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Wills and Trusts

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WILLS AND TRUSTS

I. INTRODUCTION

This article will survey important cases in wills and trusts law reported in the Bar Bulletin between January 1, 1988, and August 1, 1989. The article includes nine sections covering probate procedure, undue influence, gifts, construction of wills, evidence, damages against estates, distribution of estates, personal representative fees, and trusts. Although the New Mexico appellate courts have decided a wide variety of issues during the survey period, it is a United States Supreme Court opinion which appears to have the greatest effect upon New Mexico law. This decision significantly affects probate procedure in New Mexico and the constitutionality of New Mexico's non-claim statute.[1]

II. PROBATE PROCEDURE

A. New Mexico's Non-Claim Statute

In *Tulsa Professional Collection Services, Inc. v. Pope*,[2] the United States Supreme Court held that Oklahoma's non-claim statute, which allowed personal representatives to give notice to creditors by publication, violated the due process clause.[3] The notice provisions of Oklahoma's non-claim statute were very similar to the comparable provisions of New Mexico's non-claim statute.[4]

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1. *See infra* notes 2-40 and accompanying text.
2. 485 U.S. 478 (1988).
3. *Id.* at 491.
4. At the time of the opinion, Oklahoma's non-claim statute stated, in pertinent part, that:

> Every personal representative must, immediately after his appointment, give notice to the creditors of the deceased . . . requiring all persons having claims against said deceased to present the same . . . to such personal representative, at the place of residence or business . . . within two (2) months from the date of the first publication of said notice; such notice must be published in some newspaper printed in said county for two (2) consecutive weeks. . . .

OKLA. STAT. tit. 58, § 331 (1981). If a claim based upon contract was not presented within the time limit, the claim was barred, with some exceptions. *Id.* at § 333.

New Mexico's non-claim statute comprises §§ 45-3-803, 45-3-804, and 45-3-806 of the Probate Code. Section 45-3-803 states:

> A. All claims against a decedent's estate which arose before the death of the decedent, including claims . . . founded on . . . tort or other legal basis . . . are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as follows:
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> 1. within two months after the date of first publication of notice to creditors if notice is given in compliance with [N.M. STAT. ANN. § 45-3-801 (Repl. Pamp. 1989). . . .
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> . . .
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> B. All claims against a decedent's estate which arise at or after the death of a decedent . . . founded on . . . tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as follows:
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> . . .

In *Tulsa*, the decedent spent approximately one-half year in a hospital before he died.[5] After he died, his wife was appointed executrix of the estate.[6] In accordance with Oklahoma law, the court ordered her to "immediately give notice to creditors."[7] The wife gave notice by publishing the notice in a legal newspaper for two consecutive weeks as required by Oklahoma's non-claim statute.[8] Tulsa Professional Collection Services ("Claimant") was the assignee of the hospital's right to payment for taking care of the decedent in his last six months.[9] The Claimant did not file a claim in response to the wife's notice.[10] Instead, it applied for an Order Compelling Payment of Expenses of Last Illness as allowed by statute.[11] After losing its argument that the Last Illness statute made a claim under the non-claim statute unnecessary, the claimant argued on rehearing that the non-claim statute violated the due process clause of the United States Constitution.[12] The Oklahoma Court of Appeals and Supreme Court held that claimants in probate proceedings are not entitled to actual notice.[13] The United States Supreme Court reversed.[14]

The Supreme Court began by noting that the Oklahoma Supreme Court's decision conflicted with the Nevada Supreme Court's decision in *Continental Insurance Co. v. Moseley*.[15] In *Continental*, the United States Supreme Court vacated and remanded an earlier Nevada Supreme Court decision which held that a claimant had no right to actual notice under the Nevada non-claim statute.[16] The Court remanded so that the Nevada court could reconsider its decision in light of the Court's decision in

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2. any other claim, within four months after it arises.

C. Nothing in this section affects or prevents:

. . .

2. to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

N.M. STAT. ANN. § 45-3-803 (Repl. Pamp. 1989). The notice provision is contained in § 45-3-801. It states:

> Unless notice has already been given under this section, a personal representative, within a reasonable time after his appointment, shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the county announcing his appointment and address; the name of the decedent; and notifying creditors of the estate to present their claims within two months after the date of the first publication of the notice or be forever barred.

N.M. STAT. ANN. § 45-3-801 (Repl. Pamp. 1989).

5. *Tulsa*, 485 U.S. at 482.
6. *Id.*
7. *Id.* (quoting Record 14).
8. *Id.* at 482; *see supra* note 4.
9. *Id.*
10. *Id.*
11. *Id.* OKLA. STAT., tit. 58, § 594 (1981) states that personal representatives "must pay . . . the expenses of the last sickness" as soon as the representative has enough funds to do so.
12. *Tulsa*, 485 U.S. at 482-83.
13. *Id.* at 483.
14. *Id.* at 484.
15. 100 Nev. 337, 683 P.2d 20 (1984).
16. Continental Ins. Co. v. Moseley, 463 U.S. 1202 (1983), *vacating and remanding* Continental Ins. Co. v. Moseley, 98 Nev. 476, 653 P.2d 158 (1982).

Mennonite Board of Missions v. Adams.[17] On remand, the Nevada court held that, in light of *Mennonite*, a personal representative who has actual knowledge of a claimant cannot rely upon publication notice but must give actual notice to the claimant.[18]

The Supreme Court then reviewed its opinions in *Mullane v. Central Hanover Bank & Trust Co.*[19] and *Mennonite Board of Missions v. Adams*.[20] These cases held that actual notice is required when a state deprives persons of a life, liberty, or property interest.[21] Finding those analyses applicable in the *Tulsa* case, the Court held that the claimant's claim was a property interest.[22] Then, the Court had to decide whether the non-claim statute was state action which would give rise to due process or whether it was a self-executing statute of limitations.[23] The

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17. Continental Ins. Co. v. Moseley, 463 U.S. at 1202 (citing Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)).

18. *Continental*, 100 Nev. at 338, 683 P.2d at 21. After *Continental*, three courts disagreed with the Nevada Supreme Court. *See* Estate of Madden, 241 Kan. 414, 736 P.2d 940 (1987); Gibbs v. Estate of Dolan, 146 Ill. App. 3d 203, 100 Ill. Dec. 61, 496 N.E.2d 1126 (1986). *See also* Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86 (Mo. 1985) (en banc) (*Continental* does not mean that the United States Supreme Court will rule the same way). *But see* Palazzi v. Estate of Gardner, 32 Ohio St. 3d 169, 512 N.E.2d 971 (1987) (similar non-claim statute called into doubt, but claimant lacked standing to challenge constitutionality of the notice provisions because he did not file claim within the specified time after receiving actual notice).

19. 339 U.S. 306 (1950).

20. 462 U.S. 791 (1983).

21. *Tulsa*, 485 U.S. at 484-85. *Mullane* interpreted the notice requirements under New York's common trust fund statutes which required that notice of account settlements be published for four consecutive weeks in a newspaper approved by the Surrogate Court. 339 U.S. at 309-10. The Court held that a deprivation of property requires that the person deprived be given adequate notice of the pending deprivation and an opportunity for a hearing. *Id.* at 313. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court held that while notice by publication is sufficient when the interested parties are missing or unknown, "[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 317-18. Notice to the latter kinds of beneficiaries was inadequate "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319.

Mennonite relied on *Mullane* when it considered whether Indiana's tax sale notice was sufficient to meet due process requirements. 462 U.S. at 795, 798. Under the Indiana statutes, counties could sell property at tax sales after giving notice of the sale by publication. *Id.* at 793. After finding that a mortgagee of the property has a substantial property interest affected by the tax sale, the Court held that "unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*." *Id.* at 798. Therefore, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Id.* at 800. The Court assumed that the mortgagee's address, which was not included on the mortgage filed in the county clerk's office, "could have been ascertained by reasonably diligent efforts." *Id.* at 798 n.4.

22. *Tulsa*, 485 U.S. at 485.

23. *Id.* at 486. The claimant relied on Texaco v. Short, 454 U.S. 516 (1978), in claiming that the non-claim statute was a self-executing statute. *Tulsa*, 485 U.S. at 486. A self-executing statute of limitations is not considered to be sufficient state action to give rise to due process requirements. *Id.* In *Texaco*, the Court upheld an Indiana lapse statute which extinguished mineral rights if those rights were not used in 20 years. 454 U.S. at 518. Under the statute, no notice was required, although it was permitted before the lapse period ran. *Id.* at 520. After assuming that the appellants in *Texaco* had knowledge of the statute, the Court held that they had no constitutional right to

Court decided that the non-claim statute was not self-executing because a self-executing statute requires that the state have "no role to play beyond enactment of the limitations period."[24] The Court held that the Oklahoma non-claim statute involved "significant" state action because it was triggered during the probate proceedings and only after a court appointed a personal representative.[25] The Court also noted that the non-claim statute started to run only after copies of the notice and an affidavit of publication were filed.[26] The Court then held that if

> the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that [*Texaco v. Short*[27]] indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required.[28]

Immediately after stating its holding, the Court began delineating the holding's limits. The Court did not consider whether a non-claim statute that runs from the date of the decedent's death—but runs for a longer period of time than Oklahoma's existing non-claim statue—would violate due process.[29] The Court also noted that neither the notice nor the search for creditors must be burdensome.[30] "Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims."[31] Because the record did not indicate whether the claimant was known or reasonably ascertainable to the wife, the Court remanded the case to the Oklahoma state courts "to determine whether 'reasonably diligent efforts' would have identified [the claimant] and uncovered its claim. If [the claimant's] identity was known or 'reasonably ascertainable,' then termination of [the claimant's] claim without actual notice [by mail or other means] violated due process."[32]

The notice provisions of New Mexico's non-claim statute are, in many respects, similar to the notice provisions of the Oklahoma statute which were stricken in *Tulsa*.[33] Most importantly, New Mexico's non-claim

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be notified that their mineral rights would expire. *Id.* at 533. The Court stated that "[i]n answering this question, it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Id.* The Court emphasized that "no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice." *Id.* at 534. Rather, the interest is lost by the claimant's inaction with no action by the state. *Id.* at 533-34. The Court also noted that the lack of notice before the lapse "has no greater force than a claim that a self-executing statute of limitations is unconstitutional." *Id.* at 536.

24. *Tulsa*, 485 U.S. at 486-87.
25. *Id.* at 487.
26. *Id.*
27. *See supra* note 23.
28. *Tulsa*, 485 U.S. at 487.
29. *Id.* at 488.
30. *Id.* at 489-90.
31. *Id.* at 490.
32. *Id.* at 491 (citations omitted).
33. *See supra* note 4.

statute currently provides for notice by publication.[34] Therefore, New Mexico's non-claim statute, like Oklahoma's former non-claim statute, may violate due process should a reasonably ascertainable claimant be barred from asserting that claim based upon publication of the notice. The Oklahoma legislature has since re-written its statute to provide for notice by mail.[35]

New Mexico's Probate Code is designed to close and distribute estates quickly, efficiently, and in a manner that guards the interests of estate beneficiaries and creditors.[36] It provides two ways to accomplish this goal, the short method[37] and the long method.[38] The Oklahoma statute is what the Supreme Court called a short statute of limitations.[39] The short method is the only limitation on presenting claims in Oklahoma. New Mexico's non-claim statute is similar to Oklahoma's non-claim statute in that it bars claims under the short method if the claims are not presented within two months after publication. Unlike Oklahoma, New Mexico also has the long method. Under section 45-3-803(A)(2), claims against the estate are barred "within three years after the decedent's death, if notice to creditors has not been published." This longer method is the kind of statute that the Court expressly stated it did not rule upon.[40] However, the analysis in *Tulsa* suggests that a statute using the long method would be self-executing because the probate court takes no action in bringing about the running of the statute of limitations.[41]

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34. *See* Letter from John P. Burton to Michie Company (October 30, 1989) (stating that the New Mexico statute is partially unconstitutional). *See also supra* note 4.

35. Oklahoma's statute now reads in part, "The notice to creditors shall be given by publication in some newspaper in the county in which the probate is filed once each week for two (2) consecutive weeks, and by mail to all known creditors of the decedent at their respective last-known available addresses, in accordance with Section 6 [OKLA. STAT., tit. 58, § 331.2 (1988)] of this act." OKLA. STAT., tit. 58, § 331 (1988).

The legislature also added a section on identifying creditors which reads:

> A. As used in this act, "known creditors," and related or similar references shall mean those creditors of the decedent actually known to the personal representative or reasonably ascertainable by the personal representative as of the date notice to creditors is filed. "Reasonably ascertainable creditors" shall be those whose identities, last-known addresses and claims can be determined by reasonably diligent efforts of the personal representative. If reasonable under the circumstances, such efforts shall include the personal representative's conducting a search after the decedent's death and prior to the filing of the notice to creditors, of the personal effects of the decedent.

OKLA. STAT., tit. 58, § 331.1(A). Section 331.1 also requires the personal representative to file an affidavit stating that he or she made reasonably diligent efforts to find the decedent's creditors. *Id.* at § 331.1(B). Section 331.2 requires that the mailed notice be mailed within 10 days of filing the notice. *Id.* at § 331.2. The notice sent must be an endorsed copy of the notice filed with the court. *Id.* Also, notice is not required for any creditor who was unknown on the date of filing the notice, even if the personal representative identifies the creditor after the notice was filed. *Id.* Personal service is equivalent to mailing. *Id.* After the mailing is completed, the personal representative must file an affidavit of mailing and of publication. *Id.* at § 332.

36. *See* N.M. STAT. ANN. § 45-1-102 (Repl. Pamp. 1989).

37. *See* N.M. STAT. ANN. § 45-3-803(A)(1) (Repl. Pamp. 1989). *See also supra* note 4.

38. *See* N.M. STAT. ANN. § 45-3-803(A)(2) (Repl. Pamp. 1989).

39. *Tulsa*, 485 U.S. at 480.

40. *See supra* note 29 and accompanying text.

41. *See supra* notes 23-28 and accompanying text.

The short method meets the speed portion of the probate code's objectives, but may do so at the expense of protecting creditors. The long method meets the fairness requirement, but at the expense of speed. The Court appears to balance these interests by allowing a speedy method which must meet more demanding notice requirements. This balance harmonizes with the *Mullane* decision in that it protects creditors from deprivation of their property interests while disposing of the property in as quick a way as possible. It appears that the Court has decided that if a personal representative uses the short statute to accomplish the objective that estates should be closed as quickly as possible, he must do so in a way that imposes the least burden on creditors. If the personal representative does not use the faster method, under New Mexico's non-claim statute, the statute of limitations may be self-executing under *Tulsa*, and therefore may meet due process requirements without giving actual notice to creditors, unlike the short statute of limitations.

The *Tulsa* opinion appears to affect all probate matters, including the matters discussed in this survey. One decision which appears to be particularly affected is the unpublished decision in *Armenta v. Aragon*.[42] In *Armenta*, the plaintiff was the decedents' nephew.[43] He claimed that the decedents promised to leave him one-half of their estate in their will.[44] In their original wills, the decedents made mutual wills, naming the plaintiff and defendant as the residual beneficiaries if the decedents did not survive each other.[45] The husband, Tomas, died, leaving his estate to his wife.[46] His will was not probated and the wife received his estate by operation of law.[47] The wife then made a new will naming the defendant as the sole beneficiary and personal representative.[48] In this will, the wife stated that "after the death of Tomas, she transferred certain funds to plaintiff, and thus made no provision for him in her will."[49] After the wife died, her will was admitted to probate and the defendant was appointed personal representative.[50] The defendant published notice,[51] and the plaintiff properly filed a claim with the appropriate court within the statutory period under section 45-3-804. The plaintiff, however, did not give personal notice to the defendant.[52]

While the probate case was pending, the plaintiff also filed a civil action for declaratory judgment and constructive trust.[53] In the civil case, the plaintiff tried to have a personal representative appointed for Tomas'

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42. Nos. 17,399 and 17,650 (N.M. Sup. Ct. November 21, 1988), *cert. denied*, 57 U.S.L.W. 3752 (1989) (No. 88-1558, 1988 Term).
43. *Id.*, slip op. at p.2.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* The notice was in accordance with N.M. STAT. ANN. § 45-3-801 (1978).
52. *Id.* at 2-3.
53. *Id.* at 3.

estate, but his request was denied because he had not filed an application to probate the estate.[54] The defendant then moved to dismiss the civil action because a personal representative for the husband's estate was an indispensable party.[55] The court allowed the plaintiff to amend his civil action to include the husband's estate within fifteen days after a personal representative was appointed.[56] However, when the plaintiff tried to probate the husband's estate, the petition was denied as untimely under section 45-3-108(A).[57] The trial court dismissed the plaintiff's civil action because there was no personal representative for the husband's estate and because his claim on the wife's estate should have been in the probate proceeding.[58]

The defendant did not take any action on the plaintiff's filed claim until she personally learned about it—three years and four months after it had been filed.[59] She then filed a notice of disallowance and a motion to strike the claim, stating that the claim was barred because it was not properly served.[60] The trial court granted the plaintiff's motion for judgment on the pleadings, stating that the defendant did not timely disallow the claim which had been properly filed under section 45-3-804(A).[61]

The New Mexico Supreme Court affirmed both of the trial court's decisions. It upheld the civil action because the plaintiff's actions were not taken within the three-year statute of limitations.[62] Because the plaintiff's civil claim was based upon a contract, the husband's personal representative was an indispensable party.[63] Because no personal representative could be appointed after the three-year period to probate the estate had passed, the indispensable party could not be brought into the civil action and the civil action had to be dismissed.[64] The court also noted that the civil action would have failed because the agreement was

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54. *Id.*

55. *Id.* at 3-4. The court found that the husband's personal representative was an indispensable party in the civil action because the plaintiff claimed that the husband was bound by the agreement. The probate estate did not involve the husband. *Id.* at 7-8.

56. *Id.* at 4.

57. *Id.* Section 45-3-108(A) stated that persons cannot bring a probate proceeding unless it is brought within three years of the decedent's death. N.M. STAT. ANN. § 45-3-108(A) (1978). The husband died in 1981 and the plaintiff made his petition in 1987. *Armenta*, Nos. 17,399 and 17,650, slip op. at 2-4.

58. *Id.* at 4.

59. *Id.* The claim was filed on April 5, 1983; the defendant did not learn of the claim until October 8, 1986. *Id.*

60. *Id.* The defendant stated that the claim was time-barred under §§ 45-3-803 and 45-3-804. *See supra* note 4. Section 804 states that a claimant may submit a claim by mailing it to the personal representative or by filing the claim with the appropriate court. N.M. STAT. ANN. § 45-3-804 (1978).

61. *Armenta*, Nos. 17,399 and 17,650, slip op. at 4. A personal representative must mail a notice of action to a claimant within 60 days of receiving the claim or within 60 days of the filing of the claim. N.M. STAT. ANN. § 45-3-804 (1978). Failure to mail the notice of action is deemed to be an allowance of the claim. N.M. STAT. ANN. § 45-3-806(A) (1978).

62. *Armenta*, Nos. 17,399 and 17,650, slip op. at 5.

63. *Id.*

64. *Id.* (quoting C. de Baca v. Baca, 73 N.M. 387, 394, 388 P.2d 392, 397 (1964) (quoting American Trust and Savings Bank of Albuquerque v. Scobee, 29 N.M. 436, 453, 224 P.2d 788, 790 (1924))).

not in writing, and "the mere making of a will" was not enough evidence of the alleged contract.[65]

Affirming the trial court's decision in the probate action, the supreme court decided that the dismissal of the civil claim was not res judicata, despite the fact that some of the property in the probate estate was the same as that in the civil claim.[66] The court then stated that the true issue in the probate action was whether the section 45-3-804(A) notice requirement is reasonable considering that the personal representative does not receive personal notice.[67] The court noted that the personal representative begins the process by publishing the notice.[68] If the creditor does not make a timely claim in accordance with the statute, the claim is barred.[69] The court then found that "[b]ecause the personal representative initiates this process, it does not seem unreasonable to make it incumbent upon the personal representative to follow up and check the court file after the last day for presentation of claims has elapsed."[70]

The court's decision in *Armenta* appears to make sense in pre-*Tulsa* cases. The court seems to view the matter as one of *quid pro quo*. If the personal representative gets the benefit of the constructive notice provisions of section 45-3-803 to deny claims, it should be barred by the constructive notice provisions under section 45-3-806. However, it is questionable whether the decision is valid after *Tulsa*. It appears that the *Tulsa* opinion has taken away the *quid* of constructive notice upon creditors. Therefore, it appears that the opinion would also take away the *quo* of constructive notice upon personal representatives.

Yet, if *Tulsa* is inconsistent with *Armenta*, it becomes difficult to explain why the United States Supreme Court denied certiorari. It could simply be that the United States Supreme Court rarely takes cases on interlocutory appeal, as was the case in *Armenta*. The cases can also be distinguished. Unlike the creditor in *Tulsa*, the personal representative in *Armenta* had a fiduciary duty to examine the claims properly filed with the court in accordance with section 45-3-804(A). Therefore, she had a better chance to be notified, making this notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[71] However, *Mennonite* required that "actual notice [be] a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."[72] Regardless of

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65. *Id.* at 6 (citing In re Estate of Vincioni, 102 N.M. 576, 582, 698 P.2d 446, 452 (Ct. App.), *cert. denied*, 102 N.M. 613, 698 P.2d 886 (1985)).

66. *Id.* at 7-8.

67. *Id.* at 8.

68. *Id.*

69. *Id.* (citing Corlett v. Smith, 106 N.M. 207, 210, 740 P.2d 1191, 1194 (Ct. App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987)). For a discussion of Corlett v. Smith, see *infra* notes 90-104 and accompanying text.

70. *Id.* at 8.

71. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

72. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983).

the fact that certiorari was denied, or the reasons for that denial, *Tulsa* should warn attorneys that constructive notice under the statute may be considered constitutionally impermissible.

Another case in which the supreme court discussed New Mexico's non-claim statute was *In re Estate of Mayfield*.[73] In *Mayfield*, the claimant made a timely claim against the estate for work and services performed.[74] The estate disallowed the claim, sending interrogatories and a request for production of documents along with the disallowance.[75] The estate then asked the district court for a trial setting, an order compelling answers to the interrogatories, and a response to the request for production.[76] The parties completed discovery without the aid of the court.[77] Nine days after the claimant should have asserted his claim by petitioning for an allowance in the probate proceeding or by filing a separate complaint against the personal representatives,[78] the court set a hearing on the merits at the estate's request.[79] The claimant neither petitioned for an allowance nor commenced a separate action.[80] On the day of the hearing on the merits, the estate moved to dismiss the claim because the claimant failed to comply with the non-claim statute.[81] The estate claimed that the district court had no jurisdiction over the matter because the claimant failed to give proper notice.[82] The claimant responded that the estate's conduct of seeking recovery and requesting a trial on the merits "constituted substantial compliance with Section 45-3-806(A)," and "that the estate manifested an intent to waive the claimant's filing of a petition for allowance."[83] The trial court held for the claimant on the procedural point and then awarded him $34,000.[84]

On appeal, the supreme court reversed.[85] The court held that neither personal representatives nor heirs may waive the requirements of the non-claim statute.[86] The court held that although strict compliance is not necessary under section 45-3-806(A), "the purpose of Section 45-3-806(A) [which is to make an efficient system for settling estates] must be satisfied."[87] The court held that "[u]nilateral actions on the part of the

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73. 108 N.M. 246, 771 P.2d 179 (1989).
74. *Id.* at 247, 771 P.2d at 180.
75. *Id.*
76. *Id.*
77. *Id.*
78. Under the non-claim statute, the claimant had to file his proceedings within 60 days of the date the notice of disallowance was mailed. N.M. STAT. ANN. § 45-3-806(A) (1978).
79. *Mayfield*, 108 N.M. at 247, 771 P.2d at 180.
80. *Id.*
81. *Id.* at 247-48, 771 P.2d at 180-81.
82. *Id.*
83. *Id.* at 248, 771 P.2d at 181.
84. *Id.* at 247, 771 P.2d at 180.
85. *Id.*
86. *Id.* (citing In re Estate of Tarlton, 84 N.M. 95, 97-98, 500 P.2d 180, 182-183 (1972); In re Landers' Estate, 34 N.M. 431, 238 P.2d 49 (1929)).
87. *Id.* at 249, 771 P.2d at 182 (citing In re Baeza's Estate, 41 N.M. 708, 73 P.2d 1351 (1937); Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1978)).

estate in preparation for defending against the claim or assuring its timely resolution cannot constitute substantial compliance."[88] The court appeared to put the burden of the substantial compliance requirement solely on the defendant.[89]

B. *New Mexico's Insurance Exception*

In *Corlett v. Smith*,[90] a husband's estate sued the wife's estate for wrongful death after the wife committed suicide and inadvertently killed the husband and their grandson.[91] The defendant moved to dismiss the case for lack of subject matter jurisdiction, stating that the plaintiff did not comply with the notice provisions required to bring the claim.[92] In *Corlett I*, the court of appeals held that the husband's estate had the burden of showing that the claim was timely filed.[93] If the husband's estate did not establish that the claim was timely filed, the trial court had no jurisdiction to hear the claim unless the claim fit within the insurance exception of section 45-3-803(C)(2).[94] The *Corlett I* court remanded the matter to the trial court to determine whether the husband's estate's claim was based upon the wife's liability insurance, and, if so, whether that claim came within the insurance exception.[95] If either question was answered in the negative, the husband's claim would be denied.[96]

After the trial court found that the husband's estate's claim fell under the insurance exception, the wife's estate appealed.[97] The court of appeals affirmed.[98] The court first held that "claims that will be paid by insurance are not considered to be claims against the estate," noting that the proceeds were not available to estate creditors and do not affect estate beneficiaries so as to interfere with "an orderly and exact administration of the estate."[99] Therefore, the husband's estate could file a claim for

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88. *Id.* at 249, 771 P.2d at 182.

89. *Id.*

90. 106 N.M. 207, 740 P.2d 1191 (Ct. App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987) (*Corlett I*) and 107 N.M. 707, 763 P.2d 1172 (Ct. App.), *cert. denied*, 107 N.M. 610, 762 P.2d 897 (1988) (*Corlett II*). Although the court consolidated both appeals, stating that "[i]n substance, there is only one appeal," reference will be made to the two decisions as if there were two appeals for clarity. For an earlier discussion of *Corlett I*, see Eisenberg, *Estates and Trusts*, 19 N.M.L. Rev. 669, 675-77 (1989).

91. *Corlett I*, 106 N.M. at 208, 740 P.2d at 1192. The wife left the car running in the garage and lay down by the exhaust pipe. She inadvertently left the garage door open so that the carbon monoxide from the car entered the house where the husband and grandson were sleeping. *Id.*

92. *Id.* at 209, 740 P.2d at 1193. The defendant asserted that the plaintiff did not timely present his claim to the wife's estate under the non-claim statute. *Id. See* N.M. STAT. ANN. § 45-3-803 (1978). For the provisions of § 45-3-803, see *supra* note 4.

93. 106 N.M. at 209, 740 P.2d at 1193.

94. *Id.* at 210, 740 P.2d at 1194 (citing In re Estate of Daigle, 634 P.2d 71, 76 (Colo. 1981) (en banc). For the provisions of § 45-3-803(C)(2), see *supra* note 4. The court did not address the *Tulsa* issue because *Tulsa* had not been decided at the time. *See supra* notes 2-40 and accompanying text. It is unclear whether the personal representative knew or had reason to know of the claim.

95. 106 N.M. at 211, 740 P.2d at 1195.

96. *Id.*

97. *Corlett II*, 107 N.M. at 709, 763 P.2d at 1174.

98. *Id.*

99. *Id.* at 709-10, 763 P.2d at 1174-75 (citing and quoting Sommermeyer v. Price, 198 Colo. 548, 552, 603 P.2d 135, 138 (1979) (en banc)).

relief up to the limits of the insurance policy if the husband's estate "ultimately *might* collect from the insurance company."[100] Because sections 45-3-803(A) and (B) provide for "any proceeding to establish liability of the *decedent* . . . for which he is *protected* by liability insurance,"[101] the court stated that a *possibility* of recovery allows the husband's estate to make the claim under the insurance exception.[102] "We hold that, for purposes of the Probate Code, 'protection' should be considered the *potential* right to payment of a claim against the insurance company."[103] Therefore, the claimant does not have to prove that the claim would be covered; it simply must show that coverage is possible under the decedent's liability policy.[104]

C. *Notice of Tax Sales*

In *Fulton v. Cornelius*,[105] the court of appeals also held that the due process clauses of the United States[106] and New Mexico[107] constitutions require the New Mexico Taxation and Revenue Department's Property Tax Division (the "Division") to give an estate's personal representative reasonable notice of a tax sale where a representative has been appointed and when the fact of the decedent's death and the representative's appointment is "reasonably ascertainable."[108] The court held that the Division must make "'reasonably diligent efforts' to discover the names and addresses of those whose interest in the property can reasonably be ascertained prior to conducting a tax sale."[109] Whether there has been reasonable diligence should be determined by the facts of each case.[110] In *Fulton*, the court held that the Division was not reasonably diligent because it had notice of the personal representative's appointment after (1) the personal representative filed proof of his appointment with the county clerk in the county where the property was located,[111] (2) the personal representative mailed a letter to the county assessor paying current taxes and advising the assessor that all tax notices were to be sent to

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100. *Corlett II*, 107 N.M. at 710, 763 P.2d at 1175 (emphasis added).
101. *Id.* (emphasis in *Corlett II*); *see supra* note 4.
102. *Corlett II*, 107 N.M. at 710, 763 P.2d at 1175.
103. *Id.* (emphasis added).
104. *Id.* The court also noted that the insurance company is not an indispensable party to the claim because "[a] determination of whether potential coverage exists can be made in the absence of the insurance company. . . . [I]t is clear that the claim has been made in order to establish liability rather than to collect against the estate." *Id.*
105. 107 N.M. 362, 366, 758 P.2d 312, 316 (Ct. App. 1988).
106. U.S. CONST. amend. XIV.
107. N.M. CONST. art. II., § 18.
108. *Fulton*, 107 N.M. at 366, 758 P.2d at 316. The opinion was filed on June 28, 1988, two months after *Tulsa* and one month before *Corlett*. The court looked strictly to the *Mennonite* decision for its authority.
109. *Id.* at 367, 758 P.2d at 317.
110. *Id.*
111. *Id.* at 363, 758 P.2d at 313. The personal representative was from Texas and filed his proof of appointment pursuant to N.M. STAT. ANN. § 45-4-204 (1978).

him,[112] and (3) the Division issued an estate tax certificate showing that the taxes were paid on the property.[113]

III. UNDUE INFLUENCE

In *In re the Estate of Gonzales*,[114] the court of appeals looked at the issue of undue influence and the burden of proof for proving undue influence.[115] In *Gonzales*, the decedent executed her will and some deeds to her property at the same time.[116] Her grandson, who was one of three witnesses to the will, was given some of the property under the will and was appointed personal representative of the estate.[117] The district court set aside the will and the deeds stating that "[w]ithout specifically finding that undue influence did exist, such evidence of it exists that undue influence is presumed" and "[the grandson] has failed to rebut that presumption, and he had the burden of so doing."[118] The grandson appealed claiming that "the trial court erred in considering the issue of whether a presumption arose" and that there was no evidence to support the finding of presumed undue influence.[119]

Under the Probate Code, which sets out the burdens of proof in formal testacy proceedings and contested cases, the grandson had the burden of proving a *prima facie* case of proper execution and the contestant had the burden of proving a *prima facie* case of undue influence. [120] The court found that the contestant could prove her prima facie showing of undue influence under the New Mexico statutes by relying on a presumption of undue influence.[121] Once the contestant satisfied her burden by establishing facts sufficient to support a presumption of undue influence, the proponent has the burden of going forward with evidence to meet that presumption.[122]

However, the court reversed the trial court's finding that there was evidence sufficient to constitute a presumption of undue influence.[123] The court began its analysis by stating that section 45-3-407 was merely a restatement and clarification of the common law and added no substantive changes to the common law, thereby allowing the court to review pre-Code case law to determine undue influence.[124]

The contestant may raise a presumption of undue influence through evidence showing suspicious circumstances and a confidential relationship

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112. *Fulton*, 107 N.M. at 364, 758 P.2d at 314.
113. *Id.* at 367, 758 P.2d at 317.
114. 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).
115. *Id.* at 584-87, 775 P.2d at 1301-04.
116. *Id.* at 584, 775 P.2d at 1301.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (citing N.M. STAT. ANN. § 45-3-409 (1978 and Cum. Supp. 1988)).
121. *Id.* at 585, 775 P.2d at 1302 (citing SUP. CT. RULES ANN. 11-301 (Recomp. 1986)).
122. *Id.*
123. *Id.*
124. *Id.*

between the testator and the beneficiary.[125] Relying primarily on two earlier cases,[126] the court stated that "suspicious circumstances include (1) an elderly testator in a weakened physical or mental condition; (2) lack of consideration for the bequest; (3) a disposition that is unnatural or unjust; (4) the beneficiary's participation in procuring the will; and (5) domination of the testator by the beneficiary."[127] A confidential relationship is not enough to presume undue influence.[128] The only way that age, poor health, or the inability to read can affect undue influence is if these factors affect the testator's mental capacity.[129] Under the facts of this case,[130] none of these factors affected the testator's mental capacity.[131] Also, although the grandson was a witness to the will, the court found that he did not participate in procuring the will because two witnesses are all that are needed, and the grandson was the third witness.[132] The court held that none of the individual circumstances raised a presumption of undue influence, and the presumption did not occur when all the findings were considered as a whole.[133]

IV. GIFTS

In *Vigil v. Sandoval*,[134] the decedent gave her grandson a warranty deed.[135] The deed was to take effect when the decedent died.[136] If the decedent survived the grandson, the deed was to become void.[137] The trial court decided that the deed was a present transfer of a present interest when the deed was delivered to the grandson, but that possession was postponed.[138] The court of appeals affirmed, holding that a present transfer of a present interest is not an attempted testamentary disposition merely because enjoyment is postponed.[139] The court stressed that the delivered deed, unlike a will, is irrevocable.[140] The delivered deed gave the grandson a present interest, and therefore took effect before death, with only enjoyment of the present interest postponed.[141] The court stated that it would look at the express, not implied, intention of the grantor in view of the surrounding circumstances, and construe the deed in such

125. *Id.*
126. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968); In re Will of Ferrill, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).
127. *Gonzales*, 108 N.M. at 585, 775 P.2d at 1302.
128. *Id.*
129. *Id.* at 586, 775 P.2d at 1303.
130. The trial court found that the testator was mentally alert. *Id.* Also, although the testator could not speak English, the will execution was performed entirely in Spanish. *Id.*
131. *Id.*
132. *Id.* (citing N.M. STAT. ANN. § 45-2-502(A) (1978)).
133. *Id.*
134. 106 N.M. 233, 741 P.2d 836 (Ct. App. 1987).
135. *Id.* at 234, 741 P.2d at 837.
136. *Id.* at 234-35, 741 P.2d at 837-38.
137. *Id.* at 235, 741 P.2d at 838.
138. *Id.*
139. *Id.* (citing Callaghan v. Reed, 44 Or. App. 489, 605 P.2d 1382 (1980)).
140. *Id.*
141. *Id.*

a way as to uphold its validity if possible.[142] The court then stated that the deed's language and the surrounding circumstances[143] were sufficient evidence of the decedent's intent to transfer a presently transferrable interest.[144]

V. CONSTRUCTION OF WILLS

In *In re Estate of Bowles*,[145] the parties agreed that the decedent's will was unambiguous.[146] The courts, however, were called upon to construe a will which gave the decedent's sister "one-half of any income, rents or profits from any real property . . . located in Bull Creek (Valle del Toro) or Colinias, New Mexico" and a residuary clause in which the testator left his children, if his wife predeceased him, "[M]y interest in any real property owned by me at the time of my death, which I inherited from my family, located in Bull Creek and/or Colinias, San Miguel County[.]"[147] The plaintiffs claimed that the first devise gave the sister one-half of the property in fee simple.[148] The court of appeals disagreed with this construction stating that "[i]f a gift of income is followed by a gift over of the corpus of the property, such gift over shows that the gift of income was not intended to pass the entire property."[149] Following this rule, the court held that the sister's gift was a life estate.[150] The court further noted that "[i]t would be unreasonable to infer that the testator intended [the sister] and her heirs to continue to receive one-half of the income from the property in perpetuity. Such an arrangement could readily lead to serious complications in future management of the property."[151]

VI. EVIDENCE

The court of appeals also ruled on evidence concerning the proof of oral promises to pay vacation pay to employees of the decedent in *In re Estate of Bergman*.[152] In *Bergman*, the claimants were private nurses for the decedent and her sister.[153] The nurses claimed that one of the sisters promised them two weeks of paid vacation each year, with payment

142. *Id.*
143. The circumstances included evidence that the deed was drafted by a notary public, who stated that the decedent had wanted to give the grandson the house while giving herself some security, that the grandson had lived with the decedent for 13 years, and that the decedent had told the grandson and others that the property was his. *Id.* at 236, 741 P.2d at 839.
144. *Id.*
145. 107 N.M. 739, 764 P.2d 510 (Ct. App. 1988).
146. *Id.* at 740, 764 P.2d at 511.
147. *Id.*
148. *Id.*
149. *Id.* at 741, 764 P.2d at 512 (quoting 4 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 33.21 (1961)).
150. *Id.*
151. *Id.*
152. 107 N.M. 574, 761 P.2d 452 (Ct. App. 1988).
153. *Id.* at 575, 761 P.2d at 453.

coming after the decedent sold her ranch in Minnesota.[154] Although each claimant alleged that the vacation pay agreement was in writing, neither claimant submitted a bill for the overtime or had written evidence of the agreement, claiming that they could not find the agreement.[155]

The court found that the statute of frauds was inapplicable to this case, making a writing unnecessary to make a valid claim.[156] At trial, the claimants presented evidence about their conversations with the decedent concerning the agreement.[157] The court held that this evidence was admissible.[158] The court stated that the claimants' evidence may not have been admissible under the old Dead Man's Statutes, which state that a claimant cannot introduce evidence concerning matters which occurred before the decedent's death, unless the evidence is corroborated.[159] Because those statutes have been repealed, the court looked at whether the statements were hearsay.[160] The court stated that the claimants' testimony about the sister's statements concerning the vacation pay were not hearsay because they were not used to prove the truth of the matter asserted.[161] Instead, they were used "to prove that [the sister] had accepted an offer made by the claimants," and were therefore not offered as testimony "but rather of verbal conduct to which the law attaches duties and liabilities."[162] Also, the statements were admissible as evidence of a promise upon which the claimants reasonably relied.[163] The court added that "[w]hen an extrajudicial statement aids in proving knowledge, belief, good faith, reasonableness, or motive, it is admitted as circumstantial evidence thereof."[164] The court dismissed the claim that the claimants cannot give oral evidence of a document by noting that the claimants could produce proof of lost documents.[165]

VII. DAMAGES AGAINST THE ESTATE

In *State Farm Mutual Automobile Insurance Co. v. Maidment*,[166] a case of first impression, the court of appeals held that a deceased

154. *Id.* at 576, 761 P.2d at 454.

155. *Id.*

156. *Id.* at 576-77, 761 P.2d at 454-55. The court stated that full performance of a contract not to be performed in one year renders the contract enforceable by the party who has performed. *Id.*

157. *See id.* at 576, 761 P.2d at 455.

158. *Id.* at 576-77, 761 P.2d at 455-56.

159. *Id.* at 577, 761 P.2d at 455.

160. *Id.* Under New Mexico's Rules of Evidence, "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." SUP. CT. RULES ANN. 11-801(C) (1986).

161. *Bergman*, 107 N.M. at 577-78, 761 P.2d at 455-56. *See also* SUP. CT. RULES ANN. 11-801 & 802 (1986).

162. *Bergman*, 107 N.M. at 578, 761 P.2d at 456. Because these assertions are not testimonial but are made for another purpose, they are admissible. *See id.* at 578, 761 P.2d at 456 (citing E. CLEARY, MCCORMICK ON EVIDENCE § 249 (3d ed. 1984)).

163. *Id.*

164. *Id.*

165. *Id.* SUP. CT. RULES ANN. 11-1004 (1986) states, in part, that "other evidence of the contents of a writing . . . is admissible if . . . [a]ll originals are lost . . . unless the proponent lost . . . them in bad faith."

166. 107 N.M. 568, 761 P.2d 446 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988).

tortfeasor's estate cannot be held liable for punitive damages.[167] The court followed the reasoning of the Florida Supreme Court to hold that "the decedent's innocent heirs should not be punished when the wrongdoer is unavailable because of death."[168] The court noted that allowing punitive damages against a tortfeasor's estate would serve neither of the purposes for assessing punitive damages which are to punish the wrongdoer and to deter others from committing torts.[169]

VIII. DISTRIBUTION OF THE ESTATE

In *In re Estate of Lopez*,[170] the decedent left a house as his only substantial asset.[171] His wife was his personal representative.[172] The trial court awarded the decedent's wife a 41.08% interest in the property ($9,294.93) and the decedent's daughter a 58.92% interest ($13,331.47).[173] Later, the decedent's daughter petitioned the court to force the wife to sell her interest to the daughter.[174] The wife filed a countermotion asking the court to approve her plan of distribution, which called for a cash payment to the daughter, in order to buy out the daughter's interest.[175] The court denied the daughter's motion and granted the wife's.[176] The wife then sent the daughter a check for her share of the interest, and stated that the daughter "had received 'assets from the net estate' of $13,331.47" on the schedule of distribution.[177] The daughter refused the check and appealed the trial court's decision, claiming, among other things, that the wife was improperly allowed to continue as personal representative and that the daughter was entitled to distribution in kind.[178]

The court of appeals summarily disposed of the personal representative issue by stating that the wife did not have to be reappointed if she was retained after a petition for formal appointment.[179] The court then noted that the real property was the estate's only asset.[180] Therefore, the estate could not give the daughter cash and could not allot the property to the wife "because there would be nothing left to allot to [the daughter]. The trial court in effect required [the daughter] to sell her share to [the wife]. By approving the 'distribution' of the estate, the trial court also

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167. *Id.* at 571, 761 P.2d at 449.
168. *Id.* (citing Lohr v. Byrd, 552 So. 2d 845 (Fla. 1988)).
169. *Id.* at 571, 761 P.2d at 449 (citing *Lohr*, 522 So. 2d at 846). The Florida court stated that the deterrent effect is not furthered by "unjustly [inflicting punishment] upon the innocent, through a doctrine analogous to attainder. . . ." *Id.*
170. 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).
171. *Id.* at 158, 740 P.2d at 708.
172. *Id.*
173. *Id.*
174. *Id.* at 158, 740 P.2d at 708.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 158-59, 740 P.2d at 708-09.
179. *Id.* at 159, 740 P.2d at 709.
180. *Id.*

ordered the sale [the wife] requested. This was error."[181] The court held that the only authority the court had was to order a partition of the property, not to force one heir to sell her part of the property to the other.[182] Therefore, the parties could either keep their undivided interests as tenants-in-common, or the property would have to be sold.[183]

The court also noted that the record indicated that the daughter had in fact filed a petition for partition as a separate action while the probate case was pending.[184] The court found that the partition proceeding should have been consolidated with the probate proceeding.[185]

IX. PERSONAL REPRESENTATIVE FEES

During the survey period, the court of appeals decided two cases which in turn limited and expanded trial courts' powers to award personal representative fees. In *In re Estate of Corwin*,[186] the court held that United States Treasury notes, like United States Government bonds, are the equivalent of cash under the statute regulating personal representative compensation.[187] The court found that the word "including" following the word "cash" in the statute was meant to demonstrate types of cash rather than limit what is considered cash.[188] Because cash is subject to the lower personal representative fee schedule under the statute, the proceeds from the Treasury notes were subject to that rate.[189]

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181. *Id.* at 159-60, 740 P.2d at 709-10.

182. *Id.* The court relied on the provisions of N.M. STAT. ANN. § 45-3-911 (1978). Section 45-3-911 states that:

> A. When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the district court prior to the formal or informal closing of the estate, to make partition.
>
> B. After notice to the interested heirs or devisees, the district court shall partition the property.
>
> C. The district court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the interested heirs and devisees and which cannot conveniently be allotted to any one party.

The court also relied on In re Estate of Kunzler, 108 Idaho 374, 699 P.2d 1388 (1985).

183. *Lopez*, 106 N.M. at 160, 740 P.2d at 710.

184. *Id.*

185. *Id.*

186. 106 N.M. 316, 742 P.2d 528 (Ct. App. 1987).

187. *Id.* at 318, 742 P.2d 530 (citing N.M. STAT. ANN. § 45-3-719 (1978)). Section 45-3-719 states that:

> Unless otherwise ordered by the court, a personal representative shall be entitled to a compensation of not more than ten percent on the first three thousand dollars ($3,000) and of not more than five percent on all amounts in excess of the first three thousand dollars ($3,000) upon property at its estimated value which shall come into his possession in his capacity as personal representative. However, if the property consists of the proceeds of life insurance policies, or cash, including checking accounts, time deposits, certificates of deposit, savings accounts, postal savings certificates and all United States government bonds, then the personal representative's compensation shall not exceed five percent of the first five thousand dollars ($5,000) and not exceed one percent on all amounts in excess of the first five thousand dollars ($5,000). . . .

188. *Corwin*, 106 N.M. at 317, 742 P.2d at 529.

189. *Id.*

In *In re Estate of Greig*,[190] the court held that a personal representative may recover fees above those allowed by section 45-3-719 of the Probate Code, but that the assets of a trust were not an estate asset which could be used to determine the fee.[191] In *Greig*, the estate's personal representative spent 98.5 hours on legal work for the estate and 93.5 hours performing general personal representative duties.[192] His attorneys spent 130 hours working for the estate and also asked to be reimbursed for the cost of hiring a law clerk to do research for the estate.[193] Part of the personal representative's work was obtaining a judgment which ordered a third party to convey estate assets to the personal representative.[194] The trial court held that assets of a trust created by the decedent could be used to pay reasonable estate administration expenses "to the extent that the assets of the estate . . . are insufficient."[195]

The trial court found that under the personal representative fee formula set out in section 45-3-719,[196] the personal representative was entitled to $302.[197] The court relied on an expert's testimony that *In re Keel's Estate*[198] controlled the case, giving the trial court no discretion in setting administrator's fees.[199]

The court of appeals reversed, explaining that the legislature's 1976 amendment to section 45-3-719[200] gave trial courts discretion in awarding personal representative fees.[201] Because the court feared that the trial court believed it was limited in awarding the fees, the court of appeals remanded the case "so that the court may consider whether the facts and circumstances surrounding this case warrant a fee award above that provided by the formula."[202] The court of appeals limited its holding in view of *In re Estate of Corwin*,[203] stating that trial courts do not have discretion to increase personal representative fees for property comprising life insurance and the various forms of cash, as described in section 45-3-719.[204] The court further stated that, on remand, the personal representative must show that he is entitled to the extra compensation by

190. 107 N.M. 227, 755 P.2d 71 (Ct. App. 1988).
191. *Id.* at 228, 755 P.2d at 72. For the provisions of § 45-3-719, see *supra* note 187.
192. *Id.*
193. *Id.*
194. *Id.* at 230, 755 P.2d at 74.
195. *Id.*
196. For the provisions of § 45-3-719, see *supra* note 187.
197. *Greig*, 107 N.M. at 228, 755 P.2d at 72. Although the court of appeals reversed the district court on other grounds, it noted that even under the statutory scheme, the district court's computation was erroneous. *Id.* at 229, 755 P.2d at 73. According to the district court's findings, the estate was valued at $15,000, "through the combined efforts of [the personal representative] and the estate attorneys." *Id.* at 228, 755 P.2d at 72. Under the compensation statute, the proper fee based upon a $15,000 value would be more than $302. *Id.* at 229, 755 P.2d at 73.
198. 37 N.M. 569, 25 P.2d 806 (1933).
199. *Greig*, 107 N.M. at 228, 755 P.2d at 72.
200. The legislature added, among other things, the "[u]nless otherwise ordered by the court" language. *See supra* note 187.
201. 107 N.M. at 229, 755 P.2d at 73.
202. *Id.* at 229, 755 P.2d at 73.
203. *See supra* notes 186-89 and accompanying text.
204. *Id.* at 229, 755 P.2d at 73.

showing that the work for that extra compensation was "not usual to an ordinary estate administration, and further he must show the reasonable value of his services to the estate, considering the value of the estate."[205]

The court also held that a personal representative who does legal work as part of her personal representative duties may collect attorneys' fees for that work.[206] According to the court, the 1976 amendment also grants the personal representative compensation outside of section 45-3-719, including attorneys' fees under section 45-3-720.[207] According to the court, the personal representative carries the same burdens of proof in her capacity as an attorney as she does in her capacity as a personal representative.[208]

The court of appeals further held that when the trial court determines the personal representative fee, it may not consider the value of trust assets which are available for an estate's reasonable expenses.[209] However, the court implied that if the trust assets had "come into" the personal representative's possession, presumably by an order stating that the trust was a part of the estate going to the personal representative, the trust assets *would be* included in the fee calculation.[210]

X. TRUSTS

In *Granado v. Granado*,[211] the decedent was the beneficial owner of a bar.[212] The decedent paid for the property, made all purchase installments, paid for taxes, insurance, and repairs, and controlled the business and its assets.[213] After the decedent died, his attorney told family members that the decedent's family had the beneficial interest in the property.[214] The decedent's brother, who was named personal representative, promised the decedent's son that the brother would give the son the bar and property when the son was twenty-one years old, but did not list the property as an estate asset in the probate proceedings.[215] When the son turned twenty-one, he first learned that his uncle and sister contended that the decedent's heirs did not own the bar.[216] The decedent's sister, who had run the bar for eight years, also had the decedent's father

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205. *Id.*

206. *Id.* at 229-30, 755 P.2d at 73-74 (citing In re Estate of Brown, 653 P.2d 928 (Okla. 1982); In re Estate of Hackett, 51 Ill. App. 3d 474, 9 Ill. Dec. 592, 366 N.E.2d 1103 (1977); and 31 AM. JUR. 2d *Executors and Administrators* § 500 (1967)).

207. *Id.* at 230, 755 P.2d at 74.

208. *Id.*

209. *Id.*; N.M. STAT. ANN. § 45-3-719 (1978). For the text of section 45-3-719, see *supra* note 187.

210. *Greig*, 107 N.M. at 230, 755 P.2d at 74.

211. 107 N.M. 456, 760 P.2d 148 (1988).

212. *Id.* at 458, 760 P.2d at 150. Because New Mexico prohibits convicted felons from holding liquor licenses, the decedent, who was a convicted felon, had all leases and purchase contracts made in the name of his wife, and later, his father. *Id.* at 457-58, 760 P.2d at 149-50.

213. *Id.* at 459, 760 P.2d at 151.

214. *Id.*

215. *Id.* at 458, 760 P.2d at 150.

216. *Id.*

transfer the property to her as a gift, despite the fact that the estate attorney told her that the father held the property in trust for the decedent's heirs.[217] The son sued for the property and won; the brother and sister appealed.[218]

In affirming, the supreme court began by stating that the son's claim was within the statute of limitations because "the statute of limitations does not run between a trustee and a beneficiary until there has been a repudiation of the trust, whether it be a constructive trust, or a resulting trust."[219] The court then held that the trial court was correct in calling the arrangement a resulting trust because the son "demonstrate[d] that . . . his predecessor [had] furnished the money for acquisition of property with the intent that the one who [took] title [would] hold it in trust for the one who advanced the purchase money and that the money was so applied."[220]

The court concluded by stating that the doctrine of unclean hands did not apply to this case.[221] The court weighed "the policy of denying relief to one who transfers property for a wrongful purpose, against the policy disfavoring unjust enrichment of a transferee who was not intended to hold beneficial interest in the property."[222] Although the doctrine of unclean hands may have barred an action by the decedent, the supreme court quoted the trial court with approval that "the State had 'little to gain in achieving its public purpose of protecting the morals of every community in the state by here penalizing the unoffending children of [the decedent]."[223]

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217. *Id.*

218. *Id.* at 457, 760 P.2d at 149.

219. *Id.* at 458, 760 P.2d at 150 (citations omitted). The court held that repudiation did not occur until the son was told that he did not have an interest in the property. *Id.* at 459, 760 P.2d at 151.

220. *Id.* at 459, 760 P.2d at 151.

221. *Id.* at 460, 760 P.2d at 152.

222. *Id.* at 460, 760 P.2d at 152 (citing Garcia v. Marquez, 101 N.M. 427, 430, 684 P.2d 513, 516 (1984)).

223. *Id.*