

## Question MEE 5 – July 2021 – Selected Answer 1

1. The issue is whether the state's anti-lapse statute or Clause 3 of the testator's will determines who takes the share of a beneficiary who predeceased the testator.

The state in which a decedent was domiciled at his time of death will often determine issues related to distribution of a testator's estate in probate. State A's law governs the distribution of the decedent's estate, given that the decedent died as a domiciliary of State A. State A has an anti-lapse statute which states that if a bequest is made to a beneficiary who predeceases the testator, the deceased beneficiary's issue will take the deceased beneficiary's share. However, it also states that this rule applies, unless the will provides otherwise. Therefore, any clause in a will governed by State A law that contradicts State A's anti-lapse will take priority over State A's anti-lapse statute.

Here, testator's validly executed will states that if any beneficiary in Clauses 1 and 2 of the will predecease the testator, then the heirs of the deceased beneficiary shall take the beneficiary's bequest. Assuming a conflict were to arise between State A's anti-lapse statute and Clause 3 of the testator's will, Clause 3 of the testator's will governs.

**2. The issue is whether the charity or Doris's nephew will take the house, given that Doris predeceased the testator.**

A will speaks at the time of the testator's death. Additionally, a will is construed in order to give common meaning to the terms included in the will. Therefore, a term "heir" will often be interpreted as the issue entitled to an estate that would pass intestate.

Testator's will states that his house will go to his friend, Doris. However, Doris predeceased the testator, and therefore, it is necessary to analyze Clause 3 of the will. Clause 3 states that if a beneficiary predeceases a testator, then the "heirs" of the deceased beneficiary shall take the beneficiary's bequest. Utilizing the common meaning of the term "heir" in accordance with the proper construction of wills, Doris's nephew will be entitled to the house, as he is her sole heir would take her property if Doris were to have died intestate. Even though Doris bequeathed her entire estate to a charity in her will, the testator's will will be construed to give common meaning to the terms included, and the house will pass to Doris's nephew.

3. The issue is whether the residuary bequest to Bill lapse because of the express survivorship requirement in Clause 2 of the testator's will.

Express survivorship requirements in wills are accorded respect when interpreting a will. Even if a state has alternative survivorship requirements, the content of the will governs, as the testator's intent is an extremely important factor in determining the disposition of the testator's estate.

Here, Clause 2 of testator's will states that testator's residuary estate will go "in equal shares" to Alice and Bill, conditioned upon whether each individual survives the testator. Clause 3 alternatively states that the heirs of a deceased beneficiary shall take the beneficiary's bequest, if the testator's "will does not expressly provide otherwise." As the clauses do not contradict one another given that Clause 2 included its own survivorship requirements, the residuary bequest to Bill lapses, as Bill did not survive the testator and the testator's will makes it clear that the testator did not intend for the residuary gift to Bill to go to Bill's heirs upon lapsing.

#### **4. The issue is whether Alice or the testator's sister take the Bill's lapsed residuary gift.**

If a gift in a will lapses, it falls into the residuary. If a beneficiary of a residuary gift is named, then that individual will take the lapsed gift. If the will does not list anyone to take a residuary gift, then the testator's issue or other relatives will take the gift.

Here, assuming Bill's residuary gift lapsed, his residuary gift falls into the residuary. A court could determine that Alice is entitled to the entire residuary gift, as she is listed as a beneficiary of the residuary. However, the will also states that the residuary estate should be distributed in "equal shares" to Alice and Bill. Therefore, it is possible that the testator only intended for Alice to have half of the residuary gift even if Bill's gift were to lapse. If a court finds this to be the case, then the testator's sister will take Bill's residuary gift, as she is the testator's only surviving relative.

#### **5. The issue is whether Bill's one-half share should pass to his daughter if the gift does not lapse.**

If a gift does not lapse, then the testator's will provides that it passes to the "heirs of the deceased beneficiary." Here, Bill died intestate, and his entire probate estate passed to his daughter, his sole heir. As a result, if Bill's one-half share of the residuary does not lapse, then under the terms of the will, Bill's share of the residuary should pass to his heir, his daughter.

## Question MEE 5 – July 2021 – Selected Answer 2

Clause 3: Clause 3 applies. Here the issue is whether the anti-lapse statute applies over the clause in T's will. Generally, the law of the state where testator was domiciled at death applies in will construction and probate. Here, the testator was a domiciliary of state A, thus state A law applies. The State A statute states that unless the decedent's will provides otherwise, a bequest made to a beneficiary who predeceases decedent, will pass to the issue if the predeceasing beneficiary leaves issue surviving T. Here, T's will explicitly states that if any beneficiary of either provision predeceases her, the heirs of the deceased beneficiary shall take the beneficiary's bequest. Since T's will provides a contingency for predeceased beneficiaries, the clause applies.

T's House: Doris' nephew will take. As mentioned above, the clause states that the predeceased beneficiary's heir will take. Here, the nephew is Doris' sole heir. Thus, he will take. The fact that Doris died testate with a will bequeathing everything to charity is irrelevant because the T's will governs the bequest of T's property.

Bequest to Bill: The residuary bequest to Bill does lapse because of the express right of survivorship requirement. The issue is the interpretation of the will between the second and the third clause. The third clause is summarized above, and is inconsistent with the 2nd clause's express survivorship agreement. However, the 3rd clause states that in order for the deceased beneficiary's heirs to take, they must have predeceased T and T's will "does not expressly provide otherwise." Thus, any express provision inconsistent with clause 3 will govern. Here, there is an express requirement that the residue beneficiaries survive T. Thus, Bill was required to have survived T in order to take. Therefore the gift lapses. The anti-lapse statute does not apply because, the anti-lapse statute applies to beneficiary's who are descendant's of T's grandparents. Here, Bill is a friend and is not a lineal descendant of T's grandparents. Thus, the gift lapses.

Under the common law, there is no residue of a residue. Thus, Bill portion, if it lapsed, would pass via intestacy. Under intestacy, a decedent's spouse would take, if there is no spouse, then children would take, if no children then the parent's would take, if there are no surviving parents, then the decedent's siblings would take. T's sister is the only surviving relative of T. Thus, she would take T's portion. However, states that follow the modern trend, allow the remaining residue beneficiaries to take the lapsed portion in proportion their interest in the residue. Since Alice is the other residue beneficiary, then she would take Bill's portion.

Assuming that Bill's gift did not lapse, then Bill's daughter would take. The common law rules of intestacy outlined above would apply here. Since Bill died intestate, and his daughter is his sole heir, she would take his interest in the residue.

### **Question MEE 5 – July 2021 – Selected Answer 3**

#### **1. Anti-Lapse Statute v. Clause 3**

Clause 3 determines who takes the share of a beneficiary who predeceases the testator. At issue is whether a testator can overcome an anti-lapse statute with his own will. All states have anti-lapse statutes. An anti-lapse statute will generally preserve a bequest to a pre-deceasing beneficiary for his issues. The anti-lapse statute will apply unless the testator provides otherwise in his will.

Here, the testator has validly executed a will in which she has provided what will happen in case a beneficiary under her will predeceases her. Clause 3 of the will states that if any beneficiary under either of the foregoing two provisions . . . predeceases [the testator] and [the testator's] will does not expressly provide otherwise, the heirs of the deceased beneficiary shall take the beneficiary's bequest." Thus, the testator has overcome anti-lapse statute with a provision in her will. Here, Clause 3 will determine who takes in replace of a predeceased testator.

#### **2. The House**

Doris's nephew will take the house under Clause 3. At issue is whether "heirs" in the will will be interpreted as heirs at law, or heirs under the beneficiary's will. The word "heirs" in a will will generally be construed as heirs at law. Generally, this includes family members who would take if the person died intestate. This construction is usually more in line with the testator's intent and with anti-lapse statute in general.

Here, Doris has bequeathed her entire estate to charity. She has also left nephew as her sole heir. Thus, construing "heirs" as above, the house will go to Doris's nephew, rather than the charity, because the nephew is her heir at law and sole remaining family member.

#### **3. Express survivorship requirement.**

The residuary gift to Bill will lapse because of the express survivorship agreement. At issue is whether an express survivorship agreement will overcome a state's anti-lapse statute. In general, as stated above, an anti-lapse statute will save a gift for a predeceasing beneficiary's issues unless the will expressly states otherwise. By stating that Bill will take one half of the residuary "if he survives me," the testator has taken the anti-lapse statute out of play again. Clause 3 will not work to overcome the

survivorship language in Clause 2 because Clause 3 states that the Clause 3 will apply if the "will does not expressly provide otherwise." Because Clause 2 expressly provides that the beneficiaries will only take if they survive, Clause 2 overcomes Clause 3.

#### **4. If bequest to Bill lapses.**

If the bequest to Bill lapses, his one-half share of the residue will go to Alice. At issue is what happens to a lapsed gift of a testator's residue. At common law, the "no residue of a residue" rule controlled when a residuary gift lapsed. This meant that the lapsed residuary gift would fall into the intestate estate, rather than pass to the remaining residuary beneficiary, if any. However, the modern rule adopted in most states is that when a residuary gift fails, the remaining residuary beneficiaries will take the lapsed gift pro-rata according to their shares in the residue.

Here, because Alice has survived the testator, and Bill's gift has lapsed, according to the modern rule, Alice will take Bill's share of the residuary gift. She is the only other residuary beneficiary, so she will take all of it.

#### **5. If bequest to Bill does not lapse.**

If the bequest to Bill does not lapse, his one-half share of the residue will pass to his daughter. The daughter is Bill's only heir, and so she will take in place of Bill under the will.