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Conditional Gifts in Wills

In the Fall of 2003, *The Globe and Mail* reported a Quebec case involving a gift by Will. This gift had a very unusual condition precedent; I had the opportunity to comment for *Canadian Lawyer* magazine. In focusing on this rarely discussed area of law, I realized the fascinating nature of these conditional gifts.

The Quebec case arose out of the last Will of Reina Gagne, who died at age 82. Her closest next of kin were her eight nieces and nephews—all of them siblings. Her Will provided that one-half of her estate would go to such of the siblings as attended her funeral. The Will provided for a gift over in default to the executor of the Will, Pierre Jodoin, a cousin of the deceased.

Only one of the siblings attended the funeral, which was held in a small town. The other siblings, who did not live in that town, were not in attendance.

The disinherited siblings went to court to claim their inheritance. Their application was brought under Section 757 of the Quebec Civil Code, which reads as follows: “A condition that is impossible or contrary to public order is deemed unwritten.”

The beneficiaries argued, unsuccessfully, that it was impossible to attend the funeral because the executor did not contact them to advise them of the time and place of the funeral. They argued that the executor had a duty to personally advise them and he did not properly notify them.

He speculated that the testatrix had imposed the condition with the sole purpose of rewarding those who paid her the final homage of attending her funeral.

The judge dismissed that complaint. He found that the executor was bound by secrecy of the Will not to divulge the condition. Further he found that the executor was not required to notify each potential beneficiary of the funeral. He said it was their responsibility to ask. He speculated that the testatrix had imposed the condition with the sole purpose of rewarding those who paid her the final homage of attending her funeral.

The judge referred to the fact that most of the beneficiaries had not visited with the deceased since 1989. The court even dismissed the claim of a disappointed beneficiary who was holidaying in Europe, on the basis that she did not testify that she

would have come back to the funeral. The judge found that it was unlikely she would have returned.

As a result, the court ruled that the condition in the Will was *not* impossible within the meaning of the Quebec Civil Code.

This decision arises in the context of the civil law system, which applies in Quebec, to disputes between private parties. In my view, a British Columbia judge could well reach a different conclusion, based on our somewhat distinct common law principles and judicial approach to such questions.

The Gagne estate case, however, is a good example of the conditions that some testators try to impose on their beneficiaries. The courts, in interpreting such conditions, frequently reach inconsistent results.

In general terms, our courts have a great deal of latitude interpreting such conditions. Generally speaking, they will try to uphold such conditions to carry out the testator’s intentions. They will not do so, however, if they consider the condition to be in conflict with public policy.

1 Conditions Precedent and Conditions Subsequent

Wills often include conditions intended to make a gift contingent upon either:

- the happening of a specific event; or
- the continuing of a particular situation.

It is always a question of construction whether the condition is precedent or subsequent.

A condition precedent is a condition that must occur *before* the gift can take effect. For example, “to John for life, then to Charles absolutely *if* he attains the age of 21.” In this case, John’s interest is vested, but Charles’ interest is contingent upon his attaining 21. It will not vest *unless and until* Charles attains the age of 21. This condition must be fulfilled for Charles to inherit and is therefore a condition precedent to that inheritance.

Conversely, if the Will provides the gift shall take effect, but shall terminate on the happening of a condition, then it is generally interpreted to be a condition subsequent.

An example would be “to Andrew but, if he ceases to use the land as a farm, the property shall revert to my estate.” In this case, Andrew has a vested interest but will lose it *if* he does not continue to use the land as a farm.

The crucial distinction, therefore, between a condition precedent and a condition subsequent, is whether:

- the occurrence of the event causes the gift to vest (condition precedent); or
- whether the event causes a previously vested gift to terminate (condition subsequent).

Early Vesting

There is a rule of construction known as the presumption of early vesting or becoming “vested in interest.” This principle provides that once all preceding interests under a Will have been determined, a subsequent interest shall vest.

For this principle to apply to an interest in a Will, the following pre-conditions must exist in relation to that interest:

- it must be given to an ascertained individual already existing at the time of death; and
- it must not be subject to any condition precedent.

Provided these conditions are met, there is a general presumption that the interest shall vest immediately.

The Supreme Court of Canada, in *Re Robertson*, (1937) S.C.R. 354, quoted with approval the principle that all estates are to be presumed vested, except those estates where a condition precedent to the vesting is clearly expressed. If there is a condition

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precedent, the courts cannot circumvent the express terms of that condition.

Further, the Privy Council, in *Sifton v. Sifton*, (1938) 2 W.W.R. 465, at page 478, stated as follows:

Where it is doubtful whether a condition be precedent or subsequent, the court *prima facie* treats it as being subsequent. For there is a presumption of early vesting.

2 Void Conditions

A Illegal Conditions and Conditions Contrary to Public Policy

Conditions will be ruled void if they are found to be either illegal or contrary to public policy. For example, *Re Edgar*, (1939) 1 All E.R. 635, involved a condition purporting to divest a beneficiary of his interest, *if* the beneficiary became a candidate for Parliament or any other public office. The court found this condition to be void as contrary to public policy.

The court’s interpretation of public policy will clearly change from time to time. I suspect many older cases would no longer be followed because they would contravene modern day public policy. For example, modern human rights legislation, the *Charter of Rights*, and the hate crime provisions of the *Criminal Code* may now be considered in determining the relevant public policy.

In *University of Victoria Foundation v. British Columbia Attorney General*, 32 E. T. R. (2d) 298, the deceased’s Will appointed the university as trustee for two shares of residue of her estate. In the Will, the shares were intended to be given as bursaries to Roman Catholic students. The university sought the court’s guidance as to whether the religious qualifications placed on the shares potentially violated human rights legislation or public policy.

The court found that the conditions did *not* violate the law. First, they found this was *not* contrary to public policy. Further, they held that for the *Human*

Rights Act to apply, the relationship to be considered must be *public* in nature.

In this case, the university was acting as trustee to administer bursaries with terms and conditions that had been established by a private citizen. The relationship between the deceased and student beneficiaries was private in nature and was not a relationship to which the *Human Rights Act* was applicable.

B Conditions Void for Uncertainty

Generally, a condition precedent must be clearly expressed before a court will hold that the failure to comply with that condition will disentitle the beneficiary.

For it to be upheld as a valid condition precedent, the court must be able to determine, from the beginning, precisely *what event* must occur before the gift will vest.

There are many cases where a conditional gift has been disallowed as being too uncertain. Most often such cases involve conditions subsequent.

A condition subsequent must be drafted so the court may determine at *any* material time, whether the condition has or has not taken effect. Even if the condition appears, on its face, to be certain, it will fail for uncertainty if it uses a formula that makes it impossible for the court to ascertain the occurrence of the relevant event.

The leading case is *Sifton v. Sifton*, (1938) A.C. 656, a decision of the Privy Council on appeal from Canada. In this case, the Will directed the trustees to pay the testator’s daughter a sum sufficient in their judgment to maintain her suitably until she was 40 years old and, thereafter, to pay her annually the whole income of the estate. The Will continued, “*The payments to my said daughter shall be made only so long as she shall continue to reside in Canada.*”

The court held that the words “*only so long as she shall continue to reside in Canada*” amounted to a condition subsequent. Since it was impossible for the court to determine precisely which future events would constitute a ceasing to reside in Canada, the condition was void for uncertainty.

Another example is *Re Lysiak*, (1975) 55 D.L.R. (3d) 161. In this case a testator left his entire estate to his wife and son, who resided in the Ukraine. The Will contained the following direction to the executors:

...and I hereby leave it to their sole discretion to dispose of it and of all my estate in such a manner and at such time as they see fit, and *until they are absolutely satisfied that the beneficiaries are free and unhindered to receive the said benefits without interference from the regime under which they are presently residing.*

The beneficiaries, who continued to live in the Ukraine, made an application to take the whole of the residue without interference from the executors.

The court ruled the testator had intended to make an absolute gift in favour of the beneficiaries. This gift could not, therefore, be defeated by a provision in the Will. In the alternative, however, the court said if the words created a condition, it was a condition subsequent that was vague and uncertain and thus was not capable of interpretation by the court. In such circumstances there was a presumption of law that a gift vested in the beneficiaries immediately on the testator's death.

Therefore the court granted the beneficiaries' application to take the residue immediately.

Similarly, in *Re Messinger Estate*, (1968) 66 W.W.R. 377, a Will purported to leave a life interest to the spouse beneficiary "so long as she resides in it." At the time of death, the wife was not living in the house. Nor had she resided there since the death, nor did she intend to reside there in future.

The court held that the wife had a life interest in the home whether or not she resided in it. They ruled the purported limitation was a condition subsequent that was void for uncertainty. (How do you know when someone *ceases* to reside somewhere?)

Some eccentric testators impose unusual conditions. An example is found in *Re Millar*, (1927) 60 O.L.R. 434. In that case the court upheld a condition whereby the testator provided a gift to the Ontario mother who should have the greatest number of children in a certain period of time. The court found that such a provision was *not* void for uncertainty.

C Promotion of Marriage Breakdown

Conditions that require or promote the separation of spouses are invalid.

In *Re Fairfoull*, 41 D.L.R. (3d) 152, a bequest to a son of the deceased provided that the son could not inherit if he remained married to his wife. The court ruled the condition void as being a *malum prohibitum* (a prohibited act).

D Conditions Void for Impossibility

Generally, conditions precedent that are impossible to perform will be disregarded and the gift upheld. This is especially so if the testator knew, or should have known, of the impossibility.

As well, if the condition is made impossible by an act or omission of the testator, then the condition will be found to be void.

Unger v. Gossen, 13 E.T.R. (2d) 194, dealt with a condition found to be invalid for impossibility.

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In this case, the testatrix had drafted her Will before the end of communism. At that time, the intended beneficiaries resided in a Communist country.

The Will provided the estate should go to the deceased's sister if she survived the testatrix. If she did not survive, then the estate was to go to the deceased's nephews on condition that they become residents of Canada within 15 years of her death.

If any of the nephews did *not* fulfill this immigration requirement or died before qualifying, the children of that nephew were to receive his share, again on condition that they become residents of Canada within 15 years of her death.

In this case the sister predeceased the testatrix. None of the nephews immigrated or intended to immigrate to Canada. Indeed, an immigration lawyer provided an opinion that, due to the selection criteria set out by Canadian law, none would be eligible to immigrate to Canada. All of the potential beneficiaries agreed that the estate should be divided equally among the nephews. The executor of the testator's estate applied for an order allowing the estate to be so distributed.

The court ruled that intent of the testatrix in imposing this condition was to ensure that her estate went to her nephews and did *not* fall into the hands of the communist government. Further they found the residency requirement was a condition precedent that was impossible to fulfill due to the operation of law.

The court therefore allowed the application.

3 Restraints on Alienation

Most estate practitioners have seen the attempts of some testators to rule from the grave. They purport to give a gift absolutely, then impose strict conditions on the use of the gift.

If a testator gives a beneficiary an absolute interest in a property, the testator *cannot*, at the same time, impose a condition that in effect deprives the beneficiary of those rights recognized by law as part of an absolute gift. Such a condition will be ruled void as being repugnant to the interest involved.

By way of example, some years ago I handled a case where the deceased had devised her house to her three children equally. This devise appeared on page one of the Will. On the next page, she stated that one of the children should have a life interest in the house to the exclusion of the other two children.

This condition was found void because the deceased, having already given an absolute interest to the three children, could not thereafter attempt to limit that gift.

Similarly in *Re Johnson*, (1985) 19 E.T.R.260, the testatrix directed the transfer of her interest in her house to her husband "for his own use absolutely." She then provided that "[in] the event of the sale of the said property," \$25,000 should be paid to her sister and \$25,000 should be paid to her parents. The executor of the testatrix's estate applied to the court for directions.

The court found that the condition was void because the husband had been given an absolute interest. The subsequent condition was a restraint on alienation and therefore was void as being repugnant to the estate given to the husband.

A different result was reached in *Beadle v. Gaudette*, (1985) 21 E.T.R. 117. In that case the testator provided that his house should be given to his nephew, D,

“for his own use absolutely, provided and only in the event” of two conditions:

- that he should use it as his home by residing in it for a continuous period of 10 years; and
- that he should not, during the period of 10 years, encumber the property in any manner or use it as security for a loan.

In the event that the nephew did not continuously use the property as his home for the continuous period of 10 years, the testator directed that the property was to be sold and the proceeds distributed among his nephews and nieces in equal shares.

The nephew, D, applied to the court for direction as to the effect of the gift of the house. Two legal issues were put forward:

- whether both conditions were void for uncertainty; and
- whether the second condition was a restraint on alienation.

The court upheld the validity of both conditions and ruled the following.

- (1) The conditions were conditions subsequent. Therefore the words used

had to be such that the court could determine with reasonable certainty on what events the conditions would occur. These conditions satisfied this test and therefore they were *not* void for uncertainty.

- (2) The second condition was not void as a restraint on alienation. Although the gift of the house was expressed as absolute, it was in fact subject to the continued use of it as a residence. Thus the second condition was not repugnant to the testator’s intention with respect to the disposition of his house. Indeed the condition was consistent with that intention.

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4 Conditions Imposing a Gift Beyond the Age of Majority

Estate practitioners will be familiar with the desire of many testators to delay the gift of the capital of a fund until the beneficiary attains an age greater than majority. To be enforceable, such a provision *must* include a gift over to another. Otherwise the donee is entitled to call for the whole fund, provided that he or she is *sui juris*, that is, legally capable of managing his or her own affairs.

This principle is known as the rule in *Saunders v. Vautier*, 41 E.R. 482. It provides as follows:

where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee or, in other words, the court holds that a legatee may put an end to an accumulation that is exclusively for his benefit.

The courts essentially may find that such a gift has vested and therefore any

postponement of the enjoyment of the gift will be found to be repugnant. This case is consistent with the general principle that restrictions on the enjoyment of a gift are void if they are contrary to the nature of the gift.

Note, however, that a gift may be made contingent upon a donee attaining a certain age *so long as* there is a gift over in the event that the donee does not reach that age. The gift over prevents the initial gift from vesting indefeasibly in the beneficiary before he or she reaches the required age.

Similarly it is possible to create a valid “spendthrift” trust to ensure that the beneficiary does not receive the gift all at once, but instead by installments or when a special need arises. Such conditions may postpone the beneficiary’s receiving the benefits of the trust until well after obtaining the age of majority, *provided* a gift over is included.

5 Conditions as to Residence

Testators sometimes try to impose residency conditions on beneficiaries. There are many cases where the courts have interpreted such clauses. Often they find clauses requiring a beneficiary to live and reside in a particular area or to occupy certain premises as too vague to be enforceable and therefore void for uncertainty.

If, however, the condition is drafted with sufficient particularity, the court may well uphold the condition as a valid condition precedent.

This was the situation in *Melnik v. Sawychy*, (1978) 1 W.W.R. 107. In that case the testator left all his estate to a niece who was living in the USSR. The Will stated: “Provided, that the said [niece] come to Canada and make her permanent home in Canada.”

On an application for the interpretation of the Will, it was held this was a condition precedent. Counsel for the niece had argued that the condition was a condition subsequent so that immediate vesting took place.

On appeal, the Saskatchewan Court of Appeal ruled that the terms of the Will were clear. They said that finding this term to be a condition subsequent would require the court to make a finding directly contrary to the wording of the Will. To receive the gift, the niece must come to Canada to live. That was a pre-condition to

the acquisition of the gift and not merely a condition to its continued retention. The court therefore dismissed the appeal.

6 Conditions in Restraint of Marriage

A condition is void if, in actual or practical terms, it amounts to a *total* restraint on marriage. *Re Hanlon*, (1933) Ch. 254.

Where the conditions, however, attempt to impose a *partial* restraint on marriage, the law is not as clear.

Most such cases, however, are quite dated and it is questionable whether they would be followed today.

Theobald on Wills, 14th edition, at page 638, states as follows:

Thus, conditions restraining a widow or widower from marrying again or requiring marriage with consent or restraining marriage before a certain age are good conditions, provided that there is a gift over (to a third person if there is non-compliance with the condition). So conditions against marriage to a Scotsman, or in a manner not in accordance with the rules of the Quakers, or with a Roman Catholic, or a person not being a Jew, or not being a Protestant, or a domestic servant, or if the legatee marries beneath her are valid in so far as they do no more than impose a partial restraint on marriage, but may, in the particular case, be void for uncertainty.

A good example of a partial restraint on marriage is in *Re Muirhead Estate*, (1919) 2 W.W.R. 454. In this case the court upheld a condition in restraint of a second marriage. They ruled that was only a partial restraint on marriage and therefore not void as contrary to public policy.

Most such cases, however, are quite dated and it is questionable whether they would be followed today.

7 Conditions Not to Dispute a Will

In *Bellinger v. Nuyten Estate*, 50 E.T.R.(2d)1, the plaintiffs were given small

bequests under a Will. They, however, made an additional claim bringing an action against the estate alleging alternatively:

1. a constructive trust arising from a mutual Will; or
2. a claim under the *Wills Variation Act*.

Both claims were dismissed at trial. After the reasons for judgment were delivered, the defendant’s counsel raised a forfeiture clause contained in the deceased’s Will. This clause read as follows.

IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so, then he or she shall forfeit any legacy he or she may be otherwise entitled to.

Counsel claimed that, by bringing their unsuccessful action, both plaintiffs had forfeited their inheritances under the Will.

Mr. Justice Hood did not agree. He upheld the original gifts, primarily because the Will did not provide for a *gift over* if the beneficiaries did contest the Will. His reasons contain historical analysis of this area of the law.

As Justice Hood said, forfeiture clauses were permitted at common law; their scope, however, was limited by the ecclesiastical courts who developed the *in terrorem* rule. This rule provided that the courts could find a forfeiture clause void:

- if a gift was conditional; *and*
- if those conditions were in the nature of a threat; *and*
- if there was *no gift over* to an alternate beneficiary in the event the condition was not met.

Justice Hood also referred to *Feeney’s Canadian Law of Wills*, 4th edition. According to *Feeney’s*, a conditional gift may be valid *if, and only if*, there is the required gift over. With a gift over, such a clause will be valid unless the forfeiture condition:

- is in total restraint of marriage; or
- prevents a beneficiary from instituting any litigation whatsoever concerning the testator’s estate.

The Bellinger decision therefore stands for the following propositions.

1. A term providing for forfeiture *if* the Will is contested is ineffective *vis-a-vis* a claim under the *Wills Variation Act*. Such an attempt to prohibit a valid statutory claim is void as contrary to public policy.
2. A properly drafted forfeiture clause, *provided there is a gift over*, may be effective *vis-a-vis* a beneficiary's claim brought at common law.

Thus, a properly drafted forfeiture clause is legal and enforceable insofar as it relates to common law claims, but not to claims under the *Wills Variation Act*.

8 Conclusion

There will always be testators who wish to impose conditions on the gifts they leave in their Wills. Their motivations will range from the eccentric to the vindictive, from the controlling to the overly cautious. At the same time, the tendency of the common law courts will be to find early vesting and to rule the condition to be void.

Thus it is very important for drafting solicitors to state the condition appropriately. For example, in the *Bellinger* case, had there been a gift over included in the forfeiture clause, the decision could have gone the other way.

From a litigator's perspective, I think it is safe to say nothing is certain. The courts have frequently reached inconsistent results in conditional gift cases.

I believe the judicial trend to limit conditional gifts will continue. The *Charter of Rights* as well as human rights and other recent legislation will provide persuasive authority to challenge such conditional gifts. ▲

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