Failure of Gifts by Will

This month’s CPD will examine the many reasons why a gift made by Will may fail. This paper will look at the most common reasons for the failure of gifts, listed below, but practitioner’s should be aware that this list is non-exhaustive and gifts may fail for other reasons; including a contingency for a gift not being met, as a matter of public policy, or even because a condition attached to a gift is void.

Main Reasons a Gift May Fail

A gift may fail for one of the following main reasons:

- The beneficiary or a spouse or civil partner of the beneficiary is an attesting witness
- The divorce or dissolution of a marriage or civil partnership between the testator and the beneficiary
- Lapse
- Ademption
- Abatement
- Uncertainty
- The beneficiary is guilty of the unlawful killing of the testator
- The beneficiary disclaims their gift

Beneficiary or their Spouse is an Attesting Witness

This is the most well-known reason for the failure of a gift. Section 15 of the Wills Act 1837 deprives an attesting witness and their spouse or civil partner from receiving any benefit under the Will which they attest.

If a beneficiary or their spouse is an attesting witness the attestation itself will be valid and this will not cause the Will to fail; only the gift to the witness or their spouse shall be void.

There are some key exceptions to this general rule:

- If a beneficiary was not married to the witness at the time the attestation took place but married the witness afterwards then they will not be deprived of their benefit.
- If the Will is a privileged Will then this rule will not apply, as a privileged Will requires no witnesses, so the fact that a beneficiary happened to witness the Will has no effect.
- If the beneficiary or their spouse was a superfluous witness their attestation can be disregarded if the Will could have been duly executed without their attestation.
- If the gift was made or confirmed by another Will or codicil. For example where a person is a beneficiary of Will and did not attest it but later attests a codicil to the Will, their benefit under the Will is not affected.
- If the witness or their spouse takes their benefit under a secret trust.
### Divorce or Dissolution

Section 18A of the Wills Act 1837 provides that where a testator has made an appointment of, or made a gift to their spouse or civil partner and at a later their marriage or civil partnership ends in divorce or dissolution, such gift or appointment shall take effect as if the former spouse had predeceased the testator.

These provisions are subject to contrary intention in a Will. In such cases where the testator is making their Will in contemplation of their divorce and still wishes their soon to be former spouse to benefit the following clause will be included:

‘Section 18A of the Wills Act 1837 as amended by the Law Reform (Succession) Act 1995 s3(1) shall not apply to my Will.’

As a divorce or dissolution also causes any appointments of the former spouse to fail. As a result any appointment of a former spouse as a guardian of a minor child will fail if the spouse did not have parental responsibility for the child. In most cases this will only apply where the former spouse was the step-parent of the child.

### Lapse

Under the doctrine of lapse a gift will fail if a beneficiary predeceases the testator. The doctrine of lapse cannot be excluded by a testator. Take the case of Re Ladd [1932] 2 Ch 219 where the testator included a statement “to the intent that this my will shall take effect whether I survive or predecease my husband.” The husband predeceased but it was held that the appointment to the husband lapsed and his personal representatives did not take as this statement could not exclude the doctrine of lapse.

Substitutional gifts are acceptable so a testator may direct that if a beneficiary predeceases them their gift will pass to their personal representatives to be held as part of their estate, or will pass to a different beneficiary entirely.

The doctrine of lapse will not apply where a gift is made to two or more people as joint tenants unless all of the beneficiaries predecease.

The doctrine of lapse may be avoided where a gift is made to a class of people as the members of the class are established at the time of the testator’s death, for example a gift to “my nieces and nephews living at the date of my death”. In this case where a person who would have been a member of the class if they had survived the testator predeceases no lapse occurs as they were never a member of the class. The gift will instead be shared evenly between the surviving members of the class.

The most well-known exception to the doctrine of lapse is section 33 of the Wills Act 1837. Where a testator makes a gift to a child or remoter descendant and that descendant predeceases the testator leaving issue who are living at the testator’s death then their gift will not lapse, and will pass instead to the issue in equal shares unless there is some contrary intention in the Will.

Section 33(2) prevents lapse where there is a class gift. If a testator makes a gift to a class of people consisting of their children or remoter descendants, a member of the class predeceases the testator
leaving issue and those issue are surviving at the testator’s death then the gift will take effect as if the issue of the deceased member of the class were an original member of the class.

The order of deaths is crucial to the operation of lapse. If the deaths of the testator and a beneficiary both occur in uncertain circumstances, for example in a plane crash, it is important to determine if the beneficiary survived or predeceased. If a beneficiary is seen as surviving the testator, their estate will gain whatever gift they would have received from the testator.

Where the circumstances of death mean that the order of death is uncertain, section 184 of the Law of Property Act 1925 provides that for all purposes it is presumed that the younger shall be deemed to have survived the elder.

ADEMPTION

A specific gift will fail by ademption if the subject matter of the gift does not form part of the testator’s estate at death. General gifts cannot fail for ademption as the executors should raise such funds to make the gift if the subject matter is not part of the estate. Similarly, demonstrative gifts cannot fail by ademption. If the specified fund does not exist or if there are not enough assets in the fund to make such a gift, the remaining will be treated as a general gift.

A general rule of ademption is that if the subject matter of a gift changes name or form, it does not cause the gift to adeem, however if the substance changes it does.

Gifts of shares are useful to illustrate this rule. If the Will includes a gift of a shares in a particular company but between attestation and the testator’s death the company changes its name or reconstructs how its shares are organised these changes will not cause the gift to adeem, as the shares held at death are identical in all but name and form to those held at the time of the Will.

Alternatively, the company could instead be acquired by another company between the attestation and death and the testator be issued with shares in the acquiring company as compensation. At death, the testator would own shares in a completely different company, causing the gift to adeem as the substance of the gift is no longer the same.

There are a number of common methods that are used to avoid ademption.

Gifts will often be worded to be less specific, for example a gift may be worded to refer to all monies from ‘all bank and building society accounts’ at death rather than money from a specific bank account. If a gift is of money from a specific bank account and such bank account is closed between attestation and death, there is a risk that the gift could adeem. However, a gift of money from all bank accounts would only fail if there are none at all in the estate at death.

If the testator moves address between the attestation and death, it could cause any gift of the previous property to fail. To combat this the following can be included.

‘or if such property does not form part of my estate then instead such interest in the property which I owned and last used as my principal residence before my death’
This allows any property used as main residence to instead be gifted. Abatement would then only occur if there is no property in the estate which is used as the main residence.

Property & Affairs Lasting Powers of Attorney can create some conflicts with abatement. Attorneys are not entitled to have access to the donor’s Will under the terms of an LPA. There is therefore a risk that an attorney may sell or dispose of property that was the subject matter of a specific gift, causing that gift to adeem when the testator dies.

There is unfortunately very little that can be done to avoid this scenario. There have been a small number of cases where it has been held that moving money to a separate savings account did not cause the gift of the old savings account to fail, but these cases are limited to their own specific facts and were made after considerable hesitation.

Deputyships do not have a similar problem; the Mental Capacity Act 2005 prevents ademption from occurring where a deputy disposes of the subject matter of a gift.

**Simultaneous Lapse and Ademption**

Special rules apply where a testator dies in a disaster which also destroys the subject-matter of a specific gift. If the death occurred before the destruction, the beneficiary will be entitled to any insurance claim proceeds. If the order is uncertain then it is presumed that the destruction has occurred first and the burden is on the beneficiary to prove that the testator died before the destruction.

It should be noted that this would not apply if the testator dies in an accident that also destroys his property, as a gift of property is the property and the land it stands on. Destruction of the building is merely damage of the asset.

**Abatement**

If after the payment of debts, liabilities and testamentary expenses there are not enough assets in the estate to satisfy all legacies they must be abated. There is a statutory order in which assets are used towards expenses, liabilities and debts. A distinction should first be made between situations where the estate is insolvent and solvent.

Where the estate is insolvent (the estate is insufficient to meet its liabilities), all gifts in the Will fail, as everything will be used to meet the estate’s liabilities.

Where the estate is solvent (the estate is sufficient to meet its liabilities), the order in which assets are used to cover liabilities is covered by the First Schedule of the Administration of Estates Act 1925.

Legacies are abated in the reverse order to which they would be paid; residuary, general then specific. Gifts within the same category will abate rateably.

The statutory order is as follows:

1. Assets in the Residuary Estate are firstly used to pay towards the liabilities, each person’s share in the Residuary Estate will be reduced rateably.
2. If the Residuary Estate is not large enough to cover liabilities, any general gifts shall then also be used, each general gift will be reduced rateably.
3. If the general gifts are also not enough to cover liabilities then specific gifts will have to be used, these will again be reduced rateably.

4. For the purposes of this order, demonstrative gifts are treated as if they are specific so far as they can be satisfied out of the specific fund. Anything that cannot be satisfied shall be treated as a general gift.

It is possible for a testator to vary the statutory order of abatement by his Will or give a certain legacy priority over others however this must be clear on the face of the Will.

Abatement is best illustrated by example:

H leaves a specific holding of ICI stock worth £10,000 to W, £30,000 each to his four siblings and a charity, and any residue to his two children.

At H’s death the estate is worth £110,000 including the ICI stock.

Abatement -

W takes the ICI stock in full

The pecuniary legacies are more than the net estate. As they are all the same class of gift, each will abate rateably

£30,000 × (£100,000 ÷ £150,000) = £20,000

There is no residue.

(Example from IHTM12086)

**Uncertainty**

It is important to ensure that gifts are not drafted in a vague manner, as a gift will fail for uncertainty if it is impossible to identify either the subject matter or the object of the gift. This could lead to costly and lengthy court cases in which the court may have to decide what the testator intended.

The subject matter of a gift is the gift itself whereas the object of the gift is the beneficiary. For example, in a gift of my jewellery to my daughter, the jewellery is the subject matter and the daughter is the object.

Where the failure of a gift due to uncertainty will cause an intestacy the courts are more willing to make sense of the gift.

One exception to the rule on uncertainty of objects however, is that an exclusively charitable gift cannot fail for uncertainty of objects.

**Unlawful Killing**

The Forfeiture Act 1982 provides that if a person unlawfully kills, they are then barred from inheriting from the victims’ estate via Will or Intestacy. In such a case, the beneficiary is seen as immediately
predeceasing the victim. This rule applies to murder, any type of manslaughter and other types of unlawful killing such as death by dangerous driving but does not apply if a killer is found not guilty by reason of insanity.

The Act also gives the courts a power to modify this rule barring inheritance (as long as the killer has not been convicted of murder) however the killer must apply to the courts within three months of their conviction.

The rule does however not preclude the killer from applying under the Inheritance (Provision for Family and Dependents Act) 1975, however some previous cases have failed as the Will would have provided reasonable provision, the only reason the killer now lacked reasonable provision was due to the Forfeiture Rule. Take for example the case of Re Royse, Royse v Royse [1985] Ch D 22 where a woman convicted of unlawfully killing her husband could not make an application under the I(PFD)A 1975 as the reason for the lack of provision was the public policy rule and not the Will itself.

**DISCLAIMER**

A beneficiary has the freedom to declaim any gift to them by Will or Intestacy, they cannot be forced to take a gift against their Will. Any person that does wish to disclaim can do so by a Deed of Disclaimer, or alternatively it may be seen from their conduct that they have disclaimed.

It is possible for a beneficiary to retract a disclaimer, however if a person has altered their position and now relies on the disclaimer they will not be able to retract.

There are some limitations to the freedom to disclaim:

- It is not possible to disclaim a gift before the testator/Intestate’s death, although if the rules of contract law are correctly followed it is possible to treat such disclaimer as an enforceable contract.
- If a person has clearly accepted a gift, they cannot then disclaim.
- Where a person receives multiple gifts under a Will they are free to disclaim one gift and still take the other, however there are some circumstances that require both or none to be accepted.
- It is not possible to disclaim part of a gift, the beneficiary must disclaim all of it or none of it. For example, a person receiving a house and its contents cannot accept the house but disclaim its contents as it is one single gift, not two separate gifts.

Where joint beneficiaries are receiving as joint tenants, a single joint beneficiary cannot disclaim, disclaimer by joint tenants can only be made by all of them. A single joint beneficiary can however release their interest to the other beneficiaries.

**CONCLUSION**

There are many other reasons why a gift may fail that have not been discussed in this paper.

Gifts may fail if such gift is against a rule of public policy. A common example of this is if a gift has a condition which is seen as encouraging the break-up of a marriage, such gift would fail. A gift which is
induced by force, fear or other type of undue influence will fail. Similarly a gift with a condition that is made ‘in terrorem’ of the beneficiaries may fail.

As a Will Writer it is your duty to ensure that all of the client’s circumstances are considered, such as whether they are contemplating divorce, and gifts are drafted appropriately to reduce the risk of them failing.