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ESTATES, TRUSTS, AND WILLS

Robert J. Law

INTRODUCTION

During 1979, the Montana Supreme Court decided ten cases dealing with wills, estates, and trusts. These cases involve a variety of subjects and legal points. Although some of the cases are narrow in their application and make little change in Montana law, others are broad and bring about significant changes. This survey examines those areas which have undergone changes Montana attorneys should be aware of. These include cases involving attorney fees, holographic wills, and Montana's Mortmain Statute. The survey also points out major changes made by the 1979 legislature and examines how these changes affect Montana law.

I. ATTORNEY FEES

In *Estate of Magelssen*,¹ the Montana Supreme Court, for the first time, discussed at length the enforcement of fee arrangements under the Montana Uniform Probate Code (MUPC).² In *Magelssen*, the testator died leaving an estate in excess of \$3,500,000. The personal representative employed a law firm to provide legal services necessary to probate the estate. Attorney fees, however, were not discussed until two months after the initial meeting. Later, the firm handling the estate was disengaged because of a dispute with the personal representative, and the personal representative petitioned the court to review the fees charged. The lower court determined that the work was ninety-five percent completed and awarded the law firm \$106,464.42, based upon a fee arrangement of three percent of the gross estate as valued for federal estate tax purposes.³

The supreme court held there was a valid contract for attorney fees even though the contract was entered into after the inception

1. — Mont. —, 597 P.2d 90 (1979).

2. *But see* Estate of Dygert, 170 Mont. 31, 33, 550 P.2d 393, 394 (1976), in which the court decided that an unsuccessful applicant for a letter of administration is not entitled to be paid attorney fees out of the estate of the decedent under the MUPC.

3. This amount is authorized by MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 72-3-633 (1979).

of the attorney-client relationship. In so holding, the court followed the majority rule that attorney fee contracts made after the establishment of the fiduciary attorney-client relationship are valid if they are fair and reasonable.⁴ Whether the terms are fair and reasonable depends upon good faith, full disclosure, and the amount of the fee, as well as the client's maturity, intelligence, and understanding of the transaction.⁵

The court rejected the argument that the method of determining attorney fees as set out in the MUPC⁶ is contrary to public policy. The personal representative contended that such a method, based upon a fixed percentage of the estate value, should not be allowed since it encourages attorneys to inflate the value of the estate in order to increase their fees. The court, however, found no public policy in the MUPC that would invalidate a fee clearly within its terms.

The court also discussed the procedure to be used by a district court in reviewing attorney fees charged for probate⁷ and held that the district court may consider an existing contract in determining if the fee is reasonable. It emphasized that the district court is not setting the fee, but is reviewing the fee arrangement. Since one purpose of the MUPC is to promote prior fee agreement,⁸ the statute authorizing the review of probate fees⁹ must be read in light of it. A determination of fees by "quantum meruit is normally appropriate only where a valid contract does not exist."¹⁰ The court made clear that the result will be different when attorney fees are awarded pursuant to a statute.¹¹ In that case, the court makes the initial determination of what is reasonable, and contingent fees are not considered. It was also held that although evidence of the actual number of hours spent on the probate may be relevant, it is not reversible error to exclude it, since the time factor usually plays only a minor role in determining whether a fee is reasonable.¹²

4. Annot., 13 A.L.R.3d 701, 710 (1967).

5. Magelssen, — Mont. —, 597 P.2d at 93.

6. MCA § 72-3-633 (1979).

7. See MCA § 72-3-634 (1979).

8. MCA § 72-3-613 (1979).

9. MCA § 72-3-634 (1979).

10. Magelssen, — Mont. —, 597 P.2d at 95.

11. See *State Highway Comm'n v. Marsh*, — Mont. —, 575 P.2d 38, 43 (1978).

12. "Time, as a factor in the determination of proper attorneys' fees, appears to be accorded lesser significance in matters relating to decedents' estates than in other fields, at least according to some authority, apparently either on the ground that the settlement of estates is a field for specialists or on the ground that the multiplicity of kinds of legal services rendered raises a question as to the reliability of the time schedules presented by counsel as indices of time spent on matters which may properly be classified as legal." Annot., 58 A.L.R.3d 317, 325 (1974).

II. HOLOGRAPHIC WILLS

In *Estate of Craddock*¹³ (decided under pre-MUPC statutes), the testator had lived on his farm with his brother and two sisters until he died in November 1969. In February 1972, one of the sisters found a holographic will in a cupboard. The will was taken to the county attorney's office shortly thereafter but was retrieved a few days later.¹⁴

The purported will was entirely in the handwriting of the decedent, although one sentence had been erased.¹⁵ The court found that since the proponent of the will had not established that the erasure was made by the decedent, the will was not "uncontaminated by a stranger's touch" and could not be probated.¹⁶ Thus, applying the court's reasoning, a dissatisfied beneficiary can nullify the intent of the testator simply by erasing a provision of the will (assuming the will is not found in the testator's possession). Contrast this result to the effect of the same action on an attested will: In that case only the altered provisions benefiting the person making the alteration would not be probated, and the provisions affecting other persons would not be defeated.¹⁷

Although few cases are on point, the general rule is that alterations or interlineations made without the testator's knowledge "should be disregarded in determining whether the instrument is in the handwriting of the testator and the instrument should be admitted to probate with the marks and alterations deleted."¹⁸ Since this case was not decided under the MUPC it is possible that a contrary result would be reached for a testator dying after July 1, 1975, in light of the more lenient provisions of the MUPC.¹⁹ Under the MUPC only the material provisions, rather than the entire will, has to be in the handwriting of the testator.²⁰ In addition, the

13. — Mont. —, 586 P.2d 292 (1978); the same case was reported earlier in *Estate of Craddock*, — Mont. —, 566 P.2d 45 (1977) and *Estate of Craddock*, 166 Mont. 68, 530 P.2d 483 (1975).

14. The will was not offered for probate by the brother until after one of the sisters who had been living with the testator had died, and the other had been declared incompetent and hospitalized at a mental institution. *Craddock*, — Mont. —, 586 P.2d at 293.

15. The will is reproduced in *Craddock*, — Mont. —, 566 P.2d at 46.

16. *Craddock*, — Mont. —, 586 P.2d at 293. See also *In re Irvin's Estate*, 114 Mont. 577, 580, 139 P.2d 489, 489-90 (1943).

17. Annot., 34 A.L.R.2d 619, 625 (1954). If, however, the obliterations are so extensive that the original provisions cannot be ascertained the will cannot be probated. *Id.*

18. 57 AM.JUR. *Wills* § 634 (1971); 28 R.C.L. § 144; *But see In re Wall's Will*, 216 N.C. 805, 5 S.E.2d 837 (1939).

19. See MCA § 72-2-303 (1979).

20. MCA § 72-2-303 (1979) provides: "A will which does not comply with 72-2-302 is valid as a holographic will, whether witnessed or not witnessed, if the signature and material provisions are in the handwriting of the testator." REVISED CODES OF MONTANA (1947) [here-

MUPC emphasizes that it is to be construed liberally to make "effective the intent of the decedent in the distribution of his property."²¹

III. MONTANA'S MORTMAIN STATUTE

In *Estate of Holmes*,²² the Montana Supreme Court ruled that Montana's Mortmain Statute²³ was impliedly repealed by the MUPC. In addition, it held that beneficiaries under a will must receive notice of any will contest and entry of orders admitting the will to probate.

In *Holmes*, the testator executed a will twelve days prior to his death. He devised his entire estate to the Shriners Hospital, specifically stating that he left nothing to his family. The personal representative petitioned for formal probate of the will, and the Shriners were notified of the hearing, although they did not attend. The decedent's son orally objected to the will, and the court declared two-thirds of the devise void under the Mortmain Statute. No notice of this order was served on the Shriners. The Shriners received notice from the personal representative telling them of the voidance and they appealed. The higher court found that the MUPC²⁴ requires notice to all named devisees of pleadings, including will contests, filed in formal probate proceedings. Even though the Shriners made no appearance at the formal probate proceeding, no default was entered, and, therefore, they were entitled to notice of the entry of any order in the proceedings. Since the Shriners received no

inafter cited as R.C.M. 1947] § 91-108 provided: "A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

21. MCA § 72-1-102 (1979).

22. — Mont. —, 599 P.2d 344 (1979).

23. MCA § 72-11-334 (1979). It provides:

No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation or to any person or persons in trust for charitable uses except the same be done by will duly executed at least thirty days before the decease of the testator, and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided that the prohibition contained in this section shall not apply to cases where not more than one-third of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes, and provided further, that if any such devise or bequest be made in a will executed within thirty days prior to such death and be for more than one-third of the estate of the decedent, the same shall be void as to the excess over one-third but as to that only.

24. MCA § 72-1-303(3) (1979) provides: "Notice is required as follows: (a) Notice as prescribed in § 72-1-301 shall be given to every interested person or to one who can bind an interested person as described in (2)(a) or (2)(b) above. Notice may be given to both a person and to any other who may bind him."

notice of either the will contest or entry of the order admitting part of the will to probate, they were not bound by the order, the time allowed for appeal did not start to run, and they were not barred from requesting that the court modify or vacate the order entered.

The court also held that MCA § 72-1-106 (1979) (which provides that MUPC provisions override previously enacted, inconsistent legislation) combined with general rules of statutory construction, require that Montana's Mortmain Statute is impliedly repealed. The court reasoned that MCA § 72-2-501 (1979), which provides "the intention of the testator as expressed in his will controls the legal effect of his dispositions" and MCA § 72-1-102 (1979) which provides that the underlying purpose of the code is to effectuate the intent of the testator, directly conflict with the Mortmain Statute. It found that the MUPC "mandates implementation of the testator's intent" and the Mortmain Statute "prevents implementation of the intent expressed in the will as to as much as two-thirds of the testator's estate."²⁵ Since the two statutes conflict and cannot be reconciled the later comprehensive legislation must control.

The court specifically restricted its decision to the repeal by the MUPC of a prior conflicting statute.²⁶ It pointed out that it was not restricting in any way the application of provisions within the MUPC which conflict with the testator's intent. It should be noted, however, that the logical conclusion of the court's reasoning is that other statutes enacted prior to the MUPC which conflict with the testator's intent are also repealed. These could include the rule against perpetuities,²⁷ and the statute on the suspension of the power of alienation.²⁸

Six other cases were decided since the last survey.²⁹ In *Estate of Murphy*,³⁰ the court remanded the case because the district court failed to enter findings of fact in its determination of the priority of creditors in the estate. In *In re Patton*,³¹ the testatrix executed two wills which were similar except for the deletion of some bequests to

25. Holmes, — Mont. —, 599 P.2d at 348.

26. *Id.* at —, 599 P.2d at 349.

27. MCA § 70-1-408 (1979). It should be noted that the rule against perpetuities was amended to read "No interest in real or personal property is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies" (emphasis added). The purpose of the addition was not to change prior law, but to bring the language in line with the standard phrasing of the rule.

28. MCA § 70-1-407 (1979).

29. *Estates, Trusts, and Wills Survey*, 40 MONT. L. REV. 102 (1979).

30. — Mont. —, 598 P.2d 612 (1979).

31. — Mont. —, 587 P.2d 1307 (1979).

grandchildren and a change in the executor. The first will was presumed to have been revoked, and the second will was denied probate because of improper execution. The court refused to apply the doctrine of dependent relative revocation because the wills were not sufficiently similar.³²

In *Estate of LaTray*³³ and *Holm v. Parsons*,³⁴ testamentary incapacity was discussed. In *Monaco v. Cecconi*,³⁵ the court once again looked at the elements necessary to establish undue influence. The last case in this area decided in 1979 was *Eckart v. Hubbard*,³⁶ in which the court discussed the essential elements of express and resulting trusts.

IV. LEGISLATIVE CHANGES

The 1979 legislature enacted a number of additions and amendments to the MUPC. Before 1977, \$25,000 could be deducted from the value of property passing to a spouse in computing the state inheritance tax.³⁷ The 1977 legislature increased this exemption to \$40,000 and fifty percent of the value of the property distributed or payable to the spouse.³⁸ The 1979 legislature amended MCA § 72-16-313 (1978) to allow a complete exemption from inheritance tax for all property distributed or payable to a spouse. Because of Montana's estate tax, however, the estate will still be taxed in an amount equal to the maximum federal credit for state death taxes.³⁹ Thus, if a husband dies leaving his entire estate of \$600,000 to his wife, under the 1979 statute there will be no inheritance tax. In computing the federal estate tax, however, a credit of \$3,600 will be allowed for state death taxes paid. The Montana estate tax provision takes advantage of this credit and would tax the estate \$3,600, thus raising \$3,600 in revenue for the state with no additional tax to the decedent.

The 1979 legislature amended MCA § 72-16-303 (1978) governing the taxation of joint tenancies. This amendment represents the second change in the statute in the last three years. Prior to

32. For an extensive review of the doctrine and an analysis of this case see Note, *Too Narrow to be True: Montana's Interpretation of Dependent Relative Revocation*, 40 MONT. L. REV. 337 (1979).

33. — Mont. —, 598 P.2d 619 (1979).

34. — Mont. —, 588 P.2d 531 (1979).

35. — Mont. —, 589 P.2d 156 (1979).

36. — Mont. —, 602 P.2d 988 (1979).

37. R.C.M. 1947, § 91-4414.

38. MCA § 72-16-313 (1979).

39. MCA § 72-16-905 (1979).

1977, only one-half or other proper fraction of the value of jointly owned property was included in a decedent's gross estate even without a showing of contribution to the purchase of the property.⁴⁰ In 1977, MCA § 72-16-303 (1978) was changed to include in the gross estate all of the value of the jointly owned property unless contribution could be shown. The single exception would be when the property was held jointly with a spouse; in that case one-half or other proper fraction would be included. The 1979 legislature amended the statute to put property held jointly by the decedent and the decedent's issue in the same position as property held jointly by the decedent and the decedent's spouse. After 1979, then, property held jointly with the decedent's spouse or issue would be included in the gross estate only up to one-half or other fractional part of the value.

The legislature also amended MCA § 72-16-308 (1978) to allow a deduction of only one-half of the decedent's liabilities on jointly owned property from the decedent's gross estate. This amendment negates the effect of *Estate of Baier*,⁴¹ in which the Montana Supreme Court held that the entire amount of any debt on jointly held property for which the decedent was jointly and severally liable could be deducted. Under the recent amendment, it is possible that the entire value of the property may be included in the gross estate, but only one-half of the liabilities may be deducted.⁴²

A number of new MUPC provisions were added which may aid the owner of a family farm or closely-held business in the payment of state inheritance taxes. The new sections, MCA §§ 72-16-331 through 342 and 72-16-451 through 493 (1979) closely follow I.R.C. § 2032A and I.R.C. § 6166. They attempt to protect certain farms and businesses from the increased state inheritance tax impact caused by substantial appreciation in land values. The provisions allow fifteen years to pay state inheritance taxes and allow the property to be valued on the basis of its present use rather than its highest and best use. The impact of these provisions, however, may be minimal since the inheritance tax rates are relatively low (eight percent maximum to children⁴³ and no tax to a spouse⁴⁴).

40. R.C.M. 1947, § 91-4405.

41. — Mont. —, 567 P.2d 943 (1977).

42. Under federal law, when both joint tenants are jointly and severally liable, the entire amount of any liability is deductible if the entire value of the property is included in the decedent's gross estate. TREAS. REG. § 20.2053-7 (1963).

43. MCA § 72-16-322 (1979).

44. MCA § 72-16-313 (1979).