

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.

Amended by Chapter 324, 2010 General Session