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WHEN IS A LIFE ESTATE NOT A LIFE ESTATE IN COLORADO?

BY THOMPSON G. MARSH*

"We fail to get from the briefs in this case, . . . the assistance to which we are entitled."[1] With these disturbing words the Colorado Supreme Court began a strange detour from which it may now be returning. The route can be traced in seven cases.

There are orthodox landmarks in 1922 and 1926; deviation beginning in 1942 and continuing into 1960; and at least a halt in 1965.

I. *Barnard v. Moore.*[2]

An orthodox case on the main route: "I hereby devise . . . to my wife . . . for her sole use and enjoyment *during her natural life,* my ranch . . . , and after the death of my wife the life estate hereby . . . devised to her shall cease, and I hereby devise the remainder over of said land, in fee simple, to my five sons . . . in fee simple. . . . In the event my wife shall desire to sell said place during her lifetime, the proceeds shall be at once freed from her life estate hereinabove devised, and shall be equally divided between my five sons and Ida V. Pricket."[3] (Emphasis added.)

The widow quit-claimed "all the right, title, interest, claim and demand which the said party of the first part has in and to the . . . premises" to the five sons and Ida V. Prickett.[4]

The court said:

> A . . . question is whether the widow, by her deed . . . conveyed the fee or only her life estate. We think only her life estate. . . . A power to convey creates, in the donee thereof, no right, title or interest in the premises to be conveyed. . . . Her only right, title or interest, then, was an estate for life; therefore she conveyed nothing more, unless, elsewhere in the deed, it appears that she intended to exercise the power.[5]

No such intention was found. It is obvious that the result of the case would have been different if the widow had been held to have had an estate in fee simple absolute.

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[1] McLaughlin v. Collins, 109 Colo. 377, 380, 125 P.2d 633, 634 (1942).

[2] 71 Colo. 401, 207 Pac. 332 (1922).

[3] Abstract of Record and Assignment of Errors, pp. 8-9, Barnard v. Moore, 71 Colo. 401, 207 Pac. 322 (1922).

[4] *Id.* at 14-15.

[5] 71 Colo. 401, 404, 207 Pac. 332, 333 (1922).

II. *Blatt v. Blatt.*[6]

Another orthodox case on the main route: "I . . . devise and bequeath to my wife . . . all my property . . . *so long as she shall live,* and I hereby authorize my . . . wife and my executor . . . whenever in the judgment of my . . . wife and executor, they shall deem it advisable, to sell said real estate. . . ."[7] (Emphasis added.)

The widow elected to take against the will and was the only heir. It was held that she took the entire estate; one-half by election and the other half as heir. Collateral relatives of the testator unsuccessfully tried to establish a remainder by implication. Thus it is clear that the widow would have taken the entire estate by election and by inheritance whether the will had given her the fee simple absolute or only a life estate, but the court said, "It seems to us altogether clear that this will disposed only of a life estate . . . by giving it to the widow. . . . The fee . . . is not devised . . . to any person. . . ."[8]

III. *McLaughlin v. Collins.*[9]

The detour begins: "I hereby . . . devise . . . all . . . of my estate . . . to my . . . wife . . . *to be held and enjoyed by her during her lifetime,* Provided However, that she may sell . . . the real estate for an adequate consideration, but should she die seized . . . of the real estate . . . then it is my wish that said real estate shall descend to my son Harry . . . during his lifetime, without the power of grant or sale as to the same. . . ."[10] (Emphasis added.)

The widow did sell the real estate, and the proceeds in the hands of her executor were unsuccessfully claimed by the heirs of the testator upon the ground that the widow was given only a life estate and that the remainder to Harry was of real estate only, not proceeds.

The court held that the proceeds belonged to the widow, and said,

> As to the real estate it is pointed out that she took only a life estate with power of sale, but that . . . no authority was given to dispose of the proceeds. Let us see. . . .
>
> It thus seems clear that the interpretation contended for by [the heirs of testator] would defeat the intention of [the testator] in the following particulars: First. It would give to Dan over $1300 which his father certainly intended he should not have. Second. It

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[6] 79 Colo. 57, 243 Pac. 1099 (1926).

[7] *Id.* at 60, 243 Pac. at 1100.

[8] 79 Colo. 57, 61, 243 Pac. 1099, 1101 (1926).

[9] 109 Colo. 377, 125 P.2d 633 (1942).

[10] *Id.* at 378-79, 125 P.2d at 634.

> would convert the power of sale expressly granted [the widow] from something to nothing. Third. It would give Harry money with all the authority over it implied by possession when his father only intended he should have real estate without right of alienation. We must therefore affirm this judgment [sustaining the widow's right to the proceeds] unless forbidden by some positive statute or some decision which has become a rule of property, hence stare decisis. No one contends there is such a statute and we think the authorities binding upon us are to the contrary.[11]

The opinion might have ended there, and if it had, the court would still have been on the orthodox route. However, having referred to "the authorities binding upon us," the court proceeds to discuss them. They turn out to be, surprisingly enough, two cases from Maine.[12] The language from these two cases fits together very nicely. In the first case, *Gregg v. Bailey,* the court says, "If . . . [the intent of the testator] is so expressed that it cannot be effectuated without violating some 'canon of interpretation so firmly established as to have become a fixed rule of law . . .' it must fail of execution."[13] The second case, *Methodist Church v. Fairbanks,* quotes a rule, and says, "This rule has been so frequently laid down by this court [i.e., the Supreme Judicial Court of Maine] that it . . . is now recognized as a 'fixed canon of interpretation.' "[14]

What is this "canon of interpretation"? "A devise without words of inheritance but coupled with an unqualified power of disposal, either express or implied, conveys an absolute estate."[15] A mere reading of the rule would lead one to suspect that it was not being applied to words which expressly created a life estate, "to be held and enjoyed by her during her lifetime," such as the Colorado court was considering, but that the "canon of interpretation" was being applied to language which merely omitted the words of inheritance, "and his heirs," which are usually employed when the creation of an estate in fee simple is intended. A reading of the Maine case shows that this was indeed the fact. The language was, "I . . . devise to my . . . wife . . . and my . . . daughter . . . all the . . . property . . . to their free use and benefit forever and free from the interference and control of anyone; but if at the decease of my wife . . . and my daughter . . . there is any of my property that I . . . devise . . . to them left . . . it shall be equally divided. . . ."[16]

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[11] 109 Colo. 377, 380-83, 125 P.2d 633, 635-36 (1942).

[12] Methodist Church v. Fairbanks, 124 Me. 187, 126 Atl. 823 (1924); Gregg v. Bailey, 120 Me. 263, 113 Atl. 397 (1921).

[13] 120 Me. 263, 266-67, 113 Atl. 397, 398 (1921).

[14] 124 Me. 187, 188, 126 Atl. 823, 824 (1924).

[15] *Ibid.*

[16] *Ibid.*

Of course, this devise was held to be an estate in fee simple. Only the words of inheritance, "to them and their heirs," were missing.

Colorado Revised Statutes, section 118-1-7, would produce the same result. The statute provides, "Every estate in lands which shall be devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, *if a less estate be not limited by express words,* or do not appear to be devised by operation of law." (Emphasis added.)

If the Colorado court had considered this Colorado statute which has been unchanged since its adoption in 1867, as "authority binding upon us," then it might have been impressed by the fact that in the case before it "a less estate" had been "limited by express words," the words being, "to be held and enjoyed by her during her lifetime."

The "binding" quality of the other Maine case, *Gregg v. Bailey,* is also obscure. The language was, "to my sister Georgie . . . I . . . bequeath four thousand dollars. At her decease same to go to my sister, Frances. . . ."[17] Held, Georgie took only for her life. Yet this case is cited by the Colorado court as requiring a decision that, "to my . . . wife to be held and enjoyed by her during her lifetime, Provided However, that . . . she may sell . . . ," created in the wife an estate in fee simple.

As a matter of fact the Colorado court was not itself convinced by these Maine "authorities." After discussing them and concluding that "the rule would thus convert the bequest into a gift absolute to Harriet [the wife]," the court in the very next paragraph of its opinion says, "here Harriet was authorized to and did extinguish the *remainder.*" (Emphasis added.) How could there have been a remainder unless Harriet had had an estate for life?

The court's detour began in an intellectual fog of which it was aware — "We fail to get from the briefs in this case, . . . the assistance to which we are entitled."[18]

IV. *Patch v. Patch-Smith.*[19]

A distant view of the main route: "I . . . bequeath to my wife . . . all of my property . . . and at her death all of the said property . . . is to be divided equally between our . . . children. I wish to make it plain that my wife . . . is to have all of my property . . .

[17] 120 Me. 263, 265, 113 Atl. 397, 398 (1921).

[18] McLaughlin v. Collins, 109 Colo. 377, 380, 125 P.2d 633, 634 (1942).

[19] 113 Colo. 186, 155 P.2d 765 (1945).

to do with as she pleases, she can sell or trade any part of it but what is left at her death is to be divided as specified above."[20] The land was in Kansas. In a proceeding to construe the will the court said,

> Counsel for plaintiffs in error cite . . . our recent opinion in *McLaughlin v. Collins* . . . in support of their contention that the will should be construed so as to give an estate in fee to the widow. . . .
>
> Counsel for defendant in error . . . raise the . . . point that . . . the property involved is real estate . . . in Kansas.
>
> . . . the law governing the interpretation of the will here involved is the law . . . of Kansas.
>
> . . . Kansas decisions . . . announcing the law both at the time the will was executed in 1936 and as of the time it was admitted to probate, would clearly support the construction which would award a life estate to the widow and the remainder to the two daughters.[21]

V. *Davey v. Weber.*[22]

The detour continues, and acquires a name. "To my wife . . . I give . . . the residue of my estate . . . *for and during her natural life,* granting unto my . . . wife the privilege of disposing of any part thereof at any time she may deem it necessary for her welfare and if at the death of my said wife there shall be any of my estate remaining it shall go to the following named brothers. . . ."[23] (Emphasis added.)

In an action to quiet title the court held for the widow's devisees and against the named remaindermen, and said, "counsel . . . attempt to distinguish the McLaughlin case [from the case at bar], but we are not persuaded that there is any difference so far as the *Colorado rule* is concerned.

"An unqualified power *given a life tenant* to dispose of property devised by will enlarges the life estate to a fee simple title. Such is the Colorado rule."[24] (Emphasis added.)

As if in confirmation, the court quotes the quite different rule from *Methodist Church v. Fairbanks,* "A devise without words of inheritance, but coupled with an unqualified power of disposal, either express or implied, conveys an absolute estate."[25] The fog continues. Colorado Revised Statutes, section 118-1-7 is not yet visible.

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[20] *Id.* at 187, 155 P.2d at 765.

[21] *Id.* at 188-91, 155 P.2d at 766-67.

[22] 133 Colo. 365, 295 P.2d 688 (1956).

[23] *Id.* at 366, 295 P.2d at 688-89.

[24] *Id.* at 368, 295 P.2d at 689.

[25] 124 Me. 187, 188, 126 Atl. 823, 824 (1924).

VI. *Zell v. Zell.*[26]

Fog continues to blanket the "Colorado" detour. "I give . . . all the . . . residue . . . of my estate . . . unto my wife, *for and during her natural life,* with the full right and authority to sell . . . any portion or the whole . . . if she in her sole discretion determines that she is . . . in need thereof . . . and in the event that she shall die before she has so disposed of this bequest, then I give . . . such remaining portion to. . . ."[27] (Emphasis added.)

In a proceeding for construction of the will, the court held that the wife was vested with an absolute fee simple estate and said:

> Since the decision in *McLaughlin v. Collins* . . . Colorado has followed what is termed the minority rule in interpreting such testaments of remainders. Our re-affirmance of this rule appears in *Davey v. Weber* . . . wherein it was stated: "An unqualified power given a live tenant to dispose of property devised by will enlarges the life estate to a fee simple. Such is the Colorado rule."[28]

The court is no longer looking for road signs, and doesn't see Colorado Revised Statute, section 118-1-7.

VII. *First Nat'l Bank v. People.*[29]

The detour is no longer proudly called the "Colorado rule" but is renamed the "McLaughlin rule." The majority calls a halt. The dissenter says it is a turning back. The will created a trust and provided, "My trustees shall pay all of the net income . . . to my wife . . . *as long as she shall live.* . . . In addition . . . my trustees shall pay to my wife such sums from principal as she may from time to time request in writing. It is my intention that no limitation be placed on my wife as to either the amount of or reasons for such invasion of principal. . . . I hereby grant to my wife alone and in all events, the power to appoint by her will . . . the entire balance of principal and undistributed income, if any, . . . free of this trust, to her estate or to any other persons. . . . In the event . . . that my wife shall fail to exercise the power of appointment hereinabout conferred upon her, then. . . ."[30] (Emphasis added.)

In a proceeding involving the assessment of the Colorado inheritance tax, the court held that the wife did not take a fee simple, but only a life estate, and said,

> The commissioner relies upon three decisions of this court, namely,

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[26] 142 Colo. 343, 351 P.2d 272 (1960).

[27] *Id.* at 344, 351 P.2d at 273.

[28] *Id.* at 344-45, 351 P.2d at 273, citing Davey v. Weber, 133 Colo. 365, 368, 295 P.2d 688, 689.

[29] 405 P.2d 730 (Colo. 1965).

[30] *Id.* at 731.

McLaughlin v. Collins, Davey v. Weber, and *Zell v. Zell.* The rule announced in these cases may be stated as follows:

An unqualified power given a life tenant to dispose of property devised by will enlarges the life estate to a fee simple title.

Colorado would seem to stand alone in following the "McLaughlin Rule." The three Colorado cases supporting it have a number of similar factual backgrounds, viz:

(1) They all involved a direct devise of real property.

(2) They all involved disputes between a widow and contingent remaindermen.

(3) They all resulted in giving full effect to the intent of the testator as gathered from the will as a whole.

(4) They all involved a legal life estate created by express language of the will.

(5) None of them involved assets specifically made the corpus of trust.

(6) None of them involved any question arising under the statute authorizing collection of inheritance and successor taxes.

Under the factual situation disclosed by the record in the instant case, we hold that the trial court erred in applying the "McLaughlin rule." It should not be extended to include trust assets of the kind involved in this case.[31]

The court does not say how many of the six enumerated "factual backgrounds" must be present in order to justify the application of the "McLaughlin rule" (formerly the "Colorado rule").

There are, no doubt, several interesting combinations, for example, (2) and (6). Taken together they seem to mean that the widow always wins: against remaindermen she has an estate in fee simple; against the Inheritance Tax Commissioner she has but a life estate. If it should happen that the same will should be litigated on both points in separate cases, neither decision would be res judicata as to the other.

The six "similar factual backgrounds" look like pellets from a pleader's shotgun, and that is what they are.[32] There is, therefore, the possibility that they may be stated in a manner that may be overly-persuasive.

(1) "They all involved a direct devise of real property." True, and they all involved a direct bequest of personal property. The will in *McLaughlin v. Collins* said: "I hereby . . . devise . . . all . . . of my estate . . . both real and personal . . . to my wife . . . to be held and enjoyed by her during her life time, provided however, that all personal property . . . may be . . . sold or disposed of as she may wish. . . ."[33] (Emphasis added.)

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[31] *Id.* at 732-33.

[32] Brief for Plaintiffs in Error, p. 20, 405 P.2d 730 (Colo. 1965).

[33] 109 Colo. 377, 378-79, 125 P.2d 633, 634 (1942).

The will in *Davey v. Weber* said, "To my wife, I . . . bequeath the residue of my estate, both real and *personal* . . . for and during her natural life, granting unto my . . . wife the privilege of disposing of any part thereof at any time she may deem it necessary for her welfare."[34] (Emphasis added.)

The will in *Zell v. Zell* said, "I . . . bequeath all the residue . . . of my estate, real, *personal,* and mixed . . . unto my . . . wife, for and during her natural life, with the full right and authority to sell . . . any portion or the whole of this bequest. . . ."[35] (Emphasis added.)

(2) "They all involved disputes between a widow and contingent remaindermen." Not quite true, and certainly misleading. In *McLaughlin v. Collins,* the widow had sold the land and the proceeds in the hands of her executor were claimed by those who would have been reversioners if she had had only a life estate. However, the court's first ground for decision was that even though her estate was a life estate, she was empowered to deal with real estate and its proceeds as she pleased unless restricted by the phrase "for an adequate consideration," and the court found no such restriction.[36]

(3) "They all resulted in giving full effect to the intent of the testator as gathered from the will as a whole." This statement is true only of the first ground of the decision in *McLaughlin v. Collins.* As to the second ground, "authorities binding upon us," the court said, in this part of the opinion, "If we assume that the words, 'during her life' and 'for an adequate consideration' evidenced McLaughlin's intent that . . . any proceeds . . . should go to Harry, the foregoing rule *defeats that intent* and confirms Harriet's absolute title to said proceeds."[37] (Emphasis added.) The "foregoing rule" was, "A devise without words of inheritance, but coupled with an unqualified power of disposal, either express or implied, conveys an absolute estate."[38]

Davey v. Weber does not purport to look for the intention of the testator, who had said, "to my wife . . . for and during her natural life," but simply the said case was like that of *McLaughlin v. Collins* and applied the "Colorado rule."[39]

Zell v. Zell simply says, "The wording . . . is in fact no differ-

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[34] 133 Colo. 365, 366, 295 P.2d 688, 688-89 (1956).

[35] 142 Colo. 343, 344, 351 P.2d 272, 273 (1960).

[36] 109 Colo. 380-81, 125 P.2d 635. ". . . Harriet was authorized to and did extinguish the remainder." *Id.* at 384, 125 P.2d at 636.

[37] 109 Colo. 377, 383, 125 P.2d 633, 636 (1942).

[38] *Ibid.*

[39] 133 Colo. 365, 368, 295 P.2d 688, 688-89 (1956).

ent from that in McLaughlin," and applies the "Colorado Rule."[40] There is no attempt to ascertain the intention of the testator who has said, "unto my . . . wife for and during her natural life."

(4) "They all involved a legal life estate created by express language of the will." True, but this statement seems to fall somewhat short of justifying the court's misapplication of the rule from Maine. Is it intended to suggest that a legal life estate created by implication would be more likely held to be a life estate than one created by express words?

(5) "None of them involved assets specifically made the corpus of a trust." True. The idea seems to be that a life estate plus a power to sell can be created only upon payment of a fee — to a trustee.

(6) "None of them involved any question arising under the statute authorizing collection of inheritance and successor taxes." True, and intriguing. The thought seems to be that by devising to one's wife for life with a power to sell, she may be given a fee simple absolute, but that it will be taxed only as a life estate. This really sounds too good to be true.

One is inclined to agree with the dissenter, who failed to find in these six "similar factual backgrounds" any sufficient reason for distinguishing *McLaughlin v. Collins.*

If the court has turned around and does wish to regain the main road, Colorado Revised Statutes, section 118-1-7, which has never been called to its attention, points in the right direction. *Barnard v. Moore* and *Blatt v. Blatt* lend a feeling of familiarity to the main road. One might even hope to enjoy seeing the technique of the next-to-the-last paragraph of *McLaughlin v. Collins* used to destroy the "McLaughlin rule."

In that paragraph the court escaped the rule expressed in *Blatt v. Blatt* by saying, ". . . a careful examination of the *Blatt* case will demonstrate that the holding there was dictum, since in that case there were neither children nor descendants of children. Mrs. Blatt would have taken the whole had there been no will."[41] Thus by supplying an alternative ground for decision, the court disparaged the expressed ground as dictum. How much easier to do the same thing to the "McLaughlin rule," where the alternative ground is expressed as a principal reason for the decision, and the "rule" is employed *only,* "If we assume. . . ."[42]

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[40] 142 Colo. 343, 345, 351 P.2d 272, 273-74 (1960).

[41] 109 Colo. 377, 384, 125 P.2d 633, 636 (1942).

[42] *Id.* at 383, 125 P.2d at 636.

If it be suggested that lawyers have come to rely upon the McLaughlin rule, one wonders just how many lawyers, with Colorado Revised Statutes, section 118-1-7 in mind, and wishing to create an estate in fee simple absolute, have begun by saying, "to my wife for and during her natural life."

If it be suggested that security of title requires persistence of any rule for the sake of certainty, what certainty can there be, without a return to the main road, after the opinion in *First Nat'l Bank v. People?*