

**Section 2-606. Nonademption of Specific Devises; Unpaid Proceeds of Sale, Condemnation, or Insurance; Sale by Conservator or Agent.**

(a) A specific devisee has a right to specifically devised property in the testator's estate at the testator's death and to:

(1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property or tangible personal property; and

(6) if not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

(d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication for at least one year.

(e) For the purposes of the references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) "incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

**Comment**

**Purpose and Scope of Revisions.** Under the "identity" theory followed by most courts, the common-law doctrine of ademption by extinction is that a specific devise is adeemed—rendered ineffective—if the specifically devised property is not owned by the testator at death. In applying the "identity" theory, courts do not inquire into the testator's intent to determine whether the testator's objective in disposing of the specifically devised property was to revoke the devise. The only thing that matters is that the property is no longer owned at death. The application of the "identity" theory of ademption has resulted in harsh results in a number of cases, where it was reasonably clear that the testator did not intend to revoke the devise. \* \* \*

Recently, some courts have begun to break away from the "identity" theory and adopt instead the so-called "intent" theory. \* \* \* The major import of the revisions of this section is to adopt the "intent" theory in subsections (a)(5) and (6).

Subsection (a)(5) does not import a tracing principle into the question of ademption, but rather should be seen as a sensible "mere change in form" principle.

*Example 1.* G's will devised to X "my 1984 Ford." After she executed her will, she sold her 1984 Ford and bought a 1988 Buick; later, she sold the 1988 Buick and bought a 1993 Chrysler. She still owned the 1993 Chrysler when she died. Under subsection (a)(5), X takes the 1993 Chrysler.

*Variation.* If G had sold her 1984 Ford (or any of the replacement cars) and used the proceeds to buy shares in a mutual fund, which she owned at death, subsection (a)(5) does not give X the shares in the mutual fund. If G owned an automobile at death as a replacement for her 1984 Ford, however, X would be entitled to that automobile, even though it was bought with funds other than the proceeds of the sale of the 1984 Ford.

Subsection (a)(6) applies only to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by the provisions of subsections (a)(1) through (5). In that event, subsection (a)(6) allows the devisee claiming that an ademption has not occurred to establish that the facts and circumstances indicate that ademption of the devise was not intended by the testator or that ademption of the devise is inconsistent with the testator's manifested plan of distribution.

*Example 2.* G's will devised to his son, A, "that diamond ring I inherited from grandfather" and devised to his daughter, B, "that diamond brooch I inherited from grandmother." After G executed his will, a burglar entered his home and stole the diamond ring (but not the diamond brooch, as it was in G's safety deposit box at his bank).

Under subsection (a)(6), A could likely establish that G intended A's devise to not adeem or that ademption would be inconsistent with G's manifested plan of distribution. In fact, G's equalizing devise to B affirmatively indicates that ademption is inconsistent with G's manifested plan of distribution. The likely result is that, under subsection (a)(6), A would be entitled to the value of the diamond ring.

*Example 3.* G's will devised her painting titled *The Bar* by Edouard Manet to X. After executing her will, G donated the painting to a museum. G's deliberate act of giving away the specifically devised property is a fact and circumstance indicating that ademption of the devise was intended. In the absence of persuasive evidence to the contrary, therefore, X would not be entitled to the value of the painting. \* \* \*