

Part 6 Rules of Construction for Wills

75-2-601 Scope.

In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a will.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-602 Will construed to pass all property and after-acquired property.

A will is construed to pass all property the testator owns at death and all property acquired by the estate after the testator's death.

Repealed and Re-enacted by Chapter 39, 1998 General Session

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

75-2-604 Failure of testamentary provision.

- (1) Except as provided in Section 75-2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.
- (2) Except as provided in Section 75-2-603, 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.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-605 Increase in securities -- Accessions.

- (1) If a testator executes a will that devises securities 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:
 - (a) securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

- (b) 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; or
 - (c) securities of the same organization acquired as a result of a plan of reinvestment.
- (2) Distributions in cash before death with respect to a described security are not part of the devise.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-606 Nonademption of specific devises -- Unpaid proceeds of sale, condemnation, or insurance -- Sale by conservator or agent.

- (1) A specific devisee has a right to the specifically devised property in the testator's estate at death and:
- (a) any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;
 - (b) any amount of a condemnation award for the taking of the property unpaid at death;
 - (c) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;
 - (d) property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;
 - (e) real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and
 - (f) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by Subsections (1)(a) through (e).
- (2) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to 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.
- (3) The right of a specific devisee under Subsection (2) is reduced by any right the devisee has under Subsection (1).
- (4) For the purposes of the references in Subsection (2) to a conservator, Subsection (2) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.
- (5) For the purposes of the references in Subsection (2) to an agent acting within the authority of a durable power of attorney for an incapacitated principal:
- (a) "incapacitated principal" means a principal who is an incapacitated person;
 - (b) no adjudication of incapacity before death is necessary; and
 - (c) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

Amended by Chapter 324, 2010 General Session

75-2-607 Nonexoneration.

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-608 Exercise of power of appointment.

In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if:

- (1) the power is a general power and the creating instrument does not contain a gift if the power is not exercised; or
- (2) the testator's will manifests an intention to include the property subject to the power.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-609 Ademption by satisfaction.

- (1) Property a testator gave in his lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if:
 - (a) the will provides for deduction of the gift;
 - (b) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise; or
 - (c) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.
- (2) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.
- (3) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 75-2-603 and 75-2-604, unless the testator's contemporaneous writing provides otherwise.

Repealed and Re-enacted by Chapter 39, 1998 General Session

75-2-610 Marital deduction formulas -- Wills.

For estates of decedents dying after December 31, 1981, where a decedent's will executed before September 13, 1981, contains a formula expressly providing that the decedent's spouse is to receive the maximum amount of property qualifying for the marital deduction allowable by federal law, this formula shall be construed as referring to the unlimited marital deduction allowable by federal law as amended by Section 403(a) of the Economic Recovery Tax Act of 1981.

Amended by Chapter 21, 1999 General Session

75-2-611 Direction to pay taxes in will.

A general direction in a will to pay all taxes imposed as a result of a testator's death or similar language shall not be construed to include taxes imposed on a "generation skipping transfer" under Section 2601 of the Internal Revenue Code of 1986 (or any successor or amended section

of similar content) unless the testator shall express an intention that these taxes be paid out of his estate by reference to the generation skipping tax or otherwise.

Repealed and Re-enacted by Chapter 39, 1998 General Session