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# ESTATES AND TRUSTS

JOHN D. LAFLIN\* AND GARY D. EISENBERG\*\*

This section of the Survey deals with New Mexico appellate court cases addressing issues of estate and trust law. Five cases decided during the Survey period considered issues of recurring importance.<sup>1</sup> These issues include questions of will construction, testamentary intent, pretermitted children, undue influence, omitted spouses, and will execution. Most of these decisions involved the interpretation of the New Mexico Probate Code.<sup>2</sup>

## I. WILL CONSTRUCTION AND TESTAMENTARY INTENT

Two New Mexico cases decided during the Survey period involved construction of wills and interpretation of testamentary intent. In *New Mexico Boys Ranch, Inc. v. Hanvey*,<sup>3</sup> the supreme court dealt with the issue of whether a decedent died intestate. Decedent's will provided that upon her death, her mother should inherit all her property. A separate clause provided that in the event that decedent and her mother died simultaneously, or under circumstances causing doubt as to who survived the other, then the bequest to decedent's mother would lapse and the New Mexico Boys Ranch would receive all of decedent's property.<sup>4</sup> Decedent's will also included a no-contest clause which stated that persons estab-

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1. One other estate law case, *Bowman v. Butler*, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982), was decided during the Survey period. *Bowman*, which deals with estate and fiduciary administration, is limited to its facts and is not considered in this section.

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

3. 97 N.M. 771, 643 P.2d 857 (1982).

4. The FOURTH clause of decedent's will read as follows:

In the event that my death should occur simultaneously with my beloved mother, Mary M. Martin, or approximately so, or in the same common accident or calamity, or under circumstances causing doubt as to which of us survived the other, then it is to be presumed that my said mother, Mary M. Martin, died first, and the paragraph herein denominated second shall lapse and be inoperative, and I then give, devise and bequest all of the rest, remainder and residue of my estate, real, personal or mixed, wheresoever situated, which I may own or be entitled to at the time of my death, to the New Mexico Boys Ranch, Belen, New Mexico.

*Id.* at 772, 643 P.2d at 858.

lishing a right to inherit were to receive one dollar.<sup>5</sup> Decedent's will, however, did not provide expressly for the situation in which decedent would survive her mother. In *Hanvey*, the decedent survived her mother by more than six years.<sup>6</sup>

The district court determined that decedent died testate, leaving her entire estate to the New Mexico Boys Ranch.<sup>7</sup> The court of appeals reversed this judgment, and held that decedent died intestate. This holding entitled decedent's first cousin to receive the entire estate.<sup>8</sup> On appeal, the supreme court reversed, and held that the intent of the decedent must be determined by considering the will as a whole.<sup>9</sup> Furthermore, the supreme court held that in construing a will, there is a presumption in favor of testacy and against intestacy.<sup>10</sup> Based on these two findings, the court determined that the decedent clearly intended to bequeath all of her property, and that no one, other than the designated beneficiaries, should take any of her estate.<sup>11</sup> The court ruled that the only other designated beneficiary, the New Mexico Boys Ranch, was entitled to decedent's estate because decedent's mother could not take the estate.<sup>12</sup> This decision indicates, at least in cases where the court wants to avoid an intestacy ruling, that the intent of a testator will be construed liberally.

The second case involving the construction of a will and the interpretation of a testator's intent was *Portales National Bank v. Bellin*.<sup>13</sup> In *Bellin*, the court of appeals dealt with the issue of whether the term "children," as used in a decedent's will, included grandchildren. Decedent provided in his will that the Portales National Bank should receive all of his property in trust. Decedent's will further provided that the proceeds of the trust should be distributed to five of his brothers and sisters.<sup>14</sup> Finally, decedent's will stated that if any of the named brothers

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5. The SEVENTH clause of decedent's will provided in pertinent part:

Should any person or persons other than my beloved mother, Mary M. Martin, establish a right to inherit from me or against my estate of any character whatsoever, or in any matter whatever, then and in the event I hereby give and bequeath unto such person or persons the sum of ONE DOLLAR (\$1.00) each, which shall constitute the only share of any such person or persons in my estate.

*Id.*

6. *Id.* at 775, 643 P.2d at 861.

7. *Id.* at 772, 643 P.2d at 858.

8. *Id.* The court of appeals determined that decedent's will contemplated only two possible situations: (1) that her mother would survive her or (2) that she and her mother would die simultaneously. It did not provide for the situation in which decedent survived her mother. Therefore, despite the court of appeals' sympathies with the Boys Ranch, the court held that decedent died intestate. See *Matter of Estate of Martin*, 97 N.M. 773, 643 P.2d 859 (Ct. App. 1981).

9. 97 N.M. at 773, 643 P.2d at 859.

10. *Id.*

11. *Id.*

12. *Id.*

13. 98 N.M. 113, 645 P.2d 986 (Ct. App. 1982).

14. Decedent's will did not provide for his four other brothers and sisters. *Id.* at 115, 645 P.2d at 988.

and sisters predeceased decedent, then that sibling's interest would pass to his or her *children*.<sup>15</sup> All but one of the named beneficiaries died before the decedent.

On appeal, the grandchildren of one of the deceased beneficiaries, whose father also was deceased, claimed that the word "children" in decedent's will should include grandchildren.<sup>16</sup> A similar claim was made by the adopted grandchild of a sister of decedent who was not named as a beneficiary in decedent's will.<sup>17</sup>

The court of appeals held that decedent's will was not ambiguous as to the term "children," and that extrinsic evidence was not admissible to vary the customary and normal meaning of the word.<sup>18</sup> Moreover, the court stated that the definition of "children" in the New Mexico Probate Code does not include grandchildren.<sup>19</sup> The court held, therefore, that the grandchildren of decedent's brothers and sisters were not entitled to share in decedent's estate, regardless of whether the brother or sister was named as a beneficiary in decedent's will.<sup>20</sup>

In a separate issue, the court in *Bellin* determined that the anti-lapse statute was not applicable.<sup>21</sup> The court held that the anti-lapse statute is only applicable to the issue of a devisee, and that in this case the devisee was the trustee, not the beneficiary.<sup>22</sup> Therefore, the beneficiaries were not entitled to take under the anti-lapse statute.<sup>23</sup>

In contrast to the supreme court's decision in *Hanvey*, the court of appeals in *Bellin* strictly construed the intent of the testator. This construction is in accord with the court of appeals' decision in *Hanvey*,<sup>24</sup>

15. Paragraph three of decedent's will provided in applicable part:

If any of said brothers and sisters predecease me, the interest that would have gone to such Beneficiary under this my Last Will and Testament shall pass to and vest in his or her children in the amount that the brother or sister would have taken if said Beneficiary had survived me, such share to be equally divided among the children of any brother or sister who fails to survive me.

*Id.* at 115, 645 P.2d at 988.

16. *Id.* at 116, 645 P.2d at 989.

17. *Id.*

18. *Id.* at 117, 645 P.2d at 990.

19. *Id.* N.M. Stat. Ann. § 45-1-201(3) (1978) defines "child" to exclude any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

20. *Id.* at 118, 645 P.2d at 991.

21. The anti-lapse statute, N.M. Stat. Ann. § 45-2-605 (1978), provides that:

"If a *devisee*, who is related to the testator by kinship, . . . fails to survive the testator, . . . the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee. . . ." (emphasis added.)

22. 98 N.M. at 118, 645 P.2d at 991. The court relied on N.M. Stat. Ann. § 45-1-201(7) (1978) which provides as follows:

"In the case of a devise to an existing trust or trustee, . . . the trust or trustee is the devisee and the beneficiaries are not devisees."

23. *Id.* If there was no trust involved in this case, clearly the anti-lapse statute would have allowed the grandchildren of the brother named in decedent's will to share decedent's estate.

24. See *supra* note 8.

which was reversed by the supreme court.<sup>25</sup> The estate lawyer should be aware of this conflict, and should realize that without a consistent standard, testators' intentions will be construed in the future on a case-by-case basis.

## II. PRETERMITTED CHILDREN

In *Matter of Estate of Hilton*,<sup>26</sup> the court of appeals considered the issue of whether a no-contest clause in a will was sufficient to disinherit issue of one's child under the New Mexico Probate Code. In *Hilton*, testator died on August 2, 1980, leaving a will dated August 30, 1972.<sup>27</sup> Testator had four children; one child, however, predeceased testator and died prior to the execution of the will. In his will, testator left his wife a life estate in a home and other monies, and left the bulk of his estate to his three surviving daughters.<sup>28</sup> The predeceased child was not mentioned or provided for in testator's will. Testator's will also included a no-contest clause stating that any person claiming to be a child or heir would receive one dollar.<sup>29</sup>

The children of testator's deceased son appealed the district court's order denying them an intestate share of testator's estate as pretermitted heirs.<sup>30</sup> The court of appeals first stated that the New Mexico pretermitted children statute provides that the omission of a child from a will is presumed to be unintentional.<sup>31</sup> The court further stated, however, that the presumption against disinheritance could be rebutted, and that extrinsic evidence is admissible to rebut the presumption.<sup>32</sup> The court then concluded that to disinherit a child in a will under N.M. Stat. Ann. §45-2-302(A)(1) (1978),<sup>33</sup> a clause in the will either must mention the child by name, or fairly and clearly express an intention on the part of the testator to exclude the child.<sup>34</sup>

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25. See *supra* notes 8 and 9 and accompanying text.

26. 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982).

27. *Id.* at 421, 649 P.2d at 489.

28. *Id.*

29. *Id.* at 422, 649 P.2d at 490.

30. N.M. Stat. Ann. §45-2-302 (1978) provides 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:

(1) it appears from the will that the omission was intentional. . . . (emphasis added.)

31. 98 N.M. at 424, 649 P.2d at 492.

32. *Id.* at 425, 649 P.2d at 493.

33. See *supra* note 30.

34. 98 N.M. at 427, 649 P.2d at 495.

The court of appeals held that the no-contest clause in testator's will was sufficient to disinherit the children of testator's deceased son.<sup>35</sup> The court reasoned that the phrase in testator's will stating that any other person claiming to be a child or heir shall receive one dollar, amounted to an expression by the testator of an intention to exclude the testator's grandchildren as heirs from taking under his will.<sup>36</sup>

The language of the *Hilton* decision indicates that the omitted children of a testator, whether alive or deceased when the testator's will is executed, are presumed to be pretermitted heirs. The court belies this presumption, however, by holding that a simple no-contest clause, included as boiler-plate in many wills, disinherits the omitted children. This decision ignores the intent behind the New Mexico pretermitted child statute that the omission of a child in a will is presumed to be unintentional.<sup>37</sup>

### III. UNDUE INFLUENCE AND OMITTED SPOUSES

In *Matter of Estate of Elbelt*,<sup>38</sup> the court of appeals considered the issue of whether the New Mexico omitted spouse statute<sup>39</sup> invalidated a post-marital testamentary disposition procured by the exercise of undue influence by the omitted spouse. In *Elbelt*, the testator at age ninety-one married Rutland, the appellant. The testator had no children or grand-

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35. *Id.* But see *Matter of Estate of Seymour*, 93 N.M. 328, 600 P.2d 274 (1979), which held that no-contest clauses, although valid and enforceable, are not effective to disinherit a party who has contested a will in good faith and with probable cause to believe that the will was invalid.

36. *Id.* The courts of other jurisdictions are not in accord as to whether a no-contest clause in a will is sufficient to disinherit children not specifically mentioned in the will. See *Goff v. Goff*, 352 Mo. 809, 179 S.W.2d 707 (1944); In re *Ray's Estate*, 69 Nev. 204, 245 P.2d 990 (1952) (a clause in a will leaving a nominal sum to anyone who claimed to be an heir or contests the will is not sufficient to disinherit one's child or that child's issue); compare In re *Benolken's Estate*, 122 Mont. 425, 205 P.2d 1141 (1949) with *Estate of Szekely*, 104 Cal. App. 3d 236, 163 Cal. Rptr. 506 (1980) (a clause in a will leaving a nominal sum to anyone who claims to be an heir or contests the will is sufficient to disinherit one's child or that child's issue). The court of appeals, however, determined that the California pretermitted heir statute was substantially similar to the New Mexico statute such that California case law should govern the result in the *Hilton* case. *Id.* at 426, 649 P.2d at 494. The court of appeals relied on *In re McClure's Estate*, 214 Cal. App. 2d 590, 29 Cal. Rptr. 569 (1963), which held that a no-contest clause in a will constitutes an adequate statement of the testator's intention to disinherit children not specifically mentioned in a will.

37. For a more thorough discussion of the problem of omitted children, see T. Atkinson, *Law of Wills*, § 36 at 141 (2d. ed. 1953).

38. 99 N.M. 229, 656 P.2d 892 (Ct. App. 1982).

39. N.M. Stat. Ann. § 45-2-301(A) (1978) provides as follows:

If a testator fails to provide by will for the surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional, or the testator provided for the spouse 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. (emphasis added.)

children from previous marriages. Shortly after the marriage in 1980, testator executed a will leaving all his property in fee to Rutland, except for a certain property, which testator left to Rutland in a life estate, with the remainder to pass to Rutland's children.

Scanlan, the appellee and testator's nephew, contested the will alleging undue influence.<sup>40</sup> Scanlan also filed a petition seeking formal probate of testator's prior will executed in 1971, which bequeathed Scanlan a portion of decedent's estate. During the trial, Rutland moved to bar Scanlan from presenting any evidence of undue influence, arguing that the evidence was irrelevant because she was entitled to testator's entire estate as an omitted spouse, even if the claim was true.<sup>41</sup> The trial court denied Rutland's motion, and the court of appeals granted an interlocutory review.<sup>42</sup>

The court of appeals held that the lower court correctly denied Rutland's motion.<sup>43</sup> The court reasoned that the lower court is required to determine the validity of every testamentary document and which persons are entitled to decedent's property under any testamentary document filed for probate.<sup>44</sup> The court held that the evidence of undue influence was admissible, because testator's 1980 will made dispositions to persons other than Rutland.<sup>45</sup>

More importantly, however, the court of appeals held that if a testator is competent to enter into a valid marriage, the omitted spouse statute still controls, even if the omitted spouse exercised undue influence so as to invalidate a later testamentary disposition.<sup>46</sup> This decision recognizes the presumption that the omission of a spouse from a will is unintentional. As a result of this decision, however, the lower court must look at evidence of the testator's capacity to marry and at evidence of the testator's capacity to execute a later will. A significant amount of time can pass between these two events, such that it is possible that the testator was competent to marry, but not competent to execute a will some years later because his or her spouse exercised undue influence. In this instance, the *Elbert* decision still would allow the testator's spouse to inherit as an omitted spouse if a pre-marital will was executed and admitted to probate. Certainly, the Legislature did not enact the omitted spouse statute to reward the testator's spouse under these circumstances.

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40. 99 N.M. at 231, 656 P.2d at 894.

41. *Id.* Note that Rutland's omitted spouse argument is valid only if the 1971 will was admitted to probate, because the omitted spouse statute, *supra* note 39, is only applicable to spouses omitted from pre-marital wills.

42. *Id.* at 230, 656 P.2d at 893.

43. *Id.* at 233, 656 P.2d at 896.

44. *Id.* at 231, 656 P.2d at 894.

45. *Id.*

46. *Id.* at 232, 656 P.2d at 895.

## IV. WILL EXECUTION

In *Matter of Estate of Kelly*,<sup>47</sup> the court of appeals considered the issues of whether a decedent's will was executed and witnessed properly and whether the decedent intended the instrument to constitute his will.<sup>48</sup> The decedent, while hospitalized, directed his cousin, Mills, to prepare a handwritten will. Mills requested two strangers to witness the will and Mills signed the will for decedent, purportedly at his direction and request.<sup>49</sup> Decedent's nephew filed a petition seeking to have a previous will executed by decedent admitted to probate, a motion seeking to have the handwritten will declared invalid, and a motion seeking summary judgment.<sup>50</sup> The trial court granted the motion for summary judgment, and Mills appealed.<sup>51</sup>

The court of appeals reversed the trial court, and held that there were genuine issues of material fact concerning whether the will was executed properly and duly witnessed and whether the decedent intended the instrument as his will.<sup>52</sup> In reaching this decision, the court enumerated several factors to be considered when drafting wills. First, the court held that when a testator directs that an individual sign a will on his behalf, N.M. Stat. Ann. §45-2-502(B) (1978)<sup>53</sup> requires publication or some manifestation by the testator that the individual is signing the instrument "at [the testator's] request as and for his last will and testament."<sup>54</sup> The court stated, however, that no particular form of publication is required; there need not be an express spoken declaration, and it is sufficient that the testator, by words or conduct, signifies to the witnesses in some manner that the instrument is his will.<sup>55</sup> Furthermore, the court stated a declaration that the instrument to be witnessed is the will of the testator may be made by one other than the testator if the testator indicates his agreement.<sup>56</sup>

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47. 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

48. N.M. Stat. Ann. §45-2-502 (1978) provides as follows:

A. Every will shall be in writing, signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and attested in the presence of the testator by two or more credible witnesses; and

B. the witnesses to a will must be present, see the testator sign the will, or one sign it for him at his request as and for his last will and testament, and must sign as witnesses in his presence and in the presence of each other.

49. 99 N.M. at 484, 660 P.2d at 126.

50. *Id.* at 485, 660 P.2d at 127.

51. *Id.*

52. *Id.* at 490, 660 P.2d at 132.

53. See *supra* note 48.

54. 99 N.M. at 487, 660 P.2d at 129.

55. *Id.* at 488, 660 P.2d at 130.

56. *Id.* The court also reiterated the holding in *McElhinney v. Kelly*, 67 N.M. 399, 356 P.2d 113 (1960), stating that although N.M. Stat. Ann. §45-2-502, *supra* note 48, requires that the execution of a will be done with the testator and witnesses all present at the same time, §45-2-502 has been



Additionally, the court of appeals held that it is not essential for a document to recite expressly that it shall take effect only at the death of the testator, if the instrument and circumstances under which it was written reasonably indicate that the testator intended the document to be testamentary in character.<sup>57</sup> The court also stated that extrinsic evidence generally is admissible to establish testamentary intent in an instrument, which on its face is ambiguous as to whether the decedent intended it to serve as a testamentary document.<sup>58</sup>

In *Kelly*, the court of appeals interpreted for the first time some troublesome language in New Mexico's will execution statute. The case indicates that publication is required when a testator directs another to sign a will for him, and that it is not essential for a will to recite expressly that it shall take effect only upon death, if other circumstances indicate that the document was intended to be testamentary. Despite these clarifications, however, New Mexico still requires strict formality in the signing and witnessing of wills.<sup>59</sup>

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interpreted so as not to require the witnesses to see the other witnesses sign, but merely that they be in the line of sight, so that they could have seen one another had they looked. 99 N.M. at 488, 660 P.2d at 130.

57. *Id.* at 489, 660 P.2d at 131.

58. *Id.*

59. For a thorough discussion of New Mexico's will execution statute, see Flickinger, *Intestate Succession and Wills Law: The New Probate Code*, 6 N.M.L. Rev. 25, 35-40 (1975).