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WEALTH STRUCTURING ANALYSIS FOR TRUST AND ESTATE PRACTITIONERS

The doctrine of lapse

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A will takes effect only on death and can therefore be revoked at any time while the testator is alive (subject to their having mental capacity). As a result of this ambulatory nature of a will, the general rule is that if a beneficiary dies before a testator, any gift under the will lapses. Where the gift is a simple legacy and the legatee has predeceased, the subject matter of the legacy will fall into residue and increase the value of the residuary estate.

There are important exceptions to this doctrine of lapse:

1Where the gift discharges a moral obligation recognised in the will and that still exists at the testator's death.2A statutory saving under section 33(1) of the *Wills Act 1837* (the *Wills Act*) for the issue of the testator.3Substitutions or alternatives expressly provided for by the testator.4Accrues in the will which may be express or implied.

In the case of (i), the discharge of a moral obligation, the gift does not lapse because the inference is that the testator intended the gift to pass into the estate of the legatee, in the event of the latter dying first. The scope of this exception from lapse is not entirely certain and may be limited to simply discharging a debt.¹

The statutory saving in the *Wills Act* (ii) has wide-reaching implications. Section 33(1) provides that:

a 'where a will contains a devise or bequest to a child or remoter descendant of the testator; and b the intended beneficiary dies before the testator, leaving issue; and c issue of the intended beneficiary are living at the testator's death,

then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death'.

For example, Tom gifts the residue of his estate to his two sons in equal shares. The eldest son Peter dies before Tom, leaving two children. Section 33(1) *Wills Act* operates to ensure that the two grandchildren of Tom (Peter's children) take Peter's half in equal shares.

Although it is not possible simply to exclude the doctrine of lapse under a will, the testator may of course provide for an alternative in the will so that another legatee or beneficiary takes the gift instead. This could be done either by an accruer or a substitutionary gift.

The effect of an accruer is that the failed gift accrues or is added to another gift that already exists under the will. An accruer (in its widest sense) may be implicit in the wording of the gift. Where, for example, a testator makes a gift to two or more people and it is clear that the failed share of any who predecease the testator will increase the share(s) of those who survive, there will be an implicit accruer.

For example, under a gift of 'my jewellery to my sisters Jill and Joan', Joan will take all the jewellery if Jill predeceases the testator. This is because the wording indicates a joint tenancy under which the survivor takes the whole gift.²

Express accruers are commonly used for residuary gifts under a will. For example a testator with three adult children may want to create three separate shares for the family of each child and their own children, possibly with ongoing trusts. These three shares would remain separate unless all the beneficiaries under a one-third share die, in which case the testator would typically want to make provision for the failed share to accrue to one or other (or both) of the other two shares.

In the case of the testator making a gift to a class of people under his will, for example 'to my grandchildren', a person who is potentially a member of the class but dies in the testator's lifetime cannot be treated as being within the class. This is because the class is only ascertained at the time of death of the testator. The analysis is therefore slightly different from the case of a joint tenancy referred to above, where there is an implicit accruer.

Section 33 will apply to a class gift provided the class consists of children or remoter descendants of the testator, in the absence of contrary intention. The effect is to substitute the issue of the deceased child with no accrual to the other members of the class.³

Legacies to charities that cease to exist in the testator's lifetime lapse, or may be applicable cy-pres for other charitable purposes. Where the legatee charity 'merged' with another charity so that it ceased to exist, the gift will take effect as if it was made to the successor⁴. It is usual for a will to expressly provide that, if the charity is no longer in existence, the executors should pay the legacy to another charity of their choice.

The consequences of any death of a legatee or a residuary beneficiary before the testator should be carefully considered when drafting the will. Alternatively, a testator can make a substitute gift to the donor's personal representatives and that gift will pass into the estate of the donee, if they predecease the testator.