

TO ADEEM OR NOT TO ADEEM

Mum was scared. The confusion when she paid her bills, mixing up her medications and failure to remember when to renew her GICs prompted her to grant her son Sam power of attorney over both her property and personal care. Sam was now authorized to make decisions regarding Mum's financial affairs and personal care related to issues like housing and health care.

Over the years, Mum's situation deteriorated. She became incapable of managing her financial affairs or taking care of herself. Things got so bad that Sam placed her in a nursing home. Except for the condominium, Mum had no assets of value left.

Sam authorized Mum's company to sell the condominium for \$150,000 and it was intended that the funds be used to defray the cost of Mum's care. The decision made sense except for the fact that Mum's will left the Condominium to her daughter Bessie with the residue (what was left over in the estate) to be divided equally between her two children.

Unfortunately, Mum died soon after the sale of the condominium. Sam and Bessie fought about who was to receive the money from the sale. Sam wanted to split the money evenly. He argued that Mum's corporation really owned the condominium and the shares from that company went to the estate. Even if Mum (as opposed to the company) was entitled to the money from the sale of the condominium, there is a general principal in law that when a gift in a will is not owned by the testator at the time of death then the intended beneficiary gets nothing. By virtue of this legal principal of *ademption*, Sam's lawyer argued that Bessie gets nothing since the condominium was no longer owned by the Estate.

Bessie disagreed. Her lawyer pointed out that the *Substitute Decisions Act*, says that *ademption* does not apply to property that is subject to a specific testamentary gift that a guardian of property disposes of under this Act. Bessie argued that proceeds from the sale of the condominium should go to her because Mum wanted her to have the condominium. The fact that Mum owned the condominium through a corporation was just a legal technicality. The will showed that Mum thought the condominium really belonged to her personally.



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So who is right?

In a very similar scenario to the one described above, the Ontario Court of Appeal (*McDougald Estate v. Gooderham*) confirmed that statutory provisions have declared that in certain circumstances *Ademption* does not apply. When someone with a Continuing

Power of Attorney over property sells property that was left by a will to an individual the Estate has to give that beneficiary the money that came from the sale. Based on this case, it would seem that Bessie would get the proceeds from the sale of the condominium.

Going to court to can be very complicated. Despite the temptation to jump to conclusions, it would be a mistake to substitute this case review for substantive legal advice. For those considering this option, there is no replacement for hiring a competent solicitor whose own research, analysis and judgment should be canvassed prior to going to court.

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