

Drafting Wills and Trusts - Best Practices -



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Testator and Settlor Intent

◆ Asking Questions to Determine Testamentary Intent

- Who do you want to inherit your assets at your death?
- In equal shares or in some other fair proportion?
- What should happen with that gift if that beneficiary dies before you?
- Is it possible for that gifted item to be sold prior to your death? If yes, then any replacement gift?



Take Notes to Remember Intent

- ◆ How long will it be between your client interview and when you draft the Will or trust? Days? Weeks? Months?
- ◆ Diagrams, abbreviations, and mnemonics
- ◆ Outright or in further trust?
- ◆ Determining familial relationships
 - Are step-grandchildren to inherit?
 - In-laws vs. outlaws!



Use of Forms vs. Using Software

- ◆ Do Not let your form be your finished product – customize for clients' wishes
- ◆ Work from questionnaires more than notes
- ◆ Do Not Cannibalize past clients' documents
 - Use made up names in your forms, such as Joseph Client and Mary Client
 - No client wants to know who else you represented by reading those past clients' names in your draft documents



No One is Perfect

- ◆ Two sets of eyes are better than one
- ◆ Does it read how you typed it or how you thought it?
- ◆ Proofread, Proofread, and Proofread again!
- ◆ Review a Two Documents Side by Side
 - Review printed drafts next to each other
 - Compare Husband's Will to Wife's Will
 - Slow down and set it aside – it can be sent later



Aiding Clients in their Review

- ◆ Show of Hands on Who Mails Drafts
- ◆ Paper drafts Vs. Digital drafts?
 - Include Letter of Explanation?
 - Include Summary of Decision-Makers?
 - Highlight key provisions?
 - Encourage clients to skim legalese?
 - Encourage clients to mark-up drafts with questions and comments
 - What is GST?



Review Meeting or Signing Date

- ◆ Set Client Expectations from Start
 - Explain how many meetings you anticipate
 - Two meetings for Wills and powers of attorney?
 - Three or four meetings for estate plans with trusts?
 - Build relationships and better understanding
 - Coordinate and communicate with clients' other advisory team members (financial advisor, CPA)
 - When/if to include clients' children in the process



INCONCIEVABLE!

- ◆ “You Keep Using that Word. I do not think it means what you think it means.” Inigo Montoya from The Princess Bride
- ◆ Cannot be conceived vs. unbelievable – if an event happens right in front of you then it does not need to be imagined, but it can be difficult to believe!



Rules of Construction

- ◆ Had you planned for the unanticipated event, then you probably would have wanted this result. Guessing at testamentary intent!
- ◆ Anti-lapse – substitute gifts!
- ◆ Anti-ademption – replacement gifts!
- ◆ Plain meaning in Wills vs Ambiguity & Extrinsic evidence more in Trusts
- ◆ Sufficient language within the four corners of the document to show a contrary intent?



Semantic Change

- ◆ The general linguistic term for when a word is misused so much that it takes on a new meaning.
- ◆ Word evolution can accelerate with search engines and artificial intelligence.
 - Black's Law Dictionary Vs. Google
 - Latin roots Vs. Plain English



Per Capita

- ◆ Latin term means “by the heads” or “by the number of individuals”
- ◆ Does not mean “surviving” or “who survive me”
- ◆ Multiple meanings in a myriad of sources
 - Many interpret it to have predeceased heir's share drop out
 - Some interpret it to have predeceased child's children share equally with testator's surviving children



Example of Per Capita

- ◆ Will reads, “The residue to my children Andy, Beatrice, and Carl, *per capita*.”
- ◆ Andy and Beatrice survive testator, and Carl predeceases testator, but Carl has two children Dean and Edward.
 - More common interpretation is that Andy and Beatrice each receive one-half
 - Less common interpretation is that Andy and Beatrice and Dean and Edward each receive one-fourth



Children Vs. Descendants

- ◆ Courts and commentators make a distinction on whether scrivener uses the words testator's "children, *per capita*" or "descendants, *per capita*"
- ◆ When "children" is used the result is usually that predeceased child's share lapses
- ◆ When "descendants" is used the result is often that testator's predeceased child's children (testator's grandchildren) receive equal shares of testator's surviving children.



Per Stirpes

- ◆ Latin term meaning “by branch” or “by roots”
- ◆ More common than *per capita*
- ◆ Adopted by Ohio intestacy law as the presumed testamentary intent
- ◆ Adopted by Ohio anti-lapse statute as the presumed testamentary intent



Example of *Per Stirpes*

- ◆ Will reads, “The residue in equal shares to my children Andy, Beatrice, and Carl, if living, otherwise to their descendants, *per stirpes*.”
- ◆ Andy and Beatrice survive testator, and Carl predeceases testator, but Carl has two children Dean and Edward.
- ◆ Unilateral interpretation is that Andy and Beatrice each receive one-third, and Dean and Edward each receive one-sixth.



Children Vs. Descendants

- ◆ Will reads, “The residue to my then-living children, *per stirpes*.”
- ◆ Will reads, “The residue to my then-living descendants, *per stirpes*.”
- ◆ How to give meaning to both words “then-living” and “*per stirpes*” as it relates to the class of children? Either the children are living or they are not.
- ◆ Descendants includes both children and next generations, so *per stirpes* applies to all.



Ohio Anti-lapse Statutes

- ◆ Rule of Construction to be implemented only when the language of the Will or Trust is not sufficient to form a contrary intent.



Two Ohio Statutes

Wills:

Ohio Revised Code
Section 2107.52 eff.
3/22/2012, as
modified
3/22/2019, as
modified 4/3/2023

Trusts:

Ohio Revised Code
Section 5808.19 eff.
3/22/2012, as
modified 3/22/2019
(including
testamentary trusts)



Why “New” Statutes

- ◆ ORC 2107.52 Will Anti-lapse statute dates back to 1953, with amendments in 1992, 2012, 2019, and 2023
- ◆ 7th District Court of Appeals rules that ORC 2107.52 does NOT apply to trusts. Dollar Savings & Trust Co. of Youngstown v. Byrne, No. 85 C.A. 133, 87-LW-1952 (1987)



Uniform Probate Code 2-603

- ◆ BASED on UPC 2-603, but MODIFIED to more closely adhere with Ohio common law
- ◆ Example: “words of survivorship”

UPC 2-603(b)(3) disregards the phrases “if he survives me” AND “my surviving children” as NOT contrary intent;

ORC 2107.52(C)(2) only disregards “my surviving children” as not contrary intent



Rule of Construction

- ◆ “Unless a contrary intent appears in the will ...” ORC 2107.52(B)(2)
- ◆ “Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust...” ORC 5808.19(B)(2)
- ◆ Contrary Intent vs. Ambiguity



Ambiguity Required

- ◆ If the terms of the Will or Trust are clear, then Testator's or Settlor's intent shall prevail, and Anti-lapse shall not apply.
- ◆ The most fundamental tenet for the construction of a will requires that the court ascertain and carry out the intent of the testator. Such intention must be ascertained from the words contained in the will.



Types of Ambiguity

- ◆ “technical” vs. “ordinary” words
- ◆ scrivener’s words vs. testator’s intent
- ◆ “in equal shares, share and share alike”
- ◆ “my living children” on the date the Will was signed or the date of testator’s death?
- ◆ Lack of an alternative devise



No Ambiguity

- ◆ Examples:
- ◆ “to my son Adam, if he survives me, otherwise to my daughter Eve, if she survives me.”
- ◆ “to my son Adam, if he survives me, otherwise to his then-living descendants, *per stirpes*.”
- ◆ “to my sons Andy, Ben, and Charles, or to the survivors among them” *Polen v. Baker*, 92 Ohio St.3d 563 (2001)



Further Testator's or Settlor's Likely Intention

- ◆ As a rule of construction, the anti-lapse statute creates a substitute gift when a named beneficiary predeceases the testator or the settlor.
- ◆ Substitute gift created only if predeceased beneficiary is part of a preferred group of individuals.



Preferred Group of Beneficiaries

- ◆ Grandparent of testator;
- ◆ Descendant of testator's grandparent;
- ◆ Stepchild of testator; or
- ◆ One of the above three to the donor of a power of appointment exercised by the testator's will.
- ◆ ORC 2107.52(B)(2)



Example 1 of Substitute Gifts

- ◆ “\$10,000 to my son Adam.”
- ◆ Absent language showing a contrary intent, if Adam dies before his father/testator, and Adam’s only two children survive testator, then Adam’s two children each receive \$5,000.



Example 2 of Substitute Gift

- ◆ “\$10,000 to my son Adam.” Absent a contrary intent in the Will, if Adam dies before his father/testator, and only one of Adam’s two children survives the testator, and Adam’s predeceased child has two children who survive the testator, then \$5,000 to Adam’s surviving child and \$2,500 to each of Adam’s predeceased child’s 2 children.



Example 3 of Substitute Gift

- ◆ “\$12,000 to my mother Mary.” Absent a contrary intent in the Will, if Mary dies before testator/son and Mary has three children, Sam, Sue, and testator, and Sam and Sue survive brother/testator and testator’s only 2 children survive testator, then \$4,000 to Sam, \$4,000 to Sue, and \$2,000 to each of testator’s two children.



Example 4 of Substitute Gift

- ◆ “\$10,000 to my wife’s son Abe.” Absent contrary intent in the Will, if Abe dies before the testator with his only two children who survive the testator, then \$5,000 to each of Abe’s two children.
- ◆ Important Note: the inclusion of a stepchild of the testator was first included in 2012 statute.



Example 5 of Substitute Gift

- ◆ “\$10,000 to my wife Ann’s first husband’s child Barry (my wife’s stepchild) pursuant to my exercise of the power of appointment granted to me by my wife Ann in her trust pursuant to Article 3.” Thus, if Barry dies before the testator with his only two children surviving the testator, then \$5,000 to each of Barry’s two children.



Example 6 of Substitute Gift

- ◆ “\$12,000 to my surviving children.” Absent a contrary intent, if testator had three children, but only 2 of 3 children survive testator, and predeceased child’s only two children survive the testator, then \$4,000 to each of the testator’s children, and \$2,000 to each of testator’s predeceased child’s children. Word “surviving” is ignored.



No Anti-lapse = No Substitute Gift

- ◆ “\$10,000 to my son Adam, if he survives me.”
- ◆ “\$10,000 to my son Adam, if he survives me, otherwise to his then-living descendants, *per stirpes*.”



No Anti-lapse = No Substitute Gift

- ◆ “residue to my beloved step-granddaughter Erica, in fee simple, absolutely and forever, *per stirpes*.” See *Bills v. Babington*, 2019 Ohio 3924 (6th District 2019), citing *Richland Trust Co. v. Becvar*, 44 Ohio St.2d 219 (1975)
- ◆ “Per stirpes” alone without identification of the heirs is sufficient to distribute to Erica’s descendants, *per stirpes*.



Class Gifts Confusion

- ◆ “Class member” defined as “an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.” ORC 2107.52(A)(1).
- ◆ “Class gift” not defined in statute.
- ◆ 2107.52(B)(2)(a) vs. 2107.52(B)(2)(b)



“not in the form of a class gift”

- ◆ If testator’s “devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee’s surviving descendants...” 2107.52(B)(2)(a)
- ◆ Example: “I give my house to my nephews John, Joseph, and James.” If Joseph dies before the testator with surviving descendants, then Joseph’s descendants take his one-third share of the house.



“devise in the form of a class gift”

- ◆ “other than devise to issue, descendants, heirs of the body, heirs, next of kin, relatives, or family, or a class of similar import that includes more than one generation” (emphasis added) ORC 2107.52(B)(2)(b)
- ◆ IF the class gift is not to a “class” described above, then a substitute gift is created for the descendants of the predeceased devisee of such class



“devise in the form of a class gift”

- ◆ WHEN class gift is a devise to “issue, descendants, heirs of the body, heirs, next of kin, relatives, or family, or a class of similar import that includes more than one generation”
- ◆ THEN NO substitute gift is created and the remaining members of the class who survive the testator receive the devise.



Castillo v. Ott:

Statutory Interpretation

- ◆ Castillo v. Ott, 2105 Ohio 905 (Ohio App. 6 Dist. 2015)
- ◆ Court concludes that a class gift to “my children, share and share alike, absolutely and in fee simple” qualifies as a class gift of “similar import” to a class gift to “issue, descendants, heirs” for which ORC 2107.52 prevents the creation of a substitute gift.



Children of Predeceased Child

- ◆ Court concludes that the children of testator's predeceased child do not take such child's testate share.
- ◆ Conclusion is contrary to numerous cases decided over many decades applying the prior version of ORC 2107.52



Court's Reasoning

- ◆ Applied the same interpretative rules of applying common meaning to common words used to determine testator's intent in a Will, to the process of interpreting relatively new statutory language.
- ◆ “children” are “heirs”; so “children” are a class of “similar import”



Comments to UPC 2-603

- ◆ The other classes described in ORC 2107.52(B)(2)(b) are multi-generational. A gift to “children,” by contrast, is a gift to a single generation class.
- ◆ Class Gifts. In line with modern policy, subsection (b)(2) continues the pre-1990 Code’s approach of expressly extending the antilapse protection to class gifts. Subsection (b)(2) applies to single-generation class gifts (see Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.1, 14.2 (2008)) in which one or more class members fail to survive the testator (by 120 hours) leaving descendants who survive the testator (by 120 hours)...



Multi-Generation Class Gifts

- ◆ Multiple-generation class gifts, i.e., class gifts to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” “family,” or a class described by language of similar import are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member’s descendants are substituted for him or her. See Sections 2-708, 2-709, 2-711; Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.3, 14.4 (2008).



Statutory Response

- ◆ OSBA Committee on Estate Planning, Trust, and Probate Law responds quickly and propose an amendment to the statutes in January 2016.
- ◆ Legislative process takes three years for HB 595 to be passed in January 2019, to result in effective dates of amendments as March 22, 2019.



Language Added to Statutes

- ◆ If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of any deceased devisee.



Anti-lapse vs. Vesting

- ◆ Many times an action for declaratory judgment is brought that touches on anti-lapse interpretation, but the case is decided on other grounds.
- ◆ A common one is the vesting of the beneficiaries' interests in the Estate as of the date of testator's death, rather than the date of distribution.



Estate of Gaskill, 2019 Ohio 4936 (3rd Dist. 2019)

- ◆ “I give .. My entire estate ... to my three step-children ... Sharon, Rita, and Harry, absolutely and in fee simple. If any one of the aforementioned predeceases the others, then his or her share shall be divided equally by the other two.”
- ◆ All three named beneficiaries survive the testator.



Estate of Gaskill - continued

- ◆ Beneficiary Sharon dies nine months after testator/step-father, and the other two step-children/beneficiaries seek to exclude Sharon's children from inheriting her share, when administering testator's Estate more than one year after testator's death.
- ◆ Court concludes that Sharon's share is payable to her Estate, as having fully vested at testator's death.



Language to Avoid Anti-lapse

- ◆ Court properly concludes that language in the Will that serves the purpose of avoiding the application of the anti-lapse statute cannot be used to defeat a vested interest of a beneficiary that dies after the testator, but before distribution.



Exam Question #1

- ◆ “All of my tangible, personal property ...I give devise and bequeath to A, B and C, or the survivor thereof, absolutely and in fee simple, share and share alike equally, per capita and not per stirpes. The term "per capita" as used in this Will is to say that should any of my beneficiaries predecease me, their bequest shall be divided equally only among those surviving named beneficiaries.”
- ◆ B dies before testator with children, who takes?



Answer #1

- ◆ A and C take to the exclusion of B's children, because of the clear language of the Will excluding such heirs of predeceased beneficiary.



Exam Question #2

- ◆ Same Will as Question #1
- ◆ Residuary clause states, "50% to A and B, in equal shares, absolutely and in fee simple."
- ◆ Again, B predeceases testator with children.
- ◆ Do B's children receive his share?



Answer #2

- ◆ It depends!
- ◆ If B is a grandparent of testator, or a descendant of such grandparent, or the testator's step-child, then B's children inherit in *per stirpital* shares because ORC 2107.52 creates a substitute gift for B's descendants.
- ◆ Language of contrary intent for preresiduary gift of tangible personal property does not apply to residuary language.



Trusts vs. Wills; Anti-lapse and Future Interests

- ◆ ORC 5808.19, as part of the Ohio Trust Code, applies the rule of construction to inter vivos trusts and testamentary trusts created by the terms of a Will.
- ◆ “Transferor” replaces “testator”
- ◆ "Future interest" means an alternative future interest or a future interest in the form of a class gift. ORC 5808.19(A)(5)




“Transferor” defined

- ◆ "Transferor" means any of the following:
- ◆ (a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;
- ◆ (b) The testator, if the future interest was devised by will;
- ◆ (c) The settlor, if the future interest was conveyed by inter vivos trust.
- ◆ ORC 5808.19(A)(10)



Vesting and “Distribution Date”

- ◆ It is common in a trust for the settlor to delay the distribution of trust assets to trust beneficiaries; thus the “Distribution Date” is the critical determinative date for the application of the anti-lapse statute rule of construction.
- ◆ "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day. ORC 5808.19(A)(4).




Curtis v. Edsell, 2024 Ohio 3420 (2nd App. Dist.) interprets ORC 5808.19

This Court rules that the 3 children of the Trust Settlor's daughter who survived Settlor will receive substitute gifts of their deceased mother's contingent remainder interest after the death of Settlor's surviving son, pursuant to ORC 5808.19, because that share of the trust had not vested and is not part of their mother's Estate (subject to Medicaid Recovery)



“Surviving” and “Living”

- ◆ Describing a class of beneficiaries as "surviving" or "living," without specifying when the beneficiaries must be surviving or living, such as a gift "for my spouse for life, then to my surviving (or living) children," is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. ORC 5808.19(C)(1)



“then-living” vs. “living”

- ◆ Subject to division (C)(1) of this section, attaching words of survivorship to a future interest under the terms of a trust, such as "for my spouse for life, then to my children who survive my spouse" or "for my spouse for life, then to my then-living children" is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. ORC 5808.19(C)(2).



Exam Question #3

- ◆ The Trustee shall hold the share for my son in further trust for his education and support until he attains age 25, upon which date the Trustee shall distribute all remaining trust assets to my son.
- ◆ Settlor's son dies after settlor, but before attaining age 25, with one child surviving (settlor's grandchild.)



Answer #3

- ◆ Deceased son's child (settlor's grandchild) receives balance of son's trust share, absent any other language in the trust that would show an intention to negate the application of the anti-lapse statute.
- ◆ Distribution date is the settlor's son's death. (Perhaps trust agreement includes provision for any share of beneficiary less than age 25 to be held in further trust; otherwise, guardianship for minor grandchild's trust distributive share would be required.)



Exam Question #4

- ◆ The Trustee shall administer the trust assets for my wife's support, and then upon her death, distribute all remaining trust assets in equal shares to my wife's surviving children, subject to her limited power of appointment
- ◆ Settlor's wife's three children survive settlor, but one child dies during wife's life, with two children.
- ◆ Do deceased child's children inherit?



Answer #4

- ◆ Yes, settlor's deceased stepchild's children inherit the one-third share of their parent, unless some other trust language expresses the settlor's intent to negate the application of the anti-lapse rule of construction.



Conclusion

- ◆ Anti-lapse is a rule of construction to effectuate the result that most reasonable minds would expect the testator or settlor to have desired had the possibility of the beneficiary's death prior to the testator or settlor been considered when drafting the Will or trust instrument.
- ◆ Preference for descendants and step-children, but not for non-relatives.