Wills & Estates
Winter Term 2025

Lecture Notes – No. 14

XIV. GIFTS

Two related concepts are important: abatement and ademption.

'Abatement'

Abatement refers to the process by which the assets of a solvent Estate are used to pay debts, liabilities, and expenses which arise on the testator's death which may reduce some gifts as a result.

If there are insufficient assets to pay creditors, then the Estate is *insolvent* and no gifts can be satisfied.

Where the Estate is solvent but there is insufficient property to satisfy all gifts, then some gifts will *abate* – that is, the assets that would otherwise be used to make the gifts will be used to pay the deceased's debts instead.

If the Will doesn't provide specific terms on the point, then the residue and then general legacies and then specific legacies abate in order (and pro rata). In other words, specific gifts take priority over general gifts which in turn takes priority over residuary gifts.

> **Estates Administration Act, s.5**
>
> Subject to section 32 of the Succession Law Reform Act, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the person's will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration.

The 'contrary intention' to prefer one set of legatees over another in respect of abatement as set out in the Will must be clear on the face of the document.

Lindsay v Waldbrook
(1897), 24 OAR 604 (C.A.)

Here five legacies were set out in the Will in relation to a fund of money arising from the sale of real property. There wasn't enough money in the fund to satisfy all the gifts. Should all of the gifts in question abate or should some be preferred?

The question here was whether the words setting up the clause set out a 'contrary intention' to treat the legatees differently. The argument made by one legatee was that his share was to be set aside and invested and used for his education and maintenance. On appeal, it was held that the testator did not display an intention in the Will to treat this

gift differently than others within the same class. Thus, **only clear language to effect the testator's intention to give one general legatee priority over another will allow for avoidance of the pro rata approach to abatement.**

'Ademption'

Ademption occurs where the property subject of the legacy no longer exists as part of the testator's estate and as a result the gift is void.

Thus, where a house is destroyed by fire (in which the testatrix perishes), the insurance money falls into the residue of the estate as a gift of the house under the will adeems; **Re Hunter (1975), 8 O.R. (2d) 399 (H.C.J.); cb, p.585.**

[Please note the Succession Law Reform Act, s.20(2)(b) would now operate to allow the legatee to receive the insurance proceeds.]

McDougald Estate v. Gooderham
(2005), 17 E.T.R. (3d) 36 (Ont. C.A.)

In this case, a woman was incapable and her Attorneys under a Power of Attorney for Property sold some Florida property to pay for her care. The property was subject of a disposition in her Will. The Court of Appeal examined the section of the *Substitute Decisions Act* dealing with ademption; s.36(1).

> 35.1
> (1) **A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.**
> (2) Subsection (1) does not apply in respect of a specific testamentary gift of money.
> (3) **Despite subsection (1),**
> **(a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties**; or
> (b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37.
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> ...
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> **36.(1) The doctrine of ademption does not apply to property that a guardian of property disposes of under this Act, and anyone who would have acquired an interest in the property acquires a corresponding interest in the proceeds.**
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> ...
>
> 37.(1) A guardian of property shall make the following expenditures from the incapable person's property:
> 1. The expenditures that are reasonably necessary for the person's support, education and care.
> 2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.

3. The expenditures that are necessary to satisfy the person's other legal obligations.

Gillese JA held:

29 **At the time that the attorneys considered selling the Palm Beach property, they faced two apparently conflicting obligations. The first was their obligation to ensure that Ms. McDougald's assets were managed prudently. They had to manage Ms. McDougald's property so as to provide her with adequate care while ensuring that her assets were preserved. Both at common law and by virtue of s. 32(1) of the Act, as discussed below, the attorneys were required to act diligently, with honesty and integrity and in good faith, for Ms. McDougald's benefit.**

30 The attorneys' second obligation was to ensure that Ms. McDougald's testamentary intentions were fulfilled. Under the terms of Ms. McDougald's will, her sister, Cecil Hedstrom, was to receive the Palm Beach property. The fact that a corporation owned the property was not a problem because paragraph 4 of the will directed her trustees to do whatever was necessary to transfer property held by the corporation to the beneficiary.

31 **Absent the anti-ademption provision, the trustees could not have fulfilled both obligations. If they sold the property in order to prudently manage Ms. McDougald's assets, they would upset Ms. McDougald's desire to give the property to her sister. If they retained the property and transferred it to Ms. Hedstrom on Ms. McDougald's death, they would have permitted Ms. McDougald's assets to be depleted.**

32 Section 36(1), as interpreted above, enabled the trustees to meet both obligations. They were able to manage Ms. McDougald's property prudently. In this regard, it is worthy of note that the application judge found that the attorneys' decision to sell the property was prudent. And, the attorneys were able to respect Ms. McDougald's clear wish that her sister receive the property, by giving her the proceeds of sale of the property.

33 As the application judge noted, **the Act is to be given a large and liberal interpretation so as to best ensure the attainment of its objects. The intent of the Act is to provide a structure to protect individuals who are incapable of managing their financial affairs. It provides methods by which the property of persons whose capacity is diminished may be managed by others, including by means of a continuing power of attorney. Unlike a capacitated testator, Ms. McDougald did not have the ability to revise her will when it became apparent that the property should be sold. On the interpretation of s. 36(1) of the Act given above, the attorneys were able to take the steps required to manage Ms. McDougald's property in a way that respected her needs and her wishes at a time when she was incapable of managing her affairs on her own.**

[*McDougald Estate v Gooderham* is also important in estate litigation generally and stands for the proposition that the normal costs rules apply in most cases; see *Sawdon Estate v. Sawdon*, 2014 ONCA 101 (Ont. C.A.); *Salter v. Salter Estate* (2009), 50 E.T.R. (3d) 227 (Ont. S.C.J.)]

Abatement and Ademption

Specific legacy (i.e. a gift of a specific property)	A specific legacy which adeems fails. A specific legacy carries all income, profit and accretions on it. General legacies abate before specific legacies. Expenses in respect of preservation of the subject-matter can be charged against the legacy.
General legacy (i.e. a gift of specified property from the general assets of the estate; e.g. a gift of shares, which the estate may have to purchase)	General legacies abate before specific legacies. General legacies don't adeem.
Demonstrative legacy (i.e. a general gift but primarily from a specific fund held by the estate, e.g. from an investment certificate)	A demonstrative legacy may adeem but only in respect of that fund upon which it is to be drawn. A demonstrative legacy is treated as a specific legacy and will abate after general legacies.
Residuary legacy (i.e. a gift of the residue of the testator's general personal assets after other bequests are satisfied).	A residuary legacy carries all income, profit and accretions on general legacies.

Property abates as follows:

1. Residuary personalty;
2. Residuary real property;
3. General legacies (including pecuniary bequests from the residue);
4. Demonstrative legacies (i.e bequests from the proceeds of a specific asset or fund, such as a bank account, which does not form part of the residue);
5. Specific bequests of personalty; and
6. Specific devises of real property.

Illustrative Cases:

Re Millar
(1927), 60 OLR 434 (S.C.); cb, p. 561

Here there was a general legacy which was impossible to fulfil. The preamble to the Will read:

> This will is necessarily uncommon and capricious because I have no dependents or near relatives and no duty rests upon me to leave any property at my death and what I do leave is proof of my folly in gathering and retaining more than I require in my lifetime.

The clause in question read:

> **To each Protestant Minister exercising his clerical functions at an annual salary and resident in Toronto at the time of my death and to each Orange Lodge in Toronto I give one share of the O'Keefe Brewery Company of Toronto Limited.**

Not only had O'Keefe Brewery Company been reorganized by the time of the testator's death, but the successor firm was privately held and so shares could not be purchased.

It was held that the gift created a general legacy which could be satisfied by the value of the shares in question if they could be purchased.

Middleton JA approved of the dicta in Re Gray (1887), 36 Ch.D. 205, 211, '**a general legacy of this kind amounts in effect to a direction to the testator's executors to buy the shares or other property designated ... if the legatee had a choice in the matter and said that he would rather not have shares, he would then take the amount of money which would have had to be expended in buying them.'**

[nb: in essence then this was a gift of money, valued notionally as against the shares. As the property was not actually owned by the testator at any time, the gift did not adeem.]

Culbertson v Culberston
(1967), 60 WWR 187 (Sask CA); cb., p.568

The will gave 'the following amounts to the following persons' and named 31 people. It then provided:

> I direct that each of the above legacies shall be paid out of the money realized from the sale of my farm lands, and if the amount... should not be sufficient to cover the full amount of the said legacies, then each person shall take a proportionate share.

The sale of the lands during the testator's lifetime resulted in a fund well in excess of the legacies but, on his death, the executor received only a much smaller amount as what remained owing. Previous payments had been put in a general bank account and their identity lost.

At first instance it was held that the legacies were demonstrative and should be paid in full, using the balance of the purchase price first, then the general estate.

On appeal, it was held that the legacies were specific and payable only out of the balance of the purchase price. Thus, the legacies adeemed equally ('pari passu'). The testator's language, given its natural and ordinary meaning, limited payment to this particular fund.

Per Maguire J.A.:

> 2 The late Moses Culbertson died on June 30, 1965. By his last will and testament bearing date June 30, 1960, the testator bequeathed 31 legacies of varying amounts, totalling $24,750, to certain charitable institutions and named persons. In respect to these legacies the will read:
>
> > I give devise and bequeath the following amounts to the following persons and organizations.
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> 3 Then followed the names of the persons and organizations together with the amount given to each.
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> 4 This provision in the will is immediately followed by the following paragraph:
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> > I direct that each of the above legacies shall be paid out of the money realized from the sale of my farm lands and if the amount recovered from the sale of my farm lands should not be sufficient to cover the full amount of the said legacies, then each person shall take a proportionate share in accordance with the amount he would have received if the full amount of the legacies had been realized.
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> 5 The residue of the estate, remaining after certain other bequests or provisions not of importance in our present consideration, was devised and bequeathed to his brother, William, and William's wife, in equal shares.

> 6 At the date of the will, the testator owned 850 acres of farm lands. These lands were sold by him on July 4, 1963, under an agreement of sale for a total sale price of $30,000. At the date of death the sum of $9,288.75 remained payable under this agreement.
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> ...
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> 15 **With every deference to the learned chambers judge, I am of the opinion that the language used by the testator, given its natural and ordinary meaning, limits the payment of the legacies to the fund to be realized from the sale of his farm lands. To place upon the words of the testator an interpretation that he intended the legacies to take effect out of some other of his property if the fund proves inadequate would, in my opinion, defeat entirely his direct and specific instructions that the legacies abate if the fund should be deficient. In my view, by reading the two paragraphs together and giving to the language there its natural and ordinary meaning, the legacies constitute a bequest of the specific fund to be realized from the sale of the testator's farm lands to the amount of the bequests: If the fund should be deficient, the legacies would abate; if the fund exceeds the amount of the legacies, the excess would fall into residue.** While the courts do not favour construing a bequest or devise in a will, as being specific when there is doubt, recourse cannot be taken to this rule of construction when, from the language of the will, the intention of the testator can be determined.
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> 16 Payment of these legacies may, therefore, be made only from the fund designated by the testator. The portion of the sale proceeds received by the testator in his lifetime, having lost identity as such proceeds and thus as part of the designated fund, there remains only the balance of the sale price of the lands remaining payable at the testator's death, namely, $9,288.75, which may constitute the fund.

DATE FROM WHICH WILL SPEAKS

The *Succession Law Reform Act* provides:

> 22. Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,
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> (a) the property of the testator; and
> (b) the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator under subsection 20 (2).

This section is based on the 1837 English Wills Act and establishes the ambulatory nature of Wills; that is, the Will can be created in respect of assets which comprise part of the testator's estate. Sometimes the question arises as to whether property acquired after the execution of the Will was intended to be excluded from the operation of a particular

clause (i.e. a gift of the house in which T owned at the execution of the Will, or, the specific house which was owned at execution and which may have later been sold); alternatively, one might approach the question as one of interpretation of the term rather than operation of the Will.

Re Rutherford
(1918), 42 OLR 405 (HCJ); cb, p.589

Per Middleton JA:

> The section [the predecessor of the present s.22, SLRA] in effect provides that, **unless from the will itself you can see that the testator did not intend after-acquired property to pass, it must be read as though he had executed it immediately before his death.** In many cases this must result in imputing to the testator an intention which in fact he never had; but, on the other hand, the opposite rule would even more frequently result in defeating his intention, This is at once apprehended where the expression used is general, e.g., where there is a gift of "my house" or "my horse," and the testator had sold his house or his horse and had bought another. The wife to whom he had given his house or the son to whom he had given his horse would riot easily understand why nothing was given because of the sale of the property owned at the will's date. So this statute establishes the rule, as put by one Judge, that **the testator must be assumed to have read his will or carried it in his mind till shortly before his death, and to have refrained from any change because it expressed his intention at that time.**
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> **Now two things have been frequently found in wills which the Courts have taken as an indication of a contrary intention. When a testator speaks of that which he gives as that which he owns at the date of the will, clearly that and that alone is given, for the provision is not that the will must in all respects be regarded as made immediately before the death.**
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> **Then, when the will speaks of a specific thing, and is not general in its provisions, the thing given must be determined by the language used by the testator. Nothing else passes, for nothing else is given.** In this way Judges, always slow to recognise by decision the desirability of reform, cut down the full meaning and effect of the statute. But it has always been held that when the thing given remains, and has, been added to between the date of the will and the date of, death, the whole property answering the description at the latter date will pass.

Re Bird
[1942] OR 415 (CA); cb, p.592

Here the testatrix bought a vacant lot in 1891 described as ‘Lot 57, Plan 184’ with a municipal address (set after she built a house on the property) of 14 Mitchell Avenue. She made a will devising it to her son, but later was required to tear it down and thereafter rebuilt is as two houses, 14 and 16 Mitchell Avenue. No change was made in the Will

notwithstanding this development of the lot. There was a signed memorandum in which the testatrix set out her intention to give both houses to the son. While the dissenting judge would apply the statute strictly and only allow 14 Mitchell Ave to pass to the son, the majority held that there was a contrary intention.

Per Fisher JA:

> **It is clear to my mind, the testatrix having by her will specifically described and identified the property she devised to her son, that notwithstanding the fact that the description at the date of death applied to part only of the property, the devise covered and included not only the land itself, but all the buildings thereon at the date of death**, and further that even if there was a changed condition of the property subsequent to the making of the will, that changed condition satisfied the description of the property devised under the will...
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> ... Lindley L.J. in In re Portal and Lamb (1885), 30 Ch. D. 50, [said] at p. 55: "It [meaning section 24 of The English Wills Act] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death." Hawkins on Wills, 3rd ed., at p. 27, on the authority of In re Evans, says: "A specific devise is not cut down by an alteration in the property made after the date of the will..."
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> The Court, in construing a will such as this, is entitled to take into consideration the condition of things in reference to which it was made, and, where there exists a specific description, to consider all the circumstances relating to the property and material to identify the thing described...
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> **I am of opinion that a contrary intention within the meaning of s. 26(1) of The Wills Act, appears here from the fact that the testatrix has used the description, "14 Mitchell Avenue" to refer to the whole Lot 57. The description "14 Mitchell Avenue" meant the same to her as the description "Lot 57", and therefore the will must be read as if she had said "Lot 57".**

DISCLAIMER

A gift must be accepted; if disclaimed, it reverts to the Estate for distribution as part of the residue (unless it was a gift of the residue in which case there is an intestacy in respect of the residue). See **Montreal Trust Co. v. Matthews (1979), 99 D.L.R. (3d) 65; cb, p.630** It is not uncommon for a person interested in a gift to disclaim in favour of a residuary beneficiary for tax reasons.