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THE CREATION OF GENERAL AND SPECIFIC BEQUESTS OF SECURITIES AND THE RULES FOR THE DISTRIBUTION OF ACCESSIONS TO SECURITIES*

Although wealth was once measured solely in terms of realty, it is now most frequently measured in terms of personal property. Thus, decedents' estates now consist mainly of personal property, and most wealth is passed on to posterity in that form. The most valuable form of personal property is generally securities, and thus, one would expect that the scrivener of a will would be most careful to describe bequests of securities in detail. But it seems that while attorneys have become accustomed to giving complex legal descriptions of land in wills, they tend to describe securities in general terms, as "100 shares of XYZ Corporation stock." Additionally, accessions to securities occur frequently, raising the issue of whether the legatee of the enumerated securities or the residuary legatee should get the benefits of the accession. Accessions to land, on the other hand, are infrequent, and testators seldom own more than one house to create confusion within their wills. Words showing possession of securities are also frequently omitted from descriptions in wills. A testator would never describe his gift as "a diamond ring"; he would always say "my diamond ring." But again when dealing with securities, it seems that he would probably forget the possessive word.

The omission of words, which have the legal effect of creating a specific bequest, may create results far different from those which the testator intended. If accessions to the securities occur after the execution of the will, their disposition will, in most states, be resolved by the nature of the legacy legally created. The requirements for the creation of general and specific legacies of securities, and the application of these principles of classification to decide who should receive accessions to such securities, will be examined in this article.

The General Nature of General, Specific, and Demonstrative Legacies

A legacy of securities may be seen legally as a general, specific, or demonstrative bequest. A general legacy is defined as:

one which may be satisfied out of the general assets of the testator's estate without regard to any particular fund, thing, or things, and does not amount to a gift of a particular thing or part of the estate distinguished and set apart from the rest of the testator's property, and capable of precise identification, or a gift of a particular fund distinguished and set apart from all others of the same kind.¹

*The Law Review Board acknowledges that Atty. Edwin F. Walmer, a partner in the firm of Foley, Sammond and Lardner, was the advisor in the construction of this article.

¹ 96 C.J.S., *Wills* § 1125(e) at 881-2 (1957).

The term "general legacy" encompasses all legacies that are not demonstrative or specific.² The subject of a general legacy need not even be a part of the testator's property; for example, if the testator left an individual 100 shares of stock in the XYZ Corporation and never owned any such shares, the gift may still be satisfied by the executor purchasing stock of that kind for the legatee.³

A demonstrative legacy must contain two elements. The legacy must be an "unconditional gift in the nature of a general legacy,"⁴ and it must also indicate the fund out of which it is payable.⁵ It is an unconditional gift to the legatee of a specified amount, and, if the designated fund fails, it is payable out of the general assets of the estate.⁶ It is said to be a gift charged on a specific fund which becomes a general legacy if that fund is insufficient.⁷ Demonstrative legacies are infrequent, and they are either clearly expressed or created by construction to reach an equitable result. *Page on Wills* states that the real question is whether the gift is general or specific.⁸ Demonstrative legacies will not be further examined in this article.

A specific legacy is "limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other."⁹ The particular thing must be described so that the item is distinguished from all others of the same generic type.

The distinguishing feature in the creation of a specific, general, or demonstrative bequest is the intent of the testator. It is said that the intent of the testator as to the nature of the legacy will prevail over all rules of construction. However, when this rule is added to the one stating that the intention that is controlling is that which is expressed, it may be seen that the nature of the legacy is almost always determined by the wording of the will.

Distinguishing General Bequests of Securities From Specific Bequests in Wisconsin

The intent of the testator controls over all rules of construction in Wisconsin.¹⁰ His intent is to be gathered from the "four corners" of the will in light of the surrounding circumstances at the time the will

² *Houston Land and Trust Co. v. Campbell*, 105 S.W.2d 430 (Tex. Civ. App. 1937).

³ *Young v. Young*, 202 Ga. 694, 44 S.E.2d 659 (1947); *Bailes v. Halsey*, 179 Ga. 182, 175 S.E. 472 (1934).

⁴ 96 C.J.S., *Wills* § 1125(f) at 883 (1957).

⁵ *Ibid.*

⁶ *Id.* at 883.

⁷ *Lansburgh v. Lansburgh*, 37 F.2d 997 (D.C. Cir. 1930); *Ballinger's Devises v. Ballinger's Administrators*, 251 Ky. 405, 65 S.W.2d 49 (1934).

⁸ 6 PAGE, *WILLS* § 48 (3d ed. 1962).

⁹ BLACK'S LAW DICTIONARY 1038 (4th ed. 1957).

¹⁰ *In re Mory's Estate*, 29 Wis. 2d 557, 139 N.W.2d 623 (1966); *First Wis. Trust Co. v. Perkins*, 275 Wis. 464, 468, 82 N.W.2d 331 (1957); *Boyle v. Northwestern Mut. Relief Ass'n*, 95 Wis. 312, 324, 70 N.W. 351 (1897).

was executed.¹¹ But, since the only intent that the court will give credence to is that which is manifested by the testator, the wording of the will almost always determines the nature of the legacy.

The Wisconsin Supreme Court over thirty years ago set the standards for the creation of general and specific legacies of securities. In one term of court, that body decided two cases involving the language necessary to create general or specific legacies in Wisconsin. In *Will of Blomdahl*¹² a will contained a legacy worded, "I give and bequeath one hundred (100) shares of the common stock of the Ohio Oil Company."¹³ The wording in the form "x shares of Y Corporation stock" was held to create a general legacy—not a specific legacy.

*Will of Hinners*¹⁴ involved a will containing a legacy worded, "I give devise, and bequeath . . . two hundred, twenty-five (225) shares of my stock in the Geo. H. Smith Steel Casting Company."¹⁵ This wording in the form "x shares of my stock in Y Corporation" was held to create a specific legacy and not a general legacy. The court, in the *Hinners* case, gave no explanation of its decision that the legacy was specific except to say that the wording creates a specific bequest, citing authority from other states.¹⁶ But the court detailed the language necessary to create a specific legacy in the *Blomdahl* case.

The court in *Blomdahl* reiterated the rule from *Will of Weed*¹⁷ that to create a specific legacy it is necessary to indicate a specific article to charge the gift against and that the testator's failure to do so created a general bequest.¹⁸ The court said:

It is a generally accepted rule that where the language of the will is clear and unambiguous it must control and that rule must prevail in this instance. The gift of a certain number of shares of stock *without words of identification and possession* is a general legacy. (emphasis added)¹⁹

It seems from the court's language that the generally recognized presumption, that a gift is general unless clearly specified otherwise, could only be overcome by words used to indicate possession or ownership. The court stated:

. . . a bequest is a general legacy unless the testatrix, by some qualifying words, expressly indicated a different intention and a purpose to have it a specific legacy.²⁰ . . . We hold that words

¹¹ *Uihlein v. Uihlein*, 11 Wis. 2d 219, 105 N.W.2d 351 (1960); *In re Buser's Estate*, 8 Wis. 2d 10, 98 N.W.2d 425 (1959); *First Wis. Trust Co. v. Perkins*, 275 Wis. 464, 82 N.W.2d 331 (1957).

¹² 216 Wis. 590, 257 N.W. 152 (1935).

¹³ *Id.* at 591.

¹⁴ 216 Wis. 294, 257 N.W. 152 (1934).

¹⁵ *Id.* at 295.

¹⁶ *Id.* at 299, 300.

¹⁷ 213 Wis. 574, 252 N.W. 294 (1934).

¹⁸ 216 Wis. 590 at 593 (1935).

¹⁹ *Id.* at 594.

²⁰ *Id.* at 592.

specifically identifying the property and indicative of possession are necessary in the making of a specific bequest.²¹

From the two cases, then, the form "x shares of Y Corporation stock" creates a general legacy, while "x shares of my stock in the Y Corporation" creates a specific legacy. Of course, use of the word "my" is not the only way a testator may express a specific legacy of stock. Words of specific identification, such as indication of stock certificate numbers, or possession, as "the 100 shares of XYZ Corporation stock now in my possession," all fit the requirements for specific legacies enumerated in the *Blomdahl* case. These expressions all legally show testator's intent to create a specific legacy. Apparent indicia of the testator's intent, apart from his expressions in the will, however, do not vary these classifications. The court stated: "Under the law of this state, the circumstance of the ownership of the stock at the time of execution is not material in determining this question in the absence of the necessary qualifying words creating a specific gift."²² The court, ruling that the fact that the testator owned the exact number of shares he bequeathed was irrelevant, seemed to foreclose proof on the circumstances of the testator's security ownership at the execution of the will. But, at least one Wisconsin court, since this ruling, has heard evidence on such circumstances over specific objection of counsel based on the *Blomdahl* decision.²³ Thus, even though the fact that the testator owned the exact number of shares bequeathed has been ruled irrelevant by the Wisconsin Supreme Court, some courts may still allow evidence on this point, at least as an offer of proof.

It is clear that in Wisconsin the presumption is that a legacy of securities is general, and it takes a clear showing of the testator's intent to make a bequest specific under the *Blomdahl* ruling. The Wisconsin rule is in accord with the majority of American courts, but there have been some notable deviations from the rule.

Distinguishing General From Specific Bequests of Securities Nationally

The general rule in all courts is that the intention of the testator as expressed in his will governs the nature of a legacy of securities and that such intent is to be interpreted from the four corners of the will in light of surrounding circumstances.²⁴ In the absence of an expression of intent to the contrary, a bequest of securities described by the corporation or obligor, or by value or quantity, but not indicating any specific lot, will be considered a general legacy in America or England, especially where the securities referred to are those dealt

²¹ *Id.* at 593.

²² *Id.* at 592.

²³ Estate of Zarne, File No. 504-515, (Milwaukee Co. Probate, 1965).

²⁴ 96 C.J.S., *Wills* § 1129(b) (1) (1957).

in by the general public on public exchanges.²⁵ That the general law is in accord with Wisconsin's is indicated by the fact that the *Blomdahl* case is cited as authority for many of these propositions along with cases from many other states and England.²⁶

Expressions of a testator necessary to indicate an intent that a bequest is specific are fairly uniform in most states. Use of the word "my" to indicate ownership and possession creates a specific bequest,²⁷ and labeling gifts of stock "specific legacies" creates specific legacies;²⁸ however, failure to use expressions of possession or ownership produces varying results between the several states.

One group, seemingly most numerous, rules that in the absence of possessive words or an intent that a gift should be specific, discernible from the entire will, the gift is general regardless of the fact that the testator owned the exact number of shares he bequeathed.²⁹ This view is held by the courts of England and the states of Ohio, California, Colorado, New Jersey, New York, Pennsylvania, Wisconsin, and probably some others. Recent cases in California and New York, however, cast doubt on their present positions.³⁰

The Virginia Supreme Court in a recent case stated:

Appellants also argue that the failure of testator to use the possessive word "my" in referring to the stock bequeathed is a clear indication that he intended the stock legacies to be general and not specific. There is no merit in this argument.

It is true that the authorities generally agree that the use of the word "my" indicates an intention to make legacies of stock specific, but the law is not so technical as to insist upon the use of the word "my" when other language in the will clearly indicates the intention of the testator to bequeath the shares of stock he owned at the time the will was executed.³¹

The will in this case, however, contained the following expression which probably showed the testator's intent to make a specific legacy: "In the event any of the shares of stock heretofore bequeathed shall be disposed of during my lifetime . . . [the executor] shall pay to the beneficiary an equivalent amount in cash based upon the market value

²⁵ *Ibid.*; 6 PAGE, WILLS § 48.6 (3d ed. 1962).

²⁶ 96 C.J.S. *Wills* § 1129 at 896 n.40 (1957); 6 PAGE, WILLS § 48.6 (3d ed. 1962).

²⁷ *In re Anslinger's Estate*, 185 Misc. 827, 57 N.Y.S.2d 466 (1945); *Gorham v. Chadwick*, 135 Me. 479, 200 A. 500 (1938); *In re Hinner's Will*, 216 Wis. 294, 257 N.W. 148 (1934); *Quill v. Schlechter*, 121 N.J.Eq. 149, 188 A. 237 (1936); *In re Estate of Kirkwood*, 2 Ohio Misc. 56, 207 N.E.2d 587 (1965).

²⁸ *In re Willet's Estate*, 173 Misc. 199, 17 N.Y.S.2d 578 (1939).

²⁹ 96 C.J.S. *Wills* § 1129(b) (2) at 898 n.66 (1957); 6 PAGE, WILLS 22 n.2 (3d ed. 1962); *Estate of Kirkwood*, 2 Ohio Misc. 56, 207 N.E.2d 587 (1965).

³⁰ *In re Ehrenfel's Estate*, 50 Cal. Rptr. 358 (Cal. App. 1966); *In re Coleman's Will*, 39 Misc. 2d 837, 242 N.Y.S.2d 4 (1963).

³¹ 205 Va. 318, 136 S.E.2d 845, 849 (1964).

of such stock as of the day of my death."³² This ruling seems to align Virginia with the general-rule-states, or at least it does not "disalign" it.

A Massachusetts Court in *Thayer v. Pauldin*³³ held a provision stating: "It is my express wish and desire that all of the legacies and trust funds shall, as far as possible, be paid in stocks and bonds or other property which I may own at the time of my death."³⁴ to be a sufficient expression of intent to give specific legacies without use of the word "my" in the bequest. Similar cases in New York³⁵ and Pennsylvania³⁶ have held that language which shows that the testator intended payment of legacies to be from property owned at his death are specific bequests, although generally worded.

Another group of states holds that the fact that the testator owned the exact number of shares he bequeathed at the execution of his will—and that fact alone—will render the bequests specific.³⁷ Other states are between these extremes or fluctuate between them.³⁸ A gift of a certain sum in stocks or money³⁹ or a gift of a certain value of securities has been held to be general in nature.⁴⁰

Various differences in facts may change these basic rules in any court. The variation that has been most appealingly argued is that the fact that the testator owned the specific number of shares of securities he bequeathed should be a controlling indication of the testator's intent to give a specific legacy.

Treatment of Accessions to Securities as Principal or Income

The Uniform Principal and Income Act⁴¹ allocates interest paid on bonds to income, and dividends on shares of stock payable in cash without an option to receive stock are also allocated to income.⁴² Once such accessions are classified as income, their disposition is controlled

³² *Id.* 136 S.E.2d at 847.

³³ 200 Mass. 98, 85 N.E. 868 (1908).

³⁴ *Id.* 85 N.E. at 869.

³⁵ *In re* Security Trust Co. of Rochester, 221 N.Y. 213, 116 N.E. 1006 (1917).

³⁶ *In re* Ferrick's Estate, 241 Pa. 340, 88 A. 505 (1913). The will in this case provided: "Then I direct my executors to sell and dispose of such of my stock as may be necessary, to each legatee to be apportioned according to the value of his or her bequest herein." The court stated this clause rendered the bequest specific.

³⁷ *Adams v. Conqueror Trust Co.*, 358 Mo. 763, 217 S.W.2d 476; *In re* Ehrenfel's Estate, 50 Cal. Rptr. 358 (Cal. App. 1966); *In re* Garrison's Estate, 156 So. 2d 18 (Fla. App. 1963); *In re* Coleman's Estate, 39 Misc. 2d 837, 242 N.Y.S.2d 4 (1963); *Succession of Quintero*, 24 So. 2d 589 (La. 1946); *Drake v. True* 72 N.H. 322, 56 A. 749 (1903); *Jewell v. Appolino*, 75 N.H. 317, 74 A. 250 (1909).

³⁸ *Desoe v. Desoe*, 304 Mass. 231, 23 N.E.2d 82 (1939); *Vogel v. Saunders*, 92 F.2d 984 (D.C. Cir. 1937); *In re* Hick's Will, 272 App. Div. 594, 74 N.Y.S.2d 246 (1947).

³⁹ *Graham v. De Yampert*, 106 Ala. 279, 17 So. 355 (1895).

⁴⁰ *Booth v. Baptist Church*, 126 N.Y. 215, 28 N.E. 238 (1891).

⁴¹ WIS. STAT. § 231.40, 96 U.L.A. § 588 (1966).

⁴² WIS. STAT. § 231.40(6), 96 U.L.A. § 6 (1966).

by provisions in the will for payment of income or in the absence of such provisions, by the Uniform Principal and Income Act.⁴³

Dividends payable in stock or giving an option to receive cash or stock are allocated to principal by the Uniform Principal and Income Act.⁴⁴ The Uniform Act, however, apparently due to inadvertence, omits to specify the proper allocation of stock splits. A comment from the *Marquette Law Review* is instructive on this: "A purely technical oversight in the Uniform Act is its failure to direct allocation in the case of a stock split. The Florida Court had no difficulty however in allocating a "2 for 1" stock split to principal in *Pentland v. Pentland*."⁴⁵ The Florida Supreme Court in the *Pentland* case⁴⁶ applied The Uniform Principal and Income Act, Section 5(1), *stock dividend* provisions to *stock splits*. The new Revised Principal and Income Act, Section 6(a) specifically allocates stock splits to principal. An early Wisconsin case, *Pabst v. Goodrich*,⁴⁷ is in agreement, ruling that stock splits are not income, as they are not property purchased with the earnings or income of a corporation.

It would seem, then, that stock splits and dividends payable in shares of stock are principal, and, as such, their distribution is normally controlled by the nature of the legacies they accrued to—whether general or specific.

Distribution of Accessions to Legacies of Securities

If a testator manifests an intention as to the disposition of accessions to property that he has bequeathed, then that disposition is controlling whether the accessions occur before or after his death.⁴⁸

Generally, stock dividends paid after the testator's death on general bequests of stock go into the general estate and not to the legatee of the stock.⁴⁹ Specific bequests, contrarily, carry all stock dividends declared after testator's death with them.⁵⁰ Wisconsin follows these general rules and pays stock dividends to specific legatees but not to general legatees⁵¹ It is generally held that a general legacy which is segregated by the executor from other estate property for payment carries

⁴³ WIS. STAT. § 231.40(3a) (a), 96 U.L.A. § (3a) (a) (1966).

⁴⁴ WIS. STAT. § 231.40(5) (a), 96 U.L.A. § (5) (a) (1966); Will of Allis, 6 Wis. 2d 1, 94 N.W.2d 226 (1959).

⁴⁵ 46 MARQ. L. REV. 483 (1963).

⁴⁶ 113 So. 2d 872 (Fla. 1954).

⁴⁷ 113 Wis. 43, 88 N.W. 919 (1907).

⁴⁸ 6 PAGE, WILLS § 59.15 (3d ed. 1962).

⁴⁹ *Ibid.*; C.J.S. Wills § 1101; 57 AM. JUR. Wills § 1615 (1948).

⁵⁰ 6 PAGE, WILLS § 59.15 (3d ed. 1962); 96 C.J.S., Wills § 1101 (1957); 57 AM. JUR. Wills § 1615 (1948); Nelson v. Nelson 41 N.C. 409 (1849) seems to be a classic, where a specific bequest of a female slave was held to pass with it her four children born between the time of the testator's death and the date of distribution.

⁵¹ *In re Snell's Estate*, 227 Wis. 455, 279 N.W. 24 (1938); *In re Mead's Estate*, 227 Wis. 311, 333 *et seq.*, 279 N.W. 18 (1938).

dividends with it. It is, in effect, made specific property by virtue of its segregation.⁵²

Stock dividends declared before the testator's death have been held not to pass with specific bequests of the stock,⁵³ but there is a split of authority.⁵⁴ Wisconsin has ruled that a specific legatee was entitled to a stock dividend accruing prior to the testator's death where the dividend was part of a corporate reorganization,⁵⁵ but the court there stated that the general rule remained that dividends declared prior to the testator's death do not pass to specific legatees barring the reorganization aspect.⁵⁶ General bequests, again, do not pass dividends as a rule.

There are some courts, however, that do not adhere to the general rules in distributing stock dividends. Some courts hold that even general legacies of stock carry pre-death stock dividends with them. In an article propounding this view, it was stated:

The declaration of a stock dividend is little more than a book-keeping device; the stockholder has exactly what he had before—a certain proportionate interest in the corporation. He receives more paper certificates, but their market value and book value are diminished. If the new stock does not pass with the old, in most cases the value of the gift will be decreased. The fact that the testator does nothing with the dividend stock in most cases between the time he receives it and the time of his death might well be taken as an indication that he regarded it as disposed of by his will. The view of the principal case that the testatrix intended to bequeath her proportionate interest in the company rather than mere paper certificates, valueless in themselves, was the basis of the court's decision in a comparatively recent New Jersey case. . . . In reversing the usual construction and holding that the gift is of an interest in the corporation rather than certificates representing that interest, unless a contrary intent appears in the will, the Louisiana and New Jersey courts have adopted a realistic attitude and one better calculated to carry out the intent of the testator, which after all is the court's primary objective in will cases.⁵⁷

Often courts in their decisions as to who receives stock dividends achieve the result they deem equitable in the initial or classifying step. If a court can find the intent that a bequest is specific, it can adhere to precedent while paying the legatee the proceeds of a stock dividend accruing after a testator's death. Thus, in these cases the number of shares of stock the testator owned, if equal to the number bequeathed, will often be found to evince an intention to create a specific legacy.

⁵² 96 C.J.S. *Wills* § 1101 (1957).

⁵³ *In re Vail*, 67 So. 2d 665 (Fla. 1953); *Sherman v. Riley*, 43 R.I. 202, 110 A. 629 (1920).

⁵⁴ *Munro v. Mullen*, 100 N.H. 128, 121 A.2d 312 (1956).

⁵⁵ *In re Hinner's Will*, 216 Wis. 294, 257 N.W. 148 (1934).

⁵⁶ *Id.* at 305.

⁵⁷ Note, 45 MICH. L. REV. 245, 246 (1946).

Stock splits, it would seem rationally, should be treated in the same way stock dividends are. After stock splits or stock dividends, the shareholder retains the same equity and proportion of ownership in the corporation that he had had prior to the change.⁵⁸ The New York Supreme Court in *In re Lissberger's Estate*,⁵⁹ however, in construing a will provision giving stock dividends to the income beneficiary in light of a stock split ruled that the will provisions for stock dividends did not apply to stock splits. The court stated they were to be treated differently because:

The feature that distinguishes a stock dividend from a split up is the permanent retention of earnings in the business through formal transfer of earned surplus, legally available for dividends to the capital account (Paton, *Accountant's Handbook*, 3d Ed. p. 106). It is conceded that the "earned surplus account" of the corporation remained the same after the transaction as it was before.⁶⁰

A series of new cases ruling that stock splits are treated differently than stock dividends may have resulted because the courts actually did see a substantial difference between stock splits and dividends. However, it seems more likely that these courts realized the dubious results achieved by the rules controlling the disposition of stock dividends and, not being bound by the same precedents as to stock splits, merely treated them differently. *Knight v. Bardwell*,⁶¹ a 1964 Illinois case, reviews the historical struggle between specific and general bequests. The court relates that Illinois, Pennsylvania, Florida, New York, and California have discarded the general-specific classification approach in allocating stock splits, stating:

. . . since 1950, five jurisdictions . . . have recognized that the rules of construction were inappropriately applied to stock splits, by obliterating the distinction between general and specific legacies as to splits or by expressly rejecting the classification approach. . . . These cases set forth a new rule of interpretation which we consider a highly salutary one, and applicable to the case before us. It declares that in the absence of a clear expression to the contrary a beneficiary of shares of stock is entitled to additional shares resulting from stock splits occurring after execution of the will. [citations omitted and included in footnote]⁶²

⁵⁸ GUTHMAN, *CORPORATE FINANCIAL POLICY* 473 (2d ed.); *Gibbons v. Mahon*, 136 U.S. 549, 559 (1880).

⁵⁹ 71 N.Y.S.2d 585 (1947).

⁶⁰ *Id.* at 586, 587.

⁶¹ 45 Ill. App. 2d 332, 195 N.E.2d 428 (1964).

⁶² *Id.* at 195 N.E.2d 435. The court cited: *In re McFerren's Estate*, 365 Pa. 490, 76 A.2d 759 (1950); *In re Fitch's Will*, 281 App. Div. 65, 118 N.Y.S.2d 234 (1952); *In re Parker's Estate*, 110 So. 2d 498 (Fla. App. 1959), *cert. denied* 114 So. 2d 3 (Fla. 1959); *In re Helfman's Estate*, 193 Cal. App. 2d 652, 14 Cal. Rptr. 482 (1961); *Allen v. National Bank of Austin*, 19 Ill. App. 2d 149, 156, 153 N.E.2d 260, 263 (1958).

A California court has held that the classification of a bequest as general or specific is immaterial, as a legatee of stock is entitled to stock splits in either case.⁶³ This new series of decisions seems to constitute a modern rule. The Wisconsin Supreme Court, in *Will of Himmers*,⁶⁴ gave a specific legatee the benefit of stock splits issued in recapitalization of the issuing corporation and appears to still use the classification approach.

*The Merits of the Approaches Used to Determine
Distribution of Accessions to Stock Legacies*

Probably the most fundamental concept in probate law is that the intent of the testator is to be followed if it is discernible and legal. Thus, all methods of decision on the recipient of accessions must purport to be general rules of adherence to the testator's intent where it is expressed.

The classification approach, or deciding first whether a bequest is general or specific and allowing that to govern the recipient of accessions, "goes back to a very early period in our law."⁶⁵ Classifications are used to decide problems of abatement, ademption, accessions, et al., and it is assumed that the classification of a bequest is an objective determination unrelated to the type of question it is used to decide. But it is the courts who determine the character of a legacy, and it is doubtful that they use the same criteria in the same manner in all types of questions.

The courts determine the class under which a legacy is to be placed, by ascertaining the incidents which the testator intended that such legacy should have . . . and if the court has ascertained the testator's intention in such instances, the court then places the legacy in the class to which such instances belong. The court does not begin by determining the class under which the legacy is to be placed; and then attaching to the legacy in question the incidents which ultimately attach to a legacy of such class. The classification of legacies . . . is, therefore, practically a matter of convenience in expression. The rights of the parties could be determined just as well without the use of the names of these classes of legacies. . . .⁶⁶

Thus, the court may also classify a bequest to arrive at a decision it deems equitable. In this way, however, the classification approach is still responsive to a judicial ascertainment of the testator's intent. But this responsiveness is in spite of the classification approach and not because of it; in fact, classification often becomes quite burdensome in reaching the decision a court deems proper.

⁶³ *In re Helfman's Estate*, 193 Cal. App. 2d 652, 14 Cal. Rptr. 482 (1961).

⁶⁴ 216 Wis. 294, 257 N.W. 148 (1934).

⁶⁵ 6 PAGE, WILLS § 48.1 (3d ed. 1962).

⁶⁶ *Ibid.*

Additionally, there are internal inconsistencies in the classification theory which add to a court's burden. The court must theorize that in specific bequests the testator's intent was that the beneficiary should have the exact property referred to in the will even though it has changed form due to stock splits or dividends before the testator's death. This is clearly in conflict with the often quoted premise that a will speaks as of the time of its maker's death. If it did speak at that time, and related what the testator had written, the changes in nature could not be considered. Thus, in the case of specific bequests, the will must have spoken at the time of its execution, and the property it designated at that time is given to the legatee, even though it is unrecognizable at the time of death. General bequests, however, do not suffer from this inconsistency, as they only pass the property, without its accessions, designated by the will speaking at the testator's death.

General legacies, however, violate a rational premise, in that they do not pass stock dividends and splits to the legatee. Since the testator's intent is inferrably that the legatees get the designated property, and if the courts do not allow an increase merely because the property has changed nature, the classification theory, illogically, often gives the legatees less. Every time a general legacy of stock is the object of a stock dividend or split, the general legatee's gift is diminished. For example, if a general legacy of 10 shares of XYZ Corporation, worth \$1000 were the object of a 2 for 1 split, the legatee's gift would be worth \$500 afterward. The same result would follow a one-hundred percent stock dividend. Thus, it can be said that the classification theory supposes that the testator intended the legatee to get less every time an accession in kind accrues to his gift. This logic is suspect.

Professor John Paulus has advocated changing some aspects of the classification theory to make it more workable:

It would appear that the law relating to the classification of bequests of securities would be more in accordance with sound reason if the courts would ignore the presumption favoring general bequests. . . . More recognition should be given to the fact that nearly all testators making security bequests intend to give specific securities. The gift should be classified as specific in accordance with the testator's intent, and the law of specific gifts should be changed to permit the testator's probable intent to control distribution.⁶⁷

It would seem, however, that probable intent of the testator, if ascertained by the court according to Professor Paulus' suggestion, precludes the necessity of classifying the gift to arrive at a just decision. Here the classification step would clearly be superfluous.

The Proposed Wisconsin Probate Code classifies every gift of a

⁶⁷ Paulus, *Specific and General Legacies of Securities*, 43 IOWA L. REV. 467 (1958).

stated number of shares of securities as a specific bequest if that or a greater number was owned by the testator when he executed his will.⁶⁸ This approach automates the classification of gifts in most instances while retaining the framework of general and specific classes to decide the distribution of accessions. These distribution rules would also be codified in the new Probate Code, giving all accessions to specific bequests of securities to the legatee.⁶⁹ These proposals do seem to generally achieve the fulfillment of the testator's probable intent, but it is questionable whether the retention of the classification theory is necessary or advisable. The theory still suffers from the inconsistencies enumerated, despite its proposed codification, and, if the object of the law is to carry out the testator's intent, it does not need to tag a bequest with a given name in order to follow that intent.

It seems that the Wisconsin Proposed Code does not alleviate another problem in carrying out the testator's intent—determining what the intent really is. The Proposed Code reverses the decision in the *Blomdahl*⁷⁰ case as to the nature of a legacy when the testator owned the exact or a greater number of shares at the execution of his will; however, the ruling in *Blomdahl*, that extrinsic evidence bearing on the testator's intent is inadmissible when the will is unambiguous, stands intact. The inadmissibility of such evidence has often foreclosed ascertainment of the testator's true wishes, but the cardinal rule that unambiguous documents preclude extrinsic evidence of subjective intention stands opposed to such proof.⁷¹ The legislature probably could expressly allow such evidence in these cases while keeping it out in less necessitous circumstances. However, the Illinois Supreme Court has shown another way in its ruling:

Considered by itself, a bequest of shares of stock made without a reference to future stock dividends or splits will *always* in the event of such eventuality produce an ambiguity. By the very nature of such a bequest there is nothing to indicate whether it could be satisfied by distribution of the precise number of shares mentioned or whether fulfillment of the bequest would require further distribution of whatever additional shares might be issued by way of dividend or split with respect to the original stock.⁷² [emphasis added]

These circumstances, since they produce an ambiguity, would allow proof of the awareness of the testator as to accessions to the bequests he has made. The allowance of such evidence and the abolition of the classification system seems a better solution than the blanket pro-

⁶⁸ PROPOSED WIS. STAT. § 853.33.

⁶⁹ PROPOSED WIS. STAT. § 853.35(b).

⁷⁰ Will of Blomdahl, 216 Wis. 590, 257 N.W. 152 (1952).

⁷¹ Estate of Breese, 7 Wis. 2d 422, 96 N.W.2d 712 (1959); Estate of Gray, 265 Wis. 217, 61 N.W.2d 467 (1953).

⁷² Knight v. Bardwell, 45 Ill. App. 332, 195 N.E.2d 428, 430 (1964).

nouncement that a testator's gift of stock in his possession passes accessions with it because it is classed as specific. However, the Proposed Code is clearly better than the law as it now stands, and an abrupt change of the rules of any area of law involving property rights would be disastrous. Perhaps the Committee that revised the Code kept the classification theory because it was relied on in drafting existing documents.

It must be observed, however, that a practitioner would be very unwise to leave the disposition of accessions unprovided for in a will. All theories of distributing accessions are poor substitutes for the testator's own desires being fulfilled on that matter, and, even though the Illinois Supreme Court is the only one thus far to call such wills ambiguous, they certainly are incomplete. The theories for ascertaining the testator's wishes are only remedial, and their uncertainty can easily be avoided by a few extra sentences added to a will.

The courts that have discarded the classification approach in distributing stock splits to all legatees of securities are probably harbingers of the future. They have done away with the framework of general-specific in their inquiry, and, thus, they have avoided an unnecessary step in their decisions. The result of the Proposed Wisconsin Code and the direct approach of these courts will be the same in most cases; however, these courts clearly give all legatees of stock, absent contrary provisions, the proceeds of stock splits, while the Wisconsin Proposed Code does not specify the rules for distribution of stock splits paid on general legacies.

Conclusions and Suggestions

The general-specific classification rules are presently being used to solve too many problems with related origins but unrelated equities. The classification of a legacy as general in an "ademption" problem equitably benefits the legatee as he then gets the value of his missing gift. But the presumption that has arisen from this, that gifts are presumed general, deprives the legatee of accessions to securities if the court cannot find a rather clear intention to give a specific legacy. These two problems, ademptions and accessions, may arise from identically worded legacies, but the divergent equities in these situations demand different rules. The Proposed Probate Code recognizes the need for different rules for each, but it achieves it by creating specific exceptions to apply to ademption of certain specific bequests while retaining the classification system.⁷³ Using a singular classification approach to many different problems produces injustices, and, thus, the automatic dispensation of justice presently obtainable from classifying gifts is unresponsive to the intent of the testator. The present system amounts to a judicial pronouncement that no testator may intend that

⁷³ PROPOSED WIS. STAT. § 853.35.

the legatee of his bequest of "100 shares of XYZ stock" should get any accessions to it but not lose the entire gift if the stock certificate is missing from the testator's estate at his death. Yet these results are probably what the testator would have wanted if he had thought about it. Classification of gifts as general or specific should thus be abolished in order to allow different rules for implementing a testator's intent in different areas of law similar only in that the same gift is involved. A precedent created for ademptions should not obscure the questions involved in accessions, but this will continue as long as the classification system ties them together. The decisions of the courts holding that general-specific classifications are irrelevant in determining the recipient of accessions to legacies reflect the growing judicial disenchantment with that approach.

An Introduction to Legal Reasoning by Edward Levi explains the process of judicial reasoning and traces the pendulous movements in law to and from classification to resolve controversies.⁷⁴ Levi asserts that legal concepts go through three phases eventually—creation, standardization, and demise.⁷⁵ Courts begin solving problems individually, then they begin classifying apparently similar situations to develop general rules, and finally the classifications get top heavy and unresponsive, and they break down. The decisions of the courts disenchanting with the general-specific classification approach may well be portending the third stage for that approach, at least as to its use in determining the recipients of accessions to securities.

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⁷⁴ LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

⁷⁵ *Id.* at 6.