Title

Ademption by satisfaction in the trust context

Text

A testator may adeem a devise via inter vivos transfer to the devisee. In other words, the testamentary provision is rendered inoperative by satisfaction. Ademption by satisfaction is comparable to the doctrine of advancements in the intestacy context. California has an ademption-by-satisfaction statute that applies to at-death transfers via trust as well as at-death transfers by will. *See* Sachs v. Sachs, 44 Cal.App.5th 59 (Cal. App. 2020). The Uniform Probate Code's comparable ademption-by-satisfaction provision, specifically §2-609, applies only to transfers by will. That having been said, the inter-vivos gift itself need not be outright, "it can be in the form of a will substitute, such as designating…the beneficiary of the remainder interest in a revocable inter-vivos trust." *Id*. cmt. In any case, an advancement feature in the at-death transfer provisions of a trust instrument has since time immemorial been routinely enforceable in equity. Statutory authority is not required.

Cross reference: Ademption by extinction in the trust context is taken up generally in §8.15.54 of *Loring and Rounds: A Trustee's Handbook* [pages 1246-1249] of the 2020 Edition, which section is reproduced in its entirety in the Appendix below.

Appendix

§8.15.54 *Ademption by Extinction [The Trust Application]*

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(From *Loring and Rounds: A Trustee's Handbook* (2020))

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> *A specific devise is a testamentary disposition of a specifically identified asset...A general devise is a testamentary disposition, usually of a specified amount of money or quantity of property, that is payable from the general assets of the estate*.—Restatement (Third) of Property (Wills & Donative Transfers)[891]

The doctrine of ademption by extinction has its origin in the law of wills and its primary application in the failure of specific testamentary bequests and devises.[892] The scope of the doctrine, however, may be expanding to encompass the functional equivalent of specific bequests and devises under will substitutes such as self-settled revocable inter vivos trusts.[893]

In the wills context ademption-by-extinction works this way. If a specifically bequeathed or devised

[891]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.1.

[892]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2.

[893]Restatement (Third) of Property (Wills and Other Donative Transfers) §§5.2 cmt. I, 7.2 cmt. f.; 5 Scott & Ascher §35.1.6 (Partial Revocation of a Trust Due to Ademption by Extinction).

See generally §8.2.2.2 of this handbook (the revocable trust), and §8.11 of this handbook (what are the duties of the trustee of a revocable inter vivos trust).

item of property is not in the probate estate at the time of the testator's death, with certain exceptions[894] the bequest or devise adeems.[895] That means that the designated legatee or devisee is out of luck. He or she is not entitled to something of comparable economic value from the general assets of the estate.[896] An example of a specific bequest would be "I bequeath 'two-thirds of the X-Y-Z Mutual Fund shares owned by me at my death' to my mother if she survives me."[897] On the other hand, a general bequest or devise would not work an ademption. An example of a general bequest would be "I bequeath 1000 shares of the X-Y-Z Mutual Fund to my mother if she survives me."[898] If, for example, there are no such shares in the probate estate at the time of death and the testator is survived by his mother, then the personal representative may well be obliged to go out and purchase the shares for her, tapping for that purpose the estate's general assets.

The Restatement (Third) of Property (Wills and Other Donative Transfers) would apply the rules of ademption by extinction that have developed over time in the wills context to comparable dispositions under self-settled revocable inter vivos trusts.[899] The terms of a self-settled revocable inter vivos trust, for example, might provide that upon the death of the settlor, the trustee "shall distribute outright and free of trust to the settlor's mother if she is then living in Blackacre." If, say, the trustee as part of a like-kind tax exchange and with the consent of the settlor were to sell Blackacre to a third party and purchase Whiteacre with the proceeds, then the mother might well be out of luck. Assuming the terms of the trust are not amended before the settlor's death by replacing the word "Blackacre" with the word "Whiteacre" wherever appropriate, then a respectable case can be made that upon the settlor's death the mother is entitled neither to (1) Whiteacre in kind nor (2) a distribution of trust property of economic value that is comparable to that of Blackacre's, the inter vivos conveyance out of Blackacre by the trustee having worked an ademption.[900]

Over the centuries from Byzantium[901] to Massachusetts,[902] a vast body of testamentary law and lore has developed around ademption doctrine. For the most part, it speaks to how the doctrine should be applied in particular fact situations. Assume, for example, that the testator specifically bequeathed all his shares of the X-Y-Z Mutual Fund but the fund merged with another fund during the testator's lifetime and in so doing lost its legal identity. In exchange for shares of the X-Y-Z Mutual Fund, the testator received shares of the other fund. Has the merger worked an ademption? The answer may hinge on whether we are in an "intent" or "identity" jurisdiction:

> The common law developed two conflicting theories of ademption, the "identity" theory and the "intent" theory. Under the "identity" theory, which predominates in the case law, a specific devise completely fails—i.e., the devisee is entitled to nothing—if the specifically devised property is not in the estate at death. Like any doctrine that treats the testator's intent as irrelevant, the identity theory sometimes

[894]*See, e.g.*, Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2 cmts. d (change in form), f (unpaid proceeds at death), g (disposition by a guardian, conservator, or agent) & h (failure inconsistent with testator's intent).

[895]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2(c).

[896]*See* Ruby v. Ruby, 2012 Il App (1st) 103210, 973 N.E.2d 361 (Ill. App. Ct. 2012).

[897]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.1 cmt. b.

[898]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.1 cmt. c.

[899]Restatement (Third) of Property (Wills and Other Donative Transfers) §§5.2 cmt. I, 7.2 cmt. f.

[900]*See, e.g.*, *In re* Steinberg Family Living Trust, 894 N.W.2d 463 (Iowa 2017) (a case in which ademption was a nontax-related consequence of a like-kind tax exchange).

[901]*See* Newbury v. McCammant, 182 N.W.2d 147, 149 (Iowa 1970) (suggesting that historically the courts of this country, and England, in early times followed the dictates of Justinian holding that a testator's intention was crucial to the operation of the ademption-by-extinction doctrine).

[902]*See* Wasserman v. Cohen, 414 Mass. 172, 174, 606 N.E.2d 901, 903 (1993) (noting that Massachusetts courts have been taking a strict identity approach to ademption-by-extinction issues for nearly 160 years).

> operates to defeat intent, sometimes not, but then only by coincidence. Under the "intent" theory, however, the testator's intent is central to the inquiry. Under that theory, the devise fails unless the evidence establishes that failure would be inconsistent with the testator's intent.[903]

In 1993, the Supreme Judicial Court of Massachusetts applied ademption principles to the inter vivos sale to a third party of a parcel of real estate that had been specifically referenced in the seller's revocable inter vivos trust.[904] The terms of the trust directed the trustee upon the death of the settlor to segregate and distribute out the real estate to a trust beneficiary. Strictly applying the intent theory of ademption, which had been its practice in the testamentary context for nearly 160 years, the Court held that the designated trust beneficiary was not entitled to the sale proceeds, the sale having worked an ademption: "We have held that a trust, particularly when executed as part of a comprehensive estate plan, should be construed according to the same rules traditionally applied to wills."[905]

In 2012, one Illinois court similarly looked to the law of wills for guidance in a trust ademption case. "Because we are to use the same principles to ascertain a settlor's intent as those used to interpret a will," wrote the court, "and since...[our]...theory of ademption looks to intent, we see no reason why the concept should not be considered here."[906]

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[903]Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2 cmt. b. Note that under the change-in-form principle, the merger of the two mutual funds would probably not work an ademption. Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2 cmt. d. "By well-established authority, the change-in-form principle applies if the change in form is insubstantial." Restatement (Third) of Property (Wills and Other Donative Transfers) §5.2 cmt. d.

[904]Wasserman v. Cohen, 414 Mass. 172, 606 N.E.2d 901 (1993).

[905]*Wasserman*, 414 Mass. at 175, 606 N.E.2d at 903.

[906]*See* Ruby v. Ruby, 2012 Il App (1st) 103210, 973 N.E.2d 361 (Ill. App. Ct. 2012).