

A Brief History of Ademption- Stale Wills?

Take-Away: When a Will or trust is not periodically updated, it may contain specific bequests of assets that no longer exist. These *stale* testamentary instruments then require a working knowledge of ademption, or more accurately, EPIC's rules of nonademption to determine the rights and interests of the beneficiary who was to receive the now-gone property.

Background: At common law, an ademption is when an asset bequeathed or devised under a Will does not exist at the time of the testator's death. A traditional ademption was tied directly to the words used in the Will. The purpose of inheritance law is to effectuate the decedent's intent. By interpreting the decedent's Will to mean something that it does not expressly say carried risk. Thus, relying on extrinsic evidence of the testator's intended meaning was traditionally forbidden because such evidence was not executed with the formalities that were required to make a Will. Thus, at common law, if property was devised in a Will is not in the testator's estate at the time of his/her death, such that the devise as written could not be fulfilled, the devise or bequest is said to be *adeemed*, akin to revoking or withdrawing the devise or bequest.

Identity Theory: This practice came to be known as the *identity theory* of ademption. A specific bequest of personal property or a devise of real property had to accurately match the description of the property in the decedent's Will. If the Will did not identify the property accurately, the bequest or devise failed as an *empty* bequest or devise. As a result, even small and obvious errors in a Will went uncorrected as an ademption. Loosely translated, the words in the Will were not to be disturbed, even if it led to a result that defied common sense. Thus, under the *identity theory*, the disposal of property between the testator making his/her Will and the death of the testator resulted in an ademption, and the beneficiary took nothing.

Example: Nick bequeaths his Lexus RX to his niece Nora in his Will. Only if Nick owns this Lexus at the time of his death will the bequest of the Lexus to Nora be honored. Not an alternate auto owned by Nick, nor a cash equivalent owned by Nick. If Nick sold the Lexus prior to his death and he replaced it with a Mercedes, Nick would have to have said in his Will that Nora took the replacement auto, or Nick would have to have updated his Will after the fact to reflect the change in bequest.

Exceptions: But it should come as no surprise that as time passed, courts began to find exceptions to the harsh ademption rule. One exception adopted in some states was for insurance proceeds of the specifically devised assets that were destroyed contemporaneously with the testator's death. So, continuing the Nick and Nora example, if Nick died in an auto accident, or in a house fire that destroyed his Lexus, Nora would be entitled to take the insurance proceeds that were paid for the value of the destroyed Lexus. This exception was based on the rationale that Nick lacked the intent to destroy his Lexus and he also lacked the opportunity to update his Will after the Lexus' destruction, such that Nick's bequest of the Lexus was construed to include the insurance proceeds. Another judicial created exception to the harsh ademption rule was when the disposition of the specific asset was by a conservator while the testator was incapacitated.

Yet these exceptions to ademption did not extend to situations where the testator had subsequently sold the asset or converted the asset to money. In these situations, the *identity theory* consistently led to the conclusion that the devised property was adeemed. Whether the purchase price was fully paid or partially paid was immaterial. If Nick's Will says "I give and bequeath my Lexus auto to my niece Nora," and that Lexus had been sold by Nick for \$18,000 and Nick held a promissory note from the purchaser that had an unpaid balance of \$13,000 at the time of Nick's death, Nora still received nothing because there is no Lexus auto in Nick's estate to distribute.

Security Interest: Under the *identity theory*, even if the devised asset had been sold yet the testator had retained a security interest in the sold asset, the asset was still considered adeemed.

Example: Under Nick's Will, he provides "I specifically devise my cottage on Torch Lake to my niece, Nora, if she survives me." After he executes his Will, Nick then sells his Torch Lake cottage to a third-party, taking back a mortgage interest in the real estate to secure the unpaid promissory note that was given by the buyer to Nick. On Nick's death his estate holds the unpaid promissory note secured by the mortgage. Nora still takes nothing from Nick's estate since the property of Nick's estate, the note secured by the mortgage, does not exactly match the description of the property in Nick's Will (the real property itself.) Because the note and mortgage interest are not identical to ownership of the Torch Lake real estate, the devise of that real estate fails. In sum, the courts that applied the common

law's *identity theory* of ademption typically viewed any unpaid purchase price attributable to the specifically devised property as something different than the specifically devised property itself, so that ademption applied whether or not there was an unpaid debt still owed to the testator at the time of his/her death.

Uniform Probate Code: The Uniform Probate Code (UPC) significantly modified the common law approach to Will construction generally, and ademption specifically. Despite the common law's strict adherence to the words used in a Will, the UPC relaxed its focus on the words of a Will and focuses instead on the testator's intent. This *intent theory* presumes that the testator would not intend ademption in a variety of circumstances had the testator considered them. Therefore, the *intent theory* construes a Will to include several non-ademption provisions unless the testator's Will specifies otherwise. Restated, the UPC's presumed intent of the testator yields to a statement of actual intent by a testator.

EPIC: Michigan's adoption of the nonademption of specific devises is found at MCL 700.2606. The key provisions of this section are the following:

(1) *A specific devisee has a right to the specifically devised property in the testator's estate at death and all of the following:*

- **Unpaid Purchase Price:** *A 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.*
- **Unpaid Condemnation Award:** *Any amount of a condemnation award for the taking of the property unpaid at death.*
- **Fire or Casualty Insurance Proceeds:** *Any proceeds unpaid at death on fire or casualty insurance on, or other recovery for, injury to the property.*
- **Foreclosed Property:** *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.*

- **Replacement Property:** *Real property or tangible personal property owned by the testator at death that the testator acquired as a replacement for specifically devised real property or tangible personal property.*
- **Cash Equivalent:** *Unless the facts and circumstances indicate that ademption of the devised was intended by the testator or ademption of the devised is consistent with the testator's manifested plan of distribution, the value of the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered above.*

Example: Nick's Will bequeaths his 2023 Lexus to his niece, Nora. Nick sells the Lexus and he replaces it with a 2026 Mercedes prior to his death. Nick fails to update his Will to note that he no longer owns the Lexus. Under EPIC the devise of the Lexus to Nora is not adeemed. Nora will take Nick's Mercedes. Nick's failure to update his Will to reflect the change is more likely a product of his inattention than of an intentional desire to exclude Nora from receiving his Mercedes.

Accordingly, unlike the common law of ademption: (i) trading a tangible asset for a debt is not a replacement within the meaning of the statute, because it is a change in the substance of the property; yet (ii) a beneficiary is entitled to take any unpaid purchase price, regardless of whether a security interest was involved in the sale.

Under the last **Cash Equivalent** provision, for a beneficiary of a specifically devised asset to receive its cash value equivalent, the beneficiary bears the burden of showing that was the intended result by the testator. The default presumption is that the beneficiary is *not* entitled to the cash value equivalent of a specifically devised asset that is no longer in the decedent's estate at the time of the testator's death. Thus, a beneficiary of a specifically devised asset that was sold for a lump sum payment is stuck with the burden of proving that ademption is inconsistent with the testator's intent, and must then resort to meeting this burden of proof. This provision might be used by a beneficiary to assert non-ademption of a devise when the testator sold a specifically devised asset and recouped the full purchase price.

A fair conclusion following these rules is that the testator's voluntary disposition of an asset, by sale or gift during lifetime generally reflects an intent not to give the asset at death, meaning an inference of an intent to revoke the testamentary transfer.

Trusts: While all the above rules have dealt with ademption in a Will context, these same rules of construction also apply to trusts. These rules of construction are also appropriate to the interpretation of the terms of a trust and the disposition of trust property. [MCL 700.7112]

Insufficient Cash: In *In re Barbara Young Living Trust, Michigan Court of Appeals, No. 355309 (April 21, 2022)* the settlor's trust instrument directed a \$50,000 cash distribution to a trust to be created for each of her grandchildren who survived her. The trust also included an ademption provision that if property was not part of the trust estate, the specific distribution directive would be null and void. The trust estate did not have sufficient cash to fund the pecuniary bequests to the grandchildren, but the trust did have a provision that a parcel of the real estate could be sold by the trustee. The trustee claimed that the cash bequests to the grandchildren abated due to the insufficiency of cash to satisfy the bequests. The probate court found that the gift of cash was a bequest of certain value, and not of any specifically identifiable asset, and was consequently intended by the settlor to be distributed out of general assets of the estate. The lack of sufficient cash did not operate as an ademption of the pecuniary bequests.

General Bequest: In *In re Juna H. Bjorkquist Trust, Michigan Court of Appeal, No. 344217 (December 26, 2019)* the settlor's trust devised to her son-in-law all interest that she or her trust owned in real property described only by street address. The trust also provided: "*Prior to distribution, the Trustees shall have the property appraised.....and [my daughter] shall receive ½ of the appraised value.*" On the settlor's death it was discovered that the settlor never held any interest in the real property. The Court determined that these two provisions expressed both a (i) specific devise or bequest, and (ii) a general bequest. The specific bequest failed because neither the settlor nor her trust had an ownership interest in the real property. However, the provision for the settlor's daughter was expressed as a general bequest, to be paid from other trust assets. Thus, the doctrine of ademption, according to the Court, does not apply to general bequests.

Conclusion: Wills and trusts often contain gifts and bequests of specifically identified assets. Wills and trusts often become *stale*, meaning that often governing instrument is not periodically updated. That is when the *stale* Will or trust instrument refers to an asset that no longer exists owned by the testator/settlor or his/her trust at death. This is when the rules of ademption, or nonademption, come into play. If a settlor's trust refers to specific bequests of certain assets that no longer exist, it would be best to update the trust to accurately reflect the settlor's intent and avoid having to navigate these rules of construction.

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