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Rules of Lapse or Alternate Recipients in the Event of Failed Testamentary Gifts: A Review of Sections 32 and 33 of the *Alberta Wills and Succession Act*

Wills & EPAs - Commonly Occurring Issues

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INTRODUCTION

The *Wills and Succession Act*, SA 2010, c W-12.2 [the “WSA”], entailed a sweeping reform and consolidation of estate legislation in Alberta. Proclaimed into force on February 1, 2012, the WSA repealed and replaced the former *Dependants Relief Act*, the *Intestate Succession Act*, the *Survivorship Act* and the *Wills Act*.¹

This paper focuses on the circumstances and consequences of a failed or ineffective testamentary disposition under sections 21, 32 and 33 of the WSA. After briefly canvassing these new provisions, the paper will first examine the changes to the failed gift rules brought about by the WSA relative to its predecessor statutes. The circumstances in which a gift under a will is considered void or ineffective under sections 21, 32 and 33 of the WSA will then be discussed. The paper will then analyze the hierarchical rules of lapse under sections 32 and 33 of the WSA that operate in the event of a failed testamentary gift to determine the priority of alternative beneficiaries of the failed gift property. In conclusion, a summary of the potential alternate recipients of a failed gift is provided.

THE RELEVANT PROVISIONS OF THE *WILLS AND SUCCESSION ACT*

The relevant sections of the WSA pertaining to ineffective or failed testamentary dispositions and the consequential rules of lapse are excerpted here for ease of reference.

Definitions

Interpretation

1(1) In this Act,

(e) “descendants” means all lineal descendants of an individual through all generations;

The definition of “descendant” under the WSA replaced the word “issue” in predecessor estate legislation, and essentially refers to a person’s offspring. Unfortunately, the statutory definition is not particularly helpful, as it is self-referential and “lineal descendants” is not further defined therein. However, the common law assists in clarifying who qualifies as a “descendant” under the WSA. Adopted children are considered “descendants” of their adoptive parents, but not of their biological

¹ See section 125 of the WSA.

parents, for the purposes of succession statutes.² The Alberta Court of Appeal recently confirmed that “descendants” under the WSA excludes step children of the testator.³

Section 21: Void Gifts

Sections 21, 32 and 33, found in Part 2 of the WSA pertaining to wills, all deal with void or ineffective testamentary dispositions.

Section 21 expands the circumstances under which a gift or power of appointment under a will is deemed void. Testamentary dispositions to persons who witness the signing of the will (s. 21(1)(a)), persons who sign the will on behalf of the testator (s. 21(1)(b)), persons who interpret or provide translation services in making the will (s. 21(1)(c)), and the spouse, adult interdependent partner (“AIP”), descendants of, or anyone claiming by representation through, any of these aforementioned persons, are void. Subsection (2) provides exceptions to these rules, including recourse to the newly added section 40, which allows for the recipient of a void gift under section 21(1) to apply to the Court for an order validating the gift. If the testamentary disposition is void under section 21, the alternate beneficiary scheme under section 33 is engaged to determine who alternatively receives the property that is the subject of the failed gift.

Sections 32-33: Circumstances of, and Rules of Lapse for, Ineffective Gifts

Sections 32 and 33 provide for a hierarchy of possible alternative recipients of the failed gift in the event the intended beneficiary predeceases the testator or the gift to that intended beneficiary is otherwise void or ineffective. The rules under these provisions are intended to provide the best legislative estimation of the testator’s likely intention or wishes as to an alternate recipient of the gift in the event his/her primary beneficiary cannot take. Although the two sections cover different situations/circumstances of “failed” gifts, the rules providing for the resultant consequences and priority of alternate recipients are the same, with a final “default” to the intestate successors under Part 3 of the WSA.

Part 3: Intestate Succession Rules

Part 3 of the WSA, excerpted below, deals with the rules for distribution of intestate estates. The intestate succession rules are relevant to a review of the potential consequences of ineffective testamentary dispositions because they are referred to, and form part of, the hierarchical lapse rules

² *Re Matthews Estate* (1992), 1 Alta LR (3d) 198, 126 AR 287 (QB); and *Benefield v Hrenko Estate*, 2001 ABQB 242, 287 AR 33.

³ *Peters v Peters Estate*, 2015 ABCA 301, 609 AR 25.