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Wills and Estates

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VIII. WILLS AND ESTATES

A. CONTRACT TO MAKE A WILL

In *Tarr v. Hicks*,[1] the testatrix entered into a contract with her children and stepchildren to make a will devising her estate and specific real property to them. The will, as construed,[2] was not in accordance with the contract[3] and the plaintiff's, successors to the interests of a deceased son of the testatrix and the successors to the interests of a deceased stepdaughter of the testatrix, sought to enforce distribution of the estate in accordance with the contract.

The defendant, daughter of testatrix, sought to prove by parol evidence that there was no consideration flowing from the children and stepchildren to support the testatrix's agreement to make the will. It appeared from the authorities cited by the defendant[4] that she contended the agreement[5] was a mere recital of consideration, and as such could be explained by parol evidence.[6]

The supreme court affirmed the trial court's determination that parol evidence was inadmissible "to vary and wipe out essential terms of a written contract."[7] The court has refused admission of parol evidence to vary consideration when the contract was explicit, the consideration expressed and definite, and such expression of consideration contractual, going to the essence of the contract,[8] or to prove that the consideration was wholly different from that described in the contract.[9]

The court also considered the question "whether execution of the agreement served to divest [the testatrix] of any title that she

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[1] 393 P.2d 557 (Colo. 1964).

[2] In re Estate of Newby, 146 Colo. 296, 361 P.2d 622 (1961).

[3] 393 P.2d at 560. The only variation between the will and the contract was that in the contract the testatrix was to give to her two children an individual one-half of her estate and her five stepchildren the other undivided one-half of her estate. By her will she gave each child an undivided one-fourth and to each stepchild an undivided one-tenth.

[4] 393 P.2d at 563.

[5] In substance the agreement provided: that the children and stepchildren assign to the testatrix all rights that they had to the estate of Newby, Sr.; that there be no probate of his estate; that any advances received from Newby, Sr., by any of the parties should be considered gifts; that no one of the parties shall have any claim against any other by reason of such gifts or advancements; that the children and stepchildren will, at all times, treat the testatrix with respect and consideration; and that the children and stepchildren will not request any personal loans or advances from the testatrix.

[6] Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949); Gibbons v. Joseph Gibbons Consol. Min. & Mill Co., 37 Colo. 96, 86 Pac. 94 (1906); Fechheimer v. Trounstine, 15 Colo. 386, 24 Pac. 882 (1890). *But see* Hickman-Lunbeck Grocery Co. v. Hager, 75 Colo. 554, 227 Pac. 829 (1924), (contract feature may not be contradicted or varied by parol, in the absence of fraud or mistake).

[7] 393 P.2d at 562.

[8] Grand Junction Gospel Tabernacle v. Orvis, 113 Colo. 408, 157 P.2d 619 (1945).

[9] Collins v. Shaffer, 66 Colo. 84, 179 Pac. 152 (1919).

had and to vest the portion so divested in the children and stepchildren."[10]

The court resolved this issue by relying on precedent from other jurisdictions, citing *In re Johnson's Estate*[11] an Illinois decision, and *Harris v. Harris*,[12] a West Virginia decision. Reiterating language from both of these cases, the Colorado Supreme Court affirmed distribution of the property in conformity with the agreement, concluding that the agreement divested the testatrix of her fee simple title and vested in the children and stepchildren an interest in the property. However, according to *In re Johnson's Estate* this holding should be limited to contracts which devise specific and designated property.[14]

It is not clear whether the court in *Tarr* accepted or rejected the theory that the testatrix held the legal title in trust for the beneficiaries. However, the court in previous cases has acceped this theory,[15] as have other jurisdictions[16] and some text writers.[17]

The trust theory is commonly used in the case of a specifically enforceable executory contract for the sale of land. It is asserted that the vendor holds the legal title in trust for the vendee and the vendee holds the equitable title and is a trustee of the purchase money for the vendor. The trust theory finds its basis in the reasoning that because equity will decree specific performance and require the vendor to transfer his legal interest to the purchaser and the purchaser to transfer the purchase price to the vendor, there

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[10] 393 P.2d at 563.

[11] 389 Ill. 425, 59 N.E.2d 825 (1945).

[12] 130 W. Va. 100, 43 S.E.2d 225 (1947).

[13] "Where the contract is to devise specific and designated property, like a piece of real estate, the equitable title vests in the beneficiaries, under the contract. Thereafter the testator holds the legal title in trust for their benefit." Harris v. Harris, 389 Ill. 425, 428, 59 N.E.2d 825, 826-27 (1945). "After it [the contract] was made he held the legal title to the real estate in trust for their benefit until his death . . . By the contract, and at the time it was entered into, he effectively disposed of the equitable title to the land . . . ." In re Johnson's Estate, 130 W. Va. 100, 107, 43 S.E.2d 225, 229 (1947).

[14] In this case the court held that:

> Where the contract is to bequeath a definite sum of money or property of specific value, no title passes under the contract, but the beneficiaries become creditors of the estate to that extent. Where there is a breach of the contract to make the bequest, the remedy is a claim against the estate in the nature of a claim for damages for such breach. 389 Ill. at 428, 59 N.E.2d at 827.

[15] Western Motor Rebuilders, Inc. v. Carlson, 138 Colo. 404, 335 P.2d 272 (1959).

[16] Hood v. United States, 256 F.2d 522 (9th Cir. 1958), Maudre v. Humphreys, 83 W. Va. 307, 98 S.E. 259 (1919); Rhodes v. Meredith, 260 Ill. 138, 102 N.E. 1063 (1913); Breckwith v. Clark, 188 Fed. 171 (8th Cir. 1911); Estate of Dwyer, 159 Cal. 664, 115 Pac. 235 (1911); House v. Jackson, 24 Ore. 89, 32 Pac. 1027 (1893).

[17] 1 POMEROY, EQUITY JURISPRUDENCE § 105 (4th ed. 1918); 1 STORY, EQUITY JURISPRUDENCE § 790 (12th ed. 1877).

are two bare legal interests on one hand, and a beneficial equitable interest on the other, and thus two trusts.[18]

This reasoning is somewhat tenuous in view of the Restatement,[19] and other commentators who express the opinion that the relationship created is more nearly analogous to that of a mortgagor and mortgagee,[20] and that "this is a loose, inaccurate use of the word 'trust.' "[21]

Although there are no Colorado cases with fact situations similar to that in the present case, the West Virginia court stated in *Harris* that a contract to make a will is "analogous, with respect to the immediate transfer of the equitable title to property, to a contract for the sale of land."[22] It follows that if such an analogy is accurate, the Colorado Supreme Court could have reached the same result utilizing its own precedent without reference to decisions of foreign jurisdictions. In *Western Motor Rebuilders, Inc. v. Carlson*,[23] the court considered the question whether the vendee was subject to restrictive covenants formulated and recorded subsequent to payment of the consideration and to taking possession of the land by the vendee. It held that "when payments are fully made, the full equitable title vests in the vendee, and the vendor retains the naked legal title in trust for him."[24] In another action, to establish the priority of liens against the assets of a bankrupt-

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[18] BOGERT, TRUSTS & TRUSTEES § 18, at 118 (2d ed. 1965).

[19] RESTATEMENT (SECOND), TRUSTS § 13 (1957), provides:

> Trusts and Contract to Convey—
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> A contract to convey property is not a trust, whether or not the contract is specifically enforceable.
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> If the contract is specifically enforceable, the purchaser acquires an equitable interest in the property, but the relation between the vendor and purchaser, unlike that between trustee and beneficiary, is not a fiduciary one; it is more nearly analogous to a mortgage.

[20] BOGERT, *op. cit. supra* note 17, at 118; 1 SCOTT, TRUSTS § 13, at 133, 134 (2d ed. 1956) says:

> As a consequence of the fact that a contract for the purchase and sale of land is specifically enforceable, the purchaser is held to acquire an equitable interest in the land before it is conveyed to him. But of course it is clear enough that the vendor of land is in no real sense a trustee for the purchaser. It would be more nearly appropriate to speak of him as a mortgagee since he may retain the title to the land as security for the unpaid purchase price.

4 WILLISTON, CONTRACTS § 927, at 2604 (Rev. ed. 1936) states:

> Because of the unconditional duty of each party, it is held that from the formation of the contract, though it is not performable until a future day, the purchaser is the owner in equity, and that the vendor holds the legal title merely as security for the payment of the price; in other words, that the relation is substantially that of mortgagor and mortgagee.

[21] BOGERT, *op. cit. supra* note 17, at 118. For an adverse criticism of this use of trust see Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law*, 9 HARV. L. REV. 106, 117 (1895).

[22] 130 W. Va. at 109, 43 S.E.2d at 230.

[23] 138 Colo. 404, 335 P.2d 272 (1959).

[24] *Id.* at 414.

vendee's estate, the Court of Appeals for the Tenth Circuit in the case of *In re Ben Boldt, Jr., Floral Co.*[25] stated:

> A binding contract for the sale and purchase of land, under which payments on the purchase price are to be made in the future, vests an equitable title to the land in the purchaser from the date of the execution of the contract.[26]

Therefore, using these two Colorado cases, the court could have reached the same result.

B. Inheritance Tax on Proceeds of Life Insurance Policies

In *People v. Faricy*,[27] the Inheritance Tax Commissioner assessed an inheritance tax on the proceeds of four insurance policies naming the surviving widow as beneficiary. As provided by the terms of the collateral security agreement, the proceeds of the policies were paid to the assigned who deducted the amount of the loan and remitted the balance to the surviving widow. The Commissioner contended the proceeds of the policies were subject to an inheritance tax[28] bcause all the policies were assigned.

The Colorado Supreme Court held that the tax liability was not warranted because in determining the deductions from the gross estate,[29] the indebtedness of the deceased to the assignee was not included. The court concluded that the estate had paid an inheritance tax inflated by an amount which should have been offset by the indebtedness satisfied by the assigned proceeds.

The court distinguished this case from *People v. Mason*,[30] in which it had held taxable the proceeds of an insurance policy which were applied to reduce the amount of the decedent's indebtedness to a creditor-beneficiary. In determining the net value of the estate subject to inheritance tax, the debt secured by the policies in the principal case had not been claimed as a deducation, whereas in *Mason* the debt was allowed as a deduction. Therefore the interpretation of the statute by the supreme court in *Mason*[31] still appears to be valid.

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[25] 37 F.2d 499 (10th Cir. 1930).

[26] *Id.* at 502.

[27] 395 P.2d 822 (Colo. 1964).

[28] Colo. Rev. Stat. § 138-3-9(1) (1963) which establishes that: "Proceeds of insurance policies on the life of a decedent payable in such manner as to be subject to the claims against his estate or to distribution as a part thereof shall be taxable."

[29] Colo. Rev. Stat. § 138-3-16 (1963).

[30] 144 Colo. 151, 256 P.2d 257 (1960).

[31] In that case the court held:

> [I]t seems clear that the first paragraph [Colo. Rev. Stat. § 138-3-9 (1963)] is intended to cover only those policies which are made payable directly or indirectly to the estate. With respect to policies subject to claims against the estate or to distribution as a part thereof, the exemption provision is inapplicable and such policies are taxable in the full amount thereof. 144 Colo. at 155.