

Under the terms of his duly probated will, a testator devised his house to his "grandchildren in fee simple" and the residue of his estate to his brother. The testator had had two children, a son and a daughter, but only the daughter survived him. At the time of the testator's death, the daughter was 30 years old and had two minor children (grandchildren of the testator) who also survived the testator.

A third grandchild of the testator, who was the child of the testator's predeceased son, had been alive when the testator executed the will, but he had predeceased the testator. Under the applicable intestate succession laws, the deceased grandchild's sole heir was his mother.

A statute of the jurisdiction provides as follows: "If a devisee, including a devisee of a class gift, who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will or fails to survive the testator, the issue of such deceased devisee shall take the deceased's share under the will, unless the will expressly provides that this statute shall not apply. For this purpose, words of survivorship, such as 'if he survives me,' are a sufficient expression that the statute shall not apply."

Who now owns the house?

- A. The testator's brother.
- B. The testator's two surviving grandchildren.
- C. The testator's two surviving grandchildren and all other grandchildren who are born to the testator's daughter.
- D. The testator's two surviving grandchildren and the deceased grandchild's mother.

Explanation:

A gift is a voluntary transfer of property without payment or consideration (eg, by devise). A **class gift** is created when the **gift recipients** (ie, donees) are unspecified but can be **identified in the future** (eg, upon the donor's death). Under the rule of convenience, a class closes once any member is entitled to immediate possession of the property, and anyone born after the class closes cannot claim an interest in that property.*

However, if a donee receives a gift **under a will** and **predeceases the testator**, the gift will **lapse** and become invalid unless the will or a statute provides otherwise. An **anti-lapse statute** (as seen here) will save the gift from lapsing if the donee has a **specified family relation** to the testator AND the donee is survived by his/her own children or other **lineal descendants** (ie, issue). The surviving issue will then take the gift in place of the donee.

Here, the testator devised his house to his "grandchildren in fee simple." The testator had three grandchildren, one of whom predeceased the testator. This jurisdiction's anti-lapse statute applies to a testator's lineal descendants. But it does *not* save the deceased grandchild's gift because his sole heir was his mother—ie, he has no lineal descendants. As a result, the house is now owned by the testator's two surviving grandchildren (**Choices C & D**).

*Those born after a class closes are excluded from the class, but those already in utero upon closing are included.

(Choice A) The brother, as the recipient of the residuary estate, would have received the house had no grandchildren been eligible for the devise (eg, had they all predeceased the testator without lineal descendants).

Educational objective:

A gift conveyed under a will typically lapses if the recipient predeceases the testator. However, an anti-lapse statute will save the gift if the recipient (1) has a specified family relation to the testator and (2) is survived by his/her own children or other lineal descendants.

References

Restatement (Third) of Property: Wills and Other Donative Transfers §§ 1.2, 5.5 (Am. Law Inst. 1999) (lapse and anti-lapse statutes).

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Devise of class gift

