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Trusts and Estates

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ONE YEAR REVIEW OF COLORADO LAW

The following is a summary of material presented on October 23, 1953, at the 55th Annual Convention of the Colorado Bar Association. This is the fourth annual survey of developments in Colorado law and was prepared and presented under the direction of Gordon C. Johnston, dean of the University of Denver College of Law. Subjects have been grouped arbitrarily to best suit the abilities of the attorneys who prepared the material. Subjects not reviewed in this issue will be published in the January, 1954, issue of *Dicta*.—Editor.

TRUSTS AND ESTATES

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LEGISLATION

The following are changes in the statutory law relating to wills and estates which were made in 1953 and which appear in Session Laws of Colorado 1953. References are to chapters.

Chapter 111 relates to the distribution of property by the trustee of an express trust, when such distribution is made pursuant to the exercise of, or in default of, the exercise of a power of appointment. The law is for the protection of trustees. Its effect can best be illustrated by an example, as follows: Suppose that "A" by will has created a trust for the benefit of his wife "B" for life, with remainder as she shall by will appoint and in default of appointment to "C". The wife "B" dies, apparently intestate and in default of appointment the trustee distributes the remainder of the estate of "C". Shortly thereafter a will of the wife "B" is found and is admitted to probate in Colorado. This will appoints the remainder to "D". In the absence of statute the trustee would be liable to "D" for the amount of the remainder improperly distributed to "C".

The new statute provides, however, that if such erroneous distribution is made not sooner than six months after the death of the donee of such power ("B" in the illustration) the trustee shall not be responsible to "D".

The statute also provides that the trustee shall not be liable for distribution pursuant to the exercise of a power made in *an invalid* instrument, if the trustee is not aware of the invalidity.

Chapter 124 contains an amendment to the gift tax law which provides that if a donor dies, or has a guardian or conservator appointed, before making a return which he should have made, his personal representative shall make such return.

Chapter 132, relating to inheritance taxes, provides for compromise or arbitration when there are conflicting claims as to the domicile of the decedent at the time of his death.

Chapter 156 makes substantial changes in that portion of Chapter 93, 1935 C.S.A., which relates to homesteads. It makes changes in the method of creating a homestead, in the wording relative to sale of homesteaded property on execution, in the treatment of exempt proceeds used for another home which becomes a homestead, in the disposition of insurance on improvements on the homestead and in conveying or encumbering homesteaded property. These matters are merely mentioned as a warning that the new act should require careful study. Only one portion of the new act would appear to relate directly to wills and estates and that is the new section 29 (A) which provides that if property is entered as a homestead by a joint tenant who is the husband or wife of the other joint tenant, then upon the death of either spouse the homestead shall continue in effect on the interest in such property of the surviving spouse. The same is true upon the death of a joint tenant leaving an orphan child or children as surviving joint tenants.

Chapter 250 provides that no act of a fiduciary appointed by a court shall be invalid solely by reason of any order thereafter entered revoking or setting aside the appointment, or by reason of revocation of the probate of a will or by a finding of mental competency.

Chapter 251 is the result of the decision of the Supreme Court in *Hoff v. Armbruster*, 125 Colo. 198,[1] decided in March, 1953, where the court found that the mutual and reciprocal wills of a husband and wife were contractual and, in effect, irrevocable. The case merely confirmed the rule which had been in effect in Colorado since the case of *Brown v. Johanson*, 69 Colo. 400,[2] but it alarmed many attorneys and it was sought to change the rule by this act which provides that to establish an agreement to make a will, such agreement must be proved clear, satisfactory and convincing evidence, and that the fact that two or more wills were executed at or about the same time by different persons shall not of itself be evidence that such wills were made in consideration of each other.

The first part of the act merely states the existing law, for it has been said in a number of cases that the evidence to establish such a contract must be clear, strong and unequivocal.

The latter phrase of the act seems ineffective because it has never been the law, either before or after the Armbruster case, that if two or more wills are executed at or about the same time that in itself is evidence that they were made in consideration of each other. It is the reciprocal and mutual aspect of the wills that has lead the court to consider them contractual, rather than the fact that they were both made on Monday. It is respectfully submitted that the act makes no change in the existing law.

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[1] 242 P. (2d) 604.
[2] 194 P. 943. (1920)

The act does raise a question of considerable importance. Section 8 of our Statute of Frauds says that every contract for the sale of lands shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing. It has been held that a contract to make a will of real estate falls within this section. Could it be said that it was the purpose of the new act to substitute clear, satisfactory and convincing evidence for the writing required by the Statute of Frauds?

Chapter 252, the new spouse's allowance statute, is in some respects very confusing. The following are the most important new features of this act:

a. It provides that if real estate is used by the owner and family as a home, and the owner shall die or be adjudged incompetent, the court, after hearing, may permit the spouse *or* minor children to remain in possession without payment of rent upon such terms as the court directs.

b. It also provides that upon the death of a person the court may make reasonable provision for the *surviving spouse or* the minor children of decedent after appointment of a fiduciary for such estate, and that all payments made for such purpose shall be deducted from the widow's or children's allowance.

c. The widow's or children's allowance is increased to $3,500.

d. It provides that if a widow and children (not children of the widow) survive decedent the allowance is apportioned between them in such manner as the court deems just.

e. It provides that when a person shall be adjudged a mental incompetent the court may set over to the spouse *or* minor children, such articles of personal property "as it deems necessary for the use of such former spouse or minor children, and may make such allowances for the support of the spouse and minor children as the court may direct but not exceeding $3,500 until claims are paid." Just what is meant by a former spouse is not clear.

Chapter 253 has to do with the death, resignation or removal of fiduciaries. It is too long and involved to examine here. It takes the place of Sections 90, 91, and 92 of Chapter 176, C.S.A. 1935.

Chapter 254. The statute relating to determination of heirship in cases where heirship has not been determined during the County Court administration of an estate has never seemed entirely satisfactory. The law was amended in 1951 and now again it is amended by this Chapter 254. The principal changes made by the new law are as follows:

1. Section 29, Chapter 176, C.S.A. 1935 as amended in 1951 is further amended by adding a proviso that no mailing of a copy of the notice shall be necessary where a consent has been executed or the heir has been personally served or has waived or acknowledged service of notice.

2. Section 33, Chapter 176 as amended in 1951, which provided that proceedings under the act might be joined with an action affecting real property under the Rules and that in the event of such joinder the proceeding shall be conducted in compliance with the Rules, is repealed effective January 1, 1954.

3. A new section 33 states that in event of joinder the complaint shall set forth the matters required for the petition under the Act, the alleged heirs shall be joined as defendants, and the proceeding conducted in accordance with the Rules.

There is doubt, however, as to the validity of this new section 33 as it appears to have been inserted improperly in the Act.

Chapter 255 amends the small estates law by changing the size of small estates from $500 or less to $1,000 or less.

Chapter 256 relates to a joint federal income and gift tax returns and provides that on petition of a personal representative he shall have authority, when authorized by the County Court, to join with the decedent's spouse or a ward in a joint federal income tax return, to require such indemnity as the court may deem proper, to consent to gifts made by the spouse of a decedent or ward, for federal gift tax purposes, and to enter into contracts with the spouse of a decedent or ward in respect to joint income tax returns.

Chapter 257 amends Sec. 217, Ch. 176, 1935 C.S.A. relating to reports of fiduciaries. It requires that every fiduciary shall file with the court every six months after his appointment a report in the form and manner as the court may require, until the estate is fully settled, etc. While the act is one concerning estates, it immediately raises the question whether all fiduciaries, including testimentary trustees not subject to court jurisdiction and trustees under living trusts, are now required to file reports. Certainly they are fiduciaries and certainly the act contains no exception. It again demonstrates the danger of using the word "fiduciary" without discrimination.

Chapter 268 relates to wills offered for probate under Sec. 60, Ch. 176, 1935 C.S.A. and injects a number of new requirements as to procedure when wills are contested under the provisions of Sec. 63 of Ch. 176. The details of the new provisions cannot be be considered here, but in any case where there is a will contest this chapter should be referred to, as it makes important changes.

The old law provided that a date for the hearing on a will should be not less than ten or more than sixty days after the petition is filed. This new act omits the ten-day provision.

DECISIONS

The only Colorado cases decided by the Supreme Court during the year which relates to Wills and Estates and which seem worthy

of comment are the following:

Ofstad v. Sarconi,[3] .....Colo....., 252 P. 2d 94 (Dec. 22, 1952). Will contest. The court held that in determining whether or not the question of undue influence should be submitted to the jury every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence, must be considered as facts proved in favor of contestants.

Broadhead v. Robinson,[4] 254 P. 2d 857 (Feb. 9, 1953). This was a case in which the Manager of Revenue filed a claim against an estate for back personal property taxes on jewelry found among decedent's possession at the time of her death. It was held that the claim was subject to hearing and determination as in civil action in courts of record, subject to the proviso that the claimant could not prove the claim by his own oath. The burden of proof was on claimant and the statutory presumption that the assessment rolls are *prima facie* evidence of the validity of a tax does not shift the burden of proof to the taxpayer.

Cunningham v. Stender,[5] 255 P. 2d 977 (March 30, 1953). A will which is attacked on the ground of lack of mental capacity of the testator may be upheld if it represented the wishes of the testatrix and she (1) understood the nature of her act, (2) knew the extent of her property, (3) understood the disposition she was making and (4) knew the natural object of her bounty.

In *re McGarys Estate,*[6] 258 P. 2d 770 (May 25, 1953). This interesting case held that, in the absence of an attestation clause, due execution of a will cannot be presumed merely from the fact that the signatures of the testator and witnesses are genuine. No cases were cited. The decision is based, and apparently with justification, on the terms of Sections 39 and 61, ch. 176, and Laws of 1947, Ch. 340, Sec. 1. The rule seems, however, to be rather harsh because in most states due execution of the will is evidenced by the mere fact that the witnesses have signed.

In *re Clayton's Estate,* 259 P. 2d 617 (June 29, 1953). This case, as its name indicates, had to do with the will of George W. Clayton, who died in 1899, and certain aspects of which were passed upon by the Supreme Court forty years ago. The will gave the residue of the estate to the City of Denver in trust for the Clayton College.

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[3] 1952-53 C.B.A. Advance Sheet No. 10.
[4] 1952-53 C.B.A. Advance Sheet No. 12.
[5] 1952-53 C.B.A. Advance Sheet No. 17.
[6] 1952-53 C.B.A. Advance Sheet No. 22.
[7] 1952-53 C.B.A. Advance Sheet No. 25.

The question here for decision was the validity of a lease to the Park Hill Golf Club made by the Trust Commission which was created by city ordinance to administer the trust. The City contended that the lease was void because the Trust Commission had no power to lease and because the lease was not approved by the County Court. It was held that the City was estopped to deny the validity of its own ordinance, that the power to lease was clearly implied by the terms of the will which directed administration of the trust to produce income and that no order of court was needed because, for the purpose, an implied power is the same as an expressed power.

Means v. Simon,[8] 260 P. 2d 598 (August 3, 1953). In this complicated case "A" had sold real estate to "B". "A" was adjudged a mental incompetent and "C" appointed her conservator. The conservator succeeded in setting aside the sale and was ordered to pay the purchase money which had been received by "A" into the registry of the court. The conservator, "C", withdrew the money from a savings account and died without paying it to the court. "C2" was then appointed conservator and filed a claim against the estate of "C1", claiming the money was a trust fund in the hands of both "A" and his conservator. The court held that it was not a special trust fund in the hands of either "C" or his estate.

Thuet v. Thuet,[9] 260 P. 2d 204 (July 20, 1953). Lena Thuet, who owned a farm, in 1942 executed a deed conveying the property to her daughter, Marie, and delivered the same to a bank with a letter of instruction. This letter stated that the deed was delivered to the bank without power of recall, that it was to take effect presently and that upon the death of the grantor the deed was to be delivered to the said Marie, the grantor reserving the privilege of occupancy during her life. The deed was executed and delivered to the bank without the knowledge of the grantor's husband or the grantee. After the death of the grantor it was sought to have the deed declared void on the ground that it was in fraud of the husband's property rights, that the property remained under control of the grantor and that the transfer was colorable and testamentary. In deciding for the grantee the court said that the owner of property has the right to convey the same without the consent or knowledge of the spouse, that a deed may be delivered to a third person with instructions to deliver it to the grantee upon the grantor's death and that it is not essential to a valid delivery that the grantee knows of the deed's existence.

[8] 1952-52 C.B.A. Advance Sheet No. 27.
[9] 1952-53 C.B.A. Advance Sheet No. 26.