Trust & Estate Annual Case Law Update - 2019

Presented by:

Jamie J. Roth, Esq.
Law Office of Jamie J. Roth, PLLC
2520 S. Grand Avenue, Suite 204
Glenwood Springs, CO 81601
970-366-3727
jamie@jamierothlaw.com

Marital Relationship and Probate.

1. Estate of King, 2019 COA 82 (May 23, 2019).

An omitted spouse may be precluded from claiming an intestate share under C.R.S § 15-11-301(1)(c) when the decedent made transfers to the omitted spouse outside his will totaling more than $4 million.

The decedent died in July 2016. The decedent established a will and revocable trust in 2000, and amended his plan three times. In May 2015 decedent divorced his first wife. Decedent began dating Julie Pelletier, and by July 2015, considered her his "partner." In July 2015, the decedent purchased a $5 million life insurance policy, and named Ms. Pelletier beneficiary as to 80% of the value. The decedent and Ms. Pelletier married on September 16, 2015. In May 2016, the decedent wrote to the life insurance company to clarify that Ms. Pelletier was now his wife and her name was Julie Michelle King, and she was a beneficiary as to 80% of the policy proceeds. The decedent did not amend his will or trust after his second marriage. The decedent's

sister was named as personal representative of his estate. The decedent's will left 85% of his estate to his revocable trust for his children. The remaining 15% passed to other family members and charity. The omitted spouse filed a Petition contending she was unintentionally disinherited from his estate, and entitled to $163,000 (indexed for inflation) plus 50% of the balance of the estate. The probate magistrate found that the decedent had provided for his spouse by transfer outside the will, including the $4 million in life insurance proceeds, and $52,000 in joint accounts, and under C.R.S. § 15-11-301(1)(c), the omitted spouse was not entitled to any portion of the probate estate.

The Court of Appeals affirmed the trial court. Finding this to be a question of first impression, the appellate court relied on case law from Idaho, New Mexico, North Dakota, South Carolina, and particularly a Utah case, *Estate of Christensen*, 655 P.2d 646 (Utah 1982), to interpret C.R.S. § 15-11-301. The surviving spouse bears the initial burden of proving that she is a spouse of the decedent and is omitted from the testamentary documents. The burden then shifts to the proponent of the will to establish one of the exceptions under C.R.S. 15-11-301(1)(a)-(c) applies. Then the surviving spouse may present rebuttal evidence that he or she was not provided for by the non-probate transfers. Here, the proponents of the will established that the surviving spouse received over $4 million in non-probate transfers. C.R.S. 15-11-301(1)(c) provides that "the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statement or is reasonably inferred from the amount of the transfer or other evidence." The trial court did not admit any testimony regarding statements of the decedent. The Court of Appeals adopted the factors articulated in the *Christianson* case to determine whether the testator intended non-probate transfers to provide for the spouse in lieu of a testamentary gift: (1) the alternative takers under the will, (2) the dollar value of the gift to the surviving spouse, (3) the fraction of the estate represented by the gift, (4) whether comparable gifts were made to other persons, (5) the length of time between execution of the testamentary instrument and the marriage, (6) the duration of the marriage, (7) any *inter vivos* gifts the testator has made to the surviving spouse, and (8) the separate property and needs of the surviving spouse.

Both the trial court and the appellate court declined to make a finding as to the total net value of the estate, which was in dispute by the parties. The appellate decision does not disclose the dates the decedent amended his estate plan.

2. Estate of Yudkin, 2019 COA 25 (February 21, 2019).

Common law marriage exists when a court concludes the two parties have agreed to be married, have cohabitated, and established a reputation in the community as husband and wife. Cohabitation and reputation are the two essential factors. If they are not 'clearly' established, the court may then consider specific behavior of the parties including filing joint or separate tax returns, establishing joint accounts and joint ownership of assets.

The decedent died intestate. Prior to his death, he was living with Tatsiana Dareuskaya. The decedent had a biological child from a prior marriage to Svetlana Shtutman that terminated in divorce. Ms. Dareuskya had minor children who were not the biological children of the decedent.

Ms. Shtutman (the decedent's ex-wife) opened the estate informally, seeking appointment as personal representative. After her appointment, Ms. Dareuskaya objected, asserting she was the common law spouse of the decedent. The magistrate heard testimony from fourteen witnesses on the issue. The magistrate found that the decedent and Ms. Dareuskaya agreed to be husband and wife. The magistrate also found that they cohabitated for 8 years, and held themselves out to their co-workers, friends and neighbors as married. The magistrate, citing to *People v. Lucero*, 747 P.2d 660, nonetheless found there was no common law marriage because they did not maintain joint banking or credit accounts, hold other joint assets, or file tax returns, and because Ms. Dareuskava and her children did not use the decedent's sur-name.

The court of appeals reversed the trial court's ruling and ordered the trial court to enter a decree of common law marriage on remand. The court of appeals said: "[w]e understand *Lucero* to mean that if there is an agreement to be married and the two essential factors – cohabitation and a reputation in the community as husband and wife – are met, the inquiry ends there; a common law marriage has been established. When the two essential factors are not 'clearly' established, a court may consider 'specific behavior' of the parties, such as the filing of tax returns. But, if the essential factors are met, the inquiry ends." The magistrate abused his discretion in considering other conduct of the parties and in determining no common law marriage existed.

3. Estate of Little, 433 P.3d 172 (Colo. App. 2018).

An ex-spouse has standing to argue the deceased ex-spouse's will should be reformed under Colorado Revised Statute 15-11-806.

The decedent, Caroline Little and Jeffrey Curry were common law married in 1980. In 2006 they executed mutual wills. The decedent's will stated "I am married to Jeffrey Lynn Curry. Any reference in my will to my spouse is to such person." The will left her estate to her spouse if he survives her. Her will made a contingent gift to several charities. On March 29, 2010 the decedent and Curry divorced. The decedent died June 19, 2015. Curry asserted that he and the decedent remarried, and presented some evidence of a resumption of their marriage. The charities presented evidence contrary to common law remarriage, and the Court of Appeals upheld the trial court's determination the parties did not remarry by common law. Having determined the parties were not married at the time of decedent's death, the trial court applied C.R.S. § 15-11-804(2), which gives effect to the presumptive intent of a divorced party to remove their ex-spouse from their planning documents.

Curry also claimed that the decedent intended to include him as the devisee of his will, regardless of their marital status, and sought to reform the will pursuant to C.R.S. 15-11-806. The trial court relied on, *In re Estate of Johnson*, 304 P.3d 614, (Colo. App. 2012) to determine Curry had no standing to advance a reformation claim. The Court of Appeals determined "unlike the trial court, we are not bound by another division's holding. *Cite omitted.* And we are not persuaded by the standing analysis in *Johnson*." The Court of Appeals noted that the reformation statute requires proof by clear and convincing evidence of the testator's actual intent. "[B]y holding that a divorce eliminates standing to seek reformation of a former spouse's will, *Johnson* would require that we uphold the testator's presumed intent despite clear and convincing

evidence of the testator's actual intent." The Court of appeals reversed the dismissal of Curry's reformation claim and remanded the case for further proceedings in the trial court.

4. Estate of Cloos, 2018 COA 161 (November 15, 2018).

Husband is not entitled to supplemental elective share unless he is left with less than $50,000 of assets.

Decedent was married at her death to Drexel H. Cloos, father of her daughter, Jean Ann Cloos. Decedent left a will devising her entire estate to her daughter, Jean Ann. The Decedent's assets are unclear, but included an undivided half of a house in Fort Collins appraised at $325,000, a PERA retirement account, a cabin in Wyoming that was held in joint tenancy with right of survivorship with husband, valued at $277,000. Jean Ann was the initial personal representative. The husband filed demands for a family allowance and exempt property allowance under C.R.S. §§ 15-11-403 and 404. Husband also petitioned for a supplemental elective share of the marital property under C.R.S. §§ 15-11-202 to – 208. After several months, husband petitioned the court to remove Jean Ann as personal representative. After hearing, the court appointed attorney Joseph D. Findley as the successor personal representative. Findley sought an order from the court to allow the husband to purchase the estate's undivided one half interest in the marital home by first applying the husband's family allowance and exempt property allowance (totaling $64,000) and a credit of $50,000 for his "statutory minimum elective-share" and then receiving from the husband $48,500 in cash. This cash was the only reported asset in the estate on the final accounting. No determination of the value of the augmented estate was ever made by or approved by the court.

A standard elective share is based on the value of the augmented estate. C.R.S. § 15-11-202(2)(a) provides for a *supplemental* elective share, if the surviving spouse's share of augmented estate assets is less than $50,000. There is no statutory minimum elective share. A surviving spouse married for 10 years or more is entitled to an elective share equal to 50% of the augmented estate or $50,000, whichever is greater. Here, although there was no clear determination of the value of the augmented estate, husband's interest in real estate alone far exceeded $50,000. He was not entitled to a supplementary elective share. The Court of Appeals reversed the trial court's order in part and remanded the case to determine (1) whether husband held less than half of the augmented estate, and would thus be entitled to any of the probate estate as an elective share, (2) what amount, if any, to which husband would be entitled, and (3) the resulting funds, if any, husband must repay to the estate.

5. Rooks v. Rooks, 429 P.3d 579 (Colo. 2018).

In allocating cryogenically frozen fertilized pre-embryos in a divorce proceeding, the court must balance the interests of the divorcing spouses.

This is an appeal from a dissolution of marriage suit, where the trial court awarded cryogenically frozen pre-embryos to the husband who wished to dispose of them. The wife, who wished to preserve the pre-embryos to use them to become pregnant. The Colorado Supreme Court rejected some of the factors considered by both the trial court and the Court of Appeals as inappropriate, and remanded the case to the trial court "to apply the balancing framework"

adopted by the Colorado Supreme Court after consideration of several different approaches. Justice Hood filed a dissenting opinion joined by Justice Coats and Justice Samour.

A second divorce case considering the disposition of frozen pre-embryos has been published applying this Supreme Court opinion. *In re Marriage of Fabos*, 2019 COA 80 (May 23, 2019).

Guardianship Proceedings

6. Actarus, LLC v. Johnson, 2019 COA 122 (August 1, 2019)

Treasurer's deed issued while owner was under a legal disability and without a legal guardian or conservator is subject to right of redemption by properly appointed conservator.

Larnitta Johnson suffers from severe mental illness. Her husband served as court appointed guardian until his death in 2012. In 2012, no guardianship report was filed with the probate court, and Johnson failed to pay property taxes on a home she owned. The probate court issued delay prevention notices. In February 2013, Ms. Johnson's son, Bret mailed a Guardian's Report – Adult to the court using the JDF form claiming to be the new guardian. Bret Johnson did not petition the court for appointment, and the court took no action to appoint Bret or anyone else as guardian. In 2013, the Arapahoe County treasurer sold the property on the tax lien pursuant to C.R.S. §39-11-101 to -109. The probate court took no action until 2016, when it issued a delay prevention order to Bret, ordering him to file the guardian's report for 2015. Bret filed a second guardian's report. In 2017, the court issued another delay prevention order, and Bret filed a third guardian's report. The Arapahoe County tax lien went unredeemed, and on August 15, 2017, the Treasurer issued a treasurer's deed to Actarus, which was then recorded.

Bret then petitioned the court to be appointed as conservator for Ms. Johnson, and for his sister to be appointed guardian. Actarus filed a quiet title action seeking a declaration it was the sole legal owner of the home. Ms. Johnson, acting through Bret with the district court's approval filed cross-claims against the Treasurer for failing to comply with statutory notice and due diligence requirements and counterclaims against Actarus asserting Ms. Johnson's right to redeem her interest in the property. The trial court found that pursuant to C.R.S. § 39-12-104(1), Ms. Johnson was under a legal disability, and therefore had the right to redeem the property at any time within nine years of the recording of the tax deed. The Court of Appeals upheld the trial court's determination, finding that since Ms. Johnson had been determined by the court to be incapacitated, and she did not have a guardian appointed to protect her interests at the time of the issuance of the tax lien, she was under a legal disability. Before a successor guardian can act, the successor must file an "acceptance of office" and submit to the court all information required by C.R.S. § 15-14-110(1). The court must then review and approve the information and issue letters of guardianship. Because this process was not followed, Bret was never authorized to act as Ms. Johnson's guardian.

7. In re Arguello, 2019 COA 20 (February 7, 2019).

Court must follow the statutory vetting procedures in C.R.S. 15-14-304 and -305 before appointing a guardian sua sponte.

The respondent, Mr. Arguello has dementia, developmental disabilities, and mental illness. After his mother's death, he moved to Pueblo and lives in a host home. Nora McAuliff with Pueblo Community Resources supervises his care. In 2016 an emergency guardian, Ms. Balsick who works for a company called Colorado Bluesky Enterprises, Inc. was appointed to make medical decisions when family members were unavailable. Bluesky provides case management services to the respondent under Colorado's comprehensive services DD waiver. Ms. McAuliff nominated Ms. Balsick as the respondent's guardian, and later amended her petition to nominate the respondent's sister as a co-guardian along with Ms. Balsick. Other family members also petitioned nominating themselves as co-guardians.

The court appointed a court visitor and set the matter for a hearing. The court visitor prepared three reports raising concerns about all of the proposed guardians. The court held several hearings and determined none of the proposed guardians should be appointed. The court sua sponte appointed the Arc of Pueblo as guardian for good cause because the ARC has no conflict of interest because it does not provide care or care management services for individuals, and the ARC serves as guardian for many other individuals in Pueblo County.

Bluesky and Ms. Balsick filed a motion for reconsideration asserting the court erred in finding that Bluesky was a long-term care provider under 15-14-310(4), and that ARC was improperly appointed because no petition for its nomination was filed in the case.

The court of appeals found no abuse of discretion in the trial court's refusal to appoint Ms. Balsick as guardian. Trial courts enjoy wide discretion when appointing a guardian. However, the court of appeals reversed the order appointing ARC as guardian, and remanded the case so the trial court can appoint a visitor to prepare a visitor's report, set a hearing and enter a new order appointing a guardian for the respondent. Appointment of a visitor is mandatory under C.R.S. 15-14-305, and the court must receive the visitor's report before appointing a guardian.

A petition for certiorari was denied August 19, 2019.

8. Nanez v. Industrial Claim Appeals Office of the State of Colorado, 2018 COA 162 (November 15, 2018).

Worker's Compensation Insurance will not pay for guardian or conservator services.

An employee suffered a workplace accident causing significant cognitive deficits. His doctor recommended appointment of a conservator and guardian, which was accomplished in a separate proceeding from the worker's compensation claim. The employee sought an order requiring his employer to pay for the conservator and guardian's services. The Court of Appeals upheld the ALJ denial of these services as outside the scope of C.R.S. § 8-42-101(1)(a).

A petition for certiorari was denied July 1, 2019.

Attorney Client Privilege – After Death of Client

9. Estate of Rabin, 2018 COA 161 (December 27, 2018).

Personal Representative of decedent's estate is the holder of any attorney-client privileged owed to the decedent and is entitled to any legal files of the decedent.

Mark A. Freirich, a lawyer, represented his client Louis Rabin in over forty separate legal matters over the course of many years, the legal work included preparing promissory notes payable to his former wife, and preparing a quitclaim deed granting ownership of property his former wife and their daughter. Louis Rabin died, and his current wife, Claudine Rabin was named as his personal representative. In the probate proceeding, the personal representative issued a subpoena for "the entire file of Louis Rabin" on the attorney, Freirich. Mr. Freirich filed a motion to quash alleging the documents were confidential and privileged. The personal representative filed a motion to compel production of the full and complete file of the decedent. In a hearing before the court, Mr. Freirich indicated he turned over documents concerning the promissory notes which were an issue in the probate proceeding. The trial court granted the motion to quash as to other legal files, finding the decedent's attorney-client privilege survived his death, that neither the estate nor the personal representative was the privilege holder, and that no exception existed to the privilege. The trial court awarded attorney fees to Mr. Freirich, finding the personal representative's pursuit of the files was groundless.

The personal representative appealed, arguing C.R.S. 15-12-709 grants her the right to take possession of all client files relating to the decedent. "Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property…" *C.R.S. 15-12-709.* The court of appeals cites to *People v. Felker*, 770 P.2d 402 (Colo. 1989) in finding client files of a decedent are property subject to C.R.S. 15-12-709. The court of appeals held the attorney-client privilege under C.R.S.13-90-107(1)(b), and the duty of confidentiality under Colo.R. P.C. 1.6 survives the death of the client, but found the right to claim the attorney-client privilege passes to the personal representative, who becomes the holder of the privilege. The court of appeals held: "If a decedent does not want a particular individual to have access to such files, or to the information within them, he may deny that individual access by including a specific provision in the will, or by declining to name that person as a personal representative."

In a concurrence, Judges Hawthorn and Nieto state: "Freirich's arguments appear to raise concerns that Claudine will be able to destroy the attorney-client privilege by disclosing the substance of Louis's communications to others. This concern, however, is not germane to our analysis. There is no indication in the record that Claudine seeks to make such disclosures. Thus, we leave for another day the exploration of the extent to which a personal representative's fiduciary obligation to the estate restricts such disclosures."

Slayer Statute

10. Estate of Feldman, 443 P.3d 66 (Colo. 2019)

A law firm that accepts a retainer from a client charged with murder cannot be compelled to disgorge the retainer to the court registry under C.R.S. 15-11-803(9)(a).

Stacey Feldman died in 2015. Her husband, Robert Feldman received a life insurance pay out of $751,910. Three years later, Robert Feldman was charged with his wife's murder. He retained Haddon, Morgan & Foreman to represent him. Robert Feldman deposited approximately $550,000 with Haddon, Morgan & Foreman as a retainer to provide legal services. The guardian for the Feldman's minor children petitioned the Denver probate court for relief under the Slayer Statute at C.R.S. § 15-11-803, for a constructive trust, and to appoint a special administrator. The probate court appointed a special administrator to investigate and provide an inventory of the decedent's assets, pursue legal action on behalf of the estate, prevent dissipation of estate assets, and review Haddon. Morgan & Foreman's billing records and fee agreements with Mr. Feldman, and ascertain the amount held in his trust accounts. After motions and oral arguments, the probate court ordered the law firm to deposit the funds held in their client trust account to the court's registry, and disclose information relating to its fee agreement and billing records, the amount and source of funds in its client trust account.

Robert Feldman and Haddon, Morgan & Foreman filed a petition for relief pursuant to C.A.R. 21. The Colorado Supreme Court found C.R.S. § 15-11-803 provides a process for proving a person is the killer of a decedent, and once established, the killer is ineligible to receive any disposition of property from the decedent. The killer must also return any payment already received to which he is not entitled. C.R.S. § 15-11-803(9)(a). However, the statute does not expressly address the question of freezing insurance proceeds until it can be determined whether the person receiving payment was entitled to receive it or not. The court found a constructive trust cannot operate against a third party who acquired the property in good faith, for value, and without notice, and that pursuant to C.R.S. 15-11-803(9)(a) the slayer statute "protects a person 'who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation' from being compelled to return that payment or from being liable for its amount." ¶ 18. The court found the special administrator was, through its constructive trust claim seeking a remedy in the nature of a preliminary injunction and needed to establish a reasonable likelihood of success on the merits. The Colorado Supreme Court rejected the special administrator's argument that the law firm had not yet "received" the funds as contemplated by C.R.S. 15-11-803(9)(a) because the funds are being held in trust for Robert Feldman and have not yet been earned by the firm. The court found that "even if Feldman is ultimately proven to be a killer within the contemplation of the statute, the statute will not obligate the firm to return the funds or render the firm liable for their expenditure, but rather the firm may continue to earn those funds in accordance with their fee agreement. The special administrator therefore can have no reasonable likelihood of succeeding in recouping those funds covered by the statute for the benefit of the decedent's estate ant its rightful heirs." ¶ 21.

Litigation Privilege

11. Patterson v. James, 2018 COA 173 (December 13, 2018).

Litigation privilege protects an attorney from defamation claim when statement is made in the course of or in preparation for judicial proceedings in a filed case.

Louella Patterson filed a tort proceeding against her stepchildren and a lawyer, Ms. James who represented one of those stepchildren in a separate probate proceeding where the decedent was Ms. Patterson's late husband and the stepchildren's father. Ms. Patterson asserted claims of elder abuse, outrageous conduct, nondisclosure or concealment, false representation, and civil conspiracy. Ms. Patterson was represented by Robert A. Lees.

The stepchildren filed informally to open a probate proceeding for their father's estate. Ms. Patterson's tort claims alleged Ms. James prepared legal documents and provided legal advice to the step-children, and that the will, the application for informal probate and the legal proceedings in probate did not account for Ms. Patterson's elective share or other spousal rights; Ms. James failed to notify Ms. Patterson of the initiation of probate proceedings; and that Ms. James and stepchildren conspired and agreed to informal probate in an attempt to "slip it through the probate legal process" unnoticed; Ms. James and step-children did not answer questions Ms. Patterson presented, and Ms. James unreasonably billed the estate throughout.

Ms. James filed a Rule 12(b)(5) motion to dismiss the claims. Ms. Patterson withdrew her claims of elder abuse and false representation. The trial court dismissed all of the remaining claims. The trial court found the litigation shield and strict privity rule barred Patterson's claims against the lawyer. After a hearing, the trial court awarded attorney fees and costs jointly and severally against Patterson and her lawyer, Lees, pursuant to C.R.S. 13-17-201.

On appeal, Ms. Patterson had separate representation, and Mr. Lees represented himself, and they presented different arguments. Ms. Patterson alleged the trial court improperly dismissed her claims by misapplying the litigation shield and strict privity rule. The court of appeals upheld the trial court's rulings. *Begley v. Ireson* 399 P.3d 777 (Colo. App 2017), recognized the litigation privilege to protect free access to the courts for litigants and their attorneys. The litigation privilege provides that an attorney's statements when made in the course of, or in preparation for judicial proceedings in a filed case cannot be the basis of a tort claim if the statements are related to the litigation. When the statements are integral to the judicial process, the immunity provided is absolute. All of Ms. Patterson's claims arise from statements made by James in representing the personal representative in the probate litigation, which were essential to the judicial process. James is entitled to absolute immunity as a matter of law.

Ms. Patterson also alleged Ms. James failed to inform Patterson that the probate proceedings had commenced. This is not actionable under Colorado's strict privity rule, *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872 (Colo. 2016).

The court of appeals also upheld the trial court's award of attorney fees jointly and severally against Ms. Patterson and Mr. Lees, and awarded attorney fees on appeal. The court of appeals rejected Mr. Lees' argument that C.R.S. 13-17-102(3) which expressly allows joint and several allocation of attorney fee awards does not apply to fees awarded under C.R.S. 13-17-201.

The court of appeals also rejected Mr. Lees argument that the court improperly considered an unpublished court of appeals opinion presented to the court and opposing counsel by Ms. James.

Dead Man Statute

12. Estate of Brookoff, 429 P.3d 835 (Colo. 2018)

Colorado Revised Statute 13-90-102, the Dead Man Statute does not include an insurance exception.

This case was an appeal of an unpublished court of appeals decision issued on April 7, 2016, and modified on August 4, 2016. Alexander Clark filed a medical malpractice claim against his deceased pain management doctor, Dr. Daniel Brookoff. Clark sought to admit testimony from himself and his mother regarding conversations with Dr. Brookoff prior to and during treatment. The trial court excluded the evidence citing C.R.S. § 13-90-102, Colorado's "Dead Man Statute." The court of appeals reversed the trial court, citing to *In re Estate of Crenshaw*, 100 P.3d 568 (Colo. App. 2004). The Court of Appeals reasoned the Dead Man Statute is limited, and applies only to prevent an estate from being diminished. Since, should Clark prove successful in his claim, the claim would be paid by insurance and not diminish Dr. Brookoff's estate, the Dead Man Statute did not apply to bar the testimony Clark wished to present.

The Supreme Court rejected the Court of Appeals analysis, stating the *Crenshaw* opinion was based on an earlier version of the Dead Man Statute, which was amended in 2002 and 2013. The Supreme Court sets out a history of the Dead Man Statute, citing to several Colorado cases and *Colorado Dead Man's Statute: Time for Repeal or Reform?* 29 Colo. Law 45, by Herbert E. Tucker. In 2002 the amendment removed language limiting the statute to suits involving executors and administrators of estates. The 2013 amendment removed language limiting the statute to suits "by or against a person incapable of testifying." The Supreme Court looked to the plain language of the statute, and declined to limit the application of the statute when the legislature had twice removed limitations to broaden the application of the statute to all Colorado civil actions.