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Estates, Trusts, and Wills

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INTRODUCTION

This survey, unlike the other surveys in this issue of the *Montana Law Review,* examines cases decided in both 1980 and 1981 in the area of estates, trusts, and wills. This survey does not consider all cases, instead, it deals only with the more important decisions. Of particular interest are cases interpreting the Montana Uniform Probate Code (MUPC) in the areas of canceled wills, homestead allowance, exempt property, and fees and expenses in will contests. The survey also discusses recent cases dealing with undue influence and discriminatory trusts.

I. PRESUMPTION IN CANCELED WILL CASES

Estate of Cox,[1] a case of first impression in Montana, concerns will cancellation. The decedent left a single-page holographic will, entirely in her own handwriting, which was found in her bedroom nightstand. Eight large Xs had been drawn on the page so that all the paragraphs, with the exception of a small paragraph on the side of the page, had markings through them or partially through them. In addition, the words "Will and Testimony," which began the will, had three lines drawn through them.

The supreme court held that the acts of cancellation were sufficient to revoke the will under the MUPC requirements.[2] The primary question in such cases is whether the required intent to revoke can be found or implied. In *Cox,* the court ruled that where a will has been in the custody of the testator and is discovered among her effects in a canceled or defaced condition, the testator is presumed to have done the act with the intent to revoke.[3] The proponent of the will then has the burden of going forward with sufficient evidence regarding relevant factors and circumstances to rebut the presumption.

What circumstances can be raised by a proponent of an allegedly canceled will to rebut the *Cox* presumption? The court in *Cox* states one possible factor: if the will contestants had a fleeting op-

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1. ___ Mont. ___, 621 P.2d 1057 (1981).

2. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 72-2-321 (1981) states that "a will or any part thereof is revoked: . . . (2) by being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction."

3. *Cox,* ___ Mont. at ___, 621 P.2d at 1061.

portunity to tamper with the will, that fact will be considered by the court along with other proof.[4] Other possible circumstances to be considered in the determination that an apparently canceled will is still valid are listed in *Estate of Hartman,*[5] a case relied upon in *Cox*. In *Hartman,* the court ruled that in cases of lost wills, revocation by destruction may be inferred from the fact that the will once existed but cannot be found at the testator's death.[6] To overcome this presumption, the proof must be "clear, satisfactory, and convincing."[7]

The court in *Hartman* listed several factors which might be used to rebut the lost will presumption: (1) that someone other than the testator had possession of the will; (2) that testator was on friendly or unfriendly terms with certain interested persons; (3) that testator was mentally or physically incapable of destroying the will with an intent to revoke; (4) that someone else had an opportunity to dispose of the will and benefit thereby.[8]

It must be noted that in *Cox* the court did not specifically state that these factors applied to the canceled will presumption in the same way that they applied to the lost will presumption in *Hartman.* However, the court stated in *Cox* that the *Hartman* situation is "closely analogous."[9] Therefore, one might infer that the proponents of a canceled will could advance the same arguments to rebut the *Cox* presumption, as proponents of a lost will could advance to rebut the *Hartman* presumption.

II. Homestead Allowance and Exempt Property

In *Estate of Merkel,*[10] the court ruled that the homestead allowance[11] and the exempt property provisions[12] of the MUPC are fee interests of the surviving spouse (as opposed to a life estate), as long as the spouse survives the required 120 hours.[13] *Merkel* involved a situation in which the surviving spouse, through a guardian, filed a claim for exempt property and homestead allowance. The surviving spouse died nine days later. The district court dismissed the claim, ruling that the homestead allowance and exempt

4. *Id.* at 1062.
5. 172 Mont. 225, 563 P.2d 569 (1977).
6. *Id.* at 232, 563 P.2d at 573.
7. *Id.* at 234, 563 P.2d at 574.
8. *Id.*
9. Cox, ___ Mont. ___, 621 P.2d at 1061.
10. ___ Mont. ___, 618 P.2d 872 (1980).
11. MCA § 72-2-801 (1981).
12. MCA § 72-2-802 (1981).
13. MCA § 72-2-205 (1981).

property were life estates only.

Pre-MUPC statutory law in Montana considered the homestead allowance to be merely a life estate.[14] Neither the comments to the Uniform Probate Code (UPC) nor courts in other UPC states had considered the questions of whether the homestead allowance or exempt property under the UPC are life estates or fee interests. Therefore, in *Merkel,* the court made a determination that breaks new ground in the interpretation of the UPC.

The court stated three reasons for holding that the homestead allowance and exempt property are fee interests of the surviving spouse: (1) In passing the MUPC, the legislature chose not to identify the interests, purposely omitting the explicit "life estate" language of the former statute. And when a statute is revised, omitted parts are ordinarily construed as annulled. (2) To construe the statutes to require life estates would oppose the express purpose of the MUPC—to simplify the law concerning affairs of decedents.[15] Court involvement could drag on for years in transferring property to remaindermen, hearing suits for waste, and dealing with other concerns. (3) The family allowance statute specifically states that the death of one entitled to it terminates his right to it.[16] Since this is the only statute with such a provision, the implication is that the other family protections create fee interests.[17]

III. Undue Influence

In *Heintz v. Vestal,*[18] the court summarized the holdings of a number of earlier Montana cases[19] and stated the definitive test to be followed in determining whether undue influence had been employed against the decedent. *Heintz* involved claims against the decedent's estate based on a promissory note and an employment contract. The decedent was 82 years old and lived alone on a farm, while the claimant was her farmhand. Claimant made arrangements with a bank for the drafting of the note and drove the decedent to the bank where the note was executed. The district court found that the claimant had employed undue influence in securing

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14. Revised Codes of Montana (1947) § 91-2405 specifically stated that the homestead allowance was a life estate.

15. MCA § 72-1-102 (1981).

16. MCA § 72-2-803(5) (1981) states: "The death of any person entitled to family allowance terminates his right to allowances not yet paid."

17. Merkel, ___ Mont. ___, 618 P.2d at 876-77.

18. ___ Mont. ___, 605 P.2d 606 (1980).

19. Cameron v. Cameron, 179 Mont. 219, 587 P.2d 939 (1978); Blackmer v. Blackmer, 165 Mont. 69, 525 P.2d 559 (1974); Estate of Maricich, 145 Mont. 146, 400 P.2d 873 (1965); Hale v. Smith, 73 Mont. 481, 237 P. 214 (1925).

the note.

In affirming that portion of the district court ruling, the supreme court stated that the test for undue influence is as follows: (1) The influence must be such to destroy the free agency of the influenced person with the will of another substituted. (2) The influence must be exerted to procure the result desired by the influencing party. (3) The amount of influence is determined by weighing the mental and physical health of the party being influenced and correlating them with acts of influence which were exerted. In addition, the court may consider the confidential relationship of the influencing party, the physical and mental condition of the testator as it affects his ability to withstand influence, the unnaturalness of the disposition, and the demands as they may affect the donor, taking into consideration the time, place and surrounding circumstances.[20]

IV. Discriminatory Trusts

In *In re Will of Cram*,[21] the court held that a private person may lawfully discriminate in regard to the beneficiaries of his estate without offending the equal protection clause of the United States Constitution, as long as the state and its instrumentalities are not involved; in other words, there is no state action. In doing so, the court followed the long established doctrine of the United States Supreme Court as enunciated in the *Civil Rights Cases*.[22] More importantly, the court's decision in *Cram* aids in defining the meaning of "state action."

Cram's will provided for a trust for the benefit of boys who were interested in woolgrowing and who belonged to the Future Farmers of America (FFA) of Montana and the 4-H Club of Montana. The trust provided that officials of those organizations, who are state employees, were to choose the beneficiaries and purchase sheep with the funds. Appellant, a girl who was otherwise qualified to be a beneficiary, was refused a stipend. The district court denied appellant's petition to eliminate the discriminatory provisions. The district court did, however, modify the will, removing provisions requiring state FFA and 4-H leaders to certify eligible recipients and to be co-payees of the trust checks issued. In doing so, the district court attempted to remove the state from any participation in a trust which discriminated against girls by benefiting

20. Heintz, ___ Mont. ___, 605 P.2d at 608.

21. ___ Mont. ___, 606 P.2d 145 (1980).

22. 109 U.S. 3 (1883). *See also* Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

only boys.

The supreme court ruled that the district court possessed the power to apply *cy pres* principles and that there was no state action involved in the modified Cram trust. The court stated that even though the FFA and 4-H organizations are operated as part of the state university system and the Office of Superintendent of Public Instruction, and the modified trust requires that the recipients be members of those two organizations, mere membership in the organizations by the chosen boys does not constitute the requisite nexus between the state and private conduct to constitute "state action."[23] As long as private individuals rather than state employees choose the recipients, the fact that the recipients must belong to state-run organizations does not rise to the level of the state acting as part of a discriminatory trust.

V. Fees and Expenses

In *Estate of Weidner,*[24] the court addressed the question of payment of costs when a will is contested. The MUPC states:

> When the validity or probate of a will is contested through court action, the fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation . . . .[25]

The court in *Weidner,* for the first time, interpreted the meaning of "fees and expenses" in relation to will contests. It held that "fees and expenses" include attorney fees as part of the expense of the proceeding to confirm the probate of a will.[26] Thus, the ruling is very similar to the recent case of *Leaseamerica Wisconsin v. State of Montana,*[27] in which the court determined that "legal expenses" included attorney's fees.

23. Cram, ___ Mont. ___, 606 P.2d at 150.
24. ___ Mont. ___, ___ P.2d ___, 38 St. Rptr. 747 (1981).
25. MCA § 72-12-206 (1981).
26. Weidner, ___ Mont. ___, ___ P.2d ___, 38 St. Rptr. at 750.
27. ___ Mont. ___, 625 P.2d 68 (1981).