Spring 1983

Estates and Trusts

Margaret B. Alcock

ESTATES AND TRUSTS

MARGARET B. ALCOCK*

This section of the Survey deals with New Mexico appellate court cases which considered issues of estate and trust law. These issues included questions of jurisdiction, advancements, undue influence, creditors' claims, and the right of a former spouse to a decedent's death benefits. Most of the decisions involved the interpretation of New Mexico's Probate Code[1] which applies to the affairs of decedents dying on or after July 1, 1976.[2] Two cases dealt with the estates of decedents dying before the effective date of the Probate Code and the courts decided them under prior law.[3] Although pre-Probate Code estates are becoming increasingly infrequent, the law governing their administration contains no statute of limitations on the filing of probate,[4] and New Mexico practitioners must still be prepared to apply former law in appropriate circumstances.[5]

ADVANCEMENTS

In *In re Estate of Martinez*,[6] the court of appeals dealt with the issue of advancements. The case involved several procedural questions resulting from a fifteen-year delay from the date administration proceedings began in 1966 to the date the case reached the court of appeals in 1981.

---

*J.D., University of New Mexico School of Law, 1983.

1. N.M. Stat. Ann. §§ 45-1-101 to 45-7-401 (1978).

2. The effective date of the Probate Code is not found in the 1978 statutory compilation; it appears in 1975 N.M. Laws ch. 257, § 10-101, which provides:

> A. The effective date of the provisions of the Probate Code is July 1, 1976.
>
> B. The Probate Code applies to the affairs of decedents dying on or after the effective date of the Probate Code, and to matters of missing persons, protected persons, minors and incapacitated persons commenced on or after the effective date of the Probate Code.
>
> C. Nothing in the Probate Code shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

3. *In re* Estate of Martinez, 96 N.M. 619, 633 P.2d 727 (Ct. App.), *cert. denied*, 97 N.M. 140, 637 P.2d 571 (1981), discussed *infra* at text accompanying notes 6–12; *In re* Will of Hamilton, 97 N.M. 111, 637 P.2d 542 (1981), discussed *infra* at text accompanying notes 13–19.

4. The only statute of limitation under pre-1976 probate law is a six-year limitation on the rights of creditors with regard to real estate owned by decedents whose estates were not subject to administration. N.M. Stat. Ann. § 31-8-4 (1953). For a discussion of delayed administrations under the old probate statutes, see A. Poldervaart, *New Mexico Probate Manual* § 40 (1961) [hereinafter cited as Poldervaart].

5. See Poldervaart, *supra* note 4, for a discussion of when the administration of a pre-Probate Code estate may become necessary.

6. 96 N.M. 619, 633 P.2d 727 (Ct. App.), *cert. denied*, 97 N.M. 140, 637 P.2d 571 (1981).

Because the decedent died before the effective date of the Probate Code, the court decided the advancement issue under prior law.[7]

The substantive issue in *Martinez* was whether real property given by the decedent during his lifetime to one of his sons should be considered an advancement in dividing the decedent's estate among all of his children. The present Probate Code treats a gift as an advancement only if it is declared as such in a contemporaneous writing signed by the donor and acknowledged by the donee.[8] In contrast, the old common law doctrine, as set out by the court in *Martinez*, raises the presumption that a parent intends a lifetime gift to his child to be an advancement against the child's inheritance.[9] In order to overcome the presumption, the child must introduce some evidence to support a contrary finding.[10] If the child is successful, the presumption disappears and it then becomes the plaintiff's burden to establish the decedent's intention to have his gift treated as an advancement.[11]

In *Martinez*, the defendant introduced evidence at trial indicating that the gift of property was intended as defendant's share of his deceased mother's estate. The court accepted this as sufficient evidence to overcome the presumption of an advancement. Although it was not discussed in the court's opinion, legal title to the property in question apparently was held by the decedent at the time the gift was made, and the decedent's potential estate was therefore depleted by the value of that gift. It is not clear why the court assumed that because the decedent originally obtained the property from the estate of his first wife, defendant's mother, the gift was any less an advancement against the decedent's own estate. Other testimony given at trial supported the view that the gift was intended as part of the defendant's total inheritance, rather than as a special gift of property once belonging to his mother. This testimony was ruled to be hearsay and inadmissible by the court of appeals. As a result, the court's decision rested solely on the rather ambiguous testimony of the defendant and his sister that the property, legally owned by their father, was defendant's inheritance from his mother. Without more substantial evidence, the court's holding against advancement was not well founded. The decision does indicate that the quantum of evidence required to overcome the old common law presumption of advancement may be minimal.[12]

7. *See supra* notes 4–5.

8. N.M. Stat. Ann. § 45-2-110 (1978).

9. The rationale supporting the presumption for advancement is that a parent's affection for his children is usually of equal degree and the parent would not wish to favor one child over another. 96 N.M. at 623, 633 P.2d at 731.

10. *Id.*

11. *Id.* at 624, 633 P.2d at 732. Because administration proceedings were filed before the adoption of the rules of evidence in 1973, the *Martinez* court applied New Mexico common law.

12. Had N.M. R. Evid. 301 on presumptions been in effect, the outcome of the case might have

CLAIMS

In re Will of Hamilton[13] was the second case involving the estate of a decedent dying before the effective date of the Probate Code. The decedent, W. A. Hamilton, died in 1968. His will divided the residue of his estate among his three children and nominated one of the children, Jack, as executor of the estate. The other two devisees raised several objections to Jack's administration at the time the final account and report was filed in 1976. The major objections were to payments Jack had made to himself as reimbursement for his personal claims against the estate. The court held that the payments were improper because Jack had not formally filed the claims as required by statute.[14]

Although decided under prior law, the court's position would be the same with respect to a personal representative who reimburses himself for claims against an estate without following the procedure set out in the Probate Code.[15] *Hamilton* serves as a reminder that a personal representative must be careful to keep his alternate identities as fiduciary, heir, and creditor of an estate separate. He should always understand in which capacity he is acting in order to insure that all of his statutory responsibilities have been met.

UNDUE INFLUENCE

Other objections to the executor's final account and report in *Hamilton* resulted in the court finding that Jack had exercised undue influence over

---

been different. See the discussion of *In re* Estate of Padilla, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982), in Hertz, *Evidence*, *post* at 407, which sets out the legislative background and present status of the evidentiary rules on presumptions in New Mexico. *Martinez* is the first New Mexico case to deal with the issue of advancements in the context of an intestacy proceeding. Two New Mexico cases have addressed the subject in connection with the construction of wills: *In re* Williams' Will, 71 N.M. 39, 376 P.2d 3 (1962); Sylvanus v. Pruett, 36 N.M. 112, 9 P.2d 142 (1932). Prior to the adoption of the Probate Code, New Mexico was the only state in the country which did not have a statute on advancements. Ingram and Parnall, *The Perils of Intestate Succession in New Mexico and Related Will Problems*, 7 Nat. Resources J. 555, 595 (1967).

13. 97 N.M. 111, 637 P.2d 542 (1981).

14. N.M. Stat. Ann. § 31-8-3 (1953), as quoted by the court, provides that "*[a]ll claims* against the estate of deceased persons *not filed . . . within six [6] months* from the date of the first publication of notice of the appointment of executor . . . shall be barred. . . ." (emphasis by the court). 97 N.M. at 115, 637 P.2d at 546. The New Mexico Supreme Court held that the requirements of this section were mandatory in *In re* Lander's Estate, 34 N.M. 431, 283 P. 49 (1929). The court there stated that neither the heirs nor the administrator had power to waive the requirements: "[t]he statute is mandatory." *Id.* at 435, 283 P. at 50.

15. Section 45-3-803 of the Probate Code corresponds to § 31-8-3 of the 1953 compilation. The present Code bars all claims against an estate which are not presented within two months after the date of the first publication of notice to creditors or within three years after the decedent's death if notice to creditors has not been published. Oney v. Odom, 95 N.M. 640, 624 P.2d 1037 (Ct. App.), *cert. denied*, 95 N.M. 669, 625 P.2d 1186 (1981), declared § 45-3-803 to be mandatory. In *Oney*, the court held that claims not timely presented are barred. The court further held that the district court does not have the power to extend the period for presentment set out in the Code. 95 N.M. at 643, 624 P.2d at 1040. *See also* Lebeck, *Estates and Trusts, Survey of New Mexico Law: 1980–1981*, 12 N.M. L. Rev. 363, 367 (1982) [hereinafter cited as Lebeck].

his co-devisees. Jack had secured the signatures of the other two devisees on an agreement settling Jack's personal claims against the estate by means of an unequal distribution of estate assets: $56,000 to Jack; $6,000 each to his co-devisees. The co-devisees raised objections to the agreement at the time the final account and report were filed. One devisee claimed that he had a history of alcoholism and did not remember signing the agreement. The other claimed that Jack had obtained her signature by means of threats and intimidation. The trial court found that there was no evidence of fraud or undue influence and accepted the final account and report. The supreme court reversed on the issue of undue influence, holding that Jack's fiduciary relationship as executor and his strong domination over the other devisees with regard to estate matters raised a presumption of undue influence.

In dealing with the issue of undue influence, the court in *Hamilton* did not distinguish between Jack's separate identities as executor and devisee, as it had distinguished between his identities as executor and creditor when addressing the claims issue.[16] The court held that when a transaction between an executor and the beneficiaries under a will is questioned, "the executor has the burden of showing that he acted in good faith."[17] Technically, the agreement in question was not a transaction between the executor and the beneficiaries of W. A. Hamilton's estate.[18] It was a private agreement among the beneficiaries altering the pattern of distribution set out in the will.[19] Consequently, it might be questioned whether Jack should have borne the burden of proving that he had acted in good faith with regard to the two other devisees, and whether the fiduciary or confidential relationship necessary to a finding of undue influence should have been presumed because Jack occupied the position of executor as well as that of devisee. Although it appears from the opinion that there

16. *See supra* text accompanying notes 13–15.

17. 97 N.M. at 114, 637 P.2d at 545.

18. *Id.*

19. The agreement identified the parties to the agreement as the "heirs and beneficiaries under the Last Will and Testament of W. A. Hamilton, deceased." Record at 255, *Hamilton*. Jack Hamilton signed the agreement in his individual capacity as a devisee under his father's will. There was no indication in the agreement that he was acting ir the capacity of executor. *Id.*

It is interesting to note that under the present Probate Code a personal representative has no authority to make objection to an agreement among heirs or devisees altering distribution of an estate:

> [C]ompetent successors may agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties.

N.M. Stat. Ann. § 45-3-912 (1978).

were grounds for invalidating the agreement in *Hamilton*, such invalidation might more properly have been based on the contract principles of duress and lack of intent, rather than a finding of undue influence.

In *In re Will of Ferrill*,[20] the court of appeals addressed a more common form of undue influence—that of the beneficiary of a will upon the testator. The court held that the will of Hazel Cash Ferrill, which disinherited her family in favor of a married couple who had cared for the testatrix during the eight months before her death, was the product of undue influence and therefore invalid. The decision was based on a finding of "several suspicious circumstances" existing in conjunction with a confidential relationship between the testatrix and the new beneficiaries.[21]

Hazel Cash Ferrill died of cancer in December 1979 at the age of 82. She and her sister lived on Hazel's ranch from May to December of that year and were cared for by Joe and Billie Thorp. The Thorps acted at the request of their employer, a neighboring rancher, and he continued to pay the Thorps' salaries. In July 1979, Hazel executed a new will disinheriting her grandson and naming the Thorps as the primary beneficiaries of her estate. The estate was valued at between $875,000 and $1,000,000. After Hazel's death, her grandson contested the admission of the will to probate. The jury found that the will was the product of undue influence exerted on the testatrix by Joe Thorp.

In reviewing the case, the court of appeals first established the existence of a confidential relationship between Joe Thorp and Hazel. The court defined such a relationship as one in which "trust and confidence is reposed by one person in the integrity and fidelity of another."[22] It then rejected Thorp's position that a presumption of undue influence could arise only if it was also shown that he occupied a dominant position in his relationship with Hazel. The court held that the existence of a confidential relationship in conjunction with an unspecified number of suspicious circumstances, domination being only one, is sufficient to give rise to the presumption. The five circumstances enumerated by the court as "suspicious" were: (1) the testator was old and in a weakened physical or mental condition; (2) there was a lack of consideration for the bequest; (3) the disposition of the property was unnatural or unjust; (4) the beneficiary participated in procuring the will; and (5) the beneficiary dominated the testator.[23] The court concluded that the first three of these five circumstances were present at the time Hazel executed her will.

In examining the court's reasoning, the third circumstance was clearly the most important in this case. The court believed that the disinheritance

20. 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981), *cert. quashed*, ___ N.M. ___, ___ P.2d ___ (1982).

21. 97 N.M. at 387, 640 P.2d at 493.

22. *Id.*

23. *Id.*

of Hazel's grandson in favor of two relatively recent acquaintances was unfair.[24] Any other reading of the case would create a situation within which a number of wills would be potentially invalid due to the presence of undue influence. First, it can be expected that most testators make bequests only to those in whom they have trust and confidence. Second, many testators are old and in poor health. Finally, a bequest or devise is, by definition, a gift.[25] Few gifts are made in return for any consideration other than love and affection or, "trust and confidence . . . in the integrity and fidelity of another."[26] The most damning of the five circumstances are the last two, that the beneficiary participated in procuring the will and that the beneficiary dominated the testator. The court in *Ferrill* admitted that neither of these circumstances existed in relation to Hazel's will.

The holding in *Ferrill* regarding the factors necessary to prove undue influence deviates from earlier cases. Despite the court's assertion that neither domination of the testator by the beneficiary nor the beneficiary's involvement in procuring the will is required for a finding of undue influence, every case cited by the court did, in fact, contain evidence of at least one of these two circumstances.[27] As the court noted in *Galvan v. Miller*,[28] "not all influence is 'undue' influence. The mere fact that influence is exerted upon a testator does not of itself vitiate the testator's will or require that it be set aside or denied probate."[29] The fact that Hazel Ferrill was old and in poor health, and that she chose to leave her property away from the natural objects of her bounty, might have war-

24. The court noted that Hazel had raised her grandson, Don, and that he had helped her in her business activities while he was growing up. It was also noted that Hazel had lived with Don and his wife for two months during 1978. From these facts the court determined that "the jury could have concluded that the disposition of the will was unnatural or unjust." 97 N.M. at 388, 640 P.2d at 494.

25. A bequest is a "gift by will of personal property"; a devise is a "gift of real property by last will and testament of the donor." Black's Law Dictionary 145, 407 (rev. 5th ed. 1979).

26. 97 N.M. at 387, 640 P.2d at 493.

27. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968) (testator was dominated by the principal beneficiary); Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965) (testatrix was dominated and coerced by principal beneficiaries; beneficiaries participated in procuring the will); Ostertag v. Donovan, 65 N.M. 6, 331 P.2d 355 (1958) (in gift of stock from elderly patient to her doctor, the doctor assisted the donor in filling out the endorsement on the stock certificates); Calloway v. Miller, 58 N.M. 124, 266 P.2d 365 (1954) (beneficiary obtained a power of attorney from testator, transferred testator's bank accounts to joint accounts in a local bank, and procured testator's will); Brown v. Cobb, 53 N.M. 169, 204 P.2d 264 (1949) (lessees arranged drafting of inequitable lease and procured signature of elderly lessor, preventing lessor from obtaining disinterested legal advice); Salazar v. Manderfield, 47 N.M. 64, 134 P.2d 544 (1943) (grantees procured signature of grantor on deed, failing to disclose all facts concerning the deed); Trigg v. Trigg, 37 N.M. 296, 22 P.2d 119 (1933) (wife procured husband's signature on deed through constant "nagging"); Cardenas v. Ortiz, 29 N.M. 633, 226 P. 418 (1924) (grantees procured deed from elderly relatives who depended on grantee for advice).

28. 79 N.M. 540, 445 P.2d 961 (1968).

29. *Id.* at 544, 445 P.2d at 965.

ranted a challenge to her testamentary capacity. Without more, these facts should not have sustained a finding of undue influence. As a result of the decision in *Ferrill,* it has become virtually impossible for a testator who is old and infirm to dispose of his property in a manner that a judge or jury might interpret as unnatural or unjust.[30] This creates serious problems in will drafting and reemphasizes the need for attorneys to substantiate both the capacity and the motives of an elderly testator when drafting a will which provides for an unusual disposition of the testator's estate.

PRETERMITTED CHILDREN

The decision in *In re Estate of Padilla,*[31] in which the court of appeals interpreted the Probate Code on the issue of pretermitted children,[32] also reflects concern for the protection of the family. In *Padilla,* the court held that a statement in a printed form will which read: "I declare that I have no children whom I have omitted to name or provide for herein,"[33] was ineffective against the claim of the testator's illegitimate son. The court based its decision on a strict interpretation of section 45-2-302 of the Probate Code. Under that section, a child who has been omitted from his parent's will is still entitled to receive a share in the parent's estate equal to that which he would have received if the parent had died intestate, unless "it appears from the will that the omission was intentional."[34] The

30. A study of 220 California cases involving will contests determined that juries found for will contestants more than 75% of the time. Note, 6 Stan. L. Rev. 91, 92 (1953). In discussing the failure of trial judges to grant judgments n.o.v. in such cases, the author noted that the equities usually appear to be on the side of the contestants: "When . . . the decedent has disappointed the natural . . . objects of his bounty, the equities in their favor are strong. . . . If juries are dominated by their natural sympathies in this type of litigation, it may be that trial judges are swayed sometimes by a sense of justice." *Id.* at 96. The tendency of juries to find in favor of disinherited children has sometimes been troublesome for the courts. In Heidman v. Kelsey, 19 Ill. 2d 258, 166 N.E.2d 596 (1960), *cert. denied,* 364 U.S. 869 (1960), the Illinois Supreme Court reversed a decree in favor of an only child who was devised a one-sixth share in her father's estate:

> We are reviewing not the first trial, but the fourth. To be sure, this fact has made us increasingly reluctant to set our view of the evidence against that of three juries. But it also makes us increasingly reluctant to remand the cause for another trial with the prospect that we will again be called upon to reverse a jury finding and remand for another trial. "This court recognizes the tendency of juries to look for an excuse to hold invalid a will making an unequal division of the testator's property among his children. . . ." De Marco v. McGill, 402 Ill. 46, 51, 83 N.E.2d 313, 316.

19 Ill. 2d at ___, 166 N.E. at 600.

31. 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

32. N.M. Stat. Ann. §45-2-302 (1978).

33. 97 N.M. at 512, 641 P.2d at 543.

34. N.M. Stat. Ann. §45-2-302(A)(1) (1978). The complete text of subsection A of the statute reads as follows:

> A. If a testator fails to name or provide in his will for any of his children born or adopted before or after the execution of his will, the omitted child or his issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

court held that the language of the statute does not allow the introduction of extrinsic evidence indicating the testator's intent. In order to disinherit a child, an indication of the intent to disinherit must appear on the face of the will itself.[35]

The testator, Joseph Padilla, executed his last will and testament in 1968. At that time, Padilla had a twenty-six-year-old illegitimate son, Richard Sanchez. Padilla was aware of Richard's existence and had orally acknowledged the relationship between them, but Padilla did not mention or provide for Richard in the will. When Padilla died in 1978, two challenges were raised to the probate of his will. The testator's two sisters challenged the validity of the will's execution. Richard Sanchez challenged the will based on his right as a pretermitted child to take against the will. The trial court upheld the will against both sets of claimants. The court of appeals affirmed as to the execution issue[36] and reversed as to Richard's claim under New Mexico's pretermission statute.

As an illegitimate child, Richard's claim depended on a preliminary finding as to his paternity. Under the Probate Code there are three ways in which an illegitimate child may establish his paternity: (1) by a marriage ceremony participated in by the natural parents before or after the child's birth, regardless of the validity of the ceremony; (2) by a written instrument signed by the father, provided that the instrument shows on its face that it was signed with the intent of recognizing the child as an heir; and (3) by an adjudication of paternity made before the death of the father or established thereafter by a preponderance of the evidence.[37] The paternity of Richard Sanchez was established by adjudication after Joseph Padilla's death. Richard was then in a position to inherit his father's entire estate under New Mexico's pretermission statute, effectively blocking disposition of the testator's property according to the terms of his will.

In *Padilla*, the testator was aware of his illegitimate son's existence and had orally acknowledged Richard as his son. The case raises a ques-

---

(1) it appears from the will that the omission was intentional;

(2) when the will was executed, the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

35. This is a significant change from the law on pretermitted children which existed prior to adoption of the Probate Code. See Flickinger, *Intestate Succession and Wills Law: The New Probate Code*, 6 N.M.L. Rev. 25, 53–55 (1975), setting out the differences between New Mexico's former statutes and the Code.

36. 97 N.M. at 511, 641 P.2d at 542. The court held that under the evidence rule on presumptions, N.M. R. Evid. 301, Padilla's will was valid, despite the fact that the testator and the witnesses had not complied with statutory requirements of execution. For an analysis of the court's decision on this issue, see Hertz, *Evidence, post* at 407.

37. N.M. Stat. Ann. §45-2-109(B) (1978).

tion, however, as to whether it is possible for a testator to guard against having his testamentary wishes thwarted by a child of whom he is unaware. It appears from the decision in *Padilla* that he cannot. The court stated very clearly that "an affirmative, not negative, indication of intention must appear on the face of the Will"[38] in order to avoid application of section 45-2-302.

DEATH BENEFITS

In *In re Estate of Schleis,*[39] the supreme court held that a divorce decree does not automatically sever a former spouse's interest in an insurance policy of which she is the designated beneficiary. In *Schleis,* the decedent had taken out two term life insurance policies during his marriage and designated his wife as beneficiary. The couple was divorced a few months before the decedent's death. When the former wife claimed the proceeds of the two policies, the personal representative of decedent's estate objected, claiming that because the divorce decree awarded the decedent all personal property in his possession, his former wife was automatically divested of her interest in the policies. The supreme court upheld the wife's right to the proceeds.

The court distinguished the facts in *Schleis* from those in *Romero v. Melendez,*[40] relied upon by the personal representative. In *Romero,* the divorce decree specifically divested the former spouse of all interest in the decedent's insurance policies, "including the expectancy as a beneficiary."[41] The *Schleis* court held that when a divorce decree merely grants ownership of the policy to one spouse, the rule in *Harris v. Harris*[42] applies. Under *Harris,* the owner spouse must take the steps set out in the policy for a change of beneficiary in order to divest his former spouse of her right to the proceeds.[43] In *Schleis,* the terms of the insurance policies had not been introduced at trial. The supreme court adopted its own two-part test and required evidence of a clear expression of intent to change

38. 97 N.M. at 513, 641 P.2d at 544.

39. 97 N.M. 561, 642 P.2d 164 (1982). For further discussion of this case, see Kelsey & Siegel, *Domestic Relations, ante* at 379.

40. 83 N.M. 776, 498 P.2d 305 (1972).

41. *Id.* at 780, 498 P.2d at 309.

42. 83 N.M. 441, 493 P.2d 407 (1972).

43. In *Harris,* the supreme court reversed a trial court decision which divided the proceeds of two life insurance policies equally between the decedent's former wife and his estate. The court held that the decedent's failure to change the beneficiary designation on the insurance policies resulted in the entire amount of the proceeds going to his former wife:

> Decedent, being the owner of half of the policies, had the right to dispose of his half interest in the proceeds as he pleased. Since he did not change the beneficiary prior to his death, however, he exercised the right in favor of the appellant. . . . Her divorce from defendant had no effect upon her status as beneficiary.

83 N.M. at 443, 493 P.2d at 409.

the beneficiary, coupled with reasonable efforts to effect the change. Because there was no indication of any action on the part of the decedent with regard to the policies, the court held that the personal representative had not met the requirements for divesting the decedent's former wife of her rights under the policies.

It is worth noting that the court based its conclusion solely on contract principles; there was no claim that the decedent's former wife had a community property interest in the insurance policies. The court stated at the beginning of its opinion that the policies were for term insurance and that the period of coverage purchased with community funds had ended before the decedent's death. As a result, the former wife's successful claim to the proceeds rested entirely on her position as designated beneficiary.

JURISDICTION

In re Estate of Ruther[44] raised the question of whether a jury trial deciding the validity of a decedent's will may be held in a district court other than that which has jurisdiction over the probate proceedings. Two separate probate proceedings were filed for the estate of Phillip Ruther: the first was an informal testacy proceeding filed in Bernalillo County by Rubal Ruther; the second was a formal testacy proceeding filed in Curry County by Richard Ruther three months later. Although the court in Bernalillo County found that venue and jurisdiction were in Bernalillo and ordered a consolidation of all proceedings, it set a hearing on Richard's petition for formal probate of the decedent's will in Curry County. Rubal appealed the subsequent admission of the will, claiming that once the court had entered its order that venue and jurisdiction were in Bernalillo County, trial could not be held in Curry County.

The court of appeals affirmed the admission of decedent's will in the proceeding in Curry County. Section 45-1-303(C)[45] authorizes transfer of a proceeding to another court if the court having jurisdiction finds that the transfer is "in the interest of justice."[46] There was no such finding in the Bernalillo County District Court's order setting the matter for trial

44. 96 N.M. 462, 631 P.2d 1330 (Ct. App. 1981).

45. N.M. Stat. Ann. § 45-1-303(C) (1978).

46. *Id.* The interpretation of § 45-1-303 depends on N.M. Stat. Ann. § 45-3-201 (1978), which determines which court has venue:

> A. Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:
>
> (1) in the county where the decedent had his domicile at the time of his death;
>
> . . . .
>
> . . . .
>
> B. Venue for all subsequent proceedings is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 [45-1-303 NMSA 1978]. . . .

in Curry County. In fact, the order was issued one week before the final determination of jurisdiction. The court of appeals glossed over the omission by emphasizing Rubal's failure to object to the absence of a finding that transfer to Curry County was in the interest of justice. The court concluded that "such finding was implicit in the Order. . . ."[47]

Ruther is of interest primarily because it is one of the few cases interpreting the procedural statutes of the Probate Code. A second issue in *Ruther* concerned the right of a party to demand a jury trial in formal testacy proceedings. As the court pointed out, section 45-1-306 of the Code clearly provides such a right.[48] There are several sections in the Probate Code governing procedural matters; attorneys should not assume that principles of equity necessarily apply to all probate proceedings.

COMMUNITY LIEN

The article on estates and trusts in the last Survey issue[49] discussed the court of appeals' decision in *Portillo v. Shappie*.[50] *Portillo* upheld the then-prevailing rule in New Mexico that the use of community funds to enhance the value of a spouse's separate property creates a community lien against the property in the amount of the community funds expended. The supreme court granted certiorari and during this Survey year reversed the court of appeals decision.[51] The supreme court held that when the community has invested labor as well as funds in improving the separate property of one of the spouses, the community lien is not limited to the value of such labor and funds. Instead, the lien will be measured by the enhancement in value of the property as a result of the improvements. The supreme court's decision in *Portillo* modified a long-standing rule of New Mexico community property law. Whether the case is an aberration or signals a real change in the court's application of community property principles remains to be seen.[52]

47. 96 N.M. at 465, 631 P.2d at 1333.

48. 96 N.M. at 464, 631 P.2d at 1332. The full text of N.M. Stat. Ann. §45-1-306 reads as follows:

> If demanded, in the manner provided by the Rules of Civil Procedure, a party is entitled to a trial by jury in a formal testacy proceeding and in any proceeding and in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

49. Lebeck, *supra* note 15.

50. 19 N.M. St. B. Bull. 604 (Ct. App. May 27, 1980).

51. Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981).

52. For further discussion of *Portillo*, see Kelsey & Siegel, *Domestic Relations*, *ante* at 379.