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STRATEGIES FOR GIFTING FINANCIAL ASSETS & AVOIDING ADEMPTION

By Suzana Popovic-Montag - September 2024

Gifting financial assets such as investments or bank accounts through a will can pose a unique challenge, as such bequests may not be honoured if the client subsequently closes an account and opens a new one, or changes their investments. When the client dies, if a financial asset no longer conforms to the description in the will, that gift may fail or adeem,[1] regardless of the client's intentions,[2] making it necessary to apply to the court to see whether the gift can be saved.[3]

While there is no fool-proof way to ensure that such gifts do not adeem, a few strategies may help minimize the risks associated with gifting financial assets. We outline some of the available options below.

Strategy 1: Include a Power of Substitution or Conversion for Financial Assets

Probably the most effective way to prevent the ademption of financial assets is to expressly address what will happen if those financial assets are converted after the will is executed. The will may direct that anything exchanged for the financial asset shall pass under the will in the same manner as the original property.[4] Ademption ought to be avoided if a bequest permits the original gift to be substituted, as the substituted property owned by the testator at the time of death may pass in place of the property described in the will.

However, if a will does not indicate that a financial asset can be substituted, it may then be assumed that the gift was revoked if it adeemed.[5]

Strategy 2: Limit Identifiers When Describing Financial Assets in a Will

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[1] See Ian M. Hull and Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis, 2000) (loose-leaf) at §15.2 [*Feeney's*].

[2] *Wood (Estate), Re*, 2004 BCCA 556 at para. 14 [*Wood*].

[3] See, for example, *Hayduk v. Gudz*, 2022 ONSC 2249, a case where the court corrected a will clause that referred to a RRIF account with a different account number than that held by the deceased at the time of death.

[4] The court already has the power to interpret a bequest as including substituted property: see *Feeney's*, *supra* note 1 at §15.27. Also see §15.19, which addresses case law where the court has implied as a matter of will construction that the testator contemplated the conversion of certain property and "might have intended that any new thing exchanged for the thing specifically bequeathed should pass under the will as representing the specific property."

[5] *Best v. Hendry*, 2021 NLCA 43 at paras. 50, 66.

If a client has a simple estate, it may not be necessary to contemplate the substitution of financial assets in their will, as long as those assets can be identified with limited information. For example, if the client only has one chequing account, a will could gift it without stating the account number or the name of the bank holding the account. That way, if the client chooses to move their chequing account after the will has been executed, the new account could still conform to the description in the bequest. It is only when the nature of the property changes, as compared to a change in name or form only, that ademption will ordinarily occur.[6]
A specific bequest of stock will adeem if the testator sells the stock in their lifetime.[7] To avoid this outcome, if a client wishes to gift an investment like stock, it may be prudent to describe the investment in the will in a more general way – for example, by referring to the industry the client invested in, if the client's investments tend to be industry-specific. If the description of a financial asset can be read in a secondary and wider sense, so as to include substituted property, ademption may be avoided.[8]

As a general rule, additional information describing a financial asset is only needed in a will if it is necessary to identify the asset being gifted because, for example, the client has more than one of that specific type of asset. However, digital financial assets, such as cryptocurrency, are an exception to this rule. If a client holds digital financial assets, their will ought to expressly authorize the estate trustee to handle those digital assets, since there is currently no law in force in Ontario which explicitly authorizes trustees to distribute digital assets on behalf of a testator.[9] To ensure that the estate trustee can locate and distribute all of the digital assets held by the deceased, it is also prudent to list crypto assets in the will, including where the client has cryptocurrency accounts. However, the will should not include information required to access the client's digital financial assets, including the client's passwords, passcodes, or PIN numbers, to avoid the information becoming part of the public record.

Strategy 3: Gift a Specific Amount of Money Instead of an Account

When gifting bank accounts specifically, the client could also choose to bequeath a specific amount of money from an account rather than the account itself to prevent ademption. A gift of a specific amount of money is considered to be a general legacy, rather than a specific legacy, even if the bank holding the funds is referenced in the bequest. If the money is withdrawn from the specific account before the testator passes away, the legacy will not adeem if the money is transferred to another branch of the same bank, or even deposited with a different bank, so long as the name on the account is not different, and the money is not transferred to a joint account.[10]

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[6] See, for example, *Wood*, *supra* note 2.

[7] *Feeney's*, *supra* note 1 at §15.44.

[8] *Ibid.* at §15.27.

[9] Such legislation is in force in other jurisdictions. In the Yukon, see the *Fiduciaries Access to Digital Assets Act*, SY 2023, c 15; in Saskatchewan, see the *Fiduciaries Access to Digital Information Act*, SS 2020, c 6; in Prince Edward Island, see *Access to Digital Assets Act*, RSPEI 1988, c A-1-1; and in New Brunswick, see the *Fiduciaries Access to Digital Assets Act*, SNB 2022, c 59.

[10] See *Re Ashdown*, 1943 CanLII 328 (Ont. CA). See also *Feeney's*, *supra* note 1 at §15.54.

Avoiding Ademption

When gifting financial assets in a testamentary instrument, there is a real risk that the bequest could fail if the client subsequently re-organizes their finances, and the asset is technically no longer part of the client's estate. This Solicitor's Tip outlines three possible strategies to avoid this outcome: 1) permitting financial assets gifted in the will to be substituted, 2) limiting identifying information when describing financial assets in a will, and 3) gifting an amount of money from an account, rather than the account itself. Of course, encouraging clients to update their estate plans to address any meaningful changes in the structure of their assets that might inadvertently alter the entitlements of their beneficiaries is also prudent. In addition to helping prevent the failure of such gifts, these strategies may also assist in avoiding the need to apply to the court to interpret such bequests once it is time to distribute the client's estate.