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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 8-358 / 97-1571

**IN THE MATTER OF THE ESTATE OF ALICE SCHIEBEL LORENSEN,** Deceased,

**BRENTON BANK, N.A., Executor of the Estate of ALICE SCHIEBEL LORENSEN, Deceased,**
Appellee,

vs.

**SUSAN SPEICHER, KAREN LORENSEN, PAUL LORENSEN and KATHRYN TRENCH,**
Appellants.

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Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh, Judge.

Heirs to an estate appeal a district court ruling in a declaratory judgment action which determined their distribution under a provision of the decedent's will without the hearing which they requested. **REVERSED AND REMANDED.**

Peter C. Riley of the Tom Riley Law Firm, P.C., Cedar Rapids, and James A. Piersall of the Piersall Law Firm, P.C., Cedar Rapids, for appellants.

Joel T.S. Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

**VOGEL, J.**

Susan Speicher, Karen Lorensen, Paul Lorensen, and Kathryn Trench (Raymond Lorensen's heirs) appeal a district court's declaratory judgment ruling which construed a provision in Alice Lorensen's will devising to them property she received from the estate of her husband, who was their uncle. They specifically appeal the district court's denial of their request for a hearing to determine which assets, if any, had adeemed. We conclude the matter should be remanded for such a hearing and therefore reverse.

***Background facts.*** Alice Schiebel Lorensen and her husband, R.G. (Raymond) Lorensen, farmed throughout their marriage and never had any children. Raymond's will, executed in July of 1986 and amended by codicil in September of that year, devised to Alice all automobiles, household furniture and furnishings, farm machinery, yard tools, and personal effects. Raymond also placed his stock in Lorensen Farms, Inc., in trust, with Alice to receive its income for life, and the remainder to pass to his nieces and nephew upon Alice's death. Alice received the bulk of Raymond's estate through the residuary clause in his will and by virtue of being a surviving joint tenant.

Alice had executed her will in February of 1980, and amended it later by codicil to change only the names of two nieces to their married names. Item III of her will, as amended by Item I of the codicil, provided as follows:

> In the event my husband, R. G. Lorensen, does not survive me and there is any personal property in my estate which I have received from my husband's estate by virtue of being the surviving joint tenant or through devise or bequest, I direct that said property be segregated from the rest of my personal property and I hereby give, devise and bequeath said property to my husband's nieces and nephew, to-wit: Susan Speicher, Karen Lorensen, Paul Lorensen and Kathryn Trench, share and share alike.

When Raymond died in 1987, Alice disclaimed her right to receive interest in the farm stock and passed it on to Raymond's heirs. Alice also made several lifetime gifts to various family members.

After Alice's death in August of 1995, Brenton Bank, the executor of her estate, filed a petition for declaratory judgment, seeking construction and interpretation of Alice's will. The bank specifically asked the court to determine what personal property should pass to Raymond's heirs under Item I of the codicil. In their answer, the heirs requested that the court: 1) first determine the legal construction of Item I; and 2) set a hearing to determine what personal property in Alice's possession at the time of her death was traceable to personal property she received through Raymond's estate or by virtue of being a surviving joint tenant.

The district court ruled: 1) it was Alice's intent to convey to Raymond's heirs a specific bequest of both tangible and intangible property[1]; and 2) Alice intended for

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[1]While we do not necessarily agree with this finding, neither party has raised it on appeal.

Raymond's heirs to receive all personal property willed to her by Raymond which was still in her possession and in the *same form* at the time of her death.

The court added that there was some confusion as to the issues to be addressed in its ruling, and acknowledged that Raymond's heirs had requested an additional hearing to determine the specific assets which should pass to them. The court, however, concluded that its task was to make the specific finding as to the distribution of assets and subsequently went on to approve and incorporate the executor's proposed distribution, which was based upon a comparison of probate inventories from the two estates. Raymond's heirs filed a motion for enlargement of findings, claiming that an additional hearing was necessary to trace the assets from Alice's estate to Raymond's to determine which assets had, in fact, adeemed. The court denied the motion. The heirs appeal.

***Scope of review.*** A declaratory judgment action to interpret a will is tried in equity. Our review is de novo. *Gustafson v. Fogleman*, 551 N.W.2d 312, 314 (Iowa 1996); *In re Estate of Rogers*, 473 N.W.2d 36, 39 (Iowa 1991). While we give weight to the trial court's findings of fact, we are not bound by them. *Rogers,* 473 N.W.2d at 39; Iowa R. App. P. 14 (f)(7).

***Preservation of error.*** The bank argues that the heirs failed to preserve error on any claim of a right to a remand for further hearing or tracing of assets. We find error was properly preserved by their answer and motion for enlargement of findings.

***Necessity of an additional hearing on ademption.*** The assets in contention consist of mainly intangible investment assets, such as certificates of deposit and bonds, many of which matured or became payable after Raymond's death in 1987, but before Alice's death in 1995. These assets were considered by the executor to have changed form and adeemed, and therefore were not passed to Raymond's heirs under the distribution approved by the court. The heirs contend that these assets changed form only in a technical or formal sense and were never actually disposed of nor destroyed, which they argue is a requirement for ademption. They assert that a hearing is necessary to examine each asset to determine whether a mere technical change had occurred, or whether an asset no longer existed and ademption occurred. The bank asserts that the court correctly determined Alice's intent by comparing which personal property was exactly the same in Alice's estate inventory as was in Raymond's, and properly approved the proposed distribution without an additional hearing.

***Specific bequest and ademption.*** A specific bequest or devise is a testamentary gift of a designated asset or specific part of the testator's estate which is identified and distinguishable from other things of the same kind, which may be satisfied by delivery of the specific thing or portion. *In re Estate of Hoagland*, 203 N.W.2d 577, 581 (Iowa 1973). An "ademption" is an extinction of property, and when a specific devise is adeemed, no other property can take its place. *In re Estate of Eickholt*, 365 N.W.2d 44, 47 (Iowa App. 1985). Ademption only occurs if the particular property is voluntarily destroyed or disposed of by the decedent prior to death. *Conn v. Williams*, 353 N.W.2d 411, 416 n.1 (Iowa 1984). The intent of the decedent must be examined before deciding whether ademption has occurred. *Eickholt*, 365 N.W.2d at 47.

In order to determine intent, we may not look to extrinsic evidence to vary, contradict, or add to the terms of the will, but we may use extrinsic evidence as an aid in resolving doubts where the instrument is ambiguous. *See Rogers*, 473 N.W.2d at 39; *see also Johnson v. McDowell*, 154 Iowa 38, 39, 134 N.W. 419, 420 (1912) (allowing extrinsic evidence to establish testator's intent as to whether a lifetime gift was meant to satisfy a specific bequest).

The determination of what property passed from Alice's estate to Raymond's heirs is complicated by the lack of specificity in Alice's will, which devises to Raymond's heirs "any personal property in my estate which I have received from my husband's estate by virtue of being the surviving joint tenant to through devise or bequest." The district court construed that language to include both tangible and intangible personal property; however, the specific personal property was still left to be identified. Based on the limited evidence presented at the hearing, the court concluded that Alice did not intend to act as a mere repository for her husband's property until her own death. The court then accepted the bank's extrinsic evidence — a comparison of the probate inventories from both estates—and ruled that Alice intended that Raymond's heirs receive only those assets which were in the same form at the time of her death as they had been when she received them from Raymond's estate. However, in only accepting the bank's extrinsic evidence, the court foreclosed Raymond's heirs the opportunity to present other extrinsic evidence as to Alice's intent regarding the property in dispute. We find the matter should be remanded to allow them to do so. The focus on remand should be whether Alice intended the disputed property to adeem; this determination may be assisted by a tracing of the assets from Alice's estate to Raymond's.

We do not envy the district court's task. Ademption is, to say the least, a perplexing area of law which has inspired much debate and a recent change to the Uniform Probate Code. *See* Unif. Probate Code §2-606 (amended 1991) (adopting an intent theory for ademption); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 Ohio St. L.J. 1057, 1125-35 (1996); Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 Alb. L. Rev. 1067 (1992) [hereinafter Alexander]. Iowa courts historically applied the "identity rule"of ademption, which provides that if a specifically bequested item is missing from the estate at the time of the testator's death, the bequest is considered adeemed. *See In re Estate of Stonebrook*, 258 Iowa 1062, 1067-68, 141 N.W.2d 212, 216 (1966); *In re Estate of Sprague*, 244 Iowa 540, 545, 57 N.W.2d 212, 216 (1953); Comment, *Ademption in Iowa - A Closer Look at Testator's Intent*, 57 Iowa L. Rev. 1211, 1212 (1972). However, strict application of that rule can defeat testator intent and provide harsh results. To that end, where the destruction or disposal of property is accomplished through no voluntary act of the testator, Iowa courts adopted a "modified intention theory."[2] *See In re Estate of Wolfe*, 208 N.W.2d 923, 924 (Iowa 1973); *Stake v. Cole*, 257 Iowa 594, 599, 133 N.W.2d 714, 717 (1965) (holding that where sale of specifically devised property is made by the guardian of an incompetent testator, with court approval, the devise is adeemed only to the extent proceeds of the sale are used for care and maintenance of the ward and expenses of the guardianship); *In re Estate of Bierstedt*, 254 Iowa 772, 775, 119 N.W.2d 234, 236 (1963) (holding that there was no ademption of proceeds of specifically devised property where property was sold by testator's guardian). In *Wolfe*, the accident which took the testator's life also destroyed the devised property, a vehicle. Noting that the testator had no opportunity to change his will after the involuntary destruction of the devised property, the court held that the devise did not

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[2] The "modified intention theory" was explained in *In re Estate of Bierstedt*, 254 Iowa 772, 775, 119 N.W.2d 234, 236 (1963):

> Where the testator is competent and disposes of the subject of the gift, the gift is adeemed; where the testator is incompetent and the subject of the gift is sold by a guardian with court approval, the gift is only adeemed to the extent the proceeds are used for care and maintenance of the ward. The only question of intention involved is the opportunity of the testator to change the will. This opportunity is denied the incompetent testator. No question of his intentions other than expressed in the will is involved. Where, as here, the testator is incompetent and under guardianship, a sale by the guardian does not work an ademption so far as the proceeds are traceable. This is the majority view in this country.

adeem and ruled that the insurance proceeds from the vehicle should pass to the beneficiary. *Wolfe*, 208 N.W.2d at 925-26.

Other jurisdictions, in an attempt to avoid the strict and sometimes harsh application of the identity rule, have decided that a specific devise is not adeemed if the subject matter has changed only in form. *See* Alexander, 55 Alb. L. Rev. 1074-75; *see also Curtis v. Curtis*, 2 A.2d 88, 91-92 (Del. Ch. 1938); *In re Vail's Estate*, 67 So.2d 665, 667 (Fla. 1953); *Goode v. Reynolds*, 271 S.W. 600, 603 (Ky. 1925); *In re Will of Strauss*, 521 N.Y.S.2d 642, 644-45 (Sur. Ct. 1987); *In re Kingsley's Will*, 67 N.Y.S.2d 464, 477 (Sur. Ct. 1946); *Opperman v. Anderson*, 782 S.W.2d 8, 11 (Tex. App. 1989); John C. Paulus, *Special and General Legacies of Securities--Whither Testator's Intent*, 43 Iowa L. Rev. 467, 511 (1958); 80 Am. Jur. 2d *Wills* §1715 (1975). Raymond's heirs seem to urge that we adopt a similar theory; however, the issue has never been fully addressed in Iowa. *But see In re Estate of Carpenter*, 533 N.W.2d 497, 507-08 (Iowa 1995) (Snell, J., dissenting).

We therefore reverse and remand for further proceedings. We do not retain jurisdiction. Costs for this action on appeal are divided equally between the parties.

**REVERSED AND REMANDED.**