Wills & Estates
Winter Term 2026

Lecture Notes 12-A

XIII. VOID CONDITIONS

Two policies seemingly pull in opposite directions in property: the law seeks to maximize the right of the proprietor to give his or her property subject to whatever conditions are thought appropriate as an aspect of "ownership". At the same time, there is a broader interest in maintaining the vitality of the law of property both on concerns arising out of principle (public policy) and pragmatism (institutional considerations).

Re Goodwin
(1969), 3 DLR (3d) 281 (Alta SCTD)

[A condition imposing a restraint on marriage is void as a matter of policy; here the rule was avoided.]

The will included the following gift:

> I Give, Devise and Bequeath all my real and personal estate of which I may die possessed in the following manner, that is to say: One-half to my daughter, Ruth Elaine Claire Goodwin**, one-quarter to my daughter-in-law, Judeth Goodwin, provided she does not re-marry**, and one-quarter to my grandson, William Trent Goodwin.
>
> **If my daughter-in-law should re-marry then her one-quarter share shall go to my said grandson**, William Trent Goodwin.

Here the issue is whether the restraint is on marriage in an unjustified manner or whether the intention of the testator reflects a more principled approach to distributing his assets.

Per Riley J:

> 8. A distinction is of course drawn between a condition against marriage or requiring marriage with a particular person or a particular class of persons and a condition wherein the words used relating to marriage merely describe the interest to be taken by the donee. There is no prohibition to a gift to a donee so long as the donee remains unmarried for marriage may be the ground for which a gift is given or is revoked.
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> ...
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> 19. **The intention of the testator was only to provide for the daughter-in-law while she was in fact a widow and that upon her remarriage it was his intention to provide for his grandson on the basis that his**

> **daughter-in-law would then be provided for out of her subsequent remarriage.**
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> **20. The will does not [attempt to] avoid the "in terrorem rule" and in no sense is a restraint against marriage.**
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> 21. Even if Judith North (nee Goodwin) is entitled to the realty on the death of the deceased, it is divested upon the remarriage, and she is only entitled to the interest on the realty from the date of the death until the date of her remarriage meaning thereby from January 16, 1968, to July 27,1968. The maxim *de minimis non curat lex* would seem to apply: see Osbaldeston v. Bechthold, [1953] 2 S.C.R. 177.

Re Kent
[1982] 13 ETR 53 (BCSC)

[An *in terrorem* condition – one that threatens a consequence for its violation - preventing litigation is valid if it attached only to personal property or personal property and land together provided it is 'idle'; that is, there is a gift-over to someone else.]

A common type of condition that is sometimes employed is a forfeiture of gifts should the beneficiary dispute the Will. The testator seeks to protect the estate's assets against frivolous litigation. This is a difficult point as it seems to place restraints on the ability of a person to access the courts and is unnecessary given the procedural protections and the costs rules. However, is it necessary to strike the condition out on policy terms?

The will read in part:

> I HEREBY WILL AND DECLARE that **if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I HEREBY REVOKE all said benefits** and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will; PROVIDED that if such person whose benefits are so revoked would otherwise share in the residue of my Estate his or her benefits so revoked shall be divided equally among the remaining shares into which the residue of my Estate may be divided or as if such person had predeceased me and had left no issue surviving me.

In this case the Court employed a traditional approach looking to whether there was a substitute donee should the condition be breached; as there was, the traditional rules would save the gift. However, was the condition void on the general point of being contrary to policy?

Per Lander LJSC:

> The motive for the inclusion of para. 9 in the will was to carry forward his intent that his children's shares be limited. The creation of this clause was a disincentive for them to contest the will which would subvert his intentions.
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> ...
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> As to ground two, that is the challenge made that para. 9 is a clause in terrorem, such a condition attached to a legacy of personalty may be void if made in such a manner. **There are three criteria which must be met before the doctrine in terrorem is applicable:**
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> **(i) The legacy must be of personal property or blended personal and real property. See Re Hamilton (1901), 1 O.L.R. 10; Re Schmidt, 57 Man. R. 316, [1949] 2 W.W.R. 513 (K.B.).**
>
> **(ii) The condition must be either a restraint on marriage or one which forbids the donee to dispute the will.**
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> **(iii) The "threat" must be "idle"; that is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore a provision which provides only for a bare forfeiture of the gift on breach of the condition is bad.**
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> **However, if the donor indicates that he intended not only to threaten the donee but also to make a different disposition of the property to fix a benefit on another in the event of a breach of the condition, the "threat" is not "idle" and the condition is valid: Feeney, Canadian Law of Wills (Construction), vol. 2, 2nd ed. (1982), pp. 200-201.**
>
> In this instance there is no doubt that the legacies in this case contain personalty and, further, there is no doubt that the "condition" enjoins the petitioners from disputing the will.
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> **In this instance is such a "threat" idle? Ordinarily if a provision which contains such a condition is followed by a gift over in the event of a breach of that condition, the condition is held to be valid: Jarman on Wills, p. 1255. While certain authorities question whether a gift over is always necessary, I have concluded in this instance that para. 9 of the testator's will creates a gift over. The words, "I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate" are sufficient to constitute a gift over for the purpose of meeting the in terrorem doctrine. Therefore the paragraph is valid and not subject to the doctrine, even if para. 9 does not completely deprive the court of jurisdiction. However, by depriving the petitioners of their right to apply for relief under the Wills Variation Act, para. 9 may be invalid as a provision which is contrary to public policy.**
> 18 It is apparent that this "public policy" ground is not well known to the common law and indeed does not appear to have been argued in Canada, as indicated by the paucity of Canadian authorities...
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> ...

> **20 It cannot be denied with respect that the intent of the legislature in creating the Wills Variation Act is to ensure adequate maintenance and support for specified individuals. It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a testator to circumvent the provisions of the Wills Variation Act by the creation of such as para. 9. It is important to the public as a whole that widows, widowers and children be at liberty to apply for adequate maintenance and support in the event that sufficient provision for them is not made in the will of their spouse or parent. I have concluded that the intent of para. 9 was to prevent any such application. It is not necessary for the purposes of this decision to conjure up scenarios wherein inequitable and distressing results are created for a widow or children by being deprived of maintenance and support while an "undeserving" beneficiary takes under a will. Paragraph 9 therefore is void as against public policy.** The petitioners shall have their costs of this application from the estate.

Thus, in this case, access to justice was denied and the condition was void.

Re McBride
(1980), 6 ETR 181 (Ont HCJ); cb, p.789

[A condition encouraging divorce is void.]

The testator didn't like his daughter in law; if his son was married to her at the testator's death, the property would go to charity. If they were not married, the son would inherit. The will read in part:

> (e) Upon the death of my said wife, if my son Robert McBride is married to Geraldine Elizabeth Gibbons, who formerly resided at 14 Cavell Avenue, Mimico, to divide all that then remains of my estate in equal shares among:
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> (i) The Ontario Heart Foundation
> (ii) The Canadian Cancer Society
> (iii) The Ontario Society for Crippled Children
>
> (f) **Upon the death of my said wife, if my son Robert McBride is not married to Geraldine Elizabeth Gibbons, to pay, transfer and convey all that remains of my estate unto my son, Robert McBride for his own use absolutely.**

Did the condition fail or did the gift fail? Only the condition. Per Henry J:

> 10 I have considered the language of paras. 3(e) and 3(f) of the will with care and find that on their face, the only reasonable view to take of the testator's intention is that he intended to promote the divorce of the spouses

> either as a result of one of them committing a matrimonial offence, or by collusion. The affidavit fortifies me in this conclusion and I find accordingly.
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> 11 The condition is therefore void as being contrary to public policy. See Re Fairfoull (1974), 41 D.L.R. (3d) 152 , affirmed (sub nom. Can. Permanent Trust Co. v. Bullman), [1974] 6 W.W.R. 471, 18 R.F.L. 165 (B.C.) (further proceedings); and authorities therein cited.
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> ...
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> 13 ...[a]lthough, as I have found the condition is void as being contrary to public policy, the gift does not fail if the reason for invalidity is malum prohibitum and not malum in se. While the distinction between the two is somewhat obscure according to the scholars, I adopt the reasoning in Re Fairfoull , supra, where it was held that a testator's attempt to invade the sanctity of his son's marriage was malum prohibitum and that although the condition is void, the gift does not fail.
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> ...
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> 16 What then is the gift that is preserved? Reading paras. 3(e) and (f) together their combined effect reflects the testator's intention to disinherit his son if he is married to Geraldine but to pass the entire residue to him on the death of his mother if he is not. The object of the testator, as I see it, is to achieve dissolution of the marriage and not to deprive his son for any other reason or motive. He intends his son to inherit but seeks to terminate the marriage. When the condition fails the gift to Robert McBride is absolute; the charities were never intended to benefit except as a device to induce termination of the marriage.
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> 17 In the result, therefore, Robert McBride will be entitled to the residue upon his mother's death, regardless of whether he is or is not then married to Geraldine.

Carter v May
(1960), 60 D.L.R. (2d) 70 (Nfld. S.C.)

[A condition which is institutionally *repugnant* is void; e.g. giving a gift absolutely but restricting its future alienation is repugnant to property law with respect to absolute ownership.]

The Will provided:

> With regard to the Forest Road property now occupied by myself it is my will that this also be held and enjoyed by Alice Maud Cumming for her lifetime, together with the cottage situated thereon and now occupied by G. Piercey. And after her death I give and bequeath the whole to my nephew Eric Collier or his children, or son if having one, but if Forest House be occupied by Alice Cumming and her family at the time of her death, it is my wish, that the family may still continue to occupy the same for twelve months if they so wish to give them time to make other arrangements.
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> …

> **And further with regard to this property, as it has been in the family of my late mother for seven generations, it shall not be sold, mortgaged or exchanged, or conveyed in any way, from the descend — of said family for ever.**

This is an example of a condition that must be void for “repugnancy”; it simply cannot operate as intended as a matter of property law. Thus, the Court held:

> 16. Frederick Collier’s will gives to Eric Collier an absolute estate in the Forest Road property and then adds a condition which limits alienation of the property to a small class; a class which, at any given time, may be difficult to ascertain in any event, a class which, at any given time, for a variety of reasons, may not exist at all, but a class in which, nevertheless, must be found at any given time a person willing and financially able to enter into dealings about the property. If that condition is good, then Eric Collier is to all intents and purposes deprived for his whole life of his right to alienate the property and thus of full enjoyment of the property. In my view, both on principle and on authority, such a condition is repugnant to the absolute estate given to Eric Collier and as such is invalid.

Re Macdonald
[1971] 2 O.R. 577 (HCJ)

[A condition on a gift which is impossible to satisfy is void.]

Here the question was in respect of a condition that was impossible to fulfil. Is the condition void?

The will read in part:

> To pay and transfer Ten Percent (10%) to the WINDSOR PUBLIC LIBRARY BOARD, Windsor, Ontario, provided the house known as the "BABY HOUSE" situate on Pitt Street West, in the City of Windsor, has not been moved from its original foundation and providing the City of Windsor gives to my Executors the necessary assurance that such house will not ever be moved from its original foundation, such bequest to be used in collecting historical objects for showing and preservation in such "Baby House". If, at the time of my wife's death, or at the time of my death if she should predecease me, the "Baby House" is still standing on its original foundation and location, then my Executors shall request the City of Windsor to give the necessary assurance that such House will not ever be moved and the City shall have one year from the date of the death of the survivor of my wife and myself to give such assurance to my Executors. If at the death of the survivor of my wife and myself the City of Windsor fails or will not give to my Executors the necessary assurance that such House will not ever be moved from its original foundation, then this bequest shall fail and fall into and form part of the residue of my Estate.

The City of Windsor could not give the assurance as they did not own the land and lacked jurisdiction to give such an assurance. Thus the condition failed but the gift remained. In essence it was regarded as a wish.

Per Lacourciere J:

> 10 The second objection can be disposed of on the basis of the following findings of fact and conclusions of law:
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> 1. **The condition precedent attaching to the gift to the Windsor Public Library Board that the City of Windsor gives necessary assurances that Baby House will never be removed from its original foundation is impossible of performance.**
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> 2. **The impossibility existed at the time the testator drew his will and has continued to exist to the present, and continues to exist.**
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> 3. **The testator knew of the impossibility at the time he drew his will.**
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> 11 There are several reasons for this impossibility. First and foremost, the City of Windsor does not own the land in question and therefore is in no position to give any assurance as to its use. The covenant of re-grant should the land cease to be used as a museum does not alter this. Further, it is doubtful whether the city can give the type of assurance requested, and also whether there can ever be an adequate assurance given as to the use of real property for ever.
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> 12 Macdonald must have been aware of the first ground of impossibility as he was a party to an agreement reciting who was the owner of the land, which agreement antedates the execution of his will, and had been president of the association which owned the historic Baby property.
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> **13 As the gift in question was given subject to a condition which was at the time of its creation and to the knowledge of the testator impossible of performance, the condition must fail and the gift remains free of the condition. On these facts, the Windsor Public Library Board is to receive the 10% without any assurance being given.**
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> 14 The law in England is well settled on this point. It is summarized in Williams on Wills, 3rd ed. (1967), p. 270, and is as follows:
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> A condition precedent obviously impossible or a condition becoming impossible by operation of law before the date of the will, is repugnant and void and the gift remains.
> This is a development from the civil law as the gift is one of personalty and has its roots deep in the common law. As early as 1759, this was held to be the proper construction: Lowther v. Cavendish (1758), 1 Eden 99, 28 E.R. 621; affirmed 3 Bro.P.C. 186, 1 E.R. 1260.
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> ...

> **19 On the present facts the testator must have known of the impossibility when he drafted the condition. Yet he still made the grant. It would be absurd to impute to him an intent to draft a totally ineffective clause in a document as solemn and important as his will when he had full knowledge of its ineffectiveness. In the absence of anything to the contrary, it must be that the gift for the benefit of an institution which he actively supported was paramount to the testator and so the condition must fail. The only reasonable interpretation that can be given the condition to enable the clause to have any effect when written is that, if at the death of the life tenant it is possible for the city to give the assurances, then it must give the assurance as a condition precedent to gift taking effect.**

Re Tuck's Settlement Trusts
[1978] Ch. 49; cb, p.801

[An uncertain disposition is void but the construction of the words might be resolved by extrinsic evidence. Here such a condition was held to be void as the words in the Will setting up the condition where too vague.]

Barsoski Estate v. Wesley
2022 ONCA 399 (Ont. C.A.)

[The law is disposed against certain types of conditions and presumes against some characterizations unless the Will is clear to the contrary; for example, a "condition subsequent" which may divest a beneficiary of an interest.]

The Will provided:

> Upon the earlier of [the appellant] advising my Trustees that he no longer wishes to live in the House, [the appellant] no longer living in the house, and [the appellant's] death, the House shall be sold and the proceeds shall be delivered to St. Stephen's Community House to be used by the highest priority needs as determined by the board of directors.

Three issues were argued: the meaning of "living", whether there was a life interest or a mere license, and whether the "no longer living in the house" condition was void.

Harvison Young J.A.: [our former Dean]

> **(4) Was the condition void for uncertainty?**
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> …
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> [53] The respondent argues that the following words, which appear in a separate sentence after the granting words, tend to indicate a condition subsequent:

Upon the earlier of [the appellant] advising my Trustees that he no longer wishes to live in the House, [the appellant] no longer living in the House, and [the appellant's] death, or if [the appellant] predeceases me … the House shall be sold.

[54] The respondent also states that there are limitations built into the initial part of the gift that "could" indicate a determinable interest. For example, the will reads "as a home for [the appellant] … during his lifetime or for such shorter period as [the appellant] desires". She submits that the requirement that the appellant live in the home could be construed as an integral and necessary part of the formula from which the size of his interest is to be ascertained.

[55] The application judge, in my view, did not err in concluding that the words in issue created a condition subsequent. She noted that there was no dispute before her that these terms were "external to the gift", and this interpretation is supported by contextual considerations, including the fact that the appellant had never actually resided in the house before the testator's death, although he was a frequent visitor. The admissible evidence supports the inference that the testator, given her knowledge that the appellant would have to continue to work until retirement and that he would not necessarily be living in the home immediately upon her death given that his employment was unlikely to be in London, contemplated that these terms were subsequent to the vesting of the gift. Accordingly, the condition must be construed as a condition subsequent because she could not have intended that her gift would come to its natural end as soon as it vested.

[56] Nor do I see any error in the application judge's conclusion that the condition is void for uncertainty. At para. 31 of her reasons, she stated that

> **A condition subsequent is void for uncertainty if the condition is "far too indefinite and uncertain to enable the Court to say what is was that the testator meant should be the event on which the estate was to determine": McColgan Re, supra at para. 35**

[57] She continued at para. 32:

I am satisfied that the terms "no longer living" creates uncertainty such that the condition subsequent is invalid. It is impossible to define, on the terms of this will, what it means to "live" in the house. The terms do not explain what the respondent needs to demonstrate that he is "living" in the house or when he must establish that act. As noted by the respondent, this limiting phrase raises questions as to how long he can be absent or by what date or for how long he must occupy the home to be considered be "living" in the house. The problems with terms such as these are exemplified by the decisions relied upon by both parties, which concluded that such conditions requiring a beneficiary to live, reside, remain or stay on a property are void for uncertainty. [Citations omitted.].

[58] There is no dispute that if a subsequent condition contained in a grant of a life interest is found to be void for uncertainty, the gift is effective without the limiting conditions: Powell v. Powell, at para. 14. As I noted above, a condition subsequent is not integral to the interest and, therefore, the gift can exist without the condition. Accordingly, the uncertain condition is struck, and the gift survives free and clear of any condition.