IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Clements Estate (Re), 2007 NSSC 168

Date: 2007/06/01
Docket: S.H. No. 273835
Registry: Halifax

IN THE MATTER OF: An application of Barbara Lynn Durling and Pamela Charlene Jefferson, as Executrices of the Last Will and Testament of William Frederick Clements, deceased

and

IN THE MATTER OF: Entitlement to Insurance Proceeds relating to the destruction by fire of a cottage located at 212 Springfield Lake Road, Middle Sackville, in the County of Halifax, Province of Nova Scotia

Judge: The Honourable Justice A. David MacAdam

Heard: December 21, 2006, in Halifax, Nova Scotia

Final Written Submissions: January 11, 2007

Counsel: M. Ann Levangie, - Barbara Lynn Durling and Rodney Durling
Timothy C. Matthews, Q. C., - Pamela Charlene Jefferson, Gary Clements and Sandra Slaunwhite
Roberta J. Clarke, Q. C.- as Litigation Guardian for Allison Durling
Alan J. Stern, Q. C., - the Estate of William Clements

By the Court:

INTRODUCTION

[1] This application concerns entitlement to insurance proceeds arising from damage to property. At issue is the effect of the testator's death, while the property, consisting of land with a cottage and a detached garage, he had devised to one of his children, was being damaged by smoke and fire.

[2] The executrices of the will of William Frederick Clements have applied for directions as to whether the devisee or the residuary legatees are entitled to the insurance proceeds.

[3] On the application the Court received submissions on behalf of Barbara Lynn Durling and Rodney Durling, the devisees of the property, and on behalf of Pamela Charlene Jefferson, Gary Clements and Sandra Slaunwhite, the residuary beneficiaries. Ms. Durling is also a residuary beneficiary, and she and Ms. Jefferson are the executrices.

EVIDENCE

[4] The relevant provision in the Will provides:

> 3 I GIVE all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my Trustees upon the following trusts, namely:
>
> (a) I devise my cottage at 212 Springfield Lake Road and the adjacent lot at Springfield Lake, in Middle Sackville, in the County of Halifax, Province of Nova Scotia, to my daughter BARBARA LYNN DURLING and her husband RODNEY DURLING, as Joint Tenants. If both my daughter BARBARA LYNN DURLING and her husband RODNEY DURLING predecease me, I devise my said cottage and the adjacent lot to my grandson ADAM LEE DURLING....

[5] The will permits the trustees to "sell or transfer any real property which forms part of my estate for the purpose of distribution of the proceeds or for the purpose of transfer to a beneficiary or beneficiaries without such consent". Barbara Lynn Durling, the devisee, (with her husband), of the cottage property, is entitled to twenty per cent of the residue.

[6] The affidavit of Wayne Chapdelaine, a Fire and Explosion Investigator for the Halifax Regional Municipality, was admitted by agreement. The Court had raised a concern that if there were differing views on the evidence, requiring findings of credibility, it might not be possible to proceed by way of application.

The parties agreed to "accept the affidavit as it reads," and stated the Court should "ignore any categorical statements in our briefs as to anything different [and] rely on ... that evidence". Mr. Chapdelaine investigated the fire that destroyed the testator's cottage. In his affidavit he outlines his investigation:

> 4. The front of the cottage had a porch and then a second, covered porch. The covered porch was heavily damaged and mostly consumed by the fire.
>
> 5. The body of a male victim was discovered by firefighters in the debris of the covered porch. The body was extensively burned and could not be visually identified. It was later determined that the body was that of William Frederick Clements.
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> 6. A kettle used to humidify the cottage was found next to the body. It is believed that Mr. Clements attempted to extinguish the fire and was overcome by smoke.
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> 7. An autopsy confirmed that the cause of death was smoke inhalation. Mr. Clements died in the very early stages of the fire, before the cottage was substantially damaged.
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> 8. The fire originated in the covered porch, in the area where the body was found. The covered porch was so damaged by fire that no definitive cause of the fire could be determined. There was no indication that the fire was deliberately set.

[7] Mr. Chapdelaine's fire inspection report is attached as an exhibit to his affidavit. The report includes the following:

> The body of a male victim was discovered by firefighters in the debris of the covered porch. The body was extensively burned and was not suitable for visual identification. The body was discovered to the left of the exterior entrance to the covered porch. A metal container later identified as a kettle used to humidify the cottage was found next to the victim. It is believed that the victim had attempted to extinguish the fire and was overcome by the smoke in this area. An autopsy confirmed the cause of death was smoke inhalation.

[8] The fire inspector's statement as to the cause of death includes a "hearsay" reference to "an autopsy." It is not clear why the inspector concluded the kettle was used for humidifying the cottage, or why he believed the victim had attempted to extinguish the fire. Although questions remain as to the basis of the inspector's conclusion that Mr. Clements "died in the very early stages of the fire, before the cottage was substantially damaged," the agreement by the parties to "accept his evidence as it reads", for the purpose of this application, means that the sequence of events he describes must be accepted by the Court, effectively, as if it were contained in an agreed statement of facts. Therefore, for the purposes of this application, the Court will assume that Mr. Clements's death preceded any "substantial damage" to the cottage.

ADEMPTION

[9] In her submission, counsel for Mrs. & Mr. Durling references *Black's Law Dictionary*, (7th ed.) as to the definition of "ademption:

> The destruction or extinction of a testamentary gift by reason of a bequeathed asset's ceasing to be part of the estate at the time of the testator's death; a beneficiary's forfeiture of a legacy or bequest that is not longer operative.

[10] The doctrine of ademption was summarized by Newbury J.A. in *Wood Estate v. Arlotti-Wood*, [2004] B.C.J. 2267 (C.A.):

> 1 This appeal concerns the doctrine of ademption by conversion - a rule of the law of wills whereby a specific bequest "adeems", or fails, if at the testator's death the specified property is not found among his or her assets - either because the testator has parted with it, or because the property has "ceased to conform to the description of it in the will", or because the property has been wholly or partially destroyed. (J. MacKenzie, ed., *Feeney's Canadian Law of Wills* (4th ed., loose-leaf, 2000) at s. 15.2.) The doctrine applies as a matter of law, irrespective of the testator's intentions in the matter, although his or her intentions are clearly relevant to the anterior question of whether the gift in question is a "specific" legacy (and therefore subject to ademption), or a general one (not subject to ademption). The doctrine is also subject to the qualification that even if the gift in question is a specific legacy, it may be saved in some circumstances if the property has changed "in name or form only", and still forms part of the testator's property at the date of death. Each of these aspects of ademption is engaged by this appeal

[11] The residuary beneficiaries say the gift of the cottage adeemed when it was "partly destroyed by fire", and the Will does not show an intention to displace the

doctrine. In this submission the land and remains of the cottage pass to the devisee, but the insurance proceeds from the fire loss form part of the residuary estate. The devisees say the gift did not adeem, because the cottage was not "substantially damaged" when the testator died, and therefore remained in his estate at his death. In the alternative, the devisees propose a theory of ademption based on the testator's intention, rather than the identity of the gift.

English Authorities

[12] In *Durrant v. Friend* (1852), 64 E.R. 1145 (V.C. Ct.) the testator was lost at sea, along with certain chattels he had devised to a beneficiary. The chattels were insured. The Court held that, because the testator and the chattels had been lost together, the devisee had no interest in the chattels and consequently no interest in the insurance proceeds. Counsel for the Plaintiffs, the executors, said they had no interest in the question, and counsel for the Defendants, representing clients with conflicting interests, left the question to the Court, without argument. The Vice Chancellor, Sir James Parker, at p. 1147, provided a brief account of his reasoning:

> ... [I]t was clear that, if the testator had died before the destruction of the chattels, then an interest in them would have vested in the legatees, and the executors

> would have been trustees of the policy of insurance for them; but if the chattels had perished, and the testator had subsequently died, the benefit of the policy would not have passed to the legatees, but it would have been a right of action in the testator in his lifetime, and the loss would have fallen on the legatees, but the benefit of the policy would have constituted part of the testator's estate. In this case the testator and the chattels had perished together, and it was difficult to say how such a case should be dealt with; it was essential to the right of the legatees that they should have some interest in the chattels; but as they were destroyed at the same time that the testator lost his life, the legatees never had, as he thought, any interest in them; and, therefore, their claim to the money in which the chattels were insured must fail.

[13] In *Re Mercer, Tanner v. Bulmer,* [1944] 1 All E.R. 759 (Ch.) a husband and wife had died in an air raid. There was no evidence as to which spouse died first. The Court presumed the husband, being older, died first. The issue was which estate was entitled to the proceeds of insurance on chattels in their flat, which were included in the husband's estate. The Court held the wife's representatives had not met the burden of proving that the chattels were still in existence after the husband's death. Following *Durrant*, the Court presumed that the chattels were destroyed before or simultaneously with his death. Pursuant to war damage legislation, the insurance proceeds were included in the residue of the husband's estate. It should be noted that the deceased in *Mercer* died intestate, and the right to recover the value of the destroyed chattels arose under war damage legislation. This distinction appears to have no practical effect on the reasoning, however.

Canadian Authorities

[14] In *Re Gordis,* [1930] 38 O.W.N. 317 (Ont. S.C. – H.C.) a husband and wife died as the result of an automobile accident, the husband dying before the wife, "immediately after the accident." The automobile was bequeathed by the husband to the wife. The issue was which estate was entitled to the proceeds of insurance (for damage to the vehicle) and the proceeds of its sale by the husband's executor. Kelly J. held the husband was, at his death, the owner of the damaged automobile, and entitled to collect the insurance proceeds. On his death, his wife became owner of the vehicle, but not the insurance proceeds, which passed to the husband in his lifetime. Kelly J. cited *Durrant* in support of the proposition that "[e]ven if the automobile was damaged at the same time that the testator died, the same result would have followed...".

[15] In *Re Hunter* (1975), O.J. No. 2300 (Ont. H.C.) the testatrix died in a fire that destroyed her house and its contents. The issue was whether the insurance proceeds constituted personalty, and were therefore available to fulfill specific legacies, or became part of the residue. Keith J. referred to *Durrant*, *Gordis* and *Mercer*, and said:

> 17 All of these cases dealt with chattels being destroyed in such circumstances that one could not tell whether a claim for insurance moneys arose before or after the death of the testator and hence, on the theory that the insurance claim arose simultaneously with the testator's death and before any legatee could be said to have acquired a vested interest in the chattels, the proceeds of such claims must go to the personal representatives and form part of the general estate and not be the property of the disappointed legatees.

[16] It was argued that this reasoning should not apply where the destroyed property was real property. Keith J. distinguished *Hicks v. McClure* (1922), 64 S.C.R. 361, on the basis it "was a true case of ademption or no ademption, and the Court was able to find a sufficient contrary intention in the will of the deceased to permit the devisees of a parcel of land to take the benefit of a mortgage on the lands, the lands having been sold by the testator prior to his death." In *Hicks* the Will had actually directed the executors to sell the property and distribute the proceeds. *Mercer* was distinguished on the basis of the requirements of the war damage legislation, which was effective regardless of when the testator's death occurred. Keith J. concluded:

> 22 I can find nothing in the nature of a devise of real property, that would make the reasoning set out in the judgment in *Durrant* ... inapplicable, and in the absence of a contrary intention appearing in the language employed by the testatrix in her will. I must find that the devisees of the real property in this case are not as such entitled to the proceeds of the insurance on the damaged house, but that such proceeds as well as the proceeds of the insurance on the contents of

> the house, are to be treated as personalty in the hands of the applicant available for the general purposes of the estate.

[17] It should be noted the devisees were also the residual beneficiaries, which "would militate against a finding that ... a contrary intention appeared in the will as to prevent the law with respect to ademption being applicable".

[18] The devisees distinguish *Gordis* and *Hunter* on the basis that in this case the insurance claim arose after the testator died, and that when he died "there was no significant damage to the cottage and the cottage remained intact." As such, they had a vested interest in the property before the cottage was substantially damaged and should be entitled to the insurance proceeds.

[19] In *Re Ross Estate*, [1975] B.C.J. No. 964 (S.C.– Prob.) the testatrix died in a hotel fire, which also destroyed certain chattels that were subject to specific bequests. The issue was whether the insurance proceeds were payable to the beneficiary of the chattels, or to the residue of the estate. McKay J. observed:

> 11 Certain specific chattels located in the suite of the deceased were bequeathed to Mr. Presley. Those chattels were destroyed in the fire that caused the death of the testatrix. The testatrix had a policy of insurance which covered the loss or destruction of the chattels, and the sum of $9,595.50 has been paid by the insurer to the executors to cover the loss. The question is whether the said sum

> of $9,595.50 is payable to Mr. Presley or falls into residue. The question is not one of difficulty. It falls into residue. The legacy is considered as adeemed....

[20] McKay J. cited *Durrant*, *Mercer* and *Gordis*, as well as *Trustees Executors and Agency Co. v. Scott* (1898), 24 V.L.R. 522 and *Williams and Mortimer on Executors, Administrators and Probate*, 1970, at p. 743. As to certain other chattels that were damaged, but not destroyed, and which the insurer had repaired, the specific beneficiary was entitled to the chattels and, as successor in title, was entitled to look to the insurer for their repair. This reasoning did not apply to the chattels which were destroyed because he had never obtained a vested interest in them.

Nova Scotia Authorities

[21] In *Re Phillips Estate*, [1995] N.S.J. No. 107 (S.C.) the testatrix died in a car accident which also destroyed the car. On the issue of whether the insurance proceeds should go to the intended recipient of the car or into residue, Nathanson J. said:

> 11 This issue can be resolved by the principle of ademption. A specific legacy of a chattel is adeemed if at the testator's death the subject matter of the gift has been completely or partially destroyed by some act of the testator. Any insurance proceeds from the destruction of the subject matter fall into and form part of the residue of the estate: *Re Gordis* (1930), 38 O.W.N. 31; *Re Hunter* (1975), 8 O.R. (2d) 399 (H.C.); and *Re Ross* (1975), 3 W.W.R. 465 (B.C.S.C.).

[22] The residuary beneficiaries say Justice Nathanson expanded the doctrine by suggesting that destruction must be the result of an act of the testator. They say the principle is not restricted to that situation. Certainly in *Durrant* – which Justice Nathanson did not cite – the testator's own actions were apparently not the cause of the destruction of the chattels, which resulted from his ship sinking at sea, although one might observe that the testator was the captain of the ship. *Gordis*, like *Phillips*, involved a motor vehicle accident. *Hunter* and *Ross* both involved fires.

[23] The devisees suggest the phrase "destroyed by some act of the testator" indicates the inclusion of a principle of intent into ademption. They note that Nathanson J. also set out the rules of will construction, the first being to ascertain the intention of the testator. They also note that, as in *Hunter*, the specific beneficiary was also the residuary beneficiary, and therefore received the benefit regardless.

"Identity" versus "Intent"

[24] The devisees cite several American decisions in which it was suggested that, in deciding whether ademption has occurred, the "probable intent of the testator is the determining factor": *White v. White*, 251 A.2d 470. This approach is clearly at odds with the current prevailing view in Canadian law. As the author of *Feeney's Canadian Law of Wills* suggests at §15.2, "ademption occurs as a matter of law quite irrespective of the testator's intention in the matter...."

[25] A perusal of the United States cases referred to by the devisees reveals that the "intention" theory of ademption is not universally accepted in American jurisdictions. In *Kelley v. Neilson*, 745 N.E. 2d 952, the Supreme Judicial Court of Massachusetts stated that the "great weight of modern authority" supported the "identity" theory of ademption, although the Court added:

> ... we have on occasion departed from a rigid application of the "identity" rule where the rule would yield a harsh and unjust result and "would result in a disruption of the dispositive scheme of the testatrix because of wholly fortuitous circumstances beyond her control." *Walsh v. Gillespie*, [338 Mass. 278] at 282-283...

[26] The devisees claim the testator's intentions will not be upheld if the insurance proceeds are permitted to fall into the residue of the estate. They submit:

> The evidence is clear that Mr. Clements intended for Mr. and Mrs. Durling, to have the cottage property. It was devised to both of them, and if they predeceased the testator, the cottage was to go to their son. The property was adjacent to the Durlings' home and the will is clear that Mr. Clements intended for the cottage to go to the Durling family. His previous will also devised the cottage to Ms. Durling.
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> Mr. Clements made specific gifts to each of his children both *inter vivos* and testamentary, and each of them are residuary beneficiaries, including Ms. Durling. However, this is not a situation as in *Re Phillips* ... and *Re Hunter* ... where she would receive the same amount regardless of whether the property adeemed. In the present situation, Mr. Clements's testamentary gift to Mrs. Durling would be reduced substantially if ademption occurred, and Mr. Durling would not receive a gift at all.

[27] This approach is clearly inconsistent with the traditional Canadian approach, premised as it is, on the identity of the destroyed property. It should be noted that the traditional approach has been modified by statute in at least two provinces, the Ontario *Succession Law Reform Act*, s. 20(2)(b) and the New Brunswick *Wills Act*, s. 20(2).

Arguments on Ademption

[28] The residuary beneficiaries say it is impossible to know how much of the house was “destroyed” before the testator’s death, and how much after, and the will does not show an intention the insurance proceeds should take the place of the real property; that is, the will does not show an intention to displace the doctrine of ademption. In the absence of legislation – such as has been introduced in other jurisdictions – there is no basis upon which to displace the doctrine.

[29] The specific beneficiaries of the cottage claim the cottage was not destroyed at the testator’s death. When the testator died, they say, “the fire was still only smouldering in the enclosed porch area, and the main part of the cottage was uninvolved. It was only after Mr. Clements died that the cottage was engulfed and eventually destroyed.” As such, they argue, the gift did not adeem because it remained in the testator’s estate when he died and passed to them intact, thus entitling them to the insurance proceeds.

TIMING OF INSURANCE CLAIM

[30] The devisees say there are four methods of determining when an insurance claim arises, referencing *Alie v. Bertrand & Frere Construction Co.*, [2002] O.J.

No. 4697 (C.A.) (application for leave to appeal dismissed: [2003] S.C.C.A. No. 48):

> 95 The first trigger theory is referred to as the Exposure Theory. On this theory, from the first exposure to the condition or conditions which ultimately cause the property damage, that damage is inevitable, a certainty. As a result, the property damage is considered to have occurred on that first exposure so that the deterioration following that exposure is merely the manifestation of the damage that has already occurred requiring repair or replacement. Consequently, only the insurance policy in effect at the date of the first exposure is triggered to respond to the loss.
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> 96 The second is the Manifestation Theory. On this theory, damage only occurs when it becomes known (on one formulation, to the insured, and on another, to the third party whose property is affected). Therefore, coverage is triggered when the insured or third party first becomes or could have become aware of the damage. Again, the result is that only the insurance policy in effect on the date of manifestation of the damage is triggered to respond to the loss.
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> 97 The third approach is referred to as the Injury in Fact Theory. A policy responds if in fact there was damage which actually occurred during the policy period, whether or not anyone was aware of it or could have been aware of it. Where property damage is ongoing or continuous, every policy in effect while the damage continues to occur is triggered to respond to the loss.
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> 98 The fourth approach is the Continuous Trigger or Triple Trigger Theory. Under this theory, the property damage is effectively deemed to have occurred from the initial exposure to the time when the damage became manifest or ought to have become manifest to the plaintiffs, and if alerted, to the insured. In that case, all policies in effect over that period are called upon to respond to the loss.

[31] The devisees say the appropriate model here is the “manifestation theory,” because the extent of the loss, or whether there is a worth while claim, will not be

known until the fire is out. Thus the claim would arise when the fire is extinguished.

[32] Even if the claim was triggered before the testator's death, the devisees say, it was incomplete when he died. They refer to cases involving contracts to sell land that indicate that if a contract is not completed before the testator's death, the gift does not adeem: *Re Rodger* (1966), 60 D.L.R. (2d) 666 (H.C.) and *Dearden Estate v. Pittman*, [1987] M.J. No. 166 (Q.B.) In each case the testator died after a sale or a conditional sale had been agreed to, but not completed, and the property did not adeem, but passed to the beneficiary.

[33] The devisees submit that no insurance claim had arisen by the time of the testator's death, because he died before the building was "substantially consumed." In the alternative, if there was a claim, it was insignificant or incomplete. The claim to its full extent only arose when the fire was extinguished, at which point "the interest in the cottage and its insurance policy" had passed to the devisees, who also thereby became entitled to the insurance proceeds.

EXCEPTIONS TO ADEMPTION

Change "in Name or Form Only"

[34] The doctrine of ademption provides an exception in situations where the property has changed "in name or form only" and still forms part of the testator's property at the time of death. This exception may apply, for instance, where shares are transferred or reissued in such a way that tracing is possible: see *Re Wood Estate v. Arlotti-Wood,* [2004] B.C.J.. 2267 (C.A.); *Re Jameson*, [1908] 2 Ch. 111, *Re Clifford*, [1912] 1 Ch. 29 and *Re Leeming*, [1912] 1 Ch. 828.. However, ademption may occur where devised land was expropriated and the compensation paid into court (*In re Dowsett*, [1901] 1 Ch. 398); where a private water utility was acquired by a government utility pursuant to statute and new stock was issued to shareholders of the private company (*In re Slater*, [1907] 1 Ch. 665); and where gifted shares, held jointly by the testatrix and her husband, had been sold, notwithstanding the testatrix owned other shares solely in her own name when she died (*In re Palmer* (1985), 69 N.S.R. (2d) 384 (S.C.T.D.).

[35] The devisees say the cottage changed in form only. They note the acceptance of the equitable remedy of tracing in *Wood Estate v. Arlotti-Wood*, supra, where

the gift adeemed, but it was held open to the beneficiaries to bring evidence respecting identifiable contents. They cite *Re Bird*, [1942] O.J. No. 451 (C.A.), where the will identified the property by a specific street number. The cottage on the property burned down, and was replaced by a semi-detached home, one unit of which was assigned the original number. The Court held that the devise included "not only the land itself, but all the buildings thereon at the date of death," and, despite any change in the condition of the property, it satisfied the description in the will. In *Nakonieczny v. Kaminski*, [1989] S.J. No. 94 (Q.B.) the testator devised "the home which I may own at the time of my decease, presently 202 Bemister Avenue, West in Melfort." The home was subsequently sold, and the testator told the beneficiary that she was to receive the proceeds, but he did not change his will. There was evidence that he would not have had sufficient legal knowledge to know that a change was necessary. The Court held the devise was more general than specific, and that he intended the beneficiary to have the home in whatever form it existed. She was entitled to the proceeds.

Proceeds

[36] A second exception to the doctrine of ademption arises where the testator expresses in the will an intention to give the proceeds of the sale of an asset, as opposed to the specific asset itself. This exception is often raised where the testator, having directed in the will that specific property is to be sold and the proceeds given to the beneficiaries, then sells the property. In these circumstances, the gift will survive – that is, it will not adeem – where the proceeds retain a form whereby they can be identified as such. An example is *Hicks v. McClure* (1922), 64 S.C.R. 361, where, by directing that his farm be sold and the proceeds divided among the beneficiaries, the testator manifested an intention that the gift was not of the particular property but of its proceeds, so long as they could be identified. As such, the gift survived the sale of the home during the testator's lifetime. (Note also *Diocesan Synod of Fredericton v. Perrett et al.*, [1955] 3 D.L.R. 225 (S.C.C.) and *Fenton et al v. Whittier et al.* (1977), 26 N.S.R. (2d) 662 (S.C.T.D.). The gift will adeem, however, where the proceeds have become commingled and cannot be traced: see *Re Stevens*, [1946] 4 D.L.R. 322 (S.C.N.S. *en banc*).

[37] The residuary beneficiaries submit that the "proceeds" exception requires express language in the will indicating an intention to gift the proceeds of sale, rather than the specific asset. As such, it does not apply to the current situation,

where the testator's clear intention was to gift the property *in specie*. The devisees take the position that the "proceeds" exception does not require an actual reference to "proceeds" in the will, citing *Wood Estate v. Arlotti-Wood*, supra. They say the insurance proceeds meet the requirement.

[38] The devisees argue that the testator's intention was clearly to avoid ademption, which they say is borne out by his attempt to extinguish the fire. They suggest that his intention is a relevant consideration. They refer to *Diocesan Synod of Fredericton*; *Nakonieczny*; and *Hicks*, in each of which the will was read so as to give effect to the testator's intention. This argument appears to be but another formulation of the "intention" theory drawn from the American cases, and would appear to bear no relationship to the law in Canada.

TIMING OF ACQUISITION OF TITLE

[39] Section 46 of the *Probate Act* provides that upon death, the testator's real property vests in the personal representative, who holds the property as trustee for the beneficiaries:

> 46 (1) Notwithstanding any will, on the death of a deceased person, all real property that the deceased person owned immediately before the death of the deceased person for an interest not ceasing on the death and without a right in another person to take by survivorship devolves to and is vested in the personal representative of the deceased person as if it were personal property.
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> ***
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> (4) The personal representative of a deceased person is the representative of the deceased person with respect to the real property as well as with respect to the deceased person's personal property.
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> ***
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> (6) Subject to the powers, rights, duties and liabilities mentioned in this Act, the personal representative holds the real property as trustee for the persons by law beneficially entitled to the real property.

[40] Section 47 states that, except as otherwise provided in the *Act*,

> ... only the personal representative ... may dispose of and otherwise deal with the real property of the deceased person, with the like incidents, but subject to the like rights, equities and obligations as if the real property were personal property vested in the personal representative.

[41] The result of the *Probate Act* provisions is that the named beneficiary does not become legal owner of the property automatically upon the testator’s death. The beneficiary does, however, have an immediate equitable interest.

ASSIGNMENT OF INSURANCE

[42] The *Insurance Act* R.S.N.S. 1989, c. 231, provides, in Schedule VII, Statutory Condition 3, that the insurer shall be liable for "loss or damage occurring after ... change of title by succession, by operation of law, or by death."

[43] The parties agree that while the legal title was vested in the trustee, the insurance policy remained in force, with the trustee as the testator's successor in title.

[44] The devisees submit, relying on *Durrant*, that when a testator dies before the property is destroyed the trustees hold the insurance policy in trust for the beneficiaries. In *Durrant* the Court said, "if the testator had died before the destruction of the chattels, then an interest in them would have vested in the legatees, and the executors would have been trustees of the policy of insurance for them...." Consequently, pursuant to this reasoning, the specific beneficiaries obtained an equitable interest in the cottage at the testator's death, with the legal interest vesting in the trustees. The trustees, in turn, held the insurance policy for

their benefit, and, when the insurance claim arose, the devisees also had an equitable interest in the proceeds.

[45] The residuary beneficiaries argue that conveyance of title to real estate does not carry with it the assignment of the previous owner's fire insurance, as fire insurance does not "run with the land." They deny the insurance money is held in trust for the benefit of the specific devisees, citing Brown's *Insurance Law in Canada*; *Rayner v. Preston* (1881), 18 Ch. D. 1 (C.A.) and *Montreal Trust Co. v. Caledonian Insurance Co.*, [1932] S.C.R. 581.

CONCLUSION

[46] The genesis of the traditional Canadian approach to "ademption" is undoubtedly the English authorities, such as *Durrant.* The Vice Chancellors reasoning begins by acknowledging "if the testator had died before the destruction of the chattels, then an interest in them would have vested in the legatees ...". Similarly, in *Mercer*, the Court was concerned with assessing whether the wife had met the burden of proving the chattels were in existence after her husband's death. The Court found she had not.

[47] I also see no reason not to follow *Hunter* to the effect that there is "nothing in the nature of a devise of real property, to make the reasoning in *Durrant* inapplicable".

[48] The parties do not take issue with the Fire and Explosion investigator's conclusions that "Mr. Clements died in the very early stages of the fire, before the cottage was substantially damaged."

[49] Applying albeit the dicta in *Durrant* and *Mercer*, it is clear the 'substantial" damage to the building occurred following the death of Mr. Clements and consequently, after legal title had passed to his "personal representatives" to be held in trust for the "devisees" as they persons "by law beneficially entitled to the real estate".

[50] Pursuant to Statutory Condition 3, of the *Insurance Act*, the insurance coverage followed the passing of title to the "personal representatives". Since the loss occurred while legal title was held by the "personal representatives" and "beneficial title" by the devisees, the insurance proceeds to cover the loss were

payable to the “personal representatives” to be held in trust for the holders of the “beneficial title”, namely the devisees.

[51] Having regard to the circumstances, it would appear this result mirrors what would have been the intention of the deceased. In theory, the devisees may use the insurance proceeds to restore the property they were devised to its condition preceding any damage on the fateful night. They, of course, are not bound to do so.

[52] Even though the deceased’s “probable intention” is met by this result, I do not purport to alter the traditional common law approach in Canada that “ademption occurs as a matter of law quite irrespective of the testator’s intention in the matter ...”. It may well be time for the law to focus on a testator’s intention, as opposed to an arbitrary determination of entitlement to a bequest, or its value, in the circumstance of loss or damage and resulting insurance proceeds. However, this is for the Appellate Courts or the Legislature to determine.

[53] For the purpose of this case, it is sufficient that the parties do not dispute the Fire and Explosive Investigator's conclusion the "substantial" damage occurred after Mr. Clements had died.

[54] There may have been an alternative basis for finding the devisees are entitled to the insurance proceeds.

[55] Counsel have repeatedly referred to the cottage being "destroyed" by the fire. The inspector's affidavit, as noted above, states that the covered porch on the front of the cottage was "heavily damaged and mostly consumed by the fire" and "so damaged by fire that no definitive cause of the fire could be determined." He stated that the testator died "in the very early stages of the fire, before the cottage was substantially damaged."

[56] In his report, the inspector provides more detail on the damage to the cottage. He described the cottage as "a single storey wood frame bungalow clad in wooden shingles." The rear exterior wall of the cottage was "undamaged by the fire," although the three windows in this wall were broken. The inspector does not specify whether the breaking of these windows was related to the fire. There was

no damage to the exterior electrical system. The left side of the structure had fire damage near the front, and a "partial 'V' shaped pattern" appeared on the exterior wall, extending from the base of the cottage to the peak, then "in a downward direction along the peak toward the rear of the structure." Of the three windows in this wall (i.e. the left side), the "window closest to the front has fire damage around the frame and forms part of the 'V' shaped pattern."

[57] On the exterior right side of the cottage, the main entrance was located towards the rear. The steps leading to this door were undamaged, although a window in the door itself was broken. There was some marking from heat and soot on the shingles above the door, as a result of smoke and heat escaping through the doorway. A large window toward the rear was not broken, but had soot deposits on the glass. Another window on the right side was broken, with heat and soot deposits on the shingles above it. A metal chimney on this wall was not damaged. A small vent near the roof had heat damage.

[58] The inspector stated that the most significant damage to the cottage was near the front, where "[a] section of the enclosed porch has been consumed by the fire and a remaining window frame is present with fire damage extending to the roof

line above it." The front of the cottage was "heavily fire damaged and mostly consumed by the fire." The covered porch area had "burned away" and a set of wooden stairs was "partially consumed" in the area of an "entrance to the exterior located approximately in the center of the porch."

[59] As to the interior of the cottage – which consisted of a kitchen, bathroom, furnace room, living room and two bedrooms – it was "extensively damaged by the fire," according to the inspector. He wrote that his inspection began at the side door "and progressed ... from the areas of little or no smoke, heat and fire damage to the areas most severely damaged...". He concluded that the fire originated in the covered porch, which was "the area most extensively damaged by the fire."

[60] The inspector noted that the property also contained an adjacent detached garage, which was not damaged by the fire.

[61] Whatever the damage, it is undisputed that the bequest itself was not adeemed, in that the land and the remnants of the buildings passed to the specific legatees. Admittedly, the principal subject of the bequest was damaged and in the opinion of Mr. Chapdelaine, portions of the building, including the covered porch,

were “heavily damaged and mostly consumed by the fire”. As noted earlier in *Ross Estate*, supra, Justice McKay held that a specific beneficiary was entitled to the chattels that were damaged, but not destroyed, and which the insurer had repaired

[62] The insurance on the cottage and detached building, depending on the policy coverage provisions, was intended to permit the repair, or at least partial repair, in the event the buildings were damaged. The property, as a result of the smoke and fire, was not destroyed, in the sense of having disappeared. The insurance proceeds would therefore permit, at least in part, the repair or restoration of the damaged property, similar to the insurance proceeds that in *Re Ross Estate*, supra, were used to repair or restore the chattels that had not been “destroyed”.

[63] It is not, in my view, significant in law, that in the one instance the loss related to chattels and in the present circumstance it relates to buildings located on land.

[64] As indicated, although the covered porch and the front of the cottage were “heavily damaged and mostly consumed by fire”, the report does not indicate they

were "destroyed" in the sense of becoming "extinct". In fact, the report suggests the degree of damage to the cottage itself was less severe, as one proceeded from the front to the rear of the structure.

[65] There is, therefore, nothing in the circumstances here to preclude the application of the reasoning applied by Justice McKay in *Ross Estate*, supra, where the bequest has not been destroyed, but only damaged, and where there were insurance proceeds available to repair or restore the damaged bequest. Whether the insurance proceeds here would permit the full and complete repair of the damage is, in my view, irrelevant. The bequest is not adeemed if it is not destroyed. Even if the proceeds are insufficient to repair the loss or damage, this does not mean the gift has been destroyed or become extinct. The gift, in its form, passes to the designated beneficiary, together with the entitlement to insurance proceeds relating to the loss or damage that occurred to the specific bequest.

[66] Mr. Chapdelaine did not testify to clarify his report in respect to the extent of the damage and destruction of the covered porch and the cottage. A reading of his Affidavit, together with the attached report, suggests that although the covered porch and the front of the building were "heavily damaged and mostly consumed

by the fire", this conclusion did not necessarily extend to the remainder of the cottage nor for that matter, the outbuilding. On the other hand, counsel for the executrices, as well as for Mrs. Durling and Mr. Durling, have stated the cottage was "destroyed". In view of the fact that the counsel have not addressed this issue on this application, and have, at least in their written submissions, assumed that the cottage was "destroyed", it would not be appropriate to find otherwise. Nevertheless, it would similarly be inappropriate not to recognize that on the basis of Mr. Chapdelaine's affidavit, and his report attached thereto, it may very well be that there was no ademption, because the specific bequests had never been "destroyed" or become "extinct" within the meaning of the "doctrine of ademption", as it has been defined and interpreted.

SUMMARY

[67] It is unnecessary to determine when the insurance claim arose. As already noted, title passed to the "personal representatives" before any "substantial damage". Entitlement to the insurance proceeds passed to the "personal representatives" to be held for the "beneficial owner", the devisees.

[68] I am not satisfied, as is suggested by the devisees, that the change brought about by the fire damage is a change "in name or form only". The form of the bequest did not change. The testator did not "rebuild" the building or buildings such as occurred in *Re Bird,* supra, where the cottage was destroyed and removed from the property and a new semi-detached home built on the lot. There the Court, as earlier noted, held that the testatrix intended the lot to be conveyed and that both of the semi-detached units passed to the specific beneficiary. Also, as earlier noted, in *Nakonieczny v. Kaminski*, supra, the Court had found the testator had intended the beneficiary to have the home, in whatever form it existed at the time of his death, and this, the Court concluded, included the proceeds from his sale of the property prior to his death. There is, of course, the additional feature, that the testator had apparently told the beneficiary that she was to receive the proceeds, although he had not changed his Will accordingly.

[69] On the evidence, it is clear that Mr. Clements did not "change the form of the bequest", such that the specific bequest to Mrs. and Mr. Durling would extend to some new form of the same bequest. The damage to the property did not arise as a result of Mr. Clements' intending to change the nature or form of his specific bequest, such as occurred in *Re Bird* and *Nakoniecyzny v. Kaminski*.

[70] However, counsel for Mr. and Mrs. Durling, as well as for the executrices appear to accept that the “cottage was destroyed by fire”, notwithstanding the contents of the fire inspection report. In the circumstances, I have no alternative other than to accept that the cottage was “destroyed” as opposed to only “substantially damaged”. If, however, the cottage had “only” been “substantially damaged”, and regardless of the “economics of repairing and restoring the cottage, the finding of McKay, J. in *Re Ross Estate*, supra, may have been applicable. As earlier referenced, the chattels had been damaged, but not destroyed, and the bequest did not adeem. The bequest passed to the designated beneficiary, together with entitlement to the insurance proceeds payable in respect of the loss or damage that had occurred. In view of the position of the specific legatees as to the extent of damage to the cottage, I can make no such finding in this instance.

[71] Also, there is nothing in the present circumstances to suggest the testator intended to devise the proceeds of the bequest. The property was not sold and there are no proceeds of sale. The only proceeds are the insurance proceeds relating to the property damage. There is no language in the Will that would signal

an intention to replace the bequest with the proceeds from any conveyance or sale prior to the testator's death.

[72] The devisees are entitled to the bequest, and the insurance proceeds relating to the loss and damage by fire and smoke, of the finding by the Fire and Explosion Investigation that "Mr. Clements" died in the very early stages of the fire, before the cottage was substantially damaged. The damage therefore, primarily occurred after Mr. Clements' death, and consequently after legal title had passed to his personal representative and beneficial title to the devisees. The insurance proceeds relating to the loss and damage are held by the personal representatives for the benefit of the devisees.

[73] Judgment accordingly.

J.