Forfeiture and the Effect of Section 33A of the Wills Act 1837

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Introduction

The forfeiture rule is “the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing”.¹ The focus of this paper is not on the offences to which the common law rule applies or the circumstances in which its application may be judicially modified under the Forfeiture Act 1982.² Rather, it is on the destination of the property in an estate by virtue of the rule’s application.

Section 33A of the Wills Act 1837 (applicable to deaths on or after 1 February 2012) provides that “where a will contains a devise or bequest to a person who” “has been precluded by the forfeiture rule from acquiring it”,³ “[t]he person is, unless a contrary intention appears by the will, to be treated for the purposes of this Act as having died immediately before the testator”.⁴ At first glance, the section straightforwardly modifies the previous rule that a forfeited gift falls into residue,⁵ with its possible consequence of the undesirable and “premature” application of the intestacy rules. On this analysis, by virtue of section 33A any will is now simply read as if the forfeiting beneficiary has predeceased the testator, making it less likely to be necessary to apply the intestacy rules (with the same qualification) to determine the appropriate destination of the deceased’s estate. As this paper will explain, however, the phrase “for the purposes of this Act” has created unintended complications in the minds of some, with the potential considerably to reduce the impact of section 33A in an undesirable manner.

The paper begins by setting out the background to section 33A, including the Law Commission project that recommended its enactment. It then examines the perceived difficulty with the scope of section 33A with reference to scholarly works and the few judicial utterances on the section. The difficulty is said to be that section 33A treats a (disclaiming or forfeiting) beneficiary as having predeceased only where that beneficiary is a lineal descendant of the testator and the gift can be conferred by statute on remoter lineal descendants.⁶ The paper

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¹ Forfeiture Act 1982, s.1(1), albeit that this is not a codification of the rule: *Re Ninian* [2019] EWHC 297 (Ch); [2019] W.T.L.R. 645 at [5].

² See, e.g., B. Sloan, *Borkowski’s Law of Succession*, 4th edn (Oxford: OUP, 2020), pp.273-280.

³ Wills Act 1837, s.33A(1)(b). The section also applies to a *disclaimed* devise or bequest (s.33A(1)(a)).

⁴ Wills Act 1837, s.33A(2).

⁵ *Jones v Midland Bank Trust Co Ltd* [1998] 1 F.L.R. 246.

⁶ See Wills Act 1837, s.33, considered further below.

then considers whether this problem is truly present, alongside what the solution to the problem may be if it is.

The Background to Section 33A

The essential prompt for the enactment of section 33A was *Re DWS (deceased)*, a case about an intestacy rather than a will.⁷ The claimant, T, unsuccessfully sought a declaration that he was entitled to the estates of his grandparents, Mr and Mrs S, by virtue of the law of intestacy.⁸ Mr and Mrs S had been murdered by T's father (their son), R. The forfeiture rule applied to R's entitlement, but in 2001 the Court of Appeal held that the intestacy rules⁹ could not be applied as if R had predeceased Mr and Mrs S. Such predecease was a precondition of T receiving the estate on a literal construction of the statutory provisions as they then stood. Aldous LJ saw "nothing absurd in the result that if a surviving parent is prevented from taking by disclaimer or disqualification, the intestate's estate should pass, not to his child, but to others".¹⁰ The outcome was that the estates went to others instead of T, including the estate of Mr S's sister.¹¹

In response to the decision and following a request from the then Department of Constitutional Affairs, the Law Commission published a consultation paper in 2003,¹² followed by a Report on *The Forfeiture Rule and the Law of Succession* in 2005.¹³ *Inter alia*, the Commission recommended that the intestacy rules be amended so that a person who forfeits or disclaims his interest is indeed treated as having predeceased the intestate, which would have allowed T to inherit on the facts of *Re DWS*. This is now reflected in section 46A of the Administration of Estates Act 1925.

More pertinently for present purposes, the Commission also recommended that "where a person forfeits a benefit under a will through having killed the testator, the will should be applied as if the killer had died immediately before the testator, unless the will contains a provision to the contrary",¹⁴ and ultimately recommended a similar rule for disclaimer.¹⁵ The Commission's work is considered in more detail in the next subsection of the paper. The then Labour

⁷ [2001] Ch. 568.

⁸ Administration of Estates Act 1925, s.46.

⁹ Specifically the provision relating to statutory trusts in Administration of Estates Act 1925, s.47(1)(i), rendered applicable by s 46(1)(ii).

¹⁰ [2001] Ch. 568 at [24].

¹¹ Sedley LJ, dissenting, thought that Mr and Mrs S's estates should revert to the Crown as *bona vacantia*, but agreed that the construction advanced by T could not be supported.

¹² Law Commission, *The Forfeiture Rule and The Law of Succession: A Consultation Paper* (Consultation Paper 172, 2003).

¹³ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005).

¹⁴ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [4.11].

¹⁵ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [4.28].

Government accepted the Commission's recommendations in 2006,¹⁶ incorporating them into a draft Civil Law Reform Bill¹⁷ (which was the subject of a public consultation and consideration by the House of Commons Justice Committee).¹⁸ The Coalition Government did not proceed with that Bill, but ultimately supported a Private Members' Bill largely giving effect to the Law Commission's recommendations.¹⁹ Eventually, the wills recommendation was reflected in the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, which inserted a new section 33A into the Wills Act 1837. Section 33A provides as follows:

“(1) This section applies where a will contains a devise or bequest to a person who—

(a) disclaims it, or

(b) has been precluded by the forfeiture rule from acquiring it.

(2) The person is, unless a contrary intention appears by the will, to be treated for the purposes of this Act as having died immediately before the testator.

(3) But in a case within subsection (1)(b), subsection (2) does not affect the power conferred by section 2 of the Forfeiture Act 1982 (power of court to modify the forfeiture rule).

(4) In this section ‘forfeiture rule’ has the same meaning as in the Forfeiture Act 1982.”

While this appears to be a straightforward “deemed decease” interpretative provision, it will become clear that matters have been thought more complicated by some.

The Perceived Problem of Scope and Solutions to it

The Perceived Problem

Despite apparently clear intentions on the part of the Law Commission, some commentators have expressed the opinion that the scope of section 33A is not as broad as it first appears. Ian Williams, for example, has pointed out that “the

¹⁶ *Hansard*, HL Deb 18 December 2006 c221WS.

¹⁷ Ministry of Justice, *Civil Law Reform: A Draft Bill* (Cm 7773, 2009).

¹⁸ House of Commons Justice Committee, *Draft Civil Law Reform Bill: Pre-Legislative Scrutiny* (Sixth Report of Session 2009–10, HC 300).

¹⁹ C. Fairbairn, *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Bill: Bill 8 of 2010-11* (House of Commons Research Paper 11/07, 2011).

statutory deemed predecease rule only applies ‘for the purposes of this Act’.²⁰ On his analysis, it is significant that the 1837 Act “is not a statute which gives general force to wills, but merely sets out various rules in relation to wills, their validity and effect”. Because “[p]redecease is only relevant in [the Act itself] in relation to the operation of section 33”,²¹ under which a (*prima facie* lapsed) gift made to a predeceasing lineal descendant presumptively takes effect for the benefit of surviving further lineal descendants,²² Williams opines that “section 33A can only have effect in relation to section 33”.²³ He thus considers section 33A to be “irrelevant” in relation to gifts to people who are not lineal descendants, and “in relation to ‘gift overs’ ..., when property is left to a person with an explicit provision about what is to occur if that person predeceases the testator”.²⁴ We will see that the Law Commission explicitly contemplated that such cases would fall within its recommendation, and its draft Bill also used the “for the purposes of this Act” formulation. But for Williams, “because that gift over does not take effect through the Wills Act, it is not covered by section 33A” as actually drafted.²⁵

The current authors of *Williams on Wills* take essentially the same view as Dr Williams on the limited scope of section 33A, while acknowledging that “[t]his was not the Law Commission's intention”,²⁶ as do the authors of *Underhill and Hayton*.²⁷ In *Macmillan Cancer Support v Hayes*, the testatrix Sheila was killed by her husband Peter, her sole primary beneficiary, before Peter died by suicide.²⁸ Judge Mark Raeside QC acknowledged the issue highlighted in *Williams on Wills*, but we will see that he managed to avoid resolving the section 33A conundrum directly by instead granting relief from forfeiture in respect of Peter's interest in Sheila's estate.²⁹

Normatively, there is little general reason to apply the intestacy rules, a possible consequence of treating forfeited property as having fallen into residue, instead of treating the killer as having predeceased the testator.³⁰ Yet without the benefit of section 33A, the intestacy rules can be applied where (as in *Hayes*) the will specifies what is to happen to the residuary gift only where the primary beneficiary *predeceases* the testator, rather than specifying a substitute beneficiary in the event that the primary gift fails for *any* reason. A deemed

²⁰ I. Williams, “How Does the Common Law Forfeiture Rule Work?” in B. Häcker and C. Mitchell (eds), *Current Issues in Succession Law* (Oxford: Hart Publishing, 2016), p.52.

²¹ Williams, “How Does the Common Law Forfeiture Rule Work?”, p.52.

²² See, e.g., Sloan, *Borkowski's Law of Succession*, pp. 260-61.

²³ Williams, “How Does the Common Law Forfeiture Rule Work?”, p.52.

²⁴ Williams, “How Does the Common Law Forfeiture Rule Work?”, p.52.

²⁵ Williams, “How Does the Common Law Forfeiture Rule Work?”, p.52.

²⁶ R.F.D Barlow *et al*, *Williams on Wills*, 10th edn (London: LexisNexis, 2014) at [9.17]. For the avoidance of doubt, the original author of *Williams on Wills*, Sir William James Williams, should be distinguished from Dr Ian Williams.

²⁷ D. Hayton, P. Mitchell and C. Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 19th edn (London: LexisNexis, 2016) at [29.4].

²⁸ [2017] EWHC 3110 (Ch); [2018] W.T.L.R. 243.

²⁹ [2017] EWHC 3110 (Ch) at [35]-[36].

³⁰ See, generally, Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [4.9]-[4.10].

predecease is much more likely to accord with the testator's wishes in the circumstances that transpired, and respecting such wishes is a general theme running through the endeavours of both the Law Commission and Parliament leading up to the 2011 Act. In *Hayes*, Sheila's distant Australian relatives would have inherited under the intestacy rules, in preference to the "long list of charities...as well as some...friends" whom Sheila no doubt carefully chose as will beneficiaries in the event that Peter predeceased her.³¹ It seems unlikely that inheritance by the Australian relatives is what she would have wanted, notwithstanding that her husband was found to have unlawfully killed her. The irony is that if the forfeiture rule had applied without being adjusted by either section 33A or relief under the 1982 Act (the latter being chosen on the facts), the chosen beneficiaries would have, "in effect, receive[d] about half of Peter and Sheila's joint estates".³² This is highly likely to have thwarted Sheila's intentions rather than giving effect to them, by virtue of a rule that is ostensibly designed to protect her interests to some extent.

There is a possibility that a killer's actions might hypothetically have caused the deceased to feel differently about substitute beneficiaries. For example, where the substitute beneficiaries are the killer's children who are "mere" step-children of the deceased, she may have preferred her own "blood" relatives to inherit. But such imputations are highly fact-dependent and speculative, and are particularly likely to be inappropriate in cases of assisted dying or suicide pacts. *Hayes* itself exhibited *some* characteristics of both those scenarios, albeit that the coroner held Sheila to have lacked the capacity to make a decision about her life at the time of her death. A "deemed predecease" rule is likely to be even more suited, if anything, to a disclaimer situation, to which section 33A also applies. In any case, Roger Kerridge has noted that the section is likely to have little impact in cases of disclaimer since (unlike a forfeiting person) a person minded to disclaim could simply choose who should receive her interest through a variation in any event.³³

The preferable normative course, then, is to assume that the deceased would have wanted the very beneficiaries she had chosen to inherit in the event that the killer could not, even if she contemplated only predecease. The remainder of this section will therefore consider mechanisms through which the *Williams/Williams* interpretation of section 33A can be avoided.

Solution 1: A Broad and Purposeful Construction of "for the purposes of this Act"

In *Henderson v Wilcox*, in contrast to *Hayes*, the interpretation of section 33A put forward by Dr Williams and the authors of *Williams on Wills* does not appear to have been considered by Judge David Cooke.³⁴ Mrs Henderson's son and sole primary beneficiary Ian had been convicted of her manslaughter, and her will

³¹ [2017] EWHC 3110 (Ch) at [11].

³² [2017] EWHC 3110 (Ch) at [22].

³³ R. Kerridge, *Parry and Kerridge: The Law of Succession*, 13th edn (London: Sweet & Maxwell, 2016) at [14-83] n.300; see Inheritance Tax Act 1984, s.142.

³⁴ [2015] EWHC 3469 (Ch); [2016] 4 W.L.R. 14.

named her nephew Julian “as substitute beneficiary if Ian should predecease his mother”.³⁵ The judge straightforwardly asserted that:

“The effect of section 33A of the Wills Act 1837 is that if Ian is precluded from inheriting under the will by virtue of the forfeiture rule, he is to be deemed to have died immediately before the testator, with the result that Julian would inherit in his place.”³⁶

Since Julian was a nephew and thus not a lineal descendant, he could not necessarily have pleaded section 33 in aid of his claim to the estate. Moreover, he would not have benefitted under the intestacy rules because at least Mrs Henderson’s younger sister survived her.³⁷ It therefore appears to have been assumed that “for the purposes of this Act” equated to “for the purposes of giving effect to a valid will”. In effect, the whole will was given effect on its own terms, with the exception of treating Ian as having predeceased Mrs Henderson (Ian’s application for relief from forfeiture being refused in relation to his mother’s estate *per se*). Similarly, several other works omit expressly to mention a limitation on section 33A’s scope consistent with the views of Dr Williams and the editors of *Williams on Wills*.³⁸

A possible counter-argument is that section 33 *was* applicable on the facts of *Henderson*, despite not apparently being mentioned in the judgment. This would be because the primary gift was to a lineal descendant (Ian) and section 33(1) expressly conferred authority on Mrs Henderson to make the substitutionary gift to Julian because its general rule is not applicable where “a contrary intention appears by the will”.³⁹ The argument would thus run that the gift to Julian was made under the Act rather than the will alone, meaning that section 33A could be applied. But this very discussion illustrates the considerable artificiality of any distinction between gifts taking effect via the will *per se* and doing so via the 1837 Act. Conversely, it seems that Dr Williams may not support this analysis of the effect of section 33, since he makes a general statement that section 33A has “no effect in relation to ‘gift overs’”.⁴⁰

It may be that the limited scope of “for the purposes of this Act” and thus section 33A feared by Dr Williams, *Williams* and *Hayes* is an overly pessimistic view in any event. The 1837 Act certainly did not introduce wills as a means of passing property on death, and wills have a long and complex history in English

³⁵ [2015] EWHC 3469 (Ch) at [4].

³⁶ [2015] EWHC 3469 (Ch) at [4].

³⁷ Administration of Estates Act 1925, s.46.

³⁸ L. Tucker *et al*, *Lewin on Trusts*, 20th edn (London: Sweet & Maxwell, 2020) at [8-034]; S. Ross, *Inheritance Act Claims*, 4th edn (London: Sweet & Maxwell, 2017) at [7-202]; J. Ross Martyn *et al*, *Williams, Mortimer & Sunnucks - Executors, Administrators and Probate* 21st edn (London: Sweet & Maxwell, 2018) at [68-10]; R. Hedlund, *The Law of Succession* (Saltford: Hall and Stott Publishing, 2019), p.108. cf., e.g., Kerridge, *Parry and Kerridge: The Law of Succession* at [14-83] n 301, citing *Williams on Wills* and asserting that the effect of the words “for the purposes of this Act” is “not entirely clear”.

³⁹ Wills Act 1837, s.33(1).

⁴⁰ Williams, “How Does the Common Law Forfeiture Rule Work?”, p.52.

Law.⁴¹ In addition, the Act by no means codifies the law of wills. But section 3 of the Act expressly provides that:

“It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to...”

Admittedly, this statement could be said to reflect the Act’s aim of removing distinctions between formality rules for different types of property.⁴² But its presence, combined with the Act’s various provisions on formalities,⁴³ construction⁴⁴ and capacity⁴⁵ associated with wills, may well render it arguable that all wills take effect by virtue of the 1837 Act to an extent. If this were true, the concern about the phrase “for the purposes of this Act” may fall away.

It must also be noted that death, or the order of death, is presumed for other purposes, such as under the Presumption of Death Act 2013 or for the purposes of the Commorientes rule (deeming the eldest to die first in circumstances where the order of death is uncertain) under the Law of Property Act 1925.⁴⁶ It is thus plausible that the true intention of Parliament was to apply section 33A to all matters within the scope of the 1837 Act per se while leaving other statutory presumptions etc concerning death untouched, not least since there may be no suggestion that the killer has died at all. The Law Commission was anxious to provide a solution that “does least damage to the surrounding law”, and was conscious that a “deemed predecease” rule is a fiction that could exclude the very fact of the killing.⁴⁷ It thus expressly emphasised that its recommendations were “confined to the construction of the intestacy legislation and of wills, and do not amount to a presumption of predecease for all purposes”, not least the consequences of forfeiture for a joint tenancy (which falls outside the law of wills).⁴⁸ Similarly, the Chair of the Justice Committee that had considered a precursor to the new section 33A emphasised that “the deemed predeceased rule has no other legal effect [such that] determining that someone is deceased for the

⁴¹ R. Kerridge, “Testamentary Formalities in England and Wales” in K. Reid, M. de Waal and R. Zimmermann (eds), *Comparative Succession Law: Volume I: Testamentary Formalities* (Oxford: OUP, 2011), pp.307–12.

⁴² See further Kerridge, “Testamentary Formalities in England and Wales” in K. Reid, M. de Waal and R. Zimmermann (eds), *Comparative Succession Law: Volume I: Testamentary Formalities*, pp.311–12.

⁴³ Wills Act 1837, s.9.

⁴⁴ See, e.g., Wills Act 1837, ss.24, 29.

⁴⁵ Wills Act 1837, s.7, albeit that testamentary mental capacity of an adult is determined by judicially-developed law. See, in particular, *Banks v Goodfellow* (1869–70) 5 Q.B. 549.

⁴⁶ Law of Property Act 1925, s.184.

⁴⁷ Law Commission, *The Forfeiture Rule and The Law of Succession: A Consultation Paper* (Consultation Paper 172, 2003) at [6.7].

⁴⁸ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [2.29].

purposes of inheritance does not affect any other legal provision or right relating to them.”⁴⁹

This reason for referring to the 1837 Act in section 33A may not convince all of those with a view on the matter the section should be broadly interpreted, but the intention of those involved in framing and approving section 33A are considered further in the following subsection.

Solution 2: “Statutory Rectification”

Henderson and *Hayes* potentially create a conflict of High Court cases on the scope of section 33A, albeit that in *Hayes* the judge declined to decide the point and the true implications of *Henderson* may be unclear. Judge Raeside did, however, accept in *Hayes* that section 33A “may not have...achieved the clear intention of the draft proposed by the Law Commission” and contemplated the possibility that a future court may have to “embark upon an exercise of statutory rectification”.⁵⁰ He did so with reference to *Inco Europe Limited v First Choice Distribution*.⁵¹ In that case, Lord Nicholls held that “[t]he court must be able to correct obvious drafting errors” and can “add words, or omit words or substitute words” in “plain cases of drafting mistakes” where the intention of Parliament is clear.⁵² Moreover, Judge Raeside, the editors of *Williams on Wills* and Dr Williams all seem convinced that the broader interpretation of section 33A advocated in the last subsection of this paper was truly intended, even if they doubt that this is its effect. There would be an irony if this argument for statutory rectification succeeds, since section 33A was prompted because the intestacy rules could *not* be construed according to what counsel for T in *Re DWS* insisted was “the logical intention of Parliament” in the first place.⁵³

The Law Commission documents are certainly consistent with the broader interpretation of section 33A advocated in the last subsection, even if it transpires that that interpretation cannot be achieved without “rectification”. In the context of wills, the Consultation Paper’s primary concern was with the very sort of substitutionary gift at issue in *Hayes*, with no limitations on the relationships between the testator, the primary beneficiary and the substitute.⁵⁴ The provisional proposal was that “any gift in the will contingent upon the disqualified person dying before the testator should be given effect as if that person had in fact so died”.⁵⁵ Conversely, the only mention of section 33 in that Consultation Paper, which on Williams’ view is the only context in which section 33A applies, was in a footnote attached to an assertion that “‘Lapse’ (death of an intended beneficiary)

⁴⁹ *Hansard*, HC Deb, 21 Jan 2011, col. 1153.

⁵⁰ [2017] EWHC 3110 (Ch) at [35].

⁵¹ [2000] 1 W.L.R. 586.

⁵² [2000] 1 W.L.R. 586 at 592.

⁵³ [2001] Ch. 568 at [15].

⁵⁴ Law Commission, *The Forfeiture Rule and The Law of Succession: A Consultation Paper* (Consultation Paper 172, 2003) at [5.35].

⁵⁵ Law Commission, *The Forfeiture Rule and The Law of Succession: A Consultation Paper* (Consultation Paper 172, 2003) at [6.26].

is already dealt with by statute”.⁵⁶ This is hardly surprising since the Commission’s main concern at that stage was about situations where a substitutionary gift has been made, while (subject to the argument about *Henderson* considered above) section 33 is usually significant only where such a gift has *not* been made but there is no explicitly contrary intention in the will. In fact, the operation of section 33 may well be expressly excluded from the will in any event.⁵⁷

In the final report, the Commission did consider section 33, but regarded that as “another example” of a problem with the current law *in addition* to that of a substitutionary gift irrespective of the relationship.⁵⁸ This pattern of regarding the section 33 situation as an additional (if similar) problem was repeated in the Commission’s commentary on its draft Law Reform (Succession) Bill. This is despite the fact that that Bill also contained “for the purposes of this Act” (referring to the 1837 Act).⁵⁹ The commentary simply asserts that in forfeiture and disclaimer situations, “the will is to be interpreted as if the person disclaiming or forfeiting had died immediately before the testator”.⁶⁰ The same wording can be found in the Explanatory Notes to the eventual 2011 Act.⁶¹ The Commission’s commentary adds that “[t]his makes a practical difference where the will contains wording such as to A, but if A dies before me, to B”.⁶²

As for the intention of Parliament, itself inherently predicated on the Law Commission’s recommendations, it seems clear that section 33A was not intended to be limited to the situation where section 33 was applicable. While ministers and legislators had taken a different view to the Commission on “minor” matters relating to the role of the public trustee,⁶³ and “the actual wording adopted by Parliament in...section 2 was not identical” to the Commission’s Bill, the judge in *Hayes* was satisfied that “for all practical purposes [t]he Law Commission draft was adopted by Parliament”.⁶⁴ Certainly, the key phrase “to be treated for the purposes of this Act as having died immediately before the testator” appears in both the Commission’s draft Bill and the final Act.⁶⁵

⁵⁶ Law Commission, *The Forfeiture Rule and The Law of Succession: A Consultation Paper* (Consultation Paper 172, 2003) at [3.9].

⁵⁷ See, e.g., M. Hallam *et al*, *Practical Will Precedents*, R.25 (London: Sweet & Maxwell, 2012), Precedent F14b.

⁵⁸ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [2.21]-[2.22].

⁵⁹ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005), pp.40-43.

⁶⁰ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005), p.41.

⁶¹ Explanatory Notes to the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, <https://www.legislation.gov.uk/ukpga/2011/7/notes/division/4/2> [Accessed 15 February 2021] at [18].

⁶² Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005), p.41.

⁶³ *Hansard*, HC Deb, 21 Jan 2011, col. 1154.

⁶⁴ [2017] EWHC 3110 (Ch) at [35].

⁶⁵ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005), p.40; Wills Act 1837, s.33A(2).

Admittedly, there are some instances of ambiguity on the breadth of section 33A in the parliamentary debates. For example, the Parliamentary Under-Secretary of State for Justice asserted that the clause inserting section 33A “is necessary because section 33 of the 1837 Act provides that, where a child of a testator dies before the testator, leaving grandchildren who are alive at the death of the testator, the gift to the child takes effect as a gift to the grandchildren”.⁶⁶ There was some emphasis in the parliamentary debates on this scenario, which is admittedly the most analogous to the intestacy situation with which *Re DWS* was concerned.⁶⁷ But there was also an emphasis on safeguarding intentions (described by the Under-Secretary of State as the “paramount principle” of the law of wills),⁶⁸ and it was argued above that a broad reading of section 33A is the best way of giving effect to likely intentions of the deceased in the circumstances. In a total intestacy situation, by contrast, the very point is that no valid testamentary intentions have been expressed by the deceased in the first place. Moreover, Greg Knight, the MP who originally introduced the Private Members’ Bill, described the impact of section 33A as being that “the will is to be interpreted as if the person disclaiming or the person forfeiting had died immediately before the testator, the effect of this being that the person next entitled to the property will be able to inherit.”⁶⁹

It may be instructive to compare section 33A to another “deemed predecease” rule, that applicable where a marriage⁷⁰ or civil partnership⁷¹ is dissolved or annulled. Section 18A of the Wills Act provides that “any property which, or an interest in which, is devised or bequeathed to the former spouse shall pass as if the former spouse had died” on the date of dissolution or annulment “except in so far as a contrary intention appears by the will”.⁷² This is admittedly a clearer instruction about how the will is to be read than appears in section 33A, albeit that the less specific wording in section 33A may have been intended to encompass the effect of section 33 *as well as* providing for a method of reading the will.

Finally, it is worth considering the structure of the 2011 reforms. The rule in section 33 is understandably made subject to that in section 33A.⁷³ But if Parliament had intended for the effect of section 33A to be confined to section 33, it could have achieved that by simply amending section 33 itself. The fact that a new section was inserted itself suggests that Parliament intended a broader scope for section 33A, even if one is not considered to appear on its face.

It is to be hoped that Parliament’s intention is clear enough to meet the standard imposed by Lord Nicholls in *Inco Europe*, as mentioned in *Hayes*. This would mean that, if necessary, section 33A could be “rectified” to apply to the law of wills more generally rather than specifically the 1837 Act. The matter is not

⁶⁶ *Hansard*, HC Deb, 4 March 2011, col. 557.

⁶⁷ *Hansard*, HC Deb, 21 Jan 2011, col. 1129; *Hansard*, HL Deb, 13 May 2011, col. 1108.

⁶⁸ *Hansard*, HC Deb, 4 March 2011, col. 557.

⁶⁹ *Hansard*, HC Deb, 21 Jan 2011, col. 1132.

⁷⁰ Wills Act 1837, s.18A.

⁷¹ Wills Act 1837, s.18C.

⁷² Wills Act 1837, s.18A(1)(b).

⁷³ Wills Act 1837, s.33(3) (as amended).

necessary clear-cut, however. It would require the court to be “abundantly sure” of three matters: “the intended purpose” of the provision; “that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision”; and “the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed”.⁷⁴ This is a high threshold. Further solutions to the perceived problem with section 33A are therefore considered in the following subsections.

Solution 3: Relief from Forfeiture

It has been seen that Judge Mark Raeside QC acknowledged the *Williams* view of the potentially limited scope of section 33A in *Macmillan Cancer Support v Hayes*. He neatly sidestepped the issue, however, by granting relief from forfeiture and producing the same result on the facts as if section 33A had been construed more broadly. While a reluctance to engage with difficult issues of statutory construction is readily understandable, the approach might be thought somewhat unusual. Section 33A contains a mandatory rule for circumstances in which it is applicable, while relief from forfeiture is a matter of discretion.

In any event, the solution found in *Hayes* cannot be generally applicable. It essentially worked only because the list of substitute beneficiaries in the wills in question were “largely identical”,⁷⁵ and because the Sheila’s husband Peter had died (by suicide) immediately after unlawfully killing his wife. Having been granted relief from forfeiture, Peter could be deemed to have inherited from Sheila so that their joint estates could then pass to the charities and friends under his will. Moreover, resolving the issue via relief from forfeiture may create an unusual incentive to grant relief where the killer per se is undeserving but relief happens to give effect to the intentions of the person who has been killed. Conversely, no relief can be granted “in the case of a person who stands convicted of murder”.⁷⁶ It is thus likely that the proper construction of section 33A will have to be resolved at some time.

Solution 4: Careful Drafting of Wills

It is more than a little unrealistic to suggest that wills should be specifically drafted to contemplate the possibility that a beneficiary might be precluded from taking under the forfeiture rule. A desire to include such a clause on the part of a testator might suggest an extremely worrying situation, and on the part of a professional will-drafter might cause very considerable upset.⁷⁷ But a much more reasonable expectation is that wills ought to contain a sufficiently general residuary clause providing what should happen in the event of (unanticipated) failure of the primary residuary gift for *any* reason. In a context where the effect of section 33A is unclear and in the absence of further statutory reform (considered in the next subsection), it is simply not enough for a will to provide what should happen in

⁷⁴ [2000] 1 W.L.R. 586 at 592.

⁷⁵ [2017] EWHC 3110 (Ch) at [22].

⁷⁶ Forfeiture Act 1982, s.5.

⁷⁷ No similar issues would arise in the more routine case of disclaimer.

the event that a beneficiary *predeceases* the testator per se. A more general substitutionary gift in *Hayes* could have achieved the desired result without recourse to either section 33A or relief from forfeiture, and precluded the operation of the intestacy rules accordingly. It is to be hoped that will-drafters will take account of the difficulty with section 33A as recognised in *Hayes*.

Significantly, however, the Law Commission described it as “purist” to argue that because the original problem it considered could be solved by better drafting, statutory reform is unnecessary.⁷⁸ This argument retains its force where the attempt at statutory reform has not conclusively remedied the problem. It may even be enhanced if will-drafters have relied on the broader interpretation of section 33A taken by several authorities. In other words, a statutory provision purporting, but perhaps failing, to achieve the desired objective may be worse than no statutory provision at all.

Solution 5: Law Reform

Law reform is another method through which the appropriate normative effect of section 33A could be achieved, and a solution relying on the proper drafting of wills will inevitably never be comprehensive. The Law Commission is in the midst of a project on *Making A Will*, having published a Consultation Paper in 2017.⁷⁹ The Government having opted to prioritise reform of the law of weddings, the very immediate future of the Commission’s wills project is unclear and its timetable “under review”.⁸⁰ It is nevertheless plausible that debates surrounding will-making in the Coronavirus era, and the enactment of temporary reforms to deal with the impact of the pandemic,⁸¹ will cause the Government to consider the completion of the Commission’s project as a priority.⁸²

The Law Commission could expressly recommend changes to what is now section 33A, particularly if they are thought necessary properly to implement its earlier recommendations, even if the *Making A Will* Consultation Paper does not appear to mention 33A. It would surely be uncontentious for the Commission to insert a recommendation into any report on *Making A Will* in order properly to implement an earlier recommendation in the same sphere, particularly since a replacement for the Victorian 1837 Act is contemplated in any event. It would of course be for the Government and ultimately Parliament to decide whether any such recommendation should be accepted. Without losing the desired effect of section 33 where it is applicable, a new equivalent of section 33A could include a

⁷⁸ Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com 295, 2005) at [4.5].

⁷⁹ Law Commission, *Making A Will* (Consultation Paper 231, 2017).

⁸⁰ Law Commission, “Wills”, <https://www.lawcom.gov.uk/project/wills/> [Accessed 15 February 2021].

⁸¹ Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020/952.

⁸² See, e.g., B. Sloan, “Coronavirus and the Electronic Witnessing of Wills: The Legislation Analysed”, Oxford Property Law Blog, <https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2020/10/coronavirus-and-electronic-witnessing-wills> [Accessed 15 February 2021].

construction provision broadly equivalent to that applicable on divorce but also to include section 33. The phrase “[t]he person is, unless a contrary intention appears by the will, to be treated for the purposes of this Act and in the construction of the will as having died immediately before the testator” may have the desired effect. Similarity to the formulation in section 18A would be an advantage, while it is also important not to *lose* the effect of section 33A on section 33.

Alternatively, however, the Commission’s current project could resolve the situation without amending what is now section 33A itself. If a new Wills Act for the twenty-first century is enacted as a result of the Commission’s project, which is likely to include the placing of judicially-developed matters such as mental testamentary capacity,⁸³ knowledge and approval and undue influence⁸⁴ on a statutory footing, it may automatically become the “statute which gives general force to wills” that Dr Williams does not consider the 1837 Act to be. If this occurs, a mere transplanting of section 33A into the new Act may have the desired effect.

Conclusion

There are sound policy reasons for allowing a whole will to be construed as if someone who killed the testator had pre-deceased him. It is thus to be hoped that such construction of what is now section 33A can be facilitated through one of the methods considered in this paper. More generally, the story of section 33A is a salutary lesson in how statutory ambiguity can remain even after detailed consideration by the Law Commission and policymakers and extensive public/expert consultation. But without seeking to apportion blame for the uncertainty, it is vital that the law applicable in the tragic but thankfully relatively rare circumstances of forfeiture is put on a sure footing.

⁸³ Law Commission, *Making A Will* (Consultation Paper 231, 2017), ch.2.

⁸⁴ Law Commission, *Making A Will* (Consultation Paper 231, 2017), ch.7.