Wills & Estates
Winter Term 2019

Lecture Notes – No. 12

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**.
>
> 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.
>
> 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.
>
> 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:
>
> 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.
>
> … 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…
>
> [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.
>
> 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.

“THE RULE AGAINST PERPETUITIES”

Ugh.

At last, Bob discovered the previously lost simple explanation of the Rule Against Perpetuities

Since around the 13th century, the common law has attempted to limit or to expand, alternatively, the ability of property owners to place restrictions on how their property can be passed to others. Sometimes proprietors have been motivated by dynastic concerns ('let's keep the property in the family forever') or the evasion of some sort of obligation or tax payable when property passes to another person. An example: the grant 'to A and the heirs of his body' was intended to keep property within the male lineage of the proprietor ('fee tail') and was sanctioned by the statute *De Donis Conditionalibus* in 1285. Fee tail gave rise to a host of problems and was restricted gradually by the courts as the perpetual restraint of alienation. In its stead other forms of restriction arose, were scaled back and eventually abolished - but not before this seemingly endless cycle of 'development' littered the common law of property with enough abstruse points of law to keep generations of legal historians and law students busy.

For present purposes, it is important to understand the principle as a matter of common law, and, its modified form within Ontario law as provided for in the provincial *Perpetuities Act*. On the whole, perpetuities problems are easy to avoid.

(a) Vesting Problems

'Vested':

- A **'vested interest'** means a present or future interest in property which the law will presently protect.

- A **'contingent interest'** is not vested; rather, it may be conditional on something happening and one may not be able to deal with it until it vests (i.e. sell it).

- A vested interest may be **'defeasible'** or **'indefeasible'**; that is, it may vest now but can be defeated later (defeasible). Thus, 'to A for life, remainder to B for life, remainder to C' features three vested interests where all A, B, and C are alive. B's interest may be defeated by his or her death before A's death, and thus it is 'defeasible' and if defeated B would technically be **'divested'**.

- In general, the law in interpreting a conveyance will prefer **'early vesting'** as it is more certain and convenient; see *Duffield v Duffield* (1829), 3 Bligh's New Reports 260.

- Equally where there is a condition and it may operate as a condition precedent or subsequent, the law presumes a condition precedent (so as to allow early vesting).

To glance at, shudder, and hurry onwards:

'The Rules in Edwards v Edwards'
(1852), 15 Beav. 357

These rules deal with future interests where the owner conveys property to others in the form of a life estate followed by remainder interests. The orientation of these rules is to provide clarity in respect of when a contingency operates (on the death of the life tenant or otherwise) so that one may know with certainty in whom the remainder vests and when.

Here the testator left property in trust (she could not take directly) for his wife for life, and thereafter to his three children, with the provision that:

> **'if any of my children shall die, and leaving no children, his or her share shall be equally divided between the other two.'**

The widow died; the three children survived her, but subsequently a son died without issue. The Court held that **his share did not pass to his brother and sister, but became absolute in him when he survived his mother even though he subsequently died without issue.** The interpretation arises based on the (presumed) intention of the testator.

The Court pointed out four classes of cases in which questions of this description arise.

> First, **'to A, but if he shall die, then to B'**. There is no contingency arising from 'if' because A is certain to die. Thus, it is presumed the testator intended that A should not take if he died before the testator, but that the property should go to B in that event, thus preventing a possible lapse. **Rather than cut down the absolute estate in A and make it a life estate with remainder to B, the clause is given a substitutionary construction**; i.e. if A outlives the testator, he takes; if not, B takes.
>
> Second, **'to A, but if he dies without issue, then to B'**. Here, a real contingency is expressed without reference to the time of death, and it would seem that the ordinary meaning should be given the words, so that **upon A's death without surviving issue, whenever his death occurs, B should be entitled to take the property.**
>
> Third, **'to W for life, remainder to A, but if A dies, then to B'**. Since there is no real contingency expressed, **one assumes that the testator intended the gift over to take effect on the death of A before the period of possession or distribution**; and here, as distinguished from the first class, the period of distribution is at the termination of the life estate, rather than at the death of the testator. Therefore, **if A survives the life tenant, the gift to him becomes absolute, and only upon his death before the death of the life tenant can the alternative remainder to B take effect.**
>
> Fourth, **'to W for life, remainder to A, but if A die without issue, then to B'**. The contingency must be construed to mean the occurrence of the contingent event before the period of distribution, and thus **only upon the death of A without issue in the lifetime of the life tenant can the alternative remainder to B operate. If A survives the life tenant, his interest becomes absolute**, even though he may subsequently die without issue. The principle is said allow vesting as soon as possible.

Note: the intentions of the testator here are constructed by the court and are not in any way related to the actual intention of an individual testator. Thus the courts created presumptions, exceptions, and counter-presumptions. As one judge commented: there are 'ghosts of dissatisfied testators... who... wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills;' see *Perrin v Morgan* [1943] 1 AC 399, 415.

Re Brailsford
[1916] 2 Ch. 536

Here the testator left real estate to trustees in trust for his wife for life, and after her death to his son, "his heirs and assigns," with a double gift over in case he should die either without leaving or leaving issue. The widow pre-deceased the son. It was held that the gift to the son was indefeasibly vested in him on the death of his mother.

Per Sargant J:

> As was pointed out by James L.J. in *Olivant v. Wright*, the fourth rule of construction laid down in *Edwards v. Edwards*, which was overruled by the House of Lords in *O'Mahoney v. Burdett*, had laid down that the introduction of a previous life estate altered the onus probandi and raised a presumption that the death referred to was a death in the lifetime of the tenant for life unless a contrary intention appeared in the will. That was overruled by the House of Lords, and **it is now established that the contingency is to be deemed a continuing contingency in the event of the death of the devisee or legatee at any time unless a contrary intention appears by the will.**
>
> It is contended in the present case that there is a sufficient expression of a contrary intention. It is said that the manifest intention is that there shall be a division of the property at the death of the widow. No doubt the property in question will in all probability be the only property of the testator and will be divided in this sense, that the real estate devised to the son will be handed over to him, although the other property may be retained by the trustees in order to carry out the trust for the separate use of the daughter. But on the whole I do not lay any great stress upon this view of the matter, since the case is not the case of trustees dividing personal estate and so not being able to hand over the property hereafter. The property here is real estate, and if there is any gift over at a future time that is made by way of legal limitation and would operate without any intervention on the part of the trustees. This consideration, therefore, is not in my opinion sufficient to bring the case within *Olivant v. Wright*.
>
> **But a much more cogent reason for the contention is to be found in the fact that the property is expressly devised to the son, "his heirs and assigns," while if the two alternative gifts over are to be read as taking effect on the son's death whenever it occurs, the combined effect of the gifts over is to out down what is prima facie an absolute interest to one which is in substance indistinguishable from a life estate.** It is true that in point of law there is no objection to the gift of an estate in fee simple coupled with two executory devises which are exhaustive and provide for every event; but it is a curious intention to ascribe to the testator that where by marked words of limitation he has placed the devisee in the position of an absolute owner he should immediately afterwards reduce him practically to a position no better than that of a life tenant; and, bearing in mind that the presumption laid down in *O'Mahoney v. Burdett* is only a prima facie presumption, **I think that the marked use of words giving an estate of inheritance to the devisee is so far repugnant to a construction of the will which would reduce him practically to the position of a life tenant as to make it**

reasonable and proper for the Court to limit the time for the operation of the gifts over in such a way as to put the son in the position of being possibly entitled to become at some time during his life the absolute owner of the property.

Re Archer
(1907), 14 O.L.R. 374 (K.B.)

Where the will provides that a gift that would otherwise vest does not do so because some event has taken place doesn't fail because the person who would otherwise receive the gift cannot do so (unless that was T's intent).

Re Barton
[1941] S.C.R. 426

Where a specific gift is subject to the discretion of trustees to pay the whole or such part of that interest as they see fit, the gift of the corpus is nonetheless vested in the beneficiary despite that beneficiary having to fulfill a condition (here, attainment of an age).

Re Stephens
[1978] 5 W.W.R. 444 (B.C.S.C.)

A vested interest may be defeated by a subsequent condition or a contingency provided that the Court can assess from the beginning, precisely and distinctly, the date that the interest will determine according to the condition.

Re Taylor
[1972] 3 O.R. 349 (H.C.J.)

The presumption of early vesting is that wherever the words used in a will permit a construction that results in early vesting, the gift will be vested rather than contingent.

Re Squire
[1962] O.R. 863

A legatee may accelerate payment that is otherwise to be postponed where he or she is absolutely entitled to the gift on the same reasoning as the collapsing of a trust by all *sui juris* beneficiaries.

Re Krause
(1985), 18 D.L.R. (4th) 631 (Alta. C.A.)

A gift to 'my surviving brothers and sisters' was held to be a contrary intention to the anti-lapse provisions where one sister predeceased the testator; she did not 'survive' the testator and thus her gift failed to vest.

(b) Interests that Vest in Violation of the Rule against Perpetuities

The 'rule against perpetuities' is better thought of as the 'rule against remoteness of vesting'; it acts to set the maximum time *between* {the grant of an interest in property} *and* {the time that same interest does or might vest} in some person.

Why have the rule at all? Historically, the law of real property after the Norman conquest (1066 and all that) featured the principle of primogeniture. That is, inheritance by the first born son. Over time the common law shed this in favour of almost completely free alienation. However, and given that land was the most valuable asset one could own for a very long time, there was a tendency in aristocratic families to try and reproduce constraints on alienation. Hence, the "rule against perpetuities" was developed as a check.

The rule itself can be traced back at least to ***The Duke of Norfolk's Case* (1681), 23 ER 388.** At the time that the case was decided, the common law had allowed for various techniques to restrict alienation based on contingent interests. The court held that whatever the nature of the contingency it must be capable of bring fulfilled 'within the Compass of one life.'

In contemporary legal thinking, the rule acts to balance two competing policy interests in contemporary legal thinking: freedom of disposition of proprietary interests and the need to maintain the economic exploitation of property. There is a concern that property which might vest too far in the future might fall into disuse. At the same time, there is a recognition that past or present generations should not be able to rule from the grave over the disposition or property far into the future.

***Common Law Form of the Rule: if there is a possibility* that the interest might vest outside the allotted time, then the grant is void at common law.**

***Statutory Form of the Rule:* rather than determine whether the rules is breached on a theoretical possibility, we 'wait and see' whether the rule is violated.** Thus, under the provincial Perpetuities Act, s. 4(1): "[e]very contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish, (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

The basic common law rule:

an interest is only valid if it is incapable of vesting outside the perpetuity period which is calculated as the life or lives in being at the time of the creation of that interest, plus 21 years. If it is possible that the interest will vest outside the perpetuity period, then the interest is void as a matter of law.

The 'perpetuity period' itself is perhaps the most confusing part of the rule.

The form of the rule doesn't mean that the time period in question relates to just any person who was alive at the making of the grant, it is taken to mean the lives of persons *relevant to the grant* – the grantor and the grantees, or person that may obtain interests under the grant. The grant might even specify another person or set of people whose lives operate to determine the perpetuity period. Sometimes other people are necessarily involved, a grant to one's grandchild may make the life of one's child important.

Example 1:

> **"To B, the child of my good friend A, provided that she has a child during A's life or 20 years after his death."**

Here there is the grant of a contingent interest – a conditional gift of property, the gift to B being contingent on her having a child before or within 20 years her parent A's death.

The relevant life in being is that of A; therefore, (his life + 21 years) is the perpetuity period. The satisfaction of the condition *cannot* not fall outside the period as it is calculated as (his life + 20 years) an thus is valid.

Example 2:

> **The donor makes a deed giving an *inter vivos* gift of his property "to my grandchildren who attain age 21".**

Assume the donor had at least one child when the deed was executed.

The relevant time period is **the life of donor**. The grant **must** fail at common law.

The perpetuity period runs from *the time that the grant is created*; that is, when deed is executed. Is there a possibility that an interest might vest outside the period of the life of the donor plus 21 years?

Yes - it is possible that the grantor will have more children after the deed is executed and that such a child may have children. Thus, the unborn child (grandchild) of an unborn child (son or daughter of the donor) might have an interest in the property, and that interest may vest beyond the death of the grantor plus 21 years.

The jurisprudence subsequently developed assumptions respecting such matters as lifespan or the age at which women may no longer conceive – the point being to predict the future for the sake of the rule.

Because it was a harsh and confusing rule, it was softened by statute.

Selected provisions of the provincial Perpetuities Act

2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

3. No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

Presumption of validity and "Wait and See"

4. (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

Measurement of perpetuity period

6. (1) Except as provided in section 9, subsection 13 (3) and subsections 15 (2) and (3), the perpetuity period shall be measured in the same way as if this Act had not been passed, but, **in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.**

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

(3) Where there is no life satisfying the conditions of subsection (1), the perpetuity period is twenty-one years.

Presumptions and evidence as to future parenthood

7. (1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(a) it shall be presumed,
(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and

(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Subject to subsection (3), where any question is decided in relation to a limitation of interest by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that arises concerning the rule against perpetuities in relation to the same limitation or interest despite the fact that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children.

Reduction of age

8. (1) Where a limitation creates an interest in property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, would, but for this section, be void as incapable of vesting within the perpetuity period; but

(b) that it would not be void if the specified age had been twenty-one years,

the limitation shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

Exclusion of class members to avoid remoteness

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of

> the class, prevents subsection (1) from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

***Thus,* the statute (i) ameliorates the basic operation of the rule against contingent future interests by adopting a 'wait and see' approach; (ii) dispenses with the common law presumption that there is no limit on the ability to have children in terms of age; and (iii) provides that age attainment clauses that would fail are merely read down to ensure compliance with the rule.**

Is any of this really a serious concern any more?

[No. Perpetuities are easily avoided.]

THE RULE AGAINST ACCUMULATIONS OF INCOME

The rationale for the rule against accumulations of income is to prevent the income under a trust or conveyance being tied up for an unreasonable length of time. At common law the rule was that an accumulation beyond the perpetuity period was invalid; *Harrison v Harrison* (1787), 4 Ves. 338.

In *Thelluson v Woodford* (1799), 4 Ves. 227, such a Will was upheld against a public outcry against its perceived unfair terms to the testator's family. The legislative response of the British Parliament was the *Accumulations Act of 1800*. Under the original statute, no income should be accumulated for any longer term than either (a) the life of the settlor; or (b) the term of twenty-one years from his death; or (c) during the minority of any person living or *en ventre sa mere* at the time of the death of the grantor; or (d) during the minority of any person who, if of full age, would be entitled to the income directed to be accumulated. After the satisfaction of one of these periods, income that continues to flow in to the trust must be distributed.

Selected provisions of the provincial Accumulations Act

The *Accumulations Act* provides:

> **1. (1) No disposition of any real or personal property shall direct the income thereof to be wholly or partially accumulated for any longer than one of the following terms:**
>
> 1. The life of the grantor.
>
> 2. Twenty-one years from the date of making an *inter vivos* disposition.

> 3. The duration of the minority or respective minorities of any person or persons living or conceived but not born at the date of making an *inter vivos* disposition.
>
> 4. Twenty-one years from the death of the grantor, settlor or testator.
>
> 5. The duration of the minority or respective minorities of any person or persons living or conceived but not born at the death of the grantor, settlor or testator.
>
> 6. The duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated.

The terms stipulated in the statute are alternatives; any will suffice to invoke the rule. Please note that in determining the application of the rule both implied and explicit accumulations are relevant.

Terminating the Accumulation

Failure to comply voids the relevant provision under section 1 (6):

> Where an accumulation is directed contrary to this Act, such direction is null and void, and the rents, issues, profits and produce of the property so directed to be accumulated shall, so long as they are directed to be accumulated contrary to this Act, go to and be received by such person as would have been entitled thereto if such accumulation had not been so directed.

Adamson Estate v. McIntyre
(1997), 16 E.T.R. (2d) 189 (Ont. Gen. Div.); cb. p.805, note 3

Dunn J.:

> 3 The issue is to determine who is to receive the 'extra income' in the estate when the Accumulation Act, R.S.O. nullifies the continued accumulation of income after 21 years. Is such income an intestacy, or is the residuary beneficiary entitled to it?
>
> Facts
>
> 4 **The testator died March 31, 1973 having made a will the year before. That will provides certain specific bequests to friends and some of her next of kin. The residue of the estate is set aside for the life of the testatrix's sister and $150.00 per month is directed to be paid to her for life - out of the income of the capital. On her death the residue is divided into 2 parts; one part given to the C.N.I.B. and the other 1/2 to be divided among certain other named charities.** (See Appendix A for the text of the will.)

5 The life annuitant, Freida McIntyre, has received the monthly sum for over 21 years. The will also allowed for discretionary encroachment on the capital for her benefit in the event of illness, incapacity or other need. Substantial encroachments for these provisions have been made over the years. (See Appendix B.)

6 The estate residue, originally valued at some $160,000.00 in 1973 has obviously been managed well. In addition to paying the annuitant for the monthly bequest, the substantial encroachments and costs etc., the residue as at the relevant date now sits at the princely sum of approximately $300,000.00.

...

9 Twenty-one years have elapsed since the date of the death of the testator. Each year the capitalized residue earns income that exceeds that needed to pay the life annuitant and usually whatever encroachments are authorized, and all costs. The Accumulations Act prohibits further accumulations of 'excess income'. Instead, the Act requires that such ex-cess income be distributed "to ... such person as would have been entitled thereto such accumulation has not been directed".

10 Under the will and the Act, who is entitled to the 'excess income'? The charities as final residual beneficiaries claim such excess. On the other hand, the next of kin of the testatrix claim entitlement by virtue of an intestacy of that part of the estate represented by the excess income.

...

18 The lapse or illegality in our case, as a result of the Accumulations Act effects only the earned income beyond 21 years, that is not disposed of to the life annuitant or required for costs or expenses of the estate. This 'excess interest' earned beyond the 21 year peri-od does not appear to be disposed of by the will. It does not appear to be a legacy or de-vise, contrary to law that should revert to and from part of the residue.

19 Approaching the problem from another direction, the residual beneficiaries suggest that because of the Accumulations Act their entitlement to the excess income (otherwise capitalized as residue) is crystallized at the 21 year period.

20 The intention of the testator appears contrary to this approach. Their interest under the will is defeasible and not crystallized until the death of the life annuitant. The extent and determination of who is entitled to the residue will not be known until that time.

...

28 I conclude then that there is an intestacy in the will for that portion of the income earned the accumulated and crystallized residue as at the end

of the 21st year that is not required to satisfy the provision for the life annuitant and encroachments properly made and costs of administration. To that extent only, the next of kin of the testatrix will be enti-tled to share in the income.