

Wills & Estates

Trevor Todd



Forfeiture Clauses in Wills

On June 11, 2002, Justice Hood handed down Reasons for Judgment, subsequent to the trial reasons, in the case of *Bellinger v. Fayers, Nuytten*.

In this case I represented the plaintiff, Roy Bellinger, who together with his cousin Phil Nuytten contested Roy's mother's Will. In particular, the cousins contested the distribution under the Will, which left Roy a \$40,000 gift and Phil a gift of income from an agreement for sale valued at \$15,580. The residue (there was little of that) was to be shared equally by Roy, Phil, and Roy's sister Beverly, the daughter of the deceased.

Phil and Roy's complaint was with a purported *inter vivos* transfer of the deceased's home to Roy's sister Beverly. The plaintiffs alleged that the home should form part of the estate assets. In particular they made a number of claims arising from common law. Briefly these claims were the following.

- The Will violated a previous oral agreement that the estate be split equally among the three of them.
- The Will was the result of undue influence exercised by Beverly over her mother.
- Beverly wrongfully directed her mother's assets to herself before her mother's death.
- The deceased's house had been transferred to Beverly prior to death, under a sham agreement of sale, possibly forged by Beverly.

In addition Roy brought a *statutory* claim. He contested the Will on the ground that it did not adequately provide for him as required by the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

After nine days of trial, Justice Hood dismissed both the common law and statutory claims brought by the plaintiffs.

With regard to Roy's claim under the *Wills Variation Act*, Justice Hood found that \$40,000 was more than adequate, just, and equitable in the circumstances. As a result he did *not* increase that provision under the Will.

There is very little case law dealing with this area of estate law.

Surprise

Following the reasons for judgment at trial, Beverly's counsel raised the forfeiture clause contained in the Will. He claimed that both plaintiffs had forfeited their inheritances under the Will by reason of that provision, Counsel maintained the forfeited gifts should fall into the residue of the estate to be distributed *exclusively* to Beverly!

Forfeiture clause

The deceased's Will contained the following forfeiture provision.

7. 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.

At trial, only fleeting reference had been made to this provision when I asked Roy during his direct examination if he thought he was the person referred to in that clause.

Given that the clause was not pleaded in the action, nor had there been any submissions as to its effect at trial, I had the opportunity to fully consider this clause for the first time after the initial judgment.

Perhaps, like many of you, I had assumed that such a clause was archaic and would no longer be upheld by our courts. Like many estate practitioners, I expected that the courts would find such a clause to be void as against public policy. This is not entirely correct. I was surprised to learn that these clauses, when properly drafted, remain a possible option in estate planning.

There is very little case law dealing with this area of estate law. The few reported cases are old, and perhaps do not reflect modern public policy concerns.

Permit me to review the background to the law relating to forfeiture clauses.

In terrorem clauses

Forfeiture clauses were permitted at common law; their scope, however, was limited by the ecclesiastical courts who developed the *in terrorem* rule. Initially, this *in terrorem* rule applied only to gifts

of personal property. The courts of equity later expanded it to include both real property and chattels.

In general terms, the *in terrorem* 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.

According to *Feeney's Canadian Law of Wills*, Fourth edition, if, and only if, there is the required gift over, a conditional gift *may* be valid. 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, whatever concerning the testator's estate is void.

According to Feeney, even if otherwise valid, the conditions must contain the qualifications mentioned, i.e., permit some marriages or permit some litigation. Otherwise they are prohibited as contrary to public policy. Feeney explains at 16.61:

But a condition in partial restraint of marriage is good, as is a condition against disputing a Will that does not preclude *all* litigation. These qualified conditions are not contrary to public policy.

In these two cases, however, if the gift is one of personalty, or a mixed fund representing both realty and personalty (but not, it seems, in the case of the devise of land), unless there is a gift over, the court will consider the condition as being *in terrorem* and void, although normally the condition will not be void if there is a gift over. The reason for the rule is that the court considers an expressed gift over to someone else sufficient *prime facie* evidence that the gift was not *in*

terrorem, the presence of the gift over tending to show that the condition was inserted not simply to coerce the original donee but also to fix a possible benefit to another.

Modern Law

There is little modern Canadian case law considering forfeiture clauses. This is perhaps because such clauses are relatively rare. In any event, I could find only one previous BC decision to assist me.

Justice Hood's ruling on the forfeiture clause

In response to Beverly's claim that the forfeiture should occur, we brought on a motion seeking a declaration that clause 7 was void. We maintained it should thus have no effect on the gifts to the two male beneficiaries. Our application was granted in reasons delivered April 14, 2003.

...clause 7 had very likely been included because Roy had told his mother he intended to contest the terms of her Will.

In this second set of reasons, Justice Hood found clause 7 had very likely been included because Roy had told his mother he intended to contest the terms of her Will. Specifically Roy had told her he would contest her transfer of the house to his sister Beverly.

Justice Hood reviewed the excerpt from Feeney quoted above. He then discussed the gift over required to validate a forfeiture condition. He stated as follows.

The gift must be accompanied by an effective gift over which vests in the recipient on the condition being breached. If there is no gift over, then the condition Will be treated as merely *in terrorem*, that is a mere threat, and will be found to be void. And nothing short of a positive direction of a gift over, of vesting in

another, even in the case where the forfeited legacy falls in the Residue, will suffice. There must be an express disposition made of what is to be forfeited. See for example *Theobald on Wills*, 15th ed. (London: Sweet and Maxwell, 1993) at p. 656, *Wheeler v. Bingham*, [1746] 26 E.R. 1010 at p. 1012 and *Lloyd v. Branton* (1817), 36 E.R. 42 particularly at p. 46. Thus the application of the general rule that a failed gift falls into Residue is insufficient for the purpose of the rule.

Justice Hood also quoted extensively from the decision of *Kent v. McKay* (1982), 139 D.L.R. (3d) 318 (B.C.S.C.), where Lander J. considered the following condition.

...if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection to any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease...[the] said benefits so revoked shall fall into and form part of the Residue of my estate to be distributed as directed in this my Will... .

In that case, Justice Lander had found that the clause was valid because of the gift over that was made to the residue of the estate. He, however, went on to find that such a clause could not effectively apply to a statutory claim made under the *Wills Variation Act*.

In the *Bellinger* case, Justice Hood distinguished the clause in *Kent v. McKay* because it had provided specifically for a gift over to the residue of the estate. In *Bellinger*, there was *no* specific gift over. Instead the failed gift would fall into the residue *by operation of law*. In the view of Justice Hood, this was insufficient to remove the clause from the application of the *in terrorem* rule.

Public Policy and Statutory Claims under the Wills Variation Act.

In his reasons, Justice Hood also addressed the application of the *in terrorem* rule to statutory claims. In this portion of his analysis, he was able to rely specifically on the reasoning of Justice Lander in *Kent v. McKay* (*supra*).

In *Kent v. McKay*, Justice Lander had found the forfeiture clause void in so far as it purported to limit claims the *Wills Variation Act*. He found the condition contrary to public policy because it attempted to penalize the legatee for bringing a successful action provided by statute.

In reaching this decision, Justice Lander relied on the Australian case *Re Gaynor*, (1960) V.R. 640 (S.C.). He then found as follows.

It cannot be denied with respect that the intent of the Legislature in creating the *Wills Variation Act*, is to ensure adequate maintenance and support for specified individuals. It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a Testator to circumvent the provisions of the *Wills Variation Act* by the creation of such as para. 9.

Thus, following this rationale, Justice Hood concluded that clause 7 was invalid for two reasons, namely:

- 1) Clause 7 is invalid at Common Law, and cannot be enforced by the Court, because of the lack of a provision for a gift over of the benefits in the event of their being forfeited as a result of a breach of the clause;
- 2) that the clause is void as well with regards to Roy's *Wills Variation Act* claim in that it is against public policy.

Conclusion

The *Bellinger* decision thus stands for the following propositions.

- 1) A Will provision providing for forfeiture if the Will is contested is ineffective in so far as it relates to a claim under the *Wills Variation Act*. It is void as contrary to public policy as it attempts to prohibit valid statutory claims.
- 2) A properly drafted forfeiture clause may be effective in so far as it relates to a beneficiary's claim brought at *common law*, provided there is a gift over.
- 3) A properly drafted forfeiture clause is legal and enforceable in so far as it relates to common law claims, but *not* statutory claims.

In his reasons, Justice Hood also addressed the application of the in terrorem rule to statutory claims.

Thus, if a legatee makes a successful statutory claim under the *Wills Variation Act*, he or she should not lose the gift. It would be contrary to public policy to penalize the legatee for bringing a successful action provided by statute. ▲

See *Harrison v. Harrison* (1904) 7 O.L.R. 297.

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 29 years, and is the current Chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a Past President of the Trial Lawyers Association of BC. A frequent lecturer at CLE, Trevor lectures to the Notaries of BC, and teaches estate law to new Notaries.

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