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Estates and Trusts

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ESTATES AND TRUSTS

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This section of the survey deals with New Mexico appellate court cases addressing issues of estate and trust law. Seven cases decided since the last Survey on Estates and Trusts considered issues of recurring importance. These issues include questions of right of survivorship, contracts to make a will, tax apportionment, family settlement agreements, omitted spouses, and the probate non-claim statute. These decisions all involved the interpretation of the New Mexico Probate Code.[1]

I. RIGHT OF SURVIVORSHIP AND CONTRACTS TO MAKE A WILL

Three New Mexico cases decided during this survey period involved the right of survivorship and/or contracts to make a will. In *Thompson v. Barngrover*,[2] the court of appeals considered whether sums remaining on deposit upon the death of a party to a joint bank account belonged to the survivor or to the devisee under decedent's will.[3] The residuary of decedent's estate was to be divided equally among her son, James, James' former wife, Mary, and their two children.[4] Shortly before decedent's death, however, decedent moved in with her son, with whom she lived until her death.[5] At some unspecified time, decedent established a joint bank account with her son.[6] Decedent's personal representative sought to recover the funds of this account.[7]

The trial court did not disturb James' right of survivorship.[8] The personal representative appealed, claiming that the account contained substantially all of decedent's estate which decedent intended to devise according to the terms of her will.[9]

The court of appeals affirmed the trial court decision. It held that decedent's continuing intent, over substantial periods of time, to dispose

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1. N.M. STAT. ANN. §§ 45-1-101 to 45-7-401 (1978).
2. 101 N.M. 215, 680 P.2d 356 (Ct. App. 1984).
3. *Id.* at 217, 680 P.2d at 357.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 218, 680 P.2d at 358.
8. *Id.*
9. *Id.*

of her estate in the manner described in her will, did not show, as a matter of law, lack of intent to establish a right of survivorship in the joint bank account, even though the account held the bulk of her estate.[10] Therefore, decedent's son was entitled to all of the funds in the joint account as against his ex-wife and children.[11]

The court of appeals based its decision on an interpretation of Section 45-6-104(A) of the New Mexico Probate Code.[12] The court stated that this section presumes a right of survivorship, that this presumption is directed against the estate, and that the estate has the burden of going forward with evidence to rebut the presumption.[13] Additionally, the court relied on the Comment to the related section under the Uniform Probate Code, which states that the effect of this statute "is to make an account payable to one or more of two or more parties a survivorship arrangement unless 'clear and convincing evidence of a different [intention]' is offered."[14] The estate did not meet this burden in this case.[15]

The decision in the *Thompson* case is not surprising because the estate did not meet its burden of proof. What is noteworthy about this case, however, is the kind of proof the court said can defeat a right of survivorship. The court cited a New York case for the proposition that the right of survivorship could be defeated by evidence showing the joint account was opened only for convenience, or as the result of undue influence, fraud or lack of capacity.[16] The estate planning practitioner should therefore be aware of the relative ease with which a will can be overturned by a joint account, and the problems a joint account can create upon the death of one of the account holders.

A second case, *Foulds v. First National Bank*,[17] involved both the right of survivorship and a contract to make a will. In this case the supreme court dealt with the issue of whether a valid contractual will prevailed over a subsequent designation of payable on death (P.O.D.) payees.[18] In 1975, decedent and her husband entered into a contract for the disposition of their property and, pursuant to the contract, executed their joint and mutual will.[19] Decedent's husband died in 1982; decedent retained all the

10. *Id.*

11. *Id.* at 219, 680 P.2d at 359.

12. This section provides as follows: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."

13. *Id.*

14. *Id.*

15. *Id.*

16. Brezinski v. Brezinski, 94 A.D.2d 969, 463 N.Y.S.2d 975 (N.Y.App.Div. 1983).

17. 103 N.M. 361, 707 P.2d 1171 (1985).

18. *Id.* at 362, 707 P.2d at 1172.

19. A "joint will" is a single testamentary instrument which is jointly executed by two or more persons intending it to constitute their respective wills. Salley v. Burns, 220 Va. 123, 255 S.E.2d

assets of the community property.[20] Over time, decedent transferred most of these and other assets into Certificates of Deposit (CD's) issued by the First National Bank.[21] The beneficiaries listed on these CD's were different from the beneficiaries named in decedent's will.[22] After decedent passed away, the beneficiaries of the CD's brought action against the First National Bank seeking to order the bank to pay the proceeds to them.[23] The beneficiaries under decedent's will claimed these funds belonged to them.[24]

The district court held in favor of the will beneficiaries, and the CD beneficiaries appealed.[25] The supreme court affirmed the district court's decision and held that a valid contractual will prevailed over a subsequent designation of P.O.D. payees.[26] The court noted that the contractual will was found valid by the district court and that the finding was uncontested.[27] As a result, the court stated, when a party to such a will dies, the will becomes irrevocable.[28] Although the surviving party to such a will can freely use the estate and convert it from one form to another, the contractual arrangement cannot be defeated.[29]

Additionally, the court relied on Section 45-6-104, which states that the disposition of a joint account can be defeated by "clear and convincing evidence of a different intention at the time the account is created." The evidence of the different intention in this case was the terms of the contractual will.[30]

The importance of this case is that it shows the New Mexico Probate Code expressly recognizes the validity of contractual wills. As a result, the estate planning practitioner should be careful when drafting a new will for a surviving spouse. The practitioner must first determine whether the survivor is already contractually bound to the terms of a prior contractual will.

Another case dealing with a contract to make a will was *Matter of Estate of Vincioni*.[31] In this case, certain documents were found after

512 (1979). "Mutual wills" are defined as wills executed pursuant to an agreement between testators to dispose of their property in a particular manner, each in consideration of the other. Persson v. Dukes, 280 Md. 194, 372 A.2d 240 (1977).

20. 103 N.M. at 363, 707 P.2d at 1173.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 364, 707 P.2d at 1174.
27. *Id.* at 363, 707 P.2d at 1173.
28. *Id.*
29. *Id.* at 364, 707 P.2d at 1174.
30. *Id.*
31. 102 N.M. 576, 698 P.2d 446 (Ct. App. 1985).

decedent's death purporting to convey all of his property.[32] The daughter of decedent's brother-in-law, decedent's niece by marriage, claimed that these documents were valid testamentary instruments, or in the alternative, that they were enforceable contracts to make wills between decedent and his deceased spouse.[33] The district court held that decedent died intestate, refusing to find that the documents constituted a will or a contract to make a will, and refusing to allow the admission of extrinsic evidence to prove the existence of a contract to make a will.[34] As a result, all of decedent's property passed to his brother and sister.[35]

The court of appeals affirmed the trial court's decision, relying primarily on Section 45-2-701.[36] Under this section of the New Mexico Probate Code, a contract to make a will can only be established by the provisions of a will stating the material provisions of the contract, by an express reference in a will to a contract, or by a writing signed by the decedent evidencing the contract.[37] Unlike the *Foulds* case, the existence of a contract could not be shown in this case. The only evidence of a contract was the two documents in question, and they lacked the essential elements of a binding agreement between decedent and his wife.[38] Additionally, in denying the admission of extrinsic evidence, the court noted that New Mexico's version of this section of the Uniform Probate Code expressly deleted language allowing the introduction of extrinsic evidence to prove the terms of a contract to make a will.[39]

II. TAX APPORTIONMENT

Matter of Estate of Kyreazis,[40] dealt with the question of tax apportionment in a will. Decedent left two wills, each disposing of her property in different manners.[41] Decedent's heirs subsequently entered into an agreement to avoid a will contest, and agreed that each would pay the proportionate amount of estate and other taxes on the property which each actually received, whether by will or by agreement.[42] The appellant,

32. The documents consisted of an envelope and two papers contained in it. Typewritten on the outside of the envelope were the words "Agreement To Be Opened in the Event of Our Death." The two papers were dated July 1, 1989, leaving all of decedent's and decedent's wife's property to decedent's brother, sister, brother-in-law, nieces and nephews, and were signed by both decedent and his wife. *Id.* at 579, 698 P.2d at 449.

33. *Id.*

34. *Id.*

35. *Id.* at 583, 698 P.2d at 448.

36. *Id.* at 578, 698 P.2d at 453.

37. N.M. STAT. ANN. §45-2-701 (1978).

38. 102 N.M. at 583, 698 P.2d at 453.

39. *Id.* at 581, 698 P.2d at 451.

40. 103 N.M. 2, 3, 701 P.2d 1022, 1023 (Ct. App. 1984).

41. *Id.*

42. *Id.*

a residuary legatee under one of decedent's wills, was not a party to this agreement.[43] The personal representative of decedent's estate later moved for an order authorizing payment of taxes and other expenses from the residuary of decedent's estate.[44] Decedent's will, however, merely stated that her funeral expenses and just debts were to be paid as soon after death as was practicable.[45]

The district court ordered that payment of estate taxes be made from decedent's residuary estate and appellant appealed.[46] The court of appeals overturned the district court decision and held that estate taxes should be apportioned as directed by Section 45-3-916(B).[47] This section generally requires that taxes be apportioned among all persons interested in the estate in proportion to the value of the interest each receives, *unless the will otherwise provides.*[48] In this case, words directing that taxes merely be paid as soon as practicable were insufficient to overcome the provision for apportionment.[49]

The decision in this case is not surprising. The case, however, is very important to the estate planning practitioner because it shows the importance of including tax apportionment provisions in every will. For example, if a will is silent, and apportionment is required by statute, a specific legatee receiving non-cash property may have to come up with cash to pay the tax attributable to the receipt of his or her interest.

III. FAMILY SETTLEMENT AGREEMENTS

Matter of Estate of Cruse,[50] addressed the issue of whether a settlement agreement executed by a decedent's heirs must be in writing. Decedent's will listed a number of advancements[51] to her four children. Because there

43. *Id.*
44. *Id.*
45. *Id.* at 4, 701 P.2d at 1024.
46. *Id.* at 3, 701 P.2d at 1023.
47. *Id.* at 4, 701 P.2d at 1024.
48. Section 45-3-916(B) provides:

> Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The appointment is to be made in the proportion that the value of the interest, subject to tax of each such person interested in the estate, bears to the total value of the interests, subject to tax of all such persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in the Probate Code [45-1-101 to 45-7-401 NMSA 1978], the method described in the will controls.

49. 103 N.M. at 4, 701 P.2d at 1024.
50. 103 N.M. 539, 710 P.2d 733 (1985).
51. An advancement is defined as "money or property given by a parent to his child or, sometimes, presumptive heir, or expended by the former for the latter's benefit, by way of anticipation of the share which the child will inherit in the parent's estate and intended to be deducted therefrom." BLACKS LAW DICTIONARY 48 (5th ed. 1979). The fourth paragraph of decedent's will stated that she

appeared to be a mistake in the amount of these advancements, the four children discussed a settlement agreement to distribute the decedent's estate differently than as directed in her will.[52] The discussion took place during a four-way telephone conference, after which the plaintiff in this action, decedent's son and personal representative, sent a mailgram to the other three heirs and to the estate's attorney "confirming" that an oral agreement had been reached.[53] Two days later, however, the defendant in this action, decedent's daughter, sent a letter in response, which disputed that any such agreement had been reached.[54]

Decedent's son later brought an action to enforce the terms of the alleged settlement agreement.[55] The district court held decedent's estate should be distributed as directed in her will and decedent's son appealed.[56]

On appeal, the supreme court considered whether the purported agreement was valid under Section 45-3-912.[57] The court ruled that this section is effectively a mini-statute of frauds which does not require that the agreement be in the form of a single formal document.[58] As a result, the supreme court remanded the case back to the district court to determine whether plaintiff's letter and defendant's reply were sufficient under contract law and the statute of frauds to show an agreement.[59]

IV. OMITTED SPOUSES

Matter of Estate of Coleman,[60] involved a determination of the proper distribution of an estate when a decedent's will omits the decedent's spouse and the decedent's only child.[61] Decedent executed a will in 1982 leaving his entire estate to his sister.[62] The will also intentionally omitted decedent's adopted son. Decedent married appellant in 1983 and died later that year, never having made another will.[63]

Decedent's sister, who was also named as personal representative in

had previously given her son the value of $130,000, her daughter Jean the value of $100,000, and nothing to her other daughters. 103 N.M. at 540, 710 P.2d at 734.

52. 103 N.M. at 540, 710 P.2d at 734.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. Section 45-3-912 provides, in pertinent part, that:
> Subject to the rights of creditors and taxing authorities, competent 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 provided *in a written contract executed by all who are affected by its provisions* . . . (emphasis added).
58. 103 N.M. at 542, 710 P.2d at 736.
59. *Id.*
60. 104 N.M. 192, 718 P.2d 702 (Ct. App. 1986).
61. *Id.*
62. *Id.* at 193, 718 P.2d at 703.
63. *Id.*

decedent's will, petitioned the district court for an order approving the distribution of decedent's estate.[64] The district court determined that decedent's spouse was entitled to one-fourth of decedent's estate pursuant to Section 45-2-301(A),[65] and that decedent's sister was entitled to the remainder of the estate.[66] Decedent's spouse appealed claiming that decedent died without issue in which case she was entitled to all of decedent's estate.[67]

The court of appeals affirmed the district court's decision holding that decedent's wife was entitled to one-fourth of decedent's estate because decedent was survived by issue, and that the remaining three-fourths of the estate passed to decedent's sister under the terms of the will.[68] The court stated that decedent's adopted son was issue for purposes of computing his omitted wife's share of the estate, even though the son was intentionally omitted from decedent's will and was not entitled to any part of decedent's estate under New Mexico's pretermitted child statute.[69] The court also stated that insofar as decedent's wife was concerned, there was no will; however, the rest of the will was preserved in order to carry out the intended testamentary disposition.[70]

This decision raises an important issue because it clearly shows that a subsequent marriage does not revoke a will. The new spouse will come under the omitted spouse rule, but the will remains intact to the extent of the remaining property.

V. NON-CLAIM STATUTE

Corlett v. Smith[71] involved an interpretation of the New Mexico Probate

64. *Id.*

65. Section 45-2-301(A) provides:

> 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 outside the will and the intent that the transfer be in lieu of testamentary provision is shown . . .

66. 104 N.M. at 193, 718 P.2d at 703.

67. *Id.* Decedent's spouse based her claim on New Mexico's intestate succession statute, N.M. STAT. ANN. § 45-2-102 (1978) which provides:

> The intestate share of the surviving spouse is determined as follows: . . .
>
> A. as to separate property:
>
> (1) if there is no surviving issue of the decedent, the entire intestate estate; or
>
> (2) if there is surviving issue of the decedent, one-fourth of the intestate estate; . . .

68. 104 N.M. at 194, 718 P.2d at 704.

69. *Id.*

70. *Id.*

71. 106 N.M. 207, 740 P.2d 1191 (Ct. App. 1987).

Code non-claim statute.[72] The facts of this case are very interesting. The husband died of asphyxiation during his wife's suicide.[73] The same individual was initially appointed personal representative of both estates.[74] Ten months after this appointment, the personal representative resigned as husband's personal representative, and a new personal representative was appointed.[75] The new personal representative then filed a wrongful death claim against wife's estate.[76] The wife's personal representative moved to dismiss this claim arguing that the claim was not filed within sixy days of the notice to creditors as required under the non-claim statute.[77] The district court denied the motion, and a jury subsequently awarded husband's estate the sum of $93,000.[78]

On appeal, the court of appeals held that unless the wrongful death claim could be shown to fit under the insurance exception to the non-claim statute, the claim would have to be dismissed.[79] The court did not know whether insurance protection existed, so it remanded the case back to the district court for a finding of whether insurance protection existed.[80]

This case shows that the New Mexico appellate courts take a very strict and literal view of the non-claim statute. If a claim is not filed in time, the claim is barred as a matter of law. The trial court cannot extend the time limits.

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72. The nonclaim statute of the Probate Code, Section 45-3-803, contains specific time limitations governing the presentation of the claims against a decedent's estate. This statute provides in applicable part:

> A. All claims against a decedent's estate which arose before the death of the decedent, including claims . . . founded on . . . tort or other legal basis . . . are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as follows: . . .
>
> (1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801 [45-3-801 NMSA 1978] . . .
>
> B. All claims against a decedent's estate which arise at or after the death of a decedent . . . founded on . . . tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as follows:
>
> (2) any other claim, within four months after it arises.
>
> C. Nothing in this section affects or prevents: . . .
>
> (2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

73. 106 N.M. at 208, 740 P.2d at 1192.
74. *Id.*
75. *Id.* at 209, 740 P.2d at 1193.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 211, 740 P.2d at 1195.
80. *Id.*

VI. CONCLUSION

The New Mexico appellate courts addressed a number of interesting and significant issues in estate and trust law during the survey period. The decisions rendered, although not surprising, alert the estate planning practitioner to both potential problems and planning possibilities.