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Statutes - Retroactive Application of the 1980 Wyoming Probate Code - Douglas v. Newell

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STATUTES—Retroactive Application of the 1980 Wyoming Probate Code. *Douglas v. Newell*, 719 P.2d 971 (Wyo. 1986).

Elizabeth Newell executed her final will in 1969 in Mitchell, Nebraska. In Article II of her will, Mrs. Newell devised all her real estate to her husband if he survived her. That provision, however, excluded any interest she owned in a portion of real estate located in Converse County, Wyoming. If Mrs. Newell's husband predeceased her, which he did, then Article III of the will devised all her property to a testamentary trust. Article III failed to exclude the Converse County property. Article X of the will devised the Converse County property to two nieces and two nephews.¹

In 1980, Mrs. Newell and the owners of the remaining interests in the Converse County property sold the property on a contract for deed. Mrs. Newell died in 1982 with three annual payments remaining on the contract.²

Two nieces and a nephew of Mrs. Newell named in Article X brought an action for a declaratory judgment. The nieces and nephews alleged that the devise of the Converse County property did not adeem when Mrs. Newell sold the property.³ The beneficiaries of the testamentary trust contended that Article X lapsed when Mr. Newell died.⁴ The beneficiaries further argued that, if Article X did not lapse, then Mrs. Newell intended the devise to adeem when she sold the property.⁵ The trial court ruled that Article X did not lapse upon Mr. Newell's death, and that the devise contained in Article X adeemed.⁶ The court's holding gave the trust the remaining payments from the sale.

On appeal, the Wyoming Supreme Court unanimously affirmed the ruling that Article X of Mrs. Newell's will did not lapse when her husband died.⁷ The court then reversed the trial court on the question of ademption. The court refused to adopt the doctrine of ademption by extinction.⁸ The court also held that the 1980 Wyoming Probate Code applies to wills executed before the effective date of the Code, when the date of the testator's death is after the Code's effective date. The court stated that the code would apply retroactively unless such an application would

1. *Douglas v. Newell*, 719 P.2d 971, 972 (Wyo. 1986).

2. *Id.*

3. *Id.* A devise of specific property adeems when the testator's ownership of the property is extinguished during the testator's lifetime. In re Estate of McClow, 290 N.W.2d 186, 188 (Neb. 1980). (Adeem means to remove or take away a gift by will prior to death. *Woodburn Lodge No. 102, I.O.O.F. v. Wilson*, 148 Or. 150, 34 P.2d 611, 614 (1934)).

4. *Douglas*, 719 P.2d at 972-73. Mrs. Newell's grandsons argued that Article X was an exception to the devise of property to Mrs. Newell's husband contained in Article II, but not to the devise of property to the trust contained in Article III. They argued that Article X of the will expired with Article II upon Mr. Newell's death. Brief of Appellants at 14-15, *Douglas v. Newell*, 719 P.2d 971 (Wyo. 1986) (No. 85-106).

5. Brief of Appellees at 29, *Douglas v. Newell*, 719 P.2d 971 (Wyo. 1986) (No. 85-105).

6. *Douglas*, 719 P.2d at 972.

7. *Id.*

8. *Id.* at 975.

adversely affect existing vested rights.⁹ Thus, the court held that, under the 1980 Code, the remaining balance due on the contract passed to Mrs. Newell's nieces and nephews under Article X.¹⁰

This casenote focuses on the retroactive application of the 1980 Wyoming Probate Code. The Wyoming Supreme Court retroactively applied the Code without the required statutory authorization. The court's holding disregarded Mrs. Newell's right to rely on the laws in existence at the time she executed her will.

BACKGROUND

Wyoming grants legally competent individuals an "absolute right" to dispose of their property at death by will.¹¹ If a will is clear and unambiguous, a court will not look beyond the language of the will to determine the testator's intent.¹²

If, however, a testator's intent is not clear, a court will use rules of construction to determine the testator's intent and give it effect.¹³ Courts developed these rules of construction to give effect to the intent of the average testator.¹⁴ Some states have codified and changed rules of construction in efforts to modernize probate law.¹⁵ In addition to using rules of construction, courts also consider surrounding circumstances when determining a testator's intent.¹⁶

The 1980 Wyoming Probate Code

The legislature enacted the 1980 Probate Code to modernize Wyoming probate law.¹⁷ The Code stated that its effective date was in 1980 and that its procedures would apply to all probate proceedings brought after the effective date.¹⁸

9. *Id.* at 980. In holding that the Probate Code provisions apply to all wills where the date of death is after the effective date of the Code, the court relied on WYO. STAT. § 2-1-102(d) (1977, Rev. 1980), which states: "The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of this code."

10. *Douglas*, 719 P.2d at 982. WYO. STAT. § 2-6-109(b)(i) (1977, Rev. 1980) provides: "(b) A specific devisee has the right to the remaining specifically devised property, and: (i) Any balance of the purchase price together with any security interest owing from a purchaser to the testator at death by reason of sale of the property."

11. *In re Lane's Estate*, 50 Wyo. 119, 135, 58 P.2d 415, 419 (1936). The Wyoming Probate Code explicitly recognizes that right. WYO. STAT. § 2-6-101 (1977, Rev. 1980) provides: Any person of legal age and sound mind may make a will and dispose of all his property by will except what is sufficient to pay his debts, and subject to the rights of the surviving spouse and children.

That right must, however, be exercised in accordance with the law. *In re Lane's Estate*, 50 Wyo. at 135, 58 P.2d at 419.

12. *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983); *Churchfield v. First Nat. Bank of Sheridan*, 418 P.2d 1001, 1003 (Wyo. 1966).

13. 4 PAGE, WILLS (Bowe-Parker Revision 1961) § 30.4 at 12, 13.

14. *Id.* at 15.

15. *See, e.g.*, WYO. STAT. §§ 2-1-101 to 2-1-405 (1977, Rev. 1980).

16. *First Nat. Bank & Trust Co. of Wyo. v. Finkbiner*, 416 P.2d 224 (Wyo. 1966).

17. *Douglas*, 719 P.2d at 974-75.

18. WYO. STAT. § 2-1-102(d) (1977, Rev. 1980) provides: "The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of this code." The

The 1980 Probate Code attempts to modernize and clarify the rules of will construction.¹⁹ The Code, however, recognizes that the testator's intent "controls the legal effect of his dispositions,"²⁰ and the statutory rules of construction apply to the extent they effectuate that intent. If the Code does not address specific construction problems, the common law rules of construction apply.²¹

The common law rule of ademption by extinction is one rule of construction addressed by the Code. At common law, ademption by extinction is a "rule of construction that, when a specifically devised item of property is not part of the testator's estate at the time of his or her death, holds the devise fails."²² The 1980 Wyoming Probate Code contains a nonademption provision that gives the specific devisee a right to:

- (1) Unpaid owing balance of the purchase price; (2) Unpaid amount of a condemnation award; (3) Unpaid fire and casualty insurance proceeds; or (4) Property received by foreclosure or obtained in lieu of foreclosure on a specifically devised obligation.²³

Thus, if a testator sells property and dies before he receives the entire purchase price, the devisees of the property will receive the unpaid sale proceeds.²⁴

Retroactive Application of Statutes

In *Johnson v. Safeway Stores, Inc.*,²⁵ the Wyoming Supreme Court stated that retroactive applications of statutes are disfavored and permissible only upon clear direction of the legislature.²⁶ In *Johnson*, the plaintiff in a personal injury action requested an instruction explaining the effect of a percentage verdict on the plaintiff's right to recover. The trial court refused to give this instruction,²⁷ and entered judgment for the defen-

legislature developed the Code from Iowa's Probate Code and the Uniform Probate Code. Averill, *The Wyoming Probate Code of 1980: An Analysis and Critique*, 16 LAND & WATER L. REV. 103, 108 (1981). Before 1980, Wyoming probate law was based on California statutes, and the Wyoming Supreme Court used California case law when interpreting the prior law. *Id.* The Wyoming Supreme Court has not stated that it will give special consideration to Iowa court decisions when interpreting the 1980 Wyoming Probate Code. The *Douglas* court however, cited an Iowa case that addressed testator's intent. 719 P.2d at 976 (citing *Newbury v. McCammant*, 182 N.W.2d 147 (Iowa 1970)). Therefore, Iowa law may provide guidance for interpreting provision of Wyoming's current Probate Code.

19. See, e.g., WYO. STAT. §§ 2-7-808 (Abatement); 2-6-106 (Anti-Lapse); Averill, *supra* note 18, at 135-40.

20. WYO. STAT. § 2-6-105 (1977, Rev. 1980).

21. In the absence of statutory provisions, Wyoming adopts the common law. *Druley v. Houdesheldt*, 75 Wyo. 155, 159, 294 P.2d 351, 352 (1956).

22. Averill, *supra* note 18, at 133.

23. *Id.* at 134 (interpreting WYO. STAT. § 2-6-109, *supra* note 10). Averill notes that Wyoming's nonademption statute is a modification of the Uniform Probate Code's nonademption provision. Averill, *supra* note 19, at 133 n.119.

24. WYO. STAT. § 2-6-109(b) (1977, Rev. 1980). A specific devise is a devise of specific property in a testator's estate, and a specific devisee is the intended beneficiary of the specific property. In re Estate of Deutsch, 644 P.2d 768, 770 (Wyo. 1982).

25. 568 P.2d 908 (Wyo. 1977).

26. *Id.* at 912-13.

27. *Id.* at 909.

dant.²⁸ The plaintiff appealed, and argued that a 1976 statute required the court to use the instruction in the plaintiff's suit. The Wyoming Supreme Court held that use of the instruction would be an improper retroactive application of the statute because the statute did not clearly call for such an application.²⁹

The Wyoming Supreme Court has also discussed retroactive application of statutes in other contexts. For example, in *Application of Hagood*,³⁰ the Wyoming Supreme Court held that it will not apply statutes retroactively when such application will interfere with contracting parties' rights. The court stated the well established rule that laws in existence at the time and place of the agreement are incorporated into the contract as if expressly included.³¹

In that case, however, the court stated that the leases, as amended and re-executed, were essentially new leases that did not contain preferential rights. Therefore, application of the statute to the leases did not constitute an improper retroactive application.³²

When a legislature enacts a new probate code, courts must decide whether to apply the code prospectively or retroactively. Whether a court should retroactively apply a probate statute is a difficult question because, prior to a testator's death, heirs and beneficiaries have no vested rights in the testator's property.³³ The court in *Douglas* took the position that since changes in probate law do not affect any rights of heirs or beneficiaries prior to a testator's death, application of the new law is not retroactive.³⁴ The Ohio case of *Parrett v. Paul*³⁵ stated that because a will speaks from the testator's death, it is the law in effect at that time which controls the rights of the devisees.³⁶ Prior to *Douglas*, the Wyoming Supreme Court had not decided what law applied in determining a testator's intent.

Since Wyoming had not addressed the issue of the retroactive application of probate statutes before *Douglas*, case law from other jurisdictions provides guidance. Several follow the principle that, in determining a testator's intent, the law in existence at the time of the will's execution is controlling.³⁷

28. *Id.* at 909-10.

29. *Id.* at 914.

30. 356 P.2d 135 (Wyo. 1960).

31. *Id.* at 138.

32. *Id.* at 139. In that case, Texas Pacific Coal and Oil Company secured leases of certain state lands in 1947. In 1951, these leases were amended. Before the leases expired, the company applied for new leases. Hagood also applied for leases to the lands. The Commissioner of Public Lands granted the leases to the company solely on the basis of preferential rights to prior lease holders. *Id.* at 136. Hagood appealed because the legislature had abolished the preferential rights practice in 1951. *Id.* The Wyoming Supreme Court held that the 1951 changes to the law removed the authority to grant leases based on preferential rights before the 1951 lease amendments. The court stated that a statute may not apply retroactively if such application will deprive parties of rights contained in a contract. *Id.* at 138.

33. *Douglas*, 719 P.2d at 979-80.

34. *Id.* at 977-78.

35. 115 Ohio App. 488, 185 N.E.2d 798 (1962).

36. 185 N.E.2d at 799-800.

37. 4 PAGE, *supra* note 13, § 30.26 at 166 n.1.

The Court of Appeals of Ohio cited this proposition with approval in *Brouse v. Old Phoenix Nat. Bank of Medina*.³⁸ In *Brouse*, the testator executed his will in 1979. In his will, it was argued, he attempted to exercise his power of appointment. Prior to the testator's death, the Ohio legislature changed the requirements for the exercise of the power of appointment.³⁹ In determining whether the testator had exercised his power of appointment, the Ohio court relied on rules of construction. The court applied the law in existence at the time of the will's execution, and determined that the testator had intended to exercise his power.⁴⁰ In its holding, the Ohio court stated that it presumed that a testator, in exercising his right to make a will, knows of the existing law and therefore drafts his will accordingly.⁴¹

The Colorado Court of Appeals also stated that the law in existence at the time of the execution of a will controls a testator's intent, in *Matter of Estate of Daigle*.⁴² That court held that the trial court erred by using a rule of construction in existence at the testator's death when a different rule of construction was in existence when the testator executed his will.⁴³

In *Rieck v. Rieck*,⁴⁴ the Colorado Court of Appeals stated that "[t]estators are charged with knowledge of the . . . [law] in existence at the time . . . their wills are made."⁴⁵ Colorado's probate code, like Wyoming's, is very similar to the provisions of the Uniform Probate Code (UPC).⁴⁶

Oklahoma takes a similar position. In *Crump's Estate v. Freeman*,⁴⁷ that state's supreme court said that the law in existence at the execution of a will is incorporated into the will. In Oklahoma, the courts will assume that a testator knew the applicable law at the time and place of the will's execution.⁴⁸

In Illinois, the courts also assume that a testator knew the law at the time he executed his will. According to *In re Estate of Hughlett*,⁴⁹ that law is a circumstance that courts consider when ascertaining a testator's intent.⁵⁰

Likewise, the Court of Chancery of Delaware, in *Reynolds v. Russell*,⁵¹ stated the general rule in Delaware that, in determining a testator's intent,

38. 11 Ohio App. 3d 9, 495 N.E.2d 42, 44-45 (1985).

39. 495 N.E.2d at 43 (syllabus by the court).

40. *Id.* at 45.

41. *Id.* at 44.

42. 642 P.2d 527, 528 (Colo. App. 1982).

43. *Id.*

44. 724 P.2d 674 (Colo. App. 1986).

45. *Id.* at 676-77.

46. *Id.* at 676.

47. 614 P.2d 1096 (Okla. 1980).

48. *Id.* at 1099.

49. 113 Ill. App. 3d 910, 446 N.E.2d 887 (1983).

50. *Id.* 446 N.E.2d at 890.

51. 433 A.2d 699 (Del. Ch. 1981).

the law in existence at the time of execution governs, unless the will indicates a contrary intent.⁵²

Other courts have considered the law in existence at a testator's death when construing will provisions. In *Riggs Nat. Bank of Washington, D.C. v. Summerlin*,⁵³ the United States Court of Appeals, District of Columbia Circuit, looked to the law in existence both at the time the testator executed his will and at the time of the testator's death to determine his intent.⁵⁴ In that case, the court stated that the law in existence at a testator's death is the law used to determine the testator's intent.⁵⁵ However, the court further stated that the law "in existence at the time of his death . . . is the very latest that can apply."⁵⁶(emphasis added) The court stated that it cannot apply law enacted after a testator's death to ascertain or affect the intent of the testator. The court reasoned "that the testator cannot be presumed to have acted upon the basis of law not yet in being when he died."⁵⁷

One court has applied the law in existence at the testator's death without any reference to the law in existence at the execution of a will. The Supreme Court of Hawaii, a state whose probate code is based on the UPC, used the law in existence at the testator's date of death in *Matter of Estate of Christian*.⁵⁸ That case involved a change in the rules of will construction after the testator's date of death.⁵⁹ The Hawaii court did not address the testator's rights, but rather the heirs' rights, and stated that the new "anti-lapse provision could not be given retroactive application absent clear direction."⁶⁰

Iowa, whose code provided a partial basis for the 1980 Wyoming Probate Code,⁶¹ followed the same position in *Matter of Estate of Duhme*.⁶² In that case, the Iowa Supreme Court stated that changes in the rules of construction after a testator's death may not affect the vested rights of beneficiaries.⁶³

As the survey of state case law illustrates, the law is inconsistent on the question of what law applies when the legislature changes the rules of will construction between the execution of a will and the testator's death. Generally, courts apply the law in existence at the testator's death when there is a need to protect beneficiaries' rights. This happens when changes in law occur after a testator's date of death. When the change

52. *Id.* at 702.

53. 445 F.2d 201 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 851 (1971).

54. *Id.* at 208.

55. *Id.*

56. *Id.* (citing *American Sec. & Trust Co. v. Cramer*, 175 F. Supp. 367, 370 (D.D.C. 1959)).

57. *Riggs Nat. Bank*, 445 F.2d at 208.

58. 65 Haw. 394, 652 P.2d 1137 (1982).

59. 652 P.2d at 1140.

60. *Id.* at 1141.

61. Averill, *supra* note 18, at 133 n.119.

62. 267 N.W.2d 688 (Iowa 1978).

63. *Id.* at 691. For a case where a change in a rule of will construction was used to determine testator's intent, when the change was after execution of the will, but before the testator's death, see *In re Estate of Leavy*, 122 N.H. 184, 442 A.2d 588 (1982).

in law occurs between the execution of the will and the testator's date of death, courts generally look to the law that existed when the testator drafted his will. Prior to *Douglas*, the Wyoming Supreme Court had not addressed this question.

THE PRINCIPAL CASE

In *Douglas*, the Wyoming Supreme Court held that application of the 1980 Wyoming Probate Code to a will executed prior to the Code's effective date was not an improper retroactive application.⁶⁴ The court first addressed whether Article X of Mrs. Newell's will, devising the Converse County property to her nieces and nephews, lapsed upon the death of Mr. Newell. A unanimous court held that it did not. The court noted that Article X of the will was a specific devise, and that Article III was a general devise.⁶⁵ Consistent with its holding in *In re Lendecke's Estate*,⁶⁶ the court held that the specific devise prevailed over the general devise.⁶⁷

The court then held that the specific devise of the Converse County property did not adeem upon the contract sale of the property in 1980. The contract balance remaining at Mrs. Newell's death passed under Article X to her nieces and nephews.⁶⁸ The court refused to judicially adopt the common law doctrine of ademption by extinction. The court stated that the legislature had acted before ademption became a part of Wyoming law, and that it would not retroactively recognize "a discredited and legislatively repealed rule."⁶⁹

The court then discussed the appropriateness of the common law rule of ademption. The court stated that actual intent, rather than a mechanical rule, should control the disposition of a testator's property. The mechanical rule, the court said, was irrelevant when determining whether a testator intended a devisee take something in substitution for specifically devised property.⁷⁰ The court further stated that more often than

64. *Douglas v. Newell*, 719 P.2d at 980.

65. *Id.* at 973.

66. 79 Wyo. 27, 329 P.2d 819 (1958).

67. *Douglas*, 719 P.2d at 973.

68. *Id.* at 982. The court refused to apply the doctrine of equitable conversion, where the purchaser of property on a contract acquires equitable title to the property, to support the contention that the devise had been extinguished by the sale, by recognizing Mrs. Newell's continued interest in the property. The court felt it was also significant that in Article X of her will, Mrs. Newell devised "all . . . interest and title" in the Converse County property, not just the property itself. *Id.* at 980. The court stated that the devise of all "interest and title" indicated Mrs. Newell's intent, the controlling factor in determining the effect of her dispositions under WYO. STAT. § 2-6-105 (1977, Rev. 1980), and was consistent with the holding that the balance of the purchase price would pass to her nieces and nephews by way of WYO. STAT. § 2-6-109 (1977, Rev. 1980). *Douglas*, 719 P.2d at 982. A Nebraska attorney prepared Mrs. Newell's will and the will was executed in Nebraska. The land involved in the dispute was located in Wyoming. This raised the question of which state's law to apply. As Nebraska had adopted the Uniform Probate Code, with identical nonademption provisions as the 1980 Wyoming Probate Code, the court held that application of either state's law would render the same result. *Id.* at 981.

69. *Id.* at 976.

70. *Id.* at 976 (citing Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 750 (1961)).

not, application of the common law rule produced a result contrary to the testator's true intent.⁷¹

The court then held that, pursuant to Wyoming Statute section 2-1-102(d),⁷² the Probate Code would apply to all wills where the testator dies after the Code's effective date.⁷³ This application of the statute supported the court's holding on the issue of ademption, because Wyoming Statute section 2-6-109⁷⁴ provides any unpaid sale proceeds at a testator's death pass to the devisees of specific property when the property has been sold prior to the testator's death.

The court stated that retroactive application of statutes was not an issue because the Probate Code specifically requires application of the current code provisions.⁷⁵ The court stated that if Mrs. Newell, or any other testator, had wanted ademption to occur, she could have expressed this desire in her will at execution or by amendment.⁷⁶ The court also stated that its holding would not adversely affect the rights of beneficiaries.⁷⁷ The court noted that an heir or beneficiary has no enforceable rights until the death of the testator.⁷⁸

The court stated that a will speaks from the date of the testator's death.⁷⁹ The court also stated that although an heir or beneficiary may not be divested of rights to property after they have vested, the legislature reserves the power to control wills, the execution of wills, and the manner in which will provisions are carried out.⁸⁰

In dissent, Chief Justice Thomas argued that the court's holding was inconsistent with Mrs. Newell's intent because Mrs. Newell had a right to rely on the law in existence at the time of the execution of her will. Justice Thomas argued that Mrs. Newell would have been properly advised that if she sold the property, the gift would adeem, and that this is what Mrs. Newell wanted.⁸¹

71. 719 P.2d at 976 (citing Note, *Wills, Ademption and Legacies in Oklahoma*, 14 OKLA. L. REV. 108, 113 (1961); Mechem, *Why Not a Modern Wills Act*, 33 IOWA L. REV. 501, 515 (1958); and Paulus, *Ademption by Extinction, Smiting Lord Thurlow's Ghost*, 2 TEX. TECH L. REV. 195, 227 (1970-71) (citing Note, *supra* note 70, at 745-46)).

72. WYO. STAT. § 2-1-102(d).

73. *Douglas*, 719 P.2d at 980.

74. WYO. STAT. § 2-6-109(b)(i).

75. *Douglas*, 719 P.2d at 979 (applying WYO. STAT. § 2-1-102).

76. *Douglas*, 719 P.2d at 980.

77. *Id.*

78. *Id.* at 979.

79. *Id.* at 978 (citing *Strand v. Stewart*, 51 Wash. 685, 99 P. 1027 (1909)).

80. *Douglas*, 719 P.2d at 978.

81. *Id.* at 982 (Thomas, C.J., dissenting). Chief Justice Thomas stated that it was Mrs. Newell's intent that the proceeds from the Converse County property would become part of the trust. In Thomas' view, allowing the nieces and nephews to collect the unpaid sale proceeds was inconsistent with the clear intent of the testator which was to provide for her grandsons by way of the trust. The one exception was for the Converse County lands. Mrs. Newell devised these lands to her nieces and nephews only "to preserve the Read lands as a family ranch," and when the property was sold, no purpose in providing for her nieces and nephews remained. *Id.*

In his dissent, Justice Rooney pointed out that the effective date of the code only applies to procedures.⁸² In his view, "[t]he statute simply does not apply to the substantive right of the deceased to make a will and to adeem a provision thereof before her death in accordance with an intention formulated under existing law."⁸³

ANALYSIS

Retroactive Application of the 1980 Wyoming Probate Code

In *Douglas*, Justice Urbigkit and the majority said it was Mrs. Newell's intent that the devisees of the Converse County property receive the remaining payments due on the sale of the property.⁸⁴ Justice Thomas stated that it was Mrs. Newell's intent that the devisees of the property only receive the land.⁸⁵ The inevitable conclusion is that Mrs. Newell's intent was not clear and that the provisions of her will created an ambiguity. When a will is ambiguous, courts resort to rules of construction to resolve the ambiguity.⁸⁶

The problem in *Douglas* was that the Wyoming legislature changed the rules of construction between the time Mrs. Newell executed her will and the date she died. This raised the question of which rule to apply. The court's holding disregarded the rules of the retroactive application of statutes.

In discussing the application of the 1980 Wyoming Probate Code, the court noted that a retroactive application would not adversely affect any rights of the beneficiaries, because prior to a testator's death, a beneficiary has no rights to the testator's property.⁸⁷ The court's decision that the Code applies even if a testator executed a will prior to the effective date of the Code failed to give adequate consideration to the rights of a testator. This failure resulted in an improper retroactive application of the 1980 Probate Code.

The clear rule in Wyoming is that a statute shall not be applied to events that occur before the statute's enactment absent clear legislative direction.⁸⁸ The 1980 Wyoming Probate Code provides that "[t]he *procedure* herein prescribed shall govern all proceedings in probate brought after the effective date of this code."⁸⁹ (emphasis added) The rules of will construction are not procedural, but are substantive provisions of law used to give effect to a testator's intent.⁹⁰ The Code does not require applica-

82. *Id.* at 984 (Rooney, J., dissenting).

83. *Id.*

84. *Id.* at 981-82.

85. *Id.* at 982 (Thomas, C.J., dissenting).

86. 4 PAGE, *supra* note 13, § 30.4 at 14-15.

87. *Douglas*, 719 P.2d at 979.

88. *Johnson*, 568 P.2d at 914.

89. WYO. STAT. § 2-1-102 (1977, Rev. 1980).

90. The Wyoming Supreme Court has defined substantive law as that which defines rights while procedural law is the manner in which such rights are exercised and enforced. *Matter of Estate of Boyd*, 606 P.2d 1243, 1245 (Wyo. 1980). A court uses the rules of will construction to define a testator's intent, or the expression of his right to dispose of property

tion of its substantive provisions to wills where the date of death is after the Code's effective date and the date of the will's execution is before.⁹¹ The Wyoming Supreme Court has said that a court may not apply changes in law retroactively without clear direction from the legislature.⁹² However, in *Douglas*, the court did retroactively apply the substantive provisions of the 1980 Wyoming Probate Code without the requisite legislative authorization.

The Wyoming Supreme Court, ignoring its own rules on the retroactive application of statutes, refused to follow the well reasoned rule that the law in existence when a will is executed controls a testator's intent. Unfortunately, the Wyoming Supreme Court has adopted literally the statement of the courts of such states as Iowa and Hawaii, that the law in existence at a testator's death controls the testator's intent.⁹³ However, there is a significant distinction between *Douglas* and the cases of Iowa and Hawaii. The Iowa and Hawaii cases discussed the application of rules of construction that became effective *after* the testator's death. *Douglas* involved changes in the rules of will construction that became effective before the testator's death. Interestingly, the Iowa and Hawaii cases did not mention any arguments that the testator's intent would be frustrated by the application of the new rules. Presumably, such an argument would have lent even greater support to the holdings of those courts against retroactive application.

Similarly, in *Riggs Nat. Bank*,⁹⁴ the United States Circuit Court of Appeals said that the controlling law was the law in existence at the testator's death. Again, the concern was that changes in the law after the testator's death should not affect the vested rights of beneficiaries. In fact, the court did consider the law in existence at the time of the will's execution in that case, by stating that a court must look to the law in existence at a will's execution and the testator's death when attempting to determine a testator's intent. The court stressed that it should never look to laws enacted after those times in construing wills.⁹⁵ Like the *Riggs Nat. Bank* court, the Wyoming Supreme Court should have considered the law in existence at the time Mrs. Newell executed her will. Instead, the Wyoming Supreme Court dismissed the law as inapplicable because of its reading of the effective date provision of the 1980 Wyoming Probate Code.

Because Mrs. Newell's intent was not clear, the court should have considered the circumstances surrounding the will.⁹⁶ Reason would suggest that one of the most important surrounding circumstances was the "law

through a will, not to provide for the manner in which a testator is allowed to exercise his right to dispose of property by will. The provisions of WYO. STAT. §§ 2-6-201 through 2-6-211 are, in contrast, procedural in nature, defining the probate procedure to be used to accomplish the enforcement of the right to dispose of property by will.

91. *Douglas*, 719 P.2d at 984 (Rooney, J., dissenting).

92. *Johnson*, 568 P.2d at 913.

93. *Matter of Estate of Duhme*, 267 N.W.2d 688, 689; *Matter of Estate of Christian*, 652 P.2d 1137.

94. 445 F.2d 201.

95. *Id.* at 208.

96. *Finkbinder*, 416 P.2d at 229.

in force at the time the will was executed."⁹⁷ It seems anomalous that the law in existence at the time of the execution of a contract becomes part of the contract,⁹⁸ but the law in existence at the time of the execution of a will does not become part of the will.

If the Wyoming Supreme Court had correctly followed the rules of retroactive application of statutes in *Douglas*, then the devise of the Converse County property should have adeemed when Mrs. Newell sold the lands. The devise should have adeemed despite the court's holding that ademption does not exist in Wyoming, because that holding was also wrong.

Ademption

The court said the legislature had determined that the doctrine of ademption by extinction was an inappropriate tool for construing wills.⁹⁹ This statement does not accurately represent what the legislature did with ademption. The 1980 Wyoming Probate Code did not do away with ademption, but merely provided exceptions to the doctrine.¹⁰⁰ One exception is that ademption will not occur in the case of a sale of property to the extent that the sales price had not been fully paid to the testator at his or her death.¹⁰¹ This was the situation in *Douglas*. The court failed to recognize, however, that as a result of its holding, ademption did occur to the extent of payments received by Mrs. Newell prior to her death.¹⁰²

If the court intended to hold that ademption did not exist as a rule of construction prior to the enactment of the 1980 Probate Code, and exists under no circumstances now, then the court ignored the rule of Wyoming law that, absent statutory provisions to the contrary, the common law will apply.¹⁰³ At the time Mrs. Newell executed her will, ademption was the common law rule, and Wyoming statutes did not provide otherwise. Even now ademption exists in Wyoming so long as neither the specifically devised property nor a statutory substitute is found in the testator's estate at death.

CONCLUSION

In *Douglas*, the Wyoming Supreme Court held that the devise of specific property to Mrs. Newell's nieces and nephews did not adeem upon

97. *Douglas*, 719 P.2d at 984 (Rooney, J., dissenting).

98. *Hagood*, 356 P.2d at 138.

99. *Douglas*, 719 P.2d at 975.

100. WYO. STAT. § 2-6-109 (1977, Rev. 1980) provides that ademption will not occur under certain circumstances. One such circumstance is when property is not found in an estate because of a condemnation or fire and the proceeds of the condemnation award or insurance proceeds are paid to a conservator. Presumably, if a condemnation award or insurance proceeds are paid directly to the testator before death, for condemned or destroyed property which was the specific object of a devise in the testator's will, ademption will occur.

101. WYO. STAT. § 2-6-109(b)(i).

102. *Douglas*, 719 P.2d at 983 (Thomas, J., dissenting). The court also stated ademption has never been a part of Wyoming law, yet labels the doctrine "legislatively repealed." *Douglas*, 719 P.2d at 976. In what may have been a semantical error, it appears that the court said that something which has never existed has been repealed.

103. *Druley*, 294 P.2d at 352.

the sale of the property. The court stated that ademption is a rule of construction that did not exist in Wyoming and was repealed by the Wyoming legislature with the enactment of the 1980 Wyoming Probate Code. It then applied the Code to the will that Mrs. Newell executed before the enactment of the Code.

The court's holding strayed from the well established principle that a statute adversely affecting enforceable rights will only be applied retroactively upon clear direction of the legislature. The court in *Douglas* retroactively applied the 1980 Wyoming Probate Code, disregarding Elizabeth Newell's right to rely on the laws in existence at the time she executed her will, without a clear directive from the legislature for such an application. As a result of this holding, testators will not be able to rely on the current provisions of the 1980 Wyoming Probate Code, should the legislature see fit to once again modify the rules of will construction.

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