IN THE SUPREME COURT OF OHIO

MARY ANN DILLER,	:	**Supreme Court Case No. 2022-0058**
	:	
PLAINTIFF-APPELLANT,	:	
	:	
v.	:	**On Appeal from the Mercer County**
	:	**Court of Appeals, Third Appellate**
PHYLLIS DILLER, CO-EXECUTOR	:	**District**
	:	
DEFENDANT-APPELLANT	:	
-and-	:	
	:	**Court of Appeals Consolidated**
LINDA PENNUCCI ET. AL.,	:	**Case Nos. 10-21-03 and 10-21-04**
	:	
DEFENDANTS-APPELLEES.	:	

MERIT BRIEF OF APPELLEE PHYLLIS DILLER, CO-EXECUTOR

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I. STATEMENT OF FACTS[1]

On February 10, 1998, Theodore C. Penno ("Testator") executed his last will and testament. Several years later, on May 15, 2019, Theodore C. Penno died. Testator's will provided that:

> **ITEM II**. I hereby give, devise and bequeath my farm located in Butler Township, Mercer County, Ohio, and any interest that I may have in any farm chattel property to my **brother, JOHN PENNO**.
>
> **ITEM III**. All the rest, residue, and remainder of my property, real and personal, of every kind, nature, and description, wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise, and bequeath equally to my **brother, JOHN PENNO** and my **sister, MARY ANN DILLER**, absolutely and in fee simple, share and share alike therein, per stirpes.
>
> * * *
>
> **ITEM V**. I hereby appoint my **niece, LINDA PENNUCCI** and my **niece, PHYLLIS DILLER, or the survivor of them**, as Co-Executors of this my Last Will and Testament.

Last Will and Testament of Theodore C. Penno (App. p. 1, 2) (Emphasis in original). Testator had a sister, Mary Ann Diller, who survived him, as well as a brother, John Penno, who predeceased him on July 16, 2016. Third District Opinion, ¶ 2. Appellants David Penno and Linda Pennucci are the only surviving children of John Penno. *Id.* On August 27, 2019, Testator's will was admitted to probate. *Id.* at ¶ 3. That same day, Testator's nieces Phyllis Diller and Linda

[1] It is worth noting that the general background of the case has been gleaned exclusively from briefs submitted by the parties, in which no evidence has been submitted, and no evidentiary hearings have taken place. However, establishing most of these facts are not necessary because this case asks the court to interpret whether a primary devise qualifies as a "devise" pursuant to R.C. 2107.52(A)(3), which is a *de novo* question of law. The intent of the testator is unnecessary for this inquiry and nonetheless could only be established by looking at the terms contained within the will, not extrinsic details. Therefore, Appellants' continued attempts to distract the court with what they think the intent of the testator could have been if he had changed his will after his brother John predeceased him should not be considered by the court.

Pennucci were appointed to serve as co-executors of Theodore's estate pursuant to Item V of Theodore's will. *Id.* at ¶ 3.

On October 23, 2019, Mary Ann filed a complaint for declaratory judgment and for construction of Theodore's will in the Mercer County Court of Common Pleas, Probate Division. *Id.* at ¶ 4. Mary Ann named Phyllis, Linda, and David as defendants in the action. Phyllis was named as a defendant solely in her capacity as co-executor. *Id.* at ¶ 4. Linda was named as a defendant both individually and in her capacity as co-executor. *Id.* at ¶ 4. David was named as a defendant solely in his individual capacity. *Id.* at ¶ 4. In her complaint, Mary Ann contended that R.C. 2107.52, Ohio's anti-lapse statute, did not apply to Item II of Theodore's will and therefore lapsed into Item III. *Id.*

Following a briefing by the parties and oral argument before the probate magistrate, on December 7, 2020, the magistrate issued a decision declining to adopt Mary Ann and Phyllis's interpretation of R.C. 2107.52 and their construction of Theodore's will. *Id.* at ¶ 8. The magistrate concluded that R.C. 2107.52 applies to the gift to John in Item II of Theodore's will and that Theodore's will does not contain any expression of a contrary intent. *Id.* at ¶ 8. Accordingly, the magistrate recommended that the gift to John in Item II of Theodore's will be distributed in equal shares to David and Linda. *Id.* at ¶ 8.

Mary Ann and Phyllis each filed timely objections to the magistrate's decision and the trial court heard oral arguments to the objections. *Id.* at ¶ 9. On March 18, 2021, the trial court, in a judgment entry consisting mostly of its own de novo analysis, concluded that R.C. 2107.52 applies to the gift to John in Item II of Theodore's will and that "a substitute gift is created in Item II" in favor of David and Linda. *Id.* at ¶ 9. Accordingly, the trial court ordered that David and Linda "shall take title to the farm chattels and real estate as tenants in common." *Id.* at ¶ 9.

Mary Ann and Phyllis each filed timely appeals of the probate court's decision to the Third District Court of Appeals and the court heard oral arguments on the assignments of error. In *Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370, (3d Dist.), the Third District Court of Appeals unanimously reversed the probate court and remanded the matter for further proceedings consistent with their opinion. *Id.* at ¶ 61. The Third District held that Item II of testator's will is a primary devise, that primary devises are excluded from anti-lapse protection pursuant to R.C. 2107.52(A)(3), and that Item II lapsed pursuant to the common-law presumption.

II. STATEMENT OF THE CASE

At common law, a devise lapses if the devisee predeceases the testator. In Ohio, qualifying devises may create a substitute gift to various qualifying individuals pursuant to Ohio's anti-lapse statute, as codified in R.C. 2017.52. In the matter before the court, the parties dispute how the property contained within Item II of Theodore Penno's will, namely a farm and farm chattels, should be distributed as John Penno predeceased the Testator Theodore Penno. Under the common law, such a devise lapsed and fell into the residuary of the estate. While R.C. 2017.52 can create a substitute gift in certain situations, it fails to apply to Item II of Theodore Penno's will. In 2012 the General Assembly overhauled R.C. 2017.52 and redefined the term "devise" in R.C. 2017.52(A)(3) to exclude "primary devises." In an effort to narrow the anti-lapse statute, the Ohio General Assembly instead chose to only include alternative devises, a devise in the form of a class gift, and an exercise of a power of appointment. R.C. 2017.52(A)(3). Because the devise in Item II of Theodore Penno's will is not a devise recognized in R.C. 2017.52(A)(3), but is instead is a "primary devise," R.C. 2017.52 does not apply to Item II of Theodore Penno's will. As no substitute gift is created by R.C. 2017.52, Item II lapses in accordance with common law principles and becomes a part of the residuary of estate found in Item III.

III. ARGUMENT

This matter involves the straightforward application of the definition of "devise" set forth in the definitional section of Ohio's anti-lapse statute, R.C. 2107.52, which was overhauled by the General Assembly in 2012. As part of these 2012 changes, the General Assembly defined the term "devise," as used within the anti-lapse statute, for the first time in Ohio's history. Through this definitional change, the legislature limited the application of the anti-lapse statute within Ohio probate law, making a conscious decision to draw Ohio closer to the common-law presumption of lapse for devises to the first person known as a taker in the will. Such devises are commonly known as "primary devises." PRIMARY DEVISE, *Black's Law Dictionary* (11th Ed.2019).

R.C. 2107.52(A)(3) expressly states that a "devise," as used throughout R.C. 2107.52, "**means** an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment." (Emphasis added). The General Assembly intentionally chose to exclude the term "primary devise" in this definition of "devise" and chose the exclusive term "means" within the same definition to restrict any expansion of the definition. Pursuant to the General Assembly's plain and unambiguous definition of the term "devise" in R.C. 2107.52(A)(3), the Third District Court of Appeals thoughtfully and unanimously held that a primary devise must be excluded from Ohio's anti-lapse statute. In an effort to take more of their uncle's estate than Ohio law allows, Appellants seek to persuade this Court that R.C. 2107.52(A)(3) does not mean what it plainly and unambiguously says.

Despite the General Assembly's clear definition, and the fact that the General Assembly had never defined the term "devise" in previous versions of the anti-lapse statute before they chose to define the term in 2012, Appellants claim that this Court should still apply the anti-lapse statute to primary devises. They argue that because primary devises were included in previous versions

of the anti-lapse statute, that primary devises should be included in the current version of the statute. In order to adopt Appellant's reasoning, this Court would have to reject long-held precedent that interprets the term "means" exclusively in both legal and statutory drafting. Such a decision would have wide-sweeping consequences throughout the Ohio Revised Code and impact hundreds, if not thousands, of statutes. A ruling in favor of Appellants would open a Pandora's box in areas of well-settled law, just to grant Appellants property they could have been, but were not, expressly granted in their uncle's will.

Appellant's reading of R.C. 2107.52(A)(3) is contrary to the plain language of the statute. This court has previously stated that "if the General Assembly could have used a particular word in a statute but did not, [the court] will not add that word by judicial fiat." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26; *see also In re Application of Columbus S. Power Co*., 138 Ohio St. 3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 26 ("The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly. * * * Certainly, had the General Assembly intended to require that electric-distribution utilities prove that carrying costs were 'necessary' before they could be recovered, it would have chosen words to that effect"). Yet, this is exactly what the Appellants are asking this Court to do. If the General Assembly had intended to include primary devises in R.C. 2107.52, when they redrafted the section in 2012, they could have chosen words to that effect or chosen not to define the term "devise" within the statute. The General Assembly could have also included a primary devise within the list of qualifying devises found in R.C. 2107.52(A)(3) or used the term "includes" instead of the term "means." The General Assembly clearly chose not to do so, and there is no reason to believe that the statute should include anything more than what the plain and unambiguous language of the statute says. If this Court were to

construe the term "means" to be inclusive language, which is traditionally signaled in the revised code by the term "includes," then the legislature would be left with no way to limit the meaning of words in the revised code. The transmogrification of the terms "means" and "includes" would inevitably have disastrous consequences throughout Ohio law.[2]

While the statutory changes will undoubtedly impact both the drafting and interpretation of testamentary documents, any such consequences are common whenever probate statutes are redrafted. Despite Appellants' bold claims that a great deal of testamentary documents will be negatively impacted by the Third District's ruling in this matter, there is a simple solution to their alleged conundrum. Drafters of testamentary documents can simply state in the document what should happen if a devisee of a primary devise predeceases the testator, rather than relying on the legislature to attempt to presume what the testator would like to happen. This is easily accomplished by drafting an alternative devise or using other techniques that are commonly considered best practices within the legal community.

The General Assembly's 2012 changes to the anti-lapse statute are of no greater detriment to testators than previous changes to the statute, or to Ohio probate law in general, that testators are both presumed to know and required to follow. In Ohio, "a will is ambulatory and takes effect only upon the death of the testator." *In re Emery*, 59 Ohio App.2d 7, 11, 391 N.E.2d 746 (1st Dist.1978), citing *Patton v. Patton*, 39 Ohio St. 590 (1883). Further, "the testator is presumed to know that future statutory changes could affect the distribution called for in the will and

[2] The scope of what Appellants are asking this Court to hold is immense. The term "means" is used over 5,000 times throughout the Ohio Revised Code, while the term "includes" is used over 9,000 times. Additionally, the term "means" is used over 80 combined times within Ohio's Rules of Civil and Criminal Procedure. Although it would impact the entire Ohio Revised Code, a holding in favor of Appellants would have especially disastrous consequences to definitions found throughout Ohio's criminal law and within R.C. Title 29.

presumably could change the testamentary provisions to reflect the testator's response to statutory changes." *Fifth Third Bank v. Harris*, 127 Ohio Misc.2d 1, 2003-Ohio-7361, 804 N.E.2d 1044, ¶ 11, citing *Solomon v. Cent. Trust Co. of Northeastern Ohio, N.A.* (1992), 63 Ohio St. 3d 35, 584 N.E.2d 1185, paragraph one of the syllabus. Thus, as has been traditionally held in Ohio, if the legislature changes a statute and it impacts the will of a testator in a manner that is contrary to the testator's intentions, the testator must simply change their will.

a. <u>Appellee's Position in Response to Appellants' Proposition of Law No. 1.</u> R.C. 2107.52, Ohio's Anti-Lapse Statute, does not apply to the primary devise of a testator's last will and testament unless it is a class gift or power of appointment, as the plain and unambiguous language of R.C. 2107.52(A)(3) expressly limits the application of R.C. 2107.52 to an alternative devise, class gift or power of appointment by use of the term "means."

In their first proposition of law, Appellants argue that R.C. 2107.52 should include the primary devise of a testator's last will and testament, despite the plain and unambiguous language of R.C. 2107.52(A)(3), which states that: "'Devise' **<u>means</u>** an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment." (Emphasis added). In probate law, a "primary devise" is a "devise to the first person named as taker," while an "alternative devise" is a "devise that, under the terms of the will, is designed to displace another devise if one or more specified events occur." PRIMARY DEVISE, *Black's Law Dictionary* (11th Ed.2019); ALTERNATIVE DEVISE, *Black's Law Dictionary* (11th Ed.2019).

In Item II of Theodore Penno's will, Appellants' father John Penno is the recipient of a primary devise. John Penno predeceased Theodore Penno, causing the primary devise to lapse pursuant to the common-law presumption. Appellants seek a substitute gift to allow them to take in their father's place pursuant to the anti-lapse statute. However, R.C. 2107.52(A)(3), within the definitional section of the anti-lapse statute, excludes primary devises from the types of devises that qualify for a substitute gift to be made. This is in recognition that the drafter of a will could

have taken one of several commonly accepted drafting steps to make it clear what the testator would want to happen if a devisee predeceased them and that the testator should consider that at least the first taker in their will could predecease them. Theodore Penno could have: 1) granted the property contained in Item II of his will to Appellants if John Penno predeceased him, 2) changed his will after John predeceased him, or 3) changed his will after the General Assembly rewrote the anti-lapse statute in 2012. He did not do so, and, pursuant to the General Assembly's narrowly crafted definition of "devise" found in R.C. 2107.52(A)(3), the law will not presume that he wanted to do so.

i. The use of the term "means" in R.C. 2107.52(A)(3) indicates that the definition of "devise" in R.C. 2107.52(A)(3) is an exclusive definition, not an inclusive one.

In their brief, Appellants argue that "there is question and ambiguity as to whether the definition of the word devise, as used in the statute, narrows or expands the common and ordinary meaning of the word. Does the definition (1) result in the operative clause dictating that only an alternate devise, a class gift or a power of appointment will pass to the surviving descendants of a predeceased devisee and any other type of devise will not, or (2) does the definition result in the operative clause dictating that any devise, including an alternative devise, a class gift or a power of appointment, will pass to the surviving descendants of a predeceased devisee?" Appellants' Brief, p. 9 (Emphasis sic). Appellant's question was quite clearly answered by the General Assembly, who chose to use the exclusive term "means" instead of the inclusive term "includes" within R.C. 2107.52(A)(3).

It has been well settled for nearly a century that when "a definitional section says that a word 'means' something, the clear import is that this is the *only* meaning." (Emphasis sic.) Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, 226 (2012), citing *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125, 55 S.Ct. 60 (1934), fn. 1; *see Burgess v. United States*, 553

U.S. 124, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008), 130, quoting *Colautti v. Franklin*, 439 U.S. 379, 392-393, 99 S.Ct. 675 (1979), fn. 10 ("'As a rule, [a] definition which declares what a term "means" * * * excludes any meaning that is not stated.'"); *see also Groman v. Commissioner of Internal Revenue*, 302 U.S. 82, 86, 58 S.Ct. 108 (1937) ("[W]hen an exclusive definition is intended the word 'means' is employed, * * * whereas here the word used is 'includes.'"). Appellants now ask the court to interpret the term "means" as inclusive language, rather than exclusive language, because their father was the recipient of a primary devise in Item II of testator's will and the plain and unambiguous language of R.C. 2107.52(A)(3) does not include a primary devise. Strikingly, while asking for the term "means" to be read inclusively, the Appellants have been unable to cite any statute, case, or any secondary materials encouraging a court to read the term "means" inclusively.

The term "means" and the term "includes" are commonly used throughout the Ohio Revised Code to introduce the text of statutory provisions.[3] In legal drafting, "means" is a lexical definition, which "purport to give the entire meaning of a word" to the exclusion of all others, while the term "includes" is a stipulative definition, which "rely on the ordinary meaning of the word and merely expand a word's meaning." Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3rd. Ed. 2011).

The term "includes" has been frequently recognized as a legislature's method of creating inclusive definitions. "The word 'includes' is usually a term of enlargement, and not of limitation." 2A N. Singer, *Sutherland Statutes and Statutory Construction*, Section 47:7 (7th Ed.). "When a definitional section says that a word 'includes' certain things, that is usually taken to mean that it

[3] The term "means" is used over 5,000 times throughout the Ohio Revised Code, while the term "includes" is used over 9,000 times.

may include other things as well." Scalia & Garner, at 226. As the term "includes" is a term of enlargement it signals that it is inclusive language. *See* 2A N. Singer, *Sutherland Statutes and Statutory Construction*, Section 47:7 (7th Ed.). In contrast to the inclusiveness of the term "includes," the term "means" is a legislature's method of creating exclusive definitions. The term "means" "excludes any meaning that is not stated." *Burgess*, 553 U.S. at 130, quoting *Colautti*, 439 U.S. at 392-393, fn. 10; *Groman*, 302 U.S. at 86. *See also*, Scalia & Garner, at 226.

In R.C. 2107.52(A), the definitional section of Ohio's anti-lapse statute, the terms "means" and "includes" are both used to define terms within R.C. 2107.52. Additionally, R.C. 2107.52 is the only section within R.C. Chapter 2107 to define the term "devise." The term "means" and the term "includes" hold independent significance in statutory construction. Thus, if the legislature had intended for the term "devise" to be inclusive, they could have simply used the term "includes" rather than the term "means" in R.C. 2107.52(A)(3) or chosen not to define the term "devise" at all. As the Third District aptly noted, the Appellants' argument that the term means should be read inclusively, would "transmogrify" the term "means" into the term "includes." *Diller v. Diller*, 3d Dist. Mercer Nos. 10-21-03, 10-21-04, 2021-Ohio-4252, ¶ 44, citing *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo.1975).

As it is clear what the term "means" signifies, the language of R.C. 2107.52 is plain and unambiguous. "When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said." *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, ¶ 12. Even when interpreting remedial laws, "courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of * * * liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth*., 68 Ohio St.3d 344, 347 (1994).

ii. The language of R.C. 2107.52(A)(3) is plain and unambiguous and Appellants' attempts to manufacture ambiguity are without merit.

Appellants further attempt to manufacture ambiguity within the statute by stating "[t]here is further question and ambiguity as to whether the definition and use of the word devisee throughout the statute is intended to entirely remove the common and ordinary meaning of the word devise from the statute." Appellants' Brief, p. 9. In R.C. 2107.52(A)(4)(b), the General Assembly defined the term devisee as "[a]n individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator." Appellants posit that "[a] reading of the statute that does not include a primary devise would mean that John Penno would fit the definition of a devisee, but have no devise attributed to him. John Penno would be a devisee without a devise." Appellants' Brief, p. 18. Appellants are analyzing the statute backwards. R.C. 2107.52 does not create substitute gifts for devisees who are deceased when the testator dies, it creates substitute gifts for surviving descendants of the devisees who are deceased. John Penno still had a devise when Theodore Penno died. He simply had one that failed. John Penno's surviving descendants do not have a devise, and because the type of devise John was granted in Theodore Penno's will is a primary devise, they are not entitled to a substitute gift pursuant to R.C. 2107.52(A)(3) and R.C. 2107.52(B)(2)(a). Thus, R.C. 2107.52(A)(4)(b) does not indicate that the legislature intended to include primary devises within R.C. 2107.52 when they clearly and unambiguously excluded them in R.C. 2107.52(A)(3).

Appellants also call for the court to apply the ordinary meaning of the term "devise" rather than the statutory definition, by stating that "[t]he use of a word to define itself is never a best practice, nor is it the best method to clearly explain a definition." Appellants' Brief, p. 10. Yet,

this interpretation would render many definitions found within the Ohio Revised Code, and specifically within Title 29 of the Ohio Revised Code, obsolete by expanding or negating them.[4]

While appellants cite no further arguments in support of their claim of ambiguity, they do address R.C. 2107.52(C)(2), stating that it is proof the legislature intended to include a primary devise within the statute. Appellants' Brief, p. 18. R.C. 2107.52(C)(2) states that "[a]ttaching other words of survivorship to a devise, such as 'to my child, if my child survives me,' is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section." This section deals with language in a will that would negate the granting of a substitute gift pursuant to R.C. 2107.52(B). Appellants claim that "to my child, if my child survives me," as found within R.C. 2107.52(C)(2), is a primary devise and therefore a substitute gift must be created for the surviving descendants of the devisee of a primary devise. However, Appellant's interpretation looks at the fragment "to my child, if my child survives me" in a vacuum with no other context. We do not know where in a will the terms

[4] For example, R.C. 2925.01(X) states that:

> (X) "Cocaine" means any of the following:
> (1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;
> (2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;
> (3) A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

The definition here clearly uses the term Cocaine to define itself, which, by Appellants' rationale would make the statute ambiguous and a definition which the court could not rely upon. Yet, in State v. Gonzalez, this very definition was held to be unambiguous. 150 Ohio St.3d 276, 2017-Ohio-777 at ¶14.

"to my child, if my child survives me" would be placed in the example found within R.C. 2107.52(C)(2). Without that knowledge, it is not possible to know if it would be a primary or alternative devise, as a "primary devise" is "a devise to the first person named as taker." PRIMARY DEVISE, *Black's Law Dictionary* (11th Ed.2019). In the example found within R.C. 2107.52(C)(2), it is unclear if the child is the first taker or the fortieth taker without the rest of the text of the will. Appellants' contention is speculative at best and certainly should not circumvent the unambiguous definition of devise within the statute. Thus, R.C. 2107.52(C)(2) does not indicate that the legislature intended to include primary devises within R.C. 2107.52 when they clearly and unambiguously excluded them in R.C. 2107.52(A)(3).

Therefore, R.C. 2107.52, Ohio's anti-lapse statute, does not apply to the primary devise of a testator's last will and testament unless it is a class gift or power of appointment, as the plain and unambiguous language of R.C. 2107.52(A)(3) expressly limits the application of R.C. 2107.52 to an alternative devise, class gift or power of appointment by use of the term "means."

b. <u>Appellee's Position in Response to Appellants' Proposition of Law No. 2.</u> Reading R.C. 2107.52 to preclude application to a primary devise does not create an absurd result, as the exclusion of a primary devise in R.C. 2107.52 is a legitimate and intentional policy decision of the General Assembly.

i. <u>The purpose of anti-lapse statutes enacted by legislatures</u>

Anti-lapse statutes "represent a legislative effort to implement the presumed intent of the testator when the testamentary directions are frustrated by conditions that the testator did not consider—namely, the death of a devisee." Kimbrough, Lapsing of Testamentary Gifts, *Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 Wm. & Mary L. Rev. 269, 270 (1994). "[A]ntilapse statutes in effect across the United States vary significantly." *Id.* at 271. "The differences among antilapse statutes reflect the difficulty that legislatures encounter in defining presumed testamentary intent across a broad spectrum of testators." *Id.*

"A growing number of states have adopted the UPC's approach to antilapse either entirely or in part." Blankenship, *To Lapse or Not to Lapse: Does the Tennessee Antilapse Statute Further the Testator's Intent?*, 50 U. Mem. L. Rev. 169, 182 (2019). As of 2019, "[t]welve states have adopted the revised [Uniform Probate Code] UPC antilapse statute, section 2-603, or a similar variant." *Id.* at 182, 183. "Nine states enacted the original UPC antilapse statute, section 2-605, or a similar variant." *Id.* at 183. "The UPC has also influenced states that have not adopted it, leading to the incorporation of certain provisions into state statutes or the use of the UPC as a model to solve common statutory problems." *Id.* at 183, 184. "As a result, antilapse statutes across the country exist along a spectrum." *Id.* at 184.

"All states except for Louisiana have enacted some type of antilapse statute." *Id.* "Twenty-eight states, including Tennessee and the District of Columbia, have enacted their own form of antilapse statute." *Id.* at 184, 185. "The antilapse statutes in twenty of the non-UPC states protect only devisees that are descendants or relatives of the testator." *Id.* at 185. "[T]aking into account states that have adopted the UPC, only eight states and the District of Columbia have antilapse statutes that allow issue of any devisee to take, whereas forty-one states have limitations on the devisees that are protected from lapse." *Id.* at 187. Thus, when a legislature drafts an anti-lapse statute, they determine what they believe the intent of the common testator would be, and what each legislature determines that to be varies significantly. In effect, this means that while some states have expansive anti-lapse provisions, a majority of states, including Ohio, have narrow anti-lapse statutes. To the same end of an anti-lapse statute, legislatures also seek to determine the presumed intent of the common testator when they draft an intestacy statute.

Nonetheless, Appellants posit in support of their absurdity argument that "[c]learly, we are straying from the historical intent of the anti-lapse statute to effectuate the likely intent of the

testator." Appellants' Brief, p. 24. However, the Ohio General Assembly has changed what they believe the likely intent of the testator is, rendering any previous versions of the Ohio statute obsolete. It is well within the General Assembly's right to do so, and what each individual legislature has determined is the intent of the common testator has historically varied greatly. As for the current form of R.C. 2107.52, Ohio's anti-lapse statute, the General Assembly enacted entirely new language in their 2012 amendment to in R.C. 2107.52, and chose to add a definitional section that was absent from any prior version of R.C. 2107.52 or its predecessors. This means that the General Assembly's interpretation of what they presume the intent of the common testator to be changed from prior versions of R.C. 2107.52. As such, what the General Assembly presumes the intent of the common testator should be gleaned from their conscious decision to add a definition to the term "devise" within R.C. 2107.52, as well as their decision to exclude a primary devise from that definition. This means that the intent of the section changed and the General Assembly that enacted the revised R.C. 2107.52 in 2012 did not have the same intent when enacting R.C. 2107.52 that prior General Assemblies had.

The devise contained within Item II of Theodore Penno's will leaves the farm and farm chattel to his brother. It is of note, especially as Appellants claim that the statute is absurd, that in several states the devise would lapse simply because the devise was to the decedent's brother. *See, e.g.*, Ark.Code Ann. 28-26-104; 755 Ill.Comp.Stat.Ann. 5/4-11; Ind.Code 29-1-6-1(g); Miss.Code Ann. 91-5-7; Nev.Rev.Stat. 133.200. Ultimately, as anti-lapse statutes are in derogation of the common law, legislatures have great latitude and should be given great deference in how they draft the statute. The pre-2012 version of R.C. 2107.52 granted a substitute gift for all devises that lapsed. The current version of R.C. 2107.52 creates a hybrid system through R.C. 2107.52(A)(3), which recognizes the folly in presuming that every single testator would want the lineal

descendants of their first deceased devisee to take rather than someone else a testator could name if they were required to do so. This hybrid system simply encourages a testator to draft alternative devises and to state their intent rather than have the General Assembly always presume it for them. The system works in tandem with the intestacy statute, as both seek to apply the presumed intent of the common testator. The result is that the legislature presumes that the intent of the common testator would be to grant a substitute gift in certain situations, allows the express alternative devises and residuary clauses within a will to reign in some situations, and allows for items to pass through intestate succession, in other situations. The power and authority to make such decisions rests with the legislature, and this is how the legislature has decided the presumed intent of the common testator is best followed. Nevertheless, the scheme still minimizes the use of the intestacy statute. This is because most property will pass through an alternative devise or residuary clause if not covered by the anti-lapse statute. Notably, as a residuary clause is not the first disposition of the property in a properly drafted will, a residuary clause is generally an alternative devise. As the current version of R.C. 2107.52 applies to alternative devises, Appellants' further concerns about primary devises lapsing and causing more property to pass through intestate succession are simply overstated.

Anti-lapse statutes are, by their nature, statutory creations of legislatures. They are passed in derogation of the common law. As such, legislatures have the power to create, alter, amend, and even discontinue anti-lapse provisions. The Ohio General Assembly has done so here and their legitimate policy decision should be followed.

ii. <u>Reading R.C. 2107.52 to preclude application to a primary devise does not create an absurd result</u>

In their second proposition of law, Appellants claim that the court must look past the plain and unambiguous language of R.C. 2107.52(A)(3) because the exclusion of a primary devise from

R.C. 2107.52(A)(3) is an "unintended result" that was enacted due to the General Assembly's "failure to fully appreciate the legal implications of the language included in the statute." Appellants' Brief, p. 22. However, "'[t]he absurd-result exception to the plain-meaning rule of [statutory] construction' applies 'only [to] those cases in which the plain language of a statute results in an obviously unintended result.'" (Emphasis and bracketed language sic.) *State ex rel. Meyer v. Warren Cty. Bd. of Elections*, 165 Ohio St.3d 134, 2020-Ohio-4863, ¶ 14 (plurality opinion), quoting *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office,* 152 Ohio St.3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 26 (plurality opinion). "'The doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions.'" *Id.*, quoting *State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, ¶ 28 (lead opinion), quoting Scalia & Garner, at 238.

As aptly noted by the Third District Court of Appeals in this case:

> even if this result was unintended, we could not use the absurdity doctrine to correct the General Assembly's oversight. This is because the cause of the supposed absurdity, R.C. 2107.52(A)(3)'s use of the word "means" rather than "includes" to define "devise," does not appear to be an obvious technical or ministerial error on the part of the General Assembly. To the contrary, the General Assembly seems to have carefully and consciously chosen to use the word "means" to define "devise."

Third District Opinion, ¶ 48. The Third District illustrated this point by extensively "comparing R.C. 2107.52, which was modeled in part after Section 2-603 of the Uniform Probate Code ('UPC'), to UPC Section 2-603 and to the anti-lapse statutes of other states that used UPC Section 2-603 as a template." *Id.* As of 2019, 21 states have adopted some form of the UPC anti-lapse statute, or a variant of one of the versions of the UPC anti-lapse statute that uses one of the versions of the UPC anti-lapse statute as a template. Blankenship at 182, 183.

Similar to R.C. 2107.52, UPC Section 2-603 sets forth a series of definitions within the initial subsection. This includes UPC Section 2-603(a)(5), which states that a "'[d]evise' **includes**

an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment." (Emphasis Added). At least eight states have adopted the definition of devise found within UPC 2-603(a)(5) verbatim, while in Michigan, a "'[d]evise' **includes, but is not limited to**, an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment", and in Ohio "'Devise' **means** an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment." Alaska Stat.Ann. 13.12.603(d)(4); Ariz.Rev.Stat.Ann. 14-2603(D)(3); Colo.Rev.Stat.Ann. 15-11-603(1)(c); Haw.Rev.Stat.Ann. 560:2-603(a); 18-C Me.Rev.Stat.Ann. 2-603(1)(D); Mont.Code Ann. 72-2-613(1)(e); N.M.Stat.Ann. 45-2-603(A)(5); Utah Code Ann. 75-2-603(1)(c); Mich.Comp.Laws Ann. 700.2601(c) (Emphasis Added); R.C. 2107.52(A)(3) (Emphasis Added).

Of the remaining definitions found within R.C. 2107.52(A) and UPC Section 2-603(a), some definitions vary while others are identical. R.C. 2107.52(A)(1)'s definition and UPC Section 2-603(a)(2)'s definition of "class member" are the same, except that Ohio chooses the exclusive term "means" while the UPC uses the inclusive term "includes." The same change was made with respect to R.C. 2107.52(A)(4)'s and UPC Section 2-603(a)(6)'s definitions of the term "devisee." Yet, R.C. 2107.52(A)(6)'s definition of "stepchild" mirrors UPC Section 2-603(a)(7) and R.C. 2107.52(A)(8)'s definition of "testator" mirrors UPC Section 2-603(a)(9).

As noted by the Third District, "the differences and similarities between R.C. 2107.52 and these other statutes foreclose the possibility that the word 'means' was inserted into R.C. 2107.52(A)(3)'s definition of 'devise' by accident." *Id.* at ¶ 51. "Given the extensive parallels between R.C. 2107.52 and the provisions of UPC Section 2-603, the General Assembly was clearly familiar with UPC Section 2-603." *Id.* Notably, "[i]n some places, where the General Assembly was evidently satisfied with the definitions set forth in UPC Section 2-603(a), it elected to adopt

those definitions without making any alterations." *Id.* "In other places, such as in R.C. 2107.52(A)(3), the General Assembly apparently disapproved of the model definitions as written and decided to revise them." *Id.* The Third District properly concluded that "[t]hough the General Assembly might not have fully appreciated the practical effect of its modifications, this does not authorize [courts] to rewrite R.C. 2107.52 under the guise of correcting an absurdity." *Id.*

Appellants further cite R.C. 5808.19(5), the anti-lapse provision relating to trusts, as evidence that the General Assembly did not intend to exclude primary devises from R.C. 2107.52. Appellants' Brief, p. 24. This would require the legislature to have inadvertently made the same mistake twice. This is counterintuitive, as the nearly identical language clearly indicates that the legislature chose to ensure that the anti-lapse provisions pertaining to trusts found in R.C. 5808.19(5) are consistent with the anti-lapse provisions pertaining to wills found in R.C. 2107.52(A)(3).

Therefore, reading R.C. 2107.52 to preclude application to a primary devise that is not a class gift or power of appointment does not create an absurd result, as the exclusion of a primary devise in R.C. 2107.52 is a legitimate and intentional policy decision of the General Assembly.

IV. CONCLUSION

For the reasons contained herein, the terms of R.C. 2107.52(A)(3) are clear and unambiguous, and this legitimate and intentional policy decision of the General Assembly should be followed. Appellant respectfully requests the court affirm the thoughtful decision of the Third District Court of Appeals and deny any relief requested by Appellants.

Respectfully Submitted,
FABER & ASSOCIATES, LLC

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing has been served upon:

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By placing same in the United States Mail on the 30th day of June, 2022.

/s/ *John R. Willamowski, Jr.*
John R. Willamowski, Jr.

APPENDIX

Last Will and Testament

of

THEODORE C. PENNO

I, THEODORE C. PENNO, of 4100 Burkettsville-St. Henry Road, Coldwater, Mercer County, Ohio, being of full age, of sound mind and memory, and not under restraint, do make, publish, and declare this my Last Will and Testament, hereby revoking and making null and void all other Last Wills and Testaments and Codicils by me made heretofore.

ITEM I. I direct that all of my legal debts and funeral expenses be paid out of my estate as soon as practicable after the time of my decease.

ITEM II. I hereby give, devise and bequeath my farm located in Butler Township, Mercer County, Ohio, and any interest that I may have in any farm chattel property to my **brother, JOHN PENNO.**

ITEM III. All the rest, residue, and remainder of my property, real and personal, of every kind, nature, and description, wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise, and bequeath equally to my **brother, JOHN PENNO** and my **sister, MARY ANN DILLER,** absolutely and in fee simple, share and share alike therein, per stirpes.

ITEM IV. I hereby authorize and empower my Co-Executors, hereinafter named, to compound, compromise, settle, and adjust all claims and demands in favor of or against my estate, and to sell at public or private sale, at such prices and upon such terms of credit or otherwise, as they may determine best, the whole or any part of my real

(FOR IDENTIFICATION)

Witness

THEODORE C. PENNO

Witness

or personal property, without order or authority of the Probate Court; and to execute, acknowledge, and deliver deeds or other proper instruments of conveyance thereof to any purchaser or purchasers. I request that no bond be required of my said Co-Executors.

ITEM V. I hereby appoint my **niece, LINDA PENNUCCI** and my **niece, PHYLLIS DILLER, or the survivor of them,** as Co-Executors of this my Last Will and Testament.

In the event that my Co-Executors are unable or unwilling to be appointed or cease to act, I specifically state that the powers listed in **ITEM IV** are not personal in nature, but are annexed to the office of Executor, and said powers shall transfer to an Administrator with will annexed or Administrator de bonis non, said individual to serve without need of bond.

IN WITNESS WHEREOF, I have hereunto subscribed my name at Celina, Mercer County, Ohio, this 10th day of February, Nineteen Hundred and Ninety-eight (1998).

Theodore C. Penno
THEODORE C. PENNO

Signed by **THEODORE C. PENNO** who at the same time declared the same to be his last will, in the presence of us, who, in his presence and in the presence of each other, and at his request, have signed our names as witnesses.

Brenda Kaiser
Witness

Christa Imbolt
Witness

ORC Ann. 2107.52

Current through File 102 (HB 30) of the 134th (2021-2022) General Assembly; acts signed as of June 1, 2022.

Page's Ohio Revised Code Annotated > Title 21: Courts — Probate — Juvenile (Chs. 2101 — 2153) > Chapter 2107: Wills (§§ 2107.01 — 2107.77) > Construction and Operation (§§ 2107.46 — 2107.59)

§ *2107.52* Definitions.

(A) As used in this section:

(1) "Class member" means 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.

(2) "Descendant of a grandparent" means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under either of the following:

(a) The rules of construction applicable to a class gift created in the testator's will if the devise or the exercise of the power of appointment is in the form of a class gift;

(b) The rules for intestate succession if the devise or the exercise of the power of appointment is not in the form of a class gift.

(3) "Devise" means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment.

(4) "Devisee" means any of the following:

(a) A class member if the devise is in the form of a class gift;

(b) An individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator;

(c) An appointee under a power of appointment exercised by the testator's will.

(5) "Per stirpes" means that the shares of the descendants of a devisee who does not survive the testator are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the devisee had died intestate and unmarried on the date of the testator's death.

(6) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

(7) "Surviving devisee" or "surviving descendant" means a devisee or descendant, whichever is applicable, who survives the testator by at least one hundred twenty hours.

(8) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(B)

(1) As used in "surviving descendants" in divisions (B)(2)(a) and (b) of this section, "descendants" means the descendants of a deceased devisee or class member under the applicable division who would take under a class gift created in the testator's will.

(2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:

(a) If the 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. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived the testator.

(b) 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. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of division (B)(2)(b) of this section, "deceased devisee" means a class member who failed to survive the testator by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Attaching the word "surviving" or "living" to a devise, such as a gift "to my surviving (or living) children," is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(2) Attaching other words of survivorship to a devise, such as "to my child, if my child survives me," is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(3) A residuary clause is not a sufficient indication of an intent to negate the application of division (B) of this section unless the will specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(4) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power of appointment.

(D) Except as provided in division (A), (B), or (C) of this section, each of the following applies:

(1) A devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

(3) If a residuary devise fails for any reason in its entirety, the residue passes by intestate succession.

(E) This section applies only to outright devises and appointments. Devises and appointments in trust, including to a testamentary trust, are subject to section 5808.19 of the Revised Code.

(F) This section applies to wills of decedents who die on or after March 22, 2012.

History

2011 SB 117, § 1, eff. Mar. 22, 2012; 2018 hb595, § 1, effective March 22, 2019.

End of Document

ORC Ann. 2925.01

Current through File 102 (HB 30) of the 134th (2021-2022) General Assembly; acts signed as of June 1, 2022.

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2925: Drug Offenses (§§ 2925.01 — 2925.64)

Notice

This section has more than one version with varying effective dates.

§ 2925.01 Definitions. [Effective July 21, 2022]

As used in this chapter:

(A) "Administer," "controlled substance," "controlled substance analog," "dispense," "distribute," "hypodermic," "manufacturer," "official written order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in section 3719.01 of the Revised Code.

(B) "Drug dependent person" and "drug of abuse" have the same meanings as in section 3719.011 of the Revised Code.

(C) "Drug," "dangerous drug," "licensed health professional authorized to prescribe drugs," and "prescription" have the same meanings as in section 4729.01 of the Revised Code.

(D) "Bulk amount" of a controlled substance means any of the following:

(1) For any compound, mixture, preparation, or substance included in schedule I, schedule II, or schedule III, with the exception of any controlled substance analog, marihuana, cocaine, L.S.D., heroin, any fentanyl-related compound, and hashish and except as provided in division (D)(2), (5), or (6) of this section, whichever of the following is applicable:

(a) An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I opiate or opium derivative;

(b) An amount equal to or exceeding ten grams of a compound, mixture, preparation, or substance that is or contains any amount of raw or gum opium;

(c) An amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of a schedule I hallucinogen other than tetrahydrocannabinol or lysergic acid amide, or a schedule I stimulant or depressant;

(d) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II opiate or opium derivative;

(e) An amount equal to or exceeding five grams or ten unit doses of a compound, mixture, preparation, or substance that is or contains any amount of phencyclidine;

(f) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant that is in a final dosage form manufactured by a person authorized by the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and the federal drug abuse control laws, as defined in section 3719.01 of the Revised Code, that is or contains any amount of a schedule II depressant substance or a schedule II hallucinogenic substance;

(g) An amount equal to or exceeding three grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant, or any of its salts or isomers, that is not in a final dosage form manufactured by a person authorized by the Federal Food, Drug, and Cosmetic Act and the federal drug abuse control laws.

(2) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III or IV substance other than an anabolic steroid or a schedule III opiate or opium derivative;

(3) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III opiate or opium derivative;

(4) An amount equal to or exceeding two hundred fifty milliliters or two hundred fifty grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule V substance;

(5) An amount equal to or exceeding two hundred solid dosage units, sixteen grams, or sixteen milliliters of a compound, mixture, preparation, or substance that is or contains any amount of a schedule III anabolic steroid;

(6) For any compound, mixture, preparation, or substance that is a combination of a fentanyl-related compound and any other compound, mixture, preparation, or substance included in schedule III, schedule IV, or schedule V, if the defendant is charged with a violation of section 2925.11 of the Revised Code and the sentencing provisions set forth in divisions (C)(10)(b) and (C)(11) of that section will not apply regarding the defendant and the violation, the bulk amount of the controlled substance for purposes of the violation is the amount specified in division (D)(1), (2), (3), (4), or (5) of this section for the other schedule III, IV, or V controlled substance that is combined with the fentanyl-related compound.

(E) "Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance that is separately identifiable and in a form that indicates that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.

(F) "Cultivate" includes planting, watering, fertilizing, or tilling.

(G) "Drug abuse offense" means any of the following:

(1) A violation of division (A) of section 2913.02 that constitutes theft of drugs, or a violation of section 2925.02, 2925.03, 2925.04, 2925.041, 2925.05, 2925.06, 2925.11, 2925.12, 2925.13, 2925.22, 2925.23, 2925.24, 2925.31, 2925.32, 2925.36, or 2925.37 of the Revised Code;

(2) A violation of an existing or former law of this or any other state or of the United States that is substantially equivalent to any section listed in division (G)(1) of this section;

(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, shipping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing

another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy to commit, attempt to commit, or complicity in committing or attempting to commit any offense under division (G)(1), (2), or (3) of this section.

(H) "Felony drug abuse offense" means any drug abuse offense that would constitute a felony under the laws of this state, any other state, or the United States.

(I) "Harmful intoxicant" does not include beer or intoxicating liquor but means any of the following:

(1) Any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects, and includes, but is not limited to, any of the following:

(a) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, or other preparation containing a volatile organic solvent;

(b) Any aerosol propellant;

(c) Any fluorocarbon refrigerant;

(d) Any anesthetic gas.

(2) Gamma Butyrolactone;

(3) 1,4 Butanediol.

(J) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(K) "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

(L) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a licensed health professional authorized to prescribe drugs, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by a manufacturer.

(M) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of references that are approved by the state board of pharmacy.

(N) "Juvenile" means a person under eighteen years of age.

(O) "Counterfeit controlled substance" means any of the following:

(1) Any drug that bears, or whose container or label bears, a trademark, trade name, or other identifying mark used without authorization of the owner of rights to that trademark, trade name, or identifying mark;

(2) Any unmarked or unlabeled substance that is represented to be a controlled substance manufactured, processed, packed, or distributed by a person other than the person that manufactured, processed, packed, or distributed it;

(3) Any substance that is represented to be a controlled substance but is not a controlled substance or is a different controlled substance;

(4) Any substance other than a controlled substance that a reasonable person would believe to be a controlled substance because of its similarity in shape, size, and color, or its markings, labeling, packaging, distribution, or the price for which it is sold or offered for sale.

(P) An offense is "committed in the vicinity of a school" if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises.

(Q) "School" means any school operated by a board of education, any community school established under Chapter 3314. of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed.

(R) "School premises" means either of the following:

(1) The parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed;

(2) Any other parcel of real property that is owned or leased by a board of education of a school, the governing authority of a community school established under Chapter 3314. of the Revised Code, or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed.

(S) "School building" means any building in which any of the instruction, extracurricular activities, or training provided by a school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted in the school building at the time a criminal offense is committed.

(T) "Disciplinary counsel" means the disciplinary counsel appointed by the board of commissioners on grievances and discipline of the supreme court under the Rules for the Government of the Bar of Ohio.

(U) "Certified grievance committee" means a duly constituted and organized committee of the Ohio state bar association or of one or more local bar associations of the state of Ohio that complies with the criteria set forth in Rule V, section 6 of the Rules for the Government of the Bar of Ohio.

(V) "Professional license" means any license, permit, certificate, registration, qualification, admission, temporary license, temporary permit, temporary certificate, or temporary registration that is described in divisions (W)(1) to (37) of this section and that qualifies a person as a professionally licensed person.

(W) "Professionally licensed person" means any of the following:

(1) A person who has received a certificate or temporary certificate as a certified public accountant or who has registered as a public accountant under Chapter 4701. of the Revised Code and who holds an Ohio permit issued under that chapter;

(2) A person who holds a certificate of qualification to practice architecture issued or renewed and registered under Chapter 4703. of the Revised Code;

(3) A person who is registered as a landscape architect under Chapter 4703. of the Revised Code or who holds a permit as a landscape architect issued under that chapter;

(4) A person licensed under Chapter 4707. of the Revised Code;

(5) A person who has been issued a certificate of registration as a registered barber under Chapter 4709. of the Revised Code;

(6) A person licensed and regulated to engage in the business of a debt pooling company by a legislative authority, under authority of Chapter 4710. of the Revised Code;

(7) A person who has been issued a cosmetologist's license, hair designer's license, manicurist's license, esthetician's license, natural hair stylist's license, advanced cosmetologist's license, advanced hair designer's license, advanced manicurist's license, advanced esthetician's license, advanced natural hair stylist's license, cosmetology instructor's license, hair design instructor's license, manicurist instructor's license, esthetics instructor's license, natural hair style instructor's license, independent contractor's license, or tanning facility permit under Chapter 4713. of the Revised Code;

(8) A person who has been issued a license to practice dentistry, a general anesthesia permit, a conscious sedation permit, a limited resident's license, a limited teaching license, a dental hygienist's license, or a dental hygienist's teacher's certificate under Chapter 4715. of the Revised Code;

(9) A person who has been issued an embalmer's license, a funeral director's license, a funeral home license, or a crematory license, or who has been registered for an embalmer's or funeral director's apprenticeship under Chapter 4717. of the Revised Code;

(10) A person who has been licensed as a registered nurse or practical nurse, or who has been issued a certificate for the practice of nurse-midwifery under Chapter 4723. of the Revised Code;

(11) A person who has been licensed to practice optometry or to engage in optical dispensing under Chapter 4725. of the Revised Code;

(12) A person licensed to act as a pawnbroker under Chapter 4727. of the Revised Code;

(13) A person licensed to act as a precious metals dealer under Chapter 4728. of the Revised Code;

(14) A person licensed under Chapter 4729. of the Revised Code as a pharmacist or pharmacy intern or registered under that chapter as a registered pharmacy technician, certified pharmacy technician, or pharmacy technician trainee;

(15) A person licensed under Chapter 4729. of the Revised Code as a manufacturer of dangerous drugs, outsourcing facility, third-party logistics provider, repackager of dangerous drugs, wholesale distributor of dangerous drugs, or terminal distributor of dangerous drugs;

(16) A person who is authorized to practice as a physician assistant under Chapter 4730. of the Revised Code;

(17) A person who has been issued a license to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery under Chapter 4731. of the Revised Code or has been issued a certificate to practice a limited branch of medicine under that chapter;

(18) A person licensed as a psychologist or school psychologist under Chapter 4732. of the Revised Code;

(19) A person registered to practice the profession of engineering or surveying under Chapter 4733. of the Revised Code;

(20) A person who has been issued a license to practice chiropractic under Chapter 4734. of the Revised Code;

(21) A person licensed to act as a real estate broker or real estate salesperson under Chapter 4735. of the Revised Code;

(22) A person registered as a registered environmental health specialist under Chapter 4736. of the Revised Code;

(23) A person licensed to operate or maintain a junkyard under Chapter 4737. of the Revised Code;

(24) A person who has been issued a motor vehicle salvage dealer's license under Chapter 4738. of the Revised Code;

(25) A person who has been licensed to act as a steam engineer under Chapter 4739. of the Revised Code;

(26) A person who has been issued a license or temporary permit to practice veterinary medicine or any of its branches, or who is registered as a graduate animal technician under Chapter 4741. of the Revised Code;

(27) A person who has been issued a hearing aid dealer's or fitter's license or trainee permit under Chapter 4747. of the Revised Code;

(28) A person who has been issued a class A, class B, or class C license or who has been registered as an investigator or security guard employee under Chapter 4749. of the Revised Code;

(29) A person licensed to practice as a nursing home administrator under Chapter 4751. of the Revised Code;

(30) A person licensed to practice as a speech-language pathologist or audiologist under Chapter 4753. of the Revised Code;

(31) A person issued a license as an occupational therapist or physical therapist under Chapter 4755. of the Revised Code;

(32) A person who is licensed as a licensed professional clinical counselor, licensed professional counselor, social worker, independent social worker, independent marriage and family therapist, or marriage and family therapist, or registered as a social work assistant under Chapter 4757. of the Revised Code;

(33) A person issued a license to practice dietetics under Chapter 4759. of the Revised Code;

(34) A person who has been issued a license or limited permit to practice respiratory therapy under Chapter 4761. of the Revised Code;

(35) A person who has been issued a real estate appraiser certificate under Chapter 4763. of the Revised Code;

(36) A person who has been issued a home inspector license under Chapter 4764. of the Revised Code;

(37) A person who has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.

(X) "Cocaine" means any of the following:

(1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;

(2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;

(3) A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

(Y) "L.S.D." means lysergic acid diethylamide.

(Z) "Hashish" means a resin or a preparation of a resin to which both of the following apply:

(1) It is contained in or derived from any part of the plant of the genus cannabis, whether in solid form or in a liquid concentrate, liquid extract, or liquid distillate form.

(2) It has a delta-9 tetrahydrocannabinol concentration of more than three-tenths per cent.

"Hashish" does not include a hemp byproduct in the possession of a licensed hemp processor under Chapter 928. of the Revised Code, provided that the hemp byproduct is being produced, stored, and disposed of in accordance with rules adopted under section 928.03 of the Revised Code.

(AA) "Marihuana" has the same meaning as in section 3719.01 of the Revised Code, except that it does not include hashish.

(BB) An offense is "committed in the vicinity of a juvenile" if the offender commits the offense within one hundred feet of a juvenile or within the view of a juvenile, regardless of whether the offender knows the age of the juvenile, whether the offender knows the offense is being committed within one hundred feet of or within view of the juvenile, or whether the juvenile actually views the commission of the offense.

(CC) "Presumption for a prison term" or "presumption that a prison term shall be imposed" means a presumption, as described in division (D) of section 2929.13 of the Revised Code, that a prison term is a necessary sanction for a felony in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code.

(DD) "Major drug offender" has the same meaning as in section 2929.01 of the Revised Code.

(EE) "Minor drug possession offense" means either of the following:

(1) A violation of section 2925.11 of the Revised Code as it existed prior to July 1, 1996;

(2) A violation of section 2925.11 of the Revised Code as it exists on and after July 1, 1996, that is a misdemeanor or a felony of the fifth degree.

(FF) "Mandatory prison term" has the same meaning as in section 2929.01 of the Revised Code.

(GG) "Adulterate" means to cause a drug to be adulterated as described in section 3715.63 of the Revised Code.

(HH) "Public premises" means any hotel, restaurant, tavern, store, arena, hall, or other place of public accommodation, business, amusement, or resort.

(II) "Methamphetamine" means methamphetamine, any salt, isomer, or salt of an isomer of methamphetamine, or any compound, mixture, preparation, or substance containing methamphetamine or any salt, isomer, or salt of an isomer of methamphetamine.

(JJ) "Deception" has the same meaning as in section 2913.01 of the Revised Code.

(KK) "Fentanyl-related compound" means any of the following:

(1) Fentanyl;

(2) Alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl)ethyl-4- piperidyl]propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

(3) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4- piperidinyl]-N-phenylpropanamide);

(4) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl-4-piperidinyl] -N-phenylpropanamide);

(5) Beta-hydroxy-3-methylfentanyl (other name: N-[1-(2-hydroxy-2- phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

(6) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);

(7) 3-methylthiofentanyl (N-[3-methyl-1-[2-(thienyl)ethyl]-4- piperidinyl]-N-phenylpropanamide);

(8) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4- piperidinyl]propanamide;

(9) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]- propanamide;

(10) Alfentanil;

(11) Carfentanil;

(12) Remifentanil;

(13) Sufentanil;

(14) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4- piperidinyl]-N-phenylacetamide); and

(15) Any compound that meets all of the following fentanyl pharmacophore requirements to bind at the mu receptor, as identified by a report from an established forensic laboratory, including acetylfentanyl, furanylfentanyl, valerylfentanyl, butyrylfentanyl, isobutyrylfentanyl, 4-methoxybutyrylfentanyl, para-fluorobutyrylfentanyl, acrylfentanyl, and ortho-fluorofentanyl:

(a) A chemical scaffold consisting of both of the following:

(i) A five, six, or seven member ring structure containing a nitrogen, whether or not further substituted;

(ii) An attached nitrogen to the ring, whether or not that nitrogen is enclosed in a ring structure, including an attached aromatic ring or other lipophilic group to that nitrogen.

(b) A polar functional group attached to the chemical scaffold, including but not limited to a hydroxyl, ketone, amide, or ester;

(c) An alkyl or aryl substitution off the ring nitrogen of the chemical scaffold; and

(d) The compound has not been approved for medical use by the United States food and drug administration.

(LL) “First degree felony mandatory prison term” means one of the definite prison terms prescribed in division (A)(1)(b) of section 2929.14 of the Revised Code for a felony of the first degree, except that if the violation for which sentence is being imposed is committed on or after March 22, 2019, it means one of the minimum prison terms prescribed in division (A)(1)(a) of that section for a felony of the first degree.

(MM) “Second degree felony mandatory prison term” means one of the definite prison terms prescribed in division (A)(2)(b) of section 2929.14 of the Revised Code for a felony of the second degree, except that if the violation for which sentence is being imposed is committed on or after March 22, 2019, it means one of the minimum prison terms prescribed in division (A)(2)(a) of that section for a felony of the second degree.

(NN) “Maximum first degree felony mandatory prison term” means the maximum definite prison term prescribed in division (A)(1)(b) of section 2929.14 of the Revised Code for a felony of the first degree, except that if the violation for which sentence is being imposed is committed on or after March 22, 2019, it means the longest minimum prison term prescribed in division (A)(1)(a) of that section for a felony of the first degree.

(OO) “Maximum second degree felony mandatory prison term” means the maximum definite prison term prescribed in division (A)(2)(b) of section 2929.14 of the Revised Code for a felony of the second degree, except that if the violation for which sentence is being imposed is committed on or after March 22, 2019, it means the longest minimum prison term prescribed in division (A)(2)(a) of that section for a felony of the second degree.

(PP) “Delta-9 tetrahydrocannabinol” has the same meaning as in section 928.01 of the Revised Code.

(QQ) An offense is "committed in the vicinity of a substance addiction services provider or a recovering addict" if either of the following apply:

(1) The offender commits the offense on the premises of a substance addiction services provider's facility, including a facility licensed prior to June 29, 2019, under section 5119.391 of the Revised Code to provide methadone treatment or an opioid treatment program licensed on or after that date under section 5119.37 of the Revised Code, or within five hundred feet of the premises of a substance addiction services provider's facility and the offender knows or should know that the offense is being committed within the vicinity of the substance addiction services provider's facility.

(2) The offender sells, offers to sell, delivers, or distributes the controlled substance or controlled substance analog to a person who is receiving treatment at the time of the commission of the offense, or received treatment within thirty days prior to the commission of the offense, from a substance addiction services provider and the offender knows that the person is receiving or received that treatment.

(RR) "Substance addiction services provider" means an agency, association, corporation or other legal entity, individual, or program that provides one or more of the following at a facility:

(1) Either alcohol addiction services, or drug addiction services, or both such services that are certified by the director of mental health and addiction services under section 5119.36 of the Revised Code;

(2) Recovery supports that are related to either alcohol addiction services, or drug addiction services, or both such services and paid for with federal, state, or local funds administered by the department of mental health and addiction services or a board of alcohol, drug addiction, and mental health services.

(SS) "Premises of a substance addiction services provider's facility" means the parcel of real property on which any substance addiction service provider's facility is situated.

(TT) "Alcohol and drug addiction services" has the same meaning as in section 5119.01 of the Revised Code.

History

136 v H 300 (Eff 7-1-76); 136 v S 414 (Eff 9-22-76); 137 v H 565 (Eff 11-1-78); 138 v H 900 (Eff 7-1-80); 138 v S 378 (Eff 3-23-81); 139 v H 535 (Eff 8-20-82); 139 v S 199 (Eff 7-1-83); 141 v H 281 (Eff 7-18-85); 143 v H 215 (Eff 4-11-90); 143 v S 258 (Eff 11-20-90); 144 v H 62 (Eff 5-21-91); 144 v H 322 (Eff 3-2-92); 145 v H 156 (Eff 5-19-93); 146 v S 143, § 1 (Eff 3-5-96); 146 v S 2 (Eff 7-1-96); 146 v S 143, § 5 (Eff 7-1-96); 146 v H 125 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 223 (Eff 3-18-97); 147 v S 66 (Eff 7-22-98); 147 v S 117 (Eff 8-5-98); 147 v H 606 (Eff 3-9-99); 147 v S 200 (Eff 3-30-99); 148 v H 18 (Eff 10-20-99); 148 v H 202 (Eff 2-9-2000); 149 v H 7 (Eff 8-7-2001); 149 v H 273 (Eff 7-23-2002); 149 v H 415 (4-7-2003); 149 v H 364, § 1, eff. 4-8-2003; 149 v H 364, § 8, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v S 209, § 1, eff. 5-6-05; 151 v S 53, § 1, eff. 5-17-06; 152 v H 195, § 1, eff. 9-30-08; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 334, § 1, eff. Dec. 20, 2012; 2014 HB 232, § 1, eff. July 10, 2014; 2016 sb213, § 1, effective September 13, 2016; 2017 hb49, § 101.01, effective September 29, 2017; 2018 sb1, § 1, effective October 31, 2018; 2018 sb259, § 1, effective March 20, 2019; 2018 sb259, § 1, effective March 20, 2019; 2018 sb201, § 1, effective March 22, 2019; 2018 sb229, § 1, effective March 22, 2019; 2018 sb259, § 1, effective March 20, 2019; 2018 sb201, § 1, effective March 22, 2019; 2018 sb229, § 1, effective March 22, 2019; 2018 sb255, § 1, effective April 5, 2019; 2019 hb166, § 101.01, effective October 17, 2019; 2020 hb341, § 1, effective December 16, 2020; 2020 hb442, § 1, effective April 12, 2021; 2022 sb25, § 1, effective July 21, 2022.

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ORC Ann. 5808.19

Current through File 102 (HB 30) of the 134th (2021-2022) General Assembly; acts signed as of June 1, 2022.

Page's Ohio Revised Code Annotated > Title 58: Ohio Trust Code (Chs. 5801 — 5817) > Chapter 5808: Duties and Powers of Trustee (§§ 5808.01 — 5808.19)

§ 5808.19 Surviving descendants.

(A) As used in this section, unless otherwise provided in any other provision in this section:

(1) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) "Class member" means an individual who fails to survive the distribution date by at least one hundred twenty hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least one hundred twenty hours.

(3) "Descendant of a grandparent of the transferor" means an individual who would qualify as a descendant of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor's will to the descendants of the transferor's grandparent.

(4) "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.

(5) "Future interest" means an alternative future interest or a future interest in the form of a class gift.

(6) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) "Per stirpes" means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least one hundred twenty hours are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the beneficiary had died intestate and unmarried on the distribution date.

(8) "Revocable trust" means a trust that was revocable immediately before the settlor's death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) "Stepchild" means a child of the surviving, deceased, or former spouse of the transferor and not of the transferor.

(10) "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.

(B)

(1)

(a) As used in "surviving descendants" in divisions (B)(2)(b)(i) and (ii) of this section, "descendants" means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(b) As used in divisions (B)(2)(b)(i) and (ii) of this section, "surviving beneficiaries" or "surviving descendants" means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least one hundred twenty hours.

(2) Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:

(a) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least one hundred twenty hours.

(b) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least one hundred twenty hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least one hundred twenty hours.

(ii) If the future interest is in the form of a class gift, other than a future interest 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 the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least one hundred twenty hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least one hundred twenty hours. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least one hundred twenty hours. For purposes of division (B)(2)(b)(ii) of this section, "deceased beneficiary" means a class member who failed to survive the distribution date by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) 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.

(2) 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. Words of survivorship under division (C)(2) of this section include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this section unless the distribution date is the date of the settlor's death and the revocable trust instrument specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(D) If, after the application of divisions (B) and (C) of this section there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under division (D)(1) of this section and the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of division (D)(2) of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under divisions (D)(1) and (2) of this section, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor's revocable trust instrument. For purposes of division (D)(3) of this section, the residuary clause in the transferor's revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under divisions (D)(1), (2), and (3) of this section, the property passes to those persons who would succeed to the transferor's intestate estate and in the shares as provided in the intestate succession law of the transferor's domicile if the transferor died on the distribution date. Notwithstanding division (A)(10) of this section, for purposes of division (D)(4) of this section, if the future interest was created by the exercise of a power of appointment, "transferor" means the donor if the power is a nongeneral power, or the donee if the power is a general power.

(E) This section applies to all trusts that become irrevocable on or after March 22, 2012. This section does not apply to any trust that was irrevocable before March 22, 2012, even if property was added to the trust on or after March 22, 2012.

History

2011 SB 117, § 1, eff. Mar. 22, 2012; 2018 hb595, § 1, effective March 22, 2019.

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Alaska Stat. § 13.12.603

Current through 2022 legislation, Chapters 1 - 3.

Alaska Statutes > Title 13. Decedents' Estates, Guardianships, Transfers, Trusts, and Health Care Decisions. (Chs. 05 — 90) > Chapter 12. Intestacy, Wills, and Donative Transfers. (Arts. 1 — 10) > Article 7. Rules of Construction Applicable Only to Wills. (§§ 13.12.601 — 13.12.609)

Sec. 13.12.603. Antilapse; deceased devisee; class gifts.

(a) If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) except as provided in (4) of this subsection, if the 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; the surviving descendants take by representation the property to which the devisee would have been entitled had the devisee survived the testator;

(2) except as provided in (4) of this subsection, 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, a substitute gift is created in the surviving descendants of a deceased devisee; the property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees; each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator; each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator;

(3) for the purposes of AS 13.12.601, words of survivorship, as in a devise to an individual "if the individual survives me," or in a devise to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section;

(4) if the will creates an alternative devise with respect to a devise for which a substitute gift is created by (1) or (2) of this subsection, the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will;

(5) unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(b) If, under (a) of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) except as provided in (2) of this subsection, the devised property passes under the primary substitute gift;

(2) if there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) *[Repealed, § 103 ch 13 SLA 2019.]*

(d) In this section,

(1) "alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or other form; a residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause;

(2) "class member" includes 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;

(3) "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants;

(4) "devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment;

(5) "devisee" includes

(A) a class member if the devise is in the form of a class gift;

(B) an individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(C) an appointee under a power of appointment exercised by the testator's will;

(6) "primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator;

(7) "primary substitute gift" means the substitute gift created with respect to a primary devise;

(8) "stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor;

(9) "surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceases the testator nor is considered to have predeceased the testator under AS 13.12.702;

(10) "testator" includes the donee of a power of appointment if the power is exercised in the testator's will;

(11) "younger-generation devise" means a devise that

(A) is to a descendant of a devisee of a primary devise;

(B) is an alternative devise with respect to the primary devise;

(C) is a devise for which a substitute gift is created; and

(D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise;

(12) "younger-generation substitute gift" means a substitute gift created with respect to a younger-generation devise.

History

(§ 3 ch 75 SLA 1996; am § 11 ch 32 SLA 1997; am §§ 41, 42, 103 ch 13 SLA 2019)

End of Document

A.R.S. § 14-2603

Current through all legislation of the 55th Legislature's 2nd Regular session enacted as of June 25, 2022, including act chapter 305

14-2603. Substitute gifts; class gifts; definitions

A. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

1. Except as provided in paragraph 3 of this subsection, if the 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 and they take, by representation, the property to which the devisee would have been entitled if the devisee had survived the testator.

2. Except as provided in paragraph 3 of this subsection, 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 similar language, a substitute gift is created in the surviving descendants of the deceased devisee. The property to which the devisees would have been entitled if all of them had survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which that person would have been entitled if the deceased devisees had survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled if the deceased devisee had survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

3. If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph 1 or 2 of this subsection, the substitute gift is superseded by the alternative devise, whether or not an expressly designated devisee of the alternative devise is entitled to take under the will.

B. Unless the language that creates a power of appointment expressly prohibits the substitution of the appointee's descendants for the appointee, a surviving descendant of a deceased appointee can be substituted for the appointee, whether or not the descendant is an object of the power of appointment.

C. For the purposes of section 14-2601, words of survivorship, such as in a devise to an individual "if he survives me", or in a devise to "my surviving children", are, in the absence of clear and convincing evidence to the contrary, a sufficient indication of an intent contrary to the application of this section.

D. For the purposes of this section:

1. "Alternative devise" means a devise that is expressly created by the will and under the terms of the will can take effect instead of another devise on the happening of one or more events, including the survival of the testator or the failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent or any other form. A residuary clause may constitute an alternative devise with respect to a nonresiduary devise, whether or not the will specifically provides that, on lapse or failure, the nonresiduary devise or nonresiduary devises in general pass under the residuary clause.

2. “Class member” includes a person who fails to survive the testator but who would have taken under a devise in the form of a class gift if that person had survived the testator.

3. “Devise” includes an alternative devise, a devise in the form of a class gift and an exercise of a power of appointment.

4. “Devisee” includes:

(a) A class member if the devise is in the form of a class gift.

(b) A person or class member who was deceased at the time the testator executed the will as well as a person or class member who was then living but who failed to survive the testator.

(c) An appointee under a power of appointment exercised by the testator’s will.

5. “Stepchild” means a child of the surviving, deceased or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

6. “Surviving devisee” or “surviving descendant” means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 14-2702.

7. “Testator” includes the donee of a power of appointment if the power is exercised in the testator’s will.

History

Laws 2001, Ch. 44, § 5.

End of Document

A.C.A. § 28-26-104

Current through all acts of the 2021 Regular Session, First Extraordinary Session, Extended Session, Second Extraordinary Session, and the 2022 Fiscal Session including corrections and edits by the Arkansas Code Revision Commission.

AR - Arkansas Code Annotated > Title 28 Wills, Estates, and Fiduciary Relationships > Subtitle 3. Wills > Chapter 26 Construction And Operation

28-26-104. Failure of a testamentary provision.

Unless a contrary intent is indicated by the terms of the will, the following rules shall apply:

(1) Except as provided in subdivision (2) of this section:

(A) If a devise other than a residuary devise fails for any reason, it becomes a part of the residue; and

(B) If the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his or her share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue; and

(2) Whenever property is devised to a child, natural or adopted, or other descendant of the testator, either by specific provision or as a member of a class, and the devisee shall die in the lifetime of the testator, leaving a child, natural or adopted, or other descendant who survives the testator, the devise shall not lapse, but the property shall vest in the surviving child or other descendant of the devisee, as if the devisee had survived the testator and died intestate.

History

Acts 1949, No. 140, § 26; 1979, No. 813, § 1; A.S.A. 1947, § 60-410.

End of Document

C.R.S. 15-11-603

Statutes current through Chapter 290 of the 2022 Regular Session and effective on or before Jume 3, 2022. The inclusion of the 2022 legislation is not final. It will be final later in 2022 after reconciliation with the official statutes, produced by the Colorado Office of Legislative Legal Services.

15-11-603. Antilapse; deceased devisee; class gifts.

(1) Definitions. As used in this section, unless the context otherwise requires:

(a) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(b) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

(c) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(d) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) the beneficiary of a trust but not the trustee, (iii) an individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator, and (iv) an appointee under a power of appointment exercised by the testator's will.

(e) (Reserved)

(f) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 15-11-702.

(g) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(2) Substitute gift. If a devisee fails to survive the testator and is a grandparent or a descendant of a grandparent of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(a) Except as provided in paragraph (d) of this subsection (2), if the 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. They take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

(b) Except as provided in paragraph (d) of this subsection (2), 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, a substitute gift is created in the deceased devisee's or devisees' surviving descendants. The property to which the devisees would have been

entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee takes per capita at each generation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph (b), "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (a) or (b) of this subsection (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(e) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(3) Dispositions under separate writing. The provisions of this section shall not apply to dispositions of tangible personal property made under section 15-11-513.

(4) More than one substitute gift; which one takes. If, under subsection (2) of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in paragraph (b) of this subsection (4), the devised property passes under the primary substitute gift.

(b) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) In this subsection (4):

(I) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(II) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(III) "Younger-generation devise" means a devise that:

(A) Is to a descendant of a devisee of the primary devise;

(B) Is an alternative devise with respect to the primary devise;

(C) Is a devise for which a substitute gift is created; and

(D) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(IV) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History

Source: L. 94: Entire part R&RE, p. 1004, § 3, effective July 1, 1995. **L. 95:**(2)(a) and (2)(b) amended, p. 356, § 7, effective July 1.

End of Document

HRS § 560:2-603

§ 560:2-603. Antilapse; deceased devisee; class gifts.

(a) Definitions. In this section:

"Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

"Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

"Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

"Devisee" includes:

(1) A class member if the devise is in the form of a class gift;

(2) An individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(3) An appointee under a power of appointment exercised by the testator's will.

"Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

"Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 560:2-702.

"Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) Substitute gift. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) Except as provided in paragraph (4), if the 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. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator;

(2) Except as provided in paragraph (4), 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, a substitute gift is created in the surviving descendants of any

deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisees's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants;

(3) For the purposes of section 560:2-601, words of survivorship, such as in a devise to an individual "if he survives me", or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section;

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will;

(5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(c) More than one substitute gift; which one takes. If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift;

(2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift;

(3) In this subsection:

"Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

"Primary substitute gift" means the substitute gift created with respect to the primary devise.

"Younger-generation devise" means a devise that:

(A) Is to a descendant of a devisee of the primary devise;

(B) Is an alternative devise with respect to the primary devise;

(C) Is a devise for which a substitute gift is created; and

(D) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

"Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History

L 1996, c 288, pt of § 1.

End of Document

755 ILCS 5/4-11

Statutes current with legislation through P.A. 102-740, except for protions of P.A. 102-700, 102-220, and 102-221 of the 2022 Session of the 102nd Legislature.

Illinois Compiled Statutes Annotated > Chapter 755 ESTATES (§§ 5/1-1 — 99) > Probate Act of 1975 (Arts. I — XXX) > Article IV. Wills (§§ 5/4-1 — 5/4-15)

755 ILCS 5/4-11 Legacy to a deceased legatee

Unless the testator expressly provides otherwise in his will, (a) if a legacy of a present or future interest is to a descendant of the testator who dies before or after the testator, the descendants of the legatee living when the legacy is to take effect in possession or enjoyment, take per stirpes the estate so bequeathed; (b) if a legacy of a present or future interest is to a class and any member of the class dies before or after the testator, the members of the class living when the legacy is to take effect in possession or enjoyment take the share or shares which the deceased member would have taken if he were then living, except that if the deceased member of the class is a descendant of the testator, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he were then living; and (c) except as above provided in (a) and (b), if a legacy lapses by reason of the death of the legatee before the testator, the estate so bequeathed shall be included in and pass as part of the residue under the will, and if the legacy is or becomes part of the residue, the estate so bequeathed shall pass to and be taken by the legatees or those remaining, if any, of the residue in proportions and upon estates corresponding to their respective interests in the residue. The provisions of (a) and (b) do not apply to a future interest which is or becomes indefeasibly vested at the testator's death or at any time thereafter before it takes effect in possession or enjoyment.

History

P.A. 79-328.

End of Document

Burns Ind. Code Ann. § 29-1-6-1

Current with all legislation through the end of the Second Regular Session of the 122nd General Assembly

Burns' Indiana Statutes Annotated > Title 29 Probate (Arts. 1 — 3.5) > Article 1 Probate Code (Chs. 1 — 22) > Chapter 6 Intestate Succession and Wills (§§ 29-1-6-0.1 — 29-1-6-7)

29-1-6-1. Rules for interpretation of wills.

In the absence of a contrary intent appearing in the will, wills shall be construed as to real and personal estate in accordance with the rules in this section.

(a) Any estate, right, or interest in land or other things acquired by the testator after the making of the testator's will shall pass as if title was vested in the testator at the time of making of the will.

(b) All devises of real estate shall pass the whole estate of the testator in the premises devised, although there are no words of inheritance or of perpetuity, whether or not at the time of the execution of the will the decedent was the owner of that particular interest in the real estate devised. Such devise shall also pass any interest which the testator may have at the time of the testator's death as vendor under a contract for the sale of such real estate.

(c) A devise of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs", "next of kin", "relatives", or "family", or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons (including the spouse) who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, domiciled in this state, and owning the estate so devised. With respect to a devise which does not take effect at the testator's death, the time when such class is to be ascertained shall be the time when the devise is to take effect in enjoyment.

(d) In construing a will making a devise to a person or persons described by relationship to the testator or to another, any person adopted prior to the person's twenty-first birthday before the death of the testator shall be considered the child of the adopting parent or parents and not the child of the natural or previous adopting parents. However, if a natural parent or previous adopting parent marries the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural or previous adopting parent. Any person adopted after the person's twenty-first birthday by the testator shall be considered the child of the testator, but no other person shall be entitled to establish relationship to the testator through such child.

(e) In construing a will making a devise to a person described by relationship to the testator or to another, a person born out of wedlock shall be considered the child of the child's mother, and also of the child's father, if, but only if, the child's right to inherit from the child's father is, or has been, established in the manner provided in IC 29-1-2-7.

(f) A will shall not operate as the exercise of a power of appointment which the testator may have with respect to any real or personal estate, unless by its terms the will specifically indicates that the testator intended to exercise the power.

(g) If a devise of real or personal property, not included in the residuary clause of the will, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee. Whenever any estate, real or personal, shall be devised to any descendant of the testator, and such devisee shall die during the lifetime of the testator, whether before or after the execution of the will, leaving a descendant who shall survive such testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee as if such devisee had survived the

testator and died intestate. The word “descendant”, as used in this section, includes children adopted during minority by the testator and by the testator’s descendants and includes descendants of such adopted children. “Descendant” also includes children of the mother who are born out of wedlock, and children of the father who are born out of wedlock, if, but only if, such child’s right to inherit from such father is, or has been, established in the manner provided in IC 29-1-2-7. This rule applies where the parent is a descendant of the testator as well as where the parent is the testator. Descendants of such children shall also be included.

(h) Except as provided in subsection (m), if a testator in the testator’s will refers to a writing of any kind, such writing, whether subsequently amended or revoked, as it existed at the time of execution of the will, shall be given the same effect as if set forth at length in the will, if such writing is clearly identified in the will and is in existence both at the time of the execution of the will and at the testator’s death.

(i) If a testator devises real or personal property upon such terms that the testator’s intentions with respect to such devise can be determined at the testator’s death only by reference to a fact or an event independent of the will, such devise shall be valid and effective if the testator’s intention can be clearly ascertained by taking into consideration such fact or event even though occurring after the execution of the will.

(j) If a testator devises or bequeaths property to be added to a trust or trust fund which is clearly identified in the testator’s will and which trust is in existence at the time of the death of the testator, such devise or bequest shall be valid and effective. Unless the will provides otherwise, the property so devised or bequeathed shall be subject to the terms and provisions of the instrument or instruments creating or governing the trust or trust fund, including any amendments or modifications in writing made at any time before or after the execution of the will and before or after the death of the testator.

(k) If a testator devises securities in a will and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator’s ownership of the described securities and are securities of any of the following types:

(1) Securities of the same organization acquired because of an action initiated by the organization or any successor, related, or acquiring organization, excluding any security acquired by exercise of purchase options.

(2) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization.

(3) Securities of the same organization acquired as a result of a plan of reinvestment.

Distributions in cash before death with respect to a described security are not part of the devise.

(l) For purposes of this subsection, “incapacitated principal” means a principal who is an incapacitated person. An adjudication of incapacity before death is not necessary. The acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal. If:

(1) specifically devised property is sold or mortgaged by; or

(2) a condemnation award, insurance proceeds, or recovery for injury to specifically devised property are paid to;

a guardian or an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(m) A written statement or list that:

(1) complies with this subsection; and

(2) is referred to in a will;

may be used to dispose of items of tangible personal property, other than property used in a trade or business, not otherwise specifically disposed of by the will. To be admissible under this subsection as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the beneficiaries with reasonable certainty. The writing may be prepared before or after the execution of the will. The writing may be altered by the testator after the writing is prepared. The writing may have no significance apart from the writing's effect on the dispositions made by the will. If more than one (1) otherwise effective writing exists, then, to the extent of a conflict among the writings, the provisions of the most recent writing revoke the inconsistent provisions of each earlier writing.

History

Acts 1953, ch. 112, § 601; 1967, ch. 77, § 1; 1973, P.L.287, § 4; P.L.152-1987, § 10; P.L.118-1997, § 12; P.L.238-2005, § 8; P.L.6-2010, § 6, emergency retroactive eff. December 1, 2009; P.L.36-2011, § 3, emergency eff. April 20, 2011; P.L.149-2012, § 6, emergency eff. July 1, 2012.

End of Document

18-C M.R.S. § 2-603

Current through Chapters 646, 649, 652, 661-662, 676, 732, 746-749, and 759 of the 2022 Second Regular Session of the 130th Maine Legislature.

§ 2-603. Antilapse; deceased devisee; class gifts

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Alternative devise" means a devise that is expressly created by a will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

B. "Class member" includes 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.

C. "Descendant of a grandparent" means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under the:

(1) Rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift; or

(2) Rules for intestate succession if the devise or exercise of the power is not in the form of a class gift.

D. "Devise" includes an alternative devise, a devise in the form of a class gift and an exercise of a power of appointment.

E. "Devisee" includes:

(1) A class member if the devise is in the form of a class gift;

(2) An individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(3) An appointee under a power of appointment exercised by the testator's will.

F. "Stepchild" means a child of the surviving, deceased or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

G. "Surviving devisee" or "surviving descendant" means a devisee or descendant, respectively, who neither predeceased the testator nor is deemed to have predeceased the testator under section 2-702.

H. "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

2. Substitute gift. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply.

A. Except as provided in paragraph D, if the 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. The surviving descendants take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

B. Except as provided in paragraph D, 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, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the devisee would have been entitled had the deceased devisee survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take per capita at each generation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

C. For the purposes of section 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

D. If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph A or B, the substitute gift is superseded by the alternative devise if:

(1) The alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(2) The alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will.

E. Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power.

"Descendant," in the phrase "surviving descendant," used in reference to a deceased devisee or class member, means the descendant of a deceased devisee or class member in paragraphs A and B who would take under a class gift created in the testator's will.

3. More than one substitute gift; which one takes effect. If, under subsection 2, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the devised property passes under the primary substitute gift except that if there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

As used in this subsection, unless the context otherwise indicates, the following terms have the following meanings.

A. "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

B. "Primary substitute gift" means the substitute gift created with respect to the primary devise.

C. "Younger-generation devise" means a devise that:

(1) Is to a descendant of a devisee of the primary devise;

(2) Is an alternative devise with respect to the primary devise;

(3) Is a devise for which a substitute gift is created; and

(4) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

D. "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History

Section History

PL 2017, c. 402, Pt. A, §2 (NEW). PL 2017, c. 402, Pt. F, §1 (AFF). PL 2019, c. 417, Pt. B, §14 (AFF).

End of Document

MCLS § 700.2601

This document is current through Act 105 of the 2022 Regular Legislative Session and E.R.O. 2022-1

§ 700.2601. Definitions.

Sec. 2601.

As used in this part:

(a) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of 1 or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or another form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise or nonresiduary devises in general pass under the residuary clause.

(b) "Class member" includes, but is not limited to, an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

(c) "Devise" includes, but is not limited to, an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(d) "Devisee" includes, but is not limited to, the following:

(i) A class member if the devise is in the form of a class gift.

(ii) The beneficiary of a trust, but not the trustee.

(iii) An individual or class member who was deceased at the time the testator executed his or her will or an individual or class member who was living at that time, but fails to survive the testator.

(iv) An appointee under a power of appointment exercised by the testator's will.

(e) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, who is not the testator's or donor's child.

(f) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is considered to have predeceased the testator under section 2702.

(g) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

History

Pub Acts 1998, No. 386, Art. II, Part 6, § 2601, by § 8101 eff April 1, 2000 (see § 700.8101).

End of Document

Miss. Code Ann. § 91-5-7

Current through 2022 Regular Session legislation signed by the Governor and effective upon passage through April 26, 2022, not including changes and corrections made by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation. The final official version of the statutes affected by 2022 legislation will appear on Lexis Advance in the fall of 2022.

§ 91-5-7. Bequests not to lapse in certain cases.

Whenever any estate of any kind shall or may be devised or bequeathed by the last will and testament of any testator or testatrix to any person being a child or descendant of such testator or testatrix, and such devisee or legatee shall, during the lifetime of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children, who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants, of such devisee or legatee in the same manner as if a legatee or devisee had survived the testator or testatrix and had died intestate.

History

Codes, Hutchinson's 1848, ch. 49, art. 1 (17); 1857, ch. 60, art. 37; 1871, § 2391; 1880, § 1265; 1892, § 4491; 1906, § 5081; Hemingway's 1917, § 3369; 1930, § 3553; 1942, § 660.

72-2-613, MCA

Current through the 2021 Session of the Montana Legislature.

LexisNexis® Montana Code Annotated > Title 72 Estates, Trusts, and Fiduciary Relationships (Chs. 1 — 40) > Chapter 2 UPC — Intestacy, Wills, and Donative Transfers (Pts. 1 — 10) > Part 6 Rules of Construction Applicable Only to Wills (§§ 72-2-601 — 72-2-619)

72-2-613 Antilapse — deceased devisee — class gifts.

(1) As used in this section, the following definitions apply:

(a) "Alternative devise" means a devise that is expressly created by the will and that under the terms of the will may take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise or nonresiduary devises in general pass under the residuary clause.

(b) "Class member" includes 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.

(c) "Descendant of a grandparent", as used in subsection (2), means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under the:

(i) rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift; or

(ii) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift.

(d) "Descendants", as used in the phrase "surviving descendants" of a deceased devisee or class member in subsections (2)(a) and (2)(b), mean the descendants of a deceased devisee or class member who would take under a class gift created in the testator's will.

(e) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(f) "Devisee" includes:

(i) a class member if the devise is in the form of a class gift;

(ii) an individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(iii) an appointee under a power of appointment exercised by the testator's will.

(g) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment but not a child of the testator or donor.

(h) "Surviving ", in the phrase "surviving devisees" or "surviving decendants" means devisees or descendants who neither predeceased the testator nor are deemed to have predeceased the testator under 72-2-712.

(i) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(2) If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(a) Except as provided in subsection (2)(d), if the 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. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

(b) Except as provided in subsection (2)(d), 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, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of this section, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(c) For purposes of 72-2-611, words of survivorship, such as in a devise to an individual "if the individual survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by subsection (2)(a) or (2)(b), the substitute gift is superseded by the alternative devise if:

(i) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(ii) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will.

(e) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(3) If, under subsection (2), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(a) Except as provided in subsection (3)(b), the devised property passes under the primary substitute gift.

(b) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(c) As used in this subsection (3), the following definitions apply:

(i) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(iii) "Younger-generation devise" means a devise that:

(A) is to a descendant of a devisee of the primary devise;

(B) is an alternative devise with respect to the primary devise;

(C) is a devise for which a substitute gift is created; and

(D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History

En. 91A-2-605 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-605; amd. Sec. 39, Ch. 494, L. 1993; Sec. 72-2-512, MCA 1991; redes. 72-2-613 by Code Commissioner, 1993; amd. Sec. 14, Ch. 592, L. 1995; § 30, Ch. 313, L. 2019, effective October 1, 2019.

End of Document

Nev. Rev. Stat. Ann. § 133.200

This document is current through the end of legislation from the 81st Regular Session (2021) and 33rd Special Session (2021), subject to revision by the Legislative Counsel Bureau.

133.200. Death of beneficiary.

In the absence of a provision in the will to the contrary, if any beneficiary who is a descendant of the testator dies before the testator, leaving lineal descendants, the property, share or beneficial interest that would have been distributed or allocated to that deceased beneficiary must be distributed or allocated to that beneficiary's descendants then living, by right of representation, to be distributed under the same terms that would have applied to the deceased beneficiary.

History

1862, p. 58; 1937, p. 48; CL 1929 (1941 Supp.), § 9922; 1999, ch. 467, § 92, p. 2258; 2011, ch. 270, § 71, p. 1435.

N.M. Stat. Ann. § 45-2-603

Current with legislation through the 2022 regular session and special session.

Michie's ™ Annotated Statutes of New Mexico > Chapter 45 Uniform Probate Code (Arts. 1 — 9A) > Article 2 Intestate Succession and Wills (Pts. 1 — 11) > Part 6 Rules of Construction for Wills (§§ 45-2-601 — 45-2-612)

45-2-603. Antilapse; deceased devisee; class gifts.

A. As used in this section:

(1) "alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause;

(2) "class member" includes 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 class member survived the testator;

(3) "descendant of a grandparent", as used in Subsection B of this section, means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment pursuant to:

(a) rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift; or

(b) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift;

(4) "descendants", as used in the phrase "surviving descendants" of a deceased devisee or class member in Paragraphs (1) and (2) of Subsection B of this section, means the descendants of a deceased devisee or class member who would take under a class gift created in the testator's will;

(5) "devise" includes an alternative devise, a devise in the form of a class gift and an exercise of a power of appointment;

(6) "devisee" includes:

(a) a class member if the devise is in the form of a class gift;

(b) an individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(c) an appointee under a power of appointment exercised by the testator's will;

(7) "stepchild" means a child of the surviving, deceased or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor;

(8) "surviving", as used in the phrase "surviving devisees" or "surviving descendants", means devisees or descendants who neither predeceased the testator nor are deemed to have predeceased the testator pursuant to the provisions of Section 45-2-702 NMSA 1978; and

(9) "testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

B. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) except as provided in Paragraph (4) of this subsection, if the 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. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator;

(2) except as provided in Paragraph (4) of this subsection, 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, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants;

(3) for the purposes of Section 45-2-601 NMSA 1978, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children" are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section;

(4) if the will creates an alternative devise with respect to a devise for which a substitute gift is created by Paragraph (1) or (2) of this subsection, the substitute gift is superseded by the alternative devise if:

(a) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(b) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will; and

(5) unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee pursuant to the provisions of this section whether or not the descendant is an object of the power.

C. If, pursuant to the provisions of Subsection B of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) except as provided in Paragraph (2) of this subsection, the devised property passes under the primary substitute gift;

(2) if there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift; and

(3) as used in this subsection:

(a) "primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator;

(b) "primary substitute gift" means the substitute gift created with respect to the primary devise;

(c) "younger-generation devise" means a devise that: 1) is to a descendant of a devisee of the primary devise; 2) is an alternative devise with respect to the primary devise; 3) is a devise for

which a substitute gift is created; and 4) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise; and

(d) "younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History

1978 Comp., § 45-2-603, enacted by Laws 1993, ch. 174, § 42; 1995, ch. 210, § 14; 2011, ch. 124, § 24.

End of Document

Utah Code Ann. § 75-2-603

Current through legislation effective May 3, 2022.

Utah Code Annotated > Title 75 Utah Uniform Probate Code (Chs. 1 — 12) > Chapter 2 Intestate Succession and Wills (Pts. 1 — 14) > Part 6 Rules of Construction for Wills (§§ 75-2-601 — 75-2-614)

75-2-603. Definitions — Antilapse — Deceased devisee — Class gifts — Substitute gifts.

(1) As used in this section:

(a) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(b) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he survived the testator.

(c) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(d) "Devisee" includes:

(i) a class member if the devise is in the form of a class gift;

(ii) an individual or class member who was deceased at the time the testator executed his will as well as an individual or class member who was then living but who failed to survive the testator; and

(iii) an appointee under a power of appointment exercised by the testator's will.

(e) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(f) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is considered to have predeceased the testator under Section 75-2-702.

(g) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(2) If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(a) Except as provided in Subsection (2)(d), if the 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. They take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

(b) Except as provided in Subsection (2)(d), 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, a substitute gift is created in the surviving descendant's of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take per capita at each generation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this Subsection (2)(b), "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(c) For the purposes of Section 75-2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are, in the absence of clear and convincing evidence, a sufficient indication of an intent contrary to the application of this section.

(d) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by Subsection (2)(a) or (b), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(e) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

History

C. 1953, 75-2-603, enacted by L. 1998, ch. 39, § 61; 2010, ch. 324, § 123.

End of Document