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One Year Review of Wills, Estates and Trusts

William P. Cantwell

ONE YEAR REVIEW OF WILLS, ESTATES AND TRUSTS

BY WILLIAM P. CANTWELL*

1960 was a highly significant year in many important everyday areas affecting Colorado lawyers and their clients involved with wills, estates, trusts and inheritance taxes.

Problems with the mechanism of paying death taxes in estates received attention in two cases. In *Williams v. Stander*[1] the testatrix had made an intervivos transfer with a retained life interest, which resulted in a taxable transfer for both state and federal purposes. Her will contained a rather usual type of clause fixing the burden of death taxes payable "in respect to my said estate, or to any devise, legacy or distribution under this Will, or otherwise" on her probate estate, and directed her executors to pay such taxes as an expense of administration. The Supreme Court rejected an assertion by the executors that the clause was insufficient to charge the probate assets with death taxes on the assets transferred during life subject to the retained interest, and held that the testatrix had clearly fixed the burden of all taxes on the probate assets by the use of the disjunctive phrase "or otherwise." The testatrix in *Ramsey v. Nordloh*[2] chose to direct a different burden of taxes in her will, providing that each legatee or devisee must pay the death tax on benefits under the will, a scheme generally referred to as an "apportionment" of taxes. On an appeal from a county court determination that specific legatees were not required to contribute to federal estate taxes, the Supreme Court reversed. It held that the language of the tax-burden clause used, which referred to "inheritance, estate or succession taxes" was referring to the federal estate tax, and that the word "federal" was not necessary to sweep the burden of the federal estate tax within the direction of the clause. It also held that, apportionment having been directed, this meant the doctrine of equitable apportionment of the federal estate tax, and that ". . . each beneficiary must pay that part of the tax that their respective bequests bear to the net amount of the estate upon which the tax is calculated."[3] In an important dictum the court referred to the general rule on the burden of the federal estate tax in the absence of a statute as providing that specific legacies are paid without this deduction being made from them. Because Colorado has no statute it may be presumed that this would have been the court's determination in the absence of the clause in question, since it pinned its decision squarely on the adequacy and intent of the clause to alter the general rule, holding that it did so.

In another case[4] a fiduciary ran into serious difficulties with another federal tax—the income tax. The executor and principal beneficiary had settled a caveat in 1951 and closed the estate in

*Mr. Cantwell is a member of the Denver and Colorado Bar Associations and is a member of the Denver firm of Holland and Hart.

1 354 P.2d 492 (Colo. 1960).
2 354 P.2d 513 (Colo. 1960).
3 *Id.* at 515.
4 Steinbaugh v. Barday, 352 P.2d 276 (Colo. 1960).

1953. Before death in 1950 the Internal Revenue Service had begun investigating decedent's income tax returns, and finally made an assessment in 1955 which was settled at the Tax Court level in 1956. The executor paid the deficiency and demanded reimbursement of half the amount from the defendant, who had been the caveatrix. The claim was that she was liable as a transferee, but in affirming the trial court's holding for the defendant the Supreme Court pointed out that transferee liability was secondary, and that primary liability fell on the estate. Since there had been a distribution of assets by the plaintiff-executor without providing for the tax liability of which he had knowledge, he was personally liable for the payment of the estate's obligation because of his wrongful over-distribution and was without a right of contribution as against the caveatrix-defendant.

The rule against perpetuities received attention in *Colorado Nat'l Bank v. McCabe*.[5] Testatrix had created interests in a trust with a term in gross of twenty-five years. One of the beneficiaries of the trust, who was not an heir, instituted a proceeding in the county court asking for a construction of the will. The county court held the trust to be invalid and decreed that the residuary estate should be distributed to the three living residuary beneficiaries, who were designated in the will as both income beneficiaries and remaindermen of the trust if living at the expiration of its term. A contingent remainder in favor of charities was also created. The Supreme Court reversed, holding that the interest of the three living income beneficiaries, in income, was vested, and therefore without the rule; that while their interests in principal were contingent and required survivorship of the term in gross, they were nevertheless valid since they would have to vest, if at all, within the period of the lives of the beneficiaries, who were in being at testatrix' death. The other interests, being a contingent remainder in favor of issue of the income beneficiaries, and an ultimate contingent remainder in favor of charities, were stricken as being remote. In default of survivorship of the term in gross by the income beneficiaries, the decedent's heirs would take. A collateral issue involved an *in terrorem* clause which purportedly defeated the interest of anyone who should ". . . directly or indirectly contest or aid in contesting the [will] . . . or any of the provisions thereof or the distribution of my estate thereunder." Without pronouncing the validity or invalidity of such clauses in general, the court held that it did not affect the right of the petitioner (a beneficiary) in the particular case, since the petition was made with probable cause after a failure of the fiduciary to take action, and resulted in no benefit to the petitioner.

A "do-it-yourself" will was involved in *Ambrose v. Singleton*.[6] A construction proceeding followed. Specific devises were involved, and the realty was subject to encumbrances at decedent's death. The devisees contended the will showed an intent to exonerate the realty from the liens and were successful in the county and district courts against the executor's contrary contention. The Supreme Court carefully reviewed its decision in its first holding on the

5 353 P.2d 385 (Colo. 1960).
6 356 P.2d 253 (Colo. 1960).

problem of exoneration[7] and clearly stated that the common law doctrine of exoneration was not the law in Colorado and that there would be no exoneration in Colorado without an affirmative showing of intent to exonerate in the will itself. Since it found that the will showed no such intent, the holdings below were reversed and the devisees were held to take subject to the burden of the encumbrances.

The important problem of the integration of two testamentary instruments as the single will of the testator received attention in *Lehmer v. Lehmer.*[8] Decedent left two wills, one dated March 28, 1957 and the second dated May 8, 1957. In a proceeding in which both wills were offered, the county court admitted the earlier will and denied probate to the later one. On appeal to the district court it was held that both wills had been executed in accordance with proper statutory procedures. On appeal to the Supreme Court it was held that there was no inconsistency between the two documents, and since the later will did not revoke the prior will, both could be admitted to probate. Under these circumstances there was not even a partial revocation by inconsistency and both wills could be construed together as a single instrument. Remand followed the holding with instructions to so treat the wills.

Estate of Varnum[9] involved a "lost will" and an attempt to probate it under CRS '53, §152-5-29. The evidence was particularly equivocal on the matter of the contents of the purported lost will, and the Supreme Court reversed a county court holding admitting the will to probate. While there is language in the opinion that might possibly be held to impair the discussion in the leading case of *Eder v. Methodist Ass'n*[10] on the meaning of the requirement that the will must be "in existence" at the death of the testator, a careful reading of both cases, together with the court's reference to the *Eder* case in the *Varnum* decision, appears to leave the earlier holding on the point intact. That was to the effect that the term "in existence" did not require physical existence but only conceptual existence as the unrevoked will of a testator of which the physical evidence had been lost.

7 Robinson v. Tubbs, 140 Colo. 471, 344 P.2d 1080 (1959).
8 357 P.2d 89 (Colo. 1960).
9 357 P.2d 370 (Colo. 1960).
10 94 Colo. 173, 29 P.2d 631 (1934).

A number of other cases also reached the court which dealt with some of the perennial problems in the field. *Thomas v. Davis*[11] was an undue influence case holding for the caveatrix which held the "dead man statute"[12] to be no bar to testimony of beneficiary-witnesses called by an adverse party who testified against their own interests. Claims procedure was involved in three cases. In one[13] an administratrix instituted a suit in the district court to collect a debt but was met by an offsetting claim of a very nearly equal amount. The claim against the estate had been dismissed in county court for late filing, but it was allowed as an offset in the district court on the ground that the decedent could not have recovered more had he lived and that this placed a limit on what his administratrix could recover. The second claims case[14] involved the 1959 amendment to the claims statute[15] permitting claims to be tried under the rules of civil procedure. The Supreme Court held that the county court had invoked the framework of the rules, and that for this reason, defenses of laches and the statute of limitations could not be raised by a motion to dismiss, so that the cause was remanded for trial on the merits. The third case[16] adds a new and highly important facet to the heavily litigated problem of the tort claim against a decedent.[17] A district court action and a county court claim were filed against the estate of a decedent on the same day. The county court claim was dismissed for late filing. Appeal was from a district court dismissal for lack of jurisdiction. This was reversed in the Supreme Court, with a holding that there was concurrent jurisdiction, and since the county court dismissal was not on the merits, the district court had full power to adjudicate the plaintiff's claim. In its opinion the court squarely faced the issue of whether the county court has exclusive jurisdiction to hear and determine surviving tort actions against estates and its holding appears to be a clear repudiation of any idea that it does. The opinion limits the requirement of the survival statute[18] that a claim be filed in the decedent's estate to be exclusively enforceable against the estate as a claim to cases in which an action has actually been instituted before death, and not to other cases, such as accident cases in which the alleged tort-feasor is himself killed. Unfortunately, the case does not reach the problem of how a judgment can be collected, since no timely contingent claim was on file in the estate proceeding. While a judgment might be collected from after-discovered and after-inventoried assets, the case leaves uncertain the problem of collection in the absence of such assets.

A legal life estate with full power of disposition was enlarged to a fee in *Zell v. Zell*[19] in accordance with earlier case law.[20] Conflicting escheat claims of the federal and state governments to the

11 356 P.2d 963 (Colo. 1960).
12 Colo. Rev. Stat. §153-1-1 (1953).
13 Dash v. Rubey, 357 P.2d 81 (Colo. 1960).
14 McPherson v. McPherson, 358 P.2d 479 (Colo. 1960).
15 Colo. Sess. Laws 1959, ch. 290, §1.
16 Ohmie v. Martinez, 349 P.2d 131 (Colo. 1960).
17 Meyers v. Williams, 137 Colo. 325, 324 P.2d 788 (1958); Film Enterprises v. Wolfberg, 137 Colo. 84, 321 P.2d 218 (1958); Weller v. Bank of Vernal, 137 Colo. 32, 321 P.2d 216 (1958); Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956).
18 Colo. Rev. Stat. § 152-1-9 (Supp. 1957).
19 351 P.2d 272 (Colo. 1960).
20 Cf., Davey v. Weber, 133 Colo. 365, 295 P.2d 688 (1956) and McLaughlin v. Collins, 109 Colo. 377, 125 P.2d 633 (1942).

estate of a deceased veteran were litigated in *Estate of Plich*,[21] with the issue going in favor of the United States on a narrow issue of statutory construction. The effect of a broad grant of administrative powers as exempting an executor from statutory duties was also passed on by the court in a case involving an individual fiduciary to whose final report objections were made.[22] The court found no exemption from such statutory obligations and remanded the case with extremely explicit instructions as to what was required from the fiduciary in reporting his activities. In *First Nat'l Bank v. Honstein*[23] a parent-child transaction was involved. Parent's estate claimed a resulting trust and the son claimed a completed gift. After examining the facts the Supreme Court was satisfied that a completed gift had been made and affirmed the judgment of the district court.

The standing of a guardian ad litem to appeal a determination of heirship was the issue in *Miller v. Clark*.[24] The Supreme Court held that the county court's determination of heirship had ended the guardian's appointment and that he had no standing to appeal, particularly in view of the county court's denial of his petition for permission to appeal. Relative jurisdiction of the county and district courts was involved in *Burch v. Burch*[25] which concerned an accounting between a decedent and a survivor who conducted a business under an agreement. The Supreme Court held that the district court could grant complete relief since more than the estate's interest in the business was involved.

A series of important and interesting inheritance tax cases also occurred during the year. In *People v. Fester*[26] a joint bank account was involved, with the inheritance tax commissioner seeking to tax the asset under the letter of the statute while meeting an argument that the form of the transaction was not its substance. The issue was whether the form of the account rendered the transaction a "transfer" to the surviving joint tenant, a stranger, and thus taxable, or whether an oral trust under which the account was created, and which was in fact performed by the surviving joint tenant by a transfer to the trust beneficiary, a son, rendered the transaction as a transfer to him and thus within his exemption. The Supreme Court held for the taxpayer, pointing out that in such cases ". . . it is proper to show the intention of the parties in creating the joint tenancy . . ."[27] and rejected the point urged by the commissioner, which was that record title, and record title alone, should fix the incidence of the tax. In framing its own version of the perennial form against substance issue in tax litigation the court stated flatly: "The fiction of record title here must fall before the onslaught of the true facts."[28]

Two cases involving optional valuation questions[29] both resulted in reversals of the lower court holdings favoring the tax-payers.

21 348 P.2d 706 (Colo. 1960).
22 Irwin v. Robinson, 355 P.2d 108 (Colo. 1960).
23 355 P.2d 535 (Colo. 1960).
24 356 P.2d 965 (Colo. 1960).
25 358 P.2d 1011 (Colo. 1960).
26 356 P.2d 130 (Colo. 1960).
27 *Id.* at 132.
28 *Ibid.*
29 People v. First Nat'l Bank, 356 P.2d 967 (Colo. 1960) and People v. Sweet, 356 P.2d 883 (Colo. 1960).

In the cases there were equivocal facts surrounding the election of optional valuation and the court held the taxpayers to a duty of strict compliance with the statute. In one case no election at all had been filed within the thirteen month period, and in the other there had been a mere reservation of right to elect, which the court held to be no election. It is worth noting that an amendment to the statute[30] has altered the law under which these cases arose.

In the fourth inheritance tax case, *People v. Mason*,[31] a long opinion and a dissent dealt with a difficult and ominous problem. The decedent had been indebted to the Fort Collins Production Association in the sum of $58,092.64, but was insured in favor of the Association under a creditor's group life insurance policy in the sum of $10,000.00. Had there been an excess of insurance proceeds over the debt, the excess would have been paid to the decedent's estate or certain alternate beneficiaries, at the option of the creditor. The court dealt with the problem of the indirect benefit to the estate from such a policy, and held that a policy which reduced an estate's obligation, even though indirectly, was not exempt under the statute[32] since it was thereby "payable in such manner as to be subject to the claims against his estate." The court also dealt with the taxpayer's argument that possession of "incidents of ownership" was the sole test of taxability of the particular policy, determining that this was but one of two tests which might be applied, the other be-

30 Colo. Sess. Laws 1959, ch. 260, § 1.
31 356 P.2d 257 (Colo. 1960).
32 Colo. Rev. Stat. § 138-4-9 (1953).

ing the availability of the insurance proceeds to pay claims or for distribution as part of the estate. In its determination the court noted that the proceeds were indirectly subject to distribution as a part of the estate because they freed equivalent assets of the estate that would otherwise have been required to discharge the debt. The majority opinion was met by an exceptionally vigorous dissent which took the majority's position to its extreme and pointed out that it would sweep within the tax all types of third party benefits, indeminities and payments which served to reduce claims against the estate, so that all such payments, not heretofore considered taxable, would be taxable. Listed were such benefits as Blue Cross and Blue Shield payments, veteran's burial benefits, fraternal benefits payable for funeral expenses, prepaid funeral contracts and the like. The dissent would have treated the contract as true life insurance payable to a named beneficiary and thus within the exemption without regard to a debtor-creditor relationship between the beneficiary and the insured. The dissent pointed out the near-impossibility of earmarking any insurance for debts, and went on to raise questions concerning insurance collateralized to pay debts and loans from insurance companies, as well as pointing out that the opinion clearly renders taxable bank and loan company insurance on the lives of borrowers.

In many estates life insurance is a major asset. Where this is true, the estates are generally not large, and this factor makes legitimate tax saving even more crucial. At the same time the majority of persons have no wish to avoid proper claims for their debts. To render such insurance proceeds available to pay such debts and to qualify them for the life insurance exemption now seems virtually impossible. Where there are assets in a probate estate which can be bought by a life insurance trust, or against the security of which the trustees may loan insurance proceeds, a feasible way forward may exist. But where no such assets exist, or where there is virtually no probate estate and a relatively large life insurance trust, the problem becomes difficult, if not impossible, to solve. Moreover, the logic of the majority opinion might even extend to the voluntary payment by a named lump-sum beneficiary of the deceased's debts. This, too, enriches the estate and thus constitutes an indirect distribution of such payments as a "part of the estate." If this is what the statute means, a great deal of life insurance sold to make assets available to "pay debts and inheritance taxes" may well be taxable for Colorado inheritance tax purposes, even though few persons have thought so until now.

It has been many years since such a volume of cases has been decided in the field. It may be a sign of increased activity by the bar in analyzing problems or of increased interest in settling some of the many questions in the area not previously determined by the court. In particular the federal and state tax questions indicate increased awareness of the impact of taxes on more traditional matters. Yet, when these matters are open for determination at the time of administration, they frequently indicate that the planning job was unfinished and hence heighten the challenge to the bar in rendering service at that stage.