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# The Resurrection of a Beneficiary

LAWRENCE C. ARNOLD\*

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In their desire to avoid the lapse of testamentary dispositions made to the issue of a testator the Imperial legislators in the year 1837<sup>1</sup> made provisions whereby if any real or personal estate were left to a child or other issue of the testator, and such issue died during the lifetime of the testator, leaving issue surviving the testator, then the gift did not lapse but took effect as if the object of the testator's bounty had died immediately after the testator. The common law as to the effect of a testamentary donee predeceasing the testator is succinctly stated in the English case of *Re Greenwood*<sup>2</sup> where Parker J. states:

In construing a gift of this nature it must be remembered that the general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or, if it is itself a share of residue, goes to the testator's next-of-kin. . .

The mischief intended to be removed by the provision of the Wills Act<sup>3</sup> was solely this provision of the "General Law" and yet from time to time the courts have seen fit to construe the intention of the legislature so as to extend that apparent intention. In so doing they have held that the section<sup>4</sup> postpones the death of the predeceasing "child or other issue" for all purposes relevant to the disposition of the gift made to such "child or other issue".<sup>5</sup> This state of affairs has been corrected by a shaft of judicial light contained in one of the more flagrant examples of breach of the so called "doctrine of binding precedent" which will be examined later in this article.<sup>6</sup>

Section XXXIII of the Imperial statute was embodied in the wills legislation of the law of Ontario in basically similar form to the original legislation, and until 1959<sup>7</sup> had retained its original substance, but had given birth to an additional member of the family by its extension to embrace gifts left away to brothers and sisters of the testator. The law as embodied in section 36 of the Ontario Wills Act prior to 1959 provided:<sup>8</sup>

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<sup>1</sup> Sec. XXXIII, 1 Vict. 26 (Imp.).

<sup>2</sup> [1912] 1 Ch. 392, at p. 396.

<sup>3</sup> *Supra*, footnote 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> *In Bonis Parker* (1860), 1 Sw. & Tr. 523, 164 E.R. 842.

<sup>6</sup> *Re Hurd, Stott v. Stott*, [1941] 1 All E.R. 238.

<sup>7</sup> Wills Amendment Act, 1959 (Ont.), c. 108.

<sup>8</sup> R.S.O. 1950, c. 426, s. 36.

(1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator either before or after the making of the will, leaving issue and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

(2) This section shall apply to a devise or bequest to children or other issue or to brothers or sisters as a class.

The 1959 Wills Amendment Act<sup>9</sup> purports to effect not only the destination of the gift, which, but for this section, would have lapsed, but to correct, where possible the ambiguities and uncertainties which were extant in the old section 36 either by reason of, or despite the host of learned judicial expression. The purpose of this article will be to examine briefly the most important of the problems of interpretation which have arisen and to examine the remedial and other effects wrought by the new legislation. There was no intention under the old section for the "issue" surviving the testator to benefit from the prevention from lapse. The persons benefiting were those whom the "child or other issue . . ." of the testator wished to benefit, namely those named in his will or, if he died intestate, his heirs at law. It will be shown that the new section has the indirect effect of benefiting the "issue" surviving the testator, but not exclusively. The meaning of the term "issue" in the phrase "leaving issue" was the subject of the judgment in *Re Hill*,<sup>10</sup> where the testator left property to his sister, who died in the lifetime of the testator, leaving only grandchildren surviving the testator. Roach J. held:<sup>11</sup>

The question arises whether they (the grandchildren) are issue within the meaning of the words "leaving issue" in that section. I think the word "issue" in that phrase must be given its general extensive meaning and includes grandchildren.

Another question which arises under the new section as it did in the old is that of the existence of a contrary intention. It does not appear that the contrary intention must be expressed in clear language and any degree of contrary intention, whether expressed or implied, would appear to be sufficient to preclude the operation of the section. Thus in a case<sup>12</sup> decided under the Manitoba Wills Act<sup>13</sup> a testator left property to his sister who died during the testator's lifetime. The testator had foreseen this possibility and had provided in his will that in the event of a beneficiary predeceasing him "The

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<sup>9</sup> *Supra*, footnote 7.

<sup>10</sup> [1943] O.W.N. 224.

<sup>11</sup> At p. 224.

<sup>12</sup> *Re Sheardown*, [1951] 3 D.L.R. 323 (Man. K.B.).

<sup>13</sup> R.S.M. 1952, c. 293, s. 30 (one of the Uniform Wills Acts).

share due the deceased parent shall be divided among their issue." He additionally gave to his executor power "to use the share of any *infant child* of such deceased parent for its education and advancement". It was here held that the testator had shown an intention that "issue" should be construed in the restricted sense of meaning children only (and not remoter issue) by reason mainly of the use of the term "infant child" as qualifying the term "issue" previously employed, thereby showing an intention that grandchildren should not take, which was a contrary intention in terms of Section 30 of the Wills Act.<sup>14</sup> The Manitoba Wills Act, Section 30 provides in part.<sup>15</sup>

. . . the devise or bequest shall not lapse but shall take effect as if it had been made directly to the persons amongst whom and in the shares in which that person's estate would have been divisible if he had died intestate and without debts immediately after the death of the testator.

Pursuant to this section of the Wills Act the grandchildren would have benefited as next-of-kin, and an implied intention that they should not take, was, as has been shown, a sufficient expression of contrary intention. This case<sup>16</sup> would appear to have had no application under the old Ontario Section<sup>17</sup> (though if in fact the grandchildren were to benefit a similar decision may well have been reached). The new Ontario Section 36 is, in this respect at least, completely in line with the Uniform Wills Act provisions.<sup>18</sup> Indeed it would seem that the "uniform" provisions have had considerable influence upon the drafting of the new Ontario Section 36, which provides:

Unless a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies before the testator and leaves issue surviving 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 and without debts immediately after the death of the testator.

There has been a noteworthy absence of judicial expression upon the interpretation of the Uniform Wills legislation and perhaps this can be taken as a prophetic guide, if only one of a negative nature, to the future smooth working of the present Section 36.

Under the old Section 36 as under the new amended section it is provided that the estate is divisible as if the beneficiaries named in the will had died immediately after the death of the testator. The problems which arose in this connection remain with us in substance despite the amendment, and notwithstanding the changed final destinations of the gift. The problem which has confronted the judicial mind is simply what is the scope of the "resurrection"?

<sup>14</sup> *Ibid.*

<sup>15</sup> See also other provinces where Uniform Wills legislation is in effect, namely, Alberta, Saskatchewan, and New Brunswick.

<sup>16</sup> *Re Sheardown, supra*, footnote 12.

<sup>17</sup> See *Re Hill, supra*, footnote 10, per Roach J. at p. 225: no intention to benefit issue surviving the testator.

<sup>18</sup> See, *supra*, footnote 15.

Should it be interpreted widely so as to revive the deceased beneficiary for all legal purposes pertaining to the administration and distribution of the gift; or should it be afforded a narrow construction and apply only for the purpose of preventing lapse. The earlier cases of *In Bonis Parker*<sup>19</sup> and *Re Scott*<sup>20</sup> were decidedly in favour of resurrection for all purposes. However, in *Re Hurd*<sup>21</sup> Farwell J. stated with conviction, but apparently *per incuriam*, citing the above cited authorities:

The section provides that the gift is not to lapse but is to take effect as if the death of such person had happened immediately after the death of the testator. If one treats those words quite literally one must assume that the (beneficiary) survived and then died immediately after the death of the testatrix in 1939, and the effect must be that the estate must be administered according to the law in force at that date, namely at the date when she is deemed to have died.

He then goes on to say:

In my judgment, however, that is not really the true effect of this section. The effect of the section is to prevent lapsing in this particular case, the result being that instead of the gift lapsing it becomes part of the estate of the deceased person, and it is provided that the gift is to go on the footing that the (beneficiary) was alive at the death of the testatrix and was therefore a person to whom the gift could be given. However, although she is deemed, for the purpose of making this gift effective, to have been living in 1939, none *the gift itself does become part of the estate of the beneficiary* and, that estate being administered in accordance with the law as it was at the true date of the death, that is the law under which the share which she takes by virtue of this provision, must also be administered. It is not difficult to appreciate what position might arise if that were not the true effect of the section. For instance, if a person dies intestate in the lifetime of the testator, and it becomes necessary to inquire who is the next of kin at the date of the death, and an enquiry is ordered, and the whole matter is gone into. . . . If, subsequently, that estate becomes increased by a gift which is in favour of a person deemed to have died after 1925, then, if I am to read Sec. 33 as meaning that the estate is to be administered in accordance with the law as it was after 1925, a further enquiry will be necessary as to the next-of-kin of that person on the footing that she died at the time when, in fact, she had been long dead. The result might be that, in those circumstances, one might have different persons—some going out and others coming in—entitled to participate in any share to which the estate became entitled and which is saved from lapsing. . . . On the whole I have come to the conclusion that the section does not apply beyond providing for the prevention of lapse. (Italics are mine)

The decision of Farwell J. in *Re Hurd* was embodied in the Law of Ontario in *Re Branchflower*<sup>22</sup> where the question again arose as to whether those entitled to take on the death of the testator were those entitled to take at the date of resurrection, or those entitled at the actual date of death of the beneficiary; or, more succinctly, did the provisions of Sec. 36(1) merely operate to prevent lapse and go no further. Hogg J. was in the happy position of being able to choose between authorities. He rejected the wide view,<sup>23</sup> and adopted

<sup>19</sup> (1860), 1 Sw. & Tr. 523, 164 E.R. 842.

<sup>20</sup> [1901] 1 K.B. 228 and 240.

<sup>21</sup> [1941] 1 All E.R. 238, at p. 240.

<sup>22</sup> [1945] 4 D.L.R. 559 (Ont. High Ct.).

<sup>23</sup> *In Bonis Parker*, *supra*, footnote 19.

the reasoning of Farwell J.<sup>24</sup> in applying the law in force at the actual date of death of the beneficiary in determining the distribution of the gift saved from lapse. It would appear from the reasoning of Farwell J. that he postulated reasons which fitted his decision, rather than using reasoning to arrive at a decision, this being evidenced, the writer submits, by his implications that despite the clarity of the section any other interpretation would lead to an absurdity. It will be noted, however, that part of his reasoning, at least, is based upon the fact that "the gift itself does become part of the estate of the beneficiary".<sup>25</sup> It is clear that the new Ontario section precludes the gift from forming part of the estate of the beneficiary, for the gift passes directly from the testator to the next-of-kin of the beneficiary. The controversy between the "wider" and "narrower" points of view has been re-opened, when it was hoped that the new section itself would have supplied the answer.

One of the ensuing complications of the controversy between the "wider" and "narrower" views has found expression in the estate tax and succession duty fields. In *Re Scott*<sup>26</sup> the gift saved from lapse was, in pursuance of the "wider" view, held to be subject to U.K. estate duty both in the estate of the testator and that of the beneficiary. The "narrower" view, however, was adopted in *Re Hilder*<sup>27</sup> wherein Judson J. sought to distinguish *Re Scott* on the grounds (*inter alia*) that *Re Scott* involved estate duty which taxed property passing on the death, whereas the statute under consideration in *Re Hilder* taxed a "succession" which at the actual date of death was valueless. It is hoped that the problem of double succession cannot again arise under the new Sec. 36 for, in the words of Roach J.,<sup>28</sup> "I wish to point out that this problem cannot arise in those provinces which have followed the wording suggested in the draft Uniform Wills Act. . . ." We have already noted the similarity of the "Uniform" Acts to the new Ontario Section.

Having examined briefly the difficulties and anomalies of the old law, it now remains to perform the sometimes rewarding, but more often thankless, task of foreseeing the effect of the new enactment.

We have seen that under the old Section 36(1) the gift saved from lapsing was one which was made to any person "being a child or other issue, or brother or sister of the testator". The use of the two terms "child" and "other issue" indicate that all issue, no matter how remote, were embraced.<sup>29</sup>

The new section, if only for purposes of clarity, has confined the application of this part to a child, grandchild, brother and sister. It

<sup>24</sup> *Re Hurd*, *supra*, footnote 21.

<sup>25</sup> *Ibid.*, at p. 240.

<sup>26</sup> *Supra*, footnote 20.

<sup>27</sup> *Toronto General Trusts v. M.N.R.*, [1958] S.C.R. 499.

<sup>28</sup> *Ibid.*, at p. 502.

<sup>29</sup> *Wyth v. Blackburn* (1749), 1 Ves. Sen. 196, 27 E.R. 979.

is abundantly clear that the section no longer applies to remoter issue,<sup>30</sup> and in achieving such clarity the draftsmen are to be lauded indeed.

A further change from the old section is found in the omission from the new of the restriction limiting the devise or bequest to ". . . any estate or interest not determinable at or before the death (of the beneficiary) . . ." It is noteworthy that the word "determinable" and not "determined" is used, thus no interest determinable during the lifetime of the beneficiary, whether determined or not, would have been saved from lapse. Thus, for example, an interest *pur autre vie*, being capable of determination during the lifetime of the beneficiary, would have lapsed despite the old section 36(1). The omission of any restrictive limitation upon the nature of the gift in the new Section 36 means that any interest whatsoever may be saved from lapse thereunder. The removal of this limitation is again a step away from uncertainty towards clarity.

The term "issue" in the phrase "leaves issue" in the new section corresponds to its meaning in the phrase "leaving issue" in the old, and that such term embraces remote issue seems to be clearly established.<sup>31</sup>

The appearance of a contrary intention remains, as before, dependent upon the construction of the will itself;<sup>32</sup> the transposition of this limiting clause from its previous resting place at the end of sub-section (1) of Sec. 36 to the beginning in the new Sec. 36 having no apparent effect upon its meaning.

A brief comment is called for on the omission from the amended Sec. 36 of what was sub-section (2) in the old section. It was there provided expressly that the section applied to prevent the lapse of class gifts. In the absence of such provision the judgment of Middleton J. in *Re Cerswell*<sup>33</sup> would seem to retain its efficacy in construing the new section. He states:<sup>34</sup>

Section 37 (now Sec. 36) in its original form has frequently been construed and has uniformly been held to have no application to a gift to a class, as in its terms it is limited to a gift to individuals.

The gift in the new section 36 must be to "a child, grandchild, brother or sister"—gifts to individuals, and class gifts fall out of the ambit of this part of the Wills Act to be dealt with once more in terms of the general law.

Of course the most marked change brought about by the 1959 amendment is that providing for the destination of the gift saved from lapse. We have seen that under the old section the gift formed part of the estate of the named beneficiary for the purpose of its distribution, and passed to those persons entitled (as at the actual

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<sup>30</sup> *Expressio unius est exclusio alterius* rule applied.

<sup>31</sup> *Re Hill*, [1943] O.W.N. 224.

<sup>32</sup> *Re Sheardown*, [1951] 3 D.L.R. 323 (Man. K.B.).

<sup>34</sup> *Ibid.*, at p. 164.

date of death) to share in the estate.<sup>35</sup> We have also seen that it was only for the purpose of determining destination that the gift entered the estate of the beneficiary, which estate acted as a conduit pipe for passage of the gift to those eventually entitled.<sup>36</sup> The gift was therefore capable of distribution or disbursement not only to the successors to the beneficiary but also to his creditors.<sup>37</sup>

The new section, as we have seen, circumvents the problem by providing that the gift passes “. . . as if it had been made *directly* to the persons among whom, and in the shares in which the estate of that person (and the beneficiary) would have been divisible if he had died intestate and without debts immediately after the death of the testator”.

This means that none of the problems concomitant with the gift forming part of the estate can now arise.

The gift is not subject to the debts of the beneficiary's estate, nor can double succession or estate duties be imposed, yet, as shown in the examination of *Re Hurd*, it was for the reason that the gift formed part of the estate of the beneficiary that the law to be applied in distributing the gift was that which was in effect at the actual date of death of the beneficiary. The new section removes the basis for this decision without providing a substitute guide as to the law to be applied. In *Re Hurd*, Farwell J. commented that upon a literal construction of the section the law at the date of statutory death would apply. This comment is equally applicable to the new section. The difficulties envisaged by Farwell J. in the application of such a construction still remain, but it would again require an exercise in legal gymnastics to apply other than the obvious and apparent literal meaning of the new section; namely, that the law to be applied in affecting distribution of the gift, is that in effect at the date of the statutory death and such distribution is to be made to those persons entitled on intestacy, ignoring debts, at such date. The hook upon which Farwell J. hung his judicial hat having been removed, a legal contortionist rather than a gymnast will be required to change the literal and obvious meaning of the new section.

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<sup>35</sup> *Re Hurd, Re Branchflower, supra*, footnotes 21 and 22 respectively.

<sup>36</sup> *Re Hilder, Toronto General Trusts v. M.N.R., supra*, footnote 27.

<sup>37</sup> *Re Pearson, Smith v. Pearson*, [1920] 1 Ch. 247.