

THE SUPREME COURT OF ARKANSAS HOLDS THAT IDENTIFIABLE PROCEEDS FROM THE SALE OF A SPECIFIC DEVISE, MADE BY AN ATTORNEY IN FACT DURING THE LIFETIME OF AN INCOMPETENT TESTATOR WHO NEVER REGAINED COMPETENCY, ARE NOT ADEEMED FROM THE ESTATE.

In a matter of first impression, the Arkansas Supreme Court in *Rodgers v. Rodgers*¹ held that :

if the property that is the subject of a specific devise is sold by an attorney in fact at a time when the testator is incompetent, and the testator does not regain testamentary capacity before his or her death, an redemption² of the specific devise does not take place as to the unexpended, identifiable proceeds of the sale.³

In reaching this result, the court adopted the intention theory to determine whether an redemption of the specific devise had occurred.⁴ Finally, it resolved a potential conflict with the Arkansas powers of attorney statute,⁵ which gives legal, binding effect to acts of a durable power of attorney, by holding that the statute did not address the issue of entitlement to identifiable proceeds of a specific devise.⁶

The decedent, Mary Rodgers, named the appellant, Charles Rodgers, as executor of her will.⁷ The will divided and devised four parcels of land owned by Mary Rodgers: parcel one and parcel two to the appellant Charles Rodgers; parcel three to appellee Burt Rodgers; one-half of parcel four to appellee Gary Morgan; and the other one-half of parcel four to Morgan's

1. 2012 Ark. 200, ___ S.W.3d ____.

2. The general law of redemption provides: "If the identical thing bequeathed is not in existence, or has been disposed of so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone." *Rodgers v. Rodgers*, 2012 Ark. 200, at 5–6, ___ S.W.3d at ____.

3. *Id.* at 12, ___ S.W.3d at ____.

4. *Id.* at 12–13, ___ S.W.3d at ____.

5. The statute provides:

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

ARK. CODE ANN. § 28-68-202 (Repl. 2004), *repealed by* Uniform Power of Attorney Act, 2011 Ark. Acts 805 (codified at ARK. CODE ANN. § 28-68-101 to -405 (Repl. 2012)).

6. *Rodgers*, 2012 Ark. 200, at 12–13, ___ S.W.3d at ____ (citing *In re Estate of Anton*, 73 N.W.2d 19 (Iowa 2007)).

7. *Id.* at 1, ___ S.W.3d at ____.

sister.⁸ In the year preceding Mary Rodgers' death, appellee Morgan, acting as Mary Rodgers' attorney in fact, had executed two timber deeds that conveyed all of the valuable timber located on specified tracts of property to different purchasing companies.⁹ The conveyed tracts were located on the parcels of property specifically devised to Charles Rodgers in the will.¹⁰ While a portion of the proceeds from the sale had been used to support Mary Rodgers during her life, another portion had been transferred to a payable-on-death account held by Nancy Morgan.¹¹ The remaining funds became an asset of the estate upon Mary Rodgers' death.¹² Charles Rodgers, as executor, filed a motion to construe the will, requesting the court to determine whether there had been an ademption of the timber.¹³

In a pre-trial motion to the court, Charles Rodgers asserted that an ademption had not occurred and that he was entitled to the proceeds of the timber sale because the will specifically devised to him the parcels of property from which the timber had been sold.¹⁴ He argued the absence of intention on the part of Mary Rodgers regarding ademption and relied on a statutory provision¹⁵ providing that a sale of property devised by a ward was not an ademption.¹⁶ Furthermore, he asserted that an attorney in fact should not be permitted to interfere with the testator's intent.¹⁷ In response, appellees Burt Rodgers and Morgan filed a brief asserting that this was not a case for ademption because the land devised to Charles Morgan still existed and he would receive it pursuant to the devise at the conclusion of the probate matter.¹⁸ In his reply, Charles Morgan asserted that appellee's argument against ademption failed to consider that the parcels of land devised to him had ma-

8. *Id.* at 2, ___ S.W.3d at ____.

9. *Id.* at 3, ___ S.W.3d at ____.

10. *Id.*, ___ S.W.3d at ____.

11. *Id.*, ___ S.W.3d at ____.

12. *Rodgers*, 2012 Ark. 200, at 3, ___ S.W.3d at ____.

13. *Id.* at 3, ___ S.W.3d at ____.

14. *Id.* at 4, ___ S.W.3d at ____.

15. The statute provides :

In case of a guardian's sale or other transfer of any real or personal property specifically devised by a ward who was competent to make the will, but was incompetent at the time of the sale or transfer and never became competent thereafter, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may, at his or her option, take the value of the property at the time of the ward's death with the incidents of a general devise or take the proceeds thereof with the incidents of a specific devise.

ARK. CODE ANN. § 28-24-102 (Repl. 2012).

16. *Rodgers*, 2012 Ark. 200, at 4, ___ S.W.3d at ____.

17. *Id.*, ___ S.W.3d at ____.

18. *Id.*, ___ S.W.3d at ____.

terially changed.¹⁹ The court, in a letter opinion, held that the proceeds were a part of the residuary estate, and Charles Morgan appealed.²⁰

The court reiterated that the goal of the court in an ademption case is to ascertain and enforce the intention of the testator²¹ and noted that it had never addressed an ademption case in which the attorney in fact, not the testator, may have caused the ademption while acting for the testator who never regained competency.²²

In a matter of first impression, the Arkansas Supreme Court relied principally on decisions from other jurisdictions. First, it discussed *In re Graham's Estate*,²³ cited by appellant Charles Rodgers, in which the Kansas Supreme Court considered whether an ademption of a specific devise of real estate had occurred when an attorney in fact, acting under a power of attorney, sold it during the lifetime of an incompetent testator to provide for his or her support.²⁴ In holding that an ademption had not occurred, the Kansas Supreme Court adopted and applied the intention theory, which provides that “if the property that is the subject of the specific devise is sold by another person without the knowledge and intention of the testator, an ademption of the specific devise does not take place as to the unexpended proceeds of the sale.”²⁵ Extending this principle by way of logic to conveyances made by an attorney in fact, the court reasoned that the intention theory not only represented the majority view in the United States, but it best aligned with the goal of attributing paramount importance to the intention of the testator.²⁶ The Arkansas Supreme Court agreed with this reasoning and expressly adopted the intention theory, asserting that “to hold otherwise would allow an attorney in fact, either intentionally or unintentionally, ‘to disrupt the dispositive scheme of the testator as evidenced by his last competent act in relation to a specific devise.’”²⁷

Second, the court considered *In re Estate of Anton*,²⁸ again cited by appellant Charles Rodgers, in which the Iowa Supreme Court held that an ademption had not occurred when an attorney in fact, pursuant to a durable power of attorney, sold a duplex that had been specifically devised in the

19. *Id.* at 5, ___ S.W.3d at ____.

20. *Id.*, ___ S.W.3d at ____.

21. *Id.* at 6, ___ S.W.3d at ____ (citing *Estate of Mayberry v. Mayberry*, 318 Ark. 588, 886 S.W.2d 627 (1994)).

22. *Rodgers*, 2012 Ark. 200, at 6, ___ S.W.3d at ____.

23. 216 Kan. 770, 533 P.2d 1318 (1975).

24. *Rodgers*, 2012 Ark. 200, at 7, ___ S.W.3d at ____.

25. *Id.* at 7, ___ S.W.3d at ____.

26. *Id.* at 7–8, ___ S.W.3d at ____ (citing *In re Graham's Estate*, 216 Kan. at 778, 533 P.2d at 1324).

27. *Id.* at 13, ___ S.W.3d at ____ (citing *In re Estate of Bierstedt*, 254 Iowa 772, 119 N.W.2d 234 (1963)).

28. 731 N.W.2d 19 (Iowa 2007).

testator's will.²⁹ In reaching this conclusion, the Iowa Court reasoned that while the sale of the duplex was binding pursuant to the state's statute on powers of attorney, that statute was silent on the issue of who is entitled to identifiable proceeds from a sale held in the estate.³⁰ Finding the Arkansas powers of attorney statute³¹ substantially similar to Iowa's, the Arkansas Supreme Court adopted this reasoning; thus, the statute did not preclude the holding that an ademption of the sale of timber had not occurred.³² The court reversed and remanded the case.

In his dissent, Chief Justice Hannah, joined by Justice Baker, asserted that the plain language of Mary Rodgers' will evidenced an intention only to convey the land, and he admonished the majority for assuming a specific bequeath of the timber on the land, which the will failed to expressly mention.³³ Moreover, because the decedent had provided her attorney in fact with the specific authority to execute timber deeds, Justice Hannah concluded that she intended to allow the timber to be sold.³⁴ He warned that the majority's holding would invite a plethora of new litigation between devisees and attorneys in fact over the intent of the testator.³⁵

Until this case, Arkansas courts had not considered whether identifiable proceeds from the sale of a specific devise, made by an attorney in fact during the lifetime of an incompetent testator who never regained competency, constituted an ademption. This case clarifies that such a sale is not an ademption and adopts the intention theory as the law in Arkansas.

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29. *Rodgers*, 2012 Ark. 200 at 8, ___ S.W.3d at ____.
30. *Id.* at 8–9, ___ S.W.3d at ____.
31. ARK. CODE ANN. § 28-68-202 (Repl. 2004).
32. *Rodgers*, 2012 Ark. 200 at 12–13, ___ S.W.3d at ____ (citing *In re Estate of Anton*, 731 N.W.2d at 27).
33. *Id.* at 14, ___ S.W.3d at ____ (Hannah, J., dissenting).
34. *Id.* at 13–14, ___ S.W.3d at ____.
35. *Id.* at 15, ___ S.W.3d at ____.