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One Year Review of Wills, Estates and Trusts

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ONE YEAR REVIEW OF WILLS, ESTATES AND TRUSTS

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Activity in the probate and trust field in 1962 was high. Many of the cases, however, involved well documented areas in specific situations and thus significant new developments in the law were few.

Maher v. Knauss[1] concerned an antenuptial agreement under which a "widow's allowance" had been waived. The allowance having been claimed, the supreme court was faced with the question of the breadth of the terms used in the agreement. It had little difficulty in determining that the Colorado statutory allowance was within the coverage of the premarital waiver, and consequently deemed the allowance to have been fully barred by the agreement.

The always difficult stock-split problem was faced again in *Heinneman v. Colorado College*.[2] Under a bequest of 108 shares of American Telephone and Telegraph Co., which was followed in time by a three for one split of the stock, the court determined that the testamentary intent was to deliver to the beneficiaries the same proportionate interest in the company that 108 shares were at the time of the will. As a result, 324 shares were actually carried by the will's bequest of 108 shares.

Abatement, another classic problem, received attention in 1962 in *Breymaier v. Davidson*[3] as a result of an election against the will. A "family agreement" was viewed by the supreme court as creating a legacy by agreement in favor of a daughter who would otherwise have received only a share of the residue. Since abatement of legacies was required, the daughter who had created a "post-mortem legacy" found that it abated ratably with the testamentary provisions.

The ferment relating to powers of appointment continued during the year. In a bizarre and unusual fact setting, taxpayer and tax collector again found sparring material. *People v. Cooke*[4] involved the inheritance taxation of assets subject to an unexercised special power of appointment over intangibles physically located in New York. The trust under which the power was held was created when Colorado had no inheritance tax, and when the decedent and the settlor had no domiciliary or other contacts with Colorado. The decedent had lived in Colorado for less than a year before she died; the Inheritance Tax Commissioner asserted a tax under the power of appointment statute. The Denver County Court held that Colorado had insufficient contacts to assert a tax under the federal and state due process clauses. In a harsh decision for the taxpayer, the supreme court reversed, holding that the broad sweep of the power of appointment provision reached the assets even though the law was enacted after the interest was created.

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1 370 P.2d 1017 (Colo. 1962).
2 374 P.2d 695 (Colo. 1962).
3 368 P.2d 965 (Colo. 1962).
4 370 P.2d 896 (Colo. 1962).

No year seems complete without a fee dispute and on this premise, 1962 was complete. *Mellman v. Alger*[5] was a case in which Attorney I had received a fee in an estate under an order from which no appeal was taken. Attorney II claimed fees for preliminary services and the county court ordered that part of the fee paid to Attorney I should be paid over to Attorney II. The supreme court held that the county court had no jurisdiction to change its original order which had become final.

A series of cases dealt with classic problems in the field. *Denton v. Kumpf*[6] involved a legacy to George and a claim by George Jr.

5 372 P.2d 435 (Colo. 1962).
6 373 P.2d 306 (Colo. 1962).

that he was George after George had predeceased the testator. The ingenious argument failed and the gift lapsed. Since it was a gift of an interest in residue with no apparent cross-gift provisions, it lapsed not into residue, but into intestacy—a type of drafting error that can be said to express the "intent" of very few testators! Another lapse problem developed in *State Board v. Hays*,[7] wherein a gift was made to the Colorado State Soldier and Sailors Home, a legatee nonexistent at testator's death. Even though the county court had determined that a lapse had occurred, the supreme court refused to hear argument on the point, since testamentary capacity, and implicitly, the decedent's intent, had been raised but not determined below. Because lapse was necessarily a question of intent, capacity needed to be determined first. Unusual interweaving of different quality and quantity of ownership rights was the problem in *Bear v. Bear*.[8] There was homesteaded federal property; partnership; joint tenancy; reserved coal rights; a coal lease; an easement; a divorce; and ultimately the rights to partnership property upon dissolution. If a short summary of the case is possible, it is fair to say that when such diverse forms of property rights are involved, each will be recognized to the extent feasible!

More of the problem of personal injury claims against estates were involved in *Gushurst v. Benham*[9] in which the only estate asset was a public liability policy. The claimant sued the estate and insurance company defended. After a verdict for the claimant, the administrator appealed, but the claimant contended that the insurance company was the only party aggrieved and the only one entitled to appeal. The court held that the administrator was the real party aggrieved and that the insurance company was not the proper party to appeal. Mental incapacity was an issue in *In Re Sebben's Estate*[10] in which a district court's failure to submit the question to the jury was held to be error.

More restitution problems were the principal trust law developments. *Taylor v. Taylor*[11] involved a resulting trust based upon consideration furnished by the plaintiff, while *Colorado So. Pet. Corp. v. Stone*[12] raised an issue of alleged deceitful transfers by a corporate president, which, however, were not proved to be violative of the officer's fiduciary duty in any event. Alleged breach of a fiduciary relationship was also before the court in *White v. White*.[13] Here it was urged that the parent-child relationship was a fiduciary one, and required a showing of proper delivery of a deed from parent to child notwithstanding recording of the deed. The court found no such relationship, no undue influence, and no showing of a failure to deliver the deed. An accounting between co-tenants was the issue in *Dallabetta v. Estate of Rajacich*[14] and in such a proceeding, the supreme court said no issue as to failure of a deceased cotenant to compensate the other co-tenant for the use of the cotenancy property could be determined.

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7 369 P.2d 431 (Colo. 1962).
8 377 P.2d 538 (Colo. 1962).
9 376 P.2d 687 (Colo. 1962).
10 375 P.2d 516 (Colo. 1962).
11 372 P.2d 449 (Colo. 1962).
12 369 P.2d 438 (Colo. 1962).
13 368 P.2d 417 (Colo. 1962).
14 369 P.2d 553 (Colo. 1962).