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Substituted Beneficiaries under the Law of Wills

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SUBSTITUTED BENEFICIARIES UNDER THE LAW OF WILLS

A question of considerable interest to lawyers and laymen in the State of Montana concerns the effect of the common law and our statutes on the disposition of real and personal property where a testator has willed it to a beneficiary, who dies before the testator.

At the outset it must be remembered, that the disposition of property by will, in Montana, rests entirely with the legislature; it may grant the right, with or without limitations; it may deny the right, and it has the sole power to designate those who may take by will.[1]

Further, a testamentary disposition under the laws of Montana, may be made to any person capable of taking the property so disposed of, with certain prohibitions and limitations.[2] Before a testator's death the beneficiary mentioned in the will has a "mere privilege" of receiving revocable by law.[3] Upon the testator's death, the gift vests in the beneficiary, subject of course to the executor's possession for administration, until the estate is settled, or until the estate is delivered by order of court to the beneficiary.[4]

At common law, a lapse or failure most frequently occurred, where the beneficiary of real or personal property, or both, predeceased the testator, and there was no substitutionary or saving clause in the will.[5] While there were certain exceptions to the general rule and the specific exception mentioned, they are not involved here, but are noted for possible reference.

A. Exceptions, inclusive of the substitutionary clause mentioned, are discussed and commented upon at length in PAGE ON WILLS, Lifetime Edition, Vol. 4, Sections 1415 to 1421, inclusive.

B. The application of the anti-lapse or anti-failure statute is not mandatory in every case, as, where the

[1] In re Hauge's Estate (1932) 92 Mont. 36, 9 P. (2d) 1065.

[2] R. C. M. 1935, §6977: A testamentary disposition may be made to any person capable of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute.

[3] Hinds v. Wilcox, (1898) 22 Mont. 4, 55 P. 355.

[4] R. C. M. 1935, §7040: Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death; In re Deschamp's Estate, (1922) 65 Mont. 207, 212 Pac. 512.

[5] Snow v. Snow, (1861) 49 Me. 159, 163; Anderson v. Parsons (1827) 4 Greenl. (Me.) 486; 4 PAGE, WILLS, (Lifetime Ed.,) 1414, p. 162; 1 JARMAN, WILLS, (5th Am. Ed.) Ch. XI.

will shows that the testator did not intend that the property should pass as provided by such statute.

C. The enactment, however, will apply in a proper case, unless the testator's intention to eliminate it from the operation of the provisions of his will, is shown with reasonable certainty.

Under the common law rule mentioned, the property whether a bequest of personal property or a devise of real estate, would have lapsed or failed. Likewise, if it be assumed that the will in question contains no substituted beneficiary, nor any general residuary clause, both the legacy and devise pass as intestate property of the testator, that is, as if the testator had died intestate.[6] Again, if it be assumed that the testator making the will left surviving him no heirs nor next of kin, at the time of his death, then at common law, the property, both real and personal would escheat to the state.[7]

In nearly all of the states, anti-lapse or anti-failure statutes have been enacted, which variously modify or eliminate the common law rule, that a legacy or devise lapsed if the beneficiary died before the testator, and there was no substitutionary clause in the will.[8] Such anti-lapse or anti-failure statutes rest upon the presumption that the testator would have made some provision in his will for relatives of his beneficiary who predeceased him, had he, the testator had notice of the decease of his beneficiary, and an opportunity to make the provisions of such statute, a part of his will.[9] Our Code provision[10] can with accuracy be said to be but a short-hand rendering of the common law rule referred to: that a gift failed if the beneficiary predeceased the testator and the will contained no provision for avoiding lapse,[11] this being subject, of course to the proviso, "except as provided in section 7012." This exception is considered later.

Section 7042 R. C. M. 1935, by its use of the words "devi-

[6] 4 PAGE, WILLS (Lifetime Ed.) §1426 p. 190, §1427, p. 190.
[7] 4 PAGE, WILLS (Lifetime Ed.) §1427, p. 190.
[8] 28 R. C. L. *Wills*, p. 343, §337; 26 CAL. JUR. *Wills* p. 949, §255, note 20; 92 A. L. R. p. 846, anno.
[9] Hester v. Sammons (1938) 171 Va. 142, 198 S. E. 466, 118 A. L. R. 554; Waxson Realty Co. v. Rothschild (1931) 255 N. Y. 332, 174 N. E. 700; Beardsley v. Wright (1918) 89 N. J. Eq. 58, 103 A. 809.
[10] R. C. M. 1935 §7042: If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section 7012.
[11] 28 R. C. L., *Wills*, p. 336, §327; In re Murphy's Estate (1909) 157 Cal. 63, 106 P. 230, 137 Am. St. Rep. 110; 4 PAGE WILLS (Lifetime Ed.) §1420, p. 175.

see or legatee" clearly embraces within its terms, (subject, of course, to the excepted code provision 7012 R. C. M. 1935, hereinafter considered) both *real and personal property.*[12]

Therefore, except as provided in the language of section 7042 R. C. M. 1935, i.e., where "an intention appears to substitute some other in his place," and except as provided in Section 7012 R. C. M. 1935, section 7042 constitutes the law of this jurisdiction in respect to lapses.

It covers and embraces all cases involving *personal property,* and all cases of *real property,* except those lifted from its operation through section 7012 R. C. M. 1935, which is limited in its scope to a restricted class of cases coming within its terms,[13] and in those cases, it applies only to a *devisee of real property* and has no application to personal property. This results from the wording and decisions of the Supreme Court of this jurisdiction interpreting the language of section 7012 as applying only to cases of real property devisees.[14]

Because of the foregoing, it is well settled that a bequest of personal property, in such case fails or lapses under the provisions of Section 7042 R. C. M. 1935. It being assumed that there is no substituted legatee, and no residuary clause, the personal property, had testator left heirs, would have descended to such heirs of testator under the laws governing intestacy,[15] but as we are assuming at this point that testator left no heirs, the personal property, upon the completion of the administration of the estate, would be subject to escheat.[16]

In addition to being limited to "devisees" of *real estate,* Section 7012, R. C. M. 1935, is further restricted in its operation and scope. Under its terms, the beneficiary who predeceases the testator, must be, in relationship to the testator, "a child or other relation" and further, such "child or other relation" of such testator must have left surviving "lineal descendants."

[12]4 PAGE, WILLS (Lifetime Ed.) §1422, p. 177, citing Jones v. Jones' Executors, 37 Ala. 646; In re Fratt's Estate (1921) 60 Mont. 526, 199 P. 711.

[13]R. C. M. 1935, §7012: When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator.

[14]In re Fratt's Estate (1921) 60 Mont. 526, 199 P. 711; In re Hash's Estate (1922) 64 Mont. 118, 208 P. 605.

[15]In re Fratt's Estate (1921) 60 Mont. 526, 199 P. 711; 4 PAGE, WILLS (Lifetime Ed.) §1427, p. 190.

[16]R. C. M., 1935 §28: Whenever the title to any property fails for want of heirs or next of kin it reverts to the state. . . . .

The word "child" as used in said section 7012, R. C. M. 1935 has been almost uniformly interpreted as meaning the natural or full blooded child of the testator.[17] However, under our statutes the word would include the illegitimate child of a mother testatrix, and the father testator of such child under conditions described in the statutes.[18] Also, under our Codes the word "child" would include an adopted child.[19] The word "child" does not include, according to the decisions, ,a step-child, grandchild, nephew, nieces, or any collateral relation of the testator, such as a brother.[20]

The term "or other relation" of the testator as used in the statute, is not used in a general comprehensive way, since it was applied by our Supreme Court as denoting relationship by either blood or affinity in connection with the construction of a will,[21] nor can Section 7033, R. C. M. 1935,[22] be brought into the picture of either the word "child" or the words "or other relations" for purposes of interpretation, as the same is inapplicable in the construction of statutory terms, only applying in the case of testamentary dispositions.[23]

The term "or other relations" as used in Section 7012, R. C. M. 1935, only includes relationship by blood[24] and not by affinity, though there are some cases (but not the weight of authority) which use the succession statutes such as Sections 7073 and 7074, as the base or guide for the interpretation of the statutory expression "or other relations."

Where real property is concerned, everything depends on whether the beneficiary was a "child or other relation." If he was not, then it is clear that, though the devise was real estate, the case could not be brought within the operation of

[17]115 A. L. R. p. 451, anno. sub-division 8 "child; issue."
[18]R. C. M. 1935 §5863; 4 PAGE, WILLS (Lifetime Ed.) §1425, p. 187, note 6; for cases contra 115 A. L. R. p. 451, anno sub-division 8, "Child; Issue."
[19]R. C. M., 1935, §§7074, 5865 and 5852: for cases contra 115 A. L. R. p. 451 anno. sub-division 8 "Child; Issue."
[20]115 A. L. R. p. 451 anno sub-division 8, "Child; Issue."
[21]In re Bernheim's Estate (1928) 82 Mont. 198; 266 P. 378, 57 A. L. R. 1169.
[22]§7033 R. C. M., 1935: A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," or "family," "issue," "descendants," "nearest," or "next of kin," of any person without words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the chapter on succession in this code.
[23]In re Sowash's Estate (1923) 62 Cal. App. 512, 217 P. 123.
[24]115 A. L. R. p. 452, anno., in which the entire field of relationship, both by blood and affinity, with authorities, are collected and discussed.

the anti-failure statute,[25] and it is likewise clear that the devise would lapse under the provisions of Section 7042, R. C. M. 1935.

Again excluding the existence of a substituted devisee or a residuary clause, it is apparent that the real estate, had testator left heirs, would have descended to such heirs under the laws governing intestacy,[26] but, as in the case of personal property, where the testator leaves no heirs, the real estate, upon the completion of administration, would likewise be subject to escheat.[27]

A further necessary element to bring a case within the anti-failure statute is,[28] that the deceased beneficiary, that is the predeceased child or other relation of the testator, shall, at the time of death, have left "lineal descendants" who "take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator."

The term "lineal descendants" as used in said section 7012, R. C. M. 1935 was construed by the California Court, (when their statute[29] was identical in wording with ours) as meaning "issue, regardless of the degree of relationship to the ancestor."[30]

The California statutes dealing with lineal and collateral consanguinity,[31] are identical with our Sections 7076 to 7080, R. C. M. 1935,[32] involved in the interpretation of the words "lineal descendants."

[25] *Supra*, note 13.
[26] In re Fratt's Estate (1921) 60 Mont. 526, 199 P. 711; 4 PAGE, WILLS (Lifetime Ed.) §1437, p. 190.
[27] *Supra*, note 16.
[28] *Supra*, note 13.
[29] Calif. Civ. Code §1310.
[30] 26 CAL. JUR., *Wills* §257, p. 953; 26 CAL. JUR., *Wills* §257, p. 951, note 12.
[31] Calif. Civ. Code, §§1390 to 1393 incl.
[32] R. C. M. 1935 §7076: The degree of kindred is established by the number of generations, and each generation is called a degree.

R. C. M. §7077: The series of degrees form the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

R. C. M. 1935 §7078: The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.

R. C. M. 1935 §7079: In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson is the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

R. C. M. 1935 §7080: In the collateral line, the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such com-

The decisions are but few, on the point in question, in other jurisdictions with statutes similar to ours; however they follow the California interpretation and statutory construction, declaring "issue" as being synonymous with "lineal descendants," and vice versa.

> "To this common-law rule the statute has created an exception, which prevents the lapsing of a devise in the circumstances mentioned, when the devisee was a relative of the testator, and died before him, leaving lineal descendants who take by substitution.[33]
>
> While the devisee in the case at bar was a relative of the testator, he did not leave any lineal descendants, that is, any issue which is synonymous with lineal descendants, and hence would not include his mother.[34]
>
> "It will be further noticed that the devise must be made to a child or other relative, thus requiring the testator to select the child or relative to whom the word 'issue' shall attach."
>
> "The foregoing constrains us to conclude that the legislative intent and purpose can best be served by holding that the word 'issue' as used in the section of the statute under construction means off-spring of his body, and lineal descendants of such off-spring.'"[35]
>
> "The word 'issue' in section 4841 means lineal descendants of the devisee, in contradistinction to collateral or ascending heirs."[36]

And it should be noted in passing, that an "adopted child" would come within the designation of "lineal descendants," though there are cases contrary to the rule.[37]

The term "lineal descendants" of course does not include brothers, nor stepsons, nor nieces nor sons-in-law.[38]

The term "lineal descendants" means lineal descendants of such "child or other relation" of the deceased devisee,

putation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on.

[33]Keniston v. Adams, 89 Me. 290, 14 Atl. 203.

[34]Morse v. Hayden, 82 Me. 227, 19 Atl. 443, 444; cited in 22 WORDS AND PHRASES (Per. Ed.) p. 758.

[35]In re Strelow's (Neb.) 220 N. W. 251; cited in 22 WORDS AND PHRASES (Per. Ed.) p. 757.

[36]Dillender v. Wilson, 228 Ky. 758, 16 S. W. (2d) 173; cited in 22 WORDS AND PHRASES p. 757.

[37]22 WORDS AND PHRASES (Per. Ed.) p. 715; In re Pepin's Estate (1916) 53 Mont. 240, 163 P. 104.

[38]Cases cited in Vol. 11, ALEXANDER'S COMMENTARIES ON WILLS, p. 1000.

though such descendants may not be related by blood to the testator.[39]

Judging from the foregoing review of the statutes and from the liberal tone of the better considered decisions, additional legislation on the subject would seem to be in order; that is, legislative action designed to expand the scope of R. C. M. 1935, Sec. 7012, by making it expressly applicable to personalty as well as realty, to expand the class of beneficiaries to include any person named in the will whether related to the testator or not, and to expand the term "lineal descendants" to include the heirs of such deceased beneficiary.

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[39] *Supra*, note 36.