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Wills - Ademption - Protection of an Incompetent Testator's Intention

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RECENT CASES

WILLS — ADEMPTION — PROTECTION OF AN INCOMPETENT TESTATOR'S INTENTION—Appellant, a specific devisee in a will, was to receive the testator's home. The testator became incompetent and by court order the guardian sold the home for $21,000 and used the proceeds to care for the incompetent testator. The remainder of the estate consisted of $6,000 residuary that was to go to the respondent. At the time of the testator's death all but $500 of the $21,000 had been used for her care. The Supreme Court of California *held* that there was no ademption and that the appellant was entitled to have his devise redeemed to the extent that was possible from the remainder of the estate according to the contribution statute which specifically excludes residuary devisees. *In re Estate of Mary Mason*, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965).

The recent trend in the law of ademption has been to emphasize the intention of the testator.[1] Up to this time there have been three different views on the subject of ademption. England[2] and a few American jurisdictions[3] follow the strict "in specie" test of ademption.[4] Under this view the devise is adeemed if the property is not in the estate at the testator's death.[5] The Scottish courts base the test on what the testator would have done had he been competent.[6] Thus there is an ademption if the testator would have extinguished the object of the devise, but there is no ademption if he would not have done so.[7] This view recognizes the intention of the testator no further than the presumption that everyone would handle his estate in the most advantageous manner.[8] The majority view in the United States is set out in the landmark case of *Wilmerton v. Wilmerton*.[9] If the guardian sells the object of a specific devise the gift is not adeemed at the testator's death if the proceeds

1. Wilmerton v. Wilmerton, 176 Fed. 896 (7th Cir. 1910); *In re* Bierstedt's Estate, 254 Iowa 772, 119 N.W.2d 234 (1963).

2. *E.g.*, Jones v. Green, L.R. 1 Eq. 555 (1868).

3. *In re* Brann, 219 N.Y. 263, 114 N.E. 404 (1916); *In re* Barrow's Estate, 103 Vt. 501, 156 Atl. 408 (1931).

4. *In re* Brann, *supra* note 3. These courts recognize that in many jurisdictions ademption is thought to contain the element of intention on the part of the testator. They state, however, that this has ceased to be the law in the jurisdictions applying the in specie test in the absence of a statute.

5. *In re* Barrow's Estate, *supra* note 3.

6. 6 BOWE-PARKER: PAGE ON WILLS, § 54.18, at 273.

7. *Ibid.*

8. See, *In re* Barrow's Estate, *supra* note 3.

9. Wilmerton v. Wilmerton, *supra* note 1 at 900. ". . . [W]e think that the rule, that legacies are adeemed only where such an intention appears on the part of the testator himself, ought to be followed."

can be followed, or if he sells an object of a specific devise and uses the proceeds for the care of the ward there is only an ademption of the proceeds that have been used.[10]

The paramount importance of carrying out the testator's intention is illustrated by the holding in the instant case. Thus the testator's incompetency raises the question of whether his ability to form a legal intention passes to the guardian. The response to this issue should be in the negative, however, since the role of the guardian is purely administrative.[11] He is not appointed to change the testamentary plan of the testator,[12] nor should he be allowed the power to do so.

There are two basic situations in which the problem of ademption by a guardian of an incompetent testator may arise. They are where the testator becomes incompetent and remains so until his death, and where the testator becomes incompetent but regains competency before his death.

In the first situation it is obvious that the testator meant to give the devisee something of value. But if the proceeds from the specific devise are used to support the incompetent testator there is at the least a pro tanto ademption of that amount, and the testator's intention is defeated. This ademption should not be recognized because if the testator does not regain competency before his death the cost of supporting the ward is not substantially different from an expense of the estate. If the debts for his care are not paid until after his death they are surely a debt of the estate. Both California[13] and North Dakota[14] provide for a method of contribution by the devisees of a will if there is an insufficient fund for that purpose. Disregarding the idea of ademption and using the contribution statutes seems to present the best view for handling this type of situation since each devisee contributes proportionately to the debts of the estate in the method set forth by the legislature.

In the second situation it would seem that if the testator regains competency he would be presumed to know the condition of his estate. If he does not change his will then an object of a specific

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10. *In re* Bierstedt's Estate, *supra* note 1.
11. *In re* Cooper's Estate, 95 N.J. Eq. 210, 123 Atl. 45 (1923).
12. *Ibid.*
13. CAL. PROB. CODE § 753: "When property given by will to persons other than the residuary devisees and legatees is sold for the payment of debts or expenses or family allowance, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been sold, and the court, when distribution is made, must settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from his distributive share for the purpose of such contribution."
14. N.D. CENT. CODE § 30-21-18 (1960): "If an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute, according to their respective interests, to the devisee or legatee whose devise or legacy has been taken therefor, and the county court, when distribution is made, must settle the amount of the several liabilities by decree and determine the amount which each person shall contribute. Such amount shall be reserved from the distributive shares of the devisees and legatees affected respectively for the purpose of paying the amounts to be contributed."

devise that had been destroyed during his incompetency would be considered adeemed by the testator's intention.[15] This does not conflict with the holding in the instant case as it is a well settled rule that there is an ademption when the testator knows and does nothing to remedy the destruction of an object of a specific devise.[16]

The decision in this case gives a just and well-reasoned result in the first situation and does nothing to hinder a just result in the second situation. By applying the foregoing reasoning to similar cases, the courts can provide an equitable solution to this small but confused area of the law.

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TORTS—INVASION OF PRIVACY—INFANTS' RIGHT TO A CAUSE OF ACTION FOR ENTICING PARENT—By invoking the invasion of privacy principle,[1] the minor plaintiffs alleged that the female defendant disrupted the family circle by enticing the father to leave the home. The children claimed they were deprived of their father's affection, companionship and guidance and subjected to unwanted notoriety. The Supreme Court of Ohio, with one justice dissenting,[2] *held* that this action arose out of the marital contract in which the spouse was the sole beneficiary. Thus the action could not be upheld due to a lack of common law precedent or statutory authorization. *Kane v. Quigley*, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964).

Except where prohibited by statute,[3] the gist of the action by a minor seems to be related to the common law concept of alienation of affection which allows recovery for loss of consortium by a spouse.[4] Decisions allowing recovery by a minor against a third person have been based on the theories of *ubi jus ibi remedium*[5] and invasion of privacy.[6] While some state constitutions

15. See, *In re* Bierstedt's Estate, *supra* note 1.
16. See *e.g.*, *In re* Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931); *In re* Brann, *supra* note 8.

1. Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949).
2. The dissenting justice believed there was an injury to the minor plaintiffs and based recovery upon the OHIO CONST. art. I, § 16, which allows a remedy for a wrong done to a person.
3. Seven states have abolished the cause of action for alienation of affection by adopting "Heart Balm Statutes." See: Alabama, Colorado, Indiana, Nevada, New Jersey, New York and Wyoming. Maine, Massachusetts and New Hampshire have abolished the action only for breach of promise to marry. Michigan and Pennsylvania passed the statute with the exception that it does not apply to suits by a husband or wife against a defendant who is a parent, brother, sister or person in loco parentis of the plaintiff's spouse. Illinois repealed the "Heart Balm Statute" because it violated their state constitution which provides a remedy for a wrong done to a person. Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).
4. Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947).
5. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). See Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947), which based recovery on the state constitution, and Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949), which held that if a wrong has been committed there should be a remedy.
6. Miller v. Monsen, *supra* note 1.