South Carolina Law Review

Volume 15 | Issue 5 Article 4

1963

Application of the South Carolina Antilapse Statute

William M. Hagood III

LAW NOTES

APPLICATION OF THE SOUTH CAROLINA ANTILAPSE STATUTE

The common law rule, in the absence of a statutory provision to the contrary, is that a legacy or a devise by a testator to a person who dies after the execution of the will but during the lifetime of the testator lapses.[1] A lapsed gift will pass under a general residuary clause.[2] However, if the will contains only a limited residuary clause or none at all, or if the lapsed gift is all or a part of the residuum, the gift will pass as intestate property to the heirs at law and next of kin as determined by the Statute of Descent and Distribution.[3] A devise or bequest made to a proposed beneficiary who is dead at the time the will is drawn is considered at common law a void gift and it passes under the residuary clause or as intestate property in the same manner as a lapsed gift.[4]

The testator may, of course, prevent a gift from being void or lapsing by including a substitutional provision which allows the substituted beneficiary to take as a direct gift to him if the primary beneficiary has died.[5] If no secondary

1. Nash v. Gardner, 226 S.C. 165, 84 S.E.2d 375 (1954); Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943); see Karesh, *Wills and Trusts, 1955-1956 Survey of S.C. Law,* 8 S.C.L.Q. 154 (1955).

2. Watson v. Wall, 229 S.C. 500, 93 S.E.2d 819 (1956); Nash v. Gardner, *supra* note 1. Prior to 1858, lapsed *devises* could not pass into the residuary clause but passed only as intestate property. Cheves v. Haskell, 10 Rich. Eq. 534 (S.C. 1859). Since that time, with the passage of § 19-231 of the S.C. Code (1962), lapsed devises may fall into the residue. Cureton v. Massey, 13 Rich. Eq. 104 (S.C. 1866).

3. Nash v. Gardner, 226 S.C. 165, 84 S.E.2d 375 (1954); Garrett v. Garrett, 1 Strob. Eq. 96 (S.C. 1846).

4. Dozier v. Able, 241 S.C. 358, 128 S.E.2d 682 (1962); Padgett v. Black, 229 S.C. 142, 92 S.E.2d 153 (1956); Pegues v. Pegues, 11 Rich. Eq. 554 (S.C. 1860).

5. Cornelson v. Vance, 220 S.C. 47, 66 S.E.2d 421 (1951); Duncan v. Harper, 4 S.C. 76 (1872). These cases are merely representative of the numerous cases in this area. An old case which has given concern should be pointed out at this time. In Deveaux v. Barnwell, 1 Desaus. Eq. 497 (S.C. 1796), the testator left property to his wife in fee, and what she did not dispose of was to go equally among the children. Two of the testator's children died after the execution of the testator's will and during his lifetime. It would appear from these facts that in absence of an antilapse statute or an expressed substitutional clause, the gift to the two predeceased children failed and either went to the surviving children or was to be distributed as intestate property depending on whether a class gift or individual gifts had been created. However, the court allowed the children of the testator's two deceased children to take the share of their parents stating that there is a *strong presumption* that the testator meant for his grandchildren to stand in

beneficiary has been named and the primary beneficiary dies, a codicil may prevent the gift from failing.[6]

The English Statute of Wills of 1837 was designed to abrogate some of the harshness of the common law lapse by allowing a gift which would have otherwise lapsed to pass to issue of the deceased beneficiary, as the testator in all probability thought that it would.[7] The English statute has been strictly construed to prevent only what would have been a common law lapse.[8]

Nearly all states have passed an antilapse statute or lapse statute, as it is sometimes called, in one form or another.[9]

The South Carolina antilapse statute provides as follows:

> If any child should die in the lifetime of the father or mother, leaving issue, any legacy of personalty or devise of real estate given in the last will of such father or mother shall go to such issue, unless such deceased

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the place of their parents. Although this case has never been expressly overruled, its validity is to be highly questioned. It seems opposed to the rule that a gift to children does not include grandchildren. Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660 (1961); Jones v. Holland, 223 S.C. 500, 77 S.E.2d 202 (1953); Annot., 14 A.L.R.2d 1242 (1950).

6. McLaurin v. Newton, 183 S.C. 379, 191 S.E. 59 (1937); Dent v. Dent, 113 S.C. 416, 102 S.E. 715 (1919). In these cases a lapse was prevented by republication and not by express substitution. However, republication may not necessarily be for the purpose of preventing a lapse. Coffin v. Elliott, 9 Rich. Eq. 244 (S.C. 1857).

7. Wills Act, 1837, 7 Will. 4 & 1 Vict., c.26 §33. The antilapse statute provided:

> That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

8. *In re* Harvey's Estate, 1 Ch. 567 (1893); Olney v. Bates, 3 Drew 319, 61 Eng. Rep. 925 (Ch. 1855).

9. It appears that all but four states — Hawaii, Louisiana, New Mexico and Wyoming — have some form of antilapse provision. The wording in the antilapse statutes describing the relationship of the claimants to the testator necessary in order to fall within the purview of the statute is not uniform. In nine states the antilapse statute applies only where the devisee or legatee is a lineal descendant of the testator. This group would include South Carolina although it is limited to the testator's children. Another group of states, 28 in number, apply the lapse statute where the devisee or legatee is related to the testator, but some of these states limit it to certain specified relatives. A third group of states, nine in number, have lapse statutes which apply to all cases in which a devisee or legatee predeceases the testator. See Rees, *American Wills Statutes*, 46 VA.L.REV. 856, at 899 (1960).

child was equally portioned with the other children by the father or mother when living.[10]

The application of the antilapse statute has been upheld under the facts in only one case[11] before the South Carolina Supreme Court, while it has been rejected as not applicable under the facts in seven cases.[12] The language of the lapse statute is limited to a greater degree than that of most states, the majority of which do not limit it to a gift made to the child of the testator.[13] The court in *Logan v. Brunson*[14] stated that the statute allows the issue of the beneficiary to take the share of its or their parents only if: (1) the legacy or devise was given to the child by the will of his father or mother; (2) the child has died during the lifetime of the testator; (3) and the child has not been equally portioned with the other children by the father or mother.

SOUTH CAROLINA CASES HOLDING THE STATUTE INAPPLICABLE

The cases which have arisen under the lapse statute seem to indicate the court's belief that it should be construed strictly just as the English statute has been construed.

10. S.C. CODE §19-237 (1962). The first South Carolina antilapse provision appeared as early as 1789.

11. Mathis v. Hammond, 9 Rich. Eq. 137 (S.C. 1856).

12. Padgett v. Black, 229 S.C. 142, 92 S.E.2d 153 (1956); Suber v. Nash, 84 S.C. 12, 65 S.E. 947 (1909); Logan v. Brunson, 56 S.C. 7, 33 S.E. 737 (1899); Roundtree v. Roundtree, 26 S.C. 450, 2 S.E. 474 (1887); Pratt v. McGhee, 17 S.C. 428 (1882); Duncan v. Harper, *supra* note 5; Pegues v. Pegues, 11 Rich. Eq. 554 (S.C. 1860). Other South Carolina cases have mentioned the antilapse statute but it played no part in the decision. See also Citizens & So. Nat. Bank of S. C. v. Cleveland, 200 S.C. 373, 20 S.E.2d 811 (1942), and Rasor v. Rasor, 173 S.C. 365, 175 S.E. 545 (1934). The antilapse statute was not cited in these two cases but the facts were such that its application could have been raised. In the former case a trust was involved. Generally the lapse statutes in other states have been held applicable to the interest of a beneficiary under a trust who dies before the testator leaving issue. Annot., 118 A.L.R. 559 (1939). An exception to this rule usually results upon a showing that the trust was personal in nature or that the particular purpose for which it was established has been abrogated by the death of the trust beneficiary in the testator's lifetime. 57 AM.JUR., *Wills* §1435 at 964 (1948). It is probable that under the facts of the Cleveland case, the antilapse statute, even if argued, would not have changed the result due to the personal nature of the testamentary trust. In Rasor v. Rasor, the court allowed the children of a beneficiary, the testator's son who was *"civiliter mortuus,"* take the share of the parent relying completely on §19-5 of the S.C. CODE (1962), without the necessity of resorting to the antilapse statute.

13. See note 9 *supra.*

14. 56 S.C. 7, 33 S.E. 737 (1899).

In *Pegues v. Pegues*[15] the testator died in 1857 leaving a will executed in 1852. In the second clause of the will he gave to one of his sons, Malachi Pegues, $1,500.00 and in the twelfth clause he gave the rest to all his children to be equally divided among them, share and share alike. The son, Malachi Pegues, died in 1849 before the execution of the will and his children claimed his share. The court, in holding that the antilapse statute had no application, said:

> It may be very well conceived that it intended to make good a legacy which had become void, without going the length of supposing it intended to give effect to one which was void *ab initio*.

The court further stated:

> The construction which has been generally put upon the statute, has been that it was intended to prevent the consequences of lapse arising from the death of the legatee after the execution of the will.

Later cases have upheld the view that the lapse statute has no application if the testator's child dies before the will is executed[16] and the fact that the testator had knowledge of the beneficiary's death does not alter the result.[17]

In *Pratt v. McGhee*[18] the testator devised his real estate to his son who died after the execution of the will but during the lifetime of the testator. At that time the lapse statute provided that the issue of the deceased beneficiary would take any *legacy* given in the last will of the father or mother. The court held that the word "legacy" was used in its technical sense and did not include a devise of land. Within the following year, 1883, the legislature amended the statute to include a devise of real estate as well as a legacy of personalty.[19]

In *Logan v. Brunson*[20] the testator gave his property to his wife for life, remainder to his daughter, Mary C. Brown, for life, remainder to her children in fee. Sarah Brown, a daughter of Mary C. Brown and a granddaughter of the tes-

15. 11 Rich. Eq. 554 (S.C. 1860).
16. Padgett v. Black, 229 S.C. 142, 92 S.E.2d 153 (1956); Suber v. Nash, 84 S.C. 12, 65 S.E. 947 (1909); Duncan v. Harper, 4 S.C. 76 (1872).
17. Padgett v. Black, 229 S.C. 142, 92 S.E.2d 153 (1956).
18. 17 S.C. 428 (1882).
19. S.C. CODE §19-237 (1962).
20. 56 S.C. 7, 33 S.E. 737 (1899).

tator, died after the execution of the will and during the lifetime of the testator, and her children claimed the share which she would have received had she outlived the testator. The court held that the provisions of the lapse statute applied only to a gift by a parent to his child and could not be extended to embrace the great grandchildren of the testator in the face of the express language of the statute.

The court in *Padgett v. Black*[21] reached the obvious result that the antilapse statute is not broad enough to provide for children of a deceased beneficiary who was a nephew of the testatrix.

WORDS OF SURVIVORSHIP

The lapse statute has been uniformly held in other jurisdictions to have no application if the testator indicates in his will that he did not intend for it to be applied.[22] However, most states require that the contrary intent on the part of the testator must be plainly indicated before the statute is rendered inoperative.[23]

If a survivorship clause is contained in the will and is construed to relate to the death of the testator, the courts have uniformly held that since the gift is contingent upon the donee surviving the testator, the death of the legatee or devisee during the lifetime of the testator defeats the gift to that particular deceased donee, and failure of the condition defeats the gift so that there is nothing upon which the lapse statute can operate.[24] The manifestation of the clear intention of the testator to substitute another person clearly rules out the application of the lapse statute.[25]

If the language relates to the members surviving the execution of the will, this construction would not prohibit the statute from applying to persons who died after the execution of the will and before the testator.[26]

21. 229 S.C. 142, 92 S.E.2d 153 (1956).
22. Re Mott, 137 Misc. 99, 244 N.Y.S. 187 (1930). See generally Annot., 63 A.L.R.2d 1172 (1959); Annot., 92 A.L.R. 846 (1934).
23. Re Steidl's Estate, 89 Cal. App.2d 448, 201 P.2d 58 (1948); Re Gerdes' Estate, 245 Iowa 778, 62 N.W.2d 777 (1954); Rivenett v. Bourquin, 53 Mich. 10, 18 N.W. 537 (1884).
24. Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818 (1924); Wallace v. Diehl, 202 N.Y. 156, 95 N.E. 646 (1911).
25. Strong v. Smith, 84 Mich. 567, 48 N.W. 183 (1891); Converse v. Byars, 112 Mont. 372, 118 P.2d 144 (1941).
26. Gale v. Keyes, 45 Ohio App. 61, 186 N.E. 755 (1933).

The Illinois Court[27] has taken the position that the word "surviving" may relate to the time when the gift vests in enjoyment and possession at some time subsequent to the testator's death. Under these circumstances the lapse statute was applied, and the court held that the requirement of survival became significant only after the death of the testator and prior to the period of distribution.

If all the beneficiaries predecease the testator, there is authority for the view that the statute should operate since the survivorship requirement is applicable only where one survives and the testator did not contemplate or provide for the case where none of the beneficiaries survive.[28]

JOINT TENANCY

The right of persons to hold real or personal property as joint tenants has not been abolished in South Carolina.[29] Although the right of survivorship, one of the incidents of a joint tenancy, has been abolished by statute,[30] the statute does not apply if the interest of the beneficiary has not vested.[31] Therefore, a gift by the testator to his named children as joint tenants would result in the survivor or survivors taking the share of the deceased child who died during the testator's lifetime unless the antilapse statute allowed the issue of the deceased to take his share. Although there seem to be few cases dealing with this subject, the better rule would appear to be that the lapse statute has no application as shown by the case of *Campbell v. Clark*[32] in which the New Hampshire court said:

> If a devise be to two or more and to the survivor of them, or to be held by them as joint tenants . . . . and one dies in the testator's lifetime leaving issue, a holding that such issue takes under the statute as the parent would have taken had he survived would defeat the expressed intention of the testator.

27. Schneller v. Schneller, 356 Ill. 89, 190 N.E. 121 (1934); Burlet v. Burlet, 246 Ill. 563, 92 N.E. 965 (1910).
28. Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818 (1924); *In re* Burns' Estate, 78 S.D. 223, 100 N.W.2d 399 (1960).
29. Ball v. Deas, 2 Strob. Eq. 24 (S.C. 1884); Herbemont v. Thomas, Cheves Eq. 21 (1839).
30. S.C. CODE §19-55 (1962).
31. Ball v. Deas, 2 Strob. Eq. 24 (S. C. 1884); Herbemont v. Thomas, Cheves Eq. 21 (1839).
32. Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887).

The court further states:

> The statute does not apply to the case of a gift to several persons as joint tenants; for, as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no lapse, to prevent which is the avowed object of the lapse statute.

The writer has been able to find only one case in which the lapse statute has been applied to a joint tenancy.[33]

Other states are not faced with the same problem that South Carolina has in this area, as most states adopted at an early date statutes designed to reverse the common law's preference for joint tenancies, thereby facilitating the ownership by two or more persons, particularly in relation to the free alienability of real property.[34] This, along with the fact that many states have abolished joint tenancy (and in other states where it has not been abolished it is not looked upon favorably), is perhaps the reason why the cases concerning the application of the lapse statute to such an estate are so scarce.

However, since South Carolina does not have a statute which gives a preference to the creation of a tenancy in common, the problem may well arise in this state.[35] The court in *Telfair v. Howe*[36] states that the right of survivorship in almost every instance defeats the intention of the testator and if there are any words or implication in the will which indicates an intention not to create a joint tenancy, it will give effect to that intention. Nevertheless, some words indicating a tenancy in common must be present or a joint tenancy will be presumed to have been the testator's intention.[37] Thus a gift to A and B, nothing else appearing, would be a joint tenancy and A would take the entire gift if B died before the testator.[38]

33. Hoke v. Hoke, 12 W.Va. 427 (1887). The antilapse statute was applied to a gift to joint tenants so as to abrogate the rule of survivorship which would be applied in its absence.
34. *In re* Walker's Will, 195 Misc. 793, 89 N.Y.S.2d 826 (1949).
35. Ball v. Deas, 2 Strob. Eq. 24 (S.C. 1884); Herbemont v. Thomas, Cheves Eq. 21 (1839).
36. 3 Rich. Eq. 235 (S.C. 1851). See also Free v. Sandifer, 131 S.C. 232, 126 S.E. 521 (1925).
37. Ball v. Deas, 2 Strob. Eq. 24 (S.C. 1884); Herbemont v. Thomas, Cheves Eq. 21 (1839).
38. *Ibid.* It logically follows that a devise or bequest made to the testator's children as a class without words indicating that the class

There is seeming authority in this state for the view that a joint tenancy can be created with the incident of survivorship notwithstanding the statute abolishing survivorship if the suvivorship provisions are expressed.[39] It would seem in this instance that there is definitely no room for the application of the antilapse statute since the testator has expressly made his intention known.

CLASS GIFTS

Before reaching the problem of the application of the antilapse statute to class gifts, the first step should be to determine just when a gift to a class has been made.

In *Jones v. Holland*[40] the court cites the common definition used by the majority of states, that "A gift to persons as a class is a gift of an aggregate sum to a body of persons *uncertain in number* at the time of the gift, to be ascertained at a future time."[41] This definition, although cited frequently, is not of much help, and almost every case that quotes it adds that when a limitation does not come within its requirements, a clear showing of the testator's intent to give to a class will control in any event. It has been stated that the definition is simply an attempt to generalize the situations in which courts will find that the testator's wishes were such that a class will best effectuate them.[42]

The basic inquiry, therefore, should be to determine what the testator intended should happen if a person, who otherwise would take as a beneficiary, predeceased him. Since the testator does not always reveal his intention in clear and unambiguous terms, the courts attempt to provide an answer on the basis of such inferences as are reasonably deducible from the language used in describing the beneficiaries.[43]

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members were to take as tenants in common would result in a joint tenancy. Even assuming the antilapse statute applied to class gifts, discussed later in this article, the court in this situation would be faced with the additional legal issue of whether the antilapse statute abrogates the incident of survivorship if one of the joint tenants dies before the gift has vested.

39. Austin v. Summers, 237 S.C. 613, 118 S.E.2d 684 (1961); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). See Karesh, *Wills and Trusts, 1960-1961 Survey of S.C. Law*, 14 S.C.L.Q. 227 (1962).

40. 223 S.C. 500, 77 S.E.2d 202 (1953).

41. JARMAN, WILLS §310 (7th Am. ed. 1930). This definition has been criticized in Annot., 61 A.L.R.2d 219 at 221 (1958), and RESTATEMENT, PROPERTY §279, Comment e (1940).

42. Cooley, *What Constitutes a Gift to a Class*, 49 HARV.L.REV. 903 at 926 (1936).

43. Annot., 61 A.L.R.2d 219 (1958); Annot., 75 A.L.R. 774 (1931).

If the testator merely identifies the beneficiaries with a group designation, *i.e.*, "to the children of A," it is generally presumed that he is group minded and the reasonable inference which can be drawn from this fact is that he wished all those who survive to take the complete gift.[44] However, if the language supports the conclusion that he treated the beneficiaries as separate and distinct individuals, the inference to be drawn is that he did not intend for the others to profit by the death.[45] The authority seems clear in this state that, if there is a collective gift to named persons described as a class, an individual gift was contemplated by the testator in absence of contrary language; accordingly, a lapse will result if one of the named beneficiaries dies before the testator.[46] The courts generally hold that a mention of the number of persons who are to take the gift has the effect of indicating an individual gift,[47] but the fact that the testator makes a gift "in *equal* proportions among all his grandchildren" apparently is not sufficient to individualize the gift.[48]

Since the lapse statute in this state applies only when a gift has been made by a parent to *his* child, the question involved is whether a gift by the testator "to my children" constitutes a class or individual gift. Although a gift to the children of another is generally held to be a class gift unless there is language implying a contrary intention, a gift by the testator to his own children, not named, is said to create an ambiguity as to whether the testator was thinking of them as individuals or as a class.[49]

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44. Casner, *Class Gifts, Effect of Failure of Class Member to Survive the Testator*, 60 HARV.L.REV. 751 (1946).
45. *Ibid.*
46. Nash v. Gardner, 226 S.C. 165, 84 S.E.2d 375 (1954); Kirkland v. Moseley, 109 S.C. 477, 96 S.E. 608 (1918). See also Wilmeth, *Class Gifts in South Carolina*, 9 Selden Society Year Book 16 (1947).
47. Wessborg v. Merrill, 195 Mich. 556, 162 N.W. 102 (1917); Delafield v. Shipman, 103 N.Y. 463, 9 N.E. 184 (1886).
48. Logan v. Brunson, 56 S.C. 7, 33 S.E. 737 (1899). See RESTATEMENT, PROPERTY § 282, Comment b (1940). In Suber v. Nash, 84 S.C. 12, 65 S.E. 947 (1909), the testatrix made a gift, "share and share alike amongst all of my children." In a previous item in the will the testatrix had named her five children and in a subsequent item the executor was directed to divide the gift "amongst all the children *aforesaid*." The court held that "all of my children" meant the same as "all of my children aforesaid" and as the children were previously named in the will, and the name of the deceased child was not among them, there was no intention to give anything to him.
49. Annot., 61 A.L.R.2d 219 (1958); Annot., 75 A.L.R. 774 (1931).

In *In re Russell*[50] the New York Court held that a bequest to the "widow and children" of the testator constituted an individual gift to each in the absence of clear language indicating a gift to them as a body or a class.

Due to this conflict, it should not be taken for granted that since the testator did not name or number his children a class gift has been created when the gift has been made to his "children, share and share alike" or words of similar import. It is arguable that his refusal to name them was for the sake of convenience only.

Assuming that the testator has made a gift to his children as a class, the problem arising is one which South Carolina has never been squarely faced with and one that has not been handled uniformly by other jurisdictions.

THE MINORITY RULE

The states which have refused to apply the antilapse statute to class gifts have used two approaches, referred to as the "intention approach" and the "lapse approach."[51]

The "intention approach" is based upon the idea that the testator intended only that those persons who answered the description of the class at the time of his death should take.[52] Since the predeceased child does not answer the description, his issue cannot take because the antilapse statute could not give the issue what the parent was not intended to take.[53] This approach follows the settled rule of construction that where the devise is to a class, membership in the class is usually ascertained at the time of the testator's death and only those coming within the description at that time are members of the class.[54] The courts which apply the statute state that this rule of construction has been modified by the legislature through the antilapse statute, as the common law rule did not express the true intention of the testator.[55]

50. 168 N.Y. 169, 61 N.E. 166 (1901).
51. Casner, *supra* note 44, at 758.
52. Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887).
53. Morris v. Bolles, 65 Conn. 45, 31 Atl. 538 (1894). However, the court later reversed its holding and applied the lapse statute to a class gift in Clifford v. Cronin, 97 Conn. 434, 117 Atl. 489 (1922). See Martin v. Mercer Univ., 98 Ga. 320, 25 S.E. 522 (1896); Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887).
54. Jones v. Holland, 223 S.C. 500, 77 S.E.2d 202 (1953).
55. Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818 (1924); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892).

The "lapse approach" is grounded on the theory that the statute was designed to prevent a common law lapse and should be strictly construed as such, since any statute which is in derogation of the common law deserves a strict construction.[56] In a class gift there is no technical lapse since the share which the deceased class member would have received does not lapse but goes to the surviving class members.[57]

A minority of the states which have had occasion to decide the problem have done so using either one or both of these approaches without showing a distinction in many cases, as both approaches are grounded on the same legal principle, *i.e.* the time when the class is ascertained.[58]

THE MAJORITY RULE

A majority of the courts have applied the antilapse statute to class gifts if the class member died after the execution of the will and during the lifetime of the testator.[59] These

56. Johns v. Citizens & Southern Nat. Bank, 206 Ga. 313, 56 S.E. 182 (1950); Redinbaugh v. Redinbaugh, 199 Iowa 1053, 203 N.W. 246 (1925); Trenton Trust & Safe Deposit Co. v. Sibbits, 62 N.J. Eq. 131, 49 Atl. 530 (Ch. 1901); *In re* Harvey's Estate, 1 Ch. 567 (1893).

57. Trenton Trust & Safe Deposit Co. v. Sibbits, *supra* note 56; *In re* Warren's Will, 176 S.C. 455, 180 S.E. 458 (1935).

58. Martin v. Mercer Univ., 98 Ga. 320, 25 S.E. 522 (1896); Friederichs v. Friederichs, 205 Iowa 505, 218 N.W. 271 (1928); Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713 (1946); Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887); *In re* Guering's Estate, 206 Misc. 850, 133 N.Y.S.2d 253 (Surr. Ct. 1954). Maryland and Tennessee held that the statute had no application to class gifts until their lapse statutes were subsequently amended to include class gifts. See Weaver v. McGonigall, 170 Md. 212, 183 Atl. 544 (1936), and Jones v. Hunt, 96 Tenn. 369, 34 S.W. 693 (1896). For a complete list of cases in this area see Annot., 56 A.L.R.2d 948 (1957).

59. In re Steidl's Estate, 89 Cal. App.2d 488, 201 P.2d 58 (1948); Clifford v. Cronin, 97 Conn. 434, 117 Atl. 489 (1922); Drafts v. Drafts, — Fla. App. —, 114 So.2d 473 (1959); Kehl v. Taylor, 273 Ill. 346, 114 N.E. 125 (1916); Moses v. Allen, 81 Me. 268, 17 Atl. 66 (1889); Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818 (1924); Strong v. Smith, 84 Mich. 567, 48 N.W. 183 (1891); *In re* Kittson's Estate, 177 Minn. 469, 225 N.W. 439 (1929); Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931); Wooley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1888); Williams v. Knight, 18 R.I. 333, 27 Atl. 210 (1893); Hoverstad v. First Nat'l Bank & Trust Co., 76 S.D. 119, 74 N.W.2d 48 (1955); Burch v. McMillin, 15 S.W.2d 86 (Tex. Civ. App. 1929); *In re* Hutton's Estate, 106 Wash. 578, 180 Pac. 882 (1919) (dictum); Schaeffer v. Schaeffer, 54 W.Va. 681, 46 S.E. 150 (1903) (dictum). In some of the above cases the devisee or legatee died before the execution of the will, but it generally follows that if the court applies it in this instance, they will also apply the antilapse statute when the beneficiary dies after the execution of the will. For a complete list of cases see Annot., 56 A.L.R.2d 948 (1957).

courts take the view that it is a remedial statute and should be liberally construed.[60] The reasoning is the testator most probably intended or expected that the deceased beneficiary's share would be distributed to his issue, as any other rule would result in an unequal distribution of the testator's property among the objects of his affection.[61] In *Strong v. Smith*[62] the Michigan Court said that the evident intent of the legislature was not to prevent lapses in general, but to provide for the kindred of the testator.

In eight states the legislature has adopted specific provisions declaring that the lapse statute applies to class gifts.[63] No states have provisions expressly excluding the operation of the lapse statute to class gifts.

DEATH OF BENEFICIARY BEFORE EXECUTION OF THE WILL

A majority of jurisdictions refuse to apply the antilapse statute to class gifts where the class member was deceased prior to the execution of the will.[64] The reasoning of the various courts which adopt this view can be divided roughly into three categories: (1) those courts which adopt the common law "lapse approach" and refuse to apply the lapse statute to any class gifts;[65] (2) those courts which follow the "intent approach" and hold that the testator could not have intended persons deceased at the time of the execution of the will to share as class members;[66] (3) those courts which follow the common law rule that a gift to an already deceased beneficiary is void, reasoning that a statute preventing lapse cannot prevent a gift from being void.[67]

A minority of states giving a liberal reading to the statute apply it to void gifts[68] while a few states have provisions

60. Kehl v. Taylor, *supra* note 59.
61. Wooley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1888).
62. 84 Mich. 567, 48 N.W. 183 (1891).
63. Rees, *American Wills Statutes*, 46 VA.L.REV. 856 at 901 (1960). These states include Arkansas, Illinois, Kentucky, Maryland, Nebraska, Pennsylvania, Tennessee, and Virginia.
64. Annot., 56 A.L.R.2d 948 (1957).
65. Davie v. Wynn, 80 Ga. 673, 6 S.E. 183 (1888).
66. Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887); Wescott v. Higgins, 42 App. Div. 69, 58 N.Y.S. 938 (1899).
67. Clifford v. Cronin, 97 Conn. 434, 117 Atl. 489 (1922); Howland v. Slade, 155 Mass. 415, 29 N.E. 631 (1892).
68. Kehl v. Taylor, 273 Ill. 346, 114 N.E. 125 (1916); Bray v. Pullen, 84 Me. 185, 24 Atl. 811 (1892); Shumaker v. Person, 67 Ohio St. 330, 65 N.E. 1005 (1902). In Wildberger v. Cheek's Ex'r, 94 Va. 517,

stating that the statute applies to a devisee or legatee who is dead at the time the will is executed.[69]

CONCLUSION

This law note has been the product of an attempt to point out some of the circumstances which may prevent the operation of the antilapse statute in this state, with the overall objective of determining its effect upon class gifts.

If and when the problem arises wherein a testator has made a gift to his children, and a child predeceases the testator leaving issue, the problem should be approached by first asking these five questions:

1. Is it a class gift?

2. When did the class member die?

3. Are words of survivorship present or any language indicating an intention of the testator contrary to that of the antilapse statute?

4. Are there words creating a tenancy in common or is it a joint tenancy?

5. Will the antilapse statute be applied to class gifts in this state?

These questions are answered or commented upon in order:

1. As previously pointed out the gift may be construed as an individual one if the children are named, numbered, mentioned somewhere else in the will by name, or possibly even if not named or numbered at all.

2. It seems clear that the South Carolina antilapse statute would not protect the issue of an otherwise class member who died before the will was executed.

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27 S.E. 441 at 443 (1897), the court said, "The statute has regard rather to the class of individuals for whose relief it is interposed than to any technical distinction in the manner of the failure against which it proposes to guard them."

69. See Hash v. Hash, 64 Mont. 118, 208 Pac. 605 (1922). The amendment was passed after the death of the testator and the court refused to apply the original statute stating that to do so would be to usurp the powers of the legislature. *But see* Drafts v. Drafts, So.2d 473 (Fla.App. 1959), in which the court refused to apply the lapse statute to an already deceased beneficiary even though the statute contained the words " . . . or is dead at the time the will is executed. . . ." FLA. STAT. §731.20 (1957). Also see Nash, *Wills, Application of Florida Antilapse Statute to Class Gifts*, 14 U.MIAMI L.REV. 702 (1959).

3. The statute will not operate if there is language in the will clearly showing that the testator intended the gift to pass in a manner contrary to that proposed by it.

4. It appears evident in this state that words indicating an intention to create a tenancy in common must be present before such an estate can come into being. If a joint tenancy exists, the better rule would seem to be that there is no room for the operation of the antilapse statute since not only is there no lapse but there is also no language present in the antilapse statute indicating the legislature's intention to abolish the effect of a joint tenancy on a gift which has not vested.

5. An opinion of the writer as to the probable answer which the South Carolina Supreme Court will give to the question of whether the antilapse statute applies to class gifts would be purely speculative and based on the slight inferences which can be gathered from a reading of the few cases construing the antilapse statute in this state. There is no question in this writer's mind that the equitable and just result would be to allow the issue of the predeceased child to take his share, but there is also the conviction that the South Carolina statute was enacted strictly for the purpose of preventing a common law lapse, and any broader application would be an invasion of the province of the legislature. Although the South Carolina antilapse statute does not mention the word lapse, as some of the statutes in other states do, the early cases clearly placed this construction upon it. In *Pegues v. Pegues*[70] it was said, "the construction which has been generally put upon the statute, has been that it was intended to prevent a *lapse* arising from the death of the legatee after the execution of the will." (Emphasis added.) There is the further statement that "it was intended to make good a legacy which had become void." A class gift never lapses or becomes void unless all the class members die during the lifetime of the testator.

In addition, it was stated in *Suber v. Nash*[71] that there must be an intention to give the deceased child a legacy or devise before the antilapse statute can operate. No gift has

70. 11 Rich. Eq. 554 (S.C. 1850).
71. 84 S.C. 12, 65 S.E. 947 (1909).

been made to a child who merely fits into the description of a class unless he is living at the death of the testator.

To read into the statute a modification of these common law rules of construction is to allow one's concept of justice and equality as to what should have been done to interfere with the reality of what was done by the legislature.

It is this writer's opinion that the antilapse statute should be amended, but until that occurs, if ever, the draftsmen of wills should continue either to name the children or expressly state that the children of a deceased child should take the parent's share — a practice which is a common one.

WILLIAM M. HAGOOD III