

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

MARIA A. SUST & SHERRY	:	CI-983400
L. SUST, aka SHERRY SUST FORBES	:	
	:	
Plaintiffs	:	
	:	
-vs-	:	<u>OPINION AND ENTRY</u>
	:	<u>CONSTRUING WILL</u>
MARCIA S. SUST, et al.	:	
	:	
Defendants	:	
	:	

This matter came before Judge Wayne F. Wilke on April 7, 1999 regarding Plaintiffs' motion for declaratory judgment. Present were G. Mitchell Lippert on behalf of the Co-Executors; Donald P. Morrisroe and Ronald J. Goodman on behalf of Defendant Maria S. Sust; and guardian ad litem Sheri L. Hylton. After hearing the parties' arguments, the Court granted the parties three weeks to file their closing arguments and one week for a reply.

Richard L. Sust, the decedent, died testate on August 15, 1997. His last will and testament, which was executed on August 8, 1993, was admitted to probate on September 17, 1997. The decedent's estate is being administered in this court, Case No. 974331.

The decedent was survived by a spouse, five adult children and several grandchildren. Pursuant to Item VIII of the will, the decedent's children, Maria A. Sust and Sherry L. Sust, were appointed co-executors of their father's estate on September 17,

1997. On June 17, 1998, the co-executors filed a complaint to construe the decedent's will.

Item IV of the will provides in part, as follows:

"I give, devise and bequeath my Alexander & Alexander Thrift Plan to an Educational Trust to be administered as follows:

(a) The Trustee shall hold the property in trust, and shall pay the income therefrom and/or principal thereof to or for the benefit of Testator's children and grandchildren. *** It is the intention of the Testator that his children and grandchildren have funds for the reimbursement of tuition for a four (4) year degree program in an accredited college or university, and that the income/principal be used for that purpose."

The decedent transferred the funds held in the Alexander & Alexander Thrift Plan to an IRA account with Charles Schwab on February 23, 1994. Because there are no funds on deposit with the Alexander & Alexander Thrift Plan, the co-executors asked the Court to construe the will and to provide instructions. Further, the co-executors ask the Court to determine whether Item IV applies to any grandchildren not in being at the time of the decedent's death.

A court's overriding concern is to ascertain and carry out the intention of the testator. *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32, 34. The intent of the grantor is to be ascertained from the express language of the trust instrument unless there is some ambiguity or uncertainty to its meaning. In this case, there is no such uncertainty as the terms of the testator's will are sufficiently clear. However, well-established rules of construction that pertain to the doctrine of ademption will aid the Court in construing the testator's will.

Justice Sweeney of the Ohio Supreme Court recently wrote that the principle of ademption refers to "a taking away" of a specific bequest or devise and occurs when the

object of the legacy ceases to exist. *In re Estate of Hegel* (1996), 76 Ohio St.3d 476, 477. Quoting from *Bool v. Bool* (1956), 165 Ohio St. 262, Justice Sweeney elaborated that "where the subject of a specific bequest has been extinguished in the lifetime of a testator, such bequest is adeemed, and the designated beneficiary thereof is wholly deprived of it or any property in lieu of it, in the absence of a contrary expression in the will". 76 Ohio St.3d at 477. While the doctrine of ademption may apply where a thing specifically bequeathed no longer exists at the testator's death, the doctrine does not usually apply to a general legacy. *Estate of Parks v. Hodge* (1993), 87 Ohio App.3d 831, 836.

In contrast, a demonstrative legacy is a sort of hybrid of a general legacy and a specific legacy. A demonstrative legacy is a legacy that is payable primarily out of a particular fund or property but it is not subject to ademption. *In re Estate of Mellott* (1954), 116 Ohio St. 113, 115. The Ohio Supreme Court has held that if the designated source of payment of a demonstrative legacy fails, then the legacy is payable out of the corpus of the estate in the same manner as a general legacy. *Id.* As a matter of public policy, courts are to construe legacies of a doubtful nature as either general or demonstrative rather than specific legacies since specific legacies are subject to ademption if the subject matter is disposed of by the testator after the execution of the will. *Id.* Furthermore, the law strongly desires to avoid the application of ademption unless it is absolutely necessary due to the hardship that may occur. *See, e.g. Parks v. Hodge, supra.*

The Court finds the disputed bequest in Item IV is a demonstrative legacy that should not adeem. The testator's primary intent was to provide trust funds for the college

education of his children and grandchildren. The establishment of the trust was more important to the testator than knowing how his funds in the Alexander & Alexander Thrift Plan were going to be distributed. While the testator provided for such trust to be funded from the Alexander & Alexander Thrift Plan, the Plan's existence or nonexistence does not control the satisfaction of this intent. Similarly, the language used in the will clearly evidences the testator's intent that the term "grandchildren" encompasses any grandchildren born or lawfully adopted after the decedent's death.

Accordingly, the Court finds that the testamentary trust described in Item IV of Richard L. Sust's Last Will and Testament should be funded with the testator's Charles Schwab IRA Account. The Court further finds that the provisions of that trust apply to grandchildren born or legally adopted after the decedent's death.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: G. Mitchel Lippert
Donald Morrisroe
Sheri L. Hylton
Ronald J. Goodman