

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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Backgrounder

LRC 102—Report on Wills and Changed Circumstances

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Once a will has been made, it is important to review it periodically and consider the effect on it of any changes in circumstances that might have arisen. Wills only take effect on the death of the testator, but they are often made many years in advance of this occurrence. During this time, events may have an impact on the will. For example, a beneficiary named in the will may have predeceased the testator or a specific gift of property made in the will may no longer form part of the estate. If a testator has not addressed these issues prior to the will taking effect, either through careful will planning or regular reviews, the courts may have to step in to resolve any problems. A number of rules have developed over the years to assist the courts in this task, some of which are based on out dated assumptions and which produce results curious by today's standards and expectations. This report examines some of these rules and considers whether or not they require modification.

The report looks first at the situation where property disposed of by will is no longer part of the testator's estate. The general rule is that a gift will fail in these circumstances even if the proceeds of sale from the property form part of the estate. The technical term for this is *ademption*. The same rule applies to property which still exists but which is now subject to a binding agreement for its disposition. This is known as ademption by equitable or notional conversion. It is recommended that the application of these two rules are modified and should be determined by reference to the testator's intention: do the circumstances of the 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?

Gifts made during a testator's life, which resemble testamentary gifts, can also cause difficulties. The general rule is that the gift could be revoked by implication that the testator overlooked the lifetime gift when making the will. Special rules apply to lifetime gifts to a testator's child based on an assumption that a testator intends to treat all his children equally. In some cases such a gift will operate to revoke a similar testamentary gift. The report recommends that in the context of gifts to children, as a general rule the gift should be presumed to be a gift and not an advancement.

The report examines gifts that appear to be subject to a condition. These cases are governed by a rule known as *election*, which in simple terms requires the beneficiary to conform to all the requirements of the gift before accepting it. The discussion focuses on a few technical rules relating to election, in particular, problems arising when a testator attempts to dispose of property belonging to a person who is also benefiting under the will and makes certain recommendations on this issue.

The courts have developed a number of rules to resolve problems that arise where a gift fails for some reason but the subject matter of the gift remains in existence. The report considers these rules together with specific legislation that has been enacted and comes to the conclusion that the present position is inadequate. It recommends a scheme of distribution that focuses first and foremost on the actual or deemed intent of the testator so far as it can be determined.

Another issue, which can cause difficulty, is where an estate is inadequate to satisfy debts and testamentary gifts. Any gifts that fail, in whole or in part, because of this issue are said to *abate*. The report concludes that the current rules regarding distribution of the estate in these circumstances are complex and inconsistent and should be reformed. A number of recommendations are made.

Finally, the report examines some of the problems arising from the different methods of distribution where a gift is made to a group or class of beneficiaries and make recommends a few modifications.

Further Developments

The report's recommendations have not been implemented by legislation.