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REPORT ON
WILLS AND CHANGED CIRCUMSTANCES

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TO THE HONOURABLE S.D. SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
WILLS AND CHANGED CIRCUMSTANCES

A number of discrete rules of law exist in relation to wills and succession which may result in the distribution of a testator's property in ways which do not accord with his actual or likely intent. Ademption, equitable conversion, abatement, satisfaction, election, and lapse are examples of such rules. A thread which joins many of them is that they represent an imperfect attempt by the law to accommodate changes in circumstances which arise after the testator has recorded his wishes in a will. The current law emphasizes the mechanical application of a rule rather than ascertaining and giving effect to the likely wishes of the testator, in the light of the changed circumstances.

A persistent theme of previous Commission work in relation to the law of succession has been to ensure, so far as it is possible to do so, that technical rules do not prevent the courts from giving effect to a testator's wishes in the disposition of his property. This Report pursues that theme and sets out a number of recommendations designed to modify the rules noted above.

CHAPTER I INTRODUCTION

A. Introduction

Between the time a will is made and the time it takes effect, circumstances may change. Property mentioned in the will may no longer be part of the estate; a beneficiary named in the will may have predeceased the testator. A well-advised testator will do his best to provide for anticipated changes and review his will from time to time to ensure that it continues to provide for an appropriate distribution of his estate. Even so, courts are often faced with problems of construing testamentary dispositions which do not quite fit the circumstances existing at the testator's death. This Report focuses on a number of miscellaneous rules that apply when circumstances change after a testator has made his will.[1]

If a testator has not addressed the possibility of different circumstances existing at his death, the courts must resolve how the will is to take effect without any clue as to his intent. This process is sometimes referred to as discovering the testator's "probable" intent. A number of rules have developed to assist the courts in this task. Some are now contained in legislation. These rules, variously referred to as "doctrines," "rules of construction," "rules of law" or "presumptions," are based on certain assumptions concerning what most people would wish to occur in particular circumstances. Many of these rules, however, were developed centuries ago and the assumptions upon which they are based are long outdated.

Numerous rules of law or construction are potentially applicable to determine the effect of testamentary instruments. This Report is not intended to be a comprehensive review of rules that may apply. Rather, its scope is confined to those rules that arise from time to time in modern cases, and which seem to dictate results that are curious by today's standards and expectations.

B. Extrinsic Evidence as a Guide to Interpretation

Although the rules of construction are commonly regarded as tools to assist in determining the testator's probable intent, this characterization is somewhat misplaced. In practice, these rules operate not as tools of interpretation, but as default mechanisms. They are applied as a matter of course whenever the will is silent as to the testator's intention. While the result is often an objectively reasonable one, it may not necessarily correspond to the wishes of a particular testator. The rules in fact provide an easy substitute for an inquiry into circumstances that are likely to be more probative of a deceased's testamentary intentions.

This issue was discussed at length in the *Report on Interpretation of Wills*.[2] In that Report, it was recommended that relevant extrinsic evidence of the testator's intent should be more readily admissible to assist in the interpretation of his will.[3] The recommendations in this Report have been formulated in the light of the views put forward in the *Report on the Interpretation of Wills*. Consequently, references throughout

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1. The Commission has examined various aspects of thelaw of succession in a number of previous Reports: *Report on The Making and Revocation of Wills* (LRC 52, 1981); *Report on Presumptions of Survivorship* (LRC 56, 1982); *Report on Interpretation of Wills* (LRC 58, 1982); *Report on Statutory Succession Rights* (LRC 70, 1983).

2. *Ibid*.

3. *Ibid*., at 25.

this Report to "evidence of a contrary intention" should be understood as including relevant extrinsic evidence of the testator's intent.

C. The Working Paper

This Report was preceded by a Working Paper which was circulated widely for comment. The responses we received proved very helpful in the formulation of our final views and recommendations. They will be referred to in more detail throughout this Report.

D. Terminology

In the following chapters, the reader will encounter some concepts unfamiliar to all except those expert in the law of succession. These include ademption, equitable conversion, ademption by portion, satisfaction, election, lapse, disclaimer and abatement. Every effort has been made to ensure that our discussion of the relevant issues is not obscured by relying too heavily on terms of art.

CHAPTER II

WHEN PROPERTY DISPOSED OF BY WILL IS NO LONGER PART OF THE TESTATOR'S ESTATE

A. Introduction

A gift of property in a will may be characterized in one of two ways, depending on the precise form of words used by the testator to describe it. The testator may intend the beneficiary to receive a particular item of property. A gift such as "to X, my bicycle" means X is to receive a particular bicycle. If the gift were "to X, a bicycle," and the testator did not have a bicycle, assets of the estate must be used to buy X a bicycle. A gift of a particular item of property is called a specific gift.[1] A gift of a type or kind of property is called a general gift.[2]

Problems arise where the testator directs that a beneficiary is to receive a particular item of property, and it is not part of the testator's estate when he dies. The rules which the courts apply to resolve these problems constitute the law of ademption.[3]

B. General Rule

If, at the testator's death, a particular item of property is not found among his assets, a gift of it fails. The technical term for a failure of a gift in these circumstances is ademption. The gift is said to adeem.[4]

This rule is based on two assumptions. First, it is assumed that a testator who makes a gift of a particular item of property does not intend to confer a general economic benefit on the beneficiary. Second, it is assumed that when property cannot be found in the testator's estate after his death, he intended to revoke the gift of it in his will.

It is open to question how often this rule achieves a result the testator would have intended had he turned his mind to the problem. Ademption can arise as the result of many different circumstances. Property may be sold by the testator, unmindful of the testamentary gift.[5] It may also be lost or destroyed accidental-

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1. *See, e.g., Re Culbertson*, (1966) 59 D.L.R. (2d) 381, 383-4, *rev'd*, (`967) 60 W.W.R. 186 (Sask. C.A.).

2. *See Feeney, The Canadian Law of Wills* (2nd ed., 1982) vol. 2, 139, n. 10. In *Re Millar*, (1927) 60 O.L.R. 434, [1927 3 D.L.R. 270, the Ontario Court of Appeal interpreted a gift which read "to each Protestant Minister in Toronto I give one share of the O'Keefe Brewing Company," where the testator had never owned such shares, as a general legacy. *See also Rosborough* v. *Trustees of St. Andrew's Church*, (1917) 55 S.C.R. 360, 362; and *Re Culbertson*, *ibid*.

3. The modern rule of ademption was established by *Ashburner* v. *MacGuire*, (1786) 2 Bor. C.C. 103, 29 E.R. 62 (Ch.). The rootes of ademption are found in early Roman law. For a discussion of the transition from the ancient Roman doctrine of ademption to its modern day replacement, *see* Notes: "Ademption and the Testator's Intent," (1961) 74 Harv. L. Rev. 741, 742.

4. The doctrine of ademption applies only to testamentary gifts of specific property: *Re Rally*, (1911) 25 O.L.R. 112, 3 O.W.N. 273 (H.C.). A specific gift may adeem *pro tanto* (partially). Where only a portion of the specific property meeting the description in the will exists at the testator's death, the beneficiary takes that portion: *Re Ashdown*, [1943] O.W.N. 425 [1943] 4 D.L.R. 517 (C.A.). Neither a general gift nor a demonstrative gift, by definition, may adeem: *Re Atkins*, (1912) 3 O.W.N. 665, 21 O.W.R. 238 (H.C.).

5. *See e.g., Church* v. *hill*, [1923] 3 D.L.R. 1045 (S.C.C.); *Re McMurdo*, (1982) 131 D.L.R. (3d0 454 (Sask. C.A.).

ly,[6] or disposed of by the act of a third party.[7] Often, in particular cases, the assumptions upon which the rule is based do not correspond with reality.

C. Proceeds

In many cases, the testator will have in his possession property of value derived from the sale, loss or destruction of particular property. For example, property may be exchanged for other property or money. If property is lost or destroyed, insurance money may be payable or the testator or his estate may have a cause of action against another person. Property or rights derived from the sale, loss or destruction of property are often referred to as the "proceeds" of the original property.

The law assumes that a testator who makes a gift of a particular item of property does not intend to confer a general economic benefit on the beneficiary. That assumption leads to the conclusion that where a testamentary gift has been disposed of and only its proceeds remain, the beneficiary was not intended to receive those proceeds.[8]

In some cases, the testator's will may disclose an intention that the beneficiary is to receive a specific item of property or its proceeds.[9] If so, problems are sometimes encountered in identifying the proceeds, unless they have been kept separate from the testator's other assets. For example, money received from the sale of property may be deposited in a bank account and mixed with other money belonging to the testator.[10] At one time, mixing funds meant that specific money could no longer be identified.[11] More recently, however, courts have applied sophisticated principles to identify property in these circumstances.[12]

D. When Does the Gift Fail?

The examples discussed above all involve property which is no longer part of the testator's estate when he dies. The disposition, loss or destruction of the testamentary gift has been completed. In other cases, the property may still be part of the testator's estate, but subject to a binding agreement or direction for its disposition. One might guess the law would regard this situation differently, since the property has not yet

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6. *See, e.g. Durrant* v. *Friend*, (1852) 5 DeG. & Sm. 343, 64 E.R. 1145 (V.C.C.); *Re Hunter*, (1975) 8 O.R. (2d) 399 (H.C.); *Re Ross*, [1976] 3 W.W.R. 465 (B.C.S.C.).

7. If, before his death, the testator becomes incompetent to manage his affairs, a committee may be appointed, who has power over the testator's property, and who may dispose of it for the benefit of the testator without regard to his testamentary dispositions. A testamentary gift of property disposed of by a committee will fail: *Re Richment*, [1939] O.W.N. 101 (H.C.); *Maynard* v. *Gosselin*, [1977] 6 W.W.R. 385 (Man. Q.B.); *but see Re Rodd Estate*, (1981) 115 A.P.R. 239 (P.E.I.S.C.). British Columbia once had legislation, patterned after the English *Lunancy Act, 1890*, 53 Vict., c. 5, s. 123, which protected the beneficiary's gift: *Lunacy Act*, R.S.B.C. 1897, c. 126, ss. 39-41. This legilsation was repealed when the *Patients' Estates Act*, S.B.C. 1962, c. 44 was proclaimed. That Act is now called the *Patients Property Act*, R.S.B.C. 1979, c. 313.

8. *See, e.g., Re Hubert Estate*, (1975) 13 A.P.R. 257 (N.B.S.C.). If property is damaged, and the insurer elects to repair it rather than provide compensation for its loss, the gift to the beneficiary will not fail: *Re Ross, supra*, n. 6.

9. *Hicks* v. *McClure*, (1922) 64 S.C.R. 361, [1922] 3 W.W.R. 285, 70 D.L.R. 287.

10. *Re Stevens*, [1946] 4 D.L.R. 322 (N.S.C.A.); *see also Re Holden*, (1945) 61 B.C.R. 493, [1945] 4 D.L.R. 198 (S.C.); *Re Brems*, [1963] 1 O.R. 122, 36 D.L.R. (2d) 218 (H.C.); *Re Puckza*, (1970) 73 W.W.R. 56, 10 D.L.R. (3d) 339 (Sask. Q.B.); *Re Hubert Estate, supra*, n. 8.

11. *Diocesan Synod* v. *Protestant Orphans Home*, [1955] 3 D.L.R. 225 (S.C.C.).

12. *See e.g., Re Cudeck*, (1977) 1 E.T.R. 17 (Ont. C.A.).

been disposed of, and proceeds of its disposition will be readily identifiable.

No distinction, however, is drawn between the case of a completed disposition of property and one which has yet to take place. In the eyes of the law, once property is subject to a binding agreement or direction for its disposition, that disposition is regarded as having taken place.[13] This is known as ademption by equitable or notional conversion.

In *Church* v. *Hill*,[14] a will provided that the testator's youngest daughter receive particular property. The balance of his property was to be divided equally among his three other children. The testator entered into an agreement to sell the property the youngest daughter was to receive. This caused the gift to fail by equitable conversion. The proceeds of sale of the property fell into residue, to be divided among the three other children. Mignault J. commented as follows:[15]

> That the testator ever contemplated that his youngest daughter, the respondent, would take nothing under his will, and that the price of the property he had left to her would go to his other children, or that he intended any such result, seems doubtful. But the Court cannot make a will for him or provide the respondent with an equivalent for the loss of the property which the testator had devised to her. Nothing would be more dangerous than to refuse to apply the settled rules as to the ademption of legacies because it may be conjectured that the result would be contrary to the intention of the testator. *Dura lex* it is true, *sed lex* and the law must be applied.

In *Re McMurdo*,[16] the testator provided by will that A was to receive his farm. Later he entered into an agreement to sell the farm to A. At the time of the testator's death A still owed $17,300 of the purchase price. The Saskatchewan Court of Appeal held that it was irrelevant that the purchaser was to receive the farm under the testator's will. The gift of the farm failed. Tallis J.A. stated:[17]

> In some jurisdictions legislation has been enacted to correct what the learned Justices considered to be an injustice. Perhaps the Legislature of this Province may, in its wisdom decide to consider such changes.

Equitable conversion occurs in a number of cases, including situations where:

(i) the testator enters into a binding agreement to sell the property;[18]

(ii) the property is expropriated;[19]

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13. 16 *Halsbury* (4th ed., 1976) para. 1373-1377.

14. *Supra*, n. 5.

15. *Ibid*., at 1051-52.

16. *Supra*, n. 5.

17. *Ibid*., at 461.

18. Such agreements would include the grant of an option to purchase after the will is made: *Weeding* v. *Weeding*, (1861) 1 J.&H. 424, 70 E.R. 812, 815 (V.C.C.). *See also Pyle* v. *Pyle*, [1895] 1 Ch. 724; *Lawes* v. *Bennett*, (1785) 1 Cox. 167, 29 E.R. 1111 (Ch.). The girt does not fail if the option is not exercised: *Re Rodger*, (1966) 60 D.L.R. (2d) 666 (Ont. H.C.).

19. *Re Stewart*, (1974) 4 O.R. (2D) 340 (C.A.).

(iii) the court orders the sale of the property;[20] or

(iv) the testator directs the sale of property, by deed or will.[21]

E. Relevant Rules of Construction

The failure of a gift of property because it is not part of the deceased's estate occurs only when the gift is of a particular item of property. If the gift can be construed as a general gift, assets of the estate will be used to obtain a gift of the type or kind specified.[22]

Courts must first construe the words of the will to determine what kind of gift the testator intended to make.[23] As a rule, if there is any ambiguity the disposition will be construed as a general gift.[24]

Should the court find that the testator intended to give a particular item of property, it must determine whether the gift was intended to include proceeds from the disposition of the property.[25] If so, the fact that the property is no longer part of the deceased's estate will not prevent the beneficiary from receiving the proceeds so long as they are identifiable.

F. Relevant Statutory Rules

1. SECTION 20 OF THE WILLS ACT

A question which frequently arises concerns whether property described in a will refers to property the testator owned when he made the will or to property substituted for it at some later time. Does a will speak from when it is made or when the testator dies?

At common law, a will operated to pass real property belonging to the testator when the will was made and personal property owned at his death.[26] This rule has been altered by legislation. Section 20(2) of the British Columbia *Wills Act* provides:[27]

> 20. (2) Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to the property.

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20. *See* Megarry and Baker, *Snell's Principles of Equity*, (28th ed., 1982) 483 citing: *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Hyett* v. *MeKin*, (1884) 25 Ch. D. 735; *Re Dodson*, [1908] 2 Ch. 638.

21. Provided the direction is imperative: *Halsbury, supra*, n. 13 at para. 1377.

22. *See* discussion at n. 1, *supra*.

23. *Re Culbertson, supra*, n. 1 at 383.

24. *Diocesan Synod* v. *Protestant Orphans Home, supra*, n. 11 at 228.

25. *Hicks* v. *McClure, supra*, n. 9.

26. Clark, *Theobald on Wills* (14th ed., 1982) 232-3.

27. R.S.B.C. 1979, c. 434, patterned after s. 24 of the U.K. *Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26.

Problems of interpretation in this context, however, continue to arise. A reference, for example, to "my bicycle," may disclose a contrary intention. The words the testator used suggest he meant the bicycle he owned when the will was made.

A rule of construction, known as the rule in *Goodlad* v. *Burnett*,[28] provides that words denoting possession (my, mine, owned by me, etc.) are not necessarily sufficient to raise a contrary intention preventing section 20(2) from applying. There is, nevertheless, considerable difficulty in construing a gift framed in such a way as referring to property substituted for the property the testator owned when he made his will.

In *Re Deans*,[29] the testator made a testamentary gift of "my house in Niagara Falls." Later, the testator sold the house in Niagara Falls and acquired another in a neighboring area. Before his death, the neighboring area was incorporated into Niagara Falls. If the words "my house in Niagara Falls" referred to the house owned when the will was made, the gift adeemed when it was sold. The court, however, found an intention to confer a substantial benefit upon the beneficiary and the gift was construed to refer to the second house.

In *Re Sikes*,[30] the testatrix bequeathed "my piano." When the will was made the testatrix owned an old piano worth about 5 pounds. Before her death she acquired an expensive electric player piano. It was held that the testator had only intended to bequeath the old piano, and that the new piano was not to pass in substitution. The court rejected the argument that no contrary intention was expressed by the words such as "my piano" or "my car" because they are "articles of ordinary use susceptible of change" or "capable of substitution" and hence similar to generic property.[31]

What is clear is that a gift of property which is capable of increasing or decreasing will be construed to mean property owned at the testator's death. A gift, for example, of "my Canada Savings Bonds" means the Canada Savings Bonds owned when the testator died:[32]

To take a simple illustration: the testator leaves "my Canada Savings Bonds to A." At the date of the will he owned only two Canada Savings Bonds, but afterwards bought 18 more so that on his death he owned 20 bonds. Under the rule of the section all 20 bonds will pass. And it seems that this may even be so if he says "the Canada Savings Bonds now owned by me," for it is said that "now" and a phrase such as "presently owned" are to be interpreted as a reference not to the date of the will but to the date of death. But of course if he says "now owned by me on the date of my will" there is a clear expression of a contrary intention within the meaning of the section and all that would pass would be the two bonds owned by the testator when he made his will.

2. SECTION 19 OF THE WILLS ACT

Section 19 of the British Columbia *Wills Act* provides:

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28. (1855) 1 K.^J. 341, 69 E.R. 489 (V.C.C.).

29. [1973] 3 O.R. 527 (H.C.).

30. [1927] 1 Ch. 364.

31. *See* Feeney, *supra*, n. 2 at 157.

32. *Ibid*., at 146.

> 19. A conveyance of or other act relating to property comprised in a devise or bequest or other disposition, made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his death.

At first glance it might appear that section 19 abolishes the doctrine of ademption, at least in part. However, section 23 of England's *Wills Act, 1837*, upon which it is based, was not aimed at problems of ademption. It was designed to ensure that transactions which altered the nature of the testator's interest in property did not defeat a testamentary gift of it. For example, a testator might make a testamentary gift of a leasehold interest in land. Later he acquires ownership of the land. Section 23 operates so that the gift passes ownership of the land.[33] It would also apply to a gift of land owned by the testator, which he later mortgages. A mortgage amounts to a conveyance of legal title to land, and in the absence of section 23 the gift would fail.[34] In *Moor* v. *Raisbeck*,[35] it was affirmed that the section did not apply to a true ademption where "the thing meant to be given is gone."

G. Reform

1. INTRODUCTION

The common law dictates that a testamentary gift of specific property will fail if it is not found in the testator's estate on his death. In this case, the law presumes that the testator intended to revoke the gift. This position is taken regardless of whether the testator actually intended to dispose of the property or was unaware that it was no longer part of his estate. Nor may a beneficiary claim any proceeds of the property in substitution for the original gift. This is because the law presumes that a testator who makes a gift of a specific item does not intend to confer a general economic benefit.

The common law has been altered in a number of jurisdictions and it is useful to canvass the approaches adopted elsewhere. Reform has centred on three general issues:

(i) whether a beneficiary may claim the proceeds from a disposition of a testamentary gift that were not received by the testator before his death;

(ii) whether a beneficiary may claim proceeds received by the testator during his lifetime;

(iii) whether a gift of proceeds should fail if they are commingled with other funds.

These issues may be summarized more simply. Should the principles of equitable conversion continue to apply? Should the principles of ademption continue to apply? If a gift includes its proceeds, what should happen if the proceeds are no longer identifiable?

2. EQUITABLE CONVERSION AND ADEMPTION

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33. *Theobald on Wills, supra*, n. 26 at 222-3.

34. *Ibid.*

35. (1841) 12 Sim. 123, 59 E.R. 1078 (V.C.C.); *see also Church* v. *Hill, supra*, n. 5; *Re Dods*, (1901) 1 O.L.R. 7; *Re Fierheller*, (1929) 35 O.W.N. 261 (H.C.); *Hicks* v. *McClure, supra*, n. 9.

(a) Reform in Other Jurisdictions

(i) Equitable Conversion

Most jurisdictions that have modified the law of ademption have limited reform to the abolition of equitable conversion. This concept was discussed earlier in this chapter. Equitable conversion refers to a disposition of property which has not been completed on the testator's death. For example, property may be sold, expropriated, lost or damaged. If, in these circumstances, the testator dies before receiving the compensation to which he is entitled, it will be paid to the testator's estate and not to the beneficiary.

In those jurisdictions that have abolished equitable conversion, a beneficiary is entitled to claim the proceeds of a testamentary gift which the testator has not received before his death.

The *Uniform Wills Act* provides that:

> 20. (2) Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting, a conveyance of, or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

This aspect of the *Uniform Act* has been adopted in New Brunswick[36] and the Northwest Territories.[37] The Alberta *Wills Act*[38] adopts a different legislative style, but is substantially similar.

Ontario's *Succession Law Reform Act*[39] also addresses ademption by equitable conversion. The Ontario provision, however, applies whether the disposition occurs before or after the will is made. It also defines a number of particular circumstances where the beneficiary may claim proceeds in substitution for the testamentary gift:

> 20. (2) Except when a contrary intention appears by the will, where a testator at the time of his death,
>
> (a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will;
>
> (b) has a right to receive the proceeds of a policy of insurance covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will;
>
> (c) has a right to receive compensation for the expropriation of property that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or

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36. *Wills Act*, R.S.N.B. 1973, C. W-9, s. 20(2)

37. *Wills Act*, r.o.n.w.t. 1974, C. w-3, S. 15(2).

38. R.S.A. 1980, C. W-11.

39. R.S.O. 1980, c. 488.

> (d) has a mortgage, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will,
>
> the devisee or donee of that property takes the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator.

A narrower approach was advocated by the Saskatchewan Law Reform Commission, which recommended that the law of ademption be revised only as it applies to real property.[40]

The (U.S.) *Uniform Probate Code*[41] also entitles a beneficiary of a specific gift to claim unpaid proceeds in certain circumstances.

(ii) Ademption

The legislation described above distinguishes between the right to receive proceeds and the proceeds themselves. If the testator receives the proceeds during his lifetime, then the beneficiary is entitled to nothing.

A few jurisdictions have gone one step further and enacted legislation which effectively abolishes ademption. The State of Georgia, for example, once abolished ademption where property is exchanged for similar property.[42] Legislation in Kentucky is even wider in scope:[43]

> (1) The conversion of money or property or the proceeds of property, devised to one of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisee shall have and receive the value of such devise, unless a contrary intention on the part of the testator appears from the will, or by parol or other evidence.
>
> (2) The removal of property devised shall not operate as an ademption, unless a contrary intention on the part of the testator is manifested in like manner.

Under this provision the beneficiary is entitled to the economic equivalent of the gift, whether or not the testator received the proceeds before his death, even if the proceeds are not traceable. This approach, however, seems to overlook the position of other beneficiaries under the will. Payment of the economic equivalent of the gift must be made from the assets of the estate. If there are proceeds and these are traceable, it is arguable that no real disappointment is visited on other beneficiaries. However, where there are no proceeds or these cannot be traced, payment of the economic equivalent may compromise gifts to other beneficiaries. This poses an additional problem of interpretation: which beneficiary would the testator have intended should bear the loss?

(b) Distinction Between Equitable Conversion and Ademption

The common law position regarding ademption turns on the absence of property alone. The limited

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40. Law Reform Commission of Saskatchewan, *Proposals Relating to Ademption by Equitable Conversion* (October 1984).

41. S. 2-608.

42. Ga. Code, ss. 113-118 (1933). These provisions do not appear in the current Code.

43. Ky. Rev. Stat. S. 394.360 (1984).

statutory exception favoured by those jurisdictions which have abolished equitable conversion seems to turn on a different view.

Equitable conversion differs from ademption in only one respect. Equitable conversion applies when the testator had not yet received the proceeds of the property when he died. Why should such weight be attached to the time at which the proceeds of the property are received? The answer appears to be convenience in identifying the proceeds. If the proceeds are received soon after the disposition, they may change form several times, or become mingled with other property, before the testator dies. The question of exactly what constitutes the proceeds becomes an increasingly difficult one. If, however, the proceeds are owing on the testator's death, they can easily be identified at the time of payment.

Such convenience, however, does not of itself justify confining reform to situations of equitable conversion only. In situations of true ademption, whether proceeds received by the testator before his death remain identifiable is a question of fact. The testator may, for example, have kept the proceeds in a separate account. If identifiability is the critical factor, then legislation ought to exclude the rules of ademption whenever the proceeds are identifiable.

But timing, *per se*, also deserves some weight. The question is, how much and in what circumstances. Ademption is based on the view that a disposition of property is intended to revoke a gift of it. If a testator wishes the beneficiary to receive the proceeds from the disposition, he must vary his will. Adopting different rules for ademption and for equitable conversion, consequently, attaches significance to the time at which the proceeds are received.

It may be argued that this is justified because, in most cases, if the testator has received the proceeds, he has also had time to make a new will. If he has not done so he may be taken to have revoked the gift. If the proceeds have not been received when he dies, often there will not have been sufficient time, or the testator's mind will not have been directed to the need, to make a new will. An intention to revoke the gift cannot be assumed.

This kind of analysis is not wholly satisfying. Whether the testator had sufficient time to revise his will is also a question of fact. For example, proceeds may still be outstanding on a disposition of property made a number of years before the testator's death, giving him ample time to alter his will if he intends to continue to benefit the person to whom the gift of the property was made. Alternatively, the testator's death may occur within days of the payment of proceeds. Clearly, the factor of timing is not a sure objective test of the testator's intention to revoke a gift.

3. COMMINGLING PROCEEDS WITH OTHER FUNDS

A final issue for consideration concerns a beneficiary's entitlement to the proceeds of a gift where the testator has commingled the proceeds with other funds. This issue, of course, is relevant only insofar as the disposition of a gift does not result in an ademption.

In *Diocesan Synod* v. *Protestant Orphans Home*,[44] Mr. Justice Cartwright of the Supreme Court of Canada held that where a gift of the proceeds of the sale of property is made by will and the testator sells the property and commingles the resulting fund, it loses its identity and the gift adeems. Section 20(3) of the *Uniform Wills Act*, addresses this situation:

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44. *Supra*, n. 11.

> (3) Except when a contrary intention appears by the will, where the testator has bequeathed proceeds of the sale of property and the proceeds are received by him before his death, the bequest is not adeemed by commingling the proceeds with the funds of the testator if the proceeds are traced into those funds.

Only New Brunswick[45] and the Northwest Territories[46] have adopted this provision. The Ontario Law Reform Commission recommended that section 20(3) not be adopted on two grounds:[47]

1. The commingling might be looked upon as a change of intention on the part of the testator.

2. There might be difficulty in deciding what rules should be applied if the testator had withdrawn money from the combined fund.

We do not find these reasons persuasive. Commingling as an indicia of intention has little to recommend it. As to the second point, the law has developed principles for determining whether property remains identifiable after it has been commingled and which determine the limits of identifiability generally. Tracing issues have also been the subject of recommendations by this Commission in an earlier report.[48]

4. RECOMMENDATIONS FOR REFORM

We stated at the outset that the current law of ademption is based on two presumptions:

1. A testator who makes a specific gift does not intend to confer a general economic benefit on the beneficiary; and

2. A testator intends to revoke the gift if the subject matter of the gift is disposed of before his death.

It will be seen that these presumptions depend entirely on the characterization of a particular gift and the fact that a disposition has occurred. However, an inquiry restricted to these facts alone runs the risk of overlooking other circumstances that may be more probative of the testator's intent.

First, characterization of a gift as general or specific seems a dubious approach to the question of whether the testator intended to confer a general economic benefit. Other factors, such as the nature of the gift, its value relative to the worth of the estate, or the relationship of the beneficiary to the testator, may often provide more reliable clues to the testator's intent in this regard. For example, a testator who leaves a unique item of family property, such as a portrait of a mutual ancestor, to a distant relative is unlikely to have intended to confer a general economic benefit. If, however, the testator makes a gift of "my IBM shares," representing a significant portion of the value of his estate, to his only child, quite likely he was motivated by an intention to enhance the beneficiary's economic well-being. In this case, characterization of the gift as general or specific seems a meaningless endeavour.

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45. *Wills Act, supra* n. 36.

46. *Wills Act, supra* n. 37.

47. Ontario Law Reform Commission, *Report on the Proposed Adoption in Ontario of the Uniform Wills Act* (1968) 36.

48. Law Reform Commission of British Columbia, *Report on Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case* (LRC 66, 1983).

Second, not every disposition will support the presumption that a testator intended to revoke the gift. Property may be lost, accidentally destroyed, or sold by a third party such as a committee appointed to manage the affairs of the testator. The involuntary nature of these transactions does not support a presumption of intended revocation. Similarly, the length of time intervening between a disposition of property and either the testator's death or the receipt of the proceeds may be revealing. The shorter the period, the less certain the presumption becomes.

Although the two presumptions that shape the current law of ademption appear to be sound ones, it seems to us that their application should depend in every case on the testator's intention. That intention, however, should be determined only after an inquiry into the surrounding circumstances and should not be inferred solely from the fact that the language used to describe a gift would cause it to be characterized as specific, or that a disposition has occurred. Such an inquiry would require a two stage deliberation: do the circumstances surrounding the making of the testamentary gift evidence an intention to confer a general economic benefit; and, if so, do the circumstances surrounding the disposition of the gift support an intention to revoke it?

The Commission recommends that:

1. *(1) A gift, by will, of specific property fails where there has been a disposition of the property before the testator's death unless the testator*

   (a) intended to confer a general economic benefit on the beneficiary; and

   (b) did not intend the disposition to operate as a revocation of the gift

   in which case the gift is deemed to be a gift of the proceeds of the disposition.

   (2) For the purpose of paragraph (1), where there is no direct evidence of the testator's intention, it may be inferred from surrounding circumstances as provided in paragraphs (3) and (4).

   (3) For the purpose of ascertaining the testator's intention under paragraph 1(1)(a) regard may be had to:

   (a) the character of the gift;

   (b) the value of the gift;

   (c) the value of the gift relative to the worth of the estate; and

   (d) the relationship of the beneficiary to the testator.

   (4) For the purpose of ascertaining the testator's intention under paragraph 1(1)(b) regard may be had to:

   (a) whether, and when, the testator received the proceeds of the disposition;

   (b) the nature and circumstances of the disposition;

(c) the character of the proceeds;

(d) whether the disposition was made by, or at the direction of, the testator;

(e) the length of time between the disposition and the testator's death;

(f) the extent and character of other property passing to the beneficiary on the testator's death; and

(g) whether the testator had a reasonable opportunity to alter his testamentary arrangements to reflect the disposition.

(5) In paragraphs (1) to (4)

"disposition" of property includes:

(a) a binding agreement or direction for the disposition of property; and

(b) the loss or destruction of property

"proceeds" includes:

(a) consideration, including security, for the disposition of property;

(b) compensation for injury to, or loss of, property; and

(c) proceeds deposited into a mixed fund, to the extent they are identifiable.

CHAPTER III GIFTS MADE DURING A TESTATOR'S LIFE WHICH RESEMBLE TESTAMENTARY GIFTS

A. Introduction

There are many reasons for benefiting someone by will. Commonly, a testator wishes to provide for his family, satisfy moral and legal obligations, fulfill promises and benefit worthy persons or endeavours. Often, the same motivations for giving a benefit by will encourage a testator to make gifts during his lifetime. When such a gift resembles an intended testamentary gift, it suggests the possibility that the testator may have overlooked the latter. In some cases, a gift made during the testator's lifetime is regarded as revoking a similar testamentary gift.

B. Testamentary Gifts Revoked by Similar Gifts Made During the Testator's Life

1. GIFTS GIVEN FOR A PARTICULAR PURPOSE

In the ordinary case, the similarity between a gift made during the testator's lifetime and a gift made by will has no consequence.[1] Where, however, the gifts were aimed at a particular purpose, so that there appears to be duplication, the testamentary gift may be revoked by implication.[2] In one case,[3] for example, the testator made a will leaving a certain sum of money to trustees of a hospital endowment fund. During his lifetime, he made a gift to the trustees in the amount of the testamentary gift. The testamentary gift, it was held, was revoked by the gift made during the testator's lifetime.

2. GIFTS TO CHILDREN

A gift made during his lifetime by a testator to his child, or to a person to whom the testator has assumed a parental obligation, is subject to special rules based on an assumption that the testator intends to treat all of his children equally.[4] In some cases, such a gift will operate to revoke a similar testamentary gift. The similarity[5] and nature of the gifts may raise the presumption that the testator intended the gift to operate as an advancement of the testamentary gift.

The presumption arises only where the gifts are given with the intent of establishing the child in life.[6]

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1. *See* Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (16th ed., 1982) 859. Their analysis is substantially adopted in this Report.

2. *See Debeze* v. *Mann*, (1789) 2 Bro. C.C. 165, 29 E.R. 94 (Ch.); *Monck* v. *Lord Monck*, (1810) 1 Ball & Beatty 298, 303, 12 R.R. 33, 35 (Ir. Ch.); *In re Pollock*, (1884) 28 Ch. D. 552, 556; *In re Ashton*, [1897] 2 Ch. 574; *In re Jupp*, [1922] 2 Ch. 359.

3. *In re Corbett*, [1903] 2 Ch. 326.

4. *See, e.g., Lacon* v. *Lacon,* [1891] 2 Ch. 482, 498. The testator's child includes a child to whom the testator stood in *loco parentis: Pym* v. *Lockyer*, (1841) 5 My. & Cr. 30, 41 E.R. 283 (Ch.).

5. Generally, the gifts must be similar in nature for the presumption to arise. This is not so, however, where the gift is valued at the time it is advanced: *In re George's Will Trusts*, [1949] Ch. 154.

6. *Lacon* v. *Lacon, supra*, n. 4.

Such gifts are known as "portions." Any considerable gift of money might be regarded as a portion.[7] Common examples include a gift of money to assist in starting a business, or a gift upon marriage.[8] The presumption may be rebutted by evidence of the testator's contrary intent.[9] To avoid giving a child "double portions," the portion received during the testator's lifetime will reduce the child's entitlement under the will.[10] This rule does not operate where the will was made after the advancement of the portion.[11]

When a gift qualifies as an advancement of a portion, it is brought into "hotchpot," that is, into account in the distribution of the estate.[12] Hotchpot refers to the shares of the estate to which the testator's children are entitled. These shares are notionally separate from the remainder of the estate. They include the portions to be advanced to the testator's children under the will, and the portions advanced to them during the testator's lifetime.

The hotchpot rule operates to ensure equality among the testator's children. If all or part of one child's share fails because of an advancement, that portion is divided among the children so that they share equally. For example, the testator may direct that the residue of his estate, valued at $90,000, be divided equally among his children, A, B and C. If B and C received portions of $20,000 and $10,000 respectively during the testator's lifetime, these amounts must be brought into hotchpot, bringing the notional value of the residuary estate to $120,000. Each child is entitled to $40,000 or one third of the residuary estate. A would actually receive that amount. B and C, however, would receive only $20,000 and $30,000 respectively, representing one third of the residue less the value of the gifts they had already received. If the hotchpot rule does not apply, each child will receive $30,000.

C. Testamentary Gifts Which Satisfy Pre-Existing Obligations

1. GENERALLY

A situation analogous to the presumed revocation of a testamentary gift arises where the testator dies owing another person a debt. If the testator also leaves that person a benefit under the will, in some circumstances it may take effect to discharge the debt. This is known as the presumption of satisfaction.[13] The testamentary gift is presumed to have been made in satisfaction of the debt. Unless the presumption is rebutted, the beneficiary cannot claim both payment of his debt and the benefit under the will.

The presumption of satisfaction presupposes an existing obligation, while a presumed revocation contemplates a completed gift or transaction. For example, a testator may make a testamentary gift of "$569.58 to X." If the testator dies indebted to X in the same amount, the presumption arises that the testator intended the gift to discharge the debt. If, on the other hand, the testator paid X $569.58 just before he died,

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7. Maitland, *Equity* (1913) 188.

8. Gifts of bounty or gifts given to clear a child's debts are not regarded as "portiions": *see In re George's Will Trusts, supra*, n. 5

9. *Lacon* v. *Lacon, supra*, n. 4.

10. *Ibid*.

11. Feeney, *The Canadian Law of Wills* (2nd ed., 1982) vol. 2, 166-67.

12. *Lacon* v. *Lacon, supra*, n. 4 at 501.

13. Maitland, *supra*, n. 7 at 181-83.

the presumption arises that the testator intended to revoke the gift.

Satisfaction of debts operates in a manner similar to that of a presumed revocation. For this reason, a brief summary of the situations in which it arises is useful.

2. THE PRESUMPTION OF SATISFACTION: PARTICULAR SITUATIONS

(a) Satisfaction of Debts by Legacies

A testamentary gift to a creditor which equals or exceeds the amount owed is presumed to be in satisfaction of the debt.[14] The presumption arises only in defined circumstances and is easily rebutted. The debt must have existed before the will was made. The testator could not have intended the testamentary gift to satisfy a debt not in existence.[15] Nor will the presumption arise if the testamentary gift is contingent or uncertain,[16] if the debt and the gift are payable at different times,[17] or if the gift is less than the debt,[18] or of a different nature than the debt. For example, a testamentary gift is not presumed to satisfy a secured debt.[19] The presumption is not a strong one. The provision found in almost all wills directing payment of the testator's debts is sufficient to displace it.[20]

(b) Satisfaction of Portion Debts by Legacies

A situation common in the nineteenth century, but seldom encountered today,[21] arises when a testator dies without having fulfilled the terms of a formal settlement to advance a portion to his child. A "portion," it was noted earlier, is generally defined as a gift by a parent to his child "with a view to establishing him in life."[22]

A parent may assume a formal obligation to pay a portion to his child. For example, the parent might establish a trust for his child and covenant with the trustees to pay them a sum of $20,000 on that child's marriage. This obligation is termed a "portion debt." If the parent then makes a similar testamentary gift to that child, the presumption arises that the gift was intended to satisfy the portion debt. The presumption in this case is stronger than in the case of an ordinary debt.[23] It may arise where the value of the gift exceeds

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14. *See Williams on Executors* (14th ed., 1960) vol. 2, 705.

15. *Cranmer's Case*, (1896) 2 Salk. 508, 91 E.R. 434 (K.B.); *Thomas* v. *Bennet*, (1725) 2 P. Wms. 341, 24 E.R. 756 (Ch.).

16. *Nicholls* v. *Judson*, (1742) 2 Atk. 300, 26 E.R. 583 (Ch.).

17. *Clark* v. *Sewell*, (1744) 3 Atk. 96, 26 E.R. 858 (Ch.); *Adams* v. *Lavender*, (1824) M'Cle. & Yo. 41, 148 E.R. 317 (Ex.).

18. *Eastwood* v. *Vinke*, (1731) 2 P. Wms. 613, 616, 24 E.R. 883, 884 (Ch.).

19. *See In re Stibbe*, (1946) 175 L.T. 198 (Ch.).

20. *Re Manners*, [1949] 2 All E.R. 201 (C.A.); *Re Trider*, (1978) 2 E.T.R. 22 (N.S. Pro. Ct.); *Garnett* v. *Armstrong*, (1977) 83 E.L.R. (3d) 717 (N.B.S.C., App. Div.).

21. In Canada, there is no recent case law on the issue of satisfaction of portions.

22. *Lacon* v. *Lacon, supra*, n. 4.

23. Maitland, *supra*, n. 7 at 185.

the value of the debt.[24] If the gift is less than the portion debt, the debt is satisfied to the extent of the gift.[25]

D. Reform

At one time, parents may have regarded sizeable gifts made to a child during the parents' lifetime as advancements of the share that child is to receive on their death. Today, however, the concept seems antiquated. Large gifts are seldom considered by a parent or a child as instalment payments of shares expected upon the parent's death, which will affect the child's entitlement under an existing will. More often, money to establish a child will be advanced as a loan, which may well be forgiven later. If a testator makes a gift to his child intending it to be deducted from his testamentary share, it is reasonable to expect a clear indication to this effect.

The presumption of advancement, or "hotchpot," has attracted much criticism in recent years, particularly as it applies on an intestacy.[26] Some jurisdictions have recommended that the presumption be abolished altogether. In our *Report on Statutory Succession Rights*, for example,[27] the Commission recommended that the presumption should not apply on an intestacy and that the relevant provision of the *Estate Administration Act* should be repealed. In other jurisdictions, it has been recommended that the presumption be reversed. Substantial gifts made during the intestate's lifetime should be presumed to be gifts, and not advancements.[28] A few jurisdictions[29] favour retention of the presumption in cases of gifts exceeding a certain value which are given to an intestate successor within five years of the intestate's death.

In the context of testate succession, the U.S. *Uniform Probate Code* provides that a gift made during a testator's lifetime shall be regarded as an advancement of a testamentary gift only where the testator or beneficiary acknowledges this in writing. The legislation applies not only to gifts to children, but gifts to any beneficiary regardless of the beneficiary's relationship to the testator:

> Section 2-612. [Ademption by Satisfaction]
>
> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given

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24. *See, In re Tussaud*, (1878) 9 Ch. 363 (C.A.), where a testamentary gift of £2,800 was held to satisfy an unadvanced portion of £1,000. According to Maitland, *ibid.*, at 186 the gift and the debt must be of a similar nature. For example, a covenant to pay $100,000 would not be satisfied by a devise of Blackacre, even though Blackacre is worth $100,000 or more.

25. *See, e.g., Lacon* v. *Lacon, supra*, n. 4. *See also Thynne* v. *Earl of Glengall*, (1848) 2 H.L.C. 131, 154, 9 E.R. 1042, 1050; *Dawson* v. *Dawson*, (1867) L.R. 4 Eq. 504; *Nevin* v. *Drysdale*, (1867) L.R. 4 Eq. 517. This is consistent with the rules that apply when a testator makes an advancement to a child during his lifetime.

26. In British Columbia, under s. 105 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114, some *inter vivos* gifts may be characterized as advancements of a child's intestate portion.

27. *See, e.g., Report on Statutory Succession Rights* (LRC 70, 1983) 39; Scottish Law Reform Commission, *Intestate Succession and Legal Rights* (C.M. No. 69, 1986) 144; Law Reform Commission of Western Australia, *Distribution on Intestacy* (Working Paper - Project no. 34, 1972) 8. The concept has been abolished in New Zealand and Queensland.

28. *See, e.g.*, California Law Revision Commission, *Wills and Intestate Succession* (1982) 2331; Tennessee Law Revision Commission, *Proposed Final Draft on Tennessee Probate Code* (1976) 89; Manitoba Law Reform Commission, *Intestate Succession* (MLRC 61, 1985).

29. *See, e.g.*, Law Reform Commission of South Australia, *The Law of Intestacy and Wills* (28th Report, 1974); Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report No. 43, 1985).

during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

This provision in effect reverses the common law presumption. Gifts which the testator makes during his lifetime are presumed to be gifts, and not advancements of a testamentary benefit.[30] The presumption may be rebutted by evidence of a contrary intent contained in a written acknowledgment by the testator or beneficiary.

In the Working Paper, we proposed that a similar approach be adopted, but only with respect to gifts to children or other persons to whom the testator stands in *loco parentis*. It was thought that reform in the law governing gifts to creditors or other unrelated persons was unnecessary since, ordinarily, the similarity between a gift and a testamentary benefit attracts no consequences. Although our correspondents were in general agreement with this approach, they suggested that evidence of an intention to advance should not be restricted to the will or a signed memorandum. This is because sizeable gifts to children are often made informally, for example at family conferences. Excluding evidence of arrangements arrived at in such circumstances is likely to be misleading.

We are persuaded that these concerns are well-founded and believe that a wider range of extrinsic evidence should be admissible. This conclusion is consistent with our general position on the admissibility of extrinsic evidence to establish intent in testamentary matters.

The Commission recommends that:

2. *Subject to evidence of a contrary intention, property given by a testator during the testator's lifetime to a child of the testator or to any person to whom the testator stands in* loco parentis *should be presumed to be a gift and not an advancement of a portion to which that child or other person is entitled under the testator's will.*

30. The Law Revision Committee of Tennessee, adverting to the "confusing and complex" body of case authority, has recently made similar recommendations: *supra*, n. 28 at 89.

CHAPTER IV GIFTS THAT APPEAR TO BE SUBJECT TO A CONDITION

A. Introduction

To be effective, a testamentary gift usually requires only that the beneficiary be prepared to accept it. Nothing more is required of him. It is, however, open to the testator to make a gift contingent upon the beneficiary performing a particular requirement. For example, a testator, the owner of Blackacre, wishes to see that B receives Whiteacre which is currently owned by A. He may try to achieve this by making a will which leaves Blackacre to A provided that A transfers Whiteacre to B. If A wishes to receive Blackacre, he must first transfer Whiteacre to B.[1] If A wishes to benefit from the will, he must accept, and carry out, all of its terms as far as possible.

In some cases, the testator does not expressly link a testamentary gift to the performance of a condition. The will as a whole, however, provides that a particular beneficiary is to receive a benefit as well as a detriment. These cases are also governed by the general principle that a person wishing to benefit from a will must accept, and carry out, all of its terms as far as possible.

An unusual case arises from time to time. The testator, apparently acting under a mistake, attempts to dispose of property belonging to another person believing it to be his own. A testator is presumed to intend to dispose of property he owns.[2] Clearly, he cannot dispose of what he does not own. A person entitled to a gift under the will may take it only if he is willing to dispose of his property as directed by the testator. For example, a testator leaves "my car to A" and "my boat to B." If the car belongs in fact to B, B cannot claim the boat unless he transfers his car to A. No inquiry is made whether the gift of B's car was made by mistake. The presumption that a testator intends to dispose only of property that he owns dictates that the gift of the boat to B is subject to the condition that B dispose of his own car.[3]

These cases are governed by a rule known as "election,"[4] which has been described as follows:[5]

> ... [W]here a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them.

1. ELECTION

A beneficiary need not accept the testamentary gift. If he declines it, the gift falls into residue, unless the testator directs otherwise. Where the gift exceeds the value of the beneficiary's property that is to be

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1. *See* Feeney, *The Canadian Law of Wills* (2nd e., 1982) vol. 2, 171.

2. *Dummer* v. *Pitcher*, (1833) 2 My. & K. 262, 39 E.R. 944 (Ch.).

3. *Graham* v. *Clark*, [1949] 4 D.L.R. 770 (Alta. C.A.).

4. Hanbury and Maudsley, *Modern Equity* (12th ed., 1985) 814, traces the origins of the doctrine to the early eighteenth century when the right of alienation was restricted and the forms of alienation were complicated. In the early days of its existence, the doctrine played its major role in cases of improper execution of power, ineffective dispositions of realty, and dispositions in conflict with a right such as dower.

5. Codrington v. Codrington, (1875) L.R. 7 H.L. 854, 861-62, 34 L.T. 221, at 222.

disposed of, the beneficiary will likely elect to accept it. If so, the beneficiary may either give up his property or pay the economic equivalent to the beneficiary designated by the testator.[6]

If the beneficiary is not in a position to transfer his property according to the testator's directions, election is inapplicable:[7]

> Equity can only require B to submit his own beneficial interest being applied to compensate the disappointed party if that interest is one that can be so applied.

For example, where the testator directs the disposition of property in which the beneficiary only has a life interest, election can have no application. The beneficiary may take the gift under the will and is not obliged to compensate the disappointed beneficiary.[8]

2. PARTICULAR ISSUES

(a) The Relevance of the Testator's Intention

It is not necessary that the testator intend to raise a case of election:[9]

> The doctrine of election does not depend on the intention of the testator ... and, indeed, a case in which the testator frames his will with the conscious intention of bringing the doctrine into play must be very rare indeed. In the great majority of cases to which the doctrine is applicable it applies because the testator has made a mistake. His intention is not in doubt but he has mistakenly assumed an ability to do something which, in fact, he can not do of his own volition.

Professor Feeney suggests that a sounder view of Canadian law is that election should always depend on the testator having intended to put the owner to an election.[10] If the testator mistakenly believes he owns the property, he cannot be said to have this intention. As authority for this view he cites the early Ontario decision of *Mutchmor* v. *Mutchmor*[11] and case law[12] holding that election does not apply where a beneficiary is unable to transfer the property. In the latter cases, the beneficiary is able to claim the testamentary benefit because the testator is deemed not to have intended to put the owner to an election. Similarly, Professor Feeney argues, election should not arise where the testator mistakenly believes he owns the property.

(b) Joint Tenancy and Election

Several cases have considered whether an election arises where the gift is owned in joint tenancy and passes to the beneficiary outside the will. The problem arises in this way: By will the testator leaves a life

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6. *See, e.g., In re Macartney*, [1918] 1 Ch. 300; *see also Re Gordon's Will Trusts*, [1978] 2 All E.R. 969, 974-75 (C.A.)

7. *Re Gordon's Will Trusts, ibid.*, at 975.

8. *See Re Gordon's Will Trusts, ibid.; In re Vardon's Trusts*, (1885) 31 Ch. D. 275 (C.A.); *In re Lord Chesham*, (1886) 31 Ch. D. 466.

9. *Re Mengel's Will Trusts*, [1962] 2 All E.R. 490, 492 (Ch.).

10. Feeney, *supra*, n. 1 at 172-73.

11. (1904) 8 O.L.R. 271 (Div. Ct.). In this case, the testator gave a testamentary benefit on the expressed and mistaken assumption that the beneficiary had disposed of certain property in a particular way. The court held that the beneficiary was not put to an election.

12. *See, e.g., In re Lord Chesham* and *In re Vardon's Trusts, supra*, n. 8.

interest in the family home to his spouse. The family home, however, is held in joint tenancy, and passes to the spouse outside the will by operation of law. The testator also makes other testamentary gifts to the spouse and directs that the children are to receive the family home after the spouse passes on.

In *Re Kallops*[13] the British Columbia Supreme Court held that in these circumstances the widow was put to an election.[14] In contrast, the Ontario High Court in *Re Beauchamp*[15] held that no election took place. The property subject to the joint tenancy did not vest until after the testator's death. No case of election could arise because the widow did not own the property before the testator's death.

(c) Life Insurance Proceeds and Election

A testator, quite apart from the provisions in his will, may designate a particular person as a beneficiary under a life insurance policy. That person may also be a beneficiary under the testator's will. If the testator then attempts to make a testamentary gift of the insurance proceeds, the question arises whether the beneficiary must be put to an election.

This issue was considered in a number of early Ontario decisions.[16] These cases involved provincial legislation similar to British Columbia's present *Insurance Act*,[17] which makes certain designations irrevocable, or revocable only in accordance with the Act. Insurance proceeds in these cases are effectively the property of the beneficiary. An attempt to dispose of these by will is viewed as a direction to dispose of property belonging to another,[18] which might give rise to an election.

In the Ontario cases, however, it was held that the beneficiary was not bound to elect because the disposition attempted in the will was prohibited by legislation. Since the direction was contrary to law, it was void. Consequently, the issue of election could not arise.[19] The beneficiaries were entitled to both the testamentary gift and the insurance proceeds.

On a strict legal analysis, these cases are not wholly satisfying. Election operates whenever the testator attempts to dispose of another's property. Since the testator cannot do this in any case, it should not matter that legislation coincidentally reinforces that inability. These considerations may have influenced the decision in *Re Mulliss*.[20] Middleton J.A. bowed to the weight of authority but doubted its accuracy[21] and

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13. (1963) 39 E.L.R. (2d) 757 (B.C.S.C.).

14. *See also In re Sulivan Estate*, (1951) 3 W.W.R. (N.S.) 363 (Alta, S.C.) For a similar holding.

15. (1975) 56 D.L.R. (3d) 644.

16. *Griffith* v. *Howes*, (1903) 5 O.L.R. 439 (H.C.); *Re Edwards*, (1910) 22 O.L.R. 367 (H.C.); *Re Mulliss*, [1933] O.R. 638 (H.C.).

17. R.S.B.C. 1979, c. 200, particularly ss. 141, 142.

18. *Griffith* v. *Howes, supra*, n. 16.

19. *Ibid*.

20. *Supra*, n. 16.

21. *Ibid*., at 641:

> The inclination of my own mind is somewhat strongly in favour of the contention that the doctrine of election will yet apply. I can see no reason why the testator who has insured his life for the benefit of his wife, may not by his will put the wife to her election and compel her to choose between the benefit which is hers under the policy and the benefit which he proposes for her under the will. That would not appear to me to be in contravention of the general law of the land. It recognizes the absolute right of the wife to the insurance money and gives her the choice of retaining that which is her own or bringing it in to the alternative scheme proposed by the will. I am, however, precluded from

predicted that clarification from a higher court would be inevitable.[22]

This prediction has not materialized, and one can only speculate how the Supreme Court of Canada might deal with this issue. It might well defer to the dictates of logical consistency and hold that a person who is a beneficiary under both an insurance policy and a will must be put to an election. On the other hand, the Ontario cases reveal a high degree of judicial hostility to election as a rule of construction. Usually, the practical effect of election has very little to do with what the testator would have wanted had he realized his mistake. For these reasons, the approach taken by the Ontario courts might well be endorsed.[23]

B. Reform

The above discussion has focused on a few of the technical rules relating to election.[24] Particular attention has been directed to the problems arising when a testator attempts to dispose of property belonging to a person who is also a beneficiary under the will. Hanbury's *Modern Equity* makes the following observation:[25]

> An overall consideration of these technical rules reveals a doctrine far removed from the apparently simple principle from which it derives. In its present form, election is too uncertain an instrument of equity. Is there an adequate rationale for it? In practice, most election cases arise not from eccentricity of testation but from mistake. Ordinarily, mistakes in a will are not remedied by equity, but in this context they are. Why? Because there is to hand a wide and ancient principle, not invented to cover mistakes, but which in this context has come to be more concerned with mistakes than with anything else. But the real question, and the only one in relation to which it is justifiable to consider the merits of election, is whether a more general jurisdiction to correct mistakes should exist. There is limited merit in a doctrine that deals only in mistakes as to other people's property.

In *Report on Interpretation of Wills*,[26] the Commission examined the ability of the courts to rectify a will where the words used in it do not accurately reflect the testator's intention. Currently, a court's jurisdiction in this regard is limited. A court may reject an inessential or inaccurate part of a description. It may also imply words if it is satisfied that there has been an inaccurate expression by the testator of his intention, provided the correct words can be determined from reading the will as a whole. In the Report, it was recommended that the courts should have a general power to rectify mistakes in a will.[27] It was also recommended that extrinsic evidence should be admissible for this purpose.[28]

> giving effect to my own views by the decision of my brother Riddell in the case of *Re Edwards* ... That case determines that the provisions of the *Insurance Act* do prevent the general law of election applying.

22. *Ibid*.

23. According to Feeney, *supra*, n. 1, the effect of these decisions is to exclude the doctrine, at least in cases where insurance legislation creates a statutory trust. In light of the misgivings expressed by Middleton J.A. and Riddell J. in *Re Edwards*, and the legal inconsistencies raised by these cases, it may be questioned whether the position should be stated with such confidence.

24. *See* Hanbury and Maudsley, *Modern Equity, supra*, n. 4, for a clear and more comprehensive examination of technical issues relating to the doctring.

25. *Ibid*., at 823-4.

26. LRC 58, 1982.

27. *Ibid*., at 50.

28. *Ibid*.

These recommendations relate to issues of construction, however, and not to problems of election. In cases of election arising out of the testator's mistaken assumption that he owns property belonging to another, there is no question that the words in the will accurately reflect the testator's intention. That intention, however, is based on a kind of mistake which cannot be remedied by power to rectify a will.[29]

In the Working Paper, it was noted that if a testator makes a gift in his will with the intention that the beneficiary dispose of his own property in a particular way, he would ordinarily make this condition express. He would not leave it to be inferred from an unrelated disposition of property that he does not own. Such a disposition is more reasonably attributed to mistake. Our correspondents agreed with this observation.

The Commission recommends that:

3. *(1) Subject to evidence of a contrary intention, a testamentary gift of property which the testator does not own should have no effect.*

(2) Without limiting the generality of paragraph (1), the rights of a beneficiary shall not be affected by any purported disposition by the testator of property owned by the beneficiary.

29. There appears to be no common law jurisdiction which has considered election in cases involving mistake. Under Article 881 of the Quebec *Civil Code*, however, a gift of property not belonging to the testator is generally of no effect, whether or not the testator is mistaken s to ownership.

CHAPTER V GIFTS THAT FAIL

A. Introduction

When a gift in a will is unable to take effect in the way the testator intended, it is said to fail. In Chapter II, we examined the law which governs a failure that arises because there is no property existing at the testator's death that matches the description of the gift in the will. A gift may also fail for other reasons, but the specific subject matter of the gift remains in existence at the time of the testator's death. How is the property dealt with in those circumstances? The courts have developed a number of rules to resolve this problem. Legislation has also been enacted to provide for the disposition of property where a gift fails in certain circumstances.

B. Ways Gifts Fail

A gift may fail for many reasons. Sometimes events unforeseen by the testator occur after a will is made that make it impossible to carry out the testator's directions. A beneficiary may die before the testator. The technical term for the failure of a gift in this case is "lapse." A beneficiary may refuse to accept a gift, which he may be inclined to do if it is subject to conditions he finds unacceptable, or to liabilities that outweigh its value. A beneficiary who refuses a gift is said to disclaim it. A gift may also fail because it is subject to a condition that is breached by the beneficiary. For example, the testator may make a gift to "A on condition that A continue to use her maiden name." A's failure to abide by this stipulation will result in a loss of the gift.[1] Sometimes, technical rules unknown to the testator may cause the failure of a gift. A person who witnesses a will may not receive a benefit under it.[2] A gift that is void because it is uncertain, illegal,[3] contrary to public policy[4] or offends the rule against perpetuities[5] will also fail.

The law does not seem to reflect any concern as to the precise reason for a gift's failure. Gifts that fail are generally distributed in the same manner, regardless of the reason for their failure.[6]

C. Treatment of Failed Gifts

1. ALTERNATIVE PROVISION IN THE WILL

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1. Feeney, *The Canadian Law of Wills*, (2nd ed., 1982) Vol. 1, 183.

2. *Wills Act*, R.S.B.C. 1979, C. 434, S. 11. In the *Report on the Making and Revocation of Wills* (LRC 52, 1981) 80, the Commission recommended the repeal of section 11 and the enactment of a provision which would entitle the attesting beneficiary, his spouse or any person claiming under him to the gift if the beneficiary satisfies the court that the testator knew and approved of it.

3. *See* Feeney, *supra*, n. 1, at 117.

4. Conditions subsequent that may cause a gift to fail because they are contrary to public policy include those inciting the commission of a crime, those intended to induce the separation of a husband and wife or those which are an unreasonable restraint on marriage: *see Feeney, ibid*., at 199.

5. The rule against perpetuities is discussed in Feeney, *ibid*., at 234-275.

6. There are two exceptions to this statement. On arises under s. 29 of the *Wills Act*, *supra*, n. 2, (the "anti-lapse" provision) which is discussed at greater length later in this chapter. The other arises under the doctrine of *cy-pres*. Under this doctrine, a gift in a will to a charitable organization that has ceased to exist before the testator's death, or never will pass *cy-pres*, that is, in the manner and to the charity which most closely conforms to the testator's wishes: *see, e.g., Re Allendorf*, (1963) 38 D.L.R. (2d) 459 (Ont. H.C.); *Re Pace*, (1981) 8 E.T.R. 276 (B.C.S.C.).

Where a testator anticipates the event that causes the gift to fail and makes an alternative provision for that circumstance, his directions will determine who is to receive the gift. A testator's intention in this regard may be express or implied. A gift to "A, but if he should predecease me, then to B" would pass to B in the event of A's death, according to the expressed intentions of the testator. Similarly a gift to "A, but if she marries a person who does not profess the Jewish faith, then to B" would pass to B in the event A marries a person who does not fall within the testator's description.[7]

An alternative provision may be inferred from the nature of the gift. This will occur where the testator makes a gift to two or more persons with the intention of benefiting those persons as a single group. Such an intention will be inferred if the gift is a class gift or if it confers a joint interest. As a general rule, a gift that is made to a group of persons without regard to the number or names of individuals in that group will be construed as a class gift.[8] Usually, the persons in the group will share a common tie or bear a similar relationship to the testator.[9] For example, a gift to "my brother's children" or to "my nieces and nephews" is a class gift. However, if there is some indication that the testator was individual-minded, the gift is not a class gift. A gift to "my brother's three children, X,Y and Z," for example, would normally be construed as a gift to X, Y and Z individually, and not as a group.

The distinction is important if the share of one beneficiary fails. In the case of a gift to several persons as individuals, the share of a beneficiary that fails will normally fall into residue.[10] In the case of a class gift, the share of a beneficiary that fails will be distributed among the remaining members of the class. This is because a class gift is said to reflect an intention to benefit the persons in the class as a single group, so that "if one member of the group is subtracted, the shares of the others will be increased."[11] In other words, a class gift is an expression of intent that the members of the class should stand as substitutional beneficiaries for the share of any one of their number that predeceases the testator.

Similarly, a testator may make a gift to two or more persons with the intention of conferring a joint interest. A gift to "A and B as joint tenants" or to "A and B jointly" creates a joint interest.[12] A joint gift is also said to reflect an intention to benefit the beneficiaries of that gift as one group, rather than individually. Consequently, where a gift in a will fails as to the share of a particular joint beneficiary (as opposed to a failure of the whole gift) the share of that beneficiary will pass to the other joint beneficiaries.

2. LEGISLATION

Unless the testator has made an alternative provision, a gift that fails cannot be disposed of under his

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7. *See, e.g., In re Abrahams' Will Trusts*, [1969] 1 Ch. 463. In cases of conditional gifts such as this one and the one described at n. 1, whether or not the condition mus be satisfied only at the time of the testator's death or whether it must continue to be satisfied if the beneficiary is to retain the gift would seem to be a matter of construction.

8. Feeney, *supra*, n. 1, at 109.

9. *Kingsbury* v. *Walter*, [1901] A.C. 187 (H.L.).

10. Subject, or course, to the testator's directions otherwise.

11. Megarry and Wade, *The Law of Real Property* (5th ed., 1984) 261.

12. Generally, a gift to two or more persons without addition words of explanation will operate to confer a joint interest: *Roberts* v. *Southey*, (1984) 17 E.T.R. 67 (B.C.S.C.). However, the courts lean strongly against joint tenancies and will infer an intent to create a several interest where there are any words of division accompanying the bequest. Words such as "to be divided equally," "equally amongst them," "equally" and even "equally as joint tenants" have been held to create a tenancy in common: *see Re Bancrofti,* [1936] 4 D.L.R. 571 (NS.S.C.).

will. Property not disposed of by will must pass on an intestacy.[13] The way in which property is distributed on an intestacy, however, is unlikely to accord with the intentions of a person who, wishing to avoid an intestacy, made a will. For that reason, rules have been developed to limit the possibility of an intestacy when a gift in a will fails.

(a) Section 21 of the Wills Act

Under section 21 of the British Columbia *Wills Act*,[14] a gift that fails falls into residue, unless the testator has indicated otherwise. If there is no gift of residue or the gift forms part of the residue, section 21 does not apply. In this case, an intestacy will result with respect to the gift. Section 21 provides:

> 21. Except when a contrary intention appears by the will, property or an interest in it that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will.

(b) "Anti-Lapse" Legislation

A gift that fails because the beneficiary predeceases the testator is said to lapse. All of the Canadian provinces have enacted legislation governing the distribution of a lapsed gift when the predeceasing beneficiary is a close relative of the testator.[15] The share of the deceased relative will pass to certain members of that relative's family,[16] unless the will records a contrary intention.

Legislation along these lines originated in section 33 of the English *Wills Act, 1837*. It is based on the assumption that a testator would wish to benefit the family of a deceased beneficiary rather than allow his share to fall into residue.[17] This assumption, however, was restricted to cases of "most frequent

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13. In British Columbia, distribution of the property of a person dying intestate is governing by Part 7 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114.

14. *Supra*, n. 2.

15. In most provinces, gifts to a testator's child or other issue, brother or sister are subject to the anti-lapse provision: *Wills Act, supra*, n. 2, s. 29; *Wills Act* R.S.A. 1980, c. W-11, ss. 34 and 35; The *Wills Act*, R.S.M. 1970, c. W-150, s. 32; *Wills Act*, R.SN.B. 1973, c. W-9, s. 32; The *Wills Act*, R.S.N. 1970, c. 401, ss. 13, 19, as amended by S.N fld. 1971, No. 29; The *Wills Act*, R.S.S. 1978, C. w-14, S. 32. However, the equivalent provision in Nova Scotia (wills Act, R.S.N.S. 1967, C. 340, S. 30)AND Prince Edward Island (*Probate Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31) applies to gifts to the testator's brother, sister, child and grandchild. The term "issue" was deliberately not included on the recommendation of the Ontario Law Reform Commission, *Report on The Proposed Adoption in Ontario of the Uniform Wills Act* (1968) 12: "[T]he substitution of "grandchild" for "issue" would be an improvement administratively. In any event, it would be a rare instance where there would be a substitutional gift to issue beyond grandchildren." Anti-lapse provisions have been enacted in every state in the United States, except Louisiana. The scope of coverage varies dramatically, ranging from gifts to children of the testator only (S.C. Code Ann., s. 21-7-470 (Law Co-op. 1976), to gifts to anyone (*e.g.,* Ga. Ann. Code, s. 113-812 (1975)).

16. In Nova Scotia, legislation provides for the fictional survival of the beneficiary beyond the death of the testator. The deceased's beneficiary's share passes under his own will, so that his issue may not necessarily benefit. This is similar to section 33 of the (U.K.) *Wills Act, 1837; see* discussion at n. 23 *infra*. British Columbia's *Wills Act* contained the identical provision until amendments were introduced in 1960 providing for distribution to those entitled on intestacy (S.B.C. 1960, c. 62).

17. Section 33 of the English *Wills Act, 1837* is based on recommendations made by the Commissioners for Real Property (Fourth Report, 1833). In discussing the doctrine of lapse, the Commissioners stated, at 73:

> The rule, that gifts lapse if the person to whom they are made dies in the lifetime of the Testator, sometimes operates with great hardship, and lifetime of the Testator, sometimes operates with great hardship, and defeats in many cases the intention of the Testator ... [W]here a Testator gives his property among his children, and a daughter or other child dies before him leaving a family, such family are disappointed ... It is true that the event of death might always be provided for, but it is found in practice that such provision is very rarely made. A Testator does not contemplate that the objects of his bounty, and especially his children, will die before him; he does not like to encumber his Will with provision which appear to be unnecessary, and he imagines that if the event should happen, he shall be able to alter his Will ... We believe that in most cases a Testator would prefer the families of the persons to whom he gives estates of inheritance in land, or an absolute property in personalty, to persons entitled in remainder or his residuary legatees ...

occurrence and great hardship,"[18] namely the lapse of testamentary gifts to children and grandchildren.[19]

Section 29 of the British Columbia *Wills Act* provides:

> 29. (1) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person
>
> (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and
>
> (b) leaves issue any of whom is living at the time of the death of 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 if he had died intestate without leaving a spouse and without debts immediately after the death of the testator.
>
> (2) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person
>
> (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in property not determinable at or before his death; and
>
> (b) leaves a spouse but does not leave issue any of whom is living at the time of the death of the testator,
>
> the devise or bequest does not lapse, but takes effect as if it has been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate and without debts immediately after the death of the testator.

While this provision is framed in a rather cumbersome fashion, its effect is straightforward. A gift to a predeceasing beneficiary will not lapse if he leaves either issue or a spouse alive at the testator's death. Where there are issue, the gift passes directly to them.[20] In the absence of issue, the gift passes directly to the spouse.

D. Reform

1. FAILED GIFTS: EVIDENCE OF A CONTRARY INTENT

Even if a gift fails, it will pass according to the express or implied intentions of the testator. Where the circumstances that cause the gift to fail are not those specifically contemplated by the testator, however, the gift over will not take effect as the testator would likely have intended. In these cases, section 21 or 29 of the *Wills Act* applies causing the gift to fall into residue or to pass to a statutorily defined alternative

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18. *Ibid*., at 74.

19. Under section 33 of the *Wills Act, 1837*, the failure of the gift was prevented by deeming that the beneficiary survived the testator. The issue, however, whose survival saved the gift from lapse did not necessarily benefit. If the beneficiary had willed his estate to an eccentric charity, then the testator's gift would pass to that charity. Results of this nature were unlikely to correspond to any testator's intention. The provision was amended in 1982 to provide that the gift pass directly to the deceased's beneficiary issue: *see* the *Administration of Justice Act, 1982*, c. 53 (U.K.).

20. This ensures that substitutional gifts to the beneficiary's issue are not subject to a spouse's claim under the *Estate Administration Act*, *supra,* n. 13. Issue of deceased issue would take by representatiion.

beneficiary. This result strikes us as unsatisfactory.

An event often addressed in a will is the death of a beneficiary. A common provision is a gift to "A, but if A should predecease me, or die within thirty days of my death, then to B." If A predeceases the testator, the gift will pass to B according to the contrary intention recorded in the will. Similarly, a will may provide a gift to "A, but if, at the time of my death, she has ceased to profess the Jewish faith, then to B." If A does not meet the stipulation, the gift will not fall into residue. It will pass to B.

Suppose, however, that the gift to A fails for other reasons. A may disclaim the gift. In the second example, A may predecease the testator. In neither of these cases will the testator's preferred beneficiary take under the will. If a testator has designated an alternative beneficiary where a gift fails for a particular reason, he would probably intend the same result if the gift fails for some other reason. It is likely only through inadvertence or ignorance of the technical rules relating to wills that the testator has not addressed the host of other events that might cause a gift to fail. It is our conclusion that if a testator has designated an alternative beneficiary, that designation should take effect whenever possible.

2. GIFTS OF RESIDUE

Under section 21 of the *Wills Act*, unless the testator has indicated a contrary result, a gift which fails falls into the residue of the estate. In this case, it is assumed that the testator would not want the gift to pass to those entitled on intestacy. More likely, he would prefer to benefit persons he has already named in his will, such as the beneficiaries of the residuary gift. Section 21, however, does not apply to a gift which itself forms part of the residue. If a gift of the residue fails, it passes to persons entitled on intestacy.[21]

This outcome is inevitable if the testator has named only one beneficiary of the residual gift. Where, however, there are several such beneficiaries, this result is inconsistent with the assumptions underlying section 21. Section 21 is based on a view that most testators would not wish to see a failed gift pass on intestacy when that result can be avoided. It seems illogical to presume that the testator's wishes would be any different merely because the gift is part of the residue.

A sensible approach to these kinds of problems is found in the (U.S.) *Uniform Probate Code*. Section 2-606(b) provides that where there is more than one residuary beneficiary, a share of the residual gift that fails, for whatever reason, shall be distributed among the remaining residuary beneficiaries:

> 2-606 (b) Except as provided in section 2-605 [failure of a gift to testator's close relatives], if the residue is devised to two or more persons, and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to the other residuary devisees in proportion to their interest in the residue.

We believe that a similar approach should be adopted in British Columbia.

3. SECTION 29: THE "ANTI-LAPSE" PROVISION

The problem addressed by section 29 of British Columbia's *Wills Act* is the failure of gifts intended for close relatives of the testator who predecease him. Unless the testator has indicated otherwise, these gifts

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21. *Re Stuart Estate*, (1964) 47 W.W.R. 500 (B.C.S.C.); *see also Roberts* v. *Southey, supra*, n. 12. Manitoba, however, has adopted the position that the equivalent of s. 21 operates to pass a lapsed residuary gift to the other residuary beneficiaries, if any: *Re Pawlukevich*, (1986) 23 E.T.R. 37 (Man. Q.B.); *Re Cera*, (1986) 23 E.T.R. 68 (Man. Q.B.). The latter decisions, however, are based in part on an erroneous interpretation of s. 21 of B.C.'s Act: *see* Annotation, (1986) 25 E.T.R. 69.

will fall into residue, with the risk that they will pass to persons whom the testator did not wish to receive them.[22] For example, a testator makes three gifts, representing the bulk of his estate, to his three children, one of whom predeceases him. He leaves the residue to charity. In the absence of anti-lapse legislation, a third of the estate would pass to charity. Section 29, however, provides that gifts to a predeceasing brother, sister, child or other issue shall pass to the beneficiary's issue, or failing issue, to the beneficiary's spouse, if they survive the testator.

(a) General Scope of Section 29

Like section 21, section 29 is based on the presumed intentions of the testator. The presumption, however, operates only where the gift fails by reason of the death of the beneficiary. For example, a testator makes a gift to his brother, but does not anticipate the gift's failure. The brother predeceases the testator and is survived by two children. The gift passes to the brother's children under section 29. But the gift to the brother may fail for some other reason, perhaps because the brother disclaims the gift.[23] Section 21 will then apply and the gift will fall into residue. In the first situation, the *Wills Act* presumes that the testator would want to benefit the beneficiary's family. In the second case, the Act presumes that the testator would want to benefit the beneficiaries of the residuary gift. The difference turns solely on why the gift failed. This is a distinction which is difficult to justify. In the absence of any evidence that the testator intended to draw such a distinction, it seems more logical to presume that his intent should be the same, regardless of why the gift failed.

(b) Spousal Entitlement Under Section 29

Under section 29, a gift will pass to the spouse of a predeceasing beneficiary if the beneficiary is not survived by issue. There are circumstances, however, where it is not altogether clear that the surviving spouse should be entitled to the gift.

The *Wills Act* was amended in 1981 to ensure that succession rights did not operate inconsistently with rights to family property under the *Family Relations Act*.[24] Under the *Family Relations Act*, when one of several events evidencing marital breakdown occurs, the spouses each become entitled, as tenants-in-common, to a half interest in family property. A spouse who has become entitled to an interest in family property will, on the death of the other spouse, become entitled to more than a fair share unless succession rights between the spouses are severed. Section 16 of the *Wills Act* provides:[25]

> 16. (1) Where in a will a testator
>
> (a) gives an interest in property to his spouse;

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22. Because, under s. 21 of the *Wills Act*, failed gifts fall intoresidue.

23. There are any number of reasons why a beneficiary might wish to disclaim a gift. The beneficiary might incur certain tax liabilities if he accepts the gift. The gift might be subject to liabilities that outweigh its value. If the beneficiaries also a residuary beneficiary and the gift is subject to some onerous conditions, disclaimer would allow the beneficiary to take the gift free of the conditions.

24. R.S.B.C. 1979, c. 121.

25. Similarly, a separated spouse's entitlement to claim in the intestate spouse's estate is limited by s. 111 of the *Estate Administration Act*:
111. (1) The surviving spouse shall, in an intestacy, take no part of the deceased spouse's estate if the spouses had, immediately preceding the death of one spouse, separated for not less than one year with the intention of living separate and apart, and had not during that period lived together with the intention of resuming cohabitation, unless the court, on application, otherwise orders.
(2) The court may, on the application of the surviving spouse, or of the executor or administrator, or of any person interested in the estate of the deceased spouse, and on evidence the court considers relevant, determine the matter, and the court may in its discretion direct the costs to be paid out of the estate of the deceased spouse.

(b) appoints his spouse executor or trustee; or

(c) confers a general or special power of appointment on his spouse,

and after the making of the will and before his death

(d) a judicial separation has been ordered in respect of his marriage;

(e) his marriage is terminated by a decree absolute of divorce; or

(f) his marriage is found to be void or declared a nullity by a court

then, unless a contrary intention appears in the will, the gift, appointment or power is revoked and the will takes effect as if the spouse had predeceased the testator.

(2) In subsection (1) "spouse" includes a person considered by the testator to be his spouse.

This provision creates a deemed lapse and the events which trigger it correspond loosely to the "triggering" events in section 43 of the *Family Relations Act*. Under section 43, the occurrence of any one of the following events vests in the spouse an interest in the family assets:

(i) a separation agreement;

(ii) a declaration that there is no reasonable prospect of reconciliation between the spouses;

(iii) an order for judicial separation or dissolution of the marriage; or

(iv) a declaration of nullity.

Section 16 of the *Wills Act* is meant to ensure that a surviving spouse who, by reason of the *Family Relations Act*, has become entitled to a substantial share of the spouse's estate is not able to assert a further claim under that spouse's will.

A problem concerning section 16 was identified in our *Report on Statutory Succession Rights*: the triggering events set out in the two enactments do not correspond exactly. There are events, such as the making of a separation agreement, which give rise to an interest in family property under the *Family Relations Act* but which do not trigger a deemed lapse under section 16 of the *Wills Act*. It was recommended that section 16 should be revised to provide that generally, where entitlement to an interest in family assets has arisen under the *Family Relations Act*, the surviving spouse should not benefit under the deceased spouse's will or intestacy.[26]

Section 29 provides that the deceased beneficiary's spouse is entitled to receive a lapsed gift in certain circumstances. That entitlement, however, is not affected by marriage breakdown. In the Working Paper that preceded this report, we made the following observation:

> It is anomalous that entitlement which depends upon a person's status as a spouse does not end when that status alters. It is our tentative opinion that the surviving spouse of a deceased beneficiary should not be entitled to that beneficiary's gift in the event of a marital breakdown.

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26. LRC 70, 1983.

One submission made to us, while not disagreeing with this view, felt that it begged the real issue for reform. It was suggested that spouses should not benefit in any circumstances and that section 29(2) should be repealed:

> It is the Committee's experience that testators rarely wish to benefit "in-laws." On the contrary, the usual intention expressed by testators is to ensure that the "in-laws" do not share in their estate. Accordingly, the Committee is of the view that the amendment of the *Wills Act* to delete Subsection 29(2) and thereby eliminate any entitlement of the deceased's beneficiary's spouse would conform to the expectations of the ordinary testator in modern society.

Although all the Canadian provinces have enacted "anti-lapse" legislation, there is no unaniminity on which members of a deceased beneficiary's family should receive the protected gift. In some provinces, only surviving issue are entitled to the gift. Legislation in these provinces is based on the presumption that a testator would normally wish to benefit bloodlines. In other provinces, the spouse and surviving issue share equally. Legislation to this effect is based on the presumption that the testator would normally intend to benefit the family as one economic unit.

British Columbia's solution, first to issue then the spouse, appears to be unique. It is, essentially, a compromise between the other two approaches. The choice between these approaches is arbitrary. In our view, apart from excepting the estranged spouse, there is no compelling reason to vary the current law in British Columbia in this context.

(c) Gifts Evidencing a Contrary Intent: Class Gifts and Gifts Creating a Joint Interest

Section 29 applies both to individual and class gifts. It would also appear to apply to joint gifts[27] since a gift to two or more persons is of necessity either an individual or a class gift. A direction that the beneficiaries are to take as joint tenants merely qualifies the nature of their interest.

Apart from section 29, the share of a class member or of a joint tenant that fails does not fall into the residue of the estate. It passes instead to the remaining class members or joint tenants. As was discussed earlier, this is because the law imputes to a testator who makes a joint or class gift, an intention to benefit the beneficiaries as a single group, rather than individually. Consequently, the share of one beneficiary that fails passes to the remaining members of the group as substitutional beneficiaries.

If the beneficiaries of a class or joint gift consist of the testator's issue or siblings, section 29 applies. In this case, a gift that fails with respect to a member of that class, passes to the beneficiaries of that member substituted by section 29 and not to the surviving class members whom, presumably, the testator wished to benefit.

Those who favour the application of anti-lapse legislation to class gifts argue that, given the restricted range of protected beneficiaries, this result is justified. Under this view, the classification of a gift turns on technical and often arbitrary distinctions. The average testator would not expect a gift to his children or other close relatives to devolve in different ways, according to whether he designated the beneficiaries by name

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27. The characteristic feature of a joint tenancy is the right of survivorship. On the death of one joint tenant, his interest automatically passes to the surviving joint tenants. This process continues until there is one survivor, who then holds the property as sole owner. A necessary consequence flowing from the incidence of survivorship is that a joint tenant's interest cannot pass by his will, or on his intestacy: Megarry and Wade, *The Law of Real Property* (5th ed., 1984) 418.

or as a group.[28]

Case law, on the other hand, reveals a number of logical inconsistencies arising from the application of anti-lapse legislation to class gifts. For example, a gift to "all my brothers" is effectively the same as a gift to "all my surviving brothers." In both cases, only those brothers alive at the testator's death are entitled to the gift. The class closes on the testator's death under the rule of convenience[29] in the first case and by reason of the testator's expressed intent in the second. However, the first gift is subject to section 29 and the second is not.[30] The reasoning in the latter case is that the word "surviving" evidences an intention that section 29 is not to apply. This is a doubtful conclusion. The very nature of the gift dictates this result and "surviving" merely indicates when the testator intended the class to close.

It is our view that anti-lapse legislation should not apply to class gifts or gifts conferring a joint interest. Anti-lapse legislation is meant to apply in the absence of the testator's "contrary" intention. In the case of class or joint gifts, the testator's intention is self-evident. He intends that the beneficiaries in the group should also stand as substitutional beneficiaries for the share of any member that fails. These beneficiaries should be preferred to those substituted by legislation.

E. Recommendations

In this Chapter, we have canvassed a number of problems that arise when a gift in a will fails, in the sense that it cannot take effect according to the testator's directions owing to the absence of a qualified beneficiary. A gift fails, in this sense, when the beneficiary predeceases the testator, cannot meet personal qualifications stipulated by the testator, or disclaims the gift. How should such a gift be distributed?

Our recommendations contemplate a hierarchal scheme of distribution that would take into account the varying degrees of certainty with which the testator's intent is known, may be discovered, or may be assumed. Under this scheme, a gift that fails would be distributed according to the following rules:

1. The testator's actual intention: If the testator has made an alternative provision in the event a gift fails, his directions should prevail. A testator's intention in this regard may be express or implied. For example, in the case of a class or joint gift, the testator's intention may be inferred from the nature of the gift.

2. The testator's deemed intention: If the testator designates an alternative beneficiary in the event a gift fails, and the gift fails for some other reason not specifically addressed by the testator, the gift should pass to the alternative beneficiary. In this case, the testator's intention is deemed to be the same as his actual intention.

3. A legislated, reasonable result: In the absence of any evidence as to the testator's actual or deemed intent, the gift should be distributed in a reasonable manner prescribed by legislation. This, in fact, is the way that provisions like sections 21 and 29 of the *Wills Act*

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28. This was the view of the Uniform Law Conference: *see proceedings of the Commissioners for Uniformity of Legislation in Canada* (1924) 393-94, 421; (1927) 436; and (1960) 75.

29. *See* Feeney, *supra*, n. 1 at 125-26.

30. *See, e.g., Re Krause*, (1985) 19 E.T.R. 92 (Alta. C.A.); *Horton* v. *Horton*, (1978) 2 E.T.R. 293 (B.C.S.C.); *Re Koenig*, [1939] 4 D.L.R. 180 (Ont. C.A.).

operate. Their function should be preserved. In most cases, the result would conform to the average testator's expectations.

In this Chapter, a number of ancillary issues have also been identified that require some clarification or amendment. Although it is possible to implement our recommendations by amending and adding to existing provisions, we believe that a clearer and cleaner result would be achieved if these issues were governed by a single, freshly-drafted section.

The Commission recommends that:

4. *(1) Sections 21 and 29 of the* Wills Act *be repealed.*

(2) A provision comparable to the following be enacted:

Subject to evidence of a contrary intention, if a gift in a will, including a gift of residue, fails by reason of the death of the beneficiary in the lifetime of the testator, or by reason of the gift being contrary to law or otherwise incapable of taking effect, the property that is the subject matter of the gift shall be distributed according to the following priorities:

(a) *to the alternative beneficiary of the gift, if any, designated by the testator, notwithstanding that the gift fails for some reason other than the one specifically contemplated by the testator;*

(b) *to the beneficiary's issue, where the beneficiary is the brother, sister or issue of the testator;*

(c) *to the beneficiary's spouse, where the beneficiary is the brother, sister or issue of the testator and leaves no issue, provided that at the time of the beneficiary's death, there had been no marital breakdown between the beneficiary and his or her spouse, as evidenced by the circumstances referred to in section 16;*

(d) *to the surviving residuary beneficiaries, if any, named in the will, in proportion to their interests.*

CHAPTER VI PAYMENT OF DEBTS AND TESTAMENTARY GIFTS

A. Introduction

Beneficiaries under a will are only entitled to receive their gifts after the estate's debts and liabilities are paid. If the debts of the estate are substantial, there may not be enough property left to make all of the gifts intended by the testator.[1] A similar problem arises even where the testator dies without leaving unpaid debts. The estate may be inadequate to satisfy all of the gifts directed by the testator. In each case, decisions have to be made respecting which gifts should be honoured and which should fail. Gifts which fail, in whole or part, because of the inadequacy of the estate are said to "abate." The principles governing this process are derived from the common law.

B. Classification of Testamentary Gifts

The order in which testamentary gifts are distributed, and the order in which they abate to satisfy outstanding debts, depends on the nature of the particular gift. In Chapter II, the classification of gifts for the purpose of ademption was briefly reviewed. These classifications also apply in the context of abatement.

A general gift is a gift of a type or kind of property. Ordinarily, it does not refer to a particular item.[2] The most common instance is a pecuniary gift, such as a gift of "$10,000 to my brother Bob."

A specific gift is a gift of a particular item which the testator has separated from the residue of his estate in favour of a beneficiary. Gifts such as "my Emily Carr painting" or "my sapphire and ruby ring" are specific gifts.

A demonstrative gift is something of a hybrid. It arises where the testator has made a gift of money and identified the source from which it is to be primarily paid.[3] A gift of "$10,000 to be paid from my Royal Bank savings account number 3456" is a demonstrative gift.[4] Because it is a pecuniary gift it resembles a general legacy. However, because it is tied to a particular fund, a demonstrative gift also resembles a specific gift.

A gift of particular land is classified in the same way as a gift of a particular item of personal

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1. Where there are insufficient assets to discharge the estate's debts, the estate is regarded as insolvent and the beneficiaries will receive nothing. The executor's task is then to address the claims of competing creditors. This task is governed by Part VIII of the *Estate Administration Act*, R.S.B.C. 1979, c. 114, ss. 113-121. Where there are sufficient assets to pay the debts but not the testamentary gifts, the estate is solvent. In this case, the executor must decide the claims of competing beneficiaries. This process is governed by the rules relating to abatement.

2. A gift may refer to a particular item and nonetheless be a general legacy. For instance, a will provision that reads a "watch for each of the boys," is not a gift of a specific watch. It is a direction that the executors purchase a watch for each boy or give them the monetary equivalent. It is regarded as a general gift: *see* Feeney, *The Canadian Law of Wills* (2nd ed., 1982) vol. 2, 139, n. 10.

3. Apparently, a gift which is to be paid from a specified fund, and that fund only, is a specific gift. If the fund isinsufficient to pay the gift, the gift adeems *pro tanto*: *see* Feeney, *ibid*., at 140.

4. If the fund is insufficient to satisfy the legacy, the shortfall is normally satisfied from the residue. To the extent there is a shortfall, a demonstrative legacy is regarded as a general legacy for the purposes of abatement: *see, e.g., Re Culbertson*, (1966) 59 D.L.R. (2d) 381 (Sask. Q.B.).

property. It is a specific gift. A gift of land included in the residue, however, is not regarded as a general gift. For historical reasons, it too qualified as a specific gift. Before 1837, a testator's will was effective only with respect to land owned when the will was made. A gift of the residue of the estate would not include land acquired after the will was made.[5] For this reason, all gifts of land were regarded as specific gifts.[6] In 1837, English legislation was introduced which deemed a will to speak, both as to real and personal property,[7] from the date of the testator's death. Nevertheless, gifts of real property included in the residue continued to be characterized as specific gifts.[8] This characterization is still reflected in the order of abatement.

C. Order of Payment of Debts and Testamentary Gifts

1. GENERAL RULES

A testator may direct that a particular part of his estate be used to pay his debts.[9] The debts of the estate must be satisfied so far as is possible from this source. Similarly, the testator may stipulate the order in which testamentary gifts are to be distributed, usually by according certain gifts priority of payment.[10] Where the will contains no directions of this nature or where the property identified by the testator is insufficient to satisfy his debts, common law rules govern the order of abatement.

According to these rules, assets contained in the residue of the estate are first applied against the testator's debts.[11] Since pecuniary gifts are also paid from this source,[12] the executor must first set aside a portion of the residue for pecuniary gifts. As a general rule, only personal property may be used for this purpose.[13] The remaining portion of personal property is applied against the debts. If this is insufficient, the portion set aside for the payment of pecuniary gifts is applied. The pecuniary gifts abate rateably.[14]

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5. Clark, *Theobald on Wills* (14th ed., 1982) 232-3.

6. *Ibid*.

7. *Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26, s. 24.

8. *See* especially *Hensman* v. *Fryer*, (1867) L.R. 3 Ch. 420. In England, this characterization has been abandoned as a result of the *Administration of Estates Act, 1925*, c. 23 (U.K.). Gifts of land may be residual and therefor not specific if the construction of the will supports this: *see Theobald on Wills, supra*, n. 5; Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (16th ed., 1982) 562; Mellows, *The Law of Succession* (4th ed., 1983) 441. Although s. 31(2) of the British Columbia *Wills Act* clearly contemplates gifts of residual real property, nonetheless real property included in the residue would still seem to be a specific gift, at least for purposes of the order in which it will abate. *But see Re Estate of Robert James Cook*, discussed in n. 35, *infra*.

9. *See e.g., Re McClintock*, (1976) 70 D.L.R. (3d) 175 (Ont. Div. Ct.).

10. Evidence of the testator's contrary intent must be certain. A direction to pay a legacy "immediately after my decease out of the first moneys belonging to me" will not give a legacy priority so as to save it from abatement: *see, e.g., Re Peterson*, (1930) 39 O.W.N. 233 (S.C.); *In re Harris*, [1912] 2 Ch. 241. *See also In re West Estate*, [1942] S.C.R. 120.

11. Att common law, property which passed by intestacy as a result of lapse, failure or other reason was to be used for the payment of debts before residual property.

12. Subject to a contrary intention apparent in the will.

13. This is discussed in Part C, para. 3, *infra*.

14. The following is an example of *pro rata* or rateable abatement: A testator wills his automobile to A, pecuniary legacies of $50,000 to B and $25,000 to C, and the residue of his estate to D. He leaves debts in the amount of $100,000. The value of the residual estate, excluding the portion set aside for the payment of pecuniary legacies, is $50,000. The latter amount is applied against the debts, leaving an outstanding balance of $50,000. The executor must then look to the funds set aside for the payment of B's and Cs legacies. These legacies will abate on a *pro rata* basis, that is according to the proportion each legacy bears to the aggregate pecuniary legacies. The aggregate figure is $75,000, of which B's legacy represents two thirds and C's, on third. B is accordingly responsible for two thirds of the $50,000 debt and C for one third.

Demonstrative and specific gifts next abate together, also on a rateable basis.[15] Gifts of land, whether given as a specific gift or as part of the residue, abate last.[16]

2. RULE THAT GIFTS OF LAND ABATE LAST

(a) Historical Background

The rule that gifts of land abate last reflects the privileged position which realty originally enjoyed at common law. As a general rule, real property was not available for the payment of the testator's debts. This was because real property, unlike personal property, did not pass through the hands of the executors. It passed directly to the person entitled by will or intestacy.[17] This situation was changed in England in 1897[18] and in British Columbia in 1921 by legislation vesting the real property of a deceased in his personal representatives and making it available for the payment of debts in the same way as personal property. Section 91(3) of British Columbia's *Estate Administration Act* provides:

> 91. (3) In the administration of the assets of a person dying on or after June 1, 1921, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses, and with the same incidents as if it were personal estate; but nothing in this section alters or affects the order in which real and personal assets respectively were immediately before that date applicable in or toward the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies.

This section purports to preserve the common law order of abatement. Technically, there was no common law order to preserve with respect to real property since it did not previously pass through the hands of the executor and was not subject to the rules of abatement. The special position enjoyed by gifts of land stems from their characterization as specific gifts. Although the *Wills Act, 1837* deemed a will to speak from the testator's death with respect to all property, real property included in the residue continued to be regarded as a specific gift for purposes of paying the testator's debts.[19]

Legislation altering this rule was introduced in England in 1925. The *Estate Administration Act, 1925* effectively abolished the notion that a gift of real property included in the residue is a specific gift. Real and personal property included in the residue are applied rateably to pay the testator's debts before any other

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15. According to some authorities, demonstrative legacies abate before specific legacies: mellows, *supra*, n. 8 at 390-1. However, according to *Theobald on Wills, supra*, n. 5, specific and demonstrative legacies abate rateably at the same time. Feeney, *supra*, n. 2, Vol. 1 at 189, n. 133, cites *Re McClintock, supra*, n. 9 as Canadian authority in favour of view expressed in *Theobald on Wills*. It should be emphasized that demonstrative legacies are on an equal footing with specific legacies to the extent they are satisfied by the fund to which they are tied. If this proves insufficient, the shortfall is considered as a general legacy, at least for the purposes of abatement. *See also* n. 4, *supra*.

16. Presumably this is because of the way in which gifts of land were regarded prior to 1837: see text accompanying nn. 6-8, *supra*.

17. *See* Law Reform Commission of British Columbia, *Report on Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9* (LRC 91, 1987).

18. *Land Transfer Act, 1897*, 60 & 61 Vict., c. 65.

19. *See, e.g., Hensman* v. *Fryer, supra*, n. 8; *Lancefield* v. *Iggulden*, (1874) L.R. 10 Ch. 136; *Re Ridley*, [1950] 2 All E.R. 1, 4 (Ch.). *See also Jarman on Wills* (85h ed., 1951) 1224, n. 9:

assets.[20] Similarly, section 5 of Ontario's *Estates Administration Act*[21] provides:

> 5. Subject to section 32 of the *Succession Law Reform Act*, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from his will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the costs and expenses of administration.

This provision has been said to have introduced a fundamental change in the order of abatement, at least so far as residual real property is concerned.[22]

(b) Exceptions to the Rule

The rule that gifts of land are to abate last is subject to some important exceptions. One arises under section 31 of the *Wills Act*. This provision stipulates that, subject to a contrary intent, land that is subject to a mortgage is primarily liable for repayment of the mortgage. This provision is discussed below.[23]

The other exceptions have arisen at common law. If a testator charges his real property with the payment of his debts, then recourse to personal property is excluded. However, he must expressly exonerate the personal property for the exception to apply.[24] Charging his realty with the payment of debts without more constitutes the realty as an auxiliary fund, to be used only when the personal property has been exhausted.[25]

Where the testator creates a "mixed fund," both real and personal property will be applied rateably to satisfy the debts. A mixed fund is created when a testator conveys his real and personal estate to his executors with an express or implied direction to sell and to pay his debts out of the proceeds.[26]

3. PAYMENT OF GENERAL PECUNIARY GIFTS

Pecuniary gifts are generally paid from the personal property included in the residue. If the personal property proves insufficient, pecuniary gifts abate rateably. The residual real property may not be used to make up the difference.[27] This rule does not apply if the testator directs that a pecuniary gift may be paid with proceeds from the sale of real property. For example, the testator may charge real property with the payment

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20. *Administration of Estates Act, 1945*, c. 23. For a description of the Australian position *see* Law Reform Commission of Western Australia, *Report on the Administration of Assets of the Solvent Estates of Deceased persons in the Payment of Debts and Legacies*.

21. R.S.O. 1980, c. 143.

22. *Re Howard*, [1924] 1 D.L.R. 1062 (Ont. S.C.); *Re Swayze*, [1938] O.W.N. 524 (H.C.).

23. Part D, para. 1, *infra*.

24. *Re Watson*, (1922) 52 O.L.R. 287 (S.C.); *Re Howard, supra*, n. 22.

25. *Ibid.; see also* 17 *Halsbury* (4th ed., 1976) para. 1182.

26. *Re Carmichael*, [1945] 1 D.L.R. 64 (Ont. H.C.); *Re Walsh*, [1926] 1 D.L.R. 206 (Sask. K.B.).

27. *Re Carmichael, ibid., but see Executors & Admin. Trust Co.* v. *McKenzie*, [1920] 3 W.W.R. 110 (Sask. K.B.). In the latter case, the court held that the reason for the rule that personal property only is liable for the payment of pecuniary gifts was abolished when real estate was made liable for the debts, liabilities and funeral expenses of the deceased. The court therefor directed payment of a pecuniary gift from the residual real property, after the personal property had been exhausted although the will contained no direction to this estate. This approach does not appear to have been followed in other provinces: *see* Feeney, *supra*, n. 2, vol. 1, 189-90.

of a pecuniary legacy, or create a mixed fund for this purpose.

Similarly, if a pecuniary gift is followed or preceded by a gift of the residue of the testator's real and personal property as one mass, then the gift is charged upon the real property included in this residue. This is known as the rule in *Greville* v. *Browne*,[28] which is little more than a refreshing expression of the obvious. The term "residue" logically means that which remains after something has been deducted.[29] The rule, however, does not mean that the real and personal property are liable rateably. The personal property must first be exhausted before recourse can be had to the real property.[30]

D. Gifts of Encumbered Property

1. GIFTS OF REAL PROPERTY

At common law, a beneficiary of mortgaged land was entitled to have the mortgage debt paid at the expense of the general assets of the estate.[31] The common law position was altered by legislation. Section 31 of the *Wills Act* makes the land itself primarily responsible for the discharge of the mortgage debt.[32] Other property will not be used for this purpose unless the debt exceeds the value of the property. Section 31(1) provides:

> 31. (1) Where a person dies possessed of, or entitled to, or under general power of appointment by his will disposes of an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not by will, deed or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

Section 31(2) stipulates that a general direction for the payment of debts or a charge of debts on the property does not signify a contrary intention:

> 31. (2) A testator does not signify a contrary or other intention within subsection (1) by
>
> (a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real or personal estate, or his residuary real estate; or
>
> (b) a charge of debts on that estate,
>
> unless he further signifies that intention by words expressly or by necessary implication

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28. [1859] VII H.L.C. 690, 11 E.R. 275.

29. *Ibid*., at 697, 700, 11 E.R. at 278, 279:
... [I]f there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefor given subject to the prior gift ... [T]he rest and residue mean something after something has been deducted. After what has been deducted? Why that which was given before: and that appears to be to solve the whole difficulty.

30. *Theobald on Wills*, *supra*, n. 5.

31. Feeney, *supra*, n. 2 at 141.

32. Section 31 is based on a group of English Statutes known collectively as *Locke King's Act*. *See* n. 51, *infra*.

referring to all or some part of the mortgage debt.

Section 31(4) gives an extended meaning to "mortgage" as used in subsection (1):

> 31. (4) In this section, "mortgage" includes an equitable mortgage, and any charge, whether equitable, statutory or of other nature, including a lien or claim on freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

This provision, therefore, alters the abatement rules with respect to a wide variety of debts.

2. GIFTS OF PERSONAL PROPERTY

Personal property may be encumbered like real property. However, the beneficiary of personal property is entitled to have a charge against it paid by the estate.[33] The debt may not be paid out of other specific gifts. If the debt remains after all but the specific gifts have abated, the encumbered chattel is liable for its repayment.[34]

E. Reform

1. GENERAL RULES

(a) Order of Application of Assets: Need for Legislation

The rules governing abatement are complex and the relevant case law is often confusing. The distinction between real and personal property is sometimes drawn inconsistently or ignored altogether.[35] The payment of debts is sometimes treated on the same footing as the payment of pecuniary gifts.[36] In England, these problems have been addressed through legislation. The *Administration of Estates Act, 1925* provides for the order in which assets are to be applied against the testator's debts.[37] This legislation applies in the absence of the testator's contrary intent. Similar provisions are found in the *(U.S.) Uniform Probate Code*.[38]

(b) Protection of Certain Beneficiaries

The order in which assets abate depends on the nature of the particular gift and not on the relationship of the beneficiary to the testator. In some cases, this may work an apparent injustice. For example, the testator may leave specific gifts to unrelated individuals and a pecuniary gift or the residue to his spouse or

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33. The rule is stated by Leach M.R. in Knight v. Davis, (1833) 3 My. & K. 358, 361, 40 E.R. 136, 138 (Ch.):
Where a specific legacy is pledge by the testator, the specific legatee is entitled to have his specific legacy redeemed; and, if the executor fail to perform that duty, the specific legatee is entitle to compensation to the amount of the legacy, against the general assets of the testator ...

34. *Re Simpson*, [1927] 2 D.L.R. 1043 (Ont. S.C.).

35. *See, e.g., Re Cook Estate*, [1986] B.C.D. Civ. 4152-02 (S.C.), where real property included in a residuary gift was held, without supporting reasoning, to form part of a general bequest and was therefore not a specific gift. While the result of the case is welcome, its status is uncertain in the absence of legislation such as s. 5 of Ontario's *Estate Administration Act, supra*, n. 21.

36. *See* n. 27, *supra*.

37. *See* n. 20, *supra*.

38. S. 3-902. The provision is reproduced in n. 43, *infra*.

children. If there are outstanding debts, the present law requires that the gift to the spouse and children abate before the gifts to the unrelated individuals.

Other jurisdictions have enacted legislation addressing this problem. For example the (U.S.) *Uniform Probate Code*, which entitles a surviving spouse to claim a one-third interest in the deceased spouse's estate, exempts this share from abatement.[39] It also allows the Court to examine the "testamentary plan" and vary the statutory order of abatement if this would further the testator's intent. General gifts to a spouse or to children are often saved from abatement as a result of this provision.[40] Under the Iowa *Probate Code*,[41] property passing to a surviving spouse abates last.

The general common law rules of abatement, for the most part, appear to be working well. There are, for example, no reported cases which raise problems concerning either the order of the application of assets or the disappointment of beneficiaries closely related to the testator. This would suggest that there is little need for legislation restating or clarifying the general rules of abatement. The responses we received confirmed this view.

2. SPECIFIC RULES

(a) Gifts of Real Property Included in the Residue

The rule that land, whether the subject matter of a specific or residual gift, abates last is based on two obsolete legal rules. First, land was not generally available for the payment of the testator's debts. Second, a will was effective to devise only the land the testator owned at the date the will was made. These laws have since been changed by statute, both in England and British Columbia.[42] There is no longer any reason to regard residual real property as a specific gift which must abate last.

The approach adopted by Ontario in this regard is a sound one. Section 5 of the *Estate Administration Act* makes the whole of the residue liable for the testator's debts. Real and personal property included in the residue are liable rateably. This approach is consistent with other legislative initiatives which have attempted to assimilate the nature of real and personal property. For example, the (U.S.) *Uniform Probate Code* and the (U.K.) *Administration of Estates Act, 1925* abolishes the distinction altogether, at least for purposes of abatement.[43] Similar legislation should be adopted in this province.

(b) Pecuniary Gifts

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39. *Ibid*., para. b.

40. *See Uniform Probate Code*, s. 3-902, comment to para. b.

41. 633.436 (1971).

42. *See* text accompanying nn. 6, 8, 17 and 18 *supra*.

43. *Uniform Probate Code*, s. 3-902 (a) reads as follows:
3-902 (a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference of priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiently of the property on which it is charged, a general devise to the extent of the failure of insufficiently. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.
As to the *Administration of Estates Act, 1925, see* n. 20 *supra*.

Different rules of abatement apply according to whether a "liability" outstanding on the testator's death is a debt or a pecuniary gift. Real property included in the residue is liable for the payment of debts, once the other assets in the estate have been exhausted. However, this is not true for the payment of pecuniary gifts. As a general rule, only the personal property and not the real property included in the residue may be used to satisfy pecuniary gifts. When the personal property is exhausted, the gifts abate rateably. For example, a testator makes a gift of "$90,000 to A." If the residue of the estate after payment of the debts consists of real property valued at $100,000 and personal property valued at $15,000, A is entitled only to $15,000 of the $90,000 gift.

According to *Theobald*,[44] the exemption of real property in the payment of pecuniary gifts is due to four reasons: a feeling of tenderness for the heir; the fact that real property did not pass through the hands of the executor nor was it considered as an asset; and finally the fact that personal property was more readily realisable. None of these reasons apply in a modern context. The first three have been since addressed through legislation.[45] As to the last:[46]

> No doubt the executors ought to pay debts and legacies out of the first assets that come into their hands as a matter of administration. But if investments have to be sold to pay debts and legacies, there is no reason to suppose that investments in real estate are less easily realisable today than investments in leaseholds or in stocks and shares ... [Moreover] the rules for the order of application of assets are only notional rules; if the debts and legacies are in fact paid out of property not primarily liable, the matter can easily be adjusted between the beneficiaries in the final executors' accounts.

There is no compelling reason why the rules governing the payment of debts should differ from those relating to the payment of pecuniary gifts so far as real property is concerned. "Residue" reasonably means that which remains after something has been deducted.[47] If a testator makes provision for a number of pecuniary gifts after payment of his debts, these should be satisfied from the residue, regardless of the nature of the residual property.[48]

The Commission recommends that:

5. *Subject to evidence of a contrary intention, real and personal property included in the residue of the testator's estate should be liable rateably, according to their respective values, for the payment of*

   (a) the testator's debts, funeral and testamentary expenses, and the costs and expenses of administration, and

   (b) pecuniary gifts.

(c) Exoneration of Personal Property

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44. *Supra*, n. 5 at 792.

45. *Ibid.*

46. *Ibid.*

47. As was stated in *Greville* v. *Brown, supra*, n. 28.

48. As a practical matter, this result will ordinarily ensue by application of the rule in *Greville* v. *Brown*, discussed *supra*, nn. 28, 29. However, this is not necessarily so, especially where the testator makes a gift of the residue of his personalty and a separate gift of the residue of his real estate: *see Re Howard, supra*, n. 22 at 1077.

While a testator may alter the usual order of abatement, this task is complicated by the exceptional status accorded real property and the strong presumption favouring the liability of personal property. For example, a direction in a will expressly charging real property with the payment of either debts or pecuniary gifts will not necessarily accomplish what the testator intended. Unless the testator also expressly exonerates his personal property, the real property will be liable only in the event the personal property has been exhausted.[49] The oddity of this requirement was commented upon by Lord Halsbury in *Kilford* v. *Blaney*:[50]

> I should have thought ... that [when] a testator said that all his debts, etc., were to be paid out of his realty, he meant what he said, and that this was not only an oneration of the real estate but was an exoneration of the personal estate.

However, Lord Halsbury bowed to previous authority and followed the long standing principle.

We are of the opinion that the requirement for express exoneration of personal property reflects a historical anachronism. The absence of an express exoneration should not prevent a direction charging real property from taking effect.

The Commission recommends that:

6. *Real property charged by the testator with the payment of debts outstanding at his death or the payment of pecuniary gifts should be primarily liable for this purpose, notwithstanding the failure of the testator to exonerate his personal property.*

(d) Gifts of Encumbered Property

Section 31 of the *Wills Act* provides a presumption that a gift of land subject to a mortgage includes liability for the debt secured by the mortgage. Section 31 is based on English legislation referred to as "*Locke King's Act*."[51] In 1925 the English legislation was revised to provide that a gift of real or personal property subject to an encumbrance includes the encumbrance.[52] A proposal for a similar provision was considered and apparently rejected by the Uniform Law Conference of Canada.[53] In British Columbia, as in the other

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49. *See* text accompanying notes 24 and 25 *supra*.

50. (1885) 31 Ch. D. 56, 61 (C.A.).

51. The *Real Estate Charges Act, 1854*, 17 & 18 Vict. C. 113; the *Real Estate Charges Act, 1867*, 30 & 31 Vict., c. 69; the *Real estate Charges Act, 1877*, 40 & 41 Vict., c. 34.

52. Administration of Estates Act, 1925, ss. 56, 58(2), (3) and Schedule 2, part I. The relevant provision now reads as follows:
35. (1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.
(2) Such contrary or other intention shall not be deemed to be signified
(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or
(b) by a charge of debts upon any such estate;
unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.
(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment of satisfaction thereof either out of the other assets of the deceased or otherwise. Property is defined in s. 55 as an interest in, *inter alia*, real or personal property.

53. *See Proceedings of the Commissioners on Uniformity of Legislation in Canada* (1925) 393; (1926) 417. S. 34 of the *Uniform Wills Act* is identical to s. 31 of the B.C. *Wills Act*.

provinces having the equivalent of section 31,[54] the deceased's general estate is responsible for payment of debts secured against personal property.

It is difficult to see why different results ensue depending on the nature of the property. The assumption underlying section 31 seems to be that, conceptually, most people regard land and the mortgage as one and the same. For one reason, a debt secured by the mortgage is very often the means of purchasing the property. A testator, consequently, may be reasonably presumed to intend that a gift of land includes the mortgage to which the land is subject.

The same presumption, however, does not necessarily hold with respect to personal property. More often, personal property is pledged to secure a loan used for other purposes. Creating a presumption to glean a testator's unarticulated intent in these circumstances is hazardous. How likely is it that the testator intended the debt to accompany the gift? A testator, for example, who has pledged shares as security on a loan for the purchase of a car is unlikely to intend that the beneficiary of those shares assume liability for the car debt.

On the other hand, personal property may be subject to a charge granted by the testator as a means of acquiring that property. In our example, instead of pledging shares to secure the car loan, the testator may have granted a mortgage over the car itself. This in principle is no different from financing the purchase of land through a mortgage. It appears to us anomalous that one beneficiary may take property (the car) free of the debt associated with the mortgage while another beneficiary (of land) will not. We believe that section 31 should apply equally to real and personal property.

We also believe that there is another aspect of section 31 which calls for attention. It may be desirable to draw a distinction between charges related to the acquisition or use of a particular item of property and charges created for other purposes. A mortgage under section 31 includes "any charge, whether equitable, statutory or of other nature." This definition encompasses a wide array of statutory charges which may bear no reasonable connection to the property to which they attach.

Many of these charges are designed to assist a statutory body to satisfy a debt owed by the estate. For example, under the *Employment Standards Act*,[55] unpaid wages form a charge on property owned by an employer. Where the employer is a corporation, the directors are personally liable.[56] Similarly, unpaid taxes under provincial legislation such as the *Insurance Premium Tax Act*,[57] the *Tobacco Tax Act*[58] or the *Social Service Tax Act*,[59] constitute a lien or charge on the property of the taxpayer. In certain circumstances, such charges may attach to real property passing by a testator's will so that, by virtue of section 31, the property is primarily liable for payment rather than the testator's estate.

That is a surprising result. Few testators would associate charges of this nature with a testamentary gift of property affected by them. Consider the following example:

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54. Only Nova Scotia, Prince Edward Island and New Brunswick do not have similar legislation.

55. S.B.C. 1980, c. 10, s. 15.

56. S.B.C. 1980, c. 10, s. 19.

57. R.S.B.C. 1979, c. 205, s. 19.

58. R.S.B.C. 1979, c. 404, s. 15.

59. R.S.B.C. 1979, c. 388, s. 18 (as amended).

> T is a widower with 2 children. A is his daughter by his first marriage and B his son by a second marriage. The relationship between the children is less than friendly. T dies and, by will, leaves his home (value $150,000) to A and the residue (value $250,000) to B. The will contains a general direction charging the residue with the payment of T's debts. It transpires that one of those debts ($75,000) arises under the *Employment Standards Act* with respect to wages owed to the employees of a company of which T was a director. B takes the position that since the debt forms a lien on T's property, including the home, Section 31 of the *Wills Act* applies and that the whole burden of this debt must fall on A's entitlement under the will. Subsection (2) prevents T's direction that debts be paid from the residue from taking effect.

While we have not encountered any case in which such an extreme result has occurred, and no doubt a court would struggle to avoid such a conclusion, there is nothing on the face of section 31 to suggest that B's position would not prevail and yield an outcome which is manifestly unjust. Our suggestion that the principle of section 31 apply to personal property as well as realty might relieve A's position somewhat but it is not a complete answer.[60]

The example above involves a charge that arose by operation of law. Charges created by the testator may yield equally dubious results. In an earlier example, we described a testator who pledges shares to secure financing for the purchase of a car. In his will, he makes a gift of the shares to A, and a gift of the car to B. In this case, the question arises as to who should properly shoulder the burden. If any kind of property were to be primarily liable for the payment of any debt secured against it (rather than the residue of the estate being primarily liable), the debt would be paid by A. This would allow B to claim the gift of the car at A's expense, a result which is patently unfair. An alternative is to impose liability on B. However, this approach requires that a charge on one gift of property which is unrelated to the use or acquisition of that property be borne by the beneficiary of another gift, an equally unfair result. In this case, it seems to us that the estate should properly shoulder the burden.

In our Working Paper it was proposed that the operation of section 31 should be confined to those mortgages or charges that are "reasonably related to the acquisition, improvement or preservation" of the property charged. One of our correspondents felt that a distinction between charges relating to the acquisition or use of property and charges created for other purposes was untenable and would lead to increased litigation concerning the particular purpose to which the proceeds from a secured loan was applied. This correspondent preferred a general rule that all charges secured against property should accompany a gift of that property:

> [Such a rule] may be hard, but it is certain and simple and testators can be advised of its effect at the time they draw their wills. We doubt whether testators drawing their own wills would, in any event, wish to inflict the potential of complex litigation on their beneficiaries.

We are not persuaded to depart from the conclusion set out in the Working Paper. The potential for injustice in permitting the principle of section 31 to continue to apply to all charges on property is simply too great.

It is true that a testator can always avoid the application of a rule if he is properly advised of its effect when he draws up a will. The difficulty we see is that section 31, in its current form, is a relatively obscure and little understood provision. Notwithstanding the mischief it can cause (illustrated by our earlier example) we would be very surprised if a significant number of wills are drawn to include a provision which is effective to limit the application of section 31. We doubt that any provision which replaced it would loom any larger

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60. *E.g.*, if the residue of the estate is personal property which is caught by the statutory charge.

in the consciousness of will-makers and their advisors. We do not think it is an answer to say that the undesirable consequences can be avoided by drafting.

We also believe that the difficulties thought to be associated with the proposal made in the Working Paper are overstated. The concept of charges related to the use or acquisition of property is not new. In those jurisdictions that have enacted modern personal property security legislation, such charges are referred to as purchase-money security interests and distinguishing them from other kinds of charges seems to have caused little difficulty in practice.

It seems to us, moreover, that in most cases the purpose of a sizable secured loan will either be self-evident or relatively easy to ascertain. Most lending institutions, for example, customarily record the reasons for which a loan is requested. It is true that in some cases this task will involve a more searching inquiry. For example, funds advanced on a revolving line of credit that is secured against property owned by the borrower may be applied for multiple purposes. However, financing of this nature is usually arranged in connection with business debts and very seldom relates to the use or acquisition of the particular property against which it is secured. This additional inquiry in some cases is, we believe, a modest price to pay if it means that the testator's intent is less often defeated.

The Commission recommends that:

7. Section 31 of the Wills Act *should be amended to provide*

(a) the section applies to gifts of real and personal property; and

(b) the section applies only to mortgages or charges reasonably related to the acquisition, improvement or preservation of the property.

CHAPTER VII GIFTS TO ISSUE

A. Introduction[1]

If a testator makes a gift to a group of persons, intending to benefit the group as a whole rather than each member individually, he has made a class gift. Class gifts were discussed in Chapter V. As a general rule, if the group is not referred to by the names or number of its members, the gift is regarded as a class gift.

Potentially, the distribution of class gifts raises difficulties. These concern the identification of the beneficiaries and the appropriate division of the testamentary gift. For example, a gift to "my nieces and nephews" benefits a group whose membership may increase long after the testator has died. Distribution of the gift would require waiting until all the testator's siblings have died and the birth of their offspring is no longer possible. The courts have resolved this problem through rules of construction, collectively called the rule of convenience.[2] Under these rules, the class will close at a particular time and only those members then alive are entitled to share in the testamentary gift.[3] In our example, the gift "to my nieces and nephews" attracts the rule of convenience and the class closes at the testator's death. The nieces and nephews then alive share in the gift equally.

A different problem arises where the class consists of persons of different generations. This happens most frequently where the class is referred to as "issue" or by some other term denoting descendant kin. A gift to "A for life, remainder to A's issue" closes the class at A's death. At that time, A's issue may include A's children, grandchildren and great grandchildren. Under the present law, the surviving issue are *prima facie* entitled to share in the gift equally. The shares are not adjusted according to generations, so that members of the first generation are not preferred to members of the next.

This manner of distribution is subject to a contrary intent. The appropriate division in every case is a matter of the testator's wishes. Often, however, this intention is not apparent. When a testator makes a gift to "issue," it is difficult to say exactly what he intended. The Courts have developed certain rules of interpretation to address this problem.

B. Methods of Distribution

A gift to a class may be divided among its members in one of two ways. The first and more common form of distribution is to divide the gift equally among the members of the class.[4] This is known as distribution per capita ("by heads"). For example, if a gift is to "A for life, remainder to A's issue" and A is survived by two children and three grandchildren, distribution per capita results in the gift being divided into 5 equal parts among A's survivors. The courts have tended to favour per capita distribution.[5]

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1. This chapter is based on material from our *Working Paper on the Interpretation of Wills* (W.P. No. 32, 1981).

2. For a discussion of this topic, *see* Feeney, *The Canadian Law of Wills* (2nd ed., 1982) vol. 2, 117-135.

3. Persons born after the class closes who would otherwise qualify as class members are excluded from sharing in the gift.

4. Clark, *Theobald on Wills* (14th ed., 1982) 381.

5. *Ibid.*

The second method of distribution is per stirpes ("by stocks"). This means that a gift is divided into equal shares according to family or stock. Those shares are then subdivided among the members of each family.[6] Jowitt explains per stirpital distribution with the following example:[7]

> [I]f there is a gift to two or more persons, with a substitutional gift to the children of such of them as shall die before the gift takes effect, then the distribution takes place per stirpes. Thus if there were three original donees, A, B and C, and B has died leaving three children, and C has died leaving two children, the property is divided into three parts, one going to A, another to B's three children, and the third to C's two children.

Whether a gift is to be distributed per capita or per stirpes is often a matter of interpretation. Generally, per capita distribution is made when the class consists of strangers or persons unrelated to one another.[8] Per stirpital distribution is sometimes favoured where the class consists of family members.[9] These criteria, however, are often applied haphazardly and modern cases tend to be inconsistent.[10]

C. Reform

1. PER STIRPES DISTRIBUTION

A gift to issue or descendant kin is a gift to a family class. Issue surviving when the class closes are entitled to share in the testamentary gift. If the class consists of children, grandchildren and remoter kin, *per capita* distribution means each beneficiary receives an equal share. No adjustment is made to reflect the difference in generations. *Per capita* distribution results in equality of treatment among members of unequal generations. This result might surprise the ordinary testator. Studies show that most testators prefer to treat members of one generation equally.[11] However, they do not necessarily intend equality between generations.

In these cases, *per stirpital* distribution creates a result more likely to approximate the testator's intent. A gift to a person's issue would initially be divided by reference to the number of members, both living and dead, in the generation closest to that person. The share of a deceased member would then be subdivided equally among that member's children, if any. In this way, preference of closer generations is achieved without compromising equality among members of the same generation.

Per stirpital division is commonly regarded as the fairest method of distribution when a gift is to a family class. For example, a professionally drawn will usually directs that a gift to a family class be distributed per stirpes. Similarly, the *Estate Administration Act* provides for *per stirpital* distribution among the testator's issue.[12] While the case law appears to favour similar distribution in the context of testamentary

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6. *Williams on Wills* (5th ed., 1980) Vol 1, 547.

7. *Jowitt's Dictionary of English Law* (2nd ed., 1977) Vol 2, 1347.

8. *Theobald on Wills, supra*, n. 4 at 381-3.

9. *Ibid.*

10. *Ibid.*

11. *See* Fellows, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States," (1978) Am. B. Found. Research J. 319; fellows, "An Empirical Study of the Illinois Statutory Estate Plan," (1976) U. Ill. L. F. 717; Contemporary Studies Project, "A Comparison of Iowans' Dispositive Preferences with Selected provisions of the Iowa and Uniform Probate Codes," (1978) 63 Iowa L. Rev. 1041.

12. R.S.B.C. 1979, c. 114, s. 98. *See also* s. 100, which provides for *per stirpital* distribution among the issue of the intestate's brothers or sisters.

gifts to a family class, legislation in this regard would nonetheless be desirable.

2. PER STIRPES DISTRIBUTION THROUGHOUT

As a matter of construction, distribution *per stirpes* may be confined to first generation members and their issue, or may extend to remoter issue.[13] In the first case, the portion to each family or stock is determined by the members of the first generation. Each member of the first generation will take one portion. If any member of the first generation dies before receiving a vested interest, his issue will share his portion *per capita*. In the second case *per stirpital* distribution will continue throughout successive generations until completed. For example, a testator makes a gift "to A's children or substitutionally to their issue." Before the class closes, A has two children, B and C. B dies leaving two children, D and E. E dies leaving two children. This raises a problem of interpretation as to which method of distribution should apply. If distribution is to be *per stirpes* throughout, then the gift is first divided into two portions, one of which goes to C. The other portion is held for B's issue. It is divided into two portions, one of which goes to B's surviving child, D. The other portion is divided among the children of B's deceased child, E. Had any of B's grandchildren died leaving issue, *per stirpital* distribution would continue. This is known as "*per stirpital* distribution throughout." The importance of preventing competition between different generations is good reason to justify distribution *per stirpes* throughout.

An additional problem arises when there are two or more generations that might serve as the "root" from which *per stirpital* distribution should begin. There is no fixed rule concerning which should be selected. For example, the testator makes a gift to A's issue, and when the class closes only A's grandchildren survive. The gift supports two possible constructions. The testator may have intended the stocks to be determined by the generation nearest to A, regardless of whether any members of that generation are surviving on A's death. In that case, each grandchild would be entitled to a portion of the share to which his parent would have been entitled. Alternatively, the testator may have intended the stocks to be determined by the members of the nearest generation in which there is a surviving member. In this case, the gift would be distributed *per capita* among the grandchildren.

If a rule of construction is desirable to resolve this interpretation issue, it ought to be one that determines stocks with reference to the nearest generation which has surviving members. It is not necessary for the nearest surviving generation to share *per stirpes* to prevent competition between generations. This goal is not compromised if members of that generation are allowed to share *per capita*, while remoter issue, taking substitutionally, share *per stirpes*.

The Queensland Law Reform Commission has recommended that a gift to issue should be distributed *per stirpes*. They argued that:[14]

> ... it is desirable to change the already rather weak rule in favour of a more decisive and just rule, namely that legacies and devises to the issue or descendants of a person should be distributed to them in equal shares among the nearest surviving issue referred to and by representation among the more remote surviving issue. The expression "by representation" has its statutory origin in the Statute of Distribution of 1670 and its meaning is quite clear, although complex. It means in principle that surviving issue more remote than the nearest surviving issue represent their parent, if deceased, and take (between them if more than one) the share that their deceased parent would have taken had he survived ...The formula works however remote the nearest surviving issue are, and however remote the more remote representatives are. Thus if a deceased person leaves only grandchildren

13. *Theobald on wills, supra*, n. 4 at 383-4.

14. *The Law Relating to Succession* (Q.L.R.C. No. 22, 1978) 18.

> and great grandchildren, the grandchildren will take in equal shares and the great grandchildren by representation. It is considered that this is fairer than the traditional per stirpes rule which based itself on the factual assumption, generally but not universally correct, that a deceased person never dies leaving grandchildren surviving him without also leaving children surviving him.

They recommended the following provision to govern gifts to issue:[15]

> Unless a contrary intention appears by the will a beneficial disposition of property to the issue of a person shall be distributed in equal shares among the nearest issue of that person and by representation among the remoter issue of that person.

This formulation resolves the problem concerning which of several generations should fix the stocks for per stirpital distribution. However, other words besides "issue" may be used to make a gift to descendant kin, and legislation should take this into account.[16]

The Commission recommends that:

8. *Subject to evidence of a contrary intention, a gift to a class designated as "issue" of a person, or a similar term, thus encompassing more than one generation of beneficiaries, should be distributed in equal shares among the issue in the generation nearest to that person that contains one or more surviving members, and among remoter issue of that person* per stirpes *throughout.*

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15. *Ibid*.

16. As well, the term “representation” technically refers to a form of *per stirpital* distribution which may take place on an intestacy. In the context of testate successeion, the term “*per stirpes*” is more appropriate than is the term “representation..”

CHAPTER VIII SUMMARY OF RECOMMENDATIONS

A. General

In this Report, we have reviewed a number of miscellaneous rules governing the effect of testamentary instruments. The focus has primarily, but not exclusively, been on those rules that have evolved to accommodate problems arising when circumstances change after the testator has made his will. The intended object of these rules is to dispose of property in the way the testator would have wanted had he anticipated the change in circumstances.

Many of these rules were developed centuries ago and are based on assumptions which are no longer valid. Others reflect problems which have long since been addressed by legislation or resolved through case law. Often application of these rules produces results which would surprise the modern testator. In this Report, we have recommended modifications to these rules to conform to the expectations of the ordinary testator in modern society. While most of these recommendations have been framed as statements of general principle, they should be understood as contemplating appropriate amendments to the *Wills Act*.

B. Summary of Recommendations

1. (1) A gift, by will, of specific property fails where there has been a disposition of the property before the testator's death unless the testator

(a) intended to confer a general economic benefit on the beneficiary; and

(b) did not intend the disposition to operate as a revocation of the gift

in which case the gift is deemed to be a gift of the proceeds of the disposition.

(2) For the purpose of paragraph (1), where there is no direct evidence of the testator's intention, it may be inferred from surrounding circumstances as provided in paragraphs (3) and (4).

(3) For the purpose of ascertaining the testator's intention under paragraph 1(1)(a) regard may be had to:

(a) the character of the gift;

(b) the value of the gift;

(c) the value of the gift relative to the worth of the estate; and

(d) the relationship of the beneficiary to the testator.

(4) For the purpose of ascertaining the testator's intention under paragraph 1(1)(b) regard may be had to:

(a) whether, and when, the testator received the proceeds of the disposition;

(b) the nature and circumstances of the disposition;

(c) the character of the proceeds;

(d) whether the disposition was made by, or at the direction of, the testator;

(e) the length of time between the disposition and the testator's death;

(f) the extent and character of other property passing to the beneficiary on the testator's death; and

(g) whether the testator had a reasonable opportunity to alter his testamentary arrangements to reflect the disposition.

(5) In paragraphs (1) to (4)

"disposition" of property includes:

(a) a binding agreement or direction for the disposition of property; and

(b) the loss or destruction of property

"proceeds" includes:

(a) consideration, including security, for the disposition of property;

(b) compensation for injury to, or loss of, property; and

(c) proceeds deposited into a mixed fund, to the extent they are identifiable.

2. Subject to evidence of a contrary intention, property given by a testator during the testator's lifetime to a child of the testator or to any person to whom the testator stands in loco parentis *should be presumed to be a gift and not an advancement of a portion to which that child or other person is entitled under the testator's will.*

3. (1) Subject to evidence of a contrary intention, a testamentary gift of property which the testator does not own should have no effect.

(2) Without limiting the generality of paragraph (1), the rights of a beneficiary shall not be affected by any purported disposition by the testator of property owned by the beneficiary.

4. (1) Sections 21 and 29 of the Wills Act *be repealed*

(2) A provision comparable to the following be enacted:

Subject to evidence of a contrary intention, if a gift in a will, including a gift of residue, fails

by reason of the death of the beneficiary in the lifetime of the testator, or by reason of the gift being contrary to law or otherwise incapable of taking effect, the property that is the subject matter of the gift shall be distributed according to the following priorities:

(a) to the alternative beneficiary of the gift, if any, designated by the testator, notwithstanding that the gift fails for some reason other than the one specifically contemplated by the testator;

(b) to the beneficiary's issue, where the beneficiary is the brother, sister or issue of the testator;

(c) to the beneficiary's spouse, where the beneficiary is the brother, sister or issue of the testator and leaves no issue, provided that at the time of the beneficiary's death, there had been no marital breakdown between the beneficiary and his or her spouse, as evidenced by the circumstances referred to in section 16;

(d) to the surviving residuary beneficiaries, if any, named in the will, in proportion to their interests.

5. Subject to evidence of a contrary intention, real and personal property included in the residue of the testator's estate should be liable rateably, according to their respective values, for the payment of

(a) the testator's debts, funeral and testamentary expenses, and the costs and expenses of administration, and

(b) pecuniary gifts.

6. Real property charged by the testator with the payment of debts outstanding at his death or the payment of pecuniary gifts should be primarily liable for this purpose, notwithstanding the failure of the testator to exonerate his personal property.

7. Section 31 of the Wills Act *should be amended to provide*

(a) the section applies to gifts of real and personal property; and

(b) the section applies only to mortgages or charges reasonably related to the acquisition, improvement or preservation of the property.

8. Subject to evidence of a contrary intention, a gift to a class designated as "issue" of a person, or a similar term, thus encompassing more than one generation of beneficiaries, should be distributed in equal shares among the issue in the generation nearest to that person that contains one or more surviving members, and among remoter issue of that person per stirpes *throughout.*

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