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## The Problem of Replacement Property in the Law of Ademption

Nicole M. Paschoal

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# The Problem of Replacement Property in the Law of Ademption

Nicole M. Paschoal\*

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## I. INTRODUCTION

Ademption by extinction has been a thorn in the side of policy-minded lawmakers for centuries. A common-law doctrine, ademption applies when an item of real or personal property that a testator specifically bequeaths is no longer owned by him or her at death.<sup>1</sup>

Under the doctrine, the bequest “adeems” (i.e. is extinguished) and the beneficiary takes nothing in lieu of the absent property. Because many years may pass between will execution and a testator’s death, circumstances—and property—are bound to change. A testator could, for example, sell a residence and buy a new one, or she might exchange stock for a different investment vehicle, or she might incorporate a family business—all occurring without an update to her will. Sometimes these choices are natural evolutions occurring with the passage of time; sometimes they result from the recommendation of a trusted advisor.

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<sup>1</sup> Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 GONZ. L. REV. 105, 106 (1993).

Regardless of the reason for the change, if the testator fails to update his or her estate plan the results can be disastrous.

Consider the New York case of Ms. Harris, who devised her home at 31 Maple Street to a close friend.<sup>2</sup> Subsequent to the execution of her will, but prior to her death, the home was taken in condemnation proceedings, and, as a result, she purchased a new home at 79 Maple Street, yet her will remained unchanged.<sup>3</sup> Ms. Harris died owning the second property.<sup>4</sup> A troubled Surrogate's Court of New York stated it had "exhausted every avenue it could think of without success" and "reluctantly" held the property adeemed.<sup>5</sup> The Court reasoned the second property could not be substituted for the first because the property owned at death was not of the one described in the will.<sup>6</sup> The harsh result: the home at 79 Maple escheated to the state because not only did the devise to the friend fail, but there were no identifiable heirs to take by intestacy.<sup>7</sup>

In order to mitigate the harsh effects of ademption, lawmakers have developed a number of exceptions to the doctrine. One of these, pioneered by the authors of the Uniform Probate Code ("UPC"), is the "replacement property doctrine." UPC section 2-606(a) states that "a specific devisee has a right to specifically devised property in the testator's estate at the testator's death and to . . . (5) any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property or tangible personal property."<sup>8</sup> The authors of the UPC carved out this exception from the general rule of ademption in order to effectuate testator intent in a circumstance where intent is relatively clear. Nonetheless, the replacement property doctrine, together with its historical antecedents, remains controversial. Applying the rule in practice has proven difficult. Whether newly acquired property does or does not function to replace former property can turn on subtle distinctions that render consistent application of the rule elusive.

In the pages following, I will examine the problem of replacement property in the law of ademption. First, through an analysis of replacement property case law and exceptions, I will reveal the arbitrary application of the existing doctrine. Second, I will propose a refined UPC replacement property exception that includes a factor based test de-

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<sup>2</sup> *In re Estate of Harris*, 414 N.Y.S.2d 835, 836 (Sur. Ct. 1979).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 839.

<sup>6</sup> *Id.* at 838.

<sup>7</sup> *Id.* at 839.

<sup>8</sup> UNIF. PROBATE CODE § 2-606(a)(5) (UNIF. LAW COMM'N 2010).

signed to help courts determine whether current property really is a “replacement” for former property in order to better effectuate testator intent. Also, because the existing UPC exception does not, by its express terms, cover intangibles,<sup>9</sup> I will advocate extending the exception to include intangible personal property. Third, I will apply the proposed factors in the refined exception to an existing replacement property case in order to illustrate its virtues.

## II. THE IDENTITY THEORY AND EXCEPTIONS TO THE RULE

### A. Historical Background

Under the Justinian Code of Rome, which eventually grew into early English common law, the testator’s intention to adeem (or not adeem) a specific gift was considered the controlling principle.<sup>10</sup> Extrinsic evidence of all relevant facts and circumstances occurring between will execution and the testator’s death were admissible to establish a testator’s intention at the time property was transferred, exchanged, or sold.<sup>11</sup> As a result, courts could be led down an endless rabbit hole of testimony. Eventually, limitless inquiry into testator intention came to appear impracticable and the law evolved vis-à-vis two English cases decided by Lord Chancellor Thurlow late in the eighteenth century.

In *Ashburner v. MacGuire*,<sup>12</sup> Lord Thurlow held that a gift adeems if the thing bequeathed does not exist in the estate at the time of a testator’s death.<sup>13</sup> Three years later in *Stanley v. Potter*,<sup>14</sup> he refined his prior holding by declaring a testator’s intent, following a change in the property, to be irrelevant.<sup>15</sup> Occasionally known as Lord Thurlow’s rule, but more commonly called the “identity theory,” this scheme merely requires a two-part *in specie* test to resolve the question of ademption: (1) determine whether the devise is specific, and (2) determine whether the property still exists in the testator’s estate at death. The *in specie* test does not consider testator intent and the result is the same whether the property is deliberately or inadvertently exchanged, lost, or destroyed.<sup>16</sup> Inevitably, a rule of ademption that *ignores* intent is bound to *defeat*

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<sup>9</sup> *Id.* (confining the exception to real property and tangible personal property).

<sup>10</sup> *Pepka v. Branch*, 294 N.E.2d 141, 150-51 (Ind. Ct. App. 1973); *see also* William H. Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 14 (1943) (discussing the origins of ademption by extinction).

<sup>11</sup> *See Pepka*, 294 N.E.2d at 151.

<sup>12</sup> *Ashburner v. MacGuire* (1786) 29 Eng. Rep. 62; 2 Bro. C.C. 108.

<sup>13</sup> *Id.* at 110.

<sup>14</sup> *Stanley v. Potter* (1789) 30 Eng. Rep. 3; 2 Cox 180.

<sup>15</sup> *Id.* at 182.

<sup>16</sup> Lundwall, *supra* note 1, at 108.

intent. Over time it became clear that Lord Thurlow's simple two-part test often did frustrate the intent of testators, contrary to the larger framework of inheritance law. Dissatisfied with the rule and reluctant to follow it, lawmakers and judges began to develop a number of ways to avoid its application.<sup>17</sup>

The judicial escape devices adopted by courts include a preference for general devises over specific devises, date of death construction, and the change in form principle. Courts construe bequests as general or demonstrative rather than specific because the law of ademption applies only to specific devises. Whenever the language of the will permits such construction, a court can classify a bequest as general and avoid ademption by extinction.<sup>18</sup> Date of death construction allows courts to interpret the testator's will as of the date of death and not as of the date of the will's execution.<sup>19</sup> As a result, a beneficiary may get the property owned by the testator at death even if the testator sold or replaced such property several times during her lifetime.<sup>20</sup>

The change in form principle is the most common judicial escape device and is applied when there has been a change in the property between will execution and the testator's death.<sup>21</sup> This court-created test looks to the type or extent of the transformation.<sup>22</sup> A mere formal change in the bequest will not trigger ademption, but if the gift has changed in *substance*, the bequest is adeemed.<sup>23</sup> Today, the majority of identity theory jurisdictions use the form and substance test to resolve the issue of replacement property. As the comment to UPC section 2-606 observes, the replacement property exception under subsection (a)(5) represents a mere extension of the change in form principle.<sup>24</sup> Because the form and substance test is the primary method used to address ademption in identity theory states, its application warrants further analysis.

## B. The Form and Substance Test

The form and substance test is a judicially created test used to help courts evaluate whether specifically devised property has adeemed. For the purpose of this article, the test is relevant to the extent that a major-

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<sup>17</sup> *Id.* at 109-10.

<sup>18</sup> Page, *supra* note 10, at 27.

<sup>19</sup> Lundwall, *supra* note 1, at 113.

<sup>20</sup> *Id.*

<sup>21</sup> Joseph Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 319 (1940).

<sup>22</sup> *See id.*

<sup>23</sup> *Pepka v. Branch*, 294 N.E.2d 141, 152 (Ind. Ct. App. 1973).

<sup>24</sup> UNIF. PROBATE CODE § 2-606 cmt. (UNIF. LAW COMM'N 2010) ("Subsection (a)(5) does not import a tracing principle into the question of ademption, but rather should be seen as a sensible 'mere change in form' principle.").

ity of courts are using the test to give effect tacitly to changes which are replacement property. Historically, the test was based on metaphysical existences, focusing on whether the property in question was still substantially the same as that devised in the will. If a specifically devised asset was not in the testator's estate in its original form, the gift did not fail if the asset still existed in a modified form; however, case law has established that only insubstantial changes will pass muster.<sup>25</sup> For instance, a mere change in location of the asset is usually treated as a change in form, but if a testator sells the property and only holds the cash proceeds at death the change will be considered substantial, regardless of whether tracing is possible.<sup>26</sup> Using this vague insubstantial versus substantial test, courts are tasked with determining at what point the subject matter of a gift has changed so much that it is no longer substantially the same thing, i.e. it is extinguished.<sup>27</sup> Courts often look to several factors, but exactly what qualifies as a "change in substance" to trigger ademption fluctuates between jurisdictions.

*Akins v. Clark*<sup>28</sup> illustrates the form and substance test as applied in the context of real property. In *Akins*, the testator devised a farm and stock to her close friend; however, after executing the will she transferred both to a limited partnership.<sup>29</sup> Following the testator's death, the trial court held that the transfer of the farm and stock did not materially change or alter the assets and therefore no ademption was triggered.<sup>30</sup> The court of appeals reversed and held the gift adeemed for three reasons. First, the court argued the transfer changed the character of the property from real (the farm) to personal (a partnership interest).<sup>31</sup> Second, prior to the transfer, the testator owned 100% of the property but after the transfer she only owned a 91.5% partnership interest.<sup>32</sup> Third,

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<sup>25</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.2 cmt. d (AM. LAW INST. 1999) ("Even though a specifically devised asset is not in the testator's estate in its original form, the specific devise does not fail if the asset is in the testator's estate in a changed form. By well-established authority, the change-in-form principle applies if the change in form is insubstantial. It is not possible to give a comprehensive list of what types of post-execution transactions amount to a mere change in form and what types do not. It is clear, however, that if the testator gives the property to the devisee or to another, the change-in-form principle cannot operate because the testator has received nothing in return for the gift. The testator's estate owns no product into which the subject of the original devise was changed.").

<sup>26</sup> *Id.* Tracing is the process of tracking property's ownership or characteristics from the time of its origin to the present. It is also termed "tracing of funds" or "tracing of property." *Tracing*, BLACK'S LAW DICTIONARY (10th ed. 2009).

<sup>27</sup> See *Pepka*, 294 N.E.2d at 149.

<sup>28</sup> 59 S.W.3d 124 (Tenn. Ct. App. 2001).

<sup>29</sup> *Id.* at 125.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 127.

<sup>32</sup> *Id.*

the court said it was “noteworthy that [testator’s] own conduct resulted in an ademption by extinction.”<sup>33</sup> The court also briefly stated that even if the testator’s intention was only to transfer the property to save estate taxes at death, intent is irrelevant for the purpose of ademption.<sup>34</sup> This result seems to defeat probable intent, especially considering the beneficiary of the farm and stock owned the other 8.5% of the partnership.<sup>35</sup> These facts could evidence a desire by the testator to provide for the beneficiary in life and in death.

*Akins* demonstrates that the court looks to the totality of circumstances in determining whether property has changed in substance. The court looked at the property’s character, the testator’s percentage of ownership before and after the change, and whether the change resulted from voluntary conduct of the testator. While ownership interest and voluntariness of conduct applied to both the farm and the stock, the application of a change in character only concerned the farm and not the stock, as the stock remained personal property before and after the transfer. Yet, both gifts were adeemed. Arguably, at least the stock should have passed to the beneficiary.

Moreover, although the *Akins* court asserted the testator’s own voluntary action was a decisive factor in triggering ademption, the very next sentence of the opinion noted that an opposite result was reached in *Estate of Hume v. Klank* (also a Tennessee case).<sup>36</sup> In *Hume* the gift was adeemed even though the change in property was the result of a third party’s conduct and not the voluntary act of the testator.<sup>37</sup> In both *Akins* and *Hume*, the same result was reached regardless of whether the change in property was the voluntary act of the testator. What appeared to be a relevant and deciding factor in *Akins* was not afforded the same weight in *Hume*. Considering this discrepancy, exactly what triggers a “substantial enough” change in property is uncertain.

Compare the result in *Akins* to that in *Redditt v. Redditt*, a 2002 Mississippi case.<sup>38</sup> *Redditt* involved the transfer of a family farm to a family corporation after execution of the testator’s will.<sup>39</sup> This case was a bit more complicated than *Akins* because here, the testator only bequeathed the farm to three of her four children, stating that the excluded child had been “taken care of” during life.<sup>40</sup> Consequently,

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<sup>33</sup> *Id.* at 128.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 126.

<sup>36</sup> Compare *id.* at 128 with *Estate of Hume v. Klank*, 984 S.W.2d 602, 605 (Tenn. 1999).

<sup>37</sup> *Estate of Hume*, 984 S.W.2d at 605.

<sup>38</sup> 820 So. 2d 782 (Miss. Ct. App. 2002).

<sup>39</sup> *Id.* at 785.

<sup>40</sup> *Id.* at 784.

following the testator's death the excluded child argued that incorporation of the farm extinguished the devise and triggered an ademption.<sup>41</sup> The court of appeals disagreed and affirmed the lower court's decision that conveyance of land to the corporation was a change of form only, since the substance of the farm remained the same.<sup>42</sup>

Although not expressly addressed by the court, in both *Akins* and *Redditt* the testator's property was changed in character from real (the farmland) to personal property (partnership interest/corporate shares). The court in *Redditt* also noted that, analogous to *Akins*, the testator transferred the property by voluntary act in order to save estate taxes,<sup>43</sup> yet still, the court in *Redditt* came to the opposite conclusion—no ademption. These inconsistent results raise the question: why is ademption triggered when real property is transferred to a partnership, but not when real property is transferred to a corporation? If ademption by extinction is “predicated upon the principle that the subject of the gift is annihilated or its condition so altered that nothing remains to which the terms of the bequest can apply,”<sup>44</sup> then it cannot rationally be argued the farm and stock in *Akins* met this principle while the farm in *Redditt* did not. Perhaps *Akins* was distinguishable because the testator owned 100% of the property before the transfer but only 91.5% after, whereas in *Redditt* the testator maintained full ownership. Conceivably, this distinction best resolves the inconsistent outcomes. But attorneys and testators alike should find such unpredictability unsettling—especially because the beneficiary in *Akins* owned the other 8.5% of the partnership.<sup>45</sup>

*Akins* and *Redditt* are far from the only examples of inconsistent application of the form and substance test. In *Pepka v. Branch*,<sup>46</sup> the court held that incorporation of a sole proprietorship was not a change in substance because the testator continued to be the sole owner of the business, there was no change in operation of the business, and the business assets remained the same.<sup>47</sup> Contrast the result in *Pepka* with the Louisiana case of *Succession of Huguet*,<sup>48</sup> where the court held an ademption was triggered when the testator transferred real property to a partnership.<sup>49</sup> The court in *Huguet* reasoned that once the testator

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<sup>41</sup> See *id.* at 787.

<sup>42</sup> See *id.* at 788 (noting the testator transferred the farm on the advice of her advisor in order to save on estate taxes).

<sup>43</sup> *Id.*

<sup>44</sup> *Baldwin v. Davidson*, 267 S.W.2d 756, 759 (Tenn. Ct. App. 1954).

<sup>45</sup> *Akins v. Clark*, 59 S.W.3d 124, 126 (Tenn. Ct. App. 2001).

<sup>46</sup> *Pepka v. Branch*, 294 N.E.2d 141 (Ind. Ct. App. 1973).

<sup>47</sup> See *id.* at 149.

<sup>48</sup> *Succession of Huguet*, 708 So. 2d 1302 (La. Ct. App. 1998).

<sup>49</sup> *Id.* at 1305.



transferred the property to the partnership, she no longer owned the real property regardless of the fact that she owned 98.36% of the partnership.<sup>50</sup>

The most common application of the form and substance test arises in cases involving intangibles like stocks, bonds, and other investment vehicles. In this context a more challenging question arises if the testator replaces the specifically devised property with property of like-kind and function. A typical example is *In re Estate of Dungan*,<sup>51</sup> where due to a corporate reorganization a testator was forced to exchange municipal bonds of one city for those of a different city.<sup>52</sup> Despite the fact that the bonds were undeniably of like-kind and function—the new bonds were also municipal and of approximately identical amounts to the former bonds—the court asserted there was no similarity whatsoever.<sup>53</sup> Recognizing the grim result, the court still held the bequest of the municipal bonds adeemed and the beneficiary took nothing.<sup>54</sup> Juxtapose *Dungan* with *In re Estate of Block*,<sup>55</sup> where the court suggested that a change in one kind or type of security for another may be considered insubstantial enough to avoid ademption.<sup>56</sup>

The theory that a change in investment type is insubstantial is corroborated by *Parker v. Bozian*,<sup>57</sup> *Geary v. Geary*,<sup>58</sup> and *Johnston v. Estate of Wheeler*.<sup>59</sup> In *Parker* the court held no ademption occurred when a testator transferred funds from one certificate of deposit (“CD”) to two different CDs.<sup>60</sup> *Geary* reached a parallel result in holding that a transfer of funds from one brokerage account to another did not effect an ademption.<sup>61</sup> Relying on prior Tennessee precedent, the *Geary* court reasoned the “subject of the legacy ha[d] been substantially preserved.”<sup>62</sup> Finally, the *Johnston* case established that a specific bequest of investments under a retirement plan offered by an employer was not

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<sup>50</sup> *Id.* (holding ademption because Louisiana recognizes the entity theory of partnerships which defines a partnership as a distinct legal entity from the individuals composing it).

<sup>51</sup> 62 A.2d 509 (Del. Super. Ct. & Orphans’ Ct. 1948).

<sup>52</sup> *Id.* at 510.

<sup>53</sup> *Id.* at 511.

<sup>54</sup> *Id.*

<sup>55</sup> 397 N.Y.S.2d 550 (Sur. Ct. 1977).

<sup>56</sup> *Id.* at 552 (holding no ademption on other grounds).

<sup>57</sup> 859 So. 2d 427 (Ala. 2003).

<sup>58</sup> 275 S.W.3d 835 (Tenn. Ct. App. 2008).

<sup>59</sup> 745 A.2d 345 (D.C. 2000).

<sup>60</sup> *Parker*, 859 So. 2d at 435-36.

<sup>61</sup> *Geary*, 275 S.W.3d at 843.

<sup>62</sup> *Id.* Recall however, that in the *Akins* case, a contrary result was reached even though the subject matter of the gift had also been preserved. See *supra* notes 28-35 and accompanying text.

adeemed when the testator rolled the investments over to an IRA.<sup>63</sup> The significance of *Johnston* lies in the court's reasoning that a change in account location and a change in funds in which the monies were invested did not materially alter the nature of the gift.<sup>64</sup> In all three cases the courts primarily focused on the change, or lack thereof, in the underlying subject matter of the bequest.

Presuming for a moment the courts in *Parker*, *Geary*, and *Johnston* were correct, then it logically follows that in cases dealing exclusively with intangibles ademption should not be triggered if the underlying funds and the purpose of the investment remain constant. *Dungan* could then be distinguished because when the first bonds were called in new bonds had to be purchased; as a result, the subject matter was no longer the same. Nevertheless, this theory fails when considering the Ohio case of *Church v. Morgan*,<sup>65</sup> where the testator, within hours of executing her will, transferred the funds of a specifically devised bank account to a CD for a higher rate of interest.<sup>66</sup> The subject matter of the bequest was the same—the funds were simply transferred from the bank account to the CD within the same bank—but the change was considered substantial enough to constitute an ademption. The court based its decision on the fact that the funds were no longer in the specific bank account at death.<sup>67</sup> Therefore, although the money in the CD was the same money that was in the specifically bequeathed bank account, the gift adeemed because it was not in the same location.

Existing case law demonstrates a clear problem with the form and substance test: *unpredictability*. The results are not continuously unpredictable when confined to a particular state applying the test, but the test as a whole is applied inconsistently across identity theory jurisdictions. Throughout the myriad of cases applying the form and substance test, at least fourteen different factors could be identified as relevant to the analysis of whether a change in substance had occurred.<sup>68</sup> The con-

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<sup>63</sup> *Johnston*, 745 A.2d at 347.

<sup>64</sup> *Id.* at 352.

<sup>65</sup> *Church v. Morgan*, 685 N.E.2d 809 (Ohio Ct. App. 1996).

<sup>66</sup> *Id.* at 810.

<sup>67</sup> *Id.* at 811.

<sup>68</sup> Factors discussed by courts as relevant to the analysis of ademption include: whether the change was the result of advice by an advisor, whether the property was of like character, whether the change was “nominal,” whether the change was the result of an exchange or a sale of the property, whether funds from the first property were used to acquire the subsequent property, whether there was a change in ownership amount or percentage, whether there was a change in how the testator exercised dominion over the property, whether (in the context of a business) the operations of the business remained the same, whether the change was the voluntary act of the testator, whether there was evidence the testator considered the new property as different, whether there was a change in investment location, whether there was a change in the location of the invest-

sequence is a vague totality of the circumstances approach in which the factors to be evaluated in any given case are chosen at random. What one court finds relevant another court may not even consider. Therefore, it is evident, at least in the context of replacement property, the form and substance test does not go far enough to prevent the “endless uncertainty and confusion” Lord Thurlow’s identity theory endeavored to avoid.<sup>69</sup>

One alternative is for states to return to the intent theory. Eight jurisdictions—Arkansas,<sup>70</sup> California,<sup>71</sup> Florida,<sup>72</sup> Illinois,<sup>73</sup> Kansas,<sup>74</sup> Kentucky,<sup>75</sup> Missouri,<sup>76</sup> and Montana<sup>77</sup>—have already done so either by legislation or decisional law. Another option is to adopt the UPC replacement property exception.

### C. The Uniform Probate Code Replacement Property Exception

In an effort to address the harsh results of the identity theory, UPC section 2-606 was revised in 1990. One major theme of the 1990 revision was the rejection of formalism in favor of intent effectuating policies.<sup>78</sup> This renewed focus on testator intent led to the addition of subsection (a)(5) which added an exception for nonademption in the instances where a testator replaced an item of property with other property.<sup>79</sup>

Introduction of the replacement property exception was a step in the right direction. Nonetheless, the new exception failed to clarify what exactly qualifies as replacement property. The comment to UPC section 2-606 provides little in the way of guidance, noting only that subsection (a)(5) is not a tracing test, but is instead an extension of the change in form principle.<sup>80</sup> The example provided is that of a testator who be-

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ment or property, the time elapsed between disposing of the former property and acquiring the new property, and the ability of the executor to carry out the bequest. For a discussion of the most relevant of these factors, see *infra* Part III.A.

<sup>69</sup> Lundwall, *supra* note 1, at 107 (quoting *Humphreys v. Humphreys* (1789) 30 Eng. Rep. 85; 2 Cox 184).

<sup>70</sup> ARKANSAS CIRCUIT COURTS JUDGES’ BENCHBOOK PROBATE DIVISION, PROBATE BENCHBOOK 15 (2014), <https://www.arcourts.gov/sites/default/files/ProbateBenchbook.pdf>.

<sup>71</sup> CAL. PROB. CODE § 21400 (West 2019).

<sup>72</sup> FLA. STAT. § 732.609 (2019).

<sup>73</sup> *Sorensen v. First Nat’l Bank of Chi.*, 376 N.E.2d 18 (Ill. App. Ct. 1978).

<sup>74</sup> *In re Estate of Graham*, 533 P.2d 1318, 1321-23 (Kan. 1975).

<sup>75</sup> KY. REV. STAT. ANN. § 394.360 (West 2019).

<sup>76</sup> *Fid. Nat’l Bank & Tr. Co. v. Hovey*, 5 S.W.2d 437, 441-42, 446-47 (Mo. 1928).

<sup>77</sup> MONT. CODE ANN. § 72-2-616 (2019).

<sup>78</sup> Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1067 (1992).

<sup>79</sup> UNIF. PROBATE CODE § 2-606(a)(5) (UNIF. LAW COMM’N 2010).

<sup>80</sup> *Id.* § 2-606(a)(5) cmt.

queaths a specific car, and, after executing her will, sells that car and buys another different car. Applied properly, subsection (a)(5) ensures that the beneficiary takes the replacement car regardless of make, model, or year.<sup>81</sup> But if the testator sells the specifically bequeathed car and buys mutual funds instead of a replacement car, then the bequest fails and the beneficiary takes nothing.<sup>82</sup> The comment's example suggests that new property of like-kind to the former property should be considered a replacement. At least in a case analogous to *Harris*, discussed *supra*,<sup>83</sup> the UPC exception would avoid ademption. However, it is less clear whether the exception applies in situations that do not involve like-kind property such as the transfer of farm and stock to a partnership in the *Akins* case. Additionally, the exception provides no relief from the traditional identity approach in cases involving intangibles.

Addition of the replacement property exception to the UPC prompted two states—South Dakota and Georgia—to codify their own variations of the exception. In South Dakota, a specific devisee has a right to the specifically devised property in the testator's estate at death and . . . (5) property owned by the testator at death if it is “evident from the circumstances” that the testator intended the property to be distributed as a replacement for specifically devised property.<sup>84</sup> Similar to the UPC exception, the South Dakota statute provides no guidance on what constitutes replacement property, nor does it clarify what evidence is admissible to determine testator intent from the circumstances.

In Georgia, if a testator *exchanges* property that is the subject of a specific testamentary gift for other property of “like character,” or merely “changes the investment of a fund,” the testator's intention is construed as meaning to *substitute* the one for the other, and the testamentary gift does not fail.<sup>85</sup> Unlike the UPC exception, this statute clearly extends to intangibles such as investment funds. But the Georgia exception is still vulnerable to criticism by those who believe it is overly specific. For example, one author observed that “if such statute is enacted in order to give effect to the probable intention of the testator, it would seem that his intention would be the same whether in exchange for . . . [the] specifically devised [gift], he got another thing of like character, or a thing of an entirely different character.”<sup>86</sup> This critique may not be far-fetched. In a 2005 Georgia case, *Fletcher v. Ellenburg*,<sup>87</sup> the

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *supra* notes 2-6 and accompanying text.

<sup>84</sup> S.D. CODIFIED LAWS § 29A-2-606(a)(5) (2019).

<sup>85</sup> GA. CODE ANN. § 53-4-67 (West 2019).

<sup>86</sup> Lundwall, *supra* note 1, at 120 (citing William H. Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 34 (1943)).

<sup>87</sup> 609 S.E.2d 337 (Ga. 2005).

testatrix, Ms. Hyde, executed a will devising a one story house and the tract of land on which it was built to her niece.<sup>88</sup> Nearly twenty years after devising the property, she sold it and purchased a second property of like character—a tract of land with a one story brick house.<sup>89</sup> Ms. Hyde died without updating her will as to the property and, notwithstanding a replacement property exception in the Georgia Code, the Georgia Supreme Court unanimously held the gift to the niece was adeemed by extinction.<sup>90</sup> The court based its decision on whether the second property could be considered a substitute for the first and found that because the first property was used as an investment and the second was used as a residence, the latter was not a substitute for the first.<sup>91</sup> *Fletcher* exemplifies the difficult challenge faced by courts in determining whether a second property can be a replacement—or a substitute—for the first.

Twenty-eight years have passed since the 1990 revision of the UPC. Presently, only five jurisdictions have adopted UPC section 2-606(a)(5).<sup>92</sup> The inadequate adoption of replacement property exceptions is disconcerting because the majority of jurisdictions continue to resolve the issue using the vague form and substance test. These jurisdictions endeavor to avoid the morass that Lord Thurlow thought to escape by adhering to the traditional identity theory and ignoring testator intent. But in certain circumstances testator intent is clearer and lawmakers in jurisdictions that recognize exceptions do so because they can infer intent in those situations more easily. The UPC replacement property exception combines the simple identity theory test with a limited exception for circumstances in which application of the identity theory test would almost certainly defeat the testator's intent.

The lackluster response to the UPC exception may be a result of its description as an extension of the change in form principle. If a state applying the form and substance test finds the UPC exception to be a comparable method, why bother turning the legislative wheel to adopt it? Additionally, in its current form the UPC exception could prove just as mercurial as the form and substance test. Merely to call something a “replacement” is vague. For example, must the replacement property be of the same character? Must it be of the same value? Does timing of conversion play a role in the decision? Without more guidance, what

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<sup>88</sup> *Id.* at 338.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 340.

<sup>91</sup> *Id.*

<sup>92</sup> COLO. REV. STAT. § 15-11-606 (2019); MICH. COMP. LAWS § 700.2606 (2019); MONT. CODE ANN. § 72-2-616 (2019); N.M. STAT. ANN. § 45-2-606 (2019); UTAH CODE ANN. § 75-2-606 (LexisNexis 2018).

qualifies as replacement property will continue to be problematic. The UPC exception would benefit from refinement to add clarity and predictability.

### III. THE UPC EXCEPTION: A PROPOSAL FOR A “CHANGE IN FORM”

#### A. The Factor Based Test

In general, the policy of wills law is to effectuate intent, and a revised UPC replacement property exception will help achieve that goal. Inclusion of a factor based test would make replacement property clearer and more predictable, providing guidance for judges to help them resolve the issue in a way calculated to carry out a testator’s intent. The existing UPC replacement property exception fails to provide adequate parameters for determining what qualifies as replacement property. As previously noted, courts rely on a myriad of factors when applying the form and substance test.<sup>93</sup> Drawing from these factors, I have identified the five most relevant ones to be included in a refined UPC exception. The recommended factors include (1) whether the conversion of the property was voluntary or involuntary; (2) whether the conversion of the property was recommended by an advisor; (3) whether the current property was acquired simultaneously or soon after the conversion of the former property; (4) whether the current property has a value similar to the former property; and (5) whether the current property is similar in kind to the former property. No single factor in the refined statute is intended to be outcome determinative. Instead all five factors ought to be considered with the most weight placed on those that best help a court effectuate testator intent in the particular circumstances. Each factor is explained in further detail below.

(1) *Whether the conversion of the property was voluntary or involuntary.*

Whether or not the conversion of the property is the result of voluntary conduct by the testator can indicate testator intent. If the act is involuntary then it is less likely to reflect a change of intent by the testator. This element is implicit in UPC section 2-606(b) relating to the sale or mortgage of property by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal.<sup>94</sup> Under this exception, the involuntary nature of the act paired with

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<sup>93</sup> See *supra* note 68.

<sup>94</sup> UNIF. PROBATE CODE § 2-606(b) (UNIF. LAW COMM’N 2010) (“If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or a condemna-

the testator's incapacity indicates that the change in the property was not a manifestation of the testator's intent to alter an existing bequest.<sup>95</sup>

Because an involuntary act by a testator is germane to the ademption analysis, it logically follows that voluntary conduct is also relevant. For example, in *Kelly v. Nielson*,<sup>96</sup> the court held a voluntary sale by a testatrix prior to her death, but that was not completed until after her death due to circumstances beyond her control, adeemed the bequest of the property.<sup>97</sup> The court reasoned that the testatrix took every step necessary to effectuate the sale prior to her death and that refusing to recognize ademption would have disrupted the testatrix's dispositive scheme.<sup>98</sup> In *Kelly*, the testatrix was fully aware the sale extinguished the gift, she continued with the sale, and she chose not to purchase property to replace the property sold.<sup>99</sup> Therefore, when objectively considered, the voluntary (or involuntary) acts of a testator do evidence intent and should be included in any ademption analysis.

(2) *Whether the conversion of the property was recommended by an advisor.*

When a testator converts property solely in response to recommendations of an advisor, it is unlikely he or she intended the conversion to have an effect on the estate plan. Such changes are usually made to save estate taxes or otherwise improve the return on an investment. The testator is typically motivated by reasons that are completely unrelated to his or her estate plan.

For example, the 2017 case of *Steinberg v. Steinberg*<sup>100</sup> involved the exchange of previously bequeathed real property in a like-kind tax exchange.<sup>101</sup> Focusing on the fact that the exact property bequeathed was

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tion award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.”).

<sup>95</sup> See *Walsh v. Gillespie*, 154 N.E.2d 906, 910 (Mass. 1959) (holding that the sale by a conservator of one-half of the shares of stock bequeathed in her will did not operate as an ademption of the specific bequest as to the unexpended balance of the proceeds remaining in the conservator's hands at the testatrix's death. The sale of the stock, the largest asset of the estate, had been necessary for the testatrix's support. If adeemed, this asset would not have benefited “the principal objects of the testatrix's bounty,” a result the court declined to sanction.).

<sup>96</sup> 745 N.E.2d 952 (Mass. 2001).

<sup>97</sup> *Id.* at 960.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 894 N.W.2d 463 (Iowa 2017).

<sup>101</sup> *Id.* at 465 (the property at issue was held in a family living trust).

no longer in the estate, the Iowa Supreme Court declined to recognize an exception for like-kind tax exchanges and held the gift was adeemed by extinction.<sup>102</sup> The court's decision resulted in one son receiving his specific devise plus one half of the adeemed property, while the second son received only one half of the adeemed property.<sup>103</sup> The facts in *Steinberg* indicated the testator intended to provide for both sons equally when he bequeathed one property to each. Nevertheless, the identity theory thwarted the testator's intent when it unjustly enriched one son at the detriment of the other.

From a policy perspective it is difficult to imagine that a testator intends to engineer a change in his estate plan when he or she executes a like-kind tax exchange for investment purposes. Likely, the testator has no idea his actions might trigger an ademption. On the contrary, advisor recommended conversions likely reflect a testator's desire to increase the value of his property, thereby enhancing the gift to the beneficiary. Increasing the value of the gift is evidence of a reaffirmed intention to make the gift, not to adeem it. For these reasons, whether the conversion of the property was recommended by an advisor is relevant to any determination of ademption.<sup>104</sup>

(3) *Whether the current property was acquired simultaneously or soon after the conversion of the former property.*

In assessing whether current property is meant to be a replacement for the former property, case law has shown that timing is significant. Rapidity might suggest a greater likelihood that the testator conceptualized the new property as replacing the old. If this is true, then the testator likely intends the beneficiary to take the current property in lieu of the former.

Recall in *Harris*, the testatrix's home was condemned and as a result she purchased a second home on the same street in New York.<sup>105</sup> The court noted the importance of the fact that the testatrix used the funds from the first home to buy the second and that the second was purchased less than thirty days after the first home was officially condemned.<sup>106</sup> Although the timing of the conversion was undoubtedly relevant, the court ultimately held the gift of the property adeemed on

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<sup>102</sup> *Id.* at 471.

<sup>103</sup> *Id.*

<sup>104</sup> Compare *Redditt v. Redditt*, 820 So. 2d 782, 787 (Miss. Ct. App. 2002) (noting the transfer of assets to a corporation for the purpose of decreasing estate taxes as relevant to the determination of ademption) with *Akins v. Clark*, 59 S.W.3d 124, 125 (Tenn. Ct. App. 2001) (arguing a testator's intent to save taxes as irrelevant).

<sup>105</sup> *In re Estate of Harris*, 414 N.Y.S.2d 835, 836 (Sur. Ct. 1979).

<sup>106</sup> *Id.* at 836.



other grounds.<sup>107</sup> Additionally, in *Fletcher*, the court considered significant the fact that over a year had passed between the sale of the first property and the purchase of the second.<sup>108</sup> Although not expressly stated in *Fletcher*, the court suggested that a long passage of time might indicate a testator's intent to adeem a gift. Cases involving tangible and intangible personal property also support the inclusion of a factor that weighs the timing between acquisition of current property and conversion of the former property.<sup>109</sup>

(4) *Whether the current property has a value similar to the former property.*

Equivalent value at the time of conversion may suggest a greater likelihood that the testator intended the new property to replace the old. In analyzing this factor, courts should focus on rough-equivalence of value at the time of the conversion, keeping in mind that specific bequests can always fluctuate in value after a will is executed.

Value comparisons between current and former property appear repeatedly in cases decided by jurisdictions using the form and substance test. Courts applying the form and substance test often look to the value of property to determine whether a material change has occurred (i.e. whether the gift has changed to such an extent it has been extinguished). In *Geary*, discussed *supra*, a testator transferred investments from one brokerage account to another.<sup>110</sup> Holding that no ademption occurred, the court justified the decision by reasoning that the contents of the new account were the same as the old and had not been "liquidated, added to, disposed of, or otherwise substantially changed."<sup>111</sup> A similar result was reached in *Parker* where the court focused on the fact that the funds in the original CD were not withdrawn, added to, or otherwise changed, but were simply transferred to another account and split into two CDs of equal value.<sup>112</sup>

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<sup>107</sup> *Id.* at 838 (declining to consider an argument of "substituted premises," the court held the property adeemed because the premises owned at death were not those described in the will.).

<sup>108</sup> *Fletcher v. Ellenburg*, 609 S.E.2d 337, 340 (Ga. 2005).

<sup>109</sup> See generally *Welch v. Welch*, 113 So. 197, 198 (Miss. 1927) (recognizing the exchange of one vehicle for another may indicate the testator intended the second vehicle to replace the first, but holding ademption on other grounds); *Church v. Morgan*, 685 N.E.2d 809, 810-11 (Ohio Ct. App. 1996) (conceding that the simultaneous transfer of funds in a specifically bequeathed bank account to a CD at the same bank might indicate the testatrix intended the bequest to remain the same).

<sup>110</sup> *Geary v. Geary*, 275 S.W.3d 835, 836 (Tenn. Ct. App. 2008).

<sup>111</sup> *Id.* at 843 (arguing the "contents" of the first account still existed in the second account, specifically the same four municipal bonds and a small amount of cash and cash equivalents).

<sup>112</sup> *Parker v. Bozian*, 859 So. 2d 427, 436 (Ala. 2003) (holding nonademption).

Value can also be defined as percentage of ownership. This becomes relevant in cases involving the transfer of real property to a partnership or corporation, or in cases where a business is incorporated. For example, in *Akins*, the value of the testator's interest in a farm and stock decreased from 100% to 91.5%.<sup>113</sup> The court argued this change was significant enough to trigger ademption.<sup>114</sup> Equivalent value was also a pertinent consideration by the court in *Arenofsky v. Arenofsky*,<sup>115</sup> where a testator exchanged his partnership interest for corporate shares.<sup>116</sup> Focusing on the value and number of shares as compared to the partnership interest, the court held the transfer did not adeem the bequest.<sup>117</sup>

(5) *Whether the current property is similar in kind to the former property.*

Property of similar kind may suggest a greater likelihood the testator envisioned the new property as a replacement for the former property. From the standpoint of intent, the more similar in kind replacement property is, the more likely the testator intends one as a substitute for the other. This is likely substantiated by the fact that whether property is similar in kind is one of the most frequently weighed factors in replacement property cases. For instance, in *Fletcher* the court evaluated the property's like character (real property) and like use (residence versus rental property) when deciding if current property was a substitute for the former.<sup>118</sup> In *Thompson v. Mathews*,<sup>119</sup> the court primarily focused on the property's like character (both properties were farm land) when holding that no ademption occurred.<sup>120</sup> And recall that in *Akins*, the change from real property to a partnership interest was of utmost importance to the court.<sup>121</sup>

The dominance of this factor is likely attributable to the form and substance test. Under the form and substance test, whether replacement

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<sup>113</sup> *Akins v. Clark*, 59 S.W.3d 124, 127 (Tenn. Ct. App. 2001).

<sup>114</sup> *Id.*

<sup>115</sup> 102 A.2d 101 (N.J. Super. Ct. App. Div. 1954).

<sup>116</sup> *Id.* at 103.

<sup>117</sup> *Id.* at 104.

<sup>118</sup> *Fletcher v. Ellenburg*, 609 S.E.2d 337, 340 (Ga. 2005).

<sup>119</sup> 174 S.E.2d 916 (Ga. 1970).

<sup>120</sup> *Id.* at 918 (holding the exchange of property of like character did not cause an ademption); GA. CODE ANN. § 53-4-67 (West 2019) ("If the testator exchanges property which is the subject of a specific testamentary gift for other property of like character, or merely changes the investment of a fund so given, the testator's intention shall be deemed to be to substitute the one for the other, and the testamentary gift shall not fail.").

<sup>121</sup> *See Akins v. Clark*, 59 S.W.3d 124 (Tenn. Ct. App. 2001).

property is similar in kind is extremely relevant to whether property has changed in substance. Examples include, but are not limited to, a transfer of real property to a partnership or a corporation,<sup>122</sup> the exchange of a mortgage note for the underlying real property,<sup>123</sup> the incorporation of a sole proprietorship,<sup>124</sup> and the exchange of real property for stock.<sup>125</sup>

Moreover, the importance of the similar in kind analysis is implicit in the current UPC exception. The comment under UPC section 2-606 includes an example of a testator who exchanges a car for mutual funds to illustrate a conversion beyond the scope of the replacement property exception.<sup>126</sup> Although not expressly stated, this example demonstrates that whether property is similar in kind is relevant to determining what qualifies as replacement property. The repeated use as well as the substantial weight accorded the similar in kind analysis strongly support its inclusion in a refined UPC exception.

#### B. The Refined Replacement Property Exception

Refinement of the UPC exception to include the aforementioned factors is the first step. The second is to extend the exception to intangibles. Because no sentiment attaches to intangibles, there is an even greater likelihood that the testator sought to bequeath value to the beneficiary, and would therefore want the beneficiary to receive something in lieu of the original bequest. Furthermore, case law demonstrates courts are already applying the form and substance test to intangibles. Consequently, reforming the UPC exception to extend to intangibles may remedy the uneven application and inconsistent results of existing doctrine. Thus, a refined UPC section 2-606(a) statute might read:

- (a) A specific devisee has a right to specifically devised property in the testator's estate at the testator's death and to:
  - (5) any real property, . . . tangible personal property, or *intangible personal property* owned by the testator at death which the testator acquired as a replacement for spe-

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<sup>122</sup> See *Lang v. Vaughn*, 74 S.E. 270, 274 (Ga. 1912) (holding stock and real property are not of like character).

<sup>123</sup> See *Green v. Green*, 58 S.E.2d 722, 724 (N.C. 1950) (holding a change in character from a security interest to absolute ownership of the property mortgaged adeemed the legacy).

<sup>124</sup> See *Akins*, 59 S.W.3d at 124 (holding a transfer of real property to a partnership was a change in substance). *But see* *Pepka v. Branch*, 294 N.E.2d 141, 156 (Ind. Ct. App. 1973) (holding the incorporation of a business was not a change in character).

<sup>125</sup> See *Redditt v. Redditt*, 820 So. 2d 782 (Miss. Ct. App. 2002) (holding a transfer of real property to a corporation did not change the substance of the bequest).

<sup>126</sup> UNIF. PROBATE CODE § 2-606 cmt. (UNIF. LAW COMM'N 2010).

cifically devised real property, . . . tangible personal property, or *intangible personal property*;

. . .  
 (f) *For purposes of determining whether property qualifies as replacement property under subsection (a)(5), the relevant factors include:*

(1) *Whether the conversion of the property was voluntary or involuntary;*

(2) *Whether the conversion of the property was recommended by an advisor;*

(3) *Whether the current property was acquired simultaneously or soon after the conversion of the former property;*

(4) *Whether the current property has a value similar to the former property; and*

(5) *Whether the current property is similar in kind to the former property*

The proposed refinement of the UPC replacement property exception is evolutionary rather than revolutionary. The revision aims to synthesize the best parts of existing case law into a uniform test to increase predictability. Revisiting one of the most unsatisfactory decisions, *Akins v. Clark*, and applying the new exception helps to illustrate its prospective utility.

### C. Applying The Refined Exception

Recall that in *Akins* the testator converted farm and stock to a limited partnership after executing her will.<sup>127</sup> The question was whether the testator's interest in the partnership qualified as replacement property. In analyzing the case under the refined UPC exception, the facts should be applied to each of the five relevant factors and no one factor will be considered dispositive of the testator's intent to adeem (or not adeem) the bequest in question.

Factors one and two appear to be satisfied because, although the testator transferred the property to the partnership voluntarily, she did so on the recommendation of an advisor to save estate taxes.<sup>128</sup> If the purpose of the transfer was to decrease potential estate taxes, thus ensuring the bequest is of greater value to the beneficiary, then a court may feel confident inferring nonademption. The tax motivation behind the transfer is also evidence the testator did not intend to engineer a change in his estate plan or cause a specific bequest to adeem.

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<sup>127</sup> *Akins v. Clark*, 59 S.W.3d 124, 126 (Tenn. Ct. App. 2001).

<sup>128</sup> *See id.* at 127-28.

The third factor requires a consideration of timing. In *Akins* the conversion occurred simultaneously with the transfer of the property to the partnership. Under the fourth factor a court should consider whether the partnership interest is of equivalent value to the original property. Prior to conversion the testator owned 100% of the farm and stock, but after the conversion she owned 91.5%.<sup>129</sup> The testator still maintained the controlling share of the partnership, and one could argue specific bequests always fluctuate in value from the time of will execution to the time of death. Therefore, the forfeiture of 8.5% of the value upon conversion, when considered with the four other factors, may not be determinative. Nevertheless, there is no bright line rule, and courts will eventually dictate when a loss is so substantial that it triggers ademption.

Finally, the fifth factor asks courts to consider whether the new property is similar in kind to the former property. In *Akins*, there was an unquestionable conversion of real property to intangible personal property. If similar character alone triggered ademption, then the beneficiary in *Akins* would have no hope at success. However, the fifth factor asks courts to consider whether the property is similar in kind when defining replacement property, not whether the property holds the same character. From the standpoint of intent, it would seem that the more “similar”—both in value and in kind—replacement property is, the more likely the testator viewed it as a substitute. Here, the use and function of the farm as well as the stock remained the same.<sup>130</sup> The business also continued in the same manner because the testator’s controlling interest in the partnership ensured operation and management would remain consistent. The formal characteristics of the replacement property may not be identical, but the underlying subject matter, the farm business, remained the same.

#### IV. CONCLUSION

Current jurisprudence includes an abundance of evidence corroborating the arbitrary application of the existing replacement property doctrine. The danger, however, is not only in inconsistent and arbitrary results, but also in the harsh consequence of ademption, particularly in cases where it is clear testator intent was frustrated. From a policy perspective, limited exceptions in circumstances where testator intent is more clearly identifiable can help courts avoid the draconian results of the law of ademption. Moreover, limited exceptions are theoretically justified because where testator intent is discernible such exceptions ensure judicial economy and limit adjudicative costs.

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<sup>129</sup> *Id.* at 127.

<sup>130</sup> *Id.* at 128.

The current UPC replacement property exception, as an extension of the change in form principle, provides insufficient relief because it is vague and does not cover intangibles. Although there is no bright line rule for replacement property, the analysis will almost always require consideration of relevant factors. These factors must be further specified and applied uniformly in order to ensure predictability for courts, drafting attorneys and testators. In addition, the relevant factors should be limited in number to maximize consistency in application—a test evaluating the totality of all circumstances is not ideal.

The proposed refinement to UPC section 2-606(a)(5) is a sensible solution to a centuries-old problem. A factor based test will expand the exception so that it becomes predictable in the way that the form versus substance test is mercurial. Additionally, the proposed refinement is congruent with the major import of the 1990 revisions to the UPC: to adopt the intent theory within subsection (a)(5).<sup>131</sup> A refined exception may even prompt some jurisdictions to finally retire the form and substance test as applied to cases involving the unique situation of replacement property. Finally, and possibly most importantly, the proposed factor test will continue to safeguard the primary purpose of wills law: effectuating testamentary intent.

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<sup>131</sup> UNIF. PROBATE CODE § 2-606 cmt. (UNIF. LAW COMM'N 2010).

