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# SJC narrows interpretation of anti-lapse statute

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Eric T. Berkman

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The Supreme Judicial Court has ruled that a will provision leaving cash assets to the testator's mother "if she survives me" lapsed when the mother predeceased her.

Under the anti-lapse statute, G.L.c. 190B, §2-603, if a devisee who is a grandparent, parent or issue of the testator predeceases the testator, the devise falls to the issue of the deceased devisee.

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Here, testator Heather Hossack’s March 2016 will, drafted by a Connecticut attorney not licensed in Massachusetts, left cash assets from a U.S. Trust account to her 85-year-old mother, Ethel Wyman, if she survived Heather. Wyman died in 2018, and Heather died unexpectedly a year later.

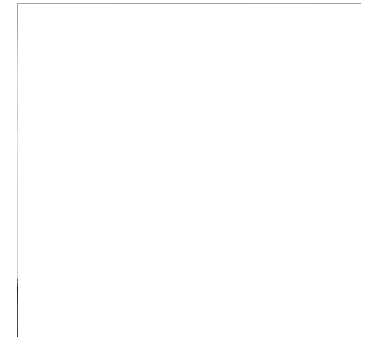
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Heather’s will did not specify, however, what would happen to the devise if Wyman predeceased her. Accordingly, a dispute arose over whether defendant John Hossack, Heather’s brother, was entitled to the cash assets under the anti-lapse statute as Wyman’s living issue, or whether Wyman’s devise fell to the residuary estate, which was left to plaintiff Thomas Gibney, Heather’s friend and apparent caretaker.

Ruling in a declaratory action brought by Gibney, a Probate Court judge determined that the statute did not, in fact, apply, and thus Wyman’s devise should go to Gibney.

The SJC affirmed.



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“The language ‘if she survives me’ evinces that Heather had the foresight to consider that the devisee ... might predecease her and, upon such consideration, conditioned the devise upon the devisee’s survival,” Justice Dalila Arguez Wendlandt wrote for the court. “There is no need to substitute a judgment (in the form of the rule of construction embodied in the anti-lapse statute) as to what the testator might have done if she had considered the issue; Heather contemplated the eventuality and provided for it expressly in the will.”

The 14-page decision is *Gibney v. Hossack, et al.*, [Lawyers Weekly No. 10-043-24](https://masslawyersweekly.com/2024/04/14/wills-and-trusts-anti-lapse-statute/) (<https://masslawyersweekly.com/2024/04/14/wills-and-trusts-anti-lapse-statute/>).

**A touch of grey**

Gibney’s attorney, Frank P. Muzio of Salem, said it was the right result given the facts of the case. He also noted the lack of existing case law on the anti-lapse statute.

“The decision was pulled from the Appeals Court by the SJC, so I suspect they felt this was an important enough issue to use the case as a means of clarifying some grey,” Muzio said.

Juliet A. Davison of Boston, who represented Heather's brother, John Hossack, said the case illustrates why Massachusetts residents should retain Massachusetts estate counsel to draft their wills.

"This will was prepared on a rush basis by a young Connecticut attorney who never met the decedent and prepared the will in about an hour and a half just before the testator was preparing for surgery," Davison said "There were many irregularities on the face of the will, but my client hasn't challenged the will, so it was in probate."

***I suspect [the SJC] felt this was an important enough issue to use the case as a means of clarifying some grey.***

***– Frank P. Muzio, Salem***

Davison added that, in Connecticut, words of survivorship, like the "if-she-survives-me" language in the case, would not suffice on their own to defeat the anti-lapse statute.

"Our argument was that it was incorrect to rely on talismanic language of survivorship to interpret [the testator's intent] in Gibney's favor," she said. "The Massachusetts Uniform Probate Code is not a model of clarity on this issue. It does not say that survivorship language always states an intention to defeat the anti-lapse statute. The equities were so plainly in my client's favor that we thought this was a good case to present this argument."

Brian Salisbury, a probate attorney in Franklin, said the question of whether a survival qualifier requirement circumvents the anti-lapse statute has lingered since the enactment of the MUPC and that it was helpful to put that question of interpretation to bed.

"Practically speaking, he added, "the takeaway is to avoid ambiguity in estate plans. When in doubt, spell it out so there's no question of the decedent's intent. And keep careful notes of conversations about your clients' intentions in case it ever becomes a subject of litigation."

Waltham lawyer Leo J. Cushing said he was pleased to see the SJC stand its ground and rule that there was no ambiguity.

"There's a tendency for appellate courts to find an ambiguity and send it back down to the Probate Court when it's really not necessary in many of the cases," he said. "The problem of sending it back for a factual finding is that it's another two or three years before the litigation ends."

Still, he said, the decision will necessitate adding language to wills and trusts spelling out what happens if there is a survivorship requirement and the devisee or intended beneficiary predeceases the testator.

Boston's Lawrence D. Hunt said the decision makes practical sense but also highlights how words can be interpreted differently depending on context.

Here, he said, the language used in the will seemed consistent with general drafting norms in Massachusetts to defeat the anti-lapse statute.

But he emphasized that the court did not rely solely on the words "if she survives me" in making its decision; it also relied on Wyman's age and the will's lack of "per stirpes" language regarding Wyman's devise while employing such language elsewhere.

"I would take the broader implication to be that these cases always revolve around facts and circumstances, and while conditioning a bequest on survivorship would appear to defeat the anti-lapse statute, language is always open to interpretation and challenge," Hunt said.

Justin R. McCarthy of East Longmeadow noted that another account that Heather left to Wyman, a Baird account, named her brother, John, as beneficiary. That, plus the fact that Heather inherited the U.S. Trust account from their father and that she left a Fidelity account to her brother

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***I would take the broader implication to be that these cases always revolve around facts and circumstances, and while conditioning a bequest on survivorship would appear to defeat the anti-lapse statute, language is always open to interpretation and challenge.***

**– Lawrence D. Hunt, Boston**

suggested she also may have wanted him to inherit the U.S. Trust account.

The entire problem could have been avoided if Heather had named a beneficiary for the U.S. Trust account as she had for the Baird account, McCarthy said. The funds in the Baird account went directly to John, as beneficiary, upon Heather's death.

Still, McCarthy said the SJC made the correct decision.

"The plain language of the will negated the anti-lapse statute," he said.

### **To lapse or not to lapse**

When Heather died in March 2019, she was single and had been in a long-term relationship with defendant Donald Etchison. Gibney, her longtime neighbor and friend, was her health care proxy.

She was predeceased by her parents, leaving her brother, John, as her only living immediate family member.

Three years earlier, Heather executed a will that devised cash assets held in Baird and U.S. Trust accounts to her mother, Wyman, "if she survives me."

Additionally, she devised cash assets held in Fidelity accounts to John "if he survives me."

**Gibney v. Hossack, et al.** (<https://masslawyersweekly.com/2024/04/14/wills-and-trusts-anti-lapse-statute/>)

**THE ISSUE:** Did a will provision leaving cash assets to the testator's mother "if she survives me" lapse when the mother predeceased her?

**DECISION:** Yes (Supreme Judicial Court)

**LAWYERS:** Frank P. Muzio of Welch & Muzio, Salem (plaintiff)

Juliet A. Davison of Boston (defense)

Meanwhile, she left all her tangible personal property and real property to Etchison per stirpes and named Gibney as devisee of her residuary estate per stirpes.

The Connecticut lawyer who drafted the will had Heather fill out a questionnaire about the desired disposition of her assets and reviewed his draft with her by telephone.

After Heather died, Gibney was appointed personal representative of her estate and it was admitted to probate

Estate counsel informed John Hossack that because his mother predeceased Heather, her devise had lapsed and the U.S. Trust accounts would fall to the residuary estate.

John challenged that interpretation, arguing that the anti-lapse statute required that the failed devise fall to him.

Gibney filed a declaratory action in Probate Court, contending that the words “if she survives me” evinced an intent to avoid the anti-lapse statute.

Judge Jennifer M.R. Ulwick ruled in Gibney’s favor. The SJC took up John’s subsequent appeal on its own motion.

### Decision affirmed

In affirming Ulwick’s decision, the SJC said its conclusion was informed by the fact that the Legislature, in adopting the MUPC, rejected the Uniform Probate Code’s version of the anti-lapse statute, which sets forth the rule of construction that John was advocating for in the present case.

“Under the proposed subsection, the testator would have had to make an explicit statement of disinheritance or to identify an alternative devisee to avoid the anti-lapse statute,” Wendlandt observed. “Given the comprehensive scheme set forth in the MUPC, we regard the Legislature’s rejection of this proposal as purposeful.”

Wyman was in her mid-80s when Heather executed the will, Wendlandt noted. Additionally, devises to the mother and brother were conditioned on survivorship, while devises to Gibney and Etchison were per stirpes, Wendlandt said.

“[I]n other words, where Heather intended that a devise should fall to a deceased devisee’s issue, she did so expressly,” she wrote. “The absence of similar language for Wyman and John bolsters our conclusion that Heather intended for Wyman and John to receive their devises only if they survived her; otherwise, these devises would lapse and fall to the residuary estate.”

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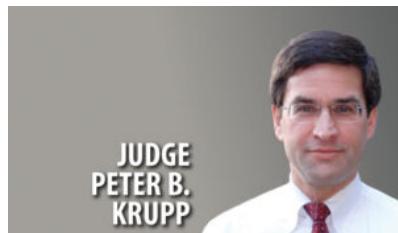


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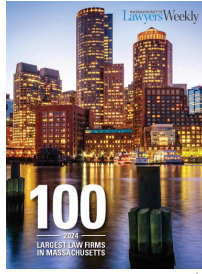
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