Wills & Estates
Winter Term 2024

Lecture Notes – No.15

XV. 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.

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.

Re Wudel Estate; Moore v. Moore
(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.
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> 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.
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> **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 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).**

XVI. 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); cb, p.695

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)

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

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.