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ONE YEAR REVIEW OF WILLS, ESTATES AND TRUSTS

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A landmark trust decision[1] highlighted the case law developments in the field of wills, estates and trusts in 1958. At the same time, several other cases of interest etched in new guidelines and provided further clarification for practitioners.

Denver National Bank v. Von Brecht[2] attracted wide interest[3] and has answered questions of the first importance in Colorado. Gustavus Adolphus Von Brecht entered into a trust agreement on July 15, 1946, under which he retained substantial powers, including powers to revoke, modify, amend, and to veto proposed investments in excess of one thousand dollars. He also retained the income, and created a remainder in favor of siblings and their descendants. The attack on the trust was four pronged, but the only issue before the supreme court was whether the aggregate retained rights and powers were so substantial as to render the settlor the owner of the trust assets so that the trust violated the statute of wills, since it had not been executed with the formalities required for a will.[4] In answering this question in the negative the court has written valuable and significant black letter law for Colorado practitioners, placing itself firmly behind the liberal, or "Massachusetts rule" announced in *National Shawmut Bank v. Joy*.[5] As a result, it is now clear that reservations of income, powers to alter, amend or revoke, and certain types of control over investments will not invalidate living trusts in Colorado as abortive testamentary dispositions. The case clearly charters the many dispositive schemes now extant in the state which rely on a revocable living trust with retained income rights as the backbone of the plan, and to that extent, confirms practices in Colorado which have wide approval elsewhere.[6] While the case goes no further than its own facts on the question of retained powers over investments, most settlors should be satisfied with a power limited to investments involving assets valued at one thousand dollars or more, like the *Von Brecht* power, so that even here, the draftsman can easily stay within the letter of the decision.

Three cases[7] involved procedure on the hearing of claims against estates and each squarely followed the holding in *Koon v. Barmettler*[8]

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[1] Denver Nat'l Bank v. Von Brecht, 332 P.2d 667 (Colo. 1958).

[2] 322 P.2d 667 (Colo. 1958). Four grounds had been set forth in the plaintiff's claim for relief. The plaintiff had obtained summary judgment below on her first ground:—that the trust instrument was a will and void because it was unwitnessed. This summary judgment was the subject of the instant appeal to the supreme court. The court reversed the summary judgment order and remanded the case to the trial court with direction to hear and determine the other issues presented by the pleadings: (1) that the instument was void because executed as a result of undue influence upon the settlor; (2) That the settlor lacked the mental capacity to enter into a trust agreement; and (3) That the settlor had made a binding agreement to revoke the trust and had failed to do so. Petition for rehearing on the summary judgment issue in the supreme court was denied on March 31, 1958.

[3] 35 DICTA 146 (1958).

[4] Colo. Rev. Stat. § 152-5-3 (1953).

[5] 315 Mass. 457, 53 N.E.2d 113 (1944).

[6] *Cf.* Casner, Estate Planning 62 ff. (2d ed. 1956); Shattuck and Farr, An Estate Planner's Handbook § 13 ff. (2d ed. 1953).

[7] Weller v. Bank of Vernal, 321 P.2d 216 (Colo. 1958); Film Enterprises v. Wolfberg, 321 P.2d 218 (Colo. 1958); Meyers v. Williams, 324 P.2d 788 (Colo. 1958).

[8] 134 Colo. 221, 201 P.2d 713 (1956).

which established that the filing of a claim against an estate in a county court confers on that court exclusive jurisdiction over the subject matter of the claim so that no action involving the same claim can be filed in any other court. In *Weller v. Bank of Vernal*,[9] this resulted in dismissal of a district court action against the administratrix of an estate where a claim had been filed on a note in the county court having jurisdiction, followed by commencement of a district court foreclosure action on the same subject matter.

Film Enterprises v. Wolfberg[10] involved a situation in which an action against the decedent was pending in district court at his death. The plaintiff filed a claim against the estate based on the same subject matter involved in the district court case. On the hearing of this claim, the executrix having moved its disallowance, the county court held that it lacked jurisdiction to determine the claim on its merits, because exclusive jurisdiction lay in the district court. However, the county court further held that the claim could remain on file as notice until a final determination of the district court proceeding pending in the supreme court. On appeal, the supreme court held that the county court order was not a final judgment from which a writ of error would lie. Thus, the county court was held to have retained jurisdiction over the claim and not to have rendered a final determination as to its validity, even though that court had no jurisdiction to hear the claim on its merits.

Meyers v. Williams[11] involved a wrongful death action against a decedent. A timely claim on the wrongful death issue was filed in county court, but nine months after issuance of letters a district court action involving the same subject matter was filed, naming decedent's executor as a party defendant. The county court claim remained on file and undetermined at the time of the supreme court hearing, which was on a writ of error by the defendant-executor after an adverse judgment in the district court suit. Record objection to jurisdiction in the district court was raised by the executor for the first time in the supreme court. The court followed its *Koon v. Barmettler* holding and stated again that the county court was the sole and exclusive forum for determination of the issues involved, and reversed and remanded with instructions to dismiss the district court action.

Counsel for caveators to wills should have advance and secure fee arrangements in view of *Proudfit v. Koons*.[12] Here a caveat was successful as to one of two wills, but unsuccessful as to the other. An application was made to the county court for allowance of attorney's fees from the estate to caveators' counsel on the theory of benefit rendered to the estate and the parties in interest as a result of the successful caveat to one of the wills. The application relied on earlier holdings awarding allowances when ambiguous wills had required construction proceedings. The supreme court denied any allowance, holding that none was authorized by statute, and that none should be allowed where services were for the sole benefit of certain interested parties in a purely personal and adversary action.

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[9] 321 P.2d 216 (Colo. 1958).
[10] *Id.* at 218.
[11] 324 P.2d 788 (Colo. 1958).
[12] 325 P.2d 273 (Colo. 1958).

Kepler v. Burns[13] involved the interesting question succinctly phrased by the trial court as follows:

> "Is an executor of an estate entitled to interest on land sold through probate court immediately upon order of court confirming the sale when the vendee is in possession but in the absence of an overt tender of the deed by the executor and in the absence of demand for interest when the deed and abstract were finally tendered and payment made?"[14]

The negative answer given to this question by the trial court was affirmed by the supreme court. It appeared that no tender of a deed had been made for nearly fifteen months after the sale, and that the interest was being sought as a result of a surcharge of the executor at the request of certain beneficiaries of the estate. The supreme court's holding barred the executor from charging the interest back to the vendees under the sales, since they had fully complied with the executor's demands, and their non-payment of the balance of the purchase price resulted only from the executor's non-tender of the deeds.

A constructive trust in land was decreed as a means of restoring a breach by one of several joint venturers under a written joint venture agreement in *Lindsay v. Marcus*.[15] The joint venturers had agreed to purchase the land, and also agreed that one of their number should hold title for the others, without disclosure. After the purchase was completed, the nominee-venturer claimed to hold the property for his own account. In decreeing the trust, the supreme court carefully reviewed the authorities and identified the nominee-venturer as a fiduciary for the others. It affirmed the trial court's determination that there had been a sufficient breach of the existing fiduciary obligation to require the remedy of the constructive trust.

The question of whether or not dispositive language used by a lawyer in his own will created a trust was before the court in *Gately v. El Paso County Bar Association*.[16] The deceased McAllister had left his library to the defendant bar association, and plaintiff contended that the language used was not that of absolute gift but such as to create certain rights in him as one who came within the ambit of a trust. It was held that no trust had been created and that the gift was absolute, so that the bar association was acting within its rights in excluding non-members, including plaintiff, from use of the library. In reaching its construction of the will, the court emphasized McAllister's standing at the bar, and his omission of any use of the word "trust" in the will, as indicative of the absence of intent to create a trust in the bequest to the association. It also pointed out that there was no other specific language from which any severance of the legal and equitable estates could be established.

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[13] 324 P.2d 785 (Colo. 1958).
[14] *Id.* at 787.
[15] 325 P.2d 267 (Colo. 1958).
[16] 328 P.2d 381 (Colo. 1958).