

No.: 36206-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID FRANK,

Appellant / Cross Respondent,

v.

FRANK FAMILY FOUNDATION,

Respondent / Cross Appellant.

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY sm
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Appeal from Mason County Superior Court
No.: 05-4-00230-2

APPELLANTS' BRIEF

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I. Assignments of Error

A. Assignments of Error

1. Appellant assigns error to the Court's Finding No. 2, that decedent's will devises all decedent's interest in Cranberry Lake to the Foundation. CP 71.
2. Appellant assigns error to Finding No. 4 wherein the Court found that if Appellant were successful in the negligence action and the Court ordered rescission, that the property would revert back to the estate and then be distributed to the Foundation through their Wills. CP 71
3. Appellant assigns error to finding No. 5, wherein the Court found that the devise in Article VII.2 does not adeem and that ademption only occurs when the conveyance occurs after the will, not before it. CP 71
4. Appellant assigns error to finding No. 6 that states that Article VII.2 of the will is valid and enforceable according to its terms. CP 71-72.
5. Appellant assigns error to finding No. 7 that the Personal Representative offered no reasons why the personal representative's claim of an interest in Cranberry Lake should not be immediately distributed to the Frank Family Foundation. CP 72.
6. Appellant assigns error to the Court's award of attorney's fees to the Foundation. CP 704-705.

B. Issues Relating to Assignments of Error

1. Whether provision in the Ken and Catherine Frank's will devising their interest in the property known as Cranberry Lake to the Frank Family Foundation adeemed such that Article VII.2 is null and void, when the Franks had divested their entire interest in Cranberry Lake to the Foundation through an Intervivos gift.
2. Whether the gift of property must be subsequent to the will in order for a devise in the will to adeem.
3. Whether the Court should look to the intent of the testator in determining whether or not a provision in a will has adeemed.
4. If the Court looks to the intent of the parties in determining whether ademption occurred, whether the facts show that Ken and Kitty Frank intended the gift by will to adeem, when they had already given away the property, the sole reasons for inclusion of the will was to ensure it had all been given to the Foundation, affirmative steps were taken after the will to ensure the property was placed therein, and Ken and Catherine Frank filed a lawsuit against the Foundation to rescind the gift.
5. Assuming that the facts set forth in the Negligence action are correct as the Trial Court did, would Ken and Kitty Frank have intended their gift to the Frank Family Foundation to adeem when they alleged in

their complaint that they would never have created the Foundation or gifted property to it had they not been subject to misrepresentation, undue influence and mistake.

6. Whether a donee, who receives property through unjust enrichment and is being sued for rescission is entitled to receive the equitable interest through a will.

7. Whether the creation (The Foundation), of estate planners, which was created and funded through misrepresentation, undue influence and mistake should be entitled to recover an equitable interest.

8. Whether the right to recover property in a rescission action from an unjustly enriched party should pass through the residuary clause of the Will

9. Whether the Foundation should have recovered fees and costs from the Estate in the action below when the decision below is based upon a misinterpretation of the facts and law and should be reversed on appeal.

II. STATEMENT OF THE CASE

A. Related Actions

On April 21, 2004, Catherine Frank (referred to as Kitty Frank” In briefing to trial court and hereinafter) brought an action in Mason County Superior Court captioned Frank v. Frank Family Foundation, No.

04-2-00374-5, against the Foundation (while she was still a director) alleging that the Foundation had wrongfully rebuffed her request to review Foundation documents. She asserted claims under state and federal law. In that litigation she was allowed to review Foundation documents other than those on which privileges were asserted. The case was dismissed in October 2006.

B. Procedural Status And Claims Asserted In This Action

Catherine and Kenneth Frank (parents of executor in this action) commenced the rescission action on November 4, 2005. Shortly thereafter Catherine and Kenneth Frank died, and the complaint was amended to substitute the Estates of Catherine and Kenneth Frank through the personal representative and son David Frank. CP 477-489.

The complaint as amended asserted a claim against the Foundation for rescission of inter vivos gifts/transfers of certain property (collectively referred to as the “Cranberry Lake Property”) to the Foundation in the period 1993 to 1997, and for professional negligence and negligent misrepresentation against three professional defendants (McClanahan, Clees and Gentry) in connection with their advices to the Franks to create and fund the Foundation. CP 477-489. The causes of action stated against the professional defendants are related as per the Amended Complaint:

21.7. If Ken and Kitty had been properly advised and informed by competent and independent professional advisors, Ken and Kitty would not have created or funded the Foundation or purportedly conveyed the Property to it.

CP 486.

The claims against the defendants were based on allegations that if properly advised by the professional defendants, the Franks would not have either created the Foundation in the first instance, or transferred the Cranberry Lake Property to the Foundation once it was created. CP 486.

C. Statement of Facts

Laurie McClanahan served as Ken and Kitty Frank's CPA, Executrix of their wills, had a power of attorney, had medical power of attorney, had physical possession of Ken and Kitty's personal checkbook, had control of the checking account for the Frank Family Ltd Partnership, was the trustee of the Frank Family Ltd. Partnership, was the trustee of the Frank Grandchildren's trust, and was the trustee of the Frank Family insurance trust. CP 382. Using her power and influence over Ken and Kitty Frank, she convinced them to donate their largest asset to a Foundation she created. CP 374-380. Later, McClanahan instigated the Franks' removal from the property, while at the same time serving as a Foundation director and its Secretary/Treasurer. CP 386-387.

McClanahan encouraged the Franks to create the foundation back in 1993 ostensibly to avoid estate taxes. CP 380 - Decl. of David Frank. She also informed Ken and David Frank that the family would still be able to maintain control over the property and use it in the same manner they had, while still gaining the tax advantages associated with placing the property into a foundation. CP 382-384 Neither McClanahan nor the Foundation informed Ken, Kitty or David Frank until 2004 that they would be considered “disqualified persons” pursuant to Internal Revenue Code §4946(a)(1)(A), -(B) and therefore would not be allowed to continue using the property for personal use. She and the Foundation also failed to inform Ken, Kitty or David Frank that if Frank family members used the property for personal use they could be subject to a self-dealing tax pursuant to Internal Revenue Code § 4941 (a), (b). CP 381-382.

When Ms. McClanahan began the process of preparing the Foundation documents, she retained counsel (Mary Gentry) to prepare the paperwork, but did not suggest the Franks even meet with counsel or otherwise seek independent counsel to evaluate the prudence of making such a large gift. CP 380. McClanahan also hired attorney John Clees to look at estate planning options available to the Franks, and according to Clees and McClanahan, the only viable estate planning options for the property were the Private Foundation, a Charitable Donation, a Charitable

Remainder Trust and/or a Family Partnership. CP 395-400. McClanahan and the attorneys she consulted on behalf of the Franks failed to completely advise the Franks of several superior alternatives for the property which would have ensured the tax savings they desired and also would have kept complete control of the property in the Frank Family. CP 391-400.

Additionally, a review of the billing records from the defendant Gentry indicates she never met the Franks prior to drafting the documents, but instead merely drafted the paperwork McClanahan had requested. CP 395-400. Ken and Kitty Frank, placing blind trust in McClanahan's advice acquiesced to her idea to simply give away the Cranberry Lake property to a foundation for no value. CP 381-384.

The Franks believed that Laurie McClanahan's advice would lead to significant tax savings:

Q. Why did you create the Foundation?

A. Well, it was thought that it would help us out with taxes.

Q. Were there any other reasons why you created the Foundation?

A. Well, we got to thinking about it after it was all done and decided that wasn't the way we wanted to go.

Q. Going back to the time the Foundation was created, were there any other reasons besides tax reasons that caused you to create the Foundation?

A. Not that I recall.

CP 350 - Kitty Frank Dep. 15:11 - 21.

Kitty Frank's testimony summarily dismissed the idea that she and Ken wanted to keep the property out of the hands of their son and grandson. CP 351 - Kitty Frank Dep. 18: 14-24.

Initially, Ken Frank deeded only 4 percent of the property to the Foundation. After Laurie McClanahan took an executive position on the Board, she had Ken Frank deed over the remainder of the property. CP 381. Thereafter in 1996 Mary Gentry Drafted wills for Ken and Kitty Frank which bequeathed the Cranberry Lake Property to the Foundation. CP 75 - 81. According to Mary Gentry, the purpose of the will was to insure that all the property be gifted to the Foundation in case the Franks died before completing the transfers. CP 75 - 81.

The Foundation held several meetings and had an initial flurry of planning. CP 381. The Franks did not know, however, that McClanahan had been taking excessive tax deductions based on the IRS classification of the Foundation as a private non-operating foundation. CP 385. Her inappropriate deductions simply demonstrated her lack of knowledge about foundation planning and taxation. CP 395-400.

As further evidence of her professional incompetence, she informed the Franks that the IRS would not allow their family members to comprise a majority on the Board of the Foundation. She even told Ken and Kitty that both of their positions on the board pushed the limits of IRS

regulations. CP 385 & CP 395-400. As a result of following McClanahan's negligent advice, the majority of the Board of the Foundation was unnecessarily comprised of non-family members. *Id.*

McClanahan was adept at using her considerable influence with Ken and Kitty Frank to disgorge much of their estate (1.1 million USD) and have it placed in charities upon which she served as a director. CP 383-384 & CP 395-400.

Until 2003, the Frank family remained ignorant of the ramifications of deeding the property to the Foundation as Ken and Kitty Frank continued to use the property (and the lake cabin in particular) for personal use:

- Q. And how long has that cabin been there, do you remember?
A. Probably about ten years. I don't know for sure.
Q. And is that something you and your husband had built or built up there?
A. Yes.
Q. And did you and your family use that cabin?
A. We did, summertime.

CP 352-353 - Kitty Frank Dep. 42: 12-20.

From the outset of the Foundation's creation, Ken and Kitty Frank had unfettered access to the Cabin and property. They spent their summers on the property using it in any manner they saw fit. When David and his wife Patti would visit them, they would all go to the Cranberry Lake property for picnics, fishing, walks, etc. Other extended family

members, Bob Golden, Don Reynolds and Sharon Linhares would come up and visit each summer, staying for a week or two. CP 382-384. Ken and Kitty regularly invited their friends for luncheons and dinners at the cabin. *Id.* None of this ever concerned the Foundation Board. CP 381.

In short, the property was simply being used as the family's recreational property, with the Foundation Board members meeting off-site and only occasionally hosting some small event. CP 384. Even the Foundation's president concedes that the Board members knew little if anything about the requirements of a Foundation and/or the Foundation's IRS status. In fact Norm Eveleth testified that they never interfered with Ken and Kitty's use of the property and that no one in the foundation was aware that Ken, Kitty and their family were considered disqualified persons and could not use the property in any manner. CP 278 – 280.

Neither Ken and Kitty Frank, nor any of their family members were ever assessed a self-dealing tax under Code §§ 4946 or 4941 for personally using the property, nor were they ever questioned about their personal use of the property by the Foundation or their CPA Laurie McClanahan. The Franks simply had no idea what the Foundation was supposed to do, since they continued to use the property in a normal manner:

Q. Other than what you've talked about so far, and you don't need to go back and repeat what you said, but other than what you said already, are there any ways in which you feel the Foundation has not been properly run?

A. Well, it seems as though there hasn't been anything going on that we were aware of and we thought maybe that they should.

Q. What did you think should be going on that hasn't been going on?

A. Well, we didn't know because we're not schooled along those lines.

CP 354 - Kitty Frank Dep. at 23: 16 -24: 1.

As the Franks continued to age they wanted to make sure that their extended family would continue to use the Cranberry Lake cabin after their death in the same manner in which they used it when they were alive. From the inception of the Foundation the Franks had always managed the use of the cabin. This was confirmed by the sworn testimony of Norm Eveleth who stated that "Ken and Kitty always managed the cabin . . . we never interfered with it." CP 314 & 280. The Franks met with Norm Eveleth and David Frank to discuss management issues regarding the cabin after their eventual passing. At that time, the Board had no idea that allowing Ken and Kitty to manage the cabin and use it personally ran afoul of IRS rules and regulations. CP 311-313 & 316 & 278.

When the Frank's decided to inform the Foundation Board about their plan for the cabin when they deceased, they were shocked and dismayed at the response they eventually received from Norm Eveleth in

February 2003. CP 384-386. Norm Eveleth's February 2003 letter informed the Franks that upon their death no family member would have access to the property without the express written consent of the Board.

CP 386 See CP 357:

Q. In the summers. And have you learned that you and your family are no longer able to use that?

A. Yes.

Q. And how did you learn that?

A. Through a letter from Mr. Eveleth.

Id.

The Franks felt betrayed and upset by Eveleth's letter, which was completely unexpected and contrary to everything professional defendants had previously told the Franks about the consequences of placing the property into a Foundation. CP 384-386. Kitty Frank testified that she never knew why she and her husband could not use the cabin, but she was admittedly hurt by the Foundation's new tact:

Q. And why were you told that you couldn't use the cabin anymore, if you remember?

A. We don't know. We were never made aware. We were just told that we were not welcome and that hurt Bob's feelings. He went out there and worked every summer.

CP 357 - Kitty Frank Dep. 44: 8-13.

After receiving Eveleth's February 2003 letter, Ken and Kitty Frank realized that they had been duped by Laurie McClanahan into giving away their most valued asset for no value. Ken spent many

sleepless nights claiming that he “must have had rocks in his head” for being duped into making such a huge mistake by following Laurie’s advice. CP 288-290 & CP 384. Upon seeking counsel, the Franks learned the extent of McClanahan’s incompetent advice and immediately sought to recoup their property from the Foundation:

Q. Why did you want to get the property back from the Foundation?

A. Well, because we had not understood where it was going at first and we decided we would like to have it back so we could pass on to our family.

Q. Who made that decision that you wanted to have the lake property back?

A. Well, I guess it was Ken’s and mine.

CP 358 - Kitty Frank Dep. at 13: 22 -14: 4.

The Franks had their counsel send a letter to the Foundation outlining the extent of the property’s mismanagement, which McClanahan received but apparently failed to share with the other directors of the Foundation. CP 315 & 289. McClanahan accused Ken and Kitty Frank of acting illegally in trying to take the property back from the Foundation. After being subjected to further ill-treatment by McClanahan and the Board, Ken and Kitty Frank sent a letter to the Board of the Foundation requesting that they all resign their positions. CP 386-387; CP 359 *see also* Kitty Frank Dep. 30: 17- 24:

Q. Do you recall ever requesting that all the board members resign?

- A. I think that, yes, I do.
Q. And when did you do that, do you know?
A. Not too long ago, I guess.
Q. Do you recall why you did that?
A. We wanted to start over, do it from the beginning.

CP 359.

In response to the Frank's request, the Board refused to allow David Frank to attend further board meetings and in June 2004, the remaining board members decided to remove Ken and Kitty from the board despite not having the authority to do so. CP 387 & 389. They removed Ken and Kitty under the auspices that their old age precluded them from traveling to board meetings. CP 387. They made this decision without consulting the Franks about whether they wanted to remain on the Foundation they created:

- Q. Are you able to serve as a director of the Foundation?
A. I could.
Q. Do you want to?
A. Not after we got thrown off. I don't think that was – it was not asked of us anyway to put us off, but we didn't say anything because it's just one less worry we had. We got a very nice letter from the board in which they said we will no longer have to attend board meetings or we can observe what's going on, but we didn't just fall off the turnip truck. So we know that there was something else there, although we don't know what.
Q. What else do you think was there?
A. Just to get us out of their hair.

CP 360 - 361 - Kitty Frank Dep. 24: 5-18. Kitty Frank Dep. 27:20-23.

Thereafter, Eveleth and McClanahan promptly had all of the locks on the property changed and informed the Franks they were no longer welcome on the property. CP 387. This lawsuit soon followed as Ken and Kitty both expressed a desire to have the property returned to them:

Q. I'm not sure what you mean by you would hope it would be all over by now. What had you hoped would be over by now?

A. Well, that we would get the lake property back.

Q. Back out of the Foundation?

A. Yes.

CP 362 - Kitty Frank Dep.23:10-15.

Q. Is it your desire to get money damages from the people who are listed at the top of the first page of the exhibit?

A. Not really. If we could get the property back, we'd be happy.

CP 362 - Kitty Frank Dep. 38:15-19.

As set forth in detail by expert Gerry Treacy, an estate planning attorney, who has reviewed the Foundation's inception papers and the professional defendants' files regarding advices and activities relating to the creation and operation of the Foundation, the creation of the Frank Family Foundation and the transfer of property to it was based on mistake, undue influence and the abuse of the confidential and fiduciary relationships of the advisers with the Franks. CP 395 – 400. His opinions relating to the professional defendants' incompetence, negligence

and misrepresentations and the basis for those opinions are set forth in detail at CP 395-400.

III. ARGUMENT

A. ADEPTION

There are two types of ademption which have been universally recognized by the courts in the United States. There is ademption by extinction and ademption by satisfaction. *In re Estate of Hume*, 984 S.W.2d 602, 603-604 (Tenn. 1999). "A primary distinction between ademption by satisfaction cases and ademption by extinction cases is that the intent of the testator is relevant to the former but not to the latter, and that the act of extinction may be the action of anyone." *Id.* at 604. Understanding and keeping in mind these and other differences between the two types of ademption is essential to a reading of the case law to which the parties will refer this Court to in its briefing. Having said so, it will also be pointed out that there is much fundamental overlap between the two as well.

1. ADEPTION BY EXTINCTION

Ademption by extinction does not apply to general bequests, but only to specific legacies, devises and bequests. *Estate of Doepke*, 182 Wash.

556 (1935); *Estate of Parks v. Hodge*, 87 Ohio App.3d 831 (Oh. 1993); *Newbury v. McCammant*, 182 N.W. 147 (Iowa 1970).

“It is a general rule that ademption by extinction is not a matter of intent and therefore evidence of a testator’s purpose in effecting an extinction of a legacy is irrelevant.” Mark S. Dennison, J.D., *Wills: Ademption of Legacy By Satisfaction or By Extinction*, 91 Am. Jur. Proof of Facts 3D 277, section 3 (Nov. 2006); *Matter of Thornton*, 162 Mich.App. 709 (1992). The rule of ademption by extinction “prevails without regard to the intention of the testator or the hardship of the case, and is predicated upon the principle that the subject of the gift is annihilated or its condition so altered that nothing remains to which the terms of the bequest can apply.” *In re Estate of Hume*, 984 S.W.2d 602, 604 (Tenn. 1999) (emphasis in original; internal quotation omitted). “[W]hen a testator disposes, during his lifetime, of the subject of a specific legacy or devise in the will, that legacy or devise is held to be adeemed, ‘whatever may have been the intent or motive of the testator in doing so.’” *Wasserman v. Cohen*, 414 Mass. 172 (1993), quoting *Walsh v. Gillespie*, 338 Mass. 278 (1959). The focus is on the actual existence or nonexistence of the bequeathed property, and not on the intent of the testator with respect to it.” *Dennison*, 91 Am. Jur. Proof of Facts 3d 277, section 3; *Kelly v. Nielsen*, 433 N.E.2d 952 (2001); *In re Hoyt’s Will*, 284

N.Y.S.2d 791 (1967); *Edmundson v. Morton*, 103 N.C. App. 253 (1991), decision aff'd, 232 N.C. 276 (1992).

In contrast to the doctrine of ademption by satisfaction, which operates to effectuate the testator's intent when the testator neglected to revoke or partly revoke a devise, the doctrine of ademption by extinction focuses on two questions only: (1) whether the gift is a specific legacy and, if it is, (2) whether it is found in the estate at the time of the testator's death." *Dennison*, 91 Am. Jur. Proof of Facts 3d 277, section 13, citing *Parker v. Bozian*, 859 So.2d 427 (Ala. 2003); *Mississippi Baptist Foundation, Inc. v. Estate of Matthews*, 791 So.2d 213 (Miss. 2001); *In re Estate of Hegel*, 76 Ohio St. 3d 476, (Oh.1996); *McGee v. McGee*, 122 R.I. 837 (1980); *Matter of Estate of Brown*, 922 S.W.2d 605 (Tex. App. 1996); *In re Estate of Walters*, 700 So.2d 434 (1997).

As respects ademption by extinction, the courts do not attempt to determine intent by use of extrinsic evidence, it being presumed that if the testator's specific bequest is not part of the estate at death of the testator, he intended the bequest to fail. *Estate of Parks w. Hodge*, 87 Ohio App.3d 831 (1993); *Johnston v. Estate of Wheeler*, 745 A.2d 345 (D.C. 2000). "If the asset has been specifically given in the will of a testator, and it is not in existence or owned by the testator at the time of his death, it is said to

have been adeemed, or more technically, adeemed by extinction.” Mark Reutlinger, *Washington Law of Wills*, pg. 154.

2. ADEEMPTION BY SATISFACTION

By contrast, ademption by satisfaction considers the testator’s intention to satisfy the bequest or devise or not. *Trustees of Baker University v. Trustees of Endowment Association*, 222 Kan. 245 (1977). To do so, the courts consider all of the circumstances of the case to determine whether the testator intended to satisfy the legacy. *Id.*; *In re Hall’s Will*, 120 N.Y.S.2d 188 (1953); see also *Rogers v. French*, 19 Ga. 316 (1856)(It is always a question of intention, in all cases, whether the advance be before or after the execution of the will). Extrinsic and parol evidence may be considered in determining the testator’s intent. *Selby v. Fidelity Trust Co.*, 188 Md. 192 (1947); *Rogers*, 19 Ga. at 321 (“ademption may be destroyed or confirmed by the application of parol evidence of a different intention by the testator.”); *Simmons v. Brannen*, 155 Ga. 494 (1923)(whether gift is advancement satisfying legacy is an issue of fact).

As will be demonstrated in the cases discussed below, there is of course an overlap between ademption by extinction and by satisfaction. Even in cases where the courts have performed the analysis based on an ademption by satisfaction, they often note that even if the requisite intent

to adeem is not found, the legacy is adeemed if the property is no longer in the estate at the time of the testator's death.

3. REVOCATION

Early case law often confused the doctrine of revocation with that of ademption, and it differs substantially from ademption. *Page On Wills*, § 21.24 and 54.2. While neither party here has asserted that revocation is an issue in the instant case, some understanding of the doctrine is helpful to reconcile some of the cases that have been cited by the parties below and in the briefing here.

The term revocation, whether in the word's ordinary use or in a legal sense refers to an act which annuls, makes void, takes back, rescinds or repeals. See Black's Law Dictionary (8th ed. 2004). Obviously then, an act of revocation, by definition, necessarily affects something done before the revoking act. This is an important feature to keep in mind when reading the cases cited by the Appellee in support of the proposition that ademption must occur before the will is made.

Another important feature of the doctrine of revocation (unlike ademption by extinction), is that it that it depends entirely on the intent and state of mind of the testator at the time of the revoking act, i.e. an intention to revoke must be established. See *Page On Wills*, § 21.2 and 21.4 and 54.2.

Revocation is largely a statutory doctrine in the states now, and with the advent of laws allowing wills to operate on after-acquired property, revocation by alienation “has ceased to exist, in most jurisdictions.” Page On Wills, § 21.68; see also Atkinson On Wills (2nd ed.) 741, § 134. Moreover, its application in will cases has been obviated by the doctrine of ademption by extinction:

“If testator owned no such property at his death, there is an ademption, and in either case there is no occasion for thinking in terms of revocation.”

Id. at 743.

B. ONCE ADEEMED ALWAYS ADEEMED

Once a gift is adeemed, it is always adeemed and the legatee’s rights are extinguished. *McIntyre v. Smyth*, 857 A.2d 1235, 1249 (Md. 2004) (“once his legacy is adeemed, his interest in the will is extinguished. To argue otherwise, as appellants do, is to claim that an interested person can be someone without an interest—a contradiction in terms.”). See also *In re Estate of Fox*, 431 A.2d 1008, 1012 (Pa. 1981) (“legatee’s interest would have been completely extinguished as a result of the ademption”); *Taylor v. Hull*, 245 P. 1026, 1027 (Kan. 1926) (“The distinctive characteristic of a specific legacy is its liability to ademption. If the identical thing bequeathed is not in existence, or has been disposed of

so that it does not form a part of the testator's estate at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone.”); *In re Estate of Parks*, 623 N.E.2d 227, 229 (Ohio App. 1993) (“where the gift of a specific legacy or devise is adeemed because it is not in existence as part of the testator's estate at his death, the rights of the beneficiaries are extinguished”).

C. EFFECT OF AN ADEPTION

Whenever a legacy or devise is found by the court, the will is to be read as though the bequest had been expunged from the will. *E.g.* *Hunsucker's Heirs v. Hunsucker*, 455 S.W.2d 780 (1970); 65 A.L.R.3d 518 (2d Dist. 1973). The result is that the legatee or devisee takes nothing, with no rights conferred by the will provision. *Will of Weiler*, 565 N.Y.S.2d 410 (1990); *Simon v. Wilson*, 291 Ill.App.3d 495 (1997).

D. REPUBLICATION OF WILL OR CODICIL

When testamentary gifts are adeemed or satisfied, they are not revived by the republication of the will or codicil which provided for the gifts. *Austin v. Austin*, 147 Neb. 109 (1946).

E. ADEPTION CASE LAW RELIED UPON BY THE COURT WAS UNSUPPORTED AND NOT APPLICABLE

As pointed out by the Appellee in its briefing below, there are two cases with language suggesting that an ademption may only occur by an act occurring after execution of the will. *Buder v. Stocke*, 343 Mo. 506 (Mo. 1938) (specifically cited by the trial court in its oral decision for such proposition) and *Brown v. Heller*, 30 N.M. 1 (N.M. 1924). No other authorities were cited by either the trial court or the Appellee in support of this alleged point of law – which point was stated by the trial court to be pivotal to its decision in favor of the Appellee on summary judgment.

The *Buder v. Stock* decision confuses the doctrines of ademption by extinction with revocation in that part of the opinion relied on by the trial court. There, the *Buder* court states that because ademption is “equivalent to revocation or indicative of an intent to revoke ... [a]cts or events which . . . work the ademption of a specific legacy . . . occur, if at all, after the will is made.” See *Buder* 342 Mo. at 519. As noted above, this reasoning does not seem to follow from the traditional application of ademption by extinction. Instead, the reasoning only relates to the outdated doctrine of revocation by alienation. *Atkinson On Wills*, § 134, at 743; see also *supra*, § I. C of this brief.

The *Buder* court does not cite any authority for the proposition that an act or event working an ademption by extinction occurs after the will is made and indeed none of the many authorities on ademption referred to

elsewhere in the decision state any such rule of law. Further, the *Buder* decision recognizes elsewhere in its text that, outside of the circumstance of revocation (i.e. where ademption by extinction is considered), the court should look only as to whether the asset bequeathed is in the testator's estate at the time of death:

“Of course where the bequeathed specific property and everything received for it has completely disappeared from the testator's estate before his death, there could be no other result reached except an ademption or revocation by complete failure of the bequest or devise...” (emphasis added)

Buder v. Stocke, supra. at 520.

This tenant of law is in fact set forth in one of the authorities relied on by the *Buder* court. See 63 A.L.R. 640.

Thus, even the *Buder* decision allows for the rule of ademption law that (as noted above), when considering ademption by extinction as opposed to ademption by revocation, the inquiry focuses only on whether the specific legacy is found in the estate at the time of the testator's death. If it is not, the legacy is adeemed whether or not any particular act or event occurred before or after the making of the will. Dennison, *91 Am. Jur. Proof of Facts* 3d 277, § 13, citing *Parker v. Bozian*, 859 So. 2d 427 (Ala. 2003); *Mississippi Baptist Foundation, Inc. v. Estate of Matthews*, 791 So. 2d 213 (Miss. 2001); *In re Estate of Hegel*, 76 Ohio St. 3d 476, 1996-Ohio-77, 668 N.E.2d 474 (1996); *McGee v. McGee*, 122 R.I. 837, 413

A.2d 72 (1980); *Matter of Estate of Brown*, 922 S.W.2d 605 (Tex. App. Texarkana 1996).

Therefore, the *Buder* court's statement that an act which would work an ademption occurs after the will is made, is based on outdated law not applicable in this case, is unnecessary given its recognition of the operation of ademption by extinction, and is unsupported by any other authority respecting ademption by extinction.

The only other case cited by the Appellee that even refers to the argued proposition that ademption is based on an act of the testator occurring after the making of a will is *Brown v Heller*, 30 N.M. 1 (N.M. 1924). It is said by the court:

“...that where a testator, subsequent to the execution of his will specifically devising his estate, voluntarily conveys such estate by absolute deed of conveyance, the will is impliedly **revoked**, and the property thereby adeemed from its operation.” (emphasis added)
Id. at 11.

As can there be seen, there is no question that the *Brown* court was attempting to state the law of revocation (confused with the doctrine of ademption) where, as discussed in section I (C) above), a revocation necessarily applies to a prior will being revoked. Further, the statement was dicta insofar as the act which was argued to adeem in that case occurred after the making of the will. Still further, all discussion of

ademption is dicta and inapplicable to the instant case as the legacy at issue there was a general rather than specific bequest, to which ademption by extinction cannot apply as a matter of law (see section I (A) above).

Of interest though, the decision goes on to recognize the overlap of such form of ademption by revocation with that of ademption by extinction wherein specific property is adeemed simply by virtue of the property not being in the testator's estate at the time of his death without regard to whether there is manifest an intention to revoke after the making of the will:

“This conclusion seems irresistible when we pause to consider the real purport and effect of a will which is merely the designation or appointment of some one to take certain property which belongs to the testator at the time of his death. The necessary consequence that he must own such property at the time of his decease is indeed indispensable in order that the will have any effect whatever. If the devised property is conveyed to the devisee, such will can have no effect thereafter, because the deed takes effect from its execution and delivery, while the will can have no effect until the death of the testator.”
Brown v. Heller, supra, at 11.

In effect then, the *Brown* court was considering the application of revocation and thereby employed the terms regarding conveyance after the making of the will; but at the same time it recognized that that doctrine is consistent with and follows the related doctrine of ademption by extinction whereby the specific property is adeemed anyway by virtue of the

property not being in the testator's estate at the time of his death, whether or not an ademption by revocation occurred before or after the making of the will.

In its Reply Brief below, the Appellee went on to argue that the case law in the State of Washington is consistent with its strained reading of the *Buder* and *Brown* cases. Specifically, the Appellee there asserted that the "underlying theory of ademption, as set out in *Doepke*, is that the testator's conveyance of the property after his execution of the will is presumed to be a manifestation of his intent that the specific legacy fail. Where the testator, however, executes a will making a specific legacy of identifiable property after having disposed of the property, no such inference may fairly be drawn." See pages 3 and 4 of Foundation's Reply Memorandum. The inference thereby suggested by the Appellee's briefing was that the law of Washington regarding ademption required that in order to effect an ademption, it was necessary that there be an adeeming act between the making of the will and the death of the testator.

However, to the contrary, the definition of ademption in Washington provided by the *Doepke* court tracks the differences between ademption by extinction and ademption by satisfaction. As noted previously, *Doepke* states that "ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the

will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed.” (emphasis added). This statement can only properly be read so that this definition encompasses ademption by extinction prior to the comma, and ademption by satisfaction after the comma. The placement of the comma after the word “bequeathed” indicates that ademption may be carried out by mere extinction of the thing bequeathed (regardless of when such extinction occurs). If disposition subsequent to the will was required, the use of the comma and the word “or” are completely superfluous (i.e., if the Foundation is correct, this should state “ademption is effected by the extinction of the thing or fund bequeathed by a disposition of it subsequent to the will . . . from which an intention that the legacy should fail is presumed”). By removing the significance of “, or” from the definition, the Foundation attempts to combine the separate ademption doctrines of extinction and satisfaction/revocation into one, to arrive at a clearly wrong reading of the case.

With this proper reading of the Doepke case, the Washington case law is found to be in accord with the universal application of ademption by extinction in all other states, wherein the only focus of the court should be whether the asset bequeathed is found in the estate at the time of death. See section I (A) above.

F. CASE LAW APPLIES ADEEMPTION TO PRIOR ADEEMING ACTS AND EVENTS

As set forth above, there can be little doubt that when the doctrine of ademption by extinction is applied as it has been applied by the courts in this country, a court considering whether ademption by extinction should apply should only determine whether the specific bequest is found in the estate at the time of the testator's death. If so, the heavy weight of authorities would apply ademption without regard to whether the bequest was transferred from the testator's estate before or after the making of the will.

It should not be surprising that the property is more often than not transferred out of the estate before the making of a will in which the property is bequeathed. In the more common case, a testator would not put a specific bequest of a property in a will which property he or she no longer owned. This could skew the number of cases considering transfers before or after the making of the wills. Also, with the concept of revocation bantered about in the cases and often confused in earlier case law with the doctrine of ademption, it is not surprising that a few authorities may have picked up on that as a possible criterion.

However, there are a several cases in other jurisdictions in which ademption has been applied to specific bequests of property disposed of prior to execution of the will. For example, in the Illinois decision of *Sorensen v. First Nat. Bank of Chicago*, 59 Ill. App. 3d 150, 17 Ill. Dec. 125, 376 N.E.2d 18 (1st Dist. 1978), the court held that a bequest of stock under a will was adeemed where, prior to the execution of the will, the testator placed the stock in a revocable living trust with the defendant bank as trustee. The terms of the testator's trust provided that at her death all trust property "was to be turned over to her estate and pass according to the terms of her will." After the will was executed, the trustee sold the stock as authorized by the trust agreement and with the written approval of the testator. The Plaintiffs, who would have taken such stock under the will, claimed the gift of the "stock never adeemed since the testator was coerced into allowing [the Trustee] to sell." The court found that the gift had adeemed, since "[a]n examination of the facts reveals the testator, by her June 1973 will, recognized the possibility of the extinction of the gift when she bequeathed to the plaintiffs and others' shares of Kloster Steel Corporation which shall lie in my estate.'" *Sorenson*, 59 Ill. App. 3d at 153. Accordingly, the Sorenson decision is a clear example of a court applying the doctrine of ademption by extinction to a specific bequest that

was transferred out of the testator's probate estate prior to execution of her will

Additionally, in *In re Pearson's Will*, 182 N.Y.S.2d 129 (Sur. Ct. 1958), the testator exchanged her stock in one insurance company for stock in a second insurance company prior to execution of her Will. The terms of her Will then gave her stock in the first company (of which she no longer had any) to one specific beneficiary, and her stock in the second insurance company to another specific beneficiary. The court held that the gift to the first legatee, being specific, was adeemed because the testator owned none of described stock at time will was made. "[I]nasmuch as the testatrix owned none of the described stock at the time the will was made, there was an ademption of the legacy and the executrices acted correctly in delivering all of the Home Insurance Company stock to the Moody Bible Institute." *Pearson's Will*, 182 N.Y.S.2d at 131.

In *Keegan v Norton*, 322 Mass 158, 76 NE2d 1 (1947), the court held that the bequest of "all my stock in the American Telephone & Telegraph Co.," being specific, was without effect in view of the facts that prior to execution of the will, the decedent sold all of her stock in such company and owned none at her death. This case is cited in a number of treatises and law review articles on ademption (see, e. *Ademption and the*

Domain of Formality in Wills Law, 55 g., the ALR cited above, and Gregory S. Alexander, Alb. L. Rev. 1067, 1089 (1992).

G. EXTRINSIC EVIDENCE AS TO INTENTION OF THE TESTATORS

As repeatedly discussed above, it is the general rule that as to ademption by extinction, the intent of the testator in effecting the extinction is irrelevant. However, should this Court determine that the intent is relevant, the facts in this case would clearly support the application of ademption under any analysis. Where such evidence of intent has been considered by the courts, "[t]he intention of the testator, so far as his intention is lawful, is his will. It is, therefore, this intention that we must look for, when we seek to construe his testamentary disposition of his estate. In construing a will, the court is authorized to put itself in the testator's place at the time he made it, and view the surrounding circumstances as the testator probably viewed them himself." *Fidelity Nat'l Bank & Trust Co. v. Hovey*, 319 Mo. 192 (Mo. 1928).

As respects the creation of the will and whether the gift adeems, the best source other than the deceased testators may be the attorney who drafted the will. Defendant and attorney Mary Gentry drafted the Franks' will at issue. Her testimony establishes that the Cranberry Lake provision

was put in the will in case they had not yet transferred inter vivos all of the Cranberry Lake property into the Foundation before they died:

“Q. Okay. The second page of those notes reflects a plan to transfer the Cranberry Lake property to the foundation, right?

A. Yes. And in this context, as I’ve indicated, are will notes, so that would be to remind myself that I need to put a provision in the will, as we’ve talked earlier, that would pick up if there was any Cranberry Lake property left, that it be transferred to the foundation.

Q. If they hadn’t yet transferred the property to the foundation prior to their deaths?

A. Exactly.

CP 81

Ms. Gentry testified that at the time of the making of the will, not all of the property had yet been transferred to the Foundation:

Q. In fact, when the will was executed, all of the property had not yet been transferred to the foundation, right?

A. I assumed that, or I wouldn’t have included that provision in the will.

CP 78.

In short the will was merely a safety net to ensure the inter vivos transfer:

A. Any reference in the will subsequent to the creation of the foundation that directed the personal representative to distribute any Cranberry Lake Property into the foundation was intended as, if you will, a safety measure to make sure if they died before all of the property was transferred in, car accident, they are both gone, that that’s where that property goes. It was – they wanted all that property in the Foundation.

CP 81.

To further emphasize the point, she testified that, “In drafting those new wills that would, you might say, pick up any loose ends if all of the Cranberry Lake had not gone into the foundation by the time of their death that it would.” CP 79.

The will was executed on August 30, 1996. Thereafter, on December 23, 1997 Ken and Kitty Frank took the affirmative act of placing the remainder of the Cranberry Lake property into the Foundation by acquiring the property in a like-kind exchange¹. See Report of Proceedings. Simply stated, a significant portion of the transfer took place fifteen months **after** the will was made - only then rendering the will provision inoperative.

Considering these and other facts bearing on the Franks’ intent completely undermines the Appellee’s arguments against the application of ademption. The question of whether a disposition by a testator of a specific bequest has worked an ademption may be determined in the light of facts and circumstances existing at the time the pertinent transactions and as well as at the time of the testator's death. *See In re Estate of Snyder*, 199 Kan. 487, 493 (Kan. 1967). *In re Estate of Graham*, 216 Kan.

¹ The Foundation sought to avoid the ademption argument using the legal fiction on point claiming that an earlier deed transferred after acquired title, and therefore the final gift to the Foundation occurred prior to the will

770 (Kan. 1975). The intention of a testator as to whether a gift should satisfy or adeem a legacy may be shown by extrinsic or parol evidence, including evidence of his conduct subsequent to the execution of the will. (96 C. J. S., Wills, Sec. 1178[a], p. 1012.) The rule and the underlying reason therefore is stated in 6 Page on Wills [Bowe-Parker Revision], Ademption, Sec. 54.27, p. 283, in these words:

"In most cases testator's intention with reference to ademption does not appear upon the face of the will, and, if it does, it relates to the future, and it is possible that testator may change it. Accordingly, it is generally held that extrinsic evidence is admissible to show the intention which testator had when he made the payment in question. This includes parol evidence of testator's declarations, evidence of the surrounding facts and circumstances from which his intent may be inferred and evidence of testator's conduct. . . ."

Trustees of Baker University v. Trustees of Endowment Asso. of Kansas State College, 222 Kan. 245 (Kan. 1977).

These and other facts set forth bearing on the intent of the Franks at the time the will was prepared, at the time the last of the property was transferred and at the time of their deaths argue strongly against the factual and legal arguments on which the Appellee' motion below was based – is three independent respects.

1) Adeeming act was after the making of the will

First of all, the applicable facts as stated undermine the reliance by the trial court and the Appellee on *Buder v. Stocke*, supra and *Brown v. Heller*, supra. When the Franks transferred a significant portion of the Cranberry Lake Property to the foundation on December 23, 1997, that act in furtherance of the adeeming act occurred fifteen months **after** the will had been made. The Franks were under no obligation to make that transfer at that time, and their affirmative act to make the transfer during their lives satisfied the testamentary provision previously made regarding that property. This fact alone completely undermines the trial court's grant of summary judgment based on its decision that the testamentary bequest did not adeem.

2) The purpose of the will provision was to be adeemed

Based on the testimony of Gentry as set forth above, the intention and plan of making the will provision regarding the property was to ensure that the inter vivos transfer was completed. In other words, the intent was to satisfy the testamentary bequest by inter vivos transfers, thus rendering the bequests inoperative - or adeemed in legal terms.

3) Franks' intention at death was to rescind the transfer, not have it pass under will

At the time of the testators' deaths in this case, they (1) had filed a lawsuit against the Foundation in order to review the Foundation

accounting documents, (2) had been removed as directors after the Foundation changed the bylaws in order to vote them off, CP 387, (3) they and their family had been permanently barred from using the property (CP 388) and (4) they had filed a lawsuit against the Foundation for rescission of the property transferred and bequeathed, based on mistake in creating and funding the Foundation. If Ken and Kitty Frank had not intended their inter vivos gifts to have adeemed, they obviously would not have sued for rescission. They clearly would not have sued for rescission with the intent or expectation that the will remained operative to return the rescinded property. By bringing the action for rescission and in fact being barred from the property, it is clear that the Franks understood that they had given away title to the Cranberry Lake Property to the Foundation such that it would not pass under the will. It would be absurd to argue a different intention.

The fact is that the Franks took several actions regarding the property which strongly suggest that, having previously transferred the property to the Foundation, the will provision was only a remnant and of no further effect.

“[A] particular bequest, although unrevoked, may become practically inoperative, if the testator in his lifetime gives to his legatee the specific thing which the will directs to be given after his death, or if the testator so deals with property which is specifically bequeathed to a legatee that upon his death the

execution of his intention in respect to this legatee is impossible. In such case he is said to adeem his bequest, and the practical result necessarily involved in his act is spoken of as an ademption of the legacy.”

See Jacobs v. Button, 79 Conn. 360, 365 (Conn. 1906).

H. The Entity Created And Enriched Through Undue Mistake, Misrepresentation And Undue Influence Should Not Recover The Equitable Interest In Property Under The Will

Appellee makes the argument in the alternative that if the Cranberry Lake bequest was adeemed, the Franks still retained an equitable interest in the property that could pass under the will, which equitable interest is the right of rescission for the Franks to recover the property. It makes the further, unseemly argument that under the Franks’ wills, the Foundation is the entity entitled to the right to recover the property from Foundation once the Franks prove that the Foundation obtained the property through mistake, misrepresentation and undue influence. Fortunately, neither the law nor equity would countenance this absurd and unjust result.

As set forth in the Amended Complaint in paragraph 21 of the claims filed in Superior Court: “If Ken and Kitty had been properly advised and informed by competent and independent professional advisors, Ken and Kitty would not have created or funded the Foundation or purportedly conveyed property to it.” CP 486. In other words, the

Franks' Amended Complaint alleges that, if properly advised by the professional defendants, the Franks never would have created the Foundation. It thus would not have come into existence, in which case it obviously would not have subsequently become a legatee of the wills. In dismissing the Foundation from this lawsuit and ordering the property be transferred to the Foundation, the trial court must necessarily have assumed that the allegations in the complaint are true and would be proven. If that is the case, then there would be no Foundation to take under the will, or at the very least, the Foundation (or some alternative estate planning entity) would be under the control of the Frank family.

It is apparent that the interest of equity would not be served by passing the equitable interest to the entity against which equity would apply, rather than transferring it to the persons in whose favor equity would be applied.

I. Ademption Occurs Because The Gift to the Foundation Is Voidable Rather Than Void

The professional defendants (which include one of the Foundation's executive directors) prepared the inter vivos gift to the Foundation, and also prepared the will providing for the very same gift. There is no doubt that the Franks did not hold legal title to the Cranberry Lake property at the time of their deaths. What the Franks did have at the

time of their death was an equitable claim for rescission against the Foundation and against the professional defendants for monetary damages for advising them to create and fund the Foundation in the first instance.

In regard to ademption, the Foundation makes the further argument that since the inter vivos transfer of property to it was void *ab initio*, the testamentary disposition to it did not adeem and, ergo, they take the property under the will which they got before based on mistake, professional negligence and undue influence.

The Foundation cited several cases to the trial court for the proposition that because the equitable interest the Franks sued it to recover can pass by the will to the Foundation itself, and therefore the prior inter vivos gift of the property did not adeem the testamentary disposition to it – so the Foundation gets the property again.² However, none of the cases cited by Appellee dealt with ademption and none of the cases concerned facts analogous to those in this case.

In *Brown v. Hilleary*, 147 Ore. 185 (1934), the property at issue was not specifically conveyed in the testator's will, and therefore the rights in the property would have gone through intestacy. Rather than accept intestacy, the court found that the equitable rights could pass

² The reasoning and outcome is so perverse that the argument is difficult to follow.

through a residuary clause. There was no mention, discussion or consideration of ademption at all. In fact, because there was no specific legacy, ademption could not have been applied as a matter of law. See section 1 (A) above.

Spurgeon v. Coate, 1959 OK 39 (1959), cited by the Foundation also did not mention, discuss or consider the issue of ademption. In that case, a testator inherited a Native American Land Allotment through her husband and son who had predeceased her. The testator made no specific bequest in her will, but prior to death had deeded the property to one of her daughters. After her death, by an Act of Congress the Secretary of the Interior was directed to pay funds to each member of the Native American tribe with an allotment. Therefore, the decedent had acquired a claim to the funds when she acquired the land. Even though the decedent had no knowledge of the claim (she was dead when it came into existence), the Court held that her claim would pass through the residuary clause of her will. The premise of the case is that a party may bequeath something she had no knowledge of if her will has a proper residuary clause. The court did not say, however, that a legacy does not adeem if the property is re-acquired after death. In fact, because there was no specific legacy at issue, ademption could not have been applied in the case.

Bethany Hospital Company v. Philippi, 82 Kan. 64 (1910), also cited by the Foundation below, does not mention, discuss or consider ademption. The decision turned on a particular Kansas court rule that provided that anytime a person takes property for no value from a person they know to be insane, the gift is a nullity as if the deed had never existed. Therefore, the property could pass under the will. The crux of the case was standing, not ademption.

The *Bethany* case does not have any particular value to this case, as there is no need for the deeds to the Foundation to be declared *void ab initio* for the Personal Representative to have standing to assert the claim for rescission against the Foundation. That right comes through RCW 4.20.046 which allows all actions brought by Ken and Kitty Frank to survive to their personal representative, which is what occurred here.

Certainly the citation by the Foundation to *Bethany* was an odd choice. *Bethany* was used by the aggrieved party as a sword to right a wrong, whereas in this case the Foundation seeks to use it as a shield against claims that they were unjustly enriched when the Frank family gave away most of its estate based on mistake, misrepresentation and undue influence.

Further undermining Appellee's arguments, under Washington law, each of the causes of action raised in the rescission claim against the

Foundation render the gift voidable, not void. Indeed, a contract secured through undue influence on the part of a fiduciary is voidable, not void, under Washington law. *See Pleuss v. City of Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972) (“Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.”) (quoting Restatement of Contracts § 497 (1932)). This rule has been consistently upheld in Washington. *See, e.g., Gerimonte v. Case*, 42 Wn. App. 611, 613, 712 P.2d 876 (1986) (quoting same passage); *Ferguson v. Jeanes*, 27 Wn. App. 558, 563, 619 P.2d 369 (1980) (quoting same passage). Rescission is the proper remedy. *Ferguson*, 27 Wn. App. at 564. Negligent misrepresentation renders a contract voidable as well. *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 186, 840 P.2d 851 (1992). A contract entered into under mutual mistake renders the transaction voidable. *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 396, 739 P.2d 648 (1987). Unilateral mistake is grounds for rescission (i.e., voidable, not void) when the other party knows or is charged with knowing of the mistake. *Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983). This distinction is important because a void gift is considered never to have

happened, and it is arguable under such a scenario that an ademption does not occur where the grantor has not been divested of the property. However, where a gift is voidable, the party has clearly been divested of title and by doing so, is held to have adeemed any testamentary gift of the same property.

J. The Foundation Should Not Have It Both Ways

Under Washington law, when a party is entitled to take property both by both deed and by will, the party takes under the deed if the deed is delivered before the will is admitted to probate. See *White v. Chellev*, 108 Wash 628, 632 (1919). The Washington Supreme Court there relied on the case of *Zimmerman v. Hafer*, 81 Md. 347, for that premise which it quoted in full:

If the deed had been sustained, Zimmerman would have held title under it, and not under the will. Clearly he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed he would then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee simple. If it had effectively conveyed a fee, then it would have divested the grantor's whole interest in the property; and, having been executed prior to the will, *there would have been no estate left in the grantor for the will to operate upon.*

Id. at 632.

The *White* case would direct in this case that the Foundation took the Cranberry Lake property by deed rather than under the will. Having

nothing then to leave the Foundation under the will, if the property transfer to the Foundation is rescinded, the property should then pass either by the will's residuary clause if applicable, or by intestacy.

K. The Equitable Interest In Cranberry Lake Should Pass Through the Residuary Clause of the Will

The Foundation argued below that the equitable interest of the Franks in Cranberry Lake property should pass to the Foundation by way of the specific bequest. The Foundation argues this point based on *Brown v. Heller*, 30 NM 1 (1924), which found that a voidable interest in property does not adeem when a fraudulent conveyance occurs after the making of the will. This reliance on *Brown* is misplaced. In that case, the testator “executed a will by which he gave his infant son \$300, and the remainder of the estate to his daughter.” Later, the testator conveyed all of his property by deed to his daughter. The mother of the infant son unsuccessfully sought to set aside both instruments. Although the gift was set aside as fraudulent, the court found that the will was not revoked or adeemed as **neither gift in the will was a specific legacy**. The monetary bequest to the son was general bequest, and the bequest to the daughter was a residuary gift. Because neither bequest in that case was a specific bequest, neither could have resulted in ademption under Washington law. See section I (A) supra.

The Foundation's argument also blurs the distinction as to what interest is really passing through the will. The Foundation and the court below must assume that the allegations in the complaint brought by Ken and Kitty Frank and later carried on by their personal representative are true and will be proven, such that the creation of the Foundation and the inter vivos gift to the Foundation was induced by mistake, misrepresentation and undue influence, and the Foundation as currently constituted would never have come into existence. Accepting those facts, the trial court should not have found that the Foundation named in the will could obtain any interest at all because the entity would cease to exist, as would the to receive property gifted to it.

Furthermore, the interest held by the Franks at the time of death is the equitable right to take the property away from the Foundation. They had only the right to rescind the gift, (see e.g. *Zartner v. Holzhauer*, 204 Wis. 18, 22 (1931)) which they began to exercise prior to death. This particular right was not passed to the Foundation through the will, nor could it be construed to have occurred since common sense dictates the Franks would not rescind a gift to a Foundation they claim they never should have created, see Amended Complaint at ¶21, with the intent to return it to the very same entity.

The right to rescind is devisable if it existed at the time of the testator's

death. Here, the action survives pursuant to RCW§4.20.046, and can be passed through the will. An interest which cannot be enforced unless a conveyance is first set aside may be devised and the right to have such a conveyance set aside will pass with the devise. *See* Page on Wills, §16.18. A residuary clause passes all of the testator's left-over property and all of his interests in property, not otherwise disposed of effectively, and not excepted from the operation of such clause. *See* Page on the Law of Wills §33.50, at page 453 (citing cases).

In *Zartner v. Holzhauer, supra*, the Court found that when a person conveys premises by deed, the deed might be voidable but, until rescinded by the testator, it stood as a good conveyance and fixed legal title to the premises in the current deed holder. The question, then became whether the residuary legatees would have the ability to rescind the conveyance. The court found that the residuary legatees could not take the claim, but the court has essentially been overruled on that point. The Court further noted, however, that if there had been a specific devise of the premises in the will, the Court would have construed the pre-death conveyance of the deed as an affirmative act of rescission on the part of the testatrix during her lifetime. The Court stated that the residuary clause, which did not mention a specific conveyance of property, could not be relied upon as disclosing an affirmative intent or an act on the testators part disaffirming

the deed by which she parted with title to the premises. *Id.* at 23.

The *Zartner* court also made the reasonable point that the right to rescind and the right to recover should vest in the same person. *Id.* at 25. The right of action in the case at bar survives to the Personal Representative by law, RCW § 4.20.046. If the right to rescind vests in the Foundation, as alleged by the Foundation, this would vest alternative remedies for the same wrong in different parties. The right to recover possession would vest in the Foundation, and the right to recover damages because of the misrepresentation would be vested in the Personal Representative.

The *Zartner* Court found that the right should vest in the same person. *Id.* at 25. This is precisely why the Court should find that when a testator previously parts with legal title, then any gift of the same property in the will adeems. Here, there is no doubt that the personal representative holds the right to continue the lawsuit under the survival action. The recovery, whether it be for damages or the rescission of the gift, should therefore be for the benefit of the residuary legatees.

L. The Personal Representative Need Not File a Will contest To Invalidate the Will Provision Devising the Property to Foundation In Order for the Rescission Suit To Be Successful

Appellee first concedes that the claim of ademption in this case need not have been brought by will contest. However, it goes on to overstate the scope of matters that can be or need be challenged through a will contest, without citing to any supporting case law. Under Washington law, the personal representative could not bring a will contest regarding the operation of the will to vest title in the Foundation which already had said legal title.

For example, the fact that someone died a few days before making a will and breached a contract to leave property to another party at death is no grounds for contest of a will leaving it to another. See *In re Donaldson*, 26 Wn.2d 72, 81 (1946) and *Minderman v. Perry*, 437 P.2d 407 (1968). The circumstances that arise subsequent to the execution of a will which revoke or render it inoperable in whole or in part, such as an ademption, do not constitute challenges to the validity of the will. Such circumstances may be brought to the attention of the probate court and established as facts as any time before the decree of distribution is actually entered. See *In re Gherra*, 44 Wn.2d 277, 286 (1954).

In cases involving the contest of a will, the only issue before the court is the capacity to make a will. The ability to bring claims regarding the construction of the will, and the ability to bring a rescission action in another venue are acceptable under the law.

In that regard, the Washington Supreme Court in *In re Estate of Donaldson*, 26 Wn. 2d, 72, 81 (1946) quoted with approval from 68 C. J. 926, § 669, for the following proposition:

"Generally a contest will lie on the ground of testamentary incapacity, undue influence, fraud, accident, or mistake, revocation of the writing offered as the will, or its partial annulment or destruction, or any matter going to the execution of the will or which, if established by proof would invalidate the will; but matter which is not ground for contest in the probate court cannot be made so in contest proceedings filed under the statute after probate. So the fact that the testatrix died a few days after making the will is no ground for setting it aside; nor is breach of a contract to leave property to plaintiff at death ground for contest of a will leaving it to another.'

In § 670 of the same volume it is stated:

"In the absence of statute conferring a wider jurisdiction on courts of probate, the only question properly involved in the contest of a will is whether the instrument produced is the will of the testator; and the functions of the court are exhausted when that question is decided."

In re Estate of Donaldson, 26 Wn.2d 72, 81 (Wash. 1946); *see also In re Kane's Estate*, 20 Wn.2d 76, 84 (1944). Furthermore, in *In re Estate of Gherra*, 44 Wn.2d 277 (Wash 1954) the court stated that in defining the term "validity," , the statement "or for any other cause affecting the validity of such will," has reference only to the genuineness or legal

sufficiency of the will under attack, raising the question whether the will is legally sufficient in form, contents, and compliance with the statutory requirements as to execution; “it does not relate to the operative effect of the will or the period of its operation.” *Id.* The Court reiterated this position *In re Peters' Estate*, 43 Wn. (2d) 846, 855, 264 P. (2d) 1109 (1953). In a will contest “the court cannot ordinarily construe the will or attempt to distinguish between valid and void dispositions; and must admit the will to probate” unless it can be attacked because of a factor which would deem the will invalid at its inception. *In re Wiltzius*, 42 Wn.2d 149 (citing Bancroft’s Probate Practice (2d ed.) 436, 439 §180.

In the case at bar, the personal representative is not challenging the validity of the will. The will met the formalities required by law to make a valid will, and at the time the Franks intended to make the bequests it did (although subsequent events proved that the creation and funding of the Foundation was based on mistake). Instead, the Franks are challenging the construction of the will in regards to whether the Foundation should be entitled to receive a gift through the will, when the testators and now their personal representative filed a suit to rescind the gift, based on their mistake in creating and funding the Foundation. The personal representative is simply doing that which he is entitled to do under the law. And rather than bring a will contest, he has properly brought the

matter to the attention of the probate court to establish the claims as fact as any time before the decree of distribution is actually entered. See *In re Gherra*, 44 Wn.2d 277, 286 (1954).

An instructive case is *Estate of McCarthy*, 5 Cal. App. 3d 158 (1970), wherein a lawyer using undue influence and fraud sought to cheat his mother and the rest of his family out of property by having it placed into a corporation. In *McCarthy*, the deceased was the sole owner of ranch property. Prior to death the defendant had consulted with her and advised her that she would gain several tax advantages by having her property transferred to a corporation. The defendant promised to create a transfer agreement with the beneficial ownership and the exclusive control and power of disposition of the property remaining with the defendant. *Id.* at 162. The attorney created the Corporation for purposes of taking title to the decedent's ranch in exchange for the issuance of certain preferred shares of stock to the decedent, but the attorney failed to provide in any manner for the vesting in the decedent of the beneficial ownership of the ranch property and the exclusive control and right to dispose thereof in accordance with her wishes. *Id.* at 162. As set forth in the case, the attorney, as opposed to the decedent was given the benefits and control of the corporation. *Id.* at 163.

By will dated 1965, the decedent acknowledged that she had given her property to the Corporation and then gave her shares of stock to the several beneficiaries. The will also had an in terrorem clause which would disinherit anyone who challenged the will. When the decedent died the executors realized that the gift to the corporation had been given through undue influence and misrepresentation and the executor brought claims in the superior court for the gift to be rescinded. The defendant attorney sought to have the will interpreted, to show that the intention of the decedent acknowledges through the will wherein she acknowledges the corporation and the gift of stock, and to have the in terrorem clause enforced because the rescission action in the Superior Court constituted a will contest.

The Court found that the executors had a right to bring the rescission action in the Superior Court regardless of the contents of the will. The Court stated that whenever a decedent might have done so (as the Franks did) his representative may sue to set aside a conveyance or transfer obtained from the decedent by means of the other party's fraud, undue influence or misrepresentation. The Court found that the in terrorem clause was not invoked because the rescission action did not constitute a will contest, and therefore it could go forward.

The Court also found that appellants claim that the Court refused to make proper findings regarding the interpretation of the creation and distribution of the ranch property to the Corporation in the will contest was without merit. The Court held as follows:

The court found, inter alia, that the will included the provisions in article 4, article 7, and article 10; and that the commencement and maintenance of the rescission action did not violate article 10 (*in terrorem* clause); and the conclusions of law were that article 10 was not violated, and that the acts of the executors in commencing and pursuing the rescission action are ratified and approved.

This case is very similar. There was no will contest but there need not have been one, the executors were still able to bring a rescission action to rescind conveyance and exchange with the corporation. Simply stated, the Foundation is now making equitable arguments to avoid giving up property which it received unjustly, and would not have received absent mistake, misrepresentation and undue influence. If the Appellee's arguments are accepted, equity has simply been turned on its head. A non-purchasing recipient of mistake and misrepresentation should not be entitled to hold on to property it should not have received, particularly when that recipient should not have been created in the first instance.

CONCLUSION

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The trial court's decision granting summary judgment turned entirely on an erroneous legal conclusion on the law of ademption, which is to be reviewed *de novo* on appeal. In its oral ruling, the trial court stated its reliance on a 1938 Missouri case which cited no support on the point of law, and which has not been cited on the point by any court in the seventy years since its publication. The decision in that case was based entirely on outdated and inapplicable law. On this basis alone, the trial court's decision on the motion should be reversed.

Although not adopted by the trial court, the Appellee put forward a number of other legal arguments on which it hoped to rely in the event it did not prevail on its ademption argument. The arguments can be summed up as creative but unsupportable methods by which the Appellee claims that it should be transferred by will the equitable right to recover the property at issue, in spite of that equitable right having belonged to the testators and having been the basis of this lawsuit brought against the Appellee in the last year of the Franks' lives.

This case should be reversed and remanded.

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DATED this 21ST day of September 2007.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be filed and served copies of Brief of Appellee on Court of Appeals Division II via U.S. Mail, postage prepaid, at the following addresses:

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