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ONE YEAR REVIEW OF WILLS, ESTATES AND TRUSTS

By PAUL S. GOLDMAN*

It was not the statement of a new rule of law that was startling in *Wright v. Poudre Valley Nat'l Bank*,[1] but rather the court's failure to state a rule. The testator, providing for distribution of his estate if all his brothers and sisters were dead at the death of his daughter, directed that his estate

> be divided between the surviving children of any deceased brothers and sisters and the children of any thereof who are deceased, share and share alike, the grandchildren of a deceased brother or sister collectively to receive the amount their immediate ancestor would have received had such immediate ancestor survived my said daughter [a life beneficiary].

At the date of the life beneficiary's death, there were two living nieces of the testator and numerous living children and grandchildren of thirteen deceased nieces and nephews.

In reversing the lower court, the supreme court determined that there should have been a per capita division of the estate into fifteen equal shares, with one share for each of the surviving nieces, and one share for each deceased niece or nephew who left children surviving, the latter shares then going per stirpes to the children of the deceased nieces and nephews. While this writer concurs in the result, it is felt that the court failed to state a rule requisite to reaching that result.

The supreme court cited the rule that words such as "share and share alike" usually require a per capita distribution,[2] but went no further. Using that rule by itself, as the court did, the children of the deceased nieces and nephews might have successfully argued that they too were entitled to per capita distribution. While taking cognizance of the testator's subsequent provision that the children of deceased nieces and nephews were to take per stirpes, the court failed to explain how it got around the fact that the words "share and share alike" immediately followed the devise to the children of the deceased nephews and nieces as well as the devise to those surviving.

In reversing the lower court, the supreme court also determined that no distribution should be made to any descendants more remote than the grandchildren of the testator's brothers and sisters, citing the well-established rule that the word "children" will be interpreted as meaning "immediate or first degree offspring," in the absence of other intent being indicated by the testator's language.[3]

Although the facts of the case are more closely connected with problems in the field of domestic relations, *Ward v. Terriere*[4]

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1 385 P.2d 412 (Colo. 1963).

2 *In re* Carroll's Estate, 62 Cal. App. 2d 798, 145 P.2d 644 (1944); Chisholm v. Bradley, 99 N.H. 12, 104 A.2d 514 (1954); *In re* Bray's Will, 260 Wis. 9, 49 N.W.2d 716 (1951).

3 Thompson, *Wills* § 273 (3rd ed. 1947).

4 386 P.2d 352 (Colo. 1963).

serves as an example of the complexities with which those in the probate and trust field often find themselves involved. The plaintiff claimed rights as a widow on the theory that the divorce between herself and the decedent was invalid, and that even if the divorce had been valid, she and the decedent again became husband and wife by operation of a common law remarriage.

The plaintiff's claim that the divorce was invalid rested on the ground that she had caused the word "dismissed" to be entered in the order book of the county court, nearly four years after the interlocutory decree had been entered. The supreme court determined that since the divorce decree had become final six months after entered,[5] the word "dismissed" later entered in an order book in the clerk's office had no effect.

The question of the alleged common law remarriage was resolved against the plaintiff on conflicting testimony in the trial court. The supreme court held that although there is a Colorado case holding that a common law *remarriage* may be proved by less than the positive and convincing proof necessary to establish a common law *marriage*,[6] that decision "was not intended to strip the trial court of its fact-finding function."[7]

In *State v. Estate of Fisch*,[8] a Colorado testator made a bequest to a non-profit Texas corporation. The Texas corporation was denied inheritance tax exemption by a Colorado court on the ground that Texas does not grant reciprocal exemptions to Colorado charities.[9] The American Lutheran Church, a Minnesota non-profit organization, then brought this action to recover the taxes paid by the Texas corporation under protest, claiming that the Texas charity was a subsidiary. The trial court ordered the taxes refunded, reasoning that the Texas corporation, being a subsidiary of the Minnesota corporation, could not receive the bequest and therefore could not be taxed.

The supreme court considered the decisive question, whether the Texas charity could take the gift directly without first having to funnel it through its Minnesota parent organization, and followed an earlier ruling that the law of the legatee's domicile determines

5 Colo. Sess. Laws 1929, ch. 91, § 3.
6 *In re* Peterson's Estate, 148 Colo. 52, 365 P.2d 254 (1961). See also 39 Dicta 102 (1962).
7 French v. Terriere, 386 P.2d 352 (Colo. 1963).
8 387 P.2d 282 (Colo. 1963).
9 Colo. Rev. Stat. § 138-4-15 (1953).

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the legatee's capacity to take.[10] Texas law gives non-profit charitable organizations the right to acquire and hold property; the supreme court ruled that the Texas charity took the gift directly, and because Texas does not reciprocate with Colorado in granting exemptions to charities, the tax was properly assessed.

An interesting collateral question arose from the fact that no court reporter was present in the trial court. The plaintiff contended that in the absence of a transcript, the supreme court was bound to presume that the findings and conclusions of the trial court were correct and that the adduced evidence supported the judgment.[11] The supreme court determined that stipulations equivalent to testimony, coupled with legal documents in evidence, constituted a sufficient record.

Articles for the "One Year Review of Colorado Law" are usually confined to noting significant cases considered by the Supreme Court of Colorado. This year, however, a ruling by the Denver County Court is of sufficient interest to be included. In *Altshuler v. Grandy*,[12] professional heir-hunters sought a declaration of their right to examine and make copies of probate records and any papers filed despite a statutory restriction of such access to "parties in interest, or their attorneys."[13] *Held*: this restriction applies in probate proceedings despite another statutory provision which states that such access shall be without charge.[14] The county court ruled that this latter provision means only that "where the right of inspection exists, the right of inspection exists without charge."[15]

10 Galiger v. Armstrong, 114 Colo. 397, 165 P.2d 1019 (1946).

11 Burton v. Garner, 374 P.2d 707 (Colo. 1962); Teets v. Richardson, 131 Colo. 592, 284 P.2d 233 (1955); Meagher v. Neal, 130 Colo. 7, 272 P.2d 992 (1954).

12 102 Trusts & Estates 732 (1963).

13 Colo. Rev. Stat. § 35-1-1 (1953).

14 Colo. Rev. Stat. § 37-5-12 (1953).

15 *Supra* note 12.

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