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Estates and Trusts

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ESTATES AND TRUSTS

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The New Mexico courts and the United States Tax Court considered a range of issues involving estate and trust matters over the Survey year. The issues addressed included questions of lost wills, the reallocation of assets, the heirship of an adopted child and an omitted spouse, creditors' claims, estate taxes, jurisdiction, mental competency, powers of attorney, the value of a community lien against an estate, and death benefits. Many of these cases addressed issues involving the New Mexico version of the Uniform Probate Code (Probate Code) which was adopted by the legislature in 1975. The Probate Code is a set of statutes designed to permit the efficient and flexible administration of estates under numerous alternative courses of action. Because of its flexibility, the Probate Code is sometimes maligned for the lack of procedural and interpretive direction which it provides to practicing attorneys.[1] The Probate Code is still relatively new and the small size of New Mexico estates frequently makes the cost of litigating unanswered issues prohibitive. Consequently, the decisions which the New Mexico courts have made in probate matters are generally of extreme importance to the development of probate law in New Mexico. The purpose of this article is to review the decisions made during the survey period concerning estates and trusts, including their impact on the interpretation of the Probate Code. The cases decided by the courts appear generally to have properly interpreted the Probate Code.

LOST WILL

In *Barngrover v. Estate of Barngrover*[2] the court of appeals ruled that a copy of the decedent's will was properly admitted to probate when the original will was lost. Mrs. Barngrover, who lived in her son's home, customarily kept all of her valuable papers in a strong box in her room. After her death her will could not be found and a

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1. For procedural assistance and forms, see R. Ramo & S. Lebeck, New Mexico Estate Administration System (1979).

2. 95 N.M. 42, 618 P.2d 386 (Ct. App. 1980).

dispute arose over whether the district court properly admitted a photocopy of the will to probate. The court of appeals affirmed the admission of the photocopy of the will, holding that Mrs. Barngrover's grandchildren and their mother presented evidence sufficient to overcome the presumption that a lost will which had been in the possession of the decedent prior to death had been revoked.[3]

The Probate Code allows the admission of a copy of a will in a formal probate proceeding if the petitioner proves the contents of the will and why it is unavailable.[4] Curiously, the *Barngrover* court did not mention the Probate Code but relied on an earlier case, *Perschbacher v. Moseley,*[5] which was decided in 1965, prior to the enactment of the Probate Code in New Mexico. In *Perschbacher,* the court held that a decedent is presumed to have revoked his will if the absence of the missing will cannot be explained and the will had been in the possession or control of the decedent. In order to overcome the presumption of revocation, the proponent of a missing will must account for the missing will, prove its proper execution, its contents, and the circumstances showing nonrevocation.[6] The proponent must provide clear, satisfactory, and convincing evidence on these points.[7] Although the court's decision in *Barngrover* does not mention the relevant section of the Probate Code, the decision appears to produce the same result as that required under the Probate Code.

REALLOCATION OF ASSETS

In *Thomas v. Reid,*[8] the court refused to reallocate the assets of an estate which had been previously distributed in approximately equal values to a son and daughter under a joint tenancy scheme. The son received eighty acres of farm land and the daughter received a house and savings account. Several years later the value of the farm land

3. About four years after her husband's death, Anna Barngrover moved from Iowa to Albuquerque to live with her son. Before she left Iowa, Mrs. Barngrover obtained her will from her attorney. In Albuquerque she kept all of her valuable papers in a strong box in her room. The strong box was never locked. Mrs. Barngrover's son was her only child but under the terms of her will she left her son one-quarter of the residue of her estate. She gave the other three- quarters in equal shares to her son's former wife and Mrs. Barngrover's two grandchildren. According to the testimony, Mrs. Barngrover, a Roman Catholic, never approved of her son's divorce and retained a close relationship with her former daughter-in-law and her two grandchildren. *Id.*

4. N.M. Stat. Ann. §45-3-402(B) (1978).

5. 75 N.M. 252, 403 P.2d 693 (1965). The *Perschbacher* case was decided in 1965. The Uniform Probate Code was enacted in 1975.

6. *Id.* at 255, 403 P.2d at 695.

7. In *Perschbacher,* the decedent did not have possession of or control over her will and, therefore, the presumption of revocation did not arise. *Id.*

8. 94 N.M. 241, 608 P.2d 1123 (1980).

given to the son substantially increased as a result of the discovery of oil and gas interests. The decedent's daughter brought a declaratory judgment action for ownership of one-half of the oil and gas interest. She claimed alternative grounds of an oral express trust, constructive trust, and resulting trust. The district court found that the daughter was entitled to one-half of the mineral interests on the farmland. The supreme court reversed the district court and found there was no substantial evidence to support any of the grounds claimed by the daughter. The court ruled that "it would create havoc in the law . . . to allow the redistribution of assets"[9] which now had substantially different values even though there was evidence that the father intended to treat his children equally. The supreme court's reasoning is wise in this case. Historically, the courts have refused to rewrite documents which failed to anticipate future events. In this case the events altered the result of a decedent's estate plan. There were a number of alternatives available to the father which he might have used to prevent this inequality. The *Thomas* case points out the danger of using an inter vivos joint tenancy scheme to carry out a testamentary plan to equally divide an estate among the beneficiaries.[10]

HEIRSHIP

The New Mexico courts decided two cases involving the determination of heirship under New Mexico law. In *Commerce Bank and Trust v. Brady,*[11] the supreme court ruled on whether a child adopted by her stepfather is a member of her natural father's family for inheritance purposes. In *Cunningham v. Taggart,*[12] the court of appeals upheld a surprising result concerning the right of an omitted spouse to inherit under her deceased husband's will.

The *Brady*[13] case involved the right of a child who had been adopted by her stepfather to inherit from her natural father's mother who died intestate. The court looked at both the adoption statutes and the intestacy statutes of the Probate Code[14] and found that once a child is adopted the child becomes a member of his or her adopting parent's family just as if the child were the natural born child of the

9. *Id.* at 242, 608 P.2d at 1124.

10. For a more detailed analysis of this case, *see* Note, *Real Property—Constructive Trust —Resulting Trust, Thomas v. Reid,* 94 N.M. 241, 608 P.2d 1123 (1980), 12 N.M.L. Rev. 591 (1982).

11. 20 N.M. St. B. Bull. 214 (Feb. 19, 1981), 622 P.2d 1032 (1981).

12. 95 N.M. 117, 619 P.2d 562 (Ct. App. 1980).

13. 20 N.M. St. B. Bull. 214 (Feb. 19, 1981), 622 P.2d 1032 (1981).

14. N.M. Stat. Ann. §§40-7-15, 45-2-103 and 45-2-109 (1978).

adopting parent. Further, the court found that the laws of intestacy determine a decedent's heirs by the status of the decedent's relationship which exists with his or her heirs as of the time of death. In other words, when the child was adopted by her stepfather, she became a member of her stepfather's family, and any right to inherit from a member of her natural father's family was severed at the moment of adoption.

In the *Taggart*[15] case, the court of appeals ruled that a surviving wife who was omitted from her husband's will was not entitled to inherit from her deceased husband's estate. The court of appeals found that there was sufficient evidence to support the jury's decision that the deceased husband intended for lifetime transfers made to his wife to be in lieu of a testamentary bequest. The Probate Code provides that a decedent's surviving spouse is entitled to inherit an intestate share of the decedent's estate, if the surviving spouse has been omitted from the decedent's will, unless the decedent has provided for the surviving spouse by making transfers outside the will and intending that they be in lieu of a testamentary bequest.[16]

In *Taggart,* the decedent, a widower, executed his will in 1976, leaving his entire estate in trust for the benefit of the mother of his first wife who was then deceased. When the decedent later remarried he named his second wife as a joint tenant on his bank and savings accounts and designated her as the beneficiary of his retirement plan account. The jury in the district court found that the decedent intended for these lifetime transfers to be in lieu of a testamentary bequest. The court of appeals reviewed the evidence submitted to the jury and found it significant that the decedent had a lifetime pattern of supporting his first wife's mother. The court also looked to the relative value of the assets the decedent left to his second wife and the length of their marriage as significant factors in determining whether the decedent intended for those transfers to be in lieu of a testamentary bequest.[17] The *Taggart* result is somewhat surprising in light of the Probate Code's presumption in favor of an omitted spouse.

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15. Cunningham v. Taggart, 95 N.M. 117, 619 P.2d 562 (Ct. App. 1980).

16. N.M. Stat. Ann. §45-2-301(A) (1978).

17. The decedent and his second wife were married less than two years when the decedent died. The value of the checking and savings accounts represented approximately twenty percent of the total value of the decedent's estate. The retirement account paid a $410.00 monthly benefit. 95 N.M. at 124, 619 P.2d at 569 (Ct. App. 1980).

CLAIMS

In *Oney v. Odom,*[18] the court of appeals held that creditors' claims against a decedent's estate which are not timely presented are barred. In the *Oney* case the claimants failed to present their claims within the time limits imposed by the nonclaim statute in the Probate Code.[19] Some claims arose before death and were not presented within two months of the first publication of notice to creditors. Another claim based on fraud was apparently not presented within four months of the time it arose after the decedent's death. The claimants asserted that the Probate Code grants the district court equitable power to allow an extension of time for contingent or unliquidated claims. The court of appeals ruled that the district court does not have the power to extend the time for presenting claims against an estate. The time limits for presenting claims under the nonclaim statute are mandatory under the Probate Code.[20] The court of appeals ruled that when a creditor asks for an extension of time to bring an action against the estate to collect on the claim which has been disallowed by the estate, the equitable power of the district court applies only to claims which have been timely presented in the first place.

In *Kapsa v. Botsford,*[21] the court of appeals dismissed a claim for payment of two promissory notes by the decedent's estate. The court ruled that the notes were unenforceable against the decedent's estate because they were given without legal consideration. The notes were given by the decedent, an alcoholic, to his two stepsons for money owed to them by their mother as her separate debt. When the stepsons' mother died they made no claims against her estate. Instead, they had their stepfather sign the promissory notes when he was visiting one of the stepsons in Illinois. When the stepfather died a few months later, the stepsons filed a claim for payment from their

18. 95 N.M. 640, 624 P.2d 1037 (Ct. App. 1981), *cert. applied for and pending,* 20 N.M. St. B. Bull. 377 (1981).

19. *See* N.M. Stat. Ann. §45-3-803 (1978), which generally requires that claims arising before death must be presented within two months after the date of the first publication of notice to creditors and that claims arising after death must be presented within four months of the time the claim arises.

20. *See* N.M. Stat. Ann. §45-3-804(C) (1978), which provides among other things that a creditor must bring an action to collect on its claim within 60 days of the time the Personal Representative disallowed the claim unless the district court "to avoid injustice" allows an extension of time for the creditor to bring an action.

21. 95 N.M. 625, 624 P.2d 1022 (Ct. App. 1981), *cert. filed and pending,* 20 N.M. St. B. Bull. 374 (March 26, 1981).

stepfather's estate. The court, applying the law of Illinois, ruled that the decedent had no legal obligation to pay the separate debts of his deceased wife and that a moral obligation alone is not legal consideration for a promise to pay.

In *Rael v. Gonzales Funeral Home,*[22] the court of appeals remanded the case to the district court and ordered the former attorney for the estate to file a complete accounting for attorneys' fees before the district court could enter a final order distributing the funds of the estate. The attorney had represented the estate in a wrongful death action and was entitled to attorneys' fees of not more than one-third of the amount paid in settlement of the wrongful death action. The attorney had retained funds from the settlement amount for his attorneys' fees without rendering an accounting to the personal representative or the district court. The court of appeals held that the attorney had the burden of establishing the amount owed to him by filing a detailed account with the district court for his time, costs, and expenses, and that after a hearing the district court should enter a final order setting the amount of attorneys' fees and ordering the distribution of the remaining funds.

ESTATE TAXES

In *Estate of Ida Maude Sowell,*[23] a New Mexico resident left the residue of his estate in trust for the benefit of his surviving wife. In his will, he appointed his wife trustee and gave her the right to invade the corpus of the trust "in cases of emergency or illness." The issue before the United States Tax Court was whether the power to invade the corpus "in cases of emergency" is a general power of appointment, or whether the power was limited by an ascertainable standard within the meaning of Section 2041 of the Internal Revenue Code. A power of invasion limited by an ascertainable standard is a power to invade for "health, education, maintenance, or support."[24] The tax court ruled that the power to invade for an "emergency" is not a power limited by an ascertainable standard because emergencies can arise which are unrelated to a beneficiary's health, education, maintenance, or support. The tax court held that therefore the entire corpus of the trust estate which had a value of $319,054.54 had to be included in the wife's estate and that an additional $101,104.78 in estate taxes was due.[25] *Sowell* serves as a warn-

22. 94 N.M. 269, 609 P.2d 351 (Ct. App. 1980).
23. 74 T.C. 1001 (1980).
24. 26 C.F.R. §2041-1(c) (1980).
25. 74 T.C. 1001 (1980).

ing to lawyers of the extreme danger of using testamentary language that does not exactly track the language of the Internal Revenue Code when an attempt is being made to achieve substantial estate tax savings.

JURISDICTION

The Probate Code was adopted to streamline and make more flexible the procedure for administering estates in New Mexico. For example, the district court alone has exclusive original jurisdiction over all formal probate proceedings, but the district court and the probate court have concurrent jurisdiction over informal proceedings.[26] As a result, in informal proceedings, attorneys frequently have the choice of filing in either district court or probate court. The court of appeals, in *Wisdom v. Kopel,*[27] rejected an argument that sought to restrict the interplay between the district and probate courts.

In the *Kopel* case, sometime after the estate had been closed in a formal testacy proceeding, two of the decedent's heirs realized that the residue of the estate had not been distributed in accordance with the law of descent and distribution. They sought to reopen the proceedings distributing the estate's assets on the ground that jurisdictional error was committed when the personal representative was appointed. The personal representative was appointed in an informal proceeding assigned to the probate court docket and heard before the probate judge. The contesting heirs claimed jurisdictional error because the documents for the proceeding were actually filed in the district court, and therefore, the probate judge was acting for the district court without authority. The court of appeals ruled that no jurisdictional error was committed because the district and probate courts have concurrent jurisdiction over informal probate matters and the record showed that the probate judge was in probate court when she signed the order. The court of appeals further held that the order of the district court approving the schedule of distribution and closing the estate was entered in a formal testacy proceeding, and, therefore, could not be reopened unless there was fraud, jurisdictional error, or the discovery of new property. None of these grounds existed in the *Kopel* case. Furthermore, the court of appeals, citing N.M. Stat. Ann., §45-3-412 (1978), ruled that an order in a formal testacy proceeding is final and the time for making an appeal had run.

26. *See* N.M. Stat. Ann. §§45-1-302 and 302.1 (1978).
27. 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

MENTAL COMPETENCY

During the Survey period, the court decided two cases which concerned mental competency: *Poppe v. Taute*[28] and *Cunningham v. Taggart.*[29] In both cases the court of appeals applied the general rule that a person is presumed to be competent.

In *Taute,* the court held that mental competency to sign a will or power of attorney does not require that a person have the ability to manage and understand complex financial affairs. Rather, it requires that a person have sufficient capacity to understand in a reasonable manner the effect of the document which is being signed. In the *Taute* case, the court found that Mr. Head had "good days" and "bad days" during the period of time that a trust amendment was signed. There was no evidence that Mr. Head was having a "bad day" on the date the document was signed, and, therefore, the presumption that Mr. Head was competent on the day he signed the trust amendment was valid. The court explained that the question for the court is whether the person at the time of signing the document reasonably understood the meaning of the document. The court noted that even if a person's mind is known to have been impaired, that person is presumed to have had a lucid interval at the moment of signing the document. The presumption may be overcome if it is proved that either the person could not have had a lucid interval at the moment of signing the document or that the person was not in fact competent at the moment of signing the document.

In *Taggart,* there was conflicting testimony by persons who were present at the time Mr. Taggart signed the power of attorney. The jury applied the same law used in *Taute* to different evidence and reached the conclusion that Mr. Taggart was not competent when he signed the power of attorney. The court of appeals held that there was sufficient evidence to overcome the presumption of competency and to support the jury's decision that Mr. Taggart was incompetent when he signed the power of attorney.

POWER OF ATTORNEY

In *Poppe v. Taute,*[30] the court of appeals construed the authority granted under a general power of appointment and under a revocable inter vivos trust agreement to include surprisingly broad powers.

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28. 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).

29. 95 N.M. 117, 619 P.2d 562 (Ct. App. 1980).

30. 94 N.M. 656, 615 P.2d 271 (1980), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).

The court's decision in the *Taute* case is so surprising that it deserves a more lengthy discussion in this article.

The court's construction of the power granted under the general power of attorney signed in the *Taute* case is contrary to good law and overextends the intent of the Probate Code. In *Taute,* the husband signed a power of attorney giving his wife "his general power of attorney, without limitations . . . ."[31] Mr. Head subsequently became incompetent and during the time that he was incompetent, Mrs. Head amended their revocable inter vivos trust agreement by removing one of the beneficiaries named by Mr. Head in the trust agreement.

The first question considered by the court was whether the power of attorney granted to Mrs. Head enabled her to act on her husband's behalf during any period when he was incapacitated or disabled. The court of appeals ruled that the wife had the right to exercise the power of attorney during her husband's disability based on two grounds.

First, the court found the power of attorney was a durable power of attorney under the Probate Code. The Probate Code provides, contrary to common law, that a power of attorney will be effective during a person's incapacity or disability if the written statement granting the power of attorney "contains the words, '[t]his power of attorney shall not be affected by disability of the principal . . . or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability.' "[32] The court of appeals held that the clause "without limitations" in the general power of attorney signed by Mr. Head were words showing such intent. The ruling on this issue appears to be contrary to the general rule that a power of attorney is to be strictly construed.[33] Furthermore, it would appear that the words "without limitation" generally describe the extent of an agent's power to act during the period of the agent's authority. These words do not seem to grant someone the power to act in the event of later disability.

Second, the court of appeals ruled that at common law the wife had a power of attorney which could be exercised during her husband's disability because she had a power coupled with an interest. The interest was the wife's interest in the trust estate. While it is true that the wife had an interest in the trust estate, she only had a one-

31. *Id.* at 662, 615 P.2d at 276.

32. N.M. Stat. Ann. § 45-5-501 (1978).

33. *See* 35 A.L.R. 467. *See also* Bloom v. Weiser, 348 So.2d 651 (Fla. App. 1977); and Hall v. Cosby, 288 Ala. 191, 358 So.2d 897 (1972).

half community property interest in the trust estate. The wife did not have an interest in her husband's one-half of their community property, and therefore, she could not have a power coupled with an interest over her husband's one-half interest in the property. Neither the language in the general power of attorney nor the common law, as applied to the community property interest of the decedent, appear to grant the wife the authority to exercise the power of attorney during her husband's incapacity. This decision is especially troublesome when coupled with the court of appeals' decision that the power of attorney, together with the trust agreement, authorized the wife to change the distribution of her husband's estate by removing one of the beneficiaries he named in the trust agreement.

The court of appeals' interpretation of the language in the trust agreement may give rise to drafting problems or adverse tax consequences. The trust agreement gave Mrs. Head the power to instruct the trustee on "all matters concerning the trust estate."[34] The court of appeals interpreted that language to mean that Mrs. Head had full power to "act in her own name with reference to any amendment, revocation, or ratification of the Trust Agreement regardless of the mental competency or incompetency of Mr. Head."[35] The author respectfully submits that the court's interpretation of the trust language is contrary to the principles of the community property laws of New Mexico and consequently may impose unwanted adverse estate and gift tax consequences for many New Mexico residents who have adopted revocable inter vivos trust agreements in this state.

The decision of the court is particularly troublesome because the court of appeals ruled that the wife had the power to "determine the beneficiaries of the trust."[36] This means that anyone who gives his spouse a durable power of attorney and the authority to deal with the trustee of a revocable community property inter vivos trust has given the spouse an inter vivos general power of appointment. In other words, by signing documents such as those involved in this case, a spouse who becomes incapacitated will be deemed to have given his spouse the right to do anything at all with his property including the right to change the entire testamentary plan adopted in the trust. This is tantamount to saying that someone with a durable power of attorney has the power to alter or revoke another person's

34. 94 N.M. at 661, 615 P.2d at 276 (Ct. App. 1980), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).

35. *Id.* at 661, 615 P.2d at 276.

36. *Id.* at 662, 615 P.2d at 277.

will. This result sets an unfortunate precedent for estate planning in New Mexico. Durable powers of attorney and revocable inter vivos trusts are instruments frequently used by attorneys as flexible and valuable estate planning tools which do not destroy or tamper with an individual client's power to control the disposition of his estate. The *Taute* decision requires attorneys to draft estate planning documents with extreme care to avoid any adverse tax or other consequences.

JOINT TENANCY

The court of appeals attempted, in *Fletcher v. Jackson,*[37] to distinguish between burden of proof requirements for proving a transmutation of community property and those required to prove a transmutation of community property into joint tenancy. In the *Fletcher* case, Mr. Fletcher received as community property shares of stock under a retirement program sponsored by his employer. The stock certificates were originally issued in Mr. Fletcher's name alone. Subsequently, Mr. Fletcher had the stock certificates reissued in both Mr. and Mrs. Fletcher's names as joint tenants. Mrs. Fletcher died leaving a will in which she named her two sons by a prior marriage as the residuary legatees of her estate. The sons petitioned to set aside the transmutation of the title to the community stock into joint tenancy. The district court denied their petition and the court of appeals affirmed the decision of the district court on three grounds.

First, the court of appeals affirmed the decision of the district court on the ground that the evidence was sufficient to prove the transmutation of the stock by clear, strong, and convincing evidence. This extraordinary proof requirement is often referred to as the *Trimble*[38] rule and has generally been required to prove transmutation of community property. Second, the court of appeals ruled that in any event a preponderance of the evidence was sufficient because the transmutation of the title to the stock was into joint tenancy. The court explained that the legislature specifically did away with the special proof requirement of the *Trimble* rule for the trans-

37. 94 N.M. 572, 613 P.2d 714 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

38. *See* Trimble v. St. Joseph's Hospital, 57 N.M. 51, 253 P.2d 805 (1953), where the supreme court ruled that " . . . the all important factor in transmutation of property by married persons . . . is that there must be an intention of the persons to make the transmutation and such intention must be proved by evidence, or supported by a presumption which is not overcome by evidence to the contrary. We hold the evidence to prove the intention must be clear, strong and convincing . . . ." *Id.* at 64, 253 P.2d at 813.

mutation of community property into joint tenancy when it enacted N.M. Stat. Ann. §47-1-16 (1978).[39] Finally, the court of appeals held that the transmutation of community property into joint tenancy does not require the signature of both spouses.[40] Under the rule announced in *Fletcher,* any spouse who initially receives title to community property in his or her name alone has the power to transfer the title into joint tenancy and thereby to jeopardize the other spouse's power of testamentary disposition over the property.

It is this practioner's experience that New Mexico citizens generally have a good concept of community property, but frequently fail to realize fully that their wills do not control the disposition of property held in joint tenancy. The *Fletcher* case may produce unwanted results, especially where one spouse has children by a previous marriage. It seems doubtful that the *Fletcher* court truly carried out Mrs. Fletcher's intentions. If Mrs. Fletcher specifically understood and intended to leave the title to the house, stock, and savings and checking accounts in joint tenancy, it is inconsistent that she later made a will which left $10.00 and a life estate in the house and furnishings to her husband and the residue to her sons by a former marriage. Neither the title to the house nor the title to the stock ever required any action on the part of Mrs. Fletcher. While it is true that she endorsed the stock dividend checks which were in the names of Mr. and Mrs. Fletcher as joint tenants, Mrs. Fletcher's intentions would have been more clear if she had been required, in the first place, to sign an instrument ordering the title to the stock to be transferred into joint tenancy. The decision of the court of appeals rejecting the requirement that both spouses sign an agreement transmuting title into community property appears contrary to the best interests of married individuals in New Mexico. Additionally, the decision im-

39. The *Trimble* case was decided in 1953. Section 47-1-16, N.M. Stat. Ann. (1978) was enacted in 1955. It states:

> An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor or two or more persons with right of survivorship, shall be prima facie evidence that such property is held in joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.

40. In *Fletcher,* the sons argued that N.M. Stat. Ann. §§40-2-2 and 40-3-8(A)(5) (1978) require a written agreement between spouses to transmute community property into joint tenancy. They also relied on A. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History,* 5 N.M.L. Rev. 1 (1974). Anne Bingaman served on the State Bar Committee that provided the first draft of the Community Property Act to the legislature. In her article, she states that after the enactment of the Community Property Act of 1973, agreements transmuting community property into separate property must be in writing "to prevent misunderstandings and the possibility of fraud." *Id.* at 6.

poses an especially onerous burden of proof on an heir seeking to set aside a joint tenancy, because in testamentary disputes the opponents of the surviving spouse are more likely to have substantial difficulty acquiring evidence of intent where there is no written agreement.

COMMUNITY LIEN

In the case of *Portillo v. Shappie,*[41] the court of appeals upheld the prevailing rule in New Mexico that the use of community funds to enhance the value of a spouse's separate property creates a community lien against the property in the amount of the funds expended by the community. The court rejected an enhancement theory argued by the surviving husband, which would have given the community a lien equal to the value of the improvements at the time the lien was asserted. This is also a troublesome decision, especially in view of the facts in this particular case.

Mrs. Portillo owned a two-room adobe house as her separate property before she and Mr. Portillo were married. After their marriage Mr. and Mrs. Portillo lived in the house for about twenty-five years. During their marriage Mr. Portillo worked during the evenings and on weekends and, using community funds, doubled the size of the house by adding three bedrooms, a bathroom, kitchen, utility room, a covered porch, concrete patios front and back, and a three-to-four room apartment detached from the main house. Prior to her death Mrs. Portillo signed a warranty deed conveying the house to her daughter by a prior marriage who was living in California. Mrs. Portillo died intestate and Mr. Portillo sought to have a community lien imposed on the property for the value of the improvements made to the property. The value of the improvements at the time of Mrs. Portillo's death was $24,900. The cost of materials and Mr. Portillo's labor at the time improvements were made was $2,800. The court rejected the enhancement theory and ruled that the value of the community lien was $2,800. This result appears harsh. The public policy of this state is to encourage marital harmony and cooperation. The enhancement theory might do more to carry out this policy, at least with respect to a couple's residence. Perhaps the legislature should consider adopting a statute which will apply the enhancement theory to a couple's residence for purposes of valuing a community lien.

41. 19 N.M. St. B. Bull. 604 (Ct. App. 1980), *cert. filed and pending* (May 27, 1980) [Ed. note: after this article was written, the supreme court reversed the court of appeals. 20 N.M. St. B. Bull. 41 (Nov. 19, 1981)].

DEATH BENEFITS

In *Barela v. Barela,*[42] the court of appeals ruled that a surviving wife has no cause of action against her deceased husband's union for death benefits paid to her mother-in-law. Mr. Barela designated his mother as the beneficiary of a union health benefits plan in 1969. He married in 1972. The designation of his mother as beneficiary was never changed and after his death the union paid the death benefits to his mother. The surviving wife brought an action against the union claiming it had wrongfully disbursed the death benefits to her mother-in-law because she had a community property interest in the policy.

The court of appeals noted that in New Mexico, either spouse has the power to dispose of community personal property.[43] The court then distinguished between the ownership of a policy and the ownership of the proceeds of the policy and held that the deceased's power to designate his mother as beneficiary of all the death benefits was not invalidated by his marriage or by the community property law. Thus, no cause of action existed against the union. The court implied, however, that the wife may have had a cause of action against the estate or against her mother-in-law.[44]

The owner of a life insurance policy generally has the authority to designate the beneficiary of the policy. If an insurance policy is owned as community property, however, the mere designation of the insured spouse as the owner does not necessarily give that spouse the exclusive power to designate the beneficiary of the policy. The power to dispose of community personal property does not authorize a spouse to dispose of community personal property in a way which is contrary or fraudulent to the other spouse's community property interests. Consequently, the court of appeals in *Barela* properly implied that while the wife had no cause of action against the union for the death benefits, an action against the deceased spouse's estate or

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42. 95 N.M. 205, 619 P.2d 1251 (Ct. App. 1980).

43. *See* N.M. Stat. Ann. §40-3-14 (1978). The power of either spouse to dispose of community personal property is based on the recognition of the underlying theory that marriage is a partnership. *See* Herrera v. Health and Social Services, 92 N.M. 331, 335, 587 P.2d 1342, 1346 (1978):

> The power [to manage, control, dispose of and encumber community property] . . . is based upon the general recognition that marriage is a partnership which is in many ways similar to a commercial partnership.

44. The court noted that, among other things, "Plaintiff is not claiming that her marriage to Barela invalidated the designation of the mother as the beneficiary. Plaintiff is not claiming that Barela's continued participation in the policy after marriage, or that the failure to change the beneficiary after marriage, defrauded plaintiff," 95 N.M. at 208, 619 P.2d at 1254, thus implying that if the wife *had* made such claims, the result might have been different.

his mother for constructive fraud or reimbursement may have been appropriate.

SUMMARY

State law during the survey year in New Mexico has been primarily concerned with interpretations of the Probate Code. Two exceptions, *Portillo* and *Fletcher,* involved community property statutes. The holdings of the New Mexico court in these cases seem harsh and may warrant reconsideration.

The Probate Code has substantially streamlined and improved the procedures for planning and administering estates in New Mexico. The Probate Code is still relatively new and is sometimes unclear to many New Mexico attorneys. As a result, the case law which is developing under the Code is important. It is of particular importance for the New Mexico courts to rely on the Probate Code wherever possible and to interpret the Probate Code carefully. The New Mexico courts have regularly applied the Probate Code to resolve testamentary disputes. The cases decided by the courts during the survey period appear generally to have properly interpreted and applied the Probate Code except in the *Taute* case. The decision of the court of appeals in the *Taute* case is most troublesome and contrary to good law. It is unfortunate that certiorari was denied in this case.