

Probate In Common Form

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ABATEMENT

By Alonna Warns

Insufficiency of Assets

Historic Terms

When does the concept of abatement arise in a probate estate?

Answer: The estate has **insufficient assets** to pay out the devises in the will.

This article is an attempt to explain some of the general principles surrounding abatement and the distribution of assets.

A will is most commonly drafted providing for distribution of assets in the following order:

- miscellaneous personal property
- specific devises
- distribution of homestead
- general devises
- distribution of residue

Historically the terms used in gifting were very specific to a particular type of property. A review of historical definitions of legal terms pertaining to gifting can clarify some of the confusion with terminology. (Using Black’s Law Dictionary as the resource.)

“Pecuniary legacy. A bequest of a sum of money. . .”

“Bequest. A gift by will of personal property; a legacy.”

*“Devise.”. . . a gift of **real** property by the last will and testament of the donor.” (emphasis added)*

Current usage

In today’s vernacular, a gift in a will is usually referred to as a devise. The gift could be either personal or real property.

ABATEMENT

Will provision example of a **specific devise**:

“I leave my 3M stock to Mary.”

(This is a specific asset to Mary.)



Will provision example of a **general devise**:

“I leave \$25,000 to Mary.”

(The cash to satisfy this general devise could come from any liquidated source or from the proceeds of the sale of the house.)

Why apply statute?

What are possible factors that can lead to the need to apply the abatement statute?

An insufficiency of assets may result from any of the following:

- payment of decedent’s debts
- loss of decedent’s assets during lifetime
- unforeseen loss in value of assets
- spouse electing against the will
- belief by testator that assets have more value than they actually do

- anticipation that assets will have more value at death than they do

Example

Abatement is a mathematical calculation and here are the facts of a hypothetical case.

Will provisions:

Beneficiary K – all of my 3M stock

Boat and fishing equipment
Beneficiary H

Beneficiary A - \$20,000

Beneficiary B - \$30,000

Beneficiary C - \$10,000

NONEXONERATION

This is a big word for a very short statute – one sentence long.

Minnesota Statute §524.2-607 says that a specific devise subject to a mortgage or a security interest existing at the time of the decedent’s death passes to the devisee with the mortgage or security interest attached to it with no right to have this mortgage or security interest paid off by the estate. The statute goes on to say that a general statement in the will to pay the debts of the estate does NOT mean that the mortgage or security interest of specifically devised property is to be paid.

ABATEMENT

Beneficiary D - \$5,000
 Beneficiary E - \$5,000
 Beneficiary F - \$5,000
 Beneficiary G - \$15,000
 Beneficiary H - \$10,000
 Homestead to Beneficiary I
 Residue to Beneficiary I
 General devisees total \$100,000

Comments – Characterize the gifts.

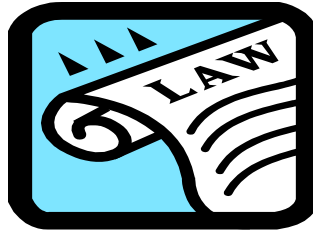
Beneficiaries A – G are given general devisees (pecuniary legacies). Beneficiary H is given a general devise and a specific devise. Beneficiary I is given a specific devise and the residue. Beneficiary K is given a specific devise.

Comments—Estate assets.

Testator dies with \$50,000 in cash left after payment of expenses; **NO** 3M stock; **NO** homestead; the boat and fishing equipment. (Assume beneficiaries are not entitled to any statutory allowances.)

Decedent was renting an apartment at the time of death.

Conclusion – There are insufficient assets remaining in the estate to pay out the devisees. The abatement statute will need to be applied to calculate the distributive shares.



Abatement Statute

Minn. Stat. § 524.3-902 “. . . **shares of distributees abate, without any preference or priority as between real and personal property, in the following order:**

1. property not disposed of by will;
2. residuary devisees;
3. general devisees;
4. specific devisees.”

1. through 4. listing is commonly referred to as the “order of abatement”.

Distribution Plan

How will the \$50,000 be distributed?

Because there are insufficient assets some gifts maybe eliminated completely or reduced proportionately.

First category to abate.

1. Any property not disposed of by will? No

Cross out property not disposed of by will.

Next category to abate:

2. Any residuary devisees? Yes

Beneficiary I is the residuary distributee, however, with \$100,000 of specific devisees (legacies) and only \$50,000 to distribute there will be no residue to distribute.

Cross out residuary devisees.

ABATEMENT

Next category to abate:
3. Any general devises? Yes

A total of \$100,000 of general devises

\$50,000 in direct relation to the amount of their original devise.

Calculation

rata share of the available assets for each distributee). Multiply the percentage times the amount available to get the dollar amount to distribute.

Next category to abate:

4. Any specific devises? Yes

Calculation of abated share

How much money will the devisees receive from the estate?

Beneficiary A = \$20,000 devise divided by \$100,000 (total of the devises) = 20% times \$50,000 (balance on final account to distribute) = \$10,000;

Beneficiary B = \$30,000 divided by \$100,000 = 30% times \$50,000 = \$15,000; and so forth.



The 3M stock, the boat and the fishing equipment.

Beneficiary H – will take the specific bequest of the boat and fishing equipment and a pro rata share of the \$50,000.

Beneficiary I – will receive nothing since there was no homestead and there are insufficient assets to have residue.

Beneficiary K- receives nothing since the decedent did not own any 3M stock at the time of death.

Beneficiaries A – H – will receive a portion of the



Minn. Stat. §524.3-902 (a) “. . . **Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.**”

Applying the statute to the example, use this formula:

Amount of the devise divided by the total of all the devises = percentage (pro

The total of the calculation must equal the \$50,000 and the percentages must equal 100%.

Will Drafting

Will drafting and abatement -

Testator makes a will and at the time he has many dollars in his bank accounts; he owns real property, his health is good, life is great all around. He has a plan to distribute his assets among various individuals. As his will is drafted he assumes

ABATEMENT

that he will have sufficient assets to distribute according to the terms of his will. In the event of an insufficiency of assets the order of abatement in the statute will apply. **(Classic case).**

ABATEMENT PLAN

However, you may have a client/testator who is realistic enough to understand that he may need to use some of his monies for his own health and welfare before he dies. Testator may wish set out an **abatement plan** in his will. The testator's plan for abatement may not necessarily be the same as in the statute. Any abatement plan will need to be **clear on the face of the will**. The court will look for the abatement plan and will look at the **surrounding circumstances**.

The abatement process may be something to discuss when drafting a will for an individual who wants to make a list of devises. Bring up the subject "what if" there are not sufficient assets to pay out the devises in full? There have been instances

where a gift of a specific dollar amount was contingent upon the size of the estate.

Will provision:

"I give \$50,000 to XYZ church only if the net assets of my estate exceed \$300,000."

Another instance that arises is where the testator wishes to benefit one set of distributees over another in the absence of sufficient funds.

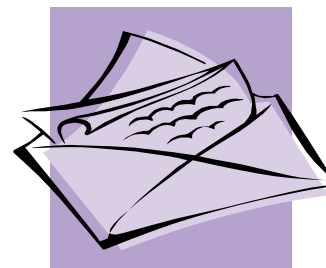
Will provision:

"I give \$10,000 to each of my grandchildren and \$5,000 to each of my great-grandchildren only if there are sufficient assets to pay all bequests in full. If there are insufficient assets to pay these bequests in full the \$10,000 bequests to my grandchildren shall be paid in full and the bequests to my great-grandchildren shall lapse."

This is a reminder notice to send a self-addressed, stamped return envelope with your certified copy orders presented at the time of the appointment with the Registrar.

Also provide us with a return envelope when ordering letters by mail.

We encourage you to send with the attorney the affidavit (s) of mailing and stamped envelopes addressed to the persons and entities named on the interested party list to expedite issuance of letters.



Reminder Notice

Problems that arise with

SPECIFIC DEVISES

PROBLEMS

specific devises

Basic premise –

A PERSON CANNOT GIVE AWAY WHAT HE/SHE DOES NOT OWN.

A. Asset sold prior to death, what happens to the specific devise?

Minnesota Statutes §524.2-606(b):

“If specifically devised property is sold or mortgaged by a conservator or guardian or by 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, . . .”



Attorney-in-fact sells decedent’s homestead (specifically devised to A) for \$250,000 prior to decedent’s death. The change

from the real property devise to cash changes this gift from a specific devise to a general devisee of \$250,000. If there are other general devises and insufficient assets to pay all in full then A’s \$250,000 general devise would be added to the other general devises and prorated according to the formula stated above.

B. What if there is a specific devise in the will and at the time of death the specifically devised property is held in joint tenancy?

Will provision:

“I give my XYZ Savings Certificate 124578 to Samuel.”

Decedent dies and the XYZ Savings Certificate 124578 is owned jointly – decedent and Joseph as joint tenants with rights of survivorship.

When decedent changed the ownership on his account to a joint tenancy account with Joseph he showed an intent to change

his mind about the specific devise in the will. The account becomes Joseph’s by right of survivorship. The gift to Samuel lapses because decedent did not own the account when he died.

However, we also need to look at the intent of the testator. Minnesota Statutes §524.6-204(a).

TESTATOR’S INTENT

Questions to ask?

Was the creation of the joint tenancy an act on the part of the decedent to revoke the will provision?

Why was the joint tenancy account set up? Convenience only?

ADEMPTION BY EXTINCTION

C. What if a specifically devised asset, say a certificate of deposit, is liquidated pre-death?

Will provision:

“I give my \$60,000 TCF

SPECIFIC DEVISES

certificate of deposit account number 987321 to John.”

Prior to death the monies were needed for decedent's care. The attorney-in-fact closed out the certificate and put the monies in the decedent's checking account. Minnesota Statutes §524.2-606(b) appears to apply to real estate and does not provide for a general devise in place of the certificate of deposit.

Result: The certificate is no longer in existence. The gift lapses. We can say that the \$60,000 gift was adeemed by extinction.

Adeemption is an act of revocation. The testator disposes of a specific item during his life making it impossible to satisfy the specific devise in the will when he dies.

Note: Keep in mind that real property and personal property in the examples above are treated differently under Minn. Stat. §524.2-606(b).

ADEEMPTION BY SATISFACTION

ADEEMPTION BY SATISFACTION

Minnesota Statutes §524.2-609 (a) talks about situa-

LIFETIME GIFT

tions where the testator during life gave to the devisee the property set aside for them in the will. There are 3 cases where the lifetime gift will be determined to be a satisfaction of the testamentary devise,

“ . . . satisfaction of a devise in whole or in part, only if, (i) the will provides for a deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.”

The common thread through the 3 statements is the need for a WRITING. There has to be a writing that acknowl-

edges the gift and its value in relation to the devise in order for there to be a satisfaction.

What value is deducted from the testamentary devise?

§ (b) of the statute says “valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.”

Practical tip: If a client is going to satisfy a devise during his lifetime with property whose value is not readily apparent it might be reasonable and prudent to have an appraisal completed at the time of the transfer.



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TO:



FOREIGN CONSUL LIST 2007

The foreign consul list was updated this summer and a copy of this updated list is attached to this issue. Remember that notice is required by statute to a foreign consul registered with the Minnesota Secretary of State when the decedent has been born in a foreign country or leaves a devisee or heir in a foreign country. The intent will be to update the list on a bi-annual basis.

