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Problems in the Interpretation of Statutes Designed to Prevent Lapses in Testamentary Dispositions

At common law if a testator devised real property or bequeathed personal property to a devisee or legatee who was non-existent or unable or unwilling to take the gift, the gift was said to lapse.¹ The most common cause of such a lapse was the death of the legatee or devisee during the lifetime of the testator.²

This lapse did not occur because the testator so desired. It rather occurred from necessity, for, as a will is of an ambulatory nature, it can communicate no benefit to persons who die previous to the death of the testator.³ It can readily be seen from this that such a lapse often may result in doing violence to the intent of the individual testator. It may be reasoned that the testator, had he known of the inability of the beneficiary to take the gift, might have desired that the property pass to some representative of the original beneficiary rather than to his heirs or to the residuary legatee or devisee. Moreover the common law rule frequently might result in an unintentional disinheritance.

For these reasons the legislatures of nearly all the states have speculated about the probable intent of the testator and passed what are termed anti-lapse statutes. These statutes vary from state to state but are generally designed to give effect to the presumed intent of the testator. Some states, such as Iowa⁴ and Maryland,⁵ have entirely abolished the lapse caused by death of the legatee or devisee before the testator by giving the property to the heirs or distributees of the deceased beneficiary. In several states⁶ such lapse is abolished in all cases if the devisee or legatee left issue surviving the testator, the issue taking as the ancestor would have done had he

¹Brett v. Rigdon (1568) 1 Plowd. 340.

²ATKINSON, WILLS (1st ed. 1937) §257, p. 617.

³See JARMAN, WILLS (4th ed. 1880) p. 617.

⁴Code, 1931, §11861.

⁵Flack, Ann. Code 1939, Art. 93, § 340.

⁶Ga., Code 1926, §3906; Ken., Carroll's Statutes, §4841; N. H., Public Stat. 1926, c. 297, §12; R. I., Gen. Laws 1938, c. 566, §30; Tenn., Code 1932, §8134; Va., Code 1930, §5238; W. Va., Code 1943, §4054.

survived. The largest number of jurisdictions⁷ leave the common law lapse unmodified unless the deceased beneficiary was a relative of the testator and left issue or lineal descendants. In four of the states⁸ the statutes provide against lapse only as to gifts to the testator's children, grandchildren, brother or sister. In eight others⁹ the statute applies only to gifts to the testator's children or descendants. In Colorado and Illinois,¹⁰ it applies only to gifts to children or grandchildren, while in South Carolina¹¹ it is limited to gifts to the testator's children only. No legislation preventing the common law rule from operating was to be found in Florida, Louisiana, New Mexico, or Wyoming.

As indicated above the Montana statute falls into the largest classification which leaves the common law rule unmodified unless the deceased beneficiary was a relative of the testator and left lineal descendants. Prior to the legislative session of 1947, the Montana statute read as follows:

"When any estate is devised to any child, or other relative of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator."¹²

The first problem that arose under this statute concerned the lapse of personal property where the legatee predeceased the testator. R.C.M. Section 7042, specifically states that, except as indicated in Section 7012, if the devisee or legatee dies during the life of the testator, the disposition to him fails; hence, in order to prevent a gift of personal property from failing under these circumstances, it would be necessary to construe Section

⁷Alaska, Ann. Codes 1913, §571; Calif., Probate Code 1937, §92; *Id.*, Code 1932, §14-323; Kan., Gen. Stat. 1935, §22-259; Me., Rev. Stat. 1930, ch. 88, §10; Mass., Ann. Laws 1933, ch. 191, §22; Mich., Comp. Laws 1929, §15552; Minn., Mason's Statutes 1927, §18747; Mo., Rev. Stat. 1929, §527; Mont., R.C.M. 1935, §7012; Nebr., Comp. Stat. 1929, §30-229; Nev., Hillger Comp. Stat. 1929, §9922; N. Dak., Comp. Laws 1913, §5679; Ohio, Page's Gen. Code 1938, §10504-73; Okla., Stat. 1931, §1574; Ore., Comp. Laws 1940, §18604; S. Dak., Comp. Laws 1929, §637; Ut., Rev. Stat. 1933, §101-1-35; Vt., Public Laws 1933, §2979; Wash., Remington's Rev. Stat. 1932, §1404; Wisc., Stat. 1939, §238.10.

⁸Conn., Gen. Stat. 1930, §4879; Del., Rev. Codes 1935, §3854; N. J., Gen. Stat. 1910, §22, p. 5966; Pa., Purdon's Stat. 1930, t. 20, §251, §252.

⁹Ala., Code 1923, §10591; Ark., Pope Stat. 1937, §14527; Ariz., Probate Code 1939, §41-109; Ind., Burns Probate Code 1933, §7-709; Miss., Code 1927, §3553; N. Y., McKinney's Consol. Laws 1939, Vol. 13, §29; N. C., Code 1939, §4168; Tex., Vernon's Civil Stat. 1941, §295.

¹⁰Colo., Stat. 1935, ch. 176, §45; Ill., Smith-Hurd Stat. 1936, ch. 39, §11.

¹¹Code of Laws 1922, §5346.

¹²R.C.M. 1935, §7012.

7012 as including gifts of personal property. In the case *In re Fratt's Estate*¹³ it was contended that the statute was meant to include gifts of personality as well as realty, but the court indicated that, if the legislature had intended the statute to be so construed, it would have included the terms "bequeath" and "legatee." A clear-cut distinction between a devisee and a bequest are indicated in other sections of the code;¹⁴ therefore, the court concluded that "the legislature used both words in their correct and approved legal technical sense."¹⁵ This view was reiterated in the case of *In re Estate of Hash*.¹⁶

It would seem that the Montana court in so construing this statute is correct and is with the weight of authority; however, the courts of several states have held that the words "devise," "bequeath," "devisee," and "legatee" are to be construed as interchangeable.¹⁷ In a later case the Montana court, when asked to overrule the *Fratt* and *Hash* cases as unsound, indicated that, if the problem were being presented for the first time, a different result might have been reached.¹⁸

In order to place a devisee and a legatee on the same footing under the anti-lapse statute and, incidentally, to make the probate of estates in which a donee predeceases the testator a less complicated procedure, the 1947 legislature passed the following statute:

"When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."¹⁹

¹³(1920) 60 Mont. 526, 199 P. 711.

¹⁴R.C.M. 1935, §§7042, 7031, 7032.

¹⁵*In re Fratt's Estate*, *Supra*, note 13, p. 537.

¹⁶(1921) 64 Mont. 118, 208 P. 605.

¹⁷*Logan v. Logan* (1887) 11 Colo. 44, 17 P. 99; *Evans v. Price* (1886) 118 Ill. 593, 8 N.E. 854; *In re Estate of Rueschenberg* (1931) 213 Ia. 639, 239 N.W. 529; *Barry v. Barry* (1875) 15 Kan. 587; *Re Estate of Breen* (1915) 94 Kan. 474, 146 P. 147. In the above cases only the Iowa court was construing a statute pertaining to lapses.

¹⁸*Converse v. Byars* (1941) 112 Mont. 372, 118 P. (2d) 144. Justice Angstman in delivering the opinion of the court said, "Were the question presented to us for the first time, we might have reached a different conclusion from that announced in the *Fratt* and *Hash* cases. The *Fratt* decision was rendered in 1921. The legislature ever since then has acquiesced in the construction of the statute there proclaimed, and we think we should not now construe it differently."

¹⁹Ch. 58 LAWS OF MONTANA 1947.

This amendment to R.C.M. Section 7012 clearly makes the *Fratt* and *Hash* cases inapplicable, but does not solve all the difficulties that are likely to beset the Montana court in construing a statute of this nature.

There are several problems suggested in the phrase "devised or bequeathed to any child, or other relation of the testator." Does the word "child" include adopted children? Illegitimate children? Stepchildren?

It would seem, in view of a Montana statute which declares that ". . . After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights . . . of that relation,"²⁰ that an adopted child is within the class to which a gift will not lapse, providing the child leaves lineal descendants. It follows that if the adopted child has the rights of a child, his children should succeed to his rights under the statutes. And yet, in the only case found, a Pennsylvania court construing a similar statute, held that the gift lapsed, saying "One adopted has the rights of a child without being a child."²¹ This is a needlessly strict construction of the statute. It is indicated below, in the discussion concerning lineal descendants, that an adopted child has been held to be a lineal descendant in California. If this is correct, it would seem that an adoptee should be considered a child or relation to whom a testator may make a devise or bequest within the meaning of the statute.

An illegitimate child clearly would be within the statute where the mother of the child is the testatrix, for almost universally the illegitimate is allowed to inherit from the mother, and he is surely the child of the mother. But where the father is the testator, the result is more doubtful. If the illegitimate child is acknowledged by the father as provided in R.C.M. Section 7074, it has been held that the child is placed on the same footing as one born in lawful wedlock in regard to inheritance;²² hence, it would seem that such a child is within the statute. Another Montana statute, R.C.M. Section 5865, provides that the father of an illegitimate child, by publicly acknowledging it as his own, receiving it into his family, and treating it as if it were a legitimate child, thereby adopts it as such; "and such child is thereupon deemed for all purposes legitimate from the time of its birth." This quoted portion of the statute would clearly bring the child within the provisions of the anti-lapse statute. In the absence

²⁰R.C.M. 1935, §5863.

²¹Phillip's Estate (1901) 17 Pa. Super Ct. 103.

²²In re Wehr's Estate (1934) 96 Mont. 245, 29 P. (2d) 836. This case was construing R.C.M. 1935, §10068, as to whether an illegitimate son was entitled to letters of administration.

of the recognition suggested by these two statutes it is doubtful that the statute should be construed to include other than legitimate and adopted children.

It is generally conceded that stepchildren are not within the scope of the word "child" as used in the statute.²³

In determining the meaning of the term "relation," states having statutes similar to the Montana law have placed emphasis on the fact that the wording is "child or other relation," stating that this indicates that the relationship is to be by blood, not marriage.²⁴ In this manner relations merely by affinity are excluded from the operation of the statute. Thus gifts to the wife of the testator or the husband of the testatrix, brothers-in-law, sisters-in-law and stepchildren have been held to lapse, while those to brothers, sisters, nephews, nieces, cousins and children of cousins have not.²⁵

The purpose of statutes preventing a lapse, as indicated in the first part of this article, is to give effect to the probable intent of the testator had he known of the inability of the beneficiary to take the gift. For the same reason it is desirable that gifts given to a devisee or legatee who is dead at the time the testator executed his will be held valid. Obviously when a testator names a deceased person as a devisee or legatee, he does not know of the death or else he desires to confer some benefit on the heirs of the beneficiary; hence, the query arises "does a statute like Montana's apply where the beneficiary is dead at the time of the execution of the will?"

The Montana court has held that it does not.²⁶ The wording of the statute is such that, in order to be applicable, the devisee or legatee must die after the will is made and before the death of the testator. This decision, which is purely one of statutory interpretation, is technically sound. Following strictly the language of the statute no other result can be reached. The court in the decision points out the fact that the California legislature found it necessary to amend its statute to include gifts

²³Nice v. Nice (1916) 275 Ill. 397, 114 N.E. 140; Kimball v. Story (1871) 108 Mass. 382; Brambell v. Adams (1898) 146 Mo. 70, 47 S.W. 931.

²⁴Brambell v. Adams (1898) 146 Mo. 70, 47 S.W. 931; Re Luckhardt (1938) 134 Neb. 55, 277 N.W. 836; Re Renton (1895) 10 Wash. 533, 39 P. 145.

²⁵For a compilation of cases see 115 A.L.R. 437.

²⁶In re Estate of Hash, *Supra*, Note 16.

to deceased donees.²⁷ In adopting this view the Montana court was aligning itself with the minority. The majority of the states, laying more emphasis on the reasons for enacting the statute than on a strict interpretation of the language employed, have held that the statute should be extended to include cases where the devisee or legatee is dead at the time of the execution of the will.²⁸

The next requirement of the statute is that the child or other relation leave "lineal descendants." The term lineal descendants is generally defined as including persons to the remotest generation who trace their lineage to the specified ancestor.²⁹ The chief problem arising under this term is the status of an adopted child. The courts of the various states seem to be hopelessly in conflict on the point.³⁰ Any determination of the question must depend in part upon the interpretation given to the statutes concerning adoption. In Montana, as indicated previously, after adoption, the adopted child shall have all the rights of the parent and child relationship.³¹ To exclude the child from the operation of this statute would be, in effect, to say they are not entitled to the full rights of natural children, which seems to be contrary to the express terms of the statute. The California court, in construing a statute that is exactly the same as R.C.M. Section 5863, held that an adopted child was a lineal descendant.³² It would seem, by the same reasoning, that an adopted child should be considered a lineal descendant in Montana.

As the anti-lapse statutes are designed to give effect to the probable intent of the testator, the statute should not apply if the testator has indicated it should not. Most states have expressly provided for this event,

²⁷It is interesting to trace the history of the California statute for the original Montana statute was identical with the original California law. In 1905 the California legislature amended the law to apply to legacies as well as devises, as did the Montana legislature in 1947. In 1921 it was again amended to apply to any child or other relation who was dead at the time the will was executed. As indicated, the Montana legislature has not yet taken this action. The final enactment of the California statute was in 1931, when "kindred" was substituted for "child or other relation" and the provision for lapse of other gifts not within the terms of the statute was incorporated in that section of the probate code.

²⁸3 A.L.R. 1682.

²⁹*Green v. Hussey* (1917) 228 Mass. 537, 117 N.E. 798; *Bassier v. J. Connelly Const. Co.* (1924) 227 Mich. 251, 198 N.W. 989. See also R.C.M. 1935, §7077.

³⁰ATKINSON, WILLS (1st ed. 1937) §257, p. 730.

³¹*Supra*, Note 20.

³²*In re Moore's Estate* (1935) 82 Calif. App. 19, 47 P. (2d) 533

either in the anti-lapse statute itself or a supplementary statute,³³ and in those states which do not so provide, it has been held that the statute will not apply when the testator has indicated a different intention.³⁴ The difficulties arise when it is necessary to determine just what the intent of the testator might have been. The intent of the testator to prevent the operation of the statute is to appear in the will itself and the circumstances disclosed thereby. In some states there is apparently a presumption in favor of the operation of the statute and against any construction of the will having the effect of defeating the statute.³⁵

As an indication of the difficulties arising in determining the intent of the testator, what is the intent of the testator when he leaves property to A, B, and C "or the survivors or the survivor?" Does the testator mean that the gift is to go to A, B, and C but if A dies it is to go to B and C only? Or does he mean, that if A dies, the gift is to go to B and C, and also to the survivors of A under the anti-lapse statutes? The Montana court was faced with exactly this situation in the *Converse v. Byars* case.³⁶ Relying heavily on a California case³⁷ the court held that Section 7012 of the Code did not apply for the testator had manifested an intention to substitute some other person in place of the legatees or devisees who had predeceased him. The *Schneller* case³⁸ in Illinois reached an opposite result in construing similar words, by adopting the view that it is to be presumed that the testator, at the time he made the will, intended to have the statute prevail, and unless the language of the will *clearly* shows a contrary intent, the statute will prevail.

As the purpose of the statutes preventing a lapse is to give effect to the probable intent of the testator, it would seem that any language of the will which might show that the intention of the testator was otherwise should be construed as defeating the operation of the statute. The anti-lapse statute is designed to fulfill the testator's wishes; hence, the statute should not be applied in an absolute manner where it is indicated that there is a possibility that the testator might not have so desired. The court should be liberal in interpreting the language used by the testator.

³³Calif., Colo., Conn., Del., Ill., Kan., Ky., Mass., Mich., Minn., Nebr., N. J., Pa., Tenn., Vt., Va., W. Va., and Wisc. Code sections *supra* notes 6, 7, 8, 10. Supplementary statutes in Montana §7042, N. Dak. §5711, Okla. §1605, S. Dak. §669, Utah §101-2-27.

³⁴*Wallace v. Diehl* (1911) 202 N. Y. 156, 95 N.E. 646, 33 L.R.A. (N.S.) 9; *Re Mott* (1930) 137 Misc. 99, 244 N.Y.S. 187.

³⁵*Schneller v. Schneller* (1934) 356 Ill. 89, 190 N.E. 121, 92 A.L.R. 838.

³⁶*Converse v. Byars*, *supra*, note 18.

³⁷*In re Todd's Estate* (1940), 17 Calif. (2d) 270, 99 P. (2d) 690.

³⁸*Schneller v. Schneller*, *supra*, note 36.

With this in mind the Montana court would appear to have adopted the view best suited to carry out the intent of the testator. On the other hand, the Tennessee court has adopted the unusual view that the statute is inoperative unless it is shown that the testator had it in mind when he executed the will.³⁹ It does not seem that the statute should be inapplicable just because the testator has not evidenced the fact of his knowledge of the statute. This view would result in defeating the ends sought to be gained by the enactment of the statute.

Other cases indicate more clearly an intention of the testator that the statute be inoperative. If a gift is given to A, "if he survives me," it seems clear that the testator has evidenced an intention defeating the anti-lapse statute.⁴⁰ If the provision is "if A does not survive me, I give it to B," it seems equally clear that the statute is not to apply.⁴¹ If the gift is to "A alone," it would seem that the testator has indicated that there is to be no substitution and the statute is inapplicable.

The applicability of the anti-lapse statutes to class gifts raises some difficult questions as suggested by the definition of a class gift.

"A gift to a class exists when the instrument creating it directs the distribution of an aggregate sum to a body of persons, commonly designated by some general name, as 'children,' 'grandchildren,' 'nephews,' uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number of persons in the designated class."⁴²

At first it would appear that, as the members of the class to which the gift is given cannot be determined until the death of the testator, the statute cannot apply. There is no gift to the persons who do not survive; hence, their lineal descendants, or others as the statute may provide, cannot claim. Technically, there is no lapse as there has been no gift. When one member of the class dies, the share he might have received goes to the remainder of the class. Following this line of reasoning, several jurisdictions have held that the statutes do not apply to class

³⁹Grant v. Mosely (1899) 52 S.W. 508.

⁴⁰Estate of Rounds (1919) 180 Calif. 368, 181 P. 638; Wallace v. Diehl, *supra*, note 35.

⁴¹In re Estate of Bennett (1901) 134 Calif. 320, 66 P. 370; In re Estate of Goetz (1910) 13 Calif. App. 292, 109 P. 492; Leary v. Liberty Trust Co. (1930) 272 Mass. 1, 171 N.E. 828; Hammond's Estate (1931) 103 Pa. Super. 503, 157 Atl. 17.

⁴²BLACK, LAW DICTIONARY (3rd ed. 1933) p. 844.

gifts.⁴³ As the Montana court has strictly construed the statute in other situations (whether a legatee was included and whether the statute should apply to those dead at the execution of the will), it would seem that this would be the result in Montana.

When the main reason behind the enactment of the statutes is considered, i.e., the realization of the probable intent of the testator, it would appear that a strong argument for the application of the statute can be made. Certainly when the member of the class predeceases the testator and leaves descendants, an unintentional disinheritance may result, just as in the case of a lapse. The majority of jurisdictions for this reason have held that the statutes will apply to class gifts.⁴⁴ It is interesting to note that where the statute specifies a lapse, the majority of the courts indicate that the statute has no application to class gifts as there has been no lapse; however, if the statute does not mention a lapse, the court will look to the reasons for the enactment of the statute and usually hold that it does apply to class gifts.⁴⁵

A still more complicated problem arises where some members of the class have died, leaving descendants, at the time of the execution of the will. Of course the Montana court will not be vexed with this problem as the court has indicated that the statute is not applicable to one who is dead at the time the will is executed.⁴⁶ The majority of the courts in other jurisdictions have held that such an extension is not justifiable in absence of indications in the will evidencing an intention of the testator to have the statute apply.⁴⁷ It can be presumed that where a testator makes a gift to class, he does not include those known to be dead. But what if he does not know of the death? Then every reason that exists for extension of the statute in the ordinary case, exists in the class gift case.

⁴³*Morris v. Bolles* (1894) 65 Conn. 45, 31 Atl. 538; *Davis v. Sanders* 1905) 123 Ga. 177, 51 S.E. 298; *Trenton Trust and S. D. Co. v. Sibbits* (1901) 62 N. J. Eq. 131, 49 Atl. 530; *Gross's Estate* (1849) 10 Pa. 360.

⁴⁴3 A.L.R. 1689.

⁴⁵*Thomas M. Cooley, II, "Lapse Statutes" and Their Effect on Gifts to Classes*, 22 VA. L. REV. 376.

⁴⁶*Supra*, note 16.

⁴⁷*Supra*, note 45.

In view of the recent amendment to the Montana statute, it is well to note that the statutes do have a limited retroactive effect. The statute should be applied to wills made before the passage of the act if the testator dies after the enactment.⁴⁸ But the statute cannot be given effect to save bequests or devises in the wills of testators who have died before the enactment, for this, in effect, would be divesting the residuary legatee or devisee of vested rights in the property.⁴⁹

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⁴⁸Bishop v. Bishop (1843), 4 Hill (N. Y.) 138.

⁴⁹Logan v. Brunson (1899) 56 S. C. 7, 33 S.E. 737.

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