

Memorandum 81-60

Subject: Study L-603 - Probate Code (Ademption)

BACKGROUND

If a will makes a gift of specific property and the property no longer exists at the testator's death or is no longer a part of the estate, the gift is said to be "adeemed" (revoked). No economic equivalent is substituted for the gift, with the result that the testamentary provision is nullified. See 7 B. Witkin, Summary of California Law Wills and Probate § 218, at 5728 (8th ed. 1974); Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 741 (1961). Both under California law and under the Uniform Probate Code, the basic rule of ademption is not codified, but rather depends on decisional law. Both California law and the UPC have specific statutory rules relating to particular ademption problems, but these two sets of rules deal with different matters and do not overlap. The staff begins with the assumption that this basic approach should be preserved. Thus the question becomes: Which of the specific UPC rules should be enacted in California, and which, if any, of the California provisions should be repealed? This memorandum next summarizes California ademption law and the UPC rules, and then examines the effect that enactment of the UPC provisions would have on California law.

Summary of California Ademption Law

Where there has been a complete extinction of the property rather than a mere change in form, California follows the traditional rule that the gift is adeemed without regard to what the testator actually intended. See 7 B. Witkin, supra § 218, at 5729; 74 Harv. L. Rev., supra at 742-43. However, where a specific gift is changed in form (such as where the testator bequeathed "That certain Hudson Automobile, now owned by me" and later sold that Hudson and bought a newer one), ademption will not automatically take place; rather the California courts will look to the inferred or probable intent of the testator to determine whether the beneficiary will get the property in its new form. 7 B. Witkin, supra §§ 220-21, at 5730-31.

Because of the harsh effects of ademption, the courts in California and other jurisdictions have strained to find nonademption whenever possible by applying various constructional rules. For example, if a gift can be construed to be a general legacy or a "demonstrative" gift rather than a specific one, the gift is not adeemed. 7 B. Witkin, supra § 218, at 5729; 74 Harv. L. Rev., supra at 743-45. California has very liberal rules such that a gift that would be adeemed in most other jurisdictions may be saved in California. 7 B. Witkin, supra; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 385 (1976).

In addition to its decisional law, California has a number of statutory rules relating to ademption. See Prob. Code §§ 73, 77-78, 1050-1052, 1054. Two of these provisions state when a testamentary gift is adeemed:

(1) There is ademption if property specifically given by will is advanced to the beneficiary before the testator's death. Prob. Code § 1050.

(2) There is ademption if the testator alters his or her interest in property previously disposed of by will and the instrument which makes the alteration either expresses the testator's intent to adeem or contains provisions wholly inconsistent with the will. Prob. Code § 73 (using language of "revocation" rather than "ademption").

The remaining California provisions state specific rules of when a testamentary gift is not adeemed, and deal with procedural and other matters:

(1) There is no ademption of a general legacy by an inter vivos gift to the will beneficiary unless the testator expresses such an intention in writing or the donee acknowledges the ademption in writing. Prob. Code § 1050.

(2) There is no ademption of a specific gift which is the subject of an executory contract of sale. Prob. Code § 77. The property passes by the will subject to the buyer's remedies. 7 B. Witkin, supra § 219, at 5730.

(3) There is no ademption of a specific gift if the testator alters but does not wholly divest his or her interest in the property by a conveyance, encumbrance, or other act. Prob. Code § 78.

The California procedural rules which are codified include the following:

(1) If an advancement to a will beneficiary which is intended to adeem a general legacy exceeds the legacy in value, the beneficiary is not required to refund any excess value to the estate. See Prob. Code § 1051; Estate of Nielsen, 169 Cal. App.2d 297, 306, 337 P.2d 87 (1959).

(2) The value of property advanced is determined as of the date of the gift, but a binding determination of value may be made in the conveyance by the testator-donor or in the acknowledgement by the donee. Prob. Code § 1052.

(3) The probate court may determine all questions concerning advancements, the decree of distribution must contain any such determination which is made, and the decree, when final, is conclusive on all parties interested in the estate. Prob. Code § 1054.

Summary of Ademption Rules Under UPC

Like California law, the UPC makes no general statement of the ademption doctrine, but rather states rules to deal with a different set of specific situations than does California law. See UPC §§ 2-607, 2-608, 2-612. The UPC rules are as follows:

(1) There is no ademption of a specific gift of securities because of a stock split, stock dividend, or substitution of securities of a different entity resulting from a merger, consolidation, reorganization, or the like, and the devisee gets the increased number of shares, the different shares, or additional shares in a regulated investment company as a result of the testator's reinvestment plan. UPC § 2-607.

(2) There is no ademption where there are unpaid proceeds resulting from sale, condemnation, or destruction of, or damage to, specifically devised property, and the devisee is entitled to such proceeds when paid to the estate. UPC § 2-608(a).

(3) There is no ademption of a secured note which is specifically given by will where the security interest has been foreclosed by the testator and the property taken by foreclosure is in the testator's estate; the will beneficiary is entitled to the property. UPC § 2-608(a)(4).

(4) There is no ademption if the testator was subject to a conservatorship and during that time proceeds have been paid to the conservator

as a result of sale, condemnation, damage, or destruction of specifically devised property, the devisee is entitled to a general pecuniary devise equal to the net sale price, condemnation award, or insurance proceeds. UPC § 2-608(b). This provision does not apply if after the sale, condemnation, or casualty, the testator is adjudicated to be competent and thereafter survives for one year. Id.

(5) There is no ademption of a general devise by an inter vivos gift to the devisee unless either the will, a contemporaneous writing by the testator, or a written acknowledgement by the devisee so provides. UPC § 2-612. For the purpose of partial satisfaction, the gift is valued as of the date of the gift or the date of the testator's death, whichever is earlier. Id.

EFFECT OF ENACTMENT OF THE UPC IN CALIFORNIA

Would the UPC Increase the Incidence of Ademption in California?

As pointed out above, neither California nor the UPC have any general statutory statement of the ademption doctrine, relying instead on the common law to furnish the general rule and providing statutory rules to deal with specific problems. However, Professors French and Fletcher have raised a potentially serious problem which would militate against the adoption of the UPC provisions:

[I]t seems likely that should the UPC be adopted in California it would by its very specificity substantially broaden the incidence of ademption. The California court has prevented ademption of many devises that would have been considered adeemed in other jurisdictions. This has been accomplished by determining the testator's intent not to adeem and by construing specific devises as general or demonstrative, by a very liberal interpretation of changes in form rather than substance, and by application of two "anti-revocation" statutes which provide that agreements to sell property and conveyances altering but not completely divesting the testator's interest in property do not revoke provisions in a will.

French & Fletcher, supra at 385 (footnotes omitted).

The staff, however, is of the view that the UPC provisions would not necessarily increase the incidence of ademption in California. The doctrine that a specific devise of property is adeemed if the property is not in existence or is no longer part of the estate at the time of the testator's death without regard to the testator's actual intent is codified neither in California nor under the UPC. There appears to be nothing in the UPC that

would inhibit the tendency of the California courts to find that the subject of the specific devise is not wholly extinguished but is merely changed in form, and then to look to the inferred or probable intent of the testator to support a finding of nonademption. See 7 B. Witkin, supra § 220-21, at 5730-33. If a statement to this effect were put in a Comment in an appropriate place, this conclusion could be assured. Moreover, the UPC provisions could be enacted without necessitating the repeal of the two "anti-revocation" statutes to which Professors French and Fletcher refer (Prob. Code §§ 77, 78). If these two sections are retained and a Comment negates an intent to increase the incidence of ademption in California, this should not be a problem.

No Ademption From Change in Form of Securities

The problem of changes before the testator's death in securities that have been specifically given by will is a "recurring problem" in California. State Bar of California, *The Uniform Probate Code: Analysis and Critique* 52 (1973). UPC Section 2-607 states specific rules of nonademption in such a case:

Section 2-607. [Change in Securities; Accessions; Nonademption.]

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) as much of the devised securities as is a part of the estate at time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

COMMENT

The Joint Editorial Board considered amending Subsection (a) (2) so as to exclude additional securities of the same entity that were not acquired by testator as a result of his ownership of the devised securities. It concluded that, in context, the present language is clear enough to make the proposed amendment unnecessary.

Subsection (b) is intended to codify existing law to the effect that cash dividends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though paid after death. See Section 4, Revised Uniform Principal and Income Act.

California has no statute governing the matter. However, to the extent that the California cases have dealt with the problem, California decisional law is "closely similar" to the UPC. French & Fletcher, supra at 383. For example, with respect to stock splits, the cases hold that the split is merely a change in form, and the legatee gets the increased number of shares as under the UPC. 7 B. Witkin, supra § 220, at 5730-31; French & Fletcher, supra at 383. However, California ademption law is unclear concerning stock dividends, securities received as a result of merger, consolidation, or reorganization, and acquisitions made through a reinvestment plan of a regulated investment company. French & Fletcher, supra at 383-84; see 7 B. Witkin, supra.

UPC Section 2-607 would clear up the uncertainties in California law, and the State Bar has approved the UPC section in concept. See State Bar of California, supra. Accordingly, the staff recommends the adoption of UPC Section 2-607.

No Ademption Where There Are Unpaid Proceeds From Sale, Condemnation, Damage, or Destruction, or Property From Foreclosed Obligation

Subdivision (a) of UPC Section 2-608 provides for nonademption where specifically devised property has been sold, condemned, or damaged or destroyed by fire or some other casualty, and all or part of the purchase price, condemnation award, or insurance proceeds is still unpaid at the testator's death. Subdivision (a) also provides for nonademption where there is property in the estate resulting from foreclosure of a specifically devised obligation such as a mortgage or deed of trust. Subdivision (b) provides rules where the testator is subject to a conservatorship.

UPC Section 2-608 provides:

Section 2-608. [Nonademption of Specific Devises in Certain Cases; Unpaid Proceeds of Sale, Condemnation or Insurance; Sale by Conservator.]

(a) A specific devisee has the right to the remaining specifically devised property and:

(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if after the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (a).

COMMENT

In 1975, the Joint Editorial Board recommended a re-ordering of the title of this section and a reversal of the original order of the subsections. This recommendation was designed to correct an unintended interpretation of the section to the effect that all of the events described in subsections (a) and (b) had relevance only when the testator was under a conserva-

torship. The original intent of this section, made more apparent by this re-ordering, was to prevent ademption in all cases involving sale, condemnation or destruction of specifically devised assets where testator's death occurred before the proceeds of the sale, condemnation or any insurance, had been paid to the testator.

California has no statute comparable to UPC Section 2-608. However, California decisional law in the situations covered by subdivision (a) of UPC Section 2-608 is "roughly similar" to the UPC. French & Fletcher, supra at 384. Accord, State Bar of California, supra at 52-53 (UPC Section 2-608 "basically represents present California case law").

With respect to subdivision (b) of UPC Section 2-608, the California cases have reached substantially the same results, but with some differences: If the property disposed of by the conservator can be traced entirely into other property remaining at the testator's death, the devisees are entitled only to the remaining property, not to a pecuniary devise as under the UPC. French & Fletcher, supra at 386-87. The UPC rule seems preferable here. Otherwise the conservator could upset the estate plan of the conservatee-testator by disposing of property in the estate.

The situation where the testator regains competence has only been addressed obliquely in dictum, but the dictum was consistent with subdivision (b) of UPC Section 2-608. Id. at 387. The UPC rule (ademption will occur if specifically devised property is sold, condemned, or

destroyed during conservatorship, then the conservatee-testator is adjudicated competent and remains so for one year before death) is based on the entirely reasonable assumption that if the testator does not change the will, having had a one year opportunity in which to do so, the testator must have intended an ademption to occur. See State Bar of California, supra at 53.

Thus UPC Section 2-608 is generally consistent with California case law. Subdivision (b) (conservatorship) is preferable generally to the California rule. Also, the UPC section clarifies matters that have not yet been addressed by the California courts. Section 2-608 would seem to be a useful addition to California law. As noted above, the State Bar has approved the section in concept. Accordingly, the staff recommends the adoption of UPC Section 2-608.

Ademption by Satisfaction

What is the effect of an inter vivos gift by the testator to a person who is also a beneficiary under the testator's will? California addresses this question in Probate Code Sections 1050, 1051, 1052, and 1054. (These sections may apply in the context of intestate succession as well as wills; the intestate succession aspects of these provisions were considered at the July meeting.)

The California sections provide:

1050. A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such.

1051. Any property, real or personal, given by the decedent in his lifetime as an advancement to an heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such heir toward his share of the estate of the decedent. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement. If the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

1052. If the value of the property so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgement of the party receiving it, it must be

held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

1054. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the decree of the court, when it becomes final, is conclusive on all parties interested in the estate.

UPC Section 2-612 provides:

Section 2-612. [Ademption by Satisfaction.]

Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

COMMENT

This section parallels Section 2-110 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although Courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section would require either the testator to declare in writing that the gift is an advance or satisfaction or the devisee to acknowledge the same in

writing. The second sentence on value accords with Section 2-110 and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable. If a devisee to whom an advancement is made predeceases the testator and his issue take under 2-605, they take the same devise as their ancestor; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to his issue. In this respect the rule in testacy differs from that in intestacy; see Section 2-110.

The substantive differences between Probate Code Sections 1050 to 1052 and 1054 and UPC Section 2-110 are discussed under the following subheadings.

Ademption of specific legacy. The first clause of Probate Code Section 1050 deals with ademption of a specific legacy by an inter vivos gift of the property specifically given. UPC Section 2-612 does not deal with ademption of specific legacies, but deals only with ademption of general legacies by satisfaction inter vivos. The UPC Comment notes that an inter vivos gift of a specific legacy would cause ademption "by extinction rather than by satisfaction, and this section would be inapplicable." This apparent difference between California law and the UPC is therefore a difference in form only, not substance. There is no need to continue the first clause of Probate Code Section 1050.

Requirement that writing be "contemporaneous" with the gift. Both California law and the UPC require a writing to indicate that, in the case of a general legacy, an inter vivos gift is intended to be an advancement and must be deducted from the legacy. Prob. Code § 1050; UPC § 2-612. The UPC requires that the testator's writing be "contemporaneous" with the gift. The California statute does not contain such a requirement, but one California case appears to have accepted that that is the rule apart from the statute. See In re Estate of Hayne, 165 Cal. 568, 574, 133 P. 277 (1913). The staff prefers the UPC approach of having an express statutory requirement that the testator's writing (if not in a revised will or codicil) shall be "contemporaneous" with the gift. The testator should not be able to revoke a completed and unconditional gift by an informal writing. Also, this will correspond to the Commission's decision at the July meeting to make a similar change in intestate succession law. The staff recommends adopting the first sentence of UPC Section 2-612 in place of Probate Code Section 1050.

Valuation of inter vivos gift. Under California law, the testator-donor may assign a value to an inter vivos gift in the conveyance or other writing, or the donee may acknowledge its value in writing, and that will conclusively establish its value. Prob. Code § 1052. The UPC has no such provision. This feature of California law seems useful. Since the testator may revise his or her will to decrease a general legacy by an amount equal to the value the testator assigns to an inter vivos gift, why shouldn't the testator be able to accomplish the same result by assigning the value in the conveyance? The staff recommends retaining this aspect of California law.

Under California law, if the value is not established by the testator or acknowledged by the donee, the property given is valued as of the date of the gift. Prob. Code § 1052. Under the UPC, the property is valued as of the earlier of the date the donee received the property or the date of the testator's death. The UPC is thus drawn to take account of the situation where the testator gives the property during his or her lifetime, but the donee does not come into "possession or enjoyment of the property" until after the testator's death; in such a case, the property would be valued as of the date of death. UPC § 2-612.

The staff recommends adopting the valuation provision of UPC Section 2-612 (last sentence) in place of Probate Code Section 1052, but retaining the California provision for a binding determination of value by the donor or donee.

Refund of excess value not required. California law provides that if the amount of an advancement exceeds the donee's share of the estate, no refund to the estate is required. Prob. Code § 1051. (Although the language of Section 1051 suggests that it applies only in the intestate context, the decisions have assumed that it applies in the wills context as well. See, e.g., Estate of Nielsen, 169 Cal. App.2d 297, 306, 337 P.2d 87 (1959).) The UPC has no provision comparable to Probate Code Section 1051. Section 1051 seems useful, and the staff proposes to retain it.

Determination by court. Probate Code Section 1054 authorizes the probate court to determine questions concerning advancements, requires any such determination to be included in the decree of distribution, and gives the decree conclusive effect. The staff proposes to retain this section.

Ademption by Alteration of Interest in Property

The general common law rule in California is that if the subject of a testamentary gift is not wholly extinguished, but is merely changed in form, ademption will not take place. 7 B. Witkin, supra § 220, at 5730. California has three statutory sections that deal with particular aspects of this general rule. These are Probate Code Sections 73, 77, and 78:

73. If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it

contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

77. An agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

78. Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will.

Although all three of these sections use language of "revocation," it is more accurate to view these as ademption sections. See French & Fletcher, supra at 344 n.48, 350; Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 38 (1956). The UPC does not have provisions comparable to these three Probate Code sections.

Under Probate Code Section 73, the testator may convey away all or part of property disposed of by will; if the testator declares in the instrument of conveyance that the conveyance revokes the testamentary gift, the declaration is given effect. Turrentine, supra. Professor Turrentine recommended repeal of Section 73:

Informal revocation in these ways is probably not desirable. It raises a question where the testator later reacquires the property and dies without having altered his will. The section ought to be repealed in toto. The situation to which it is directed is better handled under the doctrine of ademption.

Id. Under the common law doctrine of ademption, both under California law and the UPC, if the property is entirely conveyed away, the testamentary gift will be adeemed by extinction. 7 B. Witkin, supra § 218, at 5728; Official Comment to UPC § 2-612. If the property is conveyed away in part, Probate Code Section 78 would apply (no revocation where testator's interest "is altered, but not wholly divested") and the testamentary gift would not be adeemed. The staff has already concluded that Section

73 is unnecessary for the purpose of revocation of wills (see Memo 81-54). Its ademption aspects are satisfactorily covered by Section 78. Accordingly, the staff recommends the repeal of Section 73.

Sections 77 and 78 are specific statements of "non-revocation" (i.e., nonademption) and are consistent with the liberal thrust of the California decisions which avoid the harshness of ademption whenever possible. See French & Fletcher, supra at 385; 7 B. Witkin, supra §§ 219-21, at 5729-33. The staff recommends retaining Sections 77 and 78, both because their specific rules are useful and because it would be undesirable to permit an inference that the incidence of ademption should be increased in California.

Summary of Recommendations

The staff's recommendations concerning ademption may be summarized as follows:

- (1) Enact UPC Section 2-607 (change in form of securities).
- (2) Enact UPC Section 2-608 (unpaid proceeds, etc.).
- (3) Enact UPC Section 2-612 with the addition of a provision drawn from Probate Code Section 1052 for the donor or donee to make a binding determination of the value of an inter vivos gift.
- (4) Repeal Probate Code Sections 73, 1050, and 1052.
- (5) Retain Probate Code Sections 77, 78, 1051, and 1054.
- (6) Include a statement in an appropriate Comment to the effect that the rules of nonademption in the legislation are not exclusive, and nothing in the legislation is intended to increase the incidence of ademption in California.

(The Commission has previously decided to recommend repeal of Probate Code Section 1053 which applies solely in the context of intestate succession.)

Respectfully submitted,

Robert J. Murphy III
Staff Counsel