ADEEMED IF YOU DO, ADEEMED IF YOU DON'T: THE TESTATOR'S INTENT TO PASSIVELY REVOKE A SPECIFIC DEVISE

I. INTRODUCTION

The majority of practitioners in Alabama, in all likelihood, will go an entire career without handling an ademption issue; even so, the consequences of ademption can be severe. Stated simply, ademption occurs when a testator bequeaths a specific piece of property that he no longer owns at the time of death. If the property is not found in the estate, there is nothing for the devisee to take. Such a result is not particularly problematic where, for example, a specifically devised asset was disposed of *inter vivos* in order to support the testator in his declining years. In those cases, it is natural (and in some cases mandatory) for the testator to utilize his own resources before relying upon support from family or the government. On the other hand, a testator is presumed to know what bequests he has made in his will. Therefore, a decision to dispose of that property *inter vivos* is said to implicitly indicate the testator's desire for the devisee

not to receive the benefit of that gift after he dies. Ademption, in fact, may be the most cost-effective way to disinherit a specific devisee.

Of course, cases which clearly lie on extreme ends of the spectrum are easy to decide. It is the grey area in between that is problematic. For example, if a specifically bequeathed piece of property is subsequently changed or altered prior to the testator's death, can it be said that the devised property is *found* within the testator's estate? That is, is the altered property the *same* property that the testator bequeathed? Traditionally, the answer to that question was nearly always *no*, although modern courts have relaxed that harsh result with a series of exceptions and alternate standards of evaluation.

The Alabama Supreme Court has considered ademption in a few widely-dispersed opinions ranging from the nineteenth to the twenty-first centuries. In its most recent decision in *Parker v. Bozian*, [1] however, the court distinguished its current ademption analysis without overruling its prior holdings. In so doing, the court has cast a shadow of uncertainty across this narrow but important band of the law. Specifically, it is unclear when extrinsic evidence may be admitted to determine whether a particular action or non-action by a testator rises to the level of ademption. In fact, ademption may occur under this standard even where no affirmative action was taken by the testator to effectuate a change to or disposition of the property. This Note discusses the background and development of ademption jurisprudence in Alabama, and specifically examines how the *Parker* decision has expanded the limits of admissibility of extrinsic evidence in an ademption case, even where such evidence may essentially alter the substantive terms of a will.[2]

II. ADEMPTION GENERALLY

The basic premise of ademption is simple: a gift is said to be adeemed where a specific devise is not a part of the estate at the time of the testator's death.[3] Because the devise is no longer a part of the estate, an inference arises that the testator, by disposing of the property *inter vivos*, intended to revoke the specific devise of that property to the beneficiary.[4] Therefore, a devise of "my thoroughbred racehorse named Jack, to my sister, Jill" will be adeemed if the horse is sold prior to the testator's

1. 859 So. 2d 427 (Ala. 2003).

2. Special thanks goes to J. Milton Coxwell, Jr., author of *The Case of the Vanishing Devise, or in the Alternative, Praise the Lord! It's Not Adeemed: A Not-Too-Scholarly Overview of Ademption in the Law of Alabama*, which originally appeared in the September 2008 edition of the *Alabama Lawyer*, 69 ALA. LAW. 326. The underlying premise of that article provided the basis from which the discussion in this note was developed.

3. 80 AM. JUR. 2D *Wills* § 1458 (2002) (defining ademption).

4. *Id.*

death. Such a result is based upon the presumption that a testator knows what bequests he has made. By selling the horse, it follows that the testator's intent was not to leave it to his sister; instead, it is presumed that his intent was to revoke the gift. Because the horse was sold, there is nothing fitting its description in the estate left for Jill to take. Furthermore, Jill is not entitled to any proceeds realized from the sale of the animal; instead, she takes nothing.

Testamentary devises are classified as specific, general, demonstrative, or residuary.[5] Importantly, only specific devises may be adeemed.[6] A specific devise merely identifies an asset that is specifically identified from other property.[7] A general devise, on the other hand, identifies no particular property, and is payable from the general assets of the estate.[8] While a demonstrative devise does not identify any separate piece of property, it is essentially a general devise that is to be paid primarily from a designated source or fund.[9] Finally, a residuary devise serves to dispose of all probate assets not previously disposed of by a specific, general, or demonstrative devise.[10] Therefore, the first step in determining whether a devise has been adeemed is to determine whether it was a specific devise (which is subject to ademption) or a general, demonstrative, or residuary devise, which are not subject to ademption.

A. Ademption by Satisfaction and Ademption by Extinction

Ademption by satisfaction occurs where a testator makes an *inter vivos* gift as a substitute for a bequeathed piece of property, with the intent that the bequest be revoked or cancelled.[11] The lifetime gift is said to be in "satisfaction" of the bequest in the will. The practical effect is similar to an advancement[12] as applied to *inter vivos* transfers and intestate succession. When determining whether ademption by satisfaction has occurred, the "testator's intent is critical"[13] in order to ascertain whether the lifetime transfer was intended as a revocation of the bequest. The primary purpose of this theory is to prevent a devisee from taking a double gift that the testator did not intend.[14]

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5. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.1 (1999).
6. JESSE DUKEMINIER, STACY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, & ESTATES 405 (7th ed. 2005).
7. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, § 5.1 (2008).
8. *Id.*
9. *Id.*
10. *Id.*
11. 91 AM. JUR. PROOF OF FACTS 3D 277 § 1 (2006); *see also id.* § 3 ("Ademption by satisfaction occurs when the subject matter of the bequest has been withdrawn from the will by the testator, giving in his lifetime to a beneficiary the thing he had devised in the will.").
12. *See id.* § 4 (distinguishing ademption by satisfaction from advancement).
13. *Id.* § 3.
14. *Id.* § 13.

Ademption by extinction, on the other hand, occurs where the specific property to be devised is no longer a part of the testator's estate at death, and is therefore incapable of fulfilling the devise.[15] In the most basic form of ademption, the property to be bequeathed is simply no longer in existence at the time of the testator's death.[16] Because the property is no longer in existence, it is no longer part of the estate, and the devise must therefore fail. This is so even though failure of the devise may clearly defeat the testator's intent.[17] Because ademption by extinction applies only to specific devises, courts will often seek to classify a devise as general where possible in order to avoid such harsh results.[18]

In summary, ademption by satisfaction occurs where an *inter vivos* gift was intended to replace a part or all of a testamentary gift.[19] The sole determinative factor, therefore, is whether the testator's intent in making a lifetime gift was to allow the devisee to have the value of the devise today instead of receiving the devise only after the testator's death.[20] If no such intent was present, then the devisee will receive both the *inter vivos* gift and the benefit of the devise.[21] Where, however, the subject of a devise is no longer part of the estate at the time of the testator's death, no such question of intent is determinative.[22] If a testator is presumed to know what devises he has made in his will, an *inter vivos* disposition of specifically devised property is viewed as evidence of his intent to revoke the devise, because a testator cannot devise that which he does not own.[23] Therefore, under traditional ademption by extinction theory, the absence of specifically devised property from a testator's estate is prima facie evidence of the testator's intent to revoke the gift.[24]

B. Identity Theory of Ademption

The common law doctrine of ademption by extinction finds its roots in Roman law, which provided that any legacy which had been voluntarily conveyed by the testator prior to his death was adeemed, but only if it were shown that his intent in conveying the property was to deprive the beneficiary *not only* of the specific property, but from its economic equivalent as well.[25] Ademption by extinction later spread to England, first in

15. *Id.* § 3.
16. *Id.*
17. *Id.* § 13.
18. *Id.* § 14.
19. *Id.* § 3.
20. *Id.*
21. *Id.* § 5.
22. *Id.* § 3.
23. *Id.*
24. *Id.*
25. Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 741–42 (1961). Converse-

the Ecclesiastical courts, and later to the courts of Chancery.[26] As the doctrine developed, however, the English courts moved away from the Roman view that the testator's intent controls because "[i]t was thought that attempting 'to determine whether or not a testator intended to destroy the legacy by selling the thing which he had bequeathed . . . produce[d] a great deal of confusion and very little else.'"[27] As a result, the Chancery courts determined that only two questions should be asked when determining whether ademption had occurred: first, whether the legacy is specific, and second, whether that specific legacy is a part of the testator's estate at the time of death.[28] This view, known as the "Identity Theory" of ademption, looks only to identify the devise as specific or general and then determines whether it is a part of the estate at the time of the testator's death. If the property is not a part of the testator's estate, then the gift is adeemed. The identity theory was codified in the Uniform Probate Code in 1969 (adopted in Alabama as Alabama Code §§ 43-8-226 and -227) and represents the majority view in the United States today.[29]

C. Intent Theory of Ademption

Because the identity theory looks only to the existence of the specifically devised property in the testator's estate, it does not question the testator's motives in disposing of such property *inter vivos*.[30] However, ignoring the testator's intent may lead to harsh results where the facts would otherwise indicate that a revocation was unintentional. In response, the Revised Uniform Probate Code [hereinafter "revised UPC"] has adopted the "Intent Theory" of ademption, which states that if the specific property is not part of the estate at the testator's death, the devisee may nonetheless be entitled to a cash equivalent of the property, if the devisee can establish that the testator did not intend for the gift to be adeemed.[31] Ironically, in looking to the testator's intent to determine whether an ademption has oc-

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ly, if the testator had departed with the property involuntarily, the gift was said to be "impossible of fulfillment." *Id.* at 742 (quoting Joseph Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 297 (1940)).

26. *Id.* at 742.

27. *Id.* (quoting William H. Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 18 (1943)).

28. *Id.* at 742 (citing Ashburner v. MacGuire, (1786) 29 Eng. Rep. 62 (Ch.)).

29. *See* 91 AM. JUR. PROOF OF FACTS 3D 277 § 3 (2006).

30. *See id.* at § 16 ("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.").

31. UNIF. PROBATE CODE § 2-606(a)(6) (1990, amended 1997). The newest Restatement also adopts the intent theory: "[I]f specifically devised property is not in the testator's estate at death, the specific devise fails *unless* failure of the devise *would be inconsistent with the testator's intent*." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2(b) (1999) (emphasis added). However, the revised UPC requires the party opposing ademption to prove upon a showing of clear and convincing evidence, while the Restatement requires only a preponderance of the evidence. 91 AM. JUR. PROOF OF FACTS 3D 277 § 18 (2006).

curred, the revised UPC has essentially adopted the same standard that prompted the English Chancery courts to adopt the Identity Theory in the first place, due to the practical problems of determining the testator's intent.[32]

III. Will Construction and Extrinsic Evidence in Alabama

The testator's intent is the polestar of will construction in Alabama,[33] and the four corners of a testator's will control the legal effect of any dispositions.[34] In addition, the Alabama Supreme Court has held that extrinsic evidence may not be admitted to aid in will construction except to resolve a latent ambiguity.[35] A latent ambiguity does not appear upon the face of the will, but occurs only "where the language [of the will] is clear and intelligible, but when considered in light of certain extraneous facts, it takes on a multiple meaning . . . ."[36] A patent ambiguity, on the other hand, is apparent from the face of the will, and is insufficient to permit the introduction of extrinsic evidence.[37] Even where no ambiguities exist, however, the court may look to the surrounding "facts and circumstances" to aid in will construction.[38]

Evidence of the surrounding "facts and circumstances" might include, for example, the fact that the testator had an attorney present at the execution of his or her will; such evidence is admissible.[39] In comparison, extrinsic evidence is not apparent from the face of the will, and tends to alter or affect the substantive terms of the will; it may only be admitted to rectify a latent ambiguity. For example, a gift from the testator to "my favorite nephew, Bill," is a latent ambiguity where the testator had two nephews named Bill. Extrinsic evidence may be admitted to determine which nephew was intended (i.e., which nephew was testator's favorite). However, where the testator had two nephews, one named Bill and the other named

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32. *See* Note, *supra* note 25, at 742 (citing Page, *supra* note 27, at 18).

33. deGraff v. Owen, 598 So. 2d 892, 895 (Ala. 1992).

34. Ala. Code § 43-8-222 (1975) ("The intention of a testator *as expressed in his will* controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article apply unless a contrary intention is indicated by the will." (emphasis added)).

35. Martin v. First Nat'l Bank of Mobile, 412 So. 2d 250, 253–54 (Ala. 1982) ("The law states that the Court will not look beyond the 'four corners of the instrument' unless latent ambiguities exist." (citing Achelis v. Musgrove, 101 So. 670 (Ala. 1924); Gotlieb v. Klotzman, 369 So. 2d 798 (Ala. 1979))).

36. Fraley v. Brown, 460 So. 2d 1267, 1269 (Ala. 1984) (quoting Carr v. Dunn, 384 So. 2d 7, 9 (Ala. 1980) (in turn quoting Jacoway v. Brittain, 360 So. 2d 306, 308 (Ala. 1978))).

37. 11 Williston on Contracts § 33:40 (Richard A. Lord ed., 4th ed. 2008). A patent ambiguity is apparent on the face of the will, while a latent ambiguity is apparent only after the introduction of extrinsic evidence to show that a word (which on its face appears to have only a single meaning) actually has two or more meanings.

38. Parker v. Bozian, 859 So. 2d 427, 434 (Ala. 2003) (quoting First Nat'l Bank of Birmingham v. Klein, 234 So. 2d 42, 45 (Ala. 1970)).

39. *See* Baker v. Wright, 60 So. 2d 825, 829–30 (Ala. 1952).

Bob, extrinsic evidence is not admissible to determine which one was testator's "favorite." The only conclusion that can be drawn from the face of the will is that the named beneficiary, Bill, is the favorite nephew; therefore, Bill takes under the will.

IV. ALABAMA STATUTES

Alabama is in the majority of states that follow the identity theory of ademption and has codified the 1969 UPC ademption statute.[40] First, § 227(a) provides that the devisee of specific property has the right to what remains of that specific property in the testator's estate, in addition to a cash equivalent in certain, enumerated situations.[41] The commentary to this section indicates that the legislative intent was to prevent ademption in all cases involving the sale, condemnation, or destruction of specifically devised property, where the testator died before receiving the proceeds of any such disposition.[42] Next, § 226(a) provides for non-ademption in certain cases involving specific devises of securities.[43] It prevents ademption in cases where certain bonds and securities have changed in form as a result not of any action of the testator but instead of some common, enumerated business practice, such as a merger.

Granting an exception for devises which have merely changed *form* is not a novel concept in ademption cases. Securities commonly change

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40. ALA. CODE §§ 43-8-226 and -227 (1975) [hereinafter § 226 and § 227].

41. ALA. CODE § 43-8-227(a) (1975). "A specific devisee has the right to the remaining specifically devised property and:

(1) Any balance of the purchase price (together with any security interest) owing from a purchaser . . . ;

(2) Any amount of a condemnation award . . . ;

(3) Any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) Property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation."

Id.

42. ALA. CODE § 43-8-227 cmt. (1975). This situation may arise in the sale of real property, e.g., where some or all of the purchase price is still outstanding, either in a lump sum or as a result of a mortgage taken by the testator/seller.

43. ALA. CODE § 43-8-226 (1975). "If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) As much of the devised securities as is a part of the estate at time of the testator's death;

(2) Any additional or other securities of the same entity derived from the securities specifically devised and owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) Securities of another entity derived from the securities specifically devised and owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity; and

(4) Any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company . . . .

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) of this section are not part of the specific devise."

Id.

form; they may be subject to purchase options, or they may be transformed from a security in company A to a security in company B through no affirmative act of the testator. In response to this economic reality, the legislature enacted § 226 to permit such "passive" changes in form without the risk of ademption. Importantly, however, the statute applies only to the specific devise of *securities*—the Code makes no provision to prevent non-ademption in other "change of form" circumstances.[44] Therefore, under the Code, any gifts which are not specifically devised fall into the residual.[45]

V. Alabama Case Law

A. Gilmer's Legatees v. Gilmer's Executors

An early Alabama ademption case is *Gilmer's Legatees v. Gilmer's Executors*.[46] In *Gilmer's Legatees*, the Alabama Supreme Court considered whether a legacy of "twenty thousand dollars in Confederate States bonds"[47] to the testator's brother was a specific legacy subject to ademption or a general legacy to be paid out of the estate. The court determined that a two-part test should be applied—first, the inquiry should be "restricted to the legal effect of the language isolated from the context and unaffected by extrinsic circumstances, and [second, the inquiry should be considered] as influenced by the context and circumstances, which it is permissible to consider."[48]

As to the first, "legal effect" prong, the court determined that no language was used to indicate a legacy of any *particular* bonds.[49] Even if it were established that the testator had sufficient bonds to fulfill such a bequest at the time it was made, that fact alone is insufficient to make the bequest specific because of the law's preference to classify devises as general rather than specific.[50] As to the second, "context and circumstances" prong, the court first read the devise in reference to similar provisions and found the legacies to be general and, therefore, not subject to ademption.[51] Even so, the legacy failed.[52] First, the court reasoned that because any

44. *See id.*
45. *See* Ala. Code § 43-8-225 (1975).
46. 42 Ala. 9 (Ala. 1868).
47. *Id.* at 16.
48. *Id.*
49. *Id.* (Noting that language such as "'my thousand dollars of stock' [would indicate that] the thing given is individualized and specified from all others of the same class, and the legacies are specific.").
50. *Id.* Although, combined with other context and circumstances, it may be sufficient.
51. *Id.* at 16–17.
52. *Id.* at 21–22. First, the court notes that in other parts of the will, terms of art seemed to have been deliberately chosen in order to make those bequests specific, which were not used in this bequest. Secondly, the testator purported to bequeath more bonds than he possessed at the time of his death.

payment in Confederate States bonds would be entirely worthless, the legacy must fail. In response, the legatee argued such a result would be contrary to the testator's intent, because by granting him a legacy which had significant value at the time it was made, the testator must have intended to provide something for his brother, the legatee.[53] The court admitted that the bonds' complete loss of value clearly defeated the testator's intent to provide for his brother; it nonetheless held that "it is not for a court employed in the construction of a will to make [it] conformable to some vague conjecture of what the testator *would* have done, had he survived the annihilation of the value of the bonds."[54]

B. Willis v. Barrow

In *Willis v. Barrow*, the testator devised "the money owned by me which is on deposit in the Troy Savings Bank of Troy, New York."[55] A few weeks before his death, the testator transferred the funds from the Troy Savings Bank to a new, distinct account with the First National Bank of Mobile.[56] The court held that, because the gift of "the money owned by me" did not name any particular *amount* of money, it was a specific devise.[57] Therefore, applying the identity theory, it appears that an ademption would result because the testator did not own any money in the Troy Savings Bank at the time of his death. Further bolstering this position is the fact that the testator took an affirmative action in transferring the money from one bank to another.

The Alabama Supreme Court came to a different conclusion, however. First, the court noted that "[t]he authorities are much in conflict as to whether the intention of the testator in his subsequent acts is to be sought in passing upon the question of ademption."[58] Declining to decide upon whether it would be appropriate to consider the testator's intent, the court

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After noting that there was no assertion that the testator owned more railroad bonds at the time he executed his will than at the time of his death, the court concluded that the language employed in the legacy must be general; in addition, because the testator did not own the number of railroad bonds he purported to bequeath, it could not be inferred that the testator intended a specific devise. Finally, because the language used in bequeathing the railroad bonds was essentially the same as that used to bequeath the Confederate bonds, they must be given the same construction. Therefore, the legacy of the Confederate bonds was general, and as a result not subject to ademption.

53. *Id.* at 22.

54. *Id.* (emphasis added).

55. Willis v. Barrow, 119 So. 678, 680 (Ala. 1929).

56. *Id.*

57. *Id.* ("Not the *amount* of money, but *the money specified* is to go to the beneficiaries named.") (emphasis added). The devise was not to pay a sum of money from the entire estate (a general devise), nor was it to pay a sum of money from a particular fund (a demonstrative devise). Rather, the devise was a specific devise of whatever money the testator owned in his account with Troy Savings Bank at the time of his death.

58. *Id.* at 681 (citing 28 R.C.L. 344, § 338; Elwyn v. De Garmendia, 128 A. 913 (Md. 1925)); *see also infra,* note 71 and accompanying text.

stated that it would "limit [the] inquiry as to the intent of the will itself."[59] Second, the court determined that the fact that the testator kept the fund intact and discreet from his other funds in the First National Bank of Mobile (which he had recently appointed the executor of his estate) was important in identifying the devise as a separate, specified thing rather than a mere sum of money.[60] Therefore, the terms of the devise merely described the *place* where the gift itself (the fund) could be located. Because wills are ambulatory and do not speak until the death of the testator, the court determined that mere matters of description need not be read in connection with the location of the gift at the time of the testator's death.[61]

C. Ullman v. First National Bank of Mobile

The Supreme Court of Alabama undertook ademption again three decades later in *Ullman v. First National Bank of Mobile*.[62] There, the court was faced with determining whether a devise of certain government bonds was specific or general.[63] The testator had bequeathed thirty distinct $1,000 bonds to the devisee in a will executed in January of 1959, fifteen of which were issued by Mobile County.[64] Upon the testator's death five months later, ten of the Mobile bonds had been called so that the testator only owned five of them at the time of his death.[65] Because the court determined that the descriptions of the Mobile bonds, which included the issuing agency, the number, and the face value of each, sufficiently "described and distinguished [the bonds] from all other articles or parts of the same as to be capable of being identified," the court concluded that the bequest was specific.[66]

In a brief discussion, the *Ullman* court makes it clear that whether a devise has been adeemed does not depend upon the testator's intent.[67] The court goes on to state that

> [i]t appears to be the general rule that if, after making a specific bequest of corporate stock or securities, the testator sells or otherwise disposes of the subject matter of the bequest and does not

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59. *Id.*
60. *Id.*
61. *Id.* ("[T]he probate of the will as necessary evidence relates back to [the testator's death]. It does not follow that in making a specific bequest matters of description are to be referred to the date of death.").
62. 137 So. 2d 765 (Ala. 1961).
63. *Id.* at 766.
64. *Id.*
65. *Id.*
66. *Id.* at 767.
67. *Id.* at 768 (quoting Matter of Brann, 114 N.E. 404, 405 (N.Y. 1916)) ("Ademption has no relation to the intention of a testator. 'What courts look to . . . is the fact of change. That ascertained, they do not trouble themselves about the reason for the change.'").

> acquire other stock or securities answering as well to the language of gift, an ademption occurs *without regard to what may have been the intent concerning ademption*, and in such case, the legatee has no valid claim on the proceeds of the sale or disposition. If the stock or securities designated are not only not a part of the testator's estate at his decease but are actually non-existent, ademption ordinarily occurs *without regard to any matter of intent*, and the legatee has no valid claim on proceeds or anything purchased therewith.[68]

With this statement the court in *Ullman* clearly proclaims the intent theory to be the rule in Alabama. Because the specifically devised bonds were not a part of the testator's estate at death, the gift of the ten Mobile bonds was adeemed, and the legatee received only the remaining bonds which had not been called.[69]

The ultimate result of *Ullman* is somewhat harsh, however, in that ademption occurred because the bonds were called by their issuer during the few months after the will was executed but prior to the testator's death. It is entirely plausible that the testator merely did not have the opportunity to modify or correct the will in such a short period of time. Today, this problem might be avoided under § 226.[70] Even so, the non-ademption provision applies only where the securities are no longer part of the testator's estate as a result of the exercise of purchase options, or because the securities have changed form due to merger or consolidation, or where the securities have been disposed of by an investment company as a part of the testator's investment plans.[71] Other distributions of specifically devised securities are still adeemed.[72]

D. Matthews v. Matthews

While proclaiming that the "law with respect to ademption of a bequest is well settled" the Alabama Supreme Court further clouded ademption law in *Matthews v. Matthews*.[73] There, the testator devised "150

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68. *Id.* (emphasis added). While this case preceded the adoption of § 226, which would prevent ademption in certain cases involving securities, it appears that the general discussion of ademption law in Alabama would still apply as to cases in which the statute does not prevent ademption. *See* ALA. CODE § 43-8-226 cmt. (1975). *See also* Matthews v. Matthews, 477 So. 2d 391, 394 (1985) (Where shares of stock which were specifically devised had been redeemed by the corporation prior to the testator's death, and where those shares did not qualify for one of the enumerated exceptions under § 226, the devise was adeemed and fell into the residue under Alabama Code § 43-8-225 (1975)).

69. *Ullman*, 137 So. 2d at 768.

70. *See* ALA. CODE § 43-8-226 (1975); *see also supra* notes 41–43 and accompanying text.

71. ALA. CODE § 43-8-226(a)(2)–(4) (1975).

72. *See id.* §§ 43-8-225 and -226(b).

73. 477 So. 2d 391, 393 (Ala. 1985).

shares of preferred stock in Litton Industries."[74] Prior to the testator's death, however, the shares had been redeemed by the issuing company. After reading the devise in the context of the remainder of the will, the court found it to be specific. Because no securities matching the description of the devise remained in the estate at the testator's death, the court determined that the gift was adeemed under § 226, and as a result fell into the residue as required by § 225.[75] In the dissent, Justice Maddox argued that a bequest of a quantity of stock in a large, publicly-held corporation was not specific enough to indicate a specific bequest. After comparing the detailed description of the bonds at issue in *Ullman* to the more general description in the case before the court, the dissent concluded that the majority's holding "seem[ed] to mean that, in Alabama, all gifts of stock are specific."[76]

VI. *PARKER V. BOZIAN*

In *Parker v. Bozian*[77] the court departed dramatically from its prior position in *Matthews*. The testator in *Parker* devised "my CD Account # . . . 1274 with the First Bank of Dothan" to Bozian, the appellee.[78] Parker, the appellant, was the executor and residuary devisee of the estate. The certificate of deposit in question, (hereinafter "CD 1274") was for a six-month term at a rate of 4.5%, and contained an automatic renewal provision. At the date of maturity, however, the testator went to the bank and used the funds from CD 1274 to fund two new CDs, (CD 2843 and 2844, respectively) in equal amounts for a twenty-four-month term at a 7% rate of return. Therefore, upon the testator's death, CD 1274 had been replaced by CDs 2843 and 2844. The executor, Parker, filed a declaratory judgment action to determine who should receive the funds from CDs 2843 and 2844. She argued that because CD 1274 was not in existence at the time of the testator's death, the specific gift to Bozian was adeemed, and the proceeds from the two subsequent CDs should fall into the residuary. Bozian, on the other hand, argued that no ademption had occurred because (a) the money from CD 1274 was merely used to fund the new CDs in order to obtain better returns, (b) the subsequent CDs were part of the testator's same portfolio as CD 1274, and (c) the renumbering was merely for the convenience of the bank. At a bench trial, the trial court judge heard *ore tenus* evidence, and found that no ademption had occurred.[79]

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74. *Id.* at 393.
75. *Id.* at 394; *see also* ALA. CODE §§ 43-8-225 and -226 (1975).
76. *Matthews*, 477 So. 2d at 396 (Maddox, J., dissenting).
77. 859 So. 2d 427 (Ala. 2003).
78. *Id.* at 430.
79. *Id.* at 429–30.

Under the *ore tenus* rule, a trial judge's findings of fact in a bench trial are presumably correct, and "a judgment based on those findings will not be reversed unless the judgment is unsupported by the evidence or is plainly and palpably wrong."[80] However, there is no presumption of correctness applied to the trial judge's conclusions of law, or where the judge has incorrectly applied the law to the facts.[81] Accordingly, Parker, the executor, argued that the trial judge incorrectly applied the law.

The supreme court's analysis begins with the basic rule of will construction that "[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions."[82] In order to determine intent, "the court must look to the four corners of the instrument, and if the language is unambiguous and clearly expresses the testator's or testatrix's intent, then that language must govern."[83] However, the court also notes that a testator's intent may be "ascertained not only by the writing itself, but from the light of attending facts and circumstances."[84] In stating the standard for determining the testator's intent, the court made no attempt to reconcile the mandatory "four-corners" language with the permissive use of attending "facts and circumstances." While the four-corners requirement applies so long as there is no ambiguity, the use of attending facts and circumstances is subject to no such limiting language.[85]

First, the supreme court determined that the bequest was specific, but nonetheless declined to find that an ademption had occurred. The court framed the issue as follows: "[H]as the specific legacy of the [CD] adeemed because an account designated by a specific number in the will did not exist at the time of the testatrix's death because the testatrix had transferred the funds from that account into two certificate-of-deposit accounts?"[86] In answering this question in the negative, the court chose not to follow the precedent of cases such as *Gilmer's Legatees* and *Matthews*, but instead distinguished *Parker* on the facts.[87]

In distinguishing the case on the facts, the *Parker* court summarily stated that "[i]n each of the above-cited cases, the testator had taken *action* that caused the bequest to adeem."[88] However, that statement is not entire-

80. *Id.* at 433.
81. *Id.* at 434 (citing Griggs v. Driftwood Landing, Inc., 620 So. 2d 582, 586 (Ala. 1993)).
82. *Id.* (quoting ALA. CODE § 43-8-222 (1975)).
83. *Id.* (quoting Cottingham v. McKee, 821 So.2d 169, 171–72 (Ala. 2001)).
84. *Id.* (quoting First Nat'l Bank of Birmingham v. Klein, 234 So. 2d 42, 45 (Ala. 1970)).
85. *See id.* at 434–35.
86. *Id.* at 435–36.
87. Interestingly, the *Parker* opinion was authored by Justice Maddox (retired by that time), who was also the author of the dissenting opinion in *Matthews*. *See Parker*, 859 So. 2d at 429–39, *and* Matthews v. Matthews, 477 So. 2d 391, 395–96 (Ala. 1985) (Maddox, J. dissenting).
88. *Parker*, 859 So. 2d at 438 (emphasis added) (distinguishing the facts of *Matthews v. Matthews*, 477 So. 2d 391 (Ala. 1985) (*see supra* notes 73–77 and accompanying text), *Gilmer's Legatees v. Gilmer's Executors*, 42 Ala. 9 (Ala. 1868) (*see supra* notes 46–54 and accompanying text), and Carter v. First Nat'l Bank of Opp, 185 So. 361 (Ala. 1938) (*see infra* note 92)).

ly accurate. For example, in *Matthews*, the devise of 150 shares of stock was a specific devise which, in Justice Maddox's own words, "had been redeemed *by the corporation* and were not a part of the estate."[89] Such a redemption of shares by a corporation is an action imposed upon shareholders, not an affirmative action taken by the testator. Similarly, in *Gilmer*, the devised Confederate bonds were technically a part of the estate, but were worthless at the time of the testator's death.[90] It seems highly unlikely that the testator in *Gilmer* sabotaged the Confederate treasury in order to surreptitiously work an ademption upon his brother. While the testator in *Carter* did affirmatively add his second child as a named beneficiary to a life insurance policy, the actual dispute arose from the testator's *inaction* in failing to update his will to reflect that change.[91]

Interestingly, the court disregarded the most factually similar case, *Willis v. Barrow*,[92] in which the court found that the moving of devised funds from one bank to another did not cause an ademption because the name of the bank was "merely descriptive."[93] Furthermore, because CD 1274 contained an automatic renewal provision, the CD would have renewed for an additional six-month term but for the testator's action in splitting it in order to obtain a better rate of return.[94] Therefore, had the testator not acted at all, CD 1274 would have continuously renewed for six-month terms until her death; instead, she affirmatively acted to stop the automatic renewal.

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89. *Id.*

90. *See id.* (construing *Gilmer's Legatees*).

91. *See Carter*, 185 So. at 361–63. The testator's will provided that his daughter had been named beneficiary of a life insurance policy in lieu of any other bequest. The testator, a widower, subsequently remarried and had a son, who was added as a co-beneficiary to the policy; however, the will was not updated to reflect this. The court held that the son and daughter share equally notwithstanding the will provision. *Id.* at 363. Important in the court's decision, however, is the fact that the insurance policy was non-probate property (i.e., property that would not be part of the testator's probate estate in the absence of a will). *Id.*

92. 119 So. 678 (Ala. 1929). *See* discussion *supra*, Part V(B).

93. *Id.* at 681 ("It does not follow that . . . matters of description are to be referred to the date of death."). The *Parker* court did conclude that CD 1274 was renumbered for the convenience of the bank, but it did not cite *Willis* in support of its ultimate conclusion. *See Parker*, 859 So. 2d at 438.

94. *Parker*, 859 So. 2d at 431 (testimony of bank officer Lisa Merritt):

> Q. CD 1274, it ended on March 16, 2000; is that correct?
>
> A. That's when we changed it over and split it, yes.
>
> Q. Yes, ma'am. And you split it at [the testator's] direction; is that right?
>
> A. Right.
>
> Q. That's not something the bank did automatically; it's not something the bank did on its own?
>
> A. Right.

A. Review of Persuasive Authority

The *Parker* court next examined persuasive authority from other states to aid in its analysis. In *Sammons v. Elder*,[95] the Texas Court of Appeals upheld the trial court's finding that a bequest of the testator's "savings account and/or savings certificate" was not adeemed, even though the estate's inventory listed only checking accounts, CDs, money market accounts, and individual retirement accounts.[96] The appellate court found that the trial court properly determined the will to be ambiguous, and therefore admitted extrinsic evidence.[97] In addition, the funds which were actually part of the estate fell within the definition of "account" as defined by the Texas Probate Code.[98] Therefore, the finding of ambiguity, combined with the fact that the funds were "accounts," permitted the trial court to properly consider extrinsic evidence of how the testator intended to use those accounts or certificates.[99] Absent such a finding, however, extrinsic evidence would not have been permitted.[100] *Sammons* is clearly distinguishable from *Parker*, however, in that *Parker* includes no preliminary finding of ambiguity—as a result, extrinsic evidence should not properly have been admitted.

Other cases cited as persuasive authority are distinguishable as well. In *Chandler v . Owen*, [101] the testator's will provided that her home be sold at auction, and the proceeds be invested in government bonds, which in turn would pass to her nieces. Prior to her death, the testator's home was sold and the proceeds, combined with additional funds, were used to purchase a CD. Two key factors, however, distinguish that case from *Parker*. First, the court notes that "[w]here the will devises property *and proceeds from its sale*, the testator's intention in this regard is sufficiently clear that ademption should not lightly be found for technical reasons."[102] Secondly, and perhaps most importantly, the Georgia legislature has enacted a specific provision to prevent ademption where specifically devised property is not part of the estate at death, but where such property was replaced by

95. 940 S.W.2d 276 (Tex. Ct. App. 1997).
96. *Id.* at 279.
97. *Id.* at 280.
98. The term "account" is defined "to mean a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement." *Id.* at 281–82.
99. *Id.* at 281
100. *Id.*
101. 209 S.E.2d 618 (Ga. 1974).
102. *Id.* at 620 (emphasis added); *see also* Gist v. Craig, 141 S.E. 26, 41 (S.C. 1927) ("A distinction is drawn . . . between a devise or legacy of specific property and a legacy of the proceeds from the sale of the property. The rule of ademption is applied more stringently to the first class."). *Gist* is discussed in *Parker v. Bozian*, 859 So. 2d 427, 437 (Ala. 2001).

substantially similar property prior to the death of the testator.[103] Alabama has no such statute.

B. The Form and Substance Test

Where a devise may be subject to ademption because of a change in the property, the form and substance test looks to whether such property has changed in substance or merely in form; a mere change in form does not result in ademption.[104] In *Pepka v. Branch*,[105] the Indiana Court of Appeals provided a thorough analysis of the development of ademption theory up to that point. In that case, the Indiana court expressly adopted the identity theory of ademption in favor of an intent-based analysis.[106] Therefore, under the form and substance test, the testator's intent to adeem is not controlling. Instead, the court

> confines the task to ascertaining whether the specific subject matter of the bequest is still in existence. If there has only been a formal change in the bequest since the execution of the will, there is no ademption; but if the specific thing has changed in substance, the legacy is adeemed.
>
> This . . . test ignores the intention of the parties and is the majority rule.[107]

Importantly, while the intention of the testator is not controlling under this analysis, it is not irrelevant. Instead, its relevance is limited to the four corners of the will, in order to "determine the identity or exact thing which is the subject matter of the bequest at the time of the execution of the will."[108] Therefore, the key inquiry is *not* whether the testator, by changing the form of the devise, intended to work an ademption. Instead, *Pepka* seems to stand for the proposition that ademption does not occur where a mere change in form is so immaterial that the property that re-

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103. See Chandler, 209 S.E.2d at 619 (discussing former GA. CODE. ANN. § 53-2-106 (replaced by GA. CODE. ANN. § 53-4-67)). In this case, the bequest is merely substituting one kind of bond (a government bond), for another (a CD), which, in either case, was funded with the proceeds of the sale of the home.

104. *See* 91 AM. JUR. PROOF OF FACTS 3D § 23 (2006).

105. 294 N.E.2d 141 (Ind. Ct. App. 1973).

106. *See id.* at 151–52.

107. *Id.* at 152.

108. *Id.* at 153 (emphasis omitted). S*ee also* Estate of Mayberry v. Mayberry, 886 S.W.2d 627, 630–31 (Ark. 1994) (Ademption occurred where specifically devised savings account was closed, commingled with other funds, and used to open a CD. Held, that "in ademption cases our primary aim is to determine and give effect to the testator's intention. However, in most instances a determination of whether a change in the gift's form or substance occurred will decide the issue of what the testator intended. Here, there was a change in substance.").

mains in the testator's estate at death is substantively the *same property* as that described in the will. However, this determination is made from the terms of the will itself, and not through an examination of why the change in form or substance occurred. Additionally, it is important to note that the mere fact of change does not itself give rise to a latent ambiguity sufficient to permit the examination of extrinsic evidence.[109] Therefore, the reasoning behind a testator's decision to alter the form of property which is the subject of a specific devise is immaterial. All that matters is whether such an alteration so changed the property that it may be said that the specific property is not part of the estate, and is therefore adeemed.[110]

Although the opinion is not entirely clear, the Alabama Supreme Court in *Parker* also appears to have cited *Pepka* for a proposition for which it does not stand. The *Parker* court discussed *Pepka* in reference to an *American Law Reports* article. After a brief discussion of that case, it cites a portion of the A.L.R. annotation to support its decision. The A.L.R. article, however, does not cite the *Pepka* case in that section; in fact, it appears that the section cited is a discussion of the *opposite* position.[111]

C. The Ore Tenus Rule

As the Alabama Supreme Court's review of the *ore tenus* evidence admitted before the trial court demonstrates, evidence of the circumstances surrounding both the creation of CD 1274 and the two subsequent CDs was admitted and considered, as was evidence of the relationship between the testator and the parties to the suit. While the polestar of will construction in Alabama is to ascertain and give effect to the testator's intent, "the principle . . . does not mean that parol evidence can be introduced to show

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109. *Pepka*, 294 N.E.2d at 154 ("The parol and extrinsic evidence rule should not be destroyed in the name of ademption."). In addition, it would appear that no patent ambiguity exists where the will devises a specific, numbered bank account. *See* Church v. Morgan, 685 N.E. 2d 809, 811–12 (Ohio Ct. App. 1996) (The court held that even though testator subsequently moved funds from bequeathed account to a CD the same day that the will was executed, no patent ambiguity existed. Therefore, it was error for the trial court to admit extrinsic evidence of the circumstances surrounding the transfer.).

110. The *Pepka* Court offers three reasons to support its conclusion that extrinsic evidence of the testator's intent should not be considered: (1) such a rule is overbroad, vague, and without sufficient limitations; (2) allowing specific devisees to defeat ademption by proving intent through extrinsic evidence works to the detriment of general legatees; and (3), such a rule emasculates both the parol evidence rule and the will statutes, which require certain formalities to prevent fraud and perjury. *See Pepka*, 294 N.E.2d at 153–54.

111. *See* Parker v. Bozian, 859 So. 2d 427, 437 (Ala. 2003) (discussing *Pepka* as it appears in Phillip E. Hassman, Annotation, *Ademption of Legacy of Business or Interest Therein*, 65 A.L.R. 3D 541, 544 § 5(b) (1975)). While the A.L.R. article cites *Pepka* in several sections, it is not cited for support in § 5(b), which is quoted by the court. *See Hassman*, *supra.* In contrast, § 5(b) discusses a California case, *In re Creed's Estate*, 63 Cal. Rptr. 80 (Cal. Ct. App. 1967), in which the court held that mere change in form of property which is the subject of a specific devise does not result in ademption, absent a showing of testator's intent to adeem through examination of extrinsic evidence. *See Hassman*, *supra*, § 5(b).

that the will means something different from the ordinary intendment of its words."[112] To the contrary, "[e]xtrinsic evidence is not admissible to vary, contradict or add to the plain and unambiguous language of the will."[113]

The key question, therefore, is whether the *ore tenus* testimony taken at trial and reviewed by the supreme court is merely evidence of the facts and circumstances surrounding the will—which is admissible—or whether it is extrinsic evidence, which is inadmissible absent a finding of a latent ambiguity. The description in the will of "my CD Account # . . . 1274 with the First Bank of Dothan" is not facially ambiguous, and the court makes no finding of ambiguity, patent or latent. The court did undertake a detailed review of the *ore tenus* evidence taken at trial, including lengthy quotations of the transcript in footnotes.[114] While a review of *ore tenus* evidence is appropriate on appeal to determine, *inter alia*, whether the trial court correctly applied the law to the facts, the supreme court did not question whether such evidence was properly admitted in the first instance. In this case, without the evidence admitted by the trial court, the description of the CD is clearly unambiguous—it is only when the extrinsic evidence of the testator's intent is introduced that a potential latent ambiguity becomes apparent. Nonetheless, the supreme court upheld the trial court's findings under the auspices of the *ore tenus* rule without addressing whether any ambiguity existed at all. The proper analysis, therefore, is not whether the trial court's finding of fact based upon that *ore tenus* evidence was "plainly or palpably wrong," but whether such evidence should have been admitted in the first place.[115] Because the trial court did not properly apply the law to the facts, its findings are not subject to the protective cloak of the *ore tenus* rule.

VII. THE SOLUTION

In the scope of the law of wills and trusts, ademption is a relatively obscure topic. Even so, when ademption occurs, the results can devastate even the clearest intentions of a testator. As a result, it is important to know what kinds of actions will result in ademption; predictability helps the testator to confidently bequeath his property. The clearest way to resolve the problem is for the legislature to enact additional non-ademption provisions that either enumerate specific exceptions or categorically de-

112. Cook v. Morton, 47 So. 2d 471, 474 (Ala. 1950).
113. *Id.*
114. *See Parker*, 859 So. 2d at 431–34.
115. If the *ore tenus* evidence taken by the trial court were admissible, it seems reasonable to find that the trial court's findings were not "plainly and palpably wrong" and should therefore survive appellate scrutiny. Such a finding is not appropriate, however, where the trial court did not properly apply the law to the facts—in this case, by failing to apply the patent ambiguity prerequisite before admitting extrinsic evidence.

scribe particular situations (e.g., a mere change in name or form) in which ademption does not occur.[116] As discussed *infra*, statutes are already in place providing for non-ademption in enumerated instances.

Even without legislative action, however, it may be possible for a drafting attorney to include a non-ademption provision as part of standard will language. While there does not appear to be any authority addressing the validity of such a provision, a provision providing for non-ademption under specific circumstances would certainly serve to clarify the testator's intent. The problem with this solution is that the transactional costs of drafting a will are increased each time an additional contingency must be provided for. In addition, it provides no relief for the unwary drafter who fails to include such a provision. In the case of ademption, the added cost may be substantially outweighed by the relatively remote chance that an ademption will ever occur.

The most efficient solution is judicial action. In order to clarify the standards for ademption, the court must first and foremost comply with the relevant "elementary principles" of will construction in Alabama:

> (1) The testator's intent, as expressed in his will, controls the legal effect of his dispositions;
>
> (2) The intention of the testator is the "polestar" of will construction;
>
> (3) To determine testator's intent, the court must look to the four corners of the will; that language governs so long as it is unambiguous and clearly expresses the testator's intent;
>
> (4) However, the testator's intent may be ascertained not only by the four corners of the writing itself, but from the light of attending facts and circumstances as well.
>
> (5) The court should consider the instrument as a whole.
>
> (6) The will should be construed to uphold rather than defeat bequests.[117]

Of the elementary principles discussed, only (3) and (4) concern what evidence the court must consider when determining the testator's intent: the four corners of the document (which controls if unambiguous) and the

116. *See, e.g.*, ALA. CODE § 43-8-226 (1975).

117. *Parker*, 859 So. 2d at 434–35 (citing a summary of "elementary principles of law" as discussed in Cottingham v. McKee, 821 So. 2d 169, 171–72 (Ala. 2001) (summary includes other principals not relevant in this discussion, and omitted above)).

"attending facts and circumstances." In *Parker*, the provision in the will describing CD 1274 was not ambiguous on its face. However, it is possible that the term was latently ambiguous if, "when considered in light of certain extraneous facts, it takes on a multiple meaning . . . ."[118] Therefore, all the court had to do to properly admit extrinsic evidence was to determine that the term "CD 1274," when considered in light of extraneous facts, took on a multiple meaning. However, the court did not discuss any potential ambiguities. It is possible that in its analysis, the court came to a conclusion inconsistent with such a result: even in light of the extraneous facts, the term "CD 1274" cannot be reasonably construed to mean anything other than the certificate of deposit, number 1274, owned by the testator and on deposit at the First Bank of Dothan, Alabama. The specificity of the description as well as the numbering of the CD is problematic in attempting to find an ambiguity, because the description is incapable of any other interpretation.[119]

As a result, the court merely found that CD 1274 still "existed"—that is, that the unambiguous term "CD 1274" *actually* described CDs 2843 and 2844.[120] The court justified this result under the *ore tenus* rule. Because the trial court heard extrinsic oral testimony regarding the reasons for splitting CD 1274, its decision based on such testimony, the court reasoned, is entitled to a presumption of correctness. However, the supreme court did not discuss the issue of ambiguity or the admission of the evidence in the first place.[121] It is difficult to reconcile this result with the axiomatic principle that "[e]xtrinsic evidence is not admissible to vary, contradict or add to the plain and unambiguous language of the will."[122]

To resolve this problem, a new test should be articulated to ascertain what evidence constitutes mere "facts and circumstances" surrounding will construction, and what evidence is "extrinsic." Of course, by strict definition, all "facts and circumstances" evidence is "extrinsic." Therefore, a test which attempts to enumerate what kinds of evidence fall into each category would be unwieldy and impractical. As a result, the test should define general parameters to guide trial court judges in determining what

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118. Fraley v. Brown, 460 So. 2d 1267, 1269 (Ala. 1984) (quoting Carr v. Dunn, 384 So. 2d 7, 9 (Ala. 1980) (in turn quoting Jacoway v. Brittain, 360 So. 2d 306, 308 (Ala. 1978))).

119. While the court found that CD 1274 was renumbered into the two subsequent CDs, it determined that the numbering system was merely "for the convenience of the bank." *Parker*, 859 So. 2d at 438. Regardless, the court did not consider this renumbering to create an ambiguity. *See id.* at 438–39.

120. *See* Coxwell, *supra* note 2, at 330–31.

121. A slight window of opportunity may remain to contest such evidence, however. The court notes that the extrinsic evidence of the testator's intent was admitted without objection at trial. *Parker*, 859 So. 2d at 438–39. Had a timely objection been made, it is possible that the outcome would have been different. *See id.*

122. Cook v. Morton, 47 So. 2d 471, 474 (Ala. 1950).

evidence they may consider. For example, extrinsic evidence might include evidence which, if introduced, would alter the fundamental terms of the document or even defeat the testator's intent as apparent from only the four corners of the document. Such evidence, under the current rule, is already admissible upon a showing of latent ambiguity. On the other hand, mere "facts and circumstances" evidence should include evidence which is only incidental to effectuating the testator's intent—for example, evidence that will formalities were properly executed, or that the testator's attorney was present at the execution of his or her will. This kind of evidence merely upholds the testator's intent as expressed in the terms of his or her will, especially in the face of a will contested due to a relatively minor or technical error.

VIII. CONCLUSION

The current rule under *Parker* casts a great deal of doubt onto what kinds of actions will cause an ademption in Alabama. Because of the concern over what evidence might be admissible to prove an ademption, testators should review the status of their will each time specifically devised property is disposed of, moved, or changes in name or form. Especially in the case of financial products which do not fall under the specific non-ademption provision of Alabama Code § 226, a testator should be wary of the potential effect that any change to the property might have. On the other hand, a testator who attempts to work an ademption of a financial product by altering, moving, or otherwise disposing of it would be well-advised to update his or her will to reflect that change. Until it becomes more clear what evidence may be introduced to contest a will in an ademption case, the best way to avoid the introduction of extrinsic evidence is to alter or amend a testamentary instrument to ensure, where possible, that the testator's intent is clearly expressed and patently unambiguous. Obviously, continuously updating a will can be impractical. A more cost-effective solution would be to avoid specific devises where possible by using language tending to describe a devise as general. Whatever solution is chosen, devises of specific property which are likely to change in form, substance, or description should be avoided. Due to the current uncertain standard for evaluating ademption by extinction in Alabama, an adequate measure of predictability is not in place to justify reliance on such provisions.

Raley L. Wiggins[*]

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* J.D., *cum laude* 2010, University of Alabama School of Law; B.A. in Music, 2005, Birmingham-Southern College. The author would especially like to thank his attorney parents, Ann and Steve Wiggins, for their steadfast patience, love, and support.