IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In the Matter of:	)	C.A. No. 5935-VCG
JEAN I. WILLEY TRUST	)	

MEMORANDUM OPINION

Submitted: July 22, 2011
Decided: August 4, 2011

William W. Erhart, Esquire, of WILLIAM W. ERHART , P.A., Wilmington, Delaware, Attorney for Petitioner,

Scott Willey, Mark Willey and Deborah Willey, *pro se*, of 2311 Shaws Corner Road, Clayton, Delaware 19938, Respondents

GLASSCOCK, Vice Chancellor.

This is an action for approval of accounting and termination of a testamentary trust. Jean I. Willey ("Jean"), the testator, had four sons: Todd C. Willey ("Todd"), Mark E. Willey ("Mark"), Scott B. Willey ("Scott"), and Dale S. Willey ("Dale").[1] In her will ("Jean's Will"), executed on November 2, 2000, Jean devised $30,000.00 to Mark in a supplemental needs trust ("Mark's Trust"), with the remainder of her estate to be divided equally among her four sons. Todd was named as the Trustee of Mark's Trust in Jean's Will; Dale was named the executor of the Will. Jean passed away on September 7, 2004. Although the testimony indicates that her estate was closed in May 2005, $30,000.00 in assets was placed in Mark's Trust on May 17, 2005, and the remainder of Jean's estate was then distributed equally to the four Willey brothers in September 2005. In April 2009, the Willey brothers sold Jean's real property and the proceeds were distributed equally.

Todd, the petitioner in this action, filed a motion on October 28, 2010 seeking approval of the trust accounting and the termination of Mark's Trust, the corpus of which—according to Todd—is reduced to around $5,000 and should be turned over to Mark (via his guardians). The petition to approve the accounting and terminate the trust was opposed by Mark and Scott, together with Scott's wife,

[1] I use first names in this matter not out of disrespect, but rather because, due to the abundance of Willeys involved, a more formal form of address would be confusing.

Deborah Willey ("Deborah"), collectively, the "Objectors." After the objections were filed, Scott and Deborah petitioned, successfully, to be appointed as guardians for Mark, who has suffered three disabling strokes. The guardianship order was filed on May 11, 2011. Of course, Scott and Deborah, as strangers to the trust, have no independent standing to object here; they have made it clear that the initial objections were brought on Mark's behalf (under a power of attorney) and they appear here only as his guardians.

This matter was originally scheduled for a hearing on Petitioner's Motion to Approve the Accounting (akin to a default hearing) on April 1, 2011. The Objectors appeared and it became clear that the matter needed to be set for a full hearing. That hearing was held on May 10, 2011, and the parties have filed written closing arguments and answering arguments.[2] This is my decision on the Petitioner's motion, as well as on the issues raised at the hearing.

BACKGROUND

A. The Willey Compound

Jean's real property was known by the Willey family as "the Willey compound." It consisted of approximately fifteen acres of land, with both a house

[2] References to the May 10, 2011 hearing are cited as "Hearing Tr. [##]," with the name of the person or witness speaking indicated in parentheses.

and a house trailer located on the property.[3] The Willey compound consisted of five parcels: Jean's property, containing the house and trailer, and four adjacent parcels, which (as will be described) were designated by Jean for her four sons, respectively. The house and trailer were situated right next to each other, about "[a] stone throw" apart.[4] According to testimony, Jean's intention was for each of her children to receive an adjacent parcel (or an equivalent amount of money), so as to compensate each child equally.[5] Jean apparently had always dreamed that someday her four sons would all live on their parcels adjacent to her home.[6] At some point, though, it became clear that that day would never come.

By September of 2000, Scott had decided that he did not wish to live on the compound. Jean gave Scott a sum of $25,000.00 in cash—an amount approximately equal to that which his adjacent parcel of property would have been valued—and, in turn, Scott gave up his rights to his piece of property. Dale Willey and Lorena Hartnett (Dale's wife at the time; now his ex-wife) then bought that piece of land. Jean also sold Mark's designated piece of land to Dale and Lorena

[3] Hearing Tr. 18 (Deborah Willey).
[4] Hearing Tr. 72 (Todd Willey).
[5] Hearing Tr. 64 (Lorena Hartnett).
[6] *See, e.g.*, Hearing Tr. 54 (Scott Willey) ("Q. Was it your mother's dream to have all four sons living out there? A. Yes. Originally, that was my mother's dream."); Hearing Tr. 60 (Lorena Hartnett) (testifying that she was "aware of Jean's dream to have all four sons living on the roughly 15 acres that [the family] affectionately call[ed] the Willey compound"); *id.* ("It was general knowledge that Jean wanted everyone to live out there.").

for $30,000.00. This sale of "Mark's land" was allegedly the impetus for the initial $30,000.00 that was to go into Mark's Trust.[7]

Todd lived on the Willey compound his entire life. Around 1994 or 1995, Todd moved out of Jean's house and into the trailer next door. In 2003, Jean gave Todd $30,000.00 in cash to help him with building a house on the adjacent parcel he had received from Jean. In other words, Todd kept his adjacent parcel of land and also received $30,000.00 in cash. The parties disagree as to whether this $30,000 gift was meant to be an early inheritance (i.e., act as an ademption which would satisfy his inheritance under the Will) or whether it was purely a gift in addition to what Todd was to receive under the Will.[8] Jean did not revise her Will after giving Todd the money. At the time of Jean's death in 2004, Todd was still living in the trailer next to Jean's house (where Mark was still living). Shortly thereafter, Todd moved to his newly-constructed house on his adjacent parcel, and the trailer was rented to an outside tenant.

B. Mark and the Trust

In November 2000, Jean executed her will. As noted above, Jean left $30,000.00 to Mark in trust, and then the remainder of her estate was to be divided equally among her sons. At the time Jean's Will was created, Mark had already

[7] Hearing Tr. 55 (Scott Willey).
[8] The specific contentions of the parties are discussed in greater detail in Part C of the DISCUSSION section below.

experienced one stroke and was living with his mother. In fact, Mark had lived with his mother his entire life up until the time of her death.[9] After her death, Mark continued to live in the house. In 2007, Mark experienced a second stroke and was placed in a nursing home for rehabilitation. He eventually recovered sufficiently to move in with his brother, Scott, but did not return to the family home. Subsequently, Mark suffered a third stroke and is currently receiving nursing home care. The parties agree that Mark is currently unable to live on his own.

The Trust agreement is set out in Jean's Will. Pursuant to the Will, Mark's Trust is funded by $30,000.00 for the benefit of Mark E. Willey.[10] The Will appoints Todd as Trustee.[11] The Trustee is given broad authority to pay out interest and corpus for the health, maintenance, support and education of Mark.[12] In addition, the Trustee has the power to "terminate the trust as to the share of Mark affected thereby and pay out the assets thereunder *at any time* as deemed

[9] Hearing Tr. 17 (Deborah Willey).
[10] Jean's Will, Article III.
[11] Jean's Will, Article VII.
[12] *See, e.g.*, Jean's Will, Article VII, Clause B, Sections 1, 2 ("All or such part of the income of the Trust is required for the purpose of supplementing any benefits that [Todd] may receive to enable him to provide for the health, support, maintenance and education of Mark in the manner that Mark would have been accustomed to during [Jean's] lifetime, shall be paid out and applied by Trustee for such purpose . . . . Any part or parts of the corpus of the trust may be paid out and applied by Trustee for the health, maintenance, support and education of Mark, if such use is needful and necessary."); *see also* Jean's Will, Article VII, Section 7, Clause C.

proper and advisable by Trustee and by a court of appropriate jurisdiction."[13] It is pursuant to this section that the Trustee brings this petition to terminate the trust, the assets being largely depleted. In addition to the $30,000.00 bequest, the Will provided that Mark was to receive one quarter of the residue of the estate ". . . however, the share that Mark E. Willey is to receive shall be placed INTO A SUPPLEMENTAL NEEDS TRUST, the terms of trust and the name of the Trustee to be designated hereinafter."[14] Thus, the Will provides that Mark's Trust shall be funded with a $30,000.00 bequest plus one quarter of the property passing under the residuary clause.[15] In other words, Mark was to receive the $30,000.00 bequest first; *then* the residuary of the estate was distributed equally between the four brothers, with Mark's share to be deposited into the trust. It is uncontested that the initial $30,000.00 was in fact deposited into Mark's Trust. The current dispute is over the residuary clause distribution—specifically, the distribution of cash remaining in the estate after payment of specific bequests, as well as distribution of funds resulting from the transfer of Jean's real property to the four Willey brothers

[13] Jean's Will, Article VII, Clause B, Section 3 (emphasis added).
[14] Jean's Will, Article IV.
[15] The Will also provides that "[i]n addition to the assets passing to this [T]rust pursuant to this [W]ill, this [T]rust shall also accept and administer in accordance to the terms herein, any other assets payable to my Mark such as proceeds from any insurance policies payable to Mark." Jean's Will, Article VII, Clause B, Section 5. This language I regard as merely precatory: it is axiomatic that a decedent's will can determine the disposition of property passing through the estate only.

as co-tenants.

C. Distribution of Jean's Estate

Jean's estate was closed in May 2005. As set out in the Will, $30,000.00 in assets was first placed in Mark's Trust on May 17, 2005. The remainder of Jean's liquid estate was then distributed equally to the four Willey brothers in September 2005. About $60,000.00 had remained in Jean's estate after the $30,000.00 was placed in Mark's Trust. Each brother thus received a check for $15,000.00: Dale, Scott, and Todd received checks in their own name, and Todd also received Mark's check as Trustee of Mark's Trust. Todd deposited Mark's $15,000.00 into Mark's Trust. Todd's own check for $15,000.00 is what is at issue later in this Opinion—the Objectors argue that Jean's $30,000.00 *inter vivos* gift to Todd in 2003 worked an ademption on his inheritance, and that he was therefore not entitled to receive $15,000 under the residuary clause.

After Jean passed away, Mark continued living in the house, and the Willey brothers enlisted Dale, as executor of the estate, to manage the Willey compound. The brothers decided to rent out the trailer in order to cover the costs of insurance and maintaining the property. Any excess rental proceeds were distributed evenly among the four Willey brothers. In April 2009, the Willey brothers sold Jean's property and the proceeds were distributed equally. Prior to this action, no one

objected to these distributions.[16]

To clarify the timing, Jean executed her will in 2000.[17] The $30,000.00 gift to Todd took place in 2003. Jean passed away in 2004. Her estate was distributed in 2005. In 2009, the Willeys sold Jean's real property (Mark was no longer living in the house by then), and in 2010, Todd brought this action.

DISCUSSION

The Objectors make three objections to the Petition to Terminate the Estate. They argue first that the gift of money from Jean to Todd during her lifetime worked an ademption on the bequest to Todd of a portion of the residue of Jean's estate. As discussed above, Todd in fact received a distribution of $15,000 from the estate. According to the Objectors, these funds were erroneously in Todd's possession and should have been placed into Mark's Trust. Next, the Objectors contend that Jean's real property, which passed to the four brothers as co-tenants, and which was informally managed as a rental property for several years by the fourth Willey brother, Dale, generated more income than has been distributed to the brothers. According to this theory, Mark is entitled to an accounting of the funds generated by the rental, proceeds from which should be placed in Mark's Trust. Finally, the Objectors point to language in the Will which they construe as

[16] Hearing Tr. 25-26 (Dale Willey).
[17] Scott had given up his right to his adjacent piece of land and received $25,000 in cash from Jean a few months *before* she executed her will.

creating in Jean's real property a life estate for Mark. This property has now been sold: Mark's trust received a one-quarter share of the proceeds. The Objectors contend that Mark should have been compensated for his "life interest," as well as for his one-quarter-of-the-remainder interest, and that these additional funds should be placed into Mark's Trust. I will examine each of these arguments in turn.

A. The "Life Estate"

The Objectors contend that the Will conveyed a life interest in Jean's real property in favor of Mark, with the remainder interest in all four Willey brothers. This property was sold in 2009, and the proceeds were distributed equally among the four brothers, with Mark's one-fourth share distributed to Todd as Trustee, and deposited into Mark's Trust. According to the Objectors, Mark should have received the value of his "life estate" from this sale, as opposed to merely his "one-fourth share." Pursuant to Article IV of Jean's Will, Mark's undivided one-fourth interest in the property, *together with* the value of the putative life estate, are assets of the Trust. While one-quarter of the net proceeds of the sale of the property was placed in trust for Mark, the Objectors argue that the Trust cannot be discharged until the value of the "life estate" is also placed in the Trust and distributed for Mark's benefit. Todd, meanwhile, argues that the plain language of the residuary clause did not give Mark a life estate in the property.

The life estate is created, if at all, under the residuary clause of the Will. That clause—Article VI—reads in full as follows:

> Subject to the right of Mark E. Willey as enumerated hereafter, [a]ll the rest, residue and remainder of all my goods and estate, real, personal, and mixed, tangible or intangible, of every kind and description, and wherever situated, I give, devise and bequeath unto my sons, SCOTT B. WILLEY, TODD C. WILLEY, DALE S. WILLEY and MARK E. WILLEY, in equal shares, share and share alike, absolutely and forever. Provided, however, the share that Mark E. Willey is to receive shall be placed INTO A SUPPLEMENTAL NEEDS TRUST, the terms of trust and the name of the Trustee to be designated hereinafter. I also direct that ***Mark shall be allowed to reside in the residence or adjacent mobile home [on the property] for as long as necessary and that said residence or mobile home located at 5207 Holletts Corner Road, Clayton, Delaware, not be sold during Mark's occupation of the property.***[18]

It is this last sentence that the Objectors rely on to contend that the clause created a life estate in Mark. Put simply, the clause makes clear that the residue of the estate is to be divided into four equal shares, subject to Mark's ability to reside in the residence or in the adjacent trailer on the property for as long as needed, and on the condition that the home would not be sold while Mark was living there.

The plain language of Article IV does not create a life estate in Mark. The Article provides that title to the property passes to the recipients "absolutely and forever." This transfer of title, however, is clearly subject to the right of Mark to be allowed to reside on the property for as long as necessary. The property is also

[18] Jean's Will, Article IV (emphasis added) (capitals in original).

subject to the restriction that Mark's share is to be in trust. In other words, the fee interest in the real property passed to the four brothers absolutely, except that Mark's share was to be placed in trust for him, and that a trust or equitable condition attached to the property for Mark's benefit so long as his use of the property was "necessary." Accordingly, the residuary clause appears to create a fee simple interest (equally divided among the four brothers) subject to a condition that the property not be sold before Mark no longer needed to live in the house.

The intent of the testator, of course, must control the interpretation of the will. For purposes of this Opinion, however, I need not determine whether the language ultimately created a present (life) estate in the property in Mark's Trust, or, as seems likely, merely an equitable charge against the brother's interests in favor of Mark.[19] Nor need I determine the precise meaning of the term "necessary," or whose prerogative it was to determine whether at any given time Mark's use remained necessary. Mark continued to live in the house on the property after Jean's death, consistent with the terms of Article IV. In December

[19] The rights given to Mark in the property do not include the exclusion of his brothers, which would be the case if Jean had intended them to be remaindermen of Mark's life estate only. In fact, the Will provides that Mark shall have the use the house *or* the trailer; in other words *not both*, a limitation inconsistent with the occupation of an entire property by a life tenant. The fact that the Objectors do not argue that Mark is entitled to all of the rental proceeds of the trailer received by the brothers during Mark's tenancy in the house after Jean's death indicates that they recognize that Mark was not the life tenant of the property at the time of its sale. The intent of the testator was that all four brothers would own the property, but that it would not be sold so long as it was needed as a residence for Mark.

2007 or January 2008, Mark had his second stroke. As a result, he was placed in a nursing home. Unfortunately his condition has worsened since. By the time the decision was made by the four Willey brothers to sell the property in early 2009, the house that Mark had formerly shared with his mother had been vacant for over a year.[20] Mark's use of the property at that point was no longer practical or desirable; therefore, it was clearly not necessary. Since his use was not necessary and since he was no longer residing on the property, any property interest or restraints in trust created by Article IV of the Will ceased to bind the property in Mark's favor. Therefore, upon sale, Mark was entitled to 25% of the net proceeds: $65,792.55, which were received by the Trustee and ultimately spent for Mark's benefit. The interest, equitable charge or trust which permitted Mark to reside in the property had terminated, and had no value at the time of sale. Therefore, the first ground for objection is denied.

B. The Rental Proceeds

The property contained two dwelling units: (1) the house in which Mark lived with Jean before Jean's death and (2) the house trailer lived in by Todd, which was jointly titled in Jean and Todd.[21] Notwithstanding that legal title to the trailer passed to Todd upon Jean's death, Todd never claimed ownership of the

[20] The house trailer adjacent to the home had been rented to a tenant shortly after Jean's death.
[21] That is, the motor vehicle title covering the trailer was in joint names.

trailer, and it is apparent that his share of the title was held in trust for Jean and that the trailer passed to the estate on her death.[22] Todd lived in the trailer next to his mother's house until shortly after her death; he then moved to his own property and the trailer was vacant.

The four co-tenants decided to rent the trailer. Apparently in reliance on his brothers' suggestion that it was his duty as executor, Dale reluctantly oversaw the rental business. According to Dale, the rent of $600.00 per month was used to pay taxes on the property, insurance on the trailer and house and maintenance and repair for the trailer and house. Distributions of the remaining rental proceeds were made in equal shares to the four co-tenants on various dates, including, for example, distributions made around Christmas 2006 and Christmas 2007.[23] While Dale is not a party to this action, he responded to the Objectors by appearing and providing some documents in relation to his operation of the rental business.[24] According to the Objectors, Dale's informal accounting is approximately $15,000.00 short of a full accounting of all rental proceeds.

Those distributions that were made by Dale from rental payments on behalf

[22] There is a suggestion in the record that the trailer was titled jointly between Jean and Todd so that Todd could live in the trailer and no party would have to obtain a separate policy of renter's insurance. Hearing Tr. 19 (Dale Willey).
[23] Hearing Tr. 25-26 (Dale Willey).
[24] Dale's operation of the rental business is being investigated by the Attorney General's Office. According to the Investigator, Lester Johnson, who testified at the hearing, the results of the investigation are inconclusive thus far.

of Mark were placed by Todd in Mark's Trust. The Objectors ask that I deny the Trustee's request to discharge the Trust because a share of the unaccounted-for rental proceeds (i.e., the $15,000.00)—if such proceeds exist and if they are recoverable from Dale—should be placed in the Trust.[25] But that, it seems to me, is an insufficient reason to maintain the trust. The Objectors have not alleged that Todd, as Trustee, was complicit in any misallocation of the rental proceeds, that he should have taken some action on behalf of the beneficiary of the Trust or that he is surchargable for rent collected by Dale but not distributed to Mark.[26] The Objectors merely seek to preserve Mark's right to recover from Dale. The Objectors are Mark's guardians. The discharge of Mark's Trust in no way limits their right to seek a recovery of rental proceeds on Mark's behalf, should such a right exist.[27] Therefore, the Objectors' second objection is denied.

C. Ademption by Satisfaction

After her death in 2004, each child of Jean, including Todd, received

[25] The Objectors seek only one quarter of the net rentals on behalf of the trust. While the objectors claim that Jean's Will created a life estate in the house, they do not contend that the life estate applied to the house trailer as well: Article IV provided that Mark could live in the house *or* the trailer so long as necessary, and he remained in the house. Therefore, the Objector's have not argued that Mark was entitled to all of the net rentals.

[26] It is instructive that neither Scott, Todd, nor Mark objected to Dale's conduct of the rental business at the time of the First, Second or Final Distributions, or, indeed, until these objections were filed.

[27] Dale is not a party to this action. His recordkeeping appears to have been regrettably informal, as is not uncommon in *de facto* family partnerships. I make no finding here as to whether Dale has properly accounted for the rental from the trailer.

$15,000 as the distribution of her residuary estate. In 2003, Jean had transferred $30,000.00 in cash to Todd. According to the Objectors, this *inter vivos* gift was meant to form a part of Todd's inheritance from Jean. Scott and Lorena Hartnett, Dale's ex-wife, testified that they were told by Jean that the gift was meant to be a part of what Todd would otherwise receive under the estate, and Scott testified that Todd admitted, after his mother's death, that the gift had been a part of his inheritance. Todd denies making such a statement, and maintains that his mother never told him the gift was meant to reduce his inheritance. According to Todd, this gift occurred during the construction of his house on a lot that was also a gift from his mother. When the $30,000 was first offered, Todd turned it down. Jean approached Dale and asked him to convince Todd to accept the money to use for construction of the home, which Dale did. Ultimately, Todd accepted the gift. Dale corroborates this version of events.

The Objectors argue that Todd's rights under the residuary clause were adeemed to the extent of the $30,000.00 gift; that Todd was therefore not entitled to the $15,000.00 that he received as a distribution from Jean's estate; and that I should therefore order Todd to return the $15,000.00 and use it to "even up" the estate among the four brothers, which according to the Objectors would result in the entire $15,000.00 being paid to Mark.

There are two types of ademption referred to in our common law. Most frequently encountered is ademption by extinction. In that species of ademption, a specific bequest is made in a will, the property subject to that bequest is sold by the testator (or otherwise removed from the estate) during his lifetime, and the bequest is therefore adeemed—that is, that provision is read out of the will.[28] The ademption which the Objectors propose occurred here is of a different type: ademption by satisfaction. An ademption by satisfaction occurs where a bequest is satisfied by a subsequent *inter vivos* gift of the property bequeathed.[29] Ademption by satisfaction may apply to a bequest via the residuary clause as well as to a specific bequest.[30] Whether a gift has worked an ademption depends on the intention of the testator. The common law presumption is that an *inter vivos* gift that appears to satisfy a bequest is intended to adeem the bequest where the testator

[28] *See, e.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining ademption by extinction as "[a]n ademption that occurs because the unique property that is the subject of a specific bequest has been sold, given away, or destroyed, or is not otherwise in existence at the time of the testator's death," and defining ademption as "[t]he destruction or extinction of a testamentary gift by reason of a bequeathed asset's ceasing to be part of the estate at the time of the testator's death; a beneficiary's forfeiture of a legacy or bequest that is no longer operative").

[29] *See generally Page on Wills*, Volume 6, § 54.21; *see also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining ademption by satisfaction as "[a]n ademption that occurs because the testator, while alive, has already given property to the beneficiary in lieu of the testamentary gift"). For further clarity, "[t]he term 'ademption' generally applies to a specific legacy, while 'satisfaction' is applied when the legacy is general. A legacy is the testamentary disposition of personal property." *In the Matter of the Estate of Marguerite S. Condon*, 2006 WL 782707, at *2 (Iowa App. Mar. 29, 2006); *see also Marshall v. West*, 160 A.2d 637 (Del. Ch. 1932); *Marshall v. Rench*, 1868 WL 1259 (Del. Ch. Sept. Term 1868); *Hughes v. Frank*, 1995 WL 632018 (Del. Ch. Oct. 20, 1995) (VC Steele).

[30] *Page on Wills*, Volume 6, §§ 54.23, 54.34.

is the parent of, or stands *in loco parentis* to, the recipient.[31] The rationale for this presumption is the same as that which operates in the intestate arena: absent evidence to the contrary, a decedent is presumed to have intended that his children benefit equally.[32] Accordingly, the Objectors argue that the $30,000.00 *inter vivos*

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[31] *Page on Wills*, Volume 6, § 54.28 ("If testator stands *in loco parentis* to the beneficiary, and the question arises between two or more beneficiaries, to all of whom testator stands *in loco parentis*, a gift of an amount equal to or greater than the legacy will be presumed to be an ademption of the legacy. . ."). *But cf.* Restatement (Third) of the Law of Property: Wills and Other Donative Transfers § 5.4 (Ademption by Satisfaction) ("An inter vivos gift made by a testator to a devisee or to a member of the devisee's family adeems the devise by satisfaction, in whole or in part, if the testator indicated in a contemporaneous writing, or if the devisee acknowledged in writing, that the gift was so to operate."). There is no indication that Delaware has adopted this deviation from the common law presumption. *See infra* footnote 32; *see also* Restatement (Third) of the Law of Property § 5.4 cmt. b and Statutory Note (explaining that this Section of the Restatement is based on certain statutory law, such as the Uniform Probate Code—which Delaware has *not* adopted—which requires acknowledgement in a writing that a gift was meant to satisfy a devise in order for the gift to so operate, the policy reason being that "[m]ost gifts are made without strings attached, and not intended to satisfy a devise").

[32] *Page on Wills*, Volume 6, § 54.28. There are recognized pros and cons to the presumption:

> [The presumption] has been criticized on the ground that it 'more often defeats the intention than gives effect to it.' On the other hand, it has been said that the rule against double portions is useful 'to carry generally into effect the intention of parents and others making provisions for those for whom they are bound to provide.' It has been said that the rule, even if a bad one, is well settled and clear, and that it ought not to be frittered away by seizing upon minute points of distinction. It seems quite likely that, in many cases, a testator makes a gift to one of his children, for the purpose of giving such child an amount over and above that which he takes by will; and the application of the rule of a presumptive ademption defeats the testator's intention in all such cases. It may be said in favor of the rule, that a similar policy has been adopted by the legislature in case of intestate succession . . . . *Probably the chances in favor of having testator's actual intention carried out by the rule of a presumptive ademption are about the same as having the actual intention of the testator carried into effect by the rules on the subject of advancement.* The dislike of the courts of equity for double portions, which lead to the rule of presumptive ademptions, has thus been confirmed by a legislative policy in cases of intestate succession; and, *whether we may think that it gives effect to testator's intention, it seems to be too firmly intrenched* [sic] *to be attacked with any hope of success, unless the legislature*

gift worked an ademption of Todd's right to take under the residuary clause of Jean's Will. If so, the $15,000 distribution to Todd was improper. While the time to challenge the administration of Jean's estate has long past, the Objectors correctly argue that estate funds belonging to Mark (his share of the $15,000 improperly distributed to Todd) that came into Todd's possession are subject to Mark's Trust. They ask that the Trust not be discharged until the distribution improperly made to Todd under the residuary clause is placed into the Trust.

The presumption of ademption arising upon a gift from parent to child is readily rebutted by evidence that the parent wished the child to take both gift and bequest.[33] Such evidence is lacking here, however. The extrinsic evidence that exists here is insufficient to rebut the presumption that Jean intended an ademption. The testimony at the hearing illustrated two opposite factual scenarios. Ms. Hartnett, an apparently disinterested witness, supports Scott's testimony that Jean stated that she intended the gift as a part of Todd's inheritance. Scott testified that Todd admitted, after Jean's death, that this was his understanding.[34] Todd, on the

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should intervene."

Id. (emphasis added). In other words, whether or not we think the presumption is a good one, or actually carries out the testator's intent, it is the well-settled presumption that courts follow nonetheless. No Delaware case or statute suggests that we do not follow the common law presumption.

[33] *Page on Wills*, Volume 6, § 54.28 ("The presumption of an ademption where a gift is made by one standing in the relationship of *in loco parentis* to the beneficiary . . . is always subject to be rebutted by a showing that testator intended such gifts a[s] a separate and additional gratuity.").

[34] The Objectors also point out that Todd stated, upon his receipt of the $15,000.00 distribution

other hand, denies that he made that statement, and testified, as did Dale, that Jean had stated that the funds were meant by Jean as a gift. Even if Jean did state that the funds were a gift, though, such a statement by the testator is not of itself inconsistent with intent to adeem. It may have been a "gift" that was meant to adeem; it may have been just a gift. There is no written evidence (or any evidence whatsoever other than the opposing statements of the witnesses) to elucidate Jean's true intention in making the gift. Therefore, I find that the evidence does not rebut the presumption that Jean intended her $30,000 cash gift to Todd to adeem, up to that amount, his right to receive a distribution under the residuary clause.[35]

Todd therefore received $15,000 to which he was not entitled from Jean's estate. The Objectors propose that I therefore order the $15,000 paid over to Mark's Trust, as they argue that would best fulfill Jean's intent to provide her estate in equal shares to her children. The Objectors misunderstand my role here,

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under the residuary clause, that he would apply it on Mark's behalf, and that he did not place it in the Trust only because he was told not to do so by "Social Services". The Objectors suggest this is consistent with Todd's knowledge that the $30,000 *inter vivos* gift was meant to reduce his inheritance.

[35] The Objectors—correctly, I might add—have not argued that the ademption applies to Todd's right to receive a co-tenancy in the real property that was also transferred under the residuary clause. This is because "a devise of land cannot be adeemed except by a conveyance of the same land." *Page on Wills*, Volume 6, § 54.37. It is well-settled "[b]y the great weight of authority [that] no other form of ademption by satisfaction is recognized . . . and a devise of realty is not adeemed by a payment of money during the lifetime of the testator." *Id.* Thus, the devise of Jean's real property in the residuary clause of the Will could not be adeemed by Jean's *inter vivos* gift of $30,000.00 to Todd—as opposed to the $15,000.00 check Todd received from the distribution of Jean's liquid estate, which could be adeemed by the gift.

which is to enforce Jean's intent *as expressed in her Will.* The employment of the doctrine of ademption to a bequest, where indicated by the intent of the testator, is simply a tool to enforce the terms of the will in accord with the testator's intent. I may not rewrite the will itself, however.[36] The bequest to Todd being adeemed, he is considered removed from distribution of cash under the residuary clause.[37] If the $15,000 paid to him incorrectly had remained in the estate, it would have flowed through the residuary clause equally to the three remaining beneficiaries, Scott, Dale and Mark's Trust. Therefore, the sum which came to Todd that rightfully belonged to Mark's Trust is Mark's one-third of the distribution, or $5,000. Todd must therefore account to Mark's Trust for $5,000.

1. Offsets

Todd demonstrated at the hearing that he used $5,000 of the distribution to buy a prepaid burial plan for Mark. He argues that this amount should be offset against any amount he is called upon to account for to Mark's Trust. The Objectors have not opposed this offset in post-hearing briefing. Purchase of a prepaid burial plan was within the broad discretion granted the Trustee under Jean's Will. Therefore, I find that the $5,000 expended by Todd on Mark's behalf

[36] *See Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 480 (Del. 1945) ("It is not the function of the Court to make a will for the testator or to improve on the will as found . . . . Upon the contrary, it is clearly the function and duty of the Court to take the entire will of the testator in the language there used, and attempt to find the true meaning and intent of the testator.").
[37] *Page on Wills*, Volume 6, § 54.21.

for prepaid burial services offsets the $5,000 for which Todd must account to the Trust. Todd also points out that he was entitled by Court Rules to a commission as Trustee, which he never took.[38] He asks that the amount which he could have received as Trustee of the Trust also be offset against any amount for which he must account to the Trust. Since I have found that the prepaid burial expenditure fully offsets the amount for which Todd must account, I need not reach this request. Because Todd has accounted for all amounts owed the Trust, the Objectors' third ground is denied.

D. Fees

Todd seeks reimbursement of his legal fees, to be paid from the corpus of the Trust. Scott, Deborah and Mark request that their expenses (for purposes of the hearing and obtaining certain required documentation) be paid by Todd.

The common law provides "two situations in which an allowance from a trust corpus for attorneys' fees may be made: when the attorneys' services were necessary for the proper administration of the trust, . . . or where the services otherwise resulted in a benefit to the trust."[39] Our law "is in accord with the general rule," and Delaware courts have "consistently allowed fiduciaries

[38] *See* 12 *Del. C.* § 3561 (explaining that "when a trust instrument does not fix the compensation of the trustee, reasonable compensation shall be allowed" and setting forth the procedure for computing such compensation).

[39] *Bankers Trust Co. v. Duffy*, 295 A.2d 725, 726 (Del. 1972) (citing Scott on Trusts (2d ed.) § 244; Restatement of Trusts (Second) § 188; 7 C.J.S. Attorney and Client § 193).

reimbursement from the fiduciary estate for 'necessary' expenses" or where the fiduciary's services have resulted in a benefit to the trust.[40] No evidence was presented to me at the hearing or otherwise suggesting that Todd has acted in bad faith in any way by bringing his petition. Nor has Todd failed to perform his duties as Trustee of the Trust—indeed, he has done so for years uncompensated. Absent any breach of fiduciary duty, Todd had a right to retain counsel in connection with the claims asserted by and against him in his fiduciary capacity, as his petition for accounting was necessary for proper administration and dissolution of the Trust. This procedure was brought pursuant to the specific terms of Trust, which contemplated that there would be a procedure in front of this Court, or a court of competent jurisdiction, whereby the Trustee may terminate the trust.[41] The petition, and the associated attorney services and fees incurred in connection with litigating this case, were necessary to fulfill the requirements of administering and dissolving the Trust. Accordingly, Todd was entitled to hire an attorney at Trust expense. His reasonable attorneys' fees, therefore, shall be assessed from the Trust.

[40] *Id.* (citing cases).

[41] Jean's Will, Article VII, Clause B, Section 3 ("Trustee may terminate the trust as to the share of Mark affected thereby and pay out the assets thereunder at any time *as deemed proper and advisable* by Trustee *and by a court of appropriate jurisdiction*.") (emphasis added). Court approval is required by the specific terms of the Trust, making this action necessary.

Scott, Deborah and Mark have not sought their expenses from the Trust.[42] Instead, they ask that Todd pay their expenses himself. "In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses . . . to any party, to be paid by another party or from the trust that is the subject of the controversy."[43] The decision whether or not to award fees is discretionary in the Court.[44] Here, because Todd has not breached any fiduciary duty or acted in bad faith, I find no basis for shifting fees. Moreover, the Objectors' actions have not worked a benefit for the Trust. Thus, Scott, Deborah and Mark shall bear their own costs.

CONCLUSION

The Objectors' objections all being denied, the Trustee's Petition to Approve the Accounting and the Dissolution of the Trust is granted. The Trustee shall submit a form of order consistent with this Opinion within thirty (30) calendar days.

[42] The Objectors appeared *pro se* so they do not have attorneys' fees.
[43] 12 *Del. C.* § 3584.
[44] *Paradee v. Paradee*, 2010 WL 3959604, at *15 (Del. Ch. Oct. 5, 2010) (citing *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002)).