece's share <u>of the residue</u> fell to the other persons within the residuary clause, or, would be distributed as an intestacy.

It was held that if the collection of persons set out in the residuary clause was of a definable 'class' then the niece's share would be reapportioned amongst the remaining members of that class; if not, the share would be distributed according to the intestacy rules. In this case, there was no discernable class on the facts.

Per Nemetz J:

> It appears clear that a lapsed specific devise or bequest falls or is included in the residuary clause, if any, of a will. However, counsel before me have been unable to cite any case where a court has judicially considered the effect of sec. 22 of our *Wills Act* (or its counterpart in any other jurisdiction) in respect of lapsed residuary devises or bequests. Accordingly, I must now determine whether or not sec. 22 applies equally to lapsed devises and bequests in both *specific* and *residuary* bequests and devises.
>
> Romer, J. in *Re Whitrod; Burrows v. Base*, [1926] Ch. 118, 95 LJ Ch 205, restates the general principle of law relating to lapsed gifts vis-à-vis the residual provisions of a will at p. 121:
>
> > In *Vaughan Hawkins on Wills*, 3rd ed., p. 52, that learned author, after referring to the general rule that a general residuary bequest carries lapsed and void legacies, continues: 'The comprehensive import of the word residue does not extend to a gift of the residue of that residue. Thus, if the testator gives £10,000 out of the residue of his personal estate to A., and the residue to B., and the bequest to A. fails, the gift to B. will not, it appears, in general carry the £10,000 bequeathed to A., which will therefore be undisposed of.'
>
> It was urged upon me by Mr. Jonsson, counsel for some of the residuary beneficiaries, that, since sec. 22 makes no distinction between specific and residuary devises or bequests, Annabelle Palmer's portion of the residue should be distributed among the surviving residuary beneficiaries. However, it appears to me that in order to give effect to this argument, the legislature would have used words in sec. 22 similar to those appearing in sec. 30, e.g., "and in the case of a lapsed residuary devise or bequest, is divisible among the remaining residuary devisees and legatees."
>
> **Since the will does not dispose of Annabelle Palmer's lapsed share and since sec. 22 does not, in my view, provide for the disposition of lapsed residuary devises or bequests, her interest passes as on an intestacy.**

Mladen Estate v. McGuire
2007 CanLII 10904 (Ont. S.C.J.); cb., p.592, note 8

In this case the trial judge looked to the ‘surrounding circumstances’ to save a gift that would otherwise lapse.

The testatrix died leaving the residue of her estate to her aunt (one half) and two cousins (one half). The aunt predeceased. Does the aunt’s share go on an intestacy or to the other residuary legatees? Here the ‘surrounding circumstances’ were used by the court to find a contrary intent to lapse and an intestacy and in favour of the other residuary legatees.

Per Belobaba J:

[14] In sum, the gist of the uncontradicted evidence before me is that Bonnie and Roger were the only cousins that Shirley ever knew and the only family that she had left after Aunt Bea died. Shirley did not know the other three cousins. To her, they were virtual strangers.

...

[20] The more specific issue, then, is how this court should proceed to determine if there is "a contrary intention in the will." Am I entitled to sit in "the testator's armchair" and consider the surrounding circumstances, including the affidavit evidence about Shirley's family and feelings, in order to determine her intention in this regard, or am I limited to examining only the language in the Will? If the Will says nothing about what should happen if Shirley is predeceased by Aunt Bea, am I entitled, in effect, to add new language to the Will to reflect her unstated intention and fill in what Shirley herself may have omitted? Or, is this the very case where the lapsed residuary gift should logically and properly go to the next of kin?

[21] During the course of the hearing, counsel for the "other three cousins" suggested that I could not sit in "the testator's armchair" and consider the surrounding circumstances; that I was limited to the language in the Will. Because this point was not argued in the parties' factums, I invited counsel to make additional written submissions.

[22] **It is settled law that when a court interprets a will, it must determine the testator's intention at the time that she made her will. The court must use common sense, giving the words their ordinary meaning in an attempt to achieve, from the wording of the will, the result that the testator intended. Only when the testator's intention cannot be arrived at by this method should the court resort to the judicially developed rules of construction, such as the so-called "armchair rule." When the testator's intention cannot be ascertained from the plain meaning of the words used in the will, the court can sit in the "testator's armchair", assume the knowledge she had of the extent of her assets, the size and makeup of her family and her relationship to its members, so far as such things can be ascertained by the evidence, and in this way, determine and give effect to the testator's intention**: Dobson Estate v. Dobson, [2000] O.J. No. 552 (S.C.J.) at paras. 7-8; Matzelle Estate v. Father Bernard Prince Society of the Precious Blood, [1996] O.J. No. 5107 (Gen. Div.) at paras. 17 and 21.

[23] If I consider only the wording in Shirley's Will, several things become immediately apparent. It is clear that Shirley intended to dispose of her entire estate. It is clear that she believed that both her mother and Aunt Bea would survive her – otherwise why name them as residuary beneficiaries? It is also clear that she had a special connection to and fondness for her Aunt Bea, and her first cousins, Bonnie and Roger. To each of them, she gave a significant monetary gift and, if her mother predeceased her, she left to the three of them the residue of her Estate – Aunt Bea getting one-half, and Bonnie and Roger each getting one-quarter.

[24] Bonnie and Roger were obviously very important to Shirley. However, I am unable to conclude from the wording in the Will alone, that it was Shirley's intention that Aunt Bea's portion would automatically go to Bonnie and Roger, if Aunt Bea were to predecease her. I note that Shirley also bequeathed significant sums of money to several other people – for example, $45,000 to her stepson George Mladen, and $20,000 to each of her godsons, Christopher and David Elia.

[25] In short, there is nothing in the language of the Will itself that would allow me to conclude that if Shirley was predeceased by her Aunt Bea, that she would have intended that Aunt Bea's portion should go only to Bonnie and Roger.

[26] I can, however, come to this conclusion if I am able to sit in the testator's armchair and consider evidence of the surrounding circumstances. Based on the uncontradicted evidence in Bonnie's affidavit, I am able to acknowledge the fact that Shirley considered Bonnie and Roger as her only first cousins, and together with Aunt Bea, they were the extent of her remaining family. I also am able to consider the fact that Shirley didn't know the other three cousins. To her, the other three cousins were virtual strangers.

[27] In sum, if I sat in Shirley' armchair and considered the surrounding circumstances as described in the affidavit evidence, I would have no difficulty finding in favour of Bonnie and Roger, the surviving residuary beneficiaries. If Aunt Bea were to predecease Shirley, would Shirley have intended any part of Aunt Bea's portion to go to three family members that she did not know and were, to her, virtual strangers, or would she have intended that it go to Bonnie and Roger, her "only cousins" and after Aunt Bea died her "only family"? The answer is self-evident.

[28] Thus, if I am limited to the language in the Will, I would find in favour of the next of kin, that is, all five first cousins. If I can sit in the testator's armchair in order to determine whether there is "a contrary intention in the will" and I consider Shirley's knowledge of and relationship with her family, I can easily discern such a contrary intention, with the result that Aunt Bea's portion would go to Bonnie and Roger.

[29] The case law on this point is not determinative. There is authority for the proposition that I am restricted to the language in the Will and cannot consider the surrounding circumstances: see, for example, DiMambro Estate v. DiMambro, [2002] O.J. No. 4393 (S.C.J.) at para. 26.

[30] There is also case law that would allow me to sit in the testator's armchair and consider the surrounding circumstances: see, for example, Re Mackie, [1986] O.J. No. 289 (S.C.J.) at para.13 and 16; and Campbell v. Shamata, [2002] O.J. No. 99 (S.C.J.) at para. 7.

[31] I am persuaded, however, by the reasoning of my colleague, Madam Justice Molloy in Campbell v. Shamata, supra, at para. 7:

> ...to determine whether a contrary intention appears in the will, it is necessary to interpret the will itself. If there is a clear clause one way or the other, that may well be the end of the matter. However, I do not read any of the authorities cited as standing for the proposition that the ordinary rules for the proper interpretation and construction of the terms of the will do not apply. On the contrary, it seems to me that one must interpret the will in accordance with the well-established principles of construction and then decide whether, given a proper interpretation, a contrary intention is set out in the will. In some circumstances, depending on the wording of the will, surrounding circumstances will have no bearing and cannot be taken into account. In other cases, a consideration of surrounding circumstances may be necessary to properly interpret the will and give effect to the wishes of the testator... the so-called "armchair rule" for the interpretation of provisions of a will has been part of the common law for a very long time. It would take clear statutory language to displace it.
>
> [32] I conclude, therefore, that in determining whether there is a intention in the will that is contrary to the general rule in Kossak Estate, supra, that a lapsed residuary gift passes on intestacy, I am entitled to sit in the "testator's armchair" and consider such surrounding circumstances as the testator's knowledge about and relationship with her family. In my view, this is a principled approach that accords with what the Court of Appeal has described as "the basic rule for the construction of wills, that is, to determine the true intention of the testator in light of all the surrounding circumstances:" Barlow v. Hircock, (C.A.) (June 17, 1980, unreported) as cited in Re Hopkins, (1982) 35 O.R. (2d) 403 at 408; also see Re Shamas, [1967] 2 O.R.275 at 278 (C.A.).
>
> [33] **In this case, I have found "a contrary intention in the will" based on the uncontradicted affidavit evidence that Shirley considered Bonnie and Roger to be her only first cousins and together with Aunt Bea her remaining family, and that the other three cousins were virtual strangers. As a result, the lapsed residuary gift does not go out on intestacy.**

Question: Is this case decided correctly?

ANTI-LAPSE LEGISLATION: THE PREFERRED CLASS

The development of the lapse rule brought early statutory revision in English law in respect of lapsed gifts to close relatives. Thus the Wills Act 1837 (UK) provided the predecessor legislation to the contemporary provisions of our provincial statute that deemed a gift to the spouse or issue of the deceased legatee rather than have the gift to the predeceasing close relative falling into the residue of the estate. Why? Both lapse and anti-lapse are rationalized in common expectations – we presume that testator would rather the gift go to the spouse or issue of a predeceasing child (that is, stay within the family) and that a gift to a predeceasing friend (that is, stay within the friend's family). Given that these rules can be ousted by the testator in his will, we presume further that the testator knows the rule and provides in his will accordingly.

The anti-lapse rule is relatively simple:

except where a contrary intention appears in the Will, the doctrine of lapse does not apply where a legacy or devise is made to the child, grandchild, or sibling of the testator or testatrix who predeceases him / her where that person leaves a spouse or issue. In such cases, the gift is treated as being made directly to the persons who would have taken from the donee's estate if he or she had died intestate immediately after the testator or testatrix.

Thus, the SLRA provides:

> 31. Except when a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator, either before or after the testator makes his or her will, and leaves a spouse or issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,
> (a) if that person had died immediately after the death of the testator;
> (b) if that person had died intestate;
> (c) if that person had died without debts; and (d) if section 45 had not been passed.

Re Wolson
[1939] Ch 780

Here the testator left a Will with a residuary clause that his widow would take a life interest and that after she died, the remainder would go, in a ¼ part, to certain people who attained 25 years of age. One of those people was his daughter. Thus, her share of the residue was conditional.

The daughter survived the testator, but died at age 24. It was held that the statute did not operate to save her share; that is, it did not operate to consider her as still alive when the testator died (in which case she would have been 25 years of age). If she had predeceased him having attained age 25, her share would not have lapsed according to the statute. The anti-lapse rule did not relieve against a condition of the gift to her given that she survived the testator.

Dewitt v. Taggart Estate
2006 CanLII 26979 (Ont. S.C.J.); cb, p.602, fn.71

The testatrix left the residue of her estate to her two sons 'in equal shares per capita'. Does this oust the anti-lapse provisions by evidencing an intention of the testatrix to disallow a stirpital distribution. No.

Per Tucker J:

> [4] Does the wording of the Will and the provisions of the Succession Law Reform Act prevent lapse of James Dewitt's gift? Or is the intention of the testator to leave her estate only to the child that survived her?
>
> [5] The respondent argues that the deceased, James Dewitt was not close to their mother. **The lawyer that prepared the Will filed his notes from his instructions from the testator, which he says indicates an intention on the part of the testator to leave her assets only to the surviving children. In other words, use of the term "equal shares per capita" in their interpretation would result in a lapsing of James Dewitt's gift.**
>
> [6] **I would note firstly that such an interpretation would mean that there would have been an intestacy estate if both these children predeceased their mother. I note again that there was no gift over. It would potentially also have resulted in the grandson who cared for the grandmother being disentitled to share in any part of the estate. Given that my review of the wording of the Will is limited to the actual documentation, the relationship issues between the family are not part of what I can use or consider to determine the intention of the testator. I also find that the affidavit of the solicitor is not determinative or even to be considered in these circumstances where the wording of the Will is clear and not ambivalent. Family relationships and the interpretation of the solicitor of his instructions are not contrary intentions "in the Will".**
>
> DECISION
>
> [7] Section 31 of the Succession Law Reform Act permits the lapse of a gift to a child who predeceases the testator and leaves a spouse or issue alive at the date of the death of the testator and where no contrary intention appears in the Will.
>
> [8] The words "per stirpes" and "per capita" are often used in Wills but I suggest not often understood. In most situations, the phrase is used in connection with a gift to a class, i.e. the residue of my estate to my grandchildren in equal shares "per capita" and/or "per stirpes". In other words, it specifies the beneficiaries entitled to take any class of unnamed persons. Here the situation is difficult. The use of "per capita" follows the naming of the only two beneficiaries who are specifically named results in the interpretation that I set out below.

> **[9] I find "per capita" in this case means that each of the sons was to receive an equal share. This is reinforced by the wording that the share was "to be divided between them". It is also reinforced that no gift over was provided for in the Will. The anti-lapse provisions of the Succession Law Reform Act would then result in the share of James Dewitt being divided "per stirpes" among his beneficiaries.**
>
> [10] I agree with the applicants in this case and find that the equal share of James Dewitt did not lapse on his death and that s. 31 of the Succession Law Reform Act applies to prevent that lapse. Although I mentioned it before, I note again that no contrary intention is present in the Will to prevent the operation of the antilapse provisions given that James Dewitt was survived by his wife and children.

[It's interesting to note that the judge in this case takes a more conventional approach to interpretation rather than using 'surrounding circumstances' and the notes to impute an intent to the testator to oust the rule.]

Re Wudel
(1982), 13 ETR 25 (Alta QB)

The testatrix's Will provided for a disposition of the residue:

> divide the residue (including but not limiting the generality of the foregoing of cash, stocks, bonds and real property) of my estate as follows:
>
> 1. 8% **to be divided equally among my grandchildren** at the time of my death;
>
> 2. 28% of my estate is to be divided equally among my sons;
>
> 3. 64% is to be divided equally among my daughters.
>
> **If any of my sons and daughters should die after the date of this my last Will** and Testament but before my death, then I direct that the portion that that child was entitled to should be divided equally among his or her children. **Should any of my children die as aforesaid leaving no children then the portion that that child was entitled to shall be divided between my children alive at the time of my death.**

One of the daughters died ***before*** the Will was drawn; the issue was whether the anti-lapse provisions of the statute governed the disposition of the deceased daughter's share of the residue. The effect would be that the child of the deceased daughter would take her mother's share and still receive a portion of the residue equally with the other grandchildren of the testatrix.

Cawsey J held that general form of the estate plan expressed in the Will indicated that the anti-lapse provisions were excluded:

> Although a will speaks from the date of the death of the testatrix the court must go back to the date of execution of the will to ascertain the intentions of

> the testatrix. The only evidence before the court is the will itself and the court must determine the meaning of the words used by the testatrix. Many Canadian courts have stated that the question is simply one of determining the meaning of the words used by the testatrix in the objective sense but more recent cases indicate that a court of construction should attempt to determine the subjective intent of the testatrix to determine the disposition of the property.
>
> The whole will must be considered and not just isolated parts. When the will was drawn it must be accepted that Maria Wudel knew that her daughter, Marion, had predeceased her. However, she did not know what would happen between the date of her will and the date of her death.
>
> If one of Maria Wudel's other children had died between the execution of the will and the date of her death the distribution with respect to that child would not be the distribution contemplated by s. 35 of the Wills Act since no provision is made for the spouse of such deceased child. This appears to be a clear intention on the part of Maria Wudel to oust the provisions of s. 35 of the Wills Act.

Thus, the inclusion of terms to deal with the shares of children who pre-deceased the testatrix after the execution of the Will in favour of his or her children (but not a spouse) and if there are no such children then his or her surviving siblings was consistent with the statute being ousted in respect of the daughter who pre-deceased the testatrix before the execution of the Will.

[Again, a conventional approach to interpretation but one that allows the judge to find the statute was ousted by implication – but not on the face.]

EXCEPTIONS TO LAPSE

(a) Joint Tenancy

Generally one might say that a joint tenancy is by definition excluded from the rule, as gift of a share of a joint tenancy is not possible by law (unless all tenants agree and thus convert the holding to one in common). If the testator is the last surviving tenant and gives the property to someone in the Will who predeceases him, then lapse does operate (as there is no joint tenancy at that point; T has taken title wholly through the doctrine of survivorship).

Re Coughlin
(1982), 36 O.R. (2d) 446 (H.C.J.)

At issue was the construction and operation of the following clause of the will:

> 4. I GIVE, DEVISE AND BEQUEATH all my property, both real and personal, of every nature and kind whatsoever and wheresoever situate of which I am possessed or over which I may have a general power of appointment, to my sister, MONA COUGHLIN, my brother, ALONZO COUGHLIN and my

> nephew, GERARD GRADY, in equal shares, **share and share alike to be theirs absolutely.**

Only Gerard survived the testatrix; the other two each pre-deceased her leaving neither spouse nor children.

The issue was in respect of the phrase ‘in equal shares, share and share alike to be theirs absolutely’ – **did To intend to give property as a joint tenancy (but only Gerard was alive at T’s death) or in common and per stirpes (i.e. individual shares which pass to the deceased donee’s issue)?** The latter – the family circumstances were consistent with a stirpital gift and not a joint tenancy.

Per Rutherford J:

> With these principles in mind then, what did the testatrix intend by para. 4 of this will? I must put myself "in her armchair", having regard following surrounding circumstances which are in evidence:
>
> (a) From 1956, when he was one and one-half years of age, until the spring of 1978, Gerard Grady lived with the testatrix, her sisters Lillian and Mona Coughlin (his great-aunts) and her brother Alonzo Coughlin (his great-uncle) at 291 Euclid Street, Peterborough.
>
> (b) During that time, Gerard Grady was raised and provided for to the by his great-aunts and his great-uncle.
>
> (c) At the time of the making of her will, the testatrix was residing at 291 Euclid Street solely with Gerard Grady and the other named residual beneficiaries, Alonzo and Mona Coughlin (Lillian Coughlin having died).
>
> (d) During the time Gerard Grady resided with the testatrix, the surviving next of kin, Donald Coughlin, visited them approximately twice yearly.
>
> **This case raises a conflict between two rules of construction of wills: the rule that the will should be construed on the presumption that the testator did not intend to die totally or partially intestate, and the tendency of the law to lean towards a tenancy in common as opposed to a joint tenancy. If I find that the testatrix intended to benefit only the survivor of the three named beneficiaries, I must find that she intended to convey a joint tenancy. If I find she intended a tenancy in common, the result is that two of the bequests lapse and there is a partial intestacy with respect to two-thirds of her estate.** These rules, I reiterate, are to be used only if the intention of the testatrix is not manifest from the instrument in the light of surrounding circumstances.
>
> **In my view, I do not need to resort to these rules to interpret this will. My reading of para. 4 of the will convinces me that the testatrix intended that the residue of her estate pass to the survivor or survivors of the three named beneficiaries.** The testatrix, with her brother, her sister and her great-nephew, formed a household which had existed at 291 Euclid Street, Peterborough, since 1956. To that household, Donald Coughlin was

> an outsider even though he was the nearest surviving blood relative, apart from her brother and sister, to the testatrix. I do not believe that the testatrix intended that Donald Coughlin, or any other person, should take the shares of her brother and sister, should they predecease her, leaving Gerard Grady as the sole survivor of the named beneficiaries.
>
> This view is supported by the final words of the dispositive paragraph: "... to be theirs absolutely". These words denote an intention to dispose of the entire residue of the estate to the named beneficiaries and they imply a right of survivorship. As Ritchie J. said in Re Harmer (1964), 46 D.L.R. (2d) 521 (S.C.C.), at pp. 524-25:
>
> > The inclination of Courts to lean against a construction which will result in intestacy is far from being a rule of universal application and is not to be followed if the circumstances of the case and the language of the will are such as to clearly indicate the testator's intention to leave his property or some part of it undisposed of upon the happening of certain events.
> > It appears to me, however, that when an individual has purported to make final disposition of all his 'property both real and personal of every nature and kind and wheresoever situate', he is not to be taken to have intended to leave all that property undisposed of on the happening of certain events, unless there are some very exceptional and compelling reasons for so holding. As was said by Lord Shaw of Dunfermline, in Lightfoot v. Maybery, [1914] A.C. 782 at p. 802, a construction resulting in an intestacy 'is a dernier ressort in the construction of wills'.

(b) Gift Made in Fulfilment of a Moral Obligation

There is old authority that supports the proposition that a gift motivated by the testator's fulfilment of what he thought to be a 'moral obligation' upon him falls outside the lapse rule; see, for example, Stevens v King [1904] 2 Ch 30. On the other hand, courts have held that the payment must relate to a legal duty else there may lapse.

Re Mackie
(1986), 54 OR (2d) 784 (H.C.J.)

Should a gift lapse where the testator and his deceased spouse were cared for by the deceased donee (the testator's sister-in-law) and the testator may have felt he was morally obliged to provide a gift for her in his Will? Per Ewaschuk J:

> ...there is a need to confine situations where the moral obligation exception applies lest the exception swallow up and consume the general doctrine of lapse. It seems to me that it is generally arguable in most wills cases that a testator confers a testamentary gift on a beneficiary for some moral consideration, e.g. for past friendship or kindness, or simply because of blood relationship.

> **Where a testator confers a testamentary gift on a beneficiary by reason of past friendship with, or kindness on the part of, the beneficiary, the testator is under no moral obligation to do so. The testator has a moral obligation to a beneficiary only when the beneficiary is owed a fixed debt by the testator or a relative of the testator. In the later [sic] situation, the testator intends that the debt must be discharged, whether to the beneficiary or to the beneficiary's estate, since it is only morally proper to do so.**
>
> **In non-debt situations, it is difficult to accept the notion that the testator would wish to reward the beneficiary's estate, and those persons that take from the beneficiary's estate, since whatever notional obligation the testator owed to the predeceasing beneficiary was more personal in nature than the payment of a fixed debt transmissible to the beneficiary's estate. In other words, this form of obligation is owed, if at all, only to the beneficiary and not to his or her estate.**

SUBSTITUTIONARY GIFTS

The testator may include provisions to allow for an alternate beneficiary to substitute for a preferred beneficiary and avoid the lapse rules. Lapse still applies in relation to the substitute.

To be effective in avoiding lapse, then, the disposition should make clear that the lapse doctrine in being avoided through a clear statement of who should take in the event of the primary legatee predeceasing the testator.

Re Cousen's Will Trusts
[1937] Ch 381

Here the testator made a Will leaving the residue of his estate to his wife for life with one half of the remainder to the children of his uncle and aunt (separately):

> ... who shall be living at my decease in equal shares and as to and concerning the other half thereof for all the children of my late aunt... who shall be living at my decease in equal shares Provided always and **I declare that if any child of my late uncle... or of my late aunt... shall have died in my lifetime whether before or after the date of this my will leaving issue living at my death the share in the residuary trust funds which such child would have taken if he or she had survived me shall be held in trust for his or her personal representatives as part of his or her personal estate.**

No child of either the uncle or the aunt was alive at the testator's death. One of the uncle's daughters (Catherine) left a daughter (Jane) who was alive at the testator's death. Catherine had died during the testator's lifetime. Her husband (William) also died in the testator's lifetime. William had left his estate to Jane, including anything that he might have obtained through Catherine's estate.

Thus: the child of the uncle (Catherine) was no longer alive and neither was her personal representative (William). The personal representative left his Estate to their daughter (Jane). Did the gift to Catherine under the fall into intestacy, or, did it pass to Jane through the personal representative's estate?

According to Farwell J the gift had lapsed and fell to be distributed as on an intestacy as the substitute (William) had died and the statute did not operate to relieve against lapse in that contingency:

> The question here, in these circumstances, in my judgment, comes down really to a question of construction of this will. The testator has undoubtedly endeavoured, and has succeeded up to a point, in avoiding the rule of lapse, because he has made a provision for the person or persons who would take directly, in this case Mrs Alcock, predeceasing him, and has made another provision, a substitutionary provision, providing for the benefit to go to that person's legal personal representative as part of her personal estate. The question is, how are these last words to be read? **In my judgment, according to the authorities to which I have referred, the only way I am justified in reading them is in reading them as being a gift to Mrs Alcock, or, in the events which have happened, to the person who became entitled, on Mrs Alcock's death, to her estate. That, in this case, was her husband, William Alcock. William Alcock did not survive the testator, James Cousen. There is nothing in this will that I can see which provided against the lapse which must arise if, on the true construction of the will the person who is substituted for Mrs Alcock is her husband, William Alcock. If that is the true construction, then this part of the estate of James Cousen has not been disposed of.**

Re Klein
[1981] 1 WWR 41 (BCCA)

What if the testator uses the old form of 'to A, his heirs, executors and assigns' – does this provide a substitutionary gift on A's predeceasing T, or do the words limit the gift (i.e. A must provide what remains to his 'heirs, executors and assigns')?

Traditionally the heirs / executors / assigns are treated as the equivalents of A and thus there is a lapse if A predeceases T.

If one changes the wording from ''to A, his heirs and assigns' to ''to A, and his heirs and assigns' the gift will probably not lapse (unless the Will's own provisions provide for an alternative interpretation).

In this case, the clause read:

> I GIVE, DEVISE and BEQUEATH unto my wife, VIOLET VICTORIA KLEIN, all my estate, real and personal, whatsoever and wheresoever, to hold unto her, her heirs, executors, and administrators, absolutely and forever.

The wife predeceased the testator, there were no issue of that marriage, but the wife has a previous child of another marriage. Taggart JA held that the provision did not establish a substitutionary gift:

In my opinion, the construction of this will is governed in large part by the decision of the Supreme Court of Canada in Re Ottewell. I have that decision before me in (1969) 9 D.L.R. (3d) at page 314. At page 315 Chief Justice Cartwright, giving the judgment of the court, set out the provisions of the will, one clause of which read:

> "I GIVE, DEVISE AND BEQUEATH unto my brother, Fred S. Ottewell, the balance and residue of all my estate, both real and personal, whatsoever and wheresoever found or situate, to hold unto him, his heirs, executors and administrators absolutely and forever."

Chief Justice Cartwright stated the question before the court in the following way, and this is also found at page 315:

> "The question raised is as to the true meaning and effect of the residuary clause, Fred S. Ottewell having died on June 15, 1965, and so predeceased the testator. The appellant who is the only daughter and sole next of kin of Fred S. Ottewell claims the whole of the residue. The respondents claim that the residue should be divided amongst the next of kin of the testator and if this contention is upheld the appellant will be entitled to a one-eighth share of the residue."

At page 316 Chief Justice Cartwright put the contention of the appellant in this way:

> **"The contention of the appellant is that the words with which the residuary clause concludes -- 'to hold unto him, his heirs, executors and administrators absolutely and forever' are words of substitution not of limitation. I can find no support for this submission in the numerous cases which were referred to in argument or in the text- writers.** No assistance is derived from decisions such as Re Marshall, (1944) 3 D.L.R. 178, (1944) 2 W.W.R. 334, dealing with wills in which the wording in a devise or bequest is 'to X or his heirs'. **The words of the will with which we are concerned have long been held to be words of limitation, not of substitution.** It is quite true that their insertion is no longer necessary to confer an absolute interest in realty and that, as Vaisey, J., pointed out in Re McElligott, (1944) 1 Ch. 216 at p. 219, they are inapt in a bequest of personalty; but this circumstance does not alter their character or effect. I am in agreement with the passage from the reasons of Vaisey, J., in the last-mentioned case which was adopted by Johnson, J.A. (7 D.L.R. (3d) 358 at p. 363, 70 W.W.R. 47): '... there can, I think, be no room for doubting that a limitation of personal estate to one and his heirs operates to vest in the person named an absolute interest, the words being for that purpose adequate, although inapt ...' and I agree with Johnson, J.A., that the rule is equally applicable where the property given consists of mixed realty and personalty."

Re Grasett
[1973] 1 OR 361 (CA)

This is really more of a case about ‘class gifts’ than substitutionary gifts. T made the will in 1923, which read in part:

> I Give, Devise and Bequeath the principal of the shares... **unto my brothers and sisters who shall be then living or in case of the decease of them or of any of them then to the child or children of each deceased brother or sister of mine in equal shares,** but so that the child or children of any deceased brother or sister if more than one shall taken only the share which the parent would have taken if living at the time of distribution.

The testator had three brothers and two sisters. **One sister died some four years before the Will was made, leaving issue.** Two of the brothers died, one many years before the will was made and the other shortly after T; neither left issue. The remaining brother died after T, leaving issue. One sister died after T leaving issue. On appeal it was held that T intended to include the children of the sister who predeceased him and thus the gift to them did not lapse.

Per McGillivray JA:

> It is, of course, the use of the word "sisters" which gives rise to the present litigation. Had it been "sister" there would have been none. It is a situation, however, which has arisen more than once in the past and the results are of interest. In *Theobald on Wills*, 12th ed., para. 900, p. 901, the learned author states:
>
> > 900. (vii) Children of parents dead at the date of the will. When there is a gift to the members of a class for their lives, with remainder to their children the death of a member of the class in the lifetime of the testator, after the date of the will, will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take. On the other hand, if the gift is to the testator's brothers and sisters for their lives, with remainder to their children, and the testator has only one brother living at the date of the will children of deceased brothers and sisters will take.
> >
> > ...
>
> Turning then to consideration of the terms of this will I find them more consistent with the interpretation sought by the appellants than I do that of the respondents. **In view of the fact that the testator is said to have been in full possession of his faculties when the will was made it is a reasonable presumption, he having had two sisters, that he was well aware that one was dead. In that event he used the term "sisters" advisedly. Of course he was aware that one at least would not be living at the time of distribution but perhaps the others would not be either; and in fact they were not. Then he provided "in the case of the decease of them or any of them" to the children. How, one may ask, could this refer to any but brothers and sisters without qualification? It could not refer to a sister or brothers alive at the time of distribution for if they**

> **were alive at that time there would be no share to descend. In any event I am satisfied that the term "sisters" associated as it was with "brothers" and followed by the "decease" clause was the testator's way of saying that he wanted the distribution to his nephews and nieces of parents who had not lived to inherit to be on the basis that all were included. I cannot bring myself to believe because he sought by the wording to benefit certain sisters and brothers if alive at time of distribution rather than their children that he intended (sisters having been mentioned) to restrict the balance of his gift to the children of some only of his deceased brothers and sisters. The testator was said to have been on excellent and friendly terms with the Kingstone children and no independent provision is made for them in the will. While one cannot speculate regarding that which might have been in the mind of the testator one cannot help but remark it would seem unlikely, in the absence of any apparent reason for so doing, that the testator would have deliberately followed the harsh course of excluding one whole group of his nephews and nieces.**

SURVIVORSHIP

The Succession Law Reform Act provides:

> 55.(1) **Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he or she is competent to dispose, shall be disposed of as if he or she had survived the other or others.**
>
> Simultaneous death of joint tenants
> (2) **Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.**

The common law dealt with the question of multiple deaths arising from the same incident (e.g. husband and wife killed in a traffic accident) as a question of fact; i.e. determined on the evidence.

Various jurisdictions have revised that rule. Some use an approach based on the ages of the deceased and operate such that persons die according to age in ‘seniority’. As set out in s.55, the Ontario position is different – **we assume, for the purposes of distribution of assets, that the wills of the various people who die at the same time will operate on the fiction that each survived the others (thus avoiding lapse).**