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Article 9

# Decedent's Estates: Increase Resulting from Stock Splits Prior to Testator's Death

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# RECENT DECISIONS

**Decedents' Estates: Increase Resulting from Stock Splits Prior to Testator's Death**—Testatrix's will, after bequeathing household goods and personal effects to her cousin, provided:

"I give and bequeath unto my sister-in-law, Ann J. Allen, . . . 330 shares of General Motors common stock."

In the same language, she bequeathed 140 shares of General Electric stock to Ruth Sargent and 60 shares thereof to Ruth Holmes. She likewise disposed of her remaining stock in bequests of a specific number of shares to named relatives, friends, and her favorite charity. The residue was to be given to the Home for Destitute Crippled Children.

After the will was executed, but before the testatrix's death, General Electric and General Motors declared a three for one stock split. Testatrix died without having changed her will. An inventory of her estate disclosed that at her death she owned the identical shares issued by reason of the stock splits.

The executors of testatrix's estate petitioned for construction of the will. On appeal from the lower court decision adverse to the residuary legatee: *Held,* affirmed; the additional shares resulting from the stock splits and the dividends which accrued thereon after testatrix's death were to be awarded to the named legatees rather than to the residuary legatee. *Allen v. National Bank of Austin,* 19 Ill. App. 2d 149, 153 N.E. 2d 260 (1958).

In attempting to solve the distribution problem several avenues of approach were open to the court. It could have considered the bequests to be general or specific gifts, or it could have disregarded the classification of the gifts and decided the issue exclusively on what was found to have been testatrix's intent.

The decisional law of cases involving a gift of the type "X shares of Y stock to L" is characterized by a lack of uniformity. When an increase question is of primary concern, substantial authority can be found holding the gift to be general or specific.[1] Regardless of how an individual court may classify a particular gift, those courts which determine gift distribution solely on their classification of the bequest have generally recognized the difference in legal effect of finding a bequest to be specific or general in "stock-split" cases.[2]

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[1] In re McDougald's Estate, 149 Fla. 468, 6 So. 2d 274 (1942) (general); In re Dreyfus' Estate, 192 Misc. 509, 82 N.Y.S. 2d 548 (Surr. Ct. 1948) (special); Paulus, *Special and General Legacies of Securities—Whither Testator's Intent,* 43 IOWA L. REV. 467, 485 (1958).

[2] Fidelity Title & Trust Co. v. Young, 101 Conn. 359, 125 Atl. 871 (1924); First National Bank v. Union Hospital, 281 Mass. 64, 183 N.E. 247 (1932); First National Bank v. Charlton, 281 Mass. 72, 183 N.E. 250 (1932); Paulus, *supra* note 1, at 505.

Where a bequest is of a certain number of shares of a designated stock, as here involved, in the absence of any possessory words or other language in the will indicating that the stock to be given is that presently owned by the testatrix, there is numerous authority holding that bequest to be general.[3] The rationale used by the courts in so holding is found in their belief that, in the absence of a contrary expressed intention, the testatrix desires her gift to be effective, even in the case of sale or destruction of the item bequeathed before death.[4] This position is probably an outgrowth of the 1840 decision of *Robinson v. Addison*[5] which indicated an aversion to the specific bequest in the absence of clear intention of the testatrix to the contrary.[6]

The legal significance of determining a gift of this type to be general is the fact that a stock split occurring after the will was executed would not alter the number of shares received by the legatee. Thus, in the instant case, Ann Allen would receive only 330 shares of the split stock, notwithstanding the greatly reduced per share par value thereof.[7] The theory of the general gift being based on the premise that the testatrix intends to give a pecuniary gift in the form of a certain number of shares of stock upon her death, it would be illogical to conclude that the legatee should get three times such quantity following a stock split. Thus, in the event of a stock split involving a general legacy, the residuary legatee, the Home for Destitute Crippled Children in this case, would receive the additional shares of stock.

While general legatees are not entitled to increase in the nature of additional shares of stock, or, for the same reason, any cash or stock dividends declared on the stock before or after testatrix's death, they are entitled to increase in the form of the legal rate of interest paid on their legacy beginning one year from testatrix's death.[8] This is the common law rule and is applied in the absence of statutory provisions or testamentary language to the contrary.[9]

However, a different result would be reached by a court that determined these gifts to be specific, rather than general.

There seems to be little doubt that if the bequest is described with

[3] ATKINSON, WILLS §132 (2d ed. 1953); Paulus, *supra* note 1, at 515; 4 PAGE, WILLS §1397 (3rd ed. 1941); In re Blomdahl's Will, 216 Wis. 590, 257 N.W. 152, 258 N.W. 168 (1934); 28 R.C.L. 293, §268 (1929); Clegg v. Lippold, 123 N.E. 2d 549 (Ohio Prob. 1951).

[4] In re Snyder's Estate, 217 Pa. St. 71, 66 Atl. 157 (1907); Tifft v. Porter, 8 N.Y. 516, 521 (1853).

[5] 2 Beav. 515, 48 Eng. Rep. 1281 (Ch. 1840).

[6] Paulus, *supra* note 1, at 468.

[7] First National Bank v. Charlton, *supra* note 2.

[8] State Bank of Chicago v. Gross, 344 Ill. 512, 176 N.E. 739, 75 A.L.R. 172 (1931); In re Wadskier's Will, 88 N.J.Eq. 589, 103 Atl. 188 (1918); Matter of Bremer's Will, 156 Misc. 160, 281 N.Y.S. 264 (1935); In re Brandon's Estate, 164 Wis. 387, 160 N.W. 177 (1916).

[9] Cleary v. White's Estate, 134 Conn. 367, 58 A. 2d 1 (1948); State Bank of Chicago v. Gross, *supra* note 8; Hamilton v. McQuillan, 82 Me. 204, 19 Atl. 167 (1889); In re Forster's Will, 195 Wis. 58, 217 N.W. 740 (1928).

the use of possessive words, it is specific.[10] Thus, if the bequest had been "my 330 shares of General Motors," most, if not all courts would find the gift to be specific.[11] Similarly, when the gift is "X shares of Y stock which I now hold," it is usually held to present sufficient evidence that the gift was intended to be specific.[12] When such possessive words are included in the description of the gifts, other indications of testatrix's intent usually have little influence on the courts.[13]

However, the absence of possessive words does not conclusively establish the gift as general.[14] When such possessive donative words are not used, other language of the will or extrinsic facts must be consulted to acquire an indication of classification. For example, if the language of the gift is non-possessive but the corporation in which the stock is given is a "closed" corporation and the stock is not available on the public exchanges, the bequest may be found to be specific.[15] Also, if the stock given coincides with the number of shares owned at execution (as in the instant case), testatrix probably intended to give the specific stock then held.[16] This assumption is particularly strong in some jurisdictions if the bequest describes an odd lot or fractional shares.[17]

If the bequest is determined to be specific, the legatee is in a much more favorable position than a general legatee in these stock split cases. It is generally held that if the stock split does not cause an ademption, the legatee takes the amount of the new stock which represents the number of shares of the old which were specifically bequeathed.[18]

This same advantageous position is retained by specific legatees when dividends are declared on the stock after testatrix's death and before the stock is distributed. The specific legatee is entitled, not to interest commencing one year after testatrix's death as with a

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[10] Paulus, *supra* note 1, at 515. In Wisconsin, unless there are words specifically identifying the property and indicative of possession, the gift is general. In re Blomdahl's Will, *supra* note 3.

[11] In re Vail's Estate, 67 So. 2d 665 (Fla. 1953); In re Hinner's Will, 216 Wis. 294, 257 N.W. 148 (1934); In re Elliot's Estate, 76 N.Y.S. 2d 755 (Surr. Ct. 1947).

[12] Gilmer v. Gilmer, 42 Ala. 9 (1868).

[13] Paulus, *supra* note 1, at 481. *Contra*: Mahoney v. Holt, 19 R.I. 660, 36 Atl. 1 (1896); Spinney v. Eaton, 111 Me. 1, 87 Atl. 378 (1913).

[14] Vogel v. Saunders, 92 F. 2d 984 (D.C. Cir. 1937); Spinney v. Eaton, *supra* note 13.

[15] In re Buck's Estate, 32 Cal. 2d 372, 186 P. 2d 708 (1948); Paulus, *supra* note 1, at 490, 491.

[16] Adams v. Conqueror Trust Co., 358 Mo. 736, 217 S.W. 2d 476, 7 A.L.R. 2d 268 (1949). *Contra*: In re Harris' Estate, 143 N.Y.S. 2d 157 (Surr. Ct. 1955), citing Tifft v. Porter, *supra* note 4.

[17] Paulus, *supra* note 1, at 498.

[18] Fidelity Title & Trust Co. v. Young, *supra* note 2; Gorham v. Chadwick, 135 Me. 479, 200 Atl. 500, 117 A.L.R. 805 (1938); In re Mandelle's Estate, 252 Mich. 375, 233 N.W. 230 (1930); Adams v. Conqueror Trust Co., *supra* note 16; In re Hinner's Will, *supra* note 11.

general legatee, but to all accessions and accretions which accrue to the bequest after testatrix's death.[19] Thus, stock or cash dividends declared after testatrix's death would pass to the specific legatee even though earned before testatrix's death. However, even though the legacy is special, dividends declared on stock during testatrix's lifetime do not pass to the legatee,[20] even where such dividends are of stock.[21]

The advantage enjoyed by a specific legatee in the increase area is usurped by the general legatee when ademption by extinction is an issue. When ademption is involved in a bequest of this type, there is a division of authority in the decisional law on whether the gift is general or specific.[22] The legal significance of determining a gift of this type to be general is the elimination of any possibility of the gift being adeemed. Ademption by extinction is the complete failing of a testamentary gift occurring when the thing given does not exist as part of testatrix's estate at the time of death in the form in which it was described in the will.[23] However, a general bequest, by its very definition as being one "payable out of general assets of the estate and which does not require delivery of any specific thing . . . from any designated portion of testator's property,"[24] avoids the entire problem. This favorable ademption treatment is probably the most compelling reason why many courts favor the general legacy.[25]

The court's determination that a bequest is specific subjects the legatee to the possibility of losing his entire legacy by ademption by extinction. Although there is some authority holding that ademption of a special bequest depends on the testatrix's intention at the time of the adeeming act,[26] most authorities hold that ademption "depends on a rule of law arising on the extinction of the thing . . . granted, and

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[19] In re Largue's Estate, 267 Mo. 104, 183 S.W. 608 (1916); In re Mead's Estate, 227 Wis. 311, 279 N.W. 18, 116 A.L.R. 1127 (1938).

[20] Perry v. Leslie, 124 Me. 93, 126 Atl. 340 (1924); In re Kernochan, 104 N.Y. 618, 11 N.E. 149 (1887). For discussion of the difference of opinion of the courts on the distribution of stock dividends declared during testator's lifetime, see Paulus, *supra* note 1, at 506.

[21] ATKINSON, *supra* note 3, §135, at 750: "It is possible to distinguish between a stock dividend and a stock split-up on the ground that the former usually changes the capital structure by transfer of undivided profits into capital, while the capital structure is unchanged in case of a split-up."

[22] Paulus, *supra* note 1, at 485, citing cases holding such gift to be *special*: Vogel v. Saunders, *supra* note 14; Desoe v. Desoe, 304 Mass. 231, 23 N.E. 2d 82 (1939); Ossont's Will, 208 Misc. 449, 143 N.Y.S. 2d 849 (Surr. Ct. 1955). Cases holding such gifts to be *general*: In re Harris' Estate, *supra* note 16; In re McFerren's Estate, 365 Pa. 490, 76 A. 2d 759 (1950); In re Blomdahl's Will, *supra* note 3.

[23] ATKINSON, *supra* note 3, §134; THOMPSON, THE LAW OF WILLS §519 (3d ed. 1947).

[24] ATKINSON, *supra* note 3, at 731.

[25] Fidelity Title & Trust Co. v. Young, *supra* note 2; In re Mandelle's Estate, *supra* note 18; Paulus, *supra* note 1, at 469. See In re Strasenburgh's Estate, 136 Misc. 86, 242 N.Y. Supp. 447, 453, 457 (Surr. Ct. 1928) for a novel presentation of reasons for disfavoring specific gifts.

[26] Elwyn v. De Garmendia, 148 Md. 109, 128 Atl. 913 (1925); Spinney v. Eaton, *supra* note 13.

operates independently of intention in the event that the specific thing given is, at testator's death no longer owned by him. . . ."[27] The ademption by extinction may be of the entire gift or *pro tanto*.[28]

However, if the subject of the gift exists in testatrix's estate at death but is in a changed form, the legacy may or may not be adeemed. It is generally held that change in form, if not substantial, does not cause an ademption.[29] In the event of a stock split where the split does not change the relationship of the shareholder to the corporation, or the percent of the shareholder's ownership therein, there is no substantial change in form and the legacy is not adeemed.[30] If the capital structure of the corporation is changed by the split,[31] or if the stock is exchanged upon call for debentures of the corporation,[32] or for stock in a different company which succeeds the original company,[33] the change is more substantial and ademption is held to have occurred by most courts.[34] In the instant case, testatrix's will bequeathed stock which was the subject of a straight stock split in which only the evidence of the proportionate interest of the shareholders was changed. Thus, most courts would hold that no ademption by extinction was caused thereby.

The divergent legal consequences of classification are again evidenced when abatement is in issue. The same lack of unanimity in decisions is observable in this area as in the increase and ademption area.[35] By definition abatement is the reduction of legacies because, at the time for payment thereof, the estate has become insufficient to pay all debts and expenses and fulfill all bequests made by testatrix.[36] Intestate property is first applied in the payment of debts, taxes and legacies. Then, in the absence of testamentary indication as to the order of abatement, legacies abate under the common law rule in the following order: residuary legacies, general legacies, and specific legacies.[37] Hence, although general legatees are in a desirable position in

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[27] 96 C.J.S., *Wills* §1175, at 991; 30 A.L.R. 678; 40 A.L.R. 556; Ashburner v. MacGuire, 2 Bro. Ch., 108, 29 Eng., Rep. 62, 2 Eng. Rul. Cas. 18 (Ch. 1786).

[28] ATKINSON, *supra* note 3, §134; THOMPSON, *supra* note 23, §516.

[29] 96 C.J.S., *Wills* §1177; Note, 1910 WIS. L. REV. 307.

[30] ATKINSON, *supra* note 3, §134.

[31] In re Brann, 219 N.Y. 263, 114 N.E. 404, 1918B. L.R.A. 663 (1916); 4 PAGE, *supra* note 3, §1524.

[32] First National Bank of Boston v. Perkins Institute for Blind, 275 Mass. 498, 176 N.E. 532 (1931). *Contra*: Spinney v. Eaton, *supra* note 13 (intention theory applied).

[33] In re Horn's Estate, 317 Pa. 49, 175 Atl. 414, 97 A.L.R. 1029 (1934); Dean v. Tusculum, 195 F. 2d 796 (D.C. Cir. 1952).

[34] ATKINSON, supra note 3, §134.

[35] Vogel v. Saunders, *supra* note 14 (specific); Ladd v. Ladd, 2 Cranch 505, 14 Fed. Cas. 921, No. 7,972 (D.C. Cir. 1824) (general); Lewis v. Sedgwick, 223 Ill. 213, 79 N.E. 14 (1906) (specific); Garron v. Christopher, 112 N.J. Eq. 483, 165 Atl. 77 (Ch. 1933) (general); Paulus, *supra* note 1, at 485.

[36] ATKINSON, *supra* note 3, §136; THOMPSON, *supra* note 23, §510.

[37] ATKINSON, *supra* note 3, §136; THOMPSON, *supra* note 23, §511; In re Weed's Will, 213 Wis. 574, 252 N.W. 294 (1934) Under WIS. STATS. §313.26 (1957)

an ademption situation, they are in a less advantageous position in this area than are special legatees.

Thus, the court's initial classification of a gift is of crucial importance in the distribution of testatrix's estate. The necessity of classifying a gift and then abiding by the varying consequences of such classification as increase, ademption and abatement problems arise, is often a most difficult and unpleasant task for the court. If the court designates the bequest as general to avoid being adeemed, the legacy may be reduced or extinguished by abatement and the legatee usually would not receive any increase resulting from a stock split. Thus, the legatee would receive the gift, but that gift would be of greatly diminished proportion to that which testatrix intended. If the bequest is determined to be specific, the legatee receives the gift in its improved form and is less likely to have his gift reduced by abatement, but is confronted with the possibility of having his entire gift eliminated by ademption.

The inflexibility of the classification approach to distribution problems was perhaps the prime factor in motivating the Illinois Court to decide this case entirely on what they found to have been testatrix's intent when she executed her will, as gathered from the document itself and the circumstances surrounding its execution.

All courts seem to agree that the guiding principle in the interpretation of any will is the intention of the testatrix. However, many courts appear to utilize this principle only to ascertain whether the testatrix intended the gift to be general or specific.

The Illinois court was not so restrictive in giving effect to testatrix's intent. After stating the principle that intention should be the guide to will interpretation, the court commences its analysis of the testatrix's intention by a consideration of her stated plan for distribution of her estate as it existed at the time of execution of her will. Thus, the court states that it is obvious from a reading of the will that she wanted her relatives and friends to have the bulk of her estate and that she had one favorite charity. From evidence *aliunde* it was known that the residuary clause found in the executed will was an afterthought, suggested by the bank, and added after she had determined on a substantially complete disposition of her estate. The court found that because testatrix had at the time of her death the identical shares of stock she had when she executed her will (except the additions resulting from the stock splits), she intended to dispose of all her stock to named legatees. When the will was executed there was no residue of stock to be given to the residuary legatee. Thus the

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through §313.28 (1957) the order of abatement could differ from that prevailing at common law.

testatrix must have intended that only the bank balance after expenses and taxes was to be given to the residuary legatee.

The court then stated:[38] "To give the residuary legatee the additional shares of General Electric and General Motors stock would amount to giving it a legacy of the value of approximately $50,000. . ., or 12½ times as much as to the charity for which the testatrix had expressly made provision, four times as much as she gave her sister-in-law, three times as much as she gave her cousin and in more or less similar proportions to the provisions made for her other legatees."

Justice Schwartz then reiterated the maxim that "For the purpose of ascertaining a testator's intention a will speaks from the date of its execution."[39] Decedent must have intended that "shares," as the word was used in her will, meant the proportionate share of total outstanding stock of the corporations as of the date of her will. Since a stock split changes only the evidence of the shareholder's proportionate interest in the company,[40] testatrix must have intended that any additional shares resulting therefrom would go to the named legatees.

In rejecting the classification approach to this fact situation, the court states that the purpose of classifying legacies is to determine the order of distribution of the estate if problems of abatement or ademption are involved. However, because Miss Allen's estate was more than adequate to cover all bequests and the subject of the legacies remained as part of her estate until her demise, "the rationale behind the classification of legacies is not pertinent to our purposes."[41] They go on to say that "In most cases where a stock split . . . was involved, nothing more than lip service has been paid to the classification."[42] Instead, they say "courts have sought to find the intention of the testator, and almost always have found that the additions of stock in stock splits go to the legatee. . ."[43]

To substantiate these statements the court briefly discusses several cases on point. *Heckler v. Young*,[44] the only Illinois case in point, involved a legacy of 30 shares of a named stock followed by the statement that if the testatrix did not possess such shares at the time of her death, the legatee was to receive an amount in cash equal to the value of the stock on the date of execution of the will. At the time the will was executed the company of the named stock was in the process of creating a three for one stock split. The court stated that ". . . it is reasonable to suppose that the testatrix had in mind that she had defi-

[38] Allen v. National Bank of Austin, 19 Ill. App. 2d 149, 153 N.E. 2d 260, 262 (1958).
[39] *Id.*
[40] *Id.* at 263.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] 264 Ill. App. 34 (1931).

nitely described the shares which she intended complainant to have and assumed that these shares, after the increase in the whole number of shares, would pass to complainant in their changed form of 3 to 1."[45]

In *In Re Fitch's Will*,[46] the New York court clearly indicated that intention, rather than classification, was to be the controlling factor. The testator there disposed of all his stocks which he owned when he executed his will. Before his death, but after the stocks had been disposed of, there was a three for one stock split. The court held the legacies to be general and therefore not adeemed. However, the court also determined that the legatees were entitled to not only the original number of shares of stock named in the will, but also the additional shares resulting from the split. Thus, they held that both general and specific legatees may, under certain circumstances, be entitled to additional stock split shares.[47]

The Illinois Court, in affirming the lower court's decision in this case, stated: "that in the absence of an intention to the contrary, a legatee of shares of stock is entitled to additional shares issued as a result of a stock split occurring after execution of the will."[48]

Thus, Illinois, appearing to be one of the jurisdictions which does not feel bound to classify bequests, seems to put into actual practice the idea that: "The guiding principle in the interpretation of any will is the intention of the testator, which is another way of admonishing the court to keep in mind that the business at hand is determining what the testator willed by his will."[49]

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**Bills and Notes: Indorsee of Check After Eight-Day Delay in Negotiation as Holder in Due Course—Question of Law or Fact**—A check was drawn in payment of the price of a truck sold by payee to drawer. Drawer, drawee, and payee all maintained their principal offices within a ten mile radius of each other, and within the same county. Some four to eight days after issuance, drawer stopped payment, claiming misrepresentation respecting the quality of the truck. Payee, on the eighth day after issuance, cashed the check at the plaintiff bank, which was not the drawee. Upon prompt presentment to drawee, payment was refused. Action was brought against drawer,

[45] See *supra* note 38, at 263.
[46] 281 App. Div. 65, 118 N.Y.S. 2d 234, 235 (3rd Dept. 1952).
[47] In re McFerren's Estate, 365 Pa. 490, 76 A.2d 759, 762, 763 (1950). In this case, the Pennsylvania court similarly found that although the legacy was general, the legatee was entitled to increase resulting from a stock split. The court there stated: ". . . that the intention of the testator governs concerning identity or value of a legacy; that what the testatrix manifestly intended was to bequeath to each legatee 50 shares of the stock as it was at the time of the making of the will, the equivalent of which was 125 shares as of the time of death."
[48] See *supra* note 38, at 265.
[49] *Id.* at 262.