Wills & Estates
Winter Term 2025

Lecture Notes – No. 10

X. CAPACITY OF BENEFICIARIES

'Capacity' refers to the legal ability of the beneficiary to accept / disclaim the gift. If the beneficiary is incapable of taking the gift it is void.

A. Illegitimacy and Adoption

The common law distinction between a child 'born outside marriage' and one who is 'legitimate' has been abolished in Ontario: a natural or adopted child of the deceased have equal rights; *Children's Law Reform Act*, ss. 1, 2; *Succession Law Reform Act*, s.1; *Child and Family Services Act*, s.58.

B. Homicide

Gifts under Wills can be held to be unenforceable as a matter of public policy, much as trusts or contracts can be held void on the same terms. The law of succession at common law carried the matter a step farther in respect of homicide on the general principle that a wrongdoer ought not to profit from his or her wrong. Thus a person who kills another unlawfully forfeits any share in the deceased's estate.

At common law, the forfeiture rule has an uncertain scope – did it cover accessories to suicide in addition to murder or manslaughter [see *Dunbar v Plant* [1998] Ch 412]. What of statutory offences like dangerous driving or torts? As one judge has said (in a different context), '[t]he statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case;' *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 268 (HL), per Lord Griffiths).

Re Gore
[1972] 1 O.R. 550 (H.C.J.); cb, p.461

The forfeiture rule doesn't apply where a husband murdered his wife and children and then committed suicide. Her estate could rightfully receive proceeds from a policy of insurance on the husband's life.

Per Osler JA:

> While there is little authority in our jurisdiction, there have been a number of discussions of this problem in the Courts of the United States of America and the conclusion seems there to have been reached that the rule prohibiting a person from profiting from his own wrong has no application in such a case.
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> To say that the object of the murder was to accomplish what could be accomplished by the mere scratch of a pen carries its own refutation and

> leads to the conclusion that profit via the policy was not the object of the crime. The reason for the application of the rule failing, the rule cannot be invoked; *Union Central Life Ins. Co. v. Elizabeth Trust Co. et al.*, 183 Atlantic Rep. 181 at p. 185, per Berry, V.-C.
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> **… Joseph Hector Gore could have divested his late wife, the named beneficiary, of her contingent right to the proceeds of the policies "by the mere scratch of a pen" and hence, it cannot be assumed that he murdered her for that purpose. A proper case for the application of the rule does not arise, the rule being based on the axiom that nothing should be done to encourage murder.**

Brissette Estate v. Westbury Life Insurance Co.
[1992] 3 S.C.R. 87

Here the insurer sought to avoid payment under a policy of life insurance where a husband murdered his wife, was the designated beneficiary to the proceeds of a policy of life insurance on her life, renounced his claim in favour of her estate, and then sought to have the proceeds paid into the estate which he would inherit. The issue was whether the policy of insurance should be enforced, and, if so, whether a constructive trust might arise against the murderer who would take on the intestacy.

For the majority of the Court, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would inherit, but that he could not do so on the traditional rule that one who murders the insured cannot claim insurance proceeds on the victim's life. The dissenters, Gonthier and Cory JJ., would not allow the murder to inherit but held that the contract should be enforced narrowly in favour of innocent heirs; in other words, that the insurer would seem to gain inappropriately otherwise.

Sopinka J held:

> 7 In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.
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> ...
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> 9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act…
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> 13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. **A constructive trust will ordinarily be imposed on property in the hands**

of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in Schobelt v. Barber, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.

14 The requirement of unjust enrichment is fundamental to the use of a constructive trust…

…

16 **In this case, no claim of unjust enrichment has been made out… It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate…**

Oldfield v Transamerica Life Co. of Canada
2002 SCC 22; cb, p. 468, note 17

Here the insured died while committing an illegal act that was a cause of death (smuggling cocaine-filled condoms in his stomach which burst). The insurer sought to avoid paying the proceeds under the contract of insurance on the insured's life. In considering the extent of the forfeiture principle as set out in *Brissette*, the Court held the principle does not extend so far as to prevent the proceeds being paid to an innocent beneficiary where the insured does not intend the insured loss. That is, innocent beneficiaries are not affected by the public policy that a person ought not to be able to insure against his or her own criminal act and thus allow profit from a wrong. Per Major J:

23 In *Brissette*, *supra*, Sopinka J. held that it is consistent with public policy "that a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94). Applied literally, it would prevent insurance proceeds from being paid to any innocent beneficiary named in an insurance policy so long as the insured event was occasioned while the insured committed a criminal act. In this case, it would prevent Maria Oldfield's claim.

24 **Feldman J.A. recognized at the Court of Appeal that Sopinka J. did not hold that insurance contracts contain an implied term that criminal acts committed by the insured automatically exclude coverage**

even where the act is not committed with the intention of causing the insured loss. Likewise, he did not hold that there is a public policy rule that forbids payment to all beneficiaries, innocent or not, whenever the insured commits a criminal act. In *Brissette*, the insurance contract named the surviving spouse as beneficiary. The husband who murdered his wife committed a deliberate act intended to cause the insured event. There was no question that the husband was barred from receiving the proceeds; the Court had to decide whether the contract could be interpreted so as to vest the proceeds in the estate of the wife, or failing that, whether the device of a constructive trust could achieve the same result. The Court answered both of these questions in the negative. In contrast to *Brissette*, the insured in the present appeal did not intend to cause the loss. Nor does Maria Oldfield, who was expressly designated as beneficiary under the contract, need to resort to trust principles in order to receive the proceeds.

25 **In total, Sopinka J.'s decision in *Brissette* demonstrated that he did not intend to displace the principle that innocent beneficiaries who do not take through the criminal's estate should not be affected by public policy. In *Brissette*, Sopinka J. held that "[t]here is nothing unjust in refusing to pay the proceeds of insurance to a beneficiary <u>not designated by the insurance contract</u> when to do so would allow the insured to insure against his own criminal act" (p. 95 (emphasis added)).** Sopinka J. reinforced this statement during his consideration of *Cleaver*, *supra*, in which the insured took out an insurance policy on his own life with his wife as beneficiary. The wife-beneficiary then murdered the husband-insured. By statute, the proceeds were declared payable to the estate of the insured, to be held in trust for the beneficiary. Public policy prevented any payment from being made to the felonious wife-beneficiary but, in Sopinka J.'s words, "[p]ublic policy was not allowed to abrogate a right that the estate had by virtue of the statute" (p. 95). Applying this case to the facts in *Brissette*, Sopinka J. held that "the result in *Cleaver* cannot be achieved in the absence of a provision, statutory <u>or in the contract</u>, providing for payment to the estate of the wife" (pp. 95-96 (emphasis added)). Because these passages appear after Sopinka J.'s earlier statement that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" (p. 94), it is clear that the earlier statement was not intended to be an open-ended change to the traditional public policy rule.

26 A universal rule that "a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds" would have serious repercussions for *bona fide* creditors who provide value to obtain an interest in life insurance. Creditors in numerous instances such as a mortgage and other debt instruments will insist on obtaining an assignment of an insurance policy or being the named beneficiary sufficient to discharge the debt to protect their interest in the event of the debtor dying insolvent.

> **27 If Sopinka J.'s statement was given the broad interpretation that Transamerica seeks, *bona fide* creditors would be unable to obtain insurance proceeds where an insured died while committing a criminal act. To do so would run contrary to a long-standing principle that there is "no illegality in a stipulation that, if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned . . . ." (*Moore v. Woolsey* (1854), 4 El. & Bl. 241, 119 E.R. 93 (K.B.), at p. 98); see also *Beresford* (H.L.), *supra*, at pp. 607-8, *per* Lord Atkin, and at p. 611, *per* Lord Macmillan; *Stats*, *supra*, at p. 240; *Hardy*, *supra*, at p. 760, *per* Lord Denning M.R., and at p. 768, *per* Diplock L.J. ("an assignee for value before the occurrence of the event would not be prevented from enforcing the contract notwithstanding that the event was caused by the anti-social act of the original assured"). The exception was not mentioned or considered in Sopinka J.'s decision.**
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> 28 In *Brissette*, Sopinka J. did not intend to eliminate long-established exceptions to the public policy rule. *Brissette* does not bar a claim by an innocent beneficiary where the insured does not intend the insured loss.

Dhingra v. Dhingra
2012 ONCA 261 (Ont. C.A.); cb, p. 468, note 18

per Rosenberg J.A.:

> [1] **This appeal concerns the rule of public policy that a person who kills another cannot share in the deceased's estate. The principal issue in this appeal is whether that rule applies where the beneficiary, in this case of an insurance policy, was found not criminally responsible on account of mental disorder in the death of the deceased**. A second issue is the role played by the Civil Remedies Act, 2001, S.O. 2001, c. 28. The application judge Pollak J. held that the public policy rule applied.
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> [2] For the following reasons, I would allow the appeal.
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> ...

[After reviewing *Brissette* and *Oldfield*]

> [22] In my view, the public policy rule is as set out in Nordstrom and Re Dreger and the person who is not guilty by reason of insanity, now termed not criminally responsible on account of mental disorder, is not prevented from taking under an insurance policy. The only question, then, is whether the rule of public policy can be said to have been varied because of the intervention by the legislature through the Civil Remedies Act. I will deal with that particular issue later. At this point, I simply state my view that I can see no reason not to apply Nordstrom and Re Dreger. To the contrary, developments since 1976 have only strengthened the policy basis for making an exception for persons found not criminally responsible.

...

[24] **It seems to me that if a person found not criminally responsible on account of mental disorder is not "morally responsible" for his or her act, there is no rationale for applying the rule of public policy. That rule is founded in the theory that people should not profit from their crimes or, more broadly, by their own wrongs.** Section 16 and Part XX.1 of the Criminal Code deny that the NCR accused has committed a crime or can be held legally responsible for any wrongdoing. It was an error for the application judge to describe the appellant as having "committed second degree murder". Further in Winko, at para. 42, McLachlin J. makes the point that the NCR accused is not to be punished; rather, "Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation."

[25] The approach in other common law countries is generally to exempt persons with a mental disorder that would give rise to an insanity defence from the effect of the public policy rule. For example, in the United States, those states that have adopted § 2-803 of the Uniform Probate Code would exempt persons who are not "criminally accountable for the felonious and intentional killing of the decedent". Most so-called "slayer statutes" similarly exempt the insane beneficiary from operation of the public policy rule: see Laurel Sevier, "Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers" (2007) 47 Santa Clara L. Rev. 379; and Gary Schuman, "Life Insurance and the Homicidal Beneficiary: The Insurer's Responsibilities Under State Slayer Laws and Statutes" (2001) 51 Fed'n Def. & Corp. Counsel Q. 197.

[26] This same approach is generally followed in other common law jurisdictions such as Australia and New Zealand. In the United Kingdom, the common law would seem to exempt from forfeiture someone who was not guilty of "deliberate, intentional and unlawful violence, or threats of violence": see R. v. National Insurance Commissioner, ex parte Connor, [1981] 1 All E.R. 769 (Div. Ct.), at p. 774. Thus, a person found not guilty by reason of insanity would not be subject to the forfeiture rule: see Chris Triggs, "Against Policy: Homicide and Succession to Property" (2005) 68 Sask. L. Rev. 117, at p. 126. In any event, even if the forfeiture rule did apply to an insane accused, the common law has been varied to give the court discretion not to apply the forfeiture rule where "the justice of the case requires the effect of the rule to be so modified"; the court is to consider "the conduct of the offender and of the deceased and ... such other circumstances as appear to the court to be material": see the Forfeiture Act 1982 (U.K.), 1982, c. 34, s. 2(2).

[27] To conclude, it is my view that the public policy rule does not prevent the appellant from receiving the proceeds of the insurance policy.

...

[31] **I accept that the Civil Remedies Act is an indication that public policy in Ontario favours preventing persons from profiting from their crimes and that, given the provisions of s. 17, the policy extends to**

persons found not criminally responsible by reason of mental disorder. In my view, however, the Act does not supplant the common law rule of public policy that does not prevent an NCR accused from taking under an insurance policy or a will. At its highest, the Act indicates that the rule ought not to be applied automatically. The common law rule and the Act serve different functions. The common law rule simply prevents the wrongdoer, however defined, from receiving the proceeds of the insurance policy or the will. In many cases, that would mean that the funds would be available either to a secondary beneficiary in the case of an insurance policy, if one is named, or to other beneficiaries, in the case of a will.

[32] A forfeiture order made under the Act, however, deprives everyone, including other beneficiaries, of the proceeds because the proceeds are forfeited to the Crown. A more compelling expression of public policy would be for the legislature to reverse the effect of the public policy that permits the NCR accused to take under a will or insurance policy by deeming the accused to have predeceased the victim. Such a provision would result in the proceeds usually ending up in the estate of the victim for the benefit of beneficiaries other than the accused.

[33] Thus, there are competing public policies. On the one hand, the common law, reinforced by the policy as explained in Winko, is that an NCR accused is neither morally nor legally responsible for the death and therefore should be entitled to take under an insurance policy in which he or she is a beneficiary. On the other hand, there is the reflection of the public policy in the Act favouring the view that proceeds of crime in the hands of an NCR accused may be forfeited to the Crown.

[34] In my view, the way to reconcile these competing policies is to allow the common law and the Act to each operate in their own spheres. That the legislature has so recently turned its mind to the question of criminals profiting from their crimes and not sought to wholly abrogate the common law rule suggests to me that the legislature intended to leave the common law rule intact. The legislature has expressed public policy in the province but limited forfeiture to applications made by the Attorney General.

[35] The common law rule does not prevent the appellant from receiving the proceeds of the insurance policy. However, it is open to the Attorney General to bring an application under s. 3 of the Act. I note that s. 4 gives the Attorney General the right to apply for any number of interlocutory orders to safeguard any “property” pending an application under s. 3. If such an application were brought, the court would determine whether it would clearly not be in the interests of justice to forfeit the proceeds to the Crown.

The accused was ultimately absolutely discharged by the Ontario Review Board; 2015 CarswellOnt 445 (Ont. Rev. Bd.)

Subsequently, the Crown did bring a forfeiture application; *Ontario (Attorney General) v. $51,000 in Canadian Currency (In Rem)*, 2012 ONSC 4958. It was dismissed on the merits by Stewart J., 2013 ONSC 1321:

> **34 It is argued on Dhingra's behalf that his case falls within the "interests of justice" exception provided for in s. 3(1) of the Act. Would the granting of the forfeiture order sought be clearly not in the interests of justice?**
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> 35 **It is common ground that the purpose of the Act is to assist in compensating individuals, municipal corporations and prescribed public bodies who suffer losses as a result of unlawful activities, preventing people who engage in unlawful activities and others from keeping property that was acquired as a result of those activities, preventing property from being used to engage in unlawful activities, and preventing injury to the public that may result from conspiracies to engage in unlawful activities.**
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> **36 In essence, the Act creates a property-based authority to seize money and other things shown, on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality. The practical and intended effect is also to take the profit out of crime and to deter its present and would-be perpetrators (see *Ontario (Attorney General) v. Chatterjee*, [2009] S.C.J. No. 19 (S.C.C.)).**
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> ...
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> 40 In considering whether forfeiture would be clearly not in the interests of justice, the Court of Appeal for Ontario has held that **forfeiture should not be granted where the party seeking relief from forfeiture has established that forfeiture would be "manifestly harsh" or "draconian". The onus in that regard rests on the respondent.** In order to determine whether the forfeiture would meet this test, among the factors to be considered are the role of the respondent in the unlawful activity, the disparity between the amount of the proceeds and the amount sought to be forfeited, and whether forfeiture would be consistent with the purposes of the Act (see: *Ontario (Attorney General) v. McDougall*, [2011] O.J. No. 2122 (Ont. C.A.)).
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> 41 It is important to note that this list of factors is not exhaustive. The appropriate factors to be considered in each case must be determined and weighed on a case-by-case basis. However, the relief available under s. 3(1) will be the exception, not the rule, and granted sparingly (see: Ontario (Ontario (Attorney General) v. McDougall (in rem), 2011 ONCA 363 (Ont. C.A.)).
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> 42 The British Columbia courts have cited several helpful additional factors that may be taken into account in determining whether, under the counterpart statute of that province, forfeiture would be "clearly not in the interests of

justice". Among the factors considered appropriate to the determination of that issue are proportionality, fairness, the degree of culpability and/or complicity, knowledge, acquiescence, or negligence of the individual involved, the extent of the problem in the community of the sort of unlawful activity in question, the need to remove profit motive, the need for disgorgement of wrongfully obtained profits as well as, the need for compensation, prevention of future harm and general deterrence (see: *British Columbia (Director of Civil Forfeiture) v. Rai*, 2011 BCSC 186 (B.C. S.C.)).

43 All of the authorities agree that punishment is not a factor in the determination.

44 Would forfeiture in this case be consistent with the purposes of the Act? Would the granting of the order sought here take the profit out of crime and deter its present and would-be perpetrators?

45 There is no doubt but that Dhingra killed Kamlesh and that he was the sole instrument of her death. The forfeiture of the entire amount of the policy proceeds paid into court by Scotia Life is being sought by the Crown. Although the Crown did not move immediately to seek forfeiture, its delay is explained by the civil proceedings which ensued upon payment of the policy proceeds into court.

46 This is not a case in which the insurance proceeds were the instrument of the crime, or payment directly received for committing the unlawful act, or the motive for the condct.

47 Dhingra purchased the insurance policy on his own life some 8 years before Kamlesh's death. Presumably this was to provide her with some financial assistance in the event of his death. It was only at the suggestion of an insurance broker that Kamlesh was added to the policy as an insured. This policy of insurance was kept in force by Dhingra over the years through payment of premiums. Payment to Dhingra of the policy proceeds upon Kamlesh's death is a matter of contractual entitlement which, as the Court of Appeal has determined, is not prohibited by any rule of public policy.

48 Dhingra was found not criminally responsible for Kamlesh's death on the basis of extensive psychiatric evidence. There is no suggestion whatsoever that he was capable at the time of forming an intent to kill his wife, and certainly no evidence that the possible availability of the life insurance proceeds played any role in these events or his conduct. I fail to see how the granting of the order would serve to deter others in any general sense from doing what Dhingra did. The very essence of having been found not criminally responsible for the offence denotes an absence of awareness or understanding of its meaning or consequences. Any person who might replicate Dhingra's actions would, by definition and by reason of mental disorder, be impervious to any caution a forfeiture order in this instance could provide.

...

52 Dhingra is now an elderly psychiatric patient living alone in inexpensive rental accommodation in Toronto on very modest income from pension and old age security payments. He has no exigible property of any appreciable value. Legal representation was provided to him for the criminal and ensuing proceedings by Legal Aid or by amicus curiae appointed for that purpose. He is not named as a beneficiary under Kamlesh's will which leaves whatever is in her estate to their two children. Although need is not a consideration for the purposes of applying the exemption under the Act, I am of the view that Dhingra's personal circumstances may be taken into account when determining the factors of proportionality and fairness which comprise part of the exercise of deciding what the interests of justice require in any individual instance.

53 In interpreting and applying the exemption provided for in the Act, and with due regard to the exceptional nature of the relief sought, I am of the opinion that it would be manifestly harsh and therefore clearly not in the interests of justice to order the forfeiture to the Crown of the insurance proceeds which form the subject matter of this application.

The Bank of Nova Scotia Trust Company v. Rogers
2021 ONSC 1747 (Ont. S.C.J.)

Should the administration of a victim's estate be delayed until the death of the murderer-beneficiary dies to allow any children of the murderer-beneficiary to accept his gift on the doctrine of lapse? No, but the Court may disallow the murderer-beneficiary inheriting based on policy but allow the alternate beneficiaries to take the gift to preserve the Testator's intention.

Labrosse J.:

Public Policy

[21] It is well accepted that public policy precludes a person from benefiting from his or her own crime. The criminal forfeiture rule or the "slayer rule" was most recently reaffirmed by the Supreme Court of Canada in Oldfield v. Transamerica Life Insurance Co. of Canada, 2002 SCC 22, [2002] 1 S.C.R. 742, at para. 11. Justice Major stated:

The public policy rule at issue is that a criminal should not be permitted to profit from crime. Unless modified by statute, public policy operates independently of the rules of contract. For example, courts will not permit a husband who kills his spouse to obtain her life insurance proceeds, regardless of the manner in which the life insurance contract was worded.

[22] There are some exceptions that apply to this rule such as where a person is found not criminally responsible on account of mental disorder: Dhingra v. Dhingra Estate, 2012 ONCA 261, 109 O.R. (3d) 641, at para. 22.

[23] Courts in Canada have identified three different approaches to dealing with situations where the criminal forfeiture rule applies: (1) the deemed death approach, (2) the literal reading of the will approach, and (3) the implied intention approach: see Bowlen Estate (Re), 2001 ABQB 1014, 304 A.R. 100, at paras. 39-50.

[24] The courts have generally been consistent in setting out that the overall objective is to see that the wishes of the deceased, as expressed in their wills, are carried out.

Deemed Death Approach

[25] In Dhaliwall v. Dhaliwall (1986), 1986 CanLII 969 (BC SC), 30 D.L.R. (4th) 420 (B.C. S.C.), the will provided that all of the testator's property would pass to the testator's husband (the murderer) and in the event he predeceased her, to their children. The court deemed the husband to have predeceased the testator so the three children could take under the gift over provisions in the will: at p. 425. This approach avoided the need to deal with the failed gift provision of the Wills Act, R.S.B.C. 1979, c. 434, as the solution was found within the will itself. In so doing, the court declined to follow the literal interpretation. As noted in Bowlen Estate, at para. 42, the court in Dhaliwall made no reference to Re Dreger (1976), 1976 CanLII 713 (ON SC), 12 O.R. (2d) 371 (H.C.), and the literal reading of the will approach.

A Literal Reading of the Will Approach

[26] In Re Dreger, the will provided that all of the testator's property was to pass to the testator's husband, the murderer in a murder-suicide. In the event he predeceased her, there was a gift over provision in favour of alternative beneficiaries. As the husband had not predeceased her, the antecedent event necessary for the gift over to operate had not occurred: at p. 382. As a result, an intestacy followed.

[27] The husband and wife had almost identical wills. As the husband survived the wife but was disentitled by public policy, her estate was distributed as an intestacy. As for the husband's estate, the wife predeceased him and thus his estate was distributed according to the gift over provisions of his will.

[28] The theory behind the literal approach is that the testator's will only provides for a gift over to the alternative beneficiary in the event that the primary beneficiary actually predeceases the testator, but not in cases where the primary beneficiary is disentitled or barred from taking due to public policy. In such a case, the result is an intestacy.

Implied Intention Approach

[29] In Brissette Estate v. Brissette, [1991] O.J. No. 1308, 42 E.T.R. 173 (Gen. Div.), the wife left the residue of her estate to her husband (the murderer), and if he predeceased her or did not survive her for thirty days, the residue went to various persons named in the will. If the result was an intestacy, the estate would go to the testatrix's mother.

[30] The court held that the residue could not go to the murderer but found against an intestacy. In attempting to ascertain the testatrix's intentions, the court found that there was an implied condition that the husband had to be a legal beneficiary. As the husband was disentitled by public policy, the intention was that if the husband could not receive the residue, it should go to the alternative beneficiaries named in the will.

…

Analysis

[35] I begin with the general principle that the courts will seek to avoid an interpretation of a will that will result in intestacy. However, that is not to say that this objective is to be maintained at all costs. This approach was supported by the Court of Appeal for Ontario in Re MacDonnell (1982), 1982 CanLII 1844 (ON CA), 35 O.R. (2d) 578 (C.A.):

This is not to say that the above rule of construction is one of universal application; one should not strive to avoid an intestacy at all costs. The language of the will may sometimes be such as to lead to the inference that the testator intended to leave part of his property undisposed of. I adopt the words of Ritchie J. in Kilby et al. v. Myers et al., 1964 CanLII 19 (SCC), [1965] S.C.R. 24 at 28-29, sub nom. Re Harmer 46 D.L.R. (2d) 521:

> *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 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".*

[36] Thus, an intestacy should be avoided absent some exceptional and compelling reasons.

[37] The analysis then turns to a determination of the testators' actual or subjective intention. As stated in Trezzi v. Trezzi, 2019 ONCA 978, 150 O.R. (3d) 663, the court's task in interpreting a will is to determine the testator's actual or subjective intention as to how he intended to dispose of his property. This involves construing the will in light of all the surrounding circumstances to determine the testator's true intention and the court placing itself in the position of the testator at the time that the will was made: Trezzi, at para. 13.

[38] In Bowlen Estate, at para. 51, the three approaches where the criminal forfeiture rule applies were succinctly summarized as follows:

In Dahliwall, deeming a death creates a fiction as an antecedent step to a particular result (benefit the children and avoid an intestacy). Brissette simply ignores the antecedent condition of survival and implies an additional condition to achieve a desired result (benefit the children and avoid an intestacy) rather than adopting the strict literal interpretation of the particular provision as was done in Re Dreger which resulted in an intestacy. [Emphasis in original.]

[39] In the present circumstances, the clear subjective intention of both David and Merrill was:

i. To leave everything to each other;

ii. If their spouse could not receive their estate, that their estate would pass on in the form of a life interest to their son Cameron;

iii. If Cameron could not receive his life interest should he predecease them, that their estate would pass on to Cameron's then living children;

iv. If Cameron could not receive his life interest should he predecease them with Cameron leaving no then living issue, that their estate would pass on to Merrill's three brothers, subject to the annuity provisions; and

v. If the annuity provisions were not completed, the remainder would go to Autism Canada and another organization.

[40] The subjective intentions of both David and Merrill are clear. If their spouse, Cameron or Cameron's then living issue cannot receive their estate, the estate is to go to Merrill's three brothers subject to the annuities. Thus, there are four levels of beneficiaries starting with each spouse, which look to maintain the demonstrated intent to keep the estates in the family. However, there is also an intention to have their grandchildren benefit from their estates.

[41] I agree with the conclusion in Jollimore Estates, at para. 33, that to interpret the condition precedent "if he (my son Cameron) predeceased me, and if there are no issue of my son then living" as

resulting in an intestacy would be to ignore an important element of the testator's intentions. Thus, I do not believe that a literal reading of the wills would properly reflect the true intentions of David and Merrill.

[42] In Bowlen Estates, at para. 61, the court concluded that the practical effect of the deemed death approach and the implied intention approach lead to the same conclusion: the court simply gives effect to any "gifts over" which may have been frustrated by the fact that the murderer outlived the testator. Thus, practically, there are two approaches. The first is the strict literal interpretation which leads to an intestacy as the murderer does not outlive the testator. The second approach focuses on the intentions of the testator to benefit those who are subject to the "gifts over".

[43] I prefer the latter approach in the context of the implied intention approach for the following reasons:

a. Regardless of which approach is adopted – deemed death or implied intention – those approaches keep the analysis within the confines of the will and allow the contingencies contained therein to play out;

b. The rule of avoiding an intestacy, where possible, is maintained;

c. The implied intention approach is the least intrusive because it reflects more precisely what has actually happened and focusses on the intention of the testator by allowing alternate bequests to be followed. Cameron is no longer a legal beneficiary by application of the criminal forfeiture rule and there is no need to deem Cameron to have predeceased his parents. His bequest of a life interest fails and the focus shifts on the remainder of the testators' intentions. This conclusion is supported by the fact that the will did not include any wording which would contemplate that Cameron's entitlement would continue even if he was disentitled. The implied interpretation that he be a legal beneficiary failing which the balance of the will is followed. This is more consistent with the form of a will which includes "gifts over".

d. As a result of no longer being a legal beneficiary, Cameron has lost his entitlement. However, to leave the will at this point and find an intestacy does not respect the subjective intentions of the testators which were to create four contingent levels of beneficiaries and maintain control through the use of the "gifts over". Their intention was clearly not to leave it to chance as part of an intestacy.

WITNESSES AS LEGATEE / DEVISEE

Section 12 of the SLRA preserves the basic common law position voiding a gift to the witness developed under the Statute of Frauds 1677 in respect of competent witnesses and which later evolved through the Wills Act 1752 into section 15 of the Wills Act 1837

and is now modified in our own statute (which allows for a relaxing of the rule in some cases).

The Succession Law Reform Act provides:

> *Bequests to witness void*
>
> 12.--(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,
>
> (a) the person so attesting;
>
> (b) the spouse; or
>
> (c) a person claiming under either of them,
>
> **but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.**
>
> *Where will signed for testator by another person*
>
> (2) Where a will is signed for the testator by another person in accordance with section 4, to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest, or other disposition is void so far only as it concerns,
>
> (a) the person so signing;
>
> (b) the spouse; or
>
> (c) a person claiming under either of them,
>
> but the will is not invalid for that reason.
>
> ***Where no undue influence***
>
> **(3) Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void.**
>
> *Exception*
>
> (4) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection.

Re Trotter
[1899] 1 Ch 764; cb, p.471

There are a number of exceptions to the general rule. For example, if the witness was not in the prohibited class when he or she attested, the gift is valid. Also, if the Will is incorporated into a subsequent testamentary instrument which is not witnessed by a person in the prohibited class, the gift to the attesting witness under the original Will is valid. **Per Byrne J: '… the legatee must be able to point to an instrument giving him his legacy not attested to by himself before he can establish his right to his legacy.'**

Re Ray's Will Trusts
[1936] Ch 520; cb, p.474

A nun left her estate to the Abbess of her abbey at her death; an attesting witness who was not the Abbess at the execution of the will was the Abbess when the testatrix died. As the gift was not left to her in her personal capacity, it was valid.