



**HULL & HULL LLP**  
Barristers and Solicitors

### **Ademption**

Lawyers assisting clients with estate planning and administration frequently encounter the issue of ademption: where a testamentary gift cannot be fulfilled because the asset to be gifted no longer exists at the date of death, and it is said to "adeem".

In advising clients who are acting under a Continuing Power of Attorney for Property or as court-ordered guardians of property, it is important that they are aware of the terms of the incapable's testamentary documents and do not dispose of any property that is subject to a specific bequest. The *Substitute Decisions Act, 1992* (the "SDA"), prohibits a guardian (or attorney) of property from disposing of an asset that is specifically gifted to a beneficiary in the incapable's will, unless the disposition of the property is necessary to comply with his or her duties as guardian (or attorney), or making the gift while the incapable remains living to the beneficiary entitled to the asset under the will is consistent with the incapable's wishes previously expressed and the remaining property will be sufficient to pay the incapable's expenses going forward (sections 35.1 and 37 of the SDA).

If property is disposed of by the testator him or herself while capable and there is no anti-ademption clause appearing within the will, the gift will adeem and the beneficiary who would have otherwise been entitled to the specific bequest may not have any corresponding rights in respect of the estate.

As the SDA contemplates, a guardian or attorney of property will be required in some circumstances to liquidate an asset in order to fund payment of the incapable's expenses. Where this occurs, the SDA provides that the asset disposed of does not adeem, and the beneficiary will be entitled to a share in the residue of the estate that is equivalent to the value of the asset disposed of by the fiduciary (if sufficient funds remain), subject to a contrary intention in the will (section 36 of the SDA).

It is important that lawyers acting as estate trustee or assisting clients acting in such a capacity are cognizant of the potential impact that the manner in which property was disposed during the testator's lifetime can have on how the estate should be administered.

Some solicitors may be involved in both the preparation of a Last Will and Testament that bequeaths a property, as well as the sale of the property itself. In such circumstances, it would be advisable to bring the issue of ademption to the attention of the client to ensure that the will as drafted remains consistent with his or her intentions in light of the sale of the property.

In any event, when discussing an estate plan with a client, it can be helpful to confirm not only whether there have been any changes in family dynamics and life circumstances, but also any notable changes in the assets held by the client (even if just changes in the form of the property).