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CASES NOTED

WILLS—CLASSIFICATION OF ALTERNATIVE BEQUESTS

Plaintiff-church, a general legatee, brought an action to determine the construction of a will with reference to certain bequests of stock to other legatees. The bequest provided for a stated number of shares of identified stock. In the event the shares were sold before the testator's demise, the legatees were to receive in cash the market value of the stock. *Held*, such bequests were general bequests and should abate along with plaintiff's other general bequest. *Park Lake Presbyterian Church v. Estate of Henry*, 106 So.2d 215 (Fla. App. 1958).

For the purposes of abatement¹ the distinctions between specific, demonstrative and general legacies are quite simple in theory. However, the application of the respective definitions to any given set of facts has given the courts considerable difficulty. A specific bequest² is a gift created by a will of a particular thing, or part thereof, which is capable of specific identification and which can be isolated or set apart from the general assets of the testator. In order to satisfy a specific bequest, *only* that thing itself can be given and if it is no longer extant at the date of the testator's demise it is considered adeemed and the specific legatee loses all.³ *Harlan v. Alvarez*⁴ illustrates a specific bequest. There the testator provided

1. Abatement of a legacy or legacies takes place when the testator's assets at death are not sufficient to pay all the legacies, the debts of the testator and the administration expenses. See *In re Buck's Estate*, 32 Cal. App.2d 372, 196 P.2d 769 (1948); *In re Estate of Neistrath*, 66 Cal. 330, 331, 5 Pac. 507, 508 (1885) (quoting from Bouvier's Law Dictionary); *In re Van Wechel's Estate*, 241 Iowa 513, 41 N.W.2d 694 (1950); *In re Estate of Hartman*, 233 Iowa 405, 9 N.W.2d 359 (1943); *Temple v. First Nat'l. Bank of Meridan*, 202 Miss. 92, 30 So.2d 605 (1947). See collection of cases cited in 96 C.J.S. Wills § 1153 (1957).

2. *Goforth v. Goforth*, 202 Ark. 1017, 154 S.W.2d 819 (1941); *Burham v. Mayford*, 141 Conn. 96, 104 A.2d 217 (1954); *Lenzen v. Miller*, 378 Ill. 170, 37 N.E.2d 833 (1941); *In re Lepley's Estate*, 235 Iowa 664, 17 N.W.2d 526 (1945). See collection of cases cited in 57 AM. JUR. Wills § 1401 (1948); 96 C.J.S. Wills § 1153 (1957).

3. *Wychoff v. Young Women's Christian Ass'n.*, 237 N.J. Super 274, 117 A.2d 162 (1955); *Righter v. First Reformed Church of Boonton*, 17 N.J. Super. 407, 86 A.2d 305 (1952); *In re Smallman's Estate*, 138 Misc. 889, 247 N.Y. Supp. 593 (Surr. Ct. 1931). See collection of cases cited in 57 AM. JUR. Wills § 1401 (1948); 96 C.J.S. Wills § (1957).

4. 70 R.I. 212, 38 A.2d 158 (1944). The testator's bequests in the following cases were held to be specific: *In re Buck's Estate* 32 Cal. App.2d 372, 196 P.2d 769 (1948) (Where there were bequests of stock represented by a trustee's certificate); *Taylor v. Hill*, 121 Kan. 102, 245 Pac. 1026 (1926) (The U.S. government war bonds bequeathed were specifically described); *Butler v. Dobbins*, 142 Me. 383, 53 A.2d 270 (1947) (Testator bequeathed 21 of the 65 shares of bank stock she held); *In re Mandelle's Estate*, 252 Mich. 375, 233 N.W. 230 (1930) (Testator bequeathed 1200 shares of par value stock and at the time of her death these shares had been exchanged for 6000 no par shares); *Adams v. Conqueror Trust Co.*, 358 Mo. 763, 217 S.W.2d 476 (1949) (Testator bequeathed the same number of shares of stock he owned); *Fidelity Nat'l. Bank & Trust Co. v. Hovey*, 319 Mo. 192, 5 S.W.2d 437 (1927) (Testator owned a large number of shares of a certain corporation and bequeathed a part thereof); *O'Day v. O'Day*, 193 Mo. 62, 91 S.W. 921 (1906) (Testator

that all the stock which had been bequeathed to her by her mother's will should in turn be given to the testator's legatee. A demonstrative bequest⁶ is an unconditional gift which indicates the fund out of which it is to be satisfied. It can take the form of a gift of a specific amount of stock, money or similar substance. In *Young v. Young*⁶ it was held that a bequest of \$1000 to a son which was to be satisfied from the sale of a government bond, but which did not indicate any particular bond, was a demonstrative bequest. A demonstrative bequest is peculiar in that it is a combination of both the specific and general bequests.⁷ In the respect that a specific sum is bequeathed, it is similar to the general bequest, but it approaches the specific bequest by specifying a particular fund.⁸ Although it approaches a specific bequest it is really more of a general bequest and if the specific fund fails, the legacy will be satisfied out of the general estate.⁹ A general bequest is one which is satisfied neither by the delivery of a specific isolated thing nor payment from a particular fund but which "is satisfied out of the general assets of testator's estate."¹⁰ The general legacy does require a specified quantity or amount.¹¹

bequeathed railroad bonds in the hands of an agent or in the event of their sale the proceeds thereof); *Polliak v. Smith*, 17 N.J. Super. 365, 88 A.2d 351 (1952) (Testator made three bequests each of an amount on deposit in a certain bank); *In re Dreyfus Estate*, 192 Misc. 509, 82 N.Y.S.2d 548 (Surr. Ct. 1948) (Testator bequeathed the exact amount of stock he owned); *In re Morphy's Will*, 70 N.Y.S.2d 167 (Surr. Ct. 1947) (Testator bequeathed "all my shares of stock"); *In re Anslinger's Estate*, 185 Misc. 827, 57 N.Y.S.2d 466 (Surr. Ct. 1945) (Testator bequeathed funds in two banks); *In re Davis' Will*, 184 Misc. 952, 57 N.Y.S.2d 356 (1945) (Testator bequeathed to various persons certain numbers of shares of stock of specific corporations); *Crawford v. McCarthy*, 159 N.Y. 514, 54 N.E. 277 (1899) (Testator bequeathed funds in his account on deposit).

5. *Taylor v. Hull*, 121 Kan. 102, 245 Pac. 1026 (1926); *Gidden v. Gidden*, 176 Miss. 98, 167 So. 785 (1936); *In re Lewis' Estate*, 148 Neb. 592, 28 N.W.2d 427 (1947); *In re Anslinger's Estate*, 185 Misc. 827, 57 N.Y.S.2d 466 (Surr. Ct. 1945); *In re Cameron's Estate*, 278 N.Y. 352, 16 N.E.2d 362 (1938). See collection of cases cited in 57 AM. JUR. WILLS § 1403 (1948); 96 C.J.S. WILLS § 1125 (1957).

6. 202 Ga. 649, 44 S.E.2d 659 (1947). The testators' bequests in the following cases were held to be demonstrative: *Spinney v. Eaton*, 111 Me. 1, 87 Atl. 378 (1913) (Testator owned 1830 shares and made two bequests of 50 shares each and then sold the remaining 1730 shares); *Dryden v. Owings*, 49 Md. 356 (1878) (Testator bequeathed \$8000 in bonds and at his death possessed \$8000 in bonds); *In re Goldberg's Estate*, 148 Misc. 607, 266 N.Y. Supp. 106 (Surr. Ct. 1933) (Testator bequeathed bonds owned by him to value of \$15,000).

7. *In re Dietmann's Estate*, 108 Colo. 508, 119 P.2d 611 (1941); *Lenzen v. Miller*, 378 Ill. 170, 37 N.E.2d 833 (1941); *In re Lewis' Estate*, 148 Neb. 592, 28 N.W.2d 427 (1947). See collection of cases cited in 96 C.J.S. WILLS § 1125 (1957).

8. *Lenzen v. Miller*, 378 Ill. 170, 37 N.E.2d 833 (1941); *In re Phin's Will*, 99 N.Y.S.2d 177 (Surr. Ct. 1950); *In re Kingsley's Will*, 67 N.Y.S.2d 464 (Surr. Ct. 1946); *In re Sexton's Estate*, 166 Misc. 631, 4 N.Y.S.2d 111 (Surr. Ct. 1938).

9. *Heitlenger v. McNallis*, 243 Ala. 560, 11 So.2d 143 (1942); *Lenzen v. Miller*, 378 Ill. 170, 37 N.E.2d 833 (1941); *In re Child's Will*, 171 Misc. 791, 13 N.Y.S.2d 907 (Surr. Ct. 1939); *In re Mellott's Estate*, 162 Ohio St. 113, 121 N.E.2d 7 (1954). See collection of cases cited in 96 C.J.S. WILLS § 1125 (1957).

10. *Bond v. Evans*, 92 Colo. 1, 17 P.2d 311 (1932); *Burnham v. Hayford*, 141 Conn. 96, 104 A.2d 217 (1954); *Young v. Young*, 202 Ga. 694, 44 S.E.2d 659 (1947); *In re Mellott's Estate*, 162 Ohio St. 113, 121 N.E.2d 7 (1954). See collection of cases cited in 57 AM. JUR. WILLS § 1402 (1948); 96 C.J.S. WILLS § 1125 (1957).

11. *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846 (1906); *Weed v. Hage*, 85 Conn. 490, 83 Atl. 636 (1912); *Baker v. Baker*, 319 Ill. 320, 150 N.E. 284 (1925); *Tagnon Adm'x. v. Tagnon*, 253 Ky. 374, 69 S.W.2d 714 (1934). See collection of cases cited in 57 AM. JUR. WILLS § 1402 (1948); 96 C.J.S. WILLS § 1125 (1957).

In *In re McDougald's Estate*¹² it was held that bequests of a certain number of shares of certain stocks to named individuals were general bequests. Similarly in *Evans v. Hunter*¹³ bequests of \$4000 in government bonds to one daughter and \$1000 in bonds to a second daughter were held to be general bequests when the testator owned United States bonds totaling \$5000.

In the case under consideration, the Florida District Court of Appeal, Second District held that a bequest of a certain number of shares of stock was a general bequest in spite of the fact that the testator had incorporated an alternative bequest of cash in lieu thereof if such shares of stock were sold before his death.¹⁴ The court pointed out that bequests of stock are general where no fund is created to satisfy the bequest and where specific shares are not identified.¹⁵ It was further set forth in *In re Beecroft's Estate*¹⁶ that an alternative feature did not change a general bequest into a demonstrative one. In that case the court held that the mere fact that the testator had provided for his executor to pay a legacy in securities in lieu of cash did not make a general bequest demonstrative since there was no reference to a fund. Similarly in *Industrial Trust Co. v. Tidd*¹⁷, the Rhode Island court held that a bequest of \$2000 in stock was a general bequest and the fact that the testator had provided that the legatee could take cash of equal value instead of stock did not render the bequest demonstrative. The court in the instant case concluded that "the alternative feature is nothing but a statement of the law applicable to a general legacy. It is simply a measuring vessel by which the beneficiary would receive the equivalent of the gift intended by the testator."¹⁸

The dissent in the principal case concluded in theory that for the purposes of abatement the distinction between specific and demonstrative

12. 149 Fla. 468, 6 So.2d 275 (1942).

13. 86 Iowa 413, 53 N.W. 277 (1892). In the following cases the testators' bequests were held to be general: *Bond v. Evans*, 92 Colo. 1, 17 P.2d 311 (1932) (Testator owned sixteen shares of stock at his death and had bequeathed fifteen shares to one legatee); *Palmer v. Palmer's Estate*, 106 Me. 25, 75 Atl. 130 (1909) (Testator bequeathed twenty shares of a certain stock to one daughter and twelve shares of other stock to a second daughter without reference to any particular shares); *In re Fisher*, 87 N.Y. Supp. 567 (App. Div. 1904) (Testator made bequests of specific amounts to several persons in a safe deposit box but at testator's death the contents could not be divided according to the terms of the will); *In re Van Vliet*, 5 Misc. 169, 25 N.Y. Supp. 922 (1893), (Testator made three bequests of government bonds the total of which he owned at the date of bequest but at his death such bonds were at a premium); *Snyder's Estate*, 217 Pa. 71, 66 Atl. 157 (1907); *In re McFerren's Estate*, 365 Pa. 490, 76 A.2d 759 (1950) (Testator bequeathed shares of a named corporation and no such stock existed at his death).

14. *Park Lake Presbyterian Church v. Estate of Henry*, 106 So.2d 215 (Fla. App. 1958).

15. *Id.* at 217.

16. 146 Misc. 344, 263 N.Y. Supp. 142 (Surr. Ct. 1933).

17. 49 R.I. 188, 141 Atl. 464 (1928).

18. See note 14 *supra* at 219.

bequests is unimportant by virtue of a Florida statutory provision¹⁹ which treats specific and demonstrative bequests as one unit. The alternative feature of the bequest clearly created a specific bequest rather than a general one.²⁰ The dissent pointed out that in *In re Vail's Estate*²¹ a bequest of "my five hundred shares" of certain corporate stock was a specific bequest since this was all the stock of that corporation that the testator possessed. The dissent distinguished *In re McDougald's Estate*²² on the grounds that there were no possessory words such as "my" used in the bequest in that case. Hence, the conclusion followed that it was a general bequest.²³ It was next shown that the alternative feature of the bequest which stated "In event said stock has been sold then I hereby give and bequeath to . . . an amount equal to the value at the time of my death, of said stock" clearly illustrates an intent to give the specific stock that the testator then owned and hence the bequest is specific.²⁴ The dissent, for further support, pointed to the principle that where a legatee is a close relative he will be preferred to general legatees.²⁵

This case is one of first impression in Florida and it is in accord with the general rules of law as to what constitutes a general bequest. The majority, concluding that the alternative element of the general bequest would not render the bequest demonstrative, is in accord with *Knox v. Stamper*.²⁶ In that case there was a bequest of a specific mortgage with a further provision that if the mortgage was satisfied the legacy should be paid by cash of equal value.²⁷ The Maryland court in the *Knox* case held that the bequest was specific and the alternative feature could not render the bequest a general one.²⁸ The principal case follows the general rule of law since there is a bequest of stock with a provision that should the stocks be no longer in the testator's possession then the legatee should receive cash in its stead.²⁹ This is the same as providing for a bequest of stock or cash in the alternative and since no specific fund is referred to, the cash must be paid out of the general assets. Payment out of the general assets of the testator, is the test of a general legacy since a specific bequest is satisfied only by delivery of the specific item and a demonstrative bequest must point out the fund to which it is to apply.³⁰ Here, no specific item is mentioned nor is there any fund specified.

19. FLA. STAT. § 734.06 (1957) which provides for an order of abatement. First, residuary legacies abate ratably, then general, and then demonstrative and specific legacies together as one unit.

20. See note 14 *supra* at 223.

21. 67 So.2d 665 (Fla. 1953).

22. 149 Fla. 468, 6 So.2d 274 (1942).

23. See note 14 *supra* at 223.

24. *Ibid.*

25. *Ibid.*

26. 186 Md. 238, 46 A.2d 361 (1946).

27. *Ibid.*

28. *Ibid.*

29. *In re Beecroft's Estate*, 146 Misc. 344, 263 N.Y. Supp. 142 (Surr Ct. 1933); *Industrial Trust Co. v. Tidd*, 49 R.I. 188, 141 Atl. 464 (1928).

30. Cases cited note 10 *supra*.

This case clearly illustrates the responsibility of the lawyer in drawing a will in terms which will clearly express the testator's intent. If the testator had wanted to give the defendant-relative preference over the plaintiff, he could have done so by merely expressing such an intent and it would have been given effect. In *In re Van Brunt's Estate*³¹ the New York court held that where the testator's bequests indicated a preference that her burial lot be cared for and that certain charities be preferred, such intent would be given effect. The court further stated: "Preference may be given to general over specific gifts if such is the express testamentary wish."³² Similarly in *In re Weed's Will*³³ the Wisconsin court stated: "to establish a preference the words must be clear enough in their meaning to show that it was the intention of the testatrix that the legacy should not be on an equal footing with the others." If the testator fails to express clearly such an intention the legacies will abate pro rata.³⁴

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31. 159 Misc. 105, 287 N.Y. Supp. 269 (1936). In the following cases the intent of the testators as expressed in the bequests were given effect by the courts: *In re Flint's Estate*, 40 Cal. App.2d 132, 104 P.2d 516 (1940) (Testator made bequests of trust funds for his mother, wife, and sister-in-law and then provided that if there were not enough funds to create the trusts the general legacies should abate); *Morgan v. Meacham*, 279 Ky. 526, 130 S.W.2d 992 (1938) (Testator stated that residuary bequests take subject to a preferred bequest); *In re Goldstein's Will*, 109 N.Y.S.2d 553 (Surr. Ct. 1951) (Testator gave one third of his estate to his wife and requested such bequest to be preferred); *In re Haslette's Estate*, 190 Misc. 496, 74 N.Y.S.2d 294 (Surr. Ct. 1947) (Where the testator bequeathed one-third of the remainder of his estate to his wife absolutely and it was held such bequest was specific one); *In re Mass' Will*, 65 N.Y.S.2d 93 (Surr. Ct. 1946) (Where the testator bequeathed one-third of his estate to his wife and made two general bequests of \$5000, the court held that the testator had intended that the one-third be taken out before deduction of the \$10,000); *In re Cases's Estate*, 65 N.Y.S.2d 580, 584 (Surr. Ct. 1946) (The court stated that preference of one legatee over another is to be ascertained from the language of the will); *In re Clark's Will*, 166 Misc. 909, 3 N.Y.S.2d 364 (Surr. Ct. 1938) (The testator bequeathed \$25,000 to a certain person and stated that this was to be given preference over all other bequests); *In re Smallman's Estate*, 138 Misc. 889, 247 N.Y. Supp. 593 (Surr. Ct. 1931); *In re Frankenhimer*, 195 N.Y. 346, 88 N.E. 374 (1909) (Where the testator made general bequests to charities but provided for preference to a life tenant and remainderman of the residue).

32. *In re Van Brunt's Estate*, 159 Misc. 105, 110, 287 N.Y. Supp. 269, 275 (Surr. Ct. 1936).

33. 213 Wis. 574, 576, 252 N.W. 294, 296 (1934). See *In re McDonald's Estate*, 314 Ill. App. 148, 151, 41 N.E.2d 128, 130 (1942) (The court stated: "A preference or priority may be given a legatee of a general legacy if the intention of the testator to give such preference appears beyond dispute by the terms of the will."); *In re Van Wechel's Estate*, 241 Iowa 513, 517, 41 N.W.2d 694, 697 (1950) (The court noted that if there is doubt as to preference of one legacy over another then no preference will be given); *Emery v. Bachelder*, 78 Me. 233, 238, 3 Atl. 733, 735 (1886) ("no priority will be allowed where the expressions are ambiguous and do not mark with certainty the testator's intention."); *Porter v. Howe*, 173 Mass. 521, 527, 54 N.E. 255, 256 (1899) (The court likewise held that if the expressions are ambiguous no priority will be given); *In re Van Brunt's Estate*, 159 Misc. 105, 110, 287 N.Y. Supp. 269, 275 (Surr. Ct. 1936) ("preference will be given to general over specific gifts if such is the express testamentary wish").

34. *In re Van Wechel's Estate*, 241 Iowa 513, 517, 41 N.W.2d 694, 697 (1950).