Wills & Estates
Winter Term 2018

Lecture Notes – No. 13

CLASS GIFTS

Class gifts are a convenient way for the testator or testatrix to give gifts in the Will to a group. These are not gifts to individuals per se, but gifts to a class of people who share the gift. Absent guidance in the Will itself, there are rules in respect of the *ascertainment of a class* that might take the benefit of a gift, as well as for *determining membership* when the class 'opens' and 'closes' (at which point one may determine the individual entitlements of members of the class).

Thus, for example, a gift of **'the residue of my estate to my grandchildren'** is a gift to the **class of grandchildren** rather than each individually.

Please note that the common law doctrine of lapse doesn't apply to class gifts. The intention to make a class gift is a 'contrary intention' to the normal lapse rule which operates such that only the grandchildren that are alive when the testator died that have any entitlement at all.

There is a common modification, **'the residue of my estate to my grandchildren per stirpes'** thus allowing the great-grandchildren to take their parent's share where the parent dies after execution of the Will but before the testator or testatrix (and sometimes before the Will was executed).

Identifying Class Gifts

The determination of whether there is a class gift is one bound up with the subjective intention of the testator.

Certainly some forms of words clearly indicate a class ('my grandchildren') while other times the issue becomes a bit more complicated when, say, the testator sets out a list of names which correspond to all his nieces and nephews (indicating a class notwithstanding that the more general description of 'my nieces and nephews' is not used).

Re Snyder
[1960] O.R. 107 (H.C.J.)

In this case, a question arose of to whether a gift of the remainder interest in some land to a brother and sister 'if living' at the time of their father's death was a gift to each individually or to them both as a class:

- If individually and per stirpes, their issue would inherit if the named beneficiaries predeceased the testator.

- If individually and per capita, then lapse would operate and the deceased devisee's share would fall into residue of the estate.

- If a class gift, the survivor would take the whole of the gift.

The Court held that the gift here was to operate as a class gift. The sister's remainder share went to her brother after the termination of an existing life interest in the same property.

The testator's Will was made out using a pre-printed stationer's form and contained the following clauses:

> 1st. I give, devise and bequeath to my son Dorwin Henry Snyder that parcel or tract of land of my farm situated on the East side of the lane comprising Seventy-five acres be the same more or less; said farm being part of lot Seventeen in the Fifth Concession of the Township of Gainsboro. **After his death the Seventy-five acres of land which I gave to him is to be given to his two children Hugh James Snyder and Etta Florella Snyder if living**.
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> 2nd. To my Wife Sarah Elizabeth Snyder and my Daughter Laura Belle Snyder I give devise and bequeath, that certain parcel or tract of land of my farm situated on the West side of the lane containing Seventy-five acres be the same more or less.
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> 3rd. If at the time of (my) Wife's and Daughter Laura Belles death my son Dorwin Henry should be living, the Seventy-five acres of land be the same more or less situated on the West side of the lane which I gave to them is to go my son Dorwin Henry Snyder, **and after his death the same parcel of land is to go his two children Hugh James Snyder and Etta Florella Snyder if living**: And if my son Dorwin Henry Snyder should not be living at the time of the death of my wife Sarah Elizabeth Snyder and Daughter Laura Belle then the same parcel of land is to go to his two children Hugh James Snyder and Etta Floretta Snyder if living.

Thus, there were two devises in respect of two parcels of land: one was to his son Dorwin for life with the remainder to his two children 'if living'. The other parcel of land was to go his wife and daughter for life, with the remainder to go to Dorwin for life and then to his two children 'if living'.

The testator died in 1921, his wife died in 1929, Dorwin's child Etta died in 1949, and the testator's daughter Laura Belle died in 1954. Hugh Snyder claimed the entirety of the land.

One issue was whether there was a class gift. Spence J held there was not and accepted the law as follows based on dicta in **Kingsbury v. Walter, [1901] A.C. 187, 191** per Lord Macnaghten:

> In my opinion the principle is clear enough. **When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator.**

Spence J went on to hold:

> Therefore I have come to the conclusion that the gift to Hugh James Snyder and Etta Florella Snyder was, if not a true class gift, to quote the words of Maugham J. in Re Woods, *Woods v. Creagh*, [1931] 2 Ch. at p. 143, "in the technical sense, at any rate as a group of persons who have got to be living at the death of the testator in order to take any interest under the bequest", and that Etta Florella Snyder having died before the period of distribution, the whole of her interest goes to her brother, the applicant Hugh James Snyder.

Kingsbury v Walter
[1901] AC 187 (H.L.)

The testator made a Will in which he appointed his wife and his niece (Elizabeth Jane) to be his executrixes. He settled a testamentary trust with them as beneficiaries as follows:

> … upon trust to pay the income thereof to my said wife for her life, and after her decease, upon trust for the said Elizabeth Jane Fowler and the child or children of my sister Emily Walter who shall attain the age of twenty-one years equally to be divided between them as tenants in common.

When the Will was executed, the wife, the niece, and the sister were all alive. The niece predeceased the testator. Thus – *did the gift to the niece lapse, or, was the niece part of a class such that her share was redistributed amongst the rest of the class?* Although not apparent on the face, the court held that there was a ‘class of nieces’.

Per Lord Davey:

> Now, the peculiarity of this case is that it is a gift to Elizabeth Jane Fowler and the children of Mrs. Walter who shall attain the age of twenty-one years as tenants in common. It may be said, therefore, that in this case the gift to Elizabeth Jane Fowler was absolute, whether she had attained the age of twenty-one years at the testator's death or not, whereas the gift to the children of Mrs Walter would not vest in them until they attained the age of twenty-one. If it stood upon that bare fact alone, I should have been of opinion that North J's decision was right. But we have to look at the context, the whole of the will; and, reading the whole of the will, I find that although Elizabeth Jane Fowler is not described as a niece in the gift itself, still in the previous part of the will the testator had appointed his "niece Elizabeth Jane Fowler", together with his wife, executrixes of his will; and he afterwards described her as his "niece", and gives to her after his wife's death a messuage or tenement under the description of "my niece Elizabeth Jane

> Fowler". He also appoints her trustee of his will for various purposes. Then comes the gift in question, in which, indeed, he does not describe her again as his "niece", but he calls her "the said Elizabeth Jane Fowler", and goes on to speak of "the child or children of my sister Emily Walter". **I do not at all deny that the case is very near the line; but I think there is enough in this will itself to show that the testator gave the property to her as a niece, and that he makes a special class of nieces consisting of the only child of Mrs Fowler and the children of his sister Mrs Walter, and that it was intended to be a class gift to that special class, the nieces.**

Re Burgess
(1968), 64 WWR 44 (BCSC)

The Will read in part:

> To the two children (Boy and girl) of William Cowan of Lake Johnston, Saskatchewan. One thousand dollars each ($1,000.00).

On the testator's death, Cowan had six children. Notwithstanding, the court held that there was a good class gift to Cowan's children at large as the subjective intention of the testatrix to give such a gift was discernible from the surrounding circumstances.

Per Macdonald J:

> The will indicates that the testatrix had more information about some children she wished to benefit than she did about others. She named the four grandchildren of Mrs. Cartwright. She did not name her cousin, the son of her uncle Arthur Cowan. She did not name "the seven children of Leslie Somerton". She did not name or give the number of the children of Louise Burrows. The material shows that apart from the children of William Cowan, the information set out in the will proved to be accurate.
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> Mr. Morris argued persuasively that Gladys Belle and William Henry were the two children of William Cowan that the testatrix had in mind because she must have known them before coming to British Columbia; she accurately described them as boy and girl; and it is reasonable to infer that she did not know the four other children, the oldest of which was born after an eight-year interval from the birth of her cousin, William Henry. This submission is weakened, although not fatally, by the failure of the testatrix to name the two children. **Looking at the will as a whole and having regard to the little extrinsic evidence, I am of the opinion that the testatrix did not know the names of her two cousins Gladys Belle and William Henry and did not know the name of her first cousin, the son of Arthur Cowan. Having acquaintance, or even closer relationship, some 40 years ago with two particular cousins whose names are forgotten, is an unlikely basis for referring them to other cousins. My judgment of the question is that there was a dominant intention to benefit the children of William Cowan as a class rather than two of them specifically.**

Determining the Membership of the Class

In the usual case, the actual membership of the class is determined on the testator's death (the 'class closes' on that date). If the testator provides otherwise, the ascertainment of members of the class will be determined accordingly.

Re Hyslop
(1978), 3 E.T.R. 216 (Ont. H.C.J.)

The Will read in respect of the residue of the estate:

> To divide the residue of my estate in equal shares between my sons, Donald and Glen. With respect to the share for Glen, I direct my Trustees to invest the same and pay the income therefrom to Glen as long as he lives, **and upon his death to divide the assets then remaining in equal shares among his children**.

One issue was whether the class of Glen's children closed at the testator's death or later? It was held to have closed on Glen's death.

Per Craig J:

> … **there are substantial authorities, some English and some Canadian, indicating that prima facie a gift over to children of the life tenant will keep the class open so as to let in all of those members coming into existence before the date of distribution**… I would refer to *Jarman on Wills*, (8th ed.), firstly at pp. 1634 and 1635, para. 8, dealing with the heading "At what period relations, next of kin, etc. are to be ascertained." Then again at p. 1663 Jarman states in part as follows:
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> Where the Gift is future. -- Mr. Jarman continues (a): Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution.
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> … Having regard to these authorities… **I would hold and apply the rule of construction that prima facie the class remains open until the date fixed for distribution; that is the death of Glen Hyslop. However, I do not feel it is necessary to resort to any rule of construction because giving the words of the will their natural, ordinary and grammatical meaning, it is my opinion that the intention of the testator is reasonably certain. The testator provided that the income from one-half of the residue would be paid to a son and on the son's death the corpus would be distributed among his, that is the son's, children. In my view it is reasonably certain that the testator was referring to or looking at the son's children as of the time of distribution or putting it another way, it is reasonably certain from the words and the language used, that he did not intend to exclude any of the son's children that came into being after his death.**

The General Class Closing Rules

Do all humanity a favour and set out specific rules to ascertain membership of the class and when the class closes in the Wills you draft.

1. Immediate, Unqualified Gift To A Class:

the class closes on the death of the testator absent a contrary intention, express or implied but clearly discernible, in the Will. If a member of the class exists at the time of the testator's death, all those alive or conceived at the testator's death share in the gift.

Re Charlesworth Estate
(1996), 12 E.T.R. (2d) 257 (Man QB)

Per Beard J:

> The testatrix did not refer to any specific beneficiaries by name, but rather referred to "the children of my niece, LYNNE ARBEZ, and my nephew, WAYNE KINDRET." Given that Kindret had only one child and Arbez was pregnant with her first child at the date of the will, there is no indication as to whether the testatrix intended, by those words, to limit the gift to only those children in existence at the date she prepared the will, or to include children born after that date. Further, there is no direct extrinsic evidence to assist the court in determining her intention. Potentially, the class could remain open as long as there remains the potential for either Kindret or Arbez to have more children…
>
> In this case, neither the will nor the uncontested information which has been placed before the court regarding the testatrix's circumstances at the date of the will provide further clarification as to when the testatrix intended the class of beneficiaries to close. Thus, I find that I must go on to rely on the rules of convenience to resolve this issue…
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> [Quoting Feeney on Wills:]
>
> > If the will provides for a direct or immediate gift with no provision as to the time of vesting, the class will close at the date of the testator's death, if there are any members of that class at that date, even though the date of payment to those beneficiaries may be postponed to a later date.
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> In this case, the rules of convenience would require that the class of beneficiaries be determined at the date of death of the testatrix. I am therefore in agreement with the executrix that the class of beneficiaries would, according to these rules, exclude Alaina as a beneficiary, as she was conceived and born after the death of the testatrix.

2. Immediate, Qualified Gift to a Class:

if any member of the class has satisfied the condition, all members of the class will be given an opportunity to satisfy the condition before the class closes, e.g. 'to A's children who have attained 21 years'.

3. Postponed Gift to the Class:

the class closes when the postponement ends. For example, to A for life, remainder to B's children – the class of B's children closes at B's death.

Latta v Lowrey
(1886), 11 OR 517 (Ont SC); cb., p.654

The disposition in the Will provided:

> I give and bequeath unto my son-in-law Emanuel Treadway that part of my real estate commonly known…" [as, and providing a description] "…during his and my daughter Mary Ann's natural life **then and after that** to be given to her children to them their heirs and assigns forever…

The remainder interest thus went to the children of Mary Ann; 6 children were alive when the testator died. Mary Ann had another 2 children after the testator dies. When she died, 5 of her children were still alive. Were the Estates of the 3 dead children of Mary Ann to be counted within the class?
Per Boyd C:

> **The rule laid down in Hawkins on Wills, at p. 72, appears to be substantiated by the authorities and is in these words: "If real or personal estate be given to A for life, and after his decease to the children of B, all the children in existence at the testator's death take vested interest subject to be partially divested in favour of children subsequently coming into existence during the life of A."**… The Court has arrived at this rule of construction impelled by the operation of two principles, one in favour of the early vesting of estates, and the other in favour of including all who come into being before the period of division: Hutcheson v. Jones, 2 Madd. 129. **By the terms of the will in this case the estate in remainder vested forthwith upon the testator's death in the six children of his daughter then living and from time to time in the two subsequently born. The death of any child before the period of distribution does not affect the right of that child's representatives to claim the share of the one deceased. My opinion is therefore in favour of the estate being divided into eight parts and going to the living children and the representatives of the deceased children on that footing, and I so answer the case submitted.**

It was held that the issue of the dead grandchildren would inherit their portions – the class was to take upon the testator's death, but the individual entitlements of members of the class at that time were subject to becoming diminished with the birth of siblings in the future.

4. Postponed, Qualified Gift to a Class:

the class will close when the postponement ends and upon a member of the class fulfilling the condition.

Re Edmondson's Will Trusts
[1972] 1 WLR 183; cb., p.657

In this case, the testator made a gift of ¼ of the residue of his estate to his son Albert for life, remainder to such children or remoter issue of Albert as Albert "should by deed or will appoint." The testator died in 1931.

In 1949, Albert directed the executors/trustees to hold the fund for such of the children of his two sons, John and James, 'whenever born as being a son or sons shall attain the age of 21 or being a daughter or daughters shall attain that age or marry as a single class and if more than one in equal shares.' Albert released his life interest at the same time.

At the date of the release, John Had one child, a daughter Margaret age two. James had no children. John had another three children and James had another four children. Margaret attained age 21 in 1968. When did the class close – with children born before the 1949 release or after?

Upon the construction of the words 'whenever born', Russell LJ held that the class remained open until the deaths of John and James (rather than closing when one member of the class attained age 21):

> In the reported cases there are instances in which phrases descriptive of the class in apparently unlimited and general terms have been held not to exclude the rule, on the ground that they were capable of referring only to the period before the application of the rule would close the class. Among such phrases we find "all the children . . . whether now born or hereafter to be born": "all and every the children of X": "the children of X as many as there might be": "all or any the children or child of X." Goulding J. considered that it would be too great a refinement to draw a distinction between such phrases (and in particular the phrase "whether now living or hereafter to be born") and the words "whenever born." He described as tempting, and we think that in the end he succumbed to the temptation, to say that both phrases covered the future without any express limit, and therefore why should the latter phrase disclose an intention to hold up the possibility of distribution of the shares of those with a vested interest?
>
> We do not find this proposition thus tempting. In our view there is an important distinction between the two phrases. The former is a general phrase pointing toward the future and therefore to some time in the future. The phrase "whenever born" is in our view a specific and emphatic phrase which in terms points to all time in the future. It is equivalent to "at whatever time they may be born," and is limited only by the course of nature to the lifetime of the parents. If the phrase had been "whenever in the lifetime of their respective parents born" there could be surely no doubt that the class was clearly defined as remaining open to membership by all grandchildren:

just as in *Scott v. Earl of Scarborough* (1838) 1 Beav. 154, 156 where the phrase was "hereafter be born during the lifetime of their respective parents." (It is true that there was in that case apparently another phrase also which showed that the rule was inapplicable: though oddly enough this was not the phrase relied upon.) If the phrase used was "now born or hereafter at whatever time to be born" surely the rule would be excluded: and "whenever born" is to our minds the precise equivalent. In summary the phrase "born or hereafter to be born" is a general reference to the future without express limit in time and therefore consistent with a limit in time imposed by the direction for vesting and the rule. But "whenever born" is a particular reference to the future expressly unlimited in time, and therefore readily to be distinguished as inconsistent with a time limitation such as is imposed by the rule.